REVIEW OF LEGISLATION REGULATING THE ARCHTIECTURAL PROFESSION

A Personal Comment – Helen Fisher, July 2000

The Productivity Commission has stated that the public interest would be better served if architects were self-regulated and the engineering and accountancy professions have been put forward as successful models. Most of my comments relate to the comparisons made between the regulatory arrangements of these professions, using the engineers as a case study. I have learnt in consulting that each profession is different - in the way it procures work, in its position in the consulting chain, in its interface with clients and in the practice structure normally adopted. There are pitfalls in assuming that sauce for the goose in regulatory terms is sauce for the gander.

Brand Names and Information

In the hearings you made it clear that you view certification of title as a 'blunt instrument', and 'a poor vehicle for communicating information about competency'. You advocate a system that distinguishes between different levels of skill and experience and you frequently cite the engineering profession as a potential model. But I question whether the information provided by IEAust. and the NPER actually differs in any material way from that conveyed by the registration of architects.

The engineering profession is made up of a variety of discrete 'professional level' disciplines (4+3 years education/training) under the self-regulatory umbrella of the Institution of Engineers (IEAust). By contrast architecture, at this level, is a single coherent discipline and the need for horizontal differentiation at 'professional level' does not arise.

IEAust admits three categories in each discipline - 'professional engineer', 'technologist' and 'associate', each defined by levels of education. In the building design sector 'architect' is the equivalent of 'professional engineer' and the other two categories loosely correspond with architectural draftspersons, technologists and building designers who are also defined by standards required for admission to their own professional associations. The extent of the information provided to consumers by these structural arrangements is therefore much the same for both the engineering and building design sectors of the industry.

In addition there are various grades of membership in the IEAust 'Professional Engineer' category, with Chartered Engineer the accepted 'professional' designation, although registration on the NPER as a Professional Engineer appears to be replacing it as the national professional title. Admission to CPEng/NPER requires completion of competency based postgraduate training and examination similar to that required for registration as an architect, of which they are the professional equivalent. The IEAust. grades of Fellow and Senior Member recognise professional distinction and past achievement and are not sufficiently precise to provide information of much relevance to the consumer. There is also a graduate grade for those who have not yet achieved all the competencies required for

practice at 'professional' level. Neither profession provides information on the individual skills of members, nor is it feasible to do so. Practitioners with specialist expertise might advertise that skill in seeking employment but it is unlikely to be information required by consumers. Few architect firms specialise exclusively in one area of work. Again there is little to choose between these regulatory arrangements in terms of the amount of information conveyed by professional recognition.

Comparisons about the value of professional labels relate to the relative information they signal about current competence and I will come to that shortly, but first I should like to stress the importance of initial qualification in the registration process. It must be remembered that all professions in the first instance rely on accredited qualifications, i.e. input measures, as their basis for recognition. These increase in importance where evaluation of conceptual competence is required

Both engineers and architects have adopted a form of certification based on the one-off achievement of threshold standards and on the presumption that these are of **lifelong** significance. Both professions are governed by national competency standards which set output benchmarks for admission to the profession and allow for articulation between levels. Lateral and vertical distinctions in the competencies required for recognition are made by both service sectors - regulated by a large umbrella organisation in the case of engineers and by various bodies in the building design industry. As you point out, the latter situation is probably preferable in that it provides competitive incentives.

Significantly, use of the designations registered engineer, chartered engineer and architect are each restricted by law (under Fair Trading Acts and Architects Acts respectively) to those who have satisfied the admission requirements of the respective regulatory bodies.

Maintaining Competence

The currency of the information on competence provided by an occupational label is another aspect of the discussion that needs to be explored. If I understand what you have said, you see the requirement for mandatory Continuing Professional Development (CPD) for CPEng/NPER engineers as the necessary assurance that their standards are maintained at a professional level. Conversely the absence of such a requirement in the architects acts leads to the dismissive taxi driver analogy and a presumption that the information provided by certification of architect has little meaning. You are of course right that competence must be maintained but, although desirable, CPD is not a means of ensuring that standards are maintained at the required level.

Firstly, **all** registration in **all** professions is one-off. I know of no profession that re-examines its members to ensure that they continue to satisfy threshold standards for admission to that profession. Essentially requirements for mandatory CPD have been introduced by regulatory bodies to remind members of their obligation to keep up to date. Although useful, by no stretch of the imagination will CPD ensure maintenance of the overall competence required for continued practice, nor is it intended to so.

Since the comparison has been made with the engineering profession, let us look at what they are required to do. Professional Engineers must undertake 150 **weighted** hours (eg. a published technical paper scores 30-50 hrs) over a three year period. This can take many forms, from participation in meetings and service activities to formal learning or home study. CPD subjects must contribute to the development of a member's professional career or to that of others; they may range from updating technical skills to learning a new language. Compliance is largely self-certified.

The weakness of CPD as a quality assurance measure, apart from its superficiality, is its focus on existing areas of competence, when complaints about poor performance commonly arise through errors made by practitioners operating outside their competence. In my view the solution lies in placing an obligation on professionals, reinforced by codes of conduct, not to undertake to provide services beyond their capacity. The IEAust has introduced this measure and, from memory, it also occurs in some of the architects regulations. In any event there is always an implied obligation for registered persons to act in a professionally competent manner which can be and is tested by disciplinary process.

It is probably only the additional safeguard of monitoring the circumstances of members who have not practised for an extended period, adopted by IEAust, which could, by inference, provide additional information on the currency of competence. But then I personally cannot recall a case, here or there, where such a situation has been cited as an issue, except once with the UK dentists, but then they have over 2000 complaints a year (anyway he turned out to be an alcoholic not a taxi driver).

Whilst valuable, CPD is not a means of maintaining general competence nor can it be monitored in any serious way (it is interesting to note the RAIA dropped its mandatory CPD requirement after a few years of operation). If the certification of architects is a blunt instrument, then CPD is a powder puff.

Clients

In comparing the effectiveness of the labels used by the two professions in providing information, one must also take into account the contrasting make-up of the target group. Engineers are secondary consultants. They are employed by the public sector, local authorities, non-government organisations, multinationals, other consultants and industry, an informed clientele to whom the multiple, complex IEAust designations have become familiar. Employers of economists are probably even better informed. The 'man in the street' argument, frequently used in the hearings as a measure of the success or otherwise of information provision, does not in fact apply to engineers and the labels adopted by the engineering profession are directed elsewhere and serve a different purpose to certification of 'architect'.

The Quality of Information

In all the references to the success of engineers in providing information about their members to consumers and the comparable failure of architects, there is little mention of the quality or reliability of that information or the rigour with which it was established or evaluated in the first place. You have said harsh things about the accountability of the

architects registration boards. But it is on the issue of quality assurance and reliability alone that my experiences over the years have led me to conclude that the quality controls imposed by statutory regulation are more likely to provide consistent and reliable information about professional standards than those that regulate comparable industry bodies.

Professional associations must make expedient decisions to serve the interests of their members, to meet commercial objectives and generally to achieve a variety of possibly conflicting goals. The validation of approved courses of professional education is an important aspect of quality assurance for any profession and it must be carefully controlled to ensure the maintenance and uniformity of industry professional standards. No matter how worthy the intentions, there is no guarantee that standards and procedures will not be changed without notice to satisfy the current policy preoccupations of an industry association. I have seen it many times.

Statutory bodies, despite the views you have expressed about them, are ultimately answerable to the community for the decisions they make; professional associations are ultimately answerable to their membership. It is for this reason alone that architect licensing authorities overseas look for statutory regulation in accrediting architects from other countries to avoid an imbalance in accountability. (In this context, a point of correction – the UK withdrawal of its recognition of the Melbourne University architecture course was a procedural adjustment to correct the anomalous inclusion of 5 overseas qualifications in the 37 UK architecture courses recognised by ARCUK, prior to implementation of the EU Architects Directive. It had no connection at all with merit or the standard of the Melbourne course.)

Architectural Practice Examination

There has been confusion about the position of architectural graduates. They are not, as has been claimed, "competent alternative providers" but enter into the workforce as inexperienced novices. They are not capable of "doing the work of architects", just as graduate members of IEAust. are not capable of practising as a CPEng/NPER. There has also been confusion about the purpose of the Architectural Practice Examination. As you will see from the National Competency Standards in Architecture, an important segment of the competencies necessary for the practice of architecture (eg. documentation, contract administration, etc) is obtained **after** graduation in the structured practical training period and confirmed by examination. (The system in fact appears to be the same as the Stage 2 Competency Based Assessment of the 3 year training and oral examination mandatory for admission to CPEng and NPER.)

I am puzzled that the motives for adopting this process should be admired in one profession and the subject of unfounded suspicion in the other. I think the implication that the APE may deliberately be used as an artificial barrier designed to limit the numbers entering the profession is unfortunate. I have not seen any evidence that would substantiate it. The examination may well be a worrying experience for some graduates and it is quite possible that sometimes examiners may be overzealous. But to me it is inconceivable that the barriers have deliberately been set too high. What would it achieve? The next generation is no threat to experienced practitioners; they have already shepherded them through their period of

training in preparation for this last hurdle, why would they want to frustrate it? And why would it be any different in a self-regulated system since the same people would be conducting it for the same purpose?

The connection between this presumption and the so-called leakage of graduates from the architectural profession is equally unclear to me. Employment opportunities fluctuate, times change, the young cast around before making a commitment, some of them will change direction, some won't. I don't believe it is possible to reach any conclusions on such flimsy grounds. A recent survey of architectural graduates indicated that as many as 15% of the survey group were undertaking further full time study, maybe this is a significant factor? Has a comparable study with other professions been undertaken or is the evidence simply hearsay? It will be very interesting to see whether a similar pattern emerges with engineering graduates over the next decade, I suspect it will.

Accountability and Transparency

In the hearings you frequently referred to the perceived lack of accountability of the architects boards' proceedings and compared them negatively with the apparent transparency of the engineering profession. This surprised me a great deal.

The NSW Board of Architects is bound by the **Freedom of Information Act**, the objects of which are to ensure that information concerning the rules and practices of Government agencies dealing with members of the public is made available to them. As registrar, I was obliged to submit a summary of the structure, functions, operations, publications etc. of the Board to the responsible Minister at six monthly intervals. I was also required to supply details of any applications for access to information under the provisions of the Act, for publication. Complaints of non-compliance by agencies with the provisions of the Act may be referred to the Ombudsman or the Administrative Decisions Tribunal and the responsible Minister, with right of appeal to the Supreme Court. Section 63 (2) of the Act states that " **all proceedings against an agency may be commenced and maintained against the principal officer** of the agency as nominal defendant for the agency"

The NSW Board is also bound by the **Annual Reports (Statutory Bodies) Act** which requires it to submit an annual report on the year's operations to the responsible Minister and to both Houses of Parliament. The report must contain particulars of the Board's objectives, access, management, financial operations and any legal change. Copies of the Annual Report must be made available for public distribution.

The **NSW Architects Act** provides for appeal to the Administrative Decisions Tribunal against decisions by the Board not to enrol an applicant or against disciplinary measures imposed by the Board. Ultimate appeal is to the Supreme Court.

Similar legal obligations apply in all jurisdictions. I can say without hesitation that, as administrators of statutory authorities, my fellow registrars and I fully accepted that our duty was to serve the public interest. Had we not, these laws would surely have focused our

minds. It is not known what, if any, legal provisions for accountability are imposed on self-regulating professional associations.

Nor have I understood your comments that there is an absence of transparency in the accreditation of architects that could indicate a cover up of restrictive practices. Accreditation encompasses validation of university courses, examination of practical experience and assessment of equivalent competence. The competency standards and assessment procedures are adopted nationally and very clearly defined with avenues for appeal against failure to observe due process. In what way is the process perceived to be opaque? Is this a confusion about terminology?

Complaints and Discipline

I believe statements made in the hearing such as "state architects registration boards take no responsibility whatsoever" for accreditation and "they have even less accountability for who is on the register than - " to be unfounded. They suggest that the regulators of architects are not only slack but partial in disciplinary matters. As a former Board administrator I must confess I found these comments inappropriate in a public forum. By contrast it was asserted that engineers maintain quality, credibility and integrity of their brand by "very rigorous disciplinary procedures". The bad apples in the engineering profession are 'ruthlessly culled' it is said. What is the reality?

According to the IEAust Disciplinary Regulations, complaints against members are heard by a three person Complaints Panel, chaired by an engineer and including one non-member. A lay Board member would also normally participate in the NSW Architects Board's disciplinary proceedings. In NSW, disciplinary hearings are conducted **"without the exclusion** of the public". Interestingly, the IEAust disciplinary hearings are conducted in **private**. Appeals against a decision by the NSW Board may be made to the Administrative Decisions Tribunal and ultimately to the Supreme Court. Appeals against a decision of the IEAust or the NPE Board are made to an Appeals Panel of the Institution. Sanctions available to both professions are similar, neither body makes remedial provision for financial loss or damages which are properly matters for legal adjudication in the courts. Of the two, it could be argued that architects have the more transparent procedure.

How effective are the respective disciplinary proceedings in providing an avenue for removal of incompetent or dishonest practitioners? How does one find out? It is simplistic to rely on a comparison of numbers. I have learnt much about complaints in the UK where the dental profession has over two thousand unhappy patients making formal complaints about it each year who basically want revenge first and, with luck, money second. With architects it is the reverse; with engineers, who knows? I have been told, an unconfirmed comment, that only two engineers have been removed from membership of the Institution of Engineers in Queensland for disciplinary reasons in the last four years. What is the significance of this? Both engineers and architects undertake a limited number of commissions annually (compared say with UK dentists who may have 1500 patients on their lists, or UK solicitors where complaints against the profession have reached five figures per year). In consequence the number of complaints against them will always be low.

The primary function of the complaints procedure of any registration authority is to maintain the integrity of the register. As IEAust says in the Preamble to its Disciplinary Procedures, "The purpose of the Regulations and the discipline procedures is to ensure proper standards. The procedures are not capable of resolving any contractual or other legal dispute." Whilst mediation between dissatisfied clients and registered persons serves a public interest purpose, determination of restitution is a matter for common law. Practitioners should hold PII to provide public protection against loss or damage. In considering the rigour of disciplinary proceedings a distinction must be made between negligence (the failure to provide due care), incompetence (persistent failure to meet acceptable standards) and isolated lapses of judgement that all professionals make at some stage in their careers, not in themselves sufficient grounds for strike-off.

I do question whether the comparisons you have made are based on serious investigation of the issues involved and the means that have been adopted to address them. As an observer of many disciplinary proceedings I have found that professionals tend to be self righteous and over-critical of their errant colleagues who may bring the profession, and by association themselves, into disrepute. There is not much mileage in protecting incompetent practitioners for those who are trying to market their own skills.

Trade in Services

As I understand it, the Commission's view on the export of professional services is that if the engineering and accountancy professions can do it, a self-regulated architectural profession can do it. Dr Byron's experience in Indonesia is given as an example. (As it happens, Indonesia is unlike the other regional countries in that the architectural profession is only regulated by legislation in Djakarta.) But are the markets in which they operate sufficiently aligned for such assumptions to have validity? For example, what criteria influence overseas procurement; is the client likely to be an international organisations, public or private sector; would the service provider be acting as a primary or secondary consultant, independently or part of a consortium? Most importantly, what is the regulatory system in place in the host country?

The alarm shown by architects involved in the market at the damage repeal of the acts could cause to the export of services has been sufficiently consistent for it to be taken seriously. DFAT has made it clear that promotion of trade in professional services, including architecture, is a high priority for the Australian Government and careful research is needed before any irreversible decisions are taken.

In considering alternative mechanisms for export of services a distinction must be made between the small number of high profile firms already established overseas whose bona fides have been accepted, as in Dr Byron's example, and those who hope to break into this market. It would appear to be contrary to national trade objectives if mechanisms were introduced that favoured the appointment of well known firms, on the basis of projects previously undertaken in the region, at the expense of newcomers. There are certainly consistent reports that host countries look for evidence of statute backed registration as an

assurance that foreign architects meet established levels of competence. Professionals undertaking consulting work for international agencies, multinationals etc. have automatic access.

The GATS Initiatives

The WTO/GATS addresses a different aspect of trade in services in its promotion of liberalisation by means of multilateral mutual recognition agreements (MRA) and it is in this context that statutory regulation has special significance as an accepted starting point in negotiations within the architectural profession internationally. Not only are members encouraged to enter into MRAs but Art.VII of the Agreement expressly recognises the beneficial consequences likely to arise from bilateral arrangements by requiring parties to afford opportunity of access to other members. I have taken a particular interest in the current voluntary negotiations for mutual recognition between Australia and the UK and I believe its potential value as a benchmark for iterative recognition within Europe and further afield should not be underestimated. It is a matter for great concern that the negotiations are now seriously threatened by recommendation for repeal of the Australian architects acts.

It is a fact that statute backed registration of architects is almost universal whereas the regulatory systems for engineers and accountants are much less uniform with often a mixture of licensure and self-regulation of various elements within the same jurisdiction. This commitment to statutory control by the architectural profession may have been reinforced by UIA initiatives but, whatever its cause, it is part of the professional culture and cannot be ignored. This does not appear to be the case in the engineering or accountancy professions.

If the experiences of engineers are seriously to be considered as a model, it must be made quite clear just how successful the profession has been in securing access to overseas jurisdictions? Although the APEC Engineer project hopes to introduce its register at the end of the year, what is the extent of reciprocity that has been negotiated between participants? There are licensing requirements in several APEC countries, will the new register mean automatic licensure in those countries for all APEC engineers?

I attended the Darwin Forum on Reciprocity in Architecture in the Western Pacific Area last year and I am left with the perception that Australia would lose ground as a team player in the region if statutory registration of the profession were repealed. If this were to happen it could take years to re-establish credibility. Results of inter-recognition are entirely positive in terms of the ability to compete in foreign markets and the potential for benefit to Australian architects is dependent on the profession meeting international standards to the satisfaction of foreign trading partners. Care must be taken not to jeopardise these opportunities.

A crucial aspect of the Commission's recommendations is the damage that would be done to trade in architectural services if the recommendations were not nationally endorsed and the legislation was only repealed in some jurisdictions - a probable outcome, as borne out by the recent NCP review in Victoria. In this likely event the Mutual Recognition Act would no longer apply to architects in self-regulated jurisdictions and the current uniform national standards and accreditation process would cease to exist. According to DFAT, Australia has listed no limitations to market access in this sector but loss of current uniformity in domestic

regulation might be seen as trade restrictive in the GATS context. Has this matter been discussed?

Improving the Status Quo

The Productivity Commission undertook this review to assess the public benefit/cost ratio of the legislation and to consider whether there were more effective means of achieving the stated objectives. Although most written submissions focussed primarily on the public benefit issue, the secondary consideration of self-regulated alternatives, particularly those adopted by the engineering profession, played a greater part in subsequent discussions. My comments in this note have been largely directed to the latter comparisons and the opinions that you expressed in relation to them.

Despite your conclusions that the engineers, for example, have developed a system that provides more information about individual performance, is more transparent in its procedures, more rigorous in disciplining its members than the 'ramshackle' architects boards, and as effective in marketing its services overseas, I find the evidence produced to support this view unconvincing. Indeed, as I have explained above, I take the contrary view that the information provided by the statutory authorities is more reliable and their accreditation procedures more accountable than those of self-regulated systems. There are also indications that self-regulatory bodies may be more restrictive than the architects boards in their requirements for majority ownership of practising entities for use of a professional title. This is true in the case of the RAIA and the ICAA; it also appears to be the case in the IEAust.

In my view too much has been made of the defects in the current legislation. Outdated aspects of the various acts have been referred to at length but much could be corrected through revision of regulations under the acts or, at worst, by minor amendment to the primary legislation (an easier legislative option than passage of a new act).

I think the inconvenience of multiple jurisdictions has also been overstated. The geographic spread of urban centres would require regional administration in any form of national regulation and I should think an administrative process could readily be devised under the present arrangements to simplify transfer and payment for multiple registrations that would imitate a centralised national system. The Mutual Recognition Act serves the country well in this regard, with the only real impediment to national portability the variation in provisions for use of title by practising entities. Whilst not an insurmountable problem, it is hoped that the AACA proposals for certification of firms will prevail.

My own personal experience in NSW, where we were so close to achieving what I regard as enlightened legislation, does not support the view that failure of the various jurisdictions to amend their acts to accord with the AACA Legislative Guidelines is necessarily proof of lack of political will. The Victorian Architects Act was in fact passed in 1991. At this distance, I still find it difficult to believe the hurdles faced by the NSW Board. The Board's experience, shared I am sure by others, may show the situation in a different light:

- 1989: of its own motion, the NSW Board undertook a review of its Act; the legislative policy developed by the Board subsequently formed the basis of the AACA Legislative Guidelines.
- 1990: the NSW Business Deregulation Unit initiated a review of all NSW regulatory legislation and the Board was required to submit a RIS. The NSW Act was put on hold.
- 1990-1992: Trade Practices Commission undertook its national review of the regulation of the architectural profession. The NSW Act was put on hold until it concluded.
- 1993-1994: With Cabinet approval, the drafting of the new NSW Act proceeded and the Architects Bill 1994 was submitted to Parliament. The Bill lapsed when the NSW Parliament was prorogued in 1995.
- 1995-1997: The COAG review of the regulation of architects in NSW was instituted in 1995 and its Issues Paper published in 1997. Again amendment to the legislation was put on hold
- 1998-2000: The COAG review in turn was suspended to await outcome of the Productivity Commission Review. Amendment to the legislation remains on hold.

In 1993, in a letter to the NSW Premier in support of the proposed legislation, the Minister pointed out that adoption of the AACA Legislative Guidelines would "help towards national uniformity and mutual recognition" and " should provide a very practical method of improving and maintaining standards of architects". Cabinet agreed and the Bill was drafted. It has yet to be enacted. I attach a copy of an Explanatory Note summarising the contents of the Architects Bill, 1994, in which you will see that the reforms proposed in the AACA Legislative Guidelines have been incorporated. I have also included an extract from a notice of the introduction of mandatory CPD sent to all NSW architects at that time in anticipation of the passage of the Act.

In Support of Statutory Regulation

It is my personal belief, from observation of both systems, that regulation by a statutory authority is to be preferred over self-regulation by professional associations. The former is directed at the primary objective of establishing professional standards and those administering it are legally accountable for their actions. The latter have multiple objectives, which of necessity are influenced by expediency. This is not intended as a reflection on the integrity or professionalism of either system but simply a comment on process.

And, yes, I support the status quo because it is there. It would be irresponsible ultimately to reach a conclusion about the future regulation of the architectural profession without carefully weighing the cost imposed by dismantling the current system against the perceived potential for future benefit. These costs could be significant.

The Dangers of Repeal

The decision to adopt the Productivity Commission's recommendations would be a matter for each State and Territory. I share your view that it is unlikely that **all** jurisdictions would cede their powers to the Commonwealth for national legislation. However it is **equally unlikely** that they would **all** uniformly endorse the recommendations of the Commission and repeal their current Architects Acts for replacement by a self-regulated system. Almost certainly some jurisdictions would decide to retain statute backed registration for architects; Victoria has already received recommendations to this effect following the NCP review.

In such an event, as the Mutual Recognition Act applies only to statutory registration, the current uniform national system for the mutual recognition of architects would disappear. Membership requirements in a self-regulated environment would no longer be subject to the same accreditation standards and procedures as those adopted by the statutory bodies and the Commission's stated purpose to "achieve greater consistency in future regulation of the architecture the profession in Australia" would fail. The damaging consequences of this probable outcome appear not to have been discussed.

In my view, the risk of such serious consequences outweighs any perceived benefits that might accrue from repeal of the architects legislation. In any event it would take years to actually achieve the required legislative changes, in **all** jurisdictions, to the architects acts themselves and the consequent amendments to all other subsidiary and related legislation - and at what cost? It would take a generation to erase the public perception that an architect is a qualified professional. I suggest that the only realistic way ahead is to adjust and refine the present useful system.

In Defence of the Boards

In over 600 pages of hearings' transcripts I cannot recall seeing any acknowledgement of good work done by the Architects Boards, although I certainly looked for it. On the other hand you refer frequently throughout to 'ramshackle state-based' registration system, 'the litany of defects', the 'very lax' current statutes, the failure of state boards 'to take any responsibility whatever' for accreditation and so on. It is even implied that boards may not always act impartially and that examinations may be deliberately conducted to restrict admission to registration. As former registrar, I submit that the NSW Board has shown genuine commitment to introduce measures of good governance and meet its obligation to serve the public interest. To my knowledge it has always acted with integrity and in accordance with its statutory mandate. I believe that the other registration boards have done the same. On a personal level I must say that I would not have wished to be involved in the administration of a regulatory process had this not been the case.