



directors & officers liability

insurance information



CGU Professional Risks, as one of Australia's leading directors and officers insurers for over 20 years, offers an insurance policy that is designed to protect the assets of company directors and other individuals of a corporation.

It does this by providing a product that offers:

1. A broad and flexible policy definition of 'Insured Person'.

Providing cover for:

- any natural person who was, now is or hereafter becomes (past, present or future) a director, secretary, executive officer or employee of the corporation whether or not validly appointed, and
- any other person, who by virtue of any applicable legislation is deemed to be a director or officer of the corporation.

Ensuring that the policy continues to evolve with any legislative and/or board changes.

2. Special policy features that automatically provide extensive coverage.

All company directors and officers are exposed to potential litigation irrespective of the size and type of corporation in which they are involved. A CGU Professional Risks Directors & Officers ('D&O') policy has many special features to ensure comprehensive coverage for an insured. Some of these features include the following:

- **Broad operative clause** - The policy provides cover to an insured for any loss arising from a claim as a result of a 'wrongful act' committed while performing their duties as a company director or officer.

A 'wrongful act' includes any actual or alleged breach of duty, breach of trust, neglect, error, misstatement, misleading statement, omission or breach of warranty of authority. Where allowed at law, the policy will also reimburse the corporation for any amounts paid to an insured person in the defence of a claim made against them.

Automatic Extensions

- **Advancement of defence costs** - CGU Professional Risks will generally conduct on behalf of its insureds the defence of a claim. Our experience has proven that this approach is most valuable to our small and medium-sized insureds as it enables the insured to carry on running the business while we deal with the complex legal issues associated with any claim.
- **Attendance at official investigations or inquiries** - The full policy limit is available to directors and officers, for defence costs, in the event that they are required to attend any official investigation, examination or inquiry.
- **Occupational health and safety** - The full policy limit is available to directors and officers, for defence costs, in the event that there is a claim made against them relating to a breach of occupational health and safety law.
- **Joint venture cover** - The policy provides cover for directors in respect of any unincorporated joint ventures that the corporation may become involved in.
- **Continuous cover clause** - The policy provides cover for known circumstances arising prior to the period of provided the D&O policy was held by CGU Professional Risks at the time the directors and officers first became aware of the known circumstance.
- **Worldwide territorial limits** - The policy provides cover for a claim that arises from any wrongful act committed anywhere in the world provided the action is brought within the policy jurisdiction.
- **Extended reported period** - Enables the insured to purchase an additional 12-month reporting period in the event that CGU Professional Risks does not offer renewal terms. This extension allows the insured to notify claims which relate to matters arising prior to the expiry date of the policy.
- **Insured vs Insured cover** - Despite the existence of a Insured vs Insured exclusion, the policy provides cover for claims made by an insured person against another insured person in certain circumstances.
- **Other automatic policy extensions include:**
 - Cover for new subsidiaries.
 - Current outside directorships (Not-For-Profit organisations).
 - Limited prospectus liability.
 - Run-off cover for subsidiaries.
 - Run-off cover for outside directorships.

Optional Extensions

- **Reinstatement of aggregate limit** - Rarely will you find an insurer providing this policy extension under a directors and officers policy. In the event that the policy limit is eroded by a claim, the insured will have the benefit of a further policy limit provided this extension is activated at the commencement of the policy period.
- **Entity cover for Employment Practices Liability ('EPL')**
 - Enables the insured to protect the 'entity' for EPL claims brought against the corporation.
- **Other optional policy extensions include:**
 - Current outside directorships (Other than non-profit organisations).
 - Prospectus liability - initial public offering.
 - USA and Canadian jurisdiction.
 - Pre-acquisition liability.
 - Pollution defence costs.
 - Multi-year run-off after merger or consolidation.

NB: Cover for optional extensions is granted on an offer and acceptance basis.

Please refer to CGU Professional Risks Directors & Officers policy wording for full details of cover, conditions, and exclusions. A copy is available from our website at www.cgu.com.au/professionallrisks

3. Market security and experience.

- **Security** - CGU Professional Risks:
 - Has over the past 20 years underwritten over \$1.2b in premium.
 - Has in this time managed over 32,000 claims on behalf of our policy holders.
 - Insures each year over 35,000 Australian business' or individuals.
- **Expertise** - Over 20 years of experience in providing Directors and Officers insurance to the Australian market.
- **Service** - CGU Professional Risks prides itself on its excellent service and claims reputation and proudly supports the General Insurance Code of Practice. The purpose of the Code is to raise standards of practice and service in the general insurance industry.
- **Product range** - In addition to directors and officers insurance, CGU Professional Risks offers the following products:
 - Professional Indemnity Insurance.
 - Corporate Advantage Management Liability.
 - Employment Practices Liability (stand-alone wording).
 - InfoTech Liability Package.
 - Superannuation Trustees Liability.
 - Defamation Insurance.
 - Office Bearers Liability.
 - Associations and Not-For-Profit Organisations Liability.
 - Medical Malpractice Insurance.
 - Professional Indemnity + Broadform Liability Insurance.
- **Capacity** - As a long-term insurer of professional risks insurance business, we have consistently provided capacity up to \$30 million for each class of business. For our target SME clients, this means that they are able to maintain their policies with CGU Professional Risks without the need to seek excess capacity.

... security and experience



Some common questions asked about directors & officers insurance

1. What is Directors & Officers (D&O) Insurance?

D&O is the short-form phrase for directors and officers liability insurance. The policy is designed to protect the personal assets of directors and officers by providing indemnity for any loss arising from a claim as a result of a 'wrongful act' committed by them in the course of performing their duties.

2. What does a 'wrongful act' mean?

We define a 'wrongful act' to include an actual or alleged breach of duty, breach of trust, neglect, error, misstatement, misleading statement, omission, breach of warranty of authority or other act done or attempted by, or any other matter claimed against, a director and officer while acting in that capacity.

3. What is the normal structure of a D&O policy? What is the meaning of Insuring Agreements A & B?

Generally, the operative clause of a D&O policy will be divided into two parts:

- 1. Insuring Agreement A** - directors and/or officers liability provides cover to directors and officers in respect of claims made personally against them and for which the company cannot, under its indemnification provisions, provide indemnity to the individual.
- 2. Insuring Agreement B** - company reimbursement enables the corporation to be reimbursed in situations where it has granted indemnity to a director or officer in respect to a claim.

4. Who is covered under a D&O policy?

A D&O policy protects directors and officers of the corporation and all its subsidiaries. The CGU Professional Risks D&O policy will cover any natural person who was or now is or may hereafter become a director, secretary, executive officer, or employee of the corporation, whether or not validly appointed or authorised to act in this position.

The definition is intentionally broad to ensure that it protects any individual exposed to potential litigation. The operation of the definition ensures that changes to the board do not need to be notified to enable coverage to be afforded. The policy will automatically respond to such changes.

As long as the corporation continues to purchase a D&O policy, all retired and newly appointed directors will be automatically protected.

5. Does the D&O policy cover the corporation?

Generally, a D&O policy will not indemnify the corporation for any claims against it. The intention of the policy is to indemnify the directors and officers for a wrongful act committed by them in their capacity as a director and officer. It is intended to protect the assets of the individuals, not the Corporation. The policy limit is intentionally made available for actions brought against individuals and will not be eroded by claims against the corporation (other than EPL matters described below).

Insuring Agreement B will, however, reimburse the corporation where it has indemnified its directors and officers.

There is an optional extension under the policy, for the corporation to purchase protection for Employment Practices Liability (EPL) claims brought against the corporation. Our experience over the years has shown that EPL claims are frequently made against an individual as well as the corporation.

6. Why is it necessary to fill out a proposal form and to supply the financial details of the company?

The information provided in the proposal form is pertinent to the risk assessment of the corporation and its directors and officers. It enables the underwriter to gain an understanding of the individuals that CGU Professional Risks will be protecting.

In addition to the information contained in the proposal form, an underwriter needs to understand the financial position of the corporation. This enables provision of the broadest cover possible including insolvency cover to the insured. More than ten thousand companies in Australia were placed into external administration in the year to June 2009. Underwriters will request the audited consolidated financial statements for the past two financial periods. Unaudited financials, if accompanied by a signed director's statement, will be accepted.

7. What are some common types of claims brought against directors and officers?

Directors are in a position of great power and responsibility and have been held to be increasingly accountable for the welfare and activities of the corporation as a result of that position. Sources of claims include:

- Breach of duty/neglect.
- Trade Practices/Fair Trading Legislation.
- Insolvent trading under Section 588G of the Corporations Act 2001(Cth).
- Mergers and acquisitions (misleading and deceptive conduct).
- Shareholder disputes.
- Employee claims (unfair dismissal, discrimination, sexual harassment).
- Unions/members (defamation).
- Regulatory authorities (ATO, ACCC, ASIC, anti-discrimination boards, etc.)
- Federal and State government offices.
- Breach of contract.

Some directors and officers insurance cases

1. Breach of Duty – Facts: The insured directors were sued by a disgruntled minority shareholder who alleged that he did not participate in the second share allocation because he was given some misleading information about the future of the company.

The Statement of Claim alleged that the insureds had breached their duty to the shareholders and contravened Section 52 of the Trade Practices Act. After a three day hearing, the case was settled with each party agreeing to pay their own legal costs. The D&O policy responded and paid the insureds' legal costs of \$150,000.

2. Insolvent trading claim - Facts: The insured was appointed a director of a company. The company went into liquidation, after trading for six months. It was held that if the insured had been more diligent in carrying out his duties as a director he would have appreciated that the company was continuing to trade whilst insolvent.

The insured was held to have contravened Section 588G of the Corporations Law, by allowing the company to trade whilst it was insolvent and therefore liable for its debts.

3. Discrimination - Facts: A female casual factory worker, the complainant, and the company's head foreman commenced a sexual relationship. At the end of the relationship the female worker alleged that she had been pressured into the relationship in order to get the hours of work that she wanted. She also complained that her rostered work hours had been dramatically reduced following the end of her relationship.

The complainant lodged a complaint with the Anti-Discrimination Board against the insured, a company director and the company itself, alleging that she had been sexually discriminated against. The matter was settled for \$20,000 plus legal costs of \$8,000, before the Anti-Discrimination Board considered the allegations.

4. ACCC Investigation - Breach of Trade Practices Act - D&O Automatic Extension 2.6 - Facts: The insured, a director of a local hospital, received an application from a cosmetic surgeon seeking admitting rights for his patients to the hospital.

The application was refused because the hospital did not want to practice in the area of cosmetic surgery. However, the doctor claimed that his application had been refused because the other surgeons using the hospital felt that they would face competition from the cosmetic surgeon. He claimed that the director of the hospital and the other surgeons had engaged in anti-competitive behaviour in breach of the Trade Practices Act.

The doctor lodged a complaint with the ACCC. The Commission commenced an official investigation into the allegations. The Commission's investigation established that the hospital and its director had not breached the Trade Practices Act. The policy responded picking up the insured's legal costs of \$60,000, which included costs for four witnesses and legal counsel fees for attending the hearing.

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