

# Are Online Contracts Enforceable?

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Do you have a website or app through which you sell goods or services? We have all accepted terms and condition online in one form or another, but as a website owner have you questioned whether they are all enforceable, or is one way better than another?

The form of acceptance an agreement takes when accepted online is broadly referred to as a:

- Clickwrap agreement
- Sign-in wrap agreement; or
- Browsewrap agreement.

This article will look at the origins of these agreements, how to identify each of them, their legal enforceability, and our recommendations.

## Origins

These awkwardly named agreements come from the concept of a “shrinkwrap contract”. This was used to refer to the sale and purchase of goods, particularly software, which were shrink-wrapped. The act of removing that shrink-wrap was purportedly an acceptance of the terms and conditions of the product contained *inside*. Initially, some were dubious of the legal enforceability of this arrangement, because it went against the rules of contract law. Ordinarily, parties must have had the opportunity to know the terms of the agreement before they can be bound by them. However, over time this style of contract has been accepted as common practice, and

generally enforceable. Clickwrap, sign-in wrap and browsewrap are similar in that they become binding on a customer, even without the customer having read the T&Cs. Most of these are considered to be legally sound, and acceptable for commercial reasons.

## What do these online contracts look like and how do they work?

### Clickwrap agreements

## Before you join

Our mission is to build a trusted community where anyone can belong anywhere. To ensure this, we're asking you to accept our terms of service and make a commitment to respect everyone on Airbnb.

### Airbnb Community Commitment

I agree to treat everyone in the Airbnb community—regardless of their race, religion, national origin, ethnicity, skin colour, disability, sex, gender identity, sexual orientation or age—with respect, and without judgement or bias. [Learn more](#)

### Airbnb Terms of Service

I also accept [Airbnb's Terms of Service](#), [Payments Terms of Service](#), [Privacy Policy](#), and [Nondiscrimination Policy](#).

Accept

Decline

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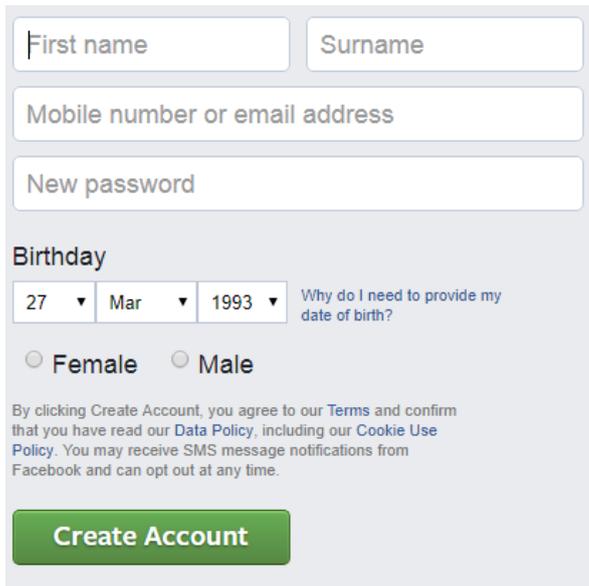
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Users will be directed to a separate window on their device’s screen in order to view the business’ terms and conditions, either by hyperlink or the entire T&Cs squeezed into the window for users to scroll through.

Users will then have to **actively accept** the terms and conditions by “clicking” into a box with words like:

- *I accept*
- *I have read the Terms and Conditions and I agree to be bound by them* (a thorough attempt to make sure the customer knows this is a legal contract)
- *OK* (technically acceptable, but fairly lacklustre in a legal context).

Sign-in wrap agreements

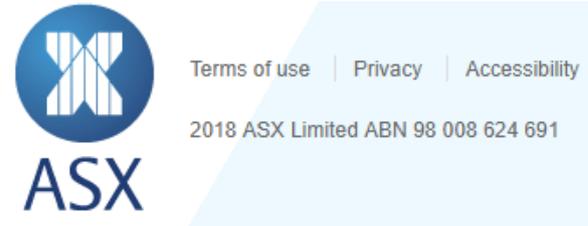


When signing into an online service for the first time acceptance of this ‘legal’ contract is presented in one of two ways:

**Option 1:** A combination of entering the user’s personal details and ticking a box that they “agree to the Terms of Use” or something similar, access to which is hyperlinked. This is **active acceptance** of the contract.

**Option 2:** Again entering details, but no checkbox is provided. There may be hyperlinks to the T&Cs/privacy policy and a notice above or below the sign-in button like: ‘By clicking “SIGN IN” I agree to the terms of use and privacy policy.’ This is **passive acceptance** of the contract. This is certainly the choice of tech giants like Facebook, Instagram, eBay, Gumtree and LinkedIn.

Browsewrap agreements



Unlike the other styles, users’ attention will not be drawn to any T&Cs or other legal policies of the website. There will be hyperlinks at the bottom of the homepage (if not every website page), which users can follow to read those documents. Generally, these will state that by entering the website or using the service hosted on the website, users agree to be bound by those terms. Simply accessing the site is considered a **passive acceptance** of the website owner’s T&Cs, etc.

**Are they enforceable?**

Clickwrap agreements

Yes, these are generally valid, because the user has had notice of the existence of T&Cs and has *actively* agreed to those by clicking the acceptance button.

To be legally binding, users must have the **opportunity** to know the T&Cs; they don’t have to actually read them. This ‘opportunity’ doesn’t just mean that hyperlinks are available. Customers must be given sufficient time to read those terms. For example, Ticketmaster used to only allocate customers 3 minutes to enter all their personal and payment information to purchase tickets online, as well as read 3025 words of the T&Cs, Privacy Policy and Purchase Policy (which included provisions for refunds, exchanges and cancelled events).<sup>1</sup> After 3 minutes, the tickets would go to the next in line.

It was impossible for purchasers to read those documents. If someone wanted to challenge these clickwrap agreements, they were probably not enforceable. Also, this was likely to be considered unconscionable conduct under the Australian Consumer Law.

Sign-in wrap agreements

The principles are similar to clickwrap agreements, in that users must be given a genuine opportunity to read the T&Cs prior to agreeing to the contract.

Looking to the US for guidance on the courts’ view of enforceability of passively accepted agreements,

<sup>1</sup> “Unfair Terms in ‘Clickwrap’ and other electronic contracts”, Dale Clapperton and Stephen Coronos, June 2007, *Australian Business Law Review*, vol 35

consensus is that it can depend on how obvious the passive assent is.<sup>2</sup> Our tips are to make the T&Cs immediately available for viewing and to:

- Include a checkbox for the notice of assent; or
- Present the notice of assent *above* the button to finalise/proceed with the transaction.

Also, for both clickwrap and sign-in wrap, unusual or significant terms, particularly with regards to refunds or extra fees, should be brought to the attention of the customer.<sup>3</sup>

### Browsewrap agreements

The user ostensibly accepts the terms, even before being given the opportunity to read them. Browsewrap agreements are less enforceable than the others because the recipient of the contractual 'offer' to be bound is not presented with the terms, nor do they give any assent to those terms. Enforceability depends on things such as: the structure of the website and ease of access to the T&Cs.

Although enforceability has been questioned (mostly in the US), it seems browsewrap agreements are legally and commercially acceptable. This is on the basis that most users have basic internet literacy, and know that there are T&Cs attached to every commercial website they enter.<sup>4</sup>

## Which one do I use for commercial transactions?

We recommend contracting with your online customers using a clickwrap agreement. Although online agreements are not fully tested at law in Australia, the following are some steps you can take to increase enforceability and minimise the risk of dispute:

- Clearly bring your customers' attention to the legal nature of the agreement;
- Don't rely on sentiments of "internet literacy";
- Make sure customers have ample opportunity to read the T&Cs;
- Require customers to actively "*Accept the Terms and Conditions*"; and
- Draw your customers' attention to any unusual or significant terms, particularly with regards to strict refund policies or extra fees.



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Cartoon by Tom Fishbourne of Marketoonist, 25 March 2018. Source: <https://marketoonist.com/2018/03/terms.html>

## Final thoughts

So how do your online agreements stack up? Are you suddenly getting sweaty palms thinking about the fact that you have no protection for your business in this realm of online contracts, or that the protection you have is lacking? Have a chat with us about how we can help put your mind at ease.

And if you are reading this from the perspective of a consumer - although it might seem daunting that we sign up to online agreements with abandon, this is nothing out of the ordinary. It is standard practice in the digital economy which surrounds us everyday.

### For more information, please contact:



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<sup>2</sup> "Electronic "Sign-in-Wrap" Contract: Issues of Notice and Assent, the Average Internet User Standard, and Unconscionability", Erin Canino, *University of California, Davis* 2016, vol 50

<sup>3</sup> *eBay International AG v Creative Festival Industries Pty Ltd* [2006] FCA 1768, [48], [52].

<sup>4</sup> Canino, pp. 535-571.