



In this week's Insurance Bulletin:

1. REGULATION AND LEGISLATION

UK: No-deal Brexit - More details published on the "Temporary Permissions Regime"

2. COURT CASES AND ARBITRATION

Australia: Combustible cladding claims: who pays and am I insured?

3. MARKET DEVELOPMENTS

EU: EIOPA publishes report on cyber insurance

4. HFW PUBLICATIONS AND EVENTS

HFW win at Asia Captive Review Awards 2018

HFW Briefing: ENRC v SFO Court of Appeal judgment: English legal professional privilege lives on



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1. REGULATION AND LEGISLATION

UK: No-deal Brexit - More details published on the “Temporary Permissions Regime”

In preparation for the possibility of a no-deal Brexit, the UK government has published guidance on how it intends to manage the regulation of banking, insurance and other financial services if there is no trade agreement between the UK and the EU before the date the UK leaves the EU, 29 March 2019.

In December 2017, the UK government stated that, in the event of a no-deal Brexit, it would introduce a “temporary permissions regime” (TPR) to allow EEA firms passporting into the UK to continue operating in the UK for a limited period of time after Brexit. No further information about how the regime would work was provided at the time but HM Treasury and the UK regulators have now published guidance and draft legislation on how the TPR will work in practice. The guidance and draft legislation remain subject to change as the UK regulators consult on the proposed rules.

It is important to highlight from the outset that the TPR will only apply if the proposed withdrawal agreement between the UK and EU is not agreed by March 2019. If however the withdrawal agreement is agreed, then there will be a transition period until 31 December 2020 during which the current passporting regime will remain in force.

TPR

The key components of the TPR (as currently envisaged) are as follows:

- **Duration of the TPR:** The TPR will allow EEA firms currently passporting into the UK to continue operating in the UK under a temporary permission for a maximum of three years after Brexit. Firms will be required to become UK authorised during this period.

- **Notification Period:** Firms who wish to use the TPR will be required to notify the UK regulators using an online process to be introduced by the regulators. The FCA has stated that it expects to open the notification window in early January 2019 and close it prior to exit day (i.e. 29 March 2019).
- **Submission of authorisation application:** Firms will be required to submit their application for authorisation within a “landing slot” allocated to them by the FCA. The FCA expects that the first landing slot will be October to December 2019 and the last to be January to March 2021.

HM Treasury also restated the government’s commitment to introduce legislation, if necessary, to ensure that contractual obligations (such as insurance contracts) between EEA firms and UK-based customers that are not covered by the TPR can continue to be met. Given the current climate of uncertainty, it is helpful that HM Treasury has repeated this as the ability to continue servicing contracts has been a key concern in the insurance industry.

The TPR will only be helpful to EEA firms passporting into the UK; no reciprocal steps have yet been taken by the EEA in respect of UK firms passporting into the EEA and therefore the position for UK firms insuring EEA customers remains unclear.

The guidance on the TPR can be found at <https://www.gov.uk/government/publications/banking-insurance-and-other-financial-services-if-theres-no-brex-it-deal/banking-insurance-and-other-financial-services-if-theres-no-brex-it-deal>. We will continue to provide updates on Brexit developments.

Please do not hesitate to get in touch if you have any questions or require any advice in respect of your Brexit preparations.

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2. COURT CASES AND ARBITRATION

Australia: Combustible cladding claims: who pays and am I insured?

Last week a \$24 million damages case against LU Simon, the builder of the residential tower, Lacrosse, which burnt down in November 2014, kicked off in the Victorian Civil and Administrative Tribunal in Melbourne.

The case is unlikely to provide clarity for all parties involved in the 1,400 non-compliant buildings in Victoria, identified by the Victorian Cladding Taskforce, and many more across the country. However the findings on liability may shed some light on the relative exposures of owners and builders in future cladding-related claims.

Background

Fires at the Lacrosse apartment building fire in Melbourne in 2014 and Grenfell Tower in London in 2017 have exposed major safety concerns regarding the use of aluminium composite panelling in the construction of buildings. The cladding in question contains polyethylene, a plastic, which fuels and spreads fires far more readily than other building materials.

While polyethylene cladding in new buildings is now generally prohibited, buildings with combustible cladding remain abundant.

Who pays?

So far the cost of replacing the combustible cladding has fallen squarely on owners.

About 100 apartment owners in Victoria so far have been issued with orders to replace combustible cladding. Property purchasers generally cannot sue builders for costs incurred in rectifying defects unless the loss is consequent upon damage or injury, or where there is a claim available for breach of a contractual or statutory warranty.

To assist the owners to replace the combustible cladding, the Victorian government introduced legislation that allow the owners to obtain low

interest loans from the government that are paid off in their council rates.

In Queensland, the *Queensland Building and Construction Commission Act 1991* (QBCC) has been amended to, among other things, create an offence of knowingly being involved with the supply and installation of a non-compliant building product. This approach has not, to date, been followed in other States.

As a property owner am I insured for these costs?

Property owners should examine their property insurance policies to determine whether coverage is available for the cost of replacing combustible cladding. Generally, this will only be the case if there is damage to the property that is covered under the policy.

If an owner is aware that their building has combustible cladding installed they are obliged to disclose this to insurers. Otherwise, in the event of a property damage and consequential loss claim or a public liability claim, insurers may decline indemnity due to non-disclosure.

What about the builders and insurers?

While to date it has been hard to shift the responsibility for replacing the combustible cladding towards builders, law firm Adley Burstynier has proposed bringing class action proceedings on behalf of affected Victorian owners against a number of large building companies. Other law firms, including Slater and Gordon, have also signalled that they are considering bringing cladding compensation actions.

Builders and developers involved in buildings that have, or may have, used combustible cladding should examine their suite of insurance policies to determine whether they are responsive to any claims that may be made against them. Insurers should be notified of any potential claims or circumstances which could or may give rise to claims. Coverage may be available under policies such as professional indemnity policies, liability policies, or potentially D&O policies depending on the level of knowledge possessed by executives.



SOPHY WOODWARD
SPECIAL COUNSEL

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Any builders and developers operating in Queensland should urgently review their insurance coverage and consider the impact of the QBCC.

Insurers should be aware of their exposure to claims under the policies mentioned above, as well as under any policies issued to manufacturers of the combustible cladding such as product liability and recall policies.

If you would like to discuss any of these points or have any questions, please contact:

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3. MARKET DEVELOPMENTS

EU: EIOPA publishes report on cyber insurance

On 2 August 2018 the European Insurance and Occupational Pensions Authority (EIOPA) published a report, “Understanding Cyber Insurance - A Structured Dialogue with Insurance Companies.”

The report aims to enhance the level of understanding of cyber risk and the cyber insurance available in Europe, and begins by observing that approximately 90% of the standalone cyber insurance market is located in the United States and only 5-9% in Europe. The content of the report is based on a survey of responses to a set of 14 qualitative questions answered by 13 insurance

and reinsurance groups located in Switzerland, France, Italy Germany and the UK.

One of the key findings of the questionnaire is that although presently cyber insurance cover is largely focused on commercial business, there is increased interest in cyber coverage for individuals due to the increased exposure of individuals to cyber risks such as identity theft.

The report highlights the challenges faced by the cyber insurance industry, such as the improper treatment of non-affirmative risks (insurance policies that do not explicitly include or exclude coverage for cyber risk) and the difficulty in quantifying risks. In particular, the report finds that qualitative models which are based on risk assumptions of exposure, questionnaires and expert judgment are more often used than quantitative models in risk assessment and pricing. The report provides an insight into the functioning, growth potential, challenges and threats of cyber insurance for reinsurers. It reports that the insurance industry expects a gradual increase in the demand for cyber insurance, driven by new regulations, increased awareness of risks and a higher frequency of cyber events, but that the lack of specialised underwriters as well as data and quantitative tools are key obstacles to the development of the industry. However, regulation could benefit the industry in that it can assist with some of the identified challenges, including the need for compliance with the Solvency II Directive (2009/138/EU).

To read the report, please go to: <https://eiopa.europa.eu/Publications/Reports/EIOPA%20Understanding%20cyber%20insurance.pdf>

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4. HFW PUBLICATIONS AND EVENTS

HFW win at Asia Captive Review Awards 2018

We are delighted to announce that HFW won the Law Firm category at the inaugural Asia Captive Review Awards. Many congratulations to Richard Jowett, Andrew Dunn, Brendan McCashin and the rest of the team.

HFW Briefing: ENRC v SFO Court of Appeal judgment: English legal professional privilege lives on

In a recent decision which will be welcomed by the legal community and clients alike, the English Court of Appeal has allowed Eurasian Natural Resources Corporation’s (ENRC) appeal against a highly controversial earlier Commercial Court decision that had threatened to significantly narrow the scope of legal professional privilege. Read HFW’s Briefing on this landmark decision at: <http://www.hfw.com/ENRC-v-SFO-Court-of-Appeal-Judgment-September-2018>.

HFW has over 500 lawyers working in offices across Australia, Asia, the Middle East, Europe and the Americas. For further information about our Insurance/reinsurance capabilities, please visit <http://www.hfw.com/Insurance-Reinsurance-Sectors>



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