



# **Responses to Questions on Notice**

## **Public Hearing, Inquiry into Procurement Practices for Government-Funded Infrastructure**

**STANDING COMMITTEE ON INFRASTRUCTURE, TRANSPORT AND  
CITIES – HOUSE OF REPRESENTATIVES**

**OCTOBER 2021**

## RESPONSES TO QUESTIONS ON NOTICE

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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 55,000 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 is a job creator for the Australian economy, directly employing 240,000 people. 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>

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Thank you to the Committee for the opportunity to provide evidence to the Inquiry into Procurement Practices for Government-Funded Infrastructure on 14 September 2021. As requested, please see below Consult Australia's responses to the Questions on Notice asked by the Committee at the public hearing.

Member	Question	Hansard page no. or written
van Manen	Do you have any statistics that you can provide us on the level of disputes over, say, the last five or 10 years so we can see whether there has been a general increase in the level of disputes and maybe what those disputes relate to as well?	14 September 2021 Hansard p. 5

#### Consult Australia response

Consult Australia has looked at 124 design and construct projects in Australia completed over the last five years where claims had been made against design and engineering consultants. The analysis showed us that around 50% of a consultant's fee was at risk at any time across those projects. The value of those claims is significant for consultants but insignificant compared to the total construction cost for each project (around 1%). We think government is not necessarily understanding the significance of the hardening in the PI insurance market because at a whole-of-construction contract level, the claim cost to the project doesn't appear so significant.

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Member	Question	Hansard page no. or written
O'Brien	I think one of you mentioned the importance of having provisions in the contracts that encourage collaboration over disputation. It would be really helpful for the committee to have one or two examples not just of the provisions you propose but also of the provisions they replace—in other words, 'Here is what the traditional contract clause would be, and here is what the alternative provisions that encourage collaboration are,' so that, basically, our eyeballs can go from left to right and we can say, 'Aha; that's the sort of thing you're talking about.'	14 September 2021 Hansard p. 5

#### Consult Australia response

Consult Australia's position is that a collaborative contract is one that:

- is fairly balanced between the parties (with balanced rights and obligations)
- recognises the role of different parties and therefore does not include clauses that are not relevant to the parties and their roles and does not extend a party's standard of care or liability beyond what is expected by the common law
- has a fair liability framework
- is informed by a risk identification, management, and allocation process so that the party best able to manage a risk does so
- has a set monetary liability cap agreed by the parties as being reasonable in the circumstances, with only limited and reasonable exceptions to the monetary liability cap
- is separate and distinct from any consideration of insurance
- allows parties to resolve potential issues without reporting to legal disputation in the first instance.

As requested, in the table below we have set out some of the key issues seen by Consult Australia in government client contracts that do not represent a collaborative approach, this is not an exhaustive list. We have also included example contract provisions for the purpose of illustration only. Finally, the table includes our proposed solution/redrafting and highlights where our preferred approach is reflected in the current Australian Standard contract *AS4122- 2010 General Conditions of Contract for Consultants*, or the international standard contract *FIDIC Consultant Model Services Agreement*.

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Table of some key contract issues faced by consultants that Consult Australia recommends need to be resolved to ensure collaborative contracting

Issue	Why it is of concern	Example contract provision	Suggested solution/redrafted provision
Elevated standard of care	<p>An elevated standard of care in a contract is a term of concern for consultants where it requires the consultant to achieve a standard of care that is higher than the normal, professional standard of care implied by common law.</p> <p>A heightened standard of care is likely to trigger an exclusion in a consultant's Professional Indemnity (PI) insurance because the liability of the consultant has been extended beyond the common law standard and is challenging to adjudicate.</p> <p>For these reasons, a elevated standard of care should not be included in contracts for professional design/advisory services.</p>	<p><i>The Consultant must exercise the standard of skill, care and diligence in the performance of the Services that would be expected of an expert professional provider of the Services.</i></p> <p>OR</p> <p><i>The Consultant must ensure that the Services are performed with the professional skill, care and diligence expected of a skilled and experienced Professional Consultant.</i></p> <p>OR</p> <p><i>The Consultant will perform its Services in accordance with the highest/best/excellent standards of the profession.</i></p>	<p>Consult Australia advocates for a standard of care in contract that matches the common law standard:</p> <p><i>Services are performed with the standard of skill, care and diligence as is generally exercised by competent members of the consultant's profession performing services of a similar nature at the time the contracted services are provided.</i></p> <p>Consistent with Consult Australia's advocacy are the following provisions of standard contracts:</p> <ul style="list-style-type: none"> <li>• clause 4 of AS4122-2010 General Conditions of Contract for Consultants</li> <li>• clause 3.9.4 of FIDIC Consultant Model Services Agreement.</li> </ul>
Fitness for purpose	<p>A fitness for purpose obligation is essentially a promise for an outcome, failure to achieve the desired result will result in a breach of the term, regardless of whether due skill and care was exercised by the supplier.</p>	<p><i>The Consultant must ensure that the Services are fit for purpose.</i></p>	<p>Consult Australia advocates for removal of fitness for purpose obligations in favour of an appropriate standard of care which still ensures the consultant is responsible for the performance of their services in a manner consistent with what would be</p>

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	<p>Such terms are appropriate for contractors/constructors who build/construct the final product. Fitness for purpose obligations are not appropriate for consultants because consultants provide professional design/advisory services but do not build/construct the final product.</p> <p>A fitness for purpose obligation, especially in the form of a warranty is a term of concern because it represents a heightened standard of care. Further it is not likely to be covered by a consultant's typical PI insurance policy.</p>		<p>expected of a consultant performing the same or similar services.</p> <p>Consistent with Consult Australia's advocacy, the <i>FIDIC Consultant Model Services Agreement</i> does not include fitness for purpose provisions.</p>
Contracting out of proportionate liability	<p>Proportionate liability allows liability to be attributed to each party based on their degree of responsibility and therefore allows for appropriate risk allocation and encourages fair contractual dealings. A term that requires consultants to contracting out of proportionate liability legislation is a term of concern and does not represent a collaborative approach.</p> <p>Contracting out of proportionate liability legislation is also likely to trigger an exclusion in consultant's PI insurance policy because it extends the liability of a consultant beyond their statutory obligation.</p>	<p><i>It is agreed that section 43B of the Civil Liability Act 2022 (Tas) is excluded and does not apply to any claim arising out of or in connection with the Services provided under this Contract.</i></p>	<p>Consult Australia advocates for retaining proportionate liability, as a statutory right that should not be withheld from consultants.</p> <p>Consistent with Consult Australia's advocacy are the following provisions of standard contracts:</p> <ul style="list-style-type: none"> <li>• clause 29 of <i>AS4122-2010 General Conditions of Contract for Consultants</i></li> <li>• clauses 8.1-8.4 of <i>FIDIC Consultant Model Services Agreement</i>.</li> </ul>

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Uncapped liability	A liability framework without a limit on the consultant's liability is of concern and does not encourage collaboration because neither party to the contract can be certain of what liabilities might arise during the project and therefore how to manage that liability.	<i>The Consultant is liable to the Client in respect of loss arising out of or in connection with the Contract.</i>	<p>Consult Australia advocates for a more prudent approach, which is to cap the liability commensurate to the consultant's role in the project, a genuine assessment of the risks likely to arise as a direct result of consultant's services, and the consultant's ability to manage those risks.</p> <p>The preferred approach is to have an express monetary value (in the aggregate) limit on liability with minimal to no carve outs.</p> <p>Consistent with Consult Australia's advocacy are the following provisions of standard contracts:</p> <ul style="list-style-type: none"> <li>• clause 29 of <i>AS4122-2010 General Conditions of Contract for Consultants</i></li> <li>• clause 8.3 of <i>FIDIC Consultant Model Services Agreement</i>.</li> </ul>
Significant carve-outs/exclusions to a liability cap	Liability frameworks with significant carve outs is of concern and does not encourage collaboration because neither party to the contract can be certain of what liabilities might arise during the project and therefore how to manage that liability.	<p><i>(a) Subject to paragraph (b) the Consultant's liability to the Client in respect of loss arising out of or in connection with the Contract, in the aggregate for all claims, is limited to \$X</i></p> <p><i>(b) The Consultant's liability in respect of the following is not counted towards the limit in paragraph (a):</i></p>	<p>Consult Australia advocates for a more prudent approach, with an express monetary value (in the aggregate) limit on liability with minimal to no carve outs.</p> <p>Consistent with Consult Australia's advocacy are the following provisions of standard contracts:</p>

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		<p>(i) damage to, or loss or destruction of any property,</p> <p>(ii) breach of any law.</p>	<ul style="list-style-type: none"> <li>• clause 29 of <i>AS4122-2010 General Conditions of Contract for Consultants</i></li> <li>clause 8.3 of <i>FIDIC Consultant Model Services Agreement</i>.</li> </ul>
Insurance linked to liability	Where a liability framework links to a consultant's insurance, this unnecessarily exposes the consultant's full PI insurance policy.	<p>(a) <i>Subject to paragraph (b) and to the extent permitted by law, the maximum aggregate liability of the Consultant to the Client arising out of or in connection with the Contract (whether arising in contract, in equity, tort (including negligence), by way of indemnity, under statute or otherwise at law) is limited to \$X;</i></p> <p>(b) <i>Paragraph (a) does not apply to a liability of the Consultant to the extent that the Consultant is entitled to be paid or indemnified for the liability by an insurer under any policy of insurance or which the Consultant would have been entitled to be paid or indemnified for the liability by an insurer if the Consultant had effected and maintained the insurance policy.</i></p>	<p>Consult Australia advocates for a more prudent approach, which is to ensure the liability framework is focussed on liability for loss not about insurance coverage.</p> <p>Consistent with Consult Australia's advocacy are the following provisions of standard contracts:</p> <ul style="list-style-type: none"> <li>• clause 29 of <i>AS4122-2010 General Conditions of Contract for Consultants</i></li> <li>• clause 8.3 of <i>FIDIC Consultant Model Services Agreement</i>.</li> </ul>
Insurance requirements	Insurance requirements in consultant contracts are of concern where the requirements are unreasonable, for example in terms of duration or amount. A consultant's insurance is a business tool that the consultant can	<p><i>The Consultant must</i></p> <p>(a) <i>from the Award Date cause to be effected and maintained or otherwise have the benefit of Professional Indemnity Insurance which must:</i></p>	Consult Australia advocates against a consultant's insurance forming part of a consultant contract. Also, for this reason, insurance should not be incorporated into the liability framework (discussed above).

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	<p>fall back on in the unlikely event that they have made a negligent error, act, or omission that has given rise to a claim for loss. It provides the business the ability to settle the claim without jeopardising the entire business (depending on the size of the claim and the sum of insurance held). An insurance policy is generally not obtained to cover a consultant's liability under one contract but must cover all relevant liabilities of the consultant.</p> <p>As a client is not a party to the insurance policy, it has no rights to the consultant's insurance because insurance is a contract between the insurance underwriter and the consulting business.</p> <p>Particularly in the context of the current PI market conditions it is very difficult for a consultant to guarantee the terms on which they are able to purchase PI insurance (which is a commercial product) or for its duration beyond the existing policy date, noting that cover has to be renewed every 12 months with the insurer. The insurance underwriters set the terms of the policy, the cost of cover, and determine who they are willing to insure.</p>	<p><i>(i) be for the amounts specified in the Contract Particulars;</i></p> <p><i>(ii) be with an insurer acceptable by the client and</i></p> <p><i>(iii) be on terms which are satisfactory to the client</i></p> <p><i>(iv) have a retroactive date of no later than the commencement of the Services;</i></p> <p><i>(v) not be subject to any worldwide or jurisdictional limits which might limit or exclude the jurisdictions in which the Services are being carried out.</i></p> <p><i>(b) promptly provide the Client with evidence satisfactory to the Client that it has complied with the above paragraphs and as required by the Client from time to time.</i></p> <p><i>(c) punctually pay all premiums and other amounts payable in connection with the required insurance policy, and gives the Client copies of receipts for payment of premiums upon request by the Client</i></p> <p><i>(d) not cancel or allow an insurance policy to lapse during the period for which it is required by the Contract without the prior written consent of the Client;</i></p>	
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		<p><i>(e) do everything reasonably required by the Client to enable the Client to claim and to collect or recover money due under any of the insurances</i></p> <p><i>(e) maintain full and appropriate records of incidents relevant to any insurance claim for a period of 10 years from the date of the claim.</i></p>	
No fault/contractual warranties	<p>Warranties that require a consultant to guarantee an outcome or accept responsibility for matters beyond the consultant's control and/or make a promise that goes beyond common law or statutory requirements are of concerns and does not encourage collaboration.</p> <p>Contractual warranties are problematic in general as they extend the consultant's liability beyond the general common law standard of care.</p>	<p><i>The Consultant warrants that it will do all things necessary for the client to meet its own statutory obligations.</i></p> <p>OR</p> <p><i>The Consultants agrees that where the Head Contractor gives a warranty to the Principal under any clause of the Head Contract, that warranty is given by the Consultant to the Head Contractor on the same terms and conditions as the warranty in the Head Contract.</i></p>	<p>Consult Australia advocates for removal of warranties from consultant contracts. Consultant obligations should be stated as such without being warranties, for example:</p> <p>Consistent with Consult Australia's advocacy, there are no warranties in AS4122-2010 General Conditions of Contract for Consultants or FIDIC Consultant Model Services Agreement.</p>
Indemnities	<p>An indemnity is a promise by one party to compensate for loss or damage suffered or expense occurred by another party. Unqualified indemnities are of particular concern to consultants as they expand the consultant's scope of risk.</p>	<p><i>The Consultant indemnifies the Client against any claim or loss, however caused, brought against, suffered or incurred by the Client arising out of or in connection with the provision of the Services.</i></p>	<p>Consult Australia advocates for liabilities in a contract to be managed without the need for an indemnity.</p> <p>Consistent with Consult Australia's advocacy, there are no indemnities in FIDIC Consultant Model Services Agreement.</p>

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Member	Question	Hansard page no. or written
Giles	I've got, probably, a question on notice, relating to the interaction between the model client suggestion and the proposals around unfair contract terms or reforms. It may be easier for it to be on notice, given the time, but there are a couple of propositions that I'd be interested in a response to. First, if a model client approach were adopted, what additional work do you believe would be done by this law reform proposal, if any? Second, is the model client approach for which you are advocating in place in comparable other jurisdictions that you could talk about? Third, looking at both of these, I see the argument you make on behalf of your clients and the operation of the market. Can you point us to any implications for the return or cost to the public purse? The last point is one that you might be able to answer now. I'm looking for a bit of guidance on the application of the unfair contract reform, given that you've made the point effectively that it really goes to, particularly in your view, the position of smaller contractors. How extensively in the Commonwealth would we be directly engaging such a contractor? If you could touch on those questions, I'd be very grateful.	14 September 2021 Hansard p. 6

#### Consult Australia response

Our response is in parts, below. Please note that our Model Client Policy is available online [here](#).

#### The work of the model client policy vs unfair contract term protections

The Committee asked what additional work unfair contract term protections of the Australian Consumer Law would do (if they applied to government contracts) in addition to government clients adopting a model client policy.

Consult Australia's view is that the unfair contract term protections and model client behaviours are complementary to each other and by having both, industry participants (particularly small businesses) would have greater protection from unfair contracting practices of government.

By signing up to a Model Client Policy, a government client demonstrates that it acknowledges and is committed to addressing the inherent and substantial power imbalance that exists when government contracts with the private sector. However, there is no enforcement mechanism anticipated by the scheme.

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The current unfair contract term protections in the Australian Consumer Law (ACL) provide protection for consumers and small businesses. By applying to all government contracts (including by commonwealth, state and territory, and local government clients), small consultancy businesses would have greater protection from unfair contract terms in government procurement than they do now. The key benefit of the ACL protections is the independent adjudicator of what an unfair contract is, which is missing from the current arrangements between small businesses and government clients.

Consult Australia hopes that in combination a model client and ACL application to government client would minimise the 'take it or leave it' approach many government clients currently display when consultants seek amendments to the contracts presented to them by government clients (typically because they contain the types of onerous contract terms shown above). It is also hoped that it will lead to more government clients positively engaging with in industry associations such as Consult Australia to find solutions and increase productivity for both industry and government. Now, concerns we raise are often dismissed by government clients as being concerns by 'sore losers' who didn't win the job. This is very far from the truth, as Consult Australia never acts on the voice of only one business. The issues we raise are industry-wide concerns.

#### Is the model client approach in place in comparable other jurisdictions?

Consult Australia is not aware of model client policies being introduced in overseas jurisdictions, although it is noted that no other jurisdiction, save the US has the legal dispute issues Australia has in terms of construction and building industry. The FIDIC and NEC forms of contract, which are seen as more collaborative and balanced, are well used internationally. Australia with its bespoke contract terms has a reputation for onerous unbalanced terms that are a deterrent to overseas organisations that are used to a different contracting environment and culture.

#### Implications for the return or cost to the public purse

As indicated in our original submission to the Inquiry, Consult Australia, and many other industry groups and thought leaders, have called for procurement reform over many years on the basis that this will unlock greater productivity for the sector and the economy as a whole. For example, in 2015 Consult Australia commissioned Deloitte Access Economics to quantify the costs associated with sub-optimal procurement practices. The findings showed that with improvements in briefs, delivery models and contracts, the following efficiencies can be gained:

- reduce the costs of projects by 5.4%
- reduce delays to projects by 7%
- improve the quality of projects by 7%.

#### How extensively in the Commonwealth would we be directly engaging small businesses?

The extent of direct procurement by the Commonwealth with small business is somewhat limited, however small business consultants often operate in the supply chain on government projects. Further small business consultants are often involved in state/territory projects or local government projects that have a portion of Commonwealth funding.

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Consult Australia advocates for all government clients to be model clients and to embrace collaborative contracting, not only to benefit the businesses that contract directly with government, but also because government need to demonstrate to the market best practice. Consult Australia believes that in addition to the significant benefits for governments in their role as client, by committing to the model client policy government will also set the standard of behaviour for the rest of industry to follow.

Member	Question	Hansard page no. or written
McIntosh	I want to get your perspective regarding a quick anecdote about an Australian contractor providing a rail part to a government rail project that's a kilometre away from their business. Because the contract was awarded to a big player and they had some contractors out of China, this Aussie firm completely missed out. What is your perspective on how much this is happening out there in the market and what we should do about it? Also, do you have any thoughts on the amount of intellectual property theft that is happening on infrastructure projects? Again in the rail sector, a business found out that their rail product was completely ripped off by a foreign competitor. That product came into Australia and was used on a contract infrastructure by the Victorian government, and it wasn't until this part was found to be faulty and they called the Aussie company, that the Aussie company found that their whole product had been ripped off. So I want to get your perspective on these two issues. It's not only one company that has told me about this; it seems to be quite prevalent across the sector.	14 September 2021 Hansard p. 6-7

#### Consult Australia response

As the questions goes to construction products in the rail sector and does not seem to relate to design, advisory or engineering services, we do not think Consult Australia is best placed to answer this question. The Australasian Railway Association or the Australian Constructors Association may be better able to assist the Committee on these issues.

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## CONTACT

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