

Discussion paper

# National Competition Policy Review of the Building Work Contractors Act 1995 - Final Report

Issued March 2001

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Government  
of South Australia



**NATIONAL COMPETITION POLICY REVIEW  
OF THE  
BUILDING WORK CONTRACTORS ACT 1995**

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## EXECUTIVE SUMMARY

On 11 April 1995 the Council of Australian Governments (“CoAG”) entered into three inter-governmental agreements to facilitate the implementation of national competition policy (“NCP”) objectives.

One of these agreements was the Competition Principles Agreement (“the Agreement”). As part of the obligations under the Agreement, State and Territory governments gave an undertaking to review all existing legislation that restricts competition. The Office of Consumer and Business Affairs is reviewing the *Building Work Contractors Act 1995* as part of this process.

The area of building work first came under regulation in 1954 when the *Building Contracts (Deposits) Act 1953-1954* was introduced to restrict builders accepting deposits from prospective building owners before the commencement of building work. The intention was to limit potential abuse by builders requiring abnormally high deposits without carrying out any building work, and to provide indirect protection for consumers in relation to the bankruptcy of builders.

The licensing of builders in South Australia commenced with the *Builders Licensing Act 1967*. The rationale for its introduction was the existence of unskilled, undercapitalised and unsuitable persons operating within the building industry, and the prevalence of undesirable trading practices (with consequent effects upon unsuspecting consumers).

The Act was amended in 1980 to introduce a new licensing requirement that applicants have sufficient financial resources to operate under the licence, and to provide the Builders’ Licensing Board with the power to order remedial work where the original work was performed by an unlicensed builder and was defective.

In 1986, the *Builders Licensing Act 1986* replaced the *Builders Licensing Act 1967*. It contained a number of initiatives including the abolition of the Builders Licensing Board; a stricter licensing regime, including closer supervision of financial resources of licensees and their standards of supervision of building work; a “cooling-off” period for significant domestic building work contracts; and the constituting of the Commercial Tribunal as the licensing authority for the building industry.

Upon forming government in 1994, the Minister for Consumer Affairs, the Honourable K.T. Griffin, appointed a Legislative Review Team to review all consumer affairs legislation in South Australia. As a result of this review, the government enacted the *Building Work Contractors Act*. The initiatives of the Act included the updating of regulation to improve standards of practice within the industry, the provision of appropriate systems for the involvement of industry in a co-regulatory system, and the introduction of a competency-based system for licensing and registration.

The market for building work services is one which most consumers will become involved with only infrequently during their lives. However, the transactions which they enter once in this market are likely to be among the most important and expensive encountered by them. Further, this market is one in which high potential for both market failure, through the existence of transaction costs, information asymmetry and externalities, and provider



failure, in terms of the risk of financial loss, substandard work and risks to public health and safety, have been identified.

Having considered these factors, along with other elements of the market, the Review Panel has come to the conclusion that the objectives of the Act are to minimise the potential for consumer loss arising through unscrupulous conduct, builder insolvency and poor quality work, as well as ensuring that the health and safety of the community is not put at risk.

The Review Panel has concluded that these objectives remain relevant in the context of the current market, and therefore that there remains continuing justification for the regulation of the market. Various mechanisms to address these objectives have been considered by the Review Panel as alternative means of regulation, including reliance on market forces, reliance on consumer laws of general application, reliance on the insurance market, industry self-regulation, and negative licensing. However, the Review Panel's conclusion is that these alternatives are not adequate to ensure that current level of consumer protection afforded by the Act is maintained. Therefore, the retention of the current Act in some form is the recommendation of the Review Panel.

The Act contains a number of restrictions, in the form of barriers to entry and conduct restrictions in relation to building work contractors. The definition of the scope of work is a barrier to entry, as it reserves a body of work to a particular class of person (that is, those who meet the requirement of the Act). The Review Panel's conclusion is that while the current scope of work is justified in general terms, the Commissioner for Consumer Affairs should seek advice from industry and other interest parties to identify any types of work which might appropriately be excluded from the definition of building work.

The requirement to be licensed is another significant barrier to entry contained within the legislation. The Review Panel's conclusion is that in a broad sense such a requirement is a justified restriction on competition. The Review Panel has however given further consideration to the individual criteria which entitle an applicant to be granted a licence to see whether it is justified in each case.

The first restrictive criteria considered is the requirement that a contractor hold prescribed qualifications. The Review Panels' conclusion is that this is a justified restriction on competition. Having a mechanism in place to ensure contractors possess sound business competency, in particular, competency in the manner in which technical building matters affect business operations, is clearly of significant public benefit

The second restrictive criteria considered is the requirement that an applicant for a contractors licence demonstrate sufficient financial resources. Such a requirement is common to many forms of occupational licensing and is considered to be a consumer protection measure, as consumers are perceived to be at risk of financial default where contractors may have accepted payments or deposits in respect of work to be rendered. While the Review Panel considers that there is significant public benefit in this restriction, nonetheless it has come to the conclusion that in the limited area where a contractor only sub-contracts with other licensed contractors, the benefits of the restriction are outweighed by the costs. The conclusion of the Review Panel therefore is that this restriction should be retained, however there should be no requirement to demonstrate sufficiency of financial resources in the case of those contractors whose licence is limited to only sub-contracting with other licensed contractors.

Another entitlement criteria considered is the requirement that an applicant for a licence be of sound financial reputation. This means, for either a natural person or a director of a body corporate, that they must not have been within the 10 years prior to the application an undischarged bankrupt, or subject to a composition or deed of arrangement with or for the benefit of creditors, or have been the director of a body corporate wound up for the benefit of creditors. The rationale for this requirement is that a poor financial history or reputation is an indicator of a lack of business skills. A further rationale is to prevent traders who may have deliberately wound up a business to avoid warranty costs from subsequently obtaining a licence and setting up a new business.

The Review Panel's conclusion is that this restriction is in general justified, however the period of prohibition should be reduced from ten to five years. Further, bankruptcy, compositions, deeds or schemes of arrangement should not disqualify a person from holding a licence limited to subcontracting to other licensed contractors.

The final entitlement criteria considered is the personal reputation of the applicant. This test is aimed at ensuring those who may present a risk to the public may be excluded from the market, and in this sense may properly be seen as addressing provider failure issues. The Review Panel's conclusion is that a test such as this is a justified restriction on competition. In coming to this conclusion, alternative means of providing similar protection were considered, including reliance on a schedule of proscribed offences. However, upon analysis of the characteristics of this market, mechanisms such as these are considered inappropriate.

The Act also sets out a system of registration for building work supervisors and requires such persons to hold prescribed qualifications. The Review Panel's conclusions are that the requirements are a justifiable given the risks to public health and safety and the risk of substandard work being performed in the absence of the restrictions.

As in the case of contractors, there are entitlement criteria for registration of supervisors. Again, these criteria have been considered by the Review Panel to ascertain whether they are justified restrictions on competition.

The only requirement identified by the Review Panel as potentially restrictive of competition is the requirement that an applicant for registration hold prescribed qualification. This requirement imposes a barrier to entry into this occupation. The potential for injury to public health and safety in conjunction with the increased likelihood of successful completion of building work contracts is considered by the Review Panel to provide benefit to the community which outweighs the identified costs of the restriction. On this basis, the conclusion of the Review Panel is that this restriction is justified.

There are a number of restrictions on the conduct of licensed contractors contained within the current Act. These are requirements in relation to the approval of registered supervisors, advertising, the provision of false or misleading information, the name in which a contractor may carry on business the provision of statutory warranties, building work contracts and indemnity insurance. All of these measures are considered by the Review Panel to provide significant public benefit, by in addressing issues of provider failure or market failure within the market, which outweighs the minimal costs associated with them.

The Act provides for disciplinary measures to be taken against contractors, supervisors and building consultants under a range of circumstances. Disciplinary measures may result in a

reduction in the number of persons who can provide services within the market, and may therefore be seen as a mechanism by which competition within the marketplace can be restricted. However the disciplinary procedures only operate to remove from the market those who engage in conduct which is against the interests of consumers generally and for this reason the Review Panel sees any restriction which may arise from the operation of the disciplinary provisions to be justified as being in the public interest.

The Review Panel also considered a number of exemptions presently contained within the Regulations to see whether they created an anti-competitive distortion in the market. The exemptions considered are those for the South Australian Housing Trust, the Minister for State Development, the MFP Development Corporation, the MFP Industrial Premises Corporation, registered architects, Demolition contractors, contractors to the South Australian Housing Trust and the Minister for State Development and Pest Controllers and Security Alarm installers. In each case, the Review Panel's conclusion is that the restrictions are justified.

The Review Panel therefore concludes that there is a clear public benefit in the retention of regulatory control of the market for building work services, and that in general the current legislation is the least restrictive and most effective means of achieving the objective of consumer protection.

## PART 1: INTRODUCTION

### 1.1 WHY IS THE ACT BEING REVIEWED?

Economic and social imperatives, not only in Australia but also globally, have in recent times required the imposition of more rigorous market conditions on every sector of the economy. This process has affected the agricultural, mining, manufacturing and utilities sectors of the economy, and is ever increasingly impacting on the occupational and professional fields.

Formal governmental recognition of this process came at the Council of Australian Governments meeting on 11 April 1995 with the adoption by the Commonwealth and all State and Territory Governments of the National Competition Policy package.

The package comprised three separate agreements aimed at facilitating the implementation of National Competition Policy objectives:-

- The **Competition Principles Agreement** consisting of six distinct areas of competition reform:-
  - Legislative review;
  - Process oversight for government business;
  - Structural reform of public monopolies;
  - Competitive neutrality;
  - Access to essential infrastructure; and
  - Application of competition principles to local government.
- The **Conduct Code Agreement** committing all governments to implementation of uniform competition laws as set out in the schedule version of Part IV of the *Trade Practices Act 1974*. Under this code all persons, including governmental bodies and professional and occupational bodies, are now subject to competition laws.
- The **Agreement to Implement Competition Policy and Related Reforms** committing all signatories to a reform timetable. The Commonwealth is also committed to making payments to State and Territory Governments subject to their meeting the necessary reform timetables.

It is the legislative review element of the Competition Principles Agreement which forms the basis for this review. In this context it must be borne in mind that legislative reviews, such as this review of the *Building Work Contractors Act 1995* and the regulations under it, do not occur in isolation but rather form a part of a fully comprehensive economy-wide policy agreed to by all Australian governments.

The legislative review process extends not only to existing legislation, but also to new legislation. Further, the concept of "legislation" encompasses all Acts, Regulations, Rules, Proclamations, Notices, Amendments and By-Laws. The reform timetable contained in the Agreement to Implement Competition Policy and Related Reforms requires the legislative review process to be completed by the end of June 2002.

While competition is a notoriously difficult term to define globally, it may perhaps be most simply considered as a process of rivalrous behaviour by suppliers in a market that has many actual and potential buyers. National Competition Policy aims to make better use of competitive forces as a means to enhance overall material living standards, to improve Australia's social and environmental outcomes, and to extend the productivity enhancing effects of competition to virtually all sectors of the economy.

It has been said that National Competition Policy is about:-

*"ensuring that the way markets work serves the whole community, rather than resulting in back-room deals which benefit a few. It is about improving efficiency of the public sector to provide better services at lower prices. And it is about ensuring that legal protections from competition genuinely promote the welfare of all Australians, rather than the narrow interests of the businesses protected. The policy doesn't prevent governments guaranteeing desirable social objectives."*<sup>1</sup>

Underlying National Competition Policy is the notion that greater competition will create incentives for producers:-

- to use their resources better, resulting in higher productivity;
- to increase their efforts to constrain costs and therefore lower prices; and
- to be more responsive to users' demands in terms of improved quality.

It is important to acknowledge at the outset that many laws restrict competition. It is also important to acknowledge that often these restrictions are essential to achieve a significant community benefit. However, National Competition Policy requires that all laws restricting competition be identified, so that the community benefits they provide and the necessity for the restriction can be reviewed in an objective fashion.

In this sense, National Competition Policy embraces competition as a means, not an end in itself. Any increase in competition in a sector of the economy can therefore only be justified under Competition Policy Principles insofar as it provides an increase in net public benefit.

That said, any National Competition Policy review must start with the presumption that any identified restriction on competition should be repealed unless it can be demonstrated that a net public benefit arises from its existence. In line with Competition Policy Principles, those who wish to maintain a legislative restriction on competition bear the onus of proving that there is such a net public benefit.

This presumption arises from the text of the Competition Principles Agreement, which states at clause 5(1):

*The Guiding Principle is that legislation (including Acts, enactments, ordinances or regulations) should not restrict competition unless it can be demonstrated that:*

- a) the benefits of the restriction to the community as a whole outweigh the costs; and*

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<sup>1</sup> Mr G. Samuel, President, National Competition Council, *Australian Financial Review*, 22 June 1998, p. 20

*b) the objectives of the legislation can only be achieved by restricting competition.*

Therefore, the only restrictions on competition permitted under the Competition Principles Agreement are those that are demonstrably in the public interest. However, clause 5(1)(b) further requires that those restrictions, which are so justified, must also be the most appropriate way of meeting the legislation's objectives.

To put matters another way, while a public interest defence is a necessary step for retention of a legislative restriction, it is not in itself a sufficient one; if the policy objectives can be achieved by other means, then the legislative restriction must be removed, even if they are in the public interest, and replaced by the less restrictive alternative.

The process of determining whether a restriction is in the public interest is known as the "public benefit test". Clause 5(1)(c) of the Competition Principles Agreement requires that competition and associated economic impacts be assessed under this test.

The Review Panel notes that in this regard clause 1(3) provides guidelines on the content of public benefits tests such that, without purporting to limit what may be considered, the following matters must be taken into account where relevant:

- (a) government legislation and policies relating to ecologically sustainable development;*
- (b) social welfare and equity considerations, including community service obligations;*
- (c) government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;*
- (d) economic and regional development and investment growth;*
- (e) the interests of consumers generally or a class of consumers;*
- (f) the competitiveness of Australian businesses; and*
- (g) the efficient allocation of resources.*

These criteria contain a clear expectation that social, environmental and regional concerns will be considered alongside the more narrow economic criteria in arriving at an assessment of overall benefits and costs. However, it should also be appreciated that, where relevant, matters beyond those set out in the Competition Principles Agreement, including rural issues, have been considered by the Review Panel.

## **1.2 WHAT IS BEING REVIEWED?**

The Agreement requires that all existing legislation (including Acts, enactments, ordinances or regulations) be reviewed.

Accordingly, this Review applies to:-

- *Building Work Contractors Act 1995 ("the Act"); and*

- *Building Work Contractors Regulations 1996* (“the regulations”)

References have been made to other legislation where appropriate. However, the scope of this review is limited to the *Building Work Contractors Act 1995* and the regulations. Issues relating to competitive restrictions in other legislation are beyond the scope of this review and are not considered in this Final Report.

### **1.3 THE REVIEW PANEL**

The review was conducted by a Review Panel consisting of the following persons:-

- Ms Margaret Cross, *Director, Consumer and Regulatory Affairs, Office of the South Australia Independent Industry Regulator;*
- Mr Adam Wilson, *Senior Policy Officer (Competition Policy), Office of Consumer and Business Affairs;*
- Ms Gillian Schach, *Legal Officer, Policy and Legislation Section, Attorney-General’s Department;*
- Ms Carolyn Wigg, *Chief Project Officer (Policy and Technical), Building Standards & Policy Branch, Planning SA.*

This Review Panel was appointed by the Minister for Consumer Affairs in accordance with the Department of Premier and Cabinet’s guidelines for the conduct of legislative reviews under the Council of Australian Governments Competition Principles Agreement.<sup>2</sup>

### **1.4 CLASSIFICATIONS OF RESTRICTIONS ON COMPETITION**

Restrictions on competition identified in the Act will not be of uniform effect, with varying degrees of impact on competition inherent in each particular restriction. Therefore, the Review Panel has adopted the process of categorising potential restrictions on competition as **trivial**, **intermediate** or **serious** in order to assist in deciding on the depth of analysis to be given in each case.

The categorisations attributed by the Review Panel to the various restrictions are derived following a consideration of various factors including the height of barriers to entry and the impediments to rivalry in all dimensions of the price-product-service packages offered to consumers by market participants given the nature of the market.

### **1.5 THE REVIEW PROCESS**

The purpose of this Final Report is to present to the Minister for Consumer Affairs the conclusions and recommendations of the Review Panel in relation to each of the legislative

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<sup>2</sup> “Guidelines Paper for Agencies conducting a Legislation Review under the CoAG Competition Principles Agreement”, Department of Premier and Cabinet, February 1998, Part E, page 19 et seq.

restrictions on competition identified within the *Building Work Contractors Act 1995* and the *Building Work Contractors Regulations 1996* in accordance with the requirements of the Competition Principles Agreement. A summary of the conclusions and recommendations of the Review Panel can be found at Appendix 1. The Terms of Reference for the review can be found at Appendix 2. A summary of the legislative restrictions on competition and their classification as identified by the Review Panel can be found at Appendix 3.

In February 1999 the Commissioner for Consumer Affairs wrote to key industry and consumer groups advising them of the upcoming review of legislation within the Consumer Affairs portfolio. These groups were invited to attend one of a number of briefing sessions in March 1999, during which representatives of the Office of Consumer and Business Affairs and the Department of Premier and Cabinet outlined the basis and structure of the review process.

An Issues Paper was released for public consultation on 15 March 1999, with eleven submissions received by the Review Panel in response. A schedule showing the distribution of Issues Papers and submissions received can be found at Appendix 4

Based on submissions received, a Draft Report was then prepared by the Review Panel and released on 23 June 2000 for a six-week period of further public consultation. A schedule showing the distribution of the Draft Report and submissions received can be found at Appendix 5.

This Final Report has now been prepared based on the materials contained in the Draft Report, information provided in submissions and further research conducted by the Review Panel.



## **PART 2: THE MARKET**

### **2.1 WHAT ARE THE RELEVANT MARKETS?**

In general terms, a market is a collection of buyers and sellers who interact, resulting in the possibility of exchange.<sup>3</sup> Buyers include consumers who purchase goods and services, and sellers include firms and individuals who sell their goods and services.

The structure of a market is characterised by a number of factors including the number and size of competitors, the barriers to entry into the market, and the ability for different products to be substituted. Of all the elements making up a market structure, ease of entry into the market is probably the most important. It is the difficulty faced by potential competitors when attempting to enter a market that establishes the possibility of market concentration over time, and it is the threat of the entry of a new player into a market which operates as the best regulator of competitive conduct on incumbents.

The Act seeks to regulate certain activity in the building and construction market, namely:-

- contracting for the performance of building work;
- the supervision of building work; and
- the conduct of building consultants.

Only those licensed as building work contractors can provide contracting services in the South Australian market. Similarly, only those registered as building work supervisors can provide supervision services.<sup>4</sup>

It is important to recognise that the contracting market under the legislative scheme is not restricted by reference to traditional professions or occupations. In other words, it is not only “builders” in the traditional sense who form the market for the contracting of building work. Any person, from any background, may be a contractor for the purposes of the Act if they meet its requirements. The Review Panel notes that there are presently 20,073 contractors licensed in South Australia.<sup>5</sup>

The supervision of building work is largely the province of those who hold technical skills. In the main, registered building work supervisors will provide these services, although in a sense there is competition for this work from registered architects, as such people are deemed by the Act to be registered supervisors.<sup>6</sup> There may well be those in other professions or occupations that are technically capable of providing supervision, but they are not currently exempted by the Act, and therefore formal registration as a building work supervisor must be sought in order for them to perform this function. There are presently 16,722 building work supervisors registered in South Australia.<sup>7</sup>

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<sup>3</sup> Pindyck R.S. and Rubinfeld D.L., *Microeconomics* (Second Edition), MacMillan, USA, 1992, p.11

<sup>4</sup> Note that registered architects are deemed to hold building work supervisor registration under section 14 of the Act.

<sup>5</sup> As at 30 June 2000, *Annual Report of the Commissioner for Consumer Affairs, 1999-2000*, p. 33

<sup>6</sup> Section 13

<sup>7</sup> As at 30 June 2000, *Annual Report of the Commissioner for Consumer Affairs, 1999-2000*, p. 33

Those who provide building consultancy services are negatively licensed under the Act. Any person, including a body corporate, may carry on business as a building work consultant by giving advice or furnishing reports about domestic building work without having to obtain a licence or registration from the Commissioner for Consumer Affairs. However, in the event that a building consultant engages in specified prohibited conduct, then the Court has the power to exclude that consultant from the market. As this sector of the market is regulated in such a manner, it is difficult to determine numbers of suppliers of building consultancy services.

It is possible that building services in the residential and non-residential sectors could be considered separate markets, given that the final products are not substitutable. For example, a house is not necessarily substitutable for a commercial office building. Nonetheless, the skills involved in building one structure may be utilised in constructing others, and the Review Panel prefers to consider building services as a single market for the purposes of this Review.

In the Draft Report, the Review Panel considered that the relevant markets for the purposes of this review are:-

- the market for contracting services in the building industry in South Australia;
- the market for supervisory services in the building industry in South Australia; and
- the market for building consultancy services in South Australia.

The Review Panel maintains that these are the relevant markets, and in doing so notes that no submission suggested that the concept of the market should be expanded beyond these terms or reduced in scope.

The market for building services in South Australia is large in real terms. Australian Bureau of Statistics figures for building activity in the June 1999 quarter show that the value of building work commenced in South Australia in the relevant period approached \$1.5 billion.

The Review Panel would point out that this figure does not include the Australian Bureau of Statistics category of "construction activity", which would in some cases fall within the ambit of the Act.<sup>8</sup> Further, other expenditures, such as wages, would also increase the dollar size of the relevant market. The Review Panel therefore notes that this market has a significant role in any consideration of the South Australian economy as a whole.

### 2.1.1 Mutual Recognition

Under mutual recognition legislation, individuals in trades and professions regulated in one jurisdiction have the ability to obtain registration in another jurisdiction by means of

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<sup>8</sup> *Building Activity South Australia : June Quarter 1999*, ref 8752.4 Australian Bureau of Statistics. Building activity for the purposes of the ABS survey relate to building activity including the construction of new buildings and alterations and additions to existing buildings. Construction activity falling outside this definition is not included for the purposes of the ABS survey.

administrative process. Currently, all States and Territories have some form of regulation of the building and construction market.

One of the effects of the mutual recognition legislation is that a decision to grant a license in South Australia will also be the licensing decision for the whole of Australia and New Zealand. It is therefore appropriate to consider that the market for these services extends beyond the boundaries of South Australia.

Correspondingly, licensed persons from elsewhere within Australia or from New Zealand can also provide contracting and supervisory services within South Australia provided they have made application under the mutual recognition process. The Commissioner for Consumer Affairs has to date granted 130 building work contractor licenses and supervisor registrations under mutual recognition legislation.

### 2.1.2 Market for Training Courses - A Secondary Market

A secondary market to be considered is the market for training courses in the building industry. The legislation requires prospective building work contractors and building work supervisors to possess specified competencies in order to obtain a licence or registration.

While the structure and governance of these training courses is largely within the province of the *Vocational Education, Employment and Training Act 1994* (which is also currently subject to review), the market for training courses is largely generated by the existence of the Act. It is therefore appropriate to consider the market for training courses as part of this Review.

The Construction Industry Training Board also noted in its submission to the Draft Report that:-

*“under mutual recognition arrangements for vocational education and training, the market for training courses (ie providers and courses) is wider than just that for South Australia.”*

The Review Panel accepts this submission and in this regards notes that the general discussion of mutual recognition above has some application to this secondary market.

## 2.2 CONCLUSION - THE RELEVANT MARKETS

### CONCLUSION 1

The conclusion of the Review Panel is that the markets affected by the operation of the Act are:-

- the market for contracting services in the building industry in South Australia;
- the market for supervisory services in the building industry in South Australia;
- the market for building consultancy services in South Australia; and
- a secondary market for training courses for the building industry in South Australia.

### **PART 3: THE NEED FOR REGULATION**

Any review of legislation in line with competition policy principles must commence from a basis that no regulation is required. The case must then be made for regulation, and, if regulation is justified, such regulation should be in the least restrictive form to meet the identified objectives.

It is therefore necessary to identify whether there is a need for any regulation within the markets for building contracting and supervisory services.

#### **3.1 COMPETITION: WHAT IS IT? WHY THE NEED?**

##### **3.1.1 What is it?**

Competition expresses itself as rivalry within a market, and can take a number of forms:-

- rivalry on price;
- rivalry on service;
- rivalry on technology;
- rivalry on quality; or
- rivalry on consistency of product.

Effective competition requires both that prices should be flexible (reflecting the forces of demand and supply), and that there should be independent rivalry in all dimensions of the price-product-service packages offered to consumers.

##### **3.1.2 Why do we need competition?**

Many economists argue that competitive market forces deliver greater choice and benefits to consumers. If a service provider is able to exercise significant power within its market then this situation may result in a misallocation of resources. Service providers have no incentive to offer new products to consumers, and consumers may pay more for services than they are worth. Vigorous competition between service providers encourages them to attract consumers to the business with targeted service provision and/or reduced or more efficient pricing.

Competition therefore functions as an incentive to business to improve performance through service innovation and to adapt to changing market environments. It provides a benefit to the community as a whole by allowing for greater consumer choice, increased efficiencies and economic growth, which may in turn lead to increased employment opportunity.

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<sup>9</sup>Drawn from *re Queensland Co-op Milling Association Ltd & Defiance Holdings Ltd* [1976] ATPR ¶40-012 at 17,246; Commonwealth of Australia, Department of Industry, Science and Tourism, *Codes of Conduct Policy Framework* (Canberra 1998) p9.

It is important to note that:-

*“Competition policy does not require that all firms compete on an equal footing; indeed, differences in size, assets, skills, experience and culture underpin each firm’s unique set of competitive advantages and disadvantages. Differences of these kinds are the hallmark of a competitive market economy”.*<sup>10</sup>

It is important to note that this Review is not primarily concerned with competitive conduct between suppliers within the market, unless such conduct results in inefficiencies and costs to the community at large. Rather, the Review is concerned with provisions in the legislation which may restrict entry into the market by new competitors, or provisions (of general application) which distort competition within the market as a whole.

### **3.1.3 Why do we regulate competition?**

Competition in markets is usually regarded as the most efficient method of allocating resources. However, unrestricted competition may not provide the best or most appropriate economic or social outcome. It has been observed that:-

*“government intervention in a competitive market is not always a bad thing. Government - and the society it represents - might have other objectives besides economic efficiency. In addition, there are situations in which government intervention can improve economic efficiency. This includes externalities and cases of market failure.”*<sup>11</sup>

It is therefore argued that where the potential for market failure exists, a basis for government intervention can be established.

#### **3.1.3.1 Market Failure<sup>12</sup>**

Competition assumes a market that is perfect, ie where:-

- maximum satisfaction and profit are sought;
- there are no hidden transaction costs;
- all parties are completely informed; and
- there are no costs to other parties.

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<sup>10</sup> National Competition Policy, Report by the Independent Committee of Inquiry, August 1993, p. 293

<sup>11</sup> Pindyck R.S. and Rubinfeld D.L., *Microeconomics* (Second Edition), MacMillan, USA, 1992, p.320

<sup>12</sup> Partly drawn from Commonwealth of Australia, Trade Practices Commission, *Regulation of professional markets in Australia: issues for review* (Canberra 1990) pp22-25; Victoria, Competition Policy Task Force, *National Competition Policy: Guidelines for the review of legislative restrictions on competition* (Melbourne 1996) pp70-72.

From the consumer's viewpoint, inefficient market outcomes will result where there are high transaction costs, information asymmetry or externalities. Such situations are indicative of market failure and may justify regulatory intervention.

### 3.1.3.2 Provider Failure

Conventional forms of market failure do not, however, account for the failure of the service provider to honour their obligations, for example, through the intervention of dishonesty, insolvency or the systematic performance of substandard work.

In theory, consumers and service providers contract for a pre-defined quality of service in exchange for a price that the provider can demand without losing business. The provision of service quality less than that bargained for may be compensated for by regulatory intervention such as the setting of point-of-entry standards, the imposition of ongoing requirements or the provision of a 'safety net' for consumers.

Analyses of occupational regulation schemes in Australia have produced a list of potential risks to consumers that are generally not related to market failure.<sup>13</sup> The main types of benefit provided to the public through regulation consist of protection against a risk of:-

- financial loss;
- substandard work being performed;
- health and safety; and
- criminal activity.

The existence of these situations also provides justification for regulatory intervention, and will be explained in further detail later in this Final Report.

## 3.2 THE EFFECT OF OCCUPATIONAL REGULATION ON COMPETITION<sup>14</sup>

The intended effect of occupational regulation is to address concerns with market and/or provider failure. **Any regulation imposed must therefore be appropriate to addressing these concerns.** However, most occupational regulation legislation was designed without any explicit consideration of its impact on competition.

Restrictions on competition imposed by occupational regulation form two broad groupings:-

- barriers to market entry; and
- restrictions on competitive conduct.

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<sup>13</sup> See Victoria, Law Reform Commission & Regulation Review Unit, *Principles for Occupational Regulation* (Melbourne 1988).

<sup>14</sup> Partly drawn from Moore & Tarr, "General Principles and Issues of Occupational Regulation" in (1989) 1 *Bond LR* 119 at 122-123.

These are briefly discussed below.

### **3.2.1 Barriers to Entry**

Regulatory barriers to market entry have the most direct influence over competitive conditions within an industry.

Numerous point of entry controls can exist:-

- barriers creating a monopoly;
- restrictions that operate by reference to the number of producers or product;
- barriers operating against interstate goods or service providers;
- barriers operating against foreign goods or service providers;
- restrictions that operate by reference to standards or qualifications.

It is the final barrier, restrictions operating by reference to standards or qualifications, which is of most relevance to this Review.

### **3.2.2 Restrictions on Competitive Conduct**

Many sectors of the economy operate under regulatory regimes which restrict certain forms of competitive behaviour. Restrictions on conduct may range from price controls to mandatory codes of practice.

If these controls were maintained by private agreement between competitors many would be caught by the competitive conduct provisions of the *Trade Practices Act*. However, as these controls are imposed by government, they are immune from the operation of the *Trade Practices Act*.

As discussed previously, competition expresses itself as rivalry within a market. This rivalry may be in terms of price, service, technology or quality. Effective competition requires both that prices should be flexible (reflecting the forces of demand and supply), and that there should be independent rivalry in all dimensions of the price-product-service packages offered to consumers. Restrictions on competitive conduct can prevent this competitive rivalry from being maximised.

Clearly, justification exists for government intervention in circumstances of market or provider failure in the marketplace. Intervention in an occupational services market, which may take the form of conduct or entry restrictions, must necessarily be subject to close scrutiny to ensure that any anti-competitive effects of this regulation can be justified as being in the best interests of the public.

## **PART 4 : ANALYSIS - THRESHOLD TEST**

### **4.1 IS THERE A NEED FOR ONGOING REGULATION?**

As a threshold question, consideration must be given to whether there is an ongoing need for regulation of this market as a whole. To answer this question it is necessary to consider both the objectives of the legislation to identify the market or provider failure that the Act seeks to address and the contemporary market to identify possible areas of provider or market failure.

### **4.2 HISTORY OF REGULATION IN SOUTH AUSTRALIA**

In 1954 an Act was introduced to restrict builders accepting deposits from prospective building owners before the commencement of building work.<sup>15</sup> The intention was to limit potential abuse by builders requiring abnormally high deposits without carrying out any building work, and to provide indirect protection for consumers in relation to the bankruptcy of builders. Under the Act, any deposits paid to building contractors pursuant to a building contract which did not contain a commencement date was required to be paid into joint accounts which could only be operated by both the building owner and the contractor for the payment of work.

The licensing of builders in South Australia commenced with the *Builders Licensing Act 1967*. The rationale for its introduction was the existence of unskilled, undercapitalised and unsuitable persons operating within the building industry, and the prevalence of undesirable trading practices (with consequent effects upon unsuspecting consumers).<sup>16</sup> It was noted that the intention of the legislation was to maintain building standards within the industry by restricting entry to only those persons considered able to undertake building work in a proper and workmanlike manner.

The Act was amended in 1980 to introduce a new licensing requirement that applicants satisfy the Builders Licensing Board that they have sufficient financial resources to operate under the licence, and provided the Board with the power to order remedial work where the original work was performed by an unlicensed builder and was defective.

In 1986, the then Minister for Consumer Affairs, the Honourable C.J. Sumner, introduced new legislation, the *Builders Licensing Act 1986*, to replace the *Builders Licensing Act 1967*. The new Act contained the following initiatives:-

- it abolished the Builders Licensing Board;
- it put in place a stricter licensing regime, including closer supervision of financial resources of licensees and their standards of supervision of building work;
- it provided for a “cooling-off” period for significant domestic building work contracts;

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<sup>15</sup> *Building Contracts (Deposits) Act 1953-54* (South Australia)

<sup>16</sup> Second Reading Speech, Hon. A.J. Shard, 12 October 1967



- it sought to protect consumers from certain contractual abuses; and
- it constituted the Commercial Tribunal as the licensing authority for the building industry.

Upon forming government in 1994, the Minister for Consumer Affairs, the Honourable K.T. Griffin, appointed a Legislative Review Team to review all consumer affairs legislation in South Australia.

As a result of work undertaken by the Legislative Review Team, the government introduced the *Building Work Contractors Bill 1995*. The intention of the Bill was to repeal the *Builders Licensing Act 1986*, update the legislation to improve standards of practice within the industry, and to provide appropriate systems for the involvement of industry in a co-regulatory system. Key features included:-

- changing the licensing/registration authority from the Commercial Tribunal to the Commissioner for Consumer Affairs, moving the judicial authority for disciplinary matters from the Commercial Tribunal to the District Court and dispute resolution from the Commercial Tribunal to the Magistrates Court;
- the introduction of a competency-based system for licensing and registration;
- the formation of an industry advisory panel;
- strengthening of prohibitions on directors of insolvent companies from operating in the building industry; and
- greater recognition and accommodation of partnerships.

The Act received assent on 7 December 1995.

### **4.3 OBJECTIVES OF THE CURRENT ACT**

The long title of the Act states only that it is an Act to regulate building work contractors and the supervision of building work.<sup>17</sup>

In the Issues Paper, the Review Panel submitted that the Act has two broad objectives:-

- to ensure that the community will not suffer from unskilled or incompetent building work; and
- to provide a level of consumer protection through occupational regulation.

Both Planning SA and the Department for Administrative and Information Services ("DAIS") agreed with these suggested objectives.

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<sup>17</sup> Preamble, *Building Work Contractors Act 1995*

In the Draft Report the Review Panel identified that a better enunciation of these objectives had been formulated in New South Wales and adopted those objectives.<sup>18</sup> These objectives are that:-

- regulation should minimise the potential for consumer loss through poor quality work, unscrupulous conduct or builder insolvency; and
- regulation should ensure that the health and safety of the community is not put at risk.

None of the submissions received in response to the Draft Report opposed this statement of objectives. The Review Panel has therefore concluded that these objectives are appropriate and applicable to the South Australian regulatory scheme.

## **CONCLUSION 2**

**The conclusion of the Review Panel is that the Act has the following objectives:-**

- 1. to minimise the potential for consumer loss through unscrupulous conduct by the licensing of building work contractors;**
- 2. to minimise the potential for consumer loss through builder insolvency by the licensing of building work contractors;**
- 3. to minimise the potential for consumer loss arising from poor quality work by the registering of building work supervisors; and**
- 4. to ensure that the health and safety of the community is not put at risk by ensuring proper and adequate supervision of building work by registered building work supervisors.**

## **4.4 THE ONGOING RELEVANCE OF THE OBJECTIVES**

The question must be asked whether these objectives continue to be relevant.

### **4.4.1 Preventing Consumer Loss**

In terms of the first three objectives, preventing consumer loss, an examination of available data is instructive. The complaint statistics for building and related work are shown in the following table.

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<sup>18</sup> Inquiry into the New South Wales Building Services Corporation (1992) (“the NSW Green Paper”) at p.10

CATEGORY	99/00	98/99	97/98	96/97	95/96	94/95
air conditioning, heating installation	29	31	21	7	0	0
carpentry, joinery	34	14	14	12	12	14
concrete work, foundations, brickwork, paving	83	19	44	35	37	70
fences, walls and gates	32	31	14	14	21	24
garages, carports, sheds and water tanks	41	33	41	63	41	0
home construction, extensions, renovations	288	176	152	189	254	333
painting, decorating, plastering	20	11	27	15	45	36
roofing, insulation, roof treatments	54	42	47	45	33	62
swimming pools, spas, hot tubs	26	15	25	18	18	26
tiling	39	20	13	17	20	24
<b>TOTAL :</b>	<b>646</b>	<b>392.99</b>	<b>398.99</b>	<b>415.99</b>	<b>481.99</b>	<b>589.99</b>

These figures demonstrate that in the majority of categories there are still a significant number of complaints received by the Office of Consumer and Business Affairs.

Where complaints about unsatisfactory work are significant in number, there is a greater argument for government intervention. The resolution of this argument will depend, however, upon whether licensing or registration can cure the cause of the complaint.

The Review Panel notes that the level of complaints received by the Office of Consumer and Business Affairs is not necessarily indicative of poor quality building work in every case. Rather, complaint levels may simply reflect a gap between consumer expectations and the actual quality of the service delivered. Nonetheless, these complaint statistics do serve as a useful indicator of underlying problems.

With respect to consumer risk arising from builder insolvency, statistics from the Insolvency Trustee Service Australia ("ITSA") show that the level of insolvency among builders in South Australia is relatively low in the context of the number of licensed contractors.

Period	Business related proceedings	Non-business related proceedings	Total
1993/1994	16	18	34
1994/1995	14	11	25
1995/1996	19	13	32
1996/1997	17	28	45
1997/1998	20	34	54
1998/1999	11	19	30

Source: Bankruptcy Act 1966 - Annual Reports

It is interesting to note that while the total level of bankruptcies among builders displays a statistical upwards trend, this is largely due to growth in the number of personal bankruptcies; the level of business-related bankruptcies is relatively static. This is perhaps

to be expected given the recent strength in the building and construction market. However, the Review Panel notes that the level of business-related bankruptcies may increase in the current reporting year due to a reported downturn in new building approvals following the introduction of the Federal Goods and Services Tax on 1 July 2000.

The Office of Consumer and Business Affairs has recently taken disciplinary action against a number of insolvent building work contractors, with several more matters to be heard by the District Court in the coming months. In several of these cases the District Court has cancelled the licence of the building work contractor. The rationale behind protecting consumers from bankrupt contractors is discussed more fully in Part 6.4.3 of this Final Report.

While the level of bankruptcies may seem statistically insignificant, builder bankruptcies tend to involve significant sums of money. A single large builder bankruptcy may account for many hundreds of thousands of dollars - in some cases, millions, and will often affect many consumers.<sup>19</sup>

The NSW Green Paper noted that:-

*"... licensing endeavours to ensure that the contractor is a "safe bet" to deal with for the consumer; that the contractor is competent; that there is enough capital to reduce the risk of insolvency; that the individuals in control of the business are competent to manage it; and that the individuals in control of the business are fit and proper people thereby reducing the risk of improper practices."*<sup>20</sup>

In the Draft Report, the Review Panel came to the preliminary conclusion that the protection of the public from loss remained a relevant objective of the Act. The Review Panel received no submissions indicating any dissent with that preliminary conclusion.

### **CONCLUSION 3**

**The conclusion of the Review Panel is that the protection of the public from loss remains a relevant objective.**

#### **4.4.2 Public Health and Safety**

In terms of the fourth identified objective of the Act, the protection of public health and safety, there will clearly be a risk posed to the wider community in the case of building work being performed in a substandard fashion.

The Act does not limit itself to minor building works, but encompasses all forms of building work, from houses to major building construction work. Structural failure in any form of building work may have disastrous consequences. Building collapses due to earthquakes in

<sup>19</sup> eg *Commissioner for Consumer Affairs v. Kirkwood*, Matter No 07/90/07, Commercial Tribunal, 30 April 1991

<sup>20</sup> NSW Green Paper, p.20

Turkey during 1999 resulted in a huge death toll and provide a stark reminder of the potential effects of substandard building work on public health and safety.

In its response to the Issues Paper, Planning SA submitted:-

*“The risk of substandard building work and the risk to public health and safety are linked, and this is the rationale for regulation of building work through development control.”<sup>21</sup>*

While it is difficult to predict levels of substandard work, and therefore the possible extent of risk posed to public health and safety, which may occur in the absence of any legislation, the Review Panel is nonetheless of the opinion that substandard work risks remain of significant concern in this market.

#### **CONCLUSION 4**

**The conclusion of the Review Panel is that the protection of the public from potential health and safety risks remains a relevant objective.**

#### **4.5 CURRENT OPERATION OF THE ACT**

The Act deals with five main areas:-

- The licensing of building work contractors;
- The registration of building work supervisors;
- Disciplinary matters;
- Provisions with respect to domestic building work; and
- Miscellaneous matters.

##### **4.5.1 Licence and Registration Types**

The Act prevents a person from carrying on business or otherwise acting as a building work contractor<sup>22</sup> or building work supervisor<sup>23</sup> unless authorised by licence or registration respectively. A person is also prevented from advertising him or herself as being entitled to carry on business or to otherwise act as a contractor or supervisor unless authorised by licence or registration. The Act prescribes certain requirements to obtain a licence.

The Act provides for the following types of contractor licence:-

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<sup>21</sup> Planning SA Submission (B5) 14 April 1999

<sup>22</sup> Section 6(1)

<sup>23</sup> Section 12

- a building work contractors licence, authorising a person to carry on business as a building work contractor; and
- a building work contractors licence with conditions, authorising a person to carry on business as a building work contractor, subject to conditions limiting the work that may be performed under the authority of the licence.

The Act provides for the following types of supervisor registrations:-

- a building work supervisors registration, authorising a person to supervise building work of any kind; and
- a building work supervisors registration with conditions, authorising a person to supervise building work, subject to conditions limiting the work that may be supervised under the authority of the registration.

These conditions may be of the following kinds:-

<i>restricted work condition</i>	a condition limiting the work that may be performed under the authority of the licence
<i>partnership condition</i>	a condition preventing the holder from carrying on business as a contractor except in partnership with a person specified in the licence or some other person approved by the Commissioner
<i>partnership (business only) condition</i>	a condition preventing the holder of the licence from personally performing functions as a contractor

#### 4.5.2 Entitlement to be Licensed - Natural Person

On application, a natural person is entitled to be granted a licence if they have the requisite qualifications and experience,<sup>24</sup> they are not suspended or disqualified from practising or carrying on an occupation, trade or business (under a law of South Australia, the Commonwealth, or another State or Territory<sup>25</sup>), and the person is a fit and proper person to be the holder of the licence.<sup>26</sup>

A person must not be an undischarged bankrupt or be subject to composition or deed or scheme of arrangement with or for the benefit of creditors for a period up to 10 years preceding the application for the licence.<sup>27</sup> Further, a person must not have been (for a period of 10 years prior to the application for the licence), a director of a body corporate wound up for the benefit of creditors (when the body was wound up, or within 12 months preceding the commencement of the winding up),<sup>28</sup> and they must have sufficient business

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<sup>24</sup> Section 9(1)(a)

<sup>25</sup> Section 9(1)(b)

<sup>26</sup> Section 9(1)(f)

<sup>27</sup> Section 9(1)(c)

<sup>28</sup> Section 9(1)(d)

knowledge and experience and financial resources for the purpose of carrying on business under the licence.<sup>29</sup>

#### **4.5.3 Entitlement to be Licensed - Body Corporate**

A body corporate is entitled to be granted a licence if the body corporate is not suspended or disqualified from practising or carrying on an occupation, trade or business (under a law of South Australia, the Commonwealth, or another State or Territory),<sup>30</sup> or is not being wound up and is not under official management or in receivership.<sup>31</sup>

No director of the body corporate can be suspended or disqualified from practising or carrying on an occupation, trade or business (under a law of South Australia, the Commonwealth, or another State or Territory),<sup>32</sup> be an undischarged bankrupt or be subject to composition or deed or scheme of arrangement with or for the benefit of creditors for a period up to 10 years preceding the application for the licence or be a director of a body corporate wound up for the benefit of creditors (when the body corporate was wound up,<sup>33</sup> or within 12 months preceding the commencement of the winding up). Each director must be a fit and proper person to be a director of a body corporate that is the holder of the licence.<sup>34</sup>

The directors collectively must possess sufficient business knowledge and experience for the purpose of properly directing the business carried on under the licence, and the body corporate must have sufficient financial resources for the purpose of carrying on business under the licence.<sup>35</sup>

Where a body corporate is granted a licence, it must ensure that the business is properly managed and supervised by a natural person who holds a licence authorising that person to perform those functions personally, without supervision.

#### **4.5.4 Entitlement to Registration**

It is not possible for a body corporate to personally supervise building work. Therefore, only natural persons are entitled to registration as building work supervisors.

A natural person is entitled to be registered as a building work supervisor if they have the qualifications and experience required by regulation, or considered appropriate by the Commissioner for Consumer Affairs.<sup>36</sup>

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<sup>29</sup> Section 9(1)(e)

<sup>30</sup> Section 9(2)(a)(i)

<sup>31</sup> Section 9(2)(a)(ii)

<sup>32</sup> Section 9(2)(b)(i)

<sup>33</sup> Section 9(2)(b)(ii)

<sup>34</sup> Section 9(2)(b)(e)

<sup>35</sup> Section 9(2)(c)(d)

<sup>36</sup> Section 16

#### **4.5.5 Negative Licensing of Building Consultants**

Part 4 of the Act, which deals with the disciplinary process, introduces the concept of a “building consultant” to the building work services market. A building consultant is defined as a person who carries on the business of providing advice or furnishing reports in respect of domestic building work.<sup>37</sup> It is noted that registered architects are excluded from this definition.

There are no formal licensing or registration requirements under the Act for those who carry on business as a building consultant. They may however be removed from the industry on the order of the District Court following disciplinary action. Therefore, the scheme for regulation of building consultants is best described as a negative licensing regime.

#### **4.5.6 Disciplinary Provisions**

In certain circumstances, disciplinary action may be taken in the District Court against building work contractors, building work supervisors and building consultants. The disciplinary power provides remedies over and above those available through other Acts or the common law and also provides a mechanism whereby those who are seen as posing a risk to consumers may be removed or excluded from the industry.

Disciplinary action is commenced by way of lodging a complaint with the District Court.<sup>38</sup> It is important to note that it is not only the Commissioner for Consumer Affairs who may lodge a complaint; the Act allows that any other person may lay a complaint.<sup>39</sup> On hearing a complaint, the District Court may, at the discretion of a Judge of the Court, sit with assessors, who are representatives from industry and consumer organisations.<sup>40</sup>

The grounds on which proper cause for disciplinary action may be made out are wide ranging,<sup>41</sup> as are the penalties available to the District Court in the event that proper cause is made out.<sup>42</sup>

#### **4.5.7 Requirements in Relation to Domestic Building Work**

Part 5 of the Act sets out a series of requirements relating to building work contracts, statutory warranties, building indemnity insurance and rights to terminate certain contracts.

The Act stipulates that a domestic building work contract must have certain characteristics, including that it must be legible and in writing, it must set out all contractual terms, it must set out the names of the parties and that they must sign the contract and also that the building owner must be given a copy of the signed contract as soon as reasonably

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<sup>37</sup> Section 20

<sup>38</sup> Section 22

<sup>39</sup> Section 22

<sup>40</sup> Section 24

<sup>41</sup> Section 21

<sup>42</sup> Section 25



practicable.<sup>43</sup> Further, domestic building work contracts must have a specific price stipulated for the performance of the building work<sup>44</sup> and the payment of that price may only be demanded under certain circumstances.<sup>45</sup>

Warranties relating to the performance of the building work, the material used, the time in which the building work will be completed, and the quality of the resultant building are implied into every domestic building work contract by the Act. These warranties run with the building rather than the contracting parties, so that a subsequent purchaser can take the benefit of them if required. The warranties implied under the Act only last for five years and any action upon them must be commenced within this time limit.<sup>46</sup>

If certain domestic building work is to be performed<sup>47</sup> then that work must not be performed unless there is a policy of insurance in place in relation to that work and, in the case of a domestic building work contract, the building owner has been provided with a certificate that the policy has been taken out.<sup>48</sup> The policy of insurance must comply with certain requirements as set out in section 35.

The Act also provided mechanisms whereby a building owner may terminate a domestic building work contract in certain situations. However, it is to be noted that these mechanisms do not apply in the case of minor domestic building work.<sup>49</sup>

A party to a domestic building work contract may apply to the Magistrates Court for relief, which may be granted in the event that a term or condition of the contract is harsh or unconscionable. Certain powers are given to the Magistrates Court in the event that such an application is made.<sup>50</sup>

#### **4.5.8      *Miscellaneous Provisions***

The Commissioner for Consumer Affairs may, with the approval of the Minister for Consumer Affairs, enter into agreements with a professional organisation under which the organisation may take a specified role in the administration or enforcement of the Act.<sup>51</sup>

Licensed building work contractors may only carry on business in the name in which they are licensed, or under a name registered by the contractor under the *Business Names Act 1996*,<sup>52</sup> and must not publish any advertisement relating to the business unless it specifies that name and the contractor's licence number.<sup>53</sup> Further, a licensed contractor must display a sign on the site of any building work performed specifying that name and licence number.<sup>54</sup>

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<sup>43</sup> Section 28

<sup>44</sup> Section 29

<sup>45</sup> Section 30

<sup>46</sup> Section 32

<sup>47</sup> For detail of the particular type of work concerned see section 33(2)

<sup>48</sup> Section 34

<sup>49</sup> Section 37

<sup>50</sup> Section 38

<sup>51</sup> Section 44

<sup>52</sup> Section 49

<sup>53</sup> Section 50

<sup>54</sup> Section 51

#### **4.6 COSTS OF REGULATION**

Regulatory intervention into an industry will inevitably give rise to some costs, which may occur in the government, industry or consumer sectors. The sources of cost which have been identified by the Review Panel are:-

- the actual and opportunity costs of complying with a regulatory regime;
- the actual and opportunity costs of administering a regulatory regime; and
- the costs arising from a reduction in competition and contestability in the relevant market.

If a scheme of regulation is aimed at ensuring a minimum level of supplier competency in a market, then it follows that prospective suppliers will be required to demonstrate that they have attained that level of competency. In most cases, this will mean that a person must undertake some form of training course, and bear the private cost of that training in the form of a “once off” cost, or alternatively a “once off” cost plus ongoing training costs.

However, it may also be the case that public money is spent in subsidising that training. In either event, public costs may arise either through the actual and opportunity costs of the money spent on training, or by a limitation on service supply. This limitation arises through potential suppliers becoming discouraged from entering the market due to the private costs of training.

The incidence of training related costs in relation to the building industry will depend in part on the particular form of regulation. History shows that regulation of the market in South Australia has consistently required pre-entry training, and this remains the case. It is possible to conclude that regulation of the market will impose costs, in terms of both the actual and opportunity costs of training.

Costs also arise through ongoing compliance with the regulatory scheme by service providers. In the absence of regulation, a service provider would be free to structure their business behaviour in the manner most efficient for their business requirements. A regulatory system imposes a framework within which a service provider must operate, and will not necessarily allow the service provider to achieve maximum efficiency. This loss of efficiency is considered a source of cost to the wider community.

Further, there may be actual compliance costs imposed on the service provider, for example, a requirement to have all accounts audited by a registered company auditor. In such cases the service provider will incur costs in obtaining audit services. Whilst these costs may not be great in the individual case, when one considers the numbers of contractors licensed in this State, the dollar value becomes more significant. It must also be remembered that these costs will ultimately be borne by the wider community through the pricing structures of contractors.

Regulation of markets can also impose costs on government, and again the wider community, through administration and compliance requirements. These are not only the immediate costs of funding, but also the opportunity costs of that funding. Again, the nature of the particular regulatory scheme will direct the extent of costs incurred.

In the case of the Act under consideration, the Review Panel has identified several sources of administrative cost. The Commissioner for Consumer Affairs is the licensing authority for the purposes of the Act. This requires that it employ staff to :-

- process, assess and grant licence applications;
- process and assess annual returns;
- advise current and prospective licensees on matters relating to the Act;
- undertake compliance work;
- undertake disciplinary actions and/or prosecutions;
- educate the public about the operation of the Act.

Obviously, these administrative costs will be significant given the numbers of contractors and supervisors presently licensed/registered. It may be argued that the costs of administration are met by the licence fees collected, and therefore, since it is the licensees who pay the fees, the costs incurred in administering the system are ultimately private rather than public costs. However, this does not take account of the fact that these costs will again be transferred to the public through licensees' cost structures. In this sense it may be appreciated that once again the wider community bears the costs of administration and compliance work.

The theory of contestability would suggest that the mere threat of entry by new competitors into the market has the potential to act as a spur to incumbents to improve efficiency. Regulation of the market that restricts entry to new competitors is a key contributor to a reduction in the level of contestability in that market. With little threat of new competition, those presently in the market have a greater incentive to maintain the status quo than to explore new or different service delivery options. On this basis, regulation may lead to a market which does not operate in a fully contestable manner, and therefore costs, both tangible and intangible, will be imposed on the wider community.

In addition to decreased contestability, regulation may lead to an actual reduction in competition within the present market. Given that the market has been regulated in some form for a considerable time, it is not possible to accurately assess the effect of regulation on competition and therefore on prices. However, it is possible to conclude that regulation which determines not only those who may enter the market, but also the manner in which service may be delivered, will have a prima facie anti-competitive effect. It is argued that as competition is the force which drives down prices, when levels of competition are reduced there will be a resultant increase in the costs of acquiring the relevant services.

Reduced levels of competition and contestability may also give rise to a situation of technological lethargy, where suppliers have lowered or no incentive to develop or implement new and potentially more efficient methods of service delivery. There will be costs imposed on the community as a whole through foregone efficiency gains in such circumstances. If a supplier is limited to supplying only a particular type of service then there is no incentive for that supplier to explore other avenues of service delivery. Whilst there may be other methods of service delivery which would result in a more efficient use of

resources, both by the consumer and supplier, these will not be pursued in the regulated environment. Again, this may be considered to impose both actual and opportunity costs on the wider community.

The Review Panel therefore concludes that regulation in an industry may result in increased costs to the community as a whole through :-

- the imposition of training requirements;
- the requirements of administration and enforcement of the regulation;
- decreasing the level of contestability in the market;
- decreasing the level of overall competitiveness in the market; and
- allowing the potential for technological lethargy to arise.

Having identified that regulation of the market potentially imposes costs on the wider community, it is necessary to analyse the potential for market and provider failure in the building work market to see what benefits may arise through regulation.

#### **4.7 MARKET FAILURE**

As discussed, market failure may occur due to the existence of:-

- transaction costs;
- information asymmetry; or
- externalities.

If regulation is able to overcome any or all of these causes of market failure, then this may be seen as providing benefits which may be weighed against the costs of regulation.

##### **4.7.1 Transaction Costs**

Transaction costs are costs incurred in doing business with a service provider, including the costs of:-

- locating a service provider;
- reaching agreement on the price and other aspects of the exchange; and
- ensuring that the terms of the agreement are fulfilled, including resort to legal advice and court action.

Market failure may occur where consumers experience significant search costs in a market with which they are unfamiliar, and therefore either abandon the search or make a less than optimal decision. Most consumers will only participate in the building work market on a

limited number of occasions during their lives. Therefore, unlike the market for household staples, most consumers will have very little familiarity with the market and face significant transaction costs.

Markets generally make available less information than would be desirable in a perfectly competitive market. In any event, consumers will only search out and utilise information so long as the costs of their search are lower than the savings that they expect to make. In the absence of licensing, the information available to consumers will be limited and it is hard for a consumer to make a fair estimate of the levels of savings they will make by undertaking research into various service providers. It may be the case that it is not possible for a consumer to come to any conclusion as to an appropriate service provider no matter how much research, and thus expense, occurs.

Once a consumer has located a service provider, they must then determine whether that provider offers an appropriate price/quality mix for their purposes. Each consumer will have some notion of the quality of the service they desire and a view of how much they are prepared to pay for that level of service. While it is expected that a consumer will seek the highest quality service for the lowest price, it is true that consumers are usually prepared to trade off price and quality - to a point.

Licensing seeks to provide basic information about suppliers in the building work market. The fact that a person has satisfied required standards is an indication to the consumer (although not a guarantee) of the competence of the service that will be provided. This can decrease the cost to consumers of individually measuring the competence of service providers. Economies of scale would dictate that the Government is in a better position than an individual consumer to undertake such an assessment on consumers' behalf.

Regulation of the building services market therefore provides a public benefit in so far as it reduces the potential incidence of transaction costs to consumers.

#### 4.7.2 Information Asymmetry

Information asymmetry occurs when there is a disparity between information at the disposal of the consumer on the one hand, and the service provider on the other. Consumers may be at a disadvantage in:-

- assessing the need for service or the type and quality of service required;
- distinguishing the competent service provider from the incompetent; and
- assessing the quality of the services rendered and whether they are excessive or inadequate for their needs.

This is particularly relevant in relation to services because generally these factors can only be assessed after the service has been provided, by which time it may be too late.

Regulatory intervention can provide consumers with additional confidence in the service provider, instead of exposing them to the risk of inappropriate service selection and the possibility of exploitation by the provider.

Most consumers at some point in their lives use building work contractors and supervisors, but generally on an infrequent basis. Consumers will most commonly enter into transactions with contractors and supervisors in relation either to the construction of the home, or other work connected with it. These transactions will usually be significant and relatively expensive for the consumer.

However, consumers in general suffer from significant levels of information asymmetry in relation to the building work market. They are usually not in a position to assess for themselves the quality or appropriateness of the service provided and the level of competence of the service provider prior to the provision of the service. In most cases consumers are unable to make such an assessment until after the service has been provided, when it is often too late. Thus they are at a significant disadvantage in terms of the information possessed in comparison with the building work contractor.

Requiring all contractors and supervisors to be licensed or registered, and to comply with all accompanying requirements, is one way of addressing this information asymmetry. Consumers can be assured that the person providing the service to them is competent to do so, without having to undertake extensive searches to discover the relevant information. This reduces the need for the consumer to obtain further independent assurance that the contractor or supervisor is competent; the Government has performed that task for the consumer. The requirement for licensing or registration also reduces the likelihood of unqualified persons entering the market and providing an inferior service at equivalent cost, which would lead to a misallocation of scarce community resources.

#### 4.7.3 Externalities

Externalities are costs or benefits to parties not directly involved in the transaction - they are sometimes referred to as 'spillovers'. Externalities can be of positive or negative effect. In some occupations, the risk of negative externalities is so significant for the community that a high degree of assurance of competence upon entry is required. Subsequent remedial action is often too late and ill directed.

The Review Panel considers that there is the potential for significant public health and safety risks to arise from substandard building work. It must be recognised that it is not only the immediate consumer of the building work who may suffer in these cases, as the safety decisions taken by the consumer or builder can have serious effects on those not party to the sale transaction. By way of example, a building or structure which has been subject of poor quality or substandard building work presents a significant risk to a subsequent purchaser as well as to any person who might happen to be in or near the building in the event of structural failure. The Review Panel notes that in these cases, it is often the "innocent bystander" who bears the brunt of that failure.

The Review Panel has therefore concluded that there is the potential for negative externalities in relation to the market for building work services, and that regulation provides significant public benefit through addressing this issue.

#### **4.8 PROVIDER FAILURE**

As discussed earlier, a set of potential risks to consumers have been identified which are not generally referable to market failure, but rather to the failure of a provider to honour obligations. Occupational regulation schemes can provide protection to the public against the risk:-

- of financial loss;
- of substandard work being performed;
- to health and safety; and
- of criminal activity.

##### **4.8.1 Financial Risk**

The financial risks thought worthy of protecting against may be conveniently described as personal risk and business risk.

###### ***4.8.1.1 Personal Risk***

Personal risks are risks attaching to the individuals behind the supplier. Regulating to reduce the risk of dishonesty is normally reflected in the requirement that an applicant be a fit and proper person to hold a licence. This requirement is commonly tested by reference to the applicant's criminal record regarding offences of fraud or dishonesty. This provides a filter to exclude from the occupation those who have a known predisposition to fraud or dishonesty. A conviction for fraud or dishonesty will also usually be grounds for disciplinary action under the licensing scheme, allowing for the formal and public exclusion of the offender from the occupation.

Protection against this risk is also facilitated by imposing controls (such as trust accounting requirements) on licensees which are directed to securing financial probity in those occupations in which large amounts of money are handled by a licensee on behalf of a third party.

In the building services market it is often the case that contracts entered into are for significant sums of money, for example, the construction of a house. The Review Panel considers that the risk of an individual contractor behaving dishonestly in relation to this money needs to be minimised to the greatest extent possible and that regulation is required to provide the necessary protection.

###### ***4.8.1.2 Business risk***

Business risk is related to the financial stability of the business. It is common for occupational regulation schemes to create some sort of financial threshold for an intending licensee to minimise the possibility of them becoming insolvent while liable to the consumer.

This threshold is commonly expressed in the requirement that an applicant have sufficient financial resources to enable the successful carrying on of the occupation authorised by the licence. It is often supported by constraints on persons who are bankrupts, or directors of companies recently wound up, from being licensed.

This risk has particular relevance in the building work market. The nature of the market is such that consumers will often have a large amount of money invested in a building work contract. If the business fails through insolvency the consumer will ordinarily rank only as an unsecured creditor, and to that extent could potentially face significant loss. Compounding this problem is the fact that the consumer will also face having to engage and pay another contractor to complete the particular building work.

#### **4.8.2 Substandard Work**

In many areas, standards of technical competency are mandated to reduce the risk of substandard work being systematically performed. This risk is reduced by the requirement that an applicant for a licence or registration must have completed a prescribed course of training or hold prescribed qualifications. Consumers are thus given confidence that services provided by practitioners will conform to a basic level of skill.

Adherents of market theory object that this sort of requirement pre-empts the role of the market in setting the preferred levels of competence and service quality. However, standard-setting in a free market relies in part on the willingness of buyers to assert their legal rights regarding substandard work. The risks and expense which such action entails for the individual buyer in that market may well deter, at least for a significant time, the correction of systematic incompetence if the potential stake for the individual buyer is not significant enough.

#### **4.8.3 Public Health and Safety**

Where public health and safety are potentially at risk, there is a strong argument in favour of regulation. In the building related area of plumbing work, it has been noted:-

*“Public health is a third party consideration in the consumption of plumbing services. In a free market, consumers will take into account personal health and safety to the best of their ability. It is unlikely that the same or any consideration will be given to factors over and above personal health and safety, factors such as those affecting public health and safety.*

*The lack of consideration of public health factors would be more pronounced in any particular case if they increased costs significantly, and the effects were remote either in time or proximity. The effects of bad plumbing are usually not apparent immediately. General unsanitary conditions do not arrive overnight. There are more immediate third party effects that can impact on the person down the street, or the treatment works, or on the subsequent owner of the property.”<sup>55</sup>*

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<sup>55</sup> SA Engineering and Water Supply, Review of the Plumbing and Drainage Regulations (Green Paper), 1989, p. 11



These comments are equally applicable to building work, particularly as the effect of poor building work may be remote in time from the performance of the work, and may affect subsequent owners who only receive the protection of statutory warranties for a period of five years from the date of completion of the building work.

#### 4.8.4 Criminal Activity

The risk of criminal activity is often perceived to be greater in occupations which deal with consumers in their own homes or workplaces, or in circumstances of trust and reliance. The Review Panel has received no submissions indicating that a risk of criminal activity is either a real or perceived risk in the building services market.

#### 4.9 CONCLUSION - CONTINUING REGULATION

In its response to the Issues Paper, the Consumers Association of South Australia ("CASA") submitted that licensing of occupations is justified if necessary to protect consumers against the risk of loss due to transaction costs, information asymmetry, provider failure and public health and safety. On these grounds, CASA submitted that the cost of licensing builders is justified.

The Review Panel stated in the Draft Report that justification is made out for continuing regulation of the building market as the potential benefits to the wider community through the addressing of market and provider failure outweigh the identified costs of regulation.

No submissions were received which displayed any opposition to this position. Therefore, in the absence of any new evidence which would tend to indicate that the reasoning of the Review Panel is not supportable, the Review Panel maintains that there is ongoing justification for regulation of this market in some form.

#### CONCLUSION 5

**The conclusion of the Review Panel is that there is justification for continuing regulation of the building services market as the potential benefits to the wider community outweigh the costs.**

## **PART 5: ALTERNATIVES**

### **5.1 ALTERNATIVES TO THE CURRENT REGULATORY SCHEME**

Having established a need for regulation in these markets, Clause 5 of the Agreement requires that the Review Panel consider less regulatory alternatives to the current system of regulation.

### **5.2 RELIANCE UPON MARKET FORCES**

The government could remove the current legislation and simply rely on market forces to control conduct within the industry. This presupposes that the market will operate to remove incompetent or uncompetitive operators, and relies on consumers exercising their legal rights where operators fail to deliver to contracted standards.

In its response to the Issues Paper, Planning SA submitted that:-

*“The advocates of allowing the market to determine standards of competence and service quality, in this case acceptable standards of workmanship and building work, do not take into account the costs of the consumer of seeking legal remedy through the courts which in itself may not achieve the benefits of occupational regulation and development control.”*

The cost of exercising legal rights (considered to be transaction costs) is significant, particularly for consumers of domestic building work. Consumers could potentially be faced with the risk of significant financial loss, remembering that for the “mum and dad” consumer, building work will be one of the most significant transactions entered into during their lifetime. Placing consumers at this kind of risk is undesirable both from a social and from an economic perspective. The Review Panel notes that this alone may provide sufficient justification for continuing regulation.

As discussed previously, the potential risks to public health and safety may not be adequately addressed if market forces are relied upon solely. In the complete absence of regulation, it is probable that incompetent and possibly dishonest practitioners would enter the industry. In this regard the Review Panel considers it important to recognise that market forces only operate reactively, i.e. once damage has been caused.

Nonetheless, the Review Panel believes that there is room for market forces to play a greater role in addressing matters such as information asymmetry.

This is based on the assumption that licensing and registration exist in part to provide consumers with an indication that a person possesses a basic level of competence. It has been asserted that:-

*“Occupational regulation in the form of licensing is premised on an assessment that it is better at the outset to exclude from the market incompetent or dishonest practitioners rather than deal with the consequences of their actions later.”<sup>56</sup>*

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<sup>56</sup> Guidelines for the Review of Legislative Restrictions on Competition, Victorian Department of Premier and Cabinet, p.71

Licensing operates as a control over entry into a market, and in one sense is therefore only concerned with setting minimum standards of competence and conduct, below which the government will not allow a person to participate in the market.

Licensing is not, however, a guarantee of service quality;

*"This assumption was expressly refuted in the Dodd Inquiry. Dodd considered it self-evident that when the focus of the Inquiry was the level of complaint and claims upon insurance as a result of problems with licensed builders, the occupational licensing scheme had not provided any guarantee of quality."<sup>57</sup>*

This fact was also noted at the 5th National Conference of Builders Licensing and Registration Authorities in 1984, where it was stated that:-

*"there is no guarantee that the possession of a licence will necessarily ensure that all building work undertaken by a licensee will be to an acceptable standard."*

Further, licensing does not provide for recognition of specialist skill or expertise. Market forces may be able to deliver such guarantees, and also give recognition to those who have achieved a degree of skill and expertise beyond the basic level of competence measured by licensing.

The Review Panel is aware that industry-based accreditation systems are in existence, and that from time to time the Commissioner for Consumer Affairs is approached to give consideration to incorporating such systems within the licensing system. In light of the above discussion, such accreditation cannot occur either through or within the licensing system, but may operate independently of the licensing system.

As industry-based certification or accreditation systems gain greater recognition within the community they may, in the future, provide an alternative to the current system, or at least may provide a basis on which industry self- or co-regulation could be considered by the government.

#### **CONCLUSION 6**

**The conclusion of the Review Panel is that given the significant risks to the health and safety of the community from faulty building work, and the financial risks to consumers of building services, it is not appropriate at this time to rely solely on market forces to regulate the identified markets.**

### **5.3 RELIANCE UPON EXISTING LAWS OF GENERAL APPLICATION**

There is a range of laws that consumers of goods and services may call on during a dispute over the performance of work.

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<sup>57</sup> NSW Green Paper, at p.18

For example, providers of services may be liable to their customers for any damage caused by their negligence in circumstances where a duty of care to the customer exists and is breached, resulting in loss or damage that can be attributed to that breach.

There are also a number of laws dealing with the advertising of goods and services. At common law, misrepresentations regarding the price or quality of services may give a consumer legal rights to void the contract or, in certain circumstances, claim damages.

The Review Panel notes at the outset that although the consumer protection laws tend to operate reactively (i.e. they are only available to the consumer once substandard work has been performed), they still offer some protection to consumers. In addition, they have some deterrent effect, because contractors and supervisors know that they may face legal action.

### 5.3.1 Fair Trading Act 1987 (SA)

The *Fair Trading Act 1987* (SA) prohibits misleading and deceptive advertising and other conduct. The more general sections read as follows:-

#### **Misleading or deceptive conduct**

56. (1) A person shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

#### **Misleading conduct in relation to services**

64. A person shall not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any services.

Building work services are subject to these laws because the definition of “services” in section 46 of the *Fair Trading Act 1987* is very wide; it includes any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce, including rights benefits, privileges or facilities that are or are to be provided, granted or conferred under a contract for or in relation to the performance of work, including work of a professional nature. Therefore building work services may fit into the category of “services” for the purposes of the *Fair Trading Act*.

### 5.3.2 Trade Practices Act 1974 (Cth)

The *Trade Practices Act 1974* (Cth) implies standard terms, which cannot be excluded, into contracts for the purchase of goods and services. Those terms stipulate that services purchased will be rendered with due care and skill and fulfil their purpose. Failure to do so will be a breach of contract.

Section 74 of the *Trade Practices Act 1974* (Cth) reads:-

### Warranties in relation to the supply of services

74. (1) In every contract for the supply by a corporation in the course of a business of services to a consumer there is an implied warranty that the **services will be rendered with due care and skill** and that any materials supplied in connexion with those services will be reasonably fit for the purpose for which they are supplied.

(2) Where a corporation supplies services (other than services of a professional nature provided by a qualified architect or engineer) to a consumer in the course of a business and the consumer, expressly or by implication, makes known to the corporation any particular purpose for which the services are required or the result that he desires the services to achieve, there is an implied warranty that the services supplied under the contract for the supply of the services and any materials supplied in connexion with those services will be reasonably fit for that purpose or are of such a nature and quality that they might reasonably be expected to achieve that result, except where the circumstances show that the consumer does not rely, or that it is unreasonable for him to rely, on the corporation's skill or judgment.<sup>58</sup>

The section only implies these terms into contracts for the supply of services between a corporation and a consumer. It is significant that the professional services of architects are excluded from the ambit of subsection 2, as architects have deemed registration as building work supervisors under the Act. Building work supervisors (who are not architects) and building work contractors carrying on business as a sole trader or in partnership with another will not have these terms implied into their dealings with consumers.

A corporation may be liable if services are not rendered with due care and skill, or if the services do not fulfil their requested purpose. It is also the case that the conduct of the directors, servants or agents of the corporation acting within the scope of their actual or apparent authority may be taken into account to ascertain whether a breach of the implied term has been committed.<sup>59</sup>

Although section 68 of the *Trade Practices Act* prohibits the exclusion of these warranties from the contract, section 68A modifies this prohibition so that a corporation may limit its liability to the supplying of the services again or the payment of the cost of having the services supplied again, provided it is fair and reasonable to do so.

#### 5.3.3 Consumer Transactions Act 1972 (SA)

South Australian law has a similar set of terms that are implied into contracts for the performance of services under the *Consumer Transactions Act 1972*, and these are not limited to contracts involving corporations.<sup>60</sup> However, that Act only applies to a limited range of services, which are defined within the Act and regulations. Building work as defined by the

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<sup>58</sup> Emphasis added.

<sup>59</sup> *Trade Practices Act 1974* (Cth), section 84(2).

<sup>60</sup> *Consumer Transactions Act 1972* (SA), section 7(1), (2).

*Building Work Contractors Act 1995* is listed as a service pursuant to the regulations. Consumers of building work presently have access to the warranties set out in section 7 of the Act and therefore a remedy in contract in the event of a breach of those warranties.

However, not all building work contracts are covered by the Act. Section 7 specifically excludes a consumer contract providing for the carrying out of domestic building work within the meaning of the *Building Work Contractors Act 1995*. In a deregulated market, it would therefore be desirable to remove the exclusion for domestic building work contracts from the *Consumer Transactions Act 1972*.

#### 5.3.4 Occupational Health, Safety and Welfare Act 1986 (SA)

In addition, there are laws protecting persons from unsafe or unhealthy work practices by way of the *Occupational Health, Safety and Welfare Act 1986 (SA)*. In a recent case, a company was convicted of failing to ensure that plant that they installed was safe, in breach of section 24(2) of the Act.<sup>61</sup> Relevantly, section 22 imposes on an employer or self-employed person a duty to take reasonable care to avoid adversely affecting the health or safety of any other person through an act or omission at work (employees are under a similar duty per section 21). Again, these laws are reactive, but do have a deterrent effect against providers.

#### 5.3.5 Conclusion

Although South Australia undoubtedly has in place a strong scheme of consumer protection under the laws discussed above, there is nonetheless some difficulty in relying on either common law remedies or generalist consumer protection laws to the exclusion of other protection. While they can be effective in some instances, in others they may offer little protection to consumers. If, for example, the supplier is insolvent, or if the extent of loss suffered as a result of the conduct is large, then while the consumer may be able to establish a claim, recovering any form of compensation will be difficult if not impossible. Thus any victory will be a moral one only, and will still leave the consumer out of pocket. Further, the costs of pursuing such remedies may in any event deter some consumers from taking any action.

The Review Panel also notes that if the amount of litigation were to increase as a result of a lowering of standards in the industry, there would be significant public costs which would follow through the increased costs to the courts, longer hearing lists and the many other costs involved in litigation.

#### CONCLUSION 7

**The conclusion of the Review Panel is that reliance on existing general laws to alleviate the risks which exist (or potentially exist) in the building and construction industry is inappropriate. Rather, these general laws when combined with a licensing or registration system provide an effective framework for regulation of these markets.**

<sup>61</sup> Carter v Ad-Box (Australia) Pty Limited and Anor, Industrial Relations Court of South Australia (Judgement 97-24401), 18 December 1998.

#### **5.4 RELIANCE UPON INSURANCE MARKET**

The Housing Industry Association ("the HIA") supported a greater reliance on insurance as an alternative to a licensing system, noting that:-

*"the requirement to take out home owners warranty insurance has been far more effective in protecting consumers from loss than any system of licensing could ever have been. Products are available commercially in the areas of warranties, professional indemnity, public liability and contract works."*

Unlike some jurisdictions, the market for homeowners' warranty insurance in South Australia is relatively open. Insurers do not require government approval to operate. Currently, the onus is on building work contractors to ensure that they have in place, prior to commencing any domestic building work, a policy of insurance that complies with the requirements set down in section 35 of the Act.<sup>62</sup>

Consequently, there is no accurate picture of who is operating in this State, and no statistics are maintained by the Office of Consumer and Business Affairs to measure, for example, the number or size of claims made. In the absence of comment to the contrary, the Review Panel concludes that the current system functions effectively.

An issues paper released as part of the review of architects and builders legislation in Victoria noted that:-

*"Professional indemnity insurance is a risk management device which benefits both building practitioners and their clients. The clients of any professional person have expectations about the services they will receive and clients who consider they have suffered injury, loss or damage due to the negligence, recklessness or incompetence of a professional person, may take legal action in an attempt to obtain compensation."*

*The compulsory insurance requirements are to ensure that there are funds to meet successful claims by consumers in the event of deficiencies in the professional service they receive and to enable building practitioners, including architects, to defend themselves when such claims are made. Generally, the costs of the premiums are passed through to consumers as fees."<sup>63</sup>*

There are two concerns about a greater reliance on the insurance industry from a competition perspective. Firstly, as has recently been noted in New South Wales, reduced competition in the insurance market can lead to greatly increased premiums for building work contractors.

A newspaper article noted that due to recent rationalisations in the New South Wales building insurance market, there were now only two providers of indemnity insurance products. As a consequence, there had been a considerable increase in premiums over the past 12 months. The possible effects on competition were noted:-

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<sup>62</sup> The indemnity insurance requirements are discussed more expansively in Part F of the Final Report.

<sup>63</sup> Victoria, Issues Paper - NCP Review of Architects and Building Legislation, Department of Infrastructure/Freehills Regulatory Group (November 1988), p.25

*"The Master Builders Association of NSW is concerned that substantially increased premiums and onerous financial conditions are both forcing builders out and preventing new builders from entering the industry."*<sup>64</sup>

Secondly, and perhaps as a consequence of the concern outlined in the preceding paragraph, difficulties in obtaining indemnity insurance can lead to reduced competition within the building market. Reduced competition will inevitably lead to increased costs for consumers.

#### **CONCLUSION 8**

**The conclusion of the Review Panel is that greater reliance upon the insurance market is not an appropriate alternative to the current system of regulation.**

### **5.5 INDUSTRY SELF-REGULATION**

There are a number of examples of professions or occupations which self-regulate, and which do so successfully. The accounting profession has never been subject to a licensing system, but has developed a system of internal regulation. The manner in which an accountant's work is performed is controlled by legislation, but the professional bodies decide who will be admitted to their membership.

A significant quantity of analysis of self- and co-regulatory systems has been undertaken recently.<sup>65</sup> In 1996, the Office of Consumer and Business Affairs released an Issues Paper entitled *"Industry Regulation - The Way Forward"*, which specified criteria that an industry would need to be able to demonstrate in order that co- or self-regulation would be considered:-

- the legal basis upon which the industry group operates;
- evidence that the industry as a whole is supportive of the proposed role (as opposed to industry association support);
- evidence that the industry group has sufficient coverage of the industry concerned;

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<sup>64</sup> Australian Financial Review, 6 July 1999

<sup>65</sup> South Australia, Office of Consumer and Business Affairs, *Industry Regulation: The way forward* (Adelaide 1996); Commonwealth of Australia, Department of Industry, Science and Tourism, *Codes of Conduct Policy Framework* (Canberra 1998) p9; Commonwealth of Australia, Trade Practices Commission, *Self-regulation in Australian industry and the professions* (Canberra 1988); Commonwealth Department of Industry, Science and Tourism, *Benchmarks for Industry-based Customer Dispute Resolution Schemes* (Canberra 1997); Commonwealth of Australia, Australian Competition and Consumer Commission, *Benchmarks for dispute avoidance and resolution - a guide* (AGPS, Canberra 1997); Commonwealth of Australia, *Fair Trading Codes of Conduct - why have them, how to prepare them* (AGPS, Canberra 1996); Commonwealth of Australia, Ombudsman's Office, *A Good Practice Guide for Effective Complaint Handling* (Canberra 1997); New Zealand, Ministry of Consumer Affairs, *Market Self-regulation and Codes of Practice* (Wellington 1997)



- evidence of public and consumer consultation in the development of the proposal;
- proposals for reporting to the Commissioner for Consumer Affairs, methods for identifying and reporting on individual industry members and systemic industry problems, and consultative mechanisms;
- evidence that the formal industry agreement and the delegated powers will be applied in a consistent and fair fashion and will not be applied to the detriment of a particular industry sector or non-member in an anti-competitive manner;
- proposals for independent evaluation of the undertaking of the delegated authorities;
- proper funding proposals; and
- evidence of capacity to handle delegations.<sup>66</sup>

The paper further noted:-

*“A mature industry is prepared to take responsibility, does not shield members who deserve censure, assists in the resolution of disputes, and has the motivation to keep industry standards at a high level. A mature industry views external participation not as a threat to “cosy” relationships but as a welcome part of adjudicatory procedures.”<sup>67</sup>*

The current Act provides that the Commissioner for Consumer Affairs (with the permission of the Minister for Consumer Affairs) can enter into agreements with professional organisations.<sup>68</sup> No such agreements have been entered into at this time.

There are a number of industry bodies within South Australia, but at this time none exhibit the necessary characteristics that would justify the Commissioner for Consumer Affairs entering into these types of agreement allowing for co- or self-regulation in this State. However, industry groups currently participate in the regulation of the industry through the Building Work Advisory Panel, established under the Act.

The Review Panel also notes the finding of the recent Draft Report of the Taskforce on Industry Self-Regulation that *“self-regulation is likely to be most effective where there are clearly defined problems but no high risk of serious or widespread harm to consumers”*.<sup>69</sup> While this finding is of a preliminary nature only at this stage, the Review Panel considers that it is applicable to the market in question. As previously discussed, this market has the potential for high levels of harm associated with the performance of work. It is not, therefore, a suitable market for the imposition of an industry self-regulatory scheme.

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<sup>66</sup>*Industry Regulation: The Way Forward*, Office of Consumer and Business Affairs (South Australia), 1996, p. 9

<sup>67</sup>*Industry Regulation: The Way Forward*, Office of Consumer and Business Affairs (South Australia), 1996, p. 9

<sup>68</sup> Section 32

<sup>69</sup> Draft Report of the Taskforce on Industry Self-Regulation, June 200, page 40, Department of Treasury, Commonwealth Government.

## CONCLUSION 9

**The conclusion of the Review Panel is that the option of greater co- or self-regulation by the industry bodies is not feasible at this time, although the option does exist within the current legislation for this to occur should the industry exhibit the level of maturity sought by Government to justify entering into appropriate agreements**

### 5.6 NEGATIVE LICENSING

“Negative licensing” is a system of market regulation in which legislation simply prescribes who may or may not operate within a specified market. There is usually no requirement to be registered with a government agency. As discussed earlier in this Draft Report, the Office of Consumer and Business Affairs administers negative licence schemes in relation to process servers (under the *Security and Investigation Agents Act 1995*), land valuers (under the *Land Valuers Act 1994*) and sales representatives (under the *Land Agents Act 1994*).

Negative licensing legislation may preclude persons who do not have specified competencies or who do have certain convictions. It will also usually provide for disciplinary action against persons operating within the market, and would typically allow for the public exclusion of a market participant as a disciplinary measure.

The experience of the Office of Consumer and Business Affairs is that negative licensing schemes impose a cost on government in terms of administering and enforcing the legislation, with no offsetting revenue from licensing. By way of comparison, a positive licensing scheme involving the payment of initial and periodic fees is a revenue neutral system. The fees collected simply offset the costs of administering the system. Negative licensing therefore imposes a cost on the wider community that must be funded from general revenues.

It is also of note that there is no “fit and proper” person test to preclude from the industry those considered an inappropriate risk to consumers. A positive licensing scheme is based ultimately on an assessment by the Government that a person is “fit and proper” to carry on the activities regulated under the Act. The absence of such a provision, particularly in a market identified as having high potential for incidence of provider failure and damage to public health and safety could have a negative cost impact on the community as a whole.

In light of the foregoing, the Review Panel does not consider at this stage that a negative licensing scheme is appropriate in this market. The risks inherent in this market, combined with the unfunded administrative costs of a negative licensing scheme, constitute costs which do not demonstrably exceed the benefits returned to the community. These benefits are ultimately synonymous with the benefits provided under a positive licensing scheme that has added advantages in terms of conduct regulation and administrative cost neutrality.

**CONCLUSION 10**

**The conclusion of the Review Panel is that negative licensing is not an appropriate alternative to the current system of regulation.**

**5.7 FURTHER ANALYSIS OF THE ACT**

The Hilmer Report noted there will often be significant opposition to regulatory review:-

*“beneficiaries of the restrictions usually have powerful incentives to resist reform, with those advocating change bearing the burden of establishing that existing restrictions are not justified”<sup>70</sup>*

and further,

*“regulation that confers benefits on particular groups soon builds a constituency with an interest in resisting change and avoiding rigorous and independent re-evaluation of whether the restriction remains justified in the public interest.”<sup>71</sup>*

As discussed, justification for government intervention into a market may be provided by the occurrence of market or provider failure. Having established that regulation of the relevant markets is necessary, and that there are no appropriate less regulatory alternatives, it is necessary for the Review Panel to examine the competitive restrictions in the current form of legislation and assess whether they can be justified in the public’s best interests.

Inappropriate regulation can reduce the competitiveness of a market in numerous ways. Both managerial and financial costs may be imposed which may in turn lead to the diversion of resources and time from more productive activities. Barriers to innovation, in terms of product and service delivery, may also result from inappropriate regulatory methods.

As discussed earlier in this Final Report, restrictions on competition imposed by occupational regulation fall within two broad groupings:-

- barriers to market entry; and
- restrictions on competitive conduct.

As will be seen in the following analysis, the Act in its current form contains both barriers to entry and restricts the conduct of service providers in the markets for construction and supervisory services. While the Review Panel has formed the conclusion that alternatives to the current overall scheme of regulation are not appropriate in this industry at this stage,

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<sup>70</sup> National Competition Policy - Report by the Independent Committee of Inquiry, August 1993 at page 189 (“the Hilmer Report”)

<sup>71</sup> Hilmer Report at page 191.

nonetheless it is necessary to examine each restriction on competition in the legislation to determine whether there are less restrictive alternatives for achieving the desired objectives.

## **PART 6: BARRIERS TO ENTRY**

### **6.1 INTRODUCTION**

Regulatory barriers to market entry have the most direct influence over competitive conditions within an industry, and may take the form of:-

- barriers creating a monopoly;
- restrictions that operate by reference to the number of producers or product;
- barriers operating against interstate goods or service providers;
- barriers operating against foreign goods or service providers; or
- restrictions that operate by reference to standards or qualifications.

It is this final barrier which is of most relevance to this Review.

The Hilmer Report noted that some “*regulatory regimes may be more restrictive than necessary to protect the public interest objectives for which they were imposed*”, and even if the imposed standards are objectively reasonable, “*there may be concerns over whether they are administered or enforced in a way that unduly favours incumbents.*”<sup>72</sup>

The theory of “contestability” suggests that the mere threat of potential competition can have efficiency effects similar to actual head-to-head competition. Removing or reducing entry barriers can therefore have a positive impact on performance, even if few or no competitors actually enter the market.

The imposition of point-of-entry controls for these purposes may preserve the status quo in the industry but, given a stable demand for the services, restriction on their supply may lead to price increases. Further, such regulation may affect the relative prices of labour and material inputs, thereby causing service providers to use inefficient mixes.

Another consequence of the imposition of point-of-entry controls may be ‘technological lethargy’ where suppliers have no incentive to innovate. Given that many innovations may result in cost reductions to consumers, regulation that inhibits innovation is imposing a hidden cost.

Similarly, point-of-entry controls such as competency standards should not impede the ability of the occupation to be responsive to change or the ability of training providers to respond to the needs of the industry as a whole.<sup>73</sup>

Point-of-entry regulation may also result in functional separation of an industry which restricts market competition and raises the cost of services. Again, this is particularly relevant to this Review. Functional separation may limit the functions that can be performed by other occupations and less-skilled workers. Without functional separation due to

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<sup>72</sup> Hilmer, at p.197

<sup>73</sup> National Training Board, *National Competency Standards: Policy and Guidelines* (Canberra 1991) pp 4-5.

regulatory intervention, market forces would determine the most efficient forms of organisation and specialisation. If there were no substantial economies to be made in specialisation, persuasive public interest reasons would need to be advanced for enforcing industry segmentation. This is relevant in the context of licences and registrations issued subject to conditions.

## **6.2 SCOPE OF WORK**

The prima facie barrier to entry presented by the current legislation is the reservation of a particular body of work to those who are of a specific class of persons, namely, those who satisfy the requirements for obtaining a contractor's licence or supervisor's registration. The Review Panel has assessed this requirement as a **serious restriction on competition**.

Clearly, the broader the scope of work reserved under the Act, the higher the barrier to entry to the market will be. In line with competition policy principles, the scope of work should encompass **only** those aspects of building work which incorporate an identifiable risk of market or provider failure. Even where such a risk can be established, it may be possible to identify a range of work within that definition for which regulation may be inappropriate.

The current scope of work encompassed by the legislation is set by the definition of the term "building work" for the purposes of the Act.

### **6.2.1 "Building Work"**

The Act defines "building work" to mean:<sup>74</sup>

- the whole or part of the work of constructing, erecting, underpinning, altering, repairing, improving, adding to or demolishing a building; or
- the whole or part of the work of excavating or filling a site for work referred to above; or
- work of a class prescribed by regulation.<sup>75</sup>

Prima facie, this definition appears straightforward, encompassing a readily identifiable and limited class of work. However, the use of the terms "improve" and "building", leads to a great expansion of the scope of work reserved.

#### **6.2.1.1 Improve**

The use of the word "improve" in the statutory definition of building work has given rise to difficulties in interpretation. These difficulties were noted by the Commercial Tribunal

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<sup>74</sup> Section 3

<sup>75</sup> The *Building Work Contractors Regulations 1996* allow that the activities of on-site construction, alteration, repair or improvement of a swimming pool or spa, paving and fencing (excluding post and wire fencing) fall within the meaning of building work

when hearing an application for a builders licence under the former legislation governing this area, the *Builders Licensing Act 1986*:-

*"The purpose of the Act is clearly to provide a proper measure of regulation of the building industry by establishing a licensing and registration system for builders, building tradesmen and supervisors, to impose certain substantive obligations on those in the building industry in relation to contracts and standards of workmanship, and to provide a means of resolving disputes between builders and their customers.*

*It is in the context of this purpose that we must examine the definition of 'building work'. Words such as 'constructing', 'erecting', 'adding to', and 'demolishing' are not difficult to interpret in the context of this purpose. However, the word "improving" is ambiguous because it may mean so many different things in different contexts."*<sup>76</sup>

The Tribunal went on to say:-

*"The primary meaning of the word 'improve' in the Concise Oxford Dictionary is 'make or become better'. In a sense, a person who arranges flowers within a building or hangs pictures on the walls is improving the building. However, this is clearly not intended to be encompassed within the definition of 'building work' within the context of the Act. When one examines the other words used in that definition, it appears that the intention is to refer to work which affects the building itself, i.e. the structure of the building, rather than non-structural work which simply improves the appearance of the building."*

The finding of the Tribunal was therefore that if the work in question merely gave rise to cosmetic improvements to the building, it would not be building work for the purposes of the Act.

The Tribunal further noted:-

*"Our interpretation that the word 'improving', in the definition of 'building work', requires some improvement to the structure of the building, may have implications for other classified trades. On one hand, our interpretation should clarify the position of certain people who would not regard themselves as performing building work even though they may be said to be, in a sense, improving a building (eg those who wash windows, hang curtains, sweep chimneys, install pot plants etc). On the other hand, our interpretation may raise some new doubts in relation to trades such as wall and floor tiling, painting and decorating, and pest control."*

Therefore, it may be appreciated that the use of the term improve opens the scope of work covered by the Act beyond that which may be traditionally considered to be building work. For instance, the Office of Consumer and Business Affairs presently requires those carrying on business as painters to be licensed under the Act, whereas this trade may not have traditionally been regarded as forming part of "building" work.

The lack of a clear definition of "improve" within the Act can be seen to add a measure of subjectivity to the scope of work covered by the Act. The Review Panel considers that this

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<sup>76</sup> *Carpet Call (SA) Pty Ltd and Mr B E Battersby* Application for a builder's licence and registration as a building work supervisor. Decision of the Commercial Tribunal in matters 43837-9 and 44541-3, published on 5 July 1989.

may have a negative effect on competition by reducing certainty in the marketplace in terms of when a licence will be required to perform certain work.

### 6.2.1.2 “Buildings” and “Structures”

The scope of work is further expanded by the statutory definition of a “building” to include a structure and part of a building or structure.<sup>77</sup> The term “structure” is not given statutory meaning in the Act but has been judicially considered in a number of cases.

In the matter of *Lee & Leow v. Osborn*, the Commercial Tribunal considered the meaning of the term “structure”.<sup>78</sup> In doing so, it considered a number of authorities which had previously determined that a reservoir,<sup>79</sup> a road<sup>80</sup> and a landscaped river garden<sup>81</sup> could be considered structures. In *Black’s case*, the court stated that, in its most general terms, a “structure” could be defined as “a construction of related parts”.<sup>82</sup>

The term has also been judicially considered on a number of other occasions:-

*“As used in its ordinary sense I suppose it means something which is constructed in the way of being built up as is a building; it is in the nature of a building. It seems to me it is not in the nature of a building, or a structure analogous to a building, unless it is something which you can say quite fairly has been built up. I do not think that is the only guide or the only test, but, roughly, I think that must be the main guide: how has it got there?”*<sup>83</sup>

*“A structure is something of substantial size which is built up from component parts and intended to remain permanently on a permanent foundation; but it is still a structure even though some of its parts may be movable, as, for instance, about a pivot...A thing which is not permanently in one place is not a structure, but it may be “in the nature of a structure” if it has a permanent site and has all the qualities of a structure, save that it is on occasion moved on or from its site.”*<sup>84</sup>

*“The word “structure” in its most natural and ordinary meaning is a building, but the word is capable of having the wider meaning of anything constructed out of material parts, and in that sense undoubtedly would include a machine and a caravan.”*<sup>85</sup>

The general tenor of these varying meanings of “structure” is a sense of building up something similar to, but not synonymous with, a building.

The effect of such a wide-ranging definition is that construction of things which might not at first glance appear to fall within the ambit of the Act may in fact be caught by its provisions.

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<sup>77</sup> Section 3

<sup>78</sup> (1992) 168 LSJS 241

<sup>79</sup> *Moran and Son Limited v. Marsland* [1909] 1 KB 774

<sup>80</sup> *Black v. Shaw and Official Assignee in Bankruptcy of Walter Shaw* (1913) 33 NZLR 194

<sup>81</sup> *Oxford Shire Council v. Millson*, reported in Stroud’s Judicial Dictionary

<sup>82</sup> *Black v. Shaw and Official Assignee in Bankruptcy of Walter Shaw*, op cit.

<sup>83</sup> *South Wales Aluminium Co Ltd v Neath Assessment Committee* [1943] 2 All ER 587 at 592, per Atkinson.

<sup>84</sup> *Cardiff Rating Authority v Guest, Keen Baldwin’s Iron and Steel Co Ltd* [1949] 1 KB 385 at 396, CA, per Denning LJ.

<sup>85</sup> *R v Rose* [1965] QWN 42 at 43 per Gibbs J.



The potential exists for a vast, and perhaps at times ridiculous, array of works being subject to regulation.

### 6.2.1.3 *Alternatives to limit the Scope of Work*

The difficulty facing the Review Panel in addressing competition concerns connected with the use of the terms “improve” and “structure” is that their removal from the definition would have a more significant effect on the scope of work covered than is warranted. If these terms were to be removed, it would be necessary to prescribe work which would thereafter not fall within the definition but which would pose such a risk to the public that its regulation would be justified under competition principles.

One method for achieving this result would be through prescription of work in the regulations, as is presently the case with paving. However, the conclusion of the Review Panel is that the implementation of this system would lead to a situation where there would be a large, and potentially unworkable, schedule of activities set out in the regulations.

However, section 62 of the Act currently allows, amongst other things, that the Governor may make regulations which exempt (conditionally or unconditionally) classes of persons or activities from the application of the Act or specified provisions of it.

If it is the case that the terms “improve” and “structure” pick up certain activities for which regulation cannot be justified under competition principles, then it would be possible for these activities to be exempted from the application of the Act by regulation.

While the Review Panel has reached this conclusion, in the absence of any evidence of the types of work that might be exempted by regulation, it does not consider it appropriate to make any recommendations with regard to specific types of work to be exempted. This therefore, will be a matter for industry bodies or the licensing authority to address in the appropriate circumstances.

#### **CONCLUSION 11**

**The conclusion of the Review Panel is that whilst the current definition of building work under the Act may be so broad as to include activities that cannot be justified under competition principles, nonetheless, as there are mechanisms in the Act that allow for any such work to be excluded, no amendment to the definition is required.**

### 6.2.2 *Categories of “Building Work”*

As well as the extended definition of building work in the Act, it must also be recognised that this area may be divided into four distinct fields of work:-

- domestic;
- commercial;

- industrial; and
- specified building work.

The division of building work into these streams also has impact upon the scope of work reserved by providing practical application of the extended definition of building work discussed above.

### 6.2.2.1 Domestic Building Work

“Domestic building work” is defined as:-

- the whole or part of the work of constructing, erecting, underpinning, altering, repairing, improving, adding to or demolishing a house; or
- the whole or part of the work of excavating or filling a site for work referred to above; or,
- work of a class prescribed by regulation.<sup>86</sup>

The regulations prescribe the construction, alteration, repair or improvement of a swimming pool or spa within the external walls of a house or within the curtilage of a house,<sup>87</sup> and any other building work carried out within the curtilage of a house or on the boundary of the curtilage of a house as domestic building work.<sup>88</sup>

For the purposes of the Act a “house” is a building intended for occupation as a place of residence, but does not include hotels, motels, youth hostels, residential camps, boarding or lodging houses, university halls of residence, boarding school dormitories, barracks, nurses homes, residential facilities for workers or for training purposes or other similar buildings.<sup>89</sup>

Therefore, the definition of “domestic building work” established through the Act and Regulations sets aside a particular body of work from the open market and establishes a restricted market for services in respect of that work. It is noted that the services included under the definition are, as the name would suggest, services which are consumed by the ordinary, or “mum and dad”, household.

When considering the appropriateness of the scope of work reserved, the question facing the Review Panel is whether there are areas of work within the definition which do not present a risk to consumers. If this is the case, then the definition as it stands may be too broad and, to that extent, an unjustified restriction on competition. The question to be addressed in

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<sup>86</sup> Section 3(1)

<sup>87</sup> The term “curtilage” was judicially considered by the Commercial Tribunal in *Lee & Leow v. Osborne* (1992) 168 LSJS 243, where Noblet J stated “It seems to me to be clear from the authorities that, in the context of the typical block of land upon which a house is built, the curtilage generally includes the whole of the block of land.”

<sup>88</sup> *Building Work Contractors Regulations 1996* regulation 5(2)

<sup>89</sup> Section 3(1) and regulation 5(3)

relation to domestic building work therefore is whether there exists, or there is potential for, market or provider failure.

An issue of primary importance in answering this question is the nature of the consumer of domestic building work. As discussed, these consumers will be the ordinary “mum and dad” type consumer. Arguably therefore, consumers of domestic building services face a greater risk of provider and/or market failure than consumers of other classes of building work services.

It is both the relative infrequency of entry to the market and the characteristics of consumers of domestic building work services which give rise to market failure in this sector of the market.

This is evidenced in several ways. As identified earlier, consumers of domestic building work services face a high level of information asymmetry. Further, they are also at a relatively greater disadvantage with respect to transaction costs, insofar as the average consumer of domestic building work will face relatively greater hurdles in enforcing their rights through the Courts than will a typical commercial or industrial consumer.

As transactions for building work services often involve a consumer’s home, there will be a significant investment, both financial and emotional, in the service provided when compared with consumers of other building work services.

Given this degree of disadvantage, the Review Panel considers that government intervention is warranted to obviate market and provider failure in respect of domestic consumers.

### 6.2.2.2 *Commercial/Industrial Building Work*

The Act does not define the terms “commercial” or “industrial” building work, however licenses issued by the Office of Consumer and Business Affairs do use these terms as a method of restricting the type of work which may be performed under the authority of the licence.<sup>90</sup>

It has been suggested by some commercial and industrial builders that the Act should only be concerned with domestic building work and should no longer continue to licence commercial or industrial building work.

It is apparent that a major focus of the Act is the protection of consumers of domestic building work. This is evidenced by the additional requirements in the legislation (eg written contracts, indemnity insurance) where domestic building work is involved.

In its response to the Issues Paper, the Consumers Association of South Australia (“CASA”) submitted that:-

*“if the objectives of the Act are agreed to be largely for the regulation of domestic building work, then the definition of “building” may well be too broad. The result appears to be that the Act regulates corporations and the way in which they contract with each other. These bodies and*

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<sup>90</sup> These terms are, however, set out under Part C of Schedule 2 of the regulations.

*their relations with each other are not a consumer issue so the regulation of them seems to be outside the Act's envisaged objectives."*

The Review Panel accepts, as a general proposition, that the majority of consumers in the commercial and industrial sectors are not the typical "consumer" that this type of legislation tries to protect. Information asymmetry is not a critical issue, as consumers in this sector will usually employ the necessary professionals to protect their interests, such as lawyers, engineers and architects. Further, they are more likely to be in a position to enforce their rights through court processes.

Nonetheless, there are difficulties with this analysis. There are numerous incentives for a small businessperson to incorporate their business activities, including tax advantages and the ability to limit legal liability. Consequently, many persons who traditionally may have carried on their business as a sole trader or within a partnership structure now operate their business as a body corporate. While they operate within this more sophisticated corporate structure, they are arguably in no better position than the average domestic consumer when it comes to protecting their interests.

As discussed above, the Review Panel notes that the current definition of building work may be so broad as to include structures such as refineries, communication towers, grandstands and manufacturing plants. There may be some justification for identifying types of commercial or industrial building work that should not be regulated in the same way as ordinary building work. There appears to be some sympathy for this view in a recent decision of the Queensland Court of Appeal.<sup>91</sup> In interpreting similar provisions, the Court noted:-

*"[T]hat a furnace for making steel, vast and fixed enough to be a structure, should be something which can be provided, in Queensland, only by a person licensed under building industry legislation is surely an odd enough outcome to make one doubt that the interpretation advanced is right. Particularly is that so if one keeps in mind that it is the furnace in all its parts which would, on the appellant's argument, be caught, however complex and remote from the skills of those in the building industry its design and construction might be."*

In the Draft Report, the Review Panel sought submissions from consumer and industry groups on the types of industrial and commercial work that could be excluded from the current definition of "building work".

The only submission received by the Review Panel addressing this issue was that of the Master Builders Association ("MBA"). The MBA submitted that the system of pre-qualification for government building and construction services implemented by the Department for Administrative and Information Services and the licensing system under the Act represents a duplication of regulation.

The MBA further submitted:-

*"It is the view of the Master Builders Association that the DAIS pre qualification system is far more rigorous assessment of a commercial contractors ability to undertake this type of work and therefore respectfully submits that commercial contractors who are performing industrial or*

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<sup>91</sup> *Stork Wescon Australia Pty Limited v. Morton Engineering Company Pty Limited* (1999) 15 BCL 278

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*commercial work should not be bound by the licensing provisions of the Building Work Contractors Act."*

While the Review Panel agrees that there may be an element of duplication in the requirements of the Act and the pre qualification system, it is important to note several matters.

It should not be assumed that every contractor wishing to carry on government building and construction projects will only perform work for the government. The mere fact that the builder is pre qualified does not preclude them from offering their services to the general public.

It is far more likely, in the Review Panel's opinion, that a contractor licensed under the Act to perform a certain type of work might seek to perform this type of work in relation to government projects when demand arose.

However, if there are builders in the market who only offer their services to the government, and never seek to perform work on any other basis than through DAIS, then the Review Panel would agree that duplication of regulation is unnecessary. In such circumstances it would be appropriate for builders to seek a Ministerial exemption under section 45 of the Act from the requirement to be licensed.

Nonetheless, it is the view of the Review Panel that commercial and industrial building work contractors should continue to be licensed under this Act. This work is subject to legislative control by the *Development Act 1993*. The Review Panel presumes that there was (and there remains) sufficient concern about externalities, public health and safety and the maintenance of building quality and standards that it was considered necessary to regulate commercial and industrial building work in this way.

The Review Panel is therefore of the view that all types of building work, whether domestic, commercial or industrial, should remain regulated under the Act.

### **6.2.2.3**            *Specified Building Work*

It appears to the Review Panel that a number of industry associations have misunderstood the nature of the restricted "specified building work" licence or registration, and have sought to use it to implement specialist licensing. This indicates a fundamental misunderstanding of the structure of the licensing and registration system.

The highest level of licence one can hold within the present system is an unconditional contractor licence or supervisor registration. A person holding either of these can contract for or supervise (as the case may be) any building work, as defined by the Act. This includes any work forming part of the restrictive category "specified building work".

Beneath this level, a licence or registration may be issued subject to a condition limiting the person to domestic, commercial or industrial building work. This allows the person to contract for or supervise any building work (as defined by the Act) within the domestic, commercial or industrial spheres, dependant upon the condition imposed. Again, this includes any work forming part of the restrictive category "specified building work".

At the lowest level, a licence or registration may be issued subject to a condition limiting the person to specified building work. This allows the person to contract for or supervise only the type of work indicated on their licence or registration. Far from being a specialist licence, it is the **most limited** form of licence or registration.

Thus any work identified under “specified building work” may be contracted for or supervised by a person holding a superior licence or registration.

The area of specified building work is perhaps the most complex area of building work to define for licensing and registration purposes. The original intention of the category was to create a number of licence streams based around the traditional trade areas.

Over time, the range of work falling within “specified building work” has grown dramatically. As discussed earlier, this has largely been due to the lack of a clear definition of “building work”.

The terms “building work” and “domestic building work” have been considered in a number of matters before various South Australian courts and tribunals.<sup>92</sup> The general principle appears to be that the meaning depends on the circumstances:-

*“Before leaving this matter we should place on record that anyone seeking to extract general principles from this decision should be very careful to ensure that the facts which they may be considering are on all fours with the facts in the application we have before us. We are not saying that a spa pool can never constitute building work. There may be other circumstances in which the nature of the installation and the end result are such that building work is involved. What we are saying is that in the circumstances of the present case we are not satisfied that the work involved building work and it is on that basis that the complaint is dismissed.”<sup>93</sup>*

The broad interpretation to the word “improve”, coupled with a philosophy of “tailor-making” a licence to suit the individual has largely been the reason behind the expansion of the definition of “building work”. As an instructive exercise, staff from the Office of Consumer and Business Affairs recently examined the range of licence conditions. After eliminating obviously similar work categories, the list of distinct conditions still numbered in excess of 800. By way of example, these categories included the following:-

- antenna installation;
- caulking;
- supply/installation of computer room floors;
- communication towers (erection and maintenance);
- cork tiling;
- cubby houses;

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<sup>92</sup> See for example, *Smith v. Trimachx, In re Carpet Call (SA) Pty Ltd, Commissioner for Consumer Affairs v. Osborn, Lee & Leow v. Osborn*

<sup>93</sup> *Commissioner for Consumer Affairs v. Pentateuch Nominees Pty Limited, Commercial Tribunal, Matter No 68/91/07, Delivered 3 March 1992*

- demountable partition fixer;
- fountains;
- garden edging;
- gates;
- landscaping;
- construction of letterboxes;
- painting (repainting and insurance work);
- repairs to taps and cisterns;
- security locks;
- spraying of concrete;
- erection of safety barriers.

The need to rationalise the number of occupational licences was recognised by the NSW Department of Fair Trading during its review of the licensing of the home building industry in NSW:-

*“Such a high number of categories makes administration extremely complex and also hinders provision of meaningful information to the consumer. The effectiveness of the current approach where every aspect of building work is broken down to such limited categories needs to be closely examined. Even the skills involved in building a door constitute a separate category.”<sup>94</sup>*

The Green Paper further noted:-

*“Rationalisation of the existing categories of work covered by occupational licensing would lead to a better targeting of the licensing system and reduce the administrative burden. This would require reviewing the existing definitions contained in the legislation to consolidate and exclude certain categories of work. It would also require clearly delineating the classes of work covered by licensing and the scope of such work.”*

The Review Panel considers that a similar approach should be adopted in this State.

The NSW paper considered the classes contained in the Queensland licensing model were appropriate, these being:-

- builder (all residential building work)

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<sup>94</sup> New South Wales, Review of Licensing of the NSW Home Building Industry, Department of Fair Trading, September 1996, p.18

- roof tiling
- metal fabricating
- plastering (drywall)
- stone masonry
- structural landscaping
- glazing
- insulating
- air conditioning and refrigeration
- bricklaying (includes blocklaying and paving)
- waterproofing
- plastering (solid)
- carpentry and joinery
- concreting
- painting (includes wall papering)
- electrical
- plumbing, draining and gas fitting
- wall and floor tiling
- swimming pool construction

Given the necessary differences in the coverage of this Act and its interstate equivalents, the above list may need to be reviewed. However, it is useful insofar as it highlights a number of broad categories which could be considered to streamline the number of categories of work for which a licence or registration is required. Advice should be sought from the industry to determine the appropriate broad categories. Once achieved, the streamlining could be done administratively at licence or registration renewal time.

The Review Panel is at pains to make clear that it is not advocating any increase in the level of competency or qualification required by contractors. All that is being said in this context is that licences issued should contain a statement of the broad trade category within which the particular licensee falls. Under this level of detail could then fall the current descriptors of the particular limitations imposed on the licence. The Review Panel is firmly of the opinion that this would reduce levels of information asymmetry for consumers of the relevant services.



### 6.2.3 Conclusions

#### CONCLUSION 12

The Review Panel concludes that the legislation should ensure that only those types of building work which can be demonstrated to pose a risk to public health and safety; or which pose a significant financial risk to consumers should be subject to licensing. In this way, the licensing system will operate in the least restrictive manner possible. Those types of work currently subject to licensing but which do not pose a demonstrated risk to consumers should not continue to be licensed.

Accordingly, the Review Panel recommends that:-

1. the Act continue to regulate domestic, commercial and industrial and specified building work;
2. the Commissioner for Consumer Affairs seek advice from industry groups and other interested parties to:-
  - 2.1. identify appropriate streams of work for specified building work with a view to reducing the current number of "specified building work" conditions through administrative means; and
  - 2.2. identify types of work which may appropriately be excluded from the definition of building work.

### 6.3 REQUIREMENT TO BE LICENSED

A building work contractor is defined in the Act as a person who carries on the business of:-

- performing building work for others; or
- performing building work with a view to the sale or letting of land or building improved as a result of that work.<sup>95</sup>

The Act also provides that a person, either natural or body corporate, must not carry on business as a building work contractor, or advertise or hold themselves out as being entitled to carry on business as a building work contractor, unless authorised by a licence issued under the Act.<sup>96</sup>

The scope of building work covered by the Act has been discussed by the Review Panel previously in Part 6.1. The breadth of the scope of work reserved, combined with the requirements to be licensed to perform such work, presents a barrier to entry into the

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<sup>95</sup> Section 3(1)

<sup>96</sup> Section 6(1)

market. Those who are not licensed under the Act are not entitled to contract for, or carry on the business of, building work within the ambit of the Act.

This requirement is categorised by the Review Panel as a **serious restriction on competition**.

Submissions received in response to the Issues Paper by the Review Panel with respect to the requirement to be licensed reflected a diversity of opinions. The Consumer's Association of South Australia submitted that, given the risk in the market of consumer loss through transaction costs, information asymmetry, provider failure and public health and safety issues:-

*"...the requirement to be licensed or registered under the Act is an appropriate restriction on competition..."*

On the other hand, the Housing Industry Association submitted that:-

*"The licensing of any trade activity is opposed other than where a proven public health and safety imperative exists. Consumer protection against financial loss when contracting with trade contractors is afforded through mandatory indemnity insurance for contracts over a threshold value."*

While the Review Panel has formed the conclusion that there are no presently appropriate alternatives to the current overall scheme of regulation for this industry, it is necessary to examine each restriction on competition in the legislation to determine whether there are less restrictive alternatives for achieving the desired objectives. The remainder of this Part will consider whether there are any such alternatives in relation to the requirement to be licensed.

## **6.4 ENTITLEMENT CRITERIA**

As discussed at Part 4.5, the Act sets out certain criteria which an applicant, either a natural person or a body corporate, must meet in order to be entitled to a licence.<sup>97</sup> The Review Panel has considered these entitlement criteria and its conclusion is that several of these present *prima facie* restrictions on competition. These are the requirements in relation to:-

- qualifications;
- business knowledge; and
- financial resources.

### **6.4.1 Qualifications**

It was noted in the Second Reading Speech that:-

*"The use of national competency standards as base requirement for both technical qualifications and business skills was strongly supported by industry. The licence/registration system... will*

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<sup>97</sup> Section 9

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*allow each competency standard relevant to the industry to be adopted as a standard licensing/registration endorsement as soon as it is finalised at a national level and accredited training and assessment is available.”<sup>98</sup>*

The Act requires a natural person applicant for a licence to have qualifications and experience either prescribed by the regulations or approved by the Commissioner for Consumer Affairs, having regard to the functions authorised by the licence.<sup>99</sup> In the case of an applicant which is a body corporate, the Act provides that the directors collectively must have sufficient business knowledge and experience for the purpose of properly conducting the business authorised by the licence.

This requirement is categorised by the Review Panel as a **serious restriction on competition**.

Although the requirements for natural persons and bodies corporate differ to some extent, ie. qualifications versus business knowledge, it is nonetheless convenient to deal with these two provisions as a single restrictive requirement.

In order for a natural person to be granted a contractor licence without conditions, an applicant must meet the qualification and experience criteria set out in Part A of Schedule 2 in the regulations.

The qualification and experience criteria a natural person must meet to be granted a contractor licence subject to conditions are not set out in the regulations. Rather, Part C of Schedule 2 provides that the Commissioner for Consumer Affairs may determine these requirements as a matter of administrative discretion.

In relation to bodies corporate, no specific criteria are set out in the Act or regulations as to what constitutes sufficient business knowledge and experience for the purposes of properly conducting a business authorised by a licence. Any assessment of sufficiency is again therefore a matter of administrative discretion on the part of the Commissioner for Consumer Affairs.

In practice, the Commissioner for Consumer Affairs assesses the qualifications, or business knowledge in the case of a body corporate, and experience components of an application for a restricted licence in light of Part A of Schedule 2. That is to say, an applicant is assessed against those criteria considered integral to the functions to be performed under the licence.

#### **6.4.1.1**            *Qualifications or Competencies?*

The Review Panel would make the preliminary point that it considers the legislation should no longer refer solely to “qualifications” and should also include reference to “competencies” where appropriate.

This reflects the fact that the licensing system is directed at ensuring the competency of industry participants and not at increasing the “professionalism” of the industry by requiring the completion of formal “qualifications”. It also reflects the fact that the vocational training system is moving towards a competency rather than qualification base.

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<sup>98</sup> Hansard, 25 October 1995, p. 344

<sup>99</sup> Section 9(1)(a)

Submissions to the Draft Report accepted that there is a move towards a competency based system occurring within the industry, but were concerned that there has not yet been sufficient development of this system to warrant replacement of “qualifications” by “competency”.

The MBA submitted that:-

*“It needs to be recognised that the whole of the training agenda in Australia is currently undergoing significant change and this is more particularly so in the Building and Construction Industry. The construction industry has currently national competency standards recognised for certificate 1,2 and 3. Certificate 3 level equates to a trade qualification. However, the industry is still developing competencies for AQF 4, 5 and 6 levels...”*

In light of these submissions, the Review Panel has concluded that rather than replacing references to “qualifications”, as suggested in the Draft Report, the legislation should refer to both “qualifications and competency” where appropriate.

#### **CONCLUSION 13**

**The conclusion of the Review Panel is that the Act should refer to “competencies” as well as “qualifications” where appropriate.**

#### **6.4.1.2 Objectives of the Requirement**

A consideration of the performance criteria set out in Part A of Schedule 2 of the regulations is instructive when considering the objectives of the qualification and experience requirements. These criteria are split into two distinct units, business management and building work management.

The business management component is concerned with the application of business management principles in relation to a business, the principle purpose of which is contracting for the performance of building work. It is of note that this component is not concerned with matters particular to the building work market. The focus is rather on matters such as preparation of a business plan, the preparation of income and expenditure projections, knowledge of legal structures of a business and other generalist legislative, administrative and legal requirements.

It is clear to the Review Panel that the objective of this component of the requirement is to ensure that those entering the market as suppliers of building work contractor services have sufficient general business competency to trade successfully. This is of benefit not only to the individual contractor, but also to consumers and to the public as a whole.

The building work management component is concerned with the application of building work principles to the operation of a contracting business. This component is particularly concerned with matters specific to the building work services market. It builds on the base provided by the business management component by identifying and addressing those

matters giving the market its particular flavour. Matters such as a demonstrated knowledge of law relevant to the building industry, including a knowledge of licensing and other statutory requirements, the preparation of tender documents, the determination of strategies, resources and operational requirements for construction and the application of contract management principles all fall within this component.

The objectives of this component are also clear. There is a recognition that general contracting and business management principles are not in isolation sufficient to guarantee that those carrying on business as a contractor will be suitably equipped to deal with problems particular to this market. By way of contrast, it is unlikely that a person with a high level of general business management skills would, on that basis alone, be able to successfully plan the sequence of trades required for the successful completion of a building contract. A failure in this regard has the potential to cause loss to consumers and could undermine the viability of a contractor's business.

The Review Panel notes that this system under which "industry specific" business knowledge is required alongside general business knowledge is not limited to this Act.

#### **6.4.1.3            *Benefits of the Requirement***

As discussed at Part 4.3.1, the conclusion of the Review Panel is that the objectives of the Act addressed by contractor licensing include the minimisation of consumer loss through unscrupulous conduct by building work contractors, and also the potential for consumer loss through builder insolvency by building work contractors.

The Review Panel's conclusion is that the qualification requirements under the Act do not go towards achieving the first objective of protecting against the unscrupulous conduct of building work contractors.

However, it is clear from the discussion above that the requirement does go toward reducing the potential for consumer loss through builder insolvency. This is achieved through the twin mechanisms of ensuring that contractors are competent in general business matters and are further competent in technical building matters in so far as they relate to the successful operation of the contractor's business.

Many building work contractor businesses, both those of natural persons and of bodies corporate, may be described as small businesses. It has been identified that 98% of businesses within the building construction industry employ less than 20 employees. Further, in 85% of businesses there are four or less employees.

Failure rates for small businesses such as these are commonly recognised as being very high, with closure rate estimates of 3-3.5% of existing small businesses per annum, or 47.4% of small businesses aged three years or less. It would appear that the first five years of operation of such business is critical, as of the businesses which do fail, approximately 69% fail within this period.

The key cause of these failures has been identified as a lack of management knowledge, with between 60% and 90% of failure being attributed to this factor.

From these figures, it is possible to conclude that a lack of management knowledge is a critical issue in contractor failure within the building work market. Given the costs imposed on the community in the event of business failure, mechanisms to alleviate this problem may be seen as providing a public benefit.

The Review Panel has concluded that the qualification and experience requirements of the Act are one mechanism for addressing this problem. In doing so it is noted that the performance criteria set out in Part B of Schedule 2 in the regulations include building work management matters. Similarly, the schedules of alternative qualifications and experience approved by Commissioner for Consumer Affairs also include building work management matters.

It has been argued in some areas that these are technical matters and as such are beyond the province of the contractor licence. In short, this argument is based on the premise that a contractor's licence should only reflect purely business competencies. What this argument overlooks however is that a building work contractors licence authorises the licensee to contract in a market which has peculiar characteristics which give it a very different complexion to the "normal" services market. The Review Panel considers that without an understanding of specific building work management issues to stand alongside more general business management and prudential competency, there is an increased risk that matters integral to the successful operation of a building work contractor business would go unnoticed. It is therefore argued that there would be a greater risk of business failure in the building work market in the absence of a requirement for contractors to demonstrate building work management competency.

Further, as the HIA noted in its submission to the Issues Paper:-

*"The public has a reasonable and valid expectation that contracted work will be performed by technically proficient and commercially competent practitioners."*

In the context of contracting, "technically proficient" must equate with sound abilities not only in general business management skills, but also in building work management skills. It is thus entirely appropriate to consider a contractor's licence an occupational licence with a strong emphasis on the business competency of the licensee.

In light of the foregoing discussion, it is clear to the Review Panel that the reduced risk of contractor business failure (or provider failure in terms of the analysis at Part 4.8), and the concomitant avoidance of the public costs of such failure, which result from the requirement to hold qualifications (or competency) is of clear public benefit.

It has been previously identified by the Review Panel, at Part 4.7, that market failure may occur if consumers are not able to obtain adequate information on which to base their decision to purchase building work services. Such a situation may result in an inefficient allocation of resources, with consumers either not spending their money on appropriate services or service providers, or abandoning or not entering the market in the first place. Further, it may be the case that prices for services can be kept higher than the quality of that service would otherwise bring if the market were better informed. It is argued that these information problems are significant in this market and could lead to market failure.

The requirement that applicants meet qualification and experience criteria is a key measure in addressing information problems within this market. A consumer can be satisfied that

those who are licensed under the Act will be capable of completing their contractual requirements. The Review Panel would however point out that the capability to complete a contract is not a guarantee that the contract will be completed; there may well be yet other innominate factors weighing against such an outcome.

The requirement does not only address the information problems in the market, it also addresses physical concerns, such as the risk that substandard work will be performed, and therefore the resultant risks to public health and safety. The qualification requirements enable a contractor to assess the nature and extent of the work required and the materials necessary to perform that work. Without the requirement, any person or body corporate who otherwise met the entitlement criteria could contract for building work which they may in fact not be capable of completing. In such a situation there would be an increased likelihood of substandard work. Consumers would therefore suffer losses in having rectification work performed, leading to public losses through the misallocation of those resources. There would also be greater risks posed to public health and safety as a result of the substandard work.

In advancing this argument, the Review Panel notes the role of the building work supervisor in the construction process. However, it is important to remember that the building work supervisor does not bear ultimate responsibility for the completion of a contract. Rather, the building work supervisor is simply an employee of the particular contractor with whom the consumer has contracted to have work performed.

#### **6.4.1.4**            *Costs of the Requirement*

There will clearly be costs to an applicant for a licence, in terms of both time and money, through compliance with the requirement. As this scheme of regulation is, in part, aimed at ensuring a minimum level of supplier competency in a market, then it follows that prospective suppliers will be required to demonstrate that they have attained that level of competency.

In most cases, this will mean that an applicant must undertake some form of training, and bear the private cost of that training in the form of a "once off" cost, or alternatively, a "once off" cost plus ongoing training costs. However, it may also be the case that public money is spent in subsidising that training. In either event, public costs may arise either through the actual and opportunity costs of the money spent on training, or by a limitation on service supply. This limitation may occur through potential suppliers becoming discouraged from entering the market due to the private costs of training.

The requirement also imposes costs on government, as the licensing authority, and therefore ultimately the wider community, through administration and compliance requirements. Applications for a licence must be processed by the Office of Consumer and Business Affairs to determine whether or not the criteria are met, which necessitates consideration and analysis of applications by government officers. It must also be borne in mind that the costs incurred are not only the immediate costs of funding that process, but also the opportunity costs of that funding. That is to say, it may be the case that money spent on these activities could be appropriated to other areas of community need if the requirement was not present in the legislation.

As discussed at Part 4.6, the theory of contestability would suggest that the mere threat of entry by new competitors into the market can act as a spur to incumbents to improve efficiency. Qualification requirements that restrict entry to new competitors are a significant contributor to a reduction in the level of contestability in this market. With little threat of new competition, those presently in the market have a greater incentive to maintain the status quo than to explore new or different service delivery options.

Features inherent in the training system may also raise the level of the barrier to entry. The frequency of courses offered is such an example. While some courses run to fixed traditional academic schedules, many are offered only as demand dictates. Therefore, a person wishing to obtain a licence may be required to wait until a suitable course of training becomes available. This may prevent them from obtaining work, or may delay their entry into work, until such time as they can complete the course and meet the qualification requirements.

The majority of training providers are prepared to grant status for students on the basis of prior studies or competency. This process is known as recognition of prior learning ("RPL"). This process usually requires payment, which in some cases is a fixed amount (up to \$250), or may be based in other cases on an hourly rate.

It is a complaint often made by students that training providers are often reluctant to grant them RPL, the suspicion of the students being that training providers would prefer that they complete the courses offered by the provider, with the requisite payment of fees. No specific evidence has been presented to the Review Panel to support this suspicion, although it is reported by the Office of Consumer and Business Affairs that such allegations frequently arise. The introduction of independently accredited industry assessors (who are not affiliated with a particular training provider) may address these concerns of students.

Planning SA agreed that if the costs and delays of RPL processes are considered by the majority of industry to be a barrier to entry, the introduction of independent assessors is an option which would address the issue.

#### **6.4.1.5            *Assessing the costs and benefits***

As identified above, the requirement is a significant barrier to entry into the market for potential new suppliers. It is also true however, that a contract for building work services is one of the most significant transaction that a consumer will enter into during their life, in both financial and emotional terms.

Having a system in place to ensure that contractors have sound business competency, and in particular, competency in relation to the manner in which building work management matters affect business operations, is clearly of significant public benefit.

As was submitted by the Concrete Institute of Australia:-<sup>100</sup>

*"competency in the 'understanding' of the principles as practices should be an essential requirement for Building Work Contractors carrying out such work as a main or sub-contractor."*

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<sup>100</sup> Joint submission of the Concrete Institute of Australia, SA Branch; Australian Pre-Mixed Concrete Association, SA; Tilt-Up Association of Australia.



In light of this, and weighing the other factors mentioned above in the balance, the Review Panel's conclusion is that the benefits of the restriction outweigh the costs.

#### 6.4.1.6 *Alternatives*

Independently of this Review, the Office of Consumer and Business Affairs has commenced an analysis of national competency standards to further refine the competencies necessary for licensing purposes. In light of this, the Review Panel does not propose to review the qualification requirements in detail and simply provides the following observations.

The Review Panel considers that the competencies required to hold a contractor's licence should be specified in the regulations and reiterates that any competencies specified as necessary for the grant of a licence must be referable to the achievement of the legislation's objectives. In other words, prescribed competencies must relate to the risks or harms that the legislation seeks to address.

#### 6.4.1.7 *Assessment of Qualifications and Experience*

While the Act and regulations set down the necessary performance criteria, the methods by which an application is assessed against those criteria is a matter of administrative direction. There are some concerns that the administrative process adopted in assessing business knowledge and experience requirements may not be adequately defined and objective, and may therefore potentially act as a barrier to entry.

Planning SA submitted that:-

*"If the administrative processes for assessment for a licence are not adequately defined, and therefore are subjective, this would be anti-competitive."*

The current process requires an applicant for a contractor licence to complete an application form. Part of this application form is a series of questions on business and management as they specifically relate to the building industry. Some technical knowledge of building work may be required to successfully complete these questions, thus a person with sound business skills who does not have building industry experience may not qualify for a contractor licence (an issue addressed above).

A more efficient assessment method may be that utilised for recognising qualifications under the *Security and Investigation Agents Act*. Under that Act, the regulations do not prescribe courses of training. Instead, the Commissioner has determined appropriate courses of training based on the functions to be authorised by the licence. These courses are published in a "*Schedule of Approved Courses*" which is made available to prospective licence applicants.

This mechanism reduces administrative costs to Government. The specification of approved training courses ensures that the Office of Consumer and Business Affairs does not have to measure the individual competency of each applicant. Rather, the applicant merely needs to present with a qualification from an approved training course to satisfy the licensing requirements. This also benefits the applicant, as it addresses the problem of information

asymmetry - they know in advance which course they will need to complete in order to obtain a licence.

Planning SA submitted that:-

*“A schedule of approved courses would appear to be a less restrictive alternative, provided that an RPL process was introduced with independent industry assessors”*

Such a system is dependent to some extent on the establishment of agreed national competency standards and a competency based training system. There have been developments in these areas recently and when this system is eventually finalised, the Office of Consumer and Business Affairs should consider the implementation of such a system.

The above process does not restrict the ability of any training provider to offer building industry training courses. There is no requirement that all training courses be approved by the Commissioner, as courses will only require approval if the training provider wishes to ensure a licence outcome at the end of the training course.

Recently, a number of training organisations submitted contractor licensing courses for the approval of the Commissioner. The submitted courses were measured against the performance criteria set down in Schedule 2. However, while the Commissioner has recognised these training courses, they are currently only considered as one element in the overall assessment of an application for a contractor licence.

A further alternative may be the development of generic contractor licensing courses, which would be acceptable for contractor licensing under many of the jurisdictions administered by the Office of Consumer and Business Affairs.

#### CONCLUSION 14

**The conclusion of the Review Panel is that the requirement that an applicant for a licence has sufficient qualifications and experience, or sufficient business knowledge and experience in the case of a body corporate, appropriately addresses the objectives of the legislation and provides benefit to the public with outweigh the associated costs.**

**The Review Panel recommends that the current requirements should be reviewed once national competency standards have been settled and that only those competencies which are necessary for the protections of consumers should be mandated for licensing purposes.**

## **6.4.2**      *Financial Resources*

To be entitled to a contractor's licence a person must demonstrate sufficient financial resources for the purposes of carrying on business under the licence<sup>101</sup>. This represents a significant barrier to entry, as it precludes those who may be otherwise proficient, but lack "sufficient" financial resources, from obtaining a contractor licence.

The Review Panel assesses this requirement as an **intermediate restriction on competition**.

### **6.4.2.1**      *Objectives of the Requirement*

This requirement is common to many forms of occupational licensing, and is largely a consumer protection measure. Consumers are perceived to be at risk of financial default by a contractor who may have accepted prepayments or deposits in respect of work to be rendered. It is intended to protect the consumer from losses caused by insolvent traders who are not able to complete contracts and honour their warranties. It also provides a secondary measure of protection for sub-contractors who may be affected by a head contractor collapsing.

The requirement also has as an implicit objective the protection of public health and safety. As was noted in the NSW Green Paper:-

*"the main cause of substandard work is not a lack of skill rather it is due to economic decisions to cut corners".<sup>102</sup>*

The Review Panel notes that the Act prohibits demands by a contractor for either prepayment of money, or for a deposit of more than \$1,000 in relation to domestic building work. To this extent, the risk to consumers of financial default by contractors having accepted prepayment or deposits is lessened, and the relevance of the requirement in relation to the objectives is also lessened. However, it must be appreciated that these prohibitions only refer to domestic building work, and not to the broader field of building work generally.

More importantly however, in terms of the objectives of the requirement, is the protection of consumers from traders not being able to complete contracts and honour warranties through financial difficulties.

There is not a significant amount of evidence before the Review Panel that the requirement for applicants to display sufficient financial resources has had any effect on either prediction or reduction of insolvency within the market. By way of example, a review of disciplinary actions before the Commercial Tribunal between 1986 and 1995 revealed that none of those actions were commenced on the grounds that the respondent had insufficient financial resources prior to the collapse of their business. However, the Review Panel considers that to a greater extent, this lack of evidence may be attributed to the positive effect that regulation has had on the incidence of contractor insolvency.

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<sup>101</sup> In relation to natural persons see section 9(1)(e) and bodies corporate see section 9(2)(d)

<sup>102</sup> NSW Green Paper, p.14

In light of this, the Review Panel considers that the prevention of consumer loss through contractors not completing contracts or honouring warranties is of sufficient concern to conclude that the objective of the requirement remains relevant.

#### **6.4.2.2            *Benefits of the Requirement***

The key benefit provided by the restriction is, as discussed above, the protecting of consumers against the risk that suppliers will not honour contracts or complete works contracted for due to financial difficulties.

A further benefit provided by the restriction is the potential for reduction in levels of contractor insolvency or bankruptcy, and thus a commensurate reduction in the imposition of costs associated with these events on the wider community. The Review Panel notes in this regard the recent Staff Research Paper released by the Productivity Commissions “Business Failure and Change: An Australian Perspective” in which the negative effects that business failures have on the wider community are discussed in detail.<sup>103</sup> These negative effects include a decrease in the efficiency of resource allocation in the economy over time, the costs of business failures for creditors, which, while being prima facie private costs, are nonetheless reflected in the wider economy and also the effects of business failures on vulnerable groups, in particular employees of firms that fail.

In its submissions to the Issues Paper, CASA submitted that both the consumer (through a reduction of the risk of loss due to provider failure) and the contractor (through an increased potential for a successful business) also benefit from the requirement.

The Review Panel also notes the existence of the “secondary” benefit provided by the restriction; the increased likelihood that corners will not be cut in the performance of work due to economic pressures on the contractor’s business.

#### **6.4.2.3            *Costs of the Requirement***

The Act is silent on what constitutes “sufficient financial” resources. The Explanatory Memorandum notes that the assessment of sufficiency of an applicant’s financial resources involves an exercise of judgement on the part of the Commissioner for Consumer Affairs.

Currently, the level of financial resources considered “sufficient” is dependent upon the type of work to be undertaken under the licence. The assessment method was developed by the former Commercial Tribunal and revolves around an assessment of access to “working capital”, including the adjusted values of some types of assets and not others. The Review Panel notes that this is not a rigorous definition from an accounting or finance perspective, and has anecdotal evidence that it causes confusion with accountants and financially literate clients.

The financial requirements are the same for individuals and bodies corporate. However, the latter group must also have a minimum share issue to the value of \$5,000, which can be partly paid to 1 cent per share. The Review Panel understands that the share capital

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<sup>103</sup> Bickerdyke, I., Lattimore, R. and Madge, A. 2000, *Business Failure and Change: An Australian Perspective*, Productivity Commissions Staff Research Paper, AusInfo, Canberra.

requirement was seen as a consumer protection mechanism, allowing for a call on unpaid capital in the case of financial difficulties. However, it notes that this scheme perhaps fails to recognise that in the majority of cases these calls will go unpaid, as the owners of the shares, who will also be the directors of the company in most cases, will have previously used all available finances to support the ongoing business.

Planning SA questioned whether the subjective assessment of financial criteria achieves the intended result, and may therefore be considered a barrier to entry.

The Small Business Advocate ("the SBA") submitted that in small business, "financial resources" can fluctuate on a daily basis:-

*"My concern is that decisions based upon the financial resources at a particular point in time may not give an accurate indication of an applicant's ability to carry on the business in the long term."*

Further costs of the requirement arise through the assessment of new licence applications and the routine checking of approximately 20,000 financial statements each year provided by current licensees. Although the information provided is checked by suitably qualified staff from the Office of Consumer and Business Affairs, the process is time consuming and difficult as much of the information is unaudited and may not have been prepared by an accountant. The type of information sought from licensees perhaps exacerbates this problem. Arguably, information which established a trend in the adequacy of a business' cash flow would be more useful to the Office of Consumer and Business Affairs than the current reliance on net tangible assets.

CASA noted that the current system for determining "sufficiency" of financial resources is too vague, and that greater clarity *"benefits consumers as government resources are not unnecessarily spent on processing hopeless licence applications"*.

#### **6.4.2.4            *Assessing the costs and benefits***

While the Review Panel has noted the various costs of this requirement, nonetheless it has come to the conclusion that assessment of financial criteria is a legislative restriction that is justified in the public interest. The benefits provided by assessing a potential supplier's financial resources at the point of entry, that is to say, at the time of first granting a licence, greatly outweigh the costs associated with this restriction.

The Review Panel also notes that there has been some ongoing debate over the nature of ongoing financial assessments by the Office of Consumer and Business Affairs made on the basis of information provided in annual returns. However, having given some consideration to this matter, the Review Panel has concluded it is beyond the terms of reference for this review and accordingly will not consider it further in this Final Report.

The reason for this conclusion is that neither the Act nor the Regulations specify the contents of the annual return that must be lodged with the Commissioner for Consumer Affairs. Section 11 of the Act simply notes that such a return must be lodged with payment of the fee fixed by regulation at intervals also fixed by regulation.

Therefore, as this review is limited to examining legislative restrictions on competition, it is not appropriate to consider the matters that the Commissioner for Consumer Affairs requires in the annual return. The Review Panel simply notes that the Commissioner for Consumer Affairs may address this issue in consultation with industry and consumer groups if a need arises.

#### 6.4.2.5 Alternatives

Planning SA submitted that compulsory professional indemnity insurance “*would seem to be a more effective mechanism for protecting consumers, and a ten year run-off requirement similar to that required of private certifiers would address the ten year liability period for defective building work under the Development Act.*”

The major difficulty with imposing a professional indemnity insurance requirement is that it may well reduce the number of practitioners operating within the market. It has also been noted that “*in some instances the financial and managerial checks and the cost of insurance involved on business licensing may impose costs that are not commensurate with the activity to be regulated.*”<sup>104</sup>

A concept considered, and indeed adopted, in some other jurisdictions is a financial threshold, below which a contractor can operate without a contractor licence. The threshold is only practical where the magnitude for potential loss by the consumer is in the low range. The Dodd Inquiry in NSW recommended a threshold of \$5,000. For work where the total value of labour and materials is under the threshold amount, contractors could be encouraged to take out insurance as a marketing initiative or guarantee.

The NSW Green Paper noted:-

*“Consumers would need to be educated as to the different levels of protection operating in different levels of the market. Additionally, it may be considered an acceptable approach to consumer protection to intervene with licensing level protection (as opposed to statutory warranty level protection) where the magnitude of consumer loss is high. Since licensing level protection is not provided for consumers purchasing consumer goods such as white goods or other electronic equipment there would not seem to be compelling reasons for providing greater protection for building work of similar value.”*<sup>105</sup>

While it may be argued that a system of contractor licensing above a monetary threshold erects barriers to entry and increases costs to consumers, allowing a section of the market to operate openly can be viewed as less restrictive than occupational licensing operating for all sections of the building market.

In the Draft Report, the Review Panel raised an option based on this system under which applicants wishing to obtain contractors licences limited to performance of individual contracts valued at \$5,000 or less per contract (inclusive of materials and labour) would not be required to meet a financial resources test.

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<sup>104</sup> NSW Green Paper, p.21

<sup>105</sup> NSW Green Paper, p.21

This option did not meet with approval from industry parties, with a number of objections being raised.

The Master Plumbers Association submitted that:-

*“The association asserts that it is very easy for one contractor to gather 10 or more jobs fairly quickly, each with a value of say just under \$5,000, which is the equivalent of \$50,000 worth of work. Much of this work will be represented in large proportion (in dollar terms) in plumbing fittings. Plumbing supply companies ...can attest to many stories of one-man business going broke and owing them tens of thousands of dollars.”*

The Master Builders Association submitted that:-

*“The suggestion that the \$5,000 limit be imposed in future legislation is not supported by the Master Builders Association.”*

In making this submission the Master Builders Association noted the difficulties that consumers could face in identifying whether the builder with whom they were contracting was licensed to undertake work over \$5,000 in value.

The Review Panel accepts the reasoning of these submissions. On this basis, the Review Panel does not propose any further exploration of this proposal.

However, the Review Panel does maintain the appropriateness of the underlying rationale for the proposal, which was the requirement under National Competition Policy principles to remove restrictions on competition from legislation wherever there is no justification for it in terms of either market or provider failure.

In line with this requirement, the Review Panel has subsequently identified a different sector of the market which does not carry any level of direct consumer risk, namely, contractors who only subcontract to other licensed contractors.

There are a number of reasons for considering it appropriate to remove the financial resources requirement in relation to contractors who will only carry on business in a sub-contracting capacity.

Perhaps most important amongst these is the fact that the nature of subcontracting dictates that those who carry on business solely in this capacity have no direct contract with a consumer and do not have any direct liability to the consumer. Therefore, there is no direct way that a licensee who carries on business only subcontracting to other licensed contractors could precipitate any market or provider failure occurrences for consumers in terms of their financial resources.

As is obvious from the name, subcontractors will only be contracting with “head” contractors for the performance of work. It is the “head” contractor who will have a contract with the consumer for the performance of the overall work. In this situation, a consumer has all of the statutory protections of the Act when entering into a contract, including an assurance that the person with whom they are contracting has sufficient financial resources to carry through the contract.

In this sense it is really of no importance to the consumer whether the subcontractors engaged by the “head” contractor are financially viable or not. Of course, the position is different for the “head” contractor, who will be concerned that the subcontractor is viable, however, these concerns are not best addressed by consumer protection legislation. Arguably, there is a significant role for the industry self-regulation, and indeed the workings of the marketplace, in determining which subcontractors are suitable and will survive.

In the event that the subcontractor does fail financially, or indeed in any other way, and the relevant work is not performed, or is not performed to an appropriate standard, it is the “head” contractor who bears the contractual liability to the consumer. Consumer protection levels would therefore be unaffected by removal of the sufficient financial resources requirement in relation to those who only subcontract with other licensed contractors.

To avoid potential consumer confusion regarding “subcontract only” licences, licence cards should be clearly endorsed to state that the licensee may not contract with consumers. Further measures such as consumer education may be necessary also to avoid confusion.

It must be borne in mind that while the Review Panel considers this is an appropriate step in relation to the financial resources requirement, this finding does not necessarily flow into other aspects of the Act. In particular, the Review Panel notes that other important consumer protection mechanisms, such as the requirement that a registered building work supervisor must properly supervise all building work, would remain in force in all cases.

Finally, in order to ensure that the process of application for a licence remains clear and open, the Review Panel considers that it may be appropriate for the Office of Consumer and Business Affairs to publish a non-binding guide setting out the required levels of financial resources based on the type and scale of work to be performed under the authority of a licence. Whilst the Review Panel recognises that such a guide could and should not be of binding effect, and would not apply in each and every circumstance, it would allow an applicant to make a prior assessment of financial adequacy. In this way hopeless applications could be avoided and the application process would have a lesser element of subjectivity than is presently the case.

#### **CONCLUSION 15**

**The Review Panel is of the general view that the requirement that a person has sufficient financial resources to carry on the business is a justified barrier to entry in those circumstances in which consumers are at risk from contractor failure.**

**However, where a licence is sought which would limit the licensee to contracting only with other licensed contractors as a subcontractor, the Review Panel concludes that there is no need for that person to satisfy any financial criteria.**

**The Review Panel also considers that it would be appropriate for the Office of Consumer and Business Affairs to publish a non-binding guideline for applicants on the sufficiency of financial resources generally adequate for a particular licence.**



### **6.4.3 *Financial reputation***

A person (both a natural person and a director of a body corporate) must not have been an undischarged bankrupt or subject to a composition or deed or scheme of arrangement with or for the benefit of creditors, or have been within the previous ten years a director of a body corporate wound up for the benefit of creditors<sup>106</sup>.

The Review Panel has assessed this requirement as an **intermediate restriction on competition**.

#### **6.4.3.1 *Objectives of the Requirement***

The rationale for the provision is that a poor financial history or reputation is an indicator of a lack of business skills. While it is arguable whether this is the case, it is a provision relied upon in many jurisdictions.

There is also a concern that where financial difficulties are encountered, the incentive to “cut corners” and perform substandard work increases.

#### **6.4.3.2 *Benefits of the Requirement***

The Second Reading Speech noted:-

*“The industry parties were concerned to ensure that adequate measures exist to prevent directors of insolvent companies from operating in the building industry.”<sup>107</sup>*

In the matter of the *Commissioner for Consumer Affairs v. Jeffries*<sup>108</sup> the District Court in considering the objectives of the requirement said:-

*“The purpose of this provision is obvious; in short, to protect consumers and others engaged in the building industry from unacceptable risk of financial loss.”<sup>109</sup>*

It is plain to the Review Panel that the solvency requirement reduces the risk to consumers that their contracts will not be completed due to financial causes. As was noted by CASA:-

*“CASA believes that financial reputation is necessary for consumer protection against provider failure”*

While the requirement is clearly a barrier to entry into the occupation, it exists to protect consumers from the risk of financial loss and criminal activity. In particular, it aims to prevent traders who, for example, may have deliberately wound up a business to avoid warranty costs, from obtaining a contractor licence and setting up a new business (so-called “phoenix” companies).

<sup>106</sup> Section 9(1)(c) and (d) for natural persons and section 9(2)(b)(ii) for directors of bodies corporate.

<sup>107</sup> Hansard, 25 October 1995, at p.343

<sup>108</sup> *Commissioner for Consumer Affairs v. Jeffries* [1999] SADC 107

<sup>109</sup> supra n 102 at page 4

### 6.4.3.3 *Costs of the Requirement*

The new Act introduced a ban on directors of companies insolvent within the last 12 months from holding a contractor licence, while at the same time extending the ban on bankrupts from 5 years to 10 years. In retrospect, either but not both may have been appropriate.

It is unclear why the period of prohibition for contractors is ten years, when a period of five years is specified in other occupational licensing legislation.<sup>110</sup> The greater the length of disqualification specified in the Act, the greater the potential for restriction of competition within the market.

Planning SA submitted that:-

*"Personal and financial reputation should be a criteria for obtaining a contractors licence, however there does not seem to be any justification for ten years if five is acceptable under other occupational licensing legislation."*

CASA submitted that:-

*"...any unnecessary restriction, as the ten year disqualification period appears to be, is ultimately a cost to the consumer in the form of less competition. A five year prohibition would conform with other legislation and with the other states while adequately protecting consumers against provider failure."*

While the Review Panel considers that it is necessary to have regard to the interests of consumers, it must also take note of the current employment structure of the industry. It is clear that very few people are employed in the building and construction industry in the traditional sense any more. Rather, the majority are engaged on a contract or sub-contract basis.

Under the current structure of the Act, anyone providing services on a contract or similar basis is required to hold a building work contractor licence.

The cumulative effect of industry conditions, the requirement to be licensed and the ten year prohibition is that a bankrupt is effectively barred from the industry for a period of ten years from the date of their discharge from bankruptcy. Even if this period of exclusion were to be reduced to 5 years, it is still a significant time to be deprived of the opportunity to earn an income. It must be remembered that the provision exists to protect consumers, not to further punish a person who has previously been bankrupt.

With respect to financial reputation, the Small Business Advocate submitted that:-

*"while the need to protect consumers from the unscrupulous or fraudulent acts by building contractors is clear, obvious and not to be disputed, it seems that current legislation is so rigid there are no options for giving special consideration to a person who has been excluded unfairly or, perhaps in unusual circumstances, from the industry."*

The Small Business Advocate further noted:-

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<sup>110</sup> see for example sections 9(1)(d) and 9(2)(b)(ii) of the *Plumbers, Gas Fitters and Electricians Act 1995*.

*"I believe that there will always be circumstances where a person who has been bankrupted, or liquidated his/her business, should not be automatically excluded from being granted a contractor's licence."*

*"It does seem to me that there are situations where a competent builder is excluded from competing in the market because the current legislation does not allow for an examination of peculiar or extenuating issues relating to a specific case. Should this review lead to changes to the Act, I would urge you to consider making provision for an individual's case to be reassessed where it can be demonstrated that there are extenuating circumstances."*

The Review Panel notes the costs to the wider community resulting from the preclusion of otherwise competent persons from the industry as described above, particularly the potential for an increase in welfare costs.

#### **6.4.3.4**            *Assessing the costs and benefits*

The Review Panel concludes that as a general proposition, the requirement that a person wishing to hold a building work contractor licence must be able to demonstrate a good financial reputation is justified. However it is accepted that there may be certain situations in which the requirement may be unduly restrictive.

#### **6.4.3.5**            *Alternatives*

As discussed, the Review Panel proposed in the Draft Report that where the value of building work authorised under a licence was below a threshold of \$5,000, an assessment of the financial resources of the contractor may not be justified. However, the Review Panel acknowledges that this proposal has some difficulties militating against its adoption.

The Review Panel has now concluded that those who carry on business solely contracting (as a subcontractor) with other licensed contractors should not be required to display sufficient financial resources.

It follows from the arguments presented in favour of that recommendation that such persons should also be exempted from the financial reputation criteria.

Again, the principle support for this conclusion is the fact that subcontractors have no direct contract with consumers and do not bear any direct liability to them. Therefore, there is no direct way that a licensee who is restricted to carrying on business on a subcontract only basis could have any direct adverse impact on consumers by reason of their financial situation.

As subcontractors will only be contracting with "head" contractors for the performance of work, it is the "head" contractor who will have a contract with the consumer for the performance of the work. In this situation, a consumer has all of the statutory protections of the Act when entering into a contract, including an assurance that the person with whom they are contracting is of sound financial reputation. Further, the "head" contractor has an identifiable contractual liability to the consumer in the event of some default on the contract.

In this sense it is really of no importance to the consumer whether the subcontractors engaged by the “head” contractor are bankrupt or insolvent. Of course, the position is different for the “head” contractor, who will be concerned that the subcontractor is viable, however, these concerns are not best addressed by consumer protection legislation. Arguably, there is a significant role for the industry self-regulation, and indeed the workings of the marketplace, in determining which subcontractors will survive.

The Review Panel notes that while this recommendation will allow those who are bankrupt or subject to deeds or schemes of arrangement to continue working in the industry, their activities will nonetheless be regulated under the provisions of the *Bankruptcy Act 1966*.

Section 269 of that Act prevents a bankrupt from acquiring credit in excess of \$3,500 without disclosing that he or she is an undischarged bankrupt. Included within the meaning of acquisition of credit are circumstances in which a bankrupt will receive an amount in excess of \$3,500 by promising to render services (i.e., building work).

Therefore, to the limited extent that it is arguable the Act protects trade suppliers and other contractors, there is in place a regulatory regime that, in combination with normal market forces, will provide protection in this sense.

Finally, the significance of avoided community welfare costs has not been lost on the Review Panel. Clearly any reduction in such expenditure of public monies is of benefit to the public, as is the retention of productive economic units within the building work services market.

#### **CONCLUSION 16**

**The conclusion of Review Panel is that:-**

- 1. the current period of prohibition be amended from 10 years to 5 years; and**
- 2. bankruptcy, compositions, deeds or schemes of arrangement should not disqualify a person from holding a conditional licence limited to subcontracting only to other licensed contractors.**

#### **6.4.4 General reputation**

A person must be a fit and proper person to hold a contractor licence<sup>111</sup>, and this requirement is extended to all directors of a body corporate.<sup>112</sup> In addition, they must not have been suspended or disqualified from practising or carrying on an occupation, trade or business under the laws of South Australia, the Commonwealth, or another State or Territory of the Commonwealth<sup>113</sup>.

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<sup>111</sup> Section 9(1)(f)

<sup>112</sup> Section 9(2)(e)

<sup>113</sup> Section 9(1)(b) for natural persons and section 9(2)(b)(i) for directors of bodies corporate

This requirement is assessed by the Review Panel as an **intermediate restriction on competition**.

The fitness and propriety of an applicant is a decision made by the Commissioner against which there lies an appeal to the District Court<sup>114</sup>.

#### 6.4.4.1 *Objectives of the Requirement*

The requirement that contractors satisfy a general reputation criteria is directed at minimising the risk of loss to consumers through the criminal activities of a contractor.

#### 6.4.4.2 *Benefits of the Requirement*

The Office of Consumer and Business Affairs has indicated that the discretionary nature of the provision can be useful in precluding persons who do not fall within a mandatory exclusion provision, but who nonetheless are considered unsuitable to hold a licence. In this way those who are assessed as presenting a risk to the public, in terms of provider failure, may be excluded from the market.

It is noted that a determination that a person is not “fit and proper” involves an exercise of discretion by the Commissioner for Consumer Affairs, and that on the reasoning of the Full Court of the Supreme Court of South Australia in the matter of the *Commissioner for Consumer Affairs v. Standley*<sup>115</sup>, this determination can be appealed to the District Court.

#### 6.4.4.3 *Costs of the Requirement*

The courts have been reluctant to exhaustively define what constitutes a “fit and proper person”. The concept of “fit and proper” (in respect of the repealed *Commercial and Private Agents Act 1972*) was considered by Perry J in *Pav v. Commercial and Private Agents Board*<sup>116</sup>:

*“The considerations which it will be proper to take into account in determining whether a person is a fit and proper person to hold a particular licence will vary according to the nature of the licence and the nature of the work done pursuant to the licence. It would be wrong to attempt any exhaustive catalogue of relevant considerations. It is obvious though that they will bear largely upon the character of the person concerned and in particular whether or not his character and reputation is such that members of the public with whom the person is dealing can deal with a reasonable degree of confidence that he will act honestly and carry out his duties in a trustworthy way and with a due and proper sense of responsibility.”*

Thus, fitness and propriety is largely a measure of an applicant’s character and reputation.

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<sup>114</sup> Section 10

<sup>115</sup> *Commissioner for Consumer Affairs v. Standley* (1998) 71 SASR 152

<sup>116</sup> (1988) 143 LSJS 1

The NSW Green Paper noted that reputation is important for assessing insurance risk, but it is “also of fundamental importance in endeavouring to exclude from the industry disreputable people and thereby preventing unscrupulous conduct.”

#### 6.4.4.4 *Assessing the costs and benefits*

One advantage of the discretion involved in applying the “fitness and propriety” criteria is the ability for the Commissioner to take into account the circumstances surrounding an offence. Notwithstanding that a person may have committed an offence relevant to the functions authorised by the licence, the Commissioner may have regard to the number of convictions and time elapsed since their commission. In the matter of *Sobey v Commercial Agents Board* (1979) 22 SASR 70, in considering a licence under the *Commercial and Private Agents Act 1972 (repealed)* Walters J said:

*“I would not go so far as to say that one criminal offence must necessarily deprive a person of that fitness and propriety which is a pre-requisite for a licence under the Act... When a considerable period of time has elapsed from now, past acts might be viewed in the light of this lapse of time and weight might then be properly given to his subsequent good behaviour”.*<sup>117</sup>

In comparison to other occupational licensing Acts administered by OCBA, which disqualify a person for life if they have committed certain prescribed offences, the Commissioner retains the discretion under this Act to grant a person a licence even if they have committed a single offence and are able to justify why that offending should not permanently exclude them, or are able to demonstrate a period of good behaviour since the offending. This can operate to lower the barrier to entry posed by the personal reputation criterion.

The Review Panel is of the view, therefore, that the costs of the fitness and propriety requirement do not exceed the benefits.

#### 6.4.4.5 *Alternatives*

CASA submitted that the concept of “fit and proper” is too vague, and ought to be replaced with a list of prescribed offences. However, the Review Panel considers that the fundamental difficulty with such a system in relation to this market is that it is not possible to categorically point to the type of offences that need to be prescribed in this market.

Other occupational licensing regimes have provisions such as trust accounting requirements and it is therefore possible to isolate offences of dishonesty as being pertinent offences for licensing purposes and to then prescribe these offences. In the case of this market no such offences can be easily isolated and the Review Panel has thus concluded that there are no viable alternatives to the “fit and proper person” test.

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<sup>117</sup> *Sobey v Commercial Agents Board* (1979) 22 SASR 70 at 75-76; followed in *Clavell v Office of Consumer and Business Affairs* [2000] SADC 107 (appeal against refusal of building work contractor licence).

### CONCLUSION 17

The Review Panel concludes that since a finding by the Commissioner for Consumer Affairs that a person is not a fit and proper person to hold the licence can be appealed to the District Court, the provision should be retained.

## 6.5 BARRIERS TO ENTRY - BUILDING WORK SUPERVISORS

### 6.5.1 Requirement To Be Registered

A building work contractor must ensure that any building work performed under authority of the licence is properly supervised by a registered building work supervisor<sup>118</sup>. However, a person cannot supervise building work unless:-

- they are registered under the Act; or
- they are a registered architect.

*Prima facie*, these are barriers to entry as they prevent those who are not registered under the Act from supervising any building work within the scope covered by the Act. This restriction stems from the definition of the scope of work.

The Review Panel has assessed this requirement as a **serious restriction on competition**.

#### *6.5.1.1 Objectives of the Requirement*

The objective of this requirement is to ensure that there is a technically proficient person in place to oversee the actual performance of building work.

The Review Panel is at pains to point out that there needs to be a clear understanding that while it considers the building work management skills of contractors must include a degree of technical knowledge (as displayed in Part B of Schedule 2 of the regulations), the Act expressly provided that detailed technical knowledge is to be the province of supervisors. As supervisors are employed by contractors, consumers are protected in terms of the physical performance of work through principles of vicarious liability.

#### *6.5.1.2 Benefits of the Requirement*

The rationale behind occupational regulation in a general sense was considered in Part 4 of this Final Report. As a general proposition, regulation may be appropriate where market or provider failure occurs.

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<sup>118</sup> Section 12 (1)(b)

With respect to building work, it is argued that there is significant scope for market failure. In many respects, the arguments are similar to those justifying the regulation of plumbing, gas fitting and electrical workers.

Chief among these arguments is the externalities argument - specifically, that public health and safety may be at risk if poor quality workmanship is not prevented, and proper controls are not maintained.

The chief concern is that consideration of public health and safety (as opposed to private) will decrease in circumstances where costs are increased significantly, or where the effects are remote in either time or proximity (eg, the effects of poor building work may not be immediately apparent, but can have later significant consequences for neighbours and subsequent property owners).

A further third party consideration is the protection of the water supply, sewerage and electrical infrastructures, which may be affected by poor building work.

#### **6.5.1.3**                    *Costs of the Requirement*

As with the requirement that a building work contractor be licensed, the major costs of this restriction are that competition is lessened overall in the relevant market. Competition policy would predict that where there is a barrier to entry resulting in less competition within a market, that market is less likely to be innovative, efficient or cost effective. The factors produce costs for the community as a whole. These costs were discussed in more detail in the earlier discussion of the costs and benefits of regulation of the market.

#### **6.5.1.4**                    *Assessing the costs and benefits*

The implicit argument in support of the registration of building work supervisors is that they must demonstrate a certain level of competence and understanding of the required standards, and that this competence is a necessary cornerstone of the regulatory structure, which includes not only this Act, but regulation such as the *Development Act 1993* and the Building Code of Australia.

Specifically, technical competence is measured at the point of entry to the occupation to ensure that incompetent practitioners are excluded from the outset, rather than having to deal with the consequences later.

The conclusion of the Review Panel is that the benefits of requiring building work supervisors to be registered outweigh the costs. The risks to public health and safety, and the risk of substandard work are such that there must be a barrier to entry to protect consumers.

Nonetheless, it may be necessary to re-examine the current supervisor registration requirements as set out in Schedule 2 of the regulations to ensure that they are not unduly restricting the ability of an applicant from obtaining a supervisor registration.



### CONCLUSION 18

The conclusion of the Review Panel is that the requirement that building work supervisors be registered is justified as the benefits to the community outweigh the costs.

#### 6.5.2 Qualifications and Competencies

Section 16 of the Act provides that a person is entitled to be registered as a building work supervisor if they have the qualifications and experience set out in the regulations. Regulation 12 provides that to be entitled to a supervisor registration without condition, a person must meet the performance criteria set down in Part B of Schedule 2.

The technical qualification and experience requirements are potentially restrictive of competition in that they pose a significant barrier to entry into these occupations. The Review Panel has assessed this requirement as a **serious restriction on competition**.

##### *6.5.2.1 Objectives of the Requirement*

Technical qualifications and competencies relate to the capacity of the registered supervisor to supervise the work to the acceptable community standard, as measured by the *Development Act* and the Building Code of Australia.

The performance criteria encompasses knowledge of the following:-

- building work management, which applies the principles of building work management in relation to the supervision of a building site;
- building technology, which applies the principles of building technology to on-site building work; and
- legislative requirements, which applies a detailed knowledge of legislative requirements in respect of on-site building work.

Clearly, the legislation requires that a supervisor possess technical qualifications and experience, as opposed to contractors who need only possess business competencies.

The key competition issue which arises out of the technical qualification requirements is whether they are too onerous, and therefore unnecessarily restrictive. There should also be a consideration of whether other professions or occupations possess appropriate competency or qualifications to perform this type of work.

##### *6.5.2.2 Benefits of the Requirement*

Planning SA agreed that the current qualification requirements for a supervisor registration are appropriate, and are justified on the basis of the arguments that were outlined in the Issues Paper (eg, public health and safety).

The HIA submitted that the public has a reasonable and valid expectation that contracted work will be performed by technically proficient practitioners. The HIA noted that technical competence in accordance with the Building Code underpins current national training reforms.

The Concrete Institute indicated that registration should be based on nationally-agreed competencies assessed by accredited workplace assessors.

The requirement to hold technical qualifications before registration is granted also provides an assurance to consumers who have contracted with a building work contractor that the work they have contracted for will be properly supervised by a person with appropriate competency. Therefore, the likelihood that the contracted work will be successfully completed is greater.

### **6.5.2.3**                    *Costs of the Requirement*

As discussed at Part 6.5.1.2, the effects of a barrier to entry into a market include a lessening of innovation, efficiency and cost effectiveness. The same arguments are applicable in relation to this requirement. However, and perhaps more importantly in some respects, the current method of assessment of qualifications also has an anti-competitive effect.

While the Act and regulations set down the necessary performance criteria, the methods by which an application is assessed against those criteria is a matter of administrative discretion. There are some concerns that the administrative process adopted in assessing technical competence may not be adequately defined and objective, and may therefore potentially act as a barrier to entry.

The current process requires an applicant for a supervisor registration to attend an interview with a member of the staff from the Business & Occupational Services Branch who is both a licensed contractor and a registered supervisor.

During the interview process, the applicant will be assessed against the performance criteria in Schedule 2 by means of questions and practical demonstrations. The depth of the assessment will depend upon the type of registration sought by the applicant. At the end of the interview, the staff member will recommend an appropriate scope of registration.

In keeping with the flexible nature of the licensing scheme, this assessment largely relies on a subjective assessment by the staff member. While the Review Panel endorses the concept of a flexible scheme, it notes that the exercise of any discretion just be carried out in accordance with the requirements of administrative law; all relevant matters must be taken into account, and irrelevant matters must not form part of the decision maker's reasons. A failure to comply with these principles may have the ultimate effect of reducing competition within the market.

### **6.5.2.3**                    *Assessing the costs and benefits*

The conclusion of the Review Panel is that the benefits of requiring registered building work supervisors to hold prescribed qualifications outweigh the costs associated with that

requirement. However, the Review Panel does have some residual concerns about the method of assessment.

#### 6.5.2.4 *Alternative Methods of Assessment*

A number of alternative methods of assessing qualifications may be considered more efficient.

As discussed previously in relation to contractor competencies, a process whereby the Commissioner can determine appropriate competencies based on the scope of work to be authorised by the registration could be implemented.

Recent changes to the vocational training system will assist in this process, through the identification of necessary competencies for the performance of specified types of work. These competencies are then organised into various training packages.

It is necessary to look beyond the identified competencies to the performance criteria which are specified, as these reveal the content of the unit of competence. It is the performance criteria which should be specified by the Commissioner for Consumer Affairs as the technical qualification requirements.

Independently of this Review, the Office of Consumer and Business Affairs has begun to analyse these national competency standards to identify those competencies which are seen as necessary for licensing and registration purposes. In light of the independent actions of the Office of Consumer and Business Affairs the Review Panel does not propose to review the qualification requirements in detail.

The majority of those who seek registration as supervisors do not possess formal qualifications. Many have acquired competency over years of experience. An alternative to the above would be to establish set competencies for all types of work subject to registration. If this was put in place, then all applicants could be assessed against the set criteria in one of two ways:-

- presenting with a qualification which has been approved by the Commissioner as satisfying the necessary competencies; or
- attend an accredited workplace assessor, who can assess the applicant against the set competencies, and certify them competent (or alternatively, that they have the equivalent competence to an approved qualification).

Both mechanisms would reduce administrative costs. The specification of approved training courses would ensure that the Office of Consumer and Business Affairs did not have to measure the individual competency of each applicant. Rather, the applicant would merely present with a qualification from an approved training course (or certification from an industry assessor) to satisfy the registration requirements.

Planning SA agreed that *“the alternatives of a schedule of approved courses and independent industry assessors would not only be more efficient, but also less subjective.”*

The HIA submitted that:-

*“mandating the requirement for competency assessment by Registered Training Organisations as part of the licensing regime ensures the currency of an applicant’s qualifications and alleviates the incidence of disputes and appeals in respect of prior qualifications.”*

The Review Panel concurs with this view, on the understanding that it applies only at the initial registration point. The Review Panel does not endorse annual or periodic assessment of technical skills.

The Concrete Institute noted that those that perform building work must be technically competent. The submission further noted that the criteria for workplace assessors in the construction industry have been established and agreed, that workplace assessors have been accredited in South Australia, and that regular courses to train further workplace assessors are conducted in South Australia and are subsidised by the Construction Industry Training Board (“the CITB”).

There is an increasing use of industry assessors in the building and construction industry in Victoria, as was recently noted in a recent newsletter of the Building Control Commission. The newsletter noted:-

*“All competency assessors will be accredited with the Australian National Training Authority to practice as workplace assessors. As a part of their assessment they were required to demonstrate their own competency and conduct tests with volunteer applicants.”*

The newsletter also noted comments by the Registrar of the Building Practitioners Board:-

*“Staff have conducted mock interviews with applicants which has resulted in good feedback for both the assessor and the applicant. Applicants were able to easily define their competencies and see areas for improvement...”*

*“We are happy this demonstrates that competency based assessment is the best way to ensure that future registered domestic builders will be skilled in all areas to conduct their business.”<sup>119</sup>*

The proposed procedures also benefit the applicant, as it addresses the problem of information asymmetry - the applicant knows in advance what competencies they will need to complete in order to obtain registration.

The Office of Consumer and Business Affairs is not in a position to consider the implementation of such a system until such time as national competencies are settled. It is understood that competencies up to Certificate III level (trade level) have now been approved, and these should now form the basis of identifying competencies for the streams under “specified building work”. Once implemented, industry assessors should be allowed to undertake technical assessment work.

The Review Panel would reiterate that any competencies specified as necessary for a person to obtain a licence or registration must be referable to the achievement of the objectives of the legislation - in other words, prescribed competencies must relate to the risks or harms that the legislation seeks to address.

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<sup>119</sup> Building Control Commission (Victoria), Inform (March 1999), p.2

Any required competencies must be relevant to the objectives of the Act. In this sense, any technical competencies specified for registration should not reflect competencies sought by employers within the industry, except insofar as they are necessary to meet the objectives of the legislation.

It must also be appreciated that the licensing system does not constitute a *defacto* selection tool for the benefit of employers. Employers must make their own assessment of the competence of any person engaged in their business.

For this reason, it is necessary that the Office of Consumer and Business Affairs critically view and appraise the National Competency Standards, which reflect the competencies desired by industry - not necessarily the competencies desired by the community or by licensing authorities.

That said, the National Competency Standards should form the basis of competencies specified by licensing authorities, to enable recognition of learning or articulation to other training by a licence applicant.

Finally, the Review Panel would like to point out that the argument contained in Part 6.4.1.1, concerning the use of competencies rather than qualifications, is equally applicable to building work supervisors. That is to say, the Act should refer to competency as well as qualification requirements for building work supervisors where appropriate.

#### **CONCLUSION 19**

**The conclusion of the Review Panel is that the requirement that a building work supervisor hold qualifications prior to the grant of registration is a justifiable restriction on competition.**

**The Review Panel recommends that the Office of Consumer and Business Affairs investigate the possibility of implementing a process whereby the Commissioner can determine appropriate competencies based on the scope of work to be authorised by the registration.**

**The Review Panel further recommends that the Act should refer to competency as well as qualifications where appropriate.**

#### **6.4 FEES**

A licensed contractor must, each year, pay to the Commissioner the fee fixed by regulation<sup>120</sup>.

The following fee structure currently applies<sup>121</sup>:

	<i>Natural Person</i>	<i>Body Corporate</i>
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<sup>120</sup> Section 11

<sup>121</sup> As at 1 July 1999

<i>Application Fee (Licence or Registration)</i>	113.00	113.00
<i>Approval of a Building Work Supervisor in relation to a Contractor's business</i>		67.00
<i>Licence fee (any building work)</i>	236.00	528.00
<i>Licence fee (light commercial/industrial and residential)</i>	236.00	528.00
<i>Licence fee (residential)</i>	236.00	528.00
<i>Licence fee (specified building work)</i>	118.00	267.00
<i>Supervisors Registration</i>	108.00	

Planning SA submitted that:-

*"In the context of the contract price for building work, eg for constructing a house, the fees could not be considered as a barrier to entry."*

The Review Panel agrees with this submission and considers that the requirement to pay fees is considered a **trivial restriction on competition**.

#### CONCLUSION 20

**The fees at their current level are a trivial restriction on competition.**

## **PART 7: RESTRICTIONS ON COMPETITION - CONDUCT RESTRICTIONS**

### **7.1 APPROVAL OF REGISTERED SUPERVISORS**

The Act requires that there must be a registered building work supervisor approved by the Commissioner in relation to a licensed contractor's business at all times during the currency of the licence.<sup>122</sup> In addition, any building work done under the authority of the contractor's licence must be properly supervised by that registered supervisor, and the supervisor's registration must authorise the supervision of building work of that kind.<sup>123</sup>

Where a licensed contractor is also registered as a supervisor, and the contractor is authorised to supervise building work of a kind not more limited than that authorised under the licence, then the contractor is deemed to be approved by the Commissioner in relation to the business<sup>124</sup>.

A person is not eligible to be approved as a building work supervisor in relation to a contractor's business unless they are registered as a building work supervisor, and they are either a director of the body corporate (if the contractor is a body corporate) or employed by the contractor under a contract of service.<sup>125</sup>

If the approved supervisor:-

- ceases to be a director of a body corporate which is a licensed contractor, or
- ceases to be employed by the licensed contractor

the contractor must notify the Commissioner in writing within 14 days.<sup>126</sup>

By way of sanction against the contractor, if for a period exceeding 28 days there is not a registered building work supervisor in relation to the contractor's business then the contractor's licence will be suspended until such time as a supervisor is approved by the Commissioner in relation to the business.<sup>127</sup>

The Review Panel has assessed this requirement as an **intermediate restriction on competition**.

#### **7.1.1 Objectives of the Requirement**

This requirement is aimed at ensuring that consumers are protected by having a technically proficient person overseeing the performance of work which the contractor has contracted to undertake.

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<sup>122</sup> Section 12(1)(a)

<sup>123</sup> Section 12(1)(b)

<sup>124</sup> Section 19(2)

<sup>125</sup> Section 19(4)

<sup>126</sup> Section 19(6)(7)(8)

<sup>127</sup> Section 12(3)

In the context of this regulatory regime, wherein contractors only need have sufficient knowledge of technical matters to successfully and appropriately contract for work, the absence of such a requirement would mean that there would be no-one with detailed “hands on” knowledge safeguarding the performance of work.

### 7.1.2 *Benefits of the Requirement*

The requirement assists in reducing transaction costs and information asymmetry for consumer in the market.

Without the requirement consumers would need to either check with the contractor as to the level of competency of the supervisor or alternatively seek out the supervisor and ascertain directly their competency level. The approval system in place under the Act removes this burden, as associated costs, from consumers. Having the assessment made on a once off basis by the licensing authority, rather than each consumer having to make the assessment, also reduces costs to the community as a whole.

The risks of substandard building work and externalities are also reduced. As part of the assessment process the Office of Consumer and Business Affairs ensures that the competence of the supervisor is sufficient to adequately supervise the type of work the contractor carries on. Without this process there would not be the same certainty that the supervisor was in fact at the requisite level of competence. In the case that they were not, there is an increased likelihood that substandard building works would result, with concomitant negative externalities occurring.

### 7.1.3 *Costs of the Requirement*

The requirement imposes costs in several areas.

A contractor must nominate a specific person to properly supervise all building work performed under the authority of the licence. This may not be practical, particularly in relation to a large business which may have numerous projects under way simultaneously.

A contractor is restricted in the scope of work they can undertake by the scope of work the supervisor is registered to supervise. For example, a contractor holding a licence for any building work could only contract for residential building work if the supervisor approved in relation to the business is limited to supervising residential building work.

There is a cost to the contractor each time they wish to change the nominated supervisor in relation to the licence (currently \$67.00).

### 7.1.4 *Assessing the costs and benefits*

It is apparent to the Review Panel that the objective of this requirement is to protect against both market and provider failure. Specifically, the requirement assists in the reduction of transaction costs and information asymmetry for consumers, whilst also minimising the likelihood of negative externalities and substandard works.



An alternative raised in the Issues Paper was that in order to ensure that consumers are able to identify a particular person as being responsible for the supervision of their building work, there could be a requirement that the name and contact details of the supervisor be included in the written contract.

However, as CASA pointed out in their submission to the Issues Paper:-

*“Due to some faults not being immediately apparent, the restriction to building work supervisors does not pose an unjustified restriction on competition. Just providing contact details for these people is not sufficient to ensure work is properly performed the first time.”*

The Review Panel agrees with this submission.

### CONCLUSION 21

**The conclusion of the Review Panel is that the requirement that a building work supervisor be approved in relation to a contractor’s business is a justifiable restriction on competition.**

## 7.2. ADVERTISING

There are two provisions in the Act relating to advertising by a licensed building work contractor.

Firstly, a licensed building work contractor must not publish, or cause to be published, an advertisement relating to the business (other than an advertisement relating solely to the recruiting of staff) unless the advertisement specifies the name of the agent appearing in the licence or a registered business name in which the agent carries on business as an agent and of which the Commissioner has been given prior notice in writing.<sup>128</sup>

The second provision requires a licensed contractor to install or erect in a prominent position on the site of any building work performed by the contractor a sign showing:-

- the contractor’s name as it appears on the licence, or the name in which the contractor carries on business and of which the Commissioner has been given prior notice in writing; and
- the contractor’s licence number (or the licence number of each partner where the contracting business is conducted by a partnership).

This provision does not apply if the contractor is merely subcontracting to another contractor (although the head contractor must comply with the requirements).<sup>129</sup>

The Review Panel has assessed these requirements as **trivial restrictions on competition**.

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<sup>128</sup> section 50

<sup>129</sup> section 51

### 7.2.1 Objectives of the Requirement

These two requirements are aimed at reducing levels of information asymmetry for consumers as well as assisting in the compliance function of the licensing authority.

### 7.2.2 Benefits of the Requirement

Advertising and promotion restrictions often have the purpose of ensuring that quality rather than price is the primary consideration in the consumer's decision. They may be sought by professions to avoid any suggestion of commercialism in the provision of professional services<sup>130</sup>.

However, that is not the purpose of the first restriction on advertising. The intention of this restriction is to ensure transparency in the market place, ie, to ensure that the consumer can identify exactly and with little difficulty who they are contracting or dealing with. This is particularly important in circumstances in which the consumer may wish to seek redress against a contractor.

The second provision is intended to assist in the identification of the contractor undertaking the building work, which benefits both consumers and compliance staff from the Office of Consumer and Business Affairs. There may also be a secondary benefit to contractors as it provides them with free advertising space.

### 7.2.3 Costs of the Requirement

The costs of the requirement are minimal. In terms of the first restriction, it is likely that a contractor would advertise in any event, and therefore a requirement to include the required details does not significantly affect the costs of placing such an advertisement.

In terms of the second restriction, the contractor bears the cost of the preparation of the signage. However, this cost is not significant.

### 7.2.4 Assessing the costs and benefits

Planning SA submitted that:-

*"The cost of advertising requirements are negligible, and they benefit consumers and consumer staff from OCBA."*

The Review Panel considers that the benefits of the requirement outweigh the associated costs.

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<sup>130</sup> *Guidelines for the Review of Legislative Restrictions on Competition*, Victorian Department of Premier and Cabinet, 1996, p73

**CONCLUSION 22**

**The conclusion of the Review Panel is that the restrictions on advertising are a trivial restriction on competition.**

**7.3. FALSE OR MISLEADING INFORMATION<sup>131</sup>**

A person must not make a statement that is false or misleading in a material particular (whether by reason of the inclusion or omission of any particular) in any information provided (or record kept) under the Act.

This provision reflects provisions in the *Misrepresentations Act 1972* (SA) and the *Fair Trading Act 1987* (SA). Bodies corporate engaging in such conduct may come within prohibitions contained in the *Trade Practices Act* (Commonwealth).

These requirements are considered **trivial restrictions on competition**.

**7.3.1 Objectives of the Requirement**

Although there is some duplication in these provisions in the sense that they are already contained in some form in other legislation, it is clear to the Review Panel that the objective of including them within the one Act is to ensure that fair trading outcomes are encapsulated under the regulatory scheme.

**7.3.2 Benefits of the Requirement**

The main benefit of this requirement is that it allows for a “one Act” approach to the building services market. Those who are involved with the relevant market are able to more easily ascertain their rights and responsibilities in this way.

**7.3.3 Costs of the Requirement**

The Review Panel has not identified any actual costs associated with this requirement. Indeed, as discussed above, the provision merely replicates the provision of other State and Federal Acts.

Planning SA submitted that the duplication may be considered unnecessary.

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<sup>131</sup> Section 48

#### **7.3.4 Assessing the costs and benefits**

Given the minimal costs of the requirement and the benefits of the “one Act” approach, the Review Panel considers that the requirement is justifiable.

#### **CONCLUSION 23**

**The conclusion of the Review Panel is that the prohibition on false or misleading information is a trivial restriction on competition.**

#### **7.4. NAME IN WHICH CONTRACTOR MAY CARRY ON BUSINESS<sup>132</sup>**

A person must not carry on business as a licensed building work contractor except in the name appearing in the licence or in a business name registered by the person in accordance with the provisions of the *Business Names Act 1996* of which the Commissioner has been given prior notice in writing.

The effect is that the contractor can carry on their business only under their own name, or in a business name registered under the *Business Names Act* (in which case the contractor licence would be in the business name).

The Review Panel has assessed this requirement as a **trivial restriction on competition**.

#### **7.4.1 Objectives of the Requirement**

The Review Panel has concluded that the objective of this requirement is to address issues of market failure, and in particular information asymmetry problems which are existent in the market.

#### **7.4.2 Benefits of the Requirement**

The intention of the restriction is twofold:-

- to ensure the integrity of the public register, which the Act requires the Commissioner to maintain;<sup>133</sup> and
- to ensure that consumers can have some degree of certainty as to who they are contracting with.

These intentions address issues of information asymmetry and transaction costs for consumers in the marketplace. Consumers search costs are minimised, they are assured that

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<sup>132</sup> Section 49

<sup>133</sup> Section 46

the person which whom they intend to contract is competent and it is easier for consumers to identify the correct party in the event that they wish to enforce their rights in court.

### 7.4.3 Costs of the Requirement

The cost of the restriction is borne by the contractor who must register their business name. The current fee<sup>134</sup> for the registration of a business name is \$103.00 (for a three year period).

### 7.4.4 Cost Benefit Analysis

Planning SA submitted that the requirement is not restrictive of competition. The Review Panel would agree with this submission.

## CONCLUSION 24

**The conclusion of the Review Panel is that the requirement to carry on business in either the licensees own name, or a business name registered in accordance with the *Business Names Act 1996* is a trivial restriction on competition.**

## 7.5 STATUTORY WARRANTIES<sup>135</sup>

All domestic building work contracts entered into on or after 22 January 1987 contain the following implied warranties:-

- a warranty that the building work will be performed in a proper manner to accepted trade standards and in accordance with the plans and specifications agreed to by the parties;
- a warranty that all materials to be supplied by the contractor for use in the building work will be good and proper;
- a warranty that the building work will be performed in accordance with all statutory requirements;
- if the contract does not stipulate a period within which the building work must be completed - a warranty that the building work will be performed with reasonable diligence;
- if the building work consists of the construction of a house - a warranty that the house will be reasonably fit for human habitation;

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<sup>134</sup> as at 1 July 1999

<sup>135</sup> Section 32

- if the building owner has expressly made known to the contractor, or an employee or agent of the contractor, the particular purpose for which the building work is required, or the result that the building owner desires the building work to achieve, so as to show that the building owner relies on the contractor's skill and judgment - a warranty that the building work and any materials used in performing the building work will be reasonably fit for that purpose or of such a nature and quality that they might reasonably be expected to achieve that result.

A person who has purchased or otherwise acquired a house succeeds to the rights of the person's predecessor in title in respect of statutory warranties.

If a person has purchased a house from a building work contractor who performed domestic building work in relation to the house, the purchaser has rights under statutory warranties as if the house had been purchased from a third party for whom the vendor had performed the building work under a contract subject to statutory warranties. This is to ensure that contractors do not circumvent the warranty provisions by merely professing to be the owner of the property.

Proceedings for breach of a statutory warranty must be commenced within five years after completion of the building work to which the proceedings relate. The period of limitation may not be extended.

The Review Panel has assessed this requirement as an **intermediate restriction on competition**.

### 7.5.1 Objectives of the Requirement

The objective of this requirement is to provide consumers with a means of enforcing their legal rights against a contractor in the event that there is some failure in the work performed. This may be characterised as a mechanism for reducing consumers' transaction costs, as the costs of enforcing one's legal rights fall within the broad category of transaction costs.

### 7.5.2 Benefits of the Requirement

The statutory warranties are materially similar to those implied into consumer contracts for the provision of services under the *Consumer Transactions Act 1972* (SA).<sup>136</sup> The regulations prescribe that building work as defined in the *Building Work Contractors Act 1995* is a service for the purposes of the Act.<sup>137</sup> However, the *Consumer Transaction Act* also prescribes that it does not apply to a consumer contract for the carrying out of domestic building work (presumably because the *Building Work Contractors Act* is intended to codify all relevant law relating to domestic building work).

The main benefit of this requirement is that it allows for a "one Act" approach to the building services market. Those who are involved with the relevant market are able to more easily ascertain their rights and responsibilities in this way.

Planning SA submitted that:-

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<sup>136</sup> *Consumer Transactions Act 1972* (SA), section 7

<sup>137</sup> *Consumer Transactions Regulations (No 2) 1996* (SA), Schedule 1, paragraph (t)

*“The statutory warranties are not an unnecessary restriction on the market as the benefits to the consumer will outweigh the costs to the contractor.”*

### 7.5.3 Costs of the Requirement

The Review Panel has not identified any actual costs associated with this requirement. Indeed, as discussed above, the provision merely replicates the provision of other State and Federal Acts.

### 7.5.4 Assessing the costs and benefits

Given the minimal costs of the requirement and the benefits of the “one Act” approach, the Review Panel considers that the requirement is justifiable.

## CONCLUSION 25

**The conclusion of the Review Panel is that the statutory warranties are a justified restriction on competition and should be retained.**

## 7.6. CONTRACT REQUIREMENTS

Statutory contract requirements are a restriction on conduct because they interfere in the bargaining relationship between consumer and contractor.

The Act requires that certain requirements be met in respect of contracts for domestic building work entered into on or after 1 May 1987.<sup>138</sup> These requirements include:-<sup>139</sup>

- the contract must be in writing;
- the contract must set out in full all the contractual terms;
- the contract must set out the name in which the building work contractor carries on business under the contractor's licence, the contractor's licence number and the names and licence numbers of any other persons with whom the contractor carries on business as a building work contractor in partnership;
- the contract must comply with any requirements of the regulations as to the contents of domestic building work contracts;

<sup>138</sup> Section 27. The requirements do not apply to contracts for minor domestic building work.

<sup>139</sup> Section 28.

- the contract must be signed by the building work contractor and the building owner personally or through an agent authorised to act on behalf of the contractor or building owner;
- the building owner must be given a copy of the signed contract as soon as reasonably practicable after it has been signed by both parties together with a notice in the prescribed form containing the prescribed information<sup>140</sup>;
- the copy of the contract and the notice given to the building owner must (apart from signatures or initials) be readily legible.

The Act also requires that a domestic building contract must stipulate a fixed price and the terms of payment.<sup>141</sup> There are further requirements in relation to domestic building work contracts.

The Review Panel has assessed these requirements as **intermediate restrictions on competition**.

### 7.6.1 Objectives of the Requirements

These requirements have been effected in the legislation largely to protect the bargaining position of consumers, and in this way address issues of transaction costs. While it may not be true in every case, it is nonetheless apparent to the Review Panel that consumers are at a disadvantage in terms of knowledge and therefore bargaining power in this market. The specific terms of the requirements ensure that consumers are aware of their rights and that these cannot be overridden by a more knowledgeable contractor.

### 7.6.2 Benefits of the Requirements

The standard information which the Act requires in contracts is specifically aimed at reducing transaction costs and information asymmetry for consumers. Thus the risk of market failure is correspondingly reduced.

The Review Panel considers that this reduction in risk is highly relevant given the nature of this market.

### 7.6.3 Costs of the Requirements

The costs arising from this requirements are that a contractor is required to use a contract which complies with the Act. This may, in some instances, result in increased costs to the supplier, and therefore ultimately to the community as a whole. However, this will only be the case in the event that there is a segment of the market which does not require all the information currently prescribed by the requirements.

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<sup>140</sup> The prescribed form is detailed in Form 1, Schedule 3 of the regulations. A copy is located in this Issues Paper at Appendix 3.

<sup>141</sup> Section 29.



#### **7.6.4 Assessing the costs and benefits**

CASA submitted that:-

*“A form of contract is a necessary consumer protection measure if subsequent litigation occurs and ensures information asymmetry is somewhat addressed. This form of contract is no more onerous than that involved in selling an existing house which has a similar level of emotional and financial risk. Thus a form of contract ought to be maintained as a justified restriction.”*

The restriction to conduct in conforming to mandatory contract requirements and providing a standard form notice to consumers setting out their rights under the Act is balanced by the advantages of the clear statement it provides as to the rights and duties of all parties. Therefore, the chance of future litigation resulting from any misrepresentation or an incomplete transaction is reduced and consumers are aware of relevant details prior to actually entering into the contract.

#### **CONCLUSION 26**

**The conclusion of the Review Panel is that the contract requirements with respect to domestic building work are justified as the benefits to the community as a whole outweigh the costs.**

#### **7.7. INDEMNITY INSURANCE**

In relation to domestic building work commenced after 1 May 1987, a building work contractor must not perform such work unless a policy of insurance is in force in relation to that building work, and the building owner has been provided with a certificate evidencing that the policy has been taken out and that it complies with the legislative requirements.<sup>142</sup>

Domestic building work is defined<sup>143</sup> as:-

- the whole or part of the work of constructing, erecting, underpinning, altering, repairing, improving, adding to or demolishing a house; or
- the whole or part of the work of excavating or filling a site for work referred to above

and includes:-

- the construction, alteration, repair or improvement of a swimming pool or spa within the external walls of a house or within the curtilage of a house, and

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<sup>142</sup> Section 34

<sup>143</sup> Section 3 and Regulation 5(2)

- any other building work carried out within the curtilage of a house or on the boundary of the curtilage of a house.

“House” does not include hotels, motels, youth hostels, residential camps, boarding or lodging houses, university halls of residence, boarding school dormitories, barracks, nurses homes, residential facilities for workers or for training purposes, or other similar buildings.<sup>144</sup>

A contractor does not need to arrange insurance in circumstances where council approval is not required in relation to the domestic building work, or where the cost of the domestic building work to the building owner is less than \$5,000.<sup>145</sup>

The Act and regulations specify that the policy of insurance must insure each person who is (or may become) entitled to the benefit of a statutory warranty in respect of the building work against the risk of being unable to enforce or recover under the statutory warranty by reason of:-

- the insolvency;
- death; or
- disappearance of the building work contractor

and insures against the risk of loss resulting from the non-completion of the building work<sup>146</sup>.

The Review Panel has assessed this requirement as an **intermediate restriction on competition**.

### 7.7.1 Objectives of the Requirement

The existence of indemnity insurance is a super-added consumer protection measure along the lines of the statutory warranties. It is clearly designed to provide continued protection when those warranties cannot be enforced by the consumer. Thus, as with the statutory warranty provisions, this requirement is aimed at addressing transaction cost problems within the market.

### 7.7.2 Benefits of the Requirement

Indemnity insurance is a risk management device which benefits consumers, even if they bear the costs of the insurance (the costs of premiums would usually be passed on through fees or contract prices.)

There are currently four providers of indemnity insurance in South Australia:-<sup>147</sup>

- Master Builders Association;

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<sup>144</sup> Regulation 5(3)

<sup>145</sup> Section 33(2), Regulation 5(4), and Section 3

<sup>146</sup> Section 35

<sup>147</sup> The Act does not provide for the Commissioner for Consumer Affairs to approve individual providers of building indemnity insurance, therefore no accurate register of providers is maintained.

- Bovill Risk & Insurance Consultants Pty Limited;
- Housing Industry Association; and
- Swimming Pool and Spa Association.

It appears to be the practice in South Australia that a separate policy of insurance is taken out in respect of each building work project. The Act does not prevent “blanket” insurance policies, although there is only one known instance where such a blanket policy is in place. There may be efficiencies to be gained in contractors obtaining “blanket” indemnity policies, although the costs of such policies may be prohibitive for smaller contractors.

The insurance requirement also provides an ongoing measure of consumer protection through the underwriting market’s assessment of the viability of the contractor. Insurance will not be offered, or will be offered at prohibitive rates, in the case that the contractor is assessed as too great a risk.

### 7.7.3 Costs of the Requirement

Obtaining indemnity insurance will lead to increased costs of doing business for the contractor. These costs will ultimately be passed on the consumer through a contractor’s pricing structures. In this way, what is initially a private cost may become a public one. If the cost or availability of indemnity insurance is keeping people out of the industry, then this is a further cost. It means that competition is reduced, which can have the effects outlined in the general discussion earlier in this report of the costs and benefits of regulation.

### 7.7.4 Assessing the costs and benefits

The submissions were generally supportive of the retention of the indemnity insurance requirement.

CASA submitted that:-

*“The risk of loss to the consumer is great and so insurance taken by the builder to cover any warranties not honoured by them is a justified restriction.”*

The Review Panel considers that the benefits provided to consumers through the requirement outweigh the costs of insurance. Whilst it is recognised that there are costs, it is necessary that consumers be protected from the risks involved in this market. Building work is often a transaction that is of tremendous importance to the consumer, and may involve a large portion of their assets. The risk of warranties not being honoured is too great to leave unprotected.

## CONCLUSION 27

**The conclusion of the Review Panel is that the benefits of the requirement to obtain indemnity insurance outweigh the costs, and that the restriction is therefore justified.**

## 7.8 DISCIPLINARY PROVISIONS

The Act prescribes certain situations in which disciplinary action can be taken. The objective of these provisions is to provide remedies over and above those which exist under other Acts and at common law. They provide a way of excluding persons from the industry who have demonstrated that they pose a risk to consumers.

Disciplinary action may be taken against a contractor where the licence of the contractor was improperly obtained, where the contractor has acted contrary to an assurance accepted by the Commissioner under the *Fair Trading Act 1987*, where the contractor has acted contrary to the Act, or has acted unlawfully, improperly or negligently in the course of conducting, or being employed or otherwise engaged in the business of the contractor, or have failed to comply with an order of the Court in relation to domestic building work, or events have occurred such that the contractor would not be able to obtain a licence if they applied for one.<sup>148</sup>

Disciplinary action may be taken against a building work supervisor if their registration was improperly obtained or they have acted unlawfully, improperly or negligently in the course of acting as a building work supervisor.<sup>149</sup>

Disciplinary action may be taken against a building consultant if they have acted contrary to an assurance accepted by the Commissioner under the *Fair Trading Act 1987* or if they have acted unlawfully, improperly or negligently in the course of acting as a building consultant.<sup>150</sup>

Action may be taken against each director of a body corporate where there is proper cause for disciplinary action against the body corporate. This includes a shadow director. This prevents people hiding behind the corporate veil in an attempt to evade the provisions of the Act.

There are a number of penalties available which range from a reprimand or a fine to suspension or expulsion from the industry.<sup>151</sup> The grounds for disciplinary action are quite extensive, as are the types of disciplinary action which may be taken. This allows flexibility in the treatment of contractors, supervisors and building consultants, and enable proportionality in the action taken against them, while concurrently ensuring that consumers are properly protected.

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<sup>148</sup> Section 21(1)

<sup>149</sup> Section 21(2)

<sup>150</sup> Section 21(3)

<sup>151</sup> Section 25(1)

### 7.8.1 Assessment of the provisions

The disciplinary provisions may be seen as placing some restrictions on market conduct. The market conduct which is restricted by these provisions, however, is conduct which is wholly undesirable - negligence or deliberate wrongdoing. Restricting such conduct cannot be seen as truly restricting competition. Additionally, such conduct is penalised under the common law.

The Review Panel considers that the disciplinary provisions are necessary for the protection of consumers and are a **trivial restriction on competition**.

#### CONCLUSION 28

**The disciplinary provisions are a trivial restriction on competition and should be retained.**

## **PART 8: EXEMPTIONS**

There are a number of exemptions which have not been dealt with elsewhere in this Issues Paper, which may have some competitive impact or create a distortion in the market for building work contracting and supervisory services.

These exemptions are discussed below.

### **8.1. CROWN EXEMPTIONS**

Numerous Crown bodies are exempt from complying with the provisions of the Act. These exemptions require examination to ensure that they do not infringe principles of competitive neutrality.

The Hilmer Report recommended that government businesses should not enjoy any net competitive advantage by virtue of their ownership when competing with other businesses. Government businesses competing against other firms within their traditional markets should be subject to measures that effectively neutralise any net competitive advantage flowing from their ownership.

The issue has arisen in the context of government businesses being exposed to greater competition in their traditional markets, and government businesses moving into traditional private sector markets. The challenge for government policy-makers is to ensure that government and private firms operate in a competitively neutral environment.

Government businesses may benefit from a number of competitive advantages, such as exemption from the application of competitive conduct rules (such as the *Trade Practices Act*).

The Hilmer Report noted<sup>152</sup> other special advantages which may be enjoyed by government businesses. Of relevance in the context of the review of this Act, immunity from various regulatory requirements.

Among the disadvantages which government businesses suffer by virtue of their ownership:-

- greater accountability obligations;
- community service obligations;
- reduced managerial autonomy;
- requirements to comply with government wages, employment and industrial relations policies; and
- higher superannuation costs.

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<sup>152</sup> at p.296

The concern is that where a government business enjoys a net competitive advantage (ie the competitive advantages outweigh the competitive disadvantages) then it may be able to offer prices below that which can be offered by more or equally efficient competitors.

From a community perspective this may result in inefficient use of community resources. From the perspective of the non-government participants in the market, the situation may well be seen as inequitable.

The issue of competitive neutrality will arise in circumstances where the traditional market of a government business is opened up to private competition. Theoretically, governments open up traditional government monopoly businesses with the object of improving efficiency and delivering a net gain to the community. Allowing an incumbent government business to retain competitive advantages will diminish these gains over time.

The issue of competitive neutrality will also arise in cases where government businesses enter markets they have not competed in previously. If these businesses are permitted to operate at a competitive advantage, they may distort the efficiency of the market by attracting business from otherwise efficient suppliers.

The Hilmer Committee noted that they had been *“presented with no persuasive argument for allowing government businesses to enjoy net competitive advantages outside their traditional markets, even on a temporary basis.”*<sup>153</sup>

It is necessary to ensure that the inclusion of the following exemptions do not infringe principles of competitive neutrality.

### **8.1.1. South Australian Housing Trust and Minister for State Development**

The South Australian Housing Trust and the Minister for State Development are exempt from the requirement to be licensed as building work contractors. They are also exempt from the building indemnity insurance requirements contained in Part 5 of the Act.<sup>154</sup>

The exemption for the indemnity insurance requirements may have been justified when the Trust was merely constructing houses for its own stock. However, it appears that the Trust is now actively refurbishing properties and selling them to tenants. The South Australian Housing Trust submitted that the construction of new housing stock was only a small part of its operation, but stated that modification, maintenance and upgrades of existing stock, which would constitute building work under the Act, forms a very substantial part of its business.

However, as the Trust pointed out in its submission, it does not have a labour force to perform its building work, but rather engages contractors to carry out work on its behalf.

Nonetheless there may be at least a prima facie argument that it is inappropriate for consumers not to have the benefit of indemnity insurance.

The Review Panel has assessed this exemption as a **trivial restriction on competition**.

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<sup>153</sup> at p.299

<sup>154</sup> Regulation 6(4)

### 8.1.1.1 *Benefits of the Exemption*

The current exemption allows the South Australian Housing Trust to fulfil its statutory functions as set out in the *South Australian Housing Trust Act 1995*. These include:-

- providing houses to meet public and community housing requirements;<sup>155</sup>
- managing public housing assets so as to ensure acceptable rates of return and protect the value of those assets;<sup>156</sup> and
- undertaking programs for the improvement of community housing within the State.<sup>157</sup>

Of course, a requirement to be licensed or to obtain indemnity insurance would not necessarily impede these functions. However, the cost of provision of the services would be increased and to this extent the achievement of the objectives of the Housing Trust would be diminished.

Under the Competition Principles Agreement, where the costs and benefits of a particular course of action are to be balanced, matters of social welfare and equity considerations, government legislation and policies relating to access and equity, and economic and regional development must be taken into account.

The Review Panel considers that there is a benefit provided to the community as a whole in so far as the objectives of the *South Australian Housing Trust Act 1995* are better facilitated under the exemption.

### 8.1.1.2 *Costs of the Exemption*

The effect of the current exemption is that if the Trust or the Minister for State Development were to compete with private sector contractors then it would have a competitive advantage. This would have a negative effect of competition in the relevant market.

CASA submitted that:-

*“Due to the power imbalance, an individual housing trust home purchaser forced to sue a government body in contract may face much resistance. Therefore some sort of compensation ought to be available to these purchasers for their losses resulting from poor workmanship.”*

The fear expressed here is that the transaction costs consumers face in dealings with government are higher than those faced when dealing with the private sector. Whether this is the case is debatable.

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<sup>155</sup> *South Australian Housing Trust Act 1995* section 5(1)(b)

<sup>156</sup> *op cit*, section 5(1)(c)

<sup>157</sup> *op cit*, section 5(1)(d)



### 8.1.1.3 *Assessing the costs and benefits*

With respect, the Review Panel does not accept the proposition that it may be difficult for a consumer to obtain redress against a government body. Underpinning this is the principle that the Crown is the model litigant and will not abuse its position of power. This is reinforced by the submission of the Trust which said:-

*"...during the 1997-1998 financial year the Trust sold 1,201 houses, 52% involving sales to tenants. In no case did it seek to avoid the statutory warranties under Section 32 of the Building Work Contractors Act."*

The Act requires that building indemnity insurance be in place to provide the benefit of the statutory warranties in the event that the contractor become insolvent, dies or disappears. None of these three risks attach to the Housing Trust.

As was noted by the Trust, a consumer can always sue the Trust, or its statutory successor, to obtain the remedy for a breach of a statutory warranty. This will be the case whether or not the relevant contractor has become insolvent, died or disappeared.

The same is true for the Minister for State Development. At common law a Minister is a delegate or agent of the Crown<sup>158</sup> and therefore, in the event that a consumer sought to enforce their warranties against the Minister, suit could always be brought against the Crown in the right of the State of South Australia.

A further problem to be faced if either entity were to be licensed is that, in effect, the Crown would be licensing itself

#### **CONCLUSION 29**

**The conclusion of the Review Panel is that the exemption from the need to be licensed and obtain building indemnity insurance for the South Australian Housing Trust and the Minister for State Development are justified and should be retained.**

### **8.1.2. *MFP Development Corporation & MFP Industrial Premises Corporation***

The MFP Development Corporation and the MFP Industrial Premises Corporation are exempt from the requirement to be licensed as building work contractors.<sup>159</sup>

It is noted by the Review Panel that the MFP Industrial Premises Corporation and MFP Development Corporation are not presently known under these names.

The *Public Corporations (Industrial and Commercial Premises Corporation) Regulations 1997* allows that:-

<sup>158</sup> B Selway, *The Constitution of South Australia* (1997) paragraph 6.4.9

<sup>159</sup> Regulation 6(4a)

5(1) *The MFP Development Corporation is continued in existence as a subsidiary of the Minister under the name **Industrial and Commercial Premises Corporation.***

The Review Panel considers that it may be necessary at some point to amend the wording of the current exemption to reflect the changes made. However, the effect of regulation 5(1) above is that the Industrial and Commercial Premises Corporation (“ICPC”) is entitled to the benefit of the exemption.

The Department for Administrative and Information Services informed the Review Panel that the Land Management Corporation “*neither contract[s] for or directly supervises building work as defined in the issues paper*”.

The Review Panel has identified this exemption as a **trivial restriction on competition.**

### 8.1.2.1 *Benefits of the Exemption*

The ICPC has a particular role to play in the industrial development of the State. It has been established to either attract business to, or assist in the expansion and relocation of existing businesses, which it has identified as providing particular benefits to the State as a whole.

In fulfilling this role the ICPC offers assistance to businesses through, amongst other things, “*facilitating constructing buildings and improvements on that land*”<sup>160</sup>. The ICPC accepts that the broad definition of building work and building work contractor give rise to the possibility that work it carries out may fall within the ambit of the Act, and therefore that it may require a licence.

To address this issue, the ICPC submitted:-

*“The exemption enables the ICPC to engage in activities to facilitate and encourage business projects to relocate or expand in South Australia without the need to become licensed pursuant to the Building Work Contractors Act.”*

The Review Panel considers that the activities of the ICPC provide significant positive externalities in this State, and in this way address market failure.

### 8.1.2.2 *Costs of the Exemption*

If the ICPC were to compete in the open market for the provision of building work services, then it would follow that the exemption from the requirement to be licensed would be a restriction on competition.

However, no evidence has been presented to the Review Panel that it does compete in the relevant market. In fact, the ICPC itself has stated that it:-

*“is not in competition with any private business or building work contractor.”*

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<sup>160</sup> submission of the ICPC

No submissions were received by the Review Panel expressing the view that the exemption imposed costs on the public as a whole.

### 8.1.2.3 *Assessing the costs and benefits*

Pursuant to clause 1(3)(g) of the Competition Principles Agreement, when weighing the costs and benefits of a particular policy, matters of economic and regional development, including employment and investment growth must be taken into account.

The Review Panel considers that the exemption granted in this case has been granted to provide a substantial public benefit in South Australia by facilitating the achievement of the ICPC's objectives.

The Review Panel finds that the exemptions do not have any significant impact on competition within the relevant markets. Even if it were considered that the exemptions impact on competition in a greater way than assessed by the Review Panel, the Review Panel considers that the benefits of these exemptions easily outweigh the costs. In each case, there is a significant public benefit in assisting these organisations to carry out work that is of great benefit to the public as a whole

### CONCLUSION 30

**The conclusion of the Review Panel is that the exemption from the requirement to be licensed held by the MFP Development Corporation and the MFP Industrial Premises Corporation are justified as the benefits to the community as a whole outweigh the costs.**

**The Review Panel recommends that the wording of the exemption be revisited so as to identify the Industrial and Commercial Premises Corporation as the immediate beneficiary of the exemption.**

## 8.2. REGISTERED ARCHITECTS

The Act deems a registered architect to be the holder of a building work supervisors registration for the purposes of the Act<sup>161</sup>. Registered architects are therefore able to compete for the provision of supervisor services without having to satisfy the registration requirements. They are also exempt from the requirement to pay the Commissioner fees fixed by regulation and lodge annual returns.<sup>162</sup>

The Review Panel has assessed this exemption as a **trivial restriction on competition**.

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<sup>161</sup> Section 14

<sup>162</sup> Regulation 6(5) and Section 18

### **8.2.1 Benefits of the Exemption**

As discussed at Part 4.3, amongst the objectives of the Act are of the risk of consumer loss arising from poor quality work, and also the minimisation of risks to the health and safety of the community. These objectives are achieved through the proper supervision of building work.

The Act requires building work to be properly supervised by registered building work supervisors. In order to obtain registration, a supervisor must display competency in the relevant field such that they will be able to address risks posed to the public in building work through their supervision. The required competencies are set out in Part B of Schedule 2 of the regulations, and focus on building management, technical and legal knowledge.

Through their training, architects obtain competency in a number of areas, including those outlined above. The Architects Board of South Australia has set out the requirements for registration as an architect in South Australia in their submission:-

*“The requirements for registration as an architect are five years approved tertiary study plus two years approved and supervised practical experience followed by an examination administered by the Architects Board of South Australia. Then a registered architect is well qualified both technically and professionally (including contract law and administration) to supervise building work.”*

It would appear to the Review Panel that architects possess the appropriate competency to supervise building work without posing a risk to the community as a whole. Therefore, the presence of architects in this market provide a positive externality for consumers generally.

There is a further benefit which the Review Panel considers arises in relation to this exemption. Arguably, the deeming of registered architects as building work supervisors actually enhances competition in the market for building work services through increasing the numbers of suppliers able to offer the service.

### **8.2.2 Costs of the Exemption**

The only costs of the exemption identified are private costs incurred by registered building work supervisors who have to pay registration fees and file annual returns. Of course, it is accepted that these fees are ultimately borne by the wider community through a contractor's fee structure.<sup>163</sup>

However, it must also be remembered that architects are also required to pay fees and incur significant training costs in order to become registered as an architect.

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<sup>163</sup> The costs are passed on to consumer by contractors since supervisors are employed by contractors and are not engaged directly by the public.

### 8.2.3 Cost Benefit Analysis

Submissions received were supportive of the retention of the exemption.

Planning SA submitted that:-

*"Deeming of registered architects is appropriate as architects are subject to separate registration requirement under the Architects Act."*

The justification for the exemption is that registered architects possess appropriate technical qualifications. It is therefore argued that the objectives of the Act are not compromised by this exemption.

### CONCLUSION 31

**The conclusion of the Review Panel is that the deeming of architects to be building work supervisors is justified and should be retained.**

## 8.3 CONTRACTORS

### 8.3.1. Demolition Contractors

A building work contractor is, in relation to domestic building work consisting solely of demolition work, exempt from the application of the following provisions of the Act:-

- Part 5, Division 1 (Requirements in relation to certain domestic building work contracts);
- Part 5, Division 3 (Building indemnity insurance); and
- Part 5, Division 4 (Right to terminate certain domestic building work contracts).

The Review Panel has identified this exemption as a **trivial restriction on competition**.

#### 8.3.1.1 Benefits of the Exemption

The effect of the exemption is that costs to those consumers who seek to have building work which consists solely of demolition work will be decreased. Contractors will not pass on to consumer the in-built costs associated with complying with Divisions 1, 3 and 4 of Part 5 of the Act.

Further, demolition work does not pose the same risks to consumers in terms of market and provider failure as do other classes of building work. Therefore, the current exemption lightens the regulation of the work so as to provide that only those elements of provider

failure or market failure which are present are regulated. This lightening of the regulatory burden provides a benefit to the community as a whole.

### 8.3.1.2 *Costs of the Exemption*

None of the submissions received by the Review Panel in response to the Issues Paper or Draft Report identified any costs arising from this exemption.

### 8.3.1.3 *Assessing the costs and benefits*

This reduction in costs to the consumer and the lightening of the regulatory burden are identified by the Review Panel as providing a benefit to the community as a whole.

## CONCLUSION 32

The conclusion of the Review Panel is that there is public benefit in exempting domestic building work consisting solely of demolition work from the application of Divisions 1, 3 and 4 of Part 5 of the Act, and therefore that the exemption is justified and should be retained.

### 8.3.2. *Contractors to South Australian Housing Trust, the Minister for State Development or bodies corporate*

A contractor is exempt from the application of sections 28 (formal requirements for domestic building work contracts), 29 (price and domestic building work contracts) and 30 (payments under or in relation to domestic building work contracts) and Division 4 of Part 5 (right to terminate certain domestic building work contracts) if:-

- the work is performed by a building work contractor as a contractor for the South Australian Housing Trust or the Minister for State Development; or
- the building owner is a body corporate that is a public company within the meaning of the *Corporations Law* or a subsidiary of such a public company within the meaning of the *Corporations Law*.
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The Review Panel has identified these exemptions as **trivial restrictions on competition**.

### 8.3.2.1 *Benefits of the Exemption*

One of the principle aims of the NCP program is to reduce unnecessary regulation in the market so as to extend the productivity-enhancing effects of competition to virtually all sectors of the economy. As has been discussed throughout this Final Report, regulation can be justified in situations of market and provider failure.

The sections which are the subject of the exemption are all aimed at reducing levels of transaction costs and information asymmetry in the market. A question therefore arises whether the Minister, the Trust and bodies corporate are at the same risk in terms of transaction costs and information asymmetry as are other consumers.

The Review Panel considers that these bodies do not face the same risks. The Trust, the Minister and bodies corporate can take a greater responsibility for their own contractual relationships. As the Housing Trust submitted:-

*"It was considered fair that contractors for the Trust should have exemptions from the application of section 28, 29 and 30 and division 4 of Part 5 of the Act, as the Trust did not need the protections which these statutory provisions would have provided it and both the Trust and the contractor benefit from the saving of compliance costs."*

Therefore, the justification for regulation in this area is not as great as in other areas, and the lightening of the regulatory burden provides benefit to the wider community.

### 8.3.2.2 *Costs of the Exemption*

The only cost which the Review Panel has identified in relation to the exemption is that one class of consumer is able to obtain building services at a reduced price. However, this reduction in price will only be reflective of savings made through contractors not having to comply with otherwise compulsory regulatory requirements.

### 8.3.2.3 *Assessing the costs and benefits*

The Review Panel considers it significant that the benefit of the exemption accrues to any contractor who contracts to under take work for the Trust, the Minister or a body corporate. It does not single out a class of contractor and give them a competitive advantage over other contractors.

The benefits provides to the community through the lightening of the regulatory burden in an area where the justification for regulation is not as great are significant. While the Review Panel accepts that any exemption from a regulatory requirement may represent a distortion in the market, in this case it is considered that the exemption is justified.

### **Conclusion 33**

**The conclusion of the Review Panel is that the exemption for contractors who contract with the South Australian Housing Trust, the Minister for State Development, a body corporate that is a public company within the meaning of the *Corporations Law* or a subsidiary of such a public company is justified and should be retained.**

### **8.3.3. Pest Controllers and Security Alarm Installers**

A person authorised by licence under the *Controlled Substances (Pesticide) Regulations 1988* to carry on business as a pest controller is exempt from the requirement to be licensed under Part 2 of the Act, subject to any requirement that building work performed by that person is limited to work authorised by the person's licence under those regulations.<sup>164</sup>

A person authorised by licence under the *Security and Investigation Agents Act 1995* to install or maintain security alarm or surveillance systems is exempt from the requirement to be licensed under Part 2 of the Act, subject to any requirement that building work performed by that person is limited to work authorised by the person's licence under those regulations.<sup>165</sup>

The Review Panel has identified these exemptions as **trivial restrictions on competition**.

#### **8.3.3.1 Benefits of the Exemptions**

These exemptions provide benefit by reducing unnecessary regulation in the market.

As discussed, pest controllers are presently licensed under the *Controlled Substances (Pesticide) Regulations 1988* to carry on business. As part of carrying on such a business, a pest controller may perform work involving the erection of termite barriers. This work would fall within the definition of building work under the Act.

However, the reality is that this sort of work may also be properly classified as pest control work. A licence to do this work will already have been granted under the abovementioned regulations. Regulation 7 of the *Controlled Substances (Pesticide) Regulations 1988* provides that in order to be granted a licence, an applicant must, among other things, have adequate knowledge of the requirements of the regulations and of the practices which should be followed in the conduct of a pest control business to avoid endangering public health or the environment.<sup>166</sup> Therefore, the Review Panel considers that the construction of termite barriers would fall within the knowledge required under those regulations.

Given this, to require a pest controller to obtain a further licence under the Act would be regulating an already regulated area. The NCP program is concerned with removing unnecessary regulation so as to provide public benefit. In this case, the exemption provides public benefit as regulation would only be addressing an area of provider or market failure which is already addressed elsewhere.

A similar argument applies in the case of security alarm installers.

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<sup>164</sup> Regulation 6(2)

<sup>165</sup> Regulation 6(3)

<sup>166</sup> *Controlled Substances (Pesticide) Regulations* regulation 7(b)(i)



### 8.3.3.2 *Costs of the Exemptions*

Any exemption from the requirement to be licensed presents a distortion in the market when the exempted person may compete with a licensed contractor to supply services. The former class of person will have a competitive advantage over the latter in the supply.

Therefore, it may be the case that those who have the benefit of the exemption will have such a competitive advantage. The question is however, whether or not those who are exempt do in fact compete in the same market. It must be borne in mind that in each case the exemption on extends to work authorised by a licence already held by the person. The building work performed must be properly seen as a mere incident of the work which is being performed under the other licence. In most cases therefore, a contractor licensed under the Act would not in any event be competing to provide the same service.

No submission received by the Review Panel expressed the opinion that these particular exemptions were anti-competitive in effect.

### 8.3.3.3 *Assessing the costs and benefits*

The Review Panel considers that the costs imposed on the wider community through a system involving dual regulation of an activity are significant. The exemptions for pest controllers and security agents who install or maintain security alarm or surveillance systems avoid the opportunity for double regulation and thus save the community from the imposition of these costs.

#### CONCLUSION 34

**The conclusion of the Review Panel is that the exemptions in favour of pest controllers and security agents who install or maintain security alarm or surveillance systems are justified and should be retained.**

## APPENDIX 1: SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

### CONCLUSION 1

The conclusion of the Review Panel is that the markets affected by the operation of the Act are:-

- the market for contracting services in the building industry in South Australia;
- the market for supervisory services in the building industry in South Australia;
- the market for building consultancy services in South Australia; and
- a secondary market for training courses for the building industry in South Australia

### CONCLUSION 2

The conclusion of the Review Panel is that the Act has the following objectives:-

1. to minimise the potential for consumer loss through unscrupulous conduct by the licensing of building work contractors;
2. to minimise the potential for consumer loss through builder insolvency by the licensing of building work contractors;
3. to minimise the potential for consumer loss arising from poor quality work by the registering of building work supervisors; and
4. to ensure that the health and safety of the community is not put at risk by ensuring proper and adequate supervision of building work by registered building work supervisors.

### CONCLUSION 3

The conclusion of the Review Panel is that the protection of the public from loss remains a relevant objective.

### CONCLUSION 4

The conclusion of the Review Panel is that the protection of the public from potential health and safety risks remains a relevant objective.

**CONCLUSION 5**

The conclusion of the Review Panel is that there is justification for continuing regulation of the building services market as the potential benefits to the wider community outweigh the costs.

**CONCLUSION 6**

The conclusion of the Review Panel is that given the significant risks to the health and safety of the community from faulty building work, and the financial risks to consumers of building services, it is not appropriate at this time to rely solely on market forces to regulate the identified markets.

**CONCLUSION 7**

The conclusion of the Review Panel is that reliance on existing general laws to alleviate the risks which exist (or potentially exist) in the building and construction industry is inappropriate. Rather, these general laws when combined with a licensing or registration system provide an effective framework for regulation of these markets.

**CONCLUSION 8**

The conclusion of the Review Panel is that greater reliance upon the insurance market is not an appropriate alternative to the current system of regulation.

**CONCLUSION 9**

The conclusion of the Review Panel is that the option of greater co- or self-regulation by the industry bodies is not feasible at this time, although the option does exist within the current legislation for this to occur should the industry exhibit the level of maturity sought by Government to justify entering into appropriate agreements

**CONCLUSION 10**

The conclusion of the Review Panel is that negative licensing is not an appropriate alternative to the current system of regulation.

#### CONCLUSION 11

The conclusion of the Review Panel is that whilst the current definition of building work under the Act may be so broad as to include activities that cannot be justified under competition principles, nonetheless, as there are mechanisms in the Act that allow for any such work to be excluded, no amendment to the definition is required.

#### CONCLUSION 12

The Review Panel concludes that the legislation should ensure that only those types of building work which can be demonstrated to pose a risk to public health and safety; or which pose a significant financial risk to consumers should be subject to licensing. In this way, the licensing system will operate in the least restrictive manner possible. Those types of work currently subject to licensing but which do not pose a demonstrated risk to consumers should not continue to be licensed.

Accordingly, the Review Panel recommends that:-

1. the Act continue to regulate domestic, commercial and industrial and specified building work;
2. the Commissioner for Consumer Affairs seek advice from industry groups and other interested parties to:-
  - 2.1. identify appropriate streams of work for specified building work with a view to reducing the current number of "specified building work" conditions through administrative means; and
  - 2.2. identify types of work which may appropriately be excluded from the definition of building work.

#### CONCLUSION 13

The conclusion of the Review Panel is that the Act should refer to "competencies" as well as "qualifications" where appropriate.

**CONCLUSION 14**

The conclusion of the Review Panel is that the requirement that an applicant for a licence has sufficient qualifications and experience, or sufficient business knowledge and experience in the case of a body corporate, appropriately addresses the objectives of the legislation and provides benefit to the public with outweigh the associated costs.

The Review Panel recommends that the current requirements should be reviewed once national competency standards have been settled and that only those competencies which are necessary for the protections of consumers should be mandated for licensing purposes.

**CONCLUSION 15**

The Review Panel is of the general view that the requirement that a person has sufficient financial resources to carry on the business is a justified barrier to entry in those circumstances in which consumers are at risk from contractor failure.

However, where a licence is sought which would limit the licensee to contracting only with other licensed contractors as a subcontractor, the Review Panel concludes that there is no need for that person to satisfy any financial criteria.

The Review Panel also considers that it would be appropriate for the Office of Consumer and Business Affairs to publish a non-binding guideline for applicants on the sufficiency of financial resources generally adequate for a particular licence.

**CONCLUSION 16**

The conclusion of Review Panel is that:-

1. the current period of prohibition be amended from 10 years to 5 years; and
2. bankruptcy, compositions, deeds or schemes of arrangement should not disqualify a person from holding a conditional licence limited to subcontracting only to other licensed contractors.

CONCLUSION 17

The Review Panel concludes that since a finding by the Commissioner for Consumer Affairs that a person is not a fit and proper person to hold the licence can be appealed to the District Court, the provision should be retained.

CONCLUSION 18

The conclusion of the Review Panel is that the requirement that building work supervisors be registered is justified as the benefits to the community outweigh the costs.

CONCLUSION 19

The conclusion of the Review Panel is that the requirement that a building work supervisor hold qualifications prior to the grant of registration is a justifiable restriction on competition.

The Review Panel recommends that the Office of Consumer and Business Affairs investigate the possibility of implementing a process whereby the Commissioner can determine appropriate competencies based on the scope of work to be authorised by the registration.

The Review Panel further recommends that the Act should refer to competency as well as qualifications where appropriate.

CONCLUSION 20

The fees at their current level are a trivial restriction on competition.

CONCLUSION 21

The conclusion of the Review Panel is that the requirement that a building work supervisor be approved in relation to a contractor's business is a justifiable restriction on competition.

**CONCLUSION 22**

The conclusion of the Review Panel is that the restrictions on advertising are a trivial restriction on competition.

**CONCLUSION 23**

The conclusion of the Review Panel is that the prohibition on false or misleading information is a trivial restriction on competition.

**CONCLUSION 24**

The conclusion of the Review Panel is that the requirement to carry on business in either the licensee's own name, or a business name registered in accordance with the *Business Names Act 1996* is a trivial restriction on competition.

**CONCLUSION 25**

The conclusion of the Review Panel is that the statutory warranties are a justified restriction on competition and should be retained.

**CONCLUSION 26**

The conclusion of the Review Panel is that the contract requirements with respect to domestic building work are justified as the benefits to the community as a whole outweigh the costs.

**CONCLUSION 27**

The conclusion of the Review Panel is that the benefits of the requirement to obtain indemnity insurance outweigh the costs, and that the restriction is therefore justified.

CONCLUSION 28

The disciplinary provisions are a trivial restriction on competition and should be retained.

CONCLUSION 29

The conclusion of the Review Panel is that the exemption from the need to be licensed and obtain building indemnity insurance for the South Australian Housing Trust and the Minister for State Development is justified and should be retained.

CONCLUSION 30

The conclusion of the Review Panel is that the exemption from the requirement to be licensed held by the MFP Development Corporation and the MFP Industrial Premises Corporation is justified as the benefits to the community as a whole outweigh the costs.

The Review Panel recommends that the wording of the exemption be revisited so as to identify the Industrial and Commercial Premises Corporation as the immediate beneficiary of the exemption.

CONCLUSION 31

The conclusion of the Review Panel is that the deeming of architects to be building work supervisors is justified and should be retained.

CONCLUSION 32

The conclusion of the Review Panel is that there is public benefit in exempting domestic building work consisting solely of demolition work from the application of Divisions 1, 3 and 4 of Part 5 of the Act, and therefore that the exemption is justified and should be retained.



**Conclusion 33**

The conclusion of the Review Panel is that the exemption for contractors who contract with the South Australian Housing Trust, the Minister for State Development, a body corporate that is a public company within the meaning of the *Corporations Law* or a subsidiary of such a public company is justified and should be retained.

**CONCLUSION 34**

The conclusion of the Review Panel is that the exemptions in favour of pest controllers and security agents who install or maintain security alarm or surveillance systems are justified and should be retained.

## APPENDIX 2: TERMS OF REFERENCE

The *Building Work Contractors Act 1995* and associated regulations are referred to by the Minister for Consumer Affairs to the Office of Consumer and Business Affairs for evaluation and report by September 1999. The review is to focus on those parts of the legislation which restrict competition or which impose costs or confer benefits on business.

Consistent with the Competition Principles Agreement, the review should assess whether any restrictions on competitive conduct represented by the *Building Work Contractors Act* are justified in the public interest by:

- identifying the nature and magnitude of the social, economic or other problems that the Act seeks to address;
- identifying the objectives of the Act;
- identifying the extent to which the Act restricts competition;
- identifying relevant alternatives to the Act, including less intrusive forms of regulation or alternatives to regulation;
- identifying which groups benefit from the Act and which groups pay the direct and indirect costs which flow from its operation; and
- determining whether the benefits of the Act's operation outweigh the costs.

### 1. METHODOLOGY AND TIMETABLE FOR REVIEW

The review should adopt the following procedures (**in accordance with the indicated timetable**):

- Appointment of Review Panel and finalisation of draft terms of reference (**by end of November 1998**)
- Initial research identifying relevant resources and materials, including materials on any interstate and overseas equivalents (**by mid-January 1999**)
- Preparation of an issues paper (**by mid-February 1999**)
- Release of issues paper for public and industry comment (**early March 1999**)
- Incorporation of comments into consultation draft report (**by end of May 1999**)
- Preparation of consultation draft report and release for public and industry comment (**early June 2000**)
- Preparation of Final Report to Minister for Cabinet (**by end 2000**)
- Release of report.

### 2. CONSULTATION

The review will consult widely with industry and consumer representatives, educational institutions and relevant government agencies.

A list of identified industry and consumer representatives is located at Appendix 3. These representatives will automatically receive copies of papers produced during the consultation process.

Other interested parties will be notified of the review via a notice in the "Advertiser" newspaper.

### **3. THE REVIEW PANEL**

The review will be conducted by a review panel consisting of the following persons:

- Ms Margaret Cross, *Director, Consumer and Regulatory Affairs, Office of the South Australia Independent Industry Regulator;*
- Ms Carolyn Wigg, *Chief Project Officer (Policy and Technical), Building Standards & Policy Branch, Planning SA;*
- Mr Matthew Bubb, *Senior Policy Officer (Competition Policy), Office of Consumer and Business Affairs (until 8 September 1999) ;*
- Mr Adam Wilson, *Senior Policy Officer (Competition Policy), Office of Consumer and Business Affairs (from 13 September 1999);*
- Ms Gillian Schach, *Legal Officer, Policy and Legislation Section, Attorney-General's Department.*

### **4. CONTACT OFFICER**

The contact officer for the review is:-

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Senior Policy Officer (Competition Policy)  
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**APPENDIX 3 : IDENTIFICATION AND CLASSIFICATION OF RESTRICTIONS**

<b>Restriction</b>	<b>Assessment</b>	<b>Final Report Part</b>
Scope of work reserved	Serious	6.2
Requirement to be licensed	Serious	6.3
Qualifications	Serious	6.4.1
Requirement to be registered (supervisor)	Serious	6.5.1
Qualifications and competencies (supervisor)	Serious	6.5.2
Financial resources	Intermediate	6.4.2
Financial reputation	Intermediate	6.4.3
General Reputation	Intermediate	6.4.4
Approval of registered supervisors	Intermediate	7.1
Statutory warranties	Intermediate	7.5
Contract requirements	Intermediate	7.6
Indemnity insurance	Intermediate	7.7
Fees	Trivial	6.4
Advertising	Trivial	7.2
False or misleading information	Trivial	7.3
Name in which contractor may carry on business	Trivial	7.4
Disciplinary provisions	Trivial	7.8
Crown exemptions	Trivial	8.1
Registered architects	Trivial	8.2
Contractors	Trivial	8.3

**APPENDIX 4 : ISSUES PAPER CONSULTATION LIST AND SUBMISSIONS****Consultation List**

- Accreditation and Registration Council
- ACT Consumer Affairs Bureau
- Australian Competition and Consumer Commission
- Australian Institute of Building
- Australian Small Business Association
- Better Heating and Cooling Bureau
- Building Control Commission
- Building Industry Specialist Contractors Organisation of South Australia
- Building, Electrical and Plumbing Control, ACT
- Construction Industry Training Board
- Concrete Institute of Australia (South Australian Branch)
- Consumer Affairs Division, Treasury, ACT
- Department of Education, Training and Employment (South Australia)
- Department of Fair Trading (Victoria)
- Department of Industry, Science and Tourism
- Department of Transport, Urban Planning and the Arts (South Australia)
- HF Sarah and Sons
- Housing Industry Association Ltd
- Johnson Winter Slattery
- Local Government Association
- Master Painters Association
- Ministry of Fair Trading (Western Australia)
- Mr Brian Hoare
- New South Wales Consumer Protection Agency
- Office of Consumer Affairs (Tasmania)
- Office of Consumer and Business Affairs (South Australia)
- ACT Building, Electrical and Plumbing Control
- Architects Board of South Australia
- Australian Institute of Building (South Australian Chapter)
- Australian Institute of Builders
- Builder's Registration Board of Western Australia
- Building Asset Policy
- Building Industry Specialist Contractors Association
- Building Services Authority Queensland
- Build-Tec Services Pty Ltd
- Concrete Pumping Contractors Association
- Consumer's Association of South Australia
- Department of Employment, Training and Further Education
- Department of Fair Trading (New South Wales)
- Department of Human Services (South Australia)
- Department of Premier and Cabinet (South Australia)
- Douglas Mawson Institute of TAFE
- Hindmarsh Group
- Insurance Council of Australia Ltd
- Law Society of South Australia
- Master Builders Association
- Master Plumbers Association
- MMAL
- Mr J P Bayet
- Office of Consumer Affairs (Queensland)
- Office of Consumer Affairs and Fair Trading (Northern Territory)
- Office of Consumer Affairs and Fair Trading (Tasmania)

- Office of Fair Trading and Business Affairs (Victoria)
- Port Adelaide Training and Development Centre
- South Australian Employers Chamber of Commerce and Industry Inc.
- Planning SA
- Queensland Building Services Authority

### **Submissions**

- Focus-On Quality Services (on behalf of the Concrete Institute of Australia, South Australian Branch, Australian Pre-Mixed Concrete Association, South Australia and the Tilt-Up Association of Australia)
- South Australian Housing Trust
- Planning SA
- Housing Industry Association
- Industrial and Commercial Premises Corporation
- Department for Administrative and Information Services
- Building Industry Specialist Contractors of SA Inc.
- The Architects Board of South Australia
- Office of the Small Business Advocate
- Consumer's Association of South Australia
- Department of Fair Trading (New South Wales)

## **APPENDIX 5 : DRAFT REPORT CONSULTATION LIST AND SUBMISSIONS**

### **Consultation List**

- Accreditation and Registration Council
- ACT Building, Electrical and Plumbing Control
- ACT Consumer Affairs Bureau
- Architects Board of South Australia
- Australian Competition and Consumer Commission
- Australian Institute of Building
- Australian Institute of Building (South Australian Chapter)
- Australian Institute of Builders
- Australian Small Business Association
- Builder's Registration Board of Western Australia
- Better Heating and Cooling Bureau
- Building Asset Policy
- Building Control Commission
- Building Industry Specialist Contractors Association
- Building Industry Specialist Contractors Organisation of South Australia
- Building Services Authority Queensland
- Building, Electrical and Plumbing Control, ACT
- Build-Tec Services Pty Ltd
- Construction Industry Training Board
- Concrete Pumping Contractors Association
- Concrete Institute of Australia (South Australian Branch)
- Consumer's Association of South Australia
- Consumer Affairs Division, Treasury, ACT
- Department of Employment, Training and Further Education
- Department of Education, Training and Employment (South Australia)
- Department of Fair Trading (New South Wales)
- Department of Fair Trading (Victoria)
- Department of Human Services (South Australia)
- Department of Industry, Science and Tourism
- Department of Premier and Cabinet (South Australia)
- Department of Transport, Urban Planning and the Arts (South Australia)
- Douglas Mawson Institute of TAFE
- HF Sarah and Sons
- Hindmarsh Group
- Housing Industry Association Ltd
- Insurance Council of Australia Ltd
- Johnson Winter Slattery
- Law Society of South Australia
- Local Government Association
- Master Builders Association
- Master Painters Association
- Master Plumbers Association
- Ministry of Fair Trading (Western Australia)
- MMAL
- Mr Brian Hoare
- Mr J P Bayet
- New South Wales Consumer Protection Agency
- Office of Consumer Affairs (Queensland)
- Office of Consumer Affairs (Tasmania)
- Office of Consumer Affairs and Fair Trading (Northern Territory)
- Office of Consumer and Business Affairs (South Australia)
- Office of Consumer Affairs and Fair Trading (Tasmania)
- Office of Fair Trading and Business Planning SA

- Affairs (Victoria)
- Port Adelaide Training and Development Centre
- South Australian Employers Chamber of Commerce and Industry Inc.
- Queensland Building Services Authority

**Submissions**

- Department of Fair Trading (New South Wales)
- Construction Industry Training Board
- Master Builders Association
- Housing Industry Association Ltd
- Ministry of Fair Trading (Western Australia)
- Master Plumbers Association of SA
- Building Industry Specialist Contractors of SA Inc