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INSURANCE TODAY

Autumn 2008

TAILOR MADE: WHY D&O COVER MATTERS



Even directors of small businesses should consider D&O insurance

Directors' and officers' (D&O) liability insurance conjures up images of the big end of town – shareholder actions, corporate social responsibility and multi-million dollar class actions.

But it's not just big businesses that need D&O cover. Firms of every size benefit from protection against claims in areas such as trade practices, insolvent trading and employment practices.

The latter, which account for more than half of all claims under D&O policies, include discrimination, defamation, sexual harassment and unfair dismissal.

While directors of listed companies tend to have traditional D&O policies, which activate as excess cover to overall liability insurance, for many directors of smaller businesses a personal D&O policy providing primary cover can prove a better fit.

According to a recent survey, the plaintiffs in D&O lawsuits are most commonly shareholders, employees, customers/clients, competitors, other third parties and government agencies. Besides

shareholders, the other groups apply just as much to small to medium-sized businesses as they do to the big market players and multinationals.

How can you be sure you'll have the best D&O cover? That's where we come in. Discussing your options with your insurance broker is vital, as there is no standard off-the-shelf D&O policy. And in the current "soft" market, with premiums continuing to fall, brokers hold all the aces in their negotiations with insurers over policy wording and extent of cover.

But the "soft" market isn't going to last too much longer. Overall, D&O rates fell by 8% last year, according to JP Morgan Deloitte's most recent General Insurance Industry Survey. Of course, because D&O policies are written with individual risks very much in mind, the terms and conditions – and the final premium – will vary.

But it's a competitive market, and insurers are pricing their policies very keenly. Despite falling overall rates, the insurers' D&O combined ratio (premium income compared with outgoing claims payments) has fallen to 76%.

While it's a win/win situation right now, premiums are expected to rise over the next year. So right now is a great time to be negotiating your D&O premiums.

D&O is a dynamic, fast-moving policy area. Insurers are constantly working to ensure their policies keep up with social and legislative changes. New gaps in cover – like climate change impacts, for example – are always appearing.

Decisions made today on property development, energy usage or sustainable practices could have unforeseen ramifications down the line. An example: Already there are signs local councils, contractors and construction firms could be held to account for building on land likely to be affected by rising sea levels.

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In the United States, courts are starting to prosecute directors and officers not only for environment-related physical and regulatory risks, but also reputational and competitive risks.

The US Supreme Court last year paved the way for lawsuits against “knowing polluters” from aggrieved third parties and shareholders.

Experts in the US say failure by directors to take account of climate change could be “tantamount to an abdication of fiduciary responsibility and an indication of poor management”.

There’s a warning in that attitude for Australian managers and directors: ignorance is no longer an excuse.

The increased powers of the Australian Securities and Investments Commission and Australian Prudential Regulation Authority are ramping up directors’ and officers’ exposure to claims.

And state occupational health and safety legislation imposes direct personal liability on directors.

It used to be the case that directors were given the benefit of the doubt, but that’s no longer the case. As Australians become more litigious, there’s always someone to blame and often it’s the company director in the firing line.

And it’s not just directors and business owners at risk. The concept of personal liability is starting to be applied below board level, meaning senior managers are also potentially liable for their decisions at work.

Given the complexity of D&O policy wording and the need for vigilance in following workplace and political trends, this is one area of insurance where flying solo is definitely not recommended.

In a recent bulletin, law firm Allens Arthur Robinson emphasised the need for tailored D&O cover.

“Insureds are wise to the fact that differences in wordings and the exclusion or inclusion of optional extensions can result in very different outcomes for the company and its directors and officers and directors down the line.”

That’s why you need your insurance broker to help you make sense of the D&O tangle. If you’d like to discuss this further, give us a call.

INSURING JUST ABOUT ANYTHING

Name a risk, and chances are an insurer has already created a policy that covers it.

These days insurance policies exist for an extraordinary variety of life’s mishaps, from alien abduction to the more earthbound kidnapping and even cover for your wedding day in case of a bride (or groom) no-show.

Attack by the Loch Ness monster is even covered by British insurer Simon Burgess, alongside the well-known eccentric’s other quirky policies including virgin birth and Valentine’s Day impotence!

Less bizarre, but just as surprising, is a new Australian policy that allows fleet-footed drivers to insure against loss of licence.

For the risk-averse driver caught speeding, this new policy is manna from heaven.

While this new type of cover has been available overseas for some time, only recently have Australian drivers had access to an insurance policy that covers drivers for alternative transport if their licence is suspended.

The policy is not aimed at serial offenders, but safe drivers who

have unwittingly strayed over the speed limit.

Drivers are covered for \$1000 a month for up to three months’ public transport or hire car costs.

The Yuletide season has even been placed under the protective umbrella of insurers, with Lloyd’s covering policyholders in the event the Grinch steals Christmas. Lloyd’s says the policy provides coverage in the event Christmas is cancelled, postponed, interrupted, curtailed or relocated due to activities linked to Santa Claus.

To lodge a valid claim, policyholders will be “required to demonstrate that nothing was left on Christmas morning but some hooks and some wire”.

“Additionally, a claim will not be valid if there was one speck of food left in the house, unless the crumb was even too small for a mouse.”

One thing’s for certain – you can insure anything, but it takes a professional intermediary to sort the wheat from the chaff.

That’s us!

GETTING TO GRIPS WITH FLOOD



A national flood-mapping tool is being collated

As we've seen through the summer, floods affect more Australians than any other form of natural disaster.

And with climate change now a major concern for the wider community in Australia, any rise in the frequency and severity of storm activity is troubling. After all, more than 80% of the population lives within 50km of the coast, and flood is a recurring risk.

But though flooding is a major aspect of the Australian natural environment, obtaining insurance cover to protect property from flood can be a complex affair.

Flood insurance is generally available to commercial policyholders in certain circumstances but is usually excluded from personal lines insurance.

Generally, Australian insurance contracts are limited to damage caused by rainwater, such as the overflow of natural watercourses.

However, the devil is in the detail. Claims are often assessed on a case-by-case basis with many personal claims paid out under the storm provisions of those policies.

This can lead to a seeming inconsistency, highlighted last year in the aftermath of floods in the Hunter Valley in New South Wales and Gippsland in Victoria.

The great majority of claims were paid, but some homeowners lost out when insurers stood firmly by the flood exclusion terms written into policies.

The Insurance Council of Australia (ICA) is currently working with the Council of Australian Governments and the National Flood Risk Advisory Group to bring together all available data to develop a national flood-mapping tool.

ICA plans to make this tool available to all stakeholders. It will enable insurers to identify those areas where flood is a measurable risk, but not an uninsurable statistical certainty. When it comes to

cover against flood, the input of insurance brokers like us is valuable. Not only do brokers put their clients' claim to the insurer – and recent media reports from flood areas show just how positive that input can be – but insurers also say they sometimes delete flood exclusion clauses from commercial policies at the request of brokers.

While few developed countries suffer the flood problem on the scale of Australia, insurers in the United Kingdom and the United States illustrate there are schemes that can provide flood cover to homes and businesses.

In the UK, an agreement with the Government means that insurers cover British residents as long as the Government is willing to enact strategies in high-risk areas to minimise flood risk. Flood risk is categorised into low, moderate, and significant probability, with premium rates determined by postcode.

But widespread flooding that cost UK insurers £15.2 billion (\$33.1 billion) last year has tested that public-private relationship.

In the US, federal authorities designate flood plain areas and also provide a system of basic insurance cover. Insurance companies administer the scheme but don't take on the risk. They also provide additional cover.

The national program was designed to be self-supporting, but losses incurred in the aftermath of the \$US40.6 billion (\$44.8 billion) Hurricane Katrina in 2005 harshly exposed its inadequacies.

In France, flood insurance is privately provided but is statutorily regulated so that the state is a guarantor of reinsurance, effectively acting as a financial backstop.

Professional advice is your best hedge against the worst effects of flood, so give us a call to discuss what your flood risks are and what's available to help.

CHEAP – BUT IS IT SAFE?

The “Made in China” badge, perhaps unfairly once denoted inferior products produced by underpaid workers in less than salubrious conditions. While the Chinese Government has worked hard to erase negative connotations of its products, a series of recent health scares has again tarnished the country’s reputation as a safe exporter.

Which raises the issue of liability cover and the limits of such specialised products as recall insurance.

Public and product liability law is in its infancy in China, and while steps are being taken that would allow consumers to sue domestic and foreign retailers which produce or stock unsafe goods, prosecution by local authorities is often handicapped by mismanagement and, in some cases, corruption.

Despite attempts by the Chinese Government to clean up rogue operators, quality will probably continue in many cases to be sacrificed to meet global demand for cheaply produced Chinese goods.

That’s an issue for manufacturers, wholesalers and retailers in Australia. As we rely more on other countries for the supply of components or completed goods, there is a risk that they won’t meet Australian product safety laws or in some way fail to meet the contracted standards. That can cause big headaches for Australian manufacturers and distributors – and even bigger compensation settlements.

While China isn’t the only country providing shoddy or suspect goods – and taking into account the enormous output of China’s factories the number of cases is small – some recent examples illustrate why vigilance is necessary with any imported goods.

Last year more than 950 people in Japan sought medical treatment after eating dumplings imported from China. The dumplings showed traces of pesticides.

And in August more than 1.5 million Chinese-made toys were recalled after a pigment was discovered to contain unsafe levels of lead.

Another 20 million toys and accessories were recalled the same month because of loose magnets.

A recall notice on Chinese-made toothpaste exported to the US and Europe was also issued for containing the anti-freeze diethylene glycol.

Reinsurance company Munich Re says while local producers are

liable for action under Chinese law, enforcement is an issue. “The important thing is to point out that recall insurance does not cover recalls necessitated by defects in quality,” it said.

“Insurance protection applies only in cases where there is a danger of personal injury – and in some cover models existing in the market, where there is also the danger of property damage.”

As you can see, this is a complex area to work in, but one that we all have to work together to tackle as the global liberalisation of trade gathers pace.

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