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Australian Consumer Law Review
www.consumerlaw.gov.au

Australian Institute of Architects

The Australian Institute of Architects (the Institute) is the peak body for the architectural profession in Australia. It is an independent, national member organisation with around 12,000 members across Australia and overseas. The Institute works to improve our built environment by promoting quality, responsible, sustainable design.

It has come to our attention that the Australian Consumer Law Review Issues Paper has raised the possibility of removing the exemption from the implied fitness for purpose warranty that currently exists for architects and engineers under section 61 of the Australian Consumer Law (ACL).

We are concerned that this matter has been raised again. The Institute believes that no market failure has been identified that requires the removal of the exemption, and that removal of the exemption will introduce circumstances that would be detrimental to consumers and will adversely impact on architects, either as principals of smaller practices in particular, or employees dependent upon them for employment as architects. With architectural services in Australia in 2014-15 generating revenue of around $6.4 billion, and with 98 per cent of Australia's 13,555 architectural businesses, being small enterprises with less than 10 employees, the proposed changes could have a significant economic impact.

Nothing in our submission should be taken to imply that we consider that section 61 ought to apply to other professional service providers, but not to architects and engineers. Many of the issues we raise for continuance of the exemption could equally be made for bringing other professional services providers within the exemption. We are also supportive of the remaining sections of the ACL applying to the professional services delivered by Architects, for instance, Architects being subject to claims of misleading and deceptive conduct under the ACL.

The current situation

It is important to understand the context in which architectural services are delivered to consumers. Unlike the provision of many professional services, architects' services to which this legislation applies almost always result in a physical product – a home, whether new, or post-alteration.

Housing designed by architects is almost invariably ‘bespoke’ in nature. Such homes are not “products” that can readily be tested before release to consumers. Rather, virtually every bespoke home resulting from architects’ services is unique. Unlike a manufactured product that can be tested and refined before sale or delivery, the bespoke product of an architect’s work comes together on completion, at which point it is ‘delivered’ straight to the consumer.
Bringing a client’s stated purpose to fruition when it is clearly documented is difficult enough, but to bring a client’s ‘implied’ purpose to fruition can be near impossible.

For example, how does an architect measure less tangible and subjective qualities - 'bright and airy spaces', ' a feeling of spaciousness', 'an inspirational quality', 'comfortable in summer without air-conditioning', etc. These issues are entirely subjective and incapable of measurement, because, for instance, one person’s level of comfort will be different to another person’s.

Under the current provision, failure to achieve a desired purpose does not of itself bring about liability – there must also be a failure to have applied the requisite standard of care (and skill). The standard to be applied incorporates the court’s interpretation of the state of knowledge a reasonable architect would have had at the time of designing. As well, the liability in negligence may also be offset by the degree to which the client contributed to the failure through their own negligence.

If the exemption were to be removed, a guarantee of fitness for purpose is imposed without allowing for any mitigation by the architect. Failure to achieve the purpose (stated or implied) means liability is automatic. Consideration of whether the architect failed to apply the required standard of due care and skill at the time of design is irrelevant, as is whether the client also contributed to the failure to achieve the purpose.

Under s.61, liability for a design that failed to achieve the purpose will apply unless the design could have been reasonably expected to achieve the purpose. However, consideration of what the purpose is could occur up to six years after the design was undertaken. The architect’s client has that long to imply a purpose into an already completed design.

No amount of explanation or technology is a guarantee of consumer comprehension of the product they have ordered by approving the design. Many clients in the residential sector find it hard to read plans and even 3D renderings.
Once a consumer has taken delivery of their home, the consumer will potentially identify things that work better for them than anticipated

and those that do not. As an Institute member observed of the process of housing design:

> *"The process of designing and building residential projects is extremely complex and personal - it will never be possible to predict and document every aspect of a project with respect to a client's implied expectations. There are many aspects of a completed building that the client will not have been able to imagine as an issue during the design stage."*

Impact of removal of exemption

Increased costs to the consumer

The removal of the exemption will result in an increase in the cost of delivery of architectural services. The costs of risk mitigation, including the additional cost of insurance, if available, cannot help but be passed in to the consumer in increased fees. This would not be of benefit to consumers in general, as it will place the services of architects further beyond reach for many.

This is not just a problem for consumers who may like to, but cannot afford the individual design provided by an architect. It is well accepted that architects are often at the forefront of advancement in home design, the benefits of which filter through the housing market. The needs of the community for sustainable cities in the face of projected massive population growth are both palpable and imperative. Australia must learn how to be more sustainable in its housing and how to mitigate the effects of climate change. Architects pursuing their livelihood conduct applied research through their work in solving real problems for clients.

Stifling Innovation and removal from the market

A guarantee of fitness for purpose, applying irrespective of an architect's genuine effort in application of care and skill, will hamper innovation. Architects will avoid innovative solutions and some architects will even decline engagement where an innovative solution is requested by a client. New solutions in housing that can benefit all of Australian society require experimentation that often takes place only where clients are able to afford it. However, the response of our members suggests the threat of a guarantee that can affect their livelihood if the experiment does not deliver, is enough to deter many architects. As mentioned by one of our members:

> *"Architects do not design in a vacuum. The client has continuous input into their house. This law is likely to inhibit leading edge and innovative design as architects play it safe. In the process the clients are likely to be more dissatisfied with their architects because they appear to be less responsive to their aspirations."*

The Institute's members have indicated that for a significant proportion of architects, the removal of the exemption from fitness for purpose will tip the balance against providing home design services for consumers, thereby reducing competition and exacerbating housing affordability problems in Australia. As one member commented: *"As a part-time architect working from home solely on residential homes and additions, the proposed changes would put such a high risk for so little return, that I would probably have to consider if it is worth continuing my practice".*

The Institute believes that there will be a resulting avoidance of residential design for consumers, and/or withdrawal of some practitioners from the market, lessening competition and the availability of services to consumers.

No-fault liability for architects' professional services is not justified

The nature of architects' work with consumers in residential projects leaves architects (and engineers) exposed to undue liability, which is particularly severe on sole practitioners and small to medium practices. There is no evidence that an additional head of liability is necessary or that it addresses a systemic failure in the recourse consumers presently have for loss attributed to architects, through negligence, misleading and deceptive conduct and/or contractual claims.

Refuting claims for such liability in addition to the forms of legal recourse already available to consumers, imposes a potentially significant additional cost burden on small architect practices that is not justified, in the Institute's view, by any benefit to consumers. This is particularly so where the costs of refutation go

beyond legal support, to inability to attend to business while claims are being defended.

It is common for the threat of, or actual negligence claim, to be raised by consumers in response to a claim for payment of outstanding architectural fees. A claim, even if not ultimately made out, has dire consequences for the architect in terms of insurance premiums and loss of productive time in managing the claim.

The nature of claims made in the consumer housing market against architects is that they are often brought in 'consumer tribunals' under the specialised housing legislation that exists in virtually every state and territory. For the plaintiff client, these are virtually legal cost-free environments where legal forms that contain costs are not entertained, and untested interpretations of the law are relatively easily explored by consumers.

The opposite is true for architects. Either there are the legal representation costs in meeting claims by represented or self-represented clients, or there are the significant costs of inattention to one's practice while defending claims.

The proposed law raises several questions, including whether the consumer's implied purpose is a subjective rather than objective one. As one Institute member has commented:

> *"Even if you could adequately defend yourself with masses of documentation, the opening would be there for Clients to at least have a go because 'implied' is such an open term. A small practice could go broke just defending claims."*

It is inequitable that, in addition to liability in negligence, an implied purpose can be identified in hindsight by a consumer who wishes to obtain both a refund of professional fees and damages.

Access to insurance

The removal of the exemption will directly impose a guarantee of fitness for purpose. This raises an immediate issue about the ability of architects to manage the risk of potentially crippling liability – particularly for smaller architect practices.

Availability of insurance to protect the business of architects (and engineers) from claims under this proposed head of liability is uncertain. No such insurance for voluntarily assumed warranties of fitness for purpose is available to architects at present. This reflects the fact that a warranty or guarantee is fundamentally different to negligence, which is insurable from a risk underwriting perspective. In the context of professional services to a client, liability in negligence only arises where the architect has failed to apply due care and skill in accordance with the objective standard required.

Insurance of architects (and engineers) is a unique line of insurance. The comfort of an insurer with fitness for purpose guarantees for other types of professionals is no indicator of the propensity of architect or engineer underwriters to endorse policies for them. In any event, if professional indemnity insurance becomes available, it is very likely that significant premium rises are involved which themselves will affect the viability of smaller architect practices.

The exposure to liability is heightened unnecessarily by the addition of a guarantee in connection with the consumer's *implied* purpose to be achieved by the services. As mentioned above, because of the nature of residential design, implied purposes can be subjective.