

MEMORANDUM

TO: WABA MEMBERS
FROM: STEPHEN DAVIES SC, PRESIDENT
DATE: 7 MAY 2020
RE: **PROFESSIONAL INDEMNITY INSURANCE AND
RENEWAL OF PRACTISING CERTIFICATES FOR 2020-2021**

As members will be aware, each year Bar Council is required, pursuant to Regulation 97(1)(a) of the *Legal Profession Regulations 2009* (WA), to consider professional indemnity insurance policies for the purpose approving the form of the policies.

The policies are assessed for compliance with The Western Australian Bar Association Professional Standards Scheme (copy attached) and compared against the standards to be applied by Bar Council under the *Professional Standards Act 1997* (WA).

This year, as the *Legal Profession Uniform Law* will come into effect in Western Australia on 1 July 2020, the policies were also assessed for compliance with the Legal Profession Uniform General Rules 2015.

Legal Profession Regulations 2009

Regulation 96 of the *Legal Profession Regulations 2009* requires legal practitioners practising in Western Australia to hold professional indemnity insurance.

Regulation 97(1)(a) exempts from Regulation 96:

a barrister who is covered by a policy of professional indemnity insurance that –

- (i) is in a form approved by resolution of the Council of The Western Australian Bar Association (Inc.); and*
- (ii) provides cover up to a limit which, in the aggregate, is not less than that provided under a certificate of insurance under the PII arrangement for the period in respect of which exemption is claimed;*

The minimum limit of indemnity required by Regulation 97(1)(a)(ii) is \$2 million each claim inclusive of claimant's costs.

The significance of the minimum limit of indemnity being a sum *inclusive* of claimant's costs is explained below and needs to be fully understood by any member choosing to take out cover at the minimum level.

Legal Profession Uniform General Rules 2015

Section 210(1)(b)(i) of the *Legal Profession Uniform Law* provides as follows:

Approved insurance policy

- (1) *For the purposes of this Part, a policy of professional indemnity insurance is an **approved insurance policy** for a participating jurisdiction if –*
- (a) *it is issued or provided by–*
- (i) *an insurer or other provider approved under, or selected in accordance with, applicable legislation of the jurisdiction; or ...*

Clause 152(1) of the *Legal Profession Uniform Law Application Bill 2020* (WA) provides as follows:

... a Bar-approved policy ... is taken to be an approved insurance policy for the purposes of this Act and the Legal Profession Uniform Law (WA) if the insurance or policy complies with section 210(1)(b) of the Law.

The Association may, by resolution of its Council, approve a policy of professional indemnity insurance for barristers: cl. 159(1).

Rule 79 of the Legal Profession Uniform General Rules 2015 sets the minimum standards for a barrister's professional indemnity insurance for the purpose of s 210(1)(b)(i) of the Uniform Law as follows:

- (2) *Professional indemnity insurance must indemnify the barrister against civil liability incurred while engaging in legal practice as a barrister within Australia. [Civil liability cover]*
- (3) *Professional indemnity insurance must provide indemnity for claims actually made and notified during the period of insurance. [Claims made and notified cover]*
- (4) *Professional indemnity insurance must provide minimum coverage of \$1.5 million for each and every claim, or each and every loss, inclusive of the claimant's costs and defence costs, up to a minimum aggregate limit of \$4.5 million. [Minimum coverage per claim and in the aggregate]*
- (5) *Professional indemnity insurance must provide indemnity for a minimum of 7 years for run-off liabilities in the event that the insured dies or ceases to engage in legal practice as a barrister for any reason, other than having the insured's Australian practising certificate cancelled as a result of disciplinary action. [Run-off cover]*
- (6) *In the case of a claim arising from dishonesty or fraud, professional indemnity insurance must not exclude indemnity of a barrister who was not knowingly involved in or party to the dishonesty or fraud. [Fraud cover]*
- (7) *Professional indemnity insurance need not but may provide indemnity to the extent that the subject matter of the claim entitles a claimant to claim and receive compensation from a fidelity fund, guarantee fund or similar cover provided under jurisdictional legislation.*

- (8) *Professional indemnity insurance must provide retroactive cover, except for claims arising out of fraud or dishonesty. However, it is permissible for the insurance to impose a retroactive limitation on cover: ...[Retroactive date cover]*

The Western Australian Bar Association's Professional Standards Scheme

Section 34 of the *Professional Standards Act 1997* (WA) ("PS Act") provides as follows:

Limitation of liability by insurance arrangements

A scheme may provide that if a person to whom the scheme applies and against whom a proceeding relating to occupational liability is brought is able to satisfy the court concerned that -

- (a) that person has the benefit of an insurance policy insuring that person against the occupational liability to which the cause of action relates; and*
 - (b) the amount payable under the policy in respect of that occupational liability is not less than the amount of the monetary ceiling specified in the scheme in relation to the class of person and the kind of work to which the cause of action relates,*
- that person is not liable in damages in relation to that cause of action above the amount of the monetary ceiling so specified.*

By s 4 of the PS Act, "the amount payable under an insurance policy in respect of an occupational liability" includes:

- (a) defence costs payable in respect of a claim, or notification that may lead to a claim ..., but only if those costs are payable out of the one sum insured under the policy in respect of the occupational liability; and*
- (b) the amount payable under or in relation to the policy by way of excess.*

The PS Act s 40 provides as follows:

For the purposes of a scheme, an insurance policy must be a policy, or a policy of a kind, which complies with standards determined by the occupational association whose members may be insured under such a policy, or a policy of such a kind.

Clause 3 of the Professional Standards Scheme provides:

...

3.2 If a person, who was at the time of the act or omission giving rise to occupational liability, a person to whom the scheme applied, against whom a proceeding relating to occupational liability is brought, is able to satisfy the court that such person has the benefit of an insurance policy:

- (a) of a kind which complies with the standards determined by the Association,*
 - (b) insuring such person against that occupational liability, and*
 - (c) under which the amount payable in respect of that occupational liability is not less than the monetary ceiling specified in this scheme,*
- that person is not liable in damages in relation to that cause of action above the monetary ceiling specified in this scheme.*

3.3 The monetary ceiling is \$2 million.

Approved PII Policies

The policies offered by:

- AAI Limited (trading as Suncorp)
- Arch Underwriting (through Marsh Pty Ltd)
- Berkley Insurance Australia (through Pacific Indemnity Underwriting Solutions Pty Ltd)

are approved by Bar Council on the basis that the policies all comply with the requirements of the *Legal Profession Regulations 2009* (WA); the Legal Profession Uniform General Rules 2015; and the Association's Professional Standards Scheme.

Policy offered by Insurance Australia Ltd trading as CGU Australia (through Aon)

This policy is still under consideration and has not, at this stage, been approved.

Unless and until it is approved members are advised not to contract to insure using this policy.

Members will be advised further in relation to this policy shortly.

Top-up Insurance

It is important to note that if you take out professional indemnity insurance cover with a policy limit of \$2 million inclusive of claimant's costs, you will be out of pocket under the Professional Standards Scheme if the total liability for damages and claimant's costs exceeds \$2 million (however allocated). It should be borne in mind that the Scheme limits a barrister's liability in damages to \$2 million; their liability for claimant's costs is not capped.

This arises as follows:

The Scheme limits liability in damages to \$2 million.

That \$2 million limit is in respect of liability for damages in respect of a claim. The limit does not apply to claimant's costs, which can be claimed, awarded and recovered from you in addition to the \$2 million limit damages.

This means that if you face a claim where the quantum of damages is at or approaching \$2 million then if you hold only the minimum limit of indemnity of \$2 million inclusive of claimant's costs, you face a prospect of being made liable, and being uninsured, in respect of any award of costs in favour of the claimant.

All members are advised to carefully consider this issue at the time of taking out or renewing cover and to give careful consideration to taking out top up insurance to accommodate the situation or face out-of-pocket expense to meet their liability under the Scheme.

Please note it is the responsibility of each barrister to satisfy him or herself as to the content of the policies on offer, the terms and conditions, and the premium applicable to them.

All inquiries about the policies, including premium information should be directed to the brokers/insurers. Bar Council is unable to provide recommendations or any advice as to the merits of the policies.

Law Mutual Professional Indemnity Insurance

Members may also take out cover through the Law Mutual Professional Indemnity Insurance arrangements.

Set out below are the contact particulars for each insurance provider:

- **AAI Limited** (Suncorp)
Suncorp Professional Risks
GPO Box 3999
SYDNEY NSW 2001
Phone: 1300 308 950
Email: sunprorisk@suncorp.com.au

- **Arch Underwriting** (through Marsh Pty Ltd)
Ms Wendy Mancini
Senior Account Executive
Financial & Professional Lines - FINPRO
Marsh Pty Ltd
Level 6, 225 St George's Terrace
PERTH WA 6000
Phone: (08) 9289 3828
Email: wendy.mancini@marsh.com

- **Berkley Insurance Australia** (through Pacific Indemnity Underwriting Solutions Pty Ltd)
Mr B Piggott
Willis Temby Insurance Brokers Pty Ltd
7 Alvan Street
MT LAWLEY WA 6050
Phone: 9227 8233
Email: brettp@willistemby.com.au

Renewal of Practising Certificates

Under rule 5 of the *Legal Profession Rules 2009* the **standard renewal period is from 1 May to 31 May.**

Applications for renewal of a practising certificate made after 31 May 2020 will attract late fees.

The Legal Practice Board has issued a [Notice on Fees](#) in relation to payment of fees for the 2020-2021 renewal period.

Notification Requirements

In order to ensure there is no delay in the issue of practising certificates, the insurers/brokers have been requested, upon providing professional indemnity insurance cover to a WABA member, to notify the following by email:

- (i) the barrister concerned;
- (ii) WABA (Debbie Cole) (ExecutiveOfficer@wabar.asn.au);
- (iii) Legal Practice Board (general@lpbwa.com)

To facilitate this process it is essential that you include your email address in your application for insurance.

Summary

Recapping the above, **it is the responsibility of each member to:**

1. Satisfy him or herself as to the content of the policies on offer, the terms and conditions, and the premium applicable to them;
2. Ensure that their application and payment for professional indemnity insurance is submitted as soon as possible, in order to allow adequate time for the insurer to notify the barrister, the WABA and the Legal Practice Board;
3. Submit their application and payment for renewal of their practising certificate to the Legal Practice Board **by 31 May 2020.**

MEMORANDUM

TO: WABA MEMBERS
FROM: STEPHEN DAVIES SC, PRESIDENT
DATE: 20 MAY 2020
RE: **PROFESSIONAL INDEMNITY INSURANCE - Policy offered by Insurance Australia Ltd trading as CGU Australia (through Aon)**

Further to my memorandum dated 7 May 2020, I write to advise that Bar Council has given further consideration to the policy offered by Insurance Australia Ltd trading as CGU Australia.

On the bases that the CGU policy has a lowest limit of \$1.5 million each claim inclusive of claimant's costs, and does not automatically extend to barristers acting as arbitrators or mediators, Bar Council has approved the policy with the extension.

This means that the policy is only approved with the extension and this policy can only be used with that extension.

Further, this policy has only been approved a minimum cover of \$2 million inclusive of costs. This means the policy can only be used with a minimum cover of \$2 million inclusive of costs.

The relevant contact at Aon is:

William Phanthana
Client Executive
Aon Risk Solutions
130 George Street
PARRAMATTA NSW 2124
Phone: (02) 8623 4198
Email: william.phanthana1@aon.com