Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010

Comments to the Senate Standing Committee on Economics

April 2010

Contact: Leanne Hardwicke
Director, International and National Policy
Engineers Australia
11 National Circuit Barton ACT 2600
Tel: 02 6270 6570 Fax: 02 6273 4200
Email: lhardwicke@engineersaustralia.org.au
www.engineersaustralia.org.au

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1. Introduction

Engineers Australia is the peak body for engineering in Australia, representing all disciplines and branches of engineering. Engineers Australia has over 90,000 individual members Australia-wide making Engineers Australia the largest and most diverse engineering association in Australia. All Engineers Australia members are bound by a common commitment to promote engineering and to facilitate its practice for the common good.

Engineers Australia offers the following for the consideration of the Committee.

2. Comments

The political and economic climate in Australia over recent years has been characterised by increasing resort to litigation as a compensation mechanism. In recent years there has been an increase in the number and quantum of claims against professionals to recover loss or unexpected costs that are alleged to have resulted from the unsatisfactory delivery of professional services. This is due to a number of factors such as:

- changes in community attitudes with respect to risk;
- a willingness to litigate more frequently; and
- an increase in the size and complexity of work being undertaken.

Currently, the Trade Practices Act implies a condition that goods will be fit for any particular purpose made known by the consumer (either expressly or by implication) to the seller. This condition is extended to contracts for the provision of services. The condition is implied where the corporation supplies the goods or services in the course of business. The condition is not implied where the consumer does not rely, or it is unreasonable for the consumer to rely, on the skill and judgement of the supplier. The Trade Practices Act currently provides an exemption from the fitness for purpose provision for services of a professional nature provided by a qualified architect or engineer.

Engineers Australia is strongly opposed to the proposal to remove the exemption for engineers (and architects) from the fitness for purpose warranty provision currently contained in the Trade Practices Act. We are further concerned that not only will a fitness for purposes test apply to engineering services, but this has been changed from a warranty to a guarantee.

We are also puzzled as to why there has been no consultation on this proposal with the relevant professional and industry bodies, other than through the review of implied terms by the Commonwealth Consumer Affairs Advisory Council, which did not initially raise the issue of removal of the exemption. There appears to be no market failure to justify taking such an approach, and no evidence that it will improve consumer protection. It may in fact have the unintended consequence of harming small engineering practices. Where it is intended to impose a higher duty, at the very least, consultation should be undertaken with the persons directly affected by changes to the law.

As a matter of principle, Engineers Australia believes that regulators should ensure that they are imposing restrictions, rights and obligations that are no tighter than necessary to create an acceptable consumer environment.

Courts or legislation can imply terms into contracts. A common implied term is “fitness for purpose”, especially with respect to consumer goods. Terms implied by the courts (the business efficacy test) are terms unique to the particular contract, and depend on the express terms of the contract and the relevant surroundings.

With respect to professional services, it is the view of Engineers Australia that the consumer and supplier are better served by terms that are implied by the wording of a contract, the circumstances surrounding the making of the contract, and the parties' understanding of those terms rather than by legislative "fitness for purpose" provisions. This follows from the nature of professional services, where the outputs and inputs cannot be well defined.

There is, and will continue to be, an increase in complexity within the various areas in which professionals work. The evolution of the "fitness for purpose" test on goods flowed from the concept of an implied warranty, which in turn flowed from a belief that consumers needed protection from having to make a choice between a warranted and an unwarranted good. That is, to be protected from making a conscious decision between accepting a risk themselves or paying more to have some part of a risk accepted by the provider of a good. Given the perceived need for an implied warranty, what should the implied warranty be? No better response has been found than an implied warranty of "fitness for purpose".

Unlike goods, services delivered by engineers to consumers are unique in every instance and require a different approach.

The practice of engineering impacts on all facets of everyday life, particularly on the health and well being of the community. The diversity of the role of engineers in the community is evidenced by the range of fields in which engineering is practised. These include aeronautical, chemical, civil, electrical, electronic, mechanical, mining, industrial, structural, and biomedical engineering. Professional engineering services also account for a significant and increasing proportion of national and international trade.

Engineering is an art that uses a significant amount of scientific input. It is not a science. The service offered by engineers is unique in each case and unless a client knows definitively what is required of an engineer at the outset, there is nothing against which to judge "fitness for purpose".

The relationship between the professional service provider and the consumer is all important. The responsibility for delivery of the service to meet the consumers needs rests not only on the ability of the professional, but more importantly, with the consumer's ability to communicate their requirements effectively. Imposing requirements on professionals to deliver a service that is "fit for purpose" would require the consumer to be in a position fully to define and articulate the purpose of the service, and comprehensively to determine the final end use of the artefact created from the service.

Fitness for purpose in terms of engineering services is difficult to define as it is impossible to state precise boundary conditions. The best that can be hoped for is an inaccurate statement of "purpose", and the degree of inaccuracy will vary throughout the continuum. For instance, what is the "purpose" of a retaining wall constructed to support the front lawn of a residential property? Is simply to support the lawn, or to support any carport, garage or block of town houses which might subsequently be built on the lawn, probably by a subsequent owner and almost certainly without consultation with the professional who provided the original service?

It is particularly difficult to define the "purpose" of a service. Issues arise such as to what extent is the "purpose" of the service conditional upon the interaction of the consumer, or to what extent is the service compromised by the actions of the client who will not follow the advice in relation to selection of contractors and the provision of adequate supervision when translating the service to a good.

It is essential that certain services are excluded from the proposed fitness for purpose guarantee. The provision exempting professional services of a qualified engineer or architect should remain. Withdrawal of this exemption will inevitably lead to unrealised and unrealisable expectations and increased costs to consumers. The community will not receive the appropriate level of protection intended.

In the case of complex engineering services, the consumer cannot check the quality of the service provided because it is embodied in the intellectual output of the engineer. There must be reliance on the professional integrity of the engineer.

In practical terms, no detailed description can be given by an engineer prior to the work being undertaken. It is therefore vital that this unintended consequence is recognised when reviewing consumer protection laws.

Given the changes to the insurance market in the last decade, it is unclear whether insurance will be available for engineering firms to cover the fitness for purpose guarantee. Under a guarantee, failure to achieve the purpose means liability is automatic. Insurance for engineering is a unique product, informal consultation with the industry indicates that underwriters will not provide coverage for such a guarantee.

The imposition of higher levels of liability on service providers, such as guarantees of “fitness for purpose”, may have an unintended consequence of changing the way that services are delivered to consumers. For instance, engineers may not design cost effectively, and the designer may in fact, be influenced in the direction of over-design, which will inevitably lead to increased costs for the consumer. The implied term of fitness for purpose may also stifle innovation.