

Standard agreements for ISPs and telcos

Everything you always needed to know, but didn't know you needed to ask

by the Logie-Smith Lanyon Telecoms & IT Law Group

PART 23—STANDARD AGREEMENTS FOR THE SUPPLY OF CARRIAGE SERVICES

Simplified outline

478. The following is a simplified outline of this Part:

- The terms and conditions on which certain telecommunications-related goods and services are supplied are:
 - (a) as agreed between the supplier and the customer; or
 - (b) failing agreement, set out in a standard form of agreement formulated for the purposes of this Part.

Standard terms and conditions apply unless excluded

479. (1) This section applies to the supply to an ordinary person by a

Introduction

Welcome to the Logie-Smith Lanyon guide to *standard agreements for ISPs and telcos*. We're about to explain what a 'standard form of agreement' is, and how it can benefit your ISP or telco business.

Background ... the contract problem



The online age has challenged and changed the law in lots of ways. But some rules stand firm. Like the rule that in order to make a contract, one party needs to offer certain terms, and the other needs to accept them. Normally, you can't say 'Now we have a contract, but I'll tell you what my terms are later.'

Over the years, the law has softened this rule at the edges. For instance, as long as I make my offer clearly available to you, it may not matter that you choose not to

read it. That's why car park operators place those big boards full of small print at the entrance. Nobody is expected to read the terms, but they're on offer.

In other cases, the standard terms of an industry are so common and well known that the law assumes that everyone takes them for granted. For instance, everyone who buys off-the-shelf software knows that the normal rule is that you can't duplicate it and give copies to all your friends.

Difficult cases arise where it isn't clear whether the rules of contract have been satisfied. For instance, if I operate a car park and only offer my terms on a folded brochure in a bin near the entrance, am I doing enough to satisfy the law that the terms were 'offered' ?

There are two problems about these difficult cases:

- It's hard to give an unqualified legal opinion about them. They often involve matters of degree and opinion, and different lawyers and judges may see it differently.
- They are only tested when something has gone seriously wrong. I could run my car park for years without anyone challenging the effectiveness of my contract offer in the brochure. But if a \$500,000 Maserati is stolen from the park, you can bet that the owner's insurance lawyers will look for every loophole in trying to avoid the 'limitation of liability' clause in my brochure.

They will say: 'Our client had no idea the brochures were some kind of contract offer. So our client isn't bound by anything in them.'

The special problems of online contracts

In the 'paper-based' world, the rules of contract are fairly well worked out. Judges have a pretty good idea of what is a fair way to make contract offers known to people, and what kinds of things people can be assumed to know in advance.



But the online world is different. It is far less clear, for instance, that a web page with 'Click here to see our terms and conditions' – buried in an 'invisible' part of the web page two 'Page Downs' is enough to include those terms in an online contract.

That's problem number one for ISPs and telcos.

Problem number two: The need for speed



As an ISP or telco, you need to move fast. You want simple application documents, with as few 'legalese' terms as possible. Maybe you don't want written terms at all, so that

you can accept new customers over the phone.

And yet legally, being an ISP or telco is a minefield.

Here's one example. If you are reselling services you acquire from a wholesaler, check your wholesale agreement. It will be full of promises from you to prevent end customers from doing certain things, and to reimburse the wholesaler for costs and losses if things go wrong.

Wholesalers argue this is all fair enough. According to them, they don't have any contract with the end customer, so they can't get these promises from them. But, they say, the retailer does have a direct contract with the end customer. So the retailer can protect itself by getting 'back to back' promises from end customers.

But if the retailer *doesn't* get 'back to back' promises in its end customer contracts, it's in the worst of all possible worlds: liable to the wholesaler for a whole range of customer actions that are beyond its control, and without any claim on the end customer if they breach the wholesaler's rules.

In many cases, simply writing an end user contract that 'back to backs' your own obligations to wholesalers requires quite a few legal terms. Don't blame your lawyer for that: it's a direct result of your wholesale arrangements and the need to protect you in the same way as the wholesaler has protected itself.

It doesn't sound good for simple web-based or even paperless voice-based ISP / telco contracts, does it ?

Part 23 to the rescue ! (Part 23 of the *Telecommunications Act*, that is)

Government has an interest in seeing the online and telecommunications industries grow. The problems of creating proper contracts were too serious to ignore. So the *Telecommunications Act* contains a solution. In contract law terms, it's almost a 'magic wand'.



It's called a 'standard form of agreement'. In outline, it's very simple:

- An ISP or telco creates a set of contract terms that comply with procedures in the Act. They can be as long as you like (but they should be well organised and clear).
- The ISP creates a summary – no more than four pages – of the contract terms. The summary needs to be lodged with the Australian Communications and Media Authority.
- After that, as long as customers are sent a copy of the summary when or after they join up, they are bound by the long form contract terms ...

Even if they have never seen them.

Even if they don't sign anything.

Even if they never visit the web page where they are published. (And hardly anybody ever does. Millions of Australians receive service from Telstra under its complex standard form of agreement, and only a handful have ever read it.)

It's even more efficient than that. You can email the summary to end customers, or just a hyperlink to a web page that contains the summary.

Imagine it: Customer Jane applies for service over the phone. You get a credit card number and other application details. As soon as her account is live, you send a 'Welcome on board!' email, including links to your help desk contacts page, your usage monitoring page and your 'standard form summary'. And a fully enforceable, detailed legal agreement is automatically in place. No pen. No paper. No 'in your face' legalese.

Or you could use clean, simple paper application forms. We recommend that these should carry a few bullet points of the very key terms, plus the online address of the summary. But apart from those simple things, no small print, no reams of lawyer-talk and no compromise on legal quality are required.

Is that all there is ?



That's the good news. But there are some responsibilities that go hand in hand with using the 'standard form'. For instance, if you change your terms in a way that could adversely affect customers, you

must advertise details of the changes – sometimes a prominent newspaper advertisement may be required.

You can also be required to make the summary available in foreign languages.

Before you decide to go ahead with a standard form, you need to understand these kinds of requirements. They are mainly set out in a determination of the Australian Communications and Media Authority. We can provide you with a copy, and answer any questions you may have about it.

What's involved in setting up a standard form ?

The main thing to appreciate is that there's a trade off between speed and low cost at the start, and flexibility and long term savings as time goes by.



Logie-Smith Lanyon have prepared standard forms for businesses that wanted to allow for lots of different products and services in months and years ahead. 'We might move into sales of prepaid cards.' 'We'd like to be able to sell over the phone.' 'We're looking at a VoIP product.'

In those cases, it takes a lot of time and care to identify and draft the different kinds of customer terms that would be appropriate. The advantage is that those companies can decide to offer a new product, and get it to market without delay. No extra 'legals' ... everything they need is already part of the existing terms.

Legal fees for a job like that reflect the many hours of work involved. It's a question of judging the long term value of a standard form, and investing accordingly.

Other clients may say: 'The budget is too tight for that approach.' Or 'we really can't plan that far ahead.' Assuming their current contract terms make legal sense – we really don't like building a standard form out of poor materials – it is a relatively quick and easy process to mould them into a standard agreement, prepare an appropriate summary and lodge with ACMA.

The 'downside' there is that the less planning you put in at the start, the more likely it is that you'll want to change the document often in the future, and that may trigger the change notification procedures, as well as some extra delay and legal costs. But that can be a fair trade off.

No fee we mention in a general memo like this should be taken as 'gospel', but a budget of \$10,000 +/- \$5,000 is realistic for an 'ordinary' case. It largely depends on the quality of your existing terms (both in terms of legal content and sensible English expression) and how much 'future proofing' you want to build in.

Larger jobs will cost more.

Any more tips and tricks ?

You need to know what you are doing when you prepare a standard form. Here's just one trap for the unwary ...

Some wholesalers include a requirement that before an end customer gets service, the retailer

must obtain *written* customer acknowledgments of certain matters. (ADSL resellers: check your wholesale agreements ... you may well find some of these requirements buried deep within them.)

So, even if you have a standard form of agreement in such a case, you can't sell over the phone unless you separately get the written acknowledgment. That's not a true 'phone sale'. It's not really paperless.

What can you do about such a thing ? Perhaps your wholesaler will agree to amend the wholesale terms to allow you to use 'push #9 to acknowledge' instead of 'written acknowledgment'. Problem solved. You just needed to recognise that the problem was there.

Summary

There's a good reason why all major telcos, and many leading ISPs, use standard forms of agreements. Yes, they involve up front cost and ongoing maintenance. But they free you from drafting, collecting and storing paper-based applications. They free you from legal doubt over the existence of your contract.

So, if your ISP or telco business wants to take the next step towards simplified, streamlined customer sign ups (without compromising legal protection) call us at Logie-Smith Lanyon.

Contact:

Peter Moon peter.moon@logielaw.com

Victor Ng vng@logielaw.com

www.logielaw.com

www.cspcentral.com.au

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