



Australian
Competition &
Consumer
Commission

Draft Determination

**Application for revocation of authorisation A58
and its substitution by authorisation A90946**

lodged by

the Royal Australian Institute of Architects

*in relation to:
its Code of professional conduct
and other related documents*

Date: 26 July 2005

Commissioners:

Samuel
Sylvan
King
Martin
Smith
Willet
McNeil

Authorisation no. A90946

Public register no. C2004/1922

Executive Summary

On 7 September 1984, authorisation A58 was granted to the Royal Australian Institute of Architects (the RAIA), on its own behalf and on behalf of its members, to give effect to the arrangements provided for its Code of professional conduct and a number of related documents.

On 8 December 2004, the RAIA lodged an application pursuant to section 91C of the TPA for a revocation of authorisation A58 and its substitution by authorisation A90946. The proposed substitute authorisation A90946 is broadly similar to authorisation A58 and is sought a period of 6 years.

The proposed arrangements

The substitute authorisation is sought 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 RAIA's:

- proposed Code of professional conduct
- Memorandum and articles of association
- Regulations and by-laws
- The Standard form contracts and associated user guides and
- Guidelines for RAIA endorsed architectural competitions

Authorisation is also sought for the RAIA to issue, from time to time, guides to assist architects and users of architects' services to negotiate appropriate fee arrangements for architectural services.

Assessment of benefits and detriments

In considering the public benefits and anti-competitive detriments of the RAIA's application for revocation and substitution the ACCC:

- firstly, assessed those aspects of the RAIA's application which it considers establish the framework within which the RAIA operates and set its standards of behaviour, namely, the Code of conduct, the memorandum and articles of association and the regulations and by-laws (collectively referred to as 'the Arrangements') and
- secondly, assessed those aspects of the RAIA's application which the ACCC considers provide guidance and information to its members, namely, the guidelines for RAIA endorsed architectural competitions, the Standard form contracts and associated user guides (collectively referred to as 'the Activities').

The Arrangements

Overall, the ACCC accepts that the Arrangements are likely to provide a benefit to the public insofar as they:

- increase consumer information and awareness of the industry and their rights in relation to the industry
- increase guidance for members to act in the best interest of the community and encourage them to act in an honest and ethical manner, and
- encourage and promote industry self-regulation.

However, for the reasons discussed in paragraphs 8.9 to 8.24 of this draft determination, the ACCC considers that were Standards 2.5, 4.3, 4.5 and 4.6 included in the RAIA's proposed Code of conduct, in their present form, they may generate a degree of anti-competitive detriment which is sufficient to outweigh the overall public benefits of the Arrangements.

The ACCC is of the view, however, that were Standards 2.5, 4.3, 4.5 and 4.6 removed or appropriately amended, the Arrangements would be more likely to generate a net public benefit.

The Activities

The ACCC considers that the purpose and effect of the RAIA competition guidelines is to promote fair and equitable architectural competitions that encourage innovation and design solutions and therefore they are likely to provide some public benefit.

The ACCC also considers that the Standard form contracts and associated user guides are likely to provide a useful reference guide for architects and their clients, although they are unlikely to result in significant efficiencies and therefore any public benefit generated by them would be small.

However, the ACCC considers that to the extent that the RAIA fee guides, and in particular the fee graphs (*see Attachment A and B*), included in the RAIA's application are adopted by industry participants, they are likely to generate significant anti-competitive detriment.

Proposed determination

Overall, the ACCC is not satisfied that the public benefits likely to result from the proposed conduct, in its current form, would outweigh the potential anti-competitive detriments of that conduct and therefore propose to deny the RAIA's application.

However, the ACCC considers that:

- if Standards 2.5, 4.3, 4.5 and 4.6 of the RAIA's proposed Code of conduct were removed or appropriately amended and
- the fee graphs were severed from the authorisation

the proposed conduct would be more likely to produce a net public benefit such that the ACCC may grant authorisation.

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1 Introduction

- 1.1 The Australian Competition and Consumer Commission (ACCC) is the Australian Government agency responsible for administering the *Trade Practices Act 1974* (the TPA). A key objective of the TPA is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.
- 1.2 The TPA, however, allows the ACCC to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an 'authorisation'.
- 1.3 Broadly, the ACCC may 'authorise' businesses to engage in anti-competitive arrangements or conduct where it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment.
- 1.4 The ACCC conducts a comprehensive public consultation process before making a decision to grant or deny authorisation.

Revocation and substitution of authorisations

- 1.5 Section 91C of the TPA allows a party to apply to the ACCC to have their existing authorisation revoked and to have a substitute authorisation granted in its place. Before the ACCC may grant an application to revoke an existing authorisation and grant a substitute authorisation, it must assess the proposed substitute authorisation in the same manner that it would consider a new authorisation application.
- 1.6 In the context of the current application for revocation and substitution, the ACCC must consider the proposed conduct against the relevant tests set out in sections 90(6) and 90(7) of the TPA which, in short, require the ACCC to be satisfied that the proposed arrangements would be likely to result in a benefit to the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result.
- 1.7 In making its decision, the ACCC conducts the same public consultation process as it would for a new application for authorisation, including informing interested parties about the application, inviting submissions and issuing a draft determination. The ACCC then issues a final determination.

The current application for revocation and substitution

- 1.8 On 8 December 2004, the Royal Australian Institute of Architects (the RAIA) requested that, pursuant to section 91C of the TPA, the ACCC revoke authorisation A58 and grant substitute authorisation A90946.
- 1.9 This document is the draft determination in relation to the RAIA's application for revocation and substitution.

2 Background to the application

Authorisation A58

2.1 In December 1974, the RAIA applied to the Trade Practices Commission (the TPC)¹ for authorisation of its Code of professional conduct (the Code), memorandum and articles of association, regulations and by-laws, and documents entitled *Architects' Services, Conditions and Fees* (which included fee guides), and *RAIA Endorsed Architectural Competitions*. In its application (A58) the RAIA stated that its members were required to comply with the Code which it claimed was, in essence, the basic "arrangement" for which authorisation was being sought.

2.2 Restrictions in the Code included mandatory fee scales, as well as a prohibition on supplanting, advertising and the entering of unauthorised competitions. The RAIA documents also contained restrictive provisions relating to membership and discipline. A number of these restrictive practices were reflected in the RAIA's stated objective, which at the time of its original application was:

The advancement of architecture and the preservation and maintenance of the integrity and status of the profession and the suppression of dishonourable and unprofessional conduct or practices.

2.3 In January 1975 the TPC granted the RAIA interim authorisation. However, because of the likely flow-on implications, the final consideration of the RAIA application had to await the outcome of the Association of Consulting Engineers Australia (the ACEA) appeal to the Trade Practices Tribunal (the TPT)² against the TPC's dismissal of ACEA's authorisation application.

2.4 The matters covered in the RAIA application were similar to those dealt with in the ACEA application for authorisation which was the subject of the first major decision by the TPC concerning a professional association. The ACEA application, which was denied by the TPC, related to the ACEA rules, code of ethics and professional practice, terms of engagement and a scale of minimum charges.

2.5 In its 1981 decision, the TPT confirmed the TPC's decision to deny the ACEA's application for authorisation. In its decision, the TPT stated:

That a minimum fee scale must inhibit competition to some degree. This might also tend to force lower fees up to the level of the minimum scale. Due to changes in circumstances, the scale would soon be out of date and the ACEA could not be given a "blank cheque" to raise minimum fees when members thought it appropriate.

(However)...if the Association (ACEA) published a fee scale as a reference and as a valuable aid for most users of engineering services, it would see public benefit in

¹ In November 1995, the TPC became known as the Australian Competition and Consumer Commission.

² The TPT became known as the Australian Competition Tribunal as of 6 November 1995.

that, provided it was made expressly clear that it is a reference scale only, and that engineers and clients can negotiate on any other basis if they want to.³

2.6 Following the TPT's decision, the RAIA amended its application to address those areas identified by the TPT as being of concern. In September 1984 the TPC issued a final determination authorising the RAIA to give effect to the arrangements as provided for in the following RAIA documentation:

- Architects services, conditions and fees
 - Schedule A- *Services to be provided by the architect*
 - Schedule B- *Conditions (of engagement of architect)*
 - Schedule C- *Basis of payment*
 - *Client/Architect agreement*
 - *Guide to Architect services*
 - *Consultants guide- Engagement of consultants*
 - *Fee guide*
 - *Working with your architect*
- Code of professional conduct
- Memorandum of Association/Articles of Association
- Regulation and by-laws
- Guidelines for RAIA endorsed architectural competitions

2.7 Essentially, the RAIA was granted immunity from the TPA to promulgate and enforce its Code and to disseminate other information relating to architectural services, including a scale of fees and a fee guide, to its members and the public.

The RAIA's application for minor variations

2.8 In April 2000, the RAIA applied to the ACCC under section 91A⁴ of the TPA to vary authorisation A58 which included amending both the Code and the Articles of Association. In October 2000, the ACCC advised that it considered the combined effect of the proposed amendments was likely to amount to a material change in the effect of the authorisation and, consequently, rejected the application.

³ Re Association of Consulting Engineers, Australia (1981) ATPR 40-2002

⁴ Section 91A provides for an authorised party to apply to the ACCC for a minor variation. A minor variation is defined as: a single variation that does not involve a material change in the effect of the authorisation. The TPA also provides that applicants can apply for two or more variations at the same time and that the ACCC may (provided it is satisfied that the combined effect of the variations, if all were granted, would not result in a material change in the effect of the authorisation) deal with those minor variations together as if they were a single variation.

- 2.9 In July 2002, the ACCC received a further application from the RAIA to vary authorisation A58. In November 2002, the ACCC again denied the RAIA's application on the basis that the variation sought was not minor. At that time, the ACCC advised the RAIA that if it wished to seek immunity for the proposed changes, it may wish to consider utilising the revocation and substitution process as a means of varying authorisation A58.

The ACCC's notice pursuant to section 91B

- 2.10 On 8 September 2004, pursuant to section 91B⁵ of the TPA, the ACCC issued a notice (the notice) to the RAIA advising it that the ACCC considered that there may have been a material change of circumstances since authorisation A58 was granted. In the notice, the ACCC identified a number of circumstances which it considered had materially changed since the authorisation was granted, changes which, in the ACCC's view, may have impacted upon the public benefits and public detriments of the authorised conduct. These changes included:
- that many of the documents which provided the basis of the authorised arrangements in 1984 had been removed, amended or superseded
 - the regulatory environment in which the RAIA and its member architects operated had changed since 1984 and
 - significant changes which reduced the need for industry organisations like the RAIA to provide any form of guidance in relation to recommended fees. For example, an exponential increase in the volume and utility of information available to both consumers and businesses through mediums such as the internet.
- 2.11 In response to the notice, the RAIA stated that they did not agree there had been a change in circumstances sufficient to warrant the revocation of A58, however, the RAIA advised that it wished to assist the ACCC in its further consideration of the authorisation. Accordingly, on 8 December 2004, the RAIA lodged the current application for revocation of A58 and its substitution by A20782.

⁵ Section 91B(3) of the TPA enables the ACCC to consider whether it should revoke an authorisation at any time after it has been granted if it considers that, amongst other things, there has been a material change of circumstances since the authorisation was granted.

3 Industry background

Trade Practices Commission Review

- 3.1 In September 1992, the TPC released its *Study of the Professions – Architects – Final Report* (the TPC Review) which was compiled as part of the TPC's broader study of competition in Australian markets for professional services. In short, the TPC Review considered the balance of the public benefits and the anti-competitive effects of the regulatory environment in which the architectural profession existed.
- 3.2 The TPC Review reached a number of conclusions, some of which may still be relevant to the ACCC's consideration of the current RAIA application, including that:
- architects work within the broader market for building design services which could be further divided into three sectors: domestic buildings; industrial buildings; and commercial buildings
 - the market for building design services was generally competitive
 - there was no legislation in Australia that reserved the provision of particular services to architects⁶, meaning that anyone could provide services in competition with architects
 - certification of the title 'architect' did not have a significant effect on competition in the market for building design and
 - the TPC encouraged the implementation of a Model Architect's Act.
- 3.3 The TPC also stated that it did not consider it necessary to review the RAIA's existing authorisation as the TPC did not consider the arrangements to be anticompetitive. The TPC's view was that the RAIA fee guide provided a public benefit insofar as it reduced the costs involved in a client selecting an architect and reaching agreement on the cost and nature of the design service. The TPC also expressed support for the RAIA's guidance on the conduct of architectural competitions.

Productivity Commission Review

- 3.4 In August 2000, the Productivity Commission released its *Review of Legislation Regulating the Architectural Profession* (the PC Review). The objective of the PC Review was to report on the preferred option for regulation, if any, in the architectural profession in Australia.⁷

⁶ With the exception of the Queensland *Architects Act 1985* which, in 2002, was replaced.

⁷ The PC review received 491 submissions from interested parties, of which over 400 were received from individual architects and architectural firms.

- 3.5 Whilst the PC Review's primary focus was on the issue of legislation regulating Australian architects, it did provide some information and analysis which the ACCC considers may be relevant to its consideration of the current RAIA application. For example, the PC Review:
- defined the market in which architects in Australia operate as being the broader market for building design and related services
 - stated that the various state architect Acts restricted the use of language but not practice (for example, the PC Review noted that any services provided by architects could be performed by 'non-architects' but not designated as architecture or architecturally designed)
 - stated that there were approximately 8,600 practising architects in Australia (in the year 2000) of whom approximately one half were members of the RAIA
 - identified approximately 4,500 to 5,000 'non-architect' building design practitioners in Australia directly competing with architects in the provision of building design services and
 - claimed that evidence suggested that many consumers in the residential and commercial sectors regarded particular services provided by 'non-architects' as closely substitutable for those provided by architects.
- 3.6 Additionally, the PC Review outlined a number of 'costs' (many of which were described as anti-competitive effects) of the architect Acts which included:
- non-architects being constrained from describing their services as 'architectural services'
 - certain buyers of design services, in particular governments, tending to only use certified architects and
 - inconsistencies between jurisdictions leading to increased costs.
- 3.7 The PC Review concluded, amongst other things, that whilst the gross cost imposed on the community by the architect Acts did not appear to be large, the community benefits appeared to be smaller. Consequently, the PC Review's preferred option for regulation of the architectural profession was to repeal the architect Acts and to replace them with a system of self-regulation.
- 3.8 The PC Review concluded that self-regulation would eliminate the costs resulting from title restrictions and that competitive pressures were likely to promote credible accreditation and certification by the profession resulting in the provision of more information (than statutory certification) to consumers about architect competence and qualifications.
- 3.9 The PC Review also stated that the RAIA's preferred regulatory approach, which included the RAIA being given a legislated monopoly over certification of architects, was likely to produce no better outcomes (and possibly inferior outcomes) to the current architects Acts.

Current regulatory environment for Architects

- 3.10 Currently, each state and territory of Australia requires that any person using the title 'architect' or offering services to the public as an architect (architectural services), must be registered with the Architects' Board in that jurisdiction. Each state and territory of Australia has its own Architects' Board. Generally, the following three steps outline the requirements for registration as an architect in a state or territory of Australia. You must:
- have a recognised academic qualification in architecture or a pass in the National Program of Assessment, or a pass in the relevant Registration Board Prescribed Examinations where offered
 - have a period of training through experience followed by successful completion of the AACA Architectural Practice Examination and
 - apply for registration to the Architects' Board in the state or territory in which registration is sought.
- 3.11 All states and territories have mutual recognition provisions which allow architects who are already registered in one or more Australian states or territories, and who are seeking registration in an additional state or territory, to apply for registration without repeating the above steps.⁸

⁸ <http://www.aaca.org.au/>

4 The RAIA's application and supporting submission

- 4.1 As discussed in section 2 of this draft determination, on 7 September 1984 authorisation A58 was granted under subsection 88(1) of the TPA for the RAIA, on its own behalf and on behalf of its members, to make and give effect to a contract, arrangement or understanding which may have the purpose or effect of substantially lessening competition, within the meaning of section 45 of the TPA.
- 4.2 In short, authorisation A58 authorised the RAIA to give effect to the arrangements provided for its Code of professional conduct and related documents.
- 4.3 Subsequently, on 8 December 2004, the RAIA, on its own behalf and on behalf its current and future members⁹, lodged an application pursuant to section 91C of the TPA for a revocation of authorisation A58 and its substitution by authorisation A90946. The proposed substitute authorisation A90946 is broadly similar to authorisation A58. Essentially, authorisation is sought to continue to engage in the arrangements the subject of authorisation A58 for a period of 6 years.
- 4.4 A copy of the RAIA's application for revocation and substitution can be obtained from the ACCC's public register or its website. The main issues are outlined below.

The application

- 4.5 The application is made by the RAIA under section 91C of the TPA for the revocation of authorisation A58 and its substitution by a new authorisation. The substitute authorisation is sought 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 RAIA's:
- proposed Code of professional conduct
 - Memorandum and articles of association
 - Regulations and by-laws
 - Client and architect agreements and user guides relating to those agreements and
 - Guidelines for RAIA endorsed architectural competitions
- 4.6 Authorisation is also sought for the RAIA to issue, from time to time, guides to assist architects and users of architects' services to negotiate appropriate fee arrangements for architectural services.

⁹ The RAIA currently has approximately 9,200 individual members.

The RAIA's submission in support of its application

- 4.7 The RAIA submits that it was established in 1929 and has evolved into a dynamic and progressive national organisation consisting of approximately 9,200 members. The RAIA submits that by promoting better, responsible and environmentally sustainable design, it aims to maintain and improve the quality of Australia's built environment.
- 4.8 The RAIA claims that it is essentially a professional association and notes that its members range from academics to sole practitioners to employees and principals of large architecture practices.
- 4.9 The RAIA states it member architects undertake continuing professional development and must comply with the RAIA's Code of conduct. As a result, the RAIA claims that its 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.
- 4.10 The RAIA claim that architects' practices are, in the main, very small professional practices. RAIA 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). The RAIA claims that architect practices are geographically spread throughout Australia including in rural and regional areas.
- 4.11 The RAIA states that it provides information to the public, corporations and governments designed to assist in engaging and dealing with architects including 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.

The relevant market

- 4.12 The RAIA state that architects compete in the market for the provision of specialist design and advisory services, advising on all aspects of building including:
- designing and planning
 - selecting sites and undertaking feasibility studies
 - managing building budgets
 - selecting and managing project teams
 - designing building interiors and landscaping and
 - maintaining buildings.

- 4.13 The RAIA submit that 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. The RAIA claim that these 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.

The public benefits and anti-competitive detriments the arrangements

- 4.14 Descriptions of the RAIA's claims in relation to the public benefits and anti-competitive detriments of the proposed arrangements are incorporated into the applicable section of ACCC's assessment chapters.

5 Interested party submissions

- 5.1 The ACCC sought submissions from a wide range of interested parties. Submissions received are summarised below and complete copies of all submissions available on the ACCC's public register and on its website.

Engineers Australia (Queensland Division)

- 5.2 Engineers Australia (EA) submit that there is evidence of a continuing decline in the quality of project documentation in the building and construction industry which seems to have resulted from the elimination of recommended scales of fees for consultants.
- 5.3 EA claim that the scale of the problem is so significant that poor quality design documentation is contributing 12% to project costs. EA claim that the savings to the industry by competitive bidding of engineering/architects design services is approximately \$1 billion compared to the cost of poor documentation of approximately \$7 billion. EA claim that the application of competition policy to engineering and architect fees has had a negative cost of around 600% - 700%.

Architects Registration Board of Victoria

- 5.4 The Architects Registration Board of Victoria (ARBV) submit that there is a public benefit in the RAIA publishing information regarding architects services, conditions and fees, including a fee guide. The ARBV state that they are aware that the information is a guide only and that fees are subject to market competition as well as competition from other designers.

Association of Consulting Architects- Australia (ACA-A)

- 5.5 The ACA-A is a national organisation representing the interests of employer architects and its members include the leading architect firms in Australia.
- 5.6 The ACA-A submit that it endorses and supports the activities of the RAIA in setting codes of conduct and standards of practice for architects. The ACA-A notes that the endorsement of architectural competitions by architectural professional associations is a world wide practice and the ACA-A considers that this provides a valuable service.
- 5.7 The ACA-A submit that, in its opinion, the alterations made by RAIA to its Code of conduct or related documents have change the effect of those documents and in most instances serve to improve and clarify them.
- 5.8 The ACA-A notes 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.

Australian Institute of Quantity Surveyors

- 5.9 The Australian Institute of Quantity Surveyors (AIQS) notes that it is associated with the RAIA on a number of levels, including industry peak bodies such as the Australian Construction Industry Forum, Professions Australia and the Australian Council of Building Design Professions.
- 5.10 The AIQS submit that the removal of self-regulating constraints on professionals in its industry has arguably had a substantially detrimental effect on the public interest. The AIQS claim that it is extremely unlikely that continuing this course of action would have anything but further negative impact on the public, now and in the future.
- 5.11 The AIQS submit that they believe that there is a substantial public and industry benefit from activities by the professional institutes and a professional Code of conduct is essential for that interest to be maintained.
- 5.12 The AIQS submit that fee scales offered as guidelines only and are not in any way enforceable on RAIA members. The AIQS submit that at best fee scales can only provide clients with a benchmark but it is a service that clients have demonstrated an interest having to access to both from the AIQS and the RAIA.

Architects Accreditation Council of Australia (AACA)

- 5.13 The AACA notes that the profession of architecture in Australia is not self-regulated but is regulated by Architects Acts in each Australian state and territory and to use the title 'Architect' and/or offer services to the public as an 'Architect' a person must be registered with the relevant architect registration board.
- 5.14 The AACA state that in recent years there has been an impetus for the reform of the architect Acts throughout Australia. The AACA state that in response, it and the RAIA formed a joint working group which, in 2003, developed the *Architect's Model Statutory Code of Professional Standards and Conduct*.
- 5.15 The AACA submits that this code is intended as a model which contains the core requirements that might be adopted in each state and territory to ensure harmony and consistency in the regulation of architects throughout Australia.

Submissions from other government agencies

- 5.16 The ACCC received submissions from the following interested parties which either expressed support for the RAIA's application, expressed support for the RAIA in general or provided views which were not strictly relevant to the application: Master Builders Australia; Architects Board of South Australia; Architects Board of Western Australia; Australia NSW Architects Registration Board; NSW Department of Commerce; NSW Department of Housing; Queensland Department of Public Works; and Queensland Department of Housing.

Submissions from RAIA members

- 5.17 The ACCC also received submissions from Mr Ian Mitchell, Mr Anthony Kemeny, Mr Cornelis Wegman and Mr Robert Peake all of whom are current members of the RAIA and all of whom expressed their support for each aspect of the RAIA's application for revocation and substitution.

The RAIA's response to interested party submissions

- 5.18 On 2 June 2005, the RAIA lodged a supplementary submission with the ACCC which, amongst other things, included its responses to the above interested party submissions.
- 5.19 The RAIA notes that a number of the submissions, in particular those from the Architects Registration Board of Victoria, the Australian Institute of Quantity Surveyors and the Association of Consulting Architects, express their support for the Fee guides and the documents relating to architects conditions and services. The RAIA states that these submissions support the fact that the Fee guides are highly valued, particularly by less experienced members of the profession.
- 5.20 In relation to its Code of conduct, the RAIA submits:
- that no one has seriously suggested that it is contrary to the public interest for a professional body like the RAIA to have such a Code.
- 5.21 Finally, the RAIA outlines a number of concerns it has with the AACA's submission. In particular, the RAIA submits that many of the AACA's comments in relation to legislative changes (or proposed legislative changes) and the Model Code are either irrelevant to the RAIA's current application or are inaccurate.

6 Statutory provisions

- 6.1 Under section 91C of the TPA, the ACCC may grant an application to revoke an existing authorisation and grant a substitute authorisation at the request of the party to whom the authorisation has been granted, or another person on behalf of such a party.
- 6.2 In order for the ACCC to grant an application to revoke an existing authorisation and grant a substitute authorisation, the ACCC must consider the substitute authorisation in the same manner as the standard authorisation process.

The statutory tests

- 6.3 In assessing an application made under section 91C of the TPA, the relevant tests the RAIA must satisfy for the substitute authorisation to be granted are outlined in sections 90(6) and 90(7) of the TPA.
- 6.4 Under section 90(6) of the TPA, the ACCC may grant authorisation in respect of a **proposed** contract, arrangement or understanding that may have the purpose or effect of substantially lessening competition if it is satisfied that:
- the contract, arrangement or understanding would result, or be likely to result, in a benefit to the public and
 - that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made and the provision concerned were given effect to.
- 6.5 Under section 90(7) of the TPA, the ACCC may grant authorisation in respect of a contract, arrangement or understanding that may have the purpose or effect of substantially lessening competition if it is satisfied that:
- the contract, arrangement or understanding has resulted, or is likely to result, in a benefit to the public and
 - that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision.

The public benefit test

- 6.6 In deciding whether it should grant authorisation, the ACCC must examine the detriments of the arrangements or conduct, particularly those arising from any lessening of competition, and the public benefits arising from the arrangements or conduct and weighing the two to determine which is greater. This is referred to as the 'public benefit test'.

- 6.7 Should the public benefits or expected public benefits outweigh the detriments, the ACCC may grant authorisation. If this is not the case, the ACCC may refuse authorisation or, alternatively, the ACCC may grant authorisation subject to conditions as a means of ensuring that the public benefit outweighs the detriment.
- 6.8 Public benefit is not defined by the TPA. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:
- ...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.¹⁰
- 6.9 Similarly, public detriment is not defined in the TPA but the Tribunal has given the concept a wide ambit. It has stated that the detriment to the public includes:
- ...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.¹¹
- 6.10 The ACCC also applies the 'future with-and-without test' established by the Tribunal to identify and weigh the public benefit and any detriment generated by arrangements for which authorisation has been sought.
- 6.11 Under this test, the ACCC compares the public benefit and detriments generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the counterfactual.

Other relevant provisions

- 6.12 Section 88(10) of the TPA provides that an authorisation may be expressed so as to apply to or in relation to another person who becomes a party to the proposed arrangements in the future.
- 6.13 Section 91(1) of the TPA allows the ACCC to grant authorisation for a specific period of time.
- 6.14 Section 91(3) allows the ACCC to grant authorisation subject to conditions.

¹⁰ *Re 7-Eleven Stores; Australian Association of Convenience Stores Incorporated and Queensland Newsagents Federation* (1994) ATPR ¶ 41-357 at 42677

¹¹ *Ibid* at 42683.

7 ACCC assessment

The ACCC's approach to assessing the conduct

- 7.1 The ACCC's evaluation of the net public benefit test (as outlined in section 6) will be conducted in the following manner:
- In the current section 7, the ACCC will provide a definition of the market(s) and counterfactual that it will consider when assessing the application.
 - In section 8, the ACCC will assess the public benefits and detriments of those aspects of the RAIA's application which it considers establish the framework within which the RAIA operates and set its standards of behaviour, namely, the Code of conduct, the memorandum and articles of association and the regulations and by-laws.
 - In section 9, the ACCC will assess the public benefits and anti-competitive detriments of those aspects of the RAIA's application which the ACCC considers provide guidance and information to its members, namely, the guidelines for RAIA endorsed architectural competitions, the client and architect agreements and the user guides.

The relevant market

- 7.2 The first step in assessing the public benefits and detriments of the conduct for which authorisation is sought is to consider the relevant market(s) in which that conduct occurs.
- 7.3 The ACCC may use market analysis to identify and measure the public benefit and detriment resulting from arrangements for which authorisation has been sought. However, depending on the circumstances, the ACCC may not need to comprehensively define the relevant markets as it may be apparent that a net public benefit will or will not arise regardless of the scope of the defined market.

Previous market definitions

- 7.4 As outlined in section 3, there have been two relatively recent reviews of the architectural profession, namely the TPC Review which was released in 1992 and the PC Review which was released in 2000.
- 7.5 Whilst both reviews were primarily concerned with the regulatory environment in which architects operate, and in particular the states' regulation of architects, they both provided a detailed analysis of the architectural profession, including providing useful information in relation to potential markets of relevance.
- 7.6 The TPC review (1992) described the area of competition in which architects operated as being "the market for building design services". The TPC review stated that this market could be broadly separated into three discrete sectors (based on the type of building): domestic; industrial; and commercial building.

- 7.7 The PC review (2000) generally agreed with the TPC's description of the market although expanded it slightly to "the market for building design services and related services". The PC review also separated the market into three discrete sectors, however unlike the TPC review, the PC review separated the sectors on the basis of client type: residential; commercial and industrial; and public sector.

Submissions on the relevant market

- 7.8 The RAIA state that architects compete in "the market for the provision of specialist design and advisory services", advising on all aspects of building including:
- designing and planning
 - selecting sites and undertaking feasibility studies
 - managing building budgets
 - selecting and managing project teams
 - designing building interiors and landscaping and
 - maintaining buildings.

ACCC assessment - Relevant market

- 7.9 The ACCC considers that the extensive and comprehensive nature of the PC review (which included over 400 submissions), and its relative recency, mean that its conclusions on market definition are likely to still be relevant. Therefore, for the purposes of the current application for revocation and substitution, the ACCC will adopt the PC review's market definition.
- 7.10 Accordingly, the market in which the public benefit and detriment resulting from the arrangements will be measured can be described as the broader market for *building design services and related services*. This market includes, but is not limited to services such as: design; site analysis; development applications; contract documentation and administration; tendering; and; project management.
- 7.11 This broader market may be separated into three discrete but overlapping areas of design and related services, being: residential; commercial and industrial; and public sector.
- 7.12 The ACCC considers that whilst these areas of competition do overlap, there are a number of significant features which serve to distinguish them from one another, including:
- the residential sector (new homes, renovations) is highly competitive with most architects (individuals and companies) competing for work to some extent but with non-architects, and in particular project home builders, holding the market share

- the lower end of the commercial and industrial sector (offices, shops) is similar in structure to the residential sector but the higher end of the commercial and industrial sector (shopping centres, industrial estates) is distinguished by fewer, larger architectural practices and a lower market share for non-architects but still highly competitive, and
- the public sector (government buildings, schools, hospitals, public housing) is less competitive than both the previous sectors and appears to be dominated by larger architectural firms. This dominance appears to be a result of, amongst other things, the purchasing practices of many government agencies which may, for example, have a pre-qualification process or a policy of only engaging registered architects.

ACCC assessment - Future with-or-without

- 7.13 The ACCC applies the ‘future with-and-without test’ established by the Australian Competition Tribunal to identify and weigh the public benefit and detriment generated by arrangements for which authorisation has been sought.
- 7.14 Under this test, the ACCC compares the public benefit and detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to make a reasonable forecast about how the relevant markets will react if authorisation is not granted. This forecast is referred to as the counterfactual.
- 7.15 In this instance, the ACCC considers that the relevant counterfactual would likely be a situation in which the RAIA or a similar professional association continued to represent the ‘architectural profession’ and continued to set and ensure standards of professional conduct and guidance, albeit in a more limited capacity.
- 7.16 The ACCC considers that as such an association, or the RAIA, would not have the certainty provided by authorisation, it is likely that its activities may only extend to such things as providing general information to its members and the public.
- 7.17 The ACCC notes, however, that regardless of whether or not the substitute authorisation is granted, the various state architect Acts and other legislation (building Acts, fair trading Acts) will continue to regulate the relevant markets and industry.

8 ACCC assessment – The Arrangements

- 8.1 In order to grant authorisation to the conduct proposed in the RAIA's application for revocation and substitution, the ACCC must be satisfied that the proposed arrangements would result in a benefit to the public that outweighs any detriment to the public constituted by any lessening of competition arising from the proposed arrangements.
- 8.2 This section of the draft determination will consider the public benefits and detriments of those aspects of the RAIA's application which the ACCC considers establish the framework within which the RAIA operates and set its standards of behaviour, namely:

The Code of professional conduct

The memorandum and articles of association and

The regulations and by-laws (collectively referred to as 'the Arrangements').

- 8.3 In assessing the Arrangements, the ACCC will begin by examining the potential public benefit and anti-competitive detriments of the Arrangements as a whole. The assessment will then focus specifically on those elements of the Arrangements which the ACCC considers have the potential to significantly influence its assessment of the net public benefit, namely:

- provisions of the Code of conduct which may restrict competition
- the admission procedures and
- the appeals and disciplinary procedures.

ACCC assessment of the Arrangements

- 8.4 The RAIA submits that its very existence provides an overall public benefit and that that public benefit is dependent on it having, amongst other things:
- a memorandum and articles of association which provides fair and transparent, membership, discipline and expulsion rules
 - regulations and by-laws which support its memorandum and articles of association and
 - an enforceable Code of conduct which promotes and enhances ethical behaviour by its members.
- 8.5 The RAIA argues that as each of these aspects of its application is fundamental to its existence, each of them contributes to the RAIA's overall public benefit.
- 8.6 Generally, the ACCC considers that an industry association whose stated objectives are to enhance the professional and ethical standards of industry participants and that the attainment of such objectives will be achieved through the implementation and enforcement of fair and transparent means, is likely to provide some public benefit.

- 8.7 In the current application, the ACCC accepts the submissions of the RAIA and a number of interested parties that the Arrangements provide an overall benefit to the public. The ACCC considers that such public benefits come in the form of:
- increased consumer information and awareness of the industry and their rights in relation to the industry
 - increased guidance for members to act in the best interest of the community and encouragement for them to act in an honest and ethical manner, and
 - the encouragement and promotion of industry self-regulation.
- 8.8 Further, the ACCC considers that such public benefits are more likely to be realised if industry participants see membership of the RAIA as providing them with a benefit. Consequently, the ACCC considers that the public benefits generated by the Arrangements are more likely to be realised if RAIA members consider that the penalties for breaching the Code of conduct are serious.

Provisions of the Code which may restrict competition

- 8.9 In the past, the ACCC has been of the view that anti-competitive detriment is likely to arise from arrangements of the type proposed by the RAIA if they contain provisions that restrict the ability of members, who are subject to those arrangements, from engaging in normal competitive practices. For example, the ACCC considers that provisions which seek to restrict how members of an association market their goods or services would be likely to generate anti-competitive detriment.
- 8.10 Whilst the ACCC notes that a number of such provisions were included in the original 1974 application for authorisation, such as restrictions on advertising, they were, for the most part, removed prior to authorisation being granted in 1984. However, the ACCC is of the view that there are a number of provisions in the RAIA's Arrangements, and in particular in its proposed Code of conduct, which have the potential to restrict its members from engaging in normal competitive practices.

Code of conduct – Standard 2.5

- 8.11 Standard 2.5 of the RAIA's proposed Code of conduct states:

Members shall not offer any inducements such as secret commissions or enter into any secret arrangements to procure an appointment.

- 8.12 Generally, the ACCC considers that a provision or standard of this type, which has the potential to limit the capacity of users (in this case RAIA members) to promote such things as discounts, reduced rates or special offers when endeavouring to obtain a contract or commission, is likely to be highly anti-competitive. That is to say, that the ACCC is of the view that inducements such as specials and discounts, are a fundamental feature of the buying and selling process and, as such, any attempt to limit their use would raise significant competition concerns.

- 8.13 Whilst the ACCC accepts that as it currently reads, Standard 2.5 specifies the type of inducements envisaged by the RAIA (i.e. secret commissions and secret arrangements) and the standard does appear to be aimed at protecting consumers from undisclosed behaviour by RAIA members, the ACCC is concerned that Standard 2.5 as it currently reads may be open to misinterpretation and therefore potential misuse.
- 8.14 The ACCC considers that if the purpose of Standard 2.5 is to ensure that all dealings relevant to a contract or commission are disclosed to the client, the RAIA could consider other means, or wording, to achieve this.
- 8.15 For example, the ACCC notes that a number of other areas of business, such as the franchising and the financial services industry, have addressed the issue of appropriate disclosure to clients. In this respect clause 5 of annexure 1 (Disclosure document for franchisee or prospective franchisee) of the *Trade Practices (Industry Codes) Regulations 1998* provides that franchisees must disclose

For any agreement under which the franchisor must pay an amount, or give other valuable consideration, to a person who is not an officer, director or employee of the franchisor in connection with the introduction or recruitment of a franchisee — the name of the person.

- 8.16 The *Financial Services Reform Act 2001* introduced a number of regulatory safeguards aimed at ensuring that consumers are provided with sufficient information to assist them in making an informed decision when acquiring financial products. Key elements of the reform were the introduction of Financial Services Guides (FSGs) and Product Disclosure Statements (PDSs) – these statements require the disclosure of fees and commissions to consumers in a transparent and accessible manner.
- 8.17 The ACCC considers that the disclosure of inducements made or received by RAIA members in respect of an appointment, to affected parties (eg. consumers of their services), would be in the public interest. Further, the ACCC considers that such disclosure would assist the RAIA in achieving its stated outcome of enhancing and promoting the ethical behaviour of its members without unduly restricting the competitive process.
- 8.18 However, the ACCC considers that in its current form, Standard 2.5 may not adequately achieve this outcome and may in fact generate significant anti-competitive outcomes.

Code of conduct – Standards 4.3, 4.5 & 4.6

- 8.19 Standard 4.3 of the RAIA's proposed Code of conduct states:

Members shall not attempt to supplant another architect employed or consulting, who has been appointed with a firm commitment for a particular job.

- 8.20 Standard 4.5 of the proposed Code of conduct states:

The member shall, on being approached to undertake a project or other professional work upon which he or she knows or can ascertain by reasonable inquiry that another architect has a current appointment with the same project or professional work, notify the other architect.

- 8.21 Standard 4.6 of the proposed Code of conduct states:

Members shall, when appointed to give an opinion on the work of another architect, notify the other architect, unless it can be shown to be prejudicial to prospective or actual litigation to do so.

- 8.22 The ACCC considers that whilst Standards 4.3, 4.5 and 4.6 have been included in the proposed Code of conduct ostensibly to ensure RAIA members 'respect and acknowledge the professional aspirations of their colleagues', they have the potential to be misused or misinterpreted in such a way as to have the effect of restricting the capacity of RAIA members to deal with clients of their colleagues, where there is no legal impediment to them doing so.

- 8.23 For example, whilst Standard 4.3 may well have the objective of protecting RAIA members, who have been engaged by a client, from having their contractual relationships interfered with, the ACCC considers that its ambiguity may leave it open to misuse. The ACCC considers that if the RAIA's intention is to prevent supplanting of members who have 'a contract for a particular job', then the Standard would be less open to misinterpretation were it to say words to that effect.

- 8.24 Similarly, the ACCC considers that Standards 4.5 and 4.6 which place obligations on RAIA members to notify each other when approached by clients to take on work or provide advice where other RAIA members have been previously engaged by that client, may be misused. The ACCC considers that were such provisions included in their current form they may, individually and/or collectively, have the effect of inhibiting or discouraging RAIA members from seeking commissions or contracts in circumstances where they may otherwise seek to compete.

Code of conduct – Standards 3.2 & 3.3

- 8.25 Standard 3.2 of the proposed Code of conduct states:

A member shall not take as a partner and shall not act as a co-director with an unsuitable person, such as a person whose name has been removed from any register of architects...or a person disqualified from membership pursuant to the standards and process prescribed in the RAIA constitution.

- 8.26 Standard 3.3 of the proposed Code of conduct provides:

Members shall not act in any way that brings the profession into disrepute.

- 8.27 Whilst the ACCC considers that provisions of this type may potentially have an anti-competitive effect insofar as they may be misinterpreted or misused, in a practical

sense, the ACCC considers that the potential anti-competitive detriment is likely to be minimal.

- 8.28 For example, in respect of Standard 3.2, the ACCC notes that the RAIA has submitted that it has not expelled a member in the last 10 years and, as discussed later in this section, RAIA members have the right to appeal any adverse decision including a decision to expel them.
- 8.29 Consequently, whilst the ACCC considers that the potential anti-competitive detriment arising from provisions 3.2 and 3.3, where applied appropriately, is likely to be small, the ACCC would consider reviewing its assessment were it provided with information to the contrary.

Admission procedures

- 8.30 The ACCC considers that anti-competitive detriment may arise from arrangements of the type proposed by the RAIA, if membership of such an industry association is considered necessary to compete, or significantly assists a business to compete, in the relevant industry. Consequently, the ACCC considers that the potential anti-competitive detriment of such arrangements would be magnified if its admission process was overly subjective and/or allowed for the arbitrary exclusion of otherwise suitable candidates.
- 8.31 The ACCC considers that the potential anti-competitive detriment of such arrangements is likely to be significantly reduced if the membership admission processes and procedures which are required to enter an association like the RAIA, are open and transparent and contain provision for the review by an independent third party of an adverse application decision.
- 8.32 In this instance, the ACCC accepts:
- a) that membership of the RAIA is not a requirement for entry into the relevant market and
 - b) that the RAIA's admission procedures are sufficiently open, transparent and reviewable.
- 8.33 Specifically, in relation to a), whilst membership of the RAIA is not mandatory to compete in the relevant markets, interested party submissions and industry information seems to suggest that the RAIA is the peak body representing architects in Australia. The ACCC considers it is therefore reasonable to assume that membership of the RAIA would carry with it some competitive advantage to, at the very least, certain sectors of the industry, a proposition which the ACCC considers is evidenced by the fact that approximately half of all registered architects practicing in Australia are members of the RAIA.¹²

¹² Productivity Commission report 2000 p31

- 8.34 However, the ACCC acknowledges that there appears to be a high level of competition in the market for building design services and registration as an architect and/or membership of the RAIA are not necessary to compete in it.
- 8.35 In relation to b), applicants for membership are required to comply with all, or some, of the following requirements, depending on the type of membership being applied for:
- application to be made on a prescribed form
 - completion of prescribed qualification and/or examinations
 - where applicable, completion of practical experience and
 - the payment of an entrance fee and annual subscription.
- 8.36 The ACCC considers these application requirements to be reasonable and objective. The ACCC also considers that the inclusion of a provision allowing an applicant who is denied membership the right to dispute the decision and to seek to have it resolved in accordance with the Institute of Arbitrators Australia Rules for the Conduct of Commercial Arbitration serve to minimise any potential anti-competitive detriment.
- 8.37 The ACCC considers that the RAIA's admission requirements, coupled with its appeal provisions, are sufficiently objective and are unlikely to result in the subjective or arbitrary exclusion of an otherwise suitable applicant.

Disciplinary and appeals procedures

- 8.38 Generally, the ACCC considers that disciplinary procedures, as with admission procedures, can potential increase the anti-competitive effect of the arrangements being considered if, for example:
- the procedures are unclear and/or ambiguous
 - there is potential for subjective or arbitrary decisions
 - there are no provisions for third party appeals and
 - there is scope for procedural unfairness or bias.
- 8.39 Conversely, the ACCC considers that the inclusion of fair and transparent disciplinary procedures may provide a public benefit to the extent that they facilitate compliance with a similarly fair and transparent Code of conduct.
- 8.40 In this instance, the ACCC considers that the RAIA's disciplinary proceedings which include both a formal and informal complaints process and provide for third party arbitration are suitably clear and certain and provide a public benefit insofar as they uphold the RAIA's Code of conduct.

ACCC conclusion on the Arrangements

- 8.41 Generally, the ACCC considers that an association which seeks to enhance the professional and ethical standards of industry participants through the implementation and enforcement of fair and transparent codes and standards of practice, is likely to provide a public benefit.
- 8.42 In this instance, the ACCC accepts that the Arrangements are likely to provide a benefit to the public insofar as they:
- increase consumer information and awareness of the industry and their rights in relation to the industry
 - increase guidance for members to act in the best interest of the community and encourage them to act in an honest and ethical manner, and
 - encourage and promote industry self-regulation.
- 8.43 In addition, the ACCC considers that the RAIA's admission and disciplinary procedures are sufficiently objective and are unlikely to produce anti-competitive outcomes.
- 8.44 The ACCC does, however, consider that, for the reasons outlined earlier in this section that a number of the Standards included in the RAIA's proposed Code of conduct, and in particular Standards 2.5, 4.3, 4.5 and 4.6, may raise competition concerns.
- 8.45 The ACCC considers that were these Standards to be included in of the RAIA's proposed Code of conduct in their current form, they may be likely to generate a degree of anti-competitive detriment which may be sufficient to outweigh the overall public benefits of the Arrangements.
- 8.46 However, the ACCC is of the view that were these Standards removed or appropriately amended, the Arrangements would be more likely to generate a net public benefit.

9 ACCC assessment – The Activities

- 9.1 This section of the draft determination will consider the public benefits and anti-competitive detriments of those aspects of the RAIA's application that the ACCC considers provide guidance and information to its members, namely:

The guidelines for RAIA endorsed architectural competitions

The Standard form contracts and associated user guides

The fee guide and fee-related practice notes (collectively referred to as 'the Activities').

Guidelines for RAIA endorsed architectural competitions

- 9.2 The RAIA submits that the purpose of its *Guidelines for RAIA endorsed architectural competitions* (RAIA competition guidelines) is to set out sensible procedures for those who wish to conduct architectural design competitions with the endorsement of the RAIA. There is, however, no requirement that an architectural competition which follows the RAIA competition guidelines be endorsed by the RAIA.
- 9.3 The RAIA submits that its competition guidelines provide a public benefit by encouraging architects to participate in architectural competitions which they may not otherwise participate in for fear of, amongst other things, exploitation. The RAIA submits that participation in such competitions promotes and advances new architectural ideas that may lead to innovations and design solutions that may not have otherwise been forthcoming.
- 9.4 The ACCC considers that anti-competitive detriment may arise from the RAIA competition guidelines if, for example, they in some way limited entry of architectural competitions to RAIA members or allowed for the arbitrary exclusion of potential non-RAIA participants. The ACCC considers that the anti-competitive effect of the guidelines may be further increased if the competition judging were considered to be in some way biased toward RAIA members or was seen in any way to favour RAIA members to the exclusion of non-RAIA members.
- 9.5 The ACCC is satisfied, however, that this is not the case. The ACCC considers that the purpose and effect of the RAIA competition guidelines is to promote fair and equitable architectural competitions that provide benefits to the client, the participants and the community. The ACCC considers that these outcomes are achieved as a result of a number of features of the guidelines including:
- the client and an independent advisor (of the clients choice) running the competition and selecting the jury
 - competition admission requirements being objective and clear
 - rules for disqualification also being objective and

- clearly defined circumstances under which the RAIA will and will not endorse an architectural competition.

9.6 Therefore, the ACCC is of the view that the RAIA's competition guidelines are likely to provide some public benefit insofar as they promote fair and equitable architectural competitions which encourage innovation and design solutions.

The Standard form contracts and associated user guides

9.7 The RAIA submits that the standard forms and users guides relevant to the current application are:

- User guide – Client and architect agreement (long form)
- Client and architect agreement (long form)
- User guide - Client and architect agreement (short form)
- Client and architect agreement (short form)
(collectively referred to 'the Standard form contracts and associated user guides')

9.8 The RAIA submits that generally, the forms and user guides it produces are designed to promote efficiency and good practice by assisting its members and the public to establish appropriate arrangements for the provision of architectural services. The RAIA states, however, that its members and their clients are free to agree on conditions of engagement and fees on any basis they choose.

9.9 The RAIA submits that the Standard form contracts and associated user guides generate a number of public benefits including offering less experienced architects and clients a set of tried and tested contract conditions and savings on expenses such as legal costs.

9.10 Generally, the ACCC is of the view that forms and user guides of the type described at paragraph 9.7 are unlikely to generate significant anti-competitive detriment if they: are not mandatory; do not seek to prescribe unfair or restrictive conditions on architects or their clients and; do not seek to limit competition.

9.11 In this instance, the ACCC is of the view that as the Standard form contracts and associated user guides are not mandatory, are not prescriptive and are not restricted to use by RAIA members, they are unlikely to generate any significant anti-competitive detriment save for their interaction with the fee graphs discussed in the following section.

9.12 Equally, however, the ACCC is of the view that although the Standard form contracts and associated user guides may provide a useful reference guide for architects and their clients, they are unlikely to result in significant efficiencies and therefore any resulting public benefits are not likely to be significant.

Fee guide and fee-related practice notes

RAIA submissions in relation to its fee guides

- 9.13 The RAIA submits that fees charged for architectural services have historically been calculated in a manner that to a typical lay client is quite complex. The RAIA submits that this complexity of fee structure is far greater with architects than for almost all other professionals (i.e. general practitioners, accountants) where reasonably straightforward scale fees, fixed fees or time charges apply.
- 9.14 The RAIA submits that the 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, which the RAIA claims can rarely be comprehended from just the drawings and documentation that result.
- 9.15 The RAIA claim that the fee charged by a specific architect for a particular architectural engagement will be dependent on a range of variables, which themselves change during the process, but may include:
- the scope of services to be provided
 - whether another consultant, such as a project manager or quantity surveyor is required to be engaged
 - the type of building involved (warehouse, hospital, office, house, etc.)
 - whether the project is new building work or a renovation/alteration
 - the nature and location of the site (topography, access to services, access for workers, etc.) and
 - the level of experience and the reputation of the architect.
- 9.16 The RAIA submits that a result of these complexities is that no two architects competing for the same commission are likely to arrive at the same fee.
- 9.17 The RAIA submits that it currently issues guidelines and practice notes to assist its members and the public to determine appropriate fee levels for professional architectural services. The RAIA claims that, for the most part, 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.
- 9.18 The RAIA submits that the guidelines and practice notes relevant to the current application are:
- Practice Note - Fee guide no 8
 - Practice Note - Small projects fee guide
 - Practice Note - Fees for partial services (collectively referred to as 'the fee guides'.)

9.19 The RAIA submits that the fee guides provide public benefits and promote competition by:

- providing education and guidance to RAIA members and the public
- assisting in overcoming information asymmetry between architects and their clients
- assisting local government and other public sector clients to determine what a reasonable price may be for assessment of architects proposals
- providing a benchmark for determining whether or not a client has been reasonably charged
- providing assistance to smaller architects practices and new entrants who would otherwise require complex costing models to compute the prices they should quote and
- maintaining a natural ceiling on architects' charges.

9.20 In addition, the RAIA submits that any potential anti-competitive detriment that may be perceived to arise from the fee guides is significantly reduced by virtue of the clear statement on each guide that they are for guidance purposes only and that architects and clients are free to agree conditions of engagement and fees on any basis whatsoever.

ACCC assessment of the RAIA fee guides

9.21 Generally, the ACCC considers that a “bottom-up” approach to providing fee information which is limited to outlining factors such as the types of expenses or costs users may consider when determining their fees proposals:

- is less likely to generate anti-competitive detriments as it does not contain any specific fee values and
- is more likely to provide benefits to industry participants, and in particular newcomers, as it provides guidance on a wide range of variables which users may be considered when calculating fees.

9.22 The ACCC accepts that whilst the RAIA fees guides do provide some information of this type, there are aspects of its fee guides which raise competition concerns. In particular, the ACCC is concerned with the potential anti-competitive effects of ***fee graphs*** of the type which are included in Fee Guide No 8 (*see Attachment A*) and Small Project Fee Guide (*see Attachment B*).

Clustering

9.23 The ACCC acknowledges that it is clearly stated on the RAIA fees guides that they are produced for reference purposes only. However, the ACCC considers that the fee graphs, included as part of the fee guides, would not be produced if they were not anticipated or intended to be followed and that to the extent to which those fee graphs are followed, the fee guides are likely to produce anti-competitive outcomes.

- 9.24 The ACCC considers that such anti-competitive detriment is likely to be generated as a result of fee guide users, in this instance RAIA members, clustering their fees around, if not exactly matching, the fees prescribed in the fee graphs. The ACCC considers that clustering of this kind is likely to result in higher fee levels than if the fee graphs were not used, an outcome which the ACCC considers is likely to produce artificially higher prices.
- 9.25 The ACCC considers that competition for design services provided to the public sector, as described in section 7 of this draft determination, is a particular area of competition that may be affected by clustering of this kind.
- 9.26 The ACCC understands that many public sector agencies will only employ registered architects¹³, and in some instances, only architects and architectural firms that have satisfactorily fulfilled certain prequalification requirements. The ACCC considers that such requirements, whilst entirely legitimate, are likely to place a limit on the number and type of building design practitioners who are eligible to tender for public sector work. That is, tenderers for public sector work may often be limited to registered architects and even more specifically to pre-qualified architects.
- 9.27 The ACCC considers that if public sector agencies assess pricing for architectural services based on the fee graphs and the architects tendering for such services are aware of this, there is the potential for those architects tendering for the commissions to set their prices at or around the levels suggested in the fee graphs in the knowledge that this fee level is considered 'reasonable' by those public sector agencies. The ACCC considers that, to the extent that clustering of this kind does occur, it constitutes an anti-competitive detriment.

Complexities of fee calculation

- 9.28 The ACCC accepts the RAIA's argument that determining a fee for the provision of architectural services is a complex process which will vary depending on, amongst other things, the level of skill and experience of individual architects or architectural firms.
- 9.29 The ACCC questions, therefore, the utility or benefit of fee guides which include fee graphs that recommend a single figure that could not take into account all of the complexities and factors outlined in the RAIA's submission. The ACCC considers that such an approach to providing fee guidance would be more likely to overstate the price of architectural services than to understate them and to the extent that the fee graphs do this and they are followed, this would constitute an anticompetitive detriment.

Assistance to new architects

- 9.30 The ACCC has some concerns with the RAIA's submission that the fee graphs included in the fee guides, provide assistance to smaller practices and new entrants

¹³ That is, architects who are accredited under state legislation.

by allowing them to avoid having to develop costing models to determine appropriate fee levels. The ACCC is of the view that it is likely to be more beneficial and indeed a prudent exercise when establishing a business, for smaller practices and new entrants to develop their fee proposal using a bottom up approach which considers all the factors relevant to their individual circumstance.

- 9.31 The ACCC considers that it would be of greater risk for a new business to provide fee proposals on the basis of fee graphs which do not take its individual circumstances and complexities into account. Indeed, the ACCC considers that the RAIA's submissions in relation to the complexities of providing prices for architectural services contradict its claim that a public benefit can be derived from avoiding having to calculate such costs.

Information asymmetry¹⁴

- 9.32 The ACCC acknowledges that, as with most professionals, it is expected that architects will have a certain expertise that their clients do not. The ACCC also accepts that much of the information provided by the RAIA in both their fee guides and in their other information documents, is intended to assist clients or users of professional architectural services in overcoming, or least reducing, this imbalance.
- 9.33 The ACCC does not, however, consider that the fee graphs, which make up part of the fee guides, would contribute to such an objective. The ACCC considers that a client, or prospective client, is unlikely to derive any benefit or constructive information from what would appear to them to be an arbitrary figure for which no explanation is given.

Conclusion on fee guides

- 9.34 Generally, the ACCC considers that fees guides which specify actual values or fees are likely to be anti-competitive. The ACCC considers, however, that fee information which provides a list of variables and factors which may be taken into account when determining a potential fee is likely to be more useful and beneficial to potential users.
- 9.35 In the case of the RAIA fee guides, and in particular the fee graphs, the ACCC considers that whilst it is clearly stated that they are provided for guidance purposes only, to the extent that they are followed and result in clustering or artificially inflated prices, they are likely to generate anti-competitive outcomes. Further, the ACCC considers that the fee graphs provide no public benefits as they do not provide constructive or useful information to either RAIA members or their clients.
- 9.36 The ACCC considers that the fee guides included as part of the RAIA's application, and in particular the fee graphs, are entirely severable from the other activities of the

¹⁴ The phrase *Information asymmetry* is used in a non-economic sense to simply describe a situation where architects have some expertise that their client does not have.

RAIA and are not essential to the broader operation of the matters which are the subject of the authorisation.

- 9.37 Finally, the ACCC notes that other comparative industry bodies such as the Association of Consulting Engineers Australia and the Australasian Institute of Mining and Metallurgy no longer disseminate fee guides of the type proposed by the RAIA.

10 Balance of the public benefits and anti-competitive detriments

- 10.1 In order to grant authorisation to the conduct proposed in the RAIA's application for revocation and substitution, the ACCC must be satisfied that the proposed arrangements would result in a benefit to the public that outweighs any detriment to the public constituted by any lessening of competition arising from the proposed arrangements.

The Arrangements

- 10.2 The ACCC considers that those aspects of the RAIA's application which it considers establish the framework within which the RAIA operates and set its standards of behaviour, namely: the Code of professional conduct; memorandum and articles of association and regulations and by-laws, provide a number of public benefits including:
- increased consumer information and awareness of the industry and their rights in relation to the industry
 - increased guidance for members to act in the best interest of the community and encouragement for them to act in an honest and ethical manner, and
 - the encouragement and promotion of industry self-regulation.
- 10.3 The ACCC does, however, consider that, for the reasons outlined in section 8 of this draft determination, a number of the Standards included in the RAIA's proposed Code of conduct, and in particular Standards 2.5, 4.3, 4.5 and 4.6 may raise competition concerns.
- 10.4 The ACCC considers that were these Standards to be included in of the RAIA's proposed Code of conduct in their current form, they may generate a degree of anti-competitive detriment which is sufficient to outweigh the overall public benefits of the Arrangements.
- 10.5 However, the ACCC is of the view that were these Standards removed or appropriately amended, the Arrangements would be more likely to generate a net public benefit.

The Activities

- 10.6 The ACCC is satisfied that the purpose and effect of the RAIA competition guidelines is to promote fair and equitable architectural competitions that encourage innovation and design solutions and therefore they are likely to provide some public benefit.
- 10.7 The ACCC is also satisfied that the Standard form contracts and associated user guides are likely to provide a useful reference guide for architects and their clients, although they are unlikely to result in significant efficiencies and therefore any public benefit generated by them would be small.

- 10.8 For the reasons discussed in section 9 of this draft determination, the ACCC considers that to the extent that the RAIA fee guides, and in particular the fee graphs, are adopted or used by industry participants, they are likely to generate significant anti-competitive detriment.

Conclusion

- 10.9 Following the arguments advanced by the RAIA and interested parties, the ACCC is satisfied that the public benefits likely to result from the RAIA's:

- Memorandum and articles of association
 - Regulations and by-laws
 - Guidelines for RAIA endorsed architectural competitions and
 - The Standard form contracts and associated user guides
- would outweigh their potential anti-competitive detriment.

- 10.10 However, the ACCC is not satisfied that the public benefits likely to result from:

- the proposed Code of conduct and
- the fee graphs which are included in the RAIA's Fee Guide No 8 and the Small Project Fee Guide

would outweigh their potential anti-competitive detriment.

- 10.11 Consequently, the ACCC is not satisfied that the overall public benefits likely to result from the RAIA's proposed arrangements would outweigh their overall anti-competitive detriments. However, the ACCC considers that:

- if Standards 2.5, 4.3, 4.5 and 4.6 of the proposed Code of conduct were removed or appropriately amended and
- the fee graphs were severed from the authorisation

the proposed arrangements would be more likely to produce a net public benefit.

11 The draft determination

The application

- 11.1 On 8 December 2004, the RAIA, on its own behalf and on behalf of its current and future members, lodged an application pursuant to section 91C of the TPA for a revocation of authorisation A58 and its substitution by authorisation A90946.
- 11.2 The application was made pursuant to section 88(1) of the TPA for an authorisation under that subsection:
- (a) to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the TPA and
 - (b) to give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of the TPA.
- 11.3 Essentially, authorisation is sought for the RAIA and its current and future members to engage in conduct which involves the making and giving effect to contracts, arrangements and understandings as provided for in the RAIA's:
- Code of professional conduct
 - Memorandum and articles of association
 - Regulations and by-laws
 - Client and architect agreements and user guides relating to those agreements and
 - Guidelines for RAIA endorsed architectural competitions.
- 11.4 Authorisation is also sought for the RAIA to issue, from time to time, guides to assist architects and users of architects' services to negotiate appropriate fee arrangements for architectural services.

Draft determination

- 11.5 For the reasons outlined in this draft determination, the ACCC is not satisfied that the public benefits likely to result from the proposed conduct, in its current form, would outweigh the potential anti-competitive detriments of that conduct and therefore propose to deny the RAIA's application.
- 11.6 However, the ACCC considers that:
- if Standards 2.5, 4.3, 4.5 and 4.6 of the RAIA's proposed Code of conduct were removed or appropriately amended and

- the fee graphs were severed from the authorisation

the proposed conduct would be more likely to produce a net public benefit such that the ACCC may grant authorisation.

ATTACHMENT A

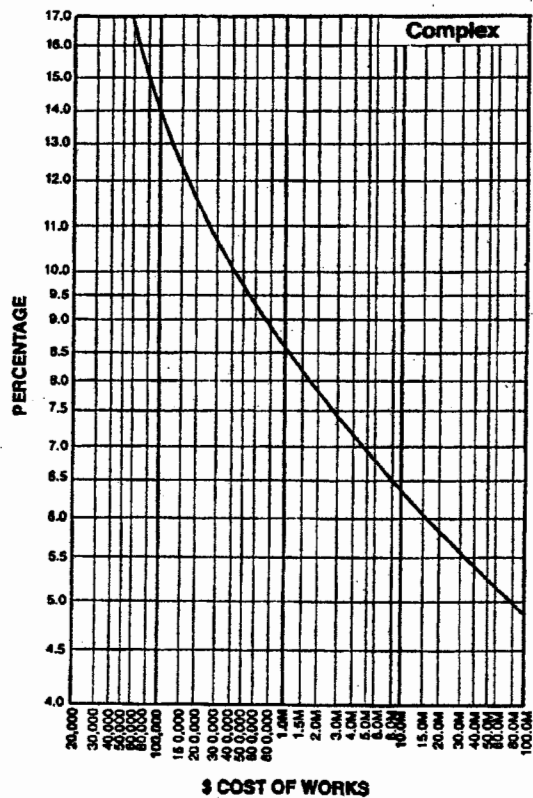
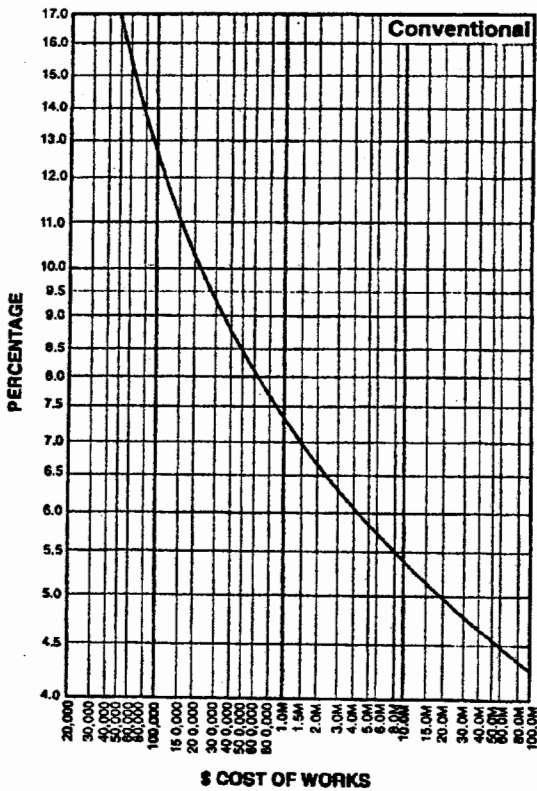
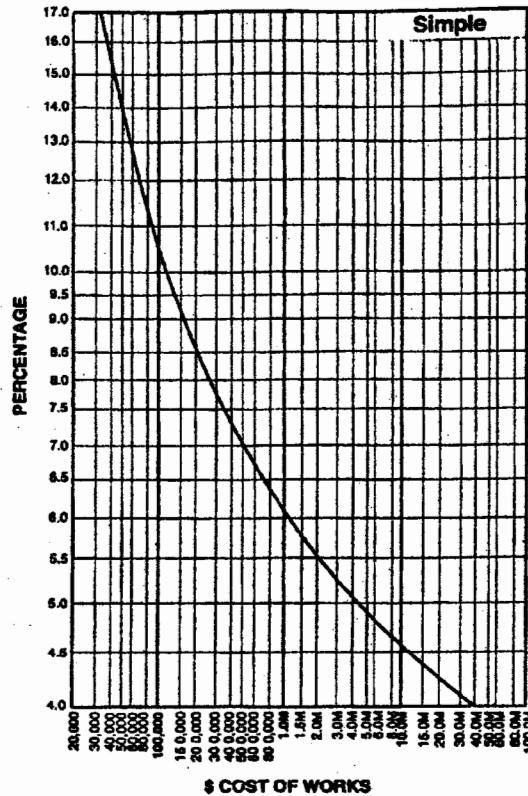
AN02.03.100 July 2001

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These graphs indicate a fee for continuous service consisting of schematic design, design development, contract documentation, tendering and negotiating and contract administration.

They allow for adequate expenditure on professional development, marketing, salaries at commercial rates and investment in new technologies.

They allow for a commercial rate of profit.

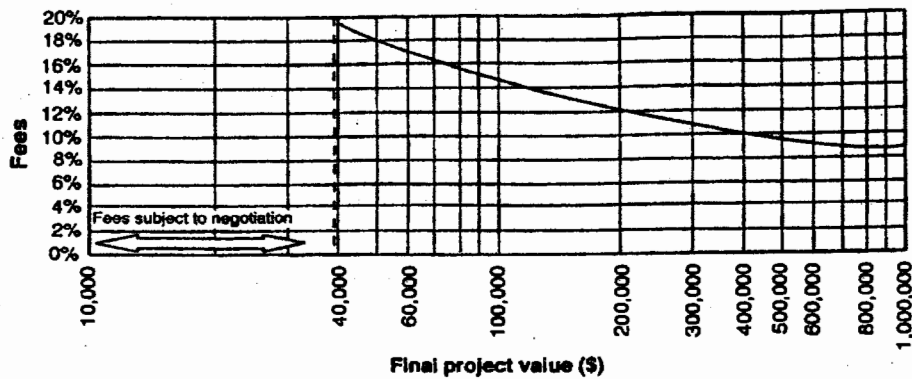


ATTACHMENT B

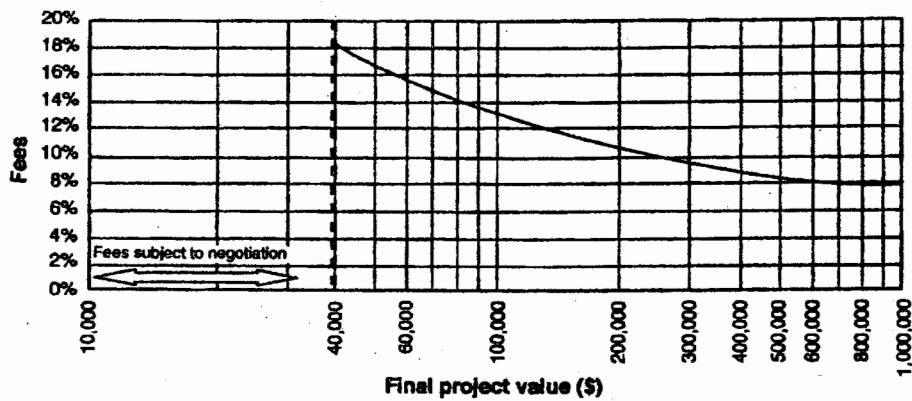
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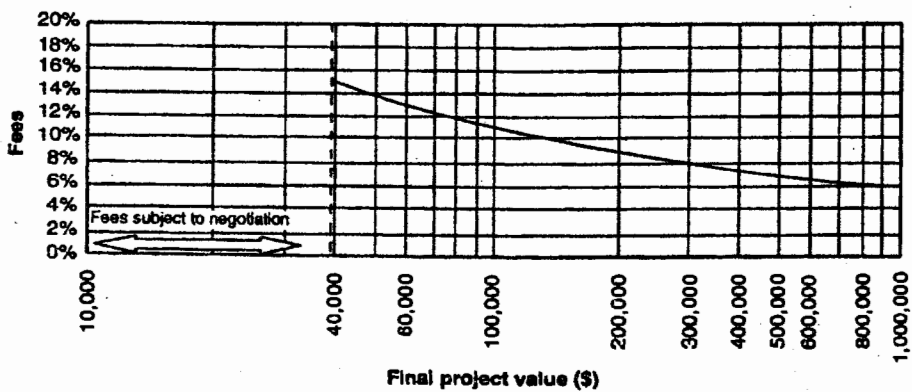
Complex projects: fees/project value %



Conventional projects: fees/project value %



Simple projects: fees/project value %



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