ASSOCIATION OF CONSULTING ENGINEERS AUSTRALIA

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PROVISIONS OF THE TRADE PRACTICES LEGISLATION AMENDMENT BILL (NO.1) 2007

JULY 2007

Submission to the Senate Economics Committee

ACEA SUBMISSION

Enquiries |

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The Association of Consulting Engineers Australia (ACEA) is an industry body representing the business interests of firms providing engineering, technology and management consultancy services.

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INTRODUCTION

ABOUT THE ACEA

The Association of Consulting Engineers Australia (ACEA) is an industry body representing the business interests of firms providing engineering, technology and management consultancy services.

There are over 250 firms, from large multidisciplinary corporations to small niche practices, across a range of engineering fields represented by ACEA with a total of some 29,000 employees.

ACEA presents a unified voice for the industry and supports the profession by upholding a professional code of ethics and enhancing the commercial environment in which firms operate through strong representation and influential lobbying activities. ACEA also supports members in all aspects of their business including risk management, contractual issues, professional indemnity insurance, occupational health and safety, procurement practices, workplace/industrial relations, client relations, marketing, education and business development.

CONTENTS

SUMMARY

It is ACEA's position that an amendment to the Trade Practices Act 1974 (TPA) is required to reinforce that all levels of Government (Federal, State and Local) must comply with the unconscionable conduct and market power provisions of the Act when they are procuring the services of the private sector.

This amendment is important because:

- Onerous contract terms that shift all/significant project risk to the private sector are not in the best interest of public sector procurers or the communities they serve.
- Distortion of competition in consulting engineering and other professional service industries so that projects are awarded on the basis of risk appetite, as opposed to quality of project outcome and value for money, are not in the best interest of all stakeholders.
- Small businesses are unable to contract with governments because of the proliferation of onerous contract terms that seek to shift unmanageable levels of risk to the private sector.
- Terms in government contracts that prohibit professionals from limiting their liability are contrary to the Professional Standards Act.
- Shifting excessive risk onto the professional firm exposes the firm to uninsurable liabilities and undermines the intention of the Proportionate Liability Legislation.

ACEA's call for the TPA to be amended to address these issues was supported by a recommendation in the Productivity Commission's Inquiry Report on the Review of National Competition Policy Reforms in February 2005 and is supported by the Australian Chamber of Commerce and Industry and the Small Business Coalition.

When it was announced towards the end of last year that the market power and unconscionable conduct provisions of the TPA were being reviewed ACEA sought to engage in the industry consultation process. ACEA has not received a response or been consulted by Treasury on the review and development of the Bill. ACEA is disappointed that despite the support for this amendment it would appear that the Government has not sought to progress.

ACEA does welcome the proposed amendment to section 46 of the Trade Practices Act to provide that a corporation must not take advantage of a substantial degree of market power, either in the market in which the power is held or in any other market. ACEA however believes that this amendment does not afford adequate protection to small business without the clarity that a 'corporation' includes all levels of government when they are procuring the services of the private sector.

RECOMMENDATION

It is recommended that the Provisions of the Trade Practices Legislation Amendment Bill (No.1) 2007 be amended to include a provision that specifies that the Trade Practices Act (including Section 46 and Part IVA) applies to all levels of government (Federal, State and Local) when procuring the services of the private sector.

GOVERNMENT AS A CLIENT OF THE CONSULTING INDUSTRY

Governments, Federal, State and Local, are major clients of consulting engineering firms. The professional services of the consulting engineering industry are procured by departments and authorities including; public works, road and rail authorities, water corporations, electricity generators, planning and environmental authorities and local councils, to name but few.

Consulting engineering firms are contracted to assist in the delivery of critical infrastructure including, mining and heavy industrial projects, roads, electricity and pipelines, telecommunications, offices, bridges, railways, harbours, industrial works, water and sewerage works and recreational facilities.

The consulting engineering industry in Australia is generally characterised by relatively small firms. The latest available data shows that more than ninety-six per cent of consulting engineering firms are small businesses employing fewer than 20 people, only 580 firms employ more than 20.

Small consulting engineering firms in particular have limited market power and low capital bases. It is for this reason that the next stage of the Trade Practices Act 1974 (TPA) reforms, to strengthen the misuse of market power provisions and unconscionable conduct provisions of the TPA, is of particular interest to ACEA members.

The public sector is a major client for consulting engineering firms. It comprises approximately 50% of the projects undertaken by the industry, and for some particular firms it constitutes the major part of their service delivery. Public sector client organisations have major market power in the consulting engineering industry (in most cases near monopolistic power because few or no private sector clients exist which can, or are allowed to, compete). They can and do dictate their own terms and conditions, and significantly influence market operations.

Public sector clients in Australia's building and construction industry are increasingly reluctant to accept the risks and liabilities associated with project developments. ACEA members regularly report the use of onerous contract terms by public sector clients to shift risk and liabilities onto the consulting engineering firm. Many of these risks and liabilities are outside the control and reasonable management of the firm.

For example, some public sector clients have standard conditions of contract that include a provision requiring that the consultant contract out of their statutory right under the Proportionate Liability Legislation and prohibit consulting engineering firms from joining a professional standards scheme under the Professional Standards Legislation. The pieces of legislation were introduced by the Commonwealth and all State Governments because it was recognised that,

"*The operation of insurance and the law of joint and several liability has given rise to professionals often being singled out as the sole target for legal action in proceedings for property damage and purely financial loss even when the professional is only one of the parties involved and may have only contributed in a minor way to the loss. These factors have led to an exponential increase in professional indemnity premiums which are not sustainable*."[1]

[1] In the Joint Communiqué issued 15 November 2002 from the Ministerial meeting on Public Liability insurance, Ministers issued the following statement.

The use of clauses demanding that the consultant forego the legislation introduced to address this problem is contrary to Ministerial intention. If a consultant seeks to vary such clauses there is a common attitude expressed by the public authorities/agencies that these clauses are not negotiable and if you don't sign, you don't get the work. ACEA believes that this is a clear example of misuse of market power and it should be clear that this behaviour is not tolerable.

The following is a standard clause currently found in a State Government contract:

> *"CONDITIONS RELATING TO THE OPERATION OF THE PROFESSIONAL STANDARDS ACT 2005*
>
> *6.1 Conditions of Appointment*
> *The Department will only appoint, as successful Tenderer, Respondents who agree to the following conditions, when relevant.*
>
> *6.2 No scheme in force*
> *If no scheme in force under the Professional Standards Act 2005 applies to the Respondent, the Department will require the Respondent to waive all present and future rights, as against the Crown, to claim any limitation of liability provided by any future scheme under the Professional Standards Act 2005, in relation to future legal liability, claims or proceedings arising from, or attributable to, the Respondent delivering the Department's Requirements including a wrongful (including negligent) act or omission.*
>
> *6.3 Scheme in force*
> *If a scheme in force under the Professional Standards Act 2005 applies to the Respondent, the Respondent will obtain a higher maximum liability for cases to which the scheme applies and for a level of liability not lower than the level described in the Specification."*

Further examples of onerous clauses imposed through a range of Commonwealth, State and Local Government contracts can be found at **annexure 1**.

The use of such terms impact on small consulting engineering firms through the tender process for public sector contracts or may be replicated in sub-contracting agreements where a contractor is engaged by the public sector procurer. The use of onerous contract terms by the public sector also has an indirect impact on small firms because private sector contractors follow suit and so the terms become standard across the public and private sector. Small firms are left unable to negotiate more reasonable terms once such practice has become adopted across the market.

Public sector procurers use tender procedures to demand compliance with their terms and conditions, and on some occasions confidentiality agreements to prevent discussions of the terms outside the framework of the client–consultant relationship. A factor in the trend to use onerous terms in public sector contracts is the ambiguity as to whether the TPA applies to governments.

According to how the courts have interpreted the meaning of Section 2 of the TPA, some government departments and agencies have deemed themselves (in some circumstances which significantly relate to our member interests) not to have obligations under the Act, on the basis that they are not engaged, when procuring the services of the private sector in '*carrying on a business'*, or that they are exempt in 'the public benefit'.

It is for this reason that ACEA is seeking an amendment under the Trade Practices Legislation Amendment Bill (No.1) 2007 be amended to include a provision that specifies that the Trade Practices Act (including Section 46 and Part IVA) applies to all levels of government (Federal, State and Local) when procuring the services of the private sector.

SUPPORT FOR ACEA'S RECOMMENDATION

GOVERNMENT

In 2003, the Senate Committee Review of the *Effectiveness of the Trade Practices Act in Protecting Small Business* expressed the view that where Commonwealth Government purchasing involves 'trade, commercial transactions or engagement' and is 'conducted with some degree of system and regularity', it is very likely that procurement already comes within the meaning of conducting a 'business' under the Act.

Importantly the Committee found that for clarity, the TPA may need amendment to make it clear and explicit that s.51AC applies to the Commonwealth Government. The Committee also agreed that Government agencies in *all jurisdictions* should conduct commercial activities without engaging in unconscionable conduct. Amending the TPA so that Part IVA, including s.51AC, applies to State and Territory Governments (including Local) would have this effect.

In 2004, in its response to the Senate Committee Report, the Government agreed with the Committee regarding application of the TPA to Government departments and agencies, but concluded that clarification of the TPA was unnecessary because section 2A of the TPA states that the Commonwealth is bound by all provisions of the Act in circumstances where it is carrying on a business and this includes Part IVA. This response does not address the many procurement circumstances where public authorities evoke the exemption clauses (i.e. they are not carrying on a business, or the public interest is involved). It has also not addressed many public sector procurers' approach to contracting and risk management.

More recently, the Productivity Commission's Inquiry Report on the Review of National Competition Policy Reforms February 2005 raised the lack of clarity in this area, and also recommended that the Australian Government should give consideration to amending the TPA to ensure that all Federal, State and Territory (including Local) Government procurement activities are covered by the Act.

In June 2005 ACEA received written advice from the Australian Competition and Consumer Commission (ACCC) that, in their view, the jurisdiction of the Act does not extend to the conduct of public sector agencies engaged when procuring goods or services for their own consumption. However in a later letter to ACEA (December 2005) the ACCC advised that Commonwealth entities are bound by the TPA as a whole and it is State governments that are only bound by Part IV of the Act and that an amendment to the Act would be required in order to give effect to the whole Act. This indicates that the extent to which government activities are covered by the Act needs clarification.

ACEA notes that once again government procurement practices have been cited as an area of concern for Australian business in the report of the Regulation Taskforce report '*Rethinking Regulation*' published in January 2006. The report notes,

"*Some agencies seem to adopt 'one size fits all' approach to tendering, with requests for tender for smaller projects requiring similar documentation and obligations – including, in some cases, insurance requirements – as for very large complex projects. In some cases, the additional requirements agencies impose on business seem to be against the spirit of the* [Commonwealth Procurement] *guidelines".*

The Government's response to the recommendation on this issue was to write to Chief Executives of government agencies to review their instructions relating to procurement, to identify and address any unnecessary requirements placed on potential tenderers. It is not known whether or not this has yet occurred.

INDUSTRY

ACEA's recommendation to amend the Trade Practices Act to ensure that it applies to all levels of government is in keeping with the position of the Australian Chamber of Commerce and Industry. Its Procurement Policy states that,

"*A business-friendly purchasing culture should pervade government procurement guidelines. A prime example of the lack of the required culture is the manner in which businesses are charged for tendering documents, the proportionate impact of which increases as the size of the firm decreases. To assist in achieving this business friendly purchasing culture the following principles should be applied:*

- *Application of the Trade Practices Act to all government procurement activities.*"

The Small Business Coalition (SBC) policy is also in keeping with ACEA's recommendation. The Coalition's policy agenda for 2007/8 includes:

"The SBC also receives regular member complaints regarding onerous government contractual terms that, for example, seek to absolve government of all liability for risk by requiring business to accept unlimited liability. Such terms are well beyond the terms of normal private enterprise contracts and would not be permitted under the Trade Practices Act. The SBC considers that government departments engaging in procurement should be subject to the Trade Practices Act and calls on the Government to amend the Act accordingly.

In the interim, the SBC considers that immediate action should be taken to address such behaviour, through a government wide policy that prevents onerous contractual clauses."

CONCLUSION

ACEA regularly surveys its membership. The availability and affordability of Professional Indemnity (PI) Insurance and limitation of liability were clearly identified as the most significant issues for their business. Small firms in particular reported that public sector clients continually demand more onerous contract terms that require unnecessarily high levels of PI and require the firm to accept unlimited liability which effectively preclude small businesses from tendering (confirming the conclusions drawn in the Rethinking Regulation Report). The following is a case study, which highlights this problem.

Case study

A small to medium-size consulting engineering firm with over 30 years of experience, and a track record of award-winning bridge design, was the initial successful tender to a government client for a $3 million bridge design project, for which the consultant's fee was $50,000. The Professional Indemnity Insurance (PI) cover required by the client was $20M.

The consultant had PI cover of $15M. However, he was unable to secure the additional $5M PI insurance cover required by the client at a reasonable commercial rate, or to negotiate a lower cover with the client. On this basis, although the consultant had initially been notified that he was the preferred tenderer, he was forced to withdraw from bidding for the project.

On protest, the client later agreed that for such a project their PI requirements were unreasonably high, and reduced their requirement to $10M, a level which the consultant could easily have met.

However by this time the tender had been awarded to another consultant who had the $20M cover (a major firm).

Although the PI market has softened over recent times for small consulting firms the cost of PI insurance remains high and some ACEA small firms reported that they are considering the withdrawal of their services

as a result. However while clients through their contracts demand high levels of PI insurance and require firms to accept liability for risks that are beyond their control (so are most likely uninsured) small consulting firms will continue to withdraw from the market. There is also little incentive for small business investment and entrepreneurship.

ACEA does not believe that the publication of guidelines on procurement and probity alone will be sufficiently effective to alter the contracting behaviour of public sector procurers across either Commonwealth or State and Territory Governments.

It is ACEA's position that without certainty in the Legislation the use of onerous contract terms will continue to proliferate in this market to the detriment not only of the consulting engineering industry, but also to government clients and the community.

ANNEXURE 1: PUBLIC SECTOR CONTRACTING

ACEA is concerned by the use of certain contract terms in public sector contracts, which expose government agencies to uncertainties in project outcomes and consulting engineers to liability(ies) which may be beyond their control, are unmanageable and which can be excluded from cover under professional indemnity insurance policies.

This is important because:

- Onerous contract terms that shift all/significant project risk to the consultant is not in the best interests of public sector procurers;
- Distortion of competition so that projects are awarded on the basis of risk appetite as opposed to quality of project outcome and value for money are not in the best interest of all stakeholders.
- Small businesses are unable to contract with public agencies because of contractual terms that seek to shift unmanageable levels of risk to the consultant;
- Shifting excessive risk to the consultant can expose the firm to uninsurable liabilities and undermines the intention of the Proportionate Liability Legislation;
- Onerous terms in contracts have a disproportionate impact on the risk profile of consultants; and
- The industry will continue to experience major skills shortages in an environment that exposes consulting engineering firms and their clients (public sector procurers) to unmanageable levels of risk rather than one which encourages high standards of engineering excellence and innovation.

The clauses in public sector contracts that ACEA perceives are in common use and that specifically give rise to these concerns are clauses relating to:

1. Expert/Highest Duties of Care
   Impose a standard of care above that required by Common Law and is thereby excluded from PI cover.
2. Fitness for purpose
   Requiring the consultant to guarantee the outcome of the project when this is beyond their control and management.
3. Warranties
   Transferring project risk to the consultant through contractual guarantees thus extending the consultants obligations beyond the professional services that they are providing.
4. Indemnities
   Transferring project risk and extending the consultant's responsibilities beyond their own actions to the actions of others, which cannot then be covered by PI insurance.
5. Limitation of liability
   No provision for limiting the consultant's liability, thus in conjunction with the clauses described in 1, 2, 3, 4, 6, 7 & 8 to expose the consultant's business to unmanageable, unrealistic and unsustainable levels of risk.
6. Proportional Liability Legislation
   Exclusion of the Proportionate Liability Legislation exposing both the client and consultant to uncertainty of outcome in the event that a claim arises and threatens the extent to which the consultant's PI policy will respond.

7. Professional Standards Legislation
   Prohibiting consultants from joining Professional Standards Scheme, thereby excluding them from schemes designed to raise standards for the benefit of all stakeholders.
8. Insurance
   Standard requirements for high levels PL and PI insurances without regard for the size of the project and risk involved.Liquidated damages
   Imposing damages on consultant for delays that may not have been caused by the consultant and fall outside PI insurance cover.

ACEA has reviewed a random sample of 24 publicly available standard contracts in use that highlight these issues. ACEA has also consulted a professional risk management and PI insurance broker and our comments on the impact on PI insurance reflect the advice received from the broker.

DUTY OF CARE

Set out below (TABLE 1) are some examples of the various types of "Standard of Care" clauses in use. The "onerous clauses" require that the consultant performs to the 'best/high/highest' standards of care.

There is no definition of what corresponds to the 'highest/expert' etc standards of care and this can lead to great uncertainty of outcome should a matter be taken to court on the basis that the professional failed to perform to best practice or highest standards in the industry.

Further, to the extent that these types of clauses may result in a liability being imposed upon the consultant which exceeds the level of liability and standard of care required by the Common Law, these clauses may result in liability which is excluded from cover under the consultant's professional indemnity policy.

ACEA's analysis showed that some agencies are using standard of care clauses that do not seek to impose higher standards on the consultant and are good examples of preferred wordings (TABLE 2). However, it should be noted that the wording varies in each and does not appear to be a common wording.

ACEA found that two of the contracts reviewed did not contain duty of care wordings. This is also a more acceptable approach, because the matter is then determined by the consultant's common law duty.

TABLE 1: ONEROUS DUTY OF CARE WORDINGS

Agency	**Duty of Care**
(Fed)	Must perform services in a diligent manner and to the highest standard of skill and care to be expected of a contractor that is a specialist in the provision of the type of services required; so that the project aims are fulfilled.
(Fed)	The consultant must perform the services at a high standard and in accordance with professional standards of conduct applying to the performance of such work at the time and/or as required by the specifications.
(Fed)	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.

(Fed)	The contractor agrees to perform the services at the standard recognised as best practice in this profession.
(NSW)	The contractor 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.
(QLD)	The consultancy services must be carried out with all due care and skills and in accordance with the highest applicable professional standards, principles and practices.
(SA)	The consultant must perform its obligations under this Agreement professionally, carefully, skilfully and competently; in a timely and efficient manner; in accordance with the best practices current in the consultant's industry; in the interests of the client without favour to any other person; and strictly in accordance with he standards referred to in the services specification.
(WA)	If no standards for the services are specified in the specification, then the contractor must supply the services in accordance with the highest standards that usually apply to the supply of the services and with proper skill, care and diligence.
(WA)	If no standards for the Services are specified in the Specification, then the Contractor must supply the Services in accordance with the highest standards that usually apply to the supply of the Services and with proper skill, care and diligence.

TABLE 2: SATISFACTORY DUTY OF CARE WORDINGS

(NSW)	The Consultant must perform the Services to that standard of care and skill to be expected of a consultant who regularly acts in the capacity in which the Consultant is engaged and who possesses the knowledge, skill and experience of a consultant qualified to act in that capacity.
(NSW)	The consultant shall perform the services diligently, in accordance with the specified timeframes and with all necessary skill and care expected in the provision of such services.
(NSW)	The contractor must perform the services diligently and to the standard of skill, care expected of a contractor who is proficient and experienced in providing services in the nature of the service.
(NSW)	The Contractor must perform the Services: (a) in a diligent manner; to the standard of skill and care of a Contractor proficient and experienced in performing the Services;
(QLD)	The consultant shall exercise reasonable skill, care and diligence in performance of all the obligations of the consultant.

(QLD)	In carrying out Design Development Work, the Managing Contractor will exercise the degree of skill and care expected of an experienced, specialist design professional, who regularly acts in the capacity in which the Managing Contractor is engaged. In carrying out Documentation Work, the Managing Contractor will exercise a degree of skill and care expected of a design professional who regularly acts in the capacity in which the Managing Contractor is engaged and who possesses the knowledge, skill and experience of a competent design professional qualified to act in that capacity.
(QLD)	Act professionally at all times and exercise skill, care and diligence in the performance of the contract.
(SA)	In carrying out the Services, the Supplier must: perform the Services skilfully and in conformity with reasonable standards.
(VIC)	The Contractor must: exercise due care, skill and judgment and perform the Services in a competent and professional manner and in accordance with generally applicable industry standards;
(VIC)	The Contractor shall exercise all due care skill and judgement and at all times act in accordance with all applicable professional standards, principles and practices.
(VIC)	In consideration of the payments to be made by the Corporation the Provider shall provide professional services and carry out the Assignment as detailed in Part 4 in accordance with sound practice employing due professional skill, care and diligence.
(WA)	AS4122 – The Consultant shall perform the Services to that standard of care and skill to be expected of a Consultant who regularly acts in the capacity in which the Consultant is engaged and who possesses the knowledge, skill and experience of a Consultant qualified to act in that capacity. The Consultant shall; with due expedition and without delay and in accordance with the Program if any, provide all professional skill and advice required for carrying out the services.
(WA)	During the term the consultant shall provide the services for the benefit of XX and in doing so shall exercise a professional standard of skill, care and diligence in the performance of those services and other obligations under this agreement.

FITNESS FOR PURPOSE

Fitness for purpose clauses require the consultant to guarantee that the services provided by the consultant will fulfil the purposes required by the client. This purpose is almost always not defined. It is not possible to reasonably expect the consultant to second guess the client's intended purpose for the design now and into the future.

Engineering design is heavily codified and subject to agency guidelines, etc. It is vital that consultants are able to reasonably rely on these codes and guidelines and hence it is important that the fitness for purpose clauses recognise this need. Furthermore, consultants rely on data provided by the agencies and other organisations, the consultant can only provide the service that has been set out in the scope of works. It is an onerous contract term to expect the consultant to guarantee fitness for purpose without clear and concise definition of what the purpose will be now and into the future. The result otherwise will be that the services are not fit for purpose intended by the client for reasons that are not the fault of the consultant.

Section 74 of the *Trade Practices Act 1974* (Cth) specifically excludes services of a professional nature provided by a qualified engineer from an implied warranty that the services provided are reasonably fit for purpose.

Claims which arise out of 'fitness for purpose' clauses, particularly those which require the consultant to guarantee, warrant or ensure a certain outcome is achieved, can give rise to a 'contractually assumed liability' exclusion under the consultant's professional indemnity insurance policy.

TABLE 3 sets out the fitness for purpose clauses found. The remaining eleven contracts reviewed do not contain fitness for purpose clauses, this is ACEA's preferred approach.

TABLE 3: FITNESS FOR PURPOSE CLAUSES

Agency	**Fitness for Purpose**
(Fed)	The project management contractor acknowledges that the construction works are intended for use (when complete) by the Partner Government. The project management contractor must ensure that: the construction works (when complete) are suitable for use by the partner government having regard to (1) the education and training of those partner government personnel and stakeholder personnel who will be involved in the use of the construction works; (2) the culture of the partner country; (3) existing partner country infrastructure; the construction works (when complete) complement existing infrastructure in the partner country; there is sufficient involvement by the partner government and other stakeholders in the conception, design and construction of the construction works to ensure that those persons identify with the construction works and as a result will actually use the construction works; and the construction works fulfil the project aims.
(Fed)	The services will be carried out with due care and skill and that any material supplied in connection with the services will be reasonably fit for the purpose for which it is supplied.
(Fed)	The Consultant must (i) ensure that the Design Documentation complies with the requirements of the Contract; and (ii) use its best endeavours to ensure that the Design Documentation will be fit for its intended purpose.
(Fed)	The contractor agrees to ensure that the services are performed properly and completely, including in a manner consistent with the purpose stated in Part A (a) [Purpose].
(NSW)	Final draft documents submitted for the Corporation's review shall represent a level of completeness that the Consultant believes is final and fit for purpose. All final documents prepared by the Consultant must have been prepared by competent professional staff and have been checked for accuracy, compliance with relevant codes, ordinances and regulations, and the requirements of the Agreement. The final draft documents and final documents shall either be signed by the Principal nominated in the Schedule or accompanied by a written statement signed by the Principal nominated in the Schedule certifying that the documents are in accordance with the above requirements.
(NSW)	The contractor must ensure that all contract material produced by it is suitable in all respects for its intended purposes, as disclosed by XX.
(NSW)	The contractor must use its best endeavours to ensure that the services will be fit for their intended purpose.

(QLD)	The subject matter to the consultant services or contract materials shall be free from defects and errors and appropriate for the intended use with regard to the assumptions that the consultant can be reasonably expected to make in accordance with sound engineering principles.
(QLD)	The Managing Contractor will complete all Design Development Work in accordance with the requirements of the Contract so that the Developed Design will be fit for its intended purpose in all respects.
(QLD)	The contractor will provide the goods or complete the services in accordance with the contract for the term, through its key personnel where nominated, to the standard and in a proper manner, frequency, quantity and times specified in the specification, letter of acceptance or purchase order.
(SA)	The design shall be fit for its intended purposes. With regard to: durability; aesthetics and visible features; safety considerations; whole of life performance; user cost; functional and operational requirements (e.g. performance, reliability and maintainability); and environmental performance.
(WA)	AS4122 – The Consultant has examined the Brief and the Services are suitable, appropriate and adequate for the purpose stated in the Brief, having regard to the assumptions that the Consultant shall be reasonable expected to make in accordance with sound professional principles.
(WA)	AS4122 – The Consultant has examined the Brief and the Services are suitable, appropriate and adequate for the purpose stated in the Brief, having regard to the assumptions that the Consultant shall be reasonable expected to make in accordance with sound professional principles.

WARRANTIES

Warranties provide a contractual guarantee that the consultant will behave or perform in a certain way during the term of the contract. Warranties typically extend the obligations of the consultant beyond their common law duties of care. Some professional indemnity policies exclude cover for liability assumed under an express warranty unless such liability would have attached notwithstanding the express warranty.

Warranties are used as a method of transferring risks onto the consultant that are often not within their control or responsibility.

If the consultant fails to observe the warranty given it is a breach of a contractual obligation. The Proportionate Liability Legislation defines an 'apportionable claim' as one which arises from a failure to take reasonable care. If a breach of warranty is defined as a breach of a contractual duty rather than a failure to take reasonable care, it is unlikely that it will be covered by the Proportionate Liability Legislation. Use of warranty clauses is therefore a way for clients to circumvent the Proportionate Liability Legislation.

TABLE 4 are examples of the warranties found in contracts that impose onerous requirements on the consultant. These typically require the consultant to warrant their standards of care and that the work will be fit for purpose.

The twelve remaining contracts reviewed do not contain warranties of this nature, this is ACEA's preferred position.

TABLE 4: WARRANTY CLAUSES

Agency	Warranties
(Fed)	The project management contractor represents and warrants that in entering into this contract, it has made its own enquiries and has not relied on any representation made or alleged to have been made by XX. The project management contractor acknowledges that XX, in entering into this contract is relying on the foregoing representation and warranty by the project management contractor.
(Fed)	The consultant warrants that it has the necessary expertise, experience, capacity and facilities required to perform the services in accordance with this deed, and the services will be carried out with due care and skill and that any material supplied in connection with the services will be reasonably fit for the purpose for which it is supplied.
(Fed)	The Consultant warrants that each of its subconsultants will exercise the standard of skill, care and diligence that would be expected of an expert professional provider of the service being provided by the subconsultant.
(NSW)	The consultant warrants that all personnel engaged in the performance of the services are properly qualified, competent and experienced. The consultant warrants that it will not, in carrying out the services infringe or breach or permit or suffer to be infringed or breached any IP rights of any third party. The consultant warrants and undertakes that all work done in connection with the services will comply and conform with all applicable legislation and any regulations, by laws, ordinances, or orders made under such legislation as well as any applicable codes of conduct, policies, guidelines, quality assurance standards and all relevant Australian standards applicable to the services.
(QLD)	Consultant Warranty: The consultant shall take reasonable actions to ensure that : a) it has the necessary skills, and experience to complete the consultant services in accordance with the contract documents, and b) its employees, authorised sub-consultants and agents have the necessary skills and experience to perform those obligations of the consultant which are allotted to them by the consultant, and c) the subject matter to the consultant services or contract materials shall be free from defects and errors and appropriate for the intended use with regard to the assumptions that the consultant can be reasonably expected to make in accordance with sound engineering principles.
(QLD)	The consultant warrants (and the Principal relies upon this warranty) that: it and its key personnel have the qualifications, admissions and memberships (if any) specified in the officer and it is a condition of this agreement that the consultant and its key personnel must retain memberships whilst performing the consultancy services; The consultancy services must be carried out with all due care and skills and in accordance with the highest applicable professional standards, principles and practices; the information contained in the offer as to the structure, viability, reliability, insurance cover, capacity, experience and expertise of the consultant or its key personnel is correct; and it has established and will comply with an maintain during the term, the quality and assurance arrangements (if any) set out in the terms of reference.

(QLD) The Managing Contractor acknowledges that all warranties and indemnities given under the Contract will remain unaffected notwithstanding: (a) any advice, review, comment, approval or direction by the Principal, the Principal's Representative or the employees, consultants or agents of the Principal in respect of: (i) any matter which the Managing Contractor has an obligation under the Contract to undertake its own investigations, and (ii) Design Development Work, Documentation Work or Construction Work produced by the Managing Contractor; (b) any Variation under clause 53; (c) any modifications to the Project Brief, Schematic Design, Developed Design or the construction Documentation pursuant to clause 19;and that the Managing Contractor engages any Subcontractor or any Consultant in connection with any of the work under the Contract (whether with or without the consent of the Principal). The Managing Contractor acknowledges that the Principal has entered into the Contract in reliance upon the warranties set out in the Contract.

(QLD) The contractor warrants that it has the qualifications, admissions and memberships (if any) specified in the Letter of Acceptance, Order, Specification or Schedule 2.

(SA) Prior to the issue of the Final Certificate, the Contractor shall provide a certificate warranting to the Principal that the Contractor, in performing the work under the Contract, has: (i) examined and carefully checked any design included in the Principal's Project requirements and established that such design was suitable, appropriate and adequate for the purpose stated in the Principal's Project Requirements; (ii) executed and completed the Contractor's design obligations and produced the design documents to accord with the Principal's Project Requirements; and (iii) executed and completed the work under the Contract in accordance with the design documents so that the works: are fit for their stated purpose (which stated purpose shall include any purpose normally implied); and comply with all Contract and Legislative requirements.

(VIC) The Contractor represents and warrants to XX at the date of this Contract and throughout the provision of the Services that: a) it has the legal right and power to enter into this Contract; b) it has entered into this Contract in its own right and not as trustee of any trust or as an agent on behalf of any other entity; c) its execution, delivery and performance of this contract has been duly and validly authorised by all necessary corporate action; d) it has or will acquire the requisite technology, skill, personnel and ability to enable it to perform all of its obligations under this Contract; e) it has used its best endeavours and will continue to use its best endeavours to fully inform itself on all aspects of the Services; f) all insurance policies are or will be in place and will remain in force in accordance with the requirements of this Contract; and g) it has the legal right to use any third party's intellectual property supplied by the Contractor for the purposes of this Contract, including but not limited to computer software.

(VIC) The Contractor hereby warrants that- (a) the Project Services shall be carried out personally by the Contractor's Staff; (b) the Project Services shall be carried out with all due care and skill and in accordance with the highest applicable professional standards, principles and practices; (c) it shall provide such further Information in relation to the provision of the Project Services as reasonably required by the Department. (d) the Information contained in the Tender as to the structure, viability, reliability, insurance cover, capacity, experience and expertise of the Contractor or the Contractor's Staff is correct; (e) the Contractor's Staff are members of the professional body stated in the Tender and it is a condition of this Agreement that the Contractor's Staff shall remain members whilst performing the Project Services; and (f) it has established and will comply with and maintain during the Term, the quality assurance arrangements set out in Schedule 2.

INDEMNITIES

By providing an indemnity, the consultant assumes the client's potential or actual legal liabilities, thereby in a practical sense be providing a form of insurance.

Indemnities are used not only to cover property damage and personal injury, but also used to cover all liabilities including, negligence, any loss suffered including industrial actions and breaches of intellectual property rights. The indemnities extend to protect the client from third party claims in some cases which may arise many years after the project is completed. Broad indemnities that extend the liability of the consultant beyond that which can be covered by their Professional Indemnity Insurance policy can expose consultants to extensive liabilities that are unsustainable and unmanageable.

Indemnities can potentially alter the common law and contractual framework within which a client – consultant relationship operates, by over-riding other provisions of the contract. In summary, where broadly worded indemnities are used:

- The effect of the indemnity clauses is to circumvent court proceedings for established liability, for example the client may not have to prove negligence.
- The client may not have to show the consultant's action actually caused the loss.
- The client does not have to take steps to mitigate the loss.
- The loss does not have to be reasonably foreseeable, and hence can extend to consequential losses.
- The Consultant cannot claim that there was any contributory negligence by the client without an express provision in the indemnity that allows it.

Only three of the contracts included in the review did not contain indemnity clauses of the nature set out below, it is ACEA's preferred position that indemnity clauses are not included in consultant contracts.

TABLE 5: INDEMNITY WORDINGS

Agency	**Indemnity**
(Fed)	The project management contractor indemnifies XX against any loss, damage, cost or expense incurred by XX as a result of the breach by the Project Management Contractor of any provision of this contract. The project management contractor indemnifies XX, its officers, employees, agents and contractors (except the project management contractor) from and against any loss, damage, cost expense (including the costs of defending or settling any action or claim) or liability whatsoever in respect of: (a) loss of or damage to property of XX or (b) personal injury (including death) to any person or loss of or damage to any property, arising our of or by reason of anything done or omitted intentionally or negligently by the project management contractor in connection with the Services.
(Fed)	The consultant must indemnify XX from and against any physical injury to persons (including death), or loss or damage to property in so far as the injury or damage is attributable to any at of the consultant or its employees, agents or subcontractors in the course of carrying out of the consultancy services, irrespective of whether there was fault on the part of the person whose conduct gave rise to the relevant liability, loss or damage, or loss or expense.

(Fed)	The Consultant must indemnify the Commonwealth against: (i) any liability to or claim by a third party including a subconsultant or Other Contractor; and (ii) all costs, losses and damages suffered or incurred by the Commonwealth, arising out of or in connection with any breach by the Consultant of a term of this Contract. All obligations to indemnify under this Contract Survive termination of the Contract. 13.2 Except for claims for: (a) an extension of time under clause 8.5; (b) payment under clause 10 of the original Fee specified in the Contract Particulars; (c) a Variation instructed in accordance with clause 9.2 or to which clause 13.1 applies; or (d) contribution or indemnity for loss or damage caused or contributed to by the negligence of the Commonwealth where a third party (other than a subconsultant of the Consultant or other party for whom the Consultant is legally responsible) makes a claim (whether in tort, under statute or otherwise at law) against the Consultant, the Consultant must give the Contract Administrator the notices required by clause 13.3 if it wishes to make a Claim against the Commonwealth in respect of any direction by the Contract Administrator or any other fact, matter or thing (including a breach of the Contract by the Commonwealth) under, arising out of, or in any way in connection with, the Services or the Contract, including anything in respect of which: (e) it is otherwise given an express entitlement under the Contract; or (f) the Contract expressly provides that: (i) specified costs are to be added to the Fee; or (ii) the Fee will be otherwise increased or adjusted, as determined by the Contract Administrator. If the Consultant fails to comply with clause 13.1, 13.2, 13.3 or 13.4: (a) the Commonwealth will not be liable (insofar as it is possible to exclude such liability) upon any Claim by the Consultant; and (b) the Consultant will be absolutely barred from making any Claim against the Commonwealth, arising out of, or in any way in connection with, the relevant direction or fact, matter or thing (as the case may be) to which clause 13.1 or 13.2 applies.
(Fed)	The Contractor agrees to indemnify XX (and its Personnel) against any Loss reasonably incurred, at any time, in relation to this Agreement, from any Claim, regarding or incidental to any: (a) fault, including deficient or inaccurate information, negligence (whether involving acts or omissions) or wilful misconduct, of the Contractor or its Personnel; (b) complaint or Claim under clause 8.2 [Complaint handling]; (c) breach of clause 9 [Privacy, confidentiality and no conflict of interests]; (d) breach of Intellectual Property Rights, whether involving any assignment, licence or warranty under clause 11 [IPRs]; and (e) workers' compensation or other insurance payments or Claims, including for premiums or compensation paid in relation to the Contractor or its Personnel.
(NSW)	The Consultant indemnifies the Principal from and against all actions, claims, costs, expenses and damages (including the costs of defending or settling any action or claim) in respect of: 1. loss of or damage to property of the Principal; or 2. personal injury (including death) to any person or loss of or damage to any property, arising out of or by reason of anything done or omitted intentionally or negligently by the Consultant in respect of the Services. The Consultant's liability to indemnify the Principal is reduced proportionally to the extent that an act or omission of the Principal or employees or agents (other than the Consultant) of the Principal may have contributed to the injury, damage or loss.

(NSW) The consultant must indemnify and keep indemnified the Principal and its officers, employees and agents ("those indemnified"), from and against all actions, proceedings, claims, demands, costs, losses, damages and expenses (including reasonable legal costs and expenses), which may be brought against, made upon, or suffered or incurred by any of those indemnified arising directly or indirectly as a result or in connection with: (a) any infringement or alleged infringement of any IP rights (including moral rights) by the consultant or any of its officers, employees, agents and/or sub-contractors in connection with the provision, supply or use of the services or any contract material provided under this agreement; (b) the provisions of the services to the extent that the same is due to a negligent, wilful or reckless act, default or omission of the consultant or any of its officers, employees, agents and/or sub-contractors; and/or (c) any act or omission of the consultant or any of its officers, employees, agents and/or sub-contractors resulting in personal injury to or the death of any person, or the loss of or damage to property, and the consultant hereby agrees to release and discharge the principal from any actions, proceedings, claims or demands which, but for this provision might be brought or made against or upon the principal.

(NSW) The Consultant shall be responsible for and shall indemnify the Corporation against liability for all loss, damage or injury to persons or property caused by the negligence of the Consultant, or its employees or agents, and the amount of all claims, damages, costs and expenses which may be paid, suffered or incurred by the Corporation in respect of any such loss, damage or injury shall be made good at the Consultant's expense and may be deducted from any moneys due or becoming due to the Consultant. Throughout the continuance of this Agreement the Consultant shall conform at its own cost and expense with all Acts of both Federal and State Parliaments and all Regulations, By-laws, Ordinances or Orders made thereunder and the lawful requirements of any Public, Municipal or other authority so far as the same may affect or apply to the Consultant or the works being carried out by the Consultant, and the Consultant shall indemnify the Corporation from and against all actions, costs, charges, claims and demands in respect thereof.

(NSW) (a) The contractor indemnifies XX, its officer, employees, contractors and agents (not including the contractor) against all damage, expense (including legal fees), loss or liability of XX, its officers, employees, contractors or agents arising out of or connected with an act, default or omission of the contractor including loss of or loss of use of or damage to any real or personal property and injury, death or illness to any person. (b) The contractor's indemnity under this clause is limited to the extent that the damage, loss or liability referred to has been caused by the negligence or default of XX or any of its officers, employees, contractors or agents (not including the contractor).

(NSW) The Contractor indemnifies XX from and against all actions, claims, costs, losses, expenses and damages (including the costs of defending or settling any action or claim) in respect of: (a) loss of, loss of use of, or damage to property of XX; or (b) personal injury (including death) or illness to any person or loss of, loss of use of or damage to any property or claim for breach of confidence or privacy or misuse of Personal Information; arising out of or by reason of anything done or omitted to be done by the Contractor, its officers or employees in the performance of the Services. The Contractor's liability to indemnify XX is reduced proportionally to the extent that a malicious or negligent act or omission of XX or employees or agents (other than the Contractor) of XX or a breach of this Agreement by XX has contributed to the injury, damage or loss.

(NSW) The contractor must indemnify the council against all costs, expenses, liabilities, losses and damages incurred or suffered by the council as a result of a breach of this contract by the contractor.

(QLD)	The consultant hereby indemnifies the principal against any claims by the principal, its employees and agents and third parties (subject to the excepted risks set out in clause 7.1.2), which is the consequence of any negligent professional act, error or omission on the part of the consultant. Clause 7.1.2 Excepted risks are: a) any negligent act or omission on the part of the principal, its employees or agents to the extent that the principal contributes to such loss or damage; b) claims arising from war, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war rebellion, revolution, insurrection, military or usurped power or confiscation, nationalisation or requisition of property by or under the order of any government or public authority; c) claims arising from ionising radiation or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of any nuclear fuel; d) occupational liability limited by schemes approved under the Professional Standards Act 2004(Qld); e) any other risks specifically excepted in the contract documents. The consultant is not liable, despite any other provisions of the contract, for any loss or liability to the extent that any act or omission of the principal its employees or agents contributed to any damage suffered. This provision is in addition to and does not derogate from any right or defence that the consultant may have under common law or legislation.
(QLD)	The consultant indemnifies the Principal its employees and agents against all damages, costs, expenses, loss or damage which they may incur or sustain and all actions, proceedings, claims and demands whatsoever which may be brought or made against it or them by any person in respect of or by reason or arising out of: the performance by or on behalf of the consultant or the consultancy services; any negligence or other wrongful act or omission of the consultant or key personnel or other employees, or sub-consultants or of any other persons for whose acts or omissions the consultant is vicariously liable; any negligence or other wrongful act or omission of the consultant's visitors, invitees or licensees; death, injury, loss of or damage to the consultant, the key personnel or its other employees, agents, sub-consultants, licensees, invitees or visitors; and any breach of this agreement by the consultant. The consultant's liability under this clause must be reduced to the extent to which any action, proceeding, claim or demand arises out of any negligence or other wrongful act or omission of the Principal or its employees or agents.
(QLD)	The Managing Contractor indemnifies the Principal against any damages, costs and consequences of failing to comply with any Statutory Requirement. The Managing Contractor shall indemnify the Principal against: (a) loss of or damage to property of the Principal, including existing property in or upon which the work under the Contract is being carried out; and (b) claims by any person against the Principal in respect of personal injury or death or loss of or damage to any property; arising out of or as a consequence of the carrying out by the Managing Contractor of the work under the Contract, but the Managing Contractor's liability to indemnify the Principal shall be reduced proportionally to the extent that the act or omission of the Principal or employees or agents of the Principal may have contributed to the loss, damage, death or injury.

(QLD) The contractor will be liable for loss or damage (including personal injury whether or not resulting in death) suffered by the agency, its officers, servants or agents, arising from the unlawful or negligent acts or omissions of the contractor, its employees subcontractors or agents, in the course of the provision (or attempted or purported provision) of the goods and services. The contractor releases and indemnifies the agency and its officers, servants and agents from and against all actions, whatsoever and howsoever arising, which may be brought or made against any of them by any person, including the contractor, arising from: (a) any wilful or negligent act or omission of the contractor or any person for whose conduct the contractor is liable;
(b) any unlawful or negligent act or omission of the visitors, invitees or licensees or the contractor; (c) death, injury, loss or image suffered by the contractor, its employees, subcontractors or agents, or any of its visitors, invitees or licensees except where the death, injury, loss or damage is caused by the negligence or other wrongful act or omission of the agency, its officers, servants or agents; and (d) any infringement or alleged infringement of any intellectual property rights or moral rights in respect of contract material. The indemnity provided shall be reduced to the extent that an act or omission of the agency, its officers, servants or agents contributes to the loss or damage.

(VIC) The Contractor indemnifies and holds harmless XX from any action, claim, demand, costs or expenses: a)arising in any way directly or indirectly from any wrongful or negligent act or omission by the Contractor; b) arising in any way from any breach or failure to observe any of the covenants, obligations, and conditions to be observed and performed under this Contract by the Contractor; c) in respect of personal injury (which expression includes illness) or death of any person or persons, arising out of or in the course of or caused by either the execution of the Services or any activity directly or indirectly associated with the Services, or both, whether arising under statute or at common law; and d) in respect of loss or damage to any property, real or personal, arising out of or in the course of or caused by either the execution of the Services or any activity directly or indirectly associated with the Services, or both, except to the extent that such injury, death, loss or damage is caused by the negligence of XX.
The rights of XX and the obligations of the Contractor under this Clause shall survive expiration or termination of the Contract for any reason.

(VIC) The Contractor indemnifies the Department its employees and agents against all damages, costs, expenses, loss or damage which they may incur or sustain and all actions, proceedings, claims and demands whatsoever which may be brought or made against it or them by any person in respect of or by reason of or arising out of: (a) the performance by or on behalf of the Contractor of the Project Services; (b) any negligence or other wrongful act or omission of the Contractor or the Contractor's Staff or other employees, or sub-contractors or of any other persons for whose acts or omissions the Contractor is vicariously liable; (c) any negligence or other wrongful act or omission of the Contractor's visitors, invitees or licensees; (d) death, injury, loss of or damage to the Contractor, the Contractor's Staff or its other employees, agents, sub-contractors, licensees, invitees or visitors; and (e) any breach of this Agreement by the Contractor.
The Contractor's liability under this clause shall be reduced to the extent to which any action, proceeding, claim or demand arises out of any negligence or other wrongful act or omission of the Department or its employees or agents.

(VIC)	The Provider shall indemnify and keep indemnified the Corporation against any legally enforceable claim and costs arising from or relating to any death or injury of, or loss or damage to any property of, third parties or the Corporation arising from the fault, negligence, breach of duty, breach of contract or other wrongful act or omission on the part of the Provider in performance of this Assignment, including unsatisfactory performance or non performance of the services. The indemnity clauses in this Agreement are not intended to and do not extinguish the rights in law provided under the Victorian Wrongs (Amendment) Act 2000. The Provider shall not be liable for any liability of loss to the extent that it is the fault of the Corporation. Where negligence is found to have been contributory, each party shall bear responsibility in accordance with that party's fault.
(WA)	AS4122 – Subject to cl 9.1 the Consultant shall indemnify the Client against, (a) loss or damage to property of the Client including the Contract Material; and (b) claims by any person against the Client in respect of personal injury or death or loss of or damage to any other property, arising out of or in consequence of carrying out the Services by the Consultant but the Consultant's liability to indemnify the Client shall be reduced proportionally to the extent that the act or omission of the Client or the employees, agents or other contractors of the Client contributed to the loss, damage, death or injury. The indemnity under this Clause 9.2 shall not apply to the extent that the liability of the Consultant is limited by another provision of the Contract or exclude any other right of the Client to be indemnified by the Consultant.
(WA)	The constructor indemnifies the Contract Authority, the customer, the State of WA and all their respective officers, employees and agents against all costs, losses, expenses, claims, damages and other liabilities (including, without limitation, legal costs and expenses) as a result of any action, suit, claim, demand or proceeding taken or made by any third party arising from or in connection with: (i) any breach of an obligation under the contract by the contractor; (ii) any wilful, tortious or unlawful act or omission of the contractor or any personnel; or (iii) any breach of state or commonwealth law relevant to the contract by the contractor or any personnel. The contractor's liability under the indemnity will be reduced proportionately to the extent that any costs, losses, expenses claims, damages or other liabilities result form the negligence of the contract authority, the customer, the state of WA or their respective officers, employees or agents. The contractor's liability under the indemnity will be reduced proportionately to the extent that any costs, losses, expenses claims, damages or other liabilities result form the negligence of the contract authority, the customer, the state of WA or their respective officers, employees or agents. Other than where the contract authority has repudiated the contract or damages are not an appropriate remedy, if the contract authority breaches the contract, then the remedies of the contractor are limited to damages.
(WA)	The Consultant shall indemnify XX and its agents and employees against all damage, injury or loss of any nature suffered by XX or its agent or employees arising out of any negligence by way of any act, error or omission in the services and for which the consultant or any sub-consultant, employee or agent of the consultant is as the case may be legally liable. The consultant shall indemnify and keep indemnified XX against any excess under any policy of insurance take out by XX under which the consultant is an insured an in respect of a claim arising out of negligence, whether by a way of act, error or omission in the provision of the services by the consultant or any sub-consultant or employees or agent of the consultant as the case may be. In the case of the public liability insurance, the consultant's liability to indemnify XX against the excess shall be reduced proportionately to the extent that any act or omission of XX or employees or agents of XX or other consultants of XX or employees or agents of XX or other consultants of XX may have contributed to the loss, damage, death or injury the subject of the claim.

(WA)	AS4122 – Subject to cl 9.1 the Consultant shall indemnify the Client against, (a) loss or damage to property of the Client including the Contract Material; and (b) claims by any person against the Client in respect of personal injury or death or loss of or damage to any other property, arising out of or in consequence of carrying out the Services by the Consultant but the Consultant's liability to indemnify the Client shall be reduced proportionally to the extent that the act or omission of the Client or the employees, agents or other contractors of the Client contributed to the loss, damage, death or injury. The indemnity under this Clause 9.2 shall not apply to the extent that the liability of the Consultant is limited by another provision of the Contract or exclude any other right of the Client to be indemnified by the Consultant.

LIMITATION OF LIABILITY

Government policies that do not allow liability limits to be negotiated and agreed expose consultants to levels of liability that are unsustainable for the industry and significant uncertainties for government. The absence of liability limitation clauses in contracts also undermines government's commitment to value for money as they encourage competition in the industry on who is prepared to 'bet the farm' rather than who can provide the best service.

The assumption that liability can be unlimited is illusory. Levels of fees paid to consultants and their balance sheets are a small percentage of project capital value and are not capable of supporting capital risk on a project. A consultant's balance sheet is supporting their business as a whole which provides services to a wide range of clients and projects. It is therefore not appropriate that consultants be exposed to unmanageable liability and project risk on any one project.

The situation is compounded by the use of indemnity and warranty clauses that seek to impose liability onto the consultant that are outside their insurance cover and for which they have little management or control over the risk of the liability being realised.

ACEA on reviewing the contracts found that not only did some require unlimited liability, but they also seek to undermine the tort and liability reforms by contractually requiring that the parties be jointly and severally liable under the agreement (shown in TABLE 6. Thereby the consultant rather than only being exposed to claims caused by its own negligence is also exposed to claims against the client.

The fifteen remaining contracts are silent and provide no provisions for the limitation of consultant liability, all though some acknowledge that the amount of liability will be reduced by the amount caused by the actions of the government authority, its agents or employees.

Only five of the contracts reviewed allow for some limitation of consultant liability and are subject to negotiation with the client (TABLE 7). ACEA's preferred position is the inclusion of a limitation of consultant liability clause in all contracts.

TABLE 6: Unlimited Liability Clauses including joint and several liability

Agency	Limitation of Liability
(Fed)	Where a party comprises two or more persons, each person will be jointly and severally bound by the party's obligations under the contract.

(NSW) If the Contractor comprises more than one person, those persons are jointly and severally liable for the performance and obligations of the Contractor.

(NSW) The contractor: will not be entitled to make any claim against the council; and expressly acknowledges that it has made an allowance in the Fee and (if applicable) the Schedule or Rates for the risk of bearing all costs, losses and damages which it may incur or suffer, arising out of or in connection with any instruction to suspend.

(QLD) If a party to this agreement consists of more than on person those persons shall be jointly and severally bound under this agreement.

(QLD) The effecting and maintaining of insurance will not limit the liabilities or obligations of the contractor under other provisions of the contract.

(VIC) Without limiting the liability of the Provider under this Agreement or at law the Provider shall be liable for all losses that the Corporation may suffer as a result of the negligent performance or non performance of the Assignment by the Provider or its servants or agents. Where the Provider is more than one person, then each shall be jointly and severally liable for the obligations under this Agreement. The Provider's liability shall be reduced proportionally to the extent that an act or omission of the Corporation, its officers, its employees or agents contributed to the loss or injury. The Provider shall remain liable under this Clause above notwithstanding the exercise of any of the powers conferred on the Corporation or the Superintendent under this Agreement.

(WA) The effecting of insurance in accordance with this agreement shall not limit the liability or obligations of the consultant under any other provisions of this agreement or in any way limit any claim which may be made by XX against the consultant.

TABLE 7: LIMITATION OF LIABILITY CLAUSES

(Fed) The Contractor's liability under clause 13.1 [Liability]: (a) will not exceed the full amount of the relevant Loss; and (b) is reduced proportionally to the extent that XX was at fault in contributing to the Loss; but (c) does not exclude any other Legal Rights available to XX.

(NSW) The liability of the Consultant under Clause 8 may be limited if the Consultant is a member of an occupational association with an approved Scheme under the Professional Standards Act, 1994 (NSW).

(WA) AS4122 – Where a monetary limit of liability is stated in Item 14, the Consultant's liability to the Client arising out of the performance or non-performance of the Services, whether under the law of contract, tort or otherwise, shall be limited to that monetary limit of liability. However, nothing in this clause shall be read or applied so as to purport to exclude, restrict or modify, or have the effect of excluding, restricting or modifying the application in relation to the supply of any goods or Services pursuant to the Contract of all or any of the provisions of the Trade Practices Act 1974 as amended and in force from time to time or any relevant State Act of Territory Act which by law cannot be excluded, restricted or modified.

(WA) AS4122 - Where a monetary limit of liability is stated in Item 14, the Consultant's liability to the Client arising out of the performance or non-performance of the Services, whether under the law of contract, tort or otherwise, shall be limited to that monetary limit of liability. However, nothing in this clause shall be read or applied so as to purport to exclude, restrict or modify, or have the effect of excluding, restricting or modifying the application in relation to the supply of any goods or Services pursuant to the Contract of all or any of the provisions of the Trade Practices Act 1974 as amended and in force from time to time or any relevant State Act of Territory Act which by law cannot be excluded, restricted or modified.

PROPORTIONATE LIABILITY LEGISLATION

In replacing joint and several liability, nationally, the operation of proportionate liability (PL) ensures that, in the event of a claim for negligence or economic loss, the consultant is liable only for the proportion of the damage or loss that reflects their actual contribution to that damage or loss.

However, the provisions of the proportionate liability legislation in NSW, TAS and WA provide that parties can specifically contract out of the operation of PL. These contracting out provisions are provided by the following sections of the relevant Acts:

(NSW) *Civil Liability Act* 2002, s 3A(2)

(TAS) *Civil Liability Act* 2002, s 3A(3)

(WA) *Civil Liability Act* 2002, s 4A(1).

Clients continue to exploit these opting out provisions by excluding the operation of PL in contracts. Acceptance of contracts which specifically exclude the operation of proportionate liability can have serious consequences for consultants. These exclusions effectively extend the consultants liability beyond the common law position. This ultimately means that the consultant may be left facing uninsured liability for a particular project.

In doing so, it is possible that, in circumstances where exclusions of proportionate liability are accepted, the consultant may find that their professional indemnity policy excludes cover for any additional liability imposed upon the consultant by reason of their agreement to 'contract out' of the application of proportionate liability.

TABLE 8 shows all the contracting out provisions found, however this should be referred with TABLE 6 which also shows contracts where joint and several liability is being mandated – including a Queensland contract which is the only State to expressly prohibit contracting out.

TABLE 8: CONTRACTING OUT OF PROPORTIONATE LIABILITY (ALSO SEE TABLE 6)

Agency	**Proportionate Liability**
(Fed)	If any party to the contract consists of more than one person then the liability of those persons in all respects under the contract is a joint liability of all those persons and a separate liability of each of those persons.

(Fed)	Notwithstanding anything else, to the extent permissible by law, the expert or the arbitrator (as the case may be) will have no power to apply or to have regard to the provisions of any proportional liability legislation which might, in the absence of this provision, have applied to any dispute referred to arbitration or expert determination pursuant to this clause.
(Fed)	To the extent permitted by law, the Proportionate Liability Legislation is excluded and does not apply to any claim arising under this contract.
(NSW)	Part 4 of the Civil Liability Act 2002 (NSW) does not apply to this Agreement or any of the Services
(VIC)	If the Contractor consists of more than one person, the terms, conditions and obligations of this Contract will bind such persons jointly and each of them severally and the persons comprising the Contractor will be jointly and severally liable for the obligations assumed by the Contractor under this Contract.
(VIC)	If a party to this Agreement consists of more than one person those persons shall be jointly and severally bound under this Agreement.

PROFESSIONAL STANDARDS LEGISLATION

Under Professional Standards Legislation (PSL) currently enacted in all jurisdictions, membership of PS schemes is available to limit the liability of members who chose to join an operating PS scheme, where such a scheme exists. Furthermore, PS schemes act as a form of quality control mechanism to ensure that minimum level of professional competency exist throughout the industry.

There have been recent instances of clients drafting contracts which both preclude consultants who are members of PS schemes, and require that they do not join such a scheme for the duration of a particular project. Acceptance of contracts which preclude membership of PS schemes can have serious consequences for consultants. These exclusions effectively extend the consultants liability beyond the recommended limits contained in a PS scheme. This ultimately means that the consultant does not have the benefits of the liability safeguards built into the scheme and may be left facing uninsured liability.

PS schemes perform an important role in regulation of professional activities in a particular industry. Therefore, by excluding a consultant who is a member of a PS scheme, the client is effectively excluding quality control regulation which is important for the entire community. Furthermore, PS legislation expressly forbids individuals or firms who are scheme members from 'contracting out' once they join PS schemes. However some PS schemes may allow scheme members to apply to the PS scheme provider to allow a higher maximum amount of liability than otherwise allowed under the terms of the scheme for particular projects ('contracting up'). There have also been instances where clients have put pressure on consultants to seek such permission.

The contractual exclusion of liability limiting schemes potentially creates an uninsured consultant. So too does 'contracting up' from the maximum liability cap.

Although none of the contract wordings reviewed contained an exclusion of the Professional Standards Legislation or a professional standards scheme, ACEA has been provided a wording from a Tasmanian Government Agency that provides the following. This suggests that while standard contracts may not contain such exclusions, such wordings are appearing in contracts. Due to confidentiality reasons where the contract is none standard ACEA is not able to provide the details of the parties, however the exclusion clause reads as follows:

No scheme in force under the Professional Standards Act 2005 applies to the Consultant. The Consultant waives all present and future rights, as against the Crown, to claim any limitation of liability provided by any future scheme under the Professional Standards Act 2005, in relation to future legal liability, claims or proceedings arising from, or attributable to, the Consultant carrying out the Contacted Services including a wrongful (including negligent) act or omission."

INSURANCE

The consulting industry is required by contract to held public liability insurance and professional indemnity insurance. The industry must procure insurances from the insurance market at the rates and coverage being supply on the open market. The consulting industry has no control over the availability of insurance and its coverage as this is a matter for the insurance underwriter. That said only five of the contracts reviewed did not specify the sum of public liability insurance to be held in the contract, thereby allowing for the possibility of some discussion and agreement as to an appropriate level with the consultant. Eleven contracts left unspecified the sum of professional indemnity insurance, but that is still less than half the contracts reviewed.

The limit of Public Liability Insurance to be held ranges from $3million to $20million, with the majority requiring $10million.

The limit of Professional Indemnity Insurance to be held ranges from $1million to $10million, with the majority requiring $5million.

ACEA believes it is inappropriate to set high levels of insurance cover requirements in standard contracts as these will often be unrealistic for the size and risk involved in the project and effectively preclude many consultants from tendering for the business, thus distorting competition in our industry. A procurement decision should not be determined on which firm can purchase the highest insurance cover but should be set to an appropriate level for the project in hand.

LIQUIDATED DAMAGES

Liquidated damages clauses impose damages upon consultants for delays in providing services and/delays in project delivery. These clauses are punitive in nature and they do not account for the fact that the delay may have been beyond the consultant's control and in fact may have been contributed to by the client.

To the extent that a liquidated damages clause may result in liability to pay damages which exceeds that which would have otherwise been the consultant's liability (for instance by being imposed in the absence of proven fault by the consultant or in an amount that exceeds the client's actual loss) such damages can fall outside the cover provided by the consultant's professional indemnity policy.

It is ACEA's preferred position that clauses imposing liquidated damages upon consultants for delays in providing services be deleted entirely. TABLE 9 sets out the clauses found in the contracts reviewed.

TABLE 9: LIQUIDATED DAMAGES

Agency	**Liquidated Damages**
(Fed)	If the project management contractor does not complete a Milestone to which this clause applies by the relevant date for milestone completion, it must pay liquidated damages at the rate specified for the purposed of that milestone for everyday after the date for milestone completion until it completes the milestone or the contract is terminated, whichever is first. This amount is an agreed genuine pre-estimate of XX damages if completion of the milestone occurs after its date of completion.
(NSW)	If the Consultant fails to complete the work by the date shown in the Schedule or such later date as may be agreed in accordance with clause 17 ("the revised date"), the Consultant shall be indebted to the Corporation for liquidated damages at the rate stated in the Schedule for every <week/day> after the date shown in the Schedule or the revised date, whichever is the latter, to and including the date when the work is actually completed or the date that this Agreement is terminated under clause 19, whichever occurs first. The maximum liability of the Consultant for delay in completion of the work shall not exceed the amount stated in the Schedule.
(NSW)	If the contractor does not complete a milestone task by any milestone date to which liquidated damages apply (as identified by item 1 of the contract details), the contractor must pay XX liquidated damages at the applicable rate stated in item 1 of the contract details for every week or pro-rata for part of a week after the time for completion of the services to an including the date the contractor completes the milestone task. The parties agree that the liquidated damages specified in the contract are a genuine pre-estimate of damages likely to be suffered by XX as a consequence of the contractor's delay.
(NSW)	If the Contractor fails to achieve Completion by the Date for Completion, the Contractor shall be indebted to XX for liquidated damages at the rate stated in Item 10 of the Schedule for every week or part thereof after the time for completion of the Services to and including the date the Contractor completes the Services in accordance with this Agreement. The Contractor and XX agree that the liquidated damages specified in Item 10 of the Schedule are a genuine pre-estimate of damages to be suffered by XX.
(QLD)	Principal for liquidated damages at the rate stated in the Annexure for every calendar day after the Date for Practical Completion up to and including the Date of Practical Completion or the date that the Contract is terminated, whichever first occurs, less the liquidated damages paid by the Managing Contractor or deducted by the Principal's Representative pursuant to sub-clause 49.5. The Principal's Representative shall deduct liquidated damages in assessing any amount due to the Managing Contractor under clause 57. If after the Managing Contractor has paid or the Principal has deducted liquidated damages, the Date for Practical Completion is extended, the Principal shall forthwith repay to the Managing Contractor any liquidated damages paid or deducted in respect of the period up to and including the extended Date for Practical Completion.
(SA)	Limit of liquidated damages: unlimited.

(VIC) If the Contractor fails to – (a) complete the provision of Project Services by the Completion Date; or (b) fails to meet any specified delivery date nominated in Schedule 2; liquidated damages at the rate specified in Schedule 1 shall be paid by the Contractor to the Department. The Parties agree that the liquidated damages specified constitute a fair and reasonable pre-estimate of the loss that will be suffered by the Department.

(VIC) If the Provider fails to complete the Assignment, or a separable part of the Assignment, as the case may be, within the time specified for completion or any extension of time granted thereto under this clause, the Provider shall be liable to the Corporation, by way of pre estimated and liquidated damages and not as a penalty, for the amount or amounts stated in the Annexure hereto for every week, or part thereof on a pro rata basis, that shall elapse after that time or the extended time until the whole of the Assignment or a separable part of the Assignment, as the case may be, has been completed or until this Agreement is cancelled by the Corporation under the provisions of Clause 1.19, whichever is the sooner and that amount or amounts shall be a debt due from the Provider to the Corporation. In addition to any other remedies, this debt may also be deducted or recovered by the Corporation from any moneys owing to the Provider.
Where the Corporation has been able to use part of the Provider's work in performing the Assignment or the separable part thereof, as the case may be, the amount of pre estimated and liquidated damages for which the Provider is liable to the Corporation by virtue of this sub clause may be reduced by an amount determined by the Superintendent and notified by the Superintendent to the Provider.

-ENDS-