



# The Financial Lines Report

JUNE 2007

## Timely release of ACE's new D&O Policy

Chris Newing, the Financial Lines Manager for ACE Insurance Limited in New Zealand, believes that the delivery of ACE's new and broader Directors & Officers insurance policy is very timely, given the rapidly changing legal environment confronting directors and officers of corporations.

### *Business and legal environment*

A number of recent New Zealand regulatory investigations and prosecutions highlight the increased willingness of shareholders to closely scrutinise boards and management. **ACE's new, wider D&O policy better protects directors and officers and offers them peace of mind in today's market.**

Mr Newing said "It's a strong, flexible and innovative policy designed for clients operating both local and international businesses".

*"Consistent with the approach of international competition agencies, the Commission has made a conscious effort to deter anti-competitive conduct by focusing on activities that cause the greatest detrimental impact on competition and consumers, and taking flagship cases that establish precedents and send clear messages to the market."*

COMMERCE COMMISSION GENERAL COUNSEL, PETER TAYLOR  
(from an article published on 11 May 2007 entitled Commission is focusing on anti-competitive conduct on the Auckland District Law Society website).

- 3 The **increased focus on corporate governance** standards, and increased public awareness of the roles that the Commerce Commission and Securities Commission play in monitoring governance of companies and directors' responsibilities.
- 4 The **changing demands upon companies and their directors** in relation to issues such as **corporate social responsibility and climate change**. These are yet to be felt in terms of directors' liability but ought to be occupying directors' minds from a potential liability and insurance perspective. These have been identified as areas for potential action in the future.

Unfortunately, now more than ever, **potential claims and litigation are an everyday risk for directors**. The above issues are not exhaustive but emphasise the need for a comprehensive D&O product from an experienced insurer. **ACE understands that directors and officers need a D&O policy, which they can promptly access and which provides appropriate covers to meet these challenges.**

The evolving legal and business landscape is demonstrated by:

- 1 Two recent cases before the New Zealand courts that have attracted media attention: **Tranz Rail**, which involves alleged insider trading by directors (amongst others); and **Oyster Bay Vineyards**, which involves alleged failure to provide all material information to shareholders in relation to a takeover offer (amongst others).
- 2 The recent insolvency of **Feltex** and the resulting public outcry by shareholders calling for court proceedings to be issued against the Feltex directors. This illustrates that, with heightened awareness of directors' responsibilities, there is an increasing intolerance of directors' alleged failings. **Shareholders are increasingly requiring that directors be held to account.**



## Benefits of ACE's new D&O policy



The standard features of ACE's policy are referred to overleaf. Some of the additional benefits contained in ACE's broader D&O policy include:

- 1 There is **no exclusion for claims by one insured against another insured**, except for a limited number of situations for claims made in, or under the laws of the USA or its territories. However, there are significant write backs to this restriction in the USA, including defence costs. This removes potential contentious issues between directors and their insurer and may avoid legal disputes over entitlements to cover. This is a significant feature of the ACE product.
- 2 **Full limit cover for defence costs and legal representation expenses in respect of any official investigation or inquiry** incurred with ACE's prior consent. It is not sub-limited and does not require an allegation in an inquiry of a wrongful act against directors and officers before it is triggered. The legal representation expenses are not limited to the actual time of attendance at the inquiry.
- 3 Further to point 2 above, there is also the **ability, in an emergency, to incur defence costs or legal representation expenses in respect to an investigation without ACE's consent** (where circumstances do not permit prior consent to be obtained) up to an amount equivalent to 10% of the full policy limit, provided ACE's consent is then obtained within 14 days of the first day on which defence costs or legal representation expenses were incurred.
- 4 **The costs of defending extradition proceedings** as well as **extradition bail bond costs** and **extradition crisis costs** in connection with such extradition proceedings. Since the "NatWest 3" incident and the various publicised extradition proceedings from the UK to USA, directors are acutely aware of the increasing possibility and costly consequences of attempted extradition.
- 5 **Additional excess limit of cover for each non-executive director**, in addition to the policy limit, when the limit of liability and all other avenues of indemnification have first been exhausted. **This is in addition to the full policy limit.**
- 6 **Public relations expenses** incurred with ACE's written consent to limit the adverse effects of negative publicity in respect of any claim or investigation.
- 7 Costs incurred (with ACE's prior consent) by a director taking proceedings to set aside (from a covered claim) adverse orders concerning their entitlement to manage corporations, their property rights, liberty or immigration status.
- 8 **No exclusions of cover for USA claims**, except in relation to claims by other insureds (there are significant exceptions to that in any event, including for defence costs).
- 9 While a director or officer will generally have the **duty to conduct their own defence**, where a claim is made against a director or officer (except shareholder derivative actions) by the insured organisation or an outside organisation, ACE will have the **right and duty to conduct the defence** of the director or officer. This allows ACE to work closely with the insured directors in defending covered claims.
- 10 ACE's policy provides for the **advancement of defence costs prior to the finalisation of any claim**. This reflects recent Australian judicial authority on advancement of defence costs and the interaction with the dishonesty exclusion (which only operates on a final adjudication of such conduct).
- 11 The definition of **Loss** includes cover for **aggravated, punitive or exemplary damages** and also **compensation orders** and **pecuniary penalties**. Any insured person doing business in the USA will understand the potential significance of cover for aggravated and similar damages.
- 12 **Automatic cover for employees** within the definition of insured person. It is not necessary for an employee to be acting in a managerial or supervisory capacity in order to be an insured. This may be a significant benefit available to employees and the corporate insured where there is a wide ranging investigation or inquiry involving a large number of staff.
- 13 **Waiver of rescission with respect to misrepresentation or non disclosure** for insured persons who are not directly involved in such misrepresentation or non-disclosure before the inception date of the policy.
- 14 **Automatic cover for any retired director or officer** who retires before the policy expires, for a period of 84 months after such expiry. This is a significant benefit for retired directors and officers.
- 15 An **'order of payments'** clause that ensures that insured persons are indemnified in priority to any other payment.
- 16 There is **no 'hammer clause'** by which ACE can force a director or officer to settle a claim when they might have grounds for defending it (other than those claims by the insured organisation or outside organisations). This type of clause is commonly found in other D&O Policies in the market for all types of claims.



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## Some standard features of ACE's policy

Standard features of D&O policies in the market are obviously also incorporated in the ACE policy including:

- 1 a broad definition of Insured Person, Claim and Wrongful Act, including Employment Practice Breaches;
- 2 discovery period options in various circumstances;
- 3 outside directorship cover;
- 4 pollution defence costs, for certain world wide claims including in the USA;
- 5 continuous cover where the insured has maintained a D&O policy for an uninterrupted period;
- 6 defence costs and legal representation costs for occupational health and safety matters, including for workplace deaths;
- 7 pecuniary penalties cover for penalties payable in and under the laws of New Zealand or Australia;
- 8 cover for insolvency situations;
- 9 severability for the proposal and the dishonesty exclusion;
- 10 recognition of directors' and officers' need for separate legal representation where conflicts require this;
- 11 run off cover after specific and major corporate events.

*Mr Newing says that "We launched our new D&O product following extensive consideration of the New Zealand market place. As a result, we are confident that, as the legal environment evolves, it will help continue to meet directors' and officers' needs".*

## At renewal of your existing D&O policy, be sure to ask your insurance broker or agent for a quote from ACE

### About ACE

The ACE Group of Companies is a global leader in insurance and reinsurance serving a diverse group of clients. Headed by ACE Limited (NYSE: ACE), a component of the Standard & Poor's 500 stock index, the ACE Group conducts its business on a worldwide basis with operating subsidiaries in more than 50 countries with a strong presence in Asia Pacific.

ACE Insurance Limited Company Number 104656 (ACE New Zealand) offers broker-based corporate and commercial casualty, group personal accident and corporate travel products, and corporate property business, tailored to clients' needs. New Zealand clients range from small businesses through to corporate and multinational concerns. We aim to develop tailored products that will meet the unique needs of our customers, to issue quotes and policies in a timely fashion, and to pay all genuine claims as quickly as possible.

### Important note

This brochure is intended to provide only a general description of the insurance policy (ACE Elite Directors and Officers ed. 05/07) and is not intended to modify the actual provisions of the wording. We recommend that a potential purchaser thoroughly examine our policy offered and consult with an appropriate expert to be certain of the precise nature of its details. Potential purchasers should contact ACE or their broker and / or insurance agent for further advice.