

Better Contract Drafting

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NZHIT: Contracting seminar

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NZHIT: Contracting workshop

- Introductions
- Why are you here?
- What do you want to get from the day?
- What level of contracting knowledge can I assume?

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My approach to contracting

My approach to contracting

- **Great area to work in**
- **This is a partnership**
- **Better to be upfront with the terms now**
- **Is there a deal to be done?**
- **If you can't understand it, ask**
- **The contract should tell a story**

My approach to contracting – plain language drafting

- aforementioned
- agreeable to
- amenable
- as per
- confirm by return
- desirous
- expiration
- foregoing
- forthwith
- fulsome
- hence
- herein
- hereinafter
- hereinafter set forth
- hereinbefore
- hereto
- hereunder
- herewith
- notwithstanding
- peruse
- pursuant
- remit
- revert
- set forth
- the said
- the same
- thereof
- thereunto
- touch base
- vesting
- whereinbefore

Contracting 101

Contracting 101

- **Offer and Acceptance**
- **Intent to Contract**
- **Consideration**
- **Certainty of contract**
- **Contracting for an outcome or to do something?**
- **Agreements to agree**

The parts of a contract

Parts of a contract

- **Background**
- **Commencement**
- **Pre-commencement activity**
- **Day to day operation**
- **Assumptions**
- **Calling it quits**

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Key clauses for today:

- Services and Service Levels
- IP
- Term and Termination
- Liability

Services and Service Levels

Services and Service Levels

- **What is each party to do?**
- **How do you measure?
What do you measure?**
- **Who carries the risk of
things unplanned?**
- **What happens if a party
doesn't do something?**

Services and Service Levels

- **Extensions of time**
- **Liquidated damages**
- **Service credits**
- **Escalation**
- **Termination triggers**

Services and Service Levels – Example 1

(Source: HGM drafted Service Level Agreement)

_____ will comply with the service level in relation to the “Availability” of the Software set out in this section 1 (Availability Service Level). The Availability Service Level will be calculated by _____ and reported to the Customer at the end of each Month using the following process:

- The Availability in a Month will be calculated at the end of that Month in accordance with the following formula: $A = 100 - ((D/T)*100)$, where:
 - A = the Availability of the Software
 - D = total minutes of Downtime
 - T = total minutes in the Month, where
 - Downtime means any time the Software is not available for use by Customer materially in accordance with the Specifications and the terms of this agreement, where such unavailability is not caused by the Customer or any planned maintenance outage which has been agreed with the Customer in advance.

Services and Service Levels – Example 1

The following table sets out the service level agreement for Response and Resolution of all issues logged by the Customer:

Priority	Description of Issue	Response Time	Resolution Time	Points	Escalation
Critical	A business process is stopped or a function is inoperable that will potentially or specifically compromise a business process.	15 minutes	[2 hours]	10	2 hours
High	The Product is experiencing considerably degraded performance and functionality is severely impacted.	30 minutes	[4 hours]	5	4 hours
Medium	Core Product functionality is available, however functionality to support end-to-end business process is not available.	60 minutes	[24 hours]	2	24 hours
Low	Issue is minor or and does not materially impact functionality.	120 minutes	[48 hours]	1	48 hours

If the issue is Critical or High priority, _____ will assign all available/necessary resources to the issue.

Services and Service Levels – Example 1

Service Points

If a fault is not responded to or restored within the prescribed period then the level of points set out will accrue. Further points of the same amount will accrue for each further period that the fault is not responded to or restored.

Escalation

The person reporting on a fault will escalate if the fault is not restored within the period set out above. It will continue to escalate each further period of the same duration if the fault is not restored.

Services and Service Levels – Example 2

(Source: HGM drafted Service Level Agreement)

Incident Priority: Incidents will be classified based on the following definitions:

Priority	Impact	Definition
P1	Critical	<p>Immediate change necessary – Critical impact problem in which Customer operations impacted to the extent that fuel sales and / or profitability is or will be severely impacted. Business relief is more important than fix quality. Examples include:</p> <ul style="list-style-type: none"> • System down or severe (i.e. not trading) impact on fuel services or sales. • Severe impact on core function of the system. • Severe financial impact on customer's business. • System couldn't be recovered and needs immediate action.
P2	High	<p>Not P1. Change needed as soon as possible; customer trading but significant risk still in place or existing workaround is not robust. Customer may be operating, but in a significantly impaired fashion. Examples include:</p> <ul style="list-style-type: none"> • System partially down or some impact on fuel services or sales. • Some impact on core function of the system.
P3	Medium	<p>Not P1 or P2. Change important but more likely to be planned and scheduled. Customer impact manageable or acceptable within defined release schedule.</p> <ul style="list-style-type: none"> • A minor problem that is causing, or may result in, service deterioration. • System still functions and no impact on core function.
P4	Low	<p>Not P1, P2 or P3. Change leads to minor improvement or has limited customer benefit. Customer perceives as low priority. Examples include:</p> <ul style="list-style-type: none"> • Enquiry or request for information. • A problem logged for historical purposes.

Services and Service Levels – Example 2

Response and Resolution Service Levels: The Service Level targets for response and resolution of Incidents are as set out in the table below.

Type of Incident	Response target Time	Workaround target time	Resolution target Time	Update Frequency	Incident Report
P1	20mins	90 minutes	90% within 90 minutes and 100% within 120 minutes	Update to be provided to the Customer every 45 minutes until Resolution	Within 24-48 hours of Resolution
P2	30 mins	120 minutes	90% within 120 minutes and 100% within 2 days	Update to be provided to the Customer every 60 minutes until Resolution	Included in Monthly Report
P3	120 mins	Next Business Day	90% within 1 day and 100% within 2 days	Update to be provided to the Customer every 24 hours until Resolution	Included in Monthly Report
P4	120 mins	5 days	As agreed with Foodstuffs	Update to be provided to the Customer upon request	N/A
Request for change	Next Business Day	N/A	Annual “support” software release or within a time agreed by both parties	Update to be provided to the Customer upon request	N/A

Intellectual Property

Intellectual Property

- **What is IP?**
 - **Copyright**
 - **Patents**
 - **Confidential Information**
 - **Trademarks**
 - **Design rights**

Intellectual Property

- **IP ownership – the approach**
- **Joint ownership**
- **IP warranties**
- **IP Indemnities**
- **What is the difference between a warranty and an indemnity?**

Intellectual Property: Example clause 1

(Sourced: Ministry of Health Agreement for Services with National Telehealth Service)

Existing Material

32.1 Each Party and any third party retains ownership of all of its Existing Material. Nothing in this Agreement is intended to deprive either Party or any third party of its Intellectual Property in Existing Material

Intellectual Property in the Work

32.2 Subject to clause 32.1, and unless otherwise agreed in writing between us, Intellectual Property in the Work and the Services (excluding the Excluded Items) will be the property of the Ministry as such rights arise, and you acknowledge that the Ministry owns the Intellectual Property in the Work and the Services (excluding the Excluded Items). To the extent that any Intellectual Property does not so vest in the Ministry, and it vests in you, you irrevocably assign ownership of such Intellectual Property to us as such rights arise. You agree to waive, or arrange for the waiver of, all rights granted to the author of the Work and the Services (excluding the Excluded Items) under Part 4 of the Copyright Act 1994.

Intellectual Property: Example clause 1

Licences and warranties

32.3 We grant you a non-exclusive, revocable, royalty free licence to use the Intellectual Property in the Work and the Services and any Existing Material we own for the sole purpose of you performing your obligations under this Agreement.

32.4 In addition to the licence granted in clause 32.3, you may, with our prior written consent for each proposed use (such consent not to be unreasonably withheld), use the Intellectual Property in the Work and the Services for the purpose of supporting the delivery of health services in New Zealand. Valid reasons for the Ministry withholding its consent under this clause 32.4 include, without limitation:

- (a) protection of personal information or other privacy and/or confidentiality considerations;
- (b) protection of third party Intellectual Property; and/or
- (c) maintaining control over and ensuring the integrity and accuracy of health education resources and promotion material in the New Zealand health sector.

Intellectual Property: Example clause 1

32.5 You grant and will arrange for any third party to grant us and any third party appointed by us, a perpetual, non-revocable, non-exclusive, sub-licensable, transferable, fully paid up, worldwide licence(s) to use, copy, modify and distribute all Intellectual Property in the Work and/or the Services (excluding the Excluded Items) that is not owned by us or otherwise licensed to us under this Agreement for any purpose whatsoever.

32.6 You will procure that your Technology Providers will grant to us and any third party appointed or nominated by us, a perpetual, non-revocable, non-exclusive, sub-licensable, transferable, fully paid up licence to use, copy, modify and distribute Visual User Interfaces, for any purpose related to health services or our other functions or purposes, such license to be granted as the Intellectual Property in each Visual User Interface arises. For the avoidance of doubt, nothing in this Agreement shall purport to or have the effect of transferring any ownership of Third Party Software to us.

Intellectual Property: Example clause 1

32.8 You undertake, at your own reasonable expense, to execute and deliver any document and to do all things as may reasonably be required in order to assist, in respect of matters within your control, the Ministry to obtain the full benefit of this Agreement according to its true intent, including assisting the Ministry to register as proprietor of, and to perfect the Ministry's title or license to, any Intellectual Property owned by or licensed to the Ministry under this Agreement.

32.9 You warrant that you are legally entitled to do the things stated in this clause 32.

32.10 You warrant that the use and possession of the Intellectual Property provided by you and incorporated into the Services or the Work do not infringe the Intellectual Property of any third party.

Intellectual Property: Example clause 2

(Sourced: MBIE Framework Terms and Conditions)

10.1 The Purchasing Agency and Provider retain ownership of all Intellectual Property Rights they respectively owned before the commencement date of the Outcome Agreement.

10.2 Unless agreed otherwise in the Outcome Agreement, all new Intellectual Property Rights (New IP) created by the Provider while performing the Services will be owned by the Provider upon their creation.

10.3 The Provider and the Purchasing Agency may agree mutually acceptable use terms (Agreed Uses) for New IP and record these in the Outcome Agreement.

Intellectual Property: Example clause 2

10.4 The owner of any New IP, whether the Provider or the Purchasing Agency, grants to the other party a perpetual, irrevocable, royalty-free and non-exclusive licence to use, copy, modify and distribute such New IP for any purpose connected with the performance of the Outcome Agreement and any Agreed Uses.

10.5 Each party to the Outcome Agreement warrants that any Intellectual Property Rights it provides under or in connection with the Outcome Agreement do not infringe the Intellectual Property Rights of any third party.

Term and Termination

Term and Termination

- **Duration**
- **Commencement**
- **Rights of renewal**
- **Cause**
- **Without cause**
- **Consequences**

Termination: Example clause 1

(Source: HGM drafted SaaS agreement for healthcare provider)

17.1 This Agreement will be effective as of the Commencement Date and will continue until the expiry of the Initial Term. Upon expiry of the Initial Term, the Agreement shall automatically renew for successive Renewal Terms, unless one party provides written notice to the other party of its intent not to renew at least ninety (90) days prior to the commencement of the then pending Renewal Term.

17.2 Either Party may terminate this Agreement on written notice to the other Party if the other Party fails to correct a material breach of its obligations hereunder and fails to cure the breach within thirty (30) days of such written notice.

17.3 This Agreement may be terminated by any party immediately by providing notice in writing if the other party enters into an arrangement for the benefit of creditors, has a receiver appointed to all or any part of its property or undertaking, or has a liquidator appointed.

17.4 The provisions of this Agreement which should by their nature survive termination or expiration, shall survive termination on expiration of this Agreement.

Termination: Example clause 2

(Source: Government Framework Terms and Conditions)

Termination

11.1 Termination of an Outcome Agreement for convenience: Unless specified otherwise in the Outcome Agreement, the Purchasing Agency or the Provider may terminate the Outcome Agreement by giving the other party at least 90 days prior written notice (or such other period agreed by the parties in writing).

Termination: Example clause 2

11.2 Termination of Outcome Agreement for breach

(a) Unless specified otherwise in the Outcome Agreement, the Purchasing Agency or the Provider may terminate the Outcome Agreement immediately by notice to the other party if:

(i) subject to clauses 11.2(b) and (c), the other party commits a breach of the Outcome Agreement and such breach is not remedied within 14 days (or such longer period agreed by the parties in writing) of receiving written notice of the breach; or

(ii) the other party ceases or threatens to cease to carry on most or all of its business operations, becomes insolvent or suffers any analogous event.

(b) Instead of exercising its rights under clause 11.2(a)(i), the non-breaching party may request that the breaching party implement a Remedy Plan. However, if a Remedy Plan is not agreed by the parties by a date specified by the non-breaching party (acting reasonably), the non-breaching party may exercise its rights in accordance with clause 11.2(a)(i).

Consequences of Termination: Example 1

19.2 On termination or expiry of this Agreement, the Supplier shall immediately deliver to the Customer:

- a) all In-put Material and all copies of information and data provided by the Customer to the Supplier for the purposes of this Agreement. The Supplier shall certify to the Customer that it has not retained any copies of In-put Material or other information or data, except for one copy which the Supplier may use for audit purposes only and subject to the confidentiality obligations in clause 16;
- b) all specifications, programs (including source codes) and other documentation comprised in the Deliverables and existing at the date of such termination, whether or not then complete. All Intellectual Property Rights in such materials shall automatically pass to the Customer (to the extent that they have not already done so by virtue of clause 13.1), who shall be entitled to enter the premises of the Supplier to take possession of them.

Consequences of Termination: Example 2

17.1 Upon expiry or termination of this Agreement, Supplier will:

- a) immediately provide _____ with all Deliverables that have been paid for by _____ to the extent that they are not in _____'s possession and will, at _____'s request, either destroy or return all _____ materials in its possession or under its control;
- b) Upon _____'s request, continue to provide the services to _____ pursuant to the terms of the Agreement for a transitional period of up to six months from the effective date of termination (the **Transition Period**); and
- c) During the Transition Period, provide such cooperation and assistance as _____ may reasonably request to support an orderly transition to another provider of similar software, services, or to _____'s internal operations.

Consequences of Termination: Example 2

17.2 _____ will pay Supplier:

- a) the Fees for the Services provided during the Transition Period;
- b) the fees calculated at Supplier's standard hourly rate(s) for the assistance to be provided under clause 17.1(c);
- c) after Acceptance for work completed, but not accepted;
- d) for work in progress;
- e) for costs of termination and closing-out supplier or lower tier subcontracts which costs cannot reasonably be avoided; and
- f) for costs incurred in preparation for continuing performance which costs cannot reasonably be avoided;

unless termination is a result of _____ exercising its rights under clause 16.2(c).

17.3 Termination of this Agreement will not affect the provisions of this Agreement which are intended to continue, or should reasonably continue after termination (whether expressly stated so or not). Termination will not affect any claim by either party against the other party arising out of any breach or failure under this Agreement prior to termination.

Liability

Liability

- **What are you liable for?**
- **What can be recovered if there were no liability caps and exclusions?**
 - **Direct, indirect and consequential damages**
 - **Dollar amounts**
- **What is the purpose of these clauses?**
- **Force Majeure**
- **Standard exceptions**

Liability: Example clause 1

(Source: Ministry of Health Agreement for Services with National Telehealth Service)

Our Liability

31.1 Save for our payment obligations in clauses 3 to 5 of Schedule 1, we are not liable to you for any claims, damages, penalties, losses or any other costs which you incur however those arise, whether pursuant to this Agreement, in negligence or otherwise.

31.2 If however we are found to be liable for any of these whether at law, by statute, in equity or otherwise arising from the relationship between us and you, our liability to you for any single event or series of related events is limited to the amount paid to you for the Services in the month prior to the relevant claim being brought to our attention.

Liability: Example clause 2

(Source: HGM drafted SaaS agreement for healthcare provider)

14. LIMITATION OF LIABILITY

14.1 To the maximum extent permitted by applicable law, in no event shall _____, its suppliers or its third party licensors be liable to Customer under any legal theory for loss of profits, loss of revenue, or any indirect, special, incidental, consequential, data loss, punitive or exemplary damages in connection with this Agreement, use or inability to use SaaS Service, even if _____, its supplier or third party licensors have been advised of the possibility of such damages. In no event shall any of _____, its suppliers or third party licensors be liable for any third party claim except under clause 14.1. Liability for damages shall be limited and/or excluded as provided in this Agreement, even if any exclusive remedy provided for in this Agreement fails of its essential purpose.

14.2 _____'s total and aggregate liability to Customer for any actual damages arising out of, based on, or relating to this Agreement, whether based in contract, tort (including negligence) warrant or any other legal theory, shall not exceed the total amounts paid for the SaaS Service hereunder in the Twelve (12) months preceding the incident.

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Liability: Example clause 2

14.3 In no event will _____ or its third party host or suppliers, employees, agents or representatives be liable for unauthorised access (i.e. hacking) into _____'s or Customer's transmission facilities, premises or equipment, or for unauthorised access to Customer's data files, programs, procedures or information, unless the unauthorised access is caused by the gross negligence or intentional misconduct of _____ or of its host or suppliers, employees, agents or representatives.

14.4 Customer agrees to indemnify, defend and hold _____ harmless from and against any loss, damage or claim by any third party resulting from:

- (a) Customer's and its Users' unauthorised use or modification of the Services;
- (b) any liability that _____ may have to any customers of Customer as a result of the Services, the Software or the Documentation the subject of this Agreement.

Conclusion

- Contracts need to reflect the deal
- The deal needs to be a fair one to work
- Test the workability
- It's a partnership

Any questions?