

- (b) *“Remedy any effects of the act or omission giving rise to the offence”*

Dealing with each:

- (a) Steps that a principal should take to prevent an offence

These steps include contractual and practical measures designed to ensure that the contractor or agent is clearly aware of its responsibilities, and in fact abides by those.

Practically, the principal can establish effective procedures to prevent offences (including effective management procedures), as well as contingency plans and backup procedures.

The principal should ensure that there is a formal and robust contract in place that, among other things, requires notification of any offences by the contractor and requires the contractor to take all steps necessary to contain, minimise and remedy the effects of an offence.

Although not a preventative step, the contract should also require the contractor to indemnify the principal for any costs, fines etc arising from the contractor's failure to comply with the statutory requirements.

- (b) Steps that a principal should take to remedy any effects of an offence

A recent Court of Appeal decision⁴ has confirmed that section 340(2) requires a principal to take all reasonable steps to remedy any effects on natural and physical features – *“One remedies the effects of the infringing act by restoring the physical damage done by it.”*

Despite the fact that its contractor has committed the offence, the principal would still need to take positive steps, where reasonably necessary, to determine the remedial action required, and ensure that occurs. It may well be that the principal is only required to assist in a supporting role, if the contractor has agreed to assume the prime remedial responsibility. However, even in that situation, the principal must be pro-active in the remedial efforts.

In summary, the potential liability of a forestry ‘principal’ does not end where it contracts with a firm to dispose of its waste, nor does that potential liability cease where a resource consent is obtained and the contractors are given precise instructions in accordance with that consent. The principal will remain liable for any offences committed by the contractor, unless it can prove that it has satisfied the defence under s 340(2) of the RMA.

Proving that defence would not be easy, in the absence of evidence that established pro-active steps taken by the principal, both before and after the offence, that were designed to prevent the offence and remedy its environmental effects.

⁴ *Canterbury Regional Council v Newman* (CA) 182/00

Compulsory Professional Indemnity Insurance – Yes or No?

Tim Thorpe
Members Representative,
NZIF Registration Board

Introduction

The Articles of Association of the New Zealand Institute of Forestry (NZIF) require applicants to provide proof of professional indemnity insurance (PI) before they can obtain registration as a Registered Forestry Consultant (RFC). In response to concerns raised about the cost and relevance of PI, the Registration Board recently surveyed RFCs about whether the NZIF should continue to require this compulsory insurance.

The pros and cons of compulsory PI were outlined to RFCs in the survey, as shown in Table 1.

A limited survey of five other professional bodies – law, accountancy, primary industries, engineers, and valuers – was also undertaken. None of these bodies require mandatory PI except in certain specified circumstances, eg in a limited liability company

Table 1: Arguments for and against Compulsory Professional Indemnity Insurance.

Pros	Cons
Protection for RFC's clients	<ul style="list-style-type: none"> The Board's function is to maintain professional standards. The requirement for indemnity insurance is a commercial decision for individual RFCs. The Board does not wish to be in a position to determine what level or type of insurance is appropriate. The insurance is expensive. Some forestry consultants are not prepared to register as forestry consultants because of this. This reduces the ability of the NZIF to maintain standards across the forest consultancy sector.
Protection for RFCs	<ul style="list-style-type: none"> Same arguments as above apply Some organisations, particularly those overseas, neither require nor expect indemnity insurance (although they may be no less willing to sue in the event of professional misconduct).
Enhances usefulness and standing of registration	<ul style="list-style-type: none"> Being registered is about meeting professional standards, not about having appropriate insurance Some insurance companies do not wish the fact that RFCs have indemnity insurance to be advertised

arrangement. All of them, however, strongly recommend that members obtain indemnity insurance.

Results

Of the 77 RFCs surveyed 70% (53) responded by the due date. Of these, 55% (29) indicated that they supported retention of compulsory PI to obtain registration as a RFC while 43% (23) stated that PI should not be compulsory. One respondent was undecided. Most respondents provided detailed comments with their responses and these have been summarised below.

Registration Board Decision

The Registration Board considered the comments received from RFCs at its November 2001 meeting and decided that:

- PI is to remain a compulsory requirement of registration subject to further review in November 2004. In part, this arose from the Board's view that some RFCs did not realise the potential liabilities arising from their consulting activities and would not otherwise seek appropriate insurance cover.
- There will be no exceptions. However clause 39(7) of the Articles states that *"A Registered Forestry Consultant shall provide satisfactory written evidence to the Board that they have taken out suitable Professional Indemnity Insurance."* The Board has interpreted this to mean that as long as an RFC can show proof of suitable indemnity - eg a company indemnifying an employee - then PI *per se* may not be required.
- The Board will investigate the potential for PI specifically tailored for RFCs.
- The Board will develop workshops and other educational material for RFCs on personal risk, liability and indemnity insurance. The workshops will tour the country.
- The Board will ensure that RFCs are reminded of applicable NZIF Articles of Association and Board policies through the Board meeting bullet points sent to all RFCs and through the Journal.

Summary of comments received from RFCs

Detailed responses from RFCs to the survey have been outlined below. Note that the titles used below eg "Professionalism" are the author's method of categorising the responses.

1. Pro retention of compulsory professional indemnity insurance

"Professionalism"

- Compulsory PI can distinguish registered from non-registered consultants, and the professional body that is behind the RFC.
- Compulsory PI indicates that the NZIF takes registration seriously
- If the NZIF did not require compulsory PI for registration then any legal actions against consultants who did not have PI would reflect badly against the NZIF.
- If the NZIF does not require compulsory PI then a proliferation of consultants may result.
- Lack of compulsory PI reduces the value of registration to existing consultants and the public.
- It may be wiser for consultants not to give advice if

they are not prepared to be sued for it.

- Those who don't apply for registration because of the PI only want to pretend to be professional, without accepting the responsibility of what that means to all, including the profession.
- If a consultant is taken to task over an issue the whole profession is affected.
- The standards required for registration by the NZIF are minimal compared with other professions. If compulsory PI was removed this would lower the standard even further.
- The test applied by the insurance company was more stringent than the requirements of the NZIF. If the insurance company did not require me to submit on my annual work record and if the NZIF dropped the requirement for PI, to try to encourage more consultants, then I would not remain a RFC.

"Protection of Clients"

- PI is about protection of clients, not protection of consultants. It shows commitment of the consultant to the client.
- My clients require that I have PI.
- If a client feels let down by a consultant what recompense is there for the client except for PI. Getting struck off as a RFC doesn't stop them practising (as it would in other professions) and failure to fix the problem then reflects on the rest of RFCs.
- It is not satisfactory that some practitioners can in effect choose to not protect the interests of their clients.
- It is important that the NZIF is not seen as toothless, that it is trying to provide protection to the general public.
- Mistakes are going to happen – we are after all only human.
- I doubt if many of my clients in NZ require me to have PI but that is no reason not to have it.
- Any one working with a range of clients and no PI is very brave indeed.
- Clients who deal with a RFC have a right to expect a certain level of protection and standards.
- Not purchasing PI means that a consultant will have to pay out clients themselves or the client cannot have due compensation. This is irresponsible behaviour.

"Cost"

- Individual consultants should be able to tailor the costs of PI to the sort of work that they undertake, or the NZIF should be able to negotiate a special rate.
- Maintain the status quo, but review in 2-5 years, particularly if costs of PI rise.
- The cost is minimal and tax deductible. PI is just one cost of running a consultancy business.
- A consultant should have PI unless they can demonstrate that they have an adequate defined level of available personal wealth.
- PI is a moderate charge when the protection provided is considerable and while the NZIF provides no formal dispute resolution process for charges made against RFCs.
- Professional fees are not low and should be able to cover the cost of PI.

“Work Overseas”

- RFC’s on long-term contracts overseas should be able to ask for temporary suspension or exemption of their classification.
- In overseas work PI may seem to be unnecessary, but I would not bet on it.
- We must retain insurance for the majority of interests, not for a minority who work offshore or who say that they can’t afford it.
- Overseas agencies, such as the World Bank, FAO and aid agencies do not operate in the real world of commercial forestry.

“Other”

- Other professional bodies may not require compulsory PI but may be protected in other ways eg by statute or by a fidelity fund.
- Consultants who work in a firm should be able to be covered by the firm’s insurance.
- PI weeds out the part timers so that the full timers can get more work.

Against retention of compulsory professional indemnity insurance

“Professionalism”

- The NZIF could indicate by asterix those RFC’s who have PI versus those who do not and/or shorten the period between review to ensure that professional standards are being maintained.
- Would enable more consultants to register and enable NZIF to have a greater oversight of forestry consultants.
- Registration is not about meeting insurance requirements but about meeting proper professional standards.
- Some consultants are less exposed than others due to the nature of their work, and therefore do not need PI.
- The greatest sanction that a consultant faces for failure to deliver professionally acceptable advice is the risk of losing future employment.
- There are more forestry “advisors” than would occur in law and accountancy.
- I am a semi-retired consultant with a few longstanding clients and don’t need PI.
- The NZIF should not set up standards higher than other professional organisations. It is up to each individual to determine his or her own exposure to risk and to act accordingly.

“Protection of Clients”

- The fact that PI isn’t advertised would imply that very few clients realise that insurance is held.
- The greater proportion of my work is for companies who have indicated that they carry the can for indemnity.
- NZIF should not specify PI unless it is also prepared to specify minimum levels and types of cover. The current PI process is farcical and some members obtain minimal cover just to meet registration requirements, but the cover is of little protection.

“Cost”

- Costs are too high, and increasing, and I have never been asked for it in 13 years as a consultant.
- The NZIF is hindered from maintaining standards across the sector because some, currently unregistered, consultants balk at the expense of PI under the registration scheme.
- Part timers shouldn’t need to have the burden of PI.

“Overseas Work”

- In 10 years of working offshore as a consultant with a range of clients it has never been a requirement of work.
- In which international jurisdiction would legal action be undertaken if an unresolved dispute arises?
- Volunteer consultancy work overseas would mean that the cost of PI would be prohibitive for the income earned.
- The NZIF should be targeting those overseas institutions that currently do not require compulsory PI.

“Other”

- PI should not be compulsory but it should be strongly encouraged.
- One consultant was apparently sued because the client was aware that he had PI.
- If PI were voluntary there would be a strong incentive for consultants to take it out anyway, unless they want to lose their shirt.

Additional comments

- Two replies suggested that the NZIF should establish appropriate levels of QA or work standards for RFCs.
- Several replies suggested that the NZIF should investigate PI specifically for RFCs, with a range of options depending on the type of work being undertaken eg supervising silvicultural operations versus forest valuation. At least one reply pointed out that there are now nearly 100 RFCs and it would be appropriate for RFCs to have their own insurance rather than being lumped in with other types of consultants eg valuers. However one reply also suggested that the Board does not need to evaluate different types of insurance, this is for the RFC to do so.
- One reply noted that there are no standards on the type of PI that the Board requires.
- Two replies expressed concern that there are no alternative methods of laying complaints with the Board about consultants eg having an informal chat in a RFC’s ear.
- One response suggested that the NZIF Registration Board should also have PI.

Conclusion

The Board’s response to the outcome of the survey is understandably prudent. While it decided that on balance RFCs should carry PI, the Board will make efforts to develop a form of PI which is of wider relevance to the members. Any RFCs wishing to contribute to this development are invited to do so.