

AUSTRALIAN GOVERNMENT IN-HOUSE COUNSEL WEBINAR SERIES 2022

Professional Development and Networking for
the In-House Legal Community

Session 8 – Commonwealth approach to liability in commercial contracts

Presented by Rachel Bannikoff, Special Counsel

Thursday, 10 March 2022

Acknowledgement of Country

In the spirit of reconciliation, HWL Ebsworth Lawyers acknowledges the Traditional Custodians of country throughout Australia and their connections to land, sea and community.

We pay our respect to their Elders past and present, and extend that respect to all Aboriginal and Torres Strait Islander peoples today.

Commonwealth approach to liability

- Minimising exposure to liability is a critical component of value for money
- Price and scope of work is usually locked in as part of tender responses
- But risk is often subject to negotiations

→ potential erosion of value for money



Commonwealth approach to liability in commercial contracts

"...risks should be borne by the party best placed to manage them;... relevant entities should generally not accept risk which another party is better placed to manage. Similarly, when a relevant entity is best placed to manage a particular risk, it should not seek to inappropriately transfer that risk to the supplier"



Commonwealth Procurement Rules

Liability Clauses: why have them at all?

1. Indemnity for breach

- Consequences of breach are worse/damages higher: greater range of damages
- Remoteness rule does not apply, no obligation to mitigate, statute of limitations period longer

Liability Clauses: why have them at all?

2. Sometimes it is better value of money for the Commonwealth to accept more risk

- Because contractors cannot get insurance for the relevant risk and/or
- the Commonwealth does not want to pay a price premium for the contractor to insure

Ways that the Commonwealth takes on risk

- To avoid having to pay for expensive insurance, or where insurance is not available, the contractor will press hard for:
 - Liability caps
 - Indemnities
 - Exclusion of types of losses



Key Concept!

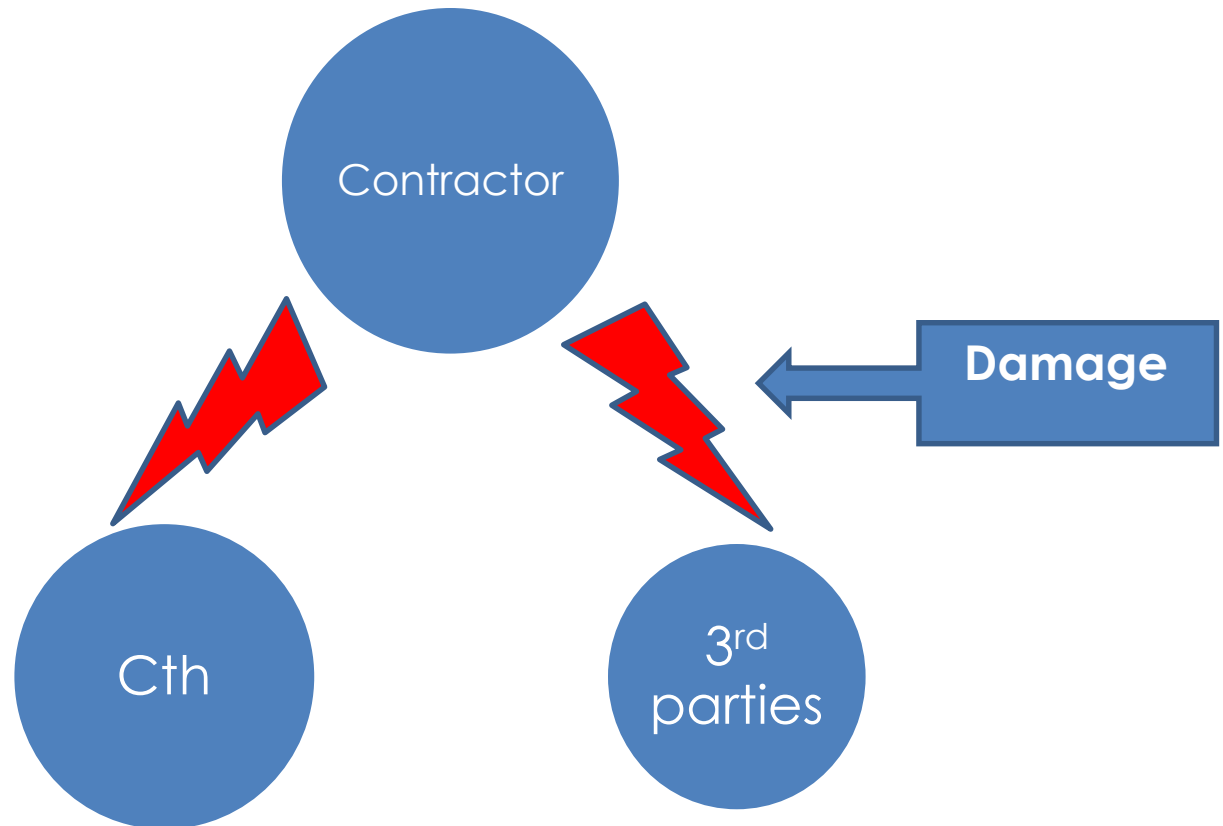
Before we go any further....

.....liability caps, indemnities and exclusion clauses
are all the same thing:

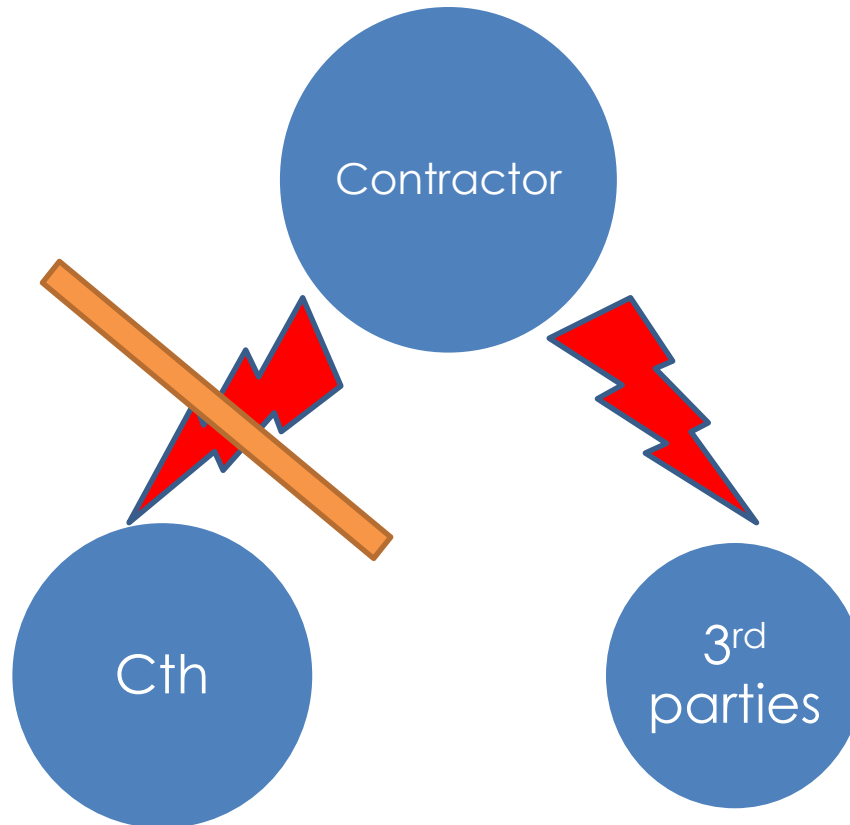
Commonwealth-provided insurance



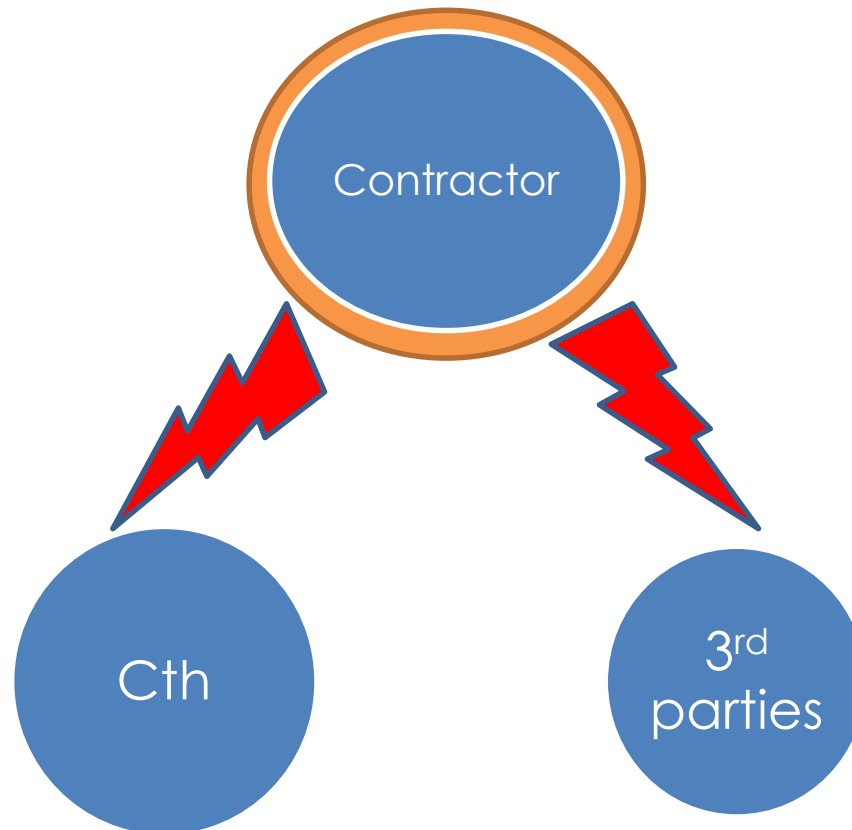
Commonwealth provided insurance



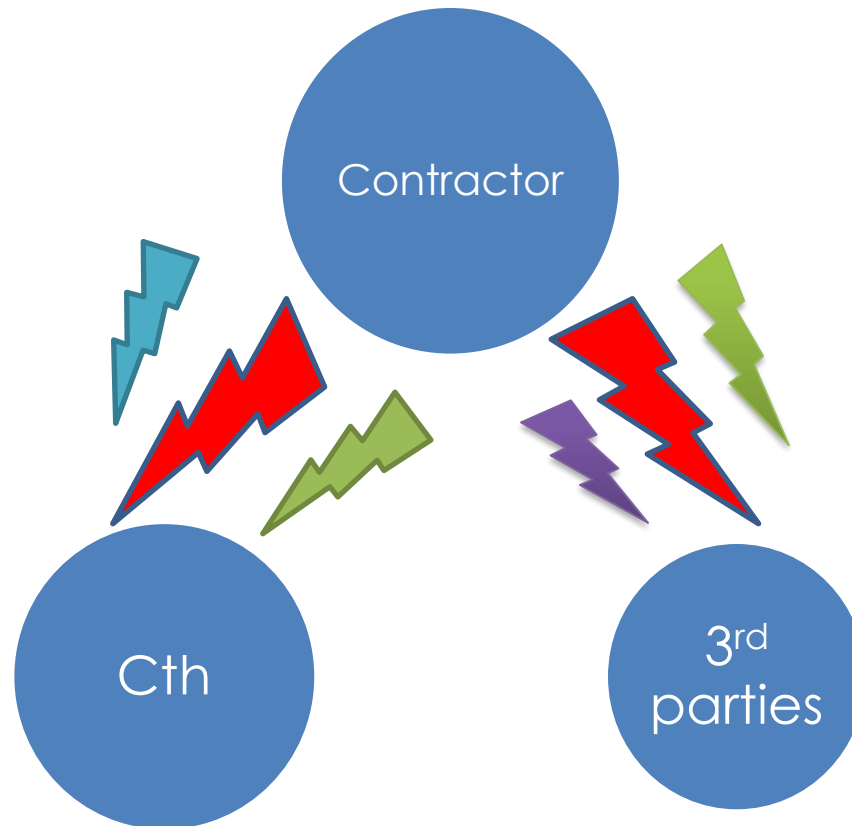
Liability cap



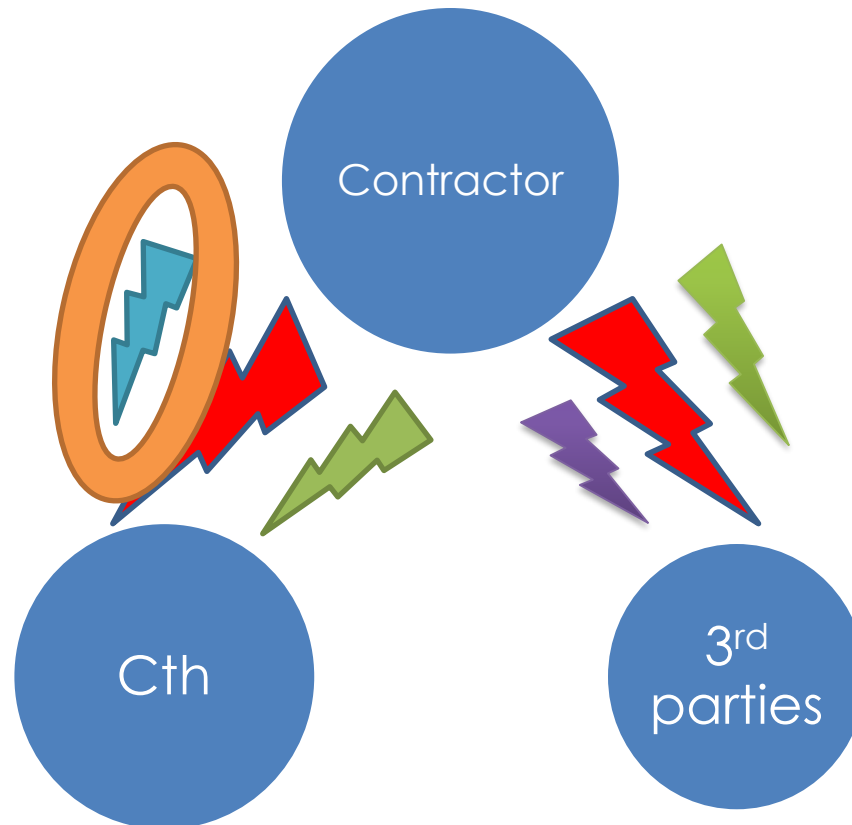
Indemnity



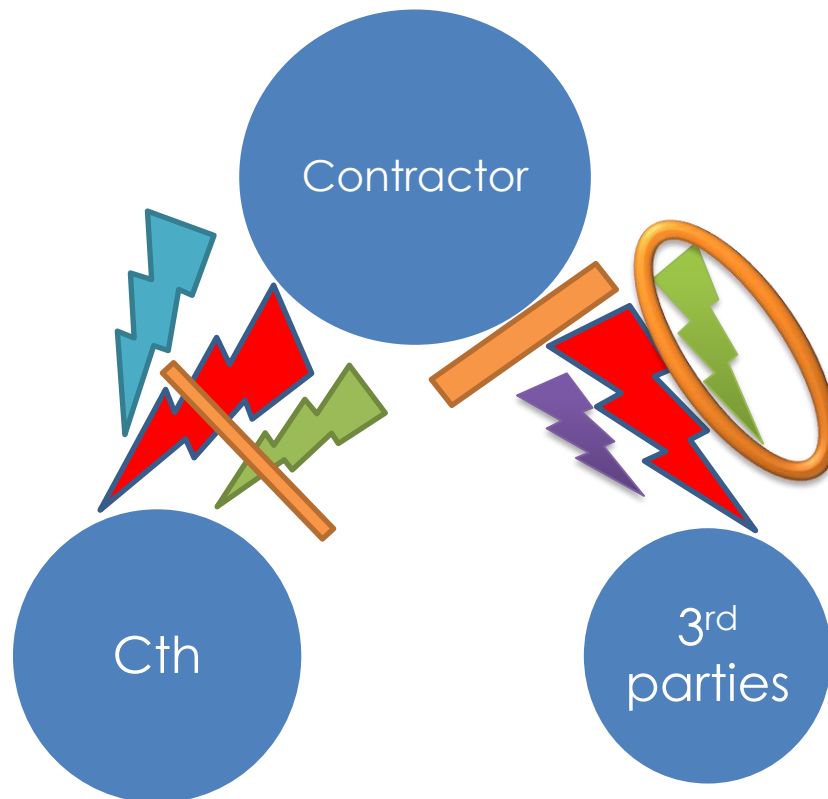
Exclusions



Exclusions



Liability caps, indemnity, exclusions all simply shield the contractor from costs



How should you determine a reasonable/appropriate liability cap?

You can either:

- do a Liability Risk Assessment; or
- make a random guess!



Liability Risk Assessments are useful!

- ✓ Will also enable you to estimate an appropriate level of insurance
- ✓ Can inform your position on other contract clauses, such as fitness for purpose warranties or defects warranties
- ✓ Will serve as important negotiation preparation



When should the Liability Risk Assessment be done?

Before release of documentation to market

contract
released with
liability caps
and
insurance
amounts

tenderer
responds
with pricing
that includes
risk issues

risk issues
not at large
during
negotiation

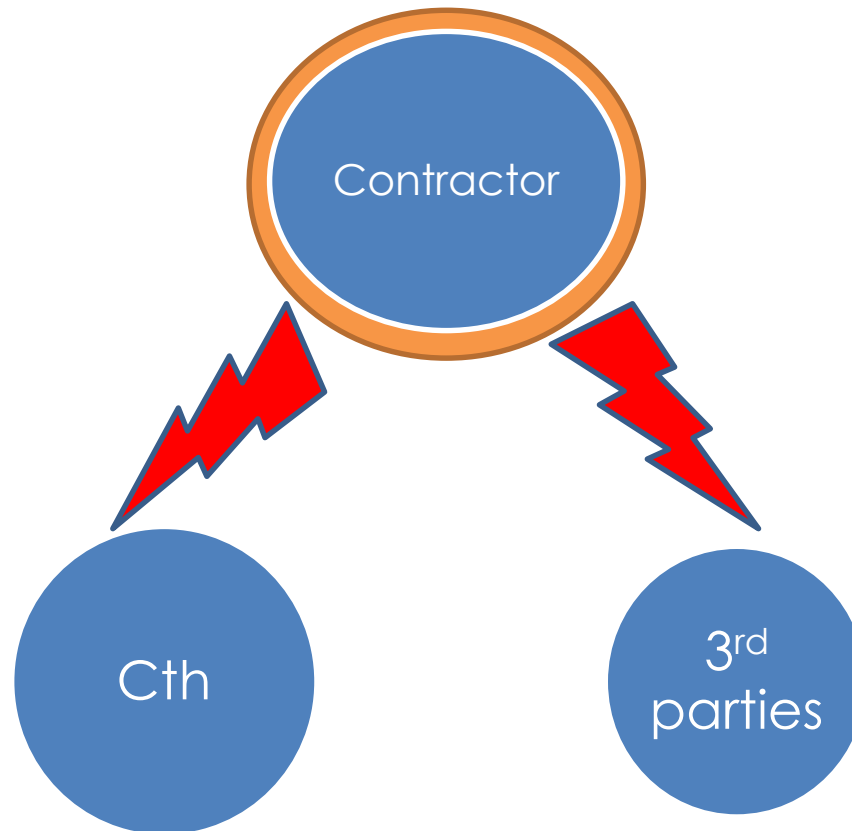
Contingent liabilities and s60 approvals

- What is a contingent liability?

A contingent liability arises when there is a ***risk that the Commonwealth has to pay out additional money***

- (over and above the amount approved in the s23 for the contract price)
- on the occurrence of a future event
- not controlled by the Commonwealth itself

Indemnity



PGPA Act s60

- If an indemnity is to be granted that involves a contingent liability, you will need PGPA Act s60 approval

*Public Governance, Performance and
Accountability Act 2013*

What must be considered before granting an indemnity? Paragraph 12 of RMG 414

- Whether there is an explicitly identified risk
- Whether commercial insurance is an appropriate alternative
- Indemnity should not cover malicious, fraudulent, wilful, or reckless acts
- Whether there is a requirement to advise the Commonwealth of relevant events
- Whether the indemnity might set an undesirable precedent
- Whether the potential cost will be funded from existing resources or by Comcover
- Maximum financial limits and time limits (and right of Cth termination)
- Whether there are subrogation rights

In conclusion

- Value for money can be improved by the Commonwealth agreeing to protect the contract from risk
- But the division of risk is best dealt with while the contractor is under competitive pressure – often before negotiations
- If you agree to use liability caps or indemnities, proceed with caution, use a liability risk assessment, and check off all the statutory and policy requirements carefully

The End

Team Contacts



Rachel Bannikoff

Special Counsel

P: +61 2 6151 2172

E: rbannikoff@hwle.com.au

Website profile: <https://hwlebsworth.com.au/people/rachel-bannikoff/>

Additional resources

- This presentation draws on
 - *Public Governance, Performance and Accountability Act 2013* (Cth)
 - Resource Management Guide No. 414 Indemnities, guarantees and warranties by the Commonwealth (RMG 414)
 - The Commonwealth Procurement Rules
 - The Defence Liability Principles

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