

Canterbury Earthquake – Some Advice for Businesses

We expect that your business like ours will have experienced some disruption due to the earthquake so we have prepared this fact sheet in anticipation of some of your questions.

Employment

You need to provide a safe workplace for staff – which may be in temporary premises. If staff can't come to work because the workplace is unsafe, they are still entitled to be paid.

If you have a safe workplace, staff have their usual rights to annual leave and sick leave. You need to have a good reason to refuse an application for annual leave.

If you are struggling to afford to pay staff or your business has closed indefinitely, then you need to consult with staff about the implications for their employment. Redundancy may be necessary but alternatives such as reduced hours or temporary suspension of wages by agreement should be considered. If you have less than 20 employees you may be eligible for the Government's wage subsidy scheme.

Contract law

Many contracts contain what is called a force majeure clause. That will determine what the consequences are for the parties if you are unable to perform services for clients due to the earthquake, or if others are unable to perform services for you. If a force majeure clause applies it is likely to excuse non-performance of contractual obligations, at least for a short while, once appropriate notice has been given to the other party.

At some point you will also need to consider which contracts you want to keep on foot and whether you have grounds to legally bring the other contracts to an end. Even if the termination clause does not apply, the contract may end due to legal "frustration" if performance is impossible now or radically different to what both parties anticipated. For example a contract to hire a painter to paint your building next week could be frustrated if the building has been destroyed in the earthquake. Contracts can also be terminated or varied by agreement between the parties.

Insurance: Material Damage

Most businesses will be insured against accidental damage to assets. When making a claim, it is important to notify your insurer as soon as possible. Late notification may lead to your claim being declined.

It is important to provide evidence of the damage to your insurer: take lots of photos, and, where possible, avoid disposing of damaged property until your insurer has advised you may do so. As there will be thousands of claims during this time, the process may be sped up if you provide a comprehensive description of damaged property - the make, model, serial numbers, etc.

It is important to check your policy carefully - there may be a limit on the total sum claimable. The insurance industry is aware that many businesses, especially smaller ones, may have under-insured as a means to reduce costs during the recession. If you are in a situation where your loss is significantly greater than the sum insured under your policy, you should speak with your financial advisers about how to manage this.

Insurance: Business Interruption

Business Interruption Insurance is sold as an add-on to Material Damage policies. It will compensate you for:

- Loss of profit associated with damage to the business property and sometimes (depending on policy wording) associated with being prevented access to the business (eg because of the cordon in the Christchurch CBD) Note that some policies will only cover loss of profit resulting from damage to insured property, so that if your premises have not been damaged in the earthquake but you have been unable to enter your office due to the cordon in the Christchurch CBD, you may not be covered.
- Costs involved in keeping your business running (eg, leasing temporary premises, paying staff to work extended hours during clean-up operations)
- Costs associated with preparing your claim (eg, engaging accounting experts)

Each policy will vary, so it is important to check the wording of your policy carefully and discuss this with your broker.

Attempt to agree with your insurer as to how the claim is to be formulated. You may wish to take legal advice if you are concerned about the approach being taken. Such advice is better taken early in the process, as insurance disputes can become protracted and expensive. You may also need to engage your own financial experts to assist with formulating the claim, who will work alongside your insurer's loss adjusters.

Business Interruption is a very complex area of Insurance, and claims take a long time to formulate and process. You may be able to receive temporary payments while the claim is processed.

Leases: Possible Cancellation Due to Earthquake Damage

Under the Auckland District Law Society Lease ("ADLS Lease") which is widely used for commercial premises in New Zealand, if the building which you occupy is destroyed or so damaged as to make your premises untenable, the lease terminates from the date of the damage. Your landlord may also terminate the lease if in their reasonable opinion the building requires demolition or reconstruction. In those circumstances the landlord must give you 20 working days notice to terminate, and this notice may be given at any time within three months of the damage occurring.

Under the ADLS Lease, if the building is not untenable, the landlord is required to spend any insurance money it receives to repair any damage, provided the necessary building permits or consents can be obtained. The government is putting in place legislation to speed up the building consent process and make it easier to obtain building consents to rebuild following the Christchurch earthquake. If however your landlord is unable to obtain building consent to carry out the required repairs, the lease will terminate.

Leases: Rent

If you are not able to occupy your premises due to damage caused by an earthquake, the Property Law Act 2007 provides that any rent or outgoings under the lease abate in a fair and just proportion to the destruction or damage until the premises are repaired and reinstated, and are again fit for your occupation. The ADLS Lease contains similar provisions. There is scope for argument between landlords and tenants as to when a building becomes fit for occupation, particularly given that many buildings will need to be reassessed by structural engineers following aftershocks. While some buildings may have received a "green sticker" after inspection by Council, there may still be reasons why a tenant may consider the premises to be untenable, and specific legal advice should be taken as to whether rent should abate. If you consider that your building is untenable, and that rent should cease to be payable, you should set this out in writing to the landlord as quickly as possible.

Leases: Improvement Rent Percentage

The ADLS Lease contains provision for an "improvements rent percentage". This provides that where a landlord is required by any legislation or other requirement to spend money on improving or altering a property, the landlord can charge an amount additional to the rent up until the next rent review date. The additional amount which can be charged is calculated by applying the improvement rent

percentage specified in the lease to the amount spent by the landlord on complying with the relevant requirements.

Improvement rent percentage provisions may be relevant where landlords are required by Council to upgrade their buildings to comply with new earthquake strengthening requirements. The improvement rent percentage provisions do not however apply to repairs of buildings which have been damaged, which are generally covered by landlord's insurance.

Resource Management

Businesses may experience delays in their dealings with Council in the upcoming period. Law changes pursuant to the earthquake legislation past under urgency allow local authorities in the Canterbury region to waive or extend various timeframes relating to the preparation and change of policy statements and plans. Obligations on local authorities to keep records and enforce district plans are also relaxed between 4 September and 4 December.

Should damaged buildings require works to be completed due to a risk to people, a local authority can require a building owner to carry out those works. Should the building owner not do so, the local authority can carry out the works themselves placing a liability on the building owner to pay for those works. Should this occur to you, you can make an application to the District Court within 5 days of the works for relief from your obligations to pay this cost. Changes have also been made to resource consent requirements that would normally apply for the demolition of buildings.

Disclaimer

This fact sheet contains general advice which is intended to be used only as a guide. Please contact us for legal advice specific to your situation.

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