

Professional indemnity matters: Changing landscape of lawyer claims in the NT

Cheryl Richardson

Managing Principal at
Marsh Pty Ltd, Darwin



The Northern Territory Professional Indemnity Insurance facility has enjoyed a reasonably good claims history over the past several years, however in recent times there has been an increase not only in the number of notifications, but also in the actual costs of claim and defence costs payments. Whilst we understand the NT results are still below the experiences of southern counterparts, there is a concern that this trend will have a detrimental effect on future insurance premium levels.

Whilst we have averted any major premium increases this year, it is important that law firms remain diligent with risk management controls within their practices to avoid any further deterioration of the claims experience.

So what is causing this increase in claims and are there any emerging patterns that may assist you in identifying key areas to focus on with you improvement of risk management within your firm or at your own desk?

Marsh has maintained statistics on the areas of practice and types of allegations of all matters reported over the past fifteen years and this assists us in flagging areas and individual work practices that may be more susceptible to claims. It is interesting to note that whilst there has been some movement in the types of activities and allegations resulting in claims, the underlying causes are substantially the same.

What is interesting, is some of the changes that we are seeing in the causes of claims. Whilst the source data group is limited due to the relatively small number of firms which can cause larger individual claims to skew the results, it is still sufficient to see a noticeable change in trends. In the following we have identified both the number of notifications and percentage of claims incurred by allegation type, for the years 2000 to 2005, 2005 to 2010 and 2010 to current. Note that 'claims incurred' includes payments made plus provisions for estimated outstanding payments.



No of Reports by Type of Allegation

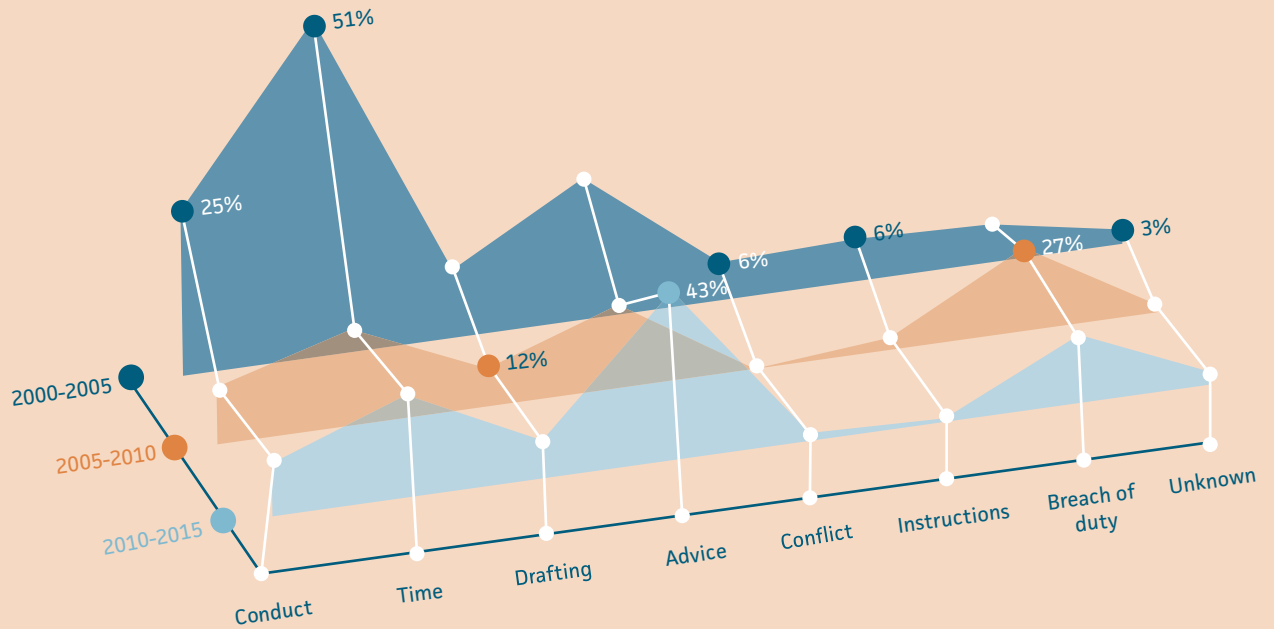


Diagram 1: Allegation type by number of notifications

Percentage of Total \$ Incurred by Allegation

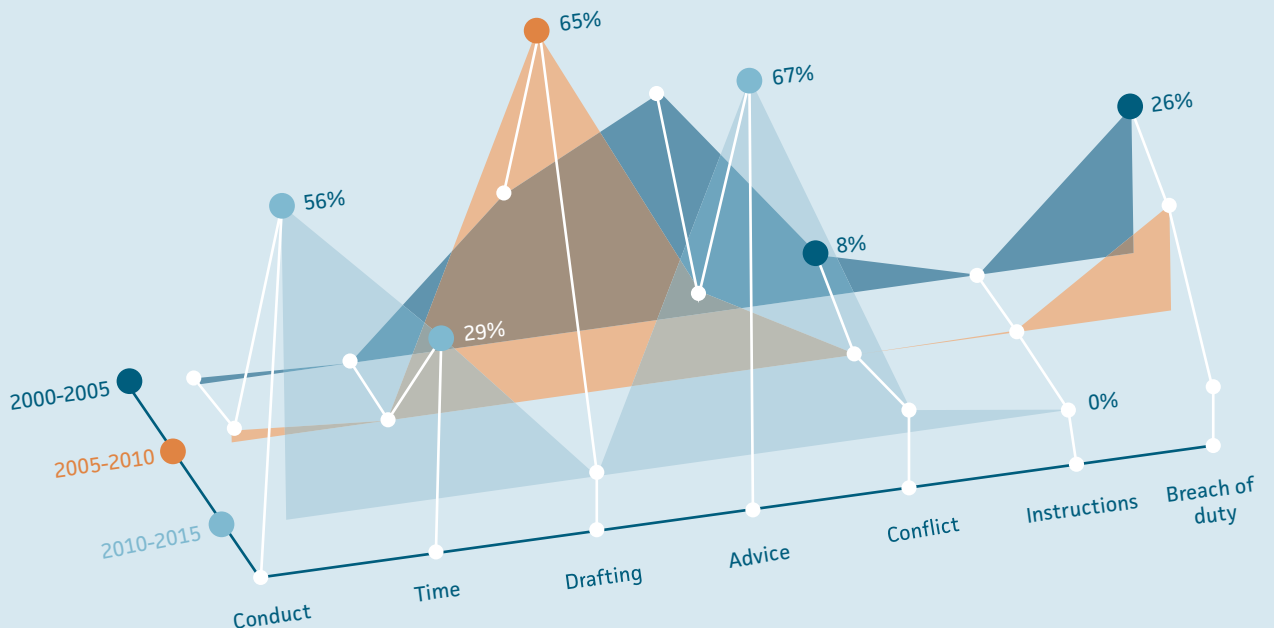


Diagram 2: Allegation type by percentage of \$ incurred (payments and estimated outstanding payments)

Professional indemnity matters:

It is interesting to note the change over the past fifteen years in the types of allegations that are resulting in both notifications and payments.

'Out of Time' matters, which range from missed limitation dates, non-advice of limitation dates, missed court dates or late applications not accepted on last day, used to account for over 40% of all notifications and (surprisingly) 29% of claim costs between 2000 and 2005, and have markedly reduced to just 21% of all notifications and NIL payments for the 2010–15 periods of insurance. This is of even more interest as our southern counterparts are actually seeing a resurgence of claims arising out of missing critical dates and deadlines. Is it the focus on risk management within firms, procedural audits, improved practice software, stricter court imposed obligations or greater supervision that assisted in this reduction within the NT? It is probably a combination of all of these. This is good!

'Drafting' and 'Advice' are clearly the main causes of claims that are costing the scheme in defence and claims payments followed by 'Breach of Duty'. Whilst these areas were attracting notifications in the past, these types of allegations are being more vigorously maintained resulting with claims and defence costs being paid under the facility. This is not so good.

The main area of practice drafting and advice errors relate to are in property transactions, where key clauses may be omitted from lease and/or sale contracts and categorisation of these matters is sometimes difficult as it can be unclear as to whether omission (or inclusion) of the offending clause is a simple oversight, or relates to the lawyer being unaware, in which case it will fall into the 'Advice' category.

However we are now seeing a greater number of advice claims in the criminal law area, where clients are alleging they have not been fully informed or advised on their options or possible outcomes.

So what is causing this influx in the advice and breach of duty? It may be related to lack of knowledge, but there are many matters where it remains the oversights that are causing these losses. Perhaps there are external influences that come into play.

Poor supervision

Are advices, responses, communications between junior lawyers and the client being monitored as closely as they were ten years ago? Whilst partners may be 'Cc'd' to an email correspondence, we can all get overwhelmed by the pure volume of email traffic and can miss the detail, miss the email, have so much else on that the details gets skimmed. Are contracts being properly vetted by the senior lawyers or partners? Are assumptions made about the experience in particular areas of law?

Assumed information

We have had several matters over the past few years where there has been a reliance on information provided to the lawyer from their new client. It may be that the client has already had some advice, is changing lawyers and simply want documents witnessed or filed on their behalf. Be very careful about accepting such briefs without fully detailing the scope of the retainer in advance.

Change of instructions

A number of matters have arisen where the law firm has included new provisions in contracts that may have been requested by the client, however the new instructions not confirmed back to the client in writing. The contract provision ultimately causes the client a loss, and the lawyer is left defending their actions and unfortunately do not have any evidence to support their position that 'that is what they wanted'.

Whilst we cannot provide details on individual matters, we can provide some of the more common examples of claims experienced in the key areas attracting claims:

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 was surprisingly 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 include agreed terms in contracts.
- Naming incorrect parties on documents. There have been several matters of this nature where documents name an incorrect party, 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;
- Omission of critical details on court documents.

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

Whilst this has been a reducing cause of claims, it is important to remain vigilant with management of critical dates and time lines. 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, or has excluded key parties to the action and is now out of time to amend.

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.