

Employers Liability Policy

Costs in Addition (Claims Made Wording)

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Introduction

All sections of the policy wording and the Schedule must be read as if they are one and the same document.
Headings are only used to help you read this Policy and do not form part of this Policy.

Section 1 – Definitions

The following defined words and expressions are assigned a particular meaning. That meaning will apply everywhere the word or expression appears and it applies to the plural and derivatives of the word or expressions.

1.1 Claim

“Claim” means:

- (a) legal proceedings instituted and served upon the Insured;
- (b) any threat or intimation that legal proceeding will be issued against the Insured;
- (c) any circumstance that a reasonable person in the position of the Insured would have considered may give rise to a demand for Damages.

1.2 Damages

“Damages” means monetary compensation ordered to be paid or agreed to be paid pursuant to a judgment or settlement of any common law action brought or capable of being brought in a New Zealand court in respect of Personal Injury to an Employee of the Insured, but does not include any such monies payable pursuant to any remedy, relief or penalty provided in any statute of New Zealand, whether by way of damages, fine, reparation or other order.

1.3 Defence Costs

“Defence Costs” means reasonable costs, charges, fees and expenses (including but not limited to lawyers’ fees, investigators’ fees and experts’ fees) incurred with the prior written consent of Lumley that:

- (a) relate directly to the conduct of the Claim;
- (b) are associated with the Insured making an application to the Court to determine whether a Personal Injury is properly the subject of cover under the Accident Compensation Act 2001;
- (c) is an amount required to be paid by the Insured as security for costs in any legal proceeding.

“Defence Costs” does not include charges for the Insured’s time including any time spent by directors, officers, partners or Employees or reimbursement of any remuneration for such people.

1.4 Employee

“Employee” means any person who is employed by the Insured in connection with the Insured’s Business and in respect of whose remuneration the Insured deducts PAYE tax at source.

1.5 Insured

“Insured” means the entity specified in the Schedule and if the Insured is a company it includes its directors, officers or employees and any subsidiaries and their directors, officers or Employees, but only while the person is acting within the scope of their duties in such capacity and does not extend to include any person or Employee who is bringing a Claim.

1.6 Insured’s Business

“Insured’s Business” means the business and undertakings of the Insured, as stated in the Schedule.

1.7 Limit of Indemnity

“Limit of Indemnity” means the amount stated in the Schedule.

1.8 Lumley

“Lumley” means Lumley, a business division of IAG New Zealand Limited.

1.9 Personal Injury

“Personal Injury” means accidental death or accidental bodily injury including sickness, disease, disability, shock, fright, mental anguish or mental injury.

1.10 Policy

“Policy” means the following:

- (a) the Insured’s application for insurance and any oral or written supporting statements or documents supplied; and
- (b) this policy wording (including any amending endorsements); and
- (c) the Schedule.

1.11 Punitive or Exemplary Damages

“Punitive or Exemplary Damages” means monies ordered to be paid as punitive or exemplary damages pursuant to a judgment of a New Zealand court in respect of a common law action brought by an Employee against the Insured in relation to Personal Injury.

1.12 Retroactive Date

“Retroactive Date” means the date shown in the Schedule.

1.13 Schedule

“Schedule” means the most recent policy schedule issued by Lumley.

Section 2 – Coverage

In consideration of payment of the premium and subject to the terms of this Policy, Lumley agrees as follows:

2.1 Insured Liability

Lumley will indemnify the Insured for any Claim that the Insured becomes legally liable to pay as Damages (including Punitive or Exemplary Damages) as a result of an Employee sustaining a Personal Injury in New Zealand and that arose in connection with the Insured’s Business.

Provided that:

- (a) the Claim against the Insured was first made during the period of insurance; and
- (b) the Claim was notified to Lumley as soon as practicable by the Insured during the period of insurance but no later than 30 days of its expiry; and
- (c) the Personal Injury arose out of an event, circumstance or accident that occurred before the expiry of the period of insurance.

2.2 Limit of Indemnity

The limit of Lumley’s liability for all Claims during the period of insurance shall not exceed the Limit of Indemnity. The Limit of Indemnity is inclusive of GST unless specifically provided for under Condition 5.10 (Goods and Services Tax).

2.3 Defence Costs

In addition to the applicable Limit of Indemnity, Lumley shall pay the Defence Costs for any Claim covered by this Policy.

Provided that:

- (a) Lumley’s maximum liability in the aggregate in respect of all Defence Costs during the period of insurance shall not exceed the amount of the Limit of Indemnity.
- (b) upon payment by Lumley of the Limit of Indemnity in respect of any Claim, judgement or settlement, Lumley’s liability in respect of any further Defence Costs in connection with that Claim shall cease.
- (c) if a payment exceeding the Limit of Indemnity has to be made to dispose of a Claim, Lumley’s liability to pay Defence Costs in connection with that Claim shall be limited to such proportion of the Defence Costs as the Limit of Indemnity bears to the amount paid to dispose of the Claim.

2.4 Separate Limits

For the avoidance of doubt, the limits under Clause 2.2 (Limit of Indemnity) and Clause 2.3 (Defence Costs) are separate. This means the Limit of Indemnity to meet Claims under Clause 2.2 (Limit of Indemnity) cannot be used to meet Defence Costs, and the Limit of Indemnity under Clause 2.3 (Defence Costs) cannot be used to meet any Claim.

2.5 Excess

The Insured must pay the excess specified in the Schedule in respect of each and every Claim including Defence Costs.

Section 3 – Extensions

The following Extensions apply automatically and are subject to the terms of this Policy unless stated otherwise. The amounts payable under these Extensions are included within the Limit of Indemnity; they are not in addition to it.

3.1 Continuous Cover Clause

Lumley will indemnify the Insured for any Claim that would be covered under this Policy but for the operation of Exclusion 4.8(c) (Known Claims and Circumstances), subject to the following:

- (a) Lumley was the Insured’s employers liability insurer at the primary level under a policy (“the former policy”) at the time when the Insured first became aware of the circumstances that subsequently gave rise to the Claim; and
- (b) Lumley continued without interruption as the Insured’s employers liability insurer at the primary level from the time when the Insured first became aware of the circumstances up until such time as the Claim was made against the Insured and notified to Lumley; and

- (c) the liability of Lumley is limited to the amount for which Lumley would have been liable at the time referred to in 3.1(a) in accordance with the terms and conditions of the former policy; and
- (d) the liability of Lumley 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.

3.2 Extended Reporting Period

If Lumley cancels or refuses to offer renewal terms for this Policy, the Insured has the right, upon payment of 90% of the annual premium, to an extension of the cover granted by this Policy for a further period of 12 months following the effective date of such non-renewal or termination, but only in respect of a Personal Injury otherwise covered under this Policy that took 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 the Insured to Lumley 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 extended reported 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 extended reported period is deemed fully earned and non-refundable upon payment.

3.3 Mergers and Consolidations

If the company named as Insured in the Schedule:

- (a) is merged, amalgamated, or consolidated with or becomes a subsidiary company of another company;
- (b) sells all or substantially all of its assets to another company;

this Policy will be extended to insure the new company, provided that:

- (a) the operations and activities of the merged, amalgamated or consolidated company are the same as those undertaken by the Insured described in the Schedule; and
- (b) the Insured gives Lumley notice that it wishes to extend cover to the new company within 30 days of the merger, amalgamation consolidation or sale; and
- (c) Lumley shall be entitled to vary the policy terms, conditions and exclusions and charge an additional premium.

There is no cover for any Claim in connection with any Personal Injury that occurred prior to the date of the merger, amalgamation or consolidation.

3.4 New Subsidiary Companies

This Policy is extended to insure a subsidiary company created or acquired by the Insured during the period of insurance provided that:

- (a) the operations and activities of the new subsidiary company are the same as those undertaken by the Insured described in the Schedule; and
- (b) the Insured gives Lumley notice that it wishes to extend cover to the new subsidiary within 30 days of the acquisition or creation of the new subsidiary company; and
- (c) Lumley shall be entitled to vary the policy terms, conditions and exclusions and charge an additional premium.

There is no cover for any Claim in connection with any Personal Injury that occurred prior to the date of the acquisition of the subsidiary company.

3.5 Previous Subsidiary Companies

The definition of Insured will include any entity that ceased to be a subsidiary company of the Insured before or during the period of insurance. However, Lumley will not indemnify any such previous subsidiary for any Claim arising out of a Personal Injury occurring before the Retroactive Date or after it ceased to be a subsidiary of the Insured.

Section 4 – Exclusions

4.1 ACC

There is no cover for liability for compensation that is available under the Accident Compensation Act 2001 or would have been available under that Act, except for the Insured's status as an exempt employer under that Act.

4.2 Asbestos

There is no cover for liability in connection with asbestos.

4.3 Dishonesty or Fraud

There is no cover for any dishonest, fraudulent, criminal or malicious act or omission of any Insured, or any directors, officers or Employees of the Insured.

4.4 Employment Disputes

There is no cover for liability in connection with:

- (a) an employment relationship problem or for an Employee or former Employee seeking compensation under the Employment Relations Act 2000;
- (b) unpaid wages or other benefits due to any Employee.

4.5 Existing Litigation

There is no cover for liability in connection with any litigation in existence at the commencement of the period of insurance.

4.6 Fines and Contractual Obligations

There is no cover for liability for:

- (a) any fine or penalty imposed on the Insured (whether under contract or statute);
- (b) any contractual obligation in the nature of a performance warranty or claim for liquidated damages.

4.7 Health and Safety in Employment Act

There is no cover for liability in connection with an Employee sustaining a Personal Injury which arose out of the failure by the Insured to comply with any improvement, prohibition or suspension notice issued to the Insured or its Employees under the Health and Safety in Employment Act 1992.

4.8 Known Claims and Circumstances

There is no cover for liability in connection with any Claims:

- (a) made against, or intimated to, the Insured prior to the commencement of the period of insurance;
- (b) notified under any previous Policy;
- (c) arising out of or connected with any facts or circumstances that:
 - (i) the Insured was aware of prior to commencement of the period of insurance; and
 - (ii) a reasonable person in the position of the Insured would have considered may give rise to a Claim.

4.9 Legal Jurisdiction

There is no cover for liability in connection with any Claims:

- (a) in respect of legal action or litigation first brought in a court or tribunal outside New Zealand;
- (b) in respect of any legal action or litigation brought in a court or tribunal within New Zealand to enforce a judgment handed down in a court or tribunal outside New Zealand whether by way of a reciprocal agreement or otherwise;
- (c) in respect of any legal action in which the proper law to be applied is that of a country other than New Zealand.

4.10 Nuclear

There is no cover for liability in connection with:

- (a) the use of nuclear reactors such as atomic piles, particle accelerators or generators or similar devices;
- (b) the use, handling or transportation of radioactive materials;
- (c) the use, handling, transportation of any weapon of war or explosive device employing nuclear fission or fusion.

4.11 Retroactive Date

There is no cover for liability in connection with any event, circumstance or accident that occurred prior to the Retroactive Date.

4.12 Terrorism

There is no cover for liability in connection with any Act of Terrorism, regardless of any contributing cause or event, including in connection with controlling, preventing, suppressing, retaliating against, or responding to an Act of Terrorism.

“Act of Terrorism” means any unlawful act, or preparation in respect of action, or threat of action designed to influence or coerce the government de jure or de facto, of any nation or any political division thereof, or in pursuit of political, religious, ideological, or similar purposes to intimidate the public, or a section of the public, of any nation by any person or group(s) of persons whether acting alone or on behalf of or in connection with any organisation(s) or government(s) de jure or de facto, and that:

- (a) involves violence against one or more persons;
- (b) involves damage to property;
- (c) endangers life other than that of the person committing the action;
- (d) creates a risk to health or safety of the public or a section of the public;
- (e) is designed to interfere with or disrupt an electronic system.

4.13 War

There is no cover for liability in connection with war, invasion, act of foreign enemy, hostilities or warlike operations (whether war be declared or not), civil war, rebellion, revolution, insurrection, civil commotion assuming the proportions of or amounting to an uprising, military or usurped power, expropriation, confiscation, nationalisation, destruction or damage to property by or under the order of any government or public or local authority.

Section 5 – Conditions

5.1 Allocation of Costs

If Defence Costs are incurred both in respect of a Claim insured under this Policy and a matter which is not insured under this Policy, then Lumley shall be liable to pay only a fair proportion of such Defence Costs as they relate to the Claim.

In the event that the Insured and Lumley are unable to agree a fair proportion, then a lawyer, mutually agreed upon by both parties and whose decision shall be final, shall determine what is a fair proportion. If the parties cannot agree on a lawyer, then a lawyer will be appointed by the President of the New Zealand Law Society.

5.2 Assignment

Unless Lumley's written consent is obtained and endorsed on this Policy, no assignment of interest under this Policy shall bind Lumley.

5.3 Cancellation

The Insured may cancel this Policy at any time by notifying Lumley in writing.

Lumley may cancel this policy at any time by giving notice in writing or by electronic means to the Insured (or the Insured's broker or agent). The policy will be cancelled from 4pm on the 30th day after the date of the notice.

Adjustment of Premium:

- (a) After cancellation by the Insured, Lumley will retain or be entitled to the premium for the period during which this Policy has been in force;
- (b) After cancellation by Lumley, the Insured is entitled to a pro-rata refund of any unused premium.

5.4 Change of terms

Lumley may change the terms of this Policy (including the excess) by giving notice in writing or by electronic means to the Insured (or the Insured's broker or agent). Unless otherwise specified in this Policy the change in terms will take effect from 4pm on the 30th day after the date of the notice.

5.5 Compliance with the Policy

The Insured (and any other person or entity covered) must comply with the conditions of this Policy at all times. If the Insured, or any other person or entity covered under this Policy, or anyone acting on the Insured's behalf, breaches any of the terms and/or conditions of this Policy, Lumley may:

- (a) decline the Claim either in whole or in part; and/or
- (b) declare either this Policy or all insurance the Insured has with Lumley to be of no effect and to no longer exist.

5.6 Conduct of Claims

The Insured must not, without Lumley's prior written consent, admit liability for or make any decision that affects the conduct of a Claim including the defence, compromise or handling of the Claim in any manner whatsoever on behalf of the Insured, or incur any costs or expenses in connection with a Claim.

Lumley shall be entitled to nominate a solicitor to act as the Insured's lawyer and subject to clause 5.8 (Defence of Legal Proceedings) shall have total discretion as to the conduct of a Claim, in the name of the Insured. The solicitor shall at all times be at liberty to disclose to Lumley any information obtained in the course of so acting, whether from the Insured or howsoever. The Insured hereby waives all claims to legal professional privilege that it might otherwise have as between itself and Lumley in respect of such information.

If Lumley believes that the Claim will not exceed the excess, Lumley may instruct the Insured to assume responsibility for the conduct of the Claim at the Insured's expense. Should the Claim subsequently exceed the excess, Lumley agrees to reimburse the reasonable costs and expenses incurred by the Insured that exceed the excess. The Insured must advise Lumley as soon as the total costs of the Claim exceed the excess or it becomes apparent that they are likely to do so.

5.7 Cross Liability

Where the Insured consists of more than one legal entity the word "Insured" shall apply to each as if a separate policy had been issued to each. Nothing contained in this Condition increases the Limit of Indemnity in respect of any Claim or period of insurance.

5.8 Defence of Legal Proceedings

- (a) If the lawyer appointed to defend the Insured advises that the Claim should not be defended, then Lumley is not required to defend the Claim against the Insured unless a second lawyer that Lumley and the Insured agree to instruct, advises that the Claim should be defended.
- (b) If the parties cannot agree on a lawyer, then a lawyer will be appointed by the President of the New Zealand Law Society. In formulating their advice, the lawyer must be instructed to consider the:
 - (i) economics of the matter; and
 - (ii) damages and costs likely to be recovered; and
 - (iii) likely costs of defence; and
 - (iv) prospects of successfully defending the claim.
- (c) The cost of the second lawyer's opinion is to be taken as part of the Defence Costs covered under this policy.
- (d) If the second lawyer advises that the claim should be settled and if the terms of settlement that Lumley recommend are within limits that are reasonable (in the second lawyer's opinion, and in the light of the matters they are required to consider), then:
 - (i) The Insured cannot object to the settlement; and
 - (ii) The Insured must immediately pay the excess shown in the Schedule.

5.9 Disputes About This Policy

The law of New Zealand applies to disputes about this Policy and the New Zealand Courts have exclusive jurisdiction.

5.10 Goods and Services Tax

Where the Insured is liable to pay tax under section 5(13) of the Goods and Services Tax Act 1985 upon receiving any indemnity payment under this Policy, Lumley will indemnify the Insured for the costs of that tax. The indemnity under this clause is payable by Lumley in addition to the Limit of Indemnity.

5.11 Insured's Warranty

It is agreed between the Insured and Lumley that the written proposal provided by the Insured forms the basis of the Policy and the Insured warrants the truth of all statements made therein.

5.12 Legislation Changes

Any reference to any Act of Parliament or subordinate rules referred to in this Policy includes any amendments made or substitutions to that law.

5.13 Material Change of Facts or Circumstances

The Insured shall give Lumley notice in writing as soon as practicable of any change that materially varies any of the facts or circumstances that existed at the commencement of this Policy. Lumley shall be entitled to vary the Policy terms, conditions and exclusions and charge an additional premium.

5.14 Other Insurance

Upon giving notice of any Claim, the Insured agrees to provide to Lumley written details of any other insurance that may cover or partially cover that Claim.

This Policy does not indemnify any Claim if it is indemnified to any extent under any other insurance policy. Lumley will not contribute towards any claim under any other insurance policy.

5.15 Reasonable Precautions

The Insured shall take reasonable care at all times to avoid circumstances that could result in a Claim and shall take all reasonable steps to minimise any Claim and avoid any further loss or liability arising. Lumley shall not be liable if the Insured is reckless or grossly irresponsible.

5.16 Reporting of Claims

Irrespective of the quantum, the Insured must give Lumley immediate notice in writing of:

- (a) any Claim made against them;
- (b) the receipt of notice, or information as to any intention by any party to make a Claim against them;
- (c) any circumstance that a reasonable person in the position of the Insured would have considered may give rise to a Claim.

Provided that in order to qualify as a Claim capable of being covered by this Policy the Insured's notice in writing must:

- (i) relate to a Claim that occurred during the period of insurance; and
- (ii) be given during the period of insurance or within 30 days after its expiry.