



AUSTRALIAN CONTRACT LAW

RESPONSE TO DISCUSSION PAPER

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CONTENTS & ISSUES SUMMARY

ABOUT CONSULT AUSTRALIA	3
EXECUTIVE SUMMARY	4
PART 1: CONTRACT LAW AND CONSULT AUSTRALIA	5
Shifting Risks: The Changing Nature of Contracting	5
Insurance and the Consulting Industry	6
Previous Studies into Contracting – Scope for Improvement	7
PART 2: STANDARDS OF CONTRACTUAL BEHAVIOUR	10
Freedom of Contract and the “Level Playing Field”	10
Contractual Aggression and The Law	10
Unfair or Onerous Allocation of Risk	11
Proportionate Liability	11
Limits on Liability	13
Indemnity Clauses	14
Standards of Care	15
Fitness for Purpose Clauses	16
Consequential Loss	17
Use of Deeds	17
Liquidated Damages	18
Changing of Terms and Conditions During the Contract	18
Payment of Guarantees	19
PART 3: EFFECTS OF BAD CONTRACTING BEHAVIOUR	20
Issues for Insurance: Uninsured Risks	20
Risk Management Practices	20
Cost of Negotiating and Managing a Contract	21
Loss of Innovation	21
PART 4: CONTRACTS IN THEIR CONTEXT	22
Harmonisation with Interstate and Overseas	22
Some Lessons from Overseas	22
PART 5: ACCESSIBILITY OF CONTRACT LAW	23
Codification	23
PART 6: TOWARDS BETTER CONTRACTING PRACTICES	24
More Collaborative Contracting	24
Alliance Contracting	24
Improved Procurement Skills	26
Better Briefs	26
Risk Assessment	27
Dispute Resolution	28
CONCLUSION	29

TRADITIONAL CONTRACTING REFORM RESPONSE TO CONSULTATION PAPER



Driving Business Success for Consulting Firms in the Built and Natural Environment

About Consult Australia

Consult Australia is the association for professional services firms within the built and natural environment; influencing policy, creating value and promoting excellence. As an association, our primary focus is on improving the commercial environment for our members and raising standards across the industry.

Our member firm services include, but are not limited to: design; architecture; technology; engineering; planning; landscape architecture; surveying; cost consulting (quantity surveyors); project management; environmental science; and management solutions. We represent some of the industry's biggest players in this space with our member firms collectively employing more than 50,000 staff.

Consult Australia is a member of the Australian National Engineering Taskforce (ANET), National Engineering Registration Board (NERB), Australian Chamber of Commerce and Industry (ACCI), the Australian Construction Industry Forum (ACIF), and the Australian Services Roundtable (ASR). Consult Australia is a host organisation for the annual Built Environment Meets Parliament (BEMP) summit.

Executive Summary

As an industry association representing professionals in the built environment sector, Consult Australia has a particular interest in seeing Australian contract law operate in a way that is fair, equitable, and easy to understand.

Our members frequently report being presented with contracts containing onerous terms that might have serious consequences if ever used in the event of a dispute. The concept of negotiating a contract is often illusory, as contracts are presented on a “take it or leave it” basis, meaning that these terms must be accepted if our member wants the work encompassed in the contract.

Risk allocation is at the core of our concerns relating to onerous contract terms. Risk is frequently passed between parties as they seek to offload a perceived liability, without regard to how that might affect delivery of the project. The professionals we represent provide their expertise as the product, and yet in many contracts are held liable for the errors of others or for circumstances beyond their control.

Other inappropriate clauses in contracts presented to our members, which might also relate to the standard of care, changes to the contract after commencement, or using a deed where a contract is more appropriate, are also problematic. Each of these clauses, as well as others discussed in this submission, serve to create an uninsurable risk, lead to ineffective risk management practices, and to increased costs, time and disputation for delivery of the project.

It should be noted that these harms generally affect the principal to a significant extent, just as they affect the service provider contracting with them. Consult Australia acknowledges that in many instances this may be due to inappropriate legal advice rather than problems with common law as it stands today.

The accessibility of contract law also needs to be carefully considered in this discussion. Many smaller businesses don't have the means to obtain legal advice, and will read and analyse the contract without legal training, and therefore use the plain English meaning of terms within that contract. Larger firms using contract law are more interested in harmonising the law between jurisdictions, which in turn saves them costs related to managing contracts.

Consult Australia notes the wide application of contract law in Australia today. However, our submission will focus on the experience of our membership: professionals operating in the built environment sector, who have a keen interest in procurement, and will often be involved in complex contractual relationships also involving contractors undertaking construction work, as well as with the client. Throughout this submission, for the sake of clarity the term “consultant” will be used in reference to our members where they are the service provider under a contract.

1. Contract Law and Consult Australia

As providers of a professional service in the built and natural environment sectors, Consult Australia's membership has a particular interest in contract law as it relates to procurement in these sectors. In particular, issues related to risk management and the allocation of liability are of relevance to the consulting industry as disputation and litigation represent a major risk to our industry. The interaction between contract law and insurance is a central part of our submission, as this linkage is at the heart of many of the problems experienced by our membership under Australian contract law.

Consult Australia acknowledges that some of these problems are due to aggressive behaviour by a party to a contract, often on the advice of their legal representatives. Other problems are simply due to poor quality legal advice, including to major procurers of consulting services. However, other problems encountered stem from the law itself or from its inconsistency between jurisdictions where our member firms operate. Other problems still are derived from the lack of access to legal advice for small and medium firms due to the prohibitive cost of seeking such advice.

This submission will draw on the experiences of our membership and broader industry, and on their dealings with clients where contracts have been made that have resulted in poor outcomes. These outcomes may be increased costs to a project, delays to the delivery date, increased litigation and disputation, and in the most extreme cases, failure of a project resulting in a firm being made bankrupt and their client still suffering significant losses.

1.1 Shifting Risks: The Changing Nature of Contracting

The nature of contracting and project delivery has changed greatly over the past 30 years. Three decades ago, clients were well informed and experienced organisations, with a clear understanding of engineering risk, an appetite to manage it and ability to document and clearly define their projects. Risk was borne by clients as part of their day-to-day operations.

With "traditional" contracting, particularly in the government sector, risks began to manifest themselves in variation claims against the client. The extent of these claims and the response to them by clients indicated an intolerance of what appeared to be uncontrolled risk outcomes.

Conventional contracting has, in some cases, been replaced by equity and partnership investment including Build Own Operate (BOO), Build Own Operate Transfer (BOOT) and Public Private Partnership (PPP) schemes. Risk allocation policies by governments in such schemes tend to move risk away from the government. In other cases, alliances are developed, where the risks and rewards of the project are shared. Alliance contracting is canvassed in greater detail later in this submission.

The various relationship models for the delivery of consulting services generally fall into one of the following broad categories:

- (a) The consultant is contracted directly to the beneficial owner as the owner's consultant for the provision of consulting services

- (b) The consultant is sub-contracted to the beneficial owner's contractor who is the client for the provision of consulting services
- (c) The consultant works in a joint venture, consortium or equity partnership with the beneficial owner or owner's contractor for the provision of consulting services.
- (d) The consultant works in joint venture partnership with another consulting firm for the provision of consulting services.

Private investors now have a more 'arms length' involvement in their investment. Large institutional financial investors such as superannuation funds allocate their funds to low risk and low volatility investments which means that they are unprepared to carry risk themselves.

Construction industry in-house skill levels have generally dropped, with a reduced emphasis on training and a significant reduction in the number of available skilled people.

The result has been a shift of project and risk responsibilities from client organisations to construction companies who then contractually pass the risk to consulting firms, based on the presumption that consultants are better able to understand and manage those risks.

Some public and private sector clients are using their market power to adopt a position, with their own best interests in mind, that risk should be transferred to the consulting engineer or architect, even though they are unable to manage those risks. A similar position is often adopted by the financial institutions and contractors; to place maximum risk with consulting engineers. In this way the consultant becomes liable for the whole of the losses associated with the project, including in some instances, economic loss which a court may not normally ascribe to professional liability.

This may have been accepted business practice in the past when insurance costs were moderate and availability relatively unrestricted. In tougher insurance environments the transfer of risk drives the cost and availability of PI insurance beyond the capacity of some consulting firms to afford and obtain.

Consultants, whose financial benefit from projects is a fraction of that derived by the client and contractor, are the contracting party who are least able to sustain the high costs and resulting increased exposure to uninsured liabilities.

1.2 Insurance and the Consulting Industry

Consulting firms that make up Consult Australia's membership play a crucial role in the built and natural environment sector. They provide the expertise used to scope potential infrastructure, to develop plans to build a project, and come up with solutions to overcome obstacles encountered along the way. Because they are not the final service provider, they are often involved in a potentially complicated web of contractual relationships with the client, and contractors that undertake the actual works on site.

The consulting industry as a whole is an asset poor class of people and organisations when compared to the parties they are contracting with. Because the service they provide is professional expertise rather than a

tangible good, they depend on insurance to cover any liability risks that arise, including contract disputes or failures in the delivery of a final product.

Accordingly, the nature of insurance cover is an essential element of this submission that must be considered alongside each issue relating to contract law. Consultants take out extensive and often expensive insurance policies to cover these situations, and to ensure they and their businesses don't suffer financial losses. However, certain contractual practices have the effect of creating risks that go beyond the cover of the insurance policy. As a general rule, insurance will only cover a party for losses they would be liable for at common law. Any contract that extends liability beyond this position risks creating an uninsurable risk, and harming both parties to that contract.

1.3 Previous Studies into Contracting – Scope for Improvement

The three Scope for Improvement reports undertaken and published by Blake Dawson in 2006¹, 2008² and 2011³, provide a valuable cross-section of pressure points in the building and construction industry. Together the three reports represent a survey covering a cross-section of the industry representing \$80 billion worth of projects in Australia considering the perspectives of diverse stakeholders. The issues identified and recommendations included in each of the reports should be closely considered as part of the reform of contracting as it relates to procurement in the built environment sector.

Highlights are summarised below.

2006: A Survey of Pressure Points in Australian construction and infrastructure projects

This landmark report investigates the obstacles standing in the way of infrastructure project delivery, and the incidents creating stress to the project or its participants. Some findings relevant to this submission include:

- The best contractual delivery method was not always used;
- Risk allocation was generally poorly handled, with an "us and them" culture prevalent in infrastructure contracting;
- Delays and disputes were often due to poor scoping or risk allocation;
- Risk allocation is weighted in favour of principals, even where they are better placed to manage that risk than the party they offload the risk to;
- Transfer of risk does not necessarily lead to successful project delivery; and
- Contract negotiation is often handled by participants without the required skill or knowledge to effectively negotiate a contract.

These issues result in cost overruns, delays and increased disputation. Importantly for public sector clients, they lead not only to adverse financial outcomes, but significant reputational damage as manager of public finances. The critical role of collaborative contracting was touched upon as a means to reduce disputation, and lead to better outcomes for all parties.

¹ Blake Dawson Waldron with the Australian Constructors Association. 2006. *Scope for Improvement: A survey of pressure points in Australian construction and infrastructure projects*. www.blakedawson.com

² Blake Dawson with the Australian Constructors Association and Infrastructure Partnerships Australia. 2008. *Scope for Improvement 2008: A report on scoping practices in Australian construction and infrastructure projects*. www.blakedawson.com

³ Blake Dawson with the Australian Constructors Association, Infrastructure Partnerships Australia and the energy Supply Association of Australia. 2011. *Scope for Improvement 2011: Project risk — Getting the right balance and outcomes*. www.blakedawson.com

2008: A report on scoping practices in Australian construction and infrastructure projects

Building on the 2006 key findings, the 2008 report examines current and increasing problems associated with scoping Australian construction and infrastructure projects. The report notes a high prevalence of deficient scoping in projects and estimates scoping inadequacies resulting in 26 per cent of the \$1 billion+ projects surveyed being more than \$200 million over budget.⁴

Six main factors are identified as leading to poor scoping:

- Lack of experienced and sufficiently competent personnel;
- Insufficient time to prepare scope documents;
- Inadequate definition of project objectives by the principal resulting in subsequent changes to the scope;
- Corrections to scope documents;
- Lack of consultation with end users; and
- Insufficient site information.

Key recommendations from the report to improve scoping include:

- Clearly identifying project objectives;
- Bringing together all relevant stakeholders and end users for the projects;
- Setting realistic timeframes and budgets;
- Interface the proposed project with related projects and existing infrastructure;
- Clearly describe the project objective and requirements
- Choose the right contract delivery model;
- Include site related information; and
- Resolve scoping issues and disputes under a contract.

2011: Project risk – Getting the right balance and outcomes

The most recent instalment in the Scope for Improvement series notes the importance highlighted in the first report of effective risk allocation to successful project delivery. Picking up many of the themes common to the 2006 and 2008 reports, the 2011 report identifies those approaches compromising project outcomes as they impact on effective risk allocation. These include:

- Inadequate scoping of project requirements;
- A lack of appropriately skilled and experienced personnel to examine risk at project outset;
- Pro forma risk allocation without consideration of project specific issues;
- Insufficient time and budget to appropriately identify and to allocate risk in contract documents;
- A failure to actively and adequately manage risk throughout the project; and
- Ineffective communication and relationships between project participants.

In response a range of options and tools to improve risk management are outlined. Of particular relevance to this submission, the report notes the importance of:

- Fair, consistent and accurate contract documents;

⁴ Blake Dawson with the Australian Constructors Association and Infrastructure Partnerships Australia. 2008. *Scope for Improvement 2008*. Page 7

TRADITIONAL CONTRACTING REFORM RESPONSE TO CONSULTATION PAPER



Driving Business Success for Consulting Firms in the Built and Natural Environment

- Proper risk assessment prior to commencement;
- Price adjustments dealt with in advance should a particular risk occur; and
- Limitations on liability.

The range of issues highlighted through the Scope for Improvement reports demonstrates the complexity of interdependent issues, including those related to contracting, impacting on successful project delivery. Importantly these issues also reflect the concerns and experience of our member firms doing business around Australia and providing services to public and private sector clients.

In this context it is vital that a wide lens is cast on opportunities to improve contracting in Australia with a view to improving governance, risk management, project delivery outcomes, contract conditions and management across the industry.

2. Standards of Contractual Behaviour

Arguably the greatest issue faced by Consult Australia's membership in the context of discussing contracting in Australia relates to standards of contractual behaviour. By placing onerous terms in contracts, clients put consultants in the invidious position of taking on responsibility for risks they cannot manage, whilst not being in a position to negotiate better contractual terms. These onerous terms and practices are canvassed in this section, as well as the contracting environment that leads to this situation.

2.1 Freedom of Contract and the "Level Playing Field"

In any discussion about standards of contractual behaviour, many problems are derived from the premise of "freedom of contract," with the notion that all contractual terms are the result of negotiation and agreement between parties.

Unfortunately, this premise is seldom the case, as uneven bargaining power is common, and means one party tends to dictate terms, while the other is forced to accept those terms. Even where negotiations take place, the common outcome is that at best, only minor changes result.

Where parties to a contract have unequal bargaining power, the concept of "freedom of contract" is illusory. Most professional firms are small businesses and even those that do not operate in very competitive markets where contracts are offered on a "take it or leave it" basis. Very few, if any, professional firms are in a position to "walk away" from work, even where the work is offered on harsh contractual terms. This is particularly the case in tougher economic environments.

The uneven nature of the negotiation process means that onerous terms that a consultant will be unable to meet often find their way into a contract. These terms are discussed in detail in these sections, and it is important to note that many of them have the effect of creating uninsured risks, which in turn exposes both parties to a contract to loss.

2.2 Contractual Aggression and The Law

In Consult Australia's experience, many clients will generally make contracts as aggressive as the law allows them to. When taken together with the uneven basis of negotiations described above, this leads to highly aggressive contracts offered to our members with little ability to address those terms that are not satisfactory to them.

Thus, where the law operates on the theory that a free contract is being reached, providing options for the parties to agree to in terms of how they manage their risks and liabilities, the reality is quite different. This is particularly the case with the proportionate liability reforms brought in around ten years ago.

2.3 Unfair or Onerous Allocation of Risk

There is a significant issue affecting the outcomes of procurement in relation to the built environment drawing on the allocation of risk between parties. Liability must be managed equitably, with regard to good risk management and the limitations of professional indemnity insurance.

Current client (especially including government) procurement practices associated with professional services in the built environment either unnecessarily add to the cost of doing business, or run counter to government policies, whether aimed at delivering best-practice procurement, or ensuring the success of insurance markets in the wake of the insurance crisis following the collapse of HIH. For example, poor procurement guidelines and risk allocation across public sector agencies see gross inefficiencies, increased costs and lost time to negotiation and disputation across all parties.

Consult Australia is opposed to requirements of excessive liability during a contract on the basis that these requirements promote the acceptance of risks which are beyond the control of any consulting firm. Such practices threaten the sustainability of our industry, produce uncertainty and higher costs for clients and do not promote good risk management to the expectation of the community.

The imposition of clauses demanding unlimited liability of consulting firms, and the contracting out of proportional liability legislation in contracts with these firms, put at risk the affordability and availability of professional indemnity (PI) insurance covering services provided by professionals and providing protection to the consumers of those services.

Such practices ignore good risk management and see the parties responsible assume unknown risks where insurance is not available to cover the liabilities sought. Such behaviour distorts the terms on which firms compete for work, and expose all parties to the possibility of project failure, unforeseen costs and poor value for money outcomes.

Despite the insurance crisis of the early 2000s and the consequent passage of Proportionate Liability (PL), and Professional Standards Legislation (PSL) by Australian governments, public sector procurement practices, as well as many private sector client practices, have yet to reflect the policy intent of these legislative reforms.

2.4 Proportionate Liability

In response to the insurance crisis of 2001, a package of reforms including proportionate liability (PL) legislation was enacted to replace the doctrine of "joint and several" liability. Under joint and several liability, several parties may have combined to cause loss to a plaintiff, but any one of them could have been held fully liable, irrespective of their individual contribution to the loss. Proportionate liability divides loss among the defendants according to their share of responsibility.

Under PL, liability is allocated to the parties according to who is able to manage the risk, rather than the party with the deepest pockets. However, when these reforms were implemented, the enacting legislation had a crucial difference between jurisdictions, with the ability to contract out of proportionate liability included in some states' legislation, but not others.

CONTRACTING OUT OF PROPORTIONATE LIABILITY

Supporters of contracting out cite the principle of “freedom of contract” and argue that government should not interfere with this principle unless justified on public policy grounds. However, there is evidence that large clients from both the private and government sectors are exerting pressure on professional service firms to contract out of proportionate liability. The professions believe that in this case there are grounds for government to intervene and prohibit contracting out for the public policy ground of maintaining a viable, thriving professional community backed by adequate levels of PI insurance.

Indeed, as canvassed in the previous section of this submission, some clients will make a contract as aggressive as the law allows. This is particularly felt with regard to proportionate liability. Where the law allows a client to contract out of proportionate liability, they will almost always do so. Where a policy such as proportionate liability has been implemented to prevent one party being overburdened with risk or to stave off a future insurance crisis, any legal methods included in the law to avoid that policy will inevitably be used, and defeat the policy intent behind those initiatives.

The express ability to contract out of proportionate liability legislation in New South Wales, Western Australia and Tasmania has encouraged poor risk management by a range of parties working across the building and construction industry. Contracting out of PL encourages the allocation of unmanageable risks and liabilities upon consultants that would normally be acceptable to clients as a normal part of project development. The consequences of this behaviour are far reaching with implications across jurisdictions. Conversely, contracting out of proportionate liability is expressly prohibited in Queensland, while the remaining jurisdictions are silent on the issue.

It is worth noting that the Standing Committee on Law and Justice (previously the Standing Committee of Attorneys General) has previously received expert advice recommending harmonisation of proportionate liability legislation around Australia, with the harmonised legislation expressly prohibiting parties from contracting out⁵.

Consult Australia strongly supports the position of this expert advice, with model proportionate liability provisions that will see the Commonwealth, states and territories introduce uniform legislation to create a clear and consistent scheme expressly prohibiting ‘contracting out’ of PL.

Harmonisation of best practice PL legislation will:

- Provide clarity and certainty for clients and consultants alike;
- Reduce disputation; and
- Remove the need for costly and prolonged litigation.

Public and private sector clients around Australia continue to apply pressure to consulting firms to contract out of proportionate liability legislation. In addition, through the use of onerous contract terms, clients are seeking to make consulting firms liable for risks beyond those they would normally or reasonably expect to have within our responsibility, control or management.

⁵ Tony Horan (2007), *Proportionate Liability: Towards National Consistency*, and Professor Jim Davis (2008), *Proportionate Liability: Proposals to Achieve National Uniformity*.

In the experience of our members, where contracting out of proportionate liability is available, clients take up that option when drawing up their contracts. The uneven nature of contract negotiations means that consultants are generally unable to reinstate this term. This action undermines the intent of the proportionate liability regime as it was originally designed, and risks a return to the situation that the original policy reform was implemented to avoid. Even in Queensland, where contracting out of PL is prohibited, our members have reported the use of indemnities to override the protections granted in the legislation, with the client requiring the consultant to indemnify them for any liability apportioned to them under PL legislation.

Contracting out of PL, or circumventing it through the use of indemnities, not only threatens the sustainability of our industry and other similar professional occupations, but also potentially exposes the community to uncertain and unmanageable risk and liability. The ability to contract out of PL is of national concern, where it leaves the market for professional indemnity (PI) insurance vulnerable to the same kind of market failure as occurred during the insurance crisis of 2001: with the creation of exposure to uninsurable risks beyond the control of policy holders. Ultimately the ability to contract out defeats the purpose of PL legislation, and the tort and liability reforms sensibly introduced in response to that crisis.

Consult Australia cautions any moves towards retrograde changes to PL legislation that attempt to balance the interests of plaintiffs and defendants at the expense of the original intent of proportionate liability reform. Such moves will result in ongoing uncertainty, increased risk and an operating environment that threatens the sustainability of the wider consulting industry and PI insurance markets.

2.5 Limits on Liability

Consulting firms accept they have professional liability for the services they deliver. However it is becoming common practice for many clients to pass most or all of the risk for the entire project to the consulting firm through contractual conditions. This results in excessively high or unlimited liability to the extent that it is unmanageable in the event that a risk is realised.

By requiring consultants to sign up to contracts that contain unlimited liability clauses, or contracts which are silent on the question of limits to liability, clients demonstrate a lack of understanding about how insurance works. There are no insurance companies offering unlimited insurance policies in Australia. In practice, this means that in the event a consulting firm enters into a contract with an unlimited liability clause and a claim is brought against them, their insurance policy will be unlikely to respond to the full extent of the claim (if at all), leaving the balance of the liability with the balance sheet of the firm and ultimately, the client. In a practical worst case scenario, it means the consulting firm going out of business, and the client being left with the liability.

Unlimited liability under a contract also lead to a range of other negative outcomes, including poor risk management practices, which will be dealt with later in this submission.

Consult Australia is aware that when faced with excessive or unlimited liability clauses in contracts, many consulting firms are reviewing their willingness to bid for work. The firms taking these decisions are often among the top performers, delivering cost-effectively and at a high standard of quality. As a result, the pool of potential suppliers is decreased. Alternatively, the unreasonable expectations of liability may be built into the fee levies. Both of these outcomes reduce the potential for a competitive procurement model to deliver optimal outcomes.

Conversely, while small businesses generally also have taken decisions against bidding for work when faced with excessive liability clauses, a portion of smaller businesses take the opposite approach and drive much riskier behaviour. In these cases, less desirable contractors may mitigate risk to themselves by protecting their personal assets (for example, by transferring ownership to a family member), and then throwing caution to the wind in their behaviour they take. They are prepared to accept highly onerous terms in a contract, but will also offer up an inferior product, without regard to the consequences of being liable for an inadequate product.

We acknowledge that under the current common law position, there are certain heads of liability that cannot be limited. These include:

- Personal injury or death;
- Infringement of intellectual property rights;
- Fraudulent, malicious or criminal conduct;
- Wilful deceit; or
- Intentional tort.

However, it is when a contract does not limit liability for risks that would not be unlimited at common law, such as loss of, or damage to tangible property, that uninsurable risks may be created.

Consult Australia has long lobbied for clients, including a range of government agencies, to not impose unlimited liability clauses. A common response from government clients is that they understand the issues and concede that it is unfair and unreasonable to impose unlimited liability, but their hands are tied as they are bound to adhere to government policy. Those setting the government policy usually come from central agencies rather than service providing agencies, and generally do not directly have to deal with the consequences of unlimited liability.

Consult Australia would like to note that there are clients that have agreed to more reasonable and equitable liability clauses in contracts, and they have enjoyed the associated benefits of improved project delivery, risk management and reduced costs, delays and disputation. Those clients that fail to act on the risk and liability issues raised in this submission risk becoming less attractive for businesses in the building and construction industry.

2.6 Indemnity Clauses

One common practice for clients procuring consulting services is to require the consultant to indemnify them, often with a broad range of cover where courts are not required to facilitate their application. While there are legitimate reasons for including an indemnity in a contract, onerous indemnities have potentially serious consequences for a consultant.

In many cases, indemnities are placed in a contract to overcome common law hurdles to establishing liability, such as proof of causation, remoteness, reasonableness, overcoming limitation periods, the obligation to mitigate against loss or where there has been no breach. Each of these aspects of an indemnity shifts the equilibrium of the contract away from a balanced agreement to one heavily favouring the client at the consultant's expense.

Some clients, financial institutions and contractors require consultants to indemnify them, even where the required indemnities:

- Are very broad in terms of their coverage
- Are not predicated on the fault of the consultant
- Do not reduce the liability of the consultant where there has been contributory negligence by the client or other parties associated with the project.

Onerous indemnities such as those described above are generally those that extend a consultant's potential liability beyond what they would otherwise be liable for at common law. Thus, they have the effect of potentially creating uninsurable risks, creating uncertainty for the consultant due to their unlimited lifespan, or leading to poor risk management practices. Indeed, because indemnities shift the risk to one particular party, unless there is a specific requirement for each party to mitigate against loss, it is easy for all parties other than the indemnifier to "wash their hands" of taking action to mitigate loss, or walk away from their own contributory negligence.

2.7 Standards of Care

A common problem faced by our membership is the inclusion in a contract of a higher than required standard of care, generally owing to a poor understanding of the law by clients and their desire to have the best possible standard of product from the consultants they hire.

Inclusion of an "expert standard" is not necessary, and indeed is likely to create uninsurable risks as well as creating other problems.

Legislation governing the standard of care required of professionals provides that a professional does not breach a duty arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted by peer professional opinion as competent professional practice.⁶

Equally under the common law, professionals are required to exercise a standard of due care, skill and diligence which is usual amongst their profession.⁷ Specifically, engineers are required to exercise such care, skill and diligence in the performance of the work undertaken as would be shown by a reasonably competent engineer retained for the purpose at hand.⁸

Where contracts call on a consultant to provide an expert standard rather than the appropriate standard described above, they take the consultant's contractual liability beyond that required by the courts at common law and under statute. It is common for professional indemnity policies to exclude claims arising where an insured assumes a contractual obligation more onerous than would normally be the insured's professional duty.

The problems described in this section generally arise from clients not having sufficient understanding of the law, and often taking a plain English understanding of legal language which gives it a different meaning with important consequences.

⁶ *Civil Liability Act 2002, s 50(1)* (NSW); *Civil Liability Act 2002 s 22(1)* (TAS); *Civil Liability Act 2003, s 22(1)* (QLD); *Civil Liability Act 1936, s 41(1)* (SA); *Wrongs Act 1958, s59(1)* (VIC); *Civil Liability Act 2002, s5PB(1)* (WA).

⁷ *Voli v Inglewood Shire Council* (1963) HCA 15

⁸ *Brickhill v Cooke* [1984] 3 NSWLR 396

2.8 Fitness for purpose clauses

Consult Australia has been concerned for some time that a fitness for purpose warranty or guarantee in contracts used to engage professional service providers is unnecessarily onerous. It is standard for legal and insurance professionals to advise engineers and architects to avoid fitness for purpose warranties/guarantees in their professional service contracts as they are likely to create an uninsurable risk.

Courts determine a professional's negligence based upon the standard of care required of a professional, namely the skill and care ordinarily exercised by members of his or her profession practicing under similar circumstances. Professionals are not held to a standard of perfection. Contractual language, whether expressed or implied, requiring a fitness for purpose warranty is more appropriately intended for contracts that can definitely state a purpose (for example, the roof will not leak).

Fitness for purpose is a nebulous concept in relation to professional services providers because the 'service' is intangible, such as the giving of 'advice' or producing a design. There is no single end product because the advice can lead to a variety of outcomes. For example, lawyers cannot guarantee that their services will result in a victorious trial; a doctor cannot guarantee that a surgery will be successful; and an engineer cannot guarantee that its reports will be suitable for whatever intended purpose the client uses it for.

An express term of the contract that design work (either with or without additional obligations relating to construction, commissioning work and the procurement of materials supplied by the contractor for the purpose of the contract) will be fit for their intended purpose, imposes on the contractor an absolute obligation (warranty) that the items specified must perform the task for which it is required. The principal need only prove that the contractor failed to produce the desired result - it is not necessary to show the contractor has been negligent in any way.

Even in the absence of an express term, it appears that in "design and build" contracts the contractor is under an implied obligation to ensure the finished product will be "reasonably" fit for its intended purpose, except where there is an express contractual term to the contrary.

Because a "fitness for purpose" obligation is an absolute warranty, failure for the item to perform as required or achieve the desired result will result in a breach of the term, regardless of whether due skill and care was exercised by the supplier. (Arguably there are two warranties covered by fitness for purpose: one as to quality and one as to reasonable fitness for the job).

As a general rule, this contractual warranty of "fitness for purpose" will not be covered by professional indemnity insurance exposing the contractor to personal liability for breach.

Professional indemnity insurance policies exclude liability for contractual liability outside common law negligence in the performance of those professional services. The claim of negligence in the provision of required services would trigger the insurance policy to respond, whereas a claim solely as a breach of warranty/guarantee to provide fit for purpose services would not, because it is beyond the standard practice of professional services.

GREAVES (CONTRACTORS) LIMITED V BAYNHAM MEIKLE AND PARTNERS

For example in *Greaves (Contractors) Limited v Baynham Meikle and Partners*⁹, contractors were employed to design and construct a warehouse to be used as a store for oil drums which would be moved across the floor by trucks: the floor would accordingly be subject to vibrating loads. The contractor engaged structural engineers to design the structure. The floors were not in fact adequately designed to resist the loads and the contractor was held to be liable to ensure that the building was fit for its intended purpose and in relation to the structural engineer it was held that notwithstanding the usual legal implication of reasonable skill and care, as a matter of fact there was an implication that if the work was completed in accordance with the design it would be reasonably fit for use.

2.9 Consequential Loss

Consequential loss is a form of indemnity, where a consultant can be made liable for actions or outcomes beyond their control. However, the range of losses that might trigger this clause is wider than under other indemnities. At present there is no definitive definition of the term, “consequential loss”, which means that unless further qualifications are included in a contract, it potentially applies widely and with uncertainty. It may apply to loss of profit or revenue, loss of business opportunity, or even loss of goodwill.

Because a consultant is providing expertise, without limiting the ways the client may use that expertise, such a clause is inappropriate and exposes them to claims for damages. A consequential loss clause in a contract means, for example, that if a report provided by a consulting engineer is used in a way different to that envisaged, and a loss to the client results, the consultant may still be liable.

This is a particularly indirect form of liability to place in a contract, and as with the other clauses discussed in this section, make a party to a contract liable for things they cannot control. As well as potentially creating uninsurable risks, this approach represents an unreasonable liability for consultants.

2.10 Use of Deeds

While not common practice, some clients use deeds as their preferred form of agreement between client and consultant. There are two fundamental differences between a contract and deed that would be a reason for a client to prefer its use:

- A deed does not require any consideration to be effective;
- A deed effectively doubles the limitation period to 12 years in which a client may bring legal proceedings against a consultant in NSW, Queensland, WA, Tasmania, ACT and the Northern Territory. In Victoria and South Australia the statute of limitations is extended to 15 years.

Consult Australia believes that the use of deeds for consulting work serves little purpose and simply extends the risk exposure to future generations of owners of our member firms, potentially exposing consultants to

⁹ *Greaves & Co v Baynham Meikle & Partners* [1975] 1 WLR 1095

higher and potentially uninsurable levels of risk than would otherwise be the case under simple client agreements. The longer limitation period also effectively means less certainty for businesses operating under a deed.

Some consultants are often unaware of the implications of doing work under a deed, which creates a small risk for them, but Consult Australia has been made aware of a small number of public sector agencies increasingly using deeds as their preferred standard agreement for engaging consultants.

2.11 Liquidated Damages

Liquidated damages clauses in our members' contracts usually exist in the form of penalties for delay. Such clauses impose harsh penalties on consultants without provision for a qualification on cause and effect. Consult Australia submits that where delay and extension of time clauses are used, they must include an objective test of the effect of the delay and must establish the consultant's reasonable grounds for uninsurable indemnities including entitlement to extension of time.

Where there is no consideration for the causes of the delay, a consultant is placed at serious disadvantage when a delay is due to circumstances beyond their control.

However, the greatest problem with liquidated damages is that they are often used to make the consultant pay a penalty for outcomes over which they have no influence. This will in turn create an uninsured liability, and cause harm to the consultant

2.12 Changing of Terms and Conditions During the Contract

This submission has already canvassed the uneven nature of contractual negotiations, and the inability of consultants to either change onerous terms or turn down work where the contract is unsatisfactory. This uneven position is magnified further when the scope of works, or terms and conditions are changed after a contract has commenced.

In some cases, the contract contains a clause dealing with situations where the scope changes, and creates a path forward for each party. However, often a client may vary a contract, and offer an additional fee that is inadequate for the additional works required. When a consultant has already invested their resources into a project, they are in even less of a position to walk away from that work than already is the case.

Additionally, variation clauses often entitle the client to remove large portions of the scope of works or indeed remove the entire scope, and have the work carried out by another consultant. Such behaviour may be permitted under a contract without establishing fault or inadequate performance on the part of the consultant. In general, where fault or poor performance are shown during a project, they would trigger a "show cause" or notice period, which that the consultant would otherwise be entitled to under termination for convenience and/or default provisions. In these circumstances, determination of the adjustment to the fee is often inadequate, and usually assessed by the client.

We appreciate that clients need the ability to exercise financial and other controls over a project and may need to reduce the scope of a project for many reasons. However, given the significant investment of resources in starting work on a project, a consultant should have confidence that large portions of the scope

will not be removed and given to another consultant, without fault and in the absence of an objective valuation process. This issue especially needs to be considered with regard to intellectual property concerns in handing over unfinished work to a rival consultant for their completion.

Often the costs associated with handing over a partially completed deliverable and demobilising from the project's site is significant and not adequately compensated for by the client. Such provisions circumvent proper termination processes and often preclude claims for loss of prospective profits, in turn giving rise to an unfair commercial disadvantage. If the scope of works is greatly reduced by using a variation clause, it should only be because the client has reduced the size of the project, and not to give that work to another consultant.

2.13 Payment of Guarantees

In some cases, our members report being required to give bank guarantees to cover any liabilities that arise out of their work. In circumstances where the right level of insurance cover and appropriate indemnities are in place, the necessity of a bank guarantee for consulting projects is considered excessive. This practice ties up cash flows unnecessarily, particularly when consultants invoice monthly in arrears, to the extent that there will often be 60 days worth of fees outstanding (i.e. one month's invoice and one month of work in progress).

Parent company guarantees are sometimes required by clients without regard to the adequacy of the consultant's insurances, financial strength or other security. Clients who require the consultant to procure a parent company guarantee are sometimes under the misapprehension that the personnel and other resources needed to deliver the services reside in the consultant's parent company rather the consultant, which is not usually the case with many consultancies.

These practices reflect poor contracting behaviour, and because other aspects of the contract cover the client's concern, simply are another risk burden placed upon the consultant.

3. Effects of Bad Contracting Behaviour

In this section of the submission, the effects of the issues raised above are canvassed. Whilst many of these effects have been highlighted, a more thorough discussion is warranted to properly understand the results of poor standards of contractual behaviour. These effects also highlight some of the deficiencies of some practitioners of contract law, who design aggressive contracts without regard or knowledge of the effects of these contracts, especially where they work to the disadvantage of their clients.

3.1 Issues for Insurance: Uninsured Risks

The recovery of losses suffered by a claimant is best achieved when there is a valid professional indemnity (PI) insurance policy in place to enable the payment of damages. PI insurance providers may not cover a consultant where their liability under the contract goes beyond their common law liability. Many of the situations that fall into this category have been described in the earlier section of this submission describing poor standards of contractual behaviour. If a consultant enters into a contract without a limit on liability then they will not be covered beyond the value of their PI insurance, even where the liability extends further.

It is worth noting that claims made against an insurance policy depend on the claims environment at the time the claim is made. In strong claims environment, such claims may be approved, whereas they are less likely to be approved in weaker claims environments. This means very little certainty exists for a client and party to a contract in knowing whether they are properly covered for a claim falling within this issue.

Should the client wish to recover monies from the consultant for any damages, the consultant will need to directly cover the damages without the use of insurance. Given that the consulting industry in the built environment sector is generally asset-poor, this might mean drawing on the personal assets of business owners or winding up the company. In some situations where the consultant does not have cover, they could go into liquidation and the client has no recourse to recover monies owed. In this situation both parties are considerably worse off.

3.2 Risk Management Practices

The experience of a number of our members working under contracts where unlimited liability was placed on one party was that the other party was easily able to “pass the buck” when they could have managed a risk. When liability was limited and risk better managed, a more collaborative approach was taken as each party had an interest in seeing the risks properly dealt with. This in turn led to better project outcomes, including better and more efficient delivery of the deliverables, as well as reduced disputation and consequentially a better experience for all participants.

To help government agencies conduct a liability risk assessment the Commonwealth Department of Innovation, Industry, Science and Research has produced a guide to assist in procurement¹⁰. The guide includes a draft clause and guidelines to limit liability in contracts. This guide is intended to assist in reducing costs for both parties, and reduce barriers to small businesses accessing the Commonwealth Government procurement market.

¹⁰ See: <http://www.innovation.gov.au/SmallBusiness/WorkingWithContracts/Documents/LiabilityRiskAssessmentGuide.pdf>

The Victorian Government has also produced good practice guidelines for *Insurance Provisions and Liability Capping for the Purchase of Goods and Services*¹¹, and we encourage public sector procurement agencies in other jurisdictions to do the same. Similarly, an equivalent practice amongst private sector clients would be a better way of dealing with risk than simply using onerous contractual terms.

3.3 Cost of Negotiating and Managing a Contract

Where a robust liability risk assessment is performed for procurement contracts, and appropriate mitigation strategies are set up, together with capping liability at the correct level, consultants in the built environment sector will be allocated risk levels that are reasonable for their involvement with a project from the beginning, negating the need for protracted and costly contract negotiations.

Anecdotal evidence from our members has consistently shown that for projects where there is unlimited liability or other onerous terms in the contract, the cost of managing the project is significantly higher. In one example, the cost of managing a project fell from around 10% to around 1.5% once they moved to a more collaborative model of contract. These savings result from reduced resources being directed towards negotiation, legal advice and resolving disputes, as well as from the more hostile environment surrounding contracts containing onerous terms.

The costs the result from these onerous terms will generally also be passed on to the client, which in turn impacts on the cost to that government agency or business. A 2009 study¹² by the Cooperative Research Centre for Construction Innovation found that disputation in the construction sector alone cost the Australian economy around \$7 billion that year, adding around 6% to the overall cost of work done.

3.4 Loss of Innovation

The greater financial risk to a consultant associated with assuming project risks in a contract that is out of their control may lead to the consultant becoming overcautious in delivering their final product. This potentially means they will not provide an innovative solution that could lower project costs or lead to better outcomes in the longer term. Thus far, there has been substantially less innovation where contracts have allocated greater liability on consultants.

¹¹ Department of Treasury and Finance (2011), *Good Practice Guidelines: Insurance Provisions and Liability Capping for the Purchase of Goods and Services*

¹² CRC (2009), *Guide to Leading Practice for Dispute Avoidance and Resolution*. At p8.

4. Contracts in their Context

Many of our members operate across state boundaries, and in the case of our largest members, they are operating internationally. To this end, it is important to highlight the importance of harmonisation of contract law across jurisdictional boundaries. Similarly, the interconnected nature of contract law with Australian Consumer Law must also be considered, as changes to that area of law may have an impact on contracts entered into by our members.

4.1 Harmonisation with Interstate and Overseas

Nationally consistent contract law will make it easier for business to understand their rights and responsibilities, especially where getting professional legal advice is beyond the means of that firm. Greater consistency will reduce the cost and time spent on managing contracts, including training and education activities to make contract law accessible to smaller firms.

Moves towards national harmonisation will also improve certainty for firms that operate across Australia. It gives them improved ability to understand how their insurance policy relates to contract law and their own bottom line, as well as knowing what they need to do, or what they may be responsible for.

4.2 Some Lessons from Overseas

There are some important lessons that can be drawn from the experience in overseas jurisdictions, as well as from other aspects of procurement policy in Australia.

In the USA, contract law contains an implied obligation of good faith upon the parties, while in the United Kingdom standard form construction contracts require the parties to act with “mutual trust”. When compared with the risk shifting approach that is common in Australia as described above, it is clear that Australia could draw on these overseas experiences and move towards a less aggressive approach to contracting.

Furthermore, in all Australian states and the Commonwealth, government is obliged to act as a model litigant. Consult Australia submits that government agencies should also be mandated with acting as model clients, including taking a better approach to risk shifting and adopting better contracting practices that will work to the advantage of all parties.

5. Accessibility of Contract Law

Like many users of contract law, the majority of our members are smaller business organisations with limited means to hire specialist legal advice, whether in-house or through a law practice. Therefore, when they are presented with a contract, they have to determine whether it is appropriate to enter into without expert advice.

Often, this means that consultants will agree to contracts without making a judgment as to whether the terms are fair or appropriate for them, while in other situations it means they will interpret legal terms through a lay-person's eyes. Where the plain English meaning of a term differs from the legal meaning, or the legal term has special significance, this has the potential to become particularly problematic.

For example, the legal use of the term, "reasonable" has special significance by signifying an objective standard of care. In our experience, however, consultants who don't have access to legal expertise interpret this term to mean that the service provided is of average standard, and represent a higher standard as they wish to provide a "best practice" service. However, this representation of a higher standard also has serious implications for their insurance cover and their potential liability for projects under that contract.

5.1 Codification

The codification of contract law is worthy of consideration in order to level the playing field between parties to a contract, where one party has access to legal advice and the other does not. However, if the Government does decide to proceed down this path, it is important that the process of codifying contract law is done in a way to make the law more accessible, transparent, and easy to use. In particular, Consult Australia is concerned that any codification should make it more difficult to include onerous contractual terms, whilst also making the effects of such terms clear to all parties. To this end, the implications for insurance of codification must be carefully considered before deciding whether to proceed down this path.

6. Towards Better Contracting Practices

Notwithstanding the significant concerns already outlined in this submission, there have also been some positive moves in contracting within the built environment sector in recent times. These include the move towards more collaborative contracting, including alliances, as well as a greater awareness in some quarters of the need to properly scope work. These issues and ways to move forward arising out of the discussion are covered in this section.

6.1 More Collaborative Contracting

Consult Australia has long supported and promoted the use of relationship or collaborative contracting as a method to avoid some of the poor standards of contractual behaviour discussed earlier, which is also a valuable tool to deliver projects to the benefit of all participants. We respect the principles on which relationship contracting has been built, and it has evolved to be an increasing component of our member firms' business over the last fifteen years.

The most common form of collaborative contracting is alliance contracting which has been taken up successfully in Australia in recent years through more efficient project delivery, effective risk management and less dispute.

These principles should not be restricted to alliance contracts however, and opportunities to reduce the adversarial nature of 'design and construct' contracting should also be considered by legal experts advising clients in contract law.

Traditional design and construct contracting in Australia is often inherently adversarial and competitive with high levels of dispute and associated increased costs and delays. With increasing project complexity and the use of tools and systems such as Building Information Modelling (BIM) and Integrated Project Delivery (IPD), it is increasingly important to build collaborative arrangements between all parties to a project.

Emphasis should shift from defensive risk allocation, to strategies for fair risk allocation, and shared goals for mutual advantage. In part, collaboration and trust in traditional contracting can be built through fairer contract terms, but improved communication, early engagement and best-practice procurement generally all will support a less adversarial contracting environment. This improved collaborative environment will work to the benefit of all parties to a contract, and not just the consultant.

6.2 Alliance Contracting

Alliance contracting has grown since the year 2000 to successfully deliver some of Australia's largest and most complex infrastructure projects. Under an alliance, a designated body is established to deliver a project, under which each party has a stake and therefore shares in the rewards as well as the risks.

Consult Australia supports alliance contracting as a valuable tool to deliver projects with benefits for all participants. We respect the principles on which alliancing has been built, and which have evolved as alliances have become an increasing component of our member firms' business over the last decade.

INFRASTRUCTURE DELIVERED BY ALLIANCE

Australia has increasingly demonstrated the strength of alliance contracting through projects such as:

- Roe Highway Stage 7 (Main Roads Western Australia);
- Tullamarine-Calder Interchange (VicRoads);
- Anthony's Cutting (VicRoads);
- South Morang Rail Extension (VicRoads, Metro Trains and Department of Transport);
- Northern Hume Alliance (NSW Roads and Traffic Authority);
- Lawrence Hargrave Drive (NSW Roads and Traffic Authority);
- Inner Northern Busway (Queensland Department of Transport);
- Ipswich Motorway Project (Queensland Department of Main Roads); and
- SAFELink Alliance (Queensland Department of Main Roads).

The projects delivered above were successful because they adopted a collaborative process that promoted openness, trust, and risk- and responsibility-sharing through the alignment of interests between clients, designers and constructors.

Since alliancing became more widespread among our members, Consult Australia has been concerned about the development of collaborative models which are not alliances, but which carry the expectation that such approaches to the relationships between the contracting parties will deliver alliance-like outcomes. Such arrangements ignore the fundamental issue that pure alliancing is built around a set of behaviours that are driven by the fair and equitable sharing of risk and reward between all contracting parties.

Caution must be exercised in supporting an approach that offers 'an each way bet' by developing an integrated project team while retaining the right to allocate responsibility or liability and blame if problems occur, or outcomes are less than desired. In these situations, the alliance created risks being an alliance in name only.

Consult Australia recognises that the strength of the alliance model lies in the full range of benefits that can be achieved by all participants. This will include a competitive process that ensures value for money is achieved. However, in accommodating competitive tendering within an alliance framework it is important that this is tailored to the project at hand, and does not compromise the model overall.

Competitive tendering in an alliance indicates a fundamental misunderstanding of the alliance delivery process. Alliancing is inherently different to traditional contracts where there is no visibility of competitiveness once a tender is accepted. In contrast, true alliancing demands: full accountability for competitiveness of every element of work as benchmarked against an Independent Estimator's target outturn cost (TOC); and that every subcontract package that is tendered, and every opportunity realised and risk managed out of the contingency is able to be analysed, shared between participants and serves as a demonstration of value for money and a learning for all parties.

Real value for money in complex projects comes from: finely tuning the scope to opportunities and stakeholder requirements; jointly managing out risks to minimise contingency; and full engagement of the Owner in determining and developing the best value for money outcomes at all stages of the project. Although there is a place for dual TOC price competition, the cost of these processes to the Owner and to industry must be weighed against compromising the benefits of a properly integrated team.

There will always be a temptation for some participants to see alliance contracting evolve to take on the seeming advantages associated with more traditional contracting models. Consult Australia cautions against

these moves where they appear to undermine those principles that have made alliancing as successful as it has proven itself to be.

6.3 Improved Procurement Skills

Many of the issues described in this submission are due to the poor quality of legal advice received by a client, rather than any defect with Australian contract law. Nevertheless, they represent a fundamental problem for Australian businesses whose dealings rely on transactions conducted under contract law.

That poor quality advice is often the reason for adversarial contracts that create risks on both sides of the contract. In our recent experience, this problem is only heightened in the public sector due to an acute shortage of skilled procurement professionals in key positions, with adequate knowledge of contract law and its interface with insurance.

Accordingly, the erosion of the skills base has led to poor quality contractual terms and conditions and undue reliance of external legal advice.

The Australasian Procurement and Construction Council (APCC) as part of their guide, *Developing the Procurement Professional* acknowledge that:

"Until now, procurement professionalism in Australia has not been clearly recognised or defined. Public procurement too often is undertaken without professional support which results in sub-optimal value for money decisions and unnecessary high prices being paid for goods and services."

The APCC guide aims to raise the profile of procurement. It sets out the three main pathways to becoming a procurement professional and describes the characteristics of such a professional based on four levels of progression. Consult Australia believes that the guide is a useful tool in raising awareness about procurement in terms of it being a career within the public service.

Within this context, it is vital that procurement professionals are adequately skilled in understanding contract law, and have the "in-house" knowledge to draft their own contracts, fully aware of the implications of onerous and aggressive contract terms. The role for external legal advice should be one of review, rather than developing terms of agreement for which they do not have to suffer the unintended consequences.

Even where external legal advice is relied on to draft a contract, there clearly needs to be greater awareness of the implications for insurance of aggressive contracts.

6.4 Better Briefs

The quality of project briefs sits alongside the quality of legal advice as a primary cause of problems occurring for our members under contract law. Poor quality briefs mean that parties to a contract are not clear on what is required from them, and the scope of works is not adequately defined. This situation, where parties aren't certain of their responsibilities, is much more likely to lead to disputation.

It is important that tendering is improved through the release of project briefs that are accurate and contain all information that is available and required by the tenderers. Consult Australia members have reported

instances where project briefs have been released by clients that appear not to have been reviewed for accuracy, that do not contain all relevant background information, and where additional information released has been difficult to access. More specifically, Consult Australia members report:

- The re-issue by clients of entire project briefs, but without track changes, making it extremely difficult and time consuming for tenderers to ascertain where the changes have been made and the implications for a tender already underway;
- Project briefs that do not correctly refer to known industry standards;
- Project briefs in a 'state of flux' evolving throughout the tender period with additional information catering to changing client demands;
- Tender advertisements (generally in the case of public sector clients) referring to published information that is not available online;
- Addenda being issued, sometimes the day before a tender deadline, with no time extension;
- References to parts of a project that are not actually relevant to the project being tendered;
- Project briefs that refer to construction phase services for projects where there is no need for such services; and
- Increased demands for building information modelling (BIM) without associated increases in time to prepare such requirements.

In some circumstances where this is an issue, quality assurance has not been correctly administered and, in part, the costs of quality assurance have effectively been passed to the consultant where they choose to engage with the tender and raise issues of concern.

Consult Australia endorses standard contract terms (for example, *AS4122-2010: General Conditions of Contract for Consultants*) supporting the provision of services against the project scope, but providing clear parameters to manage discrepancies, inconsistencies or omissions. The time and costs associated with this process can be substantial, and will either detract from resources spent on the preparation of the tender, or increase costs to the client and consultant alike following the commencement of the project. Ultimately however, of greater concern to the client are the ongoing unmanaged risks that arise in the absence of robust quality assurance.

6.5 Risk Assessment

Consult Australia submits that best practice procurement and liability management involves setting a cap on liability by undertaking a liability risk assessment.

A liability risk assessment will ensure each party, including the client, carries responsibility for their own acts or omissions. Conducting a liability risk assessment will assist the client's procurement officers to understand the risks associated with a particular project and how they might be addressed through various mitigation strategies including the appropriate type and justifiable level (if any) of insurance required of consultants.

Consultants, with their comparatively limited capital and resources compared to most client organisations, are almost always the least able of all parties in a contract to handle the increased liabilities imposed upon them. Because the consultant's services are often provided through or under the control of a contractor, project manager or architect, the consultant is not then in a position to manage the risk to which they are exposed under the contract. If a proper liability risk assessment is done then it will be self-evident that unlimited liability is an ineffective risk management strategy.

The leading risk assessment guides in Australia have already been canvassed in section 3.2 of this submission.

6.6 Dispute Resolution

Governance and dispute resolution guidelines are an important aspect of developing best practice contracting procedures. The time and costs spent resolving issues that arise during construction can be substantial, and deter consultants from tendering for future similar work. Consult Australia endorses moves towards best practice dispute resolution practices as an essential element of contract governance and management.

The first step towards a good dispute resolution process is negotiating with the other party, rather than establishing a complicated process. However, where negotiation is inadequate, it is important to establish a dispute resolution process that is fair to both sides, and agreed on ahead of time.

One practice that Consult Australia endorses is the use of dispute resolution boards, although this is not as commonly used in Australia as overseas. Under this practice, each party nominates an impartial representative, together with a jointly nominated representative who form the dispute resolution board prior to commencement of the project. Whenever an issue arises that threatens to turn into a dispute, it is referred to the board for their resolution. Evidence from overseas and elsewhere in Australia has shown that this method of dispute resolution is highly successful and saves all parties from the cost and time spent on litigation and disputesⁱ.

Conclusion

The use of contract law by Consult Australia's member firms has been a far from perfect experience, and the consequences of many of these issues can potentially be quite severe.

As this submission has argued, the causes of these problems relate not just to the nature of contract law, but also to the quality of legal practitioners providing expert advice in contract law, and their understanding of the interface between contract law and insurance issues when used for procurement purposes.

The specific nature of contracts where the service provided is professional expertise rather than a tangible good is often ignored when reforms are enacted that have wide reaching implications. Professionals providing expertise should not be held liable for the defects created by other parties, or for circumstances beyond their control. The shifting of risk has become a common practice, and works to the detriment of all parties.

As well as risk allocation, inappropriate clauses are often included in a contract, and these also serve to create uninsurable risks, or lead to ineffective risk management practices, and in turn increase costs, disputation and the length of time taken to deliver a project.

Going forward, the accessibility of contract law needs to be carefully considered, so that smaller businesses aren't at an automatic disadvantage when they can't afford legal advice, and hence are forced to accept the contract offered to them, even when it is unfair.

Recent trends such as alliance contracts and other moves towards greater collaboration are also a development that should be closely observed so that their benefits can be more widely realised.

If this review leads to reforms that level the playing field when contractual negotiations are taking place, and better contracts result, then Consult Australia commits to working with any relevant partner to achieve those desired outcomes.

ⁱ Gerber, P and Ong, B (2011). *DAPs: When Will Australia Jump On Board?* Thomson Reuters, accessed online at www.drba.com.au