

EARTHQUAKE SUPPORT GUIDE

Wynn Williams & Co appreciates the immense impact the Canterbury earthquake has had on businesses and individuals within Canterbury and New Zealand. Our thoughts are with those affected during this difficult time.

Wynn Williams & Co has produced a support guide for those businesses and individuals seeking assistance on legal issues resulting from the earthquake and subsequent aftershocks.

An Economic Task Group has been set up to assist businesses throughout Canterbury with economic recovery. You can visit www.recovercanterbury.co.nz or call the Business Helpline on 0800 50 50 96 if you wish to obtain further recovery information or have any queries.

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1. WORK ON BUILDINGS - CONSENTS

Following the September 2010 earthquake, the government passed the Canterbury Earthquake Response and Recovery Act 2010. This Act allows Orders in Council to be made to depart from or change current legislation (and bylaws and regional or district plans). This includes legislation about building, consents, local government, health and roading. Orders in Council have been made, both following the September 2010 and the February 2011 earthquake.

Building Act

Before you do any work on buildings following the earthquake, you need to ensure that you have the necessary consents or that the work is exempt from such requirement.

At this stage, a resource consent and/or building consent is still required for most demolition, rebuilding or repairs to buildings that would usually require these consents and which is not otherwise exempt.

Exemptions to works that require building consent are listed in Schedule 1 of the Building Act 2004. Building consent is not required for some minor works or repair work using comparable building materials to put things back in the same place. Extensions to the works that did not require building consent were made after the September 2010 earthquake, as well as the exemption from obtaining a building consent for the demolition of a stand alone building under three storeys.. Under a state of emergency, work can be undertaken for safety reasons also.

Please feel free to contact us to check which of these works would not require consent. Also in September 2010, the Department of Building and Housing issued a guideline for building work that does not require a building consent. You can access this guideline by visiting www.dbh.govt.nz.

Resource Management

An order was made on 16 September 2010 providing, amongst other things, extensions of various time periods and relaxation of certain duties relating to district plans. Further orders have been made as a result of the February 2011 earthquake, while some of the 2010 Orders in Council have been extended.

Since the February 2011 earthquake, Orders have also been made to allow temporary accommodation, storage and depots, as well as provide a fast track system for land remediation works (which includes infrastructure repair and replacement).

A more detailed summary of these Orders in Council are set out in our publication "Dealing with Resource Management Matters After the Earthquake" on our website (www.wynnwilliams.co.nz) under Earthquake.

Even if a building consent is not required, a resource consent still might be - and vice versa. Before you do any work, you must check whether a building and / or resource consent is required.

URGENT WORKS

Urgent demolition or repairs can only be done without a resource consent or building consent in order to save or protect life or health, prevent serious damage to property or to avoid adverse effects on the environment. Specific criteria need to be met. Urgent works will usually only mean those required to make the building safe and would not, in most cases, allow the complete demolition and rebuild/repairs.

HERITAGE BUILDINGS

As with other buildings, only urgent work can be carried out without a resource consent or building consent and it must be done in order to save or protect life or health, prevent serious damage to property or to avoid adverse effects on the environment.

NON-URGENT WORK

Normal building and resource consents will be required for all non-urgent work. Applications arising from earthquake damage should be made, as applicable, to the Christchurch City, Waimakariri District or Selwyn District Councils.

Before undertaking building works, you may also wish to consider the information on liquefaction available at www.ecan.govt.nz/publications/General/solid-facts-christchurch-liquefaction.pdf.

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2. COMMERCIAL LEASES

Our general comments below are based on the standard wording of the latest editions of the Auckland District Law Society Deed of Lease (ADLS Lease) and Property Council Retail Lease (Retail Lease). You should always refer to the specific wording of your lease to determine your actual rights and obligations.

Lease Termination

The ADLS lease and the Retail Lease are the most common forms of lease used for commercial leases. Both of those forms make provision for the termination of leases in the event of damage or destruction where the premises are rendered untenable (in the case of the ADLS lease) or unfit for use (in the case of the Retail Lease). The termination is automatic under the ADLS lease and is at the Landlord's option under the Retail Lease.

Whether or not premises have been rendered untenable will be a question of fact in each instance, but as a general guide the premises must be substantially unfit for use by the tenant and this status must have a degree of permanence.

Under the ADLS lease the landlord may also terminate the lease upon giving notice where the premises, or a building of which the premises forms a part, requires demolition or reconstruction in the landlord's reasonable opinion.

Abatement of Rent

Where the premises are tenable, notwithstanding any damage suffered, both lease forms provide that the landlord shall with all reasonable speed, once relevant consents have been obtained, expend the insurance money received towards repairing or reinstating the premises. However, if relevant consents cannot be obtained, or insurance payment is inadequate to cover the cost of repair or reinstatement, the lease shall terminate.

Under the ADLS lease rent and outgoings shall cease to be payable by a fair proportion having regard to the extent of the damage until repair or reinstatement is completed. No rent reduction is available to the tenant under the Retail Lease unless the landlord re-enters possession of the premises to effect repairs.

In the absence of a lease between landlord and tenant (or where the lease is silent) the Property Law Act (Act) governs the relationship. The Act provides that if the premises are destroyed or damaged by an earthquake to the extent that they become unfit for occupation by the tenant, the rent or any outgoings will abate, in fair and just proportion to the destruction or damage. Abatement will continue until the premises have been repaired and reinstated and are again fit for occupation by the tenant.

Where the premises are not damaged but the tenant cannot access the premises due to either a cordon or damaged adjacent premises, no abatement of rent will be available under either the ADLS lease or the Retail Lease. The tenant will need to rely on business interruption insurance if that is held.

Landlords can seek to recover loss of rental and outgoings from their insurer if their insurance policy covers this. Such insurance is commonplace and premiums are generally included as an outgoing payable by the tenant during the lease term. Such insurance should cover the period that payments by the tenant were suspended or reduced as a result of the earthquake.

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3. RESIDENTIAL PROPERTY

EARTHQUAKE COMMISSION

The Earthquake Commission (EQC) provides natural disaster insurance to residential property owners.

The EQC provides insurance for residential homes and apartments up to a maximum of \$100,000 (plus GST) and insurance for personal effects up to a maximum of \$20,000 (plus GST). To be eligible for cover, the house owner must hold private insurance over the affected property.

EQC pays the value of damaged land at the time of the earthquake, or the repair cost, whichever is lower.

Buildings that contain more than one residential unit are subject to special provisions.

Residential land is also covered, being land on which a house is situated plus all land within 8 metres of the house, and within 60 metres if it constitutes the main access way to the house.

EQC can cancel insurance if the property in respect of which the claim is settled is neither replaced nor reinstated to the satisfaction of the EQC.

You can refer to the EQC website www.eqc.govt.nz if you require further information regarding the above.

CONTRACT TO PURCHASE RESIDENTIAL PROPERTY

The earthquake has caused serious implications for businesses and individuals who have entered into a contract to buy property that may have suffered damage. Although this advice is focused primarily on the rights and options of purchasers, it applies equally to sellers as it is important that any seller is aware of the purchaser's options.

As a starting point, we suggest you contact us before entering into a contract to purchase (or sell) property as we can guide you through this process. The current owner/seller of the property should contact any professionals that may assist in reaching a solution such as engineers and insurers.

At the time of writing, it is not necessarily certain that home owners will be granted insurance cover over their respective properties as some insurers have issued a moratorium on granting new policies in Canterbury. There may be ways around this difficulty however, and we can assist you to find a solution. The obvious implications are that if you have entered into a contract to purchase a house and are borrowing funds from financial institutions to complete your purchase, you will be unable to fulfil the lender's requirement that the property is insured. Therefore you will be unable to draw down the funds to complete settlement.

Unconditional Contract

This is particularly problematic if your contract to purchase is unconditional. If there are problems, in the first instance, you should contact the seller's lawyer and ask whether the seller will agree to postpone the settlement date.

If the property has sustained damage (even if minor) you should ask the current owner to lodge a claim with EQC in order to receive funds to repair the damage sustained.

The standard ADLS agreement for sale and purchase lays down a process for dealing with a property that has been damaged after the contract becomes unconditional but before the possession date. The key issue here is whether the property is untenable (i.e. unfit for occupation). In this situation you should engage an engineer or builder to inspect the property and report back to you as to the status of damage sustained and likely cost of repair. All parts of the property will need to be inspected and consideration should be given to what damage may have occurred beneath the ground.

If the property is found to be untenable, two options are available to you.

One is to cancel the contract. If you take this option you will be entitled to a refund of your deposit. It is important to note that you cannot cancel the contract until the possession date so if the seller renders the property tenable by that time you will no longer be able to cancel.

The other option open to you is to settle the purchase at the purchase price less any decrease in value due to the damage. The inspection report should provide an estimate of the cost to repair the damage. Coming to an agreement as to the appropriate reduction in value of the property may raise difficult issues about quantification of the damage. We suggest you talk to us as we can assist you with such issues.

Conditional Contract

If your contract is subject to certain conditions, you may not be able to meet those conditions. and, if not, you would not have to settle. You should speak to us as soon as possible about that.

Firstly, you should engage an engineer or builder to carry out an inspection of the property and report to you any damage, cost of repair and any relevant issues that may have arisen.

If your contract is subject to a building report or finance you may well be able to cancel the contract. If the building report detects damage to the property you may use this as a basis not to proceed with the contract.

If you cannot obtain finance, either because of difficulties in finding insurance or for other reasons, you may be able to cancel the contract on this basis.

It is important to note that not all conditions will give you the ability to cancel the contract, such as a contract subject to solicitor's approval.

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4. RESIDENTIAL TENANCIES

Landlords and tenants of rental properties are encouraged to work together and maintain clear lines of communication where rental properties may have sustained damage.

The Residential Tenancies Act 1986 provides that in the event of destruction or damage to the premises, both landlord and tenant have the capacity to terminate the tenancy.

Where, otherwise than as a result of a breach of the tenancy agreement, the premises are destroyed, or are so seriously damaged as to be uninhabitable, the rent shall abate accordingly and either party may give notice to the other terminating the tenancy.

If the landlord wishes to terminate the tenancy, the tenant must be given at least seven days notice. Conversely, if the tenant wishes to terminate the tenancy, the landlord must be given at least two days notice.

If the rental property is partially destroyed or only part of the premises is uninhabitable, the rent shall be reduced accordingly. Further, either party can apply to the Tenancy Tribunal for an order terminating the tenancy.

The Tenancy Tribunal may make such an order if it is satisfied that it would be unreasonable to require the landlord to reinstate the property or (as the case may require) to require the tenant to continue with the tenancy albeit at a reduced rent.

If you are a tenant in a Housing New Zealand home, we recommend you contact Housing New Zealand initially on 0800 801 601 if you have any concerns or queries, as there may be additional relief available.

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5. EMPLOYMENT

HEALTH AND SAFETY IN EMPLOYMENT

Employers have a duty under the Health and Safety in Employment Act to take all practicable steps to ensure the safety of their employees whilst at work. It may well be necessary for businesses to engage experts to assess whether the workplace is safe before employees return to work. Experts may need to assess, amongst other things, the structural integrity of the building(s) and any damage the earthquake may have caused to plumbing and/or power.

EMPLOYMENT SUPPORT PACKAGE

There is an Earthquake Employment Support Package available for businesses and employees affected by the 22 February earthquake. Two options are available, firstly the Earthquake Support Subsidy; and secondly the Earthquake Job Loss Cover.

Earthquake Support Subsidy

The Earthquake Support Subsidy is an initial payment for employers to help them to pay their employees while they deal with the impact of the 22 February earthquake. The subsidy is also available to the self employed or business owners who draw a wage.

The payment will be made directly to the employer who will then pay the employee. The wage subsidy will be paid for up to 6 weeks from 22 February 2011, at a rate of \$500 gross per week per full-time employee (employees working at least 20 hours per week) or a rate of \$300 gross per week per employee for part-

time employees (those employees working fewer than 20 hours per week). The subsidy is not subject to GST but is subject to PAYE.

The first payment will be a lump sum of a three week subsidy. Employers have an obligation to inform the Government Helpline if they get their business up and running and no longer need a subsidy. If no further information is given, a further three week subsidy will be paid automatically.

To qualify, businesses (or self employed people, sole traders, or contractors) must be New Zealand owned; based in the Christchurch City Council area; unable to access their workplace due to damage, a cordon, or a lack of an essential service; or be a small business who can open but are experiencing significant loss of trade.

Employers who have business interruption insurance should contact their insurance company in the first instance. If insurance payments will be delayed, employers can access the Earthquake Support Subsidy to cover the intervening period, but will be required to repay it when the insurance payment is received.

If an employee has already applied for the Earthquake Job Loss Cover when their employer applies for the Earthquake Support Subsidy, the employee will be transferred to the Support Subsidy.

Earthquake Job Loss Cover

The Earthquake Job Loss Cover is a weekly payment of \$400 net for full-time employees and \$240 net a week for part-time employees for a period of six weeks in circumstances where their employers are no longer able to operate. It is paid directly to individual employees and is backdated to 22 February 2011.

Employers are advised to get the Earthquake Support Subsidy to assist them in paying wages as the first option while they decide what the future of their business is. If employees can't contact employers and are not working or being paid, then they can apply for the Earthquake Job Loss Cover payment.

Employees qualify if they were employed on 22 February 2011; worked for an employer who was based in the Christchurch City Council area; and no longer have an employer (because they have decided not to operate) or cannot contact their employer.

Further information and application details of the Earthquake Employment Package are available at www.workandincome.govt.nz.

WAGES

In most cases, an employer has a duty to pay an employee normal wages even though employees cannot attend work because of earthquake damage. Some employment agreements may contain provisions expressly dealing with situations following natural disasters and may provide an employer relief from the obligation to pay wages.

In the absence of such a provision, the employer has a duty to pay where the employee is ready and willing to work.

If an employer is unable to provide its employees with work but is in a position pay the employees' wages without putting its business at risk, then this option should be considered, at least in the short-term.

If an employer is not in a position to continue to pay wages (i.e. employer is uninsured or does not meet the criteria under the Government wage subsidy scheme), it may be in the parties' best interests to agree to a temporary discontinuance of work without pay. This will require the employees' express agreement.

If you can't reach such an agreement, employers should consider obtaining their employees' consent to take annual leave. If agreement cannot be reached, employers can require that annual leave be taken only after providing 14 days notice.

An employer may be able to change an employee's working hours with the employee's express consent.

It is crucial for employers to be open and honest with employees to assist in achieving a mutually beneficial outcome. Employers should ensure clear lines of communication are preserved so as to provide regular updates and developments where necessary.

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6. INSURANCE

Most businesses will have insurance which covers physical damage to the insured property which is usually all tangible property at a specific location. This is known as material damage insurance and is often part of a business insurance package.

If you have material damage insurance, you should notify your insurer of your claim as soon as possible. Become familiar with your insurance policy, including the definitions of words and your claim obligations.

Take photographs and/or retain damaged property as evidence of any damage sustained. Further, you may wish to collate information about the damaged property including invoices, receipts and proof of purchase. This should help your insurer deal with your claim swiftly.

If your property is in need of urgent repair, contact your insurer and request authority before you or a third party carries out the repair work. If authority is given over the phone, make a note of the conversation, including the date and name of the insurer's representative you speak to.

The key is to remain open and honest with your insurer and obtain their permission before you repair or alter any damaged insured property. If you fail to do so, your insurer can decline to meet your claim.

Many businesses also have business interruption insurance which covers the income the business would have earned over a specific number of months, but for the earthquake damage. Usually a claim under your material damage insurance will trigger the business interruption cover. To calculate your business' anticipated gross profit covered, you will probably need to engage a professional adviser who will want evidence on your gross profit in previous months and years for comparison. Quantifying your claim should be carried out in consultation with your insurer's loss adjusters.

Business interruption insurance may also cover costs involved in leasing temporary premises, fixed costs incurred while the business remains closed, extra expenses to continue operations, employees' lost wages and claim preparation costs. You should be vigilant in keeping all documents evidencing additional costs and expenses incurred.

There is a lot of information in the media and on-line about individuals' EQC and insurance claims. Remember that you only have until 28 March 2011 to lodge a claim for damage caused by the Boxing Day quake and until 23 May 2011 to lodge your claim following the 22 February earthquake. You should take photos of damaged property (both house and contents) and keep broken non perishable items for inspection. If you have damage to your paths, driveways, swimming pool, fences or property that is not limited to your "dwelling" you will need to make an insurance claim too.

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7. CONTRACT

DOCTRINE OF FRUSTRATION

The doctrine of frustration covers situations when changes in circumstances render it legally or physically impossible to perform a contract, thus some businesses may be excused from performing contracts in light of the earthquake. The doctrine is triggered at the occurrence of an intervening event or change of circumstances so fundamental as to be regarded as entirely beyond what was contemplated by the parties when they entered into the agreement.

Frustration occurs, without the default of either party, when a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract.

FORCE MAJEURE

In practice, contracts may expressly provide for performance to be excused or rendered impossible by unavoidable causes such as an earthquake. This clause, known as a force majeure clause, will be construed in each case with due regard to the nature and general terms of the contract and with particular regard to the precise words of the clause.

It is important to note that where the contract excuses a party from delays due to unavoidable causes, that party may be deprived of the protection of the clause if they fail to enquire whether such unavoidable causes exists and to inform the other party.

If you think you may have problems in performing a contract or you think another party may not be able to perform its side of the contract, you should speak to us as it is a matter of degree whether a force majeure clause will apply.

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This support sheet is necessarily brief and general in nature. It should only be used as a guide. We welcome you to contact the Partners at Wynn Williams & Co if you wish to obtain legal advice concerning any issues you may encounter.