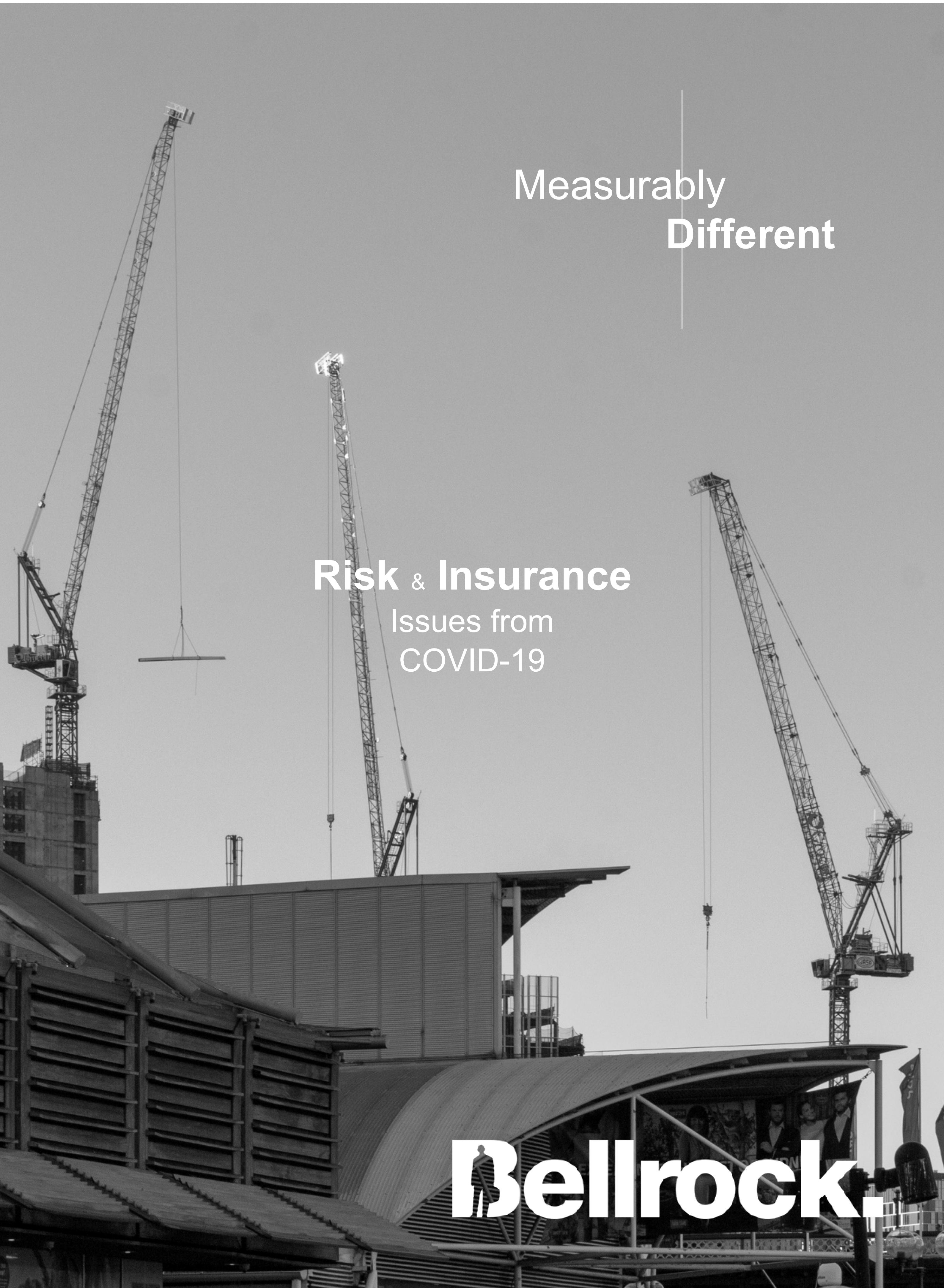
Measurably **Different**

Risk & Insurance

Issues from COVID-19



Bellrock.

Executive Summary

We have all been impacted by the effects of the COVID-19 pandemic. We must be properly informed of the issues we are confronted with, take advice and mitigate against risk to ourselves, our business and the wider community.

In this release, addressed to our key clients and referral partners, we provide our observations on common insurance products held by our clients and the effect of COVID-19 on those covers. The products we address include:

1. Material damage and business interruption – we address the implications of "infectious diseases" on consequential loss, amongst issues of rental default. There is in most circumstances limited coverage available. We observe that unoccupied properties must be maintained in a good state of repair and security measures must stay in place . There are options for premium relief depending on the circumstances of the policyholder, particularly as regards declared values for consequential loss – gross profit calculations may be significantly impacted.

2. Public and products liability – risk for legal liability may exist if companies fail to take steps and develop a pandemic plan. It may be arguable that the there was a failure to warn of the risk of COVID-19. The failure to do so caused "injury" to third parties. Premium relief may be available if turnover is set to reduce. Some insurers have agreed to deferred premium payments for 6 months.

3. Corporate travel – policy response will turn on the date COVID-19 is considered a "foreseeable circumstance" by the insurer. Travel providers (airlines/travel agents/etc) must be approached for refunds prior to submitting insurance claims. Premium relief is available given the likelihood that there will be less travel.

4. Workers' compensation – employers must develop, continually update and clearly communicate a pandemic plan for their workers. Premium relief may be applied for if employers have wage adjustments (including mid-term).

5. Professional indemnity insurance – quality control, peer review, adequate IT systems and adherence to professional standards/guidance are key. Professionals continue to advise on unestablished, changing Laws and Regulations. Contemporaneous notes (file notes) are important. It is unlikely that there will be any premium relief across this class. There is a significant onus on companies to prepare comprehensive information regarding its response to COVID-19 when preparing its next renewal proposal.

6. Directors' and officers' and company liability – one of the most important classes offering protection to companies and their directors if they fail to take appropriate steps to respond appropriately to COVID-19. Key risks include the mismanagement of company finances, continuous disclosure, insolvency, unfair dismissal, workplace discrimination, liability for work health and safety, and claims brought by regulatory authorities. Whilst insolvency laws have been developed to assist companies and their directors, duties still exist. It is very unlikely premium relief will be attainable for this policy class. Coverage issues include ensuring that your policy has no insolvency exclusion (this will turn-on the current "proven" solvency of the company at its last renewal) and making sure there is cover for the company, as well as its directors and officers.

7. Cyber – a company's computer network has never been as critical like it has during the COVID-19 pandemic. That said, many companies lack adequate risk management, governance or response plans. Their networks have not undergone stress testing and otherwise, they remain "un" or "under" insured for "cyber risk". Directors must urgently turn their mind to mitigating against these risks. A review of their systems and networks, its vulnerability, including a business impact assessment (focusing on consequences if the network is down) and emergency response plans are critical. This cover will be very difficult to obtain unless a review is completed, and the board has turned its mind to mitigate against cyber exposure.

8. Commercial crime – "social engineering" or "identity fraud" have been increasing. Commercial crime policies vary in the cover they offer. Whilst theft and malicious damage are covered under material damage policies, companies must brace for a spate of "new crime" that may emerge during and following the pandemic. Rates are expected to increase on this class.

9. Trade credit – insurers have already started to revise appetite for this cover (insuring bad debts).

10. Political risk – protects companies for investments made overseas due to acts of Governments. COVID-19 presents a range of issues for companies with offshore investments. It is unclear what decisions overseas Governments will take after the pandemic.

Common issues have emerged across the main industries and professions we advise. We have identified these and provide observations for each:

1. Construction: issues with delay, including those caused in connection with materials, contractual issues with Force Majeure Clauses and practicalities involving Extension of Time provisions. The financial implications of same including increased finance and insurance costs.

2. Professionals services including:

   (a) Law firms – emerging risk with work-form-home requirements, changes to legal practice and procedure, issues for Firms with major hearings being vacated

   (b) Accounting firms – perhaps having the greatest obligations to advise business on developing Government relief and changes to tax, and the reliance on the accounting profession for the ongoing financial viability of particularly SME business. Concerns with regard to increasing assistance to clients for credit.

   (c) Property valuers – risk with inspections, market volatility and generating comparable sales.

   (d) Health (pharmacies, medical centres, health and aged care providers) – lessons learned from the SARS epidemic; mitigation for exposure for claims brought by patients and customers for compensation if they contract COVID-19. Consequential impacts on reputation and company value.

   (e) Technology professionals – increase in contractual risk. Particular attention should be paid to indemnities given for consequential loss.

3. Strata and owners' corporations – risk to strata managers and owners' corporations regarding "failure to warn"; risk management requirements that insurers will need to see addressed at the next renewal.

4. Australian Financial Services and Credit Licensees – risk presented to wholesale and retail funds arising from market turmoil from the pandemic, including investors seeking to "liquidate"; and most importantly, the various steps that will need to be demonstrated to obtain quotes come next renewal.

Regard must be had to guidelines and protocols issued by peak industry and professional bodies across all sectors

Insurers have been exposed to significant losses at the end of 2019 (bushfires) which have extended into 2020 (bushfires and then floods). This being in the midst of an already "hardening" market. COVID-19 has exposed insurers to significant losses already - event cancellation for Wimbledon rumoured to exceed $140m – and it is expected broader classes will be impacted. Insurers have been responsive to assist where they can. Those with whom Bellrock work, have developed initiatives to assist with premium relief and have in some circumstances expedited claims payment. That said, like all business, COVID-19 presents further challenges to what was an already affected market. Comprehensive disclosures including your company's response to COVID-19 will be paramount to your next renewal.

The overarching point that we wish to convey is that directors must be proactive to ensure that their company remains viable, protected and can appropriately respond to the issues presented by COVID-19. Directors who take this approach will position their business to flourish when the pandemic settles. Those who do not may likely see their companies fail. Worse, they may be exposed to liability for failing to adequately discharge their obligations as directors.

The Team at Bellrock invites you to contact us if you have any questions regarding this release, or otherwise have questions regarding general insurance, risk management and the implications of COVID-19.

Yours faithfully

Marc Chiarella

Contents

About Bellrock

Bellrock was established in 2007, we now have 16 staff across New South Wales and Queensland. We have deliberately remained boutique to ensure service quality, efficiency and market relationships can be maintained. We seek out clients who have alignment with our values and we work with them to understand their exposures and articulate this effectively to the insurance market.

People

Our people are acknowledged as leading insurance professionals well known and respected across the industry. Bellrock's people are passionate about our brand, our clients and our industry. All our people have experience gained working for large broking houses and joined Bellrock to deliver superior service to clients and challenge the standards set by multinational broking firms, who are too reliant on "selling" insurance products and less interested in spending time understanding, mitigating, transferring or improving the risk profile of their clients.

Advice

We identify, classify and qualify 'real risk'. We work to understand and challenge the status quo on all placements – looking to identify where programs and client risk is misunderstood and therefore mispriced. We use our understanding to articulate that risk and present it concisely to insurers. We make recommendations based on our clients' needs and objectives. We are our clients' agents - not agents of any insurer.

Service

We are responsive, professional and helpful. Our servicing is consistent not only at formation or on renewal of policies. Our clients' businesses grow and evolve we help them do so with peace of mind. We can provide our services to clients and place business across all Australian States and Globally.

Market

We appreciate the challenges faced by insurers and work with them ethically and professionally. We select insurers based on terms offered and claims performance, not just price. We seek out motivated underwriters who want to understand our clients. We are acknowledged widely as being a genuine "alternative" to international brokers. Via our network we have significant leverage with markets which is derived form a combined premium pool exceeding AUD8bn with insurers across Australia, Asia, the USA and the UK.

Claims

We are not a "post box". We are 'hands on' during the claims process from notification to final payment. We encourage collaboration and communication amongst all parties to a claim. We identify where other parties should be responsible for risk to protect our clients claims experience. We prepare technical claim submissions to address complex indemnity issues. We drive sound commercial outcomes with our clients' interests and quick resolution at the forefront.

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Material damage and business interruption

These polices are designed to protect tangible assets owned by the insured, and consequential loss following damage to property insured. There are various forms of policies covering material damage including industrial special risk (“**ISR**”), “business” or “office” packs, contract works insurance, machinery breakdown, marine (property in transit), landlords’ insurance, home and contents.

Under these policies there must be “material damage” to property insured. Perils causing damage to property may be fire, storm, tempest, accidental damage, theft, malicious damage etc. Once there is material damage, indemnity may extend to “consequential loss”. Types of such loss include increased cost of working, loss of profits, wages and loss of rent.

On 29 March 2020, the Prime Minister announced that the States and Territories agreed to a 6-month moratorium on at least some evictions. Owners and tenants have sought relief under their material damage policies. The common question is whether “consequential loss” is available under standard material damage policies.

Rental default

Commercial property owners typically cover their loss of rent exposure under ISR, business pack or landlord’s policies. The general position is that the business interruption must result from material damage. There is commonly no cover for rental default by tenants in the absence of there being any material damage.

Bellrock has access to standalone commercial property policies that cover the full gambit of material damage and business interruption exposures, whilst extending the cover to include rental default by tenants. Please note that the cover is typically limited to 6 months loss of rent and there are requirements that relevant steps be taken to enforce the tenants lease obligations.

We expect that it will be increasingly challenging to obtain new rental default cover following the outbreak of COVID-19, whereas clients with existing cover should be able to obtain renewal terms, but rates will likely increase.

Infectious diseases

Some consequential loss policies are extended to provide coverage as a result of a closure of the business by a Public Authority for a number of circumstances, including “Infectious Disease”. The intent of an “Infectious Disease” extension is to provide Loss of Profits/Wages/Rent cover for things such as an outbreak of Legionnaires disease, or measles; which can close down one or two buildings disrupting a small number of businesses.

The “Infectious Diseases” clause generally incorporates either of the following Exclusions:

> *The insurer will not be liable for any loss or Damage arising as a result of any Highly Pathogenic Avian Influenza in Humans or any other diseases declared to be Quarantinable Diseases under the Quarantine Act (Australia) 1908 and subsequent amendments.*

or more recently:

> *An occurrence of a human infectious or human contagious disease which the competent local authority has stipulated shall be notified to them, with the exception of any occurrence, whether directly or indirectly, arising from Quarantinable diseases listed in the Biosecurity Act 2015, as amended, which are all specifically excluded hereunder.*

As at the end of January 2020, Coronavirus is a listed disease under the Biosecurity Act 2015. The second Exclusion therefore eliminates cover available under this extension. Specific advice should be sought on the first Exclusion as there may be scope to avoid the exclusion on the basis that the *Quarantinable Diseases under the Quarantine Act (Australia) 1908* does not apply.

The reality is that the global funds held by insurers could not meet business interruption claims arising from such a large-scale pandemic.

Steps you may take

1. you may have provided declarations to insurers for your business turnover without consideration of your current circumstances following the pandemic. Reducing your turnover declaration may reduce the premium applicable. We would caution doing so without first discussing this with your broker.

2. it is unlikely that the replacement value of your assets have fallen, and therefore unlikely any saving can be achieved, however if you are carrying significantly less (or more) stock on hand you may need to adjust your declaration to ensure you are correctly covered.

3. crime rates are likely to increase. Security and facilities management measures should be implemented to safe-guard against risk during the unoccupancy of buildings. You should check your policies as regards "unoccupied buildings" exclusions and ensure, if your premises is unoccupied, that you notify your insurer. Many insurers apply higher excess and premiums for unoccupied buildings. Given the circumstances of COVID-19 a number of insurers are providing relief against the strict application of these exclusions.

4. in relation to construction works (covering materials and labour associated with building works) you should check your policy carefully for a "cessation of work" clause. Such clauses render cover inoperative if work ceases at site for more than 30 days (depending on the wording). Should Australia move to a full shutdown of construction operations (currently unlikely) it will be important for you to advise your insurer of this to ensure you have their written confirmation that cover will remain in place during a mandated shutdown.

5. with staff working from home, consideration should be had to any business assets that are not located at the business premises. In the event there is a transfer of significant business assets from office to offsite locations (as there have been with some of our larger clients), then that property should be specifically insured.

6. as regards marine insurance, there may be limitations on incoming/outgoings due to restrictions. If there is, you may be able to seek some premium adjustments.

7. it is also of paramount importance to give your broker adequate time (at least 6 weeks) to negotiate renewal. Make sure you are aware of your renewal dates and engage with your broker as early as possible.

General public or products liability

These policies protect the business for legal liability during the provision of their services and products. The policy covers claims by third parties for personal injury and property damage and pays defence costs and damages.

Industries susceptible to public interaction on their premises must develop pandemic plans. A failure to do so may give rise to personal injury claims by persons who allege that they attended "insured" premises during the COVID-19 pandemic and contracted it whilst on those premises. Industries such as accommodation, shopping centres, pharmacies, hospitals, strata schemes, property owners generally, public authorities and educational institutions should develop these plans.

Our expectation is that the frequency of bodily injury claims brought by third parties (infected by COVID-19) will increase. If a business has failed to develop a "pandemic plan", it is arguable that they could have failed to appropriately manage or warn of the risks of COVID-19.

Steps to take

1. develop a pandemic plan - seek external advice regarding the adequacy and communication of same.

2. premium relief – premium is rated on turnover, imports/exports, wages and staff numbers for the forthcoming period. If the company expects a reduction in any of these, it may be able to seek premium relief. Your broker should be able to guide you in relation to an appropriate declaration. It is important however not to under-declare; doing so may affect the payment of claims under your duty of disclosure. Some insurers have agreed to provide deferred payments of up to 6 months for small businesses experiencing financial hardships.

3. cancelling policies - many industries now closed for "lock-outs" have asked whether cover is required (given there is no trading at present on their premises). Regard must still be had to the range of exposures covered by the policy (which will vary from industry to industry). By way of an example, a property owner/lessee whose premises is not being used may still have legal liability to third parties for injury or damage in connection with

the premises: consider a leak in a commercial building causing damage to adjoining third party property, or, otherwise somebody injuring themselves on “common property”.

4. coverage – it is recommended that you check whether there is an infectious diseases exclusion on your policy. You should also check whether there is an “unoccupied property” exclusions – insurers may start to impose these on renewal.

Corporate travel

Corporate travel covers cancellation, medical or other travel expenses relating to and “unforeseen circumstance” or personal injury during business travel. Cover can extend to leisure travel for nominated persons.

Insurers’ positions responding to COVID-19 are varied. When the insurer considers COVID -19 as a “foreseen circumstance” there is likely to be no cover for any event in relation to COVID-19 after that date. Many insurers have declared different dates as to when COVID-19 was a “foreseen circumstance”.

In the lead up to the travel ban, insurers’ preference was for insureds not to travel following the outbreak. Some insurers were allowing for cancellations, refunding “unearned” pro-rata premiums.

Steps to take

1. Cancel any upcoming travel in the next 90 days.

2. Contact your travel agent, airline and accommodation providers to seek a refund or to make alternate arrangements based on existing ticketing, prior to submitting a claim.

3. When safe to travel again, view WHO and ‘Smart traveller’ websites for the latest information.

4. Coverage and renewal – should your business have no potential cancellations, and therefore no upcoming trips, the policy should be lapsed at renewal. If your business is dependent upon travelling immediately after the bans after lifted, premium rates are likely to be lower for renewing clients as opposed to clients that have let policies lapse and are now seeking new business quotations.

Workers Compensation

Workers Compensation covers injury to an employee in the course of their employment. There is a statutory obligation across states and territories for employers to have this cover.

Under most State and Territory legislation, 'Injury' extends to 'disease' and employers must take steps to protect workers from same.

Employers should communicate safe work practices including its response to COVID-19. Employers who do not do so, may fail to discharge their obligation to manage the health and safety of any worker who contracts COVID-19.

Steps to take

1. Develop and continually communicate to staff, and or make visible to staff, the pandemic plan. Some helpful resources include:

   (a) Review the SafeWork Australia Checklist [1]

   (b) WHS & Workers’ Compensation Plan (sample plan prepared by ComCare) [2]

   (c) “How to Keep Workers Safe” poster [3]

[1] https://www.safeworkaustralia.gov.au/system/files/documents/2004/workplace_checklist_covid-19_0.pdf
[2] https://www.comcare.gov.au/about/forms-publications/documents/publications/safety/working-from-home-checklist.pdf
[3] https://www.safeworkaustralia.gov.au/system/files/documents/2004/how_to_keep_workers_safe_covid-19.pdf

   (d) "Know the Signs" poster [4]

   (e) "Stop the Spread" poster [5]

2. Note the guidance from Safe Work Australia by industry for those who cannot work from home. [6]

3. As regards premium relief:

   (a) Premiums are calculated on estimated wages adjusted annually. However, there is the ability to adjust premiums mid-term where there has been a significant change to the business.

   (b) If the wage roll has changed as a result of COVID19 amending your wage declaration ought to provide some premium relief.

   (c) Consideration should be prioritising this activity particularly where workers compensation premium is a large proportion of your overall insurance costs.

Professional indemnity insurance

These policies cover a company for acts, errors and omissions arising from advice, design or specification during the course of providing professional services to their clients. Unlike general public and products liability (which is most commonly underwritten on an occurrence basis) professional indemnity is underwritten on a "claims made" basis. [7] See also "professional services firms" under the heading "Industries – Professional Services".

Across all professionals, underwriting submissions (information attaching to your yearly proposal form or declaration) must be comprehensive. Insurers will not consider risks (new policies or renewals) without adequate information.

Steps to take

1. Premium relief: professional indemnity is underwritten on a 'claims made' basis. Insurers normally use the previous financial year's fee income to rate premium.

2. Each profession must continually visit its professional body's direction on standards and protocols to apply to their practice in the context of COVID-19.

3. Where necessary, insurance policies need to be reviewed for the following:

   (a) In the event that your profession requires a physical duty to inspect and your professional body has issued guidance in respect of same for COVID-19, make sure that your professional indemnity policy does not contain a condition for failure to inspect (many do, for instance, valuers, real estate agents, surveyors, certifiers, etc).

   (b) Does your policy contain a bodily injury exclusion? If so, you should request that this exclusion is "written-back" so it will not apply if such injury arises from "professional services".

4. Firms should start to prepare information that will be required for their next renewal, including:

   (a) details on how your services are affected by COVID-19 and how the Firm has coped with the situation.

   (b) information as to whether the firm can provide its core services without error or delay? If not, how it is managing this?

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[4] https://www.health.gov.au/sites/default/files/documents/2020/03/coronavirus-covid-19-know-the-signs-coronavirus-covid-19-know-the-signs-poster_0.pdf

[5] https://www.health.gov.au/sites/default/files/documents/2020/03/coronavirus-covid-19-stop-the-spread-coronavirus-covid-19-stop-the-spread-poster_0.pdf

[6] https://www.safeworkaustralia.gov.au/collection/business-resource-kit-covid-19

[7] that means they respond to matters first notified during the period of currency. In other words, they cover conduct occurring prior to inception of the policy and will enliven when allegations are first made against the company or its directors and officers. The retrospective cover may sometimes be subject to a retroactive date. The date of such will be that in which the insurers agree to cover conduct from.

(c) to what extent can the Firm work remotely? In doing so, how does the Firm continue to ensure the quality and accuracy of the work from its employees?

(d) whether there is remote access to the Firm's core systems?

(e) whether the Firm has electronic document management system or is it reliant on paper files?

(f) have there been any material changes to your workflows as a result of remote working?

(g) is there a central diary system to log business critical dates?

Directors' and officers' and company liability

We expect that the pandemic may expose directors and companies to claims brought by:

1. employees who may have been exposed to COVID-19 whilst working; or otherwise have not been "properly" dismissed and received entitlements.

2. regulators for failing to take appropriate actions in responding to COVID-19.

3. shareholders against directors who have failed to develop adequate contingency plans, observe or implement policies and procedures, or fail to properly disclose the impact of COVID-19 on the company's business and financial performance.

4. creditors/liquidators/examinations for the company failing to pay debts as and when they fall due.

These policies can extend to cover the company, but normally cover the directors and officers of the company for allegations of wrongful management. The policies are claims made. These policies include:

1. Directors' and officers' liability - covers the directors and officers for allegations of wrongful acts against them in the management of the company;

2. Employment practices liability - extends to cover the company and its directors and officers for allegations of wrongful acts including wrongful termination;

3. Statutory liability – extends to cover the company and its directors and officers for actions brought by regulatory authorities for breaches of various acts of parliament by the company (or its directors or officers).

Indemnity provided by these policies is available (generally) for legal costs and expenses to defend allegations of wrongful acts (or costs defending inquiries brought by authorities), compensatory penalties for breach of statute (provided that these penalties are deemed insurable at law) and damages/adverse costs for wrongful acts in which the "insured" (company/director) becomes legally liable.

Insurance product evolution has seen these covers incorporated into what is known as "Management Liability" insurance ("**ML**"). ML is generally available to privately held companies and aggregate all covers under one policy limit. Publicly listed companies will generally purchase the coverage "separately".

Directors' and officers' liability

There has been significant commentary regarding the hardening of the market for this type of insurance. It has been subject to significant claims activity. Insurers' are very selective in underwriting the class and the cover that they are offering is becoming narrower. Premiums and excess are increasing.

These policies are generally put in place for the benefit of natural persons (directors and officers of corporations). Cover can be extended to cover the entity i.e. for securities claims. This is where there has been significant claims activity (claims against corporations in connection with its securities) and the premiums for this cover are extremely expensive, if the company can obtain the cover.

The emergence of COVID-19 has caused further concern for insurers underwriting this class. The fear being that companies and their directors may be exposed to claims for a range of allegations from alleged mismanagement of the company during the pandemic. Companies and their directors must take appropriate steps to respond to the impact of COVID-19. In its article “Responding to COVID-19”, on 9 March 2020 McKinsey & Company, prepared the following checklist: [8]

COVID-19 response: Companies can draw on seven sets of immediate actions.

1 Protect employees

- ☐ Follow the most conservative guidelines available from leading global and local health authorities (eg, CDC, WHO)
- ☐ Communicate with employees frequently and with the right specificity; support any affected employees per health guidance
- ☐ Benchmark your efforts (eg, some companies have started to curb nonessential travel)

2 Set up cross-functional response team

- ☐ Overall lead should be at the CEO or CEO-1 level; team should be cross-functional and dedicated
- ☐ Create 5 workstreams: a) employees; b) financial stress-testing and contingency plan; c) supply chain; d) marketing and sales; e) other relevant constituencies
- ☐ Define specific, rolling 48-hour and 1-week goals for each workstream based on planning scenario
- ☐ Ensure a simple but well managed operating cadence and discipline that’s output and decision focused. Low tolerance for “meetings for the sake of meetings”
- ☐ Present minimum viable products: a) rolling 6-week calendar of milestones; b) 1-page plans for each workstream; c) dashboard of progress and triggers; d) threat map

3 Test for stress, ensure liquidity, and build a contingency plan

- ☐ Define scenarios that are tailored to the company. Identify planning scenario
- ☐ Identify variables that will affect revenue and cost. For each scenario, define input numbers for each variable through analytics and expert input
- ☐ Model cash flow, P&L, and balance sheet in each scenario; identify input-variable triggers that could drive significant liquidity events (including breach of covenants)
- ☐ Identify trigger-based moves to stabilize organization in each scenario (A/P, A/R optimization; cost reduction; portfolio optimization through divestments, M&A)

4 Stabilize the supply chain

- ☐ Define extent and timing of exposure to areas that are experiencing community transmission (tier-1, -2, -3 suppliers; inventory levels)
- ☐ Immediate stabilization (ration critical parts, optimize alternatives, prebook rail/air-freight capacity, use after-sales stock as bridge, increase priority in supplier production, support supplier restart)
- ☐ Medium/longer-term stabilization (updated demand planning and network optimization—solve for cash, accelerate qualification for alternative suppliers, drive resilience in supply chain)

5 Stay close to customers

- ☐ Immediate stabilization (inventory planning, near-term pricing changes, discounts)
- ☐ Medium/longer-term stabilization (investment and microtargeting for priority segments with long-term growth)

6 Practice plan with top team through in-depth tabletop exercise

- ☐ Define activation protocol for different phases of response (eg, contingency planning only, full-scale response, other)
- ☐ Key considerations: clarity on decision owner (ideally a single leader), roles for each top-team member, “elephant in room” that may slow response, actions and investment needed to carry out plan

7 Demonstrate purpose

- ☐ Support epidemic efforts where possible

McKinsey & Company

The Australian Institute of Company Directors also published on 6 March 2020 “COVID-19 – how should your board respond?” [9]

Globally, cases have already been brought against directors and officers alleging their failure to respond adequately and mitigate against the effects of COVID-19. It may be that claims here in Australia will be brought by shareholders, employees, suppliers and even regulatory authorities against directors.

There is a likelihood that there will be increased insolvencies following the next 6 months. The *Coronavirus Economic Response Package Omnibus Act 2020* (Cth) seeks to safeguard companies and their directors against insolvency. The package includes that:

1. there is a new 'safe haven' for directors that cause a company to incur a debt in the "*ordinary course of the company's business*" while insolvent (provided the debt was incurred honestly and to help continue operations through this period);

2. debt required for a creditor to issue a statutory demand from AUD2,000 to AUD20,000;

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[8] https://www.mckinsey.com/business-functions/risk/our-insights/covid-19-implications-for-business
[9] https://aicd.companydirectors.com.au/membership/the-boardroom-report/volume-18-issue-3/coronavirus-how-should-your-board-respond

3. the minimum amount of debt required for a creditor to issue a bankruptcy notice or creditor's petition from AUD5,000 to AUD20,000;

4. the minimum amount of debt required for a creditor to issue a bankruptcy notice or creditor's petition from AUD5,000 to AUD20,000;

5. the time limit for a company to respond to statutory demand has increased from 21 days to 6 months.

Whilst these provisions may provide some relief for companies and their directors, common law duties regarding insolvency will still apply. Insureds should check their D&O policies as to whether they carry “insolvency exclusions”. These provisions exclude claims where the company “fails to pay its debts as and when they fall due”.

As an aside, we have been apprised that many privately held companies’ directors/owners are making significant loans to ensure their companies remain solvent. Where this happens, those owners/directors should take advice on protecting their investments in circumstances where the company can no longer continue to trade through these difficult times and become insolvent. To mitigate against same, such loans ought to be secured by general security agreements which are registered. You should seek the advice of your lawyer/accountant in this regard. If you would like direction to obtain this advice, please contact Bellrock so that we can direct you to one of our panel lawyers.

Employment Practices Liability

Directors and Officers Liability covers “employment wrongful acts” (wrongful dismissal etc.) that are brought by employees against directors or officers. It will not ordinarily cover however the company. Most of these claims are now brought against the company as distinct from directors or officers – otherwise, they are brought against both.

It is also very important to check the scope of indemnity provided by the policy. Statutory entitlements are excluded by the policy – so in circumstances there is a claim brought and such entitlements are not paid, these will generally not be recoverable under the employment practices/directors and officers liability policy in respect of employment liability claims.

The frequency of claims made for “employment wrongful acts” is likely to increase following the pandemic. Insurers fear that this may not only be for cases of “wrongful dismissal” but may also extend to discrimination. There is already the emergence of claims alleging discriminatory behaviour by employers.. Directions to employees targeting a particular race or ethnicity will likely be considered discriminatory.

Employment policies and procedures responding to COVID-19 are critical. Insurers will want to understand:

1. What notices have been issued to staff and that the company has taken advice as regards its obligations to employees in the event of terminations.

2. How do COVID-19 absences affect employee wages? What exposure is there to the employer? What impact has JobKeeper [10] had on the company.

3. How employers handle employee quarantine cases in connection with staff privacy?

4. The extent to which employers ask employees to refrain from personal travel that might expose them to COVID-19? When can employers require employees to stay home? When can employers require employees to come in to work?

External advice from employment lawyers should be sought in connection with each of the above issues.

[10] https://www.business.gov.au/risk-management/emergency-management/coronavirus-information-and-support-for-business/jobkeeper-payment

Statutory Liability

Inquiries and examinations may also increase as regulators review the conduct of companies and their directors during and after COVID-19. There is a concern that regulators may focus on public examinations of company directors (where companies have become insolvent), issues of taxation and WHS inquiries.

Even before COVID-19, regulators had become more active, particularly with regard to Work Health and Safety. The costs alone for enquiries brought by the various State Regulators are on average ~$300,000 for a simple matter. Environmental regulators have also become more active and greater obligations exist for directors, and fines ensue, to strict new environmental laws.

It is also important for companies and their directors to consider their obligations under the *Privacy Act*. This now more than ever with remote working arrangements potentially causing greater vulnerability to networks.

Steps to take

1. Governance, compliance, disclosure: directors and officers must take practical steps to respond to issues arising from the pandemic (employee issues, response and communication team for policies and procedures, attend to cashflow and liquidity, assess the impact and benefits of Government and other forms of relief, review and stabilise supply chain, stay close to and assess client/customer sales and impact on the business, clearly articulate and demonstrate the business plan to all stakeholders.

2. Take advice insofar as the Company's risks and whether response is adequate. Consult with experts (lawyers, accountants, insurance broker/risk manager). [11]

3. As regards coverage:

   (a) directors to review policy wordings to ensure that there is cover for the company as well as "natural persons" for allegations of wrongful acts.

   (b) insureds need to check whether an insolvency exclusion has been applied.

[11] Bellrock has a panel of experts who can advise directors and companies about their respective duties and obligations. Directors are aware that risks present resultant of COVID-19. They need to show that they are addressing the risk and taking proactive steps to mitigate against it. These steps will be key in formulating "defences" should claims or inquiries commence. Bellrock has a panel of experts we can coordinate for our clients to ensure that they are taking reasonable and necessary steps.

Cyber

Traditionally the major exposure to business was damage to its premises (by fire, flood, storm, tempest, amongst perils) and consequential loss (costs of rebuilding the premises, including keeping staff during that time and profit). Without its premises, a business could not operate. Now the computer network is critical to a productivity. What COVID-19 has made abundantly clear, is business' reliance on its network.

We anticipate during the crisis that cyber-crime will increase. Many companies lack adequate risk management, governance or response plans, and otherwise remain uninsured for cyber risk.

Coverage varies in the market. Many cyber policies will trigger in the event of a "cyber breach" alone, being an intrusion to the network. However, products exist in the market that offer broader cover that responds to "human and programming error".

Cyber policies incorporate a suite of covers, including:

1. first party direct financial loss as a result of fraudulent imitation (but the terms must be checked, and generally a crime policy must complement this cover);

2. remediation costs and expenses (following a network incident or cyber breach);

3. ransom costs following a denial of service or ransomware attack;

4. legal liability to third parties as a result of a cyber breach;

5. inquiry costs and expenses following a cyber breach, and in some instances, insurable penalties imposed by regulators.

No director could assert that they did not know "risk" existed as regards the threat of a cyber breach and downtime of their network.

In the event of a breach, network outage, ransomware attack, human or programming error, how exposed is your business? How long will it take to restore your network and become operational? Who will pay for those costs? What affect will an outage caused by an attack/error have on your profitability? Legal liability should also be considered: what personally identifiable information does the business hold? What are the effects in the event of a breach exposing customers' personally identifiable information? If network services are outsourced, what indemnities are given in agreements with service providers? What are the implications under the *Privacy Act* (strict liability still exists even if data is stored on the cloud)?

Directors must turn their mind to mitigating against these risks to ensure their businesses are "cyber prepared". This means a review of their network, its vulnerability, the impact to the business if the network is down and any response plans ie policies, procedures and protocols.

Steps to take

In the current circumstances, particularly given the working from home directions, the following should be considered:

1. review business continuity plans and procedures.

2. virtual private networks and firewalls should be up to date with the most recent security patches (see guidance for Windows and Apple products).

3. increase cyber security measures in anticipation of a higher demand on remote access technologies. Make sure these are tested.

4. if you use a remote desktop client, ensure it is secure.

5. work devices, such as laptops and mobile phones, must be secure.

6. implement multi-factor authentication for remote access systems and resources (including cloud services).

7. maintain protection against denial of service threats. Perhaps seek external independent vulnerability testing.

8. staff and stakeholders should be informed and educated in cyber security threats such as social engineering.

9. staff working from home should have physical security measures in place. This minimises the risk that information may be accessed, used, modified or removed from the premises without authorisation.

It follows that without any significant attention or steps taken with the above, it will be difficult to obtain quotes come next renewal. An independent network assessment and business interruption review should be conducted by third-party experts.

Commercial Crime

Traditionally business was at risk of fraudulent conduct by employees from theft of money. Fidelity insurance would cover such exposure. Over time, exposure to “direct financial loss” suffered by business has evolved. Third-party collusion and most recently, technology, are key emerging trends in criminal activity causing companies to suffer loss of money they hold.

Presently, frequency losses are resultant of imitation fraud causing erroneous transfer of funds. That is, a perpetrator imitates a party in a transaction, and proceeds to induce payment for the fraudster’s benefit. This is otherwise known as “social engineering” fraud”: all businesses are exposed to this risk.

Commercial crime cover indemnifies the policyholder for both “internal” and “external” fraudulent acts causing business “direct financial loss” of “Money” and “Tangible Property”. Cover may extend to:

1. fraud or dishonesty committed by an Employee, whether acting alone or in collusion with others;
2. computer fraud committed by a third party;
3. funds transfer and credit card fraud;
4. unlawful taking of ‘money’ from the policyholder’s premises, or bank, or whilst in transit to and from premises/bank, or whilst being held by a director or employee at their premises;
5. alteration of a financial instruments such as cheques, bonds, currency and travellers’ cheques.

Coverage is very different across the insurance market for crime. Where cover is extended under a management liability policy, brokers and their clients should be very careful as to insurers’ intent. There have been many insurers who do not price crime risk accordingly, and in the event of a claim take adverse coverage positions.

Steps to take

There is overlap between crime, industrial special risks and cyber policies. As such risk management required by insurers will be common across those products:

1. training on ‘social engineering fraud’, in particular, strict measures on thorough identification of authors requesting transfers;

2. multi-factor authentication;

3. vulnerability and penetration testing of network;

4. ensuring strict security and facilities management during an unoccupancy of premises.

Trade credit

The current situation is unprecedented and almost all countries around the world have been affected by the COVID 19 crisis. Most governments have taken action and many countries are in lock-down. This will have a significant impact on Global trade. Some experts believe the impact could be even more dramatic than during the 2008/9 global financial crisis.

Trade Credit Insurance (TCI) is an effective financial risk management tool that safeguards a company against losses sustained from non-payment of trade related debts. TCI is available to all registered businesses that sell goods and services or credit terms, this includes businesses that trade domestically and internationally.

If a buyer does not pay (often due to bankruptcy or insolvency) or pays very late, the trade credit insurance policy will pay out a percentage of the outstanding debt. Accounts receivables typically represent more than 40% of a company's assets, trade credit insurance can prevent bankruptcies, help companies manage credit, and even present opportunities for business expansion in the increasingly connected global marketplace. The primary function of trade credit insurance is to protect sellers against buyers that do not or cannot pay.

The policy is triggered if a buyer does not pay, the trade credit insurance policy will pay out a percentage of the outstanding debt. This percentage usually ranges from 75% to 95% of the invoice amount, but may be higher or lower depending on the type of cover that was purchased.

Trade credit insurance policies are flexible and allow the policyholder to cover the entire portfolio or just the key accounts against corporate insolvency, bankruptcy and bad debts. The most common type of cover is so-called Whole Turnover Cover, which covers all buyers of the policyholder.

Already insurers have started dealing with the fallout from COVID-19 and are making amendments to their portfolios, QBE has halted trade credit protection for high-risk policies under a certain limit and made changes at higher levels in response to the coronavirus pandemic. QBE will not provide trade credit cover in high-risk areas for policy limits under $US250,000 ($406,300), has reduced cover by 25% across the board in the $US250,000 ($406,300) to $US1 million ($1.6 million) limits range, and above that level in high-risk categories it has reduced limits by 50%. Any existing coverage for goods or services already committed will be unaffected, with the changes applying to business going forward.

Political risk

Political risk insurance ("**PRI**") is typically purchased by multinational corporations, importers and exporters, project lenders, financial institutions and capital markets, foreign investors, and contractors in industries like construction and engineering. Investors in financial services are the highest users of PRI.

Political risk insurance is designed to mitigate against the loss of commercial assets, income or property as a result of a political risk event. Such events include political violence, expropriation, currency inconvertibility, non-payment, and contract frustration. Political risks are often very difficult – sometimes impossible – to predict, and the loss of assets and income that follows can be catastrophic.

Previously, the most common political risk-related loss was exchange transfer, this was followed by political violence and import/export embargos. The key geopolitical threats are US sanctions policy, emerging market crises in areas like Turkey and Argentina, protectionism/trade wars, and populism/nationalism.

COVID-19 presents a range of issues to companies who have invested in overseas markets. Businesses trading with foreign nations or investing in those countries may be highly susceptible to these exposures.

Industries and professions

Regard should be had to each industry/profession with our commentary by product. As an overarching statement, industries/professional bodies have provided comprehensive advice about changes to practice, policy and procedures. They also have sought to address the major issues confronted by their industry/profession. Our observations are made having regard to issues presented to us by clients in the respective industry/profession and consulting with experts advising those industries/professions. Regard must be had to the industry/body guidelines.

Construction

COVID -19 presents new challenges to the construction industry:

1. we have experienced new projects being put on hold, and many contractors' "pipeline" diminishing. There is an overarching fear of a decrease in asset values following the social, economic and financial effects of the crisis. The genesis here is a reluctance of equity and debt providers to commit to projects given the economic uncertainty. That said, we do note that the Government (Federal and State) have moved forward some projects.

2. parties to projects have started to rely on force majeure clauses (events beyond the parties' control meaning the contract cannot be performed). However, where a party wrongfully relies on such a clause, it could mean they have repudiated the contract, are in breach of contract and may be liable for damages.

3. Sites are experiencing delays due to core materials being unavailable. Considerable pressure has been placed on project sites to conform with new and evolving work health and safety procedures [12], which is causing or contributing to delays. Parties may be entitled to extension of time clause, but that will depend on the construction of the clause in the relevant contract. Where an entitlement exists the notice provisions must be strictly adhered to.

Steps to take

1. It may be that project funding, bank guarantees and other finance costs increase due to delays.
2. WHS: see workers' compensation and statutory liability as regards obligations of worker safety. Also take advice as regards obligations to workers under industrial instruments.
3. Directors duties: ensure business feasibility assessment is undertaken and steps taken with regard to impacts from COVID-19.
4. Premium considerations:

   (a) contract works is rated directly on "estimated turnover". This means, subject to any minimum premium conditions, reduced turnover will yield a reduction in premium. We opine that there is scope for downward adjustment of premium proportion to revenue. This takes place at the end of the policy period but may happen sooner (if necessary) to protect cashflow. Undertaking a review of your forward order book and determining your expected turnover should be undertaken and potential return premiums requested (without the need to cancel the policies) should cash flow concerns exist. Workers compensation is also rated on estimated wages and the same approach can be taken.

   (b) Claims made policies will not have the benefit of such adjustments (i.e. professional indemnity, directors' and officers' liability, etc).

   (c) Static assets such as plant and equipment still need to be insured, and no discount is generally applied if the machinery is in use or idle.

   (d) There may be additional premium for contract works, liability and professional indemnity policies where there are delays and project policies are in place, they will need to be extended if possible.

5. As regards delays with materials:

   (a) Developers may wish to protect against delay in the supply chain for materials which they could do by provisioning for additional costs to unsatisfied purchasers about alternate materials being used, where

[12] These procedures can be found at Safe Work Australia: https://www.safeworkaustralia.gov.au/covid-19-information-workplaces/preparing-workplaces-covid-19/building-and-construction-minimising#workers-in-the-building-and-construction

changes have had to be made due to late or non-delivery of items from overseas countries, build these costs into any rate for liquidated damages within your contracts

(b) Contractors should ensure that their agreements with owners/developers provision for title passing on payment, then delivery, of offsite materials. This will assist to mitigate against potential increased costs from delay of deliveries of materials

6. Contracts: Review rights under various contractual documents as regards force majeure. Understand the required notice you must give to request Extension of Time under existing contracts. Make sure that where coverage is required for other parties under any contract, that adequate cover is extended and no exclusions apply for COVID-19 "risks".

Professional services

Generally professional services firms will have in place quality control mechanisms which will, in the ordinary course, reduce exposure to claims brought under these policies. Some of these mechanisms will include peer-review, document management protocol, ongoing workplace training and professional development.

Whilst working from home plans can cater for these usual practices, ficant disruption to traditional operations may be impacted by COVID-19.

The professional indemnity insurance market has hardened. [13] It will be a particularly difficult renewal for, in particular, financial services licensees, investment advisors, accountants, lawyers, valuers, health professionals and building/construction professionals.

We make the following observations:

1. Construction professionals including architects, engineers, project managers, surveyor, certifiers and building inspectors may be exposed to liability in failing to discharge contractual obligations where their services require physical attendance on site. Guidance has been provided from the relevant industry bodies. [14] We have also been privy to issues causing delay because of failure of home computer capacity to run computer aided design IT programs. Contracts must be checked to ensure losses as a result of failure to exercise duties cause delay, particularly when we have been made aware that some insurers are excluding consequential loss on professional indemnity renewals.

2. Law firms are faced with changing procedures to daily work. Whilst most practices are adapting to technological change, the profession has been slow to do so. Given the voluminous documents that pass in litigation and complex transactions, extra care must be taken to ensure document repositories are kept up to date and documents suites are complete.

   Other concerns include increasing bad debts, lack of peer review, changes to "court procedure", issues with online hearings and the veracity of evidence given in such fora, disruption to staff working on files due to lay-offs and certification of documentation.

   The various State and Territory Law Societies have published resources and precedents to assist practices respond to COVID-19. These should be consulted. [15]

3. Accounting firms will be faced with navigating significant changes to tax and subsidy systems as well as navigating business through the issues presented by COVID-19 and the impact to their financial performance, and potential insolvency. Contemporaneous file notes will be imperative for accountants in light of the ever changing amendments to tax and government relief being offered.

   We consider that there will be an uplift in requests for accountants to assist in the preparation of applications for credit.

[13] There are less insurers (withdrawal in particular of Lloyd's of London), less competition, reduced appetite for risk, cover reduced, capacity reduced, rates and excess have increased.

[14] https://www.consultaustralia.com.au/covid-19response; https://www.engineersaustralia.org.au/COVID-19/Update; https://aca.org.au/tag/COVID-19

[15] NSW Law Society: https://www.lawsociety.com.au/news-and-publications/news-media-releases/impact-covid-19-legal-profession; QLD Law Society: https://www.qls.com.au/For_the_profession/COVID-19_LEGAL_PROFESSION_RESOURCES; Law Institute of Victoria: https://www.liv.asn.au/Professional-Practice/Supporting-You/COVID-19-Hub

The Institute of Chartered Accountants has published resources and precedents to assist practices respond to COVID-19. These should be consulted.

4. Property valuers are concerned with risk of health to those in the profession having regard to inspection of properties. Note that the Australian Property Institute has issued protocols on 29 March 2020 “Valuation Protocol – Guidelines for API Declared Time of Crisis and/or State of Emergency Impacting Physical Inspections of Real Property”. [16]

5. As regards pharmacies, medical centres, health and aged care providers all are faced with the risk of exposure to claims brought by patients, customers for compensation if they contract COVID-19. The professional indemnity policy is likely to respond to a claim brought against health practitioners for failure to diagnose.

   Companies employing experts in the medical field may also be at risk. Private medical facility employers with inadequate procedures present risk. Healthcare practitioners should consult with their professional body and have regard to Government advice. [17]

   By way of example, and specific to pharmacists, they should continue to review The Pharmacy Guild of Australia’s updates regarding business and processes, [18] workplace relations, [19] and COVID-19 employer obligations. [20]

6. Technology professionals may be susceptible to claims for failure of products and services as reliance of business becomes critical on technology in the current environment. Technology professionals are normally insured for their products and services under an information technology policy (“**IT Liability**”). That policy combines professional indemnity and public/products liability. Technology professionals should ensure that they review their contracts, particularly any consequential loss provisions.

[16] https://www.api.org.au/covid19-standards-and-protocols?fbclid=IwAR1X1pnBeO2InPDUKx5YLGuzSp9xIKAdPUiEO72QURDKuHpNFpSBUOM-PNo
[17] https://www.health.nsw.gov.au/Infectious/diseases/Pages/coronavirus-update.aspx
[18] https://www.guild.org.au/resources/business-operations/covid-19
[19] https://www.guild.org.au/resources/business-operations/covid-19/covid-19-managing-your-business-and-staff/workplace-relations-and-small-business-advice-and-guidance-about-entitlements-and-obligations,-including-government-support
[20] https://www.guild.org.au/resources/business-operations/covid-19/covid-19-managing-your-business-and-staff/COVID-19-Employer-Guide-Ed-3-17032020-pw-DW-20200318.pdf

Strata and owners' corporations

Strata Managers, we understand, are inundated with queries from tenants and owners as regards abatement of levies amongst other things. We opine that the major issues to OC's and Managers in the context of COVID-19 will be:

1. requests for abatement to levies by owners
2. duties to warn of the effect of COVID-19
3. ensuring safety of those within the plan
4. ensuring that the plan is kept in a good state of repair, including where there may be un-occupancy of some (in particular commercial) tenancies
5. dealing with orders of Authorities in the event "evacuations" are ordered.

As you are aware, Strata policies contain a range of covers including material damage, consequential loss, general liability, office bearer's liability (a form of directors' and officers' liability for persons comprising the executive committee) and supplementary legal expenses (cover for OC's for their costs in pursuing an action).

Key steps

1. The OC should be taking the appropriate risk management steps to help prevent the spread of Coronavirus. The OC is responsible for the management of the common areas and facilities. An integral part of adequate risk management includes routine and thorough cleaning of common property areas, from door handles, railings and lift buttons.
2. Enforcing the rules is a Committee responsibility but during extreme circumstances, such as these, where building occupancy will be at maximum and everyone living in close quarters, a Committee should act reasonably and consider carefully practical solutions to keep community harmony. Some rule enforcement like drying the washing on the balcony, tolerance of "quiet enjoyment" and pets may need to be relaxed. Common sense should be used.
3. The government has introduced containment measures for social distancing as well as for non-essential services, including pools and gyms. The OC should follow and implement restrictions and closures of these non-essential facilities as per Australian Government guidelines.
4. Communication between SM and OC is crucial. The appropriate medium for that communication must be via technology, in particular communications. EC's should ensure that articles of the plan permit meetings to be held using technology.

On next renewal, insurers will want to understand:

1. What procedures have been put in place as regards COVID-19?
2. Do all common areas have clear notice warnings about COVID-19 and prevention measures?
3. Has advice been taken by the OC in relation to discharging its obligations responding to COVID-19?
4. Have there been requests for abatement of levies? In circumstances there has been, what steps has the OC taken to ensure it is adequately capitalised to ensure its maintenance plans?
5. If the plan contains any commercial lots, are any unoccupied? In circumstances they are to what extent are they insured? Are there routine checks of these lots? Are they still being adequately maintained?

Australian Financial Services and Credit Licensees

The COVID-19 pandemic is causing turmoil in markets and investor in certainty. Reports suggest that "cash is King" and investors seem to be rushing to liquidate their investments. Insurers fear future claim activity which may be brought by retail and wholesale investors against fund/investment managers. All face a varying array of issues:

- For wholesale funds issues include default of investors in funds, extension of fund life, fundraising and investment periods, the extent of risk disclosures (if any) required in relation to the pandemic, accuracy of valuations given market uncertainty and the requirement to communicate clearly and accurately with investors.
- For unlisted retail funds issues include liquidity and redemptions, significant adjustments to new PDSs, delay in offerings, greater capital requirements for licensees, the suspension of unit pricing (this may occur if a responsible entity determines that the value of the fund's assets or liabilities cannot be calculated reliably) and redemptions, adjustments to buy/sell spreads, the affect of COVID-19 on third party providers

Next steps

1. Details will be required on how fund operation have been affected, and adapted, to the issues presented by COVID-19. What advice is being taken by external experts to respond to the issues presented by COVID-19.
2. Please include details of successes and failures of:

   (a) staff being able to work remotely and to access the Insured's computer systems; and

   (b) service providers (such as investment managers, custodians and administrators) are able to maintain their levels of service.
3. What review (if any) have you conducted with your third party providers or corporate authorised representatives.
4. Have you sent out any information to your investors in respect to how COVID-19 has affected the company?
5. Are you experiencing any difficulties obtaining Net Asset Value calculations in the current environment? If so, how are you managing this and how are you communicating this to investors?
6. What level of redemption requests have you received? Do investors have any withdrawal or redemptions rights available to them within the next 6 months?
7. Has the fund experienced any liquidity issues during, or does it foreshadow any following the pandemic? Have any investors, auditors, directors or regulators raised any concerns about the performance or liquidity of the fund?
8. Where you are: (a) a mortgage fund, please advise whether you are experiencing increase in arrears and aged debt (b) a direct property fund, please advise what negotiations are taking place with tenants and the effect of abatement on investor returns; (c) a development fund, any delays in projects or non-completion of pre-sales in projects.
9. Are there any plans to change any part of the fund's investment strategy?

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