

DIRECTORS AND OFFICERS LIABILITY

Frequently Asked Questions

Directors and Officers insurance is one of the most misunderstood classes of insurance available. Set out below are some frequently asked questions which will help with your expectation of the product.

Who is a Director/Officer?

An Australian proprietary company is required to have at least one director while a public company must have at least three. An officer is defined by the Corporations Act to mean a director or secretary, a person who makes or participates in making decisions that affect the whole or substantial part of the corporation, a person who can affect the financial standing of the corporation or a person whose wishes or instructions are acted upon by the directors. It includes liquidators, receivers and administrators of the corporation.

Why would a Director/Officer require insurance coverage?

Directors and officers carry the risk of personal liability for loss suffered by the corporation or by shareholders and for loss suffered by third parties in some circumstances.

What duties do Directors/Officers owe?

The essential duties owed by directors and officers include:

- a duty to exercise due care and diligence;
- a duty to act in good faith and for proper purposes; and
- a duty to avoid conflicts of interest.

What happens if I breach one of the Directors duties?

A breach of duty may give rise to an action for damages by the corporation at common law or for equitable compensation under the Corporations Act. The Australian Securities and Investment Commission ("ASIC") may also bring proceedings for a pecuniary penalty of up to \$200,000. In some cases, the breach of duty can lead to criminal sanctions resulting in up to 5 years imprisonment.

Am I in breach if I trade while insolvent?

Directors have a statutory duty to prevent insolvent trading under section 588G of the Corporations Act. A breach of duty occurs where the corporation incurs a debt and the corporation is insolvent at that time. The director or officer may be guilty of a criminal offence and/or have a pecuniary penalty order made against them up to \$200,000 and may have recovery proceedings brought against them by the liquidator of the corporation or by the outstanding creditors.

Do I owe a duty in respect of occupational, health & safety laws?

Yes. Directors and officers owe duties under various State and Federal legislation particularly in the occupational health and safety and environmental areas. Directors/officers can be held criminally liable for the company's offence.

Am I only covered for breaches of the Corporations Act?

No. A director or officer may be personally liable for his/her wrongful acts such as defamation, discrimination or harassment of other employees, personal involvement in statutory breaches such as anti-competitive activity under the Trade Practices Act 1974.

Who can sue?

Anyone who suffers a loss as a result of the wrongful acts of the director or officer may be a potential claimant and can include the corporation, a fellow director or officer, shareholders, creditors, liquidators, receivers, administrators, employees and even regulatory authorities.

Are class actions covered?

Yes. In the last decade there has been considerable growth in the number of shareholder and investor claims against boards of directors. A breach of the continuous disclosure requirements has given rise to a number of these actions particularly by shareholders. They often result from the corporate collapse of the company.

Are investigations covered?

Directors and officers are often the subject of investigation before regulatory investigators such as ASIC or called to appear as witnesses before formal investigations such as a Royal Commission. These investigations or inquiries can lead to adverse findings against the director or officer and can give rise to civil or criminal proceedings. As there may be no determination of liability, the director or officer may need to be legally represented and incur substantial legal costs.

What is excluded under the policy?

Common exclusions include major shareholder claims and unacceptable behaviour such as dishonest/intentional acts, collusion and known claims and circumstances

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