

**Building Control (Amendment) Regulations 2014**  
**An Insurance market perspective**

**Engineers Ireland – Cork Region**

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- How the discussions progressed:
  - Claims traffic – construction PI
  - The underlying causes of PI claims
  - Insurers' reactions to the emerging picture on BCAR
- Where we go from here:
  - Good practice
  - Professional Indemnity Insurance
  - Latent Defects Insurance

# Insurance Market Performance

## A Decade Defined by Natural and Man-made Catastrophes



- UK OFT report 10 year losses for liability Insurers



- Lloyds achieves CoR 83.1%
- Uncertainty in the Economy

- \$787BN stimulus approved in US

- BoE announces £150BN QE



- Recovery in World Economy
- Earthquake and Tsunami in SE Asia

- HSBC warn of sub-prime losses
- Paribas reports 'Evaporation of Liquidity'
- 'Run on the Rock'



- Quinn placed in provisional administration
- Ireland requests support from EFSF and IMF



2001

2002

2003

2004

2005

2006

2007

2008

2009

2010

2011

2012

- Turbulence in investment markets
- Dotcom bubble
- Enron bankruptcy



- Independent Insurance Co
- 9/11 terrorist attacks (\$39.5BN)
- US Stocks lost \$1.4TR in one week

- Hurricane Katrina



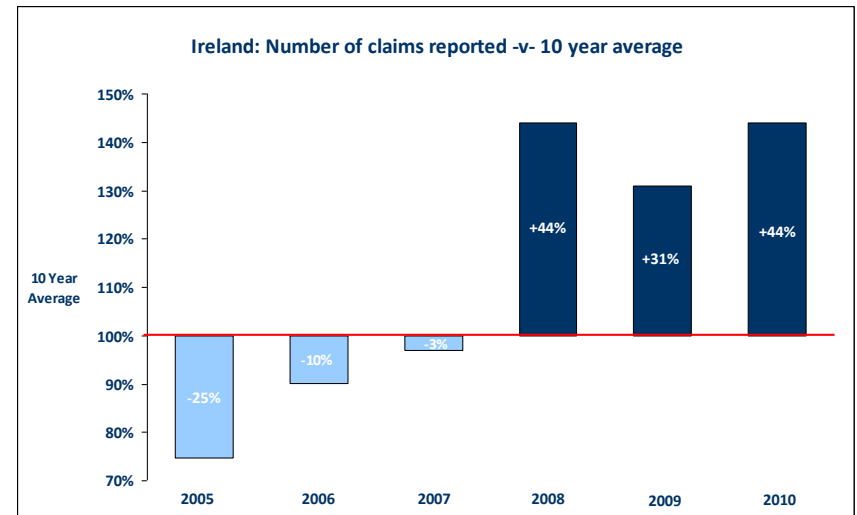
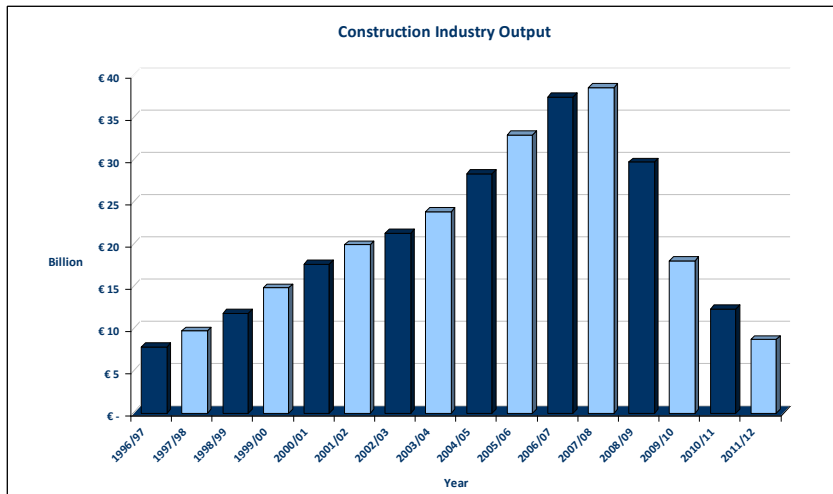
\$81BN property damage loss



- Lehman Bros bankruptcy
- AIG bail out
- RBS rescue in UK

- Natural catastrophes in Australia, NZ, Japan and the US
- Lloyds announce costliest year for natural disasters
- Ireland introduces Insurance Compensation Fund.

# Claims Traffic – Construction PI



### Economy/Environment

- Blame culture
- Fee disputes
- Last man standing
- Corporate memory / records
- Costly legal system

### Recurring Themes

- Limited brief
- Design changes / 'Value Engineering'
- Onerous contract terms
- Uncertainty on scope of services
- Certification

### **Evidence of ‘poor standards’?**

- Yes – particularly with certain small to medium firms
- Questions surrounding capabilities and qualifications
- Project profile and client type was a major factor

### **Principal issues going forward**

- Economy
- Fee levels / Procurement
- Doing more for less under increasingly onerous contracts
- Ability to fund risk

## **BCAR**

### **Insurers' reactions to the emerging picture**

- Interests aligned:
  - Improved standards
  - Transparency and accountability
  - Recognition of design input
  - Efficient use of building control resource
- Are the obligations reasonable, fair and within the control of the parties?



## Insurers influenced by the big messages

2011

‘spot check blitz on thousands of homes across the country’

Mail on Sunday 23/10/11

‘Architects must answer for misery of bad building’

Irish Times 08/11/11

2012

‘the quality of our built environment depends to a large extent on the quality of the contribution of construction professionals’

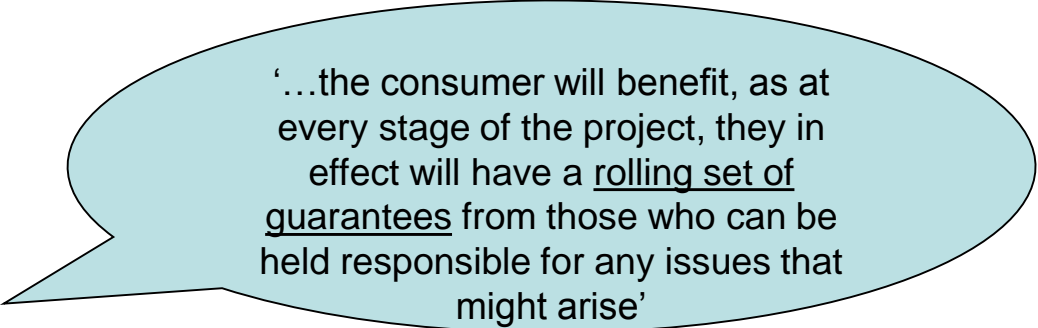
‘Where buildings prove to be less than fit for purpose, construction professionals must be held to account for the consequences of their actions’

**‘Accepts responsibility and legal liability for supervision and oversight of all works (notwithstanding the responsibilities of other person or firms) as necessary to ensure the works are neither defective nor contravene any requirements of the Building Regulations.’ (Draft Certificate of Compliance)**

*Strengthening the Building Control System DoECLG Apr 2012*

## Early 2013

- Draft Code of Practice published
- Contractor section on Completion Certificate
- Improved Certificate of Compliance (Design)
- Signed into Law, 08 March 2013



‘...the consumer will benefit, as at every stage of the project, they in effect will have a rolling set of guarantees from those who can be held responsible for any issues that might arise’

Minister for the Environment, Community and Local Government  
4th April 2013

**‘I now certify...and that the building or works is in compliance with the requirements of the Second Schedule of the Building Regulations in so far as they apply to the building works concerned’**

Certificate of Compliance on Completion – Assigned Certifier

### 2014

- S.I. No. 9 of 2014
- Revised Completion Certificate
- Code of Practice finalised
- Ancillary Certificates agreed

**‘8. ...Based on the above, and relying on the Ancillary Certificates scheduled, I now certify, having exercised reasonable skill, care and diligence, that the building or works is in compliance with the requirements of the Second Schedule of the Building Regulations, insofar as they apply to the building or works concerned.’**

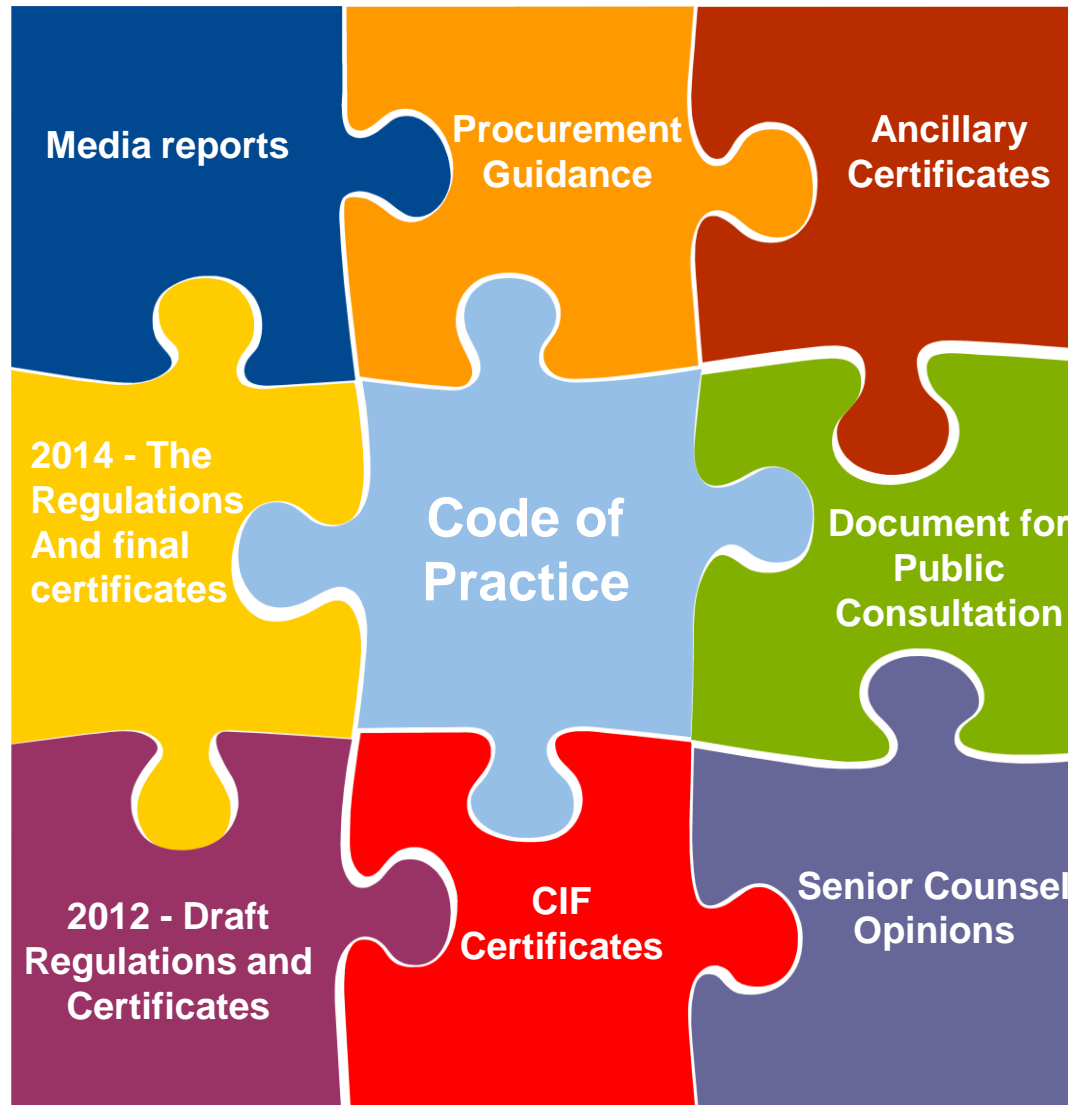
*Completion Certificate*

**‘The role of the Assigned Certifier does not include responsibility for the supervision of any builder.’**

*3.5 Code of Practice*

**‘...it is not practicable for every item of work to which the Building Regulations relate to be examined. The supervision by the Builder is, therefore, of critical importance. The test of the Inspection Plan will be its success in achieving reasonable standards of health and safety in or about buildings, energy conservation, accessibility and sustainability for building users.’**

*7.1 Code of Practice*



- Insurers' hope is that the Regulations will support a culture of compliance
- Improved paper trail – lodgement of plans and documents
- Inspection regime and input of construction professionals
- Amendments have addressed many of the earlier concerns
- Recognition of accepted duty of care (Certificates & CoP)
- Reliance on Ancillary Certificates
- Greater clarity on scope of AC's role in CoP
- Construction Industry Register
- CoP addressing issues such as referral of disputes and change of AC

- Interpretation of Regulations/Certificates
- Reliance on the Completion Certificate and potential claimants
- Will the Assigned Certifier be exposed to claims?
- Rights of recovery against other parties
- Consideration on Inspection Plan – appropriate intensity / frequency
- Ancillary Certificates
- Conditions of Engagement / Scope of Services
- Resource and remuneration
- Personal liability?

**Where we go from here**  
**Good practice and effective insurance solutions**

### Key considerations

- Contractual liabilities:
  - Duties
  - Net Contribution
  - Indemnities?
  - Personal liability
- Competence
- Scope of Services
- 'Know the Code'
- The inspection regime – guidance from professional bodies
- Adequacy of fees / resources



### Records

- Maintain good records and follow up oral advice in writing
- Document Inspections
- Retain notes of meetings, conversations, instructions etc
- Retain copies of Certificates and relevant CoP
- AC – confirmation others have undertaken inspections according to Plan
- Be clear that you are relying upon others' response and Certificates
- Documents retained 'sufficient' to demonstrate compliance

## Certification

- Compulsory Certificates:
  - Read it;
  - Understand it;
  - Consider the seriousness of it;
  - Accept likelihood recipient and third parties will rely upon it;
  - Then, ONLY IF SATISFIED, sign the Certificate.
- Do not release Certificate based on an undertaking from others to do certain actions.
- Senior management approval process on 'Undertakings' and 'Certificates'
- Ancillary Certificates – standard forms.

### The operation of cover

- Cover afforded under our main facilities
- You need to clarify extent of cover with Broker/Insurer
- Full and accurate disclosure
- Insurers' support and appetite to defend claims is crucial
- Claims made nature of cover
- Long-tail nature of claims
- Early reporting

*‘...keen that the issue of insurance of construction projects is addressed...I am therefore undertaking a review of construction project related insurance’*

Minister for the Environment, Community and Local Government  
4<sup>th</sup> April 2013

### **Litigation**

- A right to sue is not a guarantee of restitution
- Process is protracted, costly and inefficient
- If it's broken, fix it!

### **Latent Defects Insurance (LDI)**

- A first party material damage non-cancellable policy
- Repairs are funded on proof of relevant damage, without proof of fault
- Technical audit/inspections during construction
- Broader policy coverage –v- Home Warranty cover
- Possible waiver of subrogation

## Is LDI a new concept?

- Home warranty insurance / commercial LDI
- *‘Beat the cowboys’ report* (UK HMSO Working Party 1988)
- *‘Building Users Insurance against Latent Defects (BUILD)’ Report 1988*  
(UK National Economic Development Council 1988)
- *‘Constructing the team’ Report* (Sir Michael Latham, UK HMSO 1994)

## ...and closer to home:

*‘A far better way of insuring projects would be direct insurance of the underlying risks, covering all parties involved. What is envisaged is something analogous to latent defects insurance but operating during the construction phase of the project in addition to post completion.’*

Extract from G&A report for ACEI/EI for submission to GCCC – December 2003

### LDI: Statutory or Discretionary?

- Experience of Home Warranty Providers?
- Would statutory requirement encourage insurer support?
- Can we rely on long-term insurer support?
- Can we have complete confidence in pricing models?
- Can the market bear the additional costs?
- Will a waiver of subrogation support wider objectives?

*Of course, any form of insurance should be viewed as the ultimate safety net. The focus has to be on changing behaviours and promoting a culture of compliance. Whether the Regulations achieve that is something Insurers will be watching with interest.*

Thank you.

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