Submission No 5

INQUIRY INTO INQUIRY INTO THE OPERATIONS OF THE HOME BUILDING SERVICE

Organisation:

Name: Mr Colin Sharp

Telephone:

Date received: 8/11/2006

Please note the author has retracted the request for confidentiality for this submission.

I previously lodged this submission but forgot to check 'Request for confidentiality'. Please note that I have checked it now.

We are writing to make a submission to the Inquiry into the Operation of the Home Building Service of the Office of Fair Trading.

The attached chronology details how we have been failed by all the various professionals on whom we have been forced to rely during the course of our renovation and the subsequent dispute with our builder.

We believe that the lack of regulation of the Home Building industry has meant that builders such as the one who it was our misfortune to employ are able to get away with ignoring the Building Code of Australia and Australian Standards. Consumers in a similar position to ours, paying a lot of money for a renovation, should not then be forced to finance expensive legal action in order to hold such builders to account. If a builder ignores the BCA then he should not be allowed to continue working.

However, it is often the case that a consumer does not know that the BCA or council conditions are not being met until it is too late as in our case with termite prevention treatment not being done under a concrete slab. This was not discovered until 3 months after we had moved back in when we found termites in the new work.

There should be closer monitoring of builders' work throughout a project. In our case the council were not called once to carry out an inspection. As the council are the ones setting down the conditions of consent, at the time of issuing the DA the council should inform consumers of what can be done if the builder does not meet the BCA, Australian Standards or the conditions of consent.

If at any time during or at the end of a project it is found that the builder has not complied with the BCA, Australian Standards or council conditions, then he should be made to rectify it at his own expense. A consumer should not have to commence legal action or pay somebody else to get the work done properly.

The lack of regulation in the Home Building industry has also meant that in our case a structural engineer has been able to get away with supplying a fraudulent certificate and there is no way that he can be held to account for it. The engineer also did not check the footings, amongst other things, before a boundary wall was built. We have subsequently been astonished to learn that in NSW a structural engineer does not even have to be registered with any regulatory body in order to operate in the Home Building industry checking and certifying builders' work. The only way to take any action on this kind of unprofessional and irresponsible conduct is to take him to court as Fair Trading is unable to help us.

We believe that the Home Warranty insurance is not providing sufficient protection to people like ourselves. In fact, it is extremely difficult, if not impossible, to make a successful claim. The builder whom we employed cannot now get Home Warranty insurance. This is not because the insurer has been paying out on too many claims

but rather that the insurer has been paying out too much money in legal fees in order to get out of paying any claims to unfortunate people like ourselves.

We believe that the Home Warranty insurance should last for longer than 7 years and that it is absurd that a consumer can only make one claim on the insurance policy. The effect of Home Warranty insurance is to protect the builder rather than the consumer.

With the building inspections that need to be done in support of insurance claims we believe that there should be one independent body which carries these out. Again, in our case we had a report done initially which did not find many, some quite major, defects and omissions in regard to certification which a second report did uncover. The cost of these reports is not insignificant.

We have much material to support the statements made in the Chronology and would be only too happy to provide the details as and when required. Please do not hesitate to call us.

Submission to Home Building Inquiry

Colin Sharp and Mary Ellen McCue

7 November 2006.

To Whom It May Concern,

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Yours faithfully,

Colin Sharp and Mary Ellen McCue.

Submission to Home Building Inquiry

Chronology of Renovation

Colin Sharp and Mary Ellen McCue

1. In September 2001 we entered into a contract with a builder to carry out a renovation on our home in Darlington. The architect who had previously worked on other jobs with the builder, recommended him and hand-delivered his quote to us. Mary Ellen had known the first architect for over 20 years and asked him to administer the contract on our behalf. The Date for Practical Completion under the contract was 4 March 2002. The Contract Price was $257,323.

2. In November 2001 the structural engineers on the project issued a Site Instruction stating that the footings for a boundary wall had not been inspected by them prior to the concrete being poured and the wall being built. Despite this and despite there being no other documentary evidence of them having fully inspected the work, in March 2003 they issued a structural certificate stating that they had inspected the work. The structural engineer has, therefore, clearly issued a fraudulent certificate.

3. In the letter accompanying the structural certificate, the structural engineer indicated that they had had concerns at their first site inspection on 30 November 2001 about the temporary propping used by the builder to support the first floor. Their next visit was not until 25 February 2002 and the temporary propping was still inadequate. Their third and final visit during the progress of the work was 21 March 2002, but there is no documentary evidence to indicate that the builder had heeded their instructions at all. This means that for at least three months and possibly longer the temporary propping for the upper storey had been inadequate. It seems that no-one is responsible for ensuring that these sort of important inspections are carried out and acted upon.

4. By December 2001 it was evident that council requirements were not being met with regard to surveys and inspections, and we were also concerned about the position of the boundary wall. We wrote to the first architect informing him of our concerns and requesting a meeting between him, the builder and ourselves. The first architect's reply was to resign without giving any notice at all. The first architect is a member of the Institute of Arbitrators and Mediators Australia (IAMA).

5. The first architect's resignation without notice placed us in a difficult position as there were windows requiring an architect's approval which the builder claimed would delay him if they were not approved quickly. The first architect had never discussed these windows with us and the first we knew about them was when we received a fax from the builder. About 4 weeks after the first architect's resignation without notice we appointed a replacement architect.

6. Eventually the builder lodged a delay claim of 24 days for the change of architect and 47 days for the cancellation and rescheduling of the windows – a total of 71 days. The second architect assessed the delay at 42 days, rather generously in our opinion, and gave a detailed explanation of his reasons.

7. Subsequently the builder lodged progress claims which the second architect substantially reduced because the builder had claimed more money than was left outstanding in the contract. The builder's response was to submit a formal Notice of Dispute under the contract on 7 August 2002. This was also the day our son was born.

8. Even though the builder was in dispute and had therefore ceased work, even though he had not installed our stove and dishwasher, even though the house was still full of the mess caused by his occupation of it for 10 months, he submitted a claim of Practical Completion as at 9 August 2002, i.e. he claimed he had finished and that we could move in. This was 5 months after the Date for Practical Completion and still the work was incomplete.

9. When the second architect responded to this claim by not declaring Practical Completion and by supplying the builder with a list of all the things which needed to be done before Practical Completion could be declared, the builder proceeded to claim Practical Completion at an even earlier date than before, this time at 22 July 2002. Clearly at that time the house was even further from being habitable.

10. Around this time the second architect requested that the builder send all the relevant certificates to him. The builder claimed that they had all been sent to the council. This was and is untrue.

11. After giving the builder the required notice under the contract, we paid others to do the work necessary for us to move in which the builder had refused to do.

12. We then made the builder an offer of $15,000 in full and final settlement of the dispute. The builder made no response to this offer but instead issued three Notices claiming that we were in breach of the Contract. These Notices were all written in pseudo-legal language, consisting of many pages each, and were all based on false interpretations of the Contract. As such they were all invalid and would not have stood up to scrutiny in a court of law. As we clearly had no previous experience of building disputes, however, these Notices were designed purely to intimidate us.

13. The process agreed on to resolve the dispute under the contract initiated by the builder involved a mediation at the offices of the Institute of Arbitrators and Mediators Australia (IAMA). The document informing us of the date of the mediation and the appointment of the mediator was signed by the senior barrister who was later to represent the builder in our proceedings against him at the Consumer Trader & Tenancy Tribunal (CTTT). The appointed mediator was also a member at the CTTT and later presided over a directions hearing in our action there against the builder.

14. The mediation took place on 20 December 2002. The whole process was a farce. First of all the mediator did not understand that it was the builder who had initiated the dispute in the first place. Then, the builder did not even bother to attend and the delegates who he had sent to represent him did not have any power to settle the dispute. One of the delegates was also a member of the IAMA. When the mediator became aware that the builder was not in attendance to try and settle the dispute he had initiated he should have established whether the builder's delegates had the authority to do so. This he failed to do and so the mediation was a complete and utter waste of our time and money.

15. In January 2003 we found evidence of termite activity in the new work carried out by the builder. We subsequently obtained a copy of the termite certificate supplied by the builder to Council and discovered that he had not provided the treatment required under the BCA, Australian Standards, the Contract and by the Council Conditions of Consent. The termite treatment should have been installed prior to a concrete slab being poured. A new living-room, new kitchen, new laundry, new toilet, and associated new tiles and floorboards have all been built on top of the slab.

16. In February 2003 we determined the Contract with the builder due to his lack of diligence. This lack of diligence had been demonstrated throughout the builder's occupation of our home throughout the renovation.

17. In March 2003 following the receipt of a letter from the builder's solicitors, threatening to sue us for money they alleged was still owing to the builder, we lodged a Notification of a Building Dispute with the Consumer, Trader & Tenancy Tribunal (CTTT). We felt that we had to pursue this course of action as we had paid all the money certified under the Contract, it was clear that the builder had failed to provide the appropriate termite treatment, and there was a long list of other defective work.

18. We had informed the Home Warranty insurer about the termites we had found and also about a courtyard area constructed by the builder which was flooding whenever it rained. We obtained their approval to treat the termites and stop the flooding.

19. In April 2003, at the first hearing at the CTTT, the member advised us to engage a solicitor. This was despite the fact that we understood that the intent of the CTTT was that it was a less formal arena and that solicitors were not absolutely necessary.

20. On 30 April 2003, taking the CTTT member's advice, we engaged a solicitor, who was a former member in the Department of Fair Trading. On reviewing our documentation, the solicitor considered that we had a very strong case.

21. On our solicitor's advice we commissioned a report on the building work from a building consultancy firm recommended by our solicitor. This report, completed in May 2003, detailed a number of defects in addition to those which had already been identified by the second architect.

22. On our solicitor's advice we lodged a claim on the Home Warranty insurance in June 2003. In December 2003, the Home Warranty insurer denied liability for our claim. With regard to the fact that the builder had not provided the correct termite treatment, as recorded in the termite certificate supplied to Council, the Home Warranty insurer's comments were that the builder should just provide an appropriate certificate. They did not explain how an appropriate certificate could be provided when the appropriate treatment had not been supplied.

23. As a result of the Home Warranty insurer denying our claim, our solicitor attempted to join them in our action against the builder. The CTTT did not allow this but told him that we would have to start another action against the Home Warranty insurer. Our solicitor did this on our behalf.

24. In the subsequent action at the CTTT we claimed a Total Estimated Loss of $80,430.50. This had been calculated in a Scott Schedule prepared by the building inspector who had prepared our report. On our solicitor's advice, we were also represented at the CTTT by a barrister. After he had been briefed the barrister informed us that he considered we had a very strong case.

25. The builder's solicitor lodged affidavits on behalf of the builder at the CTTT in June 2004. One of these affidavits was an expert pest report which supported our contention that the termite protection provided by the builder was not as specified under the Contract.

26. Our solicitor arranged for a further report to be prepared on our behalf by an expert on termite treatment in July 2004. His conclusion was that the builder had "failed in their duty and obligation to comply with the termite management requirements of the BCA, the referenced Standard AS 3660.1 and the Contract specification".

27. Our hearing at the CTTT was to commence on Monday, 23 August 2004. After 6pm on the Friday before the builder's solicitor sent a further delay claim from the builder, over two years after the alleged delay was supposed to have occurred and after the first delay claim had been dealt with by the second architect under the Contract in April, 2002.

28. Lodging such a claim at such a time was clearly an underhanded attempt by the builder's legal team to complicate the issue, intimidate us, and deny us justice. The builder's legal team now included a senior barrister.

29. The member hearing the case at the CTTT did not dismiss this spurious claim but decided to adjourn the hearing to consider whether it should be admitted. On adjourning the hearing he instructed all sets of legal teams to work at resolving the matter.

30. Our barrister informed us that if the member admitted the builder's delay claim then he would request a further adjournment to prepare a response. We expressed some concerns to our solicitor about costs and he assured us that we would not be getting another bill from him. Our barrister also told us that he would not be charging us more than the figure he had previously quoted.

31. Our legal team spent most of that day talking to the builder's and the Home Warranty insurer's legal teams. That evening our solicitor rang us to tell us that things were looking good for us. The builder had dropped the additional amount he was claiming in the new delay claim. Our solicitor repeated what the Home Warranty insurer's solicitor had previously indicated in writing, that we only had to substantiate $40,000 worth of defects to prove our claim.

32. The next morning it seemed that our barrister did not share the optimism our solicitor had expressed to us the previous evening. In fact, the confidence we had felt after the conversation with our solicitor decreased as our barrister began trying to calculate whether we could prove the $40,000 worth of defects. This was despite the fact we had a building report which itemised over $80,000 in defects.