

Supplementary
Submission
No 16b

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

Organisation: Office of Fair Trading
Name: Ms Lyn Baker
Position: Commissioner
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Partially Confidential

NSW Office of Fair Trading

Supplementary Submission to the General Purpose Standing Committee No 2

Response to submissions lodged

Inquiry into the operations of the Home Building Service

November 2007

Submissions lodged and accompanied by oral evidence at the public hearings

Narelle Peters

Ms Peters lodged a complaint prior to the establishment of Fair Trading's Home Building Service against her builder, _____, in May 2002. Mr _____ lodged a claim against Ms Peters in the Consumer, Trader and Tenancy Tribunal for outstanding payments. Ms Peters lodged a cross-claim against Mr _____ in the Tribunal and also made a claim against the home warranty insurance through Vero Insurance Ltd. Fair Trading does not have the details of the private external insurance claim but it is understood that Ms Peters remains dissatisfied with the payout by the insurer.

Fair Trading considered the quality of work on Ms Peters' property to be of sufficient concern that Mr _____ licence was suspended on 16 August 2002. Fair Trading commenced disciplinary proceedings against Mr _____ and a determination was made on 10 September 2002. Fair Trading has completed its disciplinary action as Mr _____ was fined \$5,000 and was disqualified from holding a licence, or being a member of a partnership that holds a licence, for a period of five years.

Fair Trading action completed.

Chris Fitzgerald

Mr Fitzgerald contracted with _____ in August 1998. He apparently was a friend of the principal of the company and the contract was arranged on a "friend to friend" basis. The work commenced in May 1999. Subsequent problems arose and Mr Fitzgerald terminated his contract with Howard Design in 2000 and then undertook the works under an owner-builder permit. He contracted with various contractors and also participated in many of the works being undertaken by subcontractors.

Over the following years, Mr Fitzgerald proceeded to lodge complaints with Fair Trading about several of the contractors, that is _____ trading as _____ in February 2004, who supplied a kit home to Mr Fitzgerald; _____, the new owner of _____ in October 2004, Mr _____, who erected a retaining wall at the property; and Mr _____ a bricklayer, in February 2004. Mr Fitzgerald's original dispute with _____ was initially dealt with by the Consumer, Trader and Tenancy Tribunal. A complaint against this entity was not lodged with Fair Trading until September 2005.

Fair Trading was able to determine some matters but was unable to make determinations on other issues, such as the dispute with Mr _____, because of the blurred line between who did what work and the lack of proper contracts. Fair Trading has completed its disciplinary action with a fine of \$2000 issued to Mr _____ for failing to comply with a rectification order. Warnings were also issued to _____ for failing to provide a proper contract or to provide home warranty insurance; and to _____ for showing an incorrect licence number in their advertising. There was insufficient evidence of any breach of legislation by _____

Fair Trading action completed.

Diane Condie

Fair Trading has no record of any complaint being lodged by Ms Condie. Contrary to Ms Condie's understanding, section 48C of the *Home Building Act 1989* does allow anyone to make a complaint about a contractor. This provision gives Fair Trading the power to deal with matters such as these, where secondary damage has occurred as the result of the actions of a licensed contractor.

Fair Trading would be pleased to examine this matter in more detail. Ms Condie should be advised by the Committee to make contact with the General Manager of the Home Building Service, Mr Steve Griffin.

Offer by Fair Trading to assist.

Garry Wells

Mr Wells' complaint involved rectification work on fire damage to his property, which is rented out to tenants. Mr Wells' house and contents insurance was to cover the cost of building rectification work. The work initially proceeded, but the builder stopped work when he could not get proper access for asbestos removal. Mr Wells allegedly requested that the builder pay for relocation of his tenants during the asbestos removal, which the builder refused. After some time, the builder invoiced the insurer for the work he had done. The insurer paid Mr Wells for the balance of the quoted price and a dispute broke out over who would pay the builder and recompense the tenants for relocation.

Following receipt of Mr Wells' complaint on 27 September 2007, the Home Building Service conducted a site inspection and mediation on 19 October 2007. During the onsite mediation, the builder agreed to complete the works as long as he was paid. The insurance loss adjuster was contacted and agreed to pay the builder direct on invoice. Both parties were agreeable to this and the builder recommenced work.

There are still other issues outstanding, such as Mr Wells' request for a scope of works and electrical issues. Mr Wells has also now informed the Home Building Service that the agreed works have not been completed by the builder. A further site inspection is scheduled for 19 November 2007. Workcover NSW has also become involved as it is the body responsible for the regulation of asbestos removal.

Fair Trading currently actioning matter.

Robert Siebert

Mr Siebert lodged a complaint with Fair Trading in August 2003 and a building inspector undertook an inspection in October 2003. After Mr Siebert obtained his own independent building reports he decided that due to the seriousness of the defects he would not proceed with Fair Trading's on-site mediation services and instead made application to the Consumer, Trader & Tenancy Tribunal.

The matter was heard in the Tribunal in August 2005 and the decision was handed down in July 2006, ordering Cavalier Homes to pay \$77,753.

The builder did not comply with the order and the company is now liquidated. Mr Siebert made a claim on his home warranty insurance, however Vero has only agreed to pay the amount awarded by the Tribunal.

Although the building company surrendered its licence in 2005, disciplinary action was taken against the director of the company. The director was fined \$10,500. The penalty against the director was appealed to the Administrative Decisions Tribunal which reduced the penalty imposed to \$5,000.

Fair Trading has recently met with Mr Siebert and will investigate some further issues regarding allegations of fraudulent and misleading evidence presented to the Tribunal by the builder. Fair Trading officers have also met with Mr Siebert to discuss what he believes is an inadequate payout.

The Commissioner for Fair Trading and Acting Director-General of Commerce met with Mr Siebert on 13 November 2007 to discuss his concerns in more detail. Fair Trading will continue to assist Mr Siebert in this matter.

Fair Trading currently actioning matter.

Albert Falzon

Mr & Mrs Falzon entered into a contract with _____ by Us on 26 June 2002 to construct alterations and a first floor addition to their home. The builder lodged a claim against Mr and Mrs Falzon through the Consumer, Trader and Tenancy Tribunal, which ordered them to pay Mr _____ \$12,000. Their failure to pay this resulted in Mr _____ taking recovery proceedings which resulted in the Falzons being declared bankrupt.

Mr and Mrs Falzon continued to claim that the work was poor but withdrew action in the District Court due to their poor financial position. Mr and Mrs Falzon commissioned a number of reports on their property and first lodged a complaint with Fair Trading in December 2003. Due to the disparities between the consultant's report provided by Mr and Mrs Falzon and the report by Fair Trading's building inspector, Fair Trading commissioned an independent consultant to carry out a further report.

After an assessment of the reports and comments, Fair Trading determined that there were reasonable grounds for believing that the company did not perform the work in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract. Fair Trading has completed its disciplinary action and suspended both the company licence and Mr _____ licence for six months. Mr _____ appealed the decision to the Administrative Decisions Tribunal which set aside the suspensions and instead imposed a formal caution against both licences.

Fair Trading action completed.

Diana Cornwell

Ms Cornwell contracted with _____ to build a second storey addition to her home. In March 2004, Ms Cornwell lodged a complaint with Fair Trading stating that the work had not been completed and the builder appeared to be going into liquidation. The matter was dealt with by a senior officer in the Home Building Service, however due to the financial situation of the builder, a successful outcome could not be mediated. The matter was finalised on the basis that Ms Cornwell was advised to apply to the Consumer, Trader and Tenancy Tribunal to resolve her dispute. The Chairperson of the Tribunal has informed me, however, that there is no record of an application being received from Ms Cornwell.

Fair Trading action completed.

Andris Blum

Mr Blum's submission to the Committee is not related to a specific building dispute. Mr Blum is a regular correspondent with Fair Trading and critic of the current home warranty insurance scheme. Mr Blum is associated with a building industry group, The Builders Collective. Mr Blum raises, from a consumer perspective, issues such as the size of premiums paid by consumers for home warranty insurance, the quality of the data provided by insurers to the Home Warranty Insurance Scheme Board. Mr Blum advocates a return to a Government-run scheme based on the Queensland model. Fair Trading is continuing to correspond with Mr Blum.

Fair Trading continues to correspond.

Colin Sharp & Ms Mary Ellen McCue

This matter was first brought to the attention of Fair Trading in October 2004. Several attempts were made to contact Mr Sharp and Ms McCue both in writing and by phone. The Office of Fair Trading did not receive a reply. Without further details or contact from the consumers, Fair Trading had no choice but to close the file.

In August 2006, Mr Sharp and Ms McCue contacted Fair Trading and provided a

consultant's report regarding their building complaint. Fair Trading opened the matter and following an inspection has commenced disciplinary proceedings against the builder. A determination is yet to be made and Ms McCue has been kept up-to-date with the progress of the case.

Mr Sharp and Ms McCue also lodged a claim against the home warranty insurance with Vero Insurance Ltd and their case was also heard by the Consumer, Trader and Tenancy Tribunal in 2004. The claim was settled by commercial agreement between the parties.

Fair Trading action nearing completion.

Helen Stanojevic

Mr and Mrs Stanojevic contracted with Masterton Homes to construct a house in 2002. The Stanojevics lodged a complaint with Fair Trading in October 2003 regarding defective work.

The Home Building Service contacted Mr and Mrs Stanojevic and attempted to mediate the dispute, however they did not want the trader back on site. As a result, the Home Building Service was unable to negotiate an outcome. Mr and Mrs Stanojevic were advised to apply to the Consumer, Trader and Tenancy Tribunal to resolve their dispute. I am advised by the Chairperson of the Tribunal that the matter has been listed for a directions hearing on 5 February 2008.

Fair Trading action completed.

Charlie (Minh) Tran

Mr Tran entered into a contract with _____ in April 2002 to build a new home. In 2002, a dispute arose out of a misunderstanding between Mr Tran and his builder as to what the contract covered. The matter was heard by the Consumer, Trader and Tenancy Tribunal after Mr Tran refused to make the final payment under the contract. Mr Tran then also alleged defective work.

The first approach by Mr Tran to Fair Trading was in August 2006 when he lodged a complaint. The Office of Fair Trading has inspected the property, along with the Government Architect's Office. Fair Trading is currently determining whether there is cause to commence disciplinary action against the builder. The Tribunal action continues.

Fair Trading currently actioning matter.

Lydia Chakouch

Ms Chakouch first lodged a complaint in 2002 against _____ Fair Trading was unable to resolve this dispute regarding defective work between the builder and the strata plan, for which Ms Chakouch is the representative. Ms Chakouch was advised to approach the Consumer, Trader and Tenancy Tribunal or lodge an insurance claim. Fair Trading commenced disciplinary action against the builder and the builder's company licence and qualified supervisor certificate were disqualified in 2005 for a period of two years. The Home Warranty insurer reached an out of court settlement with Ms Chakouch and the remedial work has been completed.

Fair Trading action completed.

David Bryan

In October 2002, Mr Bryan entered into a contract with _____ for the construction of a two-storey dwelling.

In 2003, Mr Bryan lodged a complaint with Fair Trading. The company licence was also cancelled in 2003 as the company had no nominated supervisor. A new licence was

issued in 2003 for construction of single-storey dwellings only. The home warranty insurance certificate for the work at Mr Bryan's home was issued under the old licence number. In March 2003, work commenced on the property and the company went into liquidation in September 2003. The company's licence was not renewed in 2005.

Fair Trading building inspectors prepared an inspection report for the home, which was later provided to Mr Bryan for use in his Tribunal proceedings.

Mr Bryan alleges many defects and has previously lodged a home warranty insurance claim and taken his matter to the Consumer, Trader and Tenancy Tribunal. The matter is still on foot at the Tribunal.

An offer was made by Vero in December 2006 to settle the insurance dispute of \$140,000. Mr Bryan rejected this offer and proceeded with the Tribunal hearing. Vero has since revised its offer in the Tribunal to \$90,000. Mr Bryan is seeking a settlement of some \$500,000.

The Office of Fair Trading is discussing Mr Bryan's case with Vero to determine if any further assistance can be provided to him.

Fair Trading will contact Vero to determine if any further assistance can be provided.

Con Papanastasiou

Mr Papanastasiou contracted with _____ in October 2001 to construct a duplex. The builder lodged a claim through the Consumer, Trader and Tenancy Tribunal after Mr Papanastasiou and his family refused to make the final payment under the contract. Mr Papanastasiou made a cross-claim in the Tribunal and also claimed on the home warranty insurance policy. The insurer's decision to decline the claim was also appealed by Mr Papanastasiou through the Tribunal.

The first approach by Mr Papanastasiou to Fair Trading was in October 2004 when he lodged a complaint. Since the defective work and the insurer's decision were also being considered by the Tribunal at that time, the Home Building Service could not offer its dispute resolution service at that stage. Subsequently, Fair Trading building inspectors and engineers from the Government Architect's Office have inspected the property and prepared reports that identified some defective work but did not support the severity of defects claimed by Mr Papanastasiou. Fair Trading has completed its disciplinary action against the builder who was fined \$3,000 in August 2007 for the defective work. Mr Papanastasiou continues his claims in the Tribunal.

Fair Trading action completed.

George Vardas

Mr Vardas is a building consultant who works on behalf of Champion Homes. His comments do not relate to any specific consumer complaint.

No action required from Fair Trading.

Submissions lodged in writing only

Gerard Nicol

A complaint was lodged by Mr Nicol against [redacted] for his property at Leichhardt, which concerned contractual issues and payment of monies. This matter was referred to the Consumer, Trader and Tenancy Tribunal. Following Fair Trading's investigation in 2005, a warning letter was issued to the company in relation to taking excessive deposits. Further investigations by Fair Trading uncovered defective work. Disciplinary action was taken against the company and in 2006, [redacted] was fined \$20,000 and Mr Francis was fined \$15,000.

Mr Francis paid the fine of \$15,000 but [redacted] has not paid its fine. In October 2006, [redacted] surrendered its licence.

Fair Trading action completed.

Luisa Berg

In May 2002 [redacted] commenced litigation against Ms Berg in the Consumer, Trader and Tenancy Tribunal for non payment of a progress claim. At the same time Ms Berg lodged an insurance claim with [redacted], agent for [redacted] and counter-sued the builder.

The matter was then transferred to the District Court. Ms Berg then joined the [redacted] Corporation in the proceedings; however, this action was withdrawn. Echelon then ceased processing the claim until the District Court matter was determined. In this matter a [redacted] insurance claim was denied and continues to be disputed. During this action, in November 2004, Ms Berg lodged a building complaint against the builder. Due to the prior Tribunal and court action, Fair Trading's action was largely restricted to consideration of whether disciplinary action should be taken against the builder over defective work.

In April 2006, following investigations by Fair Trading, [redacted] was fined \$10,000 and [redacted] was fined \$7,500. A stay application was approved by the Administrative Decisions Tribunal pending hearing and appeal of Fair Trading's disciplinary decision. On 5 November 2007, the Tribunal set aside Fair Trading's decision to fine each licensee and ordered that a formal reprimand be issued to each licensee for improper conduct.

Ms Berg continues to make representations to the [redacted] concerning the acceptance of her claim. [redacted] is of the opinion that it is estopped from processing the claim due to the matter being settled in the District Court and the principle of "Accord & Satisfaction". In addition to this a recent review of the insurance claim indicated that at the time of dispute Ms Berg had a remaining liability under the contract of approximately \$185,000. It would appear that Ms Berg has not suffered a loss.

Fair Trading action completed.

Kamal Boules

Mr Boules' home was completed by Lily Homes in June 1999. Shortly after, Mr Boules lodged a private home warranty insurance claim and the matter proceeded to the Consumer, Trader and Tenancy Tribunal in 2001 over differences in alleged defective work.

In August 2002, a complaint was received by Fair Trading and various investigations and inspections were undertaken. In the meantime, the insurance claim continued. There were significant differences between Mr Boules' consultant and the insurer's consultant about the defective work. The insurance claim also became a BIG Corp claim following the HIH collapse. The insurance matter went back to the Tribunal in 2004.

Disciplinary action commenced against the builder in early 2004. In December 2004, the building company was fined \$10,000, the company supervisor was fined \$5,000 and the company director was fined \$2,500.

An insurance dispute with BiG Corp remains. BiG Corp has made an offer of \$80,000 to settle the matter. Mr Boules has rejected the offer claiming costs of some \$260,000.

The matter was listed in the Tribunal during October 2007 for a directions hearing. Mr Boules has failed on a number of occasions to lodge a scott schedule with costings and is in breach of the Tribunal's time table. The builder, , is co-joined in this action and will be seeking a notice of motion to strike out Mr Boules' claim. If this is successful Mr Boules could face significant legal costs incurred by , in addition to his own costs. An offer of \$80,000 to settle this matter on a 'commercial viable' basis was made to Mr Boules in January 2007. Fair Trading is awaiting further contact from Mr Boules.

Insurance offer of \$80,000 to Mr Boules.

Dilber Salih (on behalf of Ekram Salih)

In 2003, Mr Ekram Salih lodged a complaint with Fair Trading alleging defective building work by at his dwelling at . At this point, the matter had already been heard by the Consumer, Trader and Tenancy Tribunal. In the circumstances, Fair Trading could not undertake the usual dispute resolution service and the matter was investigated for disciplinary action. Grounds of complaint were for the misuse of individual licence, taking excessive deposit, defective work and not getting appropriate certification from council.

In 2004 and 2005, further investigations by Fair Trading revealed that failed to provide all warranties and certificates as ordered by Tribunal in 2002 and that the builder breached sections 4, 5, 7, 17, 18b & 51(2)c of the Home Building Act.

In December 2006, both were disqualified from holding a contractors licence or associated licence for a period of three years. Both builders appealed this decision with the Administrative Decisions Tribunal and the decision of Fair Trading was set aside. Fair Trading has completed its disciplinary action as and were issued with a reprimand in respect of their improper conduct in relation to construction work and an additional penalty of \$2000 was imposed on

Fair Trading action completed.

Kalavati Magan

completed Mrs Magan's home in 2000 and on 17 March 2006 she lodged a complaint with Fair Trading about alleged defective work by the builder.

In May 2006, Fair Trading carried out an on-site inspection and mediation in the presence of Mrs Magan and two of the builder's representatives. An important element of the complaint is the claim that the concrete footings are inadequate. A senior Fair Trading inspector has inspected the footings and is satisfied they are adequate. Fair Trading did request that the builder rectify some minor items and this was done by the due date.

In July 2006, Fair Trading gave Mrs Magan copies of various certificates from the builder and Council stating that work such as concrete footings, frames, roof trusses and electrical work were satisfactorily completed. Mrs Magan continues to dispute this based upon her own engineer's report.

Fair Trading subsequently finalised its investigation and in September 2006, Mrs Magan was advised the evidence did not support the claimed defects and that disciplinary action is not being taken against the builder.

Mrs Magan was offered Fair Trading's assistance with further mediation between herself and the builder and also advised of her option to lodge a claim with the Consumer, Trader and Tenancy Tribunal. To date, Mrs Magan has not taken up the option to go to the Tribunal.

An offer was made in November 2006 to Mrs Magan to have Fair Trading engage the Government Architect's Office to provide an independent assessment of the home. No response has been received, and file was closed in September 2007.

Fair Trading offer not responded to.