

Russell Kennedy Disability, Social and Community Services, Health Webinar

Doing away with the fine print: Better consumer contracts

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Webinar housekeeping

- You will be on mute and your camera will be off during the webinar
- Use **Chat** for technical issues
- Use **Q&A** for webinar content questions. There will be time for questions at the end.
- To provide feedback please use the QR code at the end
- This webinar will be recorded
- We will send slides afterwards

Disclaimer

This presentation is **general commentary**. It is not legal advice.

If you need specific advice on the topics discussed, please contact the presenters.

Introduction

Better consumer contracts help your clients understand what they will receive and their entitlements. It also helps protect your organisation from disputes or liability.

We will cover:

1. Contract Approach
2. Contract Design
3. Contract Acceptance & Workflow
4. Contract Content
5. Regulator Requirements
6. Unfair Contract Terms
7. Plain English Tips

1. Contract Approach



Contract Approach – First steps

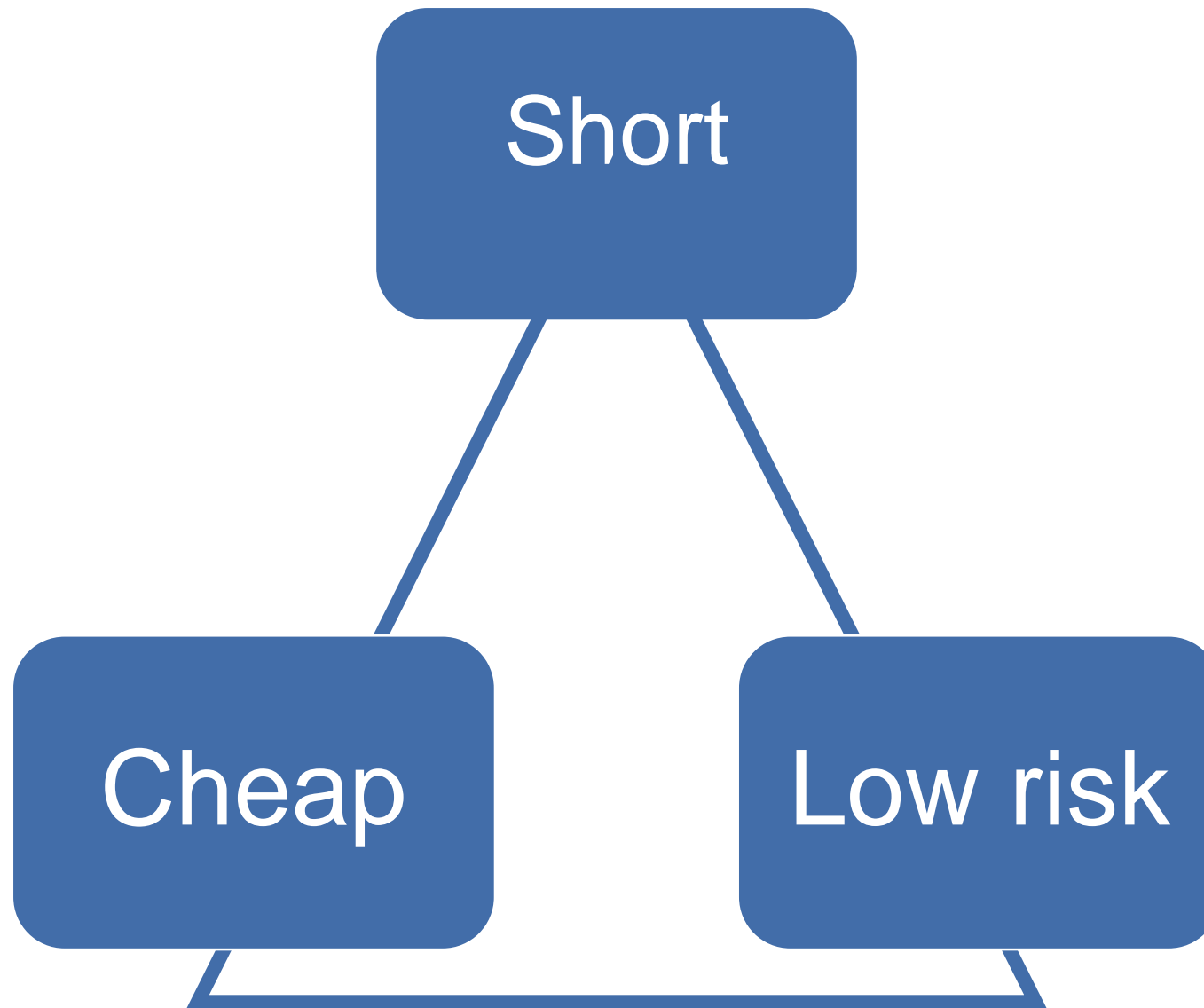
Forms of contract

- Long form + Summary
- Long form + Easy English
- Short form
- Plain English

Factors to consider

- Duration (one-off, one year, ongoing)
- Value (\$500? \$5,000? \$50,000? \$500,000?)
- Client type (NDIS, Aged Care, other businesses?)
- Risk tolerance (Low? High? Penalties from a regulator?)

The fundamental tension when designing contracts



NDIS Sample: Easy English

Sample Service Agreement

1. Who is making this Agreement?

Name

The name of the participant or their trusted person:

Name

The name of the service provider:

2. How does this Agreement fit in with the NDIS?

This Agreement is made according to the rules and the goals of the National Disability Insurance Scheme (NDIS).

A copy of the participant's NDIS Plan is attached to this Agreement.

Note: you don't have to include your NDIS Plan if you don't want to.

The participant and the service provider agree that this Agreement is in line with the main ideas of the NDIS. These ideas include things like having more choices, achieving your goals and taking part in the community.

3. What supports will be provided?

What are the supports to be provided? List the following:

ndis.gov.au

Sample Service Agreement

1

NDIS Sample: Service Agreement

Model Service Agreement

NOTE: A Service Agreement can be made between a Participant and a Provider or a Participant's representative and a Provider. A Participant's representative is someone close to the Participant, such as a family member or friend or someone who manages the funding for supports under a Participant's NDIS plan.

Text in [square brackets] is for instructions / guidance only. Please delete any text that does not apply, such as where an option is given in [square brackets].

Parties

This **Service Agreement** is for [insert name of Participant], a participant in the National Disability Insurance Scheme (Participant), and is made between:

[Participant / Participant's representative (such as a family member or friend)] [insert name of Participant /and Participant's representative – if involved]

and

Provider [insert name of Provider]

This Service Agreement will commence on [day, month, year] for the period [insert date] to [insert date].

The NDIS and this Service Agreement

This Service Agreement is made for the purpose of providing supports under the Participant's National Disability Insurance Scheme (NDIS) plan.

A copy of the Participant's NDIS plan is attached to this Service Agreement [delete this sentence if Participant chooses not to attach their plan].

The Parties agree that this Service Agreement is made in the context of the NDIS, which is a scheme that aims to:

- support the independence and social and economic participation of people with disability, and
- enable people with a disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports.

Schedule of supports

The Provider agrees to provide the Participant [insert description of supports] for [insert duration of each of the supports provided].

The supports and their prices are set out in the attached Schedule of Supports. All prices are GST inclusive (if applicable) and include the cost of providing the supports.

Additional expenses (i.e. things that are not included as part of a Participant's NDIS supports) are the responsibility of the [Participant / Participant's representative] and are not included in the cost of the supports. Examples include entrance fees, event tickets, meals, etc.

NSW Fair Trading Residential Tenancy Agreement



standard form from 28 September 2020 Residential tenancy agreement

Residential Tenancies Regulation 2019 Schedule 1 Standard Form Agreement (Clause 4(1))

IMPORTANT INFORMATION

Please read this before completing the residential tenancy agreement (the **Agreement**).

1. This form is your written record of your tenancy agreement. This is a binding contract under the *Residential Tenancies Act 2010*, so please read all terms and conditions carefully.
2. If you need advice or information on your rights and responsibilities, please call NSW Fair Trading on 13 32 20 or visit www.fairtrading.nsw.gov.au before signing the Agreement.
3. If you require extra space to list additional items and terms, attach a separate sheet. All attachments should be signed and dated by both the landlord or the landlord's agent and the tenant to show that both parties have read and agree to the attachments.
4. The landlord or the landlord's agent **must give the tenant** a copy of the signed Agreement and any attachments, two copies or one electronic copy of the completed condition report and a copy of the Tenant Information Statement published by NSW Fair Trading.

THIS AGREEMENT IS MADE ON AT

BETWEEN

Landlord Name (1):

Landlord Name (2):

Landlord telephone number or other contact details:

If not in NSW, the State, Territory or country (if not Australia) the landlord ordinarily resides in:

Note: The above information **must** be provided for landlord(s), whether or not there is a landlord's agent

Address for service of notices (can be an agent's address):

Suburb:

State:

Postcode:

Note: The landlord(s) business address or residential address **must** be provided for landlord(s) if there is **no** landlord's agent

Tenant Name (1):

Tenant Name (2):

Tenant Name (3):

Add all other tenants here:

Address for service of notices (if different to address of residential premises):

Suburb:

State:

Postcode:

Contact details:

For information about your rights and responsibilities under this agreement, contact NSW Fair Trading at www.fairtrading.nsw.gov.au or call 13 32 20.

2. Contract Design



Contract Design – Look and feel of the document

Form of contract

- Terms and conditions (more likely to be standard form)
- Agreement
- Columns
- Numbering or bullets
- Online form / checkbox
- Booklet / brochure/ A4 page
- Defined terms/ definitions/ dictionary/ glossary
- Instructions to use/complete



Russell Kennedy Home Care: Easy English Guide



When we say **you** it means the person who gets services from us.



This guide has important information about your **home care agreement**.

We will call your home care agreement **the agreement**.



This guide tells you:

- about your home care package
- about the agreement
- what we must do for you
- what you must do for us
- about your services
- how to change or end the agreement.

Former NDIS Model Service Agreement

Model Service Agreement

NOTE: A Service Agreement can be made between a Participant and a Provider or a Participant's representative and a Provider. A Participant's representative is someone close to the Participant, such as a family member or friend or someone who manages the funding for supports under a Participant's NDIS plan.

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Russell Kennedy NDIS Service Agreement

NDIS SERVICE AGREEMENT — CORE AND CAPACITY BUILDING SUPPORTS

NDIS Service Agreement for Core and Capacity Building Supports

As a registered NDIS provider, we offer individually planned supports to NDIS participants. This Agreement is made according to the rules and goals for the NDIS. It sets out the Supports we will provide you, taking into account your NDIS Plan. Supports may be NDIS funded or Self-funded.

Agreement Details

Before we provide Supports, we need your personal details.

Participant Details		
Participant	Name	
	Date of Birth	/ /
	Home Address	
	Postal Address	
	Phone Number	
	Email	
	NDIS Plan Number	

NSW Fair Trading Residential Tenancy Agreement

The Agreement

RIGHT TO OCCUPY THE PREMISES

1. The landlord agrees that the tenant has the right to occupy the residential premises during the tenancy. The residential premises include the additional things (if any) noted under 'Residential premises' on page 2 of this agreement.

COPY OF AGREEMENT

2. The landlord agrees to give the tenant:

- 2.1** a copy of this agreement before or when the tenant gives the signed copy of the agreement to the landlord or landlord's agent, and
- 2.2** a copy of this agreement signed by both the landlord and the tenant as soon as is reasonably practicable.

RENT

3. The tenant agrees:

- 3.1** to pay rent on time, and
- 3.2** to reimburse the landlord for the cost of replacing rent deposit books or rent cards lost by the tenant, and
- 3.3** to reimburse the landlord for the amount of any fees paid by the landlord to a bank or other authorised deposit-taking institution as a result of funds of the tenant not being available for rent payment on the due date.

4. The landlord agrees:

- 4.1** to provide the tenant with at least one means to pay rent for which the tenant does not incur a cost (other than bank fees or other account fees usually payable for the tenant's transactions) and that is reasonably available to the tenant, and
- 4.2** not to require the tenant to pay more than 2 weeks rent in advance or to pay rent for a period of the tenancy before the end of the previous period for which rent has been paid, and
- 4.3** not to require the tenant to pay rent by a cheque or other negotiable instrument that is post-dated, and
- 4.4** to accept payment of unpaid rent after the landlord has given a termination notice on the ground of failure to pay rent if the tenant has not vacated the residential premises, and
- 4.5** not to use rent paid by the tenant for the purpose of any amount payable by the tenant other than rent, and

4.6 to give a rent receipt to the tenant if rent is paid in person (other than by cheque), and

4.7 to make a rent receipt available for collection by the tenant or to post it to the residential premises or to send it by email to an email address specified in this agreement by the tenant for the service of documents of that kind if rent is paid by cheque, and

4.8 to keep a record of rent paid under this agreement and to provide a written statement showing the rent record for a specified period within 7 days of a request by the tenant (unless the landlord has previously provided a statement for the same period).

Note: The landlord and tenant may, by agreement, change the manner in which rent is payable under this agreement.

RENT INCREASES

5. The landlord and the tenant agree that the rent cannot be increased after the end of the fixed term (if any) of this agreement or under this agreement if the agreement is for a fixed term of 2 years or more, unless the landlord gives not less than 60 days written notice of the increase to the tenant. The notice must specify the increased rent and the day from which it is payable.

Note: Section 42 of the Residential Tenancies Act 2010 sets out the circumstances in which rent may be increased during the fixed term of a residential tenancy agreement. An additional term for this purpose may be included in the agreement.

6. The landlord and the tenant agree that the rent may not be increased after the end of the fixed term (if any) of this agreement more than once in any 12-month period.

7. The landlord and the tenant agree:

- 7.1** that the increased rent is payable from the day specified in the notice, and
- 7.2** that the landlord may cancel or reduce the rent increase by a later notice that takes effect on the same day as the original notice, and
- 7.3** that increased rent under this agreement is not payable unless the rent is increased in accordance with this agreement and the Residential Tenancies Act 2010 or by the Civil and Administrative Tribunal.

RENT REDUCTIONS

8. The landlord and the tenant agree that the rent abates if the residential premises:

- 8.1** are destroyed, or become wholly or partly uninhabitable, otherwise than as a result of a breach of this agreement, or

For information about your rights and responsibilities under this agreement, contact NSW Fair Trading at www.fairtrading.nsw.gov.au or call 13 32 20.

3. Contract Presentation & Acceptance



Contract Presentation & Acceptance

Access to contract

- Available online
- Client fills in contract details or provider fills in details?
- If provider fills in details, is this via phone/ email/ in person/ an online portal?
- How are updates conveyed to clients?

Contract Presentation & Acceptance

Execution of the contract

- Online (DocuSign, PDF, inserting name/signature)
- Print and post (or scan and email)
- In person (wet ink signature)
- Independent witness
- Verbal acceptance (is this confirmed in writing?)
- Pre-signed by the provider?
- Exchange

I ACCEPT



Executing the contract

Current NSW Fair Trading Residency Agreement

THE LANDLORD AND THE TENANT ENTER INTO THIS AGREEMENT AND AGREE TO ALL ITS TERMS.

Note. Section 9 of the Electronic Transactions Act 2000 allows for agreements to be signed electronically in NSW if the parties consent. If an electronic signature is used then it must comply with Division 2 of Part 2 of the Electronic Transactions Act 2000.

SIGNED BY THE LANDLORD/AGENT

Name of landlord/agent

Signature of landlord/agent

on the day of 20__

LANDLORD INFORMATION STATEMENT

The landlord acknowledges that, at or before the time of signing this residential tenancy agreement, the landlord has read and understood the contents of the **Landlord Information Statement** published by NSW Fair Trading that sets out the landlord's rights and obligations.

Signature of landlord/agent

on the day of 20__

<p>SIGNED BY THE TENANT (1)</p> <p>Name of tenant <input type="text"/></p> <p>Signature of tenant <input type="text"/></p> <p>on the <input type="text"/> day of <input type="text"/> 20__</p>	<p>SIGNED BY THE TENANT (2)</p> <p>Name of tenant <input type="text"/></p> <p>Signature of tenant <input type="text"/></p> <p>on the <input type="text"/> day of <input type="text"/> 20__</p>
<p>SIGNED BY THE TENANT (3)</p> <p>Name of tenant <input type="text"/></p> <p>Signature of tenant <input type="text"/></p> <p>on the <input type="text"/> day of <input type="text"/> 20__</p>	<p>SIGNED BY THE TENANT (4)</p> <p>Name of tenant <input type="text"/></p> <p>Signature of tenant <input type="text"/></p> <p>on the <input type="text"/> day of <input type="text"/> 20__</p>

For information about your rights and responsibilities under this agreement, contact NSW Fair Trading at www.fairtrading.nsw.gov.au or call 13 32 20.

13 32 20 | fairtrading.nsw.gov.au Residential tenancy agreement | September 2020 Page 16/17

4. Contract Content



Contract Content

- Document “The Deal”
- Put important things first
- Then include things required for compliance
- Is there still space to include more?
- What other risks does your organisation want to guard against?
 - Common areas of confusion?
 - Low frequency high impact risks?
- Do you really need legal boilerplates?

Contract Content – liability and force majeure

Limitation of liability

- Limited to certain acts/omissions?
- Capped \$\$ liability

Pandemic/force majeure

- Right to terminate after delay?
- Mutual rights to delay?



Contract Content – are boilerplates worth it?

Jurisdiction clause

- Where services are provided?
- Where provider's main office is?
- Which court can the client go to?

Priority of documents

- If the contract has different parts, which takes priority?
- Does the contract allow special conditions?
- What if the client includes unauthorised conditions?
- What if staff make unauthorised changes?

Contract Content – are boilerplates worth it?

Survival clause

- What will still be enforceable after the contract ends?
- What protection do you need?
- Can the client keep using a dispute resolution clause?

Assignment

- Who can assign?
- When can they assign?
- What if you need to merge, sell your business or restructure?

5. Regulator Requirements



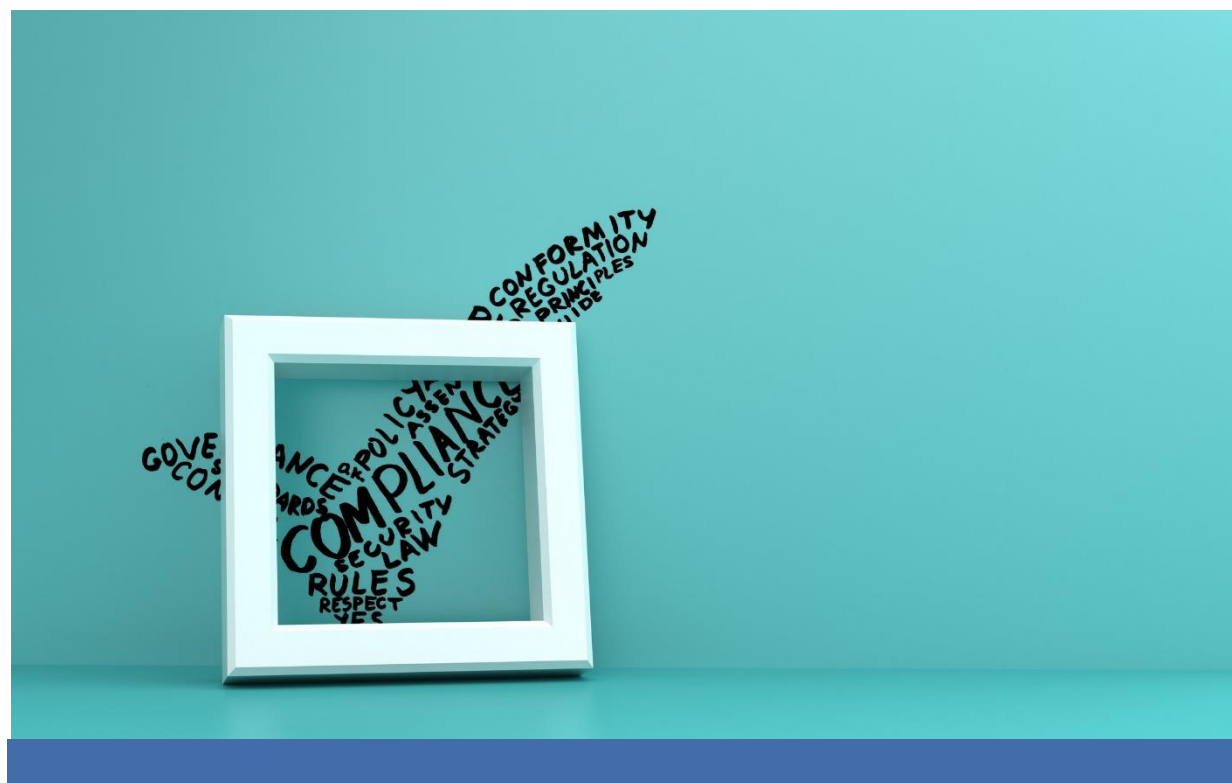
Examples of regulator requirements

NDIS Quality and Safeguards Commission

- NDIS Pricing Arrangements
- No longer provide a model service agreement
- GST

Aged Care Quality and Safety Commission

- Charter of Aged Care Rights
- Additional services requirements



Charter of Aged Care Rights

Part A: Charter of Aged Care Rights



Australian Government
Department of Health



Australian Government
Aged Care Quality and Safety Commission

I have the right to:

1. safe and high quality care and services;
2. be treated with dignity and respect;
3. have my identity, culture and diversity valued and supported;
4. live without abuse and neglect;
5. be informed about my care and services in a way I understand;
6. access all information about myself, including information about my rights, care and services;
7. have control over and make choices about my care, and personal and social life, including where the choices involve personal risk;
8. have control over, and make decisions about, the personal aspects of my daily life, financial affairs and possessions;
9. my independence;
10. be listened to and understood;
11. have a person of my choice, including an aged care advocate, support me or speak on my behalf;
12. complain free from reprisal, and to have my complaints dealt with fairly and promptly;
13. personal privacy and to have my personal information protected; and
14. exercise my rights without it adversely affecting the way I am treated.

Consumer

Provider

Consumer (or authorised person)'s signature
(if choosing to sign)

Signature and full name of Provider's staff
member

Full name of Consumer

Name of Provider

Full name of authorised person (if applicable)

/ /
Date on which the Consumer was given a copy
of the Charter

/ /
Date on which the Consumer (or authorised
person) was given the opportunity to sign the
Charter

6. Unfair Contract Terms



Unfair contract terms

- Part 2-3 of the Australian Consumer Law (in Schedule 2 of the *Competition and Consumer Law 2010* (Cth)).
- Originally regulated unfair standard form contracts signed by consumers.
- Since 12 November 2016, extends to unfair standard form contracts signed by small businesses.
- In November 2020, draft legislation was proposed which would make unfair contract terms unlawful, and give courts the right to impose civil penalties for breaches of the ACL. Eligibility to access the protection of unfair contract term laws would also be increased by raising the thresholds for small businesses (eg turnover of <\$10 million or <100 employees).

Unfair terms in standard contracts

“Small business contract” (s 23(4) ACL)

- Contract for goods and services
- One party has less than 20 employees (proposed to be less than 100 employees)
- Upfront consideration is up to \$300k (contracts less than 12 months) or \$1 million (contracts over 12 months)
- Proposed alternative eligibility requirement: annual turnover less than \$10 million (replacing the upfront contract value above)

“Standard form contract” (s 27 ACL)

- One party has bargaining power
- Contract prepared in advance
- Take it or leave it – no negotiation



Unfair terms in standard contracts

“Unfair” (s 24 ACL)

- Significant imbalance in the parties’ rights and obligations under the contract
- Not reasonably necessary to protect the advantaged party’s legitimate interests
- Would cause detriment if relied on
- Considers elements of transparency (ie plain language, legibility, presentation, readily available terms) and the contract as a whole

Examples (s 25 ACL)

- Only one party can avoid obligations under the contract or terminate the contract
- Penalties for breach only apply to one party
- Only one party may vary the contract
- Only one party may change the price or goods/services
- Only one party may renew the contract
- Only one party limits its liability

ACCC Case Studies

Price variation term

The contract allowed AAPT to “vary a Supplier or its products, or vary charges from time to time without notice to you [the consumer]”. This clause caused a serious imbalance between the parties. *Director of Consumer Affairs Victoria v AAPT Limited* [2006] VCAT 1493 at [54]

Termination clause

The contract allowed AAPT to terminate immediately for any breach. This was found to be unfair because minor breaches could result in termination. *Director of Consumer Affairs Victoria v AAPT Limited* [2006] VCAT 1493 at [53]

Online terms and conditions

The website stated that “We may change or update this website and the terms and conditions at any time without providing you with prior notice.” This was problematic because it allowed the business to alter the terms during the contract’s life without notice.

7. Plain English Tips



Plain English Tips

Commencement date	→ <i>Start date</i>
Expiration/Termination date	→ <i>End date</i>
Not less than 14 days	→ <i>At least 14 days</i>
Lessee/lessor	→ <i>Landlord/tenant</i>
Should either Party wish to end this Service Agreement they must give one months' notice in writing.	→ <i>Either party may end this Service Agreement with 1 months' written notice.</i>
The Price Schedule according to which the Supplier will charge the Client for the Services is set out in Schedule 2.	→ <i>The Supplier's Fees are set out in the Price Schedule.</i>
In the event of a medical emergency and you require urgent medical care, please call your general practitioner or call 000.	→ <i>If you need urgent medical care, please call your doctor or 000.</i>

Plain English

- **Choice of party terms**
 - **Participant v Client v you**
 - What about children and guardians?
 - **Consumer v Resident v Customer**
 - **Resident v Tenant**
 - **Provider v [Business name] v us**
- **Industry terms**
 - Service or support?
 - Authorised representative or support person?
 - Agreement or terms and conditions?



Q&A – Your Russell Kennedy Contacts



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to give instant
feedback on the
presentation



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