



Department of Health  
Government of Western Australia

**TERMS AND CONDITIONS**  
of the  
**MEDICAL INDEMNITY**  
applying to the  
**AMBULATORY SURGERY INITIATIVE**  
effective 1 July 2008

Legal & Legislative Services

## These are the Terms and Conditions of the Medical Indemnity applying to the Ambulatory Surgery Initiative, effective 1 July 2008

### 1. INDEMNITY

#### 1.1. Minister to Indemnify and Waive Rights

In consideration of you providing the Medical Services and of you undertaking the obligations in Clause 8 (Quality & Safety Requirements), the Minister agrees, subject to the terms, conditions, limitations and other exclusions of these Terms and Conditions, to:

- (a) indemnify you and keep you indemnified from; and
- (b) waive any rights of contribution or indemnity the Minister may have against you in respect of, any Loss arising from a Claim or Potential Claim.

#### 1.2. Exclusions

The Indemnity does **not** extend to:

- (a) any Loss arising from Claims or Potential Claims in respect of acts or omissions by you which are:
  - (i) reckless, malicious, or carried out with wilful or intentional disregard to the consequences;
  - (ii) criminal;
  - (iii) defamatory;
  - (iv) discriminatory (whether sexual, racial or otherwise) or otherwise constitute harassment;
  - (v) done or omitted to be done as a consequence of being under the influence of alcohol or illicit drugs, or inappropriate use of prescription or over the counter drugs including if you knew or reasonably ought to have known that those drugs would have an effect that caused or materially contributed to the Claim or Potential Claim;
  - (vi) done or omitted to be done whilst you are not registered with the Medical Board;
  - (vii) done or omitted to be done contrary to any restrictions or conditions placed on you by the Medical Board; or
- (b) the provision of Medical Services by you to patients at a Hospital while employed as a Salaried Medical Practitioner, or while engaged as a Non-Salaried Medical Practitioner.

The Indemnity further does not apply where you deliberately provided materially false or misleading information in any Application for this indemnity.

### 2. YOUR OBLIGATIONS

You must:

- (a) notify the Hospital as soon as reasonably practicable after:
  - (i) a Potential Claim arises; or
  - (ii) a Claim is made against you; and
- (b) provide to the Hospital at the time that you give notice in accordance with paragraph (a) any information or documents which you have in your possession or control which may potentially be relevant to any Claim or Potential Claim; and
- (c) act in good faith in your dealings with the Minister.

If you fail to notify the Hospital as required under sub-clause (a), or to provide the Hospital with information or documents as required under sub-clause (b), or fail to act in good faith in your dealings with the Minister, and any such failure materially prejudices the Minister's ability to deal with any Claim or Potential Claim, subject to clause 20, this Indemnity may be withdrawn by the Minister by notice in writing to you and then will cease to have any force and effect in respect of the Claim or Potential Claim.

### 3. DEFENCE OF CLAIMS

#### 3.1. Powers of the Minister

Subject to clause 3.2, the Minister shall have full discretion and control in respect of the Claim or Potential Claim, including but not limited to the power to:

- (a) conduct any investigations or inquiries it deems expedient in respect of the Claim or Potential Claim and the Indemnified Incident to which the Claim or Potential Claim relates;
- (b) defend any civil legal proceedings;
- (c) settle any legal proceedings at the Minister's sole and absolute discretion and whether or not involving an admission of liability; and
- (d) use your name for the purposes of subparagraph (b) and (c).

#### 3.2. Consultation

- (a) If requested by you the Minister will advise you about the progress of any Claim or Potential Claim from time to time.
- (b) If it is reasonably practicable to do so having regard to the efficient management of a Claim, the Minister agrees to use his or her best endeavours to consult with you before settling any Claim where you are a named defendant in any writ and which involves an admission of liability in respect of your specific conduct.

#### 3.3. Separate Representation In Limited Circumstances

If the Minister in his or her absolute discretion is satisfied that there is a conflict of interest between you and the Minister in respect of the conduct of a Claim or Potential Claim, the Minister will provide you with separate legal representation from a legal firm of the Minister's choosing for such time as the Minister determines that the conflict subsists and subject to such maximum sum as the Minister determines from time to time.

If you disagree with the Minister's determination you may refer the matter to the review panel under clause 22 which will make a recommendation to the Minister.

Notwithstanding any recommendation by the review panel the Minister's decision is final and binding and you agree that it is not subject to judicial or other external review.

#### 3.4. No Settlement or Admissions

- (a) Subject to Clause 3.2 you or the Minister must not:
  - (i) make any admission of liability in respect of any Claim or Potential Claim or part thereof but you may make a statement of regret or sorrow; or
  - (ii) make any payment or settlement of any Claim or Potential Claim.
- (b) You must not do or omit to do anything which materially compromises the ability of the Minister to defend the Claim or Potential Claim.
- (c) If you do not comply with paragraphs (a) or (b), subject to clause 20, the Indemnity may be withdrawn by the Minister by notice in writing to you and then will cease to have any force and effect in respect of the Claim or Potential Claim.

#### 3.5. Disclosure of Information and Co-Operation

- (a) You must:
  - (i) make full and frank disclosure to the Minister of any information of which you are aware and which is relevant in any way to any Claim or Potential Claim;
  - (ii) co-operate fully with the Minister including but not limited to by responding as soon as reasonably practicable to any requests for information from, or providing assistance to, the Minister in relation to any Claim or Potential Claim; and
  - (iii) neither discuss nor disclose any aspect of any Claim or Potential Claim (including any legal proceedings) with any person without the prior written consent of the Minister other than:
    - (A) to your professional advisers, professional representative body and private insurers;
    - (B) to a Court or tribunal;
    - (C) as required by law;
    - (D) in respect of information already in the public domain;
    - (E) as otherwise permitted or required by these Terms and Conditions,
 and if you fail to comply with the obligations in paragraph (i), (ii) or (iii), and that failure materially prejudices the Minister's ability to deal with the Claim or Potential Claim, subject to clause 20, the Indemnity may be withdrawn by

the Minister by notice in writing to you and then will cease to have any force and effect in respect of the Claim or Potential Claim.

- (b) Where a claim or potential claim against you is not the subject of the Indemnity, or you are the subject of a complaint, allegation, investigation or official enquiry (including but not limited to by the Medical Board or Coroner) and the Hospital holds information or documents relevant to the matter, the Hospital will, on written request from you, provide copies of that information or documentation to you or your nominated representative, provided always that it is lawful and reasonable in all the circumstances to do so and the Hospital may impose reasonable conditions on the use of any such information and documentation.

### 3.6. Agency

- (a) In respect of any Claim or Potential Claim notified to the Hospital under these Terms and Conditions, and subject to your rights under these Terms and Conditions, you appoint the Minister as your agent (principal disclosed) for the purposes of doing all things necessary or convenient to be done for or in connection with these Terms and Conditions and must, if requested by the Minister, ratify all things done by the Minister in that capacity.
- (b) If a dispute arises the parties agree the matter(s) may be referred to the review panel under clause 21 provided that in the case of a review under this clause 3.6 only the Chief Medical Officer may nominate another medical officer in his or her place.

## 4. APPLICATION OF INDEMNITY

- (a) The Indemnity applies to Claims or Potential Claims arising out of an Indemnified Incident occurring during the Term.
- (b) The Indemnity will continue to apply to Claims and Potential Claims covered under clause 4(a) made at any time after the Cessation Date.

## 5. RECOVERY OF MONEYS

- (a) If the Minister pays out any money under the Indemnity, and you are not entitled to the benefit of the Indemnity, and the Indemnity is lawfully withdrawn by the Minister pursuant to these Terms and Conditions, then any such moneys paid by the Minister become a debt due by you to the Minister repayable on demand.
- (b) This Clause 5 survives expiry of these Terms and Conditions or termination of the Indemnity by the Minister.
- (c) If you dispute a decision of the Minister to require repayment of money you may refer the matter to the review panel under clause 20.

## 6. QUALITY & SAFETY REQUIREMENTS

- (a) Without limiting your other reporting requirements in these Terms and Conditions you must report a Claim or Potential Claim on the Hospital's then current incident reporting system.
- (b) If reasonably required by the Hospital you must:
  - (i) participate in investigations of serious adverse events, and serious near misses, to identify their root causes;
  - (ii) report Sentinel Events;
  - (iii) adopt and use evidence-based best practice based on either locally approved guidelines, pathways and protocols where these are available or in local use or as otherwise approved by the Hospital; and
  - (iv) provide patients treated under the Ambulatory Surgery Initiative with an explanation of the proposed or planned treatment or procedure including material risks and obtaining written or other patient consent prior to any treatment or procedural intervention in accordance with Hospital policies and procedures. As part of the process key points of the consent discussion must be documented in accordance with the hospital's policies and/or guidelines.

## 7. CLAIMS HISTORY

You must, within 40 Business Days of receiving a written request from the Hospital, provide to the Hospital your Record of Health Care Claims History for the past 6 year period.

## 8. CONFIDENTIALITY

The Minister agrees to keep confidential any confidential information provided under these Terms and Conditions including relating to a Potential Claim or Claim received from or concerning you other than disclosure:

- (a) to a third party necessary for the proper and efficient investigation and conduct of the Potential Claim or Claim by the Minister;
- (b) to the Minister's professional advisers and insurance providers;
- (c) so as not to be in breach of the provisions of the Financial Administration and Audit Act 1985;
- (d) to any Court or tribunal;
- (e) as required by law;
- (f) of information already in the public domain;
- (g) otherwise permitted by these Terms and Conditions.

## 9. NOTICES

### 9.1 Notices

A notice or other communication in connection with these Terms and Conditions must be in writing and must be:

- (a) sent by prepaid ordinary post to the addresses; or
- (b) left at the addresses; or
- (c) sent by facsimile to the facsimile numbers,

set out on the application for the Medical Indemnity applying to the Ambulatory Surgery Initiative, or such other addresses or facsimile numbers notified by the Parties from time to time.

### 9.2 Receipt of Notices

A notice or other communication takes effect from the time it is received, unless a later time is specified in the notice or communication. For the purposes of these Terms and Conditions a letter or facsimile is taken to be received:

- (a) in the case of a letter sent by post, on the third Business Day after posting;
- (b) in the case of a facsimile, on production of transmission report from the facsimile machine from which the notice or communication was sent which shows that the entire facsimile was sent to the addressee; and
- (c) on the next Business Day, if received after 5.00pm.

## 10. ASSIGNMENT

The Indemnity is personal to you. You may not assign or create any encumbrance over your rights under these Terms and Conditions without the prior written consent of the Minister.

## 11. FURTHER ASSURANCES

Each Party agrees, at their own expense, on the request of the other Party, to do everything reasonably necessary to give full effect to these Terms and Conditions including, but not limited to, the execution of further documents.

## 12. WAIVER

- (a) No right under these Terms and Conditions shall be waived or deemed to be waived except by writing signed by the Party waiving the right.
- (b) The waiver of a right by either Party will not prejudice that Party's other rights or future rights in respect of the right waived.
- (c) Subject to paragraph (a), any failure by either party to enforce any right under these Terms and Conditions, or any forbearance, delay or indulgence granted by one Party to the other Party will not be construed as a waiver of rights under these Terms and Conditions.

## 13. ENTIRE AGREEMENT

Your Application form and these Terms and Conditions constitute the full and complete understanding between the Parties in relation to its subject matter and supersedes all prior negotiations, understandings and agreements with respect thereto.

## 14. SUPERVENING LEGISLATION

Any present or future legislation which operates to vary an obligation, right, power or remedy of any Party or any person in connection with these Terms and Conditions is excluded except to the extent that its exclusion is prohibited or rendered ineffective at law.

## 15. VARIATION

No modification, amendment or other variation of these Terms and Conditions shall be valid or binding unless made in writing duly executed by both Parties.

## 16. SEVERABILITY

If any provision of the Application for Medical Indemnity or these Terms and Conditions is void, voidable by any Party, unenforceable or illegal in any jurisdiction, it shall be read down so as to be valid and enforceable or if it can not be so read down, the provision (or where possible the offending words), shall be severed from the Application for Medical Indemnity or these Terms and Conditions (as applicable) without affecting the validity, legality or enforceability of the remaining provisions (or parts of those provisions) of the Application for Medical Indemnity or these Terms and Conditions (as applicable) which will continue in full force and effect.

## 17. COSTS

Each Party agrees to meet their own legal and other costs and expenses arising in connection with the preparation, execution and completion of the Application for Medical Indemnity, these Terms and Conditions and other related documentation. You will not be charged for the preparation, execution and completion of the Application for Medical Indemnity, these Terms and Conditions and other related documentation.

## 18. GOVERNING LAW AND JURISDICTION

These Terms and Conditions are governed by the law in force in Western Australia. Each Party irrevocably submits unconditionally to the non-exclusive jurisdiction of the Courts of Western Australia and of all Courts competent to hear appeals therefrom in relation to any legal action, suit or proceeding arising out of or in respect of these Terms and Conditions.

## 19. DELEGATION AND PROCEDURES

- (a) The Minister has delegated the Minister's powers and duties to the Director-General of the Department of Health.
- (b) The Hospital will establish from time to time procedures and protocols for the handling of Claims and Potential Claims under this Indemnity which you must comply with.

## 20. REVIEW PANEL

If the Minister intends to exclude or withdraw indemnity under these Terms and Conditions, or where otherwise required under these Terms and Conditions, the following protocols will apply:

### Generally

- (a) The Minister will give you and the AMA(WA) notice in writing of that intent, or of the decision, with details as to the reason for doing so.
- (b) Both you and the AMA(WA) will then have 2 weeks (unless the circumstances warrant its extension) to make written submissions to the Minister setting out why the indemnity should not be excluded or withdrawn or why the Minister should reconsider his or her decision.
- (c) If after considering such submissions, the Minister remains of the view that the indemnity should be excluded or withdrawn, or that the original decision should stand, he or she will give you and the AMA(WA) further written notice to that effect with details as to the reason for doing so.
- (d) You or the AMA(WA) may within 2 weeks of receipt of the Minister's further notice under clause 20(c) request the Minister to convene a review panel.
- (e) The review panel will consist of:
  - Chief Medical Officer, Department of Health
  - Director, Legal & Legislative Services, Department of Health (or nominee)
  - Representative of the AMA(WA) nominated by the President.

- (f) The review panel, after consideration of the information available to it, may make such recommendation as it thinks fit to the Minister.
- (g) The Minister shall exercise his or her discretion having regard for the advice of the Review Panel.
- (h) The confidentiality provisions of these Terms and Conditions shall apply to this process. This process shall not affect either parties' legal rights.
- (i) This clause 20 survives expiry of these Terms and Conditions or withdrawal or exclusion of the Indemnity by the Minister.

### **Expedited Review**

In respect of issues arising under clause 3 only, if the Minister determines based on time limited circumstances that are beyond the control of the Minister that the time frames above cannot be met in particular circumstances the Minister may shorten the timeframes or in extremely urgent situations, including but not limited to time limited settlement proposals, after notifying both you and the AMA(WA), and if you still request a review, proceed direct to the review panel stage.

## **21. HOLDING OVER**

If on or before the Cessation Date the Minister does not give notice in writing to you that the Indemnity will expire at that date, and a new Indemnity has not been entered into with you, after the Cessation Date these Terms and Conditions will continue to operate unless and until it is either replaced by a new indemnity with you or it is terminated by 3 months' notice in writing to you by the Minister.

## **22. DEFINITIONS AND INTERPRETATION**

### **22.1 Definitions**

In these Terms and Conditions unless the context otherwise requires:

**Ambulatory Surgery Initiative Patient** means a non-admitted patient who received or is receiving medical services as a private patient under the Ambulatory Surgery Initiative.

**Application Form** means the "Application Form for the Medical Indemnity applying to the Ambulatory Surgery Initiative".

**Business Day** means a day not being a Saturday, Sunday or Public Holiday on which banks are open for general banking business in Perth.

**Cessation Date** means 30 June 2009.

**Claim** means any claim, demand, action, lawsuit or proceeding howsoever described in respect of an Indemnified Incident and of a civil nature whether against you or the Hospital.

**Effective Date** means the latter of 1 July 2008 or the date of signing of the Application by the Minister.

**Hospital** means the public hospital or public health care institution specified in Item 17 'Declaration' of the Application for Medical Indemnity or where Medical Services are provided with the consent of the Minister.

**Indemnified Incident** means, and is strictly limited to, any:

- (a) negligent act or omission; or
- (b) trespass against the person,

by you occurring whilst actually providing Medical Services.

**Indemnity** means the indemnity and waiver given in Clause 1 of these Terms and Conditions.

**Loss** means the total amount which you or the Minister become liable to pay on account of all Claims and Potential Claims made against it or you for Indemnified Incidents in respect of which these Terms and Conditions apply, including, but not limited to, costs (as either agreed by the Minister or as taxed), charges and expenses incurred in the defence of Claims and Potential Claims and appeals therefrom, damages (other than punitive, aggravated or exemplary damages) and settlement costs, but does not include fines or penalties.

**Medical Board** means the Medical Board of Western Australia and any other tribunal performing disciplinary functions of a similar nature to that Medical Board.

**Medical Services** means:

- (a) medical services and treatment provided by you to Ambulatory Surgery Initiative Patients at the Hospital pursuant to an agreement between you and the Minister under which the Minister permits you to provide medical services and treatment to Ambulatory Surgery Initiative Patients at the Hospital;
- (b) obtaining the written or other consent of Ambulatory Surgery Initiative Patients to any procedural intervention the subject of the Medical Services in accordance with the requirements of clause 6(b)(iv) of these Terms and Conditions;
- (c) carrying out a pre-operative anaesthetic examination of Ambulatory Surgery Initiative Patients prior to any procedural intervention the subject of the Medical Services; and
- (d) participation in authorised quality and safety activities including those referred to in clause 6 of these Terms and Conditions.

**Minister** means the Minister for Health

**Non-Salaried Medical Practitioners** means medical practitioners authorised by the Minister to provide medical services but not engaged by way of an employment contract.

**Party** means you or the Minister as the context requires.

**Potential Claim** means where:

- (a) you do, or omit to do, anything which you know or reasonably ought to know may give rise to a Claim; or
- (b) an allegation is made against you which is of such a nature as to reasonably suggest that a Claim may be made against you.

**Record of Health Care Claims History** means a record of the number of health care claims, or incidents that may give rise to health care claims, notified to your professional indemnity provider (whether public or private), including date of notification of each health care claim, date and brief description of each relevant incident and, if known by you and subject to any confidentiality requirements of any settlement, the compensation range within which the health care claim fell, or is estimated to fall, as follows:

- (i) < \$50,000
- (ii) \$50,000 - < \$100,000
- (iii) \$100,000 - <\$250,000
- (iv) \$250,000 - <\$500,000-
- (v) \$500,000 - <\$1,000,000
- (vi) \$1,000,000 +.

**Salaried Medical Practitioner** means a medical practitioner employed by the Minister by way of an employment contract.

**Sentinel Events** refer to those rare events that involve patients under your care at the time of the event that lead to catastrophic outcomes. These events include but are not necessarily limited to:

- (a) procedures involving the wrong patient or wrong body part;
- (b) suicide of a patient in an inpatient unit;
- (c) retained instruments or other material after surgery requiring re-operation or further surgical procedure;
- (d) intravascular gas embolism resulting in death or neurological damage;
- (e) haemolytic blood transfusion reaction resulting from ABO compatibility;
- (f) medication error leading to the death of a patient reasonably believed to be due to incorrect administration of drugs;
- (g) maternal death or serious morbidity associated with labour or delivery;
- (h) infant discharged to wrong family or infant abduction; and
- (i) other catastrophic event resulting in serious patient harm or patient death.

**Term** means, subject to clause 21, the period commencing on the Effective Date and ending on the Cessation Date.

**You** means the person in respect of the indemnity from the Minister and **Your** has its corresponding ordinary meaning.

## 22.2 Interpretation

In these Terms and Conditions unless the context otherwise requires:

- (a) the expression person includes an individual, the estate of an individual, a corporation, an authority, an association or a joint venture (whether incorporated or unincorporated), a partnership and a trust;
- (b) the expressions "in particular", "including", "includes" and "include" have the meaning as if followed by "without limitation";
- (c) a reference in any clause to an "example" does not limit the generality of the clause;
- (d) a reference to any authority, institute, association or body is:
  - (i) if that authority, institute, association or body is reconstituted, renamed or replaced or if the powers or functions of that authority, institute, association or body are transferred to another organisation, deemed to refer to the reconstituted, renamed or replaced organisation or to the organisation to which the powers or functions are transferred, as the case may be; and
  - (ii) if that authority, institute, association or body ceases to exist, deemed to refer to the organisation as serves substantially the same purpose or object of that authority, institute, association or body;
- (e) a reference to these Terms and Conditions or to any other deed, agreement, document or instrument includes, respectively, these Terms and Conditions or such other deed, agreement, document or instrument as amended, novated, ratified, supplemented, varied or replaced from time to time;
- (f) where any word or phrase is given a defined meaning any other part of speech or other grammatical form in respect of such word or phrase has a corresponding meaning;
- (g) words importing the singular include the plural and vice versa;
- (h) one gender includes every gender;
- (i) a reference to Party includes a reference to its executors, administrators, successors or permitted assigns, including any person taking by way of novation.
- (j) clause headings are for convenience only and do not affect the interpretation of the Terms and Conditions;
- (k) a reference to a clause is a reference to the corresponding clause to these Terms and Conditions;
- (m) all obligations of each Party pursuant to these Terms and Conditions will be completely at the cost of that Party, unless expressly provided otherwise in these Terms and Conditions; and
- (n) the Minister may act through the Minister's officers and employees.