

# **Pembroke**

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## **SYNDICATE 4000**

### **Professional Liability**

**Australian Engineers Errors & Omissions**

**Policy Wording**

In consideration of the payment of the premium shown in the Schedule, and in reliance upon the statements made in the **Proposal Information** which is hereby agreed to be the basis of this **Policy** and which is incorporated into this **Policy** and forms a part hereof, the **Insurer** agrees, subject to the terms of this **Policy**, as follows:

### 1. **INSURING CLAUSE**

The **Insurer** shall indemnify the **Insured** for **Loss** and **Defence Costs** resulting from any **Claim** first made against the **Insured** by a **Third Party** during the **Policy Period** arising from a negligent act, negligent error or negligent omission committed solely in the provision of **Professional Services**.

### 2. **DEFINITIONS**

For the purposes of this **Policy**, the terms in bold type shall have the meanings designated below.

- A. **Bodily Injury** means physical injury, sickness, disease, mental anguish, mental injury, shock, or fright sustained by a person, including any resulting disability or death.
- B. **Claim** means a written demand by a claimant for, or service of civil proceedings by a claimant seeking, monetary damages.
- C. **Defence Costs** mean necessary and reasonable legal costs and expenses incurred with the **Insurer's** prior written consent in the investigation, defence or negotiation of the settlement of any **Claim** covered under this **Policy**. **Defence Costs** do not, however, include remuneration of any kind due to (or internal costs incurred by) the **Insured** and, further, does not include legal or any costs and expenses incurred in relation to those heads of liability excluded from **Loss** in Clause 2I of this **Policy**.
- D. **Director** (which expression includes an officer) shall have the meanings given by section 9 of the Corporations Act 2001, as amended from time to time and means any person who was, now is or shall become:
1. a **Director** within a company; or
  2. an officer within a company,
- including the equivalent position in any other jurisdiction.
- E. **Employee** means any person, other than a **Director**, **Partner** or **Member** of the **Named Insured** or any **Subsidiary**, who is under a contract of service or apprenticeship with the **Named Insured** or any **Subsidiary**.
- F. **Insured** means any of:
1. the **Named Insured**;
  2. any **Subsidiary**;
  3. any **Insured Person**; or

4. any heir, executor or administrator of any **Insured Person** who suffers death or incapacity, but only to the extent that indemnity was available to such **Insured Person** under this **Policy**.
- G. **Insured Person** means a person who was or now is a **Director, Employee, Member, or Partner** of the **Named Insured** or any **Subsidiary**, but only to the extent that such **Insured Person** is engaged in providing **Professional Services**. **Insured Person** does not include agents, consultants, sub-contractors or independent professional advisors.
- H. **Insurer** means the Lloyd's Syndicate or Syndicates and the Insurance Company or Companies as set out in the Table of Insurers.
- I. **Loss** means the legal liability of the **Insured** to pay monetary damages, claimant's costs and/or any settlement amount agreed to by the **Insurer**. **Loss** does not, however, include any liability for:
1. fines, penalties, taxes, punitive, exemplary, restitutionary or non-compensatory damages;
  2. liquidated damages;
  3. the multiplied portion of a multiplied damage award;
  4. the return, restitution, reduction, compromise, disgorgement or refund of commissions, fees, charges or other remuneration;
  5. costs incurred as a result of non-monetary orientated proceedings, declaratory or injunctive relief;
  6. any matters or amounts that are deemed uninsurable under the law pursuant to which this **Policy** is construed;
  7. any amounts allocated to uncovered **Loss** or **Defence Costs** under Clause 8D of this **Policy** and any costs and expenses incurred in the investigation, defence or negotiation of any of the heads of liability listed at sub-paragraphs I1 to I6 above.
- J. **Member** means any person holding the position of member within a limited liability partnership.
- K. **Named Insured** means the person, company or business entity stated in item 2 of the Schedule.
- L. **Partner** shall have the meaning given by the Partnership Act 1892 (NSW) and its equivalent provisions in other States and Territories of the Commonwealth of Australia, as amended from time to time.
- M. **Policy** means this Engineers Professional Indemnity Insurance Policy, together with the attached Schedule, including all amendments and endorsements, and the **Proposal Information**.
- N. **Policy Period** means the period of time stated in item 6 of the Schedule.

- O. **Professional Services** means those services provided by the **Insured** stated in writing in the **Proposal Information**.
- P. **Property Damage** means physical injury to tangible property (including all resulting loss of use of that property) or loss of use of tangible property that is not physically injured.
- Q. **Proposal Information** means the application for this **Policy**, together with any other information in whatever medium or form supplied by or on behalf of the **Insured** to the **Insurer** in connection with the underwriting of this **Policy**, save that **Proposal Information** shall not include information contained on any website unless the **Insurer** is provided with hard copy pages printed from such website by or on behalf of the **Insured**.
- R. **Retention** means the retention stated in item 5 of the Schedule.
- S. **Subsidiary** means any subsidiary company wholly owned (whether directly or via a wholly owned subsidiary) by the **Named Insured** created or acquired on or before the inception date and which has been declared to the **Insurer**.
- T. **Third Party** means an independent third party and does not include:
1. the **Insured**, irrespective of the capacity in which the **Insured** acts;
  2. any person, company, organisation or entity that in whole or in part and whether directly or indirectly, owns, operates or controls the **Insured**;
  3. any person, company, organisation or entity that has a direct or indirect financial interest in the **Insured**;
  4. any company, organisation or entity in which the **Insured** has a beneficial ownership or shareholding in excess of 10% or in which the **Insured** has a direct or indirect executive or controlling interest;
  5. any other company in common ownership with the **Insured**; or
  6. any company, organisation, or entity in which an **Insured Person** is a **Director, Employee, fiduciary, Member or Partner**, participant, or trustee.
- U. **USA** means the United States of America, including all and any colonies, dependencies, dominions and protectorates of the United States of America.

### 3. EXCLUSIONS

This **Policy** provides no indemnity for **Loss** or **Defence Costs** in connection with any **Claim** directly or indirectly arising out of, based upon or in consequence of, resulting from, or in any way involving:

- A. any actual or alleged liability assumed by the **Insured** under any contract, warranty (except a warranty of authority), indemnity, agreement or guarantee, unless such liability would have attached to that **Insured** notwithstanding such express contract, warranty, agreement or guarantee;

- B. any actual or alleged **Bodily Injury** or **Property Damage**. For clarification, this exclusion does not apply in respect of any **Loss** or **Defence Costs** resulting from a **Claim** arising directly from any negligent act, negligent error or negligent omission by the **Insured** solely in the provision of **Professional Services**;
- C. the ownership, possession or use by or on behalf of the **Insured** of any land, buildings, aircraft, watercraft, vessel or mechanically propelled vehicle;
- D. any breach of any contract of service or of any obligation owed by, or any liability of, the **Insured** as an employer or potential employer to any **Employee, Director, Member** or **Partner** or prospective **Employee, Director, Member, or Partner**;
- E. any actual or alleged infringement of copyright, patent, registered design, trade mark or any other intellectual property rights or passing off;
- F. actual or alleged seepage, pollution or contamination of any kind (including but not limited to asbestos; mould; lead based paint);
- G. trading losses or liabilities or debts incurred by any business managed by or carried on by the **Insured** (in whatever capacity) or the insolvency, bankruptcy, receivership, administration or liquidation or other financial failure of the **Insured**;
- H. depreciation or loss of investments when such depreciation or loss is a result of normal or abnormal fluctuations in any financial stock or commodity or other markets which are outside the influence or control of the **Insured**;
- I. the actual or alleged payment of fees, commissions or other remunerations by or to any **Insured** or the permission of, aiding or abetting, or participation in the payment of fees, commissions or other remunerations to any other entity;
- J. the **Insured's** requiring, obtaining, maintaining, advising, or failing to require, obtain, maintain or advise of any bond, suretyship or any form of insurance and/or in connection with the provision of finance, securing of finance, or advice on financial matters;
- K. the exceeding of project budgets or timescales or estimates of construction or other costs but this Exclusion shall not apply to any legal liability **Loss** or **Defence Costs** arising out of the normal activities and duties undertaken by Quantity Surveyors, Cost Engineers or Estimators;
- L. any contract where the **Insured** acts as a building contractor whether or not in conjunction with their **Professional Services**;
- M. any faulty workmanship, construction or work not in accordance with the design of the project or the construction documents (including but not limited to the drawings and specifications);
- N. the failure to meet contractual requirements relating to efficiency, output or durability unless such failure relates to an unintentional error or omission in connection with detailed design and/or detailed specification of the works;

- O. the qualitative and quantitative analysis or estimates and/or the extraction of any mineral or fuel deposit;
- P. the manufacture, construction, alteration, repair, servicing, installation, maintenance or treating of any goods or products sold, supplied or distributed by the **Insured** even though these activities might be carried on by that **Insured** in conjunction with the activities declared in the **Proposal Information**;
- Q. any actual or alleged:
1. gaining of any profit or advantage to which the **Insured** were not legally entitled, whether or not they retain such profit or advantage;
  2. conversion, commingling or misuse of funds or any form of money;
  3. criminal, dishonest or fraudulent acts; or
  4. misleading and deceptive conduct under the Trade Practices Act (Cth) or the equivalent provisions of the Australian Securities & Investment Commission Act, Corporations Act and the Fair Trading Acts of the States and the Territories of Australia. For clarification, this exclusion only applies in respect of **Loss** or **Defence Costs** resulting from a **Claim** asserting a liability in the **Insured** which is greater than, or different to, any liability the **Insured** may have to the **Third Party** for any negligent act, negligent error or negligent omission in the provision of the **Professional Services**.
  5. behaviour constituting money laundering (as defined under any statute, law, regulation, international treaty or international convention regarding the movement of illicit cash or assets representing illicit monies);
- R. any:
1. facts, circumstances or events which underlie the notification to any other insurer (prior to the inception of this **Policy**) of either any claim (of whatever kind) against the **Insured**, or any circumstances which may give rise to a claim (of whatever kind) against the **Insured**; or
  2. facts, circumstances or events which (prior to inception of this **Policy**) the **Insured** appreciated or should have appreciated may give rise to a **Claim**;
- S. the operation or existence of any joint venture or consortia in which the **Insured** have an interest, unless the **Insurer's** written agreement to the **Insured's** participation in such venture or consortia has been first obtained and an endorsement added to this **Policy**;
- T. any:
1. corruption, erasure, theft, copying, recording or alteration of any electronically held data;

2. access or lack of access to or interference with any electronically held data;
  3. loss, distortion or erasure of computer records; or
  4. actual or alleged transmission or impact of any computer virus; and
- U. any:
1. allegations of whatever kind brought or maintained against the **Insured** in the **USA**, or determined by reference to the laws of the **USA**, or which it is alleged should be determined by reference to the laws of the **USA**;
  2. legal or regulatory proceedings in the **USA**;
  3. any enforcement of any judgment given in the **USA** in any court of law or other tribunal anywhere in the world.
- V. or in connection with any of the following, regardless of any other cause or event contributing concurrently or in any other sequence to the loss:
1. ionising radiations or contamination by radioactivity from any nuclear fuel, waste or substance or the radioactive, toxic, explosive or other hazardous properties of any explosive, nuclear assembly or nuclear component thereof;
  2. war, invasion, acts of foreign enemies, hostilities or warlike operations (whether war be declared or not), civil war, rebellion, revolution, insurrection, riot, civil commotion assuming the proportions of or amounting to an uprising, military or usurped power, martial law;
  3. confiscation or nationalisation or requisition or destruction of or damage to property by or under the order of any government or public or local authority;
  4. any act of terrorism; or
  5. any action taken in controlling, preventing, suppressing or in any way relating to 2 and / or 3 and / or 4 above.

For the purpose of this exclusion an act of terrorism means any act, including but not limited to the use of force or violence and/or the threat thereof, by any person or group(s) of persons, whether acting alone or on behalf of or in connection with any organisation(s) or government(s), committed for political, religious, ideological or similar purposes or other ends including the intention to influence any government de jure or de facto and/or to put the public, or any section of the public, in fear.

For clarification, sub-paragraphs V.2 to V.5 of this exclusion do not apply in respect of any **Loss** or **Defence Costs** resulting from a **Claim** arising directly from any negligent act, negligent error or negligent omission by the **Insured** solely in the provision of the **Professional Services**.

In any **Claim** and in any action, suit or other proceedings to enforce a **Claim** by the **Insured** under this **Policy**, the burden of proving that such **Claim** does not fall within the exclusions above shall be upon the **Insured**.

In the event any element of this exclusion is found to be invalid or unenforceable, the remainder shall continue to be in full force and effect.

**4. AGGREGATE LIMIT OF INDEMNITY**

The Aggregate Limit of Indemnity for all **Loss** and **Defence Costs** for all **Claims** made against all **Insureds** covered by this **Policy** shall not exceed the Aggregate Limit of Indemnity stated in item 4 of the Schedule. All obligations of the **Insurer** under this **Policy** shall cease after the Aggregate Limit of Indemnity has been paid by the **Insurer**.

For the avoidance of doubt, this **Policy** is a single contract of insurance and if more than one **Insured** is covered, this **Policy** shall nevertheless be and remain a single contract of insurance for the benefit of the **Insured**.

**5. RETENTION**

The **Insurer** shall only be liable in excess of the **Retention**, which **Retention** shall apply to each and every **Claim** and shall be inclusive of **Defence Costs**.

**6. NOTICE OF CLAIM**

- A. The **Insured** shall give the **Insurer** written notice of any **Claim** made against any **Insured** as soon as practicable, but in no event later than the end of the **Policy Period**.
- B. The **Insured** shall give notice under this clause to the **Insurer** (via the **Insured's** broker or other agent only) at the address specified in item 8. of the Schedule. Notice shall be deemed reported on the date and at the time of receipt by the **Insurer**.
- C. The **Insured** shall, at their own cost, co-operate with the **Insurer** and provide such assistance and information as the **Insurer** may reasonably request.

**7. CLAIMS HANDLING**

- A. The **Insurer** shall be entitled, but not obliged, at any time to take over and conduct in the name of the **Insured** the investigation, defence or settlement of any **Claim**.
- B. The **Insured** shall not admit liability, enter into negotiations, or agree to the settlement, mediation or arbitration of any **Claim** or incur any **Defence Costs** without the prior written consent of the **Insurer**.
- C. The **Insurer** shall not require the **Insured** to contest any **Claim** made against the **Insured** unless a Queen's or Senior Counsel (who in the absence of agreement by the **Insurer** and the **Insured** shall be selected by the President



of the Bar Association in the State or Territory of the Commonwealth of Australia in which the **Claim** is being contested from a list comprised of three nominations from each of the **Insured** and the **Insurer**) advises that the same can be contested with a reasonable prospect of success. In formulating such advice, Senior Counsel shall take into consideration the economics of the matter (including but not limited to) the damages and costs which are likely to be recovered by the **Third Party**, the potential **Defence Costs** and the prospects of the **Insured** successfully defending the **Claim**. The costs of such an opinion will be regarded as part of the **Defence Costs**.

- D. If the **Insured** shall refuse to consent to any settlement recommended by the **Insurer** and shall elect to contest a **Claim**, then the **Insurer's** liability for **Loss** and **Defence Costs** in respect of such **Claim** shall not exceed the amount for which the **Claim** could have been settled and **Defence Costs** incurred to the date of such refusal.

## 8. GENERAL CONDITIONS

### A. Cancellation

The **Insured** may cancel this **Policy** at any time by written notice to the **Insurer**. The **Insurer** will allow a pro rata refund of premium for the unexpired **Policy Period** but such refund shall never be greater than 75%.

The **Insurer** may cancel this Policy in accordance with the relevant provisions of the Insurance Contracts Act by giving the **Insured** 21 days notice and will allow a pro rata refund of premium for the unexpired **Policy Period** but such refund shall never be greater than 75%.

### B. Other Insurance

The insurance provided by this **Policy** shall apply only as excess over any other valid and collectible insurance or other indemnity, unless such other insurance or indemnity is written only as specific excess insurance over the Aggregate Limit of Indemnity provided by this **Policy**. Therefore, where there is other valid and collectible insurance or other indemnity, the **Insured** must first claim under that other insurance or indemnity and not under this **Policy**.

### C. Subrogation

1. The **Insurer** shall be subrogated to all the **Insured's** rights of recovery against any person before or after any payment or indemnity under this **Policy** and the **Insured** shall at its own cost take all steps necessary to preserve the **Insurer's** rights of subrogation and shall give all such assistance in the exercise of rights of recovery as the **Insurer** may require.
2. Any sums recovered from any third party pursuant to sub-clause 1. shall first be paid to the **Insurer** up to the full amount of **Loss** and/or **Defence Costs** paid on behalf of the **Insured** for a **Claim**. Any sums remaining shall be paid to the **Insured**, less the costs of recovery incurred by the **Insurer**.

**D. Allocation**

In the event that a **Claim** gives rise to both a **Loss** and / or **Defence Costs** which are covered under this **Policy** and losses or defence costs which are not covered under this **Policy**, the **Insurer** and the **Insured** shall negotiate in good faith to agree on a basis for allocation, taking into consideration the relative legal exposures of the parties and the matters involved. In such negotiations, the **Insurer** and **Insured** shall take into consideration factors such as (but not limited to):

1. whether the **Claim** is principally in relation to covered or uncovered parties and matters;
2. the number of causes of action directed to covered and uncovered parties and matters; and
3. the relative legal exposure of the **Insured** compared to that of the uncovered parties.

In the event that the **Insurer** and the **Insured** cannot agree on allocation they shall submit the dispute to a Queen's or Senior Counsel (who in the absence of agreement by the **Insurer** and the **Insured** shall be selected by the President of the Bar Association in the State or Territory of the Commonwealth of Australia in which the **Claim** is being contested from a list comprised of three nominations from each of the **Insurer** and the **Insured**) to determine a basis for allocation. In determining the basis for allocation the Queen's or Senior Counsel shall take into consideration the factors contained in 8D(1-3) (above).

**E. Assignment**

This **Policy** and any and all rights under it are not assignable without the written consent of the **Insurer**.

**F. Entire Agreement**

The terms and provisions of this **Policy** shall not be waived, changed or modified, unless by written endorsement. Notices to, by or from any agent or representative of the **Insured** or the **Insurer** shall not effect a waiver, change or modification of this **Policy** and shall not prevent the **Insurer** from asserting any rights under this **Policy**.

**G. Authorisation**

By acceptance of this **Policy**, each **Insured** agrees that the **Named Insured** shall act on behalf of all **Insureds** for all purposes including the negotiation of the terms of this **Policy**, payment of or return of premiums, receipt and acceptance of any endorsement issued to form a part of this **Policy** and giving and receiving notice of cancellation of this **Policy**.

H. **Material Change**

The **Insured** shall immediately notify the **Insurer** of any material change in the facts and circumstances disclosed to the **Insurer** in the **Proposal Information** which may increase the risk accepted by the **Insurer** under this **Policy**. Where the **Insurer** is given such notice, the **Insurer** may elect to cancel this **Policy** and if so to offer the **Insured** a new policy on revised terms and conditions.

9. **LAW**

The construction, interpretation and meaning of the provisions of this **Policy** and any issue concerning its formation shall be determined in accordance with the laws of Australia.

10. **DISPUTE RESOLUTION**

In the event of any dispute save for those referable under clauses 7C and 8D above arising under this **Policy**, the **Insurer** agrees to submit, at the request of the **Insured**, to the jurisdiction of any competent Court in the Commonwealth of Australia. Such dispute shall be determined in accordance with the law and practice applicable in such Court.

Any summons, notice or process to be served on the **Insurer** may be served on:

Peter Tredinnick  
Phillips Fox Lawyers  
201 Elizabeth Street  
Sydney NSW 2001

who has authority to accept service and to enter and appearance on the **Insurer's** behalf.

If a suit is instituted against any **Insurer**, the **Insurer** will abide by the final decision of such Court or any competent appellate Court.

11. **HEADINGS**

The descriptions in the headings and any subheading of this **Policy** (including any titles given to any endorsement attached hereto) are inserted solely for convenience and do not constitute any part of the terms or conditions of this **Policy**.

**NOTICE TO THE INSURED**

**Data Protection Act 1998**

We may store your information on a computer and use it for administration, risk assessment, research and statistical purposes, marketing purposes and for crime prevention (see further details below). We will only disclose your personal details to third parties, if it is necessary for the performance of your contract with us.

In order to assess the terms of the insurance contract or administer claims that arise, we may need to collect data that the Data Protection Act defines as sensitive, such as medical history or criminal convictions. By proceeding with this contract you will signify your consent to such information being processed by us or our agents.

We will keep your information secure at all times. In certain circumstances, for example for systems administration purposes, we may have to transfer your information to another country, which may be a country outside the European Economic Area (EEA). By proceeding with your insurance application, we will assume you are agreeable for us to transfer your information to a country outside the EEA.

Should you wish to receive a copy of the information we hold on you, please contact the Compliance Officer, Lloyd's Syndicate 4000, Box 146, Lloyd's, 1 Lime Street, London EC3M 7HA.

**Complaint Procedure**

The **Insurer** is committed to providing a first class service at all times.

If at any time there are questions or concerns regarding this **Policy** or the handling of a **Claim**, you should in the first instance refer to your insurance broker or intermediary, if any. If your problem cannot be resolved, any question or complaint should then be addressed to:

Director of Claims  
Lloyd's Syndicate 4000  
2<sup>nd</sup> Floor South,  
3 Minster Court,  
Mincing Lane,  
London EC3R 7DD

Telephone: 020 7337 4400

If after following the above procedure your complaint has not been resolved to your satisfaction, you should write to the Chief Executive at the address above.

In the event you wish to pursue matters further, where appropriate, you can refer the matter at any time to the:

Complaints Department  
Lloyd's  
One Lime Street,  
London EC3M 7HA  
Telephone: 020 7327 5693 Fax: 020 7327 5255  
E-mail: [Lloyds-Regulatory-Complaints@lloyds.com](mailto:Lloyds-Regulatory-Complaints@lloyds.com)

Complaints that cannot be resolved by the Complaints Department may, where appropriate, be referred to the Financial Ombudsman Service to review the case.

The address is:

Financial Ombudsman Service  
South Quay Plaza  
183 Marsh Wall  
London E14 9SR

Telephone: 0845 080 1800

[www.financial-ombudsman.org.uk](http://www.financial-ombudsman.org.uk)

The Financial Ombudsman's Service decision is binding upon the **Insurer** but you are free to reject it without affecting your legal rights.

### **Financial Services Compensation Scheme**

The **Insurer** is covered by the Financial Services Compensation Scheme (FSCS). You may be entitled to compensation from the scheme if the **Insurer** cannot meet their obligations. This depends on the type of business and the circumstances of the claim. Further information about compensation scheme arrangements is available from the FSCS.

**AUSTRALIAN ENGINEERS ERRORS & OMISSIONS  
INSURANCE POLICY**

**SCHEDULE**

1. **Policy Number:**
2. **Named Insured:**
3. **Address:**
4. **Aggregate Limit of Indemnity:** AUD in the aggregate inclusive of  
Defence Costs
5. **Retention:** AUD each and every Claim  
Defence Costs inclusive
6. **Policy Period:**
7. **Premium:** AUD (+ tax as applicable)
8. **Address for notification:  
(via broker or other agent)** Lloyd's Syndicate 4000  
One Lime Street  
London EC3M 7HA

**TABLE OF INSURERS**

Where Lloyd's Syndicate 4000 has underwritten this policy with one or more other insurers (as listed in the Table of Insurers below), Lloyd's Syndicate 4000 and such other insurers bind themselves severally and not jointly, each for their own part and not for one another. Lloyd's Syndicate 4000 and each such insurer shall only be liable for their percentage of the risk shown below.

The insurers subscribing to this policy are:

1. Lloyd's Syndicate 4000 [ %]  
One Lime Street  
London EC3M 7HA  
United Kingdom
2. [ ] [ %]
3. [ ] [ %]

Pembroke