PRIMESPACE

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Risk must be tamed for cheaper insurance

BUILDING practitioners such as building surveyors and engineers are buckling under the strain of escalating insurance premiums.

Construction professional indemnity premium costs are becoming prohibitive. Many building professionals can't afford the cover. Some are running bare and divesting themselves of assets. Insurers have been running scared because of an escalation in construction litigation as their insured practitioners reel from litigious assault.

At a recent forum co-chaired by The Victorian Building Commission and the Australian Institute of Building on Construction professional indemnity, Therese Charles, chief executive of the Association of Consulting Engineers Australia, said that the average cost of PI for an engineering firm was $70,000 a year.

This is astonishing when you compare costs with those of the legal profession. The insurance costs are going into orbit.

Of equal concern is that insurers are refusing to provide cover for many traditional risks, such as geotechnical engineering.

One way to arrest this malaise is to redesign the construction risk landscape.

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This can best be achieved by law reform to building regulations. For instance, mediation delivers a settlement rate of about 70 per cent, but the problem is that, in many jurisdictions, it occurs on the eve of trial. If building regulations made mediation the first port of call there would be massive cost savings.

One of the banes of claims handling is vexatious litigation. Plaintiffs often issue proceedings that are largely devoid of merit for amounts that can be 500 per cent above real claim worth. Such claims are verging on fraudulent in light of the magnitude of misrepresentation and opportunism. Or the claims are merely made to stymie any competing claim without representing any actual loss. Legislative penalties should be considered to dissuade *mala fide* plaintiffs from venturing down this path.

Most building disputes will involve a technical assessor for the plaintiff and another for the defendant. In 17 years of construction law practice, I have never seen two "adversary" experts agree on cost and cause of defects. The solution is legislation that compels the parties to choose one expert nominated by an independent party on a 50/50 remuneration basis.

Proportionate liability should be introduced uniformly throughout the country.

This doctrine ensures that no defendant has to pay for any more than its contribution to any project's malaise. In some jurisdictions, joint and several liability — or the "deep pocket syndrome" — applies, whereby solvent defendants assume the liabilities of insolvent co-defendants.

If reforms of the above kind are introduced there is no doubt that the risk landscape will improve dramatically.

Lower risk will lead to a better claims environment, lower premiums and insurers will cease being gun shy about many traditional risks. If the risk landscape is not redesigned, then there could be a market failure in the small business sector as practitioners are forced to pull up stumps.

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