

Hints for Service Level Agreements

"If you're not measuring it, you cannot manage it."

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Modern service level agreements reflect fundamental changes in how we do business.

Understanding the change

Traditionally trade in commodities and products dominated legal relations in commerce. Trading relationships were relatively simple. Typically customers bought things and then looked after their support, servicing or maintenance. For these tasks there were more people in trades to fix things that broke.

It was often said that the best contract was one that was filed away after signature.

That era is long gone. The act of "buying" now involves contracts which:

- relate more often to **services** than things (ie products or commodities),
- often involve **linked transactions** - for products, services and support,
- document **ongoing legal relationships** - not one off trades between suppliers and their customers.

More and more we trade in or with customised bits and bytes not standard bricks and mortar

This contemporary configuration exists in major contractual relationships between information technology suppliers and their customers for software, phone, hosting and Internet connection offerings. It is also common in other sectors.

The change from seller-buyer to symbiotic legal relationships has been driven by new or evolving technical, commercial, management and societal needs. In the legal arena this has increased demand for legal relationships which are customised, networked, collaborative or innovative. How has the law evolved to cater to these more complex or sophisticated needs?

Responding to the change

The demand for new legal relationships has seen increasing use over recent decades of:

- partnering,
- joint ventures,
- strategic alliances,
- outsourcing,
- collaborations, and
- service level agreements.

A central feature of these relationships contracts should provide for practical considerations for service delivery and reciprocity between the parties.

All buyers and sellers can benefit from the types of clauses and schedules put into service level agreements. It is a myth that service level agreement features are exclusive to the IT, telecommunications and utility sectors.

Setting a service level is about defining standards and quality and ultimately price and value. This is of course relevant to all contracts. However traditionally in contracts a lot was left to common sense. That was OK when the focus was on trade in things, in one-off deals, for standard offerings. It is not OK for modern commerce given its dependency on "essential services" or customisation, servicing, consultancy and ongoing support.

What is the service level agreement solution to this need? Nowadays service level agreements commonly set out provisions for:

- service definition;
- timing standards;
- minimum and maximum quality needs,
- compliance with set standards;
- payment (incentives and rebates);
- consequences for performance drops;
- current and future needs;
- monitoring methods;

- security of premises and information;
- alternative dispute resolution; and
- variation of arrangements.

In service level agreements for the IT, telecoms and utility sectors, minimum performance standards can define the maximum percentage of downtime including during peak usage times, response times, the form of measurement, transaction volume, and the number of concurrent users.

To ensure legal remedies will be available, it is vital to prepare for and clearly state the consequences of performance shortfalls. It is common sense to resolve issues before signature, and to deal with them before they become problems or litigation fodder.

For vendors and customers, flexibility for variations is achieved by providing for regular reviews, factors which must trigger costs variations, and compliance with changing market and technical standards and business-specific needs, processes and technology.

For customers, good service level agreements also include both remedies and penalties for missing set service levels. These penalties need to motivate the vendor to achieve customer objectives. Customers don't want to miss service levels over and over again.

Writing the customer's business objectives or goals into a service level agreement can be useful. To minimise third-party performance risks, it may be sensible for a customer to insert a clause stipulating that the primary vendor (ie prime contractor) remains accountable for shortfalls caused by third-party partners.

These are among the many ways of using the law to achieve better, faster and cheaper outcomes. Service level agreements, or service level clauses in contracts, are tools which can benefit buyers and sellers providing "win-win" outcomes.

Increased Service Levels for Consumers

To illustrate the change in law and contracting over 100 years even for things, assume you bought a new horse-drawn cart in 1905. Now buy a new car in 2005.

Purchase of the cart would have involved you in negotiating one contract, with no obliged after sales service. Unless agreed in advance, you could not get a refund if the next day you did not like it.

Contrast that to buying a new car in 2005:

1. There is still contract negotiation.
2. The car has a service warranty, extending servicing (and the life of your contractual relationship with the dealer) to a post-purchase period.
3. The car comes with finance and optional extras, each a potential additional contract with the same or another vendor.
4. In addition to the contract/s and warranty, the car purchase transaction is affected by legislation, including the Motor Dealers Regulation 2004 (NSW) (which imposes a post-purchase cooling off period), Fair Trading Act 1987 (NSW), Sale of Goods Act 1923 (NSW) and Consumer Credit Code.

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