

Guidance Note

Collateral Warranties in relation to Housing Finance Agency / Land Development Agency and Approved Housing Bodies

This note provides guides members on how to protect themselves when engaging in housing projects, particularly where the HFA, LDA and/or AHBs are likely to become involved providing finance. These entities have existing terms and conditions that they often seek to impose through collateral warranties that can increase ACEI members' liability beyond the original appointment negotiated with clients.

Our advice is that members should not sign collateral warranties that extend liability beyond the original appointment as this is both inequitable and can expose members beyond the scope of their PI insurance cover. That being so, we recommend that if collateral warranties are introduced by the HFA et al, members should seek advice from the ACEI in the first instance and contact your PI provider as soon as possible. Legal advice may also be necessary.

Relevant Protections in Collateral Warranties:

The ACEI has engaged with the HFA extensively to agree that a 'no greater liability and equivalent rights in defence' clause be included in their standard form collateral warranty. This would mean that members would have no greater liability under the collateral warranty than they would have under the original appointment and that they could rely on any defence available to them in the original appointment in any claim made under the collateral warranty.

The HFA has a new template Collateral Warranty that now does include an Equivalent Rights clause (Clause 1.3.) However, the template still includes the HFA's standard limit on liability clause at Clause 7. The intent is that either the Equivalent Rights wording or the Limit on Liability clause would be deleted.

The Equivalent Rights clause will only be accepted by the HFA where they have reviewed the Appointment and are satisfied with the limitations on liability and other clauses contained in the appointment – they certainly won't accept a Net Contribution Clause, and in this case, will insist on their Clause 7 applying. In other words, equivalent rights are only granted if they match up to the HFA's onerous conditions.

ACEI members should review HFA Collateral Warranties carefully in line with their internal procedures and recent ACEI guidance notes. They should ensure that the warranty:

- does not extend liability beyond that already assumed under the original appointment;
- does not impose higher standards of care or additional obligations;
- does not create exposure that is not covered by your professional indemnity insurance.

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The following are important points to consider:

1. Always seek a “no greater liability and equivalent rights in defence clause”

The ACEI recommends that members seek the inclusion of a “no greater liability and equivalent rights in defence” clause in any proposed collateral warranty. This is designed to ensure that the consulting engineer has no greater liability than under its original appointment with clients. Further, the consulting engineer may raise as a defence in a claim made under the collateral warranty any defence which it could raise under its original appointment.

Without this clause, the collateral warranty can place further risk on the consultant in addition to that contained in the original appointment, which will have implications on claims that can be made against the consultant under the collateral warranty, and the ability to defend those claims.

In some circumstances, the HFA may be providing funding for only part of a development. Where a “no greater liability and equivalent rights” clause is included in the Collateral Warranty the consultant should assess whether the limitations on liability included in the Appointment are appropriate for the part of the development for which the HFA is providing funding. If these limitations on liability in the Appointment are too high, then you should attempt to negotiate more appropriate lower limitations; additional wording to reflect this should be included in the Collateral Warranty.

2. What to do if the HFA refuses to include a “no greater liability and equivalent rights in defence” clause

The HFA may refuse outright to insert a “no greater liability and equivalent rights in defence” clause into the collateral warranty. If you decide to accept this position on commercial grounds, you should ensure that your professional indemnity insurance will respond to any claim brought pursuant to this collateral warranty.

3. What to do if the HFA seeks to amend your appointment with your client

Increasingly, members are reporting that the HFA will alter the consultant’s original appointment with their client. They may seek to retrospectively amend this appointment and remove any of the limitations or exclusions it deems unacceptable and dump more risk on your firm. The ACEI’s position is that the consultant’s duties are defined by the appointment and the HFA should not be permitted to retrospectively amend those terms. Therefore, it is ACEI guidance that you should never accept any retrospective amendments to the underlying appointment.

Any HFA concerns relating to the original appointment should be addressed solely within the collateral warranty. They will sometimes offer a “no greater liability and equivalent rights in defence” clause with caveats that excludes certain clauses in the original appointment.

Essentially, this means that the consulting engineer will continue to have the protection of the exclusion or limitation clause in the appointment, but such protections, exclusions or limitations will not apply in respect of any claims pursued by the HFA under the collateral warranty agreement. Members should therefore confirm that their professional indemnity insurance will continue to respond to all liabilities arising under the collateral warranty. Members may also wish to seek legal advice for such amendments.

4. What to do if the HFA insist on a new form of appointment

The HFA may request that the original appointment with the client is replaced with a new appointment. Members should resist this and insist that the original appointment remains in place. However, members have been put under intense pressure to agree to this approach. In this case, review the contract carefully in line with your company procedures and in conjunction with your insurers and legal advisors. This might well be an onerous appointment that may contain uninsurable clauses, such as fitness for purpose obligations and wide-ranging indemnities.

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Conclusion:

ACEI members are increasingly being placed under significant commercial and professional pressure by the HFA, and other State or quasi-State bodies with significant buying power. The imposition of collateral warranties and amended appointments that extend liability beyond the original contractual position creates unacceptable risk for consulting engineers and, in many cases, exposure that is not insurable.

The ACEI will continue to engage with relevant Ministers and officials to highlight that these practices undermine market confidence and ultimately threaten the delivery of housing at scale. Projects that require consultants to accept disproportionate and uninsurable risk are unsustainable and will deter participation across the sector.

ACEI's guidance remains clear: members should not accept contractual terms—whether through collateral warranties or amended appointments—that increase liability beyond the original appointment or compromise professional indemnity cover. Where such terms are proposed, members are strongly advised to seek guidance from the ACEI at an early stage, consult with their insurers, and obtain legal advice where necessary.

Consulting engineers are essential to the delivery of housing. Members should be confident in declining arrangements that place their businesses at undue risk and that pose a material risk to the ongoing availability of effective and affordable professional indemnity insurance market.

The ACEI will continue to support members in taking a robust and collective stance on this issue.