



**Australian Council of Professions Ltd**

**THE PRODUCTIVITY COMMISSION INQUIRY**

**REVIEW OF LEGISLATION REGULATING THE ARCHITECTURAL PROFESSION  
AUSTRALIAN COUNCIL OF PROFESSIONS LTD  
RESPONSE TO THE DRAFT REPORT**

**JUNE 2000**

## OVERVIEW

**ACP supports the Royal Australian Institute of Architects recommendations in RAlA's 'Response to the Draft Report' (section 7) and further challenges the current review process: The NCP Agreements and the Review Schedule neither accommodate nor provide adequate resource for the participation of diverse community and consumer groups. The ACP is in agreement that many aspects of various regulatory acts are in need of amendment but wholesale removal of Acts without due and informed assessment, calls the role of government into question.**

The Australian Council of Professions (ACP) membership comprises national Professional Associations. Currently ACP represents 14 Professional Associations giving direct access to 160,000 professionals nationally. Through this membership, ACP accesses a further population associated with each Profession-Specific group and their Networks.

As the national peak body of Professional Associations, the Australia Council of Professions Ltd., advances and promotes professionalism for the benefit of the community. ACP does not undertake profession-specific issues but through membership consensus addresses broader societal issues that concern all Professionals in their communities. The application of the National Competition Policy (NCP) and the process used for implementing it has raised a growing tide of concern among professions, for the issues surrounding 'Public Interest'.

The increasing trend of governments in Australia to draw political inferences from purely economic premises is of growing concern to the community. This is democracy at its crudest. It is ignoring a democratic government's responsibility for the building and protection of a civil society.

'Public Interest' definition has a degree of ambiguity that is not comfortably incorporated into a primarily quantitative baseline review bias. The Indicators favored by the NCP legislators do not fully accommodate key Social Indicators that need to be used to truly assess the benefit to a community. These would be case and time specific as public good changes and the consequences of some chosen remedies are tested and evolved.

The ACP argues strongly for a wider public exposure of the issues involved in the NCP and an educated debate. The implications for a government divesting social responsibilities, without adequate public knowledge and debate, are profound.

*"The Public Interest is most properly identified with, not concrete policies as such, but rather a particular kind of a process by means of which it is decided what **should** be done."* (Smith, Howard, *Democracy and the Public Interest*. Uni Georgia Press, 1960 )

## INTRODUCTION

In undertaking the review of the Architects Acts, the Productivity Commission has adopted the legislative review requirements that legislation should not restrict competition unless it can be demonstrated that the benefits to the community of the regulation outweigh the costs and the objectives of the legislation can only be achieved through restricting competition.

The Productivity Commission appears to have interpreted this to mean that legislative regimes should be repealed in their entirety, unless the benefits of the restriction to the community outweigh the costs.

In other words, regulatory regimes should be repealed unless it is in the public interest NOT to do so. The professions believe that the key element of the process is the interpretation of what constitutes the “public interest”. To date, there has been no comprehensive evaluation of what this means for the community at large. Unfortunately, the public interest has been measured in economic or monetary terms, without a full appreciation or measurement of the social costs and benefits of deregulation. Current Key Social Indicators are not addressed with any depth.

It must be borne in mind that regulatory regimes of any kind are established either because of a perceived need for them in certain sectors of the community or where service provision shifts from government to the private sector<sup>1</sup>. The main reason for regulation of the professions is protection of the public from incompetent practitioners, about whom the public might not be aware. If this protection is removed because of cost reductions and increasing competition without consideration of the downstream effects, there is every chance that the community will suffer. Some effort has been made. The report does not fully describe or estimate the cost impact on clients or the community that may have flowed from an increase in the proportion of incomplete or incompetent work that may result from deregulation. .

How is the public interest to be balanced against competition? To do this, it is necessary to understand what constitutes a profession and how professional services differ from other business. The Productivity Commission must ask why professional services were originally regulated, and whether those reasons hold true in the current environment. It must then determine what regulatory measures and models provide the most benefit to the community for the least cost.

There is, and will continue to be an increase in complexity within the various areas in which architects work. Architectural services are inherently difficult for consumers to evaluate, as they are usually infrequent purchasers. There is a significant asymmetry of knowledge between the provider of the services and the consumer, making it difficult for consumers to choose between alternative services. Information may be either incorrect or insufficient to enable a reasonable choice to be made. Relevant information may be costly or difficult to acquire or the limited information available may be misleading.

**The ACP believes that those areas of practice that represent a risk to public health and safety or where there is a significant asymmetry of knowledge between the professional and the consumer require either explicit government controlled registration or a joint approach by government and the profession, with appropriate legislative support (co-regulation).**

The Productivity Commission should be placing greater emphasis in the review process on why the professions are regulated and what the downstream consequences of deregulation will be.

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<sup>1</sup> Further information about regulation of the professions is provided in Attachment 1

## WHY REGULATE THE PROVISION OF ARCHITECTURAL SERVICES?

ACP believes that the health, safety and welfare of the community and the long-term interests of direct and indirect consumers of architectural services can be protected most effectively by maintaining a statutory system of registration for architects.

The consequences of misjudgment when purchasing architectural services can be costly in either financial or human terms. Consumers are disadvantaged by their limited ability to:

- assess the need for the professional service;
- assess the type or quality of service needed;
- distinguish between the competent and incompetent professional; and
- determine the quality of service delivered.

Therefore, they are likely to purchase on price alone. Relatively high external market costs will result from the delivery of services by incompetent or inexperienced persons.

**Continued registration provides some particular benefits for Australian architects. Recognised standards of practice are essential for the economy with respect to overseas trade in accordance with the World Trade Organisation trade and services obligations. Most of Australia's trading partners, in Japan, Malaysia and Singapore have statutory registration and place faith in a statutory based comprehensive registration system. Registration in the country of origin usually facilitates registration in other countries. The current registrations system, while not working as effectively as it might, provides a competitive advantage to Australian architects wishing to export their services.**

Increasingly, the architectural profession is operating on an international scale and therefore, any changes made to the system must stand up to international scrutiny.

The primary purpose of a regulatory system must be to ensure that architectural services are delivered only by persons:

- with appropriate qualifications and experience;
- who maintain their competence by continuing professional development or otherwise;
- who adhere to prescribed standards of professional conduct; and
- who are prepared to be held accountable for their performance in all aspects of their professional practice.

Restricting title to persons holding particular qualifications is the least intrusive and least costly method of providing protection to the community.

Regulation of the title 'architect' provides a higher degree of consumer protection than that currently available under Fair Trading legislation and through common law. Architectural services are inherently difficult for actual and potential users to evaluate, as use of an architect by individuals is usually infrequent. As a consequence, the misjudgment of the quality of service provider can be very costly.

Although the current registration system is deficient in achieving the stated aims of the legislation, ACP believes that continued statutory system of registration of architects provides an advantage to the public. Registration:

- overcomes the market failure of information asymmetry;
- decreases the risk to public health and safety;

- reduces transaction costs for the consumer; and
- provides a benefit to Australian architects with respect to exporting services.

The regulation of architects in Australia has been beneficial for many reasons. One of the consequences of deregulation will be the development and proliferation of many quasi-regulatory regimes maintained by local, State and Territory governments. These come into existence because of the absence of a comprehensive registration system. Various bodies, including local and State government agencies and departments, will keep their own lists of architects for procurement, certification and employment purposes. These “registers” will be largely anti-competitive in nature, as they will usually be based on highly subjective and often biased or ill-informed judgement as to who is competent to practice as an architect.

## **COSTS AND BENEFITS OF RETAINING LEGISLATION**

### **The public interest test**

Regardless of how government defines the 'public interest test', the review by the Productivity Commission of the legislation regulating the Architectural profession is predicated on the assumption that any legislative restriction to competition is unnecessary unless proved otherwise.

This approach reflects the view that the market provides the most efficient allocation of resources and that government intervention is only justified if three requirements are met. They are:

- a demonstrated market failure;
- the market failure imposes a significant cost to society; and
- government intervention will actually correct the failure.

### **Market failure and registration schemes for the architectural profession**

The registration of architects under legislation can be justified as it is needed to overcome the market failures of negative externalities (spillovers) and information asymmetry.

Negative externalities occur because architectural services impact on other people as well as the initial consumer. Poor architectural work pose serious risks for public health and safety and property and enormous costs to the community.

Information asymmetry occurs because the inexperienced and uneducated consumer does not have the ability to determine the appropriate cost and quality trade-off when purchasing architectural services. To obtain the necessary information would be expensive (ie consumers would face high transaction costs) and will deter consumers from purchasing. This, in turn, will lead to resource misallocation in the provision of architectural services compared with a perfectly informed market.

One of the criticisms of having a statutory regulation regime for architects is that it creates a monopoly which results in a reduction in the amount of services produced and increased prices. However this has not been the case in Australia where fees for architects services have declined by 24% in real terms over the past 15 years. (CSIRO Research into the Quality of Design and Documentation).

### **Benefits**

There are considerable benefits to the current statutory registration system. These are:

- (a) Increasing positive externalities - A statutory registration system provides a competitive edge over other jurisdictions when exporting goods and services. This is because in the international trade of architectural services one country may give preference to other countries with statutory registration systems. Registration is recognised as common currency for trade in services.
- (b) Overcoming information asymmetry - A registration system aids the market by providing information to consumers on the education and experience levels of the people who can offer architectural services. This enables consumers to make more informed decisions. In particular, it reduces the tendency for consumers to choose on price alone due to their inability to consider other factors.
- (c) Lower transaction costs - A registration system lowers the transaction costs for consumers as it provides them with information on how to identify appropriate service providers. Without this, some consumers, particularly one-off consumers, will probably either abandon the search or make a less than optimal decision.

### **Costs**

It has been argued that registration regimes impose the following costs on the community.

- (a) **Increased cost of architectural services** - A statutory registration system increases the cost of services to the consumer by limiting the number of potential providers by entry or experience restrictions.

Although registration may limit the number of providers, it does not necessarily reduce competition. Anecdotal evidence suggests that there is robust competition between providers for the limited amount of work available.

- (b) **Reduction in the choice of services** - A statutory registration system that limits the use of the title “architect” and its derivatives does not reduce the options for consumers who prefer lower quality advice and lower fees that could be provided by para-professionals and non-architects who can substitute for architects.

### **Risk analysis**

The risks of the identified market failures in the provision of architectural services can be divided into two areas: risks to the consumer and to the public.

For the consumer, the risk depends on their access to information. The more knowledgeable they are, the more they can judge the quality-price trade-off. The one-off consumers of architectural services are the least knowledgeable and the ones facing the greatest risk. The actual number of consumers who have inadequate information is not known and is not easily ascertainable.

For the public, the risk of inadequate architectural services depends on their exposure to the services. The effect of architectural works extends to those who have no role in the selection of the architect for the project. A comprehensive and effective registration system significantly limits the incidence of failures that may be caused by unqualified or incompetent practitioners.

It is important to quantify the relationship between registration and increased public safety so as to determine if the risk can be mitigated. However, past attempts at comparisons between Australian jurisdictions have not been able to develop meaningful figures.

## Quantifying the costs and benefits

Quantifying the costs and benefits of a registration regime is difficult. What is even more difficult is justifying or abandoning the registration of architects on a market failure and monetary cost-benefit basis alone. Any measurement of costs must be balanced against the cost to government and the community if the registration system were to be abandoned. In the absence of a comprehensive registration system, additional transaction costs to government, business and the consumer would be imposed, particularly the costs of finding someone to do business with.

## ALTERNATIVE REGULATORY MODELS

There are a number of models for regulation of professions, coming under three groupings:

- self-regulation;
- co-regulation; and
- government authority regulation.

ACP favours a co-regulatory model for Architects where government and non-government bodies work in partnership to regulate certain aspects of the profession. In undertaking its role under a co-regulatory model, the non-government body must be widely representative in nature, including the professions, and community representation. Co-regulation requires a statute to ensure compulsory registration of practitioners. The statute would also empower the non-government body to undertake certain activities in relation to its registration function. Co-regulatory models can take many forms. However, two models that may be applicable are set out below.

### Model 1

Non-government bodies take on the certification of practitioners, and government undertakes general administration of the legislation, complaints handling and disciplinary actions.

The non-government body is charged with the task of:

- certification of applicants in accordance with objective and fair standards;
- objective and open appeals mechanisms against decision to refuse certification
- audit of compliance with conditions of continuing certification

The statutory body or government department charged with the administration of the legislation is required to:

- respond to complaints from consumers;
- undertake inquiries and if necessary, disciplinary action, against practitioners in response to complaints; and
- prosecute non-registered persons breaching the provisions of the legislation.

### Model 2

Non-government bodies undertake certification, registration, complaints handling and investigation, and disciplinary actions (with associated appeals mechanisms) and government undertakes administration of the legislation.

Government retains control of who may become a registration/accreditation authority. Government retains the role of prosecuting non-registered persons, or delegates this task to a non-government body. Variations on this theme are that government retains a hearing role for disciplinary actions after investigation by the registration authority or an appeal-hearing role where practitioners have been refused registration or have been deregistered.

## **RECOMMENDATION**

**ACP believes that the health, safety and welfare of the community and the long-term interests of direct and indirect consumers of architectural services can be protected most effectively by maintaining a statutory system of registration for architects.**

**ACP calls for the Competition Principles Agreements to be amended to ensure that 'Public Interest' be given a greater depth of analysis in the review process.**

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## REGULATION OF THE PROFESSIONS

### 1. What is a Professional Service?

Services provided by professionals have been regulated in different ways by different jurisdictions for a number of reasons. Both courts and regulators have accorded professionals a higher degree of responsibility than other occupational groups. This is based on the professional's specialised knowledge and skill and the high level of reliance placed on this by the client.

In attempting to define the difference between professional services and services offered by other groups, the Monopolies Commission, United Kingdom (1970), defined a professional service as one requiring:

- the application of specialised skills to offer the service;
- the skills are acquired through defined and practical training in a well defined area of study;
- the service calls for a high degree of detachment and integrity on the part of the practitioner in exercising personal judgement on behalf of the client; and
- the service involves direct, personal and fiduciary relations with the client.

The Commission further stated that:

- practitioners collectively have a sense of responsibility for maintaining the competence and integrity of the occupation; and
- practitioners are organised in bodies, which are concerned to provide the machinery for testing the competence and regulating standards of competence.

### 2. Regulatory Regimes for Professionals

To provide consumer protection and to ensure the provision of a certain standard of service, governments have adopted various regulatory means:

- (a) Restrictions on who may deliver a service - legislation reserves the right to provide services to qualified and/or experienced persons. This clearly delineates the boundaries of what activities are to be confined to professionals, while allowing other activities to be performed by less qualified persons. This regime works best where there is a significant asymmetry of knowledge between the consumer and the professional with respect to the service being offered.
- (b) Restrictions on who may use the title of a particular profession - legislation certifies the competence of the professional by reserving the title of the profession to qualified and/or experienced persons. Particular services are not reserved to practitioners, and may be performed by any person. This regime works best where consumers have a high degree of awareness of the types of services provided by a particular profession (ie. Architecture).
- (c) Regulation as to professional conduct - legislation provides for the adherence to codes of ethics and disciplinary measures to minimise the incidence of malpractice and unprofessional conduct, and to provide a visible assurance to clients that practitioners can be trusted to act in their interests. This regime is generally implemented together with one of the above mechanisms.
- (d) Regulation as to continuing professional development - legislation provides for a practitioner to undertake continuing professional development as a requirement for continuing practice after initial registration.

- (e) Restrictions on ownership of professional practices - legislation limits the controls of ownership/management of companies to qualified and/or experienced persons to protect the independence of the professional and the commitment to the client, as opposed to the shareholders.
- (f) Regulation of financial standing - legislation requires financial viability and business management capabilities prior to allowing practice. This is more common in situations where consumers commonly face risks of financial loss.
- (g) Financial compensation requirements - legislation provides that a practitioner must hold professional indemnity insurance to a certain level. This mechanism is used in conjunction with other licensing/registration requirements to provide a greater degree of consumer protection.
- (h) Professional standards requirements linked to liability capping - legislation provides that where practitioners are prepared to guarantee certain standards of practice, they will be eligible to take advantage of a monetary cap on the level of liability for professional negligence (other than for causing personal injury or resulting from fraud).
- (i) Imposition of inspection services - legislation provides for the establishment of inspection services to oversee certain aspects of the work of professionals.
- (j) Voluntary codes of practice - in a deregulated environment, professions self regulate, with government agreed codes of practice.
- (k) Imposition of quality assurance requirements - Government policy provides that a professional is to have attained quality assurance certification to a certain level prior to being able to offer services to government. This is used as a means of ensuring the provision of a certain standard of service to a particular market sector, but is only effective where the persons in charge of implementing satisfactory structures, procedures and criteria have the skills, experience and judgement to make accurate and timely decisions.

The imposition of regulatory arrangements usually requires some form of registration/ licensing/ certification system, implemented by either:

- a system operated by government through a statutory body;
- a co-regulatory systems involving a statutory body and professional associations undertaking various roles; or
- a self-regulatory system, with the professions undertaking registration/ licensing/ certification with statutory backing.