

Extract from the Administration's Response to Views of the Professional Bodies in the Building Management Sector presented to the Bills Committee on Building Management (Amendment) Bill 2005 on the proposed Building Management (Third Party Risks Insurance) Regulation

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
(11) Procurement of third party risks insurance (clause 33 and the proposed Building Management (Third Party Risks Insurance) Regulation)			
<p>The Hong Kong Institute of Housing [CB(2)2139/04-05(01)]</p> <p>Chartered Institute of Housing Asian Pacific Branch [CB(2)2139/04-05(02)]</p> <p>The Hong Kong Institute of Surveyors [CB(2)2169/04-05(01)]</p> <p>The Real Estate Developers Association of Hong Kong [CB(2)2149/04-05(02)]</p>	<p>(a) It supports the mandatory requirement for OCs to procure third party risks insurance.</p> <p>(b) The minimum insured amount of \$10 million per event in the proposed Building Management (Third Party Risks Insurance) Regulation is inadequate.</p>	<p>(a) An independent valuation mechanism should be set up to review the insured amount annually.</p> <p>(b) The minimum insured amount should be adjusted in line with compensation awards in recent cases and market practice.</p>	<p>The current proposal for a \$10 million coverage was made by the HK Federation of Insurers. We have an open mind on this matter and welcome the views of the industry.</p>
<p>The Hong Kong Institute of Housing [CB(2)2139/04-05(01)]</p>	<p>(c) The new requirement for OCs to give notice to the Land Registrar the name of the insurance company from</p>		<p>This is for the benefit of both the owners and the third party victims so that there is a reliable source for them to find out whether the OC has procured the third party risks insurance.</p>

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	<p>which an OC has effected such policy and the period of the policy will create unnecessary paperwork for law-abiding OCs every year.</p>		
<p>The Hong Kong Institute of Surveyors [CB(2)2169/04-05 (01)]</p>	<p>(d) Consideration should be given to buildings where unauthorized building works are present.</p>	<p>(c) A bulk insurance policy initiative should be introduced to help needy owners.</p>	<p>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 unauthorized building works. The solution, however, is not for the Government to arrange a bulk insurance policy for them – this will mean passing on their responsibilities to the Government and is not the proper way of using public funds. Owners should step up the management and maintenance of their buildings and to remove the unauthorized works as soon as possible.</p>
<p>The Hong Kong Federation of Insurers [CB(2)2139/04-05(03)]</p>	<p>(e) According to the proposed Regulation, the insured party will be OC and the owners of the building as a whole and the term "assured" means the assured corporation and the assured owners. However, no provision has been made to address the various issues arising from cross liability and severability of interest between those parties.</p> <p>(f) The proposed Regulation</p>	<p>(d) It is more appropriate to include an Asbestos Exclusion in proposed section 3(2) of the proposed Regulation given that Asbestos-Related injuries/disease has been taken care of by the Pneumoconiosis (Compensation) Ordinance and is also excluded from the Employees' Compensation insurance; and without such exclusions, the providers for this insurance may be limited</p>	<p>The aim of section 28(1) of the BMO and the Regulation is to protect the third party victims. As to matters relating to the cross liability and severability of interest between the assured corporation and the assured owners, and the apportionment of policy limit between the OC and the owners, we consider that they should be provided in the insurance policy, if the OC and the owners think fit. The Regulation should not be the vehicle for dealing with the liability and interest between the different assured parties.</p> <p>Having consulted the Director of Environmental Protection, and the Commissioner for Labour, we have reservation on including an Asbestos</p>

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	contains no provision in the apportionment of policy limit between OC and owners of building.	in the market or confined to a few major insurers who have the ability to retain the risk even without reinsurance protection.	Exclusion clause in the Regulation. This is because the Pneumoconiosis (Compensation) Ordinance only compensates persons suffering from pneumoconiosis but not all asbestos-related injuries/disease. The proposed exclusion clause would render some third parties uninsured.
Hong Kong Institute of Certified Public Accountants [CB(2)2554/04-05(01)]	(g) Arising from the Albert House case, there is a need to mitigate the damages to the owners resulted from similar failures of the performance of the property management company in cases such as the illegal building structure or cash embezzlement of OC's funds under the care of the property management company, etc.	(e) An additional requirement should be set out to arrange for the procurement of the professional indemnity and fidelity insurance policy on performance failure.	We understand some MCs have procured liability insurance similar to the professional indemnity insurance for their members. We consider that this should be a matter for the MC and OC to decide. If owners want to obtain such information, they could approach our Building Management Resource Centres. We will focus on the new requirement for OCs to procure third party risks insurance for the common parts of the building in this legislative amendment exercise.
The Law Society of Hong Kong [CB(2)2149/04-05(01)]	<u>Coverage</u> (h) The proposed Regulation as presently drafted will not cover the assured owners, the assured corporations and their employees. In addition, the insurance policy required to be taken out under the proposed Regulation will not cover liabilities arising out of a breach of any duty imposed by law in relation to any	(f) The Administration should make their policy very clear to the owners or OCs so that they will understand the extent of their statutory obligations for the purpose of compliance and the kind of protections afforded by the law. On the basis of clear understanding, owners or OCs could decide on the need to take out separate	Section 3(1) of the Regulation requires a policy to insure the assured (i.e. the assured corporation and the assured owners) in respect of any liability that may be incurred by the assured corporation, or the assured owners, in respect of the death of, or the bodily injury to, any person. Such person can be an individual owner, or occupier of the building. Section 2 of the Regulation defines "assured owners" as the owners of the building on behalf of whom the policy is procured – that means the owners of the building for the time being, rather than an individual owner.

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	<p>building or works carried out in contravention of the Buildings Ordinance.</p> <p>(i) It is unclear whether the principal intention of the proposed Regulation is to protect third party victims or lessen the burden of owners in meeting claims for any liability arising out of the common parts of the building. However, as owners and employees are among the groups which are most likely to suffer injury as a result of any problem with the common parts of a building and given that the number of buildings with unauthorized building works is voluminous, it would appear that only minimal protection will be afforded by the Regulation.</p> <p><u>Minimum insured amount</u></p> <p>(j) In the view that the case of <i>Albert House</i> involves a sum exceeding HK\$33,000,000, it has reservation whether the proposed minimum amount of insurance that a policy is required to provide under</p>	<p>insurance policy for their own protection and to cover their potential liabilities to others. The ambiguities in the proposed Regulation which need to be clarified are set out in the Annex.</p>	<p>Section 3(2)(b) of the Regulation is modeled on section 6(1)(b)(i) of Cap.272. If the assured corporation or the assured owners incur any liability in respect of the death or the bodily injury to an employee of the corporation of owners; and the death or injury arises out of and in the course of the employment, the liability of the assured corporation, or the assured owners, is already required to be insured under the legislation concerning employees' compensation.</p> <p>Section 3(2)(c)(i) and (ii) refers to unlawful building works. Section 3(2) does not require a policy to cover any liability arising out of a breach of certain legal duty (i.e. that relating to unlawful building works). The Regulation defines unlawful building works by reference to the appropriate concepts in the Buildings Ordinance (Cap.123) – thus we adopt, in this context, the meanings of "contravention", "building works", "street works" and "building" also from Cap.123.</p> <p>We have reservation on the Law Society's proposal to require an insurance policy to cover the risks of the matters set out in section 6(2) of the Regulation as this will certainly increase the insurance company's financial liabilities and in turn the premium for the policy to be paid by the OC. The proposal of Law Society is also not in line with section 12(1) of Cap.272.</p> <p>Under section 28(1) of the BMO, an OC shall, on behalf of the OC and the owners of a building, procure and keep in force in relation to the common parts of the building and the OC's property, such</p>

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	<p>section 4 of the proposed Regulation, i.e. HK\$10 million, is adequate, bearing in mind that the prescribed sum under the Motor Vehicles Insurance (Third Party Risks) Regulation is HK\$100 million.</p>		<p>policy of insurance with an insurance company in respect of third party risks.</p> <p>On whether the insurance company could avoid liability under section 6(3)(a)(ii) of the Regulation where only one owner has breached the user requirement, we consider that even though an individual owner is in breach of the user restriction in the DMC, the insurance company cannot escape liability unless the following conditions are also satisfied –</p> <ul style="list-style-type: none"> (a) the policy requires the assured corporation, and the assured owners, to ensure compliance with the DMC in relation to the use of the building; and (b) the death or injury is directly caused by the assured corporation's, or the assured owners', failure to comply with the requirement. <p>For the definition of "relevant instruments" in section 6(3)(iii), please refer to section 2 of the Regulation.</p> <p>As to the suggestion that the restrictions under section 6(1) should be spelt out in more express terms, section 6(1) and (5) are modeled on section 12(1) of Cap.272. Section 6(1) and 6(2) set out the kind of policy that is of no effect. Section 6(3) carves out those situations to which section 6(1) does not apply. If section 6(1) applies, and the insurance company is obliged to make payment despite the presence of a restriction, it may recover the amount of its payment from the assured by</p>

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			<p>section 6(5). We do not think there is problem with the current draft.</p> <p>On the proposed coverage, please refer to our response to the submissions from HKIH, CIH, HKIS and REDA.</p>
	<p><u>Notice of insurance</u></p> <p>(k) It does not see the need to require the office bearers of an MC to make a statutory declaration under section 5(5) of the proposed Regulation in case of loss or destruction of a notice of insurance when the insurance company could simply be asked to re-issue the notice or provide a certified or duplicate copy thereof.</p>	<p>(g) Reference should perhaps be made to section 12 of the Motor Vehicles Insurance (Third Party) Risks Regulation requiring an insurance company being satisfied that a certificate of insurance has become defaced or has been lost or destroyed to issue a fresh certificate.</p>	<p>Section 5(5) of the Regulation is modeled on section 14 of Cap.272. We will take into account the suggestion of the Law Society in making reference to section 12 of Cap.272 (which imposes an obligation on an insurance company, on being satisfied that the certificate is defaced/lost/destroyed, to issue a fresh certificate) when we finalise the Regulation.</p>

Ambiguities in the proposed Building Management (Third Party Risks Insurance) Regulation referred to in the preliminary submission of the Law Society of Hong Kong

Section 3(2)(b)

Section 3(2) of the proposed Regulation lists out the liabilities that the policy is "not" required to cover and subsection (2)(b) refers to liabilities to person employed by "assured owners" or "assured corporations". Arguably, section 3(2)(b) may not cover manager or persons employed by the manager as the relationship between an OC and a manager may not be one of employment but contractual. It is believed that the policy behind section 3(2)(b) should be clarified and managers and employees of OC should be treated alike. To otherwise discriminate against employees of an OC would only deter owners from forming into OCs and taking up the management of the building, which will defeat the main purpose of BMO.

Section 3(2)(c)

Section 3(2)(c) refers to "any liability arising out of a breach of any duty imposed by law in relation to –

- (a) any building within the meaning of the Buildings Ordinance erected in contravention of that Ordinance; or
- (b) any building works, or street works, carried out in contravention of the Buildings Ordinance."

It is unclear whether "breach of any duty imposed by law" should be read alone or together with "contravention of the Buildings Ordinance". It is not necessary for section 3(2)(c)(i) to refer to building as "defined in the Buildings Ordinance" when the term "building" has already been defined under BMO.

Section 6

It is noted that section 6(5) seeks to enable the insurance companies to recover any payment made under the policy from the assured or assured corporations, where the insurance companies have in fact restrict their liabilities in the policy regarding such payment but was nonetheless required to pay up because of section 6(1).

It seems that the proposed subsidiary legislation will on the one hand allow the insurance industry to contractually impose certain restrictions in the policy vis-à-vis the owners and OC but on the other hand render such restrictions to be of no effect so far as the third party victims are concerned. This may be considered fair if in negotiating the terms of the contract of insurance policy, the parties have agreed not to cover certain risks so that the insurance company will not have taken into account such risks in the calculation of the amount of premium payable.

However, it should be noted that the wider the scope of recovery allowed to an insurance company under section 6(5), the less will be the protection to the owners. It is also concerned that in reality, in the light of sections 6(1) and 6(5), the insurance industry will tend to restrict their liabilities in the policy but nevertheless take into account the risks mentioned in section 6(2) in calculating the premium payment. This will clearly work to the detriment of the owners.

Instead of allowing the insurance company to impose restrictions in the policy which are considered to be unacceptable so far as third party victims are concerned, it will be more appropriate for the proposed Regulation to require the policy to cover the stated risks.

As a matter of drafting, the provision of section 6 is difficult to comprehend. The following should need to be clarified –

- (a) could the insurance company avoid liability under section 6(3)(a)(ii) where only one owner of a building has breached the user requirement?
- (b) what is meant by “relevant documents” in section 6(3)(iii)?
- (c) instead of the various cross references made within section 6, the restrictions under section 6(1) should be spelt out in more express terms so that the owners and OC would know clearly the extent of their liabilities under section 6(5).