

RELATIONSHIP OF PARTIES BOILERPLATE CLAUSE

Need to know

This clause evidences the parties' intention about the relationship they intend to create with one another under their contract. The clause is not conclusive or binding as to the nature of the relationship of the parties – which is a matter of law – but it is relevant to the court's consideration of the parties' intention. Use this clause to demonstrate the parties' intention that they wish to deal with each other at 'arm's length' and in a commercial manner. However, do not use this clause if you intend to create a specific type of relationship between the parties.

THE SAMPLE CLAUSE

Except as expressly provided in this [deed/agreement]:

- (a) nothing in this [deed/agreement] is intended to constitute a fiduciary relationship, employment relationship or an agency, partnership or trust; and*
- (b) no party has authority to bind any other party.*

Relationship of Parties Boilerplate Clause

1 What is this clause and why is it used?

The purpose of a relationship of parties boilerplate clause is to seek to clarify the type of relationship that the parties intend to create under the contract.

This clause is generally used in commercial agreements where the parties are unrelated and the transaction is at *'arm's length'*. The purpose is to avoid any inference that the parties intend to create a special relationship (like a partnership, trust, fiduciary relationship, agency etc). For a quick outline of the different types of common relationships you may want to consider section 4 (Common Relationships).

If you would like to create a specific legal relationship (eg a partnership, joint venture or agency) under your contract, you should not include this clause. You will need to include more expansive clauses regarding the creation and nature of the relationship in the operative terms of the contract.

2 How effective is it?

The clause is only a statement of the parties' intentions. Whether a particular legal relationship exists is a matter of law, not a matter for agreement between the parties. This clause will not be effective if the legal relationship created at law is different from that stated in the clause.¹

3 Drafting and reviewing the clause

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

It depends on the relationship you are intending to create. If you intend to create a commercial, arm's length relationship, you should always include this clause. If you intend to create a special relationship (partnership, trust, fiduciary, etc) you should not include this clause.

It is not fatal if you do not include this clause (even where the parties wish to create a commercial arm's length relationship). Whether a particular legal relationship exists is a matter of law, not a matter for

agreement between the parties. The clause is only one relevant fact that a court will consider.

3.2 When, if ever, should I amend the clause?

Typically you will not need to amend this clause. For a commercial and at arm's length relationship, you should include the clause as is. If you want to create a special relationship (trust, fiduciary, etc), rather than amending the clause, you will typically need to include more expansive clauses regarding the creation and nature of the relationship in the operative terms of the contract.

4 Common relationships

The following outlines some of the relationships you may wish to exclude.

4.1 Partnership

A relationship of persons carrying on business with a common view to profit.² The partnership legislation specifies a number of rules to determine whether a partnership exists, and there is also extensive case law on the subject. Among the consequences of partnership are shared liability and the possibility of fiduciary obligations.³

4.2 Agency

An agency relationship is a fiduciary relationship where one party, the principal, grants authority to another party, the agent, to act on their behalf to create legal relations with others, which binds the principal. Importantly, the agent agrees to act under the control or direction of the principal. An agency relationship may be created by express agreement (written or oral), by implied agreement or by conduct where the parties actions towards one another make it reasonable to infer consent to the agency.⁴

4.3 Fiduciary relationship

Outside the scope of relationships generally recognised as fiduciary (e.g. trustee/beneficiary, lawyer/client etc), contracts do not automatically create a fiduciary relationship and generally contracting parties are not taken to have assumed fiduciary duties to each other.⁵ However, courts may find that a fiduciary relationship exists in some circumstances where it is consistent with the terms and operation of the contract⁶; eg if one party has

Relationship of Parties Boilerplate Clause

undertaken to act for or on behalf of the other or has a special opportunity to exercise a power or discretion to the detriment of that other person who is vulnerable to abuse by the fiduciary of his or her position.⁷ Fiduciary obligations have been found to co-exist with contractual obligations in the context of a joint venture.⁸

ENDNOTES

¹ *Hollis v Vabu Pty Limited* [2001] HCA 44; [\(2001\) 207 CLR 21](#) at 58 “parties cannot deem the relationship between themselves to be something it is not”.

² *Partnership Act 1892* (NSW) s 1(1); *Partnership Act 1963* (ACT) s 6(1); *Partnership Act* (NT) s 5(1); *Partnership Act 1891* (Qld) s 5(1); *Partnership Act 1891* (SA) s 1(1); *Partnership Act 1891* (Tas); s 6(1); *Partnership Act 1958* (Vic) s 5(1); *Partnership Act 1895* (Tas) s 7(1).

³ See further *Halsbury’s Laws of Australia*, Partnerships and Joint Ventures, and Fletcher, *The Law of Partnerships in Australia and New Zealand*, LBC Information Services, Sydney, 2001.

⁴ *Colbron v St Bees Island Pty Ltd* [1995] FCA 1107; (1995) 56 FCR 303.

⁵ *Moorgate Tobacco Co Ltd v Philip Morris Ltd* [1984] HCA 73; (1984) 156 CLR 414

⁶ *Hospital Products Ltd v United States Surgical Corporation* [1948] HCA 64; (1984) 156 CLR 41 at 97 per Mason J.

⁷ *Hospital Products Ltd v United States Surgical Corporation* [1948] HCA 64; (1984) 156 CLR 41

⁸ *ibid.*