

# Management Liability

Perspective for Small and Medium Enterprises (SME) Businesses

**SME companies are facing greater challenges in the current landscape. Economic uncertainty is creating an increasingly litigious environment.**

Unemployment is rising, and OH&S incidents are subject to increased scrutiny alongside higher penalties. The ATO and ASIC are well funded and are expected to use their new powers to take broader, more proactive action. On top of this, SME companies are suffering increased incidents of theft from their own employees.

A Management Liability policy will not replace a General Liability or Professional Indemnity policy due to its differing scope. It will however provide broad cover for the evolving risks facing SME businesses, and is a critical part of a tailored SME insurance program.

## A typical Management Liability policy contains:



**Cover for Directors & Officers & the Company for Wrongful Acts & Employment Practices Breaches**



**Cover for Workplace Health & Safety Investigations and Penalties**



**Cover against theft by employees & third parties**



**Cover for Tax Audit Costs**

**A Management Liability policy** is designed to cover claims from start to finish. This means that defence costs incurred in a claim will also be covered, including any court attendance costs of an Insured Person, or legal costs relating to an investigation. Once a claim has been finalised, the policy will also cover the settlement or a civil penalty if imposed (except where there is a finding of wilful, dishonest or fraudulent conduct by the company or an Insured Person.) All insuring clauses share the policy limit.

### Wrongful Acts or Employment Practice Breaches by Directors & Officers

This is designed to cover claims for alleged “Wrongful Acts” and “Employment Practice Breaches” made against a director or officer. This includes defence costs and any settlements or civil penalties imposed.

- » Wrongful act will typically include breach of duty or trust to a third party, whether this is through neglect, error, omission, misstatement or misleading statements.
- » Employment practice breaches include unfair dismissal, and harassment or bullying.

### Additional Benefits

- » Where a director retires prior to the expiry of the policy, a 72 month discovery period will be extended at the expiry of the cover for the retired director(s).
- » Cover for trustee breaches in respect of the administration of a fund (such as an Employment Superannuation Scheme)
- » Personal liability of a director arising out of the company’s unpaid taxes where the company is insolvent (excluding a wilful breach of tax legislation.)
- » An Insured Person that is a director, officer or trustee (or equivalent) in an Outside Entity is covered for any alleged conduct in that capacity (provided they were asked by the company to do so.)
- » In circumstances where a warrant or arrest has been executed against an Insured Person that requires extradition, the policy will respond to reasonable fees, costs and expenses incurred in challenging or defending the extradition in connection with a covered claim.
- » Bail bond and civil bond expenses relating to a covered claim.
- » Cost of schooling, housing, utilities and personal insurance in the event of an interim order confiscating, controlling, suspending or freezing assets of an Insured Person in connection with a covered claim under the policy.

### Wrongful Acts by the Company

- » This is designed to cover claims for alleged “Wrongful Acts” made by third parties against the Company, This includes defence costs and any settlements reached.

### Additional Benefits

- » Crisis containment costs for the company following an unforeseen event with the potential to cause an imminent impact on the reputation, or imminent decrease of greater than 30% of the total consolidated annual revenue of the company.
- » Public relations expenses to publish findings where an insured person, or the company are exonerated from fault, liability or culpability in connection with a claim under the policy.
- » Where a new subsidiary has been created or acquired during the period of insurance, the policy will automatically extend subject to the conditions of the cover. Similarly, where an entity has ceased to be a subsidiary during the period of insurance, cover will extend for conduct related to Wrongful Acts or Employment Practices Breach that occurred whilst the entity was a subsidiary.

### Investigations & prosecutions

- » A major benefit of Management Liability policies is the cover against action by regulatory bodies including for alleged breaches of Occupational Health & Safety laws and Pollution laws. The policy will advance defence costs for the attendance at regulatory investigations, as well as defence costs for defending regulatory prosecutions for breaches of legislation, subject to terms and conditions.

### Statutory Liability (Fines & Penalties) for OHS & Pollution

- » The policy will also cover fines and penalties imposed on the company by a regulator:
- » Criminal breaches, such as alleged breaches of occupational health and safety laws and pollution laws
- » Civil penalties for breaches of civil protection laws

#### Important notes:

- » Cover does not extend to damages or compensation as this is generally claimed by third parties who have suffered an alleged loss, rather than regulators.
- » Sometimes an insurer is legally prohibited to provide cover, such as for intentional breaches, and claims under the Australian Competition and Consumer Act.
- » In October 2018, Western Australia increased penalties for breaches of the Occupational Health and Safety Act 1984 and these new penalty levels should be considered when contemplating whether insurance coverage is adequate. For example, the maximum penalty for a Body Corporate for a first offence on the lower scale is now \$450,000.

### Employment Practice Breaches by the Company

Employment Practice Breaches include:

- » Wrongful or unfair dismissal
- » Refusal to hire, failure to promote, and wrongful deprivation of career opportunity
- » Adverse changes to terms and conditions of employment
- » Discrimination, harassment, defamation and breach of privacy
- » Retaliation against an employee exercising their employment rights

Subject to the nature of the claim and applicable exclusions, the policy will respond to defence costs, damages and compensation.

The Fair Work Commission hears approximately 16,000 unfair dismissal claims every year, and over 10% of claims are related to a Small Business Employer, with approximately 90% of claims settled at conciliation. The Fair Work Commission is a “no costs” jurisdiction (meaning both parties are required to pay their own costs regardless of success).

### Direct Financial Loss sustained by the Company

This clause provides cover for loss suffered by an Insured company through the loss of money, securities or other assets either owned by the company or in the care, custody or control of the company for which the company is liable. This includes a fraudulent funds transfer (meaning instructions provided to a financial institution to transfer money or security without the knowledge of the company), but will not cover loss caused by Cyber attacks such as phishing emails.

Fees, costs and expenses of a fraud investigator are included in the policy coverage.

### Tax Audit Costs for the Company

- » Provides cover for fees, charges or disbursements of an accountant or registered tax agent where an Insured Company has been issued a formal notice from the Australian Taxation Office (ATO).
- » The policy is not designed to cover legal fees, or any payments, fines or penalties issued by the ATO.