

BROKERWISE



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BW / Contractual Indemnities & Insurance - Trips & Traps

W hat is a contractual indemnity?

A contractual indemnity is a term for a contract or agreement between two parties in Con

The contractual indemnity term is usually express and in writing, although in some cases a term can be implied through a course of conduct or to give the contract business efficacy. The courts have held that the interpretation of contractual indemnities will be approached in the same way as any other clause in the contract, save that if there is an ambiguity after applying the rules of contractual construction, the clause will be interpreted strictly against the party seeking to rely on it (or contra preferentem).

There are a number of different standard contractual indemnities in wide use, for instance:

- (a) bare indemnities - where one party indemnifies the other for and against all losses incurred by the other, without stating limitations;
- (b) reverse indemnities - where one party indemnifies the other for and against losses, including as a result of the latter party's acts or omissions;
- (c) proportionate indemnities - where one party indemnifies the other for and against losses, except those arising from the latter party's own negligence.

A proportionate indemnity usually means that liability lies where it falls and will not impact on the apportionment of liability that would arise, in the absence of the contract, at common law.

How will a contractual indemnity be applied?

Even subtle differences in the words and phrases used in contractual indemnities can have a huge impact on the way in which the court will interpret and give effect to them. Contractual indemnity clauses are interpreted according to the rules of contractual construction; including the rule that contracts must be read as a whole.

A clause contractually assigning liability is often accompanied by a clause imposing insurance obligations. There is a risk that a contractual indemnity will be read down or construed narrowly so that it corresponds with the insuring clause.

For example, an indemnity that may otherwise be total or complete may be read down so that it corresponds with the obligation that each party obtain their own insurance for their own liability.

Can you contract out of liability in Queensland?

In Queensland, you can contract out of liability via a carefully crafted contractual indemnity clause, which:

- (a) assigns your liability to the party you are contracting with for and against damage howsoever arising, even from your own negligence, misconduct or breach of contract;
- (b) contracts out of your liability for damage to a third party; and/or stipulates that the party you are contracting with must insure you for your liability to that party or a third party for damages arising from your negligence etc.



(c) However, since the advent of the proportionate liability scheme in Queensland under the Civil Liability Act 2003, the contractual indemnity will not apply to your liability for property damage or consequential loss.

The proportionate liability regime, which cannot be contracted out of in Queensland, means that your liability will be determined according to the extent to which you are found liable for the damage at common law.

Will insurance cover a contractual indemnity?

Standard occurrence based public liability policies contain a 'contractual liability exclusion', which excludes any liability you have assumed under contract beyond that which would otherwise arise at common law.



If you are giving away a contractual indemnity, you must ensure that your policy of insurance does not include a contractual liability exclusion or other terms that will exclude any claim on that indemnity from cover.

Likewise, if you are the recipient of an indemnity, it would be prudent to ensure that the indemnifier has insurance cover in place or sufficient means to satisfy the indemnity. If the indemnifier does not have insurance or means, under the principle of joint and several liability, the liability will vest back in you.

Before you sign anything, it is recommended that you contact us (your broker) or your legal advisor.

Take away tips!

Not every contractual indemnity is created equal. Minor differences in words and phrases can have a major impact on how the indemnity will be interpreted by the court- seek advice!

Contractual indemnities may be read down, particularly if insuring clauses are not consistent with the indemnity.

If the indemnity is not effective, or there is no means or insurance behind the indemnifier to meet the indemnity, liability will revert to the indemnified.

Whether you are on the giving or receiving end of a contractual indemnity, make sure there is insurance behind it.



BW / Brokers Add Real Value At The Time Of a Claim

The key roles of a broker are to help identify and manage risks on your behalf, and to arrange and place appropriate cover.

However, the true value of a broker is never fully appreciated or understood until you have a claim.

Many businesses fail following a significant loss usually due to two things – inadequate or inappropriate cover prior to the loss and a lack of knowledgeable assistance to deal with an insurance claim.

After a major loss, many people feel as though they are on their own when trying to deal with an insurance company, unless they have a good insurance broker to help them through the process. From lodging the claim to negotiating settlement, a broker won't stop working for you until your claim is finalised.

Generally, an insurance broker will act as an advocate for their clients. However, some brokers may have an arrangement with an insurance company that changes this relationship. If this is the case your broker will have told you this when you bought the policy. In these instances, the broker is acting on behalf of the insurance company.

In all other instances an insurance broker is acting on your behalf and should ensure the best possible outcome for you.

This is achieved by:

- monitoring each claim to minimise disruption and ensure efficient handling of documentation,
- applying their experience and expertise in successful claim negotiations with Insurers.
- ensuring their clients are regularly updated on the progress of all claims.

Your broker will maintain close contact with you and your insurer from the time of the reported claim through to settlement.

The process adopted for claims management should include:

- Notification - prompt notification of claims to relevant insurers
- Investigation and Negotiation- Assistance in negotiating with underwriters and third parties
- Settlement - Processing of all due payments.

Contact us to find out exactly what claim service is available to you.



BW / Travel Safe - What You Need To Know

Passport - check. Clothes - check. Medications - check. Smartphone - check. You've got all of the above, but what about travel insurance?

Travelling overseas can be a fantastic adventure - but you shouldn't do it without first having a travel insurance policy in place.

Not all travel policies are the same with many policy limitations that sometimes aren't as obvious until it's too late. It's vitally important to ensure that you're purchasing a policy that is adequate for where you are going together with coverage for activities that will be undertaken.

Many activities are not included in the "standard" policies for example moped-riding, off-piste skiing, caving or certain underwater activities may be excluded or have policy limitations imposed. Be careful to ensure that any activities you intend to undertake are covered prior to your departure.

Another point to consider is the limit of medical assistance your policy will respond to. Some policies exclude cover for pre-existing medical conditions, even if you have your doctors permission to travel. In most circumstances, these medical conditions do not need to be disclosed at the time of taking out the cover, but you may find the policy will not respond when it comes to claim time due to cover limitations, leaving you with potentially significant out of pocket expenses.

Further, you should also make a point of looking up the Government's smart traveller website to check the "safety status" of the country you intend visiting. This official site classifies countries according to travel safety and, of course, in many parts of the world this is volatile and subject to constant change.

The highest warning the Government issues is its "Do Not Travel", which advises against travel to certain destinations. Some current "Do Not Travel" warnings include countries such as Syria, Afghanistan, Iraq, South Sudan and Yemen. Be aware that if you travel to countries against advice, your travel insurance will most likely be voided. A few countries are on a "Reconsider your need to Travel" list. While your travel insurance will usually provide coverage in this case violence, political unrest and terrorist activities can escalate quickly, and may force the Australian Government to upgrade its warning to "Do not Travel".

To ensure that you have the appropriate travel insurance its prudent to discuss your requirements with us, so we can tailor a policy accordingly and arrange well prior to your departure date.



“ Common sense is genius dressed in its working clothes.”
– Ralph Waldo Emerson –

BW / Brokers Add Real Value At The Time Of a Claim

An insurance broker, an administration clerk and their manager are walking to lunch when they find an antique oil lamp. They rub it and a genie comes out in a puff of smoke. The genie says, “I usually only grant three wishes, so I’ll give each of you just one.” “Me first! Me first!” says the admin clerk. “I want to be in the Bahamas, driving a speedboat, without a care in the world.”

Poof! She’s gone.

In astonishment, “Me next! Me next!” says the sales rep. “I want to be in Hawaii, relaxing on the beach with my personal masseuse, an endless supply of piña colodas and the love of my life.”

Poof! He’s gone.

“Ok, you’re up,” the genie says to the manager. The manager says, “I want those two back in the office after lunch.”

Let your boss have the first say...

THANKS FOR READING!

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