

PROFESSIONAL & FINANCIAL RISKS // DIRECTORS & OFFICERS LIABILITY // SUMMARY OF CHANGES // AUSTRALIA

Summary of Policy Changes: Directors & Officers Liability Insurance

Below is a summary of the key changes we have made to our Directors & Officers Liability Policy Wording (04-17) to create our new (02-22) Policy Wording.

The entire wording has been refreshed including the addition of new extensions, conditions and definitions. Language has been amended to ensure consistency across the policy form or to provide greater clarity.

This summary is NOT intended to document all of the changes that have been made. It only provides a summary of some changes. To discuss any of the changes in more detail, please contact one of our offices.

Notices

Important Notices is extended by the inclusion of a Privacy Notice and a Copyright Notice.

Insuring Clause

The operation of the Insuring Clauses has been altered so that each Insuring Clause will apply only if it is specified as "Included" in the Schedule.

Insuring Clause 1.1 Directors & Officers Liability – broadened by replacement of "unless the Insured Person is entitled to be indemnified" with "unless the Insured Person has been indemnified" and simplified by the removal of "which the Insured Person is legally liable to pay" (this is included in the definition of "Loss").

Insuring Clause 1.2 Company Reimbursement – revised by replacement of "is legally required or permitted to indemnify" with "has indemnified or agreed to indemnify", to allow for the broadening of Insuring Clause 1.1.

Insuring Clause 1.3 Company Securities Liability – simplified by removal of "is legally liable to pay" (this is included in the definition of "Loss") and the co-insurance percentage has been removed. Has been moved from an optional extension to an insuring clause but is still subject to being marked as "Included" in the Schedule.

Insuring Clause 1.4 Self-Report, Raid & Inquiry Costs & Expenses – simplified and expanded by removal of "preparation" and other specific qualifications relating to "Self-Report" and "Inquiry", with the scope of cover housed in each definition. "Internal Inquiry" has been added (refer to Definitions below).

Extensions

- ▶ **Asset & Liberty Expenses** – expanded to include “or on behalf of” an Insured Person. An additional leg has also been added “for the deportation of an Insured Person following the revocation of their otherwise proper, current and valid immigration status for any reason other than their conviction of a crime”. The definition of “Judicial Order” has been removed and replaced with the content of that definition.
- ▶ **Bail Bond & Civil Bond Expenses** – expanded to include “or on behalf of” an Insured Person.
- ▶ **Continuous Cover** – has been substantially revised to apply only to facts that could have been notified under a previous policy issued by Liberty, of which this Policy is a renewal or replacement, but the Insured failed to make such notification. Liberty will accept such notification under the previous policy issued by Liberty. Please also refer to the Backdated Continuous Cover Optional Extension outlined under the heading “Optional Extensions”, on page 3 of this document.
- ▶ **Cost of Living Expenses** – a new extension which provides cover, subject to a Per Insured Person and Aggregate Sub-Limit of Liability, for Cost of Living Expenses an Insured Person is unable to pay due to an interim or interlocutory court order confiscating, controlling, suspending or freezing the rights of ownership the Insured Person has in respect of real or personal property or a charge created over such real or personal property.
- ▶ **Court Attendance Costs** – a new extension which provides cover, subject to a Sub-Limit of Liability, for the reasonable costs and expenses incurred by an Insured Person where they are legally compelled to personally attend a civil or criminal proceeding as a witness in a Claim or Inquiry covered under this Policy.
- ▶ **Directors Additional Limit of Liability** – was previously named “Additional Side A Limit”.
- ▶ **Emergency Expenses** – simplified by removing specific clause references and replacing these with “insured under this Policy”.
- ▶ **Extradition Costs** – expanded to include “or on behalf of” and directly pertaining to an Insured Person. Also broadened and simplified by the removal of “in seeking legal, tax or other professional advice from an appropriately qualified and accredited professional advisor” so that it now applies “in respect of an Extradition Proceeding or an appeal of an Extradition Proceeding”.
- ▶ **Fines & Penalties** – broadened by removal of the requirement that the fines and pecuniary penalties “are not derived from a reckless act or omission”.
- ▶ **New Subsidiaries** – more appropriately extends the definition of “Company” instead of the definition of “Subsidiary”, to include new subsidiaries. Also writes back automatic cover for new subsidiaries which have Securities listed or traded in USA, where such Securities are equity issued pursuant to Rule 144A of the Securities Act 1993 (USA).
- ▶ **Occupational Health & Safety Costs** – previously limited to Defence Costs, this extension now includes the reasonable costs and expenses incurred by an Insured Person, or for which the Company has indemnified or agreed to indemnify an Insured Person, in respect of a Self-Report, Raid, Internal Inquiry or Inquiry arising out of an actual or alleged breach of any occupational health and safety legislation including legislation.
- ▶ **Outside Directorships** – the capacities in which an Insured Person may be acting in respect of an outside entity have been expanded from “director or officer” to “director, officer, trustee, governor, board advisor, board observer or equivalent”; “at the request of the Company” has been expanded to “at the request of, or with the formal consent of, the Named Insured or a Subsidiary” and cover is no longer excluded for claims brought by the outside entity. Clarification has been added that, “for the operation of this extension, any reference to Company in this Policy also includes an outside entity, however, no cover is provided to the outside entity”.
- ▶ **Personal Taxation & Superannuation Liability** – broadened to also include cover for any unpaid superannuation contributions of the Company that the Insured Person becomes

personally liable to pay arising from insolvency, receivership or external administration of the Company.

- ▶ **Public Relations Expenses and Reputation Protection Expenses** – these extensions have been broadened by including “or on behalf of” an Insured Person, and by replacing “in seeking advice from” with “in engaging” a public relations firm or consultant.
- ▶ **Shareholder Derivative Investigation Costs** – new extension which provides cover for the Company, subject to a Sub-Limit of Liability, for Shareholder Derivative Investigation Costs, being the reasonable costs and expenses incurred by the Company in determining its response to a Shareholder Derivative Demand or Shareholder Derivative Suit.
- ▶ **Subrogation Recoveries & Reinstatement of Limit** – this extension has been removed and incorporated into the Subrogation General Condition

Optional Extension

- ▶ **Backdated Continuous Cover** – new extension which, if included, provides indemnity for any Claim, Self-Report, Raid, Internal Inquiry, Inquiry or claim for any other amounts insured under this Policy that arises from facts that the Insured first became aware of after a specified Backdated Continuity Date, if such facts could have been notified under a previous policy not issued or co-insured by Liberty and had not been notified under the previous insurer’s policy. Liberty will indemnify the Insured in respect of any such claim in accordance with the terms and conditions of the previous insurer’s policy, provided that such policy does not provide broader cover than the Liberty policy.

Exclusions

- ▶ **Fraud & Dishonesty** – revised for clarity of intent in (a) with “malicious” deleted, “fraudulent” replaced with “deliberately fraudulent” and “breach” replaced with “intentional breach”.
- ▶ **Personal Injury & Property Damage** – the exclusions at (a) and (b) have been switched around to correspond with the heading of this exclusion. The writeback to this exclusion now applies to both (a) and (b) and includes a writeback for Defence Costs and Company Securities Liability.
- ▶ **Prior Matters** – the exclusion at (a) has been amended to more accurately reflect Liberty’s intent, and “any insurance policy” in (c) has been deleted and replaced with “any insurance policy providing cover for directors or officers liability”.
- ▶ **United States of America: Company versus Insured Person** – “Insured” in the heading of this exclusion has been replaced with “Insured Person” and “against an Insured Person” has been added into this exclusion to narrow its operation to Claims brought against Insured Persons only. An additional writeback of cover has been included in (b) for “a Shareholder Derivative Suit”, while “Employment Practice Breach” in (d) has been replaced with the new appropriate definition being “Employment Wrongful Act”.
- ▶ **United States of America: Future Offering of Securities** – renamed and condensed for clarity but intent remains unchanged.

Claims Conditions

- ▶ **Defence & Settlement** – updated to include new definitions and to reference the new Appointment of Legal Representation condition outlined below.
- ▶ **Appointment of Legal Representation** – new claims condition which provides for “Defence Select” to be “Included” or “Not Included” on the policy.

If the Insured chooses not to take up “Defence Select”, this will be marked as “Not Included” in the Schedule and the policy will provide access to a selection of panel law firms comprised of

experienced defence lawyers with whom Liberty has pre-agreed discounted rates. In the event that a Claim, Self-Report, Raid, Internal Inquiry or Inquiry is brought in a jurisdiction in which Liberty does not have a panel law firm, or if a material conflict of interest exists between Insureds, a non-panel law firm may be appointed, at their market rates, to conduct the defence and settlement of a covered Claim, Self-Report, Raid, Internal Inquiry or Inquiry.

If the Insured chooses to take up "Defence Select", this will be marked as "Included" in the Schedule and the Insured will have the right to appoint any law firm of its choice, at their market rates, to conduct the defence and settlement of a covered Claim, Self-Report, Raid, Internal Inquiry or Inquiry.

- ▶ **Allocation Clause** – substantially revised to specify the basis for allocation of partially covered matters or Insureds and clarifies that, where Defence Costs also benefit a matter which is not covered or a non-insured party, Liberty will pay all common Defence Costs. Furthermore, if agreement cannot be reached on the allocation of the proportion of a claim, Liberty will pay for a Senior Counsel to determine a fair and reasonable allocation of these costs. The Senior Counsel's costs will not form part of the Limit of Liability.

General Conditions

- ▶ **Excess** – substantially revised to provide clarity in relation to the applicable excess and its operation if the Company is legally required or permitted to indemnify the Insured Person or if the Company is not legally required or permitted to indemnify the Insured Person.
- ▶ **Aggregation** – new condition to provide clarity in relation to the aggregation of claims and the application of Excess.
- ▶ **Subrogation** – expanded to include Liberty's rights of recovery against a "trustee or company" and specifies the order of distribution of amounts recovered and the replenishment of the Limit of Liability.
- ▶ **Authorisation** – new condition to clarify that the Named Insured will act on behalf of all Insureds, except in relation to any Claims Conditions in respect of which each Insured will be entitled, but not obligated, to act on their own behalf.
- ▶ **Severability, Non Avoidance & Non Imputation** – revised to allow for the operation of severability in favour of innocent Insureds, and the waiving of Liberty's rights under section 28(3) of the Insurance Contracts Act 1984 (Cth) in the event of fraudulent non-disclosure or misrepresentation, other than where such fraud is established by Final Adjudication, or in the event of non-fraudulent non-disclosure or misrepresentation.
- ▶ **Sanction Limitation & Exclusion Clause** – replaces the "Breach of Economic, Trade or other Sanction or Law" general condition with Liberty's updated sanctions language.
- ▶ **Valuation & Foreign Currency** – new condition clarifying the applicable currency referred to in this Policy, as specified in the Schedule.
- ▶ **Tax** – new condition clarifying that any amount payable by Liberty under this Policy will be reduced by the amount of any tax input credit that the Insured is entitled to claim and that the Excess will be calculated after deducting the amount of any such input tax credit.
- ▶ **Confidentiality** – new condition providing that the Insured must not publish or disclose the existence of this Policy, except as required by law to their professional advisers or where they have obtained Liberty's prior written consent to do so.

Definitions

- ▶ **Change in Control** – at (b), "becomes controlled by another person, entity or group of persons or entities acting in concert" has been replaced with "any person, entity or group of persons or entities acting in concert acquire more than half of the issued share capital of the Named

Insured". At (c), "other than where an administrator, receiver, provisional liquidator or liquidator is appointed" has been added to narrow the operation of this clause and provide clarity of intent.

- ▶ **Claim** – revised at (a) to include a "written demand for monetary or non-monetary relief, including injunctive relief", at (b) to include "civil proceeding, including any arbitration, mediation, conciliation or alternative dispute resolution proceeding". "Extradition Proceeding" has been removed as it has its own definition and "Shareholder Derivative Suit" has been added.
- ▶ **Co-Insurance Percentage** – has been removed as this definition is no longer required.
- ▶ **Cost of Living Expenses** – new definition specifying the living expenses covered under the new Cost of Living Expenses Extension and how these amounts are calculated.
- ▶ **Defence Costs** – expanded to include "monitoring".
- ▶ **Director** – "is not validly appointed as a director of the Company but acts in the position of a director, or equivalent position in any other jurisdiction, of the Company" has been deleted and replaced with "is a Shadow Director", which is defined separately.
- ▶ **Disclosure Document** – revised to include "product disclosure statement" and reference to "the Australian Securities and Investments Commission and the U.S. Securities and Exchange Commission"; "any administrative or regulatory authority exercising control over the affairs of the Company" has been replaced with "any local or foreign stock exchange or any similar administrative or regulatory authority in any other jurisdiction".
- ▶ **Employee** – expanded to include a person who "is engaged by the Company as a consultant, independent contractor or secondee". The exclusion applicable to "consultants, independent contractors, secondees to or agents of the Company or their respective employees (including the employees of labour hire companies)" has been removed.
- ▶ **Employment Practice Breach** – expanded to include "bullying" and (j) amended to replace "wrongful infliction of emotional distress, anguish or humiliation" with "infliction of emotional distress, mental anguish or humiliation".
- ▶ **Employment Wrongful Act** – new definition required for the purposes of the definition of "Wrongful Act" and means "any actual or alleged act, error or omission with respect to the employment or prospective employment of any past, present, future or prospective employee or Insured Person of the Company".
- ▶ **Extradition Proceeding** – substantially revised to include "in connection with a Wrongful Act, first brought against an Insured Person and notified to Liberty during the Policy Period (or any applicable Extended Reporting Period)". This enables "Extradition Proceeding" to operate appropriately outside the definition of "Claim".
- ▶ **Inquiry** – revised for clarity and expanded to include "examination".
- ▶ **Insured Person** – revised for clarity and broadened to include "Inquiry" in (c), "information memorandum" in (d), "superannuation" in (e) and "company secretary of the Company" in (h). The exclusion has been narrowed by removal of "consultants", "independent contractors", "service providers" and "trustees" "who are not employed".
- ▶ **Internal Inquiry** – new definition which means "any internal inquiry conducted by the Company into its affairs or those of an Insured Person in their capacity as such, at the request of any administrative, regulatory or other authority or person empowered by law, following the provision of a Self-Report." This new definition has been incorporated throughout the policy wording where required.
- ▶ **Judicial Order** – removed from the wording and its content has been included in Extension 2.2 "Asset & Liberty Expenses".
- ▶ **Loss** – definition has been expanded to include "compensation or interest awarded" in (d) and "aggravated, exemplary, multiplied or punitive damages where permissible and insurable under applicable laws" in (f). The exclusion in respect of exemplary or punitive damages in the USA has been removed. "Loss also includes any amounts insured under any extension or by endorsement

to this Policy” has been added for the sake of clarity and replaces the previous reference to specific extensions.

- ▶ **Market Rates** – new definition added for the purposes of Claims Condition 5.3 “Appointment of Legal Representation” and means “any hourly rate the Insured has negotiated on a corporate retainer with the appointed Non-Panel Law Firm or, in the absence of a corporate retainer, the standard hourly rate of that Non-Panel Law Firm”.
- ▶ **Non-Panel Law Firm** – new definition added for the purposes of Claims Condition 5.3 “Appointment of Legal Representation” and means “any law firm that is not a Panel Law Firm”.
- ▶ **Panel Law Firm** – new definition added for the purposes of Claims Condition 5.3 “Appointment of Legal Representation” and means any law firm which, at the time of retainer, is listed by Liberty at <https://lmi.co/dopanellawfirms> as an approved law firm at pre-agreed panel rates in the jurisdiction in which the Claim, Self-Report, Raid, Internal Inquiry or Inquiry is brought. Liberty reserves the right to change panel law firms from time to time.
- ▶ **Raid** – revised to replace “any raid on or on-site visit to the Company” with “any raid or on-site visit”.
- ▶ **Securities Claim** – revised for clarity and broadened by replacing (a) “written demand or civil proceeding brought either directly or derivatively by any holder of Securities (other than an Insured Person) in the holder’s capacity as an investor in the Company” with “written demand or civil proceeding brought either directly or derivatively by any person or entity, including but not limited to, any holder of Securities”.
- ▶ **Self Report** – revised for clarity and expanded to include “or person” empowered by law.
- ▶ **Shadow Director** – new definition required for the definition of “Director” and means “a person who is not validly appointed to the position of director of the Company, if:
 - (a) they act in the position of a director of the Company; or
 - (b) the directors of the Company are accustomed to act in accordance with such person’s instructions or wishes, but not merely because the directors act on advice given by that person in the proper performance of functions attaching to their professional capacity or business relationship with the directors or the Company.”
- ▶ **Shareholder Derivative Demand** – new definition required for the definition of “Shareholder Derivative Investigation Costs” and means “a written demand made by a holder of Securities upon the board of directors of the Company to commence civil proceedings against an Insured Person for a Wrongful Act, first made and notified to Liberty during the Policy Period (or any applicable Extended Reporting Period)”.
- ▶ **Shareholder Derivative Investigation Costs** – new definition required for Extension 2.20 “Shareholder Derivative Investigation Costs” and means “the reasonable costs and expenses incurred by the Company in determining its response to:
 - (a) a Shareholder Derivative Demand; or
 - (b) a Shareholder Derivative Suit”.
- ▶ **Shareholder Derivative Suit** – new definition required for the definition of “Shareholder Derivative Investigation Costs” and means “a civil proceeding by a holder of Securities brought derivatively on behalf of the Company against an Insured Person for a Wrongful Act, first made or brought and notified to Liberty during the Policy Period (or any applicable Extended Reporting Period)”.
- ▶ **Subsidiary** – expanded for clarity of intent to include “either directly or indirectly through one or more other entities” and “Wrongful Act” has been included in addition to “conduct”.
- ▶ **Wrongful Act** – broadened by inclusion of “actual or alleged” and “defamation” in (a) and “Employment Wrongful Act” in (c). “In respect of any Securities Claim” has also been broadened to include “actual or alleged” and “whether such purchase, sale or offer involves a transaction with the Company or occurs in the open market” has been deleted as it is not required.

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