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Aggregation of claims

This refers to a clause that combines two or more interrelated Claims covered by the policy, to enable them to be treated as a single loss for the purposes of applying the policy Limit of Liability and Excess. Typically an Aggregation of Claims clause would provide that all Claims arising out of, based upon or attributable to a single act, error or omission or series of acts, errors or omissions attributable to the one source or original cause will be considered a single Claim and only one Excess and one Limit of Liability will be applied.

Note: Not all professional indemnity insurance policies include this clause.

Automatic reinstatement (also known as maximum aggregate limit of indemnity)

Unless otherwise specified in the policy the Limit of Liability of a policy represents the maximum amount that can be paid in any one policy period.

Some policies, however, include a clause known as an Automatic Reinstatement clause (or Maximum Aggregate Limit of Indemnity) which allows the Limit of Liability to be ‘reinstated’ for new, unrelated Claims, should the original sum be depleted by a Claim or series of Claims that equals the Limit of Liability.

Depending on the number of reinstatements provided by the policy this clause can provide indemnity for multiple Claims during the policy period where the total of these Claims exceeds the policy Limit of Liability. However, no one Claim payment by the insurer will exceed the policy Limit of Liability.

For example:

If the insured purchases a policy with a $1,000,000 Limit of Indemnity, and the policy contains one Automatic Reinstatement the policy provides cover for Claims aggregating up to $2,000,000 during the policy period, subject to any one Claim being no greater than $1,000,000.

Note: Some professional indemnity insurance policies only provide this on an optional basis. Please check the quote or policy wording to ascertain whether the policy contains an Automatic Reinstatement or Maximum Aggregate Limit of Liability clause and the number of reinstatements or maximum amount provided.

Average provision

This refers to professional indemnity insurance policies which provide a Costs Exclusive Limit of Indemnity. Where the total amount of a Claim (including the claimant’s costs and expenses incurred in bringing the Claim) exceeds the Limit of Indemnity, then the Insured Costs covered under the policy will be calculated on the basis of the proportion which the Limit of Indemnity bears to the total amount of the Claim.

For example:

In a situation where the insured has a professional indemnity insurance policy with a Limit of Indemnity of $1,000,000 and a Claim is made for $2,000,000 including claimant’s costs and expenses with Insured Costs of $750,000 the amount payable by the insurer under an Average Provision clause would be as follows:

1. $1,000,000 in respect of the Claim including claimant’s costs and expenses; and
2. 50% of the Insured Costs of $750,000, being $375,000 as the $1,000,000 Limit of Indemnity represents 50% of the total cost of the Claim.

This leaves an uninsured amount of $1,375,000

Note: If the professional indemnity insurance policy provides a Costs Inclusive Limit of Indemnity, then the uninsured amount would be $1,750,000.

Cancellation

Cancellation is the termination of an insurance policy before the expiry date. Most professional indemnity insurance policies include a Cancellation clause providing that Cancellation of the policy by the insured be requested in writing. Generally the effective date of the Cancellation will be the date of receipt of the written Cancellation request by the insurer (unless a later future date is specified). A premium refund may or may not be available to the insured for the cancelled policy period. This will depend on the terms and conditions of the policy.

The insurer may only cancel a professional indemnity insurance policy in accordance with the provisions of the Insurance Contracts Act 1984 (Cth).

Civil liability

Some professional indemnity insurance policies provide cover for an insured’s ‘Civil Liability’ to a third party arising out of the insured’s conduct of their professional business or the provision of Professional Services.

‘Civil Liability’ is liability of one party to another arising out of civil law, as opposed to criminal law.

There are four branches of civil law:

1. Tort law (the common law torts of negligence, nuisance, and defamation);
2. Contract law (breach of contract);
3. Statutory law (for example: Consumer Protection Legislation);
4. Equity – (a system of law based on the principle of ‘fairness’ designed to furnish remedies for wrongs which were not legally recognised or for which no adequate remedy was provided by the common law).
A Civil Liability wording ordinarily covers all four branches of civil law. However, the policy only responds to Civil Liability for Claims arising from the conduct by the insured of the nominated Professional Services stated in the policy schedule.

Claim

A ‘Claim’ means any demand or notice (verbal or written) made by a third party against the insured for payment under the terms of the professional indemnity insurance policy to compensate them for a loss. A Claim may be made by, a writ, Statement of Claim, application or other originating legal process or by other written or verbal notice.

Note: All professional indemnity insurance policies have a different definition of ‘Claim’. Please check the policy wording carefully for the definition.

Claims made

A reference to a ‘Claims Made’ policy refers to a policy which provides access to indemnity for Claims made against the insured and reported to the insurer during the policy period. If during the policy period the insured notifies a circumstance that may give rise to a Claim then, because of the provisions of the Insurance Contracts Act 1984 (Cth), that also triggers coverage under the policy.

Claims Made cover does not require the incident that gives rise to the Claim against the insured to have taken place during the policy period.

Consumer protection legislation

A Consumer Protection Legislation clause provides cover for misleading and deceptive conduct that breaches the legislation protecting consumer rights, such as the Competition and Consumer Act 2010 (Cth).

The object of these laws is to enhance the welfare of Australians through the promotion of competition, fair trading and provision of consumer protection. In so doing the legislation regulates how corporations act in trade or commerce.

Note: Professional indemnity insurance policies generally do not cover any civil or criminal penalties provided for by the legislation.

Continuous cover

Claims Made policies generally exclude Claims arising from facts and circumstances known to the insured before the start of the policy period. An inadvertent and innocent failure to disclose a known fact or circumstance that gives rise to a Claim could result in an uninsured loss.

Continuous Cover clauses address this situation by extending cover under the policy to a Claim arising out of a fact or circumstance which could have been notified under a previous professional indemnity insurance policy but the insured failed to do so.

For a Continuous Cover clause to apply, usually the insured must have been insured under a professional indemnity insurance policy issued by the insurer at the time they first became aware of the fact or circumstance that gives rise to the Claim. The Claim must have been covered under the previous policy and the insured must have been continuously covered, without interruption, by a professional indemnity insurance policy with the insurer until the time when they notify the Claim to the insurer.

Note: This cover will usually only be provided where there has not been any fraudulent nondisclosure or fraudulent misrepresentation by the insured.

Contractual liability

This refers to any liability assumed by the insured by contract.

Note: Professional indemnity insurance policies generally do not cover any liability assumed under contract which is beyond the liability which would have existed in the absence of the contract. This may include any express warranty, guarantee, hold harmless agreement or indemnity clauses.

Contributory negligence

Contributory Negligence refers to an act, behaviour or omission by a claimant that indicates that they did not exercise due care and therefore contributed to their loss.

Costs exclusive limit of indemnity

The Limit of Indemnity is the maximum amount the insurer will pay in respect of any one Claim first made against the insured and notified to the insurer during the policy period. A Costs Exclusive Limit of Indemnity does not include Insured Costs within this limit. These costs are in addition to the Limit of Liability (subject to any Average Provision).

Costs inclusive limit of indemnity

The Limit of Indemnity is the maximum amount the insurer will pay in respect of any one Claim first made against the insured and notified to the insurer during the policy period. A Costs Inclusive Limit of Indemnity includes within this limit Insured Costs. This means that Insured Costs incurred in defending a Claim reduce the Limit of Indemnity available to satisfy the compensation amount of the Claim.
**Excess**

The **Excess** is a policy condition requiring the insured to pay a portion of the loss. Usually this amount represents the first amount which is payable by the insured in respect of any one **Claim** with the insurer paying the balance over that amount up to **Limit of Indemnity**. The **Excess** can also be referred to as the ‘deductible’.

**Exclusive excess**

An **Exclusive Excess** means the **Excess** does not apply to costs and expenses incurred by the insurer or the reasonable costs incurred by the insured (with the insurer’s prior consent), in defending, investigating or settling any **Claim**. The **Excess** applies to the compensation amount of the **Claim** only.

**Fraud and dishonesty**

Professional indemnity insurance policies will generally exclude cover for **Claims** arising from a fraudulent, dishonest or criminal act.

However, many professional indemnity insurance policies will provide cover for **Claims** against innocent insureds for compensation for their **Civil Liability** resulting from fraudulent, dishonest or criminal acts. This cover will not extend to the perpetrator of such fraudulent, dishonest or criminal act. This cover varies significantly across different insurance policies.

**Governing law**

This clause refers to the place where disputes between the insured and insurer over the interpretation of policy terms, conditions and performance of policy obligations will be determined. An example of a **Governing Law** clause is as follows:

This policy will be governed in accordance with the laws of New South Wales, Australia. Any disputes relating to interpretation will be submitted to the exclusive jurisdiction of the courts of New South Wales, Australia.

**Inclusive excess**

An **Inclusive Excess** means the **Excess** will apply to both the costs and expenses incurred by the insurer or to the reasonable costs incurred by the insured (with the insurer’s prior consent), in defending, investigating or settling any **Claim** as well as to the compensation amount payable.

**Inquiry costs**

Traditionally professional indemnity insurance policies only provided cover for **Claims** made by third parties for compensation. Many professionals are also exposed to legal costs in representing themselves at inquiries. An extension of the policy to cover **Inquiry Costs** provides for the costs of these inquiries.

Under an **Inquiry Costs** clause, if the insured has to attend an inquiry or hearing of a disciplinary nature that is held before an official industry or professional body then the insurer will pay for the reasonable legal costs and expenses incurred in attending the inquiry if the attendance arises directly from conduct of the **Professional Services** performed by the insured.

This extension only covers notices requiring the insured’s attendance at an inquiry first ordered and received during the policy period.

**Insured costs**

This term refers to costs and expenses incurred by the insurer or the reasonable costs incurred by the insured (with the insurer’s prior consent), in defending, investigating or settling any **Claim**.

**Insuring clause**

The **Insuring Clause** is the most important clause in any professional indemnity insurance policy. This clause sets out what the policy will cover, who is insured under the policy and on what basis. Professional indemnity **Insuring Clauses** are generally very broad. The use of definitions, extensions, exclusions and general conditions within the policy wording will restrict the cover to reflect the insurer's intention.

The **Insuring Clause** can also be referred to as the ‘operative clause’.

**Intellectual property rights**

**Intellectual Property Rights** are the rights given to a person over a creation of their mind. The creator often has exclusive use of the property or can determine how or who can utilise the property. Intellectual property can include, but is not limited to, trademarks, patents, trade secrets and designs.
Joint venture liability

A joint venture is generally a contractual agreement joining two or more parties for the purposes of executing a specific business endeavour. All parties agree to share in the profits or losses in this venture according to their respective share.

Joint ventures are regularly unincorporated, but some longer term joint ventures are incorporated.

Where the insured is part of a joint venture it has a joint exposure in this venture and some professional indemnity insurance policies will cover only the insured's exposure so long as it coincides with the agreed Professional Services description.

Some professional indemnity insurance policies only provide this on an optional basis. Check the policy wording to understand whether this cover is provided.

Jurisdictional limits

Jurisdictional Limits refers to the countries where the policy will respond to Claims being made against the insured.

If the Jurisdictional Limits are restricted to certain named countries then the policy only responds to Claims in those countries. If it is ‘worldwide excluding United States of America’ then the policy responds to Claims anywhere in the world except in the United States of America.

A typical ‘worldwide excluding United States of America’ Jurisdictional Limits clause, would provide cover for Claims made against the insured anywhere in the world, except for Claims brought in a court in the United States of America, or that arise from a judgment or order of a court in the United States of America.

Not all professional indemnity insurance policies have Jurisdictional Limits.

Libel and slander

Libel and Slander refers to defamatory statements or material which may have the effect of lowering the reputation of a person in the eyes of others. The statement may be made orally (slander) or in written form (libel). Any living person, small business (employing fewer than 10 people) and non-profit organisation may sue for defamation. Corporations are restricted in suing for defamation but directors and senior managers of corporations may sue as individuals.

Professional indemnity insurance policies generally cover unintentional acts of Libel and Slander only.

Limit of indemnity

The Limit of Indemnity is the maximum amount the insurer will pay for compensation and claimant's costs and expenses arising from any one Claim and all Claims in the aggregate made by the insured under a policy during the policy period.

Liquidated damages

Liquidated Damages are an amount of damages which have been contractually pre-determined in the event of a breach of that contract. In a contract a Liquidated Damages clause must be a genuine pre-estimate of the loss that will be suffered by the innocent party as a result of a breach. This agreed sum must not be in the form of a penalty as this will be unenforceable.

Insurance policies vary in terms of coverage for Liquidated Damages. Check your policy wording for details about this coverage.

Lost documents

A Lost Documents clause will provide cover for the costs associated in the replacement or restoration of documents which have been destroyed, damaged, lost or mislaid. Insurers may also choose to cover any direct consequential loss arising from the documents being lost. The level of cover and amount of cover varies significantly between insurance policies so check your policy wording.

Documents can mean deeds, wills, agreements, data, electronic records, maps, plans, records, written or printed books, letters, certificates, written or printed documents or forms of any nature which is the property of the insured or for which the insured is responsible. It normally excludes any bearer bonds, coupons, bank or currency notes or other negotiable instruments.

Principal's previous business

Principal's Previous Business clauses offer cover to the insured principal for wrongful acts committed by them whilst conducting the same Professional Services in a prior partnership or company.

For example, an insured who was a partner in an accounting firm and then set up their own accounting firm, would need to obtain a Principal's Previous Business extension to ensure they were covered for any Claims arising out of work undertaken as a principal in the previous firm.

This is not generally a standard feature of professional indemnity insurance policies but it is usually available upon request via endorsement.
Prior claims or known circumstances

Claims Made policies generally exclude Claims arising from facts and circumstances known to the insured before the policy period.

Just like any other form of insurance, a professional indemnity insurance policy is intended to cover unforeseen circumstances and events only.

The Prior Claims or Known Circumstances exclusion is a clarification that any prior Claims or known circumstances to the insured are not covered by the policy.

Professional duty

A professional (any person who exercises and professes to have a special skill) owes a duty of care to a client or third party in the performance of their professional work. This duty may be owed in tort (any civil wrong doing) and in contract.

Generally a professional indemnity insurance policy wording which covers a breach of Professional Duty only is less broad than a professional indemnity insurance policy that covers Civil Liability as it must be proven that the Claim arose out of breach of Professional Duty owed.

Professional services

Professional Services are the insured’s business activities which are covered under the professional indemnity insurance policy. The Professional Services description is usually defined manually by the insurer in the quotation supplied. However, Professional Services can be defined within the policy wording and this generally occurs when the policy wording is tailored for a specific profession.

It is important that the Professional Services description in a professional indemnity insurance policy matches the activities performed by the insured because generally loss is covered in connection with the Professional Services only.

Proportionate liability

The principle of Proportionate Liability requires that the liability of a wrongdoer, who is a concurrent wrongdoer, be limited to the proportion of the loss or damage which is considered to be a just and reasonable reflection of that wrongdoer’s responsibility for the plaintiff’s loss.

Under Proportionate Liability there is no right of contribution between wrongdoers as such because each can only be required to compensate the plaintiff for their proportion of the loss suffered.

Retroactive date

The Retroactive Date of a policy is the date after which acts, errors or omissions of the insured are covered. Any act, error or omission occurring before that date will not be covered. That is, any act, error or omission arising from the Professional Services provided after the Retroactive Date will be covered under the policy. A Retroactive Date which is earlier than the policy inception date is known as ‘Retroactive Cover’. Retroactive Cover extends cover under the policy to acts, errors or omissions that occurred prior to the inception date of the current policy period.

Policies can be underwritten with two types of Retroactive Dates:

(a) ‘Unlimited retroactivity’ – where the policy will cover a Claim made and reported during the policy period relating to an act, error or omission, regardless of when the act, error or omission occurred; or

(b) ‘Dated retroactivity’ – where the policy will cover a Claim made and reported during the policy period relating to an act, error or omission that occurred after the Retroactive Date.

Run-off cover

Professional indemnity insurance policies are usually Claims Made and notified policies. This means that in order to trigger the policy the Claim must be made against the insured and reported to the insurer during the policy period. Companies or individuals ceasing business still have exposure to Claims being made after their business ceases arising from their previous business activities. Therefore, even though you may have had insurance at the time you provided your client with the service you will not be eligible to rely on the benefits of the insurance policy because you can only notify an insurer of Claims during an active policy period.

Professionals need to purchase Run-Off Cover.

Run-Off Cover generally protects you for the same risks that the professional indemnity insurance policy protected you against for the amount of time you purchase Run-Off Cover. It provides cover for potential incidents which have happened but are yet to be reported. It will not cover you for any work performed after the original policy expires.

Some professional indemnity insurance policies will provide automatic Run-Off Cover up until the end of the policy period should the policy be cancelled during the policy period. Further Run-Off Cover can then be purchased by the client for multiple years thereafter. Some insurers may only consider run-off on a year by year basis, whereas some insurers can offer multiple years of Run-Off Cover in a single policy.
Severability and non-imputation

A Severability and Non-Imputation clause applies where there is more than one insured under a professional indemnity insurance policy.

This clause protects an innocent party insured under the policy where there has been a failure of another insured to:

▼ comply with their duty of disclosure under the Insurance Contracts Act 1984 (Cth); or
▼ comply with any obligation, term or condition of the policy.

This clause will also protect an innocent insured where another insured undertakes any dishonest, fraudulent, criminal or malicious act so long as the innocent party had no prior knowledge of these acts.

The effect of the clause is that cover will still be available to the innocent insured despite the failure of the other insured party.

Sub-contractors and consultants

Insured’s often use the services of sub-contractors or consultants to provide specialised services. In doing so, the insured may be found to be vicariously liable for the acts and omissions of those sub-contractors or consultants performing work for or on behalf of the insured.

Professional indemnity insurance policies generally provide cover for the insured’s vicarious liability arising out of the Professional Services provided by the sub-contractor or consultant. Indemnity will generally not be extended to cover the liability of the sub-contractor or consultant who committed the act, error or omission.

Where requested, insurers may consider extending cover to the sub-contractors or consultants. Ordinarily the sub-contractor or consultant should be required to hold and maintain their own separate professional indemnity insurance policy.

Territorial limits

Territorial Limits clauses restrict cover to Claims resulting from the conduct by the insured of Professional Services in certain countries. A narrow Territorial Limits clause will restrict cover to operations in certain named countries. A broader Territorial Limits clause may cover the conduct of Professional Services worldwide.

It is typical for a Territorial Limits clause to exclude Professional Services of the insured performed in the United States of America, provided to persons in the United States of America or subject to the law of the United States of America.

Trading debt

A Trading Debt is a debt incurred as a result of the undertaking of the insured’s business or trade. As Trading Debts are generally not compensatory in nature and professional indemnity insurance policies are intended to deal with Claims for compensation, Claims for Trading Debts are generally excluded from this cover.