

DUAL Financial Lines

# Management Liability

**DUAL**



# DUAL New Zealand Mind the Gap

Management Liability Policy Wording

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# Section 1: Insuring Clauses

## 1.1 Cover for You

We agree to pay on behalf of each **insured person** all **loss** up to the **indemnity limit** arising out of any **claim** first:

- a. made against such **insured person**, and
- b. reported to **us**

during the **insurance period** in respect of any:

- a. **Wrongful act**; or
- b. **Employment practice breach**; or
- c. **Trustee breach**

for which the **company** is not permitted or required to indemnify the **insured person**.

Our liability under Insuring Clause 1.1 (Cover for You) shall (in respect of each **insured person**) only apply to that part of each **loss** which exceeds the **deductible** specified in the **schedule** and such **deductible** shall be borne by the **insured person** at their own risk.

## 1.2 Cover for the Company

We agree to pay on behalf of the **company** all **loss** up to the **indemnity limit**:

- a. Crime – first **discovered** during the **insurance period** which results from a **dishonest act** of an **associated person** acting alone or in collusion with others, or of a **third party** committed with the intention of causing the **company** to sustain a **direct financial loss**.

The total amount payable by **us** under Insuring Clause 1.2 (a) (Crime) for any one **direct financial loss** and for all **direct financial losses** in the aggregate during the **insurance period** inclusive of costs and expenses shall not exceed the sub-limit specified in the **schedule** for this Insuring Clause. This sub-limit forms part of, and is not payable in addition to, the **indemnity limit**.

- b. D&O / Company Reimbursement – in respect of any **claim** first:
  - i. made against any **insured person** and
  - ii. reported to **us**

during the **insurance period** in respect of a **wrongful act** for which the **company** is permitted or required to indemnify the **insured person**.

- c. Entity - in respect of any **claim** first:
  - i. made against the **company** and
  - ii. reported to **us**

during the **insurance period** for a **wrongful act**.

The total amount payable by **us** under Insuring Clause 1.2 (c) (Entity) for all such **loss** in the **insurance period** shall not exceed the sub-limit specified in the **schedule** for this Insuring Clause.

This sub-limit forms part of, and is not payable in addition to, the **indemnity limit**.

- d. Employment Practices - in respect of any **claim** first:
  - i. made against the **company**, and
  - ii. reported to **us**

during the **insurance period** for an **employment practice breach**.

The total amount payable by **us** under Insuring Clause 1.2 (d) (Employment Practices) for all such **loss** in the **insurance period** shall not exceed the sub-limit specified in the **schedule** for this Insuring Clause. This sub-limit forms part of, and is not payable in addition to, the **indemnity limit**.

- e. **Trustee** - in respect of any **claim** first
  - i. made against the **company**, and
  - ii. reported to **us**

during the **insurance period** for a **trustee breach**.

- f. **Taxation Investigation** – where during the **insurance period** the **company** has both received a **tax audit notice** and reported it to **us**, **we** will provide cover to the **company** for necessary and reasonable **tax audit costs** incurred by the **company** up to the completion of the audit or investigation.

The total amount payable by **us** under this Insuring Clause 1.2 (f) (Taxation Investigation) in respect of all **tax audit notices** in the **insurance period** shall not exceed the sub-limit specified in the **schedule**. This sub-limit forms part of and is not payable in addition to the **indemnity limit**.

**Our** liability under Insuring Clause 1.2 (Cover for the Company) only applies to that part of each **loss** which exceeds the **deductible** specified in the **schedule** and such **deductible** shall be borne by the **company** at its own risk.

### 1.3 Defence Costs in Addition

**We** agree to pay to or on behalf of the **insured** any **defence costs** in respect of a **claim** for **loss**, covered by this **policy** in addition to the **indemnity limit**, in an amount not exceeding the same **indemnity limit**.

**We** will only pay **defence costs** however if:

- a. **We** incur them; or
- b. The **insured** incurs them after obtaining **our** agreement in writing and the **defence costs** are in **our** view reasonable and necessary.

**We** will not defend or continue to defend any **claim** to which the **policy** would provide indemnity, or pay or continue to pay any **defence costs** associated with such defence, once the **defence costs indemnity limit** has been exhausted.

**We** also agree to advance **defence costs** in respect of such a **claim** before its final disposition. Payment will be made within 28 days of receipt of sufficiently detailed invoices for defence costs incurred.

**We** will not rely on General Exclusion 6.8 (Dishonesty) until there is a judgment against, final adjudication against, or admission by the **insured** that the relevant conduct by the **insured** did occur.

If **we** subsequently determine that the **insured's loss** under the **policy** is excluded the **insured** must reimburse **us** for any **defence costs** that **we** have paid in advance, according to the respective interests of the **insured**.

### 1.4 Retroactive Date

This **policy** only provides cover in respect of **wrongful acts, employment practice breaches, trustee breaches** and **dishonest acts** committed or allegedly committed after the **retroactive date**.

# Section 2: Automatic Coverage Clauses

The Automatic Coverage Clauses are subject to the Insuring Clauses above and all other **policy** terms.

Unless expressly provided otherwise, the indemnities in the Automatic Coverage Clauses are subject to the **deductible** and are part of and not in addition to the **indemnity limit**.

## 2.1 Automatic Reinstatement for Insured Persons

In the event of a reduction (in whole or in part) of the **indemnity limit** for **insured persons** as a result of payment by **us** of **loss** under Insuring Clauses 1.1 and/or 1.2 (b), **we** will reinstate the **indemnity limit** by the amount of such reduction on the following basis:

- a. the total amount payable by **us** under this **policy** shall not exceed twice the **indemnity limit**; and
- b. the cover under this Automatic Coverage Clause will only be available for **insured persons** for any subsequent **loss** in relation to any **claim(s)** based on facts and matters that are entirely different from and unrelated to those upon which the **claim(s)** is (or are) based and which led or contributed to the reduction referred to above. This additional benefit does not provide additional coverage in respect of the **claim(s)** that led or contributed to the reduction; and
- c. the maximum amount of **loss** payable by **us** for all **insured persons** under this Automatic Coverage Clause in respect of any number of **claim(s)** which arise out of or are attributable to or are in any way connected with a single **wrongful act**, or **employment practice breach** inclusive of all **loss** is the **indemnity limit**; and
- d. if the **company** or **insured persons** has or have in effect, or the benefit of, any policy or policies providing coverage in excess of this **policy** or any other policy, then the additional coverage provided by this clause will only take effect after the total exhaustion of any amounts payable under any such other policies but before any similar reinstatement provisions as may be contained in any such other policies take effect; and
- e. this provision shall only be available to **you** to the extent that **you** are an **insured person**.

This clause does not apply in respect of Insuring Clauses 1.2(a) and 1.2(c) – 1.2(f) of this **policy**, or any Automatic Coverage thereunder.

## 2.2 Continuous Cover

Notwithstanding General Exclusion 6.13 (Prior Knowledge) (a) and (b), **we** agree to provide cover in respect of any **claim** made in the **insurance period** where the **insured**:

- a. first became aware, prior to the **insurance period**, that a **claim** might or could arise from facts or circumstances known to it; and
- b. had not notified **us** of such facts or circumstances prior to the **insurance period**.

Provided that:

- i. **we** were the insurer of the **insured** when the **insured** first became aware of such facts and circumstances; and
- ii. **we** have continued, without interruption, to be the **insured's** insurer up until this **policy** came into effect; and
- iii. there has not been any fraudulent non-disclosure or fraudulent misrepresentation by the **insured** in respect of such facts or circumstances; and
- iv. **we** have the discretion to apply either the terms of the **policy** on foot when the **insured** first became aware of the facts and circumstances, including but not limited to the **indemnity limit** and **deductible**, or the terms of this **policy**; and
- v. the **insured** agrees to only make a **claim** under one **policy** issued by **us**.

For the purpose of this Automatic Coverage Clause only, the definition of **we/us/our** in Definition 5.59 also includes the Underwriter(s) for which **we** were the agent on any previous **policy** issued by **us**. Subject to the terms of this Automatic Coverage Clause and the terms of the **policy**, the intention of this Automatic Coverage Clause is to provide continuous cover to the **insured** notwithstanding any change in the identity of the Underwriters for which **we** presently act, or have previously acted, as agent.

## 2.3 Contractual Penalties

**We** agree to pay on behalf of the **insured** any penalty for which the **insured** is liable under a written contract resulting directly from **direct financial loss** covered by this **policy**.

The maximum amount payable under this Automatic Coverage Clause during the **insurance period** is the sub-limit specified in the **schedule**.

## 2.4 Crime Investigation Fees

Under Insuring Clause 1.2 (a) Crime and subject to Clause 4.9 Notification of Direct Financial Loss, **we** will pay the reasonable and necessary fees, costs and expenses of a fraud investigator nominated by the **company** and approved in writing by **us** to establish the amount of any **direct financial loss** notified to **us** and covered by the **policy**, in excess of the **deductible** applicable for Insuring Clause 1.2 (a) Crime.

The investigation fees do not include expenses incurred by the **company**.

The fraud investigator shall:

- a. Investigate the facts behind such **direct financial loss**; and
- b. Determine the quantum of such **direct financial loss**, and
- c. Advise when and how the **company's** controls were or may have been breached; and
- d. Provide recommendations which may prevent future similar **direct financial loss**; and
- e. Issue their findings in a report format approved by **us**; and
- f. Provide a copy of the report to the **company** and to **us**.

**We** will pay for the reasonable and necessary fees, costs and expenses of the fraud investigator provided the **direct financial loss** is ultimately determined to be covered under this **policy**.

The sub-limit for this Automatic Coverage Clause is specified in the **schedule** and is in addition to the sub-limit applicable for Insuring Clause 1.2 (a) Crime displayed in the **schedule**.

## 2.5 Crisis Containment

**We** shall reimburse the **company** for **crisis loss** in excess of the **deductible** which the **company** incurs by reason of a **crisis event** which first occurs and is notified to **us** during the **insurance period**.

## 2.6 Discovery Period

The **insured** may give written notice to **us** during the **discovery periods** as specified in (a) to (c) below of any **claim** first made in respect of a **wrongful act** or **dishonest act** occurring prior to the end of the **insurance period**. If written notice is given to **us**:

- a. within 30 days of the end of the **insurance period**, then **we** will grant cover automatically with no additional premium payable; or
- b. within 12 months of the end of the **insurance period**, then **we** will grant cover if the **insured** requests such period in writing within 15 days after the end of the **insurance period** and tenders an additional premium of 100% of the annual premium level within 30 days of the end of the **insurance period**; or
- c. within 84 months of the end of the **insurance period**, then **we** will grant cover if a **transaction** takes place and the **insured** requests such period in writing within 30 days following the end of the **insurance period**, on such terms and conditions, if any, and for such additional premium as **we** may reasonably decide.

This Automatic Coverage Clause is not available if this **policy** is:

- a. renewed or replaced with any other Directors and Officers or Management Liability policy; or
- b. cancelled or avoided.

Any **discovery period** purchased under this Automatic Coverage Clause is non-cancellable, and the premium paid for the **discovery period** is non-refundable.

## 2.7 Disposal of Subsidiary

We agree to pay to or on behalf of the **insured direct financial loss** sustained by any **subsidiary** sold, otherwise disposed of or liquidated during the **insurance period** and which was previously insured by **us** under this **policy** if the **direct financial loss**:

- a. is **discovered** after the date of sale, disposal or liquidation and before the expiry of this **policy**; and
- b. was caused by a **dishonest act** committed before the date of sale, disposal or liquidation.

Any part of such **direct financial loss** that was caused by a **dishonest act** committed after the date of sale, disposal or liquidation is not covered by this Automatic Coverage Clause.

## 2.8 Emergency Defence Costs

Notwithstanding any provision in the **policy** to the contrary, if it is not possible for the **insured** to obtain **our** written consent prior to incurring **defence costs**, **we** will waive prior consent provided that **our** consent is obtained within 30 days of the first of such **defence costs** being incurred.

If **we** subsequently determine that there is no entitlement under the **policy** for any **defence costs** that **we** have paid under this clause, the **insured** must repay those amounts to **us** immediately.

A separate **deductible** will apply under this Automatic Coverage Clause, as specified in the **schedule**. The **deductible** is inclusive of **defence costs**, unless otherwise specified in the **schedule**.

## 2.9 Employee Plans

We agree to pay on behalf of the **company direct financial loss** covered by this **policy** which is sustained by an **employee plan**. Any amount payable by **us** under this Automatic Coverage Clause shall be paid solely for the benefit of the **employee plan** which has sustained the **direct financial loss** and the **company** shall not be entitled to any payment in respect of the **direct financial loss**. For the purposes of this Automatic Coverage Clause only, **employee** includes an **employee** of an **employee plan** and an **employee plan** shall be deemed to be an **insured**.

## 2.10 Extortion

We agree to pay to or on behalf of the **insured direct financial loss** covered by this **policy** caused by **money** or **securities** being paid or surrendered by an **associated person** from the **premises** as the direct result of **extortion** provided that before such payment or surrender occurs the person who is the victim of the **extortion** has made reasonable effort to inform the **company** of the **extortion** and the **company** has reported the **extortion** to the police.

## 2.11 Former Subsidiary Cover

We agree to provide cover in respect of any company that ceases to be a **subsidiary** during the **insurance period** or prior to commencement of the **insurance period**, provided that the cover provided shall only apply in respect of a **wrongful act**, **employment practice breach**, **trustee breach** or **dishonest act** that occurred whilst the entity was a **subsidiary** of the **company**.

## 2.12 Heirs, Estates and Legal Representatives

We agree to provide cover to the estate, heirs, legal representatives or assigns of any deceased or mentally incompetent, bankrupt or insolvent **insured person** in respect of **loss** arising from a **wrongful act**, **employment practice breach** or **trustee breach** committed by an **insured person** that is covered under this **policy**.

It is a condition of this Automatic Coverage Clause that any estate, heirs, legal representatives or assigns will observe and be subject to all applicable provisions of this **policy**.

## 2.13 Insured v Insured – Defence Costs

Notwithstanding Exclusion 3.5 (Insured v Insured) of the **policy**, **we** agree to pay **defence costs** in respect of:

- a. any **claim** brought or maintained by the **company** for contribution or indemnity, if the **claim** directly results from another **claim** otherwise covered under the **policy**;
- b. any **claim** brought or maintained on behalf of the **company** or any **outside entity** by any external administrator to the **company** or any **outside entity** (including but not limited to a liquidator, receiver, administrator or other external administrator) where such external administrator is appointed by a Court and such **claim** is brought without the solicitation, assistance or co-operation of any **insured person** or director, **officer, trustee**, governor or equivalent position in any **outside entity**, except when such solicitation, assistance or cooperation is required by law;
- c. any shareholder derivative action brought or maintained on behalf of the **company** or any **outside entity** without the solicitation, assistance or co-operation of an **insured person** or director, **officer, trustee**, governor or equivalent position in any **outside entity**, except when such solicitation, assistance or co-operation is required by law; or
- d. any **claim** instigated by any regulatory authority on behalf of the **company** or any **outside entity** without the solicitation, assistance or co-operation of an **insured person** or director, **officer, trustee**, governor or equivalent position in any **outside entity**, except when such solicitation, assistance or co-operation is required by law.

## 2.14 Interest Receivable or Payable

**We** agree to pay to or on behalf of the **company** any interest actually lost or paid by the **company** directly in respect of **direct financial loss** covered by this **policy** provided that **our** liability under this Automatic Coverage Clause shall be calculated by applying the average of the Reserve Bank of New Zealand base rate in force between the time that the **direct financial loss** is sustained and the date of **discovery** of the **loss**.

The sub-limit of liability for all such payments under this Automatic Coverage Clause is the amount specified in the **schedule**. This sub-limit forms part of, and is not payable in addition to, the **indemnity limit**.

## 2.15 Internet Liability

Notwithstanding Exclusion 3.3 (Defamation, Breach of Privacy and Intellectual Property), **we** agree to provide cover in respect of any **claim** for an **internet error** committed or alleged to have been committed by the **insured** via its internet site, use of the internet, electronic mail or any electronic network.

**We** will not cover the **insured**, including for **defence costs** or **loss**, in respect of any **claim** arising from or directly or indirectly caused by, or in any way connected with:

- a. chat rooms, electronic bulletin boards or electronic open forum debates; or
- b. indecent, obscene, pornographic, adult or objectionable material of any kind or any matter prohibited by any law, rule or regulation.

The sub-limit of liability for all such payments under this Automatic Coverage Clause is the amount specified in the **schedule**. This sub-limit forms part of, and is not payable in addition to, the **indemnity limit**.

## 2.16 New Subsidiary

**We** agree to provide cover in respect of any **subsidiary** which is created or acquired by the **company** during the **insurance period**, provided that the **subsidiary**:

- a. has total gross assets which are less than 20% of the total gross assets of the **company**; and
- b. has gross annual turnover of less than 20% of the total gross annual turnover of the **company**; and
- c. has total gross assets which are less than 10% of the total gross assets of the **company** in the USA or Canada.

The cover provided shall only apply in respect of a **wrongful act, employment practice breach, trustee breach or dishonest act** occurring after the date of creation or acquisition.

## 2.17 Occupational Health and Safety

Notwithstanding Exclusion 3.1 (Bodily Injury / Property Damage), **we** agree to pay **defence costs** in respect of any **claim** that is both first made against an **insured** and first reported to **us** during the **insurance period** where such **claim** arises from a breach or alleged breach of the Health and Safety in Work Act 2015 (or any amendment or re-enactment thereof), or any other New Zealand or Australian legislation governing workplace conditions and procedures. This automatic extension will not apply if the **insured** has cover under a Statutory Liability Policy.

## 2.18 Official Investigations and Inquiries

### a. Cover for You

**We** agree to pay **defence costs** incurred with **our** prior written consent for any attendance by an **insured person** for examination at any official investigation, examination or inquiry in relation to the affairs of the **company** or any other examination of the **insured person** by virtue of his/her position as a director of the **company** where such investigation, examination or inquiry may lead to a recommendation in respect of civil liability or civil proceedings which would be a **claim** covered under this **policy**. Notice of the official investigation, examination or inquiry must be both first received by the **insured person** and notified to **us** during the **insurance period**.

### b. Cover for the Company

**We** agree to pay **defence costs** incurred with **our** prior written consent for any attendance by the **company** at any official investigation, examination or inquiry in relation to an allegation that the **company** has breached workplace health and safety laws or regulations or employment laws or regulations, where the attendance at the investigation, examination or inquiry may lead to a recommendation in respect of civil liability or civil proceedings which would be a **claim** covered under this **policy**. Notice of the official investigation, examination or inquiry must be first received by the **company** and notified to **us** during the **insurance period**.

## 2.19 Order Of Payment

If the payment of **loss** in respect of a **claim** is due under this **policy** but the amount of such **loss** in the aggregate exceeds the remaining available **indemnity limit**, **we** shall:

- a. first pay such **loss** for which coverage is provided under Insuring Clause 1.1 (Cover for You) of this **policy**; then
- b. to the extent of any remaining amount of the **indemnity limit** available after payment under (a) above, pay such **loss** for which cover is provided under any other provision of this **policy**.

## 2.20 Outside Directorship Cover

**We** agree to pay on behalf of the **insured** all **loss** arising out of any **claim** both first made against any **insured person** and first notified to **us** during the **indemnity period**, who was, is or may become, at the written request of the **company**, a director, **officer**, trustee, governor or equivalent position in any **outside entity** for any **wrongful act, employment practice breach or trustee breach** in such **insured person's** capacity as a director, **officer**, trustee, governor or equivalent position in the **outside entity**.

This cover shall:

- a. only apply in excess of any insurance in respect of the **outside entity** as well as any indemnification provided by the **outside entity**, and;
- b. not apply in connection with any **claim** made against any **insured person** by any shareholder of the **outside entity** holding 15% or more of the issued and outstanding voting share capital of the **outside entity**, and;
- c. not apply in respect of any **claim** arising out of, based upon, attributable to or in any way whatsoever connected with the actual or alleged insolvency of any **outside entity**.

## 2.21 Panel Counsel

The **insured** is entitled to one (1) hour free advice from any one firm listed on **our** panel of solicitors relating to a matter which **we** have accepted as notification of circumstances which may give rise to a **claim** under this **policy**.

**We** consent to that firm listed on **our** panel of solicitors being retained to act for an **insured** in respect of any **claim** covered by this **policy**.

## 2.22 Physical Loss or Destruction of or Damage to Money or Securities

**We** agree to reimburse the **company** for any physical loss or destruction of or damage to **money** or **securities** during the **indemnity period** caused by a **dishonest act** provided that such physical loss, destruction or damage occurs:

- a. within the **premises**; or
- b. inside any banking premises or similar recognised place of safe deposit; or
- c. whilst in transit and in the care, custody and control of the **company** or any security company or armoured motor vehicle company which is duly authorised by the **company** to have the care, custody or control of such **money** or **securities**.

The amount payable under this Automatic Coverage Clause is limited to the excess of any valid and collectible indemnity, contractual or otherwise, available to the **company**, or which would be valid and collectible except for the application of an excess or the exhaustion of a policy limit.

## 2.23 Pollution Defence Costs

Notwithstanding Exclusion 3.7 (Pollution), **we** agree to pay **defence costs** in relation to **claims** that are covered under this **policy** arising from or connected with the actual, alleged or threatened discharge of **pollutants** up to the sub-limit specified in the **schedule**.

This sub-limit forms part of, and is not payable in addition to, the **defence costs indemnity limit**

## 2.24 Positive Defence Costs For Claims

**We** agree to advance **defence costs** before final disposition of a **claim**, where **we** have not determined the **insured's** right to indemnity for the **claim**.

For clarity, **we** will not rely on Exclusion 3.10 (Wilful Conduct) or General Exclusion 6.8 (Dishonesty) until there is a relevant judgment, final adjudication or admission. If **we** subsequently determine that the **insured's loss** under the **policy** is excluded, the **insured** must reimburse **us** for any **defence costs** that **we** have paid in advance, according to the respective interests of the **insured**.

## 2.25 Public Relations Cover

**We** agree to pay on behalf of the **insured** any **public relations expenses** incurred by the **insured**:

- a. in connection with an **incident** in order to prevent or minimise the risk of a **claim** which would be covered under the **policy**, or in connection with an **incident** that results in a **claim** covered under the **policy**.

Provided that:

- i. The **insured's** entitlement to this cover is conditional upon the **insured** providing **us** with full written details of the **incident** no later than 30 days after the **insured** first becomes aware of the **incident**;
- ii. The **incident** must occur and be reported during the **insurance period**;
- iii. The **incident** must occur in New Zealand; and
- iv. The maximum amount payable under this Insuring Clause is the sub-limit specified in the **schedule** during the **insurance period** which is part of and not in addition to the **indemnity limit**. A separate **deductible** will apply under this Automatic Coverage Clause, as specified in the **schedule**.

- b. in connection with a **claim** that is covered under this **policy** for extradition of such **insured**; or
- c. to mitigate any adverse effect on such **insured's** reputation by disseminating findings which exonerate the **insured person** from fault, liability or culpability in connection with a **claim** that is covered under this **policy**, provided such findings are made by a court with jurisdiction to finally dispose of such **claim** (including the outcome of any appeal in relation to such **claim**).

**Our** liability under this Automatic Coverage Clause shall only apply to that part of each **crisis loss** which is in excess of the **deductible** specified in the **schedule**.

The total amount payable by **us** under this Insuring Clause in respect of all **insureds** for all **public relations expenses** shall not exceed the sub-limit specified in the **schedule**. This sub-limit forms part of the **indemnity limit**, and is not payable in addition to that **indemnity limit**.

## 2.26 Retirement Cover

If the **company** does not renew this **policy** or replace it with any other insurance providing Management Liability coverage, and a **discovery period** is not purchased by the **insured** under Automatic Coverage Clause 2.6 (Discovery Period) of this **policy**, then any **insured person** will be automatically entitled to an 84 month **discovery period** at no additional premium after the expiry of the **insurance period** provided that the **insured person** retired from all employment or office prior to the expiry of the **insurance period**.

## 2.27 Software Reconstitution Costs

**We** agree to pay on behalf of the **company** any reasonable and necessary costs incurred, with **our** prior consent, for re-writing or correcting or amending the **company's** software programmes which have been damaged or modified in consequence of a **dishonest act** covered by this **policy**.

For the avoidance of doubt this Automatic Coverage Clause does not provide indemnity in respect of the costs of rectifying or amending errors or deficiencies in such software programmes that existed prior to the acts giving rise to the **loss**.

The maximum amount payable under this Automatic Coverage Clause is the sub-limit specified in the **schedule** during the **insurance period** which is part of and not in addition to the **indemnity limit**.

## 2.28 Spousal Liability Cover

**We** agree to pay on behalf of the **insured** all **loss** arising out of any **claim** against an **insured person's** legal or de facto spouse, domestic partner or companion in respect of **loss** arising from a **wrongful act, employment practice breach** or **trustee breach** committed by an **insured person** that is covered under this **policy**.

It is a condition of this Automatic Coverage Clause that any legal or de facto spouse, domestic partner or companion will observe and be subject to all applicable provisions of this **policy**.

# Section 3: Exclusions

## Exclusions Applying to all Insuring Clauses

**We** will not cover the **insured** for, or in connection with:

### 3.1 Bodily Injury / Property Damage

Any **claim** for bodily injury, sickness, mental anguish or emotional distress or disturbance, disease or death of any person howsoever caused or damage to or destruction of any tangible property, including loss of use thereof.

However, this exclusion shall not apply to any **claim** in respect of mental anguish or emotional distress or disturbance alleging an **employment practice breach**.

## 3.2 Breach of Professional Duty

Any **claim** or **incident** based upon, attributable to, or in consequence of any breach of professional duty or any **claim** or **incident** based upon, directly or indirectly attributable to or in consequence of the provision of any professional services and/or advice, or the failure to provide such services or advice.

This exclusion does not apply to **wrongful acts** by any **insured person** in their capacity as an **insured person** other than in the provision of professional services to a third party. This Exclusion does not apply to the extent that cover may be provided under Insuring Clauses 1.1 (c) (Trustee Breach) or 1.2 (e) (Trustee).

## 3.3 Defamation, Breach of Privacy and Intellectual Property

Any **claim** or **incident** arising from or attributable to libel, slander or defamation of character, injurious or malicious falsehood, invasion of privacy, breach of confidence or confidentiality, unlawful interference with a contract, intimidation, interference with trade by unlawful means, conspiracy to cause damage whether by lawful or unlawful means, infringement of copyright or design right whether registered or unregistered, infringement of patent, infringement of trademark, passing-off or any other infringement of intellectual property right or plagiarism or groundless threats of infringement proceedings.

## 3.4 Insolvency

Any **claim** or **incident** arising from or in any way connected with the insolvency, liquidation, bankruptcy, receivership or administration of the **company** or any **subsidiary** or any **outside entity** or its actual or alleged inability to meet any or all of its debts as and when they fall due.

## 3.5 Insured v Insured

Any **claim** which is brought by or on behalf of the **company** or any **outside entity** provided, however, that this exclusion shall not apply to:

- a. any **claim** brought or maintained by the company for contribution or indemnity, if the **claim** directly results from another **claim** otherwise covered under the **policy**;
- b. any **claim** brought or maintained on behalf of the **company** or any **outside entity** by any external administrator to the **company** or any **outside entity** (including but not limited to a liquidator, receiver, administrator or other external administrator) where such external administrator is appointed by a Court and such **claim** is brought without the solicitation, assistance or co-operation of any **insured person** or director, **officer, trustee**, governor or equivalent position in any **outside entity**, except when such solicitation, assistance or cooperation is required by law;
- c. any shareholder derivative action brought or maintained on behalf of the **company** or any **outside entity** without the solicitation, assistance or co-operation of an **insured person** or director, **officer, trustee**, governor or equivalent position in any **outside entity**, except when such solicitation, assistance or co-operation is required by law; or
- d. any **claim** instigated by any regulatory authority on behalf of the **company** or any **outside entity** without the solicitation, assistance or co-operation of an **insured person** or director, **officer, trustee**, governor or equivalent position in any **outside entity**, except when such solicitation, assistance or co-operation is required by law.

## 3.6 Major Shareholder

Any **claim** brought by any shareholder owning, directly or indirectly, at least 15% of the voting share capital of the **company** or any of its **subsidiaries** or any **associated company** and/or by any shareholder that has or had any Board representation on the **company** or any of its **subsidiaries** or any **associated company**.

## 3.7 Pollution

Any **claim** or **incident** arising from or in any way connected with:

- a. the actual, alleged or threatened discharge, dispersal, release, seepage or escape of **pollutants** into or upon land, building or **other property**, the atmosphere or any water course or body of water, whether such discharge, dispersal, release, seepage or escape is intentional or accidental; or

- b. any direction or request to test for, monitor, clean up, remove, contain, treat, detoxify or neutralise **pollutants**.

This Exclusion shall not apply to **claims** made by a shareholder of the **company** either directly or derivatively alleging damage to the **company** or its shareholders, but subject always to Exclusion 3.6 (Major Shareholder).

### 3.8 Prospectus Liability

Any claim made against any **insured** arising out of or in any way connected with:

- a. any **disclosure document** which contains an offer for the issue, sale, purchase or transfer of **securities**; or
- b. the making of any written or verbal representations in connection with a **disclosure document** or any offer referred to in (a).

For the purposes of raising or restructuring capital for the **company** or any **outside entity**, this exclusion shall not apply to private placements.

### 3.9 Superannuation Liabilities

Any **claim**:

- a. arising out of or in any way connected with the failure of the **company** to pay into, or collect contributions for, a **fund** as required by law and/or a **fund** trust deed; or
- b. for or in respect of **benefits**.

### 3.10 Wilful Conduct

Any **claim** or **incident** arising from or in any way connected with any **insured**:

- a. gaining any personal profit or advantage to which the **insured** was not legally entitled;
- b. having improperly **benefited** from any **securities** transaction as a result of information that is/was not available to other sellers or purchasers of such **securities**; or
- c. committing any wilful violation or wilful breach of any **Act of Parliament**.

For the purpose of determining the applicability of this exclusion, the conduct and knowledge of any **insured** shall not be imputed to any other **insured**.

This exclusion shall only apply if it is established through a judgment or any other final adjudication adverse to the **insured**, or any admission by an **insured**, that the relevant conduct did in fact occur.

### Exclusions Applying only to Insuring Clause 1.2 (a) (Crime)

In addition to Exclusions 3.1 to 3.10 above, the following Exclusions apply with respect to Insuring Clause 1.2 (a) (Crime) and any relevant Automatic Coverage Clause.

### 3.11 We will not cover the **company** in connection with any:

#### Consequential Loss

- a. Indirect or consequential **loss** of any nature, including but not limited to any loss of income, profits, or dividends not realised by the **insured** or any other individual or organisation, business interruption costs or denial of service including but not limited to computer time, access or use, wear and/or tear, gradual deterioration or damage from moth or vermin or mechanical or electronic equipment damage, breakdown or failure or other property damage.

#### Credit Risks

- b. **Loss** resulting from any of the following acts or omissions by **third parties** not acting in collusion with an **associated person**:
  - i. default under a **credit arrangement**; and/or
  - ii. **fraudulent alteration** or **forgery** of documents in connection with a **credit arrangement**.

## Dual Controls

- c. **Loss** connected with the issuing and drawing of cheques, account withdrawals or funds transfers sustained by the **company** by reason of the absence of or failure to have a clear segregation of duties and procedures in connection with the issuing and drawing of cheques, account withdrawals or fund transfers in excess of \$1,000 in value.

Such cheques, account transactions or fund transfers must be counter signed or authorised by another authorised officer who must, independently of the **employee** drawing the cheque, making account withdrawals or fund transfers, examine the supporting vouchers or requisitions or verify against an authorised payment list prepared and checked independently of the drawer of the cheque, or person making the account withdrawals or fund transfers.

## Fees, Costs or Expenses

- d. Fees, costs or expenses incurred by the **company** in establishing the existence or amount of any **loss** covered by this **policy** or in prosecuting or defending any legal proceeding or for any recall costs or costs associated with a recall.
- e. **Loss** caused by fire except as expressly provided in Automatic Coverage Clause 2.22 (Physical Loss or Destruction of or Damage to Money or Securities).

## Intellectual Property and Confidential Information

- f. **Loss** that is in any way connected with infringement or plagiarism of any copyright, trademark, registered design or patent, breach of any intellectual property right or breach of confidence, or any allegation of such conduct.

## Inventory Computation Losses

- g. **Loss** of which there is no proof or supporting documentation to prove a covered **loss** other than an inventory or profit and loss computation provided that where the **company** has proven to **our** satisfaction that an identifiable **associated person** has caused the **loss**, an inventory or profit and loss computation may be submitted as partial evidence in support of proof of a covered **loss** as required by Condition 4.9 (Notification of Direct Financial Loss).

## Liabilities to Third Parties

- h. Fines, penalties and liabilities to any persons other than as expressly provided for in the definition of **direct financial loss** or Automatic Coverage Clause 2.3 (Contractual Penalties).

## Loss Sustained After Knowledge

- i. **Loss** sustained after the **discovery** of any part of that **loss**.

## Non-Violent Crime

- j. **Loss** in respect of **other property** in the **premises** unless resulting from **theft** or attempted **theft** by a **third party** following the **third party's** entry to or exit from the **premises** by violent or forcible means or resulting from the **dishonest acts** of an **associated person**.

## Premises Damage

- k. **Loss** in respect of damage or destruction to any of the **premises**, howsoever caused.

## Prior or Subsequent Discovery of Loss

- l. **Loss discovered** before the commencement of this **policy** or **loss discovered** after the expiry date of this **policy** regardless of the time at which the act or acts giving rise to the **loss** occurred.

## Reckless Conduct

- m. **Loss** resulting from recklessness by the **company**.

## Securities

- n. **Loss** resulting from any dealing or trading in **securities**, futures or foreign currencies or **funds**.

## Voluntary Exchange or Purchase

- o. **Loss** arising out of the voluntary giving or surrendering (whether or not such giving and surrendering is induced by deception) of **money**, **securities** or **other property** in any exchange or purchase unless such **loss** is committed by an **associated person** acting alone or in collusion with others and is covered under Insuring Clauses 1.2 (a) (Crime).

## Theft or Fraud by Directors and Officers

- p. **Loss** arising out of or in any way connected with any fraudulent or dishonest activities, or involving collusion by or complicity, of:
  - i. a director who at the time of the **dishonest act** owns or controls more than 5% of the issued share capital of the **company**; or
  - ii. any shareholder who, at the time of committing such acts, had direct or indirect ownership of or control over more than 5% of the voting share capital of the **company** or any of its **subsidiaries** or any **associated company**.

### 3.12 We will not cover the **company** for or in connection with **direct financial loss**:

- i. first **discovered** prior to the commencement of the **insurance period**; or
- ii. first **discovered** after the end of the **insurance period**, or the **discovery period** if applicable; or
- iii. in any way connected with any **employee** or **third party** up to a period of 30 days from the time any director or **officer** (who is not in collusion with such **employee** or **third party**) had actual knowledge that the **employee** or **third party** had committed or was suspected of having committed any fraudulent or dishonest act, even if it does not constitute a **dishonest act** as defined; or
- iv. caused by any **employee** if a director or **officer** possessed at any time knowledge of any act or acts of theft, fraud or dishonesty committed by such **employee** prior to employment by the **company** provided the act(s) involved **money**, **securities** or property valued at \$10,000 or more or failed to make reasonable enquiries prior to employment of such **employee**; or
- v. arising out of or in any way connected with any fraudulent or dishonest activities, or involving collusion by or complicity, of any shareholder who, at the time of committing such acts, had direct or indirect ownership of or control over more than 5% of the voting share capital of the **company** or any of its subsidiaries or any **associated company**.

## Exclusions Applying Only To Insuring Clause 1.2 (c) (Entity)

In addition to Exclusions 3.1 to 3.12 above, the following Exclusions apply with respect to Insuring Clause 1.2 (c) (Entity) and any relevant Automatic Coverage Clause.

### 3.13 We will not cover the **company** in connection with any **claim** made against it for or in connection with:

- a. breaches of intellectual property rights, including but not limited to any actual or alleged plagiarism, misappropriation, infringement or violation of copyright, patent, trademark or trade secret;
- b. any actual or alleged breach of any law, whether statutory, regulatory or common law, relating to anti-trust, business competition, price fixing, unfair or restrictive trade practices, or tortious interference in any other party's business or contractual relationships;

- c. any actual or alleged contractual liability of the **company** under any express or implied contract or agreement. However, this exclusion shall not apply to a **claim** for an **employment practice breach** to the extent the **company** would have had such liability in the absence of such contract or agreement;
- d. fines or penalties or non-monetary relief;
- e. any obligation, or breach of an obligation, under any law or regulation providing for paid or unpaid leave of any kind or any **industrial instrument**; or
- f. any obligation pursuant to any law, regulation, or **industrial instrument** in respect of workers' compensation, occupational or workplace health and safety, disability **benefits**, unemployment **benefits** or compensation, unemployment insurance, retirement **benefits**, social security **benefits** or any similar law, regulation or **industrial instrument** whatsoever.

### Exclusions Applying Only To Insuring Clause 1.2 (f) (Taxation Investigation)

In addition to Exclusions 3.1 to 3.13 above, the following exclusions apply with respect to Insuring Clause 1.2 (f) (Taxation Investigation) and any relevant Automatic Coverage Clause.

#### 3.14 We will not cover the **company** for or in respect of any **tax audit costs** in connection with:

- a. Any improper, unwarranted or unjustified delay, refusal or failure to comply with any request made by or on behalf of the Inland Revenue Department, for the production of documents or the provision of information by the **company**.
- b. Inquiries from the Inland Revenue Department which are not related to an identified intention to conduct an audit or likely future audit.
- c. Any audit or investigation concerning income earned or where the source of income is outside New Zealand and its external territories or protectorates, or where the services giving rise to the audit are performed by persons or any corporate entity outside of New Zealand and its external territories or protectorates.
- d. Matters arising under customs legislation.
- e. Any audit or investigation, where notice or information as to their likely conduct was received by the **company** prior to the **insurance period**. Receipt of such communication will have occurred when the Inland Revenue Department makes communication with the **company** or any other person acting on its behalf.
- f. Any fraudulent act, error, omission or misrepresentation committed by or on behalf of the **company**.
- g. The imposition of, or seeking to impose, any tax, penalty tax, costs, interest, fine or any fees or expenses in connection with any criminal prosecution.
- h. An audit or investigation of a return of income that has not been prepared or reviewed by the **accountant** or **registered tax agent**, except where the return is a prescribed sales tax return or a prescribed payroll tax return.
- i. **Tax audit costs** incurred after the audit or investigation has been completed.

## Section 4: Conditions

### 4.1 Allocation

- a. Where a **claim** involves matters and/or parties which give rise to **loss** covered by this **policy** and matters and/or parties which do not, we will use our best efforts to agree with you a fair and proper allocation of the proportion covered under this **policy**, having regard to the relative legal and financial exposures attributable to covered and uncovered matters and/or parties. Only **loss** incurred by you or the **company** (if applicable), and in the case of **defence costs** those which are directly attributable to (where applicable) both your and the **company's** defence of such **claim**, is covered, subject always to the terms and conditions of this **policy**.

- b. If an allocation cannot be agreed it shall be determined by a Queen's Counsel to be mutually agreed upon or, in default of agreement, to be nominated by the then President of the New Zealand Bar Association. Such determination will be based upon written submissions only and will be final and binding. The Queen's Counsel shall make the determination based on the relative legal and financial exposures attributable to covered and uncovered matters and/or parties. Pending that determination **we** may at **our** sole discretion meet the **loss** on an interim basis. After the allocation has been determined, **you** or the **company** (whichever is appropriate) or both **you** and the **company** will refund to **us** any amount which **we** have paid that exceeds the entitlement under this **policy**. The costs of any reference to a Queen's Counsel under this Condition shall be borne by **us**.
- c. If the **deductible** applicable to Insuring Clause 1.1 (Cover for You) applies to part of a **loss** and the **deductible** applicable to Insuring Clause 1.2 (Cover for the Company) applies to part, then **we** and the **insured** must use best efforts to reach an agreement of a fair allocation of such **loss** between Insuring Clause 1.1 (Cover for You) and Insuring Clause 1.2 (Cover for the Company). If no agreement can be reached, the dispute will be referred to Queen's Counsel using the mechanism in (b) above for determination of the issue.

## 4.2 Alteration to Risk

- a. In addition to General Condition 6.16 (Alteration to Risk), in this **policy** only:
  - i. If during the **insurance period** a **transaction** takes place, the cover provided under this **policy** is amended to apply only to **wrongful acts, employment practice breaches** and **trustee breaches** committed prior to the effective date of the **transaction**.
  - ii. The **insured** shall give **us** written notice of the **transaction** as soon as practicable but not later than 30 days after the effective date of the **transaction**.
  - iii. If, during the **insurance period**, the **company** decides to make a public offering of its **securities** in any jurisdiction then as soon as the information is publicly available, the **company** shall provide **us** with any prospectus or offering statement for **our** evaluation and assessment of the increased exposure of the **insured**, and **we** shall be entitled to amend the terms and conditions of this **policy** and/or charge a reasonable additional premium reflecting the increase in exposure.
  - iv. At the **company's** request, prior to the public announcement of such **securities** offering, **we** shall evaluate and assess the increased exposure and advise of all necessary amendments to the terms and conditions of this **policy** and additional premium. In this event and at the request of the **company**, **we** will enter into a confidentiality agreement with the **company** relating to any information provided regarding the proposed **securities** offering.

## 4.3 Basis of Valuation

### a. Securities and Foreign Currency

**We** shall not be liable for more than the actual market value of **securities** or foreign currency determined by their closing market price or value on the day that the **loss** was **discovered** or the actual cost of its replacement, whichever is the lesser value.

### b. Precious Metals

**We** shall not be liable for more than the actual market value of precious metals determined by their mid-spot rate on the last **business** day prior to the day the **loss** was **discovered** or in the event of the **discovery** of the **loss** after the close of the market, by their mid-spot rate on the day the **loss** was **discovered**.

### c. Other property

The lesser of the actual value of **other property** or the actual cost of repairing **other property** or replacing same with property or material of like quality and value. **We** may, at **our** election, pay such actual cash value or make such repair or replacement.

**We** may, with the **insured's** consent, settle any **claim** by the **insured** in respect of **loss** of property, with the owner of that property. Any property for which **we** have indemnified the **insured** becomes **our** property.

#### 4.4 Change of Control of Insured

If during the **insurance period** there is a **change of control** this **policy** shall terminate at 4.00pm on the date on which a **change of control** takes effect and the **benefits** of this **policy** shall cease absolutely at that time, subject only to paragraph (b) below. In the event of a **change of control**:

- a. the **insured** shall forthwith give notice of such to **us**;
- b. no **claim** will be payable under this **policy** unless it is in respect of **loss** covered by this **policy** resulting from acts which occurred exclusively before the date on which **the change of control** takes effect and which was first **discovered** within 30 days of that date; and
- c. **We** shall be entitled to a pro-rata proportion of the premium (subject to any adjustment required by the terms of this **policy**) for the time during which the **policy** has been in force.

#### 4.5 Claim Notifications

In addition to General Condition 6.19 (Claims Notification), upon the **insured discovering** a **loss** or potential **loss** covered by Insuring Clause 1.2 (a) (Crime) the **insured** must:

- a. take immediate steps to ascertain the full extent of any **loss**;
- b. inform **us** of any further **losses** as they are **discovered**;
- c. as soon as practicable but in any event no later than 30 calendar days thereafter, submit full particulars of the **loss** in writing to **us**;
- d. provide **us** with any reasonably required proof and information in respect of the **loss**; and
- e. allow **us** or **our** nominee to inspect the **insured's** accounting records and any accountant's report on those records providing the inspection is reasonably connected with the **loss**.

#### 4.6 Deductible

Unless otherwise stated, the **deductible** will apply to each and every **loss** net of any amounts recovered from any person.

#### 4.7 Indemnity Limit

Subject to Automatic Coverage Clause 2.1 (Automatic Reinstatement for Insured Persons), **our** total liability under the **policy** in respect of any single **claim** and in the aggregate from all **claims** shall not exceed the **indemnity limit**.

**We** may at any time pay the **indemnity limit** applying to any one **claim** or series of **claims** (after deduction of sums already paid) or any lesser amount for which such **claims** can be settled and will then have no further liability in connection with such **claims**.

#### 4.8 Jurisdictional Limit

The insurance provided by this **policy** shall apply only to **dishonest acts** committed within the Jurisdictional Limit specified in the **schedule** unless otherwise stated.

#### 4.9 Notification of Direct Financial Loss

The **insured** must give written notice to **us** of any **direct financial loss** as soon as practicable within the **insurance period** or within the **discovery period** if applicable, but in any event no later than 60 days after any **direct financial loss** is first **discovered**.

The **insured** must, at its own cost, also:

- a. Provide **us** with affirmative proof of the **direct financial loss** with full particulars within 6 months of the **direct financial loss** being first **discovered**; and
- b. Provide **us** with all requested information and documents and co-operate with **us** in all matters pertaining to the **direct financial loss**.

#### 4.10 Preservation of Right to Indemnity

In the event and to the extent that the **company** is legally permitted or required to indemnify an **insured person** in respect of a **claim**, but for whatever reason fails or refuses to do so, then **we** shall pay on behalf of the **insured person** any **loss** arising from the **claim**.

In such event, the **deductible** applicable to the Insuring Clause 1.2 (b) (D&O / Company Reimbursement) shall be paid by the **company** to **us**. However, the amount of the **deductible** will not be payable by the **company** if the **company** is unable to pay the amount of the **deductible** due to insolvency.

#### 4.11 Prior Enquiries

The **insured** must make all reasonable enquiries and take all reasonable steps to satisfy itself about the honesty and good character of each **employee** before offering him/her employment, including but not limited to checking with all referees and recent relevant employers.

#### 4.12 Prosecution for Dishonest Acts

The **insured**, when required by **us**, and at **our** expense, must use all diligence in prosecuting or assisting to prosecute any person in respect of whom a **loss** arising from a **dishonest act** is paid under this **policy**.

#### 4.13 Recoveries

Where any amount is recovered from any person in respect of a **loss**, whether or not the **indemnity limit** has been or may be exhausted, that amount will be distributed (after deducting the costs and expenses of the recovery) in the following order of priority:

- a. First, to the **insured** in respect the **deductible**;
- b. Secondly to **us** in respect of any and all amounts paid or payable by **us** under this **policy**;
- c. Thereafter to the **insured** in respect of any part of **loss** which is uninsured for whatever reason.

#### 4.14 Severability and Non-Imputation

No state of mind or knowledge possessed by any one **insured person** will be imputed to any other **insured person** for the purpose of determining whether any provision in this **policy** applies.

However, any state of mind or knowledge possessed by any past or present chairman of the board, chief executive officer, director, chief operating officer or chief financial officer of the **company** will be imputed to the **company**.

#### 4.15 Single Policy / Single Loss

- a. If the **insured** comprises more than one person, this **policy** shall nevertheless be and remain a single contract of insurance for the benefit of the **insureds** as joint-**insureds** except as provided in General Condition 6.28 (Fraudulent Claim).
- b. Where **loss** results from a series of related, continuous or repeated **dishonest acts** of an **employee** or a **third party** the **loss** shall be treated as one **loss** and in particular all **loss** as a result of the **dishonest acts** of any one **employee** or **third party** acting alone or in collusion with others will be treated as one **loss** regardless of the means by which the **loss** was caused.

## Section 5: Definitions

For the purposes of this **policy** only:

- 5.1 **Accountant** or **registered tax agent** means a person who is engaged by the **company** who is not an **insured** and is recognised by Chartered Accountants Australia New Zealand (formerly the Institute of Chartered Accountants) or similar, or any other person registered by the Inland Revenue Department as a tax agent.

**5.2 Act of Parliament** means any Act of the New Zealand Parliament, including any amendment to or re-enactment, and any code, rules, regulations, bylaws or other subordinate legislation made under such Act.

**5.3 Associated company** means any company in which the **company** or any **subsidiary** owns on or before the inception of the **insurance period** at least 25% of the issued and outstanding voting shares.

**5.4 Associated person** means any natural person, other than a director or partner, who has entered into or works under a contract of service with the **company** and whom the **company** compensates by salary, wages and/or commissions and whom the **company** has the right to govern and direct in the performance of such service. It includes any:

- a. director or trustee of the **company** but only in respect of **dishonest acts** performed while acting within the scope of the usual duties of an **employee** of the **insured**;
- b. part-time or temporary **employee** performing the duties of an **employee** under the **company's** supervision;
- c. retired **employee** appointed by the **company** under a written contract whom the **company** governs and directs in the performance of their service as an **employee**;
- d. student, secondee or volunteer pursuing studies, gaining work experience or performing the duties of an **employee** under the **company's** supervision;
- e. ex-**employee** of the **company**, for a period not exceeding 90 days following the formal termination of their employment with the **insured** (other than where such termination is as a result of a **dishonest act**); or
- f. person provided to the **insured** by an employment agency (or similar source) to perform the duties of an **employee** under the **insured's** supervision.
- g. **employees** of any company or firm authorised and retained by the **company** to perform normal administrative services which the **company** outsources to such company or firm provided that:
  - i. such services are provided under a written contract;
  - ii. the **company** has the right to audit the performance of such services;
  - iii. the **company** can demonstrate that the outsourced company or firm has been checked for competency, financial stability and honesty prior to the retention of such company or firm; and
  - iv. any indemnity provided is in excess of any valid and collectible indemnity, contractual or otherwise, available to the company or firm or to the **insured** or which would be valid and collectible except for the application of an excess or the exhaustion of a policy limit.

**Associated person** does not include any person who is or acts on behalf of any external auditor, external accountant, broker, investment adviser or investment manager, consignee, contractor or other similar agent or representative unless specifically agreed by **us** and endorsed to this **policy**.

**5.5 Benefits** means any amount payable including pensions, welfare, shares or share options, charity, shares or share options for past, present or future **employees** (not including directors, partners or trustees) to a beneficiary of a **fund** by the **trustee** under the rules governing the **fund**.

**5.6 Business** means the business of the **insured** specified in the **schedule**.

**5.7 Change of control** means the effective consolidation, amalgamation, merger, transfer, assignment, pledge or sale of a majority of the assets or shareholding of the **company** with or to any other entity which was not an **insured** at the commencement of this **policy** or became an **insured** during the **insurance period**.

**5.8 Claim** means:

- a. any formal administrative or regulatory proceeding against the **insured**, including any arbitration, mediation, conciliation or alternative dispute resolution proceeding, alleging an **employment practices breach, trustee breach, wrongful act, or dishonest act**,
- b. any civil proceeding brought by a third party against the **insured** for recovery of compensation or damages;

- c. any written or verbal demand by a third party upon the **insured** for monetary relief.
- d. any circumstance that the **insured** becomes aware of, and the **insured** or a reasonable insured should consider may give rise to any of (a), (b) or (c) above.

All **claims** which arise out of or are attributable to or are in any way connected with a single **wrongful act, employment practice breach, trustee breach or dishonest act** shall constitute a single **claim** for the purposes of this **policy**. A single **wrongful act, employment practice breach, trustee breach or dishonest act** means all respective **wrongful acts, employment practice breaches, trustee breaches or dishonest acts** which are related or form part of a series of related conduct or form part of a course of conduct that is not entirely unconnected, different and/or unrelated.

**5.9 Company means:**

- a. the entity or entities specified in the **schedule**; and
- b. any **subsidiary or associated company** in existence at the commencement of the **insurance period**.

**5.10 Credit arrangement** means any credit agreement, extension of credit or hire purchase agreement, loan or transaction in the nature of a loan, lease or rental agreement, invoice, account or otherwise evidence of debt, payments made or withdrawals from any customer's account involving items which are not finally paid for any reason.

**5.11 Crisis event** means any of the following unforeseen events where, in the reasonable opinion of the chief executive officer (or equivalent) of the **company**, the event has the potential to cause an imminent decrease of greater than 30% of the total consolidated annual revenues of the **company** if left unmanaged:

- a. the sudden, unexpected death or disability of any executive;
- b. loss of a major customer, contract or credit facility;
- c. **employee** workplace violence;
- d. the first apparent unauthorised intrusion into any of the **company's** computer facilities;
- e. a recall or boycott of any product;
- f. a man-made disaster; or
- g. any criminal or fraud investigation.

**Crisis event** does not include an event that affects a **company's** industry in general, rather than a **company**, specifically.

**5.12 Crisis loss** means the reasonable and necessary fees, costs and expenses paid by the **company** for external crisis management services provided in response to a **crisis event** within the first thirty (30) days after the event.

**5.13 Deductible** means the amounts specified in the **schedule**.

**5.14 Defence costs** means reasonable costs, charges, fees (including but not limited to legal counsel's fees) and expenses reasonably incurred by the **insured**, as applicable, with **our** prior written consent in investigating, defending or settling a **claim**. It does not include regular or overtime wages, salaries or fees of the directors, **officers or employees** of the **insured** incurred in attending, defending, investigating or monitoring **claims**, any internal or overhead expenses of the **insured** or the cost of the **insured's** time or any loss of earnings or profit. In respect of Automatic Coverage Clause 2.18 (b) (Official Investigations and Inquiries – Cover for Company) and Automatic Coverage Clause 2.24 (Positive Defence Costs For Claims) **defence costs** means the reasonable costs of the **insured's** legal representation reasonably required for the attendance at any official investigation, examination or inquiry.

**5.15 Direct Financial Loss** means direct financial loss to the **company** directly caused by the loss of **money, securities or other property** owned by the **company** or in the care, custody or control of the **company** at the time of that loss and for which the **company** is legally liable.

**Direct financial loss** does not include wages, salaries or other remuneration or benefits paid by the **company** to its directors, **officers** and **employees** or any amount excluded by the exclusions applicable to Insuring Clause 1.2 (a) (Crime).

**5.16 Disclosure document** means any prospectus, information memorandum, registration statement or similar document regardless of whether or not it has been, or is required to be, filed or registered with the New Zealand Registrar of Financial Services Providers or any other similar authority in any other jurisdiction.

**5.17 Discovery and discovered** means the time at which any **management personnel** (excluding a person whose **dishonest acts** have resulted in **loss**) first becomes aware of facts which would cause a reasonable person to believe that a **loss** had or was likely to have been sustained as a result of a **dishonest act** whether or not the amount of such **loss** or the means by which the **loss** was or may have been caused are known. **Discovery** by one **management personnel** constitutes **discovery** on behalf of each and every **insured**.

**5.18 Discovery period** means: the period of time specified in Automatic Coverage Clause 2.6 during which time written notice may be given to **us** of any:

- a. **claim** which is first made against the **insured** for a **wrongful act** committed or allegedly committed; or
- b. **direct financial loss** which is first **discovered** and results from **dishonest acts** committed; prior to the end of the **insurance period**.

The **discovery period** is not available where Condition 4.4 (Change of Control of Insured) applies.

**5.19 Dishonest act** means any act of dishonesty including but not limited to **theft**, criminal damage, **forgery**, counterfeiting, fraudulent creation, **fraudulent alteration**, **electronic fraud** and **incoming cheque forgery**. **Dishonest act** also includes the fraudulent use of any credit, debit or charge card issued to the **insured** or any **associated person** for **business** purposes.

**5.20 Electronic fraud** means:

- a. **Theft** where the property in question is subject to the direct or indirect control of a computer system caused by manipulation of computer hardware or software programmes or systems; or
- b. **money** taken from an account maintained by the **insured** at a financial institution (from which the **insured** or a person or organisation authorised by the **insured** may request the transfer, payment or delivery of **funds**) following fraudulent electronic, telegraphic, tested facsimile, tested telex, telephone or written instructions to debit such account and to transfer, pay or deliver **funds** from such account and which instructions purport to come from the **insured** or a person or organisation authorised by the **insured** to issue such instructions.

**5.21 Employee** means any person who is a past, present or prospective employee of the **insured** under a contract of service or apprenticeship on a full-time, part-time or casual basis.

**Employee** does not include consultants, independent contractors, secondees to or agents of the **company** or their respective employees (including the employees of labour-hire agencies).

**5.22 Employee plan** means any plan, foundation or body established and maintained by the **insured** to provide **benefits**.

**Employee plan** does not include any sports or social club or organisation.

**5.23 Employment practice breach** means any **wrongful act** in relation to any of the following: employment-related actual, or alleged, unfair or wrongful dismissal from, termination or discharge of employment (either actual or constructive, including breach of an implied contract), misrepresentation, wrongful failure to employ or promote, failure to grant tenure, discrimination, harassment, retaliation (including lockouts), humiliation, defamation, invasion of privacy, wrongful deprivation of career opportunity, wrongful demotion or negligent **employee** evaluation (including the provision of negative or defamatory statements in connection with an **employee** reference) which relate solely to the **company** and its past, present or prospective **employees**.

**5.24 Employment-related benefits** includes but is not limited to:

- a. non-monetary benefits including but not limited to the allocation of a company car, travel allowance, mobile or landline telephone, medical or life insurance expenses, education and training allowances, and equipment allowances;

- b. stock, shares, stock options, share options or any entitlement or right under any **employee plan**;
- c. participation in any stock, share option or share option plan, or participation in any **employee plan**;
- d. severance or redundancy payments or entitlements;
- e. any benefit, payment or entitlement of any kind in respect of paid or unpaid leave;
- f. bonus or incentive payments, or any entitlement or right under a bonus or incentive plan (which, for the avoidance of doubt, does not include any payments, entitlement or right under any commission scheme);
- g. payments or contributions in respect of any provident, benefit, superannuation, pension or retirement fund, or any other account, fund, scheme or plan intended to provide benefits, in whole or in part, at retirement or a particular age, or on the happening of a particular event; or
- h. any amount the **company** pays or is ordered to pay pursuant to any determination or settlement in respect of an allegedly unfair contract, notwithstanding that it acted in accordance with the terms of the employment contract.

**5.25 Extortion** means any threat made to any director, partner, trustee, **officer** or **employee** of the **company** to make any accusation against any person, to disclose something about any person or to cause serious damage to property or endanger the safety of any person with intent:

- a. to cause the person who is the victim of the threat is made to act in accordance with the will of the person making the threat; and
- b. to obtain any financial benefit or to cause loss to any other person.

For the avoidance of doubt **extortion** includes ransom demands in relation to the kidnapping or abduction of a person.

**5.26 Forgery** means the handwritten signing or endorsing of the name of a genuine person without authority and with intention to deceive. It does not include the signing in whole or in part of one's own name, with or without authority, in any capacity, for any purpose. Mechanically or electronically produced or reproduced signatures are to be treated in the same manner as hand-written signatures.

**5.27 Fraudulent alteration** means a material alteration for a fraudulent purpose by any person.

**5.28 Fund** means any single employer superannuation fund established for the benefit of **employees**. **Fund** does not include any industry or master superannuation funds.

**5.29 Incident** means a matter in which the **insured's** reputation and skill in the conduct of the **business** is brought into question.

**5.30 Incoming cheque forgery** means the **fraudulent alteration** of, on or in any cheque or draft drawn on any bank or by any company upon itself or any cheque or written order or direction to pay a verifiable sum representing **money** drawn by any entity itself, or any warrant drawn by any entity which the **insured** receives at the **premises** in payment or purported payment for tangible property sold and delivered or for services rendered.

**5.31 Indemnity limit** means the amount specified in the **schedule**.

**5.32 Industrial instrument** means:

- a. an award, collective or individual agreement, minimum wage order or any other instrument made or authorised under statute; or
- b. any other collective agreement; which regulates the terms and conditions of employment.

**5.33 Insurance period** means the period specified in the **schedule**.

**5.34 Insured** means each **insured person**, the **company** or both.

**5.35 Insured person** means:

- a. any past, present or future director, secretary, **officer**, **employee** of the **company**, or

- b. any **trustee**, or
- c. any natural person who by virtue of any applicable legislation or law is deemed to be a director or **officer** of the **company**.

**Insured person** does not include:

- a. a receiver, receiver and manager, official manager, liquidator, administrator, trustee or other person administering a compromise or scheme of arrangement made between the **company** and any other person or persons; or
- b. any company, organisation or other body corporate.

**5.36 Internet error** means any unintentional:

- a. infringement or unauthorised use of intellectual property rights which includes but is not limited to breach of copyright, trademark, registered design or patent or plagiarism; or
- b. unintentional defamation;
- c. unauthorised use of names (including domain names), trade names, trade address, service marks, service names, titles, slogans, formats, characters, character names, characterisations, plots, musical compositions, performances, logos, artwork, graphics, photographs or program materials; or
- d. passing off; or
- e. breach of confidentiality or infringement of any right to privacy, including any alleged breach of the terms of the Privacy Act 1993; or
- f. misuse of information which is either confidential or subject to statutory restrictions on use; or
- g. transmission of any computer virus, programme or code that causes loss or damage to any computer system and/or prevents or impairs any computer system from performing and/or functioning accurately and/or properly; or
- h. belittling of a product or work (whether completed or not) of others; or
- i. unauthorised taking for use of any advertising idea, material, slogan, style or title of others.

**5.37 Loss** means the total amount which a person or entity becomes legally obliged to pay in respect of a **claim**. **Loss** includes, but is not limited to damages, judgments, settlements, and any award of costs.

However, **loss** does not include:

- a. fines or penalties (whether civil or criminal) imposed by law, punitive, aggravated, exemplary or multiple damages, or matters uninsurable under the laws governing this **policy**;
- b. taxes;
- c. back pay, or any compensation or damages calculated by reference to the back-payment of remuneration, where the **company** is ordered by the relevant court or tribunal to reinstate the claimant as an **employee**;
- d. front pay, future loss, future damages, future compensation or future economic relief (in all cases, considered from the point in time that reinstatement was to occur) where the **company** is ordered by the relevant court or tribunal to reinstate the claimant as an **employee** but refuses or fails to do so for whatever reason;
- e. any employment-related **benefits** or amounts calculated by reference to any employment-related benefits;
- f. costs incurred by the **company** to modify any building or property, or to provide any service, in order to make such building or property, or make any service more accessible or accommodating to any disabled person;
- g. costs incurred by the **company** in connection with any educational, corrective, sensitivity or other programme, policy or seminar relating to any **employment practice breach**;

- h. **benefits;**
- i. amounts ordered to be paid pursuant to a determination by a Court, Commission or other tribunal in relation to an unfair contract; or
- j. **defence costs.**

For the purposes of Insuring Clause 1.2 (a) (Crime), **loss** means only **direct financial loss**.

For the purposes of Insuring Clause 1.2 (f) (Taxation Investigation), **loss** means only **tax audit costs**.

- 5.38 Management personnel** means the **company's** directors, trustees, partners, members of a management board or those **officers** who report directly to the **company's** directors, trustees, partners or management board.
- 5.39 Money** means only local or foreign currency, coins, bank notes, cheques, traveller's cheques, registered cheques, postal orders, money orders and bullion.
- 5.40 Officer** means any company secretary, and any **employee** who is concerned in, or takes part in, the management of the **company** regardless of the name that is given to their position.
- 5.41 Other property** means any property of any kind other than **money** and **securities**.
- 5.42 Outside entity** means any **associated company** or any other company, corporation, partnership, joint venture or organisation which is named in the **proposal** or listed by endorsement to this **policy** or **schedule**.
- 5.43 Policy** means this Management Liability Policy consisting of this policy wording, the DUAL New Zealand Mind the Gap General Conditions and Exclusions, the **schedule**, the **proposal** and any endorsement attaching to and forming part of the policy wording.
- 5.44 Pollutants** means any substance, solid, liquid, gaseous or thermal irritant or contaminant including, but not limited to smoke, vapours, soot, fumes, acids, alkalis, chemicals and waste materials. Waste materials include, but are not limited to, recycled, reconditioned or reclaimed materials.
- 5.45 Premises** means the interior portion of any building owned or occupied by the **company** and in which it conducts its business.
- 5.46 Proposal** means the **insured's** proposal made to us, together with any attachments and material referred to therein.
- 5.47 Public relations expenses** means any reasonable fees, costs and expenses of a public relations consultant retained with **our** prior written consent (which shall not be unreasonably delayed or withheld).
- 5.48 Retroactive date** means the date specified in the **schedule**.
- 5.49 Schedule** means the latest schedule to this **policy** issued by **us**.
- 5.50 Securities** means any shares, preference shares, stocks, debentures, warrants, options, bonds, promissory notes or other equity or debt security.
- 5.51 Subsidiary** means:
- a. any entity which, at the commencement of the **insurance period**, is a subsidiary of the **company** as defined in section 5 of the Companies Act 1993 (or any equivalent amendments or re-enactments of that provision); or
  - b. any entity which, at the commencement of the **insurance period**, by virtue of any applicable legislation or law, is deemed to be a subsidiary of the **company**; or
  - c. any entity over which, at the commencement of the **insurance period**, the **company** is in a position to exercise effective direction or control by means of a direct or uninterrupted succession of **subsidiaries** as defined in clauses (a) or (b) above; or
  - d. any entity with total gross assets in value of 30% or less of the total gross assets of the **company** which becomes a **subsidiary** of the **company** as defined in clauses (a), (b) or (c) above after the commencement of the **insurance period**; or

- e. any entity with total gross assets in value greater than 30% of the total gross assets of the **company** which becomes a **subsidiary** of the **insured** as defined in clauses (a), (b) or (c) above after the commencement of the **insurance period**, provided that within 60 days of the completion of the acquisition of such entity the **insured** provides **us** with full particulars of the entity and agrees to the imposition of any additional terms, including any additional premium, that **we** may require. If any part of this clause is not complied with the entity shall not be an **insured** under this **policy**.
- 5.52 Tax audit costs** means any reasonable fees, charges or disbursements of an **accountant** or **registered tax agent** or any other consultant who is engaged by the **company** for work undertaken in response to a **tax audit notice**.
- 5.53 Tax audit notice** means any notification from the Inland Revenue Department relating to the **company's** liability to pay income tax, fringe benefits tax, capital gains tax, goods and services tax or employer superannuation contribution tax (including the amount of any such tax) only.
- 5.54 Theft** means the unlawful taking, including by violence or threat of violence, of **money, securities or other property** to the permanent deprivation of its owner.
- 5.55 Third party** means any natural person who is not a director, partner, **officer**, trustee or **employee** of any **insured** and does not have and does not provide services under any contract of service, written or unwritten, with any **insured** and is not acting in collusion with any **employee**.
- 5.56 Trustee** means any **insured person** or the **company** if validly appointed to act as, and while acting in the capacity of, a trustee of a **fund**.
- 5.57 Trustee breach** means any **wrongful act** committed or allegedly committed:
- by an **insured person** in their capacity as a **trustee**, or as a director or **officer** of the **company** acting as corporate **trustee**;
  - by the **company** acting in its capacity as corporate **trustee**; or
  - by any other person for whom an **insured person** referred to in (a) or the **company** referred to in (b) is legally liable; but only in respect of the administration of a **fund**.
- 5.58 Transaction** means any one of the following events:
- the **company** consolidates with or merges into or sells all or substantially all of its assets to any other person or entity or group of persons and/or entities acting in concert; or
  - any person or entity, whether individually or together with any other person or persons, entity or entities becomes entitled to exercise more than 50% of the rights to vote at general meetings of the **company** or control the appointment of directors who are able to exercise a majority of votes at Board meetings of the **company**.
- 5.59 We/us/our** means DUAL New Zealand Limited for and on behalf of Certain Underwriters at Lloyd's.
- 5.60 Wrongful act** means any breach of duty, breach of trust, neglect, error, omission, misstatement, misleading statement, or other act committed or attempted by:
- any **insured person**, individually or otherwise, solely because of their status as a director, **officer** or **employee** in the course of his or her duties to the **company** or **outside entity**; or
  - the **company**.
- 5.61 You/your** means the **insured**.

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