

**Trade
Practices
Commission**



COMMISSION DETERMINATION

APPLICATION FOR AUTHORIZATION

UNDER SUB-SECTION 88(1) OF THE TRADE PRACTICES ACT 1974

BY

THE AUSTRALIAN INSTITUTE OF BUILDING

RELATING TO THE INSTITUTE'S GUIDELINE TERMS OF ENGAGEMENT AND
SCALES OF PROFESSIONAL CHARGES

REGISTRATION NO: A122

FILE NO: A75/228

COMMISSIONERS:

W.R. MCCOMAS, CHAIRMAN
W.J. COAD, DEPUTY CHAIRMAN
J.B. BRAITHWAITE
D.K. ROUND

DATE: 23 OCTOBER 1987

1. The Application

1.1 The application was lodged, under s88(1) of the Trade Practices Act 1974, on 13 January 1975 by Victor Talbot Edwards, then National President of the Australian Institute of Building (the Institute). The application was lodged on behalf of the Institute. Interim authorization in respect of the application was granted.

1.2 The application covers a document published by the Institute initially titled "Conditions of Engagement and Scale of Recommended Professional Charges". The document has been revised several times since 1975 and is now called "Guideline Terms of Engagement and Scales of Professional Charges". A copy of the latest (July 1987) edition of the document is at Attachment 1.

2. The Applicant

2.1 The Institute, on whose behalf the application is lodged, was founded in 1951 and incorporated by Royal Charter in 1969 and is an association of professional builders engaged in various capacities within the building industry. Its membership as at July 1987 was approximately 2300 and included:

- students studying for a qualification in building;
- technicians who hold a certificate or diploma; eg estimators; and
- professional builders who hold a degree in building and are employed, eg as building consultants on large projects, managers in large building companies, self employed builders or lecturers at tertiary institutions.

2.2 The principal object of the Institute is stated as being:

"... to promote the study and advance the science and practice of building and of all kindred matters arts and sciences and to facilitate the exchange of information and ideas in relation thereto ..."

The Royal Charter specifically prohibits the Institute carrying on any trade or business or engaging in transactions aimed at pecuniary gain or profit for its members.

2.3 The Institute issues and administers a "Code of Ethics", "Rules of Professional Conduct and Professional Conduct Practice Note for Advisory Services" in addition to the "Guideline Terms of Engagement and Scales of Professional Charges" - the subject of this application. Authorization has not been sought with respect to conduct encompassed within these other documents.

3. The Statutory Test

3.1 Sub-section 90(7) of the Trade Practices Act provides, in effect, that the Commission shall not authorize the Institute's conduct of issuing the fee guidelines unless it is satisfied in all the circumstances that:

- . the conduct has resulted, or is likely to result, in a benefit to the public; and
- . that benefit outweighs the detriment to the public constituted by any lessening of competition resulting, or likely to result, from the conduct.

4. Application of the Test

4.1 The latest revision of the relevant document has been prepared consistently with the principles established by the Trade Practices Tribunal in the application of the Association of Consulting Engineers Australia (ATPR 40-202) and adopted by the Commission in the application of the Australian Institute of Mining and Metallurgy (ATPR 50-113).

4.2 The Institute has made it clear within the latest revision of the document that Scale Charges are not binding on members by:

- . publishing the document independently of the Code of Ethics and Rules of Professional Conduct;
- . consistently referring to the fee scales as "reference" or "guideline";
- . pointing out in the preamble that the fee scales are only guidelines, and that consultants are free to negotiate terms or fees with their clients on any basis whatsoever;
- . pointing out in the preamble that the specific provisions in the document have not been authorized by the Commission.

These amendments meet the criteria which the Commission has previously established for this type of case.

Anti-competitive Effect

4.3 The Commission considers that the Institute's practice of preparing and publishing fee guidelines in the format which conforms to these criteria would not be a hindrance to builders

who choose to compete on the basis of fees. Thus any anti-competitive effect of the conduct is minimal.

Public Benefit

4.4 The Institute has submitted that:

"... the Institute has produced "Conditions of Engagement and Scales of Recommended Charges" to provide a basis on which Client and member can agree the conditions and fees for a particular professional service. By the production of this scale of fees, the Institute has provided guidelines on which adequate remuneration for Members can be estimated and Clients can base their costs for professional services provided within a framework of honest practice."

The Commission accepts that the preparation and publication of fee guidelines facilitates negotiations between a builder and his client and recognises the public benefit that flows from this.

4.5 In terms of the test within s90(7) of the Act, the Commission is satisfied that the Institute's practice with respect to its fee guidelines results in a public benefit which outweighs the minimal anti-competitive effect of the revised documents.

5. Draft Determination

5.1 On 17 September 1987 the Commission issued a draft determination proposing to authorize the conduct of the Institute. No pre-decision conference was requested and no objections were raised to the Commission draft.

6. Determination

6.1 Accordingly, the Commission confirms its draft and grants authorization to the Institute and its members from time to time to:

make and give effect to contracts or arrangements, or arrive at and give effect to understandings, for the preparation and publication by the Institute of reference fee scales for consulting services, and to prepare and publish reference or guideline terms of engagement for consulting services provided that:

- (a) such scales and terms of engagement be published in a document or documents which is or are separate from any rules or codes of ethics for the time being published by the Institute;
- (b) whenever, in a document or documents published by the Institute, reference is made to such scales or terms of engagement, the scales or terms of engagement (as the case may be) are described as 'reference or guideline scales' or 'reference or guideline terms of engagement';
- (c) all documents in which the terms of engagement and/or scales are published shall contain a prominent statement as follows:
 - (i) The terms of engagement and fee scales contained herein are reference or guideline terms of engagement and fee scales only. Consultants (whether corporate members of the Australian

Institute of Building or not) and prospective clients are free to negotiate terms or fees on any basis whatsoever, some of which may not be related to the terms or scales of fees herein.

(ii) Although the practice of the Institute in publishing reference or guideline terms of engagement and scales of fees has been authorized by the Trade Practices Commission, persons consulting these terms of engagement and scales of fees should understand that the specific provisions have not been the subject of any authorization or approval by the Trade Practices Commission.

(d) No words suggesting that the fees set out in the scales are minima are used in the scales and no words of a mandatory nature are used in the scales or terms of engagement.

6.2 This determination is made on 23 October 1987. If no application for a review of the determination is made to the Trade Practices Tribunal, it will come into force on 16 November 1987. If an application for review 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;
- (b) where the application is withdrawn - on the day on which the application is withdrawn.

THE AUSTRALIAN INSTITUTE OF BUILDING
GUIDELINE
TERMS OF ENGAGEMENT
AND SCALES OF PROFESSIONAL CHARGES

1. PREAMBLE

- (a) The following reference terms of engagement and scales of professional charges are for the guidance of Corporate members of The Australian Institute of Building when acting in their professional capacity as builders or for any other service.
- (b) The terms of engagement and fee scales contained herein are guideline terms of engagement and fee scales only. Consultants (whether corporate members of the Australian Institute of Building or not) and prospective clients are free to negotiate terms or fees on any basis whatsoever, some of which may not be related to the terms or scales of fees herein.
- (c) Although the practice of the Institute in publishing guideline terms of engagement and scales of fees has been authorised by the Trade Practices Commission, persons consulting these terms of engagement and scales of fees should understand that the specific provisions have not been the subject of any authorisation or approval by the Trade Practices Commission.

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- (d) Members of the Australian Institute of Building are governed by the provisions of the Royal Charter of The Institute, the By-Laws and Regulations made thereunder, Rules of Professional Conduct related to the practice of building and the Professional Conduct Practice Note for Advisory Services.
- (e) A professional engagement entered into between a client and a member of The Australian Institute of Building may be terminated at any time by either party upon reasonable notice being given.
- (f) Members of The Institute are advised to discuss and agree with the client the scale of professional charges and conditions of engagement prior to their acceptance of the appointment, so that there is a clear understanding as to the amount of fees and expenses payable for professional services.
- (g) The hourly rates and charges in the attached schedule may vary subsequent to 1st July 1987. Variations in the awards for experienced professional officers employed in similar vocations in the Australian Public Service may be used as a guide indicating the general movement of remuneration in these professions.

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(h) This edition of the document will be revised in June 1989.

2. CALCULATION OF FEES

(a) Arbitration and Litigation

Fees for accepting appointment as an arbitrator, attending in court for expert evidence, conference with counsel and solicitors and for any service in connection with litigation are based upon an attendance fee of 4 hours plus an hourly rate for additional time. When required to be on call from 10.00 am to 4.00 pm on each day of 'stand by' until notified whether attendance is required or to the contrary, an hourly rate is applicable.

Note: In matters of Arbitration and Litigation it is essential that the Court recognises the scale of professional charges, and it is necessary for Chapter Secretaries to forward to the Courts in their area a copy of the revised document together with a list of corporate members and bring to the notice of the Taxing Master the recommended fees.

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(b) Inspections or Surveys

For making inspections on properties or structures, preparing reports and giving evidence on the structural or sanitary condition of the property or structure an hourly rate is charged.

(c) Estimates

For preparing estimates required for insurances, for probate or any other purpose. The charge shall be on 'quantum meruit' taking into full account the purpose of the estimates and the consequent degree of accuracy required, and also the availability of existing drawings of the structures to be estimated. Estimate based on professional experience and measurement of the structure in either volume or area measurement.

In certain circumstances it may be more applicable to charge at an appropriate hourly rate for time spent (refer 2(i) below).

(d) Mortgage Valuations

For examining plans of small residences submitted for mortgage security purposes a base fee plus an additional fee based on an hourly rate for the additional time and necessary inspection is appropriate.

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(e) Property Purchase

For inspection and advice in connection with property purchase a fee based on an hourly rate is appropriate.

(f) Estimates of New Work

For preparing estimates of new works required by clients or their agents without obligation to carry out the future building or construction work, the charge shall be on 'quantum meruit' taking into account the consequent degree of accuracy required and the details needed by the client or his agent.

In certain circumstances it may be more applicable to charge at an appropriate hourly rate for time spend (refer 2(i) below).

The fees contained in the schedule for the estimates of new work do not include the provision of detailed quantities.

(g) Planning and Schedule Contracts

For consultations in programming and scheduling work a base fee of 2 hours plus an hourly rate for additional time is appropriate.

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(h) **Project Management Services**

For the provision of all or part of the various Project Management Services on behalf of the client, including project evaluation and design control, planning and scheduling, co-ordination and control, administration, documentation and records an hourly rate is appropriate.

(i) **Time Charges**

In cases not covered specifically, charges should be based on time occupied at the appropriate hourly rate.

(j) **Travelling Time**

Time charged shall include travelling time, and if work involves travelling beyond forty kilometres from the office of the member, an additional charge may be made for costs of travelling, meals and accommodation.

(k) **Other Expenses**

The scale includes reasonable typing and documentation.

The scale does not include travelling and accommodation expenses, special or voluminous documentation: or special tests and services; all of which shall be charged at agreed rates.

SCHEDULE TO GUIDANCE TERMS OF ENGAGEMENT

SCALE OF FEES

The rates contained within this schedule are for guidance only and consultants (whether corporate members of the Australian Institute of Building or not) and prospective clients are free to negotiate fees on any basis whatsoever.

TIME CHARGES

The recommended hourly rate where applicable to the services below is \$85.00 per hour and \$55.00 per hour for technical staff.

SERVICE	BASE FEE	ADDITIONAL ITEMS
Arbitration & Litigation - 'stand-by'	\$360.00	Hourly rate for time in excess of 4 hours - \$90. \$55.00 per hour
Inspections & Surveys		Hourly rate
Estimates	\$250.00	5 cents per \$100.00 of the estimated cost
Mortgage Valuation	\$170.00	Hourly rate for time in excess of two hours
Property purchase		Hourly rate
Estimates of new work	\$250.00	10 cents per \$100.00
Planning & Scheduling contracts	\$170.00	Hourly rate for time in excess of 2 hours
Project Management		Hourly rate
Travelling Time		60 cents per km up to 70 cents per km for larger vehicles