

BUSINESS STANDARD TERMS

WHAT BUSINESS OWNERS OFTEN MISS



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What Business Owners Miss About Heads of Agreement

Hidden Risks in "Non-Binding" Preliminary Documents

Most business owners understand that Heads of Agreement are meant to record key terms before formal contracts are prepared. What many don't realise is how easily these "preliminary" documents can create binding legal obligations, particularly when the language doesn't match the intention.

I work with business owners navigating commercial transactions where the gap between what they thought they agreed to and what their Heads of Agreement actually says creates significant problems. Often these issues are completely avoidable with better understanding of what courts look at when determining enforceability.

This guide identifies five commonly overlooked considerations that can turn a preliminary outline into an enforceable contract - or create disputes about what you actually committed to.

What Most Business Owners Miss About Standard Business Terms

Five Critical Gaps That Leave Businesses Exposed

Most business owners have standard terms. Many use template language from online sources or industry examples. Some have terms drafted years ago that haven't been reviewed since.

The problem isn't usually that terms are missing entirely. It's that they contain gaps or assumptions that don't actually protect the business when tested.

This guide identifies five critical issues that business owners frequently overlook in their standard terms—gaps that often don't become apparent until a dispute arises or a client relationship deteriorates. Understanding these overlooked areas helps you assess whether your current terms actually protect your interests or just create an illusion of protection.

When to Use This Guide

Best reviewed: Before finalising new standard terms, or when reviewing existing terms for adequacy

Most useful for: Business owners using template terms, those who've never had legal review of their terms, or businesses experiencing recurring disputes about scope, payment, or deliverables

OVERLOOKED CONSIDERATION 1

Terms Included in Proposals But Not Properly Incorporated

Many businesses attach their standard terms to proposals or include a reference like "subject to our standard terms and conditions available on our website." The assumption is that sending or referencing terms makes them binding.

This approach often fails when tested. For terms to bind the other party, they need to be brought to their attention before or when they accept your service. Simply attaching terms to a proposal doesn't guarantee the client actually saw them or agreed to be bound by them, particularly if the proposal doesn't clearly state that acceptance is subject to those terms.

Courts have repeatedly found that terms weren't incorporated into agreements because they weren't adequately brought to the other party's attention. Referencing terms "available on our website" is particularly problematic—there's often no evidence the client actually viewed them.

The consequence: *You believe your terms protect you, but when a dispute arises, a court might find those terms never actually formed part of your agreement. You're left with only the basic terms that can be implied by law—which rarely include the liability limitations or dispute resolution provisions you thought you had.*

OVERLOOKED CONSIDERATION 2

Liability Limitations That Don't Actually Limit Liability

Template terms commonly include broad liability exclusions: "We exclude all liability for indirect, consequential, or incidental loss." Many business owners assume this protects them from significant claims.

However, Australian Consumer Law prevents businesses from excluding liability for certain things when dealing with consumers or small businesses. You cannot exclude liability for misleading or deceptive conduct, failure to provide services with due care and skill, or breach of statutory consumer guarantees. Any term attempting to exclude this liability is void.

Additionally, courts can declare contract terms unfair and therefore unenforceable under unfair contract terms legislation. Terms that limit liability in ways that create significant imbalance between parties' rights and obligations often fall into this category, particularly in standard form contracts with small businesses.

The reality: Your liability exclusions might not exclude what you think they exclude. Worse, if your terms attempt to exclude liability that cannot legally be excluded, the entire liability provision might be unenforceable. You need liability provisions that acknowledge statutory limitations while providing meaningful protection for what can legitimately be limited.

OVERLOOKED CONSIDERATION 3

IP Ownership Assumptions Versus Actual Documentation

Many business owners assume intellectual property ownership is straightforward: if a client pays you to create something, they own it. This assumption creates significant problems.

Under copyright law, the person who creates original work generally owns copyright in it—not the person who paid for it. Without clear contractual documentation transferring IP ownership to the client, you retain ownership of what you create even after being paid for it.

The reverse problem also occurs. Business owners sometimes include broad IP transfer provisions without considering that they use pre-existing materials, templates, methodologies, or tools in their work. If your terms transfer "all intellectual property" to the client, you might inadvertently transfer ownership of your background IP—the materials and methods you use across all client projects.

Why this matters: Without clear documentation, disputes arise about who can use the work product. Can you use designs you created for this client when working with other clients? Can the client modify your work or create derivative works? Can you display the work in your portfolio? These questions should be answered in your standard terms before disputes arise, not resolved through expensive legal proceedings afterward.

OVERLOOKED CONSIDERATION 4

Payment Terms That Sound Clear But Create Disputes

Standard terms commonly state payment is due "within 30 days of invoice" or "upon completion." These sound clear until disputes arise about when the 30 days actually started or what "completion" means.

Payment timing disputes often center on questions the terms don't address: Is payment due 30 days from the invoice date or 30 days from when the client receives the invoice? If you invoice on the 29th of the month, do they have until the 29th of the next month or until the end of the next month? Does "completion" mean when you deliver work, when the client accepts it, or when any revision period expires?

Late payment provisions create additional issues. Terms might state that interest accrues on overdue amounts at a specified rate, but fail to address whether you can suspend work for non-payment, whether the client must pay disputed invoices while disputes are resolved, or what happens to payment plans if the client misses installments.

The consequence: *Payment delays become disputes about interpretation rather than straightforward collection issues. Clients argue about when payment was actually due, whether work was "complete" enough to trigger payment, or whether your late fees are enforceable. Clear, specific payment terms eliminate most of these arguments before they start.*

OVERLOOKED CONSIDERATION 5

Termination Clauses That Don't Address Key Scenarios

Template termination provisions typically address termination for breach: if someone fails to meet their obligations, the other party can terminate. What they often miss are the more common termination scenarios that actually occur in business relationships.

Relationships frequently end for reasons other than breach. Projects complete, needs change, budgets get cut, or parties simply want to move on. Without provisions for termination without cause (termination for convenience), ending relationships requires either mutual agreement or manufactured arguments about breach.

Even when termination provisions exist, they rarely address practical questions: Who pays for work completed but not yet invoiced? What happens to deposits or retainers? Who owns partially completed work? How long does each party have to return the other party's confidential information or materials? Can either party use work completed up to termination?

Why this matters: Termination is when business relationships are most likely to become contentious. Without clear procedures for ending relationships and handling outstanding obligations, relatively straightforward conclusions to projects become disputes about what each party owes the other. This is particularly problematic when relationships end badly and parties are already frustrated with each other.

IMPORTANT NOTE

This guide highlights common gaps in standard business terms to help you assess whether your current terms adequately protect your business. Every situation has unique considerations that require professional legal advice tailored to your specific business model and operations.

READY TO REVIEW YOUR BUSINESS TERMS?

Next Steps: From Gap Awareness to Proper Protection

Understanding these common gaps is the first step. The next step is reviewing your specific terms to identify which gaps affect your business and how to address them effectively.

I work with business owners to review and develop standard terms that actually protect their interests while reflecting how their business operates. Whether you're working with template terms that need customisation, haven't had your terms reviewed professionally, or are experiencing recurring issues that suggest your terms aren't adequate, we can work through what your business needs.

Ready to discuss your standard business terms? Contact Jackie Atchison at LexAlia Property & Commercial Law to explore how your specific terms can be strengthened to protect your business effectively.

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