

# E-commerce legal risk minimization without reinventing the wheel

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Like many other business issues, discussion of e-commerce suffers from what may be called the “reinventing the wheel syndrome”.

Legal compliance issues are often discussed as if they are about a completely unique problem, the implication being that they require unique solutions. That approach is akin to reinventing the wheel.

It is more cost-effective and useful to return to “first principles” in risk management and only then move to specific solutions for e-commerce if required.

## First principles for legal risk management

Key “first principles” for **general** legal risk management follow:

- if a ground for liability exists in the law, a person or organisation (such as a company) can be legally liable for its actions or inaction;
- office holders, such as directors and other officers of a company, can sometimes also be held liable;
- legal risk minimisation methods help define and treat legal risks. The methods often involve creating a paper trail in advance of issues arising.

Key methods for legal risk minimisation include:

- use of written contracts to minimise **contract law claims**, the contracts may share or transfer risk to others with clauses which specify express warranties, liability limitation or exclusion, acknowledgements, force majeure and composition of agreement provisions;
- use of **security mechanisms** such as guarantees, charges, caveats, mortgages, liens, performance bonds, indemnities and pledges;
- use of manuals, policies and procedures designed to minimise **negligence law claims** such as safety procedures, process testing and trials and surveys;
- use of ethics policies involving definitions of procedures, statements of corporate values and codes of conduct to minimise **equity law claims**;
- use of specific processes to minimise **specific statute claims** such as under the Trade Practices Act 1974 (Cth.) and Corporations Law; and

- for any remaining legal exposure, minimise legal risks by using **insurance, document retention and management policies, and project management.**

The above list is not comprehensive but it’s a good start.

## E-commerce legal risk minimisation

While e-commerce legal issues have some unique aspects, according to most informed commentators **general** legal risk minimisation processes referred to above form the core of legal risk minimisation for e-commerce.

Accordingly, possible claims under contract law, the law of securities, negligence law, equity law and specific statutes should be considered.

Also relevant are possible claims under other fields of law particularly trade practices law (which is relevant to misleading advertising, communications and verbal representations), corporations law (which is relevant to the liability of directors and company officers) and insurance law (which is relevant to insurance contracts).

## Suggested Legal Audit

As part of their service lawyers can conduct a legal audit in respect of your organisation’s affected documents used in e-commerce. These may include:

- purchase orders;
- invoices and accounts;
- agreements with customers, suppliers and others; and
- insurance contracts.

Additionally lawyers should assist you to prepare and implement document management strategies containing guidelines on the creation, distribution and storage of documents. These strategies ensure the best evidence is available to demonstrate, if the need arises, that your organisation and its officers have complied with their legal obligations, and to empower your organisation to enforce legal rights and remedies against others.