

Is your PI cover compromised?

By Ashley Balls

THE EXEMPTION PROVISIONS IN THE ANTI-Money Laundering and Countering financing of Terrorism Act 2009 (AML/CFT) may give a false sense of security.

There can be no doubt that the exemption provisions apply in terms of the day-to-day activities of lawyers but that presumes they are acting solely in the capacity of provider of legal services through their normal business operations. This will include most of the services lawyers deliver whether they are partner, barrister sole or director of an incorporated legal practice.

What is not clear is whether the exemption extends to perfectly legitimate activities delivered through a limited company which may be a wholly owned subsidiary of the legal practice. While there do not appear to be many left, a number of law firms still have contributory or nominee mortgage companies. In addition, there are practices which provide trust administration services through trust companies.

A further quirk arises and that concerns whether the activities of solicitor owned and managed mortgage and trust limited companies would have professional indemnity (PI) cover in the event of a claim for any losses incurred.

Does standard PI cover, sold to a law firm, ordinarily extend to the activities of subsidiary companies in these circumstances or is separate cover required? This may not have mattered much in the past, as these activities were considered to be an inherent part of the services delivered by a lawyer/law firm.

Now that the Act has come into force, the situation may be rather different as the separation of exempt from non-exempt services may become a factor. It is worth considering the purpose and function of insurance in all this. Insurance is there to cover anticipated and identified losses from funds aggregated from premiums paid by a range of others seeking similar cover. Put bluntly, insurers are not in the business of settling claims; they are there to sell premium. The situation becomes



murkier still when considering the activities of the solicitor-owned mortgage and trust businesses, which may not be exempt from the AML/CFT legislation.

Should these businesses not be exempt then separate cover may be required as insurers may claim the cover to be valid only if those businesses have fully complied with the Act.

If the new law applies to the subsidiary operations, the insurer might assert non-

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compliance, invalidating cover in the event of a claim. Non-exempt subsidiary businesses cannot be brought into line with the Act by the simple expedient of completing a registration form and sending it off with the appropriate fee to the Department of Internal Affairs.

It is, as Ron Pol explained in his article in *LawTalk* 821, a complex and exact procedure. Moreover, the Act has no provision for

retrospective compliance; non-compliant businesses would simply have to cease trading or run the risk of criminal conviction with all the ramifications that has for continuity of maintaining a valid practising certificate.

It may also expose partners in a legal services entity who do not practise in the areas of property or trust to significant financial risk were a claim for professional negligence to occur and be upheld. The principle of joint and several liability invariably sees those partners who are most able to settle a claim to be in the sights of any claimant.

Finding a definitive opinion on these issues is not straightforward. Law firms I have personally spoken with have told me they consider all their activities are exempt but when questioned in detail express doubts and volunteer the view that the position is vague and fraught with risk.

Legal practitioners are risk averse and will rightly be concerned that merely continuing to practise normally could result in a "technical breach" let alone a potential criminal conviction. Inadvertent and unintentional acts are no defence to prosecutions under the AML/CFT or existing proceeds of crime legislation.

Discussion with the insurance industry is revealing and confirms the potential for confusion is very real.

Another anomaly concerns the client care provisions of the Lawyers and Conveyancers Act 2006. For some firms, until the issue is sorted out one way or the other, client engagement letters may need to set out those services where there is PI cover and those where there may be none. This may not play out well with clients who may be concerned at buying services where only partial PI cover is available.

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