Bills Committee on Building Management (Amendment) Bill 2005

Supplementary Consolidated Response – The Administration's response to Members' Suggestions/Views on the Draft Building Management (Third Party Risks Insurance) Regulation

Concerns and Views	Suggestions made by Members	Administration's Response
A. Statutory Minimum Amount of Insurance Coverage		
Draft Building Management (Third Party Risks Insurance) Regulation (Regulation) – Section 4		
Members expressed diverse views on the statutory minimum amount of insurance coverage – (a) Some Members considered that the amount was too low and would not offer enough protection for the owners. (b) Other Members considered that increasing the minimum amount would lead to higher level of premium and might cause a huge burden to property owners.	(a) An independent valuation mechanism should be set up to review the proposed insured amount annually. (b) The Administration should provide information on the insured amount of various typical buildings and explain the basis on which the minimum insured amount of $10 million per event was set. (c) The Administration should consider whether a tiered structure on the basis of numbers of flat in respect of the minimum insured amount should be	The current proposal for a $10 million coverage was made by the Hong Kong Federation of Insurers (HKFI). As advised by HKFI in June 2006, an average of 6 500 public liability claims were received by its member companies between 2002 and 2004 and there was no single claim reported which exceeded $10 million. HKFI considered that a minimum limit of $10 million in the Regulation should suffice. HKFI also reminded that it is the duty of the related professionals to advise their clients in selecting the appropriate limit of indemnity. We see no strong justification to deviate from HKFI's professional recommendation. Whilst increasing the

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	devised.	minimum coverage will certainly offer better protection for the owners and the third parties, it will undoubtedly increase the level of premium as well. It is also inappropriate for the Government to impose a higher level of minimum insurance coverage solely because one or two isolated accident(s). We have considered the option of having a tiered structure for the insurance requirement. However, the number of units in buildings of Hong Kong varies greatly (from some 10 units to thousands of units) and it is basically impractical to have a demarcation that will satisfy everyone. To make a tiered system work, a number of tiers would be required to cater for the many different types of buildings. This would bring obvious inconvenience in implementation and render the mechanism unworkable and ineffective.
B. Requirements under section 6(3) of the draft Regulation		
Draft Regulation – Section 6(3)		
Members in general expressed concerns over section 6(3) of the draft	(a) To allow the Members to have a better understanding of the standard applied by	In response to suggestion (a) –

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Regulation, which set out requirements that need to be fulfilled by the assured in order to invoke the provisions concerning avoidance of restrictions in insurance policies. They considered that insurance company might reject claims by third parties on the ground that the assured had failed to fulfil the requirements set out in section 6(3).	the court, the Administration should provide relevant court cases concerning the interpretation of wordings like "having exercised reasonable diligence". (b) The Administration should review the drafting of the draft Regulation to ensure that if the assured had not exercised reasonable diligence to keep certain parts of a building in good condition and maintenance, the insurance of the assured in relation to other parts of the building would not be affected. (c) The Administration should explain why the assured was required to "ensure compliance with the deed of mutual covenant (DMC)" instead of "reasonably ensure compliance with DMC", under section 6(3)(a)(ii) of the draft Regulation.	- Reference may be made to an English court case *Fraser v B.N. Furman (Productions) Ltd and Others* [1967]3 All ER 57. The case was about liability insurance. The insurance in question contained a requirement (which was a condition precedent to the insurer's liability to pay insurance money) that the assured should take reasonable precaution to prevent accidents and disease. - According to the English Court of Appeal, the word "reasonable" in this context did not mean reasonable as between the assured and the victim. It means reasonable as between the assured and the insurer, having regard to the commercial purpose of the insurance to insure against negligence. - For there to be a breach of the requirement to take reasonable precaution, the assured must have recognised the danger, and deliberately courted it, by taking measures that the assured knew to be inadequate to avert it. The assured's conduct or omission must have been reckless - i.e. made with

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		actual recognition by the assured that a danger exists, and not caring whether or not the danger is averted. - The principle was adopted in two Hong Kong court cases, *Cheung Kai Wing v Mok Sheung Shum t/a Mok Sum Kee and others* (CACV 20/1993) and *Go Yu Liong v Bonntile Industries (H.K.) Ltd and others* (HCPI 114/1997). In response to suggestion (b), - If the assured fails to exercise reasonable diligence to keep certain part of a building in good condition, that only affects the insurer's liability to pay insurance money on any third-party risks liability incurred by the assured in respect of a death or injury that is directly caused by that failure. Reference can be made to section 6(3)(b) of the draft Regulation in this regard. In response to suggestion (c) –

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		- We will revise the wordings under section 6(3)(a)(ii) of the draft Regulation to read as "…requires the assured to exercise reasonable diligence to ensure compliance with the DMC concerned …".
C. Unauthorized Building Works (UBW)		
Draft Regulation – Section 3(2)(c)		
Some Members expressed concerns over section 3(2)(c) of the draft Regulation, which provides that an insurance policy under the draft Regulation is not required to cover UBWs.	(a) The Administration should explain to what extent building works would be classified as unauthorized, and thus the liability arising from these UBWs would not be covered by the insurance policy. (b) The policy on third part risks insurance to be procured by an owners' corporation (OC) should be required to cover liabilities incurred in relation to the UBWs of the building in respect of a third party's bodily injury and death.	- Section 3(2)(c) of the draft Regulation stipulates that a policy is not required to cover any liability arising out of a breach of any duty imposed by law in relation to any building erected in contravention of the Buildings Ordinance (Cap.123); or any building works or street works carried out in contravention of Cap.123. In other words, in determining whether certain building works would be classified as unauthorized works, reference has to be made to the Buildings Ordinance and the particular circumstances of each individual case. - We have reservations on suggestion (b). UBWs

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	(c) A statutory body should be set up to undertake insurance for buildings that fail to procure any insurance policy due to the existence of UBWs.	are unlawful building works by reference to the Buildings Ordinance (Cap. 123). Should we stipulate in the Regulation that the insurance policy has to cover liabilities arising from UBWs, it would imply that these unauthorized structures are "legalized", which is certainly against the Government's policy. It may also indirectly encourage the continual existence of these UBWs. The aim of the Regulation is to offer a buffer for the owners in case they have to settle claims from third parties but it is not to replace their basic duties to properly manage and maintain their own properties. We consider that to cure the root of the problems, owners should be encouraged to properly manage and maintain their buildings and remove any UBWs. Over the past years, both the Buildings Department, the Urban Renewal Authority and the Hong Kong Housing Society have introduced loan scheme and incentives scheme to assist owners in carrying out maintenance works. - Members may also like to note that in a number of

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		cases, although the UBW concerned was attached to or hung on the common parts (e.g. the outer wall), it was held in the court judgments that the OC or all the owners of the building should not be held responsible for the liability claim because the individual owner and/or occupier (the tenant) concerned are the sole user for the UBW which caused the claim. These include *Wong Sau Kam and Yeung Kong, the administrators of the estate of Yeung Ki Yee, deceased and Shum Yuk Fong and others* (HCPI 798/1998), *Wong Lai Kai and The Incorporated Owners of Lok Fu Building, Yuen Long* (CACV 189/1999 and CACV 195/1999), *Chan Yan Nam and Hui Ka Ming trading as Kar Lee Engineerng and others* (HCPI 1169/2000 and CACV 342/2002), *Leung Tsang Hung and Lee Wai Yu, the administrators of the estate of Liu Ngan Fong Sukey, deceased and The Incorporated Owners of Kwok Wing House* (HCPI 595/2002 and CACV 195/2004). - We have reservations on suggestion (c).

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		Management of buildings is the responsibility of the owners. We are aware that some buildings may have difficulties to get insurance coverage due to the existence of UBWs. The solution, however, is not for the Government to set up a statutory body and undertake insurance for them – this will mean passing on their responsibilities to the Government and is not the proper way of using public funds. It will also mean that responsible owners who have properly managed and maintained their buildings will have to cross-subsidize those reckless ones who do not take care of their buildings, which is most unfair. Owners should step up the management and maintenance of their buildings and to remove the UBWs as soon as possible.
D. Proposed Asbestos Exclusion Clause		
Some Members considered that claims against an OC in relation to death or bodily injury in the common parts of a building is unlikely to be associated with asbestos.	The Administration should re-consider whether an asbestos exclusion clause should be included in the draft Regulation.	Having discussed the matter further with HKFI, Director of Environmental Protection, and the Commissioner for Labour, we will include an asbestos exclusion clause in the Regulation.

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Members also considered that there might be limited choice in the market of insurers to provide such coverage.		
E. Obligations Regarding Insurance under Section 28 of the Building Management Ordinance (BMO)		
BMO – Section 28		
Building Management (Amendment) Bill 2005 (Bill) – Clause 33		
D1. Some Members enquired that in case of proceedings brought against an OC due to contravention of section 28 of the BMO, whether it would be a defence for the OC and the owners concerned if they demonstrated that they had made their best effort to procure insurance coverage for their building and yet fail to do so.		According to the new section 28(2) of the BMO, should member of the management committee (MC) proves that the offence was committed without his consent or connivance; and he has exercised all such due diligence to prevent the contravention of section 28 as he ought to have exercised in the circumstances, they will not be guilty of the offence.
D2. Some Members considered that the obligations to procure	(a) For buildings that have no OCs but engage the service of a building manager,	It is also the Government's policy intention that all buildings should, in the long run, procure third party

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insurance should not be imposed on the OCs only. The scope of the current proposal should be expanded.	the manager should be required, on a compulsory basis, to procure and keep in force in relation to the common parts of the building a policy of third party risks insurance. (b) The Administration should consider whether there were any implementation difficulties in carrying out the above suggestion.	risks insurance for the protection of the owners and third parties. The priority of the Government is to impose this on OCs first. For building managers, we understand that most of them have already procured third party risks insurance for the buildings that they manage. The need to procure insurance is also specified in the Guidelines for Deed of Mutual Covenant issued by the Lands Department. We, however, have reservation to extend this statutory requirement to building managers at this stage. The requirements for managers (which are mainly related to the financial arrangements and mechanism for termination) are stipulated in Schedule 7 to the BMO. According to section 34E of the BMO, provisions in Schedule 7 shall be impliedly incorporated into every DMC. In other words, these provisions are not statutory requirements but DMC requirements. If we were to impose on the building managers a statutory requirement to procure third party risks insurance, it is not appropriate to stipulate it in Schedule 7 to the BMO. The existing draft version of the Regulation,

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		which is a subsidiary legislation to the BMO and is applicable to OCs only, also could not be extended to building managers directly. Substantial modifications will be needed. We therefore propose to look into this matter after the enactment of the Regulation.
F. Accidents Happening in the Carpark of a Building		
Some Members enquired if a person was knocked down by a car in the carpark of a building, whether such person or his dependents could claim compensation under the motor vehicles third party risks insurance; and whether a claim could be made against the OC concerned as well.		For any accident occurring in a car park, the matter as to who should respond to the claim by the victim will depend on the merits of each case such as the cause and circumstances of the accident. Where there is clear and substantial evidence to prove that the accident was caused by a motor vehicle, in general, the compulsory motor insurance will be called upon to pick up the claim. The third party risks insurance for OC will only be called upon where there is substantial evidence to prove that the OC is responsible for the accident. Members may like to note that section 3 of the Motor Vehicles Insurance (Third Party Risks Insurance) Ordinance (Cap.272) stipulates that the provisions of the Ordinance shall apply to private roads (within the

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		meaning of the Road Traffic Ordinance (Cap.374)) as they apply to roads. Section 2 of Cap.374 stipulates that "private road" means, amongst others, car park.
G. Professional Indemnity Insurance Policy		
Some Members suggested that the Administration should bring to the attention of those OCs which had accumulated a relatively large money reserve the benefits of procuring the professional indemnity and fidelity insurance policy on performance failure.		We will promote the message among OCs.

Home Affairs Department
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