



Investigation into Plumbers, Gasfitters and Drainlayers Board CPD requirements

Ombudsman's opinion

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Agency:	Plumbers, Gasfitters and Drainlayers Board
Ombudsman:	Professor Ron Paterson
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Summary

The Federation of Plumbers, Gasfitters and Drainlayers (the Federation) represents tradesmen subject to the jurisdiction of the Plumbers, Gasfitters and Drainlayers Board (the Board). It complained about a number of issues relating to continuing professional development courses (CPD courses) the Board requires tradesmen to complete each year as a pre-condition of being re-licensed. The Federation submitted that the Board was not legally entitled to impose CPD requirements under the Plumbers, Gasfitters and Drainlayers Act 2006 (the 2006 Act), and that CPD courses were not “*necessary*” under the 2006 Act and imposed “*undue costs*” on tradesmen.

In my opinion:

- it was reasonably open to the Board to conclude that the Gazette Notices promulgating CPD requirements for tradesmen were valid;
- the Board had consulted adequately with tradesmen about its proposals to require tradesmen to complete the CPD courses each year; and
- it was reasonably open to the Board to conclude the CPD courses were “*necessary*” and did not “*impose undue costs*” on tradesmen in terms of the 2006 Act.

Complaint and investigation

1. In August 2013, the Federation¹ complained to the Ombudsman about a number of matters relating to the Board’s introduction of a requirement that tradesmen subject to the Board’s jurisdiction, as a condition of being re-licensed each year, obtain specified CPD course points by attending courses approved by (“*accredited by*”) the Board or by “*self-directed learning*”.
2. In December 2013, the Ombudsman notified the Board that the following aspects of the Federation’s complaint were to be investigated:

“(a) The 2012 and 2013 Notices did not comply with the ‘principles’ referred to in section 32, and, in particular, the CPD requirements do not comply with section 32(a)’s ‘principles’. That provision reads:

‘In prescribing matters under sections 28 and 30, the Board must be guided by the following principles:

- (a) the matters must be necessary to—*
- (i) protect the health or safety of members of the public; or*
 - (ii) promote the prevention of damage to property; or*

¹ The Federation has around 1,200 tradesmen members.

- (iii) *promote the competency of persons who do, or assist in doing, sanitary plumbing, gasfitting, or drainlaying; or*
 - (iv) *carry out, give effect to, or provide for a matter that is incidental to, or consequential on, the matters relating to subparagraph (i), (ii), or (iii);'*
- (b) *The Board has not shown that there is a demonstrable need for the CPD courses under section 32(a). It is likely that the Federation would not object to tradesmen being required to complete a competency programme where new standards or requirements are brought into force for work for a trade. However, the Federation is of the view that all (or virtually all) of the present CPD courses are in the nature of refresher courses for which registered tradesmen have already demonstrated their competence by fulfilling examination and practical experience requirements at the time they were originally registered.*
- (c) *Generally, the Board has failed to carry out any or any adequate enquiry about the effect on tradesmen of the imposition of the fees for CPD courses, the time involved in completing CPD courses, and the loss of income and other costs sustained by tradesmen in attending courses."*

Background

3. The introduction of CPD courses by the Board has a vexed history. The current CPD requirements for tradesmen subject to the Board's jurisdiction are set out in Gazette notices gazetted under the 2006 Act (the 2010 notices). These notices were amended by notices published in the New Zealand Gazette on 12 September 2012 (the 2012 notices).²
4. The Auditor-General, the former Ombudsman Dr David McGee, and the Regulations Review Committee (RRC) (on two occasions) have considered issues raised by tradesmen relating to this complaint.
5. There are two classes of tradesmen in New Zealand subject to the Board's jurisdiction: "licensed" and "certifying" tradesmen. Certifying tradesmen certify that work done complies with relevant standards and is lawful. Each year, both licensed and certifying tradesmen have to renew their licences. Three categories of tradesmen are subject to the Board's jurisdiction: plumbers, gasfitters, and drainlayers. Thus, given the two types of tradesmen (licensed and certifying), there are six classes of tradesmen.

² Plumbers, Gasfitters, and Drainlayers Board (Plumbing Registration and Licensing) Amendment Notice 2012; Plumbers, Gasfitters, and Drainlayers Board (Gasfitting Registration and Licensing) Amendment Notice 2012; Plumbers, Gasfitters, and Drainlayers Board (Drainlaying Registration Licensing) Amendment Notice 2012.

Auditor-General's Report: July 2010

6. In July 2010, the Auditor-General, after a lengthy inquiry, presented to the House of Representatives a report entitled "*Inquiry into the Plumbers, Gasfitters and Drainlayers Board*". Mr Wallace Gordon, the Federation's Chairman, and a number of tradesmen subject to the Board's jurisdiction and others made complaints to the Auditor-General about various actions of the Board affecting them, including the validity of the then CPD requirements under the Plumbers, Gasfitters, and Drainlayers Act 1976 (the 1976 Act). In regard to the complainants' criticism of those CPD requirements, the Auditor-General in her report focused on the CPD requirements for gasfitters.
7. The Auditor-General's report concluded:

"[4.41]

The Board publicly maintained that it had introduced a competence-based licensing system for gasfitters from 1 April 2004 (although a system for audits of gasfitters had been in place since 1993). It described the system of continuing professional development for gasfitters, and of auditing the competence of gasfitters every two years, as mandatory. It regarded itself as having the power to withhold licences if these systems showed a concern with competence. However, it had taken no formal steps to use the legal mechanism that had been legislated to enable these systems to be linked into the regulatory requirements of the 1976 Act.

[4.42]

We could see no clear legal basis on which the Registrar could refuse to grant a licence because a craftsman gasfitter had failed to obtain enough continuing professional development points or had failed a gas audit. It would have been possible if regulations had been made to impose these prerequisites, but no such regulations had been made. If a person had failed a gas audit, the Board may have been able to exercise its disciplinary powers, under other parts of the 1976 Act, to deal with competence issues.

[4.43]

We could also see no clear legal basis on which the Registrar could refuse to grant a licence on the basis of supervision arrangements. However, we note it was an offence under the 1976 Act for a registered person to work other than under the supervision of a craftsman. Therefore, if the Board believed that the requirements for supervision had not been adhered to, then it could carry out its own investigation to determine if an offence had occurred and take whatever action it considered necessary through the disciplinary process."

Regulations Review Committee report (February 2011): 2010 Gazette notices

8. After the Auditor-General's report was published, the Board issued the 2010 Gazette notices in purported reliance on sections 28 and 30 of the 2006 Act (which came fully into effect in April 2010). In complaints to the RRC in May 2010, Mr Gordon's company, Wal Gordon Plumbing Limited, and others, in summary, submitted that:
 - a. the 2010 Gazette notices were *ultra vires* the 2006 Act;
 - b. the Board had not demonstrated the CPD requirements imposed by the 2010 Gazette notices on tradesmen were "*necessary*" in terms of the 2006 Act; and
 - c. the Board had not consulted adequately with tradesmen about the CPD requirements.
9. In February 2011, the RRC presented to the House of Representatives a report entitled "Complaints regarding three notices issued by the Plumbers, Gasfitters and Drainlayers Board on 25 March 2010 and the Plumbers, Gasfitters and Drainlayers Board (Fees) Notice 2010".
10. One of the complainants' principal submissions to the RRC was that the Board was only able to "promote" competency standards under section 32 of the 2006 Act, and could not impose such standards on tradesmen subject to the Board's jurisdiction as a pre-condition of being re-licensed.
11. In response, the RRC stated:³

"We do not accept the complainants' argument that the board has a role only to 'promote' competency amongst plumbers, gasfitters, and drainlayers, or their suggestion that simply doing the job can be sufficient to keep up to date. The board clearly has a power under section 30 to prescribe training requirements relating to competency and other matters such as public safety. We also do not accept the complainants' argument that the board necessarily placed too much emphasis on the 2007 consultation. We consider that the board is correct when it says the 2006 Act places a strong emphasis on competence and anticipates the board imposing some training requirements. We also agree with the board that this is common practice for many professional groups, and see no reason why plumbers, gasfitters, and drainlayers should not be subject to similar requirements.

However, we are not satisfied that the board met the statutory requirements of the Act when prescribing the new training requirements as a condition on licensing.

³ Page 10.

The exercise of the power in section 30 is subject to the guiding principles in section 32. Section 32(a) says that matters the board prescribes under section 30 must be 'necessary' to protect the health and safety of the public, or to promote the prevention of damage to property, or to promote competency. In addition, section 32(a)(iv) allows the board to prescribe matters that are incidental to, or consequential on, the other matters listed in section 32(a), including the promotion of competency. We do not therefore agree with the complainants that training courses must relate solely to the core or technical skills needed for plumbing, gasfitting, and drainlaying, although in our view any other courses would need to have a reasonably strong link to core skills."

12. At the time of the RRC's February 2011 report, the Board was in the midst of consulting with tradesmen about CPD. In relation to consultation, the RRC stated:⁴

"We understand that consultation is now being undertaken to assess the skills necessary to be considered competent as a plumber, gasfitter, or drainlayer. We recommend that this include a review of both the points system and the courses which will be offered, giving careful consideration to the requirements of section 32(a). We also recommend that this work be given a high priority by the board.

We consider that the board must also consult widely on the likely costs associated with whatever training requirements it decides meet the criteria in section 32(a). It should then consider carefully whether, in view of the likely costs, the training requirements it proposes to prescribe for practitioners also meet the guiding principles in section 32(b) and (c).

We do not have sufficient information ourselves to assess whether the estimated costs we have been given by the parties are reasonable or are undue costs. We note that other professional groups must pay training costs, and this can include absorbing indirect costs such as travel to courses and down-time while staff attend them. These matters should be explored with practitioners by the board before it makes the assessments required of it by section 32(b) and (c).

Once the board has decided how it will proceed with assessing competency, after the current consultation and duly considering all the factors in section 32(a), (b) and (c), we recommend (in line with our recommendation in the next section of this report) that it consult a final time specifically about its decisions and recommendations before imposing any requirements by way of a Gazette notice.

The board will need to plan carefully the process of prescribing competency standards to meet all the requirements in the Act, including those discussed

⁴ Page 11.

above, to allow practitioners a reasonable time to meet the new training requirements by March 2012.”

13. Under section 33(1) of the 2006 Act, the Board has to consult “*about its proposal for the contents of the notice*”, ie, the Gazette notices. The RRC made the following recommendation:⁵

“We recommend that any future consultation process under section 33 include a final round of consultation on the board’s decisions and recommendations about the detail of new training requirements, before these are included in any Gazette notices.”

14. The RRC concluded that the Board’s consultation had been inadequate in terms of the decision in *Wellington International Airport v Air New Zealand*⁶ and stated:⁷

“The consultation requirement in section 33(1) is for the board to consult ‘about its proposal for the contents of the notice’. The board argued that it had consulted on the content, which was then drafted into a Gazette notice in consultation with the Department of Building and Housing and the Minister.

In our view, consultation using an options paper does not meet the requirements of section 33(1). In the decision in Wellington International Airport v Air New Zealand [1993] 1 NZLR 671, 676 the Court of Appeal said that for consultation to be meaningful, there must be made available to the other party sufficient information to enable it to be adequately informed to make intelligent and useful responses. An options paper cannot be said to amount to meaningful consultation about the ‘proposal for the contents of the notice’.

The document which was consulted on in December 2009 and January 2010 also does not appear to outline specific proposals for the training requirements and still sets out options in some areas for comment.

An options paper is a good first step in consultation, but in our view section 33(1) requires the board to consult certain persons and bodies again about the decisions it has made about what it proposes to do, before publishing a notice under section 30. This does not require a draft Gazette notice to be prepared and consulted on; however, in our view the board was required to consult again about its specific recommendations for training requirements as a condition on licensing before going to the Minister with them.

We note that the consultation papers provided by the board include a summary of submissions dated January 2010. This document also includes some detail of the board’s decisions on issues including competency-based

⁵ Page 16.

⁶ [1993] 1 NZLR 671.

⁷ Page 15.

renewal of licensing. We believe that a document of this nature should have been the subject of further consultation.

The Court of Appeal said in the Wellington Airport decision that consultation cannot be equated with negotiation, although we note that consultation must be approached with an open mind. Therefore, in our view, a final round of consultation about the board's particular proposals for training requirements as a condition on licensing could have been achieved reasonably quickly."

Board's consultation with tradesmen in 2011

15. In October 2011, the Board published a consultation document entitled "*Review of Continuing Professional Development*". It distributed that document among tradesmen for comment. Significantly, annexed to this consultation document, were drafts of the Gazette notices proposed to be issued setting out CPD requirements. Accordingly, the tradesmen were aware of the proposed CPD requirements.
16. In February 2012, the Board published a further consultation document which it distributed to tradesmen. This document was entitled "*Review of Continuing Professional Development*". In that review, it stated it had received 444 submissions on the previous proposed CPD scheme, and commented:⁸

"The Board has now modified the proposed CPD scheme to incorporate many of the suggestions contained in the submissions. The proposed scheme contains greater flexibility than the existing scheme and will also be an effective aid to achieving competence improvement. The Board believes that it achieves an appropriate balance between upskilling, cost-effectiveness and convenience.

A new round of consultation is now underway in relation to this modified proposed scheme. This document constitutes a proposal in terms of section 33 of the Plumbers, Gasfitters, and Drainlayers Act 2006."

Board's further consultation with tradesmen: February 2012 to April 2012

17. In February 2012, the Board published its further consultation document online and emailed all registered tradesmen for whom the Board held email addresses about its proposals; it posted a letter to all tradesmen holding current licences informing them the consultation document was available online; and, in the Board's February and March 2012 e-newsletters, provided details of the consultation process and informed tradesmen how they could access the consultation document.

⁸ Page 1.

18. The Board received 148 submissions on its revised proposals. The Board advises that the submissions were analysed and it took into account that analysis before it sought Ministerial permission to gazette the 2012 Gazette notices.

Second set of complaints to RRC

19. In May 2012, the Federation and others again complained to the RRC about CPD requirements. In a letter of 18 July 2012 to the Board, the RRC (Charles Chauvel MP, Chairperson, RRC) stated:

“Having considered the Board’s response to the concerns raised in the proposed complaint and the findings of the previous Regulations Review Committee, the committee considers that the Board has taken steps to address the issues identified with continuing professional development for plumbers, gasfitters and drainlayers. We consider that you have undertaken consultation with practitioners, and this appears to have resulted in a new scheme for training requirements which will be promulgated soon.”

2012 Gazette notices

20. In the New Zealand Gazette published on 6 September 2012, the Board, after obtaining the Minister’s approval as required by the 2006 Act, gazetted the 2012 notices. The 2012 notices amended the 2010 notices. The 2012 notices set out the number of points tradesmen must obtain each year as a condition of being re-licensed. Most of the required points are to be earned from courses approved by (“*accredited by*”) the Board; some points may be obtained “*through self-directed learning*”.

Third set of complaints to RRC: December 2013

21. In December 2013, the Federation and others again complained to the RRC about the Board’s CPD proposals. In certain respects, the Federation’s complaints to the RRC on this occasion mirror its complaint to the Ombudsman.

22. In its letter of 29 November 2013 to the Board, the RRC (Hon Maryan Street MP, Chairperson) stated:

“We consider a full investigation of the complaints we have received since July 2012 is not warranted, given that the previous Regulations Review Committee examined matters related to this issue at length.”

23. In respect of the third set of complaints, the RRC sought submissions only on the meaning of “*competence*” under the 2006 Act. In its letter of 29 November 2013 to the Board, the RRC stated:

“The complainants suggest that, within the scheme of the Act, ‘competence’ is intended to refer to a minimum acceptable standard, and that the purpose of any mandatory competence programme should be to ensure that

tradespeople achieve that standard. The correspondents argue that some aspects of the continuing professional development requirements may go beyond this purpose.”

24. The RRC has not delivered its report on the third set of complaints.

Statutory provisions relied on by Board

25. The Board submits that section 30(1)(e) (which authorises it to “*prescribe requirements relating to the completion of competence programmes*” for applicants for renewal of practising licences) enables it to introduce “*competence programmes*”, including the prescribed CPD courses. The Board also invokes section 55 and submits:

“Section 55(3) of the Act ... completes the link between section 30(1)(e) and section 55 by specifying:

‘(3) However, a registered person may be required by the Board to complete a competence programme only if 1 or more of the following applies:

...

(c) the person is required to complete a competence programme in accordance with a requirement imposed by a notice published under section 30(1)(e);”

26. The Board further submits:

“The form that competence programmes can take under the Act is set out in section 55(4):

‘(4) Any competence programme may require a person to do 1 or more of the following, within the period, or at [the] intervals, prescribed in the programme:

(a) pass an examination:

(b) complete a period of practical training:

(c) complete a period of practical experience:

(d) undertake a course of studies:

(e) anything else [that] the Board considers appropriate.’

Finally, section 55(5) of the Act provides that:

‘(5) The Board may specify a period within which the person to whom a competence programme applies must comply with the requirements of the programme.’

It is clear from these provisions that the Board has legal authority under the Act to prescribe requirements in relation to competency (eg, training), and to

link those requirements to obtaining, holding, and renewing practising licences. The Board therefore had legal authority to make the 2010 registration and licensing notices imposing CPD requirements as a condition of licensing, and the 2012 amendment notices.”

27. The Board accepts, as it must, that nowhere in the 2006 Act is the expression “*Continuing Professional Development*” used.

Discussion

Section 32 requirements: are CPD courses “*necessary*”?

28. The meaning and effect of section 32 of the 2006 Act – which states the principles the Board “*must be guided by*” in prescribing licensing matters – is at the heart of the Federation’s complaint that the CPD courses are *ultra vires* the 2006 Act. Section 32 (and the relevant principles) is set out in the Appendix.
29. The Federation submits the “*competency*” courses purportedly approved by the Board under the 2012 Gazette notices are not “*necessary*” in terms of section 32. The Federation submits the 2012 notices are “*unlawful*” as they:

- “(a) *are not in accordance with the general objects and intentions of the statute under which they are made:*

The Federation believes the Board have consulted and implemented a mechanism namely a points scheme called Continuing Professional Development (CPD) and have applied section 32 to that scheme. They have instituted an extra step in the competence based licensing intent of the Act and have legislated themselves power. The scheme is not a competence programme but a mechanism.

The Federation believes the Board has implemented the CPD points scheme that takes away the application of Section 32 of Plumbers Gasfitters and Drainlayers Act. Section 32 has not been applied in the manner in which it was intended and does not match the purpose of the Act. The Federation asserts the Board does not have the statutory right to authorise itself power in this manner.

Section 32 was put in place for the protection of the industry and now by way of the gazetted notices the Board has legislated itself power which takes away any protection the industry may have had.

- (b) *in that they appear to trespass unduly on personal rights and liberties:*

As personal interests such as employment and income can potentially be considered rights or liberties capable of being trespassed on, the

Federation asserts the manner in which CPD has been implemented do[es] exactly that.

The application of section 32 to a mechanism rather than to a competence programme removes the protection afforded by section 32 with regard to cost. The Board has no control over costs that can be imposed on practitioners as a result of the mandatory nature of the implementation. These costs are market driven and the resulting risk is the burden of the practitioners who are forced to obtain CPD points in order to obtain a practi[s]ing licence.

Section 32 was put in place for the protection of the industry and now by way of the gazetted notices the Board has legislated itself power which takes away any protection the industry may have had.

- (c) *appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made:*

The Federation believes the manner in which CPD have been implemented is an abuse of the powers inferred on the Board and as a result the Board has not instigated a robust, efficient regime to best monitor what matters are necessary to meet the needs of the Plumbers Gasfitters and Drainlayers Act 2006 and to help ensure delivery of maximum benefits at minimum cost. The Board has legislated themselves authority at a cost to practitioners.”

30. In response, the Board submits CPD courses are authorised by section 32(a) as “necessary” to:

“(i) protect the health or safety of members of the public; or

...

- (iii) promote the competency of persons who do, or assist in doing, sanitary plumbing, gasfitting, or drainlaying;”*

31. The Federation accepts that the public is entitled to know that registered tradesmen who hold a current practising licence are competent to perform regulated services.
32. At the Second Reading of the Energy Safety Review Bill, part of which was separated out and became the 2006 Act, Hon Maryan Street MP, a member of the Commerce Committee that considered the Bill, stated:

“I reiterate the importance that we attached as a Select Committee to the dual process of registration and licensing. Registration equals a ticket with which these young people identify – not only young people but older people who are registered tradespeople. Registration is a point of identification for them. But the licensing system is also important for making sure that ongoing competence can be attested to. That point is critical, because in the area of

plumbing, gasfitting, and drainlaying there are issues of public health at stake. It is absolutely critical for the maintenance of public health that we have competent and licensed – in an ongoing way – practitioners who are laying drains, who are plumbing buildings, and who are fitting gas appliances so that the inhabitants of houses, public buildings, and public spaces are safe.”

33. It is also important to note the purposes of the 2006 Act, which include “(a) to protect the health and safety of members of the public by ensuring the competency of persons engaged in the provision of sanitary plumbing, gasfitting and drainlaying services”. In my opinion, the public protective purpose of the legislation, and the potential impact on public health, mean that a niggardly approach should not be taken to scrutinizing the validity of CPD requirements prescribed by the Board.
34. It is clear that the Board has given careful consideration to the need for CPD courses to ensure tradesmen retain their competence in their fields. That need has been the subject of much debate by the Board and extensive consultation with tradesmen. I note that the majority of Board members, at the time of the introduction of 2012 Gazette notices, were certified tradesmen in fields subject to the Board’s jurisdiction.
35. I agree with the following comments of the RRC in its February 2011 report:⁹
- “We do not accept the complainants’ argument that the board has a role only to ‘promote’ competency amongst plumbers, gasfitters, and drainlayers, or their suggestion that simply doing the job can be sufficient to keep up to date. The board clearly has a power under section 30 to prescribe training requirements relating to competency and other matters such as public safety. We also do not accept the complainants’ argument that the board necessarily placed too much emphasis on the 2007 consultation. We consider that the board is correct when it says the 2006 Act places a strong emphasis on competence and anticipates the board imposing some training requirements. We also agree with the board that this is common practice for many professional groups, and see no reason why plumbers, gasfitters, and drainlayers should not be subject to similar requirements.”*
36. So long as the CPD courses are within the section 32 “principles”, in my opinion the Board is able to require tradesmen to complete “competence programmes” in the form of CPD courses as a pre-condition to being re-licensed each year. Section 30(1)(e)(iii) authorises this, and the Federation accepts that is the case.

⁹ Page 10

Opinion of Ombudsman Dr David McGee: January 2013

37. In January 2013, former Ombudsman Dr David McGee provided Mr Gordon and the Board with his opinion on three complaints Mr Gordon had made:
- a. a complaint, which Dr McGee upheld, that the disciplinary levy imposed on tradesmen was *ultra vires* the 2006 Act (Dr McGee's opinion in that respect led to Parliament passing validating legislation);
 - b. the adequacy of consultation concerning the CPD courses then proposed; and
 - c. the Board's refusal to register tradesmen for non-payment of fees or levies.
38. Dr McGee's opinion was thus provided between the second and third set of complaints by the Federation to the RRC, but after the Gazette notices published on 12 September 2012. Dr McGee stated:¹⁰

"Even if the 2006 Act had not mandated consultation with the industry before adopting CPD requirements, it is likely that this would have been implicit as a legal requirement. But regardless of the legal position, good administrative practice required it.

The Regulations Review Committee considered that such consultation as was undertaken was not adequate. The Board pointed out to me that some consultation did occur in 2007 and 2009 before the CPD Notices were issued. Whether this was enough to satisfy the statutory requirement must remain moot. But it is noteworthy that the consultation on a new CPD scheme embarked upon in October 2011 is of a different order from the earlier consultation papers. In particular, the October 2011 consultation document includes draft notices on which comments are invited. While the earlier consultation documents raised questions about CPD requirements, they did not disclose in this level of detail how those requirements might look in practice. At the very least, the consultation on the CPD Notices could have been more informative and structured. In other words, it could have been much better than it was.

The Committee also concluded that the Board did not have adequate regard to the principles governing the exercise of its powers as set out in section 32 of the 2006 Act. As discussed above, the Board continues to dispute this, but it does concede that it failed at the time adequately to record its consideration of those principles thus not leaving an 'audit trail' that would establish that it had addressed them.

Conclusion

¹⁰ Pages 12 and 13 of Ombudsman opinion.

To some extent, if there is an absence of evidence, the Board, in whose hands the keeping of that evidence lay, must accept the consequences of this. It is clear to me that the Board did have material on which it could rely. It was reasonable for it to have regard to the experience of the previous Board's policy-based scheme. It also had some feedback from the consultation documents that it did issue and it had the expertise of its own membership.

But given the limited nature of the consultation that did occur and the absence of evidence that the statutory principles were explicitly and carefully addressed before the CPD Notices were made, I am of the view that Mr Gordon's complaint on this score should be upheld. It seems to me that the degree of consultation that did occur was unreasonably truncated (section 22(1)(b) of the Ombudsmen Act) and that the apparent failure to address the statutory principles mean that the decision to make the notices appears to have been made contrary to law (section 22(1)(a)).

Redress

Mr Gordon asks for the scheme to be stopped immediately.

In this case, unlike the disciplinary levy, there still remains a real question about the legal effectiveness of the notices. The failure to consult about them cannot in itself invalidate them as section 33(2) of the 2006 Act makes clear. I do not intend to speculate on whether they are invalid for failure to address the principles set out in section 32. Presumptively, they are valid until set aside by a court of competent jurisdiction. I thus intend to treat them as legally effective. Furthermore, CPD requirements of some nature are clearly contemplated by the 2006 Act and the Board, as I have indicated above, had some material (not insubstantial) on which to base its decision. This is not a case of a cost being imposed on a particular sector without legislative authority. If the appropriate authorities consider that the doubts that have been urged as to the validity of the CPD Notices are serious enough to require legislative validation that is a matter for them.

In this case, the defects in the CPD Notices are being actively addressed by the Board in the consultation round on new notices that commenced in 2011. I am informed that that process is almost completed with draft notices having been submitted by the Board to the Minister in May 2012 and the Minister having approved them for promulgation in the Gazette. In my view these steps are sufficient to have addressed the deficiencies arising from the way in which the CPD Notices were made."

39. In fact, by the time of the Ombudsman's January 2013 opinion, the 2012 Gazette notices concerning CPD had already been published in the Gazette, on 6 September 2012.
40. The focus of the previous Ombudsman's investigation was thus essentially on the 2010 notices. It did not address the validity of the 2012 notices, nor whether the Board's consultation with tradesmen concerning the 2012 notices was sufficient.

41. I agree with Dr McGee's opinion that the Board could draw on "*the expertise of its own membership*" and that "*the consultation on a new CPD scheme embarked upon in October 2011 is of a different order from the earlier consultation papers*".

Validity of gazetting of 2012 notices

42. I accept the Board's submission that the 2012 Gazette notices were validly issued under section 30(1)(e) of the 2006 Act. I note that the opening part of each of the Gazette notices states:

"The Plumbers, Gasfitters, and Drainlayers Board, under sections 28, 30, 31 and 139 of the Plumbers, Gasfitters, and Drainlayers Act 2006 ..., having been guided by the principles set out in section 32 of the Act, issues the following notice to amend ..."

43. The Gazette notices' failure to specify the actual paragraph number of section 30(1)(e) cannot, as the Federation submits, invalidate the notices. The reference to section 30 in the notices is sufficient.

Adequacy of consultation

44. In my opinion, the Board has consulted adequately with tradesmen on both the need for, and the form of, CPD courses, in accordance with the principles outlined by the Court of Appeal in its *Wellington International Airport* decision. Among other things, the Board:
- published in October 2011 a consultation document to tradesmen, annexed to which were drafts of the Gazette notices proposed;
 - published in February 2012 a further consultation document to tradesmen for comment; and
 - considered at Board meetings the tradesmen's submissions – Grant Thomas Consulting submitted to the Board a review of those submissions.
45. The Board was well aware of the Federation's concerns about the CPD requirements as a result of the consultation processes it undertook with tradesmen in 2011 and 2012. Clearly, it had regard to the submissions received from tradesmen. It was open to the Board to draw, in particular, on the experience of its tradesmen members, and to conclude (as it did) that the CPD courses were "*necessary*" in terms of the 2006 Act.

Cost of CPD courses

46. The Federation submits that the amount paid by tradesmen for attending CPD courses is unreasonable. The Federation estimates the cost to a business or a tradesman to be around \$5,000 per tradesman. That estimate includes the fees for those courses and income "lost" during the time spent in attending those courses. Assuming the Federation's estimate of about \$5,000 is accurate, that is not an insignificant cost.

47. The RRC in its February 2011 report noted the Board's estimate of the cost to tradesmen of undertaking CPD courses, and stated:¹¹

"... [the Board] estimated the direct costs of obtaining the required number of points to renew a plumber's practising licence at under \$200 each year. The board said that an informal survey it had undertaken, which took into account both direct and indirect costs, indicated that the annual cost per person would be on average \$1,350. However, the board accepted that in some cases the cost could be \$4,000 to \$5,000 per person annually."

48. The Board does not accept that the costs to tradesmen of doing so are "undue" in terms of section 32(c) of the 2006 Act.
49. In my opinion, it was reasonably open to the Board to conclude that CPD courses in terms of the 2012 Gazette notices were "necessary" in terms of 2006 Act. It may be an inevitable consequence of tradesmen attending accredited CPD courses that either they personally, or their employers, will lose income-earning time.
50. On the basis of the information available to me, I conclude that it was reasonably open to the Board to conclude that the costs incurred by tradesmen or their employers were not "undue costs" in terms of section 32(c) of the 2006 Act.

Relevance of CPD courses

51. In relation to the list of accredited CPD courses, the Federation states:

- *"On page four [of the list of accredited courses] is a course 'Hearing Conversations'. Under the Board's application of section 32 this course is necessary. Page two shows a course 'Clan Labs,' and what about 'Demonstrate knowledge of health and fitness for civil infrastructure personnel'. These courses are not 'necessary' to show competence as a plumber gasfitter or drainlayer. They may be nice to know, but are not necessary but under the Board's CPD scheme ... they are deemed necessary.*
- *In 2013 a new gas certification scheme was legislated where the registration of gas work changed. This was a significant legislative and regulatory change where it was imperative that every gasfitter knew the requirements of the new regulations. This was training that was 'necessary' and the Federation feels it should have been mandatory for all gas fitters (and represented this view to the PGDB), but alas it wasn't. Most tradespeople had to fend for themselves and rely on industry groups to get the relevant information which they required to stay compliant. There is still some confusion amongst gasfitters over this change even now.*

¹¹ Page 9.

From these two examples you can see what is regulated as ‘necessary’ and what is not – what was regulated to prove competence and what was identified by industry as necessary for competence. The above example shows the difference between a demonstrated need, being the gas certification training and accredited courses being the courses on the Board’s list.”

52. The Federation submits that some CPD courses accredited by the Board are not within the guiding principles of section 32(a)(i) and (iii).
53. In my opinion, the nature and scope of CPD courses is properly a matter for the Board as regulator to determine. An Ombudsman or Court is not well equipped to weigh the fine details of courses prescribed by a regulator as a pre-condition of issuance of a practising licence. The Federation provided insufficient information for me to conclude that the Board has acted unreasonably or unlawfully in mandating particular CPD courses.

Opinion

54. I conclude that:
 - a. it was reasonably open to the Board to conclude that the 2012 Gazette notices are *intra vires* the 2006 Act;
 - b. the Board consulted adequately with tradesmen subject to its jurisdiction concerning the form of, and the need for, the CPD courses; and
 - c. it was reasonably open to the Board to conclude that:
 - i. in terms of section 32 of the 2006 Act the CPD courses (and their completion by tradesmen each year) were “*necessary*” as a pre-condition to tradesmen being re-licensed each year; and
 - ii. in terms of section 32(c) of the 2006 Act, the CPD courses do “*not impose undue costs*” on tradesmen.

Professor Ron Paterson
Ombudsman

Appendix: Relevant statutory provisions

Ombudsmen Act 1975

13. Functions of Ombudsmen

- (1) Subject to section 14, it shall be a function of the Ombudsmen to investigate any decision or recommendation made, or any act done or omitted, whether before or after the passing of this Act, relating to a matter of administration and affecting any person or body of persons in his or its personal capacity, in or by any of the departments or organisations named or specified in Parts 1 and 2 of Schedule 1, or by any committee (other than a committee of the whole) or subcommittee of any organisation named or specified in Part 3 of Schedule 1, or by any officer, employee, or member of any such department or organisation in his capacity as such officer, employee, or member.

...

22 Procedure after investigation

- (1) The provisions of this section shall apply in every case where, after making any investigation under this Act, an Ombudsman is of opinion that the decision, recommendation, act, or omission which was the subject matter of the investigation—
- (a) appears to have been contrary to law; or
 - (b) was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a rule of law or a provision of any Act, regulation, or bylaw or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory; or
 - (c) was based wholly or partly on a mistake of law or fact; or
 - (d) was wrong.

...

Plumbers, Gasfitters and Drainlayers Act 2006

3 Purposes of this Act

The purposes of this Act are—

- (a) to protect the health and safety of members of the public by ensuring the competency of persons engaged in the provision of sanitary plumbing, gasfitting, and drainlaying services; and
- (b) to regulate persons who carry out sanitary plumbing, gasfitting, and drainlaying.

28 Classes of registration may be designated by Board

- (1) The Board may, by notice in the *Gazette*,—
 - (a) designate classes of registration for the purposes of this subpart; and
 - (b) specify for each of those classes the sanitary plumbing, gasfitting, or drainlaying that a person is authorised to do, or assist in doing, by virtue of being a registered person of a particular class and holding a current practising licence.
- (2) The notice may describe the classes of registration in any way the Board thinks fit, including in 1 or more of the following ways:
 - (a) by reference to a name or form of words that is commonly understood by persons who carry out plumbing, gasfitting, or drainlaying;
 - (b) by reference to an area of science or learning;
 - (c) by reference to tasks commonly performed.
- (3) In specifying the work that may be carried out by registered persons who hold current practising licences, the Board may impose limitations on the circumstances in which a registered person may do, or assist in doing, that work.
- (4) For the purposes of this section and sections 29 to 35 and 142 to 145, **Board** means the Plumbers, Gasfitters, and Drainlayers Board (whether constituted under the former Act or continued under Part 4).

30 Board may prescribe other registration and licensing matters

- (1) The Board may, by notice in the *Gazette*,—
 - (a) prescribe for each class of registration the minimum standards for registration (including standards relating to required competence, qualifications, and experience) that persons must meet in order to be registered as registered persons and to be issued with practising licences; and
 - (b) prescribe for each class of registration the terms and conditions subject to which persons are registered as registered persons; and
 - (c) prescribe for each class of registration the terms and conditions subject to which practising licences are issued; and

- (d) prescribe requirements relating to competent and safe work practices and the testing of those practices; and
 - (e) prescribe requirements relating to the completion of competence programmes in respect of persons who—
 - (i) apply for practising licences or provisional licences; or
 - (ii) hold practising licences or provisional licences; or
 - (iii) apply for renewals of practising licences or provisional licences; and
 - (f) recognise any overseas qualification, certificate, registration, or licence as satisfying a particular minimum standard for registration (in whole or in part) if, in the opinion of the Board, that overseas qualification, certificate, registration, or licence is equivalent to, or as satisfactory as, the standard, or part of the standard, that is treated as being satisfied.
- (2) The terms and conditions referred to in subsection (1)(c) may include, for example,—
- (a) a term that authorises the person to test or certify work or to supervise work:
 - (b) a condition that requires compliance with the requirements referred to in subsection (1)(d):
 - (c) a condition that requires the person to complete a competence programme:
 - (d) a condition that imposes limitations on the circumstances in which the person may do, or assist in doing, work:
 - (e) a condition that imposes limits on the work that the person may do, or assist in doing, under the practising licence.
- (3) The Board may make arrangements with the appropriate authorities controlling the registration, licensing, or recognition of sanitary plumbers, gasfitters, or drainlayers outside New Zealand for the reciprocal recognition of registration, licences, certificates, or other evidence of proficiency in sanitary plumbing, gasfitting, or drainlaying.

31 Minimum standards for registration

- (1) A notice under section 30 may prescribe minimum standards for registration in any way the Board thinks fit, including in 1 or more of the following ways:
- (a) by requiring a degree or diploma or certificate of a stated kind recognised by the Board:
 - (b) by requiring the successful completion of a competence programme, degree, course of studies, or programme accredited by the Board:
 - (c) by requiring a pass in a specified examination or any other assessment set by the Board or by another organisation approved by the Board:
 - (d) by reference to registration with, or a licence issued by, an overseas organisation that performs functions that correspond wholly or partly to those performed by the

Board:

- (e) by requiring experience in the provision of services of a particular kind:
 - (f) by requiring a certain level of competence.
- (2) However, the minimum standards for registration prescribed under section 30 may require a person to pass a specified examination or other assessment set by the Board only if the Board is satisfied that the person does not have a degree, diploma, or certificate of a stated kind recognised by the Board under subsection (1)(a).

32 Principles guiding prescribing of registration and licensing matters

In prescribing matters under sections 28 and 30, the Board must be guided by the following principles:

- (e) the matters must be necessary to—
 - (i) protect the health or safety of members of the public; or
 - (ii) promote the prevention of damage to property; or
 - (iii) promote the competency of persons who do, or assist in doing, sanitary plumbing, gasfitting, or drainlaying; or
 - (iv) carry out, give effect to, or provide for a matter that is incidental to, or consequential on, the matters relating to subparagraph (i), (ii), or (iii); and
- (f) the matters may not unnecessarily restrict the registration or licensing of persons as plumbers, gasfitters, or drainlayers; and
- (g) the matters may not impose undue costs on plumbers, gasfitters, or drainlayers, or on the public.

55 Competence programmes

- (1) For the purpose of examining or improving the competence of persons who do, or assist in doing, sanitary plumbing, gasfitting, or drainlaying work, the Board may set or recognise competence programmes in respect of persons who—
- (a) apply for practising licences or provisional licences; or
 - (b) hold practising licences or provisional licences; or
 - (c) apply for renewals of practising licences or provisional licences.
- (2) Any competence programme may be made to apply generally in respect of all of those persons, or in respect of a specified person, or in respect of any specified class of those persons.
- (3) However, a registered person may be required by the Board to complete a competence programme only if 1 or more of the following applies:

- (a) the registration of the person or the practising licence held by the person is subject to a condition imposed by a notice published under section 30 that requires the person to complete a competence programme; or
 - (b) the person is required to complete a competence programme in accordance with an applicable minimum standard for registration; or
 - (c) the person is required to complete a competence programme in accordance with a requirement imposed by a notice published under section 30(1)(e); or
 - (d) the person is required to complete a competence programme under section 54 (which relates to a review of a person's competence) or Part 3 (which relates to discipline).
- (4) Any competence programme may require a person to do 1 or more of the following, within the period, or at the intervals, prescribed in the programme:
- (a) pass an examination:
 - (b) complete a period of practical training:
 - (c) complete a period of practical experience:
 - (d) undertake a course of studies:
 - (e) anything else that the Board considers appropriate.
- (5) The Board may specify a period within which the person to whom a competence programme applies must comply with the requirements of the programme.
- (6) The Board may exempt any person or class of persons from all or any of the requirements of a competence programme.

139 Power to amend or revoke

- (1) The Board's power to make, issue, give, or publish any order, notice, exemption, or other instrument includes the power to—
- (a) amend or revoke it:
 - (b) revoke it and replace it with another.
- (2) The Board's power to impose any terms or conditions includes the power to—
- (a) amend or revoke those terms or conditions:
 - (b) revoke those terms or conditions and replace them with other terms or conditions.
- (3) This section does not limit section 15 of the Interpretation Act 1999.