

*Riskwatch is prepared by Law Claims to assist practitioners in identifying risky areas in practice and to highlight risk prevention strategies to allow for safer, more enjoyable practice. Riskwatch appears as a monthly column in the Law Society Bulletin as well as being distributed on a monthly basis to members of the Law Society's Professional Indemnity Scheme who do not receive the Law Society Bulletin.*

## Law Claims – Frequently Asked Questions Regarding Your Professional Indemnity Insurance

By Gianna Di Stefano, PII Risk Manager



### General

The Legal Practitioners' Professional Indemnity Insurance Scheme, established pursuant to section 52 of the Legal Practitioners' Act, is the sole provider of compulsory professional indemnity insurance for legal practitioners in South Australia.

Professional Indemnity Insurance is compulsory.

Every practitioner pays a contribution every year. The contribution consists of two major portions:

- Contribution to the Professional Indemnity Fund;
- Premium payable to Underwriters.

Each practitioner pays an annual contribution of which the premium is paid to Underwriters and the balance is paid to the Professional Indemnity Fund.

The successful operation of the Scheme is predicated on the collection of a pool of funds which, together with accrued income for the life of a year's claims, will give sufficient return to meet anticipated claims.

At present the compulsory level of cover is \$2 million for each and every claim inclusive of defence costs if the cover is not exceeded and a percentage of the defence costs where cover is exceeded. There is no limit on the number of claims in each year.

Practitioners may obtain additional top-up cover through their insurance brokers.

### Common Questions & Answers

#### 1. What is an excess?

Each practitioner is uninsured for the level known as the excess. The basic excess is currently \$3,000 for a sole practitioner and \$3,000 per partner/director up to a maximum of \$50,000 per claim. From 1 January 1999, there is no limit on the number of excesses payable for claims notified in any one year, (in previous years there was a limit of 4).

## 2. Who is liable to pay the excess?

Under the Scheme the sole practitioner/partners/directors of a firm at the date of the negligent act or omission have a joint and several liability to pay the excess. Although internal agreements are often reached, if a partner or director leaves the firm, this personal liability accompanies them.

It is trite that the partners of a firm, or an incorporated practice, are vicariously liable for their employee's errors. In such a case, it is the employer who is liable, not the employee.

In the case of consultants who are engaged, not employed:

- they hold practicing certificates and are insured in their own rights and are themselves directly liable for their errors and payment of excess and loadings.

Firms are vicariously liable for defaults of consultants operating under the firm name. We suggest firms and consultants deal with issues of excesses, loadings and premiums matters of contract between themselves.

## 3. How much excess will my firm have to pay?

The excess is calculated in accordance with Clause 2 of the Scheme Documents. For the 2008-9 year or 2009-10 year, the excess amounts are:

*For a sole practitioner or a firm or company (calculated by reference to the number of partners or directors at the time of the negligent act or omission):*

- \$3,000 per sole practitioner
- \$3,000 per partner – (without penalty) maximum \$50,000
- Loss arising wholly or partly from failure to comply with a time stipulation of 30 days or less – 50% penalty \$4,500 per partner
- AND loss arising wholly or partly from failure to comply with a time stipulation of more than 30 days – 100% penalty \$6,000 per partner
- AND advice on certificates of financial transaction between 1/1/94 and 1/12/98 – 50% penalty \$4,500 per partner.
- AND advice/certificate of guarantee after 1/1/99 - 300% penalty excess \$12,000 per partner
- AND if claim arises out of dishonest or fraudulent act or omission of a partner / director of a practitioner company - 100% penalty excess \$6,000 per innocent partner
- AND if a claim arises because a practitioner acts for more than one person whose interests may be in conflict – 100% penalty \$6,000 per partner
- **Maximum excess with penalty \$200,000**
- Discount on settlements below base excess at level of payment only.

## 4. Who pays loadings and how are they calculated?

Where a claim payment is made under the Scheme, all persons who were sole practitioners, partners or directors of a practice at the time the negligent act or omission occurred, may incur a loading on their premium. Loadings have a similar effect to the loss of a no claim bonus, but in reverse. If a claim is paid, an extra percentage may be incurred for future PI insurance usually for 3 years. The formula used means that, if the amount paid for a claim (excluding the excess) exceeds premiums paid by each partner/director during the three preceding years, the cost of insurance is increased for up to 3 years by up to 50%, depending on the ratio of claims payments to premiums.

*For example:*

- ♦ A claim is paid in 2009 of \$51,000.00 (excluding excess).
- ♦ The firm consisted of **three** (3) partners in 2006 when the error was made.
- ♦ The insurance contribution for three (3) years prior to 2009 for each partner was \$8,000.00.
- ♦ The defence costs for the claim were \$12,000.00.
- ♦ Each partners share is \$21,000.00.
- ♦ The ratio  $\frac{\$21,000.00}{\$8,000.00}$  of = 263%

To renew insurance for 2010, 2011 and 2012 an additional 30% is payable by each partner in addition to the standard premium/contribution (assuming no other claim payment made during the three year period).

## 5. Why do we have loadings?

The successful operation of the Scheme is predicated on the collection of a pool of funds which together with accrued income for the life of a year's claims will give sufficient return to meet anticipated claims. Part of the basis of the scheme's operation is the concept that practitioners against whom claims are successfully made shall contribute more to the necessary premium pool than those whose mistakes or inadvertence do not result in a successful claim. That same burden of a higher contribution is imposed on those who would have been jointly, severally or vicariously liable for loss occasioned by a claimant, if sued ie co-partners/co-directors employers.

## 6. How long after a claim is made could I be liable for loadings or excess?

A claim could be notified in say 2009, the alleged act of negligence might have occurred within the previous 6 years, ie back to 2003.

The conduct of the claim might take 5 years to be resolved by payment to the claimant in say december, 2014. The practitioners who were partners or directors in 2003 could in 2014 have a liability to pay an excess.

If the payment to the claimant exceeded the aggregate of the practitioner's premiums for the insurance years 2011, 2012 and 2013 (every practitioner who was a partner or director in 2003 would have an additional amount to pay of between 20% and 50% to renew professional indemnity insurance for the years 2015, 2016 and 2017.)

This contingent liability has a very long tail. All practitioners ought to be aware of these contingent liabilities when planning a budget and particularly if changing firms or practice. The liability for a loading and an excess stays with the practitioner at the new firm or at the Bar. Practitioners would be wise to consider negotiating conditions for meeting these contingent liabilities.

## 7. What occurs following written notification of a claim or potential claim to Law Claims? When will a panel solicitor be appointed?

If proceedings have not been commenced, Law Claims will obtain instructions from the insured. If the matter is a potential claim, Law Claims will provide general guidance and support and, where appropriate, Counsel's assistance (characterised as claims payment by Underwriters), in attempts to rectify or ameliorate the matter. Some potential claims considered either well founded or very risky to defend will be handled and settled in-house.

If proceedings have been issued or are about to be commenced and the claim is particularly complex, the matter will be referred to a Law Claims panel solicitor who will obtain instructions from the insured and will report to Law Claims and the Claims Committee on liability, quantum and indemnity. The panel solicitor will conduct the matter upon instructions from Law Claims, the insured and underwriters.

## 8. Who pays for my costs in defending a matter?

Costs of defending just the claim are paid by the Professional Indemnity Fund or Underwriters. No excess is payable, or loadings calculated, with regard to defence costs.

If a claim involves a matter covered by the terms of the Policy, and a matter not covered, a defence costs sharing arrangement is negotiated and as a last resort separate representation for the insured is arranged. If the matter not covered is a cost dispute no defence costs are payable by the Fund or Underwriters unless insured provides authority to Underwriters to handle the disputed cost claim. If a client disputes a claim for costs by alleging negligence but does not claim damages or any other loss, the costs of defending the whole proceedings are excluded from cover.

**For any queries about this, or other Risk Management Services offered by Law Claims, please contact the PII Risk Manager, Gianna Di Stefano on 8410 7677.**