

This resource is intended to help you quickly identify potential issues in draft contracts that you are reading over. However, it is not intended to be a substitute for legal advice in the case of individual contracts. If you spot something that you think might be problematic in a contract that you are asked to sign, ask for an explanation from whoever has sent the contract to for signing and then, if you are still not satisfied, get them to initiate a formal legal review through Legal Services.

## 1 Indemnity Clauses

These are the bugbear of many contracts and they need to be considered carefully. To indemnify someone is to secure them against a particular loss, so an indemnity clause is a contractual commitment by one party to compensate the other party for certain potential losses under a contract. In other words, an indemnity clause is a commitment by one party to cover the liability of the other party.

If the university is being asked to give an indemnity, you should consider whether or not this is reasonable and whether or not the scope of the indemnity is reasonable. Things to look out for are:

- *Indemnities that are more like insurance than an indemnity:* The proper scope for an indemnity is to cover the other party for loss or damage that results from breach of contract, negligence or improper behaviour (sometimes called misfeasance) and not just anything that results from the subject matter of the contract. Insurance companies provide cover against anything that might happen but universities don't!
- *Indemnities that extend too far:* Some indemnities overstep the mark in that they make the party giving the indemnity liable for everything that happens after something goes wrong (and not just the direct and foreseeable consequences of whatever has gone wrong). You can spot these types of clauses; they will refer to things like "indirect loss", "hold harmless", "loss or damage arising direct or indirectly from", "loss howsoever arising" or "loss of reputation, business opportunity or data." The university will not accept this sort of loss except in the most particular circumstances.
- *Indemnities that are one sided:* If the university is giving an indemnity, generally it should be reciprocated or, at the very least, it should acknowledge that the university's liability will not extend to indemnifying the other party against its own negligence (and acknowledgements like that are called contributory negligence clauses). The university should not provide an indemnity that may extend to the consequences of an event brought about through the other party's fault.

*Indemnities in favour of the university:* A contract or agreement which requires a party to provide a service or product to the University should ideally have an indemnity clause that requires that party to indemnify the University in the event of an adverse impact upon the University arising from that party's actions or lack of action.

## 2 Insurance Clauses

Things to watch out for are:

- *Taking out new insurance:* Clauses that require the university to have a particular insurance that it doesn't already have are problematic (and you can check out Griffith's insurance policies at [Insurance website](#) and there could be a significant cost involved in placing the insurance. If in

doubt, ask whoever has sent the contract to you to check with the university's [insurance@griffith.edu.au](mailto:insurance@griffith.edu.au) in the first instance.

- *Noting the other party's interest:* Some contracts require the university to note another party's interest on the university's insurance policies. This can be expensive or problematic and you should ask whoever has sent the contract to you to check with the university's [Insurance Office](#) in the first instance.

*Clauses requiring changes to the university's insurance policy:* Some contracts also require the university to get its insurer to change the terms of the university's insurance policy in favour of the other party (and you'll see that these clauses often refer to waiver of rights of subrogation and contribution and such like). These clauses are somewhat relics of the past: modern insurers will simply refuse to change the policies in the manner required and then you have an intractable problem.

### 3 Limitations of Liability

An exclusion of liability clause is used to set an arrangement where one party's liability will be capped at a fixed amount (or capped at an amount determined in accordance with an agreed formula). It is common to see liability capped to a dollar value that matches the total value of goods or services being provided under the agreement, or to the value of assets being transferred from a seller to a buyer. However, the dollar value being paid for the goods or services usually bears no logical relationship to the magnitude of the risk being assumed by the party acquiring them. While such a cap on liability makes sense to the seller to prevent them suffering a loss greater than the sale price they receive, if the university accepts such terms, it could be exposed to substantial risk and this should be avoided.

### 4 Representations and Warranties

Representations and warranties are statements made in a contract verifying that particular states of affair do or do not exist. Review and understand warranties and representations given by the university. Don't give any representation if you do not actually know that the representation is true or if the other party is in a better position to know the facts being represented. If you are buying goods or services, make sure that the other party has given appropriate warranties about them.

### 5 References to Incorporated Documents

When another document is incorporated by reference always ask for a copy of the incorporated document so you can review it. The university shouldn't accept a scenario where the other side is entitled to change the incorporated document without the university's consent because that gives the other party the right to unilaterally change the contract, perhaps to the university's disadvantage.

### 6 Exclusivity Clauses

Sometimes clauses are included that make the relationship between the parties "exclusive" in some way – having the effect that one or more parties may be limited as to who or how they can deal with third parties in the future. Agreeing to these kinds of arrangements can be a criminal offence if they create a cartel arrangement (where two or more competitors agree to carve up a market). For the university, with so many outside partners and collaborators, exclusivity clauses should only be agreed to in very special and limited circumstances and only after obtaining legal advice. Remember, any exclusivity arrangements in your local agreement may extend to everyone in the University, not just your area. These types of arrangements should always be referred to Legal Services.

## 7 Intellectual Property Rights

Intellectual property rights are legal rights over certain intellectual creations. Such rights may be protected by legislation (e.g. copyright, patents, registered designs, trademarks), or may be protected under case law or common law (e.g. trade secrets, unregistered trademarks, confidential information). Where it is likely that the activities under the contract will give rise to the development of intellectual property by either the University or the other party to the contract, you must consider the position of ownership and access to those intellectual property rights – as well as future use.

Generally intellectual property rights belong to the person (or their employer) who creates the intellectual property. Where the University is paying full commercial rates for a contractor to create intellectual property, the University may want to own the intellectual property seek ownership of the created intellectual property rights – therefore, the contract should specifically transfer the intellectual property rights created by the contractor under the agreement to the university.

At the very least, where the university is contributing to the creation of intellectual property, the university should be given the right to retain the intellectual property for its teaching and research purposes.

## 8 Right to Publish

Any restrictions on rights to publish outcomes of research activities should be considered with the utmost caution. Why participate in a research activity if you can't publish? Ultimately restrictions of this nature are up to the academic or academics who will be conducting the project but if there are restrictions on the right to publish, you might want to make sure they are known and accepted. After all, it may be possible to negotiate a better outcome.

## 9 Moral Rights

Authors have legal rights to be acknowledged as the creator of their works and to insist on faithful reproduction of their works. The university should not agree to allowing false attribution (ie where someone else takes the credit) or non-attribution of the project material (where no credit is given) unless the academics concerned are comfortable with that. Again, it may be possible to negotiate a better outcome.

## 10 Privacy

The University has extensive obligations in relation to personal information it receives and stores about students, employees and any other individuals. If an arrangement requires the university to share personal information with a third party, the university is obliged to secure protections for the personal information before it is shared. Any arrangement of this nature should be referred to Legal Services.

Arrangements that impose an outright prohibition on the export of data from Australia are also problematic. The university's email system and other cloud based technologies involve the transfer and storage of data outside of the Commonwealth of Australia. Significant effort and vigilance goes into ensuring these arrangements comply with privacy and data management standards so export of data does not constitute a breach of privacy legislation. Government organisations from time to time issue contracts prohibiting export of data and agreeing to them can cause issues.

## 11 Contract Extensions and Renewals

Where it is likely that the university will wish to continue with the contract past the expiry of the initial term, you should consider whether you would like clauses included that provide either:

- an option to renew – this will enable the university to renew the agreement by providing notice by a certain date; or
- a provision for negotiation prior to the end of the term, with a view to agreeing to an extension.

It is possible for a contract to specify that it will automatically be renewed unless early notice is given by one party that it wishes not to renew, or unless some event has already ended the contract before its expiry. Be sure to check any contracts drafted externally to make sure there is no automatic renewal under a contract for the other party – or if it is included, make sure the university's consent is required before renewal occurs.

## 12 Governing Law or Jurisdiction Clauses

These are clauses through which the parties specify which law (ie the law of which state in which country) will govern the agreement for the purposes of resolving any disputes. Laws vary from place to place, so when the parties are engaging in the contract across state or country lines, it is important that the contracting parties agree at the outset which laws will be applied if things end up going wrong. Sometimes, contracts may go so far as to specify a forum (or specific court) in which cases would need to be brought. If a contract that is presented to the university has the law of any place other than Queensland proposed as its governing law, you should consider insisting on a formal legal review of the contract.

## 13 Does it all make sense?

Finally, does the arrangement actually make sense when you've looked through it? Does it actually describe who is to do what, when, where and how? If the contract doesn't make this clear, then it is likely to cause problems down the track.