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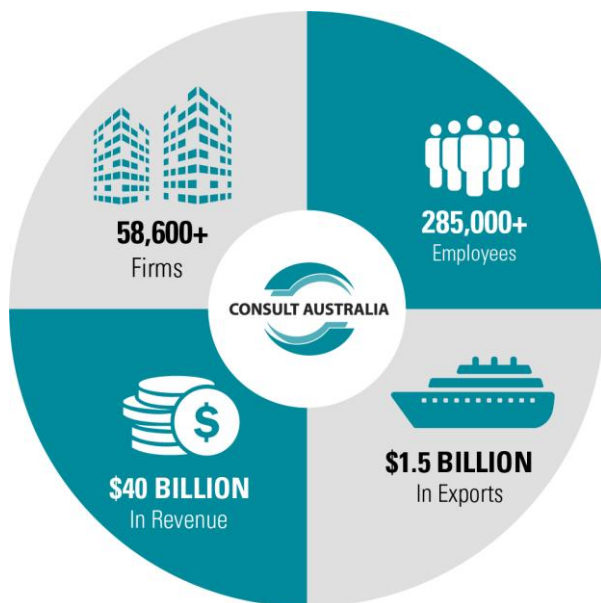
Construction Productivity Inquiry

**SUBMISSION TO QUEENSLAND PRODUCTIVITY
COMMISSION**

Consult Australia

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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 on our [website](#).

Executive summary

Consult Australia welcomes the opportunity to provide initial input to the Queensland Productivity Commission's inquiry on construction productivity, with a focus on policy and regulatory settings affecting construction productivity. We are pleased to provide examples and solutions.

The members of Consult Australia have a vital role in the broader construction industry, with a well-established role in supporting planning, design and delivery. The highly technical services our members provide are critical to deliver the government's construction priorities.

With every design, advisory and engineering service provided by our membership, there is a positive impact on job growth, community connectivity and economic productivity. But without reform, productivity of the broader construction industry will continue to lag and the ability to innovate will remain challenged.

Often productivity is focussed on the construction side of projects. However, productivity is also relevant to design and service delivery. Further, an uplift of productivity on the government side is also an uplift for industry. Think of the many weeks or months spent on contractual negotiations that could be alleviated by a comprehensive review of standard contracts in collaboration with industry associations.

The inquiry is timely given federal initiatives, including the [Productivity Commission's five pillar productivity growth agenda](#), the National Construction Strategy and the [National Construction Blueprint](#). Consult Australia has been calling for reform for many years to unlock greater productivity for industry, government and the broader economy. Reform opportunities should be maximised through coordination and alignment with other reforms. We are keen to understand the interplay and consistency between federal and Queensland reforms.

In this submission, we provide insights and recommendations, drawing on our thought leadership, including:

- [Unravelling Risk](#)
- [Uplifting Productivity](#)
- [Confidence and Continuity Survey Findings](#)
- [Model Client Policy](#) (originally released in 2018 and re-released in collaboration with the Australian Constructors Association in 2022)
- [Enabling Digital by Default White Paper](#).

Our recommendations focus on policy settings that are impacting productivity and hindering market participation. The recommendations are grouped under the following headings:

- client opportunities
- procurement reform
- market behaviours
- project practices.

We have set out our recommendations below:

Client opportunities

- Adopt a Model Client approach across Queensland government construction projects.
- Seek visibility of contracts between the lead contractor and consultant to mitigate inappropriate pass-through or back-to-back arrangements of provisions that lead to unmanaged risk.
- Promote fair insurance requirements and obligations in Queensland government contracts.
- Develop a whole-of-government integrated pipeline to build industry capacity and confidence and plan project releases with an awareness of the impact on the market, including competing projects by various agencies.

Procurement reform

- Commit to collaborative contracting methods and undertake a comprehensive review of existing government contracts to identify improvements.
- Invest more time and resources in the planning and/or pre-design phases of projects, engaging with industry during these phases, rather than inefficient design review processes.
- Change the procurement practice of labelling bids as 'non-conforming' to allow innovation to be considered.
- Drive innovation by moving away from the 'digital by exception' mindset to specify digital requirements in procurement processes and advance 'digital by default'.
- Do things differently by adopting our [Uplifting Productivity](#) recommendations, with a focus on simplifying and streamlining the approvals process for major projects and avoiding duplication in the regulatory process.
- Disallow the practice of fee capping by clients and government agencies, which overrides market forces.

Market behaviours

- Support amendments to the Australian Consumer Law to limit the misuse of misleading or deceptive conduct provisions and to protect consumers and small businesses.
- Support retention of the explicit exemption in the Australian Consumer Law for the '*supply of services of a professional nature by a qualified architect or engineer*' from the fit-for-purpose consumer guarantee.
- Amend labour hire laws in Queensland to remove unnecessary burdens on businesses where labour hire is only incidental to their services.

Project practices

- Adopt the reforms in Consult Australia's [Unravelling Risk](#) report to improve project practices through scoping for success, valuing valuations, transparent timing, refining the rules and resolution over disputation.
- Seek to reduce regulatory impost and uncertainties.

Client opportunities

Our recommendations:

- Adopt a Model Client approach across Queensland government construction projects.
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- Develop a whole of government integrated pipeline to build industry capacity and confidence and plan project releases with an awareness of the impact on the market, including competing projects by various agencies.

MODEL CLIENT

Consult Australia believes construction industry productivity can be improved by adopting a model client approach, where the government is an 'active client' and sets the tone from the top. In 2022, Consult Australia developed with the Australian Constructors Association the [Partnership for Change Model Client Policy](#) outlining the behaviours of a Model Client:

1. understands the commercial risks, market conditions and different roles of the industry suppliers, using that knowledge to balance the risk exposure of all parties (for example, minimises the use of security deposits for contractors and sets reasonable insurance limits and limits of liability for consultants)
2. undertakes appropriate risk identification, assessment, mitigation, and management including by understanding the particular project risks
3. has clear, consistent and transparent tender processes, evaluation criteria and provides quality documentation including well-structured and accurate briefs, providing reasonable review and response times (the key benefit flowing from this is reduced cost of bidding)
4. always considers business and industry sustainability, by avoiding unnecessary pressure on parties. For example:
 - a. setting fair and reasonable assessment of stipulated ends to account for costs to consultants and contractors
 - b. always settling invoices on time and ensuring that contract negotiations are fair; not a 'take it or leave it' approach
 - c. provides fair assessments and timely payments for work undertaken particularly in relation to additional works and claims.
5. avoids use of non-standard or heavily amended contracts and prioritises collaborative contracting including appropriate liability frameworks, maintaining proportionate liability, balanced rights/obligations, and placing risks with the party best able to manage them
6. avoids the practice of multiple rounds of best and final offers
7. fosters a collaborative culture. This includes, through early engagement, supporting and driving innovation and maintaining open and constructive communication between all parties
8. plans and prioritises projects and avoids making assumptions about industry capacity. This includes having a genuine commitment to improved culture, mental health, and diversity, and observing industry closure times (for example Christmas tender blackout periods).

Being a model client means working collaboratively with the industry on projects and achieving mutually beneficial outcomes. It formalises the government's intent to do things better by putting clear obligations in place. Practically, a model client approach makes the government a more attractive client for industry to work with, provides business confidence, and in turn attracts an increased market response and informed, quality tenders for work.

When it comes to a design and construct type model, where the consultant is at arm's length to the government principal client, Consult Australia has seen improved outcomes where the government acts as an 'active client'. This is where the client sets expectations on the lead contractor and allow consultants to raise issues with the principal. The best example of this is what has been termed the 'new approach' used by Major Road Projects Victoria.

Example in Queensland

Consult Australia has seen a new government requirement for consultants to register joint ventures at pre-qualification stage, with the purpose of limiting delays following tender award. This is contrary to market practices and is creating unnecessary pressure. Consulting businesses are having to invest time, effort and money to meet this requirement, creating joint venture companies that may not be needed.

PASS-THROUGHS AND THE BACK-TO-BACK FALLACY

The prevalent practice of lead contractors passing through contractual obligations and liabilities to consultants results in these businesses being faced with inappropriate obligations and/or significant liabilities that outweigh the consultant services provided. From a client perspective, this can result in an unmanaged risk where the consultant is unable to mitigate the risk, for example where the risk is beyond the consultant's control.

There is an expectation of 'back-to-back' contract obligations, which is misplaced where:

- **the consultant is contracting to a constructor** – the roles of consultants and constructors are different and many of the requirements imposed on a constructor are unsuitable for consultants and/or are uninsurable under their professional indemnity insurance policy.
- **the consultant is only providing some of the services** – in this case the liability under the head contract will outweigh the risks of the services being provided by the consultant.

Therefore, instead of falling for the back-to-back fallacy, we recommend that the government ensure that contracts used to engage consultants reflect the role and services of the consultant. This is a good start for risk management.

Consult Australia recommends Queensland government be an 'active client' by seeking visibility of contracts between the lead contractor and consultants to stop the pass-through or back-to-back arrangements of provisions leading to unmanaged risk.

INSURANCE REQUIREMENTS AND OBLIGATIONS

Government projects can be delayed by unnecessary contract negotiations to address clauses that transfer undue risks onto suppliers. A key example, in our context for consulting businesses is insurance requirements and obligations.

Consult Australia supports fair insurance requirements and obligations that align with the type and nature of services being provided. While the affordability of professional indemnity (PI) insurance has slightly improved, availability remains a concern for design, advisory and engineering consulting businesses. This challenge is exacerbated by onerous, unnecessary and unfair PI insurance requirements in government contracts. This includes levels of professional indemnity

insurance that are often not available in the market and / or are above what is necessary for the work being undertaken.

Queensland government can have a positive impact on productivity by ensuring government contracts emphasise collaborative risk management and clear communication, and do not contain unreasonable terms and conditions, e.g. insurance requirements, unlimited liability. The NEC framework is a good example that aims to provide a flexible and adaptable approach to contract administration, catering to various project types and industry sectors.

Example

Consult Australia members have reported spending 3-6 months negotiating contracts with government clients that have unreasonable insurance requirements.

PIPELINE IMPACTS ON BUSINESS CONFIDENCE AND CAPACITY

Pipeline investment is an economic lever. If that lever is pulled too tightly, or let loose, it has implications for market capacity to deliver, regional growth, and competition. The Queensland government should continue to improve its approach to the pipeline of projects that provides certainty to the industry and increases accessibility for small to medium businesses. This will deliver benefits to productivity (both industry and government) and workforce planning.

Example in Queensland

A positive example, supported by Consult Australia, is the establishment of the delivery authority for the 2032 Olympic and Paralympic Games to provide a 'program approach' for related projects. The adoption of delivery partner models has demonstrated improvements in construction productivity, if properly managed, and should be considered for other government projects.

City of Gold Coast is currently procuring under a five-year Professional Services Partnership Initiative contract (PSPI) for all its infrastructure projects. These types of partnership models have been successfully implemented in other countries for over 25 years, and therefore, Consult Australia is keen to assist in ensuring success in Queensland.

While many of the historical barriers to talent growth have not been resolved for professional design and engineering consultants working across the built and natural environment, the shortages have the potential to increase if capacity and confidence are not prioritised. Consult Australia recommends the Queensland government:

- develop a whole of government integrated pipeline that indicates the design phase, as well as construction. This will provide business confidence to invest in capacity.
- plan project releases with an awareness of the impact on the market, including competing projects by various agencies. A steady stream of projects supports market sustainability as opposed to whole sector release at one time.

Consult Australia acknowledges that these align with existing actions identified in the [Infrastructure Productivity and Workforce Roadmap](#) (IPWR) to improve pipeline governance and transparency.

Consult Australia recommends the pipeline of projects for the next 7 years to deliver the 2032 Delivery Plan and other major projects is prioritised to enable supply chain planning, coordination and resource management. There will be competing demands for labour and material with other jurisdictions and other projects. For example, the [Residential Activation Fund](#) requires construction to commence within 12 months of funding allocation and be completed within 3 years. These are tight timeframes to achieve and with project announcements to occur from July 2025 there will be overlaps with the 2032 Delivery Plan and impacts on market capacity.

Procurement reform

Our recommendations:

- Commit to collaborative contracting methods and undertake a comprehensive review of existing government contracts to identify improvements
- Invest more time and resources in the planning and/or pre-design phases to projects, engaging with industry during these phases, rather than inefficient design review processes
- Change the procurement practice of labelling bids as 'non-conforming' to allow innovation to be considered.
- Drive innovation by moving away from the 'digital by exception' mindset to clearly specify digital requirements in procurement processes and advance 'digital by default'.
- Do things differently by adopting our [Uplifting Productivity](#) recommendations, with a focus to simplify and streamline the approvals process for major projects and avoid duplication in the regulatory process.
- Disallow the practice of fee capping by clients and government agencies which overrides market forces.

Consult Australia is an advocate for a productive industry underpinned by a collaborative culture where model client behaviours are the norm. Our advocacy is heavily focused on procurement and contracting – we aim to find solutions to the broader business challenges of productivity, promote increased innovation and collaboration, and restore balance to the contractual relationships across procurement supply chains. We point to our significant contribution through our thought leadership work, but also through our [Centre for Contracting and Risk](#).

COLLABORATIVE CONTRACTING

Consult Australia recommends that collaborative and fair contracting is a focus of Queensland government's procurement policy to drive improvements in contracting with the private sector. Consult Australia has long advocated for reform that embraces early involvement and collaborative relationships, including contracting with a fair and balanced risk allocation.

Consult Australia previously raised concerns about the use of two-stage (design and construct) building and construction contracts (also referred to as a Managing Contractor (MC) contract) for major projects and the misrepresentation as a collaborative form of contract in all instances. This was a policy position of the previous Government through the Building Policy Framework, and has been amended by the current Government, with other forms of contracting now permissible. Consult Australia notes this new policy position has not yet been reflected in the [Building Policy Guideline](#), and policy requirement 2 still mandates the use of two-stage MC procurement on Best Practices Principle (BPP) projects.

The Queensland's government's MC contract provides a limited framework for collaborative contracting between the principal and the contractor, and it is unclear how or if this extends to or captures the other parties to the contract/ project. The [Queensland Health capital review](#) concluded:

[The] risk allocations in the MC contract are problematic and are outside of prevailing market conditions and other jurisdictions' approaches to contracting major projects. Without exception, MCs interviewed as part of the Review were willing to review risk allocations with the Government and (transparently) share in the savings available.

A procurement principle for collaborative and fair contracting will ensure that the standards governments set for our industry via law and policy are also applied to government dealings when

procuring the services of the private sector. It cannot be overstated how much the private sector follows the example set by the government.

The 'collaborative contracting' opportunity was a key focus of discussions during the development of the [IPWR](#), and resulted in a government commitment to develop a set of core principles to guide all interaction between the government and the construction sector (e.g., collaboration, pipeline transparency, early engagement, standardised contracts, reduced bidding costs). It is not clear to the industry if this work has progressed. Given the resource investment from government and industry to develop the IPWR and the benefits of collaborative contracting, Consult Australia strongly supports the progress of the agreed actions in the IPWR.

Consult Australia would also be pleased to support a comprehensive review of government standard contracts to achieve greater consistency, improved risk allocation, collaboration and value for money outcomes.

It is positive to see government departments expanding their use of collaborative contracting models; however, Consult Australia notes that where these have not been used for some time, there is a lack of understanding of how these contracts are applied and what the drivers are.

This is leading to skewed risk allocations, specifically for consultants who operate under a different business model than contractors. For example, where clients try to obtain traditional design and construct risk profiles under Alliance models, or contractors misunderstand the risk profile that they are signing up to. It is important that changes to contract models in use be accompanied by investment in procurement capability.

'NON-CONFORMING BIDS' AND INNOVATION

Government procurement practices that hinder innovation and the long-term competitiveness of markets include the late engagement of industry on project design and scope, and the practice of labelling bids as 'non-conforming bids'.

To lead the way on innovative projects, we encourage the Queensland government to invest more time in early involvement, including by:

- conducting early industry briefings
- moving away from the 'non-conforming bid' mindset that dissuades bidders from delivering innovation
- recognising the commercial nature of the market and use that to drive innovation.

These recommendations are supported by [The MacLeamy Curve](#), which illustrates the benefits of an integrated design process with early involvement of design professionals. This includes industry briefings, tender processes, scope of projects, and contract negotiations with a focus on fair and balanced contract terms and appropriate risk allocation.

Innovation has the best chance if discussed earlier in the process. Talking innovation at or after tendering is too late. Innovation needs to be a core element in business cases and industry briefings. With the current 'non-conforming bid' mindset evident in government procurement, any deviation by bidders is left unconsidered, limiting innovation. More early involvement of the supply chain in the pre-design phase and collaboration would enable a detailed understanding of desired project outcomes between client and supplier, and can facilitate innovation.

Key barriers we see from government procurement right now that should be remedied include:

- At early industry engagement stages, there is little encouragement by the government of innovative solutions by industry.
- A conservative view by the government of technologies and innovative products, even where the technology or product has been widely used in other jurisdictions or countries.
- The increasing weighting of price in tender assessments.

- No section of the tender proposal documents to expressly identify innovations available.
- A lack of understanding by procurement and assessment teams of innovative solutions.
- A culture of 'take it or leave it' by procurement teams towards bidders.
- Little regard to the value of consultant designers as a trusted advisor.

Example

Design review processes are an area where productivity and innovation practices could be improved. Additional layers of certification can cause delays and low-value outcomes. As an example, time used for stakeholder review and comment close out for the design of government project made up 50% of the duration of the design development.

DIGITAL BY DEFAULT

Consult Australia is an advocate for digital by default. With the significant investment required for the 2032 Delivery Plan, Queensland has a once-in-a-generation opportunity to accelerate digital transformation.

Consult Australia's [Enabling Digital by Default paper](#) presents five recommendations to harness best practices to create an enabling environment that catalyses change:

1. Build a Digital by Default Community of Practice
2. Invest in the business case for digital technology
3. Harmonise standards and guidance for data and information management
4. Embed requirements through procurement with an outcome-led approach
5. Build capability and skills.

The roadmap for digital transformation presented by Consult Australia aims to address industry fragmentation, innovation inertia and sluggish productivity. By leveraging the expertise and commitment of diverse stakeholders through a community of practice, we can drive the necessary standards and innovations to build momentum and achieve digital by default and do so consistently across jurisdictions.

Businesses are waiting for governments to set standards for digital working. Governments are waiting for market forces to determine the pathway forward. Consult Australia recommends that the Queensland government lead by moving away from the 'digital by exception' mindset to specify digital requirements in procurement processes and advance 'digital by default'.

Queensland developed a coordinated whole-of-government approach to BIM in 2018, however, progress has been slow, and digital opportunities are still to be fully leveraged.

Example

A partial approach to digital currently results in duplicative resource effort, such as where government clients requiring drawings in different formats, paper and digital versions. This results in significant time expenditure to deliver drawings in different formats, and many may not be used.

To move away from 'digital by exception', the Queensland government should look to embed digital by default, including by prioritising the following measures:

- Supporting a common national approach to information frameworks and requirements applied across infrastructure assets.

- Recognising information as an asset in projects and programs that informs effective insights, drives action and investment throughout the project lifecycle.
- All major contributors to infrastructure delivery should have clear digital transformation strategies, moving to a fully digital approach for design and construction where appropriate.
- All infrastructure projects and programs should identify minimum critical data sets for design, construct and operation phases (and for carbon emissions tracking of infrastructure projects and the adoption of digital twins).
- Programs should adopt development and procurement approaches that enable innovative infrastructure solutions and collaborative delivery models.

DOING THINGS DIFFERENTLY

Consult Australia's [Uplifting Productivity](#) report is about doing things differently to improve productivity across the project lifecycle – from pre-tender to post-completion. This includes simplifying and streamlining the approvals process for major projects and avoiding duplication in the regulatory process.

Example in Queensland

There have been significant delays to the award and start of several new projects over the past 18 months, which has created additional pressure on industry and could compromise the ability for industry to deliver all major projects across the state.

Consult Australia members report having to wait three months or more for tender award decisions. This is a significant issue as it ties up valuable capacity and people that could be used to tender or deliver other projects.

Ongoing development of procurement capability is critical to support improved productivity. Procurement officers need to be trained and empowered to make changes to processes and contracts. The Australian Government Centre for Procurement Excellence (CoPE) provides tools, advice and whole-of-government systems to build procurement capability, streamline processes, and provide quality reporting to execute procurement responsibilities.

Significant engagement by Queensland's Department of State Development and Infrastructure with industry representatives across 2023-2024 led to the development of the [IPWR](#). This included priority action focused on government commercial capability, including:

- support for the appropriate use of standard contracts across government and promote consistency within each procurement category
- monitoring the use of standard contracts to understand how they are being operationalised, identify pain points and develop improvements
- developing common or standard tools to support effective procurement and contract management (e.g., guidance material, which may incorporate collaboration principles, issue resolution strategies).

Consult Australia hasn't seen progress on these actions yet. Consult Australia therefore recommends an investment in procurement to:

- improve procurement skills and capacity across the Queensland government
- deliver consistent procurement practice, including the use of standard contracts, across the Queensland government
- improve capability and delivery of fair, balanced and collaborative procurement practices with businesses of all sizes

- enable regular knowledge-sharing between government and industry to drive best practice for each and every project.

In our [Uplifting Productivity](#) report, Consult Australia members nominated over 20 individual projects across Australia that demonstrate best practice in procurement and contracting, showing it is not an invention test – it's been done before. The Queensland government should be looking to tackle unnecessarily complex and lengthy procurement procedures and undesirable contracting behaviours – issues that have always been problematic. The below example highlights the potential productivity gains.

Example

Changes to procurement practices could reduce the costs of projects and delays and improve the quality of projects by at least 5-7%.

In 2015, Consult Australia commissioned Deloitte Access Economics to quantify the economic impacts of poor procurement practices, as it relates to professional services employed for public sector built environment projects. The report concluded that better procurement could reduce the costs of projects by 5.4%, reduce delays to projects by 7% and improve the quality of projects by 7%.¹ This is a very conservative quantification, noting that these figures are from 2015, prior to the heightened levels of pipeline demand and capacity constraints now prevalent in the market.

GOVERNMENT CLIENTS SEEKING FEE CAPS

Consult Australia members operate in a competitive commercial market and yet have experienced state and local governments attempting to control the fees charged by businesses. This fee-capping attempts to control the pricing in the market.

It is worth noting that historically, Consult Australia provided published 'fee scales' which were used as a guide for members on the market rate for their services. Consult Australia no longer provides that service because in March 2001 the association was informed by the Australian Competition and Consumer Commission that publication and issue of fee scales by associations was not advisable as they could be deemed anti-competitive and in contravention of the *Competition and Consumer Act 2010* (Cth).

Given it is anti-competitive for an association to publish fee guides, it is incongruous that government procuring agencies would be permitted to develop fee caps and/or scales and require all bids to comply with such fee caps/scales. In such cases the government also prohibits refreshing of the caps/scales in line with market pressures (instead reviews are conducted by the government's schedules which are often delayed year by year).

Example in Queensland

Local Buy in Queensland requires suppliers to submit a pricing schedule to set the maximum rates that can be charged.

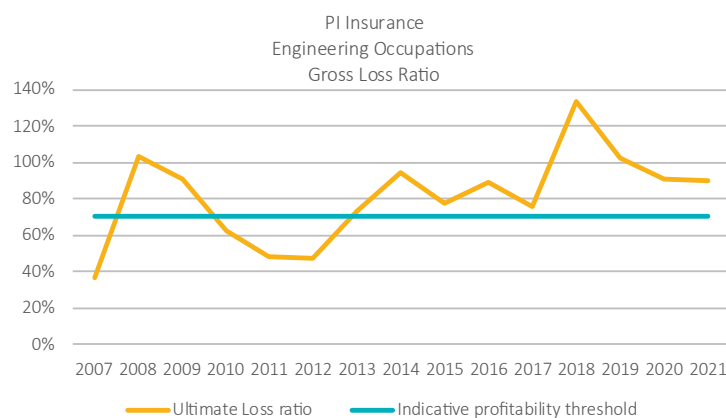
Consult Australia recommends that Queensland government policy clearly states that government agencies, departments or authorities will not seek to cap rates where there is a competitive commercial market.

Market behaviours

Our recommendations:

- Support amendments to the Australian Consumer Law to limit the misuse of misleading or deceptive conduct provisions and to protect consumers and small businesses.
- Support retention of the explicit exemption in the Australian Consumer Law for the *'supply of services of a professional nature by a qualified architect or engineer'* from the fit-for-purpose consumer guarantee.
- Amend labour hire laws in Queensland to remove unnecessary burdens on businesses where labour hire is only incidental to their services.

Australia's construction industry has a reputation of adversarial, problematic and uncollaborative contracting, primarily flowing from inappropriate risk allocation. The impact of the level of disputation is illustrated through the high gross loss ratios for professional indemnity (PI) insurance (especially in engineering) in the figure below. Insurers need the gross loss ratio to be below the teal line which is the indicative profitability threshold. Engineering occupations have been above that line since around 2013.



A market with a high likelihood of claims and corresponding high insurance costs does not foster participation, productivity and competition. Behaviours contributing to the market conditions include:

- misuse of the Australian Consumer Law's (ACL) misleading or deceptive conduct provisions
- inappropriate use of fit for purpose clauses in professional services contracts, which is inconsistent with the exclusion in the ACL
- fee capping by clients and government agencies
- unfair contract terms.

The Queensland government has a role to play in supporting federal regulatory reforms, 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.

Consult Australia's recommendations seek to reduce the unnecessary disputation in the market and align contracting provisions in government contracts to cover government risk. Investing in these reforms will have a significant positive impact on businesses in Australia and the economy.

These reforms will improve business viability and market relationships, unlock productivity, and reduce disputation. This will in turn influence the stability of the PI insurance market.

MISUSE OF MISLEADING OR DECEPTIVE CONDUCT PROVISIONS

Over the past five years, Consult Australia has seen an increase in the rate of sophisticated contracting parties misusing the ACL's misleading or deceptive conduct provisions in business-to-business situations, to avoid contractually agreed liability caps and to strong-arm consultants into settling claims. This practice discourages businesses from competing in the market. Consult Australia wants to ensure that misleading or deceptive conduct claims are preserved to protect consumers and small businesses and to limit the claims being used in business-to-business contractual situations where sufficient legal protection is provided under the contract and/or common law. Consult Australia is seeking ACL amendments to this end.

The Queensland government has a role to play in governing its projects, setting the tone, culture and rules of play to promote ethical and fair contracting and prudent expenditure. Consult Australia would be pleased to discuss this further with the Queensland government. We would also be pleased to brief you more fully on our confidential work exploring the increasing disputation we are seeing in the market in response to design and construct type models and the direct impact it has on the value for money delivered through procurement.

RETAINING THE ACL EXEMPTION ON FITNESS FOR PURPOSE

The ACL includes a general fit for purpose consumer guarantee of products and services. This consumer guarantee is expressly excluded from applying to the *'supply of services of a professional nature by a qualified architect or engineer'* (see section 61). This exemption dates back to the 1986 Trade Practices Act and was retained after the 2017 review of the ACL. Consult Australia holds that the exemption remains vital.

This exemption makes sense when you consider that creating a unique design for the first time is very different from making, testing, and selling a commercial product. An architect or engineer works with a client to develop the client's idea into a design, with various data inputs from third parties. The client then entrusts constructors and subcontractors to achieve the final product for the client. The architect or engineer cannot guarantee that the final product will be fit for the client's purpose, because they do not have control of the constructors. It is also particularly difficult to identify the client's 'purpose' at the early stages of the project, which is when the design professionals are first engaged, and often the client's 'purpose' evolves throughout the project.

When negotiating contracts, some clients will seek a fit for purpose guarantee from design and engineering professionals. This guarantee might be limited to the provision of design services rather than the resulting building or facility. This can still be problematic because it is almost impossible to define the purpose of a professional service with the same certainty as the purpose of a finished build.

Consult Australia advocates against fit for purpose obligations in professional services contracts and supports the explicit exemption in the ACL. Generally, PI insurance policies do not cover assumed liabilities or contractual warranties (a fit for purpose guarantee is such a liability/warranty).

Too often fit for purpose obligations are thought of by governments, clients or regulators as a solution to issues such as poor construction, ineffective regulation or lack of building defects insurance. However, fit for purpose obligations on designers, advisors and engineers only exacerbate current market pressures in the PI market without necessarily addressing the core issues.

Any changes to the current ACL exemption would be detrimental to the professional services industry and negatively impact competition. Consult Australia has requested that the explicit fit for

purpose exemption is maintained for the '*supply of services of a professional nature by a qualified architect or engineer*' (under section 61, ACL). Queensland government can support good practice by ensuring its professional services contracts do not include fit for purpose obligations and these obligations aren't passed through from lead contractors.

AMEND LABOUR HIRE LAWS

Labour hire laws in Queensland create an unnecessary burden on businesses where labour hire is only incidental to their services. Consulting businesses were not part of the policy problem sought to be addressed by the legislation but are caught up in the Queensland scheme because of the legislative drafting. Consult Australia recommends Queensland's labour hire legislation is amended to clarify its intent and application.

Example

Consult Australia members who currently need to report under labour hire laws advise that a saving of over \$200,000 per business could be realised if unnecessary regulatory burdens of labour hire laws were removed where labour hire is not the core service of the business.

Project practices

Our recommendations:

- Adopt the reforms in Consult Australia's [Unravelling Risk](#) report to improve project practices through scoping for success, valuing valuations, transparent timing, refining the rules and resolution over dispute.
- Seek to reduce regulatory impost and uncertainties.

UNRAVELLING RISK

Consult Australia's [Unravelling Risk](#) report explores the leading causes of claims on infrastructure projects both globally and locally. We propose five reform threads in the [Unravelling Risk](#) report that go to unravelling the risk of claim and dispute at the project level:

1. Scoping for success

Change in scope is a leading cause of claims. Collaboration and transparency between parties at the earliest stages of a project and program scoping could deal with a significant volume of unnecessary claims.

2. Valuing variations

Claims for 'design error' are often linked to changes between the tender and final design phases. Variations should be about achieving the best outcome for the project. An early warning approach to issues would assist all to value variations.

3. Transparent timing

Claims for delay are frequent, with strict liability in contracts working against a collaborative approach to resolve issues to get the project 'back on track'.

4. Refining the rules

Unreasonable claims against consultants can be limited by refining the ACL and civil liability laws. The misleading or deceptive conduct provisions of the ACL should be modified to guarantee protection for consumers and small businesses. Civil liability laws to explicitly prohibit contracting out of proportionate liability should be maintained in Queensland. Consult Australia advocates for other states to amend legislation to align with Queensland.

5. Resolution over dispute

Australia's construction industry has a reputation as being marred by adversarial, problematic and uncollaborative contracting arrangements. Resolution of issues rather than dispute is best for project, relationship and business outcomes.

It is recommended that Queensland government adopt the five reform threads of the Unravelling Risk report, as they support a focus on project performance measures and practices. The goal of much of Consult Australia's work is to understand where project practices are impacting productivity and recommend reforms to influence project productivity trends.

REGULATORY IMPOST AND UNCERTAINTIES

Our industry is navigating the complexity of balancing systemic skills shortages over the long term with increasing uncertainty in the short term on the forward program and continuity of work, as evident in the results of our [2024 Confidence and Continuity survey results report](#).

For our member businesses, lack of continuity of work makes it challenging to hold resources and/or invest in capability. Where businesses work across jurisdictions, workforces are managed

nationally, and members look across sectors for opportunities to support using existing teams. Significant occupational mobility is needed to enable businesses to deliver a vast range of projects in different parts of the country for different clients, whether it be the Department of Defence, state/territory governments or local councils. It is not just large consultancy businesses that operate cross-jurisdictionally; over 90% of Consult Australia's small business members also work across multiple jurisdictions.

The local procurement policies of Queensland government disincentivise the use of resources from interstate or through offshoring, and require substantial effort in tendering, data collection and systems to complete reporting for unknown benefits. Consult Australia recommends Queensland government engage with other state and territory governments to explore alternative models that reduce the regulatory impose and increase available resources for project delivery.

In addition to managing resource constraints, businesses are having to navigate regulatory uncertainties that impact on productivity. An example is provided below. Consult Australia recommends Queensland government prioritise addressing any identified regulatory uncertainties across government projects to help form up robust business cases and financial commitments to projects, reducing the number of projects being parked and the resultant wasted effort.

Example in Queensland

In terms of environment and conservation, there is a lack of agreed frameworks between the federal and state governments, and no consistent guidelines on environmental legislation. This is hampering productivity on projects.

One example is the framework for polyfluoroalkyl substances ([PFAS](#)). The Council of Australian Governments have been in discussions on a PFAS agreement for many years. In practice, Consult Australia members have noted that on each relevant project, an enormous amount of effort is expended trying to find a different answer / approach to the issue. It is recommended that an agreed framework between the federal and state environment departments that resolves how this issue should be managed on projects, would significantly improve productivity.

Another example is in respect of Environment Protection and Biodiversity Conservation. Consult Australia members recommend that the provision of consistent guidelines for a number of technical areas would be beneficial to improve productivity on projects. A major project in Queensland saw ongoing discussion between the project and the government on appropriate methodologies, which were then impacted by public comment. This resulted in redundant work, additional work and delays to environmental approvals, with correlating cost and time expenditures.

Contact

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



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