



BARRY.NILSSON. - YOUR FINANCIAL LINES SPECIALISTS

June 2020

Adelaide +61 8 8128 7700
Brisbane +61 7 3231 6300

Hobart +61 3 6218 8800
Melbourne +61 3 9909 6300

Sydney +61 2 8651 0200
Perth +61 8 6424 0400

bnlaw.com.au

INTRODUCTION

Barry.Nilsson.'s (BN) national financial lines team are regularly involved in disputes involving professionals, both acting directly for insurers in coverage disputes, and defending claims made against insureds on instructions received from their insurers.

Our experience equally applies to all the investigation, inquiries, disciplinary proceedings, public hearings and prosecutions that these insurance products cover.

Such recognised expertise leads to our appointment on panels of many major insurers. We are also trusted with more complex and significant claims, including instructions from the London market, where the number of Lloyd's syndicates from whom we receive work and the overall volume of instructions continues to increase.

We understand our claims management needs to fit into your wider business objectives. We take a holistic approach to our clients' needs, considering more than just the legal issues. We will seek to understand your needs in relation to the 'bigger picture' - including your strategy, goals and reputation - in conjunction with your commercial imperatives.

BN is known for implementing innovative and rapid solutions so our clients are ahead of the game. On some occasions appropriate resolution means taking claims to trial. In those circumstances, our team will work with you to plan the litigation strategy in a way that is commercial, cost conscious and committed to achieving the best outcome.

When partnering with BN, you can trust you will be aligning with one of the insurance industry's most respected, trusted and experienced legal services providers.

RHETT KENNEDY

Principal and Insurance & Health Practice Leader

rhett.kennedy@bnlaw.com.au
+61 7 3231 6327



FINANCIAL LINES EXPERTISE

In a world where businesses of all sizes are governed by an increasingly complex web of regulations, things can still go wrong. At these times, both insurers and insureds want advice from a team of legal experts who are specialists in defending claims under financial lines insurance policies.

BN understands the complexity of financial lines insurance, based on over 30 years of experience. For example, with most professional indemnity matters, the evidence is crucial. In many professions, it is likely to be complicated and extremely technical. This means that the client needs an experienced lawyer who understands the technical issues facing the particular profession, has the skill to analyse the evidence relevant to the matter, and can then build a strong case in their defence.

Our expertise includes:

- Professional Indemnity
- Property & Construction PI
- Medical Malpractice & Allied Health PI
- Directors' & Officers' Liability
- Employment Practices Liability
- Management Liability
- Financial Institutions
- Cyber Liability
- Defamation
- Class Actions, Commissions of Inquiry and Royal Commissions.

Our aim is to deliver real world value by making your work easier and achieving the best results for our clients.



I deal with hundreds of professional indemnity claims on an annual basis... and they certainly outperformed the standard interaction we have with panel solicitors in terms of communications and managing the process for the insured."

Greg Hansen, Director - Professional Risks, Austbrokers Countrywide

CLAIMS SNAPSHOT

Professional Indemnity: Defended an insurance broker in a claim brought by the former directors of Storm Financial, a collapsed financial planning company, who were denied indemnity for legal representation expenses by their D&O insurer, allegedly resulting from the broker's failure to provide advice on the directors' disclosure obligations. A successful outcome was negotiated on behalf of the broker by linking the material non-disclosure to matters of a type the directors knew they were obliged to reveal.

Professional Indemnity: Acted for an engineer who was involved in a multi-million dollar clean up of a contaminated industrial site following a major fire. The Environmental Protection Agency (EPA) prosecuted the engineer for alleged illegal placement of contaminants on the site. By proactively engaging with the EPA, the EPA was persuaded to drop all charges against the engineer and a costs award was also successfully obtained against the EPA.

Professional Indemnity: Acted for a building surveyor regarding claims made in relation to a multi-unit development, the value of which exceeded \$6 million. The matter involved four defendants, hundreds of alleged defects and multiple plaintiffs (who were separately represented). The claims were further complicated by the failure of the leading plaintiff and others to understand the impact of proportionate liability legislation. Finally, the building surveyor had limited insurance. Our lawyers approached this matter strategically and resolved individual plaintiff claims, which put pressure on the remaining plaintiffs. As a result, the claim was resolved for less than half the claimed amount (inclusive of costs).

Property & Construction PI: Currently acting in a range of litigated cladding disputes issued out of the Supreme Court of Victoria and the Victorian Civil and Administrative Tribunal. These claims are being managed amongst an evolving regulatory landscape with different impacts for each of the relevant building professionals involved. One particular litigated dispute involves the installation of cladding and is anticipated to be the first cladding dispute heard by a Supreme Court in Australia.

Property & Construction PI: Acting in an ongoing multimillion-dollar construction claim involved alleged negligence of a private certifier in certifying the nursing home construction as complying with the Building Code of Australia and issuing relevant certificates of compliance.

Property and Construction PI: Acted for a major national engineering company (and its insurers) in a claim by a property developer in connection with a residential development near Port Hedland, Western Australia. The matter involved allegations of breach of contract and negligence in relation to drainage and road design.

Medical Malpractice: Assisting Woolcock Institute of Medical Research in responding to a complaint made by a participant in a clinical trial and the subsequent investigation by the Sydney Local Health District.

Medical Malpractice: Defended a consultant endocrinologist with respect to a coronial inquest into the death of a patient at a hospital. Other parties to the coronial inquest include numerous hospitals, specialist surgeons, doctors, dieticians and nurses.

Medical Malpractice: Assisted an insured dentist to draft a comprehensive response to the Australian Health Practitioner Regulation Agency. The response resulted in the early closure of an investigation regarding whether the insured dentist had injected foreign material into the patient's soft palate.

Directors' & Officers': Acted on behalf of D&O insurers in relation to a claim for indemnity by the insured director of an ASX listed company. It was not in dispute that the insured had incurred extremely significant legal costs in defending an action brought against it by the Australian Securities and Investments Commission. We raised arguments in defence of the claim for indemnity based on alleged pre-contractual non-disclosure by the insured in reliance on what we alleged were breaches of the insured's duty of utmost good faith and that duty's interaction with Section 54 of the *Insurance Contracts Act*. The matter ultimately resolved at mediation.

Directors' & Officers': Defended a claim brought by a financier against the responsible entity of a high yield fund and its director, alleging in excess of \$3 million in losses as a result of being misled into accepting a valueless second priority share of a loan. The claim, which was commercially settled in advance of trial, involved examination of complex causation and indemnity issues, arising out of the suggestion of fraud on the part of the insured.

Directors' & Officers': Acted for the insurer of auditors of a publicly listed company which was liquidated. Two claims arose from the group's collapse, one by the receivers and the other by one of the group's financiers. The claims exceeded \$500 million. Through astute selection of experts, thorough but appropriate investigations and resolute settlement strategies, we settled both claims and kept defence costs within the policy limit.

Employment Practices Liability: Currently defending an application in the Federal Court of Australia alleging sexual harassment and discrimination on the basis of sexual orientation in employment.

Employment Practices Liability: Represented a primary school that was the subject of litigation alleging discrimination against a student and achieved dismissal of the matter with costs.

Employment Practices Liability: Represented a Statutory Authority in a dispute lodged under the terms of the enterprise agreement in the Fair Work Commission, which was subsequently joined with a general protections claim. Three separate unions sought to act as representatives for various employees. Having assessed the merits of the general protections claim, we refused to enter into any settlement and the matter was subsequently withdrawn. While the unions pressed the dispute, based on our solid understanding of the enterprise agreement, the Commission found in favour of the Authority.

Management Liability: Acted for a mortgage aggregator in a multimillion-dollar dispute concerning a series of fraudulent loans. The claim involved allegations of a failure to verify the identity of multiple mortgagees. The claim resolved on favourable terms at mediation following the joinder of parties for the purposes of apportioning liability under the proportionate liability regime in the *Wrongs Act 1958*.

Management Liability: Defended an AR and AFSL holder against an application for Special Leave to Appeal to the High Court on the issue of abuse of process.

Management Liability: Acted for accountants who were auditors for a company. The insured failed to detect fraud being committed by the company's CFO. Losses claimed by a major bank were in excess of \$5 million. Resolved the matter for approximately 10% of the claim by arguing contributory negligence on the part of the bank and apportioning loss to the fraudster.

Financial Institutions: Advised an insurer of an AFS licence holder in relation to class action proceedings in the Federal Court and subsequent appeal proceedings arising from investment in exotic Constant Proportion Debt Obligation (CPDO) notes.

Financial Institutions: Defended an AFS licence holder in relation to 150 separate claims by administrators and receivers for insolvent trading and/or breaches of directors' duties.

Financial Institutions: Acted for the insurers of a financial advisory company and its authorised representative in relation to claims totalling more than \$5 million made by two investor claimants.

Cyber Liability: Acting as coverage counsel for an international insurer in respect of a business email compromise incident affecting an online retailer where the policy contained an out-of-band authentication condition that had not been complied with. We advised the insurer in respect of possible policy arguments in favour of the insured (including under section 54 of the ICA) which ultimately led to the insurer and the insured agreeing to compromise the claim under the policy.

Cyber Liability: Acted as coverage counsel for an international insurer in a large scale incident involving an ASX listed company affected by the Emotet malware strain. The incident resulted in large first party losses and required an assessment of potential third party losses arising from complaints made immediately following the incident. The incident also required close coordination of multiple third party vendors including forensic IT, PR and privacy counsel to ensure communications with third parties and stakeholders about the incident was effectively managed. This minimised the risk of third party claims and complaints arising from the incident.

Cyber Liability: Acted as breach coach and privacy counsel for a community legal centre that suffered a business email compromise attack. Because of the nature of the information contained in the affected mailbox, it was necessary to seek a declaration from the Commissioner that the organisation need not comply with the notifiable data breach requirements under s 26WQ of the *Privacy Act 1988* (Cth).

Defamation: Acted on behalf of the public liability insurer of a Body Corporate in defamation proceedings commenced by a unit holder, concerning statements made in a body corporate meeting and noted within the body corporate minutes. Matter involved particularly difficult plaintiffs but was able to be resolved before incurring costs associated with preparing for trial on the basis that each party walk away and bear their own costs.

Defamation: Defended a defamation claim made against a lawyer by having the statement of claim struck out at an early stage of the proceedings.

Defamation: Defended a defamation action against a local government councillor involving the publication of a pamphlet that referred to the council's CEO. The pamphlet was distributed to council employees at a union meeting.

Royal Commission into the Misconduct in the Banking, Superannuation and Financial Services Industry (confidential): Providing advice on an ongoing basis to an insurer of an Australian big four bank directly impacted by the Royal Commission into the Misconduct in the Banking, Superannuation and Financial Services Industry.

Class action following ASIC investigation: Advised an insurer in relation to claims made under D&O and prospectus liability policies following the collapse of a large vocational training provider. The collapse gave rise to investigations by the Australian Securities and Investments Commission (ASIC) and three related class actions. We provided indemnity advice in relation to a number of complex issues, and then acted in close conjunction with defence counsel to protect the insurer's position by minimising their exposure and reducing their defence costs.

Public Inquiry under the Charitable Fundraising Act 1991: Represented a former president of the NSW RSL at the Public Inquiry under the *Charitable Fundraising Act 1991* commenced to investigate alleged corruption and irregularities within the Returned and Services League of Australia (New South Wales Branch), the RSL Welfare and Benevolent Institution (also known as RSL DefenceCare), and its Trustees, and RSL LifeCare Limited. We successfully managed the Inquiry to ensure no prosecution or penalty was ultimately brought against this interested party.

A NATIONAL FINANCIAL LINES TEAM

In this proposed BN team, we have assembled some of our finest financial lines insurance lawyers, headed by Insurance & Health principal, Rhett Kennedy.



RHETT KENNEDY

Principal, Queensland

In addition to Rhett, BN's contacts in each state are Simon Black, Hubert Wajszel, Andrew Hilditch, Peter Forbes-Smith and Toby Barrie.

They are supported by a national team of lawyers with experience in respect to all aspects of financial lines insurance, which allows us to allocate matters at the right level and manage claims without re-inventing the wheel or incurring unnecessary costs.

“

Relationships at all levels lead to trust; they add value and give great service; provide very good value; ability in thought leadership (in options/recommendations/advice) to think outside the box; give accurate recommendations.”

Independent Client Listening Survey



SIMON BLACK

Principal, New South Wales



HUBERT WAJSZEL

Principal, Victoria



ANDREW HILDITCH

Principal, South Australia



TOBY BARRIE

Principal, Western Australia



PETER FORBES-SMITH

Principal, Tasmania

QUEENSLAND

RHETT KENNEDY

Principal

JORDAN FARR

Special Counsel

ADRIAN LEWIS

Senior Associate

SARAH HULL

Senior Associate

NEW SOUTH WALES

SIMON BLACK

Principal

JACK GENG

Special Counsel

LAUREN RICKERSEY

Senior Associate

VICTORIA

HUBERT WAJSZEL

Principal

CORRINA DOWLING

Special Counsel

DAMIAN CLANCY

Senior Associate

GILLIAN SHEPPARD

Special Counsel

STEFANIE LUHRS

Senior Associate

KINGSLEY GRIMSHAW

Senior Associate

LAURA SOWDEN

Special Counsel

THOMAS BYRNE

Special Counsel

ALANA LATHROPE

Senior Associate

RADHIKA MENDIS

Consultant

EMILY SCHNEIDER

Special Counsel

SCOTT SHELLY

Senior Associate

SOUTH AUSTRALIA

ANDREW HILDITCH

Principal

EMMA PILKINGTON

Senior Associate

WESTERN AUSTRALIA

TOBY BARRIE

Principal

JASON HART

Special Counsel

DARYL LANGMAN

Senior Associate

TASMANIA

PETER FORBES-SMITH

Principal

HANNAH HUGHES

Senior Associate

BILL CONOR

Special Counsel

BELINDA RANDALL

Special Counsel

GEORGIA HANCY

Senior Associate

ALISON HAY

Special Counsel



Click on a team member to
view their online profile.



RHETT KENNEDY

Principal, Queensland

rhett.kennedy@bnlaw.com.au
+61 7 3231 6327

With a career spanning more than 30 years, Rhett now focuses on handling complex and strategically important claims, as well as managing a team of lawyers who specialise in financial lines.

Recently a significant focus has been on building and construction professionals, including the successful management of a large claim involving the plaintiff, a government owned corporation and 9 defendants in a \$25 million claim. The claim involved damage to a community housing project caused by differential movement and needed to settle by virtue of contractual issues. Confronted by an approaching 4 week trial, the matter ultimately resolved for \$15 million with appropriate contributions from all parties. The resolution was only achieved by us taking a very active role in dividing the parties into camps and applying pressure because of the attitude taken by certain parties. The claim resolved within a reserve raised very early in the management of the claim.

Rhett is the national leader of BN's Insurance & Health practice and acts as Client Relationship Partner for significant BN clients like Suncorp Group, QBE and Lexon (PI insurer for Queensland Law Society members).

Rhett has been recognised in the 2016 - 2021 editions of Best Lawyers for Insurance Law, and was named *Lawyer of the Year for Insurance Law* in the 2018 edition. He has also been recognised as either a *Preeminent* or *Leading Professional Indemnity Lawyer* in Queensland by Doyle's Guide every year since 2016.



SIMON BLACK

Principal, New South Wales

simon.black@bnlaw.com.au
+61 2 8651 0205

Simon has spent over a decade practicing exclusively in insurance litigation and has extensive experience in directors' & officers' liability, management liability, professional indemnity and property and commercial matters.

Simon has advised large multi-national insurers in relation to a number of high-profile ACCC and ASIC investigations, inquiries and prosecutions, as well as securities class actions. Simon is currently acting as defence counsel for five defendant entities and directors in an ongoing class action in the NSW Supreme Court involving in excess of 200 plaintiffs.

He is also currently acting for insurers in relation to claims against several of the major Australian banks arising out of the Hayne Royal Commission, and is acting for excess insurers in relation to a number of current and anticipated shareholder class actions. In addition, he recently advised a large insurer in relation to the resolution of the recent CBA Austrac proceedings.

In the property and construction space, Simon has advised markets of domestic and European insurers in relation to a broad range of property claims, including several arising out of tunnel and highway construction projects, including claims valued at in excess of \$200 million.

In the 2019 - 2021 editions of Best Lawyers, Simon is listed as a *Leading Insurance Lawyer* in New South Wales, and since 2015 Simon has been recognised as one of Sydney's *Leading Professional Indemnity Lawyers* in the Doyle's Guide.



HUBERT WAJSZEL

Principal, Victoria

hubert.wajszel@bnlaw.com.au
+61 3 9909 6302

Hubert has extensive financial lines expertise including professional indemnity, directors' & officers' liability, and management liability.

Hubert specialises in professional indemnity insurance with a particular focus on construction (including architects, engineers, building surveyors and conveyancers); financial institutions (including accountants, financial planners and mortgage brokers); health care; and local government (including councillors and officers).

He has defended claims made against directors and officers in a wide variety of professions, including in the construction sector and financial services; employers in all facets of employment practice liability; and a variety of individuals who are the subject of defamation proceedings.

Hubert regularly acts as coverage and defence counsel in claims arising from ASIC investigations, alleged breaches of the Corporations Act 2001, wrongful termination and discrimination, as well as advising on policy wordings.

Hubert is very familiar with the nuances of schemes, and currently advises on schemes relating to schools, councils, dentists and conveyancers. He is also the exclusive legal services provider for all of the Suncorp conveyancing claims.

Hubert has been recognised in the 2016 - 2019 editions of Doyle's Guide as one of Victoria's *Leading Professional Indemnity Lawyers*.



ANDREW HILDITCH

Principal, South Australia

andrew.hilditch@bnlaw.com.au
+61 8 8128 7731

Andrew specialises in financial lines, professional indemnity, directors' & officers' liability, property damage, business interruption and construction claims.

He acts for both London and Australian underwriters with respect to professional indemnity claims involving architects, construction professionals, accountants, valuers, stock brokers, engineers and health professionals. Andrew has also acted for underwriters in the USA and France with respect to professional indemnity and directors' and officers' liability claims.

Andrew's experience includes representing in a multi-million dollar professional indemnity claim involving an architect, and the construction and design of the Alice Springs hospital which was heard in the Northern Territory Supreme Court. He is also acting for London insurers in respect of disputes over design, delays and material damage in the construction of submarines.

As the legal profession is fused in South Australia, Andrew is experienced in representing clients in court, enabling him to develop strong advocacy skills.

Andrew is listed as a *Leading Professional Indemnity Lawyer* in the 2016 - 2019 editions of Doyle's Guide, and has been recognised in the 2018 - 2021 editions of Best Lawyers as a *Leading Insurance Lawyer*.



TOBY BARRIE

Principal, Western Australia

toby.barrie@bnlaw.com.au
+61 8 6424 0401

At BN, Toby specialises in financial lines including professional indemnity, directors' and officers' liability, errors and omissions and management liability.

Toby regularly acts on behalf of professional indemnity insurers defending professional negligence claims against insureds in a wide range of professions. He has also acted in connection with investigations instigated by regulatory and disciplinary bodies.

More specifically Toby has acted for the professional indemnity insurers of various professionals in relation to disputes litigated in the District Courts, Supreme Courts and the Federal Court of Australia, including architects, design consultants, engineers, financial service providers, real estate agents, and valuers.

Over the years, Toby has defended the insurers of directors and officers of large mining companies, publicly listed entities and financial services providers. He has also assisted directors and officers facing claims relating to managed investment schemes. Toby also acts for management liability insurers of a number of small, managed entities.

Toby has been recognised in the 2014 - 2021 editions of Best Lawyers, and has also been recognised in the Chamber's Asia-Pacific Guide. He is listed in Doyle's Guide as one of Western Australia's *Preeminent Professional Indemnity Lawyers*.



PETER FORBES-SMITH

Principal, Tasmania

peter.forbes-smith@bnlaw.com.au
+61 3 6218 8810

Peter heads our Tasmanian Insurance & Health practice and holds nearly 40 years of experience in insurance law. He specialises in financial lines including professional indemnity and directors' and officers' liability and public/product liability.

Peter regularly acts for professional indemnity insurers and their insureds. He has extensive experience acting in professional indemnity claims on behalf of engineers, architects, building surveyors, councils, accountants, real estate agents, barristers, solicitors, financial planners, HR/IR consultants and health professionals.

Peter has advised and represented the interests of professionals before tribunals under inquiries including AHPRA. He also provides his clients with advice in relation to coverage, including considerations of business descriptions, occurrences, notification claims made in professional indemnity policies, and exclusions.

BN'S DIFFERENTIATORS



BN provides significantly better value for money than other panel firms due to a combination of cost effectiveness and the outcomes they achieve."

Independent Client Listening Survey

In our most recent independent client survey, which comprised of face-to-face and telephone interviews with our top 20 Insurance & Health clients, as impressive 78% of clients said BN performed better than other firms in understanding their business drivers and requirements. 89% of clients said we provided more value.

Understanding of client business drivers and needs:

How BN compares with other firms



■ Significantly better ■ Somewhat better ■ On par/average
■ Somewhat worse ■ Significantly worse

How BN performs

Overall they understand your key business drivers



They demonstrate they understand your claims management philosophy



Reserving estimates at least on par with others



They go the extra mile in meeting your needs



They anticipate your needs in managing claims



Good cultural fit with your business



■ Strongly agree ■ Agree ■ Somewhat disagree ■ Strongly disagree

Value for money:

How BN compares with other firms



■ Significantly better ■ Somewhat better ■ On par/average
■ Somewhat worse ■ Significantly worse

How BN performs

Level of cost consciousness



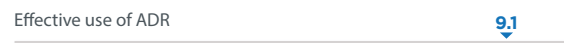
Relative defence costs



Settlement outcomes achieved



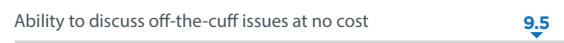
Effective use of ADR



Quality of value-added service



Ability to discuss off-the-cuff issues at no cost



10 Point Scale

Quality of service

Quality of their people



Easy to work with



Reliability and responsiveness



Service standard compliance



Specific expertise in business lines



Commerciality of advice



Flexibility



Clarity of communication



Consistency of service regardless of whom you deal with



Thought leadership in claims resolution



■ Very good ■ Good ■ Average ■ Poor ■ Very poor



Adelaide +61 8 8128 7700
Brisbane +61 7 3231 6300

Hobart +61 3 6218 8800
Melbourne +61 3 9909 6300

Sydney +61 2 8651 0200
Perth +61 8 6424 0400

bnlaw.com.au