

Submission

No 21

INQUIRY INTO THE OPERATIONS OF THE HOME BUILDING SERVICE

Organisation:

Name: Ms Luisa Berg

Telephone:

Date Received: 13/11/2006

Subject:

Summary

This submission has been kept partially confidential by resolution of the Committee.

Submission by Luisa Berg

**Re: NSW Legislative Council's Inquiry into the operations of the
Home Building Service of the Office of Fair Trading**

TERMS OF REFERENCE

a) The builder licensing system

The Builder licensing system aims to protect consumers by ensuring that builders and other trades persons are adequately qualified, reputable and abide by the standards of the trade.

My experience is that the existing builder licensing system does not adequately and properly protect Consumers, as the system seems to focus more on the collection of licencing fees and keeping builders in business than on the protection of consumers from errant and unscrupulous builders.

The end result of my experience with the Builder Licensing System is that it is weighted in favour of the builder to my detriment.

In my view, the builder licensing system operates under an inherent conflict of interest in that it should protect the interests of consumers while at the same time it is financially dependent for its existence and survival on the collection of licensing fees from the trade that it purports to regulate. In my view, the system has not been adapted to cope with the inherent conflict of interest between consumers and builders at the same time.

Anecdotal evidence suggests that there is a need to provide consumers with greater accessibility to the builders' licences and historical records including claims and complaints lodged and or pending against builders licences. Also, that the supervision and monitoring of the exercise by the regulatory body of the power to grant and renew licences is not done thoroughly. Thus, although the relevant legislation and regulations deserve to be enforced; these were not enforced in my case.

Although a building licence should be a certificate of skill and adherence to approved standards of trade and regulatory code as well as personal and business credentials of good character, honesty and fair-trading, in practice this did not occur in my case.

My builder's work was grossly and blatantly defective and he protracted the dispute for his own benefit by subverting the licensing, inspection, resolution and investigation processes, including the agreement of the Conclave of Experts.

While the OFT ostensibly encourages consumers to seek information and to check if tradespersons /builders are suitably qualified and adequately licenced, my experience with the OFT did not reflect this.

My search of the Register of builder's licences prior to entering into a contract with my builder in 2001, did not alert me to the builder's previous corporate Name and history, which had a different builders' licence number and supervisor's Certificate number and contained a warning stating:

" DO NOT CONTRACT WITH THIS LICENSEE" Supervisor Cert No. ?.

Further when in 2005, I tried to ascertain how it came about that my builder could continue to practice in spite of his failure to abide by industry standards, HBS hindered my efforts. Although my application for a historical search of my builder's licence and for his building supervisor's licence, was in writing and was accompanied by a cheque for \$ 30.00, initially the licensing branch tried to dissuade me from obtaining the search. However, when I persevered with my request, it advised me that it would send me copies of records which would be blacked out of all useful information and that therefore, it proposed to return my cheque, which it did.

When I persisted further and renewed my application under the FOI Act, the HBS hindered my application by its prohibitive estimates of costs of \$ \$997.50 (or \$ 30 per hour for 33.25 hours) to process my application. I thus abandoned my enquiry and to this day, I am unable to understand how the licensing system could have issued over a period of time a number of Supervisor's licences with different registration numbers from that allocated in the original Supervisor licence.

Recommendations: on The Builder Licensing System

1. The legislation and Regulations relating to the issuing and renewing of licences should be more strictly implemented and importantly should also be better supervised.
2. The conflict of interest in having the same body protecting consumers and regulating the industry and also at the same time been financially dependent on the said industry for its existence and survival should be resolved.
3. Builders Licensing Records should provide an accurate record of the expertise, qualifications and history of the builders and this should be made readily available to interested consumers. This would reduce or obviate potential claims.
4. The granting, renewing and supervision of Building licences should be continuously under review and re: assessment for preventative action in order to create a more efficient Building Industry. The system or at least its investigation branch should ensure that:
 - (a) Applications for licences and/or renewals of licence disclose details of expired and/or suspended licences. Also it should disclose builders' of their existing contracts, the status of work in progress and other matters that the HBS considers appropriate, such as details of claims pending resolution and of determination of disputes.
 - (b) The claims lodged with the insurer and or its Representative Agent are cross-referenced with the Register of licences and recorded in the Register of licences as pending claims.
5. The builder licensing system should set up a mechanism for liaising and cross referencing information so as to simultaneously update the information contained in the records of the entities of the OFT.

Consideration should also, in my view, be given to the setting up of an accreditations' system for builders. It would be of assistance to consumers if they could ascertain the level of competence and area of expertise of the builder with whom they are entering into a contract.

b) The Home Warranty Insurance Scheme

The Home Warranty Insurance Scheme (HWI) was set up to protect Consumers from financial loss if the builder failed to complete or rectify the defective work.

In January 2001, I paid a premium of \$1,086 for the ex-HIH Home Warranty Insurance Scheme prior to its collapse, to protect me from financial loss. Since then, I relied on the NSW Government's Rescue Package for the HWI to indemnify me to the same extent that would have applied under Home Warranty policies issued by the HIH Group.

I engaged my builder because he was a licenced builder and a Structural Engineer and because an OFT search of his License showed that there was no complaint against his name. I thus relied on the builder's licence and the OFT records and the Home Warranty policy and Rescue Package to protect me from potential defaults in the construction.

My builder was not only the sole director of his building company; he was also the Structural Engineer and the Supervisor of the project. He thus wore 3 separate hats, but at times conflicting hats. Soon after I signed the contract, I found out that this builder carried out shoddy and defective work and had not practiced for many years. He employed labourers to carry out work, which should have been done by tradesmen and his acting Supervisor on my site was unlicensed and inadequately experienced.

The Office of Fair Trading (OFT) through the Home Building Service (HBS) administers Building Insurers' Guarantee Corporation (BIG Corp) which is vested with the responsibility of indemnifying consumers like me.

However, both BIG Corp and its Representative Agent, Strategic Claims Solutions Pty Ltd (SCS) failed to protect me when I called upon them to do so and treated my Home Warranty Insurance as "last resort" even though it was taken out prior to 2002. Further, they went to considerable lengths to avoid becoming involved with my claim even though they were in possession of all the relevant documents and Expert Reports since I lodged my claim Notification Form with SCS on 24 May 2002.

A first, SCS declined to carry out site inspections of the defective work, then blamed me for not settling the dispute. It blamed me because I would not accept the builder's word that the defects either did not exist or were trivial or he would rectify at the end. Needless to say, I could not accept the builder's word as I had experts' reports documenting the serious defects and expert's advice to have the defects rectified before rendering was applied to the walls as the defects were serious and substantially affected the construction.

Owing to SCS reluctance to become involved in my case (and thus avoiding having to meet my claim), I was forced to join BIG Corp to District Court proceedings, which were then on foot between the builder and I. BIG Corp took the position that it would only deal with my claim if I discontinued the litigation against it.

Trusting in BIG Corp and its in-house Solicitor's () agreement that the discontinuance was without prejudice to my rights against the insurer and that BIG Corp. would set up a conclave to resolve my dispute, I agreed to discontinue my proceedings against BIG Corp in the District Court on 7.07.2003.

It took 19 months before BIG Corp notified me that it accepted that the majority of the complaints in my insurance claim were justified and a further 6 months before Mr. () made a determination as directed by SCS. with settlement terms that could not be realized.

Mr. () justified the reversal of his prior assessment of the defective work at the Conclave on the ground that " he had to say or to do what he was told " by the Insurer who had engaged him.

The reversal of Mr. () position, was a great disappointment to my building Consultant, Mr. () (who is a Committee Member of the Master Builders Association, Maroubra Branch), who said words to the effect that " () stabbed him in the back". Mr. () determination cost me dearly as I was forced to go through the litigation, without the Insurer as an interested party, attending the proceedings.

I notified BIG Corp of the Conclave's decision and requested clarification; however, BIG Corp. took no action to follow up my complaint and now disowns its duties and the commitments it provided to my Legal Representative.

In my view, BIG Corp has not administered the Home Warranty Insurance Scheme in accordance with the intent of the Rescue Package.

In a nutshell, SCS and BIG Corp did not process my claim with due diligence and care as from the beginning they set up obstacles instead of assisting me and did not follow proper and due process in the handling of my case.

I gained the impression that BIG Corp lacked the organization skills to deal with grievances with impartiality and within a reasonable time frame.

Something must be wrong when after having incurred bills for nearly \$ 250,000 I still have an unfinished structure, probably needing demolition and after having taken out the obligatory insurance.

Had the defective work being inspected, when I notified the Insurer, I would not have suffered the severe stress and financial costs to protect myself from the constant pressure exercised by the builder towards me and having to deal with a paper war of letters from the builder up to 11 pages long.

Recommendations: on the Home Warranty Insurance Scheme (HWI)

1. There seems to be a consensus among people who have been aggrieved by unscrupulous builders that the body administering the Scheme (OFT/HBS) should be independent of the Builders Licensing Scheme.

The conflict of interest that arises when the same body that on the one hand raises Builders' Licences fees and on the other, disciplines the builders and compensates for the builders' defaults, needs to be resolved.

Once the conflict is resolved, the HWI should have a clear mandate of its function and should be managed by competent and experienced experts who should strictly adhere to due process.

2. Consideration should also be given to the setting up of a special fund in the nature of ex-gratia payments to compensate the category of consumers who have been and are the victims of the "Home Warranty Insurance Scheme". My case would be an example of a case to which the funds should apply.

3. The Home Warranty Insurance Scheme should recognize the importance of ensuring that homes are built to a high standard or at least to an acceptable standard and when this does not occur, as in my case, should ensure prompt rectification especially when one has taken out insurance and paid a premium, as I did.

(c) The resolution of complaint

The complaint by Luisa Berg:

SCS and BIG Corp did not resolve my complaint against the Builder for defective work as the builder consistently maintained a policy of denial and SCS did not appoint an OFT Inspector to inspect and only provided me with a report of my complaint in May-June 2006.

BIG Corp incorrectly treated my claim as "Last Resort". This does not provide for indemnification for losses caused by a builder as a result of failure to complete or rectify the defects. Further, BIG Corp caused delay and other obstacles, which protracted the dispute and caused me to incur heavy legal and consultants' costs.

BIG Corp & SCS exacerbated my dispute by allowing the builder to subvert the inspection and conclave process. See: Terms of Reference "The enforcement of relevant legislative and regulatory provisions"

BIG Corp. reneged its commitments to me to deal objectively with my claim and prejudiced my rights by prevailing upon me to discontinue my proceedings against BIG Corp in the District Court.

BIG Corp. in breach of its fiduciary duty did not attend the hearing in the NSW District Court and I was thus forced to settle to avoid a protracted hearing.

HBS & BIG Corp allowed the builder to subvert the investigation, the licensing processes the exercise of disciplinary powers and the enforcement of relevant legislative and regulatory provisions by relying on a report from an Inspector with no Engineering qualifications who relied on the builder's opinion to report and assess the Structural Defects in the building work.

HBS imposed penalties of \$ 17,500 against the licencees. These penalties were too lenient in "my view" and I was kept in the dark as to the basis of the penalties and as to the documents relied upon by the Delegates who imposed the fines.

HBS declined to indemnify me for my losses and has not given me a response from its legal advisors in respect of the defective structural work covered under the Statutory Warranties of the Home Building Act 1989 and other matters in issue.

Recommendations: on the Resolution of Complaint

1. In my case, this process was lengthy, painful and costly. The Insurer's Representatives were disinterested, secretive, dilatory and all too readily yielding to the builder's unreasonable requests and interests. This resonated on the other processes. There should be a follow-up of the system. A procedure whereby claims are resolved within a reasonable timeframe and in default to have some "appeal or review" mechanism.

2. The Entities of HBS and BIG Corp have not discharged their function to protect and indemnify me in accordance with the Rescue Package provided by the NSW Government following the collapse of HIH. The HBS should fully indemnify me for my losses as required by the Rescue Package of the Home Warranty Insurance Scheme.

3. I was the victim of an unscrupulous builder, unsuspecting and burdened by work and family commitments. Instead of being helped, I was made to prove my case, thus causing me to incur heavy Consultants and Legal Costs. I was also requested to incur further legal costs to prove what I had already supplied to the HBS and its legal advisors. The BIG CORP Solicitors and the Consumer Trader and Tenancy Tribunal (CTTT) requested me, to supply comprehensive details of my claim in the form of "Points of Claim". This document was 7 pages long and involved me in further and unnecessary significant expenses.

4. Some aspects of the current system of resolution before the CTTT are too legalistic, inconsistent and adversarial, an example was when I lodged my claim with the CTTT. Although I had supplied to BIG Corp/ HBS comprehensive reports with photos of my claim, I was requested to re-file my claim in the form of "Points of Claim". Then, after I complied and the Insurer became obliged to file a "Defence", the CTTT did not enforce its direction for BIG Corp. to file a Defence.

Further and in spite of the above, when the case was called over and neither my Solicitor nor I had received the Notices of Hearing – the CTTT dismissed my claim for failure to attend.

I am now expected by BIG Corp and the CTTT to incur additional litigation costs to have the claim re-listed without having been provided with sufficient and adequate information relating to the grounds of the Defence relied upon by BIG Corp.

Thus, while I was required to abide by the CTTT formalities of lodging my claim in a "Points of Claim" form and of being present in Court, even when neither my Solicitor nor I, had received the Notices of Hearing, the HBS's Solicitors were not required to abide by the CTTT's procedures as to the filing of their Defence. Indeed, as to this date I have not been served with the grounds of the Defence by BIG Corp.

d) The exercise of disciplinary powers

The process of the exercise of disciplinary powers should be alerted from the date of lodgment of a claim and not from the date of the victim's complaint against the builder's licence.

In my case, while the SCS and BIG Corp had notice and documents of my claim since 2002, it did not start investigating my builder until early November 2004.

Even so, my experience is that this process was carried out unwillingly and dismissively of my concerns. It took 17 months for the HBS to complete the investigation and to impose penalties. This process was essentially brought about by the Insurer's refusal to deal with my claim, which forced me to settle with the builder without receiving any compensation.

Thus the investigation was carried out belatedly and it also took an excessive long time.

In the interest of fairness and justice, the exercise of the disciplinary action against builders, the HBS should be open in its process. In particular, it should not be secretive about the evidence produced to it by the Builder and should make available the grounds for the disciplinary action and the bases for its decision and the penalty (ies) imposed. In my case, while my builder was fully aware of my complaint and consulted and had meetings with HBS, I was not informed either of the builder's response or the information relied upon by the HBS for the imposition of the penalties.

In my view, as the complainant I should have been invited to attend and make submissions if appropriate. Instead HBS froze me out of the process. I was not given the opportunity to rebut the builder's misleading and self interested statements against me to the effect that "he would have rectified some defects if I had allowed him to continue on the site" whereas in actual fact, he was the one who had abandoned the site.

The HBS advised me that the Builder had breached a statutory warranty but did not provide me with details of the grounds for the show cause action as required by the Home Building Act 1989 or of the details of the statutory warranty breached by the licencees.

Whilst, the penalty against the building company is considerably less severe than that imposed on the building supervisor, the aggregate penalties are minimal compared to the damages caused to me by the defective work.

There should be a more rigorous regime of requirements to be met and penalties provided, as the current penalties imposed by HBS on defaulting "errant" builders are too lenient.

In my view, the penalties should reflect the severity of the damage inflicted on the innocent party and the community.

e) The enforcement of relevant legislative and regulatory provisions

The legislative and regulatory provisions have been enacted to assist and facilitate the quick resolution of building disputes and the parties should be made aware and fully advised as soon as possible at the commencement of the dispute of their rights and obligations. The Parties should be provided with a summary of their rights and obligations.

The legislative and regulatory provisions and Conciliation processes should be implemented and enforced if they are not complied with.

The Conciliatory processes such as Conclaves should have a clear function, be composed of competent Experts without conflict of interest and should strictly adhere to due process. In my case, I do not believe the above occurred.

The entities HBS BIG Corp after many requests from me, eventually arranged for a Building Consultant to inspect the construction and provide me with a record of inspection. However, I now realize that the building Consultant who inspected the construction (Mr.) was not a Building Inspector from the OFT and was thus unable to issue directions to the builder. This explains why had a long period of disputation without any directions or report of inspection being issued by an Inspector from the OFT to the builder.

This is a serious flaw and reflects that the system allows a builder to ignore the claims lodged with SCS/BIG Corp. This was at the time unknown to me and it is in my view a dereliction of duty on the part of BIG Corp. and the HBS.

Mr. had requested the builder to return to the site to, among other things dismount the sliding doors and windows for the removal and cleaning of excessive mortar in between the cavities of the walls and the mortar stuck to the exterior walls and sliding doors and windows so as to enable the Experts to assess the cost of rectifying the serious defects. This request to the builder was endorsed on the Schedule of Complaints agreed by the Experts at the Conclave.

The determination of the Presiding Consultant to the Conclave did not follow due process as it was done without the consent of the Conclave of Experts, which was to have a further meeting for assessment of additional defects and costs to rectify all the defects listed in the schedule of complaints. BIG Corp allowed SCS to direct Mr. to make a determination without reconvening the conclave. In my view, this irregularity and failure of due process subverted the Conciliation process.

Similarly, the HBS failed to obtain a report from an Inspector qualified in Engineering concerning the Structural defects in my construction and relied on the opinion of the builder as a Structural Engineer who had a conflict of interest in the matter. This enabled the builder to subvert the system.

In my case, the system failed to achieve the purpose and intent of the legislation.

Therefore I believe that as the Insured party, I am entitled to be indemnified for the losses and damages suffered by me.

f) The establishment of a Home Building Advice and Advocacy Centre

This should be a first priority to balance the enormous disadvantage faced by consumers with grievances against unscrupulous builders. The most flagrant disadvantages result from:

The minimal and insufficient lobbying from consumer agencies compared to the existing lobbying on the Government Instrumentalities on behalf of pressure groups from the building and insurance trade.

My case illustrates how Consumers with genuine grievances are grossly disadvantaged in their contest against unscrupulous builders from the very start of their dispute, and how the existing building culture through its financial power and network overrides the system set up by the Government to protect the consumers.

Further, how the legal system through lack of strength is unwilling or unable to overcome the weight and powerful influence of the network and culture of the building trade.

Such a centre is essential for consultation and guidance of the process to deal with disputes and the methodology to achieve a fair and reasonable outcome. It would avoid expensive litigation and consultants' costs and attract more young legal practitioners to learn about building law and practices.

I incurred high legal and consultants' costs for the Insurer's representative (SCS) to take any notice of my claim and then further costs for BIG Corp to become aware of my claim to be met by further obstacles and secrecy which made it impossible for a disadvantaged person to overcome. Finally, BIG Corp reneged on its commitment to my former Solicitor to deal with my claim and in neglect of its fiduciary duty did not attend the District Court Hearing where the presence of BIG Corp/HBS was repeatedly requested.

g) Any other relevant matters.

It is vital that the Experts engaged by the HBS be properly qualified, competent, experienced and without conflicts of interest.

These Experts should have the necessary accreditations to provide certifications if requested. In the event of conflict of opinion between the builders' and the Consumers' Experts, HBS should be prepared to certify the work.

In my case, the HBS Inspector trivialized the structural defects. I am now unable to find experts to certify the work.

On 6 August 2004, I "settled" with the builder subject to his providing me with certificates about the structural work. The certificates he provided to me are not correct; hence, although the HBS Inspector with no Engineering qualifications, said that some of the Structural defects were unimportant, I am very concerned, as I have been advised that the work is not certifiable and may need demolition.

Regarding conflict of interest I believe that the HBS Inspector wrongly accepted the report from the Builder who was also the Structural Engineer of the project, as the latter had self-interest in the dispute and in the project. The report was provided to the delegates who then imposed lenient penalties on the builder.

The HBS ignored my requests for an Inspector with engineering qualifications. Therefore the HBS does not have a report from an independent expert Engineer on the structural defects of my construction. Thus, the Delegates who assessed the disciplinary proceedings could only rely on the report from the Inspector with no Engineering qualifications who had adopted the builder's/Engineer self-assessment of his own work. This was in preference to the detailed and comprehensive report supported by photographic evidence of my fully qualified Expert Structural Engineer.

I relied on the Home Warranty Insurance Scheme and believed that I would be indemnified for my losses as the policy provided for indemnification of claims. However when I reminded the HBS that BIG Corp had a clear obligation to meet my claim, Mr. [redacted], the Acting General Manager of HBS responded that he could do nothing for me.

L.L. Berg