



## Managing Risk and Liability through Insurance

### Introduction

When public sector agencies purchase goods and services under contract they are required to operate in a framework of good governance and accountability. Managing legal risk is an essential component of these requirements. Indemnities and insurance are key ways public sector agencies can manage legal risk.

In this paper, we focus on what you need to consider when dealing with indemnities in government contracts and the pitfalls that you need to be aware of when negotiating and drafting these provisions.

### Features of an indemnity

An indemnity is a promise to hold a person harmless in relation to a particular event. The most common indemnity is found in an insurance contract, whereby an insurer promises to indemnify a party against an event.

An indemnity provision is akin to an insurer; anyone who provides indemnity accepts the responsibility for an event, similar to an insurer.

Unlike a guarantee, an indemnity is a primary obligation and is not contingent on the default of another party.

Indemnities are subject to the general law of contract.

### Types of indemnity

Common forms of contractual indemnities include:

*Third party indemnity* - the indemnifier agrees to cover the indemnified party for loss caused by a third party.

*Party-party indemnity* - the indemnifier agrees to cover the indemnified party in respect of a breach of duty by the indemnifier.

*Default indemnity* – operates as an exclusion of liability whereby the indemnifier agrees to indemnify for a breach by the indemnified.

Each kind of indemnity serves a different purpose and they are not mutually exclusive.

### Indemnity vs release

An indemnity differs from a release. A release is a promise by a party that it will not exercise legal rights against the other party. A release may also be referred to as a waiver or surrender of the entitlement to exercise legal rights.

### Advantages of indemnity

You may be wondering why it is necessary for a contract to include indemnity provisions and why not rely on rights at law to deal with legal liability arising between the parties.

There are three key benefits for having an indemnity in a contract:

- First, the indemnified party does not have to be found to be in default to be able to call upon the indemnity.<sup>1</sup>
- Second, it is not necessary for the indemnified party to incur the expense of paying out a claim before calling on the indemnity.

- Third, an indemnity can provide more certainty for government in relation to management of risks as entitlement is governed by the terms of indemnity and not through the legal rules that apply to entitlement and assessment of damages.

### **Appropriate form of indemnity**

Given that an indemnity requires the party giving it (indemnifier) to accept responsibility for the event, an indemnity is a powerful risk management tool and is likely to be the subject of intense negotiation between the parties. In considering what form of indemnity is appropriate for a particular contract, it is necessary to consider the following:

- Risks of the project.
- The Party best placed to manage those risks.
- Insurance available in the market place for the contractor to insure against the risk that government wants to allocate to the contract.

As a minimum requirement, the contract should include party-party and third party indemnities against claims and liability arising from death or injury to person, loss or damage to property, economic loss and any claim or loss arising from a breach of contract.

### **Insurance relevant**

The willingness of the other party to agree to the terms of the indemnity will to some extent depend on the cost and availability of insurance.

A broad and comprehensive indemnity is of limited use if the indemnifier has no insurance or does not have sufficient assets to satisfy the obligations of the indemnity.

A simple indemnity that requires the indemnifier to be responsible for negligence, unlawful, reckless, deliberate or wrongful acts or omissions generally will not cause insurance issues as the liability is no greater than at common law.

### **Indemnity must be clearly drafted**

Indemnities can be complex, and care needs to be taken in drafting them so that the terms clearly reflect what the parties have agreed. Categories of damage, the range of acts and the parties must be clearly outlined.

The litigation concerning the indemnity provisions in the contract between Brambles Ltd and Andar Transport Pty Ltd demonstrates how ambiguous drafting in an indemnity clause can create problems for the parties. The indemnity in the contract was considered in legal proceedings in the County Court of Victoria,<sup>2</sup> the Supreme Court of Victoria, Court of Appeal<sup>3</sup> and finally, the High Court of Australia.<sup>4</sup>

#### ***Andar Transport Ltd v Brambles Ltd***

Andar was contracted to Brambles to provide laundry services by employing drivers to load, deliver and unload hospital linen on delivery rounds as directed by Brambles. Mr Wail, a director of Andar and employee driver of Andar was injured whilst unloading linen on trolleys supplied by Brambles and sued Brambles for failing to provide safe trolleys.

Clause 8.2 of the contract contained an indemnity in favour of Brambles as follows:

8.2.2 Loss, damage, injury or accidental death from any cause to property or person caused or contributed to by the conduct of the delivery round by Andar.

8.2.3 Loss, damage, injury or accidental death from any cause to property or person occasioned or contributed to by any act, omission, neglect or breach or default of Andar.

Brambles joined Andar as a third party and sought to rely on the indemnity, or alternatively, contribution under the *Wrongs Act 1958*. Brambles claimed the effect of the indemnity was that Brambles was indemnified for its own negligence (a default indemnity). The trial judge dismissed Brambles' claim.

Brambles appealed to the Court of Appeal which held that the indemnity indemnified Brambles against all sums payable by Brambles in the legal proceedings brought by Mr Wail. The Court held that Brambles was entitled to a contribution under the *Wrongs Act 1958* but that the indemnity made it unnecessary to consider the claim further.

Andar appealed to the High Court on the basis that the indemnity was limited to covering Brambles against vicarious liability, which Brambles might incur against third parties, and did not include Brambles' negligence against drivers such as Mr Wail. The majority held that:

- Clause 8.2.2 or 8.2.3 did not expressly provide that Andar would indemnify Brambles for injuries suffered by Andar employees
- Clause 8.2.2 was limited to liability arising in connection with the conduct of the delivery round by Andar
- Clause 8.2.2 was referring to a person other than Andar
- The indemnity provisions were ambiguous and that the interpretation rule that any ambiguous contractual provisions should be read in favour of the indemnifier.<sup>5</sup>

The court found that Andar was liable to make a contribution under the *Wrongs Act 1958*.

### **Appropriate exclusions to indemnity**

Under 'value for money' procurement requirements, government takes responsibility for risks which it can manage at a cheaper cost. These are generally risks over which the government party has some control.

Appropriate exclusions in a government contract include fraudulent, negligent or wilful acts or omissions on the part of the government party or a breach of the contract.

In some instances it may also be appropriate for force majeure events to be included as an

exclusion in the indemnity and for liability to be capped for a specified sum of money.

Care also needs to be taken in drafting exclusion provisions. In the Brambles and Andar contract, the indemnity provisions did not specifically state that the negligence of Brambles was an exception to the indemnity given by Andar. Had this been specifically stated, the meaning of the indemnity would not have been the subject of legal proceedings.

### **Proportionate liability**

In considering the form of indemnity to be included in the contract indemnity provisions, regard also needs to be had to the proportionate liability provisions in Part IVAA of the *Wrongs Act 1958*.

Proportionate liability means that where there is more than one person who has independently or jointly caused the plaintiff's loss, each person (concurrent wrongdoer) has their liability limited to the proportion of the loss they actually caused.

The proportionate liability provisions apply to claims for economic loss or damage to property in an action for damages, whether in tort, contract or under statute but not to personal injury.

### **Uncertainty in Victoria**

A significant degree of uncertainty surrounds the practical operation of Part IVAA provisions, which creates an added difficulty for indemnities.

Section 24AI of the *Wrongs Act 1958* provides that a concurrent wrongdoer's liability is limited to the amount reflecting the proportion of the loss or damage claimed having regard to that wrongdoer's contribution.

If an indemnity has been given under a contract, and proceedings instituted, a contractor may claim that it is only proportionally liable as a concurrent wrongdoer for the extent of its responsibility to the loss or damage incurred. Where the

contractor has a number of subcontractors, an effect of the Part IVA is that the contractor would push liability down to the subcontractors and other parties involved in the project. It would be a question of fact as to whether or not a contractor would be a concurrent wrongdoer and this will depend on the extent of the contractor's involvement in actually performing the works.

Unlike the legislation in New South Wales, Western Australia and Tasmania, there is no express provision in Victoria that enables the parties to contract out of the legislation.

### **Suggested provisions for inclusion in a contract**

To ensure that the benefit of an indemnity is not displaced by s 24AI, VGSO recommends that a provision be included in contracts to the effect that the contractor agrees and understands that for the purposes of s 24AI, the contractor is entirely responsible for any failure to take reasonable care on the part of its subcontractors, consultants or other persons acting in connection with the contract, whether or not acting under the contractor's direction, supervision or control.

To date, there has been no consideration by the courts on the interpretation on Part IVA of the *Wrongs Act 1958* that gives guidance as to whether the courts would take such a provision in the contract into account. However, such a clause may make it more difficult for a contractor to claim that s 24AI applies to reduce its exposure.

### **Conclusion**

The entire contract, including the indemnity and insurance provisions needs to be considered as a whole in considering the transaction in question and risk allocation between the parties. The areas of indemnity and insurance are complex and the provisions in a contract need to be considered and drafted carefully to ensure that they are appropriate for that transaction and meet the requirements of government.

The issues discussed in this seminar are matters that need to be considered, by a government party when entering into

contracts, keeping in mind that each transaction is different and the provisions of the contract will need to be tailored to meet the individual requirements of that transaction.

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<sup>1</sup> It used to be the case at common law that default to the indemnified person was required before the indemnifier was required to pay. Equity law developments mean that now payment is not required the indemnified party can enforce the contract and require payment under the indemnity, unless the contract provides otherwise.

<sup>2</sup> *Daryl Wail v Brambles Ltd* (2000) in the County Court of Victoria before his Honour Judge Kent.

<sup>3</sup> *Brambles Ltd v Wail; Brambles Ltd v Andar Transport Pty Ltd* (2002) 5 VR 169.

<sup>4</sup> *Andar Transport Pty Ltd v Brambles Ltd* [2004] HC 28.

<sup>5</sup> *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549.

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