



# Contemporary, robust website and business terms

*Presented by*

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Contract Law 101  
What is a Contract?  
*(briefly)*

‘Contract Makers’  
and  
‘Contract Takers’

‘Website Terms of Use’  
vs  
‘Terms of Trade’

Purchase Orders  
as  
Trojan Horses

*Why this matters*

# Contract Law 101 - What is a contract?

- **Offer** (intention to create legal relations)
- **Acceptance** of that Offer
- **Certainty** of the terms between the parties
  - reasonable and objective interpretation
  - **variation of contract or counter-offer\***
- **Consideration** (the parties have bargained or paid for their mutual promises)



# 'Contract Maker' vs 'Contract Taker'

## Contract Maker

- Superior bargaining position
- Get some (or most\*) of what they ask
- Terms biased in their favour
  
- *Big players in the industry*
- *Niche specialists and experts*
- *Main Contractors*
- *Preferred supplier*

## Contract Taker

- Inferior bargaining position
- To a large degree, get what they're given\*
- Reduced protections and exposure
  
- *Subcontractors*
- *Small business*
- *Businesses who don't get legal, tax and insurance\* advice*

# 'Website Terms of Use' vs 'Terms of Trade'

## Website Terms of Use

- Usage rights and restrictions
  - Ownership of IP and others
  - Content limitations/exclusions
  - Warranties/indemnities
  - Limitation/exclusion of liability
  - Privacy/cookies/tracking/data
- *For visitors and customers/clients*
- *Higher volume, lower(?) risk*
- *Contract Maker*

## Terms of Trade

- Supply and payment terms
  - Limitation/exclusion of liability and warranties
  - Credit and security for payment
  - Dispute resolution
  - Ownership of data, including personal information
  - Terms controlling use of personal information disclosed (e.g. ensuring cross-border recipient complies with the APPs)
- *For customers (lower volume, higher risk)*

## Clauses a Contractor Taker must *understand* and *watch for*:

- Payment Terms (and hoops)
- Standard/quality of goods/services
- Warranties (e.g. qualifications)
- Indemnities
- Defects and remedying
- Limitation of liability
  - By kind
  - By quantum
- Exclusion of consequential loss
- Extensions of Time
- Variations – and who bears the cost

- Liquidated damages
- Retention Sums (and their release)
- Insurances\*
- Default and Termination
  - termination for convenience
- Security for payment (e.g. PPSR)
- Intellectual Property ownership
- Incorporation of other documents into the contract eg. annexures, schedules, policies  
(amongst many others)

\* *Will insurance save you?*

# Purchase Orders as Trojan horses

- After agreeing to your terms, Client sends a purchase order with:

*“The Goods and/or Services requested pursuant to this Purchase Order are subject to our General Terms and Conditions.*

*By providing the Goods and/or Services the Contractor agrees to be bound by our General Terms and Conditions”*

*“This Purchase Order applies to the exclusion of any terms and conditions appearing or forming part of the Suppliers dockets, quotations, invoices or any other documentation, including if even referenced on this Purchase Order”*

*“SUPPLY OF GOODS & SERVICES AS PER OUR STANDARD TERMS AND CONDITIONS OF PURCHASE UNLESS STATED OTHERWISE”*

*(whatever those ‘standard terms and conditions’ are)*

Terms on the back of the PO

*in small font and a strange colour*

Terms **attached** to an email

A link or URL in the PO to terms

# Purchase Orders as Trojan horses

- Subsequent T&Cs (e.g. by PO) 👉 “Battle of the Forms” 👉 “Last Shot Rule”:
  - Last offer/set of terms wins, **unless**:
  - *‘Some other factors coming in to play’*
- Most readily available **‘other factor’**:
  - Confirmation that your terms apply to the supply; and
  - Confirmed in writing.



## What might you lose?

- Palatable payment terms ▶
- Standard/quality of goods/services
- Warranties (e.g. qualifications)
- Indemnities ▶
- Defects and remedying
- Limitation of liability ▶
  - By kind
  - By quantum
- Exclusion of consequential loss ▶
- Extensions of Time
- Variations – and who bears the cost

- Liquidated damages ▶
- Retention Sums (and their release)
- Default and Termination
  - ▶ termination for convenience
- Security for payment ▶
- Intellectual Property ownership ▶
- Ensuring recipient complies with Privacy Act

**Insurance cover**

# Purchase Orders and contract management

- ✓ Check a purchase order for its own terms (on the back, URL, other reference)
- ✓ Build a business rule to double check POs internally
  - Send higher value/risk contracts for legal review 🙌
- ✓ Don't supply goods or services until “Battle of the Forms” is resolved





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