



# BARRIERS TO EFFECTIVE CLIMATE CHANGE ADAPTATION

RESPONSE TO THE ISSUES PAPER

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**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; 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 Sustainable Built Environment Council (ASBEC), the Australian Construction Industry Forum (ACIF), the Australian Chamber of Commerce and Industry (ACCI) and the Australian Services Roundtable (ASR). Consult Australia is a host organisation for the annual Built Environment Meets Parliament (BEMP) summit.

## EXECUTIVE SUMMARY

Consult Australia welcomes the opportunity to respond to the Productivity Commission Inquiry into Barriers to Effective Climate Change Adaptation.

Consulting firms have a profound effect on the natural environment and society; through their actions and designs the built environment is formed, and our natural environment preserved. Consult Australia's members provide design solutions that seek to either repair environmental damage, or plan adequately for a sustainable future. Our industry plays a constructive role in helping to raise and address these issues with clients and the wider population. As sustainable design, innovation and practice become important drivers of domestic and international business, the consulting industry will play a key role in driving, promoting and delivering sustainable outcomes for clients and the broader community.

Consult Australia's member firms' own business advantage is based on harnessing Australia's best minds in design, engineering and new technologies. The environmental, social and economic challenges to which our firms develop innovative, tailored and efficient solutions are the very same challenges currently dominating the headlines and exercising the minds of policy makers and elected representatives across the country.

### **Consult Australia, the Australian Sustainable Built Environment Council and a Policy Framework for Adaptation in the Built Environment**

Consult Australia is a proud member of the Australian Sustainable Built Environment Council (ASBEC). ASBEC is the peak body comprising 38 industry and professional organisations, academic institutions and government observers, committed to a sustainable built environment in Australia.

In recent years, the ASBEC Climate Change Task Group (CCTG) has been active in progressing debate advocating the benefits of energy efficiency. The CCTG commissioned research released in 2008 and updated in 2010—*The Second Plank Report: Building a Low Carbon Economy through Energy Efficient Buildings* (2008) and the *Second Plank Update Report* (2010). These landmark reports identify a range of measures to achieve abatement across the built environment in parallel with those facilitated through a price on carbon.

In 2011 the CCTG turned its attention to climate change adaptation and the steps necessary to facilitate a built environment that is more resilient to changes in the environment including: rising sea levels, higher temperatures, more intense bushfires, higher wind speeds and more frequent storms and cyclones.

As set out in the letter to the Commission of 16 December 2011 from David Parken, Chair of the CCTG, the Task Group has identified a number of challenges and opportunities associated with climate change adaptation in the built environment. To address these issues in a co-ordinated, effective manner the Task Group has commissioned the development of a policy framework to help guide industry to make informed decisions and engage with government about the relevant measures that can be taken to enable the built environment to be more resilient to changes in climate.

Consult Australia is pleased to have been able to contribute to this work as a member of the Task Group. We expect that the policy framework will be completed and provided to the Productivity Commission in March 2012, and will be a critical contribution to the consideration of issues associated with barriers to effective climate change adaptation.

In the interim, this submission responds directly to those questions posed by the Productivity Commission in their 2011 Issues Paper focusing on those issues of principal concern to Consult Australia's member firms. We look forward to further discussions with the Productivity Commission in 2012, both regarding to the specific issues raised here, and those broader issues and recommendations identified through the thought leadership created through ASBEC's policy framework for adaptation in the built environment.

## RESPONSE TO THE ISSUES PAPER

### Section 2: What does adaptation to climate change mean?

#### *How can uncertainty be addressed in the context of adaptation to climate change?*

##### ***A National Adaptation Plan***

It is generally accepted by experts that even with substantial efforts to achieve global mitigation of carbon emissions, adaptation will be required to maintain the quality of life we currently enjoy. To be successful adaptation will entail significant public and private investment over a considerable period of time.

As adaptation requirements become more generally accepted, planners and designers, rather than climate change experts, are increasingly being relied on to include adaptation considerations in new design accounting for 'likely' climate change scenarios. These scenarios are redefining the services expected by clients and point to a rapid need for clear parameters against which to measure project designs.

Without clear guidelines, liability for future climate change impacts may be unintentionally placed on the designer or planner of the project. Without clearer policies, increasing levels of liability and ambiguity will push engineers, designers and architects to over-compensate and therefore over-design for protection against this and therefore increase the costs of their services, and project construction costs. Continued collaboration between the private sector, the scientific community, and government is essential to establish a policy framework and clear parameters, on which to base industry standards for consulting in the built and natural environment.

A nationally consistent adaptation plan needs to be developed, and kept constant across political cycles, to protect Australia against the threat of damage from climate change, and to help us manage other demographic and economic changes already forecast (for example, population ageing).

Risk management has been identified as the predominant approach for adaptation. However, due to uncertainties with change, the fundamental information for a risk management approach is not available. For example, in relation to climate change, the level of mitigation, extent of change impacts, and probabilities of these impacts occurring cannot be quantified. Without this information, a full risk management analysis cannot be completed. Therefore, an overall precautionary approach needs to be relied on, in conjunction with risk management principles.

### Prepare, Protect, Adapt and Innovate for Climate Change

In preference to the general classification of climate change adaptation, governments need to segment research and action into four distinct areas. All four need to be addressed individually, but together are all essential elements of a prosperous future for Australia:

**Prepare:** Climate change adaptation is still considered a distant and innocuous risk. Private and public institutions need to be educated, their preparedness established, and resources provided to assist them in becoming prepared. Adaptation needs to be considered now in Environmental Impact Assessments, local planning procedures and included through other appropriate standards.

**Protect:** There needs to be immediate action for protective measures on assets—natural and human made—which will be under direct threat if climate change predictions eventuate. Neither natural nor built assets should be lost by accident.

**Adapt:** Action needs to identify ways we can adapt to climate changes as they eventuate to minimise the impacts of climate change on Australia. In many instances there may be no alternative than to retreat or abandon in which case there will be emerging issues related to insurance and compensation.

**Innovate:** In order to maintain and improve the quality of life in Australia, and increase prosperity for the long term, we need a concerted effort to develop innovative responses. Government initiatives and incentives will be required to reduce the risk for the private sector and provide return on investment for government.

A National Adaptation Plan will ensure that the standard of adaptation, and therefore protection, is sufficient in all areas of Australia. The requirements for adaptation are immense, and it is unreasonable to expect that we will be able to afford the cost of all action. Therefore, planning is vital to identify the cost of adaptation action against the potential cost of no action, to prioritise projects and initiatives and support evidence based policy development.

A National Adaptation Plan for Action will need to:

- Establish how prepared the public and private sector are;
- Establish value-at-risk in recommending scenarios outlining the impact of climate, economic and demographic change;
- Include adaptation considerations in planning and construction approvals;
- Consider changes to urban infrastructure;
- Adjust regulatory and policy frameworks to account for necessary adaptation requirements;
- Review social services and changing community needs;
- Provide clear recommendations for the modification of planning frameworks, legislation and design guidelines; and
- Prioritise the preservation of ecosystems which do not have the means to adapt.

Adaptation will take a long time to plan and implement, but needs to pre-empt forecast changes to our existing way of life. It cannot be a reactive policy, but must progress sufficiently to permit its evolution and the identification of lessons learned. In responding to climate change, adaptation to our changing natural environment needs to commence well before the full effects are known.

### **Section 3: Are there barriers to adaptation?**

*What market failures could inhibit adaptation in any specific sector or region?*

*Are there examples of policy or regulatory barriers that could inhibit adaptation?  
What are these?*

#### ***Policy & program fragmentation***

Operating on the frontline of commercially driven solutions to climate change adaptation, Consult Australia's member firms directly encounter many of the current barriers to effective adaptation created as a consequence of market failure, regulatory and organisational obstacles. These barriers demand the consideration of an integrated economy-wide approach to climate change adaptation. Some of those more commonly encountered barriers are outlined below to help contextualise the need for urgent reform:

- Environmental, social and economic sustainability principles are not appropriately and consistently recognised in decision making across all levels of government. The absence of a clear commitment to all aspects of sustainable development, enshrined in legislation at a national level, has contributed to uncertainty as to how to put sustainability into practice at all levels of government, in business and in the community.
- Fear campaigns and scaremongering foster ill-informed public opinion, which influences and distorts policy development. Policy debate needs to focus on 'How?' rather than 'Should we?' For example, ongoing political debate about the merits of an emissions trading scheme and carbon pricing distract from the development of the best possible economic model required to achieve a sustainable future and adapt to climate change.
- Complacency and a perspective that we should not lead best practice but 'follow the leader' guides public opinion and policy development.
- Policy and program development for adaptation tends to follow the traditional approach of delivering policies through discrete ministries and different levels of government. As a consequence it is fragmented across multiple ministerial portfolios, government departments and agencies, with no clear leadership, collaboration or coordination to avoid duplication and help ensure appropriate prioritisation.
- Where policies and programs are implemented, they appear unsupported by any comprehensive process evaluating their costs and benefits (or lessons learned) against higher level objectives for sustainable outcomes, complementarities with other policies and programs, or overseas experience.
- The need to promote adaptation in the built environment to achieve sustainability in the face of future economic, demographic and climate change is not sufficiently prioritised or incentivised through existing policy settings.

Delivering effective climate change adaptation is a complex undertaking that challenges the conventional approaches of government and demands a new way of working collaboratively rather than in silos. To remain globally relevant and competitive, it is essential that Australian governments at all levels move as quickly as possible towards a more integrated, collaborative approach.

***What other significant barriers (for example, behavioural or organisational) might inhibit adaptation?***

***Green skills***

With new emerging markets in adaptation, energy efficiency, resource management, retrofits, energy assessments and audits there is an escalating demand for skills to meet these new markets. Increasingly in the built environment, these are referred to as 'green skills' and their supply will be critical in determining our capacity to adapt to climate change.

When we refer to 'green skills' we are describing those technical skills, knowledge, values and attitudes needed in the workforce to develop and support sustainable social, economic and environmental outcomes in business, industry and the community.<sup>1</sup>

Mechanisms to ensure the supply of these skills must become a focus for both industry and government if market demand for adaptive solutions is to be met. In this context green skills need to become embedded across the education lifecycle. This will require coordination by government across secondary and tertiary education, vocational education and training, and professional development through a strong partnership with industry. The cross-disciplinary nature of green skills and their application across industries indicates that delivery must focus on market sectors. This may be particularly true in the built environment for example, where skills need to be directed across infrastructure, commercial buildings, residential buildings, manufacturing and resources.

It is clear that as the markets for these skills emerge across these sectors, to be globally competitive and avoid capacity constraints, the domestic supply of these skills through education and training must be a priority.

Consult Australia continues to advocate for governments to prioritise and lead the coordination and delivery of green skills through the education system, and in partnership with industry, universities and the Vocational Education and Training sector.

**Section 4: What policy instruments could be used to address the barriers?**

**Broad-based reform**

***Are there any other impediments to capital and labour mobility that are particularly relevant to adaptation? For example, if climate change results in some jobs or business activities no longer being viable, or less profitable, is there anything that discourages businesses or workers from changing locations, undertaking new economic activities, or changing occupations?***

***National Registration Scheme for Engineers***

Early indications that labour market mobility will feature on the forward agenda as part of the Council of Australian Governments (COAG) Seamless National Economy initiatives are welcomed. In this context, and with direct relevance for broad-based reform supporting effective climate change adaptation, the national registration of engineers is a key issue.

Engineers play a critical role in Australian society and are critical to an effective adaptation response particularly where that response supports more sustainable infrastructure and an adaptive built environment.

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<sup>1</sup> <http://www.deewr.gov.au/Skills/Programs/WorkDevelop/ClimateChangeSustainability/Pages/default.aspx>

The standard, quality and availability of engineers is of fundamental importance to our ability to achieve these objectives.

Consult Australia is a founding member of the National Engineering Registration Board (NERB)<sup>2</sup>, which is working with all Australian governments to introduce a nationally consistent registration scheme for engineers. While Australian governments are embarking on a process of developing national systems for trade and professional qualifications, engineering remains a glaring exception. The Productivity Commission has already identified that making architects register and pay a separate fee in each jurisdiction acts as a barrier to their mobility. Engineers face much greater variability in professional requirements and fees.

Fourteen different acts and subordinate legislation regulate engineering services in most states and territories. Where regulation exists, it is rarely specific to engineering services. Queensland is the only state that requires all engineers to be registered if offering or providing engineering services, and Western Australia is considering introducing similar requirements. In other states and territories engineers generally operate under a self-regulatory system.

While we undergo an unprecedented mining and construction boom, Australia is facing a shortage of some 20,000 engineers. Making sure engineers can move seamlessly to where they are needed is a key part of the solution to the engineering skills shortage.

Now more than ever we need a national system for registration to ensure that there is portability of the profession across jurisdictions to bring efficiency to the system while making sure standards are protected. A nationally-consistent registration scheme will lead to improvements in:

- Addressing the skills shortage and enhancing mobility of engineers;
- Improved risk management and consumer protection by allowing only registered engineers to deliver complex engineering projects and providing appropriate recourse against sub-standard work;
- Building community awareness of the skills required to protect community safety, health and welfare while improving the attractiveness of the profession;
- Ensuring that qualified and competent engineering professionals observe statutory codes of practice that mandate their obligations to community, clients and colleagues; and
- Cutting red tape through consistent legislation that allows engineers to register just once, in one jurisdiction to practise in all States and Territories.

Consult Australia is currently seeking the support of all state and territory governments to have this issue added to COAG's forward agenda in pursuit of a seamless national economy.

### ***Are there any other taxes or regulations that may affect adaptation decisions?***

#### ***User-charging for transport infrastructure***

Australia's economy is more dependent on transport than most other Organisation for Economic Co-operation and Development (OECD) countries. We owe Australia's economic and social development and well-being in large part to past investment decisions in transport infrastructure. Transport and logistics represent some 14 per cent of Australia's GDP and account for some 330 million kilometres of travel made every day in capital cities. In addition to growth within our cities, intercity movements are also growing at an average annual rate of 3.9 per cent<sup>3</sup>. Our transport infrastructure provides access to employment, facilitates social inclusion, and allows our cities to grow. It moves 520 billion tonne kms of freight each year, supplying Australia's industry, enabling export revenues, and supporting our economy. Transport represents up to 8 per cent of industry output.<sup>4</sup>

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<sup>2</sup> Alongside Engineers Australia, the Institute of Public Works Engineering Australia (IPWEA), and the Association of Professional Engineers, Scientists and Managers, Australia (APESMA).

<sup>3</sup> Australian Government Department of Transport and Regional Services. 2006. *Passenger movements between Australian cities, 1970-71 to 2030-31*

<sup>4</sup> Consult Australia, *Transporting Australia's Future*, November 2010, [www.consultaustralia.com.au](http://www.consultaustralia.com.au)

However, in addition to supporting our economy, transport infrastructure contributes around 15 per cent of Australia's greenhouse gas emissions, 87 per cent of which are due to road transport. Transport emissions in 2010 were some 30 per cent above those of 1990. The true costs of our transport infrastructure network are not borne by the user.

*Current road tax arrangements will not meet Australia's future transport challenges. Poorly functioning road networks harm the amenity, sustainability, liveability and productivity of society. Moving from indiscriminate taxes to efficient prices would allow Australia to leverage the value of its existing transport infrastructure.<sup>5</sup>*

Currently government funding for transport infrastructure is mainly sourced through consolidated revenue, reflecting a political balancing between competing demands. Given other pressures on government investment, this is unlikely to change over the short term. Many 'user charges' are woven into the current consolidated taxation system. Current revenue streams derived from transport infrastructure are mainly limited to:

- Fuel Excise;
- Vehicle registration;
- Parking fees;
- Tolls and Ticket fares; and
- GST.

Reliance on traditional fuel excise as the key revenue tool to fund transport infrastructure is internationally recognised as having limited longevity, with diminishing reserves and increased fuel efficiency curtailing revenues. An infrastructure funding regime based on fuel taxes has no sustainable future.

While revenues from transport users cover the aggregated costs of transport, they are largely treated as taxes and a net contribution to general revenue, with no accountability to transport users who are frustrated by inadequate reinvestment in transport. These charges do not account for less tangible costs of transport (e.g. congestion, greenhouse emissions, community service obligations, or social equity).

Consult Australia believes that governments must commit to undertaking pilot studies of new road pricing mechanisms including road-user charges. Such studies should include extensive community consultation, consider impacts across the whole transport system, and draw on overseas experience to maximise the likelihood of public acceptance, success and a sustainable source of infrastructure funding in the future.

Road-user charging and efficient road pricing has gained increasing recognition in Australia as providing an appropriate market-led solution to a burgeoning infrastructure deficit, increasing maintenance costs, dwindling government funds, frustrated community expectations, and the need to adapt to a changing climate.

*Australia's future tax system: Report to the Treasurer* (Henry Review) notes that the implementation of user charging would lead to less congested roads, shorter travel times and investment in road infrastructure that addresses user demand and provides a foundation for further productivity growth, improved living standards and more sustainable cities. In exchange for targeted charges, road users benefit. They would pay less fuel tax, motor vehicle stamp duties could be abolished, and compulsory third party insurance (set through improved data on vehicle use) would be fairly priced. The revenue from efficient user charges could help finance new urban transport infrastructure, and cover the cost of heavy vehicle damage.<sup>6</sup>

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<sup>5</sup> Henry, Ken. December 2009. *Australia's Future Tax System: Report to the Treasurer Part Two Detailed Analysis*. Page 373

<sup>6</sup> The Productivity Commission has also reported favorably towards user pays and distance based charges for heavy vehicles, informing COAG's decision to proceed with mass distance charges for heavy vehicles; see: Productivity Commission. April 2007. *Road and Rail Freight Infrastructure Pricing: Inquiry Report*

### ***Washington State Road Pricing Pilot***

The Puget Sound Regional Council Traffic Choices Study recruited a statistically significant sample of volunteers and, after establishing their baseline “before-tolling” driving routine, began charging them for access to selected roadway facilities during particular time periods in the day. In other words, they had to pay road tolls. The study monitored driving behavior of participants for an average of approximately 18 months per household.

Participants did not lose money. They were given a travel budget (or endowment account) from which tolls were deducted. If their driving patterns remained unchanged over the study, they would “spend” their account balance by the time the experiment concluded. If they changed their driving patterns to reduce the amount of driving on toll roads, they would keep the difference. This method held participants financially harmless, yet offered them the incentive of keeping their leftover budget if they changed their driving patterns. In this way, the study introduced real price incentives of a toll system, and measured whether and how much participants responded to those incentives.

The Study found that participants made small-scale adjustments in travel that, in aggregate, would have a major effect on transportation system performance. Done right, this type of road-user charging could provide broad benefit, including lower vehicle emissions, fewer accidents, travel time savings, improved roadway performance reliability, and lower vehicle operating costs. For motorists to be better off, however, the revenues from road tolling must be used to provide additional benefits to users of the transportation system.

*Puget Sound Regional Council (<http://www.psrc.org/transportation/traffic/faq/>)*

### ***What other reforms would improve the overall flexibility of the Australian economy and thus contribute to efficient adaptation?***

#### ***Procurement reform***

Adaptation, particularly in response to climate change, will demand increasingly rapid responses by governments as risks crystallise and new risks emerge. Governments’ responses will include increased procurement of those professional services best able to develop solutions to these challenges and risks—those very services provided by Consult Australia’s member firms.

The efficiency and speed of governments’ response supporting adaptation will depend in part on the resolution of outstanding issues associated with government procurement, liability management and risk allocation. To facilitate adaptation, effective risk management in procurement is critical where there is already a high level of uncertainty associated with forecast climate change, and therefore greater risk for all parties responding to these challenges.

Current 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 policy aimed at delivering best-practice procurement and facilitating insurance markets. For example, the lack of standardisation of fair and efficient contract terms, procurement guidelines and risk allocation across governments and agencies sees gross inefficiencies, increased costs and lost time to negotiation and disputation across all parties.

There is no more significant issue affecting procurement outcomes in relation to the built environment than the allocation of risk between parties. Liability in procurement must be managed equitably, with regard to good risk management and the limitations of professional indemnity insurance.

### *Dispute Avoidance and Resolution*

One of the major casualties of the current perceived unfairness in risk allocation is trust between parties. A loss of trust, among many other things, can increase the risk of dispute. The costs of contractual disputes, direct and indirect, affecting the construction industry are substantial. The CRC for Construction Innovation conducted a Dispute Avoidance and Resolution research and implementation project to identify and communicate to key industry stakeholders strategies to avoid contractual disputes, and where disputes cannot be avoided, to manage disputes more effectively.

The CRC for Construction Innovation analysis of available industry data regarding costs suggested a direct cost of resolving disputes of between about \$560 million and \$840 million nationally per year. Added to the avoidable costs, the total waste exceeds \$7 billion per year.

The imposition of clauses demanding unlimited liability of consulting firms, and the contracting out of proportionate 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 (see our more detailed response to 'Facilitating insurance markets' and the 'Supporting liability reform' case study below).

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 behaviours distort 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.

Consult Australia continues to strongly advocate for:

- Procurement reform as a priority for COAG's next round of initiatives, agreed in 2012, pursuing a seamless national economy;
- Policy supporting the appropriate, fair and reasonable and equitable allocation of liability through proper risk assessment;
- The development of consistent guidance across the states and territories equivalent to the Federal Government *Liability Risk Assessment Guide for FMA Act Agencies* to support best practice procurement policy; and
- The adoption of model terms and conditions that have been developed through industry and client groups working together to achieve balance and consistency (e.g. AS4122 General Conditions of Contract for Consultants).

## Facilitating insurance markets

*What kinds of government intervention, if any, would be most appropriate for addressing any market failures or regulatory barriers? What are the costs and benefits of these interventions?*

### ***Liability management & risk allocation***

Despite the insurance crisis of the early 2000s and the consequent passage of Proportionate Liability (PL) and Professional Standards Legislation (PSL) by Australian governments (see 'Supporting liability reform' case study below), it has taken some time for government procurement practices to reflect the policy intent of these reforms.

Generally speaking, government procurement practice has been slow to recognise the legitimacy of limitation of liability for providers of goods and services to government. In relation to risk management, the Commonwealth Procurement Guidelines 2008 enunciates the general principle that "risks should be borne by the party best placed to manage them – that is, agencies should generally not accept risks which another party is better placed to manage". For the most part, this has been interpreted by government procurement agencies as meaning that risks should be borne by the provider of goods or services to government clients.

This tendency was reinforced by Regulation 10 of the Financial Management and Accountability Regulations 1997, which up until recently stated "If any of the expenditure under a spending proposal is expenditure for which an appropriation of money is not authorised by the provisions of an existing law or a proposed law that is before the Parliament, an approver must not approve the proposal unless the Finance Minister has given written authorisation for the approval."

This regulation was interpreted (in advice issued to agencies by the Australian Government Solicitor) as effectively meaning that any limitation of liability granted to a supplier of goods or services by a government agency would require approval by the Finance Minister. The reasoning was that limitation of a supplier's liability theoretically passes on to the agency the risk of bearing any loss not able to be recouped from the supplier over and above the limitation of liability granted, it being unlikely that money would have been appropriated to fund such potential losses. Not surprisingly, agencies were reluctant to seek written authorisation from the Finance Minister for limitations of liability and instead preferred to seek unlimited liability from suppliers, notwithstanding that in reality there is no such thing as "unlimited liability".

To the Government's credit, there have been positive developments in the procurement area in the past couple of years, including the following:

- The preparation by the Department of Finance and Deregulation of a model contract for Accounting and Related Professional Services aimed at simplifying and standardising government contracts for the provision of accounting services;
- The preparation of a Liability Risk Assessment Guide by the Department of Innovation, Industry, Science and Research to assist FMA agencies assess appropriate levels of liability (and in turn, PI insurance) to be required of service providers; and
- The introduction of new Regulation 10A of the Financial Management and Accountability Regulations 1997, effective from July 2010, to reduce the necessity for agencies to require approval from the Finance Minister whenever there is any risk of a contingent liability arising from the provision of goods or services.

Whilst these developments are welcome, further refinements are needed and it also remains to be seen how these changes are implemented. Whether the above changes result in practical improvements in processes will depend in part on cultural issues within the public sector and whether there is a fundamental change in the perception that the supplier is always the party best placed to manage risk (we would submit that in many situations it is the client that is best placed to manage the overall risks associated with a given project).

There is also the ongoing disconnect between specific government policy on the one hand and government procurement policy on the other. For example, the Federal Government as part of a compact with the states and territories introduced proportionate liability (PL) as a measure to ensure the availability of affordable PI insurance for the protection of consumers of professional services. However, as a consumer of goods and services the Federal Government is actively undermining this policy by using its market power to require suppliers to contract out of PL.

It is of course a concern that federal agencies should be seeking contracting out of PL when PL is a policy of the federal government and particularly when the issue of harmonisation of the contracting out provisions under PL is under consideration by the Standing Council of Law and Justice. It is also of concern from a risk management perspective that those agencies that seek to impose contracting out of PL appear not to have considered that contracting out could lead to the risk of uninsured liability because a service provider's PI insurance may not respond to cover the additional risk that is being voluntarily assumed. Potentially this risk is greater for those professional service providers in small business who may themselves be unaware of this risk.

Apart from the obvious conflict between government policy and government procurement practice, the question should also be asked whether it is appropriate for government to require suppliers to waive their legal rights when competing for government work. Whilst larger professional practices may be better placed to negotiate with large government agencies on this point, such negotiations around contract variations inevitably add to costs for both parties.

### Recalling lessons learnt: Supporting liability reform

Brought to a head with the collapse of HIH in 2001, the lessons learned from the insurance crisis of the last decade must not be forgotten.

That crisis, most notably demonstrated in the cost and availability of both public insurance and PI insurance was brought about by a combination of factors. With the collapse of HIH, governments responded by convening a series of meetings between federal, state and territory insurance ministers aimed at agreeing on a common set of solutions to address these matters.

Ministers accepted that in relation to PI insurance, the market could not ensure that there would be available affordable insurance to cover the scale of potential risk for the full range of services offered by professional service providers (i.e. that there was market failure in relation to PI insurance). The consequences included the withdrawal of professional services, particularly those perceived to be high risk, and professional services being uninsured or under-insured. Both were to the detriment of consumers of professional services and the community generally.

The two solutions unanimously endorsed by insurance ministers in relation to market failure in PI insurance were the introduction of Professional Standards Legislation (PSL) by the states and territories (with complementary federal legislation to give effect to PSL schemes under relevant federal laws) and proportionate liability (PL) in cases of financial harm/economic loss to replace joint and several liability between concurrent wrongdoers. The former reform sought to introduce high standards of risk management to prevent claims arising in the first place and limit damages payable at the upper end of claims to insurable levels. The latter reform addressed perhaps the most significant factor driving the lack of profitability of PI insurance as a product under the law of joint and several liability – namely that an insured professional could be held liable not only for the damages their own negligent acts or omissions had caused, but also the acts of other, potentially unrelated parties whose acts or omissions had also caused the harm suffered by a plaintiff.

In short, these reforms were introduced for sound policy reasons to as far as possible create an environment where PI insurance would be available and affordable for the full range of professional services for the benefit of consumers of professional services. Both PSL and PL were duly introduced by governments in all Australian jurisdictions as recommended by insurance ministers.

Schemes under state and territory PSL have been approved for 14 professional associations with a further three associations having applications under consideration. The success of the schemes is perhaps demonstrated by the fact that, as far as we are aware, the schemes have not yet resulted in any claims for damages being “capped” by a court, even though some schemes have been in operation for many years. Statutory reviews of PSL undertaken in NSW, WA and Victoria since the legislation was introduced have all concluded that the policy objectives of PSL remain relevant and that the legislation appears to be working effectively and as intended.

With regard to PL, however, the legislation enacted differs between jurisdictions. Most significantly, the legislation in some jurisdictions (NSW, WA and Tasmania) permits parties to “contract out” of the operation of PL.

Harmonisation of PL, including with respect to contracting out, is an issue on the agenda of the Standing Council of Law and Justice (SCLJ; formerly the Standing Committee of Attorneys General). Consult Australia, alongside many other organisations representing professional services, unanimously oppose contracting out of PL. Contracting out undermines the intended policy objectives of PL (namely, better consumer protection through affordable, available PI insurance) and places both professionals and their clients at risk because a professional who voluntarily accepts additional risk by contracting out of PL may be uninsured for the additional risk they have accepted. It is important to note that where a person agrees to “contract out” of the operation of PL, whether the person’s PI insurance will cover the additional liability they have voluntarily assumed will depend on the specifics of the policy. Certainly it should not be assumed that an insurance policy will automatically respond to cover such additional liability on the part of the policy holder.

## **Regulatory responses**

*What reforms are needed to improve the efficiency of existing regulations? Are there alternative ways to achieve the desired objectives?*

### ***Standard setting***

In many cases operating outside direct regulatory intervention, standard setting is an important part of the national response to facilitate adaptation as it provides a mechanism to set best practice, build consensus, identify common definitions, benchmarks, and translate research findings into action and policy.

The current process for prioritising, developing, marketing and distributing standards is cumbersome, slow and unlikely to be able to keep pace either with rapidly emerging research findings, or the demands of industry, community and governments. An effective standards setting process is essential to avoid adverse selection and asymmetric information amongst stakeholders.

Resources need to be committed to a streamlined standard setting process that delivers real-time information and guidance to governments and industry to facilitate effective adaptation. Current resources for standards appear poorly allocated and inadequate to deliver standards efficiently. The recent development of Australian Standard (AS) 5334 on Climate Change Adaptation for Infrastructure aims to provide consistent principles and guidelines on the effective identification and management of risk. In itself this is not without merit, but beyond reiterating best practice risk management the Standard adds little value to existing risk management standards and guidance. Given the breadth of research initiatives supporting adaptation in the built environment and the variation in responses based on this research, it seems reasonable to conclude that the resources committed to the development of AS5334 may have been better prioritised.

## **Government provision of public goods**

*Who bears climate-related risks in public-private partnerships and other government contracts? Is there scope to further clarify who bears the burden of such risks in a manner that would have net benefits for the community?*

### ***Procurement reform, liability management & risk allocation***

The Issues Paper suggests a response to risks associated with government infrastructure assets susceptible to climate change impacts might include:

*A clear allocation of climate and other risks in government contracts [...] to place responsibility for managing these risks on the party that is best placed to do so (which in some cases could be private companies)*

Any such solution, must be considered in the context of those broader issues associated with government procurement reform, liability management, risk allocation and the consequent effects on facilitating insurance markets. These issues, many of which remain outstanding and requiring urgent attention at all levels of government are addressed under those same headings previously.

## **Which governments are responsible for addressing the barriers to adaptation?**

### ***Are local governments adequately resourced and equipped to respond to climate change and implement policies developed by state and territory governments?***

#### ***Local government reform***

Local government performs a vital role in Australia's system of governance delivering an increasing range of services across portfolios. The efficiency of local government in being able to rapidly deploy funds to develop infrastructure and meet community needs is recognised in the ongoing support provided through the Australian Government's Roads to Recovery program and in the distribution of the 2009 National Stimulus Package in response to the Global Financial Crisis.

The principle of subsidiarity that underpins strong local government is critical in the development of our cities where local government performs a vital role, representing local communities, developing local strategic plans, infrastructure and services. This principle is equally relevant when considering an efficient response to adaptation where local government is best able to tailor responses to local needs and circumstances. Though as noted in the Issues Paper this is dependent on the availability of resources and capability.

The variation in the resources and capability of local governments across Australia (particularly in our major cities) is a cause for concern and a likely barrier to effective climate change adaptation. *State of Australian Cities Report 2010* highlighted wide disparities in the number of local government areas that make up each of our major cities (ranging from one to 43). Where there are multiple local councils, each has varying resources available to provide services and infrastructure to support their local economic area (e.g Marrickville and City of Sydney). It has been clear since federation that a large number of local government areas in a given city is an obstacle to efficient infrastructure delivery and integrated strategic planning that delivers the best results for the city as whole. Sydney (with 43 local government areas within its boundaries) is the clearest example of the challenges created by smaller, less well-resourced local governments. The efficiencies and opportunities for integrated planning and more centralised infrastructure delivery created by Brisbane City Council offers a polar point of comparison.

The Committee for Sydney, in response to their 2009 report *Global Sydney: Challenges and Opportunities for a Competitive Global City* called for a Productivity Commission study into Australia's capital cities and the economics and efficiencies derived from the creation of greater metropolitan local government areas similar to that in Brisbane.

Consult Australia has similarly recently advocated for a Productivity Commission review of what constitutes best-practice local government (including reference to size, structure, powers and geographic reach) in Australia's major cities, with reference to a city's ability to achieve: the COAG Cities Criteria; the indicators of city performance established by the *State of Australian Cities Report*, and the objectives established through the National Urban Policy and Sustainable Population Strategy.

We believe the outcomes of this review should be incorporated into a revised COAG Cities Criteria and explicitly linked to commonwealth funding agreements to incentivise the delivery by the states of best-practice local government: geographically larger, better resourced local government.

In any event, progressing an effective adaptation response is further reason to progress local government reform.

## **Section 5: Setting priorities for reform**

*Are there other considerations or criteria the Commission should take into account to assess the likely costs and benefits of reform options?*

### ***Ongoing industry consultation***

The criteria outlined in the Issues Paper present a strong case for effectively evaluating and setting priorities for reform. However as noted in the Issues Paper, in setting priorities it is important that reform initiatives that may provide less easily quantified or estimated benefits, but benefits that are potentially substantial, are not overlooked.

Given the costly and time consuming nature of detailed cost benefit analyses, stakeholder engagement and further consultation should be a key component of the Commission's approach to identifying reform priorities. The consultation effected as part of this Issues Paper is a helpful first step as part of this process.

Further consultation with organisations such as the Australian Sustainable Built Environment Council and consideration of its work towards a Policy Framework for Adaptation in the Built Environment will further enhance the Commission's ability to prioritise and identify reform priorities. Consult Australia looks forward to contributing as part of this engagement in the months ahead.