

# Refining the rules

A reform thread from *Unravelling Risk*

Consult Australia claims data demonstrates that there is significant wastage to the economy. To address unreasonable claims against consultants, we need reform to limit avenues of unfair claims. For example, there has been a rise in misleading or deceptive conduct claims in the past few years, arguably as an ambit claim.

Clarifying and refining how current legislative provisions are framed and used would reduce the volume of unnecessary and unreasonable claims. This includes:

- modifying the availability of misleading or deceptive conduct provisions of the ACL in line with other provisions to guarantee protection for consumers and small businesses.
- modifying civil liability laws in all states and territories, except Qld to explicitly prohibit contracting out of proportionate liability.
- championing the explicit exemption for professional engineers and architects from the fit for purpose consumer guarantee in the ACL and reflecting that position in contracts for professional services.

## WHO & HOW

**Government** competition regulators should work together to modify the Australian Competition Law to ensure no further misuse of misleading or deceptive conduct provisions.

**ACT, NSW, NT, SA, Tas, Vic and WA governments** should amend their civil liability laws to explicitly prohibit contracting out of proportionate liability.

**Clients** should ensure there is no fit for purpose warranties in professional services contracts.

## Misleading or deceptive conduct provisions

The ACL is designed to protect consumers and small businesses. Yet, the misleading or deceptive conduct provisions are being misused by sophisticated contracting parties, Consult Australia argues, as an ambit claim. We hold that such contracting parties have sufficient protections under the contract, the common law and other statutory rights and obligations. Therefore, the rules need refining to ensure consistency with the rest of the ACL.

## Civil liability laws

Proportionate liability is a statutory right, which ensures that a party is only liable in damages for the proportion of the suffered loss that is attributable to that party. It only applies to financial harm and economic loss, not to cases involving personal injury or death. Proportionate liability was introduced nationally through state and territory civil liability legislation to improve the availability and affordability of professional indemnity insurance in Australia following the insurance crisis of 2001 when the insurer HHH collapsed. Contracting out of it in professional services contracts undermines the original policy intent.

Contracting out of proportionate liability also opens a party to liability in damages for more than is attributable to their acts/omissions. This can lead to more spurious claims, and as a pressure tactic in a market rife with disputation.

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