

Body Corporate Insurance



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Body Corporate Insurance

RiteTrack is the loss prevention arm of Barley Insurances Ltd. Prevention is aimed at eliminating causes of loss, rather than being dependent upon insurance policies which respond only to the effect of the cause (symptoms).

Many losses, accidents and errors of judgement are due specifically to the human factor. Prevention/elimination relates to awareness of the hazards and the risks that we encounter on a day to day basis.

The purpose of this Report is to provide an insight into the jigsaw puzzle of ownership and insuring properties. We will endeavour to put all the pieces together for you to provide clarity and a pathway for you to follow.

Insurance Covers - Building

1. Material Damage

The building should be insured for full replacement value based on the figures detailed on the valuation. On this basis the building needs to be covered for accidental losses, malicious damage, attempted burglary, storm, cyclone, fire and also earthquake.

Note: The valuation is an estimate of the cost of rebuilding based on the costs known at the time of completing the valuation. The description of the property insured needs to correspond to the policy schedule ensuring that such items as swimming pools, lifts and parking areas are noted.

Unless otherwise stipulated, normally the excesses that applies to a body corporate building are:

- \$500 Accidental damage (ie fire, impact, flood, storm, cyclone)
- \$1,000 Burglary and malicious damage
- \$2,500 Earthquake - 2.5% of the sum insured subject to a minimum of \$2,500 each claim

2. Business Interruption

This policy covers the loss of rental income and rates payment in the event of damage to the building caused by fire and the perils insured against under the Material Damage policy.

The policy will indemnify the body corporate for its claims for each of the unit holders that have been affected by the damage for their respective losses of income of rental.

There is normally an indemnity period of 12 months. Noting the length of time that it takes to obtain building and resource consents before a rebuild can commence it is worth reviewing this issue to ensure that the indemnity period is sufficient. 18-24 months may be more appropriate.

Basically this period should relate to the time that it takes to rebuild the property in the event of fire and earthquake. In some cases there may be an excess. Normally the excess is the first 7 days of 196 hours. Thus in the event of a claim, the first 7 days (or 196 hours) is not insured.

3. Public Liability

As property owners the Body Corporate (which represents your interests) is insured in the event that through the ownership and management of the building if there is damage to third party property (ie caused by fire) then the body corporate and its unit holders can be held liable not only by surrounding property owners but also by the tenants in that building for loss of turnover and loss of their business.

This is very much the same as a house owners policy which also has a landlord's liability policy attaching to it.

4. Statutory Liability

This relates to the entities responsibilities to fulfil the obligations as set by NZ statutes. There are principally three Acts which relate to property owners:

- **Health & Safety in Employment Act** - this relates to property owners responsibility to provide a safe building for its designed purposes. Failure to fulfil this obligation will mean that the Body Corporate and its unit holders will be fined and incur reparation and defence costs. The Statutory Liability policy covers the reparation and defence costs but effective from 2003 it is illegal to insure the fine.
- **Building Act** - this sits very closely within the requirements of providing a safe building. It specifically looks at the ability of the building to withstand an earthquake so that those people who occupy the building are safe and can easily walk out of the building after an earthquake. The Building Act also defines the Body Corporate officers responsibilities and the maintenance and recording of management decisions. We shall deal with this issue further in the report.
- **Resource Management Act** - Again this applies to the necessity of the occupiers of the building and property owner to prevent discharge of pollutants and dangerous chemicals.

Earthquake Risk

Due to the Christchurch Earthquake there came a realisation of some specific issues that needed to be addressed by property owners and also those that occupy properties as tenants.

The most important aspect from a property owners point of view is that the Earthquake authority can determine whether a building can be occupied or not. Thus if the building seems to be structurally OK but not signed off by the Earthquake Authority then your tenants cannot occupy those premises and thus they have the legal right (subject to the lease agreement) to stop payments for the rental.

From an owner/occupier point of view the situation is a little clearer in that they can immediately put in a claim for loss of rental income. From a tenants point of view if they cannot occupy the premises and yet the assets within the building are undamaged (ie Civil Defence prevents access to the building), but they cannot be extracted then there are a number of issues that have to be considered and dealt with.

We also recognised that after an earthquake it takes more than 12 months to rebuild premises and in some instances the appropriate indemnity period should be 18 or even 24 months and then Indemnity Limits increased accordingly. This of course will increase the premium.

For a one off event such as fire, we believe the appropriate indemnity period should be 18 months to take into consideration building consents, demolition and removal of debris.

On the subject of **removal of debris** you need to be aware that the insurance companies will now be limiting the amount to be claimed for **removal of asbestos from a site to \$100,000**. Anything in excess of this figure is up to the insured. Furthermore, after the earthquake it was recognised that the limit for demolition and removal of debris should be higher than the normal figure for a local event such as fire because in times of high demand the cost of demolition and removal of debris becomes excessive.



Body Corporate Liabilities

You need to have Public Liability and Statutory Insurance as a Body Corporate entity so that in the event that the Body Corporate causes damage to third party property then the entity will be insured. Please recognise that if there is a separate tenancy (ie the tenancy is different to the property ownership) then the tenancy needs to have its own liability package although the landlords (the owners of the units) will actually have a liability to the tenant should there be issues relating to faulty wiring, plumbing, etc.

The liability between the landlord and the tenant relates to the lease agreement between the two parties. In some instances, we need to recognise that although the Body Corporate has a Public Liability policy, in some instances because the unit is owned by a trust or another entity and the trust has its own fixtures and fittings then that entity should also consider having its own liability policy.

1. Statutory Liability

We have mentioned above that all entities need to be aware of their obligations to fulfil the requirements of the various statutes that apply to property owners.

2. Body Corporate Association Liability

The policies mentioned above relate to physical damage to the property insured and also third party property. However, under the Building Act 2004 there were specific changes to the act as to its application to body corporates.

There is a requirement of Body Corporates and their administration to ensure that it complies with the Building Act in regard to administration, application for consents, financial recording and Health & Safety. Under the Building Act, specifically sections 386, 387 and 388 there is specific attention drawn to the officers of the administration to ensure that the officers comply with the Act. Failure to do so will permit the authorities to bring action against the officers and the Body Corporate.

Furthermore, if the officers fail to comply with the Act and bring financial harm to the Body Corporate as an entity then the officers of the Body Corporate can be sued by those outside third parties.

The policy that is purchased to cover the officers of the body corporate is Association Liability insurance. This primarily covers:

- The Association (the Body Corporate as an entity)
- The officers within that Body Corporate

If there was action against the Body Corporate the third party would need to name the **officer and the entity** to trigger the particular policy in question. The Association Liability policy is written very much on the same basis as a Directors & Officers Liability policy or for a limited liability company.

As a Body Corporate is not a limited liability company, because of the nuances within the insurance industry a new product was developed. The Association Liability policy is provided to charitable trusts, not-for-profit organisations, clubs and of course organisations such as Body Corporates.

The policy provides a limit of indemnity which is consumed at the time of the claim for not only the financial damages against the organisation but also for the defence costs that the officers will probably have to incur. In the event of notification the insurer has to be informed immediately and all documentation relating to that particular incident must be passed to the insurers. They will then appoint the lawyers to act on your behalf. The legal costs less the excess will be paid for by the insurer. They will off course initially defend the case but if it is recognised that there is negligence (this must be proven), then the insurers will settle with the third party for their claim.

Technicalities

There are some technical aspects to these policies and they are:

a) **Retroactive Cover**

With other insurance types it is a simple matter of moving cover from one insurer to the next in order to secure the most beneficial premiums in the market. However, the structure of a liability policy is quite different to Material Damage or Motor Vehicle and we highly recommend that when selecting an insurer for your liability portfolio that you do so with a long term focus. Changing insurers can result in gaps in cover and the two relevant clauses are the **Retroactive Date** and the **Continuity Date**.

For instance in the future, if you choose to change insurers and you opt not to purchase the retroactive insurance then any claim made against you in the new policy year with the new insurer for events that took place 2-3 years prior but not discovered until now will **not** be insured.

As an example, if unbeknown to yourself or to the staff there is an error made in the new/current insurance year, but the claim is not made against the organisation for another 2 years that claim will be accepted subject to the terms and conditions of the policy.

b) **Continuity Date**

This is a very important aspect of the policy. Even with repurchasing retroactive insurance the **continuity date** will always be the original inception date of the policy (ie the first date that the policy was purchased with a particular insurer).

The challenge of the continuity date is that if you innocently fail to disclose an event that was in existence but you felt was not likely to evolve, but a claim is made in the new insurance policy (if the Continuity Date is not before that event) then the insurer will have every right to decline the claim. If the continuity date is prior to the event then the insurer is obligated to accept the claim. Please recognise that the continuity date and retroactive date are not the same.

Hazards

We have discussed throughout this summary the issues relating to Health & Safety and safety of the building as complying with the Building Act, although once again we highlight the fact that the building must be safe for the purposes of its designed occupation. In the event of an earthquake it must be capable of not collapsing so that the occupiers can easily walk out of the premises. It must be noted though, that just because the building has survived does not necessarily mean it is safe for ongoing occupancy. (An earthquake safe building means that occupants can depart safely after an earthquake, but the structural integrity may still be compromised).

Therefore there is the necessity of businesses occupying the premises to be aware and manage this specific risk and ensure that the building is compliant.

1. Hazardous Substances

This is closely related to the HSNZO and the Health & Safety in Employment Act. Failure to comply with the Hazardous Substances regulations can result in huge fines being imposed upon businesses. If you have toxic product in excess of 40 litres you must be registered with the authorities to ensure that you will not be fined.

In addition, by not having the correct licence for the occupancy due to the hazardous substances being in excess of 40 litres you could in fact be jeopardising the Body Corporate insurances under the Material Damage and Liability insurances.



Summary

Thank you for permitting us to present this information to you. We trust that you have found the information to be informative and permit you to make informed choices.

This report has dealt with insurance on the building, Business Interruption, Public Liability, Statutory Liabilities and Liabilities under the Body Corporate.

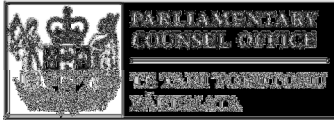
If you have any questions in regard to these issues please feel free to contact me

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Appendices



New Zealand Legislation

Building Act 2004

• Warning: Some amendments have not yet been incorporated

386 Liability of principal for acts of agents

- (1) The consequence specified in subsection (2) applies if a person (**person A**) commits an offence against this Act while acting as an agent (including a contractor) or employee of another person (**person B**).
- (2) Person B is liable under this Act in the same manner and to the same extent as if person B had personally committed the offence.
- (3) The liability of person B under subsection (2) is without prejudice to the liability of person A.
- (4) Despite subsection (2), if proceedings are brought under that subsection, it is a defence if the defendant proves,—
 - (a) in the case of a natural person (including a partner in a firm), that—
 - (i) he or she did not know nor could reasonably be expected to have known that the offence was to be or was being committed; or
 - (ii) he or she took all reasonable steps to prevent the commission of the offence; or
 - (b) in the case of a body corporate, that—
 - (i) neither the directors nor any person involved in the management of the body corporate knew or could reasonably be expected to have known that the offence was to be or was being committed; or
 - (ii) the body corporate took all reasonable steps to prevent the commission of the offence; and
 - (c) in all cases, that the defendant took all reasonable steps to remedy any effects of the act or omission giving rise to the offence.
- (5) If a body corporate is convicted of an offence against this Act, every director and every person concerned in the management of the body corporate is guilty of the same offence if it is proved—
 - (a) that the act that constituted the offence took place with that person's authority, permission, or consent; and
 - (b) that he or she knew or could reasonably be expected to have known that the offence was to be or was being committed and failed to take all reasonable steps to prevent or stop it.

Compare: 1991 No 150 s 82A



New Zealand Legislation

Building Act 2004

• Warning: Some amendments have not yet been incorporated

387 Liability for acts of employees or agents of Crown organisations

- (1) [Section 386](#) does not apply if a person acting as agent or employee of a Crown organisation commits an offence under this Act.
- (2) If an offence referred to in [section 6\(1\)\(a\)](#) of the Crown Organisations (Criminal Liability) Act 2002 is committed by a person acting as the agent or employee of a Crown organisation, the Crown organisation must (without affecting the personal liability of the agent or employee) be treated for all legal purposes as having committed that offence.
- (3) Despite subsection (2), if proceedings for an offence referred to in [section 6\(1\)\(a\)](#) of the Crown Organisations (Criminal Liability) Act 2002 are brought against a Crown organisation in reliance on subsection (2), it is a good defence if the Crown organisation proves that—
 - (a) the organisation took all reasonable steps to remedy any effects of the act or omission constituting the offence; and
 - (b) either—
 - (i) no person involved in the management of the organisation knew or could reasonably be expected to have known that the offence was to be or was being committed; or
 - (ii) the organisation took all reasonable steps to prevent the commission of the offence.
- (4) If a Crown organisation is convicted of an offence against this Act, the chief executive or principal officer (however described) of the organisation and every person concerned in the management of the organisation is guilty of the same offence if it is proved—
 - (a) that the act that constituted the offence took place with that person's authority, permission, or consent; and
 - (b) that he or she knew or could reasonably be expected to have known that the offence was to be or was being committed and failed to take all reasonable steps to prevent or stop it.

Compare: 1991 No 150 s 82



New Zealand Legislation

Building Act 2004

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388 Strict liability and defences

- (1) Except as otherwise provided in this Act, in a prosecution for an offence of contravening or permitting a contravention of this Act, it is not necessary to prove that the defendant intended to commit the offence.
- (2) It is a defence in any prosecution that is referred to in subsection (1) if the defendant proves—
 - (a) that all of the following circumstances apply:
 - (i) the action or event to which the prosecution relates was necessary for the purposes of saving or protecting life or health, or preventing serious damage to property; and
 - (ii) the conduct of the defendant was reasonable in the circumstances; and
 - (iii) the effects of the action or event were adequately mitigated or remedied by the defendant after it occurred; or
 - (b) that the action or event to which the prosecution relates was due to an event beyond the control of the defendant, including natural disaster, mechanical failure, or sabotage, and in each case—
 - (i) the action or event could not reasonably have been foreseen or been provided against by the defendant; and
 - (ii) the effects of the action or event were adequately mitigated or remedied by the defendant after it occurred.

Compare: 1991 No 150 s 83