

Navigating Liability, Risk and Corporate Contracts: Strategies for a Risk-Averse Era

Welcome

The Seminar will start at 8.30am

HOWDEN

Gold Sponsor



Silver Sponsor



Supporter



Disclaimer

This content contains Association of Building Compliance Regional meetings information and training material which has been provided by the Association and the guest speakers to guide and support the Association members.

The Association of Building Compliance makes no representation as to the appropriateness, effectiveness or safety of this material for anyone other than the Association members. The Association of Building Compliance will not be responsible or liable for any outcome caused by unauthorised reliance on this material.



House keeping



WIFI – Steps

1. Select Wifi – Millenium Conference
2. Select “visitors”
3. Connect code is “connect” all lowercase
4. Click connect at the bottom



What we will cover

- 8.00am Guests arrive – Tea, Coffee
- 8:30 am Opening and welcome from Trent Fearnley
- 8:40 am Insurance Council NZ - Susan Ivory & John Lucas
- 9:10 am Understanding the Activities of IQP’s “Independently Qualified Persons” -
interactive Lead by John Lucas
- 9:30 am Morning Tea
- 10:00 am Understanding Liability in Corporate Contracts – Teresa Aherne, David Hoskins
- 10:45 am Typical IQP engagement contracts and discuss any observable short comings
and how they could be improved. - Teresa Aherne, David Hoskins, SWL
- 11:15 am Claim Scenarios – René Hattingh, Howden
- 12:00 pm Lunch
- 12:45 pm Liability Insurance - Howden René Hattingh
- 1:45 pm Conclusions and Wrap up – Trent, John, Susan and Rene
- 2.30 pm Networking function in Atria bar

Before we start.....

- You won't always necessarily agree with My view or that of others, but that is okay.....
- Remember, we don't all see things the same way.....
- And always remember there is no stupid question...
.....the only stupid question is the one you don't ask
- *All information is given with the best of intentions however cannot be solely relied on for compliances.*



Why?

- Events such as Al Noor Mosque and Loafers Lodge
- Conference 2024
- Changes to IQP Registration
- Higher Insurance Premiums
- New Building Act Section 108A



108A Duties of independently qualified person

- (1) An independently qualified person must not state (whether in a building warrant of fitness or any other document) that the inspection, maintenance, or reporting procedures in a compliance schedule relating to a specified system (for example, a lift or ventilation system) have been complied with during the previous 12 months if those inspection, maintenance, or reporting procedures for that system have not been fully complied with during that period.
- (2) Every person who acts in breach of subsection (1) commits an offence.
- (3) It is a defence to a prosecution for an offence against subsection (1) if the defendant proves that—
 - (a) the failure to comply with subsection (1) was due to—
 - (i) a reasonable mistake; or
 - (ii) reasonable reliance on information supplied to the defendant by another person; or
 - (b) the defendant took reasonable precautions and exercised due diligence to avoid the failure.
- (4) A person who commits an offence under subsection (1) is liable on conviction,—
 - (a) in the case of an individual, to a fine not exceeding \$50,000;
 - (b) in the case of a body corporate, to a fine not exceeding \$150,000.

Section 108A: inserted, on 26 November 2024, by [section 12](#) of the Building (Earthquake-prone Building Deadlines and Other Matters) Amendment Act 2024 (2024 No 49).



Navigating Liability, Risk and Corporate Contracts: Strategies for a Risk-Averse Era

Association of Building Compliance - Liability Workshop 5 June 2025

Susan Ivory & John Lucas, Insurance Council of New Zealand

About ICNZ

- The Insurance Council of New Zealand | Te Kāhui Inihua o Aotearoa is the representative organisation for general insurance companies in New Zealand
- Our members collectively write more than 95% of all general insurance in New Zealand and protect well over \$2 trillion of New Zealanders' assets
- We advocate to:
 - sustain a strong and affordable insurance sector
 - enhance the safety and protection of all New Zealanders by strengthening resilience and reducing the risks of climate change to communities and the economy.



Government Action in Building Regulation

The Government has decided:

- Granny flats up to 70 square metres will be able to be built without resource or building consents.
- Approved building firms, plumbers, and drainlayers will be allowed to sign off their own work (self-certify).
- It will be easier to bring overseas building products into New Zealand.

The Government is considering:

- Increasing the use of remote inspections.
- Reviewing the liability settings for Building Consent Authorities.

Insurers Views on Construction Liability



- Long tail liability – Building Act 10 Year Long Stop
- Granny Flats without a building consent
- Remote Inspections – Is this really a good idea?
- Building Act New Section 108A

Morning Tea

We will resume at 10.00am

HOWDEN

Gold Sponsor



Silver Sponsor



Supporter



Navigating Liability, Risk and Corporate
Contracts:
Strategies for a Risk-Averse Era

5 June 2025

Liability

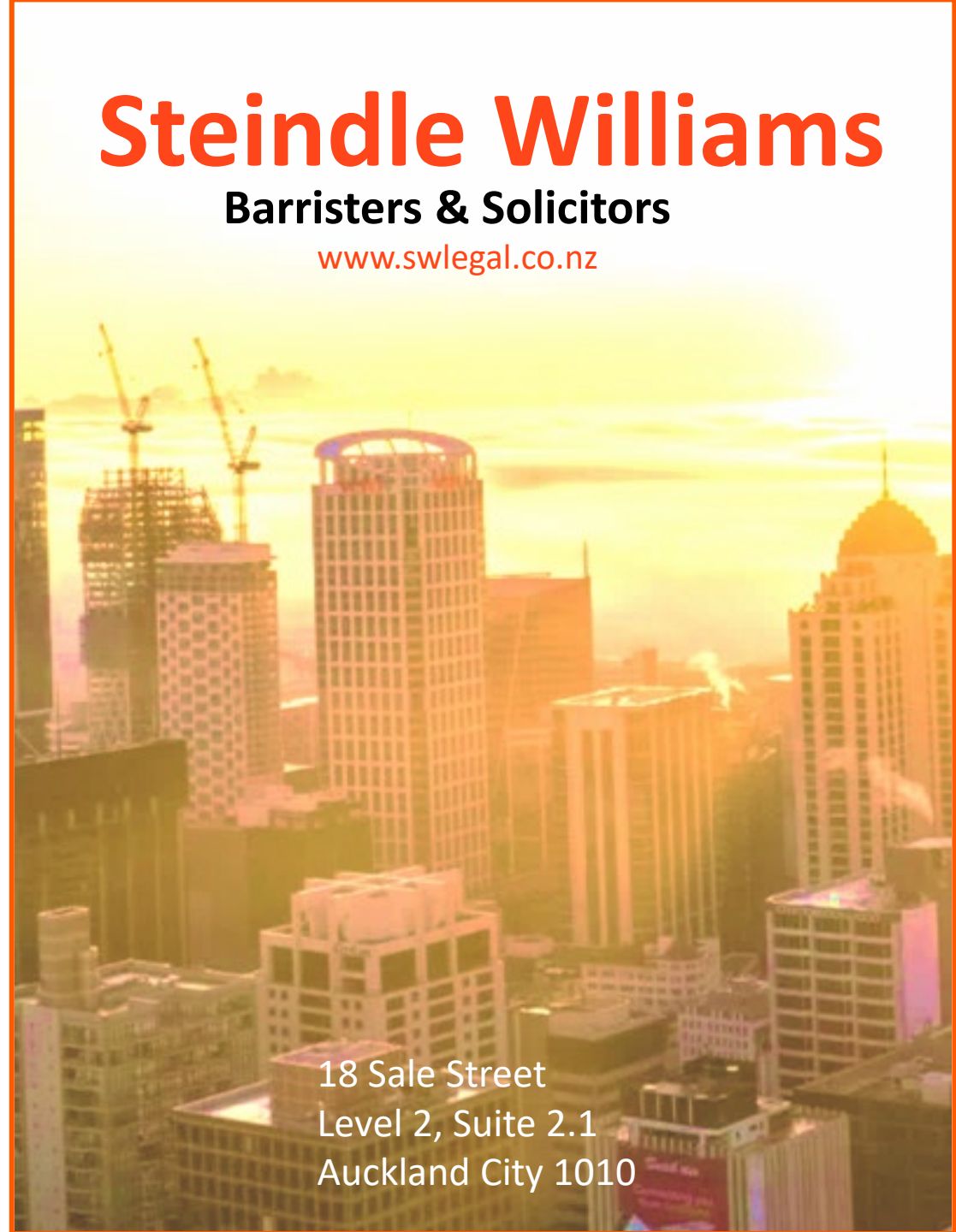
Dave Hoskin - Partner

Teresa Aherne – Special Counsel

Steindle Williams

Barristers & Solicitors

www.swlegal.co.nz



18 Sale Street
Level 2, Suite 2.1
Auckland City 1010



Contractual Liability

Sources of contractual liability:

- Verbal contracts
- Implied terms
- Written contracts



Verbal Contracts

- Convenient / less administration
- Still a binding contract
- Harder to prove the terms
- Greater exposure to personal liability



Implied Terms

Sources of implied terms:

- Legislation: e.g. Consumer Guarantees Act / Fair Trading Act, Contract and Commercial Law Act
- Representations between the parties – e.g. see Section 37 Contract and Commercial Law Act 2017 damages for misrepresentation "entitled to damages....as if the representation were a term of the contract that has been breached"
- Other – can be implied retrospectively by the Court



Implied Terms

Terms can be implied into verbal or written agreements:

- The term must be reasonable and fair
- It must be so necessary so that the contract cannot be performed without it
- It must be so obvious that it ‘goes without saying’
- It must be capable of being a ‘clear’ term
- It must not contradict any other term

Ward Equipment Ltd v Preston [2017] NZCA 444 per *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 (PC)



Written Contracts

Written Contracts:

- Are easier to prove and enforce the terms
- Can reduce the risk of dispute since both parties agree to the terms before signing
- Important for any limitations of liability

NB:

- When relying on limited liability company (to limit exposure personal liability)



Defences Contract

Possible Defences to a Breach of Contract Claim

- Denial of breach: Evidence of compliance with contractual or implied terms will be necessary. This will be supported by effective risk management / processes.
- Denial of terms: either that the claimant's interpretation of a term is disputed or that an implied term claimed was part of the contract
- Misrepresentation / incorrect information provided by another party and relied on (this will often take the form of a contribution claim against either the claimant themselves or another party).





Statutory Liability

- Relates to a breach of an Act or other legislation / regulations (e.g. The Building Act, Health & Safety in Employment Act)
- Can be pursued by the regulatory body who enforces that legislation
- Can be an additional cause of action in civil actions (in addition to / instead of contractual liability)



Cause of Action

Who can allege a breach of statutory duty under the Building Act

- Can be pursued by MBIE but also can be the subject of civil causes of action. They can be taken outside a contract (e.g. by parties who were not involved in a contract)
- “ ... a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty”

Harriman v Attorney-General CIV-2012-485-881 4 November 2015



Form 12A

Compliance

The inspection, maintenance, and reporting procedures of the compliance schedule have been fully complied during the 12 months prior to the date stated below in relation to the following specified system(s):

State specified system(s):

Signature of
**Independent qualified
person (IQP)**

(of owner/agent on behalf of and with the authority of the owner)

Full name:

Date:

DAY

MONTH

YEAR



Statutory liability - IQP

The Person who signs the form is the liable party:

108A Duties of independently qualified person

(1) An independently qualified person must not state (whether in a building warrant of fitness or any other document) that the inspection, maintenance, or reporting procedures in a compliance schedule relating to a specified system (for example, a lift or ventilation system) have been complied with during the previous 12 months if those inspection, maintenance, or reporting procedures for that system have not been fully complied with during that period.

(2) Every person who acts in breach of subsection (1) commits an offence.

Section 108A: inserted, on 26 November 2024, by section 12 of the Building (Earthquake-prone Building Deadlines and Other Matters) Amendment Act 2024



Statutory Defences

It is a defence to a prosecution for an offence against subsection 108A(1) if the defendant proves that;

- (a) the failure to comply with subsection (1) was due to—
 - (i) a reasonable mistake; or
 - (ii) reasonable reliance on information supplied to the defendant by another person; or
- (b) the defendant took reasonable precautions and exercised due diligence to avoid the failure.

NB: It is not a defence that an employee / subcontractor carried out the inspections because of Section 386 Building Act: Liability of principal for acts of agents. An employer or contractor is liable under the Building Act in the same manner and to the same extent as if they had personally committed the offence.



Reasonable Mistake

What is a reasonable mistake ?

Honest mistake goes to culpability, but it is not a proxy for reasonableness. Reasonableness is assessed by reference to the totality of the circumstances, including whether the person infringing ... reasonably ought to have known better.

(Stird Potential Ltd v Roycroft [2019] NZHC 429 [13 March 2019])

Considering similar defence under Sale and Supply of Alcohol Act 2012 referring to Courts previous comments considering Local Elections and Polls Act 1976)



Reasonable Reliance

What is reasonable reliance on information ?

it may not be enough for a defendant to prove reliance on information supplied by another when the defendant has simply closed its eyes to consideration of whether or not the information was in fact reliable. Willful blindness will not suffice.

Commerce Commission v Health Pride Ltd 1998 WL 36021085 (considering similar defence under Fair Trading Act 1986)

In deciding whether the reliance was reasonable, factors such as whether the advice was impromptu or considered, oral or written by a person with authority or experience or anonymous, and the nature of the advice may be taken into account as well as the knowledge of the defendant.

Commerce Commission v Ecoworld New Zealand Ltd 2005 WL 3701905 / Cardin Laurant Ltd v Commerce Commission HC Auckland [1990] 3 NZLR 563; (1989) 3 TCLR 470; (considering similar defence under Fair Trading Act 1986)



Reasonable precautions

What are reasonable precautions to avoid the failure ?

"The taking of such precautions and the exercise of such diligence involves, or may involve, two things. First of all, it involves the setting up of an efficient system for the avoidance of offences under the Act. Secondly, it involves the proper operation of that system. ..

Whether or not he has done so is a question of fact and while it may be that the appointment of a competent person amounts in the circumstances of a particular case to the taking of all reasonable precautions, if he does nothing after making the appointment to see that proper steps are in fact being taken to comply with the Act, it cannot be said that he has exercised all due diligence. "

Collins v Openshaws Midway Ltd High Court NZ 19 February 1993 HC Auckland AP19/92, 19 February 1993 per *Tesco Supermarkets Ltd v Natrass* (1970) 3 All ER 357 (re breach of Trade Descriptions Act 1968 UK)





Exposure

Exposure = amount + time

- Caps on Liability (maximum amounts)
- How liability is shared between defendants
- Limitation Periods



Can liability be capped

Tauranga City Council v Harrison Grierson Holdings Limited [2024] NZHC 714 [28 March 2024] (under appeal to the Court of Appeal)

Contract term of engineers with limitation cap of \$500,000 was upheld.

However it is unlikely that IQPs can limit liability as the same case stated:

"The similarity in function between territorial authorities and private certifiers was a reason ...that liability could not be limited ... The similarity in function does not however, apply to engineers..."

I accept the defendants' submission that one limb of the Court's reasoning related to the special role of territorial authorities and private certifiers and does not therefore apply to the defendants [Harrison Grierson]"

Tauranga City Council v Harrison Grierson Holdings Limited [2024] NZHC714 [28 March 2024] considering **Body Corporate 207624 v North Shore City Council** [2012] NZSC 83; [2013] 2 NZLR 297 [Spencer on Byron]



How liability is shared

Joint and Several Liability

Under joint and several liability each defendant held liable for the same damage is liable for the whole of that damage, regardless of how many other defendants are also liable for the damage (but may seek contributions from the other defendant).

If these individuals are "concurrent tortfeasors," then each can be held liable for all of the damages, even if their individual contribution to the overall harm was minor.

There is a right for a defendant to claim contribution between tortfeasors under Section 17(1)(c) of the Law Reform Act 1936. However, this right may be of no benefit e.g. where a company has become insolvent.

Joint and several liability is the reason that high policy limits are required



Joint and Several Liability

New Zealand is unlikely to move from joint and several liability

Law Commission Report 3 June 2014 stated:

"[The] shift to proportionate liability in Australia has been less successful than first envisaged. ...the proportionate system has caused "considerable increase in the complexity and cost of litigation and made settlement by way of an effective offer of compromise or negotiation and mediation more difficult""

Recommended: "Where two or more civil defendants are held liable to a plaintiff for the same, indivisible damage, the basis for determining liability should continue to be that of joint and several liability. "

(The Law Commission did recommend that the Court be given discretion where a defendant played a minor role – but this recommendation has not been adopted into the Law Reform Act)



Limitation period

Claim for Contribution

10 year "longstop"

*"...No relief may be granted in respect of civil proceedings relating to building work if those proceedings are brought against a person **after 10 years** or more from the date of the act or omission on which the proceedings are based."* s 393(2) Building Act 2004

Section 34 of the Limitation Act 2010 provides that a claim for contribution must be made within "2 years after the date on which A's liability to B is quantified by an agreement, award, or judgment."

Beca Carter Hollings & Ferner Ltd v Wellington City Council [2024] NZSC 117



Summary : Exposure = amount + time

Amount of Loss Risk

Joint and Several Liability:

In providing cover under a policy, the insurer is exposed to the risk of the whole of a claim (even where the ICP has only a small part of liability).

Time Period that could be engaged – following Supreme Court Beca Carter 2024 decision

Limitation Period:

If a defendant was sued:

- just within 10 years from the date of their breach
 - 5 years of litigation ensued
 - the Court's decision took 1 year to release
 - and the defendant is found liable and then seeks contribution from an IQP just within the 2 year period
- = 18 years from when the breach occurred

The risk of potential claims can therefore be significant and continuing





Common Clauses

Common clauses in contracts:

- Indemnities
- Warranties
- Limitations of Liability



Common Clauses

Indemnities – passing risk – may increase liability

Changes the risk of something happening from one party (or both) to another. An indemnity clause in a contract is a promise by one party (the indemnifier) to cover the losses or damages of another party (the indemnitee) if certain specified events occur.

Warranty – guarantee – may increase liability

A warranty is a contractual promise or assurance made by one party to another regarding the existence of certain facts or conditions, often relating to quality.

Limitation of Liability – operates to limit damages

Any limit on the amount one party can seek from another in the event of a breach or other legal issue.



Contractual Limitation of liability

Caps for liability of IQP's would likely be prohibited for the same reasons as private certifiers:

"The similarity in function between territorial authorities and private certifiers was a reason ...that liability could not be limited ... The similarity in function does not however, apply to engineers...

Tauranga City Council v Harrison Grierson Holdings Limited [2024] NZHC714 [28 March 2024] *Body Corporate 207624 v North Shore City Council* [2012] NZSC 83; [2013] 2 NZLR 297 [Spencer on Byron]

However having a limited liability company, together with adequate risk management procedures against personal liability may be effective in limiting exposure to professional risks



Drafting and negotiating contracts

Avoiding issues of interpretation

Future proofing

Additional duties

Clauses excluding misrepresentations

Section 25 Companies Act



Plain language

Responsibilities

If the meaning of a term is ambiguous or could have a number of interpretations, this is more likely to lead to disputes and potentially costly litigation.

The contract should spell out who is responsible for what.

This can be set out in step by step form e.g. you agree to provide [list of information required including any other information which would assist in the provision of our services] we agree to [list of services step by step] .

You can also list the assumptions you have relied on.



Future Proof Contracts

Additional duties

If you are going to have a written contract at all, it should contain terms that are useful and can help protect you from future risk / costs. e.g. - include a list of the documents required from your client.

The terms of a contract can provide the ability to resolve issues, enforce payments and defend your position when things do not go to plan.

Plan the terms to assist if there are company changes/acquisitions so that the contract can be an asset and part of the value of the business (e.g. assignment clauses).

Be careful not to create a duty when you include terms: e.g. that certain items will be at any additional cost (e.g. repairs work will be additional). This could be interpreted as acceptance that the duty to identify and carry out repairs is on the IQP and the only obligation the owner has is to pay.

Instead use terms like "If we agree to carry out those repairs / [additional service] this will be at any additional cost to you of labour plus materials".



Dispute Resolution

Frankenstein's Monster

Dispute resolution clauses can provide an agreed process for resolving a dispute and ideally avoid the costs involved in litigation.

While they do not replace the role of the Courts or remove the rights of parties to seek justice through civil litigation, they can encourage parties to engage with the issues and negotiate early.

Often parties will find terms from other contracts and include them because they look formal. This can create problems where those terms are inconsistent with other terms in the contract, or where the language is unclear.

If you are including a term from a different source, make sure you are including it because that particular term is useful in the context of your contract.



Section 25

The Companies Act requires that:

A company must ensure that its name is clearly stated in:

- (a) every written communication sent by, or on behalf of, the company;*
- and*
- (b) every document issued or signed by, or on behalf of, the company that evidences or creates a legal obligation of the company.*

For consistency, make sure the full company name with "Limited" or "Ltd" is on every sign off of every email.



Risk Management

Good Risk Management Processes can

- Help you market your business
- Distinguish you for your competition
- Assist in obtaining better insurance terms
- Safeguard against liability



Show your work

Processes that show how the job was done

“No one comes to work wanting to do a bad job”.

Sydney Dekker Professor in the School of Humanities, Languages and Social Science at Griffith University in Brisbane

The rate of errors/omissions will be far less than the frequency by which work is done correctly. However, exposure to liability can sometimes arise not because there were actually errors or omissions when doing the work but because it cannot be shown that adequate processes existed and were followed.

Litigation relating to building defects often involves a large number of defendants who then cross claim against each other. Where there are gaps in the process followed this presents as a weakness and can be a target for allegations of errors / omissions.

Effective systems processes, which can be shown to have been followed, can protect against exposure to liability..



Quality of Evidence

A defence to a claim is only as good as the evidence supporting it.

Where there is conflicting evidence, the Court will decide civil matters 'on the balance of probabilities' i.e. what probably happened.

Recall of a single or several highly specific details does not guarantee that a memory is accurate or even that it actually occurred. In general, the only way to establish the truth of a memory is with independent corroborating evidence.

Guidelines on Memory and the Law: Recommendations from the Scientific Study of Human Memory
- British Psychological Society Research Board 2010



Having a 'good' memory

Having what you believe is a good memory is not a reasonable system

"what gets encoded into memory is determined by what a person attends to, what they already have stored in memory, their expectations, needs and emotional state.

This information is subsequently integrated (consolidated) with other information that has already been stored in a person's long-term, autobiographical memory.

What gets retrieved later from that memory is determined by that same multitude of factors that contributed to encoding as well as what drives the recollection of the event"

The fallibility of memory in judicial processes: Lessons from the past and their modern consequences 2015
Feb 23;23(5):633–656

Department of Psychology, Centre for Memory and Law, City University London, London, UK



Risk Management Systems: Setting up a system, then complying with it

First of all, it involves the setting up of an efficient system for the avoidance of offences under the Act. Secondly, it involves the proper operation of that system. ..

Whether or not he has done so is a question of fact and while it may be that the appointment of a competent person amounts in the circumstances of a particular case to the taking of all reasonable precautions, if he does nothing after making the appointment to see that proper steps are in fact being taken to comply with the Act, it cannot be said that he has exercised all due diligence. "

Collins v Openshaws Midway Ltd High Court NZ 19 February 1993 HC Auckland AP19/92, 19 February 1993 per ***Tesco Supermarkets Ltd v Natrass*** (1970) 3 All ER 357 (re breach of Trade Descriptions Act 1968 UK)



Efficient Systems

Efficient Systems are: contemporaneous, mandatory and simple

-

Identifiable in time ("contemporaneous"). They can be shown to have been complied with at the time (i.e. not possible it was constructed retrospectively).

-

A requirement for everyone. In other words, the work is not complete until each step is shown to have been completed. E.g. if checklists/notes are a requirement of the process, then the work is not done until the process has been followed.

-

Easy to use, which usually means in the simplest possible form. Think photographs, checklists and journals which show they were scanned/saved at the time.





Insurance Issues

- Exclusion of contractual liability
- Dual retainer
- Wasted Costs



Exclusion of contractual liability in insurance policies

Insurance policies often contain a contractual liability exclusion

Example:

This policy does not cover any claim arising from or in connection with any contractual liability, warranty or guarantee assumed or provided by the insured.

However, if the Insured can show that was that liability was not caused or contributed to by the contractual term, then the insurer will not be permitted to rely on the exclusion (Section 11 of the Insurance Law Reform Act 1977 and in future Section 71 of the Contracts of Insurance Act).

In other words, liability pursuant to an indemnity or warranty can only be excluded if the liability would not otherwise have existed or would have been less.



Defence of claims by insurers – common terms

The lawyer acting owes duties directly to the IQP direct and also the insurer

Dual retainer is where a lawyer is acting for two parties with related but not identical interests in a proceeding. Where a lawyer is acting in litigation on behalf of both an insurer which provides professional indemnity insurance and the indemnified party (e.g an IQP, the lawyer owes duties to both. That means that the lawyers must act in the interests of the IQP and also the insurer.

If the two interests are aligned, the lawyer can act for both. If the interests change or are no longer aligned, the lawyer must stop acting. E.g Gallaway v National Standards Committee v New Zealand Law Society Te Kāhui Ture o Aotearoa[2020] NZHC 3384.

There will be a cost to defend even where no liability is proven

Wasted Costs The High Court Rules contain rates and steps designed to deliver to the successful party approximately two thirds of the daily rate considered reasonable. E.g. Corrick v Silich [2017] NZHC 2033.

This means that, even where 100% successful, there will still be 'sunk' costs. These are often referred to as "wasted costs" and are usually considered in the context of settlement negotiations in terms of making an offer (even where no liability is accepted).



Personal Liability

Can arise because of:

- Fair Trading Act
- Omissions
- Negligent misrepresentation
- Companies Act

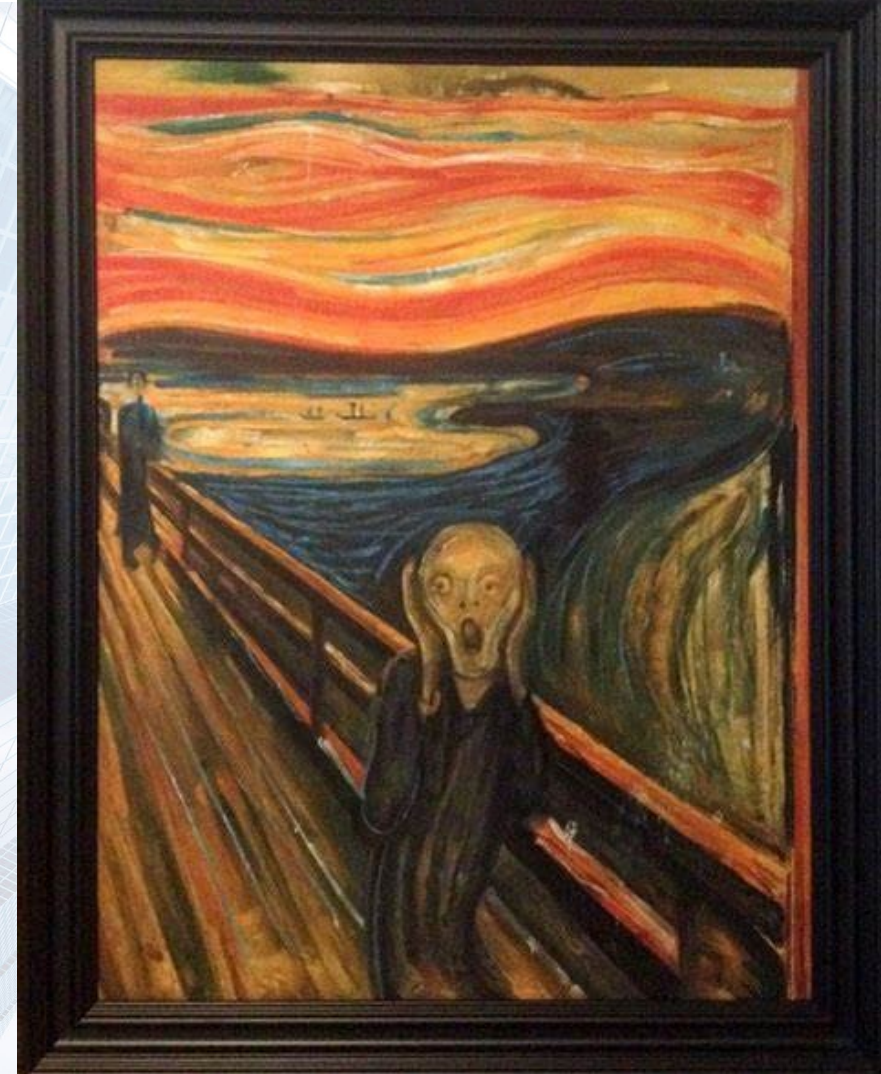
-

Alter ego

- Agent / employees

Mere conduit defence

Limited liability v Personal Liability



Fair Trading Act

Fair Trading Act

A director may be directly liable under the FTA for their own personal conduct in trade, even where acting on behalf of their company. *Waiwera Water New Zealand Limited v David Murray Melrose* [2019] NZHC 3399 [18 December 2019]

Misleading conduct: Section 9 of the FTA states no person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

It is not necessary under section 9 to prove an intent to mislead. *Commerce Commission v New Zealand Nutritionals (2004) Ltd* [2016] NZHC 832

Liability under section 9 can extend to a defendant who was not trading directly on his or her own account, but rather was acting as a director (or senior employee). *Bhargav v First Trust Ltd*[2024] NZHC 1054 [2 May 2024] (Vendor company purchased a property known to be leaky and on-sold it (post renovations) when it was still leaky.

The misleading conduct of one person can be deemed to be the conduct of another. *The objectives of the FTA would be frustrated were directors able to avoid personal liability under section 9 by procuring third parties, acting under the authority of that director, to engage in misleading and deceptive conduct.* *Bhargav v First Trust Ltd*[2024] NZHC 1054 [2 May 2024]



Omissions

Misstatement

Incomplete Information

The provision of information which the provider knows is incomplete can constitute misleading or deceptive conduct. *Steel v Spence Consultants* [2017] NZHC 398.

Negligent misstatement

Negligent misstatement: when a person relies on a statement made or advice given to them by a person with special skills from which loss results. In such circumstances, a duty of care may exist and the person providing the statement or advice can be liable for the loss that flows. A defendant is deemed to have assumed responsibility if they foresaw or ought to have foreseen that the plaintiff would place reasonable reliance on the statement or advice.

MacFarlane v Informed House Inspections Limited & Sewell [2023] NZHC 934 [26 April 2023]



Companies Act

Limited company – personal duties

How a company is run can result in personal liability, such as a breach of duty to creditors/ employees in the event that the company becomes insolvent.

In 2023 the Supreme Court emphasised that directors must not allow business to be operated where it would create a substantial risk of serious loss. *Yan v Mainzeal* [2023] NZSC 113

In September 2024 the High Court found that a director had breached duties by failing to prepare financial statements, improve revenue streams, engage with tax authorities or seek external advice. The director was held liable for \$342,632 for reckless trading. *NZ LJ Food Express v Zeng* [2024] NZHC 2517 [4 September 2024]

It is not necessary to be named or registered as a ‘director’ in order to have obligations as a director under the Companies Act. The definition of director includes any person “*who controls or who is entitled to control the exercise of powers*”.



Alter ego

Liability of a director as principal of a company is commonly imposed where that director is the “alter ego” of the company and the only person authorised to act on its behalf. *Hyzon Motors Inc v Bartlett* [2024] NZHC 3687 [5 December 2024]

Agents / Employees

An employer or contractor is liable under the Building Act in the same manner and to the same extent as if they had personally committed the offence. Section 386 Building Act: Liability of principal for acts of agents



Mere conduit

An agent may be personally responsible for making misleading or deceptive statements or misrepresentations, unless the “mere conduit” defence is available. *Birnie v Outward Ltd* [2024] NZHC 2665 [16 September 2024]

However:

The conveyor of misleading or deceptive information must make it plain to the recipient that they are merely passing on information without giving the impression the conveyor has first hand knowledge of the information.

Red Eagle Corporation Ltd v Ellis [2010] NZSC 20

When relaying information from other parties ensure that you:

Actively disown or clearly qualify information to avoid liability;

Clearly attribute statements to the entity that provided the information;

Disclaim accuracy e.g., “not verified by [IQP];

Advise Building owners to do their own due diligence.

(refer *Weber v Hastie* [2022] NZHC 3264)



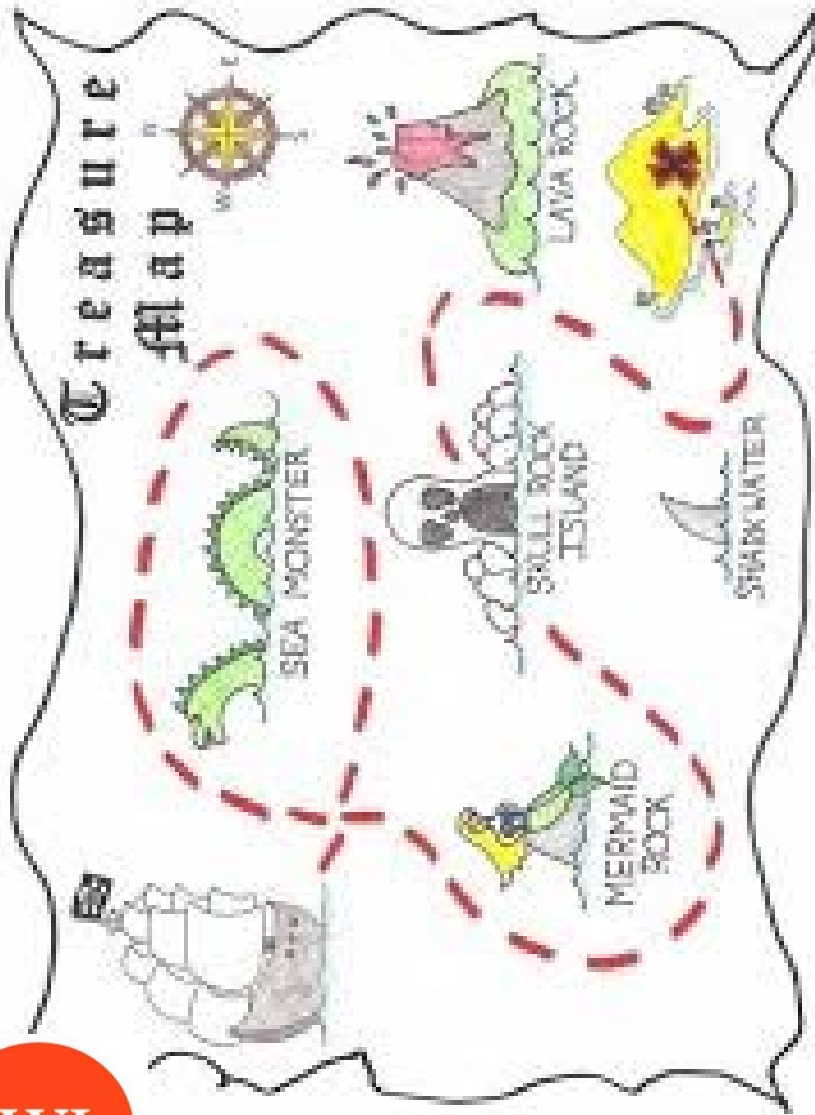
Limited liability -v- Personal Liability

While the definition of IQP under the Building Act specifies 'a person', the Act acknowledges that IQPs can act as a company "body corporate" (e.g. see Section 108(A)(4)(b)).

Where personal negligence is asserted the Court is to examine whether there is a sufficient relationship of proximity between the director and plaintiff. The primary question is likely to be whether the director (or humble employee) exerts a sufficient degree of control over the relevant acts or omissions. *Hsu v Mahoney* [2021] NZHC 1611

If the defendant personally carried out the observations as required [for the Building Act], there is a reasonable argument that the defendant has potential liability in negligence to the plaintiffs. *Body Corporate 444813 v Auckland Council* [2022] NZHC 1346 [9 June 2022]





Asset Protection

- Asset protection allows you to benefit from and maintain control over assets without owning the assets.
- Trusts are a great way for protecting non-income earning assets from creditors, like the family home or boat;
- Your assets can be structured to avail of lower interest rates / avoid the higher (39%) interest rate for Trusts, such as with Portfolio Investment Entities (PIEs) or by distributions to certain beneficiaries
- Assets should be transferred well before any risk of a creditor claim arises to protect from being voided / clawed back



Steindle Williams

Barristers & Solicitors

www.swlegal.co.nz

18 Sale Street
Level 2, Suite 2.1
Auckland City 1010



Insurance - Claims

- Understanding IQP Liability Risks - Grounds for Discipline or Liability Claims

- Did supervised work negligently or incompetently or outside of competency

service or inappropriate behaviour

- Obtained registration for specified systems dishonestly

- Carried out work on systems - not registered for

- Failure to provide correct documentation - consistently

- Misrepresented competence on specified systems

- Provision of false information / documentation to building owner of City Council

- Substantiated customer complaints, re quality of



- Common Causes of PI Claims

1. Client Selection

2. Delegation of inspections to those unqualified and deemed competent

3. Specified systems that did not perform its intended function or continue to perform

4. Lack of supervision/ failure to seek assistance

5. Advising outside your area of expertise

6. Not following correct process

7. Time Pressure resulting in E&O

8. Mental Health and Wellbeing of Insured Person

9. Breach of Contract



Claim 1:

Fire in building – resultant property damage – landlord insurance paid out, but insurer subrogated against the installer of the sprinkler system, sprinkler system certifier and IQP who continues to inspect it – allegations defective workmanship/faulty/inadequate passive fire system – IQP incorrect/inadequate certification in respect of passive fire system

Triggers:

Resultant Property damage
Allegation – incorrect installation/certification/professional negligence

General Liability and Professional Indemnity policies will respond

Claim 2:

Leaky building claim – resultant property damage – landlord claimed against Council, contractors, engineers and IQP's – allegations against the IQP specifically was breach of professional duty - incorrect certification – new standards - negligence to not know that the regulations have changed and new standard should have been certified for.

Triggers:

Resultant Property damage / financial loss

Allegation – breach of professional duty

Left field claim

Claim 3:

Building Inspection – failed ccc – no property damage – financial loss landlord claimed against building inspector and IQP’s for cost in relation to failed consent applications and missed opportunity. Allegations against the IQP specifically was breach of professional duty - incorrect certification – new standards - negligence to not know that the regulations have changed and new standard should have been taken into consideration. Additional costs incurred.

Triggers:

Allegation – breach of professional duty – negligent / acting outside of scope

- PI Claims – Important Considerations

As Professional Indemnity policies are written on a “[claims made and reported basis](#)”, this requires the firm to provide immediate notice to insurers of any claim made against the firm.

This requirement also extends to [circumstances](#) which the firm or any Insured (refer to Definition of Insured within policy wording) are, or become aware, of [that might lead to a claim](#).

Late Notifications: Any claim or notification of a circumstance that could give rise to a claim is made after the expiry date of the policy then Insurers may decline the claim for either reporting outside the policy period or decline the claim as they may have been prejudiced

[PI Claim protocol:](#)

Preliminary Notice

Letter of Claim, Investigation

Letter of response / letter of settlement

Commence Court Proceedings

Commence negotiations

Lunch Break

We will resume at 12.45pm

HOWDEN

Gold Sponsor



Silver Sponsor



Supporter



Howden Insurance Brokers

Insurance market update and Liability of IQP
Work – June 2025



HOWDEN



HOWDEN

Agenda

1. Howden Insurance Brokers overview
2. Insurance market update
3. Insurance cover summaries
4. Changes to the Contracts of Insurance Act 2024



Rene Hattingh

Head of Technical Delivery, Howden
Broking NZ

Howden in the Pacific

Howden has global scale and local focus

\$42bn+

Premium placed into international markets

20,000+

Howden specialists across the globe



115+

Territories (including our partners)

Offices

- Auckland
- Christchurch
- Dunedin
- Thames
- Hamilton
- Wellington

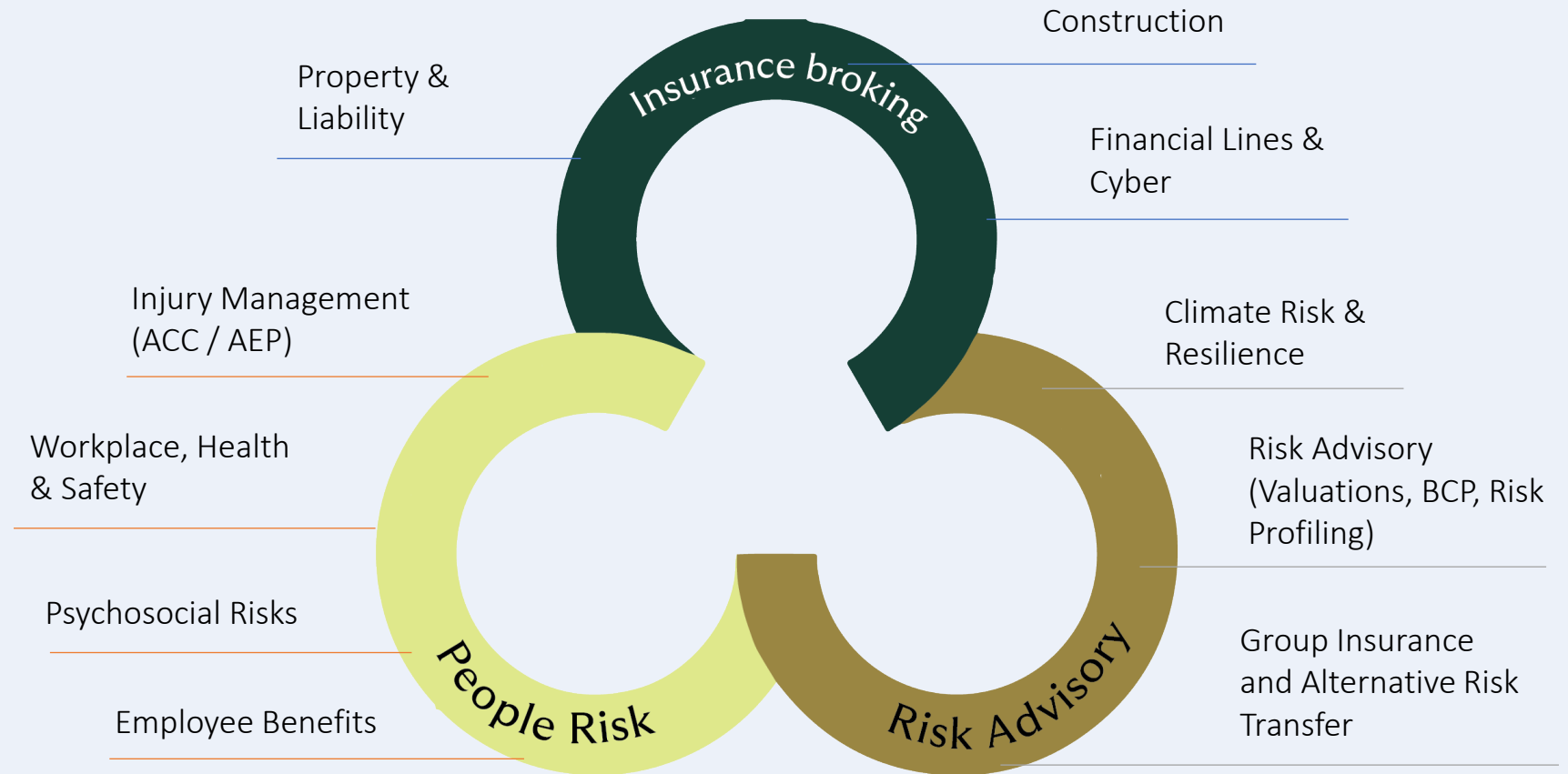
“ We are sellers of risk, not buyers of insurance



Key specialties for the Pacific region

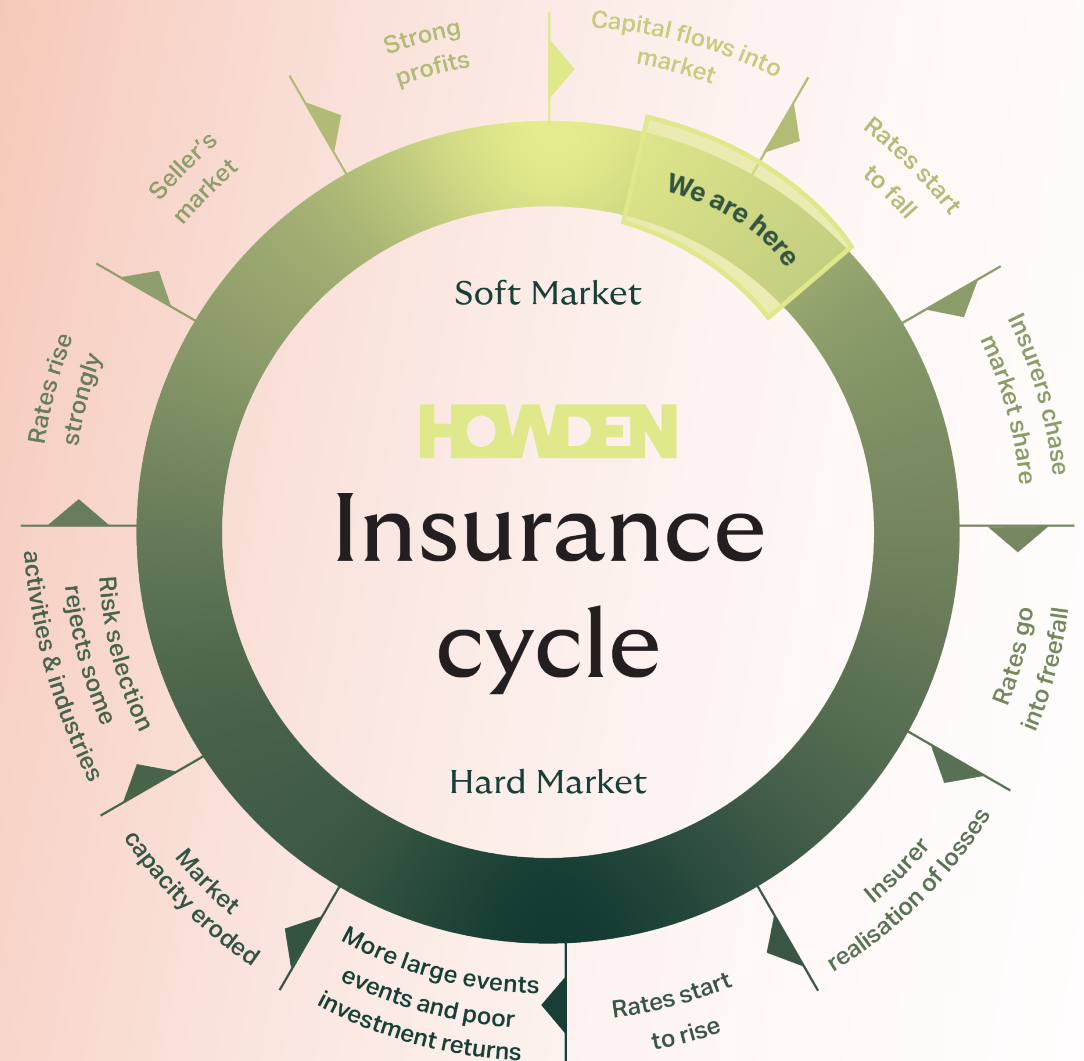
Insurance market update

Insurance Broking, Risk Advisory and People Risk



Global market trends

- 2024 marked a transition from prevailing harder market conditions (favouring insurers) to conditions that were more beneficial to our Clients.
- The Global insurance and reinsurance landscape has a significant influence on what happens in the Pacific.
- Price increases across most commercial insurance lines continued to moderate throughout 2024, with several areas seeing rate reductions by year-end.
- Commercial carriers continue to report strong underwriting performance in most areas, which is supporting the general pricing environment as we head into 2025.



NZ market update

New Zealand Insurers

- Currently the NZ market are looking to retain the business they currently hold and will fight hard to retain certain business.
- At this point in time, we are expecting to see average rate reductions in the NZ market of between 5% and 10% on clean renewals.
- NZI (IAG NZ) received an approx. 15% reduction in their 1/1/25 Treaty renewal but their allocation of the Treaty renewal costs with IAG Australia, increased from 37.5% to 40% (last year the allocation of costs to NZI NZ increased from 30% to 37.5%).

London Insurers

- London have a longstanding appetite to write NZ property business and are keen to grow their NZ and Australian books.
- Capacity will not be an issue, due to the introduction of new carriers and new smart follow capacity & consortiums.
- As most NZ renewals in the London market don't really commence until 31 March, there is little actual evidence yet to support what the underwriters are telling us.
- We are expecting to initially see 10% rate reductions in London and this is likely to increase during the year.
- This is dependent upon the effects of large Nat Cat losses to the market and the impact of significant amounts of new and smart follow capacity.
- Most carriers are looking for increased line sizes on placements for 2025.

Pacific outlook

Market conditions softening

- The last half of 2024, and into the first quarter of 2025, has seen a general softening in market conditions (product agnostic), in line with the global outlook.
- The Pacific region showed the largest average rate declines globally in the 4th quarter of 2024.
- Market sentiment sees the rate of softening accelerating with insurers being particularly aggressive around select new business opportunities often resulting a differential pricing for renewal business versus new business.
- Capacity from new market entrants and expanding appetite from current market participants is a factor driving the market.
- The Pacific region is not immune to increasing global geopolitical tensions.

Casualty Lines – General Liability / Employers Liability / Statutory Liability

Insurers remain focused

- Casualty rates declined, according to Howden data, by an average of 2% in Q4 2024.
- Insurers are still carefully reviewing wordings, and applying restrictions, on non-traditional General Liability coverages such as Professional Indemnity, pure Financial Loss, Cyber loss and data risks.
- We have seen general availability of capacity in this product class increasing through new entrants, or existing participants expanding their appetites and growth aspirations.

Key message / take-away
recommendations

Financial Lines

D&O

- Pricing remains competitive across the D&O market with rates continuing to trend downwards creating a favourable environment for buyers.

Professional Indemnity

- Pricing remains competitive across the D&O market with rates continuing to trend downwards creating a favourable environment for buyers.

Cyber

- Overall, 2024 triggered an acceleration in cyber risk awareness, which is the key driver of demand for security and insurance.
- The market emerged stronger through an unprecedented sequence of losses that reinforced the value of its offering.
- Insurance was key to accelerating recovery for businesses impacted by these incidents, not only by paying claims but also providing access to incident response experts.

Key message /
take-away
recommendations

Summary of Liability Insurance

What is Liability Insurance?

The Councils require IQP's to have Public Liability and Professional Indemnity.

What does the cover entail?

It provides for legal defence coverage which consists of:

- Coverage of lawyer's fees and defence costs
- Out-of-court settlement payment; and
- Coverage for damages awarded against you

In the event of investigations and third-party claims.

What limit is sufficient?

Key message / take-away
recommendations

Summary of Main Liability Insurance Covers

Commercial General Liability Insurance

- protects IQP's from lawsuit claim that you are legally liable for personal injury, property damage, false advertising and libel/slander.

Professional Indemnity / Errors and Omissions

- is liability coverage for lawsuit claim against IQP's for mistakes or poor job performance led to your client's losses.

Statutory Liability Insurance

- Provides cover for legal costs, awards and fines which arise from unintentional breaches of most New Zealand statutes. The policy is an "almost all acts" coverage that in particular responds to claims arising from:
 - The Privacy Act;
 - The Fair Trading Act;
 - Health & Safety in Employment Act.
 - In excess of 40 other acts.

- PI Claims – Important Considerations - Subcontractors

Specified systems are crucial to safety and health of a building and those that use it.

Compliance Schedules

IQP's undertake the inspection, maintenance and reporting procedures listed on the compliance schedule for specified systems and issue Form 12A to the building's owner.

Can an IQP employ a local tradesperson to do the checks and then sign the 12A form themselves?

Common practice has outstripped the actual wording in the compliance schedule.

The Building Act says that an IQP can carry out or supervise inspection and maintenance of specified systems.

Common interpretation is that an IQP or their staff and/or agents can undertake these roles, but NOT the building's owner.

IQP's signs the 12A – they have ultimate accountability. If they decide to use staff and/or agents, they must ensure that they have had the correct training through initial supervision and quality assurance checks.

Changes to the “Contracts of Insurance Act 2024”

- The Contracts of Insurance Act, a revised version of the Insurance Contracts Bill proposed in 2022, has passed.
- The Act consolidates and replaces six Acts and the current surrounding principles and case law.
- The Act will commence on 15 November 2027.
- **Some changes to note:**
- The **codified duty of disclosure** – Non-consumer duty – fair representations and material disclosures
- **Remedies for insurers** – right to avoid a policy and decline a claim
- **Changes to “Claims-made policies”** – late notifications - While the Act carries over and modernises that statutory provision remedying late notice in the absence of material prejudice, it expressly carves out its application to claims-made policies. An insurer may decline cover where the policyholder does not notify the insurer of a claim or circumstance within 90 days of a claims made policy period ending, or within that 90-day period if the insurer has been prejudiced.

Changes to the Contracts of Insurance Act 2024 -

continue

- **No Statutory Charges** – the Act repeals the statutory charge regime – often precluded defence costs from eroding policy limits.
- **Third party claims** - there will be a similar regime to New South Wales - claims can be made **directly against the insurer**. This requires the insured to be insolvent, deceased or struck-off the companies register, and then for the Court to grant leave to proceed.
- This **now includes** claims against an **overseas insurer**.
- Claims can now be paid **in the order in which they are settled, or judgment obtained**. Expect races to settlement with multiple third party claimants against policies where claims exceed policy limits
- **Defence costs and payments** - The regime still provides that some payments by insurers to insureds do not reduce, discharge or otherwise affect the insurer's liability to third party claimants, where an insured is insolvent, deceased or struck-off.
- **Information requests** - a third party will be able to request specified information from a policyholder or another person reasonably believed to be able to provide that information – a wide net. This information can include the existence and terms of a policy, the insurer's identity, any declinature by the insurer, and remaining policy limits. The request can be made if the policyholder is insolvent, deceased or struck-off, and the person reasonably believes there is an insured liability to them, and they may be able to recover that liability from the insurer.



Rene Hattingh
Head of Technical Distribution
+64 27 319 9423
rene.hattingh@howdengroup.com

www.howdeninsurance.co.nz
www.howdenicare.co.nz

The information contained in this document is confidential and may not be copied, distributed or disclosed to any third parties without our consent. Howden has taken care in the production of this document and the information contained in it has been obtained from sources that Howden believes to be reliable. Howden does not make any representation as to the accuracy of the information received from third parties and is unable to accept liability for any loss incurred by anyone who relies on it.

Howden Broking Limited (CN 8169557 - NZBN 9429049189520) and Howden People Risk Limited trading as Howden Care (CN 8169580 - NZBN 9429049192094) are part of Howden Group Holdings Limited.

© Copyright 2025 Howden Broking Limited.

Panel Discussion

Q&A session

Those online please come off mute and ask your questions or put it in the chat box.



Thank you to our Partners

ARGEST Building & Compliance | Fire
Whakanoa ngā whare | Te Ahi

Diamond Partner

argus | Assuring fire
protection

Gold Partner



Gold Partner



Gold Partner



Gold Partner



Silver Partner

