

Our Ref: DJG 10092659

8 February 2011

Mr Bob Bentley  
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AND TO

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Dear Bob

**Directors and Officers' Liability Policy 04CH008050-ACE Insurance Elite II**

I refer to our recent discussions and to your enquiry in relation to the directors and officers' liability cover and its adequacy.

In particular you were concerned that there may be another inquiry in the future and if that is the case, you want to ensure that your cover for a company and for directors is adequate.

*Amount insured*  
The insurance policy has provision for a maximum aggregate liability of \$20million. There are a number of sub limits which form part of the total \$20million, but the maximum amount for which the insurer can be liability under the policy is \$20million.

*Term of policy*  
This policy is for a period of 12 months from 30 June 2010 at 4.00pm to 30 June 2011 at 4.00pm. ✓

The important aspect of these policies are that they are claims' policies. That is, the insurer is liable in respect of any claim made during the currency of the policy. That is, if the policy expires and a matter that occurred during the course of the policy is the subject of the claim outside the policy, if no claim has been made during the course of the policy, the insurer is not liable.

Where, for example, a claim has been made against you personally, and Racing Queensland Limited in respect of the liability for the Albion Park claim, notice has been given and, subject to the terms of the policy, indemnity has been extended to you so that if in the course of this matter, you were found liable to pay any sum, the insurer must pay that sum.

In respect of giving notice of claims and investigations, the provision of clause 5.3 are specific: 5.3 provides:

**Notification of claims and investigations**

- (a) The Company or the Insured must give written notice to the insurer of any Claim or Investigation as soon as practicable within the policy period or Discovery Period if applicable.
- (b) In the event of expiry of a Policy Period, notification must be given in any event no later than 60 days after the expiration of the Policy Period, or, in relation to a claim first made against the Insured or Investigation first commenced during the Discovery Period if applicable no later than 30 days after expiry of the Discovery Period. *(Amended)*  
The Discovery Period is a period of 12 months from the date of expiration of the policy period.

This arises where the insurer refuses to renew the insurance. If that happens, you have the contractual right to buy cover not exceeding \$20million for a maximum period of 12 months by paying 100% of the premium cost. *Not done*

Where that happens you actually get an extension of time within which to claim. By doing this the insurer will be liable in respect of any claim first made against the insured before or during the Discovery Period (i.e. the period of 12 months after the policy period expires) but only in respect of Wrongful Acts committed prior to expiry of the Policy Period; and any investigation first commenced before or during the Discovery Period, but only in respect of actual or alleged conduct undertaken prior to expiry of the Policy Period. The right to purchase the Discovery Period expires 30 days after expiration of the Policy Period and is only effective upon payment of the additional premium. Indemnity is offered in respect of a Claim and an Investigation. *Specify date*

"Claim" is defined to mean:

- (a) any written demand; or
- (b) any civil or arbitral proceeding; or
- (c) any criminal prosecution; or
- (d) any formal administrative or regulatory proceeding;  
made against an Insured, alleging a Wrongful Act;
- (e) any Extradition Proceeding.

"Investigation" is defined to mean:

"A formal or official investigation, examination or enquiry into the Company or an insured in their capacity as such at which the attendance of the Insured is first required or requested in writing during the Policy Period or any Discovery Period.

*Conduct covered*

"Wrongful Acts" are defined to mean:

"Any actual or alleged act, breach of trust, error, omission, misstatement, misleading statement, neglect or breach of duty or any other matter claimed against an Insured whilst acting in the capacity of an Insured, including any violation of the *Corporations Act 2001* (Cth), *Sarbanes-Oxley Act of 2002* or any equivalent law, rule or regulation in any other jurisdiction, and an Employment Related Wrongful Act." There are exclusions. For the purposes of determining the applicability of any Exclusion, the Wrongful Act or other conduct of an Insured shall not be imputed to any other Insured.

The insurer is not liable to pay under the policy "based on, arising from or attributable to:

- (a) any dishonest or fraudulent act or omission of the Insured or an intentional breach of the law by the Insured; or
- (b) any person or profit or advantage gained by the Insured to which such Insured was not legally entitled;

provided that this Exclusion shall only apply if it is established through a judgment or any other final adjudication (including any appeal thereof) or any written admission by such Insured that the relevant conduct occurred.

"The insured" mean:

A natural person who was, now, is, or becomes during the Policy Period:

- a director or officer;
- a Shadow Director;
- an Employee;

- any lawful spouse or domestic partner of a Director or Officer or Employee but only where the claim results from the wrongful Act of such Director or Officer or Employee;
- the estate, heir or legal representative of a deceased Director or Officer or Employee but only where the Claim results from the Wrongful Act of such Director or Officer or Employee.

The effect of the policy wording is that, if any administrative body sought to have an informal hearing or investigation, (informal but meaning that you are not compelled to attend) then you should not attend because the wording of the policy in respect to investigations is that it must be a formal or official investigation. Therefore anything that is not formal or official will not entitle you to indemnity.

As we discussed with you, the important issue is to ensure that during the Policy Period or during the Discovery Period if the option is exercised, you are perfectly entitled to provide the Insurer with notice of facts which might in the future give rise to a claim. If no claim is ever made, no harm occurs but by giving notice within the Policy Period, you lock in your right to indemnity.

I have asked one of my insurance partners to also look at the policy and I will provide you with his comments shortly when I am in receipt of them.

Yours faithfully  
**COOPER GRACE WARD**

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