

Pollution risks – for property owners and occupiers

As part of the risk management process, property owners and occupiers will review their exposures and make a decision regarding the mitigation of these risks. In this process, it's easy to overlook pollution exposures as they are often not clearly visible and understood or may prove difficult to quantify and therefore hard to manage.

The truth is that property owners and occupiers face a wide range of pollution exposures which can have a devastating impact on their business. Storage and transportation of hazardous goods, off-site migration of firewater, illegal waste dumping, historic contamination and release of asbestos are only a few of the pollution examples that should be considered during the risk management process of site ownership and occupancy.

Who's responsible when things go wrong?

The "Polluter Pays" principle applies under environmental legislation. This does not mean that the liability for property owners stops if the tenant caused the pollution event. If the tenant has disappeared or gone into liquidation, the liability for the clean-up can fall back on the owner even if the owner did not control the site. By virtue of their position, owners can be held liable for pollution on or migrating from their sites. In addition, liabilities can exist for both owners and occupiers under contract or arise as a result of their operations or development works undertaken on the site.

Limitations of pollution liability in General Liability policies

The majority of businesses rely on their General Liability policy for protection against losses resulting from pollution claims. Although these policies commonly provide a write-back for sudden & accidental pollution events, they do not provide protection for loss resulting from:

- ▶ Clean-up costs, property damage or bodily injury from gradual pollution events
- ▶ Clean-up costs on own site or responsible for
- ▶ Statutory compliance with a clean-up order and fines and penalties
- ▶ Damage or destruction of natural resources
- ▶ Emergency response costs incurred to mitigate a pollution event where immediate action is required
- ▶ Crisis containment expenses and reputational damage
- ▶ Pollutants such as asbestos, radioactive material, mould and bacteria
- ▶ Historical pollution

Claims examples

Many pollution claims fall into one or more of the above categories and leave business exposed to losses as can be demonstrated in the following examples:

Property owner responsible for clean up after a warehouse fire

→ A fire in a warehouse caused toxic smoke and significant run-off from stored chemicals and firefighting foam into a neighbouring creek. The site was leased and operated by a third party who had gone into liquidation. The property owner faced extensive remediation and investigation costs to determine the degree of soil and groundwater remediation required to clean the site and creek to a standard acceptable to the regulatory authority.

→ As this was statutory liability action, the General Liability Policy did not provide cover for the clean-up and associated costs.

Gradual pollution from storage tanks

→ A large property fund leased their premises to a steel fabrication business that went into liquidation. Contractors employed to refurbish the unit discovered large process tanks, which had been poorly maintained. This had resulted in leakage of chlorinated solvents. Furthermore, cracks in the reinforced concrete floor of the warehouse had allowed chemicals to escape, causing extensive soil and groundwater contamination to the surrounding property, with potential to impact on sensitive local water resources.

→ As a result of the former tenant going into liquidation, the property fund became liable for the resulting environmental exposures. The property fund had purchased an annual portfolio-wide Environmental Pollution Liability policy, covering some 75 properties, as part of their management strategy and in order to protect their stakeholders.

Historical pollution discovered on site

→ A commercial developer acquired a site for development into a commercial and residential estate. During excavation works asbestos was discovered on-site which appeared to have been dumped by third parties. The regulator issued a clean-up order and costs were incurred to transport and dispose the material to an asbestos facility.

→ Under the sale and purchase agreement the purchaser assumed responsibility for all historical and new contamination on the site. General Liability policies commonly contain a total asbestos exclusion and would not provide financial protection where historical pollution is discovered on the site.

Legionnaires

→ Commercial and residential buildings generally have cooling towers, hot water tanks, large plumbing systems, swimming pools and fountains which are all potential sources of legionnaires if not properly maintained. As a property owner or operator you can be held liable for losses resulting from an outbreak even if you are not at fault. Sickness and death, decontamination of the site, expensive lawsuits, closure of the premises and reputation damage have the potential to cause major financial loss and disruption to a clients' business.

→ Most General Liability policies are silent or exclude coverage for legionnaires disease and exclude many other types of pollutants



What cover is provided under an Environmental Impairment Liability policy

Pollution Legal Liability policies are designed to fill the gaps that exists in General Liability policies. This can be structured to provide cover for:

- ▶ Individual sites or multiple sites
- ▶ Both sudden and gradual pollution events
- ▶ On-site and off-site clean-up costs of new and historical pollution conditions (clean-up costs extend to investigation, ongoing monitoring and disposal costs)
- ▶ Third party bodily injury and property damage including diminution in value and loss of use
- ▶ Business interruption and extra expense costs
- ▶ Pollution from transportation and during loading and unloading
- ▶ Emergency and crisis management costs
- ▶ Legal defense costs

As a property owner/occupier it is critical to understand your pollution exposures so they can be managed or transferred. Tightening environmental regulation combined with heightened public awareness means businesses have an increased exposure to the potentially costly consequences of a pollution event. Standard liability policies do not provide the necessary protection. Pollution Liability policies are designed to cover the many pollution events that are associated with your business.

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