Peter Donovan
NSW

13 December 1999

Ms M. Cross.
Architects Inquiry,
Productivity Commission,
Locked Bag 2, Collins Street East,
Melbourne Vic 8003.

Dear Madam,

REVIEW OF LEGISLATION REGULATING ARCHITECTS

1. THE BACKGROUND OF THE AUTHOR

My interest and expertise in this matter began with a building dispute earlier in the decade. Since then I have followed the general issues in various ways.
The original dispute and its sequels wasted time beyond measure for both my wife Margaret Donovan and myself, caused various expenses that may well amount to something like $15000, and changed our lives. The following does not say it all., but it indicates the depth of the hurt:

> Certainly they [the Donovansl have not had a good experience but their case is moving; along.
> *Wendy Machin Minister for Consumer Affairs, in the NSW Legislative Assembly,.14 September 1994. (1)*

A four-page history of the saga is available for the private use of the Productivity Commission upon request.
Since the incident happened, Margaret Donovan has been appointed a member of the NSW Home Building Advisory Council.
Sections 5 to 12 below are based on a submission made to the those reviewing the NSW Architects Act. That review was suspended when it became apparent that a. national review would eventually take place. Thus there is some reference to the numbered sections of the NSW Public Works Department *Issues Paper of 1997.*

2. SUMMARY OF THIS SUBMISSION

I recommend that the participating States [SLaLes' includes the two territories with NZ being allowed to become a 'State' for this purpose] all pass identical legislation along the lines of the *NSW Architects Act* but modified as follows:

1. Any Architect registered with the Board of Architects in any other participating State be deemed to be registered with the Board of Architects of that State.

2. The Board of Architects of each participating State be required to notify the Boards of Architects of each other participating State of any complaint against any registered architect that has been upheld, [There would need to be simple rules as to which Board has jurisdiction in any particular case.] Deregistration by any Board would lead to automatic deregistration in all participating States.

3. The list in the present *NSW Architects Act* of conduct that is deemed to be unprofessional be augmented by the following:
   - 3.1 Giving false or misleading evicleri to any tribunal, court, arbitrator or board about any matter related to architecture or building.
     At one stage before the Donovan case started ‘moving along’ (in the words of quotation (1)) a member of the NSW Board of Architects wrote an ‘affidavit of evidence’ to the effect that the building concerned was structurally sound and of an adequate standard of workmanship. Now the builder has been delicensed, the architect principally responsible reprimanded by the NSW Board of Architects and the building replaced substantially at the cost, of BSC Insurance, the need for something like 3.1 has become clear.
     Perhaps 3.1 should he worded using the phrase ‘with reckless indifference’ as in section 'I78BB of the NSW Crimes Act quoted as (3) in section 4 below.
   - 3.2 Issuing any certificate for the payment, of money for building services without having verified with due care and skill that all conditions for payment had been satisfied and that the work had been done with due care and skill.
     Section 178BB of the Crimes Act may be relevant. We paid our builder on the written certificates of the, architect! See quotation (22) below.
   - 3.3 Recommending any form of building contract not in the best. interests of the client.
     Many architects have been doing this for years. This change would result. in the, RAIA or the Boards making sure that satisfactory contract, forms were available. Perhaps 12 months notice should be given before this item takes effect.
     See also section 6 below.
   - 3.4 Failing to specify any part of a building contract ill sufficient detail to protect the best interests of line client.
     Some such item would help clarify once and for all what architects are supposed to be doing in specifying a proposed building. The word processor has made detailed and exhaustive specification far easier to achieve.

4 Making adequate Professional Indemnity insurance mandatory.

See sections 11 and 12 below.

5 Making appropriate provision for registration of companies providing architectural services.

See section 12 below.

6 Raising the maximum fine to $50000 or so, making the bad architects pay some of the costs of running the pieces of infrastructure called Boards of Architects.

Fines of $200 are absurd for this sort of offence against society.

7 Clarifying the general right for the public to attend hearings and establishing a general right to publish deregistration decisions.

Compare quotation (16) in section 1.6 below.

3. INTTIAL JUSTIFICATION OF SECTION 2.

The Inquiry should appreciate that bad architecture and bad building will leave a legacy of waste and stress for up to 100 years. This is socially undesirable.

There are four evident initial reasons for adopting the course set out- in section 2.

The first is that it will set up a national market for architectural services. [Admittedly one or two States may delay their participation for a while, but eventually sanity will prevail.]

The second is that as the Gyles Royal Commission into the Building Industry in NSW (1993) found much evidence of collusive tendering, extortion, fraud, intimidation, assault and perhaps even murder. The profession of architecture must have been unpleasantly close to appalling conduct. The Productivity Commission should read the Gyles Report carefully. There is no reason to suppose that the situation in other States is much better than that in NSW.

The third is that simple statutory codification along the lines of parts 3.1, 3.2, 3,3 and 3.4 of the above list will render ineffective the obfuscation of architects' duties that currently is available to confuse the client.

The fourth is that over a century of experience in the regulation of various professions has revealed what is needed -and why it is needed. **Thus some of the general background on regulation of professions is set out in section 4**. Considerable use has been made of two volumes of collected cases on Legal Ethics put together by the University of Sydney Law Extension Committee. The Productivity Commission may find much that is relevant in this useful source.

4. ETHICS FOR THE REGULATED PROFESSIONS

> The independence and integrity of the legal profession, with professional standards and professional means of enforcement, are of institutional significance in our society.
>
> *Chief Justice Jim Spigelman, SMII, 28 May 1998. (2)*

This section deals with the background to the laws that regulate certain professions, explains the basic difference between such law acrd the criminal law and gives numerous quotations frosty diverse sources on such regulation. Some sarticular• emphasis is placed on the regulation of architects.

4.1. THE CRIMINAL LAW

The. *NSW Crimes Act* is in essence a list of human activities which have been totally proscribed by the Parliament. Such activities include offenees against the person, offences against the course of justice and fraud. An example is the following:

> Whosoever, with intent to obtain for himself or any other person any money or valuable thing or any financial advantage of any kind whatsoever makes or publishes, or concurs in making or publishing any statement (whether or not in writing) which he knows to be false or misleading in a material particular, or which is false or misleading in a rnaterial particular and is made with reckless disregard as to whether it is true or false or misleading in a material particular shall be liable to imprisonment for 5 years.
>
> *Section 178BB of the NSW Crimes Act 1900 as amended. (3)*

In interpreting this *Crimes Act* there is a strong onus of proof placed on the prosecution. See the second half of quotation 9 below. Any alleged offence must satisfy numerous special criteria set out in such texts as the *NSW Criminal Law Handbook*. There are certain key phrases in the sample section, such as 'with reckless disregard. The general key concept in criminal law is that of rnens rea, or 'guilty intention'. Here the much weaker phrase. 'with reckless disregard' is used.

4.2. REGULATING A PROFESSION

We analyse the situation. People may gain the right to practice in a regulated profession by gaining an appropriate university degree and perhaps by some documented work experience carried out under supervision. The members of the profession have a strong financial interest in maintaining general public confidence in the registered practitioners. They also have a strong financial interest in not being exposed to blackmail and so in having a system that prevents frivolous and vexatious complaints from doing damage. So Parliarnent passes an Act which empowers the members of the profession to vote for members of a statutory Board, Council or Tribunal that can handle complaints from those who care to walk in the door. Complaints made to such bodies are in general deemed not to be defamatory.

The NSW Professional Standards Act of 1994 creates a. framework in which any group of professionals may, with the consent of the Alttorney-General, set up their own system of this type. Membership of such a voluntary group may well give commercial advantages in addition to a statutory limitation on liability. See the speech made by the then Attorney-General John Hannaford in the Legislativc Council on 14 September 1994, where the general public benefit of such systems is erxplained. See also section 9 below.

All of this is subject to the general legal rights of both the complainant and the respondent. These rights are summarised in:

> Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations ...
>
> *Section 10, Universal Declaration of Human Rights, 1948 (4)*

4.3. WHY REGULATE ANYWAY?

The Australian States have agreed with the Commonwealth to encourage competition. Any form of licensing is seen as restriction on competition and so is considered to he suspect unless there is some clear gain to public health or safety.

It is far from clear that, for example, discouraging bookmakers from being involved in the sub-stitution of one racehorse for another is directly related to health or safety. Likewise the ban on ‘pyramiding” in the Commonwealth Tades Practices Act, is ultimately required to protect the public even though only financial safety is involved.

Some selected comments made by the then Minister for Public Instruction in the second reading debate on the NSW Architects Act 1921 follow:

> This measure, which is a bill to provide for the registration of architects, is a measure that has been called for for many years ...

> I may say that the, purpose of this measure is to lift the profession of architecture to a definite standard.
> Definitely I say that I believe that the provisions of this bill will protect the community against the jerry-builder.
> ….the object of this bill is to prevent houses from being built which do not conform to a proper standard of architecture.
> It would be better to pay the $6.30 [the fee!] for an assurance that everything was in accordance with the requirements of the law, and that. the house would be a substantial and satisfactory structure, than to have any doubts upon these points.
> All the architects are clamouring for it.
> ….payment is made on the certificate of an architect that, the places arc properly built.
>
> *Thomas Mutch, :VSU' Legislative Assembly, 2 December 1920.(5)*

The views of the late Thomas Mutch and those (quote (2) above) of Jim Spigelman, current NSW Chief Justice, demand considerable respect.

The NSW Issues Paper refers on page 14 to 'information asymmetry'. The. customer in a. small building project simply does not understand the finer points of architecture. and building. Essentially the, customer is entitled to put substantial if not total confidence in the architect (or the. heart surgeon) he has commissioned. The Donovans did and see what happened!

4.4. KEY DECISIONS BY THE COURTS

The top judges are not only good but indeed excellent. The key aspects of their reasons for judgement are considered almost as binding as the text approved by Parliament.

In the 1890's a British doctor, Allinson, was disciplined by the General Medical Council of England and Wales. (Law) Lord Esher, who handled the appeal, produced the leading decision on the subject. A key Australian judgement refers to Allinson's case:

> These words ['professional misconduct'] or the words 'misconduct in a professional respect' have been the subject of many decisions in contexts largely but not entirely analogous to the present. Usually the words have been employed in a statute regulating a particular profession, e.g. the Legal Practitioners Act 1898, s43 (solicitors), the Medical Practitioners Act 1938, s27(1)(c) and the Dentists Act 1934, s 8. These words thus used have been interpreted as meaning conduct in such breach of the written or unwritten rules of the profession as would reasonably incur the strong reprobation of professional brethren of good repute and competence. See *Qidwai v Brown* (1984] 1 NSWLR 100 at 105. The generality of this formula was discussed by Sugarman J in *Ex parte Meehan*: *Re Medical Practitioners Act*]1965] NSWR 30 at 35, 36, where he pointed out the wide range of conduct it can cover. The formula is derived from what was said by the English Court of Appeal in *Allinson vs General Medical Council* [1894] 1 QB 750 where the judges recognised that it was not 'an exhaustive definition'.
>
> *Justice Priestley in Prothonotary v Costello [1984] 3 NSWLR 201.(6)*

Justice Priestley had previously quoted from a High Court case where it was explained that the rules governing a body of professional men

> may be divided roughly into two classes. . ..Rules of the second class are not merely conventional in character, They are fundamental. They are, for the most part, not to be found in writing because they rest essentially on nothing more and nothing less than a generally accepted standard of common decency and fairness.
>
> *Clyne v NSW Bar Association [1960] .104 CLR 188 at 199 and 200. (7)*

Perhaps another quote is relevant here.

> A charge of misconduct as relating to a solicitor need not fall within any legal definition of wrong doing. It need not. amount to an offence under the law. It was enough that it amounted to grave impropriety affecting the professional character and was indicative of a failure either to understand or to practise the precepts of honesty or fair dealing in relation to the courts, his clients or the public.
>
> *High Court Justice Rich on the Kennedy case (1939] 13 ALJ 563. (8)*

A final quotation is needed on the nature of the onus of proof on the conrplainants in cases concerning professional ethics.

> The onus of proof is upon the Association but is according to the civil onus. Hence proof in these proceedings of misconduct has only to be made upon a balance of probabilities: *Rejfek vs McElroy*. Reference in the authorities to the clarity of the proof required where so serious a matter as the misconduct (as here alleged) of a. member of the Bar is to be found, is an acknowledgement that the degree of satisfaction for which the civil standard of proof calls may vary according to the gravity of the fact to be proved. [Citations of authorities omitted.] In the .joint judgement of the High Court in *Rejfek vs McElroy* the following passage appears:
> 'But the standard of proof to be applied in a case and the relationship between the degree of persuasion of the mind according to the balance of probabilities and the gravity or otherwise of the fact of whose existence the mind is to be persuaded are not to he confused. The difference between the criminal standard of proof and the civil standard of proof is no mere. matter of words: it is a matter of critical substance. No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied and has not with respect to any matter in issue in such a proceeding to attain that degree of certainty which is indispensable to the support of a conviction upon a criminal charge: see *Helton vs Allen* ...'
>
> *Re Evatt;' ex parte NSW Bar Association [1967] SR (NSW) 236. (9)*

It is now appropriate to go to Justice Sugarman's judgement cited above.

> (a) the expression 'infamous conduct in any professional respect' in the Medical Practitioners Act refers to conduct which, being sufficiently related to the pursuit of the profession, is such as would reasonably incur the strong reprobation of professional brethren of good repute and competence.
> (b) the word 'infamous' must be understood by reference to the context of professional disapprobation and conduct may be infamous either in general estimation or merely in the special professional sense or in a professional sense accompanied by some element of moral turpitude.
> (c) as the Medical Practitioners Act provides penalties for infamous conduct, in a professional respect ranging from removal from the register down to a caution, the infamous conduct, need not necessarily be of a type deserving of the strongest reprobation or so heinous as to merit, removal from the register or necessarily requiring the presence of moral turpitude and whether these elements must be present depends on the nature of the conduct in question in each instance.
>
> *Headnote to Ex parte Meehan (1965] NSWR 30 at 30. (10)*

The full report expands on part (b) in particular and in effect states that the use, of 'infamous' in the (old) Medical Practitioners Act is not that of common parlance. For the purposes of ethics in the practice of, say, architecture, it should be noted that any conduct remotely like recklessly issuing a certificate for the payment of money for building services or recklessly issuing an affidavit of evidence about architectural or building services is likely to be 'infamous in general estimation', whether or not it constitutes a breach of the NSW Crimes Act.

An. example of text on professional misconduct (in medicine) is:

> A physician shall certify only that which he has personally verified.
>
> *The International Code of Medical Ethics (1949, revised 1983). (11)*

Another example, taken from architecture but substantially identical with part of the 1994 Code of Ethics issued by the Institution of Engineers Australia is:

> An expert witness has an important contribution to make in judicial proceedings and should never place himself in the position of being discredited or dishonoured.
> His expertise does not arise because he is an expert at giving evidence. It should be clearly understood that the expert witness is present to assist the Court to arrive at a just decision. His primary duty is to assist the Court irrespective of the effect on the interests of his client. This duty is one of impartiality. If he is a professional man, then he must at all times have: in mind the ethics of his profession. If, as a result of his investigations, he has discovered matters unfavourable to his client, he must notify his client and, when in Court, tell the whole truth in answer to questions. He must not make omissions likely to deceive.
>
> *RALA Law Note 17, 1982: The Expert Witness. (12)*

Despite its name, the Royal Australian Institute of Architects (RAIA) is a private voluntary association of architects and is not to be confused. with the Board of Architects. It issues a series of Practice Notes and Law Notes. These are mentioned again in quotations (20), (21) and (22). The RAIA has its own disciplinary procedures.

4.5. THE NSW ARCHITECTS ACT

Part of the *NSW Architects Act* 1921 is:

> [s 17 (1)] The board may remove from the register the. name of any person who-..
> [s 17 (1) (g)] is guilty of improper conduct in a professional respect.
> [s 17 (2)] Without limiting the meaning of the expression "improper conduct in a professional respect" in subsection (1), an architect shall be deemed guilty of any such conduct who- ...
> [s 17 (2) (a)] in connection with any contract in respect of the design or construction of any building, enters into collusion with the builder or any other person in any way prejudicial to the owner's interests and rights under the contract;
> [s 17 (2) (g)] without reasonable cause, commits a breach of a contract in respect of the design or construction of any building;
> [s 17 (2) (h)] in the course of carrying out a contract in respect of the design or construction of any building, fails to comply with the requirements of any Act, regulation, by-law or rule with respect to the design or construction of the building;
> [s 17 (2) (i)] commits any fraud or makes any misrepresentation in connection with any contract for the design or construction of any building; or
> [s 17 (2) (j)] is or was at any time the managing director or manager or person having the management and supervision of the business relating to the design or construction of buildings of a firm or corporation which does anything referred to in paragraph (1), (c), (c), (f), (g), (h) or (i) -.. except ...
> [s 17 (6)] The board as an alternative to removing from the register the name of any person who is guilty of improper conduct in a. professional respect may reprimand the person or impose a fine on the person not exceeding $200 (1923 values)
> [s 17A (1)] The board may hear any complaint or charge made to it against an architect.
> [s 17A (2)] The board may refuse to hear any complaint or charge referred to in subsection (1) where, in the opinion of the board, the complaint or charge is frivolous or vexatious.
> [s 17A (6)] For the purpose of hearing any complaint or charge or the the conduct of an enquiry under this section. the board may enquire into the conduct of an firm or corporation carrying on a business relating to the design or construction of buildings.
>
> *NSW Architects Act 1921, as amended. (13)*

Some comment must be made on section 17 (2) (g). The Commonwealth *Trades Practices Act (1974)* and the *NSW Fair Trading Act* require 'due care and skill' to he part and parcel of every contract for the provision of services. The relationship between federal and state law here is specified by section 109 of the federal constitution. Even before these Acts applied, there was a common law 'due care and skill' presumption in such contracts. The standard authority from the High Court (Justice Victor Windeyer, 1963) is;

> [The architect.] must bring to the task he undertakes the competence and skill that is usual among architects practising their profession.
> And he must use due care. If he fails in these matters and the person who employs him thereby suffers damage, lie is liable to that person. This liability can be said to arise either from a breach of his contract or in tort.
> *Vo1i v Inglewood Shire Council [1963] 110 CLR 74. (14)*

4.6. PROCEDURE & PRACTICE

It is now time to consider other aspects of the law. It must be emphasised that organisations like the NSW Board of Architects are, in effect, courts handling complaints that have survived the preliminary vetting.

> [s 22 (2)] Every person duly summoned as aforesaid who does not attend after reasonable expenses have been paid or tendered to him, or who refuses to be sworn or to make a statutory declaration or to answer any lawful question shall be guilty of an offence against this Act and shall he liable, upon conviction, to a penalty not exceeding $200.
> *NSW Architects Act 1921, as ameded. (15)*

> [19 (1)] A hearing or inquiry referred to in clause 17 shall he held without the exclusion of the public.
> *NSW Architects Regulation 1983,• compare 1995 Regulation, clause 16 (3). (16)*

The system, such as it is, appears to be that the complainant must submit detailed evidence in the form of affidavits, and the respondent may then produce evidence in the form of other affidavits. There is no site inspection, no use of photographs and no cross-examination of those who sign the affidavits. So there is essentially no way to prevent the respondent from producing more witnesses who say whatever is necessary to counter the possibly truthful complaint. All this seems to violate section 10 of the Universal Declaration of Human Rights (quotation 4 above). Furthermore, again despite the Regulation and the Universal Declaration of Human Rights, the Board of Architects does not announce its hearings in the Law Notices of the SMH, and does not hold them in public. This may be contrasted with the practice of the Legal Services Tribunal.

As already noted, the NSW Board takes seriously anything said by any architect, such as the gentleman hired as an additional expert witness by the architect ultimately reprimanded over the Donavan case. This is hard to understand particularly as this gentleman failed to note the key place in the site meeting minutes recording the failure to consider sub-soil conditions. Thus the Productivity Commission must accept that architects can and do lie to protect their colleagues. The McGuinness quotation (17) is relevant, here. The key defence against, false evidence is inspection of the site. Let the investigating committee see for itself a concrete slab in a cut-and-fill situation with rock on the uphill side and garden soil on the downhill side.

4.7. FURTHER ISSUES

There has been trouble with teachers covering up colleagues involved in sexual molestation of children:

> This behaviour is part of the general mindset of public sector unions: despite having full access to the industrial relations system and elaborate systems of tribunals and appeals mechanisms, they always tend to defend the indefensible on the principle that to give the interests of justice and discipline an inch is to abandon the interests of their members. The contrary is the truth. The professional obligations of any teacher, police officer, or judge go far beyond professional solidarity.
>
> *P. P. McGuinness, 'The Culture of the Cover-up', SMH, 20 February 1997. (17)*

Other sections of the community are now taking the giving of evidence more seriously. For example, the following matter was listed to come before the Police Integrity Commission (Judge Urquhart) in 1998:

> To investigate a purported signing by a Probationary Constable of a statement incorporated in a. NSW Police Service Brief of Evidence, subsequent actions taken by the NSW Police Service and the events that followed.
>
> *Law Notices, Sydney Morning Herald, 4 May 1998. (18)*

The NSW discussion paper of 1997 contained the following text. It appears to have originated from the NSW Board of Architects:

> Some of the complaints alleged negligence or reflect dissatisfaction of a client with an architect's professional performance and complaints on these grounds are not catered for in the current Act so disciplinary action cannot be taken.
>
> *DPW NSW, Discussion Paper on the Architects Act (1997), page 24. eti e*

This is erroneous. Firstly, section 17 of the Act explicitly mentions ‘breach of contract’ as a basis for disciplinary action. The old common law of contract always contained a 'due care and skill' requirement of the contractor. Hence failing to carry out a contractual agreement with due care and skill is breach of contract. The Commonwealth Trades Practices Act and the State Fair Trading Act both now make this ‘due care arid skill’ requirement explicit. Secondly, the Allinson case of 100 years ago and the Act give the Board full power to discipline an architect for any professional behaviour which the majority of senior practitioners of architecture would find abhorrent. [See section 4.4.]
The Productivity Commission should read with great care the ruling the late Sir Victor Windeyer made in the. High Court in the Voli v lnglewood Shire Council case. The two other judges concurred. The architect 'must bring to the task he undertakes the competence and skill that is usual among architects practising their profession'. Sir Victor continued:

> And he must use due care. If he fails in these matters and the person who employs film thereby suffers damage, he is liable to that person. **This liability can he said to arise either from a breach of his contract or in tort**.

This makes it clear that 'due care and skill' is part and parcel of any contract for the provision of architectural services. Failure to provide it is 'breach of contract' and so is included in the list of forms of professional misconduct given in the NSW Architects Act. In fact the Board, acting on the advice of a former Supreme Court Judge, accepted and ultimately upheld a complaint from us based on lack of due care and skill.

So the NSW Board of Architects has been fobbing off potential complainants with bad advice about the law!

5. TWO COMMENTS ON THE NSW ISSUES PAPER OF 1997

The following two comments on the NSW Issues Paper of 1997 may still he relevant. In general, the Productivity Commission should find much of interest in that document.

5.1 THE ROLE OF BCA

The statement 'NSW has adopted the Building Code of Australia.' (page 12) is open to some challenge. It is not clear that insurance companies offering settlements for defective building work in NSW will adopt a blanket approach that in the absence of very good reason to the contrary the general 'due care and skill' requirement in building contracts will be taken to imply compliance with all relevant parts of BCA. It is even. less clear what practice private arbitrators will adopt.

5.2 INTEGRATED DEVELOPMENT ASSESSMENT

Remarkably, the Issues Paper made no, reference to the NSW Government proposal (DUAP White Paper, February 1997) to move to self-certification in various aspects of the building approval process. Inevitably architects will be involved in this activity. It creates a now area for professional responsibility. The Inquiry has to consider whether an architect who misleads a municipal council over the compliance of a client's project with that council's regulations should be liable to be accused of professional misconduct.

6. CONSUMER PROTECTION

Chapter 4 of the NSW Issues Paper should have drawn attention to a. significant anomaly. The consumer protection for residential building work is not available for small commercial building work. Although it is difficult to define ‘small’ by any means other than a monetary limit, and any choice of limit will create anomalies, the issue remains.

A collective lack of professionalism (that is, collective unethical behaviour) has been shown by the architecture profession in failing to develop readily intelligible contract forms that protect their clients' interests. In particular, arbitration clauses in such contracts have dragged various victims of bad builders deeper into the mire. Such clauses in residential building work have been rendered void by state law in NSW, Victoria and Queensland. Otherwise, there has been far too little progress on the issue of fairer contracts since 1921.

It seems clear that the introduction of the *BSC Plain English* contract and the statutory voiding of arbitration clauses were great advances on the previous industry-based contracts. The NSW Board of Architects, despite part (ii) of its objectives as set out on page 9 of the Issues Paper, appears to have played no role in the creation of fair 'Plain English' contracts for architectural and building services. Such activity would be fully justified by the section of the existing Act allowing it to spend surplus funds for the benefit of architecture. Indeed, there is still no variant of the 'Plain English' building contract adapted for projects which are architect-administered.

The opportunity should be taken here to comment on the practice of arbitration in NSW building disputes. There is limited anecdotal evidence around about certain quite unfair decisions being made. Perhaps the best single reason for concern is the exposure by the Gylcs Royal Commission of the other activities of one minor figure in building dispute resolution in NSW. Ultimately the States have to provide such specialised courts as experience shows is necessary and do their best to stff them with appropriate personnel.

7. ARCHITECTURAL ASSISTANTS

In section 7.1.3 the NSW Issues Paper avoids the issue of whether 'architectural draftsmen' or ‘plans prepared for Council’ people need registration. This must be discussed. If registration is required, the Boards of Architects inii. t accept an enlargement of their functions.

8. ‘23 COMPLAINTS IN NSW IN 5 YEARS’

Discussion point, 12 of the *NSW Issues Paper* should be taken with a considerable grain of salt. There is no visible economic incentive to spend serious money on lawyers to nail a rogue.

Essentially one does it only when provoked beyond the limits of tolerance. If one hears that the NSW Board of Architects wastes time on legal trivialities instead of getting to the facts of the matter - and this will usually require inspection of a building one will think long and hard before taking on such a project. At the risk of repeating parts of section 4.6, I point out. that the concept of 'natural .justice' requires consideration of all relevant and non-repetitive evidence. In this context it is easier to move the. NSW Board to the evidence than vice versa. If one hears that the NSW Board accepts unsworn evidence from an architect who has made a cursory examination of the property ahead of the detailed evidence of highly competent building experts, further doubt arises about the wisdom of putting money, time and nervous energy into the matter. Note also section 4.7 above, which may he evidence that the NSW Board has been systematically discouraging complaints alleging negligence by issuing disinformation about the law.

9. ALTERNATIVE FORMS OF REGISTRATION

Discussion point 13 ignores the fact that. certification under the Professional Standards Act administered by the RAIA would, at best, amount to much the same cost and end result. Further; the behaviour mentioned below point 3.1 of section 2 of a member of the NSW Board of Architects **throws very grave doubt over the integrity of the whole organisation**. It is surely better to maintain a system in which the ordinary political processes are available to expose scandal if and when it occurs.

10. CONTINUING EDUCATION

Apparently at least a section of the architectural community does not have, training adequate to identify bad building work. Of course they should not arbitrate, administer contracts, issue completion certificates or offer written evidence on what they do not understand.

I respectfully suggest that nothing would beat groups of architects going on tours inspecting a collection of 10 to 20 jerry-built buildings. Fees would have to be charged by the sorrowing owners.

It should be remembered that suppliers of building material advertise and would be very happy to send one of each brochure they currently have to each architect in the country. Quite probably they do this already. The architects must be under some considerable obligation to read this material and selectively file it. The Boards must take every opportunity to reprimand each architect who has failed to keep on top of this flood of information.

Remarkably, the specifications organisation Natspec recently had to take the RAIA to task for informing its members that detailed understanding of certain relevant Australian standards was not expected of them for the following:

> In a significant shift in policy, the Royal Australian Institute of Architects (RAIA) have advised architects that they are not expected to be familiar with Australian Standards for building products, nor are they expected to follow them through on site.
>
> *Specnews - The National Building Quarterly, July 1996, page 26. (20)*

This comment refers to the RAIA April 1996 Advisory Note *Australian Standards and Client and Architect Agreement* advocates a. change to the client/architect. agreement. The text is:

> *It is not part of the Architectural Services to check that each item of work and materials complies with those Standards (cited in the working documentation).*
>
> *RAIA 1996 (21)*

On page 30 of the same issue of Specnews is to be found:

> Procrustes believes that the Institute's Notes referred to here (all issued together) are inconsistent both with each other, and with what many regard as 'best practice'. ... Architects and others

must bite the bullet and take standards and compliance seriously. To do otherwise is to pursue what may well be seen Lo be a less than professional path in the documentation and contract administration of buildings.

Specnews. (22)

11. PROFESSIONAL TNDEMNITY INSURANCE

Discussion points 20 and 21 of the Issues Paper raised the crucial issue of professional indemnity insurance. It should be understood that, insurance that dies with an architect may protect the architect but does not protect the client. I would suggest that in return for a. statutory time limit on liability (10 or 15 years?) such insurance be compulsory and

(a) be specific to the job;
(b) be transferred along with any transfer of ownership of the property;
(c) be rerorded in a register maintained by the Board of Architects.

12. REGISTRATION OF COMPANIES

As it may not be easy to identify which architect did what in a multi partner practice, suing in tort or in contract should normally be done against the company and so against the insurer. This in turn requires insurance policies be taken out by the company and so in turn requires all companies providing architectural services to be registered with the Board of Architects.

Companies are used by unworthy architects to make it harder for suing in tort to be successful.

The Board would simply require that the partners and/or owners and/or senior employees include registered individual architects. As before the Board should be required to file details of such insurance policies.

I would be happy to discuss any of the issues raised in this submission with the Commissioners.

Yours sincerely,

(signature)

Peter Donovan.