20 December 1999

Productivity Commission
Architects Inquiry
LB2 Collins St East
Melbourne 8003

Dear Professor Sloan and Dr Byron

Review of Legislation Regulating the Architectural Profession

Attached is a submission to the Inquiry, together with attachments and an electronic form of the submission itself (in Word 97).

I was the Registrar of the Architects Registration Board of Victoria (ARBV) from May 1992 to December 1998. In that position I was also a member of the Architects Accreditation Council of Australia (AACA). I resigned to undertake further study fulltime. I am currently a researcher, with a special interest in discourse analysis as it relates to welfare and 'industry' policy.

In recent years I have made submissions to NCP reviews of architectural legislation in the Northern Territory, New South Wales, Queensland and Victoria: such submissions were on the whole in support of a continuing regulatory regime, and opposed to any form of self-regulation auspiced or controlled by professional associations. However, the views expressed, especially in the final submission to the review panel in Victoria in December 1999, were necessarily directed as submissions on behalf of the Board. They were made in good faith, as an advocate for the Board, and on behalf of the interests of the public in Victoria, whether architects, intending architects, consumers of architects' services, or others.

It is a matter for general concern that the Victorian Act is not included for legislative review, because it is a recent example of revised legislation, and if the proposals of the 1999 Victorian review are implemented, it would stand as a still more 'competition-friendly' instrument.

The submission I now make is not to be construed as in any way reflecting the views of the ARBV, nor does it in any way reflect a personal dissatisfaction with that body or with AACA. Rather, it is an opportunity to present views and question legislative approaches, which was not always available to me in the past. In addition, a period of detailed study in 1998 and 1999, with a particular focus on the National Competition Policy and associated developments, has led me to re-evaluate many of the positions I took for granted previously. Certainly from 1996 I was formally questioning the direction of much of the agenda for change in registration procedure, and sought, with temporary success only, to persuade the Victorian Board to resist a 'national' agenda where such an agenda included matters either contradictory to the Victorian Act or less than 'best practice' in minimising costs of and obstacles to

registration. It is salutary, in my view, to see how a national agenda can be negative, even harmful, if it proceeds along the 'lowest common denominator' path, in the same way as it can be beneficial, and also consistent, when the principles are more carefully established, as with the NCP.

This aspect, therefore, has been my focus in the submission. It is perhaps moot as to how notions of competition can be imported to discussion of procedure, where there is no evidence of attempts to limit competition. However, limitation of market entry through barriers of procedural and financial requirements amounts to restrictive behaviour which ought to be examined and justified.

Because the submission I drafted for the Board in 1999 is properly the Board's submission, I do not feel free to provide my (unbound) copy, but in fairness I should say that it presents a positive case for regulation with particular attention in Victoria to meeting the requirements of the National Competition Policy. It was intended to be the strongest, most consistent case I could argue at the time. The Board itself, or the Department of Infrastructure (both at Nauru House, Collins Street), might be willing to supply a copy. I have made reference to it, with page numbers, in case the Commission is able to access a copy. I attach my own detailed submission to the Northern Territory review. I prepared a briefer form, submitted formally by the ARBV through its Chairman and subsequently published by the Board in its occasional newsletter (*Information 41*). That document would be obtainable from the Board or from the State or National Library, but as it is a public document I have attached a photocopy. A submission to the NSW review is also attached.

The paper "Competition Policy and Architecture in Victoria" was prepared as a brief research study in 1998. A copy was later provided to the ARBV by way of pointing out the vulnerabilities of existing legislation, at the time of the NCP review in 1998. It is a designedly polemical view.

I am not an architect, and have not been trained to become one. Comments I make about the role of design, and the like, derive from observations and experience as the ARBV Registrar, but I believe you will find them mostly consistent with the views advanced by boards and in Issues Papers for legislative review.

I do not seek to have any part of the submission viewed as "in confidence". I would be happy to expand on or clarify any of the comments I have made, although detailed cases in point will now be limited to sources such as the Annual Reports I hold and my own recollections or records.

Yours sincerely

Jeffrey Keddie

Attachments:

1. Submission, Review of the Architects Act 1921 (NSW); 23 June 1997
2. Submission, Review of the Northern Territory Architects Act; 2 December 1996
3. Additional comment on the Draft Report, NT review; 28 October 1997
4. Submission to the NT review by the Architects Registration Board of Victoria (*Information 41*)
5. *Information 42*, news letter of the ARBV
6. *Competition Policy and Architecture in Victoria*
7. Submission to the Productivity Commission, hard copy and electronic form

REVIEW OF LEGISLATION REGULATING THE ARCHITECTURAL PROFESSION

SUBMISSION TO THE PRODUCTIVITY COMMISSION: DECEMBER 1999

JEFFREY KEDDIE

Contact Details:

Summary of Key Points

1. The implicit assumptions of most or all regulation of architects are that
(a) it is demonstrably in the public interest;
(b) it costs little;
(c) it should be maintained by default, on these grounds (that is, the presumption of National Competition Policy is reversed).

There is no substantial ***evidence*** of such public benefit; rather, benefit is inferred *a priori*, not argued from cases, that is, the evidence is largely negative, in that regulation is perceived to have proactively minimised problems of delivery and information asymmetry.

2. If the title 'architect' is to remain a protected title (by legislation), then a professional association should not control it: such control is tantamount to awarding an anti-competitive advantage. Such control could not deliver the same regime at similar costs to existing regimes.

3. There are significant procedural, rather than formally legislative, barriers to registration which amount to professional protection in their consequences, whether or not this is an intention.

4. Regulatory authorities are significantly controlled by the profession they purport to regulate and in particular by its principal association. Consumer representation is absent, insufficient, or tokenistic.

Additional Comment

The *Architects Act 1991* in Victoria is the most recent and comprehensive example of architectural legislation. The Act, and the regulations of 1993 and 1994, read with proposed amendments (principally repeal of provisions), provide an example of a baseline for 'plain English' profession regulation, if it is deemed appropriate to maintain such legislation.

If such an Act were further amended to remove provisions either unnecessary or by implication contrary to National Competition Policy, the resultant Act would be a 'model' in accordance with, but an advance on, the 'model legislation' agreed on and promoted by the Architects Accreditation Council of Australia.

Although the Act is formally excluded from the legislation under consideration, it should be considered as a comparative example.

Information Base

Before commenting further, I draw attention to Table 1 (*Issues Paper* p.5),[1] to raise questions on two areas.

1. Because of the State base for registration, dual or multiple registration is not at all uncommon. This means that when registered numbers are reported for each jurisdiction, there is a significant overlap, especially in the larger eastern states. This can only be detected by a name search and match. I suggest that overstatement of architects' numbers may be of the order of 10-20% or more (see Table 1, below). Previous estimates within Boards put the national numbers at closer to 9-10,000 individuals.

2. Royal Australian Institute of Architects (RAIA) membership is also liable to overstatement, at least in Victoria (to my knowledge), because of the range of membership categories. Thus, when Victoria was reviewing its legislation, RAIA membership figures *for registered architect members* indicated a total of about 11-1200. *It is these members who bear relevant comparison with numbers of (registered) architects.* Membership levels also vary widely between jurisdictions, with Victoria consistently the lowest, at not above 50% of registered numbers, and usually closer to 40%.[2] If self-regulation relies on association membership, there are different options to be considered where that membership is a numerical minority of the profession. Overstatement of representation may have critical implications.

The 1997 Northern Territory review of legislation also considered residency for registered architects. The information it derived from Boards showed the following:[3]

TABLE 1

State/Territory	**Registered Architects**	**Non-residents**[4]
Northern Territory	175	106
NSW	3092	329
ACT	685	393
South Australia	743	143
Victoria	2901	447
Queensland	2069	322
Western Australia	957	99
Tasmania	230	174
Totals	**10852**	**2013**

[1] Unless otherwise indicated in footnotes, '*Issues Paper*' refers to the Productivity Commission's document.

[2] ARBV *Response* 17, n.28.

[3] NT *Review* A3 (table), "Survey of Architects Boards, May, 1997".

[4] The terminology used was "external to state/territory".

As I advised the Secretariat Officer in the Northern Territory, the Victorian figure included overseas addresses and non-Victorian postcodes. I advised that the numbers were a good approximation, but not verifiable without a detailed survey. The Victorian Register also includes a "retired" architect category (these pay a reduced fee), but their legal standing is not differentiated. Architects not in practice in any one year amount to about 10-20% of the Register.[5] When adjustment is made for further multiple registration and for overseas residence, I think the number of architects actually in Australia, in practice, is closer to 9,000.

My general observation would be that there is a shortage of strictly accurate information about architects which, in view of their relatively small numbers, can result in misperceptions about their role, influence, and competitive position, especially when compared to other classes of practitioners broadly working in the same field.

The Market for Architects

(a) The definition of a profession

The definition offered (*Issues Paper* p.5) is unexceptionable, although the reference to adhering "to high ethical standards" seems problematical in any profession: it is an aim, certainly, but inclined to be at odds with the necessities of business. In any case, such value-laden terms should not be imported into legislation. A definition in the form offered is inevitably self-serving. At the least, it needs an addendum to the final sentence: "for a fee".

(b) Professional and non-professional services[6]

The single most characteristic form of market differentiation is the emphasis on the primacy of design. Architects by training[7] and inclination focus on design, broadly interpreted, while non-architect providers (unless they have the same training but remain unregistered) do not rely upon the same extent and depth of training, nor, in most instances, is design *per se* their focus. Architects seek to capture that section of the market for whom design quality, and therefore design centrality, is desired and affordable. The reality is that for much domestic 'architecture', design is furnished to a satisfactory extent (the satisfaction of the client: the 'market') at the level of competence of a drafter and builder, who may of course inform themselves about design through any number of publications and observations. The 'value added' component of an architect's design, generally incorporated into the whole project role (the architect as the client's agent), is sometimes seen to be a luxury, when it adds a

[5] See ARBV *Annual Report 1997-98*, 16.

[6] See also ARBV *Response* 17-19.

[7] Almost invariably nowadays a 5-year tertiary course. Numbers who complete Board examinations or the AACA competency-based assessment are statistically insignificant: perhaps half a dozen annually.

fee of between (say) 7 and 15% of building works. It therefore amounts to a minority section of the market.

It is not helpful to mark this differentiation by appeals to distinctions between 'professional' and 'non-professional' provision. Building designers, for example, strenuously maintain both the design integrity of their work, including claims of equality with architects, and the 'professionalism' with which it is carried out. The 'professional' distinction too readily becomes one of social perception.

Gradation is recognised in the registration regimes: generally speaking, any person may do the work of an architect but only an architect may be *called* an architect.[8] In this there is a distinction from other professions, such as medicine and law, such that there appears to be implied a limitation on the 'harm' an architect or non-architect can do. Proposals to control architecture – work actually done - and the title with the same level of enforcement have found no acceptance in Australia in the 75 or so years of regulation.

Architects themselves increasingly accept that the market demand for their services will range from the design-only phase to the full service of what amounts to 'contract administration' or 'project management'.[9] The market is certainly not exclusively one of 'architectural design' services. Most architects, if the opportunity offers, will seek management of the project from inception to inclusion, to ensure that the design concept and its implementation are integrated.[10] The design is the starting point, and the feature most readily noticed, but in point of time it can occupy rather little of the attention to detail, management and budget which an architect's traditionally defined role also encompasses.

Architects therefore compete with drafters (usually possessing TAFE qualifications[11]) and builders with an interest in their own designs; developers, large and small, who may maintain designers (and even architects) for some services; and project and contract managers who specialise in delivering such phases of a project. The terminology, in sum, is shifting and imprecise, while Architects Acts are

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[8] There are a few exceptions to this, but they serve to prove the rule. In Victoria, for example, an architect has a general exemption from some provisions of the Building Act, so that an architect can undertake tasks as if he or she were a 'building practitioner' (itself a prescribed title). This confers no special privilege; it simply gets around the separate registration procedures for the classes of practitioner who wish and need to be able to sign for certain approvals.

[9] In Victoria, regulation (4, 8, 9, 12) forbids an architect from acting as a "project manager" where that amounts to being a "developer", but the distinction has not proved helpful and no disciplinary proceedings have been initiated for using the prohibited form of words.

[10] This point was emphasised in the Victorian Board submission to the 1998 legislation review (ARBV *Response* 3, 40-42), on the basis that the client was rarely in a position to deal with the variety of sub-contractors and 'expert' providers. The architect's role becomes crucial, in this scenario, to ensure quality delivery and adherence to a properly informed brief. It is the 'information asymmetry' argument.

[11] Disputes arise from time to time about exemptions from title control for "architectural drafters". In Victoria that exemption has been extended, although the Act (s 7 (2)) does not, strictly speaking, apply to individuals but only to organisations. Questions then arise as to how or if the Board can require that users of the drafter term can be required to hold an approved qualification: the general legal position seems to be that such control is outside of the Act. The same exemption provision has been used to exempt landscape architects, although their range of activity does not extend to buildings, and they cannot therefore be readily brought under the Act. Terms such as "building designer" or "building technologist" escape the Acts.

generally confined to a much narrower spectrum of language but within the same broad spectrum of activity. Legislation itself creates problems of perception and delimitation for the market.

In the residential sector the competitive environment is particularly evident, while in the commercial sector architects tend to offer design and advice service to developers, rather than operating as developers on their own behalf. Residential 'developers' often maintain a 'staff architect' or contract with an architect, both for the service provided and so as to be able to use the description 'architect-designed' as a *cachet* and to avoid conflict with a registration board. The Victorian Board, for example, has not been altogether happy with this practice, because it is difficult to monitor, but it has had to accept that the law is observed in the letter (and that chances of a successful prosecution are too small to risk), and that many competent architects are willing to provide their services on such a basis.[12] (Complaints about the arrangement rarely come from clients of developers; the principal complainants are other architects.)

Architects undertake major 'public works' (the MCG grandstand and the new Museum are recent cases in point) where their design credentials secure them the contract, and their particular image is reflected in the work. In such cases, a shared role in 'project management' is likely, because of the complexity of the task.

In between there is a role for institutional work, especially where it is specialised in, say, schools or health facilities: here the architect may well have a significant management role, as well as design input, the distinction between this type of project and residential work being one of scale rather than of kind.

It is not therefore possible to draw a ready distinction between sectors and associate that with the range of services an architect offers.

Most architects compete within their local community, and then within their state. The number who compete outside the state or internationally is small, generally limited to larger practices, although such practices may have a very significant profile and employ many architects.[13] On the other hand, registration costs are low (firm size is not a criterion for fee level), so that practitioners can fairly

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[12] See ARBV *Response* 25 for details and hypothetical problems. A specific instance, cited without criticism or implying impropriety, is Fasham, a developer in Melbourne. As ARBV Registrar I occasionally had to check with the director, Mr Trevor Fasham, about the firm's use of architects, and I also participated in an RAIA information workshop (for architects) with one such architect, who explained how his role was limited to producing the initial design in accordance with the client brief, after which the firm took over the project. A residence so completed could then reasonably be described as "architect designed".

The contrary interpretation of this process (citing the same example, but unnamed) is in the ARBV *Response* 25: "It is not that the service provided is defective, nor is the client necessarily unhappy, but the use of "architectural" to describe the design aspects of the project is a limited one, and the implicit asymmetry of information remains unaddressed." The client has not been "made aware of the fuller scope which might be expected from a more conventionally "architectural" service." The tenor of such assessments is that there is an implied asymmetry of information, but the counter view would be that the developer, like the client, made an informed judgement as to how much 'architecture' was wanted, and for how many dollars. Would more information have meant a different decision?

[13] The ARBV *Response* 31-32 details some examples: Denton Corker Marshall, based in Melbourne, operates internationally, with a particularly high profile in Asia; Buchan Laird and Bawden is one of the ten largest architectural firms in the world.

readily afford to maintain multiple registrations so as to minimise delays if opportunities for commissions outside their home jurisdiction arise.

International competition and registration: an example

International competition within Australia is limited by registration procedures, insofar as title is concerned. Where a project is sufficiently esteemed as to make international competition desirable, some form of local association may be required.

The practical consequences of registration requirements are illustrated in the experience of the Federation Square project in Melbourne. When the agreements were drawn up for signature, after a successful entry from two London-based designers (LAB) in association with a local firm, it became clear that the use of the term 'architect' in the contract was an obstacle. The overseas designers were not architects legally (not registered in Victoria), nor were they registered as architects at their home base (UK). They held satisfactory academic qualifications and had demonstrable periods of experience at a senior level. The ARBV accordingly registered them to enable them to continue, and waived its normal expectation of at least one year's practice in Australia or New Zealand.[14] (There was some disquiet expressed at this move, because it was contrary to established practice in other states.) Similarly, when the proposal for refurbishing the National Gallery Victoria was pursued, the successful 'architect' (Dr) Mario Bellini was promptly registered (there was no dispute as to his standing in the world of architecture).[15]

Limitation of international competition is therefore more a function of application of local legislation than an in-principle problem with reciprocal recognition. The very fact that there can be variation in outcomes between equivalent jurisdictions, and based only on procedural and policy, not legislative, issues, suggests the possibility of inequitable treatment, which is crucial to assurances of 'open competition'.

This said, most competition, by volume, is local and jurisdictional, with a particular focus on capital cities and regional centres. That is probably an inevitable consequence of Australia's geography and location in the world, as well as the nature of the market for architects' services.

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[14] That 'requirement' is generally mandated in all States and Territories, notwithstanding the precise wording of legislation. In the Victorian Act (ss 10, 11), for example, there is no obstacle to the Board's acceptance of experience wherever gained, so long as the length of the experience complies and the Board is satisfied as to its suitability. This needs to be noted for discussion in the ways in which procedural control of registration can bypass the apparent explicit intent of the law.

The formal review of all academic qualifications obtained overseas, which is AACA policy and AACA-managed (discussed further below), would also have served to disrupt the contract process because of the time required to process the application, copy and circulate documentation, hold the interview, then formally report the outcome to the registration authority.

[15] See ARBV *Annual Report 1996-97*, 33. Dr Bellini sought registration (approval) for his company as well, but because the Victorian Architects Act cast its requirements in terms of the definition of a 'company' as, in part, the holder of an ACN, it was beyond the Board's power to grant approval. Victorian law probably would have permitted registration as a 'business name'. This kind of international restriction can be disruptive for business, and is not always transparent to applicants.

Clarifying legislative objectives

It is a legislative shortcoming that objectives are not stated beyond the generality of the Act's purpose.

While objectives can readily be inferred from Architects Acts, the Victorian legislation is an example of how formal statement of objectives can determine the relationship between the registering authority, on the one hand, and those it registers and the public who use the services, on the other.[16] There is a natural confusion on the public's part as to what exactly a registering authority offers and its 'allegiances'. Among architects there is often an equal confusion. The Victorian Act clearly sets out the 'public protection' role of the Act and the Board, and makes it clear, too, why consumer representation in included. Without such statements the following (in my experience) arise:

(a) The registering authority does not know its own role clearly[17]: it is required to deduce it, or 'inherit' it.[18] It is desirable that the role be spelled out in law, at least in outline, rather than left to inference or political direction. For incoming Board members, a clear statement in legal form (possible under a 'plain English' regime) assists them in understanding their duties, and in resisting an 'in-house' culture which they may encounter.

(b) The authority readily comes to act as the architects' representative, not the public's advocate. The Victorian Board, as it has educated itself about its public role since 1991, has dramatically increased references of architects to Tribunals (disciplinary hearings), while at the same time removing forms of regulation which did little or nothing to assist the public.[19] The objectives were fundamental as a reference point in this shift.[20]

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[16] The NSW Act expresses its objectives more broadly, but is consistent in outline with the Victorian Act. See NSW *Issues Paper* 9.

[17] See, e.g., ARBV *Annual Report 1998-99*, 9.

[18] Hence, in NSW, the 'mission statement': NSW *Issues Paper* 9. The Queensland Act has the same generalised form of words for its objective (Queensland Board *Review* 1). This must then be explained as to its practical effects (*ibid.*).

[19] However, the making of new regulations in 1993 was significantly delayed because the RAIA continued to object to any regulations which did not also regulate "architectural competitions" (see the Appendix to the Northern Territory review submission). The ARBV agreed to continue to explore this issue, but finally abandoned it formally when it became clear that no form of regulation would receive approval from both Parliamentary Counsel and regulatory review bodies.

[20] The limited, clearly defined role of the RAIA (s 47) was also important: the Institute has the right to nominate 3 persons (inevitably architects, although that is not specified), but the Minister nominates the member from this panel (i.e., one member of a total of 8 members). Beyond that Board membership entitlement, the significant absence of the RAIA or like organisations from the legislation has allowed the Board to maintain its own 'independent' position. With one exception, in my 6 years, the RAIA representative soon adopted a 'Board focus', as a matter of propriety, rather than acting as an advocate either for architects or for the nominating body.

The exception indicates a weakness. It is open to the RAIA to nominate an office bearer, which inevitably introduces a conflict of roles. The same problem arises in the election of 2 architects to the Board (over which there is no other control: the Minister has no power to reject the results of the election).

(c) The public cannot readily distinguish between the authority's role and that of the RAIA, and through this confusion mistrusts the impartiality of both. Those who complain to the RAIA about a non-member rely on RAIA advice as to where they should complain (in my experience, the RAIA is punctilious about providing that advice), but the complainant is already bemused by differences in approach and, more importantly, in legal standing. The public is entitled to clarity: even if it requires explanation, a separation between the statutory body and the professional association should be directly stated.

(d) The RAIA may expect the authority to promote professional interests (although the RAIA has become more sophisticated in this area, as it properly sees advantages to being able to promote its members in particular vis-à-vis other architects).[21] In Victoria this arose with proposals to bring architects under further parts of the Building Act or to amend the Architects Act to incorporate the Building Act requirements: no matter how the proposed 'alignment' was handled, the ARBV objective (regulatory consistency and simplicity) and the RAIA agenda (a trade-off of greater privileges for 'more' regulation, with a genuine desire for 'quality' control) could not be reconciled, because the ARBV could not allow itself to be seen supporting professional benefit, even though a majority of its members were architects. Regulatory consistency has remained unresolved, even after the NCP review of legislation in 1998. However, the objectives do provide a statement which both parties can use to separate their roles and perceptions, however long that process takes.

(e) Government assumes that the authority and the professional association will have a commonality of interest, so that, for example, draft regulations will be forwarded for association imprimatur rather than for eliciting stakeholder comment. In areas like National Competition Policy this can be critical: associations try to retain 'ethical' or practice-based regulations which cannot be sustained as competition-compliant and in any case may be 'dead letter'. The Minister under the previous Government in Victoria was most reluctant to proceed on matters where the ARBV and the RAIA were opposed to one another.[22] There was a fundamental imbalance in such a situation, where the ARBV sought regulations (and their repeal), but the RAIA wanted trade-offs. These issues of political feasibility are at least addressable if the legislative objectives are clear.

The overlap between the Board and the RAIA, even in Victoria, is set out in *Information 32* (December 1993).

[21] An instance where professional associations assumed a greater influence than was their entitlement occurred in an election of architects. A notice was placed in a newspaper, as required by the Act, calling for nominations. Two associations objected that they should have been approached (by the Returning Officer), to seek, in effect, nominations, and when nominations closed both lodged objections and sought to have the proceedings annulled. (They were not, and the Minister duly approved the election results.) See *Information 42* (July 1997).

[22] The Minister proposed at one point that transfer of regulation be explored. The working party found that the same regime could not be offered at comparable cost. However, it was significant that the RAIA was given the degree of involvement to provide advice. See *Information 34* (November 1994). The report is included as an attachment to the submission in the Northern Territory review.

The task of registering authorities is harder, and the public and architects less well served, by any lack of legislative clarity as to intent.

Implied general objectives

The objectives of the Acts generally are:

(a) To provide a registration system, and therefore a register;

(b) To provide for dealing with claimants to the title (and therefore expertise) who are not registered; and

(c) To provide for disciplinary procedures against offending architects.

That is, the Architects Acts are directed to the public benefit, through redressing asymmetry of information, provision of an informed resource, and handling questions of competence, all backed by legal powers.[23] This fundamental role is consistent across jurisdictions, and, in a country the size of Australia (in population), with guaranteed free trade between states, it is beneficial for the consistency to be explicit. By the same token, desirable consistency should not mean adherence to the lowest common denominator. Rather the goal should be 'best practice'. In this regard, national objectives, such as embodied in the NCP framework, are a useful control over tendencies to maintain outmoded restrictions.

Proposed objectives (RAIA)

The difficulty with the objectives the RAIA has proposed, which are laudable statements of intent in their way, is that the first assumes far too many qualities left undefined (it says nothing, but says it 'finely'), while the second could be read to imply a control over services at large in a way which is not at present allowed ('architectural services are provided by, and under the control of architects'), and brings in further constraints on architects themselves, again without definitions of key terms ('competency and resources'). These forms of words are broad social and educational agendas not readily addressed in regulatory regimes, which by their nature deal with certification of minimum required competence. Such objectives imply a role which extends beyond the role of an authority, and introduce matters of critical judgement which are not beyond dispute.

The second objective also appears to mandate forms of intervention into an architect's practice to determine the "necessary … resources": are these to be material, technical, intellectual? One regular issue between Boards and the RAIA in recent years has been the question of 'compulsory professional development'. However desirable it may be that skills should be reviewed, renewed and upgraded, the regulation of that process has foundered on questions of

(a) Who will provide the training and at what price?

(b) How will training programs be accredited?

(c) Who is really the beneficiary of the programs, the provider or the trainee?

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[23] See, e.g., NSW *Issues Paper* 9.

(d) How will 'distance' education requirements be accommodated?

(e) What will follow from failure to complete the training?

(f) Who will determine what level of training is required for what type of practice?

These questions can be multiplied. At present, the principle is acknowledged but the mechanism not agreed.

Criteria for registration - academic

Registration by its nature restricts the supply of architects: this is a fundamental, obvious point. Restriction is limited to title.[24] A still more fundamental restriction is at the level of numbers in architecture courses. These are restricted, and entry scores remain high. This is a matter for Government, and is not addressed in regulation.

Against this it must be said that a considerable number of those completing architecture courses do not proceed to registration. Whereas it is unusual for a medical graduate not to proceed to a registrar position and thence to registration, whatever the eventual future, it is common for architecture graduates not to proceed. Architecture as a course is, like many tertiary courses, an excellent intellectual preparation for many careers, many of which will offer higher salaries (and more immediately accessible salaries). On balance, therefore, I do not think that registration serves to limit entry to the profession, *once it is accepted that a qualification is itself such a limitation.*

The continued existence of pathways other than a tertiary degree suggests that there is no absolute academic criterion, and therefore no absolute constraint on entry to the profession, although the alternative pathways are difficult and expensive (though not perhaps disproportionately so, if the full direct and opportunity costs of architectural study be considered.)[25] Architecture remains unusual as a profession in allowing such 'lateral' or 'articulated' entry, and in preserving a consciousness that many of the best known architects in modern times were not academically credentialled.

Criteria for registration - 'Good character'

Good character provisions (Victorian Act s 10 (a), e.g.) are now redundant. The Victorian Board consistently received legal advice that unless it could define what such words meant, and was

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[24] ARBV *Response* 27 makes the case that in 6 years only one academically qualified applicant for registration continued to be refused it, on the grounds of a failure to demonstrate adequate knowledge of practice. However, the same applicant was not refused review at any stage, and considerable efforts were made to find assessors who could be seen to be impartial. This single instance was out of a total of 623 applicants, while annual approval rates in general are consistently the highest in Australia (95-100%), with the balance of applicants succeeding on their second (very rarely, third) attempt.

[25] An attempt was made to provide indicative costs in the ARBV *Response*, both as directly incurred community costs and the opportunity and direct costs of participants.

empowered within the terms of the Act, to give effect to such a definition, it merely opened the way to an appeal against any refusal to register. Such provisions should be repealed.[26]

Related provisions relating to 'mental incapacity', by which it is presumed some form of psychiatric illness or disability is intended (provided for, e.g., in NSW and Northern Territory legislation), are outmoded and discriminatory. Sufferers from illness should not bear additional burdens of being required to demonstrate 'capacity' beyond what is normally required for social functioning.[27]

Questions of criminal conviction are more vexed. The ARBV, through its Tribunal, cancelled the registration of an architect in 1992, but an appeal to the (then Victorian) AAT was successful, both on procedural grounds and on the grounds that the architect had paid heavily for his offence and ought not to be required to continue to pay.[28] Although legal advice was that the latter point might be open to successful challenge in the Supreme Court, the issue was not pursued. The architect concerned resumed practice and has not been the subject of further complaint. The form of the Victorian legislation (s 32 (e)) is, in my submission, defective, in that it does not allow for reform or rehabilitation, and sets no time limit on the effects of a conviction: an architect could be brought before a Tribunal and, in effect, summarily suspended, for a conviction incurred many years previously. Because of the form of words in the section, it is difficult for an architect charged under it to offer an effective defence, so that the Tribunal is left to make an arbitrary determination (judgement) as to penalty.

The Victorian instance also points to the risk of anti-competitive or merely prejudicial action: a competitor or client has an effective 'club' to use, without any requirement for *bona fide* motivation; the registering authority can judge that a person is 'not the sort of person we want' without being required to relate this perception to the architect's capacity to deliver competent services.

Gender and registration

What is more a concern is the ongoing gender imbalance among registrants. Given the proportion of the architecture courses who are women (up to 50%?), it would be reasonable to expect a reflection of that proportion in the Registers. It is not the case. Victoria is the high point: 25-40% of applicants in recent years and 12% on the Register overall are women[29] (there is an inevitable hysteresis in attempts at raising the latter figure quickly, because architects routinely remain registered for many years, and gender imbalance is preserved in the figures, even while the proportion of younger architects rises).

Statistics for Victoria, as new registrants, are:[30]

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[26] See also NSW *Issues Paper* 23.

[27] *Ibid.*

[28] The ARBV did not publish the outcome so as to identify the architect (the Act authorises publication of suspensions and cancellations, but only after all review proceedings are concluded), but AAT proceedings then, as with VCAT proceedings now, were routinely identified in the Law Listings for the day, and the reference could pursued in Jacobs and The ARBV Tribunal, at the Victorian AAT, 1992.

[29] ARBV *Response* 27.

[30] ARBV *Annual Report 1998-99*, Statistics.

TABLE 2

	Total new registrants	Women registrants	Women %
1995-96 [31]	106	26	24.5
1996-97	133	33	24.8
1997-98	207	63	30.4
1998-99	127	47	37.0

Although data are incomplete, this can be compared with earlier figures for the numbers seeking assessment of architectural practice experience:[32]

TABLE 3

	Total applicants	Women applicants	Women %
1985	95	16	16.8
1986	88	14	15.9
1987	80	9	11.3
1988	95	19	20.0
1989	98	20	20.4
1990	43	9	20.9
1991	79	19	24.1
1992	60	18	30.0

The residual imbalance in the Register and in the transition from training/education through to registration, which may be more pronounced in other jurisdictions, should be examined to see if a form of affirmative action is called for, not only as a social goal but to redress what might be a significant wastage of human potential and community investment. One initiative in Victoria, albeit on a limited scale, was the affirmative recruitment of 'examiners' or assessors who were women architects, to 'send a message' to candidates and the profession.[33]

Preferred registration criteria

I have long been of the view that the five years of full-time study, followed by two years of supervised or reviewed experience (and a further examination, of which more later), is excessive when compared with other professions, and given the nature of the architectural profession itself vis-à-vis comparable professions. My point of reference is usually engineering (I was general manager of an engineering

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[31] This was the date when statistics were kept in detail and published in the Annual Reports, but Board records would enable calculations for earlier years. Years recorded are the financial years used for the Reports.

[32] ARBV *Annual Report 1992-93*, 42.

[33] ARBV *Response* 27. Salary discrepancies are more pronounced, but these lie outside of regulation (ARBV *Response* 14).

In Victoria, the (then) Minister also queried the predominantly male membership of the Board: women were at most alone on the Board, until the most recent period, when the number rose to two. However, the difficulty was not just in urging women architects to stand for election (one did, was elected and re-elected), but in encouraging other nominating bodies, including Ministers themselves, to propose women members.

faculty for nearly five years): I do not believe it is sustainable to argue that architecture requires a five-year course while engineering can be satisfactorily accommodated in four. I have yet to see any evidence of dissatisfaction with the engineering graduate which would be offset by a further year's study, while the anecdotal comment on architecture graduates, made by their architect-employers, is that they are not very useful initially and require much on-the-job training; this justification usually accompanies claims to restrain their early wages to low levels. Practical training could as well commence after four years. It is generally recognised that the registration component of architectural education is equivalent to four years' study. (That has been the accepted view in Victoria: the regulations set out minimum subject equivalents.[34] Schools of architecture argue that they offer *education*, not only *technical training*: that broader education component accounts for the additional year of study.)

A fifth year of study, or a 25% increase on a minimum course, is a significant cost to the community in training, to the individual in support and foregone income, and to society overall in foregone revenue from taxation and productive output.

Criteria for registration - 'Minimum age'

The minimum age requirement, where it exists, is unjustifiable, in view of the time required for tertiary study and experience. In practice it is difficult to imagine completion of a 5-year course and 2 years of experience which yet resulted in an applicant too 'young' to be registered.[35] Has such an argument been applied to other professions? And how can such provisions be made to equate with general anti-discrimination legislation?

Registration and procedural constraints: the AACA examination

The registration procedure is not entirely what is expected on the face of many, or most, Acts. It is not, that is, completion of an approved qualification and obtaining of approved experience, but includes additional requirements.

The Victorian Act, for example, requires a prescribed course (a degree course is specified in regulation), together with two years' experience to the satisfaction of the Board. In the absence of a completed course, the applicant can complete Board examinations, together with a longer period of experience (s 10, *Architects Act*).

This is not what actually happens. There are additional requirements imposed which arise out of procedural determinations and a regime which is adopted de facto *(more commonly than* de jure*) Australia-wide.*

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[34] Regulation 50; ARBV *Response* 20. The 'prescribed course of study' (or 'syllabus') is detailed in ARBV *Annual Report* 1992-93, 31-39.

[35] See, e.g., NSW *Issues Paper* 23.

At the base level, Victoria, in common with other states, usually specifies that at least one year's experience should be in Australia or New Zealand. This is sometimes discounted where the ARBV believes that the building and planning regimes overseas are comparable (the UK, the US, some parts of Asia), but it involves application of a judgement which is not formed systematically on the basis of evidence nor is it systematically applied. Thus the overseas-experience applicant confronts the 'Catch-22' of registration, often doubly effective: he or she need recognition through registration so as to be able to gain employment and experience, but finds that the Board will not accept the experience (which sends a 'message' to prospective employers) and may also not recognise the credential. If the latter is accepted on review (at a cost), experience remains a hurdle.

Even if appropriate experience is obtained for a year, a further hurdle remains. This is the AACA Architectural Practice Examination.[36]

The AACA is a body incorporated in the ACT. It has no legal standing in many of the Acts, and certainly not in Victoria. Boards 'subscribe' to AACA membership, through a levy in proportion to registered numbers. They meet annually, as Board Chairs and Registrars, to determine fee levels for the coming year and broad policy directions. All Boards use AACA procedures to assess suitability for registration, which involves payment of fees (usually around $500), and substantially higher hurdles for possessors of overseas qualifications.

A candidate for registration must complete an AACA logbook,[37] sold through the Board, and AACA documentation, and pay examination fees which, in Victoria, are not envisaged by the Act nor authorised under regulation. Appeals against assessment incur further fees. The form of examination has been a written exercise (completion of a business letter, but for the 'information' of examiners only, not for pass-fail), and two 30-40 minute interviews with separate panels of two architects, one examining the applicant's knowledge of practice in theory, the other reviewing the experience the applicant has cited in the logbook. Successful completion of both is necessary. An applicant who fails both parts may be required to wait for up to a year before resitting, and is liable for full fees. An applicant can lose 'credit' for successfully completed components after certain periods.[38]

As a result of changes to this procedure, AACA will now require a lengthy (3-hour) formal written examination on architectural practice (from 2000), as well as interviews (up to 1 hour), as well as the formal logbook submission. In addition, the procedural requirements of the form of examination

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[36] See, e.g., ARBV *Response* 20-21.

[37] Strictly speaking, the logbook is unnecessary as a legal or practical measure (it does assist most candidates by providing a readymade format). Where an applicant objected to its completion, I would waive that requirement, provided that all other information the ARBV required was in an equally assessable form (not too difficult to ensure). Other jurisdictions may have additional requirements: NSW, for example, may not admit any applicant to examination who has not attended an information briefing. Almost all jurisdictions purport to 'require' the logbook.

[38] In Victoria, most of these requirements were weakened or removed in the period from 1992 to 1998, and candidates' access to further review generally facilitated. One applicant, for example, was examined in full on three occasions, but eventually satisfied the examiners. In several instances, personal problems, such as nervousness and even varieties of depression, had to be accommodated through familiarising applicants with procedures. It seemed unreasonable to refuse registration when demonstrably the applicants were qualified by training and experience, and would work in an environment appropriate to their characteristics, but were hampered by the examination prospect itself.

may reduce the availability of assessment from monthly to something rather less: AACA must take on the assessment of responses and their moderation; there are concerns that applicants may seek to be examined in a jurisdiction which offers more frequent assessments.[39] (All registration boards have now agreed to follow this new procedure.)[40]

For registration applicants who have completed five years of study and at least two of experience, who can produce any number of testimonials as to their competence, a further formal examination is a significant imposition, personally and financially. It is a salutary experience to witness the anxiety with which applicants approach the examination, and the deep sense of failure they experience if all does not go according to plan: they are, after all, now at least two years away from formal assessment, and much, including their remuneration, rides on the outcome. All that is happening is that largely untrained, usually 'senior' architects, are reviewing their peers' employees and recommending admission to the profession on the basis of interviews (at present) or interview and written examination.

This remains a significant, unnecessary procedural barrier to registration and entry to the profession (i.e., holding title). There is no compensatory benefit to either the public or to architects themselves. It remains a way for predominantly male, almost invariably older architects to assert their professional control. There is little or no quality control over the assessment process. Where such control is sought, through AACA review and 'accreditation', it remains fundamentally within the Board's 'gift', it is demonstrably not independent, and it is usually outside of the legislative framework.[41]

The requirement is more onerous than necessary and should not be maintained. Its invalidity is increased by a reliance on extra-legal agreement between Boards rather than formally legislated provisions which are reviewed by Parliaments or Parliamentary Counsel: it is a way of imposing controls without meeting accountability requirements which would otherwise apply. It serves to delay

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[39] Boards frequently ask the 'home' jurisdiction for 'permission' to examine a non-resident applicant, even though the legislation contains no obstacle. I once arranged for the examination of an ACT applicant, who had been refused registration by the local board. The applicant passed, registered in Victoria, then sought ACT registration under mutual recognition arrangements. The ACT representative at AACA objected strongly. (After that experience, I declined to provide ARBV examiners with any such 'approvals' and advised them that they examined under the Victorian Act, which contained no residence requirement.) On another occasion, however, I arranged for the assessment and registration of a Northern Territory applicant, who could not for technical reasons satisfy the NT requirements except by mutual recognition. That arrangement was amicable, although costly to the candidate.

[40] The ARBV 'held out' longest, but has now agreed to join the other boards, notwithstanding the formal legal wording of its Act (see ARBV *Annual Report 1998-99*, 21).

[41] The ARBV sought legislative amendment to give it power formally to adopt AACA procedures and fees (*Response* 23). To date this has not been resolved. There are formidable legal objections in Victoria to any authority seeking to delegate its powers and duties away from the regime granted by the Parliament. That fundamental concern tends to escape other boards. It is not, however, a matter of legal nicety, but a basic responsibility which is encapsulated in the requirement to report in writing annually to the Parliament through the responsible Minister. If there is delegation outside the jurisdiction, the Minister's sphere of responsibility is also compromised. Parliamentary Counsel has therefore always declined approval of regulations or proposed amendments to the Act which so move 'beyond power'.

professional entry by a further period in addition to extended tertiary study and minimum required experience.

Criteria for registration - Overseas qualifications and registration

Until recently, overseas qualifications were reviewed irregularly, and allowances for equivalence made where it was apparent on the face of course content and through experience (usually by way of visits or contacts with registering authorities elsewhere) that the level of architectural education in another country was comparable to that in Australia. If a qualification appeared on the 'list' the applicant proceeded to gain 'local' experience, usually a minimum of one year, then register through the AACA examination and Board procedures taken together.

However, this list was discontinued (in about 1996), except in Victoria,[42] and overseas-qualified applicants found themselves faced with an expensive AACA review of their qualification, followed by the registration requirements. Further, if, say, 16 applicants appeared from New York with the same qualification, all 16 would be interviewed and assessed, with, of course, the possibility that an assessment could be adverse; that is, the person not the qualification was the focus of review. Where such persons held the NCARB qualification (the US national level) or the higher RIBA and ARCUK levels (in the UK), for example, the benefit of a further assessment was questionable, even to the assessors themselves. (The Convenor of the Architectural Practice Examination in Victoria, especially in the years up to 1997, believed that much time and resources were wasted in the re-reviewing of qualifications, and a by-mail system was substituted which incurred only a cost of his time, and no fee to the applicant.)

For many applicants this review procedure is a substantial financial penalty at a time when they can ill afford it. It is almost insulting to their professional standing, which adds to their discomfort. It is conducted in English (assurance that interpreter services would be offered if necessary was a minority view[43]), which under all the circumstances can be disadvantageous, and it significantly delays entry to the profession when a level of professional training was in many cases a significant basis for the right to enter and settle in Australia in the first place.

Delegation of assessment for migration purposes to AACA, from NOOSR, has acted to cement this review procedure. The trend has been for AACA to assume a critical role in assessment which *de facto* comes to override regulatory authority responsibility.

The argument often put, that the same situation applies to Australians going overseas, does not commend itself as a principle.

These review requirements, which AACA can explain in some detail, and with contrary views as to their importance, are real barriers to overseas architects.

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42 ARBV *Annual Report 1997-98*, 19.

43 The Victorian Government's general policy on language assistance was helpful in persuading some assessors of the need for a flexible approach, but other jurisdictions do not take the same view, notwithstanding the absence of an 'English test' component in their legislation.

The possibility of significant inequity (or downright discrimination) is evident when we consider the earlier example of the Federation Square project in Melbourne: the two winners were legally able to be registered as architects, were required to pay none of the fees or undergo the reviews set out above, and have, on all reports, provided admirable service. If they had been required to undertake the AACA review, which includes direct interviews, they would have incurred significantly greater costs, and the time delay would have put at risk their successful obtaining of contracts.

The Victorian Board has now agreed to pursue the AACA regime for review of overseas qualifications.[44]

Criteria for registration: Summary

I submit that the examination and review regimes as currently practised in Australia are neither necessary nor, substantively, beneficial; on the contrary, they are obstacles to professional entry and offer significant opportunities for discriminatory treatment of applicants on the grounds of origin and native language.

The development of a 'national' system based on competency has resulted in the withdrawal of entitlements to speedy, lower cost registration, in the interests of addressing a problem which has not been shown to exist. The increase in the burden on applicants is directly contrary to the spirit and intention of the Hilmer Report and NCP. It is also contrary in significant detail to the legislative regimes which it purports to assist.

In short, *the AACA procedures, both hitherto and as planned from 2000, are not necessary to meet the objectives of architects' legislation.* The registration criteria should be limited to holding an approved qualification and, only if necessary to protect the public, a period of experience transparently acquired, recorded and approved, at minimum cost.

Restriction of title

Much of what has gone before is predicated on acceptance of title control.[45] Without title control, architectural regulation would have little or no place: it is a part of the scheme of legislative objectives.[46] It is also a fundamental position adopted and promoted by registration boards that the

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[44] ARBV *Annual Report 1998-99*, 21.

[45] The assumption also is that the title is of 'architect' in relation only to the design, planning and specification of buildings and their parts (as the Victorian Act specifies), so that other usages, such as 'naval architect' or 'golf course architect' need not be further considered. This point needs to be understood, because the ARBV, for example, has spent some time, every year, responding to complaints by architects about unrelated usage, such as 'computer architect'. This is the kind of problem which arises when a word is controlled but insufficient regard paid to context. See NSW *Issues Paper* 16: "This effectively removes the ordinary English words 'architect' and 'architectural' from general use." If this is the contention, I doubt that it is a practical or effective one.

[46] ARBV *Response*, 2, 16-17, 29-30, 44-46.

limitation of their power to title control (who can be called an architect), not practice control (who can do an architect's work, under whatever title), is not itself anti-competitive.[47]

I submit that such control in its present form (control of a word but not of practice) is in effect meaningless, because the legislative scheme, in so limiting the effects, does not provide an effective remedy for consumers, nor does it deliver to Boards a sufficient power to prosecute title breaches.[48] Title control does not limit the supply of services to the market, in view of the substantial numbers of architects and competing practitioners,[49] *but by the same token, unless there is a demonstrable public benefit to the title, the presumption should be for non-regulation, not for continuation of the status quo.* The latter fundamental point of National Competition Policy is either not understood or not conceded by architects.[50] What is consistently sought is in fact an increase in regulatory burden, through imposition of fees and monitoring regimes, driven from the registration side by AACA and from the professional side by the RAIA. Yet these indicative directions cannot be reconciled with the underlying assumptions and principles of NCP.

The remedy therefore lies either in abandoning the current scheme altogether, or reviewing and enhancing the capacity of authorities to take action. In the latter case, NCP principles require that a public benefit test be satisfied.

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[47] *Ibid.* 2, 5-7, 24-26, 45-46, 48.

[48] The ARBV prosecuted no title breaches between 1992 and 1999, not because such breaches were absent, but because the proof requirements in a Magistrates Court were difficult to meet (was there therefore an offence?), and because the risk of costs orders and/or general legal expenses did not encourage an 'adventurous' approach. The record of other boards is scarcely more 'active'. At most there would be one or two cases in Australia, on average. See ARBV *Response* 24, referring to a few successful prosecutions in WA and NSW only. (NSW *Issues Paper* 34 refers to one instance successful out of 7 attempted.)

The ARBV has put the best face on this regime (*Response* 24): "There is always the possibility that …an allegation is falsely made for leverage in a dispute. The maintenance of the prosecution avenue through the Courts, for what amounts to a criminal offence, ensures that justice remains in the Court system where it properly belongs, and that there is no "capture" of the market by the Board through using its Tribunal system to deal with non-architects." That is, there is a risk of an inappropriate response. Up until 1991, the Victorian Board used its Act to bring non-architects before it, until a significant case foundered. The procedural problem in the earlier period was that the Board decided *prima facie* if there was a case to answer, issued proceedings (a summons), then adjudicated the case itself.

The NSW Board reported 92 allegations of title misuse, 1991-1997 (NSW *Issues Paper* 34). The ARBV over the same period would have dealt with many hundreds, but that includes several systematic reviews of Yellow Pages entries in the Melbourne (03) area, and occasional reviews of regional Yellow Pages, as well as other directories. Significant complaints by architects would amount to at least several dozen a year, often multiple references to the same misuse (most commonly building site or office window advertising). At the same time, written compliance rates were almost at the 100% level, with only one or two persistent 'offenders' holding out.

[49] This argument is made in more detail in the ARBV *Response* to the 1998 legislation review (12-13), and maintained also in the Queensland Board *Review* 8.

[50] E.g., ARBV *Response* 5: "The presumption against statutory intervention is based upon a market-effectiveness assumption which has not been adequately tested or demonstrated in connexion with the provision of human services or public goods…. Market failure is … directly contrary to the assumed direction of legislation review where a public good is involved."

It would be desirable to provide actual instances of public benefit to title control, but such examples as are adduced rely on hypothesis or are statistically insignificant: they rely on assertions that title control redresses asymmetry of information.[51] The counter argument to be advanced in each case is, what would have happened if there had been no title control? The answer, at least in Victoria, is that the project would have proceeded and any complaint dealt with under the Building Act regime and/or resolved in the normal course of commercial disputes or litigation, through arbitration or Court proceedings. The argument for the beneficial regulation is one historians like to call "from silence": because there are so few complaints, and because quality is sustained, regulation is the underlying cause. The form of argument is not strong.

On balance, therefore, I submit that unless regulation can be shown to be effective, it should be rescinded.

Types of architectural practices (the 'two-thirds' requirement)

Control of practice composition is designed, it is claimed, to ensure that architects, and only architects, deliver 'architectural services' and that clients can be confident that services so described are delivered accordingly.[52] In fact the two-thirds minimum (typical) limitation on architect-directors serves only to limit the form of approved architectural companies and partnerships, without limiting (say) developers from maintaining or using an architect for a component of their service. That is, it is a prevention of competition *within* the limited market of defined architectural companies, but it has no practical effect outside of that market: it is a 'right' to a different form of practice and competition which is conceded by architects as the price of registration or approval. The concession is effectively made under duress. The argument rests upon presumptions of what might happen if such companies were not controlled in this way. Since such control is relatively recent, and still a minority regime, it is difficult to argue in its support: most jurisdictions do well without it, although AACA formally supports it.[53]

I submit that those proposing retention of such controls should advance evidence of failure where control is not managed by majority provisions.

Architects in partnership with other design professionals, including engineers, would seem to offer opportunities for innovation which should not depend on the privileging of any one party.[54] If an architect wishes to participate in such a business arrangement, where lie the disadvantages to the public? The Victorian legislation, for example, specifically declares an architect director responsible

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[51] ARBV *Response* 3, 39, 42, 48. The public good and externalities argument were canvassed in the *Response* (8-12).

[52] ARBV *Response* 24: "responsibility and delivery are unambiguously secured." But the Board was also prepared to acknowledge that the same security could be gained through a 51% regime (*ibid.* 24-25).

[53] More subtly, it is an effective 'fund raiser' for regulatory authorities. Companies 'pay up' readily, rarely incur problems *qua* corporate entity, and lend themselves to multiple approval through changes in corporate structure. There is an incentive for authorities to encourage such forms of rent seeking.

[54] Cf. NSW *Issues Paper* 21.

for actions of an approved company by virtue of being an architect (see ss 6, 8, 69, regulations 17, 21). The proportional control of the company is not necessary for this effect.

Conduct restrictions

Restrictions on advertising (the size of lettering) were removed generally in Victoria in 1992 when the last of the 'old' regulations reached their sunset date. There is no evidence of a problem arising from that change. A regulation was made for ensuring that information was accurate (regulation 16), but this does no more than fair trading legislation.[55] A change to insert control of advertising, as outlined for Queensland, is therefore undesirable: it imports the problem of creating an offence where no demonstrable problem exists.[56]

Where advertising constraint is extended to include matters such as legitimately obtained certificates of qualification (as a 'B Arch', or 'Cert Arch Draft' [drafter], for example), it seems unreasonable that the display of a legitimate, accredited qualification should be prohibited, as in Queensland's Act (s 40 (5)).[57] If it is claimed that the title alone is limited, not the practice, then the extension to prevent a non-architect legitimately entering the market on fair terms, through display of proper qualifications (i.e., but not a certificate of registration) does not seem reasonable. There is a problem of perception and jurisdiction where a person obtains in good faith an accredited qualification, with Commonwealth recognition in the case of tertiary education, only to find that its value is rendered nugatory. The Victorian response for some years has been that there can be no objection to a person listing qualifications; an offence only arises if the holder then uses that listing to imply or lay claim to registered status. The onus is on the regulatory authority to address information asymmetry through inviting the public to check all matters of registered status, as a matter of course. Clients who have reason to believe they have been misled can take appropriate steps for redress and complaint.

The ARBV was obliged to address the question of parts of words (e.g., "Architext"), to see if such forms could be pursued as breaches of the Act. Generally legal advice was that the Act extended only to the whole of the prescribed words, and in the context intended by the Act: Parliamentary Counsel at one point made the rhetorical, telling point, that the Board would find itself prosecuting people named "Archibald". Earlier limitations by the Board on the form of approved company names (they could include only the names of architects) were also discarded on the basis that the Act did not endorse such controls, practices legitimately changed their composition over time but retained a

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[55] ARBV *Response* 7. Regulation 12 adds a further restraint on architect "engaged by a developer": documents and advertising must ensure that the architect's name and status are in letters the same size as the developer's. This regulation has not been tested (nor the subject of complaint) since 1993. The requirement that the architect "take all reasonable steps to ensure" this is difficult to test. The regulation is slated for repeal.

[56] Queensland Board *Review* 24. The basis for the statement, "It is apparent that most architects do not advertise their services to any significant degree", is not provided. In Victoria advertising is quite actively pursued.

[57] See Queensland Board *Review* 14.

corporate identity, and it was unreasonable for the Board to intervene to direct such an ordinary aspect of commercial practice.

Restrictions on minimum fee levels were similarly removed. Architects are in business and can be expected to compete. It is anti-competitive, and a disincentive to innovation in practice methods, to impose fee minimums. It may well be an effective competitive device to offer an initial free consultation or certain free or below-cost 'add-ons' as an inducement to secure a contract. If such inducements comply with provisions of the Trade Practices Act, it is unreasonable to restrict their scope on the basis of some assumed code of practice or ethics, or an inferred incapacity to deliver services, or, worst, an inferred anti-competitive stance that such low levels disadvantage 'colleagues'.

In Victoria the source of remuneration to architects is only in question when it amounts to a 'secret commission' (or "kickback" of some kind) (regulations 14, 15). Architects are expected to strike agreements with their clients and others in which all fees are specified openly. If those fees involve payment in kind, the only requirement should be that the payment is openly agreed and known to the concerned parties (all affected by the transaction).

Victoria has a 'supplanting' provision (regulation 10), to the extent that an architect approached to take on another architect's commission is only obliged to notify the other architect, not refuse to take the commission.[58] In my experience, even this constraint served only to assist those architects who objected to clients taking business elsewhere. The regulation was slated for removal, but in the meantime, the Board moved to declare that normally it would not refer such a complaint to a Tribunal, if that were the only ground for complaint.[59]

In general, the items listed on p.10 if the *Issues Paper* only have to be stated for their anti-competitive and/or illogical nature to be revealed. They belong to an earlier age and a view of 'gentlemanly' professionals which has long since passed, if it ever existed in the form appealed to.

Disciplinary procedures

If there is to be a disciplinary procedure, I commend to the Commission the Victorian system, which requires the Board to appoint a Tribunal and its chair (ss 20, 23), which thereupon becomes independent of the Board (*Architects Act* Part 4).

The Tribunal must comprise 3 persons, one of them an architect *not* a Board member, and one not an architect (s 21). Institutional control of the outcome is thus limited.

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[58] The word 'supplanting' is generally avoided, especially since the Trade Practices Commission 1992 report. See *Information 31* [October 1993]. It remains a sore point with architects, who in some cases feel that it is unethical for a client to change practitioners. However, in all the instances before the ARBV, 1992-1998, there was dissatisfaction with the architect, or a dispute over services or fees, which the architect being dismissed wanted redressed through leverage against the client: denial of access to further architectural services. For the architect taking on the transferred commission, the mere requirement of having to respond to a complaint was the cause of cost and anxiety: few architects care to have the professional reputations discussed by a board before which they are unrepresented, and records retained in their registration files, notwithstanding the dismissal of a complaint.

[59] ARBV *Annual Report 1998-99*, 11.

The range of penalties open to the Tribunal is wide and practical (s 32 (g)-(m)), and Tribunals have availed themselves of this range, especially the capacity to require some form of professional training within a specified period, but without otherwise interrupting an architect's right to practise.[60]

It is not perfect, but it is an advance on a Board-managed (Board-directed) procedure which by its nature breaches standard principles of natural justice (especially the authority becoming the judge in its own cause).[61]

The RAIA could not offer a comparable *enforceable* regime unless there were significant legal changes. Problems of perception could not be addressed effectively under any association-controlled regime, whatever the *bona fides* of the association officers.

My brief reading of the *Trade Practices Act* suggests that it is not at present geared to the level and type of disputes which arise between architects and clients and which form the staple of complaints to Boards. The TPA is more substantially corporate in its focus, despite the amendments of Part IV through Competition Policy Reform legislation; the focus is also on restrictive or anti-competitive conduct rather than on the particulars of professional standards and issues of technical competence which might be an agreed standard within the architectural profession without being, strictly, a matter of legal dispute.[62] Perhaps that focus could be addressed. Certainly the penalties envisaged by the TPA are substantially higher, and its powers accordingly greater, which might (properly) advantage complainants.

One difficulty about accessing complaint procedures is the lack of public awareness of the complaint authority's existence. Boards do not have the same public profile as the RAIA (for example), in part because they have not wished to be seen to offer some form of competition to the association (with the exception of Victoria, where the association and the Board physically separated in the 1980s, the RAIA and the regulatory authority tend to share premises and resources, as well as significant membership overlap). Public awareness is enhanced by advertising: in the case of the ARBV this was through insertion of a prominent notice in the Yellow Pages directory. The consequences of the degree of public awareness are illustrated in the number of complaints against architects. The numbers in Victoria are regarded as high:

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[60] The NSW Board appears to seek the same broad terms: NSW *Issues Paper* 33.

[61] Cf. the situation in Queensland (ss 31-33 of that Act): Queensland Board *Review* 10. The options offered were either to retain the existing power or to extend it, but in both instances leaving prosecution (for want of a better term), trial and judgement in the Board's hands. That situation generally cannot survive in modern judicial and quasi-judicial proceedings. The Victorian Board, incidentally, has faced the problem of dealing with complaints subsequent to a suspension. Where such complaints extend to other fair trading measures and the like the complainant can reasonably pursue the action in the appropriate forum, where a finding or conviction can then be taken into account if the person (read 'architect') seeks readmission as an architect. Alternatively, as happened in Victoria, a suspended architect was advised that if his appeal were successful, further proceedings would be immediately instituted. He withdrew his appeal in return for waiving that further action (Farrington and the ARBV Tribunal, VCAT 1999).

[62] Cf. NSW *Issues Paper* 11.

TABLE 4

Complaints against Architects

1992-93	32 [63]
1993-94	31 [64]
1994-95	19 [65]
1995-96	21 [66]
1996-97	34 [67]
1997-98	n/a [68]
1998-99	25 [69]

Referrals to Tribunals also increased, from an average of about one a year to about 5,[70] while forms of 'counselling' (i.e., non-enforceable, non-adjudicated advice to architects) increased where there was perceived a benefit to practice generally.[71]

The level of complaints can be understood as supporting the regime (few enough complaints in relation to numbers in practice),[72] but the alternative argument is that a complaint *rate* of about 1.5-2% (say, 35, on a base of 3,000) suggests equally that the procedure is either not well enough publicised still or it is not relied upon or that breaches are not being detected and/or reported. That is, should legislation of a special kind be used for such a small number of cases, or should such cases fall under fair trading legislation? A comparison with the record for the medical board equivalent suggested that the complaint rate was not unduly depressed, at least in Victoria. There was, however, a significant difference in the publicising of outcomes, the severity of actions taken, and the general lack of interest of the media in publicising proceedings (which are formally open to the public unless declared otherwise, but not advertised in the Law List, and therefore they remain unknown).

The more subtle argument in favour of legislation is that the regime itself discourages activities which would be breaches of it.[73]

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63 ARBV *Annual Report 1992-93*, 26.

64 ARBV *Annual Report 1993-94*, 15.

65 ARBV *Annual Report 1994-95*, 19.

66 ARBV *Annual Report 1995-96*, 24-30.

67 ARBV *Annual Report 1996-97*, 22-29.

68 ARBV *Annual Report 1997-98*, 15-16, does not indicate total numbers.

69 ARBV *Annual Report 1998-99*, 12.

70 Six in 1998-99, ARBV *Annual Report 1998-99*, 13. Costs of proceedings, which the ARBV can never recover in full (because it is responsible for non-recoverable costs of legal services to the Tribunal itself), set an effective cap – unless registration fees were substantially increased.

71 See ARBV *Annual Report 1998-99*, 13.

72 ARBV *Annual Report 1996-97*, 29; *Response* 2, 34-36, 43.

73 ARBV *Response* 5: "regulation of architects is a proactive regime, not a reactive one…. By adopting a proactive approach, the long lifecycle enjoyed by buildings is enhanced, public and private benefit maximised, and costs in both the short- and longer term minimised."

Victoria is far ahead of the other jurisdictions in the number of complaints it receives and addresses.[74] The ARBV has always taken the view that this is not the result of a greater degree of negligence or incompetence among Victorian architects but rather the outcome of the Board's deliberate advertising of its availability and its provision of 'user friendly' complaint forms and advice (the assumption being that it was no part of the Board's or Registrar's role to seek to discourage complaints, unless they clearly fell outside the jurisdiction – and even then it remained the complainant's right to lodge the documentation).

Market information

Title control does not extend beyond the registered architect, so far as actual practice control is concerned, so that it is disputable whether it can be sustained as a serious argument.

The simple question is, what real protection to the public is offered through Architects Act? How is it measured? What is the evidence for it?

In serious cases I have encountered, where the architect's failure of competence resulted in substantial losses to the client, the Tribunal was limited to finding against the architect, but not so as to reimburse the client. In more than 6 years, only 1 architect was suspended (for three years),[75] while others who directly caused losses were fined or reprimanded.[76] This, on its face, is an unlikely outcome out of more than 160 complaints. This is especially evident when it is known also that between 1992 and 1999 the Board, as 'prosecutor', was successful in every one of the actions it brought against architects. The Tribunal cannot be regarded as entirely responsible for this outcome, because it has in the most part responded to Board submissions on penalty, which also focus on fines, costs, and education.

The client is compelled to seek redress through other forums for compensation. Information at the outset does not address such structural weaknesses. The regulation argument points to the scale of such financial risks and losses, arguing that their limitation in numbers and extent favours regulation.[77] The client who receives only 'moral' justice may be aggrieved by the limitation in the penalties imposed and the lack of capacity to order compensation or restitution. Clients (complainants) not infrequently abandon their complaints rather than pursue multiple avenues once they know that material redress must be sought elsewhere.

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[74] NSW *Issues Paper* 24 notes that that Board received 23 complaints in 5 years. The NSW Board would presumably argue along the same lines as the ARBV: proactive legislation discourages behaviour which would otherwise be deemed a likely breach.

[75] Detailed in ARBV *Response* 34-35. The architect eventually abandoned his appeal (request to review by VCAT). Criminal proceedings were initiated by the Major Fraud Squad, who also attended the Tribunal hearing and indicated informally that the hearing was a useful information source on what a client could expect and how an architect could act.

[76] An instance where the clients were substantially injured financially, and the Tribunal found against the architect, the penalty was a reprimand, a fine, and a retraining requirement (ARBV *Response* 35-36): the clients, however, lost their home.

[77] ARBV *Response* 36.

Architects Acts and the RAIA

The RAIA would, I suggest, argue that the quality assurance is *greater* in dealing with an RAIA member than with a generally registered architect.[78] The form of the *Issues Paper* question (p.12) is the reverse of this presumption. Architects Acts aim to ensure that *all* registered persons reach a minimum requirement of competence, a level that can be tested by adjudication if necessary. The RAIA, as a private body, may proceed quite differently if it chooses, whether at a higher or lower standard. At present the RAIA uses registration as a minimum entry level for its principal form of membership, which suggests that the question asked is not being directed in quite the right way.

If registration is not to be maintained, then the RAIA will ensure its market presence by normal commercial means.

If a regime of self-regulation is instituted, and if a degree of title control is awarded to the RAIA, there will also be substantially higher costs for architects, which will in turn be passed on.[79]

Other matters

Other matters raised in the *Issues Paper* are adequately canvassed from my viewpoint in the attachments.

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[78] The NSW *Issues Paper* 18 draws attention to implications that the Act could support use of an architect for services where an architect is perhaps not required. This point is well made, but not readily conceded by architects themselves. It is certainly likely that any professional association with effective control over title and/or registration would seek to promote such a view: why otherwise exist?

[79] ARBV *Response* 38.

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