

Interpretation boilerplate clause



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Need to know

An interpretation clause is used to express the rules which the parties wish to apply to the interpretation of their deed or agreement. The sample interpretation clause provided below is a standard boilerplate interpretation clause containing rules of interpretation that are fairly typical of those in most commercial contracts. However, certain options must be selected or adjustments made in each case. These are explained further below.

Sample clause

1.1 Interpretation

In this [**deed/agreement**] the following rules of interpretation apply unless the contrary intention appears:

- (a) headings are for convenience only and do not affect the interpretation of this [**deed/agreement**]
- (b) the singular includes the plural and vice versa
- (c) words that are gender neutral or gender specific include each gender
- (d) where a word or phrase is given a particular meaning, other parts of speech and grammatical forms of that word or phrase have corresponding meanings
- (e) the words "such as", "including", "particularly" and similar expressions are not used as, nor are intended to be interpreted as, words of limitation
- (f) a reference to:
 - (i) a person includes a natural person, partnership, joint venture, government agency, association, corporation, trust or other body corporate
 - (ii) a party includes its agents, successors and permitted assigns
 - (iii) a document includes all amendments or supplements to that document
 - (iv) a clause, term, party, schedule or attachment is a reference to a clause or term of, or party, schedule or attachment to this [**deed/agreement**]
 - (v) this [**deed/agreement**] includes all schedules and attachments to it
 - (vi) a law includes a constitutional provision, treaty, decree, convention, statute, regulation, ordinance, by-law, judgment, rule of common law or equity [*or a rule of an applicable Financial Market*] and is a reference to that law as amended, consolidated or replaced
 - (vii) a statute includes any regulation, ordinance, by-law or other subordinate legislation made under it
 - (viii) an agreement other than this [**deed/agreement**] includes an undertaking, or legally enforceable arrangement or understanding whether or not in writing
 - (ix) a monetary amount is in Australian dollars and all amounts payable under or in connection with this [**deed/agreement**] are payable in Australian dollars
- (g) an agreement on the part of two or more persons binds them [**jointly and not severally/severally and not jointly/jointly and each of them severally**]
- (h) no rule of construction applies to the disadvantage of a party because that party was responsible for the preparation of this [**deed/agreement**] or any part of it
- (i) when the day on which something must be done is not a Business Day, that thing must be done on the [**following/preceding**] Business Day
- (j) in determining the time of day where relevant to this [**deed/agreement**], the relevant time of day is:
 - (i) for the purposes of giving or receiving notices, the time of day where a party receiving a notice is located
 - (ii) for any other purpose under this [**deed/agreement**], the time of day in the place where the party required to perform an obligation is located
- (k) a day is the period of time commencing at midnight and ending immediately before the next midnight is to occur [**and**]

- (i) if a period of time is calculated from a particular day, act or event (such as the giving of a notice), it is to be calculated exclusive of that day, or the day of that act or event [**and/**]

[Optional]

- (m) If there is any conflict between the body of this [*deed/agreement*] and its schedules [*and/or*] attachments [*or*] [**specify any related documents eg Statement of Work, special conditions, specifications etc**], [*the terms of the main body of this [deed/agreement] will prevail/the schedules or attachments will prevail in the following order: [specify order]*]

1 What is this clause and why is it used?

Most commercial contracts include an interpretation clause that sets out the rules of construction that the parties intend to apply to the contract. The clause can often be the place to look for significant concepts in a legal document.¹ While there is temptation to simply cut and paste, the provisions of this clause are often material to the contract. Hidden issues may arise if this clause is not properly reviewed.

The purpose of this clause is generally:

- to provide certainty of understanding when interpreting the contract, to avoid a court interpreting the contract in a way that is inconsistent with the parties' intentions
- to avoid repetition of information when drafting a contract, making it easier to read.²

Interpretation clauses in commercial contracts tend to be reasonably standardised, although important choices need to be made within parts of the clause in each particular case (these are discussed in section 3 below). Each firm will have their own version but the content, wording and topics addressed are often similar. Interpretation clauses are not often the subject of negotiation and are ordinarily less tailor-made than other clauses that relate to the core of the contract.³

The sample interpretation clause is a standard "boilerplate" clause; that is, it is a clause of the type that will ordinarily be inserted into most commercial contracts with minimal alteration other than selecting appropriate options where the clause provides for this. The rules of interpretation contained in the sample clause are fairly typical of those in most commercial contracts. However, the interpretation clause should be read together with the draft contract before finalisation to ensure that the contract has been drafted in accordance with the rules contained in that clause, and to ensure that its application does not cause any part of the contract to have an ambiguous or unintended meaning. Areas of particular consideration are set out in section 3 below.

2 Using the sample interpretation clause

2.1 What does the sample interpretation clause do?

In summary, the sample interpretation clause operates by:

- (a) expressly stating how the parties intend particular grammatical conventions (adopted in the document) should be interpreted. For example, an interpretation provision which states that "*the singular includes the plural and vice versa*" avoids the need to draft the document by including references to both singular and plural versions of each noun;
- (b) by setting out the breadth with which particular concepts are intended to be treated by the parties. For example, the inclusion of the phrase "*a document includes all amendments or supplements to that document*" obviates the requirement to state this repeatedly throughout the document (or to repeat such a rider in the definitions section for every defined document); and

¹ *Springrange Pty Ltd v Australian Capital Territory & ACT Planning and Land Authority* [2010] ACTCA 17 at [29].

² cf *AIB Group (UK) Ltd v Martin* [2002] 1 All ER 353 at [8] per Lord Millett.

³ Fontaine M and De Ly F, *Drafting International Contracts, an analysis of contract clauses*, Koninklijke Brill, the Netherlands, 2009.

- (c) by altering, confirming or clarifying certain common law construction principles which might apply to the interpretation of the contract, and seeks to achieve a level of certainty among the parties about the rules which a court should apply when interpreting the contract. For example, the inclusion of the phrase, "*no rule of construction applies to the disadvantage of a party because that party was responsible for the preparation of this [deed/agreement] or any part of it*", excludes the contra proferentem rule (ie that in the event of ambiguity, a contract, or clause in a contract, should be construed against the draftsman or interests of the party who provided the wording).

2.2 How effective is it?

Parties may include their own interpretation rules in a contract which courts will give effect to when construing the contract.⁴ Contracting out of the common law rules of interpretation is also permissible provided clear words are used.⁵

A limitation on the effectiveness of the sample interpretation clause is that it is expressed only to apply "*unless the contrary intention appears*". Accordingly, if the contract is drafted in such a way that it appears that the parties intended a provision to be interpreted in a way that is inconsistent with the interpretation clause, then that interpretation will prevail.⁶ You should consider this limitation when drafting a contract.

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

If this clause or parts of it are not included, the parties may not obtain the benefits described above. In practice, nearly all sample deeds or agreements will include an interpretation clause in substantially the same form as the boilerplate clause. If not, a court will simply interpret the contract without the benefits described above.

3 Drafting and reviewing the clause

Drafting notes for each particular sub-clause of the sample interpretation clause are set out below.

- (a) headings are for convenience only and do not affect the interpretation of this [*deed/agreement*]

Sub-clause (a) provides that headings are not to be used for the interpretation of the agreement.⁷ Headings are often used in contracts to summarise provisions and to assist with finding clauses and navigation generally (such as by using a table of contents).⁸ This sub-clause negates the common law principle of construction that catchwords or identifiers inserted for convenience (including headings) may be given due weight, although cannot prevail over the express words of a clause or create ambiguity where none otherwise exists.⁹

The effect of this sub-clause is to give *no weight* to headings when interpreting the contract.

⁴ An objective approach is adopted in determining the rights and liabilities of parties to a contract. The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean: see the authorities set out in *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7 at [35]. Most of the cases noted in this paper are examples of a court applying this process by giving effect to an interpretation clause.

⁵ *Cody v J H Nelson Pty Ltd* [1947] HCA 17; (1947) 74 CLR 629 per Starke J citing *Thorman v Dowgate Steamship Company Ltd* [1910] 1 KB 410; cf contracting out of the provisions of a statute which is generally not effective, even in the absence of an express statutory prohibition on such an agreement (*Caltex Oil (Australia) Pty Ltd v Best* (1990) 170 CLR 516 at 521-522). Courts will give effect to the principle that it is not permissible to do indirectly what is prohibited directly, and will not permit the use of contractual devices to avoid statutory obligations (*Bank of NSW v Commonwealth* (1948) 76 CLR 1 at 349-350).

⁶ For examples of such a case see *MSW Property Pty Ltd v Law Mortgages Queensland Pty Ltd* [2003] QCA 487 and *Unsworth v Debsan Pty Ltd* [2014] WASC 46.

⁷ For an example of such a provision being applied to exclude a heading being taken into account on the question of interpretation, see *Orleans Investments Pty Ltd & Anor v MindShare Communications Ltd* [2009] NSWCA 40 at [67]-[68].

⁸ Fontaine M and De Ly F, *Drafting International Contracts, an analysis of contract clauses*, Koninklijke Brill, the Netherlands, 2009 at p 151.

⁹ See eg *Cott UK Ltd v FE Barber Ltd* [1997] 3 All ER 540 at 545 (g to j). That case has not been cited on this point in Australia. However, the principle is sound, and cases make it clear that headings will be taken into account unless the parties have provided otherwise: see eg *Australian Olive Holdings Pty Ltd v Huntley Management Limited* [2010] FCAFC 76 at [62](h) and *Central Petroleum Ltd v Century Energy Services Pty Ltd* [2011] WASC 211 at [41]. Similarly, *Acts Interpretation Act 1901* (Cth), s13(1) provides headings will be taken into account as a matter of construction.

If your contract relies on headings to clarify certain parts of the contract, you should remove this sub-clause from the interpretation clause or, alternatively, amend the contract so that it no longer relies on headings for clarification or interpretation.

- (b) the singular includes the plural and vice versa
- (c) words that are gender neutral or gender specific include each gender

A provision that the singular includes the plural and vice versa is commonly included in interpretation clauses (as is a provision to support gender neutral drafting).¹⁰ The purpose of each sub-clause is to avoid clumsy drafting (eg expressions such as "*his or her*") and to avoid restrictive interpretations being adopted because an expression in the contract is confined to a singular, plural or particular gender when this is not intended.

- (d) where a word or phrase is given a particular meaning, other parts of speech and grammatical forms of that word or phrase have corresponding meanings;

This sub-clause mirrors a provision in the various *Interpretation Acts* relating to statutes.¹¹ The object of this sub-section is to ensure consistency between defined terms and other parts of general speech or grammatical forms of the defined word or phrase so that a court does not attribute different meanings to those derivatives.¹² This sub-clause also removes the need to specifically define all other "*parts of speech or grammatical forms*" of a defined word or phrase in the contract.

When drafting a contract, consideration should be given to any words that are not themselves defined, but which form part of general speech or another grammatical form of a defined word or phrase. If not a court is likely to interpret those non-defined words in-line with the definition of the associated defined word in the contract (particularly if you incorporate the phrase in sub-clause (d) above).¹³

- (e) the words "such as", "including", "particularly" and similar expressions are not used as, nor are intended to be interpreted as, words of limitation

This sub-clause prevents the use of the *noscitur a sociis* principle of interpretation (ie where a phrase in the contract employs a number of concepts that may to some extent overlap). The *noscitur a sociis* principle provides that the meaning of a word can be gathered from its associated words, meaning that a general word may be confined to mean something analogous to more specific words which are linked with it.¹⁴ For example, by using one of the connecting words stated in this sub-clause ("such as"; "including", "particularly" or similar expressions).¹⁵

There is ongoing debate about whether this rule of construction has much or any continued applicability given modern principles of interpretation. Given parties can contract out of this rule,¹⁶ the usual course in commercial contracts is to expressly exclude it by using a clause such as this one. This avoids any doubt about the rule's operation and also avoids the need to repeat concepts or provide clarification using the phrase "*including, but not limited to*".¹⁷

¹⁰ *Phoenix Commercial Enterprises Pty Ltd v City of Canada Bay Council* [2010] NSWCA 64 at [210].

¹¹ see eg s 18A *Interpretation Act 1901* (Cth).

¹² cf *Redland Shire Council v Stradbroke Rutile Pty Ltd* [1974] HCA 4 per Menzies J albeit discussing a different section of another Act; see *Jankovic v Minister of Immigration, Local Government and Ethnic Affairs* [1994] FCA 1316 at [21].

¹³ for an example of such a provision being used as an aid to interpretation see *Healthscope Limited v Symbion Health Limited* [2008] NSWSC 893 at [77] and [103], and on appeal *Healthscope Limited v Symbion Health Limited* [2009] NSWCA 191 at [38]-[60].

¹⁴ *Lend Lease Real Estate Investments Ltd & v GPT RE Ltd* [2006] NSWCA 207 at [30].

¹⁵ cf the *ejusdem generis* rule of interpretation, which is a sub-rule of *noscitur a sociis*. The *ejusdem generis* rule states that where there are general words following particular or specific words the general words should be confined to things of the same kind as those specified: see *Cody v J H Nelson Pty Ltd* [1947] HCA 17; (1947) 74 CLR 629. Here, the sub-clause is directed to phrases where the general words come first.

¹⁶ *Cody v J H Nelson Pty Ltd* [1947] HCA 17; (1947) 74 CLR 629 per Starke J.

¹⁷ It may be that the words do not suggest a limitation in any event (for example in *Pepper v. A-G (Qld)* [No 2] [2008] QCA 207 at [28] it was held that the phrase "in particular" was not an expression of limitation) but the sub-clause removes any doubt.

- (f) a reference to:
- (i) a person includes a natural person, partnership, joint venture, government agency, association, corporation, trust or other body corporate;
 - (ii) a party includes its agents, successors and permitted assigns;
 - (iii) a document includes all amendments or supplements to that document;
 - (iv) a clause, term, party, schedule or attachment is a reference to a clause or term of, or party, schedule or attachment to this [**deed/agreement**];
 - (v) this [**deed/agreement**] includes all schedules and attachments to it;
 - (vi) a law includes a constitutional provision, treaty, decree, convention, statute, regulation, ordinance, by-law, judgment, rule of common law or equity [*or a rule of an applicable Financial Market*] and is a reference to that law as amended, consolidated or replaced;
 - (vii) a statute includes any regulation, ordinance, by-law or other subordinate legislation made under it;
 - (viii) an agreement other than this [**deed/agreement**] includes an undertaking, or legally enforceable arrangement or understanding whether or not in writing; and
 - (ix) a monetary amount is in Australian dollars and all amounts payable under or in connection with this [**deed/agreement**] are payable in Australian dollars;

Sub-clause (f) gives defined and, in many cases, extended meanings to matters referred to in the contract. For example sub-clause (f) (ii) provides that a reference to a party includes a party's "*successors and permitted assigns*".¹⁸ As with many commercial agreements, the generic concept of a "*person*" is used as a convenient means of referring to any legal entity, natural or otherwise.¹⁹ However, the following matters should also be considered:

- sub-clause (f) (vi) extends the definition of a law to that law as "*amended, consolidated or replaced*". While such a clause is common, changes to the law after a deed or agreement are entered into may impact the parties rights and obligations and, therefore, this should be considered before this sub-clause is included
- the default currency in sub-clause (f) (ix) is Australian dollars. You should alter this where the transaction requires it (ie if you are dealing with a different currency).

- (g) an agreement on the part of two or more persons binds them [jointly and not severally/severally and not jointly/jointly and each of them severally]

Sub-clause (g) requires the drafter to select whether agreements on the part of two or more persons will bind them jointly (and not severally), severally (and not jointly), or jointly and severally. The distinction between these concepts has been described by Moynihan J as follows:

*A joint promise by two or more persons creates a single obligation incumbent upon both or all. A joint and several promise creates both a joint obligation on all and a number of several obligations respectively incumbent on each of the parties. The several obligations are not cumulative so that performance by one is performance by all.*²⁰

As stated above, solely several obligations are cumulative. They arise where two or more persons make separate promises to another person (whether under the same contract or different contracts). That is, payment or the fulfilment of the first promisor's obligations will not discharge payment or the fulfilment of the second promisor's obligations.

¹⁸ see *Rushton (Qld) Pty Ltd & Ors v Rushton (NSW) Pty Ltd & Ors* [2003] QSC 8 for an example of such a successors and assigns provision being applied.

¹⁹ *Australian Encyclopaedia of Forms & Precedents*, Commentary to Boilerplate Clauses at [63-20].

²⁰ *Re Broons* [1989] 2 Qd R 315 at 316; cited with approval by Reeves J in *Karingbal Traditional People Aboriginal Corporation v Santos GLNG Pty Ltd* [2011] FCA 1456.

- (h) no rule of construction applies to the disadvantage of a party because that party was responsible for the preparation of this [*deed/agreement*] or any part of it [**;** *and/.*]

This sub-clause is intended to negate at least one perceived view of the contra proferentem rule of construction. The Latin maxim “*verba cartarum fortius accipiuntur contra proferentem*” (contra proferentem) translates as “the words of documents are to be taken strongly against the one who puts [them] forward”.²¹

There are inconsistent lines of authority on exactly what construing a document *contra proferentem* means.²² Many cases state the rule as requiring an ambiguous term to be interpreted against the party who drafted it.²³ However, another view is that a promise should be construed contrary to the interests of the person who makes it, irrespective of who the drafter may have been.²⁴ Sub-clause (h) operates to prevent the document from being construed against the party who drafted it or part of it.

Courts generally regard the *contra proferentem* rule as a rule of last resort; that is, it should be used only if an ambiguity remains after the application of all other rules of contractual interpretation.²⁵ Clauses like sub-clause (h) are frequently included in commercial contracts because it is desirable to exclude the possibility of a provision of a contract being determined against the party who drafted it (ie particularly in circumstances where both parties are legally represented and where both parties have had the opportunity to review the contract and suggest amendments in negotiating its final form).

- (i) when the day on which something must be done is not a Business Day, that thing must be done on the [**following/preceding**] Business Day;
- (j) in determining the time of day where relevant to this [*deed/agreement*], the relevant time of day is:
- (i) for the purposes of giving or receiving notices, the time of day where a party receiving a notice is located
 - (ii) for any other purpose under this [*deed/agreement*], the time of day in the place where the party required to perform an obligation is located; [**and**]
- (k) a day is the period of time commencing at midnight and ending immediately before the next midnight is to occur; [**and**]
- (l) if a period of time is calculated from a particular day, act or event (such as the giving of a notice), it is to be calculated exclusive of that day, or the day of that act or event [**;** *and/.*]

Each of these sub-clauses clarify exactly when a particular day specified in the contract should fall to avoid uncertainty. Sub-clause (i) provides that if the day an act must be done is not a Business Day (as defined in the Dictionary), you must choose whether it is done on either the following or preceding Business Day. The appropriate selection may depend on the transaction (eg standard practice for banking transactions is for obligations to fall due on the following Business Day unless the following Business Day falls into the next calendar month, in which case the obligation falls due on the preceding Business Day).

Sub-clause (j) provides rules that deal with the situation where parties are in different time zones. This avoids a court having to construe the contract to determine which time zone is the one intended by the parties, if necessary, applying common law principles to compute the time.²⁶ Sub-clauses (j)(i) and (j)(ii) deal with giving

²¹ *North v Marina* [2003] NSWSC 64 per Campbell J at [58].

²² *Rava v Logan Wines & Anor* [2007] NSWCA 62 at [51].

²³ *North v Marina* [2003] NSWSC 64 at [71]; his Honour cites the cases to which he refers at [60] and [61].

²⁴ That view was embraced in *Commonwealth of Australia v Aurora Energy Pty Ltd* [2006] FCAFC 148 per North and Emmett JJ.

²⁵ See *Rava v Logan Wines & Anor* [2007] NSWCA 62 at [55], *MLC Limited v O'Neill* [2001] NSWCA 161 at [20] (Mason P, with whom Handley and Hodgson JJA agreed); *Ingham v ACN 000 333 844 Ltd (In Liq) (formerly known as Australian Casualty & Life Ltd) & Ors* [2006] NSWCA 63 at [6] (Giles JA with whom Handley and Santow JJA agreed) and further authorities cited in *North v Marina* [2003] NSWSC 64 at [77]. In *McCann v Switzerland Insurance* [2000] HCA 65 Kirby J said (at [74]) this was “because it is widely accepted that it is preferable that judges should struggle with the words actually used as applied to the unique circumstances of the case and reach their own conclusions by reference to the logic of the matter, rather than by using mechanical formulae.”

²⁶ See *White Cliffs Opal Mines Ltd v Miller* (1904) 4 SR (NSW) 150 for an example of the problems that can arise in the absence of an express clause about time zones.

or receiving notices in this context, and should be checked against any Notices clause in the contract to ensure consistency.

[Optional]

(m) If there is any conflict between the body of this [deed/agreement] and its schedules [and/or] attachments [or] [**specify any related documents eg Statement of Work, special conditions, specifications etc**], [the terms of the main body of this [deed/agreement] will prevail/the schedules or attachments will prevail in the following order: [**specify order**]].

This optional ranking clause allows the parties to determine the order in which the terms of particular documents will prevail in the event of a conflict with the contract. It can be used where there is a conflict between the body of the contract and its schedules (etc), or where the contract conflicts with another specified and/or related document.

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