

Professional Indemnity Wording Construction Consultants



Construction Consultants Professional Indemnity Insurance Policy

Preamble

In consideration of the payment of the **Premium** and in reliance on the contents of the **Proposal**, the **Insurer** agrees to provide indemnity subject to the terms of this **Policy**.

SECTION 1 – INSURING CLAUSES

1.1 Professional Liability

The **Insurer** agrees to indemnify the **Insured** against any **Claim** for civil liability first made against the **Insured** during the **Period of Insurance** arising from the provision of **Professional Services**.

1.2 Defence Costs

The **Insurer** agrees to pay **Defence Costs** in respect of any **Claim** indemnified under clause 1.1.

A. Automatic Extensions

These automatic extensions form part of the **Policy** and are subject to all of the **Policy** terms and conditions. With the exception of extension 1.3 (Automatic Reinstatement) the inclusion of these automatic extensions will be part of and not in addition to the **Limit of Liability** of the **Policy**.

1.3 Automatic Reinstatement

If the **Limit of Liability** is either partially or totally exhausted by the payment of a **Claim** under this **Policy**, the **Insurer** agrees to reinstate the **Limit of Liability** by an amount equal to the **Limit of Liability**

PROVIDED THAT:

- (a) the **Insurer's** total liability in respect of all **Claims** shall not exceed the **Limit of Liability** in the **Aggregate** in the **Schedule**; and
- (b) such reinstatement is only available to subsequent **Claims** totally unrelated to those that give rise to the partial or total exhaustion of the **Limit of Liability**.

1.4 Consumer Protection

The **Insurer** agrees to indemnify the **Insured** for any **Claim** for a misstatement or misrepresentation under the terms of the Competition and Consumer Act 2010 (Cth), National Consumer Credit Protection Act 2009 (Cth), the Australian Securities and Investments Commission Act 2001 (Cth) and the Corporation Act 2001 (Cth) or any **comparable legislation**

arising from the performance of **Professional Services**.

1.5 Consultants, Contractors & Agents (Vicarious Liability)

Subject to the application of Automatic Extension 1.7, the **Insurer** agrees to indemnify the **Insured** for any **Claim** for civil liability arising from the performance of **Professional Services** undertaken for and on behalf of the **Insured** by a consultant, contractor or agent PROVIDED THAT there is no indemnity available for the consultant's, contractor's, or agent's own liability, nor will the **Insurer** be prevented from seeking recovery against such a consultant, contractor or agent.

1.6 Continuous Cover

1.6.1 Notwithstanding Policy Exclusion 3.14 (Prior **Claims** or **Circumstances**), and in the absence of fraudulent misrepresentation or non-disclosure by the **Insured**, the **Insurer** agrees to extend indemnity for any **Claim** arising from or attributable to or in consequence of any fact or circumstance which could have been, but which was not, notified under a previous professional indemnity insurance policy ("**Previous Policy**") PROVIDED THAT:

- (a) if the fact or circumstance had been notified under the **Previous Policy**, the **Insured** would have been entitled to indemnity under the **Previous Policy**;
- (b) other than the **Insurer's** right to refuse indemnity due to:
 - (i) failure to disclose the fact or circumstance to the **Insurer** before this policy was entered into; or
 - (ii) the application of Exclusion 3.14.2the **Insured** would be entitled to indemnity under this **Policy**; and
- (c) the **Insured** has continued without interruption to be insured under a professional indemnity insurance policy with the **Insurer** from the time when the fact or circumstance could have been notified under the **Previous Policy** until the time when the **Claim**, fact or circumstance is notified to the **Insurer**.

1.6.2 The **Insurer's** liability for the **Claim** shall not exceed the amount of indemnity which would have been available under the **Previous Policy** if the fact or circumstance had been notified under the **Previous Policy** or the available **Limit of Liability** under this **Policy**, whichever is the lesser.

1.7 Contractors & Consultants

The definition of **Insured** is extended to include any contractor or consultant who:

- (a) is deemed a worker under the worker's compensation laws of the Australian State or Territory in which the contractor or consultant is performing the **Professional Services**; and
- (b) has a written contract with the **Insured** to perform **Professional Services**,

PROVIDED THAT cover is only provided for **Professional Services** performed for or on behalf of the **Insured**.

1.8 Costs of Official Inquiries

The **Insurer** agrees to indemnify the **Insured** for the reasonable costs and expenses (excluding the **Insured's** regular or overtime wages, salaries, fees, travel and accommodation expenses) incurred by the **Insurer**, or the reasonable costs incurred by the **Insured** with the **Insurer's** prior written consent (which shall not be unreasonably withheld), for the **Insured's** legal representation at any inquiry or other similar process relating to or connected with the performance of the **Insured's Professional Services**, which the **Insured** is legally required or compelled to personally attend PROVIDED THAT:

- (a) the **Insurer** shall be entitled to nominate lawyers to represent the **Insured**;
- (b) the notice requiring the **Insured** to attend the inquiry or similar process is first served on the **Insured** during the **Period of Insurance**, and notified to the **Insurer** in writing as soon as practicable during the **Period of Insurance**;
- (c) there is no indemnity for legal representation at any inquiry or other similar process happening within the jurisdictional limits or territorial limits of the United States of America or Canada or their territories or protectorates; and
- (d) the **Insurer's** aggregate liability for all **Claims** under this clause shall not exceed \$250,000.

1.9 Court Appearance Costs

The **Insurer** agrees to indemnify the **Insured** for the reasonable costs and expenses incurred with the **Insurer's** prior written consent which any natural person who is an **Insured** incurs where they are legally required to personally attend a civil proceeding as a witness in a **Claim** covered by this policy.

The **Insurer's** liability for all **Claims** under this clause shall not exceed \$500 per day per natural person and \$50,000 in the aggregate.

1.10 Cyber Disruption

The **Insurer** agrees to indemnify the **Insured** against civil liability for any **Loss** incurred by the **Insured** in respect of any **Claim** first made against the **Insured** and which is notified to the **Insurer** during the **Policy Period** arising from the **Insured's** failure to prevent the unauthorised access to, use of, or tampering with a **Computer System** by any third party (but not any **Insured**) in the performance of the **Professional Services** where such **Loss** arises from:

- i. an attack using a **Computer Virus**; or
- ii. an attack by a computer hacker; or
- iii. the unintentional transmission of a **Computer Virus**; or
- iv. **Electronic Data Theft**.

The **Insurer's** aggregate liability for all **Claims** under this clause shall not exceed \$100,000.

1.11 Defamation

The **Insurer** agrees to indemnify the **Insured** for any **Claim** for unintentional defamation arising from the performance of **Professional Services**.

1.12 Extended Reporting Period

If this **Policy** is not renewed or replaced, the **Insured** shall be entitled to a further period of 30 days commencing from the end of the **Period of Insurance** during which time the **Insured** may notify the **Insurer** of any **Claim** under the **Policy** provided that **Claim** arises from **Professional Services** performed prior to the end of the **Period of Insurance**.

An **Extended Reporting Period** is not available if a **Change in Control** occurs.

1.13 Heirs, Estates and Legal Representatives

The **Insurer** agrees to indemnify the estate, heirs, executors, administrators or legal representatives of a natural person who is an **Insured** and incapable of managing their own affairs by virtue of death, incapacity or bankruptcy. Cover is provided as if the **Claim** had been brought against that **Insured** PROVIDED THAT there is no cover for any actual or alleged act or omission by the estate, heirs, executors, administrators or legal representatives themselves.

1.14 Innocent Party Indemnity

Notwithstanding Policy Exclusion 3.5 (Dishonest or Reckless Acts), the **Insurer** agrees to indemnify the **Insured** under this **Policy** where the **Claim** arises from a dishonest, fraudulent, criminal or malicious act or omission of any of the **Insured's Employees**, partners or directors PROVIDED THAT there is no indemnity under this clause for:

- (a) any person committing or condoning the act or omission;
- (b) any loss sustained as a result of any act or omission occurring after the date on which the **Insured** first discovers, or had reasonable cause for suspicion of, a dishonest, fraudulent, criminal or malicious act or omission on the part of any person;
- (c) loss of negotiable instruments, bearer bonds or coupons, stamps, bank or currency notes.

1.15 Intellectual Property Rights

The **Insurer** agrees to indemnify the **Insured** for any **Claim** for unintentional:

- (a) infringement of copyright, trademarks, registered designs, patents, plagiarism; or
- (b) passing off; or
- (c) breach of confidentiality

arising from the performance of **Professional Services**.

1.16 Joint Ventures

The **Insurer** agrees to indemnify the **Insured** against any **Claim** for civil liability arising from the performance of **Professional Services** by the **Insured** in their capacity as a joint venture partner but only to the extent of the **Insured's** proportion of any liability incurred by such joint venture.

Further, the **Insurer** will only pay for **Defence Costs** incurred by the **Insured** in respect of any such **Claim** solely in respect of the **Insured's** own liability as a joint venture partner.

1.17 Loss of Documents

1.17.1 The **Insurer** agrees to indemnify the **Insured** for the costs, charges and expenses, incurred with the **Insurer's** prior written consent, which they incur in replacing or restoring **Documents** (including but not limited to **Documents** which are the property of the **Insured**) which have been destroyed or damaged, or lost or mislaid and cannot be found after diligent search PROVIDED THAT:

- (a) the **Insured** first discovered the destruction, damage, loss or mislaying of the **Documents** and notifies the **Insurer** in writing during the **Period of Insurance**;
- (b) the **Documents** were in the **Insured's** physical custody or control or in the physical custody or control of another person to whom the **Insured** entrusted, lodged or deposited the **Documents** in the ordinary course of the **Insured's Professional Services**; and
- (c) the **Insurer's** aggregate liability for all **Claims** under this clause shall not exceed \$500,000 or the **Limit of Liability**, whichever is the lesser.

1.17.2 There is no indemnity under this clause for any costs, charges or expenses as a result of any **Document** being destroyed or damaged by normal wear, tear or other gradual processes.

1.18 New Subsidiaries

If during the **Period of Insurance** the **Insured** acquires or creates an entity so that it becomes a **Subsidiary** that has total revenue of less than 10% of the consolidated revenue of the **Insured**, then the **Policy** will automatically extend cover in respect of the **Subsidiary** without notice to **the Insurer** or additional premium being payable, but only in respect of **Professional Services** performed after such entity becomes a **Subsidiary**, PROVIDED THAT the new entity:

- (a) is incorporated and **Professional Services** performed within Australia or New Zealand; and
- (b) has no paid or incurred professional indemnity claims against it for the past 5 years preceding the date of acquisition.

1.19 Privacy

The **Insurer** agrees to indemnify the **Insured** against any **Claim** for civil liability arising from any actual or alleged breach of any Federal or State privacy legislation in the performance of **Professional Services**.

1.20 Reputation Protection Expenses

The **Insurer** agrees to indemnify the **Insured** for the reasonable fees, costs and expenses, incurred with the **Insurer's** prior written consent (which shall not be unreasonably withheld) in retaining a public relations consultant for the sole purpose of protecting the **Insured's** professional reputation in connection with any **Claim** indemnified by this **Policy**.

The **Insurer's** aggregate liability for all **Claims** under this clause shall not exceed \$50,000.

B. Optional Extensions

These optional extensions form part of the **Policy** and are subject to all **Policy** terms and conditions. Their inclusion will be part of and not in addition to the **Limit of Liability** of the **Policy**.

1.21 Contractual Liability (Optional)

Notwithstanding Policy Exclusion 3.3 (Contractual or Commercial Liabilities), the **Insurer** agrees to indemnify the **Insured** against any **Claim** for civil liability the **Insured** incurs under an indemnity and/or hold harmless term of a contract PROVIDED THAT such civil liability arises from the performance of **Professional Services** by or on behalf of the **Insured**.

1.22 Limitation of Liability (Optional)

Notwithstanding Exclusion 3.18 (Waived or Limited Rights) the **Insurer** agrees where an **Insured** enters into a written contract with another party relating to the performance of **Professional Services** which excludes, or limits the liability of such parties, such contracts will not prejudice the **Insured's** right to indemnity under the **Policy**. The indemnity provided under this extension does not apply to contracts (whether or not they are written contracts) entered into as a result of a dispute which involves the **Insured** in any way.

1.23 Loss Mitigation & Rectification (Optional)

The **Insurer** agrees to indemnify the **Insured** for the reasonable direct costs and expenses incurred by the **Insured** to rectify or mitigate the effects of an act, error or omission by or on behalf of the **Insured** resulting from the performance of **Professional Services** that would otherwise be subject to a covered **Claim** under the **Policy** if not rectified or mitigated. PROVIDED THAT:

- (a) the act, error or omission is discovered by the **Insured** and notified to the **Insurer** as soon as practicable during the **Period of Insurance**; and
- (b) the **Insured** notifies the **Insurer** of its intention to take such action and receives the **Insurer's** written consent (which shall not be unreasonably withheld) before incurring these costs and expenses; and
- (c) no cover is provided for indirect costs and expenses including loss of profit or bonus, or costs and expenses of material, or **Professional Services** which result in an increased quality or standard from that specified in the design or the relevant contract.

The **Insurer's** aggregate liability for all **Claims** under this clause shall not exceed \$250,000.

1.24 Novated Designs (Optional)

Where a **Professional Service** has been novated under a written contract (the "**Novated Contract**") to the **Insured**, Exclusion 3.3 (Contractual or Commercial Liabilities) will not apply to the **Novated Contract**.

No cover is provided for liabilities in the **Novated Contract** that were not covered by the **Policy** prior to the novation.

1.25 Proportionate Liability (Optional)

Exclusion 3.3 (Contractual or Commercial Liabilities) shall not apply where:

- (a) the **Insured** has agreed in writing with a **third party** to contract out of **Proportionate Liability Legislation**; and
- (b) the **Insured** is permitted by law to contract out of **Proportionate Liability Legislation**.

SECTION 2 – LIMIT OF LIABILITY

2.1 Limit of Liability

- 2.1.1 The **Insurer's** total liability under this **Policy** for any one **Claim** shall not exceed the **Limit of Liability** specified in the **Schedule**.
- 2.1.2 The **Insurer's** total liability in the aggregate in respect of all **Claims** under this **Policy** shall not exceed the **Limit of Liability** in the **Aggregate** in the **Schedule**.
- 2.1.3 Where the **Limit of Liability** in the **Schedule** is specified to be exclusive of **Defence Costs**, the **Insurer** agrees, in addition to the **Limit of Liability**, to pay the **Defence Costs** of any **Claim** which is the subject of indemnity under insuring clause 1.1 PROVIDED THAT:
- (a) where the **Insured's** liability exceeds the available **Limit of Liability**, the **Insurer** shall only pay such proportion of the **Defence Costs** as the available **Limit of Liability** bears to the **Insured's** liability;
 - (b) where the amount the **Insurer** have paid or incurred as **Defence Costs** exceeds the share that the **Insurer** are obliged to pay under 2.1.3(a), the **Insured** shall upon demand pay to the **Insurer** the excess amount. Alternatively, the **Insurer** may deduct the excess amount from any entitlements the **Insured** may have at any time under this **Policy**.
- 2.1.4 Where the **Limit of Liability** in the **Schedule** is specified to be inclusive of **Defence Costs**, the **Insurer** agrees to pay the **Defence Costs** of any **Claim** which is the subject of indemnity under clause 1.1 PROVIDED THAT the total of our liability together with the **Defence Costs** shall not exceed the **Limit of Liability**.

2.2 Claims Aggregation

- 2.2.1 All acts, errors and omissions which are in any way related or originate from one source or original cause shall jointly constitute a single act, error or omission for the purposes of this **Policy**.
- 2.2.2 Where a single act, error or omission gives rise to more than one **Claim**, all such **Claims** shall jointly constitute one **Claim** under the **Policy**, and only one **Excess** and one **Limit of Liability** shall be applicable in respect of such **Claim**.

2.3 Excess

- 2.3.1 The amount of the **Excess** shall be borne by the **Insured** at its own risk in respect of each **Claim**.
- 2.3.2 Where the quantum of any **Claim** is less than the **Excess**, the **Insured** shall be liable and remains uninsured for the **Claim** and the **Defence Costs**.
- 2.3.3 Where the **Excess** is specified to be inclusive of **Defence Costs**, the **Insured** shall pay the **Defence Costs** as they are incurred, up to the amount of the **Excess**.
- 2.3.4 Where the **Insured** is entitled to claim an **Input Tax Credit** for a payment made by the **Insured** as an **Excess**, then the monetary limit of the **Excess** will be deemed to be net of the **Input Tax Credit**.

SECTION 3 – EXCLUSIONS

The **Insurer** will not indemnify the **Insured** under any section of this **Policy** for:

3.1 Asbestos

any **Claim** directly or indirectly arising from, based upon, attributable to, or in consequence of asbestos.

3.2 Cladding Systems

any **Loss, Mitigation or Rectification costs** (under Optional Extension 1.23), settlement or other payment, or pay any **Defence Costs** or **Inquiry Costs**, in connection with, arising out of, based upon, attributable to, or in consequence of any advice or services provided, actual or alleged, or any other act,

error or omission by the Insured, or any consultant, contractor (or any sub-consultant or sub-contractor engaged by such consultant or contractor), or other agent of any named insured, in respect of an **External Wall System** alleged to be or that is:

- (c) not compliant with or does not conform to any relevant legislation, regulation, standard, instructions or **Building Codes**; or
- (a) installed, applied, specified or utilised in such a manner that is not compliant with or does not conform to any relevant legislation, regulation, standard, instructions or **Building Codes**.

3.3 Contractual or Commercial Liabilities

- (a) any liability assumed by any **Insured** or on behalf of any **Insured** under a contract, unless such liability would have attached to the Insured in the absence of such contract; or
- (b) any liability assumed by any **Insured** or on behalf of any **Insured** under any express guarantee or express warranty, unless such liability would have attached to the **Insured** in the absence of such warranty or guarantee; or
- (c) any duty or obligation assumed by any **Insured** or on behalf of any **Insured** that is not assumed in the normal conduct of the **Professional Services**; or
- (d) any trading debt incurred, or any guarantee provided in respect of such debt, by any **Insured** or on behalf of any **Insured**; or
- (e) any refund or waiver of professional fees (including any related expenses and disbursements).

3.4 Directors and Officers Liability

any **Claim** directly or indirectly arising from any duty, capacity, performance or non-performance as a director, member, officer, secretary or trustee.

3.5 Dishonest or Reckless Acts

any **Claim** directly or indirectly arising from any actual or alleged:

- (a) dishonest, fraudulent, criminal or malicious act;
- (b) willful breach of any statute, contract or duty; or
- (c) conduct with a reckless disregard for the consequences thereof;

by the **Insured**.

3.6 Employer's Liability

any **Claim** directly or indirectly arising from, based upon, attributable to, or in consequence of the **Insured's** liability as an employer, including **Personal Injury** of any person occurring in the course of their employment with the **Insured** (either as the **Insured's Employee** or as a contractor to the **Insured**).

For the purpose of this exclusion **Personal Injury** shall mean personal injury, sickness, disease, or the death of any person including but not limited to mental injury, anxiety, stress, emotional upset or nervous shock.

3.7 Finance and Insurance

any **Claim** directly or indirectly arising from:

- (a) actual or alleged advice, representation or service in relation to finance, insurance, accounting or tax; or
- (b) failure to provide, effect or maintain any bond, surety or insurance.

3.8 Fines, Penalties and Damages

any fines, penalties, punitive damages, exemplary damages, aggravated damages, or any other kind of non-compensatory damages.

3.9 Insolvency

any **Claim** directly or indirectly arising from, based upon, attributable to, or in consequence of:

- (a) the **Insured's** insolvency, bankruptcy, liquidation; or
- (b) any failure to pay any trading debt; or
- (b) the insolvency of any other person or entity.

3.10 Jurisdiction and Territorial Limits

any **Claim**:

- (a) directly or indirectly arising from, based upon, attributable to, or in consequence of any actual or alleged act, error or omission committed within the territorial limits of the United States of America or Canada or any of their territories or protectorates; or
- (b) which is brought in a court of law within the territorial limits of the United States of America or Canada or directly or indirectly arising from any settlement or for the enforcement of any judgment or order obtained within the territorial limits of, or determined pursuant to the laws of those countries or their territories or protectorates.

3.11 Licensing

any act, error or omission committed, attempted or alleged to have been committed or attempted by any **Insured** or on behalf of any **Insured** in the conduct of any activity for which such person or entity is not properly licensed, registered or authorised in accordance with any relevant legislation or regulation

3.12 Manufacture, Products and Workmanship

any **Claim** directly or indirectly arising from any defect or alleged defect to anything manufactured, supplied, sold, installed, fabricated, assembled, erected, treated, serviced, repaired or maintained by the **Insured**, except arising directly from the performance of **Professional Services**.

3.13 Occupier's Liability

any **Claim** directly or indirectly arising from any occupation, ownership, management or control of any real or tangible property by or on behalf of the **Insured**.

3.14 Prior Claims or Circumstances

any **Claim** directly or indirectly arising from

3.14.1 any **Claim** made, threatened or in any way intimated against the Insured prior to the **Period of Insurance**; or

3.14.2 attributable to, or in consequence of, any fact or circumstance:

- (a) of which written notice has been given under any previous professional indemnity or other insurance policy;
- (b) noted on the **Proposal** for the current **Period of Insurance** or on any previous proposal; or
- (c) of which the **Insured** first became aware prior to the **Period of Insurance** and which the **Insured** knew, or ought reasonably to have known, might give rise to a claim under the **Policy**.

3.15 Radioactivity

any **Claim** directly or indirectly arising from, based upon, attributable to, in consequence of, caused by or contributed to by ionising radiation or contamination by radioactivity from any nuclear fuel, weapon, medical isotope, waste or other material whether occurring naturally or otherwise, or by the radioactive toxic explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof.

3.16 Related Entities

any **Claim** brought or maintained by, or on behalf of:

- (a) any **Insured** against another **Insured** unless the **Claim** is seeking contribution or indemnity which results directly from another **Claim** which would be covered under the **Policy** if made directly against such other **Insured**; or
- (b) any person who, at the time of the act, error or omission giving rise to the **Claim**, is a **Family Member** of the **Insured**; or
- (c) any entity operated or controlled by any **Insured** or **Family Member** of the **Insured**; or
- (d) any parent company or other entity which owns, operates or controls any **Insured**.

This Exclusion however, does not apply to any **Loss, Defence costs**, settlement or any other payment arising from any claim made by an independent third party without the co-operation or solicitation of any insured.

3.17 Terrorism

any **Claim** directly or indirectly arising from caused or occasioned by or happening through or in consequence of terrorism or any action taken in controlling, preventing, suppressing any act or acts of terrorism or in any way relating thereto.

For the purposes of this **Clause**, "terrorism" means any act or acts (whether threatened or actual) of any person or persons involving the causing or occasioning or threatening of harm of whatever nature and by whatever means made or claimed to be made in whole or in part for political, religious, ideological or similar purposes.

3.18 Waived or Limited Rights

the **Insured** in any way waiving, limiting or reducing their rights of recovery or contribution from any other party.

3.19 War

any **Claim** directly or indirectly arising from or caused by war, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, revolution, insurrection, military or usurped power or confiscation or nationalisation or requisition or destruction of or damage to property by or under the order of any government or public or local authority.

3.20 Watercraft, Aircraft & Motor Vehicles

any **Claim** directly or indirectly arising from the ownership, maintenance, operation, possession, use, loading or unloading by or on behalf of the **Insured** of any watercraft, aircraft, motor vehicle or trailer.

SECTION 4 – GENERAL CONDITIONS

4.1 Change in Control

If during the **Period of Insurance** the **Insured**

- (a) consolidates with, merges into or sells more than 50% of its assets resulting in the **Insured** no longer being an independent legal entity; or
- (b) has any person or entity individually or acting in concert (other than a **Subsidiary**) become entitled to control more than 50% of the shareholder votes; or
- (c) is placed into liquidation, under administration, wound up, insolvent or a receiver appointed to any part of the business,

the **Policy** will convert into run-off with liability available only in respect of civil liability the **Insured** incurs in respect of a **Claim** arising from **Professional Services** performed prior to the effective date of the change in control.

4.2 Assignment of Interest

No change in, modification of, or assignment of, any interest under this **Policy** shall have effect at law unless made with **the Insurer's** written approval.

4.3 Cancellation

- (a) The **Insured** may cancel this **Policy** by giving notice in writing to the insurer at any time. Cancellation will take effect no earlier than the day on which such notice is received by the **Insurer**.
- (b) The **Insurer** may cancel this policy in any of the relevant circumstances set out in the Insurance Contracts Act 1984 (Cth), such cancellation to take effect 7 days from the time the notice of cancellation is issued by the **Insurer**.
- (c) After cancellation a refund of premium will be allowed pro-rata of 80% of the premium for the unexpired portion of the **Policy Period**.

4.4 GST

Where under this **Policy** the **Insurer** are obliged to indemnify the **Insured** against any **Claim** or **Defence Costs** for which the **Insured** is entitled to an input tax credit for the Goods and Services Tax (GST), the amount of any such input tax will be deducted from any amount payable by the **Insurer**.

4.5 Material Change to Risk

The **Insured** shall as soon as reasonably practicable notify the **Insurer** of any material change in the risk that is the subject of this **Policy** during the **Policy Period**, including but not limited to:

- (a) any merger with, or acquisition of or by, another company, entity, partnership or business or the establishment of a subsidiary company or branch office;
- (b) the appointment of any type of administrator, receiver or liquidator, or a trustee in bankruptcy, to any **Insured**;
- (c) any material change in the nature of the professional activities of any **Insured** as represented in the **Proposal Form**;
- (d) the cancellation, suspension or loss of, or the imposition of any restriction or limitation on, any license, registration or authorisation under any legislation or regulation applicable to any aspect of the **Professional Services**.

Where such notice is given, the **Insurer** shall be entitled to negotiate with the **Insured** the terms for the continuation of this **Policy**. The **Insurer** shall also be entitled to cancel this **Policy** in accordance with the provisions of the Insurance Contracts Act 1984.

The **Insurer** shall be entitled to reduce any indemnity or payment which may be available to the **Insured** under this **Policy** in respect of any **Loss, Defence Costs, Inquiry Costs**, settlement or any other payment to the extent of any prejudice suffered by the **Insurer** arising from any failure by the **Insured** to comply with this condition.

4.6 Other Insurance

If the **Insured** is entitled to be indemnified under some other policy of insurance effected by or on behalf of the **Insured** in respect of which indemnity is available under this **Policy**, the indemnity afforded by this **Policy** shall be in excess of the applicable limit of indemnity under the other policy of insurance.

4.7 Policy Construction, Interpretation and Notices

- 4.7.1 The construction, interpretation and meaning of the terms of this **Policy** shall be determined in accordance with the laws of the state or territory in which this **Policy** is issued. Any dispute relating to this **Policy** shall be submitted to the exclusive jurisdiction of the courts of that state or territory.
- 4.7.2 The headings in this **Policy** are included for descriptive purposes only and do not form part of this **Policy** for the purpose of its construction or interpretation.
- 4.7.3 In this **Policy** words used in the singular shall include the plural and vice versa.
- 4.7.4 Any notice which the **Insurer** or the **Insured** are required or elect to give under this **Policy**, may be given to or by the **Insurer**.

4.8 Sanctions

The **Insurer** shall not be deemed to provide cover nor be liable to pay any **claim** or provide any benefit under the **policy** to the extent that the provision of such cover, payment of such **claim** or provision of such benefit would expose the **Insurer** to any sanction, prohibition or restriction under United Nations resolutions or the trade or economic sanctions, laws or regulations of Australia, the European Union, United Kingdom, United States of America or any other country.

4.9 Severability and Non-Imputation

4.9.1 Where an **Insured** is more than one person or entity and one or more of those persons or entities:

- (a) failed to comply with its duty of disclosure under section 21 or section 21A of the Insurance Contracts Act 1984 (Cth);
- (b) made a misrepresentation to the **Insurer** before this **Policy** was entered into; or
- (c) failed to comply with a term of this **Policy**;

the rights of any other **Insured** under this **Policy** shall not be prejudiced as a result
PROVIDED THAT the other **Insured**:

- (i) acted in good faith in the performance of their or its duties and obligations both under this **Policy** and at law;
- (ii) was entirely innocent of, had no prior knowledge of, or did not have reasonable cause to suspect, the relevant conduct; and
- (iii) notifies the **Insurer** in writing of all facts known to them as soon as is reasonably practicable upon becoming aware of the relevant conduct.

4.9.2 For the purposes of this clause, knowledge imputed to a person by reason of partnership or otherwise is to be disregarded.

4.9.3 This clause shall not operate to increase the **Limit of Liability** as stated in the **Schedule**.

4.10 Subrogation

4.10.1 If indemnity is granted under this **Policy** in respect of any **Loss, Defence Costs, Inquiry Costs**, settlement or any other payment, the **Insurer** shall be subrogated to all rights of recovery, contribution and indemnity of the **Insured** in respect of such **Loss, Defence Costs, Inquiry Costs**, settlement or payment.

4.10.2 The **Insured** must always act to secure and preserve all rights of recovery, contribution and indemnity, and must provide all necessary assistance and execute all documents to enable the **Insurer** to enforce those rights referred to in clause (above clause) 4.10.1.

SECTION 5 – CLAIMS CONDITIONS

This Policy may be a protected Policy under Federal Government's Financial Claims Scheme (FCS), which is administered by APRA. The FCS may apply in the event that a general insurance company becomes insolvent. If the FCS applies a person who is entitled to make a claim under this Policy may be entitled to a payment under the FCS. Access to the FCS is subject to eligibility criteria. You may obtain further information about the FCS from www.fcs.gov.au and the APRA hotline on 1300 55 88 49.

5.1 Reporting Claims

The **Insured** must give the **Insurer** written notice as soon as practicable, and during the **Period of Insurance**, of any **Claim** made against the **Insured**.

5.2 Defence and Settlement

- 5.2.1 The **Insurer** shall be entitled at any time to take over and conduct, in the **Insured's** name, the defence or settlement of any **Claim**. Lawyers retained by the **Insurer** to act on the **Insured's** behalf shall at all times be at liberty to disclose to the **Insurer** any information or document obtained (whether by the **Insured** or otherwise) in the course of so acting, and the **Insured** agrees to waive any claim for client legal privilege to the extent that such privilege may otherwise prevent that disclosure to the **Insurer**.
- 5.2.2 The **Insured** must not settle any **Claim**, incur any **Defence Costs**, make any admission, offer any payment, or assume any contractual obligation in relation to any **Claim** without the **Insurer's** prior written consent (which consent shall not be unreasonably withheld). The **Insurer** shall not be liable for any settlement, **Defence Costs**, admission, offer or payment, or assumed obligation to which the **Insurer** have not consented in writing.
- 5.2.3 Where, in the **Insurer's** opinion, any **Claim** may not exceed the **Excess**, the **Insurer** shall be entitled to require the **Insured** to conduct the defence of the **Claim**. In this situation:
- (a) the **Insured** shall keep the **Insurer** advised in writing of all developments relating to the defence and settlement of the **Claim** as they occur;
 - (b) the **Insured** may settle the **Claim** without the **Insurer's** consent PROVIDED THAT they do not claim indemnity under this **Policy** in respect of the **Claim**; and
 - (c) where it becomes apparent that the **Claim** will exceed the **Excess**, the **Insurer** shall be entitled to take over and conduct, in the **Insured's** name, the defence or settlement of the **Claim**, and the **Insurer** will reimburse the reasonable **Defence Costs** incurred to date by the **Insured**.
- 5.2.4 Where, in the **Insurer's** opinion, the liability of any **Claim** may exceed the available **Limit of Liability**, the **Insurer** shall be entitled at the **Insurer's** discretion to discharge the **Insurer's** liability by paying the available **Limit of Liability** to the **Insured** or on the **Insured's** behalf and paying the **Defence Costs** up to the date of that payment. In this situation:
- (a) if at the time of payment the **Insurer** are conducting the defence of the **Claim**, the **Insurer** shall also relinquish that conduct; and
 - (b) **Policy** condition 2.1.3 shall still apply.
- 5.2.5 The **Insured** must, when instructed by the **Insurer** to do so, pay promptly within the terms of any proposed settlement the amount of the **Excess**. If the **Insured** fails or refuses to make that payment and the **Insurer** elect to make the payment on the **Insured's** behalf, the **Insurer** shall be entitled to deduct the amount from any entitlements the **Insured** may have at any time under this **Policy**.

5.3 Insured's Right to Contest a Claim

In the event that the **Insurer** recommends a settlement of any **Claim** but the **Insured** does not agree with the **Insurer's** recommendation, the **Insured** may elect to contest the **Claim** PROVIDED THAT if the actual liability for the **Claim** exceeds the amount for which, but for the **Insured's** election, the **Claim** could have been settled, then:

- (a) the **Insurer's** liability for the **Claim** shall be the amount for which, but for the **Insured's** election, a **Claim** could have been settled; and
- (b) the **Defence Costs** of the **Claim** shall be the **Defence Costs** incurred with the **Insurer's** prior written consent up to the date of the **Insured's** election.

5.4 The Insurer's Right to Contest a Claim

The **Insured** will not be required to contest any **Claim** unless a **Senior Counsel** (to be nominated by the **Insurer**) advises that the **Claim** should be contested. In formulating that advice, **Senior Counsel** shall take into consideration the economics of the matter, the likely liability together with **Defence Costs** and the prospects for successfully defending the **Claim**. The cost of the **Senior Counsel's** advice shall be regarded as part of the **Defence Costs**.

5.5 Claims Mitigation and Co-operation

- 5.5.1 The **Insured** must use due diligence and do and concur in doing all reasonable and practicable things in order to avoid, minimise or mitigate any liability, loss or damage that is or might be the subject of a **Claim**.
- 5.5.2 The **Insured** must disclose to the **Insurer** honestly and frankly all relevant information, and provide all information and assistance the **Insurer** request to investigate and defend any **Claim**, to determine whether the **Insured** is entitled to indemnity under this **Policy**, or to prosecute any recovery action.
- 5.5.3 Compliance with clauses 5.5.1 and 5.5.2 shall be at the **Insured's** own cost.

SECTION 6 – DEFINITIONS

6.1 Building Codes

“Building codes” means:

- (a) Australian Standards, as published and amended from time to time, by Standards Australia Limited; or
- (b) the National Construction Code, including the Building Code of Australia, or any superseding document, published and amended from time to time, by the Australian Building Codes Board; or
- (c) any conditions of use or application approved by a recognised, and relevant, building standards organisation; or
- (d) any equivalent organisations to those outlined in (a) to (c) above, in any other relevant jurisdiction; or
- (e) any manufacturer’s specifications or instructions in respect of the appropriate application and/ or installation of a **external wall system** provided that such specifications or instructions are not contrary to any of (a) to (d) above.

6.2 Claim

“Claim” means:

- (a) the receipt by the **Insured** of a demand for compensation made by a third party against the Insured. It must take the form of:
 - (i) a writ, statement of claim, summons, application or other originating legal or arbitral process, cross claim, counterclaim or third party or similar party notice; or
 - (ii) any other form of written notice; and where applicable
- (b) the making by the **Insured** of a claim against the **Insurer** under automatic extensions 1.8 (Costs of Official Inquiries), 1.17 (Loss of Documents), and 1.23 (Loss Mitigation & Rectification).

6.3 Combustible Material

“Combustible Material” means:

any external cladding or continuous insulation product comprised of thermoplastic or thermoset polymers, including but not restricted to polyurethane (PUR), polyisocyanurate (PIR), expanded or extruded polystyrene (EPS/ XPS) foams or any similarly combustible material.

6.4 Comparable Legislation means

- (a) any provision of any predecessor or successor legislation with materially similar effect; or
- (b) any provision of any legislation applicable in another jurisdiction within the Commonwealth of Australia or New Zealand with materially similar effect;

6.5 Computer System

“Computer System” means

- (a) electronic, wireless, web or similar system, (including any hardware, firmware and software) used to process data or information, including computer programs, electronic data, operating systems, networking equipment, servers, mobile devices, web sites, and all input, output, processing, storage and online or offline media that is maintained by, or on behalf of, the **Insured** in the performance of the **Professional Services**; and which
- (b) is subject to appropriate data encryption and security protocols.

6.6 Computer Virus:

“Computer Virus” means a set of instructions written in a computer language or code that is introduced to the Computer System of the Insured without the Insured’s knowledge or consent and commands the Computer System to maliciously process data or interact with ancillary equipment, including but not limited to malware, worms, trojans, rootkits, spyware, dishonest adware, crimeware, logic bombs and other malicious unwanted software.

6.7 Defence Costs

“Defence Costs” means the costs incurred by the **Insurer**, or the reasonable costs incurred by the **Insured** with the **Insurer’s** prior written consent, in the investigation, defence, reporting or negotiation for settlement of any **Claim** indemnified by the **Policy**.

It shall not include any costs of the party that is claiming against the **Insured**. It also does not include salaries, wages, allowances and other expenses incurred by the Insured in assessing, investigating and assisting with any **Claim**.

6.8 Documents

“Documents” means documents of any nature whatsoever, whether written, printed or reproduced by any method including computer records and electronic data material BUT SHALL NOT INCLUDE money, negotiable instruments, bearer bonds or coupons, stamps, bank or currency notes or any other negotiable instrument.

6.9 Electronic Data Theft

“Electronic Data Theft” means the unauthorised procuring or misuse of information by a third party (but not any **Insured**), which information is:

- (a) in electronic form; and
- (b) intended to interact with the **Computer System**; and
- (c) stored in the **Computer System** maintained by, or on behalf of, the **Insured** and protected by appropriate data encryption, security protocols, data backup and recovery procedures.

6.10 Employee

“Employee” means any person employed under a contract of service or apprenticeship but shall not mean a consultant, contractor or agent.

6.11 Excess

“Excess” means the excess specified in the **Schedule**.

6.12 External Wall System

“External Wall System” means any:

- (a) aluminium composite panels (or aluminium composite materials) (ACP/ ACM) having a core comprised of any **combustible material** constituent that is greater than 7%; or
- (b) any continuous insulation of a combustible nature; or
- (c) any other combustible cladding, insulation or façade material of any kind,

including any materials, components or equipment supplied in connection with any of the above.

6.13 Family Member

“Family Member” means:

- (a) any spouse, domestic partner or companion;
- (b) any parent, or parent of the spouse, domestic partner or companion; or
- (c) any sibling, child, adopted child or any child living with the person as if the child were a member of the person’s family.

6.14 Inquiry Costs

“Inquiry Costs” means any reasonable and necessary fees, costs and expenses resulting solely from the representation of any **Insured** at an **Inquiry** including any investigation directly related to such representation but shall not include the travel, accommodation, salary or other employment related costs (including remuneration of any **Principal**) of any **Insured**.

6.15 Insured

“Insured” means:

- (a) the **Insured** specified in the **Schedule** and its **Subsidiaries**;
- (b) any person who is, was, becomes or ceases to be a principal, partner, director or **Employee** of the **Insured** or its **Subsidiaries** but solely in respect of a liability arising from **Professional Services** for and on behalf of that entity.

6.16 Insurer

XL Insurance Company SE, Australia branch (ABN 36 083 570 441).

6.17 Limit of Liability

“Limit of Liability” means the limit of liability specified in the **Schedule**.

6.18 Limit of Liability in the Aggregate

“Limit of Liability in the Aggregate” means the limit of liability in the aggregate specified in the **Schedule**.

6.18 Loss

“Loss” means compensatory damages and/ or claimant’s costs (whether awarded or by settlement with the prior written consent of the **Insurer**), but shall not include;

- (i) civil or criminal fines or penalties imposed by law; or
- (ii) punitive, exemplary, multiple or aggravated damages; or
- (iii) any amount uninsurable at law; or
- (iv) any amount for which the Insured is not legally liable or for which there is no legal recourse to any Insured

6.19 Novated Contract

“**Novated Contract**” means any deed of novation or novation agreement specified by endorsement to this policy.

6.20 Period of Insurance

“Period of Insurance” means the period specified in the **Schedule**.

6.21 Policy

“Policy” means:

- (a) the insuring clauses, extensions, exclusions, conditions, definitions, **Schedule** and other terms contained herein;
- (b) any endorsement to this **Policy** whether issued at the inception of the **Policy** or during the **Period of Insurance**; and
- (c) the information provided by the **Insured** in the **Proposal**.

6.22 Premium

“Premium” means the premium specified in the **Schedule**.

6.23 Principal

“Principal” means the owner or proprietor of a construction project, PROVIDED THAT:

- (a) the **Principal** has no involvement in the design, construction, management or supervision of the project; and
- (b) the **Insured** has entered into a written agreement to provide services to the **Principal**.

6.24 Professional Services

“Professional Services” means the “Professional Services” specified in the **Schedule**, performed by or on behalf of the **Insured**.

6.25 Proportionate Liability Legislation

“Proportionate Liability Legislation” means the Civil Liability Act 2002 (NSW) Pt 4, Wrongs Act 1958 (Vic) Pt IVA, Civil Liability Act 2002 (WA) Pt 1F, Civil Liability Act 2003 (Qld) Pt 2, Civil Law (Wrongs) Act 2002 (ACT) Ch 7A, Proportionate Liability Act 2005 (NT), Civil Liability Act 2002 (Tas) Part 9A, Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA) Pt 3, Trade Practices Act (Cth) s87C, Development Act 1993 (SA) s72, Building Act 2004 (ACT) s141, Building Act 2000 (Tas) s252, and any similar legislation, all as amended from time to time.

6.26 Proposal

“Proposal” means the written proposal by the **Insured** made to the **Insurer** containing information and statements which, together with any other information or documents provided, are the basis of this **Policy** and are considered incorporated in it.

6.27 Schedule

“Schedule” means the schedule to this **Policy**.

6.28 Subsidiary

“Subsidiary” means any entity where the **Insured** before or at any time during the **Period of Insurance**, directly or indirectly:

- (a) controls the composition of the board of directors; and/or
- (b) controls the voting power at any general meeting; and/or
- (c) holds greater than 50% of the issued voting share capital; and/or
- (d) exercises effective controls of management, including of any joint venture.