



Tipsheet 4 Public Liability Policies – Tips & Traps for Contracts

Client Version
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What are the key issues for you when you agree to place public liability insurance in a commercial contract?

Purpose of public liability insurance

Public liability insurance insures against legal liability for property damage and/or personal injury suffered by a third party person arising from the acts or omissions of the insured (whether due to negligence or otherwise).

Public liability cover can also be found in “broadform”, general liability, employer’s liability and other specific policies for aviation, IT, transport, goods in transit/cargo, contract works, environmental and other risks.

Although some policy terms are similar to professional indemnity policies – a public liability policy has a very different purpose and can have very different exclusions and conditions.

You may be asked to arrange public liability insurance to comply with a commercial contract you have entered into - including a lease, licence agreement, construction contract, subcontract, supply agreement, loan agreement, services contracts, manufacturing contract and many others.

There are some common areas where a commercial contract may conflict with the terms of your public liability insurance policy.

Business descriptions in the policy schedule

If the description of your business activities is incorrect or too narrow, the insurer can easily deny the claim. It is important to check the services to be provided under a contract and

contact your broker to discuss with them whether those activities come within the business description in your policy.

It is also important to keep your broker informed of any changes to their business activities. Even the slightest change to business operations might render a public liability insurance policy ineffective to meet a claim.

Exampleⁱ: A client told their broker that the business was manufacturing drilling equipment and mid-term the client began to fabricate underground re-fueling stations. The client didn’t tell their broker about the change - this is a monumental change to the risk profile and the insurer did not agree to insure the client!

Exampleⁱⁱ: A client held a farm insurance pack which also had public liability insurance. The client wanted to use the policy to cover tourism activities (eg farm stay). The farm pack policy did not cover these activities without an extension from the insurer.

A full copy of the contract should be given to your broker so they can assess the services you have agreed to provide under contract and work out whether the scope of those services comes within the business description in your policy schedule. This also allows your broker to make changes to the policy by contacting the insurer to add to or vary the services covered in that business description.

Naming other contracting parties on the policy

Insurers can be reluctant to “name” a person (or principal) on a policy unless they can collect adequate underwriting information about the principal and the project/contract to

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ascertain the risk profile and to calculate premium. Often there will be an additional charge for this.

Sometimes a principal might ask to be treated as a joint insured or a co-insured and this type of status is similar to “named insured” status.

This can be expensive and sometimes insurers will not permit this except for insureds with high limits of indemnity. It is not always in your best interests to name the other contracting party on their policy.

Often a better alternative to allowing the principal to be ‘named’ or jointly insured on your policy is to obtain principal’s liability cover. The insurer provides cover for the principal for any liability that they may incur as a result of the work you perform. This is known as ‘principal’s liability’.

Many public liability insurersⁱⁱⁱ provide this cover automatically or on request by the insured (in which case the name of the principal will be shown in your client’s policy schedule).

Ask your broker for more information about the differences between “named insured” and interested party status^{iv}.

Assuming responsibility for others (indemnities)

Some contractual indemnities are very broad, requiring you to assume liability for loss or damage that is not within your reasonable control.

Some indemnities are so broad that they extend to loss or damage:

- not actually caused by the insured; or
- caused by a person that the insured is not usually responsible for at law; or
- that occurred when the insured was “on site” but wasn’t actually caused by the insured.

Example^v: “The Contractor will indemnify the Principal against any liability, loss, damage, claim, suit, action, demand, expense, proceedings of whatsoever nature whether arising under statute or common law in respect of:

- (i) personal injury (including illness and disability), or death of any and all persons;*
- (ii) loss or destruction of or damage to or loss of all property real or personal (including but not limited to the property of the Principal),*

arising from the Contractor’s presence on the site or, out of or, in the course of or, caused by the execution, performance or purported performance of work under the Contract or other obligations hereunder directly or, indirectly associated therewith.”

Very broad indemnities will almost always trigger the ‘assumed liability’ or ‘contractual liability’ exclusion in a public liability policy especially if the indemnity clauses in the contract do not provide for proportionate liability. If this happens, it is unlikely that you will be covered for the entire amount of a claim made by the principal in reliance on the indemnity in the contract.

Getting the right legal advice on whether claims made under the indemnity will be covered by insurance is vital to avoiding the risk of uninsured losses. If they will not be protected by the insurance, the principal is usually more willing to change the indemnity clause.

Your broker can help you access specialist legal advice on your contracts which can help you to ‘align’ the contractual indemnities with your legal liability and the cover provided under your policies.

Having a contract “noted” on the policy

It is common practice for insureds to request that a contract be “noted” on the policy. It is a complete fallacy that this leads to automatic coverage for the indemnities provided and other clauses under the contract.

If the policy would not have covered the contractual obligation or indemnity in the first place, merely noting the contract will not make the insurer liable to pay a claim that is made against you.

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The only way to amend the terms of the policy is for your broker to negotiate with the insurer to have the policy endorsed. Any endorsement under which you seek to have a contract “designated” should be carefully drafted to ensure that the assumed liability or contractual liability exclusion does not operate in relation to the contract.

In many cases, the insurer will not agree to do this unless the indemnity clauses are reasonable, ie not too broad. Generally, the indemnity in the contract needs to be consistent with your liability at law (eg it should apportion liability proportionately between the parties, relative to their responsibility for the loss).^{vi}

The best way for you to manage this risk is to get advice from your broker about your policy coverage and the risks of covering other parties under your policy.

You might also require specialist legal advice on the correlation between the contract and the insurance policy. If there are gaps in cover, have the contract changed to ensure that in most cases, the policy will respond. If this is done effectively, the insurer may be willing to “note” or “designate” the contract on your policy. Your broker can help arrange by referral to specialist lawyers.

Sub-consultants or sub-contractors

Sub-contractors and sub-consultants have their own legal duties and liability (eg liability in negligence for property damage or personal injury).

In most cases, a policy will cover you for your vicarious liability for the acts or omissions of your sub-contractors or sub-consultants but will not cover any primary or direct liability the sub-contractors or sub-consultants have to a third party without a specific endorsement or unless the sub-contractor is a named insured.

In most cases, it is better to require sub-consultants and sub-contractors to have their own public liability insurance policy than to have them covered under the same policy.

You may need to make changes to the contractual requirements relating to sub-consultants or sub-contractors to be allowed to have each sub-consultant and sub-contractor maintain their policies instead of being covered under yours.

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Ask your broker to review your contracts and provide insurance advice. Your broker can also help arrange a legal review of your contracts.

ⁱ This example comes from a paper presented by Colin Todhunter (Strathearn Insurance Brokers) at an AILA Seminar held in Perth on 17 May 2006.

ⁱⁱ This example was a query by one of the Steadfast brokers through the Contractual Liability Helpline. The farmer was asked to sign a licence/lease to have permission to offer tourism activities on an adjoining property owned by the Crown. If the insured had not sent the contract to their broker, they would have been uninsured for these activities and in breach of the contract.

ⁱⁱⁱ The Steadfast general and Products Liability policy provides principal's liability cover automatically.

^{iv} Our Tipsheet 7 details the differences between named insureds, interested parties and noting interest on a policy. Ask your broker for a copy.

^v This example comes from a paper presented by Greg Pynt (Pynt & Partners) at an AILA Seminar held in Perth on 17 May 2006.

^{vi} If you are not familiar with proportionate liability, ask your broker for our Tipsheet 3.