

WAIVER BOILERPLATE CLAUSE

Need to know

Waiver clauses purport to define and restrict the circumstances in which legal rights, including the right to terminate, may be lost by a failure to exercise them. The sample clause seeks to achieve this by requiring any relinquishment of rights to be in writing and signed.

CAUTION: While it is difficult to invalidate a waiver clause under a contract, clients must be specifically cautioned to avoid any conduct that would objectively amount to a clear and unequivocal act to forgo their rights under a contract (in particular their termination rights).

THE SAMPLE CLAUSE

- (a) *No waiver of a right or remedy under this [deed/agreement] is effective unless it is in writing and signed by the party granting it. It is only effective in the specific instance and for the specific purpose for which it is granted.*
- (b) *A single or partial exercise of a right or remedy under this [deed/agreement] does not prevent a further exercise of that or of any other right or remedy.*
- (c) *Failure to exercise or delay in exercising a right or remedy under this [deed/agreement] does not operate as a waiver or prevent further exercise of that or of any other right or remedy.*

Waiver Boilerplate Clause

1 What is this clause and why is it used?

This clause relates to post-contractual conduct and attempts to reserve legal rights (whether contractual, statutory or common law rights) in the event that a party fails to exercise or enforce those rights or where that party's conduct indicates a relinquishment or foregoing of those rights. In this way, the clause seeks to overcome the doctrine of waiver which would otherwise operate to defeat those rights (as explained below).

A waiver of rights may occur either by a representation that those rights will not be enforced, or by a failure, whether deliberate or inadvertent, to exercise those rights (eg the contractual right to terminate following breach). In those cases, without an express provision to the contrary, a waiver may result and inhibit a party's current and future ability to obtain remedies for breach and/or enforce their rights under the contract .

Waiver "*is an imprecise term, capable of describing different legal concepts*".¹ In general, waiver is used to describe the conclusion that a party has lost a particular contractual right, by words or conduct.² This loss of a legal right may occur where there has been:

- rescission of an entire agreement;
- variation of particular terms (where consideration is provided);
- agreement not to enforce strict compliance with the contract; or
- election to affirm a contract and a waiver of the right to terminate.

Waiver is primarily used to refer to situations where legal rights and/or remedies are lost without consideration. This may occur in two ways:

- (a) **Election**; Election occurs where a party possesses alternative and inconsistent rights, and exercises one of those rights. By the exercise of one right, the party

extinguishes the inconsistent right, as both rights cannot be exercised together. This has also been referred to as the intentional abandonment of the right.³

- (b) **Estoppel**; Estoppel arises where a party makes a representation, either by words (promissory or equitable estoppel) or conduct (estoppel in pais), that they will not enforce a right and the other party relies on that representation to their detriment. In this situation, the representing party will be estopped from enforcing the relevant right.

The sample clause, commonly referred to as a "no waiver clause", is drafted to require any conduct which could be construed as a waiver to be in writing. This requirement for writing is intended to prevent waiver (including inadvertent waiver) by oral statements or conduct. By specifying the manner in which waiver will arise, this clause attempts to ensure that the extent of any waiver is identified and understood by all the parties to the contract.

The sample clause is not intended to counter the effect of the doctrine of *res judicata* (and it would be read down if it purported to do so). *Res judicata*, sometimes referred to as "estoppel by judgment" or "estoppel by record", refers to the existence of a judicially determined matter and restricts re-litigation of a cause of action.⁴

2 How effective is it?

2.1 A waiver clause does not oust the doctrine of waiver

Where a party makes a clear and unequivocal representation that a right will not be enforced, or where they exercise one right which is inconsistent with another, waiver may arise despite the presence of a waiver clause in the contract. A waiver clause will be enforced unless there is evidence that clearly demonstrates a party's clear election to waive the particular rights.⁵ Under Australian law, the doctrine of waiver requires close consideration of the conduct said to have waived the right, as well as the circumstances surrounding that conduct.

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2.2 A waiver clause requires strong evidence to the contrary before a finding of no effect

The effect of waiver clauses has not been examined in detail by the courts. While a waiver clause may not prevent a waiver arising in all circumstances, it will help demonstrate the parties' intention and raise the evidentiary threshold to *challenge* the effectiveness of the clause (ie requiring clear evidence of conduct to the contrary).⁶ For example, it has been held that a bank did not waive its contractual right to terminate, notwithstanding having tolerated multiple previous breaches by a borrower, because no evidence had been adduced which demonstrated that the bank had specifically elected to waive its rights and communicate such an election to the borrower.⁷

3 Drafting and reviewing the clause

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

Including a waiver clause in a contract provides greater certainty for the parties regarding their rights and remedies available under that contract. However, as noted above, this clause is not a panacea and may not prevent waiver arising in all circumstances.

If a waiver clause is not included in a contract, it may be easier to argue that a party has waived their rights under the contract by virtue of the doctrine of waiver (such as the right to damages for a past breach, or the right to insist on timely performance in the future).

3.2 What is the sample clause?

The sample clause is drafted in general terms and requires any waiver to be in writing and signed by the party electing to waive that right. The waiver clause also restricts the effect of the signed notice to the particular instance of waiver to which it relates.

Parts (b) and (c) of the sample clause complement the requirement of writing by providing that no other conduct of a party will constitute waiver of past or future rights –

whether that be the partial enforcement of a right, the failure to exercise a right or the delay in exercising a right.

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

If you foresee particular conduct in a transaction that may be interpreted as a waiver of a right, it may be beneficial to amend the boilerplate clause to cover-off that conduct. The sample clause is drafted in general terms. This allows you to easily include references to certain specific conduct, if relevant.

For example, where ongoing payments are due under a contract, you may wish to specify that acceptance of late payment does not waive the right to obtain damages in compensation for the delay, or alter the time conditions for the acceptance of future payments.

4 Other practical considerations

As identified above, waiver may still arise despite the inclusion of a waiver clause. Parties should be advised of this risk, as well as the appropriate measures to take to avoid a waiver arising. These steps include:

- promptly taking the specified contractual steps to preserve termination rights upon breach; and
- giving written notice to other parties to the contract reserving all rights, notwithstanding continued performance, which may maintain the right to exercise those rights in the future.

ENDNOTES

¹ *Commonwealth v Verwayen* (1990) 170 CLR 394, 406 (Mason CJ). In fact, the judgments in this case also demonstrate the divergent views that exist, with the majority splitting on the legal bases of their finding: Deane and Dawson JJ held that the Commonwealth had been *estopped* from disputing its liability to Verwayen whereas Toohey and Gaudron JJ held that the Commonwealth had *waived* its rights to dispute its liability. Interestingly, two of the three dissenting judges also found that the Commonwealth was

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either estopped by conduct (Mason CJ) or that there was equitable/promissory estoppel (Brennan J) but that either an order for costs was sufficient to satisfy the estoppel or that a compensation order was sufficient to cover the detriment suffered.

² *Agricultural & Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570, 587 [51] (Gummow, Hayne and Kiefel JJ).

³ Per Mason CJ in *Commonwealth v Verwayen* (1990) 170 CLR 394; (1990) 95 ALR 321 at 329.

⁴ *Chamberlain v Deputy Tax Commissioner* (1988) 164 CLR 502. See also *Queensboro Pty Ltd v Butler Poll Now Pty Ltd* [1999] NSWSC 700; J K Handley (1999) "Res Judicata: General Principles and Recent Developments" 18 *Australian Bar Review* 214.

⁵ *Canberra Advance Bank Ltd v Benny* (1992) 38 FCR 427. See also *R v Paulson* [2921] 1 AC 271 at 282-3.

⁶ *Ibid.*

⁷ *Kostopoulos v GE Commercial Finance Australia Pty Ltd* [2005] QCA 311.