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## **Australian Competition and Consumer Commission Review of Authorisation A58 to The Royal Australian Institute of Architects**

### **A submission from The Association of Consulting Architects- Australia**

#### **Executive summary**

The Association of Consulting Architects – Australia (ACA-A) is a national organisation which represents the interests of employer architects. It is registered with the Australian Industrial Commission and relevant State and Territory Commissions. There are ACA-A branches in all States and Territories.

The ACA-A believes that the conduct of The Royal Australian Institute of Architects (RAIA) and the current versions of the authorised documents produce a net public benefit and adhere to the principles approved by the TPC in Authorisation A58.

In updating the authorised documents the RAIA has demonstrated public responsibility and accountability by adhering to the principles approved by the TPC and thus have maintained the currency and usefulness of the documents to the public and to the profession.

If any public cost or detriment arising from the alleged anti-competitive conduct of the RAIA can be demonstrated there is no doubt that this is justified by the considerable public benefit that flows from this conduct.

In particular the ACA-A makes the following submissions to this Review;

***S1. the current version of the RAIA Code of Conduct does not constitute a material change of conduct to that authorised by A58, within the terms of the Trade Practices Act***



***S2 the current version of the Code of Conduct requires RAIA members to maintain standards of behaviour and practice which produces a net public benefit without creating significant anti-competitive behaviour.***

***S3. the RAIA Memorandum and Articles and Regulations and By-laws dated May 2004 does not constitute a material change of conduct to that authorised by A58, within the terms of the Trade Practices Act.***

***S4. the RAIA Memorandum and Articles and Regulations and By-laws dated May 2004 comply with all relevant legislation, enable the proper governance and administration of the RAIA***

***and thus confers a net public benefit, without creating anti-competitive behaviour.***

***S5. the RAIA Guidelines for Architectural Competitions (October 2003) does not constitute a material change of conduct to that authorised by A58, within the terms of the Trade Practices Act.***

***S6. the RAIA Guidelines for Architectural Competitions (October 2003) provide a useful non-mandatory guide for the good conduct of architectural competitions, they do not lessen competition or cause public detriment within the meaning of the Trade Practices Act.***

***S7. the Client Architect Agreements, long and short forms, the Fee Guide No 8 and the Small Projects Fee Guide published by the RAIA do not constitute a material change of conduct to that authorised by A58, within the terms of the Trade Practices Act.***

***S8. the Client Architect Agreements, long and short forms, the Fee Guide No 8 and the Small Projects Fee Guide published by the RAIA provide a useful guide for potential consumers of architectural services, they do not lessen competition or cause public detriment within the meaning of the Trade Practices Act.***

***S9. changes to the regulatory environment since the granting of authorisation A58 has had the effect of creating an even greater public interest need for the RAIA to make freely available contemporary information of the type contained in the Authorised documents.***



## 1. Introduction

The Association of Consulting Architects – Australia (ACA-A) is a national organisation which represents the interests of employer architects. It is registered with the Australian Industrial Commission and relevant State and Territory Commissions. There are ACA-A branches in all States and Territories.

ACA-A members include the leading architectural firms in Australia.

In addition to representing members in discussions and negotiations with unions, employee associations, industrial courts, commissions, and tribunals the ACA-A lobbies Federal or State Governments and their agencies in all matters pertaining to the profession.

ACA-A encourages and assists its members to maintain the highest standards of architectural service by providing ongoing advice to members on technical and contractual matters, staff salaries, staff sharing and development technology.

The ACA-A acknowledges The Royal Australian Institute of Architects (RAIA) as the sole national learned professional association of architects with a membership made up of public and private sector employers and employees, academics and students of architecture. The ACA-A endorses and supports the activities of the RAIA in setting codes of conduct and standards of practice for architects.

The ACA-A is therefore making this submission in support of the vital role the RAIA plays in maintaining standards of architectural education, training and practice through its publications and activities.

## 2. Grounds for the Review

Clause 9 Authorisation 58, determined by the Trade Practices Commission (TPC) on 7<sup>th</sup> September 1984, acknowledges the necessity for The Royal Australian Institute of Architects (RAIA) to revise authorised documents in response to changing circumstances. The same Clause draws attention to the risk of contravention of the Trade Practices Act if the principles in the authorised documents are changed.

This submission will argue that the current versions of the authorised documents published by the RAIA adhere to the same principles approved by the TPC in Authorisation A58.

Further it will be submitted that the net public benefit derived by the publication of the current documents is as great, or greater, than that provided by the authorised documents.

The Australian Competition and Consumer Commission (ACCC) states, as grounds for this Review, that “*a material change of circumstance appears to have occurred in granting the authorisation to A58*”. The changes of circumstance identified by the ACCC are;

- changes to the authorised conduct
- changes to the regulatory environment
- other changes

## 3. Changes of Circumstance

### 3.1 Authorised Conduct

This section of the submission will analyse the changes made to authorised documents in terms of anti-competitive behaviour and the net public benefit of those changes.

#### 3.1.1 Code of professional conduct

The current version of the RAIA Code of Conduct, RAIA Council Resolution NC94/73, maintains principles identical to those contained in the A58 authorised document J – Code of professional conduct.

The content of the document has been re-arranged to more clearly articulate those principles which define the RAIA members responsibility to;

1. serve and promote the public interest



2. serve their clients and their employer so that confidence in and respect for the profession is engendered
3. maintain standards and integrity within the profession
4. communicate with the public in a professional and responsible manner.

Under these principles the current document defines rules and provides advisory notes. Much of the wording is identical to that contained in the authorised document. So that the current document is improved by being better ordered, easier to comprehend and is no more anti-competitive in its requirements than the authorised document. It is therefore submitted that;

***S1. the current version of the RAIA Code of Conduct does not constitute a material change of conduct to that authorised by A58, within the terms of the Trade Practices Act***

***S2 the current version of the Code of Conduct requires RAIA members to maintain standards of behaviour and practice which produces a net public benefit without creating significant anti-competitive behaviour.***

### **3.1.2 Memorandum and Articles, Regulations and By-laws**

The ACA-A is aware of changes that have been made to the RAIA Memorandum and Articles and the Regulations and By-Laws since September 1984.

These changes relate primarily to the governance of the RAIA and to disciplinary procedures.

The TPC's primary concerns, expressed in A58, relate to admission to membership and appeal against disciplinary sanctions. The authorisation acknowledges that the 1984 Memorandum, Articles and Regulations and By-laws are not anti-competitive.

In ACA's opinion, no subsequent alteration made by RAIA changes the position that there is no coercion to join the RAIA and membership of the RAIA does not affect the career and professional opportunities for an architect (in spite of what the RAIA may fondly believe). In fact it is estimated that only about 40% of architects take up RAIA membership.

The Articles continue to provide for appeals to an independent arbitrator against refusal of entry and against expulsion under RAIA disciplinary sanctions. The most recent changes add the ability for a person expelled to apply for readmission after a qualifying period.

The amended documents reflect contemporary standards for professional associations constituted as limited liability companies. The changes appear to have been undertaken with due regard the provisions of the Trade Practices Act and the laws relating to the operation of incorporated organisations.

The amendments to these authorised documents are unexceptional and should be accepted as a necessary requirement for continuing compliance with the evolving laws of the land and the operation of a national professional association.

It is submitted that;

***S3. the RAIA Memorandum and Articles and Regulations and By-laws dated May 2004 does not constitute a material change of conduct to that authorised by A58, within the terms of the Trade Practices Act.***

***S4. the RAIA Memorandum and Articles and Regulations and By-laws dated May 2004 comply with all relevant legislation, enable the proper governance and administration of the RAIA and thus confers a net public benefit, without creating anti-competitive behaviour.***

### 3.1.3 Endorsed architectural competitions

The endorsement of architectural competitions by architectural professional associations is a world wide practice supported and encouraged by individual clients, governments, consumer organisations and architects.

The endorsement process ensures that the conduct of the competition is such that the outcome will be valuable to the competition sponsor and that the architects will compete under defined and fair conditions.

The ACCC has asserted, without explanation, that because the authorised Guidelines are no longer published in their approved form they no longer provide the accepted public benefit of advancing architecture. Yet the RAIA Guidelines for Architectural Competitions (Oct.2003) are evolved directly from the authorised document to respond to current conditions. They are consistent with the principles and content of the authorised document whilst being, probably, a little less prescriptive. These are the guidelines that have been used for recent very high profile architectural competitions such as Federation Square in Melbourne and the Museum of Modern Art and the State Library in Brisbane, projects which have raised great public interest within Australia and overseas. These competitions have undoubtedly provided a public benefit in advancing architecture. A key objective of competition is that it produces better results for consumers.

These high quality public assets are the result of a fair competition process attracting the participation of very competent, highly creative and skilled competitors.

The RAIA offers endorsement to competition sponsors as a service which will establish the bona fides of the competition and thus encourage architects to participate. Eligibility to enter RAIA endorsed architectural competitions is not restricted to RAIA members by the Guidelines. It is difficult to conceive how the RAIA Guidelines for Architectural Competitions could create a public detriment by a lessening of competition or in other way be being contrary to the Trade Practices Act. There is no obligation to hold architectural competitions in Australia, nor is there an obligation for architectural competitions to be endorsed by the RAIA.

It is submitted that;

***S5. the RAIA Guidelines for Architectural Competitions (October 2003) does not constitute a material change of conduct to that authorised by A58, within the terms of the Trade Practices Act.***

***S6. the RAIA Guidelines for Architectural Competitions (October 2003) provide a useful non-mandatory guide for the good conduct of architectural competitions, they do not lessen competition or cause public detriment within the meaning of the Trade Practices Act.***

### 3.1.4 Architectural services conditions and fees

The authorised documents labelled A to G deal with architectural service, conditions of service and client/architect agreements. This subject matter is currently documented in the RAIA Client and Architect Agreement long and short forms and accompanying Guide Notes. These documents have been endorsed and are supported by the ACA-A. They are in plain English and set out with great clarity the role and responsibilities of both parties to the Agreement.

The form of the current documents enables clients to appreciate and select the extent and nature of the service that they require, thus affording an enhanced level of consumer protection. The documents have been

developed from the authorised documents, in manner entirely consistent with the Authorisation intent that authorised documents require updating in response to changing circumstances.

Authorised document H is the RAIA Fee Guide published in January 1984.

The documents that have evolved from that document are Fee Guide No 8 - July 2001 and Small Projects Fee Guide –July 2001. Both current documents have the following opening paragraph-

*“This is a reference or guideline document only. Architects and prospective clients are free to agree conditions of engagement and fees on any basis whatsoever, providing that these are not in conflict with the law applicable in the state or territory concerned.”*

It should be stressed that the documents produced by the RAIA in relation to architectural services, conditions of engagement and fees are considered by the profession, the industry and the client body both public and private as useful guides

It should also be noted that there is absolutely no requirement for consumers of the services normally provided by an architect to-

- use the services of an architect
- use the services of an RAIA member
- refer to or use the RAIA guide documents related to architectural services and fees. ( nor is there any requirement for RAIA members to do so)

Consequently, under these circumstances, the publication of these documents has virtually no impact on the competitive market for architectural services. On the other hand they do provide a public benefit by providing a cost free source of information for potential consumers of architectural services.

It is submitted that;

***S7. the Client Architect Agreements, long and short forms, the Fee Guide No 8 and the Small Projects Fee Guide published by the RAIA do not constitute a material change of conduct to that authorised by A58, within the terms of the Trade Practices Act.***

***S8. the Client Architect Agreements, long and short forms, the Fee Guide No 8 and the Small Projects Fee Guide published by the RAIA provide a useful guide for potential consumers of architectural services, they do not lessen competition or cause public detriment within the meaning of the Trade Practices Act.***

### **3.2 Changes in the regulatory environment**

The most significant changes in the regulatory environment affecting architects since 1984 have resulted from government competition policy, particularly the Review of Architects Legislation and significant changes to

the methods adopted by all levels of government in the procurement of architectural services.

The legislative reviews have unfortunately failed to produce uniform legislation and regulation. For example some jurisdictions will adopt a code of conduct for architects others will not, some will regulate architectural companies, others will not. So that in terms of setting and maintaining national standards of service and conduct, the subject matter covered by the contemporary versions of the RAIA authorised documents are now more important to the public interest than they have been in the past.



More importantly, however, are the procurement practises adopted by the public sector agencies for architectural services. The current generation of public sector middle and junior level management involved in the procurement of the services of architects are trained to base the selection process generally on a fee tendering method.

The effect of this practice has been to drive down fee levels for public sector work and this has flowed on into the private sector. Architects have had to adapt to the new market environment, to maintain the commercial viability of their firms, by modifying levels of service, reducing or abandoning staff training, limiting design research and the extent and coordination of construction documentation. None of these practices are in the public interests as the additional life cycle and construction costs incurred far outweigh the savings from reduced fees.

The CSIRO Design and Documentation Quality Survey - May 2000 clearly identifies the effect of declining fee levels in the preceding fifteen years on construction time and cost.

Architectural firms and individual architects are unable to resist the procurement practises of powerful public sector clients and so it is left to the RAIA to define appropriate standards of conduct and service.

The problems identified above have been recognised in some areas of government and steps are very slowly being taken to address them. For example all jurisdictions are committed to the introduction of Professional Standards Legislation which, ironically, will require that participating professional associations develop the very types of disciplinary systems, guides, codes and standards defined in Authorisation A58 and the associated documents.

Some public sector agencies, recognising the negative outcomes from fee based selection, have introduced in house fee scales, others state the fee in advance, or weight the selection criteria with the intention that the choice is based on qualification and capability to deliver the required service. In these situations the contemporary versions of the Authorised documents can be used to provide well researched information that is not readily available from other sources.

Clearly there is a significant level of information asymmetry in the market for architectural services, even amongst experienced clients and there is a continuing public interest need for the RAIA to provide informed professional advice to consumers and architects on the conduct and levels of architectural service.

It is submitted that;

***S9. Changes to the regulatory environment since the granting of authorisation A58 has had the effect of creating an even greater public interest need for the RAIA to make freely available contemporary information of the type contained in the Authorised documents.***

#### **4. Public benefit of the maintenance of professional standards of conduct and service.**

A key objective of the Trade Practices Act is to prevent anti-competitive conduct. The ACCC is charged with the responsibility of identifying such conduct and dealing with it according to the provisions of the Act.

It is arguable that the RAIA publications and activities do not fall within the meaning anti-competitive conduct as intended by the legislation.

Most architectural service providers are not registered architects and only approximately 40% of architects are members of the RAIA. The RAIA documents most likely to affect the market for architectural services are those relating to architectural services and fees. Yet as explained above these are only guide documents which may or may not influence the outcome of negotiated agreements between RAIA members and their clients. The reality is that the RAIA activities and publications provide information and guidance only to a relatively small section of the total market for architectural services and cannot therefore be regarded a likely to lessen competition..

Nevertheless the ACCC has apparently deemed the RAIA conduct to be anti-competitive and the purpose of the Review is to determine whether this conduct can continue to be authorised because the public benefit derived from it outweighs any public detriment.

As observed above it is difficult to identify, let alone quantify, public detriment resulting from the conduct of the RAIA. On the other hand the public benefit can be identified;

##### *Code of Professional Conduct*

The Code requires members of the RAIA to, amongst other things, maintain a primary duty of care to the public interest and to communicate with the public in professional and responsible manner. It may well be argued that professional standards and ethics are anachronistic in a commercially competitive society, for they require those that uphold them to put the public interest ahead of their self interest. Nevertheless the fact that a minority of architects are willing to voluntarily become members of the RAIA and to adhere to such standards confers a public benefit without incurring a public cost.

##### *Memorandum, Articles, By-laws and regulations*

The RAIA is a national association constituted as public company limited by guarantee. As such it is required to comply with requirements of company law. The total cost of the management and administration of the organisation is borne by the members.

The constitution and regulations of the RAIA are the instruments enabling the proper administration and operation of the organisation, which confers a public benefit by-

- researching, collecting and disseminating information on the art and science of architecture
- defining standards of architectural education and practice
- maintaining standards of practice and conduct through a disciplinary regime

##### *Architectural Competitions*

The RAIA promotes and endorses architectural competitions with out cost to the public.

The major cost of architectural competitions is borne by the competitors who contribute their time, knowledge, skill and experience in the process. Competitors are willing to make this contribution into the public domain because they are seeking a commission, the recognition of their talent and they wish to contribute to architectural thought. These costs are not passed on to consumers or the public because of the highly competitive nature of the market for architectural services.

Well conducted architectural competitions confer a significant public benefit by-

- raising public knowledge and awareness of architecture and design
- focussing a wide range of architectural talent on projects in the public domain
- generally producing innovative designs for buildings and spaces



*Architectural services conditions and fees*

There is a significant information asymmetry between architects and most of the consumers of their services. A situation that is unlikely to change, because most individuals through out their lives will not use or be involved in the use of the services of an architect. Consequently there is little incentive for the general public to acquire the knowledge necessary to become informed consumers of architectural services.

In this situation individuals wishing to engage an architect requires information from an independent source that is objective and authoritative. The RAIA documents on architectural services and fees are the only available documents that fill this criteria.

Even professional clients and public agencies, who are regular uses of architectural services, reference these documents as an authoritative source of information on the standards of practice and service they should expect from their service providers.



## **5. Conclusions and submission summary**

The ACA-A believes that the conduct of The Royal Australian Institute of Architects (RAIA) and the current versions of the authorised documents produce a net public benefit and adhere to the principles approved by the TPC in Authorisation A58.

In updating the authorised documents the RAIA has demonstrated public responsibility and accountability by adhering to the principles approved by the TPC and thus has maintained the currency and usefulness of the documents to the public and to the profession.

If any public cost or detriment arising from the alleged anti-competitive conduct of the RAIA can be demonstrated there is no doubt that this is justified by the considerable public benefit that flows from this conduct.

The Association of Consulting Architects – Australia  
18 October 2004