

November 2008

“COMMUNIQUE” HAS A NEW LIVERY

Members will note that we have rebranded NZACS, Acanthus and Communique with new logos and new formats.

This new branding provides contemporary and exciting graphics for the society. The simplicity of the designs, created by Alt group, will also lend themselves to web based communication. This is the first Communique to go out with the new graphics and our website is in the process of being updated.

Hamish Wixon
Chairman

ALERT: MINISTRY OF EDUCATION – CONDITIONS OF ENGAGEMENT - FOURTEENTH SCHEDULE UNDER CONSTRUCTION CONTRACTS

Over a period of some considerable time the *NZIA* and *ACENZ* have held discussions with the Ministry of Education (*MOE*) seeking agreement for the use of “*standard*” Agreements for Services or the Conditions of Engagement as prepared by these Professional Bodies, where Members were engaged for new School Projects funded by the *MOE*.

Agreement was reached between the parties confirming this position in early 2007.

Subsequent to this agreement however, the Auckland Office of the *MOE* issued a Form of Guarantee (“*the Fourteenth Schedule*”) to be attached to any design/build construction contracts for new School Projects as the Ministry wanted a single line of accountability for both the design and the construction of new school projects.

The revised Form of Guarantee produced by the Ministry was considered to be too onerous by the Professional Bodies. In late 2007 a further meeting was held between the *MOE*, *NZIA* and *ACENZ* and legal advisors from both sides, to negotiate an agreed revised Form of Guarantee. The outcome was a revised Fourteenth Schedule.

It was not possible, however, to obtain agreement from the *MOE*, or its legal advisers, to amend Clause 12. This Clause, in effect, creates the potential for double jeopardy because the Architect will be required to accept a liability to the Contractor under the *NZIA* Agreement for Services with the Contractor for a maximum limit of **\$2,000,000** any one claim and in the aggregate. The Architect may also be potentially liable to the *MOE* under the Fourteenth Schedule for a further **\$2,000,000**.

The reason the **MOE** was quite emphatic in not agreeing to any change to Clause 12 was that should a claim arise and settlement be made upon the Contractor by the Architect or its Insurer, then if the Contractor subsequently becomes insolvent the **MOE** may not receive any of the compensation.

Accordingly legal advice was sought by **NZACS** on behalf of Members as to the ways and means of best capping the liability in Clause 12 of the Fourteenth Schedule.

The legal advice received is to limit the Architect's liability in the **NZIA** Agreement for Services (**AAS 2007**) or in the **ACENZ/IPENZ** Contract of Engagement (**CCCS**) which, of course, will be entered into by architects with the Design/Build Contractor.

This can be done under AAS 2007 as follows:

It is recommended to replace E5 (g) with the following Clause:

“The maximum total aggregate payable by the Architect, whether in contract, tort or otherwise - In relation to claims, damages, liabilities, losses or expenses arising from:

- (i) breaches of this Agreement; and*
- (ii) in respect of the Guarantee given in favour of the Ministry of Education;*

is limited to \$2,000,000 or five times the Architect's fee for Agreed Services whichever is the lesser.”

This can be done under the CCCS as follows:

Replace 6.2 with:

“The total maximum aggregate amount payable by the Consultant to the Principal and the Ministry of Education under this consultant agreement and the Guarantee given in favour of the Ministry of Education, whether in contract or tort or otherwise, in relation to claims, damages, liabilities, losses or expenses, is as specified in the Special Conditions.”

Members are recommended to include these revised Clauses when signing up with a Contractor where the Fourteenth Schedule is to be used in the Construction Contract for a new School Project for the **MOE**.

If this cannot be achieved then the only alternative to cover the potential liability is to increase the Professional Indemnity Insurance held by the Member for the project to **\$4,000,000** and endeavour to recover the increased premium cost, as may apply for the duration of the services and then subsequently for any discovery period of years after completion of the services, within any fee proposal.

NZACS has taken the lead in initiating negotiations with **MOE** regarding the Fourteenth Schedule by first seeking and then providing this advice as to how best to minimize the effects of Clause 12.

This is your Society acting for you, our Members.



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ALERT: GREEN BUILDINGS - BEWARE OF WARRANTIES AND INDEMNITIES – DON'T SIGN

In a recent issue of Construction News there appeared an article, written by a lawyer, on Green Buildings, in which the lawyer suggested a number of issues that could be included in the design consultants Conditions of Engagement to achieve a particular Green Star Rating required by a client.

As Members will know the New Zealand Green Building Council has issued a star rating system which covers new design, as built, in use/performance, and interior fit out and operation. For New Office design projects; 4 Star Green Star NZ Certified Rating signifies “*Best Practice*”: 5 Star signifies “*New Zealand Excellence*”: while 6 Star signifies “*World Leadership*”.

The following are some of the specific spurious suggestions made in the article that could be included in a Consultant’s Conditions of Engagement:

- ❖ *“Stated environmental objectives – be it green star rating, or specific targets such as usage of utilities*
- ❖ *The requirement to document everything carefully as this will be required for certification purposes*
- ❖ *Warranties to achieve the environmental objectives and complete the specific design – these should be back to back with any warranties the landlord has had to give tenants in agreements to lease*
- ❖ *Indemnities if the building fails to achieve the environmental objectives – as the building will be less valuable, commanding lower rents and higher operating costs*
- ❖ *Regular design certification during the project so that any problems are brought to the parties’ attention early and issues may be dealt with*
- ❖ *As it can take about 12 months or so to have a building and its systems operating optimally the consultants need to remain involved during this period fine tuning things such as operation of air-conditioning*
- ❖ *Defects rectification requirements*
- ❖ *Requirement for collaborative approach between consultants*
- ❖ *Check that professional indemnity insurance is sufficient to meet any warranty/indemnity provisions in the contract.”*

Why would you sign up committing to those kinds of warranties/indemnities and other onerous expectations, as advocated in this article?

If you are “Green” enough to sign up on such conditions, you may not be fully insured and your practice could end up in the “Red!”

Green Buildings are obviously demanding commissions with specific, even onerous targets to meet.

Therefore it is important that the fee charged adequately remunerates the practice for the expertise, skill, **and risks** involved designing such buildings, and to cover a possible longer period of involvement, post construction, to ensure stated objectives have been met.



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“WET BUILDINGS” EXCLUSION – A REMINDER

With the insurance renewal time approaching the Directors considered it would be timely to remind Members with regard to the Professional Indemnity policy “*Wet Buildings*” Exclusion 2.04, as advised in *November 2007*. This exclusion will continue to apply for the coming insurance year.

Firstly, the exclusion does not apply to ‘*Commercial Projects.*’ It only applies to “*Residential Projects.*” These are any building that contains any “*household unit*” where the building or any part of the building is used, or intended to be used or occupied for residential purposes.

The exclusion does not apply to any hostel, hotel, boarding house, or specialised accommodation that was not designed to be used or occupied for residential purposes.

A new concession negotiated by *NZACS* for *2008-2009* provides that Exclusion 2.04 will not apply to any commercial project having *10%* or less of the building, based upon floor area, used or occupied or intended to be occupied for residential purposes.

Secondly, the Policy continues to provide a Limit of Indemnity of *\$250,000* any one claim and for all claims during the period of insurance in the aggregate, for any “*Residential*” projects.

This cover does not apply to any projects where the Building Consent and Code Compliance Certificate were issued prior to *31 March 2005*. Residential “*multi unit*” projects (*i.e. projects containing two or more units*) that have not been subject to an independent peer-review of the waterproofing and cladding aspects of the project are also excluded from the policy cover.

Thirdly, it is confirmed that levels of indemnity higher than *\$250,000* any one claim and in the aggregate can be applied for by Members in relation to new “*Residential Projects*” at a negotiated additional cost. The availability of cover will be subject to providing underwriting information that will generally require an independent peer review of the waterproofing and cladding aspects of the project.

This is *not a peer review* that is intended to be supplied to anyone other than the Member designing the project and the *NZACS* Insurers for insurance coverage purposes. A suggested draft of what would be required is appended.

The peer review may be carried out for *NZACS* Members by another independent registered architect or in the case of a design by an *ADNZ* Member of *NZACS* by another independent *ADNZ* Member, or alternatively by any other qualified professional consultant as may be approved of by the *NZACS* Insurers. The Directors reiterate that this facility is special to the *NZACS* Programme.

Members should always be aware of the “*Claims Made & Notified*” basis of annual coverage and therefore whilst an increased limit will apply to a current period of insurance once it is accepted by the *NZACS* Insurers, it is still subject to annual renegotiation and continued availability for any further periods of insurance.



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CONTINUE TO PRACTICE WITH CARE IN TIMES OF DOWNTURN

Our Claims Directors advise that in slowing economic times, such as we are entering at present, there is a likelihood of an increase in claim notifications. Clients and others appear to have more time to contemplate actions against architects when the going gets tough.

So our message is, practice with care.

UNDERWRITER SECURITY

In these times of troubled economic conditions around the world continuity of cover and Insurance Underwriter Security feature as important considerations for any professional practice. Recently some of the International Rating Agencies have applied credit watch notices on some Insurers.

NZACS is pleased to advise that there is no change to the co-insurance arrangements for the Member's Liability Programme for **2008-2009** and there is no change in the security ratings of the Insurers.

COMMUNIQUE

*The Official Newsletter of the
New Zealand Architects Cooperative Society Ltd*

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*We welcome contributions from readers,
on how they manage risk.*



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INSURANCE PEER REVIEW CERTIFICATE

To the New Zealand Architects Cooperative Society Ltd

Instructing Architect/Designer _____

Building/Location _____

Name of Peer Reviewer _____

I/we declare:

I/we have perused the architectural design, construction detailing, specification and supporting documentation for the above referenced building and am/are of the opinion that in terms of weather-tightness matters, the building design and documentation satisfies the minimum requirements of the NZ Building Code – E2 (External Moisture) and the instructing project architect or designer has exercised reasonable architectural skill and care.

I/we have made appropriate enquiries regarding the nature and terms of the architectural services being provided by the instructing project architect or designer, and I believe on reasonable grounds the documentation to be appropriate for its intended purpose (*not to be construed as a guarantee*).

This Peer Review Certificate is for the sole benefit of the insured instructing project architect or designer and the NZACS Insurers, and cannot be relied upon or used by any other parties without the express written consent of the instructing project architect or designer and the peer reviewer.

I _____ hold the following qualifications.

SIGNED BY _____ ON BEHALF OF _____
(Name of Peer Review Firm)

Date _____ Signature _____

Note: Any liability under this statement accrues to the Peer Review Firm only. The total maximum amount of damages payable arising from this Statement in relation to the above referenced building, whether in contract, tort or otherwise is limited to \$250,000.



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