

What is professional indemnity insurance and why bother?

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Professional indemnity (PI) insurance originated from a professional persons duty of care at common law. You may ask why would I need PI? Justice Kirby pointed out that it is important to ask yourself 'Is the advice based on a skilful answer?' In the context of the business as a whole, what is being provided? Where you are offering advice and services within a particular profession and the third party suffers a loss arising out of that advice, you can be held liable for that loss.

The primary value

Often the value in a professional indemnity policy is the legal defence costs. If the third party alleges your advice was negligent and/or it caused them a loss, the insurance policy will cover your legal costs to defend that action. In addition, the policy will cover damages awarded against you. Therefore, a professional should seek to understand if any legal defence costs are included in their professional indemnity limit, or available in addition to it.

Without such insurance protection, professional persons put at risk their personal assets. It is a misconception that a professional can set up a legal entity as a form of protection against this risk. Closing down that entity or ensuring it has no assets does not prevent the third party from suing you personally for alleged losses suffered.

On this basis PI insurance is essential for asset protection. On numerous occasions a PI policy has saved a professional person from bankruptcy and the closure of their business. Insurance companies offer specialist legal representation as they employ a panel of solicitors well versed in insurance law and the policy holders' occupation. Finding suitable legal advice independently and within your field of expertise can be both difficult and costly at short notice.

It is professionally prudent to carry PI insurance. To operate without cover is arguably to expose your clients to unnecessary risk which may deter a client from employing your services. It is not only protection for yourself; it is also protection and a form of risk management for your clients.

Sub-consultants

It is common for PI policies to cover the principals and the employees of the company. If you employ sub-consultants ensure they have their own cover to protect your business. Conversely, if you are a sub-consultant, find out if you are excluded by your employers' PI policies. Your concern is not whether the employer engaging you will sue, the exposure is that their insurer is certain to sue you if they feel that in any way you contributed to an alleged loss through a subrogation action.

Signing contracts

Signing contracts can have the potential to impact upon your insurance cover. A common issue faced by AusIMM consultants is that they are often expected to sign contracts before they are engaged and contracts can be a minefield of onerous terms and conditions placed on the consultant. An important issue to consider is that most PI insurance policies have assumed liability exclusion. This means that if you enter into a contract and hold a third party harmless (ie carry their loss or agree to not be able to pursue them for contributory negligence) then you may have just prejudiced your insurer as they will not be able to take action against this party. This clause allows the insurer to reduce the cover under your policy by the amount they have been prejudiced by you signing up to these contractual warranties, guarantees or indemnities.

Austbrokers Countrywide can assist AusIMM consultant members in reviewing their contracts to

determine if there are any insurance and indemnity clauses which may impinge upon or threaten the level of cover under their PI insurance. Seek professional advice when reviewing contractual exposures. Always aim for contracts to be proportionate in nature, that is, each party will be liable for their own losses and their own negligence.

The advice and comments in this article should not be construed as legal advice. Separate legal advice relating to the interpretation and implication of this article for your individual circumstances should be obtained.

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