



Tipsheet 7 Insurance Clauses – Named Insured vs Interested Party

Client version
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“Named insured”, “interested party” or “noted” on the policy - What are the differences? What is the impact for you?

Many commercial contracts (including leases) require the benefit of the contractor’s insurance to be extended to the principal.

This is done by requiring the contractor or tenant to:

- Include the principal/landlord as a “Named Insured” on their policy - or as an “additional insured”, “joint insured” or “co-insured”;
- Include the principal/landlord as an “Interested Party” on their policy - “Principal’s Liability” is one example; or
- Note the “interests” of the principal/landlord on their policy – sometimes this is expressed as noting their “respective rights and interests”.

This often applies to “third party” insurance (eg public liability policies) but can also apply to “first party” insurance (eg property damage policies).

Example: A financier may require the borrower to arrange comprehensive motor vehicle insurance and have the financier named as an “interested party”.ⁱ

Example: A hire agreement may require an event organiser to purchase public liability insurance to cover any property damage or personal injury to the public while the event is being carried on at the venue and may require the owner of the event venue to be named as an “interested party”.ⁱⁱ

Example: A contractor for a construction project has a policy which insures its

subcontractors and subconsultants as additional insureds.ⁱⁱⁱ

Sometimes a contract or lease will ask for more than one of the above notations. Brokers should review the insurance clauses in the contract carefully against the client’s insurance program and seek professional advice where necessary so as not to put the client in breach of contract.

What is a “named insured”, an “interested party” and a “noted” interest?

A “named insured”:

- Is usually a party to the insurance contract (but not the ‘contracting party/insured’);
- Will receive and can give insurance notices (e.g. expiry/renewal or cancellation notices); and
- Can make a claim and enforce the policy directly against the insurer but the conduct of the contracting party/insured can affect whether a claim is paid (eg non-disclosure /misrepresentation).

Example of Named Insured: The description of insured in the policy schedule includes “subcontractors and consultants engaged by an insured from time to time”.

An “interested party”:

- Is not a party to the insurance contract;
- Does not receive any insurance notices; and
- Can make a claim and enforce the policy directly against the insurer if they are:
 - listed or named as a beneficiary in the policy;^{iv} or

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- referred to in the policy as someone to whom the benefit of the policy extends^v, but the conduct of the contracting party/insured can affect whether a claim is paid (eg non-disclosure /misrepresentation).

Example of Interested Party: A mortgagee will often be listed specifically on the policy as an interested party along with a clause or endorsement explaining the basis of their rights and entitlements to make a claim.

When a person's interest is "noted" on a policy, that person is not entitled to claim under the policy.^{vi} The notation simply puts the insurer on notice that someone else has an insurable interest. This can assist the principal to have the claim proceeds paid to them but it doesn't always provide cover for their own losses.

'Noting' an interest is often used where a contract requires property to be insured against loss or damage and the principal has an insurable interest in the property.

Example: In a hire purchase contract, the financier often requires the borrower to insure the equipment against loss or damage until the final installment is paid. The financier usually asks to have their interest "noted on the policy".

Example: In a lease, the landlord may require the tenant to insure plate glass and the tenant's fittings and fixtures and to note the landlord's "interests on the policy".^{vii}

There is some statutory protection for "Interested Parties"^{viii} but very limited protection for people with "Noted Interests". They are only protected for damage to insured property when^{ix}:

- They will suffer a pecuniary or financial loss if the property is damaged;
- The insurer does not notify the insured before the cover was placed that it will not insure their interest;
- Following a claim, the policy sum insured is not exhausted in paying the insured's claim;

- The conduct of the insured does not prejudice a claim (eg non disclosure or misrepresentation by the insured); and
- The interested party/principal makes a claim against the insurer within 3 months of the date of the loss.

Shortly, changes to the Insurance Contracts Act^x will improve the rights of "Interested Parties" by giving them:

- Access to the duty of utmost good faith for the conduct of the insurer;^{xi}
- The right to compel the insurer to advise whether it admits liability and whether it will conduct the defence of the claim made against them (for liability insurance);^{xii}
- The right to payment of a share of the proceeds recovered from a third party in a subrogation action.^{xiii}

What is "Principal's Liability"?

It has become common for principals to ask for "Principal's Liability" cover in a contractor's third party insurance policies (eg public liability insurance).^{xiv} This is a type of "Interested Party".

Principal's Liability usually provides cover for the principal's legal liability arising from the performance of work by the contractor under a contract (eg its vicarious liability to third parties). It does not provide cover for liability that arises independently of the contractor's work.

It is not appropriate for a landlord/tenant relationship but it is suitable for many commercial contracts.

In many public liability policies, Principal's Liability is available as an automatic inclusion or offered as an additional extension at the request of the insured.^{xv}

What are the challenges for including a "Named Insured"?

Practically, it can be hard for your broker to obtain cover for a "Named Insured" because the insurer may want:

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- Additional underwriting information about the principal; and
- Additional premium is paid in exchange for accepting the risk of insuring them under the client's policy.

Some insurers will not agree to add a principal as a "Named Insured"— particularly if the principal's interests conflict in some way with your interests.

Few professional indemnity insurers will agree to name a principal as an insured. Public liability insurers may be more inclined to do this – but this may not be in your best interests. Often the best outcome is to change the contract requirement to "Principal's Liability" (see below).

If you and the underwriter *are* willing to add a "Named Insured", it is important that the policy terms and exclusions are reviewed and modified accordingly by the insurer.

Sometimes the insurance clause in the contract will specify what is required. Your broker may need to have the clauses endorsed on the policy to comply with contract.

If a principal asks for "named insured" status it may also be necessary to seek certain changes to the policy terms including the following:

- **Joint vs composite policies** – In a "composite" policy, the insurer recognises the individual rights and interests of each "Named Insured" and does not treat those rights and interest as joint or co-insured rights.

A joint policy is usually appropriate where the legal liability of the parties will be joint and several (eg joint venture parties).

A composite policy is usually appropriate where the parties could have different legal liability (eg under proportionate liability legislation).

- **"Insured vs insured" exclusions** – This exclusion may need to be removed to allow one party to recover against another for legal liability. This is usually a feature of a composite policy.

- **Subrogation clauses** – A waiver of subrogation might be necessary. This means the insurer agrees not to exercise its rights to pursue another insured for their proportion of the liability. It is usually a feature of a composite policy.
- **'Innocent insureds' clause** – These clauses prevent the insurer from relying on breaches by one insured where another insured had no knowledge or involvement in the breach.
- **Non-imputation clause** – This clause may need to be inserted so that the knowledge and state of mind of one insured is not imputed to any other insured.
- **'Cross liability' clause** – This clause obliges the insurer to separately protect each insured so the policy operates as if a separate contract of insurance had been issued to each party.
- **Severability clause** – This type of clause prevents the insurer from raising non-disclosure or misrepresentation by one party as a basis to decline the claim of another party. This is usually a feature of a composite policy.
- **Sums insured and automatic reinstatements** – These are important where the policies placed for you are used for your entire business and not for one particular project or contract. The sum insured can be 'exhausted' very quickly when more than one insured can make claims.

What is the impact for you?

If you let the principal be named under your policy, this entitles the principal to make a direct claim against the insurer for anything which is within the terms of the policy.

This might even extend to a liability claim made against the principal which has nothing to do with the goods or services you have supplied to the principal.

Example: If a head contractor is a 'named insured' on a subcontractor's policy but only the head contractor is legally liable for a

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personal injury claim, the head contractor may be able to claim on the subcontractor's policy to meet that liability (even though the subcontractor had nothing to do with the accident that caused the injury).

In this sense, the principal can use your policy in preference to their own insurance and they won't have to pay the premium. When more than one principal or party is permitted to use your policy in this way, they can quickly exhaust the insurance that is available for you to use for other insurance claims.

"Named insured" status is appropriate when the insurance was purchased for a particular project, supply contract or job. It is not ideal where the policy is used for your entire business.

What are the challenges of adding an "Interested Party"?

Your broker will need to make sure they work with the underwriter to have an "interested party" correctly named on the policy. This might take some time and it may require some amendments to the policy.

If the principal has asked for "Principal's Liability", the underwriter may need to consent to this or include the name of the principal on your policy schedule.

Sometimes the principal will ask for one or more of the following:

- Severability clause;
- Cross liability clause;
- 'Innocent beneficiary' or non-imputation clause; and
- Removal of 'insured vs insured' exclusion.

These requirements give the interested party similar benefits to a named insured if a claim occurs. They may not be standard inclusions and your broker may need to request policy endorsements from the insurer.

What is the impact for you?

Allowing the principal to be an "Interested Party" or obtaining "Principal's Liability" cover is often easier and it results in better outcome for you and the principal.

Principal's Liability cover usually limits the right of the principal to claim under your policy to incidents involving you, your work or your products. This means the policy can only be used where you are legally liable to the principal and the principal cannot use the policy for claims that do not involve you. It doesn't "open up" your policy to claims by the principal which are unrelated to you.

This is fairer to both parties as the principal needs be assured that your policy will meet any liability the principal has for your work or goods/products.

A word of caution – Principal's Liability cover does not mean you covered for all of your contractual liabilities (ie the obligations you assume under its contract with the principal). For contractual liability cover, your broker would need to ask the insurer to "designate" or note the contract on your client's policy (see below).

What are the challenges of "Noting" an Interest?

It is important to clarify precisely what is to be "noted":

- Is it "rights and interests" or "rights and liabilities"?
- Is it an insurable interest?
- Is it a contract?

If the requirements in the contract are unclear, it is in everyone's interests to clarify them. You can't comply with them if they are vague or uncertain.

Ask the other contracting party, what the objective of 'noting the interest' is?

Is it to:

- Allow them to claim on your policy; or
- Notify the insurer of their insurable interest?

For "first party" insurance (eg material damage insurance), it may be necessary for your broker to have the "respective rights and interests" of the principal noted by endorsement.

Example: A mortgagee or lender trying to protect their financial interest in leased property could be listed as a mortgagee on the policy and have an endorsement inserted

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which details the rights they have to the proceeds of any insurance claim.

For “third party” insurance (eg liability insurance), sometimes the requirement is to note the principal or the “principal’s rights and liabilities”:

- Does this mean “Principal’s Liability”?
- Does the principal want the right to claim as a “Named Insured”?

The better approach is to have the principal named as an “interested party” for its vicarious liability or “Principal’s Liability”.

Example: A property developer who has engaged a consulting surveyor for a project may seek to have their interest “noted” on the surveyor’s liability policy so that they can access the policy in the event that the developer is liable to a third party for a personal injury claim. This should be re-drafted in the contract as an “Interested Party” or “Principal’s Liability” requirement.

“Noting a contract” is not always possible and is at the discretion of the insurer. It is possible where:

- a contract works policy requires each contract the insured signs to be noted on the policy; or
- the insurer is prepared to accept certain “contractual liabilities” under a public liability policy (eg by listing the contract as a ‘designated contract’^{xvi}).

“Noting a contract” doesn’t mean the insurer will cover all and any liability or indemnity claim relating to the contract because the other policy terms and conditions still apply.

Unless the contract is changed to ‘align’ it with your policy coverage, you may still have exposure for uninsured losses. You can mitigate this exposure by negotiating a financial cap on your uninsured contractual liability.^{xvii}

It can take time to have your insurance endorsed to provide “Named Insured” or “Interested Party” or “Principal’s Liability” cover or to have another person’s interests noted.

Remember, unless the contract is changed so it is consistent with the insurance or the policy is changed to ‘align’ it with the contract, neither

party will be properly ‘protected’ by the insurance.

For assistance with reviewing insurance clauses, a policy wording or an endorsement, contact your insurance broker. Your broker can also arrange a legal review of your contract if necessary.

ⁱ *General Motor Acceptance Corporation Australia v RACQ Insurance Ltd* [2003] QSC 80 – In this case, GMAC was the financier and GMAC’s interest in the vehicle was noted on the policy arranged by the borrower with RACQ.

ⁱⁱ *NSW Arabian Horse Association Inc v Olympic Co-Ordination Authority* [2005] NSWCA 10 – In this case, an association was hiring a venue for equestrian eventing and the hire agreement required the association to hold public liability insurance.

ⁱⁱⁱ *Transfield Pty Limited v National Vulcan Engineering Insurance Group Limited & Ors; Connell Wagner Pty Ltd v National Vulcan Engineering Insurance Group Ltd & Ors* [2002] NSWSC 830 – In this case the contractor held a policy that referred to the subcontractors as additional insureds.

^{iv} *Trident General Insurance Co Ltd v. McNiece Bros Pty Ltd* (1988) 165 CLR 107.

^v Section 48 of the Insurance Contracts Act 1984 (Cth); Section 49 of the Insurance Contracts Act 1984 (Cth).

^{vi} The exception is where the insurance policy states that the cover under the policy extends to a person whose interest is noted. This usually requires an endorsement from the insurer to that effect.

^{vii} This type of request is common but may be difficult to accommodate if the landlord does not own the fittings and fixtures or the plate glass because these things are owned by the tenant. In such cases, noting the landlord’s interests in such cases may not give the landlord the right to claim unless there is an appropriately worded endorsement.

^{viii} Section 48 of the Insurance Contracts Act 1984 (Cth).

^{ix} Section 49 of the Insurance Contracts Act 1984 (Cth).

^x The Insurance Contracts Amendment Bill 2010 Bill was passed in the House of Representatives on 23 June 2010 and the Bill is waiting to be reintroduced into the Senate when Parliament next re-convenes.

^{xi} Proposed changes to section 13 of the Insurance Contracts Act in the Insurance Contracts Amendments Bill 2010.

^{xii} Proposed changes to section 41 of the Insurance Contracts Act in the Insurance Contracts Amendments Bill 2010.

^{xiii} Proposed changes to section 67 of the Insurance Contracts Act in the Insurance Contracts Amendments Bill 2010.

^{xiv} Sometimes they also ask for a principal’s liability extension under workers compensation.

^{xv} The Steadfast General and Products Liability Policy provides principal’s liability cover automatically – i.e. without the endorsement of the insurer. Many of the Lloyd’s public liability policies offered in the Australian market require the insured to make a request to the underwriter and once accepted, the name of the principal is listed on the insured’s policy schedule.

^{xvi} This is an option under the Steadfast General and Products Liability Policy and liabilities assumed under contract can be designated in the policy schedule by agreement with the underwriter. Often the underwriter will want to review the contract and will only be prepared to designate the contract if it is on reasonable terms.

^{xvii} This needs to be done in the drafting of the contract. Your broker can arrange a legal review of your contract or legal advice to help you manage your uninsured contractual liability exposure.

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