

NOTICES BOILERPLATE CLAUSE

Need to know

Notices clauses are included in contracts:

- to establish an agreed and valid mechanism for the giving and serving of notices; or
- to determine if and when notices have been validly delivered.

It is important to include a Notices clause in a contract where:

- contractual obligations must be performed by a specified time;
- performance of contractual obligations are conditional on the receipt or giving of notice; or
- the contract requires the parties to report to one another about progress in performance (or any other requirements).

Including a Notices clause in a contract provides the parties with an agreed method of communication, significantly reducing the level of doubt that may surround communication delivery or receipt and/or evidence about whether the above contractual obligations have been met.

CAUTION: Parties are generally free to specify the requirements for giving valid notice under a contract. A notice that does not satisfy those requirements will be invalid. Always ensure that the wording of the boilerplate clause (prior to its inclusion in a contract), is appropriate and relevant to the transaction and the client. With this in mind, please be aware that:

- the *Electronic Transactions Act* will apply if provisions relating to electronic notices / communications are deleted;
- clients should consider the server capabilities of contracting parties if provisions relating to electronic notices / communications are retained and whether automated messages confirming email delivery / read receipts are enabled / agreed to be relied upon;
- clients should be warned, from an evidentiary perspective, about the risks associated with email delivery of notices and whether they wish to expressly prohibit the use of email as a form of notice delivery under the contract;
- delivery time frames will vary between postal providers and whether a notice is sent by regular post, priority post or courier. Delivery methods and timelines for deemed receipt in clause 1.1(c) must be considered and amended as appropriate;
- delivery modes not applicable to the client should be deleted. For instance, “*Facsimile*” should be deleted if the client does not own or operate a fax, or “*hand delivery*” if your client does not have a formal reception / principal place of business (eg, some mining companies); and
- technology updates rapidly and any new delivery methods clients wish to rely upon must be expressly reflected in the Notices clause, including the delivery / receipt parameters associated with those new methods.

Notices Boilerplate Clause

THE SAMPLE CLAUSE (LONG FORM)

1. Notices



Caution – Notices by email

NB: The *Electronic Transactions Act* will apply if provisions relating to electronic notices / communications are deleted from this clause. In addition to this, clients should be warned, from an evidentiary perspective, about the risks associated with email delivery of notices generally and whether they wish to expressly prohibit this form of notice delivery under the contract. See page 35 of the *Clauses and Commentary Guide* for further details.

NB: If you do decide to include email as an option in clause 1.1(a) below, please ensure that you also include clauses 1.1(b)(iii), 1.1(c)(iv), 1.2 (**Notices sent by email**) and consider whether any important notices should be expressly specified and excluded from this mode of delivery under clause 1.3 (**Certain Notices not to be sent by email**).

1.1 General

- (a) *Unless expressly stated otherwise in this [deed/agreement] [and subject to clause 1.2 (**Notices sent by email**)], a notice, consent or other communication given under this [deed/agreement] including, but not limited to, a request, certificate, demand, consent, waiver or approval, to or by a party to this [deed/agreement] (**Notice**):*
- (i) *must be in legible writing and in English [(or accompanied by a certified translation into English)];*
 - (ii) *must be addressed to the party to whom it is to be given (**Addressee**) at the address [[,/or] facsimile number] [or email address] set out below or to any other address [[,/or] facsimile number] [or email address] as notified by the Addressee for the purposes of this clause:*
 - (A) *If to [Party A]:*
 - Address:*
 - Attention:*
 - Position:*
 - [Facsimile:]*
 - [Email:]*
 - (B) *If to [Party B]:*
 - Address:*
 - Attention:*
 - Position:*
 - [Facsimile:]*
 - [Email:]*
 - (iii) *must be signed by or on behalf of the sender (if an individual) or an Officer of the sender;*
 - (iv) *must be either:*
 - (A) *delivered by hand or sent by pre-paid mail (by airmail if sent to or from a place*

Notices Boilerplate Clause

- outside of Australia) to the Addressee; [and/or]*
- (B) *[sent by facsimile, to the Addressee's facsimile number]; [and/or];*
- (C) *[sent by email to the Addressee's email address; and]*
- (v) *is deemed to be received by the Addressee in accordance with clause 1.1(c).*
- (b) *If:*
- (i) *a party changes its address and fails to notify the other part[y/ies] of this change and the new address, delivery of Notices marked to the attention of the Addressee at that new address is deemed compliant with the notice obligations under this clause; [and/or]*
- (ii) *an individual named in clause 1.1(a)(ii) ceases to work in the role specified or ceases to work for the Addressee and the Addressee fails to notify the other part[y/ies] of an alternative individual, delivery of Notices marked to the attention of an individual in the same or equivalent role at the Addressee is deemed compliant with the notice obligations under this clause[./; and/or]*
- (iii) *an individual associated with an email address listed in clause 1.1(a)(ii) ceases to work in the role specified or ceases to work for the Addressee and the Addressee fails to notify the other part[y/ies] of an alternative email address, Notices sent by email to a manager or equivalent level personnel at the Addressee are deemed compliant with the notice obligations under this clause.]*
- (c) *Without limiting any other means by which the sender may be able to prove that a Notice has been received by the Addressee, a Notice is deemed to be received:*
- (i) *if delivered by hand, when delivered to the Addressee;*
- (ii) *if sent by post, on the [6th/[insert]] Business Day after the date of posting, or if to or from a place outside Australia, on the [10th/[insert]] Business Day after the date of posting; [or]*
- (iii) *[if sent by facsimile transmission, on receipt by the sender of an acknowledgement or transmission report generated by the machine from which the facsimile was sent; [or]]*



Option – email delivery

NB: Generally under the *Electronic Transactions Act*.

- a) if an email address (or facsimile number) is specified in a contract (but unaccompanied by delivery / receipt parameters), communications sent using those methods will be deemed received when the message enters the recipient's mail server; or
- b) if no email address (or facsimile number) is specified in the contract, communications sent using those methods will be deemed received at the time when the recipient becomes aware of the message.

For evidentiary purposes, this clause establishes a clearer mechanism for determining deemed receipt of electronic notices. Clients who wish to rely on email delivery of notices must have an awareness of their server capabilities and decide on the appropriate deemed timing for their receipt or whether automated messages confirming email delivery / read receipts are enabled and agreed to be relied upon. Please discuss this clause with your client, particularly if email delivery of important notices has not been expressly prohibited under clause 1.3 (**Certain Notices not to be sent by email**).

Notices Boilerplate Clause

(iv) *[if sent by email:*

- (A) *when the sender receives an automated message confirming delivery; or*
- (B) *[30 minutes/[insert time period]] after the time sent (as recorded on the device from which the sender sent the email) unless the sender receives an automated message that the email has not been delivered,*

whichever happens first,]



End option – email delivery

but if the delivery or receipt is on a day which is not a Business Day or is after 5.00 pm (Addressee's time) it is deemed to be received at 9.00 am on the following Business Day.

- (d) *[A facsimile transmission is deemed to be legible unless the Addressee telephones the sender within 2 hours after the transmission is received or regarded as received under clause 1.1(c) and informs the sender that it is not legible.]*



Option – Notices sent by email

1.2 Notices sent by email

Notices sent by email need not be marked for attention in the way stated in clause 1.1 (General). However the email:

- (a) *must state the first and last name of the sender; and*
- (b) *must be [insert any other form requirements].*

Notices sent by email are taken to be signed by the named sender.



End option – Notices sent by email



Option certain Notices not to be sent by email

For evidentiary reasons, you may wish to expressly prohibit the delivery of all Notices (or all important Notices) by email. For example, a notice terminating this agreement by email. Please seek specific instructions from your client.

1.3 Certain Notices not to be sent by email

Despite clauses 1.1 (General) and 1.2 (Notices sent by email), the following Notices must not be sent by email:

Notices Boilerplate Clause

(a) *[insert any Notice to be excluded].*



End option – certain Notices not to be sent by email

THE SAMPLE CLAUSE (SHORT FORM)



Information/alert – Notices by email

For evidentiary reasons, please use the long form Notices clause if your client seeks to rely on email delivery of notices under the contract.

1.1 Notices

- (a) *A notice, consent or other communication under this [deed/agreement] is only effective if it is in writing, signed by or on behalf of the party giving it and it is received in full and legible form at the addressee's address [or facsimile number]. It is regarded as received [at the time and] on the day it is actually received, but if it is received on a day that is not a Business Day or after 5.00 pm on a Business Day it is regarded as received [at 9.00 am] on the following Business Day.*
- (b) *For the purposes of this clause, a party's address [and facsimile number are those/is] set out below, unless the party has notified a changed address [or facsimile number] in which case the notice, consent, approval or other communication must be to that address [or number]:*

[Insert party's name]

Address:

[Facsimile:]

Attention:

Position:

[Insert party's name]

Address:

[Facsimile:]

Attention:

Position:

- (c) *If a party changes address and fails to notify the other part[y/ies] of this change and the new address, delivery of notices to that party at that new address is deemed compliant with the notice obligations under this clause.*
- (d) *If an individual named in clause 1.1(b) ceases to work in the role specified or ceases to work for a party and that party fails to notify the other part[y/ies] of an alternative individual, delivery of notices marked to the attention of an individual in the same or equivalent role at that party is deemed compliant with the notice obligations under this clause.*

Notices Boilerplate Clause

1 What is this clause and why is it used?

The role of a Notices clause is to prescribe an acceptable system of communication between the parties to a contract. It ensures parameters are in place to verify whether certain communications have been received by appropriate people, in the appropriate form, and at the correct time and place. That is, it sets out the agreed methods for contracting parties to provide notices to one another and deems when and if such notices have been received.

In any given case, a contract should clearly and expressly state when a party is required to give notice. Typically, contracting parties are required to give notice to:

- notify of a breach of contract;
- terminate or cancel the contract;
- commence legal action;
- elect to exercise a right under the contract;
- make a request or demand;
- provide information (ie measurements or technical specifications);
- waive a condition under the contract;
- deliver money;
- demand the performance of an obligation; or
- provide an approval or consent under the contract.

2 How effective is it?

A Notices clause will be effective provided it is clearly worded. Its purpose is to set out the parameters and agreed methods of communication between contracting parties in order to eliminate or substantially reduce any disagreements about, or evidence of, communication delivery or receipt.

Failure to comply with a Notices clause in a contract may result in ineffective and, therefore, invalid notice. Non-compliance with this clause could, therefore, have material flow on effects particularly if providing valid notice is a precondition to exercising certain rights under the contract (ie such as those listed in item 1 above). Parties may also wish to specify the consequences of not complying with a Notices clause (ie, whether oral notification can in any circumstances be effective when the parties have agreed that notices must be provided in writing). The importance of complying with a Notices clause should not be overlooked.

3 Drafting and reviewing the clause

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

It is good practice to always include a Notices clause in a contract because it significantly reduces the ambiguity surrounding the sending and receipt of contractual communications.

It is most important to include a Notices clause in a contract where:

- (a) contractual obligations must be performed by specified times;
- (b) performance of contractual obligations are conditional upon the receipt or giving of notice; or
- (c) the contract requires the parties to report to one another about progress in performance (or any other requirements).

3.2 About the sample clause

The sample clause is a standard clause and is representative of those widely used in contracts throughout Australia and in other common law jurisdictions. However, like with any boilerplate clause, its wording must be considered before it is included in a contract to ensure that it is appropriate to the transaction and the client.

Notices Boilerplate Clause

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

A Notices clause must be amended if the methods of giving or receiving notice and/or the timing of deemed receipt are not appropriate for the transaction or suitable to your client.

Constant upgrades in technology are resulting in a continual shift towards new and other acceptable forms of communication between contracting parties. If contracting parties agree that notices or other communications may be delivered by new or other methods (ie, methods not included in the sample clause eg, secure website etc), those methods, as well as their delivery / receipt parameters, must be reflected in the clause.

The *Electronic Transactions Act* will apply if the provisions relating to electronic notices / communications are deleted from the clause. In Victorian and NSW this means:

- (a) if an email address (or facsimile number) is specified in a contract (but unaccompanied by delivery / receipt parameters), that communications sent using those methods will be deemed received when the message enters the recipient's mail server;¹ or
- (b) if no email address (or facsimile number) is specified in the contract, that communications sent using those methods will be deemed received at the time when the recipient becomes aware of the message.²

Complications may arise if your client is required to prove when an electronic communication was received by a recipient's server or when, in fact, they became aware of the message. Evidence in each instance to substantiate the timing of receipt of these messages can be very difficult to obtain. To avoid these issues altogether, consider expressly prohibiting the delivery of notices by email.

4 Other practical considerations

4.1 Service of court process by agreed method

The sample Notices clause does not extend to cover the service of court process to resolve disputes under or in connection with the contract itself.

Service of court process must be undertaken in accordance with the rules of court, however many such rules permit the parties to agree on the method of service.³ An additional clause can therefore be included in the contract to specify an agreed method of service for the originating process. The clause will be effective provided the court in which the process is issued has a rule permitting service by agreement.

A suitable draft clause is as follows:

Service of court process

Any summons, notice or process to be served for the purpose of resolving any dispute under or in connection with this agreement may be served by [specify the method of service, eg upon the Manager / CEO of the relevant party].

ENDNOTES

¹ *Electronic Transactions (Victoria) Act 2000*, s13A(1)(a).
Electronic Transactions Act 2000 (NSW), s13A(1)(a).

² *Electronic Transactions (Victoria) Act 2000*, s13A(1)(b).
Electronic Transactions Act 2000 (NSW), s13A(1)(b).

³ eg r 10.6 Uniform Civil Procedure Rules 2005 (NSW), r 6.14 Supreme Court (General Civil Procedure) Rules 2015 (Vic), O 9 r 3 Rules of the Supreme Court 1971 (WA).