

# BROOKLYN - Professional Risks Frequently Asked Questions

## WHAT DOES A PROFESSIONAL INDEMNITY INSURANCE POLICY COVER?

Professional Indemnity (PI) insurance policy protects a professional against legal liability for claims arising out of advice or services provided to clients for a fee or for some other benefit (e.g. commission). PI policies cover claims made under common law (negligence) and for breach of statutes which govern a professional's activities (such as Trade Practices Act 1974 (Cth)).

## WHO IS A PROFESSIONAL?

If you give advice or provide a service of a specialised nature to another person or organisation, and there is an expectation that the person or organisation will rely on that advice then you may be regarded as being a professional. Generally, you will be regarded as being a professional if the advice you give or service you provide is of a skilful character according to an established discipline for which recognised qualifications are required.

## WHO IS COVERED UNDER A PROFESSIONAL INDEMNITY (PI) POLICY?

A PI policy will cover any sole trader, partnership or corporation that provides advice or services for a fee or some other benefit (e.g. commission). If the PI policy is taken out in the name of a corporation the policy will also extend to cover the corporation's directors and employees.

## WILL A PROFESSIONAL INDEMNITY POLICY COVER ME FOR THE ACTIONS OF CONSULTANTS, SUB-CONTRACTORS OR AGENTS WHO PROVIDE ADVICE OR SERVICES ON MY BEHALF?

Yes, a Professional Indemnity (PI) policy will cover a person for their liability arising out of acts, errors or omissions committed by consultant, sub-contract or agent who provides advice or services on their behalf. Generally, a Professional Indemnity (PI) policy will not cover the liability of the consultant, sub-contractor or agent who will be expected to hold their own Professional Indemnity (PI) policy.

## WHAT IS THE RETROACTIVE DATE?

The retroactive date is a date included in all claim made policies. It determines whether a claim made will respond to a claim arising out of an act, error or omission that occurred prior to the inception of the policy. If the act, error or omission took place after the retroactive date but prior to the policy inception, a claim made policy may respond to claims arising out of this act, error or omission if the insured first became aware of the potential claim during the period of insurance and notified it to the insurer.

## WHEN SHOULD I NOTIFY MY INSURER OF A FACT OR

## CIRCUMSTANCE?

Generally, it is prudent to notify your insurer of a fact or circumstance if you receive a threat (either written or verbal) that someone is going to commence legal proceedings against you, or they are going to refer a matter to a tribunal which has jurisdiction over your profession/industry. Your insurer needs to be notified immediately if you receive a writ or summons to appear at a hearing.

## HOW LONG SHOULD I RETAIN A PROFESSIONAL INDEMNITY (PROFESSIONAL INDEMNITY (PI)) POLICY AFTER I RETIRE?

A professional's legal liability for claims arising out of alleged mistakes in past advice or services does not disappear simply because they have retired. In most Australian states, a person has up to six years after the completion of the services to make a claim.

In the case of a professional who was a director, partner or employee of a firm that will continue to trade after their retirement, they will have protection under the firm's Professional Indemnity (PI) insurance policy whilst the firm maintains a current Professional Indemnity (PI) insurance policy. It is therefore prudent practice for a professional who is about to retire, to enter into a written agreement with their firm which obliges the firm to keep them indemnified for any allegations made against them arising out of services performed whilst they were with the firm.

Covering this exposure is a little trickier for a professional who is a sole trader or where the firm is going to be wound up upon the professional's retirement. In this case, the professional will have to arrange for a "run-off" Professional Indemnity (PI) insurance policy to ensure they have adequate insurance protection. The trouble is that Professional Indemnity (PI) insurers will only offer "run-off" Professional Indemnity (PI) policies on an annual basis. This means that a retired professional has to set aside adequate money to fund up to a minimum of six (6) renewals of their Professional Indemnity (PI) policy after they have retired.

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## **WHAT DOES A DIRECTORS & OFFICERS' LIABILITY INSURANCE POLICY COVER?**

A Directors & Officers' Liability (D&O) insurance policy protects the directors, officers and senior managers of a corporation against loss they are legally liable to pay for claims made against them arising from allegations of a wrongful act in the conduct of their duties on behalf of the corporation. Generally, a D&O policy will cover any damages awarded against a director, officer or senior manager of a corporation, and will also cover any legal costs incurred by the director, officer or senior manager in defending a claim. In some cases, D&O policies will also cover fines and penalties awarded against a director, officer or senior manager of a corporation.

## **WHAT IS A WRONGFUL ACT?**

Under most Director & Officers' Liability (D&O) policies the definition of Wrongful Act includes any actual or alleged breach of duty, breach of trust, neglect, error or misstatement, misleading statement, omission, breach of warranty of authority, or any other matter claimed against a director, officer or senior manager solely because of their capacity a director, officer or senior manager.

## **WHO IS COVERED UNDER A DIRECTORS & OFFICERS' LIABILITY (D&O) POLICY?**

A Directors & Officers' Liability (D&O) policy will cover any past, present or future director, officer or senior manager of a corporation. Generally, Directors & Officers' Liability (D&O) policies will also extend to cover any person who acts in the capacity of a director, officer or senior manager of a corporation even though they may not have been validly appointed as such, and will also cover the directors, officers or senior managers of any subsidiary company of the company in whose name the Directors & Officers' Liability (D&O) policy has been taken out.

## **WHAT ARE THE MOST LIKELY SOURCES OF LEGAL ACTION AGAINST DIRECTORS, OFFICERS OR SENIOR MANAGERS?**

A director has five core duties or responsibilities:

- a) A duty to discharge their responsibilities with due care and diligence;
- b) A duty to exercise their powers and discharge their duties in good faith;
- c) A duty not to improperly use their position to gain advantage for themselves or someone else or to cause detriment to the company;
- d) A duty not to improperly use information obtained as a director to gain an advantage for yourself or someone else or to

cause detriment to the company;

- e) A duty to disclose any material personal interest in dealings with the company.

## **DOES A DIRECTORS & OFFICERS' LIABILITY (D&O) POLICY EXTEND TO COVER CLAIMS AGAINST THE CORPORATION?**

Generally, a Directors & Officers' Liability (D&O) policy will not extend to cover claims made against a corporation as a legal entity. Directors & Officers' Liability (D&O) policies are only intended to cover claims against directors, officers or senior managers. However, where a corporation has indemnified a director, officer or senior manager, the Company Reimbursement section of the Directors & Officers' Liability (D&O) will reimburse the corporation where it has legally paid expenses on behalf of its directors, officers or senior managers.

Some D&O insurers will provide an element of cover to the corporation as a separate legal entity. This is known as "entity cover". Most typically, "entity cover" is provided in respect of employment related claims (e.g. wrongful or unfair dismissal, harassment or discrimination), however it can also extend to company securities claims.

## **WILL THE DIRECTORS & OFFICERS' LIABILITY (D&O) POLICY STILL COVER ME IF I RETIRE/LEAVE THE CORPORATION?**

Most Directors & Officers' Liability (D&O) policies provide cover for any past directors, officers or senior managers, so whilst the corporation maintains a current Directors & Officers' Liability (D&O) policy you will continue to be covered under this policy. However, if the corporation decides not to renew its Directors & Officers' Liability (D&O) policy then your cover will lapse.

Some Directors & Officers' Liability (D&O) insurers provide an extension under their D&O policies for retired directors. This policy extension provides up to 7 years run-off cover for any director who retires or otherwise leaves the corporation prior to the board deciding not to renew its Directors & Officers' Liability (D&O) policy.