



fact sheet

for property managers

NUMBER 5

November 2015

Negotiating indemnities in leases

This fact sheet provides Australian Government entities with some useful tips on negotiating lease indemnities by the entity as tenant in favour of the landlord.

Issues to consider

An indemnity provided in a lease is a legally binding promise by which the lessor or lessee undertakes to accept the risk of loss or damage another party may suffer (which could include that party's liability to third parties for third party loss resulting from activities under the lease). As a tenant, the entity will often be asked to provide an indemnity. Breaking down the indemnity and identifying the beneficiary, when the indemnity is triggered, and what liabilities are covered can assist entities to manage indemnities in the context of leases.

- Identify who is the beneficiary of the indemnity.
 - Generally, the indemnity should only benefit the lessor.
 - If the indemnity is benefiting third parties, the entity is potentially acting like an insurer.
- Identify when the indemnity is triggered.
 - Generally, events triggering liability under the indemnity should be limited to breaches of the lease by the entity or events arising from the entity's negligence.
 - Liability for events beyond these will often be extending liability beyond the common law.
 - If it is necessary for the indemnity to extend liability beyond common law liability, the events should at the very least be in the control of the entity.
 - Avoid indemnities that purport to cover the negligence, fraud, wilful misconduct or illegal actions of the lessor or third parties.¹
- Identify what liabilities are covered by the indemnity.
 - Consider the scope of losses covered by the indemnity.
 - For example, there is a difference between indemnities for damage for which a landlord becomes liable (the landlord would need to have a legal liability to pay) and losses which the landlord might suffer or incur (although there may be no legal obligation to pay).

Don't forget:

- Section 15 of the *Public Governance, Performance and Accountability Act 2013* (the PGPA Act) requires the accountable authority of every entity to govern the entity in a way that promotes the proper use and management of public resources. 'Proper use' means efficient, effective, economical and ethical.
 - Additionally, the accountable authority of a **non-corporate** Commonwealth entity must govern the entity in a way that is not inconsistent with the policies of the Commonwealth.²

¹ The Finance Minister's delegation under s 60 of the Public Governance, Performance and Accountability Act prevents a delegate in a non-corporate Commonwealth entity from agreeing to an arrangement which contemplates indemnifying another party for civil or criminal penalty costs.

² Some Commonwealth policies connected with procurement are available here: <http://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/policy-framework/procurement-policies/principles>. However, other Commonwealth policies may also be relevant to the lease. For example, the Commonwealth Risk Management Policy available here: <http://www.finance.gov.au/comcover/risk-management/the-commonwealth-risk-management-policy>.

- One of the policy guidelines which will need to be complied with if the lease includes an indemnity is Resource Management Guide No. 414: *Indemnities, guarantees or warranties granted by the Commonwealth*.
- Entities should undertake a risk assessment as an initial exercise when considering whether granting an indemnity would be appropriate and, if it is appropriate, what limits on the indemnity would be suitable – the entity should develop and implement a risk management plan if an indemnity is given.
 - Property management by non-corporate Commonwealth entities is governed by the Commonwealth Property Management Framework, which is available on the Department of Finance website.
 - The Commonwealth Procurement Rules may also be relevant.
- The power to grant an indemnity, for non-corporate Commonwealth entities, is conferred on the Finance Minister by s 60 of the PGPA Act. This power has been delegated to the accountable authorities of non-corporate Commonwealth entities, subject to certain limitations. The delegation permits the delegate to grant an indemnity involving a contingent liability in relation to an event if the delegate is satisfied that the likelihood of the event occurring is remote (less than 5% chance) and the most probable expenditure that would need to be made if the event occurred would be less than \$30 million. The delegation also permits the delegate to grant the indemnity where the Finance Minister has approved the grant or the grant has been explicitly agreed in a decision of Cabinet, the National Security Committee of Cabinet or its successor or the Prime Minister.
- Don't forget Comcover: Indemnities that extend the Commonwealth's common law liability will require the approval of Comcover if they are to be covered by Comcover.

More information

If you require further information about this fact sheet, please contact:

CANBERRA

Andrew Miles Deputy General Counsel Commercial
T 02 6253 7100 | andrew.miles@ags.gov.au

Terry De Martin Senior Executive Lawyer
T 02 6253 7093 | terry.demartin@ags.gov.au

SYDNEY

Simon Konecny Deputy General Counsel Commercial
T 02 9581 7585 | simon.konecny@ags.gov.au

Jim Sullivan Senior Executive Lawyer
T 02 9581 7418 | jim.sullivan@ags.gov.au

MELBOURNE

Teresa Miraglia Senior Executive Lawyer
T 03 9242 1493 | teresa.miraglia@ags.gov.au

Helen Moran Senior Executive Lawyer
T 03 9242 1387 | helen.moran@ags.gov.au

BRISBANE

Maree Ferguson Senior Lawyer
T 07 3360 5767 | maree.ferguson@ags.gov.au

ADELAIDE

Phil Sedgley-Perryman Senior Lawyer
T 08 8205 4223 | phil.sedgley-perryman@ags.gov.au

PERTH

Lee-Sai Choo Senior Executive Lawyer
T 08 9268 1137 | lee-sai.choo@ags.gov.au

DARWIN

Mieke Dixon Senior Lawyer
T 08 8943 1400 | mieke.dixon@ags.gov.au

This material is provided to AGS clients for general information only and should not be relied upon for the purpose of a particular matter. Please contact AGS before any action or decision is taken on the basis of this fact sheet.

© Commonwealth of Australia, represented by AGS 2015. Apart from any use permitted under the *Copyright Act 1968* or unless otherwise expressly indicated all other rights are reserved. Requests for further authorisation should be sent to webhelp@ags.gov.au