



THE LAW SOCIETY
OF NEW SOUTH WALES

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5 October 2012

Professional Indemnity Insurance Amendment
Fair Trading Policy
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Email: policy@services.nsw.gov.au

Dear Sir / Madam

Property, Stock and Business Agents Amendment (Professional Indemnity Insurance) Regulation 2012

The Law Society of NSW appreciates the opportunity to comment on the proposed *Property, Stock and Business Agents Amendment (Professional Indemnity Insurance) Regulation 2012* (draft Regulation).

The draft Regulation has been reviewed by the Law Society's Property Law Committee (Committee) which is comprised of experienced and specialist property law practitioners, drawn from the ranks of the Law Society's members, who act for various stakeholders in the conveyancing process.

In the Committee's view, the Government should be commended in mandating Professional Indemnity Insurance (PI Insurance) for licensees. Mandating of PI Insurance has been anticipated since the commencement of the *Property, Stock and Business Agents Act 2002*, specifically section 22, and is a long overdue reform.

The Committee notes that NSW Fair Trading is particularly seeking comments on two issues as set out in the "Summary - *Property, Stock and Business Agents Amendment (Professional Indemnity Insurance) Regulation 2012*" prepared by NSW Fair Trading and responds as follows:

1. Do you agree with the proposed minimum amount of professional indemnity insurance cover of \$1 million per claim and \$3 million in the aggregate during the period of insurance?

The Committee has some misgivings about the level of cover. The sum of \$1 million per claim is lower than the level of coverage required for solicitors and (on its understanding) conveyancers. Given the potential for claims against agents for losses arising under, for example, the *Australian Consumer Law* or section 64(3) of the *Property, Stock and Business Agents Act 2002*, the Committee believes that a higher level of coverage is appropriate.

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The Committee also understands that the level of cover required by members of the Real Estate Institute of New South Wales is \$2 million and suggests this may be a more appropriate level of cover.

Consideration should also be given to whether it is proposed that the amount of indemnity cover is inclusive or exclusive of claimant's costs and defence costs. For example, the LawCover policy of PI Insurance for solicitors is inclusive of both costs so that if, for instance, a claim is made against a solicitor that runs for two or three weeks in the Supreme Court, the costs of the claimant can be, say \$250,000 and the costs of the defence can be of the same magnitude. That means that if the solicitor is unsuccessful, the amount of indemnity goes from \$2M to \$1.5M because the costs of the claimant and the defence costs are taken out.

Presumably cover would be provided on a "claims made" basis, as is the approach taken in most PI Insurance policies.

2. Are the proposed mandated insurable events appropriate?

In reviewing this issue, the Committee has made some comparisons with the LawCover policy of PI Insurance for solicitors.

The Committee suggests that consideration should be given to including liability for breach of fiduciary duties, in clause 13B(2), since agents are fiduciaries.

The Committee also suggests that consideration should be given to including liability for actions in conversion and detinue in clause 13B(2), since agents can withhold property or proceeds of sale as security for payment.

In the Committee's view, there is a strong argument for not covering fraud or dishonesty. Those contributing to the cost of the scheme, licensees, ought not pay for a licensee to be indemnified when the licensee has engaged in fraud or dishonesty. By way of comparison, fraud or dishonesty is specifically excluded in the LawCover policy, although if a partner in a licensee business was not aware of the fraud/dishonesty then that partner ought to be indemnified.

The Committee also suggests that the opening two lines of clause 13B(2) should link the liability with the carrying on of the business of a licensee. For example, add after the words "any of the following" in clause 13B(2) the additional proviso "provided such liability arises from the provision of services to consumers by the licensee".

On a related point, the Committee suggests that clause 13B(2)(g) should be expanded such that it is only acts or omissions arising from the conduct of the licensee's business that attract vicarious liability. Also, the "others" referred to in clause 13B(2)(g) ought to be specifically defined ie employees, servants, agents etc.

Other comments

Who is Insured

In the Committee's view, the insurance should not only cover the acts of the licensee but also his/her/its employees, servants and agents. The Committee is aware of a recent case where the court awarded 20% of the amount claimed against the estate agent/licensee and the remaining 80% against the individual employee agent. The agent was impecunious and the relevant PI cover excluded indemnity for individual liability of employees, servants and agents. The claimant only recovered about 25% of the damages awarded. If the scheme is designed to ensure that consumers are

adequately compensated, then the cover should be extended in this manner. The Committee notes that pursuant to section 41 of the Act, the licensee is liable in tort and in contract for certain acts or omissions of an employee, but suggests that any policy should explicitly provide that cover.

In the Committee's view, the cover ought to also extend to service entities, that is, companies that are set up by licensees to provide clerical, administrative or management services to the business itself. The experience of LawCover is that it is sometimes those service entities that are the subject of a claim.

A more detailed consideration of "Who is Insured" should probably be reserved for the wording of the policy itself but for the sake of completeness, the Committee suggests the wording could be as follows (utilising the LawCover PI Insurance wording under a heading "Who is Insured"):

1. We insure the licensee being:
 - (a) a sole licensee
 - (b) a partnership of licensees
 - (c) an incorporated licensee, practice or organisation, or
 - (d) a multi-disciplinary partnership.

2. We will also insure:
 - (e) a person who is or was a principal or employee of the licensee
 - (f) a licensee who is or was a shareholder of an incorporated practice
 - (g) a body corporate related to the licensee that provides or provided clerical, administrative or management services to the licensee, or
 - (h) the estate of each person referred to in the above clauses.

Run off cover


The Committee recommends that the required insurance include "run off" cover, that is, cover for those licensees that retire. It is quite foreseeable that a claim may be made on an agent many years after retirement. This is an important consideration from the perspective of consumer protection.

Approved policy

In the Committee's view, the draft Regulation should have provision for the wording of the actual policy to be determined by the Director-General, analogous with the requirement that the LawCover policy be approved by the Attorney General.

The Law Society appreciates the opportunity to comment on the draft Regulation. Please do not hesitate to contact Gabrielle Lea, Policy Lawyer, Property Law Committee should you require any further information on telephone (02) 9926 0375 or via email: gabrielle.lea@lawsociety.com.au.

Yours faithfully


per **Justin Dowd**
President