

## The Point of PI

# What is Professional Indemnity Insurance and why bother?

Professional indemnity insurance originated from a professional persons duty of care at common law. You may ask, why would I need Professional Indemnity? 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. These causes of action against you would not be covered by a more general liability insurance policy.

Often the value in a professional indemnity policy is the legal defence costs. If the third party alleges your advice was negligence and/ or it caused them a loss, the insurance policy will pay for your legal costs to defend that action, regardless of whether the action is eventually baseless. In addition, the policy will pay for damages awarded against you, which is in effect an amount awarded to the third party to rectify or compensate for the error caused by your business.

Without such insurance protection professional persons put at risk their personal assets, the house and any other assets that you might own. It is often a misconception that the professional can set up a legal entity as a form of protection against this risk. By simply closing down that entity or ensuring it has no assets, this does not prevent the third party from suing you personally for errors caused.

On this basis Professional Indemnity Insurance is essential for asset protection. On numerous occasions a Professional Indemnity policy has saved the professional person from personal bankruptcy and the closure of their business. Whilst you may only charge a fee for services of say \$50,000, your advice may result in an error that causes a financial loss of say \$2,000,000. A client seeking compensation of this size would have substantial impact on your business's future, without any reserves or a suitable Professional Indemnity in place. Specialist legal representation is a relief to policy holders in the event of a claim against them as Insurance Companies have a panel of solicitors well versed in Insurance Law and the policy holder's occupation waiting to defend the Insured party. 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 Professional Indemnity insurance. To operate without coverage is arguably exposing your clients to unnecessary risk and 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. If you make a professional error, there is an insurance policy to put your client back into a pre loss position, in effect restitution.

It is common for Professional Indemnity policies to cover the principals and the employees of the company. This usually means the policies specifically exclude any cover for sub consultants in their own right. If you are the employer using sub consultants ensure they have their own cover. If you are acting as the sub consultant, check and find out if you are in fact excluded by the employers Professional Indemnity policy. If so you are legally exposed. 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 the alleged loss through a subrogation action.

A caution to you, signing contracts can have the potential to impact upon your insurance cover!, A common issue we find faced by Contractors is that they are often expect to sign a contract before they are engaged and the contract can be a minefield of onerous terms and conditions placed on them. An important issue to consider is that most Professional Indemnity Insurance policies have an Assumed Liability exclusion. What this means is that if you enter into a contract and hold a third party harmless (i.e. 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 clients who have Insurance polices through our office by 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 Professional 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.

Professional Indemnity is essential for a business providing advice and professional services. The points outlined above make it clear that it a necessary annual purchase to protect both yourself and clients.

This advice and comments are provided in the capacity as your insurance broker and 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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