Global FINEX - Directors and Officers Insurance (D&O)

# D&O Liability Survey 2021

April 2021

CLYDE&CO

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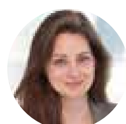

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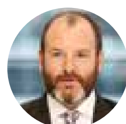

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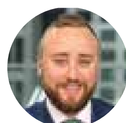

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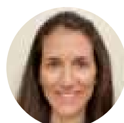

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## Table of contents


Introduction ........ 4
*Angus Duncan*

Distribution of Respondents ........ 5

Key findings ........ 6

Top 5 D&O Risks ........ 9
*Eve Richards, James Cooper, John Orr*

Class Actions – a Global Trend? ........ 11
*James Cooper, John Orr, Mitch McBain*

Class Actions - Australia Focus ........ 14
*John Moran, Travis Luk*

Risk #1 – Cyber Attacks and Data Loss ........ 16
*Charlotte Gill, Ben Di Marco, Stuart Maleno, John Moran and Reece Corbett-Wilkins*

Cyber Risk – US Spotlight ........ 19
*Ashley Hart, Edward Kirk*

Insolvency ........ 21
*Angus Duncan, Mark Sutton, Chris Smith, John Orr, Kevin van't Wout, Ulysses Grundey*

Influence of Social Media ........ 25
*John Orr, Amber O'Brien*

Regulatory Exposures ........ 27
*Mandip Sagoo, Edward Kirk, John Orr, Avril Lattin*

Climate Change ........ 30
*Jacinta Studdert, Laura Cooke, Edward Kirk, Rob Greenwood, John Orr*

Risk #5 – Employment Practices Liability (EPL) ........ 33
*Richard Multon, David Amentas*

Employment Professional Liability (EPL) exposures – COVID-19 impact ........ 35
*Talene Carter*

Corporate Culture & Whistleblowing - Why Should We Care? ........ 37
*Crispin Marriott, Michael Tooma, David Lee*

D&O Insurance Priorities in the Hard Market ........ 39

# Introduction

Welcome to the 2021 report from Willis Towers Watson in partnership with Clyde & Co LLP. For the first time, this report is a truly international affair, with contributions from colleagues across our offices including the UK, the US, Australia, the Netherlands and Spain. The geographic spread of the respondents to our survey can be seen on page 5 in Figure 2, while their industry distribution is shown in Figure 1. We took the opportunity this year to ask new questions, some of which are inspired specifically by the COVID-19 pandemic and some of which are simply reflections of changing social mores and you will see in this report that considerable effort has been taken to show the comparison between the perceptions of the risks in the different regions (see, for example figures 4 and 5 on pages 7-8.

Our survey in 2021 shows the impact that COVID-19 has had on the respondents' perceptions of the risks facing directors. The highest rated risks continue to be Cyber-attack and Data Loss, which have been in the top two, although changing order, for the last three surveys. Given the widely-publicised statements that home working has increased these risks, it is unsurprising to see them feature so highly (see article **Top 5 D&O Risks** for more discussion). What might be more surprising is that despite considerable anticipation of a landslide of insolvencies to come, insolvency does not feature particularly highly as a risk for most of the respondents. In fact, as discussed in our article **Insolvency**, in many jurisdictions, insolvencies are at their lowest level in recent times – perhaps reflecting the success of government measures such as furlough and changes in "wrongful trading" laws.

Despite a year of unprecedented turmoil across the world as a result of the COVID-19 pandemic, the worldwide trend of increasing focus on director exposures has not let up. In England & Wales, we have seen a slew of new laws, regulations and consultations, from the Pensions Act 2021 to the FCA listing rule requiring a TCFD "comply or explain" statement to be made by premium listed companies, to the UK Government's consultation regarding audit and governance, all of which impose or talk about imposing new obligations on directors (see article **Regulatory Exposures** for more information). With board diversity class actions in the US and NASDAQ imposing minimum board diversity levels and similar regimes being considered by the FCA in the UK, board diversity is becoming not just a concern, but a mandatory part of business, at least for some companies. Climate change too is being forced into the board room as a leading issue. As well as legal actions being brought in the US and in Australia, both the Australian Prudential Regulatory Authority and the UK Prudential Regulatory Authority are looking at climate-related stress tests for banks and insurers. In the US, the Commodities Futures Trading Commission and the SEC have both issued statements regarding the seriousness of climate change as a risk to businesses and in the UK, climate change is being included as a key risk which has to be considered by boards and pension trustees (see the article **Climate Change** for further information).

The COVID-19 pandemic has also coincided with and intensified a hard market for Directors' and Officers' liability insurers, unlike any seen before. In the last article in this report (**see the article D&O Insurance Priorities in the Hard Market**), we look at the impact the hard market has had on our respondents and the limits that they buy.

I must take a brief moment to thank the many, many people who have been involved in bringing all of this together, from the survey teams to the people reviewing the survey results and drafting this report and all of the people behind the scenes who have turned this into a polished product. It has been a huge effort by all concerned.

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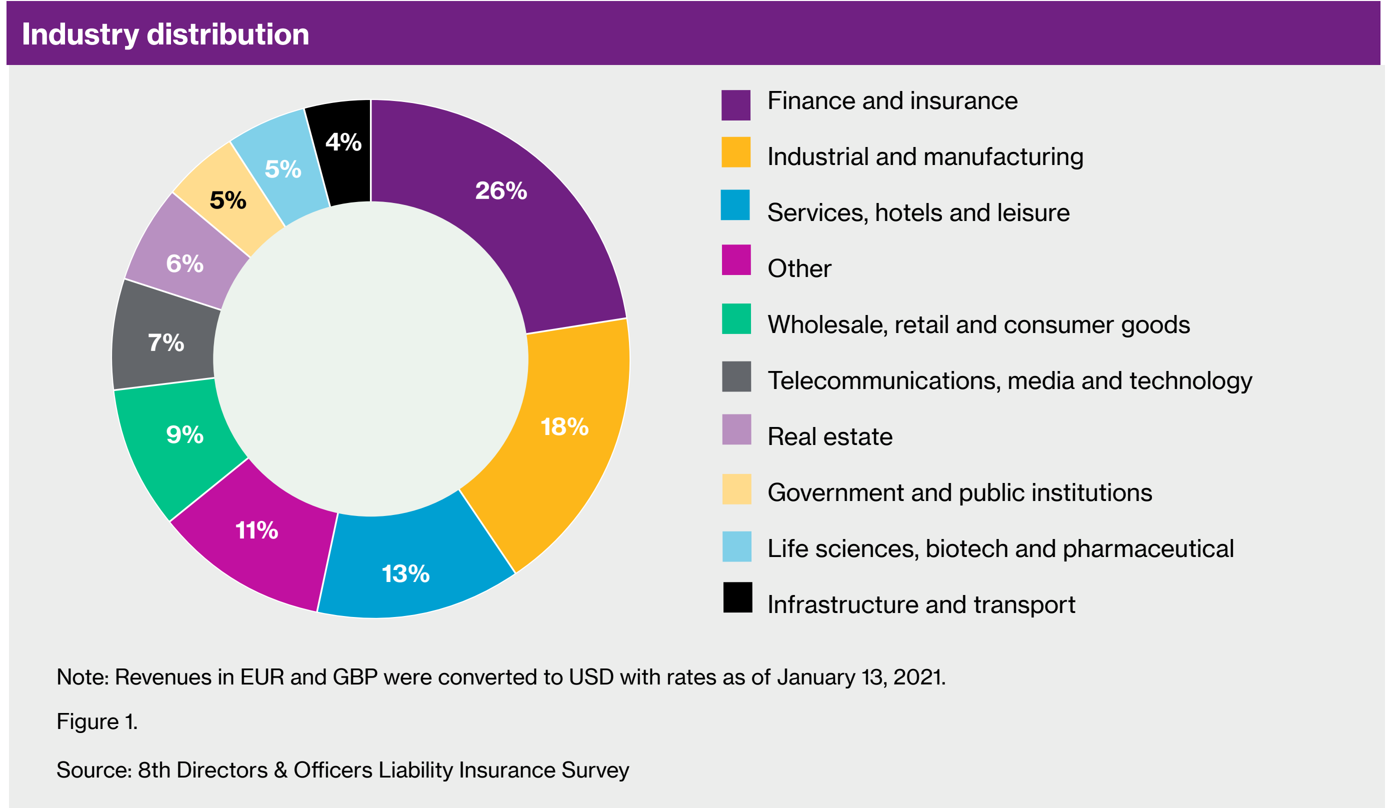
# Distribution of Respondents




Note: Revenues in EUR and GBP were converted to USD with rates as of January 13, 2021.

Figure 1.

Source: 8th Directors & Officers Liability Insurance Survey

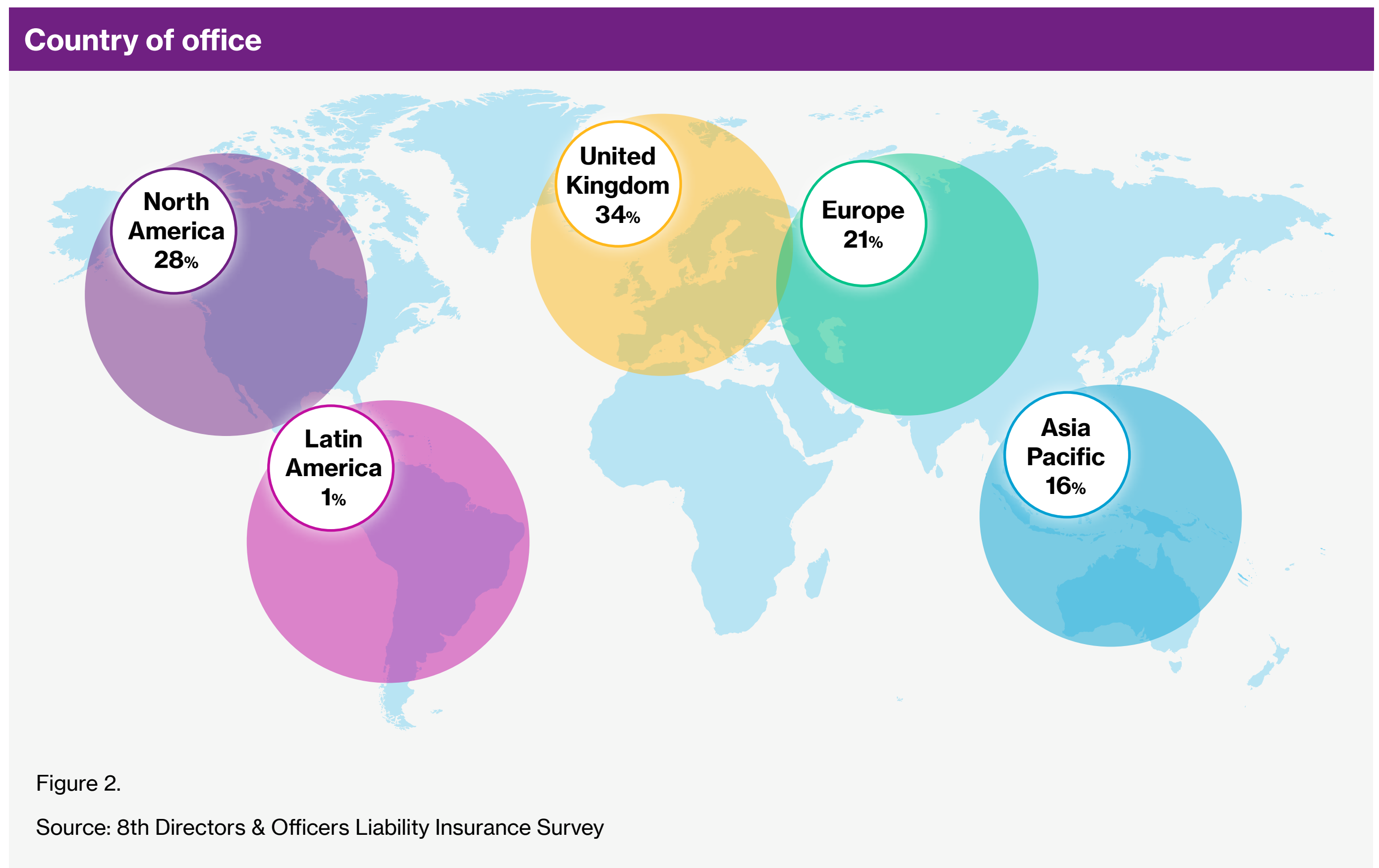
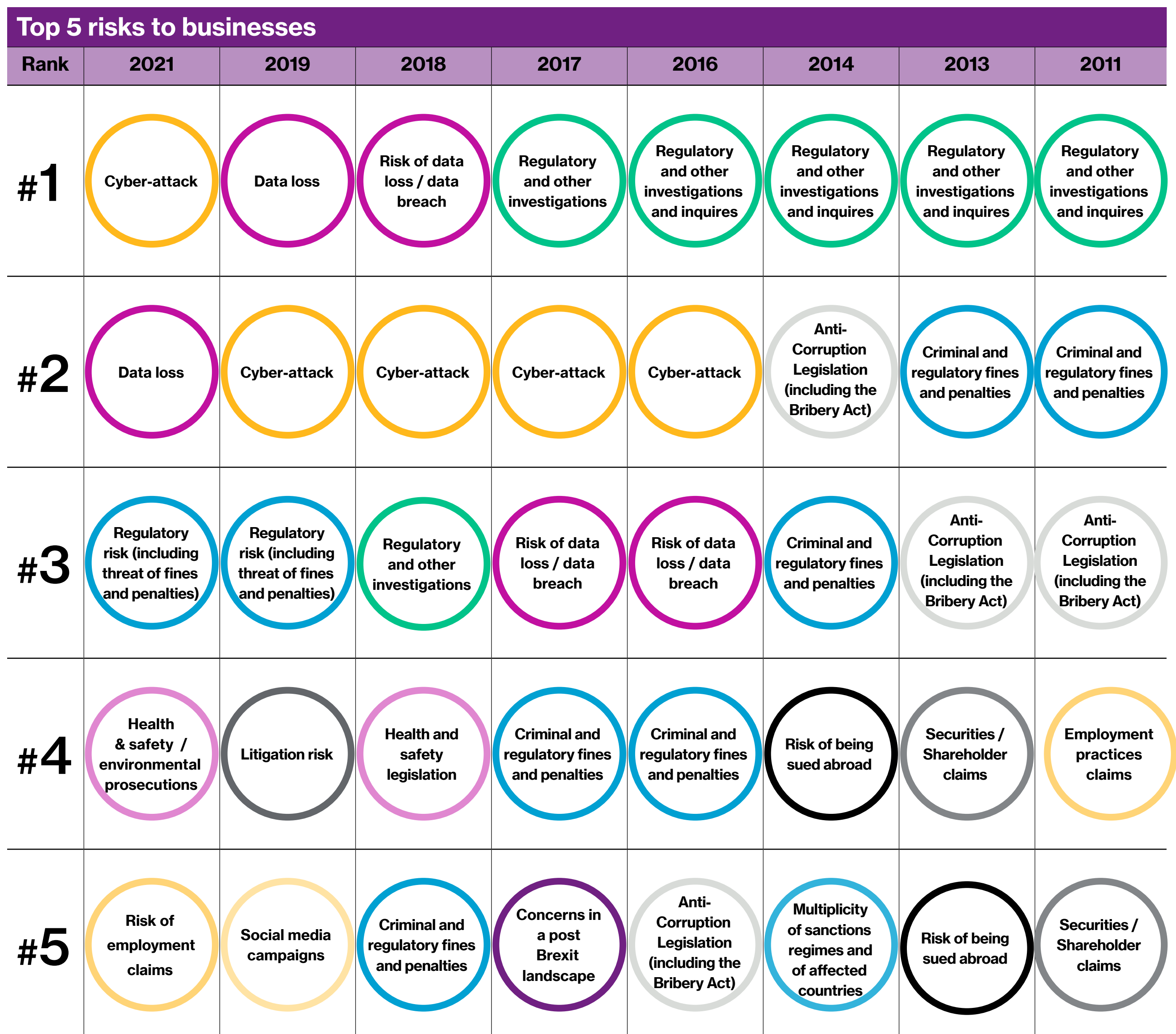



Figure 2.

Source: 8th Directors & Officers Liability Insurance Survey

# Key Findings



| Top 5 risks to businesses | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| **Rank** | **2021** | **2019** | **2018** | **2017** | **2016** | **2014** | **2013** | **2011** |
| #1 | Cyber-attack | Data loss | Risk of data loss / data breach | Regulatory and other investigations | Regulatory and other investigations and inquires | Regulatory and other investigations and inquires | Regulatory and other investigations and inquires | Regulatory and other investigations and inquires |
| #2 | Data loss | Cyber-attack | Cyber-attack | Cyber-attack | Cyber-attack | Anti-Corruption Legislation (including the Bribery Act) | Criminal and regulatory fines and penalties | Criminal and regulatory fines and penalties |
| #3 | Regulatory risk (including threat of fines and penalties) | Regulatory risk (including threat of fines and penalties) | Regulatory and other investigations | Risk of data loss / data breach | Risk of data loss / data breach | Criminal and regulatory fines and penalties | Anti-Corruption Legislation (including the Bribery Act) | Anti-Corruption Legislation (including the Bribery Act) |
| #4 | Health & safety / environmental prosecutions | Litigation risk | Health and safety legislation | Criminal and regulatory fines and penalties | Criminal and regulatory fines and penalties | Risk of being sued abroad | Securities / Shareholder claims | Employment practices claims |
| #5 | Risk of employment claims | Social media campaigns | Criminal and regulatory fines and penalties | Concerns in a post Brexit landscape | Anti-Corruption Legislation (including the Bribery Act) | Multiplicity of sanctions regimes and of affected countries | Risk of being sued abroad | Securities / Shareholder claims |

Figure 3.

Note: Ranked based on percentage “very important” or “extremely important” for each risk

Source: 2011-2021 Directors & Officers Liability Insurance Surveys

## How significant do you think each of the following risks are to you and your business?

(% of "Very significant" or "Extremely significant")

| | 2021 regional breakdown | | | | Average for the year | | |
|---|---|---|---|---|---|---|---|
| | APAC | Europe | UK | US | 2021 | 2019 | 2018 |
| Cyber-attack | 42 | 72 | 54 | 52 | 56 | 54 | 50 |
| Data loss | 37 | 58 | 52 | 44 | 49 | 55 | 52 |
| Regulatory risk (including threat of fines and penalties | 42 | 52 | 44 | 45 | 46 | 50 | 32 |
| Litigation risk | 26 | 48 | 28 | 44 | 36 | 41 | |
| Shareholder actions / disputes | 21 | 34 | 20 | 33 | 27 | | |
| Anti-trust law / regulation | 16 | 32 | 20 | 35 | 26 | 38 | |
| Risk of a health and safety / environmental prosecutions | 39 | 40 | 38 | 47 | 41 | 38 | 37 |
| Risk of employment claims | 32 | 30 | 40 | 45 | 38 | | |
| Risk posed by supplier business practices | 29 | 36 | 20 | 29 | 27 | 38 | |
| Breach of human rights within your business operations | 16 | 26 | 17 | 32 | 23 | 32 | |
| Your company / organisation becoming a focus of a social media campaign | 26 | 38 | 26 | 32 | 30 | 38 | |
| Work place issues (pay / discrimination, #MeToo) | 24 | 34 | 22 | 37 | 29 | 35 | 30 |
| Economic crime (your company / organisation as a victim) | 18 | 32 | 27 | 36 | 29 | 38 | |
| Risk of criminal penalties arising from breach sanctions | 24 | 36 | 23 | 35 | 29 | 35 | |
| Bribery and corruption | 18 | 42 | 21 | 29 | 27 | 34 | |
| Economic crime (your company / organisation as a vehicle for crime) | 24 | 24 | 21 | 33 | 25 | 35 | |
| Risk of other criminal proceedings | 16 | 22 | 19 | 27 | 22 | 37 | |
| Pensions liabilities | 18 | 27 | 24 | 35 | 26 | | |
| Insolvency, bankruptcy or corporate collapse | 13 | 30 | 22 | 34 | 25 | 35 | 27 |
| Risk of proceedings in a jurisdiction outside your organisation's main jurisdiction | 24 | 30 | 20 | 24 | 24 | | |

Figure 4.

Source: 8th Directors & Officers Liability Insurance Survey

## How significant do you think the following issues are for your company's / organisation's business operations

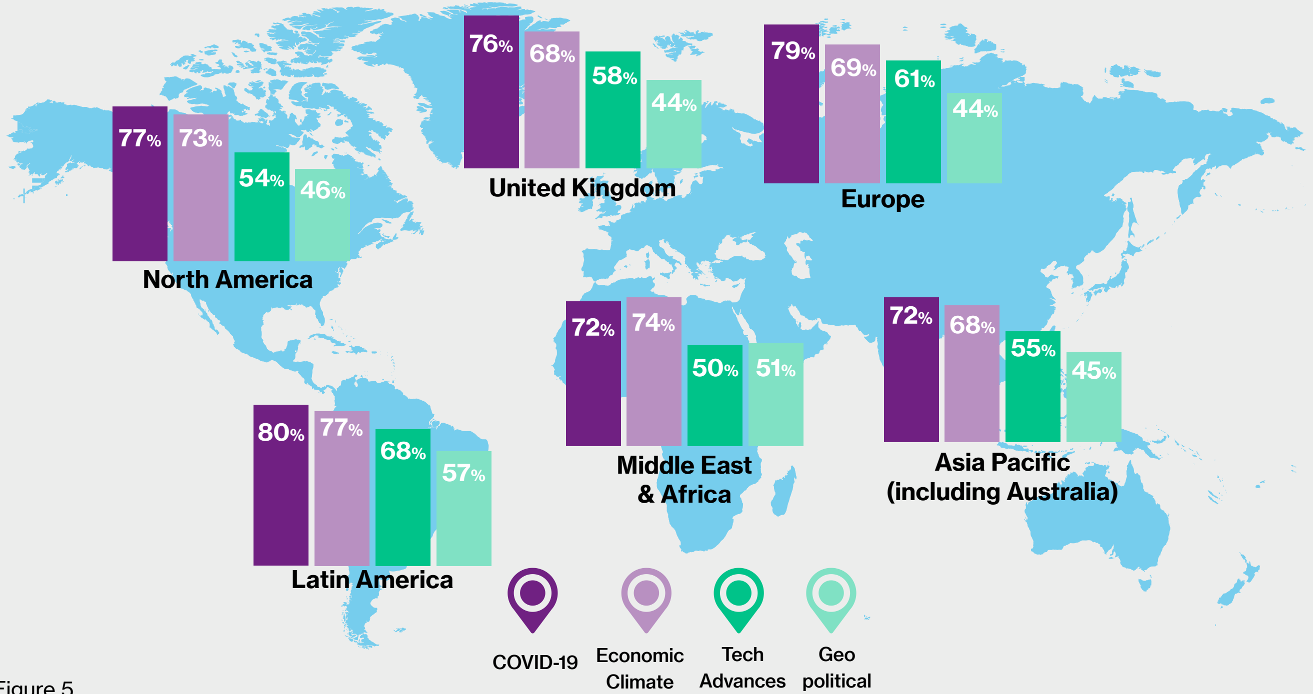



Figure 5.

Source: 8th Directors & Officers Liability Insurance Survey

(% of "Very significant" or "Extremely significant")

# Top 5 Directors and Officers (D&O) Risks

### What does this mean for D&O Liability?

Boards could be accused of mishandling the pandemic, with allegations of failure to have robust IT systems and inadequate handling of increased exposure to cyber risks, corporate manslaughter or occupational health breaches resulting from a failure to ensure adequate health & safety in the workplace.

Cyber-attacks and data loss have featured in the top 3 overall since 2016, with data loss moving up to the top spot in 2018 and 2019 (likely due to the GDPR coming into force and reports of the significant fines that have been imposed) but cyber-attacks taking the top spot this year. Given the prevalence of cyber-crime and the severe consequences for companies and D&Os should they fall foul of an attack and / or data is lost, this is no surprise. The COVID-19 pandemic has proved to be a fertile ground for cyber criminals seeking to exploit the weaknesses presented by businesses having to move to new procedures and systems overnight, often with a remote workforce. The trend is towards bigger targets and bigger incidences and ransomware attacks are also on the increase, which could expose D&Os to criminal sanctions for breaches of terrorism and proceeds of crime laws.

**Cyber-attacks and data loss have featured in the top 3 overall since 2016.**

In Australia, cyber-attacks moving from the second to top risk facing Directors and Officers similarly is expected, again given the vulnerabilities exploited by cyber criminals during the COVID-19 remote working environment. The increasing prevalence of ransomware, state sponsored cyber-attacks and increasingly sophisticated and directed method of attacks has very much increased the risk for corporates and their Directors and Officers in Australia.

This increased cyber-attack frequency and severity has provoked hyperactivity from APAC regulators now intently focussed on privacy and data protection and ensuring corporates / directors have systems and policies in place to ensure cyber resilience. In 2020, we have seen corporate regulators target Directors and Officers with inadequate cyber security systems and this is set to continue in the region with privacy reforms recently implemented or on the agenda in Japan, Singapore, Australia and New Zealand.

Regulatory risk has moved down in the rankings in the last three years and litigation risk and shareholder claims have fallen off the top 5, but all the risks identified above have the potential to trigger regulatory investigations (which are increasingly being brought by more aggressive regulators) and follow-on civil claims, as well as shareholder litigation against the board of directors.

**Regulatory risk has moved down in the rankings in the last three years and litigation risk and shareholder claims have fallen off the top 5**

By comparison with some of the other regions, regulatory risk continues to be a high priority risk in the APAC region ranking second in the top 5. In Australia, corporate regulators, including the Australian Securities and Investments Commission (ASIC) have continued to pursue the 'why not litigate' approach (a legacy of its criticism following the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services industry, completed in 2019) and enforcement actions generally are increasing.

Further, significant legislative reform targeting corporate misconduct have been introduced and key decisions by the High Court of Australia expanding the definition of those employees considered 'officers' under the Corporations Act will mean regulatory risk will remain high in the top 5 D&O risks for Directors and Officers in Australia.

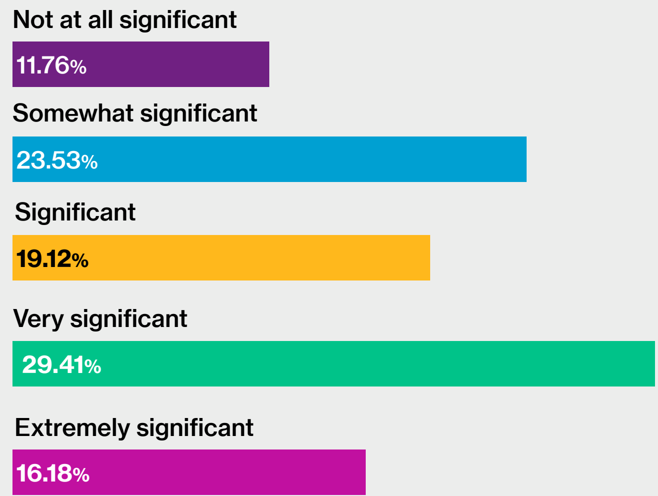
Whilst the survey suggests that Directors and Officers are somewhat less concerned about insolvency, bankruptcy or corporate collapse, what we hear from insurers is that they are concerned that corporate or financial restructuring, job losses and insolvencies could trigger investigations into directors' conduct and then transcend into D&O claims (see **Insolvency** article). There is also increased focus on analysing corporate governance and assessing how boards are managing risks during the pandemic.

There is no doubt that boards have a huge task on their hands to navigate this broad range of risks. They must ensure robust, resilient business models are in place that are sustainable and profitable, whilst ensuring the welfare and safety of the business's people – both employees and customers and the wider impact of its actions on the environment and society as a whole. Will we see a material shift in boards' mindsets to address these rapidly evolving risks?

Respondents working in offices in the US gave a top 5 that is fairly consistent with the overall global survey result. The main difference was that the risk of employment claims was ranked considerably higher at just over 45% (making it joint 3rd highest risk from the US respondents) when compared to the global result which ranked employment claims as 5th, with 38% (see Figs. 3 and 6). Employment claims have long been a substantial business risk, with high frequency claims and, in some cases, very high severity claims impacting operations – with select matters (#MeToo) shaking up the C-suite itself. It is perhaps not surprising that exposures relating to pandemic-triggered furloughs and layoffs, as well as return to work and vaccination policies, may exacerbate those concerns, bringing these issues higher into the top 5 in the minds of our US respondents.

In APAC and Australia, employment claims also ranked highly. There have been recent developments in industrial relations legislation and increasing wage / employee related class actions that are consistent with this risk becoming more and more prominent.

**How significant do you think the risk of employment claims are for your company / organisation?**




Responses from US (Country / region of HQ)

Figure 6.

Source: 8th Directors & Officers Liability Insurance Survey

**There is also increased focus on analysing corporate governance and assessing how boards are managing risks during the pandemic.**

# Class Actions – A Global Trend?

Shareholder actions have not featured within the top 5 risks to businesses since 2013 and this year's survey found that only 27% of those surveyed consider shareholder actions to be a "very significant" or "extremely significant risk". Whilst this number rises for large companies (34%) and varies by jurisdiction (for example, 31% of those surveyed with their headquarters in the US, where class actions are prevalent, saw shareholder actions as a "very significant" or "extremely significant risk", compared to 22% in the UK), it reflects a fairly low perception of the risk amongst those responding. This may be, as far as the UK is concerned, due to the relatively low number of such actions in the UK but there is cause for concern. We are witnessing a rise in group claims, assisted by the growing involvement of litigation funders in large UK actions, and the consequences for defendants are great, given that group actions can expose businesses to considerable costs and the potential for significant awards for damages depending on the size of the class. There is also a growing risk of D&Os being named in the actions, in addition to operational and reputational risks.

**27%**

**of those surveyed consider shareholder actions to be a "very significant" or "extremely significant risk"**

Shareholder actions are also just part of the picture. Large-scale consumer claims are also on the increase and particular points to note are as follows:

- **Competition claims:** Whilst opt-in mechanisms have been available for some time in the UK, the Consumer Rights Act 2015 created an opt-out group action procedure (administered by the Competition Appeal Tribunal (CAT)) for competition breaches. This process is currently being tested in the English courts, with the UK Supreme Court finding that the CAT had incorrectly assessed a large group action for a CPO and has remitted the case back to the CAT for reassessment. The Supreme Court's decision in this case has paved the way for other large actions, including claims for Forex manipulation and price fixing amongst truck companies.
- **Data protection:** The rights of individuals have been strengthened by the GDPR (now the UK GDPR following Brexit) and the Data Protection Act 2018 and we have seen an increase in regulatory actions (with sizeable fines) and large-scale civil claims. Further, following the decision in Lloyd v Google [2019] EWCA Civ 1599[1], individuals are, in principle, entitled to compensation if a controller has lost control of their personal data even if there is no pecuniary loss and no distress. This could lead to an increased volume of representative actions. The UK Supreme Court hearing of the appeal is due to commence in April 2021.
- **Parent company liability:** In 2019 the Supreme Court confirmed that the English courts are free to exercise jurisdiction over claims against parent companies for damage caused by their subsidiaries abroad[2]. In a further judgment, handed down in February 2021, the Supreme Court granted an appeal in respect of a claim brought by more than 40,000 claimants against the UK-domiciled parent company of a multi-national group of companies, finding that there was an arguable case against the parent company[3]. Both of these cases involved environmental liabilities and the decisions will inevitably increase the risks for parent companies and of forum shopping, particularly in relation to group litigation where the local legal system does not have a long-standing history of effective management of these types of claims.

## A View from the US

According to Cornerstone Research, there were 334 US federal securities class action (SCA) filings in 2020, falling below the more than 400 new filings annually for the first time since 2016[4]. While this represents a decrease in filings over recent years, it nevertheless remains well above the 1997 to 2019 average of 224 filings per year. The average SCA settlement in 2020 was $54.5 million, reflecting a near doubling over the average settlement in 2019, but below the 2018 average[5]. The median settlement in 2020 was $10.1 million.

**The average securities class action settlement in 2020 was $54.5 million, reflecting a near doubling over the average settlement in 2019, but below the 2018 average.**

Most of the decrease in filing frequency appears to be the result of fewer SCAs related to mergers and acquisitions. There were 38% fewer such SCAs in 2020 year over year. Although there was a more modest decline, 12%, in core SCA filings (those asserting fraud from more traditional financial and accounting allegations), the filing levels for core cases were consistent with 2017 and 2018 levels. Whether the overall decrease in filings is the temporary result of factors directly or indirectly related to the COVID-19 pandemic is unclear. It is also possible the fewer filings may be a signal of a potential trend. It is interesting to note, for example, that through March 15, 2021, only 61 SCAs have been filed for the year, which would lead to an annualized frequency of fewer than 300 cases for the first time since 2016[6].

**through March 15, 2021, only 61 securities class actions have been filed for the year, which would lead to annualized frequency of fewer than 300 cases for the first time since 2016.**

Several of our survey questions touched on the subject of large-scale litigation against organizations and their Directors and Officers, with varying responses on the perceived significance of the risks.

When asked to what extent Directors and Officers see increases in the amount of large-scale group (including class action) claims as a risk to their organizations, nearly three-quarters of US respondents believed it was "to some extent," "to a moderate extent," or "to a great extent" a risk. Half of US respondents believed the risk to themselves personally was low, but felt differently when considering the risk to other Directors and Officers in their organizations: a full two-thirds of respondents believed the phenomenon was a risk to others to "some extent," a "moderate extent," or "great extent."

**38%**

**fewer such securities class actions in 2020 year over year**

1. http://www.bailii.org/ew/cases/EWCA/Civ/2019/1599.html
2. http://www.bailii.org/uk/cases/UKSC/2019/20.html
3. http://www.bailii.org/uk/cases/UKSC/2021/3.html
4. Filings report: https://securities.stanford.edu/research-reports/1996-2020/Securities-Class-Action-Filings-2020-Year-in-Review.pdf
5. Settlements report: https://securities.stanford.edu/research-reports/1996-2020/Securities-Class-Action-Settlements-2020-Review-and-Analysis.pdf
6. Cornerstone Research, Stanford Securities Class Action Clearinghouse, https://securities.stanford.edu

When asked about the significance of shareholder actions / disputes to the business risks of their organizations, US respondents appeared less concerned, in fact evenly divided. 50% opined the risk was "not at all significant" or "somewhat significant," while the remaining 50% believed the risk was "significant" or "very significant" or "extremely significant" (see Fig. 7).

Notwithstanding the fact that the respondents to our survey may not have rated exposure to class actions in their top 5 risks, it remains a significant driver of losses in the D&O market and therefore a major factor in the challenging market conditions.

Initial trends so far in 2021 suggest that the hard market for D&O insurance in London and throughout much of the globe will continue through 2021 (albeit with hopefully considerably less turbulence than was seen in 2020).

As rates and retentions have increased significantly over the last 18 months the 'Value vs Cost of Insurance' is a point of discussion amongst clients and their brokers.

Given the responses to this survey, now may be a good time for Directors and Officers to review the protection their current policy provides and what they want to protect when renewing their cover. There may be more appetite from the market and favourable terms on offer for clients willing to remove the cover for securities claims from their D&O policy. On the other hand, it has to be recognised that securities claims are often accompanied by derivative actions which can also be a factor which some insurers will consider in pricing the removal of the cover for securities claims.

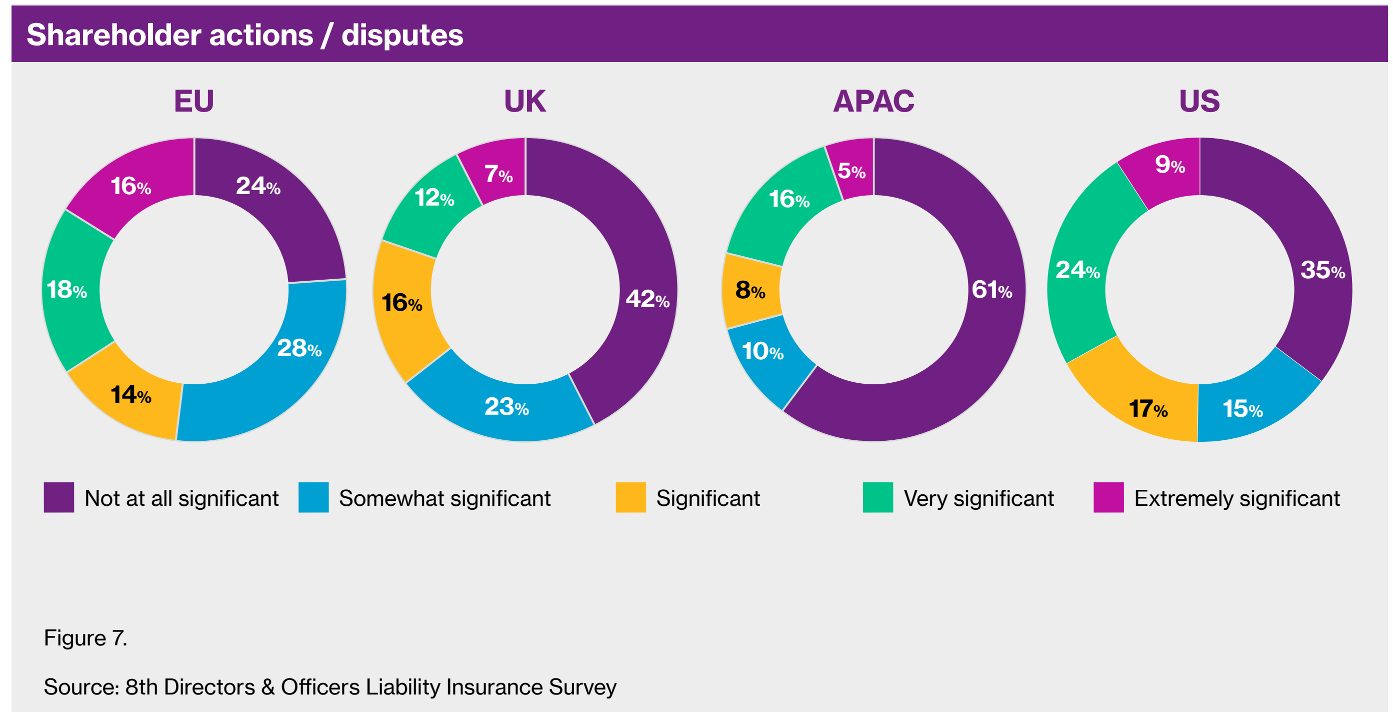



Figure 7.

Source: 8th Directors & Officers Liability Insurance Survey

# Class Actions - Australia Focus

34% of all respondents in APAC consider that shareholder actions and disputes were “significant”, “very significant” or “extremely significant” risks to their businesses.

Securities class actions remain a significant business risk in Australia, as settlements exceeding AUD20-AUD30 million are not uncommon (the highest in 2020 being AUD95 million) and the rate of new filings is holding steady. The rest of APAC remains largely insulated from these types of claims given the relatively undeveloped class action regime there. However, 2020 did see a record number of securities actions filed in the US against Asian domiciled companies through their American Depository Receipts (ADRs) and should be a growing area of concern for APAC directors.

**34%**

**of all respondents in APAC consider that shareholder actions and disputes were “significant”, “very significant” or “extremely significant” risks to their businesses.**

As the economy stabilizes and Australian corporates emerge from COVID-19, we expect to see class action activity pick up in 2021. The Federal Government did introduce measures to alleviate the risk of securities actions through COVID-19 and COVID-19 related class actions in Australia have to date focused on injury caused by COVID-19 infections / deaths. However, we expect COVID-19 linked securities actions will be actively considered and pursued in Australia over the coming 12 months. One area of concern is declarations made by Australian Stock Exchange listed entities on their ability to refinance debt assumed during COVID-19.

Securities class actions and class actions generally are garnering increasing political and regulatory attention in Australia – the focus being very much on controlling the frequency of these types of claims (e.g. through regulation, continuous disclosure reform, regulation of litigation funders). Although 2020 saw the first successful defence of a securities class action, which should give directors some confidence to defend opportunistic securities claims, it is clear these claims will remain a dominant feature of the Australian class action landscape for some time.

The survey also identified that 34% of respondents in the APAC region considered that litigation risk to their business was “not at all significant” or “somewhat significant”. Connected to that, 58% of APAC respondents said they were “not at all”, to a “small extent” or only to “some extent” “aware” of an increase in large scale group claims in the APAC region. This again signals a trend of businesses and D&O focus very much remaining on COVID-19 and related economic risk. Despite that, Directors and Officers must continue to manage and mitigate the risk – we have already seen class actions filed for COVID-19 related injury / infections and there has been a significant increase in employee / wage related class action filings, a fast developing risk for Directors and Officers as well.

**To what extent are respondents in APAC aware of an increase in the amount of large-scale group claims, including class actions?**

| Response | % |
| --- | --- |
| Not at all | 18.42% |
| To a small extent | 7.89% |
| To some extent | 31.58% |
| To a moderate extent | 28.95% |
| To a great extent | 13.16% |

Based on country / region of respondent HQ.

Figure 8.

Source: 8th Directors & Officers Liability Insurance Survey

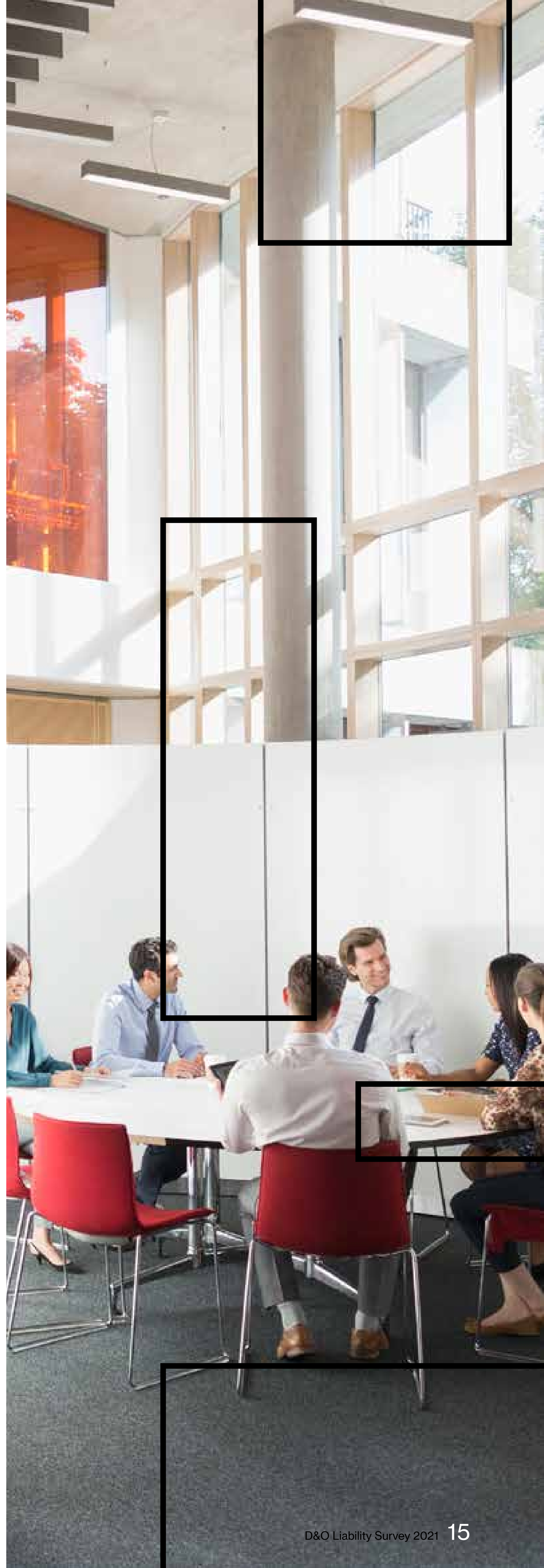
There are key developments in class action regulation in the Australian region which will affect the risk of large-scale group claims in 2021 including:

- Increased regulation of litigation funders (i.e. requirement to hold an Australian Financial Services License);
- Reforms to Continuous Disclosure Laws, the laws founding every securities class action in Australia were reformed during COVID-19, making it harder to bring speculative securities class actions, but then reverted to the pre-COVID-19 (stricter) test for breach on 22 March 2021; and
- Developing appetite for class action regulatory reform – the 4th Australian Inquiry into Litigation Funding and Regulation of the Class Action industry completed on 21 December 2020

Directors and Officers need to remain vigilant to the risk of large-scale group claims and ensure they are both meeting their disclosure obligations to shareholders and have appropriate capital and insurance protection in place should a proceeding be filed. Although the frequency of new filings remains steady, the consequence if a company or its Directors and Officers are subject to one is severe given the potential damages exposures. Despite the survey indicating a subdued awareness of class action risk, developments in this area over the past 12 months mean it should remain a key concern for Directors and Officers in 2021.

**58%**

**of APAC respondents said they were “not at all”, to a “small extent” or only to “some extent” “aware” of an increase in large scale group claims in the APAC region.**



# Risk #1 – Cyber-attacks and data loss

It will not be a surprise to many that once again the risk of cyber-attacks and data loss issues are perceived as a key risk for businesses. This year, according to our survey respondents, cyber-attack and data loss occupy first and second position respectively in the top five risks that face businesses.

The level of attention directors are paying to these risks reflects the steady stream of media stories reporting the frequency and severity of attacks against businesses of all sizes and sectors.

Global regulators have become concerned about the consequences of the attacks and are challenging directors to play a greater role in managing cyber risk in their business. First, they are looking for directors to promote the effective safeguarding of information assets within their business and the use of a broad cyber security risk management framework. Second, regulators are increasingly demanding that boards sign off on cyber security accountability and governance strategies covering elements such as the board's engagement expectations, delegation processes, structures for escalation, risk reporting, and regular inclusion of information security updates within board papers. Emerging legislation suggests that the scale of expectations placed on directors to promote cyber resilience will only increase in the future.

There are interesting regional differences in the level of concern around cyber risk, even though it is a risk that can be described as being "without borders".

European respondents showed a very high concern for cyber risk and data loss with 72% stating that the risk of a cyber-attack is either "very significant" or "extremely significant" versus 51% in the USA (Fig. 4). One explanation for this may be the impact of the General Data Protection Regulation. In 2020 (and early 2021), we have started to see significant fines imposed under the new regime, with examples from the Dutch, French, German, Italian, Spanish, Swedish and UK regulators, ranging from €50m to €750,000. Aside from the numbers themselves, it is the fact that (perhaps unsurprisingly given at least part of the rationale for GDPR being brought in) the fines continue to break records.

**72%**

**of European respondents stated that the risk of a cyber-attack is either "very significant" or "extremely significant" versus 51% in the USA (Fig. 4)**

## Has your company experienced a cyber-attack and / or loss of data significant enough to have been brought to the attention of the Board of Directors (or the senior-most governing body) of your company / organisation in the last 12 months?

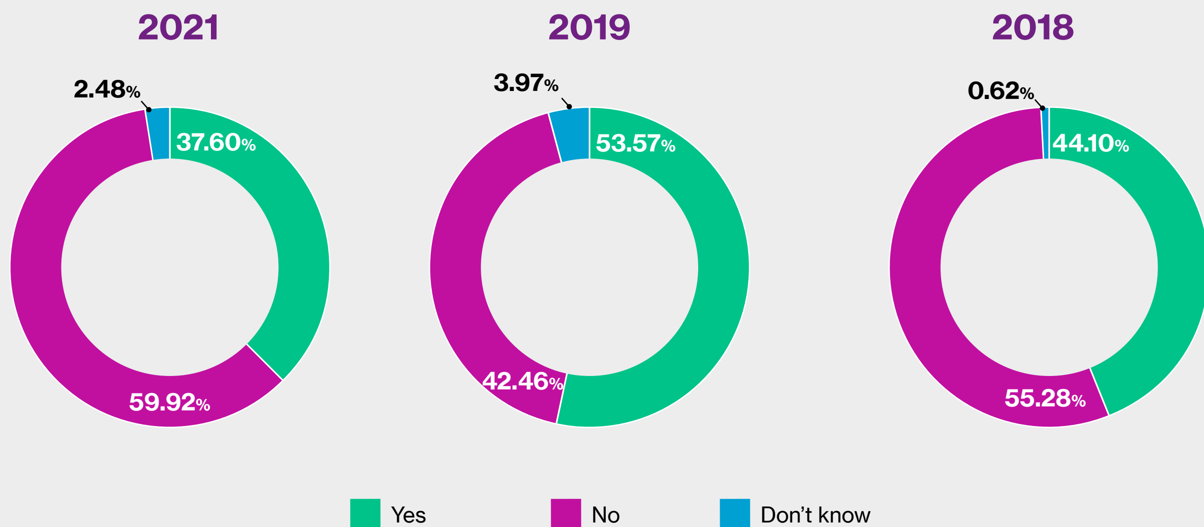



Figure 9.

Source: 8th Directors & Officers Liability Insurance Survey

Moving to the APAC region, the survey indicates that boards do not rate the risk of a cyber-attack or data loss event as highly as their EU / UK / US counterparts, with only 39% rating a 'cyber-attack' as being "very significant" or "extremely significant" and 37% rating a 'data loss' event as being "very significant" or "extremely significant" (compared with ratings ranging between 51% and 72% (for cyber-attack) and 46% and 59% (for data loss) in the other jurisdictions for both events (Fig. 4)).

Despite the comparative difference across the regions, cyber-attacks are still rated as the highest risk (alongside Regulatory risk including fines and penalties) and data loss events are the third highest rated risk, which reflects the general concern amongst boards in the region.

The lower risk rating might be explained by the perception of a less mature data protection regulatory regime across the region, when compared with more established jurisdictions such as the EU / UK / US. For example, throughout APAC there has been a patchwork of data breach notification laws come into effect over the past 12 months (e.g. Japan, Singapore and New Zealand) and businesses are becoming familiar with these regimes.

Further, there is likely a historical perception of a 'relaxed' regulatory environment with regulators traditionally adopting a conciliatory enforcement approach, and lower-class action risk surrounding cyber events when compared to the EU / UK / US regimes. However, these issues were recently addressed in the law reform discussions in the region to give individuals greater rights over the way their data is handled and a right to bring direct actions against companies for mishandling their data. Therefore, we consider this perception is likely to shift in coming years due to recent hyperactivity from regulators and law reform efforts in the data protection environment.

In Australia, for example, (where most APAC survey participants reside) increasingly we are seeing corporate consumer, financial services and media regulators viewing data protection within their remit in addition to traditional privacy regulators. These regulators are taking enforcement action against tech companies and other large organisations to set an example for the industry. It is likely this will raise the profile of cyber risk management across the wider business community, including for smaller businesses (which, according to the survey, currently view such risks as less significant than the larger organisations).

The survey encouragingly shows an increased awareness of cyber-attack and data loss risk although it is important to highlight that, whilst combined for survey purposes, cyber risk and data loss risk represent different challenges for directors. Cyber-attacks are exclusively tied to the malicious acts of an unauthorised third party whilst data loss events can be caused by much wider behaviours extending from employee errors, system misconfigurations, back-up practices, inadequate policy controls, misplaced devices, insufficient identity management procedures and physical security events. Both risks can be effectively managed through a cyber risk management framework although often the data loss risk will demand a much wider strategic gaze.

**Moving to the APAC region, the survey indicates that boards do not rate the risk of a cyber attack or data loss event as highly as their EU / UK / US counterparts**

## Insurance perspective

In respect of the response of the Directors and Officers insurance market to cyber risk, there is an increasing focus from D&O insurers on cyber risk management and the roles and responsibilities Directors and Officers have in this. Some insurers have developed a repertoire of set cyber-related questions which focus on governance, audit and incident response. Additionally, as of 1 January 2021, Lloyd's of London now mandates that Lloyd's syndicates have to affirm or exclude cover for Cyber risks on D&O policies. Generally, the D&O insurance market has adopted the positive approach of affirming cover for cyber-related risks for Directors and Officers.

It is apparent that increased regulatory scrutiny combined with greater insurer focus on cyber risk management will keep cyber-attack and data loss risk high on board agendas for the foreseeable future.

# Cyber Risk – US spotlight

If the end of 2020 and beginning of 2021 has proven anything, it is that cybersecurity related issues and cyber-attacks will continue to be every organization's worst nightmare. In our recent survey, respondents identified a cyber-attack the number one risk for their businesses. Of those respondents, 55.79% identified the risk posed by a cyber-attack to be as "very significant" or "extremely significant" (see Fig. 10). Given the severity and sophistication of these cyber-attacks, the referenced survey results are of no surprise.

2020 and COVID-19 shaped up to be one of the most challenging years for cybersecurity. Because of COVID-19, organizations were forced to reshape and quickly roll out new technologies and strategies due to the shift in doing business. As remote work continues, cybercriminals will continue to execute social engineering attacks. Due to the expedited roll out of these new technologies and new levels of security risk, our recent survey further highlights organizations increased concerns. 37.19% of the survey respondents considered the risk of cyber-attacks to have been increased "very significantly" or "extremely significantly" due to the impact of COVID-19 / lockdown.

Cybercriminals are also targeting businesses of all kinds with ransomware attacks. These sophisticated attacks are not only impacting an organization's ability to access their entire electronic infrastructure but are now more than ever including a data exfiltration component. Ransom demands have significantly increased, often reaching eight figures.

## How significant do you think cyber-attack risks are for your company / organisation?

| Response | % |
|---|---|
| Very significant / Extremely Significant | 55.79% |
| Not at all significant | 2.89% |
| Some what significant | 15.29% |
| Significant | 26.03% |
| Very significant | 34.71% |
| Extremely significant | 21.07% |

Figure 10.

Source: 8th Directors & Officers Liability Insurance Survey

The recent Solar Winds and Accellion hacks demonstrate the broad impact and difficulty of defending against cyber-attacks. The Solar Winds hack discovered at the end of 2020 of the company's widely used IT and network management tools has had a broad disruptive impact on over 18,000 users of the software, including at least numerous U.S. government agencies and companies. The U.S. government has called for potentially impacted companies to immediately assess the risks to the organization and its customers, and undertake other sustained investigative efforts. Similarly, the hack announced by Accellion in January 2021 again highlighted the knock-on effect of vendor or supplier hacks, the dangers and difficulties of defending against cyber-attacks, and the need for companies to carefully and thoroughly examine vendors and their cyber security.

Such hacks of vendors or suppliers may trigger a company's notice obligations under contract or under multiple breach notification laws under state, federal and international laws. In addition, the company may have disclosure requirements, including the Securities and Exchange Commission's (SEC) disclosure requirements for public companies, and with respect to financial institutions and service providers, the New York Department of Financial Services (NYDFS) cybersecurity regulation, which requires firms to notify the NYDFS of "any Cybersecurity Event" that has "a reasonable likelihood of materially harming any natural part of the normal operation." On December 18, 2020, the NYDFS issued a letter to all regulated entities requesting that they notify the department if they used the Solar Winds products or if the institution has been notified of any impact by any affiliate that has access to its network or non-public information.

Cyber-related shareholder litigation against companies and their D&Os has been slow to develop, but may be gaining a foothold. For a number of years, shareholders have filed securities class actions and derivative lawsuits following sizeable hacks of public companies. Those cases have been slow to gain traction, primarily because in many cases, the targeted company's stock price recovered quickly, and plaintiffs simply were unable to overcome procedural hurdles and substantive defences to derivative actions.

In more recent years, however, as cyber risk has become a board-level risk management issue, it has become increasingly difficult for D&Os to defend against shareholder actions following a cyber event, and some cases have resulted in sizeable settlements. In particular, in a recent high-profile example, a company and its D&Os entered into settlements of $80 million in a securities class action and $29 million in a derivative action, and agreed to a $35 million penalty to the SEC, to resolve allegations that it misled investors by failing to disclose a large data breach and theft of personal information of hundreds of millions of user accounts. In the past four years, investors have filed a small but steady number of cyber-related securities class actions, including four each year in 2017, 2018 and 2020 and six in 2019.

**as cyber risk has become a board-level risk management issue, it has become increasingly difficult for D&Os to defend against shareholder actions following a cyber event**

Regulatory investigations and actions against companies that fail to properly address and disclose cyber risks are a significant concern for D&Os. The SEC has increasingly focused on whether broker dealers, investment advisers and public companies are complying with rules and regulations regarding cyber risks. Both the SEC and the DOJ included a focus on cyber-based attacks and threats and pursuing regulatory reform initiatives in their Strategic Plan for Fiscal Years 2018-2022.

In FY2020, the SEC's Cyber Unit investigated and brought numerous actions involving initial coin offerings (ICOs) and digital assets, as well as cybersecurity threats to public companies and other regulated entities.

The SEC has expressed concern over cyber-related attacks due to the COVID-19 pandemic and has warned companies to be on the look-out for ransomware attacks and "credential stuffing."

# Insolvency

One of the most unusual results from this year's survey is the marked decrease in respondents' concerns about the risk of insolvency, bankruptcy or corporate collapse. 62.66% of respondents considered that the risk of insolvency, bankruptcy or corporate collapse was either "not at all significant" or only "somewhat significant". This compares with 46.03% and 49.69% in the last two surveys.

This statistic is also reflected in the respondents' views regarding the impact of COVID-19 / lockdown measures. Despite the concerns which we have heard from many insurers anticipating a tsunami of insolvencies, 58.09% of the respondents to our survey thought COVID-19 / lockdown measures had not had any significant effect on the risk of insolvency, bankruptcy or corporate collapse or had only had a "somewhat significant" impact.

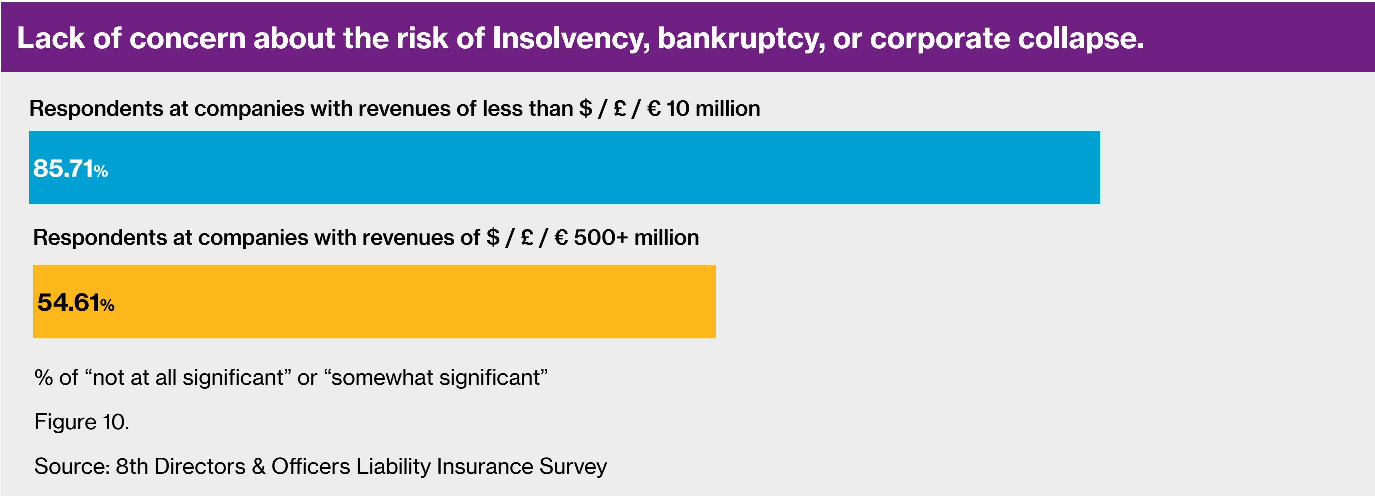



Figure 10.

Source: 8th Directors & Officers Liability Insurance Survey

**58.09% of the respondents to our survey thought COVID-19 / lockdown measures had not had any significant effect on the risk of insolvency, bankruptcy or corporate collapse or had only had a "somewhat significant" impact.**

## View from the UK

In various jurisdictions, governments have taken considerable steps to limit the financial risks of COVID-19 including, in the UK, furlough arrangements, to preventing landlords from evicting tenants, to temporary changes in the laws regarding wrongful trading (similar laws on wrongful trading were passed in Australia – see below). Statistics from the Insolvency Service, published on 16 March 2021 noted that company insolvencies in the UK fell to a record low in February, with only 686 company insolvencies in England & Wales compared to 1348 in the same month in 2020. However, the report noted that some caution needs to be applied when interpreting these statistics given the measures in place and the disruption to operations registering insolvencies. We may well see insolvencies surge as government support for businesses and the wider economy is wound down.

Many London market insurers have certainly taken a different view of the level of solvency risk involved in SME businesses, particularly for those industries most affected by COVID-19 with some imposing insolvency exclusions on these sectors by default. However, we have seen considerably more flexibility from some other London market insurers who have been willing to underwrite these risks at the higher end. Looking further into 2021, in the UK, insolvency has seen sweeping changes brought in by the Corporate Insolvency & Governance Act 2020 and it remains to be seen what impact these will have.

**Looking further into 2021, in the UK, insolvency has seen sweeping changes brought in by the Corporate Insolvency & Governance Act 2020**

## View from the Netherlands

The position in the Netherlands is similar, by February 2021, the number of bankruptcies had reached its lowest level since December 1990. The announced extension of the financial support by the government is seen as the main reason for this[1]. According to several insolvency specialists the predicted bankruptcy wave is not averted but is now expected to start in Q3 2021 with a high peak a quarter later in Q4 2021.

Most bankruptcies are expected in the leisure, wholesale and retail, culture and recreation sectors. This is in line with our experiences in the current financial lines market. Almost all D&O insurers are rejecting new SME business applications received from these industries in the Netherlands. Some positive news is that up to now we have not seen recently added insolvency exclusions on D&O policies.

Nevertheless, the decrease in respondents' concerns about the risk of insolvency, bankruptcy or corporate collapse looks like to be in line with the view of the President of the Central Bank of the Netherlands (DNB): he has high hopes for the Dutch economy after the summer. He does not support the idea of an upcoming tsunami of bankruptcies and he points out the important role of the tax authority as (preferred) creditor.

We have not seen any legislation changes or new legislation in relation to COVID-19 (as for example in the UK) but there are some recent cases since May 2020 in the retail / real estate sector. It looks like judges are seeking reasonable / favorable solutions to share the financial pain between parties (for example the court in Amsterdam decided a 50-50 split between landlords and tenants). We will have to wait and see if this aim for a positive outcome will also be copied into other areas and sectors.

**In the Netherlands,most bankruptcies are expected in the leisure, wholesale and retail, culture and recreation sectors**

## View from the US

There were 32,506 commercial US bankruptcy filings in 2020, compared to 39,050 in 2019, reflecting a 26% decrease year over year – a significant difference to what many predicted in the early days of the COVID-19 pandemic. Nevertheless, commercial Chapter 11 filings increased 29% in 2020, from 5,519 in 2019 to 7,128 last year, the highest levels since 2012.

Looking ahead, while the progress of vaccine development and distribution is encouraging, companies may nonetheless face ongoing or periodic shutdowns and demand falloffs. Financial and liquidity challenges may follow, and commercial Chapter 11 filings may continue their upward trend. Should the pandemic linger, the greater the likelihood there is of repeat restructurings (euphemistically referred to as "Chapter 22s" or "Chapter 33s"). In those instances, pre-packaged and pre-agreed restructurings may be more difficult to achieve.

**There were 32,506 commercial US bankruptcy filings in 2020, compared to 39,050 in 2019, reflecting a 26% decrease year over year**

In our survey, only 42% of US respondents viewed insolvency, bankruptcy, or corporate collapse as a "significant" business risk or worse, with the remaining 58% opining the risk to be "not at all" or only "somewhat significant." These results reflect what may be viewed as a counterintuitive response to the increase in Chapter 11 filings, coupled with the risk that a continued pandemic may have on short term and long term business prospects. In contrast, others may believe that an end is in sight, in light of reduced new COVID-19 cases and continued government support not just to businesses, but to individuals and families as well, at least enough to maintain sustainable levels of both supply and demand.

**42%**

**of US respondents viewed insolvency, bankruptcy, or corporate collapse as a "significant" business risk or worse**

1. https://www.cbs.nl/nl-nl/nieuws/2021/10/aantal-faillissementen-in-februari-op-laagste-niveau-in-30-jaar

Source: Epiq AACER

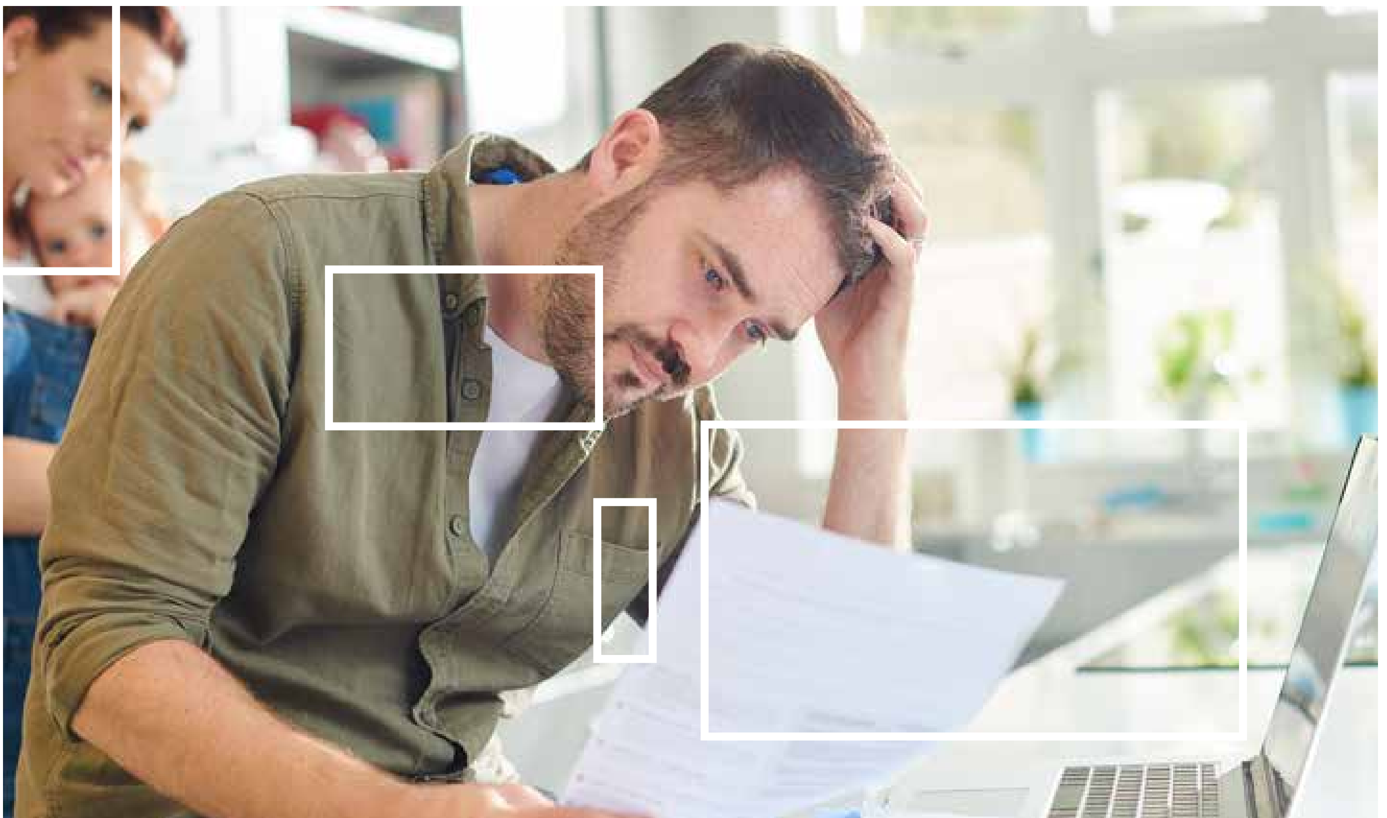
## View from Australia

Prior to 2020, corporate insolvencies had been falling gradually in Australia since 2016. In 2020, the Australian economy went into recession for the first time in 25 years. Ironically, as a result of the temporary COVID-19 specific measures introduced by the Federal Government in March 2020 (including the JobKeeper wage subsidy scheme, temporary liability relief for insolvent trading for directors and extended deadlines for complying with statutory demands), insolvency numbers fell dramatically. While there were, nonetheless, some high profile financial collapses, 2020 was one of the quietest years in memory for many in the field of insolvency and restructuring. Sentiments expressed in the survey perhaps reflect the reduction in the number of insolvencies last year. Only 13% of APAC participants (the majority of whom were from Australia) indicated that insolvency, bankruptcy or corporate collapse risk was "very significant" / "extremely significant" to their business. This was significantly lower than participants in other regions (UK 22%, USA 34% see Fig. 4). Interestingly APAC participants were more concerned with the risk of shareholder actions / disputes (21% rating the risk as "very significant" / "extremely significant", see Fig, 4).

On 31 December 2020, the temporary moratorium on insolvent trading ended, along with the extended thresholds for complying with statutory demands. Currently, all eyes are on the economy, as JobKeeper reaches its imminent demise. Currently, about 1 million Australian companies and businesses are registered for JobKeeper in order to continue paying about 3 million workers. There is concern that many of the businesses will never reopen. The JobKeeper regime has now ended (with some exceptions) on March 28, 2021. There is much conjecture about what will happen to many businesses after that date.

On the positive side, on 1 January 2021, a new simplified debt restructuring and liquidation process was introduced for small businesses that have less than $1 million in liabilities. It allows directors to continue to manage the company during a restructuring, rather than handing control to an external administrator.

The longer-term financial consequences of the sporadic State lockdowns during 2020 are therefore yet to materialise on a broad scale as a result of the temporary measures. Also, because Australia's position from a public health perspective is currently better than most other developed countries, the economy has not experienced the full economic effects of a COVID-19 pandemic. Nonetheless, the concern is that for many companies, particularly small and medium sized businesses and businesses in certain sectors such as travel, hospitality and entertainment, the temporary measures have only delayed an inevitable wave of insolvencies. Many, including Australian Restructuring Insolvency and Turnaround Association - Australia's peak body for insolvency practitioners - have spoken of a potential insolvency tidal wave which could overwhelm the resources of the country's insolvency practitioners.



## View from Spain

According to data from the Bank of Spain, one in five companies, between 15% and 19% of the Spanish business landscape, is at risk of insolvency due to the impact of the health crisis caused by COVID-19.

Last February a record was set for bankruptcy proceedings since the pandemic broke out in March 2020: a total of 532 companies declared insolvency, which represents an increase of 18% compared to the same month of the previous year. The data for February especially reflect the strong impact of the crisis on the hospitality sector, which dominates the number of bankruptcy proceedings with a total of 138 filings so far this year.

The Spanish Government has put in place measures to allow for delays in insolvency applications where the insolvency is due to COVID-19 and related lockdown measures. Debtors are not required to file for voluntary insolvency until 31 December 2021 (the previous deadline was 14 March 2021) and the insolvency court shall not process creditors' filings for involuntary insolvency proceedings submitted on or after 14 March 2020. Any debtor's filing for voluntary insolvency made up to 31 December 2021 shall prevail over any filings made by any creditor.

There is a risk of litigation if doubts arise as to whether the financial difficulties of a company were really due to the COVID-19 crisis, or if, on the contrary, the moratorium of the obligation to file insolvency has been used improperly, thereby complicate the situation of the company for not requesting the insolvency in time, which can generate liability for it's D&Os.

To this is added that, in theory and according to bankruptcy regulations, managers should not assume expenses if they know that they will not be able to pay them, something that in the current situation becomes a very complex decision.

# Influence of Social Media

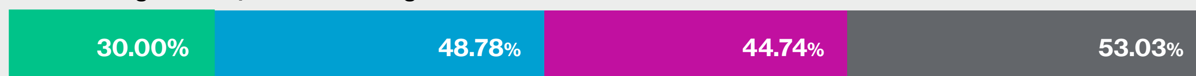
For more than a decade, social media platforms have established their influence in the discourse of social and political issues. In a shift, their influence in the manipulation of stock valuation and trading recently emerged like a tidal wave in the United States, leading to swift and significant increases in the stock prices of several high profile companies.

The spectacle is highlighting a struggle between the influence of "Wall Street vs. Main Street," as well as calls for government oversight into stock price manipulation and trade halting. Caught in the crossfire, however, are companies whose stocks have wildly fluctuated, in many instances due to factors outside their control. To what degree are Directors and Officers concerned that their organizations could become the focus of a social media campaign? Our survey reveals that there is a notable divide on this question. For respondents from country / region of office in the United States, more than half, 53%, believe that becoming a focus of a social media campaign is "not at all significant" or "somewhat significant" of a business risk, with the remainder believing the phenomenon is either "significant," "very significant," or "extremely significant" of a business risk. Results were reversed relative to respondents from country / region of office in the United Kingdom and Asia Pacific. In this regard, less than half, between 45% and 50%, of respondents in those regions believed the risk was less significant. The standout region on this question was Europe (excluding the UK), wherein a full 70% opining the risk was "significant," "very significant," or "extremely significant" (see Fig. 11).

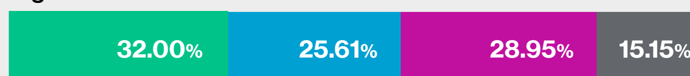
Survey results are capturing early, and clearly divergent, reactions to an emerging subject. For those respondents who are more concerned about the risk, it is possible they view their organizations as facing unique, heightened risk, or they are possibly conveying a concern for the potential gravity of social media influence on business more broadly and in the longer term. For those survey participants who are less concerned, they may believe their organisations are in lower profile, less impacted industries.

**How significant do you think is the risk of your company / organisation becoming a focus of a social media campaign?**

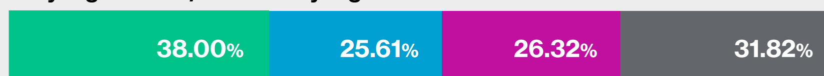
Not at all significant / Somewhat significant




Significant




Very significant / Extremely significant




Europe UK APAC US

Figure 11.

Source: 8th Directors & Officers Liability Insurance Survey

Alternatively, their views may be influenced by the lack of initial impact to affected organizations.  For example, shareholder plaintiffs have not (yet?) filed securities litigation against companies whose stocks were impacted in the weeks and months following the first incidents (although we are aware of consumer and securities litigation against trading platforms relating to the halting of trades).  This may explain, at least in part, why a majority of US respondents were less concerned about the risk.

In Australia, the influential power of social media platforms has seen much recent commentary and discussion raising questions over the control, or lack thereof, that businesses have in relation to content shared on social media outlets (which are clearly also concerns being raised in other jurisdictions).

The Australian Securities and Investment Commission (ASIC) has recently noted that the task of monitoring social media forums is far from easy and whilst the regulator has been proactive in identifying the rising market power of social media influencers over investor behaviour, the GameStop saga has highlighted the significant challenges it faces in policing online discussion.  ASIC surveillance is often hamstrung by privacy laws and limits on its ability to use private information sourced on social media.

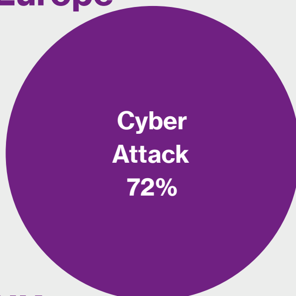
# Regulatory Exposure

46% of those surveyed considered regulatory risk to be a “very significant” or “extremely significant risk” and, for the second year in a row, it comes within the top 3 risks to businesses chosen by the respondents (see Fig. 4). It is no surprise that the financial services sector feels the weight of this risk most amongst the sectors surveyed, with 36% of respondents in this sector also seeing regulatory action against them personally as “very significant” or “extremely significant risk”. In the years following the global financial crisis, the regulatory agenda has strengthened and significant reforms and shifts in focus have led to an increasingly aggressive environment for D&Os, especially those in the financial services sector.

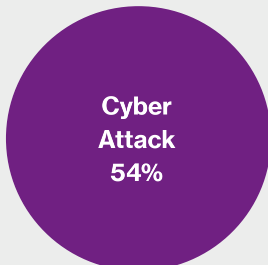
**Top 3 anticipated risks from respondents based in offices across APAC, Europe, UK and US.**

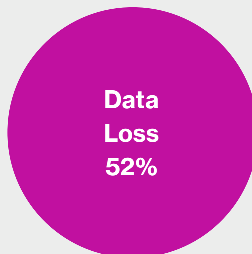
**APAC**

**Europe**



**UK**



**US**

Figure 12.

Source: 8th Directors & Officers Liability Insurance Survey

## Financial Services

In the UK, the Financial Conduct Authority (FCA) has increasingly focussed on individual responsibility in order to encourage an improved corporate culture.  Alongside this focus has been a change of operations, with the FCA opening more and more investigations in order to diagnose and stop breaches before significant harm can occur.  Early intervention is increasingly used by the FCA, often without formal notice of investigation and data from the FCA's Enforcement Report for 2019 / 20 shows that cases are also taking longer to resolve and are costlier.

In the US, it is expected that under the new Biden Administration, there will be increased scrutiny of financial institutions and Wall Street, and oversight of market participants and intermediaries in many areas, including higher capital and customer suitability requirements.  Both the Securities and Exchange Commission (SEC) and Department of Justice (DOJ) have continued to stress individual accountability and target individual officers of corporations as a means of deterrence.  The SEC will likely continue to focus on the protection of retail investors and individual accountability, and increase its interests in whether broker dealers, investment advisers and public companies are complying with rules and regulations regarding cyber risks in particular.  In FY2020, the SEC's Cyber Unit investigated and brought numerous actions involving initial coin offerings (ICOs) and digital assets.

In the financial services sector in Australia, the new product design and distribution obligations for retail products and a new breach reporting framework will enter into force in October 2021.  The expansion of the individual accountability regime for Directors and Officers continues but slowed last year.  In 2020, Australian Prudential Regulatory Authority (APRA) announced that it had delayed further consultation on the roll out of the Financial Accountability Regime (beyond the banking sector).  With consultation likely to continue well into 2021, legislation extending the Banking Executive Accountability Regime (BEAR) to the Insurance and Superannuation sectors is unlikely to occur before 2022.

## Other Sectors

There is increased activity from other regulators in the UK as well, impacting D&Os in all sectors, not just those in financial services.  D&Os are increasingly exposed to regulatory actions in relation to pensions, competition, bribery and corruption, health and safety failings, environmental damage, and data protection failings. Failures in relation to pensions should be of particular concern going forward following the enactment of the Pension Schemes Act 2021, which grants the UK Pensions Regulator new powers to investigate and sanction (both on a civil and criminal basis) those who cause harm to a pension fund.  With the Pensions Regulator's recent move towards a more aggressive and proactive stance, this could lead to an increase in actions against directors and may see the current low perception of pension liability risk rise.

In addition, the Department for Business, Energy and Industrial Strategy's (BEIS) long-awaited white paper on audit and corporate governance was published on 18 March 2021.  The Financial Reporting Council is to be replaced by a new regulator, the Audit, Reporting and Governance Authority (ARGA), which will be given a new mandate and a suite of powers, including the power to sanction all directors of relevant companies, regardless of their professional qualification, to account for their duties to prepare and approve true and fair accounts and compliant corporate reports, and to deal openly and honestly with auditors.  Regulations are also likely to extend beyond listed companies to large privately held companies as well.

**The Financial Reporting Council is to be replaced by a new regulator, the Audit, Reporting and Governance Authority (ARGA)**

The position in the US for non-financial services regulation following the change in the administration is going through similar changes to those for the financial sector.  In July 2020, the SEC and DOJ issued updated guidance on the Foreign Corrupt Practices Act (FCPA) and announced a new hallmark for an effective compliance program.  The SEC and DOJ continue to aggressively enforce the FCPA around the world, and under the Biden Administration international cooperation is likely to increase, resulting in more multi-jurisdictional investigations.

In APAC, 42% of survey participants considered the risk of regulatory action to be “very significant” / “extremely significant”, perhaps with good reason (see Fig. 4). Australian corporate regulators continue to aggressively pursue enforcement action for corporate misconduct. In light of the release of the Final Report from the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, there

**42%**

**of APAC survey participants considered the risk of regulatory action to be "very significant" / "extremely significant", perhaps with good reason (see Fig. 4).**

have been significant Government reforms to corporate regulation and significant increases in maximum financial penalties and the number of breaches that attract significant penalties. The Australian Securities and Investments Commission (ASIC), in particular, continues to increase the number of enforcement actions that are taken to court through their "why not litigate" strategy. The strategy has faced some criticism due to ASIC's mixed results in the last 12 months and may change with new leadership at ASIC.

The High Court's decision in ASIC v King [2020] HCA 4 has confirmed an expansive definition of "officer" under the Australian Corporations Act. The Court confirmed that it will not be necessary for a person to be a named officer but rather it will be a matter of fact and circumstance to determine whether a person has the requisite capacity to significantly affect the financial standing of a company. Such persons could include shadow directors or other persons exerting influence. In the context of a corporate group, this could extend to a person who is strictly an officer of another entity. The court held the term "officer" could extend to lenders and other third parties helping companies out of financial distress, where they were involved in management of the corporation and able to ensure their advice was implemented.

In terms of ongoing enforcement trends, the key priorities of Australian regulators remain protecting vulnerable consumers, maintaining the integrity of markets and supporting businesses. Emerging areas of regulatory concern for directors include breaches of anti-money laundering / counter-terrorism financing regulation and management of cyber incidents.

## Climate Change

Climate change-related risk is also likely to feature more in the concerns of D&Os going forward with increasing regulatory focus – for more on this topic, please see our **climate change** article found in this document.

# Climate Change

The survey results indicate that directors' concerns about environmental / climate change have taken a back seat in some businesses over the last 12 months. More immediate risks emanating from the current economic and geo-political environment have rightly taken prominence resulting in environment / climate change concerns ranking below other risks examined in the survey.

Despite the survey findings, we anticipate climate risk will continue to be a key, and growing, risk for Directors and Officers as governments and regulators work to implement the recommendations from the Task Force on Climate-related Financial Disclosures (TCFD) and as more insurers focus on this as a risk area.

We consider the geographic differences highlighted by the survey:

## APAC

In APAC, only 34.21% indicated a "very significant" / "extremely significant" concern about environmental / climate change risks (compared to the economic climate at 47.37%). Additionally, survey participants seem to exhibit a higher level of apathy towards climate-related risks. In APAC, 44.74% of participants indicated "not at all significant" / "somewhat significant" to a concern of environmental / climate change (compared to economic risks at 21.05%). However, for Australian corporates and their boards, climate change represents a growing risk.

**How significant do you think the risk of Enviromental / Climate Change are for your company's / organisation's business operations?**

| Region | % |
|---|---|
| Europe | 50.98% |
| UK | 39.74% |
| APAC | 34.21% |
| US | 35.29% |

Based on country / region of HQ.

Figure 13.

Source: 8th Directors & Officers Liability Insurance Survey

In the last 12 months, several court proceedings suggest Australia is becoming a forum for climate change test litigation against corporates, financial institutions and governments. Also, Australian regulators are focusing on ensuring that companies are taking adequate steps to consider and manage climate-related risks. Risks to companies are continuing to emerge and require action by Boards to avoid future issues. On 2 November 2020, proceedings against Retail Employees Superannuation Trust (REST) settled just before trial. The claim alleged that REST breached its fiduciary duties by failing to consider climate change risks adequately. The terms of settlement are confidential, but REST released a press statement agreeing to comply with Task Force on Climate-related Financial Disclosures (TCFD) recommendations on disclosure and risk assessment, including conducting "stress tests" on its investment portfolio.

Activists have launched a further class action against the Australian Commonwealth Government concerning its issue of sovereign bonds. The claim seeks declarations that the Commonwealth has failed to disclose the material risk that climate change presents to the bonds' value over time. If successful, the case may also expose financial institutions and corporates to securities class actions risk from failures to make adequate climate change disclosure.

In addition to litigation, Australian regulators have also indicated an increased focus on ensuring that companies manage their climate change risk. The Australian Prudential Regulation Authority and the Reserve Bank of Australia are gearing up to put banks and insurers through a challenging new climate change "stress test" model. Further, the Australian Securities and Investments Commission announced companies would face court action if they fail to tell shareholders and customers about climate-related financial risks. For signatories to the UN Principles for Responsible Investment, which includes 179 Australian headquartered corporates, public disclosure of TCFD indicators is now mandatory.

Increased scrutiny over managing climate-related financial risks will require boards to regularly consider the effect that climate change risks may have on their business. Listed companies with material exposure to climate risk are strongly recommended by Australian regulators to report under the TCFD framework.

Echoing this, in late 2020, the New Zealand government announced plans to make TCFD aligned climate-related financial disclosures mandatory for certain publicly listed companies and large financial institutions.

## UK and Europe

Turning to the UK and Europe, the percentage of responses which identified the environment and climate change as "very significant" or "extremely significant" was higher than in APAC.

There have been significant developments in the UK around climate change reporting in the last few years. The UK government was an early supporter of TCFD and, in its 2019 Green Finance Strategy, set out its expectation for all listed companies and large asset owners to disclose in line with the TCFD recommendations by 2022. Furthermore, in November 2020, the UK government announced TCFD aligned disclosures will be mandatory for large UK companies and financial institutions by 2025. A new rule has been introduced for accounting periods on or after 1 January 2021 requiring UK incorporated and overseas commercial companies with a premium listing to state in their annual financial report whether their disclosures are consistent with the TCFD recommendations, or to explain if they have not done so. The UK government launched a consultation on 24 March 2021 on the extension of this rule to a wider group of entities.

In the pensions arena, the new Pensions Schemes Act 2021 provides for increasing requirements on larger occupational pension schemes to take into account climate change in their investment objectives and policies and to implement TCFD aligned reporting.

Added to this, the UK prudential financial services regulator, the PRA, has issued supervisory statements and guidance setting out how banks and insurers should approach and manage the financial risks of climate change and has introduced stress tests to assess the resilience of key institutions to climate change. This heightened pressure on banks and insurers is impacting all companies. Insurers increasingly are turning their attention to how companies seeking insurance for their risks are addressing their physical and transition risks. Companies can expect to be asked questions in relation to how these risks are being managed as part of applying for D&O insurance.

## US

Investors, regulators and plaintiff law firms have shown an increasing interest in the adequacy of corporate disclosures relating to climate change risks and opportunities. In 2010, the U.S. Securities and Exchange Commission (SEC) issued interpretative guidance to public companies regarding its requirements regarding climate change, which it has recognized as a material risk that companies should report. Investors and non-governmental organizations have also used shareholder proposals to address climate change disclosures, including recommendations issued in June 2017 by the Task Force on Climate-Related Financial Disclosures.

Last September the Commodities Futures Trading Commission (CFTC) issued "Managing Climate Risk in the U.S. Financial System", a report detailing the systemic risks to the U.S. financial system from climate change. The CFTC concluded that U.S. financial regulators must recognize that climate change poses serious emerging risk to the U.S. financial system, and decisive action is necessary. On November 5, 2020, just a couple of days after the Presidential election, SEC Commissioner Allison Herren warned that climate change presents a "systemic risk" to markets, the financial system and the U.S. economy and called for a coordinated effort to create uniform climate change reporting and disclosure standards regarding climate change risks. In late February 2021, Herren announced that the agency will begin the process to update its 2010 climate-related guidelines.

Finally , also in the new Biden Administration, the Department of Labor announced it would no longer enforce previous administration rules that purportedly made it more difficult for employers to include environmental, social and governance (ESG) investment options in retirement plans, stating it intends to revisit the rules and potentially to issue further guidance.

Given the increased focus on climate change in these and other jurisdictions (not only by regulators but also by NGOs, investors and consumers), our expectation is that our future survey responses will evidence climate change climbing up the board agenda once again.

**In the new Biden Administration, the Department of Labor announced it would no longer enforce previous administration rules that purportedly made it more difficult for employers to include environmental, social and governance (ESG) investment options in retirement plans.**

# Risk #5 – Employment Practices Liability (EPL)

The global COVID-19 pandemic has impacted all businesses and the individuals who work within them.  Governments around the world have struggled with the balancing act of maintaining the health and welfare of its people whilst being mindful of the significant economic impact of pressing the pause button for all but essential business.  In the UK, all non-essential businesses were forced to close, and the Government introduced the Furlough scheme allowing employers to keep their employees in work whilst the business was shut.

While broadly welcomed, the Furlough scheme is not, on its own, a silver bullet.  Boards are continuously reviewing the practical measures required to navigate their businesses through lockdown and ecomomic uncertainty with.  Redundancies and standing down large parts of the workforce are becoming commonplace as cost reduction measures.  Indeed, redundancies in the UK have seen an increase to the highest levels for decades[1].

Businesses do need to carefully manage redundancy programs within the parameters of current employment laws as such decisions open up an increased risk of unfair or wrongful dismissal claims.  This potential risk  is perfectly illustrated in our survey, which shows that the risk of employment claims has entered the Top 5 risks to businesses.  Indeed 38% of respondents see the risk of employment claims as a "very" or "extremely significant" risk to their business see (Fig. 4) (if you include people who considered it to be a significant risk, this figure rises to 60.33%).

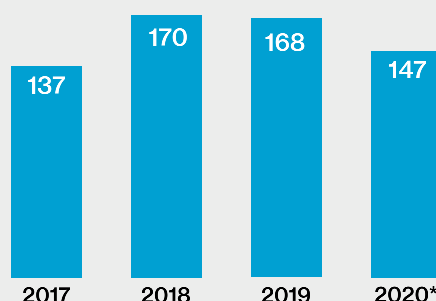
**38%**

**of respondents see the risk of employment claims as a very or extremely significant risk to their business (see Fig. 4) (if you include people who considered it to be a significant risk, this figure rises to 60.33%)**

However, given the fact that it is the leisure / hospitality and retail sectors that have been hardest hit by the pandemic, it is perhaps surprising that our survey shows that these industries perceive the risk of employment claims as being lower than for businesses in the industrial / manufacturing and finance sectors.

On a positive note we are not seeing an increase in EPL claims in the UK as a result of the pandemic.  It is early days however and it is possible that more claims will materialise once the pandemic recedes and furlough schemes are brought to an end.

**EPL claims notified to FINEX GB**




* Full year projection

Figure 14.

Source: 8th Directors & Officers Liability Insurance Survey

Outside of the US, EPL is not typically purchased alongside other financial lines insurance products such as Directors & Officers, Crime or Pension Trustee Liability (PTL). Nonetheless, fearing increased claims resulting from measures taken during the pandemic, those insurers who may have once been willing to look at writing new EPL placements are much more reluctant to entertain new submissions, instead concentrating on renewals only.

The **Top 5 Risks** article, discusses the environment in APAC, and Australia in particular, where there have been recent developments in industrial relations legislation and increasing wage / employee related class actions that are consistent with this risk becoming more prominent.

1. https://www.ons.gov.uk/employmentandlabourmarket/peoplenotinwork/redundancies/timeseries/beir/lms

For the past 3 years there have been a series of employee underpayment scandals focused on some of Australia's most prominent ASX listed entities including companies listed. Connected to that, a series of decisions in the Federal Court of Australia in 2020 found that employees in Australia's valuable mining and resources sector were not being paid proper entitlements as a result of their misclassification as casual employees, instead of permanent. The Federal Government estimated between $18 - $39 billion may have to be back paid to 'casual' workers nationwide on the basis of that decision.

Those events, coupled with the favourable conditions for litigation funders generally in Australia, has been significant for employment related class actions. High value, large group representative class actions are being filed with increased frequency.

Industrial relations reform passed in March by the Federal Government has largely avoided the anticipated wave of employee entitlements actions related to the 'casual misclassification' issue, however, wage / employment related class actions remain a key and developing risk for Directors and Officers in Australia.

Our survey respondents are clearly concerned about the potential of increased EPL claims but the evidence is not yet supporting this. As we suggested earlier in the article, the moment of truth is likely to be when Governmental support is throttled back and a clearer picture of the economy emerges. The extent to which businesses will need to continue cutting back staff will be pivotal to immediate claims trends.

# Employment Professional Liability (EPL) exposures – COVID-19 impact

There have been several events over the past few years that have had a significant impact on employment-related exposures as it relates to Directors and Officers.

First, there was the #MeToo movement that highlighted the continued prevalence of sexual harassment within organizations. What followed was a number of notable people being removed from their positions, legislation being passed to help protect the victims, and lawsuits being filed against Boards of Directors for their alleged failure to prevent a workplace culture that enabled sexual harassment. It was then not surprising that in our **2018 D&O Survey** 55% percent of 77 executives surveyed from various companies noted that claims by employees were their top concern in the coming year. While sexual harassment claims are still prevalent, they are not filed as frequently as they were during the height of the #MeToo movement. Similarly, the lawsuits against Boards of Directors have decreased significantly as many companies have taken steps to address workplace culture.

While the impact of #MeToo has decreased over the past few years, the more recent Black Lives Matter movement is still fairly prevalent. Claims of racial discrimination continue to increase and demands for more diversity on Boards of Directors and at senior levels continue. Since the height of the Black Lives Matter movement in the summer of 2020 there have been a number of lawsuits filed against Boards of Directors alleging among other things, misrepresentations about the company's commitment to inclusion and diversity. As such, it is surprising that 48.8% of Senior Managers / Executives do not view discrimination as a significant risk for the company. However, 65% of Risk Managers view discrimination as a "significant risk", "very significant" or "extremely significant", and 62% of Risk Managers view the risk of employment claims as a "very significant" risk for the company.

Finally, the most significant event of late continues to be the COVID-19 pandemic. According to the survey, more than 70% of individuals surveyed indicated that COVID-19 and lockdown measures are a "very significant / extremely significant" issue for their company (see Fig. 5 for a regional breakdown).

This is absolutely in line with what we have seen and anticipate. A little more than a year ago businesses across the globe came to a halt and many workers were sent home to work remotely for the foreseeable future. Events like this that impact the workplace naturally come with an increased risk of exposure to employment related claims alleging discrimination, retaliation, and harassment.

Throughout the past year we have seen a steady increase in employment litigation ranging from disability and age discrimination claims to retaliation claims. As businesses continue to reimagine and reconfigure the impact to the workplace continues[1].

A more recent COVID-19 risk exposure is the issue of vaccines. Many companies are deciding whether they should mandate vaccination of their employees prior to returning to the office. The EEOC in the United States has provided guidance that states employers may mandate vaccination but must do so within the legal confines of the federal employment laws. Some states, on the other hand, are taking a different approach and passing legislation that states vaccines cannot be mandated. Vaccine mandates of course come with employment-related risk such as, disability and religions discrimination, retaliation and invasion of privacy to name a few. As such, the risk of employment-related claims is expected to continue[2].

**of individuals surveyed indicated that COVID-19 and lockdown measures are a "very significant" / "extremely significant" issue for their company**

1. For further information: https://www.willistowerswatson.com/en-US/Insights/2020/03/covid-19-response-and-employment-practices-liability-concerns and https://www.willistowerswatson.com/en-US/Insights/2020/04/client-alert-covid-19-response-and-employment-practices-liability-concerns-part-II
2. For further information: https://www.willistowerswatson.com/en-US/Insights/2020/12/covid-19-vaccine.

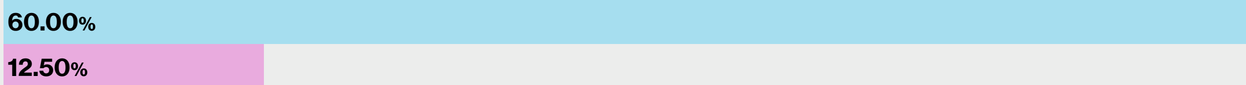
## How significant do you think employment claims risk is for your company/organisation?

All Respondents

Board of Directors, Senior management / Executive team

Risk management

Other




Not at all significant / Somewhat significant    Very significant / Extremely significant

Figure 15.

Source: 8th Directors & Officers Liability Insurance Survey

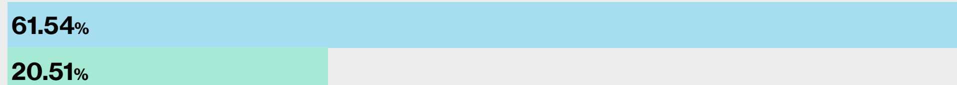
## How significant do you think the risk of work place issues (Pay/discrimination/#MeToo) is for your company/organisation?

All Respondents

Board of Directors, Senior management / Executive team

Risk management

Other




Not at all significant / Somewhat significant    Significant

Figure 16.

Source: 8th Directors & Officers Liability Insurance Survey

# Corporate Culture & Whistleblowing - Why should we care?

Simply put, company culture may be defined as, "the way we do things around here". Organisation cultures can be effective, or ineffective, or in worst cases, lead to morally and legally dubious behaviours. Healthy cultures are those that drive good outcomes e.g. better financial performance, and customer satisfaction, engaged employees, a good reputation and a sustainable business model. While each culture is different, an important common denominator is the ability to speak up freely and without fear of reprisal, especially if pointing out wrongdoing or safety issues.

Directors and Officers should focus on culture not only for the reasons above, but also because there are regulatory requirements to develop, measure and report on good governance and culture. There are also regulatory requirements to have effective whistleblowing policies in place. In the survey, 78% of respondents were aware of their company's whistleblowing policy, leaving 22% being unsure or unaware, which, given the legislation around this is a cause for some concern (see Fig. 17).

**Respondents aware of their company's whistleblowing policy**

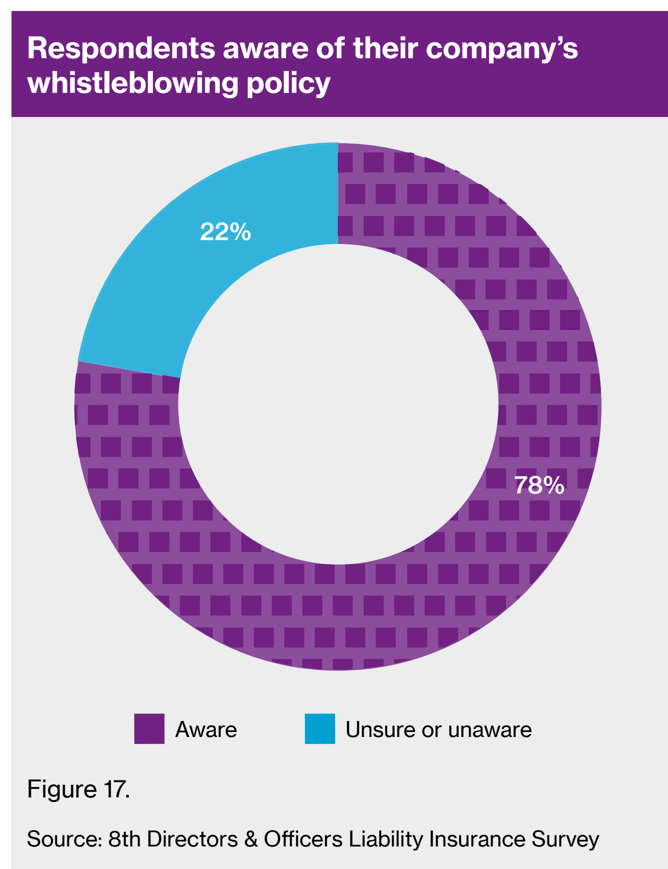



Figure 17.

Source: 8th Directors & Officers Liability Insurance Survey

Importantly, organisation culture is something that can be built, changed, and measured. At Willis Towers Watson we see a major shift amongst leading companies to redefine and recreate organisation culture in terms of High Performing Employee Experience (HPEX). Companies who create an HPEX environment have a 7% higher Gross Profit Margin over 3 years, compared to those with a poorer Employee Experience and significantly out-perform sector averages on, return on assets, return on equity and revenue growth.

**Companies who create an HPEX environment have a 7% higher Gross Profit Margin over 3 years**

The evidence is clear, good culture can drive great results and poor culture can have devastating consequences. Surprisingly, fewer than half of our survey respondents believe that culture impacts exposure to claims, a stance that Directors and Officers may wish to re-evaluate. Looking specifically at cyber, 37.6% (see Fig. 9) of respondents report their firm has suffered a significant cyber-attack in the past year. Willis Towers Watson research indicates that cultural elements are predictive of the likelihood of a cyber breach, with significant cultural difference between breached and non-breached companies. These predictors can be measured and tracked.

The survey also finds that 35% of respondents believe their corporate culture is affected by the whistleblowing policy, but this is not necessarily a direct causal link. Having a formal whistleblowing programme is no substitute for a poor culture, and conversely having a good culture does not mean you should not have a whistleblowing programme.

**The evidence is clear, good culture can drive great results**

Source: WTW databases based on 500 global companies and circa 10 million employees.

## Cultural elements are predictive of the likelihood of cyber breach

### A corporate culture can take several forms:

**Pathological** – meaning that the organisation does not care about anything other than making money. This is typically toxic and frequently leads to negative outcomes for all stakeholders in the long term.

**Calculative** – meaning a focus on "avoiding being caught". In addition to being ethically and commercially dubious, this can also involve considerable effort and cost whilst the risk of being caught and its consequences don't go away.

**Proactive** – meaning it adopts a risk management approach to all decision making. This is a positive culture.

Ideally, a corporate culture will be generative, meaning all systems, processes and behaviours align instinctively with the corporate values. Doing the right thing comes naturally in that culture and doing the wrong thing stands out and is policed by peers. Whistleblowing regimes promote that culture. They embed the sense of 'right' and 'wrong' and can be effective even if not actually used.

One way to think about the relationship between effective corporate culture and whistleblowing is that the better the culture is, then the less need there is for whistleblowing. If the culture pre-disposes people to "do the right thing" and they feel safe to speak up, then incidents will generally occur less frequently and be less significant. However, that does not mean a whistleblowing policy is not required, in many instances there is a regulatory requirement to have a policy in place. Paradoxically, the better the culture the more likely people are to use the whistleblowing policy on those occasions where things do go wrong and other avenues are exhausted.

Directors and Officers should not underestimate the increasing regulatory pressure to develop, measure and report on good governance and culture. This is more than just a box ticking exercise.

Having an effective culture is not only morally right, but it is good for business, both reputationally and in terms of profitability as shown by numerous studies over the years. A good culture and an effective whistleblowing policy offer significant protection against the types of incidents that could ultimately spiral towards regulatory or criminal investigations.

# D&O Insurance Priorities in the Hard Market

This report has considered the key risk areas highlighted in our survey and insurers will, necessarily, be mindful of emerging and heightening areas of risk which could result in increased regularity or severity of claims and ultimately impaired underwriting profitability.

The D&O insurance market has already undergone a period of "correction" with insurers seeking premiums increases across the board in order to try and balance their books. Some insurers have even taken the 'nuclear' option and have stopped writing D&O business entirely. Meanwhile the emergence of Cyber, Environmental, Social and Governance (ESG), and reputational risks are all on board agendas and the impact on future claims trends will be will therefore be concerning Insurers too.

Our survey has confirmed a strong awareness amongst the respondents of the difficult D&O insurance market, and this is not surprising given that many of the respondents will have experienced challenging insurance renewals over the last year or more. Increased premiums, higher retentions and a reduction the overall policy limits are all outcomes which our respondents have identified and that is consistent with our experience over the last year.

The survey also identifies disparity in firms' purchasing habits. Whilst it is true that higher turnover firms purchase bigger Insurance limits, only 36% of businesses with 500+ million of turnover are purchasing insurance of more than 51 million (see Fig. 20). The spread of results across the graph is somewhat surprising and perhaps suggest a requirement for greater education from brokers and Insurers.

**To what extent are you aware of changes in the market for Directors & Officers liability insurance (a "hardening" in that market)?**

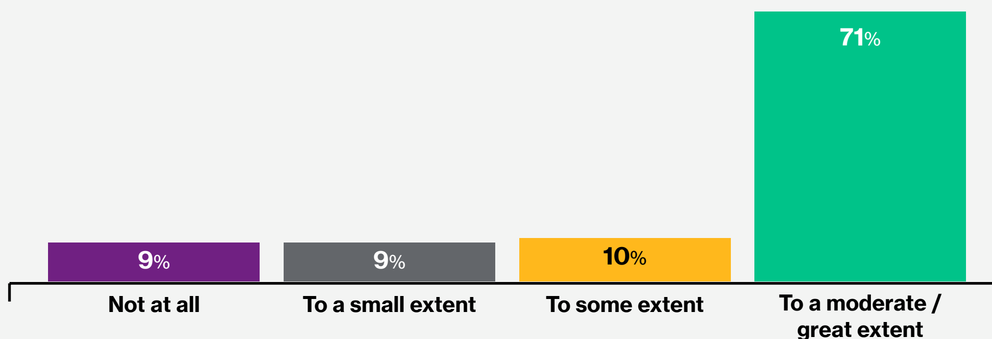
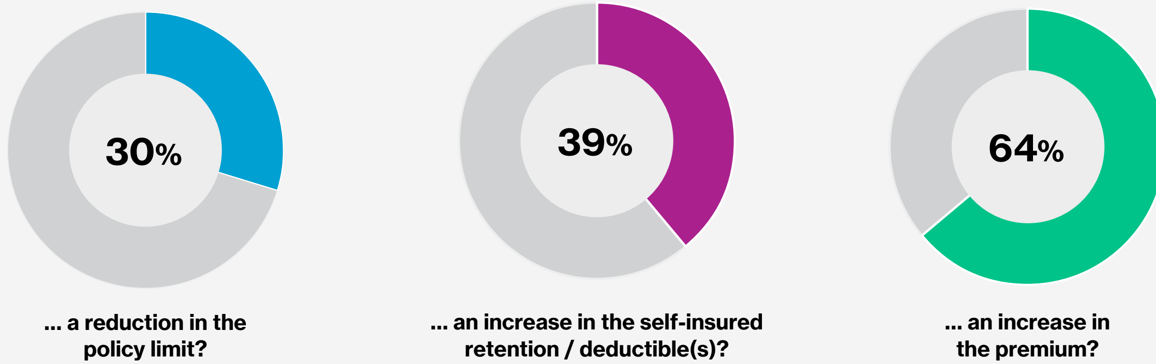



Figure 18.

Source: 8th Directors & Officers Liability Insurance Survey

## Has your company's / organisation's Directors & Officers liability insurance policy been the subject of...




... a reduction in the policy limit?

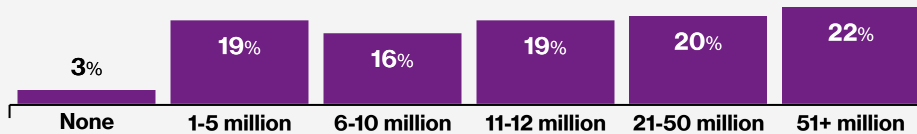
... an increase in the self-insured retention / deductible(s)?

... an increase in the premium?

Figure 19.

Source: 8th Directors & Officers Liability Insurance Survey

## What limit does your organisation buy for Directors & Officers' insurance?




Source: 8th Directors & Officers Liability Insurance Survey

## By revenue

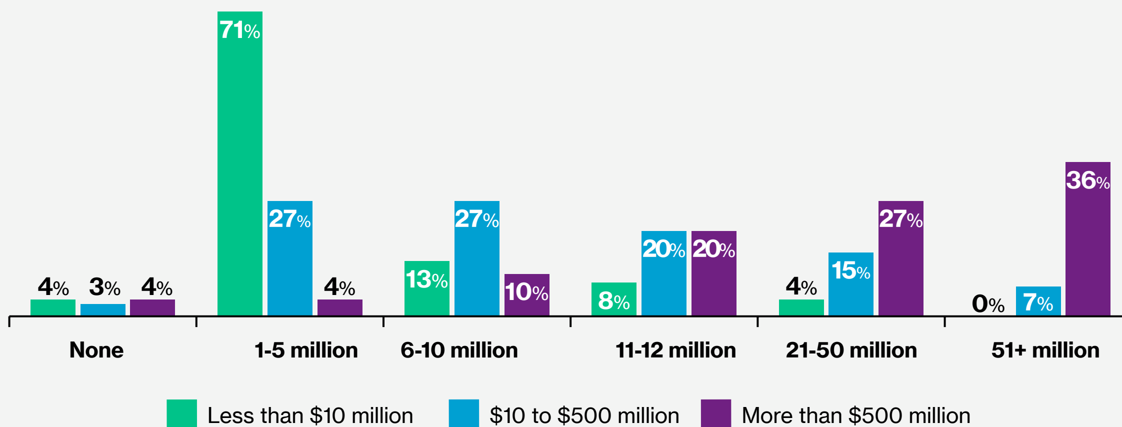



Figure 20.

Source: 8th Directors & Officers Liability Insurance Survey

As well as looking at respondents' views regarding the risks being faced by Directors and Officers and their businesses, we also asked respondents to comment on their priorities for coverage. In the hard market, many insurers are looking to tighten the coverage they are prepared to offer and it will be interesting to see to what extent the changes insurers want to make match the priorities which Directors and Officers (and indeed the risk managers who coordinate the purchasing of the policies) have identified.

**How important are the following Directors & Officers liability insurance coverage issues to you?**

Figure 21.

Source: 8th Directors & Officers Liability Insurance Survey

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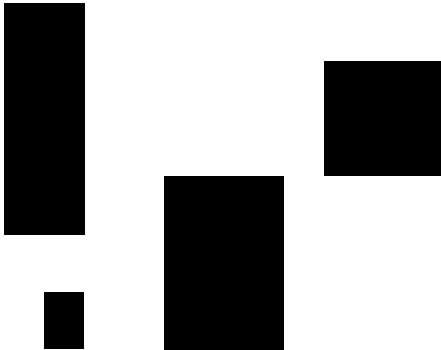

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