

TRADIE LAW FACT SHEET

DEALING WITH CUSTOMERS

TRADIE LAW
POWERED BY FordSumner
LAWYERS

Terms of Trade

OVERVIEW

Your terms of trade help lay the foundations for business success. Get them right and you'll have a clear written record of what has been agreed between you and your customers. You, and your customers, will know what work you have agreed to do, at what price and the timeframe. If things don't go well and you end up in a dispute, carefully drafted terms of trade will be key in helping navigate your way through it.

However, if your terms of trade aren't fit for purpose, you could end up in a bind. You might be required to do additional work without payment, be unable to on-charge price increases for materials or face claims from unhappy customers without any clear written record of what the terms of your contract are.

As a starting point, we have set out below the key things to keep in mind when preparing your terms of trade.

1. *Written terms of trade are essential*

- Make sure you have written terms of trade. Standard-form terms of trade are a good starting point, but make sure that you take care to update them for the particular requirements of each job. If you rely solely on the same standard-form terms of trade for each job, you risk getting into trouble if the particular details of a job are not recorded in writing.
- As the job develops over time, make sure that any variations to the scope of works or your terms of trade are recorded in writing, even if just by an email that the customer sends you or one you send them and which they acknowledge receipt of. For example, if the customer has asked you to do additional work once you're on site, or to make changes to the existing plans, make sure you record that in writing and get them to confirm it. If there are price changes, you need to have them recorded in writing too.
- Make sure your written terms of trade are clear and consistent. Avoid pulling different versions of other people's terms of trade together to make your own, as often those versions won't match your needs, will be inconsistent and have different obligations. We have seen several situations where DIY terms of trade like this can cause big problems when there is a dispute.

2. Be clear on who/what your business is, and who/what the customer is

- If you are a sole trader, your business name should be recorded as “[Insert your name], trading as [insert trade name]”.
- If your business is run by a company, make sure your terms of trade refer to the name of the company, rather than your own name. You also need to make sure that any agreements you sign are in the name of the company and that you sign them as a director, not in your own name.
- If your customer is an individual or more than one individual, make sure that their full name (or all of their names) and their home address is clearly recorded on your written contract.
- If your customer is a company, make sure that the company's name is recorded as the customer and that:
 - if the company has only 1 director, any signatures by the company are witnessed; or
 - if the company has more than 1 director, at least 2 directors sign any contracts.
- If your customer is a trust or trustees of a trust, make sure that the full names of all trustees are recorded in the contract and that all trustees sign the contract.

3. Scope of work is clearly defined

- One of the most common areas of dispute is around the scope of works. Your terms of trade need to very clearly describe the exact scope and nature of the works that you will be doing for the customer. If possible, include detailed drawings, plans and specifications with your terms of trade, including by referring to those documents in the terms of trade and then attaching the documents themselves to the terms of trade to be signed by the customer.
- Make it clear what will happen if the scope of work changes over time and the process for agreeing any changes to the scope of work. For example, you may want to include a term that says that the scope of works cannot be changed unless the details of the changes are recorded in writing and signed by both parties.
- Your terms of trade should also state who is actually going to be on site performing the works, who the customer should expect to deal with on a day-to-day basis and who has authority to reach agreement with the customer on variations to the works.

4. Consider whether any personal guarantees are required

- If your customer is a company, we recommend that your terms of trade include personal guarantees from the company's directors and shareholders (if the company customer is a small/closely held company). The personal guarantee will give you an ability to seek payment from the personal guarantor, as well as the company, if things don't go well.
- If you are seeking personal guarantees, make sure that the personal guarantor's full names are clearly recorded and that they sign the guarantee/terms of trade. If there is more than 1 personal guarantor, make sure that all of them sign.

5. Make sure the price, method of charging and payment terms are clear

- The agreed price for your work needs to be clearly stated. If it is a fixed price, that needs to be clear. Likewise, if it is an estimate, or if the price is subject to changes in prices of materials, that needs to be clear.
- If you are going to be charging on a time basis, or for labour hours, the price of each labourer involved on an hourly basis needs to be specified.
- Check whether your work falls within the scope of the Construction Contracts Act 2002 (**CCA**). If it does, you need to:
 - state that the CCA applies;
 - state whether the payment terms are different to those set out in the CCA, and if so, what they are;
 - make sure that your invoices comply with the requirements of a Payment Claim under the CCA – see section 20 of the CCA here:
<https://www.legislation.govt.nz/act/public/2002/0046/latest/DLM163299.html>
 - make sure that you explain what the customer has to do in response to a Payment Claim, including the need to submit a Payment Schedule that complies with section 21 of the CCA in the event of a dispute.

6. Ownership and risk

- Your terms of trade need to state who owns the works (i.e. that you will continue to own the works or materials until they have been paid for, or if not, when title to the works changes).
- You should also make it clear in your terms of trade who bears the risk of loss while the project is being undertaken. For example, if materials are damaged or destroyed while on-site, who is responsible for that?
- You should specify for each job the kinds of insurance that you have in place (such as public liability insurance, project works insurance) and what insurances the customer may need to put in place (such as project works insurance).

7. Liability

- Your liability exposure will change depending on whether your customers are consumers or businesses.
- If you sell products or services to consumers then you will need to comply with the Consumer Guarantees Act 1993. Among other things, this means that your products or services must be fit for purpose and meet certain standards.
- If you are selling to businesses, it is more common to limit and exclude your liability as much as possible. For example, a business will often exclude their liability for losses suffered by a customer resulting from defective products or services that the business couldn't reasonably foresee.

8. Termination

- Your terms of trade need to set out how the contract between you and your customer can be terminated.

- You might want to include termination rights that allow you, or you and the customer, to end the contract. Usually this would involve a requirement for one party to give notice of termination to the other (either immediately or from a future date). You might want termination rights to be limited to situations where you or the customer consider the other is in breach of the contract, or broader, enabling you or the customer to terminate at any time for any reason.
- Your terms of trade should state what will happen if the contract is terminated. For example, you will want to ensure that you can still charge the customer for the work you have done to the date of cancellation, as well as for any materials that you have already paid for but which have not been used and so on.

9. Disputes

- Make sure your terms of trade set out a process for when there is a dispute between you and the customer. This may involve the requirement for one party to give the other written notice of the dispute, a period of negotiation and if that is not successful, mediation/arbitration (such as under the CCA).
- Your terms of trade should include the ability for you to recover from the customer all of your costs incurred in enforcing your rights under the contract, including your legal fees on a solicitor-client basis (i.e. recovery of your actual costs) and any debt recovery/collection charges.

If you need help with preparing or reviewing your terms of trade, get in touch so we can help.

Contact:

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W www.tradielaw.co.nz/contact/

One of our team will be in touch to assist you within 24 hours.