Indemnity, Hold Harmless or Waiver of Subrogation etc

Indemnities, guarantees, warranties and letters of comfort are forms of contingent liabilities that exist at any given point in time that may give rise to a liability on the occurrence of a particular future event that is outside the control of the ANU.

An indemnity is a legally binding promise whereby a party undertakes to accept the risk of loss or damage another party may suffer.

A guarantee is a promise whereby the ANU assumes responsibility for the debt of, or performance obligations of, another party should that party default in some way.

A warranty is a promise whereby one party provides certain assurances to another party, for example, that an item sold is the vendor’s to sell, is fit for use, and that for a specified period, defective parts will be replaced or otherwise rectified.

A letter of comfort is essentially an instrument that is used to facilitate an action or transaction but is constructed with the intention of not giving rise to a legal obligation. Despite this intention a court may find that the party receiving the letter was entitled to rely upon its contents.

A hold harmless or waiver of subrogation prevents the ANU from recovering damages from another party.

Contracts that contain any of these clauses may enable the ANU’s insurer to deny indemnity.

When should the ANU enter into arrangements involving the issuance of an indemnity, guarantee, warranty or letter of comfort?

An indemnity, guarantee, warranty or letter of comfort is ultimately a risk transference mechanism, which results in the ANU accepting risks and the other party experiencing reduced risks. The ANU’s policy on issuing indemnities, guarantees, warranties and letters of comfort is to accept such risks only when the expected benefits, financial or otherwise, are sufficient to outweigh the level and cost of the risk which the ANU would be assuming. As a matter of principle, risks should be borne by those best placed to manage them – that is the ANU should generally not accept risks which another party is better placed to manage.

Indemnities, guarantees, warranties and letters of comfort should not be given except where there is an explicitly identified risk. That is, these instruments should not be issued simply to provide comfort against general, unspecified events. This will ensure that the ANU is exposed to the minimum risk necessary to achieve the particular objective.

Further, staff should have regard to whether the proposed indemnity, guarantee, warranty or letter of comfort will set a precedent that may be undesirable.
The ANU must undertake a risk assessment (see forms) to inform any decision about whether limiting a contractor’s liability through a liability cap or indemnity would be appropriate, and if so, what limits may be suitable. This approach is consistent with the broader financial management framework that provides for ANU to consider all contingent liability matters in the context of sound risk and contract management practices.

Risk management involves assessing and accepting risk in a way that minimises the long term costs to the ANU. The strategies for managing these exposures are aimed at:

- managing the relationship with the indemnified party so as to reduce the likelihood that the contingency is triggered; and
- managing the aggregate risks from an ANU perspective, including by:
  - establishing an awareness of the environment the Agency is operating in;
  - ensuring easy access to relevant documents (see section on Document security);
  - identifying the risks to be managed (including by consultation with other parties as appropriate);
  - analysing the risks, which involves consideration of the possible consequences of the risk and the likelihood that those consequences may occur;
  - treating the risks (such as they are retained, reduced, eliminated, controlled or transferred); and
  - monitoring and reviewing the risks on a periodic basis.

Please advise the Insurance Office if you have entered into or are considering entering into a contract with Indemnities/Guarantees/Warranties/Letter of Comfort/Hold Harmless or Waiver of Subrogation clauses.