

30 November 2016

Consumer Affairs Australia and New Zealand (CAANZ)
Australian Consumer Law Review Secretariat
By email: ACLReview@treasury.gov.au

To Whom It May Concern,

RE: Australian Consumer Law – Interim Report

Consult Australia welcomes the opportunity to comment on the interim report into the review of the Australian Consumer Law (ACL). Consult Australia is the leading not-for-profit association that represents the business interests of consulting firms operating in the built and natural environment. Consult Australia member firms' services include, but are not limited to architecture and engineering.

Consult Australia represents an industry comprising roughly 48,000 firms across Australia, ranging from sole practitioners through to some of Australia's top 500 firms. Over 95% of firms in our industry are smaller firms. Collectively, our industry is estimated to employ over 240,000 people, and generate combined revenue exceeding \$40 billion a year.

Of greatest interest to Consult Australia and the subject of this submission and previous submissions is the question as to whether the consumer guarantees should be extended to goods and services currently excluded, including services provided by qualified architects and engineers. As the interim report highlights these services are currently excluded from the consumer guarantee relating to fitness for a particular purpose.

We note that the interim report highlights that *"... given the general, economy-wide application of the ACL, each 'carve out' or exemption has the potential to undermine the benefits of a nationally consistent approach to consumer protection"*.

Consult Australia argues that while this clause may appear relatively minor, it reflects an acknowledgement of the need to tailor the Act to prevent unintended consequences where, due to the very nature of the services provided, a guarantee of fitness for purpose is not possible nor desirable to meet the objectives of the Act.

Where this issue has been previously and extensively examined, the avoidance of a one-size-fits-all approach to fitness for purpose has been essential to respond to the operational realities of an industry dominated by small businesses operating in an economically significant sector of the economy.

Further, this guarantee is not possible due to the very nature of the services provided and the unique characteristics of the supply chain in which engineers and architects provide these services. Building and construction projects involve multiple parties in the delivery of a project. It is the builder or contractor that delivers the end product.

To require the architect or engineer to warrant the performance of other parties, particularly where they have no control over the other parties or the quality of their work, is plainly unreasonable, reflects poor risk management, and creates new risks for all those involved in the supply chain. The introduction of an implied fitness for purpose warranty introduces substantial risk for engineers, architects and their insurers because it exposes them to the risks associated with the performance and behaviour of other participants involved in delivery of the project. The removal of this exemption would run counter to the very objectives of the ACL and this Review.

Removing the exemption for architects and engineers will not provide any added benefit to consumers, who are already well protected from the consequences of negligent advice by an architect or engineer through the common law; their contract with that professional consultant; and the

guarantee as to care and skill. Faulty workmanship is covered by the fitness for purpose warranty given by the builder.

Conversely the removal of the exemption will result in substantial detriment to engineering and architectural professionals because it will significantly increase the risk of litigation against consultants. Clients will be able to sue a consultant regardless of whether or not there has been any fault on the part of the consultant and regardless of the fact that it is the builder that has control over delivery of the final project and not the engineer or architect.

Consult Australia submits that there is no robust policy basis for the removal of the exemption that applies to engineers and architects. Further, the Act already adequately protects consumers and most importantly there appears to be no market failure to justify the removal of the exemption.

I appreciate your consideration of our comments and recommendation that the exemption for architects and engineers remain and look forward to participating further in the review.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Megan Motto', written in a cursive style.

Megan Motto
Chief Executive