
Corporations and Markets **Advisory
Committee**

Directors and Officers
Insurance

Report

June 2004

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Corporations and Markets Advisory Committee
GPO Box 3967
SYDNEY NSW 2001

(02) 9911 2950 (ph)

(02) 9911 2955 (fax)

camac@camac.gov.au



Australian Government
Corporations and Markets
Advisory Committee

30 June 2004

The Hon. Peter Costello, MP
Treasurer
Parliament House
Canberra

Dear Treasurer

I am pleased to present a report prepared by the Advisory Committee on *Directors and Officers Insurance*.

The report reviews the availability in the Australian market of insurance cover for the personal liability of directors and officers of corporations. The Committee undertook this review in the context of a broader inquiry it is conducting into aspects of directors' duties and personal liability, in response to a reference from Senator the Hon. Ian Campbell when he was Parliamentary Secretary to the Treasurer.

The report notes that the market for D&O insurance has tightened in recent years, as the number of insurers and the capacity of the market have declined. It also appears that insurers have placed greater limitations on the coverage of policies offered and that premiums have increased markedly, though the rate of increase may now be levelling out.

The Committee's research suggests that most listed companies currently take out some form of D&O insurance, though some of them may have reduced their cover in an effort to contain the increasing costs of that insurance. Also, start-up and other small to medium enterprises, and companies in higher risk sectors, have more difficulty in obtaining cover.

The report canvases matters that are relevant to the analysis and undertaking of risks and liabilities to which directors and other officers of companies are exposed. The Committee does not put forward in the report any proposals for change.

The Committee proposes to publish the report in due course.

Yours sincerely

A handwritten signature in black ink that reads "Michael A. John".

R.A. St John
Convenor

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1 Introduction

1.1 Background

This report reviews the availability in the Australian market of insurance cover for the personal liability of directors and officers of corporations, commonly referred to as D&O insurance.

The review was undertaken in the context of a broader and continuing inquiry by the Advisory Committee in response to a reference from the former Parliamentary Secretary to the Treasurer, Senator the Hon Ian Campbell, into aspects of directors' duties and personal liability. Senator Campbell asked the Advisory Committee to examine amongst other questions the impact of directors' liability on the availability of professional indemnity insurance and the consequences of rising insurance premiums.

The availability and scope of insurance cover are relevant to any analysis and understanding of risks and liabilities to which directors and other officers of companies are exposed.

1.2 Significance of D&O insurance

D&O insurance is a means by which companies and their officeholders may seek to mitigate potential personal liabilities of those officeholders. The directors and other officers of companies are exposed to considerable potential personal liability arising out of the performance of their roles. They are exposed to personal financial liability for any breach of common law and statutory duties as well as sanctions for offences, ranging from imprisonment to fines or other pecuniary penalties. There is an increasing trend to impose personal liability on corporate officeholders for the shortcomings of companies. In some circumstances, officers are deemed to be liable for certain outcomes unless they can exculpate themselves. This trend is reflected in the *Corporations Act 2001* as well as regulatory statutes of the Commonwealth, States and Territories. As a

practical matter, the personal exposure of corporate officers to financial sanction or penalties generally extends beyond any such liability attaching to public officeholders in the performance of their roles.

Corporate officeholders who incur personal financial liability may be able to fall back on a right of indemnity from their company. This will depend on the circumstances and, as a practical matter, on the solvency of the company. They may also have recourse to any existing relevant insurance cover.

Accordingly, the extent to which insurance cover is available to directors and other corporate officers is relevant in considering the practical consequences of the liability regime and any changes to it.

1.3 Scope of the review

There is limited published information about the market for D&O insurance in Australia, and details of the commercial arrangements between particular insurers and insureds are not readily available. The Advisory Committee made inquiries of relevant industry and other sources in an effort to inform itself. To cast more light on the subject, the Advisory Committee seeks in this report to present an overview and offers some general comments. The report:

- examines the current state of the market for D&O insurance in Australia, including the types and terms of contracts offered, the factors that insurers take into account in offering this insurance and the trends in insurance premiums. This section draws on a report by insurance broker Aon, which is set out in full in Appendix 1
- discusses the results of a survey conducted by the Advisory Committee of the take-up of D&O insurance by companies listed on the ASX
- discusses the results of a survey conducted by the Australian Institute of Company Directors of the views of company directors about D&O insurance
- presents some general conclusions.

1.4 Findings about the D&O market

On the basis of its inquiries, it appears to the Advisory Committee that:

- the market for D&O insurance has tightened in recent years; the number of insurers and the capacity of the market have declined; insurers have placed greater limitations on the coverage of policies offered; premiums have increased markedly but the rate of increase may be levelling out
- in deciding whether to provide cover in a particular case, and on what terms, insurers are influenced by general market factors (global as well as Australian) and the nature of the insured's business, financial condition and claims history; while there does not appear to be much direct correlation with particular changes in legal and regulatory regimes affecting corporate officeholders, these developments all contribute to insurers' appreciation of D&O risk and their appetite for that line of business
- while most listed companies currently take out some form of D&O cover, the adequacy of the level of cover, and the appropriateness of the terms and conditions, for particular companies cannot be assessed given the lack of available information. However, there is an indication that some companies may have reduced their cover in an effort to contain the increasing costs of D&O insurance
- start-up and other small to medium enterprises (SMEs), and companies in higher risk sectors, have more difficulty in obtaining cover than more established companies in stable sectors
- while the availability of D&O insurance is a relevant factor in considering the personal liability of directors and other officers and the extent to which they can mitigate relevant risks, it does not provide protection for all or unqualified protection for those who do have cover.

1.5 Acknowledgements

The Advisory Committee acknowledges with appreciation the assistance of Julie Hamilton, Principal, Aon Professional Risks, in providing information about the Australian D&O market. Aon is the largest insurance and reinsurance broker in Australia, and is part of the Aon Group, which is the second largest insurance, and the largest reinsurance, broker in the world.

The Committee thanks the Australian Institute of Company Directors, in particular Gabrielle Upton, Senior Policy Officer, for undertaking a survey of AICD members on D&O insurance in consultation with the Advisory Committee.

The Committee also thanks Simon Alroe and Jennifer Crowther of Minter Ellison, Brisbane, and Mark Waller of Clayton Utz, Brisbane, for their comments on particular matters discussed in this report.

In preparing this report, the Advisory Committee took into account other relevant published information, including an article on D&O insurance in *CCH Australian Corporate News* (Issue 13, July 2003) and conference papers by Mark Sheller, Partner, Phillips Fox (December 2002), Steve Armstrong, Principal, Aon Professional Risks (November 2003), Rehana Box, Partner, Blake Dawson Waldron (March 2004) and Kerry Hogan-Ross, Partner, and Anne Horvath, Senior Associate, Phillips Fox (March 2004).

1.6 Committee members

Information about the Advisory Committee and its members and the Legal Committee and its members is set out in Appendix 2.

2 The D&O market

2.1 Trends

According to a report prepared by the insurance broker Aon in December 2003 (set out in Appendix 1), the market for D&O liability and company reimbursement cover in Australia has contracted substantially over the past three years. The report refers to significant premium increases, reduced capacity and the imposition of more restrictive policy terms and conditions on insurance buyers.

Aon also refers to a convergence of factors globally and in Australia that have influenced this outcome, including poor underwriting performance, the insurance market contraction, bond and share market volatility, a large increase in claims activity, the rising price of reinsurance and the tightening of regulatory requirements, as well as a series of significant natural and political events.

2.2 Participants and capacity

The Aon report details a decline in the number of insurers participating in the Australian market, together with a decline in the maximum cover each insurer is able to offer on individual risks.

Aon estimates that the total domestic capacity on any single risk through layering is theoretically in the order of \$240 million (down

from about \$550 million in 1999), though a realistic maximum capacity on a single risk is closer to \$150 million.¹

Australian companies that are unable to obtain the level of cover they require in the domestic market presumably have to look overseas. While some companies may access D&O cover outside Australia, the Aon report states that cover available offshore is less competitive than it was earlier.

2.3 Coverage of policies

2.3.1 Parties to the contract

D&O policies are taken out by companies for the benefit of their directors and officers. The company may pay the premium in full, or alternatively have an arrangement whereby the individuals covered also contribute to the premium, thereby giving themselves privity under the contract. Subsections 300(8) and (9) of the Corporations Act require reporting entities who have paid all or part of the premium costs to disclose that fact in their annual reports.

2.3.2 Matters covered

Under a D&O policy, a company may obtain insurance cover in respect of its directors and officers for any liability they may incur for ‘wrongful acts’ committed by them in the conduct of their duties. Policies generally include:

- *a D&O section*, which covers the insured directors and officers for their ‘wrongful acts’
- *the company reimbursement section*, which reimburses the company for loss where it is obliged to indemnify, and has in fact indemnified, the insured individuals for their ‘wrongful

¹ Under layering, several insurers provide cover for the same risk under a staged arrangement whereby one insurer provides cover up to a certain amount, with each successive insurer providing further insurance up to a specified amount in excess of that already provided by the previous insurers. The quoted figures assume that the risk is acceptable to all insurers and they are willing to outlay their maximum capacity on that risk.

acts'. Beyond this, the policies do not normally cover any liability incurred by the company itself.

D&O policies may be expressed to be subject to any right of indemnity the insured officer may have against his or her company.²

The definition in a D&O policy of 'wrongful acts' can vary from insurer to insurer and from industry to industry. A typical definition of 'wrongful acts' includes any actual or alleged breach of duty, breach of trust, neglect, error, misstatement, misleading statement, omission, breach of warranty of authority or other act done by any insured persons or any liability asserted against them solely because of their status as directors or officers of the company. The Aon report indicates that, while on the whole D&O policies appear to provide similar levels of coverage to potential insureds, the actual coverage can vary quite significantly from insurer to insurer.

It should be noted that D&O policies generally are confined to any liability an officer may incur to a third party and do not cover claims by a company against its current or former officers.

2.3.3 Statutory exclusions

Section 199B of the Corporations Act provides that D&O policies cannot cover (other than for legal costs) any liability by the directors or officers arising out of:

- wilful breach of duty in relation to the company
- improper use of position, or
- improper use of information.

² A company may indemnify a director or other officer for any personal liability incurred in the exercise of his or her office, other than for any of the circumstances set out in s 199A of the Corporations Act, namely where that person:

- owes a liability to the company or a related company
- is personally liable for a pecuniary penalty or a compensation order, or
- owes to a third party a liability that did not arise out of conduct by the person acting in good faith.

2.3.4 Contractual inclusions and exclusions

Subject to s. 199B, the coverage of D&O insurance and any exclusions are matters for determination between the insurer and the insured. For instance, particular policies may cover all or some of the following: civil proceedings (including employee actions and joint venture liability), official investigations, cost of successful defence of criminal proceedings and actions under various statutes, for instance, trade practices and occupational health and safety legislation and prospectus liability.

According to Aon, insurers usually write their D&O policies, and exclusions, in terms of general descriptions of insured ‘wrongful acts’ (as explained above) and exclusions (such as ‘dishonesty’ or ‘personal profit/advantage’), rather than by reference to any specific legislation in particular jurisdictions. In this way, policies are cross-jurisdictional and do not depend on how particular behaviour might be regulated in each jurisdiction. In consequence, policies do not have to be adjusted as particular laws are enacted or amended. Coverage will usually be afforded in respect of any additional obligations arising from legislative changes, unless the obligations relate to behaviour already excluded from the ambit of cover.

The Australian Institute of Company Directors *Guide to directors and officers liability insurance* states that it is common for D&O policies to have standard exclusions over and above s. 199B, which could include:

- prospectus liability
- professional indemnity
- insider trading
- claims brought by shareholders
- claims arising from breaches of environmental or occupational health and safety regulations
- claims alleging dishonesty or fraud.

It is also common for insurers to exclude insolvent trading from the insured events, particularly for start-up companies or where a company's accounts suggest some potential problems.

D&O policies, like all insurance contracts, are regulated by the *Insurance Contracts Act 1984*. The review of that Act by Alan Cameron and Nancy Milne, *Issues Paper on second stage: provisions other than Section 54* (March 2004), has raised a range of issues that apply to insurance contracts generally.

2.3.5 Policy terms and period

D&O policies typically run for 12 months and need to be renewed annually to maintain coverage.

D&O policies are offered on either:

- a 'claims made' or 'claims made and notified' basis (the majority of policies), or
- an 'occurrence' basis.

'Claims made' and 'claims made and notified' policies provide coverage for claims against insured persons during the policy period. The key distinction between these two types of policies is that the 'claims made and notified' policies require notification of a claim to the insurer (as well as the claim arising) during the policy period. However, the effect of judicial interpretation of s. 54 of the *Insurance Contracts Act* has been to override attempts by insurers to deny claims merely by reliance on this strict notification requirement.

The Government has foreshadowed amendments to s. 54 of the *Insurance Contracts Act* in regard to the period for notifying claims, and when protection ceases, under such policies, in response to the report by Alan Cameron and Nancy Milne, *Review of s. 54 of the Insurance Contracts Act 1984* (October 2003).

Under an occurrence based policy, the circumstances or situation leading up to a claim must have occurred during the period of insurance coverage, though the making and notification of the claim can occur subsequently.

2.4 Acceptance of risk

In deciding whether to provide D&O cover in a particular case, insurers take into account risk factors associated with the applicant. These factors, most of which are within the control of the applicant, include:

- *the type of activity undertaken by the applicant*—some companies such as new technology businesses, internet-related initiatives or speculative mining ventures may find it difficult to obtain D&O insurance for their officeholders, at least until their operations are shown to be viable
- *adverse financial performance or prospects*—enterprises that do not have an established financial track record, whose performance is deteriorating, or whose economic viability is at risk because of changes in market conditions may be unable to obtain D&O insurance or only do so on very restrictive terms and conditions
- *claims history*—will affect an applicant’s ability to secure ongoing coverage, or the terms of that coverage
- *the legal status of the applicant*—Directors of public companies generally have greater legal exposure than their private company counterparts, taking into account, for instance, developments in corporate governance principles and guidelines. Aon suggests that companies whose practices differ from these guidelines may find it more difficult to obtain D&O insurance or may obtain it only on more restricted terms.

Insurers may vary significantly in whether they are willing to insure particular applicants and, if so, the terms and conditions they are prepared to offer. This variation is reflected in the following data provided by Aon, in response to questions from the Advisory Committee.

Question 1. The number or percentage of new applicant companies refused D&O insurance (and the types of reasons for their refusals)

Insurer	Estimated percentage
1	53
2	38
3	25
4	50
5	65
6	33
7	20

Aon points out that, in assessing the relevance of the above responses, it is important to appreciate that insurers hold varying appetites with respect to the type of business preferred. Business declined by one insurer may be attractive to another. Overwhelmingly, the reasons for rejecting an application were cited as:

- financial position or risk falling outside underwriting guidelines (cited by one insurer to represent 50% of all refusals)
- new/start-up risk
- nature of activities outside underwriting guidelines
- past claims
- market speculation, for instance takeovers etc.

Overall, uninsurable risks may represent less than 10% of risks sought to be covered by insurance, given that at least half of the risks declined by one insurer may be attractive to another insurer.

Question 2. The number or percentage of companies refused renewal of D&O insurance (and the types of reasons for their refusal)

Insurer	Estimated percentage
1	Not provided
2	1
3	5
4	1
5	2
6	5
7	2-3

Aon stated that insurers refer to deterioration in financial position as the key reason for refusing to renew D&O policies.

Question 3. The number or percentage of companies offered renewals of their D&O insurance, but with materially reduced coverage than previously (and the types of coverage excluded)

Insurer	Estimated percentage
1	Not provided
2	1
3	10-15
4	10
5	5
6	Very few
7	5-10

Aon stated that methods employed by insurers to reduce their exposure to an individual insured include:

- reduction in limits of indemnity
- increase in deductibles/excesses
- imposition of insolvency exclusions
- deletion of outside directorship cover
- imposition of takeover/merger exclusions.

2.5 Cost of insurance

According to Aon, premiums for D&O insurance have increased since 2001 on average between 35-50% on an annual basis. Less attractive risks, or instances where premiums were not considered to be properly representative of the risk, have faced much higher increases.

The Aon report also estimated the total domestic D&O premium pool in 2003 to be in the order of \$180-200 million, a substantial increase in the estimate of \$80-90 million for 1999.

The Aon report has indicated that these price increases have led insureds to reassess, and in some instances reduce, their level of cover in order to contain their overall cost of insurance.

An industry survey by JP Morgan/Deloitte at the beginning of 2004 anticipated a further 18% rise in that year (*Australian Financial Review* 23 February 2004). However, Aon has since indicated that, as at mid-2004, the market may be entering into a transitional phase, arising in part from increased market competition, with premium increases for the rest of 2004 for risks that have stayed the same being more in the order of 10%.

2.6 Related forms of cover

Related forms of cover that may be available to companies and individuals include:

- *supplementary legal expense insurance*: this includes additional fees and expenses arising from litigation or official inquiries
- *personal directors and officers liability/legal expense insurance*: this covers legal costs and any damages, in excess of those covered by a D&O policy, that may be awarded against a director, for instance, in relation to claims arising out of employment practices, environmental issues, occupational health and safety matters, and claims brought by fellow directors
- *former officeholders insurance*: until mid-2003, this ‘run-off cover’ could be taken out by a company on behalf of a former director or officer. Typically, it provided cover for 6-10 years against claims that may arise in that period in consequence of that officeholder’s actions during his or her period of office. Currently, this form of insurance is not being offered, though former officers and directors without existing run-off cover can be protected under D&O policies taken out by their former companies, provided these policies are renewed each year
- *warranty and indemnity liability insurance*: this covers liabilities arising from any warranty or indemnity given in the course of a restructure and sale of corporate assets, including, for instance, liabilities incurred by directors and officers of the selling company
- *prospectus liability insurance*: this transaction-specific insurance indemnifies the company as well as its directors and officers for any claims arising from a particular prospectus or other disclosure document.

3 Take-up of D&O insurance

3.1 Survey of listed entities

Reporting entities are required by s.300(8) and (9) of the Corporations Act to indicate in their annual reports whether they have paid any premium for D&O insurance taken out on behalf of their directors and officers. To get a measure of the extent to which D&O insurance cover is taken up by these entities, the Advisory Committee carried out a survey of listed companies whose annual reports were posted on their websites. However, there was no equivalent way to survey the annual reports of unlisted entities.

Information on D&O insurance was collated from the latest annual reports of 570 ASX listed entities, representing 42% of all listed entities. Of the listed entities surveyed, 413 were industrial entities (constituting 43% of all listed industrials) and 157 were mining or oil entities (constituting 40% of all listed mining and oil entities).

In summary, 88% of the listed entities surveyed have D&O insurance. The level of D&O insurance for industrials (92%) was significantly higher than for mining (80%).

3.1.1 Industrial entities

Entities with D&O insurance

Of the 413 listed industrial entities surveyed, 379 (92%) had D&O insurance.

Most of those entities did not disclose their premiums or the terms of the insurance, referring to the confidentiality clauses in their contracts of insurance.

Of the small number that did disclose their premiums, most paid less than \$100 000 per year. There is no way of determining how representative these disclosed premiums are. A few larger listed industrials disclosed their premiums:

- one entity paid a D&O insurance premium of some \$560 000 in 2003, up from \$420 000 in 2002
- another entity paid a D&O insurance premium of some \$2 million for 2003
- a third entity reported that the cost of its D&O insurance for the year to 30 June 2004 is some \$2.3 million.

Entities without D&O insurance

Of the 413 listed industrial entities surveyed, 34 (8%) did not have D&O insurance. Of these:

- twenty entities simply stated, without elaboration, that they do not hold D&O insurance. Most refer to internal indemnity arrangements for the directors/officers
- nine entities referred only to their internal indemnity arrangements. It was therefore assumed that they have no D&O insurance
- five entities indicated that they had discontinued, interrupted or were still negotiating D&O insurance. One entity gave no explanation for its parent company discontinuing its policy. The second entity said that, 'given the current climate surrounding indemnity insurance', it had been unable to renew the expired D&O contracts by the date of the report. The third entity (a subsidiary) said that 'due to changes in the insurance market' its parent company had decided not to renew D&O insurance for its subsidiaries. The subsidiary 'was currently reviewing its options whether it will take out a policy'. The fourth entity said that insurers had declined to offer terms 'until the future activities of the Company are established'. The fifth entity said that the parent company was still in the process of negotiating D&O insurance.

3.1.2 Mining entities

Entities with D&O insurance

Of the 157 listed mining entities surveyed, 125 (80%) had D&O insurance.

Most of those entities did not disclose their premiums or the terms of the insurance, referring to the confidentiality clauses in the contracts of insurance.

Of the small number that did disclose their premiums, most were in the range of less than \$50 000 per year. One entity indicated that for a premium of \$16 000 it had \$1 million coverage. Another entity reported (without explanation) a premium increase of \$15 000 to \$45 000 between 2002 and 2003. A third entity reported an increase from \$14 000 to \$16 000 for that period.

Entities without D&O insurance

Of the 157 listed mining entities surveyed, 32 (20%) did not have D&O insurance. Of these:

- twenty-six entities simply stated, without elaboration, that they do not hold D&O insurance. Most referred to internal indemnity arrangements for their directors/officers
- five entities referred only to their internal indemnity arrangements. It is therefore assumed that they have no D&O insurance
- one entity indicated, without explanation, that it had discontinued D&O insurance.

3.1.3 Follow-up inquiries of entities without D&O insurance

Letters were sent to the 66 industrial and mining entities in the survey that had indicated in their annual reports that they did not have D&O insurance, inviting them to indicate their reasons for that decision and to raise any other matters relevant to D&O insurance.

Seven replies were received. Of those:

- two respondents indicated that they now have D&O insurance (though one of them, a bio-technology company, had obtained insurance only through the US market)
- one respondent indicated that it was unable to obtain D&O insurance, partly due to its small capitalisation, diverse overseas operations and unprofitable history
- three respondents, who were mineral explorers, had decided not to take out D&O insurance for various reasons, such as the limited extent of coverage offered and excesses applying, the cost of premiums relative to cover provided and the exclusions from coverage, such as prospectus liability
- one respondent indicated that it could not afford D&O insurance, as it was currently not generating any revenue.

4 Views of directors

4.1 AICD survey

In 2003, the Australian Institute of Company Directors (AICD), in consultation with the Advisory Committee, conducted an e-mail survey of its members on various aspects of D&O insurance. It received over 260 responses, from directors of SMEs as well as directors of listed entities.

The AICD published the results of the survey in *Company director*, November 2003. In summary, the results of the survey were as follows.

Question 1

Part 1—Are you satisfied with the availability of Directors' and Officers' Liability Insurance?

- Yes—46%
- No—47%
- Other—7%

'Other' responses include the following categories of answers:

- no comment
- did not directly address the question
- indeterminant answer.

Part 2—Do you have any suggestions concerning the availability of Directors' and Officers' Liability Insurance?

- See 'Matters raised by respondents', below.

Question 2

Part 1—Are you satisfied with the operation of Directors’ and Officers’ Liability Insurance?

- Yes—40%
- No—27%
- Other (as per Question 1)—33%

Part 2—Do you have any suggestions concerning the operation of Directors’ and Officers’ Liability Insurance?

- See ‘Matters raised by respondents’, below.

Question 3. In your experience, are there areas of possible directors’ liability that are uninsurable?

- Yes—48%
- No—27%
- Other (as per Question 1)—25%

Most common responses for areas of possible directors’ liability that are uninsurable were criminal or illegal acts and fraud and negligence.

Question 4

Part 1—In the Corporations Law (ss 199A, 199B) there are some restrictions on companies providing exemptions and indemnities to directors in respect of their liabilities. Does this concern you?

- Yes—46%
- No—23%
- Other (as per Question 1)—31%

Part 2—Do you have any suggestions for change?

- See ‘Matters raised by respondents’, below.

Question 5. In your opinion, do any of the concerns you have raised in this questionnaire act as a disincentive for you holding/accepting directorships and engaging in responsible risk taking as a director?

- Yes—41%
- No—40%
- Other (as per Question 1)—19%

Question 6. If you or your company have ever made any claims in the past, do you have any concerns with the way these claims were processed?

- No claims, no concerns—55%
- No claims, have concerns—5%
- Yes claims, have concerns—2%
- Yes claims, no concerns—0.7%
- Other (as per Question 1)—37.3%

Question 7. Do you have any other concerns about any aspect of directors' and officers' liability insurance?

The most common additional concerns expressed were:

- the high price of D&O insurance
- lack of availability and choice of insurance, especially for SMEs
- insurers do not take into consideration the experience of the directors and the board when assessing whether they will offer coverage to a company.

4.2 Matters raised by respondents to the survey

Respondents to the AICD survey raised a range of issues concerning the availability and operation of D&O insurance, including for SMEs.

4.2.1 Availability of D&O insurance

Various respondents indicated that, in their experience, it was easier for directors of established companies to obtain D&O insurance than those serving on start-up companies or those operating in more economically risky sectors. This scarcity of insurance in some instances affected the ability of these companies to attract experienced persons willing to serve on their boards. Indeed, 41% of respondents considered that their concerns regarding insurance acted as a disincentive for them to take up directorships and engage in commercial risk taking.

Some respondents proposed that this disincentive could be overcome by requiring all insurance companies to provide some minimal level of D&O cover at an agreed nation-wide single rate. Variable and discretionary rates could apply above the base rate. This would allow SMEs and companies operating in economically riskier industry sectors to at least secure and retain quality directors. Some respondents proposed that an insurance pool be established, with a view to obtaining better cover and premium levels.

The lack of available D&O insurance for some companies, or its prohibitive cost or limited coverage in some instances, could well, as respondents have suggested, act as a disincentive for some experienced persons to serve as directors of those companies. Nevertheless, in a market environment, it is a matter for each insurer to determine whether to offer D&O insurance, to whom, and on what terms, including premiums and exclusions. The basis, and funding arrangements, for any suggested statutory or regulatory intervention in a line of business such as D&O cover are far from clear.

4.2.2 Terms of D&O insurance

Some respondents considered that insurance companies may not sufficiently take into account the level of experience of board members, or the claims history of a company, in determining whether to offer D&O insurance, or its terms and exclusions. They also stated that it is relatively commonplace for insurance policies to contain exclusions such as for shareholder and creditor claims against the directors or officers and insolvency actions.

In a market environment, the terms on which D&O insurance is provided are matters for negotiation between the applicant and the insurance company. The not uncommon exclusion of apparently pertinent risks reflects the current state of the market in which buyers appear to have limited power and the insurers appear to be wary about covering these particular risks. It is a commercial decision by insurance companies whether to attempt to attract business by offering 'no-claim' bonuses or other incentives to enter into D&O contracts.

4.2.3 Cap on directors' liabilities

Some respondents asserted that the protection provided to directors by limited liability, and the incentive this creates for entrepreneurial activity, are being undermined by the increasing trend to 'lift the corporate veil' and impose personal liability on directors. They argued that this trend increases the need for readily available and reasonably priced D&O insurance cover. Respondents also asserted that D&O insurance may be more available and have better coverage if directors' liability were capped (for instance, as a multiple of the turnover or profit of the company).

4.2.4 Standard documentation and plain English

Various respondents expressed concern about the language and structure of D&O policies, including the difficulties in understanding the extent of cover provided. They proposed that insurance contracts use standard documentation and plain English so that they could be better understood and compared. They also argued that individual insurers should have to stipulate where they depart from the standard documentation. This could also reduce

areas of misunderstanding or possible disputation between insurer and insured.

4.2.5 Copies of policies

A number of respondents expressed concern about difficulties in obtaining copies of D&O policies within a reasonable time of entering into the contracts. This can create considerable uncertainty for insured persons concerning their rights, and obligations, under their policies. This problem can be exacerbated where the cover is given by foreign companies.

4.2.6 Problems when making claims

Some respondents pointed out that persons making claims can face a range of practical difficulties, such as where insurance companies:

- reserve their rights for an indefinite period before deciding what to do
- exercise control over the conduct of proceedings
- decline to respond to inquiries from insured persons about what those persons can do with the authority of the insurer and then later claim that the insured acted without authority
- settle cases without consultation.

The process of making claims, and the rights of both the insurer and the insured in the context of litigation that directly affects the obligation of the insurer to pay under the policy, are not necessarily capable of easy resolution. To some extent the rights of the parties are regulated by legislation. For instance, s. 54(1) of the Insurance Contracts Act qualifies the right of an insurer to refuse to pay a claim by reason of the act of the insured or some other person. In *Antico v Heath Fielding Australia Pty Ltd* (1997) 146 ALR 385, the High Court applied this subsection to uphold the right of an insured to claim under the D&O policy, notwithstanding that he did not comply with a condition of the policy which stated that the insurer was not liable to indemnify the insured unless the insured obtained the specific consent of the insurer before incurring legal expenses. In other circumstances, disputes between

the insurer and the insured may need to be dealt with through other forms of dispute resolution, as often set out in the terms of the insurance contract.

4.2.7 Illegal acts by fellow directors

Some respondents proposed a prohibition on policies penalising innocent directors for the acts of their co-directors, whereby the whole policy becomes void upon one or more of the directors committing an illegal act.

This is an important issue in practice. Sections 21 and 28 of the Insurance Contracts Act permit an insurer to void a contract ab initio for any fraud or dishonesty. An insurer may, for instance, be able to rely on a fraudulent non-disclosure by one director to void the whole D&O policy, thereby exposing the innocent directors. This is a problem for all types of insurance. In *Advance (NSW) Insurance Agencies Pty Ltd v Matthews* (1989) 85 ALR 161, the High Court voided a home insurance policy taken out by a husband and wife, following a fire in their home, where the husband failed to disclose the rejection by another insurer of a prior claim, which was unknown to the wife.

It follows that anyone seeking D&O insurance needs to consider carefully, and if necessary seek to negotiate, the terms of the policy to avoid if possible this voiding effect for innocent parties. Some policies have a cross-liabilities clause that excludes protection where a fellow director has acted illegally. However, other policies will continue to cover directors who were not party to an illegality. The terms of cover, and the premium for that cover, that an insurer will offer are matters for commercial negotiation.

4.2.8 Corporations Act s. 199B

Some respondents raised concerns about the legality of D&O insurance contracts that seek to preserve the rights of innocent directors (or other officers) where one or more of their fellow directors have breached their duties to the company. They considered that the legality of these contracts should be placed beyond dispute.

Section 199B prohibits a company from paying the premiums on any policy that insures an officer against any liability (other than

for legal costs) ‘arising out of’ any conduct involving a wilful breach of duty in relation to the company or improper use of corporate position or information. It has been suggested that the provision could prohibit an innocent director or other officer from being insured against a liability arising out of the improper conduct of a fellow officer. This matter has not been the subject of litigation. In the event of case law adopting this interpretation of ‘arising out of’, there would be a case for legislative amendment to make it clear that the prohibition on paying the premiums on insurance policies applies only in so far as the insurance policy would cover any person in breach of the stipulated obligations.

4.2.9 Run-off cover

Some respondents raised concerns about the availability of run-off cover for the statute of limitations period after the departing director or other officer had left the company. This is a matter that is sometimes addressed by agreement between the company and its officers, with a commitment by the company to maintain cover for the requisite period following the departure of an officeholder. Unless D&O cover is maintained, a former officeholder may be left without any recourse against a policy for claims arising in subsequent years.

4.2.10 Claims made policies

The Advisory Committee notes that issues raised by some respondents concerning when protection ceases under a claims made policy have been considered in the review of s. 54 of the Insurance Contracts Act.

4.2.11 Costs of litigation

Some respondents referred to the recent decision of the New South Wales Court of Appeal in *Silbermann, Rich and Greaves v CGU Insurance Limited* [2003] NSWCA 203, and the subsequent decision of the New South Wales Supreme Court in *Daniel Wilkie v Gordian RunOff Limited* [2003] NSWSC 1059.

The Advisory Committee notes that both cases involved the question of the ongoing payment of defence costs by the insurance company during the course of litigation against the defendant

directors. Both cases turned on the wording of the dishonesty exclusions under the specific policies and their application to the specific actions of the insured persons. In both cases, the insurer was able to rely on the dishonesty exclusions to deny the insured's claim.

Aon has advised that most insurers consider that these decisions are specific to the wording of the particular policies. Insurers have not altered their standard policy clauses (which vary from insurer to insurer). However, a number of policies are under review and these clauses will be reviewed as part of that overall process, depending upon the final outcome of the litigation. In June 2004, the High Court granted leave for an appeal in the *Silbermann* case.

5 Conclusions

5.1 State of the market

This report provides an overview of the current position regarding the availability of D&O insurance cover. While D&O is a well-established line of insurance, the market for it (together with some other forms of liability cover) is less transparent than the market for other forms of insurance, such as for householders and motor vehicles, where the product is more standardised and reasonably comprehensive cover is generally available.

The period 2000 to 2004 has seen a general tightening of the D&O insurance market, with fewer insurers offering D&O insurance, premiums rising considerably, and policies in general containing more limitations and restrictions. Aon says that the trend over the last few years has been for insurers to become more selective in the risks they were prepared to cover, and the pricing, terms and conditions of the cover offered. It appears to be very much a seller's market.

However, the state of the insurance market fluctuates, and the slow-down in the rate of increase of premiums anticipated by the industry may signify a degree of stabilisation.

D&O cover is available in Australia but not for all who seek it. It appears to be the case that well-established and successful companies are more likely to be able to obtain cover than start-up companies or companies operating in riskier environments or experiencing financial stress. Also, even stronger companies may have difficulty in obtaining cover for particular types of risk that they regard as pertinent in their own lines of business. As a practical matter, insurance cover of this kind is less likely to be available where the need may be greatest. Accordingly, D&O insurance does not serve as an across-the-board mitigator of the personal financial liabilities to which corporate directors and officers are increasingly exposed. It cannot provide a complete cushion.

It is of course the case that D&O insurance is not a gift or a free good. It is a product offered by an insurer on the basis of its assessment of the risks involved and its ability to earn across the relevant line of business a sufficient return on the capital required (by regulatory fiat as well as commercial judgment) to succeed in that form of business.

While the availability of D&O insurance is clearly a relevant factor in weighing the benefits and risks of assuming a corporate office, directors and officers need to be aware that any insurance cover obtained is not necessarily standardised or comprehensive. This points up the need for company officers to inform themselves of the terms of cover, including what is included and excluded.

In a general sense, developments in the regime affecting the liability of directors will have an impact on the availability of relevant insurance cover. Any significant increases in the potential liability, or in claims experience, and even uncertainties regarding the same, will be relevant to the assessment of risk by insurers and their willingness to offer cover or the terms of that cover. At the same time, the approach of insurers appears more likely to be affected by overall trends, globally and in Australia, than by reaction to particular legislative or judicial changes or developments.

5.2 Take-up of D&O insurance

It is difficult to assess the adequacy of the coverage of D&O insurance in Australia and the consequences of rising insurance premiums. Most but not all listed entities have some D&O insurance, though information about the level of take-up of insurance by unlisted companies is not available. In some cases, companies may have to go offshore to obtain the cover, or the level of cover, that they seek.

There is no indication that an increase in premiums, or any other factor, is creating a trend towards listed entities discontinuing D&O insurance. The reported level of withdrawal in the survey (at most 1%) is insignificant. As Aon has suggested, however, some companies may have reduced the level of their cover in an effort to contain cost increases.

Given the lack of available information, it is not possible to determine the adequacy of the coverage provided by the D&O policies. Most listed entities with D&O insurance referred to the confidentiality clauses in their contracts in declining to disclose in their annual reports any coverage details, including whether their coverage is changing. A few entities indicated in their annual reports that they had decided not to take up D&O insurance because of the limited coverage offered, restrictions or exclusions included, and cost.

5.3 Attitude of directors

Respondents to the AICD survey, who included directors of SMEs as well as listed entities, expressed a significant level of concern about the availability and operation of D&O insurance, including areas of possible directors' liability that are uninsurable. Nearly half the respondents indicated that these concerns may act as a disincentive to holding or accepting directorships and engaging in entrepreneurial activity. This can affect the ability of entities such as SMEs to attract capital and experienced board members. The AICD survey indicates that obtaining effective and affordable D&O insurance is a major commercial issue, particularly for the SME market. A matter of particular concern to AICD respondents has been the considerable increase in the premiums for D&O contracts. Pricing of insurance premiums is a commercial consideration, affected by the level of competition in the industry, claims experience, profitability of insurers (which, in turn, is influenced by the nature and size of D&O claims) and overall developments in the corporate governance and liability framework.

5.4 Further review

The D&O insurance market, like other insurance markets, will fluctuate over time. This report provides an overview of the Australian market in 2003-04. Future surveys could assist in gaining a better appreciation of the effect of changes to, and trends in, that market.

Likewise, comparisons with trends in comparable overseas markets may be instructive, given the global nature of the D&O insurance market. For instance, a UK Department of Trade Consultative

Paper *Director and auditor liability* (December 2003) has raised for discussion whether, in the UK:

- the cost of D&O insurance is increasing in real terms and the coverage is becoming less comprehensive
- if so, it is a fair reflection of the market pricing of increased risk.

This exercise is a follow-up to the statement in the 2003 UK Higgs Report that ‘the cost of directors’ and officers’ insurance is increasing and the coverage appears to be becoming less’. A report on the matters raised in the Consultative Paper is possible in 2004.

Appendix 1 Report from Aon

Request from the Advisory Committee

In November 2003, the Advisory Committee contacted Julie Hamilton, Principal, Aon Professional Risks, seeking information on various aspects of D&O insurance. Aon is the largest insurance and reinsurance broker in Australia, and is part of the Aon Group, which is the second largest insurance, and the largest reinsurance, broker in the world.

The information requested included:

- the nature and size of the Australian D&O market
- the number of current insurers in that market
- the types and availability of D&O insurance policies
- D&O contract coverage and exclusions
- factors in assessing risk
- trends in premiums.

In December 2003, Julie Hamilton forwarded the following report from Aon, stating that:

This report represents Aon's views of the prevailing general conditions in the Australian D&O insurance market as at the date of this report. In relation to specific insurance placements, Aon provides many solutions for its clients which are unique to those clients and are confidential. If the Committee has any additional questions or requires any updated information, please contact the author at any time.

The Advisory Committee requested and received further information from Aon on various other matters, including that set out in Section 2.4 of this report.

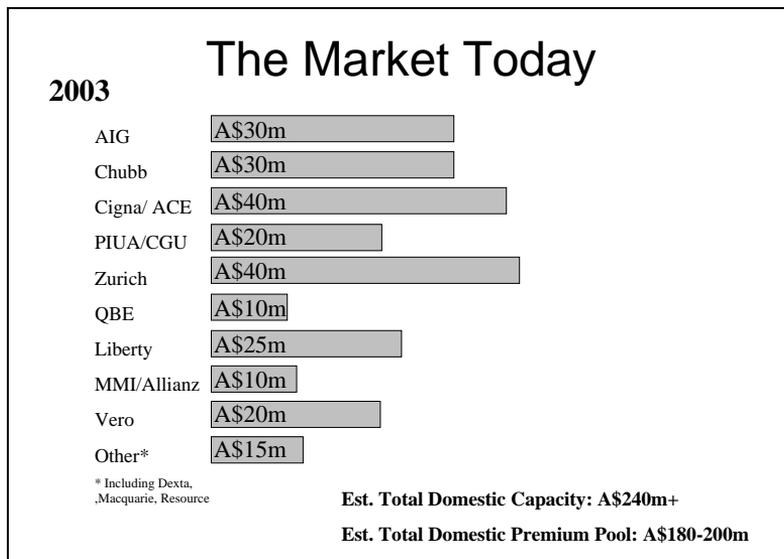
Aon report on directors and officers liability and company reimbursement insurance (December 2003)

1. The Australian D&O Market

The Australian Directors & Officers Liability and Company Reimbursement market ('D&O Market') has contracted substantially over the last three years. The following diagram summarises current market participants together with the maximum capacity each Insurer is able to offer on individual risks.

Where an individual insured requires a higher limit of indemnity than is available from a single insurer, such capacity is generally achieved by 'layering'³. In some instances, Insurers will be prepared to co-insure to achieve required limits of indemnity, however, this practice is less common in the D&O market.

Diagram 1



³ The process whereby one insurer is required to provide insurance in excess of another's participation.

Estimated total domestic market capacity is currently A\$240 million. In real terms, however, total domestic market capacity that can be secured on behalf of an individual Australian insured is more likely to be less than A\$150 million as a result of:

1. varying risk appetites,
2. the inability or preparedness of certain insurers to ‘follow’,⁴ another underwriter, or
3. the inability or preparedness of certain insurers to ‘follow form’,⁵

In addition to the above, market capacity available on an individual risk can be influenced by a plethora of other market parameters, including, for example:

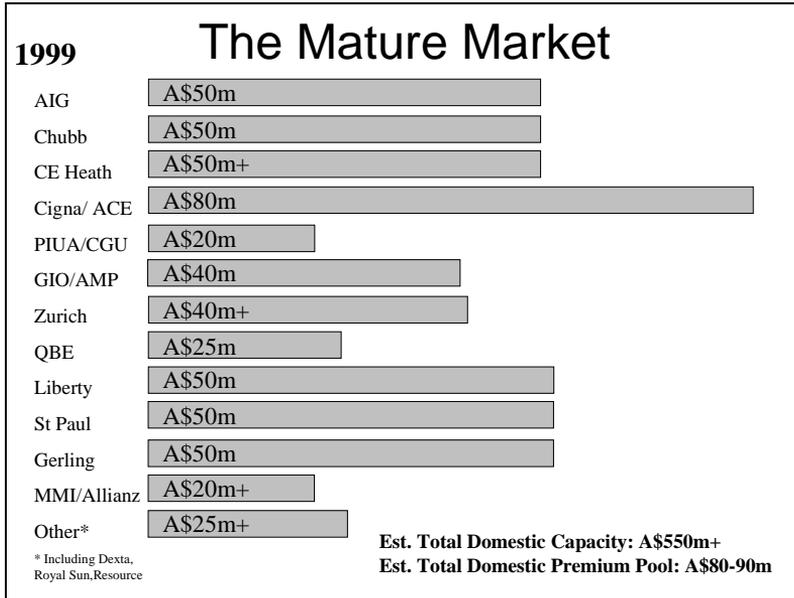
1. American International Group (‘AIG’) will only follow Chubb Insurance Company (‘Chubb’). Therefore, if an alternative lead is selected, AIG capacity of \$30 million will be unavailable.
2. If the risk is incorporated outside of Australia or has substantial US exposures, Zurich Australian Insurance Limited (‘Zurich’) will be unable to participate. (Capacity—\$40 million)
3. Insurers will generally be unwilling to offer greater limits of indemnity per layer on an excess basis than is offered by the primary insurer. So on larger risks, selection of an insurer with a smaller lead line can result in increased layering and a less cost effective result.(i.e. \$10 million or less)
4. Allianz Australia Limited (‘Allianz’) will not participate on an excess basis. (\$10 million).

⁴ In a layered program, an Insurer may not choose to participate or ‘follow’ another Insurer based on that individual insurers perception of the underlying insurers financial stability, claims paying ability or practices or in some instances, for market related reasons.

⁵ Follow form means participation on the same terms and conditions (i.e. policy wording) as the primary insurer.

For comparison purposes, available market capacity in 1999 is shown in the Diagram 2, below.

Diagram 2



You will note from the above that while total domestic market capacity has reduced substantially, the domestic premium pool is estimated to have increased by in excess of 100% since 1999.

Australia has been the key D&O market for Australian Insureds since the softer market conditions of the late 1990s substantially reduced the competitiveness of the Lloyds and UK companies markets. Australian markets continue to offer superior cover at more competitive pricing than is generally available to Australian Insured's in the United Kingdom/Europe or other overseas markets.

Notwithstanding, some niche markets, such as financial institutions, may derive cost/coverage benefits from leading substantial programs out of the UK/Europe.

1.1 Availability of D&O Insurance

The contraction in available D&O market capacity as demonstrated by the variance between Diagrams 1 and 2 is driven by numerous factors relevant to the current hard market cycle.

In indicating a preparedness to participate in this class of insurance, in the Australian jurisdiction, each Insurer has made an assessment of the extent to which they are prepared to provide insurance relative to the legislative and legal environment, and the minimum return on capital required to maintain participation.

As a result, the breadth of an Insurers' standard D&O contract is determined by guidelines established by them in consideration of the above and as a result of their own underwriting experiences. This is also limited by the parameters of their reinsurance arrangements.

As the key D&O markets in Australia are generally operations of overseas insurers, these guidelines are reflective of worldwide experience in the class of insurance and overseas trends.

Whilst on the whole D&O policies appear to provide similar levels of coverage to potential insureds, the actual coverage can vary quite significantly from Insurer to Insurer.

Rather than address specific legislative issues, the exclusions imposed on D&O policies are more commonly 'behaviour' based or 'activity' based thereby enabling the application of the exclusions across multiple jurisdictions irrespective of the specific legislation in those jurisdictions.

Examples of 'behaviour' based exclusions are 'dishonesty' or 'personal profit/advantage' exclusions. Examples of 'activity' based exclusions are 'bodily injury/property damage', 'pollution', 'professional indemnity' and 'prospectus' exclusions.

An Insurer's decision in respect of the breadth of their standard policy wording is one which is independent from the individual characteristics of any one risk and is usually not negotiable in respect of individual risks. Coverage discussions on these issues would normally be undertaken on behalf of all risks underwritten with that particular insurer.

Insurers are cognisant that the potential personal liability of directors' falls beyond the exposures generated by the Corporations Act and, historically, have been prepared to provide coverage beyond Corporations Act liabilities. For example, coverage is provided to varying degrees under standard market policies in respect of actual or alleged breaches of:

- Trade practices/fair trading legislation,
- Occupational Health & Safety Legislation, and
- Environmental Law (defence costs only and limited in availability)

Where new legislation is passed which imposes additional personal responsibilities upon directors or others involved in the management of corporations, coverage will usually be afforded in respect of those additional obligations without the necessity for policy amendment, unless the legislation relates to exposures currently excluded from the ambit of cover.⁶

Notwithstanding current hard market conditions, we are unaware of a recent instance where an Insurer has sought to specifically exclude liabilities generated under new legislation, on a blanket basis, where such coverage would otherwise be provided.

Insurers do, however, closely monitor developing case law and may seek to alter their policy as a result of developments in this regard. As such, it may be appropriate to suggest that Insurers will only seek to limit coverage under their policies in respect of specific legislation where the extent of litigation under that legislation is causing concern.

Where claims against directors under the subject legislation are not covered as a result of existing policy exclusions, coverage is unlikely to be provided in relation thereto unless we are able make a case for coverage, on behalf of our clients.

Naturally, in harder market conditions this process is more difficult due to the less competitive environment.

The following parameters provide for an assessment of risk based upon the individual merits of a particular risk relative to either a predetermined set of standards or relative to other similar risks. As such, these factors are seen to be within the control of the Insured and will affect the premium and terms and conditions offered. The list is not complete but is provided by way of example.

⁶ Coverage under D&O policies is not provided by reference to specific legislation. D&O policies provide coverage for 'Wrongful Acts', which are defined to include an actual or alleged breach of duty, breach of trust, misstatement, misleading statement, error etc.

Parameter	Impact on the Availability of D&O
Class of Risk <ul style="list-style-type: none"> • Banks, Financial Institutions • Construction • Mining (speculative and non speculative) • Oil and Gas • Tobacco • Pharmaceuticals • Airlines • Internet related • Hi-tech • Infrastructure 	May prohibit some Underwriters from participation thereby limiting market options. Terms, conditions and premiums will be reflective of more limited options and an increase in perceived risk.
Financial Performance	Poor financial performance, especially on a sustained basis may lead to an inability to secure ongoing coverage. A lack of financial 'track record' will also have an impact on an organisation's ability to obtain D&O insurance.
Business Trends	Business activities relative to economic considerations and any negative media attention has the ability to impact the terms and conditions of coverage, especially if renewal coincides with media attention.
Takeover Activity	Acquisition activity generates additional exposures and premiums will be reflective of this.
Legal Status of the Entity	Clearly directors of public companies have greater exposures than their private company counterparts. Premiums and coverage are reflective of this.
USA/Canada Exposures e.g. The issue of American Depository Receipts of US Debentures	Any US/Canadian exposures will receive special underwriting attention including the imposition of increased excesses and additional exclusions.
Claims History	Naturally an insured's claims history will impact its ability to secure ongoing coverage, or where coverage is achievable, the terms of that coverage

In addition to the above, recent developments such as the ASX Corporate Governance Guidelines and a company's extent of compliance with these guidelines, has the ability to impact an Insurer's decision to provide coverage and the terms and conditions upon which coverage will be provided.

As a result of the hardening market conditions, Insurers have certainly become more selective in the risks that they are prepared to cover and the pricing, terms and conditions of that cover.

Many risks have been unable to secure renewal of their D&O coverage due to increased underwriter selectivity. This selectivity is particularly evident in respect of:

1. Organisations demonstrating deteriorating financial performance.
2. New organisations that are unable to demonstrate a financial track record
3. New technology companies, unless income producing
4. Internet related ventures

2 Premiums

Since 2001, premiums have increased on average between 30-50% on an annual basis. Consistent with this environment, less attractive risks, or risks whose premiums were not considered to be properly representative of the risk, have faced much higher increases.

In 2001 and 2002 primary pricing was the focus of most attention with excess insurers following suit with similar rate increases for their participation.

Due to the very soft market conditions of the late 1990s excess pricing became very cost efficient relative to the outlay of capacity with excess pricing on some risks priced as finely as 30% of primary pricing for similar capacity outlay.

As a result, excess pricing has been the focus of significant attention over the most recent renewal cycle, with pricing of 60-70% of underlying pricing being sought on excess participation for similar capacity outlay. In addition minimum premium for the outlay of capacity currently stands at about \$1200 per million irrespective of underlying pricing. Renewal increases on primary pricing has begun to taper at 15-20%.

In recent months renewed flexibility has been identified in the market in respect of preferred risks underwritten by at least one major market participant. As this is a recent development, any substantial negative claims experience sustained by this market could delay any further improvement in market conditions.

Pricing movements have led to a re-assessment by Insureds of the appropriateness of established limits of indemnity and in many

instances, reductions in limits of indemnity have been initiated by Insureds to contain overall pricing.

Consideration has also been afforded to the relative premium savings achieved by increasing the company reimbursement excess. Generally savings in this respect are minimal even for larger excess of up to \$1 million as the D&O Insuring clause retains a nil excess.

It is anticipated that average renewal increases of 15-20% will continue to apply during 2004 with reduced increases in 2005 as the market begins to stabilise. While at renewal some Insurers continue to seek 30% increases, this is being offset by increased competition on preferred risks.

This competition is expected to continue, on selected risks over the next 12 months. Naturally, any new market entrants would increase competition and assist in the development increased market flexibility, while the impact of major D&O claims will delay this process.

Appendix 2 Committee members

The Advisory Committee

Functions

The Corporations and Markets Advisory Committee is constituted under Part 9 of the *Australian Securities and Investments Commission Act 2001*.

Section 148 of that Act sets out the functions of the Advisory Committee:

CAMAC's functions are, on its own initiative or when requested by the Minister, to advise the Minister, and to make to the Minister such recommendations as it thinks fit, about any matter connected with:

- (a) a proposal to make corporations legislation, or to make amendments of the corporations legislation (other than the excluded provisions); or
- (b) the operation or administration of the corporations legislation (other than the excluded provisions); or
- (c) law reform in relation to the corporations legislation (other than the excluded provisions); or
- (d) companies or a segment of the financial products and financial services industry; or
- (e) a proposal for improving the efficiency of the financial markets.

Advisory Committee members

The members of the Advisory Committee are selected by the Minister in their personal capacity from throughout Australia on the basis of their knowledge of, or experience in, business, the administration of companies, financial markets, financial products and financial services, law, economics or accounting.

The members of the Advisory Committee are:

- Richard St John (Convenor)—former General Counsel of BHP Limited and Secretary to the HIH Royal Commission
- Elizabeth Boros—Professor of Law, Monash University, Melbourne
- Barbara Bradshaw—Chief Executive Officer, Law Society Northern Territory, Darwin
- Philip Brown—Emeritus Professor, University of Western Australia, Perth
- Berna Collier—Commissioner, Australian Securities and Investments Commission (alternate to Jeffrey Lucy, ASIC Chairman)
- Greg Hancock—Managing Director, Hancock Corporate & Investment Services Pty Ltd, Perth
- Merran Kelsall—Company Director, Melbourne
- John Maslen—Chief Financial Officer and Company Secretary, Michell Australia Pty Ltd, Adelaide
- Louise McBride—formerly Partner, Deloitte Touche Tohmatsu, Sydney
- Marian Micalizzi—Chartered Accountant, Brisbane
- Ian Ramsay—Professor of Law, University of Melbourne
- Robert Seidler—Partner, The Seidler Law Firm, Sydney
- Nerolie Withnall—Consultant, Minter Ellison, Brisbane.

Legal Committee members

In preparing this Report, the Advisory Committee has been assisted by the legal analysis and advice it has requested from its Legal Committee. The members of the Legal Committee are selected by the Minister in their personal capacity from throughout Australia on the basis of their expertise and experience in corporate law.

The members of the Legal Committee are:

- Nerolie Withnall (Convenor)—Consultant, Minter Ellison, Brisbane
- Elspeth Arnold—Partner, Blake Dawson Waldron, Melbourne
- Ashley Black—Partner, Mallesons Stephen Jacques, Sydney
- Elizabeth Boros—Professor of Law, Monash University, Melbourne
- Suzanne Corcoran—Professor of Law, Flinders University, Adelaide, and Professorial Fellow, Australian National University, Canberra
- Damian Egan—Partner, Murdoch Clarke, Hobart
- Brett Heading—Partner, McCullough Robertson, Brisbane
- Jennifer Hill—Professor of Law, University of Sydney
- Francis Landels—formerly Chief Legal Counsel, Wesfarmers Ltd, Perth
- Duncan Maclean—Partner, Cridlands Lawyers, Darwin
- Laurie Shervington—Partner, Minter Ellison, Perth
- Gary Watts—Partner, Fisher Jeffries, Adelaide.

Executive

The Executive comprises:

- John Kluver—Executive Director
- Vincent Jewell—Deputy Director
- Thaumani Parrino—Executive Assistant.