



# Directors' & Officers' Liability Insurance

Wording Document

## Your Award Winning Insurer



**Berkley**  
Insurance Australia  
| a Berkley Company

1300 800 772  
berkleyinaus.com.au

## Directors & Officers Liability

### Insurance Policy

#### Important Information

Please read the following information

#### A. Your Duty of Disclosure

Before you enter into an insurance contract, you have a duty to tell us anything that you know, or could reasonably be expected to know, may affect our decision to insure you and on what terms.

You have this duty until we agree to insure you.

You have the same duty before you renew, extend, vary or reinstate an insurance contract.

You do not need to tell us anything that:

- reduces the risk we insure you for; or
- is common knowledge; or
- we know or should know as an insurer; or
- we waive your duty to tell us about.

#### **If you do not tell us something**

If you do not tell us anything you are required to, we may cancel your contract or reduce the amount we will pay you if you make a claim, or both in accordance with Our rights at law, including the Insurance Contracts Act 1984 (Cth).

If your failure to tell us is fraudulent, we may refuse to pay a claim and treat the contract as if it never existed.

#### B. Claims Made and Notified Policy

This policy provides Directors' & Officers' Liability Insurance on a "Claims Made and Notified" basis. This means that the policy covers you for claims made against you and notified to us during the period of cover.

It does not provide cover for:

- claims arising from an event which occurred before the policy's "retroactive date" where such a date is specified in the schedule;
- claims made after the period of cover expires (even where the event giving rise to the claim occurred during the period of cover);
- claims made, threatened or intimated before the period of cover commenced;
- claims arising from facts or circumstances of which you first became aware before
- commencement of the policy and which you knew or ought reasonably to have known, had the potential to give rise to a claim under the policy or any previous policy;
- claims arising from circumstances noted on the proposal form or any previous proposal form.

### C. Subrogation Agreements

Where another person would be liable to compensate you for any loss or damage otherwise covered by the insurance, but you have agreed with that person either before or after the loss or damage occurred that you would not seek to recover any monies from that person, we will not cover you under the insurance for such loss or damage.

### D. Privacy Statement

Berkley Insurance Australia handles your personal information in a responsible manner and in accordance with the Privacy Act 1988 (Cth).

#### Consent

By requesting us to provide you with insurance and insurance related services, you consent to the collection, use and disclosure of personal information you have provided to us for the purposes set out in our Privacy Policy.

#### How we collect your personal information

Generally we collect personal information from you or your agents. Personal information may also be collected by us from our agents and service providers; other insurers and insurance reference bureaus; third parties who may claim under your policies; service providers who assist us in investigating, processing and settling claims; third parties who may be arranging cover for a group that you are part of; statutory, regulatory and law enforcement bodies and from publicly available sources.

#### Why we collect personal information

The personal information we collect enables us to provide our products and services. This may include processing and settling claims; offering products and services that may be of interest to you and conducting market research for products and services that may be relevant to you.

You can choose not to receive product or service offering from us by calling (02) 92758500 Eastern Standard Time 9am to 5pm Monday to Friday inclusive. For further information, you can access our Privacy Policy at [www.berkleyinaus.com.au](http://www.berkleyinaus.com.au)

#### Who we disclose your personal information to

Your personal information may be disclosed to other parties with whom we have business arrangements for purposes set out in the paragraph above. These parties may include insurers, intermediaries, reinsurers, related companies, our advisers and parties involved in claims assessment, processing, investigation and settlement. Where required by law, we may also disclose information to government, law enforcement, dispute resolution and statutory or regulatory bodies.

#### Personal information about others

Where you provide personal information about others, you represent to us that you have made them aware that you will do so, the types of third parties we may disclose it to together with the purposes we and our third parties use it for, how they can access such information and how complaints can be made.

Where you provide sensitive information about others, you represent to us that you have obtained their consent. If you have not, and will not do so, you must tell us before you provide the sensitive information.

#### **Overseas Disclosure**

Your personal information may be disclosed to other companies in the Berkley group, reinsurers and service providers that may be located in Australia and overseas. The countries this information may be disclosed may vary from time to time but may include the United States of America and other countries where the Berkley group has a presence.

Any information disclosed may only be used for the purposes detailed above.

#### **Accessing your personal information and dealing with complaints**

You may request access to the personal information we hold about you by calling us at any time.

Our Privacy Policy details how you can make a complaint about a breach of the privacy principles as set out in the *Privacy Act 1988 (Cth)* and our complaints process.

Our Privacy Policy is available at [www.berkleyinaus.com.au](http://www.berkleyinaus.com.au)

#### **E. Contact Details**

Berkley Insurance Australia

Level 7, 321 Kent Street

SYDNEY NSW 2000

Ph: 02 9275 8500

Fax: 02 9261 2773

Email: [australia@berkleyinaus.com.au](mailto:australia@berkleyinaus.com.au)

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# Directors & Officers Liability Insurance Policy

## Table of Contents

1. Insuring Clauses .....	1
2. Extensions .....	2
3. Definitions .....	6
4. Exclusions .....	13
5. Indemnity Limit .....	17
6. Claims and Notice Provisions .....	18
7. General Conditions .....	20

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## Directors & Officers Liability

### Insurance Policy

In consideration of the payment of the premium and in reliance upon all statements made and information provided to Berkley Insurance Australia ABN 53 126 559 706 ("We, Us or Our"), including statements made in the Proposal Form and materials accompanying it and subject to all terms, conditions and limitations of this Policy, We, the Insured Persons and the Company agree as follows:

## 1. Insuring Clauses

### 1.1 Directors & Officers Liability

We shall pay to or on behalf of an Insured Person any Loss resulting from any Claim which is first made against such Insured Person during the Period of Insurance and notified to Us in accordance with the terms of this Policy, except when and to the extent that the Company has granted indemnification as permitted or required by law to the Insured Person.

### 1.2 Company Reimbursement

We shall pay on behalf of the Company any Loss resulting from any Claim which is first made against an Insured Person during the Period of Insurance and notified to Us in accordance with the terms of this Policy, but only when and to the extent that the Company has granted indemnification as permitted or required by law to the Insured Person.

### 1.3 Legal Representation Expenses

In respect of any Formal Investigation, We will pay Legal Representation Expenses of an Insured Person to or on behalf of:

- 1.3.1 such Insured Person, except when and to the extent the Company has granted indemnification to the Insured Person as permitted or required by law; or
- 1.3.2 the Company, but only when and to the extent the Company has granted indemnification to the Insured Person as permitted or required by law.

This cover only applies where the notice compelling the Insured Person's attendance at the Formal Investigation is first served on the Insured Person during the Period of Insurance, or Non-Renewal Discovery Period if applicable.

## 2. Extensions

Subject to all of the terms, conditions, exclusions and limitations of this Policy, cover is extended as follows. These Extensions, other than Extension 2.8 (Non-Executive Directors' Additional Limit), do not increase the Indemnity Limit.

### 2.1 Advance Payment of Defence Costs and Legal Representation Expenses

2.1.1 We shall, subject to the Indemnity Limit and any applicable Excess, advance Defence Costs and Legal Representation Expenses on an ongoing basis prior to the final payment or settlement of any Claim or Formal Investigation. In the event that it is established that the Insured are not or were not entitled to such payments, the Insured will severally and according to their respective interests, repay those payments to Us, and the Indemnity Limit shall be reduced by such amounts until repaid to Us.

2.1.2 For the avoidance of doubt, when advancing Defence Costs or Legal Representation Expenses, We will not rely on Exclusion 4.2 (Illegal Profits and/ or Deliberate Acts) until the conduct in question has been established by written admission, court judgment or any other final adjudication

### 2.2 Emergency Defence Costs and Legal Representation Expenses

Notwithstanding any provision in the Policy to the contrary, if it is not possible for an Insured Person to obtain consent prior to the incurring of Defence Costs or Legal Representation Expenses, We will temporarily waive prior consent as long as Our consent is obtained within fourteen (14) days of the first of such Defence Costs or Legal Representation Expenses being incurred. The sub-limit for all payments made during the aforementioned fourteen (14) day period is 10% of the Indemnity Limit.

### 2.3 Continuous Coverage

Notwithstanding Exclusion 4.5.3 (Prior Claims and Circumstances), cover is provided under this Policy for any Claim arising from any fact, circumstance, act, omission or claim which prior to the commencement of the Period of Insurance, the Insured is aware may result in or could reasonably be expected to result in a Claim or Formal Investigation, and which could or should have been notified under any earlier policy with Us, provided always that:

2.3.1 We have continuously and without interruption been the insurer of the Insured for directors and officers' liability since that date;

2.3.2 had We been notified by the Insured of the circumstance when it or they first became aware of it, the Insured would have been covered under the policy in force at that time but is not now entitled to be covered by that policy;

2.3.3 there is an absence of fraudulent noncompliance with the Insured's duty of disclosure and an absence of fraudulent misrepresentation by the Insured in respect of such facts or circumstances;

2.3.4 We may reduce Our liability to the extent of any prejudice We may suffer in connection with the Insured's failure to notify the facts or circumstances giving rise to a Claim prior to the Period of Insurance; and

2.3.5 the Claim or the Inquiry or the circumstance have not previously been notified to Us or any other insurer.

If the Insured was entitled to have given notice under any other policy of insurance and thereby have an entitlement to indemnity, in whole or in part, then this Continuous Cover extension does not apply.

The Indemnity Limit provided for Claims covered by this extension is the lesser available under the terms of the policy in force at the earlier time referred to in paragraph 2.3.2 above, or under this Policy. The terms of this Policy otherwise apply.

## 2.4 Estates, Heirs and Legal Representatives

This Policy shall extend to include any claim made against the estates, heirs, legal representatives or assigns of an Insured Person in the event of that person's death, incapacity, insolvency or bankruptcy, provided that the claim:

- 2.4.1 arises directly from a Claim made against an Insured Person which is covered by the Policy; and
- 2.4.2 is made solely by reason of their status as estates, heirs, legal representatives or assigns of an Insured Person in the event of that person's death, incapacity, insolvency or bankruptcy.

## 2.5 Crisis Costs and Public Relations Expenses

This Policy shall extend to include Crisis Costs and Public Relations Expenses subject to the applicable sub-limits stated in the Policy schedule.

## 2.6 Extradition Bail Bond Costs

This Policy shall extend to include Bail Bond Costs, arising from Extradition Proceedings up to the amount of the sub-limit for all payments under this extension specified in the Policy schedule.

## 2.7 New Subsidiaries

If during the Period of Insurance, the Company acquires or creates an Australian or New Zealand domiciled entity so that such entity becomes a Subsidiary, then such Subsidiary and its Insured Persons shall be covered under this Policy for Claims in respect of Wrongful Acts committed after such entity became a Subsidiary, subject to the Policy's terms and conditions, unless such Subsidiary:

- 2.7.1 has total assets which exceed 25% (twenty-five percent) of the total consolidated assets of the Insured as shown in their last consolidated financial statement or annual report;
- 2.7.2 has any of its securities publicly traded on any stock exchange or market (including any over the counter market); or
- 2.7.3 is a bank, savings and loan institution, mortgage lender, insurance company, reinsurance company, hedge fund, mutual fund, unit trust or investment or fund manager, venture capitalist, private equity firm, pension provider, superannuation provider or building society.

We may agree to include other acquired entities upon receiving full details of such acquired entity and making amendments to the Policy terms and conditions as necessary including charging an additional premium having regard to the nature of the risk to be assumed by Us.

## 2.8 Non-Executive Directors' Additional Limit

Subject to the Non-Executive Directors' Additional Indemnity Limit stated in the Policy schedule, We will pay to or on behalf of Non- Executive Directors only, Loss resulting from any Claim, provided that:

- 2.8.1 the Indemnity Limit has been exhausted by payment of Loss;
- 2.8.2 all other indemnification for Loss available to any Non-Executive Director through the Company or any Outside Entity, has been exhausted;
- 2.8.3 the limits of liability of any and all policies operating in excess of this Policy have been exhausted by payment of Loss; and
- 2.8.4 any other policy entered into by or on behalf of the Non-Executive Director, whether prior or current, which covers any part of that Loss is exhausted.

The Non-Executive Directors' Indemnity Limit shall only apply in respect of Claims subsequent to and completely unrelated and unconnected to the Claims, or related underlying facts and matters, that led to the exhaustion of the



Indemnity Limit.

## 2.9 Non-Renewal Discovery Period

If We refuse to renew this Policy (other than for non-payment of premium) or the Company chooses not to renew this Policy and there has been no notification made before the expiry of the Period of Insurance, the Insured Persons shall have the right to purchase an extension of this Policy for any Claim first made against an Insured Person during such period for Wrongful Acts, or conduct leading to a Formal Investigation, committed or alleged to have been committed prior to the commencement of this Non-Renewal Discovery period:

- 2.9.1 for a period of sixty (60) days from the expiry date of this Policy; or
- 2.9.2 upon payment of an additional premium calculated at 100% (one hundred percent) of the Premium (plus any applicable other taxes and charges), for a period of three hundred and sixty-five (365) days from the expiry date of the Policy, provided that:
  - a) this Non-Renewal Discovery period is only available if We are notified in writing prior to expiration of the Period of Insurance, the Insured Persons wish to exercise this Non-Renewal Discovery period;
  - b) the additional premium is paid to Us within thirty (30) days of the expiration of the Period of Insurance; and
  - c) the premium shall be deemed to be fully earned at inception of the Non-Renewal Discovery period and is not refundable.

It is understood and agreed that:

- 2.9.3 the quotation by Us of different premiums, terms, conditions, limitations, exclusions or indemnity limits at renewal does not constitute a refusal to renew;
- 2.9.4 this extension shall only be granted provided the Insured Persons cannot effect directors or officers liability insurance, management liability or similar insurance, with any other insurer or underwriter or other similar entity, prior to expiry of this Policy and provided that the Insured has made reasonable efforts to secure such cover;
- 2.9.5 this extension is not available if the Policy is cancelled or avoided;
- 2.9.6 this extension is not available if a Takeover, Merger or Administration has occurred;
- 2.9.7 the Indemnity Limit stated in the Schedule shall not be increased in any way by the provisions of this extension; and
- 2.9.8 this extension is not available if the additional premium is not paid in accordance with clause 2.9.2 b); and
- 2.9.9 cover under Extension 2.14 (Retired Directors and Officers Liability) is not available if this Non-Renewal Discovery period is purchased; and
- 2.9.10 any discovery period purchased shall cease immediately upon a similar insurance policy being obtained, without any obligation upon Us to return any portion of the premium.

## 2.10 Workplace Health & Safety Costs

Notwithstanding Exclusion 4.1 (Bodily Injury and/ or Property Damage), this Policy shall extend to include any Defence Costs, or Legal Representation Expenses, arising from a Claim or Formal Investigation, in respect of any alleged breach of any occupational health and safety legislation, whether or not involving workplace manslaughter, first ordered or commissioned during the Period of Insurance.

### **2.11 Outside Directorship Liability**

This Policy shall extend to include Loss for any Claim against an Insured Person who at the specific written request of the Company is a director, officer, trustee, governor or equivalent of any Outside Entity in their capacity as such, provided that:

- 2.11.1 the cover provided under this extension applies in excess of any other indemnification provided by the Outside Entity; and
- 2.11.2 the cover provided under this extension applies in excess of any directors and officers liability insurance in force for such Outside Entity.

### **2.12 Pecuniary Penalties**

This Policy shall extend to include Pecuniary Penalties connected to any Claim made against an Insured Person up to the amount of the sub-limit specified in the Policy schedule.

### **2.13 Pollution Defence Costs**

Notwithstanding Exclusion 4.4 (Pollution), this Policy shall extend to include Defence Costs, and Legal Representation Expenses, in respect of Pollution, up to the amount of the sub-limit specified in the Policy schedule.

### **2.14 Retired Directors and Officers**

If the Company does not renew or replace this Policy with any other policy affording directors and officers liability coverage and a Non-Renewal Discovery Period is not purchased, We shall provide an extension of this Policy for eighty four (84) months from the end of the Period of Insurance to any director or officer who voluntarily retired from the Company during the Period of Insurance and the retirement was other than as a result of a Takeover, Merger or Administration, but only with respect to a Wrongful Act committed by such director or officer prior to their date of retirement.

### **2.15 Spousal Liability**

This Policy shall extend to include any spouse or domestic partner (or the equivalent in any jurisdiction) of an Insured Person but only for a claim arising solely out of their status as such and only where such claim seeks damages from marital community property, jointly held property or property transferred from the Insured Person to the spouse or domestic partner, and where the damages arise directly from a Claim made against the Insured Person which is covered by the Policy

### 3. Definitions

The following definitions of each word, words or phrase appearing in the title are applicable to all Policy sections. All words appearing in the title also include the plural or singular of those words.

#### 3.1 Bail Bond Costs

means the reasonable premium (not including collateral) for a bond or other financial instrument to guarantee an Insured Person's contingent obligation for bail or equivalent in any jurisdiction required by a court in respect of any Claim.

#### 3.2 Claim

means:

- 3.2.1 any written demand for monetary damages or non-monetary relief;
- 3.2.2 any civil or arbitration, mediation or alternative dispute resolution proceedings;
- 3.2.3 any criminal proceedings;
- 3.2.4 any formal administrative or regulatory proceedings commenced by the filing of a notice of charges, formal investigative order or similar document, against an Insured Person for a Wrongful Act, or
- 3.2.5 any Formal Investigation;
- 3.2.6 any Extradition Proceeding.

#### 3.3 Company

means the organisation named in the Policy schedule and any Subsidiary.

#### 3.4 Computer System

means an information technology system made up of a network of one or more items of computer hardware, software, or programmes and the electronic data stored thereupon that share a central storage system, and any other peripheral devices. Computer System shall also include any electronic devices and/or electrical equipment.

#### 3.5 Crisis Costs

means any reasonable and necessary professional fees, costs and expenses of any accredited counsellor or tax advisor retained by an Insured Person with Our prior written consent (such consent not to be unreasonably withheld) where:

- 3.5.1 there is implicit risk to such Insured Person's livelihood as a consequence of adverse publicity or media attention, and
- 3.5.2 there is an allegation of a Wrongful Act, an Extradition Proceeding, or a Formal Investigation.

### 3.6 Defence Costs

means the reasonable legal expenses and legal costs incurred by an Insured Person with Our written consent (such consent not to be unreasonably withheld) to defend or appeal a Claim and which the Insured Person is obligated to pay. This includes the cost of an appeal bond but without the obligation to apply for and furnish any such bond. Defence Costs are part of and not in addition to the Indemnity Limit. Defence Costs does not include wages, salaries or other remuneration.

### 3.7 Employment Benefits

includes but is not limited to:

- 3.7.1 severance or redundancy payments or entitlements;
- 3.7.2 any benefit, payment or entitlement of any kind in respect of paid or unpaid leave;
- 3.7.3 bonus or incentive payments, or any entitlement or right under a bonus or incentive plan (which, for the avoidance of doubt, does not include any payments, entitlement or right under any commission scheme);
- 3.7.4 non-monetary benefits including but not limited to the allocation of a company car, travel allowance, mobile or landline telephone, medical or life insurance expenses, education and training allowances, and equipment allowances;
- 3.7.5 stock, shares, stock options, share options or any entitlement or right under any employee plan of any description, or participation in any stock, share option or share option plan, or participation in any employee plan of any description;
- 3.7.6 payments or contributions in respect of any provident, benefit, superannuation, pension or retirement fund, or any other account, fund, scheme or plan intended to provide benefits, in whole or in part, at retirement or a particular age, or on the happening of a particular event; or
- 3.7.7 any amount the Company pays or is ordered to pay pursuant to any determination or settlement in respect of an allegedly unfair contract, notwithstanding that it acted in accordance with the terms of the employment contract.

### 3.8 Employment Practices Breach

means any actual or alleged:

- 3.8.1 unfair or wrongful dismissal, termination or discharge of employment, either actual or constructive;
- 3.8.2 harassment including bullying; discrimination;
- 3.8.3 retaliation, including lockouts;
- 3.8.4 employment related misrepresentations to an employee or applicant for employment;
- 3.8.5 employment related humiliation, defamation or invasion of privacy, denial of natural justice;
- 3.8.6 wrongful failure to employ or promote;
- 3.8.7 wrongful deprivation of career opportunity;
- 3.8.8 failure to provide accurate references;
- 3.8.9 negligent evaluation or unfair discipline;
- 3.8.10 wrongful failure to grant tenure;
- 3.8.11 failure to comply with employment policies or procedures; or
- 3.8.12 breach of statutory, equitable or common law duty;
- 3.8.13 solely relating to any past, present or prospective employee of the Company or Outside Entity.
- 3.8.14 Employment Practices Breach does not include any actual or alleged unfair contract of employment.

### **3.9 Extradition Proceeding**

means:

- 3.9.1 any request for extradition of any Insured Person, any warrant for arrest in respect of any Insured Person or other proceeding under the provisions of the Extradition Act 1988 (Cth); or
- 3.9.2 any associated appeal including but not limited to the pursuit of judicial review proceedings against the decision of the Attorney General or another appropriately authorised representative of the Australian Government to issue a surrender warrant under the Extradition Act 1988 (Cth); or
- 3.9.3 the equivalent of the above in any other jurisdiction.

### **3.10 Formal Investigation**

Means an official investigation, official examination or official inquiry including royal commission, in relation to the conduct of an Insured Person, or in relation to the business or activities of the Company for which the notice or process compelling attendance of an Insured Person is first served during the Period of Insurance. It is not necessary that a Wrongful Act be alleged against the Insured Person.

### **3.11 Indemnity Limit**

means the aggregate limit of liability stated in in the Policy schedule.

### **3.12 Insured**

means the Company and Insured Persons.

### **3.13 Insured Person**

means a natural person who was, now is or becomes during the Period of Insurance:

- 3.13.1 a director, Officer, manager or trustee of the Company or the equivalent in any other jurisdiction;
- 3.13.2 an employee of the Company;
- 3.13.3 a de facto or shadow director in their capacity or solely by reason of their status as such.

Insured Person shall not include any auditor, trustee, receiver, receiver and manager, liquidator, administrator, mortgagee in possession or the like, or their respective employees.

### **3.14 Legal Representation Expenses**

means the reasonable legal costs and expenses (not including wages, salaries or other remuneration), for which an Insured Person is legally liable and which are incurred, with Our prior consent (which shall not be unreasonably delayed or withheld), for legal representation at any legally compelled attendance at a Formal Investigation. Including but not limited to legal costs and expenses related to a raid or on-site visit to the Company by any official government body or authority, regulator, governmental or administrative agency or any self-regulatory body in respect of such Formal Investigation.

### **3.15 Listed Human Disease**

means:

- 3.15.1 any disease identified or listed at any time as a human disease under the Biosecurity Act 2015 (Cth) or its current equivalent, as amended or replaced from time to time, or
- 3.15.2 any disease identified or listed in a state of emergency, public health emergency or pandemic declared by any

governmental authority or identified by the World Health Organisation or its current equivalent as amended or replaced;  
regardless of when the disease is so listed or identified.

### **3.16 Loss**

means:

- 3.16.1 damages, interest, settlements, compensation orders and judgments, including punitive damages not otherwise excluded;
- 3.16.2 Bail Bond Costs;
- 3.16.3 Pecuniary Penalties;
- 3.16.4 Defence Costs;
- 3.16.5 Public Relations Expenses;
- 3.16.6 Crisis Costs;
- 3.16.7 Legal Representation Expenses;

for which an Insured Person is legally liable resulting from a Claim. Loss does not include:

- a) fines and penalties, other than Pecuniary Penalties;
- b) taxes;
- c) punitive damages in respect of any Employment Practices Breach;
- d) the multiplied part of any multiple damages award;
- e) Employment Benefits;
- f) matters uninsurable under the law of Australia and New Zealand;
- g) amounts not covered due to Section 6.4 (Allocation); or
- h) costs and expenses related to any uncovered matter.

### **3.17 Non-Executive Director**

means a natural person who is a director of the Company but is not also an employee of the Company and does not have day to day responsibility for the management of the Company.

### **3.18 Officer**

means any natural person who:

- 3.18.1 is a company secretary; or
- 3.18.2 is concerned in, or takes part in, the management of the Company whether or not that person is a director; or
- 3.18.3 makes or participates in making, decisions that affect the whole or a substantial part of the business of the Company; or
- 3.18.4 in their role within the Company has the capacity to affect significantly the Company's financial standing; or
- 3.18.5 is a contractor who acts as a member of a committee duly elected or appointed by resolution of the Board of Directors of the Company to perform specific, as distinguished from general, directorial acts on behalf of the Company.

### **3.19 Outside Entity**

means any:

3.19.1 non-profit organisation, trade association or registered charity under the laws of any jurisdiction, or

3.19.2 entity in which the Company has a 10% to 50% shareholding but which is not a Subsidiary; or

3.19.3 any entity listed in the outside entity endorsement (if any) attaching to and forming part of this Policy.

However, Outside Entity does not include any entity:

- a) whose head office is registered or domiciled in the United States of America or its territories, or
- b) which has any of its securities publicly traded on any stock exchange or market (including any over the counter market) in the United States of America or its territories, or
- c) which has negative net assets at the start of the Period of Insurance, or
- d) which is a bank, savings and loan institution, mortgage lender, insurance company, reinsurance company, hedge fund, mutual fund, unit trust or investment or fund manager, venture capitalist, private equity firm, pension provider or building society.

### **3.20 Pecuniary Penalties**

means any penalty which an Insured Person is ordered to pay pursuant to the laws of and in the jurisdictions of Australia or New Zealand, provided We are not legally prohibited from paying such penalty.

### **3.21 Policy**

means:

3.21.1 this insurance policy document;

3.21.2 any endorsements attaching to and forming part of this policy either at the commencement of the Period of Insurance or during the Period of Insurance; and

3.21.3 the schedule.

### **3.22 Period of Insurance**

means the period stated in the Policy schedule.

### **3.23 Pollutant**

means, but is not limited to, any solid, liquid, gaseous or thermal irritant or contaminant including smoke, vapour, soot, fumes, acids, alkalis, chemicals, any air emission, waste water, oil or oil products, infectious or medical waste, mould, or waste (which includes, but is not limited to, material to be recycled, reconditioned or reclaimed).

Pollutant shall not include any nuclear or radioactive materials, asbestos or silica of any sort.

### **3.24 Pollution**

means the actual, alleged or threatened discharge, release, escape, disposal of, or exposure to any Pollutant, or any request, direction or order that the Insured Person or Company tests for, monitors, cleans up, removes, contains, treats, detoxifies, neutralises or in any way responds to or assesses the effect of any Pollutant, or any voluntary decision or omission to do so.

### **3.25 Public Relations Expenses**

means the reasonable and necessary fees and related expenses of a public relations firm or consultant, crisis management firm or law firm, which the Insured Person may engage with Our written consent, (such consent not to be unreasonably withheld) in order to:

- 3.25.1 prevent or limit adverse effects or negative publicity which it is anticipated may arise from any Claim, or
- 3.25.2 disseminate to the public any resolution of a Claim, including the findings of a final adjudication in favour of the Insured Person or Company.

### **3.26 Securities**

means any security representing share capital, equity or debt instrument of the Company

### **3.27 Securities Claim**

means a Claim made against an Insured Person that is brought:

- 3.27.1 by any person or entity arising out of, based upon or attributable to the purchase or sale or offer or solicitation of an offer to purchase or sell any Securities of the Company,
- 3.27.2 by a holder of Securities of the Company with respect to such holder's interest in Securities of the Company,
- 3.27.3 derivatively on behalf of the Company by a holder of Securities of the Company.

### **3.28 Social Engineering Fraud**

means any fraudulent or dishonest instruction to the Insured or its agents which purports to be from a legitimate or trusted source authorised to make such instruction and which results in the Insured:

- 3.28.1 transferring, paying or delivering any money or securities from an account maintained by the insured to another person or entity;
- 3.28.2 transferring or delivering any property maintained by the insured to another person or entity;
- 3.28.3 revealing confidential information; or
- 3.28.4 changing or altering bank account or payment details of any person or entity.

### **3.29 Subsidiary**

means any entity in respect of which the Company, at the commencement of the Policy Period:

- 3.29.1 controls the composition of the board of Directors, or
- 3.29.2 controls more than half the voting power, or
- 3.29.3 holds more than half of the issued share capital, or
- 3.29.4 any joint venture or entity over which the Company directly or indirectly exercises management control.

In relation to any Subsidiary that is sold, dissolved or otherwise disposed of prior to the expiration of the Period of Insurance, this Policy does not provide cover in respect of any Wrongful Act or conduct occurring after the sale, disposal or dissolution of such Subsidiary.



**3.30 Takeover, Merger or Administration**

means

- 3.30.1 any sale of the Company or its merger with or acquisition by another entity such that the Company is not the surviving entity;
- 3.30.2 the acquisition by any entity or person or group of entities or persons of 50% (fifty percent) or more of the issued share capital of the Company;
- 3.30.3 a change in the majority or the board of directors;
- 3.30.4 the acquisition of the assets of the Company by another entity or person, or group of entities or persons acting in concert; or
- 3.30.5 an administrator, receiver, liquidator being appointed voluntarily or otherwise.

**3.31 We, Us, Our**

means Berkley Insurance Company (trading as Berkley Insurance Australia) ABN 53 126 559 706.

**3.32 Wrongful Act**

means any actual or alleged error, misstatement, misleading statement, act, omission, neglect, breach of trust, breach of duty, or Employment Practices Breach committed or attempted by an Insured Person in their capacity as such or by reason of their status as such.

## 4. Exclusions

We are not liable to pay any Loss:

### 4.1 Bodily Injury and/or Property Damage

arising from any Claim for any actual or alleged bodily injury, death, sickness, disease, emotional distress, mental anguish, injury, or damage to or destruction of any tangible property including loss of use.

This exclusion shall not apply to an Employment Practices Breach, nor shall it apply to Defence Costs, or Legal Representation Expenses, in respect of any alleged breach of occupation health and safety legislation.

### 4.2 Illegal Profits and/or Deliberate Acts

directly or indirectly caused by, arising out of or in any way connected with:

4.2.1 any Insured Person committing or permitting any criminal, dishonest, fraudulent or malicious act; or

4.2.2 any Insured Person committing or permitting any wilful breach of duty; or

4.2.3 any Insured Person or the Company gaining in fact any personal profit or advantage or receiving any remuneration to which they were not legally entitled; or

4.2.4 any Insured Person having been improperly involved in any securities transaction by using information that was not available to other sellers or purchasers of such securities.

This Exclusion only applies in the event that the foregoing conduct is established by final adjudication by a court or tribunal or by formal written admission by such Insured Person.

### 4.3 Insured v Insured Claims

arising from any Claim brought by or on behalf of any Insured Person or the Company, however this exclusion shall not apply to any:

4.3.1 Claim instigated by a shareholder, or group of shareholders, of the Company without the solicitation, participation or assistance of any Insured Person or the Company;

4.3.2 Claim for an Employment Practice Breach;

4.3.3 Claim that is in the form of a cross claim, third-party claim or otherwise for contribution or indemnity which is part of and results directly from a Claim which is not otherwise excluded under this Policy;

4.3.4 Claim brought or maintained by a liquidator, administrative receiver or receiver either directly or derivatively on behalf of the Company without the solicitation, participation or assistance of any Insured Person or the Company;

4.3.5 Claim brought or maintained by any former director or officer of the Company;

4.3.6 Defence Costs; or

4.3.7 Claim instigated by a shareholder or group of shareholders of the Company without the solicitation, participation or assistance of the Insured Person or the Company.

### 4.4 Pollution

directly or indirectly caused by, arising out of or in any way connected with Pollution, however provided that such Claim is brought or maintained entirely outside of, and not subject to the laws of the United States of America or Canada or any territories or possessions thereof, this exclusion shall not apply to Pollution Defence Costs or any Claim instigated by any shareholder or group of shareholders of the Company whether in his/her own right or in the name of the Company without the solicitation, participation or assistance of the Insured Person or the Company.

#### **4.5 Prior Claims and Circumstances**

directly or indirectly caused by, arising out of or in any way connected with:

- 4.5.1 any Claim, investigation, litigation or proceeding threatened, intimated, in existence or commenced against the Company or Insured Persons before Period of Insurance, or
- 4.5.2 any Claim arising from the same or essentially the same cause as any Claim, investigation, litigation or proceeding threatened, intimated, in existence or commenced against the Company or Insured Persons before the commencement of the Period of Insurance, or
- 4.5.3 any Claim that arises out of any fact, circumstance, act, omission or claim which, prior to the commencement of the Period of Insurance, an Insured Person is aware may result in or could reasonably be expected to result in a Claim, or
- 4.5.4 any Claim, circumstance or any investigation of which notice has been given, or which prior to the commencement of the Period of Insurance, an Insured Person was aware may result in, or could reasonably be expected to result in, a Claim or investigation, under any policy existing or expired before or on the inception date of this Policy or which was included on the proposal form.

For the purpose of this exclusion, the term 'litigation or proceeding' shall include, but not be limited to, any civil or criminal proceeding as well as any administrative or regulatory proceeding or official investigation or arbitration or adjudication.

#### **4.6 Professional Services**

directly or indirectly caused by, arising out of or in any way connected with any actual or alleged for any act, error or omission allegedly committed in connection with the provision of, or agreement to provide, professional services to a third party.

This Exclusion does not apply to an alleged failure of an Insured Person to supervise an employee of the Company in their capacity as an Insured Person.

#### **4.7 Listed Human Disease**

arising from any Claim for any actual or alleged liability directly or indirectly arising out of, related to, or in connection with a Listed Human Disease or any directly or indirectly related condition or threat or fear thereof (whether actual or perceived).

#### **4.8 Cyber Liability and Social Engineering Fraud**

arising from any Claim for any actual or alleged liability directly or indirectly arising out of, related to, or in connection with

- 4.8.1 the unauthorised access to or use of any Computer System owned, operated by or licensed to the Insured; or
- 4.8.2 Social Engineering Fraud.

#### **4.9 Securities Claim**

arising from any Claim for any actual or alleged liability directly or indirectly arising out of, related to, or in connection with any Securities Claim.

#### **4.10 Insolvency or Administration**

4.10.1 arising directly or indirectly from or in connection with one or more of the following:

- a) any act, error or omission of any Insured which is alleged to have led to or caused, directly or indirectly, wholly or in part the Company being unable to pay any or all of their debts as and when they fall due;
- b) the Company having sustained financial loss due, directly or indirectly, wholly or in part to any act, error or omission of any Insured, but only if such Claim is made or commenced after:
  - i) an order being made for the winding up of the Company;
  - ii) the appointment to the Company of a liquidator, receiver, administrator or an administrative receiver or a trustee in bankruptcy or, in the case of a voluntary arrangement, a nominee or a supervisor;
  - iii) a proposal being made by or to the Company, or by or to its creditors, of a composition of debts or scheme of arrangement to be conducted under the supervision of an insolvency practitioner, either as a nominee or otherwise; or

4.10.2 alleging, arising directly or indirectly from or in connection with:

- a) any Claim brought by or on behalf of any liquidator, receiver or administrator of the Company; or
- b) any Claim brought by or on behalf of any creditor or debt holder of the Company alleging, arising out of or in connection with the Company being unable to pay any or all of its debts as and when they fall due.

4.10.3 in any way whatsoever relating to the solvency or insolvency of the Company.

#### **4.11 Major Shareholder**

arising from any Claim brought by any person or entity holding beneficially or otherwise or in control of more than 20% (twenty percent) of the issued share capital of the Insured at the time of the Wrongful Act, whether such Claim is made in the name of the Insured or not.

#### **4.12 Securities Offering**

arising directly or indirectly from or in connection with the actual or alleged public sale, private sale, offer to sell, offer to purchase or offer to distribute Securities in the Insured or any Subsidiary.

#### **4.13 USA / Canada**

4.13.1 arising from Wrongful Acts committed in the Dominion of Canada and the United States of America, and their territories and protectorates.

4.13.2 arising from any Claim brought in the Dominion of Canada and the United States of America, and their territories and protectorates, or

4.13.3 arising out of the enforcement of any judgment, order or award obtained within or determined pursuant to the laws of the Dominion of Canada or the United States of America, and their territories and protectorates.

#### **4.14 War and Terrorism**

arising directly or indirectly from or in connection with:

4.14.1 war, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, riot;

4.14.2 civil commotion assuming the proportions of or amounting to an uprising;

4.14.3 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;

4.14.4 any act or acts of terrorism, force or violence for political, religious or other ends directed towards the overthrowing or influencing of the government, or for the purpose of putting the public in fear, by any person or persons acting alone or on behalf of or in connection with any organisation; or

4.14.5 any action taken in controlling, preventing, suppressing or in any way relating to 4.15.1 - 4.15.4 above.

**4.15 Sanction**

where such payment would be in violation of any sanction, prohibition or restriction with which We are legally obligated to comply.

## 5. Indemnity Limit

### 5.1 Aggregate Indemnity Limit

The Indemnity Limit in the Policy schedule is the aggregate limit of Our liability for all Loss under this Policy, other than in respect of payments for Loss in accordance with Section 2.7 (Non- Executive Director's Additional Limit).

The Indemnity Limit is not increased or reinstated when the Non-Renewal Discovery Period, if purchased, or Retired Directors and Officers cover, is in operation. Any cover under those Extensions is part of and not in addition to the Indemnity Limit.

### 5.2 Sub-limits

Any sub-limit specified in this Policy shall be Our maximum aggregate liability under any cover which is subject to a sub-limit, irrespective of the number of claims, the amount claimed or the number of Insured Persons named in any Claim. Any sub-limit shall be part of and not in addition to the aggregate Indemnity Limit shown in the Policy schedule.

### 5.3 Excess

We shall only be liable to pay Loss in excess of the Excess amount stated in the Policy schedule which applies to each and every Claim. This Excess is to be borne by the Company and is not to be insured.

No Excess shall apply to any Loss where the Company is prevented by law or financial impairment from indemnifying the Insured Person.

## 6. Claims and Notice Provisions

### 6.1 Notice of Claim or Formal Investigation

The Insured shall, as a condition precedent to Our liability, give notice to Us in writing of any Claim or Formal Investigation as soon as reasonably possible and in any event within 30 days of the end of the Period of Insurance.

Notice of any claim will be provided in writing to:

National Head of Claims

australiaclaims@berkleyinaus.com.au

Berkley Insurance Australia

PO Box Q296

QVB NSW 1230

### 6.2 Defence of Claims

It is a condition precedent to Our liability that in the event of a claim notification which might reasonably be expected to give rise to a Claim:

6.2.1 the Insured Person and the Company shall give Us such information and co-operation as We may reasonably require;

6.2.2 that neither the Insured Person nor the Company shall admit liability for, or attempt to settle any Claim, or incur any Defence Costs or Legal Representation Expenses, without Our prior written consent; and

6.2.3 that neither the Insured Person nor the Company shall take any action which will or might prejudice Us with respect to any Claim or Loss covered or potentially covered by this policy.

### 6.3 Contest of Claims

6.3.1 An Insured Person shall not be required to contest any legal proceedings unless counsel (to be mutually agreed upon by the Insured Person, the Company and Us) shall advise that such proceedings should be contested.

6.3.2 We shall be entitled to nominate a solicitor and, if appropriate a barrister, to represent the Insured Person.

### 6.4 Allocation

Where, between any Insured Person and any other person or the Company, any loss amount has been jointly or jointly and severally incurred, Our liability under this policy is limited to the proportion which represents a fair and equitable allocation between the Insured Person and those other persons or the Company, taking into account the relative legal and financial exposures of, and the relative benefits obtained by, the Insured Persons and those other persons or the Company.

Where any amount is incurred in respect of any Claim which arises from both covered matters and matters not covered by this policy, Our liability is limited to the proportion which represents a fair and equitable allocation between any Company, the Insured Person and Us, taking into account the relative legal and financial exposures attributable to covered matters and matters not covered under this policy.

If We and the Insured Person cannot agree on an allocation between covered and uncovered amounts and/or parties, the matter shall be submitted to binding opinion from a Senior Counsel agreed between the parties or, failing agreement, appointed by the President of the Law Society of the State or Territory in which this policy is issued.

#### **6.5 Multiple Claims**

Two or more Claims arising out of a Wrongful Act or a series of related Wrongful Acts will be treated as a single Claim. All such Claims will be treated as if first made at the time the earliest Claim was made. Any such Claims will be treated as a single Claim for the purpose of applying the Indemnity Limit and Excess.



## 7. General Conditions

The following general conditions apply to this Policy

### 7.1 Severability

No statements made, nor any information or knowledge possessed by an Insured Person when applying to Us for this insurance, nor conduct of an Insured Person falling within Exclusion 4.2 (Illegal Profits and/or Deliberate Acts) shall be imputed by Us to any other Insured Person.

### 7.2 Other Insurance and Non-Accumulation

To the extent permitted by the Insurance Contracts Act 1984, this Policy will only cover Loss to the extent that the amount of such Loss is in excess of any indemnity or cover available to the Insured Person in respect of that Loss under any other policy entered into by the Insured Person or the Company.

To the extent permitted by the Insurance Contracts Act 1984, this Policy will only cover Loss to the extent that the amount of such Loss is in excess of any indemnity or cover available to the Insured Person in respect of that Loss under any other policy effected on behalf of the Insured Person or under which the Insured Person is a beneficiary (but not a policy to which the preceding paragraph applies).

Neither of the two paragraphs immediately above applies to such other insurance that is written only as specific excess insurance over the Indemnity Limit provided in this Policy.

If such other insurance is provided by the Insurer, or any other member company, associate or affiliate of the Insurer and it covers a Loss covered by this Policy in respect of a Claim or Formal Investigation, the Limit of Liability under this Policy in respect of that Claim or Formal Investigation shall be reduced by any amount paid by the Insurer (or member company, associate or affiliate of the Insurer) under such other insurance.

### 7.3 Order of Payments

If We are liable to make any payment for Loss covered by the provisions of this Policy, then such payments under the Policy will be made in the following order:

- 7.3.1 first, payment of Loss for which cover is provided under Insuring Clauses 1.1 (Directors & Officers Liability) and 1.3.1 (Legal Representation Expenses) of this Policy
- 7.3.2 second, and only after payment of Loss has been made pursuant to paragraph 7.3.1 above, with respect to whatever remaining amount of the Indemnity Limit is available after such payment, at the written request of the chief executive officer of the Company, either pay or withhold payment of such other Loss for which cover is provided under Insuring Clauses 1.2 and the reimbursable cover under 1.3.2 of this Policy.

Except as otherwise provided above, We may make payment in the order that the request for payments is received by Us.

### 7.4 Assignment of Interest

Assignment of interest under this Policy shall not bind Us unless Our consent to such assignment is endorsed to this Policy.

### 7.5 Takeover, Merger or Administration

In the event of a Takeover, Merger or Administration any coverage hereunder shall apply only to Wrongful Acts committed prior to the date of such Takeover, Merger or Administration.

## **7.6 Alteration to Risk**

The Insured must notify Us as soon as practicable of any material alteration to the risk during the Period of Insurance including but not limited to:

- 7.6.1 the Company going into voluntary bankruptcy, receivership, liquidation or any other form of external administration or the Company failing to pay debts or breaching any other obligation which could give rise to the appointment of a receiver or bankruptcy or winding-up proceedings; and
- 7.6.2 any material change to the nature of the activities undertaken by the Company.

Where the Insured fails to notify Us as required under this clause or there is any material alteration to the risk during the Policy Period, We may be entitled to cancel this policy in accordance with the Insurance Contracts Act 1984 (Cth).

Where such notice is not provided by the Insured before the happening of a Claim or a notification giving rise to a Claim under this Policy, We may refuse to pay a Claim either in whole or in part or We may reduce our liability to pay a Claim in accordance with the Insurance Contracts Act 1984 (Cth).

## **7.7 Subrogation and Recovery**

If We make a payment under this policy, We are subrogated to the Insured Person's rights and/or the Company's rights. Neither the Insured Person nor the Company shall do anything to prejudice Our ability to assert such subrogation rights.

## **7.8 Notices to The Company**

Any notices to the Company under this Policy shall be provided to the Company at the last known address and to the Company's insurance agent or broker.

## **7.9 Changes**

Notice to or knowledge possessed by any agent or other person acting on behalf of Us shall not effect a waiver or a change in any part of this Policy or stop Us from asserting any right under the provisions of this Policy, nor shall the provisions be waived or changed except by written endorsement issued to form a part of this Policy.

## **7.10 Company Authorisation**

With the exception of Extension 2.8 (Non-Executive Directors' Additional Limit), the Insured Person and the Company agree that the Company will act on behalf of all Insured Persons and the Company with respect to this Policy.

## **7.11 Interpretations**

In this Policy:

- 7.11.1 descriptions in the headings are solely for convenience, and form no part of the terms and conditions of coverage, apart from the titles in section 3. Definitions, and
- 7.11.2 singular includes the plural and vice versa, and
- 7.11.3 references to specific legislation include amendments to, and re-enactments of, such legislation and similar legislation in any jurisdiction in which a Claim is made.

#### **7.12 Governing Law and Jurisdiction**

This Policy shall be governed by and interpreted in accordance with the laws of the Commonwealth of Australia and the State or Territory of Our office in which the Policy was issued. The courts of that State or Territory have exclusive jurisdiction in relation to any disputes regarding the interpretation of this Policy.

#### **7.13 Presumptive Indemnification**

If the Company is permitted or required by law to indemnify, or is not prevented by law from indemnifying, an Insured Person for Loss but fails or refuses to, other than due to insolvency or bankruptcy, indemnify an Insured Person, then We shall pay such Loss on behalf of said Insured Person. In such event any applicable Excess shall be paid by the Company to Us.

#### **7.14 Confidentiality**

The Insured Person and the Company must not disclose the terms, the nature or the Indemnity Limit or the premium payable under this Policy, to any third party, including disclosure in the Company's annual report, except where:

7.14.1 We provide written consent; or

7.14.2 disclosure is required by law.