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9 September 2002

Mr David Abernethy  
Corrs Chambers Westgarth  
DX 135  
BRISBANE

By facsimile: 07 3228 9444

Dear David

**BRISBANE GRAMMAR SCHOOL****INTRODUCTION**

- 1 I refer to the meeting you attended in Sydney on 2 August 2002 with me, Ken Horsley of Minter Ellison and representatives of ACE Insurance Limited ("ACE"), American Home Assurance Company ("AIG") and Royal & SunAlliance Insurance Australia Limited ("RSA") (collectively "the insurers").
- 2 Brisbane Grammar School ("BGS") has claimed that it is entitled to indemnity under various liability policies of insurance, which it says were issued to it by either AIG, RSA or the predecessors in business of ACE and RSA for various policy years between 1 September 1977 and 1 September 1988, with respect to claims which have been made against BGS by 68 former students who allege that they were sexually assaulted by Kevin Lynch during counselling sessions at BGS. A large proportion of these claims are scheduled to proceed to mediations in Brisbane in the three week period commencing on 30 September 2002.
- 3 As you are aware I represent the interests of ACE and Mr Horsley represents the interests of AIG and RSA. This letter, which is written with the express approval and on behalf of Mr Horsley, is designed to form the framework of an agreement between ACE, AIG, RSA and BGS which will enable BGS to explore settlement of the various claims within the mediation framework on terms which are acceptable to ACE, AIG, RSA and BGS. To the extent that I refer below to a "policy year" I am referring to a period commencing on 1 September in one year and ending on 31 August in the following year.

**POLICY COVERAGE**

- 4 I am instructed to advise you that:

- 4.1 ACE does not accept that its predecessor in business, Insurance Company of North American ("INA"), was on risk for BGS for the 1977/78 policy year, and considers that BGS must treat itself as "self-insured" during that policy year;
- 4.2 ACE accepts that INA was on risk for BGS during the 1978/79 policy year pursuant to a primary liability policy with a limit of liability of A\$1million;
- 4.3 ACE accepts that its predecessor in business, CIGNA Insurance ("CIGNA"), was on risk for BGS during the 1982/83, 1983/84, 1984/85 and 1985/86 policy years pursuant to annual primary liability policies with a limit of liability of A\$1million;
- 4.4 AIG accepts that it was on risk for BGS during the 1979/80, 1980/81 and 1981/82 policy years pursuant to annual primary liability policies with a limit of liability of A\$1million;
- 4.5 RSA does not presently accept that it was on risk for BGS as a primary insurer during the 1986/87 policy year, and considers that BGS must treat itself as "self-insured" during that policy year;
- 4.6 RSA accepts that it was on risk for BGS during the 1987/88 policy year pursuant to a primary liability policy with a limit of liability of A\$1million;
- 4.7 The insurers consider that BGS must treat itself as "self-insured" for all periods prior to 1 September 1978, for all periods after 1 September 1988, and for the 1986/87 policy year ('the period of self insurance');
- 4.8 for drafting convenience, BGS will be regarded as a self insured entity known as BGSi for the period of self insurance.
- 4.9 ACE does not admit that BGS is entitled to indemnity pursuant to the primary policy which would have been issued by INA to BGS for the 1978/79 policy year, or pursuant to the annual primary policies which would have been issued by CIGNA to BGS for the policy years between 1982 and 1986, and expressly reserves its rights pursuant to those policies by reason, inter alia, of the matters referred to in paragraph 7 below;
- 4.10 AIG does not admit that BGS is entitled to indemnity pursuant to the annual primary policies which would have been issued by AIG to BGS for the policy years between 1979 and 1982, and expressly reserves its rights pursuant to those policies by reason, inter alia, of the matters referred to in paragraph 7 below;
- 4.11 RSA does not admit that BGS is entitled to indemnity pursuant to the primary policy which would have been issued by RSA to BGS for the 1986/87 policy year and expressly reserves its rights pursuant to that policy by reasons, inter alia, of the matters referred to in paragraph 7 below.

#### **MEDIATION/SETTLEMENT**

- 5 I am instructed to advise you that, within the framework of and for the purpose of the mediations which are to commence on 30 September 2002 ("the mediations"), and without prejudice to their rights pursuant to their respective policies, the insurers are prepared to contribute to settlements to be negotiated with the various Plaintiffs on the following bases:

- 5.1 Corrs Chambers Westgarth are to continue to act for BGS;
- 5.2 Corrs Chambers Westgarth are to undertake settlement negotiations on behalf of BGS and the insurers;
- 5.3 BGS is to be liable to pay the first 20% ("the discount percentage") of any amounts which the insurers agree should be offered in settlement to any Plaintiff;
- 5.4 the remaining 80% of any amounts which the insurers agree should be offered in settlement to any Plaintiff is to be apportioned on a pro rata basis between ACE, AIG, RSA and BGS by reference to the periods each was on risk during the general periods of abuse alleged in the Statement of Claim filed on behalf of that Plaintiff;
- 5.5 once the insurers have had the opportunity to consider the advices on quantum which are being obtained by BGS from various Counsel ACE, AIG and RSA as the case may be will, for any claim with respect to which they have an exposure pursuant to paragraph 5.4 above, provide BGS with a range within which they will authorise BGS to negotiate settlement of such claim ("the authorised settlement amount") during or within 28 days of completion of the mediations;
- 5.6 should BGS settle any claim for an amount in excess of the authorised settlement amount ("the excess settlement amount"):
- (a) the insurer(s) which have an exposure for that claim will consider whether it was reasonable in all the circumstances for BGS to offer the excess settlement amount and whether they will contribute to the excess settlement amount;
  - (b) BGS will run the risk that such insurer(s) will conclude that it was not reasonable in all the circumstances for BGS to offer the excess settlement amount and that the insurer(s) will refuse to contribute to the excess settlement amount;
  - (c) BGS will not be bound by the decision reached by any insurer and reserves the right to subsequently attempt to recover the excess settlement amount (or any part of which any insurer declines to pay) from that insurer.
- 5.7 should any Plaintiff donate back to BGS all or any part of any negotiated settlement amount BGS will, within 14 days of receipt of such donation, refund to the relevant insurer(s) the proportion(s) of such settlement contributed by such insurer(s).

## DEFENCE COSTS

- 6 I am instructed to advise you that, without prejudice to their rights pursuant to the respective policies, ACE, AIG and RSA are prepared to contribute to the legal costs and fees incurred by BGS up to or within 28 days of completion of the mediations on the following bases:
- 6.1 once the final settlement has been negotiated during or within 28 days of completion of the mediations BGS will provide to ACE, AIG and RSA details of

all costs and fees it has incurred to that point in time ("the BGS legal costs") supported by copies of all relevant accounts;

- 6.2 BGS will provide to ACE, AIG and RSA its best estimate of the BGS legal costs which related to defence and/or settlement of the various claims ("the BGS defence costs") and of the total amount of the BGS legal costs which related to identifying and negotiating with the insurers on risk for years relevant to the various claims ("the BGS indemnity costs");
- 6.3 ACE, AIG, RSA and BGSI will calculate the percentages contributed by each to the total of the negotiated settlements achieved during or within 28 days of completion of the mediation process ('the contribution percentage');
- 6.4 Each insurer will pay BGS a contribution towards costs calculated by the formula: its contribution percentage x 80% x reasonable defence costs;
- 6.5 BGS will be responsible, as between the insurers and BGS, for the entirety of the BGS indemnity costs;
- 6.6 BGS will provide the insurers with a copy of the fee agreement between BGS and Corrs Chambers Westgarth that governs the defence of the claims or, in the absence of a fee agreement, with details of the manner in which the fees are calculated.ccc

#### EXPLANATORY COMMENTS

- 7 Allegations have been made by various former students of BGS to the effect that in the late 1970's they made various staff at BGS aware that Lynch had or had attempted to sexually abuse them. You will appreciate that the insurers have not had the opportunity to interview the relevant students or to gauge the credibility of such allegations. However if these allegations are accepted by a Court the insurers will be entitled to decline indemnity to BGS under their respective policies on the basis that:
  - 7.1 BGS was guilty of non-disclosure of relevant facts;
  - 7.2 BGS breached its duty of utmost good faith to them;
  - 7.3 the claims involve a lack of fortuity;
  - 7.4 the failure by BGS to prevent ongoing abuse by Lynch involved illegality, with the result that it would be against public policy for BGS to be entitled to indemnity under the various policies of insurance;
  - 7.5 BGS failed to take reasonable precautions to prevent the Plaintiffs being abused by Lynch.
- 8 Additionally, each plaintiff has reasonable prospects of recovering an amount on account of exemplary or punitive damages. Any such award is not recoverable from any insurer.
- 9 It is for these reasons that the insurers require BGS to agree to the discount percentage referred to in paragraph 5.3 above as part of the framework within which attempts can be made to settle the claims within the mediation process. The insurers reserve their rights to rely on all or any of these defences, both in the event that BGS does not

accept the proposal set out in this letter and with respect to any claims not settled within the mediation process.

- 10 By way of illustration of the proposed apportionment between the insurers and BGS referred to in paragraph 5.4 above I refer to the claim by REDACTED. Although in his Statement of Claim REDACTED does not articulate the precise dates or, for that matter, the precise periods during which he suffered abuse by Lynch he alleges in his Statement of Claim that he attended Counselling sessions with Lynch in 1978 and 1979. It is proposed that apportionment of liability between the insurers and BGS with respect to REDACTED claim be undertaken as follows:

10.1 BGS to bear the discount percentage of 20%;

10.2 as to the remaining 80%:

- (a) as BGS was "self-insured" from 1 January 1978 to 1 September 1978 (a total of 8 of 24 months or 33.3% of the 24 month period), BGS to bear an additional 26.64%;
- (b) as ACE is exposed from 1 September 1978 to 1 September 1979 (a total of 12 of 24 months or 50% of the 24 month period), ACE to bear 40%;
- (c) as AIG is exposed from 1 September 1979 to 31 December 1979 (a total of 4 of 24 months or 16.7% of the 24 month period), AIG to bear 13.36%.

- 11 I await your formal response to the proposals made in this letter at your earliest convenience.

Yours sincerely

**Phillip Wotton**  
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