



## RISK & PCC 19

ICC | SYDNEY | AUSTRALIA  
15 - 17 MAY 2019



ENGINEERS  
AUSTRALIA



Australian Cost  
Engineering Society



AACE  
AUSTRALIAN  
SECTION



Risk  
Engineering  
Society

# RISK ENGINEERING & PROJECT CONTROLS CONFERENCE 2019

International Convention Centre, Sydney Australia

15 – 17 May 2019 | ICC Sydney

*A Time for Action – Risk Engineering & Project Controls  
Impacting the Future*

[risk-pcc19.com.au](http://risk-pcc19.com.au)

**Robert Finnigan – Wotton + Kearney**

wotton  
kearney

A founding member of LEGALIGN  
GLOBAL



## RISK & PCC 19

ICC | SYDNEY | AUSTRALIA  
15 - 17 MAY 2019



*A Time for Action – Risk Engineering & Project Controls Impacting the Future*

# Infrastructure Projects - Risk Management through Insurance

## Today we will cover

- 1 **Risk Management**
- 2 **Insurance:**
  - Professional indemnity
  - Contract works
- 3 **Claims Management**
- 4 **Summary**



## RISK & PCC 19

ICC | SYDNEY | AUSTRALIA  
15 - 17 MAY 2019



*A Time for Action – Risk Engineering & Project Controls Impacting the Future*

## Risk Management: Identify – Allocate - Manage

### Risk

- Principal – late completion – inadequate completion – damage to the project
- Contractor – design defects – construction defects – increased costs – late completion – damage to the project – third party damage/injury
- Financier – late completion – insolvency – failure to complete

### Risk Allocation

- Assume risk (price into tender)
- Pass on to sub-contractor (make sure back to back conditions in contracts)
- Allocate risk to party best able to control it
- Insure risk (price into tender)

### Management

- Who assumes the risk and who is responsible for insuring the risk



## RISK & PCC 19

ICC | SYDNEY | AUSTRALIA  
15 - 17 MAY 2019



*A Time for Action – Risk Engineering & Project Controls Impacting the Future*

## Other Policies

- Delay in Start Up
- Workers Compensation Policy
- Industrial Special Risks
- General Liability Policy
- Contractors Pollution Liability Policy



## RISK & PCC 19

ICC | SYDNEY | AUSTRALIA  
15 - 17 MAY 2019



*A Time for Action – Risk Engineering & Project Controls Impacting the Future*

## Introductory Comments

- Different triggers; different points in time
- Various policies do not interact “perfectly”
- Potential double insurance



## RISK & PCC 19

ICC | SYDNEY | AUSTRALIA  
15 - 17 MAY 2019



*A Time for Action – Risk Engineering & Project Controls Impacting the Future*

## Professional Liability Policy

- Third party claims for breach of professional duty
- For the benefit of **construction professionals** (engineers, architects, surveyors etc) or the design element of the work undertaken by **D&C contractors**
- Typical exclusions:
  - faulty workmanship (as opposed to design)
  - faulty products
  - assumed liability (warranties and contracting out)



## RISK & PCC 19

ICC | SYDNEY | AUSTRALIA  
15 - 17 MAY 2019



*A Time for Action – Risk Engineering & Project Controls Impacting the Future*

## Professional Indemnity Insurance

Professional indemnity insurance seeks to insure:

- Liability of breach of professional duty
- In relation to:
  - **claims** made against the professional during the period and notified to the insurer in that policy period; or
  - **circumstances** likely to give rise to a claim notified to the insurer during the policy period (even if the circumstances have not yet fully matured into a claim)



## RISK & PCC 19

ICC | SYDNEY | AUSTRALIA  
15 - 17 MAY 2019



*A Time for Action – Risk Engineering & Project Controls Impacting the Future*

## Basis of Cover

- The key concepts:
  - Insuring clause
  - Professional Services
  - Claims made





## RISK & PCC 19

ICC | SYDNEY | AUSTRALIA  
15 - 17 MAY 2019



*A Time for Action – Risk Engineering & Project Controls Impacting the Future*

## Professional Services

- Services of a skilful character according to an established discipline
- Court will define the term very broadly
- Most policies will define the insured's professional business and use that definition to control the scope of cover
- The policy may define "*Professional Services*" by reference to a description in the Policy Schedule



## RISK & PCC 19

ICC | SYDNEY | AUSTRALIA  
15 - 17 MAY 2019



*A Time for Action – Risk Engineering & Project Controls Impacting the Future*

## Professional Services ... cont

- The policy schedule may describe the insured's professional business as:  
  
*"... Consulting electrical, mechanical and structural engineering, project/construction management..."*
- The definition of professional business controls the scope of cover by reference to the particular areas of expertise



## RISK & PCC 19

ICC | SYDNEY | AUSTRALIA  
15 - 17 MAY 2019



*A Time for Action – Risk Engineering & Project Controls Impacting the Future*

## What is a Claim or Circumstance?

A claim is:

- A positive assertion of a legal entitlement to damages
- Contrasted with defect notice which is simply a direction to fix a defect during the construction or defects liability phase of a project



## RISK & PCC 19

ICC | SYDNEY | AUSTRALIA  
15 - 17 MAY 2019



*A Time for Action – Risk Engineering & Project Controls Impacting the Future*

## What is a Claim or Circumstances? ... cont

A circumstance is:

- something which the insured is aware of that could lead to a possible claim for negligence being made against the insured. The insured need not know precisely how or why the claim may arise, or whether the claim is justified or likely to succeed.
- Accordingly, if an insured is aware it has made an error of which the client is ignorant, this will be a circumstance likely to give rise to a claim



## RISK & PCC 19

ICC | SYDNEY | AUSTRALIA  
15 - 17 MAY 2019



*A Time for Action – Risk Engineering & Project Controls Impacting the Future*

## Claims Made and Notified Compared to Occurrence Based Policies

Policy Year 1	Policy Year 2	Policy Year 3
Incident occurs here		Claim first made here

- The Public Liability Policy responds on an “Occurrence Basis” – the year in which the incident occurred
- The Professional Indemnity Policy responds on a “claims made” basis – the year in which the claim is first made against the insured and notified to the insurer



## RISK & PCC 19

ICC | SYDNEY | AUSTRALIA  
15 - 17 MAY 2019



*A Time for Action – Risk Engineering & Project Controls Impacting the Future*

## Retroactive Date

30 June 2014	30 June 2015	30 June 2016
Professional Services provided 1 August 2014	Insured becomes aware of potential claim arising from services provided on 1 August 2014	Insured received claim and notifies insurer

- Retroactive date **30 June 2015** – no cover
- Retroactive date **30 June 2014** - covered



## RISK & PCC 19

ICC | SYDNEY | AUSTRALIA  
15 - 17 MAY 2019



*A Time for Action – Risk Engineering & Project Controls Impacting the Future*

## Basis of Cover

Professional indemnity insurance covers a professional for claims made against the professional as a consequence of an actual or alleged act, error or omission on the part of the professional in the provision of professional services



## RISK & PCC 19

ICC | SYDNEY | AUSTRALIA  
15 - 17 MAY 2019



*A Time for Action – Risk Engineering & Project Controls Impacting the Future*

## Policy Wording - Exclusions

- Professional indemnity policies usually contain exclusions relating to personal injury or property damage claims, unless arising out of breach of professional duty
- Professional indemnity policies commonly contain the following exclusions:
  - fraud and dishonesty
  - prior known claims
  - prior known circumstances
  - refund of fees
  - penalties and fines
  - related parties
  - assumed liability/contractual liability
  - geographical limits





## RISK & PCC 19

ICC | SYDNEY | AUSTRALIA  
15 - 17 MAY 2019



*A Time for Action – Risk Engineering & Project Controls Impacting the Future*

## Key Points

- The insuring clause is the gateway to cover under the policy
- The definition of professional services is the key concept with respect to professional indemnity insurance, it determines cover including the extent of cover



## RISK & PCC 19

ICC | SYDNEY | AUSTRALIA  
15 - 17 MAY 2019



*A Time for Action – Risk Engineering & Project Controls Impacting the Future*

## Contract Works Policy

- Typically combined material damage and legal liability policy
- Intended to cover “the project”
- Typically **multiple insureds** are covered (subrogation waivers)
- Only for the **period of construction** and any **maintenance** period
- Typically **covers any damage** to the project (that is, the contract works being undertaken)
- “[The insurers] will indemnify you for sudden and accidental physical loss or damage, that you could not have expected to happen to Insured Property, during the Period of Insurance.”



## RISK & PCC 19

ICC | SYDNEY | AUSTRALIA  
15 - 17 MAY 2019



*A Time for Action – Risk Engineering & Project Controls Impacting the Future*

## Contract Works Policy ...cont

- Annual policies vs project specific policies
- Common exclusions:
  - faulty design and faulty workmanship
  - consequential loss
  - wear and tear





## RISK & PCC 19

ICC | SYDNEY | AUSTRALIA  
15 - 17 MAY 2019



*A Time for Action – Risk Engineering & Project Controls Impacting the Future*

## Claims Management

- Identify which policy responds
- Notify claim or circumstance as soon as possible
- Capture all circumstances however remote a claim may be
- Claim submission (date, place, description)
- Once a notification of a claim has been made provide insurer with all relevant material (contracts, designs, reports and quantum documents)
- Involve insurance professional (internal or external)
- Follow up insurer
- Document it



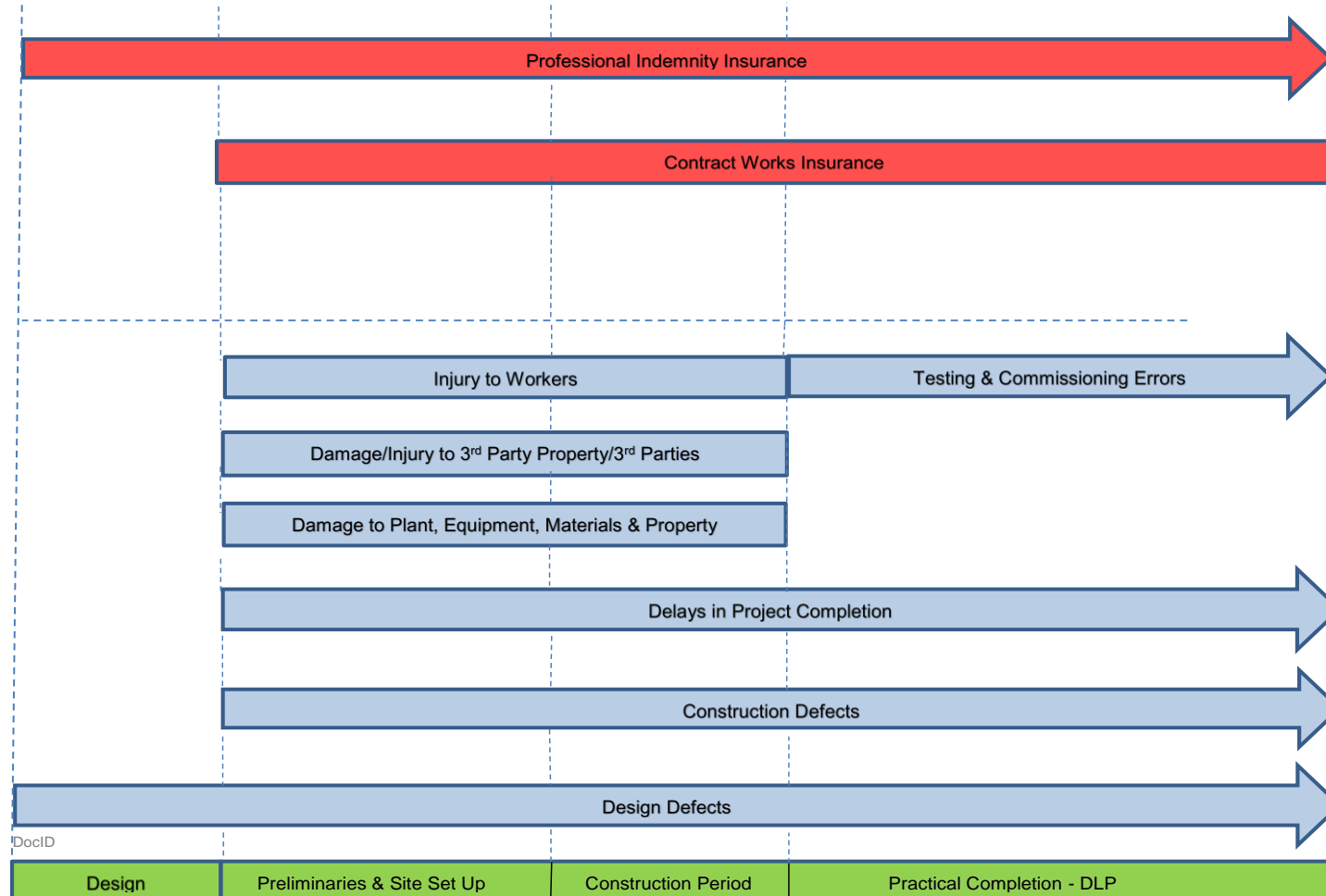
# RISK & PCC 19

ICC | SYDNEY | AUSTRALIA  
15 - 17 MAY 2019

# Summary & overview – Risk Management Through Insurance



*A Time for Action – Risk Engineering & Project Controls Impacting the Future*



DocID



## RISK & PCC 19

ICC | SYDNEY | AUSTRALIA  
15 - 17 MAY 2019



*A Time for Action – Risk Engineering & Project Controls Impacting the Future*

## Contact



### Robert Finnigan

Special Counsel, Wotton + Kearney

T: +61 2 8273 9850

E: [robert.finnigan@wottonkearney.com.au](mailto:robert.finnigan@wottonkearney.com.au)



wotton  
kearney

A founding member of **LEGALIGN™**  
GLOBAL