

DESIGN & CONSTRUCTION PROFESSIONALS CIVIL

Liability Wording 01.06.19



www.brooklynunderwriting.com.au

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BROOKLYN 
UNDERWRITING

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PREAMBLE

Introduction

The **Insured** and the **Insurer** agree that the **Insurer** will, in consideration of the paid premium, provide insurance to the **Insured** under the terms and conditions of this **Policy**. This **Policy** consists of your proposal, this document, the **Policy Schedule** and any Certificates and Endorsements affixed hereto. All of these should be read as if they were the one document.

This **Policy** is written on a **Claims** made and notified basis, which means that, subject to Clause 2.5 Continuous Cover, it will only respond to **Claims** first made against the **Insured** and notified to the **Insurer** during the **Period of Insurance**. Any word or expression to which a specific meaning has been attached shall bear the specific meaning as defined in Section 3, Definitions, wherever it may appear.

Duty of Disclosure

Before you enter into a contract of general Insurance with an **Insurer**, you have a duty, under the Insurance Contracts Act 1984, to disclose to the **Insurer** every matter that you know, or could reasonably be expected to know, is relevant to the **insurer's** decision whether to accept the risk of the Insurance and, if so, on what terms.

You have the same duty to disclose those matters to the **Insurer** before you renew, extend, vary or reinstate a contract of general insurance.

Your duty however does not require disclosure of matter:

- That diminishes the risk to be undertaken by the **insurer**;
- That is of common knowledge;
- That your **insurer** knows or, in the ordinary course of his business, ought to know;
- As to which compliance with your duty is waived by the **insurer**.

Non-Disclosure & Misrepresentations

If you fail to comply with your Duty of Disclosure, the **Insurer** may be entitled to reduce their liability under this **Policy** in respect of a **Claim** or may cancel the **Policy**.

If your non-disclosure is fraudulent, the **Insurer** may also have the option of avoiding the contract from its beginning.

Privacy

Brooklyn collects personal information in order to provide its various services which include insurance broking, **Claims** management, risk management consultancy, underwriting management, and reinsurance.

If the personal information Brooklyn requests from you is not provided, Brooklyn or any involved third party may not be able to provide the appropriate services.

Brooklyn discloses personal information to third parties who are involved in the provision of our services.

For example, in arranging and managing your insurance needs Brooklyn may provide information (including sensitive information such as health information) to insurers, reinsurers, other insurance intermediaries, it's advisors such as loss adjustors, lawyers and accountants, and other parties involved in the **Claims** handling process. By submitting your proposal and continuing to deal with us, you confirm on your behalf and/or on behalf of those you represent consent to Brooklyn and these parties collecting, using and disclosing personal and sensitive information about you.

Brooklyn has a duty to maintain the confidentiality of its client's affairs which includes their personal information. Our duty of confidentiality applies except where disclosure of your personal information is with your consent or required by law.

Brooklyn may make use of your personal information to provide you with information about its products and services.

Simply contact the Brooklyn Privacy Officer on the details below if you would like to:

- Access the personal information Brooklyn holds about you
- Update or correct the information Brooklyn holds about you
- Discuss your privacy concerns
- Be removed from the mailing list to receive information about Brooklyn products and services

**Privacy Officer - Brooklyn - Angel Place, Level 28,
123 Pitt Street, Sydney NSW 2000
t: (02) 8270 1790
e: privacyaustralia@axaxl.com**

General Insurance Code of Practice

We are a signatory to the General Insurance Code of Practice. The Code aims to raise standards of practice and service in the insurance industry. It:

- promotes better communication between insurers and customers which will lead to better public understanding of insurance to allow customers to make informed choices, and
- outlines good standards of practice and service to be met by insurers to enhance their regulation for responding efficiently to their customers' needs

Financial Claims Scheme

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.

DISPUTE RESOLUTION

In the event that a dispute arises between Underwriters and the **Insured/ReInsured** out of or otherwise in relation to this agreement, then:

- (a) Any party to the dispute shall, without prejudice to any other right or entitlement they may have, give written notice to the other party (the "**Dispute Notice**") requiring them within 7 days of this notice to negotiate (whether in a face to face meeting or by teleconference) in good faith as to how the dispute can be resolved;
- (b) If a dispute is not resolved within 10 days of the **Dispute Notice**, either party can request the other party within a further 10 days to agree on either:
 1. a process for resolving the dispute through means other than litigation or arbitration, such as further negotiation, mediation, or any other alternative dispute resolution technique. The rules governing any such technique shall be agreed as between the parties and where no such agreement as to the process and or guidelines is reached within 10 days, then it shall be by mediation by a mediator selected by the Chairperson for the time being of Lawyers Engaged in Alternative Dispute Resolution (**LEADR**) (or other appropriate professional body as agreed by the parties); or
 2. referral of the matters in dispute to an independent expert for an expert determination. The parties agree that they will not be bound by the determination of the expert. The expert:
 - (a) will be a person agreed between the parties within 10 days of the dispute being referred to expert determination or failing this, the expert will be a person appointed by the Australian Insurance Law Institute (or other appropriate professional body as agreed by the parties);
 - (b) will act as an expert and not as an arbitrator;
 - (c) will proceed in such a manner as he or she thinks fit without being bound to observe the rules of natural justice or the rules of evidence;
 - (d) Will take into consideration all **Documents**, information and other written and oral material that the parties place before him or her including **Documents**, information and material relating to the facts in dispute and to arguments and submissions upon the matters in dispute; and
 - (e) will act with expedition to provide the parties with a determination in writing within 35 days of the referral to him or her of the matters in dispute.

Both parties must use their best endeavours to achieve resolution by the selected process and further agree that neither party will initiate litigation (as set out in clause (c) below) without first pursuing such informal resolution techniques in good faith; In the event that the dispute is not resolved by such informal process within 35 days of the **Dispute Notice** (or such other period as agreed in writing between the parties) the dispute shall be referred to litigation.

- (c) Following either a mediation or an expert determination pursuant to clause (b) of this provision, either party may then initiate proceedings in any competent Court in the Commonwealth of Australia in relation to the matters in dispute. Such proceedings may only be commenced on 14 days written notice to the other party and shall be determined in accordance with the law and practice applicable in such Court.
Any summons, notice or process to be served upon Underwriters may be served upon:

The Complaints Officer
XL Insurance Company SE, Australia branch
L28 123 Pitt St, Sydney NSW 2000
Email: apacompliance@axaxl.com

who has authority to accept service and to appear on Underwriters' behalf.

If proceedings are instituted against any one of the Underwriters, all Underwriters participating in this insurance will abide by the final decision of such Court or any competent Appellate Court.

- (c) Except where the dispute renders it impossible to do so, the parties will continue performing their respective obligations under the **Policy** while the dispute is being resolved, unless and until such obligations are terminated or expire in accordance with this agreement.
- (d) Each party must use its reasonable endeavours to ensure that where a dispute is reasonably foreseeable, it is dealt with at a sufficiently early stage to ensure that there is a minimal effect on the ability of either party to perform its obligations under the **Policy**.
- (e) Notwithstanding anything in this **Schedule**, either party may at any time commence Court proceedings in relation to any dispute or **Claim** arising under, or in connection with the **Policy** where the party seeks urgent interlocutory relief.

SECTION 1: INSURING CLAUSES

1.1 Insuring Clause

The **Insurer** will indemnify the **Insured** against civil liability for compensation and Claimant's costs and expenses in respect of any **Claim** first made against the **Insured** and notified to the **Insurer** during the **Period of Insurance** resulting from the conduct of the **Professional Services** by the **Insured** occurring after the **Retroactive Date**.

1.2 Limit of Indemnity

The liability of the **Insurer** for compensation and Claimant's costs and expenses in respect of all **Claims** first made against the **Insured** and notified to the **Insurer** during the **Period of Insurance** shall not exceed the **Limit of Indemnity**.

1.3 Insured Defence Costs

The **Insurer** will, in addition to the **Limit of Indemnity**, pay **Insured Defence Costs** provided that if the total amount of compensation and Claimant's costs and expenses required to dispose of the **Claim** or **Claims** exceeds the **Limit of Indemnity**, the liability of the **Insurer** for such **Insured Defence Costs** shall be only that proportion which the **Limit of Indemnity** bears to the total amount of compensation and Claimant's costs and expenses required to dispose of the **Claim** or **Claims**.

The **Insurer** will pay for these **Insured Defence Costs** as and when they are incurred prior to the final resolution of the **Claim**. However, to the extent that it is established that such **Insured Defence Costs** are not **Insured** under the **Policy**, the **Insured** shall repay to the **Insurer** all payments of **Insured Defence Costs** incurred on the **Insured's** behalf.

1.4 Excess

The **Insured** is liable for compensation and Claimant's costs and expenses or **Insured Defence Costs** that are collectively less than the **Excess** for each **Claim**. The **Excess** is deducted from compensation and Claimant's costs and expenses payable before the application of the **Limit of Indemnity**.

The **Insured** is liable for **Official Investigation and Enquiry Costs** that are less than the **Excess** for each notice. The **Excess** is deducted from **Official Investigation and Enquiry Costs** payable before the application of the aggregate limit stated in Clause 2.15.4 **Official Investigation and Enquiry Costs**.

The **Insurer** has no liability for compensation and Claimant's costs and expenses, **Insured Defence Costs** or **Official Investigation and Enquiry Costs** that are less than the **Excess** for each **Claim** or notice. The **Insured** agrees that the **Excess** must be retained by the **Insured** and is to remain un**Insured**.

1.5 Aggregation of Claims

All **Claims** arising out of, based upon, attributable to or in respect of a single act, error or omission or series of acts, errors or omissions consequent upon or attributable to one source or original cause shall be considered to be a single **Claim** and shall attract one **Excess**.

For the purposes of **Clause 2.15 Official Investigation and Enquiry Costs**, all notices arising out of, based upon, attributable to or in respect of any one enquiry or hearing shall be considered to be a single notice and shall attract one **Excess**.

SECTION 2: AUTOMATIC EXTENSIONS

These Automatic Extensions are subject to all the terms of the **Policy**, unless otherwise stated. The total of all payments made under Section 2 - Automatic Extensions, will be part of and not in addition to the **Limit of Indemnity**, unless otherwise stated.

2.1 Automatic Reinstatement

In the event of exhaustion or partial exhaustion of the **Limit of Indemnity** solely by reason of indemnity granted for compensation and Claimant's costs and expenses in respect of **Claims** first made against the **Insured** and notified to the **Insurer** during the **Period of Insurance**, the **Insurer** agrees to reinstate (or partially reinstate in the case of partial exhaustion) the **Limit of Indemnity** in respect of compensation and Claimant's costs and expenses. Provided that:

1. the **Insurer's** liability for any single **Claim** will not exceed the **Limit of Indemnity**; and
2. the aggregate liability of the **Insurer** under this **Policy** will not exceed the sum of the **Limit of Indemnity** and, in the event of exhaustion or partial exhaustion of the **Limit of Indemnity**, a single reinstatement of the **Limit of Indemnity**, save that the **Insurer** will in addition pay **Insured Defence Costs** on the basis set out in this **Policy**.

2.2 Breach of Confidentiality

The **Insurer** agrees to indemnify the **Insured** against civil liability the **Insured** incurs in respect of a **Claim** alleging breach of confidentiality by the **Insured** resulting from the conduct of the **Insured's Professional Services**.

2.3 Claims Preparation Costs

The **Insurer** will pay up to AUD25,000 in the aggregate during the **Period of Insurance** for reasonable professional fees and such other expenses incurred by the **Insured** for the preparation of any **Claim** that is covered under this **Policy**.

The cover provided under this **Policy** Extension operates in addition to the **Limit of Indemnity** or Aggregate **Limit of Indemnity** (whichever may be applicable). Provided always that such cover shall not include any **Official Investigation and Enquiry Costs** (as defined in Clause 3.11 – **Official Investigation and Enquiry Costs**).

2.4 Consumer Protection Legislation

Claims resulting from breach of a statutory duty under the Competition and Consumer Act 2010 (Cth), Corporations Act 2001 (Cth), National Consumer Credit Protection Act 2009 (Cth) or similar legislation enacted for the protection of consumers, within any Australian jurisdiction including any amendment, consolidation or re-enactment of such

legislation, provided that the **Insurer** will not indemnify the **Insured** for Claims made where such Claim arises:

1. under the penal or criminal provisions of the above Acts, or any similar legislation; or
2. from conduct of the **Insured** which is fraudulent or intended to mislead or deceive.

However the **Insurer** will only exclude such **Claims** where it is established by final adjudication that the **Insured** breached the penal or criminal provisions of the Acts, or where the conduct was established by final adjudication to be fraudulent or intended to mislead or deceive.

2.5 Continuous Cover

Where the **Insured** first became aware of facts or circumstances which may give rise to a **Claim** prior to the **Period of Insurance**, and had not notified a previous **insurer** of such facts or circumstances prior to the **Period of Insurance**, then Exclusion 4.11 Prior **Claims** or Known Circumstances will not apply to any notification during the **Period of Insurance** of any **Claim** resulting from such facts or circumstances, provided that:

1. there is an absence of fraudulent non-compliance with the **Insured's** duty of disclosure and an absence of fraudulent misrepresentation by the **Insured** in respect of such facts or circumstances; and
2. the **Insured** has, at the time of notification of the **Claim**, been **Insured** without interruption under a similar professional indemnity **Policy** and was **Insured** under a similar professional indemnity **Policy** at the time when the **Insured** first became aware of such facts or circumstances; and
3. the **Insurer** may reduce its liability under this **Policy** to the extent of any prejudice the **Insurer** may suffer in connection with the **Insured's** failure to notify the facts or circumstances giving rise to the **Claim** prior to the **Period of Insurance**.

2.6 Court Attendance Costs

For any person described in (a) or (b) below who actually attends court as a witness in connection with a **Claim** notified under and covered by this **Policy**, it is agreed that **Official Investigation and Enquiry Costs** will include the following rates per day on which attendance in court has been required:-

- (a) For any person who was or is a principal, partner or director of the Named Insured: AUD500.
- (b) For any person who was or is an Employee of the Named Insured: AUD250.

No Deductible shall apply to this Automatic Extension.

2.7 Dishonesty of Employees

The **Insurer** will, notwithstanding Exclusion 4.5 Dishonest, Fraudulent or Criminal Acts, indemnify the **Insured** against civil liability for compensation and Claimant's costs and expenses in respect of any **Claim** first made against the **Insured** and notified to the **Insurer** during the **Period of Insurance** resulting from any dishonest, fraudulent, criminal or malicious act or omission by any employee of the **Insured** occurring or committed in connection with the **Professional Services**.

Nothing in this Automatic Extension shall require the **Insurer** to indemnify any employee who has perpetrated any such dishonest, fraudulent, criminal or malicious act or omission or who has by act or omission condoned any such act or omission.

2.8 Fidelity

Notwithstanding Exclusion 4.5 Dishonest, Fraudulent or Criminal Acts, the **Insurer** will indemnify the **Insured** against loss of money, negotiable instruments, bearer bonds or coupons, stamps, bank or currency notes belonging to the **Insured** or for which the **Insured** is legally liable where any such loss is sustained in consequence of any dishonest or fraudulent act or omission of any **Insured**.

Provided that:

- (a) such loss is first discovered by the **Insured** during the **Period of Insurance** and is notified in writing to the **Insurer** as soon as reasonably practicable after the date of such discovery (but never beyond the expiry date of the **Period of Insurance**);
- (b) the **Insurer** shall not be liable for any loss sustained in consequence of any act or omission occurring after the date of the discovery of, or the reasonable cause for suspicion of, dishonest or fraudulent conduct on the part of the **Insured** concerned;
- (c) the **Insurer** shall not be liable to indemnify any **Insured** who committed or condoned any dishonest or fraudulent conduct in consequence of which the loss occurred;
- (d) the **Insured** shall bear the burden of adducing satisfactory proof to substantiate any loss hereunder (including any legal, investigative, accounting or other costs incurred in such process) and the **Insurer** will be under no obligation to provide indemnity to the **Insured** until such time as the **Insurer** is satisfied that such loss has, in fact, been sustained;
- (e) all interrelated individual dishonest or fraudulent acts or omissions shall be deemed to constitute a single loss and a single **Excess** shall apply to such loss; and
- (f) the total liability of the **Insurer** under this clause shall not exceed AUD50,000 in the aggregate.

2.9 Contractual Liability

Notwithstanding Exclusion 4.2 Contractual liabilities & Commercial Risks, the **Insurer** will indemnify the **Insured** against civil liability the **Insured** incurs in respect of a

Claim under an indemnity and/or hold harmless term of a contract to the extent that such civil liability results from the performance of the **Insured's Professional Services**.

2.10 Infringement of Intellectual Property

The **Insurer** will indemnify the **Insured** for infringement of rights of intellectual property, provided that:

1. The infringement is committed by the **Insured** in the course of carrying on their **Professional Services**; and
2. The **Insured** did not intend to commit such infringement.

2.11 Joint Venture Liability

The **Insurer** will indemnify the **Insured** against civil liability for compensation and Claimant's costs and expenses in respect of any **Claim** first made against the **Insured** and notified to the **Insurer** during the **Period of Insurance** resulting from the **Insured's** participation in a joint venture in connection with the **Professional Services**. Provided that any indemnity given shall relate only to the **Insured's** proportion of any liability incurred by such joint venture.

2.12 Libel or Slander

The **Insurer** will indemnify the **Insured** for Libel or slander, provided that:

1. The libel or slander is committed by the **Insured** in the course of carrying on their **Professional Services**; and
2. The **Insured** did not intend to commit the libel or slander.

2.13 Lost Documents

The **Insurer** will, in the event of loss of or damage to **Documents** occurring in connection with the **Insured's** conduct of the **Professional Services**, indemnify the **Insured** against costs and expenses reasonably incurred by the **Insured** in replacing or restoring such **Documents**, provided that:

1. Such loss or damage is sustained during the **Period of Insurance** while the **Documents** are either in transit to or in the custody of the **Insured** or of any person to whom the **Insured** has entrusted them in the course of the normal conduct of the **Professional Services**; and
2. The amount of any **Claim** for such costs and expenses shall be supported by bills and accounts which shall be subject to approval by a solicitor to be nominated by the **Insurer** with the consent of the **Insured** or if such consent is withheld, by the President of the Law Society in whichever State the **Policy** was issued; and

the **Insurer** shall not be liable in respect of loss or damage caused by riot or civil commotion.

2.14 New Subsidiaries Extension

The **Insurer** agrees that in the event that the **Insured** either acquires or creates a new subsidiary entity according to the laws of the Commonwealth of Australia that this **Policy** shall automatically be extended to include that subsidiary as a named **Insured** during the **Period of Insurance**, provided that:

- 1) In the case of an acquisition by the **Insured**, the revenue of the new subsidiary for the 12 months preceding the date of its acquisition does not exceed 10% of the declared revenue of the **Insured** for the 12 months preceding the **Period of Insurance**
- 2) The new subsidiary is not incorporated in North America and/or Canada
- 3) The new subsidiary does not perform any **Professional Services** within North America and/or Canada
- 4) The new subsidiary has not had any professional liability **Claims** made against it within the 5 years preceding the date of its acquisition
- 5) The new subsidiary provides **Professional Services** that are in the same professional discipline and substantially similar to those provided by the **Insured**.

This automatic extension shall only apply to **Professional Services** performed by the subsidiary whilst they are a subsidiary of the **Insured**.

2.15 Official Investigation and Enquiry Costs

The **Insurer** will indemnify the **Insured** for **Official Investigation and Enquiry Costs**, provided that:

1. The notice requiring the **Insured's** attendance at the enquiry or hearing is first received by the **Insured** and notified to the **Insurer** during the **Period of Insurance**; and
2. Such attendance results directly from an act, error or omission committed or allegedly committed by the **Insured** in carrying on their **Professional Services**; and
3. Such indemnity is subject to the written consent of the **Insurer** prior to incurring **Official Investigation and Enquiry Costs**, and does not include any regular or overtime wages, salaries or fees of the **Insured**; and
4. The total liability of the **Insurer** under this clause shall not exceed AUD250,000.

2.16 Public Relations Expenses

Where the **Insured** retains the services of a public relations consultant for the sole purpose of protecting the **Insured's** reputation that has been brought into question as a direct result of a **Claim** covered by this **Policy**, the **Insurer** agrees to pay any reasonable fees, costs and

expenses of such public relations consultant.

Provided that:

1. The **Insured** notifies the **Insurer** within thirty (30) days of first becoming aware of the **Insured's** reputation being brought into question, and provide full written details outlining the circumstances surrounding the event; and
2. The **Insurer** has given prior written consent (which consent shall not unreasonably be withheld) to retain the services of such public relations consultant; and
3. The total liability of the **Insurer** under this clause shall not exceed AUD50,000 in the aggregate.

2.17 Run Off Cover Insured Entity or Subsidiary

The **Insurer** agrees that in the event that an **Insured** entity ceased or ceases to exist or operate or be a subsidiary or became or becomes consolidated with, merged into or acquired by any other entity either before or during the **Period of Insurance** then the coverage provided under this **Policy** with respect to such **Insured** entity shall continue until the expiry date of the **Period of Insurance**.

Provided always that such coverage shall only apply in respect of **Claim(s)** arising from any act, error or omission occurring prior to the effective date that such **Insured** entity ceased to exist or operate or was consolidated with, merged into or acquired by another entity.

2.18 Statutory Liability

The **Insurer** will, notwithstanding Exclusion 4.7 Fines, Penalties, Punitive or Aggravated Damages, indemnify the **Insured** against breach of a statutory duty resulting from the conduct of the **Insured's Professional Services** involving:

- 1) any civil offence,
- 2) breach of occupational health and safety law or regulation.
- 3) any strict liability offence in connection with the discharge, dispersal, release or escape of **Pollutants**.

Nothing in this Automatic Extension shall require the **Insurer** to indemnify the **Insured** in connection with any breach of a statutory duty directly or indirectly based on, arising out of or attributable to the reckless or grossly negligent conduct of the **Insured**, or any intentional breach or violation of law by the **Insured**.

The total liability of the **Insurer** for all cover under this extension shall not exceed AUD250,000 in the aggregate for all **Claims** inclusive of **Insured Defence Costs**.

2.19 Sub-contractors, Consultants and Agents

The **Insurer** agrees to indemnify the **Insured** against civil liability the **Insured** incurs in respect of a **Claim** resulting from any acts, error or omission of sub-contractors, consultants and agents of the **Insured**, provided that the **Insurer** will only indemnify the **Insured** for its civil liability in connection with the **Professional Services** provided by the subcontractor, consultant and/or agent whilst working on behalf of the **Insured** and for whom the **Insured** is responsible. Indemnity will not extend to the sub-contractor, consultant and/or agent who committed the act, error or omission.

2.20 Technology Services

The **Insurer** agrees to indemnify the **Insured** against civil liability the **Insured** incurs in respect of a **Claim** resulting from the provision of any Technology Services that are performed for the purpose of providing the **Insured's Professional Services**.

SECTION 3: DEFINITIONS

For the purpose of this **Policy**:

- 3.1 **Act of Terrorism** means an act, including but not limited to the use of force or violence and/or the threat thereof, of any person or group(s) of persons, whether acting alone or on behalf of or in connection with any organisation(s) or government(s), which from its nature or context is done for, or in connection with, political, religious, ideological, ethnic or similar purpose or reason, including the intention to influence any government or to put the public, or any section of the public, in fear.
- 3.2 **Claim** means any demand made by a third party upon the **Insured** for compensation, however conveyed, including a writ, statement of claim, application or other legal or arbitral process.
- 3.3 **Documents** means deeds, wills, agreements, maps, plans, records, written or printed books, letters, certificates, written or printed **Documents** or forms of any nature, but excluding any bearer bonds, coupons, bank or currency notes or other negotiable instruments, which is the property of the **Insured** or for which the **Insured** becomes responsible during the conduct of their **Professional Services**.
- 3.4 **Excess** means the amount shown in the **Schedule** and represents the first amount which is payable by the **Insured** in respect of compensation and Claimant's costs and expenses or **Insured Defence Costs** arising out of or in respect of any one **Claim** made against the **Insured** or in respect of any **Official Investigation and Enquiry Costs** arising out of any one notice.
- 3.5 **Enquiring Body** means a court, tribunal or legally constituted industry or professional body.
- 3.6 **Insured** means:
1. The named individual(s), legal entity or entities specified in the **Schedule**; and
 2. Past and/or present employees of the legal entity or entities specified in the **Schedule**, but only in their capacity as such; and
 3. Any past and/or present sole practitioner, partner or a director of the legal entity or entities specified in the **Schedule**, but only in their capacity as such; and
 4. The estate, heirs, legal representatives or legal assigns of any natural person insured under this **Policy** in the event of the death or legal incapacity of such person.
- 3.7 **Insured Defence Costs** means all necessary and reasonable costs and expenses incurred by the **Insurer**, or by the **Insured** with the **Insurer's** prior written consent, in defending, investigating or settling any **Claim** (not being **Official Investigation and Enquiry Costs** or Claimant's costs and expenses).
- 3.8 **Insurer** means Brooklyn for and on behalf of Certain Underwriters at XL Insurance Company SE.
- 3.9 **Limit of Indemnity** means the **Limit of Indemnity** as shown in the **Schedule**.
- 3.10 **North America** means the United States of America and Canada and their territories and protectorates.
- 3.11 **Official Investigation and Enquiry Costs** means necessary and reasonable legal costs and expenses incurred by the **Insured** arising out of any notice requiring the **Insured's** attendance at an enquiry or hearing held before an Enquiring Body.
- 3.12 **Period of Insurance** means the **Period of Insurance** as shown in the **Schedule**.
- 3.13 **Policy** means the **Schedule**, the terms of this **Policy** and any endorsements thereto.
- 3.14 **Pollutants** means any contaminant whether solid, liquid or gas including but not limited to chemicals, smoke vapours and fumes.
- 3.15 **Professional Services** means the **Professional Services** described in the **Schedule**, of the named individual(s), legal entity or entities specified in the **Schedule**.
- 3.16 **Retroactive Date** means the **Retroactive Date** shown in the **Schedule**.
- 3.17 **Schedule** means the current **Schedule** issued by the **Insurer** to the **Insured**.
- 3.18 **Technology Services** means any:
- (a) Website design or website programming
 - (b) Database design or database management, data warehousing, data application hosting
 - (c) Maintenance of computer programs, applications or systems designed or developed by the **Insured**
 - (d) Design and development of computer software programs, applications and systems
 - (e) Creation, maintenance, use, modification, alteration, and input into any digital model or digital representation including building design, drafting systems or programs
 - (f) Electronic data transmissions in conjunction with any of the above

SECTION 4: EXCLUSIONS

The **Insurer** shall not be liable in respect of any **Professional Services, Claim, liability, compensation, Official Investigation and Enquiry Costs, Claimant's costs and expenses or Insured Defence Costs:**

4.1 Asbestos

Arising directly or indirectly from or in respect of asbestos, asbestos fibres or derivatives of asbestos.

4.2 Contractual Liabilities & Commercial Risks

arising directly or indirectly from:

1. Any liability or liabilities which the **Insured** has assumed under a contract unless such liability would have attached in the absence of such contract;
2. The insolvency, receivership, administration, bankruptcy or liquidation of the **Insured**
3. Any trading debt incurred by the **Insured**
4. Any guarantee given by the **Insured** for a debt

4.3 Controlling or Financial Interests

arising directly or indirectly from or in respect of work undertaken for or on behalf of any company related to any **Insured**, which for the purposes of this **Policy** includes:

1. Any other **Insured**; or
2. Any subsidiary of an **Insured**; or
3. Any company of which an **Insured** holds or has held at least a 20% financial interest and has had or has board representation at that company.

4.4 Directors' and Officers' Liability

arising directly or indirectly from or in respect of the **Insured's** functions and duties as a director and/or officer of the **Insured** or any legal entity, corporation or other incorporated body.

4.5 Dishonest, Fraudulent or Criminal Acts

arising directly or indirectly from or in respect of any dishonest, fraudulent, criminal or malicious act or omission by the **Insured**.

4.6 Employer's Liability

arising directly or indirectly from or in respect of:

1. The death, bodily injury, disease or illness of any **Insured** Arising out of or in the course of their employment; or
2. A breach of any obligation owed by an **Insured** to an **Insured**.

4.7 Fines, Penalties, Punitive or Aggravated Damages

arising directly or indirectly from or in respect of fines or penalties including civil penalties, punitive or aggravated damages.

4.8 Liquidated Damages

arising directly or indirectly from or in respect of liquidated damages imposed upon the **Insured** by contract or agreement, except to the extent that the **Insured** would have been liable for that damage in the absence of any such contract or agreement.

4.9 North America

arising directly or indirectly from or in respect of:

1. Any civil liability resulting from the conduct of the **Professional Services** within **North America**; or
2. The provision of **Professional Services** to persons in **North America**; or
3. Any **Claim** brought against the **Insured** in any court of law, arbitration, tribunal, forum or other body entitled to impose enforceable orders in **North America**; or
4. Any **Claim** Arising from the enforcement of any judgment, order or award in respect of any action brought in any court of law, arbitration, tribunal or other judicial body in **North America**.

4.10 Pollutants

Claims directly or indirectly based upon, attributable to, or in consequence of the discharge, dispersal, release or escape of **Pollutants**, including but not limited to the prevention, clean up or containment of **Pollutants**, any bodily injury or property damage caused by **Pollutants** and the remediation of any environment affected by **Pollutants**; provided however that this Exclusion shall not apply where the **Insured** has proved that the discharge, dispersal, release or escape of **Pollutants**:

- (a) did not occur gradually over a period of time but suddenly, at an identifiable point in time; and
- (b) was entirely unexpected, unintended and fortuitous, from the standpoint of the **Insured**, and
- (c) was the result of a negligent act, error or omission in the course of the **Insured's Professional Services** as stated in the **Schedule**.

4.11 Prior Claims or Known Circumstances

arising directly or indirectly from or in respect of:

1. Any **Claim** first made against the **Insured** prior to the **Period of Insurance**; or

2. any circumstances, acts, errors or omissions which were:
 - i. Known to the **Insured** prior to the **Period of Insurance** and the **Insured** ought reasonably have expected to give rise to a **Claim** or **Official Investigation and Enquiry Costs**; or
 - ii. Notified under any insurance that was in force prior to the **Period of Insurance**.

4.12 Product Liability

Claim based upon, attributable to, or in consequence of the manufacture, preparation, modification, repair, supply, maintenance or treatment of any goods or products sold, supplied or distributed by the **Insured**, except where such **Claim** arises solely and directly from any advice, design or specification prepared by the **Insured** in the conduct of the professional activities and duties of the **Insured's** business.

4.13 Radioactive Contamination and Explosive Nuclear Assemblies Exclusion Clause (NMA 1622)

this **Policy** does not cover

- a) loss or destruction of or damage to any property whatsoever or any loss or expense whatsoever resulting or arising therefrom or any consequential loss
- b) any legal liability of whatsoever nature directly or indirectly caused by or contributed to by or arising from:
 - i) ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel
 - ii) the radioactive, toxic, explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof.

4.14 Subrogation Waiver

arising directly or indirectly from or in respect of any liability which is incurred or affected by reason of the **Insured** entering into a deed or agreement excluding, limiting or delaying the **Insured's** legal rights of recovery against another.

4.15 Terrorism

arising directly or indirectly from or in respect of:

1. any **Act of Terrorism**; or
2. any action taken in controlling, preventing, suppressing or in any way relating to any **Act of Terrorism**.

4.16 Trading Debts

arising directly or indirectly from or in respect of any trading debt incurred, or any guarantee in respect of such debt given, by the **Insured**.

4.17 War and Civil War Exclusion Clause (NMA 464)

notwithstanding anything to the contrary contained herein this **Policy** does not cover Loss or Damage directly or indirectly occasioned by, happening through or in consequence of war, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, 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.

4.18 Sanction Limitation and Exclusion

No (re)insurer shall be deemed to provide cover and no (re)insurer shall be liable to pay any **Claim** or provide any benefit hereunder to the extent that the provision of such cover, payment of such **Claim** or provision of such benefit would expose that (re)insurer to any sanction, prohibition or restriction under United Nations resolutions or the trade or economic sanctions, laws or regulations of the European Union, Australia, United Kingdom or United States of America.

SECTION 5: GENERAL CONDITIONS

5.1 Assistance with Claims

The **Insured** shall give all such assistance as the **Insurer** may reasonably require but shall not be required to contest any legal proceedings if the **Insured** objects to doing so unless Senior Counsel or a person of similar authority (appointed by mutual agreement between the **Insured** and the **Insurer** and paid for by the **Insurer**) shall advise such proceedings could be contested to the extent that there is a reasonable probability of success.

5.2 Cancellation

The **Insured** may cancel this **Policy** at any time by written request to the **Insurer**. Upon receipt of such request, the **Insurer** will retain a short period premium calculated on the **Insurer's** short term rates for the time it has been on risk and the **Insured** will receive a refund of any balance of the premium actually paid. The **Insurer** may cancel this **Policy** in accordance with the Insurance Contracts Act 1984 by giving notice in writing to the **Insured** of the date from which such cancellation is to take effect.

5.3 Claims Conduct

The **Insurer** shall be entitled to take over and conduct in the name of the **Insured** the defence or settlement of any **Claim** and shall have full discretion in the conduct of any proceedings and in the settlement of any **Claim**.

5.4 Claims Notification

Every **Claim** made against the **Insured** shall be notified to the **Insurer** as soon as practicable and in any event prior to expiry of the **Period of Insurance**, and every letter, demand writ summons and legal process pertaining to such **Claim** shall be forwarded to the **Insurer** as soon as practicable after receipt. All **Claim** notifications to the **Insurer** must be sent to: The **Claims** Manager, Brooklyn, Angel Place, Level 28, 123 Pitt Street, Sydney NSW 2000

5.5 Claims Settlement

Should the **Insured** object to a proposal by the **Insurer** to settle or compromise any **Claim** and wish to contest or litigate the matter, then the **Insured** may so elect, provided that the **Insurer's** liability in respect of any such **Claim** so contested or litigated shall not exceed the

5.6 Goods and Services Tax

As part of the premium, the **Insurer** will charge the **Insured** an amount on account of GST. The **Insured** must inform the **Insurer** of the extent to which it is

entitled to an input tax credit for that GST amount each time that it notifies a **Claim** under this **Policy**. No payment will be made to the **Insured** for any GST liability that it may incur on the settlement of a **Claim** if it does not inform the **Insurer** of its entitlement to an input tax credit.

Despite the other terms of this **Policy**, the **Insurer's** liability to the **Insured** will be calculated taking into account any input tax credit to which the **Insured** is entitled for any acquisition which is relevant to the **Claim**, or to which it would have been entitled had it made a relevant acquisition. 'GST', 'input tax credit', 'acquisition' and 'supply' have the meaning given in A New Tax System (Goods and Services Tax) Act 1999.

5.7 Governing Law

This **Policy** will be governed in accordance with the laws of Australia. Any disputes relating to the interpretation of this **Policy** will be submitted to the exclusive jurisdiction of the courts of Australia.

5.8 No Admission of Liability

No admission, offer, promise or indemnity shall be made or given by or on behalf of the **Insured** without the written consent of the **Insurer**.

5.9 Other Insurance

If at the time a **Claim** under this **Policy** arises there is any other insurance in force covering the same liability the **Insured** shall promptly notify to the **Insurer** full details of such other insurance, including the identity of the **Insurer** and the **Policy** number, and such further information as the **Insurer** may reasonably require.

5.10 Payment of Premium

The **Insured** must pay the agreed premium to the **Insurer** by the due date. The due date is on or before 30 days after the inception date of the **Period of Insurance** as specified in the **Schedule** or such other time the **Insurer** agrees to in writing. If the **Insured** fails to pay the premium by the due date, the **Insurer** is entitled to cancel this **Policy** in accordance with the Insurance Contracts Act 1984.

5.11 Severability and Non-Imputation

Where this **Policy** insures more than one party, any failure on the part of any of the parties to:

1. Comply with the Duty of Disclosure in terms of the Insurance Contracts Act 1984; or
2. Comply with any obligation in terms of this **Policy**; or
3. Refrain from conduct which is dishonest, fraudulent, criminal or malicious, shall not prejudice the right of the remaining party or parties to indemnity under the terms of this **Policy**, provided that such remaining party or parties shall:
 - i. Be entirely innocent of and have had no prior knowledge of any such failure; and
 - ii. As soon as practicable after becoming aware of any such failure, advise the **Insurer** in writing of all the relevant circumstances.

XL Insurance Company SE
trading as Brooklyn Underwriting
ABN: 36 083 570 441
Level 28, 123 Pitt Street
Sydney NSW 2000

BROOKLYN 
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