

# A redrafting exercise

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*[Editorial introduction from Peter Butt — former Clarity President and occasional Clarity Guest Editor)* Each year, I run a short course on legal drafting for final year law students at the University of Sydney. As part of the assessment for the course, students are asked to take a gobbledygook document and redraft it in plain language. The students may be as inventive as they like, but they must ensure that the redraft retains the legal nuances of the original.

The following is a rewrite offered by three outstanding students. I hope that you will agree with me that they did a superb job.

Key sections from the original clauses 5 (confidentiality) and 6 (exclusivity/non competition) are printed at the end of the redraft, The entire original document is available at Clarity’s website [www.clarity-international.net](http://www.clarity-international.net).

## Consulting Agreement

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## Details

<b>Parties</b>	<i>Company and Consultant</i>	
<b>Company</b> (“We”, “our”)	Name Address Telephone	<i>Company Pty Ltd 123 Main St, Sydney, NSW, 2000 (02) 9123 4567</i>
<b>Consultant</b> (“You”, “your”)	Name Address Telephone	<i>Consultant 1 Accidenture Pl, Sydney, NSW, 2000 (02) 9876 5432</i>
<b>Consulting Services</b>	Described in Schedule 1	
<b>Price</b>	<i>\$100 000</i>	
<b>Bonus Options</b>	<i>12 000</i>	
<b>Start Date</b>	<i>1 January 2005</i>	
<b>End Date</b>	<i>1 January 2010</i>	
<b>Governing Law</b>	<i>New South Wales</i>	

# 1. Consulting Services<sup>1</sup>

## 1.1. Services you must provide

You agree<sup>2</sup> to perform the Consulting Services described in Schedule 1.<sup>3</sup>

## 1.2. You must comply with applicable laws

When performing the Consulting Services, you agree to comply with applicable federal, state, local and foreign laws.

# 2. Price<sup>4</sup>

## 2.1. What we must pay – your base fee<sup>5</sup>

We agree to pay the Price described in the Details.

Payments are calculated monthly and are subject to applicable statutory deductions or withholdings.

## 2.2. What we must pay – your expenses<sup>6</sup>

We agree to reimburse you for any reasonable expenses you incur while performing the Consulting Services. You must provide us with an itemised account of the expenses and reasonable supporting data.

Reimbursement is subject to our policy on business related expenses. We will give you Notice of any changes to our policy.<sup>7</sup>

## 2.3. When we will pay you<sup>8</sup>

We agree to pay any amount we owe under this Agreement on the 1<sup>st</sup> and 15<sup>th</sup> of every month.

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<sup>1</sup> We moved Article II “Consulting Duties and Responsibilities” to the first clause. We believe that it is most logical that the services appear first because they are the reason for the contract and the payments.

<sup>2</sup> To emphasise the exchange of consideration, we have used the phrase “agrees to” rather than “must” in the first two clauses.

<sup>3</sup> We moved Section 2.3 “Availability” to Schedule 1. As this is a standard form contract, we wanted to ensure that all “variables” are either on the Details page or in a Schedule (for more complex information).

<sup>4</sup> We moved Article IV “Compensation” to the second clause because it is the consideration for the services provided in Clause 1. Therefore, they should appear together.

<sup>5</sup> Formerly section 4.1 “Base Compensation”.

<sup>6</sup> We deleted Section 4.2 because (1) it was an unnecessary preamble to Section 4.3 “Expenses” and Section 4.4 “Stock Option”; and (2) we believe that people would not think that “reimbursements for expenses” are “bonuses”.

<sup>7</sup> The original agreement did not provide for any changes in company policy on business-related expenses. To avoid potential disputes, we introduced a “Notice” provision.

<sup>8</sup> The original agreement sets out preconditions for the payment of expenses, but not the time of payment. To fix this problem, we moved this part of Section 4.1 to a separate clause – thus covering both the payment of expenses and the base fee.

## Stock options<sup>9</sup>

### 2.3.1. Your bonus is subject to our Board's approval

If our Board of Directors approves, we will give you the Bonus Options described in the Details.

### 2.3.2. Options are over ordinary shares

The options give you a right to buy our ordinary shares at the exercise price.

### 2.3.3. What the exercise price will be

The exercise price of the options is the closing price on the End Date described in the Details.<sup>10</sup>

### 2.3.4. When we will give you the options

We will give you:

- (a) 1/3 of the options on the day the Board of Directors gives its approval (“approval date”); and
- (b) 1/12 of the options every 3 months after the approval date (until you have received all of the Bonus Options described in the details).

#### **Example:**

If the Board of Directors agrees on 1 January 2010 to give you 12 000 options, you will receive the options on the following days:

<b>Day</b>	<b>Number of Options</b>
1 January 2010 (“approval date”)	4 000
1 April 2010	1 000
1 July 2010	1 000
1 October 2010	1 000
1 January 2011	1 000
1 April 2011	1 000
1 July 2011	1 000
1 October 2011	1 000
1 January 2012	1 000

### 2.3.5. When the options will expire

The options will expire 10 years after the approval date.

<sup>9</sup> For ease of reading, we split Section 4.4 “Stock Options” into several subclauses.

<sup>10</sup> As an aside, it would be more sensible for the company to make the exercise price an average of the closing price over a number of days. This is because the price might be artificially low on the exercise day.

### **2.3.6. Conditions of the options**

The options are subject to our Stock Option and Restricted Stock Plan.

## **3. Duration<sup>11</sup>**

### **3.1. When this Agreement starts**

This Agreement commences on the Start Date described in the Details.

### **3.2. When this Agreement ends**

This Agreement ends on the End Date described in the Details, unless it ends earlier because of Clause 7 (“Ending the Agreement”).

## **4. Confidentiality**

### **4.1. You must protect our confidential information**

You must not disclose our confidential information.

### **4.2. We own the confidential information<sup>12</sup>**

We own all documents that contain<sup>13</sup> confidential information.

We own all work<sup>14</sup> you produce based on confidential information. You must inform us promptly when you produce this work. You must transfer to us any rights you have in this work.

### **4.3. You must return our property<sup>15</sup>**

When this Agreement ends, or at our request, you must promptly deliver to us all materials<sup>16</sup> within your custody, possession or power<sup>17</sup>:

- (a) that contain confidential information; or
- (b) we have provided to you.

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<sup>11</sup> Previously Article III “Term of Agreement”.

<sup>12</sup> This condenses the majority of Section 5.2 and 5.3 (relating to ownership of information, inventions, etc).

<sup>13</sup> We considered using the phrase “contain or refer to” instead of “refer to”. However, we decided that “contain or refer to” was too broad. For example, this might capture memoranda that only say “bring me a copy of the Company’s business plan to the next meeting”.

<sup>14</sup> Section 5.3. Work includes all inventions, improvements, discoveries and ideas.

<sup>15</sup> Section 5.2.

<sup>16</sup> All materials includes copies.

<sup>17</sup> “Custody, possession and power” are distinct legal concepts which refer to different degrees of control of documents – see *Palmdale Insurance Ltd (In Liq) v L Grollo & Co Pty Ltd* [1987] VR 113; *Roux v ABC* [1992] 2 VR 577. We wish to encompass them all.

#### **4.4. What you may disclose<sup>18</sup>**

You may disclose any confidential information that:

- (a) we require you to disclose for our business purposes; or
- (b) we authorise you, by Notice, to disclose.

#### **4.5. What is confidential information?**

Confidential information is information that:

- (a) we provide to you; or
- (b) you discover<sup>19</sup>

while you perform the Consulting Services.

Confidential information includes information about us, our products, suppliers or customers.<sup>20</sup> It may take any form and is not limited to information marked “confidential”.

Confidential information does not include information that becomes public through no fault of your own.<sup>21</sup>

## **5. Restraint**

### **5.1. You must not be involved with our competitors<sup>22</sup>**

You must not be involved with our competitors for the duration of the Agreement.

### **5.2. You must not interfere with our business<sup>23</sup>**

You must not interfere with our clients or employees for the duration of the Agreement.

### **5.3. What is being involved with our competitors?**

You must not, directly or indirectly:

- (a) own an interest in; or
- (b) manage; or
- (c) operate; or
- (d) join; or
- (e) control; or
- (f) perform services for; or
- (g) lend money to; or
- (h) render financial or other assistance to

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<sup>18</sup> We made the last sentence of Section 5.1 a separate clause.

<sup>19</sup> Trying to tie into the Inventions, Rights to Improvements section (5.3).

<sup>20</sup> This encompasses: (a) business practices; (b) technology; (c) business plans; (d) marketing; (e) financial information and plans; or (f) research activities.

<sup>21</sup> This encompasses the “without his fault” concept in the final sentence of Section 5.1.

<sup>22</sup> Formerly Section 6.1 “Exclusivity / No Competing Consulting”.

<sup>23</sup> Formerly Section 6.2 “No Interference”.

our competitors.

However, you or your immediate family may own up to 5% of any of our competitors.<sup>24</sup>

#### **5.4. Who are our competitors?**

Our competitors include any:

- (a) individual; or
- (b) partnership; or
- (c) corporation; or
- (d) other entity<sup>25</sup>

that is engaged in a similar business to us in one of our markets.<sup>26</sup>

#### **5.5. What is interference?**

Interference includes if you, directly or indirectly, recruit or solicit persons who:

- (a) are our employees; or
- (b) were our employees within the last 12 months; or
- (c) are our clients; or
- (d) were our clients within the last 12 months.

## **6. Dispute resolution and remedies**

### **6.1. How disputes will be resolved**

Unless this Agreement says otherwise, any disputes about this Agreement (including tort and product liability claims) must be finally settled by arbitration.

### **6.2. Arbitration<sup>27</sup>**

#### **6.2.1. What rules apply to the arbitration?**

The arbitration will be governed by the Commercial Arbitration Rules of the American Arbitration Association, unless modified by this Agreement.

#### **6.2.2. The place of the arbitration**

The seat<sup>28</sup> of arbitration will be Maryland, USA.

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<sup>24</sup> Formerly Section 6.3 “Stock Ownership”.

<sup>25</sup> We removed “firm” from this list because it did not belong with the other terms – it is not a trading structure in the legal sense. We changed “business entity” to “entity” to ensure that we capture all manner of trusts, unincorporated associations, cooperatives, etc.

<sup>26</sup> We consolidated the territorial clause in Section 6.4 “Territorial Scope”.

<sup>27</sup> The original Section 7.1 “Arbitration” contained different concepts in no logical order. Therefore, we have split this section into many concise subclauses.

<sup>28</sup> We have used the word “seat” instead of “place”, for legal reasons. In arbitration law, a “seat” of arbitration is specified in an agreement to give a particular State jurisdiction and to activate local arbitration rules and procedures. The actual “place” or “site” of arbitration is irrelevant.

### **6.2.3. The time of the arbitration**

The arbitration tribunal will determine the time of the arbitration.

### **6.2.4. The language of the arbitration**

The arbitration will be in English.

### **6.2.5. The tribunal must give reasons**

The arbitration tribunal must give reasons for its award<sup>29</sup>.

### **6.2.6. How will the award be enforced?**

Either Party may apply to a court of competent jurisdiction<sup>30</sup> to:

- (a) enter the award as a judgment; or
- (b) obtain judicial acceptance of the award and an order for enforcement.

### **6.2.7. Who will pay the enforcement costs?**

Unless the arbitration tribunal decides otherwise, the unsuccessful party must pay the successful party's reasonable costs.

Reasonable costs include legal fees, investigation costs, litigation costs and arbitration costs.

## **6.3. Equitable remedies<sup>31</sup>**

We remain able to take proceedings in equity about any actual or anticipated breach by you of Clause 4 ("Confidentiality") or Clause 5 ("Restraint").

### **6.3.1. You submit to jurisdiction**

You submit to the jurisdiction of any court in which we take proceedings in equity.<sup>32</sup>

### **6.3.2. We may suspend payments**

We may suspend any payments we owe you during the proceedings in equity.<sup>33</sup>

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<sup>29</sup> We kept "award", as opposed to "decision", because it is a term of art in arbitration law. An 'award' incorporates the idea that an arbitration ruling is capable of being enforced in a foreign jurisdiction.

<sup>30</sup> We are not defining court of competent jurisdiction, because a court will declare for itself whether it will accept jurisdiction.

<sup>31</sup> Formerly Section 7.2 "Equitable Remedies".

<sup>32</sup> We have removed the phrase "in personam" because equity acts in personam.

<sup>33</sup> We have moved Section 7.3 into the equitable remedies section, because: (1) it refers to breaches of Articles V "Confidentiality" and VI "Exclusivity / Non-Competition"; (2) it refers to litigation; and (3) it refers to injunctive relief.

### **6.3.3. What are proceedings in equity?**

Proceedings in equity include proceedings for injunctions, specific performance or other equitable remedies.

### **6.4. Remedies are cumulative<sup>34</sup>**

Any remedy provided by this Agreement is in addition to any other remedy available to us.

## **7. Ending the Agreement<sup>35</sup>**

### **7.1. How the Agreement ends – your breach**

We may end<sup>36</sup> this Agreement if you breach any of its provisions.

### **7.2. How the Agreement ends – your death or inability to perform**

This Agreement will end if you:

- (a) die; or
- (b) are unable to perform your obligations for a continuous period of 60 days.

### **7.3. How the Agreement ends – by Notice**

Either Party may end this Agreement by giving 60 days' Notice to the other Party.

### **7.4. Consequences of ending the Agreement**

We must pay any amounts you have earned up to the date the Agreement ends.<sup>37</sup>

Other than this, we are not obliged to make further payments to you.

### **7.5. What clauses survive the end of this Agreement?<sup>38</sup>**

If this Agreement ends, the following clauses survive:

- (a) Clause 4 (“Confidentiality”)
- (b) Clause 5 (“Dispute resolution and remedies”).

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<sup>34</sup> Formerly Section 7.4 “Remedies not Exclusive”. However, we preferred to use active, positive words.

<sup>35</sup> Formerly Article VIII “Termination of Agreement”.

<sup>36</sup> We used “end” because it encompasses termination and rescission.

<sup>37</sup> We used “earned” because the only rights that survive termination are those that have accrued unconditionally, and the enforcement of which is not inconsistent with the election to terminate: *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 at 477 per Dixon J. If the contract is rescinded, then no payments have been earned ‘under’ the agreement.

<sup>38</sup> We moved the survival clauses from the individual articles to this single clause. It is more logical to group them within the clause that deals with ending the agreement.

## **8. Notices<sup>39</sup>**

### **8.1. What form must notice take?**

Any notice required by this Agreement must be in writing and sent to the other Party's address. That address is the Address described in the Details, unless a Party has changed its address under Clause 8.4 ("How a Party can change its address").

### **8.2. What is the method of delivery?**

Any notice must be delivered:

- (a) personally; or
- (b) by fax; or
- (c) by registered or certified mail (with return receipt requested).

### **8.3. When does notice takes effect?**

A notice delivered under Clause 8.2 ("Method of delivery") is effective from the time it is received.

### **8.4. How a Party can change its address**

A Party may change its address by giving Notice to the other Party.

## **9. Release<sup>40</sup>**

### **9.1. You release these persons from liability**

You release the protected parties from any legal action you may take against them, except in relation to this Agreement.

### **9.2. Who are the protected parties?<sup>41</sup>**

The protected parties include:

- (a) us; and
  - (b) our predecessors; and
  - (c) our Associates; and
  - (d) our Associates' predecessors;<sup>42</sup>
- and persons who participate in the above.

Persons who participate include:

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<sup>39</sup> Formerly Article IX "Notices".

<sup>40</sup> Formerly Article X "Release". We consolidated Section 10.1 "Released Parties" and Section 10.2 "Further Action" into this clause.

<sup>41</sup> We defined "protected parties" before "legal action" because, logically, a party would first want to know who the protected parties are. Most parties will already have a basic idea of what a legal action is.

<sup>42</sup> Probably need Associate's predecessors, if an Associate is an actual person.

- (a) employees; and
- (b) contractors; and
- (c) consultants; and
- (d) officers; and
- (e) directors; and
- (f) shareholders; and
- (g) limited partners; and
- (h) general partners; and
- (i) members; and
- (j) managers.

### **9.3. What is a legal action?**

Legal action includes, but is not limited to:

- (a) litigation; or
- (b) arbitration; or
- (c) any other legal proceedings.

A legal action may occur in any jurisdiction.<sup>43</sup>

## **10. General<sup>44</sup>**

### **10.1. This is the entire agreement<sup>45</sup>**

This Agreement is the final and entire agreement. It supersedes anything previously said or written about its subject matter.

### **10.2. What if there are counterparts?<sup>46</sup>**

If there is more than one signed copy of this Agreement, together those copies are treated as the one document.

### **10.3. What is the governing law?<sup>47</sup>**

This Agreement is governed by the Governing Law described in the Details, without regard to the principles of conflicts of laws.

### **10.4. How to interpret headings<sup>48</sup>**

Headings are for convenience only. They do affect how a clause is interpreted.

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<sup>43</sup> See the former Section 10.1 “Released Parties”.

<sup>44</sup> Formerly Article XI “Miscellaneous”.

<sup>45</sup> Formerly 11.12 “Entire Agreement”.

<sup>46</sup> Formerly 11.8 “Counterparts”.

<sup>47</sup> Formerly 11.6 “Governing Law”.

<sup>48</sup> Formerly 11.11 “Headings”.

## **10.5. Further steps<sup>49</sup>**

Each Party agrees to do any acts necessary to give effect to this Agreement.

## **10.6. You must have no conflicts<sup>50</sup>**

You guarantee<sup>51</sup> that you do not have any other obligations that restrict your ability to perform this Agreement.

## **10.7. How to amend this Agreement<sup>52</sup>**

Any amendment to this Agreement must be in writing and signed by both Parties.

## **10.8. Waiver of rights<sup>53</sup>**

If a Party waives a right in this Agreement, that does not affect any other rights the Party may have.

A Party must give Notice to waive any right given by this Agreement.

## **10.9. Assigning the Agreement<sup>54</sup>**

You must not assign or deal with<sup>55</sup> your rights under this Agreement.

We must not assign or deal with our rights under this Agreement, except in favour of our Associates.<sup>56</sup>

## **10.10. Successors are bound by this Agreement<sup>57</sup>**

The rights and obligations in this Agreement are binding and enforceable against the Parties and the Parties' agents and successors.

## **10.11. What happens if a clause is severed?<sup>58</sup>**

If a clause in this Agreement is held to be unenforceable:

- (a) it is automatically replaced by an enforceable clause with the closest meaning;
- and

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<sup>49</sup> Formerly 11.3 "Further Assurance".

<sup>50</sup> Formerly 11.10 "No Conflicts".

<sup>51</sup> We replaced "represents and warrants" with "guarantee".

<sup>52</sup> Formerly 11.7 "Amendments".

<sup>53</sup> Formerly 11.5 "Effect of Waiver".

<sup>54</sup> Formerly 11.1 "Agreement is Non-Assignable". Note that the essence of a personal service contract is that the rights are not able to be assigned: *Tolhurst v Associated Portland Cement Manufacturer (1900) Ltd* [1903] AC 414.

<sup>55</sup> We have added the phrase "otherwise deal with" to stop assignments or the creation of lesser interests (eg charges).

<sup>56</sup> "Us" includes our successors.

<sup>57</sup> Formerly 11.2 "Binding Effect".

<sup>58</sup> Formerly 11.9 "Severability". We moved subclause (a) before (b), as this arrangement is more logical.

(b) the other clauses in the Agreement remain unaffected.

**10.12. You are an independent contractor<sup>59</sup>**

You are an independent contractor, not an employee. You are solely responsible for your own insurance (including workers compensation), tax payments and superannuation.

DELETED:

**Rights of third parties [Old 11.4]<sup>60</sup>**

This Agreement does not give rights to non-parties.

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<sup>59</sup> Formerly 11.13 “Declaration by Independent Contractor”.

<sup>60</sup> This clause may not be necessary because privity of contract and common sense both imply that third parties are not privy to the contract, unless expressly mentioned.

## 11. Definitions

### 11.1. Who are the parties?

“Associates” includes persons controlling us, controlled by us or under common control with us.

“You” includes the Consultant, your successors and your assigns.

“We” includes the Company, our successors and our assigns.

### 11.2. Other terms used in this agreement

\$ All dollar amounts are in US dollars.

“Agreement” means this entire agreement, as described in Clause 10.1 (“This is the entire agreement”).

“Consulting Services” means the services described in Clause 1 (“Consulting Services”).

“Details” means the summary on the first page of this Agreement.

“Notice” means a notice that is given in accordance with Clause 8 (“Notices”).

“Party” and “Parties” means the Company and Consultant described in the Details.

## Schedule 1 – Consulting Services

You agree to perform the following services for us and our Associates:<sup>61</sup>

(a) *details of the services*

(b) ...

(c) ...

You will perform these services as requested by *the management of the Company*.<sup>62</sup>

You agree to be available for *a minimum of 8 hours per working day* to perform these services.<sup>63</sup>

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<sup>61</sup> Contains the technical details which would have been included in Section 2.1.

<sup>62</sup> Also see Section 2.1.

<sup>63</sup> Formerly Section 2.3 “Availability”.

## Signing page

### Signed by Consultant

.....  
Name

.....  
Signature

### Signed by Company<sup>64</sup>

.....  
Name

.....  
Name

.....  
Title

.....  
Title

.....  
Signature

.....  
Signature

---

<sup>64</sup> In Australia, two officers are required to sign on behalf of the company under section 127 of the *Corporations Act 2001* (Cth).