



TAX, STRUCTURE & COMPLIANCE

D&O Insurance: The Gap the Law Creates, and Many Policies Don't Fill

A company limited by guarantee cannot indemnify its directors for claims by the company itself. Some D&O policies exclude this too

Directors and officers insurance is widely assumed to be a complete safety net, and this assumption is dangerous. If your association is a company limited by guarantee, the Corporations Act prohibits it from indemnifying its directors for certain liabilities, and some D&O policies do not fill that gap either, leaving individual directors exposed where they might assume they are most protected.

Which rules apply to your association?

The law depends on how your association is set up. A **company limited by guarantee** follows the Corporations Act 2001 (Cth) and its constitution. An **incorporated association** follows its state or territory associations Act and its rules. A **registered charity** also follows the ACNC Act and the ACNC Governance Standards, and some Corporations Act rules are replaced for charities that are companies. Check your own governing documents, and get advice before decisions with legal consequences.

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The Legal Restriction Most Directors Do Not Know Exists

Section 199A of the Corporations Act prohibits a company, including a company limited by guarantee, from indemnifying a director or officer against liability owed to the company or a related body corporate, pecuniary penalty or compensation orders, and liability for conduct not in good faith. Section 199B also restricts paying premiums for some wilful breaches. Incorporated associations under state or territory Acts are not covered by these sections, so check your Act and rules for your own position. This is a hard legal restriction, not a policy choice the association could simply write around in its constitution. A director facing a claim brought by their own organisation, rather than by an outside third party, cannot rely on the organisation's own indemnity to cover that specific liability, regardless of how the constitution is worded.

The Gap Many D&O Policies Specifically Do Not Fill

D&O insurance can, in principle, fill exactly this gap, providing direct cover to an individual director where the organisation is legally prohibited from indemnifying them. In practice, some policies exclude claims brought by the organisation, or a related party, against its own directors through an insured-versus-insured exclusion, often with carve-backs for derivative actions or claims by a liquidator or administrator. A board should read this specific exclusion in its own policy directly rather than assuming the insurance automatically covers what the constitution cannot. Assuming your D&O policy automatically covers the exact gap the law creates is a reasonable assumption to make and a dangerous one to leave unverified. Some policies leave this gap open through an exclusion clause many boards never actually read.

The Shared Limit Risk Worth Understanding Precisely

A typical D&O policy contains distinct coverage components, direct cover to individuals where the organisation cannot or will not indemnify them, reimbursement to the organisation where it has indemnified a director, and coverage for claims against the entity itself. These components frequently share a single, aggregate limit across the entire policy, meaning a large claim under one component can exhaust the funds available to protect an individual director under another. A board should confirm how its own policy structures this, since an apparently generous overall limit can still leave an individual director under-protected if most of it has already been consumed elsewhere.

- Read your association's actual D&O policy for an insured-versus-insured exclusion, confirming whether it covers claims brought by the organisation itself against a director, not just third-party claims.
- Confirm whether your policy's coverage components share a single aggregate limit, and assess whether this leaves individual directors adequately protected if a large claim arises elsewhere in the policy.
- Ensure your association's constitution and any separate indemnity deed dovetail with the actual D&O policy in place, since a mismatch between what is promised and what is covered creates a real gap.
- Treat your D&O policy's claims-made structure with seriousness, building a clear internal process for prompt notification of any claim or circumstance that could become one, since delay can itself jeopardise coverage.
- Review retroactive dates and continuity provisions carefully whenever changing insurer or renewing cover, since a gap here can leave historical conduct uninsured despite continuous coverage appearing to exist.

D&O insurance is a valuable protection for the volunteer and paid directors who serve an association, but it is not automatically comprehensive, and the specific gaps this article has identified are exactly the kind that surface only once a claim has already been made. Confirming the actual scope of your policy now costs considerably less than discovering its limits during a dispute. This is one of the practical governance topics built into our Board Director course, alongside the papers, tools and frameworks that turn the principle into your board's actual practice. [Explore the course](#)

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BOARDROOM ACTION WORKSHEET

D&O Insurance: The Gap the Law Creates, and Many Policies Don't Fill

Turn the resource into evidence, a decision and an accountable next step. Keep the completed record in your association's approved board records system.

1 What is the issue or decision?

State the governance question in one clear sentence.

2 What evidence do we already have?

Record the facts, source documents and stakeholder evidence available now.

3 What evidence is still needed?

Identify the legal, regulatory, financial, member or operational information still required.

4 What is the agreed next action?

Capture the owner, timeframe and how the matter will return to the board.

Action owner	Review date	Board decision or resolution

General education, not legal, financial, tax, clinical or governance advice. Confirm specifics at the relevant primary source or with your own qualified adviser. Nexus Leadership is operated by Lipstick Consulting Pty Ltd · ABN 15 619 120 482.

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