

## MEMORANDUM

TO: All ordinary members of the Western Australian Bar  
FROM: Martin Cuerden SC, President  
DATE: 22 April 2022  
RE: **IMPORTANT: Professional Indemnity Insurance and  
Renewal of Practising Certificates for 2022-2023**

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### **APPROVAL OF PROFESSIONAL INDEMNITY INSURANCE POLICIES**

Regulation 97(1)(a) of the *Legal Profession Regulations 2009* (WA) (**the Regulations**) provides that 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

is exempt from the requirements to comply with reg 96(a) and (b) thereof.

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

This year, Bar Council has considered the following 4 policies of professional indemnity insurance which have been provided to it for consideration:

- AAI Limited trading as Suncorp described as '*Professional Indemnity Insurance Policy for Barristers 2022-2023*' (**the Suncorp Policy**)
- Arch Underwriting at Lloyd's (Australia) Pty Ltd acting on behalf of certain underwriters at Lloyd's described as '*Western Australian Barristers Approved Indemnity Insurance with Optional Public Liability Extension*', offered through Marsh Pty Ltd (**the Arch Underwriting Policy**)
- Insurance Australia Limited trading as CGU Insurance described as '*CGU Barristers Civil Liability Professional Indemnity Insurance Policy*', offered through AON (**the CGU Policy**)

- Pacific Indemnity Underwriting Solutions Pty Ltd on behalf of Berkley Insurance Australia trading as Berkley described as '*Barristers Professional Indemnity Policy Wording – PIUS WA BAR 21\_22*' (**the Berkley Policy**)<sup>1</sup>

Each policy was assessed for compliance with the Regulations, *The Western Australian Bar Association Professional Standards Scheme* (**the Scheme**) and compared against the standards to be applied by Bar Council under the *Professional Standards Act 1997* (WA).

As it is expected that the *Legal Profession Uniform Law (WA)* (**the Uniform Law**) will come into effect in Western Australia with effect from 1 July 2022, the policies were also assessed for compliance with the *Legal Profession Uniform General Rules 2015* (**the Uniform General Rules**).

Par 153(1) of the *Legal Profession Uniform Law Application Bill 2021* provides, relevantly, that a 'Bar-approved policy' is taken to be an approved insurance policy for the purposes of the Act and the Uniform Law if the insurance or policy complies with s210(1)(b) of the Uniform Law. Par 152(1) of the Bill defines a 'Bar-approved policy' to mean a policy of professional indemnity insurance approved under s160(1). Par 160(1) of the Bill provides that the Western Australian Bar Association may, by resolution of Bar Council, approve a policy of professional indemnity insurance for barristers.

I observe that under par 302 of the Bill, which is part of the transitional provisions found in Part 16, Div 8 thereof, a policy of professional indemnity insurance approved by resolution of the Council of the Western Australian Bar Association that is in force immediately before the commencement day is taken on and from the commencement day, to be a Bar-approved policy under s160(1).

Subject to what is said below, Bar Council considers that each policy complies with the requirements of each of the above.

Each of the Suncorp Policy, the Arch Underwriting Policy and the Berkley Policy will be issued with a minimum limit of indemnity of \$2 million per claim inclusive of claimant's costs (exclusive of defence costs). The CGU Policy is offered with a minimum limit of indemnity of \$1.5 million per claim (which does **not** comply with reg 97(1)(a)(ii) or the Scheme).

Each of the Suncorp Policy, the Berkley Policy and the CGU Policy comply with the requirements of rule 79 of the Uniform General Rules in respect of retroactive date cover. However, the Arch Underwriting Policy does **not** comply unless the member requests retroactive liability cover in the proposal form and the contract is extended accordingly.

Both the Suncorp Policy and the Arch Underwriting Policy expressly extend cover to barristers acting as arbitrators and mediators. Neither the Berkley Policy nor the CGU Policy expressly provide that cover extends to work as an arbitrator or mediator. Pacific Indemnity Underwriting Solutions Pty Ltd has confirmed in writing that this is included in the cover provided by the Berkley Policy. However, AON have confirmed

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<sup>1</sup> We have confirmed with the insurer that this is the policy applicable to the 2022-23 financial year even though it is described by reference to the 2021-22 financial year.

in writing that if a member wishes to act as a mediator or arbitrator, they will need to note it on the Proposal form for the CGU Policy.

### **RESOLUTIONS OF BAR COUNCIL**

Bar Council has resolved, pursuant to reg 97(1)(a)(i), to:

1. **unconditionally** approve each of the Suncorp Policy and the Berkley Policy;
2. approve the CGU Policy **on the following conditions:**
  - (1) the member takes out cover with a minimum limit of indemnity of \$2 million per claim inclusive of claimant's costs; and
  - (2) if the member wishes to act as an arbitrator or mediator, they note that intention on the Proposal form and take out any necessary cover; and
3. approve the Arch Underwriting Policy **on the condition** that the member requests retroactive liability cover in the proposal form and the contract is extended accordingly.

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

At the risk of stating the obvious, any member who takes out cover under a policy of insurance which Bar Council has conditionally approved, without complying with the conditions of that approval, will be non-compliant with their legal obligations in respect of professional indemnity insurance.

### **BAR COUNCIL APPROVES BUT DOES NOT GIVE ADVICE AS TO POLICIES**

Please note that Bar Council approves policies of professional indemnity insurance but does not give any advice or make any recommendations as to their commercial terms. Bar Council is unable to provide recommendations or any advice as to the merits of the policies.

It is the responsibility of each member to satisfy themselves as to the content of the approved policies, the terms and conditions, and the premium applicable to them. All inquiries about the policies, including premium information, should be directed to the relevant broker/insurer.

## **INSURANCE PROVIDERS' DETAILS**

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

- The Suncorp Policy:  
AAI Limited (Suncorp)  
Suncorp Professional Risks  
Level 10, 10 Shelley St  
Sydney NSW 2000  
Phone: 1300 308 950  
Email: [sunprorisk@suncorp.com.au](mailto:sunprorisk@suncorp.com.au)
  
- The Arch Underwriting Policy:  
Arch Underwriting at Lloyd's (Australia) Pty Ltd (through Marsh Pty Ltd)  
Georgia Gorman  
Account Executive  
Marsh Pty Ltd  
Level 13, 111 Eagle Street  
BRISBANE QLD 4000  
Phone:(07) 3115 4649  
Email: [georgia.gorman@marsh.com](mailto:georgia.gorman@marsh.com)
  
- The Berkley Policy:  
Berkley Insurance Australia (through Pacific Indemnity Underwriting Solutions Pty Ltd)  
Mr Brett Piggott  
Willis Temby Insurance Brokers Pty Ltd  
PO Box 20  
MT LAWLEY WA 6929  
Phone: (08) 9227 8233  
Email: [brettp@willistemby.com.au](mailto:brettp@willistemby.com.au)
  
- The CGU Policy:  
Insurance Australia Limited (through AON Risk Solutions Ltd)  
Ms Divya Devadiga  
Team Leader  
Legal and Consulting  
Aon  
80 Collins Street  
MELBOURNE VIC 3000  
Phone: (03) 9211 3704  
Email: [divya.devadiga@aon.com](mailto:divya.devadiga@aon.com)

## **IMPORTANCE OF THE MINIMUM LIMIT OF INDEMNITY OF \$2 MILLION PER CLAIM**

The minimum limit of indemnity of \$2 million per claim inclusive of claimant's costs (exclusive of defence costs) is the minimum required to comply with both reg 97(1)(a)(ii) and the Scheme. (Although the Scheme limits liability for 'damages' to \$2 million, 'damages' is defined to include legal costs and expenses ordered to be paid in connection with an award of damages, so that a minimum limit of indemnity of \$2 million per claim inclusive of claimant's costs is compliant).

**Any member who does not have a minimum limit of indemnity of \$2 million per claim inclusive of claimant's costs would not only be non-compliant with reg 97(1)(a)(ii) and the Scheme, but by reason of their non-compliance with the Scheme would no longer have the protection of its limitation of liability to \$2 million inclusive of claimant's costs.**

### **CONSIDERATION OF LIMIT OF INDEMNITY GREATER THAN \$2 MILLION PER CLAIM**

All members are advised to carefully consider their own position and whether they wish to take out insurance with a limit of indemnity greater than \$2 million per claim, so as to hold more than the minimum level of cover.

One particular issue which members should consider is that the Scheme commenced on 1 July 2014. Each of the approved policies is a claims-made policy. Accordingly, if a claim relates to conduct prior to 1 July 2014, the member concerned may not have the protection of the limitation of liability under the Scheme in respect of that claim.

### **CONSIDERATION OF OTHER INSURANCE**

Members should also carefully consider whether they wish to take out other insurance including indemnity insurance such public liability insurance.

### **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 2022 will attract late fees.

### **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 member of The WA Bar, to notify each of the following **by email**:

1. the barrister concerned;
2. the WA Bar ([ExecutiveOfficer@wabar.asn.au](mailto:ExecutiveOfficer@wabar.asn.au))
3. the Legal Practice Board ([general@lpbwa.com](mailto:general@lpbwa.com))

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

## MEMORANDUM

TO: All ordinary members of the Western Australian Bar  
FROM: Martin Cuerden SC, President  
DATE: 3 May 2022  
RE: **IMPORTANT: Professional Indemnity Insurance – Amended Resolution in relation to Arch Underwriting Policy (offered through Marsh Pty Ltd)**

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I refer to my memo of 22 April 2022.

As I advised in that memo, Bar Council resolved to approve the Arch Underwriting Policy on the condition that the member requests retroactive liability cover in the proposal form and the contract is extended accordingly.

The resolution was passed in those terms because of the terms of the policy as communicated to Bar Council.

However, the broker and insurer of the Arch Underwriting Policy have now confirmed that retroactive cover is unlimited as standard and does not need to be specifically requested.

Accordingly, Bar Council has resolved that in lieu of the resolution passed on 21 April 2022 with respect to the Arch Underwriting Policy, to unconditionally approve the Arch Underwriting Policy for 2022-2023.