

## **REAL ESTATE AGENTS**

### **PROFESSIONAL INDEMNITY INSURANCE**

#### **IMPORTANT INFORMATION**

**Please read the following information**

#### **A. Your Duty of Disclosure**

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

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

Your duty, however, does not require disclosure of any matter:

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

#### **Non-disclosure**

If you fail to comply with your duty of disclosure, the insurer may be entitled to reduce its liability under the contract in respect of a claim, or may cancel the contract.

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

#### **B. Claims Made and Notified Policy**

This policy provides Professional Indemnity Insurance on a "Claims Made and Notified" basis. This means that the policy covers you for claims made against you and notified to the insurer 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

The Privacy Act 1988 (as amended) applies to this insurance and requires us to advise you that:

### Purpose of collection

W. R. Berkley Insurance Australia collects personal information (this is information or an opinion about an individual whose identity is apparent or can reasonable be ascertained and which relates to a natural living person) for the purposes of:

- providing insurance services to you;
- evaluating your application;
- evaluating any request for changes to any insurance provided;
- issuing administering and managing the insurance provided after acceptance of an application;
- investigating and, if covered, managing claims made in relation to any insurance you have with us.

The personal information collected can be used or disclosed by us for secondary purposes related to those purposes listed above, but only if you would expect us to use or disclose the information for such secondary purpose. However, for sensitive information the secondary purpose must be directly related to the purposes listed above.

### Disclosure

When necessary and in connection with the purposes listed above W. R. Berkley Insurance Australia may disclose your personal information to and/or receive information from other companies within the same group, your insurance broker or our agent, government bodies, loss assessors, claim investigators, reinsurers, other insurance companies, mailing houses, claims reference providers, other service providers, hospitals, medical and health professionals, legal and other professional advisers.

### Consequences if information is not provided

If you do not provide us with the information we need we will be unable to consider your application for insurance cover, administer your policy or manage any claim under your policy.

### Access

You may request access to the personal information we hold about you by contacting W.R. Berkley Insurance Australia at the address shown.

## E. Complaints

Any complaints should firstly be addressed to you insurance intermediary. If you remain unsatisfied please place your complaint in writing to The Compliance Manager at W.R. Berkley Insurance Australia at the address shown.

### Contact Details

Level 7  
1 Market Street  
Sydney NSW 2000  
Ph: 02 9275 8500  
Email: [australia@wrberkley.com](mailto:australia@wrberkley.com)

Level 18  
333 Ann Street  
Brisbane Qld 4000  
Ph: 07 3232 1165  
Web site: [www.wrbaustralia.com.au](http://www.wrbaustralia.com.au)

**REAL ESTATE AGENTS  
PROFESSIONAL INDEMNITY INSURANCE**

**INDEX**

<b>Item</b>	<b>Page</b>
INSURING CLAUSES	4
AUTOMATIC EXTENSIONS	5
OPTIONAL EXTENSIONS	8
CLAIMS CONDITIONS	9
GENERAL CONDITIONS	10
EXCLUSIONS	11
DEFINITIONS AND INTERPRETATIONS	13

**REAL ESTATE AGENTS  
PROFESSIONAL INDEMNITY INSURANCE**

THIS IS A CLAIMS MADE AND NOTIFIED INSURANCE POLICY

**1.1 Insuring Clause**

W. R. BERKLEY shall indemnify the INSURED, up to the INDEMNITY LIMIT, against civil liability for compensation and costs arising from any CLAIM first made against the INSURED during the POLICY PERIOD arising out of a breach of professional duty in the exercise and conduct of the BUSINESS.

**1.2 DEFENCE COSTS**

W. R. BERKLEY shall also indemnify the INSURED for DEFENCE COSTS where such costs have been incurred with W. R. BERKLEY's 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 W. R. BERKLEY's liability for such DEFENCE COSTS shall be in the same proportion as the INDEMNITY LIMIT bears to the sum required to dispose of that CLAIM.

### **AUTOMATIC EXTENSIONS**

W.R. Berkley shall provide the following additional cover PROVIDED ALWAYS THAT:

- (a) the cover provided by each Automatic Extension is subject to the Schedule, Insuring Clauses, Conditions, Exclusions, Definitions and Interpretations and any other terms of the policy (unless otherwise expressly stated); and
- (b) the inclusion of any Automatic Extension shall not increase the INDEMNITY LIMIT.

#### **2.1 Trade Practices Act and other legislation**

The cover provided by this policy extends to any CLAIM which arises out of conduct in contravention of the Trade Practices Act 1974, Australian Securities and Investments Act 2001 or any State or Territory Fair Trading Act but only where such conduct:

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

The cover provided by this extension is not subject to Exclusion 5.17.1.

#### **2.2 Loss of or Damage to DOCUMENTS**

In the event of physical loss of or damage to DOCUMENTS which are the property of the INSURED or are in the INSURED's care, custody or control and such loss occurs and is notified to W. R. BERKLEY during the POLICY PERIOD, the INSURED is indemnified, in addition to any cover provided by insuring clauses 1 and 2 in respect of such event, for reasonable and necessary costs and expenses incurred by the INSURED (although not the INSURED's own time) in replacing, restoring or reconstituting such DOCUMENTS.

The cover provided by this extension is not subject to Insuring Clause 1.1 or Exclusion 5.11.

#### **2.3 Dishonesty of Employees**

The cover provided by this policy shall extend to any CLAIM brought about, or contributed to, by the dishonest, fraudulent, criminal or malicious act or omission of any person at any time employed by the INSURED provided that:

- 2.3.1 there is no indemnity 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;
- 2.3.2 there is no indemnity in respect of any loss or theft or embezzlement of money, negotiable instruments, bearer bonds or coupons, stamps, bank or currency notes;
- 2.3.3 no indemnity shall be provided to any person committing or condoning such dishonest, fraudulent, criminal or malicious act or omission;
- 2.3.4 the INSURED shall, at the request and expense of W. R. BERKLEY take all reasonable steps to obtain reimbursement from such person committing or condoning such dishonest, fraudulent, criminal or malicious act or omission;
- 2.3.5 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, shall be deducted from any amount payable under this insurance;
- 2.3.6 the person who committed the dishonest, fraudulent, criminal or malicious act or omission was not a principal, partner or director of the INSURED;
- 2.3.7 the sums payable hereunder shall only be for the balance of liability 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;
- 2.3.8 nothing herein shall preclude W. R. BERKLEY from exercising any right of subrogation against any person committing or condoning such dishonest, fraudulent, criminal or malicious act or omission.

The cover provided by this extension is not subject to Exclusion 5.16.

**2.4 Present or Former Principals, Employees and Others**

The cover provided by the policy shall extend to all present and former partners, principals, directors and employees of the INSURED in the same manner as if they were the INSURED.

**2.5 Defamation, Libel and Slander**

The cover provided by this policy shall extend to any CLAIM in direct consequence of any defamation, libel or slander by the INSURED arising out of the conduct of the BUSINESS.

**2.6 Infringement of Copyright or Patents**

The INSURED is indemnified for reasonable legal costs and expenses incurred with W. R. BERKLEY's prior written consent (not to be unreasonably withheld) in the investigation, defence or settlement of any claim or proceedings first made against the INSURED and notified to W.R. Berkley during the POLICY PERIOD seeking injunctive or other non-compensatory relief in respect of an inadvertent infringement or alleged infringement of any copyright or patents or other intellectual property rights arising out of the conduct of the BUSINESS.

The cover provided by this extension is not subject to Insuring Clause 1.1 or Exclusion 5.17.2.

**2.7 Enquiry Costs**

The INSURED is indemnified for reasonable legal costs and expenses incurred with W.R. Berkley's prior written consent (not to be unreasonably withheld) of representation at any enquiry or other proceedings which have a material effect on the defence of any CLAIM covered by Insuring Clause 1.1 however the amount payable in regards to representation at any enquiry or other proceedings is limited to \$100,000.

The cover provided by this extension is not subject to Insuring Clause 1.1.

**2.8 Joint Venture/Consortium**

The cover provided by the policy shall extend to:

2.8.1 any CLAIM against the INSURED arising out of the conduct of any joint venture;

2.8.2 the INSURED's legal 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:

- (a) such conduct would have been covered by this policy if it had been the conduct of the INSURED;
- (b) such conduct occurred whilst the INSURED was a member of the joint venture or consortium;
- (c) the INSURED has specifically declared in writing to W.R. Berkley, prior to entering into this policy, 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);
- (d) the joint venture has specifically been agreed as covered in writing by W.R. BERKLEY.

**2.9 Estates and Legal Representatives**

W. R. BERKLEY agrees to include in the definition of the INSURED the estate, heirs, legal representatives or assignees of the INSURED in the event of the death, mental disorder and/or other incapacity or insolvency or bankruptcy of such INSURED in respect of any civil liability of the INSURED that would have been covered by Clause 1.1 or 1.2 if the INSURED was alive, had capacity or was not insolvent or bankrupt PROVIDED ALWAYS THAT such persons shall observe and be subject to all the terms of this policy insofar as they can apply.

**2.10 Appointed Sub-Consultants**

The cover provided by this policy shall extend to any CLAIM against the INSURED in respect of the INSURED's civil liability directly arising out of the conduct of any appointed sub-consultant in the course of the exercise and conduct of the BUSINESS.

**2.11 Newly created or acquired subsidiaries**

The cover provided by this policy shall extend to indemnify, in the same manner and to the same extent as the INSURED, any entity or subsidiary acquired or created by the INSURED during the POLICY PERIOD. PROVIDED ALWAYS THAT:

2.11.1 the POLICY PERIOD applicable to such cover shall be the period commencing on the date of such acquisition or creation and expiring fourteen (14) days after that date or on the expiry date of the POLICY PERIOD (whichever is the earlier).

2.11.2 the retroactive date applicable to such cover shall be the date of acquisition or creation of the entity or subsidiary; and

2.11.3 the CLAIM arises out the exercise and conduct of the entity or subsidiary's business which is the same as or substantially similar to the INSURED's BUSINESS.

The INSURED may apply to W.R. BERKLEY within such period of fourteen (14) days, to vary the policy to continue the cover provided by this Extension until the expiry date of the POLICY PERIOD by notifying W.R. BERKLEY of the acquisition or creation of the entity or subsidiary and providing all information requested by W.R. BERKLEY. Any such variation shall be offered by W.R. Berkley at its absolute discretion and subject to any additional terms imposed including the charging of any additional premium which it considers appropriate.

**2.12 Run-Off cover**

W.R. BERKLEY agrees that in the event that an INSURED entity or subsidiary ceases to exist or operate or is consolidated with, merged into or acquired by any other entity then the coverage provided under this POLICY with respect to such INSURED entity or subsidiary shall continue until the expiry date of the POLICY PERIOD. PROVIDED ALWAYS THAT such coverage shall only apply in respect of CLAIMS arising out of acts, errors or omissions occurring prior to the effective date on which such INSURED entity or subsidiary ceased to exist or operate or was consolidated with, merged into or acquired by another entity, unless otherwise agreed in writing by W.R. BERKLEY.

**2.13 Severability**

W. R. BERKLEY agrees that where this policy names more than one INSURED in the SCHEDULE, any conduct on the part of an INSURED named in the Schedule whereby such INSURED:

2.13.1 failed to comply with the duty of disclosure in terms of the Insurance Contracts Act 1984; or  
2.13.2 made a misrepresentation to W. R. BERKLEY before this contract of insurance was entered into,

shall not prejudice the right of any other INSURED named in the SCHEDULE to indemnity as may be provided by this policy. PROVIDED ALWAYS THAT:

- (a) such other INSURED, its directors or employees shall be entirely innocent of and have no prior knowledge of any such conduct. The onus of proof in this regard shall be upon the INSURED;
- (b) such other INSURED shall, as soon as is reasonably practicable upon becoming aware of any such conduct, advise W. R. BERKLEY in writing of all known facts in relation to such conduct; and
- (c) enquiry has been made, before the contract of insurance was entered into with W. R. BERKLEY, of each INSURED and persons who make up the INSURED for the purposes of complying with the duty of disclosure under the Insurance Contracts Act 1984.

For the sake of clarity, this provision is not intended to limit the INSURED's duty of disclosure owed by the entities or persons that make up the INSURED.

**2.14 Franchisors' Indemnity**

If the INSURED operates as a real estate franchisee then any CLAIM against the franchisor arising out of its vicarious liability for the acts errors or omissions of the franchisee shall be covered by this policy as if made against the INSURED.

**2.15 General Insurance Distributor**

The definition of BUSINESS in paragraph 6.2 of the policy shall be extended to include the distribution of general insurance products by the INSURED that does not require an Australian Financial Services License and is in a capacity other than as an authorised representative of an Australian Financial Services License holder. However for the purposes of this extension W. R. BERKLEY will not be liable for any CLAIM in connection with:

- 2.15.1 the failure of any INSURED to give written disclosure of any commission, fees or other benefits received in connection with the provision of the advice, services or products in the capacity of a general insurance product distributor; or
- 2.15.2 the INSURED providing advice in respect of general insurance products.

## **OPTIONAL EXTENSIONS**

The following Optional Extensions shall only apply where it is specifically noted in the SCHEDULE that they are included:

### **2.16 Reinstatement of the INDEMNITY LIMIT**

If the INDEMNITY LIMIT is partially reduced or exhausted by any CLAIM or DEFENCE COSTS then W. R. BERKLEY agrees to reinstate the INDEMNITY LIMIT for any CLAIMS covered by Insuring Clause 1.1 and DEFENCE COSTS that are totally unrelated or unconnected to the CLAIM that reduced or exhausted the INDEMNITY LIMIT, PROVIDED ALWAYS THAT in the aggregate for all CLAIMS and DEFENCE COSTS (subject to whether the DEFENCE COSTS are inclusive or in addition as per Clause 1.2) W. R. BERKLEY shall be liable for no more than twice the INDEMNITY LIMIT.

### **2.17 Fidelity**

W. R. BERKLEY agrees to provide indemnity to the INSURED against loss of money, negotiable instruments, bearer bonds or coupons, stamps, bank or currency notes belonging to the INSURED or for which the INSURED is legally liable where any such loss is sustained in consequence of any dishonest or fraudulent act or omission of any person employed by the INSURED. PROVIDED ALWAYS THAT:

- 2.17.1 such loss is first discovered by the INSURED during the POLICY PERIOD and is notified in writing to W. R. BERKLEY within twenty-eight days of the date of such discovery (but never beyond the expiry date of the POLICY PERIOD);
- 2.17.2 there is no indemnity 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;
- 2.17.3 no indemnity in respect of such loss shall be afforded hereunder to any person committing or condoning such dishonest, fraudulent, criminal or malicious act or omission;
- 2.17.4 the INSURED shall, at the request and expense of W. R. BERKLEY take all reasonable steps to obtain reimbursement from such person committing or condoning such dishonest, fraudulent, criminal or malicious act or omission;
- 2.17.5 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, shall be deducted from any amount payable under this insurance;
- 2.17.6 the sums payable hereunder shall only be for the balance of liability 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;
- 2.17.7 the EXCESS is also applicable to each and every loss incurred by the INSURED and is costs inclusive;
- 2.17.8 nothing herein shall preclude W. R. BERKLEY from exercising any right of subrogation against any person committing or condoning such dishonest, fraudulent, criminal or malicious act or omission;
- 2.17.9 there is no indemnity for any loss in connection with the INSURED receiving cash payment for anything including, without limiting the foregoing, rent;
- 2.17.10 the person who committed the dishonest or fraudulent act or omission was not a principal, partner or director of the INSURED;
- 2.17.11 the maximum amount payable under this extension is \$50,000 which is part of the total INDEMNITY LIMIT and not in addition.

The cover provided by this Extension 2.17 is not subject to Insuring Clauses 1.1 and 1.2 or Exclusion 5.16.



## CLAIMS CONDITIONS

The following CLAIMS conditions apply to this insurance:

### **3.1 Discovery of a CLAIM**

If during the POLICY PERIOD the INSURED receives notice of any CLAIM that is indemnifiable under this insurance the INSURED shall give notice to W. R. BERKLEY as soon as practicable.

### **3.2 Admission of Liability**

In the event of any CLAIM, the INSURED shall not admit liability and no admission, offer, promise or payment shall be made by the INSURED without W. R. BERKLEY's prior written consent.

### **3.3 Conduct of CLAIMS**

Following notification of any CLAIM, W. R. BERKLEY shall be entitled to take over and conduct in the name of the INSURED the investigation, defence or settlement of any such matter. The INSURED shall CO-OPERATE with and give all such assistance as W. R. BERKLEY may reasonably require.

### **3.4 CLAIM Settlements**

W. R. BERKLEY 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 W. R. BERKLEY's prior written consent) and upon such payment (or agreement to pay) W. R. BERKLEY shall not be under any further liability in respect of such CLAIM except for DEFENCE COSTS incurred prior to such payment (or agreement to pay) with W. R. BERKLEY's prior written consent.

Notwithstanding such payment (or agreement to pay) by W. R. BERKLEY, in no circumstances will W. R. BERKLEY be liable in respect of such CLAIM or CLAIMS for an amount greater than otherwise provided for in this POLICY. In the event that:

3.4.1 W. R. BERKLEY has made a payment in excess of the amount for which W. R. BERKLEY would otherwise have been liable in accordance with the POLICY in respect of such CLAIM, the INSURED shall refund to W. R. BERKLEY that proportion of the payment which exceeds the amount which W. R. BERKLEY would otherwise have been liable for in accordance with the POLICY.

3.4.2 W. R. BERKLEY has agreed to pay an amount in excess of the amount which W. R. BERKLEY would otherwise have been liable for in accordance with the POLICY in respect of such CLAIM, W. R. BERKLEY's liability in respect of such agreement shall be limited to the amount which W. R. BERKLEY would otherwise have been liable for in accordance with the POLICY.

### **3.5 W. R. BERKLEY's and the INSURED's right to defend**

The INSURED shall be required to contest any legal proceedings unless a Senior Counsel (to be mutually agreed upon by the INSURED and W. R. BERKLEY or failing agreement to be appointed by the President of the NSW Bar Association) shall advise that, taking due account of the interests of both W. R. BERKLEY and the INSURED, such proceedings should not be contested.

If the INSURED wishes to continue to contest any CLAIM which W. R. BERKLEY wishes to settle, the INSURED may do so. However, W. R. BERKLEY's liability in respect of that CLAIM shall thereafter be limited to the amount for which the CLAIM could have been settled plus DEFENCE COSTS incurred with W. R. BERKLEY's prior written consent up to the date upon which it would have reasonably settled the claim, less any unpaid EXCESS.

### **3.6 EXCESS**

The INSURED is liable for the amount of any EXCESS stated in the SCHEDULE and W. R. BERKLEY shall have no liability for the amount of any EXCESS.

## **GENERAL CONDITIONS**

The following general conditions apply to this insurance:

### **4.1 Jurisdiction and Service**

In the event of a dispute arising under or in connection with this policy, W. R. BERKLEY 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.

Any originating legal process and all interlocutory proceedings in connection with any such dispute may be served upon:

Mr Lindsay Joyce, Partner  
DLA Phillips Fox, Solicitors  
201 Elizabeth Street  
SYDNEY NSW 2000

Mr Joyce has authority to accept service and to enter an appearance on W. R. BERKLEY's behalf.

### **4.2 Terms of Payment**

All premiums due to W. R. BERKLEY under this policy will be paid within 30 days from the policy's inception.

### **4.3 Cancellation**

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

The INSURED may cancel this insurance at any time by giving 14 days notice and provided there have been no notifications made by the INSURED under this policy the INSURED shall 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.

In any event W. R. BERKLEY is entitled to retain a minimum premium of \$750.00 in the event of cancellation by the INSURED.

### **4.4 Subrogation**

If any payment is made by W. R. BERKLEY, the INSURED grants to W. R. BERKLEY all rights of recovery against any parties from whom a recovery may be made and the INSURED shall take all reasonable steps to preserve such rights.

### **4.5 Retroactive Date**

Where a retroactive date is specified in the SCHEDULE, this insurance shall not indemnify the INSURED for any CLAIM in connection with the exercise and conduct of the BUSINESS prior to the said retroactive date.

The cover provided by Extension 2.11 this insurance shall not extend to any CLAIM in connection with the exercise and conduct of the business of such entity of subsidiary prior to the retroactive date specified in that Extension.

### **4.6 Claims Aggregation**

Where two or more CLAIMS arise from the same original cause then all such CLAIMS shall constitute one CLAIM under the policy and

4.6.1 only one EXCESS shall be payable by the INSURED; and

4.6.2 the maximum amount payable by W. R. BERKLEY in respect thereof shall not exceed the INDEMNITY LIMIT.

### **4.7 Alteration to risk**

The INSURED shall give W. R. BERKLEY written notice as soon as practicable of any material alteration to the risk during the POLICY PERIOD including but not limited to:

- (a) an 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 giving rise to the appointment of a receiver or bankruptcy or winding-up proceedings;
- (b) any material change in the nature of the professional services offered by an INSURED.

Where such notice is given and/or where there is any material alteration to the risk W. R. BERKLEY shall be entitled to cancel this policy in accordance with the Insurance Contracts Act 1984.

## **EXCLUSIONS**

This insurance shall not indemnify the INSURED against any CLAIM or for any loss directly or indirectly arising out of, related to, or in connection with:

### **5.1 Previously Known CLAIM or Circumstance**

any:

- 5.1.1 CLAIM made upon the INSURED prior to the inception of this policy; or
- 5.1.2 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
- 5.1.3 fact, matter or circumstances which were disclosed by the INSURED to W. R. BERKLEY prior to the inception of this policy, whether in the proposal or otherwise; or
- 5.1.4 fact, matter or circumstance which was notified by the INSURED to any prior insurer.

### **5.2 Trading Losses and Insolvency**

- 5.2.1 any trading losses or trading liabilities incurred by any business managed or carried on by the INSURED; or
- 5.2.2 the insolvency of the INSURED.

### **5.3 Fines, Penalties, Punitive, Multiple or Exemplary Damages**

any fine or penalty or any multiple, exemplary, punitive or aggravated damages.

### **5.4 Nuclear Risks**

any of the following:

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

### **5.5 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:

- 5.5.1 war, invasion, acts of foreign enemies, hostilities or warlike operations (whether war be declared or not), civil war, mutiny, revolution, rebellion, insurrection, uprising, riots, strikes or civil commotion; or
- 5.5.2 military or usurped power or confiscation or nationalisation or requisition or destruction of or damage to property by or under the order of any government (including but without limiting the foregoing this includes any government de jure or de facto) or public authority or local authority; or
- 5.5.3 any ACT OF TERRORISM; or
- 5.5.4 any action taken in controlling, preventing, suppressing or in any way relating to things in 5.5.1 to 5.5.3 above.

The burden of proving that a CLAIM does not fall within this exclusion shall be upon the INSURED.

### **5.6 Asbestos, Toxic Mould and POLLUTION**

asbestos, toxic mould, seepage, POLLUTION or contamination of any kind.

### **5.7 USA/Canada**

- 5.7.1 any action brought in any court of the United States of America, Canada or their dominions or protectorates or judgement registered or lodged in connection with such an action; or
- 5.7.2 any work or activities undertaken by the INSURED in the United States of America, Canada or their dominions or protectorates.

### **5.8 Loss of DOCUMENTS - Magnetic or Electrical Media**

the physical loss of or damage to DOCUMENTS which are stored on magnetic or electrical media unless such DOCUMENTS are duplicated on magnetic or electrical media with the intention that in the event of loss or damage the duplicate can be used as the basis for restoring the DOCUMENTS to their original status.

- 5.9 Liability arising out of Employment**  
bodily injury, mental injury (including but not limited to mental stress and mental anguish), harassment, 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.
- 5.10 Liability involving Transport or Property owned by the INSURED**  
the ownership, possession or use by or on behalf of the INSURED of any aircraft, watercraft, hovercraft, motor vehicle or trailer or any buildings, structures, premises or land or that part of any building leased, occupied or rented by the INSURED or any property of the INSURED.
- 5.11 Bodily Injury and/or Property Damage unless in breach of a professional duty**  
bodily injury, mental injury (including but not limited to mental stress and mental anguish), harassment, invasion of privacy, disease or death of any person(s) or loss of or damage to property unless such CLAIM arises directly out of any breach of a professional duty owed by the INSURED arising from the exercise and conduct of the BUSINESS.
- 5.12 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:  
5.12.1 to pay liquidated damages or any penalty; or  
5.12.2 in the nature of an indemnity, release, hold harmless, warranty or guarantee.
- 5.13 Supply of Goods**  
the sale, manufacture, installation, construction, alteration, repair, servicing or treating of any goods or products sold, distributed or supplied including but not limited to the sale and/or supply of hardware and/or software by the INSURED.
- 5.14 Directors' and Officers' Liability**  
any breach or alleged breach by the INSURED of a duty owed or any alleged wrongful conduct in the capacity of a director, secretary or officer of a body corporate.
- 5.15 Trustee Liability**  
any advice or services provided by the INSURED in the capacity of a trustee provided always that this exclusion shall not apply where the INSURED acts as a stakeholder, custodian or trustee where such activities are undertaken incidentally to the provision of other professional advice and service(s) in the course and conduct of the BUSINESS.
- 5.16 Fraud, Dishonesty or Criminal Act**  
any act, error or omission of any person which is dishonest, fraudulent, criminal or malicious.
- 5.17 Extensions**  
5.17.1 the Trade Practices Act 1974, Australian Securities and Investments Act 2001 or any State or Territory Fair Trading Act; or  
5.17.2 any inadvertent infringement or alleged infringement of any copyright or patents or other intellectual property rights.
- 5.18 Refund of Fees or Charges**  
any CLAIM for return, refund or disgorgement of any professional fees, charges, commissions or other remuneration of whatsoever kind received by, paid or payable to the INSURED in connection with the BUSINESS.
- 5.19 Associated Companies**  
made against the INSURED by any firm, company or partnership in which the INSURED or any director, partner or principal of the INSURED has a financial or executive interest or which has a financial or executive interest in the INSURED unless emanating from an independent and unrelated third party.
- 5.20 Failure to arrange insurance or finance**  
a failure by the INSURED to arrange insurance or finance.
- 5.21 Valuations**  
property or business valuations.

**5.22 Investment Advice**

the giving of any express or implied warranty or guarantee, making a representation, failing to give an appropriate warning or engaging in misleading and deceptive conduct relating to the financial return (including, without limitation, any actual, historical, anticipated, forecast or projected financial return) of any investment or portfolio of investments.

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 shall remain in full force and effect.

**DEFINITIONS AND INTERPRETATIONS**

Headings and notes are for information purposes only and are not to be construed as part of this insurance. Various words and phrases are used in this insurance and wherever they appear, whether they are used in the plural or singular form, they are deemed to have the meaning set out below:

**6.1 ACT OF TERRORISM**

Shall mean an activity that (1) 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 (2) appears to be intended to (i) intimidate or coerce a civilian population, or (ii) disrupt any segment of the economy of a government de jure or de facto, state or country; or (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.

**6.2 BUSINESS**

Shall mean advice given and service(s) performed by or on behalf of the INSURED as described in the SCHEDULE.

**6.3 CLAIM**

Shall mean:

6.3.1 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 remedy; and

6.3.2 the positive assertion in writing of a legal entitlement to damages or other compensatory remedy in connection with an alleged civil liability on the part of the INSURED, in terms evincing an intention to pursue such legal entitlement.

**6.4 CO-OPERATE**

Shall mean that the INSURED:

6.4.1 assists W. R. BERKLEY and its duly appointed representatives to put forward the best possible defence of a CLAIM within the time constraints available;

6.4.2 shall have adequate internal systems in place, which will allow ready access to material information; and

6.4.3 shall at all times and at its own cost give to W. R. BERKLEY or its 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.

**6.5 DEFENCE COSTS**

Shall mean all costs and expenses incurred in the investigation, defence or settlement of any CLAIM in respect of which W. R. BERKLEY is liable to indemnify the INSURED under the terms of this insurance.

**6.6 DOCUMENTS**

Shall mean 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 shall include computer software and systems records (electronic data shall 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 paper.

**6.7 EXCESS**

If the SCHEDULE states that the EXCESS is costs inclusive then EXCESS shall mean the sum shown in the SCHEDULE unless otherwise stated in this insurance and shall be the first amount payable of each CLAIM made against the INSURED.

If the SCHEDULE states that the EXCESS is costs exclusive then EXCESS shall mean the sum shown in the SCHEDULE unless otherwise stated in this insurance and shall be the first amount payable of each CLAIM made against the INSURED excluding DEFENCE COSTS .

**6.8 INDEMNITY LIMIT**

Shall mean the sum shown in the SCHEDULE which is available to indemnify the INSURED in respect of any one CLAIM and in the aggregate during the POLICY PERIOD subject to Optional Extension 2.15.

**6.9 INSURED**

Shall mean the person(s), partnership, company, corporation or other entity named as the INSURED in the SCHEDULE.

**6.10 POLICY PERIOD**

Shall mean the period shown in the SCHEDULE plus any extensions to the period which may be granted by W. R. BERKLEY.

**6.11 POLLUTION**

Shall mean any one or a combination of a release, emission, discharge, dispersal, disposal, escape of any substances, which are capable of causing harm (which shall 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, shall include offence caused to any of their senses) into or onto any water, land or air.

**6.12 SCHEDULE**

Shall mean the document entitled 'Schedule' that relates to this insurance.

**6.13 W. R. BERKLEY**

Shall mean W. R. Berkley Insurance Australia which is a trading name of W. R. Berkley Insurance (Europe), Limited (ABN 81 126 483 681).