



MINTERELLISON

Practical guide to enforcement of indemnities

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A Latin phrase	Explicit	Scaffold	Flood
Precedent	Church	Tough mudder	Guarantee
Rescuer	Proximate	A tongue twister	Bizarre
Death	276	Illogical	Harmless

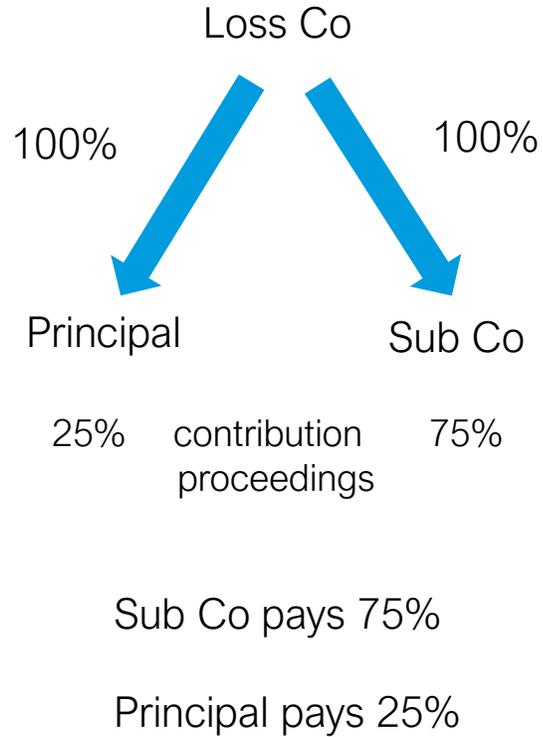




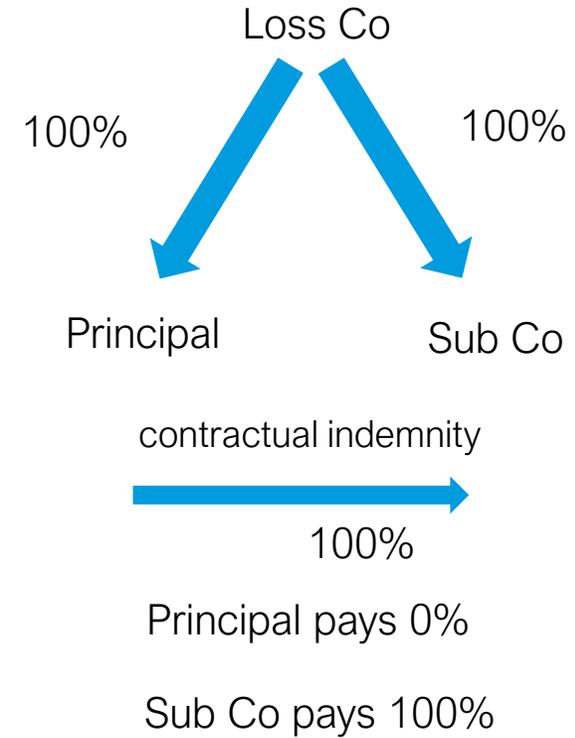
01

It's fine, we've got an indemnity

If there was no indemnity clause



With indemnity clause



Example 1

You are responsible for –

- a) damage loss or injury to any person or property; and
- b) The cost of any security or emergency call-out to the Premises;
arising from your use of the Premises.

You will indemnify us, our employees and agents against all claims for damages, loss, costs or injury arising from your use and occupation of the Premises.



Example 2

The Consultant holds the Principal **harmless** from any action, claims, liability or loss in respect of the performance of the Consultant's services.



Example 3

The Consultant indemnifies the Principal against all loss, damages, claims, liability or expenses incurred by or awarded against the Principal arising directly or indirectly from:

- any breach by the Consultant of this agreement; or
- any act or omission of the Consultant relating to this Agreement or arising as a consequence of the performance or non-performance of the services,

but the indemnity shall be reduced proportionally to the extent that the Principal caused or contributed to the loss.



Example 4

The hirer of the equipment shall bear the risk of a loss in hiring of the equipment and must defend, indemnify and hold the supplier harmless against any injury, death, claim or other loss arising from the hiring of the equipment.



Example 5 – Tough Mudder Spectator Liability Agreement

To the extent permitted by law, I hereby agree to hold harmless, defend, and indemnify (which for the avoidance of doubt includes defending and paying any judgment, court costs, investigation costs, attorney's fees, and any other expenses incurred that relate to a breach of this Contract) IMG (and the other Released Parties) from any and all claims made by me (or any Releasing Party) arising from injury or loss due to my participation in the TM Event. This applies both to claims arising from the inherent risks of the TM Event or the ordinary negligence of IMG (or any Released Parties).

I further agree to hold harmless, defend and indemnify (which for the avoidance of doubt includes defending and paying any judgment, court costs, investigation costs, attorney's fees, and any other expenses incurred that relate to a breach of this contract) IMG (and the other Released Parties) against any and all claims of co-participants, rescuers, and others arising from my conduct in the course of my participation in the TM event.



01

It's fine, we've got an indemnity



02

“NO”

—



03

But I thought we had indemnity!

Erect Safe Scaffolding (Australia) Pty Ltd v Sutton

Indemnity clause

The Subcontractor must indemnify Australand Constructions against all damage, expense (including lawyers' fees and expenses on a solicitor/client basis), loss (including financial loss) or liability of any nature suffered or incurred by Australand Constructions arising out of the performance of the Subcontract Works and its other obligations under the Subcontract.



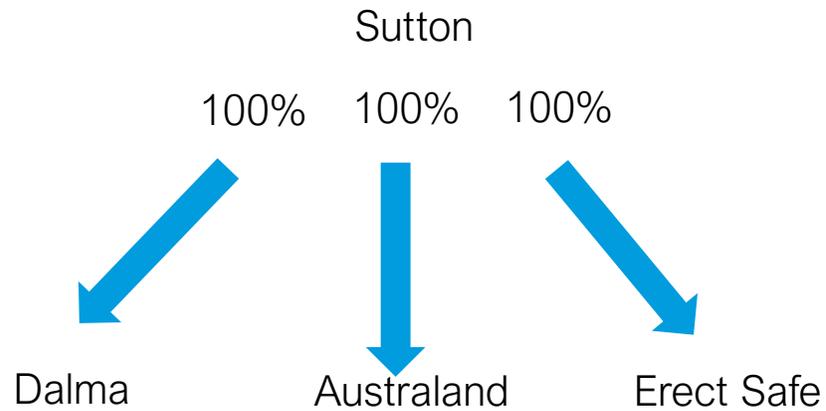
Erect Safe Scaffolding (Australia) Pty Ltd v Sutton

Insurance clause

Before commencing work, the Subcontractor must effect and maintain during the currency of the Subcontract, Public Liability insurance in the joint names of the Australand and the Subcontractor to cover them for their respective rights and interests against liability to third parties for loss of or damage to property and the death of or injury to any person.



If there was no indemnity clause



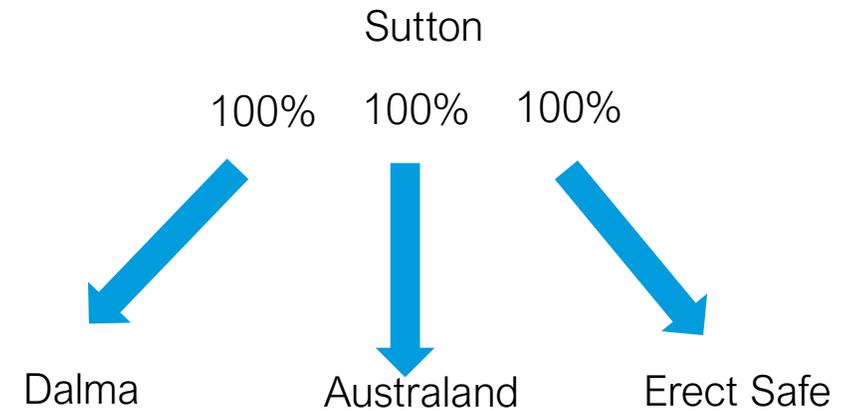
Contribution Proceedings

Dalma 15%

Australand 25%

Erect Safe 60%

With indemnity clause?



Contribution Proceedings

Dalma 15%

Australand 0%

Erect Safe 85%



Key questions relevant to enforcement of the indemnity

- Did Australand's liability 'arise out of' the performance of the Subcontract Works?
- Did the indemnity clause cover Australand's own negligence?
- How did the insurance clause come into play?

Indemnity clause

The Subcontractor must indemnify Australand Constructions against all damage, expense (including lawyers' fees and expenses on a solicitor/client basis), loss (including financial loss) or liability of any nature suffered or incurred by Australand Constructions arising out of the performance of the Subcontract Works and its other obligations under the Subcontract.



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Indemnity clause's close cousins

Warranty

- What is it? A promise that certain things are as they purport to be.
- Thing to remember? If breached, right to claim damages, but the contract otherwise stands and has not been repudiated.

Guarantee

- What is it? A promise to answer the debt of another.
- Thing to remember? In some states, must be in writing and signed by guarantor to be enforceable.



Limitation of liability

- What is it? A promise that sets the maximum amount for which a person will be liable.
- Thing to remember? There are restrictions when it comes to limiting liability to consumers and in respect of proportionate liability.

Exclusion/exemption clause

- What is it? A provision in a contract excusing a party from a liability they otherwise would have had.
- Thing to remember? As above, plus if liability for a party's own negligence is to be excluded, must be mentioned explicitly.



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Context is key



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Surely there must be a road map



Guidance

- Will be construed strictly – punctuation and phrases matter.
- Read in context – what other risk allocation measures are included in this contract?
- As to indemnities covering the indemnified party's own negligence without mentioning explicitly, there are competing views:
 - 1) Inherently improbable that a party would indemnify another party for its own negligence without saying so explicitly;
 - 2) One of the main reasons to include an indemnity in a contract is to protect a party from its own fault.
- In the case of ambiguity, resolve in favour of the indemnifier.





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Beware: Unfair contracts?



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Beware: Consumer Law

Competition and Consumer Act 2010

- Cannot contract out of consumer guarantees (s276)
- Supplier has a right to be indemnified by manufacturer if supplier liable to pay damages to consumer for breach of consumer guarantees and manufacturer is or would have been liable to pay damages to the consumer for the same loss/damage (s274)
- Limitation period: earlier of 3 years of consumer commencing proceedings against supplier or supplier's payment to consumer
- Cannot contract out of manufacturer's indemnity to supplier (s276)





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Beware: Proportionate Liability

Proportionate liability legislation

Jurisdiction	Contracting out permitted?	Right to enforce contractual indemnity
NSW, WA, NT*, TAS	Yes	Yes
QLD	No	No
ACT, VIC, SA	Silent	No





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Beware: Insurance issues

Contractually assumed liability is often excluded

“There is no cover for Claims arising out of any liability assumed by express warranty or agreement unless such liability would have attached to the insured notwithstanding such express warranty or agreement.”





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Beware: Limitation issues



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Globe Church v Allianz

Globe Church Incorporated v Allianz Australia Insurance

- June 2007-March 2008: Damage suffered
- September 2009: Globe Church made a claim on 2 insurance policies
- 2011: Claim denied by both insurers
- November 2016: Globe Church commenced proceedings against both insurers



When did the cause of action accrue?

- **Insurers:** on the happening of the insured event (i.e. when the property damage occurred, prior to the claim being advanced on the policy)

VS

- **Church:** when insurers declined the claims (or at least when the claim had been made and a reasonable time had elapsed for insurers to discharge their obligations)





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Road to enforcement



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Debt, damages or specific performance?



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Proof of loss



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Top tips:

If you are drafting for the
indemnifier

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1. Make sure clause is as specific and narrow as possible, don't use 'hold harmless'
 2. Limit scope by excluding liability arising out of indemnified party's own conduct
 3. Include an obligation on the indemnified party to mitigate loss
 4. Talk to broker/insurer to understand any insurance restrictions
 5. Consider whether contract is subject to laws in a state where the parties are not permitted to contract out of proportionate liability legislation
 6. Be selective about which business entity gives indemnity





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Top tips:

If you are drafting for the indemnified —

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1. Be as clear and prescriptive as possible
 2. Be explicit if indemnity is to extend to circumstances where your client has caused the loss or if loss or damage is suffered by third parties
 3. Ensure that the party giving the indemnity has capacity (or insurance) to meet the obligation
 4. Use both 'indemnify' and 'hold harmless' in the clause
 5. Avoid using the word 'defend'
 6. Consider jurisdiction in light of proportionate liability contracting out prohibitions



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Say what you mean (and
mean what you say)

Common connecting words

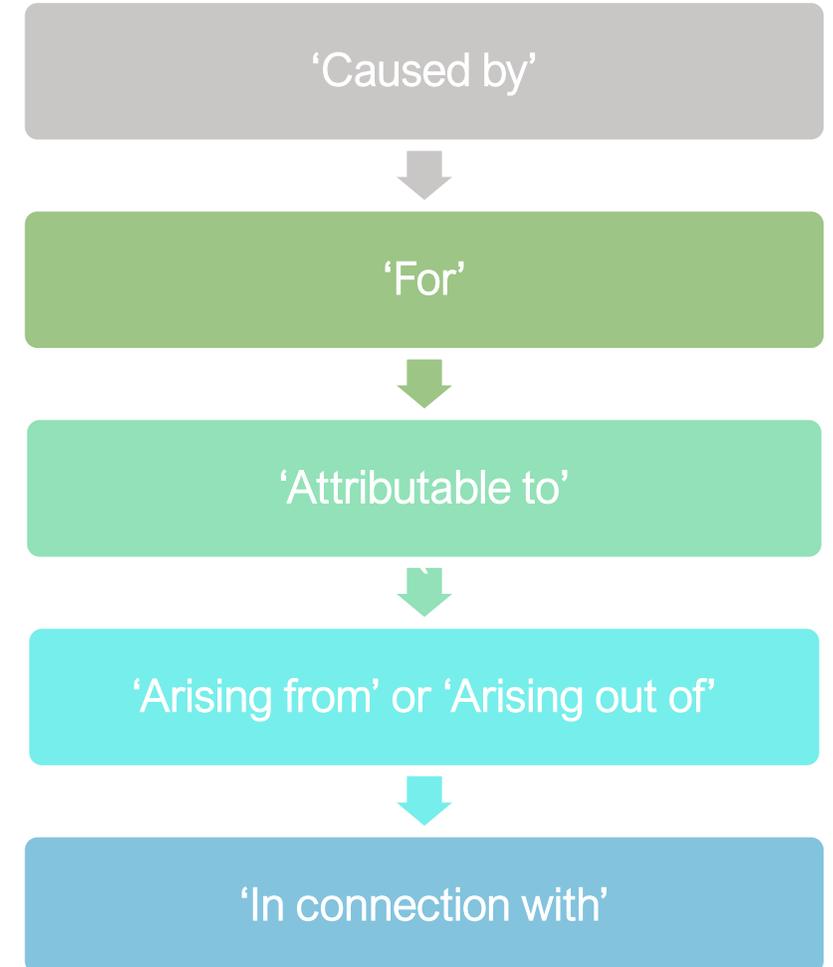
'Caused by' requires proximate cause'

'For' more restrictive than 'arising from', but not as narrow as 'caused by' and can also function as a limitation eg 'compensation for personal injury'

'Attributable to' wider than proximate cause, can cover any act/event/state of affairs that could be a cause

'Arising from or arising out of' wide connecting phrase, requires some causal connection, but not usually the sole cause, direct cause or proximate cause

'In connection with' refers to a relationship between two things that is not necessarily causal, context is highly relevant





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Top tips:
If you are advising the
indemnified

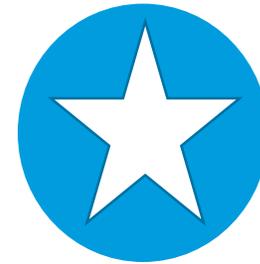
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1. Protect your client's position
 2. Review indemnity in context of full contract
 3. Notify the indemnifier
 4. Prepare client for resistance (not necessarily a quick, easy fix)
 5. Document everything (including proof of loss)
 6. Diarise limitation period



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Top tips:
If you are advising the
indemnifier

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1. Review the terms of the indemnity – has the indemnified event occurred? Is the loss quantifiable?
 2. Consider the limitation period
 3. Is the indemnity void because of unfair contract term, proportionate liability, consumer goods?
 4. Notify own insurer
 5. Develop strategy based on the above



We made it!

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