Officer protection arrangements – questions for in-house counsel to consider

Authors:
Alastair Macphee
(amacphee@piperalderman.com.au – Special Counsel)

Practice Group: Companies, Trusts, and Taxation

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Corporate officers face significant legal risks, prompting requests for protection from their companies. In-house counsel play a vital role in reviewing, designing, and maintaining these arrangements. This guide outlines key legal and practical considerations, from onboarding new directors to updating existing protections, offering essential insights for counsel navigating complex officer liability issues.

Why might in-house counsel be asked to consider officer protection arrangements?

Officer protection arrangements are an important and increasingly common feature of corporate life. Directors and other corporate officers are exposed to a broad range of potential liabilities under general law and statute, and so are increasingly likely to request appropriate protection from the company (or another group company) as a condition of accepting office.

However, officer protection arrangements typically raise a number of legal and practical issues, and there are legitimate differences of opinion on some legal issues in this context. This means that in-house counsel must take care when assisting in the design and implementation of officer protection arrangements.

In-house counsel may be asked to assist in a range of scenarios:

- A proposed new director or other officer requests protection before agreeing to act, and the company's existing officer protection arrangements are materially different to what is requested.
- The board may become aware that the level and type of protection that the company (or group) is offering to directors and other officers does not reflect market practice, and requests in-house counsel to review and advise.
- The board may request in-house counsel to review the company's existing officer protection arrangements at regular intervals and propose updates as necessary.
- The company may need to review and address multiple existing officer protection arrangements, for example following M&A activity.

Here are some key threshold questions for in-house counsel to consider when reviewing, designing and/or implementing officer protection arrangements:

What (if any) officer protection arrangements are already in place?

The first step is to understand the nature and scope of the company's existing officer protection arrangements. These will commonly be multi-faceted, and may include protections under the company's constitution, the company maintaining Directors and Officers insurance and the company entering into Deeds of Indemnity, Insurance and Access with its directors (and, potentially, other officers).

What rules are set out in the company's constituent documents?

If the company has a constitution, this will typically include provisions concerning indemnity and insurance. It would be rare for the constitution to prohibit the company from indemnifying officers or purchasing D&O insurance for their protection. Most likely, the constitution will either contain *mandatory* indemnity and insurance provisions (whereby the company is obliged to do those things under the constitution, which is a special form of contract), or *permissive* provisions (which permit but do not oblige the company to indemnify relevant officers and purchase D&O insurance for their protection).

If the constitution contains mandatory provisions, then the company's entry into Deeds of Indemnity, Insurance and Access may result in there being two parallel but inconsistent indemnities in place. This is sometimes considered undesirable or inappropriate, but market practice is not uniform on this point.

If there are other constituent documents – for example, a shareholders agreement – it will also be important for in-house counsel to confirm whether they contain any provisions that have a bearing on the proposed officer protection arrangements.

When was the company's D&O insurance program last reviewed?

The D&O insurance market is dynamic, and the company's circumstances may have changed since a review was last undertaken. A conversation with the company's insurance brokers is a common first step, but in some circumstances in-house counsel may wish to seek legal advice from a D&O insurance specialist.

For Australian subsidiaries with a foreign parent company, the process can be more complicated, particularly if the parent does not wish to disclose full details of the group's D&O insurance cover. This may call for a broader conversation between in-house counsel and the parent company regarding the potential liabilities associated with holding office in an Australian company, and current market practice for protecting officers of Australian companies.

Does the company use a template Deed of Indemnity, Insurance and Access?

For a number of important reasons, it is common for officers to seek separate contractual comfort from the company under what is typically called a "Deed of Indemnity, Insurance and Access". Broadly speaking, a Deed of this kind provides the officer with indemnification, D&O insurance cover (often on a "reasonable endeavours" basis, or equivalent) and a contractual right of access to company documents over and above the *Corporations Act 2001* (Cth) regime. These insurance and access-related protections commonly apply while the officer holds office and for 7 years thereafter. Deeds will typically also provide the company with benefits and protections that it would not otherwise enjoy.

If the company has already entered into a Deed of Indemnity, Insurance and Access with one or more current officers, it is important for in-house counsel to consider whether that template Deed will be used again on this occasion. If an updated Deed is proposed, in-house counsel should consider:

- the implications of the company being party to multiple officer protection contracts whose terms are not identical; and
- whether it is instead preferable to transition all officers onto the new form of Deed, and if so what other issues need to be contemplated in making that change.

If the company has a preferred template Deed, in-house counsel should also be alert to the possibility that the template may no longer be appropriate, for example due to material changes to the company's circumstances. Some of the key issues to consider are discussed below.

The question of whether the company's directors require independent legal advice regarding the proposed Deed may also need to be considered, along with whether the company is willing to pay the directors' associated legal costs in reviewing and negotiating the Deed.

Have the company's circumstances changed radically since these matters were last considered?

If the company's financial position has worsened since the last review, this is of critical importance and in-house counsel should consider whether it is appropriate for the company to offer certain types of protection to its officers at this time.

More broadly, the company's circumstances may have changed in ways that are material to the terms of the proposed officer protection arrangements. For example, subsidiaries may have been acquired or divested, or the D&O insurance may now be maintained by a different group company, or the company may have transitioned to electronic board packs, among other possible developments that could have a bearing on how a Deed of Indemnity, Insurance and Access should be drafted. In-house counsel should identify any such changes and consider how the proposed officer protection arrangements should respond to them.

Do the officer protection arrangements need to extend across more than one group company?

Older Deeds of Indemnity, Insurance and Access may be company-specific, and so would not be suited for use in a corporate group where individuals may be asked to assume office in multiple group companies. In-house counsel should assess whether an older Deed of this kind can be updated, or if it is preferable to use a more contemporary Deed.

Which entity is providing the protection?

In a corporate group, the entity that maintains the D&O insurance cover may not be the same entity that indemnifies officers of group companies. Moreover, each group company may be responsible for maintaining its own documents and granting its officers access to them. In-house counsel should ensure that the Deed of Indemnity, Insurance and Access that is used accurately reflects the group's approach to these matters.

In addition, in-house counsel should consider whether the entity entering into the Deeds should assume absolute obligations regarding the document access regimes to be maintained by each of its subsidiaries, or if this should only be (for example) a "reasonable endeavours" obligation.

Whose approval is required for the company to enter into a Deed of Indemnity, Insurance and Access with one or more of its officers?

This remains one of the most complex issues associated with Deeds of Indemnity, Insurance and Access. The most challenging scenario will be where all of the company's directors are being offered the protection of a Deed simultaneously – for example, if this is the first time that the company has offered such protection to its directors.

Depending on the type of company, in-house counsel may need to consider issues such as related party transactions, material personal interests of directors and whether the board can form a quorum on this item of business, as well as the directors' general law and statutory duties more broadly. In some situations, the view is taken that member approval is required for the company to enter into Deeds with its directors. If so, inhouse counsel should be mindful of the need to make appropriate disclosure to the company's members when seeking their approval for the company's entry into the proposed Deeds.

In-house counsel may also need to brief the board on the legal analysis and proposed way forward, which may include helping directors to understand why the intended process may differ from that of other companies on whose boards they serve or have served.

If the ultimate parent company is not registered in Australia, what approvals are required and what is the likely lead time?

In this situation, in-house counsel may need to navigate the group's internal processes and any cultural differences relating to officer protection arrangements. Any likely delays should be factored into the overall review and approval process, particularly if there are any external deadlines to be met.

If the entity is a registered charity or a public sector entity, what else needs to be considered?

While charitable companies and public sector bodies sometimes enter into officer protection arrangements, in-house counsel for such entities will need to consider a number of other issues before any such arrangements are designed or (if permissible) implemented.

Other ways of protecting company officers

Directors and other company officers face a range of risks, not all of which can be identified and managed in the same way. In-house counsel should not limit their attention to the matters summarised above.

For example, a thorough induction training process for new directors and other corporate officers, along with regular refresher training and briefings on any key developments, will also assist in protecting directors and other officers from potential legal liabilities arising from these roles.

Conclusion

The above list of questions is not exhaustive, but will provide in-house counsel with a useful starting point when considering officer protection arrangements for their company or group.

One size definitely does not fit all when it comes to officer protection arrangements, particularly with respect to D&O insurance cover and Deeds of Indemnity, Insurance and Access. In-house counsel should be ready to guide the company in exploring the above questions and other relevant matters, and identifying the preferred model for protecting the company's officers.