

TRAINING CONSULTANTS' CIVIL LIABILITY PROFESSIONAL INDEMNITY

Policy Wording 01.06.19



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BROOKLYN 
UNDERWRITING

TABLE OF CONTENT

PREAMBLE.....	5
Lloyd’s Australian Alternative Dispute Resolution Clause (LSW1145).....	6
SECTION 1: INSURING CLAUSES.....	7
1.1 Insuring Clause.....	7
1.2 Limit of Indemnity.....	7
1.3 Insured Defence Costs.....	7
1.4 Excess.....	7
1.5 Aggregation of Claims	7
SECTION 2: INSURANCE CLARIFICATION	8
2.1 Breach of Confidentiality	8
2.2 Consumer Protection Legislation.....	8
2.3 Contractual Liability	8
2.4 Infringement of Intellectual Property	8
2.5 Libel, Slander or Defamation	8
2.6 Implied Warranties.....	8
2.7 Privacy	8
2.8 Fiduciary Duty.....	8
SECTION 3: AUTOMATIC EXTENSIONS	9
3.1 Automatic Reinstatement.....	9
3.2 Claims Preparation Costs	9
3.3 Continuous Cover	9
3.4 Court Attendance Costs	9
3.5 Dishonesty of Employees	9
3.6 Fidelity	10
3.7 Joint Venture Liability	10
3.8 Lost Documents	10
3.9 New Subsidiaries Extension.....	10
3.10 Official Investigation and Enquiry Costs.....	10
3.11 Public Relations Expenses	11

3.12 Run Off Cover Insured Entity or Subsidiary with Additional Thirty Day Reporting Period	11
3.13 Statutory Liability	11
3.14 Sub-contractors, Consultants and Agents	11
3.15 Legal Consultation	11
SECTION 4: DEFINITIONS	12
4.1 Act of Terrorism	12
4.2 Civil Liability.....	12
4.3 Claim.....	12
4.4 Documents	12
4.5 Employee	12
4.6 Excess	12
4.7 Enquiring Body.....	12
4.8 Insured	12
4.9 Insured Defence Costs.....	12
4.10 Insurer	12
4.11 Legal Advisor	12
4.12 Limit of Indemnity	13
4.13 Loss	13
4.14 North America	13
4.15 Official Investigation and Enquiry Costs.....	13
4.16 Period of Insurance	13
4.17 Policy	13
4.18 Pollutants.....	13
4.19 Professional Services	13
4.20 Retroactive Date.....	13
4.21 Schedule.....	13
4.22 Senior Counsel	13
SECTION 5: EXCLUSIONS	14
5.1 Asbestos.....	14
5.2 Contractual Liabilities & Commercial Risks.....	14
5.3 Controlling or Financial Interests	14
5.4 Directors' and Officers' Liability.....	14
5.5 Dishonest, Fraudulent or Criminal Acts.....	14
5.6 Employer's Liability	14

5.7 Fines, Penalties, Punitive or Aggravated Damages.....	14
5.8 Liquidated Damages.....	14
5.9 North America.....	14
5.10 Prior Claims or Known Circumstances.....	14
5.11 Product Liability.....	15
5.12 Professional Fees.....	15
5.13 Radioactive Contamination and Explosive Nuclear Assemblies (NMA1622)...	15
5.14 Subrogation Waiver	15
5.15 Terrorism	15
5.16 Trading Debts.....	15
5.17 War and Civil War Exclusion Clause (NMA464)	15
5.18 Occupier’s Liability	15
5.19 Motor Vehicles/ Aircraft/ Watercraft	15
5.20 Financial Investment Advice / Performance	15
5.21 Mergers & Acquisitions Advice	15
5.22 Total Molestation	15
5.23 Sanction Limitation and Exclusion	16
SECTION 6: GENERAL CONDITIONS.....	17
6.1 Assistance with Claims.....	17
6.2 Cancellation	17
6.3 Claims Conduct	17
6.4 Claims Notification.....	17
6.5 Claims Settlement	17
6.6 Goods and Services Tax	17
6.7 Governing Law	17
6.8 No Admission of Liability	17
6.9 Other Insurance	17
6.10 Payment of Premium	17
6.11 Severability and Non-Imputation.....	17
6.12 Subrogation	18
6.13 Assignment.....	18
6.14 Material Change to Risk	18

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 3.3 **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 4, **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. You have this duty until we agree to insure you.

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

XL Insurance Company SE, Australia branch, trading as Brooklyn Underwriting (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
XL Insurance Company SE
trading as Brooklyn Underwriting
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.

SECTION 1: INSURING CLAUSES

1.1 Insuring Clause

The **Insurer** will 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 **Period of Insurance** resulting from the conduct of the **Professional Services** by the **Insured** occurring after the **Retroactive Date**.

1.2 Limit of Indemnity

1. The total liability of the **Insurer** for **Loss** 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** or the applicable Sub-limit specified in any Extension or in the **Schedule**.
2. Nothing in this **Policy** operates to increase the **Limit of Indemnity** or any Sub-Limit specified in any Extension or in the **Schedule**.
3. The **Limit of Indemnity** is inclusive of any Sub-Limit specified in any Extension or in the **Schedule**.
4. Any Sub-Limit specified in any Extension or in the **Schedule** is an aggregate limit inclusive of any applicable **Defence Costs**.

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 **Loss** 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 **Loss** required to dispose of the **Claim** or **Claims**.

The **Insurer** will pay for **Insured Defence Costs** 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 **Insurer** is only be liable to indemnify the **Insured** for such amount of any **Loss**, settlement or other payment that may be the subject of indemnity under this **Policy** (including any Extension or Optional Extension unless otherwise specified), and/ or pay any **Insured Defence Costs** or **Official Investigation and Enquiry Costs**, in respect of any one **Claim** or the proceedings of an **Enquiring Body** the **Insured** is legally required to attend which is in **Excess** of the **Excess**. The **Excess** is to be borne by the **Insured** and shall 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 3.10 **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: INSURANCE CLARIFICATION

For the purposes of clarifying the scope of indemnity under this **Policy**, Clause 1.1 (Insuring Clause) and Clause 4.2 (Definition of Civil Liability) include:

2.1 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**.

2.2 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.

2.3 Contractual Liability

Notwithstanding Exclusion 5.2.1 **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 written contract between any **Insured** and a third party for the performance of the **Insured's**

Professional Services by or on behalf of the **Insured** to the extent that such **Civil Liability** arises directly from an act, error or omission in the performance of such **Professional Services** by or on behalf of the **Insured**.

2.4 Infringement of Intellectual Property

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.

2.5 Libel, Slander or Defamation

Libel, slander or defamation, provided that:

1. the libel, slander or defamation 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, slander or defamation.

2.6 Implied Warranties

a breach of an implied warranty in relation to merchantable quality, due care and skill or fitness for purpose implied in a contract, at common law and/ or the terms of the Competition and Consumer Act 2010 (Cth) or any or similar legislation enacted for the protection of consumers, within any Australian jurisdiction including any amendment, consolidation or re-enactment of such legislation.

2.7 Privacy

a breach of, or unlawful interference with, privacy.

2.8 Fiduciary Duty

a breach of fiduciary duty.

SECTION 3: 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 3 - Automatic Extensions, will be part of and not in addition to the **Limit of Indemnity**, unless otherwise stated.

3.1 Automatic Reinstatement

In the event of exhaustion or partial exhaustion of the **Limit of Indemnity** solely by reason of indemnity granted for **Loss** 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 **Loss** 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**, two full reinstatements of the **Limit of Indemnity**, save that the **Insurer** will in addition pay **Insured Defence Costs** on the basis already set out in this **Policy**.

3.2 Claims Preparation Costs

1. The **Insurer** will indemnify the **Insured** for any reasonable costs and expenses incurred by the **Insured** with the prior written consent of the **Insurer** specifically for the preparation of the defence or investigation of any **Claim** that is indemnified under this **Policy**.
2. The aggregate amount of all payments made by the **Insurer** pursuant to this Extension will not exceed \$25,000.

3.3 Continuous Cover

Where the **Insured** has failed to exercise their rights pursuant to Section 40(3) of the Insurance Contracts Act 1984 (Cth) in relation to an earlier professional indemnity insurance **Policy** issued to the **Insured** by or on behalf of a previous **Insurer**, then clause 5.10 (**Prior Claims or Known Circumstances Exclusion**) of this **Policy** shall not apply to the facts, circumstances, acts, errors or omissions to which such unexercised rights apply provided that:

1. the **Insured** has been continuously **Insured**, without interruption at the commencement of the **Period of Insurance**, under a similar professional indemnity insurance **Policy** from the earliest time at which the **Insured** could have reasonably first exercised their rights pursuant to Section 40(3) of the Insurance Contracts Act 1984 (Cth) in respect of the subject facts, circumstances, acts, errors or omissions; and

2. there has been no fraudulent misrepresentation or fraudulent non-disclosure by the **Insured** in respect of the subject facts, circumstances, acts, errors or omissions; and
3. the **Insurer** may reduce their liability to indemnify the **Insured** or make any payment by reason of this extension to the extent that the **Insurer** has been prejudiced by the failure of the **Insured** to exercise their rights pursuant to Section 40(3) of the Insurance Contracts Act 1984 (Cth) at the earliest time at which the **Insured** could have reasonably first exercised such rights in respect of the subject facts, circumstances, acts, errors or omissions; and
4. in determining any prejudice referred to in point 3 above, the **Insurer** may take into account any factors the **Insurer** may deem to be material including, but not limited to, the limits of indemnity, sub-limits, terms, conditions and exclusions of any applicable earlier professional indemnity insurance **Policy**.

3.4 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 and is the subject of indemnity under 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 **Insured**: \$500.
- b. for any person who was or is an Employee of the **Insured**: \$250.

The **Excess** shall not apply to this Automatic Extension.

3.5 Dishonesty of Employees

The **Insurer** will, notwithstanding Exclusion 5.5 **Dishonest, Fraudulent or Criminal Acts**, indemnify the **Insured** against **Civil Liability** for **Loss** 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.

3.6 Fidelity

Notwithstanding Exclusion 5.5 **Dishonest, Fraudulent or Criminal Acts**, the **Insurer** will indemnify the **Insured** against **Loss** of tangible property, 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:

1. 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**);
2. 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;
3. 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;
4. 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
5. the total liability of the **Insurer** for all **Claims** under this Automatic Extension shall not exceed \$100,000 in the aggregate.

3.7 Joint Venture Liability

The **Insurer** will indemnify the **Insured** against **Civil Liability** for **Loss** 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.

3.8 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 directly or indirectly arising from, in whole or in part:

1. wear and tear or any other gradual process; or
2. any computer virus or other malicious or damaging software; or
3. any, act, error or omission committed or made, by any person or entity who at the time of such act, error or omission was not an **Insured**.

The total liability of the **Insurer** for all **Claims** under this Automatic Extension shall not exceed \$250,000 in the aggregate.

3.9 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** for a maximum period of 30 days from the effective date of such creation or acquisition. 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 25% 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 provides **Professional Services** that are in the same professional discipline and substantially similar to those provided by the **Insured**;
5. unless the **Insurer** agrees in writing to include such subsidiary under clause 4.8 (Definition of **Insured**) of this **Policy**.

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

3.10 Official Investigation and Enquiry Costs

The **Insurer** will indemnify the **Insured** for **Official Investigation and Enquiry Costs** of attending the proceedings of an **Enquiring Body**.

Provided that:

1. the **Insured** is legally required or compelled to attend such enquiry; and
2. 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
3. such attendance results directly from an act, error or omission committed or allegedly committed by or on behalf of the **Insured** in the conduct of the **Professional Services**; and
 4. 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
 5. the **Insurer** is entitled, at their sole discretion, to appoint legal or other representation for the **Insured** at such enquiry; and
 6. the total liability of the **Insurer** for all **Claims** under this Automatic Extension shall not exceed \$250,000 in the aggregate.

3.11 Public Relations Expenses

The **Insurer** will indemnify the **Insured** for the reasonable and necessary costs and expenses directly incurred by the **Insured** with the prior written consent of the **Insurer** in seeking advice from a reputable public relations consultant solely for the purpose of protecting the professional reputation of the **Insured** that has been brought into question as a direct result of a **Claim** that is the subject of indemnity under this **Policy**.

Such indemnity will be subject to:

1. the **Insured** providing written notice to the **Insurer** within 30 days of first becoming aware of the professional reputation of the **Insured** being brought into question; and
2. the **Insured** providing prior written notice to the **Insurer** within 30 days of the subject **Claim** being finalised of the intention to incur such costs and expenses.
3. the onus of, and any costs and expenses incurred in, proving entitlement to indemnity under this extension shall rest solely with the **Insured**.
4. the total liability of the **Insurer** for all **Claims** under this Automatic Extension shall not exceed \$25,000 in the aggregate.

3.12 Run Off Cover Insured Entity or Subsidiary with Additional Thirty Day Reporting Period

The **Insurer** agrees that the coverage provided under this **Policy** shall continue until the 30th day after 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 earlier of either the:

1. expiry date of the **Period of Insurance** or the
2. effective date that an **Insured** entity ceased to exist

or operate or was consolidated with, merged into or acquired by another entity.

A notification to the **Insurer** during the 30 days after the expiry date of the **Period of Insurance** will be deemed to have been first notified to the **Insurer** during the **Period of Insurance**.

3.13 Statutory Liability

The **Insurer** will, notwithstanding Exclusion 5.7 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 **Claims** under this automatic extension shall not exceed \$250,000 in the aggregate for all **Claims** inclusive of **Insured Defence Costs**.

3.14 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 subcontractors, 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.

3.15 Legal Consultation

The **Insurer** agrees to pay for the cost of up to two hours legal advice from the Legal Adviser specified in the **Schedule** (or their delegate) on any matter related to the risks **Insured** under this **Policy**, except in relation to the scope of cover provided under this **Policy**, or **Claims**, disputes or complaints against the **Insurer**, provided that:

1. the legal advice is sought during the **Period of Insurance**;
2. the **Insured** must provide the legal adviser with the **Policy** number, **Period of Insurance** and name of the **Insured**; and
3. the legal advice is limited to one hour in relation to any particular matter.

SECTION 4: DEFINITIONS

For the purpose of this **Policy**:

4.1 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.

4.2 Civil Liability

means legal liability arising from any civil cause of action including but not limited to;

1. negligence; or
2. breach of contract; or
3. breach of statute; or
4. breach of fiduciary duty; or
5. breach of trust; or
6. misstatement or misrepresentation; or
7. breach of an implied warranty; or
8. libel, slander or defamation; or
9. infringement of Intellectual Property Rights; or
10. breach of confidence or misuse of any information, which is either confidential or subject to restrictions as to its use.

4.3 Claim

means any written demand made by a third party upon the **Insured** for compensation.

4.4 Documents

means the following property owned by a third party and for which the **Insured** becomes responsible during the conduct of their **Professional Services** and shall include deeds, wills, agreements, maps, records, written or printed books, letters, certificates, written or printed **Documents** or forms of any nature including any electronic or computer record or reproduction of such physical documents but shall not include;

1. any shares, bearer bonds or coupons, stamps, bank or currency notes or any other negotiable instrument; or
2. any electronically stored data; or
3. any software or computer programme.

4.5 Employee

means any natural person employed under a contract of service or apprenticeship with the **Insured** and includes any part-time, casual, trainee or work experience personnel.

4.6 Excess

means the amount shown in the **Schedule** and represents the first amount which is payable by the **Insured** in respect of **Loss** 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.

4.7 Enquiring Body

means a court, tribunal or legally constituted industry or professional body.

4.8 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.

4.9 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).

4.10 Insurer

means XL Insurance Company SE, Australia branch, trading as Brooklyn Underwriting (Brooklyn).

4.11 Legal Advisor

means the legal adviser as shown in the **Schedule**.

4.12 Limit of Indemnity

means the **Limit of Indemnity** as shown in the **Schedule**.

4.13 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;

1. civil or criminal fines or penalties imposed by law; or
2. punitive, exemplary, multiple or aggravated damages; or
3. any amount uninsurable at law; or
4. any amount for which the **Insured** is not legally liable or for which there is no legal recourse to any **Insured**.

4.14 North America

means the United States of America and Canada and their territories and protectorates.

4.15 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**.

4.16 Period of Insurance

means the **Period of Insurance** as shown in the **Schedule**.

4.17 Policy

means the **Schedule**, the terms of this **Policy** and any **Endorsements** thereto.

4.18 Pollutants

means:

1. any solid, liquid, gaseous or thermal irritant or contaminant, including without limitation smoke, vapour, soot, fumes, acids, alkalis and chemicals: and
2. waste materials, including materials to be recycled, reconditioned or reclaimed: and
3. other air emission, odour, waste water, oil, oil products, infectious or medical waste or any noise emissions

4.19 Professional Services

means the **Professional Services** of the **Insured** specified in the **Schedule**.

4.20 Retroactive Date

means the **Retroactive Date** shown in the **Schedule**.

4.21 Schedule

means the current **Schedule** issued by the **Insurer** to the **Insured**.

4.22 Senior Counsel

means a barrister in active practice who is entitled to use the post-nominals QC or SC in any one or more superior court in the Commonwealth of Australia or the Dominion of New Zealand.

SECTION 5: EXCLUSIONS

The **Insurer** shall not be liable in respect of any **Loss**, settlement or other payment or pay any, **Insured Defence Costs** or **Official Investigation and Enquiry Costs**:

5.1 Asbestos

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

5.2 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.
5. any liability assumed by 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.

5.3 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 a 20% or greater financial interest and has had or has board representation at that company.

5.4 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.

5.5 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**.

5.6 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** as an employer to any **Employee** or applicant for employment.

5.7 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.

5.8 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.

5.9 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**.

5.10 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:
 - a. 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

- b. notified under any insurance that was in force prior to the **Period of Insurance**.

5.11 Product Liability

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 Services**.

5.12 Professional Fees

arising directly or indirectly from or in respect of the return, refund or disgorgement or any professional fees, charges, commissions or other remuneration or whatsoever nature received by, paid or payable to the **Insured** in connection with the **Professional Services**.

5.13 Radioactive Contamination and Explosive Nuclear Assemblies (NMA1622)

This **Policy** shall not indemnify the **Insured** in respect of any

- 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 or
- 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 or
 - (ii) the radioactive, toxic, explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof.

5.14 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.

5.15 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**.

5.16 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**.

5.17 War and Civil War Exclusion Clause (NMA464)

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.

5.18 Occupier's Liability

arising directly or indirectly from or in respect of any occupation, ownership, control or management of any real property by the **Insured** or any agent.

5.19 Motor Vehicles/ Aircraft/ Watercraft

arising directly or indirectly from or in respect of the ownership, use, operation, or maintenance of any motor vehicle, aircraft or watercraft of any kind by the **Insured** or any agent.

5.20 Financial Investment Advice / Performance

It is hereby noted and agreed that this **Policy** does not provide any cover for any **Claim** arising directly or indirectly or in respect of financial advice and/or the failure of a financial / investment product to perform. In all other respects this **Policy** shall remain unaltered

5.21 Mergers & Acquisitions Advice

It is hereby noted and agreed that this **Policy** does not provide any cover for any **Claim** arising directly or indirectly from or in respect of the provision of advice in respect of mergers or acquisitions.

In all other respects this **Policy** shall remain unaltered.

5.22 Total Molestation

It is hereby noted and agreed that this **Policy** does not provide any cover for any **Claim** arising directly or indirectly from, or in connection with any of the following:

- a) the molestation of, interference with, mental or physical abuse of, or assault of persons; or
- b) any act(s) of indecency; or
- c) the failure to detect, act upon or prevent the molestation of, interference with, mental or physical abuse of or assault of persons or acts of indecency, by:
 - i. the **Insured**; or
 - ii. any agent of the **Insured**; or
 - iii. any person performing any volunteer service for or on behalf of the **Insured**.

The **Insurer** shall not defend any **Claim** against the **Insured** directly or indirectly arising from or in respect of molestation, interference, mental abuse, physical abuse, assault or act(s) of indecency or a failure to detect, act upon or prevent molestation, interference, mental abuse, physical abuse, assault or act(s) of indecency.

5.23 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 6: GENERAL CONDITIONS

6.1 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.

6.2 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 30 days' notice in writing to the **Insured** of the date from which such cancellation is to take effect.

6.3 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**.

6.4 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, GPO Box 4668 Sydney NSW 2001.

6.5 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 amount for which, but for such election, the **Claim** could have been settled or compromised by the **Insurer**, together with costs and expenses payable in accordance with the terms of this **Policy** and incurred up to the time of such election.

6.6 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.

6.7 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 The Commonwealth of Australia.

6.8 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**.

6.9 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.

6.10 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.

6.11 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.

6.12 Subrogation

1. If indemnity is granted under this **Policy** in respect of any **Loss, Insured Defence Costs, Official Investigation and Enquiry 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, Insured Defence Costs, Official Investigation and Enquiry Costs**, settlement or payment.
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 6.12(1).

6.13 Assignment

This **Policy** and any rights hereunder cannot be assigned without the prior written consent of the **Insurer**.

6.14 Material Change to Risk

The **Insured** will immediately notify the **Insurer** of any material change in the risk that is the subject of this **Policy** during the **Period of Insurance**, including but not limited to:

1. any merger with, or acquisition of or by, another company, entity, partnership or business or the establishment of a subsidiary company or branch office, notwithstanding clause 3.9 (**New Subsidiaries Extension**);
2. the appointment of any type of administrator, receiver or liquidator, or a trustee in bankruptcy, to any **Insured**;
3. any material change in the nature of the professional activities of any **Insured** as represented in the applicable proposal form;
4. 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** will be entitled to negotiate with the **Insured** the terms for the continuation of this **Policy**. The **Insurer** will 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, Insured Defence Costs, Official Investigation and Enquiry 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.

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

BROOKLYN 
UNDERWRITING