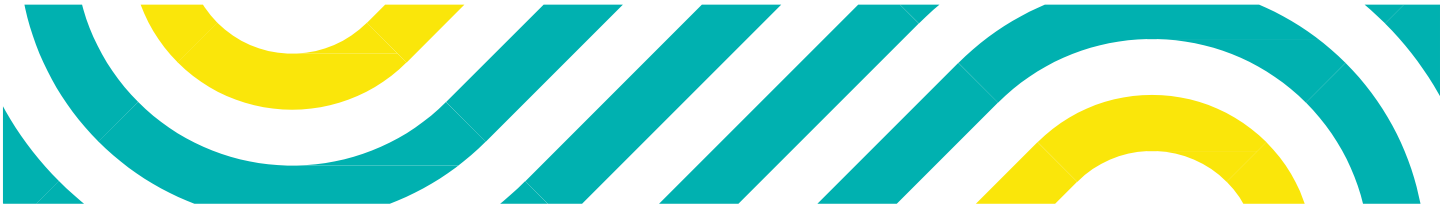


Earthquake update

Key issues businesses need to consider



Business interruption

The most relevant types of insurance for affected businesses will be material damage cover (which applies to physical damage to property) and business interruption cover (which applies to financial loss consequent on physical damage to property).

Business interruption insurance covers lost profit i.e. reduced turnover or an increase in expenses, caused by a business interruption. In most of these policies, the claim will be for the gross profits lost as a result of reduced turnover, or for the increased costs of continuing to operate through the interruption. It may also include items such as wages, professional costs and debts that need to be written-off. In some cases, there may also be cover for losses arising from damage suffered by specified third parties - for example, suppliers or subcontractors. As always with insurance, the terms of the policy determine what is covered.

Business interruption insurance is tied to physical damage. If there is no damage to insured property, or the loss of profit arises because of other reasons, there is no cover. The physical damage must be an effective cause of the business interruption - not just coincidental to it. Your business interruption policy will include an indemnity period that is a fixed period (normally around 12 months but sometimes up to 24 months) running from the date of the physical damage - here the earthquake. Businesses might continue to suffer lost profits after the indemnity period has expired but this is not covered by insurance.

Understanding your rights and obligations and making decisions early to ensure the viability of your business is fundamental. Make sure you review your policy and contact your insurer or insurance broker. Clarify any areas of uncertainty with the scope or meaning of the policy, or what is required of you. Ask about a progress payment on your claim to ease cashflow. If you have any queries about your case, seek legal advice.

Landlord and tenant issues

Many landlords and tenants will be currently taking stock of the damage caused to their premises following the recent earthquakes.

Under most commercial leases, the landlord will be responsible for repairs to the structure and exterior of leased premises. The tenant is generally responsible to repair glass breakages. Landlords should take steps to repair any damage within a reasonable time to avoid being liable for loss suffered by a tenant as a result of the damage. When a tenanted property has suffered damage, a fair proportion of the rent and outgoings should abate - but only until repairs or reinstatement have been completed. A tenant should not simply stop paying rent or withhold rent without explanation, nor unilaterally decide what proportion of rent it considers should cease to be payable. A sensible approach by a tenant would be to notify its landlord of the damage and the extent to which this affects its operations.

In assessing how much rent and outgoings should abate, the parties should consider not only the area of the premises which is damaged, but also the significance of the affected area to the tenant's business. For example, damage to a customer area of a retail tenanted property will have more impact on the tenant than damage to the same sized area of the premises used for storage. This may justify a higher proportion of the rent being abated.

There may also be instances of a tenant being unable to gain access to its premises because they are located within an area cordoned off, whether this is part of a general cordon or a limited area due to damage to a neighbouring property. Many provisions on rent abatement in older leases will not be relevant in this situation as the tenant's inability to access the property is not an issue between the tenant and its landlord. The current edition of the ADLS Deed of Lease does provide for this situation, and a fair proportion of the rent and outgoings will cease to be payable for the inaccessibility period. Landlords and tenants should check their lease documents to see if this applies.

Employment

Employers should be conscious that regular communication is even more important than usual. A single point of contact is useful for centralising communication, place updates on a company website, use text message broadcasts, and, if necessary, set up an 0800 free calling number which employees can call for daily updated news and employment information.

Payment of wages

Employers with business interruption insurance should have cover for payment of wages under this policy if they cannot operate due to damage.

Where there is no work available, there is no obligation on the employer to offer work. However, a general obligation exists for employers to pay employees who are 'ready, willing and able to work.' If employees are ready and willing to work but cannot work because their place of work is closed or damaged, then consider alternatives such as transferring them to other sites where possible or offering alternative work.

Check what is currently provided by the relevant employment agreement. For issues such as alternative duties and locations of work, it will depend on the circumstances and what is specifically agreed by the employer and employee in the terms and conditions of employment. A variation to duties and the employment agreement may be required to be negotiated and agreed.

Health and safety

It is the responsibility of any person conducting a business or undertaking (PCBU) to ensure the workplace is safe. A worker can refuse to perform work if they have reasonable grounds to consider that it may be dangerous. In such a situation, the PCBU should ensure that they have taken all reasonably practicable steps to provide a safe workplace and to ensure workers and others are not harmed. If the workplace is safe and the worker can access the workplace, an employer can refuse to pay that person if they refuse to attend work. In some circumstances, this may even become a disciplinary matter due to unauthorised absence. But before reaching this step, try and discuss and agree a pragmatic approach to such issues.

Please contact us for further information:



Brian Nathan

Partner, Nelson

d +64 3 539 5402

m +64 29 201 1746

brian.nathan

@duncancotterill.com



Hamish Grenfell

Partner, Nelson

d +64 3 539 5405

m +64 21 274 3352

hamish.grenfell

@duncancotterill.com



Jeremy Barton

Partner, Nelson

d +64 3 539 5407

m +64 21 274 9005

jeremy.barton

@duncancotterill.com



Judith Harper

Partner, Nelson

d +64 3 539 5408

m +64 21 310 361

judith.harper

@duncancotterill.com