Time to address insurance cover anomaly

BUILDING regulatory changes have significantly eroded consumer and practitioner protection in the industry over the past couple of years. The catalyst, in a negative sense, has been the insurance industry.

Insurers have put heavy pressure on governments to revise regulatory regimes to minimise underwriter risk and exposure.

I have no difficulty with risk minimisation as insurers like any business have to make money.

But the magnitude of the reforms and the extent to which the foundations have been compromised is worrying. Consumers and practitioners of the likes of builders, surveyors and engineers have collectively been left in a parlous position.

Take the case of aspiring apartment purchasers. If you want to buy an apartment, and it is over three stories, the law in Victoria and NSW says that not one cent of warranty insurance is required. If defects emerge, the owner's sole redress will be against the builder. If the building company disappears or lacks the financial ability to rectify or pay damages, then the claimant is left bereft of economic redress (that is, the owner) will be shut out if the claim is non-structural. In addition, the claimant can only sue the builder if the builder is insolvent or vanishes. Home builders on the other hand have to pay a large amount of money to get cover. They also have to provide insurers with draconian forms of security, such as personal and spousal guarantees. The irony of this is that the builder in effect indemnifies the risks and liabilities of the insurer.

The diabolical characteristic about this so-called form of insurance cover is that the person who pays for the cover, not only gets no cover, but to reiterate, indemnifies the insurer for losses that he or she sustains. It's a bit like paying for your own mercenary, but the mercenary doesn't fight for you, he fights for your opponent against you.

There is no other insurance like this, it is an underwriting anathema. Lawyers, engineers, accountants, car owners and the like pay premiums to obtain comprehensive insurance protection. They mightn't like the cost but they don't have to put up security, they don't have to underwrite insurer losses and all things being equal, they get insurance protection.

The net effect is that many builders, because of the burden of insurance guarantees, have been forced out of business as in 1998. It is a fantastic form of insurance for practitioners and consumers alike as it provides indemnification to practitioners and claimants for 10 years after the practitioner retires.

As the lawyer who assisted the Victorian and NSW governments on development of the Victorian Building Act and Part 4 of the Environmental Planning and Assessment Act this form of cover is dear to my heart.

The early 90s reform team that I was involved with regarded it as a critical ingredient to the establishment of the privatised building approval system. It was a linchpin for the introduction of proportionate reliability in NSW and Victoria.

Proportionate liability was introduced so that no defendant could be forced to pay anymore than its contribution to damages. To ensure that the claimant was protected from the down sides of proportionate liability, mandatory insurance was introduced for all building practitioners. Engineers, buildings surveyors, inspectors and builders were caught up in the net.

LTC or 10-year cover was a critical ingredient to the holistic framework, particularly in respect of the introduction of private certification.

The logic that the then reform team adopted was that liability would be their liabilities long term. Traditional claims-made cover does not provide this facility. So we imported the French concept of indemnification, 10-year cover. Once the practitioner retires the practitioner is indemnified for the duration of his or her exposure at law, which is 10 years under the Victorian Act and the EPAA. The logic was compelling from a consumer and practitioner protection point of view.

Kim Lovegrove

Home owners, builders, surveyors and engineers are in a vulnerable

Alas insurers pressured governments to desist with the regulatory requirement for long-tail cover and during the past couple of years it has been regulated out. Without long-tail cover the certain Australian jurisdictions are left with a seriously compromised building regulatory thesis. The tenets that undermined the proportionate liability and private certification reforms are compromised.

In one offshore jurisdiction the Crown is being sued because it introduced private certification without an appropriate form of insurance indemnification. The alleged blemish was that the Crown was remiss in not providing the requisite level of security afforded by councils — long-tail cover. Whether the Crown will have a case to answer will depend upon the Courts. But it sends out a salutary warning to govern-

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