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Business services bulletin

Are your standard business practices leaving you uninsured?

Contact
Melissa Fitzpatrick
Director
Level 5, Quay Central, 95 North Quay, Brisbane Qld 4000
Telephone: 07 3007 9251
Email: melissa.fitzpatrick@foxthomas.com.au

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For many businesses, insurance is the most important, if not the only, risk management tool utilised in the protection of the business. Knowing that policies of insurance have been put in place to protect your business from a wide array of potential losses and liabilities can bring great peace of mind and allows you to focus on the core aspects of your business.

However, unless you carefully note the terms of your policies, your standard business practices have the potential to render your insurance ineffective in many common situations.

Indemnities

This is the case with contractual indemnities. Indemnities serve to give the indemnified party increased scope for recovery and additional protection not afforded by the common law or statute. This makes them useful and important contractual tools which are common in all sorts of commercial contracts, both simple and complex.

Typically, however, commercial insurance policies contain provisions which exclude from cover liabilities which have been assumed solely under an agreement unless:

1. that liability would otherwise have arisen at law (e.g. a liability under the *Trade Practices Act 1974* (**TPA**)); or

2. the assumed liability has been disclosed to the insurer.

This means that it is vital that all contractual indemnities be disclosed to your insurer, preferably prior to execution of the contract.

Limitation clauses

A similar situation arises where you contractually agree to allow another party to limit their liability to you in some way. This limitation may be to a set dollar amount or, more commonly, in relation to a liability under a statutory warranty such as those implied into contracts for the sale of goods and services under the TPA.

Although liability for breach of statutory conditions and warranties under the TPA can't be excluded, the Act does allow for that liability to be limited in certain circumstances and so it is common to see limitation of liability provisions in commercial contracts for the sale of goods and services. Where you agree to limit the other party's liability without disclosure to your insurer, any costs or damages beyond the limitation for which you become liable will be uninsured.

These types of clauses will be noticed easily where the terms of a contract to be entered into are specifically negotiated but are more easily missed or disregarded when the limitation of liability is contained in a supplier's standard terms and conditions. Again, these provisions must be noted and disclosed to your insurer prior to entering into the contract.

What can you do?

These common situations can be avoided relatively easily.

Firstly, businesses should review all of their significant commercial agreements (including leases and suppliers' standard terms and conditions) to determine the nature and extent of indemnities, limitation of liability clauses and other assumed liabilities and then make full and immediate disclosure to their insurers.

Secondly, to prevent insurance cover being inadvertently excluded in the future, contract sign-off procedures should be updated to incorporate a step which requires that a check of the contract be made for any indemnities, limitation clauses or other assumed liabilities and that the necessary disclosures are made to the insurer prior to execution.

Melissa Fitzpatrick