

Professional Indemnity Claims – What to do?

A broad guide for businesses in how to deal with professional indemnity insurance claims

Presented by



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This is intended as generic background information only. Please refer to your policy documentation and/or insurance broker or advisor for specific advice on your own cover and insurance position.

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What is professional indemnity insurance and what does it cover?

Professional indemnity insurance ("PI") is designed to cover a business for errors made when providing advice and services to clients. The exact parameters of the cover will vary with different insurers and wordings, and this document is not intended to circumvent the importance of reading and reviewing individual wordings.

PI policies will, in general, cover a business for errors made whilst advising or servicing clients. It will usually provide cover for not just the damage caused by the mistake but also the legal costs and expenses of investigating and, if justified, defending the business' advice and conduct. Payment of the legal costs of defending an allegation of negligence or similar is often the part of the cover most appreciated by an insured business.

All business' should discuss their own cover with your insurance advisor or broker however PI can also include extensions providing insurance for reconstituting a clients documents if lost or destroyed ("loss of documents cover"), loss of money due to dishonesty ("fidelity cover") or the costs of appearing in official investigations by tribunals, ombudsman bodies or even royal commissions ("Inquiries costs cover").

Claims Made and Notified

The vast majority of PI insurance is written on a "claims made and notified" basis. This means that the policy in force when a claim is first made against the business and notified to the insurer on risk is the policy that will respond to the insurance. This differs from "losses occurring" policies where the date of the incident will determine the policy.

As an example if inappropriate advice was provided to a client in 2006 but that client only complained about the advice in 2007 the policy in force in 2007 would normally cover the claim.

Conversely the 2008 PI insurers will likely include terms that will exclude any claims that the business already has received - even if they have not yet been notified to the 2007 insurer.

This policy structure makes it essential that businesses immediately notify their PI insurers when a claim is made against them.

Circumstances that may give rise to a claim

In addition to any claim made against them every business has a right under statute law to notify to their insurers any facts that they think may in future give rise to a claim (usually termed as a “circumstance” by PI insurers). Again, as a result of this right, PI insurers will, at the beginning of a policy, exclude any circumstances that the business is aware of irrespective of whether the previous PI insurer has been notified.

If you don't notify claims or circumstances when you first become aware of them a later insurer may not cover them under their policy.

What is a circumstance?

This is a question that has been before a number of courts but is still difficult to define. Broadly a circumstance can be viewed as a set of facts that if an average business had been in possession of would have recognised that a claim may later arise against them.

These could include such issues as a business knowing it has given incorrect advice (even if the client does not yet know) or even if a business knows that a client is of the belief that the advice was incorrect (even if the business disagrees).

Importantly it is still a circumstance even if the business correctly considers that the advice was correct. If a claim is made against them at a later date it does not matter if the claim is misconceived and unjustified. A claim or circumstance should be considered irrespective of the business' view of the merits. This is because the PI policy will usually provide cover for the legal costs to defend any unjustified allegation against the business and so will be called on even if a claim has no merits.

What happens when something is notified?

Any set of facts, circumstances or a claim that a business considers may be worth notifying should be immediately discussed with an insurance advisor or broker. It is likely that they will recommend that it be notified to PI insurers.

On receipt of this insurers will review the facts and possibly ask for more details. Once they understand the background to the notification they will act accordingly and this may be simply to make a note of it and allow the business to continue as is (this is especially likely if the notification is purely a circumstance). In other cases insurers may instruct solicitors or loss adjusters to get a better understanding of the facts or legal issues involved.

Usually the insurer will ask that any further correspondence with the potential claimant is approved by insurers before it is sent. This is an important precaution as it will ensure that the business does not prejudice insurer's position by putting the wrong information in a letter.

A number of top tier insurers use specialist firms of claim managers (such as DCS Asia Pacific) to act on their behalf in this process.

Why Notify?

There are a number of practical reasons why all circumstances and claims should be notified to PI insurers as soon as possible.

1. It will avoid policy problems

Any unreasonable delay, even if not over a renewal, can result in PI cover being jeopardised if the insurer suffers any prejudice. As an example if a business has a clear and reasonable opportunity to prevent or resolve a claim that insurers are unaware of but fails to take this opportunity without good reason then any later costs and any increase in the size of the claim may not be covered by PI insurers. If the PI insurers are aware of the claim and opportunity to resolve it but allow the business to miss it the cover would not be affected.

From a legal perspective the prompt notification of circumstances will provide a business with statutory protection that is not available after expiry of the policy. This is invaluable if a circumstance later explodes into a serious claim.

2. Insurers may be able to assist

Most PI insurers and claims management companies such as DCS Asia Pacific are highly experienced in how to mitigate and manage claims against a business. In the vast majority of files the business is insured and the insurer and insured business have the same vested interest in seeing the claim resolved on the best achievable terms.

It rarely benefits any business (outside of solicitors) to be involved in long and protracted legal proceedings. DCS Asia Pacific places great importance on efforts to resolve claims at an early stage minimising the financial, managerial and reputational impact of the claim on the insured business. We will work to try and ensure that the business retains the claimant as a client and will often sit in the background so that the business gains credit with a client for resolving a justified complaint quickly and calmly.

3. The ramifications of the claim may be wide spread

In a number of scenarios there are other parties and/or other insurers who may be culpable for errors that are alleged against one business. Once PI insurers are notified they will quickly identify and act if such a scenario arises. Since all PI insurers will have the same requirements regarding prompt notification it is equally essential that the other parties also notify their insurers. No business wants to be in a position where the truly culpable party has no PI cover as they were not pushed to notify the claim to their own insurers.

In the case of Authorised Representatives, subsidiary companies or satellite offices there may be policies held by group or parent entities that require notification by them.

Why not notify?

At the end of the day what harm does a precautionary notification to PI insurers do? A number of the common misconceptions we see that have led to late notifications are:

1. "It was under the excess"

Even if a claim is under the excess it should be notified to PI insurers. In the case of a circumstance it is very difficult to assess if it is definitely under the excess. If a claim is to be defended then it is possible the PI insurance will provide for the costs of doing so without you paying the excess ("a costs exclusive excess") so the value of the claim itself is irrelevant. If it is a justified claim then it can easily exceed your excess once the claimant's costs and interest are added in.

It may be that the claim or circumstance will disappear or resolve under the excess and if it does insurers will simply close their file. If it escalates and costs more than the excess and you haven't notified insurers you could be left with an uninsured claim – the risks and downside of not notifying are far greater than the potential benefits.

2. "I thought it would go away"

Circumstances and sometimes claims often do go away with little or no effort. They also often do not. If a circumstance is notified and it never becomes a claim then insurers will simply close their file. However conversely if it doesn't go away and escalates into legal proceedings you do not want to be without your PI insurance because you failed to notify the issue when you first became aware of it.

3. "I had done nothing wrong, the claim was unjustified"

Each year a significant proportion of the funds spent by PI insurers are on defence costs. It can cost hundreds of thousands of dollars to run the defence of a PI claim and it is only after a favourable judgment that any claim can really be said to be unjustified.

It is essential that even those complaints and circumstances that a business considers have no merit are promptly notified. The longevity of a claim is dependent on whether the claimant views it as merited not on the view of the insured business.

4. "I did not want to have my premium increased"

Claims history is an important aspect of the rating process that underwriters undertake on renewal. That said they are also well aware that a proportion of notified circumstances do not develop into claims. Good insurers will consider the position on each notification and obtain the views of their claims staff or DCS Asia Pacific. Precautionary notifications are not likely to significantly affect premiums and even if they do increase premiums by a small factor this will be far less than the potential financial downside of being without PI insurance due to a failure to notify. Again your insurance broker or advisor will be able to advise you in this regard and will work to ensure that your premium payments are reasonable for your risk.

In summary

Notify, notify, notify. Though you should carefully read and review the terms of your PI policy with your insurance advisor you are highly unlikely to be criticised or suffer from the prompt notification of any issue that you consider could later develop into a claim against you and a claim under your PI insurance.

If you have received a claim demanding reimbursement or similar then this should always be immediately notified to your PI insurer. If the claim is justified your insurer, or DCS Asia Pacific, will assist in mitigating and resolving the dispute. If it is not justified then you'll be provided with assistance to present your position to the claimant in the best manner and if necessary provide the best legal team to back you.

PI CHECKLIST

- ✔ Notify PI insurer of all claims/circumstances.
- ✔ Notify your insurance advisor or broker of all claims/circumstances.
- ✔ In discussions or correspondence with the claimant never disclose information about your professional indemnity insurers, solicitors or any legal advice you have received.
- ✔ Once a circumstance or claim is notified, forward draft correspondence relating to it to insurers for their approval before sending it off.
- ✔ Inform PI insurers of any offer to resolve the complaint.
- ✔ Immediately notify insurers if proceedings, or any similar legal document is served, send them a copy and store the original safely.
- ✔ Never make an admission of liability or culpability for any loss.
- ✔ Never make any deals or enter into any agreement to resolve the complaint without insurers consent unless you are content to have no insurance involvement.
- ✔ Before renewal, ask all staff/offices/Authorised Reps to confirm by return email that they are not aware of any circumstances or claims against them. Encourage openness and not a culture of fear regarding notifications to PI insurers.
- ✔ If in doubt refer any issue to insurance advisor, broker or in their absence your PI insurer.

DCS Asia Pacific is an independent claims management company specialising in the proactive resolution and management of commercial lines claims including professional liability, general liability and directors' and officers' insurance. The DCS Group has offices in London and Australia and manages claims across the globe for insurers based in Australia, United Kingdom, United States of America and Bermuda.

Please feel free to contact us at enquiries@dcsclaims.com.au or via www.dcsclaims.com.au