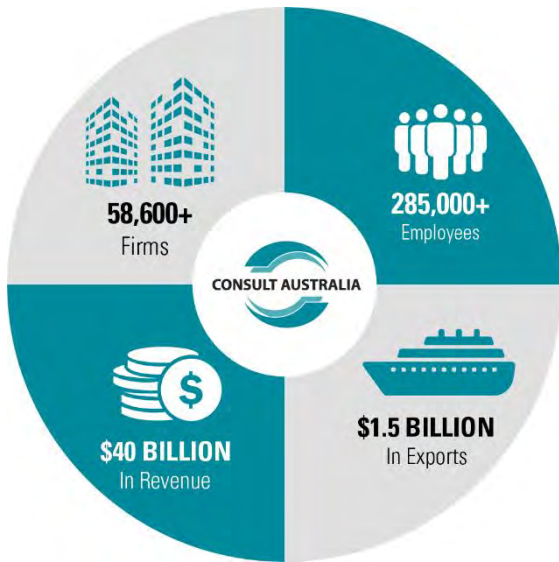




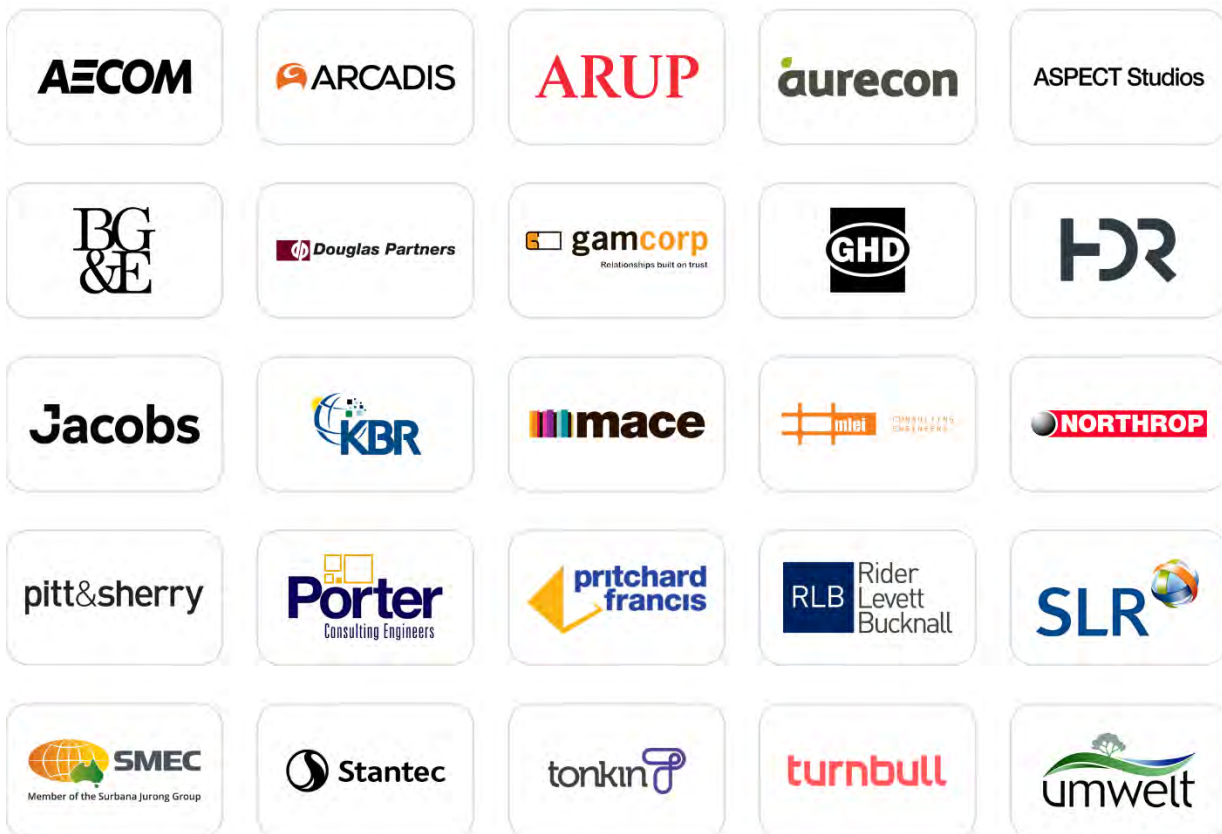
VIC ELECTION 2022



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>

Consult Australia advocates for a healthy and sustainable ecosystem of productive businesses to realise **Victoria's** economic future

Consultants design the future. With every design, advisory and engineering service provided by our membership, there is a positive impact on job growth, community connectivity, and economic productivity.

Victoria's economic future relies heavily on delivering the record investment in infrastructure as well as stimulating private sector investment in other areas. To achieve this, we need a strong ecosystem of productive businesses, ready to take the lead on innovation and collaboration. We call on the next Victorian government to be a part of this future by adopting our seven key policy recommendations, set out below.

Consult Australia's solutions, as presented below, will deliver benefits for industry, the government (both as a client and as a regulator) and the community. Our proposals span across statutory reforms to fix the insurance market, procurement practices, skills, and mental health. At the heart, our priorities are business driven but people centric.



De-risking for delivery

To de-risk the market, the Victorian Government should reform the Wrongs Act 1958 (Vic) to expressly prohibit contracting out of proportionate liability. The government should also support federal statutory reforms such as limiting misleading or deceptive conduct to protect consumers and small businesses and modify unfair contract term protections to capture government contracts. This will help address the imbalance in market power in government to business and business to business contracts, reduce wastage through unnecessary disputation, and bring balance back to the professional indemnity insurance market.



Collaboration as culture

The Victorian Government should embrace collaboration as the cultural norm and embed collaboration in contract design and tendering approaches which will significantly reduce the imbalance between contracting parties and provide a more collaborative, productive environment with all parties focussed on successful project delivery. This includes using AS4122-2010 unamended, guaranteeing proportionate liability for professional services and ensuring industry voices are given the opportunity to review codes and laws before introduction.



'Go slow to go fast'

The Victorian Government should adopt and support a 'go slow to go fast' approach for all projects ensuring best practice in due diligence right at the start of projects. This will deliver better projects and minimise cost and time over-runs that currently mar projects, particularly infrastructure projects.



Smarter pipeline of projects

The Victorian Government should adopt and support an approach to the pipeline of projects that provides certainty to the industry and increases accessibility for SME businesses. This will deliver benefits to productivity (both industry and government), workforce planning and regional participation.



Digital by default

The Victorian Government should drive innovation by committing to and pushing for digital investment at all stages and on all projects so businesses, particularly small businesses, have the confidence to do the same. This includes national consistency across the adoption of packages, specifications, and processes. This will deliver benefits for both government and industry including job growth, increased productivity, improved risk management, improved accessibility, and innovation.



Thinking smarter about skills

The Victorian Government must think smarter about skills. In addition to investing in initiatives to tackle the existing skills capacity issues, we need reforms to particular areas such as labour hire laws, registration schemes, and improve steppingstones to employment for migrant engineers.



Striving for a mentally healthy industry

The Victorian Government must set the tone from the top and strive for a mentally healthy industry. In doing so, the Victorian Government should champion model behaviours both as a regulator and a client to support the vitality of our industry. This will deliver sustainable businesses with healthy and productive people at their hearts.

Recommendations

De-risking for delivery



To de-risk the market, the Victorian Government should reform the Wrongs Act 1958 (Vic) to expressly prohibit contracting out of proportionate liability. The government should also support federal statutory reforms such as limiting misleading or deceptive conduct to protect consumers and small businesses and modify unfair contract term protections to capture government contracts. This will help address the imbalance in market power in government to business and business to business contracts, reduce wastage through unnecessary disputation, and bring balance back to the professional indemnity insurance market.

A focus on de-risking will have a significant positive impact on consulting businesses in Australia and for the delivery of projects. We are currently seeing the worst conditions in the professional indemnity (PI) insurance market since the collapse of HIH in 2001. Unfair contract terms in professional services contracts are driven predominately by the imbalance in market power between the professional services consultant and their client (whether public or private). As a result, **Australia's building and construction** industry has the highest levels of disputation in the world, outside of California in the USA. **Consult Australia's proposed** legislative reforms will address this imbalance and result in a fairer contracting environment and reduce the most significant areas of litigation seen across our industry in Australia:

- **The Wrongs Act 1958 (Vic) should explicitly prohibit contracting out of proportionate liability in professional services contracts.** This will secure the policy intent of the proportionate liability reform introduced throughout Australia between 2001-2004 and stabilise the PI insurance market. By securing an express provision, insurers will know that consultants are managing their risk exposure. It is inherently unfair that a consultant be held liable for the fault of others in the delivery chain. We also see occurrences in Victorian government contracts, of the State requiring the contracting out of proportionate liability, and requiring consultants to have sub-consultants contract out of proportionate liability – see for example: <https://www.dtf.vic.gov.au/practitioners-toolkit/practitioners-toolkit-standard-form-contracts>. The *Wrongs Act 1958 (Vic)* is silent on permitting contracting out of the operation of proportionate liability (unlike Qld civil liability legislation which expressly prohibits, and NSW which expressly permits it). Consult Australia holds that where the legislation is silent, a person is not permitted to contract out of the operation of that legislation because it is a protection for the public good, over the individual *Re Jacob Morris (1943) 43 SR (NSW) 352 at 356*. The original policy intent of proportionate liability reforms was for the public good, in encouraging affordable and available insurance in Australia. Not only is Victoria as a client creating significant contractual imbalance and passing liability on to consultants for actions of others creating unreasonable risks for businesses (impacting in some cases business viability) but also going against the original policy intent of the law.
- **Misleading or deceptive conduct claims should be limited to protect consumers and small business.** This will ensure that large, sophisticated businesses cannot claim against consulting businesses when other (more appropriate) avenues of redress are available through the contract or common law. Currently misleading or deceptive conduct claims are used to avoid contracted liability caps and to pressure consultants to settle other unproven claims, noting the considerable legal costs associated with defending multiple heads of claim.
- **Existing unfair contract terms protections should be extended to government contracts.** The current protections have the potential to be a very powerful incentive to fix bad contracting in Australia – however Australian government departments, agencies and clients are the most prolific creators of contracts but are not subject to the Australian Competition Law. As a flow on, private sector clients follow the lead of government, and it is a constant drain on the resources of consulting businesses attempting to negotiate fair contract terms in the market, which at the size and scale of projects in the market is a consistent lag on productivity.

The Victorian Government has a role to play in supporting the federal regulatory reforms described above, as well as in the capacity of a client (agency by agency) by protecting proportionate liability and avoiding misleading or deceptive conduct claims between sophisticated parties where an alternative is available.

If these de-risking reforms are prioritised by all governments across Australia, we will see significant changes in the productivity and mental health of the industry and enhanced business certainty for our professionals. Without a focus on de-risking, the PI insurance market will continue to deteriorate, and the diversity of consultant businesses will diminish as businesses and people exit our industry thus impacting the ability to design the future. It is up to the Australian Government to champion model client behaviour by embracing these de-risking opportunities.

See our [Professional Indemnity Insurance Market Briefing \(September 2021\)](#), [Model Client Policy](#), our [submission](#) to the Parliamentary Standing Committee on Infrastructure, Transport and Cities, Inquiry into Procurement Practices for Government-Funded Infrastructure as well as the [Infrastructure Australia's 2021 Plan](#) for more information.

Collaboration as culture



The Victorian Government should embrace collaboration as the cultural norm and embed collaboration in contract design and tendering approaches which will significantly reduce the imbalance between contracting parties and provide a more collaborative, productive environment with all parties focussed on successful project delivery. This includes using AS4122-2010 unamended, guaranteeing proportionate liability for professional services and ensuring industry voices are given the opportunity to review codes and laws before introduction.

Collaboration as culture is a commitment by everyone to shift away from disputation and embed a positive collaborative culture at every stage of a project, underpinned by communication. This combined with **'de-risking for delivery'** (above) and **'go slow to go fast'** (below) will dramatically change the broader construction industry for the better and deliver significant productivity savings for all parties. Using past **projects as case studies**, Consult Australia's [Uplifting Productivity](#) report demonstrates how collaboration and communication can be prioritised at all stages of a project from pre-tender to post-completion.

Having a collaborative culture would also dramatically reduce the disputation in the market and create more mentally healthy workplaces. It is acknowledged by government clients, contractors, and consultants that while no one contract model is by default **'always good'** or **'always bad'** some models are typically less collaborative, such as lump sum design and construct (D&C) contracting.

Data we have collected on D&C contracts reveals 57% of consultant revenue is at risk when entering a D&C contract. This has a devastating impact on consultant businesses, despite representing only a very small percentage of the overall construction cost of a project (0.9%). Consult Australia holds that the claims, especially where **'design error'** is cited, cannot represent actual design errors otherwise we would see more rectification work being undertaken around the country. These claims are typically settled before adjudication in the courtroom because the number and type of claims made are constructed tactically to push the consulting business towards settlement to avoid the substantial costs of defending the claim in court.

Our members report that Victorian government clients are using AS4122 with significant changes which undermine the original balance and intent of the standard contract. The changes made typically appear as designed to pass on unreasonable and often unmanageable risks to consultants. We would like to see reform by the Department of Treasury and Finance to the standard template to embrace collaborative contracting. In some sectors such as contracting with Major Road Projects Victoria (MRPV) we see new forms of collaborative contracting and a move away from traditional D&C contracting which is welcomed.

We also see as a regular occurrence in Victorian government contracts, the State excluding itself from compliance with its own laws, namely the *Wrongs Act 1958* (Vic) which provides protections, such as proportionate liability. The *Wrongs Act 1958* (Vic) is silent on permitting contracting out of the operation of proportionate liability (unlike Qld civil liability legislation which expressly prohibits, and NSW which expressly permits it). Consult Australia holds that where the legislation is silent, a person is not permitted to contract out of the operation of that legislation. The reason is that, while a person may contract out of the operation of legislation that is intended to protect the rights of the individual, a person may not contract out of the operation of legislation that is for the public good: *Re Jacob Morris (1943) 43 SR (NSW) 352 at 356*. The original policy intent of proportionate liability reforms was intended for the public good, in encouraging

affordable and available insurance in Australia. Not only is Victoria as a client creating significant contractual imbalance and passing liability on to consultants for actions of others creating unreasonable risks for businesses (impacting in some cases business viability) but also going against the original policy intent of the law.

Adoption of more collaborative forms of contract and procurement practices will have multiple benefits:

- Significant reduction in the costs and resources (both government and industry) throughout the project lifecycle
- Uplift in productivity
- Uplift in innovation: noting that the value-add services our members provide is finding solutions to wicked problems, most significantly transitioning to a net-zero economy.

Collaboration as culture extends to the relationship between government as a regulator, and industry as a stakeholder. Clear communication and timely consultation processes are necessary to achieve industry understanding and participation in new and emerging schemes. A key example of where collaboration as culture could be improved is in the introduction of the Fair Jobs Code which was released without consultation or guidance. Consult Australia is a solutions-focussed, member-driven industry association that welcomes any opportunity to hear and discuss changing and emerging practices. We encourage the next Victorian Government to embrace collaboration as culture to uplift productivity and performance through communication between stakeholders.

The Victorian Government has a role to play not only as a client, but also as a role model to the market. If prioritised by all levels of government, collaboration as the cultural norm can deliver significant productivity benefits to everyone and enhance project outcomes.

See our [Uplifting Productivity](#) report and [Model Client Policy](#) as well as the [Infrastructure Australia's 2021 Plan](#) for more on collaborative contracting.

'Go slow to go fast'



The Victorian Government should adopt and support a 'go slow to go fast' approach for all projects ensuring best practice in due diligence right at the start of projects. This will deliver better projects and minimise cost and time over-runs that currently mar projects, particularly infrastructure projects.

The 'go slow to go fast' approach is where the emphasis in project development is placed on preliminary due diligence to enhance project outcomes. The investment of time and resources up front will also reduce project risks making it more likely that:

- clients (including government clients) will meet financial settings and reduce financial loss
- industry will meet delivery deadlines
- industry will deliver the right outcomes.

This is in stark contrast to the current environment where projects are put to market without a clear/defined scope, incomplete design, and substantial risk transfer. This predictably leads to problems with the market's ability to price the project, commit to a timetable, or assess the risks involved. Lack of due diligence in the early stages of project development is consistently cited in case study analysis of projects that have been beleaguered by disputes and failures.

If prioritised by all levels of government, 'go slow to go fast' can deliver significant benefits to everyone and enhance project outcomes and improve the operating environment for all stakeholders. In addition, with **government clients leading the way, private projects will see the benefits of a 'go slow to go fast' approach and follow.**

The greatest opportunities to ensure the best solution for the end-user happen at the earliest stages of the project during problem identification, project origination, and design. Improving how projects are conceived, planned, designed, and assured in these early stages has long been regarded the most effective mechanism

owners have to consistently deliver superior project outcomes. Consult Australia welcomes the opportunity to connect with Victorian Government agencies, departments, and ministers on upcoming pipelines.

See our [Uplifting Productivity](#) report and [Model Client Policy](#) as well as the [Infrastructure Australia's 2021 Plan](#) for more detailed consideration of this approach.

Smarter pipeline of projects



The Victorian Government should adopt and support an approach to the pipeline of projects that provides certainty to the industry and increases accessibility for SME businesses. This will deliver benefits to productivity (both industry and government), workforce planning and regional participation.

A smarter pipeline of projects will produce sector-wide productivity, create a dynamic workforce, and increase regional participation. Businesses are also seeking continuity of projects, including a healthy mix of project types and sizes, and greater visibility on project timelines from procurement through to delivery and operations. We welcome the recommendation from Infrastructure Australia in the [Delivering Outcomes report](#) for infrastructure projects to be **assessed as a 'network' rather than in silos**. A smarter pipeline relies on the key elements of transparency and **diversity of industry participants (in addition to an embedded 'go slow to go fast' mentality as discussed above)**.

It is expected that transparency of the upcoming pipeline of projects across Victoria will allow:

- government clients to utilise industry feedback more effectively on barriers experienced by industry (which may not yet be seen by government – including skills shortages)
- industry to predict, prepare, and plan the resources required to meet demand, including the creation and maintenance of a dynamic workforce
- industry to attract workers to regional areas based on the pipeline in the region
- all parties to benefit from increased productivity.

Breaking down mega projects into smaller packages is something Consult Australia supports as a way to increase SME participation. Our Victorian members recognise the Major Roads and Projects Victoria approach to mega projects as a good example of addressing high volume pipelines. It is expected that if mega projects are broken up into smaller packages, small to medium businesses will be utilised for government projects, which will re-balance their current experience of having a downturn in work, and support larger businesses that are struggling to keep up with tender demands (see our [recent Industry Health Check results: June 2022](#)). This will help maintain a healthy diversity of businesses capable of delivering for Australia.

The Victorian Government has a role to play as an investor in infrastructure projects, but also as a client in the supply chain. If prioritised, having a smarter pipeline of projects will lead to greater economic prosperity across the industry.

Digital by default



The Victorian Government should drive innovation by committing to and pushing for digital investment at all stages and on all projects so businesses, particularly small businesses, have the confidence to do the same. This includes national consistency across the adoption of packages, specifications, and processes. This will deliver benefits for both government and industry including job growth, increased productivity, improved risk management, improved accessibility, and innovation.

Digital by default means job growth, global leadership, increased productivity, risk management, and digital solutions to improve accessibility and innovation. Our Victorian members recognise the current push for digital uptake by Victorian agencies and welcome this initiative. However, to enable strong industry adoption of digital solutions there is work needed to be done to address some of the complexities surrounding digital requirements. Our members report barriers to digital uptake across Australia including:

- agencies approaching the modelling capability of the latest packages differently
- outdated documentation specifications for different agencies/departments
- the current specification requirements are all or nothing which deters small business participation due to the investment required to participate
- the appropriate level of design model features and information are still being developed to suit smaller projects
- different terminology used, inconsistent processes, and 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 department to the next project.

There are numerous ways in which digital by default can be delivered, from data sharing during projects, digital project controls, using digital tools to manage project risks and delivering building information modelling (BIM) and/or digital twins of assets. By going digital by default businesses (especially small businesses) will see the cost of digital tools as an investment rather than burden and will deliver better outcomes by reducing risk and increasing innovation.

Consult Australia has long called for mandated BIM for government projects, with very few jurisdictions taking that approach. See **also Consult Australia's [Uplifting Productivity](#)** report for examples where digital solutions were used in successful projects. We also see digital solutions being vital in the successful implementation of the automatic mutual recognition/automatic deemed registration regime throughout Australia, particularly for engineers and other registered professionals.

The Victorian Government has a role to play as a model client to mandate the adoption of digital by default and to work with other jurisdictions to ensure consistency. Consult Australia welcomes the opportunity to work with the next Victorian Government to deliver on digital by default and break down the digital barriers highlighted above.

See also [Infrastructure Australia's 2021 Plan](#) for more digital by default recommendations.

Thinking smarter about skills



The Victorian Government must think smarter about skills. In addition to investing in initiatives to tackle the existing skills capacity issues, we need reforms to particular areas such as labour hire laws, registration schemes, and improve steppingstones to employment for migrant engineers.

Thinking smarter about skills, includes investing in education and migration initiatives but also addressing the issues that currently impact on workplace mental health and cause burn-out of people (see above on 'de-risking for delivery' and 'go slow to go fast', and below on 'striving for a mentally healthy industry'). By doing this, we can produce a thriving workforce to deliver the current and future pipeline of projects.

The size of the infrastructure pipeline will create significant job growth both during the delivery phase and through the benefits of the infrastructure itself. However, we do not currently have enough people to deliver the infrastructure pipeline or participate in the job creation it will generate. Consult Australia has campaigned for a stronger focus on engineering education for many years, noting that the skills shortages are systemic. The number of school students studying STEM in Year 11 and 12 has flat-lined at around 10% of less.¹ Further, in 2019, approximately 25% of individuals studying engineering undergraduate courses dropped out (5% in the first year, and 20% in later years).² Our members are particularly interested in the Victorian Government creating stepping-stones for migrant engineers.

¹ [The Commonwealth Department of Education, Why is STEM important?](#)

² [Engineers Australia, Skills Discussion Paper.](#)

Labour hire laws

Consult Australia supports the policy intent of the *Labour Hire Licensing Act 2018 (VIC)* to protect vulnerable workers. However, the broad definition of labour hire in the Act also captures our members, who do not provide labour hire as a core function of their business. Our members often have arrangements that fit the broad definition but are not in sectors where workers are found to be vulnerable. In fact, many of the secondments from our member businesses are to government agencies. Imposing this scheme on our members has a major impact, subjecting them to significant administrative and financial burdens without a countervailing community protection outcome. Members advise that the financial burden of being licenced in Victoria and Queensland (including costs of reporting) for the benefit of ten workers is in excess of \$200,000 a year.

Our sector is not a risky industry, which was recognised in recent amendments to the SA labour hire scheme. We proposed the next Victorian Government reform labour hire laws to ensure protection of those workers that need it most and to reduce the burden on other businesses. The government would see a resultant uplift in productivity as the Victorian Labour Hire Authority can focus attention on the industries in most need of scrutiny such as cleaning, horticultural, meat processing, seafood processing and trolley work.

Streamlining registration schemes

Consult Australia calls on the next Victorian Government to remove unnecessary restrictions to the Construction Supplier Register (CSR) which stops multi-disciplinary businesses delivering for Victoria. The CSR requires a business to have nominated directors in every discipline of operation registered with the Victorian Building Authority (VBA) – this is essentially body corporate registration. This is despite the VBA not requiring body corporate registration in the majority of those disciplines.

Consult Australia holds that the requirement to have registered practitioners on the Board is an unnecessary business burden. The role of the Board is to run the business, and therefore should have a mix of individuals. The Boards of multi-disciplinary businesses would become unwieldy if every discipline was represented by a registered practitioner. We understand the need to ensure the CSR only includes those businesses that have the capabilities to deliver in the categories nominated. However, like with engineers, this can be achieved by seeking a Deed from the business confirming that all relevant practitioners required to be registered by the VBA will hold registration.

We call on the next Victorian Government to engage with industry on this matter and adopt the reforms we have set out above.

Steppingstones for migrant engineers

We need to prioritise stepping-stones to STEM qualifications and practical experience to upskill people. Our members report that mid-level to senior-level candidates are the most difficult to find. Given this, we require continued support for higher education and flexible courses that can provide skilled migrants and mid-level candidates an opportunity to upskill, who are not adequately familiar with the relevant Australian codes and standards applicable to their fields of practice. Further, we need to create opportunities that connect people, and target diversity inclusion, whether it be networking opportunities or marketing campaigns that showcase careers. Consult Australia welcomes the opportunity to collaborate with the next Victorian Government on stepping-stones to STEM qualifications and practical experience.

The Victorian Government has a role to play as a legislator. For more information on the skills shortage facing our industry, please see our [Thinking Smarter About Skills](#) paper.

Striving for a mentally healthy industry



The Victorian Government must set the tone from the top and strive for a mentally healthy industry. In doing so, the Victorian Government should champion model behaviours both as a regulator and a client to support the vitality of our industry. This will deliver sustainable businesses with healthy and productive people at their hearts.

Striving for a mentally healthy industry is a multi-level problem needing many solutions. Many of the recommendations above, if realised will have a significant positive impact on the mental health of our people. Currently, the stress of accessing affordable PI insurance, the litigious nature of working in the construction and the built environment, pipeline demands, including client timetabling/tender requests, the lack of a collaborative culture, and the significant skills shortage, are all taking a toll on the mental health and wellbeing of our workforce.

One way to demonstrate would be committing to Consult Australia's Christmas Tender Campaign and implementing a Victoria-wide black-out tender period across Christmas and New Year to give industry a well-deserved and uninterrupted rest period. Currently, support from government agencies is sporadic and is often undermined by many projects 'by exception'.

Consult Australia and its members are committed to striving for mentally healthy workplaces. This includes creating environments that build confidence and acceptance of employees seeking help (removing perceived barriers are key here). However, we know a myriad of pressures and external factors outside of an **employer's control can also impede on the mental health of our workforce and the sustainability of our industry.**

We note the proposed OHS Amendment (Psychological Health) Regulations amendments intend to introduce **a requirement for an employer to 'eliminate any risk' associated with a psychological hazard and introduce a risk reduction process for employer's where it is not reasonably practicable to eliminate a risk associated with a psychosocial hazard.** This risk reduction process is welcomed, but we have outstanding concerns on how it could be implemented to address external risk factors.

External risk factors can impact a person's psychological health in a workplace setting. A key example of this is the current climate – industry cannot eliminate the economic impacts of COVID-19, but those impacts are likely to have impacted the mental health of employees. Additionally, pipeline demands, including client timetabling/tender requests and the lack of a collaborative culture is putting significant pressure on consultants to perform and produce, often to unreasonable standards and timeframes. We see this both in terms of public and private sector clients. These concerns are further complicated by the significant skills shortage that has impacted our industry which has intensified with COVID-19 and the resource capacity constraints under increasing pipeline demands. These factors are outside of employer's control however, we are concerned that the proposed OHS amendments could capture these situations.

Further, we note the duty to report under the proposed amendments captures applicable employers ('50 employees or more at any point in time during the reporting period'), 'an independent contractor engaged by the employer', and 'any employees of the independent contractor'. It is not clear how the duty to report impacts circumstances where an employer sends an employee to work at a site that is controlled by a third party, or where an employer sends an employee to work in a different jurisdiction. Further clarity is needed here.

Consult Australia welcomes the opportunity to assist the next Victorian Government in developing these amendments in consultation with industry.

The Victorian Government has a critical role to play in the health of all Victorians. By prioritising mental health of our people, we will see positive impacts on projects because the success and sustainability of **Australia's economy is underpinned by the health and wellbeing of its people.**

For more information see Consult Australia's [Striving for Mentally Healthy Workplaces](#), as well as [Infrastructure Australia's 2021 Plan](#) which revealed that the construction industry is 'in the top three unsafe sectors in Australia.'

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CONSULT AUSTRALIA'S PRIORITIES



CONTACT

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

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