

# INSURANCE POCKET SQUARE

## NOTIFICATION OF CLAIMS UNDER A “CLAIMS-MADE” POLICY – WHEN, WHY AND WHAT?

The Light in Real Life No.11 by Lin Zihao



### WHY IS THIS QUESTION IMPORTANT?

**Most liability policies (such as professional indemnity, D&O, statutory liability, and management liability policies) operate on a “claims-made” basis.**

If a policy is “claims-made”, it means that regardless of when the event causing the claim occurred, coverage will ordinarily be provided so long as the claim is made and notified *during* the policy period.

Insurance policies will usually contain a definition of “Claim” and contractual provisions relating to notification, such as:

- which entity, business unit or person needs to provide the notification;
- who notification needs to be made to; and
- any prescribed form the notification must take.

Failing to notify a claim in the policy period, or even facts or circumstances which might give rise to a claim (as defined in the policy) can be significant in terms of policy response, and whether you will need to debate with insurers that the claim has been made against the correct policy period.

While it tends to be easier to identify if a claim has been made or not (for example, the commencement of legal proceedings, or a written demand for compensation or relief), identifying what are “facts or circumstances which might give rise to a claim” can be more difficult (including in respect of complaints made about services provided). It is therefore necessary for policyholders to implement systems and processes to identify and appropriately notify such matters to insurers.

### WHAT IS THE LAW?

The commercial purpose of a notification under a claims-made policy is to put insurers on notice of:

- a claim that is made against the insured; or
- facts or circumstances that may give rise to a claim against the insured.

A notification provides information about a claim (it may enclose any written demand, notice of dispute or originating proceedings), with progress updates or more detailed updates, or a detailed claim submission following in due course.

#### Exceptions to the typical notification process

##### EXTENDED NOTIFICATION PERIOD OR CONTINUITY PROVISIONS

An extended notification period provides an additional period to notify outside of the standard policy period.

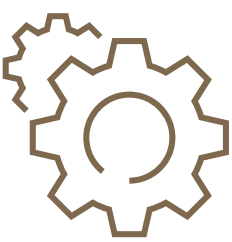
Continuity provisions allow notifications of circumstances *after* the policy has expired if a new policy is taken out with the same insurers.

If included, these provisions can provide additional time for notification of a claim.

##### NOTIFYING THE INSURERS OF CIRCUMSTANCES THAT MAY GIVE RISE TO A CLAIM

This may be expressly stated in the policy and is otherwise permitted under section 40(3) of the *Insurance Contracts Act 1984* (Cth). This means that if the insured notifies insurers of circumstances that might give rise to a claim, any claim that later arises in relation to those circumstances should be covered even if the claim is not made and notified until after the policy period has expired.

Separate to the notification requirements (which operate during the policy period), policyholders have duties of disclosure which they must meet before entering a new insurance policy.



### WHAT ARE THE PRACTICAL IMPLICATIONS?

The making of a notification is important to preserve the right to seek indemnity under a policy (even if that occurs at some point in the future). Here is a simple list of important principles to consider when next preparing a notification of circumstances or a claim:

- Are there appropriate internal processes in place to ensure the people within the business that notify insurers are promptly made aware of circumstances that may give rise to a claim? Policyholders (especially large organisations) should consider if the relevant policy has a provision relating to the deeming of knowledge (i.e. by a certain office holder or department).
- Even if you are not fully aware of the basis of the claim or extent of loss, consider notifying the insurer of the circumstances that you are aware of, as such circumstances may later develop into a claim.
- Avoid the temptation to be “cute” with the notification and seek to arbitrage or abridge facts or matters. Put simply, policyholders should provide appropriate detail in the notification, including in relation to the underlying facts, and any potential causes of action or purported losses.
  - Documents containing relevant information (such as court pleadings or a letter of demand) can be useful to support the notification.
  - The more information that is included, the more likely insurers are to accept that a notification of circumstances captures a later claim.
  - That said – policyholders should be mindful about not providing documents (including legal advice) which might risk waiving privilege.
- There might be a concern from some policyholders about an impact on future premiums if a notification is made. Caution should be exercised with such an analysis. If you are considering making a forensic decision to *not* make a notification (in order to save hypothetical premium in the future), that may be fatal to the success of any later insurance claim.

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