

# The Consensual Claims exclusion

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**Rewind the clock a decade and you would be hard pressed to find a D&O policy which didn't contain an Insured v Insured exclusion. The exclusion excludes claims brought by the company against its own directors or officers, or by one director or officer against another. This insulates the insurer from claims which have been concocted by the directors and officers, to be brought against them by the company, in order to recover business losses allegedly arising from poor management.**

The market has seen a shift away from the Insured v Insured exclusion, towards the more favourable Consensual Claims exclusion, which often contains final adjudication language. The latter only excludes claims which have been invited or solicited by the insured (as opposed to claims which are brought by other insureds). The focus is on whether collusion has in fact occurred, as opposed to the identity of the parties.

This shift has been primarily driven by commercial considerations and increased competition between insurers. Newer D&O policies which are marketed as premium products don't contain either of the exclusions. However, insurers generally have an exclusion in their endorsement library, to apply if there is a history of in-fighting between insureds which the insurer does not want to insure.

Another space in which the Consensual Claims exclusion is prevalent is Management Liability. These policies typically respond to claims arising

from Wrongful Acts of the insured. Management Liability policies are generally more competitively priced than standalone D&O policies and cover many of the same exposures. They are sold largely through online platforms.

The Consensual Claims exclusion is generally absent from professional indemnity policies. That accords with the nature of the cover, which is designed to protect the insured's clients from any professional negligence. Accordingly, the prospect of collusion between the parties to the claim is limited.

Nevertheless, there arise situations where the insured can fall into the uncomfortable position of having arguably invited or solicited the claim for which it seeks indemnity under the professional indemnity policy.

An example is where ASIC takes the proactive approach of requiring an AFSL-holder to compensate a client for a liability, regardless of whether or not the client has made a claim. The distinction with this scenario, as opposed to a collusion scenario, is that the liability is likely to be "real", as opposed to the manufactured result of collusion.

An AFSL-holder who compensates, or proposes to compensate, a would-be claimant at ASIC's request may run into trouble when seeking indemnity under its professional indemnity policy. It is uncontroversial that professional indemnity policies respond to claims made against the insured (as opposed to liabilities incurred by the insured).

Even in the absence of a Consensual Claims exclusion, the insurer may

point to conditions on the cover which effectively prohibit the solicitation of claims. An example is the standard condition requiring the insured to take all reasonable steps to avoid or diminish any liability under the policy. If the claim would not have been made but for the solicitation, section 54 is unlikely to assist the insured. Further, the insurer may allege a breach of the obligation of utmost good faith.

Where insureds are concerned about whether a professional indemnity policy will respond in the event of the fraudulent misappropriation of funds, a crime protection policy may be more suitable. This type of policy responds where a client's funds have been dishonestly siphoned into ventures without his or her authority, even in the absence of a claim.

AFSL-holders may only be required by the regulator to purchase professional indemnity insurance. However a robust approach to risk mitigation would see buyers of professional indemnity policies looking to purchase the full suite of specialty products, such as D&O, Employment Practices Liability, Tax Audit Insurance, Statutory Liability & Supplementary Legal Expenses and Commercial Crime Insurance to ensure that they have adequate protection – for not only their own balance sheet, but also for their clients, who may find themselves on the wrong end of a dishonest employee or authorised representative.

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