



Australian  
Institute of  
Architects

**Draft**

# Code of Novation



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## PURPOSE

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This draft code is prepared by the Australian Institute of Architects (the Institute) to engage and consult more broadly throughout the construction industry in an attempt to establish sector-wide principles to guide the procurement of projects using novation. For the purposes of this draft code, novation means the transfer to the head contractor of the consultant's obligations under an original consultancy agreement with the principal.

This draft Code provides a basis for consultation with consultants, contractors, government and clients.

The final Code of Novation produced from this consultation is proposed to be an industry-wide framework, defining standards of conduct that promote good design, safety and quality standards throughout the entire procurement process, thereby mitigating project risk and resulting in significant benefits to the built environment and broader community.

## INFORMATION

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The Australian Institute of Architects (Institute) is the peak body for the architectural profession in Australia. It is an independent, national member organisation with around 11,000 members across Australia and overseas.

The Institute exists to advance the interests of members, their professional standards and contemporary practice, and expand and advocate the value of architects and architecture to the sustainable growth of our communities, economy and culture.

The Institute actively works to maintain and improve the quality of our built environment by promoting better, responsible and environmental design.

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## EXECUTIVE SUMMARY

The methods of procurement of architectural services are frequently being examined.

It is vital to develop better practices for novation because novation is the predominant procurement model used on mid-rise and high-rise residential projects, a sector that has contributed greatly to recent public concern over major defects, non-conforming building products, and apartment building fires.<sup>1</sup>

In April 2019 the Institute undertook a national survey of its members to gain information on the positive and negative outcomes of novated projects.

The use of novation continues to spread into commercial, government and university projects, to the extent that the Institute's survey found that over 64% of surveyed member practices derived over 50% of their revenue through design and construct contracts that have been novated. While some large public projects (such as Public Private Partnerships) use non-novated structures, much of the guidance in this document is still deeply relevant to those projects, including the importance of transparency, minimising silo behaviour, and ensuring that those who superintend and inspect construction work have the skills and powers required to do so vigilantly and effectively.

The Institute is actively pursuing engagement, including industry research, to understand how holistic improvements can be made to provide a 'best value' approach to safer environments and creating quality built outcomes. This work is an important step towards addressing the loss of trust in the industry resulting from recent high-profile building defects occurring often, though not always, on novated projects.

Novation can create positive outcomes and is generally supported by the architectural profession. Many benefits can be delivered including improved buildability, time and cost outcomes. However, the April 2019 survey has identified issues which require further consideration.

Overwhelmingly, the survey found that there is a need for a mutually agreed approach to novation to provide the best outcomes for clients, consultants, head contractors, and the end building users. 83% of respondents supported the development of a code of novation. The following draft code is based on the results of the survey and in consultation with large architectural practices including Architectus, ARM Architecture, Bates Smart, Cox, Denton Corker Marshall, Elenberg Fraser, Hassell, John Wardle Architects, Lyons and Woods Bagot.

The draft code is intended to be a guideline document covering many matters including the level of completeness of documentation at the novation point, input into the principal's project requirements (PPR), head contractor selection, protocols for product substitution, and transparency of the scope of service for all consultants. It addresses communications protocols, value management, client relationships and the need for an independent superintendent during the construction phase.

Further consultation with the construction industry will allow a final consensus on guidelines to be developed for inclusion in an industry-wide Code of Novation.

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<sup>1</sup> On the extent of defects, see for example Johnston and Reid, An Examination of Building Defects in Residential Multi-owned Properties (Deakin University, June 2019); Shergold and Weir, Building Confidence: Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia (February 2018); Senate Economic References Committee, Non-conforming building products: the need for a coherent and robust regulatory regime (December 2018).

## INTRODUCTION

The Australian Institute of Architects is in the process of preparing a Code of Novation that will ultimately be endorsed industry-wide to provide guidance to government, principals, head contractors, consultants and other participants in the building industry.

In this document, the term design and construct refers only to the procurement model where consultants are engaged for design under an original consultancy agreement with the principal, and subsequently novated to the head contractor for the remainder of the project. Commercial and multi-residential projects most commonly use this model.

Construction has three major key variables: time, cost and quality. Design and construct procurement is adopted by clients to reduce the risks associated with construction, including cost and time overruns, using mechanisms such as a guaranteed maximum price (GMP) and completion date with the head contractor. Such mechanisms incentivise accelerated construction programming as reducing time on site generally saves money. With cost capped, and time minimised, focus can shift to the remaining variable - quality. Novating the design team from principal to head contractor acknowledges that the design (quality) may be controlled or indeed modified to achieve cost and time targets whilst under the direction of the head contractor.

In this context, 'quality' can be defined as durability, safety, maintainability, workmanship, coordination of works and sustainability of the built outcome. This means with this type of procurement the principal often trades the risk to cost and time, for a potential risk to quality. The head contractor may manage the risks of cost and time through some flexibility on quality.

The April 2019 survey of the architectural profession acknowledges that novation does bring benefits to aspects of project quality, particularly around buildability, quality assurance and safety during construction, due to the earlier involvement of the head contractor. This highlights the complexity of this procurement model.

The Code of Novation attempts to establish a clear set of expected standards of conduct, and methods to better manage risk and maintain quality, resulting in improved outcomes for all parties and the built environment. The format of the code sets out numbered principles with explanatory guides and notes in italics beneath each principle.

The key aims of the proposed Code of Novation are:

- To provide guidance on the fair and proper negotiation and performance of contractual arrangements for all parties in a novated consultancy agreement.
- To provide advice to principals on best practice in the procurement of building works under a novated consultancy agreement.
- To provide an industry-wide framework, defining expected standards of conduct to promote good design, safety and quality standards throughout the entire procurement process, thereby mitigating project risk and resulting in significant benefits to the built environment and broader community.

## DEFINITIONS

The following defined terms are used in this document:

***architect:*** means the architectural consultant.

***consultants:*** means architects, engineers, landscape architects, quantity surveyors and others providing professional design and advice services.

***consultancy agreement:*** (or original consultancy agreement) means the contract between the principal and the consultant, which will be novated to the head contractor.

***design and construct:*** means (for the purposes of this document) a procurement model in which the consultants are engaged for design under an original contract with the principal, and subsequently novated to the head contractor for the remainder of the project. (*Other design and construct procurement models which do not include novation are outside the scope of this document.*)

***design and construct contract:*** means the contract for design and construction between the principal and the head contractor.

***lead consultant:*** means the consultant responsible for coordinating the work of the consultant team (usually the architect).

***head contractor:*** means the party responsible for the physical construction works on the project site, including the coordination of all subcontractors' inputs for design, documentation and physical construction of the works on the project site. Post novation the head contractor becomes responsible to the principal for design and manages the consultants' design services.

***novation / novated:*** means the process of effectively transferring the consultant's obligations under an original contract with the principal to another party, in this case a head contractor, as part of a design and construct procurement model.

***novation deed:*** means the contract between the principal, head contractor and consultant which implements novation.

***principal:*** means the party that formed the original contract with the consultants that is subsequently novated to the head contractor. The principal may either own the site / project or represent the owner/s of the site project.

***principal's project requirements (PPRs):*** means the documents that form part of the design and construct contract that embody the principal's brief up to the point of novation and against which the final built form will be assessed. The head contractor must deliver what is documented in the PPRs, which can only be varied by agreement with the principal.

***subcontractor:*** means a contracting party for a part of the physical construction of the works on the project site, directly engaged by the head contractor.

***superintendent:*** means the superintendent of the design and construct contract.

## DRAFT CODE

### Novation

1. An appropriate level of completion of the design should be established and defined prior to novation:
  - 1.1. A significant proportion of the design development phase should be completed prior to novation. Depending on scale and complexity, it may be appropriate to go further and complete construction documentation.
  - 1.2. The principal and consultants should agree and define the required level of completion to be achieved for key packages of design work at the point of tender.

*The experience of the profession is that quality is generally improved if novation occurs when certain aspects of the design are substantially developed/resolved.*

*For the purposes of this document, the end of design development is considered to be when all design scope has been articulated.*

*A common complaint from subcontractors is that the partial design development information they are tendering on does not have sufficient detail and is not properly coordinated. They may then increase their price to cover potential risk – setting a later point of novation reduces this risk.*

*The longer the documentation period, the greater the level of coordination and detail will be provided to the head contractor and to the subcontractor by the consultants. This increased level of detail allows for greater cost certainty and quality.*

*On the other hand, it can be more costly and time consuming to alter progressed documentation if required by the principal or head contractor for cost savings or to improve the ease of construction should the head contractor and subcontractor prefer an alternative method of construction, material selection or detailing.*

*Clear definition of completion levels is crucial to the parties' understanding of what is being tendered and how 'shovel ready' a project is once a head contractor is engaged.*

2. The consultants should be provided with access to review and provide input to the principal's project requirements (PPRs) and or agreement for lease (AFL):
  - 2.1. Prior to issue for tender.
  - 2.2. Prior to inclusion in the construction contract.

*The PPRs form part of the head contractor's contractual obligations, and if a functional brief for the project is to be included, the consultants should actively contribute in consultation and review of this document with the principal to avoid conflicts of information between 'drawn', 'specified' and 'briefed' documents.*

3. Protocols and scope of service for product substitution should be established prior to novation. These protocols should include recognition of the additional time and expense necessary for proper review by the consultants of performance, compliance and appearance of any proposed product substitutions.

*The experience of the profession is that quality is generally improved if product substitution is reduced or controlled by the principal via scope and contractual provisions to ensure like for like performance and appearance.*

*Suggested protocols include:*

- *The head contractor should submit full and complete information for review of material and sample selections to allow for a holistic review of performance, compliance and appearance.*
  - *Submissions for substitutions should specifically be reviewed by the head contractor for compliance with the performance and intent of the originally specified materials.*
  - *Sufficient time and additional fees for review of substitutions should be allowed for in the consultancy agreements to permit the consultants to perform proper reviews.*
4. The original terms of the consultancy agreement should remain in place after novation and should not be significantly renegotiated.

*The novation deed should provide for a clean transfer of the consultant's liability from the principal to the head contractor, without imposing on the consultant duplicated or additional liability.*

### **Consultant Team**

5. The architect should be given access to the scope of service for all other consultants:
- 5.1. Particularly if appointed as the lead consultant or otherwise involved in coordination of consultants.
  - 5.2. Including when other consultants are not included in the process and/or when their scope of services is limited.

*Coordinating the inputs of many disciplines is often a key role of the architect. This is compromised if they do not have visibility of the full or limited scope of services for all consultants. This transparency is required to identify what is and is not in scope for each consultant and identify conflicts and gaps between them.*

6. The architect (particularly if appointed as lead consultant) is to be provided with unfettered access to all key consultants involved in the design, documentation and delivery process for consultation on issues that relate to the design and documentation, before and after novation.

*The experience of the profession is that head contractors often limit direct contact between the architect and consultants after novation. This limits the ability of the architect to properly develop the design and coordinate with the work of the other consultants.*

7. Consultants should be given access to liaise with appropriate subcontractors and subconsultants after novation to consult on issues that relate to the design,



documentation and construction of the works included within the design on mutually agreed terms.

*Any access to the subcontractors needs to be facilitated and managed by the head contractor, as they have management responsibility.*

## **Transparency**

8. Transparent communication protocols should be established between the principal, head contractor, superintendent and consultants prior to novation. This should be written into the novation deed.

8.1. The principal should be able to make enquiries directly to the consultants in relation to the services and the project but not able to give instructions to the consultants.

8.2. The consultant should be able to advise the principal in writing if it becomes aware of any departure from the design intent, compliance and quality standards by the head contractor; and anything that will negatively affect the quality of any aspect of the project without penalty by the head contractor.

*It is important that the principal can seek and receive advice from the original design team regarding decisions that may affect quality after novation.*

*This is particularly important in light of safety and fit-for-purpose design documentation and materials.*

9. Both before and after novation, consultants should be involved in strategic decision-making processes at project control group (PCG) meetings and this should be written in the novation deed.

*It has become common practice that the project manager and head contractor run the PCG meetings without the architect, despite the fact that the architect is considered the 'lead consultant' and as a result is likely to have exceptional valuable and strategic input to provide.*

## **Value Management**

10. Construction cost estimates and cost management processes should be visible and available to all parties:

10.1. To allow for the provision of appropriate advice to the principal prior to novation.

10.2. To allow for appropriate engagement in value management processes prior to novation.

10.3. To allow for protection of the design intent, regulatory compliance, safety and quality prior to and post novation.

*The architect has a holistic view of a project, across all disciplines but also more broadly, the impact a building has on its users, the public, and its context. Architects are well placed to provide advice regarding the value of different building elements, their contribution to the overall project and how best to manage these in relation to cost.*

*Traditionally, the architect would work in close collaboration with the principal and quantity surveyor to finesse a project to an estimated budget. In recent years, both prior to and after novation, the architect has often been removed from this process. The architect, as lead consultant, is in an ideal position to provide the principal with significant insight into value for money decisions, should these be required.*

*Value management, if it is to be incorporated, should be integrated within the overall program with a commensurate time and cost allowance for the architect and principal.*

## **Head Contractor**

11. The consultants should be involved in the head contractor selection process, including, but not limited to, the shortlisting of tenderers:
  - 11.1. To assist with selection of head contractors that are appropriate to the project scale and type.
  - 11.2. To comment on past relevant experience with the potential head contractors prior to inclusion in the tender process.

*Inclusion of the consultants in this process would benefit the principal and the project outcome.*

12. All consultant agreements should be provided to the head contractor at the time of tendering for the construction work.
13. Consultants should be involved in the creation of order of precedence of documents included within the construction contract prior to novation, and have access to the final version.

## **Construction Phase**

14. The principal should select and engage an experienced, qualified and independent superintendent to administer the design and construct contract.

*It is important for the principal to understand that the architect's role during the construction phase under novation is limited to the scope detailed in the consultancy agreement. This places more emphasis on the separate role of superintendent and the superintendent's ability to observe quality of construction and administer the contract.*

15. All consultants involved in the construction process should have free and unfettered access to the site to facilitate the level of observation envisaged within the consultancy agreements. This requirement should be incorporated into the design and construct contract.
16. The design and construct contract should require the head contractor to submit unedited versions of any reports and/or certificates prepared by the consultant team to the principal and superintendent, ensuring:

- 16.1. The wording of certificates realistically represents the level of observation of the construction works agreed in the consultancy agreement.
17. Project procedures should allow sufficient time for the activities required by the consultant team, noting:
- 17.1. The head contractor should provide a sequential program(s) for construction, clearly indicating the timing for submission and review of construction documentation to be prepared by the consultants.
  - 17.2. The head contractor should provide a sequential program(s) for submission and review of all shop drawings and samples submissions.
  - 17.3. Time periods for shop drawing and sample reviews should be mutually agreed and included in the consultancy agreement between the principal and the architect prior to novation.
  - 17.4. The head contractor to provide the consultants with regular updates of the construction program.
  - 17.5. The construction program should clearly indicate dates for shop drawings and samples submissions to ensure that adequate time for review and ordering of materials is allowed for prior to their need for installation on site.

*When undue pressure is placed on the consultant, the result is often rushed reviews which can result in errors or omissions and increased project risk which can detrimentally impact on the project's quality.*

*It is worth noting that late submission of information for review often leads to the need for unnecessary compromise in order to maintain the construction program on site.*