

Internet Liability

Policy

Lumley, a business division of IAG New Zealand Limited, Lumley Centre, 88 Shortland Street, PO Box 2426, Auckland 1140, New Zealand
Tel 09 308 1100 www.lumley.co.nz

Introduction

This Policy is a contract of insurance between You and Lumley. Your Policy contains all the details of the cover that We provide subject always to Our receipt of the premium.

It is agreed that this Policy consists of and must be read together with the Schedule, the Proposal and any Endorsements. It is further agreed that the Proposal contains particulars and statements which are the basis of this contract.

This Policy provides liability protection for Your Business but only for the Period of Insurance shown in the Schedule.

Important: This is a claims made policy. A Claim must be first made while the Policy is in effect to be covered.

The Policy does not cover Wrongful Acts prior to any Retroactive Date specified in the Schedule.

Section 1: Definitions

1.1 Business

'Business' means Your business as described in the Schedule.

1.2 Claim

'Claim' means:

- (a) a demand for compensation made against You by a third party; or
- (b) legal proceedings seeking compensation instituted and served upon You; or
- (c) any threats or intimation that legal proceedings seeking compensation will be issued against You.

1.3 Costs and Expenses

'Costs and Expenses' means:

- (a) any legal costs, disbursements, witnesses' costs, assessors' costs or experts' costs incurred by Us in investigating, defending or settling any Claim made against You in respect of which You are entitled to be indemnified by Us in terms of the indemnity granted by this Policy.
- (b) all reasonable expenses (other than loss of earnings or profits) that are incurred with Our prior written consent, such consent not to be unreasonably withheld, in assisting Us or Our solicitors in the investigation, defence or settlement of any Claim.
- (c) any interest accruing after the date of entry of judgment against You and until the date We pay tender or deposit in court the judgment sum or such part of that judgment sum as is required to satisfy Our liability to You in terms of the Limit of Indemnity.

1.4 Endorsement

'Endorsement' means an individual endorsement document that We give You that attaches to and forms part of Your Policy.

1.5 Excess

'Excess' means the amount specified as the Excess in the Schedule.

1.6 Family Member

'Family Member' means:

- (a) any spouse or de facto partner;
 - (b) any parent, or parent of the spouse or de facto partner;
 - (c) any sibling or child;
- of Yours.

1.7 Intellectual Property Rights

'Intellectual Property Rights' means copyright, trademark rights, or plagiarism, registered designs, geographical indications, plant variety rights or layout design rights.

1.8 Internet

'Internet' means electronic mail, intranet, extranet, internet, worldwide web or any manifestation of the worldwide public network of computers.

1.9 Limit of Indemnity

'Limit of Indemnity' means the amount specified as the Limit of Indemnity in the Schedule.

1.10 Named Insured

'Named Insured' means the legal entity specified in the Schedule.

1.11 Period of Insurance

'Period of Insurance' means the period of insurance specified in the Schedule.

1.12 Personal Injury

'Personal Injury' means:

- (a) bodily injury, death, sickness, disease, shock, fright, mental anguish or mental injury;
- (b) false arrest, false detention, wrongful imprisonment or malicious prosecution;
- (c) wrongful entry or wrongful eviction.

1.13 Policy

'Policy' means:

- (a) this document;
- (b) the Schedule;
- (c) the Proposal; and
- (d) any Endorsements

that together are to be considered as one document.

1.14 Property Damage

'Property Damage' means physical injury to or destruction or loss of tangible property.

1.15 Proposal

'Proposal' means the proposal form You have completed, and any other underwriting information You have provided to Us, for this Policy.

1.16 Retroactive Date

'Retroactive Date' means the date specified in the Schedule as the Retroactive Date.

1.17 Schedule

'Schedule' means the Schedule document that We give You that attaches to and forms part of Your Policy.

1.18 Subsidiary

'Subsidiary' means any organisation in which You hold more than 50% of the voting rights of that organisation or You have the ability to control decisions made by the board of directors (whether directly or indirectly).

1.19 Valid Claim

'Valid Claim' means any Claim that is:

- (a) first made against You during the Period of Insurance; and
- (b) notified in writing to Us by You during the Period of Insurance or within 28 days after its expiry, or during the discovery period, if exercised; and
- (c) arising out of any Wrongful Act which occurred subsequent to the Retroactive Date in connection with Your Business.

Claims that do not accord with all of (a), (b) and (c) of this definition shall not be covered under this Policy.

1.20 We, Us or Our

'We,' 'Us' or 'Our' means Lumley, a business division of IAG New Zealand Limited.

1.21 Wrongful Act

'Wrongful Act' means any act, error or omission committed by You in advertising, web-casting, electronic publishing, transmission, replication, re-transmission utterance, dissemination, distribution, serialisation, creation, production, origination, exhibition or displaying of material over the Internet.

1.22 You or Your

'You' or 'Your' means:

- (a) the legal entity shown in the Schedule as the Named Insured and any Subsidiary of the Named Insured;
- (b) any person who is or becomes during the Period of Insurance a principal, partner or director of the Named Insured but only in respect of work performed for and on behalf of the Named Insured;
- (c) any past or present employee of the Named Insured.

Section 2: Insuring agreement

We will indemnify You for Valid Claims in accordance with, and subject to, all terms and conditions of this Policy for legal liability arising from any Claim in respect of any Wrongful Act while using the Internet for:

- 2.1 infringement of Intellectual Property Rights;
- 2.2 defamation;
- 2.3 unauthorised use of names (including domain names), trade names, trade addresses, service marks, service names, titles, slogans, formats, characters, character names, characterisations, plots, musical compositions, performances, logos, artwork, graphics, photographs or programme materials;
- 2.4 passing off;
- 2.5 breach of confidence or infringement of any right to privacy, including any alleged breach of the terms of the Privacy Act 1993 or similar legislation;
- 2.6 misuse of information which is either confidential or subject to statutory restrictions on use;
- 2.7 transmission of any computer virus;
- 2.8 any act that belittles the product or work (whether completed or not) of others; or
- 2.9 unauthorised taking for use of any advertising idea, material, slogan, style or title of others.

Section 3: Automatic extensions

The following extensions to the Policy are included automatically, Provided always that each extension is subject to the terms of this Policy (unless otherwise stated).

3.1 Defence costs

We agree to pay the Costs and Expenses incurred with Our written consent in defending, investigating, monitoring or settling any Claim under this Policy.

3.2 Estates and legal representatives

If You are deceased, incompetent, infirm, disabled, insolvent or bankrupt We will indemnify Your estates, heirs, legal representatives or attorneys for Claims arising from Your Wrongful Acts to the extent that in the absence of such death, infirmity, disability, incompetence, insolvency or bankruptcy, such Claims would have been covered under this Policy.

3.3 Continuous cover

We will indemnify You for Valid Claims in respect of Your legal liability arising from any Claim where a Claim that would otherwise be covered under this Policy is excluded by exclusion 4.11 (Known Claims and circumstances) subject to the absence of fraudulent non-disclosure, and subject to the following additional conditions:

- (a) We were Your Internet Liability insurer at the primary level ('the former policy') at the time when You first became aware of the circumstances which subsequently gave rise to the Claim;
- (b) We continued without interruption as Your Internet Liability insurer at the primary level .from the time when You first became aware of the circumstances up until such time as the Claim was made against You and notified to Us;
- (c) Our liability is limited to the amount for which We would have been liable at the time referred to in 3.3 (a) in accordance with the terms and conditions of the former policy; and
- (d) Our liability will be reduced by the amount that fairly represents the extent to which liability for the Claim could have been reduced had the circumstances been duly reported under the former policy.

3.4 Acquisitions and creation of new subsidiaries

- (a) We will indemnify any Subsidiary acquired during the Period of Insurance, Provided that You shall advise Us within 90 days of the acquisition, and We shall have the right to charge any additional premium.
- (b) We will indemnify any Subsidiary created during the Period of Insurance from the date of creation in respect of activities carried out after the date of creation, subject to the provisions of general condition 6.3 (Alteration to risk).

Provided that we will not indemnify You for any Claim arising from a Wrongful Act committed before any entity became a Subsidiary, or after any entity ceased to be a Subsidiary.

3.5 Consultants and sub-contractors

We will indemnify You for Valid Claims in respect of Your legal liability arising from any Claim made against You arising out of the actions of any consultant, contractor, sub-contractor or agent but the cover provided under this extension is specifically agreed not to extend indemnity to any consultant, contractor, sub-contractor or agent.

3.6 Joint venture liability

We will indemnify You for Valid Claims in respect of Your legal liability arising from any Claim in respect of any liability attaching to You as a result of Your involvement in any joint venture or partnership arrangement. However, the indemnity provided by this extension shall not extend to the other joint venturers or partners.

3.7 Acts of employees

We will indemnify You for Valid Claims in respect of Your legal liability arising from any Claim brought about or contributed to by any

dishonest, fraudulent, criminal, malicious act or omission, or as otherwise excluded in 4.8 (Obscene matter) of or on behalf of any person at any time employed by You Provided always that: such indemnity shall not be provided to any person committing or condoning any act, omission or breach excluded by reason of exclusions 4.2 (Dishonesty/deliberate conduct) or 4.8 (Obscene matter) or who knew of it and failed to take steps to prevent the same.

3.8 Discovery period

If We or You do not renew this Policy or if We or the Named Insured terminates this Policy, You have the right, upon payment of 75% of the full annual premium, to an extension of the cover granted by this Policy for the period of 12 months following the effective date of such non-renewal or termination, but only in respect of a Wrongful Act otherwise covered under this Policy taking place prior to the effective date of such non-renewal or termination.

This right of extension will lapse unless written notice of such election, together with payment of the additional premium due, is given by You to Us within 30 days following the effective date of termination or non-renewal. If the right of extension lapses then cover under this Policy ceases as at the effective date of termination or non-renewal.

Any Claim made during the discovery period will be treated as if it had been made during the Period of Insurance and is subject to the remaining Limit of Indemnity at the effective date of non-renewal or termination.

The entire premium for the discovery period is deemed fully earned and non-refundable upon payment.

3.9 Severability

Notwithstanding exclusion 4.2 (a) & (b) (Dishonesty/deliberate conduct), where any one of You fails to comply with Your duty of disclosure, makes a misrepresentation or is in breach of a Policy term or condition, We will not deny indemnity to any other one of You on these grounds if that other one of You was unaware of the matter not disclosed or the fact of the misrepresentation or did not breach or condone the breach of the Policy term or condition. **Provided always that** this extension shall not apply in the case of an application for indemnity made by You knowing that such application is false or fraudulent.

3.10 Run-off cover

We will indemnify, until expiry of the Period of Insurance, any Insured entity which is sold, ceased trading, merged or wound up during the Period of Insurance in respect of those activities of the Insured prior to the sale, cessation of trade, merger or winding up.

3.11 Consumer Guarantees Act 1993

We will indemnify You for Valid Claims in respect of Your legal liability arising from any Claim made against You under the terms of the Consumer Guarantees Act 1993.

3.12 Fair Trading Act 1986

We will indemnify You for Valid Claims in respect of Your legal liability arising from any Claim made against You under the terms of the Fair Trading Act 1986 (Sections 9 to 14).

3.13 Territory/jurisdiction (USA and Canada)

We will cover you, subject to the Insuring Agreement and all other terms and conditions of the Policy, for:

- (a) any Wrongful Act committed or omitted within the territorial limits of the United States of America or Canada or their territories or protectorates;
- (b) any action brought in a court of law in the United States of America or Canada or their territories or protectorates;
- (c) enforcement in any jurisdiction of any judgment, order or award in respect of any action brought in a court of law in the United States of America or Canada or their territories or protectorates.

Section 4: Exclusions

We shall not be liable to indemnify You in respect of any Liability arising out of any Claim:

4.1 Contractual/assumed liability

arising out of or connected with any contractual liability, warranty or guarantee assumed or provided by You except if You would have been liable in the absence of the contractual liability, warranty or guarantee.

4.2 Dishonesty/deliberate conduct

arising out of or connected with:

- (a) any actual or alleged dishonest, fraudulent, criminal or malicious Wrongful Act by You or Your consultants, contractors, sub-contractors or agents; or
- (b) any wilful breach of duty including any breach of statute, contract or duty, or Wrongful Act committed or alleged to have been committed deliberately or with a reckless disregard for the consequences by You or Your consultants, contractors, sub-contractors or agents; or
- (c) any application for indemnity which is false or fraudulent.

However, this exclusion only applies to any Insured who actually or allegedly committed or condoned the Wrongful Act or breach of duty, or knew of it and failed to take steps to prevent the same.

4.3 Obligations to employees

- (a) arising out of or alleging breach of any obligation owed by You as an employer;

- (b) arising out of or alleging sexual harassment or sexual or racial discrimination; or
- (c) arising out of or alleging discrimination on the basis of any of the prohibited grounds of discrimination under the Human Rights Act 1993.

4.4 Directors and officers liability

arising solely from Your duties in acting as a director or officer of any company.

4.5 Fees

for a refund, by way of damages or otherwise, of professional fees or in respect of any Claim that You are not entitled to professional fees.

4.6 Insured v Insured

brought or maintained by or on behalf of any person, firm, company or entity:

- (a) who is entitled to benefit under this Policy, or any Subsidiary of Yours; or
- (b) who, at the time of the act, error or omission giving rise to the Claim, is a Family Member; or
- (c) operated or controlled by You; or
- (d) operated or controlled by any employee, partner, nominee or trustee of Yours; or
- (e) in which You have a direct or indirect financial interest (a shareholding of less than 5% in a publicly listed company shall not constitute a financial interest); or
- (f) advised or induced by You to invest in or lend money to any person, firm, company or entity referred to in any of (a) – (e) above or to You.

For the purposes of this exclusion, the term 'You' shall include Family Member.

4.7 Financial condition

arising as a result of Your insolvency, bankruptcy, receivership, statutory management or liquidation.

4.8 Obscene matter

arising out of or relating to obscene matter of any kind.

4.9 Personal Injury

for Personal Injury.

4.10 Property Damage

for Property Damage.

4.11 Known Claims and circumstances

- (a) made against, or intimated to You prior to the commencement of the Period of Insurance;
- (b) notified under any previous Policy; or
- (c) arising out of or connected with any facts or circumstances which:
 - (i) You were aware of prior to commencement of the Period of Insurance, and
 - (ii) a reasonable person in Your position would have considered might give rise to a Claim against You.

4.12 Fines and penalties

for punitive, aggravated, liquidated, multiple or exemplary damages, or fines or penalties imposed by law.

4.13 Retroactive Date

arising out of or connected with any Wrongful Act which occurred prior to the Retroactive Date.

4.14 Professional services exclusion

brought by or on behalf of any client or customer of Yours in connection with professional services provided by You.

4.15 War, confiscation, radioactivity, nuclear perils

for loss, damage, injury, illness or liability directly or indirectly arising from or connected with:

- (a) any war, hostilities, whether war is declared or not, rebellion, invasion, insurrection or the use of military or usurped power;
- (b) any order of any government or public or local authority involving the confiscation, nationalisation, requisition, damage or destruction of any property unless such damage or destruction was undertaken to reduce the spread of fire;
- (c) radioactivity or any radioactive substances; or
- (d) nuclear fission or nuclear fusion.

4.16 Date recognition

which consists of or arises directly or indirectly out of or in connection with the failure or inability of any:

- (a) electronic circuit, microchip, integrated circuit, microprocessor, embedded system, BIOS or other instruction set, hardware, software, firmware, program, computer, data processing equipment, telecommunication equipment or systems, or any similar device; or
- (b) media or systems used in connection with any of them;

whether Your property or not, at any time to achieve fully and successfully any or all of the purposes and consequential effects intended by the use of any number, symbol or word to denote, represent or express a date including but without being limited to any failure or inability to recognise, capture, save, retain or restore and/or correctly to manipulate, interpret, transmit, return, calculate or process any date, data, information, command, logic or instruction as a result of or in connection with:

- (i) anything referred to in (a) or (b) recognising, using or adopting any date, day of the week or period of time, otherwise than as, or other than, the true or correct date, day of the week or period of time; or
- (ii) the operation of any command or logic which has been programmed or incorporated into anything referred to in (a) or (b) above.

4.17 Patent

arising out of or connected with any alleged breach of patent.

Section 5: Claims conditions

5.1 Reporting of Claims

You shall give Us notice in writing as soon as practicable of

- (a) any Claim made against You; or
- (b) the receipt of notice from, or information as to any intention by any party to claim against You;

5.2 Notification of circumstances

If, during the Period of Insurance, You become aware of any circumstances that may (in the opinion of a reasonable practitioner of Your Business) give rise to a Claim and give written notice to Us of such circumstances during the Period of Insurance, then any Claim subsequently arising from such circumstances is deemed to have been made during the Period of Insurance in which the circumstances were first reported to Us.

5.3 Defence and settlement of Claims

You shall not admit liability for or settle any Claim or incur any costs or expenses in connection therewith without Our written consent, such consent not to be unreasonably withheld.

We are entitled at any time to conduct, in Your name, the investigation, defence or settlement of any Claim. If We believe that the Claim will not exceed the Excess We may instruct You to conduct the investigation, defence and settlement at Your expense.

Should the Claim subsequently exceed the Excess We agree to reimburse the reasonable expenses incurred by You in investigating, defending and settling the Claim.

5.4 Legal counsel

We shall not require You to contest any legal proceedings in respect of any Claim against You, nor shall You require Us to contest, on Our behalf, any legal proceedings in respect of any such Claim unless a legal counsel (to be mutually agreed upon by You and Us) shall advise that such proceedings should be contested.

In formulating such advice, counsel shall take into consideration the economics of the matter, having regard to the damages and costs which are likely to be recovered by the plaintiff, the likely costs of defence and the prospects of You successfully defending the action. The cost of counsel's opinion shall be regarded as part of the Costs and Expenses of any Claim.

In the event that counsel advises that, having regard to all the circumstances, the matter should not be contested but should be settled, provided that settlement can be achieved within certain limits which, in counsel's opinion, are reasonable, then You shall co-operate with Us to effect such settlement in accordance with this Policy.

5.5 Your right to contest Claims

If You do not agree with a decision by Us to settle a claim, then You can elect to contest the Claim at Your own expense but Our liability will not exceed the amount for which the Claim could have been settled in the opinion of counsel appointed under clause 5.4 (Legal counsel).

5.6 Claims co-operation

You agree to use Your best endeavours to avoid or diminish a Claim and will provide at Your own cost all information and assistance to Us as is required to determine liability under the Policy and investigate, defend and settle a Claim.

Upon receipt of notice from You of any request for indemnity under this Policy, We may take whatever action We consider appropriate to protect Your position in respect of the Claim against You. Such action by Us shall not be regarded in any way as prejudicing Our position under the Policy and shall not be an admission of Your entitlement to indemnity under the Policy.

Solicitors retained by Us to act on Your behalf in relation to any Claim against You shall at all times be at liberty to disclose to Us any information obtained in the course of so acting, whether from You or howsoever. You hereby waive all claims to legal professional privilege that You might otherwise have as between You and Us in respect of such information.

5.7 Other insurance

Upon giving notice of any Claim, You agree to provide to Us written details of any other insurance that may cover or partially cover that Claim. In the event that You hold other insurance cover with another insurer in respect of any Claim then the indemnity under this Policy shall not be available until the limit of indemnity under any other policy has been exhausted.

5.8 Subrogation

We are entitled to all of Your rights of recovery (before a Claim has been paid and whether or not You has been fully compensated for their actual loss) and You will do everything necessary to secure and preserve such rights. This will include but not be limited to the execution of documents necessary to allow Us to take any legal action in Your name. However, We shall not exercise any subrogated rights of recovery against any employee of Yours unless the Claim has been brought about or contributed to by the dishonest,

fraudulent, criminal or malicious or deliberate act or omission of the employee. In the event that a recovery is made, the amount recovered shall be applied first to the costs of effecting the recovery, then the balance shall be paid to Us and You pro rata in proportion to the insured and the uninsured losses (excluding the Excess) of Us and You respectively. Any balance shall be paid to You in respect of Your Excess.

5.9 Payment of the Limit of Indemnity

We may at any time pay the Limit of Indemnity applying to any one Claim or series of Claims (after deduction of sums already paid) or any lesser amount for which such Claims can be settled and shall then be under no further liability in connection with such Claims.

Section 6: General conditions

6.1 Limit of liability – Claims

Our total liability including Costs and Expenses under this Policy shall not exceed the Limit of Indemnity for any one Claim. Our aggregate liability including Costs and Expenses in respect of all Claims shall not exceed the Limit of Indemnity.

6.2 Excess

You must pay the amount of the Excess in respect of each and every Claim. Where a Claim does not exceed the Excess, You must also pay the expenses incurred in investigating, defending and settling that Claim.

The Excess does apply to any Costs and Expenses incurred with Our written consent in the defence or settlement of any Claim. The Excess does not apply to Costs and Expenses incurred by Us to determine indemnity under the Policy.

Where more than one Claim arises out of the same act or omission or causally connected or interrelated acts or omissions, all of those Claims will together constitute one Claim for the purposes of determining the Excess.

6.3 Alteration to risk

You must give Us notice in writing as soon as practicable of any material change to the risk. A material change to the risk includes without limitation:

- (a) activities that are materially different from those declared in the Proposal or that are outside the normal activities of Your Business;
- (b) a material change to Your Business; or
- (c) the cancellation, suspension or termination of Your statutory registration.

6.4 Cancellation

(a) Method of cancellation:

- (i) You may cancel this Policy at any time by notifying Us in writing.
- (ii) We may cancel this Policy at any time by giving 30 days' notice in writing to You of the date from which cancellation is to take effect. Such notification is to be delivered personally or posted by registered mail to You at the address last notified to Us. Proof of mailing is sufficient proof of notification.

(b) Adjustment of premium:

After cancellation the premium will be adjusted on a pro-rata basis with any unexpired portion returned to You.

6.5 GST

Where You are liable to pay tax under section 5(13) of the Goods and Services Tax Act 1985 (or any statutory amendment or re-enactment of the section or Act) upon receiving any indemnity payment under this Policy, We will indemnify You for the costs of that tax. The indemnity under this clause is payable by Us in addition to the Limit of Indemnity.

6.6 Policy disputes

This Policy shall be governed by the laws of New Zealand whose courts shall have sole and exclusive jurisdiction in any dispute arising herein.

6.7 The Proposal

The Proposal completed by You or on Your behalf for the purpose of obtaining this cover and any Proposal information supplied by You or on Your behalf is deemed to be the basis of this Policy and incorporated herein, and You warrant the truth of all statements made therein.

6.8 Notice

All notices, including notification of Claims, shall be sent to Us in writing at the following address: Lumley, a business division of IAG New Zealand Limited, Lumley Centre, 88 Shortland Street, Auckland 1140, New Zealand.

6.9 Interpretation of words

Words referring to persons shall include companies and other legal entities. The singular includes references to the plural and vice versa and any gender includes reference to all other genders.

6.10 Headings

Headings are included for reference purposes only and do not form part of Your Policy for interpretation purposes.