



RISK NZ

WELCOME TO THE RISK NZ LUNCHTIME SEMINAR SERIES 2019

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Directors' & Officers' Liability Insurance

Catherine Tait

September 2019

Who, What, Where?

Description

Insurance for “Insured Persons” in respect of loss arising from claims made against them, alleging a Wrongful Act in the discharge of their duties on behalf of the Company

What is a Wrongful Act?

Breach of duty, breach of trust, neglect, error, misstatement, misleading statement, omission, or other act done by an Insured Person in their capacity as such, or any matter claimed against an Insured Person solely because of their status as such.

Who is Covered?

Insured Persons, including past, present and future directors, officers, company secretaries, alternate directors; plus Employees concerned with or taking part in managing the Company, or with respect to Employment, or if named as co-defendant with other Insured Persons
The Company, for Securities Claims (laws regulating sale / purchase of securities)

What is Covered?

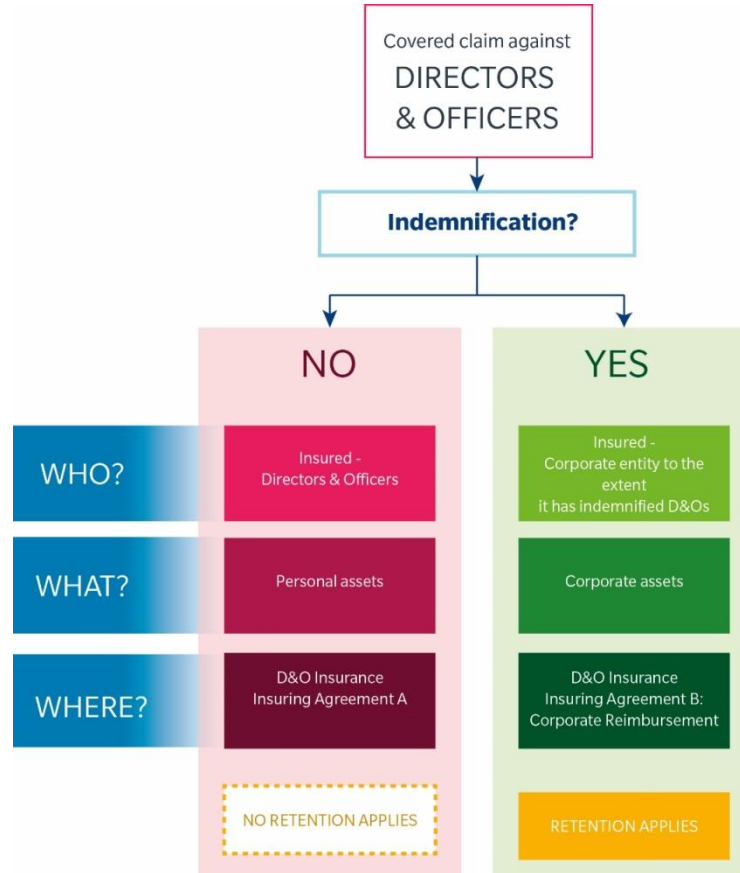
- Defence Costs to defend the allegations of a Wrongful Act
- Damages awarded by a court
- Settlements negotiated with the Insurer’s consent
- Awarded costs / expenses

Side A and B coverage – who's covered

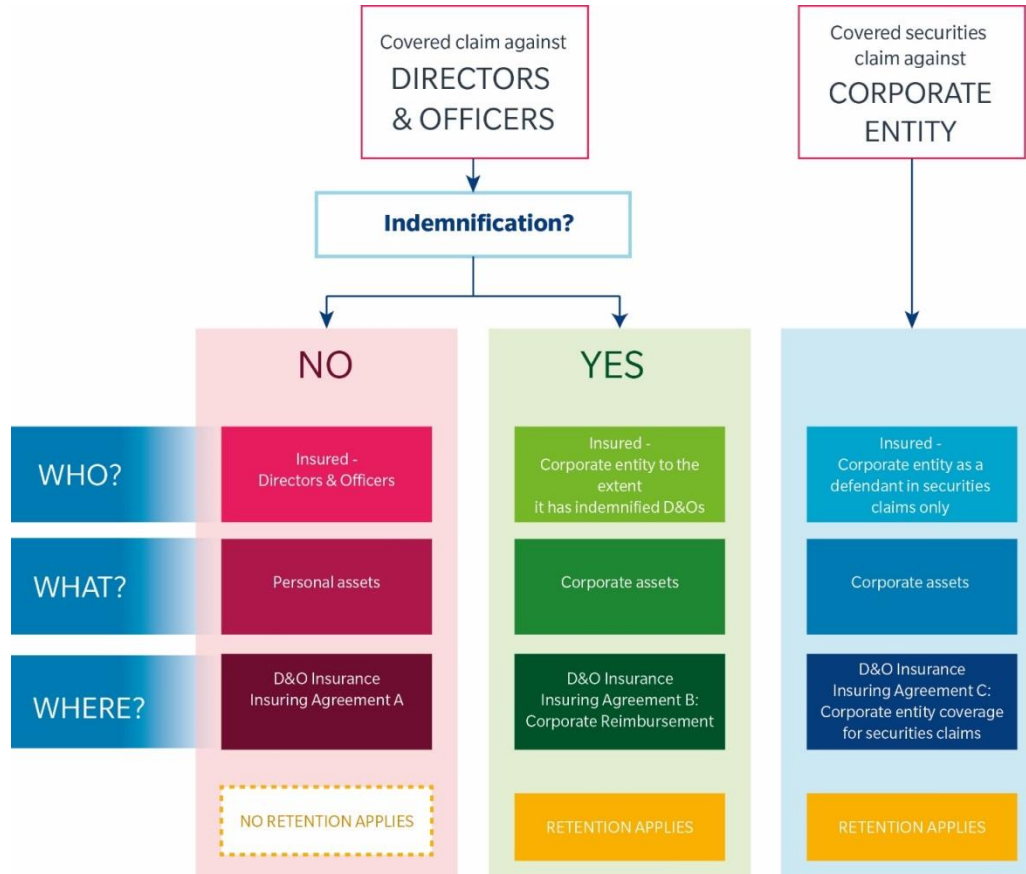
- Traditional D&O policies cover:
 - Directors, officers, board committee members
 - General counsel
 - Persons who are “concerned with or take part in the management of the company” – historically limited to the company's central administration
- Modern approach can extend to:
 - Co-defendants
 - Any employees

May cover more people than you might have assumed.

D&O Policy Structure – It's as easy as A, B...C



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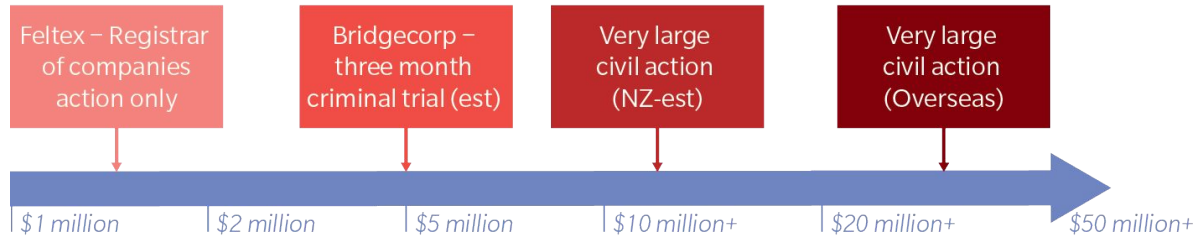


The Risk Is Real

- In 2018, over 1000 D&O and Statutory Liability claims notifications were lodged with insurers in NZ.
- Legal costs are escalating, and cases often lasting for years.
- The risks facing directors are very real.

Estimate of Legal Costs

Estimated D&O Defence Costs



Primary sources of claims against directors

Claimant	Example of Allegation
Creditors	Reckless trading (seeking to recover debt following insolvency of the company), alleged breach of contract.
Competitors	Unfair trade practices, defamation breach of intellectual property rights.
Employees	Discrimination, unfair treatment etc.
Liquidators /Receivers	Reckless trading (trading while insolvent); negligence resulting in loss to the company.
Regulatory Bodies	Financial Markets Authority/Reserve Bank of New Zealand, Department of Labour, Commerce Commission alleging breach of Securities Act, Health & Safety At Work Act, Commerce Act and Fair Trading Acts respectively.
Shareholders and Other Investors	Misrepresentation, inadequate or inaccurate disclosure in financial reporting in public or private placement materials, failure to exercise reasonable standard of care.

Entity Indemnity and Insurance

- **Company Indemnity**

- The Companies Act 1993 does not allow companies to indemnify its directors or employees in all circumstances and constitutional indemnities are generally discretionary rather than compulsory

- **162 Indemnity and insurance**

- Except as provided in section 162, a company must not indemnify, or directly or indirectly effect insurance for, a director or employee of the company or a related company in respect of—
 - (a) liability for any act or omission in his or her capacity as a director or employee; or
 - (b) costs incurred by that director or employee in defending or settling any claim or proceeding relating to any such liability.
- (2) An indemnity given in breach of this section is void

Entity Indemnity and insurance

- Crown Entities Act

- A statutory entity may only indemnify a member, an office holder, or an employee in respect of an excluded act or omission (including costs incurred in defending or settling any claim or proceeding relating to that excluded act or omission).”
- **excluded act or omission** means an act or omission by the member, office holder, or employee in good faith and in performance or intended performance of the entity’s functions
- **Insurance for liability of member, office holder, or employee**
- A statutory entity may effect insurance cover for a member, office holder, or employee of the entity in relation to his or her acts or omissions, except an act or omission that is—
- (a) in bad faith:
- (b) not in the performance or intended performance of the entity’s functions

Crown Entities - Breach of indemnity and insurance limits

- **Section 125**

- (1) A member, office holder, or employee who is indemnified or insured by a statutory entity in breach of this Act must repay to the entity the cost of providing or effecting that indemnity or insurance cover, to the extent that the indemnity or insurance cover exceeds that which could have been provided or effected under this Act.
- (2) The entity may recover the amount as a debt due in a court of competent jurisdiction.

Market Update

Australia

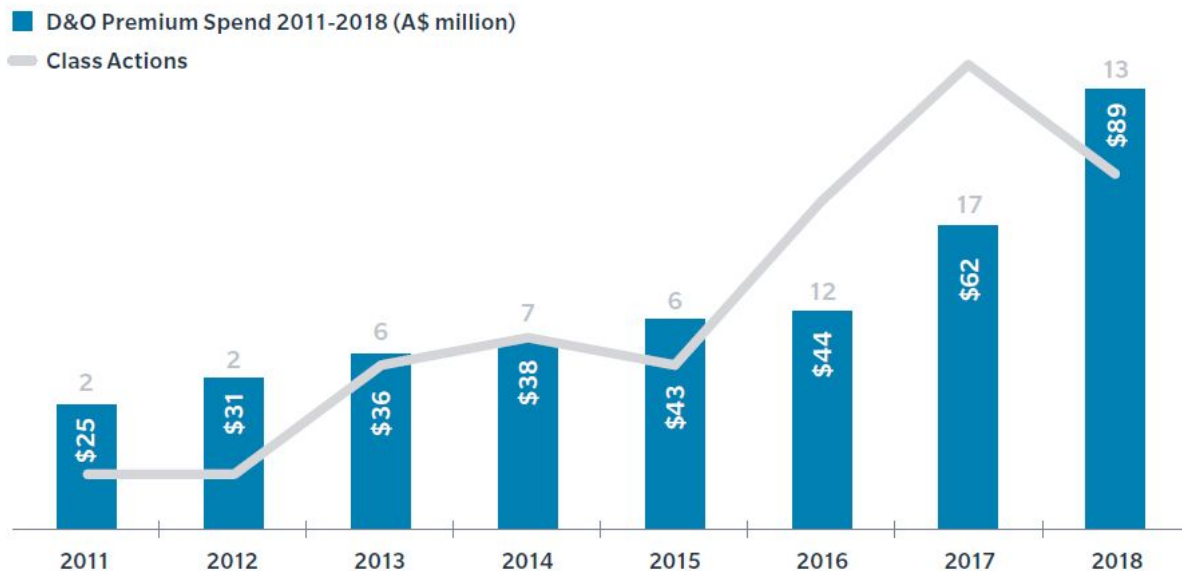
- Volatile Market
- Conditions are quickly adjusting, in particular for ASX listed clients off the back of continued unsustainable pricing & significant increase in new securities class action claims.
- Capacity restricting for entity cover (Side C)
- Underwriters are showing a more restrained and disciplined approach “Back- to-Basics”

London

- Trending upwards;
- Not the answer to the hardening Australian Market

FIGURE
3

D&O Insurance Premiums vs. Class Action 2011-2018 (Marsh Client data within the ASX200)



Reference: Marsh ALRC Discussion Paper July 2018

Coverage Must Haves

Consideration to Policy Structure

If cover is included for the company, is there any left for the Directors in the event of a company claim?

Ring-fenced Defence Costs

In the event there is a charge placed over the D&O policy and access to defence costs is unavailable.

Advancement of defence costs

Pays defence costs as they are incurred and before the finalisation of a claim. Written consent of the insurer must be obtained before incurring the costs (not to be unreasonably withheld).

- Fraud and dishonesty exclusion and “final adjudication” language
- Advancement of defence costs should be unconditional

Discovery Period

An additional period of insurance during which you can report claims in the event your policy is not renewed

Investigation and Inquiry Costs Cover

It is important that directors and officers are legally represented and that these costs are covered by a D&O policy

Severability and non-imputation

A severability provision is intended to preserve insurance coverage for an innocent director or officer notwithstanding improper conduct by other directors and officers.

- ‘A full’ severability provision either states that the proposal form is deemed to be a separate proposal form by each insured or states that no knowledge of one insured is imputed to another insured for the purposes of the proposal form

Non-avoidance and cancellation

- Insurer waives the right to avoid the policy – Usually by limited write-back
- Insurer may only cancel the policy for non-payment of premium

Insurers Areas of Interest and Best Practices

Insured Directly

- Any past or current claims history including newly notified claims or circumstances that could give rise to a claim.
- The ownership structure of the Entity
- The Culture of the Entity
- The quality, experience and expertise of the board and management.
- The Entity financial position.
- The Entity activities, including any overseas exposures.
- Whether there is a relationship they wish to maintain or develop with the company and its directors.

External influence

- Insurers' particular experience of claims as well as more general trends in litigation and settlements.
- Availability and cost of reinsurance.
- State of the insurance market.
- Skill, expertise and “buying power” of the insurance broker charged with negotiating with potential insurers.

Future Predictions?

- More of the same...
- D&O Insurance market needs to return to profitability
- The AXA XL D&O 2nd white paper suggested that the D&O premium pool needed to triple based on 2016 data. Premiums will continue to 'correct' for a number of years
- Premiums will continue to 'correct' for a number of years
- Continued Insurer Consolidation
- Clients may choose to cease insuring the company
- Watch out for new Exclusions:
 - Insolvency / Financial Impairment
 - Specific Matters
 - Cyber / Failure to Insure
 - Good risks can continue to buy very broad insurance however, it will cost more



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