

# Directors' and Officers' Liability Insurance



In today's business climate of corporate transparency and accountability, an organisation's officers and directors face a myriad of employment-related exposures. Claims can come from many sources, employees, regulators, shareholders, creditors, customers, etc. Ever-changing regulations, increased employee awareness of employment rights as well as the rise of shareholder activism means directors are more frequently at risk, translating to rising claims and escalating settlement costs.

In the wake of recent unprecedented corporate scandals, clearly the trend of corporate accountability applies to large corporations. But, smaller privately held companies, including not-for-profits, are not exempt from litigation arising out of the management decisions of their boards. They, too, are at risk.

Regardless of your company's size, the legal cost to defend a director is substantial, as are the potential penalties that can be personally incurred. Due to liability risks, protecting boardroom talent can be a challenge. To help ensure both your officers' as well as company's well-being, a directors' and officers' liability insurance (D&O) policy is part of a comprehensive risk financing strategy.

### D&O Fills the Cover Gap

Unlike liability policies that provide cover for claims arising from property damage and bodily injury, a D&O policy specifically provides cover for a 'wrongful act', such as an actual or alleged error, omission, misleading statement, neglect or breach of duty.

For example, a manufacturer told one of its suppliers to increase inventory because they were expecting a large increase in production. As predicted, demand for the manufacturer's product grew but the manufacturer increased its inventory with another supplier instead. The original supplier successfully sued the manufacturer, alleging they suffered damages as a result of having relied on the manufacturer's promise.

A D&O policy provides defence costs and indemnity cover to the entity listed on the policy declarations, which may include:

- Cover for individual directors and officers
- Reimbursement to the organisation for a contractual obligation to indemnify directors and officers that serve on the board
- Protection for the organisation or entity itself

Indemnification provisions are typically included in the charter/bylaws of a company. While an important risk component, small to medium-sized enterprises or not-for-profit organisations often do not have the financial resources to fund the indemnity provisions, making the bylaws hollow. A D&O policy can provide an extra blanket of security in the event of a covered loss.

A 'fraud' exclusion is typically included in a D&O policy, which eliminates cover for losses due to dishonest or fraudulent acts or omission or wilful violations of any statute, rule or law. D&O cover can be tailored to your needs but be aware that D&O insurers are not consistent with their policy forms. This fact, plus the complexity of D&O claims, requires the insurer to have

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market commitment and deep expertise as well as the financial resources to handle potential claims. There are also additional forms of cover to adequately protect directors and officers, including:

- entity cover;
- payment priority for insured persons;
- severability of the insured as well as severability of the application;
- cover over time, meaning cover responds to past, present and future directors and officers;
- pay on behalf clause; and
- duty to defend clause.

### Consideration for Not-for-Profits

Many not-for-profit organisations with directors and officers often report some difficulty in affording the cost of D&O insurance. To minimise the costs, brokers should recommend choosing only those policy provisions considered most critical. For example, a volunteer-run not for profit without paid staff may skip employment practices cover until it hires staff. To defray the cost of premiums, some not-for-profit organisations consider charging board members a portion of the policy cost.

### We're Here to Help

Whether you are a not-for-profit, privately held or a public company, it is likely that your business can benefit from a D&O policy. Since there is no such thing as a 'standard' policy, a professional broker is invaluable when purchasing D&O cover. We understand your organisation and can knowledgeably help design policy language to meet your needs. Call us today at 0333 222 1182 to learn more about the appropriate protection for your company against potential directors' and officers' liability.