

Contract for Professional Indemnity Insurance for Barristers

2020/2021

LEGAL PRACTITIONERS' LIABILITY COMMITTEE
CONTRACT OF PROFESSIONAL INDEMNITY INSURANCE FOR BARRISTERS
2020/2021

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LEGAL PRACTITIONERS' LIABILITY COMMITTEE

CONTRACT OF PROFESSIONAL INDEMNITY INSURANCE FOR BARRISTERS

2020/2021

SUM INSURED: \$2,000,000.

PERIOD OF INSURANCE: 1 July 2020 to 30 June 2021.

INSURING CLAUSES

1. Civil liability

The Insurer will indemnify the Insured against any civil liability in connection with the Practitioner's legal practice in respect of which a claim is first made against any Insured -

- (a) during the period of insurance; or
- (b) during or after the period of insurance and arising from a reported circumstance.

2. Defence costs

The Insurer will also indemnify the Insured against defence costs:

- (a) for any claim referred to in clause 1; or
- (b) relating to any reported circumstance.

LIMITS AND EXCESSES

3. Limit of liability

The limit of the Insurer's liability for any one loss (including defence costs) is the sum insured specified above.

4. Excess

The Insured will bear (in addition to any part of the loss which is excluded from cover under this contract) the first amount of each and every loss (other than a loss to which the deterrent excess applies) up to the specified amount. The excess does not apply to defence costs.

5. Deterrent excess

The Insured will bear (in addition to any part of the loss which is excluded from cover under this contract) the first amount of each and every loss up to twice the specified amount, arising from any of the following. The deterrent excess does not apply to defence costs.

5.1 Limitation periods

Any failure to issue any proceeding within a period of limitation.

5.2 Multiple parties or interests

Any matter or transaction in respect of which the Practitioner acted for or represented more than one party or interest.

5.3 Fraud, dishonesty, etc.

Any act, omission or conduct in respect of which any Insured is liable to indemnify the Insurer under clause 14.

5.4 Non-party costs order

Any order for costs against the Practitioner as a non-party to a proceeding.

6. Aggregate excess limit

Unless otherwise stated in the Certificate of Insurance, the aggregate excess limit is three times the specified amount. The limit is eroded by half the amount of any deterrent excess payments under clause 5 (the other half being borne by the Insured) followed by any excess payments under clause 4. When the limit is fully eroded, any further excess payments will be borne by the Insurer (without increasing the limit under clause 3). Any ex gratia payment, or any payment made without the express consent of the Insurer may, at the Insurer's discretion, be omitted from the calculation of the erosion of the aggregate excess limit.

7. 'Loss'

For the purposes of this section and this contract unless the context otherwise requires, 'loss' is the aggregate of all amounts paid or payable in respect of a claim or a reported circumstance, including payments for defence costs, and -

- (a) all claims against any Insured arising from -
 - (i) one act or omission;
 - (ii) one matter or transaction;

- (iii) one series of related acts or omissions;
- (iv) the same or similar act or omission in a series of related matters or transactions;
- (v) the same or similar act or omission in one or more matters or transactions for the same client (or a relative or associate of the same client);
- (vi) the same or similar series of related acts or omissions in one or more matters or transactions for the same client (or a relative or associate of the same client); or
- (vii) all dealings and advice in respect of one managed investment scheme (including a contributory or nominee mortgage),

will be regarded as one loss;

- (b) all claims arising from all dishonesty or fraud of any one person or any two or more people acting in collusion will be regarded as one loss; and
- (c) otherwise, each claim will be regarded as a separate loss.

SPECIAL CONDITIONS

8. Non-disclosure/misrepresentation

The Insurer may not avoid this contract or reduce its liability under this contract by reason of any failure to comply with the duty of disclosure or by reason of any misrepresentation (whether that failure or misrepresentation was fraudulent or not).

9. No cancellation

This contract must not be cancelled other than if (and with effect from the date upon which) the Practitioner ceases his or her legal practice during the period of insurance.

10. Breach of conditions

The Insurer will not refuse liability or reduce its liability (or delay any settlement with or payment to a claimant) by reason of a breach by any Insured of -

- (a) a condition of this contract; or
- (b) any duty to the Insurer (including the duty of utmost good faith but excluding the duty of disclosure),

but the Practitioner will indemnify the Insurer to the extent that the Insurer's interests were prejudiced as a result of any such breach.

11. No set off

Any amount payable by the Insurer to indemnify any Insured against civil liability to a claimant will be paid only to the claimant (or at the claimant's direction) and the Insurer may not set off against any such amount any payment due to it by any Insured (whether for premium, in respect of a breach of the conditions of this contract or otherwise).

12. Related parties

The Insurer will not refuse liability or reduce its liability (or delay any settlement with or payment to a claimant) by reason of the claimant being, or claiming a loss suffered by -

- (a) a relative of the Practitioner; or
- (b) an associated enterprise,

but -

- (i) the Practitioner will indemnify the Insurer to the extent of each amount paid or payable by the Insurer to compensate that relative or for that relative's loss; or
- (ii) the Practitioner will indemnify the Insurer to the extent of the defined proportion of each amount paid or payable by the Insurer to compensate that associated enterprise or for that associated enterprise's loss, the defined proportion being the proportion that the related interest at the time that the cause of action accrued bears to the aggregate of all interests in that enterprise.

The Practitioner is not liable to indemnify the Insurer under this clause in respect of an act or omission which occurred at a time when the Practitioner was insured other than by the Insurer.

13. Known circumstance

If -

- (a) a claim in respect of which the Insured is entitled to be indemnified by the Insurer under this contract arises from a circumstance which occurred prior to the period of insurance; and
- (b) the Practitioner became aware of that circumstance prior to the period of insurance; and
- (c) a reasonable person in the position of the Practitioner would have considered that the circumstance may give rise to a claim against any Insured; and

- (d) the circumstance was not reported to the Insurer or to the then primary insurer prior to the period of insurance,

then the Insurer will not refuse liability or reduce its liability (or delay any settlement with or payment to a claimant) in respect of that claim, but the Practitioner will indemnify the Insurer to the extent of -

- (i) the difference between the Insurer's liability under this contract (including for defence costs) and the liability it or the then primary insurer would have incurred under the contract for the period of insurance during which the Practitioner first became aware of the circumstance (had the circumstance been duly reported then); plus
- (ii) the amount that fairly represents the degree to which the loss could have been mitigated if the circumstance had been notified to the Insurer or to the then primary insurer at the time that the Practitioner first became aware of it.

14. Indemnity

Any Insured who -

- (a) committed; or
- (b) permitted (whether knowingly or recklessly) -
 - (i) the witnessing (or purported witnessing) of the signing or execution of a document without seeing the actual signing or execution of it; or
 - (ii) the making of a representation (including, but not limited to, a representation by way of a certificate, acknowledgement or other document) which was known at the time it was made to be false; or
 - (iii) dishonesty or a fraudulent act or omission; or
 - (iv) the provision of a financial service in respect of which an Australian financial services licence or authorisation was known to be required under Chapter 7 of the *Corporations Act 2001* (Cth) and was known to have not been obtained; or
 - (v) the dishonest or fraudulent use of a digital certificate, security item or other form of electronic authorisation in connection with an electronic conveyancing transaction,

will indemnify the Insurer to the extent of each amount paid or payable by the Insurer (including for defence costs) arising from such witnessing, representing, dishonesty, act or

omission or such provision of a financial service. The Practitioner will retain (to the extent permitted by law) any property, remuneration or benefit belonging to that Insured and will deal with it as the Insurer requires.

15. Non-party costs order

The Practitioner will indemnify the Insurer against each amount paid or payable by the Insurer in respect of any order for costs made against the Practitioner as a non-party to a proceeding, to the extent that the order is based on -

- (a) the Practitioner having a financial interest in the outcome of the proceeding, including an interest in whether or to what extent the Practitioner's fees will be paid; and/or
- (b) the Practitioner having engaged in conduct knowingly or recklessly in breach of the Practitioner's duty to the court or tribunal, including having advanced a claim or defence found to have had no real prospects of success.

16. Interest

Where any Insured is liable to indemnify the Insurer under this contract, that Insured will also pay interest on the amount outstanding to the Insurer from time to time calculated daily at the rate fixed under the *Penalty Interest Rates Act 1983 (Vic)*. Where an Insured is liable to indemnify the Insurer in respect of an amount paid by the Insurer, interest runs from the date of payment by the Insurer.

GST NEUTRALITY

17. Intention

The intention of this contract is that, to the extent possible, as between the Insured and the Insurer, neither is to be adversely affected or advantaged by the operation of GST. If any party requires a tax invoice or the assistance of any other party to obtain an input tax credit, the other party will provide such invoice or assistance promptly upon being requested to do so.

18. 'GST' and other expressions

For the purposes of this section, 'GST' means tax payable under *A New Tax System (Goods & Services Tax) Act 1999 (Cth)* and, unless the context otherwise requires, other expressions used in this section have the meanings given to those expressions in that Act.

EXCLUSIONS

19. General

The Insurer will not indemnify any Insured against any liability (or defence costs) as follows:

19.1 *Death or personal injury*

Arising from the death or personal injury of any person other than mental injury resulting directly from the performance of, or failure to perform, legal services.

19.2 *Property damage*

Arising from any damage to or destruction or physical loss of property other than documents in the Practitioner's custody or control in connection with the performance of legal services.

19.3 *Trading debts*

For any trading or personal debt of any Insured.

19.4 *Prior matters*

Arising from any -

- (a) actual or possible claim; or
- (b) circumstance,

notified prior to the period of insurance to the Insurer or to the then primary insurer or in respect of which the Practitioner is insured under a primary insurance contract for an earlier period of insurance.

19.5 *Contractual undertaking*

Arising from an express warranty, guarantee, indemnity or other contractual provision to the extent that -

- (a) it extends a duty of any Insured beyond exercising the standard of care and skill which would have been applicable in the absence of that provision; or
- (b) it increases the compensation, damages and/or costs for which any Insured is liable beyond the amount which would have been payable in the absence of that provision.

19.6 Contracting out of proportionate liability

Arising from a provision of a contract entered into on or after 1 July 2014 to the extent that it increases the apportionment of liability to any Insured by expressly ousting or altering the application of any legislation relating to proportionate liability or by expressly reducing or eliminating any allowance for contributory negligence or other wrongdoing by a claimant or other wrongdoer which would have been allowed in the absence of that provision.

(For the avoidance of doubt, it is not intended that this exclusion apply to the extent that the liability of another wrongdoer is limited by a professional standards scheme.)

19.7 Defalcation or default

Arising, in whole or in part, directly or indirectly from, or brought about by a defalcation or default as defined in the Act or as defined in applicable, corresponding legislation in another State or Territory of Australia, irrespective of whether a claim lies against any Fidelity Fund.

19.8 Insured versus Insured

To any Insured.

19.9 Employment practices

Without limiting clause 19.8, for any alleged discrimination, harassment or other wrongful conduct in relation to an employee or an applicant for employment.

19.10 Geographical

Arising from any act or omission which occurred outside the Commonwealth of Australia and the Practitioner is insured, or required by the law of the jurisdiction in which the Practitioner resides to be insured, other than under this contract against that liability.

19.11 Insured's charges

To refund, account for, or pay compensation or damages calculated by reference to, any fee, commission or disbursement charged or incurred by any Insured.

19.12 Advice on insurance cover

Arising from any representation to a claimant of, or failure to correctly advise a claimant of, the extent of insurance cover available (or not available, as the case may be) to indemnify any Insured under this contract.

19.13 Directors and officers liability

Arising from any Insured acting as a director, secretary or officer of a body corporate other than a company referred to in paragraph (c) of the definition of 'Insured'.

19.14 Penalties, etc.

For any civil penalty or for any punitive, exemplary, aggravated, additional or like damages or for any fine, costs or expenses incurred or ordered to be paid by any Insured in connection with any complaint against, or investigation into the conduct of, any Insured.

19.15 Insurance intermediaries

Arising from any Insured acting as an insurance intermediary.

19.16 Orders for costs

Under an order for costs against any Insured as a party to any proceeding other than a proceeding in respect of which the Insurer is liable to indemnify the Insured against defence costs.

19.17 Claims by liquidators, etc.

To a liquidator, administrator or trustee in bankruptcy to account for any preferential payment or to make any payment in respect of a void or voidable transaction.

19.18 Responsible Entities

As a Responsible Entity.

19.19 Financial services

Arising from any Insured providing a financial service in respect of which that Insured was licensed or authorised under Chapter 7 of the *Corporations Act 2001* (Cth).

19.20 Incorporated and unincorporated legal practices and multi-disciplinary partnerships

Arising from the provision by an incorporated legal practice, an unincorporated legal practice or a multi-disciplinary partnership of a service other than a legal service.

19.21 Credit activities

Arising from any Insured engaging in credit activities in respect of which that Insured was licensed under Chapter 2 of the *National Consumer Credit Protection Act 2009* (Cth).

19.22 Group costs order

Arising from a group costs order as defined in the *Supreme Court Act 1986* (Vic) or equivalent order as defined in applicable, corresponding legislation in another State or Territory of Australia.

GENERAL CONDITIONS

20. Notice of claims and circumstances

The Insured will give immediate notice in writing to the Insurer of any -

- (a) claim first made against any Insured during the period of insurance; or
- (b) circumstance of which any Insured first became aware during the period of insurance.

21. Cooperation and assistance

Each Insured will give the Insurer and any investigators or solicitors appointed by the Insurer all information they reasonably require, and full cooperation and assistance in the conduct of the investigation, defence, settlement, avoidance or reduction of any actual or possible claim or any proceeding. The Insured agrees to waive any claim for legal professional privilege to the extent only that the privilege would otherwise prevent any legal representative from disclosing information to the Insurer.

22. Reasonable steps and precautions

If the Practitioner becomes aware of a circumstance which may give rise to a claim against any Insured, the Insured will thereafter take all reasonable steps and precautions to avoid or minimise any liability or costs and expenses arising from that circumstance.

23. Conduct of any proceeding

The Insurer may at its option take over and conduct in the name of any Insured any proceeding arising out of or relating to any claim in respect of which the Insurer is liable to indemnify any Insured.

24. No admission of liability

The Insured will not admit liability for or settle any claim in respect of which the Insurer is liable to indemnify any Insured without the prior consent of the Insurer. If the Practitioner wishes a claim to be settled but the Insurer refuses consent, the Insurer will brief Queen's Counsel or Senior Counsel (to be mutually agreed or, in default of agreement, to be selected by the Chairman of the Victorian Bar Council) to advise on whether or not the claim against the Insured has reasonable prospects of success. If

counsel's advice is that the claim has reasonable prospects of success, the Insurer shall take such steps as are mutually agreed to settle the claim on terms to be mutually agreed or, in default of agreement, such steps and such terms as counsel advises having due regard to the interests of both the Insured and the Insurer. Counsel's fee will in each case be payable by the party against whose contention counsel advised.

25. Consent to settlement

The Insurer will not admit liability for or settle any claim in respect of which the Insurer is liable to indemnify any Insured without the prior consent of the Practitioner. If the Insurer wishes a claim to be settled but the Practitioner refuses consent, the Insurer will brief Queen's Counsel or Senior Counsel (to be mutually agreed or, in default of agreement, to be selected by the Chairman of the Victorian Bar Council) to advise on whether or not the claim against the Insured has reasonable prospects of success. If counsel's advice is that the claim has reasonable prospects of success, the Insurer shall be at liberty to take such steps as are mutually agreed to settle the claim on terms to be mutually agreed or, in default of agreement, such steps and such terms as counsel advises having due regard to the interests of both the Insured and the Insurer (and the Insured will be deemed to have consented to the Insurer taking such steps on behalf of the Insured) . Counsel's fee will in each case be payable by the party against whose contention counsel advised.

26. Subrogation

If any payment is made by the Insurer in respect of a claim against any Insured, the Insurer will be subrogated to all rights of indemnity, contribution or recovery of the Insured in relation thereto. The Insured will not surrender any right, or settle any claim for indemnity, contribution or recovery, without the prior consent of the Insurer. The Insurer will not subrogate any rights against any employee except to the extent that the employee is liable to indemnify the Insurer under clause 14.

27. Payment

Any payment by the Insurer by way of indemnity under clause 1 of this contract is required to be made in Victoria.

DEFINITIONS AND INTERPRETATION

28. General

In this contract, unless the context otherwise requires -

- (a) the singular includes the plural;
- (b) the male gender includes the female, and vice versa;

- (c) the words 'arising from' (and similar expressions) where used in this contract imply a factual connection and not necessarily a causal connection;
- (d) headings are merely descriptive and not to aid interpretation; and
- (e) words and expressions used in this contract have the meanings set out in this section and in the Act (and if there is any inconsistency, this section prevails).

28.2 'The Act'

The Act means the *Legal Profession Uniform Law Application Act 2014* (Vic) and, as appropriate, the Legal Profession Uniform law, other than in relation to any matter prior to its commencement, in relation to which the Act means the *Legal Profession Act 2004* (Vic) or, as appropriate, the *Legal Practice Act 1996* (Vic).

28.3 'Associate'

Associate in clause 7 has the same meaning as under the *Corporations Act 2001* (Cth).

28.4 'Associated enterprise'

Associated enterprise means any firm, company, trust or other entity in which any related interest is held.

28.5 'Certificate of Insurance'

The Certificate of Insurance is the certificate issued by the Insurer which certifies that the Practitioner is insured by the Insurer for the period of insurance on the terms of this contract.

28.6 'Circumstance'

A circumstance is an incident, occurrence, fact or matter which may or does give rise to a claim.

28.7 'Claim'

A claim is a demand for, or an assertion of a right to, civil compensation or civil damages in connection with the Practitioner's legal practice or an intimation of an intention to seek such compensation or damages.

28.8 'Defence costs'

Defence costs are legal costs and disbursements and related expenses reasonably and necessarily incurred in -

- (a) defending any proceeding;

- (b) conducting any proceeding for indemnity, contribution or recovery; or
- (c) investigating, avoiding, reducing or settling any claim,

incurred by -

- (i) the Insured with the consent of the Insurer after reporting the claim or the circumstance to the Insurer; or
- (ii) the Insurer after it has assumed conduct of any such claim or proceeding.

Defence costs do not include any internal or overhead expenses of the Practitioner or the cost of any Insured's time.

28.9 'Employee'

Employee means any person who is, or becomes during the period of insurance, or at any time was -

- (a) employed or otherwise engaged in connection with the Practitioner's legal practice including, without limitation, as a barrister's clerk, reader or office or clerical staff member;
- (b) seconded to work for the Practitioner;
- (c) seconded by the Practitioner to work elsewhere,

but does not mean any independent contractor who provides or provided services to the Practitioner including, without limitation, auditing, accounting, advisory or consulting services (other than a barrister's clerk to the extent that the clerk acts, or fails to act, in connection with the Practitioner's legal practice).

28.10 'Insured'

The Insured is -

- (a) the Practitioner;
- (b) each employee;
- (c) each service, administration, trustee or nominee company to the extent it provides services to the Practitioner;
- (d) each director or officer of an entity referred to in paragraph (c); and
- (e) the estate or legal personal representative of any person referred to in paragraphs (a), (b) and (d).

Any Insured means any one or more of the Insured.

28.11 'The Insurer'

The Insurer means the Legal Practitioners' Liability Committee established under the Act.

28.12 'Interest'

Interest means, in the context of related interest, any share, unit, entitlement or other financial interest.

28.13 'The period of insurance'

The period of insurance means the period from 00.01am on 1 July 2020 to midnight on 30 June 2021 (or if the Practitioner arranged insurance after 1 July 2020, from the date insurance was arranged to midnight on 30 June 2021).

28.14 'The Practitioner'

The Practitioner means the practitioner specified in the Certificate of Insurance.

28.15 'The Practitioner's legal practice'

The Practitioner's legal practice means the practice of a barrister carried on by the Practitioner prior to and/or during the period of insurance.

28.16 'Primary insurer'

Primary insurer means the provider of the first layer (above any excess or deductible) of professional indemnity or civil liability insurance cover.

28.17 'Related interest'

Related interest means the aggregate of all interests beneficially held (whether directly or indirectly) by or on behalf of the Practitioner or any relative of the Practitioner but only where the aggregate is 10% or more of the aggregate of all interests in the enterprise.

28.18 'Relative'

Relative means any spouse, defacto spouse, parent, child, or any parent or child of a spouse or defacto spouse.

28.19 'Reported circumstance'

A reported circumstance is a circumstance first reported by any Insured to the Insurer during the period of insurance.

28.20 'Responsible Entity'

A Responsible Entity is a responsible entity for a managed investment scheme under Chapter 5C of the *Corporations Act 2001* (Cth).

28.21 'Specified amount'

The specified amount is the amount specified in the Certificate of Insurance to be the (non-deterrent) excess for this contract.