Association as circulated. Prof. Adams suggested that the expulsion or suspension of a member under the proposed amendments to Rule 5 should be effected by a resolution of the whole committee, but that there should be provision for the appointment of a panel to hear representations and report back to the committee. The meeting approved the amendments (including Prof. Adams' proposal) to the constitution.

8. **Subscriptions for 1990/91**

The Hon. Treasurer stated that subscriptions had not been increased at the last AGM, that there was a need to fund increased BILA activities and that the Association's financial position should be strengthened with an increased differential between corporate and individual subscriptions. By a large majority the meeting agreed the following subscription rates for 1991/92:

Individual – £25
Corporate – £100

9. **Any other business**

There was no other business.

M P England
Hon. Secretary

THE 1990 UPDATES

1. DIRECTORS' AND OFFICERS' LIABILITY INSURANCE LAW AND PRACTICE
By Reg Brown, R.E. Brown and others, Syndicate 702 Lloyd's

Since I spoke at the BILA Colloquium in London a few years ago, the Directors' and Officers' Liability class has come of age and is now a very hot potato.

Legislation

A number of legislative changes have helped to encourage the sale and purchase of Directors' and Officers' Liability Insurance.

The 1986 Insolvency Act introduced the concept of wrongful trading and gave wide powers and duties to the insolvency practitioners who are required to consider a report on the behaviour of directors when a company becomes insolvent.

One of the first cases brought against directors under the Act - the Produce Marketing case - resulted in an award of £75,000 against the defendant directors for wrongful trading. There are currently outstanding a number of actions against directors under the Act said to be in the hundreds and many directors are currently considering purchasing the cover for the first time for fear of liability under the Act.

Another concept created by the Insolvency Act is that of the shadow director. The Act imposes liability not only to those who are formally appointed as directors but also on those who act as directors and whose instructions the directors act upon. As the law develops we may begin to understand more about who will be caught by the provisions, but parent companies could apparently be held to be shadow directors of subsidiary companies and consequently liable for wrongful trading. Significant investors and certainly bank investors could be caught. According to David James, the company director trying to rescue Eagle Trust from total ruin, the Act has frightened banks from giving advice to troubled companies for fear of becoming liable as shadow directors.

Whether the banks are justified in that fear is another question, but one group of people appears to be safe and that is the group of professional advisers who are given protection from the effects of the Act for performing professional duties for companies who subsequently become insolvent.

The liability of company directors and officers is also affected by such legisation as the Data Protection Act, Health and Safety at Work Act and is affected by provisions in the Environmental Protection Act which imposes criminal liabilities on the directors of companies in the same way that criminal liabilities are imposed upon the companies themselves.

The most significant legislative amendment affecting the sale and purchase of directors' and officers' liability insurance must be the amendment to Section 310 of the 1985 Companies Act introduced by the 1990 Companies Act amendments. A severe difficulty with the sale of directors' and officers' liability policies has always been Section 310 of the 1985 Companies Act which provides that any provision, whether contained in the company's articles or in any contract with the company or otherwise, for exempting any officer of the company or any person (whether an officer or not) employed by the company as auditor from, or indemnifying him

against, any liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company is void. The principal exceptions to avoidance are agreements for the payment of defence costs incurred in successfully defending civil or criminal proceedings or in applying to the court successfully for release from liability where the director has been in default but has not been dishonest or unreasonable.

The new amendments provide that nothing in Section 310 prevents a company from purchasing and maintaining for the directors and officers liability insurance provided that, where a policy has been purchased, that fact shall be stated in the directors report.

Now at least it seems that the purchase of directors' and officers' liability insurance is recognised by the legislation as being perfectly proper and permissible.

Practical examples of directors' and officers' liability

The Blue Arrow affair has led to prosecutions and I understand from press reports that Nat West Investment Bank with the full support of the Nat West Group has decided to fund the legal costs of its present and former directors and employees. The bank thought it right that the directors and employees should have proper representation and in agreeing to provide assistance, hopes that the case can be dealt with quickly rather than run on for years as in other cases such as Guinness.

D & O insurers will usually indemnify prosecution defence costs, except in cases of fraud and dishonesty. In the event that underwriters pay defence costs and their client is then found guilty of an offence involving dishonesty, they may seek to recover their expenditure from their assured.

In the case of the prosecutions arising out of the *Herald of Free Enterprise* disaster, the D & O policy would normally indemnify the officers charged with manslaughter. The policy would not indemnify for any compensation awarded for bodily injury or property damage on the assumption that the appropriate employers liability, public liability and product liability policies would be in place. The cover in relation to criminal prosecution defence is often undervalued and could certainly apply in other disaster cases such as Kings Cross, Clapham, the *Marchioness*, Lockerbie, Chernobyl, Union Carbide/Bophal.

I wonder whether we might see more prosecutions similar to the P & O prosecutions.

Disasters of a financial nature rather than a bodily injury nature includes Ferranti, British & Commonwealth, Bond Corporation, Equiticorp in New Zealand where the directors are already defendants in an action for record damages of NZ$564M, Quintex, National Safety Council, Rothwells Bank.

The Market

The market remains a province of specialists, the principals of which are:-

(1) 5/6 Lloyd's syndicates who are leaders.
(2) Sun Alliance.
(3) AIU and Chubb
(4) The composites, who have remained on the sidelines for so long while the market developed and who have now joined forces under the banner of Encon, a Canadian Underwriting Agency.

2. THE ENVIRONMENTAL PROTECTION BILL
By Dr. Malcolm Aickin

I wrote a paper on this subject in the May 1990 issue of the British Insurance Law Association Journal. I was conscious then that things would change by the time it was published. I said then that the Bill was expected to pass into Law before the end of July and that the Government's White Paper on the environment would be published at about the same time. The White Paper was published on 25th September 1990.

The Environmental Protection Bill has passed through the House of Lords Committee stage and is now expected to complete its House of Lords Report stage in the middle of October.

Contaminated Land

Since I wrote the previous paper, the Government promised to introduce provisions into the Environmental Protection Bill requiring local authorities to create registers of contaminated land. This has now appeared in the miscellaneous section at the end of the Bill as Section 136. There are other sections in the Bill which deal with contaminated land, as I mentioned in my earlier paper. In particular Section 60 imposes a duty on Waste Regulation Authorities to monitor and secure the safety of closed landfill sites. The application to close landfill sites is mentioned in the marginal note. However, the language of the section itself extends to all land except where a site licence is in force, thus clearly excluding open landfill sites, where one of