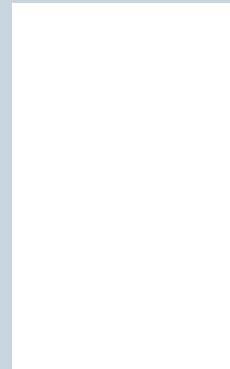
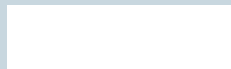
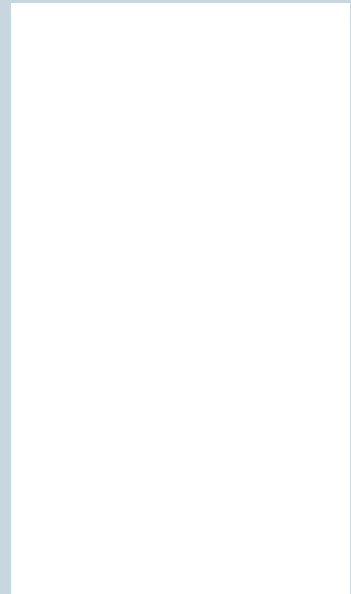


FICPI Conference

29 July 2017

PI Insurance and the Current Insurance Market



Professional Indemnity (PI) Insurance

Background

Limited market for PI insurers

- **Understanding of what Patent and Trade Marks Attorneys do**
- **Not lawyers**
- **Favorable claims experience**

Professional Indemnity Insurance

What it covers

PI is currently underwritten on what is commonly known as a broad “civil liability” basis, which covers:

“..any Loss for civil liability arising from the performance of the Professional Services by or on behalf of the Insured, and which arises from a Claim first made or commenced against the Insured and notified to the Insurer during the Policy Period..”

- Civil Liability
 - Negligence
 - Contractual Liability
 - Misleading and Deceptive conduct
- Claims made
- Key Extensions to look out for:
 - Worldwide cover
 - Fidelity
 - Attendance at Investigations
 - Associate / Agent firms – importance due to availability of PI insurance in certain territories

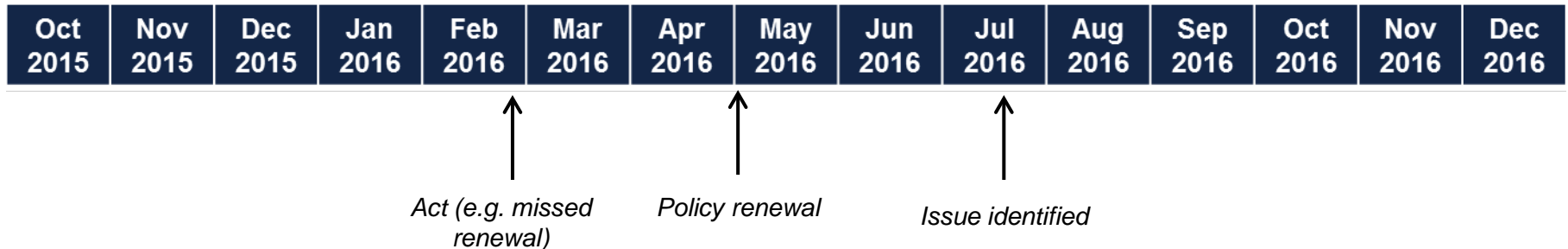
Professional Indemnity Insurance

Claims Made

Almost without exception, PI policies are underwritten on a “Claims Made” basis.

A Claims made policy responds to a claim made against the Insured during the policy period regardless of the date or period of time that the alleged error causing the claim occurred.

(other policies such as property and public liability insurance simply cover events that happen in the policy period. The policies are called “occurrence” policies).



Professional Indemnity Insurance

Notification

Typical notification provision

“The Insured shall give to Insurers notice in writing as soon as practicable and during the Period of Insurance of any Claim made against the Insured pursuant to an Insuring Clause.”

Australian policies silent on the notification of circumstances. This is due to case law which led to insurers removing so-called “deeming” provisions from almost all PI policies.

Professional Indemnity Insurance

Known claims and circumstances

Typical prior known claims and circumstances exclusion

Insurers shall not be liable under this policy to provide indemnity for any Claim relating to facts or circumstances existing prior to or at inception of this policy and which the Insured knew or ought reasonably to have known might give rise to a Claim

Presents a problem at renewal and when considering changing insurers

Professional Indemnity Insurance

Insurance Contracts Act

Section 40 – Certain contracts of liability insurance

(3) *Where the insured gave notice in writing to the insurer of facts that might give rise to a claim against the insured as soon as was reasonably practicable after the insured became aware of those facts but before the insurance cover provided by the contract expired, the insurer is not relieved of liability under the contract in respect of the claim, when made, by reason only that it was made after the expiration of the period of the insurance cover provided by the contract.*

(our underlining)

Why is this important?

“Claims Made” policies such as PI will cover claims arising in the future from matters (claims and circumstances that might give rise to a future claim) notified during the policy period.

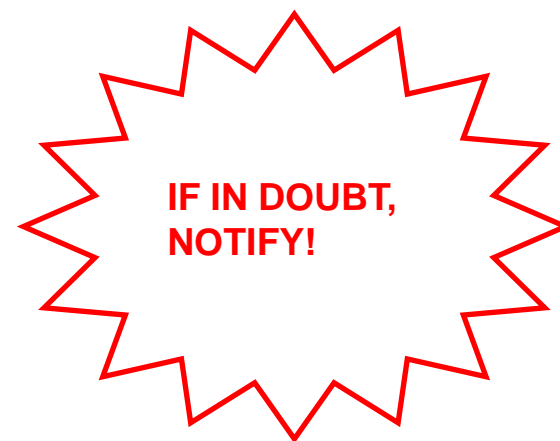
If you take one thing away from this....

Professional Indemnity Insurance

What to notify

As part of practice management procedures you should have central contact through which all issues are channeled. Notify the following:

- Explanation of issue
- When did you become aware of the issue?
- Can the issue be remedied?
- Is the client aware?
- What is the estimate of damages?



e.g. - if you're applying for an extension of time Sec 233 there will be a discontinuation of rights in relation to enforcement for the period that the application or patent is in a temporary state of lapse

NO PENALTY FOR NOTIFICATION

Professional Indemnity Insurance

Hard and Soft Insurance Market Cycle

Hard Market characteristics:

- Pricing high
- Short in duration (often 2 years or so, before pricing begins to fall off)
- Insurers selective
- Policy coverage restricted
- Reinsurance paramount (or support from backing insurers for underwriting agencies)

Soft market characteristics:

- Abundant “capacity” – investors invest in the insurance sector
- Lower premiums due to competition between insurers
- Insurers less selective
- Policy Coverage is broader
- Less reliance on reinsurance, but where it is used it is cheap

We are currently in a soft market and these can last as long as (currently) 13+ years.

Professional Indemnity Insurance

Recent Global Insurance headlines:

Insurers' profits near three-year lows

Reinsurers insist market will stand firm as signs some 'losing stomach' for risk

Atrium to open in Singapore (2009)

Atrium exits Singapore (2016)

Sompo Canopus forecasts slashed as large losses and soft market bite

Professional Indemnity Insurance

So, where are we now?

It's hard to say..

- Insurers are reporting underwriting losses
- Investment income is at historically low levels

These are the key ingredients for a hardening of the market.

However, capital has continued to flow into the insurance market and competition between insurers continues. This has kept the market soft.

D&O appears to have reached breaking point, with pricing increases and coverage restrictions now being imposed by insurers.

Professional Indemnity Insurance

APRA Statistics Reported in 2016

Directors & Officers insurance premiums need to increase by 80% for all Australian D&O Risk (private and public companies) to return to profitability;

In publicly listed company D&O insurance, claims are outweighing premiums by a factor of 4. This is driven by class actions against listed companies fuelled by litigation funders and plaintiff law firms;

Professional Indemnity appears to be at break even at best – APRA states the loss ratio is currently 55% for all PI (the other 45% is taken up by insurers' overheads and profits);

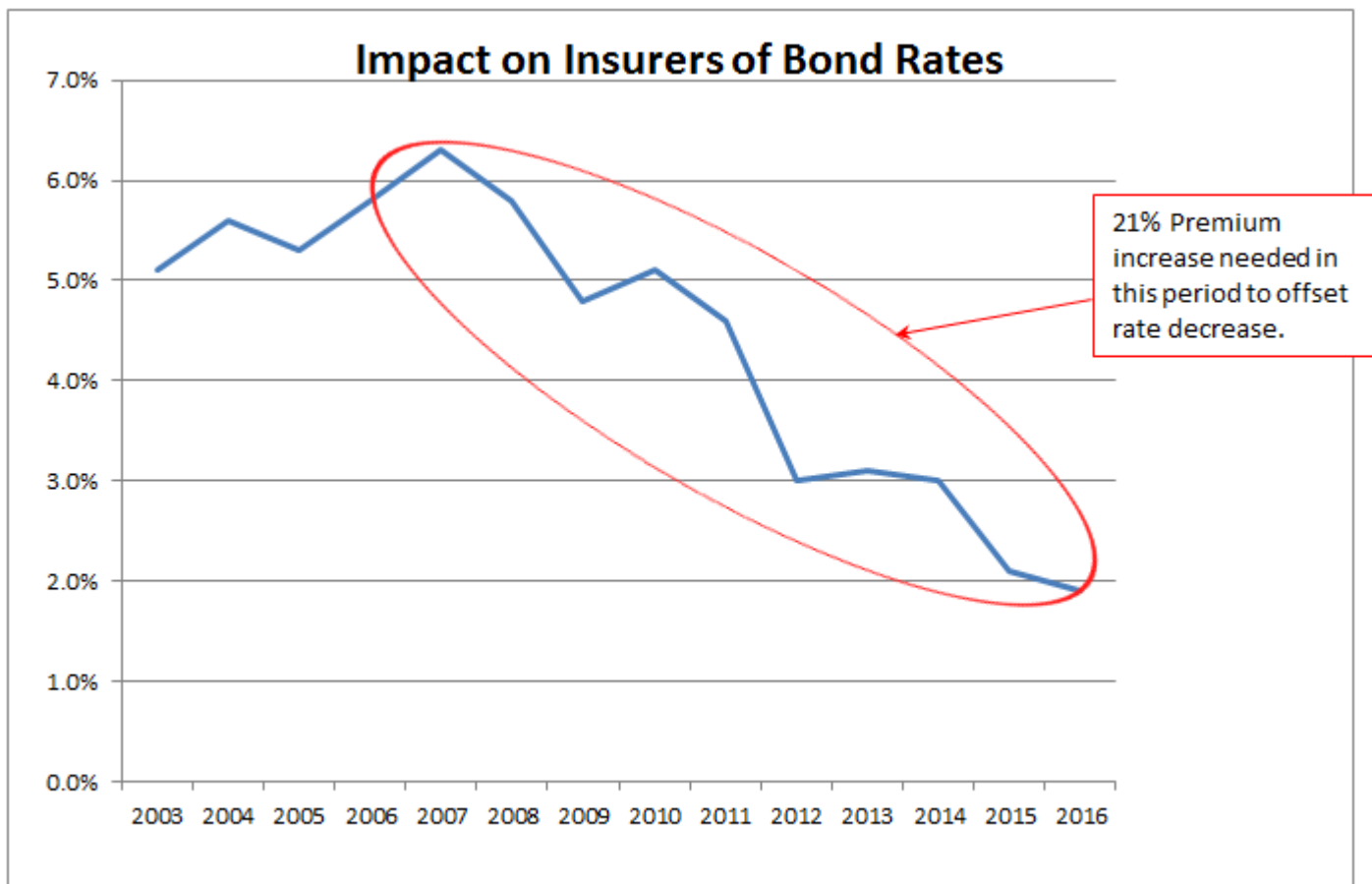
Problematic PI areas for insurers are:

- Some engineering disciplines (structural and geotechnical)
- Design & Construct contractors
- Accountants and wealth advisers

The good news is that patent and trade mark attorneys are considered a good risk.

Professional Indemnity Insurance

Investment income – out the window?



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Professional Indemnity Insurance

What coverage could become “at risk” in a hard market?

The insurers giveth and the insurers can taketh away...

- Contractual liability cover (a contract signed today can create liability for many years to come, so negotiate the best terms you can)
- Costs in addition coverage; Reinstatements
- Low deductibles / excesses

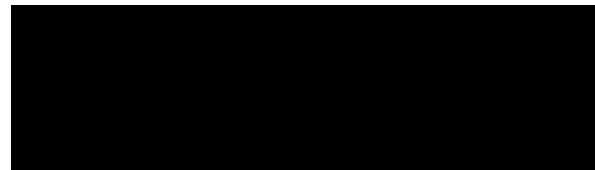
Professional Indemnity Insurance

In Summary

Timely notification of claims (or threatened claims) is essential

- Notification of circumstances that might give rise to a claim secures the protection of Australian insurance law;
- When in doubt, notify;
- If you're still not sure, notify.
- Don't take renewal difficulties personally, it is the market
- Do seek alternatives – if you can demonstrate good risk management you will be in a stronger position. Membership of FICPI helps.

Questions & Answers...



...Thank You