

# ***Counterparts boilerplate clause***



# Counterparts boilerplate clause

## Need to know

This clause permits the execution of multiple copies of the same agreement or deed. It is prudent to include this clause if parties wish to execute multiple copies of the same agreement or deed in counterparts (ie because not all parties can sign in the same place and at the same time).

## The sample clause

*This [deed/agreement] may be executed in any number of counterparts, and this has the same effect as if the signatures on the counterparts were on a single copy of this [deed/agreement]. Without limiting the foregoing, if the signatures on behalf of one party are on different counterparts, this shall be taken to be, and have the same effect as, signatures on the same counterpart and on a single copy of this [deed/agreement].*

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

The purpose of a counterparts clause is to facilitate commercial arrangements where it may not be practical for every party to sign every copy of an agreement or deed, and to enable each party to retain an executed copy of the agreement which may then be produced as an original if required for evidentiary purposes or, in the case of real estate transactions, stamp duty.

A counterpart of a document is a copy. It is usually created:

- (a) to accommodate situations where parties are unable to execute a single document at the same time or place – because they may be, for example, located in different cities, countries, time zones or otherwise unavailable at the time of signing
- (b) so that each party may retain their own original.

Using a counterparts clause clarifies that:

- multiple copies of the same agreement or deed, known as counterparts, may be executed by the parties
- each signed copy will be treated as an original
- together the counterparts will comprise a single legal instrument.

The result is that each party retains an 'original' of the same agreement, executed by all parties, once the counterparts are exchanged.<sup>1</sup>

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<sup>1</sup> *Sindel v Georgiou* (1984) 154 CLR 661.

## 2 How effective is it?

### 2.1 Counterparts clauses are generally effective

A counterparts clause ensures that the intention of the parties to sign an agreement using counterparts is clear.

However, exchange of counterparts, whether there is a counterparts clause or not, will normally be enough to form a contract given that exchange generally constitutes acceptance.<sup>2</sup> Therefore, the inclusion of a counterparts clause is not strictly necessary.

Decisions involving counterpart clauses consistently apply the seminal case of *Sindel v Georgiou*,<sup>3</sup> which provides authority for the principle that a legally binding contract can be formed by the exchange of written documents, or ‘counterparts,’ each of which is considered an original.

As each counterpart may be treated by the court as an original document,<sup>4</sup> and as one deed or contract, the court is able to look at each counterpart to ascertain the proper construction of the contract.<sup>5</sup> It is therefore unnecessary to state that each counterpart when executed is an original, although to do so might be said to clarify the intention of the parties.

Barrett J in *Investmentsource Corporation Pty Ltd v Knox*<sup>6</sup> affirmed that swapping counterparts is a well-recognised method of exchanging contracts, particularly in conveyancing transactions. His Honour also said:

*“I am satisfied that the absence of a ‘counterparts clause’ (ie a provision expressly recognising that several parts may be executed are together to make up the agreement) does not detract from the reality that a contract was formed by the exchange.”*<sup>7</sup>

It is now well established that the exchange of counterpart identical contracts brings a binding contract into existence in land transactions.<sup>8</sup> The practice of exchange is also commonly followed in general commercial transactions<sup>9</sup> either to create a binding contract or to formalise contracts already binding.<sup>10</sup> It is also now recognised that any non-material discrepancy between the counterparts may be remedied through rectification and that a discrepancy does not defeat the intention of the parties to be bound in committing to an exchange.<sup>11</sup>

The principal document and counterparts need *not* be executed at the same time to be effective.<sup>12</sup> When all parties execute each document, each document is considered equally to be the principal (except in the context of leases where the principal lease executed by the lessor and retained by the lessee will be presumed to be the correct version as explained below).<sup>13</sup>

If using a counterpart, it is important to ensure that there are no rules affecting the execution of the instrument for other purposes, for example copies for stamping or registration (see further discussion below).

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<sup>2</sup> *Investmentsource Corporation Pty Ltd v Knox* [2002] NSWSC 710.

<sup>3</sup> (1984) 152 CLR 661.

<sup>4</sup> *Colling v Treweek* (1827) 6 B&C 394.

<sup>5</sup> *Matthews v Smallwood* [1910] 1 Ch 777.

<sup>6</sup> [2002] NSWSC 710.

<sup>7</sup> *Ibid* [27].

<sup>8</sup> *Harrison v Battye* [1974] 3 All ER 830; [1975] 1 WLR 58 at 60 per Lord Denning MR (Cairns and Sir Erich Sachs JJ concurring). See also *Iannello v Sharpe* (2007) 69 NSWLR 452; [2007] NSWCA 61 per Hodgson, Santow and Basten JJA and *Adicho v Dankeith Homes Pty Ltd* [2012] NSWCA 316 per Meagher JA at [17] (Sackville and Tobias AJJA agreeing) and the authorities there cited including *Sindel v Georgiou* (1984) 154 CLR 661.

<sup>9</sup> Butterworths Encyclopaedic Australian Legal Dictionary, Exchange of Contracts.

<sup>10</sup> Which will depend on when the parties intend to be bound: see *Masters v Cameron* [1954] HCA 72; (1954) 91 CLR 353.

<sup>11</sup> *Sindel v Georgiou* (1984) 154 CLR 661.

<sup>12</sup> *Fryer v Coombs* (1840) 113 ER 468.

<sup>13</sup> *Matthews v Smallwood* [1910] 1 Ch 777.

Other considerations in relation to formation where counterparts are used include:

- when assessing whether there is a material difference between two counterparts, the court can consider the cumulative effect of the differences between the documents<sup>14</sup>
- in order for the exchange of documents to successfully create a binding agreement, all substantial respects of the exchange must be correctly carried out.<sup>15</sup>

## 2.2 What happens if I don't use it?

Provided there is an exchange of the counterparts (or other clear communication of acceptance), execution can be achieved without an express counterparts clause. However, in the property context, most States and Territories have standard-form contracts for the sale of land which prescribe distinct procedures for the exchange of documents which must be followed.<sup>16</sup>

## 2.3 Counterpart clauses and deeds

Parties will ordinarily be bound upon their due execution of a deed. This means that a party signing an intended counterpart will be bound without exchange of counterparts and without execution by all other parties.<sup>17</sup> Risks associated with this can be managed through:

- the use of an escrow deed, so that the delivered deed is only to take effect upon the happening of a specified event or upon condition that it is not to be operative until some condition is performed<sup>18</sup>
- by expressly noting in the instrument that the deed is not delivered (and will not be binding on the parties) until all parties have executed it, including all signatories required for execution by a company.

## 2.4 Position where inconsistency between counterparts

Where the counterparts are not identical and a dispute arises as to which version of the agreement is binding or, indeed, whether a binding agreement exists at all, the case law presupposes that a principal agreement is distinguishable from the counterparts and in this case:

- with respect to leases, the principal agreement will prevail unless there is an obvious mistake
- discrepancies may be remedied through rectification since the parties' intention to be bound is demonstrated in the exchange,<sup>19</sup> (although the remedy of rectification is not a pre-requisite for finding that a contract is binding)<sup>20</sup>
- where the discrepancy is material, it will be impossible to establish a meeting of the minds sufficient to form a contract.<sup>21</sup>

If the original and counterpart are inconsistent, the original document prevails unless there is an obvious mistake or ambiguity when both copies are compared.<sup>22</sup> Formerly, the view was that each counterpart must be

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<sup>14</sup> *Zaccardi v Caunt* (2008) 15 BPR 28,403.

<sup>15</sup> *Lee v Ross* (2003) 11 BPR 20,975.

<sup>16</sup> *Investmentsource Corporation Pty Ltd v Knox* [2002] NSWSC 710.

<sup>17</sup> An intention to be bound by the deed will sufficiently constitute "delivery" even though the deed is not physically delivered: see *400 George Street (Qld) Pty Ltd and Ors v BG International Ltd* [2010] QCA 245.

<sup>18</sup> See eg *Mirzikian v Tom & Bill Waterhouse Pty Ltd* [2009] NSWCA 296 at [39].

<sup>19</sup> *Sindel v Georgiou* (1984) 154 CLR 661.

<sup>20</sup> *Zaccardi v Caunt* (2008) 15 BPR 28,403.

<sup>21</sup> *Matthews v Smallwood* [1910] 1 Ch 777; this appears to be so even if the difference is not discovered until much later and parties have assumed that there was a binding contract (*Andruse Pty Ltd v Bray* (1970) 2 NSW 525).

<sup>22</sup> *Burchell v Clark* (1876) 2 CPD 88.

identical at exchange to be valid, but it is now acknowledged that a discrepancy may be remedied through rectification and it does not defeat the intention of the parties to be bound in committing to an exchange.<sup>23</sup>

Rectification reforms the document not the contract made and, as such, it applies generally to documents, contractual or otherwise.<sup>24</sup> It is an equitable remedy associated with mistake. The object of the order given by the court is that an instrument is rectified or reformed so that the common mistake in it will be eliminated.<sup>25</sup> The decision of *Hayward v Planet Projects Pty Ltd*<sup>26</sup> provides an example of the application of principles of rectification involving a counterpart and the surrounding case law.

Where the respective contractual documents do not perfectly correspond, it is a matter of objectively construing documents to determine whether a binding agreement can be inferred despite the lack of consistency between the formal parts.<sup>27</sup> If there is a manifest discrepancy between the principal document and the counterpart, the principal document will prevail unless both are considered “principal” documents or duplicates, in which case both are equal in effect and the court will need to determine what the true agreement was and in doing so the counterpart may inform the decision.<sup>28</sup> Allsop P in *Zaccardi v Caunt*<sup>29</sup> considered counterparts that differed in a material respect. His Honour stated that the correct interpretation of *Sindel* on this point is that the availability of rectification is not a pre-requisite to find that the contract is actually binding.

Where a party remains unaware of a material discrepancy between the counterparts, it is impossible to suggest that an adequate meeting of the minds ever occurred, and therefore no contract could be formed.<sup>30</sup>

See below for how, practically, to manage the risk of inconsistency between documents, especially in a digital environment.

## **2.5 Counterparts and the requirement for “exchange” in land transactions**

In NSW, contracts for the sale of real estate have been held to be presumed to be non-binding without an exchange of written contracts.<sup>31</sup> This follows ordinary conveyancing practice in NSW and a similar presumption may arise in other Australian jurisdictions.

## **2.6 Counterparts and special rules for leases**

Where duplicate copies of a lease are executed, the document executed by the lessor and retained by the lessee is the original and the other copy retained by the lessor is a counterpart,<sup>32</sup> although each duplicate is as effective as the other.<sup>33</sup> The counterpart, as an inferior reference in this case, must yield to the principal document in any case of inconsistency between them.<sup>34</sup> However, the counterpart can still be used to correct any ambiguity in the principal instrument.<sup>35</sup>

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<sup>23</sup> *Sindel v Georgiou* (1984) 152 CLR 661.

<sup>24</sup> *United States v Motor Trucks Ltd* [1924] AC 196.

<sup>25</sup> *Halsburys' Laws of Australia* [110-5565].

<sup>26</sup> [2000] NSWSC 1105.

<sup>27</sup> *Sindel v Georgiou* (1984) 154 CLR 661.

<sup>28</sup> *Lidsdale Nominees Pty Ltd v Elkharadly* [1979] VicRp 10; [1979] VR 84 at 86; *Burchell v Clark* (1876) 2 CPD 88 at 94.

<sup>29</sup> (2008) 15 BPR 28,403.

<sup>30</sup> *Longpocket Investments Pty Ltd v Hoadley* (1985) 3 BPR 9606 and *De Jong v Carpenter* (1982) 2 BPR 9524.

<sup>31</sup> *Hearse v Staunton* [2010] NSWSC 954 (affirmed by *Hearse v Staunton* [2011] NSWCA 139).

<sup>32</sup> *Matthew v Smallwood* [1910] 1 Ch 777 at 783-4.

<sup>33</sup> *Lidsdale Nominees Pty Ltd v Elkharadly* [1979] VicRp 10; [1979] VR 84 at 86; *Colling v Treweek* (1827) 6 B&C 394 at 398.

<sup>34</sup> *Butterworths Encyclopaedic Australian Legal Dictionary*, Counterpart

<sup>35</sup> *Matthews v Smallwood* [1910] 1 Ch 777.

## 2.7 Counterparts and special rules for dutiable property

In order to be used in law or equity or to be admissible as evidence in a court, an *original* document relating to dutiable property and/or a dutiable transaction must be marked (stamped) by the relevant authority in the applicable State or Territory.<sup>36</sup> In this context:

- dutiable property is defined differently between the States and Territories but generally includes land, shares, business assets and units in a trust<sup>37</sup>
- a dutiable transaction is again variously defined but generally refers to the transfer of dutiable property or some interest such as a partnership interest.

In general terms, if a dutiable transaction is evidenced with a document and also a duplicate or counterpart for another party to retain, the counterpart is considered the inferior copy for the purpose of duties. The general rules are as follows:

- a duplicate or counterpart is not usually stamped and an additional nominal duty is payable on the counterpart when it is proved to the satisfaction of the stamping authority in the relevant State or Territory that the proper duty has been paid on the original instrument of which it is the duplicate or counterpart.
- secondary evidence will not ordinarily be received of the contents of an unstamped document when the original is in existence.<sup>38</sup> There are some exceptions to this rule (eg s 304 of the *Duties Act 1997* (NSW) permits unstamped documents to be admitted into evidence where the person producing the document is not liable for payment of the duty and identifies the party liable).

It has been observed that where there are two or more counterparts, double stamp duty will not be required on the executing instrument, and in conveyances, duty is only payable on the document that the parties have determined will be the principal instrument for stamping purposes.<sup>39</sup>

## 3 Drafting or reviewing the clause

### 3.1 About the sample clause

The sample clause is a standard clause and is representative of those widely used in contracts throughout Australia and other common law jurisdictions.

### 3.2 When can or should I amend the clause?

Counterparts clauses are fairly standard and neutral in effect and so there is normally no need to amend them.

## 4 Other practical considerations

### 4.1 Executing digital and non-digital agreements by counterparts

Counterparts of a contract should contain identical terms and identical attachments/annexures. Where non-dutiable property is concerned, to minimise the risk of inconsistency between final agreements, particularly in a digital environment, consider taking the following steps prior to execution:

- agree on a process for document control during negotiations and amendments

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<sup>36</sup> *Duties Act 1997* (NSW) s299; s304; *Duties Act 2000* (VIC) s272; *Duties Act 2001* (QLD) s252(2); s258(2)(a), (c), s262(1)(a), (b), s455A(1)(b), s455(1)(c), s455(4), s487, s491(1), s492, s494, Sch 6; *Stamp Duties Act 1923* (SA) s22; *Stamp Act 1921* (WA) s27; *Duties Act 1999* (ACT) s250; *Duties Act 2001* (TAS) s246; *Duties Act 2008* (WA) s279.

<sup>37</sup> *Duties Act 1997* (NSW), s11; *Duties Act 2000* (Vic), s10; *Stamp Act 1921* (WA), s16; *Duties Act 2001* (Qld) s10; *Duties Act* (Tas) s9; *Stamp Duties Act 1923* (SA) s4; *Stamp Duty Act* (NT), s4; *Duties Act 1999* (ACT) s10.

<sup>38</sup> *Dent v Moore* (1919) 26 CLR 316.

<sup>39</sup> *Duties Act 1997* (NSW) s18.



- ensure that the final contract is clearly marked and dated as the final version for execution (eg “*Execution Version 16 September 2013*”)
- check that the copies of the agreement or deed exchanged by the parties are identical, including any annexures/attachments
- where the nature of delivery of the final version for execution is digital (eg by email or data exchange server):
  - consider encrypting the file to minimise the risk of modification, and ensure any email notification is sent to the addressee’s designated email address for that purpose; and
  - ensure the email itself clearly communicates that the attached or linked file is in the agreed final form for execution and designate the email address either for return of the executed counterpart or notification that the executed counterpart has been uploaded to the data exchange server.

## 4.2 “Split” executions

A “split” execution occurs when two people who are required to sign a deed or agreement on behalf of one party both sign on different copies of the same document, usually because they are in separate locations. For example, s127(1)(a) of the *Corporations Act 2001* (Cth) provides that a company may execute a document if it is signed by two directors. A statutory presumption of due execution will arise pursuant to s129(5) of that Act if the document appears to have been executed pursuant to s127(1).

There is an issue as to whether a split execution will fall within the references to “a document” and “the document” in s127 and s129 of the Act respectively given that the signatures are on separate copies of the document.

PwC’s position is that a split execution will fall within the statutory requirements. Although the matter is not free from doubt, that position reflects a purposive reading of the relevant sections, and is consistent with the only authority which currently addresses the issue.<sup>40</sup>

To cover the situation where a party or parties will be executing by split execution, the firm recommends including the following wording (also included in the sample clause above): *Without limiting the foregoing, if the signatures on behalf of one party are on different counterparts, this shall be taken to be, and have the same effect as, signatures on the same counterpart and on a single copy of this [agreement/deed].*

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<sup>40</sup> The only case to consider the issue is *Re CCI Holdings Ltd* [2007] FCA 1283.





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