

## DIRECTOR'S AND OFFICER'S LIABILITY INSURANCE: HIRD V CHUBB INSURANCE COMPANY OF AUSTRALIA LTD

The Victorian Supreme Court decision in [Hird v Chubb Insurance Company of Australia Ltd \[2016\] VSC 174](#) represents another interesting chapter. The Court found in favour of Chubb Insurance Company of Australia Ltd ("Chubb") and declined the indemnity of legal costs ("the Challenge Costs") of \$691,989.97 to Hird. It also provides some lessons for Directors and Officers Indemnity Insurance ("D&O Insurance") for NFP Directors.

Briefly, the background included:

1. In February 2013, the Australian Football League Ltd ("AFL") and Australian Sports Anti Doping Authority ("ASADA") commissioned a joint investigations into allegations of use of prohibited "performance enhancing" substances by Essendon Football Club Ltd ("Essendon") players at the instruction of Essendon support staff ("the Joint Investigation").
2. The AFL through its rules and contractual relationships with Clubs, Club employees and players had broad ranging powers to compel evidence to assist any inquiry or investigation but at that time ASADA did not. Hence a joint investigation approach was adopted by the AFL and ASADA.
3. As part of the Joint Investigation Hird was required to attend interviews and produce extensive documents ("the Interview Notice").
4. Hird was then subjected to a disciplinary proceeding by the AFL, which was settled, with Hird agreeing to, amongst other things, a 12 month suspension from the AFL.
5. In 2014 Essendon and Hird sued ASADA in the Federal Court that ASADA exceeded its powers by participating in the Joint Investigation and as a consequence the issuing of the "show cause notices" to Hird and 34 Essendon players were unlawful. The Application by Essendon and Hird was dismissed by the Federal Court.
6. Hird (alone) appealed the Federal Court decision to the Full Federal Court which in turn dismissed the appeal in October 2014.

7. Accordingly, Hird's defence costs amounted to \$659,519.82 ("the Challenge Costs").
8. Hird claimed indemnity of the Challenge Costs from Chubb under the Essendon Directors and Officers indemnity Insurance policy ("D&O policy") and was rejected. Hird then brought this proceedings in the Supreme Court of Victoria to compel recovery from Chubb.
9. Hird claimed that he was covered by Essendon's D&O policy and that he had satisfied the requirements of the D&O policy terms which entitled him to indemnity from Chubb for his Challenge Costs.

### **Decision of Supreme Court**

Justice Hargrave undertook a detailed analysis and interpretation of the contract, being the D&O policy and concluded that Hird was not entitled to indemnity because he did not satisfy the contractual requirements of the D&O policy for indemnity.

### **Lessons for NFP Directors**

Many NFP Directors have D&O policies but probably few understand the extent or limitations of the coverage. Caution should be exercised when a D&O policy is presented as "a standard policy". There is considerable variation between policies.

To look at the "exclusions" solely does not necessarily explain what is and what is not covered. For example the definition of "loss" can be extensive but also may exclude items from a "loss".

In some cases matters are not specifically covered e.g. inquiries whether or not a "wrongful act" is alleged. These may be a particularly important inclusion for government funded bodies such as hospitals, health services or health networks which may need to appear before government or parliamentary inquiries.

D&O policies commonly carry "endorsements" which in essence are additional provisions or special conditions. The impact of the endorsements (if any) on the D&O policy must be carefully considered.

Another area to monitor is not only the policy dollar limits but any sub-limits for separate areas such as investigations. Another area to consider is discrimination and harassment allegations (employment practices liability coverage) which can be expensive and harrowing to investigate (even when the allegation is not substantiated).

Finally, there is no substitute for carefully reviewing the D&O policy on renewal for any policy changes or changes in the circumstances of your organisation.

**N.B.** It was reported on [www.afl.com.au](http://www.afl.com.au) on 16 February 2016 that a “White knight helps Hird pay ASADA legal bill”. The report indicates during cross examination Hird revealed that his liability for costs had been paid by a third party but the identity of the third party was not revealed.

**Date Published: 27 May 2016**

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