

CONSULT AUSTRALIA HELPS YOU NAVIGATE YOUR WAY THROUGH PI

Choosing an appropriate policy that provides you with the quality of cover you need at a reasonable price is an important decision. Here Consult Australia asks our Panel of Brokers to list some of the key questions to ask your Broker prior to renewal, and the answers you can generally expect to receive.

If there are other questions you'd like to see included, please contact Consult Australia.

Note: Don't forget, your Panel Broker is an insurance broker and risk management consultant. They do not offer advice in relation to tax, accounting, regulatory or legal matters and you are encouraged to take such advice as you consider necessary in relation to those matters from appropriate professional advisers.

SOME QUESTIONS TO ASK YOUR BROKER AND THE ANSWERS YOU NEED

POLICY CONTENT

1. What is a 'claims made' policy and do I need one?

The claims made nature of professional indemnity insurance stems from the difficulty of identifying in complex designs when the act, error or omission causing the loss took place. For simplicity the professional indemnity policy document that is current, when the claim is made against it, is the policy that responds to the claim irrespective of when the actual work took place or defect became apparent. This differs from a traditional insurance policy that requires a policy to be in effect at the time of the event.

If you wish to protect your liability arising from your professional business activities, you will need a professional indemnity policy. A Claims Made policy is the only one available for professional indemnity insurance. Because you need a current policy in force to support a claim, you need to continually purchase PI insurance to make sure you have cover when you need it.

All Claims Made policies have a common exclusion which excludes known claims or circumstances; that you were aware of at the time you entered into the policy which might, sometime in the future, give rise to a claim against you.

It is therefore extremely important that you notify your current insurer of any matter, where you believe there is the potential for a claim to be made against you at some future point in time. Notification should be made irrespective of whether you consider yourself liable, even where the amount of the claim is within your policy excess. This will put your current insurer on notice and prevent them from denying cover, due to non-reporting, if a claim is made against you in the future.

2. To what extent should the policy be retroactive?

As the policy is on a "Claims Made" basis, insurers will sometimes impose a limitation as to how much of your past work is to be covered. This is known as the "Retroactive Liability Date". Generally, firms who are purchasing a PI policy for the first time will have the amount of "Retroactive Liability Date," limited to the date of commencement of the policy. This date remains fixed in every subsequent policy so the following year's policy will cover two years work and the subsequent policy three years etc. Once the firm has been trading for a significant time and continuously purchasing PI insurance this date can be changed to "Unlimited" which removes any retroactive date limitation.

3.

Who should be the 'insured'?

The insured should include all current legal entities through which your practice conducts its business and include all past, present and future directors, principals, and employees. It should also include those entities who made up the firm in the past. For example, where the firm has commenced as a sole trader progressed to a partnership and then to a company all three legal entities should be noted to safeguard your protection.

Where a principal joins the firm or folds their business into the firm it is possible to secure a Previous Business cover. Some insurers automatically include this cover and others wish to underwrite this exposure, so you will always need to advise your broker when this occurs.

4.

My client wants to be named on my policy, should I say yes?

Professional indemnity insurance policies are intended only to cover your firm for breach of its professional duty to clients and third parties. If your client is named on your policy the insurer will be obliged to indemnify them as if they also were an insured entity. Very few insurers are prepared to do this as they may unwittingly end up insuring an exposure of which they had no knowledge. Hence insurers will not generally permit any unrelated entities to be included as an insured under your firm's policy.

An additional issue is the ability of your client to make a claim against you knowing that you will have the benefit of your PI policy to call upon. Many PI policies will exclude claims made against you by another insured under the policy. This is obviously to avoid collusion amongst insured parties to exploit the policy. It might also remove any benefit you may have under the policy to claim for compensation to your client. Your client could find they are worse off than if they had never requested they be named on your policy.

5.

To what extent should my liabilities arising from any arbitration, adjudication or other alternative dispute resolution be covered?

Your policy will generally cover you for liability arising out of a breach of your professional duty. As a general rule, liability is only confirmed when the Courts have determined that a liability exists. Alternative dispute resolution mechanisms, such as arbitration and mediation, are generally supported by insurers as they are intended to reduce expensive legal costs incurred when going through the court system.

However, should you participate in alternative dispute proceedings without advising your insurer, any subsequent settlement you agree to may not be supported by your insurer. Hence it is important to;

1. obtain consent from your insurer to all and any legal processes you become involved with in relation to a claim for compensation by a third party; and
2. obtain your insurers agreement to your involvement in such proceedings.

6.

To what extent should I seek cover for criminal proceedings?

Typically the insurance industry has adopted the philosophy of not providing indemnity for criminal matters as it is considered "against public policy" to compensate an insured for their committing of a crime. You should check with your broker whether limited indemnity is available for, coronial inquests, industry enquiries, Royal Commissions, OHS issues, etc.

7.

Do I need to cover claims arising as a result of bodily injury and third party property damage?

Some PI insurers now exclude certain claims arising from bodily injury or property damage on the belief that such claims are more appropriately dealt with under a public liability insurance policy. Claims arising from your professional business activities that lead to a claim for financial loss as a result of an injury or damage should be covered. Public Liability policies will generally exclude such claims where you act in a professional capacity. So, it is important that your PI policy covers your firm for both bodily injury and third party property damage arising from a breach of professional duty.

It is also important for a firm to effect a public liability policy covering the business for its legal liability to the public when property is damaged or people are injured due to a lack of care in the normal course of its business.

PROPOSALS & QUOTATIONS

8.

How long before my renewal date should I start to prepare my proposal form?

It is recommended that clients prepare the information required for the renewal submission well in advance of the policy expiry date. Most insurers/brokers will forward renewal proposal forms to insureds between 6 - 12 weeks prior to the expiry date of the policy. It is preferable that you return the completed forms to the broker as soon as possible after receiving it but no later than 4 - 5 weeks prior to the renewal, to allow your broker adequate time to obtain and negotiate quotations and finalise the renewal with you, before your current policy expires.

9.

What information should I attach to my proposal form?

Brokers will look for sufficient information that will allow an underwriter to gain a good working knowledge of your firm, its activities and the expertise and qualifications of the principals. It is in your best interests to provide relevant information to allow them to fully understand your business as well as your firm's risk minimisation procedures which you adopt together with detailed explanations on any past claims matters. We further suggest you provide a business profile, details of your website and any other material which you believe will provide an underwriter with sufficient information to better understand your specific risk.

10.

Will I be given the opportunity to review all the quotations received?

Your broker should generally provide to you with information on all quotations which they have obtained and, where appropriate, an explanation of the differences in the quotations. Sometimes details might not be provided for certain uncompetitive quotations received.

Insurers' response times for issuing quotations may vary and will influence how quickly these can be provided to you prior to your renewal date.

11.

What are 'subjectivities'?

Some insurers will provide a quotation subject to the clarification of certain issues, generally known as 'subjectivities'. Subjectivities will vary and may include items such as;

- more information on a past claim stated in your proposal form;
- further information or clarification on some aspects in the proposal form such as types of activities or projects that may be contemplated;
- or it may be something as simple as requiring a signature or date to be completed by you on the proposal form.

The existence of subjectivities enables an insurer to indicate their premium cost and policy coverage quotation which is subject to clarification on certain issues. The broker should explain any subjectivities to you.

12.

How long is a quotation valid?

Different insurers will place varying lengths of time on their negotiated terms which could vary from 14 days to 30 days or more. Details of the length the quotation is valid, should always be provided to you by your broker.

13.

Will my broker explain the benefits cover, restrictions, exclusions and conditions?

It is critical that you understand the full implications of the various aspects of each quotation. There is no substitute to you reading and understanding the policy document and raising any issues you do not understand with your broker for explanation. Brokers can also provide you with advice and explain the terms and conditions of the cover, to assist you in making an informed decision in selecting the most suitable policy.

14.

What if the quotation does not comply with my instructions?

Whilst your broker will endeavour to source cover meeting your instructions, in some circumstances an insurer may be unable to meet your requirements. Your broker should advise you of the reasons why insurers have not provided cover as per your instructions and detail what alternative options are available, if any.

15.

Will I receive a cover note before receiving confirmation of cover?

No, insurers and brokers do not issue cover notes for PI insurance. Following your written acceptance of a quotation, confirmation of cover will generally be issued within 24 hours or before your current policy expires.

PI insurance is unique as it is not a renewable policy and requires the completion of a new proposal each year to enable insurers to issue quotation terms for acceptance. In exceptional circumstances where the insurer has not received the completed proposal form, or received a quotation from the insurer, the broker may request an extension of cover for a limited time.

16.

When will I receive full confirmation of cover?

Generally within 24 to 48 hours from the time of issuing the broker with instructions to place cover. Should there be subjectivities under the quotation then the broker's response will be determined by your ability to satisfy those subjectivities.

17. Who is my broker representing, me or the insurer?

An insurance broker can act in one of two capacities, either as your agent or as the insurer's agent. Where the broker acts as your agent it is obliged to act in your best interests and has a duty of care to provide you with professional advice. When acting as your agent the broker should act impartially when presenting different insurer's options to you.

Where a broker is acting as an insurer's agent it is obliged to act in the best interests of that insurer and must act for and on behalf of that insurer as if it was the insurer.

You should always ask the broker in what capacity it is acting.

INCIDENTS AND CLAIMS

18. Is there a difference between notification of incidents and making a claim?

Notifying your insurer of a circumstance is when you formally advise your insurer of any circumstance, which a reasonable person in your professional position believes may result in a claim being made against you.

Notification of a circumstance is a process whereby you put your insurer on notice that there is potential for a formal claim to develop. Not all notifications of circumstances develop into formal claims. How each individual insurer will respond to a notification of a circumstance depends upon the facts of each particular matter. On some occasions an insurer will prefer to await developments; on other occasions an insurer may have no choice but to act swiftly in order to minimise the effect of the claim.

Most professional indemnity insurance policies define a "claim" to include a formal demand for compensation made against you by an aggrieved third party and require you to notify the insurer immediately, so that it can become involved without delay to protect your and its interests.

When you notify a matter, be it a circumstance or a claim, your insurer will record the matter and respond accordingly.

19. When should I notify my broker or the insurer about an incident?

With either claims or circumstances, it is strongly recommended that you immediately report any facts, matters or any circumstance that could potentially lead to a claim being made against you for compensation. Your broker can provide you with further guidance as and when required.

20. How much detail do I need to provide when I make a notification of an incident or a claim?

You need to provide details of your retainer on the project and the nature of the possible problem/s that have led to you notifying your concerns. This information should be presented in a factual manner and supported by copies of relevant documents. We recommend that when reporting a claim or circumstance you do not provide any written admission of liability to the broker, as the files of a broker might not be subject to legal and professional privilege and could possibly be discoverable during the legal process.

Consult Australia's Panel of Brokers has developed a 'Insurance Alert Form' to assist users of the PI Pathway.

21. What happens once I notify my broker of an incident or claim?

Having notified the broker of an incident they are obligated to inform your insurer. The insurer is then entitled to take over and conduct the defence and/or settlement of the incident or claim on your behalf. It should be noted even though insurers may take over management of the claim they will always reserve their rights with respect to indemnity.

22. If I appoint a new broker will they take over the management of open circumstances and claims?

This will depend on the terms of engagement you enter into with the new broker. You should also review the terms of engagement you entered into with the old broker to see what you agreed on claims management if you removed them as your broker.

Often, the original broker will continue to manage open circumstances and claims unless you provide an authority for the new broker to take over management.

23. How will I receive my settlement of claim?

Claims can be settled in a variety of ways. Often settlement amounts are paid directly to the aggrieved third party to settle their claim against you and then the insurer will seek recovery of your excess. Alternatively, the insurer may pay the settlement amount less the amount of your excess or pay the total settlement amount and, if you excess is "Costs Inclusive", request you reimburse the legal costs up to the value of the excess. The mechanism selected by the insurer will be in advised to you by the insurer.

Where the insurer selects to pay the indemnity to you, they will issue you with a cheque and generally send it via your broker.

DIFFERENTIATING BETWEEN BROKER SERVICES

If you are intending to seek quotes from a number of brokers, here are some questions that you might like to ask to help you identify the differences between the services each broker offers to you.

24.

Will I receive information about the insurance markets that my broker recommends?

25.

How will I be charged for using the services of the broker and how is the broker paid?

26.

What will my premium payment terms be?

27.

Will I receive formal terms of agreement with my broker and will this include their costs and charges?

28.

What steps will my broker take in order to locate the most appropriate cover for me?

29.

How will I know whether the documentation provided by my broker will be acceptable to the regulators?

30.

Will my broker review the insurance liability clauses of contract conditions?

31.

Will my broker review my internal risk management procedures?

32.

Will my broker provide advice on project insurance?

33.

Will my broker visit my office and explain the policy and cover provided?

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