

D&O Insurance – Coverage for Penalties

New Insights from Recent Australian Judgement

Coverage for fines and penalties remains largely nebulous due to ambiguous insurer approaches and limited judicial pronouncements and guidance. Many people view coverage for fines and penalties as more imaginary than real. This scepticism is understandable even though insurance policy provides coverage for civil fines and penalties for which an insured person is legally liable, unless they are uninsurable / prohibited by applicable law.

It is interesting to see that certain jurisdictions like Brazil specifically allow coverage for penalties subject to certain conditions whereas certain others prohibit them.

Brazil:

Brazilian Civil Code (BCC), talks about insurance contracts and the main principles that regulate the insured–insurer relationship. The Superintendence of Private Insurance (SUSEP) allows coverage of civil and administrative penalties in directors and officers (D&O) insurance (SUSEP Circular No. 553/2017)

UK:

Financial Conduct Authority (FCA) of UK prohibits indemnification under an insurance policy of any financial penalty it imposes. Relevant provisions from the FCA Handbook are as under:

- *General Provision 6.1.5: No firm may enter into, arrange, claim on or make a payment under a contract of insurance that is intended to have, or has or would have, the effect of indemnifying any person against all or part of a financial penalty.*
- *General Provision 6.1.6: The Society, managing agents and members' agents must not cause or permit any member, in the conduct of his insurance business at Lloyd's, to enter into, arrange, claim on or make a payment under a contract of insurance that is intended to have, or has or would have, the effect of indemnifying any person against all or part of a financial penalty.*

While the debate goes on about the legality of coverage on the ground it conflicts with public policy of deterrence, recently there is a judgement in Australia which has introduced a new and nuanced perspective to this continuing legal debate.

Some relevant portions of the judgement by Federal Court of Australia in *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd* (trading as Captain Cook College) (in administration) (No 6) [2025] FCA 542, are given below.

“122 Mr Wills is insured under a directors and officers insurance policy issued to Site by Chubb Insurance Australia Ltd. He has made a claim under the policy in respect of this proceeding. The “Chubb Elite II” policy wording includes indemnity in respect of “civil penalties which an

Insured is legally obligated to pay including but not limited to civil fines or civil penalties imposed pursuant to ... the Competition and Consumer Act 2010 (Cth)".

123 The ACCC refers to CFMEU HCA at [116] and submits that the effect of Mr Wills being indemnified under the insurance policy for any penalties that he has to pay will render the penalty devoid of any sting or burden and thus remove, or at least drastically reduce, any specific or general deterrent effect of the penalty. With reference to that case, the ACCC submits that the Court has the power to order that Mr Wills not claim or accept any indemnification under the policy.

"127 A rationale for directors and officers insurance is that "[i]n its absence, capable and talented individuals may be unwilling to join boards of directors, particularly as non-executive directors, or may become excessively risk averse on boards, to the detriment of the individual company and the broader commercial community": Bathurst T F, "Insurance Law – A view from the Bench" (2014) 25(3) Insurance Law Journal 216 at 217. It would undermine that rationale, and the utility of such insurance, if courts too readily made orders preventing someone from having the benefit of it. In particular, in circumstances where the relevant conduct is not wilful or dishonest, I do not consider that it is correct or fair to make such an order.

128 I consider that it would not be fair on Mr Wills to deny him the benefit of Site's directors and officers' insurance in his favour. I therefore decline to make the personal payment order sought by the ACCC."

While this judgment does not set any precedent for courts outside Australia, it presents valuable insights and a nuanced perspective that can be relied upon to strengthen insured defences.

That said, it remains difficult to make a definitive assertion regarding the insurability of fines and penalties. Yet, application of the following criteria helps - more as a guiding framework than as a definitive assertion.

1. The act that triggered the claim does not involve unscrupulous or intentional wrongdoing.
2. There is no prohibition imposed by law or any regulator or any judicial pronouncement on insurability of fines.
3. Insurance policy provides coverage explicitly.
4. Penalty is civil in nature.

Ultimately, determination of the coverage is done in accordance with the specific policy wording and the legal admissibility within the relevant jurisdiction.

The relevant judgement can be accessed via the following link:

<https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2025/2025fca0542>

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References:

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