

# ENTIRE AGREEMENT BOILERPLATE CLAUSE

## Need to know

An entire agreement clause seeks to limit the terms of a contract to those expressly included in the written deed or agreement and prevent other statements, representations or terms, not expressly included in the contract, from having contractual force.

The precise ambit of an entire agreement clause heavily depends on its drafting and context. Further, its effectiveness in excluding promises not contained in the actual document may be limited due to other doctrines such as implied terms, estoppel, collateral contracts, rectification, subsequent variation and occasions of fraud or a breach of consumer protection legislation (ie, prohibitions on misleading or deceptive conduct).

Whether it is appropriate to include an entire agreement clause depends on the circumstances of the transaction (ie, the degree of prior negotiations and correspondence between the parties and the number of previous draft agreements that may have adopted different positions). Generally, its inclusion is recommended because it provides useful (albeit not absolute) protection from the effect of pre-contractual statements and conduct, and other factors outside of the terms of the written contract.

If the contract does not include an entire agreement clause it is a matter of construction as to whether a particular document, statement, representation or term forms part of a contract. Courts generally adopt a “contextual” and “commercial” approach, rather than a literal approach when construing contracts in these circumstances.

### CAUTION

- This clause cannot prevent claims for fraudulent misrepresentation or misrepresentations under s18 of the *Australian Consumer Law (ACL)*, nor can it exclude some statutory warranties and guarantees, eg those under s64 of the ACL.
- To reduce the risk of the entire agreement clause itself being viewed as an exclusion clause (and being subject to the validity (and potentially severance) issues associated with those clauses), it is preferable for non-reliance statements, or the exclusion of prior representations and warranties, to be dealt with in a separate clause (see paragraph (c) of the sample clause).

If you include a reference to a *Confidentiality Agreement* or to *Transaction Documents*, you will need to insert appropriate definitions in the definitions section.

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## THE SAMPLE CLAUSES

(a) *[Other than the Confidentiality Agreement ,t/T]his [deed/agreement] [together with all Transaction Documents/[specify documents]] supersede[s] all previous agreements, understandings[, /and] negotiations[, representations and warranties] about its subject matter and embodies the entire agreement between the parties about its subject matter.*

### Option – termination of previous deed or agreement

(b) *[specify previous deed or agreement] is terminated from the date of this [deed/agreement].*

### Option – non-reliance clause

(c) *[Each party/[insert party]] acknowledges that no representations and warranties about the subject matter of this [deed/agreement] have been made by or on behalf of [the other party/[insert party]] except as expressly set out in this [deed/agreement] and [the Transaction Documents/[specify documents]] and that it has not relied on any representations or warranties about the subject matter of this [deed/agreement] and [the Transaction Documents/[specify documents]] given by or on behalf of [the other party/[insert party]] except as expressly provided in this [deed/agreement] and [the Transaction Documents/[specify documents]].*

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## 1 What is this clause and why is it used?

An entire agreement clause states that a contract embodies the entire agreement between the parties about its subject matter. The intention behind such a clause is simply to make the document in which it is contained an exhaustive statement of the express terms of the contract.<sup>1</sup>

An entire agreement clause is used to prevent a party claiming that a contract has additional terms (either oral or written) which are not in the document executed by the parties. In particular, an entire agreement clause operates:

- (a) to limit the terms of the contract - An entire agreement clause is necessary because the terms of a contract may be:
  - (i) constituted by one or more written document(s), oral statements or representations, or a combination of written documents and oral statements or representations; or
  - (ii) implied by conduct or law (see item 2 below for a discussion of the limits / effectiveness of relying on an entire agreement clause to exclude implied terms).
- (b) to limit recourse to extrinsic evidence - The inclusion of an entire agreement clause also evidences the parties' intention for the 'parol evidence' rule to apply in the event that a court is required to construe the meaning of the written contract.<sup>2</sup> In general terms, the parol evidence rule is a limitation on the use of extrinsic evidence when construing a contract and contractual rights. The parol evidence rule applies (if the whole contract is in writing)<sup>3</sup>, meaning that evidence outside the written contract is inadmissible other than the background of the contract at formation<sup>4</sup> That is, if the terms of a bargain have been recorded in writing, extrinsic evidence (including "parol" evidence) cannot be produced to show that there are other terms / different terms to those recorded in the agreement.

- (c) as a "non-reliance" clause – An entire agreement clause may also seek to operate to prevent a party from later claiming that the other party induced them to enter into the contract on the basis of a pre-contractual representation that was in fact inaccurate (but not fraudulent).

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## 2 How effective is it?

While an entire agreement clause provides a good indication of the parties' intention to exclude terms not expressly recorded in a written contract, there are important limits on its effectiveness which should be kept in mind. These limits are discussed below.

### 2.1 Not entirely effective to exclude implied terms

An entire agreement clause does not prevent the implication of terms.<sup>5</sup> For an entire agreement clause to have the effect of excluding terms that would otherwise be implied by operation of the law, it must do so expressly.<sup>6</sup> It is more effective to include a clause that expressly excludes implied terms, rather than an entire agreement clause. The effectiveness of an entire agreement clause which seeks to exclude implied terms is subject to the following:

- (a) it is relatively settled that an implied term of good faith may be excluded by an express or inconsistent term of the contract.<sup>7</sup> However, an entire agreement clause may not achieve this result alone,<sup>8</sup> and
- (b) an entire agreement clause cannot exclude certain consumer protection terms implied by statute (ie it will be void to the extent that it purports to exclude consumer guarantees and rights under Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (Australian Consumer Law)).<sup>9</sup>

### 2.2 Evidence of pre-contractual conduct or representations may sometimes be admitted notwithstanding an entire agreement clause

In some circumstances, despite the parol evidence rule and the presence of an entire agreement clause, evidence of pre-contractual statements or conduct may be admissible in

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relation to certain disputes. Key situations when this issue may arise include:

- (a) Inaccurate representations – An entire agreement clause which seeks to exclude pre-contractual representations and warranties will not be effective:
  - (i) if a misrepresentation was fraudulent;<sup>10</sup> or
  - (ii) to exclude claims based on misleading and deceptive conduct under section 18 of the Australian Consumer Law<sup>11</sup> (although an entire agreement clause may be useful as the court may take it into account in deciding whether any misleading conduct occurred or, if it did, whether a party was actually induced by or relied upon the representation or warranty).<sup>12</sup>

There appears to be some scope (although it is unclear) for an entire agreement clause to exclude liability for non-fraudulent pre-contractual misrepresentation under the common law,<sup>13</sup> though the contract must unequivocally state that it was the parties' intention to do so.

Courts have conceded that an entire agreement clause that includes a 'non-reliance' clause, whereby the parties acknowledge that they have not relied on the pre-contractual conduct of the other, may be some evidence of an absence of reliance for claims under section 18 of the Australian Consumer Law and claims for common law misrepresentation, but have not gone further than that.<sup>14</sup> If, however, a party seeking to rely on a non-reliance clause, in fact, knew that the other party was relying on a pre-contractual representation that was not included in the contract, the non-reliance clause is unlikely to be enforceable.

Additionally and/or alternatively, it may be preferable to expressly exclude liability for pre-contractual misrepresentation. If the parties prefer to expressly exclude or limit liability for pre-contractual misrepresentation, then to reduce the risk

of the entire agreement clause itself being viewed as an exclusion clause (and subject to validity and potential severance issues), such exclusion should be dealt with in a separate clause, elsewhere in the contract.<sup>15</sup>

- (b) Estoppel – Courts are divided as to whether an entire agreement clause is effective to preclude an estoppel argument (whether based on pre-contractual promises or representations, or on conduct or convention).<sup>16</sup> In this instance, the issue is likely to turn on the facts of the case and how the Court interprets the overall intentions of the parties.
- (c) Collateral contracts – If one party makes a promise to another party prior to the execution of a contract in consideration of the other party entering into the contract, that promise may constitute a 'collateral contract'. The High Court has adhered to the view that such collateral contracts cannot be inconsistent with the main contract.<sup>17</sup> However, the position as to whether an entire agreement clause would exclude a collateral contract is remains unclear.
- (d) Rectification – A contract may be rectified if there is clear evidence that a common mistake occurred during the recording of the bargain, and an entire agreement clause would not prevent the rectification.<sup>18</sup>
- (e) Unfairness – Unfair contracts legislation may preclude or restrict the enforceability of an entire agreement clause.<sup>19</sup>
- (f) Subsequent variation – Evidence of a subsequent variation to a written contract is always admissible. The parole evidence rule applies only to the incorporation of pre-contractual terms.

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## 3 Drafting and reviewing the clause

### 3.1 Should I always include it, and what happens if I don't?

Including an entire agreement clause in a contract (or any other boilerplate), should always

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be a deliberate decision, not one made as a matter of course. Lawyers must always consider the transaction and the appropriateness of the clause, the party you are acting for and, in particular, the extent of any pre-contractual discussions and negotiations had between the parties. Generally, an entire agreement clause provides useful (albeit not absolute) evidentiary value in establishing the parties' intention that the written agreement is the complete agreement or, where a non-reliance clause is used, that a party did not rely on a pre-contractual statement. Where an entire agreement clause is not included, it is a matter of construction whether a particular document, statement, representation or term forms part of the contract.

Some practical examples of where the inclusion of an entire agreement clause requires careful consideration are set out in Section 4 (**Other practical considerations**) below.

## 3.2 When should I include the optional clauses? When should they not be included?

The sample clause set out at the front of this paper includes the following optional paragraphs:

- (a) an optional carve out for a confidentiality agreement between the parties (which must be separately defined).

*In deciding whether or not to include this carve out, you should consider whether the confidentiality agreement imposes more onerous provisions on the counterparty than any confidentiality obligations within the contract at hand;*

- (b) an option to include other transaction documents (which must also be separately defined), which are linked to the same transaction (for example in the case of an asset purchase agreement, other transaction documents might include a real property purchase agreement, an assignment of intellectual property and novation agreements).

*This option should be used if statements and representations made in one of those contracts might be relevant to one of the other contracts. You will need to carefully consider whether it is*

*appropriate in your transaction for such agreements (assuming they do not already constitute part of your contract) to be carved out of the entire agreement clause;*

- (c) an option to state that the contract supersedes previous representations and warranties in sub-clause (a) and a non-reliance clause in subclause (c) which may be given by one or both parties.

*There is a risk that such clauses may be viewed as exclusion clauses. Accordingly, to reduce the risk of the entire agreement clause itself being viewed as an exclusion clause (and subject to validity and potential severance issues), it is preferable for any exclusions to be dealt with in a separate clause; and*

- (d) an optional termination of prior contract clause in sub-clause (b).

*If your transaction involves the termination of a prior contract, you should also always obtain instructions about what should happen to accrued rights and obligations under a prior deed or agreement relating to the same subject matter and consider whether a separate document such as a deed of termination and release should also be entered into.*

The Sample entire agreement clause **does not** expressly exclude implied terms. Parties should think carefully before expressly excluding implied terms as it will be difficult to predict at the point of entry into the contract whether there may be circumstances in which they may like to have the benefit of implied terms. If parties wish to expressly exclude implied terms, again to reduce the risk of an entire agreement clause itself operating as an exclusion clause, it is preferable to do so elsewhere in the contract.<sup>20</sup>

## 3.3 When, if ever, should I amend the clause?

The appropriate scope of an entire agreement clause will always depend on the transaction and what exactly it is that the parties intend. Always consult with your client to ensure that the clause is customised for the transaction and your client's needs or concerns. Some practical examples of where the inclusion of an entire agreement clause, and the content of such a clause, requires

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careful consideration are set out in Section 4 (**Other practical considerations**).

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## 4 Other practical considerations

### 4.1 Examples of entire agreement clause drafting issues

- (a) Sale: In a sale context, it is in the seller's interest to prevent the buyer from relying on pre-contractual statements or representations about the goods being sold (and, as such, is unlikely to agree to an entire agreement clause being omitted). On the other hand, the buyer prefers to retain the right to sue for breach of contract in the event that such statements turn out to be inaccurate.

When acting for the buyer, and the seller insists on including a non-reliance statement (whether in the entire agreement clause or elsewhere), ensure that any important pre-contractual statements or representations are expressly included in the written contract and/or are the subject of appropriate warranties.

- (b) Incorporating documents and statements: For substantial transactions, there may be many documents generated and meetings and discussions held prior to execution of the written contract and your client may wish for such documents and records of such meetings and discussions to be included in the contract.

If the other party insists on an entire agreement clause in the context of significant prior documentation and representations during discussions, ensure that there is a formal process for including them, such as in a warranties clause, a disclosure letter (that is expressly incorporated into the agreement), or otherwise incorporate them by reference. If this is not done, an entire agreement clause may operate to exclude them.

- (c) Technical specifications: In service contracts, there may be important agreed

technical specifications that should form part of the contract.

To ensure technical specifications form part of the contract, ensure they are either expressly incorporated into the written contract, or that the entire agreement clause expressly includes them.

### 4.2 Interaction with other clauses in contract

An entire agreement clause should not be considered in isolation as it impacts on other important clauses such as clauses dealing with:

- (a) warranties and indemnities;
- (b) exclusion clauses; and
- (c) limitation clauses.

Careful consideration should be given to the interaction between such clauses and entire agreement clauses to ensure that they are consistent and that no unintended consequences arise.

As discussed above, also consider whether any exclusion clause in the contract should exclude implied terms and liability for pre-contractual misrepresentation, and whether such exclusion clause(s) (as opposed to the entire agreement clause) should also deal with prior representations and warranties and include a non-reliance clause.

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## ENDNOTES

<sup>1</sup> Peden E and Carter J, "Entire Agreement – and Similar – Clauses" (2006) 22 *Journal of Contract Law* 1

<sup>2</sup> See even recently *Golding v Vella* [2001] NSWSC 567.

<sup>3</sup> *State Rail Authority of New South Wales v Heath Outdoor Pty Ltd* (1986) 7 NSWLR 170 at 191 per McHugh J. However, Latham CJ had previously observed in *Hope v RCA Photophone of Australia Pty Ltd* (1937) 59 CLR 348 at 357, that where the contract is partly in writing and partly oral then parol evidence is admissible to complete the written contract. Carter and Peden have observed that, in reality, discovering the terms of the bargain will always require consideration of extrinsic evidence and this is why we say that the parol evidence rule only applies to stage two of the three stages of construction.

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<sup>4</sup> *Bacchas Marsh Concentrated Milk Co Ltd v Joseph Nathan & Co Ltd* (1919) 26 CLR 410.

<sup>5</sup> See *Hart v McDonald* (1910) CLR 417 in which a clause: ‘that there is no agreement or understanding between us not embodied in this tender’, was held by the High Court not to preclude implication, with O’Connor J observing that “every implication which the law makes is embodied in the contract just as effectively as if it were written there in express language”.

<sup>6</sup> See *L’Estrange v F Graucob Ltd* [1934] 2 KB 394.

<sup>7</sup> See for example *Burger King Corporation v Hungry Jacks Pty Ltd* (2001) 69 NSWLR 558 and *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* (2005) Aust Contract R 90-213; [2005] FCA 288 which support the assertions that an implied duty of good faith can be excluded by an express term and *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) in which the Federal Court was critical of this view. In *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15 at paragraph [191] Giles JA assumed an implied term of good faith could be excluded without deciding; followed by *Solution 1 Pty Ltd v Optus Networks Pty Limited* [2010] NSWSC 1060 at [61].

<sup>8</sup> See *Vakras v Cripps* [2015] VSCA 193 [422]. See also *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15 at paragraph [200].

<sup>9</sup> See section 64 of the *Australian Consumer Law*. (See also similar provisions in State and Territory sale of goods legislation e.g. section 64(1) of the *Sale of Goods Act 1928* (NSW)).

<sup>10</sup> *Commercial Banking Co of Sydney Ltd v H R Brown & Co* (1972) 126 CLR 337 at 334 (Menzies J); 349-50 (Gibbs J); *Allen v Empire Life & General Assurance Co Ltd* (1926) 22 Tas LR 9; *Suburban Homes Pty Ltd v Topper* (1929) 35 ALR 294; *Pearson & Son Ltd v Dublin Corp* [1907] AC 351 at 353-4. See also *BSkyB Ltd v HP Enterprise Services UK Ltd* [2010] All ER (D) 192 (Jan); [2010] EWHC 86 (TCC).

<sup>11</sup> See *Campbell v Backoffice Investments Pty Limited* (2009) 238 CLR 304; (2009) 257 ALR 610; [2009] HCA 25 at [130] (Gummow, Hayne, Heydon and Kiefel JJ) and *IOOF Australia Trustees (NSW) Ltd v Tantipech* (1988) 156 ALR 470.

<sup>12</sup> See *Collins v Marrickville Pty Ltd v Henjo Investments Pty Ltd* (1987) ATPR 40-783 and *Campbell v Backoffice* *ibid*.

<sup>13</sup> See *Byers v Dorotea* (1986) 69 ALR 175 in which the Federal Court held that an entire agreement clause validly excluded liability for innocent misrepresentation but also *McDonald v Shinko Australia Pty Ltd* [1999] 2 Qd R 152 in which a majority of the Queensland Court of Appeal expressed doubts whether this was possible.

<sup>14</sup> See for example *Keen Mar Corp Pty Ltd v Labrador Park Shopping Centre Pty Ltd* (1989) 67 LGRA 238; ATPR (Dig) 46048. See further Peden E and Carter J, “Entire Agreement – and Similar – Clauses” (2006) 22 *Journal of Contract Law* 1. See discussion of disclaimers in *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60 ; 218 CLR 592.

<sup>15</sup> See further Peden E and Carter J, “Entire Agreement – and Similar – Clauses” (2006) 22 *Journal of Contract Law* 1.

<sup>16</sup> See *Australian Co-Operative Foods Ltd v Norco Co-Operative Ltd* (1999) 46 NSWLR 267 (Bryson J) and *Franklins v Metcash* [2009] NSWCA 407. Conversely, see, *Branir Pty Limited v Owston Nominees (No.2) Pty Ltd* [2001] FCA 1833 (Allsop J), *Chint Australasia Pty Limited v Cosmoluce Pty Limited* [2008] NSWSC 635 and *Saleh v Romanouos* [2010] NSWCA 274 (Handley AJA).

<sup>17</sup> See *Hoyts Pty Ltd v Spencer* (1919) 27 CLR 133, *Maybury v Atlantic Union Oil Co* (1953) 89 CLR 507 and *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1.

<sup>18</sup> See for example, *McDonald v Shinko Australia Pty Ltd* [1999] 2 Qd R 152.

<sup>19</sup> See for example, section 23 of the *Australian Consumer Law* and also the *Contracts Review Act 1980* (NSW).

<sup>20</sup> See further Peden E and Carter J, “Entire Agreement – and Similar – Clauses” (2006) 22 *Journal of Contract Law* 1.