

Guide to managing indemnities

A guide to meeting the indemnities requirements of the Standing Direction of the Minister for Finance 4.5.5.1 – Insurance

The Standing Direction of the Minister for Finance 4.5.5.1 – Insurance directs an accountable officer of a public sector agency required to insure with VMIA to verify that the agency has appropriate insurance in place.

Under the insurance attestation requirements, agencies are required to **record all indemnities and make these available to VMIA on request.**

VMIA has developed a register of indemnities template. Although the use of the VMIA template is not mandatory, it will assist with the core requirements of recording and managing indemnities.

Key points

1. Agencies are required to record indemnities from contracts entered into or renewed from 1 January 2014. Details of retrospective contracts are not required.
2. Where common indemnities are issued across multiple parties, they can be aggregated into a single entry on the register. The entry should outline the nature of the indemnity and the number of parties the indemnity is issued to.
3. Where an agency has issued more than 20 indemnities, the register submitted to VMIA should include a minimum of the top 20 indemnities by value.
4. Where common law provisions apply to a contract or agreement, these may be excluded from the register.

Granting indemnities

It is important that agencies do not grant indemnities indiscriminately to third parties as these may create potential liabilities that fall outside VMIA's insurance coverage and their financial appetite and tolerance.

Four common indemnities clauses used in contracts are:

Third Party Indemnity

Occurs where the indemnifier (Party A) agrees to compensate or hold harmless the beneficiary (Party B) from loss or damages arising from a claim made by a third party.

Party-to-Party Indemnity

Occurs when the indemnifier (Party A) holds the beneficiary (Party B) harmless against specific losses suffered such as a loss arising from a breach of contract.

Bare Indemnity

Party A indemnifies Party B for all liability or loss events and circumstances but without imposing any specific limitation.

Proportionate or Limited Liability

Party A indemnifies Party B against losses except those incurred as a result of Party B's own acts or omissions.

Risk assessment

When reviewing a contract or agreement the following risk management principles should be considered:

- Identify the risks associated with forming the basis of the contract.
- Assess the identified risks.
- Determine the allocation of risks by parties.
- Review insurances being relied upon and consider the extent of any gaps.
- Implement strategies to mitigate the risks.
- Continue to monitor and manage risks.

Indemnity clauses considerations

Things to consider when drafting or reviewing indemnity clauses:

- Have you accounted for potential losses due to business interruption?
- Can you put a financial value on potential losses?
- Have you provisioned for costs relating to other contract breaches such as punitive damages, legal fees, penalties and fines?
- Have you clearly identified who is responsible for losses and under what specific conditions?
- Can you effectively manage any assumed risk?
- In instances where a third party is liable, can they cover any outstanding financial losses?

For more information about insurance attestation, please refer to our website. If you require additional assistance, please email contact@vmia.vic.gov.au or phone 03 9270 6900.

General principle

The party with the greatest control and the strongest ability to avoid or mitigate the risk should bear it.

Guidance materials

The following will support you to manage indemnities:

Undertake a thorough risk assessment, understand the risks and know the contract.

Read the indemnity clauses carefully and draft them even more carefully.

Check the Victorian Government Purchasing Board on goods and services policy.

Check with VMIA as to insurance provisions – VMIA does not provide legal advice.

Links

- Insurance Provision – Procurement Guidelines
www.procurement.vic.gov.au
- Insurance Management Policy and Guidelines/
Victorian Government Risk Management Framework
www.dtf.vic.gov.au
- Standard indemnity clauses
www.vmia.vic.gov.au/insure/dealing-with-third-parties
- Victorian Managed Insurance Authority
www.vmia.vic.gov.au

