

Insurance Brief

The Building Act 2004

- Implications for Statutory Liability Policies

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On 31 March 2005, the Building Act 1991 was repealed and the 2004 Act came into full force and effect.

The Act contains a raft of changes from its predecessor, all of which aim to better protect home owners. The focus is on safety. Parliament has sought to encourage and improve the control of better practices in building design and construction so that buildings meet the standards set out in the Building Code.

The Act contains some nasty surprises for the unprepared. In particular, residential builders and residential property developers are now subject to new criminal and civil liabilities. As before, it will not always be necessary to prove that a defendant intended to commit an offence under the Act for prosecutions to succeed. In addition, many vendors of residential properties will now find themselves caught by the provisions of the Act.

Voluntary licensing of builders will begin in 2007. Applicants will need to be able to show that they have met the licensing standards. Once licensed, they can sign off work. It will not be mandatory for builders to become licensed but those who are not licensed will need to have their work signed off by someone who does have the appropriate certification.

Licensing will extend to design as well as to building. Persons affected by the design aspect are likely to be engineers, architects, draughtsman and the like.

Coverage under a statutory liability policy extends to include the costs of defence and certain fines or penalties under certain statutes. Given the potential for a new range of prosecutions, insurers may wish to consider excluding the Act from the range of statutes that cover is provided for.



The cover for builders and other sub-trades will need to be carefully considered by underwriters. In terms of setting premiums, it may well be necessary to be aware of (and ask to see) the terms of a builder's licence. If a builder (or a sub-trade) is a licence holder and intends "signing off" building work carried out by others, then that would inevitably increase the risk of future claims. Consideration will need to be given as to whether to exclude that type of work (or whether the underwriting terms need to be amended if cover is offered to those carrying out this work).

There are also a range of new offences under the Act. For example, it is an offence if a person carries out or supervises restricted building work and is not licensed. Builders, developers and potentially plumbers, engineers and electricians (or similar sub-contractors) would be the type of businesses affected. If you would like some more details as to the types of offences or the parties likely to be affected, then please contact Paul Smith:

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EARLY NEUTRAL EVALUATION - A NEW FORM OF ADR

Insurers have rightly embraced mediation as a cost-effective means to achieve resolution as an alternative to the costs and risks of the trial process.

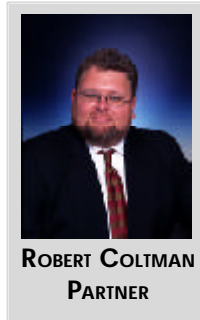
However, in some cases the inevitable compromises inherent in the mediation process can lead to a sense of frustration where a technical legal point or point of policy construction/interpretation is lost to the analysis of legal and other costs to be incurred in the alternative to a mediated resolution (it is this analysis that drives the mediation process).

An alternative developed in the United States but gaining some traction in the United Kingdom with its new civil procedure regime is the Early Neutral Evaluation. The Early Neutral Evaluation is particularly appropriate for points of law or legal interpretation where facts can be agreed or are not particularly in dispute. The process sees the submission of the legal question to an evaluator (who is usually legally qualified and probably a specialist in the subject matter to be decided upon). The evaluator hears submissions and in some cases may be empowered to undertake his or her own investigations before issuing a non-binding evaluation of the merits of the respective



parties' cases. It may be an evaluation with or without reasons.

The Early Neutral Evaluation is not dissimilar in concept to a preliminary question in the Court context but has the advantage of being able to be speedily conducted with confidentiality and as a basis to set up a subsequent negotiation. Indeed in the model terms issued by the UK Centre for Effective Dispute Resolution a mediation option is included as an outcome following the evaluation (see www.cedr.co.uk).



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The use of alternative dispute resolution mechanisms as a means to achieve expeditious and cost efficient settlement is well established but alternatives to mediation may provide even further opportunities for insurers to dispose quickly of disputes without sacrificing the legal or underwriting reasoning that underpins a policy term or other point of principle under dispute.

Rob Coltman is a longstanding member of the Arbitrators and Mediators Institute of New Zealand. If you would like to discuss alternatives to litigation, please contact him on:
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