

Professional Indemnity Matters

What are the causes of claims?

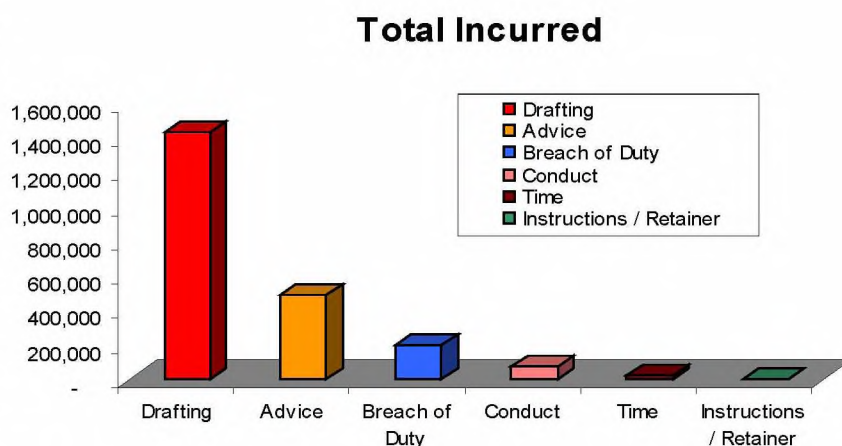
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Hopefully we all learn from our mistakes, and if given the opportunity we can also learn from the mistakes of others. Marsh Pty Ltd, who manages the Northern Territory professional indemnity insurance (PII) scheme, has maintained key information of all notified (PII) matters over the past 10 years to identify trends in the types and causes of claims. This assists the Law Society with development of appropriate topics for future risk management seminars, and by providing you with details of how some claims have arisen in the past, you may be able to learn from the mistakes of others and introduce measures to avoid such incidents occurring within your own firm.

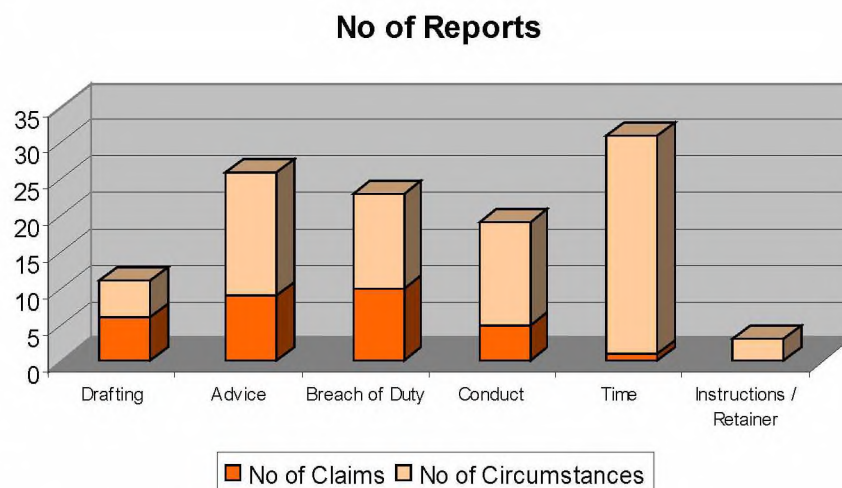
Historically the trend for lawyer PII claims in Australia has been that most claims tend to arise from simple oversights and errors rather than a lack of knowledge of the law. Our recent analysis of the last five years of data generally supports this as a continuing trend.

The graphs opposite identify the different types of allegations attracting claims and notifications since 2005.

"Out of Time" issues continue to account for the highest *number of notifications* followed by Advice and Breach of Duty, however it is "Drafting" that has the highest *cost incurred* which is a shift from the pre-2005 policy year analysis. It is also of interest to note that a number of Out of Time matters can also be contributed to drafting issues although they have not been



A: Total Incurred - the amount incurred by allegation type over the past five years. Note that "incurred" includes paid and reserved matters.



B: The types of allegations attracting the most number of notifications. Note that a "circumstance" is a report that has not developed into a claim.

categorised this way.

Some of the specific causes of claims for each category include:

Drafting

- Poor precedent document

controls with specific amendments required for a particular client being saved to the precedent. An example of this is deletion of a GST provision in a sale contract for a particular client and the

precedent document is then saved excluding this provision for future use.

- Omission of intended beneficiaries in Will. It is important to verify all version changes and amendments with the client prior to them signing.
- Incorrect referencing between common tenancy and tenants in common. This is surprisingly becoming quite a common cause of loss in property and estate matters and in most cases a search or verification of documents would have avoided the claim.
- Failure to note all parties on guarantees which leaves the client with no avenue for recovery when things go pear-shaped.
- Failure to include agreed terms in contracts.
- Naming incorrect parties on writs. There have been several matters of this nature where the writ names an individual when the correct party is the company or vice versa, or where not all defendants are named and matter is then out of time to bring others into the action once the error is realised.

Breach of Duty

- Providing inadequate notice of termination of retainer immediately prior to trial.
- Failing to establish correct beneficiary for estate.
- Incorrect defendant listed on court proceedings.
- Inappropriate distribution or release of trust moneys.
- Incorrect disbursement of settlement funds.
- Failure to use key documents in defence of a matter.

Advice

- Failure to advise of correct

defendants.

- Incorrect parties noted in contract.
- Incorrect advice regarding company structure,
- Failure to advise on specific lease requirements.
- Failure to advise of onerous contractual requirements.
- Incorrect advice regarding potential for automatic judgement.
- Incorrect advice regarding workers compensation entitlements.

Out of Time

Missed limitation periods can of course often be recovered, however, irrespective of whether a missed date is an indemnified claim or not, there is a great cost to the firm in managing these matters. Apart from the un-billable hours spent by the practitioner working to rectify, the client relationship is usually also put at risk and if not severed can become tenuous, and you may suffer personal and firm reputational issues and personal stress throughout the process.

Some of the common reasons for missing limitation dates include:

- **Poor diary management**
 - Simply not putting the date in any external diary and just missing it.
 - Transposing of dates - i.e. 1/2/2010 instead of 2/1/2010 or system inadvertently picks up the American date format (get into the habit of writing the name of the month on your file notes instead of the number of the month)
 - Transfer of file to a new lawyer within firm and the imminent key date is not immediately apparent until a full file review, which may be conducted too late.
 - Mixing up input of key dates

to do with the matter, i.e. the date of incident and date of retainer

- Missing court ordered deadline or mediation deadline
- Miscalculation of key dates

Client Engagement

- Your client is "not quite sure" of the exact date so an estimated date is used on the file in the initial meeting and not corrected or verified
- Failure to advise client of any limitation date issues upon disengagement of retainer
- Unclear instructions resulting in delay in finalising retainer with limitation date being exceeded in the meantime

Alternate Cause of Action

This is becoming quite a common notification event where the lawyer is running a matter as a common law injury case and establishes out of time that it was a Workers Compensation matter

Incorrect party named.

There have been several matters where the writ names an individual when the correct party is the company or vice versa, or where not naming all possible defendants and being out of time to bring others into the action.

It is important to learn from the claims history and to implement sound risk management practices that reduce the likelihood of similar claims occurring in your firm. A good place to start is by reviewing your current precedents, establish good diary management processes, introduce checklists for key data and actions on files, have an open door policy for junior staff to access senior practitioners, conduct thorough research, always double check the correct parties are named, keep detailed file notes and confirm everything in writing. ●