

Multi-layered tower risks in Australia and how that market is responding to FI and D&O (side C) claims

Keith Bethlehem



Partner, Colin Biggers & Paisley Sydney





Proposition:

- Can conflicts within the prevailing structure of FI and D&O towers be eliminated by revising the structure of the towers; and
- Can reinsurance be utilised to enable the solution.



The Problem:

- The typical structures create choke points that lead to conflicts within the towers and between towers (in the case of D&O and POSI Towers).
 - Debate as to duties owed between layers and increasing invitations to excess layers to 'shave the limits'.
- 
- 



The Problem: cont.

- Creates uncertainty and communication difficulties for the broker and insured.
 - Significant cost for the market to engage multiple coverage counsel.
 - Can be exploited by insurance-savvy plaintiff counsel.
 - Insurers now routinely joined to Class Actions: *Blue Sky*, *Virgin*, pending application in *ANZ Flex Commissions* resulting in higher costs where multiple insurers are parties.
- 
- 

The solutions:

- Single 'layer' policies or super layers to address historical choke points \$50M/\$100M.
 - Can the Australian market move to a subscription model as used in the Lloyd's market for this species of risk - same interests through the super layer.
 - Review of typical pricing structures and reliance on reinsurance to manage large exposures.
 - Reinsurance market better equipped to address conflicts and resolve disputes.
- 
- 

The benefits:

- ❖ Market cohesion.
 - ❖ Enhance broker and insured relationships.
 - ❖ United front to take on the funders with cohesive interests.
 - ❖ Significant saving on coverage counsel expenses and associated coverage litigation.
- 
- 

The barriers:

- Fluid nature of the D&O Market capacity a deterrent - changing appetite.
- Solutions require fundamental shifts in the market in Australia.
- Acknowledge that the pricing and claims control aspects require novel approach and cooperation of key insureds, 'big' brokers and market leading insurers.

Selected 2021-23 Settlements

Case	Category	Settlement Sum
NAB consumer credit insurances	Financial products	\$49,500,000
Crown Resorts	Securities	\$125,000,000
Colonial First State -super fees	Financial products	\$56,300,000
Vocation	Securities	\$50,000,000
Westpac Life Insurance Products	Financial products	<\$30,000,000
Slater & Gordon	Securities	\$28,000,000
Suncorp Group	Securities	\$33,000,000
Colonial First State - commissions	Financial products	\$100,000,000
BT Fund Management	Financial products	\$29,500,000
CBA consumer credit insurances	Financial products	\$50,000,000
ANZ consumer credit insurances	Financial products	\$47,000,000
Westpac consumer credit insurances	Financial products	\$29,000,000

Example of hypothetical tower with choke points

	D&O Tower	D&O Layer	POSI Layer	POSI Tower
	Insurer 9 \$10M xs \$60M Side A DIC	6th xs		
	Insurer 7 50% \$10M xs \$50M Side A B	5th xs		
	Insurer 8 50% \$10M xs \$50M Side A B			
	Insurer 6 \$10M xs \$40M Side A B	4th xs		
	Insurer 5 \$10M xs \$30M Side A B	3rd xs		
Settlement value conflict	Insurer 3 50% \$10M xs \$20M Side A B	2nd xs	3rd xs	Insurer 7 \$10M 3 rd xs \$30M
	Insurer 4 50% \$10M xs \$20M Side A B		2nd xs	Insurer 3 \$10M 2 nd xs \$20M
Side C v Side A+B conflict	Insurer 2 \$10M xs \$10M Side A B C	1st xs	1st xs	Insurer 2 \$10M 1 st xs \$10M
	Insurer 1 \$10M primary Side A B C	Primary	Primary	Insurer 1 \$10M primary

POSI v D&O conflict



GLOBAL ACCESS

**GLOBAL INSURANCE.
GLOBAL REACH.
WE ARE MORE THAN A NETWORK.**



UK & Asia

COLIN
BIGGERS
& PAISLEY
LAWYERS

Australia



HMN • PARTNERS

France



USA

Kennedy Van der Laan

Netherlands



MILLER THOMSON
AVOCATS | LAWYERS

Canada

Keith Bethlehem

Partner

Keith.Bethlehem@cbp.com.au

+612 8281 4421

© 2021 Colin Biggers & Paisley Lawyers

No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means—electronic, mechanical, photocopying, recording, or otherwise—without the permission of Colin Biggers & Paisley Lawyers.

This document provides an outline of a presentation and is incomplete without the accompanying oral commentary and discussion.

COMPANY CONFIDENTIAL

