SOUTH AUSTRALIA

COMPETITION POLICY REVIEW OF THE DEVELOPMENT ACT 1993 AND THE DEVELOPMENT REGULATIONS 1993

FINAL REPORT

July 1999

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RECOMMENDATIONS

The following recommendations of the Review Panel arise from a competition policy review of the Development Act, 1993 (the Act) and Regulations pursuant to obligations of the Government under clause 5 of the Competition Principles Agreement.

The Panel has identified the restrictions on competition in the Act and Regulations and analysed the effects of these restrictions in the relevant market/s. In assessing and balancing the costs and benefits of the restrictions, the Panel has concluded that a number of the identified restrictions are justifiable on the basis that the benefit of the restriction outweighs the cost and that the objectives of the legislation can only be achieved by the restriction.

However, in certain instances, the conclusion was drawn that, on balance, the costs arising from the restriction were greater than the benefits arising and, accordingly, made recommendations as detailed below.

(1) The Review Panel takes the view that, as a general rule, competitive neutrality principles should apply to government business enterprises when engaged in business activities for profit and when competing directly with the private sector. In these circumstances, government agencies should be required to undertake the same development assessment procedures as a private sector applicant and be subject to exactly the same requirements for application fees, public consultation, classification of a building and building safety measures.

Further, the Review Panel recognises that, while the provision of health and education services by government is, as a general rule, exempt from the application of competition policy on the grounds that the development is in furtherance of community service obligations, the Review Panel took the view that where such a development is undertaken on the basis of commercial gain, competitive neutrality principles should apply. In relation to the application of the Building Rules to Crown Development, the principle of occupant safety should not be compromised by exemptions in the Act.

(2) The Panel takes the view that there is clear potential to apply the use of private certification to Provisional Development Plan (**PDP**) consent applications, but only in the case of a *complying* development. While recognising that there is not a wide scope for this at present, given that the range of *complying* development is limited, the Panel notes that a policy to increase the range of *complying* development through Plan Amendment Reports (**PAR**) may remedy this situation and expand the benefits of this mechanism.

However, wider application of private certification for PDP consent to most development applications (including *non-complying* and those made on merit grounds) is not supported by the Panel as such discretionary judgements should only be made by independent and accountable decision-making bodies.

(3) The Review Panel recommends the removal of the requirement in the Regulation 86 to seek independent qualified planning advice in certain instances as other jurisdictions do not have this requirement and, in the view of the Panel, there is no sustainable argument that the

benefits of this requirement (which are difficult to quantify) outweigh the costs of compliance. The Panel notes that there are sufficient safeguards in place in any event, as the final arbiter for decisions to which Regulation 86 applies will be either the Minister or the Development Assessment Commission (and both of these bodies ensure planning advice is sought as part of the decision making process).

(4) The Review Panel has noted that other jurisdictions have lesser periods of post graduate experience before qualification to act as a private building rules certifier, than the eight years required by the Act, and recommends that this matter be examined. It is noted that the matter of an appropriate period of experience is currently being considered by a Working Group of the Building Advisory Committee at a national level.

(5) The Review Panel notes that in Section 48(5) the Governor, before approving a Major Development must only *have regard to* the relevant Development Plan, the Building Rules and the Planning Strategy. The Panel understands that, as a matter of practice, developments have only been approved which comply with the requirements of the Building Rules. The Panel supports this position and strongly recommends that it be maintained in respect of future development.

(6) The Review Panel recommends that this Report be treated as a public document and made available to any interested party, after Ministerial consideration of the Report.

COMPETITION POLICY REVIEW OF THE DEVELOPMENT ACT AND REGULATIONS

1. INTRODUCTION

1.1 *Background*

The following represents the report of the Review Panel constituted to undertake a Competition Policy Review of the *Development Act, 1993* **(the Act)** and the *Development Regulations, 1993* **(the Regulations)**, pursuant to obligations under clause 5 of the Competition Principles Agreement **(the Agreement)**.

The Agreement binds the State Government to review current legislation which restricts competition by the year 2000. This obligation is tied to Competition Payments under the Competition Policy Implementation Agreement as agreed by CoAG on 11 April, 1995.

To fulfil the terms of the Agreement in relation to this Review, the following matters must be considered:

- the provisions of the Act; and
- the Regulations (and Schedules thereto).

It is not intended that this Review examine the Planning Strategy as it is not a statutory instrument. The obligation in clause 5 of the Agreement is to review legislation (which includes Acts, enactments, Ordinances or Regulations). The Development Plans have not been examined in detail but the principles upon which they are based, and their effect, has been considered by the Review Panel.

1.2 *Central Issue*

For the purposes of this Review, the guiding principle (as established by clause 5 (1) of the Agreement) is whether the Act restricts competition in the relevant markets and, if so, whether it can be shown that:

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

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

1.3 *Review Panel members*

The Review Panel is comprised of the following members:

Stuart Moseley	Director, Development Planning, Planning SA
Phil Smith	Director, Development Assessment, Planning SA
George Capetanakis	Manager, Building Standards and Policy, Planning SA
Gavin Lloyd Jones	Director, Strategic Planning with Local Government
Graham Duncan	Board member, private development and investment companies
Anni Foster	Senior Solicitor, Crown Solicitor's Office, Competition Unit
Elmer Evans	Principal Planner, Planning SA (Executive Officer)

1.4 *Terms of Reference*

For the purposes of Clause 5(9) of the Agreement, the following terms of reference have been agreed against which to review the Act and Regulations:

(a) Clarify the objectives of the Development Act, including the identification of the public benefits of the Act, and provide an assessment of the importance of these objectives to the community:

(b) Identify the restrictions to competition contained in the Act and Regulations made under the Act;

(c) Analyse and describe the likely effects of the restrictions on competition in the relevant markets, and on the economy generally;

(d) Assess and balance the costs and benefits of the restrictions;

(e) Where the restriction is justifiable on the basis of public benefit, consider whether there are practical alternative means for achieving the objectives of the Development Act, including non-legislative approaches;

(f) Consider whether any licensing, reporting, or other administrative procedures, are unnecessary or impose an unwarranted burden on any person.

A glossary of abbreviations used may be found in Schedule 4 to this Report.

1.5 *Brief History of the Act and Regulations*

The Act and Regulations emanated from the Planning Review, established in 1990, and led by Mr Brian Hayes QC. The Review was undertaken to examine the plethora of different Acts and Regulations which governed planning and development management, with the intention of establishing an integrated planning and development control system based upon local government as the principal point of access for applicants.

With the aim of a "one-stop-shop" in mind, the Act and Regulations replaced previous relevant legislation, including the *Building Act, 1971, Planning Act, 1982,* and *City of Adelaide Development Control Act, 1976,* which were repealed in their entirety, while amending other related legislation, including the *Coast Protection Act, 1972, Mining Act, 1971, and Real Property Act, 1886.* Work on the Planning Review and Planning Strategy and formulation of the legislative framework proceeded in concert with related legislative reforms, including new environmental protection legislation and revamped heritage and coast protection legislation.

The Act introduced a number of key reforms to the planning and development process, including the preparation and publication of an overarching Planning Strategy for development of the State, underpinned by Development Plans for local planning policy. A

new court, the Environment, Resources and Development Court was established to provide for an integrated system of enforcement and appeals for planning and development matters.

(a) Clarify the objectives of the Development Act, including the identification of the public benefits of the Act, and provide an assessment of the importance of these objectives to the community.

Section 3 of the Act provides as follows:

"The object of this Act is to provide for proper, orderly and efficient planning and development in the State and, for that purpose-

(a) to establish objectives and principles of planning and development; and

(b) to establish a system of strategic planning governing development; and

(c) to provide for the creation of Development Plans-

(i) to enhance the proper conservation, use, development and management of land and buildings; and

(ii) to facilitate sustainable development and the protection of the environment; and

(iii) to advance the social and economic interests and goals of the community; and

(d) to establish and enforce cost-effective technical requirements, compatible with the public interest, to which building development must conform; and

(e) to provide for appropriate public participation in the planning process and the assessment of development proposals; and

(f) to enhance the amenity of buildings and provide for the safety and health of people who use buildings; and

(g) to facilitate-

(i) the adoption and efficient application of national uniform building standards; and

(ii) national uniform accreditation of building products, construction methods, building designs, building components and building systems.

1.5 *Benefits for the community*

The important provisions in the Act are those which provide for consideration of places with State and local heritage significance, building safety requirements, orderly and economic provision of infrastructure and protection of the environment.

Members of the public also benefit from the certainty and transparency of the development assessment policies, procedures and decision making which the Act seeks to promote. In particular, significant public benefit arises from the provision for appropriate public participation in the planning process and the assessment of development proposals. The benefits of the Act and Regulations become clear if one considers the consequences of no planning and development regime at all - adverse impacts upon certainty, investor security, local amenity and safety standards.

1.6 *Benefits for Development Applicants*

The establishment of a Planning Strategy provides a framework for the formulation of local Development Plans. These documents are intended to articulate policies and provide greater certainty for applicants in the development assessment and decision making process. The periodic reviews of Development Plans by local councils have the potential to ensure flexibility and a responsiveness to change.

Greater certainty and clarity of policy in this area guides investment and development decisions, and can promote economic growth and foster development in appropriate zones. Time frames specified in the Act are intended to facilitate streamlined approval processes. Applicants are, in certain instances, permitted to take legal action if the prescribed time frames are not met by the relevant authorities. A more streamlined appeal and enforcement process, and informal dispute resolution process, is also of advantage to applicants who, previous to the introduction of the Act, were subject to a multiplicity of Court procedures for disputes and enforcement matters.

1.7 *Importance of the objectives of the Act*

Clearly, and as stated above, the objectives of the Act and Regulations are of significance in a social, economic and environmental sense. The development of a Planning Strategy enunciates a future vision for the State which shapes the kinds of development which may occur. The Development Plans allow for regional and local concerns and choices to be considered within the overarching framework of the Strategy. The Building Code of Australia (BCA) stipulates minimum technical provisions for the construction of buildings to ensure the safety, health and amenity of building occupants. [1]

[1] Background information on the Planning Strategy, the Development Plans and the Building Code of Australia may be found in Schedule 2 to this Report.

(b) Identify the restrictions to competition contained in the Act and Regulations made under the Act:

1. describe the theoretical nature of each restriction (e.g. barrier to entry, restriction on conduct etc.);

2. identify the markets upon which each restriction impacts; and

3. provide an initial categorisation of each restriction (i.e. trivial, intermediate or serious).

2. RESTRICTIONS ON COMPETITION

Clause 5(9)(b) of the Agreement requires that a Competition Policy Review of legislation should identify the nature of the restriction on competition. This step requires a description of the nature and type of the restriction, and an initial categorisation of how each restriction impacts upon competition in the relevant market.

2.1 *What are the tests for restricting competition?*

In order to indicate the nature of the restriction on competition, the following analytical framework has been adopted by the Review Panel to identify broad categories of restrictions upon competition:

(a) those which restrict entry into a market;
(b) those which restrict competitive conduct by persons in the market; and
(c) those which discriminate between actual or potential competitors in a market.[2]

2.2 *What are the relevant markets?*

Section 4E of the *Trade Practices Act, 1974 (C'wth)* **(the TP Act)** defines "market" as "a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services".

This legislation review project will involve a defining and discussion of the relevant markets in which the Act impacts. Broadly, the markets impacted are:

- the use and development of land in metropolitan and rural areas and the markets associated with the development of land;
- those associated with activities which operate from land subject to the Act;
- building work and the supply and acquisition of associated goods and services;
- professional building and planning advisory services.

The central task of this legislation review will be to consider the regulatory regime enshrined in the Act and Regulations to establish how, if at all, this regime affects the entry into, and conduct of, those markets.

[2]Examples of conduct which falls within these three broad categories may be found in Schedule 1 to this Report.

2.3 *Aspects of the Relevant Markets*

There are four aspects of a market which need to be considered in determining the relevant market. These are:

(a) the product aspect;
(b) the geographic aspect;
(c) the functional aspect (production, wholesale, retail); and
(d) the temporal aspect.

product: The product in the use and development of land market is clearly land, either vacant or developed. In this instance, the central issue for the purchaser is whether the particular land is within a zone that allows for the use proposed by the purchaser. For instance, if a purchaser wishes to establish a small industrial operation i.e. a joinery and cabinet making venture, he or she would have to secure land usually in an area zoned for industrial development.

There are several relevant related product markets in the market for building services, including both professional and trade skills. For example architectural, building surveying, civil engineering and project management services in the professional sphere and plumbing, electrical and bricklaying skills in the trade sphere.

geographic: The geographic areas of the market for use and development of land fit within two distinct categories. This arises due to a lack of substitutability between regions. For example, land in the Riverland region is not a substitution possibility for land in the Adelaide metropolitan area.

Hence, one defined region is the Adelaide metropolitan area, north through to Gawler and south to Willunga. Other geographic areas comprise rural regional areas like Fleurieu Peninsula, the South-East and the Iron Triangle.

Within each geographic market, competition occurs to develop land for particular purposes, for example housing, commercial and industrial development in urban areas and agriculture, horticulture and viticulture in rural areas.

The geographic markets for building goods and services also fit within the above two geographic areas. Within the bounds of the geographic markets, there may be substitution between one source of supply and another, in response to changing prices. For example, in the market for plumbing services, buyers may switch their patronage from one company's services to another, within the particular geographic area, depending upon a number of factors, including price.

functional: Often, the goods required for building and construction of a development are purchased on a wholesale basis. The necessary services for construction are purchased in the main in the form of sub-contracted labour. The cost of both goods and services to the consumer are included in the contract for supply of building and construction work agreed between the parties.

temporal: Usually, the markets identified above are not differentiated in time, i.e. there is a continuous market for supply of building and construction goods and services. However, in the market for development of land, land zoned as "deferred urban" is held for use only at an appropriate time in the future but effective zoning policies will ensure that land is made available as needed.

2.4 *Competition issues in the relevant markets*

(a) Use of land

The central issue in the market for use and development of land in urban areas is whether the use proposed can be realised within the zone allocated for that land in the relevant Development Plan. If it is not possible to purchase land and use it for a particular purpose in a certain area, the zoning requirement acts as a barrier to entry to the market. For instance, a purchaser may wish to locate a fast food outlet in an area that is zoned as residential and thereby be prevented from realising that goal in that particular area. Although it is recognised that an application may be made for a *non-complying* development, such a move may not be successful and may increase the likelihood of objections being raised.

In considering restrictions on competition, and with regard to the issue of access to rail services raised below in (b), the matter of individual rights is not the issue but rather the impact of the regulatory regime enshrined in the Act and Regulations and the impact upon the identified markets. As long as a proponent is able to proceed with his or her proposed development within the same geographic market, it is irrelevant that it is constrained within an appropriately zoned area. Competition will still occur for the provision of goods and services in areas where such development is permitted. For example, zoning may restrict shopping centres in rural areas but, in general, these developments will be permitted in defined locations in urban areas. Similarly, urban development may be restricted in the Adelaide Hills area but there is an abundance of land zoned residential in the larger metropolitan area.

For land in rural areas the proposed use will be impacted not only by zoning considerations but also by a number of other factors, including soil type, rainfall, vegetation etc. In rural areas, there is an increasing emphasis on more flexible zoning through the use of performance standards.

(b) Commercial Enterprises

The Act and Regulations also have an impact upon markets related to commercial enterprises which operate upon land subject to the Act. For example, this may occur if a particular enterprise requires rail services to transport goods for marketing and sale. If the only area in which such a venture can be located, due to zoning requirements, is some distance from an available railway service, this imposes a cost in the market, thus impacting upon the price competitiveness of the goods. Costs of this nature may readily be removed through a PAR.

(c) Building goods and services

The Act and Regulations also have a direct impact upon the market for building and construction work and associated goods and services. Competition is strong in the market for supply of building goods and services, as there is ready substitution of one source of supply by another. The market for building services is highly portable, for example, a plumber or architect may be located in the eastern suburbs but be available for any project within a wide geographic area. (There is also increasing movement across State borders within this market).

As part of the consultation process, the Panel sought comment on certain matters and expressed a preliminary view. The Panel has now further considered these matters, including the comments made by respondents to the Discussion Paper, and puts forward a final view in relation to each issue raised.

(1) does the Act allow for an adequate availability of land to meet demand for various uses and allow for new entrants, while satisfying other parameters eg heritage and amenity matters?

The Review Panel is of the view that the Act does provide an appropriate framework for the above and does not act as an obstacle to the entry of new market participants but is aware that there will always be differences of view on policy matters, as evident in the Development Plans.

(2) have the Act and Regulations had the effect of constraining the size of the market for building goods and services within the geographic markets outlined above?

The Review Panel is aware that the regulation of building goods and services for certain reasons, eg safety, necessarily lead to a constraining of the size of the market but at this point takes the view that the benefits outweigh the costs.

3. COMPETITION ISSUES ARISING FROM THE ACT

3.1 *Crown development by State agencies*

(a) Application of the Act

Ministers and their Departments and statutory authorities subject to the control and direction of the Minister, when undertaking development, are covered by Division 3 of Part 4 of the Act, unless exempted by regulation. A small number of agencies (Julia Farr Services until 30 June, 2001, the South Australian Housing Trust and the South Australian Totalizator Agency Board) will have their applications assessed in the same way as private sector development applications.

Division 3 of Part 4 of the Act applies to the following:

- a state agency proposing to undertake development;
- a state agency proposing to undertake public infrastructure development;
- a state agency proposing to undertake public infrastructure development in partnership or a joint venture with a private sector partner;
- any person proposing to undertake public infrastructure development initiated or supported by a state agency.

The Division does not apply to the following:

- a state agency proposing to undertake development in partnership or joint venture with a private sector partner;
- where the proposed development is declared by the Minister as a Major Development.

The Act does not apply to much of the development work proposed by State agencies which arise due to a community service obligation imposed by legislation. Schedule 14 of the Regulations lists the developments which will be exempt from approval under the Act. This work includes repair and reconstruction of roads and wharves, any temporary development required in an emergency situation, repairs and maintenance of existing buildings and sand management as authorised by the Coast Protection Board.

(b) Applications and Approvals

A state agency proposing a development which falls within Division 3 of Part 4 of the Act must undertake the following:

- lodge its development application with the Development Assessment Commission (**DAC**);
- give notice to the relevant local council;
- DAC will assess if the application is seriously at variance with the Development Plan and, taking into account any comments from council and other agencies consulted, make report within three months to the Minister;
- the Minister may approve (with conditions) or refuse the development application, subject to the rider that any building work be certified by a private building rules certifier or a person determined by the Minister;
- once approval has been gained, no further approvals or procedures under the Act are necessary;
- no right of appeal by a council or member of the public is possible against a decision of the Minister.

A Crown development may be declared as a Major Development and thereby required to undergo the procedures for such developments as set out in Division 2 of Part 4 of the Act.

(c) Fees, Notice and Consultation Requirements

No application fees are payable on applications by Crown agencies, and public notice and consultation requirements set out in Section 38 of the Act are not applicable to Crown developments.

(d) Different Treatment for Crown Agencies

There are a number of differences between the procedure for development approval for private developments and those specifically noted for development approval sought by State agencies of the Crown.

The differences in procedure are as follows:

- the DAC has no statutory obligations to consult with other authorities or agencies;
- the public consultation process for *Category 2* and *Category 3* developments does not apply and there are no appeal rights for the general public;
- no application fees are payable on applications by Crown agencies;
- there are no applicant appeal rights;
- a building owned or occupied by the Crown (or an agency or instrumentality) does not have to be classified in accordance with Division 4 of Part 6 of the Act or obtain a certificate of occupancy;
- a building owned or occupied by the Crown (or an agency or instrumentality) is not subject to the building fire safety requirements in Division 6 of Part 6 of the Act;
- there is no requirement for buildings owned or occupied by the Crown to seek Building Rules consent.

The effect of these differences are relevant in a time and cost context. With regard to the issue of timing, DAC must provide a report to the Minister within 3 months, unless an extension is granted. In comparison, a relevant authority has a maximum period of 14 weeks in which to make a decision if the application must be referred to one or more of the

prescribed bodies listed in Schedule 8 of the Regulations. The differences here are of a trivial nature.

However, development applications of State agencies which are undertaken with the purpose of raising revenue, and enjoy exemptions from a range of requirements, are in a favourable position vis a vis a private sector entity.

(e) Competitive Neutrality Principles

Clause 3 of the *Competition Principles Agreement* (CPA), signed on 11 April, 1995, binds the State Government to apply competitive neutrality policy to the business activities of significant Government business enterprises. It is not intended that competitive neutrality principles are to apply to the non-business, non-profit activities of these entities.

Business activities of Government are defined in "A Guide to the Implementation of Competitive Neutrality Policy" as "those activities which are producing goods and services for sale in the market with the intention of maximising profit and financial returns to their owners, or at least of recovering all or a significant proportion of their operating costs".

A community service obligation is defined as arising when a government specifically requires a government business enterprise to provide a concession, a service or to carry out an activity which the enterprise would not elect to do on a commercial basis, and which the government does not require other businesses in the public and private sectors generally to undertake, or, which the government business enterprise would only do commercially at higher prices.

It is recognised that competition policy is not intended to apply to areas such as education, health, welfare, community services and labour market programs where the public sector has, and will continue to have, a dominant role. Competition policy will be limited to those circumstances where enterprises are engaged in business activities.

Support for this position can be found in the second reading speech which accompanied the *Competition Policy Reform Act, 1995 (C/wth)*:

> "In sectors such as education, health, welfare, community services and labour market programs where the public sector has, and will continue to have, a dominant role, the relevance of competition policies will be limited to those circumstances where enterprises are engaged in business activity. In most cases, where this is an issue at all, this is a small part of their overall role, or ancillary to the provision of core services.
>
> For instance, government schools are not normally engaged in business activity. While they may be seen as competing with private schools (for students), this is not competition to earn revenue and profits, and is therefore not a "business" activity to which the competitive neutrality principles apply. Similarly, these reforms will not be relevant to public hospitals services, but may be relevant where these hospitals are

treating private patients or operating commercial cleaning services. In these areas a public hospital would be directly competing with private firms."

Should government enterprises, when engaged in business activities, be subject to exactly the same application procedures and building safety requirements as a private sector developer?

The Review Panel takes the view that, as a general rule, competitive neutrality principles should apply to government business enterprises when engaged in business activities for profit and competing directly with the private sector. In these circumstances, government agencies should be required to undertake the same development application procedures as a private sector applicant and be subject to exactly the same requirements for application fees, public consultation, classification of a building and building safety measures.

Further, the Panel recognises that, while the provision of health and education services by government is, as a general rule, exempt from the application of competition policy on the grounds that these are not business activities, the Panel took the view that the application of competition policy in these areas should be undertaken on a case by case basis with the principle of occupant safety as the paramount concern in the context of building proposals.

3.2 *Development by Commonwealth Government*

While recognising that this matter is beyond the scope of this Review, the Review Panel wishes it to be noted that it is aware that development proposals by private sector entities on Commonwealth land are not bound by the provisions of the Act and Regulations. The Panel understands that the Commonwealth Government or developments on Commonwealth owned land (by either the Crown or a private sector entity) are subject to the processes and procedures of the relevant Commonwealth legislation but is aware that, on occasion, this has led to cost benefits to the proponents (i.e. no requirement to install certain fire safety devices), which would not be available to State entities bound by the Act and Regulations. The Review Panel does not regard this as desirable and suggests that the Commonwealth Government be approached as to whether it would agree to extending the reach of the Act and Regulations to the above situations.

3.3 *Prescribed qualifications*

(a) Private building rules certifiers

A private building rules certifier may be engaged to assess a development application against the Building Rules and may make a decision in relation to a Provisional Building Rules consent (**PBR consent**), subject to consideration of any Provisional Development Plan consent (**PDP consent**) (and conditions) issued by the relevant authority.

A person must not act as a private building rules certifier unless he or she possesses the following:

- current registration pursuant to regulation 93A;
- current accreditation as a building surveyor or approval from the Minister.
- at least 8 years post graduate experience as an architect, civil engineer or building surveyor;
- professional indemnity insurance as prescribed by Schedule 23 of the Regulations.

The circumstances in which a private building rules certifier may not act include, where he or she has been involved in any aspect of the planning or design of the development, if he or she has a direct pecuniary interest in any aspect of the development or where they are employed by a person or body associated with the development (other than when employed as a private building rules certifier for that particular development).

The Review Panel is aware that other States do not have a requirement that a private building rules certifier attain such a lengthy period of post graduate experience.

(b) Advisers and Certifiers

The Act provides that certification and advice must be obtained in certain circumstances from persons holding prescribed qualifications in the following areas:

- planning;
- building;
- engineering.

Section 101(2) of the Act provides that a relevant authority, authorised officer or private certifier must seek and consider the advice of a person with prescribed qualifications in circumstances declared by regulation. Part 15 of the Regulations declares the circumstances in which such advice must be sought and prescribes the necessary qualifications.

(i) *Planning Advice*

Regulation 86 provides that advice from a person with planning qualifications must be sought:

- where a council or the Minister seeks to amend a Development Plan; and
- where a relevant authority is considering the grant of a PDP consent in respect of a *non-complying* development.

Regulation 86 specifies as necessary the following qualifications in planning:

- corporate membership of the Royal Australian Planning Institute Inc.; or
- such qualifications and experience in urban and regional planning, environmental management or a related discipline as the Minister considers necessary.

(ii) *Building Advice*

Regulation 87 provides that a relevant authority must seek and consider the advice of a person with building qualifications when-

- assessing a development against the provisions of the Building Rules pursuant to s33 of the Act;
- when considering an application for a certificate of occupancy pursuant to s67 of the Act;
- when granting approval to occupy a building on a temporary basis pursuant to s68 of the Act.

The regulation prescribes qualifications for three different levels of building, ranging from current accreditation as a Building Surveyor issued by the Building Surveyors and Allied Professions Accreditation Board, for advice at the more complex level, to current accreditation as a Building Surveying Technician at the lower levels.

(iii) *Independent Technical Expert*

Regulation 88 applies to the assessment of a proposed development against the Building Rules in respect of certain parts of the BCA and for the certification of particulars, plans, drawings or specifications as complying with the BCA pursuant to section 36(4)(a) of the Act.

An "independent technical expert" is defined by regulation 85 to be a person with engineering or other qualifications which qualify the person to act as a technical expert.

(1) Should private certification services be extended to planning decisions?

The Review Panel takes the view that there are clear benefits in providing for the assessment and determination of PBR consent, where the assessment is generally technical and quantitative in nature. (The Panel notes that the Building Codes Board is currently addressing the matter of private certification being extended to assistant building surveyors).

There is clearly potential to apply a similar approach to the certification of PDP consent applications in the case of a *complying* development, although it is recognised that there is limited scope for this as present, given that the range of *complying* developments is restricted. However, the Panel acknowledges that a policy to expand the scope of *complying* development through PARs may remedy this situation.

However, wider application of private certification for PDP consent to most development applications (including *non-complying* and those made on merit grounds) would raise issues for planning authorities in that such discretionary judgements would be made by the private sector rather than the public sector, as is the present case.

(2) Is the requirement to seek planning advice justified?

In relation to the requirement to seek planning advice, the Review Panel recognises that there may be instances where a poor planning decision may have serious consequences (eg the decision to develop land on a flood prone area) but the Panel recommends the removal of the requirement in the Regulations to seek independent planning advice in certain instances as other jurisdictions do not have such a requirement and, in the view of the Panel, there is no sustainable argument that benefits of this requirement (which are difficult to quantify) outweigh the costs of compliance. The Panel notes that there are sufficient safeguards in place in any event, as the final arbiter for decisions to which Regulation 86 applies will be either the Minister or the DAC, both of which ensure planning advice is taken as part of the decision making process.

(3) Does the requirement for 8 years post graduate experience for a private building rules certifier act as a restriction on competition?

The Review Panel is aware that other jurisdictions have lesser periods of post graduate experience before qualification to act as a private building rules certifier. The Panel notes that the matter of an appropriate period of experience is currently being considered by a Working Group of the Building Advisory Committee at a state level and is aware that the issue is also being considered at a national level by the Australian Building Codes Board.

3.4 *Development application processes*

A key aspect of the regulatory regime put into place by the Act and Regulations is the procedures by which development applications are to be assessed. The Act puts in place procedures for the following matters:

- general development;
- major developments or projects;
- Crown development by State agencies;
- appeals and enforcement in the Environment, Resources and Development Court

Development by State agencies of the Crown has already been considered in this Report, and therefore the focus in this part will be on the other processes identified above. In order to understand the way in which the Act operates, it is necessary to gain an overview as to how the major processes operate. The effect of the processes will be discussed with a more detailed explanation of the necessary steps in each process which are to be found in Schedule 3 to the Report.

The development assessment procedures, outlined in Schedule 3, for general development and Major Developments or Projects require approval from a relevant authority before a developer may proceed with a proposal. The question for consideration in the context of a competition analysis of these procedures is whether the requirement to have a development application approved, restricts the entry of applicants into the relevant market.

Before a developer may engage in a development proposal, he or she must submit an application, accompanied by the appropriate fee, for the consideration of the relevant authority and either receive an approval or refusal to proceed.

The requirement to submit an application imposes a restriction on entry into the relevant markets as development proposals must, before proceeding, be assessed against zoning requirements in the relevant Development Plan, the building standards established in the Building Rules and must obtain all consents and certificates necessary for the particular development. If appropriate, the application will have to be the subject of public notification and consultation with relevant State agencies or specialist bodies and the applicant may have to prepare costly and time consuming reports, as required by the Minister. All reasonable costs and charges incurred by the relevant authority in giving notice of an application for development approval or PDP consent will be recoverable from the applicant, before proceeding further with an assessment or before making its decision on the application. Depending upon the size and nature of the proposed development, and the number of agencies required to be consulted, these charges may be significant.

It is to be noted at this point that the Schedules to the Regulations (in particular, Schedules 2, 3, 4, 8, 9 and 14) may lead to very different approval pathways for development proposals which are identical. For instance, a development application for commercial premises in an area zoned for use as a shopping centre will receive a speedier approval process as a *complying* or merit development, than the same application in an area zoned as residential.

The public notification requirements for *Category 1*, *Category 2* and *Category 3*[3] development applications adds time and cost elements for a proponent and may restrict the entry of an applicant into the market.

(1) Does the public notification process in section 38 of the Act lead to a restriction on competition?

The Review Panel takes the view that the public notification processes in the Act are satisfactory. As the community has a role in the development of the zoning requirements, it is not necessary to revisit these matters if a development application clearly falls within the agreed Development Plan but if an application is not contemplated by the Plan then it is appropriate that the community be consulted.

(2) Do the different pathways which a development application may take lead to inequities?

As noted, a development application may take a number of pathways, depending upon its classification as a general development, mining tenement, Crown development or Major Development. The Review Panel is of the view that, while there are clear differences and inequities in each pathway as a matter of *process*, decisions are ultimately made by the same arbiter (the Governor) against the same set of criteria. The Panel notes that the exception in this respect is to be found in section 48(5) where the Governor, before approving a Major Development must *have regard to* the relevant Development Plan, the Building Rules and the Planning Strategy. The Panel understands that, as a matter of practice, developments have only been approved which comply with the requirements of the Building Rules. The Panel

[3] For an explanation of the requirements of these categorisations see Schedule 3, Page 2 of 6 *"Notification and consultation"*.

supports this position and strongly recommends that it be maintained in respect of future developments.

3.5 *Assessment against building rules*

As previously noted, particular building work declared to comply with the Building Rules, must be granted a PBR consent. However, assessment of an application against the Building Rules by a private building rules certifier is an alternative to assessment by a council and is at the discretion of the applicant.

The BCA is called up by Regulation 4 as part of the Building Rules. Therefore, applicants will be required to adhere to the conditions and safety standards established in the BCA as appropriate for all building work.

The requirement to adhere to rules that impose conditions of quality or standard, constitutes a supply side restriction of market conduct.

The Panel notes that, while a local council has a maximum prescribed fee which can be charged for BCA assessment, a private building rules certifier is not similarly restricted. A reasonable fee, in this instance, is left to the market.

3.6 *Application fees*

Schedule 6 of the Regulations prescribes the relevant fees for development applications.

The current schedule of application fees came into effect upon the proclamation of the Act in January 1994. The fees were substantially increased from the previous fee structure in the *Planning Act* which was a flat fee ($35 plus advertising costs) for all applications irrespective of whether the development was a minor domestic matter or a major commercial development.

The basis for the new fee structure was a deliberate attempt to align more closely the amount of the application fees with the impact and magnitude of the development proposed. The criteria used to establish the amount of fees for applications is based on the following characteristics -

- development cost/number of allotments proposed;
- location;
- intended use;
- referrals to agencies;
- extent of public notification.

Examples of the fees payable for land use applications are as follows:

- a development valued at $6,000 would require lodgement and development plan assessment fees of $43.60 - the fee representing approximately 0.73% of the development cost;

- a development valued at $45,000 would require lodgement and development plan assessment fees of $81.70 - the fee representing approximately 0.17% of the development cost;
- a development valued at $1,500,000 would require lodgement and development plan assessment fees of $1,527.20 - the fee representing approximately 0.1% of the development cost;
- a development valued at $100,000,000 would require lodgement and development plan assessment fees of $100,027.20 - the fee representing approximately 0.1% of the development cost.

Building Rules consent fees and additional fees for referral, non-complying development, public notification purposes and advertisement fee may be applicable depending upon the circumstances.

Further, Major Developments or Projects must pay a development application fee of $1,045 plus additional fees for development plan assessment, land division or building rules consent, depending upon the nature of the development.

The requirement to pay a fee can only operate as a restriction on competition if the fees or charges are in a sum which is of such an amount that it may exclude some applicants from entering the market. In this instance, the fees as outlined above, represent a very small amount relative to the overall development costs and would therefore only constitute a trivial restriction on competition.

Should the fees charged by a relevant authority be set on a full cost recovery basis?

The Panel takes the view that the current system of fees represents a fairer and more equitable system for applicants. Further, the current structure provides the opportunity for partial cost recovery to State and local government for the amount of time spent in assessing the development applications. Full cost recovery is considered inappropriate given that proper planning decisions on development applications is of a benefit to the community and should be subsidised to an extent.

3.7 *What are the competition restrictions?*

The following restrictions on competition have been identified within the Act:

(a) the separate development application process for development by State agencies of the Crown is not consistent with the competitive neutrality policies of the Government which requires that a "level playing field" be implemented for business activities of the Crown;

(b) the academic and experience requirements for registration as a private building rules certifier operates as a barrier to entry into the market for certification of development applications against the Building Rules;

(c) the academic requirements for planning and building advisers and independent technical experts operate as a barrier to entry into the markets for planning and building advice;

(d) the procedure for general development and major development or project applications restricts the entry of applicants into the market;

(e) the requirement to adhere to building conditions of quality or standard in the Building Rules operates as a restriction on market conduct;

(f) the application fees for assessment of a development application also act as a restriction on entry to the market.

(c) Analyse and describe the likely effects of the restrictions on competition in the relevant markets, and on the economy generally:

1. what are the practical effects of each restriction on the market;

2. assign a weighting to the effect of each restriction in the market;

3. assess what is the relative importance of each restriction in a particular market to the economy as a whole.

As the markets upon which the Act and Regulations have been broadly defined, the practical effects of each restriction on the market is addressed in Item 4 (Pages 22 - 28).

A weighting is assigned to each restriction in the next section (pages 22 through 27) of this Final Report and the costs and benefits assessed to ascertain which outweighs the other.

(d) Assess and balance the costs and benefits of the restrictions.

4. COSTS AND BENEFITS OF COMPETITION RESTRICTIONS

The following represents a discussion of the costs and benefits of the restrictions on competition identified above and a categorisation of each restriction. The critical point in this examination is, not that a restriction exists, but that the restriction imposes a cost in the relevant market.

In assessing public benefit against public detriment, the following matters, set out in Clause 1(3) of the Agreement, will be taken into account:

- economic and regional development, including employment and investment growth;
- the interests of a class of consumers;
- the competitiveness of Australian businesses; and
- the efficient allocation of resources.

If a restriction is identified as having only a trivial effect on competition then no further analysis of net benefit will be considered. The process of having reached a conclusion that a restriction on competition is trivial includes an intuitive balancing of detriment and benefit. However, where a restriction is considered to be of a more significant nature, there will be a more transparent analysis of the costs as against the benefits accruing to the community as a whole.

The costs and benefits of each restriction on competition are considered and a conclusion reached as to which outweighs the other. In addition, this part will examine the effect on competition of designated zones in Development Plans.

4.1 *Crown Development by State Agencies*

(a) Costs

The costs of prescribing a different procedure for Crown development from that of private development, in certain circumstances, is that a State agency proposing to undertake development as part of its business activities is not competing on a "level playing field" with private sector agencies. This appears to be at odds with the State Government's obligation to apply competitive neutrality principles to the business activities of significant Government business enterprises.

The effect of this different procedure is that State agencies competing directly with the private sector gain time and cost benefits by avoiding the obligation to pay application fees, undertake public consultation, have a building classified and meeting building safety requirements, including fire safety measures. On the face of it, it appears that the effect of this restriction puts non-government developers at a significant disadvantage vis a vis a State agency undertaking a development.

However, it appears to the Review Panel that, over recent years, there has been increasing parity of treatment for both public and private development proponents.

(b) Benefits

The benefit of providing for a speedier process for State agencies is that the community service obligations of agencies may be met without the time and cost imperatives of undertaking the development application route prescribed for developments which have, as their object, the raising of revenue.

However, the Panel recognises that there may also be a loss of benefit to the community by allowing development controls to be overridden in these instances. As previously stated, the Panel recommends that the application of competition policy to this type of public sector activity should be considered on a case by case basis with the principle of occupant safety of paramount concern in the context of building proposals.

4.2 *Prescribed Qualifications for Private Building Rules Certifiers*

Regulation 91 of the *Development Regulations 1993* sets out the qualification requirements for private certifiers, including a requirement for 8 years professional postgraduate experience. This regulation has recently been reviewed by Planning SA and the Building Advisory Committee and eight years is considered too onerous, given the accountability measures now in place, and in comparison with other States which require 3 years experience. The Australian Building Code Board is currently developing a framework for building certifiers for all States and Territories and Planning SA supports adoption of nationally consistent qualifications and experience for private certifiers.

(a) Costs

As outlined above, the prescribing of technical and experience qualifications for a private building rules certifier to enter the market for assessment of development applications against the BCA acts as a restriction to entry to the market. The restriction can be categorised as an intermediate restriction as a person would have to gain tertiary qualifications and serve a period of time (eight years) in that field before he or she could seek registration as a private building rules certifier. As previously noted, the Panel notes that the Working Group of the Building Advisory Committee is currently examining this requirement.

(b) Benefits

The benefits of this restriction to the entry for the provision of certification of building work is that registered certifiers have the necessary relevant tertiary qualifications and also a reasonable period of practical experience to rely upon in making their assessment of the building work. The issues here again are safety and quality of product. As a private building rules certifier has the authority to make a decision in regard to a PBR consent, in the same way as a relevant authority, it is essential that the community can have confidence that he or she has attained the necessary qualifications. It is the view of the Review Panel that the benefits of the restriction outweigh the costs.

It is also to be noted that, prior to 1994, developers were bound by the views of the relevant authority in relation to certification of building work. Since 1994, applicants have been

afforded the opportunity of engaging a private building rules certifier to undertake this task. Further, the fees and charges of private building rules certifiers have been deregulated, resulting in strong supply side competition on price.

4.3 *Planning, Building and Independent Technical Advice*

(a) Costs

As already stated, the requiring of academic and other qualifications for the entry of the above advisers into the market operates as a barrier to entry. Again, this restriction can be categorised as an intermediate restriction on competition for the same reasons as those given for private building rules certifiers.

The mandating of advice or certification from certain experts, in particular planning advisers, adds to the costs of development application assessment. These costs are of particular relevance in rural areas where the cost of engaging an expert, rather than utilisation of in-house resources, is often passed on to the applicant.

The Review Panel is aware that legislation in other jurisdictions does not prescribe the same requirements as those in section 101(2) of the Act.

(b) Benefits

One of the benefits of requiring the advice of persons with particular expertise to be provided to the relevant authority, is the informing of the decision maker, which is not required to have such qualifications, of matters which it should take into account.

The clear benefit of this is apparent in the building area where the risks of a poor decision are tangible and may have dire consequences, eg the incorrect assessment of a building in terms of its earthquake risk. However, in the planning area, where decisions are of a more political and discretionary nature, it is questionable whether the requirement for professional advice is justified or whether the benefits outweigh the costs.

4.4 *Procedures for Assessment of Development Application for General Development and Major Developments or Projects*

(a) Costs

As discussed above, the procedures established in the Act for assessment of development applications, whether they be of a small domestic nature or related to a major development proposal, operate as a restriction to entry to the market in the sense that an applicant must obtain the approval of a relevant authority (whether council or DAC) against established development and building standards criteria before the applicant may proceed with the development.

The restriction on entry may be classified as an intermediate restriction on competition.

The question as to whether this restriction on competition imposes a cost in the market can be answered by looking at the low cost required for assessment of a development application, relative to the cost of the development as a whole.

(b) Benefits

The benefits of having clear statutory procedures for different types of development are similar to the arguments advanced above in relation to designated zones in the Development Plans. Clear, understandable procedures provide for clarity and certainty for development applicants and the general community and a planned and regulated approach makes for appropriate and orderly development.

Members of the community adjacent to the proposed development, or those who may be affected to a significant degree, have an opportunity to express any concerns or comments and, in the instance of a *Category 3* development, the community as a whole is given the chance to make submissions. The importance of the public notice and consultation steps for *Category 2* and *3* developments is the involvement of other interested agencies and the community. The intent of *Category 2* and *3* notifications is to inform the decision maker, by allowing affected parties an opportunity to raise concerns, about off-site impacts which are either in excess of those anticipated or which were not contemplated at all.

Further, the development application process allows for building work (that is not within Part 2 of Schedule 4 as complying) to be assessed against the codes and standards in the BCA. The advantages of this step in the process are that safety and quality of construction requirements for buildings are addressed during the assessment process.

It is clear that the benefits to both applicants and the wider community of the procedures for assessment of applications set out in the Act and Regulations outweigh any costs of the restriction.

4.5 *Requirement to meet BCA standards*

(a) Costs

As outlined above, requirements to adhere to rules that impose conditions of quality or standard operate as a restriction on market conduct. In this instance, an applicant must gain a PBR consent before proceeding with a development and may have to engage a private building rules certifier in certain circumstances to certify that development plans and specifications etc are in accordance with the Building Rules requirements.

This appears to be an intermediate restriction on competition.

(b) Benefits

The benefits of assessment against the established codes and standards in the BCA have been outlined above but turn around safety and quality of construction issues. As previously stated, these matters are an essential step in the process of consideration of a development application. In the view of the Review Panel, the cost of this restriction on market conduct is clearly outweighed by the benefits.

4.6 *Requirement to pay Application Fees*

This matter has been discussed above, with the conclusion that the development application fees required are a trivial restriction on entry when considered in the overall context of the development cost to the applicant.

4.7 *Designated Zones in the Development Plans*

While this Review Report will not address matters raised in each Development Plan, the question of reserving land for particular purposes by way of designated zones should be examined.

(a) Costs

Each Development Plan designates zones as areas for preferred kinds of development. While it is acknowledged that *non-complying* development applications may be considered in such areas if able to show special circumstances, it is more difficult to proceed with such a development. Accordingly, zoning requirements operate as a barrier to entry into the market for a purchaser of land. If certain developments are not preferred types of development in particular areas, i.e. if it is not possible to establish a tannery on a particular area of land because that area is zoned as residential, then a purchaser of land who wishes to establish such a venture in that particular area is prevented from doing so. In certain circumstances, this restriction on competition may impose a cost in the relevant market, i.e. the above example of a venture which requires rail services to transport its goods but due to zoning requirements must locate its enterprise some distance from the railway.

This restriction on competition is categorised as intermediate, given that it is possible for an individual to proceed with his or her development within the same geographic market.

In relation to this matter, some have argued that, as zoning requirements are integral to the overall policy and institutional framework in which the Act operates, they are not a barrier to entry. However, while the Review Panel recognises this argument, it prefers to take the approach that zoning is a determinant to entry to the market and operates as a barrier to entry.

(b) Benefits

The benefits of designating certain areas as zones in which particular types of development may occur are clearly of a significant nature, as such a plan provides for the shaping and creating of an environment. With an agreed Development Plan indicating the desirability of certain types of development in certain areas, orderly and proper development may occur within relevant areas. An absence of zoning requirements may lead to significant market failure, eg the establishment of an abattoir in a residential area.

The regulatory regime enshrined in the Act and Regulations (and, in particular the Planning Strategy, the relevant Development Plans and the BCA) is designed to meet a need for the State Government, local government and the community to plan ahead and provide applicants with a reasonable degree of certainty. The Act and Regulations provide the community and applicants with a clear understanding of the ground rules for development and, importantly, an opportunity to make recommendations in relation to certain development proposals during the assessment period.

The Act contemplates a process for amendment of the Planning Strategy and Development Plans which allows for flexibility and the ability to respond to change. In relation to amendment of the Development Plan, the local community also has an opportunity to make submissions on a PAR.

Further, and in addition to the above, the zoning requirements provide for the following:

- protection of areas of environmental importance;
- protection of resources from the effects of inappropriate development eg water, minerals, agricultural land etc;
- economy in provision of infrastructure for expanding urban areas;
- health, safety and amenity of development activities.

Thus, the regulatory regime embodied in the Act and Regulations provides for clarity, certainty, flexibility, forward planning and accountability for the community and the applicant. The zoning requirements in the relevant Development Plans are not aimed at restricting competition but at reserving land in certain areas for particular purposes, and in doing so only has an incidental effect on competition.

The above mentioned benefits are significant to the community and clearly outweigh the barriers to entry for a purchaser of land outlined above.

4.8 *Summary*

The above restrictions on competition have been identified and assessed as follows:

- the different procedure for Crown development by State agencies raises competitive neutrality issues and leads to the view that a government business enterprise pursuing development for the purposes of its business activities should be bound by exactly the same processes and procedures as private sector counterparts. Further, the provision of health and welfare services by government, while generally exempt from the application of competitive neutrality principles, should also be subject to these principles where the development is undertaken for commercial gain;

- the prescribed qualifications for private building rules certifiers may be categorised as an intermediate restriction on competition and, while it appears that the benefits outweigh the costs, further examination of certain matters needs to be undertaken;

- similarly, prescribed qualifications for planning, building and independent technical advice leads to an intermediate restriction on competition but, while the benefits may outweigh the costs in some respects eg building, the case is not so clear for mandating advice in the planning area;

- the procedures for assessment of development applications, whether for general development or Major Developments or Projects, result in an intermediate restriction on competition with the benefits outweighing the costs of the restriction;

- the requirement to meet BCA standards results in an intermediate restriction on competition, but it is clear that the benefits outweigh the costs in this instance;

- the levying of application fees for the assessment of a development application operate as a trivial restriction on competition;

- the reserving of certain areas for certain types of development results in an intermediate restriction on competition but the benefits clearly outweigh the costs.

(e) Where the restriction is justifiable on the basis of public benefit, consider whether there are practical alternative means for achieving the objectives of the Development Act, including non-legislative approaches.

As noted, the Act and Regulations enshrine a regulatory regime for the control and planning of development in the State.

The stated purpose of the Act is to provide for planning and regulation of development in the State; to regulate the use and management of land and buildings, and the design and construction of buildings; to make provision for the maintenance and conservation of land and buildings where appropriate; and for other purposes.

The above mentioned purposes are of central importance to the future planning and development of the State and affects all members of the community.

Other options for regulation in this area may include self-regulation or agreed Codes of Practice. Limited roles for alternative mechanisms have been found, in particular the use of restrictive covenants in private contractual arrangements between developer and purchaser to prevent certain development on land and land management agreements to formalise undertakings on management issues.

However, in an area of such importance, where decisions are made that potentially affect fundamental rights of community members, legislation sanctioned by the Parliament is to be clearly preferred. Legislation ensures the accountability, continuity and enforceability in an area where there are on-going public interest issues.

In conclusion, legislation is the appropriate vehicle in which the regulatory regime for planning and development should be encapsulated.

The Panel welcomes the recent establishment of the National Development Assessment Forum (NDAF) as a worthwhile initiative. The NDAF, a national planning and policy making body, has representation from a number of key government and industry stakeholders, including State Planning agencies, the Housing Industry Association, the Property Council of Australia, the Master Builders Association of Australia, and the Royal Australian Institute of Architects. The charter of NDAF is to operate as an information sharing forum for dissemination of new initiatives in the planning area and to review all State planning legislation with the aim of identifying "best practice" models.

In addition, the Australian Local Government Association has established a nationally representative body which aims to identify "best practice" and information sharing across State bodies in relation to statutory planning processes.

If either of the above bodies identify means, other than legislative, for fulfilling the objects of the Act, the Panel recommends that they be considered.

(f) Consider whether any licensing, reporting, or other administrative procedures, are unnecessary or impose an unwarranted burden on any person.

(a) Administrative Procedures

Clearly, there are a number of administrative procedures in the Act and Regulations, many of which have been the subject of analysis in this Report.

As previously noted, there are time limits prescribed by regulation for a number of the steps within the various procedures and an opportunity for the applicant to seek redress in the Court if these are not met.

Administrative requirements are imposed by the legislation and are applied equally to all applicants. In the view of the Panel the administrative procedures required by the Act do not impose an unwarranted burden upon applicants. However, the Panel notes that further consideration is being given to this matter as the Minister has undertaken a customer survey project to examine this issue, among other things.

The Consumer Survey of the *Development Act* prepared by Bronwyn Halliday has identified a number of administrative issues that should be addressed. The report is now in the public domain.

Some stakeholders argued for greater administrative burdens (a wide range of appeal rights and more access to information).

(b) Reporting Requirements

There are a number of provisions in the Act which require reports to be prepared, including the following:

- an annual report on the administration of the Act by the Minister to Parliament (s21);
- report by a council on the review of a Development Plan to the Minister and copies available for public inspection (s30);
- report by Major Developments Panel (MDP) as to the level of assessment appropriate for a particular development (s46(12));
- report from a building owner to the appropriate authority as to adequate proof of the carrying out of maintenance and testing in respect of safety provisions (Reg. 76(5));
- an annual report by the appropriate Minister on various matters in relation to the Planning Strategy (s22(6)).

In the view of the Panel, the above reporting requirements in the Act are necessary for the purposes of accountability and safety.

SCHEDULE 1

RESTRICTIONS ON COMPETITION

It is to be noted that the three broad categories of restrictions on competition overlap. For example, restrictions that discriminate between persons may be either by way of barriers to entry or by way of restrictions on competitive conduct. Practical examples are given below to enable the reader to understand the identification of legislative provisions in the Act and Regulations that restrict competition.

For example, legislation that:

(a) **restricts entry** (supply side) by limiting the number of providers in the market. Before a person can engage in a particular trade or in certain commercial or professional conduct, they may be required to:

(i) hold a licence;

(ii) obtain the approval of a Minister or an Official;

(iii) obtain certain professional or trade, qualifications or standards;

(iv) obtain membership of, or registration with, a professional or trade, body or organisation;

(v) satisfy certain medical, psychological, or "fit and proper person" standards or tests. This may apply to employees and agents as well as to principals;

(vi) observe certain industrial relations, gender or race quota, occupational health and safety, or other similar obligation that may impose a cost on participation in a market activity; or

(vii) pay a fee or charge (including revenue collection), which is of such an amount, or is discriminately applied, so that it could inhibit entry.

(b) **restricts entry and restricts market conduct** (demand side) by limiting the number of types of goods or services that persons can acquire, thus limiting the size of the market, through:

(i) requiring a prescription or licence to acquire the product;

(ii) limiting the quantity of any particular product that a person may acquire; or

(iii) any outright ban on the acquisition of a particular product (eg, certain "adult" products).

(c) **restricts market conduct** (supply side) by rules that impose, or provide for the imposing of, the:

(i) price, or

(ii) conditions of quality or standard;

of products provided in the market; or

(iii) the way in which those products may be provided;

for example:

(a) rules relating to the quality or standard of goods or services, or to the provision of those goods or services, that may be provided in the market, eg, by requiring:

- that goods meet certain Australian standards,
- use-by dates on products,
- labelling laws.

(b) enabling certain professional or trade organisations to set Codes of Conduct or Ethics, together with some power (official or unofficial) of enforcing them.

SCHEDULE 2

BACKGROUND

The purpose of this Discussion Paper is to review the Act and Regulations in order to ascertain if there are any restrictions on competition and the costs and benefits which flow therefrom. The Planning Strategy, each Development Plan and the BCA will not be the subject of this Review.

(a) *The Planning Strategy*

Of central importance in the Act is the preparation and maintenance of the Planning Strategy for development within the State. The Strategy itself is an expression of Government policy formed after consultation within government and the community as to the future direction of planning and development in the State.

The Strategy may be altered by raising the matter in the annual report on the document required to be prepared by the appropriate Minister (Premier) and laid before both Houses of Parliament. Any proposed alteration to the Strategy must include the general effect or implication of the alteration and, once agreed, be published in the *Gazette.*

(b) *The Development Plans*

The Planning Strategy forms the framework within which local and regional Development Plans can be developed and seeks to promote the provisions of the Strategy.

The Development Plan is of central concern in the planning process and sets out a number of objectives or principles relating to environmental, social, economic and cultural matters with which development applications should comply. All development applications are assessed to ascertain if they are in conformity, or seriously at variance, with the Development Plan.

An amendment to the Development Plan may be prepared by either the council or the Minister. If the council wishes to amend, it must have first prepared a "Statement of Intent" followed by a draft Plan Amendment Report which is then assessed by the Minister against various other documents, including the Development Plans for adjoining areas. Unless rejected by the Minister, the Plan Amendment Report may then be released for public consultation. A similar process is in place for amendment of the Development Plan by the Minister.

An amendment approved by the Minister is then referred to the Governor for declaration of the authorised amendment in the *Gazette* and referred to the Environment, Resources and Development Committee of Parliament for consideration. The amendment may be objected to by the Committee and laid before Parliament for consideration. If Parliament disallows the amendment, then it ceases to have effect and the Development Plan applies as if not amended.

Provision is also made in the Act for interim development control or for certain amendments to come into effect without formal procedures where it is necessary to make an amendment to the Development Plan without delay.

A council must review its Development Plan, first, within four years and then every three years. Such a review must be the subject of public notice in order that interested persons may make submissions. The purpose of the Review is to ascertain the appropriateness of the Development Plan for the particular area and to determine its consistency with the Planning Strategy.

The Development Plan contains maps designating certain zones for preferred uses as, for example, a Light Industrial Zone, General Industry Zone, District Commercial Zone or a Residential Zone. The maps are supported by written statements and tables which show whether various kinds of development are "complying" or "non-complying" in each zone. Emphasis is on locating development in zones where such development is complying or subject to merit. Although it is possible to apply for development which would be a "non-complying" use in a zone, it must be recognised that the Development Plan has declared that the particular use is not envisaged.

(c) *The BCA*

The BCA is a national document which is produced and maintained by the Australian Building Codes Board (**ABCB**) on behalf of the Commonwealth Government, and each State and Territory Government.

The BCA is a uniform set of technical provisions for the design and construction of buildings and other structures throughout Australia. It allows for variations in climate and geological or geographic conditions.

The goals of the BCA are to enable the achievement and maintenance of acceptable standards of structural efficiency, safety (including safety from fire), health and amenity for the benefit of the community now and in the future.

These goals are applied so that the BCA extends no further than is necessary in the public interest, is cost effective, easily understood and is not needlessly onerous in its application.

The BCA is called up by the appropriate legislation, dealing with building assessment and construction, in each State and Territory. In South Australia, the BCA is adopted by regulation 4 as part of the Building Rules.

SCHEDULE 3

DEVELOPMENT APPLICATION PROCESSES

(a) GENERAL DEVELOPMENT CONTROL

The Act provides that no development may be undertaken unless the development is an approved development.

(i) Relevant Authority

The assessment of and decision on a development application relating to the Development Plan or Building Rules will be undertaken by the "relevant authority". Either the council in whose area the proposed development is to be undertaken or the DAC will be constituted as the relevant authority, or in the case of building rules, a private building rules certifier.

In the majority of circumstances, the local council will be the relevant authority, even in circumstances where it is involved in the development, but the DAC will assume this role in certain circumstances, including where the proposal is a commercial development to be undertaken by a council, where the proposal relates to an area not within the area of a local council or where the class of development is of State significance.

The Act has created a statutory monopoly in favour of a relevant authority in respect of the granting of a PDP consent. The designation of the relevant authority as a monopoly provider of services in this respect, in effect, prohibits the entry of other competitors into the relevant market. This is to be compared with a PBR consent, whereby an applicant may seek the services of a private building rules certifier.

(ii) Prescribed Fee

A development application is made up of a number of consents, including a PDP consent and a PBR consent, which may be gained in a staged manner or all in the one application. The application must be accompanied by the prescribed fee. Components of the overall fee could include public notification, referral to a prescribed body and Building Rules assessment fee. The relevant authority has the discretion to waive or refund all or part of an application fee.

Further, all reasonable costs and charges incurred by the relevant authority in giving notice of an application for development approval or PDP consent will be recoverable from the applicant.

(iii) Complying and Non-complying Development

The first issue for determination by the relevant authority is whether or not the proposed development is *complying, non-complying* or to be considered on merit. The forms of development and building work deemed to be complying are listed in Parts 1 and 2 of Schedule 4 of the Regulations. A council may also include further matters on the list of complying development within its Development Plan. If classified as a complying development, the relevant authority must grant a PDP consent (and PBR consent providing

any building work is certified as complying with the Building Rules), subject to any conditions or exceptions. An appeal to the Environment, Resources and Development Court (ERD Court) is possible in these circumstances.

Non-complying development is development which is ordinarily considered to be inappropriate in a particular zone or policy area and will only be approved if special circumstances can be made out and if not at serious variance with the provisions of the Development Plan. No appeal lies against a decision to refuse to proceed with the assessment or to give a PDP consent.

(iv) Notification and consultation

Section 37 and 38 of the Act deal with the sources from which the relevant authority must seek information when making a PDP consent decision.

Public notification

Section 38 of the Act provides that there will be three types of developments, *Category 1, Category 2* and *Category 3*. The relevance of such categorisation is the extent of public consultation which must be undertaken.

A *Category 1* development is exempt from consultation, while a *Category 2* development involves notification to adjacent owners. The most extensive consultation is in respect of a *Category 3* development which requires notice to adjacent owners or occupiers, other land in the locality which would be directly affected to a significant degree by the development and a notice in a newspaper circulating throughout the area. A *Category 3* development proposal and accompanying documentation must be made available for public representations.
The relevant authority may be required to consult with certain bodies with specialist expertise, including the following:

- Coast Protection Board;
- Commissioner of Highways;
- Minister responsible for the Heritage and Water Resources Acts;
- Federal Airports Corporation;
- Minister for Primary Industries, Natural Resources and Regional Development;
- SA Metropolitan Fire Service or Country Fire Service; and
- Environment Protection Authority.

Categories of Public Notification

The broad philosophy underlying Categories of public Notification are as follows:

Category 1 (Exempt)

Comprises developments broadly in accordance with the purpose of the Zone. For example, detached dwellings in a residential zone.

Category 2 (Notification but no appeal rights)

Comprises notification of adjacent land owners to a site. Example is a shopping centre on a site which is contiguous to a residential zone.

These adjacent land owners have the right to be notified and provide comment, but no appeal rights are available.

Category 3 (Notification with appeal rights)

Comprises development not contemplated in the zone, excluded (non-complying) or not addressed. Example is a landfill application in a General Farming Zone.

Adjacent landowners and the community generally have the right to provide comment and lodge an appeal.

(v) Prescribed time frames

For a development application involving land division, the DAC coordinates the consultation with State agencies which have an interest in the development and comments must be made within a 28 day period. DAC then has an eight week period from receipt of the application in which to forward advice to council. Similarly, for any other application, the time allowed for an agency to provide comments to the relevant authority varies as set out in Schedule 8.

The Act allows for an applicant to access the ERD Court in the event that a relevant authority takes no action or delays in making a decision in relation to the application.

(b) ***MAJOR DEVELOPMENTS OR PROJECTS***

(i) Declaration by Minister

In South Australia, the Minister for Transport and Urban Planning is responsible for major developments or projects.

Pursuant to section 46 of the Act, the Minister may, if of the opinion that a declaration under this section is appropriate or necessary, declare a development or project to be of major environmental, social or economic importance by notice in the *Gazette* and the development is then assessed under Part 4, Division 2 of the Act. If a development or project is declared by the Minister, (unless refused by the Governor) it is subject to the processes and procedures prescribed in relation to the preparation and consideration of an Environmental Impact Statement (**EIS**), a Public Environment Report (**PER**) or a Development Report (**DR**).

This exercise of Ministerial discretion is another example of a development proceeding upon a different pathway. On one view, this process leads to an applicant avoiding the prescribed development controls, for example zoning requirements. (Pursuant to section 48(5) the Governor must, before approving a development, ***have regard to*** the provisions of the

appropriate Development Plan and relevant Regulations, the Building Rules (if relevant) and the Planning Strategy, and there is no appeal from a decision of the Governor.)

(ii) Application

Following the Minister's declaration, the proponent must submit an application to the Minister which includes a number of details, including a description of the development and the locality, a description of the possible environmental, social and/or economic effects and how they could be managed and a statement assessing consistency with the Planning Strategy and the Development Plan.

(iii) Major Developments Panel

On receipt of the material, the Minister refers the matter to the Major Developments Panel (**MDP**) for preparation of an issues paper and written submissions from the public. The MDP then decides which is the appropriate level of assessment and provides guidelines to assist in the preparation of the EIS, PER or DR. While there are many common aspects to each report, the level of assessment decided upon will reflect the extent, magnitude and importance of the likely impacts of the development. For example, the EIS will be the more time consuming and lengthy of the reports. The MDP then reports to the Minister.

(iv) Consultation

The completed documents are completed by the proponent and provided by the Minister to her Department, which places them on public exhibition for a maximum period of 30 days. Councils, State agencies and members of the public then have an opportunity to comment and the proponent a right to respond to submissions received. A public meeting is required for an EIS or PER.

(v) The Assessment Report

The Minister then prepares an Assessment Report, pursuant to section 46D(8) of the Act, which sets out the Minister's assessment of the development or project and includes comments from the bodies which chose to do so.

(vi) The Decision

Decisions on major development applications are made by the Governor after having regard to a number of factors, including the Development Plan, the Building Rules and any relevant assessment report.

There is no right of appeal against a decision of the Governor and no proceedings for judicial review may be brought to challenge a decision of the Governor, the Minister or the MDP.

(vii) Fees

Fees are payable in accordance with Schedule 6 to the Regulations, as outlined above.

(c) ***ERD COURT***

The Act provides for an integrated system for the hearing of appeals and matters of enforcement within the jurisdiction of the ERD Court.

(i) Jurisdiction

The *Environment, Resources and Development Court Act, 1993* (ERD Court Act) establishes the ERD Court. Applications or appeals may be brought in relation to a number of matters, including:

- a refusal to grant an approval or the conditions attached (except where PDP consent for non-complying development);
- certain assessments, requests, decisions, directions etc of a relevant authority;
- an appeal against a refusal by a council to grant a certificate of occupancy;
- an appeal against an order to complete work;
- an appeal by a person in dispute over the Building Rules.

(ii) Who Can Appeal?

The following may bring an appeal in the ERD Court:

- an applicant against a relevant authority regarding a refusal to grant a development approval or conditions attached thereto;
- a third party who has made representations and disagrees with the decision of the relevant authority (after receiving notice of the decision);
- a person who applies for a certificate of occupancy or approval to occupy on a temporary basis and disagrees with the decision;
- a person who has a development approval and has received a notice regarding outstanding work from a relevant authority;
- a person who undertakes work on a development without approval or in breach of conditions and who has received a notice from the relevant authority;
- an owner who has received notice of an emergency order from a relevant authority.

(iii) Compulsory Conference

Pursuant to section 16 of the ERD Court Act a conference of the parties is held under the chairmanship of a member of the Court with the purpose of attempting to resolve the differences between the parties.

(iv) Costs

Pursuant to section 29 of the ERD Court Act, the Court may make an order for costs against any party, if the Court considers that any proceedings are frivolous, vexatious or instituted for the purpose of delay or obstruction.

It is important to note that this is an important weapon against a large entity attempting to prevent a smaller group from competing fairly for available work in the marketplace. The ability of the Court to be able to award costs, where in its view, an action has been instituted with a view to delaying or obstructing a development, acts as a discipline against the above occurring.

(v) Further Appeal

A party to proceedings before the Court may appeal further to the Supreme Court, constituted of a single judge, in certain instances.

(vi) Enforcement - Contravening Development

The Act provides for enforcement proceedings against any person or body for a contravention of the Act. There are two distinct groups of matters in this area:

- incomplete development where a body commences work in accordance with a development approval but fails to substantially complete that development within the prescribed time frame;
- unauthorised development where a person or body contravenes the Act.

The development application procedures, briefly outlined above, for general development and Major Developments or Projects require approval from a relevant authority before an applicant may proceed with a proposal.

Applicants will also have to provide all plans, drawings and specifications in accordance with Schedule 5 of the Regulations and accompany the application with the prescribed lodgement fee in accordance with Schedule 6 of the Regulations.

(vii) Categorisation of Restriction

For a simple *complying* development application with no issues as to land division, the restriction on competition would be categorised as minor. In this instance, a Provisional Development Plan consent would have to be issued (with or without conditions) and if the building work falls within Part 2 of Schedule 4 of the Regulations, the relevant authority must grant a PBR consent.

The categorisation of the restriction increases with the complexity of the matter. For a Major Development proposal which requires the preparation of an EIS and/or other reports, the matter, both from a time and cost perspective, may amount to an intermediate restriction on competition. For example, the applicant will have to have some monies available in order to successfully make the application and this may lead to the exclusion of some applicants from entering the market.

Guidelines for the Exercise of Discretion

The guidelines for the exercise of discretion by planning authorities lies in the provisions of the Development Plan which applies to a particular Council or an area of the State. These provisions, couched as objectives and principles of development control, can be broad or specific - the degree to which discretion is able to be applied varies from site to site, because of restrictions in some areas (e.g. Watershed) and limited guidance in others (e.g. Far North).

Despite the range and style of provisions that apply, the same rules are imposed on all applicants.

Avenues of appeal also vary from site to site or zone to zone, according to the provisions of the Development Regulations or the Development Plan (refer section below regarding Categories of Public Notification)

The same rules are applied in appeal hearings by the ERD Court, as those applied by the planning authority in making decisions. No appeal rights or judicial review proceedings are available on Major Developments.

SCHEDULE 4

ABBREVIATED TERMS USED IN THIS REPORT

In order of appearance:

1.	**BCA**	Building Code of Australia
2.	**TP Act**	*Trade Practices Act, 1974 (C/wth)*
3.	**DAC**	Development Assessment Commission
4.	**CPA**	Competition Principles Agreement
5.	**PBR**	Provisional Building Rules consent
6.	**PDP**	Provisional Development Plan consent
7.	**ABCB**	Australian Building Codes Board
8.	**ERD**	Environment, Resources and Development Court
9.	**EIS**	Environmental Impact Statement
10.	**PER**	Public Environmental Report
11.	**DR**	Development Report
12.	**MDP**	Major Developments Panel

SCHEDULE 5

LIST OF CONSULTEES

Mr Tim Jordan
President
The Urban Development Institute of Australia
107 Greenhill Road
UNLEY SA 5061

Mr Bryan Moulds
Executive Director
Property Council of Australia
45 King William Street
ADELAIDE SA 5000

Mr Lindsay Thompson
Chief Executive Officer
SA Employers Chamber of Commerce and Industry Inc
136 Greenhill Road
UNLEY SA 5061

Mr Robert Stewart
Executive Officer
Masters Builders Association
47 South Terrace
ADELAIDE SA 5000

Ms Judith Brine
Professor
Division of PALACE
University of Adelaide
North Terrace
ADELAIDE SA 5000

Mr Andrew Davies
Chairman
Architects Board of SA
43 Greenhill Road
WAYVILLE SA 5034

Mr Neil Kirkham
Chief Executive Officer
Australian Institute of Building Surveyors
231 South Road
MILE END SA 5031

Mr Kenneth Milne
President
Royal Australian Institute of Architects (SA Chapter)
1 King William Road
UNLEY SA 5061

Mr Les Thompson
Honorary Secretary
Australian Institute of Building
(SA Chapter)
81 Greenhill Road
WAYVILLE SA 5034

Mr Sterling Griff
Chief Executive Officer
Retail Traders Association
Level 3, 132 Grenfell Street
ADELAIDE SA 5000

Mr John Brownsea
Executive Director
Small Retailers Association
321 Port Road
HINDMARSH SA 5007

Ms Helen Dyer
President
Royal Australian Planning Institute
C/O Level 6, 136 North Terrace
ADELAIDE SA 5000

Professor Stephen Hamnett
School of Building and Planning
University of South Australia
North Terrace
ADELAIDE SA 5000`

Mr Ian Dixon
Chief Executive
Industry and Trade and Tourism
Level 10, 178 North Terrace
ADELAIDE SA 5000

Mr Trevor Argent
Executive Director
Transport SA
33 Warwick Street
WALKERVILLE SA 5081

Mr Dennis Mutton
Chief Executive
Department for Primary Industries & Resources
GPO Box 1671
ADELAIDE SA 5001

Mr Kim Tothill
Chief Executive Officer
Transnet
GPO Box 77
ADELAIDE SA 5001

Ms Carol Procter
Executive Director
Office of Local Government
Riverside Centre
ADELAIDE SA 5000

Mr John Comrie
Executive Director
Local Government Association
GPO Box 2693
ADELAIDE SA 5001

Ms Michelle Grady
Conservation Council of SA
120 Wakefield Street
ADELAIDE SA 5000

Mr Fraser Bell
National Environmental Law Association
C/O Finlaysons
81 Flinders Street
ADELAIDE SA 5000

Mr Greg Black
Chief General Manager
SA Housing Trust
Riverside Centre
ADELAIDE SA 5000

Mr John Scanlon
Chief Executive
Environment, Heritage and Aboriginal Affairs
GPO Box 1047
ADELAIDE SA 5001

Mr Graham Foreman
Chief Executive
Department for Administrative and Information Services
GPO Box 1072
ADELAIDE SA 5001

Mr Edward Phipps
Chief Executive Officer
SA Water Corporation
GPO Box 1751
ADELAIDE SA 5001

Mr Roger Cook
Chairman
Major Projects TaskForce
Level 13, 99 Gawler Place
ADELAIDE SA 5000

Mr Martin Walsh
Director
Housing Industry Association
PO Box 137
HINDMARSH SA 5007

Mr James Blindell
Environmental Defenders Office
118 Halifax Street
ADELAIDE SA 5000

Mr Andrew Lothian
Environment Institute of Australia
PO Box 3248
Rundle Mall
ADELAIDE SA 5001

Mr Bruce Harper
Acting Chief Executive
Land Management Corporation
Level 8, Riverside Centre
ADELAIDE SA 5000

Mr Doug Wallace
Presiding Member
Development Assessment Commission
Level 6, 136 North Terrace
ADELAIDE SA 5000

Mr Mario Barone
Presiding Member
Development Policy Advisory Committee
Level 6, 136 North Terrace
ADELAIDE SA 5000

Mr Ivan Venning
Presiding Member
Environment Resources and Development Committee
Parliament House, North Terrace
ADELAIDE SA 5000

Mr George Zillante
Presiding Member
Building Advisory Committee
C/O School of Building and Planning
University of South Australia
North Terrace
ADELAIDE SA 5000

Mr Des Egan
Chief Executive Officer
B.S.A.P
231 South Road
MILE END SA 5031

SCHEDULE 6

LIST OF RESPONDEES

Professor Judith Brine
Head of PALACE Division
University of Adelaide
ADELAIDE SA 5005

James Blindell
Environmental Defenders Office (SA) Inc
1st Floor
118 Halifax Street
ADELAIDE SA 5000

Kenneth Milne
President
Royal Australian Institute of Architects (SA Chapter)
1 King William Road
UNLEY SA 5061

Edward Wolinski
15 Davis Crescent
MOUNT GAMBIER SA 5290

Neil Kirkham
Chief Executive Officer
Australian Institute of Building Surveyors (SA Chapter)
231 South Road
MILE END SA 5031

Greg Black
Chief General Manager
South Australian Housing Trust
Riverside Centre
North Terrace
ADELAIDE SA 5000

Dr Tim Doyle
President
Conservation Council of South Australia
120 Wakefield Street
ADELAIDE SA 5000

Carol Procter
Executive Director
Office of Local Government
Department of Industry and Trade
Level 1, Riverside Centre
North Terrace
ADELAIDE SA 5000

Dennis Mutton
Chief Executive
Primary Industries and Resources SA
GPO Box 1671
ADELAIDE SA 5001

Peter Hoey
Director Environment Policy
Department for Environment, Heritage and Aboriginal Affairs
GPO Box 1047
ADELAIDE SA 5001

Land Management Corporation
Level 8 North, Riverside Centre
North Terrace
ADELAIDE SA 5000

Bryan Moulds
Executive Director
Property Council of Australia
Level 8
45 King William Street
ADELAIDE SA 5000

George Zillante
Presiding Member
Building Advisory Committee
GPO Box 1815
ADELAIDE SA 5001

Brenton Nottage
Principal Adviser Construction Industry Policy
Department for Administrative and Information Services

Rod Williams
Consultant
Micro Economic Reform Branch
Department of Premier and Cabinet

Brian Clancey
Director
Legislation and Environment
Local Government Association of South Australia
GPO Box 2693
ADELAIDE SA 5001