



Clyde & Co

## Braemar Adjusting

**DAMAGE TO EXISTING PROPERTY UNDER WELCAR 2001**

**SOME ISSUES**

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# WELCAR 2001

- Scope of WELCAR Sections I and II
- Practical problems with “Existing Property”
  - Scope of cover
  - Limitations
- Importance of the Contractual Regime
- Quantum
- Loss of Use

# Health Warning!

- Variations in Wording
  - Not all WELCAR placings are the same
  - Amendments are common
    - Section I and Section II placed separately
    - Loss of use excluded
    - Exclusions (watercraft) deleted subject to conditions
- Variations in Contracts
  - Not all contracts are the same
  - The proper law of those contracts may limit their scope

# WELCAR 2001

## What is it all about?

- WELCAR 2001
  - Construction All Risks Cover

*“Subject to the insuring agreements, applicable terms, conditions and exclusions, this insurance covers the following activities undertaken in the course of the project identified in Item 2 of the Declarations (hereinafter, the “Project”), provided such activities are within the insured values”*
  - Broad range of principal and additional assureds
- Scope of Cover
  - Section I-Property Cover for covered property on a primary basis
  - Section II-Liabilities on an excess basis

# WELCAR Section I

## Covered Property under Section I

*“This insurance covers works executed anywhere in the world in the performance of all contracts relating to the Project including (provided they are included in the contract values declared to Underwriters and insured herein) materials, components, parts, machinery, fixtures, equipment and any other property destined to become a part of the completed project, or used up or consumed in the completion of the project. This insurance shall also cover (provided they are declared to and agreed by Underwriters) all temporary works, plant, equipment, machinery, materials, outfits and all property associated therewith, whether such items are intended to form a permanent part of the works or not, including site preparatory work and subsequent operational risks.”*

# WELCAR Section I

## **Not** Covered under Section I

- Property which does not form part of the Project or Contract works
- Existing property owned by the assured(s) or third parties

# WELCAR Section II

## Scope of Section II Cover

### *“Clause 1 Coverage*

*Underwriters agree, subject to the limitations, terms, conditions and exclusions herein, to indemnify the Assured(s) for Ultimate Net Loss which the Assured(s) **shall be obligated to pay** by reason of*

- i. **liability imposed upon the Assured(s) by law, and/or***
- ii. **Express Contractual Liability,***

*for Bodily Injury or Property Damage caused by an Occurrence, provided always that the Occurrence takes place during the Project Period and arises out of the activities described in the Scope of Insurance section herein.”*

# WELCAR Section II Features

## Cross Liabilities Clause

### *“Clause 4 CROSS LIABILITIES*

*In the event of one Assured incurring liability to any other of the Assureds, this Section II of the Policy shall cover the Assured against whom the claim is or may be made in the same manner as if separate policies had been issued to each Assured. However, the inclusion of more than one Assured hereunder shall not operate to increase the Limit of Liability.*

***In no case shall this Section II of the Policy provide coverage for any physical loss of or physical **damage to** or defects discovered in the property insured under Section I.***

*Coverage in respect of Other Assureds does not apply to actual or alleged liability to other contractors and/or vendors and/or suppliers for consequential loss, loss of profit or business interruption.”*

## Section II Exclusion

### Existing Property

*“The insurance afforded by Section II does not apply to actual or alleged liability:*

- 21. For damage to or loss of or loss of use of:*
  - i. property owned or occupied by or rented or leased to the **Assured**;*
  - ii. property used by the **Assured**; or*
  - iii. property in the care, custody or control of the Assured or over which the **Assured** is for any purpose exercising physical control;”*

# Consequences

The Risk of Damage to Existing Property

- **Not** covered under WELCAR
- Important in context of construction work adjacent to existing fields
- May be covered under operating policies

# The Optional Buy-Back

## The DTEP Buyback

Sometimes Assureds purchase for additional premium cover for damage to existing property:

### **" EXISTING PROPERTY/CONTRACTUAL EXCLUSION BUYBACK**

*Notwithstanding the Existing Property/Contractual Exclusion contained in this Policy, it shall not apply to any claim for:*

*Physical loss of and/or physical damage to existing property identified on the attached schedule of insured property.*

**ALL OTHER INSURING AGREEMENTS, TERMS, CONDITIONS, DEFINITIONS, EXCLUSIONS, NOTICE REQUIREMENTS, SCHEDULES AND ENDORSEMENTS OF THE POLICY REMAIN UNCHANGED."**

# The Buy-Back

- What it **does**
  - Negates the effect of Exclusion 21 in respect of scheduled property
- What it **does not** do
  - Is to modify the basic insuring clause (Clause 1) which requires a **legal liability** (either by operation of law or under contract) and **an obligation to pay**
- The other terms of the insurance are expressly preserved.
  - Section II is still **excess** of other collectible insurance available to the relevant Assured
  - Other potentially relevant exclusions **still apply**:
    - Liabilities arising out of use of watercraft
    - Liabilities for consequential loss

# Stages of Inquiry

- What property is damaged?
- Is that property part of the Project Works?
  - If so, covered under Section I and excluded under Section II
- Is it Existing Property within the Section II Exclusion?
- If yes, no cover under WELCAR if unless DTEP purchased
  - And the property is scheduled as existing property
- That is not enough to trigger a claim under Section II

# Other Considerations

- How was the damage caused?
- Which party is responsible?
  - Liability in tort
  - Liability in contract
- Do any exclusions apply?
  - Does liability arise out of the operation of watercraft?
    - Is the watercraft exclusion deleted?
    - If so, is a P&I Club policy primary?
  - Other exclusions
    - Punitives
    - Professional liability

# But.....

- Can the party responsible bring themselves within the scope of the Section II Insuring Clause as an assured?
- This means establishing an **obligation to pay** by reason of
  - legal liability or contractual liability arising out of the Project activities
- There is **no** legal liability where:
  - A party has caused damage to its own property
  - There is no one who is legally responsible (Act of God/unidentified third party)
- There is **no** obligation to pay where:
  - The party who is responsible is relieved of the obligation to pay by contract
- What this means
  - The buyback only responds to legal **liabilities**.
  - It does not “convert” a liability policy into a first party policy

# Analysis of Contractual Regime

- Does it create a liability where there is no tort liability?
- Does it contain effective provisions relieving a party from liability by indemnity or hold harmless?
- Not all contracts are the same
  - Variations of party
  - Scope of hold harmless/indemnity
  - Extension to sub-contractors
  - Extension to “Contractor Groups”

# Claims against Contractors?

- Often Precluded by the Indemnities
- Example: Clause 22 of the LOGIC conditions
- Clause 22.2 states:

*"The COMPANY shall be responsible for and shall save, indemnify, defend and hold harmless the CONTRACTOR GROUP from and against all claims, losses, damages, costs (including legal costs) expenses and liabilities in respect of:*

*loss of or damage to property of the COMPANY GROUP whether owned by the COMPANY GROUP, or*

*leased or otherwise obtained under arrangements with financial institutions by the COMPANY GROUP*

*which is located at the WORKSITE arising from, relating to or in connection with the performance or non-performance of the CONTRACT, but excluding the PERMANENT WORK [the Project works]..."*

# Claims against Sub Contractors

- The definition of "CONTRACTOR GROUP" includes sub-contractors and the same clauses therefore may preclude a claim against the sub-contractors who therefore have no **“liability”**

# Consequences

- No recovery under Section II DTEP because there is no relevant assured who has a legal liability and who has an obligation to pay
- Could the policy ever respond?
  - **Yes** if there was a true liability to a third party **and**
  - There is an obligation to pay  
**but** a contractor with a hold harmless/indemnity may have no such obligation

## Other Issues

- Even if there is cover, it is not on a “new for old basis” and may exclude liability for consequential loss
- The measure of indemnity will be reflect the legal liability and will not be cover on a “new for old” basis

# Summary

- There is a commercial need for cover for damage to existing property
- Cover already exists under operating covers
  - Subject to deductibles
  - Possible adverse effect on loss record
- Seeking to secure (cheap) cover under WELCAR DTEP is not possible without analysing the contracts
  - “Unravel the spaghetti”
- Better option may be to secure additional cover by including existing property under Section I (on a primary basis) and rating according

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