



**SEPTEMBER 2022**

# **Construction contracts – new legal provisions for digital assets**

**SUBMISSION TO OFFICE OF PROJECTS VICTORIA**

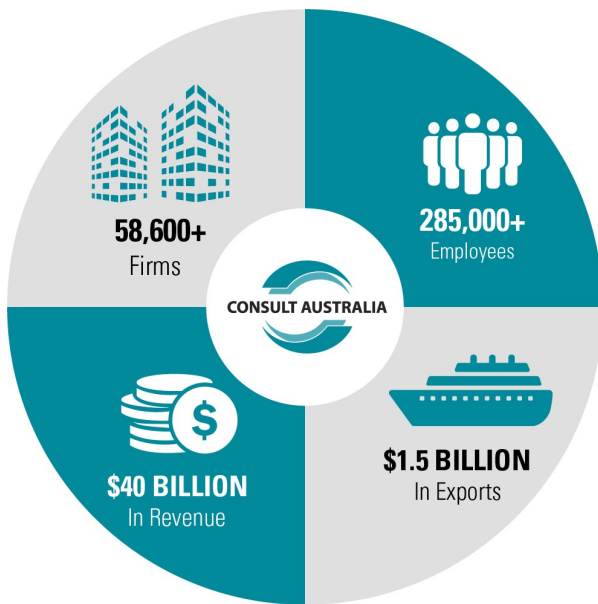
Consult Australia

Postal Address: GPO Box 56, Sydney NSW 2001  
Email: [info@consultaustralia.com.au](mailto:info@consultaustralia.com.au)

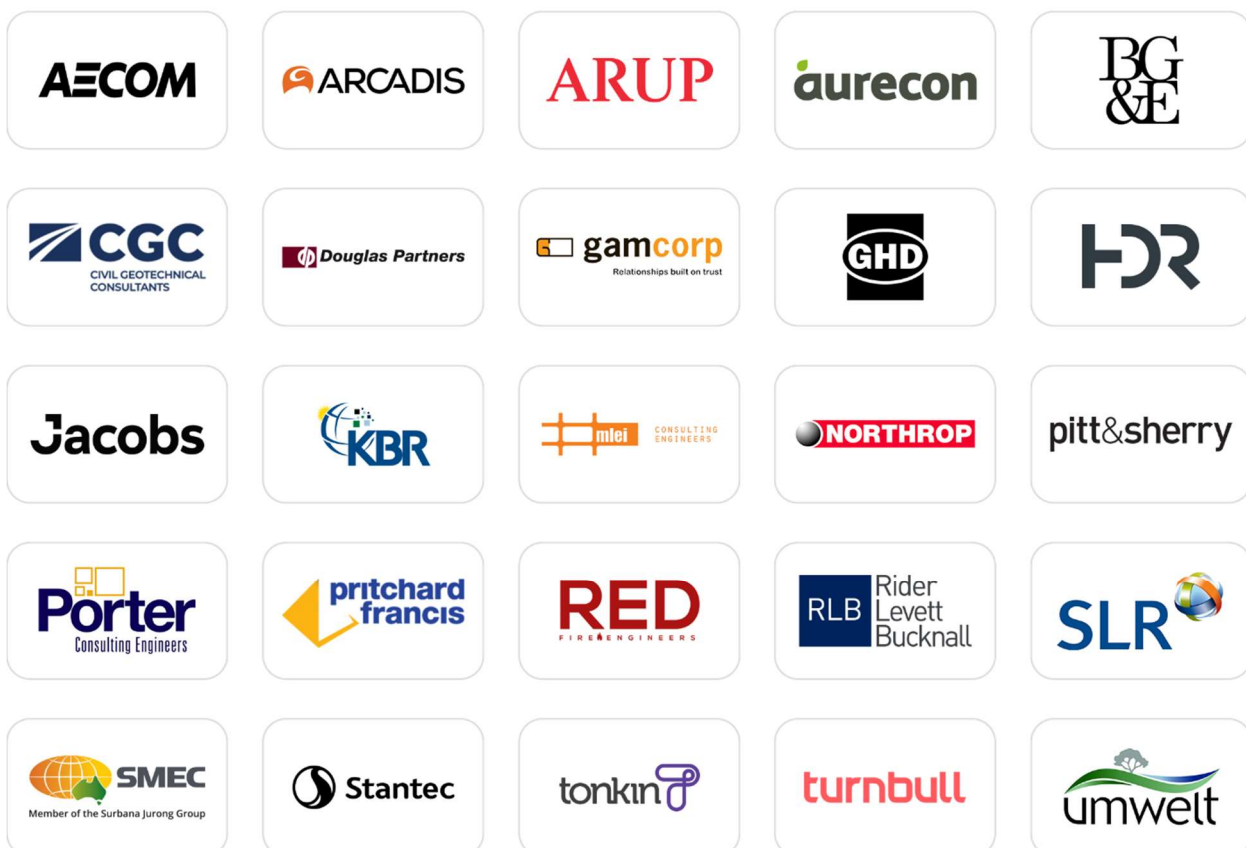
Tel: 02 8252 6700  
Web: [consultaustralia.com.au](http://consultaustralia.com.au)

## ABOUT US

Consult Australia is the industry association representing consulting businesses in design, advisory and engineering, an industry comprised of over 58,600 businesses across Australia. This includes some of Australia's top 500 companies and many small businesses (97%). Our members provide solutions for individual consumers through to major companies in the private sector and across all tiers of government. Our industry directly employs over 285,000 people in architectural, engineering and technical services and many more in advisory and business support. It is also a job creator for the Australian economy, the services we provide unlock many more jobs across the construction industry and the broader community.



### Our members include:



A full membership list is available at:

<https://www.consultaustralia.com.au/home/about-us/members>

## EXECUTIVE SUMMARY

Consult Australia thanks the Office of Projects Victoria (OPV) for the opportunity to comment on the Construction Contracts - New Legal Provisions for Digital Assets. Consult Australia supports the implementation of the Digital Asset Policy to enable information management practices and uplift digital adoption within projects.

However, Consult Australia's members have significant concerns regarding the risk allocation being placed on consultants through the proposed contract terms. Contractual issues are likely to arise including disputes over ownership of intellectual property (IP), data ownership and security, licensing, and integrity. Consult Australia welcomes the opportunity to work with the OPV to address these concerns and provide risk mitigation strategies for a more balanced and fair contractual relationship.

Consult Australia notes that problematic contractual terms in consultancy services contracts can have an adverse impact on our members accessing affordable professional indemnity (PI) insurance. This challenge has implications on the construction industry ecosystem as a tightening PI insurance market will ultimately push businesses, particularly small businesses, out of the industry due to inability to obtain affordable cover, let alone access cover at all.

In this submission we have identified the solutions we see as alleviating some of these concerns, provide a more collaborative environment, and enable the uptake of digital by default. Our recommendations focus on the following core actions:

- More communication and collaboration between the OPV and industry before implementation, especially on:
  - insurance implications of a digital asset strategy
  - digital process management
  - digital performance requirements
  - updated data security requirements
  - digital reuse
- Further policy development and coordination across Australia, especially on:
  - 3D design models for reliance
  - digital design review process
  - integrated design, fabrication, and as-built models
- Reconsideration/redefining of the contract provisions, especially on:
  - digital roles and responsibilities
  - consistent asset classification structures
  - digital client to contractor interface
  - digital spatial foundations.

## INSURANCE IMPLICATIONS OF A DIGITAL ASSET STRATEGY

Consult Australia has significant concerns about ownership of IP rights under the Digital Asset Strategy. We hold that IP rights need to be vested in the originator of the design who can licence or sell the use of these designs with appropriate restrictions.

It is generally the consultant that pays for IP development, not the client. It is important that the consultant retains IP rights so that their work may be used in other settings. Further, a consultant's asset is their people, and the brain power behind the design. Allowing clients to replicate designs without an upfront payment, or a pay by use agreement to the designer will deter innovation from being created and impact the viability of consulting businesses.

The contract provisions must also reflect a collaborative approach and indemnify the designer from the risks of replicating the design in situations the original design was not intended for and including where technical standards may have changed. Granting broad IP ownership does not demonstrate to the consultant's insurer that the consultant can manage risk.

We note this is linked to 'design reuse' discussed below.

### *Case study*

*A consultant designed a retaining wall structure for a client meeting all the relevant technical standards at the time. Without that consultant's knowledge, another consultant used the original design five years later, without amendment and without referencing changes to the technical standard. The resulting wall structure failed. The first consultant was held liable for the failure of the second wall structure, because he was the original designer. To cover the claim, the consultant relied on his PI cover. Fifteen years later this single claim, in combination with the significant hardening of PI market was used by multiple insurers to deny the first consultant PI cover, at any price.*

### **Recommendation:**

The OPV works with Consult Australia and the Insurance Council of Australia to understand and address poor risk management in contracts and the adverse implications on the PI insurance market. This includes recognising that IP should be vested in the creator of the design, with any reuse to be suitably restricted and the ability for the creator to charge for the work and on a by-use basis where reuse is requested.

## DIGITAL ROLES AND RESPONSIBILITIES

Consult Australia appreciates the importance of productive and collaborative relationships based on clear understanding of the roles and responsibilities of parties to the contract. Therefore, we support OPV's proposal to have contract provisions that define the roles and responsibilities for the reporting, review, and hand over of project information. We also support including reporting information type, format and purpose – but not frequency. Consult Australia warns against holding parties to contractual timelines, especially where multiple parties are involved. It should be noted if timelines are not included in a contract, it is expected that it will be in a reasonable time. This allows external issues to be considered.

Further, we have a question about the role of the information manager, especially the practicality and implementation of this role. For example:

- will the appointed information manager be independent?
- will the appointed information manager be directed by the client or the consultant?

- if the information manager is directed by the client, how will the client ensure that the appointed person has the suitable knowledge to carry out the role?

**Recommendation:**

The contract provisions should capture the roles and responsibilities of the parties in the scope of the contract as well as reporting information type, format, and purpose. While frequency of reporting should be captured outside of the contract and be adaptable to changing circumstances underpinned by transparency, and clear communication between the parties.

### 3D DESIGN MODELS ISSUED FOR RELIANCE

Consult Australia supports data being relied upon by the client where a contractual relationship exists between the consultant and the client – as per our [Partnership for Change - reliance paper](#) with the ACA. However, we caution against unrestricted third-party reliance clauses. As per the example above with unrestricted granting of IP rights, unrestricted third-party reliance clauses leave the original consultant open to unnecessary risk.

All parties agree that the nature and the data provided in reliance documents should be clear and discrete to avoid ambiguity or misinterpretation by third parties.

Consult Australia members note that the systems and technology for 3D design models to be issued for reliance is not yet approved for some disciplines, and there are inconsistent approaches across jurisdictions on the use, format, systems, and processes to be carried out. Therefore, further policy development and coordination across Australia is required before contract terms of this nature can exist. If this is not prioritised, we fear that greater liability will be placed on the consultant/constructor to adhere to changing methods across clients and jurisdictions.

**Recommendation:**

Third-party reliance clauses need to be suitably restricted and further policy development and coordination across Australia is required before contract terms requiring 3D design models can exist.

### DIGITAL DESIGN REVIEW PROCESS

As a starting point on design reviews, Consult Australia refers OPV to our [Partnership for Change – multiple design reviews paper](#) with the ACA. The maturity and capability levels within government and industry to fully manage design and review processes in a digital environment is a consideration that requires attention. Industry's attempt to bring forward nationally consistent standards have been eroded by:

- different terminology
- inconsistent processes
- having to resource bespoke processes each time to accommodate varied standards, naming conventions and requirements
- the inability to apply productivity learnings from projects with one client to the next project, for example an infrastructure team within a consultancy business may build capacity nationally to service projects, however, that team will need to have custom processes and requirements for every project in each state/territory to meet their client's requirements.

Consult Australia supports OPV's proposal to have a 'clash resolution process' and clarity on decision-making authority. Noting again the current situation in Australia with the lack of coordination and agreement on which digital platforms should be used, we recommend that OPV lead further policy development and coordination across Australia before contract terms mandating certain platforms is put in place.

**Recommendation:**

OPV lead further policy development and coordination across Australia before contract terms mandating certain platforms is put in place. This could include working with platform providers to discuss the need for programs to be adaptable and connectable with other platforms. This will enable greater uptake of digital technology and increase business accessibility, particularly for small to medium businesses.

## CONSISTENT ASSET CLASSIFICATION STRUCTURES

Consult Australia has a concern about the implementation of consistent asset classification structures, for example, how will consistency be obtained if each contractor specifies their own asset classification structures?

**Recommendation:**

The client should discuss with parties which classification asset structure, and asset information requirements should be used. Technical standards should be used to assist, such as ISO 19650.

## DIGITAL PROCESS MANAGEMENT

OPV has proposed digital process management, which is relatively detailed. However, Consult Australia members are not aware of any product that would provide the transparency and specifics that OPV have suggested.

**Recommendation:**

Further education, research and industry consultation be done on digital process management before introducing a contractual requirement.

## INTEGRATED DESIGN, FABRICATION, AND AS-BUILT MODELS

Consult Australia commends OPV for recognising the value of as-built information matching the as-constructed conditions. However, our members note that there is a lack of platforms in the market that can coordinate integrated design, fabrication, and as-built models. Consultants need to use multiple design platforms to do this, but these platforms are not interoperable or compatible.

Additionally, we have concerns that contract compliance that is outside of a consultant's control could adversely impact on PI insurance premiums. This is particularly problematic given the insurance crisis and the inability for many businesses to afford, let alone access, insurance products.

**Recommendation:**

Before implementing contractual requirements for integrated design, fabrication, and as-built models, OPV conduct further research on available platforms and insurance implications.

## DIGITAL CLIENT TO CONTRACTOR INTERFACE

Consult Australia has significant concerns with the proposal for a digital client to contractor interface. Allowing client auditing and viewing of consultant designs and data at any time instils a non-collaborative dynamic where the consultant may feel their professionalism can be questioned at any time.

Further, there is a real danger in clients accessing and potentially relying on designs or data before the consultant has finalised their advice, information may be incorrectly interpreted or taken out of context leading to reliance issues.

**Recommendation:**

Reconsider the digital client to contractor interface to ensure collaboration as culture is promoted.

## DIGITAL PERFORMANCE REQUIREMENTS

Consult Australia appreciates the desire to implement digital performance requirements, as this is a way that the effectiveness of digital asset strategies can be monitored, revised, and improved. However, we have concerns around the level of compliance in this area, and the possibility of using poor or partial data. This concern arises because it is not clear who will be responsible for and has ownership over the data. Therefore, consultants may receive incomplete data from the supply chain, which ultimately impacts the robustness of their own reporting.

Additionally, there are inevitable costs and skills implications of implementing a digital performance requirement as industry will need to upskill to comply with reporting frameworks and spend time on this task.

### **Recommendation:**

To enable digital performance requirements to succeed, further discussion between industry and the OPV on the particulars of this proposed contractor project performance reporting is needed. Consult Australia notes the challenges that may arise if the responsibility and ownership of data is not clearly articulated.

## UPDATED DATA SECURITY REQUIREMENTS

The OPV has proposed updated data security and privacy clauses to include best practice data security requirements. Consult Australia realises the importance of updating data security requirements.

### **Recommendation:**

The specified protection systems be communicated to industry to enable opportunity to understand the cost implications.

## DESIGN REUSE

Consult Australia supports the reuse of designs and innovations in the interest of economic productivity and to solve the challenges of today and the future. However, as discussed above under insurance implications of a digital asset strategy – restrictions are necessary to manage risk. See the first recommendation of this submission.

## DIGITAL SPATIAL FOUNDATIONS

Consult Australia members supports standardised use of GDA 2020 across government projects to provide future-proofed geocentric datum requirements and to mitigate spatial errors and reduce wasted manual rework.

The contracts need to reflect from the outset which data is specifically used and in what format and a management plan for assets in the post build phases of the life cycle, likely requiring additional project scope to migrate from older standards.

### **Recommendation:**

A collaborative contracting approach to geocentric datum is used where the best approach is used in consultation with the consultant and provision is made for an ongoing management plan.



## **CONTACT**

We would welcome any opportunity to further discuss the issues raised in this submission.

### **Kristy Eulenstein**

Head of Policy and Government Relations

[kristy@consultaaustralia.com.au](mailto:kristy@consultaaustralia.com.au)

### **Mark Rogers**

Manager – Victoria

[mark@consultaaustralia.com.au](mailto:mark@consultaaustralia.com.au)

### **Teone Tobin**

Senior Policy Advisor

[teone@consultaaustralia.com.au](mailto:teone@consultaaustralia.com.au)