

Guiding Principles for Balanced and Insurable Novation Deeds

Australian Institute of Architects



Australian
Institute of
Architects

Guiding Principles for Balanced and Insurable Novation Deeds

The Australian Institute of Architects' document Guiding Principles for Balanced and Insurable Client and Architect Agreements identifies some contract terms that are seen as unfair, and in some cases are also uninsurable.

The principles in that document apply equally to novation deeds. However, the novation process may expose the architect to particular risks. There are certain safeguards that architects require in compensation for the benefits which the client seeks to achieve through novation.

The aim of these guiding principles is to simplify the negotiation process for architects and their clients contemplating novation.

In this document:

'Principal' means the architect's original client.

'Contractor' means the incoming party to whom the architect becomes novated (usually a design-and-construct contractor, although the incoming party may be a different entity such as a financier or related company of the owner);

'Novation' means the transfer of the architect's original contract with the principal to form a new contract between the architect and the contractor on the same terms.

Role of a novated architect

Novation is not just a formality. It is a fundamentally different project structure from the traditional method.

After novation, the architect is employed and directed by the contractor. They will no longer be under the control of the principal. Since they are paid and directed by the contractor, they cannot administer the construction contract on behalf of the principal.

The principal should understand that they will lose their direct contractual and communicative relationship with the architect. It is the contractor who will control the architect. If, for instance, the contractor directs the architect to substitute a cheaper material in place of a better one, the architect will be obliged to comply. On a novated project, the architect's scope of services should reflect this different role. The original scope, if inadequate, should be amended.

Novation requires work from the principal

The success of a novated project depends on the active input and involvement of the principal after novation.

Because the architect can no longer administer the construction contract, the principal must engage experienced, authoritative personnel to fulfill that role. The principal and the principal's representative must be vigilant in observing the contractor's contractual responsibilities with respect to items such as quality and cost control.

It is essential that the principal understand their inability to maintain a direct relationship with the architect during the post-novation stage. A diligent and astute superintendent is essential to ensure that the time, cost and quality requirements of the contract are being met, and that this information is officially conveyed to the relevant parties. Ideally, the superintendent should be an experienced architect, so that their crucial decisions can support the quality of the original design (which, after all, the principal has paid for) rather than allowing it to be compromised.

Novation is better suited for projects where it is a straightforward matter to define the extent and quality of what is required. For more complicated projects, especially public projects where design quality is a key objective, novation is unlikely to be appropriate unless the superintendent is an experienced architect who can control design changes so that quality is maintained.

No new obligations

Practically, novation should be a simple process of transferring the old contract with the principal to the contractor. The original client-architect agreement should already set out the architect's obligations adequately. The novation deed should not give the architect any new obligations.

The architect's full release

Principals should appreciate that the architect will not be 'their' architect after novation. The novation deed should specifically reflect this by releasing the architect from any ongoing liability to the principal under the client and architect agreement. The architect should not be asked to give any collateral warranties.

All too often, novation deeds do not release the architect from the initial agreement, so that the architect is left with two sets of legal duties. This creates a risk of uninsured liability because it may exceed the architect's usual common-law liability, and it also places the architect in an untenable position of conflict of interest.

Preparing for novation

The design documentation requirements for a novated project are likely to be different from a project delivered by traditional procurement. The architect therefore needs to know from the beginning whether the project will be novated. If the principal is contemplating novation, it should be clearly set out in the client-architect agreement. The principal and the architect should then negotiate and agree the wording of the proposed novation deed. If the form of the novation deed is to be agreed later, it must be in a mutually agreed form.

From the outset, the client-architect agreement should set out:

- the form of the novation deed
- the form of the architect's monthly statement (see item 8)
- the contents of the architect's monthly report

The novation contracts should include clearly agreed copies of:

- the current brief as agreed between the architect, principal and contractor
- a list of drawings and documents of the architect which the principal accepts as reflecting their requirements in the brief of project requirements
- statement of architect's fee showing monthly cashflow and what monies and progress have been completed prior to novation

The client-architect agreement should specifically recognise the architect's right to refuse a novation upon reasonable grounds, for instance if the proposed contractor is financially unreliable, has a poor record, or has been involved in a significant dispute with the architect

Selection of the contractor is a vital factor in the success of novated projects. The architect should play a key role in short-listing and, ideally, selecting the contractor.

No warranties, guarantees or indemnities

Principle 2 of the Guiding Principles for Balanced and Insurable Client and Architect Agreements explains that phrasing obligations in the form of indemnities, warranties or guarantees places both the architect and their client at risk of the architect's insurer denying claims. Obligations using this sort of language should therefore be avoided in novation deeds.

Completion of documents

The contractor's price for the design and construction of the works will be based in part on the architect's design documentation. However, that design documentation will usually be partially complete, especially if the novation occurs early in the design process.

Novation deeds should never suggest that the architect's documentation will be 'fully complete'. They should specifically acknowledge that the architect's design documentation will not be complete and will require further development and co-ordination. The contractor must accept those risks (including management of the completion of the documentation) as part of accepting the novation.

Communication with the principal post novation

Post novation, the architect will not have direct contractual obligations to the principal. However, it can be beneficial to preserve a defined avenue of communication between the architect and the principal so that the principal can be kept aware of any issues or conflicts regarding the contractor's work and the design instructions.

The novation deed should provide for unedited monthly reports to be provided by the architect to the contractor (but with the explicit agreement that this reporting duty does not make the architect liable for any unreported non-conformances). Clear lines of communication should also be established.

Architect's site visits and compliance statements

On a novated project, the architect does not administer the construction contract, and has no authority to direct the contractor on how to construct the architect's design.

All responsibility for the quality of the constructed works must therefore rest with the contractor. At most, the architect may assess whether the constructed works comply generally (to the best of the architect's knowledge) with the design intent of the architect's documentation. The architect cannot be expected to provide a certificate as to the detailed compliance of the works, or to provide certificates addressed to third parties such as the principal.

All risks in the client-architect agreement should be reconsidered

Certain clauses which may be acceptable in a traditional client-architect agreement may no longer be appropriate if that agreement is to be novated. For instance, it may not be appropriate for the architect to engage the consultant team as its subconsultants on a novated project, because the contractor will require direct access to and control of that team in order to have the flexibility required for novation.

If a project will be novated, the principal and the architect should consider the whole of the client-architect agreement and make any changes necessary.

Limitation period to be that of an agreement

Novation deeds are often drawn up in the form of a deed so that they are enforceable even if there is no consideration. However, deeds typically carry a longer liability period – sometimes twice as long as a mere agreement – under the various state statutes of limitation. A novation deed should state that, despite being in deed form, the limitation period applicable to the deed will be the period that would usually apply to an ordinary agreement.

The architect's fees

Fee recovery is a significant risk for architects. It should be a condition of any novation that the principal must pay the architect's outstanding fees in full before the novation takes effect. If there are unresolved fee disputes between the principal and the architect, the novation deed should include a specific clause preserving the architect's right to have that dispute resolved. Otherwise the architect will lose all rights to pursue those fees.

The client-architect agreement (supported by the novation deed) should confirm that services such as the following constitute variations for which the architect is entitled to a fee increase:

- redesigning to the contractor's preferred construction requirements
- producing multiple trade packages for tendering by the contractor
- designing to include cost-saving changes proposed by the contractor

Cost of novation

Novation may create extra risks and costs for the architect, especially if the issues set out in these guiding principles are not addressed. It is not unreasonable for the architect to increase their fees in the event of novation to account for these risks and costs.

For the same reason, it is not unreasonable for the architect to include an appropriate limitation clause in the novation deed or in the original client-architect agreement, limiting the architect's liability by way of a monetary cap on claims and/or a disclaimer of liability for indirect and consequential loss.