

THE ROYAL AUSTRALIAN INSTITUTE OF ARCHITECTS



PARTNER YBE 2004

6 December 2004



Year of the Built Environment 2004  
ARCHITECTURE FOR ALL

Mr Scott Gregson  
Director Adjudication Branch  
Australian Competition & Consumer Commission  
PO Box 1199  
DICKSON ACT 2602

FILE No:	
DOC:	004   59424
MARS/PRISM:	

Dear Mr Gregson

**Review of authorisation A58**

I refer to your letter of 8 September 2004 giving notice under section 91B(3) of the Trade Practices Act 1974 that the ACCC is considering whether or not to revoke the RAIA authorisation A58. I refer also to subsequent correspondence and our meeting, including Commissioner John Martin, of 15 November 2004.

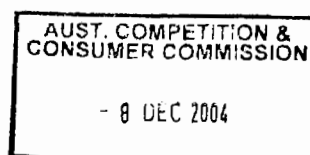
The RAIA does not agree that there are changed circumstances warranting revocation of authorisation A58. However, the RAIA wishes to assist the ACCC in its consideration of authorisation A58. As previously advised, we now enclose our application under section 91C(1) for substitute authorisation and concurrent revocation.

In support of the application is a detailed submission which provides relevant background and details of the significant public benefits that accrue from the activities of the RAIA.

Please do not hesitate to contact me if we can be of further assistance or if any additional information is required.

Yours sincerely

**Ross Clark**  
General Manager Services



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THE ROYAL AUSTRALIAN  
INSTITUTE OF ARCHITECTS  
ABN 72 000 023 012

## **APPLICATION FOR SUBSTITUTE AUTHORISATION**

To the Australian Competition and Consumer Commission:

Application is hereby made under section 91C of the *Trade Practices Act 1974* for the revocation of authorisation A58 dated 7 September 1984 and the substitution of a new authorisation, in the terms set out below, under that section.

**1. (a) Name of applicant:**

The Royal Australian Institute of Architects  
2a Mugga Way  
Red Hill ACT 2603

**(b) Short description of business carried on by applicant**

The Royal Australian Institute of Architects (**RAIA**) is the national professional body for architects. RAIA has the following aims:

- to advance architecture;
- to maintain the integrity and standing of the profession;
- to promote the profession's views nationally and internationally, and
- to encourage the study of architecture.

RAIA works actively to maintain and improve the quality of Australia's built environment. RAIA has a major role in raising design standards in our cities, urban areas and commercial and residential buildings and in shaping Australia's future. RAIA does not regulate the practice of architecture in Australia.

**(c) Address in Australia for service of documents on the applicant**

The Royal Australian Institute of Architects  
2a Mugga Way  
Red Hill ACT 2603

**2. (a) Brief description of contract, arrangement, understanding or conduct**

Authorisation A58 authorises RAIA to give effect to the '*arrangements as provided for in*' the following RAIA documentation:

- the RAIA memorandum and articles of association;
- the RAIA regulations and by-laws;

- the code of professional conduct;
- the architects' services, conditions and fees and the documents contained therein;
- the RAIA fee guide; and
- the guidelines for RAIA endorsed architectural competitions.

RAIA seeks a substitute authorisation, in the form set out below, in relation to the arrangements in each of those documents, as updated and included with this application.

**(b) Names and addresses of other parties or proposed parties to contract, arrangement or understanding**

The current and future members of RAIA. RAIA presently has approximately 9,200 individuals as members. A list of members will be provided to the ACCC on request.

**(c) Description of the goods or services in relation to the supply or acquisition of which this application relates**

The supply of advice and assistance to members to assist them to advance architecture, undertake their professional work efficiently and cost effectively, maintain the integrity and standing of the profession and promote the profession nationally and internationally in the public interest.

**3. (a) Brief description of the authorisation to be revoked**

Authorisation A58 dated 7 September 1984

**(b) Description of substitute authorisation sought**

*(a) Authorisation for the RAIA and its current and future members to engage in conduct giving effect to the contracts, arrangements and understandings as provided for in the:*

- (1) RAIA code of professional conduct;*
- (2) RAIA memorandum and articles of association;*
- (3) RAIA regulations and by-laws;*
- (4) client and architect agreements and user guides relating to those agreements; and*
- (5) guidelines for RAIA endorsed architectural competitions as amended from time-to-time.*

- (b) *Authorisation for RAIA to issue, from time to time, guides to assist architects and users of architects' services to negotiate appropriate fee arrangements for architectural services; being guides which:*
- (1) *are expressed to be reference guides only;*
  - (2) *contain a prominent statement that architects and clients are free to agree conditions of engagement and fees on any basis whatsoever;*
  - (3) *are designed to provide guidance on lump sum, percentage-based and/or time-based fees;*
  - (4) *are based on historical data provided by architects;*
  - (5) *provide a range of scenarios in relation to reasonable profit margins an architect might apply; and*
  - (6) *provide guidance on possible fee apportionment arrangements for lump sum and/or percentage-based fees.*

**4. Names and addresses (where known) of parties and other persons on whose behalf the application is made**

The names and addresses of current members will be provided to the ACCC on request.

**5. Class or classes of persons to whom the conduct relates:**

The current and future members of RAIA.

**6. (a) Grounds for grant of substitute authorisation**

The grounds for revocation and substitution are summarised as follows:

- (a) the ACCC has given RAIA notice that it proposes to revoke the permanent authorisation granted to RAIA in 1984. Although RAIA does not agree that there are changed circumstances warranting revocation of that authorisation, RAIA wishes to cooperate with the ACCC in having authorisation A58 reviewed;
- (b) there is no evidence that arrangements have had any adverse effect on competition in any market over the past 20 years and they are not likely to do so in the future. Nevertheless there remains the risk that the arrangements may be challenged in the future notwithstanding RAIA's view of their competitive effect; and
- (c) the arrangements have provided and continue to provide public benefits which significantly outweigh any future adverse effect on competition (if any). These benefits include providing valuable aids to architects (efficiency benefits), providing valuable aids to users of architects'

services (consumer benefits), establishing and upholding the professional standards of architects and supporting international trade in services.

These grounds are amplified in the attached submission.

**(b) Facts and contentions relied upon in support of those grounds**

See attached submission.

**7. This application may be expressed to be made also in relation to other contracts, arrangements or understandings or conduct, proposed contracts, arrangements or understandings or conduct, that are or will be in similar terms to the above-mentioned contracts, arrangements or understandings or conduct.**

**(a) Is this application to be so expressed?**

Yes

**(b) If so, the following information is to be furnished:**

**(i) the names of the parties to each contract, arrangement or understanding or conduct**

RAIA and its members from time-to-time.

**(ii) the names of the parties to each other proposed contract, arrangement or understanding or conduct which names are known at the date of this application:**

RAIA presently has approximately 9,200 individuals as members. A list of members will be provided to the ACCC if requested.

**8. (a) Does this application deal with a matter relating to a joint venture of the Trade Practices Act 1974?**

No

**(b) If so, are any other applications being made simultaneously with this application in relation to that joint venture?**

N/A

**(c) If so, by whom or on whose behalf are those applications being made?**

N/A

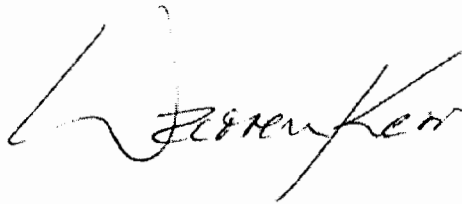
**9. Name and address of person authorised by the applicant to provide additional information in relation to this application:**

Rick Barton  
Company Secretary & Legal Counsel  
2a Mugga Way  
Red Hill ACT 2603

Phone: 02 6273 1548  
Fax: 02 6273 1953

**Dated:** 06 December 2004

**Signed by/on behalf of the applicant**

A handwritten signature in black ink, appearing to read "Warren Kerr". The signature is written in a cursive style with a large initial 'W'.

.....  
Warren Kerr  
President  
The Royal Australian Institute of Architects



The Royal Australian  
Institute of Architects

# Application for Substitute Authorisation

Submission to  
Australian Competition &  
Consumer Commission

06 December 2004

**SUBMISSION BY**

The Royal Australian Institute of Architects  
PO Box 3373  
Manuka ACT 2603  
Telephone: 02 6273 1548  
Facsimile: 02 6273 1953  
email: national@raia.com.au

**PURPOSE**

This submission is made by The Royal Australian Institute of Architects (RAIA) to the Australian Competition & Consumer Commission in support of an application for substitute authorization.

**ABOUT THE RAIA**

The Royal Australian Institute of Architects (RAIA) is an independent voluntary subscription-based member organization with approximately 9,200 members, of which 5,400 are architect members.

The RAIA, incorporated in 1929, is one of the 96 member associations of the International Union of Architects (UIA).

At the time of this submission the National Executive of the RAIA is:

- Warren Kerr (National President)
- Robert Nation (President-Elect)
- Carey Lyon (Honorary Treasurer)
- Alec Tzannes (Honorary Secretary)
- Catherine Townsend

The CEO is David Parken.



**Year of the Built Environment 2004**  
AN AUSTRALIAN GOVERNMENT INITIATIVE





The Royal Australian  
Institute of Architects

# Application for Substitute Authorisation

Submission to  
Australian Competition &  
Consumer Commission

06 December 2004

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## Executive summary

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### 1. The current authorisation

- (a) Authorisation A58 granted authorisation in respect of the arrangements provided for in the following:
  - RAI A code of conduct;
  - RAI A memorandum and articles of association;
  - RAI A regulations and by-laws;
  - Guidelines for RAI A endorsed architectural competitions; and
  - Architects services, conditions and fees, including a fee guide.
- (b) The authorisation is expressed to cover '*RAIA's arrangements as provided for in*' the above documents rather than the specific documents considered by the Trade Practices Commission when it made its original decision.
- (c) The ACCC has given notice to the RAI A under section 91B(3) of the *Trade Practices Act 1974* that, in its opinion, there are material changes in circumstances in relation to the authorisation since it was granted and that the ACCC is considering whether or not to revoke the authorisation.
- (d) The RAI A does not agree that there are changed circumstances warranting revocation of Authorisation A58. Nevertheless, the RAI A wishes to cooperate with the ACCC in having Authorisation A58 reviewed and has accordingly made this application under section 91C(1).

### 2. Substitute authorisation

In the RAI A's submission the ACCC should grant the substitute authorisation referred to in the Application, in substitution for Authorisation A58, because:

- (a) there is no evidence that the arrangements have had any adverse effect on competition in any market over the past 20 years;
- (b) the arrangements are unlikely to have any adverse effect on competition in any market in the future;
- (c) there nevertheless remains the risk that the arrangements may be challenged in the future notwithstanding the RAI A's view of their competitive effect;

- (d) the arrangements have provided and continue to provide public benefits, including:
- fostering business efficiency;
  - assisting efficient small architects' businesses with guidance on costing and pricing;
  - improving the quality of architectural services and expanding consumer choice;
  - supplying information about architectural services to consumers and businesses; to permit informed choices to be made;
  - promoting cost savings in the practice of architecture through education and information;
  - maintaining professional standards in the architecture profession; and
  - promoting equitable dealings in the market for architectural services<sup>1</sup> and
- (e) those public benefits have, over the past 20 years, significantly outweighed any adverse effect on competition (if any) that might arise from the arrangements, and will continue to do so.

Each of these points is amplified in this submission.

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<sup>1</sup> See *Re ACI Operations Pty Ltd* (1991) ATPR (Com) 50-108.

## RAIA - an overview

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### 3. History and objectives

- (a) RAIA is a national body consisting of approximately 9,200 members in Australia and overseas. It is incorporated as a company limited by guarantee.
- (b) RAIA was established in 1929 when state architectural institutes combined to form a unified national association with the following aims:
- to advance architecture;
  - to maintain the integrity and standing of the profession;
  - to promote the profession's views nationally and internationally, and
  - to encourage the study of architecture.

Copies of RAIA's Memorandum and Articles of Association, Regulations and By-Laws are in **Schedule 1**.

- (c) Since it was established, RAIA has evolved into a dynamic and progressive national organisation with active programs in many areas relating to the architectural profession and the provision of services to other sectors of the community.
- (d) By promoting better, responsible and environmentally sustainable design, RAIA aims to maintain and improve the quality of Australia's built environment. RAIA and its members have a major role in shaping Australia's future by raising design standards in our cities, urban areas and commercial and residential buildings.
- (e) RAIA has established the highest professional standards. RAIA member architects undertake continuing professional development and must comply with the RAIA code of professional conduct. As a result, RAIA member architects are more likely to be better informed and more up-to-date on all matters architectural and to conform to high professional standards.
- (f) RAIA offers a wide range of services including:
- an extensive professional development program at both national and state level, keeping members abreast of the latest ideas, technology and trends in architecture;
  - detailed information including practice, law, cautionary and client notes;
  - specialist publications, including Australia's premier architectural magazine, *Architecture Australia*, as well as chapter bulletins and other publications;

- access to reference services and counsellor advice;
  - ensuring the quality of people entering the profession through recognition of tertiary architecture courses; and
  - contributing to the development of Australian Standards.
- (g) RAIA provides information to the public designed to assist in engaging and dealing with architects. This includes guidance materials on:
- essential issues to consider when undertaking a building project;
  - how to select and procure professional architectural assistance;
  - how to find a relevantly experienced and located architect; and
  - the cost and benefits of using an architect.
- (h) Guidance materials are not only used by individual consumers seeking assistance with building projects. They are used by corporations undertaking major commercial building projects and by governments in undertaking infrastructure procurement.
- (i) RAIA also:
- maintains an on-line listing of architects for use by the public when seeking the services of an architect;
  - produces standard form client and architect agreements and guidance notes on those agreements;
  - produces standard form construction contracts and guidance notes on those contracts; and
  - produces the BDP Environment Design Guide - a service containing articles on all aspects of design in order to develop projects which are ecologically sustainable.

## 4. Professional Development

### 4.1 RAIA Policy on Professional Development

- (a) The RAIA policy is:

*"As a member of the RAIA you have a professional obligation to improve your skills in the practice of architecture. The RAIA has a professional development scheme, and a member's record of involvement in professional development activities may be relevant to and be taken into consideration in disciplinary procedures as they may arise. To enjoy the maximum benefit of participation in PD, programs need to be relevant to the broad spectrum of the architectural profession but also emphasise those areas in which you are actively engaged."*

### 4.2 Aims in Professional Development

- (a) The RAIA Professional Development Unit aims to ensure that all practising architect members of the RAIA:
- have up to date technical knowledge;

- can operate a business which is efficient and financially viable;
  - can understand and communicate with their clients and meet client needs and expectations.
- (b) The Unit also aims to ensure that all RAIA members not working in a practice environment:
- have up to date technical knowledge; and
  - are encouraged to improve their skills through external programs which meet their needs in the public sector, higher education or other relevant area.

## 5. Standard documentation, guidance materials & advice

- (a) RAIA has developed and maintains industry best practice standard agreements and guidance materials in relation to them.
- (b) The RAIA also produces a range of guidance materials designed to assist members in their practices and inform the public in their dealing with architects. This includes practice notes, management notes, technology notes, cautionary notes and notes on current issues.
- (c) These guidance materials provide best practice benchmarks and help to inform consumers and the building industry on the performance by architects of their role. They assist in overcoming information asymmetry and are regularly referred to and used by state and local government in seeking professional architectural work.
- (d) the standard client and architect agreement and related guideline documents are in **Schedule 2**.

## 6. Maintaining standards

- (a) The maintenance of high professional standards is as important to the architecture profession as it is to any profession. Consequently, RAIA has adopted a code of professional conduct designed to set world best practice standards for its members.
- (b) Professional standards are of little value if they are not adhered to. RAIA has a number of traditional mechanisms to encourage compliance. It provides guidance and training for its members. It has a complaints handling mechanism for resolving complaints against or between members, which includes conciliation and counselling. However, for the more serious cases RAIA has formal disciplinary processes.
- (c) While adherence to high standards is an important feature of RAIA's role, discipline is regarded as the last resort measure for maintaining those standards. A more detailed description of the disciplinary process is provided in para 13.2.





## RAIA membership

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### 7. Entitlement to membership

- (a) The Articles of Association provide for a number of classes of membership depending on the qualifications and experience of the member. They include Affiliate members, Honorary members, Student Members, Graduate Members, Ordinary Members and Fellows.<sup>2</sup> Level 2 membership is established in the Affiliate and Ordinary Member classes.
- (b) Any person who holds a prescribed architectural qualification and who has gained the prescribed experience may become an Ordinary Member.<sup>3</sup> Fellows are Ordinary Members of long standing, nominated by other Fellows.
- (c) The prescribed architectural qualifications for membership are a qualification in architecture which is recognised by the state and territory registering authorities<sup>4</sup> for the purpose of registration.
- (d) The prescribed experience for membership is that required by the relevant Architects Registration Board to enable registration as an architect<sup>5</sup>. Membership does not depend on whether or not the applicant is actually registered.
- (e) Graduate membership requires an applicant for admission to have only the required architectural qualification.
- (f) Affiliate membership is available to applicants who have had the prescribed architectural qualification<sup>6</sup> for 5 years or are teaching in an architecture course but who have not obtained the prescribed experience for registration as an architect.
- (g) **Table 1** shows the current breakdown of members by class:

---

2 Articles of Association, article 2.  
 3 Articles of Association, article 6.  
 4 Architects Registration Boards  
 5 Currently a period of 2 years recorded practical experience and an examination conducted by the Board  
 6 Refer (c) above

**Table 1**  
**Membership by Category**

Category	Number of Members
Fellows including Life Fellows <sup>7</sup>	1,767
Honorary Fellows <sup>8</sup>	8
Honorary Members <sup>9</sup>	8
Ordinary Members Level 1 & Level 2	3,686
Graduate Members	1,082
Affiliate Level 1 members	69
Affiliate Level 2 members <sup>10</sup>	42
Student Members	1,774
<b>TOTAL</b>	<b>9,226</b>

- (h) RAlA is essentially a professional association of individuals as members. Members range from academics to sole practitioners to employees and principals of large architecture practices. Membership is not essentially distinguished by these roles, except to the extent that RAlA Member level 2 is not available to sole practitioners or principals of firms.
- (i) Architects' practices are, in the main very small professional practices. RAlA estimates that, of those principals in private practice about 27% are sole practitioners and almost 75% are in practices of 10 or less total staff (of which less than half would generally be architects). Details are shown in **Table 2**. Architect practices are geographically spread throughout Australia including in rural and regional areas.

**Table 2**  
**Relative Size of Architectural Practices<sup>11</sup>**

Practice size (total staff)	% of all architects
26 plus	15%
11 to 25	12%
6 to 10	14%
2 to 5	32%
sole practitioner	27%
<b>TOTAL</b>	<b>100%</b>

- 7 Life Fellows are Fellows distinguished by service to the profession of architecture
- 8 Honorary Fellows are non-architects distinguished by eminent attainment in relation to architecture
- 9 Honorary Members are persons who have made a significant and long term contribution to the RAlA.
- 10 Affiliate Level 2 members are persons whose qualifications are construction industry related but the qualification is not a prescribed qualification [refer 7(c) above]
- 11 Sources: RAlA 2004 Membership Survey Report; RAlA (2003) Architectural Office Profile & Financial Benchmarking Report, No. 3; State & Territory Architecture Boards (August 2004)

- (j) RAIA has no record of any application for membership of the RAIA by a registered architect or person otherwise qualified for membership that has been refused.

## 8. Regulatory requirements for practice

- (a) There is no statutory prohibition on anyone designing a building, or extensions to a building. It is not a statutory requirement that a person doing so be a registered architect. Legislation providing for the registration of architects merely provides, typically, that:

*(1) An individual must not represent himself or herself to be an architect, and must not allow himself or herself to be represented to be an architect unless he or she is an architect.*

*(2) A person must not represent an individual to be an architect if the person knows, or ought reasonably to know, that the individual is not an architect.<sup>12</sup>*

In other words, a person is not an architect unless registered under state or territory law. A full list of the state and territory architects legislation is set out in **Schedule 3**.

- (b) Building design can and is done by designers who are not architects, as is interior design. Architects, by their registration, distinguish themselves from others by their professional standards and training, supported by the work of the RAIA.
- (c) Although it is regarded by the RAIA as desirable that they do so, there is no requirement that architects join the RAIA. They are free to choose whether or not to do so. There are approximately 11,605 registered architects in Australia<sup>13</sup>, of which approximately<sup>14</sup> 5,400 are members of the RAIA.
- (d) Although many architects have joined and maintain membership of the RAIA as their professional body and gain benefit from their membership, there is no evidence that membership of RAIA has an impact on architects' ability to win work, except at the margin.<sup>15</sup> Specifically:
- none of RAIA's standard form client/architect agreements, available for purchase to anyone, specify that the architect must be a member of RAIA;
  - members compete for business openly and routinely with non-members and with persons who are not registered architects;

<sup>12</sup> Architects Act 2003, NSW section 9. Provisions of similar effect are to be found in other state and territory legislation.

<sup>13</sup> Available statistics do not distinguish architects registered in more than one state or territory, as each Board keeps its own public records.

<sup>14</sup> A member does not have to be actually registered, merely formerly registered or capable of being registered. It could therefore be expected that several members in other forms of employment are no longer registered, although no figures are available.

<sup>15</sup> This point is explained at para 27(b) below.

- it is not a condition that architects responding to state and local authorities procurement tenders be a member of RAIA; and
- as far as RAIA is aware no private sector procurement tenders have been restricted to RAIA members.

## The practice of architecture

### 9. Practices - an overview

- (a) As noted in **Table 2** above, architects' practices are small to medium businesses, with almost 75% comprising 10 or fewer staff and 27% being sole practitioners.
- (b) Architect's practices are geographically spread, including in rural and regional Australia. The practices in rural and regional Australia tend to be very small and relatively isolated.
- (c) The work an architect undertakes is quite varied, including:
- home buildings, renovations and extensions;
  - small commercial buildings such as shops and shop fit outs
  - small office buildings and fit out;
  - industrial buildings and warehouses;
  - community buildings such as schools, halls, aged care facilities;
  - multi unit residential apartments; and
  - large commercial, industrial and community buildings.
- (d) The median annual turnover of architects' practices in Australia is estimated by RAIA to be about \$600,000, as shown in **Table 3**.

**Table 3**  
**Median architectural practice revenue (FY 2002-03)**  
**by practice size<sup>16</sup>**

Practice size (total staff)	Median gross practice revenue
1 to 4	\$191,522
5 to 9	\$464,011
10 to 19	\$1,037,415
20 plus	\$3,355,347
<b>All firms</b>	<b>\$591,314</b>

- (e) Architects compete with each other and with many others who offer all or part of the services offered by architects. They include architectural draftsmen, building designers, building consultants, project managers, construction managers, developers, engineers, town planners, interior designers and interior decorators, landscape architects, quantity surveyors and builders.

<sup>16</sup> Source: RAIA (2003) Architectural Office Profile & Financial Benchmarking Report. Note that respondents to this survey tend to be both larger and more financially successful than a perfectly representative sample would be.

- (f) The list is not exhaustive because the building design and advisory industry is virtually unregulated, meaning that almost any business can offer such services.

## 10. Architects' clients

- (a) The nature of architects' clients varies as widely as the array of architectural solutions produced. Clients may be individuals, corporations or units of government. They may be intimately involved in the construction industry, as in the case of developers and project managers, or they may have no experience with architects. They may understand the processes of design and construction or not. They may be informed consumers capable of exercising a high level of control, or naïve participants heavily reliant on the professional advice they will receive.
- (b) The relationship between client and architect is unusual among the professions because it is so interactive and iterative. Generally, with an accountant or medical practitioner, the 'client' provides basic data and the professional service is then delivered.
- (c) In the architect/client relationship the process is creative and subject to constant feedback, sometimes to the extent that both the scope and nature of services provided, and the finished product, bear little resemblance to what was initially envisaged.
- (d) Clients themselves are subject to a wide array of internal processes and constraints that can impact heavily on the professional relationship with the architect. Especially in government and larger corporations, requirements for probity, confidentiality, key performance indicators, defined systems requirements and standard procedures can add substantially to the task of the architect.
- (e) Some clients, particularly in the government sphere, have also become increasingly risk averse in our more litigious society and particularly since the 9/11 tragedy in the USA. As a result, they have used their market power to allocate virtually all project risks downstream to contractors and consultants, while simultaneously seeking to acquire all project benefits (such as copyright, intellectual property etc). The capacity of architects to effectively manage their businesses has been significantly impacted by both.

## 11. Architects' fees

- (a) Fees charged for architectural services have historically been calculated in a manner that to a typical lay client is quite complex. This complexity of fee structure is far greater with architects than for almost all other professionals, where reasonably straightforward scale fees, fixed fees or time charges apply. Most people have a reasonable understanding of the way their GP, accountant or vet establishes fees for particular services, but none of these offers any real guidance to the nature of architectural fees.

- (b) Complexity arises as a result of the reasonable principle that the fee should reflect the amount of effort required of the architect, and the costs necessarily incurred in undertaking a particular assignment. Like with many professional services, the complexity of the assignment and the skill required of an architect to complete it can rarely be comprehended from the drawings and documentation that result.
- (c) The fee charged by a specific architect for a particular architectural engagement will be dependent on a range of variables, which include:
- the scope of services to be provided (eg whether contract administration or site investigation or other specialist services are involved);
  - whether another consultant, such as a project manager, is undertaking part of the services normally provided by an architect;
  - the type of building involved (warehouse, hospital, office, house, etc.);
  - whether the project is new building work or a renovation/alteration;
  - the level of complexity of the building involved (hospital compared to warehouse);
  - the proposed method of procuring the building (traditional tender, construction management, staged construction, etc);
  - the nature of the site (topography, access to services, access for workers, etc.);
  - the location of the site relative to the architect's office;
  - the level of briefing and background data provided by the client;
  - responsibility for other specialist consultants, such as engineers, quantity surveyors and the like;
  - whether the fees of specialist consultants are included in the architect's fee, or separate;
  - the level of experience of the client with the type of project;
  - the level of experience of the architect, and the allocated staff of the architect, with the type of project;
  - whether the architect is experienced in the relevant market segment (eg education, health, multi-residential etc) or seeking to enter a new market;
  - the extent of innovation sought by the client;
  - the reputation of the architect;



- the current and projected workload of the architect;
  - whether the client will be providing materials, plant etc directly to the builder, or has access to some form of discount from the builder; and
  - which direct expenses of the architect, if any, are to be covered by the fee, or separately reimbursed.
- (d) Another factor that contributes to the complexity of architect's fees is that many clients understandably require a reasonable level of certainty in the actual final dollar cost, in relation to a process that is inherently uncertain and may extend over many months, and commonly, years. Just a few of the uncertainties the architect must routinely take account of in proposing a fee include:
- changes in scope of services (eg where the client, once involved with the project, requires more or less work to be undertaken);
  - changes in brief resulting from the input of the architect, or the client's response to the architect's ideas, or from an external factor such as the requirement of an authority;
  - unforeseen protraction of the services, due to factors outside the architect's control;
  - changes in the client's budget (either up or down);
  - construction variations; and
  - unforeseen issues arising from the performance of other participants in the design, documentation and construction processes who the architect is required to manage.
- (e) In order to manage the business risks imposed by these and many other potential uncertainties in delivering architectural services, architects have traditionally structured fees in one or more of the following ways (often in combination for a particular project):
- percentage-based, where the fee is a percentage of the final building cost, determined by the project's complexity and size (generally higher for more complex projects, and lower for more expensive projects) and often apportioned by a further percentage breakdown to each key element of the services being provided. With percentage-based fees the client effectively assumes the fee risk on project cost, but the architect assumes the risk associated with time.
  - lump-sum, where a total dollar value is quoted (often based on the percentage-based fee that would otherwise have applied) and usually subject to stringent conditions. Under this arrangement, the architect carries most of the risk and therefore may build in to the fee a contingency amount to mitigate that risk.
  - time-based, where all or most of the fee is charged at agreed rates (dependent on individual qualifications and experience) for

the number of hours actually required. Time-based fees are rarely applied to the whole of an architectural service, but may be useful for discrete services where the time required is difficult to predict. With time based fees, the client carries most of the fee risk.

- (f) A result of the complexity described above is that no two architects competing for the same commission are likely to arrive at the same fee, or possibly even the same fee basis. However, the reason for the differences in fee proposals will not necessarily be transparent, especially to a lay client. The financial risks for the client in appointing on the basis of the 'cheapest' proposal may be just as high, or higher, than those associated with a more expensive fee. Hence the value in utilising a 'qualification-based selection' method, especially where the client is inexperienced.

## Relevant market

### 12. The market definition

- (a) Architects compete in the market for provision of specialist design and advisory services, advising on all aspects of building including:
- designing and planning;
  - selecting sites;
  - undertaking feasibility studies;
  - managing building budgets;
  - selecting and managing project teams;
  - designing building interiors;
  - landscaping; and
  - maintaining buildings.
- (b) The RAlA submits that it is in relation to this market that the likely effect of the arrangements on competition is to be tested.
- (c) In the market for these services architects compete with each other and with many others who offer all or part of the services offered by architects. They include architectural draftsmen, building designers, building consultants, project managers, construction managers, developers, engineers, town planners, interior designers and interior decorators, landscape architects, quantity surveyors and builders.
- (d) There are at least 12,500 firms in Australia providing services of the type provided by architects<sup>17</sup>, and this includes about 4,400 architectural practices<sup>18</sup>.
- (e) In this submission the relevant market is referred to as the market for professional services in the field of architecture.
- (f) Although identification of relevant markets is part of the process through which the ACCC proceeds when considering authorisation applications, the RAlA submits that in this case precise market definition is not of crucial relevance because the arrangements do not have more than a theoretical effect on competition howsoever the market is defined.

17 ATO 1999-2000 Taxation Statistics: Table 3: Industry benchmarks (Note: ATO no longer provides publicly available data to profession level)

18 ABS Architectural Services: Key characteristics by state 1992-1993, Selected Technical Services, Australia 1992-1993, Cat No. 8676

## The arrangements - an overview

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### 13. Memorandum and Articles of Association

#### 13.1 Overview

- (a) RAIA's memorandum and articles of association have not changed since they were authorised in 1984, save in the following respects:
- governance changes have been made to enable elections to be based nationally, rather than in the Chapters, for some members of the RAIA's governing Council and to define the role of Chapter Councils in relation to the national governing body, the Council;
  - disciplinary procedures have been amended, primarily to provide an informal but structured counselling and conciliation service for handling complaints, in addition to a formal complaint procedure as in 1984; and
  - procedures for admission, conducting elections and for payment of subscriptions have been moved to separate Regulations and clarified.
- (b) None of those changes impact on the likely effect of the memorandum and articles of association on competition in the market for professional services in the field of architecture.
- (c) The Trade Practices Commission considered the memorandum and articles of association in 1984 and correctly concluded that an authorisation should be granted in relation to them, subject to RAIA inserting a right of appeal to an independent arbitrator if either an application for membership were refused or a member was dissatisfied with the outcome of a disciplinary hearing. The amendments were made and the memorandum and articles of association continue to meet this requirement.<sup>19</sup>

#### 13.2 Discipline

- (a) RAIA's disciplinary rules are open, transparent and fair. Only under the formal procedures can RAIA take any action in relation to a member. The formal procedures provide for:
- initial assessment of a complaint for a prima facie case in relation to the standard of conduct imposed by the RAIA's code of professional conduct;
  - dismissal of complaints that are "paltry, trivial or vexatious";
  - a complaint for which, in the opinion of the Assessor, there is a prima facie case, is referred to a Professional Conduct Tribunal;

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<sup>19</sup> Articles of Association, article 85

- the sanctions available to a Tribunal are the same as in 1984, save that mandatory professional training has been added;
  - persons dissatisfied with a decision by the Tribunal may have the matter referred to independent arbitration; and
  - an expelled member may apply to the RAIA Council for readmission not less than 3 years after expulsion, and may reapply at further 3 year intervals.
- (b) Many matters raised with RAIA by members of the public arise from misunderstanding and the need for technical guidance. These are routinely resolved by explanation, discussion with the member and guidance from RAIA Senior Counsellors.
- (c) The RAIA disciplinary process works extremely well. It aids in the resolution of disputes between members and others and between members inter se. The RAIA receives less than 10 formal complaints per annum, many of which are resolved without reference to formal proceedings.
- (d) Where formal disciplinary proceedings are commenced many are resolved by agreement without the Tribunal having to make an order. Over the past 5 years an average of 3 cases per annum have been referred to the Tribunal, with no resulting action more severe than a reprimand.
- (e) In the past 10 years, as far as can be ascertained from RAIA records, there has been no case which led to expulsion as a result of a Disciplinary Tribunal hearing. In that period there have been 3 cases where a member has been expelled automatically due to being convicted of an indictable offence and/or deregistered as an architect.

## 14. RAIA regulations and by-laws

- (a) The RAIA regulations and by-laws may be summarised as follows:
- Provisions for the election of the RAIA's governing Council and Chapter Councils
  - Procedures for Chapter Council meetings
  - The powers of Chapter Councils
  - Rules for the allocation of funding within the RAIA and the keeping of RAIA's accounts
  - Provision for Chapter divisions and for Area Committees
  - Procedure relating to admission of members and their allocation to membership classes and categories, and rights of review of membership refusal by independent arbitration

- Provision to vary the prescribed academic qualification for admission to Ordinary<sup>20</sup> membership
- Authority to appoint a Chief Executive

Copies are in **Schedule 1**.

- (b) Although there have been changes since 1984, none of the changes materially affect the balance between public benefit and competitive detriment as found by the Trade Practices Commission.
- (c) The Trade Practices Commission considered the regulations and by-laws in 1984 and correctly concluded that an authorisation should be granted in relation to them, subject to the same condition as applied to the memorandum and articles of association.

## 15. RAIA code of professional conduct

- (a) The RAIA code of professional conduct underpins the professional values on which the profession is based. Although changes to the Code have been proposed in order to update them in accordance with world best practice in the profession, they have not been amended in any substantive way since they were authorised in 1984.
- (b) RAIA expects to amend its Code in line with discussions previously held with ACCC staff. Changes reflected in the version of the Code now submitted for authorisation may be summarised as follows:
- the reference note to TPA and other state and territory legislation is removed;
  - the code is generally reworded and reformatted to reflect a more “plain English” style and it begins with an Introduction setting out the general principles of its contents and its application;
  - it is formatted and arranged to set out only the standard of conduct expected of RAIA members, not, as in 1984, beginning with a statement of the authority on which the Code is based, its application to partnerships and corporations, a quotation of the relevant article from the Articles of Association, and a further statement of obligation not otherwise founded in the Articles of Association. In contrast, this Code refers to the relevant Article of Association for the consequences of breach of its standards and the procedure for applying those consequences;
  - Its application is broadened to accommodate work by members in other cultures, commensurate with the significant body of overseas members and a greater proportion of work by Australian members overseas. Hence, it no longer imposes comprehensive standards concerning communication with the public, instead it relies<sup>21</sup> on the overarching principle that

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20 As described in paragraph 7(c)

21 Standards 1.1 – 1.5

members and firms must not communicate in a misleading or deceptive manner, and should maintain local codes of ethics and laws and natural and cultural heritage, including environmental sustainability;

- unlike the 1984 Code, it has only one obligation for an employer/employee relationship in Standard 4.7, rather, it lists a greater range of specific standards for the architect/client relationship. These obligations<sup>22</sup> include care and diligence, promptness, keeping the client informed, working within expertise, disclosure of financial benefit and/or conflict of interest and maintaining client confidentiality; and
  - in relation to obligations to the profession<sup>23</sup>, it separates those to the profession from those to colleagues<sup>24</sup> and contains provisions<sup>25</sup> which have the effect of upholding moral rights of authors, consistent with international laws, but not existing within Australia in 1984.
- (c) The Code for which authorisation is sought under this application is in **Schedule 4**.
- (d) When the Trade Practices Commission considered the Code in 1984 it acknowledged the important role codes of conduct play in *'laying down members' responsibilities to the public and to clients and employers'*<sup>26</sup>, and found this to be a public benefit and authorised the code subject to certain changes which were made as requested.
- (e) There is no evidence that the Code has had any adverse impact on competition in the market for professional services in the field of architecture. RAIA submits that the amended Code is unlikely to have any adverse effect and is in the public interest.

## 16. Guidelines for RAIA endorsed architectural competitions

- (a) The RAIA guidelines for endorsed architectural competitions have changed since they were authorised in 1984, but not in any substantive manner relevant to this application. The changes may be summarised as follows:
- general revision of the document in terms of simpler style and language, and less prescriptive, more principle-based provisions;
  - involvement of a professional competition advisor is now normally a prerequisite for endorsement;

22 Standards 2.1 – 2.7

23 Standards 3.1 – 3.3

24 standards 4.1 4.7

25 Standard 4.2

26 Authorisation A58, para 8.8.

- other than through provision of advice on the appointment of the professional advisor, the RAIA is no longer involved directly in the running of architectural competitions, whether endorsed or not;
- the range of types of competitions covered in the guidelines has reduced, as some types referred to in 1984 are no longer common;
- eligibility is no longer limited to architects;
- the RAIA is no longer directly involved in selection of the jury members (originally 'assessors');
- the RAIA no longer charges a fee for endorsement;
- the schedule of suggested prize amounts has been considerably simplified; and
- recommended competition timetables are no longer included.

The guidelines are in **Schedule 5**.

- (b) The purpose of the guidelines is, as the name suggests, to set out sensible guidelines for those who wish to conduct architectural design competitions with the endorsement of RAIA. There is no requirement that such competitions actually be endorsed by RAIA. There is no impediment to architects participating in competitions that are not so endorsed.
- (c) When the Trade Practices Commission considered the guidelines in 1984 it considered that there was no anti-competitive detriment in the guidelines. In authorising the guidelines the Commission saw public benefit in them. RAIA submits that the same position pertains today.

## 17. Fee guides

- (a) RAIA issues guidelines and practice notes to assist its members and the public to determine appropriate fee levels for professional architect services. The current guidelines and practice notes are:
- Practice Note - Fee guide no 8 (July 2001)
  - Practice Note - Small projects fee guide (July 2001)
  - Practice Note - Fees for partial services (July 2001)

Copies of each guideline and practice note are in **Schedule 6**.

- (b) When the Trade Practices Commission considered the guidelines in 1984 it considered that *there is value in fee guidance documents in which it is made clear that they are a reference or guideline only*<sup>27</sup> and authorised RAIA issuing such guides.

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27 Authorisation A58 para 8.4



- (c) The majority of these guideline documents do no more than set out business management issues that may need to be taken into account in establishing fees for a particular project. The two Practice Notes that offer more specific fee guidance contain the following prominent statement:

*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, provided that these are not in conflict with the law applicable in the state or territory concerned.*

## 18. Architects services and conditions

- (a) RAIA issues standard form client and architect agreements, and related guidelines and practice notes to assist its members and the public to enter into appropriately governed arrangements for professional architectural services. The relevant current documents are:

- RAIA Client and architect agreement (long form) (July 2000)<sup>28</sup>
- User Guide - RAIA Client and architect agreement (long form) (July 2000)
- RAIA Client and architect agreement (short form) (July 2000)
- User Guide - RAIA Client and architect agreement (short form) (July 2000)

- (b) Copies of these documents are included at **Schedule 2**.

- (c) RAIA no longer publishes the package of documents entitled *Architects Services Conditions and Fees* that formed part of Authorisation A58. The documents listed in paragraph (a) above and some of those listed in section 17 have been developed to replace the earlier package.

- (d) The standard short form agreement is a four-page document designed for use with very small projects or those involving only basic conventional services. The standard long form agreement contains the following statement inside the front cover:

*This agreement is in a standard form for the benefit of architects and their clients. However, architects and their clients are free to agree on conditions of engagement and fees on any basis whatsoever, providing that they are not in conflict with the law applicable in the state or territory concerned.*

- (e) These documents are designed to promote efficiency and good practice. Use of the forms is not mandatory for architects generally or for RAIA members. They are available for purchase and, subject to copyright provisions, are able to be modified to incorporate any provisions the parties agree to include.

<sup>28</sup> Copyright in both standard form agreements is jointly held by RAIA and the Association of Consulting Architects Australia.

## Public benefits

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### 19. The principles

- (a) The principle on which this submission is based is that the law on what constitutes a public benefit is well established. As the Trade Practices Tribunal has noted<sup>29</sup>:

*Public benefit ... is ... 'anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress'. ... [E]fficiency is a concept that is usually taken to encompass 'progress': and ... commonly efficiency is said to encompass allocative efficiency, production efficiency and dynamic efficiency."*

- (b) It is also well established that the term "the public" refers to the Australian public and is wider than simply consumers. Economies of scale and considerable cost saving in supply of goods and services may constitute a substantial benefit to the public even though the cost saving is not passed on through lower prices.<sup>30</sup>

### 20. Overall benefit

- (a) Although it is necessary to consider the benefit of each of the elements of this submission, there are overall benefits in there being a Royal Australian Institute of Architects, as a highly reputable and long standing professional association, fulfilling its objectives. It is submitted that there is public interest in it doing so.
- (b) RAIAs sets professional standards in the public interest. It provides education and guidance for its members and for members of the public concerning the practice of architecture and this is in the public interest. It maintains professional standards through adherence to its code of conduct and this is in the public interest. It aids members, through its guidance materials and training, to operate efficiently and that is in the public interest.
- (c) RAIAs also contributes to the maintenance of professional standards through the recognition of tertiary architectural courses in Australia. This occurs in conjunction with the Boards accrediting courses under relevant legislation.
- (d) It is submitted that the individual arrangements for which a substitute authorisation is sought should be assessed against that background. The ACCC should consider this application in the context of a professional body of high reputation whose only

<sup>29</sup> Re 7-Eleven Stores Pty Ltd (1994) ATPR 41-357

<sup>30</sup> Re Howard Smith Industries Pty Ltd (1977) 28 FLR 385; ATPR 40-023:

objective is to establish and maintain high standards of ethical behaviour consistent with the profession it represents - not from a viewpoint that RAIA has a narrow anti-competitive purpose in relation to the arrangements to which this application relates.

## 21. Memorandum and Articles of Association

- (a) The memorandum and articles of association provide an overall public benefit because they are the governance arrangements for RAIA. There is benefit in the existence of professional bodies such as RAIA. The work they do is of utility to the community because it provides for sensible self regulation of an important profession, as well as establishing standards and aiding efficient use of professional services in the field of architecture.
- (b) RAIA therefore submits that the starting point for any analysis of the memorandum and articles of association is that, through its work, RAIA delivers benefits to the community at large, as well as to its large membership base and therefore the memorandum and articles of association are of benefit.
- (c) Most competition analysis of constituent documents focuses on entry and expulsion rules. This is what the Trade Practices Commission did in 1984. Changes requested by the Commission were introduced. The current rules relating to membership and expulsion are set out above.
- (d) RAIA submits, in relation to its membership provisions, that there is a public benefit in professional bodies having fair, transparent membership criteria acceptable to the profession the body represents. The RAIA membership criteria satisfy this test and are in the public interest.
- (e) RAIA submits that, in relation to its discipline provisions (including its rights of expulsion in serious cases) there is a public benefit in professional bodies upholding professional standards, including through transparent rules for disciplining members who do not meet the standards of professionalism the profession expects. Absence of rigorous, transparent disciplinary processes acceptable to the profession the body represents ultimately leads to a lowering of standards, contrary to the public interest.
- (f) RAIA also submits that, save where the discipline provisions are so vague as to be open to capricious decisions, in voluntary professional associations where membership is not a requirement in order to compete, it is a matter for the members of the professional body to determine what discipline provisions they want.
- (g) In this case it is clear that RAIA's discipline provisions are appropriate by any standard. They are in the public interest.

## 22. RAI A regulations and by-laws

- (a) An overall public benefit is provided by the regulations and by-laws because they fill out the detail of the governance arrangements for RAI A embodied in its memorandum and articles of association. As previously noted there is benefit in the existence of professional bodies such as RAI A.
- (b) RAI A therefore submits that the starting point for any analysis of the regulations and by-laws is as an adjunct to the memorandum and articles of association. Through its work, RAI A delivers benefits to the community at large, as well as to its large membership base and therefore the whole of its governance arrangements are of public benefit.
- (c) The entry rules discussed in relation to the memorandum and articles are contained in the regulations and by-laws now considered to be separate from the articles of association but empowered by article 82. The current rules relating to admission to Ordinary membership are consistent with those required by the Trade Practices Commission in relation to the 1984 authorisation in respect to the right to appeal via independent arbitration. The current wording is:

*Regulation 11.3.*

*Any candidate for admission to Ordinary Membership of the Institute whose application for such membership is not approved by the Chapter Council or by an Area Committee as the case may be or whose qualifications are determined by the National Manager Membership not to be in accordance with the requirements of the Institute may give notice to the National Manager Membership within thirty days of receipt of notice that such application for membership has not been approved advising that he or she disputes any of the decisions abovementioned whereupon such dispute or difference shall, if the candidate agrees, be submitted to arbitration in accordance with and subject to the Institute of Arbitrators Australia Rules for the Conduct of Commercial Arbitrations.*

- (d) In relation to the regulations and by-laws, RAI A repeats its submission that there is a public benefit in professional bodies having fair, transparent membership criteria acceptable to the profession the body represents. The RAI A membership criteria embodied in the regulations and by-laws satisfy this test and are in the public interest.

## 23. RAI A code of professional conduct

- (a) The proposed RAI A code of professional conduct provides an overall public benefit because it promotes and enhances ethical behaviour on the part of RAI A members. There is public benefit in the existence of professional bodies such as RAI A who enforce standards of conduct among their membership. The Code sets out the standards of professional conduct that RAI A members bind themselves to. In establishing standards the Code is of utility to the community because it is part of sensible self regulation of an

- important profession, which promotes efficient use of professional services in the field of architecture.
- (b) RAI A therefore submits that the starting point for any analysis of the proposed Code is the public benefit in its regulation of the way RAI A members deliver benefit to the community at large through the services they provide. Also significant as a public benefit is the benefit to the RAI A's large membership base of ethical behaviour by members one to another.
  - (c) The Code is necessarily linked to the disciplinary procedures in the RAI A's Articles of Association for enforcement, as without a mechanism for complaint, transparent and fair consideration and enforcement of sanctions where appropriate, the public benefit of a standard is diminished by lack of adherence. RAI A submits that the Code and disciplinary provisions work in tandem and are inextricably linked.
  - (d) It is therefore necessary, in order to maximise public benefit, that the Code be contemporary, relevant to architects practice and easily understood, so that the number of complaints is minimised. It is also necessary that the Code not contain anti-competitive prohibitions. RAI A submits that the proposed Code contains no anti-competitive elements inconsistent with the provision of public benefit afforded by the high professional standards the Code seeks to ensure.
  - (e) RAI A submits that it is clear the proposed Code is appropriate by any standard as being in the public interest.

## 24. Guidelines for RAI A endorsed architectural competitions

- (a) In the 1984 authorisation, it was concluded that:

*"The TPC agrees that architectural competitions have the potential to enhance the promotion and advancement of architecture and it sees public benefit in the RAI A guidelines for such competitions."<sup>31</sup>*
- (b) RAI A submits, however, that there are further public benefits that accrue from RAI A endorsement of architectural competitions, beyond the obvious cultural benefit of advancing architecture.
- (c) A key benefit of the guidelines is that they facilitate competition by encouraging architects to participate in competitions, in the knowledge that they will be fairly treated and compensated. (Many architects are reluctant to become involved in non-endorsed competitions because of the perceived danger of either financial loss or 'theft' of intellectual property.)

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31 Authorisation A58 para 7.8

- (d) Properly run competitions make available quality design solutions that might never otherwise have been available, especially for significant public works (the Sydney Opera House, Federation Square and Parliament House in Canberra were all the result of appropriately run architectural competitions.)
- (e) Significant architectural competitions usually enable multiple stakeholders to express views about various design alternatives, through media exposure, public debate and the jury process itself. This is a particularly strong benefit where the project is a major civic or public work.
- (f) Another benefit arising from the conduct of architectural competitions in line with the guidelines is that they make it difficult for promoters/developers to abuse significant market power to obtain architectural concepts on unfair terms.

## 25. Fee guides

- (a) The Tribunal and the Trade Practices Commission have each accepted the public benefit in fee guides that are designed to provide guidance only and clearly expressed as such and based on appropriate data.

- (b) The Tribunal<sup>32</sup> has said that:

*'... There was ... discussion as to whether we should indicate our preparedness to consider the authorisation of a scale of fees if it were not a mandatory one. ... We are persuaded that the ACEA scale is regarded as a valuable aid by most users or potential users of engineering services. ... Accordingly we conclude that there is value in a scale, provided it is made clear that it is a reference or guideline scale only.'*

- (c) The Trade Practices Commission has acknowledged that there is value in fee guidance documents as references for members of the profession or industry and for the public, as long as it is made clear that they are guides only.<sup>33</sup>

- (d) RAI has been scrupulous in ensuring that, in issuing guidance on fees under the current authorisation, that information provided is clearly a guide only. As noted above, each Practice Note contains a the following prominent statement:

*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, provided that these are not in conflict with the law applicable in the state or territory concerned.*

<sup>32</sup> Re Association of Consulting Engineers, Australia (1981) ATPR 40-202 at p 42,798.

<sup>33</sup> Re Royal Australian Institute of Architects (A58); Re Real Estate Institute of the ACT (1985) ATPR (Com) 50-087.

- (e) The fact that the guides are only guides is well understood:
- Architects, clients and the public are routinely reminded of their guidance status when making related telephone or in-person enquiries of the RAIA;
  - As noted in section 11 above, the factors influencing the calculation of fees by a particular architect for a specific project are sufficiently complex and variable that no two architects are likely to arrive at precisely the same fee arrangements;
  - If they were not regarded as guides, there would be little, if any, need for clients to seek competitive fee proposals, and such proposals are always sought (with the possible exception of occasional developer or government related projects where the fee is set by the client); and
  - Architects must be able to compete in the market – they would thus vigorously resist any attempt to dictate fee levels (and frequently complain when a prospective client seeks to set the fee).
- (f) RAIA submits that its fee guides provide the following public benefits. They:
- assist in overcoming information asymmetry between architects and clients. This is especially important given that clients are typically in the market for architects services once or twice in a lifetime;
  - assist local government and other public sector clients to determine what a reasonable price may be for assessment of architect's proposals. About 80% of government procurement for infrastructure and buildings is in the traditional model under which architecture, engineering and other consulting services are separately procured;
  - provide a benchmark for determining whether or not a client has been reasonably charged; and
  - provide assistance to smaller architects' practices and new entrants who would otherwise require complex costing models to compute the prices they should quote.
- (g) RAIA is aware that the ACCC has suggested that there are now alternative means for architects and others to compute reasonable prices utilising mediums such as the internet. As far as RAIA can ascertain there are no alternative sources of the information its fee guides provide. There is nowhere on the internet an architect or client can go for this guidance. In fact state consumer affairs bureaus and state and local government authorities refer to RAIA and its fee guides for this information.

## 26. Architects services and conditions

- (a) As noted above, the Trade Practices Commission has accepted the public benefit in documents that are designed to provide guidance only and that are clearly expressed as such.
- (b) The standard form client and architect agreements and their associated user guides are not in any way mandatory, but do offer a basis on which clients and architects can appropriately structure the formal agreement between them.
- (c) By developing and publishing standard form agreements, RAI A generates public benefit in a range of ways, in particular that they:
  - offer less experienced architects and clients a set of contract conditions that have proven fair and equitable over a long period and many projects;
  - enhance efficiency of architects services through not requiring extensive customised legal input at the outset of new projects;
  - offer clients the security of knowing which are standard provisions (sanctioned by RAI A) and which are special provisions inserted by the architect;
  - make it easy for clients or prospective clients to consult the RAI A on the appropriateness of particular conditions;
  - help ensure that architects do not inadvertently or intentionally enter a relationship with a client on terms that are unreasonable or unfair to the client; and
  - provide a benchmark that means that the effects of relevant new legislation introduced from time to time can be readily and consistently embodied in a revision of the standard form.



# Detriment

## 27. The principles

- (a) There are four relevant principles concerning detriment on which this submission is based. The first is that in considering detriment for the purposes of the relevant test for authorisation, it is only detriment constituted by lessening of competition that is relevant.<sup>34</sup> In doing so it has to be borne in mind that anti-competitiveness cannot be taken to necessarily be a detriment. Effects that may be anti-competitive can be a benefit.<sup>35</sup>
- (b) The second principle is that, when considering the competitive effect, if any, the arrangements may have, the mere possibility of an effect on competition is not sufficient. The only effects on competition to be taken into account are effects that *'would result, or be likely to result'*.<sup>36</sup> A mere possibility is not sufficient.
- (c) The third principle is that it is unsafe to make assessments of competitive effect based on theoretical assumptions concerning the nature of the subject matter under consideration. In considering the likely effect of an arrangement that does not have lessening competition as its object, it is its economic effect, rather than a formalistic appraisal that is relevant.
- (d) The fourth principle, which follows from the third principle, is that assessments of likely effect must be based on credible evidence rather than assumption.

## 28. Overall comment

- (a) There are a number of submissions that RAIA wishes to make which affect the matter overall, before dealing with any possibility of detriment arising from specific elements of this application.
- (b) The first is that, in proceeding with each of the arrangements it is not RAIA's objective to adversely affect competition. Quite the reverse. Through these arrangements RAIA aims to assist its members to be more informed, trained and efficient and therefore be more able to compete. It also aims, through the information it provides to the public, to bridge the information gap, thereby assisting to overcome information asymmetry which impedes consumers of professional services in the field of architecture making informed choices.
- (c) The second is that there is no evidence that any of the arrangements have actually had an adverse effect on competition in the 20 years

<sup>34</sup> Trade Practices Act 1974, section 90(6).

<sup>35</sup> Re 7-Eleven Stores Pty Ltd (1994) ATPR 41-357; Re Media Council of Australia (No 2) (1987) ATPR 40-774.

<sup>36</sup> See footnote 15

since they were first authorised. In this respect RAI A submits that the concerns which the Trade Practices Commission took into account in 1984 have proven to be more theoretical than real.

- (d) It follows that, in assessing the arrangements for the purposes of granting the substitute authorisation RAI A is seeking, the balance in favour of granting authorisation will be easily achieved if the arrangements deliver any public benefit whatsoever. It is, of course, RAI A's submission that they deliver significant public benefits in any event.

## 29. Memorandum and Articles of Association

- (a) There is, it is submitted, nothing in the RAI A memorandum and articles that should cause the ACCC competition concerns.
- (b) Any registered architect can join RAI A if he or she wishes. However, there is no compulsion to join. Over 50% of registered architects have chosen not to join RAI A. Many of these are employed architects who are able to derive many of the benefits of membership because the principals of their practices are members.
- (c) In the market for professional services in the field of architecture other service providers compete with architects and architects (whether members or not) compete with each other vigorously.
- (d) Larger development projects tend to involve architects, many assignments for which are tendered. The RAI A is not aware of any tender or assignment that has limited those who could contest the assignment to members of RAI A. For instance, the architects engaged on the Federation Square redevelopment in Melbourne were not members of RAI A at the time they were awarded the assignment.
- (e) In its disciplinary role RAI A is doing no more than upholding important professional standards. RAI A is an incorporated body. In practical terms it competes for members, but it is not in competition in the market for professional services in the field of architecture. Consequently, its disciplinary provisions can not have any effect on competition in any market in which RAI A participates.
- (f) RAI A acknowledges that, if membership of RAI A was a requirement for participation in the market for professional services in the field of architecture, the expulsion of a member may have an effect on the ability of an expelled person to compete in that market. Whether or not that could result in an adverse effect on competition in the market is, RAI A submits, debatable.
- (g) In any event, RAI A submits that it is clear that RAI A's disciplinary provisions are fair and equitable. No question of anti-competitive effect arises.

### 30. RAIA regulations and by-laws

- (a) RAIA submits that nothing in the RAIA regulations and by-laws (regulations) should cause the ACCC competition concerns.
- (b) The regulations cover the procedures for Chapter Council meetings and the powers of Chapter Councils, internal funding allocation and account keeping rules, provision for divisions within Chapters and for Area Committees outside Chapters, and the procedures relating to admission for members and allocation to membership classes and categories, including rights of review of membership refusal and provision to vary the prescribed academic qualifications for admission.
- (c) RAIA submits that none of the procedures for admission, including setting academic qualifications for membership, could be regarded as anti-competitive in effect.
- (d) Any person with the required qualifications can join RAIA if he or she wishes, but the class and/or category of membership to which the person will belong depends on the particular qualifications and experience of the applicant. In relation to admission procedures, the regulations merely set out the procedures and expand upon the rules applying these distinctions between classes and categories of member.
- (e) Any person whose application for Ordinary membership is refused is entitled to appeal to an independent arbitrator against any negative decision, but in practice no one who has the relevant qualifications of membership is refused membership.
- (f) In the unregulated market for professional services in the field of architectural services, other service providers compete with architects and non-architects (whether members or not) quite effectively, irrespective of the existence of rules and procedures for allocation of differing membership classes and categories within RAIA.
- (g) RAIA may vary the prescribed academic qualifications for admission from time to time, but this is a necessary adjunct to rules for allocation to membership classes and categories brought about by the changing nature of educational opportunities which are outside RAIA control. The structure and content of architectural courses has and will change over time. RAIA's ability to uphold the public benefit of the highest professional standards and ethics depends on RAIA's ability by means of its regulations to keep the prescribed architectural qualification relevant to that purpose.

### 31. RAIA code of professional conduct

- (a) RAIA submits there is nothing in the proposed RAIA Code of professional conduct that should cause the ACCC competition concerns.
- (b) A high standard of professional conduct is of no detriment to competition.
- (c) Architects who are bound by a Code through RAIA membership compete effectively with both non-member architects and with non-architects in the market for architectural professional services. This is borne out by the fact that member architects have chosen to join RAIA despite the obligation to conduct themselves in accordance with the principles espoused in an RAIA Code, as compared to the choice of non-membership without such obligation.
- (d) The Trade Practices Commission readily accepted in 1984 that the existence and content of an RAIA Code, setting a high standard of behaviour for members, was not anti-competitive.
- (e) RAIA submits that the proposed Code is not in any way anti-competitive, but in any event contains no elements that are more anti-competitive than the version authorised in 1984.

### 32. Guidelines for RAIA endorsed architectural competitions

- (a) As these RAIA guidelines do no more than describe the conditions on which RAIA will agree to endorse an architectural competition proposed by a government or private sector sponsor, they have no detrimental effect on competition whatsoever:
  - they are not in any way mandatory;
  - they do not restrict entrants or jurors to being RAIA members;
  - they do not necessarily limit entrants to being architects; and
  - they are transparent and attract no fee in relation to endorsement.
- (b) On the contrary, the guidelines are a valuable aid to competition, and indeed this is the reason they were devised. In the absence of competition conditions that are fair and equitable, many architects (arguably those who are more prudent and capable) choose not to enter architectural competitions. In order to encourage the involvement of architects of the highest possible calibre, RAIA endorsement and the competition conditions that result are of great competitive benefit.

- (c) RAIA submits that the guidelines for RAIA endorsed architectural competitions create no anti-competitive effects. In fact, with the refinement and removal of some requirements from the 1984 version, this is even more the case now than it was under Authorisation A58.

### 33. Fee guides

- (a) The RAIA fees guides are clearly recommendatory only. They are stated to be such and this is well understood.
- (b) There is no evidence that the guides have any adverse effect on competition in the relevant market. As noted above, there is no requirement to use an architect member of RAIA and, in fact, no requirement to use an architect at all. Architects compete on service, quality and price with others in the market for professional architectural services.
- (c) In RAIA's submission, the fee guides enhance competition, including by:
- allowing smaller architect's practices and new entrants to benchmark pricing without having to undertake complicated costing exercises;
  - helping to inform consumers of the likely rates architects might charge so that informed negotiation can occur;
  - maintaining a natural ceiling on architect's charges; and
  - aiding consumers to make more informed choices between architects based on price, quality, reputation and innovation.
- (d) Competition for architect services routinely occurs through some form of competitive bidding process. Such bids will necessarily take account of relevant experience, nominated personnel, capacity to deliver, references from previous clients and a host of other qualitative information, so the fee proposal (both quantum and how determined) will be just one of a number of significant bid components.

### 34. Architects services and conditions

- (a) Given that the standard form client and architect agreements and related user guides are not mandatory, not restricted to use by members and are freely available for purchase by clients, architects and others, RAIA submits that they create no detriment to competition.
- (b) The documents, both in their current form, and in a slightly different form prior to their revision in 2000, have been extensively used and RAIA is aware of no evidence that they have in any way impacted negatively on competition between architects or on the rights of clients.

- (c) RAlA sells in excess of 1,500 copies of the two standard form agreements each year, which indicates that they are widely used (especially by smaller practices and sole practitioners) but also that alternative, non-standard forms are clearly used for the majority of architectural commissions.

# Conclusion

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## 35. Summary

- (a) RAIA further submits that the ACCC should conclude that:
- the likely adverse effects on competition of the arrangements are, at their highest, minimal and that, in all of the circumstances do not amount to any detriment within the meaning of section 90(6) of the Act; and
  - there are significant public benefits arising and likely to continue to arise from the arrangements.
- (b) RAIA further submits that, for the reasons set out in this submission, the ACCC should grant the substitute authorisation and concurrently revoke Authorisation A58. The substitute authorisation should be as follows:
- (1) Authorisation for RAIA and its current and future members to engage in conduct giving effect to the contracts, arrangements and understandings evidenced by the:
    - (i) RAIA code of professional conduct;
    - (ii) RAIA memorandum and articles of association;
    - (iii) RAIA regulations and by-laws;
    - (iv) client and architect agreements and user guides relating to those agreements; and
    - (v) RAIA guidelines for RAIA endorsed architectural competitions

as amended from time-to-time.
  - (2) Authorisation for RAIA to issue, from time to time, guides to assist architects and users of architects' services to negotiate appropriate fee arrangements for architectural services; being guides which:
    - (i) are expressed to be reference guides only;
    - (ii) contain a prominent statement that architects and clients are free to agree conditions of engagement and fees on any basis whatsoever;
    - (iii) are designed to provide guidance on lump sum, percentage-based and/or time-based fees;
    - (iv) are based on historical data provided by architects;
    - (v) provide a range of scenarios in relation to reasonable profit margins an architect might apply; and
    - (vi) provide guidance on possible fee apportionment arrangements for lump sum and/or percentage-based fees.

### 36. Additional information

- (a) The RAIA invites the ACCC to indicate any further information the RAIA may reasonably provide to assist the ACCC in its consideration of this application.
- (b) The RAIA reserves the right to provide additional information in the course of the ACCC's consideration of the matter.



## Schedules

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- **Schedule 1:** Memorandum and Articles, Regulations and By-laws
- **Schedule 2:** Standard form client and architect agreements and related documents
- **Schedule 3:** State and territory architects legislation
- **Schedule 4:** RAI A code of professional conduct
- **Schedule 5:** Guidelines for RAI A endorsed architectural competitions
- **Schedule 6:** Fee Guide and fee-related practice notes