

# D&O CLAIM MISSES THE MARK

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Legal Briefings - By **Guy Narburgh** and **Sally-Anne Ivimey**

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You may have seen recent press coverage about James Hird's failed Court bid to recover the legal costs of his attempts to challenge ASADA's joint investigation with the AFL into Essendon's supplements program from the Club's D&O Insurer.

The case serves as a timely reminder that D&O insurance policies may cover the costs of proactive defensive steps taken in response to an investigation – however, careful thought needs to be given to policy coverage issues at an early stage so that those steps are taken in a way (and at a time) which triggers coverage under the policy and can be supported with the proper evidence in the context of the insurance claim. Otherwise, the policyholder could be left with a hefty legal bill, in addition to the reputational damage arising from the investigation.

## DECISION

In 2013, James Hird received an interview notice as part of a joint investigation between ASADA and the AFL over the Essendon supplements program. Mr Hird participated in the joint investigation, but subsequently brought an unsuccessful challenge to ASADA's power to conduct the investigation and rely on the information it had collected. Mr Hird then sought to recover the legal costs of this challenge from Essendon's D&O insurer, Chubb Insurance.<sup>1</sup>

Mr Hird argued there were two possible ways in which his costs of defensive action against ASADA could be covered under the D&O Policy.

First, as defence costs in response to a 'formal regulatory proceeding'. The Court rejected this argument on the basis that ASADA's interview notice process was not a 'formal regulatory proceeding'. Particular emphasis was placed on the fact that the policy provided specific coverage in relation to regulatory investigations and examinations, which was the subject of his alternative claim.

Secondly, as defence costs incurred on account of a 'formal investigation' (which was defined in the policy to include inquiries). The Court agreed that the ASADA process did fall within the policy's meaning of a formal investigation and (in Mr Hird's favour) that:

- his D&O policy was capable of covering positive defence action in relation to an investigation, such as challenging the conduct of the investigation during the interview process or seeking relief at the time of the interview process that information obtained could not be relied upon by the investigators, and
- his costs of defensive action were ‘reasonably incurred’ as required by the policy, because he had a reasonably based fear that his reputation and earning capacity would be adversely affected and positive legal advice as to his prospects of success.

However, Mr Hird’s claim ultimately failed because the coverage was limited to those costs ‘which an Insured Person incurs *on account* of the attendance and / or provision of documents or information ... at or to any Formal Investigation’. In other words, Mr Hird had to demonstrate a causal link between the costs incurred and the requirement that he attend the interview.

Mr Hird did not give direct evidence that attendance at the interview or production of documents caused him to commence and maintain his challenge. Rather, the evidence showed that he had already attended the interview, and his motive in commencing and maintaining the application was fear of damage to his reputation and economic interests arising out of the show cause notices served by ASADA on the players, and the events consequent on those notices. That motive did not establish the necessary causal link with the interview.

## **LESSONS LEARNED**

If Mr Hird had taken steps to identify the existence of the D&O policy as soon as he received the interview notice and obtained advice on what defensive action might or might not be covered, his strategy (and potentially therefore the insurance outcome) may have been quite different. So, as with any event giving rise to a potential insurance claim, check your policy wording and get advice early on how best to bring yourself within the parameters of the insurance coverage (and how to avoid stumbling across the risk of exclusions).

## **ENDNOTES**

1. *Hird v Chubb Insurance Company of Australia Ltd* [2016] VSC 174.

# 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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