

Discussion paper

National Competition Policy Review of the Plumbers, Gas Fitters and Electricians Act 1995 - Final Report

Issued February 2003

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NATIONAL COMPETITION POLICY REVIEW
OF THE
PLUMBERS, GAS FITTERS AND ELECTRICIANS ACT 1995

TABLE OF CONTENTS

EXECUTIVE SUMMARY	I
PART 1: INTRODUCTION	1
1.1 WHY IS THE ACT BEING REVIEWED?	1
1.2 WHAT IS BEING REVIEWED?	4
1.3 THE REVIEW PANEL	4
1.4 CLASSIFICATIONS OF RESTRICTIONS ON COMPETITION	5
1.5 THE REVIEW PROCESS	5
PART 2: THE MARKET	6
2.1 IDENTIFYING THE RELEVANT MARKET	6
2.2 MUTUAL RECOGNITION.....	8
2.3 CONCLUSION 1 - THE MARKET	9
PART 3: THE NEED FOR REGULATION	10
3.1 COMPETITION: WHAT IS IT? WHY THE NEED?	10
3.1.1 What is it?	10
3.1.2 Why do we need competition?	10
3.1.3 Why do we regulate competition?.....	11
3.2 THE EFFECT OF OCCUPATIONAL REGULATION ON COMPETITION	13
3.2.1 Barriers to entry	13
3.2.2 Restrictions on competitive conduct	14
PART 4: ANALYSIS - THRESHOLD TEST	15
4.1 IS THERE A NEED FOR ONGOING REGULATION?	15
4.2 HISTORY OF REGULATION IN SOUTH AUSTRALIA.....	15
4.2.1 Occupational regulation of plumbers and gas fitters.....	15
4.2.2 Occupational regulation of electricians.....	16
4.3 IMPETUS FOR A SINGLE REGULATING ACT.....	18
4.4 OBJECTIVES OF THE CURRENT ACT	18
4.4.1 Conclusion - objectives of the Act.....	20
4.5 ONGOING RELEVANCE OF THE OBJECTIVES	20
4.5.1 Conclusion 3- ongoing relevance of objectives	23
4.6 CURRENT OPERATION OF THE ACT	23
4.6.1 General.....	23
4.6.2 Licence and registration types.....	24
4.6.3 Entitlement to be licensed - natural person	25
4.6.4 Entitlement to be licensed - body corporate.....	25
4.6.5 Entitlement to be registered.....	26
4.6.6 Disciplinary provisions	26
4.6.7 Miscellaneous provisions	27
4.7 COSTS OF REGULATION	27
4.8 MARKET FAILURE	30
4.8.1 Transaction costs.....	30
4.8.2 Information asymmetry.....	31
4.8.3 Externalities	32
4.9 PROVIDER FAILURE.....	32
4.9.1 Financial risk.....	32
4.9.1.1 Personal risk.....	33
4.9.1.2 Business risk.....	33
4.9.2 Substandard work.....	33
4.9.3 Public health and safety	34
4.9.4 Criminal activity.....	35

4.10	CONCLUSION - CONTINUING REGULATION	35
PART 5: ALTERNATIVES.....		36
5.1	ALTERNATIVES TO THE CURRENT REGULATORY SCHEME.....	36
5.2	SOLE RELIANCE UPON MARKET FORCES.....	36
5.2.1	Conclusion - sole reliance on market forces	37
5.3	RELIANCE UPON EXISTING LAWS OF GENERAL APPLICATION.....	38
5.3.1	Fair Trading Act 1987 (SA).....	38
5.3.2	Trade Practices Act 1974 (Cth).....	39
5.3.3	Consumer Transactions Act 1972 (SA)	40
5.3.4	Building Work Contractors Act (SA) 1995	40
5.3.5	Occupational Health, Safety and Welfare Act 1986 (SA)	40
5.3.6	Conclusion - reliance on laws of general application	41
5.4	RELIANCE UPON INSURANCE MARKET.....	41
5.4.1	Conclusion - sole reliance on insurance market.....	42
5.5	INDUSTRY SELF-REGULATION	43
5.5.1	Conclusion - co- and self-regulation.....	44
5.6	NEGATIVE LICENSING	45
5.6.1	Conclusion - negative licensing	45
5.7	AMALGAMATION OF LICENSING REGULATION WITH TECHNICAL REGULATION.....	46
5.8	FURTHER ANALYSIS OF THE ACT.....	46
PART 6: BARRIERS TO ENTRY		48
6.1	INTRODUCTION	48
6.2	SCOPE OF WORK - GENERAL.....	50
6.2.1	Objectives of the restriction	50
6.2.2	Impact of the scope of work on competition.....	50
6.2.3	Alternatives - working under supervision.....	51
6.2.3.1	Conclusion - apprentices	52
6.3	SCOPE OF WORK - PLUMBING.....	52
6.3.1	“Plumbing” for the purposes of the Act.....	52
6.3.2	Infrastructure.....	53
6.3.3	Minor work	54
6.3.4	Industrial and commercial plumbing.....	54
6.3.5	Urban irrigation.....	57
6.3.6	Sprinkler fitting.....	58
6.3.7	Conclusion - scope of plumbing work	58
6.4	SCOPE OF WORK - GAS FITTING	58
6.4.1	“Gas fitting” for the purposes of the Act	58
6.4.2	Industrial gas fitting	59
6.4.3	Conclusion - scope of gas fitting work	60
6.5	SCOPE OF WORK - ELECTRICAL WORK.....	60
6.5.1	“Electrical work” for the purposes of the Act.....	60
6.5.2	Electrical infrastructure.....	62
6.5.2.1	Conclusion - electrical infrastructure	66
6.6	ENTITLEMENT CRITERIA - CONTRACTORS.....	66
6.6.1	Impact of the entitlement criteria on competition	66
6.6.2	Technical qualifications and experience	66
6.6.2.1	Objectives of the requirement	69
6.6.2.2	Assessing the costs and benefits.....	70
6.6.2.3	Conclusion - contractor technical qualifications	76
6.6.3	Business knowledge and experience.....	76
6.6.3.1	Objectives of the requirement	78
6.6.3.2	Costs of the requirement.....	78
6.6.3.3	Benefits of the requirement	79
6.6.3.4	Assessing the costs and benefits.....	79
6.6.3.5	Alternatives to current regulation.....	80
6.6.3.6	Conclusion - business knowledge and experience.....	82
6.6.4	Financial reputation.....	83
6.6.4.1	Objectives of the requirement	84

6.6.4.2	Costs of the requirement.....	84
6.6.4.3	Benefits of the requirement	84
6.6.4.4	Assessing the costs and benefits.....	86
6.6.4.5	Alternatives to current regulation.....	86
6.6.4.6	Conclusion - financial reputation	86
6.6.5	General reputation.....	87
6.6.5.1	Objectives of the requirement	87
6.6.5.2	Costs of the requirement.....	87
6.6.5.3	Benefits of the requirement	88
6.6.5.4	Assessing the costs and benefits.....	88
6.6.5.5	Alternatives to current regulation.....	89
6.6.5.6	Conclusion - general reputation.....	89
6.6.6	Financial Resources	89
6.6.6.1	Objectives of the requirement	90
6.6.6.2	Costs of the requirement.....	91
6.6.6.3	Benefits of the requirement	91
6.6.6.4	Alternatives to current regulation.....	92
6.6.6.5	Conclusion - financial resources	92
6.7	ENTITLEMENT CRITERIA - WORKERS	93
6.7.1	Technical qualifications and experience	93
6.7.1.1	Objectives of the requirement	93
6.7.1.2	Impact on competition.....	93
6.7.1.3	Costs of the requirement.....	94
6.7.1.4	Benefits of the requirement	94
6.7.1.5	Assessment of the costs and benefits.....	95
6.7.1.6	Alternatives to current regulation.....	95
6.7.1.7	Conclusion - worker qualifications	96
6.8	FEES	97
6.8.1	Application fee.....	97
6.8.2	Periodic fees.....	97
6.8.3	Conclusion - fees.....	98
PART 7: CONDUCT RESTRICTIONS		99
7.1	LICENSED CONTRACTOR TO ENSURE WORK TO BE CARRIED OUT BY REGISTERED WORKER	99
7.1.1	Conclusion - contractor to ensure work carried out by registered worker	99
7.2	NAME IN WHICH CONTRACTOR MAY CARRY ON BUSINESS.....	100
7.2.1	Conclusion - carry on business in contractor licence name	100
PART 8: EXEMPTIONS		101
8.1	OTHER CONTRACTORS	101
8.1.1	Objectives of the exemption.....	101
8.1.2	Assessing the costs and benefits	101
8.1.3	Conclusion - exemption of other contractors	103
8.2	PERSONS WORKING ON ELECTRICITY INFRASTRUCTURE.....	103
8.2.1	Objectives of the exemption.....	103
8.2.2	Assessing the costs and benefits	104
8.2.3	Conclusion - electrical infrastructure exemption	104
APPENDIX 1 - SUMMARY OF CONCLUSIONS		105
APPENDIX 2 - TERMS OF REFERENCE.....		111
APPENDIX 3 - DRAFT REPORT CONSULTATION LIST.....		114
APPENDIX 4 - SUBMISSIONS RECEIVED IN RESPONSE TO ISSUES PAPER & DRAFT REPORT		115

EXECUTIVE SUMMARY

The *Plumbers, Gas Fitters and Electricians Act 1995 (the PGE Act)* seeks to regulate certain activity in the market for plumbing, gas fitting and electrical work, namely:

- contracting for the performance of plumbing, gas fitting and electrical work; and
- the actual performance of plumbing, gas fitting and electrical work.

Only those licensed as plumbers, gas fitters or electricians are permitted to provide contracting services in the South Australian market. Similarly, only those registered as plumbing, gas fitting or electrical workers are permitted to perform plumbing, gas fitting or electrical work.

The Review Panel has identified the objectives of the *PGE Act* to be:

- to minimise the risk to the health and safety of the community, including consumers, workers and the general public;
- to minimise the risk of damage to the water, sewerage, gas and electrical infrastructure and other property; and
- to minimise the potential for consumer loss arising from substandard work, business failure and criminal activity.

There is the potential for significant public health and safety risks to arise from substandard plumbing, gas fitting or electrical work. By way of example, a fire caused by faulty wiring or a gas explosion is likely to place innocent bystanders at risk of injury or property damage. Further, damage to the public water, gas or sewerage system may affect the entire community in terms, for example, of impairment to health by poisoning and the costs of effecting repairs to publicly owned infrastructure.

Consumers also stand to suffer significant loss as a result of substandard plumbing, gas fitting and electrical work. Many consumers would have difficulty identifying substandard work where such work is often hidden from view in wall cavities and under flooring. Substandard work may not become manifest until significant damage is caused by, for example, water or fire damage.

Overall, the Review Panel has concluded that continued regulation under the *PGE Act* is justified as the benefits in terms of protection of public health and safety and against consumer loss are considered to exceed the costs of regulation. The Review Panel has considered possible alternatives to the current form of regulation, including reliance on the common law, general consumer protection legislation, the

insurance market and negative licensing. However, none of these options is considered to be a satisfactory alternative to retaining the *PGE Act*.

The Review Panel examined the scope of regulation under the *PGE Act* with a view to determining whether it was too broad and as such unnecessarily restricts competition.

The Review Panel has concluded that apprentices under a contract of training registered with the Accreditation and Registration Council (ARC) should be exempt from the registration requirement under the Act. It is considered that contracts of training and registration with ARC ensure that apprentices are readily identifiable and will be adequately supervised such that registration under the *PGE Act* provides no additional net benefit.

The Review Panel has concluded that work on electrical infrastructure owned or operated by an electricity entity required to have a safety and technical management plan under the *Electricity Act 1996* should be entirely exempt from the application of the Act. This would mean that contractors contracting for this work would not require a licence to contract for such work, in addition to the current exemption of workers from the requirement to be registered.

The Review Panel has assessed the qualification and experience requirements in the Act, which it has identified as a substantial barrier to entry into this market. The Review Panel has concluded that the requirement that natural persons (sole traders) who contract for work possess the same technical qualifications and experience as the registered workers who actually perform the work is an unjustified restriction on competition. Although the effect of the restriction is ameliorated by the fact that directors of incorporated contractors, as well as persons trading in partnership with a contractor who does possess the technical qualifications and experience, are not required to meet the technical qualification and experience requirements, the requirement discriminates against sole traders. The requirements should be reviewed and reduced significantly such that only basic industry or trade knowledge, sufficient to enable contractors to organise resources and materials and quote for work, is required for all types of contractor licences.

The Review Panel has also concluded that the prescribed business knowledge and experience requirements for electrical contractors are in excess of what is required to achieve the consumer protection objectives of the Act. The Review Panel has noted that the Office of Consumer and Business Affairs is currently in the process of reviewing those requirements.

The Review Panel considers that the financial reputation criteria and fitness and propriety requirements are justified restrictions on competition and should be retained to protect consumers from the risks of contractor insolvency and criminal activity. The Review Panel is also of the view that the benefit in terms of protecting

consumers against contractor insolvency justifies the requirement that contractors possess sufficient financial resources to carry on business.

However, the Review Panel suggests that the barriers to entry posed by the business competency, financial reputation and financial resources criteria could be lowered by exempting a person whose sole business consists of subcontracting with licensed building work, plumbing, gas fitting or electrical contractors from these requirements. With an appropriate education campaign, the Review Panel suggests that these restrictions on competition could be decreased without increased risk of consumer detriment.

The technical qualification and experience requirements for registration of those who perform plumbing, gas fitting and electrical work have been considered. The Review Panel has noted that these requirements are in the process of being reviewed by OCBA in light of the soon to be settled National Training Packages for the relevant trades and has emphasised the importance of ensuring that the competencies ultimately prescribed are not in excess of those necessary for achieving the community safety and consumer protection objectives of the *PGE Act*.

Finally, the various exemptions under the *PGE Act* have been reviewed. The Review Panel considers that the exemption of other contractors from the requirement to be licensed is justified, given the condition that the actual plumbing, gas fitting or electrical work must be performed by a person possessing the necessary competencies who is a registered worker under the Act. The Review Panel also considers that the exemption from the registration requirement of all persons performing work on electrical infrastructure owned or operated by electricity entities required to have a safety and technical management plan under the *Electricity Act* is justified and has concluded, as set out above, that the exemption should be extended to those who contract to perform such work.

Several submissions in response to the Draft Report expressed concern that the Review Panel was focussed on reducing the technical competency requirements for the trades. The Review Panel emphasises that it has not made any specific recommendations for a reduction in the technical competency requirements for workers, rather has noted that the Office of Consumer and Business Affairs is in the process of reviewing those requirements against the soon to be settled National Training Packages developed in relation to the trades. The Review Panel has sought to emphasise that the technical requirements must ultimately be set at the level required to achieve the community safety and consumer protection objectives of the legislation. Fixing more onerous requirements would constitute an unjustified barrier to entry into the relevant trades. The Review Panel does recognise that there are skills that are perceived as “best practice” for that industry or trade and that the market, or consumers, can even come to expect or demand those skills. However, these industry “best practice” skills can be far removed from what is required to achieve community safety and consumer protection and regulation which sought to achieve best practice would impose unreasonable costs and burdens on consumers

and industry. Once they exceed the level required to address market failure and achieve the objectives of the legislation, it should be left to the market to determine what additional skills and experience are optimum.

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 (CPA) which forms the basis for this review.

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.

Many laws restrict competition, however, often these restrictions are essential to achieve a significant community benefit. National Competition Policy requires that all laws which are prima facie restrictive of competition be identified, so that the need for restrictions and the community benefits they provide can be reviewed in an objective fashion.

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."*¹

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

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

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 CPA, 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:

¹ G. Samuel, President, National Competition Council, *Australian Financial Review*, 22 June 1998, p 20.

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

and

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

Although 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 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 CPA requires that competition and associated economic impacts be assessed under this test.

Clause 1(3) of the CPA 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.

However, the Review Panel notes that a restriction does not have to be removed if the conclusion concerning that restriction falls within a range of outcomes that could

reasonably be reached based on the information available. Within that range of outcomes, Governments have a policy discretion to determine which particular outcome is in the public interest.

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 the:

- *Plumbers, Gas Fitters and Electricians Act 1995; and*
- *Plumbers, Gas Fitters and Electricians Regulations 1995.*

References have been made to other legislation where appropriate. However, the scope of this review is limited to the *Plumbers, Gas Fitters and Electricians 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 Report.

1.3 THE REVIEW PANEL

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

- Ms Judy Hughes, *Deputy Commissioner - Policy and Legal, Office of Consumer and Business Affairs;*
- Mr Rafael Orschulok, *Principal Engineer (Electrical), Office of the Technical Regulator;*
- Ms Gillian Schach, *Senior Policy Officer, Office of Consumer and Business Affairs;*
- Brett Williams, *Policy Officer (Competition Policy), Office of Consumer and Business Affairs;*
- Mr Adam Wilson, *Senior Policy Officer (Competition Policy), Office of Consumer and Business Affairs (until 25 January 2002);*

This Review Panel was constituted 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.²

² *Guidelines Paper for Agencies conducting a Legislation Review under the CoAG Competition Principles Agreement*, Department of Premier and Cabinet, February 1998, p 19.

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

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 Commissioner for Consumer 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 during 1999. The Review Panel received eleven submissions to that paper. As a result of information provided in submissions and further research by the Review Panel, a Draft Report was prepared and released for public and industry comment during 2001. The Review Panel received 17 submissions to that paper. A list of the stakeholders that made submissions to the Issues Paper and Draft Report can be found at Appendix 4.

The purpose of this Final Report is to present the conclusions and recommendations of the Review Panel. A summary of the conclusions and recommendations is set out at Appendix 1.

The Terms of Reference for the review may be found at Appendix 2.

PART 2: THE MARKET

2.1 IDENTIFYING THE RELEVANT MARKET

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

The term “market” is often used when discussing economic matters, both in the sense of describing the extent of competition, and in a more specific sense describing the physical location of a market. For the purposes of this review, the Review Panel is more concerned with the former, as the latter is by and large governed by the constitutional limitations on the powers of the South Australian Parliament.⁴

In the competition context, the term “market” was perhaps best defined by the Trade Practices Tribunal in *Re Queensland Co-operative Milling Association Ltd and Defiance Holding Ltd*:

“A market is the area of close competition between firms or, putting it a little differently, the field of rivalry between them. (If there is no close competition there is of course a monopolistic market). Within the bounds of the market there is substitution - substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive.”⁵

The focus of a National Competition Policy Review in terms of the market is whether the relevant Act:

- Sets the boundaries of a market too narrowly;
- Creates barriers to entry to that market which are too high; and/or
- Imposes conduct restrictions on market incumbents which restrict competition.

The structure of this 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 the market structure, ease of entry into the market is probably the most important. It is the

³ Pindyck RS and Rubinfeld DL, *Microeconomics (Second Edition)*, MacMillan, USA, 1992, p 11.

⁴ The Review Panel does however note the operation of the *Mutual Recognition (South Australia) Act 1993*.

⁵ *Re Queensland Co-operative Milling Association Ltd and Defiance Holding Ltd* (1976) 8 ALR 481 at 517; ATPR 40-012 at 17,247.

difficulty that potential competitors face in entering the market which establishes the possibility of market concentration over time, and it is the threat of the entry of a new player into the market which operates as the best regulator of competitive conduct on incumbents.

Having considered all of these matters, the Review Panel has come to the conclusion that the relevant market for the purposes of the review is the market for the provision of contracting services and the performance of work relating to plumbing, gas fitting and electrical matters in South Australia.

Only those licensed as plumbers, gas fitters or electricians can provide contracting services in the South Australian market. Similarly, only those registered as plumbing, gas fitting or electrical workers can perform plumbing, gas fitting or electrical work.⁶

In South Australia, these services are provided by the following numbers of licensed contractors and registered workers:⁷

Service	Contractors	Workers
Plumbing	1,137	3,600
Gas Fitting	694	2,452
Electrical	4,081	14,189

As at 30 June 2002.

Unlike other industries, service-providers in this industry are not subject to competition from external competitors. This is due in large part to the breadth of the definition of work covered by the *Plumbers, Gas Fitters and Electricians Act 1995*, and the reservation of that work to a strictly limited class of persons. Even in the building industry, which is similarly regulated, licensed contractors are subject to competition from owner-builders, who are not required to be licensed under the *Building Work Contractors Act 1995*. This may be contrasted with the position under this Act, where only those who hold appropriate registration are permitted to perform plumbing, gas fitting or electrical work, whether or not it is on their own homes.

The only class of persons beyond registered workers or licensed contractors permitted to offer similar services are civil engineers, who are exempt from the requirement to hold a licence or registration for certain types of drainage work. There is currently no exemption for electrical engineers from the application of the Act.

The relevant market does not include plumbing and gas fitting work performed on infrastructure⁸ or plumbing, gas fitting and electrical work of a very minor nature.⁹

⁶ *Plumbers, Gas Fitters and Electricians Act* sections 6 (contractors), 13 (workers).

⁷ *Annual Report*, Commissioner for Consumer Affairs, 2001/02, p 31.

When the size of the market for building services in South Australia is considered, some appreciation of the size of the market for plumbing, gas fitting and electrical work is gained. Australian Bureau of Statistics figures for building activity in the June 2002 quarter shows that the value of building work commenced in South Australia in the relevant period was approximately \$534.2 million.¹⁰ A proportion of this amount would relate to plumbing, gas fitting and electrical work. However, it would not include the value of plumbing, gas fitting and electrical work not performed as part of a construction process, for example, plumbing and electrical repairs and the installation of equipment.

Thus while the Review Panel is unable to provide a precise dollar quantification of the value of the South Australian plumbing, gas fitting and electrical work market, taking into account also other expenditures, such as wages, it is able to conclude that the market in question has a significant role in any consideration of the South Australian economy as a whole.

2.2 MUTUAL RECOGNITION

Under mutual recognition legislation, individuals in trades and professions regulated in one jurisdiction have the ability to obtain equivalent registration in another jurisdiction by means of administrative process.¹¹ Currently, all States and Territories have some form of regulation of the plumbing, gas fitting and electrical markets.

One of the effects of the mutual recognition legislation is that a licensing decision taken in South Australia may also be the licensing decision for the whole of Australia and also for New Zealand. It is therefore appropriate to consider that the market for plumbing, gas fitting and electrical services extends beyond the boundaries of South Australia.

Correspondingly, licensed and registered persons from other Australian jurisdictions and New Zealand may also carry on business as a contractor or perform work as a worker within South Australia by virtue of the mutual recognition principle.

As at August 2002 the Commissioner for Consumer Affairs had granted 578 plumbing, gas fitting and electrical licences and registrations under mutual recognition legislation.

⁸ Such work is exempted from the scope of the Act and Regulations: see *PGE Act* s 4 (definitions of "plumbing", "water plumbing", "sanitary plumbing work", "draining work"), *PGE Regulations* reg 4(5).

⁹ *PGE Regulations* reg 4(6)(c)(iii).

¹⁰ *Building Activity South Australia: June Quarter 2002*, ref 8752.4, Australian Bureau of Statistics.

¹¹ *Mutual Recognition Act 1992 (Cth)* Pt 3, *Mutual Recognition (South Australia) Act 1993*, *Trans-Tasman Mutual Recognition Act 1997 (Cth)* Pt 3, *Trans-Tasman Mutual Recognition (South Australia) Act 1999*.

Submissions to the Draft Report generally supported the preliminary conclusions drawn by the Review Panel in respect of the nature of the market which is affected by the operation of the *Plumbers, Gas Fitters and Electricians Act 1995*.

2.3 CONCLUSION 1 - THE MARKET

CONCLUSION 1

The conclusion of the Review Panel is that the market affected by the operation of the *Plumbers, Gas Fitters and Electricians Act 1995* is the market, primarily in South Australia, for:

- 1.1 contracting for the performance of plumbing, gas fitting and electrical work other than work on water, sewerage and gas infrastructure; and**
- 1.2 the actual performance of plumbing, gas fitting and electrical work other than work on water, sewerage, gas and most electrical infrastructure.**

PART 3: THE NEED FOR REGULATION

Any review of legislation in line with competition policy principles is required to commence from the premise that no regulation is required. The case must then be made for regulation, and that 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 this market.

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, a misallocation of resources may result. The provider has no incentive to offer new products to consumers, and consumers may pay more for the service than it is worth. Vigorous competition between service-providers encourages them to attract consumers to the business with targeted service provision and/or reduced prices.

¹² 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) p 9.

Competition therefore functions as an incentive to business to improve performance through service innovation and adaptation 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.

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 that may restrict entry into the market by new competitors, or provisions (of general application) that distort competition within the market as a whole.

One submission to the Issues Paper from an industry stakeholder suggested that:

“competition in the context of this review means short cuts to get the job done cheaper and quicker... and unscrupulous people are taking advantage of our lack of compliance and lack of effective deterrent”.

In light of this submission, the Review Panel considers it is important to emphasise that the goal of Competition Policy is not deregulation as an end in itself, rather to examine possible alternatives to levels of regulation which restrict competition with no net benefit to the community. Increased competition is unlikely to justify deregulation where this would result in a lowering of quality standards and increase in the risk to public health and safety.

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.”¹⁴

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

¹³ National Competition Policy, Report by the Independent Committee of Inquiry, August 1993, p 293.

¹⁴ Pindyck RS and Rubinfeld DL, *Microeconomics* (Second Edition), MacMillan, USA, 1992, p 320.

3.1.3.1 *Market failure*

Competition assumes a market that is perfect, ie:

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

From the consumer's viewpoint, inefficient market outcomes may result where there are high transaction costs, information asymmetry or externalities. Such situations indicate market failure and may justify regulatory intervention. Market failure will be discussed in greater detail at Part 4.8 of this Final Report.

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.¹⁶ The main types of benefit provided to the public through regulation consist of protection against a risk:

- of financial loss;
- of substandard work being performed;

¹⁵ Partly drawn from Commonwealth of Australia, Trade Practices Commission, *Regulation of Professional Markets in Australia: Issues For Review* (Canberra 1990) pp 22-25; Victoria, Competition Policy Task Force, *National Competition Policy: Guidelines for the review of legislative restrictions on competition* (Melbourne 1996) pp 70-72.

¹⁶ See Victoria, Law Reform Commission & Regulation Review Unit, *Principles for Occupational Regulation* (Melbourne 1988).

- to health and safety; and
- of criminal activity.

The existence of these situations may also provide justification for regulatory intervention, and will be explained in further detail at Part 4.9 of this Final Report.

3.2 THE EFFECT OF OCCUPATIONAL REGULATION ON COMPETITION

The intended effect of occupational regulation is to address concerns with market and/or provider failure. Any regulation imposed should 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.

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 products;
- 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.

¹⁷ Partly drawn from Moore & Tarr, "General Principles and Issues of Occupational Regulation" in (1989) 1 Bond LR 119 at 122-123.

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

3.2.2 *Restrictions on competitive conduct*

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

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 any 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 which the *Plumbers, Gas Fitters and Electricians Act 1995* seeks to address and the contemporary market to identify possible areas of provider or market failure.

4.2 HISTORY OF REGULATION IN SOUTH AUSTRALIA

4.2.1 Occupational regulation of plumbers and gas fitters¹⁸

In the early history of South Australia, sewerage services were governed by the *Public Health Act*. In 1878, the *Adelaide Sewers Act* was proclaimed to provide for compulsory connection to the sewerage system. It also provided for inspection of plumbing work, and regulated all aspects of plumbing, including materials.

The first regulation of plumbing workers came with the registration of sanitary workers under the *Sewerage Act 1929*. This legislation provided that only registered plumbers could perform sanitary plumbing within prescribed areas.

Water plumbers were not regulated until 1967, although water plumbing work itself had been subject to regulation for some time. Impetus for the regulation of water plumbers came as a result of a number of accidents from incorrectly installed hot water systems. The *Waterworks Act* provided that only registered master plumbers, sanitary plumbers, and registered water plumbers could undertake this installation work.

In South Australia, occupational licensing for sanitary and water plumbing was vested in the Minister for Infrastructure who would arrange for the registration of applicants by the Engineering and Water Supply Department upon advice from the Sanitary Plumbers Examining Board.

Gas fitting work has been closely allied with plumbing work, and this is reflected in the education and training system.

Occupational licensing of gas fitters was vested in the Minister for Mines and Energy, and was carried out by the South Australian Gas Company which would

¹⁸ Partially drawn from the *Review of the Plumbing and Drainage Regulations (Waterworks and Sewerage Acts) Green Paper*, Engineering and Water Supply Department, 1989.

register applicants who met the standards prescribed by the Gas Fitters Examining Board.

In December 1989, the Minister for Water Resources published a Green Paper on the review of plumbing and gas fitting licensing.¹⁹ Following an extended period of consultation, a White Paper was published in 1991 reaffirming the need for continued regulation of plumbers and gas fitters.²⁰ Of note, the White Paper recommended that licensing be limited to those installations which were connected only to the main public infrastructure. In the case of gas fitting, it was recommended that licensing extend to the connection of pipe work and equipment utilising liquid petroleum gas.

In 1993, an *Electricians, Plumbers and Gas Fitters Licensing Bill* was drafted in conjunction with two other Bills to establish "Southern Power and Water" (a proposed amalgamation of ETSA and the E&WS). This Bill broadly encompassed recommendations contained in the White Paper, but met with industry and union objections. For a number of reasons this Bill did not proceed.

Concurrent with activity in this State, the subject of occupational licensing was taken up at the national level in 1991 as a result of moves to introduce mutual recognition of standards and regulations in Australia. Agreement was reached between Australian Heads of Government that partially registered occupations be reviewed so that these occupations became either fully registered or fully deregistered in all States and Territories. This activity was undertaken by the Ministers for Vocational Education, Employment and Training, and was assigned by that body to the Vocational Education, Employment and Training Advisory Committee.

Also at the national level, the Australian Labour Ministers Council was conducting a review of occupational licensing under the auspices of the Departments of Labour Advisory Committee ("DOLAC"). DOLAC had established a working party to review occupational licensing in the areas of plumbing, electrical and gas fitting.

The stated South Australian position to DOLAC was that only those areas "fundamental to the issues of public and occupational health and safety, and the safety and integrity of the public water, sewerage and gas infrastructures" should continue to be licensed.

4.2.2 Occupational regulation of electricians

South Australia was one of the last jurisdictions to enact licensing legislation. The *Electrical Workers and Contractors Licensing Act (1965-1966)* received assent on 17 March 1966, with the stated intention that it was:

¹⁹ Ibid.

²⁰ *Review of the Plumbing and Drainage Regulations (Waterworks and Sewerage Acts), White Paper, 1991.*

“An Act to provide for the licensing of electrical workers and electrical contractors”.²¹

The introduction of legislation to regulate who could perform electrical work was designed to prevent the risk of injury from faulty wiring. In the six years leading up to the introduction of the legislation there had been 19 fatalities in South Australia due to electrical work and, in particular, faulty wiring. The Government considered it:

*“...important that immediate steps be taken to put an end to the [then] current situation whereby any person can install or interfere with electric wiring and cause injury to himself or others.”*²²

The *Electrical Workers and Contractors Licensing Act (1965-1966)* established a regulatory regime restricting the performance of specified electrical work to licensed electrical workers. It also provided for the licensing of contractors, with the express intention that this would enable the person responsible for electrical work performed by a number of workers to be readily identifiable.²³

The *Electrical Workers and Contractors Licensing Act (1965-1966)* provided that the administration of its provisions lay with the Electricity Trust of South Australia (“ETSA”).

In 1988, ETSA first commenced a review of its methods and practices of electrical licensing and inspection.

In 1990, the Tregillis Report reviewed electrical licensing in Australia, and argued against supply authorities also being licensing authorities.

In 1991, ETSA commenced a review of its legislation. In November of 1991, it published a position paper, and embarked on a period of consultation.

In June 1992 a joint ETSA/Department of Public and Consumer Affairs Working Party completed a report titled *“Proposal for the Transfer of Licensing of Electrical Workers and Contractors to the Commercial Tribunal”*, which examined the feasibility of transferring the licensing function to the Commercial Tribunal.

The main findings of the Working Party contained in the Report were, *inter alia*:

- that it was feasible for the Commercial Tribunal to take over the electrical licensing function by incorporating the licensing of electrical workers and contractors into the *Builders Licensing Act*; and

²¹ Preamble, *Electrical Workers and Contractors Act 1965-1966 (SA)* (repealed).

²² Second Reading Speech, Hon. A F Kneebone, 10 February 1966.

²³ *Ibid.*

- that the transfer of ETSA's licensing function to the Commercial Tribunal would solve perceived conflicts of interest and denials of natural justice caused by ETSA acting as both the licensing and disciplinary authority.

4.3 IMPETUS FOR A SINGLE REGULATING ACT

In the wake of reform initiatives to separate the licensing and technical regulatory functions from supply authorities, and in the wake of the privatisation of the South Australian Gas Company, the Attorney-General and the Minister for Infrastructure agreed in June 1994 to transfer the licensing of electricians, plumbers and gas fitters to the Commissioner for Consumer Affairs.

Early in 1994, the Attorney-General had established a Legislative Review Team to review all legislation administered by the Commissioner for Consumer Affairs and, in particular, the need for continued licensing of certain occupations. It was agreed to include the issue of the transfer of licensing of plumbers, gas fitters and electricians as a matter for consideration by the Review Team.

As a result of this process, it was proposed to draft a new Bill to accommodate the new jurisdictions in a workable format. It was proposed that:

- existing legislation relevant to the licensing of electricians, plumbers and gas fitters be repealed; and
- licensing of the occupations be continued under a new Bill which would provide for a competency-based approach to occupational and business licensing, and a streamlined administration vested with the Minister for Consumer Affairs (with the licensing authority to be the Commissioner for Consumer Affairs).

The *Plumbers, Gas Fitters and Electricians Act 1995* was assented to on 27 April 1995, and came into operation on 1 July 1995.

4.4 OBJECTIVES OF THE CURRENT ACT

The long title of the *Plumbers, Gas Fitters and Electricians Act 1995* simply states that it is "*an Act to regulate plumbers, gas fitters and electricians*". The Review Panel has therefore been required to infer the objectives of the legislation from the provisions of the Act itself, Parliamentary debates, and other previously published material.

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

- with respect to contractor licensing, the regulation of the contractual or business relationship between tradesperson and consumer directed, largely, at the prevention of provider failure;
- with respect to worker registration, the protection of public health and safety, with a secondary objective of protecting the infrastructure from contamination and damage.

In the Draft Report however, the Review Panel refined this submission, identifying that the Act has the following objectives:

- to minimise the risk to the health and safety of the community by ensuring that only registered persons with prescribed competencies perform plumbing, gas fitting and electrical work and by requiring contractors to ensure that work performed in the course of a contractor's business is carried out by a registered person;
- to minimise the risk of damage to the water, sewerage, gas and electrical infrastructure and the risk to public health of contamination of the water supply by registering plumbing, gas fitting and electrical workers; and
- to minimise the potential for consumer loss arising from business failure, substandard work and criminal activity by the licensing of plumbing, gas fitting and electrical contractors.

Submissions to both the Issues Paper and the Draft Report were generally supportive of the objectives of the Act as identified by the Review Panel.

The South Australian Chapter of the National Electrical Contractors Association ("NECA") and a Queensland electrical contractor (also a Queensland Electrical Licensing Board representative) submitted in response to the Issues Paper that the suggested objective of contractor licensing was not accurate in so far as it did not emphasise public safety and protection of infrastructure as the primary objective of regulation.

It is very important to differentiate between the objectives of contractor licensing and worker registration. Contractors are required to meet additional competency requirements for licensing over and above the worker registration requirements, in particular fitness and propriety, business knowledge and experience and financial resources criteria. These requirements are designed to protect consumers against financial loss as a result of business failure and loss as a result of criminal activity.

Even if there was no requirement under the Act for contractors to be licensed, the objectives of the Act in protecting public health and safety and the integrity of the infrastructure would nevertheless be addressed by the requirement that plumbing, gas fitting and electrical work is performed by registered plumbers, gas fitters and

electrical workers who are required to possess prescribed qualifications or competencies. This demonstrates that these health and safety objectives of the Act are primarily achieved by the registration of workers.

4.4.1 Conclusion - objectives of the Act

CONCLUSION 2

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

- **to minimise the risk to the health and safety of the community, including consumers, workers and the general public;**
- **to minimise the risk of damage to the water, sewerage, gas and electrical infrastructure and other property; and**
- **to minimise the potential for consumer loss arising from substandard work, business failure and criminal activity.**

4.5 ONGOING RELEVANCE OF THE OBJECTIVES

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

An examination of accidental electrocution data demonstrates the risks associated with electrical work and electricity generally. In early 1966, when the *Electrical Workers and Contractors Licensing Bill* was being introduced, 19 electrical fatalities had occurred in South Australia in the period since 1960 (just over five years).²⁴ In a similar period of time from January 1994 to July 1999 (five and a half years), there was a total of 11 fatalities due to electrocution in South Australia.²⁵ The Electrical Regulatory Authorities Council reported total numbers of electrical fatalities in South Australia since the beginning of 1992 as follows:²⁶

²⁴ Hon A F Kneebone, Second Reading Speech, 10 February 1966.

²⁵ Data available online at www.erac.gov.au (ERAC News). See also Annual Report of the Technical Regulator 2000/1 available online at www.technicalregulator.sa.gov.au.

²⁶ Ibid.

Year	Fatalities
1992*	0
1993	0
1994	1
1995	2
1995/96	2
1996/97	2
1997/98	2
1998/99	3
1999/2000	2
2000/2001	7
TOTAL	21

* Data prior to 1995/96 is on a calendar year basis.

Source: Electrical Regulatory Authorities Council

Of the total number of seven electrical fatalities in 2000/2001, three of these involved members of the general public misusing, or misunderstanding the dangers associated with, electricity, one involved a child and resulted from the faulty installation of a socket outlet and the remaining three involved tradespersons. Although the Technical Regulator reported that the 2000/2001 statistics, when compared with past years, did not reveal any emerging trends, these statistics demonstrate the risks associated with performing electrical work and hence the risks of "do-it-yourself" electrical work. They emphasise the necessity of regulating who performs electrical work and ensuring that such persons are competent to perform the work.

Parallels can be drawn from the danger posed by electrical work to that posed by gas-fitting work, where risks to the community from substandard work include explosion, fire and asphyxiation.

Substandard plumbing could lead to contamination of the water supply and consequent risks to public health.

OCBA receives a number of complaints from consumers each year relating to electrical, gas fitting and plumbing work. The number of complaints received in the period since 1994/95 may be summarised as follows:

Category	01/02	00/01	99/00	98/99	97/98	96/97	95/96	94/95
<i>electrical</i>	12	8	13	18	13	11	11	16
<i>plumbing</i>	N/A	N/A	N/A	N/A	N/A	N/A	18	23
<i>plumbing - water, gas drainage</i>	17	16	37	41	26	36	N/A	N/A
Total	29	24	50	59	39	47	29	39

Source: Annual Reports of the Commissioner for Consumer Affairs

The Review Panel notes that the level of complaints received by OCBA is not necessarily indicative of poor quality work - it may simply reflect a gap between consumer expectations and the actual quality of the service delivered. Nonetheless, complaint statistics can serve as a useful indicator of underlying problems.

The number of complaints received in relation to plumbing, gas fitting and electrical work are considerably less than the total number relating to home construction and renovation generally, however the Review Panel suggests that this is partly due to the relatively less obvious and more complex nature of plumbing, gas fitting and electrical work. Many consumers would have difficulty identifying substandard work, where such work is often hidden from view in wall cavities and under flooring. Substandard work may not become manifest until significant damage is caused by, for example, water or fire damage. It is the magnitude of such consequential consumer loss that supports the need for regulation of who performs electrical, gas fitting and plumbing work.

With respect to consumer risk arising from the insolvency of the contractor, statistics from the Insolvency Trustee Service Australia ("ITSA") indicate that the level of insolvency among plumbers and electricians in South Australia is relatively low in the context of the number of licensed contractors. ITSA publishes bankruptcy statistics relating to particular occupational groups. The relevant groups for the purposes of this review are "toolmakers, plumbers, mechanics, etc" (although this ceased to be a separate category from 1998/99) and "electricians and related electrician workers". Accordingly, not all listed bankruptcies in these categories are plumbers, gas fitters or electricians. The statistics are divided into business-related bankruptcies (where the person became bankrupt as a result of a proprietary interest in a business) and non-business bankruptcies (where the person was either an employee or unemployed prior to bankruptcy).

<i>Period</i>	toolmakers, plumbers, mechanics, etc			electricians and related electrician workers		
	Business	Non	Total	Business	Non	Total
1994/1995	9	20	29	1	2	3
1995/1996	10	21	31	3	3	6
1996/1997	11	19	30	5	4	9
1997/1998	4	19	23	1	10	11

<i>Period</i>	other tradespersons & related workers			electrical and electronics tradespersons		
	Business	Non	Total	Business	Non	Total
1998/1999	7	18	25	3	1	4
1999/2000	9	14	23	5	5	10
2000/2001	18	17	35	2	4	6
2001/2002	14	20	34	6	3	9

Source: Bankruptcy Act 1966 - Annual Reports

Although it is difficult to appreciate from the above figures the actual number of bankruptcies that are specifically related to plumbing, gas fitting and electrical contractors, the Review Panel notes that in the 2000/2001 financial year, the total number of business-related bankruptcies throughout Australia in the occupational group titled “tradespersons and related workers”, which includes the occupational subgroups set out in the above table, was significantly higher than that of any other listed occupational group.

While the level of bankruptcies may seem statistically insignificant, contractor bankruptcies tend to affect a number of consumers for whom the cost of, for example, reparation work may be one of the most significant expenditures made during the course of a year. Further, it is not clear what the level would be in the absence of regulation of trade contractors’ financial competencies. Therefore, the Review Panel considers that protection of consumers against the risk of financial loss remains a relevant objective of the Act in the current marketplace.

4.5.1 Conclusion 3- ongoing relevance of objectives

CONCLUSION 3

The conclusion of the Review Panel is that the identified objectives of the Act remain relevant.

4.6 CURRENT OPERATION OF THE ACT

4.6.1 General

The Act prevents a person from carrying on business, or otherwise holding himself or herself out as entitled to carry on business, as a plumbing, gas fitting or electrical contractor except as authorised by a licence under the Act.²⁷

²⁷ PGE Act s 6.

A person is prohibited from personally carrying out plumbing, gas fitting or electrical work unless authorised by registration under the Act²⁸ and a contractor must ensure that plumbing, gas fitting or electrical work performed in the course of the contractor's business is carried out by a registered worker authorised to carry out that work.²⁹ The Act prescribes certain requirements to obtain a licence and registration.

The Act is administered by the Commissioner for Consumer Affairs, who is empowered to request any information necessary to determine an application for a licence.³⁰

Refusals of licence and registration applications by the Commissioner for Consumer Affairs are appealable to the Administrative and Disciplinary Division of the District Court.³¹

The Commissioner for Consumer Affairs can initiate disciplinary proceedings against persons licensed or registered under the Act in the Administrative and Disciplinary Division of the District Court, and the Court has wide powers to deal with such complaints.³²

The Act establishes two advisory panels to provide advice to the Minister for Consumer Affairs and the Commissioner for Consumer Affairs on matters affecting licensing and registration.³³

4.6.2 Licence and registration types

The Act provides for the following types of contractor licence:³⁴

- plumbing contractors licence—authorising a person to carry on business as a plumbing contractor;
- gas fitting contractors licence—authorising a person to carry on business as a gas fitting contractor;
- electrical contractors licence—authorising a person to carry on business as an electrical contractor;
- restricted licence—limiting the work that may be performed under the authority of the licence, ie

²⁸ PGE Act s 13.

²⁹ PGE Act s 12.

³⁰ PGE Act s 8.

³¹ PGE Act ss 10 (contractors), 17 (workers).

³² PGE Act Pt 4.

³³ PGE Act s 26.

³⁴ PGE Act s 7.

- a plumbing contractors licence subject to conditions limiting the work that may be performed under the authority of the licence to water plumbing work, sanitary plumbing work, draining work or in any other way;
- a gas fitting contractors licence subject to conditions limiting (in any way) the work that may be performed under the authority of the licence;
- an electrical contractors licence subject to conditions limiting (in any way) the work that may be performed under the authority of the licence.

4.6.3 Entitlement to be licensed - natural person

A natural person is entitled to be granted a licence if the person:³⁵

- has the qualifications and experience required by regulation, or which the Commissioner considers appropriate, for the kind of work authorised by the licence;³⁶
- has sufficient business knowledge and experience and financial resources for the purpose of properly carrying out the business authorised by the licence;
- is not suspended or disqualified from practising or carrying on an occupation, trade or business under a law of this State, the Commonwealth, another State or a Territory of the Commonwealth;
- is not an undischarged bankrupt or subject to a composition or deed or scheme of arrangement with or for the benefit of creditors;
- has not, during the period of five years preceding the application for the licence, been a director of a body corporate wound up for the benefit of creditors when the body corporate was being wound up or within the period of six months preceding the commencement of the winding up; and
- is a fit and proper person to be the holder of a licence.

4.6.4 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

³⁵ PGE Act s 9(1).

³⁶ The qualifications prescribed are set out in PGE Regulations reg 5.

Territory), and is not being wound up and is not under official management or in receivership.³⁷

In addition, no director of the body corporate:³⁸

- 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); or
- can have been a director of a body corporate wound up for the benefit of creditors (when the body corporate was wound up, 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.³⁹

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.⁴⁰

4.6.5 Entitlement to be registered

It is not possible for a body corporate to personally perform plumbing, gas fitting or electrical work. Therefore, only natural persons are entitled to registration as a plumbing, gas fitting or electrical worker.

A natural person is entitled to be registered as a plumbing, gas fitting or electrical worker if the person has the qualifications and experience required by regulation or considered appropriate by the Commissioner for Consumer Affairs having regard to the type of work authorised by the registration.⁴¹

4.6.6 Disciplinary provisions

In certain circumstances, disciplinary action may be taken in the District Court against contractors or registered workers. The disciplinary power provides remedies over and above those which are 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.⁴²

³⁷ PGE Act s 9(2)(a).

³⁸ PGE Act s 9(2)(b).

³⁹ PGE Act s 9(2)(e).

⁴⁰ PGE Act s 9(2)(c)-(d).

⁴¹ PGE Act s 16.

⁴² PGE Act s 24.

Disciplinary action is commenced by way of lodging a complaint with the District Court.⁴³ The Commissioner for Consumer Affairs or any other person may lodge a complaint. 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.⁴⁴

The grounds on which proper cause for disciplinary action may be made out are wide ranging,⁴⁵ as are the penalties available to the District Court in the event that proper cause is made out.⁴⁶

4.6.7 Miscellaneous provisions

Agreements may be entered into with a professional organisation by the Commissioner for Consumer Affairs, with the approval of the Minister for Consumer Affairs, whereby the organisation may take a specified role in the administration or enforcement of the Act.⁴⁷ At the time of writing this report no such agreements are in place.

Licensed 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*.⁴⁸

4.7 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 identified 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

⁴³ *PGE Act* s 21.

⁴⁴ *PGE Act* s 23.

⁴⁵ See *PGE Act* s 20.

⁴⁶ See *PGE Act* s 24.

⁴⁷ *PGE Act* s 28.

⁴⁸ *PGE Act* s 33.

off" 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.

Costs arise through ongoing compliance with the regulatory scheme by service-providers. In the absence of regulation, a service-provider is free to structure their business behaviour in the most efficient manner 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. The nature of the particular regulatory scheme will direct the extent of costs incurred.

In the case of the Act under consideration, significant governmental costs arise. OCBA is the licensing and registration authority for the purposes of the Act. This requires that it employ staff to:

- process, assess and grant licence and registration applications;
- process and assess annual returns;
- advise current and prospective licensees and registrants 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 and compliance costs will be significant given the number of contractors and workers presently licensed or registered. It may be argued that the costs of administration are met by the licence and registration fees collected, and since it is the contractors and workers who pay the fees, any 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 be transferred to

the public through contractors' cost structures. Therefore, it can 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 can 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. In these circumstances costs, both tangible and intangible, will be imposed on the wider community.

In addition to decreased contestability, regulation may have other detrimental effects on competition within the present market. Given that the market has been regulated in some form for a considerable time, it is not possible for the Review Panel 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 services may be delivered, is of prima facie anti-competitive effect. It is argued that since competition is the force which drives down prices, a reduction in levels of competition will cause 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, in which suppliers have lower 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. Although there may be other methods of service delivery that 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 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 this market to see what benefits may arise through regulation.

4.8 MARKET FAILURE

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 that may be weighed against the costs of regulation.

4.8.1 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 markets for plumbing, gas fitting or electrical services on a limited number of occasions during their lives. Therefore, unlike the market for household staples, most consumers will have little familiarity with these markets 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 regulation, 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 and goods. It may be the case that it is not possible for a consumer to come to any conclusion as to an appropriate service-provider irrespective of the amount of research, and thus expense, undertaken.

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 regulation seeks to provide basic information about suppliers in a market. The fact that a person has been granted a licence or registration 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 markets for plumbing, gas fitting and electrical services therefore provides a public benefit in so far as it reduces the potential incidence of transaction costs to consumers.

4.8.2 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 goods or services 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 services have 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.

It is fair to say that most consumers will transact with plumbers, gas fitters and electricians at some point in their lives. These transactions will often be relatively expensive for the consumer.

In general, consumers suffer from significant levels of information asymmetry in relation to these markets. They are usually not in a position to assess for themselves the quality or appropriateness of the service prior to provision. 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 contractor.

Requiring all contractors and workers to be licensed or registered is one way of addressing this information asymmetry. Consumers can be assured that a 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 worker is competent; the Government has performed that task for the consumer. It 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 resources.

4.8.3 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 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.

As discussed above, there is the potential for significant public health and safety risks to arise from substandard plumbing, gas fitting or electrical work. The safety decisions of a purchaser can have serious effects on those not party to the sale transaction. By way of example, a fire caused by faulty wiring or a gas explosion is likely to place innocent bystanders at risk of injury or property damage. Further, damage to the public water, gas or sewerage system may affect the entire community in terms, for example, of impairment to health by poisoning.

The Review Panel considers that there is the significant potential for negative externalities in relation to the markets for plumbing, gas fitting and electrical services, and that regulation provides significant public benefit through addressing this issue.

4.9 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.

4.9.1 Financial risk

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

4.9.1.1 ***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.

In the markets for plumbing, gas fitting and electrical services it is often the case that contracts entered into involve significant sums of money. The Review Panel considers that the risk of a 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.

4.9.1.2 ***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 the licensee 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.

Consumers will expend significant amounts of money on plumbing, gas fitting and/or electrical services. If the business fails through insolvency, a consumer will ordinarily rank only as an unsecured creditor, and to that extent could potentially face significant loss if the consumer is forced to engage and pay another contractor to perform rectification work if work performed by the former contractor was defective.

4.9.2 ***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 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 consumers to assert their legal rights regarding substandard work. The risk and expense which such action entails for the individual consumer in that market may deter, at least for a significant time, the correction of systematic incompetence if the potential stake for the individual consumer is not significant enough to justify that risk and expense.

4.9.3 Public health and safety

Where public health and safety are potentially at risk, there is a strong argument in favour of regulation. In relation to 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.”⁴⁹

Fatality statistics discussed above demonstrate the risks to public health and safety of substandard electrical work. The risk of injury or death due to faulty electrical or gas fitting work, or contamination of the water supply due to faulty plumbing work, is not confined to the direct consumers of those services.

If the performance of a particular type of work or the carrying on of a particular occupation has the potential to negatively impact on public health and safety, then there are arguably grounds for government regulatory intervention. Intervention in such circumstances must be designed to eliminate or minimise the potential for harm to the general public. There are many legislative examples of regulation aimed at achieving these outcomes. For example, the regulation of medical practitioners and dentists aims to minimise public health and safety risks by ensuring that only those who are demonstrably competent are permitted to carry out the relevant activities.

As set out at Part 4.8.3, there is a very real risk of externalities in the markets for plumbing, gas fitting and electrical services. Of concern to this Review is the

⁴⁹ SA Engineering and Water Supply, *Review of the Plumbing and Drainage Regulations (Green Paper)*, 1989, p. 11.

potential for serious negative externalities, which the Review Panel considers is justification for continued regulation of the markets.

4.9.4 Criminal activity

The risk of criminal activity is often perceived to be greater in occupations that deal with consumers in their own homes or workplaces, or in circumstances of trust and reliance. Plumbing, gas fitting and electrical work will usually be performed in a consumer's home or workplace. However, as it is workers who actually perform the work, in many cases contractors will not enter these premises.

The Review Panel does not consider that the risk of criminal activity is either a real or perceived risk in this market. Further, no submissions have been received by the Review Panel to date expressing a contrary viewpoint.

4.10 CONCLUSION - CONTINUING REGULATION

On the basis of the foregoing analysis, the Review Panel has come to the conclusion that justification is made out for the continuing regulation of the markets for plumbing, gas fitting and electrical work as the potential benefits to the wider community through the addressing of market and provider failure outweigh the identified costs of regulation.

CONCLUSION 4

The conclusion of the Review Panel is that the continued regulation of the markets for plumbing, gas fitting and electrical work is justified as the potential benefits to the wider community outweigh the costs.

PART 5: ALTERNATIVES

5.1 ALTERNATIVES TO THE CURRENT REGULATORY SCHEME

Having established that there is need for regulation of this market, clause 5 of the Competition Principles Agreement requires that the Review Panel consider less regulatory alternatives to the current system of regulation.

5.2 SOLE RELIANCE UPON MARKET FORCES

The Government could remove the current legislation and place sole reliance 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 effect, it requires consumers to “vote with their feet”.

The costs of exercising legal rights (considered to be transaction costs) are significant, particularly for the average consumer. Having to take legal action against a contractor to obtain performance of the contract, whether in the form of obtaining legal advice or the commencement proceedings in court, will be a costly exercise and result in misallocation of consumers’ resources. Placing consumers at this kind of risk is undesirable both from a social and an economic perspective.

The more significant risk, in the opinion of the Review Panel, is the potential for incompetent and possibly dishonest practitioners to supply their services to the market in the absence of any direct form of control. The supply of such services would have a number of negative impacts on the community; increased levels of cost arising through greater risk of injury to public health and safety, increased costs arising through higher risk of negative externalities, as well as increased costs arising through greater information imbalances between suppliers and consumers. The Review Panel will briefly consider each of these elements in turn.

There is a justified ongoing concern over the potential for injury arising from the substandard performance of work in the plumbing, gas fitting and electrical spheres. Statistics show that even with regulation delimiting the types of persons who may undertake work, injury levels are high enough to draw a conclusion that these types of work remain a danger to the community as a whole, including those actually performing the work. The absence of regulation would allow any person to perform this work, greatly increasing the risk of injury arising from substandard work. This risk alone may provide sufficient justification for some form of continuing regulation.

The Review Panel discussed the issue of externalities generally at Part 4.8.3, and noted the possibility of negative externalities arising in this market. Poor safety decisions taken by contractors, workers, or even consumers can have serious effects on those not party to the immediate transaction. Further, it is not only the

immediate effects posed to these third parties which are of concern; subsequent purchasers of properties containing unsafe works will also be put at risk of injury or incur the cost of remedial works.

Where consumers are at an information disadvantage, and are thus unable to accurately identify the “high quality” service-providers prior to consumption of service, economic theory would predict that all service-providers in the market have to charge to same fee. This fee will be reflective of the fee that the market will support for average quality service. As a result, the talented, high quality service-providers will either leave the market, or not enter it at all, preferring to offer services in other markets where their superior ability, and therefore ability to command greater financial reward, can be put to use. Those left in the market will be the lower quality service-providers. Such a situation will impose costs on the community in terms not only of lower quality of overall service, with the outcomes described above, but also in terms of reduced competition and thus lost service efficiency, higher prices and a potential reduction in contestability in the market.

The Review Panel also notes that market forces only operate reactively, i.e. once damage has been caused. Although it is acknowledged that a consumer who suffers poor quality service is unlikely to return to the provider of that service in the future, nonetheless it must be recognised that in a market with high potential for negative externalities this is not enough; damage to property or person will already have occurred.

However, while the Review Panel believes that there are compelling reasons against total reliance on market forces, it considers that there is room for market forces to play a greater role within a regulated market environment by addressing matters such as information asymmetry. Consumers may be able to obtain some useful information about product or service quality by direct observation. Therefore, with the identification of competent service-providers already performed for them by some regulatory means, consumers are safely able to test and re-test service-providers to determine those who offer the most appropriate price/service/quality combination to meet their needs without presenting risk to them or the wider community.

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.

5.2.1 Conclusion - sole reliance on market forces

⁵⁰ Guidelines for the Review of Legislative Restrictions on Competition, Victorian Department of Premier and Cabinet, p.71

CONCLUSION 5

The conclusion of the Review Panel is that sole reliance on market forces is an inappropriate mechanism for the overall regulation of the market for plumbing, gas fitting and electrical services.

5.3 RELIANCE UPON EXISTING LAWS OF GENERAL APPLICATION

Consumers of goods and services have a range of laws that they may call on during a dispute.

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 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 dealers 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. In particular, the following sections are of relevance:

- section 56 Misleading or deceptive conduct
- section 57 Unconscionable conduct
- section 58 False or misleading representations
- section 63 Misleading conduct in relation to goods
- section 64 Misleading conduct in relation to services
- section 69 Harassment and coercion.

The provision of plumbing, gas fitting and electrical services is 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.

5.3.2 Trade Practices Act 1974 (Cth)

The *Trade Practices Act 1974 (Cth)* implies standard terms into contracts for the purchase of goods and services that cannot be excluded. 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:

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.⁵¹

The section only implies these terms into contracts for the supply of services struck between a corporation and a consumer. Due to constitutional limitations, the *Trade Practices Act 1974* does not in general extend to govern transactions between unincorporated traders and consumers.

A corporation may be liable if services are not rendered with due care and skill, or if the services do not fulfil the 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.⁵²

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

⁵¹ Emphasis added.

⁵² *Trade Practices Act 1974 (Cth)*, *PGE Act* s 84(2).

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 corporations.⁵³ However, the *Consumer Transactions Act* only applies to a limited range of services, which are defined within the Act and regulations. Section 2 of the Act defines “services” to include, relevantly:

“...the repair or servicing of articles of household use or ornament;

the repair, reinstatement or renovation of part of a dwellinghouse; and

the performance in relation to a dwellinghouse or its curtilage of work of a kind usually performed by a plumber or electrician”.

It is clear that consumers of plumbing and electrical services therefore have access to the warranties set out in section 7 of the *Consumer Transactions Act* and they are not required to prove the existence of those warranties when seeking to enforce their rights through the courts. It appears that the same applies to consumers of gas fitting services.

5.3.4 Building Work Contractors Act (SA) 1995

In some cases, consumers will also have the protection of the statutory warranties applying to domestic building work under the *Building Work Contractors Act 1995* but this protection is not available in relation to all plumbing, gas fitting and electrical work because not all such work will come within the definition of domestic building work.

5.3.5 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* (OH&S Act). In one case, a company was convicted of failing to ensure that plant which they installed was safe, in breach of section 24(2) of the OH&S Act.⁵⁵ Of relevance, section 22 of that Act 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

⁵³ *Consumer Transactions Act 1972* (SA) s 7(1), 7(2).

⁵⁴ *Carter v Ad-Box (Australia) Pty Limited and Anor*, Industrial Relations Court of South Australia (Judgement 97-24401), 18 December 1998.

⁵⁵ *Carter v Ad-Box (Australia) Pty Limited and Anor*, Industrial Relations Court of South Australia (Judgement 97-24401), 18 December 1998.

under section 21). Again, these laws are reactive, but arguably have a deterrent effect against providers.

5.3.6 Conclusion - reliance on laws of general application

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 deter some consumers from taking any action. Finally, if litigation increased as a result of a lowering of standards in the industry, there would be significant consequent public costs.

CONCLUSION 6

The conclusion of the Review Panel is that reliance on existing general laws alone to alleviate the risks existent in this market is inappropriate - rather, these general laws when combined with a licensing or registration system provide an effective framework for regulation of this market.

5.4 RELIANCE UPON INSURANCE MARKET

Another option considered by the Review Panel for regulation of this market is sole reliance upon a private insurance underwriting market.

Under such a scheme, those carrying on business as contractors and workers would be required to hold a policy of indemnity insurance in favour of their customers. Further, there would need to be an ongoing requirement to maintain a policy of insurance throughout the life of the licence or registration.

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.”⁵⁶

However, there are concerns about a greater reliance on the insurance industry. This is particularly true in the wake of the recent collapse of Australia’s second largest insurer, HIH and the terrorist attacks in the United States and the consequent turmoil in the insurance industry. Australia is currently suffering significant shortages in insurance, particularly public liability and professional indemnity insurance, the consequences of which have been particularly felt by the building industry. At the time of preparing this report builders were experiencing difficulties obtaining insurance and increases in premiums due to a lack of providers.

Difficulties in obtaining indemnity insurance can act as a barrier to entering the industry and can therefore lead to a reduction in competition and increased costs for consumers.⁵⁷

Furthermore, sharp rises in insurance will ultimately be borne by consumers in the form of increased prices.

Another concern is that insurance is an entirely reactive way of dealing with consumers’ complaints. Insurance is not a preventative measure and relies on compensation. A regulated industry, on the other hand, has the potential to minimise or prevent problems before they occur.

Although the plumbing, gas fitting and electrical markets are not the same as the general market for building work or construction services, nonetheless the arguments are applicable to those markets as well. The Review Panel therefore has concerns over the effectiveness of a system of insurance standing alone as a means of market regulation.

5.4.1 Conclusion - sole reliance on insurance market

CONCLUSION 7

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

⁵⁶ Victoria, *Issues Paper - NCP Review of Architects and Building Legislation*, Department of Infrastructure/Freehills Regulatory Group (November 1988), p 25.

⁵⁷ See, for example, discussion in Steinwall, Duns et al, *Butterworths Australian Competition Law*, Butterworths, Sydney, 2000, p 96.

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.⁵⁸ In 1996, the Office of Consumer and Business Affairs ("OCBA") 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:⁵⁹

- the legal basis upon which the industry group operates;⁶⁰
- evidence that the industry as a whole is supportive of the proposed role (as opposed to industry association support alone);
- evidence that the industry group has sufficient coverage of the industry concerned;
- 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;

⁵⁸ 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).

⁵⁹ *Industry Regulation: The Way Forward*, Office of Consumer and Business Affairs (South Australia), 1996, p. 9.

⁶⁰ For example, whether the industry group is an incorporated association or a company. It would be necessary to demonstrate that the rules or constitution (as the case may be) permit the industry association to take on the responsibilities proposed to be delegated.

- proper funding proposals; and
- evidence of capacity to handle delegations.

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.”⁶¹

The current Act provides that the Commissioner for Consumer Affairs (with the permission of the Minister for Consumer Affairs) may enter into agreements with professional organisations.⁶² However, no such agreements have yet been entered into. Industry groups currently participate in the regulation of the industry through the Plumbers, Gas Fitters and Electricians Advisory Panel, established under the PGE Act.

No industry groups have sought to demonstrate that they meet the self-regulation criteria.

In any event, the Review Panel notes the finding of the 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”*.⁶³ The Review Panel considers that this is applicable to the market in question. As previously discussed, this market has high levels of risk of serious or widespread harm associated with the performance of work. It is not, therefore, a suitable market for the imposition of an industry self-regulatory scheme.

5.5.1 Conclusion - co- and self-regulation

CONCLUSION 8

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.

⁶¹ *Industry Regulation: The Way Forward*, Office of Consumer and Business Affairs (South Australia), 1996, p. 9.

⁶² PGE Act s 32.

⁶³ Final Report of the Taskforce on Industry Self-Regulation, August 2000, page 40, Department of Treasury, Commonwealth Government.

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. OCBA 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 have certain convictions from providing specified services and would typically allow for the public exclusion of a market participant as a disciplinary measure.

Negative licensing schemes tend to 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 can be 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 that 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.

5.6.1 Conclusion - negative licensing

CONCLUSION 9

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

5.7 AMALGAMATION OF LICENSING REGULATION WITH TECHNICAL REGULATION

The Communications Electrical Electronic Energy Information Postal Plumbing & Allied Services Union of Australia (Electrical Division - SA branch) ("CEPU Electrical") argued that a further alternative to current regulation would be to transfer the licensing of electrical contractors and workers to the Technical Regulator. The justification for this was argued to be that the Office of the Technical Regulator has a better understanding of the electrical industry and "more results in compliance of unsafe electrical work". CEPU further argued that the cost of regulation is greater due to the PGE Act being administered by a non-technical department. It is suggested that greater efficiency and consumer protection would be achieved if the licensing function was removed to the Technical Regulator.

As discussed above at Part 4.2, regulation of the electrical industry was initially transferred away from ETSA as a precursor to the privatisation process. The Technical Regulator was established under the *Electricity Act* to regulate technical and safety standards for electricity generation, distribution and supply as well as electrical installations. The PGE Act seeks to protect consumers by regulating *who* may perform work in relation to electrical installations (as well as plumbing and gas fitting work). Regulation of *how* this work is to be performed is the responsibility of the Technical Regulator, who possesses the requisite technical knowledge. These are different roles. The Review Panel notes that the impetus for transferring responsibility for licensing to OCBA was to streamline regulatory imposts on business.⁶⁴ Economies of scale are achieved by centralising the licensing of a number of occupations within one agency, therefore, decentralising occupational licensing is likely to result in increased, rather than decreased, costs to business. On that basis, the Review Panel does not consider this option to be a less restrictive form of regulation.

5.8 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"*⁶⁵

and further,

⁶⁴ Hon K T Griffin, *Legislative Council Hansard*, 9 March 1995 at p 1451.

⁶⁵ *National Competition Policy - Report by the Independent Committee of Inquiry*, August 1993 ("the Hilmer Report"), p 189.

“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.”⁶⁶

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 each of 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 discussion, the Act in its current form contains both barriers to entry and restricts the conduct of service-providers in this market. Whilst the Review Panel has formed the conclusion that alternatives to the current overall scheme of regulation are not appropriate in these markets at this stage, 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.

⁶⁶ Hilmer Report, p 191.

PART 6: BARRIERS TO ENTRY

6.1 INTRODUCTION

A barrier to entry is, in essence, anything impeding the entry of new competitors to a market. The requirement for registration is itself a considerable barrier to entry. A more complete description of barriers to entry is that they are factors preventing or deterring the entry of new competitors into a market even when incumbents within that market are earning excess profits, and provides that barriers may fall within one of two broad classes; structural (or innocent) and strategic.

Structural barriers to entry arise from basic market characteristics such as technology, costs and demand. The widest definition suggests that these barriers to entry arise from factors such as product differentiation, the absolute cost advantages enjoyed by market incumbents and economies of scale.

- Product differentiation creates advantages for incumbents because entrants are required to overcome the accumulated brand loyalty of existing products as part of the market entry process if they are to take any profits from the market.
- Absolute cost advantages imply that a new entrant to the market will be faced with higher unit costs at every rate of output. This is generally attributable to matters such as inferior technology and knowledge of practical application of production processes in the market.
- Scale economies will also restrict the number of suppliers who are able to operate at minimum costs in a market of given size.

A narrower definition of structural barriers suggests that barriers to entry arise only when entrants must incur costs not borne by incumbents, and excludes scale economies as a barrier.

The importance of sunk costs as a barrier to entry may also be emphasized. Since it is entrants who must incur these costs, which have already been borne by incumbents, a barrier to entry is created. In addition, sunk costs reduce the ability to exit and thus impose extra risks on potential entrants.

Strategic barriers to entry arise from the behaviours of incumbents within a given market. In particular, incumbents may act to heighten structural barriers or threaten to retaliate against entrants if they do enter.

Therefore, in terms of the *PGE* Act, the various preconditions, or entitlement criteria, which must be satisfied prior to the grant of registration, are barriers to entry. It necessarily follows that the prescription of specific qualifications is also a barrier to entry.

The conclusion reached by the Review Panel in the Final Report was that the requirement that those wishing to provide electrical, gas fitting or plumbing should hold qualifications is a justified restriction on competition.

Having reached this conclusion however, it is clear that there is a further restriction on competition underlying this requirement. While the fundamental requirement to hold qualifications is justified, the issues of which qualifications are appropriate needs to be further explored.

The limitations on the qualifications acceptable for registration purposes have an effect on competition in so far as other qualifications, which might be appropriate but are not listed in the regulations, do not lead to registration. What the Review Panel is required to test is whether there are alternatives which achieve the same outcomes in a less restrictive manner.

If other qualifications exist which address market and provider failure issues in the market in the same way as the currently prescribed qualifications, then it follows that precluding those with such other qualifications is restricting supply.

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.”*⁶⁷

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.

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.

Point-of-entry regulation may also result in functional separation of an industry, restricting market competition and raising 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 regulatory intervention, market forces would determine the most efficient forms of organisation and specialisation. If there are no substantial

⁶⁷ Hilmer, at p.197

economies to be made in specialisation, persuasive public interest reasons need to be advanced for enforcing industry segmentation.

In the Final Report, the Review Panel identified the existence of any pre-requisite to entry into the market as a barrier to entry. While the concept of barriers to entry was dealt with in that report, it is convenient that the Review Panel revisit this topic for the purposes of this Final Report.

6.2 SCOPE OF WORK - GENERAL

The scope of work regulated by the *PGE Act* is a restriction on competition because it limits those who are allowed to perform the work which falls within the scope of regulation. The scope of work reserved under the *PGE Act* is equally applicable to contractors and workers, with the exception of work on electrical infrastructure. Workers are generally exempt from the requirement to be registered in respect of work on the electrical infrastructure.⁶⁸

6.2.1 Objectives of the restriction

The Review Panel has identified at Part 4.5 that there are significant risks associated with plumbing, gas fitting and electrical work. In order to address these risks, the Government has sought to “ring-fence” certain areas of plumbing, gas fitting and electrical work described in the following paragraphs from the general sector of the economy and to ensure that only persons possessing the appropriate competencies perform this work. This “ring-fencing” therefore aims to reduce the risk of injury to the public and workers.

6.2.2 Impact of the scope of work on competition

The current scope of plumbing, gas fitting and electrical work reserved may be restrictive of competition if it is too broad and therefore encompasses work that could be appropriately performed by anyone without risk to consumers. The Review Panel has identified this as a **serious restriction on competition**.

Whenever a class of activity is regulated, costs will be incurred. The reservation of the activities of plumbing, gas fitting and electrical work has potential to reduce competition in the market. The number of persons carrying on this activity in a regulated market is less than would be the case if the work were not reserved. Consequently, there is likely to be a reduction in supply of services, with corresponding higher prices for consumers, in a regulated market.

The Review Panel also notes that an early casualty of an over-restrictive scope of work will be rural and regional areas. As a result of lower population density, any

⁶⁸ *PGE Regulations* reg 4(5). See discussion at Part 6.5.2.

reduction in levels of supply will have a more immediate market impact in less densely populated areas.

6.2.3 Alternatives - working under supervision

One alternative approach to meeting the objective of public safety may be to permit any person, under the direct supervision of a qualified or registered worker, to undertake plumbing, gas fitting or electrical work without being registered. This would be particularly applicable to apprentices and trades assistants, who are currently required to be registered under the Act. Although OCBA does not charge a fee for apprentice registrations, there are administrative costs associated with the regulation of apprentice workers under the Act.

In the case of apprentices, the Accreditation and Registration Council (ARC), which administers the training agreement system for New Apprenticeships, and the applicable Registered Training Organisations have registers of those apprentices who are under contracts of training involving paid work. Therefore, there is an alternative system in place for identifying who is under such a training agreement and ensuring apprentices are adequately supervised.

The provision of adequate direct supervision is also an occupational health and safety issue. Under the *Occupational Health, Safety and Welfare Act 1996* an employer is required to provide employees with such training and supervision as is reasonably necessary to ensure its employees are safe from injury and risks to health.

Arguably, the current system of granting apprentices a restricted worker registration allows greater control over apprentices to ensure that they are being adequately supervised so as to protect public safety and the infrastructure. However, the Review Panel has not received any submissions specifically arguing that work or safety standards would be compromised by exempting apprentices from the registration requirement.

NECA submitted that allowing anyone to perform work under direct supervision of a registered worker would result in a compromise in (technical) standards. It also considered that this would lead to increased costs associated with supervision, as is presently the case with apprentice training.

CEPU Electrical disagreed that apprentices should be exempted from registration. However, in the context of the issue of registration fees, CEPU submitted that apprentices should be registered at no cost (which is presently the case), or alternatively, that apprentices should be deemed to be registered, as in the case in Victoria. Deeming apprentices to be registered would have the same practical effect as exempting apprentices from the requirement to be registered under the *PGE Act*, ie the remaining provisions in the Act relating to disciplinary action, etc would continue to apply.

The Review Panel notes that the majority of other States and Territories do not licence or register electrical or plumbing apprentices.⁶⁹

In the absence of arguments to the contrary, the Review Panel has formed the view that exempting apprentices under a contract of training from the requirement to be registered under the *PGE Act* would not compromise public safety.

6.2.3.1 Conclusion - apprentices

CONCLUSION 10

The Review Panel has concluded that apprentices under a contract of training registered with the ARC should be exempt from the requirement to be registered under the *PGE Act*.

6.3 SCOPE OF WORK - PLUMBING

6.3.1 "Plumbing" for the purposes of the Act

The performance of plumbing is regulated under the Act. "Plumbing" is defined in the Act to mean water plumbing work, sanitary plumbing work, draining work and the installation or testing of backflow prevention devices.⁷⁰ This is an extremely broad definition, such that almost all plumbing work is reserved for persons who have appropriate qualifications and are licensed or registered under the Act. It is therefore necessary to consider each of the elements of plumbing work separately.

Water plumbing is defined as the installation, repair, maintenance or disconnection of pipes or equipment (including water heaters) which are to be connected directly or indirectly to a public water supply system.⁷¹

Sanitary plumbing is defined as the installation, alteration, repair, maintenance or disconnection of pipes or equipment to receive or convey waste water to sanitary drains including associated plumbing ventilation equipment. A sanitary drain consists of pipes and equipment to collect and convey wastewater from a sanitary plumbing installation to an on-site wastewater treatment facility or a public sewerage or effluent disposal system.

⁶⁹ The only other jurisdiction apart from South Australia to license apprentices appears to be Western Australia, which licenses electrical apprentices. In Victoria, apprentices within the meaning of the *Vocational Education and Training Act 1990 (Vic)* are deemed to be licensed to carry out work under supervision.

⁷⁰ *PGEA* s 3.

⁷¹ *Ibid.*

Draining work is defined as the installation, alteration, repair, maintenance or disconnection of sanitary or stormwater drains. A stormwater drain consists of pipes and equipment to collect and convey stormwater to a public stormwater disposal system.

As is evident from these definitions, the concept of plumbing for the purposes of the Act does not extend to any work on the public infrastructure. Rather, plumbing relates to work on systems which are ultimately to be connected with the infrastructure.

6.3.2 Infrastructure

It is accepted that the owners of infrastructure, be they Government or private companies, are responsible for the infrastructure and therefore for any work performed on it. It is these inevitably large entities which bear the risk of any loss as a result of damage to their assets due to substandard plumbing work. Infrastructure owners are far better placed than ordinary consumers to assess the competency of persons engaged to work on the infrastructure, whether directly as employees or through private contractors. Therefore the information asymmetry and transaction cost arguments justifying regulation are not necessarily applicable in relation to infrastructure.

The Master Plumbers Association (MPA) pointed out in another context in its submission that instances of burst water mains have caused extensive damage to private property. While, to the extent that burst water mains can be the consequence of substandard plumbing work, protection of consumers from such risks to property may justify regulation of this area of work. However, it may be argued that the common law provides adequate protection to consumers in this situation because infrastructure owners are unlikely to disappear or become insolvent, are more likely to be insured and are therefore more readily sued and able to compensate members of the public for property damage. The potential to be sued, together with the costs of rectifying damage to its own assets, should operate as sufficient incentive to the owners or operators of water and sewerage infrastructure to ensure that those who work on the infrastructure possess the appropriate competencies.

In practice, work on the water infrastructure is generally performed or overseen by civil engineers. This is also the reasoning behind exempting major stormwater drainage works carried out under the supervision of civil engineers from the scope of the Act. The exemption clarifies that councils may carry out such works without the need for their workers to be registered. The fact that such work, which may relate to pipes, culverts or open channels, is professionally designed and supervised is considered to operate as sufficient protection for the infrastructure and public safety.⁷²

⁷² Ibid.

6.3.3 Minor work

The scope of plumbing work regulated under the *PGE Act* and Regulations is narrowed by a number of exemptions contained in the Regulations. The following work is exempted from the application of the Act:

- the installation, alteration, repair, maintenance or disconnection of a cold water pipe not exceeding 25mm in diameter except where the pipe is in or on a building;
- the installation, alteration, repair, maintenance or disconnection of a non-testable backflow prevention device;
- the replacement, alteration, repair, maintenance or disconnection of domestic tapware;
- the clearing of blockages in pipes not exceeding 50 mm in diameter (or associated traps) installed to convey wastewater to sanitary drains;
- plumbing work relating to stormwater drainage pipes consisting of work on pipes not exceeding 90mm in diameter or consisting of work carried out under the supervision of a professional civil engineer.

These exemptions allow homeowners to perform minor work on their own property such as installing automatic watering systems, changing taps and facilitating the drainage of stormwater from their property. Such work was not intended to be regulated because it does not pose a significant degree of risk to public safety or the infrastructure.⁷³

6.3.4 Industrial and commercial plumbing

The definition of plumbing work under the Act includes plumbing work performed in commercial and industrial environments.

In 2000 a Regulation was made under the Act exempting employees of Smith's Snackfood Company Ltd ("Smiths") who perform cold water plumbing maintenance work at the food processing company's premises from the requirement to be registered. The Review Panel considers that the principles underlying this Regulation are squarely aligned with Competition Policy principles, and are thus worthy of further consideration.

The rationale of exempting Smith's employees was that the work in question, relating to stainless steel fabrication, is so highly specialised that it is not covered in

⁷³ See Hon K T Griffin, *Legislative Council Hansard*, 7 April 1995 at p 1848

plumbers' apprentice training. Consequently, even those plumbers with unrestricted registration (which, it must be remembered, are the "highest" form of registration which can be held) are nonetheless not practically competent to perform the work. However, under the current legislative scheme, the company is forced to engage licensed plumbing contractors/registered workers (who are themselves not able to perform the work) to oversee the work so that the work can be certified as complying with standards under the *Waterworks Act 1932*.

Further bases for making the exemption included the fact that testable backflow prevention devices are installed on the company's premises, minimising any risk to the public water system. The company also has in place quality assurance processes and appropriate training for its employees to minimise the risk of worker injury.

The work is performed on the company's own plant and equipment on its own premises, therefore, there are not the risks to public safety and of consumer detriment associated with domestic plumbing work.

Although the exemption relates to one company's circumstances only, it is anticipated that other food processing companies and possibly other industries experience the same problem in relation to highly specialised work on plant and equipment which falls within the definition of plumbing work under the Act.

The Review Panel considers that this form of exemption highlights the issue of whether industrial plumbing work should be regulated under the Act. The market failure arguments justifying regulation of plumbing work generally are not so compelling in relation to industrial and commercial plumbing work.

Where plumbing work is performed by industry on its own premises on its own plant and equipment, the risk of damage to valuable plant and equipment should provide sufficient incentive for a company to ensure that the persons who perform work on its plant and equipment are competent to perform that work. The value of regulation under the *PGE Act* is called into question where the competencies required to obtain an unrestricted registration under the Act are not sufficient to perform highly specialised work on industrial plant and equipment.

Industry is generally better placed than consumers to assess the competency of persons engaged to work on its assets. This is particularly the case where the work is highly specialised.

Further, industry and commercial entities are far better placed to enforce their legal rights than consumers.

Persons performing cold water plumbing work only were not required to be registered prior to the introduction of the *PGE Act*. It is suggested that this work does not pose as great a risk to workers or the public because it does not involve

water heaters with the attendant risk of explosion. Standards for such work are regulated under the *Waterworks Act*.

However, protection of public health remains a concern in terms of the risk of contamination of the water supply with the toxic substances often used by industry. This risk could potentially be addressed by making an exemption for industrial plumbing work conditional on a testable backflow prevention device being in place on the relevant premises. The Review Panel understands that SA Water as technical regulator keeps records of where testable backflow prevention devices are installed and in relation to testing of the devices. Testable backflow prevention devices themselves are required to be tested by registered plumbing workers.⁷⁴

The technical regulator's role in auditing compliance with standards for plumbing work under the *Waterworks Act 1932* and *Waterworks Regulations 1996* provides further protection against substandard work.

CEPU Plumbing Division argued that industrial and commercial cold water plumbing should not be exempted, listing the risks associated with such work as:

- failure of the system (Legionella);
- Breakdown of the system (plant room shut down);
- Potential flooding;
- Equipment damage (building);
- Cross connection of services causing tainted water with serious risks to the public.

The Review Panel accepts that regulation of industrial plumbing is justified by the need to protect the public from contamination of the water supply. However, the installation of testable backflow prevention devices would appear to provide protection against such risks.

Concerns were expressed in submissions to the draft report about applying an exemption to an entire industrial site. It has been argued, for example, that it would be unacceptable to allow unqualified persons to perform plumbing work on ablution blocks within an industrial site. SA Water submitted that any exemption of industrial and commercial plumbing should be limited to work on cold water piping within the production area and that there would be a need to ensure that there were adequate controls to guard against cross connection, for example, additional backflow prevention devices as was the case in relation to the Smiths exemption. It was argued that it would only be possible to ascertain whether adequate cross connection controls were in place on a case by case basis and therefore that exemptions should only be granted on a case by case basis.

⁷⁴ See definition of "plumbing": *PGE Act* s 3.

The MPA conceded that industrial cold water only plumbing work could be exempted without compromising public health and safety but argued that backflow prevention measures would be required and restrictions would need to be placed on pipe size and material such that only qualified people were allowed to install 12 inch copper pipe.

The Review Panel accepts that regulation of industrial and commercial plumbing is justified by the need to protect the public from contamination of the water supply. However, there would appear to be good arguments for exempting such work from the scope of the *PGE Act*. The Review Panel notes that any restriction on competition as a result of requiring persons who perform such work to be registered is significantly ameliorated by the availability of the power to make exemptions such as the 'Smith's exemption'. It was intended that other industrial and commercial entities could be the beneficiary of such exemptions if they could demonstrate that appropriate safety mechanisms were in place. As yet no other entity has sought such an exemption. If a number of such exemptions are ultimately granted, further consideration could be given at that time, on the basis of accumulated experience and information, to framing a general exemption.

6.3.5 Urban irrigation

In 1993 and 1994 at a series of meetings of the Labour Ministers' Council, the Ministers agreed on a number of reforms to plumbing and gas fitting occupational licensing arrangements. In particular, it was agreed that the regulation of plumbers and gas fitters would be nationally consistent, based on the core areas of sanitary plumbing, water plumbing (hot and cold, where the supply is from a public water system), draining and gas fitting.

It was also agreed that jurisdictions which were then licensing workers in areas including urban irrigation and sprinkler fitting would discontinue doing so. However, irrigation work (involving pipes measuring in excess of 25mm in diameter) and sprinkler fitting are currently considered part of water plumbing for the purpose of licensing under the *PGE Act*.

The Review Panel understands that the materials and systems now available for urban irrigation work are relatively straightforward for a layperson to use and less complex to work with than those used for rural irrigation work.

Examples of urban irrigation work include irrigation systems in vineyards and market gardens. Toxic chemicals such as fertilisers and pesticides are commonly used on such properties and there is therefore a significant risk of contamination of the public water supply associated with urban irrigation work. Again, it is possible that the presence of testable backflow prevention devices on such properties may provide adequate protection of the infrastructure. The audit role performed by SA Water as technical regulator under the *Waterworks Act 1932* would also provide additional protection from substandard urban irrigation work.

The MPA agreed that, provided the correct backflow prevention device is installed and inspected, urban irrigation work could be safely exempted. SA Water also agreed that consideration could be given to extending the current domestic irrigation exemption (of cold water pipes not exceeding 25mm in diameter except where the pipe is in or on a building) to irrigation pipework exceeding 25mm downstream from a testable backflow prevention device.

Given the potential risks to the public water system associated with urban irrigation work, the Review Panel is of the view that continued regulation of this area of work is justified. However, in circumstances where public health and safety and the integrity of the infrastructure are adequately protected by the presence of testable backflow prevention devices, the Review Panel concludes that an exemption from regulation should be considered.

6.3.6 Sprinkler fitting

The Issues Paper in relation to this review raised the issue of whether sprinkler fitting should be regulated under the Act.

It has been argued, including by CEPU Plumbing Division, that faulty sprinkler fitting work poses a significant risk to public health. There is a significant risk to public safety should fire sprinklers malfunction where a fire occurs, for example, in an occupied office building.

The Review Panel considers that there is a net benefit in regulating sprinkler fitting work.

6.3.7 Conclusion - scope of plumbing work

CONCLUSION 11

11.1 The Review Panel considers that the current scope of plumbing work regulated under the Act is justified.

11.2 However, the Review Panel recommends that consideration be given to exempting urban irrigation work performed downstream of a testable backflow prevention device from the scope of regulation of plumbing work under the Act.

6.4 SCOPE OF WORK - GAS FITTING

6.4.1 "Gas fitting" for the purposes of the Act

The performance of gas fitting is regulated under the Act. “Gas fitting” is defined in the Act as the installation, alteration, repair, maintenance or disconnection of any pipes or equipment to convey or utilise gas (including associated gas ventilation equipment) downstream of the outlet of a meter installed for measuring consumption of reticulated gas supplied by a licensed gas supplier under the *Gas Act 1988*, or the outlet of any gas storage tank or cylinder.⁷⁵

As with plumbing, work on the gas infrastructure is excluded from the scope of the Act.

The scope of work reserved is further narrowed by an exemption contained in the regulations providing that the Act will not apply to the connecting or disconnecting of a gas cylinder and portable equipment that utilises gas contained in the cylinder.⁷⁶

The intention of the exemption is to prevent, for example, a person who uses a portable gas barbecue from the requirement to hold a gas fitters registration for the purpose of connecting and disconnecting the barbecue from the gas bottle.

No submissions received by the Review Panel identified any costs associated with the current scope of gas fitting work reserved under the Act. Nor were any areas identified in which regulation was considered inappropriate or unjustified.

6.4.2 Industrial gas fitting

The Review Panel considers that the issue of whether industrial plumbing should be regulated under the *PGE Act* (as discussed in Part 6.3.4) is also applicable to industrial gas fitting. An example of such work includes work on industrial furnaces. As with some types of industrial in-house cold water plumbing work, gas fitting work in an industrial environment tends to be highly specialised and not within the range of competency of a person who has completed the prescribed qualifications to obtain an unrestricted gas fitting worker registration. In fact, maintenance work on industrial plant and equipment tends to be performed by persons with a metals trade background who have undergone gas awareness training.

Previously, such workers obtained a restricted registration limited to performing gas fitting work at a particular industrial site (an “in house” registration). However, following a review of this registration type, a course of training in relation to “Type B” (commercial and industrial) appliances was developed to facilitate the issue of a restricted type of registration authorising work on any “Type B” appliance, regardless of where it is located. This removes the previous restriction on the mobility of persons with site-specific registrations.

⁷⁵ *PGE Act* s 3.

⁷⁶ *PGE Regulations* reg 4(b).

Persons granted the new “Type B” restricted registration generally have a metals trade qualification and after completing the “Type B” appliance course, will qualify for a restricted gas fitting worker registration which enables them to perform maintenance work on industrial and commercial gas appliances, downstream of the appliance isolation valve.

The Review Panel considers that this is an example of where industry is best placed to determine the competencies required of its workers and to facilitate or require the necessary training to ensure that work on equipment or appliances owned by the relevant entity is performed by persons possessing the necessary competencies. Industry is arguably best placed to understand what competencies are required in relation to a particular industrial or commercial appliance or piece of equipment in order to ensure the safety of its employees and protect its valuable plant and equipment.

Provisions in the *Gas Act 1997* and *Gas Regulations 1997* relating to technical and safety requirements,⁷⁷ together with the technical regulator’s auditing role, already operate to provide protection for public and worker safety and for gas infrastructure. As an extension of this regulation, the Review Panel considers that there is some merit to the suggestion that industrial gas fitting work could be more suitably regulated by the technical regulator under a system of safety and technical management plans. However, there is currently no suitable alternative form of regulation of this area of work available.

The Review Panel has therefore formed the view that the continued regulation of industrial gas fitting work under the *PGE Act* is justified in the interests of safety.

6.4.3 Conclusion - scope of gas fitting work

CONCLUSION 12

The conclusion of the Review Panel is that the current scope of gas fitting work regulated under the Act is justified.

6.5 SCOPE OF WORK - ELECTRICAL WORK

6.5.1 “Electrical work” for the purposes of the Act

The performance of electrical work is regulated under the Act. Electrical work is defined in the Act as the installation, alteration, repair or maintenance of an electrical installation. An electrical installation is in turn defined to mean the whole or part of

⁷⁷ *Gas Act 1997* ss 8, 55, 56.

any system or equipment wherever situated intended for the conveyance, control, measurement or use of electricity supplied or intended to be supplied by a person or body that supplies electricity to the public at a voltage above extra low voltage as defined in *Australian Standard AS3000 Wiring Rules* (now the *AS/NZS 3000:2000 Wiring Rules*).⁷⁸

This is a very wide definition and, unlike plumbing and gas fitting work, includes work performed in relation to the infrastructure.

The scope of work regulated is narrowed by the exemption of the following work from the application of the Act:⁷⁹

1. the oiling, greasing, cleaning or painting of an electrical installation;
2. the installation, alteration, repair or maintenance of an electrical installation
 - (a) that is situated outside of a municipality or township if the installation is used in connection with the carrying on of the business of primary production;
 - (b) the purpose of which is to transmit television or radio programs from a television or radio station;
3. the installation, alteration, repair or maintenance of any system or equipment connected or intended to be connected to and beyond an electrical outlet socket at which fixed wiring terminates, but not including the alteration, repair or maintenance of an electrical connection of a rating above low voltage (as defined in Australian Standard AS 3000 "SAA Wiring Rules"⁸⁰);
4. consisting of the replacement of a fuse, switch or two-point outlet socket other than any such equipment or device belonging to a person or body that supplies electricity to the public;
5. involved in the manufacture or assembling of new equipment;
6. consisting of the repair of used equipment for resale when carried out at a workshop of a retailer or wholesaler of equipment of that kind under the supervision (which must include personal checking and approval of each item before resale) of a registered electrical worker authorised by registration to carry out electrical work of that kind without supervision; and

⁷⁸ PGE Act s 3.

⁷⁹ PGE Regulations reg 4(6)(c).

⁸⁰ Now the *AS/NZS 3000:2000 Wiring Rules*.

7. any work involved in educational courses or scientific research or experiments.

The majority of these exemptions have been made on the basis that the work involved does not pose a sufficiently significant risk to public health and safety or of consumer detriment to justify regulation.

NECA submitted that the intention of the exemption for rural electrical installations was:

“to assist struggling regional and rural dairy farmers and primary producers to ‘maintain’ their own electrical installations...”

and that this exemption was no longer appropriate because motor travel and road surfaces have improved since the exemption was made such that electrical contractors are readily available to perform this work in outlying areas.

The Review Panel notes that the exemption would apply equally to all rural primary producers and is therefore not a competition issue for the purposes of this report.

No submissions were received in response to either the Issues Paper or Draft Report, suggesting any further areas of electrical work that could be exempted from the scope of the Act.

6.5.2 Electrical infrastructure

The definition of electrical work under the Act, as set out at Part 6.5.1 above, is so broad as to include work on the electrical infrastructure. The infrastructure operated by the recently privatised electricity businesses in this State includes generation plant, powerlines, substations and transformers. While generation plant is unlikely to fall within the definition of an electrical installation for the purposes of the Act, other parts of the infrastructure, in particular, the distribution network, fall within the definition and are therefore regulated under the Act.

Reserving this area of electrical work to be performed by licensed and registered persons is a **serious restriction** on competition, as identified at Part 6.2.2. However, this restriction is significantly ameliorated by the Regulations which contain an exemption for persons who perform work in relation to certain infrastructure.

Until 1 July 2000, employees of “a designated electrical entity” carrying out work in the course of their employment were exempt from the requirement to be registered under the Act. This exemption is referred to below as the “ETSA exemption” as it originally applied to employees of the former State-owned electricity supply business, the Electricity Trust of South Australia. The recent privatisation of the State-owned electricity businesses was impetus to review this exemption. It was also considered that the detailed technical and safety requirements in the *Electricity Act*

1996 and *Electricity (General) Regulations 1997* afforded sufficient protection to worker and public safety and that the requirements in the *PGE Act* were an unnecessary duplication of regulation of work on electrical infrastructure.⁸¹

Regulations were made under the Act in January 2000 to repeal the ETSA exemption and insert a new exemption which came into operation on 1 July 2000, which exempts any person who carries out work in relation to electrical infrastructure⁸² that is owned or operated by an electricity entity that is required to have a safety and technical management plan under the *Electricity Act 1996* (the “infrastructure exemption”).⁸³

This amendment to the legislation resolved the discriminatory effect of the previous “ETSA exemption”, whereby ETSA could contract out its employees to perform electrical work other than on ETSA-owned infrastructure in competition with private contractors. Those employees, carrying out work in the course of their employment, were not required to be registered, whereas a competing private contractor did not enjoy the benefit of the exemption and its employees were required to be registered to perform the same work. Under the new exemption, *any* person carrying out work on infrastructure required to be covered by a safety and technical management plan, whether as an employee of the infrastructure operator or of an outside contractor, is exempt from the requirement to be registered under the Act.⁸⁴ Similarly, *all* persons performing work other than on such infrastructure are required to be registered, regardless of who the employer is.

Notwithstanding the “infrastructure exemption” applicable to workers, contracting for work on electrical infrastructure covered by a safety and technical management plan remains within the scope of regulation under the *PGE Act*. In practice, the resulting restriction has limited impact because those who contract for work on electrical infrastructure are likely to be larger contractors that are incorporated and the directors would not be required to meet the onerous technical qualification requirements contained in the Act. Further, if the recommendation of this Review regarding reduction of technical competency requirements for contractor licences (see 6.6.2 below) is implemented, no contractors would be required to meet those onerous requirements in order to contract for work on infrastructure. However, consideration should be given to whether work on electrical infrastructure should be

⁸¹ See *Electricity Act 1996 Pt 6 (safety and technical issues)*, *Electricity (General) Regulations 1997 Pt 4 Divs 3 (safeguarding persons working with conductors or electrical equipment)*, 5 (*safety and technical management plans and reports*).

⁸² Electrical infrastructure for the purposes of the exemption means (as defined in the *Electricity Act 1996*) electricity generating plant, powerlines, substations for converting, transforming or controlling electricity, equipment for metering, monitoring or controlling electricity and any wires, equipment or other things (including tunnels and cavities) used for, or in connection with, the generation, transmission, distribution or supply of electricity.

⁸³ *PGE Regulations* reg 4(5).

⁸⁴ Provided the infrastructure is owned or operated by an electrical entity required to have a safety and technical management plan: *ibid*.

regulated at all under the *PGE Act*, particularly given that work in relation to water, sewerage and gas infrastructure is not regulated under the Act.

The Draft Report canvassed the possibility of adopting the definition of “electrical installation” in the *Electricity Act* for the purposes of the *PGE Act*. The *PGE Act* definition includes all areas of work captured by the *Electricity Act* definition of “electrical installation” but the *Electricity Act* definition does not include work on any system or equipment situated beyond the electrical outlet or socket, eg appliances. Repair or maintenance of plug-in appliances is also exempted under the *PGE Act*, although not where the appliance is above low voltage.⁸⁷

The *Electricity Act* definition would also exclude repair work on used electrical equipment intended for resale, which is currently regulated to a minor extent because the exemption in relation to such work is conditional on the work being supervised and approved by a registered worker authorised by registration to carry out that type of work. If the definition of “electrical installation” were amended to mirror the *Electricity Act*, the ability to require supervision by a registered worker would be lost. In the respect, it is noted that new electrical appliances are generally required to be certified prior to sale as to their compliance with technical standards under the *Electrical Products Act 2000*. There would not appear to be any equivalent regulation of second-hand electrical appliances and therefore it appears that there may be justification for regulating work performed on second-hand appliances to the extent that it is currently under the *PGE Act*.

In relation to this issue, CEPU Electrical submitted that “*more electric shocks (a large number not reported) and deaths are occurring in relation to plug-in appliance repair work*” and opposed complete exemption of this area of work. CEPU Electrical did not provide statistics in support of this claim but indicated that statistics could be obtained from the Office of the Technical Regulator. The Technical Regulator’s Annual Report for 2000/01 does not contain any statistics specifically relating to electrical shocks due to faulty appliance repair work, rather the Report focuses on the need for consumers to use and maintain appliances appropriately.

NECA pointed out in its submission that the adoption of the *Electricity Act* definition would mean that maintenance work could be performed on industrial appliances that, although connected to the electricity supply by a plug, nevertheless use more electricity than a multi-storey commercial building.

The Review Panel accepts that there is a risk to consumer safety associated with appliance repair work such that the current restrictions on the performance of that

⁸⁵ *Electricity Act 1996* s 4.

⁸⁶ “Electricity entity” is defined as a person licensed under Part 3 of the Act to carry on operations in the electricity supply industry, including a person whose licence has been suspended or cancelled or has expired: *Electricity Act 1996* s 4.

⁸⁷ Such work is exempted by regulation: *PGE Regulations* reg 4(6)(c)(iii), (v), (vi).

work (which the Review Panel considers to be trivial in the context of the present exemptions in relation to appliance repair work) are justified.

On that basis, it would not appear appropriate at this time to consider amending the definition of “electrical installation” under the *PGE Act* to mirror the definition contained in the *Electricity Act*.

An alternative is to consider broadening the existing infrastructure exemption to include contractors as well as workers. CEPU Electrical opposed this proposal, however this opposition tended to relate more to the existing exemption of those who actually perform work on the electrical infrastructure (where owned or operated by an electricity entity required to have a safety and technical management plan under the *Electricity Act*). There was concern that the proposal extended the current exemption to workers employed by private sector electrical contractor companies who now work on the infrastructure. However, the existing exemption already applies to workers employed by a private contractor. Because the exemption only relates to workers, the private sector contractor contracting for that work would currently be required to be licensed. It is this anomaly that the Review Panel recommends be addressed. If the contractor also contracts for other electrical work the contractor will still require a licence.

Infrastructure not covered by a technical and safety management plan does not come within the exemption. Some stakeholders argued that the existing infrastructure exemption, limited as it is to infrastructure owned by an electricity entity required to have a safety and technical management plan, results in a ridiculous situation where a person requires a registration to work on infrastructure on one side of a fence (the private infrastructure owner’s side - eg infrastructure owned by private industry such as car manufacturers or mine operators) but not the other. However, the current infrastructure exemption was crafted on the basis that the requirement to implement a safety and technical management plan under the *Electricity Act* afforded sufficient protection of worker and public safety, such that additional regulation under the *PGE Act* conferred no additional benefit. There was also a concern that a broad infrastructure exemption may catch certain types of infrastructure that it would not be appropriate to exempt, for example, an electrical distribution system for a block of residential units.

NECA argued that the existence of safety and technical management plans did not offer sufficient guaranty of compliance with technical standards, suggesting there was a problem with compliance with the plans. However, such plans appear to be accepted practice nationally and the Technical Regulator has not raised any significant concerns regarding compliance with the plans.

Having identified the objective of contractor licensing as protecting against consumer loss resulting from business failure, it is difficult to justify the regulation of those who contract to undertake work on electrical infrastructure. Electrical entities, unlike ordinary consumers, are far better placed to enforce their legal rights

against such contractors and to absorb financial losses sustained as a result of the insolvency of contractors engaged to carry out work on the entities' assets.

6.5.2.1 Conclusion - electrical infrastructure

CONCLUSION 13

The Review Panel has concluded that work on electrical infrastructure owned or operated by an electricity entity required to have a safety and technical management plan under the *Electricity Act* should be exempted entirely from the application of the Act, such that those who contract for that work are also exempt (as is the case presently in relation to those who perform the work).

6.6 ENTITLEMENT CRITERIA - CONTRACTORS

The Act sets out certain criteria which an applicant for a contractor's licence, either a natural person or a body corporate, must meet in order to be entitled to a licence.⁸⁹ These are the requirements in relation to:

- technical qualifications;
- business knowledge;
- general and financial reputation; and
- financial resources.

6.6.1 Impact of the entitlement criteria on competition

The entitlement criteria constitute a barrier to entry into the market. The consequent effects of excluding potential new entrants into the market are decreases in innovation, efficiency and cost effectiveness as well as resulting increases in service prices which flow from the lack of competitive pressure. The Review Panel has identified the entitlement criteria as a **serious restriction on competition**.

6.6.2 Technical qualifications and experience

The Act requires that a person hold prescribed qualifications in order to obtain a contractor licence. This requirement is a barrier to entry.

The two competition issues which arise from this barrier are whether any requirement to possess technical qualifications and experience is justified and whether the current requirements are set at an appropriate level (ie the level at

⁸⁸ PGE Act s 9.

⁸⁹ PGE Act s 9.

which consumers derive the most benefit at the least relative costs - the community standard).

It needs to be remembered that regulatory control aims only to ensure that those who wish to participate in the market have the basic skills necessary to do so without presenting risk to the consumer. The Act sets out the competencies that Parliament has determined are the basic skill set plumbers, gasfitters and electricians must have.

The Review Panel does recognise that there are skills which market participants develop over time, and which can, over time, become perceived as being “best practice” for that industry. However, these industry “best practice” or “specialist” skills are often far removed from base level consumer protection area, and it is the latter which are regulated by the Act. It must be remembered that the purpose of regulation of any sector of a market is not to ensure business efficiency or success for individuals, nor it is to protect the public from all possible risk; regulation which sought to achieve these ends would impose unreasonable costs and burdens on both market participants and consumers.

The current prescribed qualification and experience requirements for a contractor licence without conditions for each of the three occupations are set out below.⁹⁰

- *Plumber*

A natural person must hold either:

- (a) a Certificate of Competency in Sanitary Plumbing or a Certificate of Competency - Advanced Plumbing issued by the Sanitary Plumbers Examining Board and have completed -
 - six years of plumbing including at least two years as the holder of a certificate of registration as a sanitary plumber issued by the Sanitary Plumbers Examining Board or a registered plumbing worker; or
 - seven years of plumbing including at least 18 months as the holder of a certificate of registration as a sanitary plumber issued by the Sanitary Plumbers Examining Board or a registered plumbing worker; or
- (b) a Certificate of Proficiency and a Certificate of Competency in Sanitary Plumbing, Draining and Water Plumbing issued by the Regency Institute of TAFE.

⁹⁰ Regulation 5 (contractor licence), 9 (worker registration)

- ***Gas Fitter***

A natural person must hold either:

- (a) a Certificate of Competency in Gas Fitting issued by the Gas Fitters Examining Board; or
- (b) a Certificate of Proficiency and a Certificate of Competency in Gas Fitting issued by the Regency Institute of TAFE.

- ***Electrician***

A natural person must hold a Certificate in Electrical Stream 3212 issued by a training provider approved by the Commissioner (including passes in modules approved by the Commissioner).

In addition, a person must hold one of the following qualifications issued by the Industrial and Commercial Training Commission:

- a Certificate of Competency in Electrical Mechanics; or
- a Certificate of Competency in Electrical Fitting; or
- a Certificate of Competency in Engineering Tradesperson (Electrical/Electronic).

The Draft Report suggested that the legislation should no longer refer solely to “qualifications” and should instead refer 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-based system.

Submissions to the Draft Report accepted that there is a move towards a competency-based system in the industries but expressed concern that there had not yet been sufficient development of the system to warrant replacement of the term ‘qualifications’ completely.

CEPU Electrical argued that *“until such time as all registered trades have fully implemented their trade competency training packages and the assessment of them is in place and affectively working, qualifications must be recognised.”*

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 competencies” where appropriate.

CONCLUSION 14

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

The technical qualification and experience requirements are potentially restrictive of competition in that they pose a significant barrier to entry into these occupations.

There are two relevant competition issues which arise out of the technical qualification requirement for contractor licences:

1. whether the current technical requirements are too onerous, and therefore unnecessarily restrictive; and
2. whether the requirement that a contractor hold technical qualifications is unnecessarily restrictive.

The appropriateness of the current prescribed technical qualification and experience requirements is discussed in detail at Part 6.7.1 in relation to worker registrations as the technical qualifications prescribed for an unrestricted worker registration are identical to those prescribed for a contractor licence.

Discussion under this heading is focussed on the possible effects on competition arising out of the requirement that a contractor who is a natural person hold technical qualifications.

The Review Panel is of the view that the requirement that contractors who are natural persons hold technical qualifications is a **serious restriction on competition**.

6.6.2.1 Objectives of the requirement

The objectives of requiring contractors to hold the same technical qualifications where there is a concurrent requirement that all work be performed by a registered worker are not clear. This is particularly so given the fact that the directors of contractors which are bodies corporate are not required to possess technical qualifications, nor are all members of a partnership required to hold technical qualifications in order to be licensed.

In relation to electrical licensing, the Tregillis Report (1990) recommended that an understanding of business principles be a pre-requisite to a contractor being licensed.

A similar view was endorsed in 1993 and 1994 at a series of meetings of the Labour Ministers' Council, where Ministers agreed on a number of reforms to plumbing and

gas fitting occupational licensing arrangements⁹¹. In particular, the Council agreed that if State and Territory Governments chose to continue to specifically regulate plumbing and/or gas fitting contractors, such regulation should be by a business licence (ie based on consumer protection objectives) and not encompass occupational criteria.

The directors of a body corporate do not have to possess technical qualifications in order for the body corporate to obtain a licence under the Act.⁹²

Further, an applicant for a licence who does not meet the technical qualification requirements may be granted a licence subject to the condition that the applicant carry on business under the licence in partnership with a person who does meet those requirements.⁹³

The Act requires that a natural person have both technical and business qualifications to be entitled to a contractor licence.⁹⁴ The person must have technical qualifications notwithstanding that a contractor is required under the Act to ensure that all plumbing, gas fitting and electrical work performed in the course of the contractor's business is personally carried out by a registered worker authorised to carry out such work.⁹⁵

The qualification and experience requirements relate primarily to technical capability, and to a lesser extent, business capability. This prevents a person possessing adequate business capability from obtaining a contractor licence, unless they are prepared to undertake the required technical training. In many cases, due to such factors as age, technical training, which generally takes about six years to complete, may not be practical or, indeed, possible.

6.6.2.2 Assessing the costs and benefits

This barrier to entry effectively restricts competition by excluding from the market of contractors those who do not possess technical qualifications. The qualification requirements, being the same as those for the workers who actually perform the work, are so onerous as to be likely to deter many potential applicants who possess the requisite business qualifications but lack technical qualifications.

In effectively requiring that a natural person without technical qualifications must either form a partnership or incorporate their business in order to carry on business as a contractor, the Act restricts the manner in which persons may structure their business operations. This conduct restriction may potentially result in opportunity costs in terms of potential loss of innovation in service delivery which a person

⁹¹ Letter from Secretary, Department of Industrial Relations (Commonwealth) to Australian Plumbing and Mechanical Contractors Association, dated 1 June 1994.

⁹² *PGE Act* s 9(2).

⁹³ *PGE Act* s 9(3).

⁹⁴ *PGE Act* s 9(1).

⁹⁵ *PGE Act* s 12.

possessing business acumen might achieve if allowed to operate a contractor business.

NECA disagreed with the suggestion that this restriction may result in a stifling of innovation, submitting that:

“in this highly competitive industry, standards and innovations are inextricably linked”.

This submission suggests that innovation in these markets is restricted in any event and can only be achieved within the scope of prescribed standards for plumbing, gas fitting and electrical work. The Review Panel accepts the validity of this submission in relation to the actual performance of work, however it notes that the issue of the performance of work is separate from the issue of running a contracting business and whether a contracting business could be operated effectively and efficiently from an administrative point of view by a person possessing the necessary business knowledge and experience without technical qualifications.

Further costs of this restriction are identified as the costs associated with incorporating a contractor business or forming a partnership. However, the Review Panel considers that these costs would not be significant over the period of operation of the contracting business, although they may potentially deter a person from entering the market.

As discussed at Part 4.7, 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 which restrict entry to new competitors are a key contributor to a reduction in the level of contestability in the market. With little threat of new competition, those presently in the markets for plumbing, gas fitting and electrical work have a greater incentive to maintain the status quo than to explore new or different service delivery options.

Further, given a static level of competitor entry into the market, increasing demand for services will lead to a relative decrease in supply, and higher prices to consumers.

Submissions have been received in response to the Draft Report from industry stakeholders listing the benefits of requiring contractors to hold technical qualifications as including:

- protection of public health and safety and of the integrity of the water, sewerage, gas and electrical infrastructure;
- prevention of substandard work;
- ensuring that workers are adequately supervised;
- preventing unscrupulous persons becoming contractors and engaging unregistered and unskilled persons to perform work; and

- ensuring contractors are able to quote accurately for work.

The Review Panel considers it difficult to reconcile these suggested benefits with the fact that contractors which are bodies corporate are not required to possess technical competencies. In each case, the above suggested benefits derive from the requirement that contractors ensure that work performed in the course of the contractor's business is personally carried out by a registered worker authorised to carry out that work and that the requirement that those who perform the work possess the necessary competencies.

The rationale behind the licensing of contractors is to regulate the contractual relations between contractor and consumer, and to protect consumers from the risk of financial loss and criminal activity. In both of these areas, technical qualifications would appear to be of little relevance and to offer little benefit.

CEPU Electrical submitted that a justification for continuing to prevent non-technically qualified people from holding contractor licences was that:

"history has shown that there have been a large number of "fly by night contractors" that have not only "hood winked" the public but have employed/subcontracted unlicensed or unskilled workers to perform electrical work."

The Review Panel considers that this problem is adequately addressed in the Act by the fitness and propriety and financial reputation criteria for contractor licences as well as the requirement that contractors ensure that plumbing, gas fitting and electrical work performed in the course of the contractor's business is personally carried out by a registered worker.

To the extent that a contractor without technical qualifications may not be able to adequately assess the competency of a worker to be engaged/employed, it is this information asymmetry problem which registration of workers under the Act is designed to overcome. A contractor should be able to employ a suitably competent worker on the basis of the worker's registration.

Consumers Association of South Australia Inc. ("CASA") did not consider that the requirement that contractors possess technical knowledge was necessary, stating in its submission that

"contractors need not possess this knowledge to ensure the effective and efficient operation of a business if their registered workers are technically skilled with the appropriate qualifications".

A submission received from the Managing Director of a Queensland contracting firm and representative on the Queensland Electrical Licensing Board, argued that

"the requirement for technical qualifications on a licence holder [is] extremely important in control and direction of qualified electrical workers"... "Who would an

electrical worker turn to for technical advice when their own knowledge is insufficient to complete the task?[...] I point out that it is normally the case that the average electrical worker frequently does require a lot of technical advice."

The Review Panel points out that, as the Act currently stands, contractors are required to have the same qualifications and experience to be granted a licence as required for worker registration. No submissions have been received by the Review Panel which argue that the currently prescribed qualifications for worker registration are insufficient. Registered workers should be competent to perform all work authorised by their registration to the appropriate standard without direction from a contractor.

The question of additional experience is separate from the question of the minimum qualifications and experience requirements. It is not the current requirement that contractors hold technical qualifications which necessarily ensures that the person who performs the work in question is able to perform the work to the required standard.

It is always possible that unscrupulous contractors or workers may take short cuts. This risk is offset by the random auditing of work by the technical regulators of each of the trades.⁹⁶

The Small Business Advocate supported the proposal that sole trader contractors not be required to meet the onerous technical qualification requirements. The Small Business Advocate stated that the requirement had been a focus of complaint to her office, citing the example of a client who had worked with and taken over his father's contracting business and who faced having to do an apprenticeship, incorporate the business or form a partnership with a person possessing the technical qualifications in order to obtain a contractors licence.

SA Water (technical regulator for plumbing) submitted that:

"there is a need to have a sound knowledge of installation requirements if a person is to quote for plumbing work, as consumers would assume they are dealing with a qualified tradesperson".

The Review Panel considers that this is a valid concern. Quoting for work is perhaps more likely to be performed by a natural person contractor, who may only employ one or two registered workers to perform work, because those workers may be busy performing the technical work of the business. Whilst it is ultimately the contractor who would bear the financial loss in the event of underquoting, and the potential loss of business as a result of overquoting, there is the potential for corners to be cut where a contractor has underquoted with the consequential risk of loss to consumers.

⁹⁶ In its submission to the Review Panel, SA Water advised that it currently audits 5% of installations and that the number of reported infringements is "manageable".

The Review Panel notes that under the *Building Work Contractors Act 1995*, contractors are required to possess “building management” competencies, that is, building-specific business competencies. Although operating a building business may be more complex than operating a plumber’s or electrician’s business in so far, for example, as building projects often involve organising a sequence of tradespersons and building materials, the requirement to possess a basic level of trade or industry knowledge in addition to general business skills could be considered necessary for plumbing, gas fitting and electrical contractors to ensure consumers do not suffer loss as a result of inaccurate quoting or mismanaged work projects.

Accordingly, the Review Panel has formed the conclusion that OCBA review the current prescribed technical qualifications for natural person contractors under the *PGE Act* with a view to reducing them significantly such that only basic industry or trade knowledge is required for a contractor licence, sufficient to enable contractors to organise resources and materials and quote for work.

However, the Review Panel concedes that such a change would result in the continued anomalous situation where the qualification requirements for natural person contractors, as well as for one of the partners of partnership contractors, differ from the requirements for body corporate contractors, resulting in discrimination in favour of body corporate contractors. The Review Panel therefore recommends that OCBA review the technical qualification requirements for *all contractors*.

It may be appropriate for the abovementioned reviews to occur in line with a general review of the technical competencies required for contractors and workers under the *PGE Act* once the new National Training Packages have been settled with respect to the plumbing, gas fitting and electrical trades.

The Review Panel agrees with SA Water’s submission also in relation to the potential for consumers to be misled by a contractor licence held by a person without the technical qualifications to perform the work in question.

In practice, bodies corporate who are licensed contractors receive their licence in the form of a certificate which would be displayed at their business premises. Natural persons, however, are issued a licence card. Consumers have been educated by OCBA to request to see a tradesperson’s licence or registration card to ensure that the person is licensed/registered. Although no submissions have been received by consumers in relation to this issue, the Review Panel considers that it is highly likely that consumers do not generally differentiate between a natural person’s contractor licence and their worker’s registration and would assume that a contractor licence authorises a person to actually perform, rather than merely contract for, plumbing, gas fitting and electrical work.

This is in great part due to the history of regulation of this market. Prior to the introduction of the *PGE Act* in 1995, sole trader electricians with a “worker licence” were permitted to contract for electrical work without the requirement for a contractor licence.⁹⁷

It is considered that a concerted effort would need to be made to re-educate consumers regarding the difference between contractor licenses for natural persons and worker registrations if natural persons without technical qualifications sufficient to perform work contracted for were to be granted contractor licences. Additionally, the practice of issuing natural person contractors with licence cards may need to be reviewed, or at least, a clear condition printed on licence cards stipulating that the licence does not authorise the actual performance of plumbing, gas fitting or electrical work.

Submissions have been received arguing that consumers will treat any education campaign with apathy and fail to appreciate the change. As with many changes, it may take some time for the public to get used to the change. However, the Review Panel considers that the fact that the actual performance of the work is required to be undertaken by a registered worker, who is in turn required to hold the requisite registration card (or dual licence/registration card if the contractor is also a registered worker, having completed the required technical training and experience), significantly reduces the significance of the proposed change in terms of its impact on consumers. Further, it should be noted that the concept of a pure contractors licence (signifying fitness to operate a business) already exists in relation to builders, therefore the present already exists and greater consistency would be achieved by bringing the plumbers, gas fitters and electricians licensing system in line with the builders licensing scheme.

The Technical Regulator submitted that the proposal to remove technical competency requirements in relation to natural person contractor licences could lead to contractors placing pressure on workers to cut corners in order to complete jobs more quickly and cheaply on the basis that the contractor will not fully understand the nature of the work. This comment was made in the context of requirements relating to the provision of certificates of compliance in relation to electrical work. The *Electricity Act*, *Gas Act*, *Waterworks Act* and *Sewerage Act* impose self-certifying requirements on persons undertaking plumbing, gas fitting and electrical work. Certificates of compliance must be completed certifying that the work has been performed in accordance with relevant technical standards. The various Acts differ as to whether the obligation to complete the certificate of compliance is imposed on the contractor, the worker, or both.⁹⁸ These Acts recognise the importance of

⁹⁷ *Electrical Workers and Contractors Licensing Act 1965*.

⁹⁸ Under the *Gas Act* the worker who carries out the work must examine and test the work and complete the certificate of compliance. Under the *Waterworks Act*, the worker or contractor who has carried out the work must certify. Under the *Electricity Act*, the worker who carries out the work must complete the certificate of compliance, and, if the worker is employed or engaged by a licensed contractor, the contractor must also certify.

requiring those who actually perform the work to certify that the work complies with technical standards.

The Review Panel notes that the *Sewerage Act* requires sewerage work to be performed and certified by a licensed plumbing contractor. This appears to be an anomaly given the requirement under the *PGE Act* that such work be performed by a registered worker. This anomaly may need to be addressed prior to implementing the proposal to reduce the technical qualification requirements imposed on natural person contractors. Generally, however, the Review Panel considers that the certification requirements will have the same application in relation to natural person contractors as they currently have in relation to incorporated and non-technical partner contractors following implementation of the proposal. In that regard, the Technical Regulator did concede that it was difficult to justify more onerous requirements being placed on natural person contractors than on non-natural person contractors.

6.6.2.3 Conclusion - contractor technical qualifications

CONCLUSION 15

15.1 The conclusion of the Review Panel is that the objective of requiring natural persons who apply for contractor licences to possess the same technical competencies as registered workers who actually perform the work is not easily identified and, in any event, not relevant or appropriate.

15.2 The Review Panel recommends that the current prescribed qualifications be reviewed for all contractors with a view to ensuring that the requirements are limited to basic industry and trade knowledge sufficient to enable contractors to quote for work and manage work resources such as materials. This would eliminate the current discrimination between the requirements imposed upon natural persons, and those imposed upon partnership and body corporate contractors.

15.3 The Review Panel considers that amending the Act to reduce the technical requirements for natural person contractors has the potential to mislead consumers and recommends that any such amendment be accompanied by an education campaign to inform consumers about the difference between a contractor licence and a worker registration.

6.6.3 Business knowledge and experience

To be entitled to an unconditional gas fitting or electrical contractors licence, in addition to the prescribed technical qualifications or competencies for each type of

service, a person must also have successfully completed certain approved business administration subjects.⁹⁹

For bodies corporate, the directors collectively, and for partnerships, at least one of the partners, must demonstrate these capabilities.

The following modules have been approved by the Commissioner for Consumer Affairs, and must be completed in order that the person satisfy this requirement with respect to an electrical contractors licence:

- *conducted by an RTO*

Title	Duration
Establishing a Contracting Business	40 hours
General Legislative Requirements	20 hours
Estimating, Tendering and Contracting	40 hours
Financing and Controlling	40 hours
TOTAL DURATION	140 hours

or

- *conducted by TAFE SA*

Title
Planning for Success
Marketing
Ownership Structures
Business Finance
Cost, Profit and Breakeven;
Business Law

The alternatives to completion of the above business training modules are Recognition of Prior Learning results, a business, economics or accounting related degree or diploma or demonstrated continuous twelve months experience operating a business within a five year period prior to applying for a licence.

Applicants for a plumbing or gas fitting contractors licence must currently complete a course in Small Business Management (60 hours) or the business models, 'Planning for Success', 'Cost Profit and Breakeven' and 'Marketing'.

The existing business knowledge and experience requirements restrict entry into the occupations. The Review Panel assesses the requirements as an **intermediate restriction on competition**.

⁹⁹ Regulation 5(b), 5(c).

6.6.3.1 Objectives of the requirement

The objective of requiring contractors to possess business qualifications and experience is to prevent or minimise the risk of consumers suffering financial loss as a result of the failure of a contracting business.

It is well-known that the failure rates for small business are high, with some studies¹⁰⁰ estimating that of small businesses which fail, approximately 70% fail within the first five years of operation. Survival rates tend to improve with each successive year in business. Researchers are in consensus that the major cause of small business failure is lack of management knowledge and experience, with estimates of between 60% and 90%.

The prescribed business administration subjects are directed at ensuring that contractors are equipped with the necessary management knowledge and other business skills specific to these industries, including establishing a contracting business and estimating and tendering to enable them to trade successfully.

It should be noted that, while contracts for plumbing, gas fitting and electrical work may not involve as significant sums of money as domestic building contracts, they can nevertheless involve amounts in the thousands of dollars. Rectification work could similarly involve significant monetary amounts, particularly taking the example of the cost of repairing faulty plumbing concealed under flooring or within wall cavities. The resulting financial loss to a consumer if a contractor business failed and was unable to perform rectification work would be significant.

Where plumbing, gas fitting or electrical work is performed in relation to a residential dwelling under a contract with the owner or on the contractor's own behalf and the work is worth in excess of \$12,000 (and development approval is required under the *Development Act 1993*), the contractor will in most cases be required to take out building indemnity insurance in relation to the work because the work is likely to fall within the definition of building work for the purposes of the *Building Work Contractors Act 1995*.¹⁰¹

However, plumbing, gas fitting and electrical work performed under a contract worth less than \$12,000 will generally not be insured against contractor insolvency.

6.6.3.2 Costs of the requirement

Apart from the general cost to the community of any barriers to entry which are predicted by Competition Policy, namely, higher prices due to restricted supply and losses of innovation, efficiency and cost effectiveness, the other obvious costs of

¹⁰⁰ See for example McMahon et al (1993), *Small Enterprise Financial Management Theory and Practice*, Harcourt Bruce, Sydney, pp 132-143.

¹⁰¹ *Building Work Contractors Act 1995* s 34.

meeting the business knowledge and experience criteria are those of undergoing the required modules of training.

Information provided by TAFE SA Regency Institute and PEER TEC, who offer the business administration modules required for an electrical contractors licence, indicates that the cost of undergoing the required training ranges between approximately \$210.00 and \$816.00, depending on whether a person receives any subsidy or concession for being a member of one of the industry associations or unions or reimbursement from the Construction Industry Training Board.

The costs of the business administration modules prescribed in relation to plumbers and gas fitters are indicated by TAFE SA to be \$3.50 per student per hour of training (ie \$490.00 for the currently required 140 hours), with a Government subsidy of \$9.20 per hour for successful completion of training (ie an additional \$1,288.00 for each student who successfully completes the training).

Further potential costs of the requirement are the opportunity costs to those undergoing the training modules in terms of income foregone while attending the training. However, overall the costs are not so prohibitive as to be likely to deter entry of new players into the market.

6.6.3.3 ***Benefits of the requirement***

The benefits of the requirements are the prevention or minimisation of financial loss to consumers. Trade suppliers and subcontractors also tend to suffer financial loss when contracting businesses fail and money owed for materials or labour cannot be repaid. Therefore, they also benefit from the requirements.

As discussed at Part 4.8.2, consumers experience difficulty obtaining adequate information on which to base decisions regarding service-providers. There are further benefits to be gained in the form of reduced transaction costs associating with comparing service-providers by a centralised system of information as to which service-providers possess the competencies necessary to operate a successful business.

6.6.3.4 ***Assessing the costs and benefits***

All of the parties who provided submissions to the Review Panel regarding this issue agreed that the requirement that contractors possess business qualifications or competencies was justified.

The conclusion of the Review Panel is that the costs of requiring contractors to possess business knowledge and experience are outweighed by the benefits afforded in terms of consumer protection from financial loss as a result of provider failure.

6.6.3.5 Alternatives to current regulation

It is important that the point of entry requirements in relation to business competencies are set at the minimum acceptable level to achieve the intended benefit. This is the “community standard” as opposed to a “best practice” level at which competencies may be desirable for employers seeking new employees but are in excess of what is required for consumer protection.

The submissions received from industry organisations and OVET disputed that there should be any reduction in the current level of required business knowledge and experience.

The MPA argued for an increased requirement of business competency, stating:

The Association believes that the requirement for business acumen [is] absolutely essential for a contractor licence and once again rejects the notion that it is restrictive in terms of competition. Quite the contrary, if more small business owners had more of a propensity towards business skills there would be an increased benefit to the consumer, resulting in more vigorous competition than at present.

As indicated above, the Review Panel does not dispute that business skills are justified, rather is concerned that the requirements should not exceed what is considered to be justified in accordance with the identified objectives of the requirements, which is consumer protection. An illustration of this point is the recent reduction in the business competencies prescribed for plumbing and gas fitting contractors. Previously, plumbing and gas fitting contractors were required to have completed approximately 80 hours of ‘Communications’ training modules in addition to the 60 hour course in Small Business Management. The Communications modules included training in areas such as letter writing and speaking to groups. Although the Review Panel agrees that such skills may confer benefits in terms of increased professionalism and improved customer service, such skills are more in the realm of industry best practice than what is necessary in order to achieve consumer protection.

The Review Panel notes that, independently of this Review, OCBA is currently in the process of reviewing the prescribed business competencies for electrical contractors.

6.6.3.5.1 *Subcontracting condition*

The Draft Report raised the issue of whether a “subcontract only” licence condition could be imposed, which would not require the applicant to meet the business knowledge and experience requirements or the financial resources and financial reputation criteria. This was suggested on the basis that where a plumbing, gas fitting or electrical contractor subcontracts to a building work contractor or another plumbing, gas fitting or electrical contractor, the head contractor is responsible to the consumer for completion of the work and carrying out warranty work.

Submissions have argued that effectively removing the business knowledge and experience requirement for subcontract-only licences would increase the potential for head contractors to suffer financial loss as a result of the failure of a subcontractor's business. However, it should be remembered that the objective of the legislation is to protect consumers. Contractors within the building, plumbing, gas fitting and electrical trades are far better placed than consumers to protect themselves against subcontractor insolvency. Often networks within these industries are such that members of the industry become aware early on where a contractor, or subcontractor, is unable to pay bills or otherwise demonstrates signs of being in financial trouble.

It was also argued that contractors tend to move from being head contractors to subcontractors regularly. It is clear that such persons would need to complete the business and financial requirements and obtain an unrestricted licence. The proposal is to allow only persons who never contract with the public to obtain a 'subcontract only' licence. A 'subcontract only' licence will need to be clearly endorsed as such so consumers can identify whether a contractor is entitled to transact directly with consumers. Alternatively, consideration should be given to not issuing licence cards to 'subcontract only' contractors.

CEPU and NECA were concerned that this proposal would encourage the exploitation of subcontractors by employers. It was suggested that employers may seek to avoid occupational health and safety and other obligations to employees by engaging workers as subcontractors rather than employees. Recent taxation law reforms, which have introduced tests to distinguish genuine subcontracting relationships, may have gone some way to discouraging this practice. However, the Review Panel considers that the proposed reduction in business and financial requirements may remove regulatory barriers that could prevent persons unable to meet the business and financial criteria from working in the industry at all in such circumstances. Where such a person might ordinarily rely on their worker's registration and seek to be employed, they may experience difficulty obtaining employment due to a preference by contractors to engage subcontractors rather than employ workers. The ability to obtain a contractor's licence limited to subcontracting may be the difference between that person being effectively precluded from the industry entirely or being able to continue to work.

Concern was also expressed in submissions from the trades about the potential exploitation of subcontractors by head contractors where contractors lack business knowledge and experience. The Review Panel acknowledges that this is a potential concern, however, while it is agreed that it would be desirable for subcontractors to possess business knowledge and experience for their own protection and while it is conceded that it is possible that the failure of a subcontractor's business could have flow-on effects to consumers (for example, where a subcontractor may cut corners to save costs) it is not clear that these flow-on effects would be significant given that the head contractor remains liable for the satisfactory completion of the work and that the head contractor is generally far better placed than consumers to ascertain

whether a particular subcontractor may be exhibiting signs of being in financial trouble.

NECA stated in its submission that it agreed in principle with the argument in relation to the subcontract only licence, but rejected the proposal that subcontractors should be exempt from the business knowledge and experience requirements. NECA also argued that improved compliance measures would need to be developed before implementing the change.

There are persons who would be prepared to subcontract only, including those that would seek to be employed as a worker but for the preference of some employers to engage subcontractors rather than employees to perform work. Notwithstanding that such persons do not deal with consumers, they are considered to be carrying on business for the purposes of the legislation and therefore required to be licensed. However, where the person does not intend to contract with consumers directly, the consumer protection objective does not justify the imposition of the business knowledge and experience, financial reputation or financial resources criteria. In so far as a person holding a 'subcontract only' licence would be precluded from contracting directly with consumers for the performance of plumbing, gas fitting or electrical work, this would operate like any other licence condition restricting the scope of work permitted to be performed under the licence, including in terms of enforcement.

It should be noted that subcontractors will also be required to possess technical competencies and hold a workers registration in order to personally perform work.¹⁰²

6.6.3.6 Conclusion - business knowledge and experience

CONCLUSION 16

16.1 The Review Panel has noted that the current prescribed business knowledge and experience requirements for electrical contractors are being reviewed with a view to reducing the requirements. The Review Panel agrees with this initiative and emphasises that only those business competencies required to achieve the above identified objectives of the legislation should be prescribed for the purpose of contractor licensing;

16.2 The Review Panel recommends that persons who seek only to subcontract to licensed building work, plumbing, gas fitting or electrical contractors not be required to meet the business knowledge and experience requirements. This could be facilitated by grant of a 'subcontract only' licence with a clearly worded notification of the limits of the licence, or alternatively,

¹⁰² PGE Act section 12.

consideration could be given to not issuing a licence card to 'subcontract only' licensees.

6.6.4 Financial reputation

To be entitled to be a contractor, a natural person must not be an undischarged bankrupt or subject to a composition or deed or scheme of arrangement with or for the benefit of creditors. Neither a natural person or a body corporate is entitled to hold a contractor's licence if the person or any director of the body corporate has been within the previous five years a director of a body corporate wound up for the benefit of creditors.¹⁰³

The Review Panel notes that the financial reputation criteria in the Act differ from those in the *Building Work Contractors Act 1995* (the "*BWC Act*") which currently preclude those who have been bankrupt or directors of a company wound up for the benefit of creditors within the previous *ten* years.

Unlike the *BWC Act*, the *PGE Act* does not prevent a body corporate from holding a contractor's licence if any of the directors is or has been an undischarged bankrupt. However, although the *PGE Act* does not preclude a corporation from holding a contractor's licence where any of the directors is an undischarged bankrupt, the Review Panel notes that the provisions of the *Corporations Act 2001 (Cth)* automatically disqualify a person who is an undischarged bankrupt or subject to a deed of arrangement or a composition with creditors under Part X of the *Bankruptcy Act 1966* from being a director of a company.¹⁰⁴ However, such a person will remain listed as a director of a company unless the company notifies ASIC that the person has ceased to be a director by virtue of the automatic disqualification. In practice, it is likely a certain number of companies fail to notify ASIC, so when checking company extracts provided with licence applications, OCBA may not be alerted that a person listed was not entitled to be a director by virtue of automatic disqualification for bankruptcy.

A potential effect of this anomaly, and the effect of not precluding a recently discharged bankrupt from being licensed, is that consumers may incur greater transaction costs in seeking out information themselves regarding financial reputation when searching for a reliable service-provider.

It is argued that the justifications for disqualifying a person for five years who managed a company which went into liquidation apply equally to persons who have been bankrupt. Therefore, although the terms of this Review are limited to identifying and assessing existing restrictions on competition, the Review Panel

¹⁰³ *PGE Act* s 9(1)(c), 9(1)(d) (natural persons), 9(2)(b)(ii) (directors of bodies corporate).

¹⁰⁴ *Corporations Act 2001 (Cth)* ss 206A, 206B (unless the person continues to manage a company with the permission of ASIC or the Court).

recommends that consideration be given to amending the legislation to address this anomaly.

The Review Panel has assessed the financial reputation entitlement criteria as an **intermediate restriction on competition**.

6.6.4.1 *Objectives of the requirement*

The rationale for the financial reputation entitlement criteria is that a poor financial history or reputation is an indicator of a lack of business skills which in turn poses a risk of financial loss to consumers. 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.

NECA submitted that the current restrictions regarding financial reputation were inappropriate, suggesting that the Act does nothing to prevent a person holding both a personal and corporate contractor licence to continue to trade under the personal licence after the company goes into liquidation. This contention is incorrect. The financial reputation criteria prevent this, in conjunction with the disciplinary provisions contained in the Act, which state that grounds for disciplinary action exist where events have occurred such that a person would no longer be entitled to a licence (for example, if the licensee is a director of an insolvent company wound up for the benefit of creditors). One of the disciplinary orders available to the Court is cancellation of the licence.

However, there is an argument that the objective of preventing risk of financial loss to consumers does not necessarily justify the restriction in every contracting situation. Where plumbing, gas fitting or electrical contractors subcontract for work, say, with a building work contractor, the building work contractor is liable to the consumer in respect of the statutory warranties and incomplete work under the head contract. The consumer in such situations is not at risk of suffering financial loss as a result of the failure of the plumbing, gas fitting or electrical subcontractor’s business. However, it should be noted that head contractors may suffer financial loss as a result of failure of a subcontractor’s business. This is discussed at 6.6.3.5.1 above.

6.6.4.2 *Costs of the requirement*

The costs of the requirement in term of restricting entry into the market are potential losses of innovation and efficiency, with attendant decreases in consumer choice and higher prices.

6.6.4.3 *Benefits of the requirement*

It was stated in the Second Reading Speech for the *Building Work Contractors Act (BWC Act)* in relation to a similar requirement that:

*“The industry parties were concerned to ensure that adequate measures exist to prevent directors of insolvent companies from operating in the building industry.”*¹⁰⁶

In the matter of the *Commissioner for Consumer Affairs v Jeffries*¹⁰⁷, the District Court in considering the objectives of the requirement in relation to builders 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.”*¹⁰⁸

The Review Panel considers that the solvency requirement reduces the risk to consumers that their contracts will not be completed due to financial causes. In its submission on this issue, CASA referred the Review Panel to the submissions it made in relation to the NCP Review of the *BWC Act*, which included the following:

“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).

However, where there is no risk to consumers, as in the case of persons who merely subcontract to perform work, there is no benefit in terms of consumer protection in precluding such persons from entering the market.

This is acknowledged in a recent decision of the District Court in *Commissioner for Consumer Affairs v Dunn*.¹⁰⁹ In that case, after considering the recent decision of the Supreme Court in *Commissioner for Consumer Affairs v Sollars*,¹¹⁰ which emphasised the public protection objective of the disciplinary provisions of the licensing legislation, the District Court held that the appropriate order for a building work contractor who had been declared bankrupt was the imposition of a licence condition requiring the contractor to contract only with other building work contractors (ie subcontract only) for a period of 10 years. The Court considered that this enabled the contractor to continue operating in the industry, without exposing the general public to a risk of financial loss.

¹⁰⁶ Hansard, 25 October 1995 at p343.

¹⁰⁷ *Commissioner for Consumer Affairs v. Jeffries* [1999] SADC 107.

¹⁰⁸ Supra note 102.

¹⁰⁹ [2002] SADC 34.

¹¹⁰ [2001] SASC 110.

6.6.4.4 *Assessing the costs and benefits*

The Review Panel concludes that as a general proposition, the requirement that a person wishing to hold a contractor licence must be able to demonstrate a good financial reputation is justified. The restriction yields a net benefit to consumers. However, the Review Panel does not consider the requirement is justified in the case of those persons who only subcontract their services.

There may be a number of persons who are excluded from the market because, through factors unconnected with their business acumen, they have been declared bankrupt or a company of which they were a director was wound up for the benefit of creditors. In allowing such persons to carry on business as a contractor with the condition that they subcontract their services to a head contractor, competition in the market may be increased.

6.6.4.5 *Alternatives to current regulation*

The only possible alternative to the financial reputation criteria suggested in submissions was the common law. It is difficult to see, however, how the common law would operate to prevent business failure or reduce transaction costs associated with the search for a reliable service-provider. It is the problem of the inability of contractors who are bankrupt or have gone into liquidation to meet their liabilities, including those under common law, which the restriction seeks to address.

While there may be a benefit to head contractors in requiring those who subcontract their services to have satisfied the financial reputation criteria, this benefit alone is not considered sufficient to justify the restriction and is not directed to the objective of the provision, which is consumer protection. Therefore, as discussed at 6.6.3.5.1 above, the Review Panel recommends that the restriction be removed in relation to persons who contract only with licensed contractors. In practice this would involve the granting of restricted contracting licences limited to contracting with licensed building work, plumbing, gas fitting or electrical contractors only.

6.6.4.6 *Conclusion - financial reputation*

CONCLUSION 17

- 17.1 The conclusion of the Review Panel is that the financial reputation criteria should be retained.**
- 17.2 However, the Review Panel considers that persons who contract only with licensed building work, plumbing, gas fitting or electrical contractors should be permitted to obtain a “subcontract only licence” without the requirement to meet the financial reputation criteria.**

6.6.5 General reputation

A person must be a fit and proper person to hold a contractor licence,¹¹¹ and this requirement is extended to all directors of a body corporate.¹¹² In addition, a person 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.¹¹³

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.¹¹⁴

6.6.5.1 Objectives of the requirement

The requirement that contractors satisfy the general reputation criteria is directed at preventing the risk of loss to consumers from criminal activity by a contractor.

6.6.5.2 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*:¹¹⁵

“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.”

In its submission to this Review, CASA referred to the previous submissions it made in the Review of the *BWC Act*, that the concept of “fit and proper” is too vague and ought to be replaced with a list of prescribed offences.

¹¹¹ *PGE Act* s 9(1)(f).

¹¹² *PGE Act* s 9(2)(e).

¹¹³ *PGE Act* s 9(1)(b) (natural persons), 9(2)(b)(i) (directors of bodies corporate).

¹¹⁴ *PGE Act* s 10.

¹¹⁵ (1988) 143 LSJS 1.

The indeterminate nature of the fitness and propriety requirement can lead to increased costs by deterring potential applicants from seeking to obtain a licence as well as the administrative costs involved in exercising the discretion.¹¹⁶ The greater likelihood of appeal of licence refusals also leads to increased costs. Whereas the court has held that the Commissioner has no discretion to grant a licence where an occupational licensing Act prescribes particular offences for the purposes of the entitlement criteria and the applicant has been convicted of a prescribed offence,¹¹⁷ there is greater scope to appeal a licence refusal based on general reputation.

However, the difficulty with such a system is that it is not possible to categorically point to the type of offences which need to be prescribed. Other occupational licensing regimes have provisions such as trust accounting requirements. 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.

6.6.5.3 *Benefits of the requirement*

The NSW Green Paper noted in relation to building 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.”¹¹⁸

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 may be excluded from the market.

6.6.5.4 *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

¹¹⁶ This usually involves scrutinising a National Police Clearance Certificate as well as a statutory declaration setting out relevant circumstances regarding the offence which the applicant wishes to be taken into account.

¹¹⁷ *Commissioner for Consumer Affairs v Standley* (1998) 71 SASR 152.

¹¹⁸ *Inquiry into the New South Wales Building Services Corporation* (1992) (“the NSW Green Paper”), p 10.

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".¹¹⁹

In comparison to other occupational licensing Acts administered by OCBA which can 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 where they have committed a single offence or are able to demonstrate a period of good behaviour since 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.

6.6.5.5 Alternatives to current regulation

NECA submitted that "on a personal basis it should be sufficient to have a character reference from a prescribed person". The Review Panel considers that this is not an alternative to the fitness and propriety requirement, rather an alternative way to assess it. No other alternative means of protecting against criminal activity by contractors was suggested in the submissions received. The Review Panel does not consider that there is any less regulatory alternative of achieving the objective of this requirement.

6.6.5.6 Conclusion - general reputation

CONCLUSION 18

The Review Panel recommends that the fitness and propriety requirement be retained.

6.6.6 Financial Resources

To be entitled to a contractor's licence a person must demonstrate the possession of sufficient financial resources for the purposes of carrying on business under the licence.¹²⁰ This represents a significant barrier to entry, as it precludes those who may be technically proficient but who lack "sufficient" financial resources from obtaining a contractor licence.

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

¹¹⁹ *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).

¹²⁰ *PGE Act* s 9(1)(e) (natural person), 9(2)(d) (body corporate).

6.6.6.1 Objectives of the requirement

This requirement is common to many forms of occupational licensing, and is largely a consumer protection measure. 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 subcontractors, including workers, and suppliers who may be affected by a contractor's business collapsing.

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

“the main cause of substandard work is not a lack of skill rather it is due to economic decisions to cut corners”.¹²¹

The objective of the requirement is the protection of consumers from traders not being able to complete contracts and honour warranties through financial difficulties.

There is little evidence before the Review Panel that the requirement that an applicant display sufficient financial resources has had an 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, this lack of evidence may be in part attributed to the positive effect that regulation has had on the incidence of contractor insolvency.

The Act is silent on what constitutes sufficient financial resources. 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. It revolves around an assessment of access to “working capital” and includes the adjusted values of some types of assets and not others. It is not a rigorous definition from an accounting or finance perspective, and 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 of \$5,000 which can be partly paid to 1 cent per share. The share capital requirement was seen as a consumer protection mechanism, allowing for a call on unpaid capital in the case of financial difficulties. It perhaps fails to recognise that in the majority of cases these calls go unpaid, as the share owners will have previously used all available finances to support the ongoing business.

¹²¹ NSW Green Paper, p 14.

It was noted in the Final Report of the Competition Policy Review of the *BWC Act* that in small business, “financial resources” can fluctuate on a daily basis and are not necessarily an accurate indicator of the ability of the business to trade successfully in the long term. CASA argued 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”. However, these are not arguments for removing the financial resources requirement, rather for modifying the way it is administered.

The recent significant tightening of the building indemnity insurance market in this State following the collapse of insurer HIIH, which was one of only two insurers writing building indemnity insurance in this State, and withdrawal of its short-lived replacement, Dexta Corporation, has highlighted a gap between the financial assessment criteria of the insurers (who are essentially insuring against builder insolvency) and that undertaken by licensing authorities around the country. This has led to criticisms from insurers that they have become the de facto regulators (at least financially) of the building industry in the sense that they are effectively precluding licensees from the building industry by refusing them insurance (which is a prerequisite for domestic building work valued at over \$12,000).

The Review Panel notes that a recent national review of the building indemnity insurance system conducted by Professor Percy Allan AM recommended that licensing authorities ‘beef up’ their financial assessment of applicants for building work contractors licences.¹²² The Review Panel notes that OCBA is currently participating in a working group formed under the Ministerial Council for Consumer Affairs to consider this report and make recommendations to Ministers regarding implementation of the report recommendations.

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.

6.6.6.2 *Costs of the requirement*

The costs of the requirement include those that are associated with barriers to entry as outlined at Part 6.6.2.

Further costs of the requirement arise through the assessment of new licence applications and the auditing of existing licensees. Although the information provided is checked by suitably qualified staff of OCBA, the process is time consuming and difficult as much of the information is unaudited and may not have been prepared by an accountant.

6.6.6.3 *Benefits of the requirement*

¹²² Prof. P Allan AM, *National Review of Home Builders Warranty Insurance and Consumer Protection*, June 2002 p 48 (available at www.consumer.gov.au).

The key benefit provided by the restriction is, as discussed above, the protection of consumers against the risk that suppliers will not honour contracts or complete works contracted for due to financial difficulties. This is an important point of entry control which also benefits consumers by addressing the problem of information asymmetry. The Government is better placed than consumers to obtain information as to the financial viability of service-providers.

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) benefit from the requirement.

6.6.6.4 *Alternatives to current regulation*

NECA suggested that the requirement could be removed with respect to those who contract for work worth less than \$5,000. A condition would then apply to the licence restricting the holder to contracting for work up to this amount.

The Review Panel considers that a better alternative is a restricted “subcontract-only” licence (as discussed in relation to the business knowledge and experience criteria at 6.6.3 above), the grant of which would not be dependent on meeting the financial resources criteria. This would allow persons who are unable to meet the financial resources criteria to operate in the market without compromising the consumer protection afforded by requiring those who contract directly with consumers to meet certain point of entry criteria.

For those who contract with consumers, the present requirement that an applicant display sufficient financial resources should remain. In order to ensure that the process of application for a licence remains clear and open, it may be appropriate for OCBA 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. While the Review Panel recognises that such a guide could not 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. It is recommended that this be considered in any upcoming review of the financial resources criteria in response to the Percy Allan report discussed above.

6.6.6.5 *Conclusion - financial resources*

CONCLUSION 19

19.1 The Review Panel is of the general view that the requirement that a person has sufficient financial resources to carry on business is a justified barrier

to entry in those circumstances in which consumers are at risk from contractor failure;

19.2 However, the Review Panel considers that persons who contract only with licensed building work, plumbing, gas fitting or electrical contractors should be permitted to obtain a “subcontract only” licence without the requirement to meet the financial resources criteria.

6.7 ENTITLEMENT CRITERIA - WORKERS

6.7.1 Technical qualifications and experience

Only natural persons who satisfy certain qualification and experience criteria are permitted to carry out plumbing, gas fitting or electrical work.¹²³ The *PGE Act* provides that a natural person is entitled to be registered if the person has the qualifications and experience prescribed by regulation or has qualifications and experience which the Commissioner considers appropriate.¹²⁴ Only technical qualifications and experience are prescribed in relation to worker registrations and these are identical to the qualifications and experience requirements prescribed in relation to contractor licences which are set out at Part 6.6.2.

6.7.1.1 Objectives of the requirement

The objectives of the requirement that workers hold technical qualifications are:

- to ensure that plumbing, gas fitting and electrical work performed is not substandard or faulty in order to protect public health and safety as well as prevent damage or contamination of the infrastructure;
- to prevent financial loss to consumers arising from substandard work.

6.7.1.2 Impact on competition

The requirement that workers meet the onerous technical qualifications and experience criteria constitutes a barrier to entry which the Review Panel considers is a **serious restriction on competition**.

As discussed at Part 6.1, the effects of barriers to entry into a market include decreases in innovation, efficiency and cost effectiveness with increases in prices of services due to the absence of competitive pressure from new participants.

¹²³ *PGE Act* s 13.

¹²⁴ *PGE Act* s 16.

In the case of plumbers, to obtain an unrestricted registration, there is a requirement that persons holding a Certificate of Competency in Sanitary Plumbing or a Certificate of Competency in Advanced Plumbing issued by the Sanitary Plumbers Examining Board must also have six or seven years' experience as a plumber. The Review Panel considers that this "time served" requirement is particularly onerous and in itself constitutes a serious barrier to entry. However, the majority of apprentices now obtain qualifications through the new apprenticeship system, which is generally completed in four years, including on-the-job training, or time served.

6.7.1.3 ***Costs of the requirement***

The most obvious costs of the technical qualifications requirement are the costs of undergoing the requisite training courses. These costs are borne directly by the contractor or worker and may ultimately be passed onto consumers in the form of increased service prices. Public money is also spent in subsidising the training. Information provided by training providers indicates that the prescribed technical modules for plumbers and gas fitters involve 800 hours of training over 3 years at a cost of approximately \$800 for the student in addition to a Government subsidy of approximately \$6,000 per student. The training costs for electricians are similar, with a cost to each student of about \$960 for 960 hours of required training, with the Government subsidising the remaining cost of the training. Some employers pay or reimburse apprentices' training expenses.

These costs do not take into account the opportunity costs to trainees of forgoing paid employment over the hours of training. Such costs increase the overall costs of undergoing the required technical training.

Several submissions argued that these costs are ultimately borne by consumers and the general community. The Review Panel agrees that the costs of the training and experience requirements will at least in part be passed on to consumers in the form of increased prices for services.

These costs are additional to the costs associated with the effect on competition of this barrier to entry as discussed at Part 6.1.

6.7.1.4 ***Benefits of the requirement***

The benefits of requiring persons who perform plumbing, gas fitting and electrical work to demonstrate competency to perform such work to designated standards are primarily in preventing risk to public health and safety as a result of faulty or substandard work and the protection of the public water, sewerage, gas and electrical infrastructure from damage or contamination. All submissions received in relation to this discussion point agreed that the identified benefits of worker registration were significant.

6.7.1.5 Assessment of the costs and benefits

The Review Panel considers that the benefits of requiring workers to demonstrate competency to perform plumbing, gas fitting and electrical work to specified standards are so significant as to outweigh the costs of this restriction.

6.7.1.6 Alternatives to current regulation

Any barrier to entry should be set at the minimum level necessary to achieve the intended benefit. This will not necessarily correspond with industry views of “best practice”. Having determined that there is a net benefit in requiring workers to hold certain prescribed qualifications, it must be determined whether the benefits to public health and safety and the infrastructure can be achieved with a lower experience requirement.

NECA submitted that there is a need to continue with the “time served” requirement until such time as there is a “proven method of assessment in place”.

Similarly, CEPU Electrical argued that time served is required “to expose apprentices to the widest possible scope of work to gain effective competency, not just a once off task under supervision”.

TAFE School of Plumbing Services submitted that:

“time served is not necessary but experience in the industry is essential”.

Conversely, CASA argued in its submission that:

“the time of service before a plumber can gain registration appears onerous compared with other regulated occupations. For example, nurses and doctors are afforded greater responsibility in less time than a plumber can gain registration! Presumably when a plumber gains their certificate in the various levels of plumbing, it is proof that they are adequately skilled. Therefore, it is unnecessary for them to prove themselves over the length of time currently required. A lesser amount of time under senior supervision would be more than adequate to ensure proper work is done and that litigation is avoided.”

The MPA stated that “it accepts the concept of competency based training and assessment and the removal of the “time served” requirement. However, it supports the point made by NECA that it should not be removed until such time as there is a ‘proven method of assessment’ for establishing whether competence has been achieved or not”. MPA disputed that the new Training Packages would resolve concerns about the lack of a proven method of assessing ‘on site’ competency.

The Review Panel notes that National Training Packages for plumbing, gas fitting and electrical services are close to being settled. Workers will gain certificates of competency for the various work functions from training providers after

undertaking specified training or otherwise demonstrating competency. As part of demonstrating competency under the new Training Packages, workers may be able to receive recognition for prior learning.

Submissions to this Review have argued that the current licensing system is too rigid and that insufficient regard is had to recognition of prior learning. The introduction of the training packages and review of the current prescribed qualifications should aid in addressing this concern.

Various submissions from industry and trades expressed concern about the consequences of lowering standards of safety for the sake of increased competition. This not the focus of this review. As explained in Chapter 1, the NCP review process requires the Review Panel to consider the public benefits of regulation. One of the most fundamental benefits is safety. There is no suggestion that standards required for safety should be reduced, rather only a requirement to ensure that standards are not set so high that they exceed what is required to achieve the safety and consumer protection reasons and become unjustified barriers to entry aimed at mandating industry 'best practice'.

Once the new Training Packages are in place, OCBA is to independently review the qualifications prescribed under the Act to reflect the specific units of competency established for each work function.

As OCBA intends reviewing the qualification and experience requirements prescribed under the Act once the new national Training Packages for plumbing, gas fitting and electrical services have been settled, the Review Panel has not made specific recommendations regarding the level of the qualification and experience requirements. However, the Review Panel points out that the qualification and experience requirements for workers registrations should not exceed the level required to achieve the community safety and consumer protection objectives of the legislation. This will not necessarily coincide with the 'industry best practice' standard.

6.7.1.7 *Conclusion - worker qualifications*

CONCLUSION 20

The conclusion of the Review Panel is that the benefits of requiring workers to hold prescribed qualifications and experience/competencies outweigh the costs. The Review Panel notes that the Office of Consumer and Business Affairs is reviewing the prescribed qualification and experience requirements for workers against the new National Training Packages for plumbing, gas fitting and electrical services. The competencies ultimately settled on should not exceed the level necessary to achieve the community safety and consumer protection objectives of these requirements.

6.8 FEES

6.8.1 Application fee

An application for a licence or registration must be accompanied by the fee fixed by regulation¹²⁵. Currently, an application for a contractor licence or worker registration must be accompanied by a fee of \$125.00. If both a contractor licence and worker registration are sought, an application fee of \$250.00 applies.

6.8.2 Periodic fees

The Act requires that a licensed contractor¹²⁶ or registered worker¹²⁷ must pay to the Commissioner, at intervals fixed by regulation, the fees fixed by regulation.

The following fee must be paid in order for the licence to be issued for a twelve month period (contractor licence) or a three year period (worker registration):

- Contractor Licence (Natural Person) \$221.00
- Contractor Licence (Body Corporate) \$328.00
- Worker Registration only \$91.00
- Dual Contractors Licence and Workers Registration \$312.00

If partners in a partnership apply for contractor licences, the second partner is not required to pay an application or licence/registration fee and discounts apply for third and fourth partners.

These fees must be paid at the relevant anniversary date to ensure continuation of the licence or registration.

These fees can be characterised as a **trivial** barrier to entry.

A number of other fees apply if a change to licence or registration conditions is required. These fees are also considered to be trivial barriers to entry.

NECA conceded that the fees did not constitute a barrier to entry but argued that they should be reduced in any event. CEPU Electrical also argued that the fees for newly qualified workers should also be reduced. However, the Review Panel

¹²⁵ PGE Act ss 8(1)(b) (contractor licence), 15(b) (worker registration).

¹²⁶ PGE Act s 11(2)(a).

¹²⁷ PGE Act s 18(2)(a).

considers that the significantly lower fee for workers registrations adequately accounts for the lower earning capacity of workers.

6.8.3 Conclusion - fees

CONCLUSION 21

The fees at their current level are a trivial restriction on competition.

PART 7: CONDUCT RESTRICTIONS

7.1 LICENSED CONTRACTOR TO ENSURE WORK TO BE CARRIED OUT BY REGISTERED WORKER

The *PGE Act* requires that a licensed contractor ensure that any work undertaken under authority of the licence is undertaken by a registered worker.¹²⁸

As discussed previously, in 1993 the then Government introduced the *Electricians, Plumbers and Gas Fitters Bill* into Parliament with the intention of creating a single licensing Act to cover these related occupations. In introducing the Bill to the Legislative Council, the Hon M.J. Evans noted:

*“public health and safety are ever present concerns in electrical, plumbing and gas fitting work. It is important to ensure that only appropriately qualified people are allowed to practice these trades and that public health and safety are not put at risk by poor quality workmanship.”*¹²⁹

This remains the chief justification for the restriction.

NECA disputed that the requirement is a restriction on competition.

It is difficult to differentiate the effect on competition of this restriction from the effect of the requirement that all persons who perform plumbing, gas fitting or electrical work be registered under the Act. The Review Panel does not consider that the requirement results in any additional restriction on competition over that already existing as a result of the requirement for workers to be registered. There may be minimal administration costs incurred by contractors in keeping records of employees' registration details, however, the Review Panel assesses that this is a **trivial restriction on competition**, the benefits of which outweigh the minimal costs.

It should be noted that an acceptance of the recommendation at Part 6.2.3 that apprentices be exempted from the requirement to be registered may necessitate making an exemption from the application of this provision.

7.1.1 Conclusion - contractor to ensure work carried out by registered worker

CONCLUSION 22

The requirement that a contractor ensure that any work undertaken under authority of the contractor's licence is performed by a registered worker is a trivial restriction on competition, the benefits of which outweigh the minimal costs.

¹²⁸ *PGE Act* s 12.

¹²⁹ Hon M J Evans, *Hansard*, 12 August 1993 at p 283.

7.2 NAME IN WHICH CONTRACTOR MAY CARRY ON BUSINESS

A contractor is prohibited from carrying on business except in the name in which the contractor is licensed, or in a business name registered by the contractor under the *Business Names Act 1963*.¹³⁰

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 intention of the restriction is twofold:

1. to ensure the integrity of the public register, which the Act requires the Commissioner to maintain; and
2. to ensure that consumers can have some degree of certainty as to who they are contracting with.

The cost of the restriction is borne by the contractor who must register their business name. The current fee for the registration of a business name is \$114.00 and \$91.00 for renewal (for three years), which is considered a trivial cost.

7.2.1 Conclusion - carry on business in contractor licence name

CONCLUSION 23

The requirement to carry on business in the contractor licence name or a registered business name is a trivial restriction on competition.

¹³⁰ PGE Act s 33.

PART 8: EXEMPTIONS

There are a number of exemptions contained in the Regulations not dealt with elsewhere in this Final Report, which have some competitive impact or create a distortion in the market for plumbing, gas fitting and electrical services.

Two of the exemptions are subject to “sunset clauses” and no longer operate.¹³¹ The exemptions which are still operative are discussed below.

8.1 OTHER CONTRACTORS

A person who carries on business as a builder, building contractor or architect, or who carries on another business, the principal purpose of which is the construction, installation, alteration, repair or maintenance of a building, structure, plant or equipment is exempted from the requirement to be licensed under the Act as a contractor (plumbing, gas fitting or electrical). However, this is subject to the condition that any plumbing, gas fitting or electrical work performed by the person is performed in the ordinary course of business by a person authorised by licence or registration under the Act to perform or carry out work of that kind.¹³² This is assessed to be an **intermediate restriction on competition**.

8.1.1 Objectives of the exemption

The intention of the exemption is to allow, for example, a licensed building work contractor to contract with a consumer for the construction of a new house (which implicitly and necessarily involves plumbing, gas fitting and electrical work) without the need to separately hold contractors licences for building work and plumbing, gas fitting and electrical work.

Consumer and public protection are ensured by the inclusion of a condition that the actual work must be undertaken by appropriately licensed and registered persons, eg while the building work contractor can contract for the electrical work, they must ensure that the work is undertaken by an appropriately registered electrical worker.

8.1.2 Assessing the costs and benefits

Exemptions can create a distortion in the market by giving certain persons or classes of persons an advantage over other persons in the market. Those, for example, who

¹³¹ Those exemptions were the exemption of supervised apprentices from the requirement to be registered, which applied until 1 July 1996 (*PGE Regulations* reg 4(1)), and the exemption of persons carrying out plumbing work in an area outside a drainage area from the requirement to be licensed as a plumbing contractor or registered as a plumbing worker, which applied until 1 July 1997: reg 4(2). A “drainage area” is defined in the Regulations to have the same meaning as in the *Sewerage Act 1929*, and refers to land proclaimed under the *Sewerage Act 1929* to which that Act is to apply.

¹³² *PGE Regulations* reg 4(3).

are not required to pay licence fees or undergo training are able to offer their services more cheaply than those who are required to comply with the restriction.

Because the exemption eliminates the duplication of resources, the construction industry benefits by way of reduced costs (fees and paperwork) in not having to hold more than one licence. The community as a whole benefits as a result of the reduction in the administration costs of the licensing authority. Consumers benefit from the exemption because:

- it removes need to contract with several different contractors;
- it reduces costs (legal, etc); and
- they receive protection of indemnity insurance protection over all work (building, plumbing, gas fitting and electrical) if there is one contract with a building work contractor for a domestic dwelling.

Further, the protection against provider failure is retained because the person with whom the consumer contracts is required to meet the financial and personal reputation requirements of a contractor licence.

The Review Panel notes that there appears to be an anomaly in the way the exemption operates. Although a person, for example, who carries on business the principal purpose of which is the installation of gas appliances, is theoretically exempt from the requirement to hold a gas fitting contractor licence provided the actual gas fitting work is performed by a registered gas fitting worker,¹³³ the fact that some building work is associated with, for example, the installation of an air conditioner, means that the person contracting for such work may be required to hold a building work contractor licence in any event and that the licence would need to authorise the person to contract for plumbing, gas fitting or electrical work.¹³⁴

The anomaly arises because, in order to obtain a building work contractor licence authorising plumbing, gas fitting or electrical work, a person is required to possess the same qualifications and experience as required for a plumbing, gas fitting or electrical contractor licence. This means that a natural person, who is not required to possess technical qualifications in order to hold a building work contractor licence, would have to complete the onerous technical training requirements currently required of natural persons under the *PGE Act*.

This anomaly could at least partially be addressed by reducing the technical qualification requirements for natural persons to qualify for a plumbing, gas fitting or electrical contractor licence.

The exemption nevertheless yields a net benefit and the Review Panel recommends that it be retained.

¹³³ See *PGE Regulations* reg 4(3)(b).

¹³⁴ A person who carries on the business of performing building work for others is required to hold a licence under the *BWC Act* s 6. See also *BWC Regulations* reg 8(1), 8(4).

8.1.3 Conclusion - exemption of other contractors

CONCLUSION 24

The exemption of other contractors from the requirement to hold a licence under the Act, provided that any plumbing, gas fitting or electrical work is actually performed by a person authorised by licence or registration under the Act, is justified and should be retained.

8.2 PERSONS WORKING ON ELECTRICITY INFRASTRUCTURE

A person carrying out electrical work relating to electricity infrastructure owned or operated by an electricity entity that is required to have a safety and technical management plan by condition of licence, or by the regulations, under the *Electricity Act 1996* is exempt from the requirement to be registered under the Act as an electrical worker.¹³⁵

Until 30 June 2000, it was the *employees* of the former State-owned electricity generation, transmission and distribution businesses which were exempt from the requirement to be registered under the Act in relation to work performed on electrical installations owned by those businesses.

However, the substitution of that exemption with the current exemption was precipitated by the recent leasing of the State's electricity businesses. The new exemption also addresses the discriminatory effect of the previous exemption, in so far as *any* person who carries out electrical work relating to electricity infrastructure is now exempt, ie including private contractors and employees of another electricity entity. The exemption also no longer offers a competitive advantage to State-owned businesses, as work on infrastructure owned by *any* electricity entity that is required to have a safety and technical management plan is exempt.

8.2.1 Objectives of the exemption

The exemption reduces regulatory duplication and the costs associated with registration fees and compliance.

As discussed at 6.5.2, the *Electricity Act* and *Electricity (General) Regulations 1997* contain provisions to ensure that persons performing work on the infrastructure

¹³⁵ PGE Regulations reg 4(5).

where there is the danger of accidental direct contact with exposed live conductors or live parts of electrical equipment must possess appropriate competencies.¹³⁶

The *Electricity Act* was considered to adequately ensure that only appropriately qualified persons perform work in relation to electricity infrastructure and as such to achieve the objective of minimising the risks to public health and safety. Regulation of who performed work on electrical infrastructure under the *PGE Act* was therefore considered to be unnecessary regulatory duplication.

8.2.2 Assessing the costs and benefits

Given that anyone who performs work on the electrical infrastructure owned or operated by an electricity entity required to have a safety and technical management plan is exempt from the requirement to be registered under the Act, there is no longer an unfair advantage to State-owned businesses and their employees. Self-employed contractors or employees of other electrical entities are entitled to the same exemption and the exemption applies to work on the infrastructure owned by electrical entities only. There is no question of exempt employees of electrical entities contracting for work outside the infrastructure. This exemption may therefore be seen as relating more to the scope of work regulated by the Act and issues of competitive advantage no longer apply.

As the exemption prevents unnecessary regulatory duplication, the Review Panel is of the view that it is justified. However, as discussed at Part 6.5.2, the Review Panel has recommended that work on the electrical infrastructure owned or operated by an electricity entity required to have a safety and technical management plan be exempted from the application of the Act entirely such that a person who contracts for such work is not required to be licensed. Of course, if the contractor also contracts for other electrical work the contractor will still require a licence.

8.2.3 Conclusion - electrical infrastructure exemption

CONCLUSION 25

The exemption for persons carrying out electrical work relating to electricity infrastructure owned or operated by an electricity entity required to have a safety and technical management plan is justified. However, the Review Panel recommends that such work be exempted entirely from the scope of the Act as set out in conclusion 13.

¹³⁶ See *Electricity (General) Regulations 1997* regs 20, 23(a), 22, 28.

Appendix 1 - Summary of Conclusions

CONCLUSION 1

The conclusion of the Review Panel is that the market affected by the operation of the *PGE Act* is the market, primarily in South Australia, for:

- 1.1 contracting for the performance of plumbing, gas fitting and electrical work other than work on water, sewerage and gas infrastructure; and
- 1.2 the actual performance of plumbing, gas fitting and electrical work other than work on water, sewerage, gas and most electrical infrastructure.

CONCLUSION 2

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

- 2.1 to minimise the risk to the health and safety of the community and to minimise the risk of damage to the water, sewerage, gas and electrical infrastructure by ensuring that only registered persons with prescribed competencies perform plumbing, gas fitting and electrical work and by requiring contractors to ensure that work performed in the course of a contractor's business is carried out by a registered person;
- 2.2 to minimise the potential for consumer loss arising from business failure, substandard work and criminal activity by the licensing of plumbing, gas fitting and electrical contractors.

CONCLUSION 3

The conclusion of the Review Panel is that the identified objectives of the Act remain relevant.

CONCLUSION 4

The conclusion of the Review Panel is that the continued regulation of the markets for plumbing, gas fitting and electrical work is justified as the potential benefits to the wider community outweigh the costs.

CONCLUSION 5

The conclusion of the Review Panel is that sole reliance on market forces is an inappropriate mechanism for the overall regulation of the market for plumbing, gas fitting and electrical services.

CONCLUSION 6

The conclusion of the Review Panel is that reliance on existing general laws to alleviate the risks existent in this market is inappropriate - rather, these general laws when combined with a licensing or registration system provide an effective framework for regulation of this market.

CONCLUSION 7

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

CONCLUSION 8

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.

CONCLUSION 9

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

CONCLUSION 10

The Review Panel has concluded that apprentices under a contract of training registered with the ARC should be exempt from the requirement to be registered under the *PGE Act*.

CONCLUSION 11

11.1 The Review Panel considers that the current scope of plumbing work regulated under the Act is justified.

11.2 However, the Review Panel recommends that consideration be given to exempting urban irrigation work performed downstream of a testable backflow prevention device from the scope of regulation of plumbing work under the Act.

CONCLUSION 12

The conclusion of the Review Panel is that the current scope of gas fitting work regulated under the Act is justified.

CONCLUSION 13

The Review Panel has concluded that work on electrical infrastructure owned or operated by an electricity entity required to have a safety and technical management plan under the *Electricity Act* should be exempted entirely from the application of the Act, such that those who contract for that work are also exempt (as is the case presently in relation to those who perform the work).

CONCLUSION 14

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

CONCLUSION 15

15.1 The conclusion of the Review Panel is that the objective of requiring natural persons who apply for contractor licences to possess the same technical competencies as registered workers who actually perform the work is not easily identified and, in any event, not relevant or appropriate.

15.2 The Review Panel recommends that the current prescribed qualifications be reviewed for all contractors with a view to ensuring that the requirements are limited to basic industry and trade knowledge sufficient to enable contractors to quote for work and manage work resources such as materials. This would eliminate the current discrimination between the requirements imposed upon natural persons, and those imposed upon partnership and body corporate contractors.

15.3 The Review Panel recommends that implementation of this proposal be accompanied by a consumer education campaign.

CONCLUSION 16

16.1 The Review Panel notes that the current prescribed business knowledge and experience requirements for electrical contractors are being reviewed with a view to reducing the requirements. The Review Panel agrees with this initiative and emphasises that only those business competencies required to achieve the above identified objectives of the legislation should be prescribed for the purpose of contractor licensing.

16.2 The Review Panel considers that the barrier to entry posed by the business knowledge requirements could be further reduced by allowing a person who has not completed the approved business training to obtain a contractor licence limited to subcontracting with a licensed head contractor. The Regulations should be amended to exempt those who contract only with a licensed builder, plumber, gas fitter or electrician from the business knowledge and experience requirements.

CONCLUSION 17

17.1 The conclusion of the Review Panel is that the financial reputation criteria should be retained.

17.2 However, the Review Panel considers that persons who contract only with licensed building work, plumbing, gas fitting or electrical contractors should be permitted to obtain a "subcontract only" licence without the requirement to meet the financial reputation criteria.

CONCLUSION 18

The Review Panel recommends that the fitness and propriety requirement be retained.

CONCLUSION 19

- 19.1 The Review Panel is of the general view that the requirement that a person has sufficient financial resources to carry on business is a justified barrier to entry in those circumstances in which consumers are at risk from contractor failure;
- 19.2 However, the Review Panel considers that persons who contract only with licensed building work, plumbing, gas fitting or electrical contractors should be permitted to obtain a "subcontract only" licence without the requirement to meet the financial resources criteria.

CONCLUSION 20

The conclusion of the Review Panel is that the benefits of requiring workers to hold prescribed qualifications and experience/competencies outweigh the costs. The Review Panel notes that the Office of Consumer and Business Affairs is reviewing the prescribed qualification and experience requirements for workers against the new National Training Packages for plumbing, gas fitting and electrical services. The competencies ultimately settled on should not exceed the level necessary to achieve the community safety and consumer protection objectives of this requirement.

CONCLUSION 21

The fees at their current level are a trivial restriction on competition.

CONCLUSION 22

The requirement that a contractor ensure that any work undertaken under authority of the contractor's licence is performed by a registered worker is a trivial restriction on competition.

CONCLUSION 23

The requirement to carry on business in the contractor licence name or a registered business name is a trivial restriction on competition.

CONCLUSION 24

The exemption of other contractors from the requirement to hold a licence under the Act, provided that any plumbing, gas fitting or electrical work is actually performed by a person authorised by licence or registration under the Act, is justified and should be retained.

CONCLUSION 25

The exemption for persons carrying out electrical work relating to electricity infrastructure owned or operated by an electricity entity required to have a safety and technical management plan is justified. However, the Review Panel recommends that such work be exempted entirely from the scope of the Act as set out in conclusion 13.

Appendix 2 -Terms of Reference

1. REVIEW METHODOLOGY AND PROCEDURES

Consistent with the Competition Principles Agreement, the review should assess whether any restrictions on competitive conduct represented by the *Plumbers, Gas Fitters and Electricians 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.

The review adopted the following procedures:

- Appointment of Review Panel and finalisation of draft terms of reference;
- Initial research identifying relevant resources and materials, including materials on any interstate and overseas equivalents;
- Preparation of an issues paper;
- Release of issues paper for public and industry comment;
- Incorporation of comments into consultation draft report;
- Preparation of consultation draft report and release for public and industry comment ;
- Preparation of Final Report to Minister for Cabinet
- Release of report

2. CONSULTATION

The review consulted widely with industry and consumer representatives, educational institutions and relevant government agencies. As well as consulting directly with the identified stakeholders listed in Appendix 3, the Draft Report was posted on OCBA's website and an advertisement placed in *The Advertiser*

newspaper notifying of the review and inviting submissions on the Draft Report. A consultation period of six weeks was allowed.

3. THE REVIEW PANEL

The review was conducted by a review panel consisting of the following persons:

- Ms Judy Hughes, *Deputy Commissioner - Policy and Legal, Office of Consumer and Business Affairs;*
- Mr Rafael Orschulok, *Principal Engineer (Electrical), Office of the Technical Regulator;*
- Ms Gillian Schach, *Senior Policy Officer, Office of Consumer and Business Affairs;*
- Brett Williams, *Policy Officer (Competition Policy), Office of Consumer and Business Affairs;*
- Mr Adam Wilson, *Senior Policy Officer (Competition Policy), Office of Consumer and Business Affairs (until 25 January 2002).*

This Review Panel was constituted 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.

Appendix 3 - Draft Report Consultation List

- Accreditation and Registration Council
- ACT Building, Electrical & Plumbing Control (BEPCON)
- ACT Office of Fair Trading
- Australian Competition & Consumer Commission
- Australian Retailers Association
- Australian Small Business
- BEST Centre
- Better Heating and Cooling Bureau
- Blake Dawson Waldron
- Building Industry Specialist Contractors Association of SA
- Building Industry Specialist Contracts Organisation of SA
- Business SA
- CEPU - Electrical Division
- CEPU - Plumbing Division
- Consumers' Association of South Australia Inc
- Department of Education, Training and Employment
- Department of Energy NSW
- Department of Equity and Fair Trading
- Department of Fair Trading NSW
- Department of Human Services
- Department of Industries and Business
- Department of Mines & Energy QLD
- Department of Primary Industries & Energy ACT
- Department of Transport, Urban Planning and the Arts
- Electrical Licensing Board
- Electrical Regulatory Authorities Council
- Electrical, Electrotechnology, Energy and Water Training Board (SA) Inc
- Engineering Employers Association
- ETSA Utilities Pty Ltd
- Housing Industry Association
- Insurance Council of Australia Ltd
- Law Society of South Australia Inc
- Master Plumbers Association of SA
- MERS ITAB
- Ministry of Commerce NZ
- NASTEC Solutions
- National Electrical Contractors' Association (SA Chapter)
- Office of Consumer & Business Affairs SA
- Office of Energy Planning & Conservation TAS
- Office of Energy Policy SA
- Office of Energy WA
- Office of the Chief Electrical Inspector VIC
- Office of the Electricity Regulator TAS
- Office of the Technical Regulator
- Office of Water Regulation
- One Steel
- Origin Energy
- Planning SA
- Port Adelaide Training & Development Centre
- Power and Water Authority NT
- SA Water
- TAFE School of Plumbing
- Office of the Small Business Advocate
- Transport Workers Union (Gas Industry Sub-branch)
- Von Doussa Solicitors

Appendix 4 - Submissions received in response to Issues Paper & Draft Report

- Electrical Regulatory Authorities Council (ERAC)
- Office of the Technical Regulator
- Consumers Association of South Australia (CASA)
- Office of the Small Business Advocate
- Business and Occupational Services Branch, Office of Consumer and Business Affairs
- Communications Electrical Electronic Energy Information Postal Plumbing and Allied Services Union of Australia, Electrical Division - S.A. Branch (CEPU Electrical)
- Communications Electrical Electronic Energy Information Postal Plumbing and Allied Services Union of Australia, Plumbing Division - S.A. Branch (CEPU Plumbing Division)
- National Electrical and Communications Association - South Australian Chapter (NECA)
- Master Plumbers Association of S.A. (MPA)
- SA Water
- Origin Energy
- School of Plumbing Services, Regency Institute of TAFE (TAFE SA)
- Office of Vocational Education and Training, Department of Education Training and Employment (OVET)
- Manufacturing, Engineering and Related Services Industry Training Advisory Body (SA)
- Department of Industry and Trade
- Electrical Licensing Board, Department of Mines and Energy (Queensland)
- Mr N. M., Registered Plumbing Worker
- Mr H. B., Registered Electrical Worker
- Mr C. S., Queensland Electrical Contractor
- Department of Fair Trading (New South Wales)

