

## ■ Time to review your D&O policy

Directors have been advised to check how their D&O policy and deed of indemnity deals with their rights to claim legal fees.

This follows the High Court's recent rejection of former NRMA president Nick Whitlam's application for special leave to appeal a decision made by the New South Wales Court of Appeal. In that case, the New South Wales Court of Appeal had ruled that he could no longer pursue his former employer for the cost of pursuing two defamation actions.

Briefly, Whitlam and the NRMA had sued radio station 2GB and the Nine Network over an interview and comments by journalist John Lyons in 2004. 2GB apologised in court after a jury found in Whitlam's favour. There was a confidential settlement with Nine.

A trial judge ruled that the NRMA should pay Whitlam's costs, but the NSW Court of Appeal said this indemnity only applied when he was sued in his capacity as a director, not when he sued others. Whitlam argued that if his costs were not specifically covered by his deed of indemnity, then they were under common law.

Freehills partner and regular *Company Director* contributor, Professor Bob Baxt, explains that the High Court rejected Whitlam's application for special leave because it felt that the case did not warrant the High Court hearing the matter as it probably did not raise any new law.

"In essence, the New South Wales Court of Appeal decision means that it is very difficult for directors to obtain indemnity for legal costs," he says.

Commenting on the wider implications for directors in general, Risk Partners director Mark Parris says the Court of Appeal reviewed the specific NRMA indemnity only. Other indemnities may be worded differently and may lead to different decisions.

In the Whitlam case, a unanimous Court of Appeal decision relied on the established principles that a commercial document that is ambiguous should not be given a construction that is commercially unlikely and that a contract of indemnity should be construed in favour of the party providing the indemnity.

Parris says this highlights that ambiguities in an indemnity will be construed in a commercial manner in the company's favour. "Directors need to be cognisant that typically an indemnity is drafted and supplied by the company. As a result, it may conflict with the scope of indemnity an individual actually needs. This is exacerbated by the fact that typically the D&O insurance is negotiated and purchased again by the company."

He says the scope of coverage under D&O policies is really determined by the definition of loss and any applicable exclusions. As a general rule, D&O policies do not provide 'proactive' coverage and respond only to 'claims' for demands for monetary compensation, civil, criminal and administrative proceedings, and increasingly, official investigations costs cover.

Parris notes: "The issue for directors, and D&O insurers, is that now there may be gaps in coverage between company indemnities and D&O policies with both conflicting on defamation style actions. Conversely, directors could find neither the D&O nor the indemnity responding. Furthermore, D&O insurers may no longer provide such cover now that the NRMA case has quashed the concept of a company indemnity responding to proactive defamation actions – D&O insurance is structured to mirror a company indemnity."

Parris says: "My advice to directors would be to ensure their D&O policy is with a suitable, experienced D&O insurer and is as broad as possible in addressing the known gaps between company indemnities and D&O insurance."

■ [contribute feedback](#)