NCP Review of Architects and Building Legislation

FINAL REPORT

February 1999

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Final Report

Executive Summary

Freehills Regulatory Group was appointed by the Department of Infrastructure to undertake the National Competition Policy Review of the Architects Act 1991, the Architects Regulations 1993, the Building Act 1993 and the Building Regulations 1994.

We find that several provisions in the above legislation operate as restrictions on competition. Some of these provisions warrant amendment. In many other instances, however, we hold that the provision may raise costs to business but nevertheless provides net benefits to the community.

In respect of the Architects Legislation, a primary consideration is whether the title restrictions and registration provisions achieve net benefits for the community. We hold that they do and subject to our finding on the potential benefits of integration with the Building Legislation, we could not find an alternative mechanism which would clearly achieve higher net benefits.

Review of the Building Legislation gave rise several issues. We find that where the registration levels for a building practitioner category or class is high, the title restrictions, registration requirements and compulsory insurance requirements are likely to provide net benefits. However, for categories where registration levels are low, it is not clear that the provisions provide net benefits. Given the relatively recent reform of the legislation, we take the view that it is premature to repeal the provisions. It appears that insufficient time has elapsed to ensure adequate levels of compliance with the title constraints and registration requirements. Instead, we recommend that the provisions be amended with a view to clarifying their meaning and to increasing levels of registration. For instance, in our view, partnerships and companies should be required to obtain registration. Further, we recommend that review of registration levels should be undertaken at regular intervals to assess whether it is appropriate to retain registration requirements for any or all categories. Increased audits of building surveyors should enhance the benefits of the building permit system.

We did not assess the individual compulsory insurance orders issued by the Minister. However, it is our view that the Minister's power to issue and revoke compulsory insurance orders provides net benefits and should be retained.

Further issues arise in relation to the Building Legislation's administration. Though we do not find that the building permit levy, the registration fees or other charges amount to restrictions on competition per se, it is our opinion that the provisions governing the funding of the legislation's administration should be framed to offer greater efficiency incentives and to provide greater transparency. In this regard we make some recommendations about the building administration fund, a building permit levy formula and about separate disclosure of the revenues and expenses of the BCC, BPB, BAC and the BRAC.

We recommend that consideration be given to undertaking a further review of the structure, function and performance of the regulatory bodies to procure greater benefits from the administration of the legislation.

The terms of reference required consideration of the case for integrating the Architects Legislation with the Building Legislation. We adopt the view that there are potential benefits to be derived from such integration, such as administrative cost savings, streamlined legislation and the common application of construction industry policy to all relevant occupational groups. The experience and effectiveness of the ARBV suggests that amalgamation of the ARBV and the BPB could facilitate improved regulation of the Building Legislation. As the Building Legislation is still somewhat in its infancy, we are of the view that if integration was to proceed, an appropriate transition period would further enhance the available benefits.

We summarise our broader findings in the following tables.

Ch	Provision of Architects Legislation	Recommendation
4.4	Constraints on use of the title "architect" to registered architects (Sections 4, 5 and 6).	Subject to our discussion on integration of the Architects and Building Legislation, we recommend retaining title restriction and registration requirements for architects.
4.5	Control on the ownership of organisations using the title "architect" and its derivatives (Sections 13 and 14).	We recommend that the ownership provisions be amended to ensure that in firms which use the title "architect", or hold themselves out as offering architectural services, at least one director or partner is a qualified/practising architect.
4.6	Constraints on acting as developer and architect on same project (Regulation 8), on using the title "architect" when carrying on the business of developer (Regulation 9), and on advertising as an architect when acting for a developer (Regulation 12).	We recommend Regulations 8, 9 and 12 should be repealed and Regulation 10 be amended to require an architect, acting as both developer and architect, give the client notice in writing of the scope of his or her different roles. Apart from Regulations 5, 6, 7 and 10, generic laws governing misleading and deceptive conduct may also be relied upon. This will achieve a higher net benefit than the existing provision.
4.7	Prohibition on architects endorsing, for profit, a specific building material, component, service or product (Regulation 13).	In our view, Regulation 13 imposes costs without achieving benefits over and above those achieved by Regulations 5, 6, 7, 10, and 14. We recommend the repeal of Regulation 13 and reliance on Regulations 5, 6, 7, 10 and 14 to achieve higher net benefits.
4.8	Constraints on accepting financial advantages from suppliers, contractors and tradespeople of the project, except as a client (Regulation 15).	We recommend that Regulation 15 be repealed and Regulations 5, 6, 7, 10 and 14 be relied on. This offers a higher net benefit as it achieves similar benefits using less interventionist and hence less costly prescriptions.
4.9	Exemptions for public sector employed architects (Section 7).	Our recommendation is to repeal these exemption provisions to ensure that all architects, including private and public sector employees, are treated equally by the provisions.
4.10	Constraints on seeking business from clients of other architects (Regulation 19).	Our recommendation is to repeal this provision because contract law provides adequate redress for an architect in the event of breach by a client.
4.11	Other provisions.	For various reasons we do not recommend amendment to these provisions.

Ch	Provision of Building Legislation	Recommendation
6.4	Title constraints and registration of building practitioners (Sections 169, 172 and 176).	To improve monitoring and enforcement, we recommend that companies and partnerships be subject to the registration requirements. To avoid eroding the meaning of the building practitioner titles and to further address the objectives of the Legislation, Section 176 should be clarified to provide that all practitioners, whether sole practitioners or employed by companies or partnerships, are required to register. However, relevant orders should except building practitioner employees of adequately insured companies and partnerships. In our view, registration levels and compliance levels should be reported by the BPB and should be one of the BPB's key performance indicators. We recommend regular review of the registration categories and classes to assess and report on the ongoing need for these categories. If new categories or classes of Building Practitioner are to be added, an appropriate Regulatory Impact Statement should be prepared.
6.5	Compulsory insurance provisions (Part 9 Division 3).	We recommend retention of the Minister's power to issue compulsory insurance orders. We take the view that when deciding to issue or revoke such orders, a competition analysis and cost-benefit assessment should be undertaken to assess the case for the relevant order.
6.6	Building permit requirement (Part 3) and occupancy permit requirement (Section 39).	We recommend increased use of audits of building surveyors to ensure that standards are maintained and fostered. We recommend that consideration be given to conducting a study into the case for integration of aspects of the planning permit application process and the building permit provisions.
6.7	Exemptions for public sector employees and the Crown (Section 176(5)(a)).	We recommend repeal of the provisions which grant exemptions to public sector employees, public authorities and the Crown. However, of these provisions, we recommend retention of those which exempt certain high security Crown buildings from the requirement to lodge permit documents with the relevant council.
6.8	Building permit levy and the building administration fund (Sections 200 and 201).	It is our view that the levy should be based on a formula which is cost-reflective and includes incentives for cost-effective administration of the legislation. One method by which to ensure adequate resources are available to allow enforcement of registration provisions, is to amend the provisions constituting the building administration fund to specify that registration fees be paid to the BPB to cover the cost of regulating building practitioners and administering the registration system. In this way, registration fees can be set at a cost reflective level and the BPB has incentives to realise operational efficiencies. To further enhance regulatory efficiency, we recommend that the regulatory bodies develop Key Performance Indicators (KPIs) and provide greater disclosure. A review of the structure, functions, and performance of the regulatory bodies could further enhance benefits.
6.9	Other provisions.	For various reasons we do not recommend amendment to these provisions.

Ch	Other	Recommendation
7	Integration of the Architects Legislation and the Building Legislation.	We find that there are potential net benefits to be obtained from integration of the Architects Legislation and the Building Legislation. We take the view that integration, subject to any appropriate transition period, should procure administrative cost savings and should allow consistent application of construction industry policy to all participants. The experience and apparent effectiveness of the ARBV should assist an amalgamated ARBV and BPB to achieve higher levels of compliance with the Building Legislation.

1 Background

1.1 National Competition Policy

Victoria is a party to the Competition Principles Agreement (CPA) which was signed in 1995 by the Council of Australian Governments, one of three agreements to give effect to National Competition Policy (NCP). Under the CPA the Australian Governments agreed to adopt the guiding legislative principle that[1]:

legislation (including Acts, enactments, Ordinances or regulations) should not restrict competition unless it can be demonstrated that:

- **the benefits of the restriction to the community as a whole outweigh the costs; and**
- **the objectives of the legislation can only be achieved by restricting competition.**

To give effect to the guiding legislative principle, the Victorian Government has agreed to review and, where necessary, reform all existing legislative restrictions on competition against this principle and ensure that all new legislative proposals are consistent with this principle. As part of this process the Minister for Planning and Local Government has commissioned the NCP Review of the Architects and Building Legislation (the review).

The review adheres to the principles set out in the CPA and the Victorian Government Guidelines for the Review of Legislative Restrictions on Competition (Guidelines).

As the scale of the review has been assessed as "complex-minor", the review has been conducted in accordance with Model 2, "Semi-public", of the Guidelines. A Model 2 review requires the reviewer to be independent from the government department and from the area under review. Using a process of competitive tendering, the Department of Infrastructure (DOI) appointed Freehills Regulatory Group (FRG) to undertake the review.

A Model 2 review also requires public notification of the review and a call for submissions. These were advertised in The Age on Saturday 14 November 1998. An issues paper was prepared to assist those wishing to make submissions. Submissions were received and where relevant have been relied on in making findings and/or recommendations.

The review was supported by a reference group comprising representatives with appropriate knowledge and experience from DOI, the Architects Registration Board of Victoria , the Building Control Commission, the Department of Premier and Cabinet, the Plumbing Industry Board and the Office of Fair Trading and Business Affairs. Research was conducted through a range of methods such as desktop analysis, interstate comparisons, use of industry specialists and discussions with peak industry bodies and professional associations to assist with information collection and analysis. Drafts of the issues paper and the review report were presented to the reference group for feedback.

[1] *Competition Principles Agreement*, Clause 5(1).

1.2 Terms of reference

The review consists of two distinct parts. The Part A element involves the review of the Architects Act 1991 and the Architects Regulations 1993, and the Part B element involves the Building Act 1993 and the Building Regulations 1994. Part 12A of the Building Act 1993, which deals with regulation of plumbing work, is excluded from the scope of this review as it has already been assessed as complying with NCP. The Building Code of Australia is also excluded from the review.

Parts A and B of the reviews were undertaken simultaneously as they feature in the building services value-added chain in an integrated way.

The terms of reference specified the following tasks to be conducted in the review:

- clarify the objectives of the legislation;
- identify the nature of any restrictions contained in the legislation;
- analyse the likely effect of any restrictions on competition in the economy in general in the context of the legislation and the building industry;
- identify any non-legislative means of achieving the objectives of the legislation;
- assess the costs and benefits any restrictions may have for the community as a whole; and
- determine whether any restrictions identified outweigh the costs to the community as a whole.

In addition, the terms of reference required the following specific matters to be addressed:

- analysis of how architects and other building practitioners align with regard to relevant insurance cover and registration;
- assessment of the need for statutory insurance against a scheme of voluntary insurance;
- analysis of the need for statutory registration and associated processes and practices;
- consideration as to whether a business or body corporate could be a registered building practitioner as opposed to or in addition to natural persons; and
- examination of the possibility of consolidating both sets of legislation.

We note that it is not within the scope of the review to provide drafting recommendations in respect of any amendments, but rather to suggest the intention or desired effect of amendments.

1.3 Structure of report

The following chapter broadly outlines the process and principles of NCP legislative reviews.

Chapter 3 provides a broad market framework of the Architects Legislation and Chapter 4 examines the potential restrictions on competition resulting from the Architects Legislation. Chapter 5 outlines the framework of the markets affected by

Building Legislation and Chapter 6 analyses the restrictions on competition due to the Building Legislation. Chapter 7 assesses the case for integration of the Architects Legislation with the Building Legislation. Appendices A and B outline the interstate architects and building regulatory regimes, Appendix C provides an overview of three recent reports conducted on regulation of architects, and Appendix D lists the submissions made to this review.

2 Overview of NCP legislative reviews

> *"National Competition Policy represents a commitment by all Australian governments to a consistent national approach to fostering greater economic efficiency and improving the overall competitiveness of the Australian economy."*[2]

Clause 5 of the CPA outlines the States' obligations to undertake legislation reviews to ensure that their regulations comply with NCP principles. The NCP review process is designed to ensure that the community benefits from open and competitive markets and that governments should only intervene where the public benefits of intervention outweigh the costs.

The Guidelines highlight further principles underlying an NCP legislative review[3]:

- **There must be a presumption against statutory intervention and the onus of proof should be on the proponent of intervention.**
- **The direct costs of the regulation should be borne by the immediate beneficiaries of the regulation.**
- **Co-regulation, self regulation and codes of conduct are all valuable regulatory mechanisms but potentially subject to capture.**
- **There are regulations with minimal statutory support which are very targeted and cost effective.**
- **Information is important and ordinary market mechanisms should generally not be inhibited, subject to active enforcement of the ordinary fair trading and other law.**

2.1 Legislative objectives and market failures

The early stages of the legislative review process involve understanding:

- what are the legislative objectives;
- what market failures they seek to address; and
- what other, if any, social goals they aim to achieve.

Unrestricted competition under conditions of perfect markets with full information, even bargaining power and an absence of external effects, is generally regarded as the most efficient method of allocating resources. However, the conditions necessary to foster a competitive environment are not always present. Accordingly, unregulated markets do not always provide the best possible economic and social outcome.

When markets do not operate efficiently, there is said to be a market failure. The most common sources of market failure include the following:

[2] *Guidelines for Review of Legislative Restrictions on Competition*, Department of Premier and Cabinet Competition Policy Taskforce, 1996, p 2.

[3] Ibid, p 6.

- public goods;
- externalities;
- natural monopolies; and
- information asymmetries.

These market failures generally provide the main rationale for governments' intervention in a market economy. See the discussion below for a brief outline of these market failures.[4]

(a) Public goods

Public goods occur when the supplier is unable to economically exclude or technically prevent those who do not pay for the good from enjoying its benefit. It is unlikely that public goods would be provided at the socially desired level if governments did not intervene in the market to secure their provision. In the present review, there are no apparent public good aspects which the Architects and Building Legislation seek to address.

(b) Externalities

Externalities arise where benefits or costs accrue ("spillover") to third parties to the transaction. In the context of the building and construction environments, negative effects could occur, for instance, where poorly constructed buildings cause harm to third parties who were not parties to the construction contracts.

There are few market incentives for the parties to reduce the level of the activity which generates negative externalities. Consumer protection laws and negligence laws are designed to minimise the risk of spill-over costs, and to transfer the spill-over costs onto those issuing or causing the damage, so as to create disincentives for engaging in those harmful activities. Governments may intervene in other ways to reduce the incidence of such negative externalities:

- by prohibiting the activity outright;
- by imposing a tax or charge on the activity;
- by imposing minimum safety standards; or
- by creating tradeable property rights in the harmful activity in order to internalise the externalities.

Positive spill-overs occur when the actions of a producer or consumer result in positive benefits for third parties for which the initiator goes uncompensated. For instance, high standards of architecture, which add to the aesthetics of a city, may provide benefits to third parties who were not party to the construction contract, such as residents who personally enjoy the aesthetics and the benefits of increased tourism.

(c) Abuse of market power

Even markets that are judged on competition policy criteria to be highly competitive might nevertheless exhibit the abuse of market power. Abuse of market power typically

[4] Paragraphs (a) to (d) obtained from the discussion of market failures in the Guidelines pp 34 - 40.

results in lower levels and a lesser quality of goods or services being provided at higher prices than would otherwise be the case under competitive market conditions.

Problems of market power arising from uncompetitive market structures or from anti-competitive conduct should generally be addressed by:

- general competition laws prohibiting certain anti-competitive conduct or preventing anti-competitive mergers; or
- changes to market structure to make the market more contestable.

Market power can be exacerbated by regulation.

> *"[O]ccupational regulations which restrict entry to persons with particular qualifications will not necessarily ensure that standards are subsequently maintained but may confer significant market power on individual members of an occupation."*[5]

Thus in some instances, where regulation limits the number of firms providing a particular service or product, the regulation can enhance the market power of those permitted to supply the service or product.

As discussed in Chapters 3 and 5, the Architects and Building Legislation does not appear to grant or exacerbate any concentrations of market power.

(d) Information asymmetries

In highly competitive markets, buyers and sellers have the same knowledge about the product or services involved. It follows from the way sellers often specialise in just a few products, that, in real world markets, sellers will have much greater information about product or service quality than buyers. This may arise because it is costly for consumers to acquire quality information prior to purchase, or because quality can only be assessed after purchase and consumption.

One consequence of information asymmetries is that lower quality products may drive higher quality products out of the market. Alternatively, firms which are able to establish a reputation as producers of high quality products may be able to extract a premium price over the additional cost of producing the higher quality. In both cases, community welfare is reduced because quality is lower or prices higher than would otherwise occur where no information failures exist.

Where consumers are only able to determine product or service quality after purchase and consumption of the good, the goods are known as experience goods. Information asymmetries have particular relevance to the building and construction industries as the quality of architectural and construction services will often not be known until some time after supply of the service.

Market solutions to problems of information failure may emerge spontaneously to reduce the risks imposed by those failures. For instance, product warranties are aimed at alleviating the costs borne by consumers due to information asymmetries. Secondary markets in information may also emerge such as certification services, agents, insurers and consumer magazines, which facilitate consumer learning and which provide incentives for the communication of product quality.

Professional services generally have some typical characteristics which tend to exacerbate the information asymmetry problem and its consequences, including the following:

- Services are generally not observable before they are purchased as the consumer cannot inspect a service before purchase in the same way as with products.
- The complex nature of professional services often requires considerable skill to deliver the service to the consumer and tailor it to the consumer's needs. This adds to the difficulty of assessing the quality of the service before it is purchased.
- The quality of many professional services can be difficult to assess even after the service has been purchased. These services are, therefore, in the nature of experience goods.
- Many consumers are infrequent customers of professional services. As non-repeat purchasers, knowledge of the quality of the services is difficult to accumulate.
- The consequences of purchasing professional services may, in some sectors, be significant.

Information asymmetries may justify regulation aimed at quality assurance to provide a guaranteed level of service quality to consumers as a risk management device. Such schemes can substitute for search and information gathering by individuals. Information gathering and assessment is provided through the regulatory mechanism, thereby reducing transaction costs for consumers. In some markets, consumers may be able to develop reasonably well informed assessments of quality and risk through mechanisms such as word-of-mouth, reputation and branding.

Many of the regulations in the Architects and Building Legislation are designed to address information asymmetries. For instance, provisions restricting certain titles to only qualified practitioners are aimed at providing information to consumers.

Information asymmetries and externalities are the most prevalent rationale for regulating the building and construction industry and related occupations.

2.2 Competition in a "market"

To determine the restrictions on competition resulting from the Architects and Building Legislation it is necessary to identify, assess and articulate the markets affected by the Legislation. We must also describe the nature and boundaries of the market.

A market is, broadly speaking, an arrangement in which units of a product are voluntarily exchanged between buyers and sellers. Markets have product, geographic, functional and time dimensions. Professor Stigler defines a market as embracing:

> *"the maximum geographical area and the maximum variety of productive activities in which there is strong long run substitution. If buyers can shift on a large scale from product or area B to A, then the*

two should be combined. If producers can shift on a large scale from B to A, again they should be combined."[5]

The first step in identifying the market, therefore, is to assess what product or service is involved. The ambit of these markets will then be determined by identifying those participants between whom there is an area of close rivalry. A market has further been defined as:

"...the area of close competition between firms or.....the field of rivalry between them.... Within the bounds of a market there is substitution - substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong competition, at least in the long run, if given a sufficient price incentive."[6]

Having defined the relevant product market, it is necessary to consider the functional element of a market,[7] the geographic area within which firms compete[8] and the period over which they effectively compete.

2.3 Restrictions on competition

The central feature of NCP reviews is the assessment of whether the provisions restrict competition in a market. As discussed, the guiding legislative principle is that legislation should not restrict competition unless the benefits outweigh the costs and there are no alternatives which produce higher net benefits.

Where restrictions on competition do not address the legislative objectives, then they generally should be reformed. Where the restrictions do address the legislative objectives, then it is nevertheless necessary to undertake a cost-benefit analysis and a consideration of alternative mechanisms by which to address the legislative objectives.

Restrictions on competition could arise by virtue of one or more of the following:

- raising the barriers to entering the market;
- restricting the type of business structure, form or ownership;
- raising the costs of doing business in the market;
- limiting the number of participants that may participate in the market;
- giving unfair advantages to some but not all competitors in the market;

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[5] GJ Stigler, NBER Conference on Business Concentration and Price Policy, Princeton UP, Princeton, 1955, p 4.

[6] Trade Practices Tribunal, *QCMA*, 1976.

[7] Is there a significant sphere of influence as between two or more functional stages of a production and/or distribution sequence such that it is impossible adequately to explain the competitive process at one stage without knowledge of the role or influence of individual firms who also operate at adjacent or other stages? Per Smith, R and Norman, NR., (1996), "Functional Market Definition", *Competition and Consumer Law Journal*, pp 1 - 14.

[8] *Queensland Wire Industries Pty Ltd v The Broken Hill Pty Co Ltd* (1989) ATPR para 40-925 at p 50,008.

- imposing costs on Victorian participants that are not imposed on their competing interstate or international competitors;
- restricting particular forms of conduct;
- prescribing particular production processes or input requirements;
- affecting the size of firms in the industry;
- imposing unjustifiable administrative burdens; or
- inhibiting innovation or differentiation of products or services.

In assessing any identified restriction on competition it is necessary to understand whether market responses to information imbalances are capable of adequately addressing the problem. For instance, it might be argued that these markets are capable of managing risk of harm from information asymmetry, provided it is possible to establish legal liability for the consequences of substandard work.

2.4 Cost benefit analysis

Having identified a restriction on competition imposed by the regulations, it is necessary to assess the costs and benefits to the community from that provision.

The Guidelines recognise that the analysis need only attempt a quantification of significant costs and benefits.

> *"It is difficult to quantify the costs and benefits of many regulations....While there is a significant qualitative component in evaluating the costs and benefits of most forms of regulation there are a number of approaches which can be of assistance....Cost benefit analysis requires that all major costs and benefits be quantified in money terms."*[9]

Cost benefit analysis requires that all relevant benefits and costs deriving from any specific project, undertaking or course of action be enumerated, whenever they occur, whether or not they can easily be measured, and that the exercise be done on a consistent basis, meaning that future values are discounted, and most especially that benefits and costs are measured in the same units as each other.

Intervention must be assessed for the costs it imposes by way of:

- costs associated with administration compliance and enforcement; and
- costs associated with any detrimental effects of regulation on competition and hence on economic efficiency.

[9] Guidelines, op cit, pp 77 and 78.

The CPA clause 1(3) provides for the following matters, where relevant, to be taken into account for balancing costs and benefits:

- **ecologically sustainable development policies and legislation;**
- **social welfare and equity considerations;**
- **occupational health and safety, industrial relations and access and equity policies and legislation;**
- **economic and regional development, including employment and investment growth;**
- **the interests of consumers generally or a class of consumers;**
- **the competitiveness of Australian business; and**
- **the efficient allocation of resources.**

Clause 1(4) states that the above matters are not comprehensive and that other matters may be taken into account, such as those included in the interpretation of public benefit for the purposes of the Trade Practices Act's authorisation and notification procedures.

Should the costs of the restriction outweigh the benefits, the provisions should be reformed. If they provide net benefits, they should nevertheless be assessed to determine whether there are alternatives which will provide higher net benefits.

(a) Benefits of occupational regulation

The Regulation Review Unit, Department of Small Business considered the costs and benefits of occupational regulation in a report released in 1992 entitled the Victorian Government Framework for the Valuation of New Occupational Regulation Schemes in Victoria.

The benefits were regarded as comprising two types - the benefits to members of the occupational group and the benefits to the public.

The benefits to members of the occupational group are considered to include:

- a better image for members of the group; and
- an improved competitive position compared with those who are not regulated, and in some cases a monopoly over the provision of certain services.

Benefits to the public result from protection against risks including, amongst other things:

- risks to health and safety;
- financial risks;
- risks arising from lack of adequate information; and
- risks of dishonest or inappropriate activity.

The Regulation Review Unit stated that -

> "*only where it can be shown that an unacceptable degree of risk results from the unregulated activity, are regulatory controls justifiable. The*

stringency of the controls must, in all cases, be commensurate with the level of the risks"[10].

Risks to the public health and safety are, for instance, involved in building activity during both the construction stage and during any occupation of the building. Regulations requiring training or experience can raise the standards of service provided and thereby reduce the risk to health and safety. A permit system, for instance, may provide a useful mechanism for monitoring and enforcing construction and maintenance standards.

Occupational regulation may also be aimed at reducing the risk of loss to the public caused by the dishonesty of participants in the occupation. The regulation may do this by requiring that persons engaged in a particular business be of good character and that persons lose the right to participate in the occupation in the case of dishonesty.

Other controls may also be used to promote the financial security of participants in an industry. For instance, requirements relating to adequate professional indemnity insurance cover reduce the risk that practitioners will be unable to pay damages if sued for malpractice.

Members of the public generally possess less information than service providers and generally only search out information if the cost of the search is lower than the savings which they expect to make. The fact that a person has certain qualifications or has satisfied standards of entry into a regulated occupation, generally indicates to the public that they may expect service of a particular quality. In this way the cost of search is decreased to the consumer.

There is a concern that any changes to a State or Territory's occupational regulation provisions could impact negatively on mutual recognition agreements and, by implication, international agreements. The Mutual Recognition Act 1992 provides that professionals registered in one jurisdiction will be given recognition in another jurisdiction. The review must consider any anti-competitive impacts which the Mutual Recognition Act could have on the regulation and on deregulation.

(b) Costs of occupational regulation

The costs of occupational regulation are generally categorised into:

- entry costs for people who want to enter the occupational group;
- compliance costs for those who are regulated;
- costs for the public particularly in the form of higher costs of services; and
- costs for government arising from the administration of the regulatory system.

Entry costs arise by virtue of expenses associated with, for instance, education, training and administration. Often this high cost of entry results in fewer people entering the occupation, leading to higher prices to consumers and a generally lower level of service from the occupation. It also may mean a lower level of employment in the particular occupation.

[10] Ibid, p 6.

Costs are often also borne by participants in the regulated occupation. Annual fees that are levied, reporting requirements, restraints on conduct, and other regulatory mechanisms often raise the costs of compliance for those in the occupation. These requirements also may impact the manner in which the services are provided or in which the business is conducted in ways in which the regulation does not intend. The Regulation Review Unit stated estimates of the total aggregate cost of business regulation in Australia to be around 22 billion to 48 billion dollars each year amounting to between 9% and 19% of gross domestic product.[11]

The total cost to Government of running numerous occupational regulation systems in Victoria has also been estimated to run into many millions of dollars annually.

Occupational regulation often results in a restriction of supply and consequent higher prices to consumers. The extent of the restriction and the impact on prices depends on the level of regulatory control and the elasticity of demand. Restrictions may be greatest in the case of impositions of heavy educational requirements particularly where accompanied by the imposition of quotas on the intake to relevant courses. Similar restrictions of supply result when experience requirements or minimal hours requirements are imposed.

Even if regulations are appropriately targeted when established, it is possible that the context and application of the regulations evolve over time such that the regulation no longer addresses the objectives effectively. Two aspects of this regulatory failure include regulatory capture and regulatory drift.

Regulatory capture occurs when a regulator takes decisions which are biased in favour of the industry that is being regulated. There is a risk that regulatory capture will occur when professional bodies or associations representing an occupation have an operational responsibility to set standards of entry, in addition to carrying out registration, licensing and other enforcement functions. It is possible that entry standards, though they may be necessary to ensure consumer protection, might result in capturing the process of occupational regulation by lifting standards above the level which is really necessary. This could create skilled, high cost services to an extent that lower quality, lower priced services are eliminated from the market.[12] This could result in marginalising or even excluding those consumers who cannot afford high cost services, but who may nevertheless be adequately served by a less qualified practitioner.

A further concern is that even if regulations are appropriate when adopted, they may cease to be so over the passage of time. This is termed regulatory drift and can result from structural change in the economy due to changes in technology or consumer preferences. The necessary level of consumer protection may rise, for instance, if services become more complex, or fall if consumers become more sophisticated or if alternative laws develops.

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[11] Ibid, p 8.

[12] Some studies for instance show that any control of supply results in high costs of professional services. See for instance the 1994 *Baume Report*, commissioned by the Australian Government in relation to the Royal Australasian College of Surgeons.

2.5 Alternatives

Relevant alternatives to the existing regulations have been examined to ascertain which, if any, will provide the highest net benefit.

Good quality regulation is considered to be regulation which achieves appropriate objectives in the most efficient way. Poor quality regulation may be seen to either have inappropriate objectives or to achieve appropriate objectives in an inefficient way or with unintended consequences. Importantly, the extent of compliance with regulation will also influence its appropriateness.

(a) Types of occupational regulation

There are many ways in which an occupation may be regulated. Some methods are more intrusive than others and they can be distinguished by, for instance:

- the source of the controls;
- the form of protection given to the public;
- the extent to which entry into the occupation is restricted; and
- the basic distinction between self regulation and Government regulation.

Self regulation refers to a situation in which Government does not involve itself in regulation at all. It is left to the occupation to regulate itself, usually through an industry association and an ethical code. One type of self regulation includes accreditation such as the Certified Practicing Accountant accreditation. Generally speaking, Government regulation which grants the regulatory administration to occupational groups is termed co-regulation.

The three main types of Government occupational regulation are registration, certification and licensing. The terms have often been used interchangeably and in some instances a combination of these types of controls are actually used. The Regulation Review Unit uses the following definitions:

- Registration is to refer to a system which involves no more than the listing of people in an official register with no conditions upon registration other than the payment of a fee so that registration is a means of identifying those who practice the occupation to ensure they receive information facilitating their practice and to ensure that they are complying with special legal requirements.
- Certification is to be used to refer to a system involving the formal recognition of those who have attained certain qualifications thought desirable for a person who practices an occupation so that a person who is not certified is still allowed to practice the occupation but is not allowed to pretend that he or she is a certified member of the occupation -

  > *certification is a means of providing information to the public to facilitate choice between competing services*.

  The certification of standards is based on a theory that where markets are not fully informed, certification of standards, in particular certification of formal qualifications, increases the availability of information and helps members of the public to choose between different levels of competence. In this way, members

of the occupation who offer better services will eventually displace those who do not.

- Licensing is generally used to refer to a system which makes entry to the occupation dependent upon the fulfilment of certain substantial criteria usually relating to education and experience as a means of minimising the risk of loss to the public arising from the incompetence of practitioners. Licensing usually involves the establishment of a regulatory body to administer the relevant controls. The exclusion of unqualified persons from the occupation is only considered necessary where the risk of loss to members of the public is particularly high, as this form of regulation imposes costs on the public and on the Government.

Though the Legislation under review can be seen to involve a system of registration, the title restrictions and registration requirements effectively amount to regulation akin to the certification system described above.

It does not automatically follow that serious consequences of action require direct government intervention. In many cases, government action will not be the most effective solution due to other extrinsic factors such as lack of information and inability to enforce the action. Dispersed information held by groups and individuals that are closer to the industry may be more reliable and a better basis for action. Alternatively, the cultural context and general mores of social behaviour could result in substantial sanctions for inappropriate behaviour through loss of face and reputation within the community. General legal and institutional structures which apply across an economy may be sufficient to appropriately control behaviour. Competition law, fair trading legislation and common law principles of contract, tort and equity are all examples of generic regulation is discussed below.

(b) Generic regulation

Civil remedies may be available in some situations. A person who suffers loss or damage as a result of defective building or architectural services may sue the responsible builder or architect in tort or contract.

For instance, in tort, if it is reasonably foreseeable that a person may be affected adversely by an architects design or a builder's construction and, by failing to exercise the appropriate standard of care, the architect or builder causes loss or damage to the person (eg as a result of the subsidence of the building), the person may sue the architect or builder for negligence.

If the injured person has a contract with the architect or builder, pursuant to which the architect or builder must provide design or construction services of a certain quality and the architect or builder has failed to do so, the person may be entitled to damages for breach of contract.

The Trade Practices Act 1974 (Cth) (TPA) regulates agreements and business conduct. By virtue of the Competition Policy Reform (Victoria) Act 1995, the provisions of the TPA now apply to almost all persons, Government organisations and corporate entities in Victoria. Architects and other providers of building services can be prosecuted for engaging in any of the anti-competitive behaviour (often called restrictive trade practices) prohibited by Part IV of the TPA.

Restrictive trade practices include anti competitive agreements, the abuse of market power, exclusive dealing, price fixing and, third line forcing. Other conduct is prohibited where it substantially lessens competition in the market.

The TPA also contains a number of consumer protection provisions in Part V. For example, a person must not in connection with the supply of services (among other things) make false or misleading representations with respect to the standard, price or benefits of services.

The Prices Surveillance Act 1983 (Cth) may prohibit the supply of goods and services by certain people or the supply of certain goods and services unless the ACCC's approval of the price of those goods or services has first been obtained.

The Fair Trading Act 1985 contains provisions relating to consumer protection associated with the provision of goods and services. The Fair Trading Act replicates the consumer protection provisions of the TPA and includes a number of other more specific provisions.

The Planning and Environment Act 1987 regulates land use and development in Victoria. Included in its objectives are the aims of securing a pleasant, efficient and safe working, living and recreational environment. It establishes a planning framework, the Victorian Planning Provisions, with a system of planning schemes using zoning, permits and other mechanisms to control land use and development.

The Occupational Health and Safety Act 1985 provides for the maintenance of certain standards of safety in a workplace and may thereby ensure that the quality of building services is maintained. Numerous other regulations at State and Commonwealth level impact upon the relevant markets, such as industrial relations laws, environment protection laws and so forth.

2.6 Summary

The legislative review process seeks to assess whether the public interest in promoting efficient markets is served by the regulations or whether the costs of the regulation exceed the costs of the market failure. The mix of regulation which results in the highest net benefit, or in the least costly solution, is to be preferred.

This review is guided by the principle that:

> *The objective should be the freeing up of the occupational services market to the maximum extent consistent with the maintenance of adequate standards of practice.*[13]

However, the above NCP principles are general principles only, and each regulatory regime must be assessed in light of its particularities.

[13] Guidelines, p 79.

3 Markets Affected by the Architects Legislation

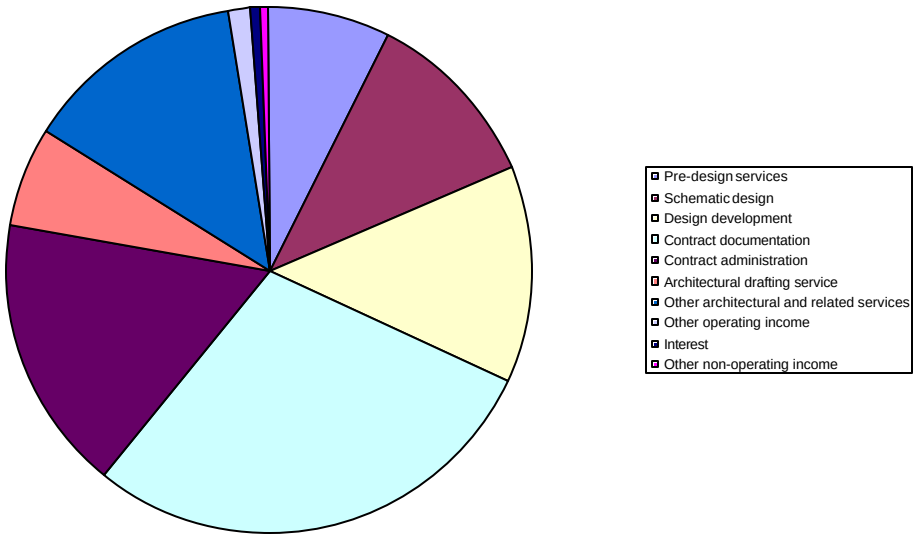
The Architects Legislation affects those markets in which architects operate.

According to the RAIA, an architect typically undertakes one or more of the following roles in a building project:

- designing and planning;
- selecting a site;
- undertaking a feasibility study;
- managing the building project;
- managing the construction process or team;
- designing the interior;
- landscaping the external surroundings;
- maintaining the building;[14]

Design, documentation and contract administration are the main services provided by architects. The proportion of an architect's total income derived from each source is indicated in the chart below. Contract administration and documentation accounted for almost half of total income to architectural businesses in 1992-93.

Chart 1: Sources of income for architectural businesses, Australia, 1992-93.



Source: ABS, 8676.0, 1992-93, p 20.

Given these general roles, it is our view that architects offer services in two main markets:

[14] *You and your architect, building projects*, The Royal Australian Institute of Architects, p 6.

- the building design services market covering detailed design, such as site building and interior design, preparation of planning applications and related studies, cost options, building application documents, tender documents and construction drawings, specifications and details; and
- the market for contract administration services encompassing tender and contract negotiations, management and inspections of construction work in progress and other contract administration duties[15].

Geographically, the markets impacted by the Architects Legislation are limited to Victoria. However, the legislation affects the interstate competitiveness of Victorian architects at least due to the Mutual Recognition legislation. The Mutual Recognition legislation means that any person in a registered occupation in one jurisdiction is now able, through an administrative process, to obtain registration to carry out that occupation in any other jurisdiction. We consider the nature of each market at both the Victorian and national levels.

Data presented in this chapter supports the view that the markets affected by the Architects Legislation are generally competitive.

3.1 Building design services

There is evidence that the market for building design services is competitive. Data on the design market is provided below.

Architects provide a wide array of building design services including schematic design, assisting a client in the development of feasibility studies, preparing architectural briefs, design conception, offering design solutions and calling and reporting on tenders. An architect may also advise, during the design stage, on any need for specialist consultants in the project and may co-ordinate the contributions of specialist consultants to final designs.

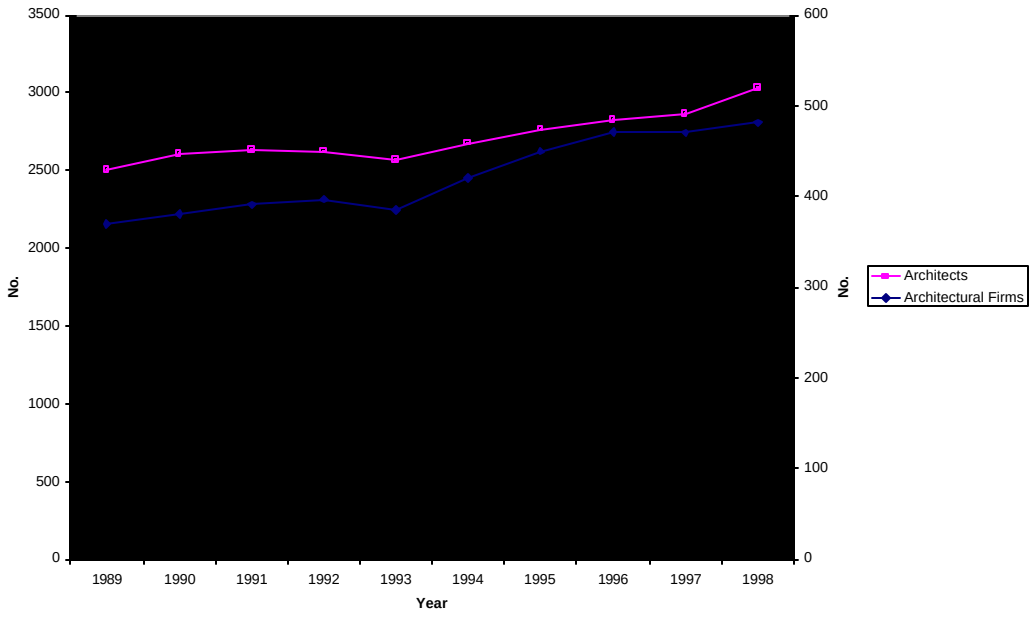
Building design is an important source of income for architects. More architectural businesses earned some income from this source than from any other. Of the 4,409 businesses providing architectural services in Australia, 75 per cent generated income from design development[16].

Numbers of architects and architectural businesses provide further support for the view that Victorian building design services market is competitive. The number of registered architects and architectural firms in Victoria has steadily increased since the late 1980's.

[15] A detailed list of these services is set out on pp 22 and 23 of the Client and Architect Agreement, October 1993, published jointly by the RAIA and the Association of Consulting Architects.

[16] ABS 8676.0, 1992-93, p 5.

Chart 2: Number of registered architects and architectural firms, Victoria.



Source: ARBV.

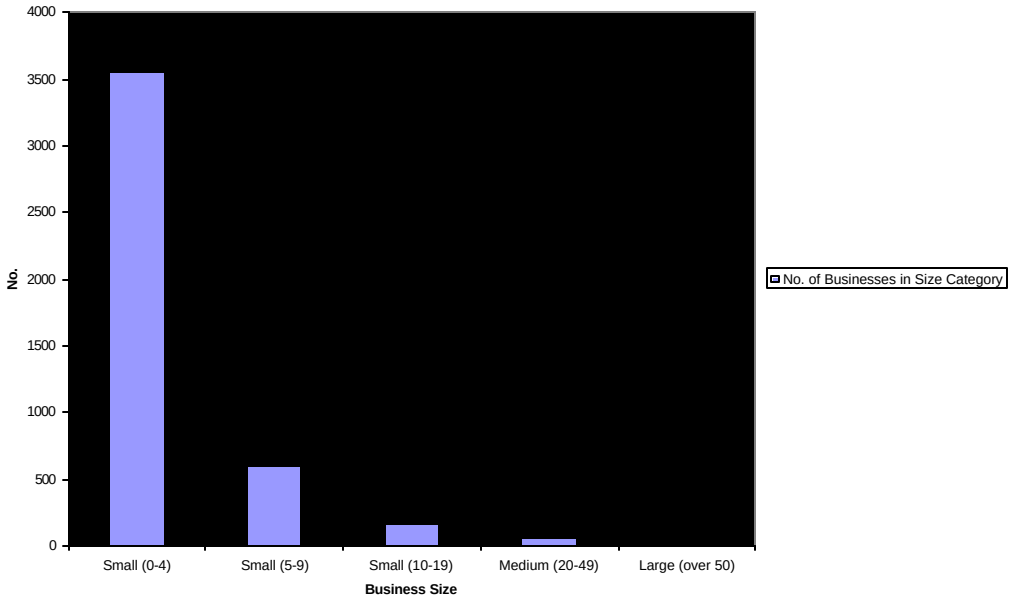
The main professional body representing architects is the Royal Australian Institute of Architects (RAIA) comprising chapters in each State which are coordinated by a Federal council. We found that the RAIA represents around 70 per cent of all Victorian architects[17]. Since more architects are registered than are members of the RAIA we conclude that, most Victorian architects are registered.

Most architectural businesses are small, which further suggests that the market is generally competitive. In Australia, there are a few large national firms, a greater number of state based partnerships and many small architectural businesses and sole practitioners. In fact, 98 per cent of all businesses providing architectural services employed fewer than 20 persons (excluding contract and agency staff) and most of these employed less than five persons[18]. The prevalence of small architectural businesses in Australia is evident from Chart 3.

[17] It should be noted that these figures on RAIA memberships are for active corporate memberships in Victoria. Graduate members and student members are not included. Architectural partnerships and companies are also excluded because the RAIA only offers memberships to individuals. (The ARBV submission states that the percentage is around 40%).

[18] ABS,8676.0, 1992-93, p 8.

Chart 3: Size of architectural businesses, Australia, 1992-93.



Source: ABS, 8676.0, 1992-93, p8.

In Victoria, a similar picture emerges. Most firms providing architectural services are small. Between 1988 and 1993, the number of architectural businesses in Victoria increased by 6 per cent against a 3 per cent decline nation wide. Over the same period, selected income fell by 23.6 per cent, resulting in a decrease in average firm size (as measured by gross income per business)[19].

The market share held by architects does not indicate that architects are enjoying any monopoly rents. The RAIA advises that architects service in excess of 50 per cent of non-residential projects, while they service around 15 per cent of projects in the residential sectors of the market[20]. Architectural draftspersons dominate the mid to lower end of the residential sector.

Architects compete in the building design market with architectural draftspersons, interior designers, building consultants, builders, building services firms, quantity surveyors, engineers and project managers. They compete in two main ways. Significant fee-based competition between architects characterises the industry for the provision of building design services. While the RAIA has prepared a fee guide at a broad level, competition on fees means that these scales are rarely used. Fees are negotiated directly between the architect and the client and can range between 2 and 5 per cent of the project value[21].

Industry sources have suggested that the fee tendering process and completion of work on spec has led to a fall in the proportion of architects fees to the value of the project from 5 per cent in the 1980s to around 2 per cent now. This position is likely to continue given the trend is for public organisations and private companies to tender out

[19] ABS, 8676.0, 1992-93, p 10.

[20] IBIS, L7821, Vol 10, Jul 1998, p 6.

[21] Ibid p 7.

more architectural services and more competitively priced services are being provided by architectural draftspersons[22].

However, specialisation is a growing basis for competition. The development of building services companies capable of providing a broad package of services has forced architects to extend the range of building services they offer by providing these services themselves or by entering into agreements with associated companies. IBIS predicts that building services firms will continue to increase their market share at the expense of traditional architectural companies.

The TPC has indicated that architects face increasing competition in the market for building design services.

> *Limited inquiries by the Commission confirm that architects are experiencing more competition from others in the building design field...Respondents reported that the main sources of competition were construction/project managers, drafting services, building designers, building contractors and consultants.*[23]

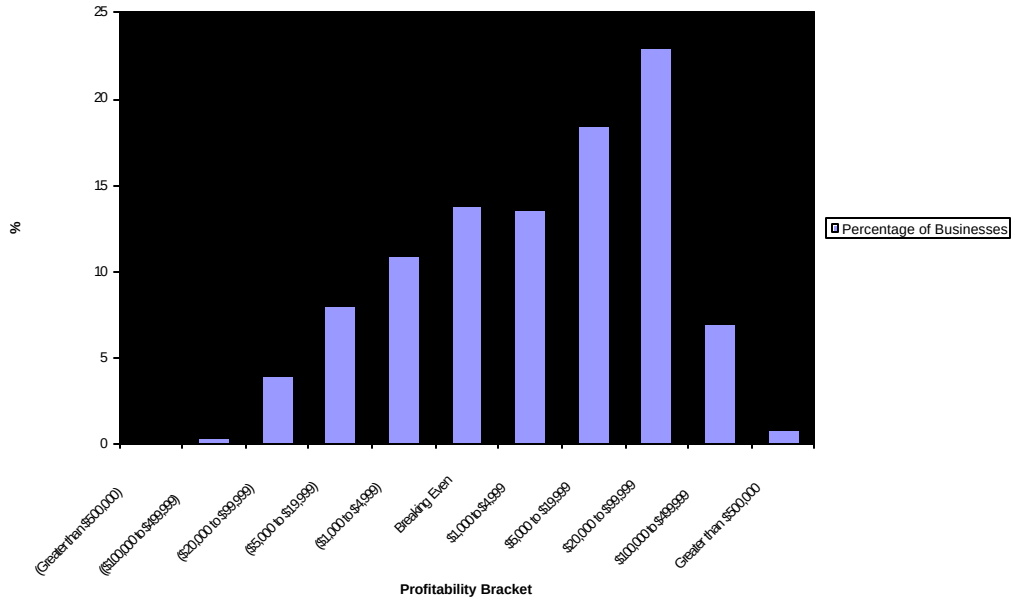
Performance measures of architectural businesses suggest that architects face considerable competition in the market for building design services. About one quarter of architectural businesses make a loss while most of those that are profitable earn less than $100,000 profit annually. 76 per cent of businesses providing architectural services either broke even or made an operating profit before tax in 1992-93. Of the profit making businesses, 22 per cent fell in the $5,000 to $19,999 range, and 22 per cent fell in the $20,000 to $99,999 range. However, almost one quarter of businesses in this industry incurred an annual loss[24].

[22] Ibid p 7.

[23] TPC, *Study of the Professions - Architects*, Final Report, 1992, p 16.

[24] AC, 8676.0, 1992-93, p 11.

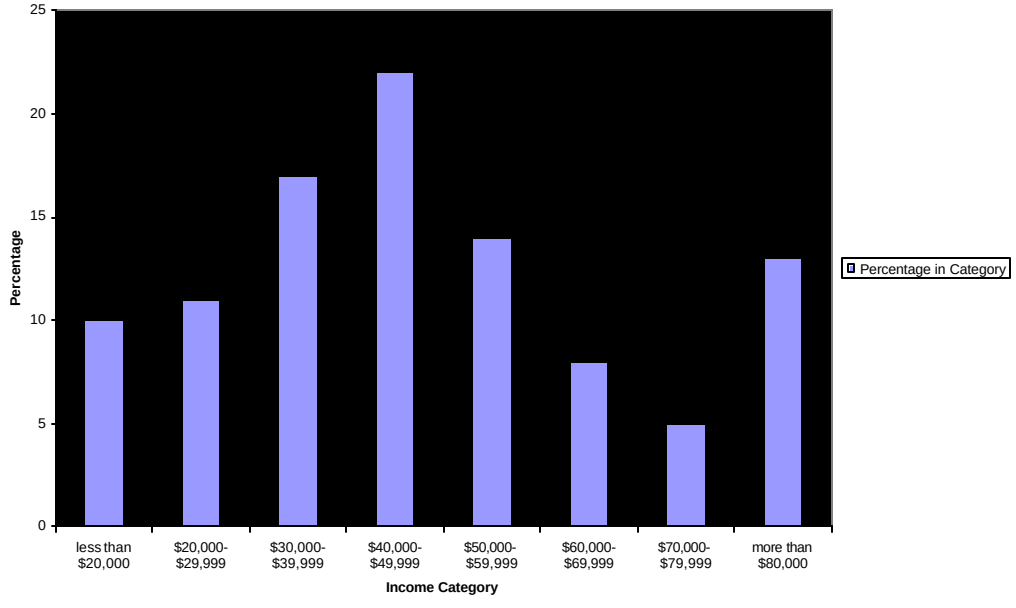
Chart 4: Profitability of architectural businesses, Australia, 1992-93.



Source: ABS, 8676.0, 1992-93, p22.

Chart 5, showing the distribution of the incomes of individual architects, indicates that the majority of architects earn below $50,000. Compared to other professions, architects do not earn high salaries. In 1988, architects were ranked ninth out of eleven professions on the basis of average incomes[25].

Chart 5: Distribution of architectural incomes, Australia, 1993-94.



Source: TPC, *Study of The Professional Architects*, Final Report, Sept 1992, p 14.

[25] TPC, *Study of The Professions - Architects*, Final Report, Sept 1992, p 15.

3.2 Contract administration services

Available data suggests that the market for contract administration services is also competitive.

Some building contracts provide for the appointment of a third party superintendent, contract administrator or similar person to supervise the works performed by the builder and to administer the building contract.[26] Architects, engineers, quantity surveyors, building consultants and project managers may all provide contract administration services.

The role of the architect as the administrator of the contract is to:

- value and certify payments;
- assess and value variations;
- assess time extension claims; and
- control quality by assessing compliance with the contract documents.

The architect's role as the owner's professional adviser and agent requires the architect to promote the owner's interests whilst in his/her role of certifier, the architect must act impartially between the owner and the builder. Some building contracts describe the roles of agents and of the certifier or valuer in detail.

An architect can manage any tendering process including selection of the builder by tender or by negotiation. The architect can negotiate on the owner's behalf with a builder on the basis of the construction documents and the architect may recommend a contract price to the owner.

A superintendent also provides contract administration services and may be a specialist project manager, engineer or quantity surveyor, amongst others. Support for the view that architects face competition in the market for contract administration, is provided by the TPC Report:

> *As a consequence, although architects continue to be involved in design, they sometimes lose the overall management and administration role on commercial projects*[27].

The contract administrator or superintendent appointed under a building contract generally has a dual role as both:

- an agent of the principal, which requires the superintendent to act in the interests of the principal and follow instructions of the principal, for example, when instructing the builder to perform variations to the works; and
- an independent certifier, which requires the superintendent to act fairly and independently between the builder and principal, for example, in valuing variations to the works or granting extensions of the time.

[26] HIA housing contracts, which tend to be widely used in housing projects, generally have only the builder and owner as parties to the contract.

[27] TPC, *Study of the Professions - Architects*, Final Report Sept 1992, p 16.

The superintendent is not usually a party to the building contract and therefore has no contractual liability to either the principal or builder under the building contract, though the building contract may:

- specify rights of the superintendent, for example, to issue instructions to the builder on behalf of the principal or assess amounts payable to the builder under the building contract; and
- specify obligations of the superintendent, for example, to certify progress certificates within specified timeframes.

The structure of the market for contract administration services is difficult to describe because data on the market is not available. However, given the wide array of different professionals capable of providing contract administration services and the lack of any real barriers to entry, there is no evidence that the market is not competitive.

4 Potential restrictions imposed by the Architects Legislation

4.1 Summary

This chapter discusses our findings in relation to the Architects Legislation. We make several recommendations for amending specific provisions contained in the Architects Act and the Regulations. We recommend retention of title regulation and reduction of the ownership restrictions on architectural firms. There is sufficient protection in the Architects Legislation and in generic laws against architects engaging in conflicts of interest and we recommend removal of certain broad conduct restrictions. Finally, exemptions for public sector architects are considered to offend principles of competitive neutrality. These recommendations should be read in light of our discussion of the potential benefits available from integrating the Architects Legislation and the Building Legislation.

4.2 History of the architects regulatory regime

The Architects Legislation may be viewed as part of the development of professionalism. According to the Australian Council of Professions (ACP), professionalism arose by associations of persons formed together for the purposes of controlling the conduct and standard of behaviour of those persons professing to provide, and providing, those services.

> *It was because of the function of individual professionals in banding together and agreeing amongst themselves to adopt high standards of entry and to observe high standards of performance that the community came to respect and trust persons providing those services.*[28]

The ACP goes on to state that:

> *Self regulation and autonomy were an integral part of the development of those standards and it was in the interest of the members of the professions that those standards be maintained. From the point of view of the community it helped to ensure the quality of the services being provided.*[29]

Architects have been regulated by legislation since 1922. The following discussion examines the objectives of the Architects Legislation and the potential restrictions on competition imposed by that Legislation.

4.3 Legislative objectives

The Architects Legislation sets up a system of occupational regulation in relation to the provision of architectural services.

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[28] Doctor John Southwick, President, Australian Council of Professions, *In competition law and the professions conference, can the profession survive under a National Competition Policy*, Perth, 11 April 1997, p 4.

[29] Ibid.

The purposes of the Architects Act 1991 are expressed as being:

- **to provide for the registration of architects;**
- **to provide for the approval of architectural partnerships and architectural companies;**
- **to regulate the professional conduct of architects;**
- **to provide a procedure for handling complaints against architects;**
- **to regulate the use of the words "architect", "architecture" and "architectural";**
- **to establish the Architects Registration Board of Victoria.**

Legislation regulating architects in Victoria has been in force since 1922 and includes the following four principal Acts:

- Architects Act 1922;
- Architects Act 1928;
- Architects Act 1958; and
- Architects Act 1991.

The Act generally restricted the use of the title "architect" to those persons with qualifications and experience acceptable to the Architects Registration Board of Victoria (ARBV). The Architects Legislation thereby takes a structuralist approach to regulating the occupation, using predominantly supply-side controls.

The following extracts from the second reading speeches to the Acts indicate the purpose behind the regulation:

> *The Bill will not prevent anyone practising as an architect but it will enable people to know whether they are dealing with architects who have proper qualifications.*[30]
>
> *The general public have no idea of the value of degrees in any of the professions.*[31]
>
> *The Bill provides for the general public a safeguard against architects practising without the possession of full practical qualifications to enable them to undertake major works....In the early stages of his experience a man may be exceptionally well qualified in theory but he has not had experience in applying that theory to practice.*[32]

[30] Second-reading speech, Architects Registration Bill 1922, Parliamentary Debate, Legislative Assembly, 23 Nov 1922, p 3053.

[31] Ibid, p 3144.

[32] Second-reading speech, Architects (Amendment) Bill 1953, Parliamentary Debate, Legislative Council, 10 Nov 1953, p 1946.

There is a need for architects to maintain their knowledge of current practice issues.[33]

The need for the regulation also had its detractors:

Many people design and construct buildings who are not professionally qualified, but who, nevertheless, do the work well.[34]

There have been few cases where architects have preyed on the community.[35]

If that is not a closed shop, I have never heard of one. That group of architects will pass judgement on other architects. There is no mention of anyone of independent mind on the tribunal to properly assess whether architects are doing the job correctly.[36]

The objects of the Architects Regulations are specified along similar lines to those of the Act, with the intention of prescribing any matters necessary to give effect to the Act.

The objectives appear to address the market failure of information asymmetry and, possibly, broader positive and negative externalities.

The restriction on the use of the title "architect" and its derivatives appears to be mainly intended to redress an imbalance of knowledge between providers and consumers about the level of service consumers can expect from an architect. This is based on the assumption that, left to themselves, consumers may have difficulty identifying untrained, unscrupulous or substandard providers of architectural services. The information asymmetry would arise because the purchase of architectural services is generally a non-repeat purchase, as consumers tend to require such services infrequently. This is particularly so in relation to residential consumers who generally purchase architectural services very few times during their lifetime.

A 'perfect market' is difficult to achieve in this industry because many clients, such as home buyers, might only use the services of building practitioners once in their lives. Consequently they have little knowledge or experience on how to ensure that they engage practitioners who will deliver a quality product.[37]

Commercial consumers of architectural services on the other hand, such as developers, would purchase architectural services many times more frequently as part of their ongoing business activity. In addition, the consumption of architectural services generally does not allow for inspection of the service prior to purchase, so that purchasers are generally uninformed as to the quality of service they are likely to get.

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[33] Second-reading speech, Architects Bill 1991, Parliamentary Debate, Legislative Assembly, p 368.

[34] Second-reading speech, Architects Registration Bill 1922, Parliamentary Debate, Legislative Assembly, 28 Nov 1922, p 3143.

[35] Second-reading speech, Legislative Council, Architects (Amendment) Bill 1953, Parliamentary Debate, 10 Nov 1953, p 1944.

[36] Second-reading Speech, Architects Bill 1991, Parliamentary Debate, Legislative Council, 16 Apr 1991, p 706.

[37] Submission, Australian Institute of Building, J Thomas (President), 18 Dec 1998.

It was submitted that the legislation seeks to provide a level of public good, being information, as well as a minimum standard of architecture, or to further a general policy objective of promoting standards of Victorian architecture[38]:

> *Architecture and more especially public or civic architecture includes elements which amount to a public good.*[39]
>
> *[P]ublic goods [are] all those [goods] whose supply is determined not by individual market demand but may be by collective political choice, ie any goods and services which governments decide to supply free or below cost to their users.*[40]
>
> *[R]egulation underpins functionality of design and construction, to ensure that standards are met, safety observed, sound principles followed.*[41]

Put differently, the provision of architectural services is seen to contain positive externalities that are not fully valued by private decision makers or consumers of architectural services, as the private decision makers are not able to exclude others from benefiting from the use.

We do not find anything expressly stated in the legislative objectives or in the second reading speeches to indicate that the legislation is intended to promote the standards of Victorian architecture or to ensure that the standards of health, safety and amenity of buildings is maintained.

> *Building Codes and other legislation which regulate town planning, building, environmental impact and health and safety standards applies to all persons in the design and building industry, including architects.*[42]

The provisions of the Act which prescribe certain education and training requirements might be interpreted as intending to achieve these objectives. In addition, the objectives of the Building Act 1993 indicate that a policy objective of the government is to improve standards and efficiencies of the construction industry generally, though registration of architects is not included in that Act. Accordingly it has been argued that the Architects Act 1991 includes, as an objective, the improvement of standards and efficiencies of Victorian architecture.

It is our view that the principles of NCP and of occupational regulation require that as the onus is on the proponent of regulation to show it is warranted, and as the presumption is that no regulation is the starting point, any broad policy objectives that go beyond apparent market failures should be articulated in the legislative objectives. Accordingly, the broader interpretation of the legislative objectives recognises

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[38] Submission, ARBV, J. Keddie, 17 Dec 1998, p 8.

[39] Submission, ARBV, J. Keddie, 17 Dec 1998, p 9.

[40] H. Stretton, L Orchard, *Public Goods, Public Enterprise, Public Choice*, p. 54 (MacMillan 1994), quoted in ARBV Submission, p 8.

[41] Submission, ARBV, J. Keddie, 17 Dec 1998, p 9.

[42] Trade Practices Commission, *Study of the Professions - Architects*, Final Report - September 1992, p 52.

objectives which are, in our view, some of the benefits of the Act rather than existing objectives of the Act per se.

4.4 Constraints on use of the title "architect" to registered architects

The Act constrains the use of the title "architect" and its derivatives. Section 4 does this in relation to natural persons, Section 5 in relation to unincorporated bodies and Section 6 in relation to bodies corporate. To be entitled to use the word "architect" or its derivatives to describe themselves, practitioners must be registered with the ARBV which further requires satisfaction of minimum training requirements (5-6 year university degree or ARBV examination) and experience.

(a) Restriction on competition

Submissions contended that because the provisions do not prohibit non-architects from providing architectural services, but merely constrain the use of the title, the provisions do not amount to a restriction on competition.

> *The Act does not prohibit other persons or organisations from providing similar, identical or additional services within the building market and as such it can not be seen as restricting competition in any way.*[43]

Competitors in related fields who are not registered with the ARBV are, however, required to use alternative terms like "building designer" and "building planner". It is argued that the title architect does contain value to the bearer as consumers do perceive "architects" as offering higher standards of design than "building designers" or "draftspeople".

> *The experience since 1923 is that the title is perceived to have a value in that it confers a standing on a practitioner, which does imply a perception of benefit: this is so a priori, or individuals and firms would not seek registration or approval, and unauthorised persons would not seek to use the title to misrepresent their services.*[44]

In this way the regulations potentially grant to registered architects an advantage over those competitors who actually offer the same service standards, by allowing them to use the valuable title in offering or marketing their services whilst competitors are forced to use less valuable titles. This "competitive advantage" has the potential to distort the market and restrict competition.

In addition, the registration requirements raise the costs for "architects" offering architectural services. The cost of an architectural degree including loss of income is estimated to be around $220,000. These costs amount to a barrier to entry which, in addition to quotas on recognised architectural courses, would reduce the number of participants able to practise as architects.

(b) Address the objective

[43] Submission, David White Architect, ARIA, 8 Dec 1998, p 2.

[44] Submission, ARBV, J. Keddie, 17 Dec 1998, p 26.

It is our view that the provisions assist in providing useful information to consumers - the title "architect" indicates that the practitioner in question can provide a high quality service commensurate with his or her considerable qualifications and experience. Information about providers of high quality services minimises search costs and facilitates the efficient operation of the market.

> *As a client it is an expectation that an Architect has appropriate qualifications and experience as required by legislation. When choosing an Architect I expect to start from a high standard as required by legislative registration then assessing my particular need against specific experience. If this were not so there would be considerable cost, in time and money, in researching qualifications and experience.*[45]

It appears to be particularly important at the domestic/residential building level where search costs can result in significant information asymmetries.

> *Thus generally the potential client is not in a position to effectively assess whether a seller of architectural services is competent or a charlatan. This is particularly critical in the smaller sized projects with the less sophisticated clients, say $100,000 and under, which represent a significant proportion of the number of projects in the architectural market (42%). Further most of these projects represent a once in a lifetime investment for the purchaser and the value of the project compared to the clients financial resources makes recovery from a poor service outcome particularly difficult.*[46]

Adopting a broad view, the pursuit of high standards of architecture is an objective of the Architects Legislation. It was submitted for instance that aesthetic construction is a public benefit or positive externality aspect of the Legislation. However, we adopt the narrower view of the objectives as being largely aimed at information asymmetries. If the promotion and preservation of high quality architecture is an objective of the Architecture Legislation it should be expressly stated as such.

It has also been argued that the legislation intended to prevent corruption in the industry and thereby protect consumers.

> *The Victorian Architects Act was originally introduced in 1922 to counter a perception that unrestricted competition in the building industry was leading to...corruption and collusion between service providers ie architects, building contractors and suppliers of building materials. In addition there was a perception that building industry competency standards were in need of improvement.*[47]

The requirement to be registered can be used as a monitoring measure (eg as a means of handling complaints) and a disciplinary mechanism (eg through deregistration). We take the new that registration addresses the objective of reducing the risk of corruption.

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[45] Submission, Mr John Kennedy, p. 1.

[46] Submission, Peter John Kerr and Vito John Inserra, p. 2.

[47] Submission, David White Architect, ARIA, 8 Dec, 1998, p 2.

(c) Costs and benefits

Costs involved in becoming and practising as an architect might be considered to constitute a cost to the public if they are passed on through higher architectural fees. The costs include education costs, set up costs, registration costs, and operating costs. Education costs incurred by architects include costs of tuition, books and living for a five year degree as well as the opportunity cost of forgone income for the duration of the degree and the subsequent two years of experience. These costs, have been estimated at $220,000 per practitioner[48]. IBIS estimated that the initial set up cost to establish a home based practice was in the vicinity of $20,000. Application for registration costs are $85 for individuals and $110 for partnerships and companies. Annual registration fees are $90 per annum thereafter.

However, in our view the title and registration provisions do not impose significant costs on the community. We found no evidence that architects are charging higher fees than non-architects for the same quality of design or contract administration service. The markets for the provision of architectural services are characterised by large numbers of participants who compete vigorously on price and service quality. Numbers of non-architect service providers are increasing at a steady rate, and the share of the market serviced by non-architects is significant. According to the RAIA, non-architects comprise approximately 85% of the residential market sector, whilst also servicing 50% of non-residential projects. There is no evidence of monopoly rents being earned by architects. Our analysis of the available market data suggests that the costs of any distortionary or restrictive impact on the markets are not significant.

Costs of the ARBV in administering the Legislation amount to approximately $350,000 per annum. These costs are funded from registration fees.

The main benefits of the regulation are in the form of lower search costs for consumers as well as enhanced or improved:

- public safety;
- building aesthetics;
- building functionality;
- effective and efficient integration of a building into its environment to optimise resource use;
- complaint handling and response;
- tourist income; and
- international and interstate architectural "export" income.

The perceived importance of aesthetics to the State can be seen in the following quote:

> *Architecture, exemplified in such projects as the Museum (Exhibition Gardens project), Federation Square, the Exhibition Centre and extensive "cladding" of freeways in and around Melbourne, is an expression of civic pride and prosperity, it contributes to the public*

[48] Submission, ARBV, J. Keddie, 17 Dec 1998, p 31.

> *welfare through enhancement of civic amenity (as well as, materially, through attractions for tourism)....*[49]

The ARBV provided instances of complaints about registered architects and the loss that has arisen by virtue of substandard architectural practice.[50] In merely one or two cases a year, costs can amount to more than $350,000 per annum. These instances provide evidence that there is a real risk of loss to clients if architectural service standards are not preserved at a high level.

Registration has the benefit that it ensures architects are highly qualified. Available data indicates that nearly all individual architects are registered, irrespective of whether the company or partnership they work for is also registered. If an architect did not register because he or she worked for a registered organisation, the title provisions would not ensure that qualification levels are maintained. In 1994, 25 per cent of architects worked from home, 26 per cent were involved in partnerships and the rest were salaried employees[51].

It is difficult to quantify the benefits from high standards of architectural service, but these benefits must also be seen in light of the value of downstream construction activity which was approximately $9,000 million in Victoria for 1996/97.[52] The significance of the construction industry to the Australian economy underlines the importance of maintaining high standards of architecture.

High standards of architectural services also earn Australia foreign exchange. Approximately $30 million of export credits come from architectural services annually, and around $1 million is spent on the architectural services of foreign enterprises. Growth in the servicing of Asia by Australian firms is also expected. Related benefits are obtained from sectors such as the tertiary education market.

> *Schools of Architecture in Australia are held in high regard both in Australia and overseas. Without the Architects Registration Board of Victoria accreditation of university courses in that State, international students would favour universities in other Australian jurisdictions, resulting in considerable economic loss to Victoria.*[53]

At paragraph 6.5 below we discuss the compulsory insurance requirements which are imposed on architects by Sections 136 and 137 of the Building Act and find that they do provide a net benefit and that voluntary insurance would not secure a higher net benefit. It follows from this that mechanisms which aid compliance with the compulsory insurance provisions will thereby procure benefits. Accordingly, we find that an additional benefit of title restrictions and registration requirements is improved compliance with compulsory insurance provisions.

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[49] Submission, ARBV, J. Keddie, 17 Dec 1998, p 10.

[50] Submission, ARBV, J. Keddie, 17 Dec 1998.

[51] IBIS, Architectural Services, L7821.

[52] Submission, ARBV, J. Keddie, 17 Dec 1998, p 33.

[53] Submission, Architects Accreditation Council of Australia Incorporated, p. 8.

It is our view that the relatively low costs associated with the regulation, compared to the high risk of loss which the regulation seeks to address, and the benefits which accrue by virtue of improved standards of architectural design and compliance with compulsory insurance provisions, ensure that net benefits are derived by the community from the title and registration provisions.

(d) Alternatives

One alternative is industry self-regulation. This alternative entails removing statutory registration and relying on a regime of regulation established and administered by the RAIA. By restricting membership to those possessing certain minimum architectural qualifications and by promoting membership as an assurance of high quality service, the RAIA may be able to address the information asymmetry which exists between consumers of design services and service providers. High design standards may also be fostered by industry self regulation and peer-review and existing consumer protection laws may provide sufficient protection to consumers.

It is not clear that this alternative will reduce administrative costs and compliance costs. RAIA membership fees are currently about four times higher than ARBV registration fees. In addition to existing functions performed by the RAIA, the RAIA would need to undertake further functions to achieve the same benefits as are currently procured by the Architects Legislation. For instance, the promotion of RAIA membership as an indicator of superior qualifications and design skills is costly and is likely to exert upward pressure on RAIA membership fees. The expense of taking on additional administrative functions may also inflate the RAIA's costs.

Because architectural services contain elements of "experience goods" ie that their quality can only be assessed after their provision, and in particular because domestic consumers do not consume architectural services frequently, the added protection provided by the legislation over and above that provided by consumer protection legislation is considered to be valuable. Existing consumer protection legislation generally offers ex-post protection in its application to services which contain such qualities, and it therefore tends to be reactive. Legal avenues of redress tend to be time-consuming and costly.

Similarly, other legislation such as the Planning and Environment Act 1987, which does not address standards of design, would not provide the same levels of ex-ante public protection from substandard architectural services as is provided by the statutory registration provisions. Furthermore, the registration requirements ensure that Victorian architects obtain mutual recognition and thereby avoid the need to re-register in other States.

In addition, international recognition of the high levels of experience and standards of registered Victorian architects, facilitates international competitiveness that might not be procured under industry self-regulation. Accordingly, we do not consider that the alternative of industry self-regulation would generate a higher net benefit to that currently being achieved.

The terms of reference expressly state that the review must consider the case for integration of the Architects Legislation and the Building Legislation. The case for this alternative is discussed further in Chapter 7 below.

(e) Recommendation

We recommend retaining title restriction and registration requirements for architects.

4.5 Control on the ownership of organisations using the title "architect" and its derivatives

Section 13 of the Act requires that in an architectural partnership not less than two-thirds of the partners being beneficially entitled to not less than two-thirds of the capital assets and profits of the partnership are architects.

Similarly, Section 14 provides that the ARBV may approve a company as an architectural company if various requirements are complied with. Two-thirds of shareholders entitled to exercise two thirds of the voting power of the company must be architects and architecture must be the primary purpose of the company provided for in the memorandum and articles of association. In addition, the principal executive officer of the company must be an architect and the directors of the company must be natural persons.

If the company has only two directors, one must be an architect and the other must be a prescribed relative of the architect or a person approved by the ARBV. Otherwise not less than two-thirds of the directors of the company must be architects.

(a) Restriction on competition

The provisions potentially limit the ways in which architects can structure their businesses whilst still being entitled to use the term architect in relation to the business. Growing numbers of "one-stop shop" construction companies are offering a complete package of building services, from predesign through to completion including architectural design and contract administration services.

The capacity of architectural companies and partnerships to compete with these multi-disciplinary firms by offering integrated construction solutions is potentially inhibited by the ownership provisions. Potential economies associated with structuring a business in this way are lost to architectural firms.

Though the provisions do not appear to materially reduce the number of participants in the industry, they do, nevertheless, constrain the way in which architectural firms could organise themselves. Competition is thereby potentially restricted.

(b) Address the objectives

It has been submitted that the intention of the provisions is to enable consumers to identify organisations which have architectural services as their predominant output, or to provide an indication that the services are likely to be provided by a registered architect or under the supervision of a registered architect.

It is not clear from the legislative objectives, second reading speeches or other material that the provision was intended to assist consumers seeking firms which provide architectural services as their predominant output.

Nor is there any conclusive evidence to support the view that two-third ownership provisions are necessarily related to whether work is done by or under the supervision of a properly qualified and experienced architect. Large numbers of qualified partners

or directors in a firm increases the probability that an architect has been involved in the firm's architectural services. However, a predominance of architects in a company's shareholding does not necessarily ensure their involvement in the provision of services. The relationship between architects owning a firm and the numbers of architects actually working for the firm is not covered by the legislation.

In addition, firms employing architects and therefore offering architectural services are prohibited from informing the market of this fact through their business title unless structured according to the Architects Legislation. Information asymmetries may, therefore, be exacerbated by the provision.

In our view, these provisions do not clearly address the objectives.

(c) Cost benefit

One cost of the regulation is that synergies and economies associated with multi-disciplinary practice are forgone by architectural firms. Limiting the ability of architectural companies and partners to restructure also reduces the competitiveness of these firms and therefore erodes competition in the market.

Benefits of the provision include the information provided to consumers which assists them to find firms offering architectural services. These firms are more likely to have registered architects perform or supervise work done for a client.

However, the provision may also mislead consumers who expect that work done by the firm is done by a registered architect when this is not necessarily the case, particularly where a company simply has architects as owners. Further confusion may arise because many firms employing architects to provide architectural services are not entitled to advertise this fact through their business title by virtue of the provision.

It does not appear that the existing ownership restrictions procure net benefits.

(d) Alternatives

The first alternative to the current provision is to remove title constraints on companies and partnerships. As discussed in paragraph 4.4 above, we are of the view that title restrictions provide valuable information to the community, raise standards for the occupation and product a net community benefit.

Removing the title restrictions for companies will raise the risk of individuals circumventing the restrictions by offering services through a company or partnership structure. An unregistered practitioner who uses the term architect through a company structure might not be in breach of Section 4 of the Act if the company's holding out etc cannot be ascribed to the individual. There is also an argument in these circumstances that Section 52 of the TPA might not be breached if the term architect and its derivatives are defined broadly to include architectural design by building designers and draftspersons. In any event, our view is that generic laws and trade practices laws would not provide consumers with as high protection against this risk as those laws tend to be more reactive and costly avenues of redress.

The risk of non-compliance will undermine the efficacy of the title provisions and will thereby limit achievement of the objectives. Furthermore, if the organisations themselves are not held responsible for breach of the title provisions, a practitioner employee could

be held responsible for acts of the corporation over which he/she had no control. It is not clear that removing the title restrictions on organisations will ensure a higher net benefit than the existing provisions.

A second alternative is to retain title constraints on organisations but to remove statutory registration. The benefits compared to the existing provisions include the saving of registration fees and the removal of constraints arising from the requirement to have registered architects as members of an architectural company.

Registration is a sound means by which to provide information to consumers and to the regulator about those firms that are complying and those that are not. Without statutory registration, there is an increased risk that the title restrictions will not be adequately enforced. Hence the value which the statutory registration requirements procure would be lost and greater uncertainty could in fact result from low levels of compliance. As discussed above, our view is that generic laws and trade practices laws will not provide as high protection against non-compliance with the title restrictions. In our view, it is not clear that the removal of statutory registration would provide the highest net benefit available.

A third alternative is to retain statutory registration of companies and partnerships, but to amend the ownership provisions of Sections 13(1) and 14(1). For instance, the constraints could be reduced to require at least a one-third ownership restriction, as used in New South Wales. Alternatively, the constraints could be further reduced to require only one of the directors or partners to be a registered architect as is the case in the Building Act Sections 176(3) and 176(4), or to require that at least one of the employees is a registered architect.

As discussed at paragraph 4.5((b)) above, we do not consider that ownership of a company or partnership is necessary to address the objectives. Accordingly, we do not consider that a one-third ownership restriction will procure the highest net benefit available.

Like the existing provision, the alternative of requiring at least one registered architect director or partner will not ensure that the work of an architectural partnership or company will be done by an architect. However, it does provide some assurance that the architectural services provided by the organisation will be conducted or overseen by a registered architect. It also provides some protection against unregistered practitioners circumventing the title restrictions by setting up a company or partnership. In this way it retains benefits of information provision and protection against non-compliance, whilst reducing the constraints on organisational structure. Accordingly, we are of the view that this alternative provides the highest net benefit.

(e) Recommendations

We recommend that the ownership provisions should be amended to ensure that in firms which use the title architect, or hold themselves out as offering architectural services, at least one practising director or partner should be a registered architect.

4.6 Constraints on acting as developer and architect

The Regulations prohibit an architect from acting as both a developer and an architect on the same project (Regulation 8(1)) and on using the title "architect" when carrying on

the business of developer (Regulation 9). An architect who has designed or documented any part of a project on behalf of a client must not act as an assessor of, or an adviser to the client in respect of tenders by builders for that project if the architect intends to tender as a builder on the project (Regulation 8(2)).

(a) Restriction on competition

The above regulations inhibit the realisation of potential economies of scale and scope from efficiencies associated with multidisciplinary practice. As stated above, "one-stop shop" businesses are gaining market share. Prohibiting architects from also performing the role of developer constrains architects from offering an integrated service from design through to completion of the building project and thereby restricts competition.

(b) Address the objectives

The prohibition aims to avoid conflicts of interest which may arise where the architect on a project also acts as the developer. For instance, where the architect performs the inspection functions on its own development work, there is a risk that the inspection will be compromised. An architect has the power to influence a client by virtue of the trust which a client has for his or her architect. When also acting as a developer, an architect has an incentive to persuade his or her client to invest in a speculative project, driven by self interest, which may not be in the best interests of the client. The provision aims to avoid the risk of a conflict arising using a broad measure.

However, there is no similar restriction on draftspersons, or quantity surveyors, suggesting that in the absence of the provision the risk of this form of abuse is low. In addition, the prescriptive nature of the prohibition means that it is easily evaded by an architect who interposes a development company between himself or herself and the client.

Regulation 10 is a better measure for preventing the harm envisaged in Regulations 8, 9 and 12. It requires the architect to inform the client of any conflict of interest. Conflicts are also prohibited by Regulations 6 and 7. These provisions are more effective measures against conflicts of interest. Regulations 8, 9 and 12 do not appear necessary to meet the legislative objectives.

(c) Cost benefit

Costs of the prohibition include the efficiencies in scale and scope forgone when architects cannot offer packaged construction services and some administrative costs. It is unclear how significant these costs are as there is currently no evidence to support a conclusion that in practice the provisions operate as a material restriction on competition.

The benefits include any reduction in the risk that architects will take advantage of their clients, over and above the reduction obtained by virtue of Regulation 10.

It is unclear as to whether the provision derives net benefits to the public.

(d) Alternative

An alternative is to permit architects to act as developers on the same project coupled with existing requirements to disclose all interests. Regulation 10 could be expanded to require disclosure in writing before acting in multiple capacities.

Existing Regulations would appear to protect a client against the risks. Regulation 5 imposes requirements to act in a proper manner and to a professional standard. Regulation 6 requires an architect to employ his or her skills in the interests of his or her client. Regulation 7 prohibits an architect from favouring his or her own interest over that of his or her client, and Regulation 10 requires disclosure of conflicts.

Costs are decreased whilst benefits appear to be maintained by existing generic laws as well as Regulations 5, 6, 7 and 10. Accordingly, the alternative of repealing Regulations 8, 9 and 12 and relying on existing laws and Regulations 5, 6, 7 and an expanded Regulation 10 will procure a higher net benefit than retention of those Regulations.

(e) Recommendations

We recommend Regulations 8, 9 and 12 should be repealed and Regulation 10 be amended to require an architect, acting as both developer and architect, to give the client notice in writing of the scope of his or her different roles. Apart from Regulations 5, 6, 7 and 10, generic laws governing misleading and deceptive conduct may also be relied upon. This will achieve a higher net benefit than the existing provision.

4.7 Prohibition on endorsement of materials, components, services or products

Regulation 13 prohibits an architect from endorsing, for profit, a specific building material, component, service or product.

(a) Restriction on competition

Regulation 13 has the potential to raise costs for producers or providers of building materials, components, services and products by preventing them from using an efficient means of disseminating information about their products. In this way, Regulation 13 could operate as a restriction on competition in the markets in which providers of materials etc operate. In addition, Regulation 13 could operate as a restriction in the markets for the provision of architectural services by restraining the ways in which architects could, legitimately, conduct business.

(b) Address the objectives

Regulation 13 limits the risk that an architect will engage in a conflict of interest by accepting a profit for endorsing a product. However, it is unclear whether Regulation 13 provides additional protection to Regulations 5, 6, 7, 10 and 14 which set standards of conduct and require an architect to notify his or her client of a conflict of interest.

(c) Cost benefit

The costs of the provision include the increased costs to producers or providers of building materials. The benefits include a reduction in the risk of architects' committing conflicts of interest. For instance, by endorsing substandard products for profit an architect could be engaging in a conflict of interest.

It is unclear whether a net benefit is derived from Regulation 13.

(d) Alternative

In our view a less restrictive alternative would be to remove Regulation 13 and to rely on Regulations 5, 6, 7, 10, 14 and 15 together with existing consumer protection laws and the Building Code of Australia. This will remove the restriction on competition caused by Regulation 13 whilst maintaining protection against conflicts of interest. Accordingly, it is our view that repeal of Regulation 13 will derive higher net benefits than the existing provisions.

(e) Recommendation

In our view, Regulation 13 imposes costs without achieving benefits over and above those achieved by Regulations 5, 6, 7, 10, 14 and 15. We recommend the repeal of Regulation 13 and reliance on Regulations 5, 6, 7, 10, 14 and 15 to achieve higher net benefits.

4.8 Constraints on accepting financial advantages

The Regulations prohibit an architect from accepting any financial advantage from a contractor, tradesman or supplier of materials in respect of a project unless they are a client (Regulation 15).

(a) Restriction on competition

These constraints amount to a potential restriction on competition in that they may, for instance, prohibit architects from offering an integrated service from design through to completion. If architects are not entitled to contract for a financial advantage with persons other than clients, they may be constrained from competing with firms offering a broad range of building services.

(b) Address the objectives

The provision appears to be intended to prohibit an architect receiving a financial advantage in conflict with a client's interest or as an inducement to engage in some form of corruption.

However, given Regulations 5, 6, 7, 10 and 14 and the existence of other consumer protection laws aimed at addressing these risks, we take the view that the provisions go unjustifiably far by prohibiting any form of financial advantage passing from a non-client to an architect. Accordingly, Regulation 15 does not appear necessary to address the legislative objectives.

(c) Cost benefit

Costs of the provision include limitations on economies in scale and scope of business, and the imposition of annual administrative costs involved in enforcing the provision.

Benefits include the reduced risk of architects accepting a bribe or financial inducement to engage in corrupt activities or a conflict of interest. This benefit is limited by the existence of adequate consumer protection laws.

It is not clear whether this provision produces a net benefit.

(d) Alternative

Regulations 5, 6, 7, 10 and 14 are less interventionist ways of achieving the legislative objectives.

(e) Recommendation

We recommend that Regulation 15 be repealed and Regulations 5, 6, 7, 10 and 14 be relied on.

These alternatives offer higher net benefits as they achieve similar benefits using less interventionist and hence less costly prescriptions.

4.9 Exemptions for public sector employed architects

Section 7 of the Act grants an exemption to public sector employed architects from some of the provisions of the Act.

(a) Restriction on competition

The exemption grants a competitive advantage to public sector architects over private sector competitors. This conflicts with principles of competitive neutrality which mandate that public sector enterprise should not be given advantages merely by virtue of their government ownership, and amounts to a potential restriction on competition.

(b) Address the objectives

It is our view that the exemptions do not address the legislative objectives.

(c) Recommendation

Our recommendation is to repeal these exemption provisions to ensure that all architects, including private and public sector employees, are treated equally by the provisions.

4.10 Constraints on seeking business from clients of other architects

An architect must not knowingly seek a specific architectural commission which has been awarded to another architect. If an architect is approached by a client to do so, the architect must immediately notify the architect who was awarded the commission (Regulation 19).

(a) Restriction on competition

A client is not prohibited from breaching an existing contract with one architect to engage another who is more competitive. Although contractual damages may be awarded against the client, it may, nevertheless be in the client's interest to change because the benefits from the change outweigh the costs. Contract law compensates the first architect and the client is then afforded the freedom to retain the architect he or she prefers. In light of this it is our view that the regulation potentially inhibits competition between architects.

(b) Address the objectives

In the TPC's 1992 report, it was noted that only Architects' legislation in South Australia and Victoria contained rules on supplanting. The architects legislation in the other States did not have equivalent provisions. Existing contractual remedies should

adequately protect architects from breach of contract. We conclude that the provision does not address the legislative objectives.

(c) Recommendation

Our recommendation is to repeal this provision because contract law provides adequate redress for an architect in the event of breach by a client.

4.11 Observations on other provisions

We make the following observations on the following provisions that were also considered during the course of the review:

- Regulations 5, 6, 7 and 10: general standards of professional conduct apply to an architect under the Architects Regulations 1993. An architect must perform his/her work in a competent manner, to a professional standard and must employ his/her skills in the client's interests without favouring his/her own interests over those of the client. If a conflict of interest appears likely, the architect must immediately inform the client of this in writing. We do not consider these provisions to create a restriction on competition.
- Regulation 12: If an architect is engaged by a developer, he/she must take all reasonable steps to ensure that any advertisement or stationery relating to the project includes the architects name followed by the words "architect (or consulting architect) to (name of developer)" and the lettering used is at least the same size as that used for the architect's name. Though we do not find that this amounts to a restriction on competition, in our view there is no apparent need or justification for Regulation 12.
- Regulation 16: An architect must ensure that information contained in an advertisement about the availability and nature of his/her services is accurate and current. It is not clear that Regulation 16 adds additional obligations over and above existing common law and TPA obligations.
- Regulation 17: A sole practitioner's letterhead must disclose the sole practitioner's name. Similarly, an architectural partnership's letterhead must disclose all architect partners and an architectural company's letterhead must disclose all architect directors. We do not find that this amounts to a restriction on competition, yet in our view there is no apparent need or justification for Regulation 17.
- Regulation 18: Before an architect accepts an engagement to provide architectural services or as soon as possible after any change to the terms and conditions or scope of such engagement, he or she must set out the description, terms and conditions of the engagement or the change, and supply a copy of that document to the client.

5 Markets affected by the Building Legislation

The Building Legislation affects those markets in which building practitioners operate. Engineers, quantity surveyors, draftspersons, builders and building surveyors are all building practitioners regulated by the legislation. Although potentially many markets may be impacted by the Building Legislation, we have considered the following main markets in assessing restrictions on competition:

- building design services;
- contract administration services;
- engineering services;
- quantity surveying services;
- building services; and
- building surveying services.

In this chapter, we find that there is evidence to support the view that the markets impacted by the Building Legislation are competitive.

It is our understanding that low registration levels are explained by the fact that many practitioners are not compelled to register because they are employees of firms with at least one registered director or partner. This appears to be due to an interpretation of the requirements by participants and to some extent by the regulators, that such employees are not required to register. Our view of the requirements is that they mandate registration by all practitioners who hold themselves out as registered practitioners or use the title, which includes employees acting as building practitioners generally. This is consistent with our interpretation of the legislative objectives.

5.1 Building design services

The Building Legislation affects the building design services market by requiring architectural draftspersons to become registered if they want to use the title "draftsperson" to prepare plans of a building for the purposes of applying for a building permit. As discussed in Part A, there is no evidence to suggest that the market for building design services is not competitive.

In addition to the architects participating in the market, there are approximately 1600 registered draftspersons in Victoria. Architectural drafting service business are, therefore, usually small businesses[54]. This accords with our view that the building design services market is competitive.

5.2 Contract administration services

The market for contract administration services was discussed in Part A. It is mentioned again here simply to highlight the fact that the Building Act affects the contract administration services market by requiring registration for building practitioners offering these services, such as engineers, quantity surveyors and builders.

[54] TPC, *Study of The Professions - Architects*, Final Report, Sept 1992, p 16.

5.3 Engineering services

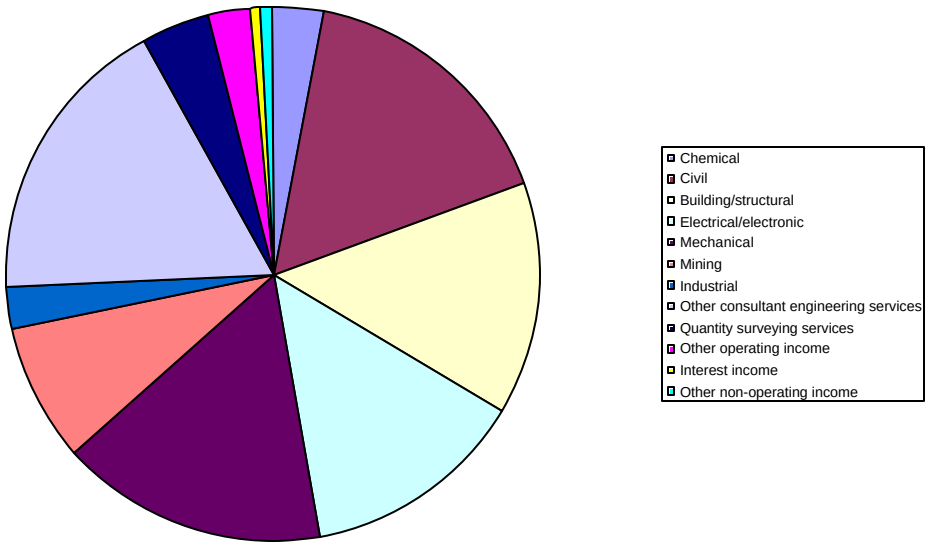
Engineers engaged in the building industry must become registered under the Building Legislation if they wish to use the title "engineer". In this way, the Building Legislation affects the engineering services market in respect of the building industry.

The engineer in a building contract is often a secondary consultant to the architect, appointed by the architect or by the owner directly. Generally, in major industrial and engineering projects, an engineer will be the principal consultant. A building or engineering project would involve engineers in various fields including civil, structural, mechanical, electrical and hydraulic engineers, all responsible for a different part of the design.

No support was found for the view that the engineering services market is not competitive.

Chart 6 shows the proportion of consultant engineering income derived from various sources[55].

Chart 6: Sources of income for engineering businesses, Australia, 1992-93.

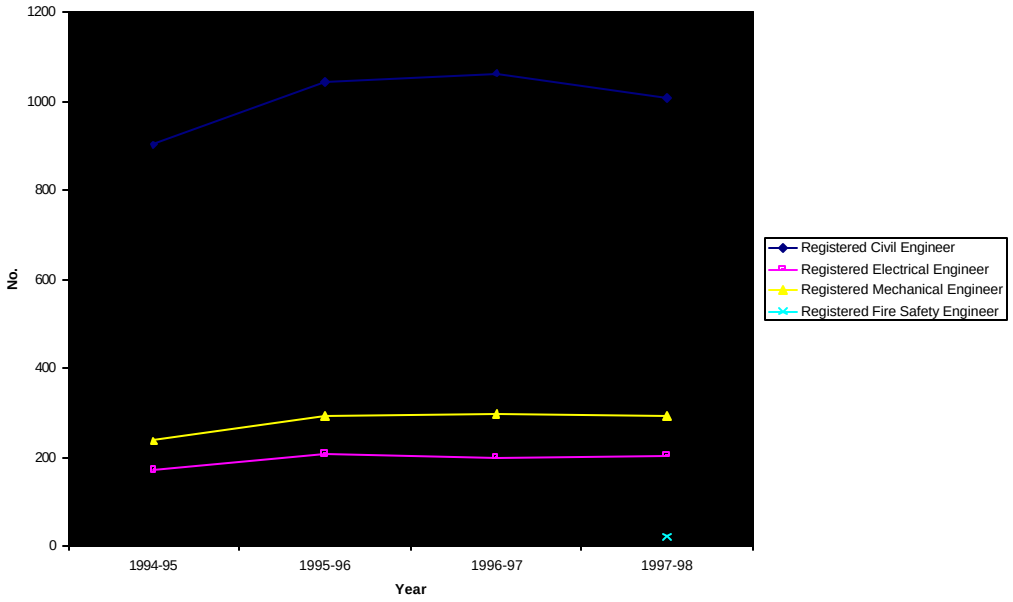


Source: ABS, 8676.0, 1992-93, p29.

Chart 7 shows that since the enactment of the Building Act in 1993, numbers of registered engineers have remained relatively steady at 1500.

[55] Businesses primarily engaged in quantity surveying as well as businesses mainly providing consultant engineering services are included in these statistics.

Chart 7: Number of registered engineers, Victoria.



Source: BCC, Annual Reports, 1995-1998.

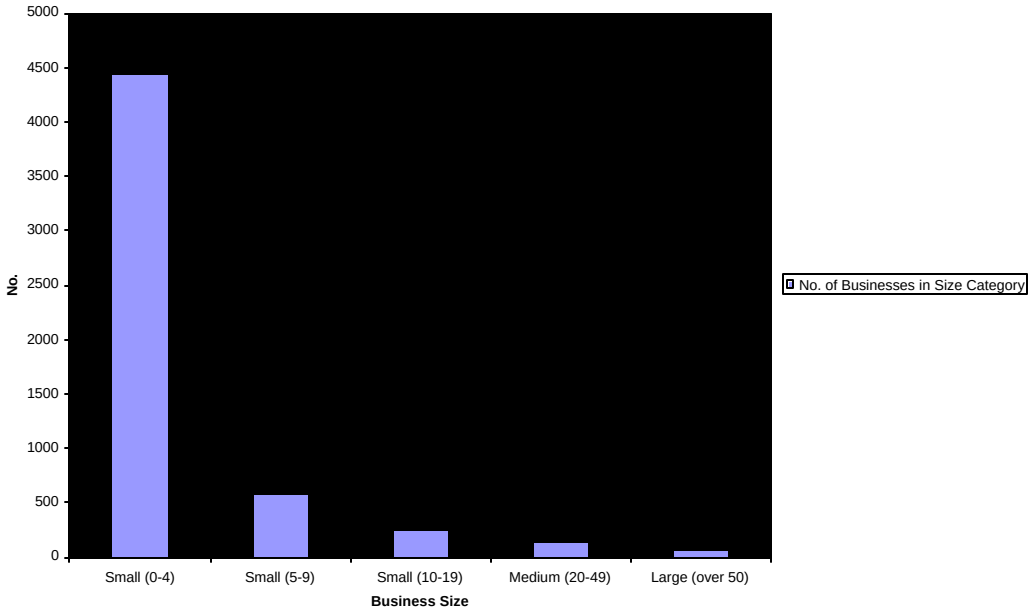
The Institution of Engineers, Australia (IEA) is the main professional body of engineers. The Association of Consulting Engineers Australia (ACEA) represents those engineers in private practice and the Association of Professional Engineers represents employee professional engineers.

From these figures, it appears that about 20% of IEA members are registered under the Building Legislation as engineers in Victoria. It is not clear what percentage of engineers practising in the building industry are registered with the BPB, but available data suggests that the percentages are relatively low. This provides support for the view that employees of firms with a registered partner or director are not becoming registered.

Across Australia, most consultant engineering businesses (97%) are small (ie. employing less than 20 persons). Of these, 84 per cent are very small businesses employing less than five persons[56].

[56] ABS, 8676.0, 1992-93, p 32.

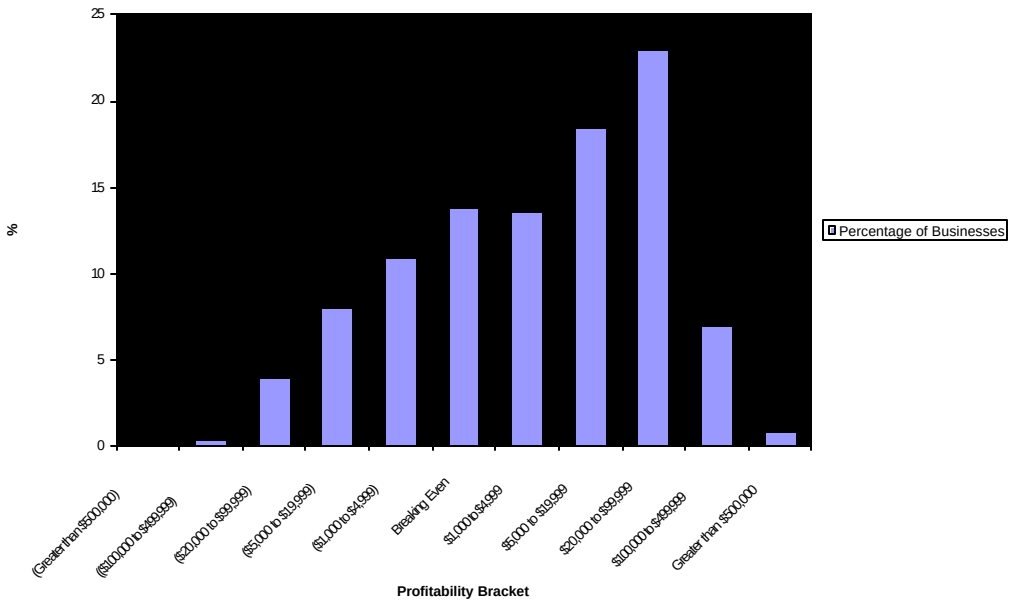
Chart 8: Size of engineering businesses, Australia, 1992-93.



Source: ABS, 8676.0, 1992-93, p 32.

Profitability figures for the engineering services market do not indicate that engineering firms are enjoying monopoly rents. Most consultant engineering services businesses (77%) made an operating profit before tax or broke even during the 1992-93 year. 23 per cent of all businesses were in the $20,000 to $99,999 profit bracket while less than one per cent of businesses reported an operating profit before tax of more than $500,000. Almost one quarter of businesses reported a loss[57].

Chart 9: Profitability of engineering businesses, Australia, 1992-93.



Source: ABS, 8676.0, 1992-93, p 34.

[57] Ibid, p 34.

We have been unable to obtain separate data on engineering businesses specifically involved in the construction industry. However, on the assumption that Charts 8 and 9 provide a proxy for that data, we find that the markets for the provision of engineering services in the construction industry are competitive.

5.4 Quantity surveying services

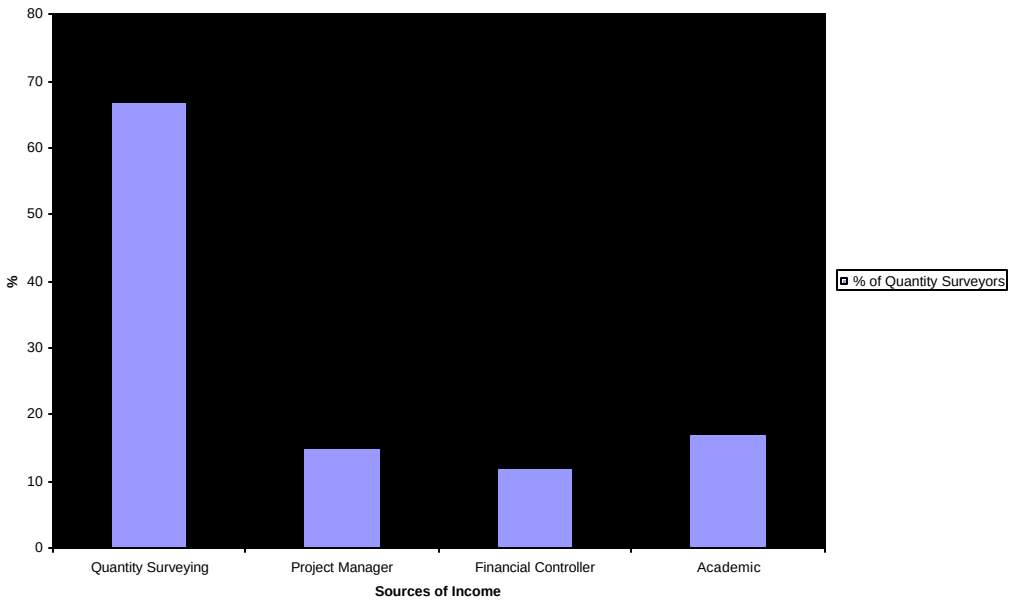
Since quantity surveyors must register to use the title "quantity surveyor", the Building Legislation affects the market for quantity surveying services.

The principal functions of a quantity surveyor are to take measurements of the quantities of the separate sections of the work, to prepare a Bill of Quantities and to provide measurements and valuations during the course of a contract. A Bill of Quantities is generally used on most medium to major projects and serves different functions under the contract. The quantity surveyor has recently developed an additional role as a building cost consultant and economic adviser to owners and architects.

We found no evidence to suggest that the market for quantity surveying services was not competitive.

Chart 10 shows the range of income sources for quantity surveyors according to a survey done by the AIQS in 1996. Quantity surveying is the main source of income. Project management and financial control are of equal importance to quantity surveyors.

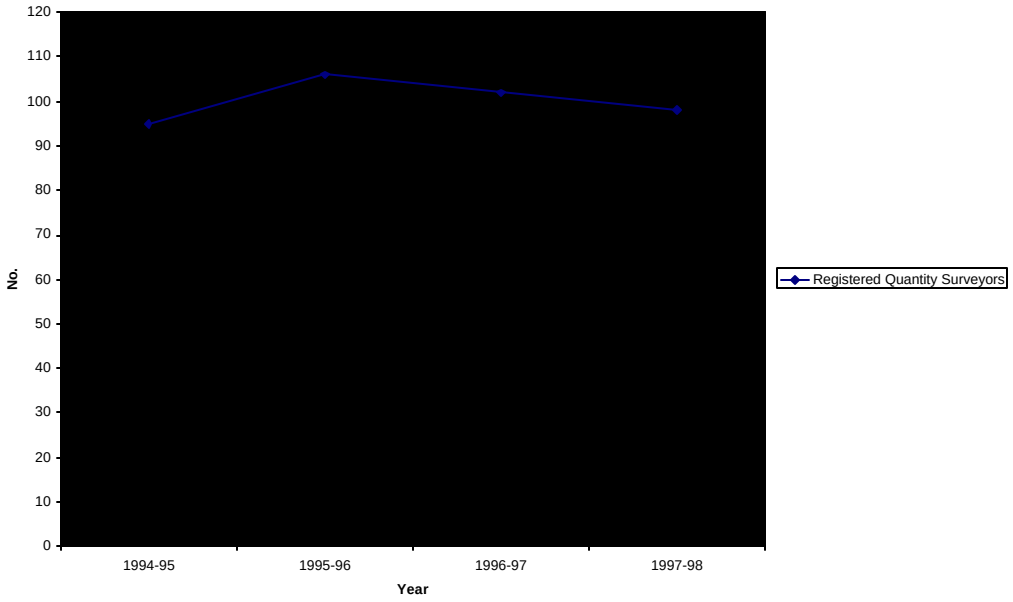
Chart 10: Sources of income of quantity surveyors, Australia, 1996.



Source: AIQS, Annual Report, 1996, p 9.

As is evident from Chart 11, numbers of registered quantity surveyors have remained relatively constant fluctuating slightly around the 100 mark.

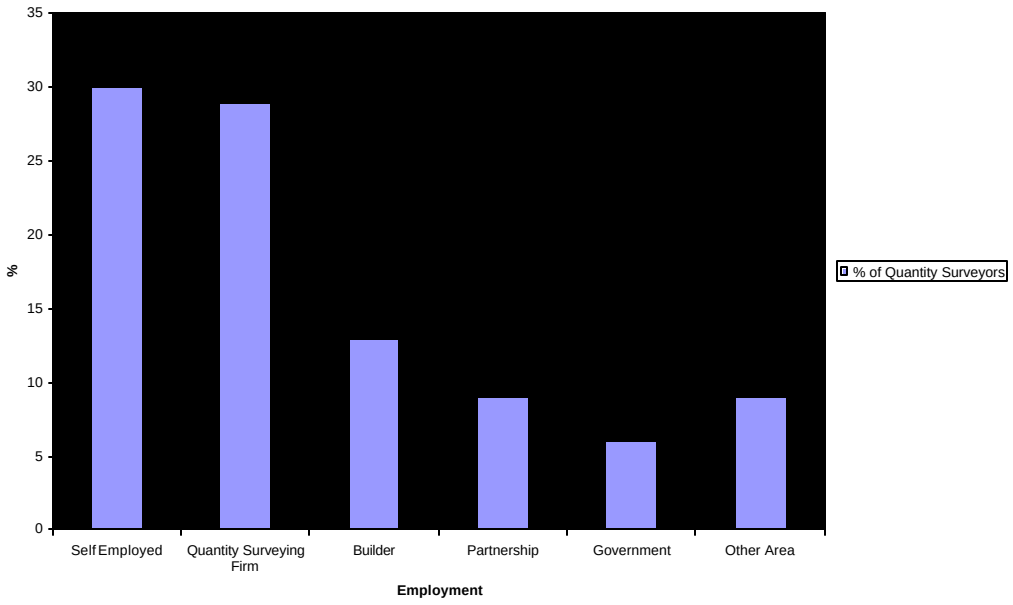
Chart 11: Number of registered quantity surveyors, Victoria.



Source: BCC, Annual Reports, 1995-1998

About 60% of quantity surveyors are either self employed or work for a quantity surveying firm as evidenced by Chart 12. The remaining quantity surveyors are spread evenly between builders, partnerships and governments.

Chart 12: Nature of employment of quantity surveyors, Australia, 1996.



Source: AIQS, Annual Report, 1996, p 9.

Quantity surveyors are represented by their professional body Australian Institute of Quantity Surveyors.

Numbers of Victorian AIQS members have remained relatively static over time since 1995 at approximately 375[58]. Based on this data, it would appear that approximately one quarter of AIQS members in Victoria are registered under the Building Act. This provides support for the view that employees of firms with one registered partner or director are not registered with the BPB.

The ABS has incorporated statistics on quantity surveyors with their survey of engineering service providers. The information available leads us to conclude that the market for quantity surveying services is competitive.

5.5 Building services

The Building Legislation affects the market for building services because it requires participants in this market such as domestic builders, commercial builders etc to become registered.

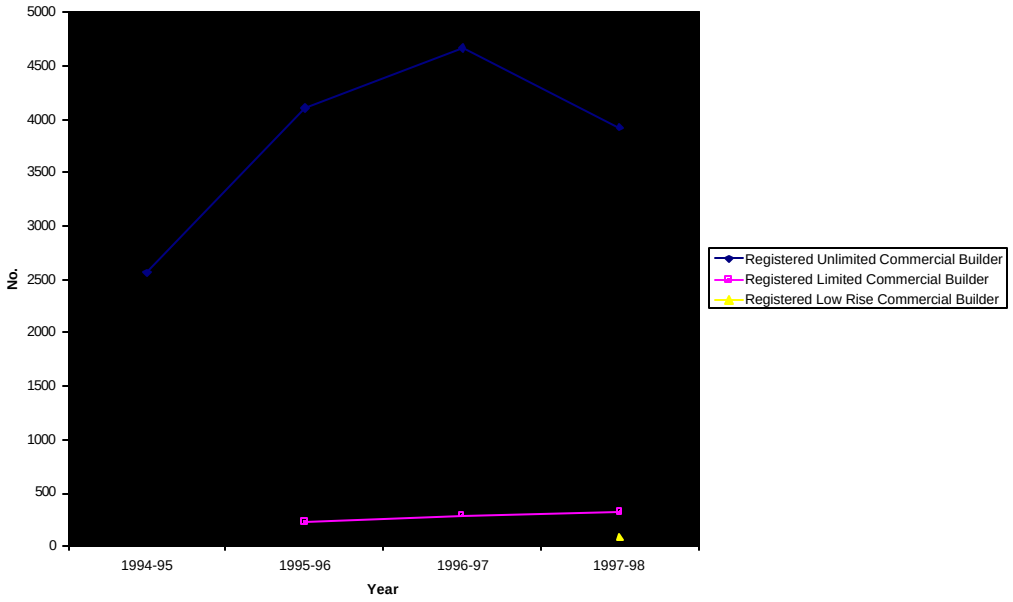
The builder is the person or entity who carries out the building or engineering work. The builder is also known as the contractor, the building contractor or the engineering contractor. Whilst traditionally a builder was the person who undertook all the work to erect a building using their direct employees, nowadays the role is generally filled by a contractor who is largely a broker employing only supervisory staff and engaging sub-contractors for various elements of the work. The builder is engaged by the principal to either "design and construct" the project or to only construct the project in accordance with the principal's design and documentation.

The available evidence suggests that the market for building services is competitive.

Overall, the number of unlimited commercial builders registered under the Building Act has risen substantially since 1993, despite a fall in 1997-98. Numbers of limited commercial builders have remained relatively static since the introduction of this category in 1995-96.

[58] AIQS, Annual Report, 1997, p 7.

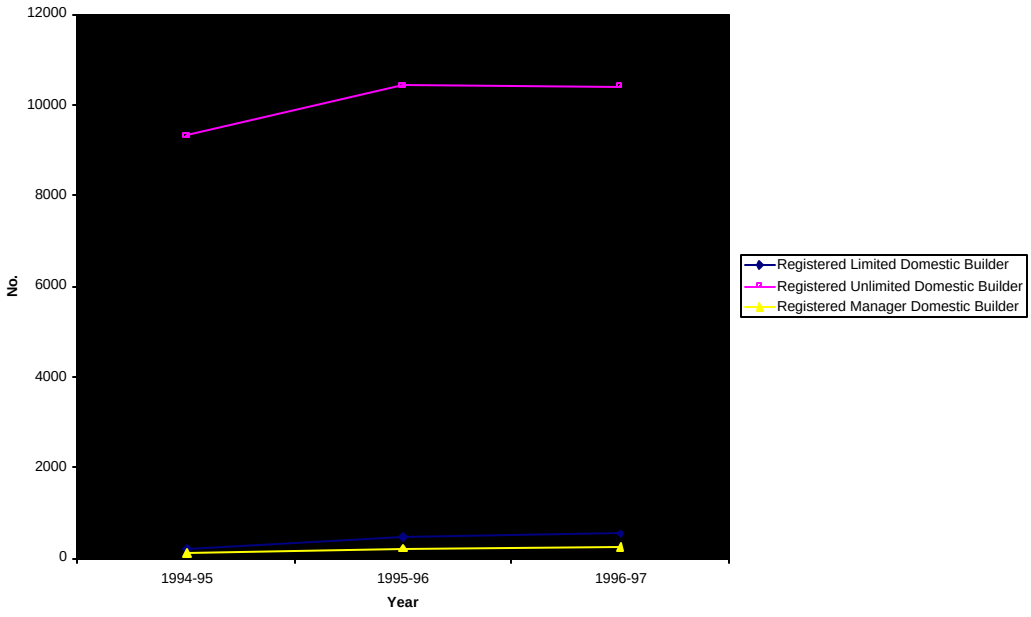
Chart 13: Number of registered commercial builders, Victoria.



Source: BCC, Annual Reports, 1995-1998.

The numbers of registered domestic builders in the unlimited, limited and manager categories have remained relatively constant since 1994-95 (see Chart 14).

Chart 14: Number of registered domestic builders, Victoria.



Source: BCC, Annual Reports, 1995-1998.

A number of bodies represent the interests of the contractors. The Master Builders Associations (MBA) in each State and the national body, Master Builders Australia Inc, have existed for many years and have been involved in the preparation of many standard form contracts. Furthermore, in each State there is a Housing Industry Association (HIA) which issues standard form contracts and represents contractors in the housing sector. The RAIA, Standards Australia, The National Public Works Conference and

the Property Council make significant contributions to the production of standard forms of contract. The main body representing sub-contractors is the Building Industry Specialist Contractors Organisation of Australia (BISCOA) which has participated in the preparation of companion sub-contract forms for use with the standard main contract form. Various other specialist associations exist to represent members of various trades.

The Builder Owners and Managers Association of Australia (BOMA) is now the Property Council of Australia (PCA). It is a representative body, mainly for non-residential property owners.

Various industry groups have developed to address issues and problems in their respective industries including the National Building and Construction Council and the Construction Industry Development Agency. The MBA have advised that they have approximately 4,500 Victorian members in seven membership categories. The HIA represents contractors in the housing sector and an array of other people associated with the building industry. The HIA has approximately 12,000 members in Victoria and about 30,000 nationally, with eight regional offices.

In Australia, IBIS reports that the construction industry is "Australia's second most fragmented industry". There are approximately 1000 small and medium enterprises (less than 200 employees) for every large business (more than 200 employees)[59]. 77 per cent of industry revenue is accounted for by small and medium enterprises, while large businesses are responsible for the balance.

The market shares of the largest participants in the construction industry are set out in the table below. The five largest participants in the construction industry account for 12.5 per cent of sales.

Company Name	**Estimated Market Share**
Leighton Holdings	4.1%
Transfield Pty Ltd	1.8%
Roads & Traffic Authority NSW	1.1%
Multiplex Constructions Pty Ltd	1.6%
AW Baulderstone Holdings Pty Ltd	1.5%

Source: IBIS, X4100, Vol 2, Mar 1998, p 4.

In general, barriers to entry in the construction industry are considered to be low[60]. They are lowest in the dwelling construction segment and in trades where small operators are dominant. Business size may be a barrier to entry in the non-dwelling and engineering segments along with specialist skills in project management and goodwill derived from on-time within-budget delivery.

[59] IBIS, X4100, Vol 2, Mar 1998, p 12.

[60] Ibid, p 13.

Competitors in the market for building services include architects, engineers, quantity surveyors and building consultants.

Competition on price characterises the lower end of the housing market, particularly for first home buyers[61]. Price becomes less important in the middle to top end of the housing market where quality, design and the reputation of the builder for reliability and cost effectiveness are attributed more weight.

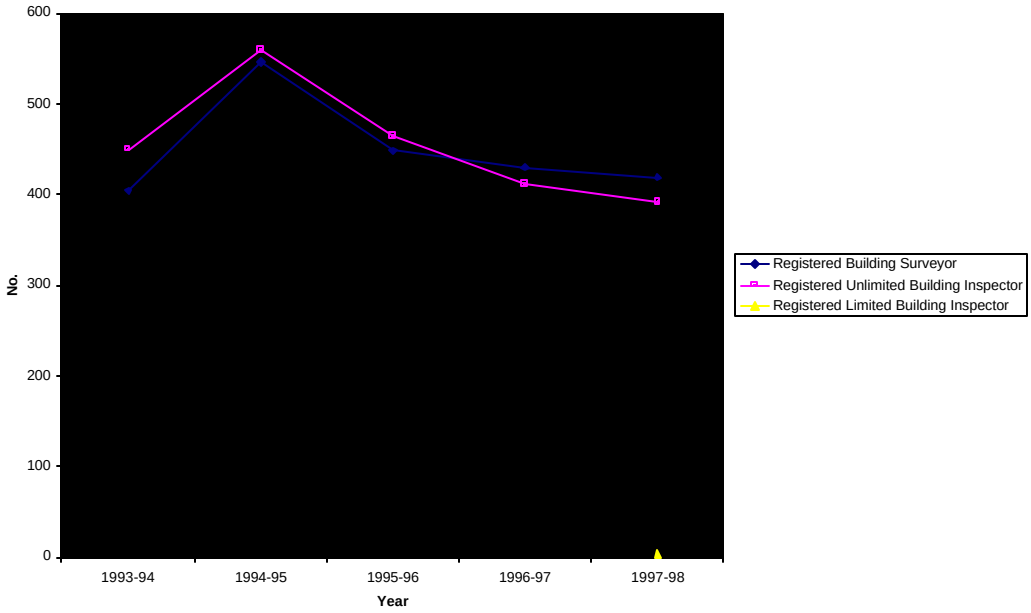
Based on the above evidence and available data, we find that the market for building services, in which various categories of building practitioner operate, are competitive.

5.6 Building surveying services

Only registered building surveyors are able to provide building surveying services pursuant to the Building Legislation. The impact of this legislation on the market for building surveying services is, therefore, considerable.

In 1997-98, there were 811 registered building surveyors, unlimited building inspectors and limited building inspectors. Given that only registered building surveyors may offer building surveying services, the Chart 15 represents participants in the Victorian building surveying services industry.

Chart 15: Number of registered building surveyors and inspectors, Victoria.



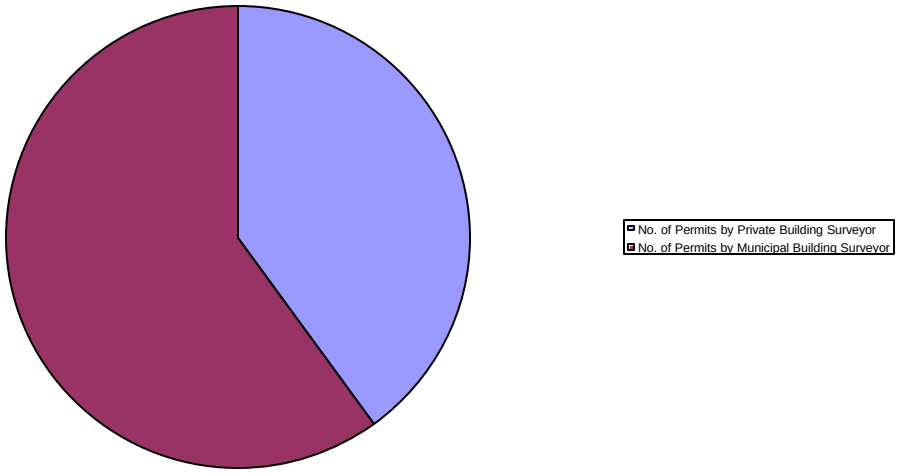
Source: BCC, Annual Reports, 1995-1998.

Chart 21 shows, there are 508 members of the AIBS in Victoria in 1997-98. Although numbers of AIBS members should be less than or the same as numbers of registered building surveyors, the discrepancy may be accounted for by the inclusion of the categories of fellow, life fellow, associate and student in the numbers of AIBS members.

[61] Ibid.

Private building surveyors control the majority of the market for building surveying services (see Chart 16).

Chart 16: Number of building permits issued by private or municipal building surveyors, Victoria, 1997-98.



Source: BCC, Annual Report, 1998, p 14.

Competition is primarily on the basis of the building permit fee although the Minister's Guidelines for the BCC as to building surveying services fees and the AIBS minimum scale of building permit fees both set minimum fees (around $100 in the former case and around $300 in the latter). Anecdotal evidence suggests that building surveyors largely disregard these guidelines, discounting their fees in order to win work. Extent of inspections and efficiency may also be grounds on which building surveyors compete.

Most complaints made to the BCC concern building surveyors. The number of complaints against building surveyors has settled to a constant level.

The BCC have indicated that of the 57 audits conducted in the 1997-98 financial year, four concerned municipal building surveyors and 53 were private surveyors. Of the private surveyors, 21 involved no further action, 14 received a letter of warning, 15 were still pending a decision and 3 involved full legal action.

Since the introduction of the Building Act, private building surveyors have been allowed to compete with municipal surveyors. Available evidence suggests that the market for building surveyor services is more competitive that prior to the legislation. As they perform some pseudo-regulatory functions, the manner in which they compete raises different issues from those applicable to other categories of building practitioners.

6 Potential restrictions imposed by the Building Legislation

6.1 Summary

We have examined the Building Legislation and find that the main constraints imposed by the legislation - title constraints, registration requirements and permit requirements - generally produce net benefits for the community. However, we recommend amendments to several provisions contained in the legislation which do not appear to adequately address the legislative objectives or which do not appear to procure net benefits. We also recommend that consideration be given to undertaking a further review of the building permit levy and other fees and charges, and of the funding, structure, functions and performance of the regulatory bodies, aimed at achieving more cost-effective regulation.

6.2 History of the building regulatory regime

The responsibility for making laws with respect to building matters rests with the States and Territories. In some States, responsibility for this regulation was delegated to municipal councils and the building regulatory regime was enacted by council by-law.

The earliest form of building regulation in Victoria was prepared at council level. Victoria's first permanent building regulatory body, the Building Regulations Commission, was established by the Local Government (Building Regulations) Act 1940. It prepared draft uniform regulations which applied to metropolitan Melbourne and elsewhere, at the discretion of the relevant council, between 1945 and 1974.

In 1975, the Premier appointed the Building and Development Approvals Committee (BADAC) to inquire into Victoria's Planning and Building Systems. Its report to the Victorian Government was submitted in November 1978. The report recommended that a separate Building Control Act replace the building provisions in the Local Government Act 1958. The Building Control Act was enacted in 1981 and the Building Regulations 1983 later replaced the Uniform Building Regulations 1974.

In 1990 the Australian Uniform Building Regulations Co-ordinating Council (AUBRCC) commenced the development of a National Model Building Act which was completed in November 1991. The Building Act 1993 substantially enacted the reforms recommended by the Model Building Act project.

6.3 Legislative objectives

The Act's objects are set out in Section 4 of the Act. They are:

to establish, maintain and improve standards for the construction and maintenance of buildings;

to facilitate:

- **the adoption and efficient application of national uniform building standards; and**
- **the accreditation of building parts, construction methods, building designs, building components and building systems;**
- **to enhance the amenity of buildings and to protect the safety and health of people who use buildings and places of public entertainment;**
- **to facilitate and promote the cost effective construction of buildings and the construction of environmental and energy efficient buildings;**
- **to provide an efficient and effective system for issuing building and occupancy permits and administering and enforcing related building and safety matters and resolving building disputes;**
- **to regulate building practitioners and plumbers;**
- **to regulate plumbing work;**
- **to reform aspects of the law relating to legal liability in relation to building and plumbing matters;**
- **to aid the achievement of an efficient and competitive building and plumbing industry.**

The Building Legislation aimed to improve the health, safety and amenity of people who use buildings whilst providing cost savings to government.

Second reading speeches provide some insight into the objectives of the Building Legislation. Insurance reform was one such objective:

> *This is an area where unscrupulous developers could manipulate...consumers.*[62]
>
> *The requirement to have mandatory insurance is absolutely essential if we are going to have a system that gives some guarantee to the public.*[63]
>
> *Responsible insured practitioners have been disadvantaged at the tender stage as the cost of their insurance has often made their prices uncompetitive when compared to practitioners who elect not to carry insurance cover. The introduction of compulsory insurance will put all building practitioners on the same footing and will provide building owners with more certainty. A further benefit is the predicted improvement in care and diligence which will result from*

[62] Second-reading speech, Building Bill 1993, Parliamentary Debate, Legislative Council, 22 Dec 1981, p 5606.

[63] Second-reading speech, Building Bill 1993, Parliamentary Debate, Legislative Council, 1 Dec 1993, p 1494.

the compulsory insurance requirement, as no-claims records will lead to lower premiums.[64]

Improving the building approval process was another aim of the Building Legislation:

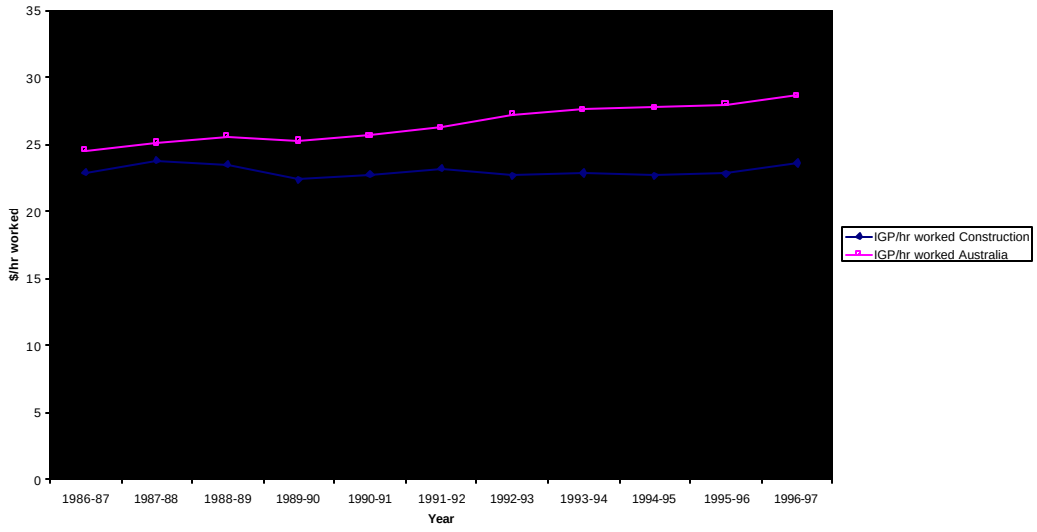
The intention of the Bill is to achieve an administrative structure which will result in a one-stop permit shop philosophy.[65]

Costs which the Building Legislation was designed to reduce include:

- excessive insurance premiums caused by uncertain and indefinite liability periods;
- costly exposures of local authorities to highly questionable liability claims;
- application processing costs imposed by regulatory authorities including demolition fees, building fees, etc;
- costs due to imperfect drafting, inappropriate regulation or inaccurate applications or documentation modification, etc;
- costly delays due to slow processing of initial applications, on-going work approvals and final approvals.

Another stated objective of the Legislation is the achievement of a competitive and efficient building industry. Historically, productivity growth has been poor in the construction industry compared to other industries, averaging 0.3 per cent over the past decade compared to 1.6 per cent nationwide (see Chart 23). The Building Legislation was designed to increase efficiency in the Victorian building sector.

Chart 17: Productivity of construction industry, Australia.



Source: IBIS, X4100, Vol 2, Mar 1998, p 18.

[64] Second-reading speech, Building Bill 1993, Parliamentary Debate, Legislative Council, 30 Nov 1993, p 1348.

[65] Second-reading speech, Building Control Bill 1981, Parliamentary Debates, Legislative Assembly, 15 Dec 1981, p 5121.

The legislation establishes a system of building regulations applying to building work in Victoria. The main mechanisms by which it regulates building work include the establishment of a system of registration of various classes of persons engaged in building work; a system of building permits issued by building surveyors necessary to undertake any building work; a system of occupancy permits required to occupy buildings; and a set of regulations and standards to be adhered to in performing building work. Those aspects of the regulation which are considered to amount to a potential restriction on competition are outlined further below.

6.4 Title constraints and registration of building practitioners

Part 11 of the Act governs the registration of building practitioners with the BPB. It is an offence to take or use the various building practitioner titles or to hold oneself out as being registered or qualified unless registered with the BPB (Section 176).[66] A certificate is issued to evidence the registration of a practitioner under Section 172. Part 15 of the Regulations prescribes the classes of building practitioners for registration. Although provision is made in Sub-sections 176(3) and (4) for the use by partnerships or companies of the titles where at least one partner or director is registered, Section 169(1) allows only natural persons to register as building practitioners.

Building practitioners working on a project must be specified in the permit and must, therefore, be registered under either Part 11 or the Architects Act. To be eligible for registration a building practitioner must hold a prescribed qualification or its equivalent. Applications must be accompanied by the prescribed fee and by evidence that the practitioner is covered by the required insurance, or in the case of a domestic builder, that the builder is eligible to be insured.

We discuss the compulsory insurance provisions at paragraph 6.5 below and hold that they do not warrant repeal. However, our understanding is that one of the primary objectives of the registration provisions is to encourage and monitor compliance with the compulsory insurance provisions. Accordingly, we discuss title constraints and registration requirements with reference to the compulsory insurance provisions and the net benefit procured by those provisions.

(a) Restriction on competition

The qualification requirements impose barriers to entry. Practitioners wishing to use a building practitioner title must incur costs of obtaining qualifications including income lost during the years of education and training. Registration fees impose initial and on-going costs of doing business which are currently $380 for domestic builder registration and $90 for other building practitioners.[67]

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[66] The following persons must be registered: building surveyors; building inspectors; quantity surveyors; engineers; draftspersons; builders including domestic builders; demolishers; supervisors of temporary structures; and those responsible for a building project or any stage of a building project and who belongs to a class or category of people prescribed to be building practitioners and generally does not include an architect.

[67] We recommend below that a review should be conducted of the BCC, the BAC, the BRAC, the BPB and the fees and charges levied under the Act. Such a review should include an assessment of the registration fees, and of the differences in registration fees for domestic builders verses other building practitioners.

Our analysis in chapter 5 indicates that the percentage of market participants that are registered varies considerably depending on the category of building practitioner under consideration. This tends to suggest that the extent to which title restrictions and registration requirements raise barriers to entry and compliance costs differs between the various markets in which building practitioners operate.

It has been suggested in submissions that the registration requirements and insurance provisions do not go far enough as they generally only apply to work over $5,000 and that they do not apply to subcontractors.[68] It has been submitted that most work in this category is uninsured even though there are significant risks that could be faced, such as with substandard restumping of a house. Within the scope of this review we have not undertaken an assessment of the appropriateness of the threshold and the exclusion of subcontractors, but do not regard these exclusions/exemptions to operate as restrictions on competition.

(b) Address the objectives

Occupational title restrictions aim at addressing, amongst other things, information asymmetries in the markets for the provision of building practitioner services. As discussed above, consumers do not always have adequate levels of information on the quality and standard of service provided by building practitioners, since consumers are often non-repeat purchasers of these services and have difficulty assessing their quality prior to delivery.

> *Building practitioners provide complex services to consumers who are unable to readily assess the quality of service provided.*[69]

By restricting the use of the title to those practitioners that have met certain prescribed qualifications, the provisions aim at informing consumers of the level of service they can expect to obtain when purchasing from a registered practitioner.

The objectives of the registration requirements are also aimed at increasing insurance coverage:

> *A major factor in introducing registration requirements for Draftspersons was the need to ensure adequate and continuing insurer involvement.*[70]
>
> *The chief criterion for registration is that all principals to the building contract should be required to be registered. The ability to obtain an acceptable level of insurance cover is a primary consideration in the registration provisions of the Act.*[71]

We discuss at paragraph 6.6 below the insurance provisions and hold that they do address the objectives.

The qualification requirements, which promote more highly trained and experienced practitioners, can also be seen to be aimed at the following objectives of the Act:

---

[68] Eg. Submission, MBA.

[69] Submission, Australian Institute of Building Surveyors, P. Davern (President), 24 Dec 1998, p 13.

[70] J. Kotsopolous Policy Notes, p 18.

[71] J. Kotsopolous Policy Notes, p 113.

- maintaining and improving the standards for the construction and maintenance of buildings;
- to enhance the amenity of buildings and to protect the safety and health of people who use buildings and places of public entertainment;
- to aid the achievement of an efficient and competitive building industry.

  Externalities associated with the building industry include:

  - *harm that can be caused by others who use buildings that are dangerous or unsafe;*
  - *loss of amenity, where a building or structure from one party reduces the natural light available to another as a result of siting contrary to the standards;*
  - *aesthetic or visual amenity problems, where the design or look of a building imposes costs on those in surrounding areas (possibly reflected in lower property values for surrounding areas); and*
  - *costs to health and safety, which may spillover to other members of the community through contagious disease or as a result of poor building construction.*[72]

Furthermore, registration provides a mechanism for handling complaints against practitioners and for monitoring and enforcing conduct standards.

Available data indicates that in some categories only 20 per cent to 50 per cent of individual participants are registered (see table below).

Building practitioner category	Broad estimate of registration levels
Draftpersons	mid (50%)
Engineers	low (20%)
Quantity surveyors	low (25%)
Builders	high (90%)
Building surveyors	high (100%)

Low registration levels may arise because building practitioners do not see the need to register when their employer has a registered director or partner and is, therefore, entitled to hold out the whole organisation as a provider of the relevant class of building practitioner services. However, the qualification requirements for registration are designed to maintain service quality. If individual practitioners are not registering, qualification levels and work standards may not be improved or maintained.

[72] Submission, Australian Institute of Building Surveyors, P. Davern (President), 24 Dec 1998, p 13.

It is our understanding that the regulators currently enforce the provisions in accordance with the former interpretation. We are of the view, however, that interpreting the provision so as to mandate the registration of building practitioner employees would give greater effect to achieving the legislative objectives. Ministerial Orders relating to insurance could ensure that these employees need not acquire insurance if they are covered by their employer's policy.

Though the registration provisions are framed to address the objectives, an important issue arises as to their effective operation in practice. In those categories where percentages are low, we take the view that the provisions do not address the legislative objectives as effectively as in the high percentage categories. Low registration levels may even exacerbate the information asymmetry faced by consumers. Since purchasers rely on titles to find service providers with certain qualifications, an otherwise wary consumer may be more easily induced to use an unscrupulous unregistered practitioner by virtue of his or her reliance on the practitioner's use of a restricted title.

On our analysis of the available data it is not clear whether the following categories of building practitioner are currently demonstrating high levels of registration:

- quantity surveyor;
- engineer;
- supervisor of temporary structures;
- category of builder class of demolisher;
- category of draftsperson class of building design (interior);
- category of draftsperson class of building design (services).

Accordingly, in some categories it is unclear whether the provisions are substantially addressing the legislative objectives.

The issue of whether to register companies and partnerships turns largely on the need for such organisations to be insured. Though Section 136 makes it an offence for a company or partnership to practise as a building practitioner without the required insurance, there is no associated mechanism for monitoring compliance with the provision. We have not been able to obtain information on insurance levels for companies and partnerships offering building practitioner services. Furthermore, it is not clear that a client of a company or partnership will be adequately protected by the professional indemnity insurance coverage of a single director or partner. In our view, providing for the registration of companies and partnerships would address the objectives by extending the Act's monitoring mechanism ie registration, to these organisations.

(c) Cost benefit

The costs of the provisions include entry costs such as qualification requirements and loss of income during education and training. These costs vary depending on the type of qualification and the number of years, but for some categories they have been estimated to be as high as $220,000 per practitioner (for architects, refer paragraph 4.4 above). Registration fees amount to $90 per annum or $380 per annum for domestic builders.

We have assessed the available data on the building practitioner markets and conclude that there are relatively high levels of competition in those markets. The available information suggests there are high numbers of practitioners in the markets, no evidence of monopoly rents and no evidence of anti-competitive or collusive behaviour. Accordingly, any restriction on competition imposed by the registration requirements does not, in our view, impose material costs on the community.

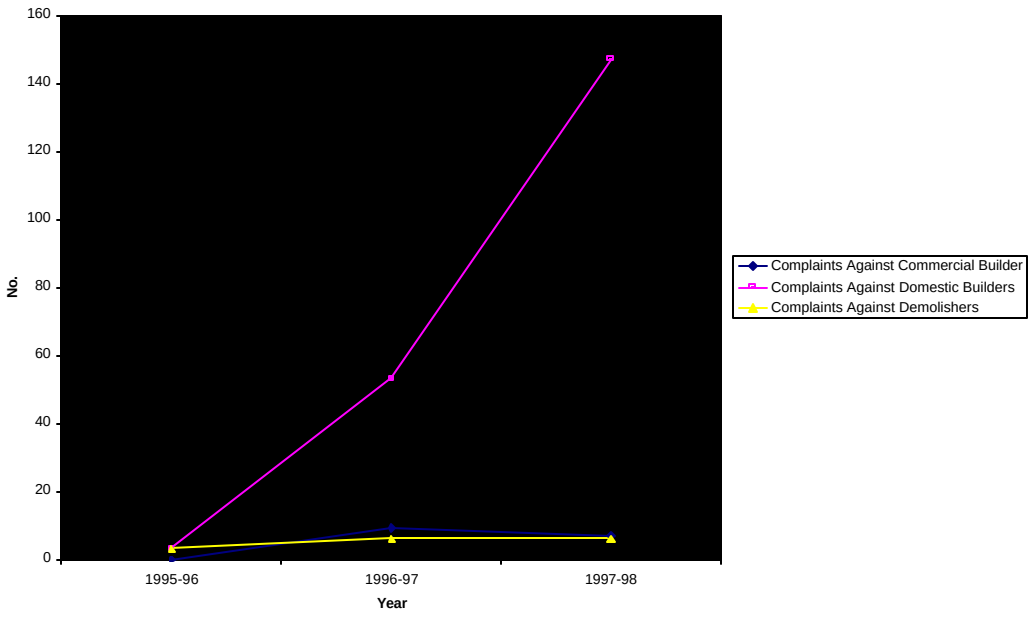
However, low registration levels mean that not all practitioners incur compliance costs. Those avoiding registration are at a competitive advantage relative to those registering under the Legislation. Low registration levels may also bring the Legislation into disrepute, create uncertainty and even exacerbate information asymmetries.

One benefit of the registration provisions is that search costs incurred by consumers are reduced.

> *"Consumers would incur costs in locating a competent service provider with the appropriate price/quality mix if the signals were not provided by the registration system provided under the Act."*[73]

Another benefit is that registration provides a mechanism for monitoring the Act's conduct requirements, handling complaints and for resolving disputes. Data supports the view that the complaints handling mechanism is increasingly being utilised (see Chart 18).

Chart 18: Number of complaints against registered builders and demolishers, Victoria.



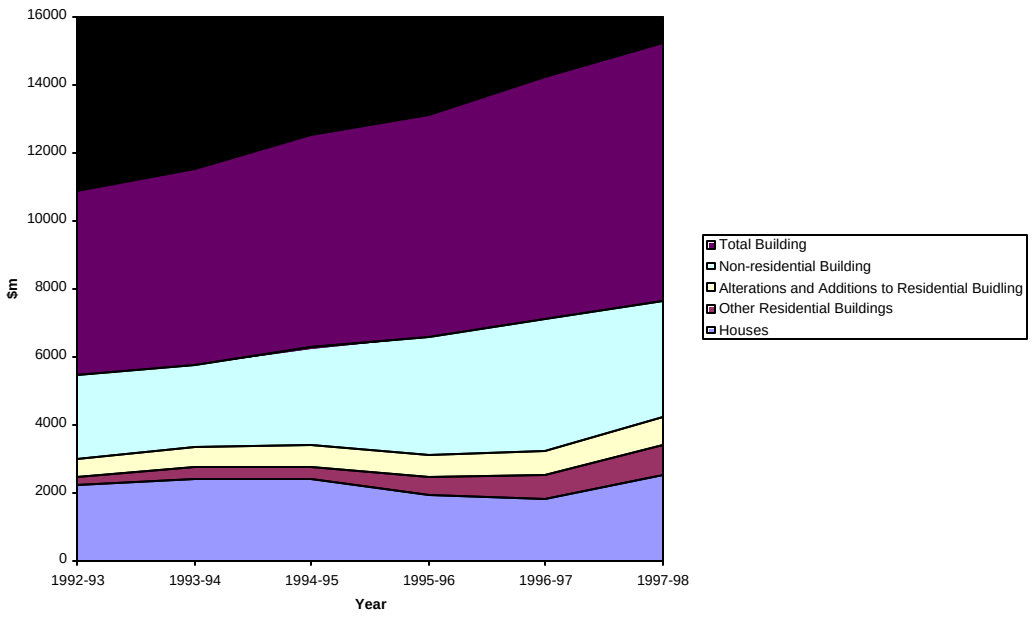
Source: BCC, Annual Reports, 1995-98.

By promoting training, skill and experience through registration, standards of construction, amenity and safety are supported and elevated. The very high value of the construction industry suggests that the benefits which may be derived from improved

[73] Submission, Australian Institute of Building Surveyors, P. Davern (President), 24 Dec 1998, p13.

quality and efficiency are considerable. Chart 19 gives an indication of this value and suggests the potential for future growth.

Chart 19: Value of building work, Victoria.



Source: ABS, 8731.2, 1992-98.

Submissions suggest that the industry participants regard the provisions as procuring net benefits.

> *Registration, together with continuing professional development, provides long term benefit for consumers and improvement in the professionalism of the industry.*[74]

Qualification requirements also foster international and interstate competitiveness of Victoria's construction industry. International trade in construction services is very limited because Australian building businesses providing construction services overseas have established operations in those countries. However, international trade in project management skills is more common and exports in this area are expected to grow.

Net community benefits appear to be produced by the registration provisions where registration levels are high. It is not clear that net benefits are derived from the registration requirements in all categories of building practitioner.

(d) Alternatives

One alternative is to remove registration requirements from those categories of building practitioner in which registration levels are low and allow professional associations in conjunction with the market to determine appropriate levels of qualifications and insurance coverage. Generic laws and the professional associations' codes of conduct may then be relied upon for consumer protection[75].

[74] Submission, BDAV, p. 17.

[75] Codes of conduct were discussed briefly in Chapter 2.

A representative organisation may be able to address the information asymmetry which exists between consumers and service providers by restricting membership to those possessing certain minimum qualifications and by promoting membership as an assurance of high quality service. High design standards may also be maintained by co-regulation. It is not clear that this alternative is less costly than the existing regulation. Membership fees are often higher than registration fees and may rise even further if the professional body must advertise membership as an indicator of high levels of quality and experience. The cost of additional administration functions may also increase the organisation's costs and, ultimately, its charges.

In respect of several building practitioner categories, there may be a number of representative bodies. In some cases, standards of qualifications and service standards under co-regulation may be lower than under the Building Legislation regime. We did not undertake an assessment of the appropriateness of the prescribed qualifications of Regulation 15.3, to assess whether these are considered to be the minimum qualifications necessary to practise effectively as a building practitioner. However, as we received no submissions to suggest that the qualification requirements were higher than minimum standards, and as the relevant qualifications were established on advice from industry bodies, we have not found that alternative qualifications would derive higher net benefits.

It is our view that amending the registration provisions in relation to categories which demonstrate low registration levels may provide higher net benefits than the existing requirements. However, as the legislation is relatively new, there is an argument that registration levels will increase in the short to medium term. Accordingly, implementing the alternative at this point in time is considered to be premature. Consideration should be given to the removal of those categories of building practitioner in which registration levels remain low over time.

Another alternative is to require the registration of companies and partnerships, in addition to natural persons. Monitoring and enforcement of compulsory insurance requirements would be aided if companies and partnerships were required to register as building practitioners. All practitioners, including building practitioner employees, companies and partnerships, who use building practitioner titles or who hold themselves out as building practitioners, should be required to register. This will ensure that the title provides useful information to the market and will reduce uncertainty. It is our view that this would procure higher net benefits. We are also of the view that amendment of Section 176 to make it clear that building practitioner employees must be registered, even where their company/partnership employer has a registered director or partner, would similarly derive higher net benefits.

(e) Recommendation

To avoid eroding the meaning of the building practitioner titles and to further address the objectives of the Legislation, we recommend that consideration be given to amending Section 176 to clarify that all practitioners, whether sole practitioners or employed by companies or partnerships, are required to register. However, consideration should be given to exempting from the relevant compulsory insurance orders, the building practitioner employees of adequately insured companies and partnerships. To improve the monitoring and enforcement of insurance provisions, we recommend that companies

and partnerships using restricted titles or holding themselves out or engaging in building practitioner work etc. be subject to the registration requirements.

In our view, registration levels and compliance levels should be reported by the BCC and BPB and should be one of the key performance indicators.[76] We recommend regular review of the registration categories and classes to assess and report on the ongoing need for these categories. If registration levels remain low in some categories, then there would appear to be a case for removing those categories from the Legislation. A system of co-regulation may then be relied upon to provide information to consumers. Insurance should continue to be compulsory for all building practitioners. Similarly, if new categories or classes of Building Practitioner are to be added, an appropriate Regulatory Impact Statement should be prepared.

6.5 Compulsory insurance

Compulsory insurance provisions are contained in Part 9 Division 3 of the Act. Section 135 of the Act grants the Minister power to make an order requiring building practitioners in specified categories or classes to be covered by insurance, and may specify the kind and amount of insurance required. Section 136 makes it an offence to work as a building practitioner without the required insurance, unless the building work is domestic building work under the value of $5,000. Non-compliance with these requirements can involve penalties including fines and deregistration. Architects are deemed to be building practitioners for the purposes of the compulsory insurance provisions.

It is our view that as new orders may be made and existing ones revoked, the appropriate assessment within this review is of the Minister's power and not of the orders themselves. Accordingly, we consider below the Minister's power to make compulsory insurance orders.

(a) Restriction on competition

The power to issue orders may result in increased costs of providing building practitioner services and may, thereby, amount to a barrier to entry for potential competitors. Where the cost of premiums is a barrier to entry, the provisions can be seen to restrict competition.

Where compulsory insurance orders do not prescribe which insurers must be used, they do not restrict competition in the insurance markets. Our understanding is that approximately seven insurers provide insurance to the construction sector. Though the policies tend to be homogenous due to Ministerial orders specifying types of policies, eg the six and a half year coverage for domestic building work, it is our understanding that insurers are competing vigorously on price. It would appear that since the removal of the Housing Guarantee Fund Ltd (HGFL), the insurance market for this sector is more competitive.

(b) Address the objectives

[76] We recommend below that a review should be conducted of the BCC, the BAC, the BRAC, the BPB and the fees and charges levied under the Act. Such a review could include, amongst other things, an assessment of the performance of these bodies and appropriate KPIs.

We do not undertake an analysis of the effects of each of the Minister's orders, but we take the view that the power to issue these orders addresses the objectives of the Legislation in those markets which demonstrate a requirement for compulsory insurance. We discuss below the way in which compulsory insurance provisions can address the legislative objectives.

Insurance provides protection to customers in the event that practitioners can not meet their liability for defective work. The issue underlying compulsory insurance is whether the insurer can ensure the stability of the scheme, or a particular regulatory response is required from Government.

By pooling contributions or premiums, and spreading the risk across a large number of individuals, the insurance company is able to provide coverage to those individuals who experience the insured event.

The insurer effectively averages out the risk faced by different individuals who are able to pool resources for unlikely contingencies and to avoid the high costs that may arise should the uncertain event occur.[77] Hence the premium tends to reflect the average risk of the pool. This may lead to low risk persons electing not to purchase insurance because the pool price is too high compared to their estimation of their own risk exposure. This creates a cycle of growing premiums encouraging low risk types out of the scheme in a process of "adverse selection".

The threat of adverse selection is particularly present where the extent of the practitioner's riskiness is difficult to ascertain. Despite training and education commonalities, construction services by their nature leave considerable scope for service quality differentiation. Accordingly, building practitioner risk is difficult to ascertain. In particular, the riskiness of domestic builders who enter and leave the market frequently has not been adequately scrutinised.

> *We do not believe there is sufficient incentive to undertake insurance by virtue of market forces alone. While prudent practitioners will take out appropriate insurance, the building industry continues to work on low profit and overhead margins and many practitioners in the industry continue to work on the premise that they will only cover statutory requirements. Given the under-capitalisation of the industry, particularly in the housing sector, and a lack of understanding of business principles and risk, many practitioners would not perceive any benefits in taking out insurance. One of the main areas for claims in the housing sector relates to bankruptcies and insolvencies. Market forces would tend to suggest that those practitioners who did not have insurance might also win significant work as a result of lower prices. This in turn would encourage other practitioners to re-evaluate their position in maintaining appropriate insurance.*[78]

[77] See for instance, Productivity Commission, *Private Health Insurance*, Report No 57, Febuary 1997, p. 168.

[78] Submission, BDAV, p. 16.

Anecdotal evidence of the lack of insurance coverage for domestic building work under $5,000 suggests that if compulsory insurance orders were removed for other sectors of the market, many participants would elect not to take up insurance.[79] This could result in adverse selection and an unstable insurance market.

Where adverse selection poses a risk to the stability of an insurance scheme, it may be eliminated by making insurance compulsory. Compulsory insurance prevents movement out of the market and creates an effective average premium.

It is not clear whether compulsory insurance orders are causing a moral hazard problem.[80] No submissions were made which suggested moral hazard is a concern. The use of lower premiums for no-claims records reduces the risk of moral hazard.

The compulsory insurance requirements can also be seen to be aimed at using insurance markets to monitor standards in the industry and to protect consumers. By depriving high risk practitioners of insurance and hence registration, potential clients are warned. The requirements also seek to ensure the availability of sufficient funds in the event of a successful claim for damages against a practitioner, particularly in the absence of joint and several liability.

> *The number of practitioners with compulsory insurance has increased since the introduction of registration, hence providing improved customer protection.*[81]

The extent to which the orders themselves address the objectives differs depending on the nature of the market and the particular order. For residential consumers for instance, there appears to be a prima facie argument that the need for compulsory insurance is greater.

> *The levels of information asymmetries between architects and clients in the residential housing market as compared to the large commercial construction market differ. They differ in so far as the owners of commercial properties usually seek advice prior to making their decisions and are better informed and equipped to make their own decisions. Whereas the owners of residential properties tend to place a higher degree of reliance on the architect to deliver all manner of expertise that the owners do not possess. The need is for a higher degree of protection for owners of residential buildings.*[82]

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[79] Discussion with MBA.

[80] Once insured, an individual may engage in behaviour which increases the insurer's risk exposure. This change in behaviour may not be observable by insurers. As a result, the operation of the insurance market could suffer because insurers may systematically underestimate the true risk, which in turn would place the premium pool under pressure. One response to moral hazard is to provide incentives for the insured to share the costs of loss such as including an "excess" in the policy. Alternatively insurers may limit the amount of benefits payable and the circumstances under which they may be paid or may establish eligibility thresholds for certain benefits: *NCP Review of Workplace Accident Legislation, Final Report*, Janurary 1998, Department of Treasury and Finance, p. 66.

[81] Submission, Australian Institute of Quantity Surveyors, G. Crutchley, 18 Dec 1998.

[82] Submission, Building Control Commission, M. Croxford, 31 Dec 1998, p 4.

Based on the foregoing, we take the view that the Minister's power to issue compulsory insurance orders allows the market failures presented by insurance markets to be addressed, at least in respect of some of the categories of building practitioner.

(c) Cost benefit

Professional indemnity insurance is regarded as benefiting both practitioners and their clients. For instance, the building practitioner's insurer will bear responsibility for running the defence case, thereby saving the practitioner from enduring protracted litigation.

It has been argued that compulsory insurance has been shown to decrease the costs of premiums and thereby to spread the risk of loss efficiently in reduced price pass-through.

> *There does not appear to be any evidence to support the view that registration 'restrictions' have increased the cost of insurance premiums..... In fact it is likely that 95% of firms and practitioners have not experienced any increase in their premiums as a result of registration requirements.*[83]

No submissions suggested that compulsory insurance imposes material costs on providing building practitioner services. Submissions did contend that compulsory insurance provides substantial benefits. In particular, the professional bodies themselves support the compulsory insurance requirements.

Based on available evidence, it appears that at least in respect of some categories, compulsory insurance provides net benefits. Accordingly, we take the view that the Minister's power to issue compulsory insurance orders can provide net benefits.

(d) Alternatives

Under the HGFL, house builders were required to be members of either the HIA or the MBAV for purposes of obtaining a guarantee. It was submitted that the HGFL compelled house builders to join an association, whilst aggrieving consumers who alleged that HGFL was biased in favour of builders. In addition, the HGFL restricted competition in the insurance market. These issues provided impetus for replacement of the HGFL with compulsory insurance with a choice of insurer and without mandatory association. The current insurance provisions appear to generate higher net benefits than the former scheme.

The compulsory insurance provisions have been recognised internationally as setting the benchmark for the construction industry.

> *The reforms adopted touched on all of the foregoing inequities and imported a number of features which went a long way towards making the building system in Victoria more equitable.... The Act...is a giant step forward towards assuring that individual players in the industry are not isolated in liability situations. In other words, the mandatory run-off insurance coverage makes it less likely that an individual participant in the industry will be isolated as being the*

[83] Ibid.

> *"deep pocket". The reasons to adopt a similar approach in Canada are ever present and hopefully not too far on the horizon....There is a lesson to be learned from Australia.*[84]

We have considered the alternative of voluntary insurance. It appears that there are a number of reasons why voluntary insurance might not provide sufficient protection to the market. In particular, it appears that the residential sector requires protection from substandard service provides due to the information asymmetry which limits the ability of residential consumers to adequately ascertain the risk they face.

> *We do not believe that there would be sufficient incentive to undertake insurance if membership of an industry association or professional institute was dependent on insurance cover. While obviously potentially advantageous in terms of increased revenue to professional associations, it would add further costs to those building practitioners who choose not to be members of an industry association or professional institute.*[85]

In addition, abolition of joint and several liability has strengthened the case for compulsory insurance. As building practitioners can be proportionately liable for building defects, the removal of compulsory insurance raises the risk that in cases where a partly responsible practitioner is insolvent and uninsured, the plaintiff would not be fully compensated.

It is not clear that voluntary insurance would at this stage procure a higher net benefit than the compulsory insurance provisions. The industry bodies themselves support the compulsory insurance provisions and no submission suggested that they impose unwarranted compliance costs on participants.

> *The BDAV does not believe that consumer education about the value of selecting an architect or other building practitioner with professional indemnity insurance would provide as good or better consumer protection than making professional indemnity insurance compulsory.*[86]

Appropriate competition assessment and cost-benefit analysis prior to the issue or revocation of compulsory insurance orders, including consideration of issues such as the impact of the order on national firms, should ensure that the Minister's compulsory insurance powers will procure the highest net benefit.

(e) Recommendation

The Minister is empowered by Section 135 to mandate insurance coverage. The provisions allow the Minister to issue orders on required insurance and to revoke an order. We have not considered each of the insurance orders that have been made. We do, however, find that the power of the Minister to make and revoke such orders, if

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[84] John R Singleton, Singleton Urquhart and Scott, Barrister and Solicitors, Canada, (a major Canadian construction litigation law firm) September 1997, http://www.singleton.com/articles/articlep.html, p. 3.

[85] Submission, BDAV, p. 16.

[86] Submission, BDAV, p. 16.

exercised after conducting a cost-benefit analysis for the relevant building practitioner categories, will produce net benefits. Accordingly, it is not apparent that the repeal of the compulsory insurance provisions would procure a higher net benefit.

We recommend retention of the Minister's power to issue compulsory insurance orders. We take the view that when deciding to issue or revoke such orders, a competition analysis and cost-benefit assessment should be undertaken to assess the case for the relevant order.

6.6 Requirements to obtain a building permit and an occupancy permit

Under Part 3 of the Act, a building permit must be obtained in order to carry out all building work except exempted building work. Building work includes work for or in connection with the construction, demolition or removal of a building.[87] An application for a building permit must be on a prescribed form and contain sufficient information. It must be accompanied by the appropriate fee and at least 3 copies of certain drawings, specifications and allotment plans. The fee is determined by the private building surveyor or in accordance with the Local Government Act 1989.

Where an occupancy permit is required by a building permit, Section 39 provides that an occupancy permit must be obtained before a person may occupy the relevant building. A building surveyor must not issue an occupancy permit unless the relevant building is suitable for occupation.

There are no limits on the number of occupancy permits required though building surveyors may refuse to issue an occupancy permit where the building or part thereof is not suitable for occupation and the application for an occupancy permit must be accompanied by a fee.

(a) Restriction on competition

In our opinion, the permit system (building and occupancy permits) does not, prima facie, amount to a restriction on competition. There is effectively no limit on the number

[87] Examples of classes of buildings to which the Regulations apply include:

Class 1a - a single dwelling, example, a detached house;

Class 1b - a small boarding house;

Class 2 - two or more sole occupancy units;

Class 3 - a residential building;

Class 4 - a dwelling in a building of another class such as a caretaker's flat;

Class 5 - an office building used for professional or commercial purposes;

Class 6 - a shop for the sale of retail goods;

Class 7 - a warehouse or carpark;

Class 8 - a factory or laboratory;

Class 9a - a healthcare building;

Class 9b - an assembly building;

Class 10a - a non-habitual building such as a carport or shed;

Class 10b - a structure such as a fence or wall.

of building permits or occupancy permits which may be issued. In addition, no submissions argued that the permit provisions amount to a material cost of construction.

However, permit requirements, (eg building permit fee or occupancy permit fee), do impose some costs on business. Permit fees currently range from around $350 for projects worth $30,000 or under to around $8,000 for a $5 million construction project[88]. In our opinion, these fees are not a material cost of construction. However, given other requirements which attach to the permit, we consider below whether the provisions address the objectives and produce net benefits.

(b) Address the objectives

The permit system addresses the legislative objectives by monitoring and enforcing compliance with the Legislation. The ongoing auditing of building surveyors ensures that the regulatory role of building surveyors is properly performed. The requirement to obtain an occupancy permit addresses the public health and safety objectives of the Legislation. In our view, the permit system addresses the objectives.

(c) Costs and benefits

Although a cost of construction, it is our view that building permit fees do not amount to a material cost.

We understand that since the introduction of private building surveyors into the market for the provision of building permits, processing times for building permits have, in many cases, halved. Professional indemnity insurance premiums for building practitioners have also decreased.[89] One issue is whether the introduction of private surveyors has seen a fall in the standards required to obtain a permit.

> *"The level of risk associated with building inspection and survey services is demonstrated by the fact that around 60% of building inspections are not initially approved or are approved with conditions attached."*[90]

In 1997-98, 53 private surveyors were audited. In 21 cases there was no further action. In 14 cases letters of concern were issued, 15 were still pending a decision, and in 3 cases full legal action was taken. Only 4 audits of municipal surveyors were conducted.

In addition, more complaints are made against building surveyors than against any other category of building practitioner (see Chart 20).

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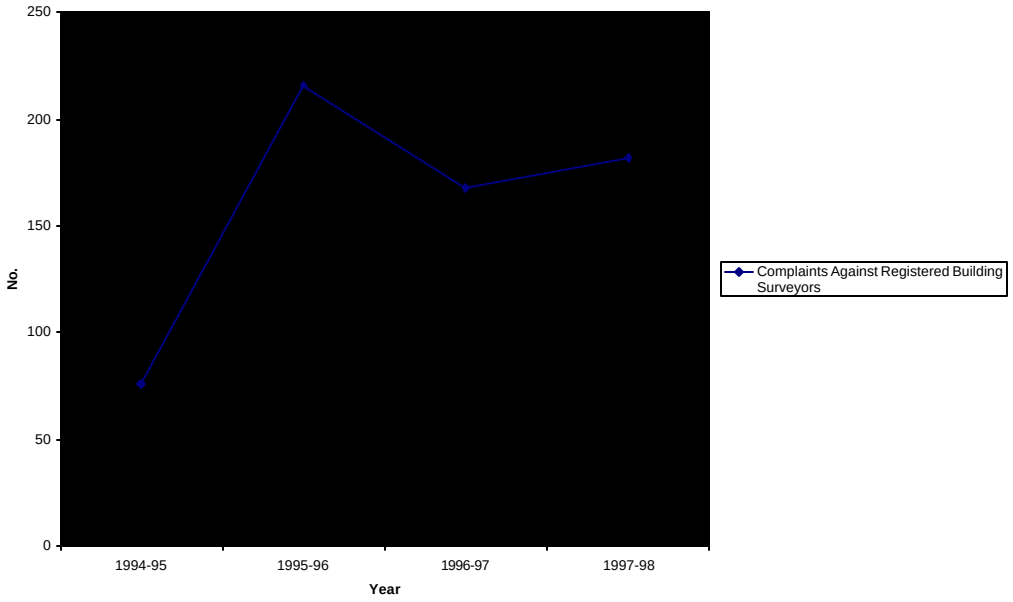
[88] AIBS Guideline Minimum Scale of Building Permit Fees Commercial Works and Minister's Guidelines, Building Control Commission - Fees for Building Surveying Services.

[89] According to the BCA referring to a survey commissioned by the Municipal Association of Victoria, referred to at paragraph 2.30 of a paper prepared by the Law Reform Committee, *Regulatory Efficiency*, May 1997, at website http://home.vicnet.net.au.

[90] Australian Institute of Building Surveyors submission from Philip Davern (President) dated 24/12/98, p 15.

Chart 20: Number of complaints against registered building surveyors, Victoria.



Source: BCC Annual Reports, 1995-1998.

These figures suggest that there may be scope for greater auditing of building surveyors to ensure the permit system is being properly administered.

Occupancy permits produce high benefits in the form of improved public safety.

In our opinion, the benefits of the permit system are relatively high. The permit system produces net benefits.

(d) Alternatives

Greater benefits may be derived from the present system by increasing the number of building surveyor audits. This would ensure greater compliance with the building permit system and with the standards required by building permits (such as BCA standards).

Removing the occupancy permit requirement to allow the free market to set occupancy standards will increase the risk to public safety well above any associated reduction in the costs of compliance. Accordingly, it is not apparent that an alternative will result in a higher net benefit than the existing provisions.

In addition, we consider that there may be synergies available from integrating aspects of the building permit process with aspects of the planning permit process in those instances where both permits are required. A further study into this alternative would be necessary to make a finding as to whether it could in fact achieve a higher net benefit.

(e) Recommendation

We recommend ongoing use of audits of building surveyors to ensure that standards are maintained and fostered.

We recommend that consideration be given to conducting a study into the case for integration of the planning permit application process and the building permit provisions in cases where both permits are required.

6.7 Exemptions for public sector employees and the Crown

Section 176(5) grants to certain public sector employees exemptions from the registration offences section.

Section 5 of the Act provides that except as provided in Division 6 of Part 12, the Act does not bind the Crown in right of the State of Victoria or a public authority. Section 217 provides that various Parts of the Act bind the Crown in right of the State of Victoria and so far as the legislative power of Parliament permits, the Crown in all its other capacities and that those Parts apply to a public authority. However, Part 8, which governs enforcement of safety and building standards, does not apply to the Crown or public authorities. Part 8 includes emergency orders, building notices and building orders and other general enforcement mechanisms. Furthermore, Section 218(4) ensures that the Crown or public authority is not liable for any offence under the Act or Regulations and Section 218(5) ensures that the Crown is not liable to pay any fee or charge except the building permit levy fee.

(a) Restriction on competition

It is our view that the provisions place some practitioners and government businesses at a competitive advantage to private practitioners. Competitive neutrality principles contained within the Competition Principles Agreement require that government businesses should not be given any competitive advantage over private enterprises merely due to their government ownership.

(b) Address the objectives

In order to address legislative objectives such as the promotion of safety and construction standards etc, the provisions must be enforceable against both public and private participants. Accordingly, it is our view that the exemptions do not appear to address the legislative objectives.

(c) Recommendation

We recommend repeal of the provisions which grant exemptions to public sector employees, public authorities and the Crown. However , we recommend retention of those provisions which exempt certain high security Crown buildings from the requirement to lodge permit documents with the relevant council. Exemptions are justified, in these cases because they aim to maintain the safety of certain occupants (eg women's refuges) or they limit the access to plans or buildings of sensitive locations (eg prisons). The Crown exemption in respect of the re-erection of any relocatable building used as a school should also be retained.

6.8 Building permit levy and the building administration fund

The regulators constituted under the Act, ie the BCC, BAC, BPB and BRAC are funded by the building administration fund set up by the BCC pursuant to Section 200 of the Act. The fund consists of a general account, a building permit levy account and the domestic building account. All moneys received by the BCC, the BPB, the BAB and the Minister under the Act or Regulations, must be paid into the fund.

Section 201 imposes a building permit levy of .064 cents for every dollar by which the cost of building work exceeds $10,000. It is payable to the building surveyor before the

building permit is issued. In 1997-98 for instance, the levy raised $4.8 million. It is our understanding that the levy was arrived at on the basis that the BCC should be immediately self-funding, taking into account future contingencies and down turns in the building industry. Yet it appears that the levy is not cost reflective as it is fixed by the Legislation without a mechanism for review.

The building permit levy, together with registration revenue of $1.7 million and other revenue, totalled $7.3 million revenue in 1997-98. We consider this total to be part of the cost of administration of the Legislation. It is in addition to any related costs borne by DOI, local government or other reporting authorities in carrying out their functions under the Legislation. Whilst we do not consider the levy to amount to a material cost on individual building works, we consider that the levy and other charges impose significant regulatory costs in total. In this regard, NCP principles suggest an examination be made of the extent to which the administration of the Legislation constitutes a cost effective means of regulation.

Recommendations

It is our view that the levy should be based on a formula which is cost-reflective and includes incentives for cost-effective administration of the legislation.

One method by which to ensure adequate resources are available to allow enforcement of registration provisions, could be to amend the provisions constituting the building administration fund to specify that registration fees be paid to the BPB to cover the cost of regulating, effectively, building practitioners and adequately administering the registration system. This could be done, for instance, by amending Section 200(2), to require the fund to include a building practitioner registration account, from which all funds are paid to the BPB. In this way, registration fees can be set at a cost reflective level and the BPB has further incentive to realise operational efficiencies. Adequate resourcing of building practitioner audits should be pursued, and an assessment undertaken of the appropriate body ie BCC or BPB, to be conducting those audits.

The BCC prepares annual reports in accordance with Australian Accounting Standards and other professional reporting requirements. It also complies with the requirements of the Financial Management Act 1994 and the accounts are subject to an Auditor-General's Report. However, to further enhance regulatory efficiency, we recommend that the regulatory bodies develop Key Performance Indicators (KPIs) to demonstrate the efficacy with which they are administering the Act and expending the building administration fund. Further disclosure requirements should allow greater understanding and transparency of their functions. For instance, disclosures about special projects expenditure should reveal what benefits were derived and how such expenditure is in furtherance of the legislative objectives. It is our view that separate costs and KPIs for each of the bodies should be disclosed.

As a means of addressing the issues involved and extracting sustainable benefits, it is further recommended that the Government consider undertaking a review of the BCC and the remaining regulators. Such a review could for instance, be along similar lines to those espoused in Clause 4 of the Competition Principles Agreement regarding the "Structural Reform of Public Monopolies". Some of the elements of the review could include the appropriate objectives structure and functions of the regulators, the merits of

separating potentially competitive functions of the regulators, performance of the regulators and pricing of the fees and charges levied under the Act.

It was submitted that there would be efficiencies in amalgamating the BAB and the BRAC, and in the relocation of the inquiries held by the BPB to VCAT.[91] Within the scope of this review we have not been able to conclusively examine the case for these proposals. In the event that a review is conducted into the regulatory bodies, consideration could be given to these proposals.

6.9 Other

We have also considered the other provisions of the Act. No submissions held that they amount to restrictions on competition. Though some of the following provisions impose costs on practitioners or, potentially, on the broader community, it is our view that the benefits of these provisions outweigh the costs, and that there are no higher net benefit alternatives:

1. The Act prohibits an owner-builder who is not a registered building practitioner, from selling more than one owner built dwelling in a 5 year period. This provision appears to aim at ensuring that owner-builders do not avoid the registration and insurance provisions applicable to domestic builders by claiming to be an owner-builder. The provision addresses the legislative objectives of public protection and improved standards of construction, and is likely to produce net benefits for the public.

2. Buildings are required to be maintained to ensure the ongoing safety of their occupants. The Regulations that relate to the maintenance of buildings are divided into two divisions, those buildings built before 1 July 1994 and those buildings built on or after 1 July 1994. In relation to buildings built on or after 1 July 1994, maintenance is required to ensure that every essential service to the building continues to perform at the same level as it did at the time of the issue of the occupancy permit or when commissioned. Essential services are the life and fire safety items installed or constructed in the building. They include all traditional fire services such as sprinklers, mechanical services, etc, but also include specific safety items such as fire doors etc. Though these provisions might impose costs on business, we have received no submissions to suggest that they constitute an unjustifiably high cost of construction. Accordingly we do not consider they involve a restriction on competition. In the event that they do amount to a restriction on competition, we are of the view that these provisions address the public safety objectives and result in net benefits. We support the ongoing use of performance based regulations such as the BCA.

3. Accreditation of building products, construction methods, building designs, building components and building systems is undertaken by, and is subject to any conditions or variations imposed by the Building Regulations Advisory Committee. The fee for accreditation of building products is $1000 (Regulation 14.9). We received no submission to suggest this is unduly onerous. The

[91] BCC Submission.

Australian Building Codes Board may also accredit building products. A person may apply to the Building Regulations Advisory Committee to have a building product accredited and the accreditation may be revoked at any time. A building surveyor has to recognise accredited products, methods and designs that are used in building work. Accreditation of building products allows for the recognition of accredited products interstate. Accreditation prima facie imposes costs on the provision of products, methods, designs etc., and thereby potentially restricts competition. The accreditation process addresses the public safety objectives of the Legislation and fosters improved building standards.

4. The Building Act entitles the Minister to issue Guidelines on various matters. In particular, the Minister can issue Guidelines in respect of application and permit fees, commission charges for services rendered, building surveyor functions, and the circumstances in which a building surveyor should seek assistance from the Fire Brigade with respect to the issuing of building notices or orders. The Minister has issued Guidelines in relation to permit fees which prescribed minimum fees and a sliding scale related to the cost of the construction project. Though the Guidelines could amount to a restriction on competition, building surveyors do not have to rely on these Guidelines by virtue of Section 188(1)(a). In addition, the Institute of Building Surveyors have issued similar Guidelines in relation to permit fees. Accordingly, there is a strong argument there would be no greater competition in relation to prices in the absence of the Guidelines. We do not have any evidence to suggest that the Guidelines are restricting competition and accordingly we do not recommend amendments to the Minister's powers in this regard.

5. Time constraints apply in relation to the period of building work. Building work related to houses and outbuildings should commence within 6 months and be completed within 24 months of the date of issue of the building permits. For all other buildings, commencement should occur within 12 months and be completed within 36 months of the date of issue of the permit except for re-erection of a building which must be completed within 12 months of the date of issue. In some instances, a building permit extension may be granted. Though these provisions might amount to a constraint on the way business is conducted, we have received no submissions to suggest that they impose high costs on construction. Accordingly, we do not consider them a restriction on competition. In the event that these provisions do amount to a restriction on competition, we hold the view that they address the objectives of reducing risks to public health and safety, of encouraging cost effective construction and of aiding the achievement of an efficient and competitive building industry. These provisions are, therefore, likely to achieve net benefits.

6. No submissions were received in relation to the provisions regulating places of public entertainment and temporary structures. Accordingly, we have not found that the provisions amount to a an unwarranted restriction on competition.

7 Integration of the Architects Legislation and the Building Legislation

7.1 Summary

Subject to what is said below, we take the view that systematic integration of the Architects Legislation with the Building Legislation should procure higher net benefits than the present regulatory matrix. The qualification requirements necessary to ensure the mutual recognition of Victorian architects in interstate jurisdictions would need to be retained to ensure any integration does not erode existing benefits.

We also take the view that administrative cost savings and economies of scale appear to be available by integrating the ARBV and the BPB into a new body responsible for the regulation of architects and building practitioners. A review of the function, structure and performance of the BCC, the BPB, the BAC and the BRAC, and where necessary their reform, would enhance the benefits available from integration.

Accordingly, we recommend that if integration is pursued, it should be subject to any transition period deemed necessary for improvement in the administration of the Building Legislation.

Factors relevant to inclusion of architects as a category of building practitioner in the Building Legislation include:

- streamlined regulation;
- funding; and
- compliance levels.

These are discussed in turn below.

7.2 Streamlined regulation

Although architects and draftspersons participate in the same market, they are regulated by different statutory regimes. Similarly, different regulatory regimes apply to architects on the one hand and engineers, quantity surveyors and builders on the other, though they compete in some markets. Applying common regulations to both architects and draftspersons will remove any distortionary impact of two different regulatory regimes on competition and efficiency. In addition, any ongoing legislative reform will be considered for its impact on all participants and will then apply consistently to both architects and other building practitioners.

Amalgamation will clarify the objectives of the Architects Legislation, since an objective of the Building Act is to improve the standards of construction and enhance the amenity and safety of buildings. Although the Architects Legislation does not clearly articulate such an objective, submissions from industry participants and consumers suggest that this is a perceived objective. Clearly defined legislative objectives generally assist in achieving greater consistency of administration and transparency.

Cost savings are likely to arise as a result of the replacement of two regulatory regimes with a single streamlined system. For instance, economies of scale in regulation may be procured if a new body is established to take on the responsibilities of the BPB and the

ARBV. The ARBV incurs administrative costs of $350,000 per annum. The BPB's costs are unknown. By reducing the combined numbers of employees between the ARBV and BPB, sharing resources and removing the duplication of functions (eg maintaining the register, enforcing the registration provisions), inclusion of architects as building practitioners is likely to result in cost savings.

Duplication of some functions is evident from the following table which compares some of the functions of the ARBV with those of the BPB.

ARBV	BPB
Determines the qualifications and experience required for registration (Section 46(a)).	Makes recommendations to the Minister about the qualifications for registration (Section 182(2)(c)).
Regulates the examination of persons applying for registration (Section 46(b)).	Administers a registration system for building practitioners (Section 183(2)(a)).
Assesses and accredits courses in architecture in association with the approved schools of architecture (Section 46(c)).	Makes recommendations to the Minister about the qualifications for registration (Section 183(2)(b).
Holds examinations and appoints examiners.	
Issues or cancels certificates of registration or approval (Section 46(d)).	Issues building practitioner certificates (Section 172(1)).
Suspends or cancels the registration of any person under the Act (Section 46(e)).	Suspends a persons registration in certain circumstances (Section 174(1)).
Approves architectural partnerships and architectural companies and cancels or suspends an approval (Section 46(f)).	
Revokes any suspension (Section 46(g)).	May revoke a suspension under specified circumstances (Section 172(4)).
Regulates the professional conduct of architects, architectural partnerships and architectural companies (Section 46(h)).	Supervises and monitors the conduct and ability to practise of registered building practitioners (Section 183(2)(b)).
Publishes information relating to the operation of the ARBV and the Act (Section 46(i)).	BCC: Keeps under regular review the administration and effectiveness of the Act and regulations (Section 196(a)).
Investigates and takes proceedings for offences against the Act (Section 46(j)).	Conducts inquiries into conduct and may take action such as imposing fines, require undertakings (Section 179).
The ARBV may constitute a Tribunal to conduct on its behalf inquiries concerning architects (Part 4 Division 2).	BAB: Considers and determines matters referred or application made to it under the Act or any other Act and makes any order that it considers appropriate in the circumstances (Section 161).
Generally carries out any other powers and functions which are given to it by the Act or which are necessary to implement the Act (Section 46(k)).	BCC: Carries out any other function conferred by or under the Act or any other Act or under any agreement to which the State of Victoria is a party (Section 196(p)).

The ARBV's current roles also include coordination with other States and countries regarding mutual recognition procedures. These should be retained in the event that integration is pursued.

It is our view that the new Board should include, amongst others, several ARBV members, in order to bring the relevant technical knowledge and experience required to regulate architects, as well as to bring their experience with enforcement and compliance. In addition, we are of the view that a new Board should be constituted with several consumer group representatives and community or non-industry representatives. This would ensure that wider interests are represented in the regulatory bodies and that regulatory capture is avoided.

Similarly, integrating the role of the Architects Tribunal and the BAB should reduce the total cost of investigating allegations of misconduct against architects and building practitioners. Certain costs, such as overheads, are necessarily incurred by all quasi-judicial bodies. If one body can perform the functions of two, expenses are likely to be reduced. Synergies also exist between the hearing of allegations against architects and building practitioners. A new Appeals Board or Tribunal should be constituted by members with experience relevant to all building practitioners, including architects, and should appropriately represent consumer and community interests.

Minor one-off costs would be incurred with repeal of the Architects Legislation and amendment of the Building Legislation and any orders required under this Act and the Mutual Recognition Legislation.

7.3 Funding

Application fees are $85 for individuals and $110 for architectural partnerships and companies and the annual registration fee is $90 for individuals, companies and partnerships. In comparison, application and annual fees for all registrations under the Building Act are $90 per annum except in the case of domestic builders for whom the fee is $380 per annum. The fee is $410 for combined registration. Streamlining the tasks of application processing, maintaining the register, fee collection and enforcing the registration provisions are likely to result in efficiencies and economies such as reduced application and registration fees. Accordingly, reduced compliance costs is a likely benefit of including architects in the Building Act.

The ARBV is funded from the annual registration fees. However, we understand that fees collected by the BPB are not entirely retained by it. Rather, they are passed on to the BCC for distribution under the Legislation. It is unclear from the accounts available whether the funds made available to the BPB are sufficient to ensure effective enforcement by the BPB. However, anecdotal evidence that the BPB's capacity to enforce the title and registration provisions is limited suggests that it might not be receiving adequate funding. In our view, the self funding basis of the ARBV could be used as a model for the new registration board. Separate accounts could be established and maintained by the new board and performance against certain KPIs should be monitored. (These issues were further discussed in paragraph 6.4 above.)

7.4 Registration levels

So long as the new body will continue to regulate the architects profession as effectively as the ARBV currently does, integrating the Architects Legislation with the Building Legislation should secure at least the same benefits as under the current regulation. Improved information would still be provided to consumers and high standards would be encouraged with qualification criteria if architects were included in the Building Legislation regime.

The experience of ARBV members could be injected into the new body, ensuring greater compliance by building practitioners than is currently being achieved.

> *...since the introduction of the Building Act (1993), there have been numerous reports of Building Practitioners failing in their responsibilities to their clients. In these instances, no disciplinary action has been taken under the Building Act (as it has no teeth). By comparison, strong disciplinary actions are continually enforced against architects who engage in unprofessional conduct with the general public.*[92]

Given the ARBV's apparent success in enforcing the Architects Legislation, amalgamating the regulatory bodies should assist in raising compliance with the registration provisions of the Building Legislation.

7.5 Recommendation

Integration of the Architects Legislation and the Building Legislation and of the ARBV and the BPB, combined with greater disclosure requirements, establishment of KPIs and improved funding etc, would appear to derive a higher net benefit than the current regulation. It is our view there is a strong argument that a review of the BCC and the other regulatory bodies should be conducted. The review should, amongst other things, assess the need for further separating policy, regulatory and commercial functions, establish appropriate objectives and performance benchmarks, and establish appropriate pricing of the fees and charges levied under the Act. It is our view that such a review would further NCP objectives and enhance the benefits of any integration.

The timing of implementation is beyond the scope of this review, yet it is important that a consistent and systematic approach be adopted for reform. Accordingly, we are of the view that integration be pursued subject to any review of the BCC, the BRAC, the BAC and BPB and to any transition period deemed necessary by the Government to ensure improvements in the administration of the Building Legislation.

Our recommendations in Chapter 6 would generally be unaffected if integration was pursued.

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[92] Submission, The Architects Branch of The Association of Professional Engineers, Scientists & Managers, Australia, p. 1.

8 Appendix A - Overview of interstate building regulatory regimes

8.1 Regulatory instruments

The New South Wales Building Control Regime is contained within regulations administered by local government authorities. Residential building work is specifically regulated through the Building Services Corporation Act 1989 (the Home Building Act from 1 May 1997).

The regulations set minimum standards for building, town planning, environment, health and safety. The Building Services Act 1989 (NSW) requires that contractors have a licence to carry out residential building work or specialist work such as plumbing, gas fitting or electrical work (Section 4), or a permit to be an owner-builder (Sections 29 to 32). An injunction may be granted to restrain an unlicensed contractor from carrying out work (Sections 4, 12 and 138).

In Queensland there is a requirement that contractors be licensed to carry out any building work under the Queensland Building Services Authority Act 1991 (Sections 30 and 42). The licence may be limited to classes of building (Sections 30 and 42). A contractor who does not hold the necessary licence commits an offence by carrying out building work (Section 42) and, in some cases, may be expressly precluded from recovering or retaining payment for such work (Section 42(3)).

In South Australia building contractors must obtain a category 1 licence to carry out any building work under the Builders Licensing Act 1986 (Section 8(1)(a)). Different categories of licence may be granted for specified types of work or subject to conditions (Section 8). In South Australia a contractor who does not hold the necessary licence commits an offence by carrying out building work (Section 9). An unlicensed contractor is not entitled to recover any fee or other consideration in respect of the building work unless the Tribunal or Court is satisfied that the failure to be licensed resulted from inadvertence (Section 39).

In Western Australia there is a requirement that contractors be registered to carry out building work under the Builders Registration Act 1939 (Section 10). A contractor who does not hold the necessary registration commits an offence by carrying out building work (Section 4).

In the Australian Capital Territory contractors must be licensed to carry out any building work pursuant to the Building Act 1972 (Part II, Division 3). The different classes of licenses effectively cover all types of building work in the ACT. Different classes of builders licence are issued in respect of specified types of buildings. Under the Building Act 1972, a contractor who does not hold the necessary licence commits an offence by carrying out building work (Section 14).

8.2 Binding of the Crown

In New South Wales, where the Crown is proposing to undertake building work, the local government must be notified under the Local Government Act 1993 (Section 72). The Council remains the consenting authority, but under the supervision of the Minister.

The local government must also be given an opportunity to make submissions within a prescribed period (Section 72(3)).

A building must be built by the Crown in accordance with the technical building standards (Section 70(2)). However, the Minister may exempt a particular proposal from any of these requirements (Section 70(3)).

In Queensland the local government must be notified where the Crown proposes to undertake building work pursuant to the Building Act 1975 (Section 4(4)). The local government need not be given an opportunity to make submissions. The Crown must build in accordance with the technical building standards (Section 4(1)). The Minister may not exempt the Crown from these requirements.

The Development Act 1993 requires that the local government be notified where the Crown intends to commence building work (Section 49(2) and 49(3)). Certain developments can be excluded from this requirement. The local government has an opportunity to report on the development within two months (Sections 49(5) and 49(6)).

In South Australia a Crown building must be built in accordance with technical building requirements (Section 49(14a)). There is no provision for exempting the Crown from these standards. Where the Crown proposes to install underground drains and devices to prevent backflow to public water supplies, the Local Government (Building and Miscellaneous Provisions) Act 1993 requires that the local government be notified (Section 64(4) and 64(5)). However, there is no requirement that the local government be given an opportunity to make submissions.

As in the other States, a Crown building must be built in accordance with the technical building standards (Section 64(1)). However, the Minister may exempt a particular proposal from any of these requirements (Section 64(1)).

In the Northern Territory, the Crown must build any building in accordance with the technical standards set out in the Building Act 1993 (Section 5).

In the Australian Territory, the Building Act 1972 requires that the Crown comply with the building standards when constructing a building (Section 6A).

8.3 Requirements to obtain a building permit

In **NSW** building work is not permitted to be undertaken without the prior approval of the relevant authority under the Local Government Act 1993 (NSW) (Section 68(1), 68 Table Part A, items 1 to 5), evidenced by the grant of an approval (Section 94(1)(a)) or deferred commencement approval (Section 95).

The commencement of building work without such an approval is an offence (Section 626) and once approval is given the person carrying out building work must ensure that it complies with the approval (Section 627). In New South Wales there is no power to retrospectively approve building work carried out prior to grant of approval (*Rancast Pty Ltd v Leichhardt Council (1995) 89 LGERA 139*). Where work has been carried out prior to approval, a building certificate may be applied for.

In **Queensland** the Building Act 1975 provides that building work is not permitted to be commenced until the prior **approval** of the relevant authority is obtained (Section

30A(1)). The consent of the relevant authority is evidenced by the grant of an approval or approval subject to conditions (Section 303(2)). It is an offence to undertake building work without such approval (Section 64(C)(1)). In Queensland there is a procedure for approval to cover building work already carried out. The local government may require application for approval of such work (Section 52A). Even though application for approval may be made and approval given, this will not remove the breach of Section 30A of the Building Act 1975. It has been held that a letter from the local government indicating a lack of objection to building work carried out in breach of Section 30A(1) remaining constructed did not constitute approval for the purposes of Section 66A of the Building Act 1975 (*Mitchell v Spring [1996] 1QD R 487, CA (QLD)*). Local governments have the function of deciding whether to grant building approvals (Section 30A(1)).

In **New South Wales** local governments are given the function of deciding whether to grant building **approvals** (Section 68(1)). "Building work" is defined to cover work which relates to the erection of buildings (Section 3, Dictionary). Erection is defined to include structural work, alterations, additions or rebuilding (Section 3, Dictionary).

In **Queensland** the definition of building work mentions both "erection" and "construction", as well as demolition and removal, incidental excavation or filling (Section 5). Work may also be excluded from the definition of "building work" by the regulations (Section 5). The definitions of "erection" and "construction" cover structural work, alteration, addition, rebuilding and relocation (Section 5).

In **South Australia**, building work cannot be commenced without the prior approval of the local government under the Development Act 1993 (Section 32). Building work is defined to mean "construction" as well as demolition and removal, incidental excavation or filling and other prescribed work (Section 4(1)). Such approval is evidenced by the grant of a **development authorisation** (Section 40), an authorisation subject to conditions (Section 42), a notice of determination (Development Regulations 1993, Reg. 42 to 45) and a form of notice (Development Regulations 1993, Schedule 11). It is an offence to commence building work without such approval (Section 44(1)).

Where approval is obtained, a person carrying out building work must comply with the approval (Section 44(2)). A procedure exists for approvals to cover building work already carried out (Sections 39(1)(c), 85(14) and Development Regulations 1993, Reg. 23 which provides that the decisions maker can await the outcome of any proceedings before determining an application to cover building work carried out unless the Court adjourns proceedings for that purpose).

In **Western Australia**, the Local Government (Miscellaneous Provisions) Act 1960 provides that building work is not permitted to be undertaken without the prior approval of the Local Government (Section 374(1)). A detailed list of activities in relation to a building which require authorisation is specified (Section 374(1)). Approval for building work is evidenced by the **grant of a licence** or a conditional licence (Sections 374 and 374A). Undertaking building work without such a licence is an offence (Section 374(1)). A person carrying out building work under a licence must ensure that it complies with the licence (Section 374(1)).

In **Tasmania** building work cannot be commenced without the approval of the local government pursuant to the Local Government (Building and Miscellaneous Provisions) Act 1993 (Sections 45(1) and 46(1)). A permit evidences the grant of an approval (Section 45 and Building Regulations 1994, Reg. 21). It is an offence to commence building work without a permit (Sections 45(1) and 46(1)).

Once a **permit** is obtained, a person must ensure he or she complies with the permit and all the terms and conditions of approval for the building work (Section 55(2)). In Tasmania a permit to proceed may be issued to approve building work already carried out (Building Regulations 1994, Reg. 67).

Building work is not permitted to be undertaken in the **Northern Territory** without the prior approval of the director of building control pursuant to the Building Act 1993 (Section 55). Approval is evidenced by the grant of a permit (Section 57 and Schedule 3, clauses 4 and 9). It is an offence to commence such building work without a **permit** (Section 55). A person carrying out building work must comply with the permit once it is obtained (Section 55). Building work is defined to cover work relating to construction of buildings, as well as demolition and removal, and other specified work such as plumbing and drainage services (Section 4). There is no procedure for approvals to cover building work already carried out.

In the **Australian Capital Territory** a permit is required under the Building Act 1972 to undertake building work (Sections 30(1)(a) and 30(2)).

The building controller issues permits (Section 7(3)). Building work is defined to mean work relating to the erection of buildings, as well as demolition, removal, installation, structural modification and maintenance of warm water and mechanical ventilation systems (Section 5(1)) and 5(4)). Erection is defined to include removal and re-erection, with or without alteration (Section 5(4)). It is an offence to commence building work without a permit in the Australian Capital Territory (Section 30(4) to 30(6)). It is a defence that the person reasonably believed that a **building permit** had been granted. The procedure for approval of building work already commenced involves an application for approval upon receipt of notice stopping, specifying or requiring the carrying out of building work (Sections 43(4), 44(3), 46(2)).

8.4 Compulsory insurance

In Queensland, where domestic building work is carried out defectively or is not completed by the contractor, the proprietor has, in some jurisdictions, a right of recourse to a statutory insurer or guarantor to recover losses incurred in carrying out rectification or completion pursuant to the Queensland Building Services Authority Act 1991 (Part 5).

In the Australian Capital Territory, a proprietor has a right of recourse to a statutory insurer or guarantor to recover losses incurred in carrying out rectification or completion where domestic building work is carried out defectively or is not completed by a contractor pursuant to the Building Act 1972 (Section 58E).

Builders undertaking domestic building work must also have appropriate insurance before any building approval will become effective (Section 35(3)). This is evidenced by

a certificate of insurance (Section 35(4)). An exception is made for owner builders (Sections 35(3)(c) and 39(1)A).

In New South Wales, appropriate insurance is required by a builder undertaking domestic building work before any building approval will become effective under the Local Government Act 1993 (Section 102). This Act requires compliance with the Home Building Act 1989 (Part 6). A certificate of insurance is required to evidence this appropriate insurance (Section 102A(2)). An exception exists for owner-builders (Section 102(1)).

South Australian builders performing domestic building work must obtain insurance before a building approval will become effective under the Development Regulations 1993 (Reg. 21(3)). This will be evidenced by a certificate of insurance (Reg. 21(2)). Owner-builders are an exception (Reg. 21(2)(a)(ii)).

In Western Australia insurance must be obtained by a builder undertaking domestic building work before a building approval will become operative under the Local Government (Miscellaneous Provisions) Act 1960 (Section 374AAA). In Western Australia owner-builders must have appropriate insurance before selling the relevant property under the Home Building Contracts Act 1991 (Section 25F) for work for which a building licence was issued after 6 February 1997.

In the Australian Capital Territory the Builder Controller retains a discretion to issue a permit where no insurer will insure the builder, if the Building Controller believes that it is "fair in all the circumstances" (Section 35(3)(b)).

8.5 Occupancy permits

In New South Wales a permit must be obtained before a building can be occupied under the Local Government Act 1993 (Section 68(1)), Section 68 Table Part A, item 6). The permit must be obtained prior to completion of the building.

Applications for an occupancy permit are to be in accordance with those for other types of building approvals (Section 68(1), Section 68 Table Part A, item 6 which refers only to use and occupation of incomplete buildings and Chapter 7, Part 1). In addition, a certificate of classification must be obtained and use and occupancy must then be in accordance with the certificate under the Local Government (Approvals) Regulation 1993 (clause 45(1)). Authorisation for occupancy will be granted once the building work has been completed or substantially completed and the building can be certified as fit for occupation and use under the Local Government Act 1993 (Section 89(1)) and the Local Government (Approvals) Regulation 1993 (clause 17, Health and Safety of Occupants).

The occupancy permit will list the classification of the building and the conditions which apply to the building (Local Government (Approvals) Regulation 1993, clause 47). Occupancy permits can be obtained for parts of a building and must be replaced by a new authorisation if a further part of the building is to be occupied (clause 45(1) and 48). Occupational use of any building, other than in accordance with the required permit, is subject to a penalty (Local Government Act 1993, Sections 626 and 627).

In Queensland a permit must be obtained before a building can be occupied under the Standard Building Law 1991 (Section 6.5). A certificate of classification must be

obtained and use and occupancy must then be in accordance with the certificate (Standard Building Law 1991, Section 6.5). Authorisation will be granted once the building work has been completed, substantially completed and even where the building is not substantially complete, and the building can be certified as fit for occupation and use (Section 6.4). The occupancy permit will list the classifications of the building and the conditions which apply to the building (Section 6.4(5)). Occupancy permits can be obtained for parts of a building and must be replaced by a new authorisation if a further part of a building is to be occupied (Section 6.7). Occupation use of any building other than in accordance with the required authorisation is subject to a penalty (Building Act 1975, Sections 64C, 64E, 65 and Standard Building Law 1991, Section 6.5).

In South Australia the Development Act 1993 provides that a permit must be obtained before a building can be occupied (Sections 67 and 68). Applications are generally to be in accordance with those for other types of building approval (Section 67). Authorisation will be granted once the building work has been completed or substantially completed and a building can be certified as fit for occupation and use (Section 67(6)). The occupancy permit will list the classification of the building and the conditions which apply to the building (Development Regulation 1993, Reg. 83(9), Schedule 19). Occupancy permits can be obtained for parts of a building and must be replaced by a new authorisation if a further part of the building is to the occupied (Development Act 1993, Section 67(12) and Development Regulations 1993, Reg. 83(11)). Occupational use of any building other than in accordance with the required authorisation is subject to a penalty (Development Act 1993, Section 67(1)).

In Western Australia a permit must be obtained before a building can be occupied (under the Local Government (Miscellaneous Provisions) Act 1960, Section 374C(5), Building Regulations 1989, Reg. 20(4)). The use of a building must be for a purpose in accordance with the classification of the building. A certificate of classification must be obtained and use and occupancy must then be in accordance with the certificate (Local Government (Miscellaneous Provisions) Act 1960, Section 374C(5)). Authorisation will be granted once the building work has been completed or substantially completed and the building can be certified as fit for occupation and use (Building Regulations 1989, Reg. 20(1)). A condition precedent of occupation in Western Australia is the affixing of live load plates to the building (Regulation 39(1)). The occupancy permit will list the classification of the building and the conditions which apply to it (Regulation 20(1), Schedule 1, Form 1 (Approved Form)).

Occupancy permits can be obtained for parts of a building and must be replaced by a new authorisation if a further part of a building is to be occupied (Regulation 21). Occupational use of any building other than in accordance with the required authorisation is subject to a penalty (Local Government (Miscellaneous Provisions) Act 1960, Section 374C(5).

In Tasmania an occupancy permit must be obtained before a building can be occupied under the Local Government (Building and Miscellaneous Provisions) Act 1993 (Sections 31 and 48). Applications must be in an approved form (Section 48(2) and Building Regulations 1994, Reg. 71(2)). Authorisation will be granted once the building work has been completed or substantially completed and the building can be certified as fit for occupation and use (Building Regulation 1994, Reg. 71(3)). The occupancy

permit will list the classification of the building and the conditions which apply to the building (Regulation 71(7) and 77(1)). Occupancy permits can be obtained for parts of a building and must be replaced by a new authorisation if a further part of the building is to be occupied (Regulation 71(6) and 72(1)). Occupational use of any building other than in accordance with the required authorisation is subject to a penalty (Local Government (Building and Miscellaneous Provisions) Act 1993, Sections 31(1) and 48(1)).

In the Australian Capital Territory a permit must be obtained before a building can be occupied under the Building Act 1972 (Section 54). The owner of land may apply for an occupancy permit, or the application may be by way of the Building Controller receiving a certificate of final inspection (Section 53). Authorisation will be granted once the building work has been completed or substantially completed and the building can be certified as fit for occupation and use (Sections 53(1A), 53(1B), 53(2), 53(4) and 53(5)). A condition precedent of occupation in the Australian Capital Territory is the affixing of live load plates to the building (Section 57(4)). The occupancy permit will list the classification of the building and the conditions which apply to the building (Section 53(2)).

Occupancy permits can be obtained for parts of a building and must be replaced by a new authorisation if a further part of the building is to be occupied (Sections 53(6) and 53(7)). Occupation or use of any building other than in accordance with the required authorisation is subject to a penalty (Sections 54 and 54A).

In the Northern Territory a permit must be obtained before a building can be occupied under the Building Act 1993 (Section 65). Applications are generally to be in accordance with those for other types of building approval (Sections 67(1) and 68). Authorisation will be granted once the building work has been completed or substantially completed and the building can be certified as fit for occupation and use (Sections 69(1) and 70). The occupancy permit will list the classification of the building and the conditions which will apply to the building (Section 71). Occupancy permits can be obtained for parts of a building and must be replaced by a new authorisation if a further part of the building is to be occupied (Section 71). Occupation or use of any building other than in accordance with the required authorisation is subject to a penalty (Section 65).

8.6 Building surveyors

In South Australia private building certifiers are allowed to grant building approval in most circumstances, under the supervision of the local authority or other specified person under the Development Act 1993 (Section 90). To become a building certifier, a person must be registered as a building practitioner (Section 91 and Development Regulations 1993, Reg. 93A). To be registered a person needs to meet criteria including certain qualifications and experience (Section 91 and Development Regulations 1993, Reg. 91). Certifiers may not be commissioned in respect of work or buildings in which they have too close an interest, which need not be pecuniary. Involvement in planning or design, a pecuniary interest or employment by an associated person or body are sufficient for establishing that too close an interest exists (Section 92 and Development Regulations 1993, Reg. 93B).

In the Northern Territory private building certifiers are allowed to grant building approval in most circumstances, under the supervision of the Local Authority or other specified person pursuant to the Building Act 1993 (Sections 4, 38(1) and 47). Applications in respect of places of public assembly must be referred to the Director of Building Control, who may remit the matter back to the certifier. To become a building certifier, a person must first be registered as a building practitioner under the relevant registration scheme (Section 22). To be registered, a person needs to meet criteria including certain qualifications and experience (Section 24(1)). A person is also required to be of good character, a fit and proper person and must comply with any other prescribed conditions. Certifiers may not be commissioned in respect of work or buildings in which they had too close an interest, which need not be pecuniary (Section 41). The Minister may also direct any certifier or class of certifier not to be involved in aspects of, or the whole of any application.

8.7 Exemptions from permit requirements

In New South Wales exemptions cover building work prescribed by the regulations under the Local Government Act 1993 (Section 748, Schedule 6, clause 8).

In Queensland an approval will not be required for building work prescribed by the regulations under the Building Act 1975 (Section 6).

In South Australia approval will not be required for prescribed building work in the regulations pursuant to the Development Act 1993 (Sections 7(3)(b), 108, Schedule 6, clause 35).

In Tasmania the Local Government (Building and Miscellaneous Provisions) Act 1993 provides that building work prescribed by the regulations is exempt from requiring approval (Sections 15(3) and 45(3)).

In the Australian Capital Territory the Building Act 1972 provides that certain building work does not require approval (Section 67(a) to (c) and Building Regulations 1972, Reg. 3).

In the Northern Territory approval will not be required for prescribed building work in the regulations under the Building Act 1993 (Section 168(2), Schedule 1, clause 38).

9 Appendix B - Overview of interstate architect regulatory regimes

9.1 Constraints on use of title "architect"

In New South Wales it is an offence to use or publish the word "architect" or any title, name, words or letters which indicate or imply a person is qualified to practice as an architect unless the person is registered as an architect under the Architects Act 1921 (Section 19(1), 19(3A), 19(3B)). This prohibition generally does not apply to certain types of architects such as landscape architects, architectural drafts persons, architectural assistants and architectural technicians who have different qualification requirements (Section 19(3C)).

In New South Wales, a further distinction, based on a person's practical experience, is made between "chartered architects", who may not use the title "chartered architects" unless registered as such, and "non-chartered architects" (Section 19(3)).

In Queensland it is an offence to use or publish the word "architect" or any title, name, words or letters which indicate or imply a person is qualified to practice as an architect unless the person is registered as an architect pursuant to Architects Act 1985 (Section 40).

In South Australia it is an offence to use or publish the word "architect" or any title, name, words or letters which indicate or imply a person is qualified to practice as an architect unless the person is registered as an architect under the Architects Act 1985 (Section 40).

In Western Australia it is an offence to use or publish the word "architect" or any words which indicate a person is qualified to practice as an architect unless the person is registered as an architect under the Architects Act 1921 (Section 29).

In Tasmania it is an offence to use or publish the word "architect" or any words which indicate or imply a person is qualified to practice as an architect unless the person is registered as an architect under the Architects Act 1929 (Section 19).

In the Northern Territory it is an offence to use the word "architect" or any words which imply a person is qualified to practice as an architect unless the person is registered as an architect under the Architects Act 1963 (Section 25(1)).

In the Australian Capital Territory it is an offence to use or publish the word "architect" or any words which indicate or imply a person is qualified to practice as an architect unless the person is registered as an architect under the Architects Act 1959 (Section 28).

9.2 Ownership restrictions on organisations that can use the title architect and its derivatives

In New South Wales, the prohibition on individuals using the title "architect" or any words which indicate or imply qualification to offer architectural services, unless registered as an architect applies also to partnerships and companies (Section 19(1)).

In the case of a corporation or firm, at least one third of the directors or partners must be enrolled on the register as chartered architects (Section 19(3A)(b)). However, there is no provision for the registration of architectural partnerships or architectural companies.

In Queensland, where a firm or company consisting wholly of architects advertises or holds itself out as, or uses words which imply it is, a firm or company qualified to practice architecture, it must specify the name or names of the architect or architects supervising the performance of architectural services undertaken by the firm or company (Section 40(3)).

In South Australia the prohibition on individuals using the title "architect" or any words which indicate or imply qualification to offer architectural services unless registered as an architect applies also to partnerships and companies (Section 28(4)). In the case of an architectural firm, at least two thirds of the members of the firm must be registered architects and the other members must have prescribed qualifications. However, there is no provision for the registration of architects for partnerships. There is no specific prohibition against unregistered companies, although they may apply to be registered (Section 32(a)).

In Western Australia the prohibition on individuals using the title "architect" or any words which indicate or imply qualification to offer architectural services, unless registered as an architect applies also to partnerships and companies (Section 29(1)).

In the Northern Territory, the prohibition on individuals using the title "architect" or any words which indicate or imply qualification to offer architectural services unless registered as an architect applies also to partnerships and companies (Section 25(1)).

In Western Australia, a partnership may be registered as an architectural partnership under the Architects Act 1921 (Section 14A). The requirements for a partnership to be registered as an architectural partnership are that:

(a) the partnership has a place of business in, or is carrying on business within, the jurisdiction, and is under the personal supervision of, and is managed by, a registered architect (Section 14C(1)(c) and 14C(1)(d));

(b) the partnership carries on business within the jurisdiction under a registered business name (Section 14C(1)(b));

(c) the partnership is constituted pursuant to a Partnership Deed approved by the Architects Board of Western Australia (Board), which contains a provision that no amendment may be made to the Deed or have effect without the prior approval of the Board (Section 14C(1)(c);

(d) no less than three fifths of the partnership are architects (Section 14A(1)(d));

(e) where one of the partners in the partnership is a company, that company is eligible to be registered as an architectural company (Section 14C(1)(f)); and

(f) a member of the firm who is not a registered architect must be an engineer, surveyor or member of an allied profession having qualifications approved by the Board, or is a person who complies with such other requirements as the Board may determine from time to time (Section 14C(1)(e)).

In the Northern Territory partnerships may be registered as architectural partnerships (Section 14A). The requirements for a partnership to be registered as an architectural partnership are that:

(1) the partnership has a place of business in or is carrying on business within, the jurisdiction, and is under the personal supervision of, and is managed by, a registered architect (Section 14A(a));

(2) the partnership carried on business within the jurisdiction under the names of the partners or a registered business name (Section 14A(b));

(3) the partnership is constituted pursuant to a Partnership Deed approved by the Northern Territory Architects Board (Board) which contains a provision that no amendment may be made to the Deed or have effect without the prior approval of the Board (Section 14A(c));

(4) not less than two thirds of the partnership are architects (Section 14A(d)); and

(5) where one of the partners in the partnership is a company, that company is an architectural company (Section 14A(e)).

In Queensland a company may be registered as an architectural company. An architectural company must carry on business within the jurisdiction and be under the personal supervision and management of a registered architect who is resident in Queensland (Section 25(1)(a)). An architectural company's Memorandum and Articles of Association must make the following provisions:

(A) only natural persons may be directors of the company (Section 25(1)(b)(vi));

(B) where there are two directors of the company, both directors must be registered architects or one must be a registered architect and the other a person with prescribed qualifications, a relative, as prescribed, of the architect or an accountant or legal practitioner who acts for the company (Section 25(1)(b)(ii));

(C) where there are more than two directors of the company, at least two-thirds of the directors must be registered architects (Section 25(1)(b)(iii));

(D) not less than two-thirds of the company's voting power must be exercised by registered architects and at least two-thirds of the voting power at a meeting of directors must be held by registered architects (Section 25(1)(b)(iv) and 25(1)(b)(v)); and

(E) the principal executive officer of the company must be a registered architect and the principal executive officer must also be a director of the company (Section 25(1)(b)(i)).

Companies may be registered as architectural companies in South Australia. An architectural company's memorandum and articles of association must make the following provisions:

(i) only natural persons may be directors of the company (Section 32a(1)(b));

(ii) where there are two directors of the company, both directors must be registered architects, or one must be a registered architect and the other a person with prescribed qualifications, a relative, as prescribed, of the architect, an

accountant or legal practitioner who acts for the company, or an employee of the company where the articles provide that in the event of a disagreement between the directors the opinion of the registered architect prevails (Section 32a(1)(ba));

(iii) where there are more than two directors of the company, at least two-thirds of the directors must be registered architects and each director must hold a prescribed qualification (Section 32a(1)(bb));

(iv) shares in the company can only be held by a director or employee of the company, the spouse, parent, child or grandchild of such a person, a trustee on trust for such persons or another company whose shareholders comprise such persons (Section 32a(1)(c) and 32a(2));

(v) not less than two-thirds of the company's voting power must be exercised by registered architects and the remainder of the voting shares, if any, must be held by persons who hold prescribed qualifications (Section 32a(1)(d)); and

(vi) the memorandum and articles of association must also provide that the primary purpose of the company is the practice of architecture (Section 32a(1)(a)).

Companies may be registered as architectural companies in Western Australia. An architectural company must carry on business within the jurisdiction (Section 14A(1)(a)). An architectural company's memorandum and articles of association must make the following provisions:

(aa) only natural persons may be directors of the company (Section 14A(1)(c)(ii));

(bb) if only one director is a registered architect, the company may only have two directors (Section 14A(1)(e)(ii));

(cc) if two or more directors are registered architects, the articles of association must contain a provision that three-fifths of the total number of directors must be registered architects (Section 14A(1)(d)(iii));

(dd) where only one director of the company is a registered architect, all voting shares are to be held by that director (Section 14A(1)(e)(i)) and where two or more directors are registered architects, all voting shares are to be held by the directors (Section 14A(1)(d)(i)) and three-fifths of the total voting rights are to be held by registered architects (Section 14A(1)(d)(ii));

(ee) the principal executive officer of the company must be a registered architect (Section 14A(1)(a)); and

(ff) an architectural company's memorandum and articles of association must contain provisions that the Architect's Board of Western Australia be notified of any impending change to the memorandum and articles of association (Section 14A(1)(b) and 14A(1)(c)).

Companies may be registered as architectural companies in the Northern Territory. An architectural company must carry on business within the jurisdiction and be under the personal supervision and management of a registered architect (Section 14B(1)(a) and 14B(3)). An architectural company's memorandum and articles of association must make the following provisions:

- only natural persons may be directors of the company (Section 14B(1)(b)(ii));
- there need only be one director who is a registered architect, as long as he or she holds not less than two-thirds of the company's total voting rights (Section 14B(4));
- where there are more than two directors of the company, at least two-thirds of the directors must be registered architects (Section 14B(1)(c));
- not less than two-thirds of the company's voting power must be exercised by registered architects and at least two-thirds of the voting power at a meeting of directors must be held by registered architects (Section 14B(1)(c)(i) and 14B(1)(c)(ii));
- the principal executive officer of the company must be a registered architect (Section 14B(1)(a) and 14B(3)); and
- an architectural company's memorandum and articles of association must contain provisions that the Northern Territory Architect's Board be notified of any intended change to the memorandum and articles of association (Section 14B(1)(b)).

9.3 Criteria for registration as an architect

In order to be registered as an architect in New South Wales a person must be of good name and character (Section 12) and must have achieved to the satisfaction of the Architect's Board of New South Wales prescribed educational and practical qualifications (Section 13(1)). A non-chartered architect must have passed a board or equivalent examination and have a prescribed or equivalent qualification, or have in the opinion of the board, special qualifications or experience to justify enrolment as a non-chartered architect. A chartered architect must have at least two years' practical experience in an approved architectural capacity, of which one year must be post graduate experience and/or have passed an approved examination in architectural practice, or have special qualifications or experience to justify enrolment as a chartered architect (Architect's Regulation 1983 clauses 8, 22 and 23).

In order to be registered as an architect in Queensland a person must be of good character and reputation and must have achieved, to the satisfaction of the Board of Architect's of Queensland prescribed educational and practical qualifications (Section 17). An architect must pass prescribed board examinations or an approved course of studies and prescribed practical experience (Architect's Regulations 1985 regulations 22-25, 27 and 28).

In order to be registered as an architect in South Australia a person must be of good character (Section 32) and must have achieved, to the satisfaction of the Architect's Board of South Australia, prescribed educational and practical qualifications (Section 32(b)(iii)). An architect must possess one of the architectural qualifications prescribed by the bylaws of the board.

In order to be registered as an architect in Western Australia a person must be of good character and reputation (Section 14(1)) and must have achieved, to the satisfaction of the Architect's Board of Western Australia, prescribed educational and practical

qualifications (Section 14(1)). An architect must have completed an approved course of architectural studies or be a member of a prescribed institution and have the requisite practical knowledge (Architect's Board of Western Australia Bylaws 1965 regulations 38 and 38A).

In order to be registered as an architect in Tasmania a person must be of good name and character (Section 12) and must have achieved, to the satisfaction of the Board of Architect's of Tasmania, prescribed educational and practical qualifications (Section 13). An architect must pass the prescribed examinations, complete two years' practical experience, one of which is post graduate, and pass any other professional examinations prescribed by the board, or be a person who, in the board's opinion, is otherwise entitled to be registered because of competence and ability (Architect's Regulations 1955 regulation 22).

In order to be registered as an architect in the Australian Capital Territory a person must be a fit and proper person (Section 16A(b)) and must have achieved, to the satisfaction of the board prescribed educational and practical qualifications (Section 16(1)(c)). An architect must have a degree or diploma in architecture approved by the board, two years' practical experience in architecture, one of which is post graduate, and have passed an examination in architecture approved by the board.

In order to be registered as an architect in the Northern Territory a person must be a fit and proper person (Section 14(1)) and must have achieved, to the satisfaction of the Northern Territory Architect's Board, prescribed educational and practical qualifications (Section 14(2)). An architect must have a degree or diploma in architecture conferred by a prescribed institution or an institution recognised by the RAIA or the Architect's Accreditation Council of Australia, two years' practical experience, one of which is post graduate, and have satisfied the board by examination that he or she possesses knowledge and skill appropriate for the practice of architecture.

10 Appendix C - Recent studies of architects regulation

10.1 TPC study of the professions - final report on architects

The TPC report on the TPC study of the architectural professions as part of its broader study of competition in Australian markets for professional services. The study approach involved consideration of the professions regulatory arrangements in the context of the market in which its members operate. Any adverse affects of the regulation on competition were balanced against the need to regulate in the public interest. Sources of regulation of the profession were the State and Territory Architects legislation and the RAIA self regulatory arrangements. The RAIA estimates that in 1990 there were 8,015 registered architects resident in Australia of which 70% were members of the RAIA.

(a) General Conclusions

The market for building design services is generally competitive. It appears that in recent years the share of the market traditionally serviced by architects has been eroded through competition from other service providers. The commission concludes that the architectural professions regulatory arrangements do not generally inhibit competitive activity in the market for building design services. The RAIA's regulations were considered by the commission during its authorisation of these arrangements in 1984, when the RAIA amended its rules to lessen or remove their anti-competitive effect. However the main focus of the report is on the State and Territory legislative arrangements and how they inter-relate. This legislation, which is administered by autonomous architects' registrations boards, varies between each State and Territory. The lack of uniformity in the regulations has been the cause of some difficulties for architects practicing in more than one state.

Model Architects Act legislative guidelines are being prepared by the AACA in consultation with State and Territory architect's registrations boards. The TPC indicated that when implemented the guidelines would overcome the difficulties caused by lack of uniformity and would also address the majority of issues of concern to the TPC.

(b) Use of the title "architect" and its derivatives

In all states but Queensland, restrictions on use of the title "architect" are limited to certification of the title "architect" under State and Territory legislation, which restricts use of the title and its derivatives to persons who have satisfied prescribed training and experience requirements. Other service providers are not prevented from competing in the market for building design services but there are restrictions on the way they describe themselves and their services. The TPC considers that certification does not have a significant effect on competition in the market for building design services.

Where there are significant disparities in the knowledge and expertise of service providers and their clients, certification can benefit consumers by assisting them to identify practitioners with prescribed standards of training and experience. Clients in those segments of the market in which architects operate, ie the commercial market and the upper end of the industrial and residential market, are likely to be well informed or to have the capacity to inform themselves about the qualifications of the services provided by architects and other service providers in the market. The TPC concludes that this is

likely to be the case irrespective of certification. However, it appears the clients in mid and lower segments of the industrial and residential markets for building design services are generally unaware of the distinction between architects and other providers of building design services. The TPC argues that the provision of appropriate public information about the certified title and the training and experience it signifies would assist clients to differentiate between service providers in the building design services' market, and would be in the public interest.

(c) Controls on ownership and organisation

Some State and Territory Architects Acts place restrictions on the nature of partnerships on companies that may use the title "architect", with some jurisdictions requiring the registration of architectural practices. The States and Territories agree that all architectural practices should be registered to enable use of the title "architect" to be regulated, in order to achieve the objective of allowing architectural practices to adequately respond to the needs of the community by providing the diversity of services relevant to the practice of architecture, whilst ensuring that architectural work undertaken by the practice will be under the direct control and supervision of an architect. The TPC favours the New South Wales architects' board proposal which does not place restrictions on control of practices, but requires all architectural work undertaken by a practice to be under the control of an architect principle and carried out under the direct control and supervision of an architect. However, the commission considers rules which require that a simple majority of the ownership of practices be controlled by architects may not pose anti-competitive problems.

(d) Advertising and promotion

Accurate and informative advertising and promotion by individual suppliers can improve the information available to clients and therefore promote competition, stimulate efficiency, and contribute to lower costs and prices to the benefit of clients and the community at large. The TPC identifies Victoria, Western Australia and South Australia are the only States that at present have specific legislative controls over architects advertising. The Victorian legislation requires that advertising be accurate and current. In Western Australia, all architects' advertising must be approved and the TPC recommends this requirement be deleted. Only general standards are imposed in South Australia (eg advertising must be accurate, responsible and not denigrate the profession). The TPC favours the approach adopted in the Model Architects Act which requires architects to ensure that information given in connection with their services is in substance and presentation factual and neither "misleading" nor "unfair" to others. There can be no objection from a competition or public interest prospective to these requirements.

(e) Fees

There are no legislative or self-regulatory mandatory fee scales for architects' services. The RAIA issues guidance fees and a conditions document, which were authorised by the TPC in 1984, on the basis that individual architects and their clients had the freedom to negotiate and agree on fees and conditions of engagement. The TPC recommends that a provision in the South Australian legislation prohibiting architects from working for

a fee too low to allow them to provide adequate and proper professional service be amended.

(f) Supplanting

Supplanting is the practice of one professional actively seeking to provide services to a client from another fellow professional. Rules prohibiting supplanting are anti-competitive if they have the effect of keeping competitors away from a client who is not actually awarded a contract but is only at the stage of negotiation. However, rules which require that a professional must not attempt to induce a breach of contract are acceptable. The TPC concluded that the RAIA rule, the South Australian by-law, nor the regulation proposed by the Victorian board on supplanting were anti-competitive.

(g) Exemption of architects from section 74(2) of the Trade Practices Act

The TPC formed the view that the continued exemption of architects and engineers from the region of Section 74(2) of the Trade Practices Act is not justified.

(h) Professional indemnity insurance

The TPC recognised the benefits of professional indemnity insurance to both consumers and buildings designers, as it provides an avenue of redress and restitution to consumers and limits the financial loss of service providers. At that time there was no statutory requirement that architects or others in the design field carry such insurance. As no evidence of any possible anti-competitive implications of statutory insurance was submitted to the TPC, it considered a detailed examination of professional indemnity insurance to be outside the scope of the study.

(i) Continuing professional development

In order to ensure that the standard implied by the use of the title "architect" is maintained over the lifetime of practitioners it would appear necessary that architects engage in continuing professional development. There is at present no formal structure in place for continuing education for all architects. The TPC endorsed the proposal in the Model Architects Act legislative guidelines that individual architects be required to undertake structured programs of career development on a regular basis and that architectural practices be required to adopt a policy of systematic commitment to continuing professional development of the practice and architects.

(j) Restrictions on architects acting as builders

In the TPC's view, rules which guard against conflicts of interest that may arise when an architect provides both architectural and non-architectural services in respect of the same project are in the public interest. However, rules which prohibit an architect from providing both architectural and non-architectural services appear to be unnecessarily restrictive. The TPC recommends the Model Architects Act legislative guidelines which do not prohibit an architect from also providing non-architectural services, but rather state that architects must inform their clients or employers of the existence or likelihood of conflict between personal or business interests of themselves and those of their clients or employers.

(k) Complaint handling and discipline

The TPC received no information which indicated that the RAIA or Board's disciplinary arrangements were directed towards restraining architect's commercial activities (eg. advertising) and thereby adversely affecting competition. Disciplinary arrangements can be in the public interest where sanctions are imposed for professional negligence or malpractice and where they provide for the handling of individual complaints, with dispute resolution and remedies being available as an alternative to court action. The TPC recommends the adoption of a number of public accountability features such as consumer representation, appeal procedures, providing reasons for decisions, and public reporting of sanctions.

The following restrictions, categorised into practice protection, restrictions upon practice and actions of the Architects Board, were identified in the issues paper:

- the registration of natural persons as architects;
- the registration of companies as architects;
- the registration of architects;
- the process of registration;
- title protection;
- architectural draftspersons and architectural technicians exception to holding out;
- professional misconduct;
- returns by companies registered as architects;
- restrictions upon architectural companies practicing in partnership;
- joint and several liability of directors of an architectural company;
- amendment of Memorandum or Articles of Association of an architectural company;
- functions and powers of the Architects Board.

10.2 West Australian NCP Review of Architects Act 1921

The long title of the Architects Act 1921 is "an Act to make provision for the Registration of Architects". It is an example of the type of legislation known as a "titles" or "certification" Act and it restricts the way that the word "architect" and its derivatives may be used by both individuals and organisations. The Act does not control who may offer building design services, only who may describe themselves as an "architect" or their services as "architectural".

There are two primary objects of the Act. First, provision of a measure of consumer protection in markets for building design and associated services. Second, provision of a means for regulating the architectural profession. The second reading speech acknowledged that the profession was being given "a certain amount of privilege".

The restrictions on competition in the Architects Act 1921 identified in the issues paper are:

- the restriction on use of the title "architect" and its derivatives to persons registered with the Architects Board of Western Australia;

- the requirement that at least three fifths of the owners or principals of an "architectural" firm be registered architects;
- the requirement that a person must be at least 21 years of age in order to be registered as an architect; and
- the requirement that a person must satisfy the Architects Board that he or she is "a person of good character and reputation".

The work of an architect can be broadly described as the design of buildings and the provision of services related to construction activities. Some of the services provided by architects are also offered by persons in other occupations such as architectural drafters and landscape architects.

The potential benefits to the architectural profession from the Architects Act 1921 include marketing and promotion of architectural services, interstate and international recognition of architectural qualifications and expertise and provision for liaison with education institutions.

10.3 Northern Territory NCP Review of Architects Act 1991

The Review Panel released its final report in the National Competition Policy Review of the Architects Act 1991. The provision of architectural services is within the building design, documentation and construction market. Others may compete with architects in that market provided they do not use names incorporating "architect" or its derivatives. The chief restriction on competition arising from the Act is the reservation of the title "architect" and its derivatives to registered architects. The Review Panel found that this restriction was anti competitive because of the impediment to the marketing of services that resulted and because the registration restrictions exclude certain corporate structures even though they are capable of being used by providers of architectural services.

The Review Panel rejected the argument that the legislation was in the public interest because non-architects carry out a large part of the work in building design, documentation and construction and no evidence was presented to show that the public was being exposed to risk as a result of this practice. The title "architect" indicates, by virtue of the Architects Act 1991, that the person has a certain level of qualification. The Review Panel considers it more appropriate for the profession to be responsible for the marketing of its own excellence and considers the RAIA to be an appropriate body to carry out this function.

The Review Panel noted a problem with interstate mobility of practitioners under the Mutual Recognition legislation. The Review Panel recommended repeal of the Architect Act 1991 be delayed to allow architects to seek registration in other jurisdictions before the repeal takes effect and to allow the other jurisdictions to repeal their architects legislation.

11 Appendix D - Submissions Received

No	Organisation	Contact Name
1		John Kennedy
2		Peter John Kerr (Architect) Vito John Inserra (Architect)
3	Hexalink Investments Pty Ltd	Stephen Ong
4		David White (Architect)
5	Col Bandy Pty Ltd Architects	Col Bandy
6		Bruce Williamson
7	Jacobs Thomas & Associates	Graham Thomas Peter Jacobs
8	Hal Walter Architects Pty Ltd	Hal Walter (Director)
9	Georgiev Partnership	Peter Georgiev
10	Architects Accreditation Council of Australia Incorporated	David Archer (President)
11	Association of Professional Engineers, Scientists & Managers, Australia	Andrea Mahony (Executive Officer)
12		Phil Coulter (Architect)
13	Neil Evans and Noel McKerman Pty Ltd	Neil Evans
14	Building Designers Association of Victoria Inc	Sean J Hamilton (President)
15	Architects Registration Board of Victoria	Jeffrey Keddie
16		Margaret Lothian (Mediator & Consultant)
17	Australian Council of Building Design Professions Ltd	Heather Howes (Executive Officer)
18	Royal Australian Institute of Architects	Michael Peck (Chief Executive)
19	Australian Institute of Building	J D Thomas (National President)
20	Save Our Suburbs	Miles Lewis
21	Australian Institute of Quantity Surveyors	Gary Crutchley (President, Victorian Chapter)
22	Board of Architects of New South Wales	Martyn Chapman (President)
23	Goliath Hinging Systems	Elisabeth & Neville Burgess

No	Organisation	Contact Name
24		Robert Knott (Architect)
25		Caroline King
26		Shelley J Penn
27		David Grutzner (Architect)
28		David Moore (Architect)
29		Luke Murphy
30	University of Melbourne	Clare Newton (On behalf of Anthony Mussen, Head of Architecture)
31		Terence Nott (Architect)
32		Megan Harris
33	RMIT University	Shane Murray (Associate Professor)
34		Marcus Ward
35		Christopher IIeris
36	Department of Infrastructure	Jeff Norton (Director, Building Policy)
37	Association of Consulting Architects - Australia, Victorian Branch	Robert Peck (President)
38		Trevor Scott Architects
39	Master Builders Association, Victoria	Brian Welch
40	Lewis Building Consultancy Pty Ltd	Glynn Lewis
41	City of Melbourne	Warren Knight (Acting Principal Officer, Building Certification & Inspection)
42	Bird de la Coeur Architects	Vanessa Bird (Director) Neil de la Coeur (Director)
43	Building Control Commission - Part B	Max J Croxford (Commissioner)
44	Australian Institute of Building Surveyors	Philip Davern (President)
45	Building Control Commission - Part A	Max J Croxford (Commissioner)
46	Building Practitioner's Board	Brian Morison (Chairperson)
47		Geoff Stevenson

12 Appendix E - List of acronyms

AACA	Architects Accreditation Council of Australia
ABS	Australian Bureau of Statistics
ACEA	Association of Consulting Engineers Australia
ACP	Australian Council of Professions
AIBS	Australian Institute of Building Surveyors
AIQS	Australian Institute of Quantity Surveyors
ARBV	Architect's Registration Board of Victoria
AUBRCC	Australian Uniform Building Regulations Co-ordinating Council
BAB	Building Appeals Board
BAC	Building Advisory Council
BADAC	Building and Development Approvals Committee
BCC	Building Control Commission
BISCOA	Building Industry Specialist Contractors Organisation of Australia
BOMA	Builder Owners and Managers Association of Australia
BPB	Building Practitioner's Board
BRAC	Building Regulatory Advisory Committee
CPA	Competition Principles Agreement
DOI	Department of Infrastructure
FRG	Freehills Regulatory Group
HGFL	Housing Guarantee Fund Limited
HIA	Housing Industry Association
IEA	Institution of Engineers, Australia
MBA	Master Builders Associations
NCP	National Competition Policy
PCA	Property Council of Australia
RAIA	Royal Australian Institute of Architects
TPC	Trade Practices Commission