Under pressure – D&O insurance in a hard market

Trends and insights, September 2020

Institute of DIRECTORS NEW ZEALAND

MinterEllison RuddWatts

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1. Introduction

Australia and New Zealand are in the midst of the most volatile and restrictive Directors & Officers Liability (D&O) insurance market in its history – commonly known as a 'hard' market in the industry. This is not only impacting listed companies, but is flowing through to private companies and not-for-profit organisations. And there are no signs of things getting better anytime soon.

D&O insurance is a critical protection mechanism for any strong corporate governance regime that ensures the sustainability of boards and ultimately the organisations they represent. While D&O insurance remains available, directors and officers need to be aware of the restrictive conditions now applying to this segment of the insurance market and the effects this may have on the coverage afforded. It is important to ensure that policies continue to be relevant and effective in the ever-changing risk environment faced by directors. In this publication, we highlight key D&O insurance issues and risks directors need to know about and discuss developments since our 2019 publication D&O insurance – trends and issues in turbulent times.

How many directors have D&O insurance?

The IoD's 2020/21 Directors' Fees Report found that 78.5 percent of organisations provided directors with liability insurance (up from 76%).

78.5%

2. Market developments

The hardening of the D&O insurance market in Australia and New Zealand is impacting all organisations.

While securities class action litigation has been the largest contributor to D&O insurance losses, there have also been other regional factors which have driven this momentum, such as the FMA / RBNZ culture and conduct reviews of banks and life insurers in New Zealand, the Australian Royal Commission into financial services, and an emerging class action and litigation funding environment. The number of D&O claims (and reported circumstances) regionally are exceeding the total insurance market premium pool by a significant margin. As a result, renewals for D&O insurance are being increasingly scrutinised as insurers seek to rebalance their position through premium adjustments to compensate for claims and related costs. It is anticipated that these hard market conditions will continue into the foreseeable future.

This challenging environment has led to companies examining their D&O insurance to ensure they are purchasing a programme with sustainable limits, coverage and premiums for the risks faced. In a soft market, an organisation's goal will be to secure the broadest coverage, and highest limits, possible at reasonable premiums. This has historically been available as insurers have been willing to offer wide cover and extensions as they compete for business and look to expand their portfolios. However, in today's hard market, the opposite is occurring – insurers are seeking to restrict capacity and coverage, resulting in companies having to determine the scope and level of cover they need, while adhering to their own budgetary constraints.

Compounding the difficult market conditions is the number of insurers, both locally and overseas, who have ceased providing D&O insurance, particularly to dual-listed entities. Capacity available in the London D&O market alone for those companies with an ASX presence is 50% less than it was in 2017. In addition, a significant number of insurers across Australasia have withdrawn from insuring this class of insurance for listed companies, or quoting such onerous restrictions on coverage that it effectively amounts to a de facto withdrawal.

> "Market reports estimate that the D&O insurance industry has under-reserved for losses by somewhere between $3bn to $5bn in recent years – despite a significant rise in premiums in recent years"
>
> **Steve Walsh**
> Chief Client Officer, Marsh Ltd

Some companies and organisations may therefore face the possibility of a D&O renewal outcome where there will be a reduced overall policy limit with increased retentions, reduced coverage (especially if Companies Securities cover is purchased), and a year-on-year premium uplift. The challenge for companies in this environment is to find the right balance between the rising cost of insurance and having the right level and mix of protection for directors and the organisation.

COVID-19

The COVID-19 pandemic continues to impact societies and economies around the world. From a D&O insurance perspective, it has added further pressure to an already disrupted marketplace with some insurers limiting their appetite to take on new D&O business, especially for certain sectors.

Insurers are now asking detailed questions around the financial position of a company, including solvency, business continuity plans, the pandemic's impact on employees and customers, and for listed companies, how disclosures to shareholders are being managed. In some instances, insurers are tightening coverage provisions with the application of insolvency exclusions in cases where they have concerns around the financial condition of a company. However, New Zealand insurers are not yet applying COVID-19 or pandemic exclusions on D&O policies.

Not-for-profit organisations

Although the major impacts of the changing climate in the liability insurance market are currently being felt strongly by larger corporations and listed companies, it is important to consider the potential for this to cascade down to more vulnerable sectors including not-for-profit organisations.

The insurance industry in New Zealand was largely sympathetic to the plight of not-for-profit clients during the thick of the initial impact of COVID-19. There are some exceptions to this based on the size of the organisation and the activities they are involved in, however for the main part, insurers provided roll-over renewals with expiring premium and terms. Some insurers also automated the renewal process to assist clients during this tough period.

This is vastly different to the experience of similar organisations in other jurisdictions and there have been some concerning experiences reported in Australia, with some not-for-profit clients experiencing large premium increases and much higher self-retention levels for D&O Insurance.

Many of these organisations are already suffering from the consequences of COVID-19 with a reduction in ability to raise funds for their causes and this additional cost may result in their sacrificing some of the services they provide.

Whilst we have seen a very different approach locally, it is now time to think about strategies for dealing with the possibility that insurers in New Zealand may take a less compassionate approach to renewals in the coming year.

Often smaller organisations will have a management policy which includes D&O insurance along with a variety of other covers. Management policies will often include Statutory Liability, and in some cases Employment Disputes, insurance. Both of these covers have a high claims frequency already and the potential to be impacted by claims related to COVID-19 in respect of the handling of employment and health and safety during the pandemic. This creates the potential for inflation of management liability package premiums and self-retention levels in the near future.

What's the future of class actions in New Zealand?

With the prevalence of securities class action litigation in Australia, and the effect this environment has had on the Australasian D&O insurance market, is it likely that such actions will become commonplace in New Zealand?

While the New Zealand securities class action environment is still evolving, there are signs that it could be moving in the same direction as Australia. These signs include:

- The establishment and active engagement of several litigation funders in New Zealand.
- Introduction of amended continuous disclosure rules for listed companies from July 2019, mirroring aspects of the Australian continuous disclosure rules. In particular, the introduction of a new constructive knowledge element with a requirement to disclose promptly and without delay any 'material information' which a director or senior manager ought reasonably to have known.
- The reactivation of the Law Commission project into Class Actions and Litigation Funding announced in June 2019.
- The September 2019 Court of Appeal decision in *Ross v Southern Response* allowing for an 'opt out' class action to proceed. An 'opt out' class action enables individuals with the same type of claim as the plaintiffs to automatically be included in the action, unless they 'opt-out' from doing so. This is a similar regime to that available for class action litigation in Australia.
- In the last quarter of 2019, there were four class actions announced or proposed in New Zealand with support from litigation funders. The actions arise from the failure of two listed companies and allege breaches of continuous disclosure obligations, as well as representations made in IPO documents.
- So far in 2020, a class action has been launched on behalf of the IPO investors in Intueri Education Group, supported by a New Zealand litigation funder. In August, a class action was initiated on behalf of owners of a leaky 99 unit apartment building, funded by an Australian litigation funder. Suggestions have also been made that Work and Income NZ may face a class action for allegedly wrongly advising benefit applicants that they were not entitled to support before their redundancy payments ceased.

New Zealand insurers are wary of these developments and are looking at the trends in Australia for guidance on the possible claim settlements that could be sought. With claims payments continuing to outweigh the D&O premium pool across all sectors in Australia, the cautious approach of local insurers to offer D&O insurance is likely to continue for some time to come.

> "We are seeing a noticeable increase in the number of 'class action' proceedings against directors, supported by third party funders on behalf of investors. This is a result of the courts' relaxation of the rules concerning litigation funding and a new willingness to permit class actions to be brought for the benefit of people who do not specifically 'opt in' to a claim. At the same time, directors of financial services companies are under increasing regulatory scrutiny."
>
> **Andrew Horne**
> Partner, MinterEllisonRuddWatts

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What's litigation funding?

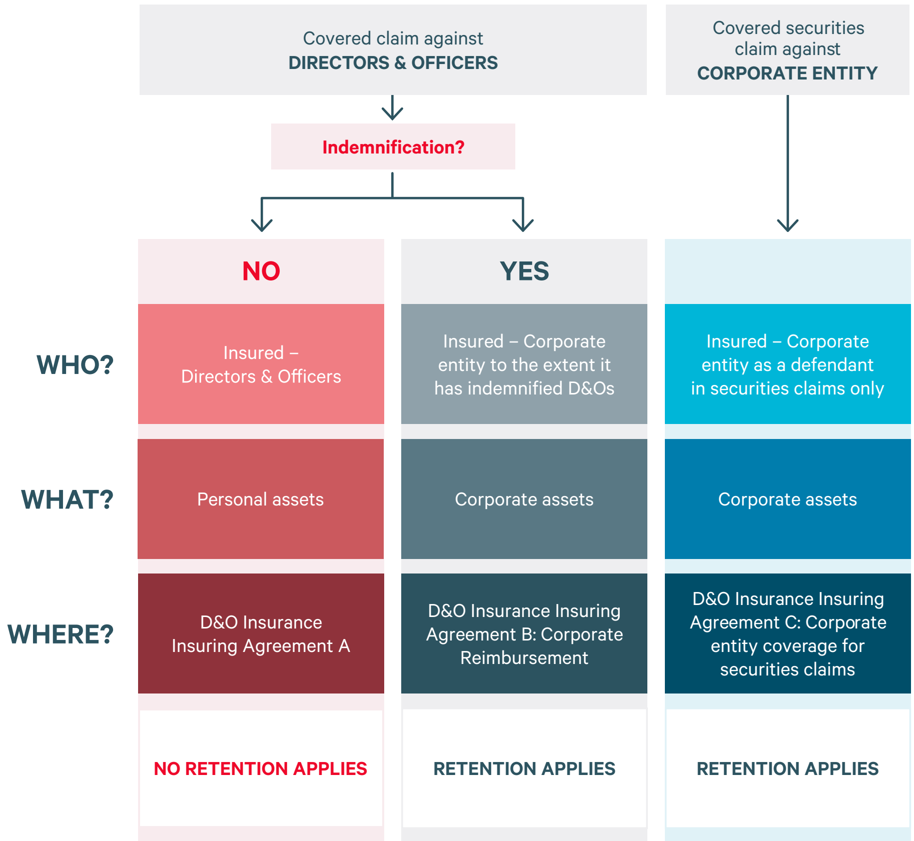
> Third party litigation funding is the financing of litigation by an independent party, so called litigation funders. Their primary business is to finance litigation and it is generally a high risk / reward model. A funder will usually contribute all of the costs associated with a plaintiff's case in exchange for a share of any judgment or settlement proceeds. If the case is not successful in court, the funder will be liable for the costs of the case including those of the defendant.

Side A, B and C cover explained

D&O policy

Side A cover	Insures directors and officers for losses not indemnifiable by the company
Side B cover	Reimburses the company for amounts paid to its directors and officers as indemnification (e.g. legal defence costs, settlements or judgments)
Side C cover	Insures losses incurred by the company resulting from securities claims (made against the company for its own liability in relation to its securities)

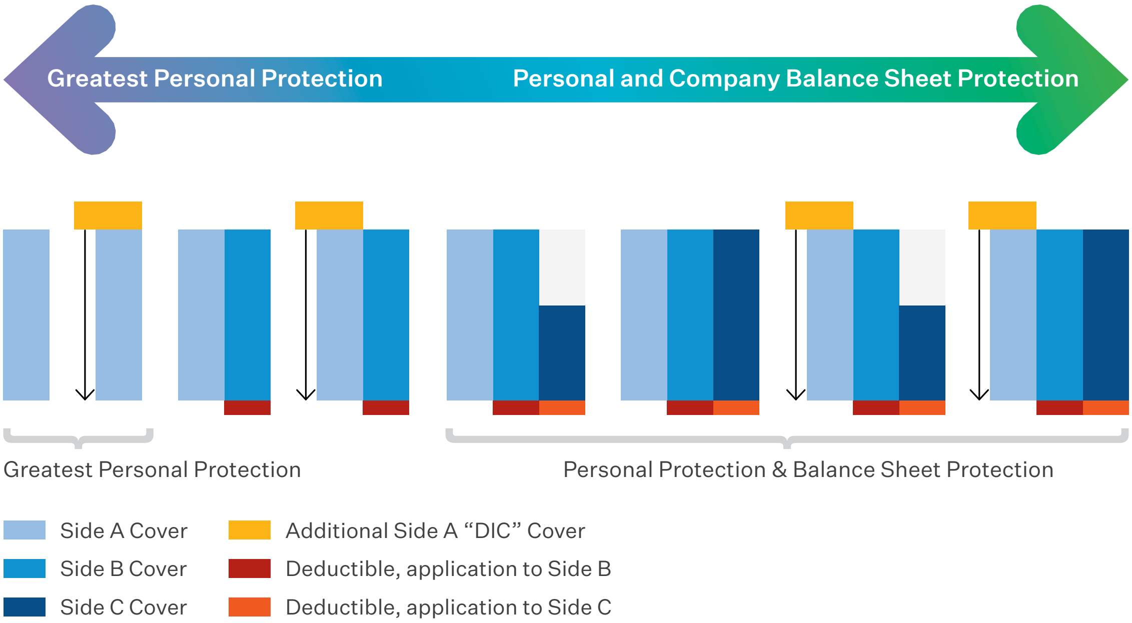
D&O policy structure – it's as easy as A, B and C



Source: MARSH

The Side C debate for listed companies

For many listed companies, Companies Securities ('Side C') cover has been a staple coverage component of their D&O programme for the past two decades. There are, however, some listed companies who have taken the decision never to purchase this cover. The rationale being that Side C is not the traditional basis of a D&O policy, which was designed primarily to protect the personal liability of the company's directors and officers. Furthermore, as Side C is included within the policy's total limit, a covered Company Securities claim will erode the policy limit available to the directors and officers for claims which may be brought against them personally.



Limits are shared across Sides A, B and C

It has been argued that the existence of Side C cover within a company's D&O programme may, in itself, encourage more shareholder class actions to be brought against a company as the claimants know there is an insurance policy to contribute to a settlement. With the increase in securities class action litigation, and the impact this is having on D&O premiums, retentions and insurer capacity, companies that do purchase Side C cover may now, for the first time, contemplate whether to reduce or keep this cover.

Some key questions directors and companies should consider include:

- Will removing Side C cover for the entity affect shareholder class action behaviour?
- Does removing this cover simply shift the target of class actions from the company to individual directors? (meaning, will shareholders and litigation funders start pursuing individual directors as opposed to the company in their class actions?)
- What impact would removing Side C cover have on the premium for the company's D&O policy?
- If a company withdraws its Side C coverage in the hope of managing costs, will it be even more expensive to reinstate in the future? Also, will Side C cover still be available?

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3. Changing regulatory environment

Most directors and officers will be aware of the changing regulatory environment as it pertains to their particular governance roles. The financial services industry continues to be under the spotlight following the FMA / RBNZ culture and conduct reviews of banks and life insurers and the Australian Royal Commission. The sector is also subject to increasing oversight in relation to its treatment of vulnerable customers, whether as a result of COVID-19 or otherwise. There is an increasing focus on the following areas:

- Conduct and treating customers and investors fairly – particularly when they are vulnerable
- Scams and fraud
- Continuous disclosure
- Fiduciary duties
- Health and safety
- Anti-competitive behaviour
- Cybersecurity and privacy – with a new Privacy Act coming into force in December 2020
- Climate related matters – with the first climate change litigation against New Zealand companies
- Market / Codes of conduct
- New financial advice regime from March 2021 and other market oversight reforms

The continually evolving regulatory environment has the potential to alter both the business and personal risk to directors and officers, who need to monitor their risks and stay current, particularly when there are regulatory changes.

Climate risk and D&O insurance

The board's role in overseeing climate risks and opportunities is expected to receive increasing scrutiny as organisations recover and rebuild from the coronavirus pandemic. The government has also announced that it intends to introduce mandatory climate related financial disclosures for listed issuers, banks, insurers, asset owners and asset managers. As part of discharging their duties, directors should consider whether climate related matters also impact on their D&O insurance (from coverage exclusions and 'occurrences', to disclosure and notification considerations). See also the IoD's article Climate risk - key resources for boards.

Cyber risk

There have been a number of high profile cyber attacks in New Zealand this year including against NZX and MetService. It is essential that directors understand their entity's approach to managing cyber risk. Our research shows that many boards still need to focus on cyber risk. In the 2019 Director Sentiment Survey only 50% of directors said that their boards discussed cyber risk at least annually (down from 58%). There is a lot of material available for directors and officers on cybersecurity, including the IoD's Cyber Risk Practice Guide and guide on Reporting Cybersecurity to Boards.

Liability from this risk comes in the form of both first and third party losses. Whilst D&O policies (and some others) may offer limited cyber related cover, a specific Cyber Insurance Policy is strongly recommended.

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4. Insurers' areas of interest

When the D&O insurance market is going through a difficult time, insurers pay even more attention to detail, including when requesting additional information and learning about the business being insured.

Insurers use a combination of financial and non-financial metrics when rating D&O risks, with non-financial areas of interest including:

- The experience and expertise of individual directors, and the approach taken to ensuring the board has the appropriate skill sets for the company
- The board's awareness and understanding of disclosure requirements with examples of the company's policies, protocols and procedures
- Culture of the company and the directors' working relationships with the C-suite
- The directors' oversight of new and emerging risks, such as cyber, environment and societal matters
- The directors' appreciation of and response to COVID-19 related risks, such as identification and authorisation systems and other procedures that may not function properly when employees are working remotely.

In order to respond to insurers' requirements and concerns (outside of the standard requests for completed proposal forms and company financials) directors need to participate actively in the renewal of their D&O insurance. Increasingly, insurers are seeking face-to-face meetings with directors and the C-suite to obtain a holistic view of the company and the role played by the board in setting the company's direction.

If D&O insurers do not fully understand the risks they are being asked to underwrite, they will commonly:

- Not offer any capacity or terms
- Limit the amount of capacity they are prepared to offer
- Restrict coverage or narrow the scope of the policy wording, so as to not expose themselves to risks and / or claims they do not fully understand
- Increase pricing
- Remove offers for Side C cover and, potentially, individual D&O protection
- Introduce exclusionary language.

In the current market environment, placement of D&O insurance programmes are taking longer to conclude. This stems from a variety of factors including the time required by insurers to provide quotations due to increased underwriting scrutiny and in some cases, referral processes. Furthermore, reductions in the capacity offered by existing insurers on a D&O programme may require additional insurers to be engaged to obtain the required limits.

Top 6 insurance issues

2020 has proved to be an immensely challenging year for New Zealand business in many ways, but for large corporates and listed companies their D&O renewals were high in the list of challenges. From a Broker perspective the following are the top 6 insurance issues that are affecting the top end of the D&O market:

1. The cost of the insurance premiums
2. Availability of capacity
3. Restrictive coverage terms
4. Sustainability of cover in the future
5. Higher self-retention levels
6. Contagion from off-shore claims trends.

5. Key coverage issues – not all D&O policies are equal

It is essential that those arranging cover for directors and officers take particular care when negotiating terms and placing cover.

When considering D&O policy coverage, recent loss scenarios demonstrate the importance of setting limits in a structured way. The following are key considerations:

- If a claim is made today, it will be the current D&O policy which will respond. If the claim is not settled until 5 or 10 years' time, would today's policy limit be sufficient? How might the quantum of the risk rise in that period?
- How might legal defence costs (discussed further below) rise in the same period, and might they be increased by a greater number of directors and officers over time and the possible need for separate representation?
- What, if any, changes are you likely to face in the future, in terms of developments in the standards required or the duty of care?
- What are your personal circumstances and your ability to defend and / or fund a loss (if there is limited or no insurance)?
- Is the industry sector / company you govern susceptible to class actions or other group litigation, or new types of regulatory action and penalties?

Claims Made Policies

D&O insurance policies are written on a 'claims made' basis. This means it is the policy in place at the time the first reported circumstance or claim is made and notified to the insurer(s) which will be triggered; not the policy in place at the time the actual or alleged wrongful act was committed.

Key coverage issues that directors and officers need to consider

Investigation costs

Most D&O policies include cover for directors' and officers' 'investigation costs' incurred in responding to a regulator's investigation. Proper legal representation and advice at the investigation stage is crucial. A poorly handled investigation may result in damaging evidence or admissions that enable a regulator to pursue a claim.

Not all D&O policies are equal and coverage can differ greatly, especially in relation to investigation costs. Many policies limit such costs in ways directors may find surprising. It is not unusual for investigation costs cover to be triggered only when an allegation of a breach of a legal duty is made against a director. The problem is that, in most investigations, allegations are not made until the investigation is concluded. Indeed, the purpose of the investigation is normally to identify whether allegations should be made and against whom.

It is surprisingly common for D&O insurers to resist paying for legal representation to respond to initial document requests and representation at interviews. Insurers may assert that what is being investigated is an 'event' or an 'entity', not an insured 'individual', and decline to pay legal costs under the D&O policy until an allegation against a director or officer is made.

It is critical that investigation cover is drafted widely. This should include cover for the costs of responding to a notice requiring the provision of documents and information or attendance at interviews, without the need for an allegation of breach.

Separate defence costs cover

Most directors and insurers are now aware of the importance of separate defence costs-only cover in addition to D&O liability cover. Separate defence costs cover is necessary because of the 2013 decision of the Supreme Court in the *Bridgecorp* case, recognising a claimant's right to a statutory charge over the directors' insurance proceeds. This meant that the directors could not call upon their D&O insurance for their legal costs incurred in defending the claim. The rule in the *Bridgecorp* case applies to all liability policies, not just D&O policies. Directors who rely upon statutory liability, professional indemnity, employment liability and other liability policies should take note.

Adequacy of cover

Care should be taken in deciding the amount of D&O liability and defence costs cover that is taken out. A variety of factors should be taken into account when determining what limit is appropriate. For example, consideration should be given to the likelihood that directors will have differing interests in defending the claim (depending, for instance, upon their differing roles and the extent of their personal knowledge) but will generally not have a limit of liability reserved only for them within the insurance but rather will share an aggregate limit with other directors and officers.

It is commonplace for groups of directors and / or officers to require separate legal representation when a claim is made, which increases overall defence costs substantially. The costs of defending claims have risen significantly. D&O insurance programmes can be structured in a number of ways to achieve different coverage objectives. These require careful consideration of the overall limits of liability for defence costs.

Capital raising / IPO

Most policies do not provide automatic cover for any capital raising or IPO transactions. Liability arising from this type of activity can be complex. It is crucial that the most appropriate form of cover is obtained for a particular transaction.

Majority Shareholders

This key policy exclusion can be a particularly difficult matter to resolve for directors and officers. Some insurers will provide a 'carve-out' or a limited form of cover for claims arising from majority shareholders. From an insurance perspective, a majority shareholder is typically classified as one holding shares of 15% or greater of the insured entity.

To obtain an extension of cover, insurers will typically look at the shareholder and board composition and company indemnities, as well as any historical activity in relation to those particular shareholders.

Insolvency

With responses to the COVID-19 pandemic creating additional financial pressures for companies, insurers are closely examining the financial position of entities especially around solvency, compliance with debt obligations and banking covenants. Insurers are asking specific questions about how COVID-19 may affect companies' solvency. In cases where they have concerns around the financial performance, an insolvency exclusion may be applied.

An insolvency exclusion removes cover for claims brought against directors and officers which arise, either directly or indirectly, from the insolvency of the company or the inability to pay its debts when they are due. This removes cover for a key exposure faced by directors and officers of a company.

Temporary 'safe harbour' protections

The government introduced temporary 'safe harbour' protections for directors to support them and their companies through the period of uncertainty created by COVID-19. The Ministry of Business, Innovation and Employment announced in August that the safe harbours will cease on 30 September 2020. However, there is scope within the regulations to bring them back if circumstances change.

The protections were implemented in response to concerns that directors would place companies into liquidation or would reduce their activities because of the uncertainty resulting from the pandemic. The key change is that, in some circumstances, directors are relieved of their obligations under sections 135 and 136 of the Companies Act not to allow the business of a company to carry on in a manner likely to create a serious risk of substantial loss to creditors and not to agree to it incurring obligations that the director does not believe on reasonable grounds it will be able to perform.

The protection applies where a company was able to pay its due debts on 31 December 2019 (so it had to be a solvent company to begin with), the directors hold a good faith opinion that the company will face significant liquidity problems because of COVID-19, and they consider in good faith that it is more likely than not that the company will be able to pay its due debts by 30 September 2021. In summary, the protection benefits directors of originally solvent companies that will have short term liquidity or solvency problems because of COVID-19 but are likely to be solvent again by late 2021.

The safe harbour protections are enhanced by the availability of a temporary business debt hibernation process that allows directors to resolve to apply for a debt moratorium and put a proposal to creditors.

Directors should be aware that the safe harbour protections do not relieve them of any other duties and obligations, such as their general duty to act in the best interests of the company and their obligation not to use false pretences to obtain credit or cause material loss to a creditor.

Pollution

In respect of pollution events, other liability policies will provide some protection for directors, officers and in certain instances, the company, but only from pollution events caused by a sudden and accidental occurrence. Usually, liability arising from pollution events is complicated and often arises from historical or continual exposure types of events that have occurred over time.

Costs, awards and penalties (typically under the Resource Management Act) can be severe so it is very important to understand and study any risk related information a company has on these exposures. Only then will it be possible to consider properly specific pollution / environmental insurance coverage.

Failure to insure

This exclusion has the potential to be significant, yet it often seems to be overlooked. Directors and officers may incur personal liability if they fail to ensure the appropriate insurance coverage is in place for their entity, if it suffers a loss that ought to have been covered.

The disclosure trap

When a claim is made, insurers are increasingly scrutinising whether the directors fairly disclosed any relevant information before the policy was initiated or renewed. Insurers are particularly diligent in investigating claims where a claim is made shortly after a policy renewal.

It is important to take disclosure requirements seriously and ensure that a proper process has been followed to ensure that any claims or potential claims are identified and reported to insurers.

Company indemnities

It is good practice for companies to indemnify their directors for claims made against them, where the law allows. However, many companies do not indemnify their directors, or do not have proper regard to the Companies Act limitations and procedural

requirements when arranging cover. It is important to note that an indemnity given in breach of the Companies Act is void.

Accordingly, it is essential to ensure that indemnities given to directors are in a proper form and are authorised in the company's constitution and by resolution. The same applies where the company arranges insurance for directors, which must also be certified as fair to the company. Irrespective of the policy language used, D&O insurers have a general expectation that the company will indemnify its directors where it is legal and it has the financial ability to do so. D&O insurers commonly cover both the company for any payments it makes to its directors under an indemnity (known as 'Side B' cover) and the directors where the company does not meet their costs (known as 'Side A' cover). It is nevertheless important to ensure that valid indemnities are provided so that no insurance issues arise.

Dual-listed companies

Directors of New Zealand companies that are dual-listed on both the New Zealand and Australian stock exchanges should consider whether their D&O policies are adequate to protect them from claims arising in both jurisdictions.

Most dual-listed companies have attained 'foreign exempt' status in Australia, which means that they are not obliged to comply with ASX rules provided they comply with corresponding NZX rules. Established Australian 'class action' law firms and litigation funders face a disincentive in pursuing directors of New Zealand companies with foreign exempt status because they will need to deal with claims in the New Zealand courts, which they may not be familiar with.

There remains a risk, however, of an Australian claim being brought against the directors of a New Zealand dual-listed company, particularly if it does not enjoy foreign exempt status. Where that is the case, directors will need to ensure that their D&O insurance extends to claims in Australia under Australian law. All listed company directors should take a strong interest in their D&O insurance and seek reassurance that it is appropriately tailored for the heightened risks that listed companies and their directors face.

6. What's next for D&O insurance?

There is no doubt that the D&O insurance market is in a difficult state, and this is expected to continue for several years to come. The availability of coverage is being impacted by the Australasian claims environment and withdrawal of insurers, resulting in increased pricing, higher retention levels and coverage restrictions.

The increasingly active presence of litigation funders, actual and anticipated changes to New Zealand's class action regime, and the growing regulatory burden on directors and officers could have the following effects:

- Difficulty in sourcing, or the complete withdrawal of insurers to offer, Side C (Company Securities) cover
- Impose retentions (excesses) in the order of NZ$10-$20m for Side C (Company Securities) claims
- Increased retentions (excesses) for Side B (Company Reimbursement) claims and inflation of cost for both Side A and B cover as part of the overall D&O premium pool. There is evidence of this impacting across all sectors in Australia including not-for-profit entities
- Greater focus for directors on the protection afforded by D&O policies, with greater emphasis on Side A only cover
- Increased information requirements could result in insurers requiring the directors to provide statements of competency, and potentially a higher level of evidence of the same eg being a Chartered Member or Fellow of the IoD
- Insurer contraction
- Limitations in coverage through the application of additional exclusions as insurers respond to evolving risks (e.g. cyber / failure to insure, anti-money laundering, industry-wide commissions, and climate change).

We will continue to monitor developments in the market and keep directors updated of changes they need to know about.

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