BOARD OF ARCHITECTS OF NEW SOUTH WALES

RESPONSE TO THE DRAFT REPORT OF THE PRODUCTIVITY COMMISSION 2000 ON THE REVIEW OF LEGISLATION REGULATING THE ARCHITECTURAL PROFESSION

6 June 2000

The Productivity Commission is referred to the Architects Accreditation Council of Australia (AACA) and the Board's Response to the Issues Paper.

The Board has not attempted to duplicate the matters and arguments put forward by the AACA in its response to the Draft Report of the Productivity Commission, however the Board strongly supports the criticisms, matters and arguments put forward in that response concerning:

1. **Certification - The significance of title**
2. **International issues**
3. **Community benefit of regulatory authorities**
4. **Evaluation of Productivity Commission's preferred approach**
5. **Retention of certification, and**
6. **The conclusions and recommendations**

The following matters are intended to supplement parts of the AACA response.

1 FUNDAMENTAL OMISSION - PROPOSED LEGISLATION.

The National Competition Principles Agreement commits the Commonwealth, States and Territory Governments to consider the potential anti-competitive effect of all legislation, both existing and proposals for new or amending legislation.

Some of the Reviews that have been conducted in some States considered proposals for new and/or amending legislation as the Registration Boards had proposed to their respective Governments that the Architect's Act be amended in accordance with the AACA National Legislative Guidelines.

The New South Wales State Review was nearing completion at the time the Commonwealth Government invited the States and Territories to agree to a national review. The NSW Government then deferred the completion of the State Review in favour of participating in the National Review. The State Review was considering the AACA National Legislative Guidelines as part of its consideration of proposals for new or amending legislation to increase **the benefits to the community** under the Act .

The terms of reference of the inquiry do not preclude the Productivity Commission from inquiring into proposals for new or amending legislation.

In fact in clause 2 of the Terms of reference it is stated *"The purpose of the inquiry is to: (a) achieve greater consistency* ***in any future regulation*** *of the architectural profession; and (b) assist State and Territory governments in meeting their legislative review obligations under the Competition Principles Agreement, in relation to legislation which regulates the architectural profession."*

The Productivity Commission includes consideration of the AACA National Legislative Guidelines and acknowledges (p.145) *"Several modifications to existing legislation outlined in Chapter 9 would promote competition and thus reduce the costs imposed by current restrictions."* The Commission acknowledged the constitutional difficulties (p.125) in achieving national legislation but gave scant attention to **achieving uniform legislation** that would achieve consistency in future legislation. As the AACA National Legislative Guidelines are fully supported by all State and Territory Architects Registration Boards that advise their respective governments, it is likely that uniform legislation could be achieved.

Without full and proper consideration of proposals for future legislation it is not fulfilling its obligations under clause 2 quoted above. In the case of New South Wales it will have to complete its State Review of proposed legislation in order to meet its obligations under the Competition Principles Agreement

2. COMMUNITY WELL BEING - NOT PROPERLY CONSIDERED

The report appears to be flawed as the conclusions appear to be without foundation; and the recommendations are not in accordance with the Commission’s stated purpose quoted by it one the frontispiece of the Draft Report (Paragraph 2)— *“The Commission's independence is underpinned by an Act of Parliament. Its processes and outputs are open to public scrutiny and are dr****iven by concern for the wellbeing of the community as a whole”.***

The fundamental and historic purpose of statutory regulation of architects and the controlled use of the title is to assist the ***client community*** to make an informed choice in the procurement of architectural services. Legislation does not restrict competition for such services; it is a free market.

A value-added benefit to the ***community*** is that through use of appropriately qualified and skilled *professional* architects, (i.e. those who serve *community* interest rather than purely *commercial* interests). The quality of the nation’s cultural heritage as manifested through its built environment has the opportunity to be an ongoing expression of the nation’s hopes and aspirations.

The Commission’s ‘raison d’ètre” — concern for “the ***wellbeing of the community as a whole”*** is surely not predicated solely upon economic considerations? It must remind governments of an obligation to embrace social and cultural considerations that cannot be measured objectively.

The ***community*** is ***not*** well served by self-regulation or co-regulation by a sector of the community. The Royal Australian Institute of Architects (RAIA) for example, which has as one of its primary purposes the economic welfare of its members, rather than the welfare of consumers. The two purposes are mutually exclusive.

Other conflicts of interest could well arise if an organisation representing the profession is charged with administering an Act (co-regulation), if it derives much of its income from sponsorship, It could not be demonstrated to be unbiased if it had to consider mounting an action against a sponsoring company for a breach of the legislation that it administers.

The ***community*** is not well served by "lowering the bar" for access to the worldwide community of professionals which would happen if anyone without any statutory powers controlled the title. The existing statutory monitored education and training programs are subject to competency standards backed by legislation that guarantees a standard for the use of the statutory controlled title, "Architect". Without controlling legislation anyone can call himself or herself an architect when offering even the lowest quality of drafting services and the *community* will be the loser.

For those appropriately qualified the significant additional cost of membership of the self-regulating or co-regulating body (over the nominal fee for statutory control at no cost to government) is a considerable additional cost to the ***community***.

Whilst accepting that present Acts regulating architects are anachronistic in some respects and fall short of appropriate legislative objectives, the Commission has seriously erred in not addressing the real ***community and consumer*** benefits available from the introduction of national uniform legislation in accordance with the AACA National Legislative Guidelines. These provide for control of architectural businesses, practising certificates, mandatory professional indemnity insurance and continuing professional development, and real penal provisions for malpractice, and for breach of a code of professional conduct. This would not be a consumer protection device in a self regulated environment.

A National Architects Act would be ideal *"to promote consistency between regulatory regimes and avoid unnecessary duplication"* as sought by the Commission in the ***community*** interest. However bearing in mind the Australian Constitution, for practical purposes, uniform legislation for inter-recognition of like *registered* professions (such as exists under the Trans Tasman Mutual Recognition Agreement between New Zealand and Australia) with AACA as the controlling body, would achieve the objective.

3 COST/BENEFIT ANALYSIS

Professor Sloan at the briefing in Melbourne on 2 May asserted to the effect that it was the responsibility of those making submissions to the Inquiry to show that the benefits to the community outweigh the costs imposed by legislation.

Those conducting other NCPA reviews, for example the New South Wales Department of Fair Trading (Review 0f the Valuers Registration Act 1975 - Final Report), commissioned independent consultants to provide a cost/benefit analysis. It seems unreasonable that the

Commission is not commissioning its own independent costs/benefit analysis, rather than reaching conclusions from other sources.

The conclusions reached by the Commission appear to be assertions made without proper foundation.

4 FINANCIAL PROTECTION OF CONSUMERS - NOT PROPERLY CONSIDERED

A major cost benefit to consumers of a proposal in the AACA National Legislative Guidelines is for compulsory professional indemnity insurance (PII) for architectural business entities. Repeal of the Architects' Acts would deny the opportunity for future financial protection for the losses suffered through the proven negligent acts of architects.

Losses suffered may be considerable, running into hundreds of thousands of dollars and on major projects, in the millions. Cover which may be obtained in the future in the event of some architects coming under the Professional Standards Act does not cover personal injury or tortious claims, and the liability is capped. This is hardly an adequate consumer protection measure.

An example of losses running into hundreds of thousands of dollars that were not recouped by a consumer is illustrated in the case of Mancer (FJ) Building Co Pty Ltd -v-St Mary's Private Hospital Pty Ltd, unreported, SC (NSW) Smart J, 30 March 1990. The hospital suffered irreparable damage as a result of reactive soil movement. The architect ignored technical advice given by engineers and shared liability for the damage suffered. The architect was not insured and was unable to meet the damages assessed.

Many architects insure voluntarily, however there is other evidence that some architects do not insure in the mistaken belief that they supervise their own work in the practice and could not be found liable. Consumer protection should be the business of Architect's Acts. Enactment of the AACA National Legislative Guidelines would provide that protection by requiring practising architects to hold appropriate professional indemnity insurance.

This is a prime example of the benefits to the community outweighing the costs.

It is curious that the Commission (p147) asserts that *"Several amendments outlined above could improve current legislation by reducing impediments to competition and promote transparency and accountability. However, the commission considers that, even if implemented, these changes would not overcome the fundamental shortcomings of the current system. These shortcomings are that certification provides negligible consumer protection and community benefits, and little information over and above that which is, or could be provided by a self-regulating profession and other more comprehensive regulations which are already in place."*

The benefits and protection of the community through PII could hardly be labelled *as "negligible consumer protection and community benefit."* Insurance against losses suffered

by consumers for loss of life or limb, or hundreds of thousands of dollars could hardly be labelled as a "negligible benefit."

The Commission also stated (p.124) *"If CPD and PII are considered desirable, it may be more appropriate that they are promoted by the professional association, rather than enshrined in legislation."* This is the current situation that clearly is not working.

In other professions legislation requires that PII be held by practitioners in order to practice (eg. Law), yet the Commission asserts (p.124) *"proposals to legislate for compulsory PII, may like CPD, incur significant costs by restricting consumer choice and increasing the cost of architectural services."*

Whilst Fair Trading and Trade Practices Acts may provide a means of proving liability, they do not provide means for the restitution of financial losses suffered by a consumer.

The findings of the Commission are clearly perverse in the light of the foregoing.

5. COMMUNITY WELLBEING IS ECONOMIC BUT IT IS ALSO INCLUSIVE OF EDUCATION AND CULTURAL DEVELOPMENT

The Board, in concert with the AACA, considers that the absence of *statutory* accreditation would constitute a barrier to international trade. However there is a quantifiable economic benefit to Australia in the exporting of architectural education which has as its outcome, internationally accepted access to the controlled use of the title, "architect".

Significant income is earned from fees charged to overseas students, particularly from our Asian neighbours. These students attend Australian universities in order to read architecture and obtain a tertiary qualification that meets the academic qualification to become registered. Without a regulatory standard, recognised in their own country, these students will not be encouraged to come to Australia, but to other countries such as New Zealand where a regulatory standard is maintained. This is an economic downside of de-regulation.

However the community wellbeing is also predicated upon the cultural interface and stimulus for intellectual thought and innovative design which derives from an internationally engaged community would also be lost to Australia, as would be the benefits of an ongoing relationship with people, many of whom will become leaders in their own country.

Education of architects, and of the community which architects serve, is a socially useful human activity. It ensures that the needs for shelter and all areas of human endeavour are constantly questioned and challenged in order to meet the expectations and wellbeing of an increasingly aware client community.

The essence of architecture is not merely the technically competent provision of shelter but the fulfilment of the human need for shelter in functional and emotional terms.

Effective satisfaction of those needs relies on individuals who are demonstrably educated, trained and skilled in the analysis of needs, generation and disciplined development of ideas and of inventive and practical solutions which take account of the public interest.

The public needs and deserves ready and reliable access to information which assists in their identifying those who are educated and committed to providing such services, and whose commitment is to a professional ideal of service to the community at large.

This commitment must be both implicit in attitudes cultivated through an educational process and explicit in the code of behaviour which is intrinsic to the right to use the title "architect".

The Productivity Commission appears to have overlooked these fundamentally important aspects of its inquiry into the regulation of architects and protection of the title.