

## AbaF

# Directors' and Officers' liability insurance

Directors and Officers (D&O) liability insurance covers directors and officers for the decisions and actions taken by the directors on behalf of the company. Not-for-profits tend to think that no one will sue them, therefore insurance is not needed. However, D&O insurance options should be investigated as they are not necessarily expensive. Directors can also take out their own insurance to cover them across the range of Board positions they undertake.

There are two broad types of insurance:

- Directors and Officers insurance - provides broad cover in case action is taken against the company and/or the directors
- Defence costs insurance - provides for payment to be made in the event a company and/or director has to fund a legal case. Legal costs are incurred immediately and can be high even if there is no finding of guilt. Defence costs insurance will not cover the award of damages (the monetary fine) if the company and/or directors lose the case.

Ideally a policy should include both insurance and defence cost elements. Other insurance-related issues which should be considered follow:

- An indemnity clause can give a false sense of security. Sometimes the constitution will provide an arbitrary indemnity, such as to the value of the company's assets. Indemnities provided by a government tend not to specify if there is a limit on insurance or whether there are exclusion clauses.
- Some indemnities provide that if a director is found not to have been negligent, the company will consider whether it will repay some of the expenses incurred. The director may have paid out substantial amounts of money in the meantime.
- Where possible, directors should consider requesting that an indemnity is given to directors who act in good faith. This indemnity should be in the constitution.
- Most insurance policies are on a "claims made" basis. This means that you must be insured under the policy at the time when the claim is made, which may not necessarily be when the event occurred. For example, a claim may be made within the Statute of Limitations - up to seven years after the occurrence - but a director may have left the Board and so may not be covered by the policy.
- The exclusion clauses can reduce the effectiveness of the policy. For example, there can be exclusions regarding the "insured" and "insurer" if both the company and directors are being sued.
- Companies cannot insure a director or officer against committing an illegal act, for breaking the law, or where strict liability applies, such as OH&S. The person involved and the company may be fined and/or ordered to pay the damages, which could be significant.

Source: *The Not-For-Profit Director*, p 21

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