

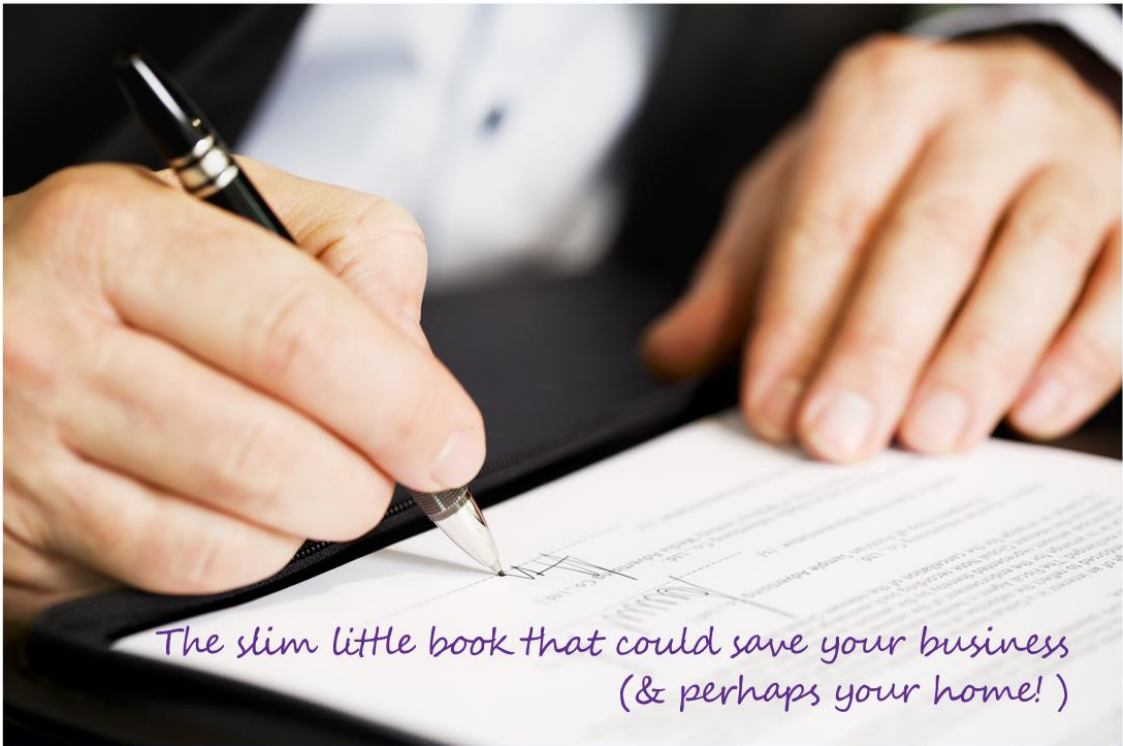


LMI Group



MANNINGS GUIDE TO

CONTRACT REVIEWS



*The slim little book that could save your business
(& perhaps your home!)*

Prof. Allan Manning

Contents

Introduction	1
Part 1: Contract Review Points to Consider	4
Part 2: Extra Advice on Specific Contracts	17
Part 3: Risk Management List for Reviewing a Contract	22
Part 4: General Approach to Contract Interpretation	27
Part 5: Expert Advice	29
Part 6: Conclusion	30

*To Steve and Chantelle
May your contract be of lifelong happiness.*

*"It's a very sobering feeling to be up in space and
realize that one's safety factor was determined by
the lowest bidder on a government contract.."*

Alan Shepherd, February 25, 1962

Other titles by Allan Manning

Business Interruption Insurance & Claims: A Practical Guide
Understanding the ISR Policy: A Comprehensive Guide
It Will Never Happen to Me! The Strategic Management of Crises in Business
It May Happen to Me! The Essential Guide to General Insurance
Fidelity, Theft & Money Insurance & Claims
The Closure of the Bougainville Copper Mine: Anatomy of a Major Claim
Mannings Six Principles of General Insurance
What's Insurance? Mr Owl explains how insurance protects your stuff

Preface

Seeing so many small and medium business owners and managers get themselves into real financial difficulty by entering into contracts prompted me to write this Guide. The root cause was that the business owner was focusing solely on the perceived benefit and not appreciating the liabilities and other consequences of what they were signing. It is the aim of this Guide to explain the major issues that should be considered when signing any contract, large or small.

Realising that most business owners and managers are time poor, I have kept this Guide as slim as I dare but at the same time covering the most important areas that I see cause the problems.

A work like this does not just happen. I have had great support from a number of people. Sincere thanks goes to many of my colleagues at the LMI Group who have offered invaluable comments based on their years of experience.

Valuable assistance was also provided by Victoria University and its College of Law and Justice in particular. For their help, I am most grateful.

I also wish to record my personal thanks to Lauren Wakeling and Elle Cody for their assistance in reviewing the Guide and to Gloria Lu for her layout and graphic design work in both the eBook and printed version.

Lastly, a warning: a Guide such as this should never be solely relied upon for advice. Matters differ according to their facts, while the law undergoes constant change. You should always seek legal and specialist insurance advice on specific contracts and fact situations, as they arise.

I would be extremely pleased to receive feedback regarding the relevance, ease of understanding and usefulness of the material contained herein, and also any suggestions for improvement. You may reply via email to allan.manning@LMIGroup.com. It is through such feedback that the Guide continues to grow with each edition.

Prof. Allan Manning
Managing Director, LMI Group
Melbourne, 23 August 2013

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Guide to Contract Reviews

Introduction

Signing contracts is part of doing business, but not everyone understands exactly what they are signing and the contingent liability they may be creating. This is nothing new, but in my view the risks associated with entering into contracts are increasing. The prime reason for this, in my opinion, is that large organisations, armed with an army of lawyers and risk managers, are now, more than ever, transferring as much risk as possible from their organisation to the other party to the contract. If a business owner or manager signs a contract, not fully appreciating the risk that they are accepting by agreeing to the terms and conditions of the contract, it can have life changing consequences.

The primary reason for writing this Guide is to stress to business owners that above everything else, it is important to understand that your Public and Products Liability insurance policy and/or your Professional Indemnity policy may not provide coverage for risk that only arises due to the terms of a contract.

Insurance underwriters are aware of the liabilities arising at common law and the provisions and risks associated with government legislation, such as the *Competition and Consumer Act* (2010). Knowing these risks, as well as the frequency and severity of claims in your industry, they can calculate a premium for that risk, often called “price the risk”, that they need to charge to protect your business.



What an underwriter cannot price are the unknown risks created by a contract that you sign. As such, insurance policies contain exclusions that mean such risks are **not** covered by the policy of insurance. An example of such a clause is:

Policy Exclusions

*This Policy **does not cover** liability in respect of:*

Contractual Liability

Any obligation assumed by you under any agreement except to the extent that:

- i. *The liability would have been implied by law;*
- ii. *The liability arises from a provision in the contract for lease of real or personal property other than a provision which obliges you to effect insurance or provide indemnity in represent of the subject matter of that contract¹ .*
- iii. *The liability assumed by you under a warranty of fitness or quality as regards your products²; and*
- iv. *The obligation is assumed under those agreement specified in the Schedules³.*

If you were to sign a contract with an onerous clause in it and your Insurer denied liability under your Liability policy, it would create a potential large loss for the business that would need to be funded. Worse still, if the contract were to include a director's guarantee, it moves the risk from a business risk to a personal risk for the director(s). Hence the tag line of this Guide, *The slim little book that could save your business (and perhaps your home)!*



Another area that needs special attention when reviewing contracts, is any contractual fines and penalties or liquidated damages clauses for events which may be outside your control. This includes a fire, flood, or storm. Insurance may be available to protect you if it is caused by an insurable peril. If the event was outside the scope of an insurance policy, such as a labour dispute or peril you are not insured for, then again this is a problem for your business. The risks are real and destroy businesses more often than most people realise.

¹ Landlords having tenants arrange insurance on the building and loss of rent is just one risk being transferred to tenants in contracts.

² This is insured under Products Liability but is subject to other exclusions that you need to understand.

³ These are contracts that have been provided to the insurer and which they have agreed to accept. An extra insurance premium may have been charged for the additional risk involved.

This Guide is broken up into four parts:

1. Contract Review Points to Consider;
2. Extra Advice on Specific Contracts;
3. Risk Management List for Reviewing a Contract; and,
4. General Approach to Contract Interpretation.

Each part is designed to highlight some of the common areas that need to be considered from a risk and insurance point of view before you sign any contract. It is strongly recommended that you also obtain quality legal and insurance advice before you commit, even for what you may consider to be straight forward contracts, such as a property lease agreement.

As this Guide covers a large range of contracts, from rental agreements to sales and employment contracts to supply agreements and more, it is, by its very nature, broad and cannot possibly cover every risk associated with every type of contract. Having said this, I do offer more specific information on three common contracts that I often see get business owners in trouble. But at its core this is but a Guide, nothing more, and it cannot take the place of specialist legal or insurance advice.

I hope that you will find this Guide to be a useful aid that you can refer to over and over again when reviewing contracts.

Part 1: Contract Review Points to Consider

1. The parties to the contract.

Please ensure that the correct entity(ies) are named in the contract, along with ABN and contact details. Also ensure the spelling and details of the director(s) signing the contract are correct.

"Act in haste, repent at leisure!"

Anonymous

2. Date contract is to begin?

This may or may not be the date the contract is signed. Is the contract being back dated? What are all the ramifications for this?



3. Date contract ends?

This refers to the date the contract would normally end, unless terminated earlier for some reason. Is this date correct? Is there an option to extend the contract, for example in a property lease there may be an option to extend the lease? What is the notification period?

4. Other important dates (deadlines, mileposts, reports due, etc.)?

All dates should be clearly identified. Use full dates (e.g. "9th September 2013") wherever possible. NOTE: in some foreign countries such as the United States dates expressed in numerals use the Month/Day/Year format (e.g. 10th September 2013 would be written as 9/10/13 rather than 10/9/13.

Using the full date reduces the likelihood of confusion. (Remember, wherever there is confusion in a contract it is a potential for dispute.)

5. Credit Check/References?

Is a credit check, police check, or reference required? Have they been completed? Are licences, trade tickets or other proofs required?

CASE STUDY #1

EMPLOYMENT

A potential recruit for an IT position advised that he had taken a long holiday in New Zealand when asked why there was a 9 month gap in his employment record. When asked to sign a police check form for New Zealand, he withdrew his job application. It is likely he served time for embezzlement.

Have these checks been done and is the necessary documentary proof of such checks on file?

With Employment Contracts, it is recommended to carry out police, credit and reference checks. Reference checks should be done, not only with the immediate previous employer; but the one before that. An extended period where there is no employer shown is a red flag that something may be amiss and that you should pay particular attention to.

6. Is the procedure for termination clearly identified, understood and acceptable?

You should record the date for any action in respect of renewals, rather than rely on your memory or a reminder from the other party to the contract. This may prevent an option to renew from being lost or a penalty being imposed.

7. Are the causes for termination clearly identified, understood and acceptable?

The ability for one party to terminate the contract for particular causes should be identified and well understood. Is this condition fair and reasonable? If not: is it acceptable? To have a contract cancelled on you without fair compensation may cause problems for your organisation and you should evaluate the risk, on a cost v benefit approach, prior to signature.

8. Time and place for performance?

If performance extends over a period of time, include due dates if necessary.

9. Method for providing notice of default and opportunity to cure?

Normally you would expect a requirement for written notice together with a reasonable time to remedy a problem.

10. Description of goods/services that are the subject of the contract?

The contract should set out a clear and understandable description of the subject of the contract. Limit the use of highly technical terms when possible and avoid abbreviations at all cost. Further, always write the word or words out in full to avoid misunderstanding.

In the case of goods purchased locally or from overseas, when does the property transfer to you? Do you have Marine or Property insurance in place from this point in time, and what risks are protected by this insurance? Have you discussed the risks and insurance coverage with your insurance broker, A.I.S Insurance Brokers?

11. Are all exhibits, attachments, appendices, schedules, and the like, attached?

It is not wise to sign any agreement until all of such documents and attachments have been provided for, reviewed and found acceptable. Does the contract refer to other documents that have not yet been provided? If so, obtain a copy and understand its terms and conditions before committing to be bound by them.

12. Clear description of amounts of money or other consideration for contract?

Partial payments should be stated with due dates; with amounts tied to other amounts (e.g., royalties, percentages) stated in clear terms. The penalties for any late payments need to be understood and procedures put in place to ensure compliance with the terms of the contract.

CASE STUDY # 2

A business owner was looking to purchase a machine from Belgium. Rather than use the local agent, he decided to buy it direct from the manufacturer. The quotation stated the sale was subject to *Orgalime s2000 conditions attached*. As the terms were not attached, rather than write and get a copy from the vendor he went online and downloaded a copy, not realising that he only got the first page. This error ended up costing the business over \$350,000 when they had to do a product recall when the machine failed to perform to specification and the full conditions prevented a recovery from the supplier.



It is also important to ensure that the amount(s) stipulated in the contract are clearly shown as either inclusive or exclusive of GST (Goods and Service Tax.). Is the other party appropriately registered for GST? If the service or goods are provided or sourced from overseas, what duties or taxes does the transaction attract?

13. What currency are payments to be made in?



If any part of the contract is performed or payable outside your country, it is possible to adopt the currency in that particular country, for example, US dollars. Consider the risk of exchange rate fluctuations. You may wish to consider currency hedging or attempting to negotiate the contract in your country's currency.

14. Are the rights, obligations and duties of every party clearly listed?

Each party's responsibilities need to be identified in understandable language. An important point to consider is waivers of subrogation (the right to recover your losses due to the other party's negligence). Another is an indemnity on your part to reimburse the other party to the contract, should they be found liable from any cause. Both of these issues are likely to be of concern to your insurer and you need to bring them to the attention of your insurance broker, A.I.S Insurance Brokers. This is continued under the next heading.

15. Is there a clause that requires you to "indemnify" or hold the other party harmless?

Indemnities are often sought when one party, such as a government department, mining company, principal building contractor or other organisation, seeks to obtain a product or service from another party and the one paying for the goods or services is relying on the supplier to do this properly.

Indemnity clauses can be found in a wide range of commercial and legal contracts and tenders including leases, construction contracts, professional services contracts, supply agreements, bills of lading, loan agreements, licensing agreements to name a few.

An indemnity is provided where one party to the contract agrees to "indemnify" or otherwise exempt the other party from their Common Law and/or statutory liability in the contract.

A 'hold harmless' clause is similar to an indemnity, but it prevents one party to the contract from holding the other responsible for any loss or damage suffered by them. This deprives the entity that suffered the loss or damage of any legal rights it may have to recover damages or a contribution towards damages from the other party. Such agreements are often found in lease agreements and some supply agreements, but hold harmless agreements are not restricted just to these types of contracts.

These types of clauses are best, wherever possible, removed from a contract where it is your organisation that is providing the indemnity. Worse still, are contracts that incorporate a Director's Guarantee. Try and negotiate to have any indemnification, hold harmless and/or director guarantee clauses deleted. This may not be possible in some cases, such as bank or other finance company loans, lease agreements and some contracts of service.

After attempting to have these deleted, if the other party refuses to the request, you need to see if they can be "softened". A good lawyer that is experienced in this area is recommended. You should also contact your insurance broker, A.I.S Insurance Brokers, so that they can advise if

CASE STUDY #3

CONTRACT WITH AN INDEMNITY

A builder sub-contractor won a job to do some work on a large company's factory complex. The builder did not appreciate that the contract he signed included an Indemnity to the customer to reimburse any costs to them that they, the factory owner, may be required to pay for any claim, dispute or action arising at the construction site. During construction, a delivery vehicle being driven by one of the employees of the factory owners, struck and injured two workers who were neither employed by the factory or the builder contractor who signed the Indemnity. The injured workers claimed off their WorkCover insurer and WorkCover, in turn, recovered from the factory owners for the injury due to their employee driver's negligence. The factory then, citing the contract, sought payment from the builder sub-contractor owner. He claimed that this was not fair but the courts found the contract was valid and he was ordered to pay \$700,000 under the contract, plus legal fees for the court case. He attempted to claim under his Business Insurance policy, Public Liability section only to find that the exclusion clause cited in the introduction of this Guide applied and his insurer refused to pay the claim. Not only did the business fail but the builder lost his family home!

insurance coverage is available to protect you and your business from the exposure to risk that signing such a clause creates. You need to have this conversation **before** the signing of the contract, not afterwards.

16. Is there a “Contracting Out” clause?



This is similar to and an extension of the points raised in Point to Consider 15.

Up until 2001 persons found legally liable for loss, damage or injury⁴, were deemed to be jointly and severally liable in most cases. As a result, a claimant had the option of picking whom they would take the action against. It was then up to those who had been sued to cross-claim or seek contribution from any other party(ies) who may have also been responsible or contributed for the claimant's loss or damage. This was often referred to as chasing the person with the “deepest pockets” and that person would then, as I say, have to pursue everyone else who they felt was responsible.

If any of the other people responsible went bankrupt or became insolvent, the person with the “deep pockets” ended up wearing that loss, as well as his own.

This changed with the introduction of Proportionate Liability Legislation in every Australian State and Territory in Australia in 2001⁵. Unfortunately, like so many other pieces of legislation, this Proportionate Liability Legislation is not the same in every jurisdiction; there are regrettably, to my mind, minor differences.

⁴ Proportionate Liability Legislation did not alter the position in respect of claims for death or personal injury.

⁵ Commonwealth - *Corporations Act 2001*, (Cth); *Trade Practices Act 1974* (Cth); *Australian Securities & Investments Commission* (Cth), Australian Capital Territory - *Civil Law (Wrongs) Act 2002* (ACT); New South Wales – *Civil Liability Act 2002* (NSW); Northern Territory – *Proportionate Liability Act 2005* (NT); Queensland – *Civil Liability Act 2003* (Qld); South Australia – *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA); Tasmania – *Civil Liability Act 2002* (Tas); Victoria - *Wrongs Act 1958* (Vic); Western Australia - *Civil Liability Act 2002* (WA).

What this legislation allows is for the courts to apportion the responsibility for a damages claim amongst each wrongdoer according to the amount the court determines is just. To arrive at their finding, the court considers the extent to which each wrongdoer's actions contributed to the loss or damage.

Proportionate Liability can apply in a broad range of commercial contracts for products and services including leases, service contracts, software licences, manufacturing contracts, maintenance agreements, security contracts, advertising agreements, transport contracts, bills of lading, and the like.

This legislation applies to:

- 1) "Apportionable claims" – which are:
 - A claim for damages relating to property damage or economic loss arising from a failure to exercise reasonable care and/or attention;
 - A claim for damages arising from a breach of a state's, with the exception of Queensland, *Fair Trading Act*; or
 - A claim for damages arising from a breach of specified Commonwealth legislation, such as: misleading and deceptive conduct; the duty of a director; and sections of the financial services legislation to name a few.
- 2) Where there are two or more concurrent wrongdoers; and
- 3) The claim is for compensation, an indemnity or liquidated damages⁶.



This legislation does not apply to:

- 1) Negligence claims involving death or personal injury.
- 2) Intentional or fraudulent damage except in Victoria; in such cases where one of the concurrent wrongdoers has intentionally or fraudulently caused damage, only that person will be liable.

⁶ Damages whose amount the parties stipulate during the formation of a contract for the injured party to collect as compensation upon a specific breach such as late performance.

- 3) Vicarious liability, agency and partnership liability.
- 4) Persons who owe no duty of care to the claimant.
- 5) Absolute or strict warranties or conditions in a contract, such as, where one party to a contract agrees to do something absolutely and is not agreeing to exercise 'reasonable care' when performing their services or supplying a product.
- 6) "Consumer transactions" in the state of Queensland.
- 7) Claims for Contractual Liability where the parties to the contract have 'contracted out' of the legislation. Note that In New South Wales, Western Australia and Tasmania, parties can 'contract out' of the legislation. At this stage it is not certain if in the other states and territories the parties are permitted to 'contract out'. This will no doubt be tested by the courts in due course.

There are of course risks to you if you were to "contract out" agreeing that the Proportionate Liability legislation will not apply. It is a similar situation where you agree to indemnify the other party or hold them harmless as discussed in Point to Consider 15 above.

Again, I would remind you that most insurance policies will exclude a claim where the Insured has entered into a contract that changes their legal liability so it is different to what would have applied at law.

This is a complex area of law and you are encouraged to seek expert legal advice if you are confronted with contracts containing "contract out", indemnity or hold harmless agreements.

17. Are there contractual fines and penalties, liquidated damages, legal fees, waiver of liability, waiver of statutes of limitations clauses?



As with the clauses in Points to Consider 15 and 16, clauses that may cause you or your organisation to pay statutory fines and penalties, or liquidated damages do create risks for you. This possible risk is known as a contingent liability⁷. In some circumstances contractual fines can be insured under a Business Interruption policy. Please speak with your insurance broker, A.I.S Insurance Brokers about this coverage.

Waivers of liability and waivers of statutes of limitations clauses are again contract terms that may put you at odds with your insurer, as most insurance policies will exclude a claim where the Insured has entered into a contract that changes their legal liability so it is different to what would have applied at law.

Again, you are encouraged to seek expert legal advice if you are confronted with any of the clauses referred to in this section.

18. Are you responsible to pay all the legal fees in respect of the drafting and signing of the contract?

It is usual for each party to a contract to be responsible only for their own legal fees. What is not recommended is that you try and save money by not engaging an experienced lawyer who knows both Contract Law and insurance (or any other relevant specialty area) and do the review alone.

19. Intellectual property / moral rights/ownership?

A contract may transfer the ownership of your organisation's intellectual property. Your intellectual property is a valuable asset that you ought to manage and not necessarily simply give away.



20. What insurance is required? What types and levels of coverage are listed?

⁷ Contingent liabilities are liabilities that may be incurred by an entity depending on the outcome of a future event such as a failure to meet the delivery or other specifications contained in a contract.

Your general insurance broker, A.I.S Insurance Brokers should be consulted if there are questions about the levels of coverage and/or insurers and the claim service they provide. In addition to the waivers of subrogation and indemnities mentioned above, special attention needs to be given to any contractual fines and penalties or liquidated damages. Cover may be available under a Business Interruption policy.



Some contracts stipulate the need to provide adequate proof of insurance in a wide range of classes such as Property, Business Interruption, Liability, Glass, and Workers' Compensation.

With Marine, Professional Indemnity and Motor Vehicle insurance, it is important that the Incoterms⁸ marry in with the insurance coverage. Requirements for certain types of insurance and limits also need to be understood and complied with.

21. Confidentiality and Privacy provisions?

You and your company may not be able to agree to keep information confidential if it is subject to public disclosure under legislation. This should be reflected in the wording of any confidentiality clause(s).

Such clauses create obligations that must be met by you, your employees, and contractors upon disclosing information. You and your business need to ensure that it has adequate controls in place to fulfil the obligations created by the contract.



On the flipside, you also need to ensure that the contract does not put the company or organisation at odds with the Privacy Legislation. In Australia, the *Privacy Act* (1988) regulates how large businesses, all health service providers and some small businesses and non-government organisations handle individuals' personal information.

⁸ The Incoterms rules or International Commercial Terms are a series of pre-defined commercial terms published by the International Chamber of Commerce (ICC) that are widely used in International commercial transactions or Procurement processes. Incoterms rules are intended primarily to clearly communicate the tasks, costs, and risks associated with the transportation and delivery of goods.

The National Privacy Principles cover the collection, use, disclosure and storage of personal information. They also allow individuals to access that information and have it corrected if it is wrong. To learn more about this legislation please visit <http://www.oaic.gov.au/privacy/privacy-act/national-privacy-principles> or speak with your legal adviser and/or insurance broker, A.I.S Insurance Brokers.

22. Publishing rights

A contract may contain terms or conditions that allow the other party publishing rights. You need to be satisfied that this is fair and reasonable to your organisation.

23. Act of God or force majeure clause v contractual fines and penalties

Force majeure is a Latin term that means "chance occurrence, unavoidable accident", it was a common clause in contracts that essentially frees both parties from liability or obligation when an extraordinary event or circumstance beyond the control of the parties, such as a war, strike, riot, crime, or an event occasionally described by the words "act of God"⁹ (such as storm, cyclone, flooding, earthquake, volcanic eruption, etc.), that prevents one or both parties from fulfilling their obligations under the contract. In practice, most *force majeure* clauses do not excuse a party's non-performance entirely, but only suspend it for the duration of the *force majeure*.



As larger organisations move to transfer more and more risk to their suppliers and tenants etc., the use of *Force majeure* clauses appear to be declining in favour of provisions that impose contractual fines and penalties or liquidated damages for non-delivery or non-performance of any kind. This may transfer an unacceptable amount of risk to the other party. Hence, it may be worth looking into Business Interruption policies that may provide coverage protection in some circumstances¹⁰. This can be a complicated issue, particularly when you consider flood is the biggest cause of property losses in Australia¹¹ and this in turn has created some massive supply chain disruption.

⁹ "Act of God" is not a term used in any insurance policy I know of.

¹⁰ Typically insurable perils such as fire, storm and tempest, impact by motor vehicle and the like.

¹¹ Flood is not unique to Australia with huge losses recently in Thailand, the United States and Europe to name but a few other places.

Please discuss the need for contractual fines and penalties cover with your insurance broker, A.I.S Insurance Brokers.

24. Business Continuity Management

Following on from the point above, supply chain risk is rated as one of the most serious risks facing business today¹². As a result, more and more organisations are including a requirement for their suppliers to have a fully documented and exercised Business Continuity Management Plan. This could be in addition to the inclusion of contractual fines and penalties.



Having a Business Continuity Management Plan is simply good business practice, in any event. To learn more about an inexpensive way to develop a Business Continuity Management Plan you are invited to visit www.ContinuityCoach.com.

25. Assignment by either party must be approved in advance in writing.

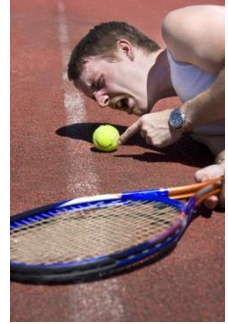
Written pre-approval of assignments¹³ are common, but not standard.

26. Jurisdiction Clauses

¹² Marchese K., Paramasivam, S., 2013, *The Ripple Effect: How manufacturing and retail executives view the growing challenge of supply chain risk*, Deloitte Development LLC., London.

¹³ An assignment is a term used with similar meanings in both the law of contracts and the law of real estate. In both situations it refers to the transfer of rights held by one party-the assignor-to another party-the assignee. The details of the assignment determines the rights and liabilities/duties of each party.

Contracts often stipulate which jurisdiction (country or state) laws the contract will be subject to. This may cause you a problem if your organisation is not headquartered or represented in that country or state, as it may increase the cost of litigation, should a dispute arise. As a generalisation, Australian courts do not look favourably on arguments whereby jurisdiction should be ignored, because of the perceived shortcomings in the foreign legal system.



27. Mandatory Alternative Dispute Resolution clause

It is of great importance for all parties to fully understand the implications of any arbitration clause (and jurisdiction clause – see above) in a contract. A failure to do so may have implications later when enforcement of an arbitral award is sought.

28. Title and authority of person signing for contractor?

Your organisation should have a risk management procedure in place that ensures that only those authorised by the organisation are entering into and signing contracts.



29. Is the spelling, grammar, punctuation, and general appearance of the contract professional and accurate?

This is important in every document as it can impact on your brand reputation. It is vital in a legal contract.

CASE STUDY # 4

**PITFALLS OF HAVING THE
TENANT ARRANGE THE
INSURANCE**

A solicitor who owned a building thought she was transferring the cost of obtaining valuations and the risk of under insurance, to the tenant they had in place by including a condition in the lease that: a) the tenant was to insure the building for full value, and b) that the tenant was to insure for 18 months loss of rent. The lease required the tenant to supply proof of insurance by way of a Certificate of Currency.

The tenant arranged for insurance in the first year for what they thought was the replacement value of the building, and arranged 12 months Loss of Rent cover. On renewal, the tenant did not increase the building sum insured and as things were “tight” they let the Loss of Rent and their own Business Interruption coverage lapse. At each renewal the tenant did not supply the Certificate of Currency.

A fire destroyed the building and the landlord then learnt the building was less than half insured and there was no Loss of Rent cover in place.

There are simply too many types of contracts to discuss the trips, traps and risks associate with each but I would share some observations with three types of contracts in common use. These are: Property Leases, Labour Hire Contracts and Sub-Contract agreements.

1. Property Rental Agreements

Lease agreements for properties often contain terms and conditions which may create insurance liabilities. Examples include:

- i. Who is responsible for the insurance of the buildings?
- ii. If so, on what basis is the insurance to be arranged? What types of coverage are available and what value should you insure for?
- iii. Is there a responsibility to insure Loss of Rent and or Business Interruption, and if so at what level?
- iv. Are you required to provide proof of insurance?
- v. Who is responsible to meet the cost of any Policy Deductible/Excess?
- vi. Is the tenant responsible for the insurance of glass?
- vii. What level of public liability is required?
- viii. Is the tenant required to have Workers Compensation insurance in place?
- ix. What are the outgoings that the tenant is liable to pay?

If you are in any doubt on any of these points, please consult with your insurance broker, A.I.S Insurance Brokers.

2. Contracts for Labour Hire

Due to the perceived complexity of industrial relations laws, the use of labour hire has become quite popular. Typically workers engaged through a Labour Hire company are employed by the labour hire firm that supplies their services to the host employer. These “hired in” workers carry out work under the direction, supervision and control of the host employer.

Even if the landlord wanted to sue the tenant, the tenant's own business failed due to inadequate insurance and they had no assets. The clear lesson is that a landlord should not abrogate the responsibility of insurance to the tenant. Rather than transfer the risk, thereby reducing the risk, in many cases it increases the risk to the landlord.

It is your asset, you have the most to lose if it is not insured correctly.

Under Labour Hire agreements, the labour hire firm has responsibility for “hired in” workers and legal liability for superannuation, Pay as you Earn (“PAYE”) tax and other employment entitlements, such as annual leave.

When entering into a contract with a labour hire firm, it is recommended that you ensure that they have the following insurance in place:

- Workers compensation, in accordance with legislation in the state or territory or, if overseas, the country.
- Public liability (covering legal liability for personal injury and property damage caused by employees whilst on assignment);
- Professional indemnity (for professional exposure as a recruitment company and for any vicarious liability for the professional activities of any employees that fall into that category).

It is not possible for a labour hire firm to purchase insurance for damage or liability arising from use of a vehicle other than those that the Hire Company themselves own. If any of the labour hire staff are using your organisation’s vehicles or your own vehicle, then that vehicle’s insurance will be the only protection available.

The legal entity that is the host employer needs to have adequate insurance in place to protect it from incidents involving the hired in worker. This is important, as the worker is under the direct supervision and control of the host employer, so there can be increased exposure to claims for injury that are not covered by the host employer’s Workers Compensation policy.

In my experience, the biggest risks for host employers when using labour hire are:

- third party injury claims, that arise when a member of the public or another worker is injured by the “hired in” worker;
- common law claims for compensation, arising from injury suffered by the “hired in” worker; or
- a subrogated¹⁴ recovery action by a Workers’ Compensation insurer after paying a ‘hired in’ Workers Compensation claim.

¹⁴ Subrogation is the legal doctrine that allows an insurer, including a workers’ compensation insurer to take over all the rights and remedies of another against a third party.

The reason for this is that if the injury occurred at a place that is under the host employer's control, they are under onerous duties to ensure a safe workplace¹⁵ and are likely to be held legally liable for the injury.



Many Public Liability insurance policies have higher excesses/policy deductibles and/or low Sub-Limits of Liability when it comes to this particular risk. Therefore special care is required to ensure that the added risk that using labour hire creates, is adequately covered. Please ensure that your insurance broker at A.I.S Insurance Brokers is made aware that you are using labour hire, even for short periods and discuss the risks and coverage available with them.

3. Sub-Contract Agreements

At Common Law, principals, head contractors and sub-contractors all owe duties of care to each other and to any third party who is injured or has sustained property damaged. The extent of each entity's direct liability for a third party's loss or damage depends on which of these parties was responsible for safety issues on the site and whose action resulted in the loss or damage.

It is possible that one or more parties may have direct liability for third party loss or damage - it naturally depends on the events leading up to the injury or damage.

The "principal and agent" relationship between principals, head contractors and sub-contractors may also create a situation where one or more is vicariously¹⁶ liable for loss or damage caused by the others. This is because at law, a principal is vicariously liable for the acts of its agents. As such, the principal is vicariously liable for the acts of the head contractor and in turn, the head contractor is vicariously liable for the acts of the sub-contractor.

¹⁵ This applies to all visitors including contractors, repairers, and customers.

¹⁶ Vicarious liability is a form of secondary liability that arises under the common law doctrine of agency. Under this doctrine the responsibility of the superior for the acts of their subordinate, or, in a broader sense, the responsibility of any third party that had the "right, ability or duty to control" the activities of a wrongdoer.

It is for this reason that we often see head contracts containing indemnity clauses requiring the head contractor to indemnify the principal for its liability for any death, injury or damage caused by the head contractor and any sub-contractors; and sub-contracts that contain similar clauses requiring the sub-contractor to indemnify the head contractor for its liability for death, injury or damage caused by the sub-contractors.



This chain of contract liability is able to be broken if the indemnity clauses in each contract are not properly drafted to give each of the parties the maximum legal protection.

As a rule of thumb, these types of contracts require each party to hold insurance to cover the indemnity they have provided. However, the combination of an indemnity clause and an insurance clause can have unintended adverse consequences in the event of a claim.

The reason for this, as I have explained several times in this Guide is that agreements/contracts that contain terms which increases the liability of the Insured over and above their normal liability, under Common Law and legislation, will activate a standard exclusion clause in the policy of insurance.

Sub-contractors are not usually liable to indemnify a head contractor for the head contractor's negligence. However, this depends on the terms of the sub-contract agreement and how broad the wording of any indemnity clause is. If the indemnity clause were to extend to a "no fault" indemnity, then the sub-contractor may be liable under the terms of the indemnity, but find themselves without the protection of any insurance.

The other concern is penalties for delay, contractual fines and penalties.

The issues surrounding contract and sub-contract agreements are complex and it is recommended that you speak with an experienced lawyer in this field and your insurance broker at A.I.S Insurance Brokers before entering into any such agreement.

Part 3: Risk Management List for Reviewing a Contract

The following has been included as a basic check list that highlights some of the things that should be considered as part of your risk management process, **before** signing a contract. The questions are worded so that a “Yes” answer means that the person reviewing the contract is satisfied that the contract has been checked for this point and the contract is acceptable to sign.



Obviously, if there are marks in the “No” column then the contract is not yet ready for signature.



Risk Management Checklist for Reviewing a Contract				
Item	Description	Yes	No	Not Applicable
General		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
1	Are the correct legal names recorded in the contract and schedules?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2	Are the correct addresses for notices shown in the contract and schedules?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3	Are the correct ABN and/or ACN numbers recorded on the contract?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4	Have items 1, 2 & 3 been verified against the ASIC Company register?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5	Have all the responsible parties in all the relevant individuals/departments been involved to the extent of their specialisation? i.e. tax, insurance, legal, finance, human resources, marketing and risk management?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6	Indemnity and Insurance. Has the organisations insurance broker been consulted in relation to indemnity/insurance/waivers or overseas cover including Workers Compensation, Liability, Marine, Property, Business Interruption, and other classes of insurance?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7	Has the organisation's legal adviser reviewed the contract?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

8	Does the contract include clauses that address the following: (note: the list is not exhaustive, nor does it attempt to cover every type of commercial or insurance contract)		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
a	Are the start and completion dates shown and unambiguous?		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b	Are you certain that there are no adverse risks being created due to compliance with local, interstate and international law?		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c	Is the legal jurisdiction acceptable?		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d	Is the organisations intellectual property protected and not transferred by the contract?		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
e	Are all the terms in respect of confidentiality fair, reasonable, legal and manageable?		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
f	Are you satisfied that the contract does not expose the organisation to any breach of the <i>Privacy Act</i> (1988)?		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
g	Does the contract prejudice the organisation by granting publishing rights?		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
h	Are you satisfied that all the Goods and Services Tax issues are addressed and understood?		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
i	Are you satisfied that the organisation has not accepted any unexpected risks due to possible fluctuations in the Exchange Rates?		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
j	Is the amount, timing and method of payments clearly set out and acceptable?		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
k	Has adequate and proper due diligence been completed on the other parties to the agreement?		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
l	Has adequate and proper reference and credit checks been completed on the other parties to the agreement?		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

m	In respect of points k & l, has this been documented and has it been reported to the relevant person, committee or board?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
n	Does the agreement adequately address (and not create issues for) the organisation in respect of the use or relationship and liability / indemnity / ownership and rights with respect of sub-contracting? Does the contract limit the use of sub-contractors?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
o	Are you satisfied that entering into this contract does not create a Conflict of Interest?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
p	Are you satisfied that the contract is clear and unambiguous?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
q	Are you satisfied that the contract does not breach Trade Practices Legislation (<i>Competition and Consumer Act (2010)</i>)?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
r	Are you satisfied that the contract does not contain any contingent liability for contractual fines and penalties?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
s	Are you satisfied that the contract adequately addresses dispute resolution mechanisms and that they are reasonable?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
t	Is there a requirement for a Business Continuity Management Plan and if so, does the organisation have an up to date plan in place?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
u	Is the contract consistent with the organisation's policy and procedure?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Expiry/Termination				
9	Is there adequate provision to allow for the formalisation of changes or variations throughout the term of the contract?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

10	Are you satisfied that there is not an “out” clause that provides an unfair advantage to the other party to the contract?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Insurances				
11	Are you satisfied that all necessary insurance coverage is in place to protect the organisation and its stakeholders including, but not limited to, those required by this contract? Have you double checked the adequacy of the insurance program with the organisations insurance broker?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Execution				
12	Does the appropriate person from your organisation have the correct level of authority and financial delegation within the organisation to sign the contract?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
13	Have all documents been reviewed and approved by the appropriate legal adviser and insurance broker?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
On-going Management				
14	Has the person responsible for the on-going management and administration of the contract agreement, agreed to accept the role and does that person fully understand what is required of them?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
15	Does the person responsible for the on-going management and administration have the necessary delegated authority?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
16	Has the risk created or potentially created by this contract been considered by the organisation's Audit and Risk Committee and/or management board as part of the organisation's Risk Register?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
17	Does entering into this contract require changes to the organisation's Business Continuity Management Plan?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
18	Has the person responsible for reviewing the performance/ indicators and/or quality under the agreement been chosen and notified?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

19	Are all necessary quantitative measures defined in the agreement or an attached schedule to the agreement?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
20	Is there a set of clearly defined acceptance and testing criteria that is fully documented and made available?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
21	Has the criteria been agreed to by all parties involved?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
22	Are there minimum service levels, measures and performance measures defined in the agreement?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
23	Are there procedures in place to ensure that the service levels are regularly documented and reported to the relevant person or committee?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Organisational Policies				
24	Are obligations of internal policies such as anti-bullying, privacy etc. passed on to any sub-contractors? This would include, but is not limited to: conflicts of interest, codes of conduct, contract management, business continuity management, insurance requirements, emergency management, fraud and corruption prevention, information security, insurable risk, occupational health and safety and risk management.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Part 4: General Approach to Contract Interpretation

This section of the Guide highlights some of the rules and principles that courts tend to follow when interpreting contracts. I have focused on insurance contracts, as these are the ones I am most familiar with, although, in most cases, the rules and principles discussed below can be applied to commercial contracts at large.



General rules

1. Insurance policies remain commercial agreements and should be given a practical and business-like interpretation.¹⁷
2. The construction of policies is to be determined by what a reasonable person in the position of the parties to the policies would have understood by the language in which the parties expressed their agreement.¹⁸
3. Consideration must be given, not only to the text of the contract, but also to the surrounding circumstances known to the parties when the contract was entered into, and the purpose and object of the transaction.¹⁹
4. The intention of the parties should be considered. The High Court held in *Australian Casualty Co Ltd v Federico*,

“As in the case of any other commercial contract [with reference to insurance contracts], a court may depart from the strictly literal meaning of a particular expression to place upon it an alternative construction which is more reasonable and more in accord with the probable intention of the parties if the words will bear that construction”²⁰.

¹⁷ *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 at 589

¹⁸ *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 176

¹⁹ *Pacific Carriers Ltd v BNP Paribas* (2004) 78 ALJR 1045 at 1050–1051 [22]; 208 ALR 213 at 221

²⁰ *Australian Casualty Co Ltd v Federico* (1986) 160 CLR 513 at 520

In cases of ambiguity

The court's starting point is usually, when considering an ambiguous provision, to apply the so-called "Golden Rule" which involves the following enquiry:

- Determine the ordinary and natural meaning of the words used in the provision;
- Consider the context of the contract, which includes matters such as the purpose of the contract, any related clauses, such as "recitals" or "background" clauses, and any other relevant provisions of the contract; and
- If the ordinary and natural meaning is inconsistent with the context of the contract, or if it gives rise to any absurdities, modify the meaning as appropriate.

If thereafter, the ambiguity is such that it cannot be reconciled by the above process, only then may the court resort to the so called 'Contra Proferentem Rule' which states that the ambiguity should be interpreted against the party who prepared the contract or seeks to rely on it.

Part 5: Expert Advice

As I have explained many times throughout this Guide, getting advice is highly recommended. This comes in two separate and important forms when it comes to Contract or Tender reviews.



Firstly, your insurance broker at A.I.S Insurance Brokers. He or she should be regarded as a trusted adviser. I believe they are as important to you and your business as your lawyer and accountant. Ideally, everything you tell your lawyer and accountant should be told to your insurance broker before you commit.

Secondly, your lawyer. Not all lawyers are highly experienced in both insurance and contract law. LMI Legal is one firm that is and if you would like to have a contract or tender reviewed before signature please email a copy to Lauren.Wakeling@LMILegal.com and she, or one of her experienced team will provide a quotation. It is far better to get the right advice upfront, than to find that some hidden or seemingly innocent clause has you exposed to a significant cost.

Part 6: Conclusion

The take away points about contract reviews that this Guide has covered are:



- contracts can result in risks being transferred to your organisation;
- these risks need to be fully understood;
- your organisation deserves to receive adequate compensation for taking on any additional risks;
- some risks may be able to be insured, but others are uninsurable;
- some contracts may not only create a business risk, but a personal risk for the directors of the organisation;
- if a contract is too onerous, it may be best to walk away from it rather than accept unacceptable risks;
- contracts should be referred to a qualified lawyer experienced in both insurance and contract law; and
- contracts should also be referred to your insurance broker.

I end with my own business mantra: *Hope for the best, but plan and insure for the worst!*
I have seen too many businesses fail relying on hope alone. I sincerely trust that this Guide helps you in your business and allows you to keep your hopes alive.

How to Order

Your FEEDBACK is appreciated...

Any comments or suggestions for improvement to this Guide are most welcome and we invite you to contact the publisher.

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