



Brokerwise

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Flood Review Report

DISASTER MANAGEMENT PLAN TO BE UPDATED

The summer 2011 floods devastated many homes and properties in many parts of Queensland including low-lying suburbs in the city of Brisbane. As Brisbane has a subtropical climate and is situated on a flood plain, it is important to recognise that flooding such as this is a natural part of living in Brisbane.

The safety and protection of residents and their homes during and after a flood event is the highest priority for Brisbane City Council which is working hard to help Brisbane recover and be better prepared for the future. An important part of this recovery has been for Council to review current development standards used in

flood-affected areas to provide certainty and confidence for new residential development and redevelopment.

A Joint Flood Taskforce was formed to help Council respond to the flood event. The Taskforce recommended Council adopt an interim flood standard equal to the January 2011 flood level in most areas, except where the existing standard is higher. The Interim Residential Flood Level will be applied to new residential development and redevelopment proposals and to increase protection of essential services in new commercial and residential buildings. This means that new homes in flood-affected areas may have to be built higher than allowed by the current standards, depending

on where the property is located along the river. Council strongly encourages residents to consider new flood standards when rebuilding residential properties on a 'like for like' basis.

The Flood Response Review Board report is expected in mid to late May 2011 and will be available on the BCC website.

www.brisbane.qld.gov.au ■



Continue to Protect **YOUR INTERESTS**

INSURANCE MATTERS TO CONSIDER IF PROPERTY DAMAGE WAS SUSTAINED

In the aftermath of the recent flood and cyclone disasters there are several insurance matters to consider if you have sustained damage to residential or commercial buildings. Although the more visible and immediate task of repair is the primary focus, many people with damaged property need to turn their attention to protection of their interests in what remains of their homes or business premises. Some things to keep in mind include:

- If your premises can't be occupied ensure that your insurance cover is still valid whilst waiting for repair work to be undertaken.
- Check the un-occupancy clause in your policy wording.
- Make sure you have the appropriate insurance cover in place whilst your residential or commercial property is under repair. Depending on the dollar value of work to be undertaken your existing policy may cover the building for property damage and/or liability purposes whilst being repaired however you may need to take out a contract works policy or ensure your builder has an appropriate contract works policy in place to cover the existing structure and repair works. Some home and contents policies provide cover for alteration, repair, renovations or additions up to a certain dollar limit.
- If your contents have been moved to another situation or storage facility whilst your property is being repaired ensure they are covered at the new situation.
- If your building is a total loss, ensure that the land remains covered for liability purposes and that any new development is appropriately covered during construction and at the end of construction.
- Ensure that you update your postal address with your insurance provider if you have to move to a new situation.
- If in doubt on any insurance matters after suffering a loss please check with your insurance broker. ■

Pool Safety **NEW LAWS**

Queensland has some of Australia's toughest swimming pool safety laws and since they were introduced in 1991, the number of child drownings has halved. Even so the statistics are still unacceptable as over the past three years, 18 young Queenslanders have drowned in private swimming pools.

In December 2008, the Queensland Government announced the most comprehensive review of the state's swimming pool safety laws in nearly 20 years. The review focused on reducing the number of drownings and serious immersion injuries in swimming pools involving children less than five years of age.

The result is a series of new laws governing pool safety. Stage 1 was



introduced on 1 December 2009 and applies to new residential pools. The final stage, stage 2, commenced on 1 December 2010 and mostly affects existing swimming pools.

There is now one pool safety standard in Queensland that replaces 11 different pool safety standards. Under the new swimming pool safety laws:

- A pool safety certificate, issued by a licensed pool safety inspector, is required when selling, buying or leasing a property with a pool (pool safety certificates are valid for one year for a shared pool and two years for a non-shared pool).
- The pool safety standard applies to all pools associated with houses, units, hotels, motels, backpacker hostels, caravan parks, mobile van parks and other forms of short-term accommodation.
- The pool safety standard applies to indoor pools as well as outdoor pools.
- All swimming pools need to be included on the state-based pool safety register.
- Safety barriers are mandatory for all portable pools and spas

deeper than 300 millimetres.

The pool safety register is being populated with Local Governments' records of regulated pools across Queensland. You can now search for a property and view details of the most recent pool safety certificate if one has been issued for that property. If the register shows that there is a current pool safety certificate for a property this can be relied on for any sale or lease of a property with a regulated pool.

The deadline for pool registration has been extended by six months to enable the government and the community to focus on flood and cyclone recovery efforts. Pool owners now have until 4 November 2011 to ensure their pool is registered. Penalties of up to \$2,000 for non-compliance will apply after this time.

Pool owners have until 30 November 2015 to comply with the new pool safety standards, or earlier if their property is sold or leased before then.

This is only a brief summary of the new regulations; extensive information is available on the Qld Government website.

www.qld.gov.au/poolsafety ■

The Devil is in the Detail **PART ONE**

Many businesses become involved in contractual arrangements which will require agreement and signature. These contracts will naturally cover a wide range of different circumstances including labour hire, work performance, rentals or lease of premises or equipment.

Most contracts impose certain requirements and many contain severe penalties for non performance. Contracts that relate to insurance may use the

term 'indemnify, 'indemnity' or similar.

In some instances, insurance protection may not be available or if available, may be at a very high premium. An example is the lawn mower man who wanted the job of mowing the small, front lawn of a large conglomerate. To win the job, he was given a contract which he signed and then discovered that he could not obtain insurance to meet all the contract requirements. He

also found the few conditions he could obtain insurance protection, to the level the contract required, would cost him more than he quoted to mow the lawn.

Make sure the terms of a contract are acceptable to you. Have the contract checked by your lawyer and insurance broker before you sign. Your signature is your agreement that you signed it based on an informed decision. ■



The Devil is in the Detail **PART TWO**

One of the oldest problems with insurance documentation, particularly with commercial policies, is having the correct name or names of the insured on the policies.

Generally, when appointed to a new case concerning insurance litigation, lawyers will first of all examine the names on the policy. Often they find errors to the extent that one or more parties may not be covered under the policy. 'Murphy's Law' would state it is usually those parties that had the loss.

It is important that the names on any insurance policy include all persons or parties who have a legal interest in the property or policy. When listing the

insured on the policy, it is also important that their legal titles are correct and include ABN where applicable.

Some common examples of action required to avoid future problems include:

Sole trader or a partnership

Policies taken out when a business commences are usually in the names of the persons involved only. As the business grows it becomes a company and the policy is changed to the company name. It is important to remember that some of the original equipment, especially if the equipment was leased, may still be owned by the

original sole trader or partnership, therefore their names should remain on the revised policy in addition to the inclusion of the new company name.

Trusts

Policies should have the full title including the trustee and the trust names. Where a business is using a registered trading name, the owner/s of the business name should be included.

It is always better to have too many names than not enough and as additional persons become involved as stakeholders in the business their names too need adding to the policy document. ■

A Disaster Waiting to Happen

TANKER DRIVER SACKED FOR MOBILE PHONE USE

Using handheld mobile phones while driving - the law is clear but many of us have done it and many of us get away with it. Here's a story about a driver who didn't get away with it - as reported in a recent case before the Fair Work Australia tribunal.

A professional truck driver was seen by several witnesses using a mobile phone while at the wheel of a fuel tanker – you know, those steel missiles containing umpteen thousand litres of high octane fuel.

The driver had been previously warned by his employer for similar behaviour. The employer's policy on mobile phone use prohibited professional transport drivers from using hand held devices while driving. The employee admitted that he was aware of the employer's mobile phone policy and was duly sacked for serious misconduct.

The employee took his employer to the Fair Work Australia tribunal on the grounds of unfair dismissal.

Evidence at the tribunal heard testimony from 3 witnesses and other evidence which included a GPS report for the tanker, driven by the employee, showing that on the same day the employee had made nine calls or texts while driving the tanker, which the employee admitted to. This and other evidence clearly demonstrated that the employee had been in breach of his employment conditions and that the employer had done everything fair, legal and by the book in sacking him. In fact, had he not done so, the consequences to the employer company could have been very serious had an accident occurred subsequent to the employer being aware of the employee's misconduct. It could:

- adversely impact on the employer's insurance premiums or cause the insurer to decline indemnity in the event of an accident;
- impact adversely on the employer's reputation and thus upon its business; and
- have adverse consequences in relation to the employer's duty of care and other obligations to

fellow employees and members of the public including, potentially, exposing the employer to liability.

In dismissing the employee's application the tribunal found that the employee's repeated and flagrant breaches of the employer's policy and the driving laws were extremely serious matters and constituted gross and wilful misconduct.

Lessons for Employers

- It is important to have clear and consistent policies dealing with employee conduct.
- Employers should ensure that they adequately investigate employee misconduct.
- Fair Work Australia will consider the onerous obligations, for example workplace health and safety obligations, imposed on employers in "high risk" industries in terms of employee conduct and the seriousness of that conduct. ■

Reference: Ben Starkey v Cootes Transport Group Pty Ltd [2011] FWA 228

Assault Case

EMPLOYER NOT LIABLE

In the summer 2010 edition of Brokerwise we reported a decision of the Queensland Supreme Court of **Sapwell v Lusk** in which an employer was found liable for damages for personal injuries to their employee, a female optical technician, who was sexually assaulted by a customer in their optometry practice in suburban Brisbane.



The elderly male customer entered the back section of the shop, where the plaintiff was carrying out some repairs to the customer's spectacles, and carried out the sexual assault. The Judge at the trial found that the employer should have put in place adequate safeguards to ensure something like this did not occur, including providing a door that was capable of being locked, or provision of an infrared beam device that would be triggered if someone entered the back section of the shop.

The employer appealed that decision and successfully had the judgment overturned. The Court of Appeal found that the risk of something like this occurring was so small that it was not unreasonable for the employer not to have taken such precautions. They found that the judge at the trial focussed unduly on the circumstances of the incident rather than on the response of a reasonable person in the position of the employer having regard to the prospect of the risk of injury. They further found that given the particular circumstances, where the employee had previously dealt with the offender who was a seemingly perfectly respectable man in his 70s and who, on her own evidence, she found to be "quite pleasant", it was unlikely in any event that the plaintiff would have locked the door or switched on the infrared beam. They further found that even if the infrared beam had been activated it was not possible to determine that the attack would not have occurred in any event.

Whilst this is a good result for the employer in this case, it is a decision that was based on the particular facts of this case. The warning from our summer 2010 article still holds; that employers need to consider whether the current security provided for their employees is sufficient in light of the potential for claims such as this to occur. ■

wise.words

I shall not waste my days in trying to prolong them.

— Ian L. Fleming

"There is no such thing as can't; only varying degrees of don't want to."

— Tony Donohue

"News is what someone doesn't want published... the rest is all PR."

— H.L. Menchen

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The CQIB represents over 60 Queensland firms employing nearly 400 staff and placing in excess of \$500,000,000 in annual premiums. The CQIB charter is to maintain the level of professionalism of its members by the sharing of knowledge, information and ideas.



For more information visit www.cqib.org.au

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