

Section 5

Liability

Introduction

This *cover section* only forms part of *your* policy when Liability Section is shown in the *schedule* and is limited to the period of insurance indicated.

Definitions

The following definitions shall apply to the words used in this *cover section*. These words are shown in *italics*. The singular shall include the plural and vice versa as the context requires.

Advertising liability means:

- a) any breach of the misleading or deceptive conduct provisions of the *Competition and Consumer Act 2010 (Cth)* or Schedule 2 to the *Competition and Consumer Act 2010* (the Australian Consumer Law) or any Fair Trading or similar legislation of any Country, State or Territory, or
- b) infringement of copyright of or passing off of a title or slogan
- c) unfair competition, piracy or idea misappropriation contrary to an implied contract, or
- d) invasion of privacy,

committed or alleged to have been committed during the *period of insurance* in any advertisement, publicity article, broadcast or telecast arising out of any advertising activities conducted by or on behalf of you, in the course of advertising *your products*.

Aircraft means any vessel, craft or thing made or intended to fly or move in or through the atmosphere or space.

Business means for the purpose of this *cover section* only, *your business* shown in the *schedule* and all other activities incidental to the conduct of *your* occupation including:

- a) ownership or occupation of *premises* by you
- b) participation in exhibitions
- c) construction, erection, demolition, alteration or addition, not exceeding in cost the sum of \$500,000, of or to *buildings* owned by you
- d) the provision and management of canteens, social, sports and welfare organisations primarily for the benefit of *your* employees, first aid, fire and ambulance services
- e) private work undertaken by any employee of yours, for any of *your* directors or senior executives
- f) hire or loan of plant, equipment or goods to other parties
- g) conducted tours of *your premises* for no reward, and
- h) the erection, use and/or maintenance by you or on *your* behalf of advertising and directional signs, their frames, supports and appurtenances.

Computer virus means an executable program or computer code segment that is self-replicating, requires a host program or executable segment in which it can be contained, and which destroys or alters the host, program or other computer code or data, causing undesired program or computer system operation.

Excess means the amount you first bear in relation to each occurrence. The excess applies to all amounts payable under this *cover section* including the indemnity provided under additional payments.

General liability means *your* legal liability covered by this policy but not arising out of *your products*.

Hovercraft means any vessel, craft or device made to float on or in or travel on or through the atmosphere or water on a cushion of air provided by a downward blast.

Incidental contracts means:

- a) any written agreement for the lease and/or hire of real and/or personal property which does not impose upon you as lessee or hirer an obligation to insure such property
- b) any written contract with any authority or entity responsible for the supply of electricity, fuel, gas, natural gas, air, steam, water, sewerage reticulation control systems, waste disposal facilities, telephone and communication services or other essential services, except those contracts in connection with work performed by you or on your behalf for such authorities or entities, or
- c) any written contract with any railway authority for the loading, unloading and/or transport of *products*, including contracts relating to the operation of railway sidings.

Insured Person means you and the parties described under the heading cover for others.

Medical Persons means legally qualified medical practitioners, legally qualified registered nurses, dentists and first aid attendants.

Occurrence means an event or series of events including continuous or repeated exposure to substantially the same general conditions which results, unexpectedly and unintentionally from *your* standpoint, in *personal injury* or *property damage* or *advertising liability* during the *period of insurance*. All *personal injury* or *property damage* happening during the *period of insurance* attributable to one source or to a common cause or to the same general conditions shall be deemed to be one occurrence.

With respect to *advertising liability*, all damages involving the same injurious material or act, regardless of the frequency or repetition thereof, the number and kind of media used and the number of claimants shall be deemed to arise out of one occurrence.

Personal Injury means:

- a) bodily injury, death, sickness, disease, shock, fright, mental anguish, mental injury or loss of consortium
- b) false arrest, false detention, wrongful imprisonment, malicious prosecution or malicious humiliation
- c) discrimination as a result of race, religion, sex, marital status, age, intellectual impairment, disability or otherwise (unless insurance thereof is prohibited by law) not committed by you or at your direction
- d) wrongful entry or wrongful eviction or other invasion of privacy
- e) defamation, libel and slander
- f) assault and/or battery.

Products means anything (after it has ceased to be in *your* possession or under *your* control) which is or is deemed to have been manufactured, grown, extracted, produced, processed, imported, exported, constructed, assembled, erected, installed, repaired, serviced, renovated, treated, sold, supplied or distributed by *you* or on *your* behalf (including *your* predecessors in *your business*) including labels, packaging or any container thereof the design, specification or formula of the products and directions, instructions or advice given or omitted to be given in connection with such products and anything which by law or otherwise *you* are deemed to have manufactured in the course of *your business* including discontinued products.

Provided always that for the purpose of this insurance the term 'products' does not include food and beverages:

- a) supplied by *you* or on *your* behalf primarily to *your* employees as a staff benefit
- b) served in any dining room or at any function to employees or guests for consumption at *your premises*, or
- c) supplied from any vending machine or any other property rented to or located for use of others but not sold by *you*,

and any claims for compensation against *you* arising out of any *occurrence* shall be deemed to be a general liability claim to which the limit of liability specified in the *schedule* shall apply.

Property Damage means:

- a) physical injury to or loss of or destruction of tangible property including loss of use of that property at any time resulting therefrom
- b) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by physical damage to or destruction of other tangible property.

Software means programs, procedures and routines associated with the operation of electronic or electromechanical data processing or electronically controlled equipment, including any operating system.

Territorial Limits means anywhere in the world (subject to the limitations set out in exclusions 11 and 15 for this cover section).

Tool of Trade means the use or operation of a vehicle and/or equipment, tool or apparatus which forms part of the vehicle, but only whilst engaged in and undertaking its designed purpose of digging, scraping, shovelling, grading, boring, drilling, compacting, harvesting, ploughing, shredding, lifting, clearing, levelling, hosing, pumping, spraying, vacuuming or suction activities.

You or **Your** means for the purpose of this cover section only, the definition of *you* or *your* is extended to include any of *your* subsidiary companies now or hereinafter formed or constituted.

Provided that:

- a) any such incorporation is notified to *us* within 90 days of the incorporation date
- b) the newly incorporated company conducts the same type of business as *your business*, and
- c) the newly incorporated company is incorporated in Australia.

Vehicle means any type of machine on wheels or self laid tracks or on skis, made or intended to be propelled by other than manual or animal power and any trailers or other attachment made or intended to be drawn by any such machine.

Watercraft means any vessel, craft or thing made to or intended to float on or in or travel on or through or under water.

Cover

Subject to the limits of indemnity stated in the *schedule* and the terms and conditions of this *cover section*, we will pay all sums that the *insured person* shall become legally liable to pay for compensation in respect of:

- *personal injury*
- *property damage*
- *advertising liability*,

happening during the *period of insurance* within the *territorial limits* as a result of an *occurrence* in connection with *your business* or *products*.

Extensions of cover

Cover for others

This *cover section* is extended to the following:

- a) any of *your* directors, executive officers, employees or voluntary unpaid workers but only whilst acting within the scope of their duties in such capacity
- b) any office bearer or member of the canteen, social, or sports organisations for *your* employees and internal first aid given by *your medical persons*, fire or ambulance services formed with *your* consent, but only whilst acting within the scope of their activities in such capacity
- c) any of *your* directors or senior executives in respect of private work undertaken by *your* employees for such director or senior executive, but only after they have obtained *your* prior consent to this private work to be undertaken
- d) any employee superannuation fund or pension scheme managed by *you* or *your* on behalf and the trustees and the directors of the trustee of any such employee superannuation fund or pension scheme which is not administered by corporate fund managers
- e) the estates, legal representatives, heirs or assigns of
 - i. any deceased or insolvent persons, or
 - ii. persons who are unable to manage their own affairs by reason of mental disorder or incapacity,who would otherwise be indemnified by this policy, but only in respect of liability incurred by such persons as described in clauses (a) to (d) above,
- f) any principal but only for their liability for *personal injury* or *property damage* that is directly caused by *your* performance of the work for that principal and only to the extent that *we* would cover *you* under this *cover section* for *your* liability to that principal had the principal made a claim against *you* in respect of the circumstances giving rise to the principal's liability.

Provided that in respect of (f):

- i. the work was carried out by *you* in an attempt to comply with a contract to perform work that was made between *you* and the principal, and

- ii. our liability shall not exceed the lesser of the minimum amount of liability insurance cover required by the contract to perform the work and the limit of indemnity shown in the *schedule*
- iii. for avoidance of doubt it is further provided that where a principal makes a claim under this clause, the exclusion 1. Employer's Liability shall apply so that we will not pay for that principal's liability for *personal injury* to any person in the service of either *you* or that principal.

Limit of indemnity

Our liability to pay compensation as a result of an *occurrence* shall not exceed the general liability limit of indemnity stated in the *schedule*.

Our total aggregate liability to pay compensation in respect of or in any way related to *your products* during any one *period of insurance* shall not exceed the limit of indemnity stated in the *schedule*.

Additional payments

In addition to the limits of indemnity stated in the *schedule*, we will pay as additional payments all:

- a) reasonable legal costs and expenses (including the costs of representation at any coronial hearing or other official investigation into the circumstances) incurred by the *insured person* with *our* written consent in the defence of any claim
- b) premiums payable for:
 - i. bonds to release attachments for amounts not exceeding the applicable limit of liability, but we shall have no obligation to apply for or furnish any such bond
 - ii. appeal bonds and/or security for costs required in any suit, but we shall have no obligation to apply for or furnish such bonds and/or security for costs
- c) expenses incurred by the *insured person* for first aid to others, other than medical expenses prohibited by Section 126 of the *Health Insurance Act 1973*
- d) reasonable expenses incurred by the *insured person* for the temporary repair or shoring up or preservation of property which has been damaged, and
- e) interest accruing after entry of judgment against the *insured person* until we have paid, tendered or deposited in court such part of the judgment as does not exceed the limit of indemnity,

resulting from an *occurrence* which is covered by this *cover section*, provided that:

- i. if a payment exceeding the limit of indemnity has to be made to dispose of a claim, *our* liability to pay any additional payments shall be limited to that proportion of those amounts as the limit of indemnity bears to the amount paid to dispose of the claim
- ii. in the event of a claim covered by this *cover section* being made against an *insured person* in any Court or before any other legally instituted body in North America, the limit of indemnity shall apply to such claim inclusive of all additional payments
- iii. we shall not be obligated to pay any compensation or additional payments, or judgment or to defend any suit after *our* limit of indemnity has been exhausted by payment of claims, judgments and/or settlements.

Exclusions

We will not pay anything in respect of:

1. Employer's liability

- a) *personal injury* to any person arising out of, or sustained in the course of the employment of such person in the service of any *insured person* or through the breach of any duty owed to that person, where any *insured person*:
 - i. is indemnified or entitled to be indemnified (either in whole or in part) in respect of claims for damages under a policy of insurance (which expression includes arrangements made by any *insured person* to provide accident insurance for any *insured person's* workers under a licence to self-insure) arranged (whether by law or not) in accordance with any workers' compensation legislation or accident compensation legislation, or
 - ii. would have been indemnified or entitled to be indemnified (either in whole or in part) had any *insured person* arranged a policy of insurance as required by such legislation.
- b) *personal injury* to any person arising out of, or sustained in the course of the employment of such person in any *insured person's* service in Western Australia, other than a person of whom any *insured person* is deemed to be an employer by reason only of Section 175 of the *Workers' Compensation and Injury Management Act 1981 (WA)*
- c) mental anguish, shock or fright suffered by any person arising out of, or in the course of, that person's employment by, or service to, any *insured person*
- d) *personal injury* arising out of the wrongful or unfair dismissal, denial of natural justice, harassment, libel, slander, defamation, misleading representation, misleading advertising or humiliation of, or discrimination against, any person while in any *insured person's* service, prospective employment or while employed by any *insured person*
- e) which indemnity previously would have been provided in whole or in part under a policy of insurance arranged in accordance with any workers' compensation legislation or accident compensation legislation, but in respect of which indemnity has been withdrawn or reduced as a consequence of a change to the scope, terms, provisions, or requirements of such legislation made after the commencement of the current *period of insurance* of this *cover section*
- f) the imposition of any liability by the provisions of any workers' compensation legislation or accident compensation legislation or any industrial award, agreement or determination.

2. Vehicles

Personal injury or property damage caused by or arising out of the ownership, use, possession, or control by any insured person of any *vehicle*:

- a) which is registered, or

- b) in respect of which registration is required by virtue of any legislation relating to *vehicles*, or
- c) in respect of which compulsory liability insurance or statutory indemnity is required by virtue of any legislation (whether or not insurance is effected).

Exclusion 2 does not apply to claims for:

- i. *personal injury* arising out of an *occurrence* that is partially (to the extent of that part) or totally outside the indemnity afforded under such compulsory liability insurance or other legislation relating to *vehicles* and where the reason the *occurrence* is outside the indemnity afforded by compulsory liability insurance or statutory indemnity does not involve a breach by an *insured person* of legislation relating to *vehicles*, or
- ii. arising out of and during the loading or unloading of goods to or from any *vehicle*, or
- iii. arising from or caused by the operation or use of any *vehicle* which is designed primarily for lifting, lowering, loading or unloading whilst being operated or used by an *insured person* or on *your* behalf within the confines of *your premises*, or
- iv. arising from the use of any *tool of trade* other than whilst in transit or whilst being used for transport or haulage
- v. for *property damage* arising out of the movement by *you* or by any employees of yours of any *vehicle* or trailer not belonging to *you* which is interfering with access to or from *your premises* or any site where *you* are carrying out work, or
- vi. for *property damage* caused by or arising out of the movement of any *vehicle* (which is required to be conditionally registered in accordance with the law of any State or Territory in Australia) in the event of *your* inadvertent and unintentional failure to effect conditional registration.

3. Property in physical or legal control

Property damage to property owned by or in the physical or legal control of an *insured person*.

Exclusion 3 does not apply to *property damage* to:

- a) *premises* leased or rented to you, but no cover is provided by this policy if *you* have assumed the responsibility to insure such *premises*
- b) personal effects of *your* directors, employees and visitors
- c) *premises* (and their contents) where the *premises* are temporarily occupied by an *insured person* to carry out work
- d) any *vehicle* (including its contents, spare parts and accessories while they are in or on such *vehicle*) in a car park unless:
 - i. the *vehicle* is used by or on behalf of the *insured person*, or
 - ii. the car park is occupied or operated by an *insured person* for reward.
- e) other property, not owned by you, but in *your* physical or legal control subject to a maximum

of \$250,000 for any one *occurrence* and in the aggregate during any one *period of insurance*.

4. Faulty workmanship

The cost of performing, correcting or improving any work undertaken by an *insured person*.

5. Damage to products

Property damage to products if the damage is attributed to any defect in them or to their harmful nature or unsuitability.

Exclusion 5 is restricted to the defective or harmful or unsuitable part of a damaged *product* and does not apply to any resultant damage caused to the remainder of the *product*.

6. Recall of products

any claims arising out of or resulting from any loss, cost or expense incurred by *you* for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of *your products* or of any property of which they form a part, if such *products* or property are withdrawn from the market or from use because of any known or suspected defect, deficiency, inadequacy or dangerous condition in them.

7. Products guarantee

Any *products* warranty or guarantee given by *you* or on *your* behalf.

Exclusion 7 shall not apply to the requirements of any Federal or State legislation as to *product* safety.

8. Professional liability

The rendering of or failure to render professional advice or service provided by an *insured person* or any error or omission connected therewith.

Exclusion 8 shall not apply in respect to:

- a) *personal injury* or *property damage* arising therefrom providing such professional advice or service is not given for a fee, or
- b) the rendering of or the failure to render professional medical advice by *medical persons* employed by *you* to provide first aid or medical services on *your premises*
- c) advice given in respect of the use or storage of *your products*.

9. Defamation, libel, slander

The publication or utterance of a defamation, libel or slander:

- a) made prior to the commencement of the *period of insurance*
- b) made by an *insured person* at *your* direction or with *your* authority with knowledge of its falsity, or
- c) related to advertising, broadcasting, publishing or telecasting activities conducted by *you* or on *your* behalf, excepting where cover is provided by us as *advertising liability*.

10. Watercraft, aircraft, hovercraft

personal injury or property damage caused by or arising directly or indirectly out of or in connection with:

- a) the operation, ownership, possession or use by *you* of any *watercraft* or *hovercraft* exceeding 10 metres in length, while such *watercraft* or *hovercraft* is on, in or under water.

Provided that 10(a) shall not apply to claims arising out of:

- i. *watercraft* used in operations carried out by any independent contractors for whose conduct *you* may be held liable
 - ii. *watercraft* or *hovercraft* owned and operated by others and used by *you* for business entertainment.
- b) the ownership, maintenance, operation, possession, or use by *you* of any *aircraft*, including any property used for the purpose of an airport or any *aircraft* landing strip.

Provided that 10(b) shall not apply to claims arising out of any model *aircraft* or unmanned tethered inflatable balloons used for advertising or promotional purposes,
 - c) *your products* that an *insured person* knew or had reasonable cause to believe would be, or are, installed as a critical part or become a component part of the hull, machinery or instruments used for navigation or maintaining an aircraft or hovercraft or any other aerial device in flight or in movement upon the ground.

11. Advertising liability

Any *Advertising Liability*:

- a) for statements made at the direction of an *insured person* with the knowledge of the illegality or falsity thereof
- b) for breach of contract, other than misappropriation of advertising ideas contrary to an implied contract
- c) for infringement or passing off of a trade mark, service mark or trade name on any *products*, goods or services sold, offered for sale or advertised. This does not apply to infringement of titles or slogans
- d) arising from the export of the *products* to, or business visits by directors, executives and employees to North America, notwithstanding the terms of sub-paragraphs (i) and (ii) of exclusion 15.
- e) for any *insured person* whose business is advertising, broadcasting, publishing or telecasting
- f) for incorrect description of the price of *products*, goods or services
- g) for failure of *products*, goods or services to conform with advertised performance, quality, fitness or durability; or
- h) for acts, errors or omissions committed prior to the inception date of this *cover section*.

12. Assault and battery

Personal injury or property damage arising directly or indirectly out of assault and battery committed by an *insured person*.

Exclusion 12 shall not apply when such assault and battery is committed for the purpose of preventing or eliminating danger to persons or property.

13. Contractual liability

Any liability or obligation assumed by an *insured person* under any agreement or contract except to the extent that:

- a) the liability or obligation would otherwise have been implied by law
- b) the liability or obligation arises from *incidental contracts*
- c) the liability or obligation is assumed by an *insured person* under any warranty under the requirement of Federal or State legislation in respect to *product safety*
- d) the liability or obligations is assumed under those agreements specified in the *schedule*.

14. Intentional conduct

Any alleged or actual fraudulent, dishonest, malicious, intentional or criminal act or omission of an *insured person*.

15. Territorial limits

Any liability:

- a) occurring in North America
- b) caused by or arising out of *products* exported by the *insured person* or its agents to North America

Exclusion 15 shall not apply to:

- i. *products* exported to North America without the knowledge of *you*, *your* agents or employees, or
- ii. business visits to North America by directors, executives and employees normally resident in Australia that do not involve the performance of manual work or supervision of manual work by any such person.

16. Pollution

Your policy does not cover:

- a) loss, damage, costs or expense, injury, illness or liability directly or indirectly arising out of the discharge, seepage, migration, dispersal, release or escape of *pollutants* into or upon any property, land, the atmosphere or any watercourse or body of water (including ground water)
- b) loss, damage, costs or expense, injury, illness or liability directly or indirectly arising out of the discharge, seepage, migration, dispersal, release or escape of *pollutants* caused by any *product* that has been discarded, dumped, abandoned or thrown away by others
- c) the cost of removing, nullifying or cleaning up *pollutants*
- d) the cost of preventing the escape of *pollutants*.

Exclusion 16(a) and (c) shall not apply where the claim arises from a sudden identifiable, unintended and unexpected event which takes place in its entirety at a specific time and place and occurs outside of North

America, however, the total aggregate limit of indemnity during any one *period of insurance* shall not exceed the limit of indemnity stated in the *schedule*.

17. Loss of use

Loss of use of tangible property which has not been physically injured, or lost or destroyed resulting from:

- a) a delay in or lack of performance by or on behalf of an *insured person* in relation to any contract or agreement
- b) the failure of the *products* to meet the level of performance, quality, fitness or durability expressly or implied, warranted or represented by an *insured person*.

Proviso (b) does not apply to loss of use of other tangible property resulting from the sudden and accidental physical injury to or destruction of the *products* after such *products* have been put to use by any person or organisation other than you.

18. Asbestos

Your policy does not cover any liability of whatsoever nature in connection with, directly or indirectly caused by, or contributed to by or arising from, asbestos or asbestos *products* or asbestos contained in any *product*.

- iii. comply with all statutory obligations, bylaws or regulations imposed by any public authority for the safety of persons or property.
- c) You shall at *your* own expense withdraw, inspect, repair, replace, trace, recall or modify any of the *products* containing any defect or deficiency of which *you* have knowledge or have reason to suspect.

3. Liability not to be admitted

The *insured persons* shall not admit liability for or offer to or agree to settle any claim without *our* written consent. *We* shall be entitled to take over and defend any claim with full discretion in the conduct of that claim.

4. Cross liability

When an *insured person* consists of more than one party, the *insured person* shall be considered as a separate *insured person* as though a separate policy had been issued to each of the said parties.

Provided that *our* limits of indemnity and additional payments will apply as though there were not separate policies issued to each party.

Special conditions

1. Additions and/or alterations to buildings and plant

Where additions and/or alterations to *buildings* or plant are being performed at the *premises* by any contractor employed by you, notwithstanding the definition of business clause (c), this policy extends to indemnify *you* against any claim for *your* legal liability to pay compensation for *personal injury* or *property damage* arising from an *occurrence* happening in connection with the conduct of the *business* or ownership of the *premises* during the period of the contract works, that is independent of the contractor's performance.

Provided also that nothing in this clause will result in an increase in *our* limits of liability in respect of any *occurrence* or *period of insurance*.

2. Reasonable care and precautions

Notwithstanding condition 1 (a) (iii) – 'Reasonable precautions', noted in the General Conditions, the following is applicable for this *cover section*.

- a) You must exercise reasonable care that only competent employees are employed and take reasonable measures to maintain all *premises*, fittings and plant in sound condition.
- b) The *insured persons* shall:
 - i. take all reasonable care and precautions to prevent *personal injury*, *property damage* or *advertising liability* losses
 - ii. take all reasonable care and precautions to prevent the manufacture, sale or supply of defective *products*, and