LEGAL DEVELOPMENTS IN THE BUILDING AND CONSTRUCTION INDUSTRY

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Wotton + Kearney's national team of Construction PI specialists is closely following the reform of Australia's building and construction industry, including key regulatory and risk developments affecting the sector.

Regulatory and legislative developments

Australia is seeing sweeping state-based legislative reform intended to regain public confidence in the building and construction industry. Next year, there are also likely to be sweeping changes to the National Construction Code, which may include significant reforms for houses and low-rise apartments.

In NSW, the Design and Building Practitioners Act 2020 is having a significant effect on establishing the liability of design and building practitioners within the construction industry and how they are insured. The Office of the NSW Building Commissioner has also advanced its digital reform initiatives and continues to refine these. For example, its Strata Hub, which will allow people living or intending to live in a strata scheme to access basic information about a particular building, is expected to be launched later this year.

In contrast, the Victorian Government has established the Building Reform Expert Panel to lead its review of the building legislative and regulatory system. The resulting changes will occur over two years and ultimately lead to a new Building Act in 2023. Within the scope of its review, The Building Reform Expert Panel is considering the introduction of project-based insurance as it can provide a "single, first resort, insurance instrument that unites the interests and strengthens the accountability of all parties involved in a single building project".

In Victoria, another key legislative development is that building owners have been given more time to commence legal proceedings against builders responsible for installing combustible cladding, with the time limit for commencing a claim increasing from the previously extended 12 years to 15 years.

From a broking perspective, these changes have effectively broadened the potential scope of an insured's liability, both in terms of exposure to an additional cohort of claimants (for example, subsequent owners of defective buildings in the case of the NSW legislative reforms) or a longer tail to exposures (in the case of the extended limitation period in Victoria for cladding actions).

As such, it is imperative that insureds are adequately insured against these emerging risks. In particular, caution needs to be exercised to ensure that insureds are not left exposed through limitations imposed by retroactive date exclusions or the lack of continuous cover where these risks are becoming broader and with longer tails.

Construction defects landscape

Over the past 18 months there has been a strong demand for home construction and renovation, fuelled by discretionary spend savings and low interest rates during the pandemic. This demand is expected to ease from mid-2022. However, in the short-term, the increased demand for building supplies and the loss of local timber due to the 2020 bushfires has meant that many builders are facing unforeseen increased material costs and significant delays in completing works.

This has invariably placed pressure on the construction sector, in particular head contractors as they face exposure to their principals either by way of liquidated damages or delays in start-up. It has also placed financial constraints on contractors as invariably their margins have been squeezed.

From an insurance perspective, brokers need to be aware of the extent of cover afforded to their insureds, which will often exclude liability for liquidated damages and rarely provide protection against business or financial losses. Similarly, delay in start-up (DSU) insurance will not typically cover insureds for revenue losses based solely on rising materials costs.

Technology and digitisation in construction

Post COVID-19, Australia has a massive pipeline of infrastructure work. Technology may play an important role in both the planning of projects and determining which projects should proceed.

The Australian Government has announced that it is investing $110 billion into public assets as part of its 10-year infrastructure program. It is already leveraging smart technologies, including aerial data capture technology, digital engineering, digital twins, virtual reality and Cloud-based project management software, to deliver infrastructure projects.

Clearly the seemingly insatiable appetite for large infrastructure has underscored the need for appropriate insurance cover. Single project professional indemnity (SPPI) cover has certainly been in demand, although it remains a somewhat misunderstood product at times. In arranging any SPPI, it is important that the contractual arrangements among the contractor and consultant group are appropriately drafted to account for the common project insurance programme (including an emphasis of subrogation waivers and proscriptive and proactive processes for the management of any defects in the project).

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