

# ‘PROFESSIONAL SERVICES’ EXCLUSION CLAUSES DO NOT EXTEND TO THE DISCHARGE OF ROUTINE MANAGERIAL FUNCTIONS

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Legal Briefings - By **Mark Darwin** and **Peter Holloway**

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## SUMMARY

The professional services exclusion is a common carve-out of the coverage provided by directors’ and officers’ (**D&O**) policies — such activities should generally be covered by professional indemnity insurance. But there is often debate about the extent to which an act or omission is a ‘professional service’ both in cases about cover under professional indemnity policies and exclusions under D&O policies.

In a recent Full Federal Court decision,<sup>1</sup> the scope of a ‘professional services’ exclusion clause in relation to a D&O insurance policy was clarified. The Court held that the provision of a statutory declaration by an officer of a construction company making a payment claim, considered by the Court to be a ‘routine’ managerial function, should not be characterised as the rendering of professional services.

## THE FACTS

In this case a contractor was engaged to redevelop and construct commercial and residential premises. Under the construction contract, the contractor was required to verify each of its payment claims by procuring one of its officers or employees to swear a statutory declaration in support of its claim. The contractor was subsequently placed into liquidation, and the principal took the view that the contractor had made payment claims to which it had not been entitled.

The principal commenced proceedings against the officer who had made the statutory declaration relating to disputed payment claims, and the officer sought indemnity under the D&O insurance of his employer. The D&O insurer refused indemnity, claiming that the officer's actions in making the statutory declaration fell within the professional services exclusion clause the D&O policy, and accordingly it was not liable.

The Full Federal Court upheld the decision of the primary judge in favour of the officer, determining that the professional services exclusion clause should not extend to the discharge of routine managerial functions. The swearing of the statutory declaration was seen by the Court as the mere '*routine compilation of material in order to secure a contractual payment*', which fell short of being described as the rendering of a professional service.

In reaching this conclusion, the Court noted the following:

- the scope of a professional services exclusion clause under a D&O policy need not necessarily correspond to the scope of the commonly used insuring clause under professional indemnity insurance,
- to avoid inappropriately limiting the professional services exclusion, the exclusion 'must relate to a narrower band of activity than the work that generally comprises or supports the delivery of building and construction activities', and
- professional services may be understood as meaning 'services of a professional nature furnished by [the contractor] involving the application of skill or judgment by the person or persons who carried out the relevant activities ... being services which fall within the scope of a vocational discipline which is generally regarded as a profession'.

It is also worth noting that evidence led by the insurer failed to satisfy the Court that 'project management' was generally regarded as a profession at the relevant time (2010- 2011). In any case, the Court held the officer's actions in making the statutory declaration would not have constituted the rendering of project management services, and hence would not have invoked the exclusion clause.

## **IMPLICATIONS FOR POLICYHOLDERS**

This is another good news decision for policyholders as the Court has construed an exclusion narrowly in dismissing an attempt by an insurer to avoid coverage.

However, to avoid controversies an important takeaway for policyholders is to ensure an appropriate correlation between their D&O policy and professional indemnity coverage – don't assume that all activities covered by professional indemnity insurance will be excluded from D&O insurance, or that what is excluded from one policy will be covered under the other. Policyholders are encouraged to review their existing policies to ensure that they are not at risk of 'falling between 2 stools' or are not paying for 'double coverage' over the same risk.

## ENDNOTES

1. *Chubb Insurance Company of Australia Limited v Robinson* [2016] FCAFC 17 (26 February 2016).

## MORE INFORMATION

For information regarding possible implications for your business, contact [Mark Darwin](#) or [Peter Holloway](#).

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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