



Australian  
Competition &  
Consumer  
Commission

# 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: 27 October 2005

### Commissioners

Samuel  
King  
Martin  
McNeill  
Willett

Authorisation no. A90946  
File no. C2004/1922

## **Executive Summary**

The Australian Competition and Consumer Commission (ACCC) has granted authorisation to various activities and arrangements engaged in by the Royal Australian Institute of Architects (RAIA), including its proposed new *Code of professional conduct*, for a period of six years.

### ***The RAIA's application***

On 8 December 2004, the RAIA, on its own behalf and on behalf its current and future members lodged an application for a revocation of authorisation A58 and its substitution by authorisation A90946.

Essentially, the RAIA's substitute authorisation sought to allow the RAIA's current and future members to engage in conduct giving effect to the contracts, arrangements and understandings as provided for in the RAIA's:

- proposed new 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.

### ***The ACCC's draft determination***

On 26 July 2005, the ACCC issued a draft determination in relation to the RAIA's application.

For the most part, the ACCC accepted the RAIA's proposed arrangements were likely to provide a benefit to the public. However, the ACCC was of the view that some aspects of the arrangements, in particular: standards 2.5, 4.3, 4.5 and 4.6 which were included in the RAIA's proposed new Code and; the RAIA's fee guidance material, had the potential to generate a degree of anti-competitive detriment which was sufficient to outweigh the public benefits of the arrangements.

Overall, therefore, the ACCC could not be satisfied that the public benefits likely to result from the substitute arrangements would outweigh their potential anti-competitive detriments and proposed to deny the RAIA's application.

However, in its draft determination, the ACCC stated that:

- if Standards 2.5, 4.3, 4.5 and 4.6 of the RAIA's proposed new Code 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.

In response to the ACCC's draft determination, the RAIA lodged a further submission - *Application for Substitute Authorisation (Supplement 2)* - in which the RAIA proposed a number of amendments to its original application. The most significant of these changes being that the RAIA:

*Proposed new Code of professional conduct*

- re-worded Standards 2.5, 4.3 and 4.5 of its proposed new Code
- deleted Standard 4.6 from its proposed new Code
- sought a transition period for the introduction of its proposed new Code

*Fee guidance material*

- withdrew the two fee guide documents which contained the fee graphs (Practice Note – Fee guide no 8 and Practice Note – Small projects fee guide) from its application
- sought authorisation for an alternative fee guidance program and
- sought a transition period to phase out the old fee guides and introduce the alternative program.

***The ACCC's final determination***

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.

For the reasons outlined in section 8 of this determination, the ACCC considers that the following aspects of the RAIA's application are likely to provide some public benefits:

- RAIA memorandum and articles of association
- RAIA regulations and by-laws
- RAIA client and architect agreements and user guides relating to those agreements and
- RAIA guidelines for RAIA endorsed architectural competitions

However, the ACCC could not be satisfied that these benefits would continue were these documents 'amended from time-to-time' which the RAIA has sought as part of its application.

The ACCC also considers that the amended version of the proposed new Code which was lodged with the ACCC on 9 September 2005, satisfactorily conveys the intended meaning of the proposed new Code, such that any potential anti-competitive detriment which was identified in the ACCC's draft determination is likely to have been significantly mitigated.

In relation to the RAIA's application for a transition period until 31 January 2006 to allow it to phase out its original Code (i.e. the Code authorised under A58) and phase in its proposed new Code, the ACCC considers that as this is unlikely to affect the net public benefits of the overall arrangements, such a transition period would be appropriate.

The ACCC is of the view, however, that the RAIA's proposal that it be granted authorisation to produce future fee guides which are not specified in its application is too broad and not specific enough to allow the ACCC to properly assess their potential benefits and detriments and therefore the ACCC does not propose granting authorisation to this aspect of the RAIA's application.

Finally, as the ACCC continues to be of the view that the existing fee guides are likely to generate significant anti-competitive detriment, the ACCC does not propose to grant the RAIA's application for a transition period to allow it to phase out those existing fee guides.

### ***Authorised conduct***

For the reasons outlined in this determination, the ACCC grants authorisation pursuant to section 88 of the TPA and the Competition Code for the RAIA and its current and future members to engage in conduct making and giving effect to the contracts, arrangements and understandings as provided for in the RAIA's:

- proposed new Code of professional conduct
- memorandum and articles of association
- regulations and by-laws
- guidelines for RAIA endorsed architectural competitions and
- standard form client and architect agreements and related documents.

The ACCC grants authorisation for a period of six years.

The ACCC also grants authorisation for the continued giving effect to arrangements provided for under the RAIA's current Code of professional conduct (i.e. the Code authorised under authorisation A58) until 31 January 2006.

### ***Conduct not authorised***

Authorisation does not extend to any amendments to the documents identified in paragraph 10.9 of this determination.

Authorisation is also not granted to the RAIA's proposal to develop an alternative fee guidance program for its members or for a transition period to phase out its old fee guides authorised under authorisation A58.

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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 final 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)<sup>1</sup> for authorisation of its Code of professional conduct (the original 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 original Code which it claimed was, in essence, the basic “arrangement” for which authorisation was being sought.
- 2.2 Restrictions in the original 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)<sup>2</sup> 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

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

<sup>2</sup> 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.<sup>3</sup>

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 the original 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 91A<sup>4</sup> of the TPA to vary authorisation A58 which included amending both the original 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.

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<sup>3</sup> Re Association of Consulting Engineers, Australia (1981) ATPR 40-2002

<sup>4</sup> 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 91B<sup>5</sup> of the TPA, the ACCC issued a notice (the notice) to the RAIA advising it that the ACCC considered that there had 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 A90946.

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<sup>5</sup> 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 architects<sup>6</sup>, 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.<sup>7</sup>

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

<sup>7</sup> 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.<sup>8</sup>

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<sup>8</sup> <http://www.aaca.org.au/>

## **4 The ACCC's draft determination**

- 4.1 Copies of the documents described in this section, including the RAIA's original application for revocation and substitution, the RAIA's supplementary submissions, and the ACCC's draft determination can be obtained from the ACCC's public register or its website.

### **The RAIA's application for revocation and substitution**

- 4.2 As discussed in section 2 of this determination, on 8 December 2004, the RAIA, on its own behalf and on behalf its current and future members lodged an application for a revocation of authorisation A58 and its substitution by authorisation A90946.
- 4.3 Essentially, the RAIA's substitute authorisation sought to allow the RAIA's current and future members to engage in conduct giving effect to the contracts, arrangements and understandings as provided for in the RAIA's:
- proposed new Code of professional conduct (proposed new Code)
  - 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.
- 4.4 Authorisation was 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.
- 4.5 Descriptions of the RAIA's submissions in support of its application are incorporated into the applicable section of ACCC's assessment sections.

### **The ACCC's draft determination**

- 4.6 On 26 July 2005, the ACCC issued a draft determination in relation to the RAIA's application.
- 4.7 In considering the public benefits and anti-competitive detriments of the RAIA's application the ACCC separated the conduct into two categories:
- the Arrangements, which included the proposed new Code, the memorandum and articles of association and the regulations and by-laws and
  - the Activities, which included the guidelines for RAIA endorsed architectural competitions, the Standard form contracts and associated user guides.

### *The Arrangements*

- 4.8 Overall, the ACCC accepted that the Arrangements, which essentially set the framework within which the RAIA operates, were likely to provide a benefit to the public insofar as they:
- 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 encouraged them to act in an honest and ethical manner, and
  - encouraged and promoted industry self-regulation.
- 4.9 However, the ACCC was of the view that some aspects of the Arrangements (and in particular Standards 2.5, 4.3, 4.5 and 4.6 which were included in the RAIA's proposed new Code) had the potential to generate a degree of anti-competitive detriment which was sufficient to outweigh the public benefits of the Arrangements.

### *The Activities*

- 4.10 Generally, the ACCC considered that most the Activities for which the RAIA sought authorisation would be unlikely to raise competition concerns and may provide some public benefit.
- 4.11 For example, the ACCC was of the view that the purpose and effect of the *RAIA competition guidelines* was to promote fair and equitable architectural competitions that encouraged innovation and design solutions and therefore they were likely to provide some public benefit.
- 4.12 The ACCC was also of the view that the *Standard form contracts and associated user guides* were likely to provide a useful reference guide for architects and their clients and may generate some small public benefits.
- 4.13 However, the ACCC was of the view that to the extent that the *RAIA fee guides* (Practice Note – Fee guide no 8 and Practice Note – Small projects fee guide), and in particular the fee graphs attached to those fee guides, were adopted by industry participants, they were likely to generate significant anti-competitive detriment.
- 4.14 Overall, therefore, the ACCC could not be satisfied that the public benefits likely to result from the proposed Arrangements and Activities would outweigh the potential anti-competitive detriments of that conduct and proposed to deny the RAIA's application.
- 4.15 However, in its draft determination, the ACCC stated that:
- if Standards 2.5, 4.3, 4.5 and 4.6 of the RAIA's proposed new Code 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.

### **The RAIA's response to the ACCC's draft determination**

- 4.16 In response to the ACCC's draft determination, the RAIA lodged a further submission - *Application for Substitute Authorisation (Supplement 2)*<sup>9</sup> - in which the RAIA proposed a number of amendments to its original application. The most significant of these changes are that the RAIA has:

*Proposed new Code of professional conduct*

- re-worded Standards 2.5, 4.3 and 4.5 of its proposed new Code
- deleted Standard 4.6 from its proposed new Code
- sought a transition period for the introduction of its proposed new Code

*Fee guidance material*

- withdrawn the two fee guide documents which contained the fee graphs (Practice Note – Fee guide no 8 and Practice Note – Small projects fee guide) from its application
- sought authorisation for an alternative fee guidance program and
- sought a transition period to phase out the old fee guides and introduce the alternative program.

- 4.17 The ACCC's consideration of these proposed amendments is contained in section 8 of this determination.

- 4.18 The RAIA's complete amended application is 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 memorandum and articles of association;*
- (ii) *RAIA regulations and by-laws;*
- (iii) *RAIA client and architect agreements and user guides relating to those agreements; and*
- (iv) *RAIA guidelines for RAIA endorsed architectural competitions as amended from time-to-time.*

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<sup>9</sup> Lodged with the ACCC on 9 September 2005.

- (2) *Authorisation, in relation to the RAIA Code of Professional Conduct for the:*
  - (i) *proposed RAIA Code of Professional Conduct as submitted by RAIA on 9 September 2005; and*
  - (ii) *current RAIA Code of Professional Conduct (being the code authorised in authorisation A58), until 31 January 2006 to permit the RAIA to bring the new Code into effect.*
- (3) *Authorisation for RAIA to produce methodologies, filed with and approved by ACCC, to assist architects to develop fee proposals and users of architects' services to negotiate appropriate fee arrangements for architectural services; being methodologies which:*
  - (i) *provide for architects to input their respective costs and proposed overhead and profit margins rather than containing preset cost and profit figures*
  - (ii) *include a prominent statement that architects and clients are free to agree conditions of engagement and fees on any basis whatsoever.*
- (4) *Limited authorisation, extending immunity under authorization A58, for the current fee guides until 31 January 2006 to permit the RAIA to bring the new arrangements into effect.*



## 5 Interested party submissions

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

### Submissions received prior to issuing the draft determination

#### *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 original Code or related documents have changed 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 are 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 proposed new Code, 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.

**Submissions received subsequent to issuing the draft determination**

- 5.22 No party requested a pre-decision conference and the ACCC received no further interested party submissions after issuing its draft determination.

## 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. The ACCC may also institute an application for revocation and substitution in certain circumstances.
- 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.<sup>10</sup>
- 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.<sup>11</sup>
- 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.

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<sup>10</sup> *Re 7-Eleven Stores; Australian Association of Convenience Stores Incorporated and Queensland Newsagents Federation* (1994) ATPR ¶ 41-357 at 42677. The Tribunal recently followed this approach in *Qantas Airways Limited* [2004] ACompT 9, 16 May 2005.

<sup>11</sup> *Ibid* at 42683.

## **7 The relevant market and the counterfactual**

- 7.1 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.
- 7.2 The ACCC uses 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***

- 7.3 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.
- 7.4 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.
- 7.5 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.
- 7.6 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***

- 7.7 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**

- 7.8 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.
- 7.9 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.
- 7.10 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.
- 7.11 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**

- 7.12 The ACCC applies the 'future with-or-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.
- 7.13 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.

- 7.14 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.
- 7.15 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.
- 7.16 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 The ACCC's assessment of the revised application**

- 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 In its draft determination the ACCC was of the view that, generally, 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.
- 8.3 In relation to the RAIA, the ACCC was of the view that much of the RAIA's Arrangements and Activities may provide a public benefit 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 promotion of industry self-regulation.
- 8.4 However, the ACCC was concerned with certain aspects of the RAIA's application and overall considered that the benefits of the RAIA's proposed arrangements were unlikely to outweigh their detriments.
- 8.5 Consequently, the RAIA lodged an amended application which seeks to address the concerns raised by the ACCC in its draft determination.
- 8.6 The following section of the determination will consider the potential public benefits and anti-competitive detriments of each element of the RAIA's revised application and then, in section 9, consider the overall net public benefit of the proposed arrangements.

### ***The first element of the RAIA's revised application***

- 8.7 The first element of the RAIA's revised application for revocation and substitution essentially seeks authorisation for those aspects of the RAIA's original application which the ACCC considered in its draft determination would be likely to provide a public benefit.
- 8.8 Specifically, the RAIA seeks:
- (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 memorandum and articles of association*
- (ii) *RAIA regulations and by-laws*
- (iii) *RAIA client and architect agreements and user guides relating to those agreements and*
- (iv) *RAIA guidelines for RAIA endorsed architectural competitions*

*as amended from time-to-time.*

8.9 Each of these four documents is briefly considered below along with the RAIA's application to be authorised to amend them from time to time.

*(i) Memorandum and articles of association and (ii) Regulations and by-laws*

8.10 As outlined in its draft determination, the ACCC considers that, were they not satisfactorily addressed, there are two aspects contained within the *Memorandum and articles of association* and *the Regulations and by-laws* which may potentially generate anti-competitive detriments, namely:

- the RAIA admission procedures and
- the RAIA disciplinary and appeals procedures.

8.11 In relation to the *admission procedures*, the ACCC is of the view that the RAIA's admission requirements are sufficiently objective and are unlikely to result in the subjective or arbitrary exclusion of an otherwise suitable applicant. In particular, the ACCC is of the view that the admission procedure appears to be open, transparent and it contains a suitable appeals process.

8.12 In relation to the *disciplinary and appeals procedures*, which include both a formal and informal complaints process and provide for third party arbitration, the ACCC considers that they are suitably clear and certain and may provide some public benefit insofar as they uphold the RAIA's proposed new Code.

8.13 On the whole, the ACCC considers that the *Memorandum and articles of association* and *the Regulations and by-laws* may provide some small public benefit insofar as they uphold the RAIA's proposed new Code.

*(iii) RAIA client and architect agreements and user guides relating to those agreements*

8.14 In its draft determination, the ACCC assessed the following *RAIA client and architect agreements and user guides relating to those agreements*:

- 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)

- 8.15 In its draft determination the ACCC was of the view that these forms and user guides were unlikely to generate significant anti-competitive detriment as they: were not mandatory; did not seek to prescribe unfair or restrictive conditions on architects or their clients and; did not seek to limit competition.
- 8.16 Since issuing its draft determination the ACCC has not received any information which would require it to reconsider this assessment.
- 8.17 However, the ACCC is of the view that whilst the *RAIA client and architect agreements and user guides relating to those agreements* are unlikely to generate much anti-competitive detriment, they are also unlikely to result in significant efficiencies and therefore any resulting public benefits are likely to be small.

*(iv) RAIA guidelines for RAIA endorsed architectural competitions*

- 8.18 In its draft determination, the ACCC was of the view that anti-competitive detriment may arise from the RAIA competition guidelines if they: in some way limited entry of architectural competitions to RAIA members; allowed for the arbitrary exclusion of potential non-RAIA participants or; if the judging of competitions were considered to be in some way biased toward RAIA members.
- 8.19 The ACCC was, and continues to be, satisfied that this is not the case. The ACCC is of the view that the purpose and effect of the RAIA competition guidelines is to promote fair and equitable architectural competitions which encourage innovation and design solutions and, insofar as this is outcome is achieved, the guidelines are likely to provide a public benefit.

*Conclusion on the first element of the RAIA's revised application*

- 8.20 Overall the ACCC considers that those aspects of the RAIA's revised application which are identified in paragraph 8.8 and discussed in paragraphs 8.10 to 8.19 are likely to provide some public benefits.
- 8.21 However, whilst the ACCC may be satisfied that the arrangements provided for in those documents *currently* provide public benefits, the ACCC could not be satisfied that those benefits would continue were the documents listed at paragraph 8.8 'amended from time-to-time'.

***The second element of the RAIA's revised application***

- 8.22 The second element of the RAIA's revised application for revocation and substitution seeks authorisation for an amended version of the proposed new Code and a transition period to implement the proposed new Code.
- 8.23 Specifically, the revised application seeks:

- (2) *Authorisation, in relation to the RAIA Code of Professional Conduct for the:*

- (i) *proposed RAIA Code of Professional Conduct as submitted by RAIA on 9 September 2005 and*
- (ii) *current RAIA Code of Professional Conduct (being the code authorised in authorisation A58), until 31 January 2006 to permit the RAIA to bring the new Code into effect.*

8.24 As mentioned, in its draft determination, the ACCC identified four specific Standards (2.5, 4.3, 4.5 & 4.6) which were included as part of the RAIA's proposed new Code<sup>12</sup>, which the ACCC considered may potentially restrict the RAIA's members from engaging in normal competitive practices. Since issuing its draft determination, the RAIA has amended three of those Standards and removed one from its proposed new Code.

*Code of conduct – Standard 2.5*

8.25 Standard 2.5 of the RAIA's proposed new Code which previously stated:

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

*has been amended to state:*

Members must not offer or receive any financial or other inducements or enter into any arrangement, in relation to procuring an appointment, that is not disclosed to the prospective client.

8.26 In its draft determination the ACCC raised concerns that prior to being amended, Standard 2.5 could potentially have been misinterpreted as an attempt to restrict competition between RAIA members, rather than its intended purpose which was, according to the RAIA, to ensure full disclosure to clients.

8.27 The ACCC considers that the change to the Standard 2.5 is satisfactory to convey the intended meaning of the Standard such that any potential anti-competitive detriment is likely to be significantly mitigated.

*Code of conduct – Standards 4.3, 4.5 and 4.6*

8.28 Standard 4.3 of the RAIA's proposed new Code which previously stated:

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

*has been amended to state:*

Members shall not attempt to supplant another architect who has been appointed for a particular project.

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<sup>12</sup> As lodged with the RAIA's initial application of 8 December 2004

- 8.29 Standard 4.5 of the proposed new Code which previously stated:

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.

*has been amended to state:*

Members must, if approached to undertake a project, for which it is known, or should reasonably be known, that another architect is currently appointed, request the client to notify the other architect.

- 8.30 Standard 4.6 of the proposed new Code which stated:

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.

*has been removed.*

- 8.31 In its draft determination, the ACCC was of the view that Standards 4.3, 4.5 and 4.6 of the proposed new Code had 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 or their colleagues, where there was no legal impediment to them doing so.
- 8.32 The ACCC understands that, 'appointed' or 'appointment' as provided for by the revised Standards 4.3 and 4.5, means that there is a legal relationship (contract) in place between an architect and their client. As such the ACCC considers that the revised Standards are likely to assist in providing guidance to architects as to important principles of contract law. On this basis, the ACCC considers that the changes to Standards 4.3 and 4.5 and the deletion of Standard 4.6 are satisfactory to convey the intended meaning of the Code.

*Conclusion on the second element of the RAIA's revised application*

- 8.33 Overall, the ACCC considers that the changes made by the RAIA to the proposed new Code and in particular to Standards 2.5, 4.3, 4.5 and the deletion of Standard 4.6, are likely to be sufficient to mitigate any potential anti-competitive detriment which may flow from the proposed new Code.
- 8.34 In relation to the RAIA's application for a transition period until 31 January 2006 to allow it to phase out the original Code (i.e. the Code authorised under A58) and phase in its proposed new Code, the ACCC considers that as this is unlikely to affect the net public benefits of the overall arrangements, such a transition period would be appropriate.

***The third element of the RAIA's revised application***

8.35 The third element of the RAIA's revised application for revocation and substitution essentially seeks authorisation for the RAIA to, in consultation with the ACCC, develop a new fee guidance program for its members.

8.36 Specifically, the RAIA seeks:

- (3) *Authorisation for RAIA to produce methodologies, filed with and approved by ACCC, to assist architects to develop fee proposals and users of architects' services to negotiate appropriate fee arrangements for architectural services; being methodologies which:*
- (i) *provide for architects to input their respective costs and proposed overhead and profit margins rather than containing preset cost and profit figures*
  - (ii) *include a prominent statement that architects and clients are free to agree conditions of engagement and fees on any basis whatsoever.*

8.37 In its draft determination the ACCC stated that, generally, it considered 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:

- was less likely to generate anti-competitive detriments as it did not contain any specific fee values and
- was 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 wish to consider when calculating fees.

8.38 The ACCC stated that whilst it accepted that the RAIA's fee guides (Fee Guide No 8 and the Small Project Fee Guide) did provide some information of this type, there were aspects of its fee guides which raised significant competition concerns. In particular, the ACCC was concerned with the potential anti-competitive effects of the fee graphs which were attached to Fee Guide No 8 and the Small Project Fee Guide.

8.39 As noted earlier, the RAIA has now withdrawn the two fee guide documents which contained the fee graphs (Practice Note – Fee guide no 8 and Practice Note – Small projects fee guide) from its application.

8.40 However, as part of its revised application, the RAIA has sought authorisation to produce fee guidance material in the future which the RAIA claims will adopt a less prescriptive approach than the previous fee graphs and which will allow architects greater flexibility in determining their fees.

8.41 Generally, the ACCC is of the view that in order to carry out a complete and comprehensive assessment of the public benefits and anticompetitive detriments of

proposed arrangements for which authorisation is sought (such as future fee guidance material), those arrangements must be well enough specified for the ACCC to properly assess them.

- 8.42 In this instance, the ACCC is of the view that the RAIA's proposal that it be granted authorisation '*to produce methodologies*' which are not defined or specified is too broad and not specific enough to allow the ACCC to properly assess their potential net public benefit.
- 8.43 The ACCC notes, however, that if the RAIA were to produce new fee guidance material which it considered may require authorisation, the RAIA would have a number of options open to it including seeking either a revocation and substitution of the current authorisation or applying for a new authorisation.

***The fourth element of the RAIA's revised application***

- 8.44 The fourth element of the RAIA's revised application for revocation and substitution seeks a transition period for the phasing out of the existing fee guides which were authorised under authorisation A58 (Practice Note – Fee guide no 8 and Practice Note – Small projects fee guide).
- 8.45 Specifically, the RAIA seeks:
- (4) *Limited authorisation, extending immunity under authorization A58, for the current fee guides until 31 January 2006 to permit the RAIA to bring the new arrangements into effect.*
- 8.46 As stated in its draft determination, the ACCC considers that the fee guides and, in particular, the fee graphs contained in *Practice Note – Fee guide no 8* and *Practice Note – Small projects fee guide* are likely to generate significant anti-competitive detriment. The ACCC is therefore unlikely to consider it appropriate to grant this element of the RAIA's revised application.

## 9 Balance of the benefits and detriments

- 9.1 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.
- 9.2 In its draft determination the ACCC was of the view that whilst the proposed arrangements may generate some public benefits, these public benefits would be likely to be outweighed the potential anti-competitive detriments of the arrangements. Consequently, the RAIA lodged an amended application which sought to address the concerns raised by the ACCC in its draft determination.
- 9.3 The ACCC continues to be of the view that the following aspects of the RAIA's proposed arrangements are likely to generate some public benefits:
- 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.
- 9.4 In particular, the ACCC considers that insofar as they uphold the RAIA's proposed new Code, the *Memorandum and articles of association* and the *Regulations and by-laws* may provide some small public benefit. The ACCC also considers that the *RAIA client and architect agreements and user guides relating to those agreements* may also generate some small public benefits.
- 9.5 In relation to the *RAIA guidelines for RAIA endorsed architectural competitions* the ACCC is of the view that insofar as the purpose and effect of the RAIA competition guidelines is to promote fair and equitable architectural competitions which encourage innovation and design solutions, the guidelines are likely to provide a public benefit.
- 9.6 In its draft determination the ACCC identified a number of Standards in the RAIA's proposed new Code which the ACCC considered may generate some competition concerns. In response to the ACCC's concerns, the RAIA amended three of those Standards and removed one from its proposed new Code.
- 9.7 As a result of the amendments, the ACCC is of the view that any potential anti-competitive detriments which may flow from the proposed new Code are likely to have been significantly mitigated.
- 9.8 On balance, therefore, the ACCC is satisfied that the public benefits likely to result from the RAIA's:



- proposed new Code of professional conduct
  - memorandum and articles of association
  - regulations and by-laws
  - guidelines for RAIA endorsed architectural competitions and
  - standard form client and architect agreements and related documents
- would outweigh their potential anti-competitive detriment.

9.9 However, as noted earlier, whilst the ACCC may be satisfied that the arrangements provided for in those documents *currently* provide public benefits, the ACCC could not be satisfied that those benefits would continue were the documents ‘amended from time-to-time’.

### **Other matters**

9.10 In relation to the RAIA’s application for a transition period until 31 January 2006 to allow it to phase out its original Code (i.e. the Code authorised under A58) and phase in its proposed new Code, the ACCC considers that as this is unlikely to affect the net public benefits of the overall arrangements a transition period would be reasonable. Accordingly, the ACCC considers it to be appropriate to grant authorisation to the transition period.

9.11 In relation to the RAIA’s application for authorisation to develop a new fee guidance program for its members and to provide a transition period to phase out the existing fee guides and replace them with the new fee guidance material, for the reasons outlined in paragraphs 8.37 to 8.46 of this determination, the ACCC does not propose to grant authorisation to either of these element of the RAIA’s application.

## 10 The determination

### The application

- 10.1 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.
- 10.2 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.<sup>13</sup>
- 10.3 On 9 September 2005, the RAIA lodged an amended application which sought to address a number of concerns raised by the ACCC in its draft determination.
- 10.4 Essentially 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 new 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
  - RAIA guidelines for RAIA endorsed architectural competitions
- as amended from time-to-time.
- 10.5 Authorisation is also sought for the RAIA to produce future fee guidance methodologies and for the ACCC to allow transitory periods for the introduction of both the proposed new Code and the proposed new fee guidance program.

### Statutory test

- 10.6 For the reasons outlined in this determination, the ACCC is satisfied that the public benefits likely to result from the RAIA's:

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<sup>13</sup> The application has also been considered as an application under the various *Competition Codes*.

- proposed new Code of professional conduct
  - memorandum and articles of association
  - regulations and by-laws
  - guidelines for RAIA endorsed architectural competitions and
  - standard form client and architect agreements and related documents
- would be likely to outweigh their potential anti-competitive detriment.

10.7 In relation to the RAIA's application for a transition period until 31 January 2006 to allow it to phase out its original Code (i.e. the Code authorised under A58) and phase in its proposed new Code, the ACCC considers that as this is unlikely to effect the net public benefits of the overall arrangements a transition period would be reasonable. Accordingly, the ACCC considers it appropriate to grant authorisation to the transition period.

10.8 However, the ACCC considers that, for the reasons identified earlier in this determination:

- granting authorisation to unspecified future conduct (such as amending the documents identified in paragraph 10.6 from time-to-time or producing undefined future fee guides) or
- granting a transitory period for phasing out of the existing fee guides

could generate sufficient anti-competitive detriment such that the overall arrangements may be unlikely to generate a net public benefit.

### **Authorised conduct**

10.9 The ACCC grants authorisation pursuant to section 88 of the TPA and the Competition Code for the RAIA and its current and future members to engage in conduct making and giving effect to the contracts, arrangements and understandings as provided for in the RAIA's:

- proposed new Code of professional conduct<sup>14</sup>
- memorandum and articles of association<sup>15</sup>
- regulations and by-laws<sup>16</sup>
- guidelines for RAIA endorsed architectural competitions<sup>17</sup> and
- standard form client and architect agreements and related documents.<sup>18</sup>

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<sup>14</sup> Appendix B of the RAIA's *Application for Substitute Authorisation (Supplement 2)* lodged with the ACCC on 9 September 2005.

<sup>15</sup> Schedule 1 of the RAIA's *Application for substitute authorisation* lodged with the ACCC on 8 December 2004.

<sup>16</sup> Schedule 1 of the RAIA's *Application for substitute authorisation* lodged with the ACCC on 8 December 2004.

<sup>17</sup> Schedule 5 of the RAIA's *Application for substitute authorisation* lodged with the ACCC on 8 December 2004.

<sup>18</sup> Schedule 2 of the RAIA's *Application for substitute authorisation* lodged with the ACCC on 8 December 2004.

- 10.10 The ACCC also grants authorisation for the continued giving effect to arrangements provided for under the RAIA's original Code (i.e. the Code authorised under authorisation A58) until 31 January 2006.
- 10.11 The ACCC grants authorisation for a period of six years. In general, authorising arrangements for a limited time period allows the ACCC, at the end of the period of authorisation, to evaluate whether the public benefits upon which its decision is actually made eventuate in practice and the appropriateness of the authorisation in the current market environment.
- 10.12 The ACCC considers that to the extent that the RAIA, or any other party to whom immunity is provided by the proposed authorisation, acts outside of the authorised arrangements or does not comply with the authorisation, they will not have protection from the TPA in so doing.

### **Conduct not authorised**

- 10.13 Authorisation does not extend to any amendments to the documents identified in paragraph 10.9 of this determination.
- 10.14 Authorisation is not granted to the following aspects of the RAIA's revised application:<sup>19</sup>
- (3) *Authorisation for RAIA to produce methodologies, filed with and approved by ACCC, to assist architects to develop fee proposals and users of architects' services to negotiate appropriate fee arrangements for architectural services; being methodologies which:*
    - (iii) *provide for architects to input their respective costs and proposed overhead and profit margins rather than containing preset cost and profit figures*
    - (iv) *include a prominent statement that architects and clients are free to agree conditions of engagement and fees on any basis whatsoever.*
  - (4) *Limited authorisation, extending immunity under authorization A58, for the current fee guides until 31 January 2006 to permit the RAIA to bring the new arrangements into effect.*

### **Effective date of the determination**

- 10.15 This decision is subject to any application to the Australian Competition Tribunal for its review.
- 10.16 This determination is made on 27 October 2005. If no application for review of the determination is made to the Australian Competition Tribunal, it will come into

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<sup>19</sup> The RAIA's *Application for Substitute Authorisation (Supplement 2)* lodged with the ACCC on 9 September 2005.

force on 19 November 2005. If an application is made to the Tribunal, the determination will come into force:

- a) where the application is not withdrawn – on the day on which the Tribunal makes a determination on the review or
- b) where the application is withdrawn – on the day on which the application is withdrawn.