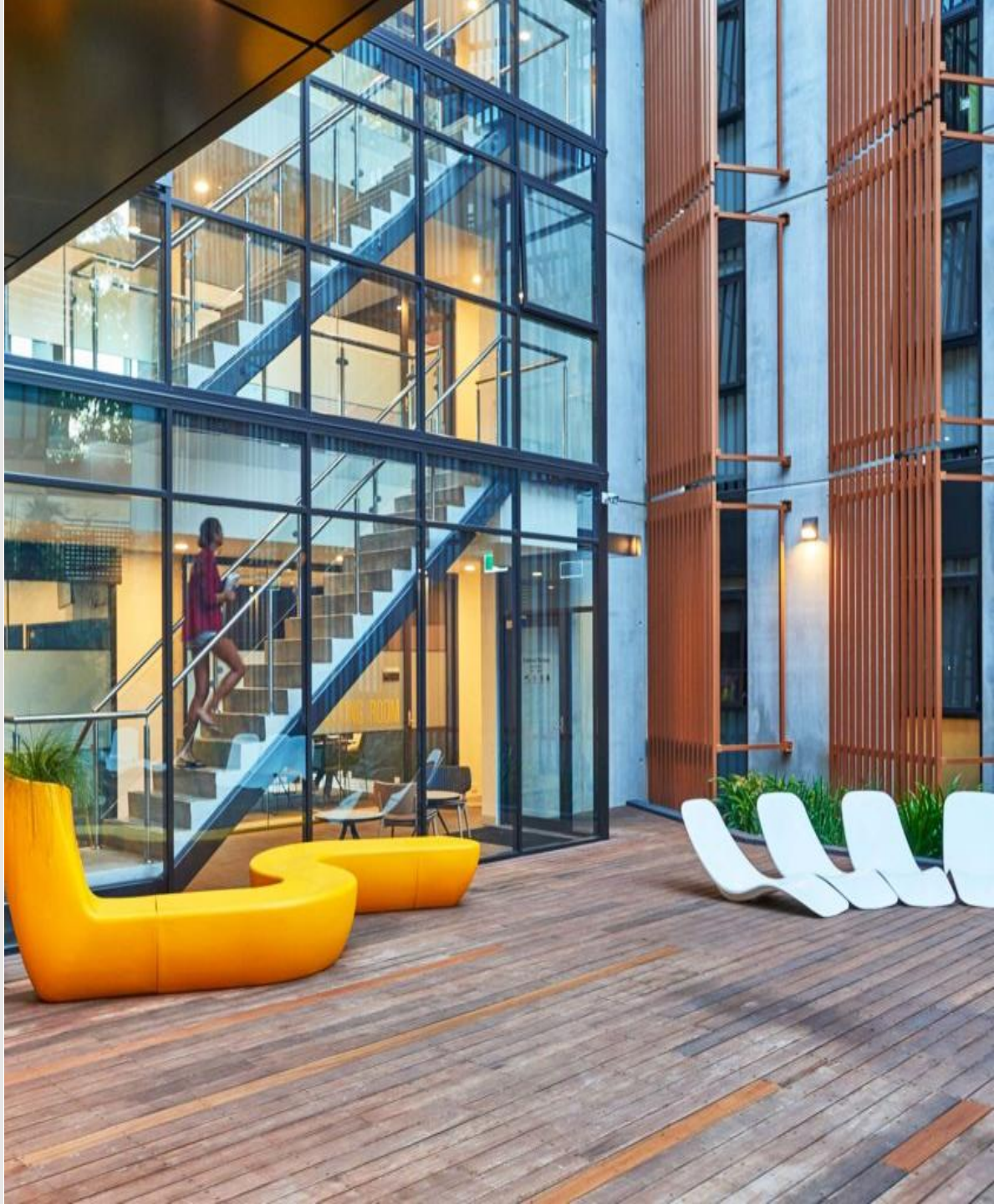
Contractual liability clauses – practical guidance to avoid excess liability and risk

Webinar for Unimutual members

18 June 2026

Patrick Riordan

Principal, Thompson Cooper Lawyers



thompson cooper lawyers

About us

1. Thompson Cooper Lawyers has acted for Unimutual members for many years

2. Our firm has 20+ years acting for educational institutions in claims involving third party losses, contractual liability, recovery actions

3. Clients include Unimutual members, insurers, universities and colleges directly, schools, Commonwealth Government agencies, community organisations.

Overview

WHAT ARE CONTRACTUAL LIABILITY CLAUSES?

TO WHAT EXTENT ARE THEY ALLOWED?

TYPES OF LIABILITY YOUR ORGANISATION BEARS AT LAW

PROTECTION / INSURANCE IMPLICATIONS

HOW TO AVOID INCREASED EXPOSURE

1.

Contractual Liability Clauses

What are liability clauses?

- Liability clauses are an important contractual tool designed to manage overall risk by limiting a party's potential liability if something goes wrong under the contract.
- These clauses use legal jargon but are aimed at delineating what each party will be responsible for.
- They operate against the backdrop of what the law would otherwise require:
  - Where no clause exists, the common law and statute will determine liability.
  - Where a clause does exist, it may narrow, expand, or transfer that liability.
- Common types of liability clauses include:
  - Limitation of liability clauses
  - Indemnity and hold-harmless clauses
  - Remedy limitation clauses
  - Proportionate liability exclusion clauses

*

Limitation of liability and indemnity clauses

- One of the most common ways of apportioning risk in a contract
- A clause might **exclude** liability for certain events: e.g. negligence.
- Or a clause may **cap** liability at a certain amount. A supplier may push for a low cap (say, equal to contract value) while the customer will seek a higher cap reflecting its consequential potential exposure.
- In essence these clauses **remove rights** that a party would otherwise enjoy under the contract or at law.
- **Indemnity clauses** are common – A is required to indemnify B for any third party claim against B – even if A was not at fault. **Hold-harmless clauses** have similar effect – requiring A to hold B "harmless" from any claim brought against B.
- Courts will enforce limitation clauses strictly, if clearly drafted. Ambiguous clauses are construed against the party seeking to rely on them. Some exclusions will be void if they avoid statutory rights that cannot be contracted out of (such as consumer guarantees under the Australian Consumer Law)

Remedy limitation clauses

- Restricts the legal solutions or compensation available to parties
- If there is a breach, these clauses limit the wronged party's options
- These can be quite one-sided. Vendors often use these to manage risk and cap exposure for certain types of damages.
- Exclusion of specific remedies like specific performance and set off rights, or exclusion of consequential loss.
- Sometimes found in a "Disputes" clause – preventing parties from seeking legal recourse until they have attempted an agreed dispute resolution process.
- Or conditions to these remedies i.e., being required to pay the return costs of defective goods

Example: *Software License Agreement*

A department purchases new software for a research project. The license agreement includes a clause stating that "*if the software contains defects causing lost data* [the provider's] *liability extends only to replacing the software. Liability is not extended to lost profits, interruption or data recovery costs*"

Proportionate liability exclusion clause

- Proportionate liability (State/Territory tort reform legislation) makes a defendant only liable for that portion of a non-injury loss that it caused. E.g. 30%.
- There are "contracting out" clauses where parties waive their rights to rely on the proportionate liability regime. Used by customers and project principals who wish to hold their principal supplier fully responsible for any problem that arises.
- Contracting out of proportionate liability is expressly permitted in WA, NSW & TAS. Not permitted, or doubtful, in other jurisdictions.
- If your institution is sued for someone else's commercial loss, proportionate liability might limit exposure, where other factors also contributed to the loss. But if you have contracted out of proportionate liability, your institution could be sued for the "full amount" of the loss.

Common practice

Limitation of liability, indemnity (etc) clauses are everywhere.

They transfer financial and legal risk between parties.

A party can find itself “on the hook” for far more liability than it would otherwise have borne at law.

That “increased” liability arises only by the terms of the contract. It would not exist otherwise. It arises from obligations voluntarily accepted in the contract.

2.

Legal Permissibility

Why contractual liability clauses are legally permitted

Freedom of contract: parties are generally free to allocate risk between themselves, subject to a narrow set of statutory and common-law guardrails.

- **General position –** parties may agree to limit or cap liability between themselves.
- **Clear drafting required –** exclusions must be expressed clearly; ambiguity is construed against the party relying on the clause.
- **Statutory guardrails –** consumer guarantees cannot be excluded; misleading conduct cannot be excluded.
- **Indemnities –** broader than a damages claim (no duty to mitigate unless drafted in); in some jurisdictions parties can contract out of proportionate liability legislation
- **Liquidated damages –** enforceable where they protect a legitimate commercial interest and are not a penalty

But they're not always enforceable…

Australian Consumer Law – Competition and Consumer Act 2010

Unfair consumer contract

Standard-form contract with an individual, for supply of goods/services for personal, domestic or household use.

Unfair small business contract

Standard-form contract with business employing <20 people, for less than $300K (or $1M in 12 months)

A term is unfair (can be made **void**) where it:

- causes a significant imbalance in the parties' rights and obligations;
- is not reasonably necessary to protect the party's legitimate interests; and
- would cause detriment (financial or otherwise) if relied on.

Examples of terms

- Unilateral variation: Where only one party can vary the contract
- Imbalanced limitation or exclusion of liability

3.

Liability at law

Legal Liability – regardless of your contract

Before considering how your organisation's contract should modify liability, consider what "baseline" liability it already has.

- Breach of contract (e.g. failure to meet agreed specification)
- Negligence
  - Under State/Territory tort reform legislation. Injury, property damage, pure economic loss in some cases
- Australian Consumer Law
  - Misleading or deceptive conduct, breach of consumer guarantees (acceptable quality, fit for purpose) or misrepresentation
- Breach of State and Territory fair trading legislation

Breach of Contract

If one party fails to perform a contractual obligation, the other party is entitled to damages as a matter of right.

Reminder: You do not need an indemnity clause to sue, or be sued, for breach of contract!

Categories of Recoverable Loss:

- **Expectation damages:** what the innocent party would have gained from full performance i.e., lost profits, value of services not received
- **Reliance damages:** wasted expenditure reasonably incurred in reliance on the contract being performed is available where expectation loss is difficult to prove (confirmed by the High Court in *Cessnock City Council v 123 259 Pty Ltd* [2024])
- **Consequential loss:** further losses, flowing from the breach, if these were within the reasonable contemplation of the parties at the time of contracting (*Hadley v Baxendale* principle)

Negligence

- Negligence is based on common law, not contract
- Based on a failure to provide a “reasonable” standard of care.
- Difficult to contract out of, particularly where related laws (e.g. WHS, ACL) expressly cannot be contracted out of
- For economic loss and property damage (non-injury claims), proportionate liability applies in all Australian jurisdictions, plaintiffs are barred from recovering their entire loss from a single defendant. WA, NSW, Tas allow contracting out.

Australian Consumer Law

Consumer guarantees (ss 54 – 64A ACL)

- Apply where goods or services are supplied to a consumer
- Guarantees of acceptable quality, fitness for purpose, and correspondence with description
- There guarantees implied into every consumer contract.
- Cannot be excluded, restricted, or modified by contract (s 64 ACL)

Misleading or deceptive conduct (s 18 ACL)

- Trade or commerce (course prospectuses, procurement, service agreements, marketing)
- No intention to mislead is required – strict liability applies
- Remedies include damages (s 236), compensation orders (s 237), injunctions (s 232), and rescission of contract
- Exclusion or limitation clause preventing liability for misleading conduct is unenforceable

Example:

Class actions against RTOs alleging misleading and deceptive conduct. Students claimed compensation for studying in pursuit of qualifications that were not recognised.

4.

Interaction with protection / insurance

What does Unimutual's protection wording say?

Combined Liability Protections exclude contractual or assumed liability:

Section 1 – General and Products Liability Protection – at clause 1.6.3 there is an **exclusion** for any claim:

> *Arising out of or as a result of any liability assumed by **you** under any warranty, guarantee, contract or agreement. This exclusion does not apply:*
>
> *a) if **you** would have been liable in the absence of such warranty, guarantee, contract or agreement; or*
>
> *b) to liability assumed by the **member** or **affiliate** for loss … caused by… the negligence of any students or employees of the **member**…*
>
> *…*

There are similarly-worded exclusions in Section 2 – Professional Liability Protection and Section 3 – Malpractice Protection.

These clauses are common. You will find similarly-worded exclusions in most commercial insurance policies with comparable cover.

What does this mean for your contracts?

(taking Unimutual's exclusion clause as an example)

Exclusion of "*any liability assumed by **you** under any warranty, guarantee, contract or agreement***"**

This means that if:

- you enter into a contract
- the contract has a liability clause that imposes liability on you (e.g. an indemnity clause); and
- you are held liable under that clause

There will be no cover for any liability that results from that clause.

However the clause has **an exception** – it will not apply (relevantly) "*if **you** would have been liable in the absence of such warranty, guarantee, contract or agreement*".

This means that if you would have been liable anyway – e.g. in negligence – your coverage is not reduced by the exclusion clause.

What this means for your contracts (cont)

What if you were going to be partly liable at law anyway, but a contractual clause increases your liability?

More nuanced.

Usually the exclusion would only apply to liability "over and above" the liability at law.

This can cause problems if there is an indemnity clause in your contract – indemnifying another party (for example) "…*against all Loss suffered … arising out of or in connection with … any negligent act or omission … or any breach of this Agreement*"

Clauses like this are a promise to cover all of another party's losses, even if only "in connection with" your omission or breach. In other words – more liability than what would exist at law.

If the tables are turned – subrogated rights

Like commercial insurance policies, if Unimutual pays a claim, it is permitted to "stand in your shoes" and exercise subrogation/recovery rights.

See **General Exclusion A.13 – Subrogation Waiver**

> *any liability which is … affected by reason of the **Member** … entering into a deed or agreement excluding, limiting or delaying **Your** legal rights of recovery against another.*

The above exclusion clause can only operate if you have:

- A deed or agreement with excluding or limiting clauses
- Legal rights of recovery against someone else (who is outside of Unimutual's cover).

Subrogated rights

So if your organisation:

- Enters into an arrangement by which it could be exposed to liability (e.g. offering a course to students)
- Depends on some third-party supplier/contractor to fulfil that arrangement/offering
- Agrees to a contract with that supplier, which excludes or limits the supplier's liability (e.g. capped at some low amount)

Then you might have inadvertently damaged the recovery or subrogation rights that would be transferred to Unimutual or your insurer.

Example (hypothetical):

- Private college offers design course to fee-paying students – 100 students at $10,000 each ($1M)
- Relies on software broker to obtain valid licenses to critical design software at a cost of $50K. The college signs the broker's standard-form supply agreement, the fine print of which limits their liability to the value of the supply.
- Software broker fails to deliver licenses and students unable to be assessed as proficient in that software. Some of the students join together and bring a claim for at least $500K in total.
- College has strong grounds for recovery from the broker – but then finds the clause that limits recovery to $50K! The insurer tells them that the claim is excluded…

Case study 1 – cap and collar agreement

Weir Services Australia Pty Ltd v AXA Corporate Solutions Assurance [2017] NSWSC 259

- Weir was engaged to perform specialist welding work on industrial equipment at a mine site. The equipment failed due to defective welding, and the mine operator brought a substantial claim against Weir.
- Before the arbitral award was handed down, Weir and the mine operator settled their dispute with a "cap and collar" agreement (mine operator agreed to cap its maximum recovery, and Weir agreed to pay a guaranteed minimum amount regardless of outcome).
- Weir “won” at the arbitration and was held to have no liability for the equipment failure. Yet is sought the “minimum” agreed amount from its liability insurer.
- Court held that this was a contractually assumed liability, not a liability to pay damages for which the insurance policy would have responded.

Case study 2 – indemnity clause

QBE Underwriting Ltd v Southern Colliery Maintenance Pty Ltd [2018] NSWCA 55

SCM supplied labour hire workers to a mine owner.

One of those workers was injured and sued SCM and the mine owner. The mine owner alleged that SCM had breached its contract and relied on an indemnity clause.

The multi-party case was settled including a monetary contribution by SCM.

The insurer refused to indemnify SCM for its contribution and costs. The insurer argued that SCM's liability was assumed under the indemnity clause.

Favourably for SCM, the NSW Court of Appeal disagreed, finding that SCM's liability "*had arisen as a matter of general law following the breach of the ordinary terms of the* [contract] *(that is, those aside from* [the indemnity clause])".

Leeming JA distinguished (at [41]) from excluded liability (indemnity clause) and non-excluded liability (for breach of other terms of the contract).

Case study 3 – warranty clause

***Absolute Tiling Solutions Pty Ltd v Certain Underwriters at Lloyds* [2024] NSWSC 364**

Absolute Tiling (**AT**) designed and installed sandstone tiled façade to a client's development. It gave a warranty to *"make good any defects, at no cost to* [the client]*"*

The tiles kept falling off (problem with design, not workmanship) and AT became liable to "make good" at no cost to the client.

The insurer refused to indemnify AT, arguing that by its warranty, it had assumed liability.

In considering the assumed liability exclusion clause, the Judge said "*This requires an enquiry into whether there is some other basis for liability independently of the contract in issue*" (at [257]).

The Judge found that, aside from the warranty clause, there were other clauses in the contract (fit for purpose, etc) that gave rise to liability.

AT was entitled to indemnity under the insurance policy.

5.

Practical tips

Know what you are agreeing before you sign

- Before signing, have proposed contracts reviewed against your protection/insurance policy wordings, not just your legal obligations.
- Be wary of any clauses that require you to bear liability disproportionate to fault
  - Unconditional indemnities or hold-harmless clauses (no carve-out)
  - Guaranteed minimum payments.
  - Zero Liability arrangements
  - Waiver of proportionate liability
- Ask: if a given clause is triggered, will I be covered?
- If you are the buyer, consider the effect that very harsh indemnity clauses might have on your supplier's insurance. Will your supplier become uninsured if there is a dispute? Would this actually make you worse off?
- Watch for proportionate liability exclusion clauses – would these make you 100% liable?

Protect your recovery rights

- Manage the risk that your suppliers bear
  - If a supplier seeks to cap or limit their liability, balance against the risk that your organisation might bear
  - Ideally, preserve ability to recover full extent of any loss that supplier might cause – not just a capped or token amount.
- Remember that subrogation rights are a condition of protection – extinguishing a recovery route could jeopardise your own cover.
- Does the Disputes clause prevent you from suing your supplier for appropriate relief?
- Where your counterparty insists on their own limitation of liability or indemnity clause, push for a "status quo" carve-out
  - For example, an indemnity clause in favour of a party is reduced by the extent to which that party contributed to the loss.
  - The aim is that you are not worse off under the contract than at law.

Contract review process

- Use your organisation's internal checklist or processes for contracts above a certain value or risk threshold
  - Key liability clauses should be flagged for legal and risk management review early.
- Consider using your insurance policy or protection as leverage when negotiating
  - A counter-party may not insist on a clause if they realise it could cause you to lose your cover. The cover may operate to their benefit!
- Be wary of other organisations' standard form contracts
- Remember that contractual liability and remedy-limiting clauses come in all shapes and sizes. Waiver of proportionate liability, Disputes, Insurance and Indemnity, Warranties
- If indemnity clauses are needed, aim to keep them balanced and mutual. But – as per Case Studies 2 and 3 – often they are not actually needed.

Questions?

Thank you

priordan@tclawyers.com.au

www.tclawyers.com.au