

# **DIRECTORS AND OFFICERS LIABILITY INSURANCE UPDATE**

**by N.H. Stanbury, Directors & Officers Limited**

As readers will be aware, the whole issue of Directors and Officers liability insurance is clouded to some extent by what is now Section 310, Companies Act 1985. That Section (which originated in the 1929 Act) severely limits the prospective indemnity available to a director from his company and can be interpreted as making void alternative arrangements for the provision of indemnity by a third party such as an insurer.

Whilst the full effect of the section has never been tested in court, as a matter of practice it has little effect on D & O as a class of business - willing underwriters accept premiums and fall over themselves to meet claims in the traditional manner. Nevertheless, the Section is long overdue for revision as there is scope for both clarification and relaxation, at least in establishing whether premiums can be paid wholly or partially by the company as distinct from by the directors and officers covered. The potential effects of the Section do not just impinge on D & O as it is arguable that any company-arranged cover (such as PI, PL or even motor) which could directly or indirectly meet a loss that attaches to a director is equally caught by the Section's voidance provisions.

In February 1988, the DTI issued a consultative document and called for comments on the Section, covering quite a wide field not merely confined to the insurance aspects. Although a significant number of relevant interested bodies were approached for views, it is noteworthy that no-one in the insurance industry seems to have been on the official list! This has not, however, precluded interested parties representing the industry (including the writer's company) from putting forward their views, which have been willingly accepted.

It is understood that the DTI has now effectively determined its approach to the possible revision of Section 310. However, time and manpower constraints may preclude proposed amending legislation (for this and other matters) being included in the forthcoming Companies Bill, leaving the probability that Cinderella will miss the ball yet again and we shall see all too-frequent piecemeal revision of companies legislation in a series of Companies Acts reminiscent of the early 80's.

Much has been written about and speculated upon the personal liability of directors and officers for the tragic events seen at Zeebrugge and Kings Cross. In both cases, there is a suggestion that the deficiencies of management in enforcing safety

procedures at least aggravated the potential for loss of life and damage to property. Companies may commit crimes such as manslaughter as well as tortious acts of negligence but, in both instances, a company can only act through the medium of its board (its "mind and will") and directors may thus be vicariously liable for acts of their company in which they themselves played no direct part.

D & O has traditionally excluded claims arising out of or involving, inter alia, bodily injury or death or property damage, on the general underwriting ground that such risks should be more specifically insured elsewhere. There is doubt, therefore, that a D & O policy could respond to indemnify directors in respect of any loss arising from the consequences of either of the disasters quoted, bearing in mind also that fines or penalties awarded would in any case be excluded from indemnity.

Nevertheless, these incidents highlight an important and material exposure to possible personal liability on the part of directors and it remains to be seen: (a) whether effective action will be taken and with what result; (b) whether directors in these situations have or should have adequate indemnity for both legal and other representational expenses and for damages awarded, by means of D & O or any other relevant cover.

With the Editor's permission, I intend to report further on both these matters as they develop.

**A Note from Australia**  
**THIRD ANNUAL NATIONAL CONFERENCE**  
**MELBOURNE 1989**

The Third Annual National Conference of the Australian Insurance Law Association will be held at the Southern Cross Hotel, Melbourne, between 1st and 3rd November, 1989, just prior to the commencement of the Melbourne Cup Spring Racing Carnival.

Plans for a stimulating program are well advanced and further details will be circulated early in 1989 when plans are finalised.

Whilst members of the Association will be informed of the progress of plans and will receive registration papers in the second half of 1989, persons who are not members of the Association and who are interested in attending should register their interest with:

The Conference Secretariat, Third Annual National Conference, Australian Insurance Law Association, P.O. Box 47, GLEN WAVERLEY. 3150. Fax: (03) 560 3008