

# Lumley

## General



## **Building Indemnity Insurance Policy**

**Domestic Building Work  
performed by a Licensed Builder**

**South Australia**

Underwritten by  
**Wesfarmers General Insurance Limited, trading as Lumley General**

ABN 24 000 036 279

Level 9, 309 Kent Street Sydney New South Wales 2000

Tel: (02) 9248 1111

## SECTION 1 - INTRODUCTION

This Building Indemnity Insurance policy is underwritten Wesfarmers General Insurance Limited ABN 24 000 036 279, trading as Lumley General, and consists of this policy wording and a Certificate of Insurance. They are important documents and provide proof of contract between You and Us. Please keep them in a safe place.

This policy is issued in compliance with the Act and the Regulations. If any term of the policy conflicts or is inconsistent with the Act and/or the Regulations then the policy must be read and be enforceable as if it complies with the Act and the Regulations.

Please read the policy and Certificate of Insurance carefully and together to ensure that You fully understand them and that they provide You with the protection that You need.

The policy is for the period of insurance and will not be renewed and is not of a type that is renewable, nor is it cancellable except in those circumstances detailed in Section 4.4.

If it is not completely in accordance with Your intentions or You are in doubt as to the meaning or effect of the wording, please contact Your Broker, legal representative or Us immediately for clarification.

Some of the words in the policy have specific meanings. You should refer to Section 3 for the definitions of those words.

## SECTION 2 – IMPORTANT NOTICES

### 2.1 Your Duty of Disclosure

We rely on the truth of what the Builder tells Us in providing You with this cover and separately what You tell Us when and if You make a Claim. We will not avoid Your Claim or refuse to make or limit payment under Your Claim solely on the grounds that the Builder:

- (i) failed to comply with any duty of disclosure;
- (ii) made misrepresentations to Us;
- (iii) Or on a ground similar to that in clauses 2.1(i) and(ii).

In the event that We make a payment under this policy in the circumstances in which this clause applies, We are entitled to seek recovery of such payment, including any fees and charges incurred, from the Builder.

### 2.2 Certificates of Insurance

When We issue this policy, We will provide You with a Certificate of Insurance stating the policy has been issued in compliance with the Act and the Regulations. At Your or the Builders request, We will also provide a copy of the policy, the Certificate of Insurance and any associated document to the policy.

### 2.3 Privacy

We are committed to ensuring the confidentiality and security of personal information. We may disclose personal information to:

- a State or Federal Authority, an assessor or investigator (for the purpose of assessing or investigating Your Claims);
- a lawyer or recovery agent (for the purpose of defending an action by a third party, the builder or You against You or Us or for the purpose of recovering Our costs);
- another insurer or a reinsurer (for the purpose of seeking recovery from them or to assist them to assess insurance risks);
- an insurance reference bureau (for the purpose of recording any Claims You make upon Us); and
- other service providers (only for a purpose in connection with this insurance).

Personal information may also be obtained about You or Your Employees from the above people or organizations. We will give You and Your Employees the opportunity to correct this personal information, or obtain access to it.

We will provide Our dispute resolution procedures to You in respect of any complaint You may have regarding Your personal information. You may request access to information held by Us about You, by contacting Us. Our Privacy statement is also available on Our Website [www.lumley.com.au](http://www.lumley.com.au).

### 2.4 Goods and Services Tax (GST)

If this policy is subject to payment of Goods and Services Tax in relation to the premium then You will pay that tax.

## 2.5 Our Code Of Practice

We subscribe to the General Insurance Code of Practice that sets the standards of practice and service for the insurance industry. It is Our aim to provide a quality service to You, Our customer. However We recognize that occasionally there may be some aspect of Our service or a decision We have made that You wish to query or draw to Our attention.

If after talking to Us, You wish to take the matter further, please ask for the matter to be referred to Our Internal Dispute Resolution Committee. We have a complaints and dispute resolution procedure that undertakes to provide an answer to Your matter within 15 working days provided We have all the information We need. We also undertake to inform You of Your alternatives should You still not be happy with Our answer.

You also have the right to appeal Our decision in relation to a Claim to the Court. Please refer to Section 7.2.

## 2.6 Severability Clause

Some provisions and terms of this policy have been inserted in the policy due to the requirements of the Act and the Regulations. Should it be found by the any court of competent jurisdiction that any provision or term of this policy, is invalid or not in accordance with the Act, or the Regulations then the provision or term of the policy shall be deemed to be severed from this policy and not binding upon the Insurer or the Insured. The remainder of the policy shall remain in full force and effect.

## 2.7 Limitation or Exclusion of Rights Against Third Parties

You must not limit or exclude your rights against a party from whom you might otherwise be able to recover in respect of loss or damage. If you do, Our liability to You is reduced to the extent that We can no longer recover from that other party as a result of the limitation or exclusion by You.

## SECTION 3 - DEFINITIONS

For the purposes of this policy, the following words have special meanings. Where also appearing in the Act or the Regulations, they are

consistent with the Act and Regulations. If there is any discrepancy, the definition contained in the Act or the Regulations will apply. The defined words are shown in the policy with the first letter capitalised. Words in the singular includes the plural and vice versa. The defined word includes derivatives of the word.

### **Act** means:

The *Building Work Contractors Act 1995 (SA)*.

### **Builder** means:

A Building Work Contractor as that term is defined in the Act, namely:

- (a) A person, partnership, company or other body corporate that carries on the business of Performing Domestic Building Work for others, or
- (b) a person, partnership, company or other body corporate who carries on the business of Performing Domestic Building Work with a view to the sale or letting (whether by lease, licence or other agreement) of land or Buildings improved as a result of the Domestic Building Work.

A Builder must also be or have been the holder of a valid Licence at the time of entering into a Domestic Building Work Contract.

### **Building** means:

The same as it does in the Act, namely a structure or part of a structure.

### **Building Owner** means:

Under a Domestic Building Work Contract, the person (being the registered proprietor of the Building Site) for whom the Domestic Building Work has been or is being carried out, managed or arranged.

### **Building Site** means:

The place where Domestic Building Work is being, has been, or is about to be, carried out.

### **Certificate of Insurance** means:

The certificate We issue to You evidencing that cover for the Domestic Building Work has been issued by Us.

### **Claim** means:

For the purposes of this policy, written notice made by You on Our Claim form of any Defect, breach of Statutory Warranty or failure by the Builder to comply with the requirements of the Domestic Building Work Contract.

**Commencement Day** means:

The earlier of:

- (a) the date the relevant Domestic Building Work Contract was entered into; or
- (b) the date of issue of consent or approval by a Relevant Authority as required by the *Development Act 1993 (SA)* for Domestic Building Work to be commenced.

**Commissioner for Consumer Affairs** means:

The Commissioner appointed to that position by the South Australian Government in the Office of Consumer and Business Affairs.

**Common Property** means:

Property in a strata, cluster or other subdivision that vests in You and other owners as tenants in common in shares proportional to Your lot entitlement as defined in the *Strata Titles Act 1988 (SA)*.

**Completion Date** means:

- (a) the date of issue of the occupancy permit for the Home (whether or not subsequently cancelled or verified); or
- (b) if an occupancy permit is not issued, the date of issue of a certificate of final inspection of the Domestic Building Work for the construction of the Dwelling; or
- (c) if neither an occupancy permit or final certificate of inspection is issued or required to be issued, the date of Practical Completion of the Domestic Building Work.

**Dead/Death** means:

For the purposes of this policy Dead includes in the case of a Builder who is not a company or a body corporate, the death of the Builder or all of the partners in the Builder.

**Defects/Defective** means:

In relation to Domestic Building Work:

- (a) a breach of any Statutory Warranty listed in Section 32 of the Act; or
- (b) a failure to maintain a standard or quality of Domestic Building Work specified in the relevant Domestic Building Work Contract.

**Disappears** means:

Not being able to be found after due search and enquiry.

**Domestic Building Work Contract** means:

The same as it does in the Act namely a contract between a Builder and another person, partnership, company or body corporate for the Performance by the Builder of Domestic Building

Work (including any Variation of such a contract), but does not include a Subcontract for the Performance of Domestic Building Work.

**Domestic Building Work** means:

The same as it does in the Act, namely:

- (a) the whole or part of the work of constructing, erecting, underpinning, altering, repairing, improving, adding to or demolishing a Dwelling; or
- (b) the whole or part of the work of excavating or filling a site for work referred to in paragraph (a); or
- (c) work of a class prescribed by the Regulations,

However Domestic Building Work does not include Minor Domestic Building Work.

**Dwelling** means:

The same as House in the Act and the Regulations, namely

Any residential Building that is used and intended sole for occupation as a place of residence but does not include:

- (a) hotels, and/or motels, or
- (b) youth hostels, residential camps, boarding or lodging houses, or
- (c) university halls of residence, boarding school dormitories or barracks, or
- (d) nurses homes, or
- (e) residential facilities for workers or for training purposes
- (f) caravan within the meaning of the *Residential Tenancies Act 1995 (SA)* or any vehicle used as a residence; or
- (g) any residence that is not intended for permanent habitation; or
- (h) or rooming house within the meaning of the *Residential Tenancies Act 1995 (SA)*; or;
- (i) any residence that Regulations state is not or was not a Dwelling for the purposes of the definition of House in the Act or Regulations.

**Insolvent/Insolvency** means:

- (a) In the case of a natural person, insolvent under administration as defined in the *Corporations Act 2001 (Cth)*; or
- (b) In the case of a body corporate, subject to external administration as defined in the *Corporations Act 2001 (Cth)*.

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### **Licence** means:

A licence under Part 2 of the Act and has the corresponding meaning.

### **Minor Domestic Building Work** means:

- (a) Domestic Building Work Performed by a Builder under a Domestic Building Work Contract,
  - (i) where the value of those Domestic Building Works is or was less than \$5,000; and
  - (ii) the Domestic Building Work Contract was entered into before 15 October 2001; or
- (b) Domestic Building Work Performed by a Builder under a Domestic Building Work Contract,
  - (i) where the value of those Domestic Building Works is or was less than \$12,000; and
  - (ii) the Domestic Building Work Contract was entered into after 15 October 2001.

### **Office of Consumer and Business Affairs** means:

The Office of Consumer and Business Affairs established by the Government of South Australia as a division of the Attorney General's Department within the Department of Justice.

### **Perform** means:

In relation to Domestic Building Work, to:

- (a) cause Domestic Building Work to be carried out; or
- (b) manage or arrange the carrying out of Domestic Building Work.

### **Practical Completion Date** means:

In relation to Domestic Building Work, the date when the Domestic Building Work is completed except for any omissions or Defects that do not prevent the Domestic Building Work from being reasonably capable of being used for its intended purpose.

### **Reasonable Legal Costs and Expenses** means:

- (a) Costs incurred after the later of:
  - (i) the date which You lodged the Claim with Us together with all reasonable information and evidence (as

determined by Us) in support of that Claim; and

- (ii) the expiration of 90 days following the date you lodged the Claim, and
- (b) costs calculated on a party/party basis in accordance with the appropriate scale having regard to the quantum of Your loss and damage covered by the policy.

### **Regulations** means:

The Building Work Contractors Regulations 1996 (SA).

### **Relevant Authority** means:

A Relevant Authority as that term is defined in the *Development Act 1993 (SA)*.

### **Statutory Warranty** means:

The same as it does in section 32 of the Act.

### **Subcontract** means:

A contract for the Performance of Domestic Building Work for a Builder who is in turn obliged to Perform the Domestic Building Work under another Domestic Building Work Contract.

### **Variation** means:

A document altering the price or scope of Domestic Building Work signed by and agreed between the Building Owner and the Builder under an Domestic Building Work Contract, however for the purposes of this policy, only a written Variation signed by both the Building Owner and the Builder shall be deemed as a Variation.

### **We, Our, Us** means:

Wesfarmers General Insurance Limited ABN 24 000 036 279, trading as Lumley General.

- (a) **You, Your** means: any person who is or may become entitled to the benefit of the Statutory Warranties; or
- (b) a person for whom Domestic Building Work is being Performed by a Builder.

but does not mean:

- (i) the Builder;
- (ii) the Building Owner if the Building Owner is a related body corporate (as defined in the Corporations Act 2001) of the Builder; nor
- (iii) the Building Owner, if neither the Builder nor the Building Owner is a public company but each has a common director or a common shareholder.

## SECTION 4 - THE COVER

### 4.1 Our Agreement

We agree to cover You if the Builder is Dead, Disappears or becomes Insolvent during the period of insurance, subject to the terms, conditions and exclusions of this policy, if You suffer loss or damage:

- (a) resulting from the non-completion by the Builder of Domestic Building Work Performed for You under and referred to in the Domestic Building Work Contract by reason of the Death, Disappearance or Insolvency of the Builder; or
- (b) resulting from a breach by the Builder of any of the Statutory Warranties if You are unable to enforce or recover under those Statutory Warranties by reason of the Death, Disappearance or Insolvency of the Builder.

### 4.2 Limit of Indemnity

We will not be liable to pay You any more than \$80,000 in the aggregate for any and all Claims made under the policy in respect of any one Dwelling, which amount includes your Reasonable Legal Costs and Expenses.

### 4.3 Period of Insurance

Cover is provided by the policy, subject to the terms, conditions and exclusions of this policy for Defects in respect of loss or damage occurring during the period starting on the Commencement Day and ending 5 years after the earlier of:

- (a) the Completion Date of the Domestic Building Work, or
- (b) the date of termination of the Domestic Building Work Contract.

### 4.4 Cover Cancellation

The policy when issued cannot normally be cancelled, however in the event that:

- (a) it can be proven that no Domestic Building Works have been Performed by the Builder under the Domestic Building Work Contract; and
- (b) the Domestic Building Work Contract has been terminated, abandoned or ended by mutual agreement; and
- (c) no Domestic Building Works will be Performed by the Builder under the Domestic Building Work Contract, and

- (d) We receive written confirmation from both You and the Builder requesting that the policy be cancelled and no reliance will be placed on it by either You or the Builder in the future,

the policy may be cancelled. In the event all of the requirements of 4.3(a) to (d) inclusive are not satisfactorily completed, the policy will not be cancelled even if We do not have any known liability under the policy.

## SECTION 5 - WHAT IS NOT COVERED

We will not pay for any loss or damage, whether direct or indirect, or Your legal liability in respect of:

- (a)
  - (i) any Domestic Building Work Performed to the remainder of the Dwelling or Building Site other than that noted in the policy, or
  - (ii) any works Performed or not Performed by any predecessors to You, by You or by subsequent owners, or
  - (iii) any Domestic Building Works which are the subject of any other insurance, guarantee or indemnity; or
  - (iv) Domestic Building Work which was not required to be Performed under the relevant Domestic Building Work Contract.
- (b) Non-completion of Domestic Building Work where the Builder's Death, Insolvency or Disappearance occurred before the Builder commenced any Domestic Building Work on the Building Site, however this exclusion or limitation is subject to Your right to recover any money paid in relation to the relevant Domestic Building Work Contract only if those monies represented the deposit or part of the deposit.

Except where this clause limits the operation of any Statutory Warranty.

- (c) Money paid to the Builder:
  - (i) that exceeds the amounts that should have been paid to the Builder in accordance with Section 30 of the Act; and/or
  - (ii) that exceeds the amount that should have been paid to the Builder in accordance with the relevant Domestic Building Work Contract.

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- (d) Normal wear and tear of Domestic Building Work including but not limited to normal shrinkage of materials or foundations, heave or any movement of earth, rust, corrosion, gradual deterioration, depreciation and/or normal drying out of materials except where this clause limits the operation of any Statutory Warranty.
  - (e) Your failure to maintain the Domestic Building Work or maintain the appropriate protection against pest infestation or exposure of natural timbers except where this clause limits the operation of any Statutory Warranty.
  - (f) Defects relating to landscaping, paving, retaining structures, driveways or fencing works unless those works are integral to the construction of a Dwelling except where this clause limits the operation of any Statutory Warranty., or
  - (g) Defects which were evident or were reasonably evident or would have been evident during a reasonable inspection at or prior to the time of purchase of the Dwelling by You or if You or a previous Building Owner of the Home has already been compensated for that loss or damage except where this clause limits the operation of any Statutory Warranty.
  - (h) Any act committed or condoned by You relating to the Claim or the Domestic Building Works which is dishonest, fraudulent, criminal or malicious except where this clause limits the operation of any Statutory Warranty.
  - (i) Penalties, fines, liquidated damages or any other sums imposed against the Builder that relate to the delay on the part of the Builder. This exclusion will not limit any increase in rectification costs caused by the effluxion of time except where this clause limits the operation of any Statutory Warranty.
  - (j) Any exemplary or punitive damages awarded by the Tribunal or a Court against either the Builder or You except where this clause limits the operation of any Statutory Warranty.
  - (k) Consequential loss, not otherwise covered under this policy except where this clause limits the operation of any Statutory Warranty.
  - (l) Bodily injury, death or illness except where this clause limits the operation of any Statutory Warranty.
  - (m) Failure or malfunction in any mechanical or electrical equipment or appliance if the malfunction is not attributable to the workmanship of or installation by the Builder except where this clause limits the operation of any Statutory Warranty.
  - (n) Work or materials made outside the reasonable lifetime of the work or materials or the manufacturer's warranty period for the materials except where this clause limits the operation of any Statutory Warranty.
  - (o) Liability imposed upon the Builder if that liability would not have been imposed upon the Builder in the absence of a Domestic Building Work Contract except where this clause limits the operation of any Statutory Warranty.
  - (p)
    - (i) War, invasion, acts of foreign enemies, hostilities or warlike operations (whether war be declared or not), civil war, civil unrest, rebellion, revolution, insurrection, civil commotion assuming the proportions of or amounting to an uprising, military or usurped power.
    - (ii) Any act of terrorism. For the purpose of this clause an act of terrorism means an act, including but not limited to the use of force or violence and/or threat thereof, of any person or groups of persons, whether acting alone or on behalf of or in connection with any organisations or governments, committed for political, religious, ideological, ethnic or similar purposes including the intention to influence any government and/or to put the public or any section of the public in fear.
- This clause also excludes loss, damage, liability, death, injury, illness, cost or expense of whatsoever nature directly or indirectly caused by, resulting from or in connection with any action taken in controlling, preventing, suppressing or in any way relating to (i) or (ii) above except where this clause limits the operation of any Statutory Warranty.
- (q) The use, existence or escape of nuclear weapons material, or ionising radiation from, or contamination by radioactivity from, any nuclear fuel or any nuclear waste form the combustion of nuclear fuel, including any self sustaining process of nuclear fission or fusion

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- except where this clause limits the operation of any Statutory Warranty.
- (r) Risks that are normally insured under a policy for public liability or contract works except where this clause limits the operation of any Statutory Warranty.
  - (s) An injury arising, directly or indirectly, out of inhalation or, or fears of the consequences of exposure to, or inhalation of, asbestos, asbestos fibres or derivatives of asbestos except where this clause limits the operation of any Statutory Warranty.
  - (t) The cost of cleaning up, or removal of, or damage to, or loss of use of, property arising out of any asbestos, asbestos fibres or any derivatives of asbestos except where this clause limits the operation of any Statutory Warranty.
  - (u) Events that gave rise to a Claim that:
    - (i) occurred prior to the Commencement Day; or
    - (ii) which might give rise to a Claim and which were known to You prior to the Commencement Day.
  - (v) Claims by:
    - (i) You, if you are the Builder; or
    - (ii) You, if you are a related body corporate, as defined in the *Corporations Act 2001*, of the Builder, or
    - (iii) You and the Builder if You have a common director or shareholder although both You and the Builder are not public companies.
  - (w) Any event to which Section 4 of this policy applies if the premium relevant to this policy has not been paid to Us.
  - (x) Any alternative accommodation, removal, moving or storage costs of any kind.
- (b) For any loss or damage You have suffered with regard to an event referred to in Sections 4.1 (a) to (d) inclusive of this policy, You must pay the first \$400 of each Claim made .

A Claim of \$400 or more may relate to more than one Defect if the amount Claimed for one or more defects is less than \$400.

For the purpose of this clause, the date when a Claim is made is the earlier of the date the Claim is made or the date when You first notify Us, in writing, of a circumstance that may give rise to a Claim.
  - (c) Despite Section 6(b), You shall only be required to pay the first part of Your Claim once, where:
    - (i) Your Claim comprises more than one Defect; or
    - (ii) two or more Claims that relate to the same Defect.
  - (d) In the event the Domestic Building Work is Performed on land in a plan of subdivision containing Common Property in any description or form, any Claim paid by Us relating to the Common Property shall be divided by a number equal to the number of all Dwellings on the land and the relevant amount referred to in Section 6(b) shall be deducted from that amount for each Dwelling.

The cover so provided extends only to the registered proprietor of the Dwelling identified in the policy and that registered proprietor's lot entitlement within the land in the plan of subdivision. No cover is provided to the body corporate, strata scheme or Common Property manager.
  - (e) In the event of a Claim made on land in a plan of subdivision containing Common Property, the Strata Scheme, Body Corporate or other Common Property management body shall be entitled to make a Claim only in the capacity as Your agent and the other owners with regard to the Common Property.
  - (f) Where a successful Claim is made by You and We agree to make payment to an alternate Builder to remedy the loss or damage suffered by You, the amount identified in Section 6 (b) and payable by You, must firstly be paid by You to the alternate Builder before We will authorise the alternate Builder to commence those rectification works.

### SECTION 6 – CLAIMS SETTLEMENT

We will, at Our discretion, either make good, direct the Builder to make good, or pay the amount assessed by Us as the loss or damage suffered by You subject to the following limitations:

- (a) If Your Claim relates to loss and damage suffered as a result of the non-completion of the Domestic Building Works, We may elect to settle Your Claim in full by way of a single payment.

## SECTION 7 - HOW TO MAKE A CLAIM

### 7.1 Your Obligations

- (a) You must notify Us of any fact or circumstance that may give rise to a Claim as soon as You become aware of the fact or circumstance.
- (b) You must take all reasonable precautions to avoid or minimise loss or damage that is covered by this policy.
- (c) In order for Your Claim to have been deemed to have been validly made, You are obliged to notify Us in writing on Our Claim form as soon as You become aware of loss or damage that is insured by this policy but in any event, not later than 90 days after the date that You first became aware of or ought reasonably have been aware of the event that gave rise to the Claim.

If You do not notify Us in writing on Our Claim form as required by this clause We may either refuse or limit payment of Your Claim.

- (d) If You make a Claim under this policy:
  - (i) You must comply with any reasonable directions that We give You in relation to the completion or rectification of the Domestic Building Work or settlement or resolution of Your Claim;
  - (ii) You must not undertake or cause to be undertaken, any rectification works without notifying Us unless those works are reasonably necessary to prevent or minimise further loss or damage;
  - (iii) You must provide Us or any Builder or other person We nominate, with reasonable access to the Building Site for the purposes relating to the Claim.
- (e) In the event that You bring any action against the Builder, You are required to notify Us within 30 days of lodging that proceeding in the tribunal or Court, and to provide to Us all details

of the Claim You have made against the Builder in those proceedings.

- (f) In the event that the Builder brings proceedings against You, You are required to notify Us within 30 days of receipt by You of advice of those proceedings from the tribunal or Court and to provide to Us all details of the Claim made against You by the Builder.
- (g) The period for making a Claim under the policy ceases simultaneously with the end of the period of insurance and We will not accept any Claim made after the expiry of the policy.
- (h) If at the time that You make a Claim, there are any monies as assessed by Us as owing by You under the relevant Domestic Building Work Contract, those monies must firstly be applied:
  - (i) toward rectification costs of any Defective and/or incomplete Domestic Building Work, and then
  - (ii) toward the costs of any other loss or damage incurred of a nature which is referred to in Section 4.
- (i) You agree not to undertake or cause to be undertaken any rectification works or completion works without notifying Us or Our agent, unless such works are reasonably necessary to prevent or minimise any further loss or damage.
- (j) In the event You make a Claim under the policy, You are obliged to advise Us of all matters that may impact Our decision with regard to that Claim or to the cover provided by the policy. If You fail to advise us of a fact that does alter the cover provided or that would alter the decision We make in respect of any Claim, We may either refuse to pay that Claim or We may seek to recover part or all of the monies already paid to You.

### 7.2 Dispute Resolution

In the event that We make a decision on a Claim and you disagree with any part of that decision, please ask to speak to the manager in the first instance. Should this not resolve Your dispute, We also have an internal dispute resolution panel that is available to You. You also have a right of

appeal to a court of competent jurisdiction. If you wish to appeal Our decision to a court of competent jurisdiction You must lodge and file that application with the a court of competent jurisdiction no later than 28 days after receipt by You of our letter of decision for Your Claim.

### **7.3 Subrogation**

In the event that We have the right to recover monies paid or payable under this policy from any other person or entity, You agree to subrogate Your rights to Us to the extent We make payment to You with respect to a Claim and agree to co-operate with Us in any proceedings at law which We may take under that right of Subrogation.