



# ITOP's

## Information Technology Organisations & Professionals Liability Wording

Wording Document

### Your Award Winning Insurer



## Information Technology Organisations and Professionals

### Liability Insurance

#### 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.

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 Policy

Section 2 of this policy provides Professional Indemnity insurance on a "Claims Made" basis. This means that the policy covers you for Claims made against you 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, the Insurer 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)

Web site: [www.berkleyinaus.com.au](http://www.berkleyinaus.com.au)

# Information Technology Organisations and Professionals

## Liability Insurance

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## **ITOP's**

### **Liability Insurance**

#### **1. Section 1 - Preamble**

Upon the basis of the information contained in the Proposal submitted by the Insured and in consideration of the Insured having agreed to pay the premium shown in the Schedule, We agree to indemnify the Insured subject to the terms, conditions, exclusions and limitations of this policy.

## 2. Section 2 - Professional Indemnity

This is a claims made section of the insurance policy.

### 2.1. Insuring Clause

We will indemnify the Insured, up to the Indemnity Limit, against civil liability for compensation including the claimant's legal costs and expenses arising from any Claim first made against the Insured during the Policy Period arising out of the supply or provision of Information Technology Services or Information Technology Products in the conduct of the Insured Business.

### 2.2. Defence Costs

We will indemnify the Insured for Defence Costs where such costs have been incurred with Our prior written consent (such consent not to be unreasonably withheld or unreasonably delayed).

If the Schedule states that the Defence Costs are "inclusive" then Defence Costs are part of the Indemnity Limit and will not be payable in addition to the Indemnity Limit.

If the Schedule states that the Defence Costs are "in addition" then Defence Costs are payable in addition to the Indemnity Limit, PROVIDED ALWAYS THAT if the Insured's liability for any Claim is for an amount in excess of the amount of the Indemnity Limit, then Our liability for such Defence Costs will be in the same proportion as the Indemnity Limit bears to the sum required to dispose of that Claim including the claimant's legal costs and expenses.

### 2.3. Automatic Extensions

We will provide cover under the following clauses 2.3.1 – 2.3.26 ("Automatic Extension"), PROVIDED ALWAYS THAT:

- a. the cover provided by each clause is subject to the Schedule, Insuring Clause 2.1, Claims Conditions, General Conditions, Exclusions, Definitions and Interpretations and any other terms of the policy (unless otherwise expressly stated); and
- b. the inclusion of any Automatic Extension will not increase the Indemnity Limit. Where a sub-limit is stated in respect of any Automatic Extension, such sub-limit shall form part of and not be in addition to the Indemnity Limit.

#### 2.3.1. Advancement of Defence Costs

We will, to the fullest extent permissible by law and subject to the Indemnity Limit and any applicable Excess, advance Defence Costs in accordance with clause 2.2 as and when they are incurred prior to final resolution of a Claim, PROVIDED ALWAYS THAT:

- a. We have provided Our prior written consent to incur such Defence Costs; and
- b. any Defence Costs that are paid by Us will be repayable by the Insured if it is ultimately determined that the Insured was not entitled to payment of such Defence Costs.

#### 2.3.2. Emergency Defence Costs

We will indemnify the Insured for any Defence Costs which are incurred pursuant to clause 2.2, prior to obtaining Our consent, PROVIDED ALWAYS THAT:

- a. such Defence Costs are incurred as a result of a sudden, urgent and unexpected

- occurrence or occasion requiring immediate action and it would not be considered reasonable in such a situation to obtain Our consent to the incurring of Defence Costs;
- b. Our written consent is obtained within thirty (30) days of the first of such Defence Costs being incurred;
  - c. We will only indemnify the Insured for that part of the Insured's liability in respect of such Defence Costs incurred above the Excess regardless of whether the Excess is Defence Costs exclusive; and
  - d. if We subsequently refuse to indemnify the Claim to which the Defence Costs relate, the Insured must reimburse Us for any Defence Costs that We have paid.
- The maximum aggregate amount payable under this extension is \$100,000.

### **2.3.3. Competition and Consumer Act and other Legislation**

We will provide cover for any Claim which arises out of conduct in contravention of the Competition and Consumer Act 2010 (Cth), Australian Securities and Investments Commission Act 2001 (Cth), Corporations Act 2001 (Cth), National Consumer Credit Protection Act 2009 (Cth), Fair Trading Act 1986 (New Zealand), or any similar legislation enacted for the protection of consumers within any Australian jurisdiction including any amendment, consolidation or re-enactment of such legislation but only where such conduct:

- a. constitutes a contravention of such statute because it:
  - i. is misleading or deceptive or likely to mislead or deceive;
  - ii. is the making of a false or misleading representation;
  - iii. is unconscionable; or
  - iv. is in breach of a warranty implied into a contract for the provision of services by any of the above Acts; and
- b. is not intentional.

### **2.3.4. Loss of or Damage to Documents and Data**

We will indemnify the Insured for reasonable and necessary costs and expenses incurred by the Insured (although not the Insured's own time) in replacing, restoring or reconstituting Documents and Data due to an unintentional physical loss or destruction of or damage to such Documents and Data that are the property of the Insured or are in the Insured's care, custody or control in the supply or provision of Information Technology Services or Information Technology Products in conduct of the Insured Business where such loss or damage is discovered and is notified to Us during the Policy Period.

The cover provided by this extension is not subject to Exclusion 6.22.

### **2.3.5. Dishonesty of Insured Persons**

We will indemnify the Insured for any Claim brought about, or contributed to, by any dishonest, fraudulent, criminal or malicious act or omission of any Insured person, PROVIDED ALWAYS THAT:

- a. We will not indemnify the Insured in respect of any loss sustained in consequence of any act or omission occurring after the date of discovery of, or the reasonable cause for suspicion of, dishonest or fraudulent conduct on the part of the person concerned;



- b. We will not indemnify the Insured in respect of any loss of negotiable instruments, bearer bonds or coupons, stamps, coins, bank or currency notes;
- c. We will not indemnify any person committing or condoning such dishonest, fraudulent, criminal or malicious act or omission;
- d. We will not indemnify the Named Insured where any person committing or condoning such dishonest, fraudulent, criminal or malicious act or omission is a sole principal or director of the Named Insured;
- e. We will not indemnify the Named Insured where all principals, partners or directors of the Named Insured are persons committing or condoning such dishonest, fraudulent, criminal or malicious act or omission;
- f. the Insured will, at Our request and expense take all reasonable steps to obtain reimbursement from any person committing or condoning such dishonest, fraudulent, criminal or malicious act or omission;
- g. We will deduct from any amount payable under this extension any monies which but for such dishonest, fraudulent, criminal or malicious act or omission would be due from the Insured to the person committing such act, or any monies held by the Insured and belonging to such person;
- h. We will only be liable to indemnify the Named Insured for the balance of loss sustained in excess of the amounts recoverable from the person(s) committing such dishonest, fraudulent, criminal or malicious act or omission or their estates or legal personal representatives;
- i. Dual Sign Off was required for any withdrawal of funds from any bank or trust account operated by the Insured at the time the dishonest or fraudulent act or omission occurred;
- j. if the dishonest or fraudulent act or omission is in connection with a trust account then the Insured's trust account must have been independently audited on an annual basis at the time of the dishonest or fraudulent act or omission; and
- k. nothing herein will preclude Us from exercising any right of subrogation against any person committing or condoning such dishonest, fraudulent, criminal or malicious act or omission.

"Dual Sign-Off" in this extension means that any cheque payment or electronic money transfer receives prior approval by at least two approved signatories; and that the person reconciling the Insured's bank statements is a different person to the one that operates those bank accounts.

The cover provided by this extension is not subject to Exclusion 6.15.

#### **2.3.6. Intellectual Property Rights**

We will indemnify the Insured for any Claim against the Insured in respect of any unintentional infringement of an Intellectual Property Right of a Third Party including any Claim made by a Third Party Licensee to whom the Insured has licensed the Insured's Information Technology Services or Information Technology Products and provided a warranty or indemnity in respect of the Insured's ownership and/ or permission to license Intellectual Property Rights.

The cover provided by this extension is not subject to Exclusion 6.29.

**2.3.7. Contractual Liability**

We will indemnify the Insured for any Claim against the Insured in respect of any Contractual Liability in the supply or provision of Information Technology Services or Information Technology Products in the conduct of the Insured Business.

Note: Exclusion 6.12 limits the cover provided for Contractual Liability in certain circumstances.

**2.3.8. Indemnity / Hold Harmless Agreements**

We will indemnify the Insured for any Claim for civil liability arising from the supply or provision of Information Technology Services or Information Technology Products in the conduct of the Insured Business, where the Insured has agreed to an indemnity or hold harmless provision of a contract with their client or customer, PROVIDED ALWAYS THAT We will not indemnify the Insured in respect of any:

- a. indemnity or hold harmless provisions of a contract with their contractors, sub-contractors or consultants; or
- b. contractual term or agreement to pay liquidated damages or any penalty.

**2.3.9. Defamation, Libel and Slander**

We will indemnify the Insured for any Claim made as a direct consequence of any inadvertent defamation, libel or slander by the Insured arising out of the supply or provision of Information Technology Services or Information Technology Products in the conduct of the Insured Business.

Notwithstanding Exclusion 6.3, the cover provided by this extension includes any civil liability to pay punitive or exemplary damages in the Commonwealth of Australia or New Zealand.

**2.3.10. Fiduciary Duty**

We will indemnify the Insured for any Claim in direct consequence of a breach of fiduciary duty owed by the Insured to a client or customer of the Named Insured.

**2.3.11. Fines and Penalties**

We will indemnify the Insured for Fines or Penalties arising from any Claim first made against the Insured during the Policy Period, PROVIDED ALWAYS THAT:

- a. the conduct giving rise to the Claim was not intentional, wilful, reckless or deliberate;
- b. indemnification is permitted at law;
- c. We will not indemnify the Insured for Fines and Penalties imposed in connection with any requirement to pay taxes, rates, duties, levies, charges, fees or other revenue charge or impost.

The maximum aggregate amount payable under this extension is \$250,000 which is inclusive of Defence Costs.

The cover provided by this extension is not subject to Exclusion 6.3 a.

**2.3.12. Appointed Contractors, Consultants and Sub-Consultants**

- a. We will indemnify the Insured for any Claim against the Insured in respect of the Insured's civil liability directly arising out of any act, error or omission of any appointed Contractor,

Consultant or Sub-Consultant in the supply or provision of Information Technology Services or Information Technology Products in the conduct of the Insured Business.

- b. We will indemnify any Contractor, Consultant or Sub-Consultant of the Named Insured in accordance with the terms, conditions and exclusions applicable to Insuring Clause 2.1 for any Claim first made against such Contractor, Consultant or Sub-Consultant which arises out of the supply or provision of Information Technology Services or Information Technology Products by them on behalf of the Named Insured.

#### **2.3.13. Joint Venture/Consortium**

We will indemnify the Insured for:

- a. any Claim against the Insured arising out of the acts, errors or omissions of the Insured in the supply or provision of Information Technology Services or Information Technology Products in the conduct of the Insured Business as part of any joint venture; and
- b. the Insured's civil liability, to pay compensation, whether jointly or severally, arising from a Claim against any joint venture entity in respect of whose conduct the Insured is legally liable, PROVIDED ALWAYS THAT:
  - i. such conduct would have been covered by this policy if it had been the conduct of the Insured;
  - ii. such conduct occurred whilst the Named Insured was a member of the joint venture or consortium;
  - iii. the Named Insured has specifically declared in writing to Us, prior to entering into this policy (whether in response to a specific question in the Proposal form or otherwise), its membership of the joint venture or consortium together with the turnover/fees of the joint venture or consortium (not just the Insured's proportion); and
  - iv. We have specifically agreed in writing to cover the Insured's civil liability in respect of the joint venture.

#### **2.3.14. Claim Preparation Costs**

We will indemnify the Insured for reasonable and necessary costs and expenses incurred with Our prior written consent (not to be unreasonably withheld) for the preparation of any Claim that is covered under this policy.

The maximum aggregate amount payable under this extension is \$25,000, which is exclusive of Defence Costs.

#### **2.3.15. Costs of Court Attendance**

In the event of any of the under-mentioned persons attending court as a witness in connection with any Claim in respect of which the Insured is entitled to indemnity under this policy, We will pay to the Named Insured court attendance costs at the following rates per day for each day on which attendance is required:

- a. any principal, partner or director of the Named Insured - \$650.00; and
- b. any employee of the Named Insured - \$250.00.

#### **2.3.16. Public Relations Expenses**

Where a Claim has been made against the Insured for which cover is available under this policy (or where the Insured has notified facts which may give rise to a future Claim), and in the reasonable belief of the Insured the Insured's reputation has been or will be significantly impaired, then We will reimburse the Insured for any reasonable and necessary costs and expenses of a public relations consultant retained by the Insured with Our prior written consent to design and implement a reasonable and necessary publicity campaign approved by Us with the object of preventing or mitigating damage to the reputation of the Insured in consequence of such Claim or anticipated Claim.

We will not unreasonably withhold or unreasonably delay the consent or approval required by this extension.

The maximum aggregate amount payable under this extension is \$100,000. The Excess payable by the Insured is costs inclusive for any Claim made under this extension.

#### **2.3.17. Mitigation Costs**

We will indemnify the Insured for reasonable and necessary mitigation costs and expenses incurred or agreed to be incurred by the Insured;

- a. as a result of a reasonable and necessary action taken by the Insured to reduce the amount of any potential Claim that would be covered under this policy; and
- b. arising from a fact, matter or circumstance first discovered by the Insured during the Policy Period which might lead to a potential Claim that would be covered under this policy.

We will only indemnify the Insured under this extension where:

- i. such fact, matter or circumstance is notified to Us as soon as practicable upon being discovered by the Insured, during the Policy Period and prior to the Insured incurring any such mitigation costs or expenses;
- ii. no admission of liability (whether by word, conduct or otherwise) is made by the Insured;
- iii. We have given prior written consent (not to be unreasonably withheld or unreasonably delayed) to the incurring of, or agreement to incur, such mitigation costs or expenses;
- iv. We will not pay any costs or expenses incurred by the Insured in proving entitlement to coverage under this extension.
- v. The maximum aggregate amount payable under this extension is \$250,000 which is exclusive of Defence Costs.

#### **2.3.18. Fee Recovery**

We will pay to the Named Insured the outstanding professional fees for which the Insured has raised an invoice to their client when the client;

- a. has advised the Insured of their dissatisfaction with the supply or provision of Information Technology Services or Information Technology Products by the Insured; and
- b. refuses to pay the outstanding professional fees; and
- c. threatens to initiate a Claim against the Insured;

PROVIDED ALWAYS THAT in Our opinion payment of the outstanding professional fees would

prevent initiation of such a Claim.

The maximum aggregate amount payable under this extension is \$25,000 which is exclusive of Defence Costs. The Excess payable by the Insured under this extension is \$1,000.

**2.3.19. Inquiry Costs**

We will indemnify the Insured for the reasonable and necessary legal costs and expenses incurred with Our prior written consent (not to be unreasonably withheld or unreasonably delayed) for representation of the Insured at any regulatory inquiry, privacy inquiry, disciplinary proceeding or other proceedings (other than in respect of a Claim) that the Insured first became aware of and was first initiated during the Policy Period.

The maximum aggregate amount payable under this extension is \$250,000.

**2.3.20. Legal Panel**

The Insured may contact Us to access Our professional indemnity legal panel during business hours for one complimentary session of up to sixty (60) minutes of verbal advice in relation to matters which are covered under this policy.

In the event of a Claim arising from the matter We agree to the appointment of any of Our professional indemnity legal panel to act on the Insured's behalf in respect of any Claim notified to Us providing there is no existing or potential conflict of interest, in which case We will refer the Insured to another member of the panel.

**2.3.21. Continuous Coverage**

We will indemnify the Insured for any Claim arising from any fact, matter or circumstance known to the Insured, prior to the Policy Period, and which the Insured knew, or a reasonable person in the Insured's profession could, in the circumstances, be expected to know, might give rise to a Claim against the Insured, PROVIDED ALWAYS THAT:

- a. We were the professional indemnity insurer of the Insured when the Insured first became aware of such fact, matter or circumstance;
- b. We continued without interruption to be the professional indemnity insurer of the Insured from the time mentioned in paragraph 2.3.21 a. above up until the Policy Period;
- c. had We been notified by the Insured of such fact, matter or circumstance when the Named Insured first became aware of it, the Named Insured would have been covered under the policy in force at that time but is not now entitled to be covered by that policy because the Insured did not notify the fact, matter or circumstance;
- d. neither the Claim nor the fact, matter or circumstance has previously been notified to Us or to any other insurer;
- e. 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;
- f. 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 Policy Period;
- g. if the Insured was entitled to have given notice under any other policy of insurance not issued by Us and thereby have an entitlement to indemnity, in whole or in part, then this

Continuous Coverage extension does not apply; and the Indemnity Limit provided for any Claim covered by this extension is the lesser available under the terms of the policy in force at the earlier time referred to in paragraph 2.3.21.c above, or under this policy. The terms of this policy otherwise apply.

The cover provided by this extension is not subject to Exclusion 6.1 b.

#### **2.3.22. Extended Reporting Period**

In the event that this policy is not renewed then the cover provided by Insuring Clause 2.1 shall be extended to any Claim first made against the Insured and notified to Us within the Extended Reporting Period, PROVIDED ALWAYS THAT:

- a. cover afforded under this extension will not reinstate or increase the Indemnity Limit or extend the Policy Period; and
- b. cover afforded under this extension will only apply to an act, error or omission committed by the Insured prior to the end of the Policy Period.

“Extended Reporting Period” means the period commencing immediately following the end of the Policy Period and finishing sixty (60) days thereafter or when the Insured first effects another professional indemnity insurance policy (whichever is the earlier).

The cover provided by this extension does not apply if this policy is cancelled.

#### **2.3.23. Run-Off Cover**

We agree that, in the event of:

- a. the Named Insured entity ceasing to exist or operate or is consolidated with, merged into or acquired by any other entity; or
- b. the Named Insured going into voluntary bankruptcy, receivership, liquidation or any other form of external administration, or an Insured 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;

coverage under this policy will continue until the expiry of the Policy Period or cancellation of this policy, whichever is earlier, PROVIDED ALWAYS THAT such cover will only apply in respect of Claims arising out of acts, errors or omissions occurring prior to the date on which such event detailed in clause 2.3.23a or 2.23.2b occurred, unless agreed in writing by Us.

#### **2.3.24. Severability & Non-Imputation**

Where the Insured comprises more than one person or entity, any conduct on the part of an Insured whereby such Insured:

- a. failed to comply with the duty of disclosure in terms of the Insurance Contracts Act 1984 (Cth); or
- b. made a misrepresentation to Us before this contract of insurance was entered into; or
- c. failed to comply with any terms of this Policy;

will not prejudice the right of any other Insured to indemnity as may be provided by this policy.

The coverage provided under this extension shall only apply when:

- i. such other Insured is entirely innocent of and has no prior knowledge of any such conduct. The onus of proof in this regard will be upon such other Insured;

- ii. such other Insured will, as soon as is reasonably practicable upon becoming aware of any such conduct, advise Us in writing of all known facts in relation to such conduct; and
- iii. enquiry has been made by each Named Insured, before the contract of insurance was entered into of each other Named Insured and persons who make up the Insured for the purposes of complying with the duty of disclosure under the Insurance Contracts Act 1984 (Cth).

Note: This provision does not limit the duty of disclosure owed by the entities or persons that make up the Insured.

#### **2.3.25. Estates and Legal Representatives**

In the event of the death, mental disorder and/or other incapacity, insolvency or bankruptcy of the Insured, We will indemnify the estate, heirs, legal representatives or assignees of the Insured in respect of any civil liability of the Insured to the extent that the Insured would have been covered by Insuring Clause 2.1 and clause 2.2 if the Insured was alive, had capacity or was not insolvent or bankrupt PROVIDED ALWAYS THAT such persons will observe and be subject to all the terms conditions and exclusions of this policy insofar as they can apply.

#### **2.3.26. Reinstatement of the Indemnity Limit**

If the Indemnity Limit is partially reduced or exhausted by any Claim(s) and/or Defence Costs then We will reinstate the Indemnity Limit for any subsequent Claims covered by Insuring Clause 2.1 and Defence Costs covered by clause 2.2, PROVIDED ALWAYS THAT:

- a. such reinstatement shall only apply to subsequent Claims and Defence Costs that are totally unrelated or unconnected to the Claim(s) and/or Defence Costs that reduced or exhausted the Indemnity Limit; and
- b. We will be liable for no more than twice the Indemnity Limit in the aggregate in respect of all Claims and Defence Costs (other than Defence Costs which are stated to be "in addition" as per clause 2.2).

### **2.4. Optional Extensions**

We will provide coverage under clauses 2.4.1 – 2.4.4 ("Optional Extension"), PROVIDED ALWAYS THAT:

- a. each Optional Extension will only apply where it is specifically noted in the Schedule as included; and
- b. the cover provided by each Optional Extension is subject to the Schedule, Insuring Clause 2.1, Claims Conditions, General Conditions, Exclusions, Definitions and Interpretations and any other terms of the policy (unless otherwise expressly stated); and
- c. the inclusion of any Optional Extension will not increase the Indemnity Limit. Where a sub-limit is stated in respect of any Automatic Extension, such sub-limit shall form part of and not be in addition to the Indemnity Limit.

#### **2.4.1. Optional Extension - Fidelity**

We will indemnify the Named Insured for loss of money, negotiable instruments, bearer bonds or coupons, stamps, bank or currency notes belonging to the Named Insured or for which the Named

Insured is legally liable where any such loss is sustained in consequence of any dishonest or fraudulent act or omission of any Insured person, PROVIDED ALWAYS THAT:

- a. such loss is first discovered by the Named Insured during the Policy Period and is notified in writing to Us within twenty-eight (28) days of the date of such discovery (but never beyond the expiry date of the Policy Period);
- b. We will not indemnify the Named Insured for any loss sustained in consequence of any act or omission occurring after the date of discovery of, or the reasonable cause for suspicion of, dishonest or fraudulent conduct on the part of the person concerned;
- c. We will not indemnify any person committing or condoning such dishonest, fraudulent, criminal or malicious act or omission;
- d. the Named Insured will, at Our request and expense take all reasonable steps to obtain reimbursement from such person committing or condoning such dishonest, fraudulent, criminal or malicious act or omission;
- e. any monies which but for such dishonest, fraudulent, criminal or malicious act or omission would be due from the Named Insured to the person committing such act, or any monies held by the Named Insured and belonging to such person, will be deducted from any amount payable under this insurance;
- f. We will only indemnify the Named Insured for the balance of loss sustained in excess of the amounts recoverable from the person committing such dishonest, fraudulent, criminal or malicious act or omission or their estates or legal personal representatives;
- g. one cost inclusive Excess shall apply to each and every loss incurred by the Named Insured; and
- h. nothing herein will preclude Us from exercising any right of subrogation against any person committing or condoning such dishonest, fraudulent, criminal or malicious act or omission.

The maximum aggregate amount payable under this extension is \$50,000.

The cover provided by this extension is not subject to Insuring Clause 2.1 or Defence Costs 2.2 or Exclusions 6.15 and 6.11.

#### **2.4.2. Optional Extension - Extended Continuity Cover**

Where:

- a. a Named Insured held a professional indemnity insurance policy for a period of twelve (12) months immediately preceding this Policy Period (the Preceding Policy); and
- b. the Preceding Policy was issued by an insurance company which was fully authorised under the Insurance Act 1973;

then, for the purposes of Automatic Extension 2.3.21 "Continuous Coverage", We will treat the Preceding Policy as if it were a policy issued by Us.

#### **2.4.3. Optional Extension - Multi Year Run-Off**

In the event that, during the Policy Period, a Named Insured entity merges with or is taken over by another entity, or is sold or wound up, then We will make available to such Named Insured entity (and any person who is or was a principal, partner, director or employee of such Named Insured prior to the effective date of such merger, takeover, sale or winding up) an extension to



the Policy Period for a period of up to an additional six (6) years PROVIDED ALWAYS THAT:

- a. such Named Insured shall give Us written notice of such merger, takeover, sale or winding up as soon as reasonably practicable and during the Policy Period;
- b. Our offer to extend cover may be subject to such additional terms, conditions and premium as We may reasonably impose having regard to the nature of the risk to be assumed by Us;
- c. such extension of the Policy Period will not take effect until Our offer is accepted by such Named Insured; and
- d. such extension will only apply to Claims arising out of a breach of the supply or provision of Information Technology Services or Information Technology Products in the conduct of the Insured Business which occurred prior to the effective date of such merger, takeover, sale or winding up.

Note: The Indemnity Limit is not increased by this extension notwithstanding the extended Policy Period.

In the event the Insured does not accept the terms offered or the amount of any additional premium, the Insured may cancel the policy in accordance with clause 5.3.

#### **2.4.4. Optional Extension - Previous Business**

We will indemnify any principal, partner or officer of the Insured for a Claim first made against them during the Policy Period arising from the supply or provision of Information Technology Services or Information Technology Products prior to them joining the Insured, PROVIDED ALWAYS THAT;

- a. coverage is only provided where the principal, partner or officer's Previous Business is noted in the Schedule; and
- b. the principal, partner or officer does not have cover under any other insurance or indemnity.

### 3. Section 3 - Public and Products Liability

This is a claims occurrence section of the Policy.

#### 3.1. Insuring Clause

We will indemnify the Insured, up to the Indemnity Limit, against civil liability for compensation including the claimant's legal costs and expenses arising from any Claim for Bodily Injury and/or Property Damage occurring during the Policy Period arising out of the supply or provision of Information Technology Services or Information Technology Products, and/or caused by Information Technology Products supplied by the Insured in the conduct of the Insured Business.

#### 3.2. Defence Costs

- a. We will also pay, in addition to the Indemnity Limit, Defence Costs where such costs have been incurred with Our prior written consent, PROVIDED THAT We will not be obligated to pay any Defence Costs after the Indemnity Limit has been exhausted by payment of judgments or settlements.
- b. In the event of an Occurrence happening in the United States of America, Canada and/or their respective protectorates and territories, the Indemnity Limit shall be inclusive of Defence Costs, claimant's costs and expenses and will apply in the aggregate to all claims during the Period of Insurance.

#### 3.3. Automatic Extensions

We will provide coverage under clauses 3.3.1 – 3.3.16 ("Automatic Extension"), PROVIDED ALWAYS THAT:

- a. the cover provided by each Automatic Extension is subject to the Schedule, Insuring Clause 3.1, Claims Conditions, General Conditions, Exclusions, Definitions and Interpretations and any other terms of the policy (unless otherwise expressly stated); and
- b. the inclusion of any Automatic Extension will not increase the Indemnity Limit. Where a sub-limit is stated in respect of any Automatic Extension, such sub-limit shall form part of and not be in addition to the Indemnity Limit.

##### 3.3.1. Advancement of Defence Costs

We will, to the fullest extent permissible by law and subject to the Indemnity Limit and any applicable Excess, advance Defence Costs in accordance with clause 3.2 as and when they are incurred prior to final resolution of a Claim, PROVIDED ALWAYS THAT:

- a. We have provided Our prior written consent to incur such Defence Costs; and
- b. any Defence Costs that are paid by Us will be repayable by the Insured if it is ultimately determined that the Insured was not entitled to payment of such Defence Costs.

### 3.3.2. Product Recall Expenses

We will indemnify the Insured in respect of Product Recall Expenses incurred by the Insured during the Policy Period, if the Insured's Information Technology Products are recalled from the market or from use, whether in response to a regulatory order or otherwise, because it has become known or reasonably anticipated that they may cause Bodily Injury or Property Damage due solely to:

- a. the accidental omission of a component; or
- b. the accidental introduction or substitution of a deleterious component.

No indemnity is provided for Product Recall Expenses:

- c. which are not incurred in the circumstances set out in 3.3.2 a or 3.3.2 b above; or
- d. where the Insured's Information Technology Products known or reasonably anticipated propensity to cause Bodily Injury or Property Damage arises from:
  - i. inherent or inevitable degradation, degeneration or corruption, or any characteristic of which the Insured knew or reasonably ought to have known at the commencement of the Policy Period; or
  - ii. mislabeling or misdirection due to the continued use of existing labels or instructions which have passed their internal review date or have ceased to be approved for the Insured's Information Technology Products by the relevant regulator.

The maximum aggregate amount payable under this extension is \$200,000.

This extension is not subject to Exclusion 6.21.

### 3.3.3. Claim Preparation Costs

We will indemnify the Insured for reasonable and necessary costs and expenses incurred with Our prior written consent (not to be unreasonably withheld) for the preparation of any Claim that is covered under Section 3 of this policy, PROVIDED ALWAYS THAT:

- a. cover afforded under this extension will not include any Defence Costs; and
- b. the maximum aggregate amount payable under this extension is \$25,000.

### 3.3.4. Costs of Court Attendance

In the event of any of the under-mentioned persons attending court as a witness in connection with any Claim in respect of which the Insured is entitled to indemnity under Section 3 of this policy, We will pay to the Named Insured court attendance costs at the following rates per day for each day on which attendance is required:

- a. any principal, partner or director of the Named Insured - \$650.00; and
- b. any employee of the Named Insured - \$250.00.

### 3.3.5. Public Relations Expenses

Where a Claim has been made against the Insured for which cover is available under Section 3 of this policy (or where the Insured has notified facts which may give rise to a future Claim), and in the reasonable belief of the Insured the Insured's reputation has been or will be significantly impaired, then We will reimburse the Insured for any reasonable and necessary costs and expenses of a public relations consultant retained by the Insured with Our prior written consent to

design and implement a reasonable and necessary publicity campaign approved by Us with the object of preventing or mitigating damage to the reputation of the Insured in consequence of such Claim or anticipated Claim.

We will not unreasonably withhold or unreasonably delay Our consent or approval required by this extension.

The maximum aggregate amount payable under this extension is \$100,000. The Excess payable by the Insured is costs inclusive for any Claim made under this extension.

#### **3.3.6. Mitigation Costs**

We will indemnify the Insured for reasonable and necessary mitigation costs and expenses incurred or agreed to be incurred by the Insured:

- a. as a result of a reasonable and necessary action taken by the Insured to reduce the amount of any potential Claim that would be covered under this policy; and
- b. arising from a fact, matter or circumstance first discovered by the Insured during the Policy Period which might lead to a potential Claim that would be covered under Section 3 of this policy.

We will only indemnify the Insured under this extension where:

- i. such fact, matter or circumstance is notified to Us immediately upon being discovered by the Insured, during the Policy Period and prior to the Insured incurring any such mitigation costs or expenses;
- ii. no admission of liability (whether by word, conduct or otherwise) is made by the Insured;
- iii. We have given prior written consent (not to be unreasonably withheld or unreasonably delayed) to the incurring of, or agreement to incur, such mitigation costs or expenses; and
- iv. We will not pay any costs or expenses incurred by the Insured in proving entitlement to coverage under this extension.

The maximum aggregate amount payable under this extension is \$250,000, which is exclusive of Defence Costs.

#### **3.3.7. Inquiry Costs**

We will indemnify the Insured for the reasonable and necessary legal costs and expenses incurred with Our prior written consent (not to be unreasonably withheld or unreasonably delayed) for representation of the Insured at any regulatory inquiry, disciplinary proceeding or other proceedings (other than in respect of a Claim) that the Insured first became aware of and was first initiated during the Policy Period.

The maximum aggregate amount payable under this extension is \$250,000.

The cover provided by this extension is not subject to Insuring Clause 3.1.

#### **3.3.8. Legal Panel**

The Insured may contact Us to access Our public liability legal panel during business hours for one complimentary session of up to sixty (60) minutes of verbal advice in relation to matters which are covered under this policy.

In the event of a Claim arising from the matter We agree to the appointment of any of Our public liability legal panel to act on the Insured's behalf in respect of any Claim notified to Us providing

there is no existing or potential conflict of interest, in which case We will refer the Insured to another member of the panel.

**3.3.9. Plant Hire**

We will indemnify the owner of plant with whom the Insured has entered into a written contract or agreement for the hire of such plant for the purpose of the Insured's Business for Bodily Injury and/or Property Damage PROVIDED ALWAYS THAT:

- a. coverage provided to the owner will be no more extensive than the coverage that would be provided to the Insured if they were held legally liable for the Bodily Injury and/or Property Damage; and
- b. coverage will only be provided where the liability arises out the Insured's use of the plant.

The cover provided by this extension is not subject to Exclusion 6.22 b.

**3.3.10. Leased or Rented Premises**

- a. We will indemnify the Insured for Property Damage to premises (including the fittings and fixtures) leased or rented to the Insured for the purpose of the Insured's Business provided always that We will not provide indemnity against:

- i. any contractual liability; or
- ii. the first \$1,000 of each and every occurrence of Property Damage caused other than by fire or explosion.

- b. Notwithstanding Exclusion 6.22 b, and Clause 3.3.10 a, We will indemnify a lessor with whom the Insured has entered into a written agreement for the rental or lease of premises (including the fittings and fixtures) for the purpose of the Insured's Business for Property Damage PROVIDED ALWAYS THAT:

- i. coverage provided to the lessor will be no more extensive than the coverage that would be provided to the Insured if they were held legally liable for the Property Damage; and
- ii. coverage will only be provided where the liability arises out the Insured's use of the premises.

**3.3.11. Buildings Temporarily Occupied**

We will indemnify the Insured for Property Damage to buildings (including contents therein) which are not owned, leased or rented by the Insured, but are temporarily occupied by the Insured for the purpose of maintenance, alteration, extension, installation or repair of their usual premises.

**3.3.12. Principal's Indemnity**

We will indemnify a Principal with whom the Insured has entered into a written agreement for the supply or provision of Information Technology Services or Information Technology Products in the course of the Insured's Business for Bodily Injury and/or Property Damage PROVIDED ALWAYS THAT:

- a. coverage provided to the Principal will be no more extensive than the coverage that would be provided to the Insured if they were held legally liable for the Bodily Injury and/or Property Damage; and
- b. coverage will only be provided where the liability arises as a result of an occurrence in connection with the supply or provision of Information Technology Services or Information Technology Products in the course of the Insured's Business.

**3.3.13. Vendor's Liability**

We will indemnify a vendor, with whom the Insured has entered into a written agreement for the distribution or sale of the Insured's Information Technology Products for any civil liability to pay compensation, PROVIDED ALWAYS THAT:

- a. no cover will be provided to the vendor for modification, representation or warranty unauthorised by the Named Insured; and
- b. coverage provided to the vendor will be no more extensive than the coverage that would be provided to the Insured if they were held legally liable for Bodily Injury and/or Property Damage.

**3.3.14. Indemnity to other Persons**

We will also indemnify as if a separate policy had been issued to each:

- a. the legal personal representatives of the Insured but only in respect of liability incurred by the Insured;
- b. any officer or member of the Insured's catering, social, sports, educational, medical, dental and welfare organisations and fire, security, first aid and ambulance services in their respective capacity as such, but not any medical or dental practitioner in respect of medical or dental services.

PROVIDED ALWAYS THAT any persons specified above shall as though they were the Insured be subject to the terms, conditions, exclusions and limitations of this policy insofar as they can apply.

Our aggregate liability to pay any amount under this extension shall not exceed the Indemnity Limit applicable to Section 3 regardless of the number of persons claiming to be indemnified.

**3.3.15. Cross Liability**

If the Named Insured comprises more than one party We will indemnify each Insured in the same manner and to the same extent as if a separate policy had been issued to each of them, provided always that nothing in Section 3 will increase Our liability to pay any amount exceeding the Indemnity Limit of the Section, regardless of the number of persons claiming to be indemnified.

**3.3.16. Appointed Contractors, Consultants and Sub-Consultants**

- a. Insuring Clause 3.1 provides cover for any Claim against the Insured in respect of the Insured's civil liability arising from any Bodily Injury and/or Property Damage occurring during the Policy Period directly arising out of any act, error or omission of any appointed contractor, consultant or sub-consultant in the conduct of the Insured Business.
- b. We will indemnify any Contractor, Consultant or Sub-Consultant of the Named Insured in accordance with the terms, conditions and exclusions applicable to Insuring Clause 3.1 for any Claim against such Contractor, Consultant or Sub-Consultant for Bodily Injury and/or Property Damage occurring during the Policy Period arising out of the Contractor's Consultant's or Sub-Consultant's supply or provision of Information Technology Services or Information Technology Products on behalf of the Named Insured.

## 4. Section 4 - Claim Conditions

The following conditions apply to this insurance:

### 4.1. Discovery and Notice of a Claim

If during the Policy Period the Insured receives notice of any Claim that may be covered under this insurance the Insured will give notice to Us as soon as practicable and before the expiry of the Policy Period.

Notice of any Claim will be provided in writing to:

National Head of Claims  
australiacclaims@berkleyinaus.com.au  
Berkley Insurance Australia  
PO Box Q296  
QVB NSW 1230

### 4.2. Admission of Liability

In the event of any Claim, the Insured will not admit liability and no admission, offer, settlement, promise or payment will be made by the Insured without Our prior written consent.

### 4.3. Conduct of Claims

Following notification of any Claim under this policy, We will be entitled to take over and conduct in the name of the Insured the investigation, defence or settlement of any such matter. The Insured will Cooperate with and give all such assistance as We may reasonably require.

### 4.4. Claim Settlements

We may at any time pay (or agree to pay) to the Insured in connection with any Claim or Claims the Indemnity Limit (less the Excess, any sums already paid and unpaid Defence Costs incurred with Our prior written consent) and upon such payment (or agreement to pay) We will not be under any further liability in respect of such Claim or Defence Costs except for Defence Costs incurred prior to such payment (or agreement to pay) with Our prior written consent.

Under no circumstances will We be liable in respect of such Claim or Claims for an amount greater than otherwise provided for in this policy.

In the event that:

- a. We have made a payment in excess of the amount for which We would otherwise have been liable in accordance with the policy in respect of such Claim or Defence Costs, the Insured will refund to Us that proportion of the payment which exceeds the amount which We would otherwise have been liable for in accordance with the policy; and
- b. We have agreed to pay an amount in excess of the amount which We would otherwise have been liable for in accordance with the policy in respect of such Claim or Defence Costs, Our liability in respect of such agreement will be limited to the amount which We would otherwise have been liable for in accordance with the policy.



#### **4.5. Our and the Insured's Right to Defend**

The Insured will not be required to contest any legal proceedings unless a Senior Counsel (to be mutually agreed upon by the Insured and Us or failing agreement to be appointed by the President of the Bar Association of the State or Territory of Australia where this policy is issued) advises that, taking due account of the interests of both Us and the Insured, the defence of such proceedings has reasonable prospects of being successful and should be contested having regard to the alternative to contesting the proceedings.

If the Insured wishes to continue to contest any Claim which We wish to settle, the Insured may do so. However, Our maximum liability in respect of that Claim will thereafter be limited to the amount for which the Claim could have been settled plus Defence Costs incurred with Our prior written consent up to the date upon which it would have reasonably settled the Claim, less any unpaid Excess or the final amount of the Claim including Defence Costs.

#### **4.6. Excess**

In respect of each Claim or loss covered by this policy the Insured is liable for the amount of any Excess stated in the Schedule. We will have no liability for the amount of any Excess.

#### **4.7. Allocation**

Where the Insured is entitled to indemnity pursuant to Insuring Clauses 2.2 and 3.2 Defence Costs in circumstances where a Claim is made and part of that Claim for compensation arises out of, is in connection with or is related to facts or matters that are not covered by this policy then, Our liability under this policy is limited to that proportion of the Defence Costs which represents a fair and equitable allocation between the Insured and Us, taking into account the relative legal and financial exposures attributable to covered allegations and allegations that are not covered under this policy.

In circumstances where We and the Insured cannot agree on an allocation between covered allegations and allegations that are not covered, the dispute shall be submitted to binding opinion from a Senior Counsel agreed between the parties or, failing agreement, appointed by the President of the Bar Association of the State or Territory of Australia where this policy is issued.

## 5. Section 5 - General Conditions

The following conditions apply to this insurance (for the purposes of these conditions any reference to Claim also includes reference to legal costs and expenses and a Fine or Penalty):

### 5.1. Jurisdiction and Service

In the event of a dispute arising under or in connection with this policy, We at the request of the Insured will submit to the jurisdiction of competent courts in the Commonwealth of Australia. The dispute shall be determined in accordance with the law and practice of that jurisdiction, as applied in those courts.

### 5.2. Terms of Payment

All premiums due to Us under this policy will be paid within thirty (30) days from the policy's inception.

### 5.3. Cancellation

The circumstances and manner in which We may cancel this insurance is governed by the Insurance Contracts Act 1984 (Cth).

The Insured may cancel this insurance at any time by giving fourteen (14) days notice and provided there have been no notifications made by the Insured under this policy the Insured will be entitled to a pro rata refund. If the Insured has made a notification under the policy then the Insured is not entitled to any refund.

### 5.4. Subrogation

In the event of any payment under this Policy, We shall be subrogated to all the Insured's rights of recourse against any other entity, person or organisation. We shall be entitled to pursue and enforce such rights in the name of the Insured who shall provide us with all reasonable assistance in order to secure those rights. The Insured is not to waive or release any right of recourse against any other entity without first obtaining Our permission in writing.

### 5.5. Waiver of Subrogation

Notwithstanding General Condition 5.4, We hereby agree to waive Our rights of subrogation under this Policy against:

- a. each of the parties described under clause 3.3.12; and
- b. any corporation, organisation or person which or who owns or controls the majority of the capital stock of any corporation or organisation to which or to whom protection is afforded under this Policy. Where such corporation, organisation or person is protected from liability insured against hereunder by any other policy of indemnity, We shall not waive their rights of subrogation to the extent and up to the amount of such other policy.

#### 5.6. Claims Aggregation

Where two (2) or more Claims are in connection with the same original cause, a series of related or interrelated events or causes or breaches of duty, then all such Claims will constitute one Claim under this policy; and

- a. only one (1) Excess will be payable by the Insured; and
- b. the maximum amount payable by Us in respect thereof will not exceed the Indemnity Limit (except in respect of Defence Costs which are stated to be “in addition” to the Indemnity Limit), and
- c. under no circumstances will any Claim give rise to indemnity under both Section 2 and Section 3.

#### 5.7. Alteration to Risk

The Insured will provide Us with written notice as soon as reasonably practicable of any material alteration to the risk during the Policy Period including but not limited to:

- a. any material change in the nature of the advice or professional services offered by an Insured;
- b. any cancellation or suspension, or loss of or condition imposed, upon any licence, registration or other authority required by the Insured to conduct the Professional Business; and/or
- c. an Insured going into bankruptcy, receivership, liquidation or any other form of external administration (whether or not it is voluntary), or an Insured 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.

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).

#### 5.8. GST

Where We are required to indemnify the Insured and the Insured is entitled to claim an input tax credit in relation to GST the amount of such input tax credit will be deducted from any amount payable by Us.

Where the Insured is entitled to claim an input tax credit in relation to GST for a payment required to be made by the Insured as an Excess, then the monetary limit of the Excess shall be deemed to be net of the Insured's entitlement to the Input tax credit.

#### 5.9. Newly Created or Acquired Subsidiaries

We will indemnify, in the same manner and to the same extent as the Named Insured, any entity or subsidiary acquired or created by the Named Insured during the Policy Period, PROVIDED ALWAYS THAT:

- a. the Policy Period applicable to such cover will be the period commencing on the date of such acquisition or creation and expiring sixty (60) days after that date or on the expiry date of the Policy Period (whichever is the earlier);
- b. the retroactive date applicable to such cover will be the date of acquisition or creation of the entity or subsidiary; and
- c. the Claim arises out of the exercise and conduct of the entity or subsidiary's business which is the same as or substantially similar to the Named Insured's Insured Business.

Note: The Named Insured may apply to Us within sixty (60) days of this extension being triggered to vary the policy to continue the cover provided by this extension until the expiry date of the Policy Period by notifying Us of the acquisition or creation of the entity or subsidiary and providing all information requested by Us. Any such variation will only be offered by Us at Our sole and absolute discretion and subject to any additional terms imposed including the charging of any additional premium which it considers appropriate having regard to the nature of the risk to be assumed by Us.

In the event the Insured does not accept the terms offered or the amount of any additional premium, the Insured may cancel the policy in accordance with clause 5.3.

#### **5.10. Headings and Notes**

Headings and notes are for information purposes only and are not to be construed as part of this insurance.

## 6. Section 6 – General Exclusions

The following exclusions apply to all sections of the policy, unless stated otherwise.

We shall not be liable to indemnify the Insured in respect of any claim, Claim, liability, loss, cost, expense, Fine or Penalty directly or indirectly arising out of, related to, or in connection with:

### 6.1. Previously Known Claim or Circumstance

any:

- a. Claim made upon the Insured prior to the inception of this policy; or
- b. fact, matter or circumstance known to the Insured, at any time prior to the inception of this policy, and which the Insured knew or a reasonable person in the Insured's profession could, in the circumstances, be expected to know or have known might give rise to a Claim against the Insured; or
- c. fact, matter or circumstances which were disclosed by the Insured to Us prior to the inception of this policy, whether in the Proposal or otherwise; or
- d. fact, matter or circumstance which was notified by the Insured to any prior insurer.

### 6.2. Trading Losses and Insolvency

- a. any trading losses or trading liabilities or debts incurred by any business managed or carried on by the Insured, but this exclusion does not apply to Claims made against the Insured for negligence in the normal course of the Insured's conduct of any receivership; or
- b. the insolvency of the Insured.

### 6.3. Fines, Penalties, Punitive, Multiple or Exemplary Damages

- a. any fine or penalty; or
- b. any multiple, exemplary, punitive or aggravated damages.

### 6.4. Nuclear Risks

- a. ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel; or
- b. the radioactive, toxic, explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof.

### 6.5. War and Terrorism

any of the following regardless of any other cause or event contributing concurrently or in any other sequence any of the following:

- a. war, invasion, acts of foreign enemies, hostilities or warlike operations (whether war be declared or not), civil war, mutiny, revolution, rebellion, insurrection, uprising, military or usurped power, confiscation by order of any public authority or government de jure or de facto, martial law;
- b. riots, strikes or civil commotion;
- c. any Act of Terrorism; or

- d. any action taken in controlling, preventing, suppressing, retaliating against or responding to or in any way relating to those things in 6.5 (a, b, c) above.

**6.6. Asbestos and Toxic Mould and Pollution**

asbestos or toxic mould of any kind.

**6.7. Pollution**

Pollution or contamination of any kind unless caused by a sudden identifiable and unintended and unexpected incident which takes place in its entirety at a specific time and place during the Policy Period and PROVIDED ALWAYS THAT:

- a. all Pollution or contamination which arises out of such incident shall be deemed to have occurred at the time such incident takes place; and
- b. Our liability for compensation under Section 3 payable in respect of all Pollution or contamination which is deemed to have occurred during the Policy Period shall not exceed in the aggregate the Indemnity Limit for Section 3.

**6.8. USA/Canada**

any action brought in any court of the United States of America, Canada or their dominions or protectorates or any judgment registered or lodged in any jurisdiction in connection with such an action.

**6.9. Liability arising out of Employment**

bodily injury, mental injury (including but not limited to mental stress and mental anguish), harassment, bullying, invasion of privacy, disease or death of any employee of the Insured or damage to or destruction of any property of any employee, including loss of use, arising out of, or in the course of, their employment or any dispute in connection with employment.

**6.10. Liability Involving Property Owned by the Insured**

the ownership, possession or use by or on behalf of the Insured of any buildings, structures, premises or land. This exclusion shall not to apply to any buildings, structures or premises where the Named Insured occupies 100% of the building, structure or premises in the conduct of the Insured Business.

**6.11. Bodily Injury and/or Property Damage**

Bodily Injury or Property Damage which is attributable to the supply or provision of Information Technology Services in respect of any Information Technology Product, however this exclusion shall not apply to Section 3 of this Policy, nor to Automatic Extension 2.3.4 or Optional Extension 2.4.1 (if applicable).

**6.12. Contractual Liability**

any liability assumed by the Insured under any contract or agreement where such liability would not have existed in the absence of such a contract or agreement including, without limitation, any contractual term or agreement to pay liquidated damages or any penalty. This exclusion shall not apply to any liability arising out of a condition or warranty implied by law.

**6.13. Directors' and Officers' Liability**

any conduct or alleged conduct of the Insured in the capacity of a director, secretary or officer of a body corporate or any breach or alleged breach by the Insured of a duty owed in that capacity.

**6.14. Trustee Liability**

any services provided by the Insured in the capacity of a trustee.

**6.15. Fraud, Dishonest, Criminal or Intentional Loss Damage or Injury**

any act, error or omission of any Insured which is dishonest, fraudulent, criminal, malicious or which is intended by that Insured to cause loss, damage or injury to, or to deprive a third party of a right to which they would otherwise be entitled (or which is done or omitted to be done with reckless disregard for the consequences) or is a wilful or reckless breach of statute, contract or duty.

**6.16. Payments or Benefits Received**

any fees, charges, disbursements, expenses, costs, taxes, commissions or other payments or benefits of whatsoever kind received or retained by, or paid or payable to, the Insured in connection with the Insured Business.

**6.17. Associated Companies**

made against the Insured by any firm, company, partnership or other entity:

- a. in which the Insured or any director, partner or principal of the Insured has a financial or executive interest;
- b. or person which has a financial or executive interest in the Insured unless solely emanating from an independent and unrelated third party.

The above exclusion shall not apply to Section 3 of the Policy.

**6.18. Cost Estimates and Down Time**

- a. the inaccurate, inadequate or incomplete description of the price of goods, products or services or as a result of any cost guarantees, cost representations, contract price, or estimates of probable costs or cost estimates being exceeded; or;
- b. down time (down time shall mean any time during which a computer or other machine is out of action and/or unavailable solely due to scheduled and/or planned maintenance occurring at the time). It being understood and agreed that the onus of proof that any Claim does not howsoever relate to down time shall be upon the Insured.

**6.19. Listed Human Disease**

a Listed Human Disease or any directly or indirectly related condition or threat or fear thereof (whether actual or perceived).

**6.20. Cyber Liability & Social Engineering**

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

#### 6.21. Motor Vehicle, Aircraft and Watercraft

- a. the ownership possession or operation by or on behalf of the Insured of any:
  - i. airline, aircraft, aerodrome, airport, spacecraft, or launch sites; or
  - ii. hovercraft or watercraft other than hand propelled watercraft or other watercraft not exceeding 8 metres in length; or
  - iii. Mechanically Propelled Vehicle; or
- b. the carrying out of any work or operation within the perimeter of any airport or aerodrome (other than in an area to which public access is permitted without a valid boarding card, or in retail or office premises), or any launch site for spacecraft or of any work or operation on or in any aircraft or spacecraft which may affect the control, navigation or safety of such craft.

This exclusion shall not apply to liability caused by or arising from;

- i. the use of Mechanically Propelled Vehicles as a tool of trade at the Insured's premises or on any site at which the Insured is working; or
- ii. the loading or unloading of any vehicle or the bringing to or taking away of a load from any vehicle; or
- iii. damage to any building, bridge, weighbridge, road or to anything beneath caused by vibration or by the weight of any vehicle or its load.

PROVIDED ALWAYS THAT we will not provide indemnity against liability:

- c. in respect of which compulsory insurance or security is required under any legislation governing the use of the vehicle; or
- d. for which indemnity is provided by any other insurance.

#### 6.22. Damage to Property

Property Damage to any:

- a. property belonging to the Insured; or
- b. property in the custody or under the control of the Insured exceeding \$250,000;
- c. property being that part of property on which the Insured or agent of the Insured is or has been working where the damage arises out of such work; or
- d. Information Technology Products supplied whilst in the custody or under the control of the Insured, although not for consequential Property Damage caused by the Insured's Information Technology Products.

The above exclusion shall not apply to Extension 2.3.4

#### 6.23. Recall, Repair or Replacement

the costs or expenses of recalling, repairing, replacing, altering, removing, rectifying, reinstating or making any refund in respect of any Information Technology Services or Information Technology Products supplied or provided by the Insured.

The above exclusion shall not apply to Extension 3.3.2



**6.24. Known Defects**

the supply or provision of any Information Technology Services or Information Technology Products that the Insured knew, or should reasonably have known to be defective, ineffective or incapable of substantially fulfilling the essential purpose for which they were intended or the essential purpose which they were required to perform as specified, warranted (whether express or implied) or guaranteed.

**6.25. Non Information Technology Products and/or Non Information Technology Services**

the provision of or supply of non Information Technology Products and/or non Information Services unless listed in the Schedule.

**6.26. Aviation and Marine Products**

any Information Technology Products which, to the knowledge of the Insured, are for:

- a. use in or on any aircraft or aero spatial device;
- b. aviation or aero spatial purposes; or
- c. use in the safety or navigation or navigation of marine craft of any sort.

**6.27. Products Liability**

any Information Technology Product except in circumstances where Bodily Injury or Property Damage occurs as a result of such product being in the custody or control of the Insured.

This exclusion shall only apply to Bodily Injury and Property Damage under Section 2 of this policy.

**6.28. Retroactive Date**

the conduct of the Insured Business prior to the retroactive date (if any) specified in the Schedule.

This exclusion only applies to Section 2 of the policy.

**6.29. Intellectual Property Rights**

any infringement or alleged infringement of any Intellectual Property Rights.

**6.30. Sanctions Limitation**

We are not liable to make any payment under this Policy where such payment would be in violation of any sanction, prohibition or restriction with which We are required to comply, including but not limited to United Nations resolutions or the trade or economic sanctions, laws or regulations of the European Union, Australia, United Kingdom or the United States of America.

To the extent that any parts of the above exclusions are found to be invalid or unenforceable, the remainder of each exclusion and all other exclusions will remain in full force and effect.

## 7. Section 7 - Definitions and Interpretations

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.

### 7.1. Act of Terrorism

Means activity that:

- a. involves a violent act or the unlawful use of force or an unlawful act dangerous to human life, tangible or intangible property or infrastructure, or a threat thereof; and
- b. appears to be intended to:
  - i. intimidate or coerce a civilian population;
  - ii. disrupt any segment of the economy of a government de jure or de facto, state or country;
  - iii. overthrow, influence, or affect the conduct or policy of any government de jure or de facto by intimidation or coercion; or
  - iv. affect the conduct of a government de jure or de facto by mass destruction, assassination, kidnapping or hostage taking.

### 7.2. Bodily Injury

Means death, illness, disease, physical or mental injury, mental anguish or shock but not defamation, libel, slander, deceit or injurious falsehood or discrimination.

### 7.3. Claim

Means:

- a. for the purpose of Section 2:
  - i. any writ, application, summons or other originating legal process, cross claim or counter claim issued against or served on the Insured claiming damages or other compensatory relief;
  - ii. the positive assertion in writing of a legal entitlement to damages or other compensatory relief in connection with an alleged civil liability on the part of the Insured, in terms evincing an intention to pursue such legal entitlement; or
- b. for the purpose of Automatic Extension 2.3.11, any enforcement action or proceeding served on the Insured seeking to impose any Fine or Penalty.
- c. for the purpose of Section 3 shall mean a claim by the Insured under this policy.

### 7.4. Computer System

Means an information technology system made up 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 that is proprietary to or licensed to the Insured.. Computer System shall also include any electronic devices and/or electrical equipment.

### 7.5. Contractor, Consultant or Sub-Consultant

Means a person or other entity with whom the Insured has entered into a written agreement for the supply or provision of Information Technology Services or Information Technology Products either to the Insured or to the Insured's customer on the Insured's behalf.

**7.6. Contractual Liability**

Means liability which attaches by virtue of a contract or agreement but only to the extent to which it would have attached in the absence of such contract or agreement.

**7.7. Cooperate**

Means that the Insured:

- a. assists Us and Our duly appointed representatives to put forward the best possible defence of a Claim within the time constraints available;
- b. will have adequate internal systems in place, which will allow ready access to material information; and
- c. will at all times and at its own cost give to Us or Our duly appointed representatives all such information, assistance, signed statements or depositions as may properly be required to facilitate compliance with all applicable Court Rules and Practice Directions, recoveries and subrogation claims.

**7.8. Defence Costs**

Means all reasonable and necessary costs and expenses incurred in the investigation, reporting on, defence or settlement of any Claim in respect of which We are liable to indemnify the Insured under this policy. This also includes reporting in writing to Us on the investigation, defence or settlement of any Claim.

**7.9. Documents and Data**

Means project models or displays, deeds, wills, agreements, maps, plans, records, photographs or negatives, written or printed books, letters, certificates or written or printed documents of any nature whatsoever and will include computer software and systems records (electronic data will be deemed to be physical property for the purposes of this insurance). This definition excludes bearer bonds, coupons, bank or currency notes and other negotiable instruments.

**7.10. Excess**

If the Schedule states that the Excess is Defence Costs "inclusive" then Excess will mean the sum shown in the Schedule unless otherwise stated in this insurance and will be the first amount payable of each Claim made against the Insured.

If the Schedule states that the Excess is Defence Costs "exclusive" then Excess will mean the sum shown in the Schedule unless otherwise stated in this insurance and will be the first amount payable of each Claim made against the Insured excluding Defence Costs.

The Excess shall be net of any input tax credit the Insured may be entitled to claim in relation to GST.

#### **7.11. Fine or Penalty**

Means:

- a. a penalty imposed upon the Insured by any regulatory authority arising from any actual or alleged breach of any workplace health and safety or environmental legislation;
- b. a penalty imposed upon the Insured by any privacy commissioner arising from any actual or alleged breach of any privacy legislation; or
- c. any compensatory civil penalty.

#### **7.12. Indemnity Limit**

Means the sum shown in the Schedule which is available to indemnify the Insured:

- a. for the purposes of Section 2, subject to Extension 2.3.26, the Indemnity Limit is to be applied as an aggregate limit in respect of the sum total of all Claims notified during the Policy Period.
- b. for the purposes of Section 3, the Indemnity Limit is to be applied as an aggregate limit in respect of the sum total of all Claims for Bodily Injury and/or Property Damage occurring during the Policy Period, caused by Information Technology Products supplied in the course of the Insured Business.
- c. for the purposes of Section 3, the Indemnity Limit is to be applied as an aggregate in respect of each Claim for Bodily Injury and/or Property Damage occurring during the Policy Period in the course of the Insured Business.

#### **7.13. Information Technology Products**

Means any information technology product including electronic equipment, communication equipment, computer hardware, computer firmware, computer software or other electronic device, designed, specified, manufactured, installed, sold, supplied, licensed, handled or distributed by the Insured.

#### **7.14. Information Technology Services**

Means services or advice including consultancy services, design, specification, training, testing, data processing, data management, project management, project implementation, analysis or maintenance and data hosting services supplied by the Insured.

#### **7.15. Insured**

Means:

- a. the Named Insured;
- b. any person who is, during the Policy Period, a principal, partner or director of the Named Insured but only in respect of work performed while a principal, partner or director of the Named Insured;
- c. any person who is, during the Policy Period, an employee of the Named Insured but only in respect of work performed while an employee of the Named Insured and on behalf of the Named Insured; and/or
- d. any former principal, partner, director or employee of the Named Insured but only in respect of work performed while a principal, partner, director or employee of the Named Insured and on behalf of the Named Insured.
- e. any person engaged under a work experience government training or similar scheme whilst working for the Insured in connection with the Insured Business.

**7.16. Insured Business**

Means the activities provided by or on behalf of the Insured as described in the Schedule.

For the purpose of Section 3 Insured Business also includes:

- a. the provision of and management of canteens, social, sports, welfare and child care facilities solely for the direct benefit of the Insured, members or guest;
- b. first aid, medical, fire and ambulance services provided by the Insured;
- c. the management of any premises which the Insured as owner or tenant uses for the purpose of the normal conduct of the Insured Business; and
- d. third party volunteer or charity events hosted or attended by a principal, partner, director or employee of the Insured, but only where such events are hosted or attended on behalf of the Named Insured.

**7.17. Intellectual Property Right**

Means a statutory right or common law right, conferred within the territory, in or to any patent, trademark, copyright or design (including in respect of semiconductor topographies) or a right in confidential information or trade secrets, claimed by any party other than the Insured.

**7.18. Listed Human Disease**

Means

- a. 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
- b. 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.

**7.19. Mechanically Propelled Vehicle**

means any type of machine on wheels, skis or on self-laid tracks made or intended to be propelled other than by manual or animal power.

**7.20. Named Insured**

Means the person(s), partnership, company, corporation or other entity named as the Insured in the Schedule and its subsidiaries if the Named Insured is incorporated.

**7.21. Policy Period**

Means the period shown in the Schedule.

**7.22. Pollution**

Means

- a. any one or a combination of a release, emission, discharge, dispersal, disposal, escape of any substances, which are capable of causing harm (which will mean any harm to the health of any living organism or interference with ecological systems of which they form part and, in the case of a

- person, will include offence caused to any of their senses) into or onto any water, land or air; and
- b. all Bodily Injury or Property Damage directly or indirectly caused by or arising from such pollution or contamination described above.

**7.23. Preceding Policy**

Means a professional indemnity insurance policy for a period of twelve (12) months immediately preceding, without interruption, the Policy Period.

**7.24. Principal**

Means any person, partnership, company, ministry or authority for whom the Insured is carrying out a contract or agreement for the performance of work.

**7.25. Previous Business**

Means the previous business noted in the Schedule.

**7.26. Product Recall Expenses**

Means reasonable and necessary costs incurred directly by the Insured in respect of:

- a. the recall notification via media including radio and television announcements and printed advertisements;
- b. shipping the Insured's recalled Information Technology Products from any purchaser, distributor or user to a place or places designated by the Insured;
- c. the hire of additional personnel (other than the Insured's employees) to handle the recall;
- d. the Insured's usual, hourly employees (not salaried employees) at basic rates for necessary straight time or overtime to handle the recall;
- e. expenses incurred by employees for transportation and accommodation where necessary;
- f. additional expenses required for the rent or hire of additional warehouse or storage space; and
- g. expenses required for the disposal or destruction of the Insured's Information Technology Product that has been recalled.

PROVIDED ALWAYS THAT, such costs are incurred solely for the purpose of recalling the Insured's Information Technology Products or property of which they form a part, because of Bodily Injury or Property Damage occurring within the Policy Period.

Product Recall Expenses do not include the following:

- i. any legal liability to pay compensation to any other person; or
- ii. the actual value of the Insured's Information Technology Products or of any property which they form a part.

**7.27. Property Damage**

Means loss of or damage to tangible property.

**7.28. Proposal**

Means any information provided by the Insured in the proposal form and/or in connection with this Policy any declaration made in connection therewith.

**7.29. Schedule**

Means the document entitled Schedule that relates to this insurance.

**7.30. Shrink Wrap Licence**

Means a non negotiated written contract in which standard conditions relating to the use of Information Technology Products or Information Technology Services are imposed and which is legally enforceable.

**7.31. 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:

- a. transferring, paying or delivering any money or securities from an account maintained by the Insured to another person or entity;
- b. transferring or delivering any property to another person or entity;
- c. revealing confidential information; or
- d. changing or altering bank account or payment details of any person or entity.

**7.32. Third Party**

Means any entity excluding the Insured unless the Claim is for an entitlement to contribution in relation to a Claim by a Third Party which is not the Insured.

**7.33. Third Party Licensee**

Means a Third Party to whom the Insured has licenced the Insured's Information Technology Products pursuant to a legally enforceable, written contact, including a Shrink Wrap Licence.

**7.34. We, Us, Our**

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