

Issues Paper

Issues

Review of the *Painters' Registration Act 1961*

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October 2006

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Department of Consumer
and Employment Protection
Government of Western Australia

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INTRODUCTION

The Western Australian Government, through the Department of Consumer and Employment Protection ('Consumer Protection') and the Department of Housing and Works ('DHW') is currently undertaking a review of Western Australian building legislation. While the individual reviews specific to each Department are being conducted separately, there is close consultation and cooperation between the two agencies, to avoid unnecessary duplication and to facilitate stakeholder input.

The agencies will work together closely on the results and recommendations arising from the reviews in an attempt, as far as is possible, to develop an integrated and consistent set of outcomes.

Consumer Protection's review is being conducted in accordance with the Terms of Reference listed in this issues paper. The Terms of Reference have established the parameters of the review and include the review of appropriate provisions of the *Home Building Contracts Act 1991 (WA)*, the *Builders' Registration Act 1939 (WA)* and the *Painters' Registration Act 1961 (WA)*.

The review will analyse the extent to which existing legislation meets the needs of the building industry and building practitioners, while providing an appropriate level of consumer protection. The objective being to identify areas in need of change and to recommend appropriate amendments. Included in the scope of the review are many issues that have been raised in State and National reviews on matters relating to the three Acts, as well as issues that have been raised by individual stakeholders.

DHW's review covers building standards and building approval processes; practitioner standards; registration of practitioners; and proposes a new Building Act for Western Australia.

Although every care has been taken by both Consumer Protection and DHW in the preparation of the issues and discussion papers to ensure accuracy, they have been produced for the general guidance only of persons wishing to make submissions to the reviews. The contents of the papers do not constitute legal advice or legal information and they do not constitute Government policy documents.

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List of Acronyms

ABS	Australian Bureau of Statistics
BDT	Building Disputes Tribunal
BR Act	<i>Builders' Registration Act 1939 (WA)</i>
BRB	Builders' Registration Board of Western Australia
CEO	Chief Executive Officer of DOCEP
COAG	Council of Australian Governments
Commissioner	A person appointed by the Minister to undertake various functions under the PR Act.
Consumer Protection	Department of Consumer and Employment Protection (Consumer Protection Division)
DHW	Department of Housing and Works
FT Act	<i>Fair Trading Act 1987(WA)</i>
HBC Act	<i>Home Building Contracts Act 1991(WA)</i>
Licensing Boards Bill	<i>Acts Amendment (Licensing Boards and Consumer Protection) Bill 2006</i>
MPAWA	Master Painters Australia WA Association
PR Act	<i>Painters' Registration Act 1961 (WA)</i>
PRB	Painters' Registration Board
SAT	State Administrative Tribunal

List of Resources

Gunning Committee of Inquiry. 2000, *Report of the Gunning Committee of Inquiry into Fair Trading Boards & Committees*, W.A. Government, Perth, WA.

Colmar Brunton. 2005, *Report on Review of Monetary Thresholds & Limits in Western Australian Building Legislation*, Department of Consumer and Employment Protection, Perth, WA.

1. THE REVIEW PROCESS AND REQUEST FOR SUBMISSIONS

1.1 *The consultation and review process*

Consumer Protection is conducting the review that is the subject of this issues paper, with the assistance of external consultants and facilitators, as required.

The process of the review to date has included identifying appropriate unadopted recommendations from other reviews and inquiries undertaken in recent years, together with new issues raised by a wide range of consumers and industry stakeholders. From these documents, a preliminary list of issues was prepared and sent to key consumer and industry stakeholders with an invitation to them to notify Consumer Protection of any new matters to be included.

The process enabled Consumer Protection to undertake preliminary consultation with key stakeholders, including DHW.

The extent and complexity of the issues that were identified by this process resulted in a decision to prepare separate issues papers for each of the three pieces of legislation covered under the terms of the review.

Once consultation has concluded, Consumer Protection will prepare a report and recommendations for consideration by the Minister for Consumer Protection.

1.2 *Issues and discussion papers*

As part of the review process, community, consumer and industry input is being sought through a number of issues and discussion papers. DHW has prepared a discussion paper on the subject of the proposed new Building Act for Western Australia while Consumer Protection is reviewing three important pieces of building legislation that fall within the portfolio of the Minister for Consumer Protection. This is the third and final issues paper in a series released by Consumer Protection.

The first issues paper released by Consumer Protection covered the provisions of the *Home Building Contracts 1991(WA)* and the second document dealt with the *Builders' Registration Act 1939 (WA)*.

Consideration of issues contained in this paper may necessitate reference to the *Painters' Registration Act 1961* ('the PR Act'), the *Home Building Contracts Act 1991 (WA)* ('the HBC Act') or to the *Builders' Registration Act 1939 (WA)* ('the BR Act'). These can be purchased from the State Law Publisher, Ground Floor, 10 William Street, Perth WA 6000 – telephone number (08) 9321 7688. Alternatively, the Acts may be viewed on the State Law Publisher's website at: <http://www.slp.wa.gov.au>.

The existing and proposed issues and discussion papers are listed on the following page.

Paper	Agency
Discussion Draft: A New Building Act for Western Australia <ul style="list-style-type: none"> • Licence Issuing, Regulation and Enforcement • Building Code Compliance • Registration of Design and Approval Practitioners 	DHW (Released November 2005 – submissions now closed)
Issues Paper: Review of the Home Building Contracts Act 1991	Consumer Protection (Released in January 2006 – submissions now closed)
Issues Paper: Review of the Builders' Registration Act 1939	Consumer Protection (Released in June 2006 – submissions close on 3 October 2006)
Issues Paper: Review of the Painters' Registration Act 1961	Consumer Protection (This paper)

Copies of the issues and discussion papers are available from:

Department of Housing and Works

or

Consumer Protection

99 Plain Street East Perth

219 St Georges Terrace Perth

Postal Address

99 Plain Street

EAST PERTH WA 6004

Postal Address

Locked Bag 14

Cloisters Square

PERTH WA 6850

Telephone: (08) 9222 4960

Telephone: 1300 30 40 54

Email:

buildingreview@docep.wa.gov.au

or from

www.dhw.wa.gov.au/buildingactwa

or from

www.docep.wa.gov.au

1.3 Making a submission

The list of issues and options identified throughout this paper are not intended to be exhaustive. Submissions need not be limited to the issues canvassed in this paper, or constrained by the way they are presented, provided that they are within the Terms of Reference for the review. Submissions outside of the Terms of Reference will not be considered.

Consumer Protection is aware that responding to all issues or options raised in this paper may not be relevant to all people interested in making a submission. Therefore, addressing only those matters that are of direct interest to you is acceptable. Please make sure you clearly identify by number the question, or questions you are addressing. This will be of considerable assistance in the task of analysing responses.

It is suggested that you read through each section of the issues paper, before responding to any of the questions in that section. This could save you time because in some instances a number of different options may be discussed.

Some of the topics that are covered in the issues paper fall under more than one chapter heading. Where possible, and to avoid repeating the issues, they have been listed by Consumer Protection in one chapter only.

In preparing your submission, please consider the impact that any suggested changes might have on the nature and extent of regulation of the painting industry. Any necessary changes should aim for efficiency and should not result in an onerous and bureaucratic regulatory system.

1.4 Confidentiality

Please note that when you lodge your submission it will become a public document, which can be viewed by others or quoted for the purpose of this project.

If you do not want your submission to be made public or quoted, please advise Consumer Protection of your wishes in writing when making your submission. You should be aware, however, that the right of third parties to access documents in the possession of Consumer Protection under the *Freedom of Information Act 1992 (WA)* means that the confidentiality of your submission cannot be guaranteed.

Visit www.foi.wa.gov.au for current details of the Freedom of Information Act as it applies in Western Australia.

Tips on Making an Effective Submission

- **Keep to the Terms of Reference when making your submission. If you do not want to simply address the questions raised throughout the issues paper, you may wish to group your ideas under the relevant Terms of Reference.**
- **Your submission does not need to be long or complex. State briefly, clearly and simply your point of view and the reasons for it.**
- **Where appropriate, provide evidence to substantiate your views and suggestions.**
- **Provide source references to any factual data, such as reports or statistics. This should include (where possible) the name and date of the publication, the author's name and page references.**
- **If your submission is necessarily long, summarise the main points in an Executive Summary at the beginning of the submission.**
- **It might assist you to join a consumer or industry group that is making a submission, or ask another interest group for help.**

1.5 Lodging a submission

Please forward your submission to:

The Project Manager
General Review of Building Legislation
Department of Consumer and Employment Protection
Locked Bag 14
CLOISTERS SQUARE
PERTH WA 6850

By fax: (08) 9282 0727
By email: buildingreview@docep.wa.gov.au

1.6 Closing date for submissions

Submissions should be made in writing and either posted, faxed or emailed to the addresses provided below by **close of business on 15 January 2007**.

Electronic documents attached to emailed submissions should be in Microsoft Word or Excel.

If you have any questions, or require further information, you can fax or email your query to the addresses given above, or telephone 9282 0721 (to leave a voice mail message).

2. TERMS OF REFERENCE FOR THE GENERAL REVIEW OF BUILDING LEGISLATION

The Terms of Reference for the **General Review of Building Legislation** that is contained within the portfolio of the Minister for Consumer Protection are as follows:

1. Clarify the objectives of the *Builders' Registration Act 1939*.
2. Clarify the objectives of the *Painters' Registration Act 1961*.
3. Clarify the objectives of the *Home Building Contracts Act 1991*.
4. Identify appropriate objectives for regulation of the building and painting industries in Western Australia.
5. Analyse the extent to which the current objectives and provisions of the legislation meet the broad requirements for regulation of the building and painting industries, both now and for the foreseeable future.
6. Analyse the extent to which the current objectives and provisions of the legislation provide an appropriate level of consumer protection.
7. Examine as appropriate the current practices and techniques of the building and painting industries in Western Australia compared to the rest of Australia.
8. Review the recommendations arising from appropriate previous reviews and inquiries undertaken in recent years but not implemented.
9. The Department of Consumer and Employment Protection (Consumer Protection) is to work co-operatively with the Department of Housing and Works in their reviews of relevant building related legislation administered through those Departments.
10. Review such other matters as appear to the Minister to be relevant to the operation and effectiveness of the legislation.
11. Recommend appropriate regulation of the building and painting industries, giving consideration to available options that meet current Government policy, including amendments to the current legislation.
12. Retain the existing home indemnity insurance scheme but consider enhancements to the current scheme.
13. Take into consideration issues relating to the structure of the Builders' Registration Board and Painters' Registration Board in light of the Boards and Committees Review and Implementation Project.

3. THE REGULATION OF PAINTERS

3.1 The purpose of occupational registration or licensing

Existing legislation

The PR Act establishes an occupational registration (licensing) regime for painters.

The primary purpose for requiring occupational registration or licensing is to address the perceived risks to consumers of unqualified or unskilled people or organisations employed to undertake the work. Registration or licensing is put into place with the object of lessening these risks, by ensuring that only fit and proper persons with appropriate qualifications and skill levels undertake important or significant services, with the object of maintaining standards within an industry. In the absence of a licensing or registration system, consumers would need to independently ascertain this information.

Other reasons which may be put forward for occupational registration or licensing include the risk of financial loss resulting from defective work, non-completion or insolvency of the trader and the existence of a process for structured recourse of consumer complaints, without the need to resort to the court system in the first instance.

Proposed amendments – the Acts Amendment (Licensing Boards and Consumer Protection) Bill 2006 (‘the Licensing Boards Bill’)

Refer to Chapter 4, paragraph 4.5, for information about proposed changes to the PR Act, shortly to be placed before the Parliament.

Amendments to the PR Act proposed under the Licensing Boards Bill are expected to include a provision for the Governor to make Regulations prescribing a code of conduct for painters, although at this stage there are no plans to do so.

Issues

As discussed in the following paragraphs, registration or licensing is not always the only method of achieving the necessary goals. The removal of the requirement for painters to be registered or licensed would include the benefits to be gained by unrestricted competition, reduced compliance costs and lower prices for consumers.

Unlike some other States, occupational licensing or registration in the building industry in Western Australia is generally limited to those services that may present a significant public health or safety risk, such as general building and construction work, plumbing, gasfitting, electrical and pest control services. Most building trades such as carpentry, bricklaying and tiling are not registered or licensed in this State and painting is seen by some to be a curious exception to this.

In Western Australia, disputes resolution mechanisms, such as the Painters’ Registration Board (‘PRB’) and the Building Disputes Tribunal (‘BDT’) are in place to deal with defective work and certain contractual disputes, but do not have jurisdiction to deal with the insolvency of the tradesperson. Insolvency has a direct and significant impact on consumers.

Although licensing or registration can reduce the incidence of insolvency, it cannot be eliminated. ‘Once only’ tests to ensure adequate financial resources at the time an application for registration is processed are often proved worthless with the passing of time.

In the past, occupational registration or licensing could sometimes be justified or partly justified as being required to protect the business and market share of qualified market participants. Such an objective would be unlikely to meet present day competition requirements. However, the maintenance of reasonable industry standards is a justifiable objective in terms of consumer protection.

According to the 30 June 2005 Annual Report of the Builders' Registration Board ('BRB'), 8.3 per cent of all complaints assessed by that Board's inspectors during the year related to painting. This was second only to solid plastering (8.4 per cent), an increase of 1.0 per cent over the previous year. In the circumstances, questions have been raised about the effectiveness of the current system in regulating the painting industry.

Effective industry self-regulation is now often considered preferable to occupational registration or licensing, where practical and appropriate. This accords with the modern approach of subjecting regulation to rigorous cost benefit analysis and regulatory impact assessments.

A typical occupational licensing risk assessment questionnaire is at Appendix A to demonstrate some of the matters that need to be considered.

Refer to Chapter 11, paragraph 11.1, for commentary about the PRB's current prosecution policy relating to unregistered painting. Further details can be found on the PRB's website, www.prb.org.au.

Questions

The following paragraphs contain discussion about a number of matters that are appropriate to the existing registration/licensing regime for painters, together with some options that might be available for the future.

Refer to paragraph 3.12 below for a summary of each of the options that are discussed, with a number of questions based upon these.

3.2 The Fair Trading Act

The *Fair Trading Act 1987* (WA) ('the FT Act') contains similar provisions to the consumer protection provisions contained in Part V of the *Trade Practices Act 1974* (Cwlth) and is designed to encourage good standards of business practices, to protect both consumers and ethical traders.

The FT Act contains implied conditions and warranties in consumer contracts and imposes sanctions against a wide range of unfair trading practices, such as misleading or deceptive conduct and unconscionable conduct. In addition, the FT Act inserts implied conditions and warranties into all contracts with consumers, including the requirement that all goods and services must be of merchantable quality and reasonably fit for the purpose for which they are sold. The implied conditions and warranties apply equally to painting services as to any other business.

As noted in paragraph 3.10 below, the FT Act also allows for standards to be set and industry Codes of Practice to be developed.

For further information, a free copy of the brochure "*A guide to the fair trader*" is available from Consumer Protection by calling 1300 30 40 54.

3.3 Other States and Territories

As indicated in the table at Appendix B, Western Australia is the only State or Territory in Australia that has industry specific legislation concerned with the registration/licensing of painters.

New South Wales, Queensland, and South Australia each license painters in the context of general building trades regulation. These licences are non-industry specific and are generally issued in relation to contracting activities and supervisory functions. However, a licence is required for a painter to carry on the business of painting in those States. At the date of publication of this issues paper, a review is being undertaken of licensing in the NSW building industry.

No legislation, apart from general fair trading legislation, applies to painters in Victoria, Tasmania, the Northern Territory or the Australian Capital Territory.

3.4 Mutual recognition

The *Mutual Recognition (Western Australia) Act 2001* came into operation on 1 March 2001 and replaced the 1995 Act.

The general principle of mutual recognition with regard to occupation is that, with limited exceptions, a person who is registered or licensed in an equivalent occupation in one State is entitled to be registered elsewhere in Australia where entry to that occupation is subject to registration or licensing.

A person in an occupation in one State or Territory, which is not subject to registration (or licensing) requirements, cannot under mutual recognition principles obtain registration in another State or Territory.

Mutual recognition legislation does not apply to partnerships or companies, only individuals.

Proposed amendments to the PR Act contained in the Licensing Boards Bill will allow for licenses to be granted subject to conditions. Therefore, it might in the future be possible to impose appropriate conditions on a painter that is registered or licensed in Western Australia under mutual recognition legislation.

A question is raised in Chapter 5, paragraph 5.6, about the criterion for 'good character' so far as it applies to painters from interstate.

Refer to paragraph 3.5 below about an initiative of the Council of Australian Governments ('COAG') to introduce more effective mutual recognition arrangements for various occupations, including a number of building trades.

3.5 The Council of Australian Governments

On behalf of the COAG and the New Zealand Government, the Productivity Commission undertook an evaluation of the various mutual recognition schemes. The review was completed in October 2003 and the contents of a final report have subsequently been endorsed. COAG has published Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard Setting Bodies.

The COAG guidelines were last amended in June 2004 and state that standard setting bodies should aim to:

- achieve minimum necessary standards;
- provide evidence that the competitive effects of regulation have been considered;
- demonstrate that the benefits of regulation outweigh the likely costs;
- minimise any restrictions to those which are necessary in the public interest;
- develop standards of regulatory measures in a way that minimises the financial impact of administration and enforcement of regulation on governments and the sectors of the community that will be affected by them; and
- achieve the greatest degree of compliance at the lowest cost to all parties.

At its meeting on 10 February 2006, COAG identified six priority areas as 'hot spots' where inconsistent regulatory regimes are impeding growth, these included building regulation. Agreement was reached on a package of measures designed to underpin a new national approach to apprenticeships, training and skills recognition in order to alleviate skill shortages in certain sections of the economy.

The new measures will impact on this review as a result of the introduction of more effective mutual recognition and offshore skills assessment processes, as well as initiatives to further encourage the take-up and completion of apprenticeships in those trades where a skills shortage exists. These measures will be designed to enable people with trade qualifications to move freely around Australia without undergoing additional testing and registration/licensing processes.

More effective mutual recognition arrangements are scheduled to be in place for a number of building trades including electricians, plumbers, carpenters and joiners by June 2007 and by December 2008 for all licensed occupations where people normally receive certificates and diplomas.

Further details of the COAG agreement can be found on their website at www.coag.gov.au.

3.6 The National Competition Policy review

National Competition Policy ('NCP') was adopted by COAG in 1995, with the object of producing reforms to benefit the Australian community. NCP is designed to produce a national economy that is dynamic, efficient and innovative and that will provide a competitive market for goods and services and stimulate economic growth. As a result of NCP, State and Territory Governments were encouraged to review existing legislation against NCP principles and to deliver the necessary reforms. All proposed new legislation, and proposed amendments to legislation, must be assessed against NCP principles.

A NCP review of the PR Act undertaken in 1997 considered a range of alternative schemes to regulate painters in Western Australia.

That review concluded that the current system of mandatory licensing (currently known as registration) for those individuals, partnerships and corporations carrying on the business of painting is too restrictive of competition and its continuation was not justified. However, the report also concluded that, at that time, there was no adequate system of self-regulation in place such as to warrant the total removal of regulation of the painting industry.

The review recommended that the existing regulatory system be replaced with one based on a 'certification' scheme, to allow for the recognition of those painters who possess particular skills and experience coupled with the provision of 'negative licensing' in certain circumstances.

Certification (sometimes known as accreditation) is a form of non-mandatory licensing. A certification regime does not establish minimum standards for entry to the market but it does involve prior approval and compliance with minimum standards, before a person can hold himself or herself out to be certified. Certification can be withdrawn if standards are not maintained but lack of certification would not prevent a person from operating as a painter.

Certification can have positive advantages for consumers by providing enhanced information, because licensing provides no information about the difference between painters who have met the minimum standard. The ability to meet certification standards can be a powerful marketing tool for those seeking to enhance their competitive advantage.

Negative licensing is a process whereby there is no screening of market entrants but persons are prohibited from operating in the industry if shortcomings in their operations are identified, such as breaches of general consumer protection or other relevant laws.

The scheme as proposed by the NCP review in 1997 would have involved minimal regulation and provided scope for considerable input by industry participants.

However, the conclusions of the NCP review were not adopted by the Government, pending further consideration of the regulation of the painting industry, on the basis that matters outside the scope of competition policy and all other issues relating to the registration of painters and administration of the relevant legislation needed to be fully considered.

The results of the later review concluded in September 2003 are discussed in paragraph 3.7 below.

3.7 *The 2003 review of regulation of painters in Western Australia*

A review of the regulation of painters in Western Australia completed in September 2003 concluded that the existing system of regulation, albeit in a modified form, was warranted because the benefits outweighed the costs.

This General Review of Building Legislation will examine that conclusion further and Consumer Protection invites the views of the public on this issue, by means of the current review process.

3.8 *Simplified registration with controls*

A scheme of simplified registration with controls could be adopted, along the same lines as is currently proposed for amending the regulation of the hairdressing industry in Western Australia. This scheme would include a capacity to remove the registration of persons considered unsuitable to remain in the industry.

Under such a scheme:

- the Painters' Registration Board would be abolished;
- painters would be required to apply to Consumer Protection for registration;
- registration would be automatic upon production of evidence of having completed appropriate training or qualifications;
- Consumer Protection could refuse to register a person when aware of past misconduct that renders the person unfit to be registered;
- registration would be granted by Consumer Protection (assisted by an advisory committee) if a person holds other appropriate training or qualifications;
- a register of painters would be publicly available;
- legislation would determine that it is an offence to undertake painting unless registered;
- Consumer Protection could apply to the SAT for cancellation of the registration of a painter if it is considered that the person is not fit and proper to carry on business as a painter (e.g. if a person has committed a serious criminal offence or obtained registration by fraud or misrepresentation) and
- painters' registration fees would be deposited into the State Government's Consolidated Fund, with a separate appropriation made each year to cover the costs of administering the new scheme.

The main benefits of such a simplified registration model may be summarised as follows.

- Consumers would continue to be protected by providing for the cancellation of the registration of persons who are considered to not be fit and proper to undertake painting.
- Consumers would be protected by providing for Consumer Protection to have the power to refuse to register unfit persons.
- Barriers of entry to the industry would be reduced;
- Accountability would be improved through:
 - removal of industry members' direct involvement in the registration/compliance process, thereby removing any perceptions of bias or 'industry capture';
 - easier balancing of consumer and industry interests to produce outcomes in the 'public interest' for Consumer Protection and the Minister.
- Reduced cost of regulating the industry by removing the costs associated with maintaining a separate Board, payment of Board members' fees, as well as a shift from proactive monitoring of the industry to a complaints based system.
- Reduced registration fees for painters.

- The register would be publicly available, allowing consumers to identify who is permitted to undertake painting.

Some identified disadvantages of a simplified registration system with controls are:

- Board members with industry experience may be better qualified to assess the suitability of persons applying for registration.
- Subject to constraints imposed by public service rules, a perception may be created that Consumer Protection is less flexible and responsive to industry.
- Government Departments have limited resources and must prioritise according to wider areas of concern.

3.9 Voluntary industry Codes of Practice

Codes of Practice are increasingly being used by government and industry as an alternative means of promoting ethical behavior and good quality standards within an industry.

Voluntary industry Codes of Practice or Codes of Conduct are established by industry groups and enforced amongst their members. These voluntary codes can be particularly effective in situations where an industry association has a high membership within the industry and the financial and other resources to take disciplinary action. A voluntary code also provides industry members with a greater control over the code and a sense of ownership.

A disadvantage of a voluntary code is that problem traders are unlikely to abide by it, with the effect that there is no protection for consumers of these services.

Another disadvantage of a voluntary code is that the maximum penalty that can be imposed is the removal of membership to the industry association(s) that established the code. Without legislative backing, and the financial penalties available under this option, there can be insufficient incentive for industry members to comply with the rules established under a voluntary code.

In the case of the painting industry, the peak industry association, the Master Painters Australia WA Association ('MPAWA') does not enjoy a sufficiently high membership to justify the creation of an industry Code of Practice. However, in an environment where legally binding requirements are in place, some industries also choose to introduce professional standards that build on the legislative requirements and promote their industry.

For example, industry groups for settlement agents and land valuers have chosen to introduce additional standards that are complementary to the legally binding requirements placed on these professions.

3.10 Codes of Practice under the Fair Trading Act

Legally binding Codes of Practice can be established under the FT Act and in some cases may be a viable alternative or supplement to occupational licensing. That is particularly true of those occupations with a strong industry body that represents the views of the majority of market participants.

A Fair Trading Code increases consumer confidence in an industry by establishing legally binding standards across the industry. The Code can clarify specific issues in an industry for the benefit of businesses and consumers. Consumer Protection endorses these standards.

Sub-sections 42(2) to 42(5) of the FT Act put into place the consultation requirements for developing a Code of Practice. These requirements include:

- inviting submissions from relevant industry and consumer representatives;
- making a draft Code of Practice publicly available and advertising for submissions on a State-wide basis; and
- obtaining some level of agreement from industry to abide by the Code of Practice.

If there should prove to be demonstrated support for such a Code of Practice, this issues paper may later be taken to have formed part of the consultation process required by section 42 of the FT Act.

A Fair Trading Codes of Practice would lapse unless a review is undertaken within three years from the date it first took effect. Before the code can be re-established, consultation must take place with the relevant industry and the general public. An interim Code of Practice may be put in place for a period of up to six months during the review period.

The FT Act sets out the process that takes place if a trader appears to have breached the Code of Practice. After an investigation of the matter, the Commissioner may require an undertaking from a business. In the event that the business does not comply, the Commissioner may apply to the State Administrative Tribunal ('the SAT') to make an order for a business to act, or not act, in a particular way. Breaches of such orders carry a maximum \$1,000 penalty.

3.11 Alignment with the registration of builders

As a further possible alternative to the current system of registering/licensing painters in Western Australia, it has been suggested that painters should be regulated under a separate tier of the *Builders' Registration Act 1939* ('the BR Act'), possibly alongside certain other building trades that are currently unregulated. An arrangement of that kind would align the licensing process more closely with other States such as New South Wales, Queensland and South Australia but would impose a considerable cost burden on industry and consumers.

The subject of licensing or registering individual trades is addressed in Chapter 8 of Consumer Protection's issues paper dated June 2006, on the subject of the '*Review of the Builders' Registration Act 1939*'. (Refer also to Appendix A of this paper that provides some examples of matters usually subject to assessment, prior to considering the introduction of an occupational licensing or registration regime).

3.12 Summary of options and questions

The questions outlined on the following page summarise the possible options for the future framework of the regulation of painters that are discussed in this chapter of the issues paper. (Other options may be identified by stakeholders and details of these are invited for inclusion in submissions to the review).

Question 1: Should the existing system of regulation of painters in Western Australia be abolished?

Or

Question 2: Should the existing system of regulation of painters in Western Australia be continued (with any improvements that may be identified as a result of the current review process)?

And

Question 3: Should a code of conduct for painters be prescribed under the Rules/Regulations of the PR Act?

Or

Question 4: Should a legally enforceable Fair Trading Code of Practice for the painting industry be introduced, in lieu of the current licensing/registration regime?

Or

Question 5: Should the existing system of regulation of painters be replaced with one based on a 'certification' scheme, to allow for the recognition of those painters who possess particular skills and experience, coupled with the provision of 'negative licensing'?

Or

Question 6: Should a scheme of simplified registration with controls be introduced?

Or

Question 7: Should painters be regulated under a separate tier of the BR Act, possibly alongside certain other building trades that are currently unregulated?

4. BACKGROUND, OBJECTIVES AND THE FUTURE OF THE REGULATION OF THE PAINTING INDUSTRY

4.1 Overview of the Painters' Registration Act

Existing legislation

The long title to the *Painters' Registration Act 1961* ('the PR Act') is:

An Act to provide for the registration of painters and other purposes.

The PR Act provides a framework for the registration and regulation of people undertaking painting valued at more than \$200 within the area of jurisdiction of the PR Act. In the context of the PR Act, the term 'registered' means in effect that painters must be 'licensed'.

The PR Act prohibits unregistered painters from carrying on business, as only those who are registered by the Painters' Registration Board ('PRB') (individuals, partnerships and companies) are authorised to contract for or carry out painting where the total fee or charge payable exceeds \$200, within the area of the PRB's jurisdiction.

The painting of commercial, industrial and residential buildings and other structures is covered by the provisions of the PR Act and, as noted in Chapter 5, paragraph 5.3, the definition of painting is extremely broad.

Registration/licensing of painters affects the provision of specialist or 'no frills' services, because, as discussed in Chapters 5, 7 and 8, applicants are required to meet basic standards in relation to every aspect of painting as defined in the PR Act. Accordingly, any person wishing to provide a specific service, even if highly qualified in that field, would be unable to obtain registration and carry out that business unless they are able to demonstrate that they meet the basic standards of all other aspects of painting.

The PR Act requires certain standards of management and supervision of painting work and provides for the PRB to deal with complaints about the quality of workmanship, by the issue of legally binding orders to remedy or to pay the costs of remedying the work.

Section 24 of the PR Act provides that the PRB, with the approval of the Governor, may make 'Rules' (Regulations) about a number of matters pertaining to the registration of painters and the carrying out of painting work.

Rules or Regulations are subsidiary legislation that is ratified by Cabinet, signed by the Governor, published and proclaimed in the Government Gazette and scrutinised by the Executive Council of Parliament. By the use of Rules or Regulations to deal with matters that are 'prescribed' under an Act of Parliament, administrative processes and matters of detail may be dealt with relatively speedily and efficiently.

Proposed amendments – the Licensing Boards Bill

Refer to paragraph 4.5 below for information relating to the Licensing Boards Bill, which is due to be placed before the Parliament in the first half of 2007. That Bill will provide for all references to 'registered' to be changed to 'licensed' and for the title of the PR Act to be changed to the *Painters Licensing Act 2006*. The name of the PRB will also be changed to the Painters Licensing Board.

4.2 Background to the PR Act

The PR Act was enacted as a result of a private Member's Bill ('the Bill'), introduced into the Legislative Assembly on 13 September 1961 by Mr Herb Graham MLA, a Member of the (then) Opposition.

The Bill received bi-partisan support but was the subject of significant amendment in the Legislative Council. The Bill was promoted as having the support of both the Painters' Union (as it then was), and the Master Painters' Association.

The essential elements of the Bill as introduced by Mr Graham were:

- the establishment of a Painters' Registration Board funded by fees;
- compulsory registration of persons carrying on the business of painting;
- it would not apply to *bona fide* employees;
- registration would only be required where the fee for the painting exceeded a fixed amount (initially proposed to be 5 pounds but raised during debate to 20 pounds); and
- the Bill would only apply to work falling within the Bill's definition of 'painting' that would exclude painting as an art, the painting of furniture or motor vehicles or ticket writing.

The Bill was recognised as new law for Australia, although it was suggested that other States (especially Queensland) were contemplating similar legislation (this did not eventuate).

In summary, Mr Graham's Second Reading Speech on 13 September 1961 provides several reasons for introducing the Bill, as follows.¹

- the capacity of persons to set up business as master painters and avoid the union controls on employees;
- the trade of painting was one in which poor quality work could easily be covered up;
- the honest master painters' businesses were being sabotaged by unqualified practitioners;
- the Bill would stabilise an important industry and improve the protection for the public; and
- the Bill would support the efforts given to trade training by protecting the rights of those who are trained from those who are not trained.

¹ Hansard pages 918 - 919

4.3 The objectives of the PR Act

Existing legislation

Although various reasons were advanced in support of the PR Act at the time of its introduction, for the purposes of item 1 of the Terms of Reference for the General Review of Building Legislation, the objectives of the PR Act may be summarised as follows:

- protect the business and market share of qualified painters;
- enhance apprenticeships and other training by protecting the business and market share of qualified painters;
- maintain standards within the industry by ensuring that those who are professionally engaged in painting are competent;
- enhance the industry's status; and
- provide basic protection to consumers by providing a means of recourse if painting work is found to be faulty or unsatisfactory.

Issues and questions

Criticism has been received from some individuals that the objectives of the PR Act are now very much out of date and are inappropriate to deal with business conditions in the 21st century. It has also been said that the PR Act is ineffective and that there is a pressing need to review the system.

Question 8: Are the objectives of the PR Act appropriate to present day requirements? If not, please provide details?

4.4 The State Administrative Tribunal

Existing legislation

On 1 January 2005, the PR Act was amended by the *State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004*, which was one of the Acts passed as part of the package of legislation created to establish the State Administrative Tribunal ('the SAT').

The enactment of the legislation resulted in the following consequences on the functions of the PRB:

- the PRB no longer holds disciplinary inquiries under the PR Act and all disciplinary matters are now referred to the SAT;
- the PRB investigates allegations against registered painters for referral and presentation to the SAT;
- the PRB no longer cancels or suspends the registration of painters, except in the event of non-payment of annual registration fees; and

- appeals against decisions of the PRB in relation to registration matters are heard by the SAT instead of the Local Court.

For further information about the SAT, visit its website at www.sat.justice.wa.gov.au.

Proposed amendments – the Licensing Boards Bill

Refer to paragraph 4.5 below for information relating to the Licensing Boards Bill, which is due shortly to be placed before the Parliament. The Bill will provide that the Commissioner will in future be responsible for undertaking investigations and compliance programs, making allegations to the SAT and reporting on those matters.

4.5 The Acts Amendment (Licensing Boards and Consumer Protection) Bill

Following the resolution of issues concerning the separation of disciplinary functions and processes relating to the SAT, Consumer Protection produced a final report of the Review of Boards and Committees in the Consumer Protection portfolio in April 2005. In accordance with the Government's 'Machinery of Government' reform program, the report outlined a recommended model for the future regulation of a number of industries in Western Australia, including the painting industry.

The PRB has recently been notified that the Government intends to proceed to implement changes arising out of the review, as initially announced in June 2004. Parliamentary Counsel is proceeding with the drafting of a Bill to implement the recommended changes.

The Bill is to be known as the *Acts Amendment (Licensing Boards and Consumer Protection) Bill 2006* (referred to throughout this issues paper as the 'Licensing Boards Bill') and is due to be put before the Parliament in the first half of 2007. The proposed Act will see responsibility for administration of the PR Act transfer to Consumer Protection.

The recommended model recognises and values the significant contribution the PRB and other boards within the consumer protection portfolio make to the licensing process, while securing greater efficiencies consistent with the Machinery of Government reforms.

The PRB will retain full responsibility for licensing decisions in relation to painters. It will also be empowered to make recommendations and provide advice to the Minister for Consumer Protection relating to the conduct of the compliance, education and advice functions. The PRB will, therefore, retain an important ongoing role in relation to the regulation of the painting industry.

As a result of the changes, Consumer Protection will become the employing authority for the staff of the PRB, covering all functions including administration, compliance, policy and education. Importantly, the changes will also create a closer working relationship between Consumer Protection and the PRB.

Regulation of the industry will continue to be funded by registration fees, with these funds to be administered by Consumer Protection. Separate accounts will be created at the Department of Treasury and Finance and annual resource agreements will be negotiated between Consumer Protection and the PRB, concerning the use of those funds.

Under the proposed amendments, the role of the Registrar of the PRB will no longer be outlined in the legislation. Instead, the Commissioner and officers of Consumer Protection, as appropriate, will perform the functions currently carried out by the Registrar.

The Commissioner will be a person appointed by the Minister to undertake various functions under the PR Act. That person will be an executive officer of Consumer Protection.

The existing powers of the PRB relating to the receipt of complaints against painters and the making of orders to rectify defective painting work will be transferred to the Building Disputes Tribunal, which will include at least one member of the painting industry.

As noted in paragraph 4.1 above, painters' registration will in future become known as painters' licensing and the terms as used throughout this document are interchangeable. As a result of the changes, the title of the PR Act will be amended to the *Painters Licensing Act 1939* and the PRB will become known as the Painters Licensing Board.

At the time that this issues paper was being prepared, the contents of the Licensing Boards Bill were still being developed in consultation with key stakeholders and Parliamentary Counsel. References to the proposed provisions of the Bill as at the time of drafting this issues paper were included where appropriate. However, these are subject to change, until such time as the legislation has been passed by the Parliament.

A number of paragraphs included within this document provide commentary about issues that have been raised in connection with the existing legislation, but which are expected to be resolved in full by the proposed amendments. This inclusion is for the information of those persons and groups that have raised the issues in the past, and those who might otherwise have done so in submissions to the review.

4.6 The future of the PR Act

As a result of the non-adopted recommendations of previous reviews and inquiries undertaken into the regulation of painters in recent years, an understandable degree of uncertainty about the future of the PR Act exists among some members and staff of the PRB, and among certain stakeholders, such as the MPAWA.

Examples of concerns that have been expressed by those market participants that support the continuing regulation of the painting industry include the following.

- The legislation is outdated, legally unstable, lacking in power and effect and uses the 'big stick' approach.
- Current registration/licensing requirements fail to demonstrate both trade competence and business competency, including such matters as taxation and occupational health and safety.
- There is no ongoing assessment of painters, or any imperative for painters to undertake continuing professional development.

The result of this review is expected to resolve some of these concerns and to provide more certainty and direction for the future of the painting industry in Western Australia.

5. THE SCOPE OF THE PR ACT

5.1 *Application and coverage*

The PR Act only applies to those matters relating to painting services specifically set out in the legislation and it is those matters which determine the market to which the PR Act applies.

The PR Act covers all aspects of painting to the whole or any part of a building or other structure, except for concrete or similar floors, paths or driveways. The PR Act encompasses such activities as roof coating and wallpaper hanging but specifically excludes signwriting.

The PR Act provides the following criteria that determine the extent of that market:

- a definition of 'painting';
- a geographical area to which the PR Act applies;
- a 'business' test; and
- a financial threshold.

The provisions relating to the 'business' test and financial threshold are contained in section 4 of the PR Act that contains the essential offence provision that underpins the registration process. That section provides that it is an offence for a person who is not registered under the PR Act to carry out painting other than as a *bona fide* employee, where the fee for the painting work exceeds the prescribed amount.

Section 4 thus contains two important market criteria:

- registration only applies to persons carrying on painting business in their own right and not as employees; and
- the dollar value of the work must exceed the prescribed amount that is currently (and has been since 1983) \$200.

5.2 *Area in which the PR Act applies*

Existing legislation

The geographical area to which the PR Act applies is fixed by section 3 which provides that it will apply to those areas set out in the Schedule to the Act and that the Schedule may be altered by Regulations.

The Schedule defines the areas to which the PR Act applies by reference to latitude and longitude and Land Titles Office data. With some exceptions, the Schedule is difficult to read and unlikely to be understood by the average reader.

Originally the PR Act applied only in the Perth Metropolitan Region and in 1983 it was extended to Mandurah. In January 1993, the area of jurisdiction of the PR Act was extended to include the whole of the South West Land Division of the State.

Following requests from several local authorities, the Minister excluded the Shires of Mt Marshall, Narambeen and Mukinbudin with effect from March 25 1994. In January 1995 coverage of the PR Act was extended to include major townsites within the Eastern Goldfields and Esperance regions, including:

- Kalgoorlie and Boulder
- Esperance, Salmon Gums, Grass Patch, Scaddan, Condingup, Coomalbidgup, Cascade and Gibson;
- Southern Cross, Marvel Loch, Morrine Rock, Bullfinch and Bodalin;
- Coolgardie, Kambalda and Kambalda West;
- Norseman;
- Laverton; and
- Munglinup.

Issues and questions

The fact that the PR Act does not apply throughout the State creates an anomalous situation in which a person may legally operate as a painter without restriction in the north of the State, the rural Goldfields and in three Shires in the south west, but not in other parts of the State. Further, consumers in those areas of the State to which the PR Act does not apply do not have the benefit of the consumer protection provisions of the PR Act. If regulation of the painting industry is necessary in order to protect the public interest, it is difficult to fully justify not applying the legislation uniformly throughout the whole of the State, unless it can be shown that to do so would demonstrably disadvantage particular regions of the State.

The primary reason for not uniformly applying the legislation throughout the State appears mostly to be based on the resources of the Painters' Registration Board ('the PRB'), rather than any difference in community circumstance. If the PR Act were to be extended to cover the whole of the State, additional revenue would most likely be needed for the PRB to meet the extra costs that would be involved. The most obvious way of increasing revenue is to increase fees for registered painters.

Those who argue for continued exemption from the application of the PR Act in outlying regional or remote areas of the State, often cite their reasons as being the expense and difficulty that consumers would experience in attracting registered painters to undertake work in those communities. These arguments are valid.

It has previously been suggested that the PR Act should be amended to apply consistently throughout the entire State, unless it could be shown that to do so would demonstrably disadvantage particular regions. In that regard, it was suggested that individual local government authorities be able to seek an exemption from the PR Act, subject to appropriate community consultation.²

² Department of Consumer and Employment Protection, Review of Regulation of Painters in Western Australia, September 2003, page 61

If exemptions were to be granted to certain regions, the nature and extent of painting work and details of the individual, partnership or company undertaking the work would assist the PRB in keeping the situation in those regions under review for the future. Conditions could possibly be made in the Rules/Regulations to the PR Act that painters in those areas exempted from the need to be registered must submit regular reports to the PRB, containing prescribed information.

Question 9: If regulation of painters is to continue under the PR Act, should the application of the Act be extended throughout the State of WA?

Question 10: If the PR Act is amended to cover the whole of the State, should exemptions be allowed by Rules/Regulation, if the local government authority can satisfy the Minister that there are reasonable grounds as to why the Act should not apply in that area?

Question 11: If exemption to the jurisdiction of the PR Act is to be allowed, should conditions be imposed on those exemptions? For example, a requirement that those persons carrying out painting work in exempted areas notify the PRB of appropriate details?

5.3 The interpretation of 'painting'

Existing legislation

'Painting' is widely defined in section 2 of the PR Act to mean:

"...the application by any method recognised or adopted by the painting trade of paint, varnish or stain or any substance or preparation of a composition similar thereto or recognised by the trade as a substitute therefore to the whole or any part of a building or other structure of a kind recognised by law as a fixture (but not being a floor, path or drive-way composed of concrete or other similar substance) and –

- (a) includes such processes or treatments as are commonly known to the trade as graining, kalsomining, marbling, distempering, gilding, color-washing, staining, varnishing and plastic relieving;*
- (b) includes the hanging of wall-paper and any substitute therefore;*
- (c) does not include painting which consists of the application of a protective coating to part of a building or other structure (not being a dwelling house or like building or structure) which has first been treated by a process known as abrasive blasting or mechanical cleaning under a contract whereby the same contractor undertook both that process and the application of the protective coating;*
- (d) does not include painting work in the nature of signwriting."*

Issues and questions

The current definition of 'painting' is extremely broad and requires anyone wishing to undertake any activity which falls within that definition to be a registered painter.

Since the introduction of the PR Act, the painting industry has altered considerably. This can be attributed to improved paint technology, changes and improvements in painting techniques and practices, as well as a significant increase in the 'do it yourself' ('DIY') painting market.

Refer also to Chapter 9 for discussion about the possible introduction of separate classes of painters.

Question 12: If regulation of painters is to continue under the PR Act, should the definition of 'painting' be amended to better reflect current industry practices? If so, are there any specific activities that should be included or excluded?

5.4 The monetary limit for unregistered painting

Existing legislation

As previously noted, Section 4(1) of the PR Act requires that the total charge, fee or reward paid or payable in respect of the carrying out of painting by anyone other than a registered painter must not exceed \$200 or such other amount as may be prescribed. The prescribed limit was amended with bi-partisan support in 1983, from \$100 to the current amount of \$200 in recognition of Consumer Price Index increases that had occurred since the fee had been previously reviewed in 1970, and in order to make the legislation more workable.

The PR Act contains provisions that are aimed at preventing individuals from avoiding the prescribed dollar limit by dividing the works into separate contracts, or by excluding the cost of painting materials from the value of the painting work.

Issues and questions

At the time that the PR Act was introduced, the threshold was intended to allow minor painting work to be undertaken without the person needing to be registered. Such works could reasonably have been expected to include the repainting or restoration of one or two rooms within a home, but not major contracts such as the painting of an entire house.

Clearly, during the 23 years since the fee limit was last amended the painting industry has undergone considerable change and substantial increases in material and labour costs have been experienced. The introduction of the GST on 1 July 2000 has also contributed to increased prices in that time.

Fees for even very minor painting jobs generally exceed \$200 and therefore require a registered painter to undertake the work. The PR Act covers activities such as fence painting and pergola painting, meaning that painters must currently be registered to undertake quite small jobs such as painting a short length of fence or a pergola. However, it has been reported that registered painters often consider minor work of that nature to be low skilled and not profitable, unless premium rates are charged.

The low level of the existing upper limit for unregistered painting can therefore significantly increase the cost of minor painting jobs by prohibiting handymen and women from undertaking small painting jobs at a lower cost to consumers. The evidence would suggest that there are very few complaints relating to work valued at less than \$200 and that the median value of work about which complaints are made is more like \$1,000. In the circumstances, it is clear that the \$200 limit for unregistered painting no longer supports the intention of the Act, nor does it realistically reflect the current economic climate in which the PR Act operates.

As previously noted by some stakeholders, the building industry often struggles to cope with consumer demand, because of shortages in skilled labour. The lessening of restrictions by significantly increasing the unregistered painting threshold might assist that situation while producing little or no adverse impact on consumers. A new threshold of \$1,000 has been suggested as being consistent with the original objectives of the PR Act.

Notwithstanding the above, a discussion forum held in April 2005 convened by an independent consultant³ and attended by representatives of the MPAWA, building industry associations and the Registrar of the PRB concluded that the threshold should remain at the current level because an increase would lessen consumer protection.⁴

The possibility of removing the threshold altogether was also discussed in the above forum. However, it was thought that this would be impractical as, for example, a builder who hangs a door may need to seal the top and bottom and it would be impractical to employ a registered painter to undertake this work. The issue of contract splitting was also raised but it was thought that a change in the unregistered painting threshold would not make contract splitting any less likely; rather, it would encourage contract splitting at a higher level.

Because of the lengthy time periods between past reviews of the threshold amount, it has been suggested that the prescribed monetary limit for unregistered painting should in future be reviewed on a regular basis, for example every three or five years.

Question 13: Should the prescribed upper limit for unregistered painting be increased from \$200 and, if so, to what amount?

Question 14: Should the prescribed monetary limit for unregistered painting be reviewed every three or five years in line with CPI? If so, what time period should apply?

5.5 Management and supervision of painting

Existing legislation

Section 14B(1) of the PR Act that relates to painting carried out by a partnership or company requires the painting to be managed and supervised by a partner or an employee who is a registered painter. Section 14B(2) requires the painting carried out by a company or body corporate to be managed and supervised by a director or by a member of the board of management who is a registered painter, or by an employee.

³ Colmar Brunton Report on Monetary Thresholds and Limits, 2005

⁴ One of the building industry associations did not offer an opinion as painting was not considered part of its core business and another stated that it did not support building trades licensing in any form.

Issues and questions

It has been suggested that the existing requirements for the supervision and management of painting are inadequate, for example the lack of requirements for job supervisors that work under a registered/licensed supervisor and have effective day-to-day control of individual painting contracts. In the circumstances, the suggestion has been made that all job supervisors should be registered/licensed painters and be nominated and approved by the PRB.

Question 15: Should individual supervisors that work under the nominated supervisor be required to be registered/licensed painters? If so, should they also be required to be nominated and approved by the PRB?

5.6 Painters from interstate

Existing legislation

Refer to Chapter 3, paragraph 3.4, for discussion relating to mutual recognition legislation.

As noted in Chapter 7, paragraph 7.2, among other criteria for registration as a painter in Western Australia, section 12(1) of the PR Act requires that an applicant be of 'good character', a requirement that is unique to Western Australia.

Issues and questions

A question has been raised about whether the PRB is entitled to require all applicants under mutual recognition legislation to provide evidence that they are of good character, and suggesting that this should be made a specific requirement of an applicant from interstate.

Question 16: Should the PRB be entitled to require all applicants under mutual recognition legislation to provide evidence that they are of good character?

5.7 Signs and advertisements

Existing legislation

Section 14 of the PR Act requires that the registered name and number of the painter is to appear in any advertisement published by or on behalf of a painter.

Section 14A of the PR Act provides that a sign is to be erected on all works under the control of a painter, and maintained throughout the progress of the work.

Issues and questions

Some people have suggested that the requirement for the erection of a sign is a waste of time and money and should be abolished. Others have expressed the view that signs may on occasions represent a security risk because homes may be unoccupied while the work is being undertaken, or unauthorised persons could pose as representatives of the painting company.

Question 17: Should the existing requirements for the erection of signs be removed?

6. RESPONSIBILITY FOR AND THE ADMINISTRATION OF THE PR ACT

6.1 Responsibility for and administration of the PR Act

Existing legislation

The Minister charged with the administration of the PR Act is the Minister for Consumer Protection.

Day to day administration of the PR Act is undertaken by the PRB that is funded primarily from income derived from fees charged to registered painters. The PRB is established under section 5 of the PR Act.

Under section 16(1) of the PR Act, the PRB may make allegations to the SAT that there is proper cause for disciplinary action against a painter.

In the case of unregistered painting, section 20 of the PR Act currently empowers the Registrar of the PRB to prosecute such cases in the courts, in order to maintain the integrity of the registration system.

The PRB employs a number of painting inspectors to undertake inspections, including random inspections, in accordance with provisions contained in section 16C of the PR Act.⁵

The current mission of the PRB is to obtain the highest possible standards in the painting industry, by the maintenance of appropriate levels of entry skills for painters, the fostering of continuous professional development, and the provision of cost efficient and impartial service to the community.

Information and details about the PRB are contained within its Annual Report 2005, copies of which may be downloaded from its website, www.prb.org.au.

Proposed amendments – the Licensing Boards Bill

As noted in Chapter 4, paragraph 4.5, changes proposed by the Licensing Boards Bill will see responsibility for administration of the PR Act transfer to Consumer Protection and the corporate status of the PRB will be removed. However, regulation of the painting industry will continue to be funded by licensing fees, with these funds to be administered by Consumer Protection in accordance with an agreement with the PRB.

Responsibility for making allegations to the SAT will transfer to Consumer Protection.

Consumer Protection will assume responsibility for prosecuting unlicensed painters under amendments proposed by the Licensing Boards Bill. In addition, Consumer Protection will assume responsibility for taking complaints and making orders against painters for the rectification of defective painting work.

Under proposed amendments to the PR Act, to be made by the Licensing Boards Bill, all inspections and similar functions will be the responsibility of Consumer Protection. Inspectors as well as other staff of the PRB will be employed by Consumer Protection.

⁵ A total of 2060 random inspections were undertaken during 2005 (Source: PRB Annual Report 2005)

6.2 The constitution and composition of the PRB

Existing legislation

Under section 6 of the PR Act, the PRB is a body corporate with perpetual succession and a common seal. It is an entity capable of suing and being sued.

Section 7 of the PR Act requires that the Board of the PRB shall consist of five members appointed by the Governor, as follows:

- Chair – the chair of the Builders' Registration Board of WA shall be the chairman of the Board;
- Member – a member of the MPAWA, nominated by the Minister from a panel of names submitted by the association;
- Member – a person nominated by the Minister from a panel of names submitted by the Confederation of Western Australian Industry (now the Chamber of Commerce and Industry in Western Australia) and representing Australian paint manufacturers;
- Member – a person nominated by the Minister from a panel of names submitted by the Operative Painters' and Decorators Union (now the Construction, Forestry, Mining and Energy Union of Workers); and
- Member – a person nominated by the Minister who is qualified to represent the interests of consumers.

Each member holds office on a part-time basis for up to three years and, under Rule 4 of the PR Act's Rules/Regulations, the Board of the PRB is required to meet formally at least once per month.

Proposed amendments – the Licensing Boards Bill

Amendments proposed by the Licensing Boards Bill will repeal section 6 of the PR Act and that will remove the corporate status of the PRB. Existing section 7 of the PR Act will also be repealed and replaced with a new section that will change the membership structure. Members will be appointed by the Minister following an appropriate selection process. At the time of publication, the proposed new membership structure had not been finalised.

Issues and questions

The following issues and questions are based on the existing composition of the Board of the BRB and also an assumption that future arrangements for the appointment of Members by the Minister may be along lines similar to existing arrangements, with certain nominees being put forward by industry.

Currently there is no provision for one of the members to be a person elected by registered painters, although this issue will be addressed in the Licensing Boards Bill. While registered painters have some representation on the PRB in the form of the MPAWA nominee, only a small percentage of registered painters are thought to be members of that association.⁶ Consequently, a number of painters have expressed their view that the current composition of the PRB does not adequately represent the interests of painters.

⁶ Almost 3000 painters are currently registered by the PRB and it is understood from information provided by the MPAWA that it has a membership of less than 200.

Comparable legislation, such as the *Real Estate and Business Agents Act 1978* and the *Settlements Agents Act 1981*, provide that membership of the respective Boards established under those Acts include two persons who are licensees that are nominated for appointment by other licensees. In the case of the *Real Estate and Business Agents Act 1978*, provision is made for one member of the Board to be a licensee nominated for appointment by the Real Estate Institute of Western Australia, which is the major real estate industry organisation representing the interests of licensed real estate agents.

Based on the assumption that the nominee of the MPAWA will be a person who is a registered painter, the current provisions of the PR Act mean that only one member of the Board will necessarily be a registered painter.

In the circumstances, it has been suggested that the PR Act be amended to provide for an additional member who is a registered painter, and elected to the Board by a ballot of all registered/licensed painters.

Increased representation of registered/licensed painters on the PRB would enable the Board to be better informed of any problems or concerns emerging within the industry.

Although the fact that an increase in membership of the Board from five to six members might give rise to concern that an even number of members would increase the likelihood of the Board becoming deadlocked over issues, this could be avoided by the inclusion of a provision that in the event of a tied vote the Chairman has a second or casting vote. Alternatively, a provision could be included that in the event of a tied vote the question is answered in the negative.

During the 2005 calendar year, the Board of the PRB met on 12 occasions.⁷

Question 18: Should provision be made for an extra member of the PR Board, who must be a person registered under the PR Act and elected as a nominee by a ballot of registered painters?

6.3 Funding of the PRB

Existing legislation

The PRB is a self-funded statutory authority funded mainly by the fees paid by registered painters and persons applying for registration.

Section 22 of the PR Act provides that the funds of the PRB are applied in the remuneration of members, in carrying out the provisions of the PR Act and for such other purposes as the BRB with the approval of the Minister may from time to time determine.

The total income received from registration fees for the calendar year 2005 was \$468,464, compared with \$445,187 for the previous year. As at 31 December 2005, the total PRB funds and reserves amounted to \$643,742.⁸

Registration fees for 2007 will be \$200 for individuals, \$125 for partnerships, and \$300 for companies and bodies corporate.

⁷ Source: PRB Annual Report 2005

⁸ Source: PRB Annual Report 2005

Proposed amendments – the Licensing Boards Bill

Under the provisions of the Licensing Boards Bill, regulation of the painting industry will continue to be funded primarily by registration (licensing) and application fees.

The Licensing Boards Bill proposes amendments that will require Consumer Protection to enter into a resource agreement with the PRB regarding the application of funds raised under the PR Act. The outcome of those negotiations cannot be determined at this stage and may impact on certain issues and questions outlined in this issues paper.

Issues and questions

It has been suggested that the funding base of the PRB should be widened to include additional income sources, instead of relying on registration and application fees from painters to cover all of the costs involved.

One proposal, for example, is that a levy should be imposed on building licences issued by local governments, similar to arrangements in place for the BRB. However, such a levy would not capture large sections of the painting market such as the painting of existing premises for consumers.

Question 19: If the current system of regulation of painters is to continue, should the PRB's funding base be widened? If so, what additional avenues for funding should be considered?

6.4 Functions of the PRB

Existing legislation

The duties and powers, or functions of the PRB have been identified as follows. These activities are not prescribed under the PR Act but the PRB has acknowledged them in its annual reports:

- provide for the registration of painters in the areas specified;
- maintain a register of painters;
- prescribe the course of training and education for painters;
- ensure adequate supervision of painting;
- receive complaints against painters in relation to work that is not carried out in a proper and workmanlike manner, and take such action as is provided in the PR Act;
- provide the means with which to prosecute persons who do not comply with the requirements of the PR Act or any lawful direction of the PRB; and
- receive fees and penalties from painters and apply them in or towards payment of the remuneration and costs of carrying out the provisions of the PR Act.

The PRB's annual reports state that its strategic objectives are to ensure that the:

- PR Act is administered in a consistent, reasoned and lawful manner;
- PR Act is administered in a financially responsible manner; and
- investigations and prosecutions for offences against the PR Act are conducted in an efficient and consistent manner.

Proposed amendments – the Licensing Boards Bill

It is proposed that the Licensing Boards Bill will provide that the functions of the PRB are:

- to decide who is to be granted a licence under the Act and who is to have their licence renewed (under the proposed amendments all references to 'registration' in the PR Act will be changed to 'licence' and 'licensing', to more properly reflect the nature of the scheme in place);
- to make recommendations and submit proposals to Consumer Protection from time to time with respect to Regulations to be made under the PR Act;
- to advise Consumer Protection in relation to the promotion and conduct of education and advisory services;
- to advise Consumer Protection in relation to the conduct of investigation, prosecution and other compliance functions; and
- to perform such other decision-making and advisory functions as are conferred on the PRB by the Act.

Those sections of the PR Act that relate to the receiving of complaints and making of orders about unsatisfactory painting work will be amended. Consumer Protection will have the responsibility of conciliating complaints, while workmanship disputes will be dealt with by the BDT.

6.5 The register of painters

Existing legislation

Section 10 of the PR Act requires the PRB to maintain (and publish annually in the Government Gazette if so directed by the Minister), a Register of Painters. The Register is required to include the names of registered painters and such other particulars as may from time to time be prescribed or required by the PRB.

The PRB's Rules 1962, that are effectively the Regulations attached to the PR Act, state in Rule No 6 that the Register of Painters to be kept by the PRB shall be in the Form No 1 in the Second Appendix. In addition to balance sheet details to be maintained by the PRB, that form provides for inclusion of the following details:

- name;
- registered number;
- address;

- date of registration;
- qualifications (as required under section 12 of the PR Act – ‘Who may register’);
- minute book folio; and
- remarks.

Section 10(2) of the PR Act states:

“The Board shall in the month of July next following the expiration of a period of 12 months from the commencement of this Act and thereafter in the month of July next following a direction by the Minister so to do cause a copy of the Register complete and correct to 31 December then last past to be published in the Government Gazette.”

Section 10(3) provides that, when such publication is not required, the PRB must publish a supplementary list containing all alterations and additions to the register during the previous 12 months ended 31 December.

Proposed amendments – the Licensing Boards Bill

Proposed uniform provisions to be introduced under the Licensing Boards Bill will provide that the Commissioner is to keep a register of all licensees and shall record in the Register required particulars, including the names and descriptions of all licensed painters. The Bill will also provide that *“The Commissioner may determine that certain particulars are not to be available for public inspection”* to protect the privacy of licensees. For example, details of licensees’ home addresses would not be included in the public Register.

Issues and questions

As at 31 December 2005, there were 2,954 painters registered with the PRB, comprising 2,267 individuals, 496 partnerships and 191 companies, an increase of 77 on the previous year.⁹

The register of painters is open for inspection by any person without any fee during the PRB’s ordinary hours of business and is also available on the PRB’s website, www.prb.org.au.

Consumer Protection keeps details about current or previously registered names in Western Australia. Extracts from the register are available at a cost of \$5.00 each and provide all of the details concerning a business name, such as proprietors or address details.

It has been suggested that registered painters should additionally be required to register their trading names with the PRB, and ensure that this information is kept up to date. This additional information may be of considerable assistance to the PRB in conducting compliance activities and, as it is now relatively easy to maintain the register electronically, this task would not appear to be an unduly onerous requirement on the PRB.

Further, it has also been suggested that the register of painters should include a much greater range of details, such as the section of the PR Act under which a painter was deregistered, telephone numbers, email addresses and ABN numbers.

⁹ Source: PRB Annual Report 2005

All publicly available registers that include personal information contain implications about the preservation of privacy and confidentiality. That raises the question of what details on the Register should be made publicly available, and what information should remain confidential to the PRB and not be available for public inspection.

Apart from the information on the register, the PRB's files contain further details of painters, much of which could be regarded as confidential. Requests for information about registered painters are often received by the PRB but the PR Act currently contains no guide as to the type of information that the PRB may release and to whom, for example details of complaints made or disciplinary action taken.

The PR Act is also silent on the subject of public 'naming' of painters by the PRB, for serious disciplinary matters.

The implications of the Freedom of Information ('FOI') legislation would need to be examined in relation to any recommendations that might result from this review.

Question 20: Should the details contained in the register of painters be expanded to include additional information? If yes, what additional information should be required or, if no, why not?

Question 21: Should the PR Act be amended to provide clarification about the type of information about painters that the PRB may release, and to whom?

Question 22: Should the PR Act be amended to allow public 'naming' of painters by the PRB, in the case of serious disciplinary matters?

6.6 Advice and education

Existing legislation

Currently, there is no formal requirement for the PRB to provide advisory or educational services, either to painters or to the general public.

Proposed legislation – the Licensing Boards Bill

The giving of advice to the Commissioner, about the conduct of education and information services for consumers and industry participants relevant to the painting industry, will in future be one of the functions of the PRB.

Issues

A number of comments have been made in submissions to previous reviews about the fact that the PRB does not currently have a formal advisory or educational function, particularly in relation to the general community.

However, to raise industry and consumer awareness, the PRB's activities during the year ended 31 December 2005 included participation at industry and consumer expos, providing guest speakers for industry meetings, speaking to students undertaking the Certificate IV of Painters' Registration at TAFE colleges, and conducting workshops in regional areas. In addition, advertisements in newspapers frequently promoted the fact that only registered painters should be employed.

In addition, some 2,068 general enquiries were dealt with by the PRB during the 2005 calendar year.¹⁰

6.7 The Chair and Deputy Chair of the PRB

Existing legislation

Under the provisions of section 7(1) of the PR Act, the Chairman of the BRB is the Chairman of the PRB. The BR Act currently requires the Chairman of the BRB to be legally qualified. Section 7A of the PR Act provides for the Governor to appoint a member of the Board of the PRB to be Deputy Chairman.

Proposed amendments – the Licensing Boards Bill

The proposed amendments will provide that one of the five Board members appointed by the Minister, and who is not a licensed painter, is to be appointed to be the Chairman.

Issues and questions

The PRB's submission to the Gunning Committee of Inquiry identified a number of issues relating to the Chair of the PRB, as noted below.¹¹

- Neither the Chairman nor the Registrar of the PRB has formal input into the appointment or re-appointment of Board members, giving rise to the risk that such appointments or re-appointments may not be as responsive to performance as is desirable.
- The Chairman of the Board of the PRB is a legal practitioner, however the PR Act does not provide for him/her to have a legal practitioner as a deputy member. Thus, if the Chairman is absent from a meeting there is no legal practitioner present at that meeting.
- There is no provision in the PR Act for the Chairman to determine legal issues considered by the Board of the PRB. There is therefore the potential for non-legally qualified members of the Board to override the Chairman's opinion on legal issues that come before the Board for determination.

Circumstances have changed since the date that that the Gunning Committee made their recommendations, with the introduction of the SAT legislation (refer to Chapter 4, paragraph 4.4). As noted, the PRB no longer holds disciplinary inquiries or cancels or suspends registration, except for the non-payment of fees. The need for the Chairman to be legally qualified has therefore diminished, although the PRB does still hold formal registration/licensing hearings.

¹⁰ Source: PRB Annual Report 2005

¹¹ Gunning Report, page 357

Question 23: Should the Minister be required to consult with the Chairman of the PRB in relation to the appointment or re-appointment of Board members (other than the Chairman)?

Question 24: Should the Chairman of the PRB be required to be legally qualified and to have a legally qualified person as a deputy?

Question 25: Should the Chairman of the PRB have the power to determine issues of law that arise before the Board?

6.8 Annual report

Existing legislation

Section 23B of the PR Act requires the PRB to submit an annual report to the Minister on or before 31 March each year, relating to its proceedings for the preceding year ending on 31 December.

Proposed amendments – the Licensing Boards Bill

Proposals contained in the Licensing Boards Bill will remove the requirement for the PRB to provide annual reports. Instead, the Department of Consumer and Employment Protection's annual report will be expanded to include matters relating to the PRB and other boards.

The PRB will report to the Minister on its general functions.

6.9 Immunity for members and staff of the PRB

Existing legislation

Currently, the PR Act does not provide a statutory indemnity for members and staff of the PRB, against liability for acts done in good faith in the performance of their functions under the legislation.

Proposed amendments – the Licensing Boards Bill

The Licensing Boards Bill will contain a suitable provision for 'protection from liability for wrong doing'.

7. PAINTERS' REGISTRATION

7.1 *Painters' registration/licensing requirements*

Existing legislation

The PR Act requires that those who are engaged in painting are competent of undertaking 'painting' as defined in section 2 of the PR Act. There is currently no provision for separate 'classes' or 'classifications' of painters in Western Australia.

Section 12 of the PR Act sets out the requirements for a person seeking to be registered as a painter. An individual seeking to be registered must:

- pay the prescribed fees;
- be over 21 years old;
- satisfy the PRB that he or she is 'of good character'; and either:
 - have five years practical experience and have completed the prescribed training and examinations; or
 - have completed an apprenticeship in accordance with the *Industrial Training Act 1975* and passed examinations prescribed by the Board; or
 - have attained a degree of proficiency as a painter which is sufficient to satisfy the PRB.

Section 2 of the PR Act, which includes a definition of the term 'painter', provides that partnerships, companies and bodies corporate that carry out painting are all painters for the purposes of the Act. Section 14 of the PR Act provides for the registration of partnerships, companies and other bodies corporate as painters. Subject to meeting the criteria set out in that section, any partnership, company or body corporate that wishes to be registered as a painter must:

- pay the prescribed fee; and
- have at least one partner, director or member of the board of management, as the case may be, or an employee responsible for managing and supervising painting, who is already registered as a painter and who, in the opinion of the Board, will ensure the proper management and supervision of the painting work to be carried out.

Section 4A of the PR Act prohibits any person who is not registered from using the words 'registered painter' or in any way holding themselves out to be a registered painter. Further, section 14A requires registered painters to include their registered name and number in all advertisements and on a sign at all sites where painting work is progress.

Proposed amendments –the Licensing Boards Bill

As noted previously, in the context of the PR Act, the term 'registered' effectively means 'licensed' and, as stated in Chapter 4, paragraph 4.5, the Licensing Boards Bill will change all references to 'registered' and 'registration' to 'licensed and 'licensing'.

The amendments proposed by the Licensing Boards Bill will replace the existing criteria with uniform provisions that are likely to include the following requirements.

- Has paid the prescribed fee.
- Has reached the age of 18 years.
- Is a person of good character and repute.
- Is a fit and proper person to hold the licence.
- Has sufficient resources.
- Meets the prescribed requirements by way of training and practical experience.
- Meets any other prescribed requirements.

The proposed amendments will alter the structure of the PR Act by moving the education and training requirements for the licensing of painters to the Rules/Regulations.

In addition, it is proposed that Rules/Regulations will provide that licences may be granted subject to conditions and that particular classes (if any) of licence may be granted or renewed under the Act. At this stage it is not intended that different classes of licence be prescribed, but the amendments will provide enough flexibility for classes to be prescribed in the future, possibly as a result of recommendations that may arise from this review.

Issues and questions

In the year ended 31 December 2005, the PRB received 222 applications for registration. Of these, 200 were approved, 18 were refused and four were withdrawn. A total of 26 applications were pending at the end of the year.¹²

A number of issues and questions relating to the criteria for registration/licensing of a painter are contained in the following paragraphs.

7.2 Age and good character criteria

Existing legislation

As noted in paragraph 7.1 above, section 12(1) of the PR Act provides that an applicant for registration as a painter must satisfy the PRB that he/she is over 21 years of age and of good character.

Proposed amendments – the Licensing Boards Bill

The Licensing Boards Bill will contain provisions to reduce the required age of applicants to 18 years. It will also require that an applicant is a person of good character and is a fit and proper person to hold a painter's licence. In addition, the Bill will include a provision allowing for objections to the grant or renewal of a licence on the basis that a licensee (painter) does not have any or all the requirements under the PR Act for the initial grant of a licence.

¹² Source: PRB Annual Report 2005

The Licensing Boards Bill will also provide that as soon as a painter fails to meet all eligibility criteria, for example being convicted of a serious offence, registration may be suspended or cancelled by the SAT without the need to wait until the date of renewal.

At the date of publication of this issues paper, consideration was being given to including provisions in the Licensing Boards Bill to require partners of a partnership or directors of a company to be of good character, and also to permit the PRB to refuse to renew a licence if the applicant is no longer able to satisfy the requirements for an initial grant of licence.

Issues and questions

The criterion that applicants for registration must be of good character is a test that is subjective in nature, but which the PRB seeks to enforce by way of a police clearance. In considering the police clearance, the PRB may allow a person to be registered if it is satisfied that any convictions are not relevant to the conduct of the business of painting or that the passage of time means that the conviction is of less relevance in determining the character and fitness of an individual.

Such a criterion is commonplace in most forms of occupational licensing in Western Australia, with provision for cancellation of the licence where an individual ceases to be of good character, or has brought the industry into disrepute as a result of conduct or actions occurring after being registered. An example of this would be where a registered person sustains a conviction for a serious offence that reflects adversely on his or her character.

There is no automatic reassessment of any of the entry criteria once a painter is registered/licensed.

Currently, the only requirement for renewal of registration is the payment of registration fees. Therefore, the only protection offered to consumers by the current system is that a registered/licensed painter was proficient and of good character at the time of initial registration/licensing, with no guarantee that this is still the case.

In the circumstances, it may be argued strongly that for registration or licensing to be of any real value to either painters or consumers, the PRB should undertake reassessment of registration/licensing criteria at the time of renewal, as a matter of routine.

Refer also to Chapter 5, paragraph 5.6, about the application of the good character criterion to painters from interstate.

Question 26: Should the PRB undertake routine reassessments for continuing eligibility at the time of renewal of a painters' registration/licence?

7.3 Training and experience criterion

Existing legislation

In addition to the age and good character criteria, section 12(1) of the PR Act requires that an applicant:

- (a) *has completed the prescribed course of training and has passed the prescribed examination as laid down by the Board for persons (other than apprentices) who have had 5 years practical experience in the painting trade; or*
- (aa) *has completed the prescribed course of training and has passed the prescribed examination as laid down under the 'Industrial Training Act 1975', for apprentices to the painting trade and has passed the prescribed additional examination laid down by the Board for those persons; or*
- [(b) *deleted.*]
- (c) *has attained a degree of proficiency as a painter which the Board considers is comparable with that ordinarily attained by persons who have completed the course of training, passed the examinations and worked as mentioned in paragraph (a).*

Section 13 of the PR Act requires the PRB to prescribe and conduct, or supervise the examinations of individuals applying for registration, pursuant to sections 12(1)(a) and 12(1)(aa).

Rule 8(1a) of the Painters' Registration Act Rules 1962 provides that additional examinations to be passed by applicants for registration as a painter are to include:

- Painters' Recording and Costing;
- Painting Technology; and
- Painting Estimating.

In practice, the PRB administers these requirements as follows.

Section 12(1)(a) of the PR Act - Five years practical experience and PRB course completed.

Non-Western Australian trained apprentices¹³

- Must pass Certificate IV of Painters Registration (14 Modules) (this is the prescribed course of training -
 - Painting Technology (including registration regulations and quality assurance) ('PT').
 - Painters Business Management ('PBM').
 - Painters Estimating and Specifications ('PES').
 - All theory assessments.
- Must have five years experience.
- Must pass the 'practical assessment' (Eight hour trade test comprising theory and practical competencies).

¹³ Fees payable by the applicant, except for the 'practical assessment' that is paid for by the PRB

Western Australian trained apprentices¹⁴

- Must pass PBM and PES of Certificate IV of Painters Registration (Seven Modules).
- Must have five years experience.
- No practical assessment required.

Section 12(1)(aa) of the PR Act - Apprenticeship completed and PRB assessment completed.¹⁵

- Must have completed a Western Australian painting and decorating apprenticeship.
- Must pass the PRB theory assessments in PBM and PES (one day).

Section 12(1)(c) of the PR Act - Proficiency comparable with requirements of section 12(1)(a).¹⁶

- Applicants responsibility to establish comparability.
- Must pass PRB theory assessments in PT, PBM and PES (one day).
- Must pass 'practical assessment' (eight hour trade test comprising theory and practical competencies).

The PRB arranges for training courses and examinations to be conducted at a registered training organisation.

Proposed amendments – the Licensing Boards Bill

Proposed amendments to be contained in the Licensing Boards Bill are expected to amend section 12 of the PR Act to include a provision that an individual applicant must meet prescribed requirements, by way of training and practical experience. At this stage, it is expected that those prescribed requirements are likely to follow the existing provisions of the legislation. Section 13 of the PR Act (Examinations) will be deleted, however the PRB will still be able to hold examinations through powers provided in the Regulations.

Issues and questions

A number of questions have been raised about the apparent lack of recognition given to apprenticeship training, because painters that have completed their apprenticeships in Western Australia are required to sit additional examinations in order to demonstrate their business acumen before they are able to gain registration.

As a result, it has been suggested that there is a perception that credentials as a qualified tradesman are not as important as painters' registration and that it is easier to undertake a registration/licensing course to become a painter than to complete an apprenticeship.

¹⁴ Fees payable by the applicant

¹⁵ No charge payable for assessments

¹⁶ Fees payable for 'practical assessment' only

The above issue is central to the work currently being undertaken by COAG, as discussed in Chapter 3, paragraph 3.6. It is seen by some as being very questionable why the PRB should undertake any additional testing if the applicant has passed accredited training.

In practice, the requirements of section 12(1)(c) of the PR Act are very subjective and it has been suggested that persons that have not completed an apprenticeship in painting should be required to demonstrate that they have attained a degree of proficiency comparable to that of a painter who has gained a trade certificate in painting.

An additional issue that has been raised is that it is arguable that legislation should require painters to undertake business management studies before allowing them to operate their own business. However, it has been suggested that this requirement protects consumers from losing deposits and other sums of money paid to tradespersons. There is no such requirement for most other building trades in Western Australia.

Question 27: Should painters that have recently completed apprenticeships and obtained trade certificates in painting in Western Australia need to pass examinations in business management, such as painters' recording and costing and painters' estimating, subject to them meeting all other criteria? If so, why?

Question 28: Should applicants for registration/licensing as a painter that have completed other appropriate accredited training need to pass examinations in business management, such as painters' recording and costing and painters' estimating? If so, why?

Question 29: Should painters who have not completed apprenticeships and who are seeking registration/licensing be able to obtain registration/licensing similar to that of a painter that has recently gained a trade certificate in painting?

7.4 Examination and assessment procedures

Existing legislation

As noted in paragraph 7.3 above, section 13 of the PR Act deals with examinations. However, that section is silent on the subject of translators or interpreters.

Section 13(2) of the PR Act states that all costs and expenses with or incidental to the conduct of examinations shall be paid by the PRB. Section 13(3) allows the PRB to charge a prescribed examination fee to each candidate.

Proposed amendments – the Licensing Boards Bill

It is proposed that section 13 of the PR Act (Examinations) be repealed and that the future requirements for examinations will be prescribed under the Rules/Regulations alongside the training requirements.

Issues and questions

In the interests of equal opportunity, fairness and equity, it is sometimes necessary to allow translators or interpreters to be present with applicants during examinations or assessment processes. However, this in itself is open to possible abuse.

In practical terms it might well be argued that in the public interest an applicant for registration/licensing as a painter should have a reasonable grasp of spoken and written English, in order to communicate with clients and suppliers, fully comprehend and follow directions on the use of products, and keep proper business records.

Under certain circumstances, it may be helpful to allow oral assessments to be conducted, instead of written examinations. For example, if an applicant is severely dyslectic. Of course, proper consideration would again need to be given to an applicant's ability to read directions on the use of products and to maintain proper business records.

Question 30: Should the use of translators or interpreters be permitted? If not, why not?

Question 31: Should oral assessments be permitted in lieu of written examinations, in selected cases as approved by the PRB?

The cost of the PRB's registration assessment processes is not insignificant and it has been suggested that in future this cost also should be borne by the applicant, rather than the PRB.

Question 32: Should any costs associated with determining whether an applicant meets the criteria for registration/licensing as a painter, such as examinations and other assessments, be borne by the applicant in lieu of the PRB?

7.5 Registration/licensing fees

Existing legislation

Section 21 of the PR Act requires every registered painter to pay a prescribed annual registration fee and that the fees should be paid to the PRB on 1 February each year. Failure to pay annual registration fees can lead to suspension or cancellation of registration under section 21(4).

Proposed amendments – the Licensing Boards Bill

The Licensing Boards Bill is expected to contain proposals to amend section 21 so that fees are paid to Consumer Protection in the prescribed manner. References to payment prior to 1 February each year will be deleted.

New provisions will state that a licence may be granted or renewed for a period of not more than three years. A provision is also expected to provide for Consumer Protection, in special circumstances, to refund the whole or any part of any fee paid for a painters' licence.

Issues and questions

No time frame is stipulated within the PR Act for newly registered painters to remit annual fees. Some newly registered painters are slow in remitting their fees and it has been suggested that a period of, say, one month should be set from the time of the grant of registration, to prevent forfeiting of approval.

Question 33: Should a timeframe be set for newly registered painters to remit annual fees, failing which they would risk forfeiting their approval?

It has been suggested that an automatic procedure should be put in place for the amount of registration/licensing fees to be increased each year, or every three or five years, in line with the rate of inflation as indicated by the CPI. However, it is considered by some that fee increases should continue, as at present, to be calculated on the basis of a demonstrated need of the PRB for extra funds to undertake their statutory functions.

Question 34: Should the basis for calculating registration/licensing fee increases be reviewed at regular intervals in line with the rate of inflation as indicated by the CPI? If “yes”, should the period of review be annually, or every three or five years?

7.6 Registration/licensing of partnerships and companies

Existing legislation

Section 2 of the PR Act provides that partnerships, companies and bodies corporate, which carry out painting are all ‘painters’ for the purposes of the PR Act.

Accordingly, any partnership that wishes to be registered as a painter must:

- pay the prescribed fee; and
- have one partner or an employee responsible for managing and supervising painting already registered as an individual (section 14(1)).

Similarly, any company that wishes to be registered as a painter must:

- pay the prescribed fee; and
- have a director, member of the board of management, or employee responsible for managing and supervising painting who is already licensed as an individual (section 14(1)).

Proposed amendments – the Licensing Boards Bill

At the date of publication of this issues paper, consideration was being given to the proposed inclusion of uniform provisions in the Licensing Boards Bill relating to the licensing of partnerships and companies.

Issues and questions

Registration/licence fees for 2007 are:

- \$200 for individuals;
- \$125 for partnerships; and

➤ \$300 for companies.

Accordingly, if a partnership were to register then at least one of the partners would also be required to be registered as well, so the cost to the business would be: \$200 (individual) plus \$125 (partnership), which equals \$325.

Similarly, a company registering is also required to have a director, member of the board or employee that is registered as an individual. Therefore the cost would be: \$200 (Individual) plus \$300 (company), which equals \$500.

A number of painters have complained that the requirement to register/licence partnerships and companies amounts to 'double dipping' by the PRB, and that such entities operating as painters are being asked to pay twice for registration.

However, it should be remembered that a company is a separate entity to the individual that is registered and it is the company that undertakes the painting and is therefore required to be registered/licensed. While it is recognised that the company relies on the qualification of the individual, it is the company that will be held responsible in the first instance for any breaches of the PR Act.

Similarly, partnerships also rely on the qualification of the individually registered/licensed partner but, unlike a company, a partnership is not a separate legal entity in its own right. The effect of registration as a partnership is that each partner, including any non-registered partner, is entitled to carry on business as a painter in partnership. At law, each partner is jointly and severally liable for acts and omissions of the partnership and for this reason the partnership as a whole must be registered.

It should also be noted that, in many instances, partnerships are formed to gain tax advantages and that the cost of registration/licensing is tax deductible.

While at least one director, partner or employee must be individually registered as a painter in their own right, an application for registration as a company or a partnership must be processed and checked, resulting in considerable administrative costs.

Question 35: Should the requirement to register/licence partnerships and companies continue, or should some other arrangement be made. If applicable, please provide suggestions.

8. THE PRESENT DAY PAINTING INDUSTRY

8.1 *Overview of the present day painting industry*

A number of significant developments have occurred within the painting industry in Western Australia since the introduction of the PR Act. This can be attributed to improved paint technology, as well as changes and improvements in painting techniques and practices that have evolved.

Improved paint technology and simplified methods of application have also seen a dramatic increase in the 'do it yourself' ('DIY') market which, it is suggested, has had an impact on the number of home owners employing painters for home redecoration.

Most painting contractors operate in the commercial, industrial, new home construction and domestic dwelling fields. However, the painting industry includes a number of specialist areas that are coupled with other trades or activities, including:

- roof renovation and coating;
- protective coatings;
- textured coatings;
- fence construction and painting;
- pergola/gazebo erection and painting;
- wallpapering and vinyl wall covering;

In addition, the work mural and streetscape artists appears to be captured by the PR Act.

Some of the specialist areas covered by the PR Act require skills and qualifications outside of those normally associated with the painting industry, such as the artistic works that form the basis of mural and streetscape painting.

Currently, the PR Act does not provide the PRB with the flexibility to grant persons limited forms of registration to those who, whilst they may be expert in their particular field, do not have the depth of knowledge and experience required for full registration.

The Licensing Boards Bill will contain provisions for various classes of painter to be prescribed under the Rules/Regulations, if required. Discussion relating to the possibility of creating various 'classes' of painter in the future is contained in Chapter 9.

The MPAWA is the only industry body that exclusively represents painters in this State. However, that association currently has very limited membership numbers and cannot be considered as representative of the industry as a whole.

Those persons engaging painters have been categorised and described in the following paragraphs.

8.2 Registered builders

Registered/licensed builders are a major customer of the painting industry.

Under the provisions of the *Builders' Registration Act 1939* ('the BR Act'), builders are responsible for supervising the work of all trades that they employ to undertake work and are responsible to the client or owner under the building contract. Where the contract includes painting work, the builder is contractually bound to ensure that it is carried out in a proper and workmanlike manner. Under section 12A of the BR Act, the Builders' Registration Board has the power to order a builder to remedy any building work including any painting work that has not been performed in a proper and workmanlike manner.

Builders often employ painters under a sub-contract arrangement for a particular project. However, such an arrangement does not satisfy the definition of a *bona fide* employee in section 4(1) of the PR Act and therefore a painter engaged under such an arrangement must be registered if the value of the painting work to be performed exceeds \$200.

Although no firm evidence has been produced, it has been reported that some registered builders engage unregistered painters to undertake painting on building projects, to save costs.

The Building Disputes Tribunal ('BDT') can determine a dispute between a builder and a homeowner over the quality of painting work performed under a home building contract. The PRB can currently determine a workmanship dispute between a builder and a painter or a consumer and a painter (this power will be transferred to the BDT under proposals contained in the Licensing Boards Bill).

Anecdotal evidence has been reported that in some cases involving poor painting work that is performed under a home building contract by a painter sub-contracted by the builder, the builder will advise the owner to complain directly to the PRB, even though the builder is ultimately responsible for all of the work undertaken under the building contract.

Currently, confusion can often arise over whether the complaint should be lodged with the BDT under the BR Act or the *Home Building Contracts Act 1991*, or with the PRB under the PR Act (the Licensing Boards Bill will transfer the function of dealing with complaints about painting work to the BDT). Such overlapping of the consumer protection provisions of these Acts created by a dual regulatory system does not produce a desirable situation.

The Report by the Gunning Committee of Inquiry suggested that the PR Act be amended to exclude painting work performed as part of a building contract with a registered builder, and recommended that all disputes in relation to painting work and contracts should be dealt with by the BDT (Recommendation 28).

Vesting responsibility for all painting complaints with the BDT would alleviate the prospect of confusion. This subject is raised separately in Chapter 10, under the heading of 'Complaints and Disputes'.

Question 36: Should the PR Act exclude painting work performed as part of a building contract with a registered/licensed builder?

Or

Question 37: Should it be made an offence for a registered/licensed builder to engage an unregistered painter to carry out painting?

8.3 Government agencies, project managers, developers, architects and designers

While these customers do not always employ painters directly, they are all involved with the painting industry in a number of ways. This may include negotiating and liaising with painters, supervising their work and 'nominating' specific painters to be employed by builders or others as sub-contractors.

8.4 Commercial and industrial property owners and agents

Property owners and agents are major customers of the painting industry, engaging painters under a wide variety of contractual arrangements. Although many large industrial and commercial companies employ their own painters for maintenance work, others contract with painting companies on the basis of tenders, quotations or maintenance agreements.

8.5 Home owners

Homeowners directly employ the services of painters for maintenance, redecoration and, on occasions, for the painting of their new homes. This area of the market is possibly the most vulnerable to unsatisfactory workmanship and unfair trading practices.

8.6 DIY 'owner' painters

Existing legislation

Under section 16D of the PR Act, where the PRB is satisfied that any painting work has not been carried out in a proper and workmanlike manner, the PRB can order the person who carried out the painting work to remedy the painting work, or pay another person the reasonable cost of having the work remedied.

Issues and questions

Many homeowners undertake painting work themselves and are encouraged to do so by a large DIY industry, that is promoted strongly by hardware stores and by paint suppliers who specialise in that market.

Currently, where a person carries out defective painting work on his or her own home and then sells the property to a purchaser who complains to the PRB about the painting work, the PRB has the power to order the former owner to remedy the defective work, or alternatively to pay the purchaser the reasonable cost of having the work remedied.

While it is acknowledged that some people are involved in renovating homes for the purpose of resale and that part of this work may include an element of DIY or owner painting, the need for consumer protection from faulty workmanship under such circumstances is very questionable.

The purpose of the PR Act was not to regulate DIY or 'owner' painters, but to regulate painting work undertaken on a commercial basis for fee or reward.

Question 38: Should the PRB's existing powers under section 16D of the PR Act to regulate DIY painting be removed?

9. ESTABLISHING ‘CLASSES’ OR ‘CATEGORIES’ OF PAINTERS AND CREATING EXEMPTIONS

9.1 *The recognition of different skills within the definition of ‘Painting’*

Existing legislation

As noted in Chapter 5, the interpretation of ‘painting’ in section 2 of the PR Act covers all aspects of painting to the whole or any part of a building or other structure, except for concrete or similar floors, paths or driveways. The PR Act encompasses such activities as roof coating and wallpaper hanging but specifically excludes signwriting.

Proposed amendments – the Licensing Boards Bill

The Licensing Boards Bill will contain provisions for various classes of painter to be prescribed under the Rules/Regulations, if required, and for conditions to be imposed on licences.

Issues and questions

The definition of ‘painting’ serves to define the industry to which the PR Act applies. In that regard, there are different categories of painters that should be considered, including a variety of specialist areas that are coupled with other trades or activities. Some of the specialist areas covered by the PR Act require skills and qualifications substantially different to those normally associated with ‘painting’, for example, wallpaper hanging and roof coating.

A number of people have questioned the need for these ‘specialist’ painters to qualify in each of the aspects covered by the current definition of ‘painting’. They suggest that this is overprotective of the industry, as well as restricting the availability of services to consumers and adding unnecessary costs.

The following paragraphs contain an overview of some of the different categories of painters in Western Australia. It has been suggested that the need for all painters to meet the basic standards of all aspects of painting could be resolved by allowing limited registrations requiring lesser qualifications, appropriate to specific specialist categories for those persons who may be expert in their particular field but who do not have the depth of knowledge and experience required for full registration/licensing.

A broad question about the possibility of creating separate classes or categories of painters is contained in paragraph 9.6 below.

9.2 *Wallpaper hangers*

This section of the painting industry appears to have become more specialised in recent years and some ‘painting’ firms only hang wallpaper, vinyl and wall fabrics. Work covers both the residential and commercial fields, including offices and hotels. Customers include home owners, architects, interior designers and business proprietors.

In order to operate a business as a wallpaper hanger a person must become registered as a painter and be proficient in all facets of the painting trade.

9.3 Roof coaters and restorers

The roof coating and restoration industry has grown with the proliferation of tiled roofs, particularly the residential market, relying on extensive advertising techniques and door-to-door trading.

This sector of the painting industry is also very specialised. As with wallpaper hangers, a roof coater must also become registered as a painter and is required to be proficient in all facets of the trade.

The roof restoration industry has often been the cause of concern, due to the actions of a relatively small number of unscrupulous operators. These operators have created a high incidence of reported cases of high-pressure sales, misleading representations, poor workmanship, failure to adhere to guarantees, and the sale or winding up of businesses.

Itinerant tradespersons are sometimes also the cause of major problems within this sector of the painting industry, targeting the most vulnerable consumers.

9.4 Associated works, including fence and pergola builders

A growing number of firms specialise in these fields and undertake all work including design, construction and painting. The major aspect of this work is construction, with painting forming a minor component of most jobs, both in terms of time and monetary value.

Nevertheless, those firms and individuals engaged in this type of work need to be registered painters, or to employ a registered painter to undertake the painting aspect of their product.

While fence painters and pergola builders fall within the scope of the PR Act, concrete floor, path or driveway painters are specifically excluded.

9.5 Signwriters

Painting work in the nature of signwriting is specifically excluded from the PR Act.

9.6 The possibility of creating classes or categories of painters

One method of resolving some of the difficulties caused by the current requirements of the PR Act would be to introduce a system of limited registration/licensing, by creating various classes or categories of 'painter'. Such a system would recognise the fact that different skills are required for specialised sections of the painting industry, for example that roof coaters do not necessarily need to be proficient in wallpaper hanging and vice versa. Each 'class' of painter would need to demonstrate to the PRB competence in their particular field.

A system of classes or categories would not only benefit consumers by limiting the current restrictions, but would also benefit those painters who have no desire to move away from their specialist field.

As noted previously, the Licensing Boards Bill will contain provisions for different classes of licences to be prescribed under the Rules/Regulations, if required.

Question 39: Assuming that the existing system of regulating painters is to remain, should limited registration/licensing be introduced for specialised classes or categories of painting, to be prescribed under the Rules/Regulations of the PR Act? If so, what specific 'classes' or 'categories' should be prescribed?

9.7 Exemptions from registration/licensing as a painter

Existing legislation

The existing requirements of the PR Act do not allow for exemptions to be granted to certain sections of the 'painting' industry.

Proposed amendments – the Licensing Boards Bill

The proposed amendments are likely to include provisions permitting the Governor to prescribe exemptions, under the Rules/Regulations. No prescribed exemptions are currently planned but some may be identified under this review process.

Issues and questions

Certain sections of the painting industry may in future be identified as being either inappropriate or not in the public interest to fall within the jurisdiction of the PR Act. Sectors of the industry will therefore be able to seek an exemption, if they are able to demonstrate to the satisfaction of the Minister that it is either inappropriate or not in the public interest for the PR Act to apply to those 'painting' activities.

The sealing industry is an example of an industry sector that has previously requested exemption. That industry specialises only in the application of sealers, as opposed to paints to roofs, walls, floors, etc.

Another group that has sought exemption are streetscape and mural artists. Past decisions of the PRB indicate that mural and streetscape artists are, in their view, 'captured', by the existing provisions of PR Act. This is unlikely to have been the intention of the Parliament when the PR Act was originally passed but, in the circumstances, mural and streetscape artists currently need to be registered/licensed as painters, or to employ a registered painter to supervise their work if they are to avoid the risk of prosecution by the PRB.

The majority of the artists work is undertaken on community arts projects or commercial premises, rather than domestic dwellings. The objective of the work is to create visual art.

Because the artists that undertake this type of work require radically different qualifications to those of a painter, it can be argued strongly that mural and streetscape artists should be excluded from the provisions of the PR Act.

Question 40: Should those persons that undertake the application of 'sealers', as opposed to 'paints', be exempted from the provisions of the PR Act?

Question 41: Should streetscape artists and mural artists be excluded from the provisions of the PR Act?

10. COMPLAINTS AND DISPUTES

10.1 *The existing complaint and dispute resolution process*

Existing legislation

Section 16D of the PR Act currently provides that where the PRB is satisfied that any painting work on any building or structure has not been carried out in a proper and workmanlike manner, it may order the person who carried out the work to:

- remedy the painting work within a reasonable time; or
- pay to the person for who the work was performed the reasonable costs of having the work remedied.

Under section 16D of the PR Act, the PRB is empowered to order a person who has failed to carry out painting work in a proper or workmanlike manner (whether they are a registered painter or not) to remedy the work or pay the owner of the painted premises “*such costs of remedying the painting as the Board considers reasonable*”.

Section 16F of the PR Act provides that, before making an order to remedy or an order to pay, the PRB must notify the person who carried out the painting of the details of the complaint and afford them a reasonable opportunity to give an explanation.

Under section 16C of the PR Act, the PRB may undertake an inspection or examination of any painting. Section 16J allows any registered painter to also request the PRB to make such an examination.

As noted in paragraph 10.2 below, the PRB is not empowered to deal with complaints or disputes of a contractual nature, for example those relating to the cost of the work.

Proposed amendments – the Licensing Boards Bill

The Licensing Boards Bill will provide for the establishment of a dispute conciliation process for painting work, which is expected to resolve the majority of painting complaints from consumers.

The power to issue formal orders relating to defective painting work will be transferred from the PRB to the BDT. Subject to confirmation at a later date, the BDT is also likely to be given the authority to deal with painting complaints of any value over the prescribed threshold for unregistered painting (currently \$200).

Disputes relating to industrial and commercial painting work will need to be referred to an appropriate court.

Issues and questions

On receipt of a complaint about the quality of painting work, the current procedure of the PRB is first to advise the complainant to give the painter details in writing of the complaint, so that the painter has the opportunity to respond. If that does not result in a satisfactory outcome, the complainant is sent a form to complete and return to the PRB, with supporting documentation.

The PRB may comply with a request for inspection, by sending a qualified inspector to carry out an examination of the painting, usually in the company of both the owner and the painter. The inspector then issues a report, or in appropriate cases issues a field notice requesting that remedial work be undertaken. If either party disputes the inspector's findings, a formal PRB Hearing is then convened.

In the future, the inspector will present his/her findings to the conciliator or to the BDT, in lieu of the PRB.

Although figures are not available from the PRB's annual reports, the cost to the PRB of employing qualified persons to undertake inspections of painting is very significant. However, no provision currently exists for the recovery of any proportion of those costs. It has been suggested by some that the PRB should be able to recover at least part of its inspection costs by the imposition of a prescribed fee, say between \$100 and \$200. Others have suggested that as inspections are an essential function of the PRB they should continue to be provided free of charge.

The PRB dealt with a total of 67 formal complaints in 2005, of which 21 were referred to a PRB hearing for determination. The remainder were resolved between the parties, often with the assistance of PRB staff. Of the complaints that were determined by the PRB, a total of 16 orders to the value of \$60,8112 were made against painters, to remedy unsatisfactory painting work or to pay the owner the cost of rectification.¹⁷

Question 42: Should the PRB be provided with the discretion to charge a prescribed fee for an inspection? If so, what amount should be charged?

Question 43: If a fee is to be charged by the PRB for an inspection, should this be refunded to the consumer if their complaint is upheld? If so, should the painter be ordered to pay this cost?

10.2 Contractual complaints

Existing legislation

The PRB is only able to make an order under section 16D of the PR Act where it is satisfied that any painting has not been carried out in a proper and workmanlike manner. Contractual disputes currently need to be dealt with in another jurisdiction.¹⁸ Where they relate to home building work undertaken by a builder, such complaints may be referred to the BDT for resolution.

Proposed amendments – the Licensing Boards Bill

The proposals to be contained in the Licensing Boards Bill will provide for the conciliation of disputes relating to painting work or transactions between a licensee (painter) and a consumer, to assist the parties to reach an agreement. Conciliation will therefore be available for both workmanship and contractual matters.

¹⁷ Source: PRB Annual Report 2005

¹⁸ The Magistrates Court deals with consumer/trader claims up to the value of \$50,000

At the date of publication of this issues paper, consideration was being given to providing the BDT with the authority to deal with both workmanship and contractual disputes between consumers and painters, for those cases where conciliation is not appropriate or has not proved successful. Consideration was also being given to empowering the BDT to deal with disputes of any value over the prescribed monetary threshold for unregistered painting (currently \$200).

The BDT currently deals with complaints lodged by homeowners or builders relating to home building and associated works where the contract is valued between \$6,000 and \$200,000.

The above option is as proposed by the Gunning Committee of Inquiry, which recommended that the PR Act should be amended to confer jurisdiction over disputes concerning painting work and contracts to the BDT or any other body charged with the dispute resolution function.

As will be the case for workmanship problems, contractual disputes relating to industrial and commercial painting work will need to be referred to an appropriate court.

Issues and questions

Some doubt currently exists about whether the PRB is able to accept a complaint from a registered painter. This issue will need to be addressed for the future, when the BDT is able to deal with contractual issues.

The PR Act does not currently make provision for the enforcement of a pecuniary (monetary) order made under section 16(1)(b) or section 16E of the PR Act. If the dispute resolution jurisdiction of the BDT were to be increased to include financial and contractual issues, it might be necessary to make provision for the enforcement of the payment of pecuniary sums, similar to the provision contained in section 44 of the BR Act.

Question 44: Should the BDT be empowered to accept complaints from registered/licensed painters?

Question 45: Should provision be made to allow for the enforcement of orders for payment of pecuniary sums made under section 16D or section 16E of the PR Act?

10.3 The cost of lodging a complaint

Currently, there is no cost for lodging a complaint with the PRB. That will in the future continue to be the case for the conciliation of painting complaints. However, a fee of \$27 (\$16 for financially disadvantaged persons) is payable to the BDT upon lodgement of a complaint.

10.4 Limitation on time for making complaints

At present there is no time limit in which the PRB may deal with painting complaints. Some persons have previously expressed the view that most complaints relating to the breakdown of painting work would become evident within the first 12 to 18 months and that therefore a two year limit would seem appropriate.

However, others believe that painting should be expected to last much longer than two years, for example, at least five years. This view tends to be supported by the advertisements of some paint manufacturers that suggest that their products may be expected to last for many years.

Question 46: Should a workmanship complaint lodged under section 16D of the PR Act be made within a limited period of the date of completion of the painting work? If so, should that period be two years, five years or some other length of time?

10.5 Time limits for orders

Existing legislation

Under section 16E of the PR Act, the PRB has the power to order that a painter pay a person the reasonable cost of remedying painting where the painter has failed to comply fully with an order to remedy defective painting work made under section 16D, whether or not the order has been varied by the SAT under section 18 of the PR Act.

Proposed amendments – the Licensing Boards Bill

The proposed amendments will transfer the functions of the PRB relating to the making of orders to the BDT.

Issues and questions

It has been suggested that it would be appropriate for a time limit to be imposed in respect of the power to make orders under section 16E. The suggestion is that this should commence to run from the date of the making of any order under section 16D, or an order made by a magistrate under section 18(1)(b), rather than from the date of completion of the painting. A period of six months has previously been suggested as being reasonable.

This would prevent a person from being unfairly deprived of the opportunity to obtain an order under section 16E, in circumstances where a painter has failed to comply with an order made under section 16D(1)(a) of the PR Act.

Question 47: Should provisions require that a complaint under section 16E of the PR Act be made within six months of the date of the making of an order under section 16D(1)(a), or the date of an order varying that order made under section 18(1)(b)?

10.6 Exercise of prescribed jurisdiction by the Registrar or an authorised officer

Existing legislation

Currently, there is no provision in the PR Act for an authorised officer of the PRB to be delegated the powers of the full Board of the PRB. This would be appropriate in minor or administrative type matters, for example to grant licences where no objection to the application has been received.

Proposed amendments – the Licensing Boards Bill

At the date of publication of this issues paper, consideration was being given to the inclusion of uniform powers for the boards within the Licensing Boards Bill, including the PRB, to delegate powers to authorised officers.

Issues and questions

It has been suggested that in order to reduce the workload of the PRB and to expedite decisions, an authorised officer of the PRB should be allowed to exercise some of the powers of the full Board of the PRB, provided that such powers are specifically outlined in the Rules/Regulations.

These safeguards could, for example, be similar to those contained in section 33A of the BR Act that relates to the exercise of the prescribed jurisdiction of the BDT.

However, because the workload of the PRB will be substantially reduced as a result of the provisions of the Licensing Boards Bill, the need for such a provision is perhaps questionable.

Question 48: Should an authorised officer of the PRB be allowed to exercise certain powers of the Board, to be prescribed under the Rules/Regulations? If so, what particular powers should be included?

Question 49: If yes to the above, should a person have the right to request that the PRB review a decision made in exercise of these delegated powers?

11. THE INVESTIGATION AND COMPLIANCE PROVISIONS OF THE PR ACT

11.1 Offences against the PR Act and cancellation or suspension of registration

Existing legislation

The PR Act establishes a number of offences, some of which relate only to persons who are registered, and others which relate only to unregistered persons. Section 16 of the BR Act lists a number of circumstances under which a painter's registration/licence may be cancelled or suspended by the SAT. These include where a painter has been convicted of fraudulent conduct.

Section 20 provides that proceedings may be taken by the Registrar or by any other person authorised by the Board of the PRB, either generally or in any particular case. The Deputy Registrar has been authorised, on a general basis, to take proceedings.

As of 1 January 2005 the PR Act was amended because of the establishment of the State Administrative Tribunal ("the SAT"). As a result, the PRB can no longer hold disciplinary inquiries under section 16 of the PR Act. Section 16 of the PR Act now provides that the PRB may allege to the SAT that disciplinary action should be taken against a registered painter, to cancel or suspend their registration.

The PRB may only prosecute offences against the PR Act if they occur in an area within their prescribed jurisdiction. Under section 20(2) of the PR Act, a prosecution must be commenced within 18 months after the date on which the offence was allegedly committed. All prosecutions are undertaken in the Magistrates' Court.

Proposed legislation – the Licensing Boards Bill

Under the proposed provisions of the Licensing Boards Bill, a 'uniform' set of investigation powers will be set out in a schedule to the PR Act, including the power of investigators to require the production of records.

It is also proposed that the responsibility for referring matters to the SAT and for conducting prosecutions under the PR Act will be transferred to Consumer Protection.

Other proposed subsidiary legislation

It is proposed that the PRB will shortly be enabled to issue infringement notices for certain offences against the provisions of the PR Act, such as failing to display painters' names or numbers on signs and advertisements. This is the result of provisions included in the *Criminal Procedure Act 2004 (WA)* for the preparation of the necessary Regulations, to be known as the *Painters' Registration (Infringement Notices) Regulations 2006*. Infringement notices are issued only for minor offences, involving simple straightforward factual situations.

Issues and questions

The PRB has published a prosecutions policy. That policy is available on request from the PRB and to download from the PRB's website at www.prb.org.au.

The PRB undertakes a number of compliance actions, including:

- warnings and the making of allegations to the SAT relating to unregistered painting and breaches of the PR Act;
- prosecutions for offences against the PR Act; and
- random site inspections.

In 2005, the PRB investigated a total of 106 allegations of breaches against the PR Act and commenced 15 prosecutions for unregistered painting. One matter was referred by the PRB to the SAT for disciplinary action against a registered painter, pursuant to section 16(1) of the PR Act.¹⁹

During the year ended 31 December 2005, the PRB's painting inspectors conducted a total of 2060 random site visits as part of the compliance program.

A number of specific issues and questions regarding the PRB's investigations and compliance activities are contained in the following paragraphs.

11.2 Unregistered painting

Existing legislation

Section 4 of the PR Act (Prohibition against unregistered painters carrying on business), provides that no painter shall carry out painting, otherwise than as a *bona fide* employee, where the fee or charge exceeds the unregistered painting threshold (currently \$200). A penalty of \$2,000 applies to this offence and \$20 per day for a continuing offence.

Under the provisions of section 4A of the PR Act (Unregistered persons not to assume title of registered painter), it is an offence for an unregistered person to assume, take or use the name or title of 'registered painter'. No specific penalties are provided for the offences covered by section 4A or section 25 of the PR Act (Registrations not to be transferred or assigned). In those cases the maximum penalty that may be imposed is currently \$500, in accordance with the provisions of section 26 of the PR Act (Offences).

Proposed amendments – the Licensing Boards Bill

Under the proposed provisions of the Licensing Boards Bill, the maximum penalty for offences under sections 4A and 25 of the PR Act will be \$5,000.

Section 26 of the PR Act will be amended to increase the maximum penalty for offences to \$5,000 where no specific penalty is otherwise stipulated.

Issues and questions

According to the PRB's website, it is their view that the object of these sections is to ensure a level of competency in the painting trade for the protection of a variety of interested groups, both within the building industry and the general community. In the circumstances, it is the PRB's stated policy to prosecute all detected cases of unregistered painting and any associated offence that potentially undermines the registration process. This policy is subject to a number of general considerations.

¹⁹ Source: PRB Annual Report 2005

Refer to Chapter 3 for discussion and questions about whether to continue the registration/licensing of painters in its present form, and for an outline of some possible options for changes.

It has been suggested that specific penalties should be provided for those offences against section 4A of the PR Act (Prohibition against unregistered painters carrying on business) and section 25 of the PR Act (Registrations not to be transferred or assigned).

11.3 Disciplinary proceedings

Existing legislation

Section 16(1) of the PR Act empowers the PRB to allege to the SAT that disciplinary action should be taken against a registered painter. It is this provision, carrying with it the ultimate sanction of prohibiting a painter from carrying out his/her trade, which underpins the PRB's role of investigating consumer complaints and maintaining painting standards. The SAT may then cancel or suspend a painter's registration in the following circumstances:

- (a) the registration has been obtained by fraud or misrepresentation;
- (b) the painter has been guilty of fraudulent conduct, negligence or incompetence in carrying out painting;
- (c) the painter has been convicted of an offence against section 16G (failure to comply with an order);
- (d) the painter, being a partnership or company or other body corporate, has failed to comply with any provision of section 14B (painting carried out by partnership, company, etc); or
- (e) the painter, being a partnership, company or other body corporate, has ceased to have registered under the PR Act at least one partner of the partnership, or one director of the company, or one member of the board of management of the body corporate or a person employed by the partnership, company or body corporate whose duty or part of whose duty it is to manage or supervise painting carried out by such partnership, company or other body corporate.

Proposed amendments – the Licensing Boards Bill

The proposed amendments will transfer to Consumer Protection the power to make allegations to the SAT.

Issues and questions

In the year ended 31 December 2005, the PRB referred only one matter to the SAT, pursuant to section 16(1) of the PR Act.²⁰

Currently, the only disciplinary tools that are available to the SAT are cancellation and suspension of registration. In some circumstances, a disciplinary breach may not justify cancellation or suspension but may still warrant limited punitive action in the form of a fine, or an order to undertake retraining.

²⁰ Source: PRB Annual Report 2005

Question 50: Should the SAT be authorised to impose a fine, or an order to undertake retraining, in lieu of the seeking cancellation or suspension of registration, when it finds cause for disciplinary action under section 16 of the PR Act?

11.4 Penalties

Existing legislation

As noted previously, the PR Act contains penalties for certain offences.

A full table of offences under the PR Act and the existing penalties can be found on the PRB's website, www.prb.org.au.

Proposed amendments – the Licensing Boards Bill

All existing penalties are to be increased significantly, under the proposals contained in the Licensing Boards Bill. The maximum proposed is \$5,000.

Issues and questions

In the past, penalty amounts have not been reviewed or amended on a regular basis. In the circumstances, it has been suggested that each of the penalties should be reviewed in line with the CPI, at either three or five-year intervals unless exceptional circumstances make an earlier review desirable.

Question 51: Should each of the penalties provided under the PR Act be reviewed in line with CPI at regular intervals? If so, should the review take place ever three years or every five years?

11.5 Applications for appeals

Existing legislation

Applications for appeals against reviewable decisions of the PRB are made to the SAT. Section 18(1) of the PR Act provides that:

“Any person aggrieved by a reviewable decision of the Board may apply to the State Administrative Tribunal for a review of the decision.”

Proposed amendments – the Licensing Boards Bill

The proposed amendments will provide that reviewable decisions by the PRB, Commissioner or the BDT may be referred to the SAT.

11.6 Re-registration/licensing of a painter

Existing legislation

Section 16B of the PR Act provides that on the application of the PRB or the painter whose registration has been cancelled or is suspended, the SAT may order that the suspension of a registration is terminated or a registration that has been cancelled be reinstated.

Section 21(4) provides that the PRB may suspend or cancel the registration of a painter who defaults in the payment of fees.

Issues and questions

The above provisions are said to have created a difficulty relating to the power to reinstate a painter's registration. For example, if a painter is suspended by the PRB under section 21(4) of the PR Act for making a default in paying any fees, the registration cannot be reinstated unless an order is made by the SAT.

Question 52: Should the PRB be provided with the power to reinstate a painter's registration/licence in certain circumstances, such as after having paid all outstanding fees?

APPENDIX A

OCCUPATIONAL LICENSING RISK ASSESSMENT QUESTIONNAIRE

Examples of matters usually subject to assessment, prior to recommending an occupational licensing or registration regime.

Key Issues	Comment
Why are certain occupations licensed?	<ul style="list-style-type: none"> • What are the risks? • What are the key indicators for the perceived need for licensing? • What other building trades are licensed and why?
Key Indicators	Comment
Market problems	<ul style="list-style-type: none"> • What problems currently exist in the market relevant to this industry? • What potential problems may emerge? • Over what period of time are problems likely to emerge? • What are the market trends? • Has there been a recent crisis/market failure? • What is the level of complaints? • What are the types of complaints? • What type of industry/consumer conduct is causing concern? • What is the extent of early warnings in industry/ consumer behaviour?
Potential for losses	<p>What is the extent of the likely financial losses to consumers?</p> <ul style="list-style-type: none"> • Is there a likely impact on the physical environment? • Are there safety issues involved for the consumer • What is the extent to which industry can be damaged (e.g. reputation)? • To what extent can consumer confidence be severely affected? • Are the BDT or the Magistrates Court able to resolve most complaints?
Other Australian jurisdictions	<ul style="list-style-type: none"> • What is the level of regulation by other jurisdictions? • What are the implications for Mutual Recognition legislation? • What links exist with other jurisdictions (e.g. flow of information, uniform legislation, template legislation)? • What is the historical rationale for the industry to be/not to be regulated?

Key Indicators	Comment
Size of the industry	<ul style="list-style-type: none"> • How many traders are competing in the industry? • What is the size of the industry sector, which is likely to be a problem?
Cost/benefits of regulation	<ul style="list-style-type: none"> • What are the likely costs/benefits of protecting consumers by registration or licensing? • What are the likely costs/benefits to Government? • What is the liability of Government? • Who should regulate? • Which Government department is in the best position to regulate? • What is the level of industry contribution including financial?
Impact on competition	<ul style="list-style-type: none"> • What impact will protection/regulation have on competition and National Competition Policy?
Barriers to entry	<ul style="list-style-type: none"> • What barriers will registration or licensing create for industry participants entering the industry?
Education requirements	<ul style="list-style-type: none"> • What are the skill requirements? • What qualifications do industry participants need to enter the industry? • Do all industry participants require each of these skills?
Existing legislation	<ul style="list-style-type: none"> • What is the current level of regulation? • Do any tribunals, boards, committees, advocacy groups, or expert panels exist? • What other section of this market is already regulated? • What other elements of the activity are regulated? • Why is one sector regulated and not the other (e.g. painters vs tilers)?
Level of self-regulation	<ul style="list-style-type: none"> • What quality assurance schemes exist? • Are there any Australian standards? • What is the level of industry coverage? • How rigorous are the self-regulatory arrangements? • What enforcement sanctions exist? • Do any self-regulatory codes exist in this industry?

Key Indicators	Comment
Peak industry groups	<ul style="list-style-type: none"> • What is the coverage of the industry by peak industry groups • What views do the major building groups have on the subject? • What is the strength of the industry group (numbers and percentage of the total industry)? • Are the views of the industry group known to be a reflection of the majority of industry participants?
Effectiveness of remedies	<ul style="list-style-type: none"> • How effective are current remedies in deterring breaches of legislation and unethical behaviour? • What length of time is required to remove a person from this industry? • How long does it take to recognise that there is a problem? • Is there a connection between recognising that a problem exists and the length of time required to remove a person's licence to practice?
Nature of transactions	<ul style="list-style-type: none"> • What are the methods of payment? • Are transactions based on success of sale and commission? • Are there discounting and price cutting practices in this industry? • Are there "too good to be true" factors? • What level of investment do service providers require? • To what extent does industry depend on turnover? • To what extent does this industry rely on return on investment?
Attraction into the industry	<ul style="list-style-type: none"> • Who is attracted into this type of industry and why?
Reputation of the industry	<ul style="list-style-type: none"> • Is this industry dependent on repeat sales? • Is this industry conducive to fly-by-night traders? • How important is the prior history of traders? • What capacity is there for rogue traders to move on and start again under another name?
Age/growth of the industry	<ul style="list-style-type: none"> • What is the age of this industry (young industries are not likely to have a peak industry group)? • What is the rate of growth in this industry? • What is the probability of long-term survival in this industry?

Key Indicators	Comment
Volatility of the industry	<ul style="list-style-type: none"> • Are there booms, peaks and troughs in this industry?
Consumer protection	<ul style="list-style-type: none"> • Are there particular categories of consumers requiring protection? • Is protection required at all levels of the market? • Who is the industry servicing? • What types of protection/safety nets are required?
Changes in consumer behaviour	<ul style="list-style-type: none"> • What changes in consumer behaviour are occurring to warrant regulation (e.g. increasing need for self-funded retirees to invest)?
Changes in demographics	<ul style="list-style-type: none"> • What demographic factors may be indicators to the need for industry regulation (e.g. baby boomer bubble, growth in disposable dollars, growth in the leisure industry, growth in the provision of services to various consumer sectors, e.g. youth)?
Changes in technology	<ul style="list-style-type: none"> • Is the technology boom leading to changes in society functions (e.g. e-commerce)?
Changes in government policy	<ul style="list-style-type: none"> • What government policy changes have occurred which may lead to changes in consumer behaviour and increasing consumer risks?
Consumer/trader relationships	<ul style="list-style-type: none"> • Is there a direct or indirect relationship between the consumer and trader? • Is there an agent/client relationship? • What fiduciary duties exist?
Insurance	<ul style="list-style-type: none"> • Are there any arrangements for financial compensation, (e.g. professional indemnity insurance, home indemnity insurance, travel compensation fund, fidelity funds)?
Access to remedies	<ul style="list-style-type: none"> • Do consumers have access to remedies other than through licensing (e.g. BDT)?
Frequency of transaction	<ul style="list-style-type: none"> • Does the infrequency of transactions lead to information asymmetry for consumers? • What level of expertise do consumers need?

Key Indicators	Comment
Significance of transactions	<ul style="list-style-type: none"> • How significant is each transaction? • How much money is involved in each transaction?
Level of consumer awareness	<ul style="list-style-type: none"> • How aware are consumers of the possible problems/traps? • How effective will an education response be in addressing market problems?
Possible Options: Do nothing Use education strategies Introduce an appropriate regulatory regime	Comment: <ul style="list-style-type: none"> • Maintain status quo • On-going education strategies directed at consumers and traders • Introduce a voluntary Code of Practice • Introduce a mandatory Code of Practice • Introduce a registration or licensing regime

REGULATION OF PAINTERS IN AUSTRALIA

APPENDIX B

(States and Territories not listed do not regulate the painting industry)

	WA	NSW	QLD	SA
Act	Painters' Registration Act 1961	Home Building Act 1989	Queensland Building Services Authority Act 1991	Building Work Contracts Act 1995
Definition of painting	All aspects of painting to the whole or any part of a building or other structure recognised by law as a fixture (but not being a floor, path or driveway comprised of concrete or other similar substance). It does not include sign writing but does include the hanging of wall-paper and similar substances and the application of roof coatings.	The application of a clear, resin based or pigmented product in liquid form which, when applied to a surface by brush, roller or spray gun, forms a dry, adherent film. For decorative purposes (e.g. murals, wall paper, frescos), preparations and minor repairs and for protective purposes.	Applying paint or other substance for protective, decorative or technical purposes, including colour matching. This includes wall paper and texture coatings, along with preparation of surfaces for application of paint, other protective, decorative or technical materials.	Falls within the definition of a building work contractor which is a person that carries on a business in connection with constructing, erecting, underpinning, altering, repairing, improving, adding to or demolishing a building or structure, including associated work in excavating or filling a site.
Licence categories	Registered Painter for - Individual - Partnership - Company	- Contractor - Painting and Decorating - Qualified Supervisor Certificate - Painting and Decorating - Nominated Supervisor - Painting and Decorating	Trade Contractor - Painting and Decorating Licence	Building Work Contractors Licence - Specified Building Work Limited to: Painting and Decorating And/or Building Work Supervisors Registration – Specified Building Work Limited to: Painting and Decorating
Value at which licence required	Over \$200	Over \$1000	Over \$1100	No limit
Administration of licence	Painters' Registration Board	Office of Fair Trading	Building Services Authority	Office of Consumer and Business Affairs
Area of jurisdiction	Metropolitan Region plus the whole of the South West Land Division of the State other than the Shires of Mukinbudin, Mt. Marshall and Narembeen, plus specified townships within the Eastern Goldfields and Esperance regions.	State wide	State wide	State wide

	WA	NSW	QLD	SA
Qualifications for individual contractor licence	<ul style="list-style-type: none"> - 21 yrs old and over - have good character - Any one of the following: <ul style="list-style-type: none"> (a) five years practical training and completed Certificate IV in Painters Registration Course. (b) completed apprenticeship and passed examinations. (c) attained a degree of proficiency as a painter which is sufficient to satisfy the PRB. 	<ul style="list-style-type: none"> - Must be 18 years old and over - Must be a fit and proper person. - Not be a current apprentice or trainee. - Completion of the relevant Trade Certificate Course through TAFE NSW (or equivalent) or successful completion of the Licence Skills Assessment in the relevant trade category conducted by the Building Industry Skills Centre. - Have completed either an approved apprenticeship or four years acceptable practical trade experience. 	<ul style="list-style-type: none"> - Any one of the following: <ul style="list-style-type: none"> (a) Completed either a apprenticeship in painting and decorating or Certificate III in General Construction (Painting and Decorating). (b) successful completion of a course equivalent to a course mentioned in (a). (c) a recognition certificate as a qualified painter and decorator. (d) a qualification issued by an approved authority for the class of licence. - An approved managerial qualification. - Two years experience, includes apprenticeship or other training experience. - Relevant financial requirements 	<ul style="list-style-type: none"> - Must be a fit and proper person - Have sufficient financial resources (not be bankrupt). - Have demonstrated business competency by completing two units of competency from Business Services Training package. <p>Need to be a registered supervisor to contract for work. To be a supervisor required to:</p> <ul style="list-style-type: none"> - Be tested for technical competency. - Certificate III in Painting and Decorating or demonstrated sufficient qualifications and/or experience through an interview process.
Life of licence	One year with annual renewal	One year with annual renewal	One year with annual renewal	One year with annual renewal
Fee to register	\$105 for companies and individuals, \$80 for partners	\$229 for Contractor, \$320 - \$366 for Partnership and Company, \$167 for Supervisor	Dependent on annual turnover and financial report.	\$145 for Contractor, \$145 for Building work supervisor
Financial reporting	No	No	Yes	Yes
Dispute resolution	PRB can issue a rectification order or order to remedy. The order may be reviewed by the State Administrative Tribunal.	Fair Trading can issue rectification order. If not resolved by Fair Trading can be referred to Consumer, Trader and Tenancy Tribunal.	BSA can issue a rectification order. If not resolved within BSA can be referred to Commercial and Consumer Tribunal.	OCB can perform conciliation, if not successful can be referred to Magistrates Court.



Department of Consumer
and Employment Protection
Government of Western Australia

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Energy Safety

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Labour Relations

2 Havelock Street, West Perth, Western Australia 6005
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Facsimile: 9222 7777 Email: labourrelations@docep.wa.gov.au

Resources Safety

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WorkSafe

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