

D&O Insurance Alert

Directors and officers indemnity deeds & D&O insurance health check

WHAT YOU NEED TO KNOW

- Directors and officers deeds of access, indemnity and insurance (indemnity deeds) and liability insurances (D&O insurance) provide important protection for companies, and their directors and officers.

WHAT YOU NEED TO DO

- Periodically review your indemnity deeds and D&O insurance policies to ensure they are in line with current laws, best market practice and afford adequate coverage given the risk profile of the company.
- Ensure that any limitations to company indemnities and D&O insurance are understood by the company, directors and officers.

Directors and officers deeds of access, indemnity and insurance (indemnity deeds) and liability insurances (D&O insurance) provide important protection for companies, and their directors and officers.

While the specific terms of D&O insurance policies vary, the insured director or officer is typically insured against their legal liability to pay compensation for wrongdoing committed, or allegedly committed, by them in their capacity as a director or officer, as well as the defence costs incurred in defending a claim brought against them. Where the director or officer is indemnified by the company for that liability, the company is entitled to reimbursement from the insurer.

Given the complexity of some claims against directors and officers, it is often the case that determining whether or not the claim is covered by the D&O insurance only occurs sometime after the claim is first made. To ensure directors and officers are not required to personally fund their own defence, most D&O insurance policies provide that the insurer will advance defence costs to the insured directors until such time as it can be determined whether the claim is covered by the policy.

Common risks to which companies and their directors and officers are exposed include:

- failure to comply with laws and regulatory requirements
- regulatory reporting errors
- inaccurate or inadequate disclosure (eg, in company accounts)
- misrepresentations in a prospectus
- decisions exceeding the authority granted to a company officer.

Directors and officers will in most cases seek indemnity from their company in the first instance, the main exception being where the claim is for a breach of the director's or officer's duty to the company itself.

The risks for directors and officers of inadequate D&O insurance are heightened where companies are under administration, receivership or liquidation. In these circumstances, any indemnity granted by the company to the director or officer by may be of little or no value and the director or officer may be wholly reliant on D&O insurance.

Other issues that companies, directors and officers need to have regard to are issues such as the effectiveness of global insurance programmes in jurisdictions requiring local insurances to be effected, possible gaps in cover in excess layer insurance programmes, cover for fines and penalties, and coverage available to provide additional comfort to directors and officers that they will have access to defence costs cover in view of the recent *Bridgecorp* decisions in New Zealand (see our update on the [Bridgecorp case, dated 20 December 2012](#)).

It is good practice for companies and their directors and officers to periodically review their indemnity deeds and D&O insurance policies to ensure they are in line with current laws, best market practice and afford adequate coverage given the risk profile of the company. It is also important that any limitations to company indemnities and D&O insurance are understood.

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