

**Submission**

**No 16**

## **INQUIRY INTO THE OPERATIONS OF THE HOME BUILDING SERVICE**

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**Subject:**

**Summary**

# *NSW Office of Fair Trading*

**Submission to the General Purpose Standing  
Committee No 4**

## **Inquiry into the operations of the Home Building Service**

*November 2006*



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# 1 Introduction

## 1.1 *Terms of Reference*

On 27 September 2006 the General Purpose Standing Committee No 4 established an inquiry into the operations of the Home Building Service. The Inquiry's terms of reference are to inquire into and report on:

- a) The building licensing system
- b) The Home Warranty Insurance Scheme
- c) The resolution of complaints
- d) The exercise of discretionary powers
- e) The enforcement of relevant legislative and regulatory provisions
- f) The establishment of a Home Building Advice and Advocacy Centre
- g) Any other relevant matters.

This submission from the Office of Fair Trading will address each of the terms of reference. As the Inquiry came about, in part, from issues raised by the Building Action Review Group [BARG] during the 2006/2007 Budget Estimates process, the Home Building Service's interaction with this Group is addressed, wherever relevant, throughout the submission.

## 1.2 *Executive Summary*

Regulation of the home building industry in New South Wales has been the subject of an array of inquiries and reviews since 1993 and has been in a constant state of reform during that time. These inquiries have included:

- the *Dodd Inquiry* in 1993, which resulted in the abolition of the former Building Services Corporation. Responsibility for home building matters was subsequently transferred to the Department of Fair Trading;
- the *Crawford inquiry*;
- the *Percy Allen Report*;
- the *Cole Royal Commission into the Building Industry* in 2002;
- the *Joint Select Committee on the Quality of Buildings [Campbell Report]* in 2002;
- the *Grellman Inquiry* in 2004 which examined issues relating to home warranty insurance;
- the *Independent Commission Against Corruption's Operation Ambrosia* in 2005, which examined specific cases of use of fraudulent qualification records to obtain licences; and
- the Moss Review of Licensing in the Home Building Industry in 2006, the report of which is currently being considered by the Government.

While all of these have led to significant reform of the home building industry in New South Wales it should be noted that at times, the conduct of yet another inquiry does serve to delay the implementation of planned reform until the recommendations of the latest inquiry are known.

The Home Building Service was established in the Office of Fair Trading in 2003 in response to the recommendations of the Joint Select Committee on the Quality of Buildings [the Campbell Report]. The Inquiry made 55 recommendations relating to the home building industry. Of the 30 recommendations relating to Fair Trading, the Home Building Service has implemented 26 and is either reviewing or finalising the implementation of the remaining four.

The Service brought together all building-related functions of the Office of Fair Trading, for example, licensing, compliance, insurance, and overseeing the private home warranty insurance scheme. It also established at that time new processes for dispute resolution and inspection.

The Service is located at Parramatta (Level 4 in the Office of Fair Trading head office at Enterprise House) with its customer service interface operating out of the Office of Fair Trading's statewide network of Fair Trading Centres.

The Service administers the *Home Building Act 1989*, which regulates the home building sector through a system of licensing and the investigation of building complaints and regional compliance programs. This helps to ensure that unqualified and inappropriate people do not work in the NSW home building industry.

The performance of the Home Building Service, in particular in its operation of the dispute resolution process, has been closely monitored since its commencement. The Home Building Service has successfully implemented the majority of the Campbell Inquiry recommendations and has also implemented a range of reforms to licensing, compliance and disciplinary action following the passage of the Government's 2004 reforms.

In the key area of dispute resolution, the Home Building Service has assisted, at no cost, over 7,100 homeowners and contractors to resolve their disputes. As a result of this service the number of matters needing to be determined by the Consumer, Trader and Tenancy Tribunal has fallen by almost one third.

The Home Building Service has also been active in the area of compliance within the residential building industry. In delivering on its compliance objectives, the Home Building Service has successfully implemented a mix of proactive and reactive strategies to bring about a greater level of compliance within the industry.

Ten major proactive compliance programs have been conducted over the past three years with over 9,400 traders visited and 1,056 penalty notices issued. These programs have been successful in achieving higher levels of compliance within the industry, particularly in relation to licensing requirements. An indicator of the success of these programs was the sharp increase in the number of licence applications received by Fair Trading over this period.

The Home Building Service has also been successful in achieving significant prosecution outcomes with a number of recalcitrant offenders receiving custodial sentences - a first for the residential building industry. To achieve these outcomes the Home Building Service has developed a surveillance capacity which allows it to effectively gather evidence of continued offending and bring matters back before the courts well before the offenders cause considerable consumer detriment. In terms of reactive compliance strategies the Home Building Service has achieved excellent results over the past three years. It has conducted more than 1600 investigations; successfully prosecuted 289 offences resulting in fines and penalties of \$500,000 and issued penalty notices to more than 1300 individuals for more than 1700 offences, resulting in fines of more than \$720,000.

The Home Building Service has also successfully implemented a number of enhancements to its licence processing regime to improve performance and address backlogs and other concerns with the licensing scheme and has put in place changes to address these. All of these reforms are discussed in detail in the body of the submission.

The Home Building Service has also been instrumental in delivering outcomes relating to home warranty insurance. Following the release of the report of the NSW Home Warranty Insurance Inquiry in late 2003 the Government moved quickly to implement the recommendations of the Inquiry. A Home Warranty Insurance Scheme Board was established and has overseen a significant improvement in the operation of the scheme. There has been an increase in the number of insurers in the market resulting in greater access to insurance for builders.<sup>1</sup> Premiums have been reduced, restrictions on turnover have been adjusted and the incidence of insurers seeking indemnities and bank guarantees has fallen markedly. A governance structure for insurers has also been introduced with amended conditions of approval requiring compliance with market practice and claims handling guidelines. An industry deed has been entered into by Government and insurers. A unit within the Home Building Service has been established to support the work of the Scheme Board and for the handling of complaints against insurers.

The home warranty insurance regime is stable and working satisfactorily. However, given the changes to the market place and the overall economy, the Scheme Board considers it appropriate to examine options for further improving the effectiveness of the scheme and its ability to deliver a quality product to the builders and consumers of NSW. The Home Building Service has also more recently taken on board the management of claims relating to the HHH/FAI rescue package with a view to improving service delivery to consumers.

Overall, the Home Building Service has steered regulation of this vital industry through a major reform program whilst at the same time continuing to provide improved services to the traders and consumers of NSW. There can be no doubt that the establishment of the Home Building Service has allowed for greater focus to be applied to major aspects of the industry thereby producing better outcomes for both consumers and traders. Any fair assessment of the performance of the Home Building Service since its introduction, based upon the facts detailed in this submission, would have to conclude that the establishment of the Home Building Service has been a success.

Whilst it is acknowledged that a small number of consumers may have had difficulty resolving their building issues, for the vast majority the systems, processes and services introduced via the establishment of the Home Building Service have benefited thousands of consumers and traders across the State.

The Home Building Service does however, recognise that there are still some further improvements that can be made for the benefit of all stakeholders and is working towards achieving these in collaboration with those stakeholders.

#### Case Study - Prouds Home Improvements

Pobjie Agencies Pty Ltd trading as Prouds Home Improvements ran extensive marketing campaigns which signed up over 600 consumers on large deposits. The company later failed to provide home warranty insurance and often failed to commence work.

The Home Building Service took action and obtained orders in the Supreme Court restraining the directors of the company from continuing their residential building activities. Disciplinary action was subsequently taken against both Thomas and Michael Pobjie for improper conduct. Both were disqualified from being the holder of a licence for a period of 10 years.

<sup>1</sup> Statements based on a press release issued by Vero in April 2004 stating that premiums had released by 5 to 10% and in some cases 30%. The release also made reference to adjustments in restrictions on turnover.

## 2 The home building environment in NSW

### 2.1 *Size of the industry*

The residential building industry in New South Wales represents approximately 22 percent of Australia's residential building activity.<sup>2</sup> New building work in New South Wales during 2005/06 amounted to some \$19.2 billion based on new housing investment of \$7 billion (32,000 units), new housing renovations of \$8.1 billion (21,500 units) and minor building work of \$4.1 billion (1.66 million units estimated at an average of \$2,500).

According to the Housing Industry Association, "Until recently the housing industry was injecting around \$15 billion into the NSW economy every year - \$8 billion in the form of new building and \$7 billion in renovations. The industry also employs over 270,000 people in NSW."<sup>3</sup>

The number of licences and certificates that are issued by the Home Building Service has increased from the 16,000 issued by the Builders Licensing Board in 1973 to the current level of 176,738 (held by 165,367 individuals or accredited entities) issued in 2005/06. In addition to this, some 13,991 owner builder permits were issued during the year.

	Full Building	Restricted Building	Electrical	Plumbing, Draining Gasfitting	Other trades	Other trades (restricted)	Building Consultants	
Contractor Licence	28514	3119	26899	15827	44962	8419	475	
Qualified Supervisor	5659	806	29042	1267	5337	1873		
Tradesperson certificate			112	4427				
<i>Totals</i>	34173	3925	56053	21521	50299	10292	475	<b>176738<sup>4</sup></b>

Table 2.1: Authority holders by category as at 30/06/06

### 2.2 *Building disputes in perspective*

The Office of Fair Trading received 5,891 building complaints during 2005/06. These complaints related to 4,088 building industry traders. Some 3,000 of these traders held a licence under the *Home Building Act 1989*. The remainder were generally either unlicensed or were not required to hold a licence for the type or value of the work performed. Around 50% of the complaints received are for contract amounts of less than \$10,000.

The Office of Fair Trading had 165,367 licences current as at 30 June 2006. The number of licensees brought to attention by complaints is 1.81% of total licence numbers.

<sup>2</sup> HIA Housing Starts: by state and territory , updated October 2006

<sup>3</sup> I Moss and K Rice, *Final report of the Review of Licensing in the New South Wales Home Building Industry*, September 2006

<sup>4</sup> This figure includes licences with multiple categories



## 2.3 *Previous inquiries into the industry*

Since 1993 the regulation of the home building industry in New South Wales has been the subject of a number of high profile inquiries. Relevant aspects of each of these are discussed below.

### 2.3.1 *Dodd Inquiry*

The Dodd Inquiry into the NSW Building Services Corporation was established by the Fahey Government in 1993 following a recommendation by the 1991-1992 Royal Commission into Productivity in the Building Industry (Gyles Royal Commission). Commissioner Gyles noted that he had received a vast body of complaint concerning the activities of the Building Services Corporation from several sources, including the Building Action Review Group.

The Dodd Inquiry looked at all aspects of the Building Services Corporation's activities. Commissioner Peter Dodd commented adversely on the "one-stop-shop" approach of the Corporation. He felt the system was unworkable. He believed that its conflicting roles should be separated. He recommended an independent Registry of Building Disputes and utilising a building disputes tribunal as the final arbiter. He also recommended that government no longer be involved in home warranty insurance but that the provision of insurance be the responsibility of the private sector.

### 2.3.2 *Crawford Inquiry*

The Crawford Inquiry was established by the Government in 1995. It followed a Government election commitment to hold an inquiry into outstanding consumer grievances with the Building Services Corporation. The Inquiry looked at around 100 individual consumer grievances, some of which were BARG members. The Inquiry's report was delivered on 31 December 1995. The Inquiry was informed by the individual consumers, BARG and by submissions to the Gyles Royal Commission and Dodd Inquiry.

The Crawford Inquiry was highly critical of the Building Services Corporation. It found features of systematic failure, perceived bias/relationships between Corporation officers and industry, and trivialisation or minimisation of defective work. It also commented on the Corporation's confusion of roles and responsibilities. It recommended a number of reforms including:

- the establishment of the body that deals with certification and licensing of natural persons;
- that accredited insurance providers provide insurance cover;
- improved building contracts;
- certification at critical stages of work;
- a Consumer Protection Bureau be established in Fair Trading to give advice;
- a new forum for dealing with straight forward complaints; and
- a new tribunal which has informality and speed in dealing with cases.

2.3.3 *Percy Allen Report*

In 2002, the Ministerial Council on Consumer Affairs established a National Review of Home Warranty Insurance and Consumer Protection. The Review was conducted by Professor Percy Allan AM. The Review looked at the systemic issues in the domestic building indemnity/home warranty insurance industry with a view to identifying a competitive scheme which is viable in both the short and longer terms and provides an appropriate level of protection for consumers.

Professor Allan made a large number of recommendations covering not only insurance but licensing, contracts, dispute resolution and compliance. Professor Allan noted the complaints made by BARG and suggested the NSW Parliament's Joint Select Committee on Quality of Building '*investigate and report on the merits or otherwise of say a dozen BARG case studies and what could be done if anything to avoid such episodes in the future.*' In relation to insurance Professor Allan did not advocate either a government scheme or private insurance but he suggested greater transparency and review of insurers' decisions, limitations on builder activity, set financial criteria and the exclusion of cover for developers and speculative builders.

2.3.4 *Cole Royal Commission into the Building Industry;*

The Royal Commission into the Building and Construction Industry (Cole Royal Commission) was established by the Federal Government to look into industrial and workplace practice and conduct.

The Commission's Report was released in February 2003. While the Royal Commission primarily dealt with industrial law issues, it did identify a problem within the industry relating to phoenix companies. It also discussed state based insurance such as workers compensation and stressed that the prudential regulation of insurers should be the responsibility of the Australian Prudential Regulatory Authority.

2.3.5 *Joint Select Committee on the Quality of Buildings*

The Joint Select Committee on the Quality of Buildings [the Campbell Report] was established by the Government in 2002. The Inquiry looked at the role that building certifiers should be playing to ensure quality of workmanship in buildings and the operation of the builder licensing system. The Inquiry was asked to report on the checks and balances necessary to ensure consumers are protected and that their homes are safe, properly certified and built to satisfactory standards and quality.

The Inquiry made 55 recommendations for reform, most of which were accepted by the Government. Establishment of a stand alone Home Building Compliance Commission to oversight building regulation in NSW was not supported on cost grounds as it would be a substantial cost to establish and maintain. It would also have no regional network and would not necessarily achieve the Inquiry's desired outcomes for home building regulation. In reviewing this option, careful consideration was given to the operation of the former Building Services Corporation, which was a stand alone statutory corporation. However this did not safeguard it from being criticised in a number of inquiries for not having sufficient consumer focus or for not providing effective leadership".

The recommendations of the review and progress on their implementation is discussed in more detail in section 3 - *The Home Building Service*.

2.3.6 *Grellman Inquiry*

A comprehensive inquiry, to be conducted by Mr Richard Grellman, into the NSW home warranty insurance scheme was announced on 5 May 2003. The decision to establish the Inquiry arose primarily out of on-going concerns about the timeliness of insurance availability from sectors of the home building industry, although certain consumer advocates had expressed dissatisfaction with the home warranty insurance issue. This inquiry is discussed in detail in section 4.2.

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2.3.7 *Statutory Review of the Home Building Act*

Under section 145(2) of the *Home Building Act 1989* the Minister was also obliged to conduct a review of the Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate.

A statutory review was undertaken in 2005 and the subsequent report on the Review of the *Home Building Act 1989* was tabled in Parliament on 23 March 2005. While the review found that the objectives of the Act remain valid, the Minister flagged in Parliament her intention to have the Act rewritten, with the help of industry, to update and simplify its provisions.

2.3.8 *Operation Ambrosia*

In late 2003, Fair Trading staff identified concerns with a number of building licence applications and referred the matter to the Independent Commission Against Corruption. This led the Commission to conduct a range of investigative activities into the conduct of persons making licence applications. The Commission's Inquiry was known as "Operation Ambrosia". The recommendations of this inquiry are discussed in more detail in section 5: - *The Home Building Licensing System*.

2.3.9 *The Moss Review of Home Building Licensing in New South Wales - 2006*

The Moss Review was established by the Minister for Fair Trading in 2005 to inquire into and report on existing arrangements for the licensing of builders and tradespeople in the New South Wales building and construction industry, the regulation of owner-builders in the residential sector and make recommendations based on its findings to improve the effectiveness of licensing for all stakeholders. This review is discussed in more detail in section 5.

## 3 The Home Building Service

### 3.1 Establishment of the Service

The Home Building Service was created as a result of recommendations made in July 2002 by the Campbell Inquiry. The Service was launched in February 2003, and was fully operational from July 2003.

Establishment of the Home Building Service brought together all building-related functions of the Office of Fair Trading – for example, licensing, compliance, insurance, and the private home warranty insurance scheme. It also established at that time some new processes for dispute resolution and inspection. Regional operations of the Home Building Service operate out of Fair Trading’s statewide network of Fair Trading Centres.

The Service re-located to Parramatta (Level 4 in the Office of Fair Trading head office at Enterprise House), on 25 August 2003.

The Service administers the *Home Building Act 1989*, which regulates the home building sector through a system of licensing and the investigation of building complaints and regional compliance programs. This helps to ensure that unqualified and inappropriate people do not work in the NSW home building industry.

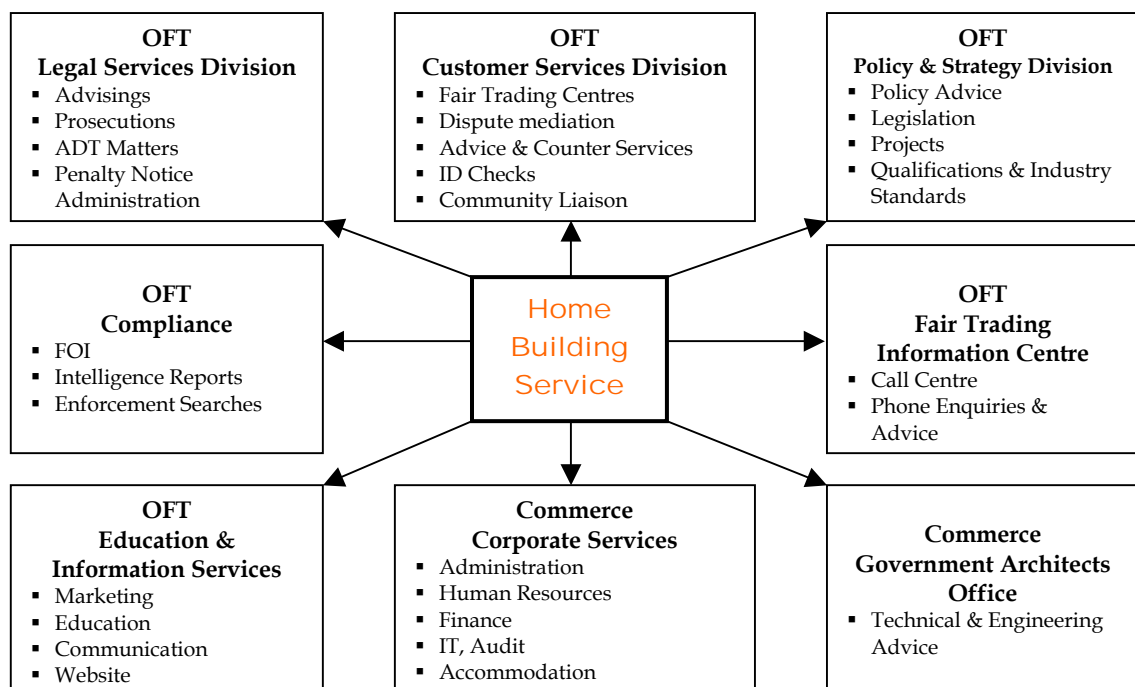


Figure 3.1: The Home Building Service’s relationships within the Department of Commerce.

The Home Building Service also administers:

- the Government-funded consumer-protection building-insurance schemes which closed in April 1997 following the establishment of the private insurance scheme; and
- the Government-funded Building Insurers’ Guarantee Corporation (BIG Corp), which was established as part of the NSW Government’s rescue package to assist victims of the HIH Insurance collapse.

### 3.2 *How it operates*

The Home Building Service operates as an entity within the Office of Fair Trading, and therefore within the Department of Commerce. While its focus is specifically the regulation of the home building industry it is able to rely upon the corporate resources of the Department of Commerce and the customer service focussed resources of the Office of Fair Trading in order to most efficiently carry out its functions. The Service's relationships within the Office of Fair Trading and the Department of Commerce are depicted in Diagram 3.1.

### 3.3 *Implementation of the Campbell Report recommendations*

The Campbell Report made 55 recommendations. The Government supported the establishment of the Home Building Service and the Building Professionals Board as the most appropriate bodies to oversight the builder licensing system and certifier accreditation respectively. Of the 30 Campbell Report recommendations relating to Fair Trading, the Home Building Service has implemented 26 and the remaining 4 are currently being reviewed or finalised.

<b>Total Recommendations</b>	<b>55</b>
Recommendations Requiring Action by Fair Trading <i>Fair Trading Only: 18</i> <i>Fair Trading &amp; Planning: 12</i>	30
Fair Trading Recommendations Fully Implemented/Concluded	26
No. of Fair Trading Recommendations Where Action Underway	4
No. of Fair Trading Recommendations Not Actioned	0

#### Major Recommendations Implemented<sup>6</sup>

- Establishment of the Home Building Service on 17 February 2003 <sup>7</sup>
- Early Intervention Dispute Resolution Service involving on-site meeting between parties and inspection by building inspector commenced 1 July 2003. <sup>8</sup>
- New Home Building web site commenced February 2003.<sup>9</sup>
- *Guide to Off the Plan Sales* fact sheet released February 2003. <sup>10</sup>

<sup>6</sup> Reference to recommendations of the Campbell inquiry used in this section are summaries only. The full text of the recommendations is included in Appendix A

<sup>7</sup> *Recommendation 1*: A Home Building Compliance Commission be established to oversight home building regulation in New South Wales.

<sup>8</sup> *Recommendation 48*: Streamlined dispute management

<sup>9</sup> *Recommendation 30*: Provision of information concerning builders licensing, home building contracts, complaint forms, Building Codes information and other relevant documentation, free and on-line

<sup>10</sup> *Recommendation 31*: That a 'Guide to Off the Plan and Strata Unit Purchases' be developed and become a mandatory attachment to sale of unit contracts

- *Guide to Standards and Tolerances* released 30 June 2003, bringing greater certainty for builders and consumers in determining what are acceptable standards of building work.<sup>11</sup>
- Inter-agency Building Co-ordination Committee established to oversee government commitments arising from the Campbell Inquiry. The Committee includes the Department of Planning, Department of Local Government, WorkCover Authority and the Department of Commerce (including the Office of Fair Trading and Home Building Service, Office of Public Works and Services).<sup>12</sup>
- Mandatory continuing professional development for builders and swimming pool builders introduced 1 March 2004.<sup>13</sup>
- Home building contracts required from 16 February 2004 to contain clauses stating that the work is to conform to the Building Code of Australia and all relevant Australian Standards and conditions of consent. A cooling-off period has been introduced for home building contracts and variations to design plans now have to be agreed to in writing by the parties. A checklist for consumers and builders and a 'signing page' to certify that the consumer has been provided with and read a mandatory consumer brochure are now included in contracts.<sup>14</sup> The mandatory consumer brochure explains the dispute resolution process and insurance requirements.
- Licensing of building consultants commenced 1 January 2004.<sup>15</sup>

#### Major Recommendations Where Action is Underway

- Ratio of qualified supervisors – Industry has concerns over the concept of a set ratio of supervisors but supported licensed builders being required to have in place a quality management plan/system. The need for a system of performance management of licence holders was considered further by the Moss Review [discussed in detail at section 5.7].<sup>16</sup>
- Licensing of commercial building work was considered further by the Moss Review.<sup>17</sup>
- Aligning of licence categories and a rating system for licensees was also considered in detail by the Moss Review which examined the current regime, including entry requirements and categories of licences, to assess whether it is appropriate and relevant in the modern building industry.<sup>18</sup>

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<sup>11</sup> *Recommendation 20:* That a consumer information booklet be prepared which outlines acceptable standards, tolerances and performance required of builders

<sup>12</sup> *Recommendation 4:* That formal information exchange protocols be developed

<sup>13</sup> *Recommendation 7:* That the Commission require continuing professional development for licensing renewal

<sup>14</sup> *Recommendation 32:* That the Commission design and establish by regulation a number of standard conditions and.... these to be included in a model contract

<sup>15</sup> *Recommendation 12:* Expansion of the building licensing regime should occur with a licensing regime for other building practitioners to include builders, subcontractors, certifiers, building consultants and engineers.

<sup>16</sup> *Recommendation 6:* That the Commission assess the effectiveness of recent licensing reforms with particular reference to concerns about.... the appropriate ratio of supervisors to the volume of work undertaken by a building company or firm.

<sup>17</sup> *Recommendation 1:* That the Government consider looking at models and undertake detailed consultations with the community with a view to determining the need to implement greater regulatory control of building standards in the non-residential building sector.

<sup>18</sup> *Recommendation 5:* That the categories of licences align with building types ie low, medium and high rise buildings;

### 3.4 *Monitoring the performance of the Home Building Service*

The performance of the Home Building Service, in particular in its operation of the dispute resolution process, has been closely monitored since its commencement. The Home Building Service has successfully implemented a number of the Campbell Inquiry recommendations and has also implemented a range of reforms to licensing, compliance and disciplinary action following the passage of the Government's 2004 reforms.

In the key area of dispute resolution, the Home Building Service has assisted, at no cost, numerous homeowners and contractors to resolve their disputes and the number of matters needing to be determined by the Consumer, Trader and Tenancy Tribunal has fallen by almost one third. [See Graph 6.4.1]

The Home Building Service has also been active in the area of compliance, with the number of penalty notices issued and prosecutions rising. It has also worked hard to address backlogs and other concerns with the licensing scheme and has put in place changes to address these.

#### **Case Study : Ahmad Diab**

Ahmad Diab is a former licensed painter who accepted large deposits and then failed to carry out work. Diab was a serial offender who targeted the elderly by offering pensioner discounts.

In response to this conduct, Home Building took various compliance actions including the issue of penalty notices, a 5 year licence disqualification and prosecution then proceedings for 14 offences. In February 2006, Supreme Court restraining orders were also obtained in relation to Diab's conduct. Covert surveillance subsequently undertaken by Home Building established that he was continuing to operate in breach of the orders. Contempt proceedings were taken in relation to 36 breaches of the Court Orders. The NSW Supreme Court sentenced Mr Diab to a 9 month non-parole period with a 9 month parole period to apply when he is released from jail in June 2007.

## 4 Home Warranty Insurance in NSW

### 4.1 Current schemes

Current home warranty insurance claims are managed under one of a number of different schemes, depending upon the time at which the building work was undertaken. The key feature of these schemes is summarised in Table 5.1.

Period	Status	Scheme	Administered by	Threshold	Type of cover	Indemnity coverage
Prior to 1997	Claims closed April 2004	Comprehensive insurance schemes	Originally by the Building Services Corporation, now by the Fair Trading Administration Corporation		<ul style="list-style-type: none"> <li>• First resort</li> <li>• 7 years - structural damage</li> <li>• 3 years - non-structural</li> </ul>	<ul style="list-style-type: none"> <li>• \$100,000 freestanding dwelling</li> <li>• \$50,000 each in a duplex dwelling</li> <li>• \$20,000 each dwelling where three or more in the building</li> </ul>
1997 to July 2001	Tail remains open	Private home warranty insurance	Private insurers	\$5,000	<ul style="list-style-type: none"> <li>• First resort</li> <li>• 7 years - structural damage</li> <li>• 7 years - non-structural</li> </ul>	\$200,000
March 2001 to present	Open	HHH Rescue Package	Building Insurers Guarantee Corporation	\$12,000	<ul style="list-style-type: none"> <li>• First resort</li> <li>• 7 years - structural damage</li> <li>• 2 years - non-structural</li> </ul>	\$200,000
July 2001 to present	Open	Private home warranty insurance	Private insurers	\$12,000	<ul style="list-style-type: none"> <li>• Last resort</li> <li>• 6 years - structural damage</li> <li>• 2 years - non-structural</li> </ul>	\$200,000

#### 4.1.1 Closed Comprehensive Insurance Scheme

The Fair Trading Administration Corporation is responsible for administering the Comprehensive Insurance Scheme which closed on 30 April 1997. This scheme was administered by the former Building Services Corporation with the latest version of the scheme being implemented in March 1990. The Scheme provided insurance coverage for defective and or incomplete residential building work carried out by the holder of a building contractor licence. The scheme provided coverage of three years for general defects and seven years for major structural defects from the date of substantial commencement of the work. However, under certain circumstances, a claim could be accepted up to 10 years after the date of commencement.

The Comprehensive Insurance Scheme provided indemnity coverage of \$100,000 for a freestanding building, \$50,000 per dwelling for a building with only two dwellings and \$20,000 per lot in a building with three or more dwellings.

The period for lodging claims under this scheme expired in April 2004, although, as stated, this time limit can be extended in certain circumstances.



**Claims paid under this scheme:**

- 1 May 1997 to 30 June 2005      \$148.38m [over 8 years]
- 1 July 2005 to 30 June 2006      \$6.27m

**Claims on hand at 30 June 2006:**

- 57 claims with a combined total \$13.5m [ \$9m paid plus \$4.4m to be paid]
- 6 claims approved in principle [Quantum to date at \$358,338 with further costings to be provided]
- 23 claims where a decision is yet to be made.

*4.1.2 First private insurance scheme*

On 1 May 1997 the NSW Government sponsored Comprehensive Insurance Scheme was replaced with an insurance product that was developed and supplied by private insurance companies. The closure of the Comprehensive Scheme was prompted by the recommendations of the Inquiry into the New South Wales Building Services Corporation by Commissioner Peter Dodd (the Dodd report 1993). The Dodd report found *'that there was no reason for the Government to continue in its monopoly of the insurance market and moreover its political ownership leaves it vulnerable to pressures not faced by private insurance'*.

The insurance product that was supplied by the private insurance companies was similar to the Comprehensive Insurance Scheme in the type of defective and incomplete building work it covered. All builders and tradespeople in NSW were required by law to give a home warranty insurance certificate to the home owner for residential building work valued at over \$5,000.

Under this scheme insurance coverage was provided for a period of seven years for general and major structural defects. The scheme allowed a consumer to lodge an insurance claim for a loss as the result of incomplete work if the builder was insolvent, deceased or had disappeared. It also allowed a consumer to lodge a claim for a loss as the result of a breach of statutory warranties, regardless of whether the builder was insolvent, deceased or had disappeared.

*4.1.3 HIH Rescue Package*

With the privatisation of the home warranty insurance industry a number of insurance companies entered the market. This included HIH Casualty and General Insurance Limited and FAI General Insurance Company Limited. In January 1999 the HIH company took over FAI. On 15 March 2001 the HIH/FAI insurance companies collapsed. At the time of its collapse, the HIH/FAI group held between 30-40% of the home warranty insurance market<sup>19</sup>.

In March 2001, the NSW Government established the HIH/FAI rescue package. The Government also created the Building Insurers' Guarantee Corporation [BIG Corp] to administer the rescue package. The rescue package was simply an extension of the provisions of the first private home warranty insurance scheme being operated by HIH and FAI. The rescue package covers certificates of insurance issued by contractors and developers from 1 May 1997 to 20 June 2001. It also covers owner builders from 1 May 1997 to 15 March 2001.

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<sup>19</sup> NSW Home Warranty Insurance Inquiry chaired by Mr Richard Grellman.

The Building Insurers' Guarantee Fund was established to assist consumers covered by the Government's HHH rescue package, by administering the insurance coverage in the same manner that HHH and FAI would have been required to do. The Corporation which administered the Fund was overseen by the Office of Fair Trading's Home Building Service. Under the direction of BIG Corp, the processing of claims [receiving and assessing] was contracted to Strategic Claims Solutions Pty Ltd [later known as Echelon Australia Pty Ltd] until June 2006.

In 2006, following a review of operational needs it was decided that effectiveness and efficiency of claims handling could be improved if BIG Corp assumed control over all insurance claims. This decision was effected on 1 July 2006.

Claimants not satisfied with the decision of BIG Corp are able to lodge an appeal to the Consumer, Trader and Tenancy Tribunal.

Arrangements have been put in place to ensure that claims are settled promptly and debt recovery against builders is proceeding.

**Claims paid under this scheme:**

- Since inception of the package in 2001 \$95m [over 5 years]

**Claims on hand at 30 June 2006:**

- 528 claims

4.1.4 *Current private insurance scheme*

On 1 April 2002 the threshold for home warranty insurance was increased to \$12,000 and significant other changes were introduced.

Since 1 July 2002 the home warranty insurance scheme has provided for claims to be made with insurers by homeowners where the contractor has become insolvent, disappeared or died.

Under the scheme the primary responsibility for ensuring that residential building work is properly and adequately performed lies with the builder engaged to undertake the work. The home warranty insurance scheme provides last resort cover for homeowners, where this responsibility has not been honoured by the builder. A range of measures have been introduced to protect the interests of homeowners having building work undertaken and which are designed to ensure the home warranty insurance scheme is an option of last resort.

These measures include mandatory critical stage inspections for all classes of buildings; early intervention dispute resolution by the Office of Fair Trading and enhanced mandatory contract provisions requiring compliance with the Building Code of Australia, the provision of a consumer guide to homeowners and the inclusion of a check list and a cooling-off period. A public register of builders and trade contractors has been set up providing on-line information about builders and other licensees so homeowners can assess the background of those with whom they intend dealing.

Where dispute resolution cannot take place because of the death, disappearance or insolvency of the builder the home warranty insurance scheme provides protection for homeowners such as a minimum cover of \$200,000 for a period of six years for structural defects and two years for non-structural defects. Cover is also provided for loss of deposit

and completion costs (for an amount up to 20% of the contract price with a \$200,000 limit) for a period of 12 months after failure to commence, or cessation of, work.

If the builder is alive and in business and the home owner has concerns regarding building work the matter is able to be referred to the dispute resolution service provided by the Office of Fair Trading. Access is also available to the Consumer, Trader and Tenancy Tribunal.

It is the responsibility of the building contractor to obtain home warranty insurance where the residential building work is valued at over \$12,000. The cover must be obtained before commencing work under any contract for residential building work with a consumer and before taking any money (including a deposit) under the building contract.

If a dwelling built within the last six years is to be sold, a property owner who is the builder or developer must attach the certificate of insurance to the sale contract. Owner-builders who sell their property within six years of the completion of owner-builder work must also provide home warranty insurance with their contract for sale of the property.

Claims for defective work must be notified to the insurer within six months after the consumer first becomes aware, or reasonably aware, of the circumstances of the claim.

A claim regarding incomplete work must be made within 12 months after the building contract date, the date in the building contract for commencement of the work, or the date work ceased (whichever is later).

Compliance with the insurance provisions of the *Home Building Act 1989* is a standard condition under the Environmental Planning and Assessment legislation applying to the development consent for residential building work.

If the conditions of the development consent are not complied with, the principal certifying authority (council or private certifier) may be unable to issue a final occupation or building certificate. This may have an adverse impact on a home owner's ability to sell and/or legally occupy a residence.

As this is a private commercial scheme, full details of claims paid are not currently available. Arrangements for collection of such data are discussed more fully in section 4.3.4.

## 4.2 *The Grellman Inquiry*

A comprehensive inquiry, to be conducted by Mr Richard Grellman, into the NSW home warranty insurance scheme was announced on 5 May 2003. The decision to establish the Inquiry arose primarily out of on-going concerns about the timeliness of insurance availability from sectors of the home building industry, although certain consumer advocates had expressed dissatisfaction with some aspects of the home warranty insurance scheme.

The concerns from industry related to the terms upon which insurance was offered to builders and customer service issues. Essentially these involved restrictions on the amount of work that may be undertaken and requirements to add capital to businesses or provide bank guarantees.

The Inquiry was conducted by Mr Richard Grellman, Chairperson of the Motor Accidents Authority, assisted by Ernst and Young in the operational aspects of the Inquiry. As part of its terms of reference the Inquiry was to consider whether the existing legislative framework

was effective for consumers and industry. It would also consider the need for, and viability and effectiveness of, options other than the existing scheme for the delivery of home warranty insurance.

The final report of the *NSW Home Warranty Insurance Inquiry* was released on 22 October 2003. The Government endorsed the thrust of the report's principal recommendations. The Inquiry found that home warranty insurance should continue to be provided by the private sector, endorsed the provision of a last resort scheme and made seven primary recommendations for reform of the scheme to ensure its transparency and accountability as well as its accessibility and affordability to builders and the level of protection provided to homeowners.

An interim Home Warranty Insurance Scheme Board was established to oversee the implementation of reforms to the home warranty insurance scheme. The Board consulted widely with interested parties including builders and insurers in the development of proposals to enable the implementation of the Inquiry's recommendations.

The *Home Building Amendment Act 2004* commenced on 1 September 2005 and provided the legislative basis to enable implementation of the agreed reforms arising from the primary recommendations. The amendments to the legislation:

- established the Home Warranty Insurance Scheme Board on a permanent basis to monitor the operation of the home warranty insurance scheme and provide advice to the Minister on matters affecting the operation of the scheme;
- reconstituted the Home Building Advisory Council established under the Fair Trading Act and re-established the Council under the Home Building Act;
- provided that the Minister must consult with the Scheme Board before setting conditions of approval for insurers under section 103A of the Home Building Act;
- enabled the Minister to enter into an industry deed on behalf of the Government with the insurers operating in the insurance scheme;
- recognised that builders may seek insurance from more than one insurer, and therefore authorise and require insurers to seek and provide relevant information between themselves regarding builders; and
- authorised the Commissioner for Fair Trading to exchange relevant information about builders with insurers.

Section 4.3 explores the most significant reforms arising from the recommendations.

### **4.3 Recent reforms to the Scheme**

#### *4.3.1 Establishment of the Board*

The Scheme Board initially operated in an interim capacity. The permanent Board was established on 5 December 2005 and consists of six members, being the Director-General of the Department of Commerce (or a nominee) and five persons appointed by the Minister with a knowledge of or experience in insurance products or commerce. The Board:

- advises the Minister in relation to approval of kinds of insurance, and insurers;
- advises the Minister on conditions of approval of insurers;
- monitors the operation of the scheme and provides advice and recommendations

relating to the scheme; and

- provides advice in relation to any other matter referred to it by the Minister.

#### 4.3.2 *Insurance industry deed*

On 30 December 2005 the Minister for Commerce, on behalf of the Government, signed an industry deed with insurers providing home warranty insurance in New South Wales.

The deed sets out the manner in which the Government has agreed to exercise its powers and authority under the *Home Building Act 1989*. This includes consultation with insurers on changes to the scheme, whether it is to the legislation or to the industry guidelines insurers are required to comply with as part of their conditions of approval.

The deed has been entered into by the seven insurers approved to provide home warranty insurance cover in New South Wales. The deed provides that the Government will consult with insurers before making any changes to the requirements of the coverage that is to be supplied under the home warranty insurance scheme. In return, the insurers will give an undertaking to long term participation in the scheme. This will give insurers, builders, homeowners and the Government with confidence in the long-term viability of the home warranty insurance market in this state.

#### 4.3.3 *Exchange of information between insurers*

The 2005 amendments to the Home Building Act enable builders to more easily change their insurer and for insurers to have access to all relevant information when determining the eligibility of a builder for insurance where the builder has previously had insurance with another insurer.

#### 4.3.4 *Reporting of data by insurers*

In order for the Board to monitor the effective operation of the scheme, information and data is required from insurers on policies and claims. The information is needed to:

- inform stakeholders and the general public of the financial progress of the scheme;
- assess the affordability and viability of the scheme;
- assist in advising the Minister for Commerce and the Government on the scheme; and
- assist in the investigation of policy matters, such as possible changes to the scheme.

Reporting of data in this manner is common to other statutory insurance schemes, such as compulsory third party insurance for motor vehicles and workers compensation.

#### 4.3.5 *Publication Guidelines*

As a result of the commencement of the agreed data requirements from insurers on the operation of the home warranty insurance scheme, the Scheme Board has recommended the adoption of guidelines for the publication of information based on that data.

No information was published during the 2005-2006 reporting period as only limited data had been received from insurers. It is expected the information to be published will evolve

over time as the scheme matures. The guidelines on information to be published will be subject to ongoing review.

#### 4.3.6 *Claims Handling Guidelines*

Claims handling guidelines, also arising from the implementation of the recommendations of the Grellman Inquiry, were introduced on 1 September 2005. Compliance with the guidelines is a condition of approval for insurers to provide home warranty insurance in New South Wales.

The claims handling guidelines govern the way in which home warranty insurers are required to deal with claims made by consumers under home warranty insurance policies. The guidelines address issues such as procedures, service standards, publication of information, third party service providers and the provision of written reasons for decisions. The guidelines were developed in consultation with insurers.

#### 4.3.7 *Changes to deemed acceptance of a claim*

The Home Building Regulation has also been amended to provide for the deemed acceptance of a claim where it has not been determined after 90 days of its receipt by an insurer. The amendment applies to all policies issued from 1 September 2005. Where a consumer makes an insurance claim, if the insurer has not determined liability within 90 days then, unless the insurer obtains an extension of time from the insured or the Consumer, Trader and Tenancy Tribunal, the claim is deemed to be accepted.

#### 4.3.8 *Amendments to Market Practice Guidelines*

The Market Practice Guidelines address issues such as underwriting procedures, premium rates, publication of information, assessment of eligibility, service standards, written reasons for decisions, outsourcing, intermediaries and complaint handling/dispute resolution. The guidelines are designed to bring more transparency and accountability to the provision of home warranty insurance.

On 1 January 2006, some minor amendments were made to the guidelines. The amendments require:

- insurers to provide a summary of past claims experience to the Director-General when varying premium rates;
- insurers to provide a detailed summary of their self-assessment or audit process, and its results, to the Director-General within six weeks after the end of the financial and calendar years; and
- that, where the Director-General intends to publish information based on data obtained from insurers, that a copy of the information proposed to be published is to be provided to insurers for comment at least 10 business days prior to its intended publication.

#### 4.3.9 *Number of Insurers*

Prior to the Government commissioning the NSW Home Warranty Insurance Inquiry, there were only two insurers approved to provide home warranty insurance to builders in New South Wales, namely, Royal and Sun Alliance Limited [now known as Vero] and Reward

Insurance Limited.

The implementation of the Inquiry's recommendations, along with other changes to the regulatory regime has assisted in creating the conditions for a viable and stable insurance scheme, resulting in more insurers entering the market.

On 31 December 2003 Australian International Insurance Limited took over the home warranty insurance business of Reward Insurance Limited. From mid and late 2004 respectively, CGU Insurance Limited and Lumley General Insurance Limited commenced providing home warranty insurance in New South Wales. During 2005, QBE Insurance Australia Limited and Calliden Limited also entered the NSW home warranty market. There are now six insurers providing home warranty insurance to builders, as well as a specialist insurer (Australian Unity General Insurance Limited) providing cover only to owner-builders.

#### 4.3.10 *Analysis of insurer supplied data*

Home warranty insurance is a very long tailed class of insurance. Claims can be reported in theory for six years after the building is complete. In practice, claims are received by insurers for periods in excess of six years from the inception date of the project certificate. There can be a delay between the date of the project certificate and when building construction commences and that delay may be significant. It can also take some time to complete a building, possibly in excess of one or two years. It can then take considerable time to assess and pay a claim, depending upon the complexity of the issues and the number of builders involved in the work over time. Consequently, insurers may still be making claim payments more than ten years after the inception date of the project certificate

The Scheme Board's actuaries expect the claims experience of the Home Warranty Insurance Scheme to be volatile over time since:

- the claims experience depends heavily on the building cycle (i.e. building activity). The cycle has a complex impact on the claims experience and lower building activity may not necessarily result in fewer claims or a lower average claims size;
- the economic cycle impacts the building industry and this cycle may be different to the building cycle. For example at times there may be a boom in residential investment properties but not owner occupied dwellings;
- changes in building codes and regulations can impact the claims experience over time; and
- there can be significant volatility in the size of builders that experience financial stress. For example the collapse of one large builder could have a major impact on the HWI Scheme's financial situation but this only happens infrequently.

The industry has commenced providing data to the Home Warranty Scheme Board but, under the conditions of the industry deed signed between the Board and the insurers, the information cannot be released without the Home Building Service giving prior notice to the insurers. This notice has been given and, once the required time period has elapsed, relevant data will be provided to the Inquiry as a supplement to this submission.

## 4.4 *Impact of recent reforms*

The establishment of the Home Warranty Scheme Board and implementation of the recommendations of the NSW Home Warranty Insurance Inquiry has seen a return of

stability and competition to the home warranty insurance market. Access to insurance for contractors has increased significantly<sup>20</sup>. There are now six insurers providing home warranty insurance plus another insurer providing specialist cover for owner-builder work.

The entry of additional insurers into the market has eased the difficulties previously faced by builders in obtaining insurance as insurers now face greater competition for market share. Builders can now receive approvals in a matter of days, which is a far different situation to the period after the HHH collapse, where there were significant delays. According to insurers, applicants for the small builder's cover will obtain a decision within 72 hours. Some easing of insurance costs has also been seen with the largest provider, announcing a reduction in its premiums.

The incidence of insurers seeking indemnities and bank guarantees has also fallen off markedly as competition has returned to the home warranty market. Previous restrictions on turnover for builders have been adjusted to enable builders to undertake a wider range of work. Insurers have moved to address concerns regarding access to insurance. Builders with turnover up to \$2 million a year and with projects below \$350,000 no longer have to provide detailed financial statements to obtain home warranty eligibility. Instead, these builders fill out a form similar to a home loan application and provide a copy of their builder's licence.

In addition, organisations associated with some of the new insurers have commenced offering a product to builders which would result in them having unlimited access to home warranty insurance.

#### 4.5 *Comparison with the Queensland scheme*

Critics of the current private, last resort scheme point to the Queensland Government Scheme as offering a better model.

The Queensland insurance scheme is similar in nature to the closed NSW government scheme.

Queensland's statutory insurance scheme offers protection for work done by licensed contractors. It does not apply to unit blocks over three storeys. It provides cover against:

- non-completion of work covered by the contract;
- defective construction; and
- subsidence or settlement of work.

The insurance is effective for six years and six months from the date of contract or payment of the insurance premium, whichever is earlier. Cover is up to \$200,000. A claim may be lodged:

- where the builder becomes insolvent during construction;
- the builder fails to complete;
- the builder fails to fix defects; and
- the building suffers the effect of subsidence.

The NSW home warranty scheme covers similar losses, with the exception that a claim for subsidence could only be made where the subsidence was the fault of the builder. The period of cover in NSW is six years for structural defects and two years for others. The amount of cover is also \$200,000

The primary differences between the schemes are:

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<sup>20</sup> The Home Building Service has experienced a significant reduction in the number of complaints about access to home warranty insurance. The numbers of applications declined by insurers is now minimal.



- in Queensland insurance cover is provided by the State Government whereas in NSW cover is provided by the private insurance industry;
- in Queensland a claim relating to incomplete or defective work may be made while the builder is still active. In NSW claims may only be made where the builder is dead, has disappeared or is insolvent;
- the risk of the Queensland scheme is carried by Queensland taxpayers whereas the risk in NSW is carried by the private insurance sector;
- the Queensland scheme is a government monopoly whereas in NSW there is a competitive private insurance market; and
- the Queensland insurer (the Queensland Building Services Authority) is also the regulator of the industry.

While some people have strongly advocated a return to a scheme similar to Queensland, it is considered inappropriate and unnecessary to re-establish a government monopoly when the private sector is willing to offer insurance cover.

Secondly, returning to a government scheme exposes the taxpayers of NSW to considerable financial risk, bearing in mind the long tail of this kind of insurance.

Lastly, having government take on both the roles of regulator and insurer creates a conflict of interest, a situation that was strongly criticised by the Dodd Inquiry and consumer groups, including the Building Action Review Group, when NSW operated a government-run scheme.

#### **4.6 *Return to a Government provided first resort scheme***

The *NSW Home Warranty Insurance Inquiry* looked at a range of options for the delivery of home warranty insurance, including the return to a government-operated scheme.

The Inquiry's preferred option was enhancement of the current scheme. It was satisfied that this approach is preferable to a profound change in the scheme.

The greatest risk facing consumers is builder insolvency and the scheme has always provided cover against such loss. Should a building dispute arise, the scheme provides a safety net in the event that the consumer cannot recover compensation nor have the work rectified because of the insolvency, death or disappearance of the builder.

The current home warranty arrangements are considered to provide fair and reasonable protection for consumers while ensuring the long term viability of the scheme. A government underwritten scheme is not considered a panacea for solving all concerns expressed by industry groups advocating such a model and would not guarantee that premiums would be significantly lower than current market rates, as any such scheme would need to operate on a commercial basis.

The Victorian Competition and Efficiency Commission in its Report on Housing Regulation in Victoria – Building Better Outcomes (October 2005) was not convinced that a shift from the private competitive provision of insurance to a Queensland-type government monopoly provider would deliver, in aggregate, superior outcomes for the housing construction industry and consumers. The Commission was complimentary of the governance mechanism put in place in New South Wales.

## 4.7 Coverage of high rise buildings

Submissions to the Grellman Inquiry consistently called for the removal of high-rise developments from the scheme. One of the primary recommendations of the Inquiry was that the Government cease to require mandatory home warranty insurance cover for high-rise developments. The Inquiry noted that this should only occur subject to mandatory certification for the construction of high rise projects, by approved certifiers.

The Government accepted, in principal, the majority of the Inquiry's primary recommendations.

The *Home Building Amendment (Insurance Exemptions) Regulation 2003* commenced on 31 December 2003 and meant that high-rise construction work that commenced on or after that date, would no longer need home warranty insurance cover.

At the same time, amendments were made to the *Environmental Planning and Assessment Act 1979* to ensure better quality construction in residential high-rise buildings. The new measures included:

- the introduction of mandatory inspections for all classes of buildings (as defined in the Building Code of Australia) beginning with high-rise buildings;
- \$1.1 million fines and two-year jail terms for building certifiers guilty of improper conduct, and for those who attempt to corrupt a certifier;
- the introduction of clearer provisions governing the role and responsibilities of principal certifying authorities;
- ensuring compliance with development applications before an occupation or subdivision certificate can be issued;
- requiring the principal contractor and principal certifying authority to place a sign (or signs) on development sites, giving their name and contact telephone number;

The cessation of mandatory home warranty insurance cover for high-rise developments from 31 December 2003 brought NSW into line with other similar jurisdictions. [See table 4.8] Insurers are still able to, and in some cases do, provide home warranty cover for high-rise residential construction projects to builders on a voluntary basis.

Owners of new high-rise apartments continue to have access to the Office of Fair Trading's dispute resolution service (including inspections undertaken by qualified building inspectors) as well as the Consumer, Trader and Tenancy Tribunal, which provides an independent, low-cost and accessible dispute resolution forum.

NSW	VIC	QLD	SA	WA	TAS	ACT	NT
Maximum height of three stories [above car park]	Maximum height of three stories [above car park]	Maximum height of three stories [above car park]	Maximum height of three stories [above car park]	Maximum height of three stories [above basement]	Maximum height of two dwellings [above car park]	Maximum height of three stories [above car park]	Maximum height of three stories

Table 4.8 Home warranty insurance coverage of multi-story residential buildings in each jurisdiction

Home warranty insurance requirements continue to apply to all high-rise developments where construction commenced prior to 1 January 2004.

The Office of Fair Trading is currently processing a number of insurance claims on high rise

buildings. The claims arise from the former government administered home warranty insurance scheme, which operated until 1997, and the Government's rescue package for victims of the HIH collapse.

#### **4.8** *Time taken to finalise claims*

Insurance claims involving the identification of and rectification of defective building work are, by their very nature, complex. In assessing an insurance claim an insurer must be satisfied that **there is in fact a valid certificate of insurance in place that provides coverage for the alleged defective work**. For a certificate of insurance to provide the necessary coverage the contract for the construction of the premises must be signed during the period of coverage or specifically issued for that construction site. In some instances, mainly on projects involving multi-storey premises, a number of builders have been engaged. Therefore, each builder must provide a certificate to cover the work that they have carried out.

Once a valid claim has been established the nature and extent of the alleged defective work must be determined. In doing this, consideration must also be given to those items that are excluded from the policy such as normal wear and tear, owner maintenance and work not done by the builder who issued the insurance. Delays are typically encountered on insurance claims involving large residential unit complexes. Within the Sydney metropolitan area there has been a clear trend towards large complexes being substantially occupied by tenants, therefore, the reporting of defective work is slow. Further to this, it is often difficult to gain access to individual units to allow a technical assessor to determine what is or is not defective. Disharmony within the owners corporation will also delay the assessment process as decisions effecting the owners corporation can only be made after a majority vote of the owners has been recorded at a special general meeting.

Often in large complexes further defects are not uncovered until rectification work has commenced. When this occurs the nature and extent of the new defects must be determined, a scope of works developed and new tenders called for.

#### **4.9** *Deemed refusal/acceptance*

The *Home Building Act 1989* had previously stipulated that, if a decision had not been made by the insurer to accept or decline the claim within 45 days after the claim had been lodged, the claimant could deem the claim to be declined. This would allow them to lodge an appeal with the Consumer Trader & Tenancy Tribunal.

On 1 September 2005 the *Home Building Act* was amended to place the onus on the insurance company to provide the claimant with a decision within 90 days of the claim being lodged or otherwise it is deemed to be accepted.

# 5 The home building licensing system

## 5.1 *Current licensing system*

### 5.1.1 *The licensing process*

Since 1 December 2005 licensing processes within the Licensing Branch of the Home Building Service have been reformed. There are now only two application forms, one for use by an individual and one by a company or partnership.

Extensive information regarding home building licence requirements is available on the Office of Fair Trading website, including qualifications, application forms and fees. The process for lodgement and approval of a licence application is outlined in Diagram 5.1

As of March 2006, proof of identity is required with every application for an individual home building licence or certificate. The proof of identity process, conducted at Fair Trading Centres, is further described in Section 5.3.3.

If the application is complete it is sent to the Home Building Service where it is entered into the computer system and a file is created. In that process, the application is carefully assessed against licensing criteria for the particular work category. This includes an examination against qualifications and, if applicable, experiential criteria and of work references and the licensees associated with the references.

TAFE qualifications are also checked against TAFE records and, where clarification of work references is needed, the referees may be contacted and interviewed by telephone. A total of 4,500 checks have been conducted with no evidence of fraudulent activity.

### 5.1.2 *Licence Criteria*

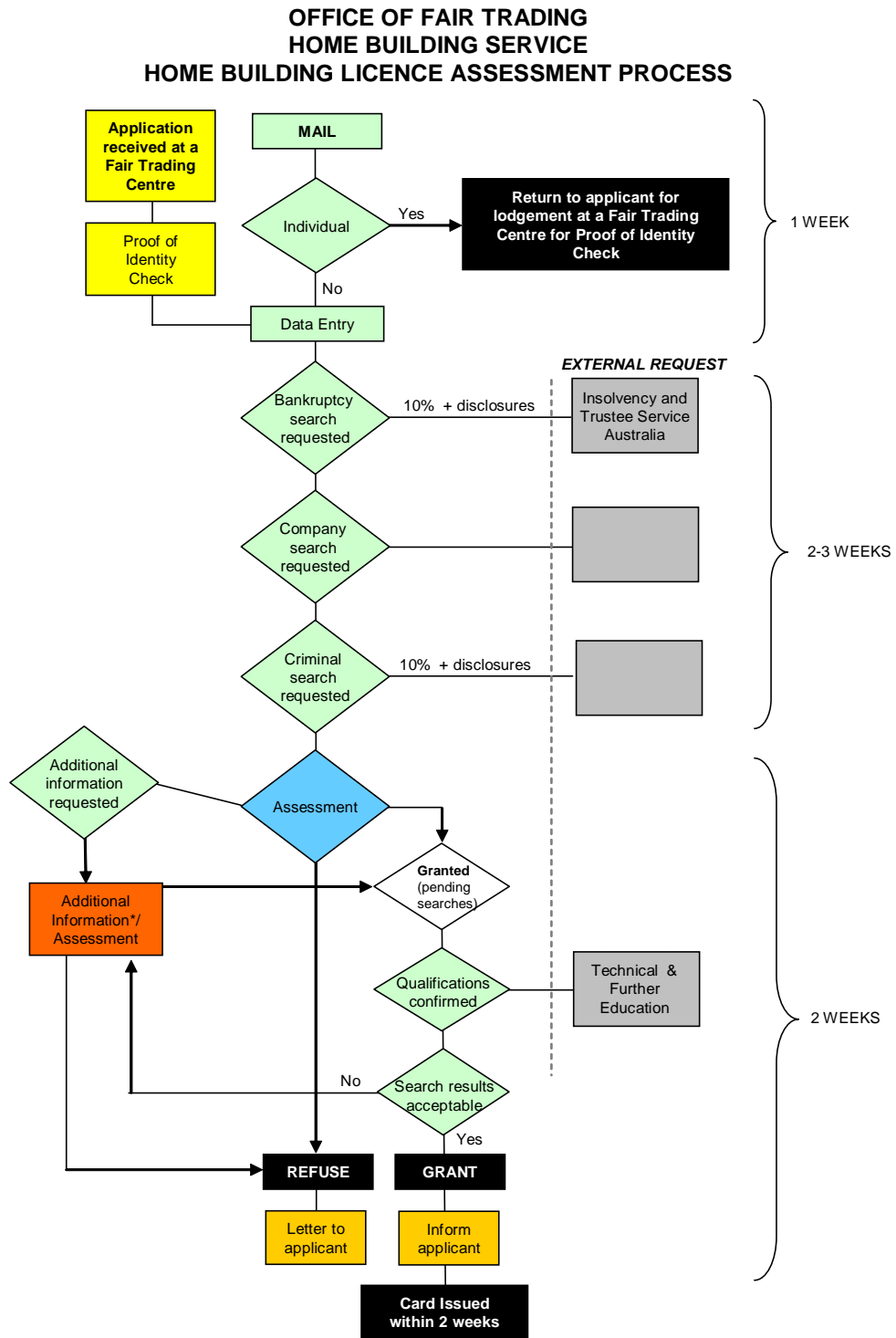
In order to qualify for a licence or certificate an applicant must be of good character, not be a declared bankrupt and hold the appropriate qualifications. Current qualification requirements include a mixture of TAFE qualifications, industry experience and skills assessments.

The Home Building Service is progressively adopting a national approach based on assessment of skills using a national training package qualification. This ensures that appropriate skill levels for licensing purposes are assessed against a national standard.

**Recent changes to the qualification requirements, which commenced 21 August 2006, make New South Wales the leading state in Australia in the implementation of a national system of qualifications for builders.**

### 5.1.3 *Criminal record and insolvency checks*

Under Section 20 1(A) of the *Home Building Act 1989* the Director-General must, in determining whether a person is 'fit and proper' to hold an authority, consider the applicant's good repute, having regard to character, honesty and integrity as well as criminal history.



\* Where additional information is required, processing time will be extended beyond 30 working-day Guarantee of Service.

**Figure 5.1 The Licensing Process**

The Home Building Service currently undertakes a random audit of 10% of licence applications to check the veracity of referee’s statements and probity issues such as criminal history and insolvency. However, in 100% of cases where an applicant discloses a criminal history, then a criminal record check is requested. This means that in reality 13% of applications have criminal checks made.

**New South Wales is the only Australian jurisdiction which conducts random criminal record checks.** Advice from licensing authorities in other jurisdictions is that criminal record checks are only conducted on those applicants who declare a criminal history.

The implementation of the proposed Government Licensing System for the Home Building Service will enable 100% of applications received to be validated against the NSW Police Central Names Index System.

Certain crimes are considered more serious than others in the context of work performed under residential building authorities, and the fitness and propriety of applicants needs to be determined. This includes considering the relevance of a criminal conviction to determine whether the conviction would render the person unfit to carry out the work for which he/she is seeking an authority, such as offences for fraud, stealing, robbery and sexual offences.

Some serious convictions may have no bearing on the applicant's ability to conduct residential building work and criminal convictions by themselves are not enough to determine whether a licensee is not fit and proper. The Home Building Service needs to show that a person's conduct is such that the person could be considered unfit to remain a member of the profession concerned and guidelines have recently been revamped to assist staff in assessing criminal history records. The guidelines will ensure that crimes are correctly categorised and appropriate responses are made in light of their seriousness, as well as how often and how long ago they were committed.

As part of a review of its risk management procedures, the Home Building Service is also currently seeking feedback from agencies in all state jurisdictions concerned with the administration of residential building authorities in relation to each agency's approach to conducting probity checks within the licence application process. Inquiries made thus far with Queensland and Tasmania indicate that they do not conduct criminal record checks on those applicants that do not self declare.

Applicants who have had their applications refused on the basis of their criminal history are entitled to have the matter heard in the Administrative Decisions Tribunal under the *Administrative Tribunal Act 1997* and there have been instances where the Tribunal has overturned decisions made by the Home Building Service to refuse a licence. This includes cases where it has ruled that past criminal activity is not relevant.

In *Corkin v Director-General, Department of Fair Trading (2001) NSW ADT 190*, the Tribunal determined that the circumstances of the applicant's convictions on sexual offences were family related and did not have a bearing on his unblemished work history as an electrician. The applicant disclosed his convictions on his licence application. Had he concealed the convictions, this would have reflected on his honesty and integrity. The Tribunal set aside Fair Trading's decision to refuse the application for a qualified supervisor certificate.

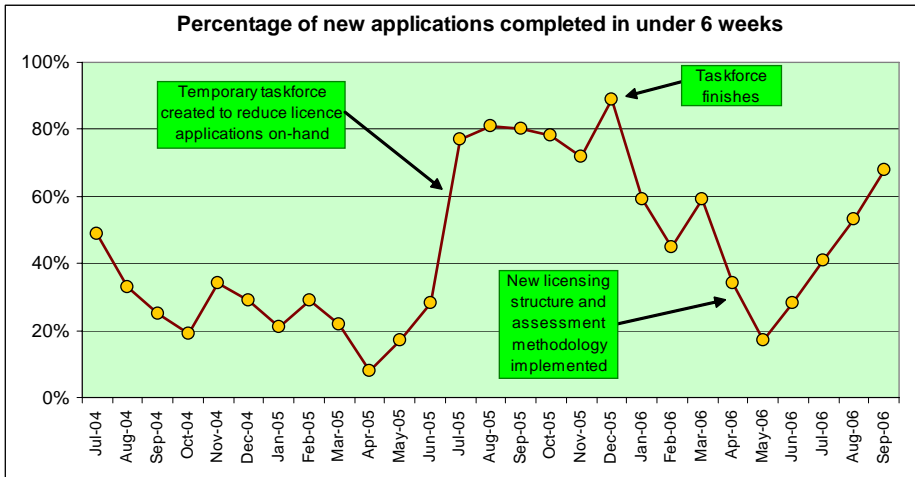
#### 5.1.4 *Processing timeframes*

##### *New applications*

The Home Building Service has a performance target of 30 working days for the processing of new licence applications. During 2004 the Service experienced an unprecedented increase in the number of applications for new licences. Some of this increase arose from existing builders changing their entity structures in response to home warranty insurance

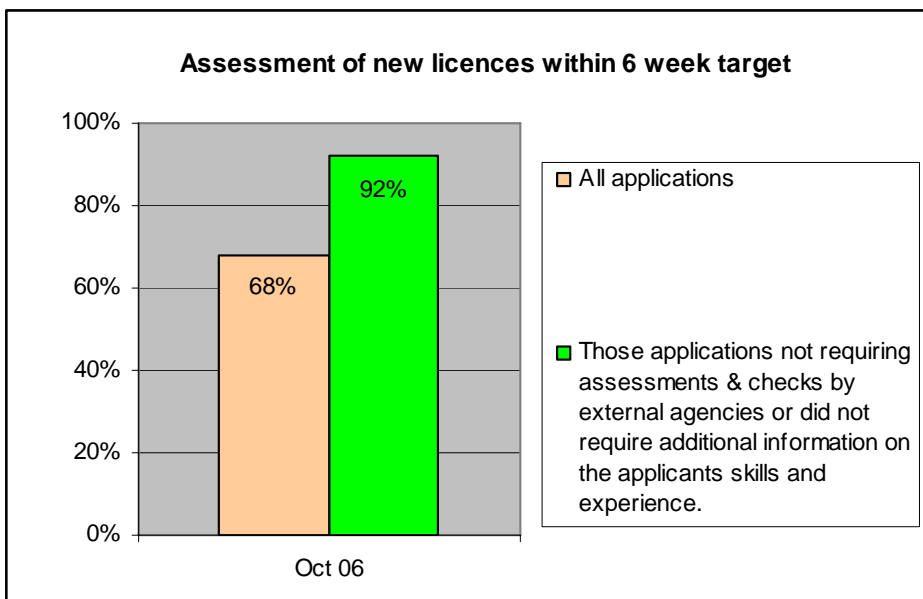
requirements. Other applications were the result of significant compliance activity by the Home Building Service to ensure that all builders were licensed.

The Home Building Service struggled for some time to meet the unexpected increase in demand and instituted a number of strategies to deal with the workload. The impact of these measures can be seen in Graph 5.1.4. Since the introduction of a new structure and assessment methodology the Licensing Branch in May 2006 the percentage of applications that are completed within the 30 day period has steadily increased to 65% in September 2006.



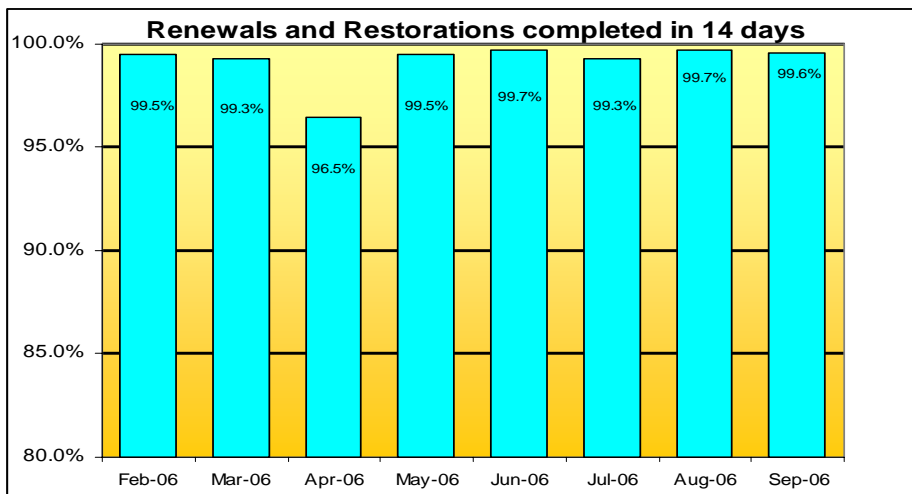
New applications where external assessment is required

As the following graph shows, 68% of applications in October 2006 which did not require any external assessment were completed by the Home Building Service within six weeks of lodgement.



*Renewals and restorations*

New applications take time to assess to ensure that applicants have the correct qualifications and experience. This may include referring the applicant to an external agency to conduct a formal assessment of their abilities and knowledge. However once granted a licence, it is essential that the annual renewal of licences be fast and efficient to ensure that the livelihood of authority holders is not jeopardised. In more than 95% of cases, licences are renewed within 14 days of the renewal form being received by the Home Building Service. In mid 2006, licence holders were also given the option to pay by credit card when mailing in their renewal forms.



## 5.2 *Recommendations of Operation Ambrosia*

Initially the investigations of the Independent Commission Against Corruption covered the operations of a training provider and an interpreter involved in assisting applicants undertaking technical assessments. The Commission report recommended that charges be brought against one individual. The report made no adverse findings in relation to the Office of Fair Trading.

Commission investigators subsequently uncovered a scam where a TAFE employee changed internal TAFE records to substitute the names of persons qualified for diplomas for those who did not. These fake documents were provided to assist individuals who lacked the qualifications, skills and experience to be a builder in NSW, to obtain a licence.

Operation Ambrosia finished last year, with the report issued on 21 December 2005. In many respects, the activities of the Commission and the cancellation of licences resulted from the vigilance of staff of the Office of Fair Trading responsible for overseeing the building licensing system.

A number of licences were identified as having been obtained with the fraudulent TAFE qualifications. 105 licences were cancelled, including 28 company licences and one partnership licence. These cancellations are all recorded on Fair Trading's website. In addition, two companies allowed their licences to expire while another two surrendered their licences. The Commission's final report identified 36 individuals involved in corrupt or



fraudulent activities relating to applications for the issue of various licences. A further seven had their licence applications rejected and nine were not required to be licensed under the Home Building Act. The remaining eight licence holders are the subject of disciplinary action with two of the licences suspended pending final determination.

Following the release of the report of Operation Ambrosia, the Office of Fair Trading reviewed the operations of the licensing system and developed a number of proposals for systemic improvement which have now been implemented to further strengthen the licensing system. These include:

- removal of the “20 year rule” pathway to obtaining a building licence [1 January 2006];
- introduction of proof of identity requirements [1 March 2006]; and
- changes in qualification requirements [21 August 2006].

These reforms are discussed in more detail in section 5.3 of this submission.

As well as reviewing and strengthening internal procedures, Fair Trading is working with other agencies, including TAFE, to ensure the system is secure against any future attempt to fraudulently obtain building licences.

### **5.3 *Recent reforms to the licensing system***

#### *5.3.1 Continuing professional development*

The introduction of continuing professional development for the residential building industry was a recommendation of the Campbell Inquiry and further supported by the Grellman Inquiry. Originally legislated for in 2001, the requirement commenced for builders and swimming pool builders on 1 March 2004. Victoria and Tasmania have voluntary continuing professional development systems which share some similarities with the NSW system.

The *Commissioner's Guidelines for continuing professional development for the home building industry*, available from the Fair Trading website, outline the requirements. It is designed to maintain skills and competence, reduce the level of disputes and raise industry standards in the interest of builders and consumers.

Extending the requirements to specialist trades like plumbers, gasfitters and drainers, electrical contractors and air conditioning/refrigeration contractors has been deferred pending the outcome of the Moss Licensing Review.

Continuing professional development is available through a variety of sources including TAFE and private registered training organisations. Distance learning training is available for those in remote areas with options available on a low-cost basis.

The requirements provide for a broad range of activities to accumulate continuing professional development points including home study, industry association membership, journal subscriptions and having a good licence record. Many other activities are also free, for example, BASIX training, Building Code of Australia, some WorkCover training and attending trade nights.

Before introducing continuing professional development, Fair Trading conducted a number

of seminars across NSW to inform builders of the requirements, answer their questions and seek their views. An information pack was also forwarded to all builders and pool builders.

A review of the current continuing professional development requirements is currently being undertaken by Stenning and Associates Pty Ltd for both the home building and property sectors to evaluate accessibility and relevance. The evaluation will be complete by the end of 2006. This included an industry round table conference convened by the Minister 20 September 2006 to discuss the issue.

Fair Trading is committed to helping builders and tradespeople in NSW remain skilled in a rapidly changing industry and is leading the way in this area. Continuing professional development helps builders and other licensees keep pace with changes within the industry and to deliver better outcomes and consumer confidence.

It is evident through the initiatives of the Council of Australian Government regarding skills shortages and licence harmonisation, that the maintenance of skills is a universal concern for all licensed occupations.

#### *5.3.2 Abolition of the '20 year rule'*

Use of the 20 year experience rule as a pathway for a building contractor licence was previously offered to applicants who did not hold an appropriate qualification but who could demonstrate a number of years of practical experience. This experience needed to be supported by industry referees who provided written documentation of the period and type of experience claimed by the applicant and by a successful skills assessment by the Building Industry Skills Centre of TAFE or completing the Back to Basics short course.

The Independent Commission Against Corruption's Operation Ambrosia found that this 20 year rule pathway was open to corruption by applicants and others willing to assist them and it was one of its major recommendations that the 20 year rule be abolished.

Since 1 January 2006 general building contractor licences and qualified supervisor certificates are only issued to applicants who hold a qualification approved by the Commissioner for Fair Trading. These changes have been made to ensure that the same standard applies to all applicants and only well-trained persons are able to obtain a builder's licence in NSW. This will help to ensure better quality building work and protect consumers.

Information specifying the new and transitional qualifications required for a building authority is available on the Office of Fair Trading website.

Abolition of the 20 year rule as a basis for licensing builders, is recognition of the need to apply contemporary standards for regulation of this important sector.

#### *5.3.3 Proof of identity check for new applications*

As part of the continuous drive to offer better protection to consumers, all applicants for building licences and certificates are now required to present themselves in person at a Fair Trading Centre or Government Access Centre and undergo a proof of identity check. This initiative is the first step towards introducing photo licences for all licence and certificate holders in the building industry.

A photo of each applicant is now required with applications and each applicant needs to provide documentation, such as, a driver's licence and other secondary documents to assist processing officers to determine their identity, in the same way that an applicant for a driver's licence or bank account would do. Specified primary and secondary documents are required to be produced and a photo ID must be sighted.

A transitional period was in place until 28 April 2006 for acceptance of applications supplied on older application forms obtained prior to the introduction of the proof of identity check and from 1 May 2006 it became a mandatory requirement for applicants. New South Wales is the only jurisdiction in Australia to have compulsory proof of identity for home building licences.

**New South Wales is the leading jurisdiction in the implementation of stronger identity checks for builders.** Applications are still accepted by mail in other states.

#### 5.3.4 *Changes to licence categories and updated qualifications*

On 21 August 2006 the *Home Building Regulation 2004* was amended to create two new residential building work categories of *kitchen, bathroom and laundry renovation*; and *erection of pre-fabricated metal-framed home additions and structures* to reflect the need for builder licences in these areas.

At the same time qualifications for the new categories of licence, and most other minor trades, were implemented. The new qualifications reflect the Commonwealth approved national qualifications and New South Wales became the first state to implement them.

**New South Wales is again the leading jurisdiction in the implementation of the new Commonwealth approved categories of licences in the home building industry.**

## 5.4 Assessment of skills by external agencies

Applicants for a licence or certificate issued under the Home Building Act 1989 are required to demonstrate that they possess the necessary training to undertake the authorised work. Increasingly this evidence is in the form of a competency based qualification issued under the national training system.

Assessments are conducted by registered training organisations at a cost to the applicant set by the registered training organisation.

The advantages of relying on this form of assessment include:

- the knowledge and training is recognised in the form of a qualification which has currency anywhere in Australia and thereby the skilled labour is mobile;
- the qualifications are competency based and include verification of both on-the-job and off-the-job knowledge and skills;
- the assessment which results in a qualification can be used to recognise prior learning. This means that a person who has been trained through an experience pathway can have their knowledge and skills assessed, and undertake gap training if necessary, in order to complete a qualification;
- as qualifications are delivered by many different registered training organisations the assessment can be applied flexibly and at a competitive price. The cost varies

depending on factors such as whether the qualification is being delivered in conjunction with other training, such as an apprenticeship, the location of the applicant, whether the assessor must travel to the student, the way that the applicant must assemble their portfolio of work and the type of qualification they are seeking, for example, the General Construction Certificate I would cost less than the Plumbing Certificate IV;

- the system is compatible with the initiatives of the Council of Australian Governments to address the skills shortages;<sup>21</sup> and
- as the assessment is against an external standard, it is more secure and transparent form of ensuring knowledge and skills.

Since 2006, qualification requirements for licensing and certification for many of the licence categories under the Home Building Act have been based on a nationally recognised qualification.

## 5.5 Role of public register

The public register was introduced under the *Building Services Corporation Act 1989*. Section 120 of the *Home Building Act 1989* also provides that the Director-General is to maintain a register of particulars of contractor licences, building consultancy licences, supervisor and tradesperson certificates and owner-builder permits. The Home Building Service provides the public and other interested parties with information regarding builders, tradespeople and specialist workers licensed in New South Wales, through the public register.

The register records information regarding a licence such as:

- date of issue and expiry;
- conditions imposed on the licence;
- names of partners of a partnership or directors of a corporation ;
- the category of work that the licence holder is licensed to undertake;
- the results of any relevant disciplinary determination;
- the results of any prosecutions under the Home Building Act against the licence holder;
- the number of insurance claims paid (after 1 September 1997) in relation to work done by the holder;
- details of any penalty notices issued to the holder ;
- any cancellations or suspensions of the licence; and
- the number of Consumer, Trader and Tenancy Tribunal orders not complied with (since 1 January 2002).

The register initially provided the public with licence details on contractors and whether or not a determination had been made against them in any disciplinary action. In March 1993 the public register was amended to also record the number of current complaints against a licence holder.

It was found that the recording of complaints on the register as soon as they were received,

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<sup>21</sup> See section 5.7

and before any investigation of the facts of the matter, was leading to concern among affected contractors who were in some cases unaware of the complaint. In other cases complaints were found to be of a vexatious nature and with no action taken against the contractor. In cases where a complaint was proven, the result of disciplinary action or payment of an insurance claim, there was no doubt as to contractor fault. On August 31, 1997, the register ceased to record new complaints against contractors and commenced recording any insurance claims paid.

As a result of the 2001 amendments to the Home Building Act, since 1 January 2002 the public register has included unsatisfied Tribunal orders against a licence holder. Prior to the introduction of this requirement, the information was not available to Fair Trading. The legislation does not allow for retrospective recording of these details.

Since July 2005 the website search technology has been improved resulting in quicker search responses and a current view of results.

Further, as part of recommendations made by the NSW Ombudsman, changes have been made this year to enable consumers to undertake wider searches on licence entities. These include a re-ordering of the check boxes in the licence search facility to encourage searches in the names of individuals, partnerships or companies initially rather than only the current licence number. This puts consumers in a better position to discover details of all licences held by the entity concerned.

The status of a licence is now shown in the summary page of the licence check facility, enabling consumers to see at a glance whether any of the licences ever held by a particular entity are current, expired, suspended or cancelled. A warning has also been provided in the introductory text of the register, advising consumers that information provided by insurers about insurance claims may be incomplete.

Consumers without internet access can contact Fair Trading's Information Centre, or attend any Fair Trading Centre, to enquire as to the bona fides of a licence holder. A hard copy of the public register's section 120 certificate is available on request.

## 5.6 Implementation of the Government Licensing System

The implementation of the Government Licensing System for the processing of home building licences is currently planned for mid 2007 and will introduce a further range of measures to strengthen the security of the licensing process. These measures will include:

- phased implementation of a photo licensing regime that will enable on the spot identification of licence holders; and
- automatic electronic interfaces with external bodies including:
  - the Roads and Traffic Authority for photo licence processing and identity checking;
  - NSW Police Central Names Index for checking criminal history; and
  - the Australian Securities and Investment Commission for checking company details.

## 5.7 Moss Review of Licensing in the Home Building Industry

On 2 May 2005 the then Minister for Fair Trading, the Hon John Hatzistergos MLC announced the Inquiry into Licensing in the New South Wales Home Building Industry to be conducted by Dr Irene Moss, former Commissioner of the Independent Commission Against Corruption. Mr Kevin Rice, former professor of architecture, was appointed to assist the Inquiry.

The terms of reference of the Inquiry were to:

1. Consider the coverage of licensing and assess whether:
  - 1.1. the range of building activity covered by licensing is appropriate;
  - 1.2. the monetary threshold (\$1,000) for requiring residential building work to be contracted by a licence holder is appropriate;
  - 1.3. the discrete licensing of individual, partnership and corporate entities is appropriate;
  - 1.4. licence categories should be aligned with building types such as those referred to in the Building Code of Australia (e.g. low, medium and high-rise);
  - 1.5. the licensing of persons not contracting directly with homeowners is appropriate; and
  - 1.6. licensing should apply to the broader construction industry.
2. Assess the adequacy of entry requirements for licensing purposes including:
  - 2.1 training and education of industry participants;
  - 2.2 competency standards; and
  - 2.3 the role of licence testing and accreditation.
3. Examine the appropriateness of existing legislative conditions placed on licences and other authorities (including the period that authorities remain valid) and whether there is scope for commonality.
4. Consider the need for differential fee structures for the issue and renewal of licences and other authorities.
5. Consider systems for performance management of licence holders including the introduction of a demerit points and/or a rating system as part of the existing disciplinary regime.
6. Assess the appropriateness of continuing the owner-builder permit regime in its current form having regard to the potential for corrupt or illegal activity in relation to that regime.
7. Consider National Competition Policy principles and mutual recognition issues

Issues such as home warranty insurance, workplace relations, security of payment, dispute resolution, the approval, design and inspection of building work, taxation or workers compensation arrangements, land development issues and responsibility for the administration of the builder licensing system were outside the scope of the Inquiry.

5.7.1 *Conduct of the Inquiry*

Sixty-six submissions were received in response to the terms of reference of the Inquiry. A number of meetings were also held with stakeholder groups. The feedback from the meetings and submissions were used in the preparation of an issues paper.

The issues paper was released in March 2006. A copy of the paper is at Appendix C. A list of the meetings conducted and parties who made submissions is included. The Inquiry again conducted a number of meetings with industry and other interested parties. To encourage input from industry participants and the general public, regional public meetings were held in Dubbo, Wagga Wagga, Tweed Heads and Penrith.

The Inquiry also met with representatives from the Victorian Building Commission and with the Queensland Building Services Authority.

To ensure the views of consumers were obtained, consumer focus groups were undertaken by an independent consultant.

The Review also conducted extensive research on licensing, especially in relation to licensing reviews previously conducted in NSW and other Australian jurisdictions. Of particular focus was the Cole Royal Commission into the Building and Construction Industry and the Report of the Campbell Inquiry. Fifty written submissions were received.

5.7.2 *Input from the Building Action Review Group*

The Inquiry met with the Building Action Review Group and its legal adviser to hear their concerns. The Group did not make a submission to the Inquiry.

5.7.3 *Final Report of the Inquiry*

The Final Report of the Inquiry has now been completed. The Report makes 29 recommendations and the matter is currently with the Government for consideration.

## 5.8 Council of Australian Governments' work on skills shortage Issues

Skills shortages have been identified in a number of building related occupations. At its meeting of 10 February 2006, the Council of Australian Governments agreed to a number of reforms to help address these skills shortages.

One of its initiatives involves improving the mobility of skilled workers by providing for greater harmonisation of skill requirements between states and territories. The occupations identified for the first round of reforms as having a higher level of mobility restriction are: plumbers, electricians, air conditioning and refrigeration mechanics, carpenters, bricklayers, joiners and motor mechanics. Because carpenters, bricklayers and joiners are regulated in some states under a builder's licence, the occupation of builder has been added.

To achieve its outcomes the Council is focussing on licensing issues with a view to rationalising and harmonising licence classes between jurisdictions, where appropriate, and to remove duplicate skills eligibility requirements between the training and licensing sectors.

As part of the agreement of 10 February, Council established occupation specific Action Groups to bring together regulators and industry stakeholders to undertake the necessary work. Four Action Groups were established in late March to undertake the work of developing mutual recognition matrices and agreed positions for harmonisation. The Action Groups are made up of:

- regulators – a representative of each State and Territory regulator;
- state training authorities – one representative only, to represent all States and Territories;
- Skills Council for each industry;
- unions – two representatives of the ACTU;
- National Quality Council – one representative to focus on standards;
- industry – Chamber of Commerce as represented by the Australian Industry Group .

The NSW Office of Fair Trading is the regulator representative for New South Wales on the Plumbing Occupations Action Group, the Electricians and Air Conditioning and Refrigeration Mechanics Action Group and the Builders, Carpenters, Joiners and Bricklayers Action Group.

The Action Groups have met on a number of occasions and are close to finalising a mutual recognition matrix for each of the identified occupations as well as agreeing on a nationally accepted description of the scope of work and minimum qualification requirement for each of these occupations. It is proposed that Ministerial declarations will be used as evidence of commitment of the States to the mutual recognition outcomes. A process for review of Ministerial Declarations will also be established.

This national process may impact on the licence categories in New South Wales, which should be consistent with those in other states, and on the qualification requirements, which should reflect a nationally agreed minimum standard. The Home Building Service will need to consider the outcomes of this national process and the report of the Moss Review before recommending any further changes to licence categories or qualifications.



## 6 Resolution of complaints

### 6.1 Distinction between complaint resolution and disciplinary processes

Complaint resolution and disciplinary action are two distinctly different but related processes. The statutory basis for each is addressed in:

- Divisions 1 and 2 of Part 3A of the Home Building Act 1989 for complaint resolution; and
- Divisions 1 and 2 of Part 4 of the Home Building Act 1989 for disciplinary action.

The complaint resolution process is consumer focused and is designed to provide complainants with an effective and inexpensive way of resolving disputes with licensed contractors.

The disciplinary processes is contractor focussed and often commences following the completion of the dispute resolution process. It involves the use of a range of compliance sanctions of sufficient magnitude to effectively regulate the residential building industry and to control the performance of licence holders.

The disciplinary process plays no part in the dispute resolution process and has no impact on the quantum of redress achieved by consumers. The consumer has no role in the disciplinary process. Disciplinary action is to maintain minimum standards in the residential construction industry and to modify the behaviour of contractors who fail to meet and maintain those standards.

### 6.2 Current complaint management system

Most building complaints are lodged with or dealt with in the first instance by Fair Trading Centre staff. Those matters not resolved through this process are forwarded to either the Home Building Service or referred to the Consumer, Trader and Tenancy Tribunal.

Once the Home Building Service receives a complaint the management process incorporates an assessment phase which allocates complaints into three streams:

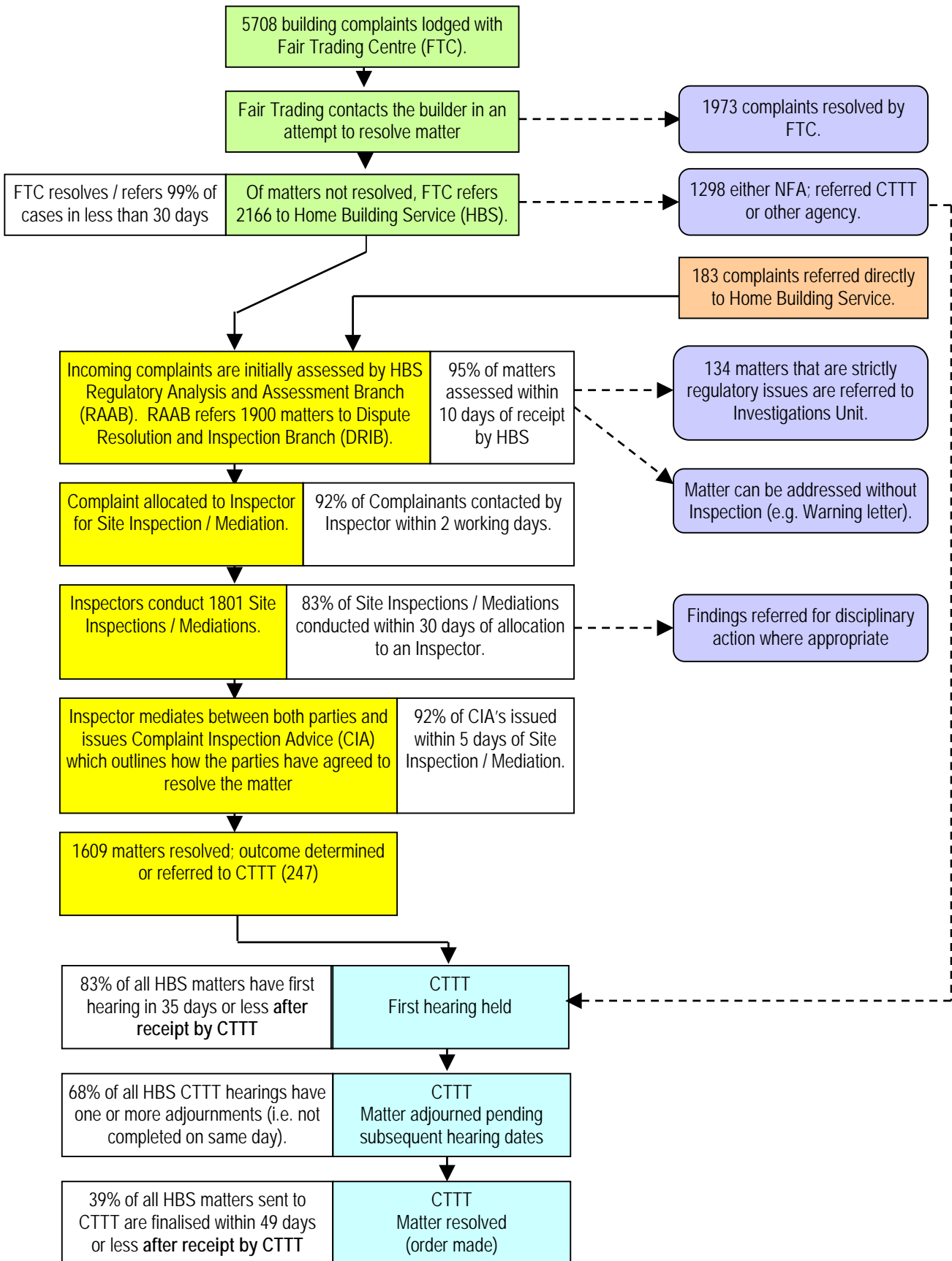
- complaints to be inspected by a building inspector
- complaints to be dealt with by a compliance investigation
- complaints to be dealt with administratively

Complaints are therefore subject to assessment on different levels, depending upon the nature of the matter and whether it has wider policy, legislative, disciplinary or operational implications.

These assessments are carried out in accordance with operational procedures, by specialist officers who are able to bring a wide range of training, experience and knowledge directly relevant to the industry, in addition to other intelligence gathered by the Home Building Service.

Once a complaint passes through the assessment phase into one of the action streams it is then managed and monitored through Fair Trading's CAS online case management system.

## Complaint Resolution Process 2005/06



The CAS online system is a seamless tracking and reporting process where progress is monitored through all steps of the action being undertaken. It was introduced in August 2006 to overcome previous difficulties in tracking the progress of complaints lodged within the system. Dates, milestones and events are all logged and are available at call to supervisors and managers. Management reports can be routinely accessed and corrective and other proactive action taken as required.

### 6.3 Complaint outcomes

Complaint management procedures, on the other hand, are designed to assist the parties to a dispute to achieve a “win-win” solution. Experienced building inspectors and assessment staff are often in a position to negotiate acceptable closures to disputes that benefit all parties and allow them to move on – without any loss of ‘face’ on behalf of either party. These negotiated outcomes cannot be prescribed and are based on the sound problem solving experience of building inspectors and assessors.

The operation of the dispute resolution and inspection group has reduced the volume of building complaints going to the Consumer, Trader and Tenancy Tribunal by approximately 30%.<sup>22</sup>

#### 6.3.1 Resolution of complaints in 2005/06

Figure 6.3.1 describes the Home Building Service Complaint Resolution Process. Data for the year 2005/06 has been included.

Of the 5,891 complaints received by Fair Trading during 2005/06, 1,973 or 33.5% were resolved at Fair Trading Centres. Of the 2,349 complaints referred to the Home Building Service, 1,801 were subject to site inspections, of which 1,609 or 89% were resolved. The remaining complaints were referred to the Consumer, Trader and Tenancy Tribunal or other agencies, or were dealt with as disciplinary matters against licence holders.

	<b>Results in three years of HBS operation<sup>23</sup></b>	<b>2005/2006</b>
▪ No. of complaints referred to HBS for action	7,178	2,349
▪ No. of site inspections conducted	6,428	1,800
▪ No. of matters resolved	5,392	1,609
▪ No. of rectification orders issued	827	221
▪ No. of matters referred to CTTT	684	247
▪ No. of matters referred for breach investigation	1,289	134
▪ % of matters resolved by site inspection	83.8% average	89%

Table 6.3.1 HBS Dispute Resolution Results for the three years (2003/04, 2004/05 and 2005/06) since its establishment

#### Timeframes for resolution by the Home Building Service - 2005/06

<sup>22</sup> See Figure 6.4.1

<sup>23</sup> Includes 2005/2006 figures

- Contact made within 2 days of receipt of complaint 92%
- Complaint inspection advice notices issued within 5 days of site inspection 92%

Chart 6.3.1 shows the average number of working days it takes an inspector to mediate a complaint, from the day it is first assigned to the inspector through to its ultimate resolution. Despite fluctuations, it can be seen that there has been an overall downward trend in the amount of time taken to resolve complaints.

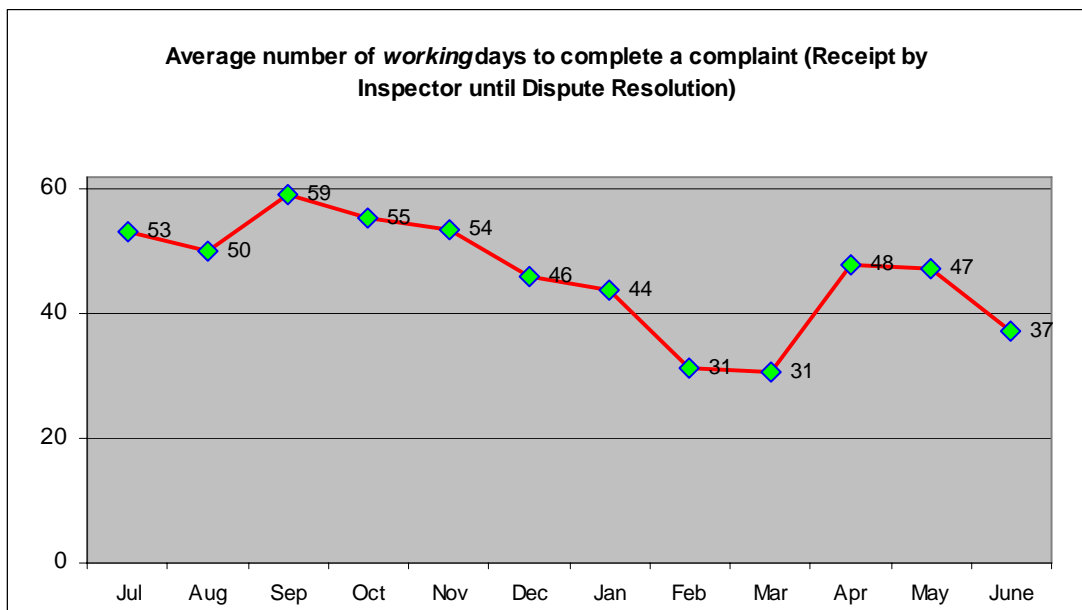


Chart 6.3.2 Average no of working days to mediate a complaint [includes time taken for the builder to rectify any defective work]

### 6.3.2 Role of Home Building Service inspectors in complaint resolution

The building inspectors group is the prime customer contact source within the Home Building Service and deals with complainants, builders, industry associations and unions, suppliers, local councils and the industry generally on a routine daily basis.

The dispute resolution function carried out by building inspectors involves an evaluation of the elements to the complaint, the convening of a site meeting which involves an on site inspection of the alleged defects, and a mediation discussion aimed at attempting to resolve the matter and have any defects corrected. If agreement is reached the inspector prepares a complaint inspection advice that documents the agreement and copies are given to the parties. Follow up action is taken to ensure the agreed rectification is completed.

Where the contractor refuses to acknowledge the defects the inspector issues a rectification order that details the required repairs and gives the contractor a specific time in which to complete the work. The outcome is monitored to ensure the work is completed in accordance with the rectification order.

If the rectification order is not complied with the consumer is advised to take the matter to the Consumer, Trader and Tenancy Tribunal, using the rectification order as evidence. Rectification orders are always accompanied by a detailed building report that is issued to both parties and can be submitted to the Tribunal as evidence of the defects.

Failure to comply with a rectification order is grounds for disciplinary action, as is defective work and breaches such as failure to arrange home warranty insurance or use the appropriate form of contract, and recommendations for disciplinary action are made by inspectors on matters such as these following completion of their action.

Building inspectors spend approximately 90% of their time inspecting, analysing and reporting on the technical aspects of complaints, about 7% on general compliance issues such as licence checks and insurance checks (as a part of normal inspections) and about 3% on general administrative tasks.

One senior position assisted by field inspectors, as required, is dedicated full time to analysing building defects and insurance claims and recommending subsequent disciplinary action. All building inspectors have undergone training in investigatory techniques. Inspectors assist in general compliance projects such as periodic licensing blitzes.

All members of the building inspectors group are physically located in Fair Trading Centres and have a very close operational relationship with Fair Trading Centre staff in their complaint mediation role. Building inspectors support the staff in Fair Trading Centres by providing specialist advice and involve themselves in the operations of the Fair Trading Centres. Building inspectors have a high public profile and are accessible to customers who visit Fair Trading Centres.

The Department's Code of Conduct is the standard that building inspectors use in the performance of their duties in regard to maintaining the highest ethical standards of behaviour. Inspectors apply high standards of impartiality in the performance of their duties in accordance with the Code of Conduct. Principal Building Inspectors examine all draft inspection reports prepared by building inspectors before they are issued to ensure that they are correct and comply with the requirements of the legislation, including the Building Code of Australia.

### 6.3.3 *Qualifications of building inspectors*

Building inspectors are field staff who are typically building, construction, or trade specialists who have qualifications and/or experience in the building industry and are expert in building and construction techniques, the Building Code of Australia and the supporting Australian Standards. The basic qualification for a building inspector is that they need to be eligible for a builders licence.

In addition to their qualifications, skills and experience, all inspectors undertake a training program during the course of their employment. Inspectors have the technical qualifications, experience, skills and competence necessary to carry out their duties in a competent and professional manner.

Currently the Inspectorate's staff have qualifications and experience in architecture, project management, building, construction, engineering, electrical contracting, waterproofing and plumbing and related services. All staff are trained in mediation via the LEADR Alternative Dispute Resolution program and some are also accredited.

## 6.4 Role of Consumer, Trader and Tenancy Tribunal

The Tribunal's primary function is to resolve disputes between consumers and traders. The Tribunal's objectives as set out in section 3 of the Act, are to ensure that:

- the Tribunal is accessible;
- its proceedings are efficient and effective; and
- proceedings are determined in an informal, expeditious and inexpensive manner; and decisions are fair and consistent.

Sixteen Acts confer jurisdiction on the Tribunal which comprises the following eight Divisions:

- |                     |                                |
|---------------------|--------------------------------|
| • Tenancy           | • Strata and Community Schemes |
| • General           | • Motor Vehicles               |
| • Home Building     | • Commercial                   |
| • Residential Parks | • Retirement Villages          |

During the year, the Tribunal received 61,089 applications and held 74,647 hearings across 95 locations.

The Tribunal uses different types of hearings, appropriate to the type of application, to deal with its workload. The majority of applications where the amount in dispute is less than \$25,000 are listed for first hearing in a Group List hearing where a number of matters are listed together before a Tribunal member. Where both parties appear, they are encouraged to resolve their dispute through negotiation. If the parties reach a settlement, the Tribunal will make consent orders, confirming that agreement. If there is no agreement, the matter will either be heard on the day, if time permits, or be listed for another day. If only one party appears, the matter may be heard on the day.

*Special fixtures*, or formal hearings, are used where attempts at settlement have failed. These hearings can run over a few hours or over several days.

*Directions Hearings* are used in complex matters when there is the need to establish jurisdiction, identify issues in dispute, set a time frame for the hearing or make directions for the exchange of evidence. Directions Hearings are used extensively in large home building and complex strata applications.

Matters can be determined on the papers with the consent of both parties. Parties are invited to submit all relevant information and submissions before a decision is made. Applications for rehearing are also determined on the papers.

### 6.4.1 *The Home Building Division*

The Home Building Division deals with disputes between consumers, traders and insurers concerning residential building work up to the value of \$500,000. Legal representation is more likely in Home Building disputes than in any other Tribunal division due to the large sums of money involved and the complex legal issues that often arise in these disputes.

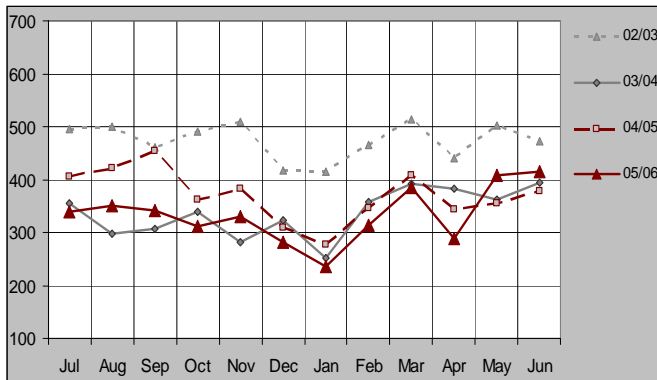
All disputes must be referred in the first instance to the Office of Fair Trading. The Tribunal is required to provide the Home Building Service with a copy of all orders made against a builder.

The preliminary dispute resolution processes applied by Fair Trading and the Home Building Service resulted in a 30% decline in applications lodged with the Tribunal since the 2003-2004 reporting period.

In 2005-2006 the Home Building Division received a total of 4003 applications, of these 76% were matters under \$25,000 and 24% were matters \$25,000 and over.

The majority of Home Building claims concern home renovations under \$25,000, tending to involve complaints about defective work. The remaining matters are valued in excess of \$25,000 and relate to complex construction issues and appeals against insurer’s decisions to decline home insurance claims.

**Home Building Division Application Lodgements over the last 4 years**



The Tribunal has a legislative obligation to attempt conciliation in all matters. Conciliation is a confidential and private process which provides the parties with an opportunity to see if they may reach an agreement. In matters where the claim is less than \$25,000 the initial listing of the matter is for conciliation and hearing. The Tribunal is finalising 68% of these matters at the first hearing.

An impact of the Home Building Service processes is a shift in the type of matters proceeding to hearing with the focus remaining on home renovation but dealing increasingly with unlicensed or inappropriately licensed traders.

Chairperson's Directions set out the procedures to be followed in home building disputes when the amount claimed is over \$25,000. These directions assisted to facilitate a range of alternative dispute resolution mechanisms and to limit undue delay in proceedings, including delay caused by unnecessary adjournments.

The Tribunal continues to explore various avenues of dispute resolution including the use of conclaves and case conferences.

Conclaves are used particularly in matters over \$25,000 where there are expert witnesses on both sides. They are conducted by a specialist Tribunal member and held on the site of the dispute with a view to clarifying the matters and, ideally, reaching an agreement which will finalise the dispute or, at least, narrow the issues in dispute.

Case conferences are facilitated by a Tribunal member and are another means by which the Tribunal attempts to narrow issues in dispute, achieve resolution or, if settlement is not achieved, ready a matter for hearing. They are most often used in complex home building matters.

## 7 Disciplinary powers and enforcement

### 7.1 Investigation Process

#### 7.1.1 *Objectives of enforcement action*

The current approach to investigating is to gather sufficient evidence with which to take compliance action against contractors who are found to have breached the Home Building Act. The compliance measures include disciplinary action, prosecution, the issue of penalty notices, trader warnings, Supreme Court injunctions and public warnings. The aim of this action is to:

- deter contractors from further breaches of the Act;
- discipline contractors who have breached the Act;
- encourage greater compliance with the Act by individual contractors and the residential building industry in general;
- maintain a high standard of competency amongst licensed contractors; and
- remove incompetent or otherwise unfit contractors from the residential building licensing system.

#### 7.1.2 *The assessment process*

The Home Building Service, like other law enforcement agencies, maximises the efficiency of its investigative resources through a formal assessment procedure which is applied to all complaints containing evidence of possible breaches of the Home Building Act.

In order to ensure that an objective assessment is made, analysts assess the matters against established criteria to determine which of the matters received should be referred for investigation. The criteria applied to the assessment process ensure that the more serious offences are identified and referred for investigation.

The criteria which guide the assessment process in order to determine an appropriate compliance response is based on:

- whether the contractor is licensed or not;
- the seriousness of the breach;
- the level of consumer detriment;
- whether the contractor has breached the Act before;
- whether any action has previously been taken against the contractor; and
- health and safety issues.

In relation to matters which are assessed as not warranting investigation, the complainant is advised accordingly and has the opportunity to seek a review of the assessment.

A warning letter may be issued to a contractor without an investigation being undertaken and the complaint details will be retained on file to be considered in the event that future breaches are detected.



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### 7.1.3 *Matters which are not formally investigated*

All complaints involving breaches of the Home Building Act are subject to an assessment process [described above] and a determination as to the appropriate compliance action outcome. This means that in some cases, identified breaches of the Act are not subject to a formal investigation. These are dealt with by administrative action, where appropriate. This would include warning letters and/or discussion with the trader. Matters which fall into this category include those where:

- the matter is not a high priority issue in relation to consumer protection;
- the evidence presented with the complaint does not support the existence of a breach;
- the matter relates to issues which are outside the jurisdiction of the Home Building Service, such as the cost of materials;
- the alleged breach is assessed as being minor in nature in terms of detriment to the consumer affected or the community as a whole;
- significant time has passed since the occurrence of the breach causing it to be statute barred<sup>24</sup>;
- the contractor has a clean record and has not been investigated for similar breaches in the past; and
- the contractor has a clean record and has not previously received warnings or been a party to other disciplinary proceedings undertaken by the Department.

### 7.1.4 *Types of disciplinary action available*

The appropriate compliance response may include but is not limited to:

- no further action but the information retained for intelligence purposes;
- written warning issued to the contractor;
- issue of a penalty notice;
- referral for full investigation which may result in:
  - issue of penalty notice;
  - prosecution of the trader in the Local Court;
  - gathering of additional information to support an injunction of the trader in the Supreme Court;
  - disciplinary action against a licensed contractor; or
  - issue of public warning by Commissioner or Minister.

### 7.1.5 *Recent increases in monetary penalties available*

Penalties imposed by the Home Building Service in the form of disciplinary action taken against licensees for failure to comply with Consumer, Trader and Tenancy Tribunal orders have increased from around \$1,500 in 2002, to about \$2,500 in 2005 and now, the suspension of licences.

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<sup>24</sup> Under the Home Building Act 1989 time limits for disciplinary action are:

- |   |               |
|---|---------------|
| • Prosecution action or penalty notices   | three years   |
| • Action for breach of statutory warranty | seven years   |
| • Most other disciplinary action          | no time limit |

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Legislative amendments introduced in mid 2005 require the Commissioner for Fair Trading to refuse the renewal of a licence where there is non-compliance with a Tribunal order. To be consistent with the policy behind that legislative amendment, compliance action is also taken against these licensees. The compliance action now includes suspension of a contractor's licence when disciplinary action is initiated.

Where the Home Building Service considers that monetary penalties are the appropriate disciplinary action to be taken for breaches of statutory warranties, the amounts have increased from around \$2,000 in 2004 to the current \$20,000 against a corporation and \$10,000 against individuals.

During 2005 the penalty notice provisions were also substantially widened to capture a range of new offences and penalty amounts were increased significantly, in some cases by 50%. In addition, penalty notices were introduced at a higher level for corporations.

### 7.1.6 *Review of disciplinary action by the Administrative Decisions Tribunal*

All decisions made by Fair Trading to take disciplinary action (other than a caution or reprimand) against licence holders are reviewable by the Administrative Decisions Tribunal. Virtually all disciplinary actions taken against contractors have been upheld by the Tribunal or only slightly reduced. Since the establishment of the Home Building Service, less than 5% of disciplinary determinations have been appealed to the Tribunal. In those matters where the Tribunal has made a decision, there is only one instance of a lesser penalty being imposed. This being a reduction of a \$3,000 penalty to \$2,500.

### 7.1.7 *Number of staff involved in compliance activities*

The Home Building Service's Mediation Services and Compliance Division has 62 staff spread across four branches:

- Building Investigation ;
- Dispute Resolution & Inspection;
- Compliance Administration and
- Regulatory Analysis & Assessment.

#### **Case Study: Michael Partridge**

Numerous complaints were received in relation to Michael Partridge's unlicensed activities involving pre-purchase and pest inspection services.

Partridge refused to cease working after being the subject of injunctive orders in the Supreme Court. Covert surveillance was instrumental in obtaining evidence of Partridge continuing to work in breach of the Supreme Court orders.

Partridge was sentenced to 150 hours community service and placed on a 12 month good behaviour bond.

All of these staff contribute significantly to the compliance activities undertaken by the Division. In addition to the staff of the Mediation Services & Compliance Division, during the conduct of targeted compliance programs, additional staff may be drawn from other areas of Home Building Service or other Divisions of Fair Trading. For example, during Operation Hammer 10 staff were drawn from Fair Trading's Customer Services Division.

### 7.1.8 *Capacity to undertake covert surveillance*

The Home Building Service has allocated significant funding and resources for this important compliance activity. Covert surveillance is an important and effective tool for gathering evidence to support a prosecution, show cause or injunction. Surveillance and

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covert operations are designed to obtain first hand documentary, video and still camera evidence which will support the Home Building Service's action against those who are breaching the Home Building Act or other legislation administered by the Home Building Service.

The conduct of surveillance of offenders has become an important tool in ensuring unlicensed and disqualified builders do not continue within the industry. Home Building Service surveillance operations are serious compliance activities with staff being subject to significant training, strict operational policies, procedures and approvals.

Home Building Service surveillance operations have been successful in providing evidence to successfully injunct and/or prosecute a number of individuals. Examples of this include Michael Partridge where video evidence was submitted as part of the brief of evidence used in the Supreme Court to successfully show he was working in breach of Supreme Court orders. Covert surveillance activities were also an important investigative tool in preparing briefs of evidence against Peter Garay and Ahmad Diab, both of whom were given custodial sentences.

### 7.2 Performance targets

#### 7.2.1 *Targets for completion of investigations*

Matters requiring investigation are categorised as preliminary, minor or major investigations. At any one time the Home Building Service has at least 100 investigations underway and completed 509 during the last financial year.

Preliminary investigations are scheduled for completion within one month of having been received. Matters allocated for preliminary investigation include those which appear to meet the criteria for investigation but some initial work is needed to establish things like the identity of an alleged offender and whether the offender is contactable.

Minor investigations are those of a routine nature such as unlicensed activity and are scheduled for completion within three months of receipt.

Major investigations are typically of a complex nature and may involve multiple breaches of the legislation, recalcitrant offenders and covert surveillance with a view to instituting proceedings in the Supreme Court seeking restraining orders against the offenders. Major investigations are scheduled for completion within six months.

During 2005/06 approximately 70% of investigations were completed by the due date. Delays can occur if the evidence available at that time is incomplete and problems may arise during the evidence gathering process which is often unforeseeable. Complications such as the availability of witnesses, offender identification, the need to conduct complex covert surveillance operations and competing priorities can all contribute to performance targets not being met on occasions.

#### 7.2.2 *Management oversight of investigative work*

All investigations are logged and tracked from when they are first received by Fair Trading. An investigation file is created and the CAS online system records milestones, dates and officer details.

Prior to the commencement of investigations, in most cases an investigation plan is prepared and approved. Team leaders monitor progress and meet with investigators on a regular basis to discuss progress. Where target dates have been exceeded, reviews take place and future actions determined. In some cases a decision may be made to terminate an investigation or apply additional resources to others.

Senior managers have access to operational and management reports which are discussed at team meetings, with individual officers or senior management meetings. These reports provide up-to-date information and are used for assessment and resourcing decisions.

The Home Building Service's monthly reports [Appendix A] also provide data on investigations and their progress.

### 7.3 Proactive Compliance Program

#### 7.3.1 *Gathering of intelligence*

Intelligence information related to contractors in the residential building industry is gathered from numerous sources. Those sources will vary depending on the nature of the compliance program and the region of the state involved. Common sources of information are:

- council development applications;
- complaint details;
- previous compliance programs;
- penalty notices;
- licences and licence applications data;
- other government agencies;
- trades unions;
- industry associations;
- interstate authorities and
- home warranty insurers.

Intelligence is also gathered from Home Building Service field staff who report back on many matters of interest, consumer complaints and stakeholder groups in the industry who report a wide variety of issues.

#### 7.3.2 *Use of regional staff in compliance activities*

Regional facilities and staff are utilised in a variety of ways during compliance campaigns. Regional staff may be called upon to gather regional intelligence information including printed materials such as newspapers, telephone books and business cards that promote their local traders. This material is then examined by Home Building Service investigators to detect breaches of the legislation or those engaged in unlicensed trading.

Counter staff at regional offices also provide real time intelligence by advising of any trends that they have observed in their region or the sudden closure of a local trader. This early notification allows the appropriate warnings to be placed in the licensing system to prevent those who have entered into bankruptcy or liquidation from renewing their licence or attempting to licence a new corporation.

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Regional inspectors may be called upon to provide physical and resource support to compliance actions in their area. The regional inspectors may be teamed with a Home Building Service staff member so they are equipped with both knowledge of the Act and the latest information regarding the residential building industry.

### 7.3.3 *Outcomes of recent programs*

Since July 2003 the Home Building Service has conducted 10 major compliance programs targeting non-compliance with the *Home Building Act 1989*. The programs involved building investigators visiting building sites or other locations unannounced and demanding the production of contractor licences. In the event that unlicensed activity is detected, penalty notices are often issued to the offenders. Persons subsequently offending would be subject to prosecution action.

Programs have been conducted in the north and south border regions of the State, Sydney and the Illawarra regions, the Central Coast and Sydney's Eastern and Inner Western Suburbs.

During the course of the programs, the Home Building Service spoke to over 9,400 individuals and issued 1,056 penalty notices, of which 420 related to doing unlicensed residential building work.

- |                    |  |
|--------------------|--|
| May 2004 -         | <b>Operation Hammer</b><br><i>Target:</i> statewide unlicensed activity<br>250 towns visited<br>2,271 sites inspected<br>6,450 individuals spoken to<br><i>Result:</i> 516 unlicensed people fined [totalling \$190,000] |
| July/August 2004 - | <b>Operation Mallet</b><br><i>Target:</i> a follow-up unlicensed compliance program<br><i>Result:</i> a further 119 people fined. [totalling \$34,000]   |
| October 2004 -     | <b>Operation Classified</b><br><i>Target:</i> non-compliant advertisements for work<br>4,000 newspaper advertisements checked<br>500 individuals spoken to<br><i>Result:</i> 200 fines issued [totalling \$30,000].      |
| February 2005 -    | <b>Operation Illawarra</b><br><i>Target:</i> unlicensed conduct in the Illawarra<br>351 sites inspected<br>650 individuals spoken to<br><i>Result:</i> 22 fines issued [totalling \$11,000].                             |
| April 2005 -       | <b>Operation West</b><br><i>Target:</i> unlicensed conduct in the Dubbo/Orange region<br>107 sites visited<br>216 individuals spoken to<br><i>Result:</i> 12 unlicensed persons fined [totalling \$6,000].               |
| September 2005 -   | <b>Operation Staunch</b><br><i>Target:</i> unlicensed activity on the North Coast<br>105 sites visited<br>240 interviews conducted   |

## 7. DISCIPLINARY POWERS AND ENFORCEMENT

*Result:* found a high level of compliance  
7 unlicensed people being fined [totalling \$3,500].

March 2006 –

### **Operation Howie**

*Target:* home warranty issues Sydney Met and Wollongong  
207 sites visited  
Retail outlets and factories targeted for HWI education purposes

*Result:* 19 infringement notices issued. [totalling \$6,750]

May 2006 –

### **Operation Spoke Shave**

*Target:* unlicensed conduct on the North Coast  
198 sites visited  
500 contractors spoken to

*Result:* 67 unlicensed people fined [totalling \$37,500]

July 2006 –

### **Operation Mortar**

*Target:* a follow up unlicensed compliance program  
192 sites visited  
358 individuals spoken to

*Result:* 60 fines issued [totalling \$37,900]

September 2006 –

### **Operation Nail**

*Target:* unlicensed conduct in the southern border regions  
201 sites visited  
436 individuals spoken to

*Result:* 43 fines issued [totalling \$62,650]

## 7.4 Enforcement results

The Home Building Service has achieved some significant enforcement results during its three years of operation. It has conducted 10 major compliance programs where over 9,400 persons were spoken to and 1,056 penalty notices were issued.

In terms of reactive compliance strategies the Home Building Service has achieved excellent results over the past three years. It has conducted more than 1600 investigations; successfully prosecuted 289 offences resulting in fines and penalties of \$500,000 and issued penalty notices to more than 1300 individuals for more than 1700 offences, resulting in fines of more than \$720,000.

### **Case study: Peter Garay**

The Home Building Service received 20 complaints in relation to defective work, and unlicensed work against Peter Garay and his companies. Supreme Court orders were obtained refraining Mr Garay and his company from carrying out residential building work for a period of five years. Further Supreme Court action was instigated against Mr Garay in relation to breaches of the Court Orders. Mr Garay was sentenced to 12 months imprisonment to be served by periodic detention.

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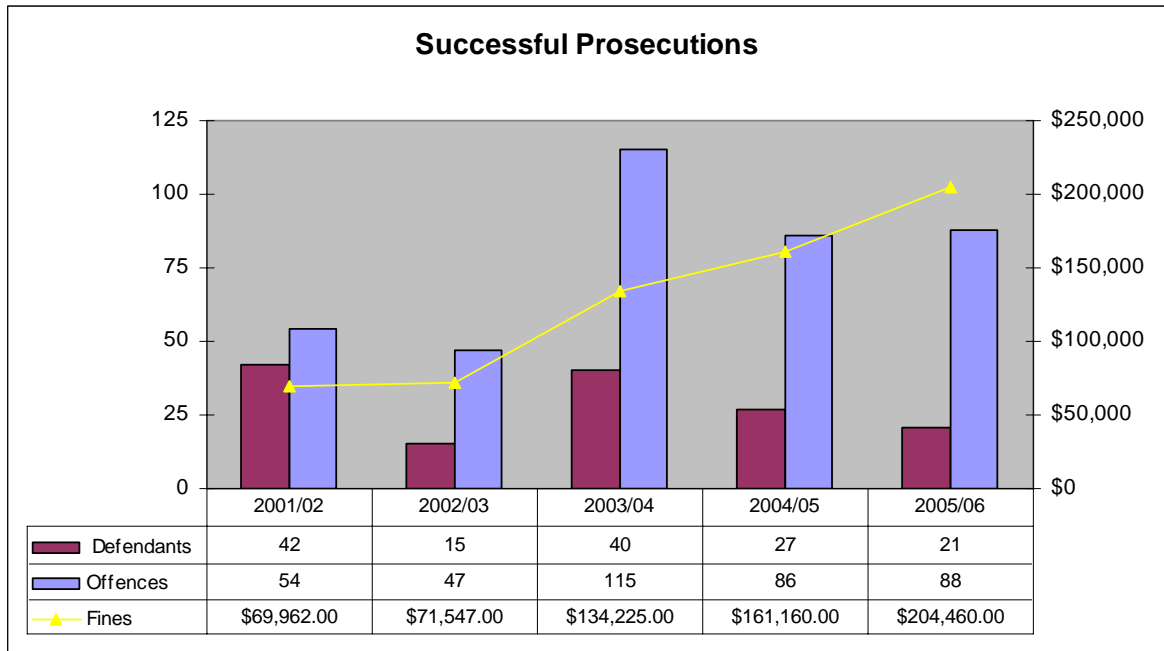


Chart 7.4 Prosecution results 2001-2006 [Home Building Service commenced February 2003]

There have also been significant Supreme Court injunctions and other results obtained:

- **Prouds Home Improvements**                      injunction plus licence disqualification for 10 years;
- **Peter Garay**    injunction plus weekend detention;
- **Michael Partridge**                                      injunction plus 12 months good behaviour bond plus 150 hour community service order;
- **Ahmad Diab**    injunction plus imprisonment of nine months plus nine months parole period.

Several significant prosecution results have also been achieved including John Hobba, an unlicensed contractor who used a bogus licence card. He was prosecuted in October 2005 and fined \$70,955 including costs.

Apart from these, the Home Building Service also investigated and took action to cancel 105 building licences identified by the Independent Commission Against Corruption as involving fraudulent qualifications.

During the 2005-06 financial year the Home Building Service:

- issued 65 show cause notices, with 45 of these finalised which included 12 licence cancellations/disqualifications and 17 fines totalling \$117,750;
- issued penalty notices for 332 offences to the value of \$157,350; and
- undertook successful prosecutions for 88 offences, with penalties totalling \$204,460.

## 7. DISCIPLINARY POWERS AND ENFORCEMENT

### 7.5 Interstate Comparison of Compliance Activities

BUILDING COMPLIANCE STATISTICS			
	NSW Home Building Service 2005/06	VIC Building Commission 2005/06	QLD Building Services Authority 2005/06
No. successful prosecutions completed (defendants)	21	22	101
Total \$ Value of fines	\$204,460 9	\$46,967	\$148,750
No. Disciplinary Inquiries completed	45	38	68 <sup>1</sup>
No. of licences cancelled/disqualified	12	2	2 <sup>1</sup>
No. of licences suspended	5	1	
No. of licences fined	17	26	66 <sup>1</sup> (demerit points)
Total \$ fines	\$117,750	\$59,564	
Average \$ fines	\$6,926	\$2,291	
No. of Complaints received	2,349 <sup>2</sup>	538 <sup>4</sup>	5,012 <sup>5</sup>
No. of Onsite inspections	1801	350	2,967
% of Complaints successfully resolved	89% <sup>3</sup>	85%	74%
No. of Compliance investigations (breaches of legislation)	509	395	204 <sup>1</sup>
No. of Penalty Notices issued (breaches of legislation)	237	33	356 <sup>1</sup>
\$ Value	\$159,500 0	WARNING S ONLY	N/A
No. of Onsite compliance inspections (breaches of legislation)	1,741	588	5,141

<sup>1</sup> QLD figures for 2004/05. Note - QLD Disciplinary process differs from NSW and VIC.

<sup>2</sup> The Office of Fair Trading received 5,891 building complaints of which 2,349 were referred to the Home Building Service.

<sup>3</sup> Resolution rate for onsite inspection

<sup>4</sup> Does not include building complaints received and dealt with by the VIC Department of Consumer Affairs.

<sup>5</sup> All QLD complaints are dealt with by the QLD Building Services Authority.



## 8 Establishment of Home Building Advocacy Service

### 8.1 Government Initiatives to establish the service

As discussed in section 2 the 2002 Campbell Inquiry recommended the establishment of a Home Building Advice and Advocacy Centre. Recommendation 3 of the Inquiry's report envisaged a non-government organisation would 'provide one-stop advice on home building disputes'. Recommendation 29 anticipated a broader skill base for staff to fulfil an extensive and comprehensive information and advice function. Comparisons were drawn with the Tenants' Advice and Advocacy Program.

The Government subsequently announced, in its response to the Campbell Inquiry, that a pilot resource service would be funded to assess the likely patronage of such a service.

Section 115A of the *Home Building Act 1989* provides that the Minister must engage such persons or bodies as the Minister may determine to provide home building advisory and advocacy services to the public. These services may include:

- development and provision of education programs;
- provision of advisory and advocacy services;
- referral of consumers to building consultants and lawyers for advice; or
- publication of information on programs and services available from the Government and other sources; and
- Other activities as prescribed by the regulation.

It was not considered necessary to commence section 115A in order to establish the pilot service, as the existing section 115(3)(d) of the Home Building Act enables the Commissioner to make payments towards "assisting any public purpose connected with the building industry and trades subject to licensing under this Act".

The Home Building Advice and Advocacy Service was to be based on the successful model of the Tenants Advice & Advocacy Program and trialled as a pilot for a six month period in a discrete geographical location. A draft proposal for the pilot was released for targeted stakeholder consultation in February 2003. The Building Action Review Group was among the stakeholders consulted, but although the Group expressed an interest in providing feedback and was given an extension of time on 12 May 2003 until 10 June 2003, it did not do so.

Initially it was proposed to advertise on 1 July 2003 for Expressions of Interest to operate the pilot Service from 1 October 2003. However, advertising was deferred while the Grellman Inquiry into NSW Home Warranty Insurance was undertaken. The Grellman Report was released in October 2003.

On 15 November 2003, expressions of interest were called for the operation of a six month pilot service. Stakeholder groups who had shown an interest in the development of the pilot proposal were advised about the expression of interest process by letter. Although applications closed on 19 December 2003, the Building Action Review Group requested, and was granted, an extension of time until 8 January 2004. Two applications were received

(neither was from the Building Action Review Group) and considered by a grants committee. As neither application was found to comply with the advertised selection criteria, neither was recommended for the Minister's approval.

In order to ensure that more suitable applications would be attracted in further calls for expressions of interest, an external review of the Home Building Advice and Advocacy Service Guidelines and expression of interest process was conducted. A number of the review recommendations were adopted, including:

- conducting a second expression of interest process, targeted at three services identified in the review as potentially suitable and interested in the pilot Service;
- increasing the length of the pilot to 12 months (operational period), preceded by a three month establishment phase; and
- adjusting the budget to reflect the longer period for the pilot. A budget of \$30,000 for the establishment phase and \$450,000 for the operational phase was allocated.

In August 2004 the Commissioner approved the conduct of a select tender process. Application kits were sent to:

- Macquarie Legal Centre - based in Merrylands.
- Hunter Community Legal Centre - based in Newcastle.
- Unifam / WESTS - both part of Uniting Care (Uniting Church) in NSW, and based in Parramatta.

All three organisations were identified by the external review as appearing to have the necessary infrastructure to provide a new service and meeting the key selection criteria in that they are:

- incorporated and operate as not for profit benevolent institutions;
- financially viable;
- consumer focused with experience in service delivery to the general public;
- able to demonstrate sound governance and organisational management;
- able to demonstrate experience in the provision of or ability to access areas of expertise in law, mediation and the home building industry.
- able to demonstrate good clerical and administrative structures and experience;
- committed to principles of effective dispute resolution; and
- that all three provide a similar range of services to the proposed home building service.

One application was received, from Macquarie Legal Centre Inc. The application was considered by a grants committee comprising senior Fair Trading officers. The committee agreed to recommend to the Minister that approval be given to fund Macquarie Legal Centre to establish and operate the pilot Home Building Advice and Advocacy Service.

No decision had been made when Ministerial portfolio changes took place in January 2005. In February 2005 options for future action were submitted to the new Minister.

During 2005 advice was received about the impending launch of HomeSource, a commercial organisation proposing to provide a subscription based service which would entitle participants to timed qualified legal and building advice and detailed information on products and services (including reliable trades people who meet specified requirements). HomeSource was launched on 8 November 2005.

In many ways the HomeSource service resembled the services to be provided by the pilot

home building advisory and advocacy service, although on a fee-for-service basis. (In this last regard it should be noted that the recommendations in the Campbell Report envisaged that fees could be charged for advocacy and specific legal advice).

The existence of HomeSource prompted a re-focus of the proposal to establish a pilot advice and advocacy service, taking account of:

- the Campbell Inquiry recommendation regarding an independent Home Building Advice and Advocacy Centre was made in the context of the Inquiry's criticism of the consumer advice, information, complaint-handling and dispute resolution procedures in place at that time. Since that time the Government had provided a better dispute resolution mechanism for consumers through amendments to the Home Building Act contained in the *Building Legislation (Quality of Construction) Act*. The new dispute resolution process began on 1 July 2003;
- the introduction of the early intervention dispute resolution service has significantly reduced the need for consumers and contractors to become involved in costly and time-consuming legal processes and in the majority of cases has provided a 'win-win' outcome acceptable to both parties; and
- independent advice on home building matters was now clearly available to consumers from a number of non-government sources.

The role of the proposed pilot service was revised so that it is focussed on advocacy for home building consumers, a function which cannot be provided by the Office of Fair Trading because of its need to maintain an impartial stance when dealing with consumer/trader disputes.

A targeted call for expressions of interest to operate a pilot home building advocacy service for consumers was approved by the Minister on 31 January 2006. On 21 February 2006, the Commissioner approved \$100,000 being made available for a pilot advocacy service from grant funds allocated for Round 7 of Fair Trading's Home Building Grants Program.

Invitations to submit an expression of interest were made on 16 May 2006 to:

- all community legal centres in New South Wales via their e-mail bulletin board;
- Building Action Review Group—received a kit by post; and
- HomeSource Pty Ltd - received a kit by e-mail.

Macquarie Legal Centre at Merrylands, Macarthur Legal Centre at Campbelltown and Western NSW Community Legal Centre in Dubbo, subsequently requested a kit.

The closing date for applications was 16 June 2006 and two applications were received, one from HomeSource Pty Ltd and the other from Macquarie Legal Centre. On 21 June, a grants committee comprising senior officers of the Office of Fair Trading considered the two applications and on 29 June the committee interviewed the principals of the two applicant organisations to clarify issues of concern such as hours of service and fees.

The committee considered that Macquarie Legal Centre was the most experienced applicant and the one most likely to deliver a service which was cost effective to consumers. The Centre also displayed a stronger understanding of the need for accountability for government funds and the relationship between a service and its funding body. The fact that the service would be offered in Western Sydney was also seen as advantageous because a significant proportion of residential building occurs in that region.

The committee's recommendation in favour of Macquarie Legal Centre was approved by the Minister 2 August 2006.

## 8.2 Operation of Pilot Home Building Advocacy Service by Macquarie Legal Centre

### 8.2.1 *Macquarie Legal Centre*

Macquarie Legal Centre has a well-established profile as an efficient and effective legal service in western Sydney. They provide legal advice and advocacy in many legal areas and have experience in settling disputes. The Centre has an extensive knowledge of local services and referral networks. The Centre's constitution specifies as its main objectives:

- to provide legal services which are free and accessible;
- to develop local awareness of legal rights and promote legal education; and
- to encourage community participation and control in the running of the service.

### 8.2.2 *Role of the Service*

The role of the Home Building Advocacy Service, auspiced by Macquarie Legal Centre, will be to assist consumers in resolving residential building disputes in a cost effective manner. 'Advocacy' will be provided by means of support services which aim to achieve the best possible outcome for consumers who are parties to home building disputes. The pilot will target two types of consumers:

- those consumers who have an ongoing dispute with a building contractor which may already have involved the Home Building Service; and
- those consumers who are seeking advice at the beginning of a dispute

### 8.2.3 *Ongoing disputes*

The pilot services role will include seeking updates on a consumer's behalf on the progress of building disputes already in the system with:

- the Office of Fair Trading; or
- the Consumer, Trader and Tenancy Tribunal, if approval to represent the consumer has been granted.

### 8.2.4 *New disputes*

When consumers approach the Advocacy Service directly for assistance (or are referred from the Office of Fair Trading) Advocacy Service will case manage the complaint, negotiating by phone, or making a site-visit with a view to resolving the dispute. Where necessary, a more formal mediation process will be utilised. If the matter can not be resolved using the assistance of the Advocacy Service, the consumer will be advised of their options of lodging an application to the Consumer, Trader and Tenancy Tribunal. The Advocacy Service will also represent consumers in the Tribunal, where appropriate.

### 8.2.5 *Commencement of the Service*

The three month establishment phase of the trial commenced on 1 October 2006, with operations due to commence on 1 January 2007. The establishment phase is the maximum allowable before the pilot opens its doors - it should be noted that this may happen sooner than the three months allocated. During the establishment period the Centre will organise promotional strategies, recruit staff and familiarise itself with the relevant legislation.

It is noted that members of the Building Action Review Group state that they contacted Macquarie Legal Service asking whether an advice and advocacy service was operating, and to whom it would be available. They allege that they were advised that the only services that would be offered was via the telephone - and that there would be no opportunity for people to present written evidence or to provide photographs and plans to enable an examination of the extent of inappropriate or improper building practices. Further, that the service would only be available to people who live within the area in which Macquarie Legal Centre operates.

It appears that Building Action Review Group members contacted Macquarie Legal Centre before the pilot or its establishment period commenced, which may explain the discrepancies in the information they received. In fact, it is part of the Centres policy that clients will attend face-to-face appointments to enable the staff to negotiate on the clients behalf. The confusion may have been in regard to clients seeking progress updates on their matters, as it is anticipated that the bulk of this contact will be undertaken via the telephone.

#### 8.2.6 *Catchment area*

Macquarie Legal Centre catchment area includes suburbs from 13 local government areas. Whilst priority will be given to the catchment area during the pilot, if workload permits, clients from other catchment areas will also be assisted.

The Centre's main office is in Merrylands, which is the next suburb to Parramatta, and the regional centre of western Sydney. The location in the shopping area is very visible, and has bus and train services at the door.

#### 8.2.7 *Fees*

Consumers whose main income source is a government benefit will receive services free of charge. The pilot will subsidise its operation by charging fees for some advocacy roles.

#### 8.2.8 *Expected outcomes of the Pilot*

There is to be a review of the pilot 12 months after commencement (in October 2007).

That review will identify:

- the level of demand for the service;
- consumer perceptions of the effectiveness of Macquarie Legal Centre in providing the service;
- Fair Trading and Consumer, Trader and Tenancy Tribunal perceptions of the effectiveness of Macquarie Legal Centre in providing the service;
- the costs of operating the service and how these costs could be off-set by a regime of fees for some services; and
- feasibility of the service being self funded through the application of fees for specific services.

It should be clearly understood that the Centre is providing a PILOT service in order to enable the Government to properly test and evaluate the viability of the concept. Suggestions that the service is under-resourced and unable to cater for the needs of the state's home building consumers are, therefore, based on completely false premises, as this was never the objective of the pilot program.