

DIRECTORS AND OFFICERS / ENTITY

Claim: Unfair Competition

Insured: Pty Ltd internet pharmaceutical company, employing 20 people and an annual revenue of \$2 million.

Scenario: The Managing Director left his former company and started a new internet based pharmaceutical company. He was subsequently sued by the directors of his former company. The directors of his former company alleged breaches of intellectual property rights and plagiarism in relation to the products which the Managing Director was marketing on the internet. It was claimed that these products were a rip off the former company's own product which were sold in chemists across Australia. The former company issued proceedings in the Federal Court seeking damages in excess of \$20 million.

Insuring clause: Insuring clause 2.2(a) triggered.

Outcome: *The claim was settled at mediation with defendant director agreeing to pay the amount of \$1.3 million in damages. The legal costs incurred in this claim were in excess of \$200,000.*

Claim: Misappropriation of Trade Secrets

Insured: Pty Ltd company with 45 employees and an annual revenue of \$3 million.

Scenario: Company X sued directors and officers and the Company of competing Company Y after five employees of Company X left to join Company Y. Company X sued Company Y for \$700,000 alleging theft of trade secrets and claiming that the five employees were still in the employment of Company X when they began sharing proprietary information with Company Y.

Insuring clause: Insuring clause 2.2(a) and 2.2(b) triggered.

Outcome: *The claim proceeding to hearing and was settled after the second day of hearing for the amount of \$305,000. Although the claim was settled on a commercial basis, unfortunately significant costs were incurred preparing this matter for hearing. The legal costs and expert witness costs totaled over \$380,000.*

Claim: Theft of Trade Secrets

Insured: Pty Ltd company with 30 employees and an annual revenue of \$3 million.

Scenario: The Chief Executive Officer of Company A left to become Chief Executive Officer of a rival Company B. Three years later, the Managing Director of Company A sued the Chief Executive and his Company B for stealing trade secrets and confidential business information.

Insuring clause: Insuring clause 2.2(b) triggered.

Outcome: *The claim was vigorously defended. Although the claim eventually settled on the basis that each party walks away and bears own costs, the legal costs incurred by Company B in defending the claim were \$110,000.*

Claim: Breach of Duty of Care

Insured: Pty Ltd company with 25 employees and an annual revenue of \$2 million.

Scenario: Company A specialized in liquidating troubled assets, such as inventory and fixed assets. It sold products to Company B. A third company (Company C) alleged Company A had already accepted an offer from them to purchase products for \$1.45 million and they sued when Company A sold equipment to Company B. The plaintiff claimed the value was \$10 million.

Insuring clause: Insuring clause 2.2(b) triggered.

Outcome: *Company A paid \$600,000 to Company C, and \$32,000 in defence costs.*

ENTITY *continued...*

Claim: Shareholder Dispute

Insured: Pty Ltd Transport Company with 40 employees and an annual revenue of \$4 million.

Scenario: The directors of the Transport Company A as well as the Company were both minority shareholders in a rival Transport Company B which they were seeking to purchase the assets and business. Upon completion of the sale, the director of the Transport Company A and the Company sought damages alleging that the rival Transport Company B and its directors and officers had made misrepresentations in connection with the purchase and sale of the Company.

Insuring clause: Insuring clause 2.2(b) triggered.

Outcome: *The director of Transport Company A and Company A sought \$320,000 in damages and subsequently agreed to a settlement of \$280,000. Company B incurred \$170,000 in defence costs.*

Claim: Shareholder Dispute

Insured: Pty Ltd company with 220 employees and an annual revenue of \$20 million.

Scenario: A class action was threatened by shareholders who alleged damages of over \$5 million when they lost their investment in stocks they purchased in the Insured Company. The shareholders threatened to sue the directors and officers of the company as well as the Company for allegedly making untrue statements of fact and omitting material facts in connection with the stock sale.

Insuring clause: Insuring clause 2.2(b) triggered.

Outcome: *The Company negotiated an out of court settlement with the shareholders for the amount of \$600,000. The total legal costs incurred were \$85,000.*

EMPLOYMENT PRACTICES

Claim: Employment Practices Liability – Wrongful Termination

Insured: Pty Ltd company with 80 employees and an annual revenue of \$8.5 million.

Scenario: A senior manager was terminated for allegedly stealing a laptop computer. The terminated employee maintained that he was provided with permission to take the laptop home to work on a report. Passing derogatory comments were made by the owner of the company that the senior manager was too old and should be 'put to pasture'. As the comments were made to the terminated manager and in front of two other employees, the terminated employee sued his employer for wrongful termination based on age discrimination. The employee further alleged he could only be terminated for good cause and maintained a history of superseding his sales targets. The terminated employee sought damages of \$800,000.

Insuring clause: Insuring clause 2.2(c) triggered.

Outcome: *The employer settled with the dismissed employee at a Court ordered conciliation for the amount of \$550,000. The employer also paid \$150,000 in defence costs.*

Claim: Employment Practices Liability – Sexual Harassment

Insured: Pty Ltd company with 90 employees and an annual revenue of \$25 million.

Scenario: A former employee who was retrenched as part of a company wide reduction in work force commenced proceedings against the company and two managers alleging sexual harassment, intentional infliction of emotional distress, wrongful termination, retaliation, and sex discrimination. The employee had made allegations against the Managing Director that he had inappropriately touched her and that he regularly made abusive and sexually explicit comments towards her. The employee further alleged that as a result, she has suffered depression and now unable to re enter the workforce due to her mental distress.

Her employer defended the claim by alleging that her employment record showed poor performance, conflict with management and claimed that the termination was part of a general reduction in workforce. The employee vigorously defended these allegations.

Insuring clause: Insuring clause 2.2(c) triggered.

Outcome: *Company was ordered to pay the former employee \$60,000 plus her legal fees. In addition the company paid \$30,000 in defence costs.*

Claim: Employment Practices Liability - Harassment and Bullying

Insured: Insured is a Pty Ltd company with 20 employees and annual revenue of \$20 million.

Scenario: Claims by two former officers of the company against certain directors and officers for bullying, harassment, abuse and sexual harassment against a former employee. Claims against the entity that it failed to respond to those allegations. Employees claim combined compensation of \$500,000.

Insuring clause: Insuring clause 2.2(c) triggered.

Outcome: *Matter settled for payment by company of \$200,000 per Claimant. In addition, the company paid \$120,000 in defence costs.*

Claim: Employment Practices - Sexual Harassment**Insured:** Sports Club.**Scenario:** Ms X has been employed by the Club for a number of years. She alleges that her supervisor sexually harassed her over the duration of her employment by touching her inappropriately and making inappropriate comments. She only reported the alleged sexual harassment to the Club when she believed one of the incidents had been caught on tape. She refused to return to work after reporting the incident to the Club on the grounds that she is suffering major depression as a result of the alleged sexual harassment. She made a workers' compensation claim due to her alleged inability to return to work. She also lodged a complaint against both the Club and her supervisor with the Australian Human Rights Commission seeking approximately \$160,000 in compensation plus future legal costs.**Insuring clause:** Insuring clause 2.2(c) triggered.**Outcome:** *Matter settled for \$75,000. In addition, the Club paid \$30,000 in legal fees.***Claim: Employment Practices - Unfair Dismissal and Sexual Harassment****Insured:** Small manufacturing company of 20 employees. Turnover of \$10 million.**Scenario:** Male former employee lodged claim with Fair Work Australia, claiming he was terminated because of his gender. His manager was a woman and most of his work colleagues were women. He alleges that his manager showed him inappropriate photos of herself and her husband and emailed these to him. He also alleged that she made advances of a sexual nature, which he says he rejected. He alleged that after that rejection she raised various performance issues which led to his employment being terminated. He seeks 6 months' salary by way of compensation, being \$60,000.**Insuring clause:** Insuring clause 2.2(c) triggered.**Outcome:** *Matter settled at Conciliation with the employer agreeing to pay \$20,000. Legal defence costs incurred in this claim totaled \$16,000.***OCCUPATIONAL HEALTH AND SAFETY PROSECUTIONS****Claim: Occupational Health & Safety****Insured:** Pty Ltd Construction Company with 20 employees and annual revenue of \$6.3 million.**Scenario:** During the construction of a commercial property, an employee was severely injured and left paraplegic when a pile of debris accidentally fell on him. The company was subject to a full Occupational Health and Safety investigation and prosecution.**Insuring clause:** Insuring clause 3.1(b) (including defence costs) and 3.11 triggered.**Outcome:** *The Company vigorously denied and successfully defended all allegations. Despite their attempt, the Company was fined \$150,000 and incurred \$100,000 in legal costs.***Claim: Occupational Health & Safety****Insured:** Pty Ltd company with 150 employees and annual revenue of \$10 million.**Scenario:** Leading up to the Christmas period, the company employed 25 part time casual employees in order to pack and ship out the company's product within time for the Christmas rush. The casual employees received a speedy 2 day safety and instruction course in relation to the safe use and handling of the equipment. Unfortunately, there were two separate instances of injury to employees. One employee caught his hand in the machine and lost his thumb and forefinger and another employee received severe lacerations and burns to his left arm. A full Occupational Health and Safety investigation began which eventually led to the company being prosecuted.**Insuring clause:** Insuring clause 3.1(b) (including defence costs) and 3.11 triggered.**Outcome:** *Following a 10 day hearing, the company was found liable and was fined \$250,000. Overall defence costs of \$100,000 were incurred over the duration of the investigation and prosecution.*

STATUTORY LIABILITY

Claim: EPA Prosecution

Insured: A Pty Ltd transport company with 20 employees and annual revenue of \$5 million.

Scenario: The director and company were charged with three offences under the Environment Protection Act. These are indictable offences and each charge carries a potential maximum fine of \$280,000.

It was alleged that the driver, employed by the company, drove a petrol tanker (owned by the company) to a petrol station. When manoeuvring the tanker to the unloading tanks, the driver collided with a fuel pipe, causing over 3000 litres of petrol to escape from the tanker and on to the grounds of the petrol station.

Insuring clause: Insuring clause 3.1(a) and 3.1(b) (including defence costs) and 3.11 triggered.

Outcome: Following a 3 day hearing, the director and company were found liable and were fined \$120,000. Overall defence costs of \$60,000 were incurred over the duration of the investigation and prosecution.

Claim: EPA Prosecution

Insured: A Pty Ltd manufacturing company with 120 employees and annual revenue of \$25 million.

Scenario: The director and company were charged with six offences under the *Environment Protection Act*. It was alleged that the carbon emissions from the factory were incredibly high over a period of three days. This was a direct result of a mechanical breakdown in the factory which took three days to repair.

Insuring clause: Insuring clause 3.1(a) and 3.1(b) (including defence costs) and 3.11 triggered.

Outcome: Following a 1 day hearing, the director and company were found liable and were fined \$30,000. Overall defence costs of \$15,000 were incurred over the duration of the investigation and prosecution.

TRUSTEE LIABILITY

Claim: Trustee Liability

Insured: Pty Ltd accounting company with four directors and 45 employees.

Scenario: One director fraudulently misappropriates money earmarked for employees' superannuation contributions. Upon discovery, employees claim against director (including innocent directors) and also the Company. The claims involve not only loss of the superannuation contributions but loss of opportunity and profits the employees would otherwise have made with the benefit of those monies.

Insuring clause: Insuring clause 2.2(d) triggered.

Outcome: Director found liable for \$230,000. In addition the company paid \$90,000 in defence costs.

CRIME

Claim: Crime – Altered Cheques

Insured: A textile manufacturing company with a staff of 220 and annual revenue of \$10 million.

Scenario: Over a period of 5 years, an employee trust accountant misappropriated \$850,000 by altering cheques received from debtors. The employee had a close friendship with the owner of the company and was a trusted friend and employee. This was the main reason the theft remained undetected for such a long period of time. The misappropriation occurred when the employee named themselves and members of her family as the payee. He facilitated the fraud by continuing a cycle of paying debtors accounts with funds from other debtors throughout this period. This continued until his scheme was uncovered by the company's new auditors.

Insuring clause: Insuring clause 2.2(e) triggered.

Outcome: Total loss to the company amounted to \$850,000. In this instance, there was no chance of recovery from the fraudster as he had no assets and had effectively gambled away the stolen funds. The investigation and legal costs totaled \$150,000.

CRIME *continued...*

Claim: Negligence / Fraud

Insured: Pty Ltd manufacturing company with 50 employees and annual revenue of \$15 million.

Scenario: The Company's sales manager and four of his team members collaborated and falsified sales in order to obtain a sales commission on top of their base salary. The sales commissions between the three employees totalled \$900,000.

The fraud was detected after the employees resigned from the company. Each employee was subsequently charged with the amount of the theft. Unfortunately, the company was unable to recover all of the funds as three of the employees were deemed bankrupt and had no means of repaying the money they had stolen.

Insuring clause: Insuring clause 2.2(e) triggered.

Outcome: The total unrecoverable loss to the company was \$420,000. The overall legal and investigation costs, including the costs of a forensic accountant, totalled \$140,000.

Claim: Crime – Theft of Inventory

Insured: Wholesale products distributor, with a staff of 150 employees and annual revenue of \$15 million.

Scenario: An administrative employee along with a supervisor of the company manipulated and altered inventory documents with the aim of defrauding the company and deriving a personal benefit. Both the raw products and finished products were stolen and sold to the 'black market' over a three year period.

Insuring clause: Insuring clause 2.2(e) triggered.

Outcome: Total loss to the distributor was in excess of \$2 million plus costs of a private investigator to uncover the scheme. Further legal costs of \$250,000 were incurred in defence costs and the costs of retaining a forensic accountant to prove the loss.

Claim: Crime – Theft of Inventory

Insured: Warehousing risk for agricultural producers.

Scenario: Truck driver from transport company had convinced warehouse manager to open doors at 2.00am rather than 4.00am for a period of 2 weeks in which \$320K of tomatoes were stolen and sold on the black market. Once discovered via a stocktake, CCTV footage was reviewed to identify the fraud. The truck driver was arrested and recovery sought and failed as proceeds had been gambled away. No cover under the burglary section of the property policy as no forced entry.

Insuring clause: Insuring Clause 2.2(e) triggered. DUAL policy responded as cover included theft by 3rd party (beyond market standard of 1st party only cover) and theft of property (beyond market standard of cover for money only).

Outcome: Insured was able to claim under Management Liability policy which in the absence would have eroded half of the companies annual profits.

DID YOU KNOW that the DUAL Management Liability Policy can provide your clients with the peace of mind they need if they are at risk of prosecutions by their relevant occupational health and safety regulator?

Prosecutions can arise where an employee is injured at a workplace. The prosecutions can be very stressful for the operators of small businesses and can lead to large legal bills. It can vary depending on the state in which the matter is prosecuted, however, both the relevant company and/or directors and officers of the company may be defendants to such a prosecution.

That is why DUAL has ensured that the Management Liability Policy addresses this issue both from the perspective of the directors of the Insured Company and the Insured Company itself. We have recently had a number of prosecutions of insured companies in relation to occupational health and safety issues.

A COMPLETE OFFERING

In addition to its 'Advantage' product, DUAL is pleased to announce an 'Essentials' offering specifically designed for the 'S' in the SME market, with turnover up to \$5M, ensuring management risks are fully covered. In line with this product offering, DUAL is releasing an enhanced 'Advantage' coverage which is targeted for companies with turnover greater than \$5M and certain complex industries. Competitive brokerage applies on both offerings.

CLAIMS APPROACH

DUAL Australia has appointed an independent claims manager, Proclaim Management Solutions Pty Ltd, to manage all incident notifications and claims for policies issued by DUAL Australia. Proclaim was set up in 1999 and specialises in Professional Lines claims utilising in-house lawyers with a commercial focus to provide superior service. In addition to this, DUAL Australia has also appointed a panel of external lawyers (with representation in every state) to assist on complicated claims matters.

This publication is intended only to provide a summary and general overview on matters of interest. It is not intended to be comprehensive nor does it constitute legal advice. We attempt to ensure that its content is current but we do not guarantee its currency. You should seek legal or other professional advice before acting or relying on any of its content. You should have regard to the terms and conditions of the policy. This document does not alter the terms and conditions of the policy.

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