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Developments in construction, engineering and contract works

This is a new publication intended to provide a brief overview of developments and important issues occurring in the building, construction and engineering industry.

NO FAULT LIABILITY FOR ARCHITECTS AND ENGINEERS

Written by Hannah Keane, solicitor

Introduction

On 21 May 2010 the Senate Economics Committee (**the Committee**) released its report on the **Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 (Cth)** (**the Bill**) which was introduced into the House of Representatives on 17 March 2010. The majority of the amendments implemented by the Bill are expected to be operational from 1 January 2011. This is to be confirmed.

The Bill is the second phase of the Federal Government's intended overhaul of Australia's Consumer Laws[1]. It is designed to introduce general and specific consumer protections including new statutory consumer guarantees and a new national consumer product safety regime.

In its current form, section 74(2) of the **Trade Practices Act 1974 (Cth)** (**the TPA**) provides an implied warranty into any contract for the provision of services/products that the services/products provided will be *"reasonably fit"* for the purpose required by a consumer. The Bill proposes replacing the implied *"fitness for purpose"* warranty with a statutory guarantee that a service/product must be reasonably fit for the consumer's intended purpose.

This is particularly relevant for architects, engineers and their insurers as the Bill proposes to remove the exemption architects and engineers currently enjoy from the implied

[1] The first phase (the **Trade Practices Amendment (Australian Consumer Law) Bill 2009**) was passed by the Senate on 17 March 2010 and amends the **Trade Practices Act 1974 (Cth)** and the **ASIC Act 2001 (Cth)**. It introduced new investigative and enforcement powers for national regulators of consumer laws, some new civil penalties, and a national unfair terms regime.

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"fitness for purpose" warranty. This means that architects and engineers will be subject to the statutory guarantee to ensure that their services are fit for purpose and may be held responsible for the outcome of a project even though a third party (such as the building contractor) was responsible for constructing the final product.

The Committee received submissions on the Bill from, among others, Engineers Australia and the Australian Institute of Architects. Their principle arguments against the removal of the exemption for architects and engineers are that:

+ it is *"not justified by any benefit to consumers"*[2] as their clients are already protected from the provision of negligent advice under the common law, contract and the implied duty of care under the TPA;
+ the nature of the services provided by architects and engineers is distinct from other professionals in that:
    - o they are engaged to develop designs/specifications for a project and a third party implements those designs/specifications; and
    - o clients often change their mind about the purpose of a design and cost constraints may affect the level of service that can be provided,

  such that architects and engineers should not be liable for the *"fitness for purpose"* of the completed project.

The Committee did not consider this argument persuasive. The Committee stated in its report that services of an architect and engineer cannot be *"sufficiently distinguished"* from that of other professionals such as interior designers and lawyers who have been subject to the implied *"fitness for purpose"* warranty under the TPA since 1986 and have experienced little or no practical affect on the cost of their services, their insurance or their exposure to litigation.

The Committee noted that architects' and engineers' liability under the proposed fitness for purpose guarantee will be limited to the terms of their engagement – i.e. providing a design concept, and if they *"have achieved a result of a kind reasonably required by the client"* they will not be found liable (our emphasis).

What does this mean for insurers?

The exclusion insurers have traditionally had in place for cover for any express *"fitness for purpose"* warranty drafted into contracts between architects/engineers and their clients will no longer be commercially acceptable. We expect to see this exclusion removed, effectively broadening the scope of professional indemnity cover and leaving insurers exposed to indemnifying claims that are brought against architects/engineers as a result of a third party's conduct. This is likely to result in increased premiums for architects and engineers until the impacts of the change can be properly assessed.

What does this mean for architects/engineers?

Should the Bill be passed as proposed, architects and engineers will be exposed to an additional cause of action by which clients can sue for defective design. Architects and engineers may consequently:

+ feel forced to adopt a more conservative approach to their designs and may *"over-design"* in an attempt to provide for any conceivable contingency;
+ find it difficult to obtain adequate or affordable professional indemnity insurance until the market settles;
+ need to increase client fees to pass on the costs of higher insurance premiums; and
+ experience greater competition in the industry.

> *"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". …Withdrawal of this exemption will inevitably lead to unrealised and unrealisable expectations and increased costs to consumers."* – Engineering Australia submission to SEC, April 2010

[2] Submission dated 23 April 2010 prepared by the Australian Institute of Architects.

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BE PREPARED FOR CHANGES TO REGISTRATION, PRIORITY & ENFORCEMENT OF SECURITY INTERESTS UNDER CONSTRUCTION CONTRACTS

Written by Hannah Keane, solicitor

Introduction

The **Personal Properties Securities (Corporations and Other Amendments) Bill 2010** (**the Bill**) was introduced into the House of Representatives on 10 March 2010 and forms the second amendment to the **Personal Properties Securities Act 2009 (Cth)** (**the Act**) which commenced in December 2009.

The Bill will, inter alia, amend the **Corporations Act 2001 (Cth)** (**Corporations Act**) and:

+ create a new register for company charges (with an anticipated commencement in May 2011); and
+ set out new rules for the creation, priority and enforcement of security interests in personal property.

Under the Act, the category of security interests will be expanded to include interests arising from agreements, hire-purchases, leases and consignments that secure payment or performance of an obligation, commercial consignments and personal properties security leases. In the building and construction industry, security interests may include bank guarantees, retention monies, charges held over plant or equipment, and retention of title (**ROT**) arrangements for materials delivered to a project site.

What measures should be undertaken to protect your security interest?

So that your security interest has priority over other security interests you will need to:

+ ensure the security agreement is in writing;
+ ensure the security interest is registered; and
+ if possible, take possession or control over any secured collateral.

You should also:

+ conduct searches of the register when deciding whether to take security over certain collateral to ensure there are no existing registered security interests;
+ amend and negotiate contracts to take account of the Bill, including contracting out of certain enforcement provisions (which is permitted if the collateral is not used predominately for personal, domestic or household purposes); and
+ ensure compliance with the Bill in relation to the enforcement of a security interest, which includes:
    - exercising a degree of "good faith" (which will be determined on the individual facts, circumstances and contractual terms of a particular case); and
    - complying with the various requirements for enforcing a security interest in a liquid asset or other types of assets (for longer term assets, such as a charge held over plant and equipment, the requirements in relation to seizure of collateral are far more stringent).

Manufacturers and suppliers should be aware that the Act changes the way in which they can sell their product on ROT terms. In effect, a manufacturer or supplier who sells on ROT terms may risk losing ownership interest in the goods, whether or not they have been paid for, if they do not comply with the Act (this can be avoided if the manufacturer registers its ROT as a security interest within the specified timeframe under the Act).

MANDATORY ENERGY DISCLOSURE OWNERS/TENANTS

Written by Hannah Keane, solicitor

Introduction

In line with the national strategy to reduce energy consumption, the Federal government has released the **Building Energy Efficiency Disclosure Bill 2010** (currently before the Senate) which will implement a mandatory energy disclosure scheme (**the Scheme**) requiring certain owners/tenants to publicly disclose the energy rating of their building/tenancy.

Who must disclose?

The Scheme applies to:

+ owners who sell or lease a tenanted area, a sub-tenanted area, base building or whole building; and
+ tenants subletting a tenancy,

so long as the net leased area is 2000m² or greater.

There are some exemptions from the Scheme, which are only available upon written application. For example, where:

+ the building or tenancy is used for police or security purposes;
+ because of the nature of the building or tenancy, it is not possible to obtain an energy efficient rating; or
+ the building or tenancy falls into any other identified category (this is thought to include strata titled buildings or tenancies, newly constructed or recently refurbished buildings where a sale is through shares or units, and where a sale is for only part of an interest in property).

What obligations are imposed by the Scheme?

Obligations imposed on owners and tenants include:

+ the requirement to first register a Building Energy Efficiency Certificate (**the Certificate**) before leasing or selling building space;
+ the requirement to produce a copy of the Certificate to potential lessees and buyers; and
+ the requirement to disclose a building's energy efficiency rating on all advertisements.

When will the scheme commence?

The Scheme is expected to commence on 1 July 2010 although it has not been decided when the obligations on owners and tenants (as outlined above) will commence. It will likely be in mid to late 2010.

The Scheme also allows for a 12 month transition period, only applicable in certain circumstances, such as for buildings or tenancies where a National Australian Built Environment Rating System (**NABERS**) rating has already been obtained (prior the obligations on owners and tenants coming into force). In that case, the NABERS rating may be disclosed instead of the Certificate.[3]

Enforcement measures

Any breach of the obligations may result in a penalty of up to $110,000 per infringement. There will also be a *"non-disclosure register"* which will publicly display an owner's/tenant's failure to disclose (when such a failure has occurred twice or more within a 12 month period).

Auditors of the Scheme will have the power to obtain a warrant to search premises, inspect and/or seize documents and information (in any medium), and interrogate relevant persons.

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[3] (A NABERS rating measures an existing building's or tenancy's environmental performance during operation. These ratings can be disclosed to interested parties including potential investors, Government agencies and Councils etc, and can be used to maintain performance targets and improve performance ratings).

ENGINEER'S RETAINER ESTABLISHES SCOPE OF DUTY

Written by Michael Bath, senior associate

Introduction

Hoeben J's recent decision in ***Al Mousawy v Howitt-Stevens Constructions Pty Ltd & Ors*** [2010] NSWSC 12 (**Al Mousawy**) provides a timely reminder that the terms of a retainer are an important factor in determining the scope of an engineer's duty of care to third parties.

On 24 November 2002 the plaintiff was injured when a suspended ceiling in the Stonewall Hotel collapsed. The plaintiff sued, amongst others, the owner of the hotel, the occupier (**Stonewall**) and a structural engineering firm JA Byatt Pty Ltd (**the engineer**). One of the issues which the Court was asked to consider was whether the engineer owed a duty of care to the plaintiff and, if so, the extent of that duty.

Judgment

Scope of engineer's retainer

The engineer was retained by Stonewall to provide a report to assist with the renewal of its Place of Public Entertainment (**POPE**) authorisation. While there was conflicting evidence on the scope of the engineer's retainer, the Court ultimately accepted that the engineer's retainer was limited to providing advice about the structural adequacy of the suspended floors of the hotel. The limited nature of the retainer was ultimately critical in the Court's determination of the extent of the duty owed by the engineer to the plaintiff.

Scope of duty

Having determined the extent of the engineer's retainer, Hoeben J turned to consider the scope of the engineer's duty (if any) to the plaintiff. The plaintiff sought to define the engineer's duty in terms that, having observed the remnants of the lath and plaster ceiling attached to the underside of parts of the floor on the second level during its inspections of the hotel, it failed to take appropriate steps to deal with that observation.

Hoeben J considered that the circumstances of the plaintiff's claim against the engineer did not fall within an accepted category of duty of care. In those circumstances his Honour relied upon the comments of Allsop P in ***Caltex Refineries (Qld) Pty Ltd v Stavar*** [2009] NSWCA 258 (**Stavar**) as authority for the proposition that where:

> *"… the posited duty is a novel one, the proper approach is to undertake a close analysis of the facts bearing on the relationship between the plaintiff and the putative tortfeasor by references to the 'salient features' or factors affecting the appropriateness of imputing a legal duty to take reasonable care to avoid harm or injury..."*

His Honour then listed the salient features referred to by Allsop P in ***Stavar*** including:

+ the forseeability of harm;
+ the degree and nature of control able to be exercised by the defendant to avoid harm;
+ the nature of the activity undertaken by the defendant;
+ the nature or the degree of the hazard of the danger liable to be caused by the defendant's conduct or the activity or substance controlled by the defendant; and
+ the nature and consequences of any action that can be taken to avoid the harm to the plaintiff.

His Honour stated that ***Stavar*** was not authority for the proposition that the imposition of a duty of care merely required forseeability of harm to be established and the capacity to do something about it. His Honour considered that even if the engineer saw something dangerous or potentially dangerous in any part of the premises other than the structural flooring, it did not follow that the engineer owed a legal obligation to third parties to say or do something in respect of that danger.

Another important factor was that the defective ceiling was constructed by others and the engineer was not involved in its design or construction.

Relevance of the engineer's retainer

His Honour concluded that the major *"salient feature"* for determining the content of the legal duty imposed on the engineer was the *"nature of the activity undertaken"*. This involved an examination of the precise terms of the engineer's contract with Stonewall. Having concluded that the terms of the engineer's retainer were clear and limited to providing advice on the structural adequacy of the suspended floors of the hotel, his Honour stated that:

> *"I do not see why a structural engineer as distinct from any other professional who is expert in a particular field, should be required to go beyond the terms of his or her or its retainer… i.e. the investigation into the construction of the suspended floors to evaluate their respective loading capacities. It was not retained to investigate and evaluate any other aspects of the building which may have been required for the POPE authorisation renewal…"*

The engineer's duty was limited to exercising reasonable care in the investigation and assessment of the structural integrity of the floors in the hotel. It did not owe the plaintiff a duty of care in relation to the ceilings.

Implications

While the decision was heavily influenced by the particular facts, it is a useful reminder that building professionals should ensure that the scope of their retainer is clearly expressed so as to avoid expanding their duties beyond what was contemplated at the time of entering into the retainer.

CROSS CLAIMS NOT MAINTABLE IN APPORTIONABLE CLAIMS

Written by Jason Buttigieg, senior associate

Introduction

In ***Dymocks Book Arcade Pty Limited v Capral Limited & Ors*** [2010] NSWSC 195 the NSW Supreme Court considered whether Peter Dalton Architects Pty Limited (**Dalton**), against whom judgment was given as a concurrent wrongdoer in relation to an apportionable claim, was entitled to contribution and/or indemnity under section 5 of the **Law Reform (Miscellaneous Provisions) Act 1946 (NSW)** (**LRMPA**) from third parties on the basis that the third parties were tortfeasors liable in respect of the claimant's claim.

Facts

The Dymocks Book Arcade Pty Limited (**Dymocks**) sought damages for property damage caused by a leak in the roof of its premises. The first defendant, Capral Limited (**Capral**), supplied the roofing material. The second defendant, Dalton was alleged to have, among other things, given advice in relation to the roof including the way that the metal roof should have been fixed to steel rafters.

Dalton subsequently filed a cross claim in which contribution or indemnity was sought from third parties under section 5 of the LRMPA for any amount that it might be ordered to pay to Dymocks. Of particular relevance was Dalton's assertion that an engineer, J T Davis & Co. Pty Limited (**Davis**) advised that certain roofing screws would be suitable for affixing the roof to the rafters. Dymocks submitted that those screws were not suitable and that they corroded the roof which allowed water to penetrate the corroded fixing points.

Davis submitted that Dymocks' claim against Dalton was an "*apportionable claim*" under Part 4 of the **Civil Liability Act 2002 (NSW)** (**CLA**). Davis argued that Dalton's claim could not be maintained against it and the cross claim should be dismissed. Davis was nominated as a

concurrent wrongdoer in Dalton's defence but Davis was not a defendant to Dymocks' claim.

Decision

McDougall J, following the decision in ***Reinhold v New South Wales Lotteries Corporation (No. 2)*** [2008] NSWSC 187, confirmed that section 36 of the CLA protects a defendant against whom judgment is given under Part 4 of the CLA as a concurrent wrongdoer in relation to an apportionable claim. McDougall J confirmed that as Davis was not a defendant to Dymocks' claim, there could be no judgment against Davis as a concurrent wrongdoer or otherwise, because Dymocks' claim was determined as an apportionable claim.

McDougall J accepted that if Davis remained a cross defendant and judgment on the cross claim was given against Davis for contribution or indemnity, that judgment would constitute a judgment against a defendant on a literal reading of section 39 of the CLA, but would give effect to the operation of a cross claim which is precisely what section 36 of the CLA was intended for, i.e. to prevent cross claims in apportionable claims. On that basis, Dalton's cross claim was dismissed.

McDougall J confirmed that the purpose of Part 4 of the CLA is to enable an apportionment of liability to occur in an action brought by a claimant, whether or not those responsible for the claimant's damage have been joined as concurrent wrongdoers, such that the concurrent wrongdoer's liability is limited to that proportion of responsibility attributed to it. It will not reflect any proportion or responsibility that the Court attributes to any other concurrent wrongdoer. McDougall J confirmed that when judgment is given against the concurrent wrongdoer in respect of an apportionable claim, judgment is not one in respect of which the concurrent wrongdoer is entitled to contribution or indemnity from any other concurrent wrongdoer.

Implications

The decision in ***Dymocks*** confirms that under the proportionate liability regime imposed by section 36 of the CLA a defendant will only have a liability for its own proportion of responsibility. A defendant is not entitled to contribution or indemnity because there is no other concurrent wrongdoer who is liable in respect of that portion of a loss.

Where a defendant is in doubt as to whether a claim is an apportionable claim it is advisable that a concession be sought from the claimant that its claim is an apportionable claim. If such a concession is not obtained, a defendant should seek an order that the claimant file a reply as to whether the claim is subject to the principles of proportionate liability.

For any information about construction related legal matters please contact **Andrew Moore (02) 8273 9943** or **Paul Spezza (02) 8273 9909**