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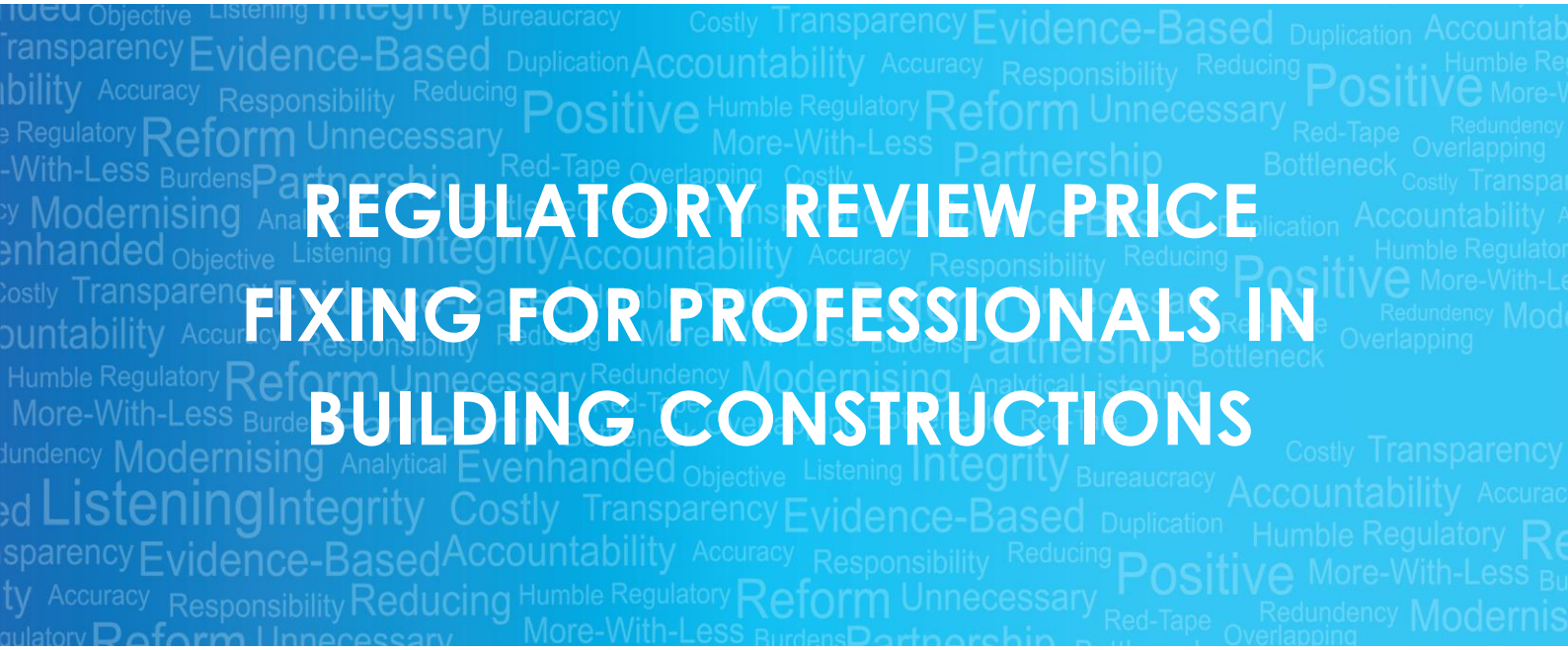

Malaysia Competition Commission &
Malaysia Productivity Corporation

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1.0 BACKGROUND

This study revisits the viability of having price fixing in the building construction industry in view of the global trends against restraint of trade, monopoly and price fixing. This study is timely with the passing of the Competition Act 2010, which took effect in 2012. The study examines five professions in the building construction industry which are excluded from price fixing prohibition under Section 4 of the Competition Act 2010. The five professions that have been identified are:

i. Architects;
ii. Engineers;
iii. Land surveyors;
iv. Planners; and
v. Quantity surveyors;

The five professions are governed by the following laws which set the price fixing mechanism in transactions involving the professions:

Table 1: Price fixing law for professionals in building construction in Malaysia

Profession	**Price fixing law**
Architects[*1]	Architects Act 1967 Section 4(1) paragraph *(d)* of the Act 1967 provides that the function of the Board shall be to fix from time to time with the approval of the Minister the scale of fees to be charged by Professional Architects, architectural consultancy practices and registered Building Draughtsman for architectural consultancy services rendered. Architects Rules 1996 Rule 29(1) of the Rules 1996 provides that "Except with the prior approval of the Board given for special reasons, a Professional Architect shall only enter into an agreement for architectural consultancy services according to the Architects (Scale of Minimum Fees) Rules 2010, the Conditions of Engagement in Part One of the Third Schedule and the Memorandum of Engagement in the Part One of the Fourth Schedule."

	Item 1(2) of the Third Schedule stipulates that "the architectural consultancy services provided by the Professional Architect shall be in accordance with the Architects (Scale of Minimum Fees) Rules 2010." <u>Architects (Scale of Minimum Fees) Rules 2010</u> Rule 3 of the Rules 2010 reads that "any architectural consultancy practice which is engaged by a client to perform any of the architectural consultancy services specified in Part II shall not charge less than the scale of minimum fees specified in Part III in addition to the other payments in Part IV, provided that higher fees, where justified by the architectural consultancy practice's special expertise, experience or standing, may be charged with the prior agreement of the client."
Engineers[*2]	<u>Registration of Engineers Act 1967 - Notification of Scale of Fees (Revised 1998)</u> In exercise of the powers conferred by paragraph 4(1)(d) of the Registration of Engineers Act 1967, Act 138 the Board of Engineers, with the approval of the Minister, fixes the following scale of fees to be charged by registered Professional Engineers for professional advice or services rendered: 1. Subject to paragraph 2, every consulting engineer who is engaged by a client to perform any of the professional services described in Part A shall be paid in accordance with the scale of fees described in Part B in addition to the other payments described in Part C. 2. (1)Notwithstanding paragraph 1 and if the consulting engineer is being paid in accordance with sub-subparagraph 1(1)(a) of the scale of fees described in Part B, the scale of fees provided in Table A of sub-subparagraph 1(1)(e) of Part B shall not apply to buildings in housing development works. (2) For housing development works, if the buildings are not more than four storeys high, the "Scale of Fees for Housing

	Development" published on 24th July 1997 under gazette notification no. P.U.(B) 288/1997 shall apply.
Planners[*3]	<u>Town Planners Act 1995</u> Section 8 paragraph *(c)* - The function of the Board shall be to prescribe the scale of fees to be charged by registered Town Planners for professional advice given and service rendered by it. <u>Scale of Professional Fees and General Conditions of Engagement 2005</u> Clause 2.0(5) – The fees and scale specified in this document shall be applicable to all works undertaken by the Town Planner.
Land Surveyors[*4]	<u>Licensed Land Surveyors Regulations 2011</u> Regulation 29(1) paragraph *(g)* – A licensed land surveyor shall not be charging in respect of professional services rendered to his client, of fees or costs not in accordance with the Schedule in these Regulations except where the client agreed in writing that the amount to be charged is more than the amount prescribed in the Thirteenth Schedule.
Quantity Surveyors[*5]	<u>Quantity Surveyors Act 1967</u> Section 4 paragraph *(d)* – The function of the Board shall be to fix from time to time with the approval of the Minister the scale of fees to be charged by registered Quantity Surveyors and firms or bodies corporate practising as consulting Quantity Surveyors for professional advice or service rendered. <u>Schedule of Fees 2004, Board of Quantity Surveyors Malaysia</u> The consulting quantity surveyor shall be paid fees prescribed therein.

*Source: *1 – Board of Architects Malaysia*
**2 – Board of Engineers Malaysia*
**3 – Malaysian Institute of Planners*
**4 – Board of Land Surveyors Malaysia*
**5 – Board of Quantity Surveyors Malaysia*

Unfortunately, the relevant laws mentioned above do not provide for the justification of price schedules and as such this report discusses the rationales of such practices from existing literatures and focus group discussion with the five professions.

2.0 CONDUCT OF THE REVIEW (METHODOLOGY)

The study examines the viability of maintaining the practice of price fixing in these five professions. The study analyses the approaches from selected countries, namely, Australia, America, United Kingdom, Singapore, India, Hong Kong, South Africa and Canada. Interviews were conducted with the five professional bodies, where focus groups explored the viability of continuing price fixing in these professions. The study aims to formulate feasible options for further deliberation in view of the international trends and spirit of the Competition Act 2010. For all the professions, the following items - related to price fixing -were compared:

i. Restriction on receiving commission;
ii. Methods of establishing fees (percentage or lump sum or time basis);
iii. Mandatory or recommended fee schedule;
iv. Fee for repetitive building;
v. Fee for complex and simple building;
vi. Fee for partial or additional services; and
vii. Suspension or alteration or termination of service

3.0 COMPARISON OF EXTENT OF FIXING OF FEES IN THE FIVE PROFESSIONS: COMPARISON WITH SELECTED COUNTRIES

Table 2: Comparison of fixing of fees in Malaysia, Singapore, India, Hong Kong, South Africa and Canada

Legend:	◎ Strong relationship	⊙ Medium relationship	• No relationship

COMPARISON (Engineer)						
Items Compared	Malaysia	Singapore	India	Hong Kong	South Africa	Canada
1) Restriction on receiving commission	◎	◎	•	•	⊙	◎
2) Methods of establishing Fees (% or lump sum or time basis)	◎	◎	•	•	◎	⊙
3) Mandatory or recommended fee schedule	◎	◎	•	•	⊙	⊙
4) Fee for repetitive building	◎	•	•	•	•	•
5) Fee for complex vs. simple building	◎	•	•	•	⊙	•
6) Fee for partial or additional services	◎	◎	•	•	⊙	•
7) Suspension or alteration or termination	◎	⊙	•	•	•	•

COMPARISON (Architect)						
Items Compared	**Malaysia**	**Singapore**	**India**	**Hong Kong**	**South Africa**	**Canada**
1) Restriction on receiving commission	◎	◎	◎	◎	◎	◎
2) Methods of establishing Fees (% or lump sum or time basis)	◎	•	◎	◎	•	◎
3) Mandatory or recommended fee schedule	◎	⊙	◎	◎	⊙	⊙
4) Fee for repetitive building	◎	•	•	•	⊙	◎
5) Fee for complex vs. simple building	◎	•	•	•	•	⊙
6) Fee for partial or additional services	⊙	•	•	•	◎	⊙
7) Suspension or alteration or termination	◎	⊙	•	•	•	•

COMPARISON (Land Surveyor)						
Items Compared	**Malaysia**	**Singapore**	**India**	**Hong Kong**	**South Africa**	**Canada**
1) Restriction of receiving commission	◎	◎	◎	◎	◎	◎

2) Methods of establishing Fees (% or lump sum or time basis)	◎	•	◎	◎	•	◎
3) Mandatory or recommended fee schedule	◎	⊙	◎	◎	⊙	⊙
4) Fee for repetitive building	◎	•	•	•	⊙	◎
5) Fee for complex vs. simple building	◎	•	•	•	•	⊙
6) Fee for partial or additional services	⊙	•	•	•	◎	⊙
7) Suspension or alteration or termination	◎	⊙	•	•	•	•

COMPARISON (Planner)						
Items Compared	**Malaysia**	**Singapore**	**India**	**Hong Kong**	**South Africa**	**Canada**
1) Restriction of receiving commission	⊙	•	•	•	⊙	•
2) Methods of establishing Fees (% or lump sum or time basis)	◎	•	◎	•	⊙	•
3) Mandatory or recommended fee	◎	•	⊙	•	⊙	•

schedule						
4) Fee for repetitive building	•	•	•	•	•	•
5) Fee for complex vs. simple building	•	•	•	•	•	•
6) Fee for partial or additional services	⊙	•	•	•	⊙	•
7) Suspension or alteration or termination	◎	•	•	•	•	•

COMPARISON (Quantity Surveyor)						
Items Compared	**Malaysia**	**Singapore**	**India**	**Hong Kong**	**South Africa**	**Canada**
1) Restriction of receiving commission	◎	•	•	◎	⊙	⊙
2) Methods of establishing Fees (% or lump sum or time basis)	◎	•	•	⊙	⊙	⊙
3) Mandatory or recommended fee schedule	◎	•	⊙	⊙	⊙	⊙
4) Fee for repetitive building	◎	•	•	•	◎	•
5) Fee for complex vs. simple building	⊙	•	•	•	⊙	◎
6) Fee for partial or additional services	◎	•	•	⊙	•	◎

7) Suspension or alteration or termination	◎	•	•	◎	◎	⊙

Source : Ultimate Merged Professions

4.0 PURPOSES OF PROHIBITION OF PRICE FIXING UNDER THE MALAYSIAN COMPETITION ACT 2010

The preamble of the Malaysian Competition Act 2010 provides that the Act aims to promote economic development by promoting and protecting the process of competition, thereby protecting the interests of consumers and to provide for matters connected therewith. Price fixing, where companies collude to set prices, effectively dismantling the free market and thus is against the spirit of free competition.

According to *Wex Legal Dictionary*, the law of unfair competition which includes 'unfair trade practices', comprises all forms of unfair competition. What constitutes an 'unfair' act varies with the context of the business, the action being examined, and the facts of the individual case.

The purpose of prohibiting price fixing and promoting competition is two-fold:

(i) to promote economic development
(ii) to protect the interests of consumers.

The economic case for free markets is said to depend on the existence of business competition. According to the conventional wisdom, competition ensures that scarce resources will be put to their most efficient use. With competition, firms which are producing services or goods for poor value, charging too much or not catering for consumer demand will be replaced by those businesses which do better. Competition keeps costs low and induces firms to innovate and engage in technological development. Competition is the institutional vehicle through which private business self-interest is said to promote the public interest .

The theory of competition can be traced back to Adam Smith's advice to the French government *"laissez-fairer passer le monde de lui meme"* (don't interfere, the world will take care of itself). In his book, The Wealth of Nations, Adam Smith argued that all restrictions on business should be removed. One of the most important ideas in his book is the concept of the "invisible hand":

> "By working for his own private gain, the businessman must produce as much as he can, and for the lowest price. In order to sell his goods he charges very

> little. This will help society as a whole, even though that was not his purpose. The invisible hand thus directs selfish acts for the good of the community."

He added:

> "Every person is a much better judge of what is good for him than any President, Governor or Congressman. When the government starts telling people what they should do with their money, they are telling people how to mind their own business. This will make a bigger mess than that which they tried to correct." (Ladenburg, T., 1974).

In the American case of *N. Pac. Ry. Co. v US*, the Court observed that the central tenet of competition law was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. (356, US 1, 4, 1958).

In short, competition law is enacted as competition can yield:

i. Lower costs and prices for goods and services
ii. Better quality;
iii. More choices and variety;
iv. More innovation;
v. Greater efficiency and productivity;
vi. Economic development and growth;
vii. Greater wealth equality;
viii. A stronger democracy by dispersing economic power; and
ix. Greater wellbeing by promoting individual initiative, liberty, and free association. (Stucke, M.E., 2013)

5.0 GENERAL ADVANTAGES OF PRICE FIXING

The advantages of price fixing include:

i. To reduce low quality services to the consumers;
ii. To protect small consumers;
iii. To increase safety to consumers;
iv. To increase standard of competence, performance, ethical behaviour and personal accountability;
v. To prevent most competent providers from leaving the market;
vi. To provide consumers assurance, consistency and certainty
    a. Professionals are not businessmen:
    b. Scale of fees protect the consumers;
    c. Scale of fees are not meant to enrich the professionals

6.0 GENERAL DISADVANTAGES OF PRICE FIXING

The drawbacks of the price fixing practice can be summarised as follows:

i. Fixed fees can lead to higher prices and thus disadvantage some consumers;
ii. Some consumers will not be able to afford the cost of hiring professionals;
iii. Fixed fees interfere with freedom of contract;
iv. Difficulty to set fair and reasonable fees;
v. Fee schedule exposes professionals with risk of litigation;
vi. Clients do not have freedom of choice;
vii. Fixed fees create floor to competition; and
viii. Fees are fixed by the suppliers not by the forces of supply and demand.

7.0 JUSTIFICATIONS FOR FEE-FIXING BY THE LAND SURVEYORS, QUANTITY SURVEYORS, ARCHITECTS, ENGINEERS AND PLANNERS

7.1 Distinction between trade and professional services

The primary argument for allowing the five professionals to control fees is by distinguishing professions from trade/commerce. The American courts established that the goal of professional activities is not to enhance profit, but to provide services necessary to the community. In *Semler v Oregon State Bd. of Dental Examiners*, the court observed that the community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises. Besides, the community is also concerned to provide safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the 'ethics' of the profession is but the consensus of expert opinion as to the necessity of such standards. Story J. in the Nymph case distinguished trade and the learned professions as follows: "Whenever any occupation, employment or business is carried out for the purpose of profit or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a trade." (18 Fed. Cas., No. 10,388)

7.2 The fee schedule is meant to protect the clients

Among the various justifications advanced for fee schedules are that they serve an informational function, both for professionals and the public, that they avoid the ethical problem of solicitation that might arise if "price-shopping" for professional services was permitted, and that they protect the public from the practitioners who would take on a large number of cases at a low fee and then handle them incompetently. Besides, fee schedule can be justified as it provides a minimum income level for professionals above that which would prevail in a free market. (Kalinowski, J.V., 1972).

8.0 THE ARGUMENT AGAINST FEE-FIXING BY THE LAND SURVEYORS, QUANTITY SURVEYORS, ARCHITECTS, ENGINEERS AND PLANNERS

8.1 Fee schedule interferes with the professional's freedom of contract

The intrusion of the association and its minimum fee schedule into a practitioner's determination of the monetary value of his professional services unquestionably interferes with the freedom of the practitioner to set his fees. He is forced to add an extra factor to his determination, one anchored in peer group pressure, which militates toward higher fees for the client and which tends to relieve the practitioner of the responsibility of setting his own fee. (Walzer, R.S., 1973)

8.2 Fee schedule allows the practitioners to control the market

In *US v Trenton Potteries*, the Court held: "The aim and result of every price fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices." (273 U.S. 392, 1927).The fact that the fee schedule is intended to promote price uniformity among practitioners is sufficient to satisfy the "combination or conspiracy" requirement under the competition law, despite the absence of specific agreement. A combination may be inferred from an agreement, either express or implied, or by the use of any means to secure adherence to a minimum price fixing scheme (e.g. disciplinary action for non-compliance) that goes beyond a unilateral vertical announcement by a seller and a mere refusal to sell. (Walzer, R.S., 1973)

8.3 The public service aspect of the profession is often misplaced

In *National Society of Professional Engineers v United States*, the Supreme Court strictly applied Section 1 of the Sherman Antitrust Act to a learned profession. The Court refused to provide an exemption for an ethical canon which purported to foster professional ethics at the expense of competition. The Court emphasized that price is the central nervous system of the economy and that an agreement that interferes with the setting of price by free market forces is illegal on its face. (435 U.S. 679, 1978)

Ethical sanctions designed to protect the public from abuses by members of the profession presumptively are reasonable, and any restraints which may be imposed upon the profession likely will be considered reasonably ancillary to a legitimate purpose. Sanctions designed to protect professionals only from each other, however, have the effect of insulating the service market of that profession from competition, thereby conflicting with the basic antitrust philosophy that restraints on competition impose added costs of the service on the public. (Gormley Jr., J.H., 1978).

8.4 Schedules provide for unreasonable fees

Most schedules provide for minimum, not average or maximum fees chargeable. The deviation from the mean is so great in many cases that it is obvious that some of the fees are either too high or too low. The differences in time (fee divided by the hourly rate) also seem to indicate that unreasonableness is present in at least some fee schedules.

9.0 USE OF SCHEDULE FEES FOR PROFESSIONALS: LESSONS FROM SELECTED COUNTRIES

The main argument put by engineers and architects to maintain a fixed price regime is due to the high liability placed on them in guaranteeing the work they approve. This is not the case in most other countries. They argue that the price schedule is necessary to ensure they are paid for the high liability that is placed upon them. However, this argument is not well established as in charging for services, multiple considerations are involved, instead of directly applying the fixed fee. A practitioner needs to consider the time involved, the complexity and novelty of the work done, the amount of money or other interests involved, his professional standing, responsibility and liability assumed and the client's ability to pay etc. (Arnould, R.J. & Corley, R.N., 1971).

In view of the liabilities of the engineers and architects, the following discussion is made, in comparison with selected countries: South Africa, Australia, Canada, New Zealand, Singapore, and India.

9.1 Contractual duty of care

A professional engineer/architect in all countries, including Malaysia, must exercise all reasonable skill, care and diligence in the discharge of the professional services agreed to be performed by him.

9.2 Limitation to the engineer's or architect's liability

Limitation of liability in Malaysia is limited as compared to other countries. For engineers, under Clause 5.1.2 of the Board of Engineers' Malaysia (BEM's) Conditions of Engagement, the only limitation to the engineer's liability is the exclusion of claim based on pollution or contamination. On the other hand, in South Africa, Clause 2.6 of the Form of Agreement for Consulting Engineering Service, South African Association of Consulting Engineers excludes engineer's liability for the acts by the contractor.

In Queensland, Australia under the Standard Form, Cl. 9 excludes the engineer's liability for acts/omissions by the sub-consultant, contractor, workman supplier, or fabricator or other third party involved in the project. In Canada, Cl. 14.6 of the

Engineering Agreement between Client and Engineer, Association of Consulting Engineering-Companies Canada provides the engineer will not be liable for the failure of any manufactured product or any manufactured or factory assembled system of components to perform in accordance with the manufacturer's specifications, product literature or written documentation.

In New Zealand, Cl. 6.1 Conditions of Contract for Consultancy Services imposes no liability on the engineer for the client's indirect, consequential or special loss, or loss of profit, however arising, whether under contract, in tort or otherwise.

In Singapore, the scope of limitation of contractual duty is fairly wide. The Association of Consulting Engineers' Standard Conditions of Engagement, Cl. 1.5.2 lists the following exceptions:

i. any errors in or omissions from data, documents, plans, designs or specifications not prepared by the Consulting Engineer, the Consulting Engineer's employees or other personnel under the direct control of the consulting engineer;
ii. any act or omission or lack of performance or any negligent or fraudulent act or omission by the client or any other consultant, Contractor or supplier to the Client or any employee or agent of the client, other consultant, contractor or supplier;
iii. the Consulting Engineer shall not be held to have made any warranty or promise as to the suitability, competence or performance of any Other Consultant, Contractor, supplier, or other third party.

As regards to architects, in Malaysia, In Malaysia, Cl. 5 Conditions of Engagement of the 3rd Schedule of the Architects Act provides that professional architects not liable for the performance, act or omission of consultants engaged by the client. In South Africa, Client-Architect Agreement, South African Institute of Architects, the following clauses limit architect's contractual liability:

i. Cl. 3.3.1.1.1 – Tender exceeding agreed budget
ii. Cl. 3.3.2 – Design, design solutions, acts or omissions of 3rd parties
iii. Cl. 3.3.3 – Failure of materials

iv. Cl. 3.3.4 – The architect shall not be responsible for the foregoing nor for the methods, techniques, sequences or procedures employed by the contractor/sub-contractor

In Australia, the Client & Architect Agreement, Australian Institute of Architects under Cl. H.2 limits the liability of the architect, where the architect has no liability to the client in respect of any indirect, consequential or special losses, (including loss of profit, loss of business opportunity and payment of liquidated sums or damages under any other agreement.). In Canada, the Standard Form of Contract for the Architect's Services excludes the liability of the architect in the following matters:

i. Cl. 8.3 – Reliance on software and product information provided by the manufacturer
ii. Cl. 8.4.1 – The architect shall not be required to make exhaustive or continuous on-site reviews
iii. Cl. 8.4.2 – Shall not be responsible for acts/ omissions of contractor/ sub-contractor/ supplier or any persons
iv. Cl. 8.4.4 – Shall not be responsible for toxic/ hazardous substances in materials
v. Cl. 8.7 – Shall not be responsible for any changes made by others to the architect's design

In New Zealand, the New Zealand Institute of Architects, Agreement for Architects Services, under Cl. 10.1 specifies that the Architect shall not be liable to the Client (whether in contract, tort or otherwise) for the Client's loss of profits (whether caused directly or indirectly) and/or for the Client's indirect, consequential or special losses, howsoever arising.

In Singapore, under the Singapore Institute of Architects' Conditions of Engagement, the architect shall not be liable for:

i. Cl. 1.1.9 - estimates of cost and time for work to be undertaken by building contractors for the purpose of inviting tenders where a quantity surveyor has not been appointed;
ii. Cl. 1.1.13 - any work carried prior to the Architect's appointment and which reasonable inspection could not have indicated as a possible problem.

In India, an architect is required to observe and uphold the Council's Conditions of Engagement and Scale of Charges while rendering architectural services in terms of Regulation 2 (1) (xii) of the Architects (Professional Conduct) Regulations, 1989. Thus, failure to provide any service that is necessary for the discharge of his duties and functions for the project for which he has been engaged, amount to deficient service. However, an architect is not liable for any liability, if the damage to the building has occasioned in the following circumstances:

i. Use of building for the purposes other than for which it has been designed.
ii. Any changes/modifications to the building carried out by the owner(s)/occupant(s) without the consent or approval of the architect who designed and/ or supervised the construction of the building.
iii. Any changes/alterations/modifications carried out by consulting another architect without the knowledge and consent of erstwhile architect or without obtaining No Objection Certificate from him.
iv. Illegal/unauthorised changes/alteration/renovations/modifications carried out by the owner(s)/occupant(s).
v. Any compromise with the safety norms by the owner(s)/ occupant(s).
vi. Distress due to leakage from terrace, toilets, water logging within the vicinity of the building and that would affect the strength/stability of the structure or general well-being.
vii. Lack of periodical maintenance or inadequate maintenance by the owner(s)/occupant(s).
viii. Damages caused due to any reasons arising out of `specialised consultants' deficient services with regard to design and supervision of the work entrusted to them, who were appointed/ engaged in consultation with the Client.
ix. Damages caused to the building for the reasons beyond the control of the architect.

9.3 Amount of compensation

Table 3: The amount of compensation for architect’s and engineer’s negligence or breach of contract

Country	Engineer	Architect

Malaysia	Depends on the assessment of quantum of damages by the court	Depends on the assessment of quantum of damages by the court
South Africa	Cl. 6.3.1 - Compensation shall be limited to the amount of reasonably foreseeable loss and damage suffered as a result of such breach. Cl. 6.5 - The maximum amount of compensation payable by either party to the other in respect of liability under this agreement is limited to an amount equal to twice the amount of fees payable to the Consulting Engineer under this agreement, excluding reimbursements and expenses unless otherwise stated in the Specific Provisions.	Depends on the assessment of quantum of damages via dispute resolution/ court.
Australia	The amount of compensation will depend on the professional indemnity insurance coverage.	Can be limited by way of contract but it must be expressed under Schedule H, of the Standard Form
Canada	The amount of compensation will depend on the professional indemnity insurance	The amount of compensation will depend on the professional indemnity

	coverage.	insurance coverage.
New Zealand	Cl. 6.2 - The maximum amount payable shall be five times the fee with a minimum limit of $500,000 and a maximum limit of $2,000,000 OR the amount as agreed by the parties to the contract	Cl. 10.7 - The maximum aggregate amount payable by the Architect, whether in contract, tort or otherwise, in relation to claims, liabilities, damages, losses or expenses is limited to $250,000 or five times the Architect's Fee for the Agreed Services whichever is the lesser.
Singapore	Cl. 1.5.3.ii – The compensation is limited to the amount specified in the Specific Provisions or, if no such amount is specified, to the lesser of $250,000 or two times the value of fees payable under this Agreement.	The amount of compensation will depend on the professional indemnity insurance coverage.

Source : Justifications For & Against Fee-Fixing by the Professionals: Engineers and Architects

9.4 Duration of liability

In Malaysia, the time limit follows the Limitation Act. It is potentially longer than other countries as the time accrues from the date the breach occurred/ discovered.

Table 4: Duration of liability for engineers and architects in selected countries

Country	**Engineer**	**Architect**
Malaysia	Follow Limitations Act 1953. S 6 – 6 years from the date the cause of	Follow Limitations Act 1953. S 6 – 6 years from the date the cause of

	action accrues	action accrues
South Africa	Cl. 8 – Depends on the agreement between parties. If no time is specified, action must be taken within a period of three years from the date of termination or completion of this agreement.	Cl. 3.2.1 – Action is barred 5 years after the date of the practical completion of the project, or postponement, termination or suspension.
Australia	Cl. 10 - after the expiration of one (1) year from the date of invoice in respect of the final amount claimed the engineer shall be discharged from all liability in respect of the services whether under the law of contract, tort or otherwise. The client shall not be entitled to commence any action or claim whatsoever against engineer (or any employee, agent or sub-consultant of engineer) in respect of the consulting services after that date.	Cl. H.2.c - the architect has no liability in respect of the architect's services after the expiration of 3 years from the completion of the architect's services
Canada	Cl. 14.5 - Within 2 years of completion or termination of the Services, whichever	Ontario Limitations Act 2002 – 2 years from the day claim was discovered (Sec. 4)

	occurs first	
New Zealand	Cl. 6.4 - The duration of liability shall be six years OR as agreed by the parties from the date of agreement/ act/ omission	Cl. 10.3 - Any claim (whether in contract, tort or otherwise) must be filed in Court, or any Tribunal which has jurisdiction to determine such a claim, within six years of the date of this Agreement or within six years of the date of the act or omission giving rise to the claim, whichever is the earlier
Singapore	Cl. 1.5.4 - The expiry of the period specified in the Specific Provisions or, if no such period is specified, six years from the completion of the Services	S 6(1)(a) Limitations Act 1959 – 6.—(1) Subject to this Act, the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued: (a) actions founded on a contract or on tor Section 24A – An action for latent defects should be brought within three (3) years from the date on which the Plaintiffs had the knowledge required to bring the

		action for damages in respect of the latent defect. Section 24B – The overall limitation for bringing of actions is fifteen (15) years from the date on which the negligent act took place.
India	Professional engineers in India are not regulated by Act of Parliament and the Institution of Engineers' Bye-laws & Regulations do not mention about duration of liability. On duration of liability, the Institute of Structural Engineers suggest the following, which is not binding in courts: a. For planning and architectural designs the time limit for liability may be upon completion of the project. b. For project management consultancy it may be upon completion of defect liability period of the contractor.	The architect is required to maintain all records related to the project for a minimum period of 4 years after the issuance of Certificate of Virtual Completion. The architect's liability shall be limited to a maximum period of three years after the building is handed over to / occupied by the owner, whichever is earlier.

	c. For structural design, it may be limited to one year after the completion of the project. This should also apply to natural disasters such as hurricane/tornado, floods or earthquake even though the same may not occur during the usable life of the structure.	

Source : Justifications For & Against Fee-Fixing by the Professionals: Engineers and Architects

9.5 Standard of care

The standard of care of a professional is similar in almost all countries compared including Malaysia. A professional is expected to command the corpus of knowledge part of the professional equipment of the ordinary member of his profession. He should not lag behind other ordinarily assiduous and intelligent members of his profession in knowledge of new advances, discoveries and development in his field.

9.6 Pure economic loss

Pure economic loss is recoverable in all countries compared.

9.7 Professional indemnity insurance (PII)

This table compares whether professional indemnity insurance (PII) is a necessary requirement for engineers and architects in the selected countries.

Table 5: Professional indemnity insurance for engineers and architects

Country	**Engineer**	**Architect**
Malaysia	PII is not mandatory. Based on request from the client. Cl. 5.2 - If so required by the Client, the Consulting Engineer	Not obligated under Conditions of Engagement, Third Schedule to take up & maintain PII.

	shall take out and maintain a Professional Indemnity Insurance for an amount to be agreed to by the Client. The premium for the Professional Indemnity Insurance shall be borne by the Client. Cl. 5.3 - In the event that the Client does not require the Consulting Engineer to take out and maintain the Professional Indemnity Insurance as provided under Clause 5.2, the liability of the Consulting Engineer shall be limited to direct damages up to the value not exceeding the fees due on the damaged portion of the Works.	
South Africa	Cl. 6.6 - The Consulting Engineer agrees to arrange and maintain professional indemnity insurance cover in respect of the services provided under this agreement for the duration of the liability period in terms of clause 6.4, and in accordance with the details set down in the Specific Provisions	Not mandatory. A4 Schedule to Standard Form: A4: Professional Indemnity Insurance: The architectural professional will provide professional indemnity insurance: YES/NO If YES, the following will apply: Insurer: Certificate Nº: Retroactive Date: Limit of Indemnity: Renewal Date:

Australia	STP Consultants terms – cl. 6 - 6. STP Consultants maintains the following insurances with the limits specified: Workers Compensation = as required by law Public liability = $10,000,000 Professional Indemnity = $5,000,000 (any one claim & in the aggregate)	Cl. H.1 Insurances - The architect must maintain: a. professional indemnity insurance, not less than the value shown in Schedule H b. public liability insurance, not less than the value shown in Schedule H c. insurance to cover liability to employees, to statutory requirements.
Canada	GC 14.1 - The Engineer will carry professional liability insurance of $250,000 per claim and $500,000 in the aggregate within any policy year. Coverage will be maintained continuously from the commencement of the Services until completion or termination of the Services and, subject to availability at reasonable cost, for 2 years after completion or termination of the Services. GC 14.2 - The Client may choose to increase the amount or the coverage of the Engineer's professional liability insurance above that provided in GC 14.1 so as to obtain additional insurance that is specific to the Project.	Cl. 8.1 – The architect carries professional, errors & omissions liability coverage & the policy is available for client inspection upon request S 40 Architects Act- No member of the Association, holder of a certificate of practice or holder of a temporary licence shall engage in the practice of architecture unless the member or holder is, (a) insured against professional liability in accordance with the regulations

New Zealand	Cl. 6.5 - The Consultant shall take out and maintain for the duration of the Services: a)professional indemnity insurance for the amount of the liability under clause 6.2; b)public liability insurance cover as set out in the Special Conditions; and c)provision for reasonable defence costs.	Cl. 11.1 - The Architect holds Professional Indemnity Insurance for a sum not less than $250,000, subject to the various terms, exclusions and limitations of the policy. The Architect will use its reasonable endeavours to obtain insurance on similar terms for 6 years from the date of expiry of its insurance cover.
Singapore	Cl. 1.5.5 – (i) The Consulting Engineer agrees to arrange and keep in force professional indemnity insurance cover to the extent of the liabilities under Clause 1.5.4 until the time at which that liability shall cease in terms of Clause 1.5.5. The insurance cover may alternatively be provided by means of an equivalent bond. (ii) The Consultant agrees to arrange and keep in force public liability insurance until completion of the Services and workers compensation insurance as required by law.	S 24 Architects Act – Every licensed corporation which is not an unlimited corporation and every licensed limited liability partnership shall be insured against liability for any breach of professional duty arising out of the conduct of its business of supplying architectural services in Singapore as a direct result of any negligent act, error or omission.
India	Professional engineers in India are not regulated by Act of Parliament. The engineering profession is still	Clause 6.1 of the Circular on Architect's Professional Liability obligates professional indemnity insurance:

	not legally recognised or properly regulated by any legislation or statute unlike other major professions – chartered accountants, company secretaries, lawyers, doctors, et al. The Institution of Engineers' Bye-laws & Regulations do not contain of requirement of professional indemnity insurance.	The architect is required to indemnify the client against losses and damages incurred by the client through the acts of the Architect and shall take out and maintain a Professional Indemnity Insurance Policy, as may be mutually agreed between the Architect and the Client, with a Nationalised Insurance Company or any other recognized Insurance Company by paying a requisite premium.

Source : Justifications For & Against Fee-Fixing by the Professionals: Engineers and Architects

According to Smith (1978) the most significant liability risk factors to engineers are:

i. Failure to observe traditional responsibilities to employ reasonable judgment, diligence and care normally governing the profession, to direct and supervise the effort with personnel reasonably skilled & experienced in the work and to deploy an adequate number of people to perform several phases of work in a timely manner.
ii. Failure to employ all measures in rendering judgments with respect to the client's options in such areas as load growth studies, evaluation of alternative approaches, counsel on mode of construction contracting and forecast of schedule, cost and cash flow.
iii. Failure, initially, to bring about a full analysis of all reasonable risks among project participants and to establish categorised accountability and communication procedures
iv. Failure to provide for all legal, code regulatory, safety, equal employment opportunity, quality assurance and quality control requirements in design
v. Failure to adequately warn of or properly evaluate the potential related to the owner's risk in accepting an innovation in concept, material, procedure or development

vi. Failure to provide adequate specification and contract conditions to guide manufactures & constructors and to define interface responsibilities delineating proper accountability

vii. Failure to recognise inadequacies in manufacturer's data, to correlate them properly, and to keep abreast of modifications made.

Today's projects are large in scope, sophisticated in nature and involve many participants who all operate in the atmosphere characterised by indecision, delay, overlapping responsibilities, fragmented control and fear of the unknown and the uncontrollable. Owners often initiate suit against all participants without categorisation of liability and fault. The shotgun approach of suing everybody connected with a project exacerbates the problem. (Smith, P., 1978). In view of this scenario, a schedule of fee for engineers and architects is inappropriate as it cannot anticipate all the factors that affect the risks and costs faced by engineers and architects in the construction industry. It would not be possible to generally foresee or apprehend upfront the extent of liability for every case. Extent of liability of engineers and architects vary from case to case. Hence, it would not be possible for the schedule of fees to anticipate all the factors that might affect the liability of engineers and architects.

10.0 INTERPRETATION OF USAGE OF TERM 'SHALL' AND INTERPRETATIONS BY THE COURTS

10.1 Interpretation of 'shall' in Application of Fees in Schedule of Fees

All the statutes governing the five professions use the word 'shall' in the related statutes as mentioned earlier. The issue is whether 'shall' implies mandatory or merely recommendation.

Generally the word 'shall' is ordinarily mandatory but it is sometimes not so interpreted if the context or the intention otherwise demands, as per *Hidayatullah J in Sainik Motors v State of Rajasthan AIR 1961 SC 1480*. Similarly, in *State of Uttar Pradesh v Babu Ram AIR 1961 SC 751,* Subbarao J held that:

> "When a statute uses 'shall' prima facie it is mandatory, but the court may ascertain the real intention of the Legislature by carefully attending to the whole scope of the statute." (Cited from: *Sri Palmar Development & Construction Sdn Bhd v Jurukur Perunding Services Sdn Bhd [2010] 6 MLJ 166*)

The issue is whether the five professions can contract at fees which differ from their respective schedule of fees by way of mutual agreement through contracts. In general, contracting out is prohibited when there is clear provision to such an effect (normally inserted by the Legislator to accord protection to a certain group such as to protect the weak position of consumers and employees). Conversely, contracting out is permissible when the provision expressly provides for such an effect. (*Ooi Boon Leong & Ors v Citibank Na [1984] 1 MLJ 222)* However, the wording of certain statutes is rather less straightforward and it must be inferred either to prohibit or allow contracting out. Some statutes merely serve as guidelines where parties may contract lower than the fees set by it. When the statute is silent, reference may be made to the legislative intent and legislative history of the statute. Since none of the statutes related to the five professions explicitly prohibitis contracting at different rates from the schedule of fees, therefore, the binding nature of the schedule of fees can be questioned.

In the case of *Sea Housing Corporation Sdn Bhd v Lee Poh Choo [1982] 2 MLJ 31*, it was held that when a particular statute was enacted to accord protection to certain

group, then the statute must be interpreted in favour of the group that the statute intended to protect.

As mentioned above, the relevant laws related to the five professions do not provide justification for price schedules. As such the application of a schedule of a schedule of fees need not necessarily be considered to be benefitting the five professions.

Contracting at different rates may be justifiable PROVIDED that:

i. the statute is silent on the prohibition of contracting out at different rates;
ii. the very foundation of the statute was not to accord certain kind of protection to certain group;
iii. the parties' bargaining power is equally/fairly matched; and
iv. rules on fair dealings, good faith, full and frank disclosure, equity, are observed.

It appears that all the relevant statutes satisy all these four points and thus it would imply that the five professions can contract at different fees from the schedules of fees by way of agreement.

10.2 Deviation from fee schedule: approaches by the courts

In Malaysia, it should be noted that only architects are governed by minimum scale of fees while the other professions are governed by fixed fees.

Table 6: Scale of fees for architects, engineers and land surveyors in Malaysia

Profession	**Scale of fees**
Architects	Architects (Scale of Minimum Fees) Rules 2010 Rule 3 - Any architectural consultancy practice which is engaged by a client to perform any of the architectural consultancy services specified in Part II shall not charge less than the scale of minimum fees specified in Part III in addition to the other payments in Part IV, provided that higher fees, where justified by the architectural consultancy practice's special expertise, experience or standing, may be charged with the prior agreement of the client.

Engineers	Registration of Engineers Act 1967 - Notification of Scale of Fees (Revised 1998) In exercise of the powers conferred by paragraph 4(1)(d) of the Registration of Engineers Act 1967 (Act 138) the Board of Engineers, with the approval of the Minister, fixes the following scale of fees to be charged by registered Professional Engineers for professional advice or services rendered: Subject to paragraph 2, every consulting engineer who is engaged by a client to perform any of the professional services described in Part A shall be paid in accordance with the scale of fees described in Part B in addition to the other payments described in Part C. (1)Notwithstanding paragraph 1 and if the consulting engineer is being paid in accordance with sub-subparagraph 1(1)(a) of the scale of fees described in Part B, the scale of fees provided in Table A of sub-subparagraph 1(1)(e) of Part B shall not apply to buildings in housing development works. (2) For housing development works, if the buildings are not more than four storeys high, the "Scale of Fees for Housing Development" published on 24th July 1997 under gazette notification no. P.U.(B) 288/1997 shall apply.
Land surveyors	Licensed Land Surveyors Regulations 2011 Regulation 29(1) para. (g) – A licensed land surveyor shall not be charging in respect of professional services rendered to his client, of fees or costs not in accordance with the Schedule in these Regulations except where the client agreed in writing that the amount to be charged is more than the amount prescribed in the Thirteenth Schedule.

Source: Application of Schedule Fees: Dispute Cases in Courts

The following discussion focuses on the approaches taken by the courts in determining the application of schedules of fees to the five professions.

As for architects, in the case of *Seniwisma S & O Akitek Planner v Perusahaan Hiaz Sdn Bhd [1980] 2 MLJ 37,* the appellants, who were architects, claimed under an agreement under which they were engaged to prepare a layout plan for housing development. The layout plan was not submitted for approval by the architects but by the respondents themselves. The plan was not approved but approval was given to another amended plan. The respondents offered $800 for the work done but the appellants claimed the sum of $65,500. The respondents also claimed that the charges should be in accordance with the Institute of Architects' scale of fees but this was disputed by the appellants. The Assistant Registrar gave the respondents conditional leave to defend upon payment into court of the sum claimed and this was upheld in the High Court. The appellant appealed. The respondents' contention is that the appellants are only entitled to the full fees, if the appellants submitted the layout plan for approval, and if the appellants' layout plan was in fact approved. On cursory examination, it will be seen that the approved layout plan ('AZ-3', page 70 of the Record) is entirely different from the appellants' layout plan ('OKI-4', page 49 of the Record), and the approved layout plan contains more units and essential facilities than the appellants' layout plan. The appellants' suggestion in their affidavit that the approved layout plan is in effect an amended form of their layout plan does not appear to be correct. The appeal was unsuccessful.

The case demonstrates that the courts would be careful in deciding the actual contractual fee that must be paid by a consumer in event the architect deviates from the minimum sum provided in the schedule. However, the case does not illustrate the reluctance of the court to rely on contractual amount agreed upon by the architect and consumer.

The case of *Mott Macdonald (Malaysia) Sdn Bhd v. Hock Der Realty Sdn Bhd [1996] MLJU 342* involved the issue of scale of fees fixed by the Board of Engineers. It was held that the plaintiff's contracted fees were reasonable and on the lower scale. The judge viewed that the object of the scale of fees set by the Board of Engineers is to put in check recalcitrant engineers who impose exorbitant fees. The judge referred to *Archbolds (Freightage) Ltd v S. Spanglett Ltd [1961] 1 QB 374*, whereby penalties were also provided under the Registration of Engineers Act, 1967 to punish recalcitrant engineers. The court observed that the plaintiff in the instant case comes

clean in the context of the scale of fees set by the Board of Engineers and no amount of bickering can change that.

With regard to land surveyors, it is to be noted that land surveyors can charge more in a contract when there are express terms in the contract between the land surveyors and customers. It would appear that by literal interpretation of Regulation 29(1) para. (g), fees below the fees provided in the Schedule are indirectly prohibited. However, it appears to the contrary in the case of *Sri Palmar Development & Construction Sdn Bhd V Jurukur Perunding Services Sdn Bhd [2010] 6 MLJ 166.* The issue for the High Court's determination was whether a land surveyor and his client could agree to the payment of a lesser fee than the prescribed scale fees under the Regulations. The judge in proclaiming the legality of the fees which deviates from the schedule of fees declared as follows:

> "The scale fees is what it is, a prescribed and proscribed fees, beyond which is prohibited and punishable with a penalty and below which is permissible though not preferred. The scale fees is recommended fees and regulated in the sense of preventing overcharging. If there is justification for going below the scale because of bulk work or because of the client being a non-profit body or because of impecuniosity of client or for some other reasons, I cannot see why that cannot be valid and permissible. Basically there cannot be something inherently or intrinsically wrong with a discount unless the legislation expressly prohibits it."

In justifying the application of the contractual fee, the judge stressed that if the professional body had wanted a no discount rule to be applicable they should have stated in clear, unequivocal and unambiguous language as in for example rule 6 of the Solicitors' Remuneration Order 2005 which reads: "There shall be no discount on fees specified in this Order."

The court finds it difficult to understand why a system of scale fees is necessary to ensure and enhance the integrity of Malaysian Torrens system of title registration. The reverse might well be true: that if developers are allowed to negotiate for a lower fee in the context of bulk work, perhaps with lower fees they can come up with the money to apply for a faster subdivision of titles after the master title has been surveyed. In any event there is no way to prevent the land surveyor from refunding to

the client the difference between the scale fees and the negotiated fees after the scale fees have been released to the land surveyor after completion of the title survey work. The rationale that scale fees protect the client and the public does not stand up well against the argument that protection of the client should also provide freedom of choice about being able to negotiate on fees.

It was argued by the defendant that public policy should have a structured scale of fees to ensure quality work is done for a reasonable stipend as stipulated by the board and that payment of scale fees to the board before work commences guarantees against shoddy work. However, the court questioned why any profession should immune itself from the market forces of free competition and stressed that if there ever was a public policy justification for inflexible scale of fees on the ground of protecting clients and consumers that public policy is fast changing with the passage of the Competition Act 2010. Once the Act is enforced, matters like cartels and professionals acting collectively to gag negotiation on fees with the help of their professional body and monopolistic fee structures would be struck down by the Commission to be set up under the soon to be gazetted Competition Act 2010.

The court questioned why a professional should be less professional in his work merely because he has agreed to a lower scale fees. The court also questioned why a professional should be penalised and punished just because he has charged a lower fee but has been no less professional in his work bearing in mind that until he has completed his work within the stipulated time he cannot get his fees from the board. Hence, the court concluded that if a member of the profession wants to charge a lower fee (such as because of lower operating or rental costs or use of productivity-enhancing technology) why would any member of his profession protest.

11.0 CONCLUSIONS AND RECOMMENDATIONS

There is no legal prohibition against agreeing to a contractual fee. An agreement on discounted fees or an agreed fee by both parties is not in conflict with the structure and scheme of scale fees under the relevant Acts and Regulations. Therefore, the possible options are as follows:

i. Maintain the status quo. From the above analysis, maintaining the schedule of fees may provide guidance to the five professions but they are unlikely to be mandatorily enforced, if there is a dispute in court as per the above cases. The professions and the MyCC could implement a programme to increase awareness that the schedules of fees are not mandatory.
ii. Amend the existing regulations in professional law to remove the schedule of fees from the relevant statutes. This would be in line with the spirit of the Competition Act 2010.
iii. The profession voluntarily withdrawal from the schedule of fees and notify this intention to the Ministry.
iv. Provide non-binding or recommended fee guidelines, for example, as practised in Canada.

Given that changes to laws can take a long time, option 1 is likely to be the best option at least in the short term. In the event this approach is taken, it is recommended that the law should be reviewed after every 5 years, whereby it is suggested that a committee under the Commission is being created to look into the viability of maintaining the schedules of fees.

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