

Submission

No 17

INQUIRY INTO THE OPERATIONS OF THE HOME BUILDING SERVICE

Organisation:

Name: Mr Gerard Nicol

Telephone:

Date Received: 10/11/2006

Subject:

Summary

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

Parliamentary Inquiry

Submission on the NSW Home Building Service

Gerard Nicol

November 8, 2006

Background

About My Family

My name is Gerard Nicol. I live in Leichhardt with my six and three year old sons and my wife who is expecting our third child in December.

Our Building Contract

In July 2004 my wife and I entered into a HIA Building contract with [redacted] for the amount of \$74,000. Under the contract the builder agreed to build an extension to my home that included a new garage.

Our Current Situation

Our family has just spent 18 months and over \$70,000 in legal expenses trying to resolve a dispute with [redacted]. With no remaining finances to pay legal bills and no end in sight, just this month we felt we had no remaining option but to settle our dispute on terms that do not allow us to recover our legal expenses and do not allow us to have our home repaired.

The renovation undertaken by [redacted] still has a pending demolition order on it from Leichhardt Council and Sydney Water have ordered that all plumbing work done as part of the renovation be excavated and re-installed.

As part of the settlement we have had to agree not to pursue the builder for any current defect or future defect so this voids any protection that our Home Owner's Warranty Policy may have provided.

How we came to choose

After receiving approval from Leichhardt Council to renovate our home we interviewed several builders.

In the end we relied heavily on the Office of Fair Trading's License Check WebSite as part of our selection criteria.

[redacted] had a completely clean record according to the License Check report and had been licensed since 1998.

The nominated Supervisor for [redacted] also had a completely clean record and had been licensed since 1978.

Although [redacted] did not have the cheapest quote for the work they were chosen primarily due to their apparent clean license record.

Where things started going wrong

After signing the HIA Contract in July 2004 and paying a \$15,000 deposit (a 20% deposit) the builder also demanded we pay the first progress payment before he commenced work or provided our Home Owner's Warranty.

During construction our building site was visited by Leichhardt Council and Work Cover due to complaints related to site safety and environmental concerns.

Upon the expiry of the contract due date, with the work still incomplete and defective we wrote to the builder expressing our concerns and threatened to end the contract if he did not rectify and complete the work.

The builder then retained legal representation who in turn blamed all of the problems on us.

The involvement of the Home Building Service

In November of 2004 we approached the Office of Fair Trading Home Building Service in an attempt have them help the situation.

In December 2004 an inspector from the Home Building Service attended our home along with the builder and took approximately ten pages on notes outlining defects.

At the end of the three hour inspection the inspector told the builder that he would write a rectification order instructing him to fix all defects.

The builder then said that unless he was paid the final progress payment he would not rectify the defects or complete the still outstanding works.

The inspector then told me there was nothing he could do, did not write the rectification order and suggested that we take the dispute to Fair Trading's Tribunal the CTTT¹. This fact has been confirmed in writing by the Minister for Fair Trading on 9th December 2005.

The CTTT Mediation

In January 2005 I attended a mediation session at the CTTT. As instructed I did not bring legal representation and I brought all relevant documentation and the evidence available to me at the time.

The builder attended mediation with legal representation and brought absolutely no supporting material.

When the mediator entered mediation the solicitor for the builder told him to leave. When I protested that the builder had legal representation I was told that this was his right.

I addressed my concerns about these irregularities to the Member on duty who asked the moderator to return to the mediation. The mediator refused this request stating that he had been offended. In solidarity with the first mediator a second mediator also refused to participate in mediation.

It was put to me by the builder's solicitor that my legal expenses would be considerable if I did not agree to a mediated settlement and that I should agree to pay the builder the final payment plus an additional fee for him to rectify the defects.

I agreed to this and signed a mediation report where I agreed to withdraw my claim in return for the builder fixing the defects and completing the works. I also agreed to pay the builder the \$9,000 final progress payment and an additional \$26,000 to rectify the existing defects.

As part of this agreement the builder and I also agreed to take any future disputes back to the Home Building Service and to abide by any decisions they made.

The Renewal

When the time had expired for the completion of the agreed works and the works were still incomplete I contacted the builder who refused to complete the works.

I then contacted the Home Building Service who also refused to get involved due to the previous CTTT action.

On the advice of the Home Building Service I contacted the CTTT registry who told me to download a renewal application and renew my proceedings.

In March 2005 the builder and I appeared at the renewal hearing and the Member gave directions that we both have expert reports written.

The Expert Reports

Both sets of Expert Reports (ours and the Builders) outlined numerous defects and incomplete works.

The Directions Hearings

Over the proceeding months we attended numerous directions hearings at the CTTT, with the final hearing in August 2005 setting down a hearing date.

At the August hearing the Member advised us that our case was complex and that we should seriously consider getting legal advice.

The Legal Advice

To help us get our legal case together we retained a law firm to give us legal advice. The law firm provided a solicitor and briefed a barrister on our case.

We were given legal advice that we had a sound case, and that it appeared the builder's case was predominately based on the tactic of bluffing us into a settlement.

The Strike-out Motion

After retaining legal representation the tactic of the builder's legal representation changed from trying to bring on a hearing as soon as possible to trying to strike-out our application.

In December 2005 the builder applied to have our claim struck-out on the basis that the CTTT had no jurisdiction due to the previous agreement that the Home Building Service would settle all future disputes.

The Strike-out Motion was allowed to proceed and added nine months and over \$25,000 to our legal expenses.

In August 2006 the CTTT found that they did have jurisdiction to hear our claim, but also found that our claim was "incompetent" due to the fact that we had only filled out a renewal form and not formally sought leave to renew. For this reason the strike-out Motion was "upheld in part" and no costs were awarded to either side.

The Next Strike-out Motion

After receiving the findings of the first Strike-out Motion the builder's solicitor informed us that he intended to bring a second strike-out motion that was based on the successful appeal of the Honneywood V's Munnings case that had occurred in the Supreme Court only days after the findings of the first strike-out motion.

The Builder is Finally Fined

The initial investigation by the Office of Fair Trading into the builder started in June 2005, but was delayed for five months after the builder accused both myself and the Office of Fair Trading of contempt of Court.

During the Office of Fair Trading investigation we also learned that the nominated supervisor of _____ was also the nominated supervisor of _____ who liquidated in 2002, and who had prior statutory warranty claims under their license.

In September 2006 _____ was fined \$20,000 and the qualified supervisor was fined \$15,000 by the Office of Fair Trading.

We are given advice to settle

In October 2006 our legal team gives us the advice that the builder may liquidate _____ and that given the new Honneywood V's Munnings precedent our claim is still viable but has been eroded in regard to what we can claim.

We Settle

In November 2006 we settle our claim against the builder on the basis that both parties pay their own legal bills and that we pay the builder \$5,000 of the \$35,000 agreed at mediation.

Terms of Reference

(A) The builder licensing system

As a consumer I relied fully on the licensing system when selecting a builder to renovate my house. Builders without a license were immediately ruled out, while builders with blemished records were given less consideration than builders with clean license records.

To establish the license credentials of each builder I relied fully on the Office of Fair Trading's Web based License Check facility as the only definitive resource available to me as a consumer.

In my case, although [redacted] and its nominated supervisor [redacted] appeared to have completely unblemished licensed when a Web based License Check Facility was run, [redacted] which shared common ownership and nominated supervisor with [redacted] had been liquidated in 2002, only 2 years before I signed a contract with [redacted]

If the web based system provided hyperlinks to related licenses or better still digested all related licenses into one indexed result page I would not have employed

In addition, the Web based License Check system has not been updated to reflect the changes in the Home Warranty Insurance regime. For instance, I based my decision to use [redacted] on the fact that it (1) Had a valid license and (2) Had no Statutory Warranty Claims. Under the new Home Owner's Warranty arrangements these two key pieces of information are mutually exclusive. That is you can not concurrently have a valid license and also have a Statutory Warranty Claim paid.

On 1st March 2006 I met with my local MP. The Honorable Sandra Nori MP and Mr. Graham Humphreys of the Minister of Fair Trading's Office. At this meeting I raised my concerns about the irregularities with the Web Based License Check Facility and Mr. Humphreys indicated that the License Check System was being redesigned to address such issues. He also indicated that these changes were expected within the next few months. This to me appeared to indicate an acknowledgement by the Office of Fair Trading that there were problems with the existing License Check System, but to this date no changes have been made to address these problems.

It remains unexplained why [redacted] even had a license in 2004 given the fact that [redacted] had liquidated in 2002 with common ownership and nominated supervisor.

It also remains unexplained why the Office of Fair Trading took from December 2004 to September 2006 (twenty-one months) to take action against [redacted] as I am told that this process should only take three months.

What became apparent to me during my discussions with the Office of Fair Trading and the Minister of Fair Trading's Department over the extended period of my complaint against :

was the absolute fixation they both have on the protection of the livelihood of license holders.

Whilst I agree that the livelihood of license holders must be considered within the Home Building Act the enforcement of the Act should at least be equally weighed to acknowledge the importance of the integrity of the licensing system and the protection of consumers.

This reluctance by the Office of Fair Trading to pursue complaints against license holders based on the protection of their livelihood would appear to be in contradiction to their stated obligations under Part 106 of The Home Building Act 1989.

(B) The Home Warranty Insurance Scheme

In my case the original dispute with my builder occurred over his failure to provide my Home Owner's Warranty. Prior to the builder providing Home Owner's Warranty I was not provided with a Product Disclosure Statement (PDS), nor was I provided with any policy documents when the policy was written.

In the event that a dispute does occur, it appears to be the goal of the resolutions system to mediate a resolution.

It also appears that statistics are kept on each mediator at the CTTT to rate them based on their successful mediation of disputes.

Given that Home Owner's Warranty is a statutory insurance product it seems to be completely inconsistent and a conflict of interest that the CTTT would promote mediated settlements without disclosing to the parties that any mediated agreement would effectively void any protection provided by Home Owner's Warranty.

(C) The resolution of complaints

The Home Building Service

When I involved the Home Building Service in my dispute, and the Inspector upheld my complaints by finding that there was work that breached my statutory warranties he refused to take any action against the builder.

The written view of the Inspector was that he could not take any action against the builder for breaches of statutory warranty as the builder wanted to be paid extra to rectify the indentified defectsⁱⁱ.

This is completely inconsistent with the role of the Home Building Service. The Home Building Service Inspector should have issued a defect notice as any alleged dispute about monies was beyond the scope of his role.

Later that month I received a letter from the Home Building Service indicating that they were unable to assist any furtherⁱⁱⁱ. This letter said that if the matter remained unresolved that I needed to consider options such as lodging a claim at the Consumer Trader and Tenancy Tribunal (CTTT).

The CTTT appeared to me at the time to be an extension of the service provided by the Home Building Service as its Internet Web Site was that of the Office of Fair Trading.

The Consumer Trader and Tenancy Tribunal (CTTT)

As set out under Section 23 of the CTTT Act 2001 the Tribunal is allowed a certain degree of flexibility in the way that it hears matters with a goal of expediting cases and reducing the cost of presenting a case on both parties.

When I involved the CTTT in my dispute I found that the only time they exercised this flexibility was to excuse their own inadequacies.

As a litigant that was unrepresented for eight months I found that absolutely no flexibility was used by the CTTT to make things easier or less expensive on either party.

As an example of this, when I summonsed documents as evidence the solicitor for . was allowed to uplift the documents for copying and I was not allowed to uplift the documents and was given 1 hour per day to review hundreds of pages with a CTTT staff member watching my every move. Despite there being electronic material such as CDs within the documents I was not provided with a PC, nor were CD duplication services available to me.

Another example was when I complained to the CTTT Chairperson that the builder had been given an unfair advantage by being allowed to be legally represented at a time when I had been told that I could not be represented. The Chairperson told me that although there was a technical requirement that leave be sought before legal representation was allowed that this was not a disadvantage to me. Conversely when the other side challenged the jurisdiction of the Tribunal it was found that my application for renewal of my case was incompetent due to the fact that I had only filled out a form to renew and not formally sought leave to renew my case.

So there is a complete double standard. If my proceedings were found to be incompetent due to the fact that I had not sought leave to renew, why should I also not be disadvantaged due to the failure of the other side to obtain leave to be legally represented against an opponent who was not represented?

It is my view that the Tribunal deliberately obstructs the parties from truly understanding the implications of their actions with a view of decreasing the costs of the tribunal.

What is presented to the parties as a "Reconciliation Report", that appears to be a document of the Tribunal becomes a "Statement of Settlement" that is a private agreement between the parties when either party attempt to rely on it at a later date. The Tribunal then refuse to call the document by the very title of the form ("Reconciliation Report"), and instead refer to it as a "Statement of Settlement".

It is of great concern to me that although the CTTT appears to present itself as an efficient service with a guaranteed level of service (see

<http://www.fairtrading.nsw.gov.au/cttt/pdfs/publications/client servicestandards0404.pdf>) this level of service does not appear to be measured in any way other than the time they take to clear cases.

Also any complaints about the operation of the CTTT are not collated, and from my experience are simply dismissed with no real consideration.

Any escalation of a complaint to the Minister for Fair Trading is in turn dismissed under the excuse that there is no place under the separation of powers for the Minister to interfere in any of the operations of the Tribunal.

On 6th September 2006 I received a letter from the Minister for Fair Trading in which she says that she has commissioned an independent review of the Tribunal's operating procedures but I have not received any feedback from this review if in fact it has occurred^{iv}.

(D) The exercise of disciplinary powers

It would appear that the Office of Fair Trading is completely uncomfortable in exercising its disciplinary powers and this leads to a complete failure in them achieving their statutory obligations.

In exercising their disciplinary powers there is a disproportionate consideration given to the livelihood of license holders, and there is next to no consideration given to the protection of consumers.

There also appears to be no consideration given to the damage that incompetent or negligent license holders do to the building industry.

It is evident that without the complaints of consumers that no investigation would be done against suspect license holders, and that without the constant monitoring of the complainant that no disciplinary action will be taken should the evidence support disciplinary action.

As there are insufficient resources allocated to investigation so complaints are only investigated after several unrelated complaints are received. It would also appear that on each complaint there is no information recorded so every complaint ends up as the first complaint.

ⁱ See letter from Hon Dianne Beamer MP where she says in Paragraph 4 that the Home Building Service suggested that I take my claim to the Tribunal dated 9th December 2005.

ⁱⁱ See complaint Inspection Advice NO 6533 10th December 2004.

ⁱⁱⁱ See letter from Patrick Daley 18th December 2004.

^{iv} See letter from the Hon Dianne Beamer MP dated 6th September 2006.



OFFICE OF FAIR TRADING
NSW Consumer Protection Agency
Department of Commerce
Home Building Service

COMPLAINT
INSPECTION ADVICE

No: 6533

File No: 2004/4522

Complainant: GERARD JOHN NICOL

Address: ...

Building Work Address: AS ABOVE

Contractor: ...

Address: ...

Licence No: ...

Expires: 31 August 2005

The above building work was inspected on 10 December 2004 and present were Gerard John Nicol consumer and (TRADER) I

A meeting was arranged to day for mediation in relation to a number of alleged defects and incomplete works at the above address. The mediation process was explained and both parties agreed to proceed. A number of items were found to be defective and incomplete however at the conclusion of the meeting the trader indicated he was not prepared to return to the site to undertake the work until the consumer had paid outstanding money to claims he is owed.

I advised both parties that I can no longer assist with this matter and they were at liberty to explore other avenues of resolution.

TRADER TO MAKE STH SALE all work to be completed by 15 December 2004 11.11

Complainant: ...

Contractor: ...

Inspector: ...

Date: 10 December 2004

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OFFICE OF FAIR TRADING
NSW Consumer Protection Agency
Department of Commerce

HOME BUILDING SERVICE



Gerard John Nicol

Our Ref: 8153
Contact Officer: Patrick Daley
Telephone: 0423604654
E-mail: patrick.daley@ofl.commerce.nsw.gov.au

Dear Mr Nicol

I refer to the complaint you lodged with the Office of Fair Trading concerning residential building, trade or specialist work carried out at unit by

At our meeting of 10 December 2004 we were unable to reach a satisfactory arrangement to resolve the issues raised by you.

As this matter remains unresolved, you need to consider what options are available to you. These include:

- A claim at the Consumer Trader and Tenancy Tribunal
- Obtaining independent legal advice

Home Building Service is unable to assist you further. If you have any questions or wish to lodge a claim at the Tribunal, please contact the Fair Trading Centre on 13 32 20 and quote the reference number above.

I enclose a copy of the application form for the Consumer Trader and Tenancy Tribunal, for your information.

Please attach a copy of this letter to the claim form as evidence that you have attempted to resolve your dispute.

Patrick Daley
Building Inspector
for Commissioner
18 December 2004



RECEIVED
14 DEC 2005

Minister for Western Sydney
Minister for Fair Trading
Minister Assisting the Minister for Commerce

COPY

RML: M05/4305, M05/4737, M05/4895
RDL M05/3852
FMO: M05/3141
Min No 15177

The Hon S C Nori MP
Minister for Tourism and Sport and Recreation
Minister for Women
and Minister Assisting the Minister for State Development
Member for Port Jackson
225 Parramatta Road
BROADWAY NSW 2007

Dear Minister

I refer to your representations on behalf of Mr Gerard Nicol of [redacted] regarding residential building work. Mr Nicol has also written to the former Commissioner for Fair Trading and the Chairperson of the Consumer, Trader and Tenancy Tribunal directly. I trust that you will pass on a copy of this response to Mr Nicol.

Mr Nicol makes a number of representations and I believe it would assist to firstly clarify the role and authority of the Office of Fair Trading and the Consumer, Trader and Tenancy Tribunal in these circumstances.

Fair Trading is responsible for the licensing of building contractors and, where appropriate, the taking of disciplinary action. It also assists in the informal resolution of disputes. Where a dispute is notified at one of its Fair Trading Centres, an officer will contact the parties by telephone and assist them to resolve the matter amicably. Some cases may be referred to a building inspector, who will normally visit the site and endeavour to achieve a mutually acceptable resolution of the dispute.

Inspectors have a broad discretion on whether to issue a rectification order. A rectification order is not binding on either party, but it is one of a number of tools used by Fair Trading to try to informally resolve disputes. To obtain binding orders in a residential building dispute, one of the parties must refer the dispute to the Consumer, Trader and Tenancy Tribunal or a court. In Mr Nicol's case, I understand that the inspector believed that issuing an order would not help resolve the matter and suggested that Mr Nicol lodge a claim directly with the Tribunal, which he has done.

While the Tribunal does come within my administration, it is an independent statutory body and it is inappropriate for either the Commissioner for Fair Trading or myself to interfere or in any way influence its decisions or consideration of any particular case. The Tribunal's authority and jurisdiction is established by the *Consumer, Trader and Tenancy Tribunal Act 2001* and, for building matters, the *Home Building Act 1989*. It has no jurisdiction in relation to council inspections or other statutory requirements.

COPY

I understand that interim orders in Mr Nicol's case were made by the Tribunal on 31 August 2005, and that the case is listed for hearing on 6 March 2006.

I appreciate the difficulties that Mr Nicol has experienced in relation to the building work at his home, however, to obtain enforceable and binding orders he will need to pursue the finalisation of the dispute through the Tribunal. As indicated above, I have no authority to intervene in Tribunal proceedings, and Fair Trading cannot make binding orders on the parties to a dispute.

The former Commissioner for Fair Trading responded to Mr Nicol's previous correspondence on 6 June 2005, advising that an assessment of his complaint against the builder is being conducted to determine if disciplinary action should be commenced against

I am advised that, at this stage, a building inspector has conducted inspections of the site and compiled a report on the quality of the work. This report has been forwarded to the director of to provide the company with an opportunity to respond to its findings.

Fair Trading's Home Building Service has contacted Mr Nicol directly to inform him of the current status of the matter. Please be assured that Mr Nicol will be kept informed and advised of the investigation outcomes once it is completed.

Finally, I also note that the Deputy Chairperson (Registry and Administration) responded to Mr Nicol's concerns regarding the staff of the Consumer Trader and Tenancy Tribunal on 8 September 2005.

I trust that the above is of assistance to you in responding to Mr Nicol.

Yours sincerely



The Hon Diane Beamer MP

09 DEC 2005



RECEIVED COPY
14 SEP 2006

Minister for Western Sydney
Minister for Fair Trading
Minister Assisting the Minister for Commerce

RML: M06/3483
Min No: 17965
Ref: HB05/11371 & HB05/36091

The Hon S C Nori MP
Minister for Tourism and Sport and Recreation
Minister for Women and
Minister Assisting the Minister for State Development
Member for Port Jackson
225 Parramatta Road
BROADWAY NSW 2007

6 SEP 2006

Dear Minister

I refer to your further representations on behalf of Mr Gerard Nicol of
regarding proceedings in the Consumer, Trader and Tenancy
Tribunal and my previous response to you dated 18 April 2006.

As you are aware, although the Consumer, Trader and Tenancy Tribunal falls within my portfolio responsibilities as Minister for Fair Trading, it is an independent legal tribunal and I do not comment or seek to influence its decisions. Nevertheless, on receipt of your representations, I referred the matter to the Chairperson of the Consumer, Trader and Tenancy Tribunal and the Commissioner for Fair Trading for examination and advice.

The Chairperson has advised me that the Tribunal handed down its decision in Mr Nicol's matter on 3 August 2006, and a copy of the order was couriered to Mr Nicol on 4 August 2006. I understand that this decision which was in Mr Nicol's favour renews the proceedings on the original application and that the matter will be listed for a directions hearing in the near future.

I note that Mr Nicol has raised a number of concerns about the Tribunal's operating procedures. For the reasons I have previously outlined I will not comment on individual cases. However I can advise that I have commissioned an independent review of the Tribunal's operating procedures generally to ensure that it is meeting its statutory objectives in practice.

The Commissioner for Fair Trading advised me that the separate show cause proceedings initiated by Fair Trading are yet to be finalised. However as indicated in my previous correspondence, I will write to you when a decision is made.

I trust that this information is of assistance to you in responding to Mr Nicol.

Yours sincerely

The Hon Diane Beamer MP

Level 33, Governor Macquarie Tower,
1 Farrer Place, Sydney NSW 2000