

Statutory Liability (Australia)

Policy

Lumley, a business division of IAG New Zealand Limited, Lumley Centre, 88 Shortland Street, PO Box 2426, Auckland 1140, New Zealand
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Introduction

In consideration of the payment to Lumley of the premium and in reliance on the written proposal, declaration and any other underwriting information provided, which shall be deemed to be incorporated into and to be the basis of this Policy, Lumley will indemnify the Insured as follows.

For the sake of clarity, this Policy does not cover any Loss based upon, attributable to or in consequence of any willful, intentional or deliberate Wrongful Breach or a Wrongful Breach caused by gross negligence or recklessness by the Insured or any dishonest, fraudulent or malicious act or omission of the Insured. In this regard, refer to the full terms and effect of the exclusions contained in clause 6 of this Policy.

Section 1: Definitions

1.1 Act

1.1.1 Act means any Act of the Parliament of the Commonwealth of Australia and any Act of the Parliaments of the States or Territories of the Commonwealth of Australia, including any subordinate or delegated legislation made under those Acts; and

1.1.2 any amendment, consolidation or re-enactment of any of the above Acts or legislation.

1.2 Appointed Representative

'Appointed Representative' means the solicitors, barristers, assessors, consultants or investigators appointed in accordance with this Policy in respect of a Claim.

1.3 Business

'Business' means the business conducted by the Named Insured as described in the Schedule.

1.4 Claim

'Claim' means any verbal or written notice received by the Insured, which alleges a Wrongful Breach and claims that the Insured is liable to pay a Penalty.

1.5 Computer Equipment

'Computer Equipment' includes but is not limited to any or an combination or part of data, computer hardware, operating system, application, software, and computer chip including microprocessor chip or embedded control logic, and irrespective of by whom it is owned or operated.

1.6 Consumer Protection Act

'Consumer Protection Act' means any of the following:

Fair Trading Act 1985 (Vic)

Fair Trading Act 1987 (NSW)

Fair Trading Act 1987 (SA)

Fair Trading Act 1987 (WA)

Fair Trading Act 1989 (Qld)

Fair Trading Act 1990 (Tas)

Fair Trading Act 1992 (ACT)

Consumer Affairs and Fair Trading Act 1996 (NI)

Trade Practices Act 1974 (Cth)

and any amendment, consolidation or re-enactment of any of those Acts.

1.7 Defence Costs

'Defence Costs' means any reasonable legal costs and associated expenses incurred with the written consent of Lumley in connection with the investigation, defence (including appeal or resisting appeal) and settlement of any Claim but shall not include wages, salaries or other remuneration of the Insured.

Provided that where proceedings are commenced to impose a Penalty and those proceedings are also in respect of other matters, then Lumley will not be liable for that proportion of the legal costs and associated expenses that may be reasonably attributed to the proceedings in relation to those other matters.

1.8 Employee

'Employee' means any person employed by the Named Insured under a contract of service during or prior to the commencement of the Period of Insurance, but does not include any independent contractor or any employee of any independent contractor.

1.9 Excess

'Excess' means the amount as stated in the Schedule, to be borne by the Insured in respect of each and every Loss.

1.10 Insured

'Insured' means:

- 1.10.1 the Named Insured;
- 1.10.2 any Officer whilst acting in the performance of their duties to the Named Insured;
- 1.10.3 any Employee whilst acting in the performance of their employment by the Named Insured.

1.11 Limit of Indemnity

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

1.12 Lumley

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

1.13 Loss

'Loss' means any Penalty and Defence Costs.

1.14 Named Insured

'Named Insured' means the Company described in the Schedule and/or any Subsidiary Company which was a Subsidiary Company prior to the commencement of the Period of Insurance.

1.15 Officer

'Officer' means any past, present or future director, executive officer (as defined by the Corporations Law) or company secretary of the Named Insured.

1.16 Penalty

'Penalty' means any monetary sum payable by the Insured to any Regulatory Authority pursuant to any Act for a Wrongful Breach by the Insured but excluding:

- 1.16.1 any amounts payable as compensation;
- 1.16.2 any compliance, remedial repair or restitution costs;
- 1.16.3 any damages including any exemplary or punitive damages;
- 1.16.4 any consequential economic loss;
- 1.16.5 any legal costs and associated expenses.

Notwithstanding clause 1.16.5, Lumley will pay any reasonable legal costs and associated expenses payable by the Insured to any Regulatory Authority upon the imposition of a Penalty covered by this Policy. Provided that where the proceedings that lead to the imposition of the Penalty also include proceedings in respect of any of the matters set out in sub-clauses 1.16.1 to 1.16.5, Lumley will not be liable for that proportion of the legal costs and associated expenses that may be reasonably attributed to the proceedings in respect of those matters set out in sub-clauses 1.16.1 to 1.16.5.

1.17 Period of Insurance

'Period of Insurance' means the period of insurance stated in the Schedule

1.18 Policy

'Policy' means:

- 1.18.1 the Policy wording;
- 1.18.2 the Schedule;
- 1.18.3 the proposal; and
- 1.18.4 any endorsements agreed by the parties attaching to and forming part of this Policy either at inception or during the Period of Insurance.

1.19 Reasonable Grounds for Defence

'Reasonable Grounds for Defence' means:

- 1.19.1 the Insured has reasonable prospects of success in avoiding or reducing any Penalty alleged in the Claim; or
- 1.19.2 the Insured has reasonable prospects of success in reducing the quantum of any Penalty alleged in the Claim, and that having regard to the likely legal costs incurred in defending the Claim it is reasonable for the claim to be defended. Provided that in either scenario 1.19.1 for 1.19.2 above the Claim is not capable of being avoided or mitigated by a settlement into which a reasonable person in the position of the Insured, properly advised, would enter.

1.20 Regulatory Authority

'Regulatory Authority' means a person or entity appointed, constituted or acting under a delegation pursuant to any Act for the purposes of enforcement of such Act or another Act, including a person or entity authorised to collect monies payable to the Consolidated Revenue Fund, Consolidated Fund or any other such fund.

1.21 Retroactive Date

'Retroactive Date' means the date shown in the Schedule. However, unless otherwise agreed in writing by Lumley, such date in respect of any entity acquired or created by the Named Insured shall be the date of acquisition or creation of that entity by the Named Insured or the date shown in the Schedule, whichever is the later date.

1.22 Schedule

'Schedule' means the document attaching to and forming part of this Policy, which is signed by Lumley's authorised representative.

1.23 Senior Officer

'Senior Officer' means any director, chief executive officer, or company secretary of the Named Insured.

1.24 Subsidiary Company

'Subsidiary Company' means any entity in respect of which the Named Insured:

1.24.1 controls the composition of the board of directors; or

1.24.2 is in a position to cast, or control the casting of, more than 50% of the issued voting shares; or

1.24.3 holds more than 50% of the issued share capital;

and shall include any entity which is deemed to be a subsidiary of the Named Insured by virtue of any legislation or law.

1.25 Territorial Limit

'Territorial Limit' means anywhere in Australia.

1.26 Wrongful Breach

'Wrongful Breach' means any act, error or omission, which occurs:

1.26.1 in connection with the Business;

1.26.2 within the Territorial Limit; and

1.26.3 after the Retroactive Date,

whereby:

1.26.4 the Insured contravenes an Act or is involved in the contravention of an Act;

1.26.5 the Insured commits an offence pursuant to an Act; or

1.26.6 such conduct is prohibited under an Act or is the subject of the imposition of a Penalty under an Act.

Section 2: Coverage

- 2.1** Lumley agrees to pay to and on behalf of the Insured any Loss arising from any Claim first received by the Insured and notified to Lumley during the Period of Insurance.
- 2.2** Lumley shall not be liable to indemnify the Insured for Defence Costs under clause 2.1 unless the Insured obtains Lumley's written consent. Lumley shall not be obliged to provide such consent unless Lumley is satisfied that the Insured has Reasonable Grounds for Defence.
- 2.3** If Lumley refuses to provide the consent set out in clause 2.2, Lumley shall give to the Insured reasons for its refusal. If after receipt of those reasons the Insured contests Lumley's refusal to provide such consent the Insured may obtain the written opinion of a Senior Counsel. The Senior Counsel shall be mutually agreed upon by both parties or failing agreement shall be appointed by the then President of the Law Society or the Law Institute in the relevant State or Territory. If the Senior Counsel is of the opinion that the Insured has Reasonable Grounds for Defence then Lumley will:
- 2.3.1 give its consent in accordance with clause 2.2;
- 2.3.2 be responsible for the Senior Counsel's reasonable fees for providing such opinion.
- 2.4** If the Insured continues to defend a Claim where Lumley has refused to provide consent in accordance with clause 2.2 and the Insured is successful in respect of that Claim, then the consent set out in clause 2.2 shall be deemed to have been given at the time it was first requested by the Insured. For the purpose of this clause 'successful' means that the outcome of the Claim establishes that at the time at which Lumley refused consent, the Insured had Reasonable Grounds for Defence.
- 2.5** Provided that notice has been given to Lumley within 30 days of acquisition or creation, it is understood and agreed that the definition of the Named Insured is extended to include any Subsidiary Company acquired or created subsequent to the commencement of the Period of Insurance but the indemnity granted by virtue of this extension shall only apply in respect of any Wrongful Breach committed or alleged to have been committed by the Insured in respect of such Subsidiary Company subsequent to such acquisition or creation.
- PROVIDED THAT:
- Lumley shall be entitled to such additional information as it may require in respect of such acquired or created Subsidiary Company and shall have the right to charge an additional premium.

Section 3: Limit of Indemnity and Excess

- 3.1 Lumley's liability under this Policy in respect of all Losses arising out of all Claims covered by this Policy during the Period of Insurance will not exceed the Limit of Indemnity stated in the Schedule.
- 3.2 Lumley's liability under this Policy applies only to that part of each Loss which exceeds the Excess.
- 3.3 For the purposes of this Policy, all Losses arising out of any one Wrongful Breach or interrelated Wrongful Breaches are deemed to be one Loss.

Section 4: Exclusions

4.1 This Policy does not provide indemnity in respect of any Claim:

- 4.1.1 based upon, attributable to or in consequence of.
 - 4.1.1.1 any willful, intentional or deliberate Wrongful Breach;
 - 4.1.1.2 a willful, intentional or deliberate failure to comply with any lawful notice, direction, enforcement action or proceeding under any Act;
 - 4.1.1.3 any Wrongful Breach caused by gross negligence or recklessness by the Insured;
 - 4.1.1.4 a dishonest, fraudulent, malicious act or omission of the Insured;
 - 4.1.1.5 the Insured gaining any personal profit or advantage or receiving any remuneration to which he/she was not legally entitled;
 - 4.1.1.6 any Wrongful Breach in connection with any strike, lockout, picket line, stand down or industrial dispute. This exclusion does not apply to Officers and Employees for Claims arising in the performance of their duties as Officers and Employees;
 - 4.1.1.7 a Wrongful Breach of any Consumer Protection Act. This exclusion does not apply to Officers and Employees for Claims arising in the performance of their duties as Officers and Employees;
 - 4.1.1.8 offences under Sections 232(5) and 232(6) of the Corporations Law;
 - 4.1.1.9 a Wrongful Breach in connection with a requirement to pay taxes; rates, duties, levies, charges, fees or any other revenue or impost;
 - 4.1.1.10 a Wrongful Breach relating to the regulation of vehicle, air or marine traffic;
 - 4.1.1.11 ionising radiations or contamination by radioactivity from any nuclear waste or from the combustion of nuclear fuel;
 - 4.1.1.12 the radioactive, toxic, explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof;
 - 4.1.1.13 war, invasion, act of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, military or usurped power or confiscation or nationalisation or requisition or destruction of or damage to property by or under the order of any Government or Public or Local Authority;
- 4.1.2 made, threatened or in any way intimated against the Insured prior to the Period of Insurance;
- 4.1.3 arising from any matter disclosed to any Underwriter (including Lumley) prior to the Period of Insurance as either a Claim or circumstance, which may give rise to a Claim against the Insured;
- 4.1.4 arising from any circumstances of which the Insured had become aware prior to the Period of Insurance and which the Insured knew (or ought reasonably to have known) to be circumstances which may give rise to a Claim;
- 4.1.5 arising from any Wrongful Breach where the Insured knew (or ought reasonably to have known) prior to the Period of Insurance that there had been such a Wrongful Breach;
- 4.1.6 for any Loss or part of any Loss which is attributable to the period after the Insured knew (or ought reasonably to have known) that its conduct was a Wrongful Breach;
- 4.1.7 deliberately or intentionally solicited by the Insured. This exclusion does not apply to Officers and Employees where such Claims arise in the discharge of their duties as Officers and Employees;
- 4.1.8 any Defence Costs incurred or paid before the consent of Lumley has been given in accordance with the provisions of this Policy;
- 4.1.9 for any Penalty
 - 4.1.9.1 imposed pursuant to any law of any country state or territory outside the Territorial Limit;
 - 4.1.9.2 imposed within the Territorial Limit but arising out of any act or omission occurring outside the Territorial Limit, and any Defence Costs associated with such Penalty.

4.2 Lumley shall not be liable to pay the amount of the Excess in respect of each Loss.

4.2 Notwithstanding any provision to the contrary within this insurance or any endorsement thereto it is agreed that this insurance excludes loss, damage, death, injury, illness, cost or expense of whatsoever nature directly or indirectly caused by, resulting from or in connection with any act of terrorism regardless of any other cause or event contributing concurrently or in any other sequence to the loss.

For the purpose of this exclusion an act of terrorism means an act, including but not limited to the use of force or violence and/or threat thereof, of any person or group(s) of persons, whether acting alone or on behalf of or in connection with any organisation(s) or government(s) which from its nature or context is done for, or in connection with, political, religious, ideological, ethnic or similar purposes or reasons, including the intention to influence any government and/or to put the public, or any section of the public, in fear.

This exclusion also excludes loss, damage, death, injury, illness, cost or expense of whatsoever nature directly or indirectly caused by, resulting from or in connection with any action taken in controlling, preventing, suppressing or in any way relating to any act of terrorism.

- 4.5** Lumley shall not be liable to indemnify the Insured in respect of any actual or alleged liability arising out of any Claim or Claims resulting from, arising directly or indirectly out of, in consequence of, or in any way involving the existence, mining, handling, processing, manufacture, sale, distribution, storage or use of asbestos, asbestos products and/or products containing asbestos.

Section 5: Claims Conditions

5.1 Notification of Claims/Circumstances

- 5.1.1 The Insured shall as a condition precedent to the Insured's right to be indemnified under this Policy give Lumley immediate notice in writing:
- 5.1.1.1 of any Claim made against the Insured; and
 - 5.1.1.2 of any circumstances which the Insured shall become aware which may give rise to a Claim under this Policy, irrespective of whether the Penalty is likely to be within or above the amount of the Excess.
- 5.1.2 If a Claim is made against the Insured during the Period of Insurance and the Insured notifies Lumley of such Claim within 21 days after the expiry of the Period of Insurance, such Claim shall be deemed to have been notified to Lumley during the Period of Insurance.
- 5.1.3 If during the Period of Insurance the Insured becomes aware of any circumstances which may subsequently give rise to a Claim against the Insured and the Insured gives written notice of such circumstances to Lumley during the Period of Insurance (or within 21 days after the expiry of the Period of Insurance), then any Claim which may subsequently be made against the Insured shall be deemed to be a Claim made against the Insured and notified to Lumley during the Period of Insurance.

5.2 Settlement/Defence/Co-Operation

- 5.2.1 The Insured shall use all reasonable care and do and concur to do all things reasonably practicable to avoid a Wrongful Breach or diminish a Loss.
- 5.2.2 The Insured shall not make any offer, payment, admission, settlement or effect any resolution in respect of any Claim or agree to pay any Penalty or consent to any order directing the Insured to pay any Penalty without the consent of Lumley shall not be liable for any such Penalty incurred without its consent. However, Lumley will not unreasonably withhold such consent
- 5.2.3 Lumley shall have the right, but not the obligation, to conduct in the name of the Insured, the investigation, defence (including appeal and resisting appeal) and settlement of any Claim. Any amount incurred by Lumley shall be deemed to be part of the Defence Costs.
- 5.2.4 Where Lumley recommends to the Insured to agree to pay any Penalty, consent to any order directing the Insured to pay any Penalty or otherwise settle or resolve any Claim, and the Insured does not agree to do so, then Lumley is entitled to reduce its liability to the Insured to the extent of any prejudice suffered by Lumley by reason of the Insured's failure to so agree.
- 5.2.5 The Insured may request Lumley to nominate the Appointed Representative to act on behalf of the Insured. Alternatively, if the Insured wishes to nominate the Appointed Representative the Insured must obtain Lumley's consent to the appointment of the Appointed Representative, which consent shall not be unreasonably withheld. If the parties cannot agree on the appointment of the Appointed Representative then the parties may agree to refer this issue to the then President of the Law Society or Law Institute within the relevant State or Territory to appoint the Appointed Representative.
- 5.2.6 The Insured shall not enter into any agreement to appoint the Appointed Representative without first obtaining the consent of Lumley as to the terms of the appointment of the Appointed Representative, including remuneration terms. Further, the Insured shall not represent to the Appointed Representative that all costs and associated expenses are covered by this Policy.
- 5.2.7 The Insured shall do all things reasonably necessary to allow Lumley to obtain from the Appointed Representative any information, report, documents or advice relating to the Claim.
- 5.2.8 The Insured shall upon the request of Lumley or the Appointed Representative and at its own expense:
- 5.2.8.1 provide all information and assistance as may be required;
 - 5.2.8.2 give a complete and truthful account of the facts relevant to any Claim;
 - 5.2.8.3 supply all documents and other evidence relevant to the Claim; and
 - 5.2.8.4 obtain and sign all documents reasonably required to be obtained and signed and attend any meeting or conferences when reasonably requested,
- AND in respect of a Claim made against.
- 5.2.8.5 the Named Insured, the Named Insured shall, upon the request of Lumley or the Appointed Representative and at its own expense ensure that a Senior Officer attends and if necessary gives evidence, on behalf of the Named Insured, at any conference, hearing, enquiry, investigation, proceeding or review in connection with any Claim made against the Named Insured;
 - 5.2.8.9 any Officer or Employee, the Officer or Employee shall, upon the request of Lumley or the Appointed Representative and at their own expense attend, and if necessary give evidence at any conference, hearing, enquiry, investigation, proceeding or review in connection with any Claim made against such Officer or Employee.
 - 5.2.8.10 For the purpose of clauses 5.2.1 to 5.2.8 any reference to a Claim includes circumstances notified under clause 5.1. 1 of this Policy.

Section 6: General Conditions

6.1 Assignment or Alteration of Interest

No change in, or modification of, or assignment of interests under this Policy shall be effective except if agreed to in writing by Lumley.

6.2 Authorisation

The Organisation described in item I of the Schedule agrees to act on behalf of all the Insureds under this Policy and each Insured agrees that such Organisation is authorised to act on their behalf with respect to the giving and receiving of notice of any Claim, the receiving and giving of notice of cancellation or expiry of this Policy, the payment of Premium and the return of any part of the Premium that may become due under this Policy, the negotiation, agreement to and acceptance of endorsements, and the giving and receiving of any other notice provided for in this Policy.

6.3 Cancellation

6.3.1 The Insured may cancel this Policy at any time by giving notice to Lumley. Lumley shall refund to the Insured the amount of the unexpired premium already paid on a pro rata basis, subject to any minimum premium applicable.

6.3.2 Lumley may cancel this Policy by sending at least 30 days notice to the Insured in accordance with Conditions 6.7.2 and 6.7.3. Lumley will refund the amount of any unexpired premium already paid on a pro rata basis.

6.4 Change in Circumstances

The Insured shall give written notice as soon as possible to Lumley of any change in any of the facts or circumstances existing at the commencement of this Policy which materially changes the nature or extent of the risk insured by this Policy.

6.5 Confidentiality

It shall be a condition of this Policy that (except to the extent that the Insured is compelled by law to do so) the Insured not release to any third party, or otherwise publish, details of the nature of the liabilities insured by this Policy, the extent of cover provided by this Policy, or the amount of the Premium specified in the Schedule, without the written consent of Lumley.

6.6 Construction

The marginal notes, titles of paragraphs or headings in this Policy are included for descriptive purposes only and do not form part of this Policy for the purposes of its construction and interpretation.

6.7 Notices by Lumley

6.7.1 Any notice given in writing by Lumley to the first Named Insured in the Schedule, or to the broker through which the Insured arranged this Policy with Lumley, shall be deemed to be notice to each Insured;

6.7.2 Any notices by Lumley may be effected by sending an, email or letter to the last known contact number or address;

6.7.3 Any such notice shall be deemed to have been received, if sent by email, at the time of transmission, and if sent by post, three business days after the date of posting.

6.8 Notices Under Acts

The Insured shall comply with any lawful notice or direction received from, or any enforcement action taken by, any appropriate Regulatory Authority under any Act within the time specified or if no time is specified, within a reasonable time.

6.9 Other Insurance

6.9.1 In the event that a policy of insurance or policies of insurance are listed in the Schedule, those policies of insurance will act as primary insurance and this Policy will only apply in excess of such policy(ies) of insurance;

6.9.2 The Insured shall notify Lumley immediately upon entering into any other policy (ies) of insurance that provides insurance cover in respect of the risks insured by this Policy.

6.10 Policy Disputes

This Policy shall be governed by the laws of New Zealand whose courts shall have jurisdiction in relation to any dispute.

6.11 Preservation

Any provision of this Policy which is illegal, void or unenforceable is only ineffective to the extent of that illegality, voidness or unenforceability, without invalidating the remaining provisions.

6.12 Reasonable Care

The Insured shall take reasonable care at all times:

6.12.1 to only employ competent Officers, Employees, agents and contractors;

6.12.2 to comply and ensure that its Officers, Employees, agents and contractors comply with the provisions of any Act; and

6.12.3 to maintain all premises, fittings and plant in a safe and sound condition.

6.13 Severability and Non-Imputation

Lumley agrees that where this Policy insures more than one party, any conduct on the part of any party or parties whereby such party or parties:

6.13.1 failed to comply with the duty of disclosure in terms of the Australian Insurance Contracts Act 1984,

6.13.2 made a misrepresentation to Lumley before this Policy was entered into;

6.13.3 failed to comply with any term or condition of this Policy; and/or

6.13.4 acted in a manner which gives rise to the application of an exclusion of this Policy;

shall not prejudice the right of the remaining party or parties to indemnity as may be provided by this Policy.

PROVIDED ALWAYS THAT such remaining party or parties shall:

6.13.5 not have participated in and have had no prior knowledge of any such conduct; and

6.13.6 as soon as is reasonably practicable upon becoming aware of any such conduct, advise Lumley in writing of all known facts in relation to such conduct.

6.14 Subrogation

If any payment is made under this Policy, Lumley shall be subrogated to the extent of such payment to all of the Insured's rights of recovery. In such case the Insured shall execute all papers required and shall do everything necessary to secure and preserve such rights, including the execution of such documents necessary to enable Lumley to effectively bring suit in the name of the Insured.