(Investors may act on professional advice that was deficient and sustain losses as a result. A claim for compensation may result). A professional forestry adviser cannot be held liable for future events that are impossible to predict, but they can be (and in some cases will be) held liable for not applying minimum professional standards. The NZIF professional standards relate mostly to disclosure. Professional fore­sters should disclose what the limitations of their professional advice are, while not undermining the purpose for which the advice is required.

Conclusions
A professional relationship needs to be clearly defined from the outset so that the client knows what to expect and the professional knows what to deliver. Most disputes arise from not meeting a client’s expectations.

Professional forestry service providers need to:
• Use a business management system that incorporates appropriate contractual agreements;
• apply professional standards; and
• ensure the application of technological advances in the provision of their services.

The NZIF professional standards are mainly about disclosure. Failure to disclose the limitations of the professional advice and giving professional advice that is poorly considered or not suitable for its intended purpose can result in a successful claim for damages.

Most disputes can be avoided; they are unproductive and undesirable for both clients and their professional service providers.

Professional indemnity insurance

Tony Gouldson*

Foreword
This paper focuses on 'Professional Indemnity' insurance for Forestry Consultants. Professional Indemnity insurance is perhaps the most important of a range of liability insurance options that need to be considered by most consulting businesses. By way of explanation a table, summarizing other types of liability insurance, is included as an appendix to this article.

1. Introduction
The forestry sector has been the subject of much coverage and attention by the media in recent times. Commodity prices and the New Zealand dollar have contributed to a period of sustained pressure. Sawmills have closed, large parts of the forestry estate have been sold and investor groups are re-opening old claims.

Typically, an industry under pressure will experience an upturn in both the frequency and amount of Professional Indemnity claims:
• Liquidators and Receivers will check every possible opportunity to recover monies.
• Disenchanted shareholders/investors will try to find ways of recovering their losses.
• Professionals in the industry will also feel the effects of an economic downturn and may be tempted to take on work that might previously have been avoided, shortcuts will be considered and the business risk will inevitably increase.

All professionals have a duty of care to those who may reasonably rely on the advice or services provided. It follows that any failure to properly deliver those services or provide adequate advice creates a risk of loss to your clients or any other entity that may reasonably rely on that advice or service. Such a loss can result in demands for compensation from the professional – often those demands will be far greater than the fee revenue for the initial consulting project.

Examples of areas of potential claims include the following:
• Advice on planting methods may result in a loss of crop, loss of investment returns and additional costs of clearing and replanting. In such a case, the fees earned for the consulting job would be insignificant when compared to the total costs and loss incurred by the client.
• A prospectus may indicate good financial returns for investors. Major currency changes and falling commodity prices can make earlier predictions look seriously misleading, especially in the eyes of investors who are relying on their investment returns.
• Errors in the preparation of valuations, treatment of tax, and failure to arrange adequate fire and insurance are also areas of potential claim.

Professional Indemnity Insurance provides cover for the legal liability of the professional in these, and other circumstance, as well as covering the cost of any legal defence.

Even if you have full insurance and the insurer pays your claim, the process of working through the claim will have a major impact on your busi-

* Tony Gouldson is a director of Risk Solutions Limited. tony.g@risksolutions.co.nz
ness. You will have your attention diverted from your core business in an effort to minimise the effect of the claim:
- Researching and defending allegations of negligence.
- Providing files and records for insurers and legal counsel.
- Repairing client relationships.

In the interest of your business (and the sustainability of your insurance), it is vitally important that you do whatever you can to avoid and minimise claims against you for professional negligence.

2. Minimisation of Risk

It must be recognised that claims are often aimed at the individual as well as the entity involved in the delivery of professional services. The comments in this article apply equally to the risks of the individual as well as the risks of the business. The use of trusts or limited liability companies can help provide protection for the individual and advice on these and similar areas should always be obtained from your legal advisor.

The following list of risk management initiatives includes some areas of business practice that will help you minimise the risks to you personally and to your business. It's well worth noting that in all of these examples Risk Management is synonymous with ‘Good Management’.
- Maintain high standards of record keeping.
- Confirm, by way of file notes, all telephone and face-to-face discussions, client instructions and terms of reference and where appropriate include these in your reports/correspondence.
- Disclaimers – use them wisely – especially on any documents that may enter the public domain. Make sure you retain credibility and value (an overemphasis on disclaimers and similar clauses can sometimes give the impression that the advice you are giving lacks real substance).
- The reverse of a disclaimer is an indemnity. Be careful not to accept excessive or unreasonable liabilities. It is common for such additional liabilities to be excluded from the cover of Professional Indemnity policies. This type of uninsured exposure has the ability to cripple many businesses.
- Apply a logical structure to reports and proposals – avoid overcommitment on deliverables – it’s far better to “undersell and overperform”.
- Wherever you can, use simple language.
- Specify the audience of your reports and be clear as to the purpose.
- Identify reference sources, highlight unknowns, variables and assumptions.
- Make sure you clearly identify material and information supplied by the client, especially if it is relied on for the advice or report.
- The value of a good peer review process – even if on an informal basis – cannot be overemphasised.
- Highlight any time constraints and limitations imposed on you.
- Gain an understanding of Intellectual Property, copyright, patent and similar issues – if necessary seek legal advice.
- Where you use sub-consultants, they should be properly qualified and experienced – it also pays to make sure they have good Professional Indemnity cover. If they are retained on contract, make sure that you don't finish up accepting liability for their work.
- If you are in the habit of arranging forestry insurance on behalf of clients make sure that you only confirm that cover is in place when you have documentary evidence of this.

This is not a complete list of the things you can do, but it does give an overview of how you can make a positive contribution to the minimisation of risk, which ultimately will have the benefit of adding value to your business. Risk Management is synonymous with good management. No busi-
ness is risk free, but if you know and manage your risks well, your business will benefit.

3. Insurance

This part of the paper explains some of the more important aspects of Professional Indemnity insurance.

3.1 The Proposal Form

Generally insurers are becoming more diligent in requiring proposal forms for new and renewal policies. Nowhere is this more important than for liability/indemnity insurance. Perhaps the most important thing to remember about these forms is that they and the supporting information you supply, become part of the policy.

So make sure the information supplied is accurate and complete. Failing to supply proper information to insurers can easily backfire on you when a claim arises - taking shortcuts can totally negate the value of your policy.

Your responsibility to advise insurers does not finish when you complete a proposal form. If the nature of your business changes and there is an increase in the risk to insurers, make sure that you tell your brokers. Again, failure to notify insurers can backfire on you.

Each year represents a new & separate insurance contract - take care to properly complete the renewal process with your broker.

3.2 What to look for when buying Professional Indemnity Insurance

Price is important, but value for money is more important. Insurance is like everything else you buy - you get what you pay for!

What are the key points to look for?

• Make sure the policy structure suits your needs - check key points with your broker, such as: o Amount of cover. o Excess. o Retroactive Date. o Business Description.

• Be sure to provide full and accurate information when completing proposal/application forms.

• Make sure that your broker understands Professional Indemnity insurance.

• Seek advice from your broker regarding the insurer, their financial security and their attitude at claim time. Select an insurer that takes a proactive position when dealing with claims. There is nothing worse than battling a potential claim on two fronts, one with your client and one with the insurers. You need an insurer who will work with you and provide advice and support.

Remember, if you buy solely on price - you usually end up with cheap insurance.

3.3 The Policy Cover

Different liability/indemnity policies apply in different ways; the following key points are common to most, if not all, professional indemnity policies:

• The insurer will pay for the cost of damages and associated costs of defence where there are claims or demands made against you alleging a negligent act, error or omission in the provision of the professional services.

• For a claim to be accepted by insurers, it must:
  o First come to your attention and be notified to insurers during the life of the policy.
  o Arise from acts, errors or omissions which took place after the “Retroactive Date”. This date will be shown on your policy and it will usually be the date that your business first purchased Professional Indemnity insurance.

Claims will not be accepted if they are notified to insurers after the policy has expired, or if you knew of the claim (or likelihood of the claim) before arranging cover.

3.4 The Business

Most Policies will include a definition or description of your business. Make sure it is accurate - insurers are only obliged to pay claims that arise out of, or in connection the business described on the policy.

3.5 Other Key Features of the Policy

Usually, when you buy Professional Indemnity insurance, you buy a specific amount of cover. For example, if you buy $500,000 of cover this can apply to a single claim of $500,000 or two claims of $250,000 and so on. The important point to remember is that once you have used the limit ($500,000) there is no more cover available, unless you can negotiate to buy more. After you have used all the cover available to your negotiating position will not be a strong one. Always try to buy a “reinstatement” of indemnity extension - it's easier to do this at renewal than after a series of claims.

Don't cut back on cover as a cost saver - increasing the amount of cover is usually a relatively inexpensive option; e.g. if a base cover of $500,000 costs $6,000 a further $500,000 of cover might cost $2,000. If you need to trim the cost of insurance think about a higher excess. Its better value than reducing the amount of cover.
3.6 Additional Covers

When buying Professional Indemnity insurance, you can often include extensions of cover, sometimes at an extra cost:

- **Loss of Documents** – covering your liability arising from loss or damage to documents, including computer media. Always buy this cover – often it is available at no extra cost.
- **Retroactive Cover** – this provides cover for claims arising now or in the future but caused by past actions. Negotiate a retroactive date for as far back as possible.
- **Automatic Reinstatement of Indemnity** – in the event that the policy cover is exhausted by a claim, or series of claims, the cover is automatically ‘topped up’ by the agreed amount of cover. This extension is an essential aspect of most Professional Indemnity policies.
- **Defamation, Libel and Slander, Breach of Copyright** – a worthwhile extension, especially where your work involves research and report writing.

Other extensions of cover are available but these four are perhaps the most important and should be an integral part of most, if not all, Professional Indemnity policies.

3.7 Common Exclusions and Conditions

Insurance policies are legally binding contracts and like most other contracts they contain some “small print”. The following Exclusions are common to most Professional Indemnity policies:

- Claims involving fraud or wilful neglect.
- Claims arising from actions or omissions prior to the retroactive date.
- Claims you should have known about when arranging your policy.
- Claims notified after expiry of your policy.
- Claims brought by an associated entity such as a subsidiary or parent company or major shareholder.
- War, nuclear and terrorism risks are also excluded.

3.8 The Excess (or Deductible)

The terms “excess” and “deductible” are synonymous. This is the part of a claim that is paid by the client. On most Professional Indemnity policies, the excess is ‘costs inclusive’ which means that any legal expenses (costs incurred by the insurer) in your defence, or research of a possible defence and/or negotiation will form part of the actual claim. In turn, that part of the costs, which is below the excess will be paid by the insured.

4. What to do at Claim Time

If you are unfortunate enough to have a demand, writ or summons land in your lap, it’s likely that your first action will be to either:

- respond to the claimant, denying liability or looking to negotiate a way out; or
- contact your own legal advisor.

In practice, you should avoid both of these actions. All Professional Indemnity policies contain conditions requiring that you immediately notify insurers. There are good reasons for this:

- They are dealing with this type of claim on a regular basis, and their staff and legal advisors know what to do.
- You will not be forced into a situation of making a hasty settlement.
- You can carry on with your business knowing that your insurer will be protecting your interests – in almost all Professional Indemnity claims your interests are the same as those of your insurer.

Policy conditions are quite specific on what you must do at claim time, especially in regard to initial notification and ongoing co-operation. Likewise, there are certain things you must not do, such as enter into negotiations, admit or deny liability. Failure to comply with policy conditions on claims matters may result in your insurer declining liability for your claim.

5. Other Important Issues.

5.1 Selling or Retiring?

The risks of a claim against you can continue long after retirement, sale of the business or company closure. Because a claim against you can surface many years after the original work was done, there are some special considerations for business owners who are considering sale of their business or retirement. If you’re considering sale or retirement, you will need to seek proper legal & insurance advice for the “run off” of risk after the sale or closure is complete.

Make certain that whoever purchases your business continues to purchase Professional Indemnity insurance for a reasonable period, say 6-7 years. Also, the policy should include cover for past employees, directors and principals.

If your business is being wound up, voluntarily or otherwise, you will need to consider the possibility of buying “run off” cover for a period after the closure of the business.

5.2 Changing insurers

If you are thinking about a change of insurer,
consider the following:
- Your old insurance policy will exclude any claims notified to them after the policy has expired.
- Your new insurer will exclude claims arising from circumstance you know about or should have known at the time cover was arranged.

If you are considering a change of insurer, take special care to check all possible claim situations and advise the appropriate insurers — otherwise you could be without cover.

6. Conclusion
If you buy $1,000,000 of Professional Indemnity insurance for $5,000, don’t treat the transaction as a $5,000 deal; ultimately it could be worth $1,000,000 to you if you are confronted with a large claim — give it the appropriate amount of time and attention — if you don’t the entire transaction could ultimately prove worthless.

Appendix

<table>
<thead>
<tr>
<th>Policy Type</th>
<th>Brief Summary of cover</th>
</tr>
</thead>
<tbody>
<tr>
<td>General, or Public Liability</td>
<td>Claims for compensation following damage to the property of others or injury to people. A good example is fire damage to a client’s forest. As an extension to this policy you should consider cover for costs incurred under the Forest and Rural Fires Act.</td>
</tr>
<tr>
<td>Products Liability (including Product Recall)</td>
<td>Damage or injury caused by accidents involving your products – a higher concern for suppliers of forestry plant and equipment.</td>
</tr>
<tr>
<td>Directors and Officers Liability</td>
<td>Covering claims against the individual Directors or Officers resulting from wrongful acts in their governance/stewardship roles.</td>
</tr>
<tr>
<td>Motor Vehicle Liability</td>
<td>Damage to the property of others, including their vehicles, arising out of the use or ownership of your vehicles.</td>
</tr>
<tr>
<td>Employers Liability</td>
<td>Claims for compensation from employees injured at work where the cover from ACC does not apply. There are few claims on these policies especially as it is now unlawful for fines under the H &amp; SE legislation to be insured.</td>
</tr>
<tr>
<td>Others</td>
<td>For specialist activities such as; aircraft operation or charter or use of commercial vessels it is usual to arrange specialist covers for these activities.</td>
</tr>
</tbody>
</table>

General:
1. All liability policy cover should include cover for defence costs.
2. All policies will contain a range of exclusions and conditions — be sure you are aware of these before purchasing any liability insurances.