

# Legal Viewpoint - Part 1

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## What Should Engineers Look For In Their Consultancy Agreements?

### Introduction

Engineers are often faced with the prospect of only securing an involvement on a particular project if they sign up to the principal's standard form of consultancy agreement. These agreements are, by their very nature, weighted in favour of the principal. The negotiation of these contracts can prove difficult for engineers who are often keen to secure a role in the project but cannot sign up to contractual terms that require them to bear an unacceptable degree of risk.

This article is written in two parts. Each part examines some common issues which arise in consultancy agreements and provides some compromise positions which an engineer could suggest to a principal when negotiating the consultancy agreement.

### Warranties and Indemnities

Engineers are often required to provide warranties and indemnities in relation to the performance of their services. As first glance, this might not seem to be unreasonable given that the engineer will be paid for providing his professional services and as such, the principal or the contractor is entitled to expect those services to be properly provided. The difficulty for an engineer lies in ensuring that the warranties in a consultancy agreement do not go further than this and require the engineer to warrant matters that are outside his control, or things that the engineer himself, cannot guarantee. Clauses that require an engineer to warrant that the project as a whole will be fit for its purpose should be avoided as the engineer cannot possibly warrant matters that are outside his own area of expertise. In addition, these clauses generally offend most professional indemnity insurance policies. A warranty that the engineer will provide his services using reasonable skill, care and diligence should be sufficient.

Indemnities should also be avoided if at all possible. An indemnity is, in effect a promise to hold harmless a person from the occurrence of any particular event. An indemnity given by an engineer may extend the scope of an engineer's potential liability beyond what it would normally be at law. Under an indemnity the common law rules of causation (namely that the loss must be a direct consequence of the event in relation to which the indemnity is given) and remoteness of damage (that the loss must not be too remote from the occurrence of the event giving rise to the indemnity) do not apply. Also the indemnified party is under no duty to mitigate his loss. In other words, where loss is suffered as a result of the occurrence of an event in relation to which an indemnity is given, the indemnifying party is liable for all loss (including purely economic loss) suffered by the indemnified party.

If an indemnity must be given in a consultancy agreement, the engineer should ensure it is limited as far as possible, and indemnifies the principal or

the contractor solely in respect of loss caused as a result of the defective performance by the engineer of his services. It should have effect only where the loss is caused by the engineer and should not apply where the loss is caused or contributed to by the acts or omissions of third parties.

### Payment

Payment terms and payment periods are obviously critical for engineers. Engineers should ensure their consultancy agreements enable them to submit payment claims on a monthly basis. In addition, payment should generally be made within 30 days of the date of the engineer's invoice.

Engineers should note that their services will generally be covered by the scope of the Building and Construction Industry Payments Act 2004 (the 'Act') meaning that engineers will be able to make payment claims pursuant to the Act. Engineers will be free to negotiate the payment periods contained in their consultancy agreements, but should note that if, for some reason, a consultancy agreement does not refer to a date by which payment is due to the engineer, the default period contained in the Act will apply and payment will be due within 10 business days of the date of the payment claim.

While consultants have historically been reluctant to make use of the Act, for fear of upsetting principals and contractors and losing repeat business, engineers should remember that the Act has been introduced to assist them in recovering payments which are owed to them. Engineers should not be afraid to ask themselves the question of whether it is worth obtaining repeat business from a principal or a contractor who is not prepared to make payments in full, on time.

### The Services

The services are the backbone of every consultancy agreement and are the hook off which the consultant's liability, if any, will hang. Careful drafting of the services is an absolute necessity. General provisions which require, for example, the consultant to perform 'all services which may reasonably be expected of an engineer engaged in like projects' should be avoided as they are very loose and are open to several interpretations. Such clauses can be used by principals and contractors as a 'catch all' in circumstances where a particular service is, for some reason, not already included in a consultancy agreement.

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# Graduate Program

Presented By WorleyParsons.

New and existing Graduates working for WorleyParsons in Queensland now have the opportunity to participate in the recently re-launched Graduate Development Program (GDP). The GDP, endorsed by Engineers Australia, has been created to ensure that WorleyParsons Graduates receive high quality experiences that enable them to become qualified as chartered professional engineers. The GDP is made up of five main elements which are rotations, accreditation, mentoring and coaching, professional development, and the Graduate Development Organisation (GDO).

The **rotations** component includes three types of rotation opportunities within the company including locally, nationally and internationally. Should Graduates feel the need to gain a more diverse experience, develop broader information networks, or simply sample other industries, the opportunity for a rotation is there.

**Accreditation** - The GDP framework has been derived from the Engineers Australia Chartered Professional Engineer (CPEng) qualification which involves Graduates demonstrating their experiences in line with competencies set by Engineers Australia. The GDP supports graduates in achieving CPEng status through providing the graduate with a mentor to discuss experiences, offering rotation opportunities, and assisting with the CPEng accreditation process.

**Mentoring and coaching** is an essential part in building graduates skills and confidence. Each Graduate is assigned a Mentor within three months of commencing work with WorleyParsons which provides both Graduate and Mentor with an array of benefits such as counselling and guidance, monitoring Graduates professional development, provision of career advice, ensuring graduates receive appropriate experience, and verification of Graduates career episode reports prior to submission to Engineers Australia. The GDP has developed guidelines to assist Mentors with their roles.

A Graduate's **professional development** is divided into three areas – business management courses, technical courses, and graduate forums. These consist of internal and externally set training courses throughout the three-year graduate period, some of which are discipline or role specific. The training events also give Graduates a chance to network and share their experiences.

The **GDO** consists of a Board of 6 current Graduates who are in place to ensure the success of the GDP by maintaining and monitoring areas such as rotations, training, and social events. They regularly meet to discuss all areas of the GDP and to bring new ideas to Managers and Graduate Coordinators.

WorleyParsons is very enthusiastic about the Graduate Development Program and the positive benefits that it yields for its graduate community. By keeping in close contact with the graduates, the GDP remains up-to-date with the requests and requirements of the current graduates and ensures that they receive the best possible experiences through the company.

 [www.qld.engineersaustralia.org.au](http://www.qld.engineersaustralia.org.au)

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*Friday September 8, 2006*

Excellence Awards at the Brisbane Convention and Exhibition Centre

For further information please call the division office on 07 3832 3749 or contact Lorena at [lnelson@engineersaustralia.org.au](mailto:lnelson@engineersaustralia.org.au)

## Legal View

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Engineers should insist on their consultancy agreements listing the specific services they are required to provide so there can be no question as to whether or not any specific service is included within the scope of the agreement. This will also help engineers ensure that they are not required to provide substantial services, which principals or contracts may claim fall within the general service referred to above, but which have not been allowed for in the engineer's fee proposal.

### Conclusion

The issues raised above are often the subject of difficult negotiations between the principal or the contractor and the engineer. Part 2 of this article will consider other important issues for the engineer to consider when negotiating the consultancy agreement such as intellectual property, assignment and novation and termination. If the engineer is in doubt as to any of the terms proposed by the principal or the contractor he should seek specific advice and should raise his concerns at an early stage to allow the maximum time for negotiation and resolution of the issue.

James Williams - Associate



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