

Is your builder 'fit and proper': the weaknesses of the home building licensing scheme in NSW



A special report to Parliament
under section 31 of the
Ombudsman Act 1974.

16 May 2018

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Executive Summary

This report arises out of an investigation by the NSW Ombudsman into the conduct of Fair Trading in relation to the Home Building Service (HBS). Fair Trading is part of the Department of Finance, Services and Innovation (DFSI).

The complainant and his wife made a complaint to Fair Trading on 22 May 2014. His complaint involved the poor practices and workmanship of a small construction company (the company), and its sole director, who will be referred to as the builder. Fair Trading attempted to mediate the dispute, however the relationship between the parties to the dispute broke down further and the complainant terminated the contract with the company in April 2015. After termination of the contract, the complainant performed a search on the Australian Securities and Investments Commission (ASIC) database and found out that the builder had been declared bankrupt in 2006. The complainant also discovered that the builder and the company had been the subject of a number of complaints to Fair Trading and there were outstanding tribunal orders against the company.

The complainant wrote to the NSW Ombudsman on 7 October 2015, alleging that Fair Trading had engaged in wrong administrative conduct in the following ways:

- Information about the builder and the company, available to the complainant on the contractor and tradesperson home building licence check public register (the public register), was inadequate because:
 - company information, in particular changes in directorships of companies that the builder has been associated with, was inconsistent with information on the ASIC company register
 - information about the company's non-compliance with tribunal orders made by the NSW Civil and Administrative Tribunal (the tribunal) was not up to date, and
 - companies that the builder was previously associated with did not appear as associated licences and are not visible when a person searches for his current licence.
- Fair Trading should not have approved the contractor licence and supervisor certificate for the builder as he was not a fit and proper person to hold these authorities under the *Home Building Act 1989* (the Act).
- Fair Trading should have taken enforcement/disciplinary action against the company sooner, rather than continuing attempts to mediate the dispute between himself and the company's director.

During the course of the complaint, the complainant also identified other dissatisfied customers of the company and encouraged them to contact our office. A number of them recited events that mirrored the complainant's experience.

The home building sector has been the subject of a previous Ombudsman investigation and parliamentary inquiry, and the legislation has undergone multiple, significant reforms since its introduction. Our decision to investigate was made in the context of these earlier reports, which have previously identified weaknesses in the regulatory system and suggested improvements to better protect customers. It seems that despite well-documented, systemic problems and repeated attempts to address them, the same issues continue to arise. This is why I have chosen to report to Parliament on the outcome of this investigation.

This investigation has found that the complainant's concerns are justified. There was information available to Fair Trading in 2013 that indicated the company's contractor licence should not have been renewed. This information concerned the company and its director (the builder) fitness and propriety to hold a licence under the Act.

There are also serious and systemic issues with both the public register and the home building licensing system. In particular, the information currently available on the public register is not in line with the requirements under the Home Building Regulation 2014 (the Regulation). Further, staff involved in licence application and renewal assessments do not have easy access to the information they need to make a decision on the assessment.

This report makes a range of recommendations, including:

- changes to the public register
- improvements in intelligence sharing for the purpose of publishing on the public register to assist Fair Trading's licence assessment processes, and
- changes to internal guidance for staff.

I also recommend that Fair Trading issue a formal apology to the complainant and make an appropriate ex-gratia payment pursuant to section 26A of the *Ombudsman Act 1974*. (I recommend that similar ex-gratia payments be considered for other customers of the builder that entered into a contract with the company after March 2013.)

The Commissioner for Fair Trading and the responsible Minister have indicated that the recommendations arising from the draft of this report were appropriate, and requested that our office refine the wording of some of the recommendations in line with work that Fair Trading has already commenced to enhance its licensing database. The refined recommendations are included in this report.



Michael Barnes
Ombudsman

1. Context

1.1. Background to complaint

On 18 December 2013 the complainant and his wife entered into a contract with a proprietary limited company to build their family home in metropolitan Sydney. The contract amount was \$555,000, with an estimated build time of six months. The company's sole director was a qualified builder (the builder) and the nominated supervisor for the contractor licence.

Before entering into the contract the complainant carried out a home building licence check on the OneGov contractor and tradesperson home building licence check public register (the public register).¹ The licence records on the public register for the company and the builder did not reveal any cause for concern about entering into a contract with the company. There were no compliance actions, insurance claims or outstanding tribunal orders recorded against either the builder or the company. There were also no associated licences or parties listed on the licence records to indicate the builder was involved or had previously been involved with any other companies.

The builder commenced construction work in January 2014. Between January and May 2014, the complainant became concerned that the work being performed did not comply with the contract. The complainant noted many items of work were defective, including poor work on the external walls, missing brick mortar joints, overhanging brickwork, no flashing on windows, and inadequate waterproof membranes, particularly on the balcony. A technical building report conducted in September 2015 found there were 102 defective items resulting from the builder's work.

The complainant complained to Fair Trading about the company on 22 May 2014. Two further complaints were made throughout 2014. The complaints were dealt with by a Senior Building Inspector from Fair Trading's Dispute Resolution & Inspection Branch (DRIB), who carried out on-site meetings with the complainant and the builder.

It appears a number of attempts were made to resolve the dispute through agreement of the parties but the builder did not carry out the work agreed to. The site meetings eventually became hostile and the relationship between the builder and the complainant deteriorated.

On 18 December 2014 the building inspector issued a rectification order in relation to the balcony waterproofing. It does not appear the builder complied with this order. The complainant and his wife terminated the contract on 10 April 2015.

After terminating the contract the complainant started making enquiries into the builder's history. By undertaking a search on the Australian Securities and Investments Commission (ASIC) database he discovered that the builder had been declared bankrupt in 2006 and had previously been director of a large number of companies, some of which held contractor licences under the *Home Building Act 1989* (the Act):

- between 28 September 2000 – 10 November 2000 the builder was director of company A, which had a current contractor licence;
- between 6 August 2004 – 14 July 2005 the builder was director of company B, which had its licence cancelled; and
- between 27 July 2009 – 25 November 2011 the builder was director of company C which had an expired contractor licence.

1. <https://www.onegov.nsw.gov.au/publicregister/#/publicregister/search/Trades> - see section 4.1 for further information

Both company B and company C were failed companies, and were the subject of court windup orders and went into external administration. The director that took over company C from the builder was later heavily fined for a range of offences in June 2013.

The complainant also heard from a number of subcontractors about unpaid accounts owed to them by the company, and made contact with a number of other customers who had similar experiences dealing with the builder and his companies. He was informed that other people had made multiple complaints to Fair Trading about the builder previously.

In July 2015 the complainant made a complaint to the Commissioner of Fair Trading about the way the Home Building Service (HBS) dealt with his complaints about the builder and the inadequacy of information on the register about both the builder and the company.

On 8 September 2015 the complainant obtained an independent building report on his property which estimated the total cost of repairing defective and incomplete work to be \$528,862.

On 29 September 2015 the Commissioner responded to the complainant, offering assistance in further mediating the dispute. The response also stated Fair Trading was in the process of assessing his complaint about the builder.

1.2. Complaint to the Ombudsman

The complainant was dissatisfied with the response from Fair Trading, and brought his complaint to the Ombudsman on 7 October 2015. Among other issues, his complaint made the following key allegations:

- Information on the public register was inadequate, because:
 - company information, in particular changes in directorships of companies that the builder had been associated with, was inconsistent with information on the ASIC company register;
 - information about the company's non-compliance with tribunal orders was not up to date; and
 - companies that the builder was previously associated with did not appear as associated licences and are not visible when a person searched for his current licence.
- Fair Trading should not have approved the contractor licence and supervisor certificate for the builder as he was not a fit and proper person to hold these authorities under the Act.
- Given the history of complaints against the builder's companies and his demonstrated failure to adhere to agreements, Fair Trading should have taken enforcement/disciplinary action against the company sooner, rather than continuing attempts to mediate the dispute.

2. Decision to investigate

2.1. Preliminary inquiries

On 16 November 2015 we wrote to the Commissioner to make preliminary enquiries into this complaint pursuant to s 13AA of the *Ombudsman Act 1974*.

In response, the Assistant Commissioner asked to meet with us, which took place on 25 November 2015. Following this meeting, we wrote to the Commissioner again on 18 December 2015, requesting further information under s 13AA.

Fair Trading responded to our inquiries on 1 March 2016 and provided additional information on 15 April 2016 as requested. Fair Trading advised that HBS had commenced a disciplinary investigation into the builder with respect to the complainant's property and another property the builder had been contacted to build in NSW's Central Coast region.

In July 2016 the disciplinary proceedings against the builder were finalised and a decision was made by the Acting Director, Mediation Services and Compliance, to cancel the builder's supervisor certificate and disqualify him for a period of 12 months.

On 12 August 2016 we visited Fair Trading's office in Parramatta to view the computer systems used by the HBS, obtain further information and speak with relevant staff members. We requested additional documents at this time.

We also made inquiries with the Home Building Compensation Fund (HBCF), and Insurance & Care NSW (icare), to obtain up-to-date details about insurance claims against the company.

On request, Fair Trading provided further procedure documents by email on 19 May 2017.

2.2. Decision to investigate

The decision to conduct a formal investigation pursuant to s 13 of the *Ombudsman Act 1974* was made on 21 March 2017. The delay in making this decision was due to limited resources and the demands of other formal investigations being undertaken by the Public Administration Division of the Ombudsman's office at the time.

There was a substantial public interest in carrying out a formal investigation into this matter due to the detriment suffered by the complainants and other customers in this case, the risk to customers where the regulatory system fails, and public safety concerns associated with defective building work.

The public expect to be able to rely on a regulatory system to give them consumer protection. If the regulatory system fails, the financial and emotional consequences for homeowners can be devastating.

The conduct of the company and its eventual insolvency led to over \$2.4 million in insurance claims paid from the HBCF to date.

As HBCF claims are capped at \$340,000 per dwelling, many of the claimants remain significantly out of pocket. The claims data also does not include losses incurred by homeowners who have not made a claim or are ineligible to do so, for example if they are classed as developers; consequential losses not covered by the HBCF insurance policy, such as loss of rent or income; and losses incurred by subcontractors or other creditors.

We have been contacted by other customers of the company who provided details of the losses they have incurred. They told us about the huge emotional impact the builder has had on their lives, families and relationships. Customers have spent large amounts of time preparing for tribunal and court proceedings, making complaints and lodging insurance claims, which has contributed to stress and loss of income. Financial hardship, uncertainty and stress have placed additional strains on families and relationships. Some told us they have sought professional counselling as a result of the experience. A number of customers described the experience as 'traumatic'. Details of how the complainant and his family have been impacted by the decision to enter into a contract with the builder are discussed later in this report.

Most of the HBCF claims were paid on the basis of defective work. In preparation for disciplinary action against the builder, the HBS prepared two building investigation reports which showed the building defects to be numerous and in some cases substantial.

One of the building sites supervised by the builder (the Central Coast site) was also the subject of compliance action by WorkCover after the first floor concrete slab collapsed. The customer informed us that the engineer had advised against pouring the slab but the supervised worker went ahead with the pour. A senior WorkCover inspector visited the site and issued notices to the company for the rectification of multiple safety issues.

2.3. History of investigations, inquiries and reforms

2.3.1. 2006 Ombudsman investigation

The complaint raises similar issues to a previous investigation undertaken by this office, which was commenced in 2004 and reported on in January 2006 (the 2006 investigation). An anonymised version of the report was made publicly available during the 2007 parliamentary inquiry into the regulation of the home building sector.

In the 2006 investigation the Ombudsman found Fair Trading incorrectly issued a contractor's licence to the trader and did not have adequate procedures for checking the previous conduct of licence applicants. We also commented that information on the public register was inaccurate and that Fair Trading's failure to link associated licences on the register increased the risk of so-called 'phoenix companies' in the sector.

Among other things, the Ombudsman recommended:

- Fair Trading provide more guidance to staff on how to assess an applicant's fitness and propriety to hold a licence
- the public register be enhanced to allow customers to research the history of other licences a trader may have previously held or been associated with, and
- Fair Trading explore the possibility of automated information exchange with ASIC to keep company information on the register up to date.

We understand Fair Trading accepted these recommendations at the time although it is unclear to what extent the recommendations were implemented.

2.3.2. 2007 parliamentary inquiry

In 2007, the Legislative Council commenced an inquiry into the operations of the Home Building Service. The inquiry was commenced to examine the effectiveness of Fair Trading's HBS, in particular its licensing and complaint handling functions, and the exercise of disciplinary powers.

The Committee's report² made recommendations to improve consumer protection which are relevant to this investigation

Recommendation 1

That the Home Building Service review its performance standards in relation to the licence assessment system and the public register, in order to maximise the:

- rigor of licence assessments
- accuracy and timeliness of information on the public register.

Recommendation 2

That the Office of Fair Trading, whilst taking account of the need for procedural fairness, investigate potential changes to the public register to alert consumers to builders who are the subject of not yet resolved complaints.

2.3.3. 2014 reforms

The 2014 reforms made a number of significant changes to the Act and replaced the 2004 Regulation with the Home Building Regulation 2014. The new laws came into effect on 15 January 2015.

2.4. Formal investigation

On 22 March 2017 we issued a notice of investigation to the Secretary, NSW Department of Finance, Services and Innovation (DFSI), pursuant to s 16 of the *Ombudsman Act 1974*. The notice made DFSI, NSW Fair Trading the subject of an investigation and identified the conduct to be investigated as the actions and inactions of NSW Fair Trading relating to:

- maintenance of the public register established under s 120 of the Home Building Act
- processing of licence applications by the builder and companies associated with him
- handling of complaints from members of the public about the builder and companies associated with him
- disciplinary/compliance actions taken against the builder and companies associated with him.

A preliminary findings and conclusions report was sent to Fair Trading for comment on 21 July 2017. The report sought clarifying information from Fair Trading, and invited any further general submission it wished to provide. The response to the preliminary report was received on 28 August 2017. A draft investigation report incorporated the additional information and comments provided by Fair Trading, and proposed recommendations to rectify the issues identified from our investigation. After further comment from Fair Trading, these recommendations have been modified, and are finalised in this report.

2. Inquiry into the operations of the Home Building Service, General Purpose Standing Committee No.2, Legislative Council, published December 2007.

3. Issues identified

The investigation focused on whether Fair Trading complied with the relevant legislation, met the consumer protection objectives of the Act, and whether Fair Trading performed its functions as regulator in accordance with best practice.

In particular, the investigation examined the conduct of the HBS, in relation to:

- maintenance of the public register;
- handling of complaints about the builder and the company, including the complainant's complaint;
- compliance and disciplinary processes; and
- licence assessment processes.

While the issues identified relate to this particular matter, they raise the broader question of whether Fair Trading's systems and processes are inadequate to effectively regulate the building industry and protect consumers from unscrupulous and/or incompetent builders.

3.1. The public register

The public register established under s 120 of the Act is made available to the public on the OneGov website,³ which is owned and managed by DFSI. The register can be accessed through the Fair Trading and Service NSW websites. Licence information is published on the register directly from Fair Trading's licensing database, the Government Licensing System (GLS).

Section 120 of the Act provides that the Secretary is responsible for maintaining the public register:

120 Register

(1) The Secretary is to maintain a register of:

- (a) particulars of contractor licences, supervisor and tradesperson certificates and owner-builder permits, and
- (b) such other particulars as are required to be kept in the register by the regulations.

(2) The register is to be in the form determined by the Secretary and is to be available for inspection by the public.

Clause 69 of the Home Building Regulation 2014 sets out the particulars that must be published on the register (see Appendix A).

Prior to 2014, cl 80 of the 2004 Regulation contained a list of nearly identical particulars and at all times the requirement to publish the particulars has been mandatory.

According to Fair Trading's website, the purpose of the public register is to inform consumer decisions and protect the public from unscrupulous builders and tradespeople.⁴ The importance of the public register for consumer protection has been noted on many previous occasions, including our 2006 investigation report and the 2007 parliamentary inquiry. Both these reports made recommendations to improve the functionality of the public register and strengthen its consumer protection value.

This investigation examined whether Fair Trading's procedures and practices are compliant with cl 69 of the Regulation and ultimately whether the public register in its current form is fit for the purpose of consumers checking whether to engage a licensed tradesperson or company.

3. <https://www.onegov.nsw.gov.au/publicregister/#/publicregister/search/Trades>

4. http://www.fairtrading.nsw.gov.au/ftw/About_us/Online_services/Home_building_licence_check.page

3.1.1. Limited visibility of associated parties on the public register

All records of licences on the register include a section titled 'associations', with separate subsections for 'associated parties', 'associated party history', 'associated licences' and 'associated licence history'. However, searches of the register undertaken during the investigation found that two different contractor licences with the same company director can exist on the register without being linked as associated licences. Furthermore, the register does not allow a consumer to search for contractor licences by company director, which makes it difficult to make any connection between two companies with the same director.

Where a person is director and nominated supervisor for a company with a contractor licence – a common scenario in small companies – the register will link the supervisor certificate with the company contractor licence as associated licences. However, the basis for this association is that the licences are linked through the supervisor certificate/contractor licence relationship. The fact that two authorities may be held by or relate to the same person is not in itself sufficient to link them as associated licences.

The effect of this limitation is that connections between licences which a reasonable person may think of as 'associations' are not in fact visible on the public register. This enables traders with a poor record to set up a new company without their unfavourable history being visible to the public. This was an issue we raised in our 2006 investigation report.

The current case demonstrates this limitation of the public register. The builder was nominated supervisor and director for the company. He was also previously director of companies A, B, and C, all companies with separate contractor licences on the public register. When a person searches the public register for the builder by typing his full name into the search field, only the supervisor certificate is returned. The licences for companies that the builder is or has been director of are not returned in the search. The company contractor licence appears on the builder's supervisor certificate under the 'associated licences' tab because the builder is (or was) the nominated supervisor for the company. Other contractor licences for companies that the builder is or has been director of do not appear as associated licences on his supervisor certificate.

Fair Trading advised that the builder's supervisor certificate was not linked to contractor licences for which he previously held directorships because the register contains a significant amount of historical data which has been transferred from previous licensing systems which is yet to be linked.⁵

While the builder is now listed on the licence records of companies B and C as a previous director, the company contractor licences are still not returned when a person searches for the builder by his name and do not appear as associated licences on the builder's supervisor certificate. As such, it is not possible for a consumer to identify the existence of these associated licences through the register alone.

For a consumer to obtain licence information about the builder's previous companies, as the complainant did after he had cause to terminate the contract, they would need to carry out a search on the ASIC database for the builder, then undertake separate searches on the public register for each company the individual was or had been director of according to the ASIC database.

Discussion

The public register creates an expectation that all licences held or previously held by the same person, either as an individual or a company director, will be listed under the associated licences section. As the register does not have this capability, there is a risk that consumers who carry out a licence check may be led to believe that a licence holder has a clear record when in fact they have a history of poor performance recorded against another licence.

5. Letter from Commissioner Rod Stowe to NSW Ombudsman, 26 February 2016 p.6.

The register currently has the following disclaimer on the first page of the contractor and tradespersons public register search:

The information contained in this register is restricted to that information which NSW Fair Trading is currently required to maintain under section 120 of the *Home Building Act 1989* and clause 69 of the Home Building Regulations 2014.

Please note also that, while Fair Trading issues licences to qualified and, in some cases 'experienced', builders and tradespeople, it cannot and will not guarantee the work of licensees.

Consequently, NSW Fair Trading disclaims all responsibility and all liability (including without limitation, liability in negligence) for all expenses, losses, damages and costs which might incur as a result of using information in the register, or for it being inaccurate or incomplete in any way, and for any reason.

While the register does not claim to be a complete repository of relevant information about a licence holder, the limitations of its search function and associated licences information raise a concern that the register does not appear to enable a consumer to undertake a thorough licence check of a tradesperson or company. While the complainant was able to obtain information about the builder's previous companies through the ASIC database, this required a degree of knowledge and an amount of effort that is unreasonable to expect from the average consumer. The register does not contain any tips or advice on what other inquiries a consumer can undertake to obtain a more complete picture about a trader.

Our 2006 investigation report recommended the public register be enhanced to enable consumers to research the history of other licences a trader may have previously held or been associated with. We specifically recommended the register's search function be modified so that searching for an individual's name returns not only the licence details of the individual, but also the names of companies and partnerships in which the person has been a director, partner or nominated supervisor. The 2007 parliamentary inquiry also suggested HBS find ways to further improve consumer protection through the public register.

The Regulation does not mandate that associated licences must be included on the public register. Consequently, there is no guidance in the legislation as to what the connection between licences must be for a licence to be listed under the 'associated licences' tab. However, as the Ombudsman recommended in 2006, it would greatly enhance the public register's consumer protection value if the register allowed people to search for all licences held by an individual, including contractor licences held or previously held by a person as the director of a company. Ideally the register would also cross reference these licences as 'associated licences' on each of the licence records in question.

During our 25 November 2015 meeting, the Assistant Commissioner expressed the view it would be very resource intensive to associate all licences that shared the same director in the manner we proposed. He also advised that Fair Trading has explored the possibility of automatically updating company information on the public register from the ASIC database, but this was found to be unworkable.

It is acknowledged that it would be a difficult undertaking for Fair Trading to identify and link licences held by companies with the same director/s. There may be insufficient identifying information to safely conclude that two directors with the same name are the same person. As with any large scale data merge, there would also be a risk that two different people with the same name become merged, or the data merge does not occur where it should due to spelling errors or other inconsistencies.

Clause 69(2)(h) of the Regulation requires the public register to show the names, dates of birth and addresses of company directors where the holder of the contractor licence is a corporation. Similarly, cl 69(3)(a) requires the public register to include the name, date of birth and residential address of the

holder of a supervisor certificate. Currently the public register only displays the year of birth and the address of the licence holder. Where the licence holder is a corporation the register displays the name of the directors, but not their dates of birth and addresses.

Enhancing the register to include further identifying information about licence holders and company directors, as required by the Regulation detailed above, and if the search function of the register was improved to allow consumers to search by company director as well as licence holder, greater visibility of a builder's previous companies would result. It could also make it easier for Fair Trading to identify and associate contractor licences held by companies with the same director.

In its March 2016 response to our initial inquiries and August 2017 response to our preliminary document, Fair Trading pointed to consumer protection improvements that have been made since our last investigation, including that individual licensees are now issued with a unique licence number to be kept for life. The effect of this change is that the history of a licence will stay with the licensee for their working life. However this does not appear to address the problem of so-called 'phoenix companies'.⁶ Builders can still operate through multiple companies, each of which will be given a different licence number that is not linked in any way on the public register. Further, a change of process to 'one licence per licensee for life' will take considerable time to have the intended effect of protecting consumers.

3.1.2. Recording outstanding tribunal orders on the public register

Clause 69(2)(o) of the Regulation states, in respect of contractor licences, the register must include 'any instance of non-compliance with a tribunal order to do work or to pay money'. The Act places an obligation on the trader to inform Fair Trading that the order has been complied with by the due date for compliance. Section 48U of the Act states:

If the secretary has not been informed that an order has been complied with by the end of the time limit for compliance with the order, the order is taken to have not been complied with and may be recorded on the register kept under section 120.

Licence records on the register include a section titled 'Compliance', which contains the subsection 'Outstanding Tribunal Notices'. Tribunal orders listed under this subsection have a minimal amount of information, including only the 'Judgment Date' and the 'Comply By Date'. We understand that the orders are only listed in this section once the order becomes outstanding. The order is deleted when Fair Trading receives information that the order has been complied with.

Fair Trading provided a copy of its relevant procedure⁷ for updating the public register to reflect non-compliance with tribunal orders, and the following explanation:

Tribunal orders are sent electronically via email to the Home Building Service. Within two working days of receipt they are entered against any licence history that is detected. One of the details entered into the Government Licensing System (GLS) is the due date of the order.

Section 42A of the Act prescribes the suspension of the licence if the order is not complied with within 28 days after the due date. GLS produces a report that identifies when tribunal money orders are due to be paid. At this time a letter is sent to the licence holder, warning them that if the outstanding debt is not satisfied (or a stay of proceedings obtained), the licence will be suspended. 28 days later, if proof of payment, or a written declaration stating the order has been complied with, is not received the licence is suspended.

6. 'Illegal phoenix activity involves the intentional transfer of assets from an indebted company to a new company to avoid paying creditors, tax or employee entitlements' (from Australian Securities and Investments Commission website, accessed on 19 July 2017)

7. Undated document titled 'CTTT Procedures'

While the above response sets out the process for suspending a licence under s 42A, it does not explain the process for publishing information on the register about non-compliance with a tribunal order as required by cl 69(2)(o). Licence suspensions are also recorded on the register in accordance with cl 69(2)(r) of the Regulation, however the entries for cancellations/suspensions are in a separate section to the entries for outstanding tribunal notices.

Fair Trading procedure provides further information about recording outstanding tribunal orders. This document suggests that an outstanding money order will be recorded on the register as soon as it falls due if the trader has not informed Fair Trading by that date that the order has been complied with. The procedure states:

A GLS report OP00130 is run weekly. This report identifies which CTTT money orders (and Combo orders) have now fallen due. Action is taken on outstanding money orders only (not work orders). If a work order is not complied with, then the usual course of action is for the applicant to return to the CTTT and have the work order converted to an equivalent money order. As these CTTT orders are now due, they would also appear on the public register as an unpaid CTTT order... The respondents are issued a letter... advising that they have 28 days to satisfy the debt otherwise their licence will be suspended.⁸

From the available information, it does not appear to be mandatory for traders to provide evidence that a money order has been paid, although such evidence is requested. The procedure states 'respondents are requested to submitted [sic] written proof that the debt has been paid'. In the letter Fair Trading sent to the company in March 2014 after a tribunal money order became due, it requested:

Write a short note** stating that the matter has been paid in full. (Include copies of cheques, bank statements, receipts or other supporting evidence)

**Fines up to \$22,000 apply for making a false statement.

In its written response to our enquiries, Fair Trading also advised cross checks are carried out in certain circumstances to check with the consumer that the money order has been complied with.

Neither Fair Trading's written response nor the procedure explains how non-compliance with tribunal work orders is recorded on the public register, as required by the Regulation. Fair Trading's written response states there is often disagreement between the parties as to whether the work ordered by the tribunal has been completed. For example, the builder may have attempted to undertake the work but the consumer denied them access. In such circumstances Fair Trading will advise consumers that they have the option of going back to the tribunal to have the work order converted to a money order. The response states: 'if the money order is not paid within 28 days of the due date, the licence is suspended 28 days after the due date for payment (section 42A of the Act)'.

Finally, during our visit to Fair Trading we were advised by staff that only current outstanding tribunal orders appear on the public register. Once the order is complied with, the licence is reinstated and the record of the non-compliance disappears from the register, although we were advised historical records of non-compliances are available to Fair Trading staff but not to consumers.

One of the issues raised by the complainant in his complaint was that there was a delay updating the public register when tribunal orders relating to the builder became overdue. Information received by this office indicates delays in updating the public register in relation to three tribunal orders.

As outlined above, s 48U of the Act provides that an order is taken to have not been complied with as soon as the due date passes if the trader has not informed Fair Trading that the order has been complied with. Fair Trading's procedure also states that a non-compliance will be recorded on the register as soon as it falls due.

8. Undated document titled 'CTTT Procedures'

When we initially reviewed the company's licence file, we found two possible occurrences of such a delay, relating to tribunal orders made in December 2013, hereafter referred to as order one and order two.

Order one was for payment to be made to the applicant in instalments, with the last instalment due on a date in February 2014. When the final due date passed it appears the company had not provided proof to Fair Trading that the order had been complied with. Fair Trading wrote to the company more than two weeks after the due date, seeking written proof that the money order had been paid. The letter states 'If no advice is received from you on or before 14 March 2014, all applicable Home Building licences will be suspended without further notice'.⁹ The builder's solicitor responded three days later, advising the tribunal order had been complied with.¹⁰ The solicitor included a copy of an email from the daughter of the applicants which stated 'the money order for [payment amount] has all been cleared. I will notify the CTTT and also the local court'.

In its submission of 25 August 2017, Fair Trading advised that order one would have been marked as a non-compliance and appeared on the register the day after the last instalment date. The non-compliance was then removed from the public register one day after receiving information from the solicitor that the order had been complied with. Fair Trading has not explained why there was a delay of 17 days between when the order fell due, and when the letter was sent to the company. Although Fair Trading said non-compliance 'would have appeared publicly on the register from [the day after the due date]', if an automatically generated letter was sent to the licence holder 17 days after the due date, it is more likely that the information of non-compliance with the order was only made publicly available on the register on the day the letter was generated.

Further to this, Fair Trading's practice of removing records of non-compliance from the register once the order is complied with makes it difficult to ascertain when non-compliance had been recorded on the register. Removal of the records of non-compliance once a tribunal order is complied with (even if after the compliance due by date) means that it is not apparent whether the short period of non-compliance was recorded.

Order two, which was also made in December 2013, was for payment to another applicant in three instalments, with the last instalment due in September 2014. The applicant wrote to Fair Trading in November 2014 advising that the tribunal order had not been complied with. Fair Trading has been unable to produce information to confirm it was aware of this order before the applicant wrote to them. Fair Trading told this office that it recorded this non-compliance on the public register six days after the applicant wrote to Fair Trading. The complainant's diary notes state that a non-compliance appeared on the register against the company in late January 2015, which we believe was in relation to this particular order.

Fair Trading wrote to the company in late January 2015 seeking written proof that the money order had been paid. The letter states 'If no advice is received from you on or before 12th February 2015, all applicable Home Building licences will be suspended without further notice'.¹¹

Considering the above information about order two, there is an issue with delay in relation to the following:

- 1) a period of delay of either 69 days or 132 days (depending on whether dates supplied by Fair Trading or the complainant are used) between when the order became due and when Fair Trading recorded the non-compliance on the public register, and

9. Correspondence on the company's licence file

10. Letter from CCS Legal to Manager Licensing dated 6 March 2014

11. Correspondence on the company's licence file

- 2) a period of delay of 133 days between when the order became due and when Fair Trading wrote to the builder as the licence holder for the company, informing him that it had not received confirmation of compliance with the now outstanding order.

A screenshot of the public register in early February 2015, provided to us by the complainant,¹² shows the company's licence was suspended in early February 2015 due to an unpaid tribunal money order. Fair Trading has confirmed this suspension related to non-compliance with order two. The licence was suspended more than four months after it should have been according to Fair Trading's procedures. The licence should have been suspended 28 days after the order became due in the middle of September 2014.

In February 2016, a third outstanding tribunal order for the company appeared on the register with a comply-by date in late February 2015. This will hereafter be referred to as order three. There has been conflicting information provided by Fair Trading about this order.

In advice provided by Fair Trading in an email on 15 April 2016, it said that tribunal order one had a comply-by date of 28 February 2015. In its response received 25 August 2017, Fair Trading provided information indicating this comply-by date actually related to order three.

Fair Trading claimed it did not receive a copy of order three from the tribunal at the time it was made as the tribunal 'does not always send copies of orders made where the decision was reserved'. It is not clear why the tribunal does not always forward these orders to Fair Trading. As a result, Fair Trading was reportedly not aware of this order until February 2016, when it was informed of non-compliance by the applicant. This order is outstanding to this date, and remains visible on the public register.

The inconsistency in the information provided by Fair Trading about the three tribunal orders is concerning. As different dates have been provided at different times during the investigation, and Fair Trading has been unable to confirm exactly when the orders were visible on the public register, it is not clear what delays occurred in updating the public register. It does appear that there were delays in having information available to the public on all three of the orders discussed above. This means that Fair Trading has not fulfilled its obligation under the Act and its own procedures in relation to updating the public register.

Discussion

As set out above, it appears some outstanding tribunal orders in this case were only recorded against the company's licence record after the consumers contacted Fair Trading to advise that the money order had not been paid.

Fair Trading has also not been able to provide sufficient information to explain why there was a delay in recording non-compliance on the public register.

It is not sufficient that Fair Trading relies on consumers to inform them when a tribunal order has not been paid by the due date. Once the tribunal makes an order, the onus should be on the trader to provide evidence to Fair Trading that the order has been complied with. If such evidence is not received by the comply-by date, Fair Trading should deem the order as not having been complied with (in accordance with s 48U of the Act) and publish the non-compliance on the register. This would also provide an incentive for traders to comply with orders by the due date.

During our 2006 investigation we raised concerns that Fair Trading did not have adequate measures in place to cross-check that a trader has complied with a tribunal order. At the time, Fair Trading did not require proof of compliance and did not check with consumers. In the course of this investigation

12. Letter from the complainant to Fair Trading dated 19 July 2015.

Fair Trading informed us it had reviewed its procedures and no longer recorded compliance unless documentary evidence was provided by the trader or verbal confirmation was obtained from the relevant consumers.¹³

It would appear from the circumstances of this case that Fair Trading still does not require traders to provide documentary evidence of compliance with a tribunal order. This is based on pro forma letters sent to the builder as director of the company when he failed to notify Fair Trading that tribunal orders had been paid. The letters ask for a 'short note' confirming the order has been complied with. It also requests 'copies of cheques, bank statements, receipts or other supporting evidence'.

While it may be difficult for traders to demonstrate that a work order has been complied with (especially where there are facts in dispute), it should be relatively easy for traders to provide documentary evidence to Fair Trading that a money order has been paid. Fair Trading could routinely require documentary evidence that such orders have been complied with. As discussed above, in the builder's case, a copy of an email was relied on to deem that tribunal order one had been complied with. The customer later went back to the tribunal and further orders were made, indicating that the works part of the tribunal order was not complied with.

The Fair Trading procedure states an unpaid money order will be published on the register as soon as it becomes due. While this is consistent with s 48U of the Act, it is somewhat inconsistent with Fair Trading's 1 March 2016 response to our direct question, which seems to suggest that a non-compliance with a money order is only recorded on the register once the licence is suspended. Information received from Fair Trading on 25 August 2017 indicates that there is inconsistency in the practice, as non-compliance with order one was recorded publicly on the register the day following the comply by date, but non-compliance with orders two and three were not recorded on the register until 575 and 538 days had passed, respectively.

In light of Fair Trading's explanation about its process for publishing information about outstanding tribunal orders and the circumstances of this case, it appears that outstanding money orders are not always published on the register as soon as they become overdue.

As identified above, we have been unable to confirm when non-compliance relating to the company has been recorded on the register because the register does not retain historical information about non-compliance. This is Fair Trading's practice due to s 48T(3) of the Act, which states:

- (3) If the Secretary is satisfied that an order has been complied with, the Secretary must ensure that the register kept under section 120 does not record non-compliance with the order.

However, if a money order is not paid by the due date on the tribunal order, the order has not been complied with, even where the trader eventually pays the money order.

It is in the public interest for historical information about non-compliance with money orders to remain on the public register even where the order is eventually paid. It is an important premise of the regulatory scheme that traders comply with tribunal orders by the due date. Failure to do so is relevant to the trader's fitness and propriety to hold a licence under the scheme and is important information for consumers to consider when choosing a trader. Adopting this practice would not be unfair to traders, as the secretary has discretion to remove any particular from the register where it is found to be unfairly prejudicial.¹⁴ Such decisions should be made on a case-by-case basis.

Fair Trading only records non-compliance with money orders made by the tribunal, not work orders. Any instance of non-compliance with a tribunal order to do work or to pay money is required to be included on the public register under cl 69(2)(o) of the Regulation. There would be practical difficulties

13. Ombudsman investigation report 2006 (anonymised version for parliamentary inquiry), p.36.

14. Home Building Act s 120(4).

with recording non-compliances with work orders on the register, as it is foreseeable that parties would regularly disagree about whether or not a work order has been complied with. It would not be fair to the builder to record that a work order has not been complied with when the consumer has prevented the builder from carrying out the work. However, it does not appear that Fair Trading's procedure is consistent with the intent of the legislation, which clearly states that all non-compliance should be recorded on the register.

Clause 69(2)(o) broadly prescribes that 'any instance of non-compliance with a tribunal order to do work or to pay money must be recorded on the register'. For the reasons outlined above, it appears that Fair Trading is not complying with this mandatory requirement.

Further, cl 69(3)(j) of the Regulation requires any instance of non-compliance with a tribunal order to be recorded on the public register against the relevant supervisor certificate. This requirement is also not specified in the relevant procedures and it does not appear to be the current practice of Fair Trading to publish non-compliances with tribunal orders on the relevant supervisor certificate record.

3.1.3. Recording insurance claims on the public register

The complainant also complained that there is a delay updating the public register to show that an insurance claim has been paid in relation to a claim made against a builder. Clause 69(2)(m) of the Regulation requires the register to include 'the number of insurance claims paid in respect of work done by the holder' (of a contractor licence).

In our 2006 investigation we found there were unreasonable delays in updating the public register in relation to insurance claims (as well as non-compliances with tribunal orders). We recommended Fair Trading introduce performance standards to improve the timeliness of such updates to the register.

Currently, the register shows there have been ten insurance claims paid in relation to the company's contractor licence. However, during the course of the investigation, we were routinely checking information on the register against information we had received from icare, and it was apparent that the information on the public register was not contemporaneous. We asked Fair Trading for information about how it counts the number of claims for the public register, specifically in relation to multi-unit developments. Fair Trading has confirmed that the number of insurance claims paid on the public register is the number of claims for which an insurer has accepted liability, and insurers report multi-unit dwellings as a single claim.

When we visited Fair Trading's offices, we asked staff about the procedure for updating such claims information on the register. We were advised that information about insurance claims is sent from icare to Fair Trading on a quarterly basis and the data is entered into the GLS. This was confirmed by icare. If the public register is automatically updated once the data is entered into GLS, this could mean a potential three-month delay from when an insurance claim is paid to when it appears on the public register.

On 17 November 2016 icare advised that there were four claimants with closed claims in relation to the company's licence. On 3 April 2017 we received updated information from Fair Trading, which showed that there were eight claims at that time. The most recent information on the public register (February 2018) has ten insurance claims paid listed.

Without knowing more about how Fair Trading inputs information onto the register, it is difficult to determine exactly how long the delay has been for each of these claims to appear on the register. It would appear, however, that in some cases the delay has been longer than three months.

Even if the GLS and by extension the public register is routinely updated as soon as the reports from icare are received, a three-month delay between payment of an insurance claim and the claim appearing on the register is unsatisfactory. Information is provided by icare quarterly because it receives information from insurers quarterly; this process could be improved.

Discussion

Clause 69(2)(m) requires Fair Trading to publish information about the number of claims paid in respect to a contractor licence. This suggests the information should be updated once each claim is paid. Publishing up-to-date claims information is clearly important for consumers to be able to make informed decisions. It is also vital for Fair Trading officers to have access to up-to-date information about insurance claims on the GLS, as this information is necessary to assess licence applications and renewals and make decisions about compliance actions. It is acknowledged that publication of more up-to-date information may require changes to the information sharing between insurers, icare, and Fair Trading.

3.1.4. Recording disciplinary and compliance actions on the public register

Clause 69(2)(k) of the Regulation requires the Secretary to publish on the register 'the results of any relevant determination under Part 4 of the Act (other than any determination that no further action be taken)' in respect to a contractor licence. Disciplinary actions open to the Secretary under Part 4 include a range of options from cautions and penalty notices to licence suspensions and disqualifications.¹⁵

Additionally, clauses 69(2)(n) and (q) of the Regulation require details of any penalty notices and formal cautions issued to the holder of a contractor licence to be recorded on the register. This seems to be in addition to those penalty notices and cautions issued as a result of disciplinary proceedings under Part 4 of the Act.

Clause 69(3) contains identical requirements with respect to supervisor certificates.¹⁶

Fair Trading's Compliance and Enforcement Policy explains why it is important to publish details of enforcement actions:¹⁷

A major reason why we undertake targeted compliance and enforcement action is to achieve outcomes that act as a deterrent to other businesses not to engage in unacceptable behaviour. Publicising the outcomes of our compliance and enforcement actions can achieve a positive deterrent effect.

Once a disciplinary or other compliance action is recorded on GLS against the licence record, it should automatically appear on the public register. In response to a request for a copy of the relevant procedure for updating information on the public register, Fair Trading advised:¹⁸

There is no written procedure for the upkeep of information on the public register as it is embedded throughout the process of what is updated in the OneGov licensing database... staff follow the appropriate data entry process that updates the record in the OneGov licensing database and by extension the public register.

While penalty notices appear to be routinely recorded on the register, it is unclear whether Fair Trading is in the practice of publishing all cautions or reprimands on the public register. It appears that where the tribunal has downgraded disciplinary action from a penalty notice or licence suspension to a caution under Part 4 of the Act, this action is recorded on the public register, as required by clauses 69(2)(k) and 69(3)(f) of the Regulation. However, it does not appear that other cautions (ie cautions issued on grounds other than Part 4 of the Act) are recorded on the register, as required under clauses 69(2)(p) and 69(3)(l).

15. *Home Building Act 1989* s 62.

16. Home Building Regulation 2014 Clauses 69(3)(f), (i) and (l).

17. Compliance and Enforcement Policy, July 2013, Part 3.2.

18. Letter from Commissioner Rod Stowe to NSW Ombudsman, 26 February 2016 p.6.

In the course of our inquiries we spoke with a number of former customers of the company who expressed frustration that the company had breached rectification orders issued by Fair Trading with no record of the breach on the register.

Staff of Fair Trading advised that since the January 2015 reforms, non-compliance with rectification orders is now recorded on the public register because penalty notices can be issued for failure to comply with a rectification order (this change of law is discussed in greater detail in Part 4.2.2). As penalty notices are recorded on the register, if a contractor fails to comply with a rectification order and a penalty notice is issued, a record of the offence will appear permanently on the register.

Staff also advised that for first offences Fair Trading will usually issue an education letter rather than a penalty notice, to ensure a builder has had adequate warning before more punitive action is taken. This practice was evident from the complaint records viewed and is consistent with Fair Trading's policy¹⁹ and the Ombudsman's enforcement guidelines. This means that, under Fair Trading's current practice, non-compliance with a rectification order may not always result in a record being made on the public register.

It is accepted that education letters should not constitute a formal caution and it would not be appropriate to record them as disciplinary action on the public register.

Discussion

Fair Trading needs to have adequate systems in place to ensure that all cautions, penalty notices, and disciplinary actions are recorded on the register promptly and routinely. As well as being a mandatory requirement under the Regulation, it is essential this information is publicly available for consumer protection purposes and as a deterrent to unscrupulous contractors and tradespeople.

Where Fair Trading has substantiated a complaint and taken some form of compliance action as a result, a record should be made on the register to provide assurance to the consumer that Fair Trading has acted on their complaint and the contractor or tradesperson has been held to account for their conduct.

3.2. Complaint handling, compliance and disciplinary processes

These functions of the HBS are carried out by the Mediation and Compliance Division. The Home Building Procedures Manual explains the structure of the division.

There are two branches within the Mediation and Compliance Division. Each branch manages a field of core compliance activities for which HBS is responsible, as follows:

1) Dispute Resolution and Inspection Branch (DRIB)

The role of DRIB Building Inspectors is to: inspect residential building sites, identify breaches under the Act and related fair trading legislation; and mediate disputes between consumers and traders. DRIB also provides advice and training on technical building issues to field staff, other government agencies and industry.

2) Home Building Investigation Branch (BIB)

The role of BIB investigation teams is to investigate and remedy breaches of the Act. BIB also supports and facilitates HBS prosecution and civil litigation functions. Within the BIB is the Regulatory Analysis and Assessment Unit (RAAU).²⁰

19. Compliance and Enforcement Policy, July 2013, Part 1.2.

20. The RAAU is also referred to by its previous name, the Regulatory Analysis and Assessment Branch (RAAB) in Fair Trading's policies and other documents provided to this office.

The role of the Regulatory Analysis and Assessment Unit (RAAU) is to collect and analyse strategic and tactical intelligence for regulatory compliance action: identify systemic industry compliance problems: and develop operational compliance policies, priorities and systems for the Mediation Service and Compliance Division, as well as posts disciplinary results and outstanding Consumer, Trader and Tenancy Tribunal orders on the public register. RAAU also co-ordinates assessment processes for all investigative activities within HBS.²¹

When a matter is assessed as suitable for disciplinary action, it is forwarded to the Compliance Administration Unit (CAU) to manage the disciplinary proceedings. The delegated decision maker for disciplinary decisions is the Director, Mediation Services and Compliance.

The complaint to the Ombudsman raised concerns about Fair Trading's complaint assessment process and the threshold for referral of complaints from the DRIB for disciplinary action. The complainant alleged it was inappropriate for Fair Trading to attempt to resolve his dispute with the builder through the dispute resolution process in light of the complaints Fair Trading had previously received about the company and the builder's demonstrated non-compliance with rectification orders.

Since we received the complaint, Fair Trading has carried out a disciplinary investigation into the builder and resolved to cancel his supervisor certificate and disqualify him from the industry for a one-year period. Subsequently, the company has gone into public administration, and the builder's licence has been disqualified.

We have considered Fair Trading's complaint handling, compliance and disciplinary processes in relation to this matter. Additionally, we have considered possible systemic issues, such as Fair Trading's ability to enforce compliance with rectification orders and the effectiveness of Fair Trading's compliance model for protecting consumers.

In the course of our preliminary enquiries we obtained copies of the building inspection reports for the complainant's property and the Central Coast property, which were prepared by Fair Trading for the purpose of disciplinary proceedings against the builder, and the disciplinary outcome letter posted to him on 15 July 2016. During our visit to Fair Trading we viewed complaint records for the company on Fair Trading's Customer Assistance System (CAS) and spoke with staff from the DRIB and the CAU. We have also viewed relevant policy documents published on the DFSI website.

3.2.1. Complaint records

Fair Trading's Home Building Dispute Resolution Procedures are available online via DFSI's website. Part 7.1.3 of the procedures sets out the process for complaints:

On receipt of a complaint, a Building Inspector will, in most instances visit the site where the work has been done.

Following inspection and mediation, the Inspector completes a "Complaint Inspection Advice" which is an agreement between the parties as to what work is to be done to resolve the complaint and the agreed time frame to complete this work.

The consumer is instructed to contact the Inspector in the event the work is not completed as per the CIA.

The Inspector will then consider whether a Rectification Order is required.²²

We were told by staff that building inspectors no longer issue CIAs.

21. Home Building Procedures Manual, last updated December 2013, p.6.

22. Home Building Dispute Resolution Procedures, 18 November 2014, p.14.

On 12 August 2016 we visited Fair Trading's Parramatta Office to review complaint records for the company. We were advised the CAS is the database for home building complaints and is accessed by all areas within HBS. We understand the CAS is also used for recording enquiries, including calls received by the contact centre.

We viewed all CAS records for complaints about the company received by Fair Trading prior to the complainant's contact with Fair Trading. We viewed only the complaint information available electronically on the CAS as well as some electronic documents stored in TRIM which were attached to the CAS record. We viewed 13 records, including complaints from eight complainants and two own motion complaints initiated by Fair Trading. Appendix B summarises the complaints, based on information obtained during our review of the CAS records and other information received from Fair Trading in the course of our inquiries. Where there has been a successful insurance claim relating to the same property, we have provided the HBCF policy number for cross referencing.

Fair Trading also pointed to its relatively new complaints register,²³ which provides information to the public about businesses that are the subject of 10 or more complaints received by Fair Trading in one calendar month. Although there are a small number of construction groups listed on the complaints register to date, it is unclear whether this complaints register will prove useful as a source of information for people engaging with small businesses such as the company involved in this case, as such small businesses are unlikely to have the volume of consumers to generate 10 or more complaints per month.

Discussion

Acknowledging that our staff are not trained in using the CAS, it was difficult to access useful information about the complaints through the database. It was necessary to read through detailed file notes to gain an understanding of whether a complaint was serious, whether the allegations were substantiated and the outcome of the complaint.

Most of the files viewed listed the outcome as 'resolved', even where a rectification order was issued that was not complied with, or where disciplinary action was taken. The dispute resolution procedures list the possible complaint outcomes as: complaint resolved; referral for building inspection; referral to Consumer Trader and Tenancy Tribunal (now the Consumer and Commercial Division of NCAT); referral to HoBAS (the Home Building Advocacy Service Program); or breach reporting.

For one of the complaints, we also obtained a printed CAS report which included an 'Outcomes and Penalties' section. We asked Fair Trading to clarify this section, and it explained that this screen is accessible by all staff of the 'Building & Construction Service' unit, and allows for each of DRIB, BIB, and RAAB to record their outcomes. Outcomes for internal review, ADT (Administrative Decisions Tribunal – now the Administrative and Equal Opportunity Division of NCAT), and court prosecution are also able to be recorded on this screen. It is unclear how these outcomes relate to the complaint outcome which appears on the front screen of the CAS record for most of the complaints we viewed.

We understand that complaint information on CAS is accessed by all areas of the Home Building Service, and is referred to for assessing licence applications, triaging new complaints and making decisions about appropriate compliance or disciplinary action. For Fair Trading to properly perform its regulatory functions it is crucial that HBS staff have ready access to intelligence obtained through complaints. For this purpose, it is important for outcomes of complaints to be clearly visible on the complaints database. This should include information about whether a complaint was substantiated, the level of seriousness, and any rectification orders, warnings, or penalty notices issued or disciplinary action taken.

23. http://www.fairtrading.nsw.gov.au/biz_res/ftweb/Public_Register/FT_Public_Register.htm.

We received information from Fair Trading in August 2017 that a new CAS system was being scoped with the intention to provide increased functionality for all units within Fair Trading. In February 2018 Fair Trading further advised the new system would be implemented within two years. Fair Trading has agreed to provide regular updates on this issue as part of the investigation reporting requirement.

The complaint records for the company show a pattern of behaviour by the builder of defects, delays and financial problems. The builder also clearly demonstrated a failure to cooperate with Fair Trading, including not adhering to mediated agreements, non-compliance with rectification orders and refusing to accept service of notices posted to his business address. Despite repeated conduct throughout 2011 and 2012 that suggested the builder would not cooperate with the dispute resolution process, Fair Trading continued to try to mediate complaints and attempted to change his behaviour through soft compliance measures, such as education letters. Over this period, complaints were escalated to senior officers for compliance assessment on a number of occasions, and on two occasions in 2012 and 2013 Fair Trading issued education letters to the builder for failure to comply with rectification orders. While an initial education letter may have been consistent with Fair Trading's escalation enforcement model, in circumstances where the builder had already demonstrated he was not willing or likely to cooperate with Fair Trading, this compliance response appears generous.

The complainant argues that DRIB officers attempted to mediate his dispute for too long. He believes that in light of what Fair Trading knew or should have known about the builder from previous complaints, firmer compliance or disciplinary action should have been taken at an earlier stage.

The HBS approach to compliance is discussed in greater detail in Part 4.2.3. It would be problematic to attempt to reassess the response to complaints in hindsight, and we have not reviewed the complaint files in sufficient detail. However, publishing clearer information on CAS about the outcome and seriousness of previous complaints could have improved Fair Trading's decision making regarding the assessment of new complaints and what level of compliance action was warranted in the circumstances. The circumstances of this case highlight the need for Fair Trading to strengthen its intelligence analysis capacity in relation to complaints about licence holders.

3.2.2. Enforcing compliance with rectification orders

As discussed above at Part 4.1.4, many of the company's customers who contacted us expressed frustration at the lack of consequences for the builder when his company failed to comply with rectification orders.

Previously when a builder did not comply with a rectification order we understand it was up to the consumer to take the matter to the tribunal to have the rectification order enforced. The DRIB had limited options for enforcing the order, and would need to refer the matter for disciplinary investigation. The Home Building Dispute Resolution Procedures state:²⁴

Should the contractor fail to carry out work specified in the Rectification Order, the consumer may pursue the matter through the CTTT. The contractor's failure to comply with a Rectification Order by the due date will be investigated to determine whether disciplinary action is warranted. Rectification Orders not complied with are recorded (for internal use only) on the home building licensing database. These details are not available on the Public Register.

The Home Building Procedures Manual elaborates on when disciplinary action will be considered: 'in order to make the most cost effective use of HBS resources only the most serious matters ... should be referred for disciplinary action'.²⁵ As non-compliance with a rectification order may not be considered

24. Home Building Dispute Resolution Procedures, last updated November 2014 p.14.

25. Home Building Procedures Manual (last updated Dec 2013) p.24.

serious enough to meet the threshold for disciplinary action, it is concerning that a trader's failure to comply will rarely result in regulatory consequences for them, making rectification orders effectively unenforceable except by the consumer taking action in the tribunal.

We understand the amendments to the Act which came into effect in January 2015 have made it easier for Fair Trading to enforce compliance with rectification orders since the time of the events under investigation. It is now a condition of a contractor licence that the holder complies with the requirements of a rectification order (s 48E(5)). Under s 36(2) of the Act it is an offence to contravene the conditions of a licence and the Regulation prescribes it to be a penalty notice offence.

As all penalty notices must be recorded on the public register, where a penalty notice is issued, a non-compliance with a rectification order should also result in a record of the transgression on the register. The risk of incurring a fine as well as a blemished public record will hopefully provide an added incentive for traders to comply with rectification orders.

It is unclear to what extent Fair Trading takes enforcement action in response to non-compliance with rectification orders. In its written response to our request for statistics about what percentage of non-compliances are referred for disciplinary action, Fair Trading advised:²⁶

While there is no percentage, I can confirm that there are a number of options available to Fair Trading when considering action against a trader for non-compliance with a Rectification Order. Options include a warning, fine or disciplinary action...

Although staff informed us it is now easier to act on non-compliance with a rectification order, it is unclear whether there has been any increase in penalty notices issued as a result of the changes. Information on Fair Trading's website about enforcement actions does not suggest any significant increase in the number of penalty notices issued under the Act since January 2015. The quarterly compliance and enforcement results published on Fair Trading's website for 2015-2016 show penalty notices were issued in relation to 449 offences, which is roughly consistent with penalty notice statistics published in earlier annual reports.²⁷ In response to our request for further information about penalty notices issued in relation to non-compliance with rectification orders particularly since January 2015, Fair Trading informed our office that there had been a total of 514 education letters, 30 penalty notices, and 94 referrals for disciplinary action for non-compliance with rectification orders since this time. Fair Trading is unable to provide a figure of total number of reports of non-compliance in this time, as data about total number of reports of non-compliance has only been recorded since April 2016.

It is understandable that HBS takes compliance action on an escalating scale, and will usually aim to resolve issues through education or warning letters before progressing to stronger compliance measures. However, it is concerning that the policy of issuing education letters for first offences may be applied inflexibly, regardless of the seriousness of the defect or the conduct of the trader during the dispute resolution process.

In the complaint files we reviewed, Fair Trading issued education letters to the company for its first and second non-compliances. These warnings were issued despite the fact the builder had not complied with the advice in a number of post complaint inspection letters, which appeared to do little to deter the builder from repeat behaviour. Fair Trading did not refer the builder for disciplinary action until the third non-compliance. We note the rectification order issued in relation to the complainant's property was found to have been incorrectly issued on assessment. This meant no action was taken to address this particular non-compliance, although the broader problems with the building work were eventually referred for disciplinary action.

26. Letter from Commissioner Rod Stowe to NSW Ombudsman, 26 February 2016 p.2.

27. http://www.fairtrading.nsw.gov.au/ftw/About_us/Data_and_statistics.page.

It is essential for the functioning of the regulatory scheme that Fair Trading monitors compliance with rectification orders and takes a systematic approach to enforcing them. Stricter penalties for non-compliance with rectification orders would ensure such orders are taken seriously and given appropriate weight by traders.

In making the above statement, it is important to note that rectification orders are issued under the Act when a building inspector has investigated and found incomplete or defective work. Section 48E states:

48E Inspector may make rectification order

- (1) If, after completing an investigation under section 48D, an inspector is satisfied:
- (a) that any residential building work or specialist work contracted to be done by the contractor is incomplete, or
 - (b) that any residential building work or specialist work done by the contractor is defective, or
 - (c) that the contractor, in the course of doing any residential building work or specialist work, has caused damage to any structure or work, or
 - (d) that, as a consequence of any defective residential building work or specialist work done by the contractor, a structure or work has been damaged,

the inspector may serve a written order on the contractor requiring the contractor to take such steps as are specified in the order to ensure that the work is completed or the defect or damage rectified, as the case requires.

In the complaint files we viewed, it appeared to be the practice of DRIB inspectors to issue a rectification order only where the matter could not be resolved informally. When a rectification order is issued, the trader is given an opportunity to remedy the defect without further consequences. If the trader believes the order was incorrectly issued, or requires an extension to comply, they also have an opportunity to make representations to Fair Trading at this point (although the Act does not provide a formal appeal avenue against rectification orders).

While the decision to take enforcement action should be made on a case by case basis, where the rectification order relates to a significant defect or the trader has not cooperated during the dispute resolution process, it is appropriate for Fair Trading to issue a penalty notice for a first offence.

3.2.3. HBS approach to compliance

Part 4 of the Act sets out Fair Trading's process for disciplinary proceedings and s 62 lists the range of disciplinary actions available to Fair Trading where grounds for disciplinary action have been made out. These include:

62 Disciplinary action that may be taken by Secretary

If, after compliance with this Division, the Secretary is satisfied that any ground on which disciplinary action may be taken against the holder of an authority has been established in relation to the holder, the Secretary may do any one or more of the following:

- (a) determine to take no further action against the holder,
- (b) caution or reprimand the holder,
- (c) make a determination requiring the holder to pay to the Secretary, as a penalty, an amount not exceeding \$11,000 (in the case of an individual) or \$50,000 (in the case of a corporation) within a specified time,
- (d) vary the authority held by the holder, by imposing a condition on the authority, including a condition requiring the holder to undertake a course of training relating to a particular type of work or business practice within a specified time,
- (e) suspend the authority for a period not exceeding its unexpired term,

- (f) cancel the authority,
- (g) disqualify the holder, either temporarily or permanently, from being any one or more of the following:
 - (i) the holder of any authority, or any specified kind of authority,
 - (ii) a member of a partnership, or an officer of a corporation that is a member of a partnership, that is the holder of an authority,
 - (iii) an officer of a corporation that is the holder of an authority.

We understand the HBS compliance role to be much broader than taking disciplinary action under Part 4. The Act and the Regulation provide a range of other compliance measures, including rectification orders, cautions and penalty notice offences. Fair Trading's Compliance and Enforcement Policy also includes a bottom tier of enforcement remedies described as 'Level 5: Guidance and advice on self-regulation, Trader education'.²⁸

We understand the Compliance and Enforcement Policy applies across all of Fair Trading's functions. In relation to Fair Trading's broader approach to compliance and enforcement, the policy states:²⁹

To make the best use of our resources, and to maximise the public benefit, our compliance activities take account of the level of risk and consequence of matters and the specific circumstances of each case. Our responses are based on intelligence-led initiatives that inform marketplace practices.

The Home Building Procedures Manual explains HBS's approach to compliance. It states:³⁰

The goals of HBS are consistent with the Policy of the Office of Fair Trading to

- stop offending conduct;
- change the behaviour of offending traders to ensure future compliance with Home Building and Fair Trading legislation and principles;
- deter those who do not comply with Home Building and Fair Trading legislation and principles;
- Advise people what avenues are available to them to seek redress from offenders eg the Consumer Trader & Tenancy Tribunal.

...

Factors considered in selecting and assessing matters for investigation include:

- the type of matter, in particular whether it comes within an identified compliance priority program;
- likelihood of success;
- previous trader conduct;
- amount or type of damage that can result from the alleged misconduct, including health and safety matters;
- number of people affected by alleged misconduct;
- whether redress has been provided by other means eg CTTT or corrective action undertaken;
- effects of the alleged misconduct on disadvantaged persons;
- public interest;
- effect on trader and/or building industry behaviour;
- whether an investigation would significantly contribute to HBS compliance objectives;
- current workload and availability of resources.

28. Compliance and Enforcement Policy, July 2013, Part 1.2.

29. As above.

30. Home Building Procedures Manual, last updated Dec 2013 p.7.

We were advised by staff that Fair Trading will take compliance and disciplinary action against traders on an escalation scale, where education letters and warnings are issued before progressing to penalty notices and disciplinary action. For disciplinary outcomes we were told that Fair Trading would usually not consider suspending a trader's licence unless the trader has previously been the subject of disciplinary proceedings where a financial penalty has been imposed and this has not changed the trader's conduct. Similarly, Fair Trading would impose a short term suspension before progressing to a longer term suspension. Staff expressed the view that it was necessary to take 'softer' compliance measures before progressing to stronger measures to allow the builder an opportunity to change their conduct.

Staff also appeared mindful that disciplinary actions such as licence suspensions and cancellations would affect a trader's ability to earn a living and should only be imposed as a last resort. This attitude appears consistent with the Home Building Procedures Manual which states:³¹

HBS acknowledges that most businesses seek to operate within the law and maintain appropriate standards of conduct and service to their customers. HBS therefore recognises it should not unnecessarily interfere with business activities and where appropriate issue trader education or warning letters for technical oversights or minor breaches of legislation. In undertaking its compliance program, HBS also recognises that consistent enforcement action can assist in modifying conduct that is contrary to the Home Building and Fair Trading Acts and should stop individuals from repeating breaches of the legislation.

During our meeting on 25 November 2015, the Assistant Commissioner emphasised it is necessary for Fair Trading to maintain a high threshold for commencing disciplinary proceedings due to resource constraints. Similarly, the Home Building Procedures Manual states:³²

In order to make the most cost effective use of HBS resources only the most serious matter where it is considered that the trader because of their conduct and history or non-compliance should be referred for disciplinary action.

The Assistant Commissioner and staff also told us that Fair Trading's disciplinary decisions are often overturned or downgraded by the tribunal on appeal.

Relevant case law

From our research of trader appeals against disciplinary decisions made under s 62 of the Act, there appear to be a number of cases where the tribunal has overturned or 'downgraded' disciplinary actions. We do not know what proportion of Fair Trading's disciplinary actions these cases represent.

The overarching principle applied by the tribunal is from *Clyne v NSW Bar Association*, which states: 'The purpose of disciplinary action is not to punish but to protect the public'³³ In determining the appropriateness of the disciplinary action in question, the tribunal emphasises the need for proportionality and applies the considerations set out in *Fair Trading v Cohen*.³⁴ These considerations are:

- a) the nature, width and extent of the contraventions
- b) the loss or damage and prejudice in consequence of the contraventions
- c) the circumstances in which the contraventions took place
- d) whether the licensee has been to have engaged in any similar conduct

31. Home Building Procedures Manual, last updated Dec 2013 p.7.

32. Home Building Procedures Manual last updated Dec 2013 p.24.

33. *Clyne v New South Wales Bar Association (1960) 104 CLR 186*.

34. *Director General, Department of Fair Trading v Cohen [2000] NSWFTT 3*.

- e) the presence of fraudulent or dishonest intent and deliberation on the part of the licensee
- f) the extent of carelessness or wilfulness of the conduct
- g) the efforts made to correct the situation and what measure have been taken by the licensee
- h) what consciousness the licensee (a) had (b) displayed, of its obligations under the relevant statute and to the owners
- i) the effect upon the licensee
- j) antecedents
- k) attitude, building history and future compliance
- l) the penalty range.

The *Cohen* ‘proportionality test’ has been applied in many subsequent cases. The tribunal added two further considerations from relevant case law in *Ng v Fair Trading*.³⁵

- any gain made as a result of the contraventions
- the degree of cooperation with the authorities.

Where the tribunal overturns or downgrades a disciplinary decision by Fair Trading, this is usually because, after applying the *Cohen* test, the tribunal takes the view that the disciplinary outcome imposed by Fair Trading is disproportionate.

In *Pilipczyk v Fair Trading*³⁶ the tribunal substituted Fair Trading’s decision to impose a six month disqualification with a caution on the basis that there was no history of disciplinary proceedings or complaints against the builder. There was also conflicting expert evidence about whether the defects could be repaired.

In the case of *Kalantzis v Fair Trading*, the tribunal commented that while there were five previous complaints about the trader, no action had been taken in relation to the complaints and Fair Trading had not supplied details to allow the member to assess the relevance or gravity of the prior conduct.³⁷

In *Harb v Fair Trading*,³⁸ two three-year suspensions were commuted to cautions even though Fair Trading had previously taken serious disciplinary action against the traders, because the improper conduct in the previous case did not pre-date the conduct the subject of the current proceedings. It was also relevant that the traders had demonstrated they were willing and able to repair the defects if allowed access.

The trader’s ability and willingness to rectify the defects was also a relevant factor in *Ng v Fair Trading* and *Kalantzis v Fair Trading*, where the tribunal downgraded monetary penalties to cautions.³⁹ In *Kalantzis* the tribunal also agreed with the applicant that the defects the basis of the disciplinary proceedings were minor.

35. *Ng & Anor v Commissioner for Fair Trading, Office of Fair Trading and anor* [2007] NSWADT 259 at 72.

36. *Pilipczck & Anor v Commissioner for Fair Trading, NSW Office of Fair Trading* [2007] NSWADT 85.

37. *Kalantzis v Commissioner for Fair Trading, NSW Office of Fair Trading* [2008] NSWADT 236 at 36.

38. *Harb v Commissioner for Fair Trading, Office of Fair Trading* [2005] NSWADT 171.

39. *Ng v Commissioner for Fair Trading, Office of Fair Trading and anor* [2007] NSWADT 259; *Kalantzis v Commissioner for Fair Trading, NSW Office of Fair Trading* [2008] NSWADT 236.

In *Pilipczyk v Fair Trading*, the tribunal expanded upon the Clyne principle to provide further clarification of the way in which disciplinary action should protect the public. In that case the tribunal commented that the concept of public protection should be interpreted broadly.⁴⁰

The Tribunal must therefore consider the second issue, whether disciplinary action should be taken and, if so, what form that should take. In doing so, it should be noted that the object of sanctions under the legislation is to protect the consumers of home building services and not to punish. However, as the Commercial Tribunal acknowledged in *McIlveen*, at p 29 **“[t]he concept of public protection is wide; it embraces fitness, the maintenance of public standards, public confidence and deterrence both of the particular builder and others in the same occupation.”** [Emphasis added]

3.2.4. Disciplinary proceedings against the builder

On 29 February 2016, in response to our preliminary enquiry letter, Fair Trading advised:

As a result of [the complainant’s] complaint, his site and another site at [the Central Coast] were inspected by Fair Trading in November 2015 for the purpose of determining if sufficient evidence of defective and/or incomplete work exists to warrant disciplinary action. The subsequent reports are due to be completed in the near future, at which time a decision will be made about commencing disciplinary action.

The building inspection reports for the complainant’s property and another property on the Central Coast were completed in March 2016 by a BIB Building Inspector, and a Notice to Show Cause was issued to the builder in May 2016 in accordance with s 61 of the Act. No submissions were received from the builder. In July 2016, the Acting Director, Mediation Services and Compliance, wrote to the builder to advise him of her decision to cancel his supervisor certificate and disqualify him from the industry for a period of 12 months. We have reviewed both building inspection reports and the disciplinary outcome letter.

It is unclear on what basis Fair Trading decided to refer the complainant’s complaint for disciplinary investigation. The CAS records suggest DRIB closed his complaints about defective work without referring any of the matters for disciplinary proceedings. It appears the decision to conduct a disciplinary investigation into the builder was made after the complainant escalated his concerns to the Commissioner.

We requested a copy of the briefing note for the decision to carry out a disciplinary investigation and received a file note, ‘RAAB Complaint Assessment’, dated 28 July 2015. The file note provides a summary of previous complaints about the company, including the complainant’s, but does not appear to recommend investigation or explain why the matter should be referred for disciplinary investigation. The recommended action states ‘for information’. The words ‘Priority Investigation (please refer to procedure for Priority Investigations)’ appear at the bottom of the assessment but it is unclear what this means. In any case, the Commissioner wrote to the complainant 29 September 2015, advising the matter was still being assessed.

The circumstances of this case suggest the matter was only referred for disciplinary investigation due to the persistence of the complainant and possibly the involvement of this office.

Overall, the building inspection reports identified 28 defects in the complainant’s Sydney property and 20 defects at the Central Coast site. Of these 48 defects, 18 are serious in nature, including structural problems, fire hazards, and causing water damage or health and safety concerns. While the majority of the defects identified were minor, it is noted that a number of them will be costly to repair. For example, misaligned bathroom tiles which would require removing and replacing all of the tiles.

40. *Pilipczck & Anor v Commissioner for Fair Trading*, NSW Office of Fair Trading [2007] NSWADT 85 at 91.

The Building Inspector made various findings that work completed by the company under the builder's supervision was not in accordance with the development consents, the Building Code of Australia and/or various Australian Standards, and was not completed with due care and skill.

On the basis of the building inspection reports, the Acting Director, Mediation Services and Compliance found the builder was guilty of improper conduct under ss 54(1) and 53(1)(b) on the grounds of breaching the statutory warranty in relation to both properties. She found the builder had breached the statutory warranty both as director of the company and nominated supervisor due to:

- failure to do work with due care and skill and in accordance with the plans and specifications set out in the contract; and
- failure to do work with due diligence and within the time stipulated in the contract.
- In light of the findings, the Acting Director decided to cancel the builder's supervisor certificate and disqualify him for 12 months from holding any authority under the Act, or being involved with any company or partnership that is the holder of a contractor licence. The disciplinary outcome letter to him states:

In the circumstances and considering the actions that may be taken against you under section 62 of the Act, I determine that you have conducted yourself in a manner that would warrant the taking of firm disciplinary action against you. I note that you have held your licence for [number of] years and according to Fair Trading's records you have been subject to previous disciplinary action [in February 2016] under section 56(c) of the Act for improper conduct. This disciplinary action required you to pay a monetary penalty of [amount]. I note that you have paid this amount [in July 2016]. Although this amount has been paid this was paid out of the provided timeframe for you to make payment and was only paid once your licence was suspended for non-payment

...

I am mindful of the fact that the primary aim of taking disciplinary action is to protect the public from holders of authorities who do not comply with provisions in the Act, not punish them. However, the purpose of requiring you as the nominated supervisor of [the company] to ensure that residential building work it does is performed with due care and skills is a matter that goes to the heart of protecting the public.

While the letter states the primary aim of disciplinary action is to protect the public, the decision to cancel the builder's supervisor certificate and disqualify him from the industry referred to the fact that it was his second disciplinary offence. In the circumstances it is unclear whether the same decision would have been made if it was a first offence, despite the seriousness of the findings.

The defective work on the two properties the subject of these disciplinary proceedings resulted in nearly \$1 million in insurance claims paid from the HBCF. This does not reflect the true financial cost to the homeowners because both claims were capped at the maximum amount.

The complainant provided us detailed information about the effect the event had on his family's life. He explained the level of stress he experienced when he first decided to terminate the contract with the company in April 2015. He said that he sought a high number of quotes from other builders in an attempt to rectify the defective work and complete the incomplete works. Most builders refused to provide a quote, stating the works were too significant for them to become involved. Others would only quote an hourly rate, as they could not estimate the time that would be required. In the end, in order to complete the house, the complainant felt he had no choice but to obtain his own owner builder permit.

Since obtaining the owner builder permit, the complainant has spent an estimated 30 hours per week working on the property, and works are still not complete. This is not including the estimated eight weeks of leave he has taken to work on the property. He disclosed impacts on his health and on his family relationships as a result of the time he has spent rectifying and completing works that were part of the contract with the builder.

In the case of the Central Coast property (a duplex) the owners also incurred loss of rent for the second property, which was not covered by the insurance policy.

Discussion

Undoubtedly it is a fine balance to ensure that disciplinary outcomes imposed by Fair Trading protect the public but do not unduly punish the trader. However, this does not mean that Fair Trading should only take compliance action where it feels (based on previous conduct) the individual trader is likely to reoffend. The need for public confidence in the regulatory system and deterrence of similar conduct within the building industry are also key considerations. While disciplinary outcomes should not unduly punish traders, to protect the public it is important that Fair Trading ensures there are consequences for traders who do the wrong thing, and that those consequences are visible to the public.

The proportionality test applied by the tribunal, in particular the weight given to prior conduct, reaffirms our view that Fair Trading must maintain a strong intelligence gathering capacity (ie complaint, compliance and disciplinary records) to better inform decisions and defend appeals. It also indicates the need for Fair Trading to take a risk-based approach to compliance and disciplinary proceedings, to meet the goal of protecting the public.

Improving the intelligence capacity of the complaints and disciplinary databases, including the ease of access to all staff will assist with this goal.

We have noted in Part 4.2.3 that it is unclear whether Fair Trading routinely publishes all cautions on the public register in accordance with clauses 69(2)(q) and 69(3)(l) of the Regulation. In the cases we viewed where the tribunal substituted Fair Trading's disciplinary outcome with a caution or reprimand, this does appear on the register in accordance with cl 69(2)(k) and is consistent with other disciplinary determinations under Part 4 of the Act.

In *Ng*, the tribunal explicitly stated that the purpose of the caution was to publicly censure the trader to serve the public interest, and commented the caution will appear on the public register (which, in this case, it did).⁴¹ This statement reaffirms the importance of Fair Trading routinely publishing all cautions and reprimands on the register, to ensure that these outcomes are visible to the public.

3.3. The home building licence assessment process

The complainant alleged that Fair Trading should not have approved the builder's application for a supervisor certificate in 2009, or the company's application for a contractor licence in 2010, due to the builder's history as a director of failed companies. In light of the large number of complaints received about the company as well as one of the builder's previous companies, the complainant further alleged the authorities should not have been renewed and queried Fair Trading's assessment that the builder was a fit and proper person to hold the authorities.

In our preliminary inquiries we requested copies of all policies and procedures to provide guidance to staff in assessing fitness and propriety. Fair Trading provided the procedures manual for the licensing branch of the Home Building Service (the Licensing Procedures Manual), which includes a section titled 'Fit and Proper' and 'Guidelines regarding fitness & propriety'; a draft working document about assessing fitness and propriety in relation to external administration and financial problems; a document titled 'Assessing an unreasonable number of complaints against an applicant'; and a flow chart titled 'A2 – assessing a new company or partnership application'.

⁴¹ *Ng & Anor v Commissioner for Fair Trading, Office of Fair Trading and anor* [2007] NSWADT 259.

Additionally, Fair Trading provided copies of the company contractor licence application file and the builder's supervisor certificate application file. We also viewed Fair Trading's licensing system and met with staff from the Home Building Service's licensing branch during our visit to Fair Trading on 12 August 2016.

In reviewing the available information, we have considered whether Fair Trading assessed the applications in accordance with the relevant policies and the requirements of the Act. In particular we have considered whether Fair Trading's assessment of the builder's fitness and propriety gave appropriate weight to the complaints Fair Trading had received about the company.

Relevant legislation, policy and practice

Contractor licences are issued under s 20 and supervisor certificates are issued under s 25 of the Act (collectively described in the Act as an 'authority'). The requirements of the Act applying to the issue of an authority apply also to the renewal or restoration of an authority.⁴²

The Act provides that Fair Trading must reject an application for an authority if it is not satisfied the applicant is a fit and proper person to hold the authority;⁴³ in deciding the issue Fair Trading must consider 'whether the applicant is of good repute, having regard to character, honesty and integrity'.⁴⁴ The regulations may specify additional requirements that must be met before the authority is issued.⁴⁵ At the relevant time, clauses 25 - 29 of the Home Building Regulation 2004 set out additional requirements.

The Licensing Procedures Manual was last updated in 2009 and includes a section titled 'Fit and Proper', which is based on cl 25 of the 2004 Regulation. The manual guides staff to look at the following factors to assess fitness and propriety:

- financial history
- unreasonable number of complaints, insurance claims and compliance actions
- unsatisfied tribunal orders, and
- criminal history.

Each of the files we viewed also contained an assessment template, titled Application Assessment Sheet. The template prompts the officer to take into consideration any previous complaints, breaches, penalty notices, insurance claims, outstanding tribunal notices, bankruptcy, involvement with a failed company and criminal history. If the assessing officer ticks 'yes' to any of these particulars and finds the records to be unacceptable they are prompted to make further inquiries and undertake a more detailed assessment.

It is unclear from the 2004 Regulation and the Licensing Procedures Manual what licence records should be viewed in consideration of these particulars, for example, whether the assessing officer should only consider those previous licences declared by the applicant or undertake their own search for licences where the applicant has had some involvement.

The legislative changes that came into effect in January 2015 introduced ss 33A - 33D to the Act, which set out particulars of which the Secretary must be satisfied before issuing an authority. These sections build upon the provisions previously contained in the Regulation and contain a number of requirements which are of particular relevance to this investigation.

42. *Home Building Act 1989* s60(1).

43. *Home Building Act 1989* s 20(1)(a) and 25(1)(a).

44. *Home Building Act 1989* ss 20(1A) and 25(1A).

45. *Home Building Act* ss 20(2) and 25(2).

Section 33B provides that Fair Trading must not issue a contractor licence or supervisor certificate unless it is satisfied the applicant:

- is not subject to a tribunal order which has not been complied with in the time specified (s 33B (1)(a)(vi))
- has not had an unreasonable number of complaints, or insurance claims made against them or a company they have been involved with (s 33B (1)(a)(vii))
- has not had an unreasonable number of formal cautions or penalty notices issued against them or a company they have been involved with (s33B (1)(a)(viii) - (ix))
- has not carried out work, or been involved in a company which has carried out work, in respect of which an unreasonable number of insurance claims have been paid (s33B (1)(a)(x))
- was not an undischarged bankrupt within 3 years of the date of the application (s33B (1)(a)(xiv))
- was not a director of a company that was under external administration at any time within 3 years of the date of the application (s33B (1)(a)(xvi)), and
- was not a director of a company that became externally-administered at any time within 12 months after the person ceased to be a director of the company and within 3 years of the date of the application (s 33B (1)(a)(xvii)).

The Act allows Fair Trading some discretion to issue contractor licences and supervisor certificates where it is satisfied the applicant took 'all reasonable steps' to avoid the bankruptcy or external administration.⁴⁶ For contractor licences, Fair Trading must also be satisfied there is no evident risk to the public with regard to the contractor completing contracts entered into.⁴⁷ Fair Trading has provided us with information that shows it is continuing to work on guidelines for its staff to assist them to assess fitness and propriety. Fair Trading said it anticipated these new guidelines would be available to staff by the middle of February 2018.

3.4. Assessment of the builder's financial history

At the time of the builder's applications for the contractor licence and the supervisor certificate, the Home Building Regulation 2004 contained the following provisions:

Clause 25

- (1) Before an authority (other than an owner-builder permit) is issued, the Director-General must be satisfied that:
 - (a) each relevant person in relation to the application for an authority:
 - ...
 - (xiii) except in relation to an application for a tradesperson certificate—within the period of 3 years before the date of the application, was not an undischarged bankrupt and was not a director of, or a person concerned in the management of, an externally-administered body corporate (within the meaning of the *Corporations Act 2001* of the Commonwealth) except in a case of a voluntary winding up of the body corporate, and

Clause 26

- (3) Despite clause 25 (1) (a) (xiii), the Director-General may issue a contractor licence if the Director-General is of the opinion that:

46. *Home Building Act 1989* s 33C(3)(b) and s 33D(2).

47. *Home Building Act 1989* s 33D(2).

- (a) there is no evident risk to the public that the applicant will be unable to complete building contracts entered into in the future for the doing of residential building work or specialist work of that kind, or both, and
- (b) the relevant person concerned took all reasonable steps to avoid the bankruptcy, liquidation or appointment of a controller or administrator.

Clause 28

- (2) Despite clause 25 (1) (a) (xii) and (xiii), the Director-General may issue a qualified supervisor certificate if the Director-General is satisfied that the relevant person took all reasonable steps to avoid the bankruptcy, winding up or appointment of a controller or administrator.

The builder applied for his supervisor certificate on 21 October 2009. He had been an undischarged bankrupt from 7 April 2006 to 8 April 2009, which was within three years of the application. He had also been director of company B discussed earlier, which was an externally administered body corporate from March 2006 until September 2007, although he ceased being director on July 2005 and was therefore not a director at the time the company went into administration.

In his application, the builder declared his bankruptcy and his directorship of a company that went into liquidation. He also attached details of his bankruptcy, including two trustee reports.

It is clear that the builder's circumstances fell within clause 25(1)(a)(xiii) of the Regulation. As such, Fair Trading needed to be satisfied the builder had taken 'all reasonable steps' to avoid the bankruptcy before issuing the supervisor certificate (cl 28(2)).

The Licensing Procedures Manual provides guidance for staff to assess whether an applicant meets this exemption. It states the following should be taken into consideration:

- When did the applicant become aware or should have reasonably become aware of the possible insolvency?
- What steps did the applicant take, or should have taken upon becoming aware?
- Were those steps reasonable in the circumstances?

The Manual also sets out how the assessing officer should record the details of the bankruptcy in their assessment, including the reasons for bankruptcy, amounts owed to creditors, the steps taken by the applicant to avoid bankruptcy and details from the accountant's report (ie the trustee's report).⁴⁸

In assessing the supervisor certificate application, it appears Fair Trading obtained ASIC records for the builder and his previous companies. Fair Trading then wrote to him on 16 November 2009 requesting, among other things, 'details of any circumstances that indicate whether all reasonable steps were taken by you to avoid the bankruptcy and liquidation of the company' (company B).

It does not appear from the file that the builder provided any further details in response to this request, as the information submitted and the further inquiries Fair Trading undertook were for the purpose of clarifying his qualifications.

Fair Trading approved the application on in December 2009. The handwritten notes on the application assessment sheet (dated 18 December 2009) state:

Details & explanations for bankruptcy & liquidation accepted, paperwork originally lodged*

* Paperwork provided shows bankruptcy was brought about by property developments which failed due to a number of reasons.

48. Licensing Procedures Manual pp.101-102.

This suggests the assessing officer decided to approve the builder's application on the basis of the information originally provided with the application, which included a report from the controlling trustee dated 13 March 2006, a report from the liquidator dated 20 October 2006, and a letter of reference from the builder's solicitors dated 22 September 2009.

The trustee reports make some unfavourable comments about the builder's conduct and character, including his spending habits, over-confidence and his propensity for risky investments. They also comment that the builder and his wife were cooperative in the process and provide details of a number of circumstances where the builder attempted to reach agreements with his creditors. The builder and his wife appointed a Controlling Trustee under s 188 of the *Bankruptcy Act 1966*, with a view to entering into a Personal Insolvency Agreement to avoid becoming bankrupt, but the proposal was rejected by the creditors.

The letter of reference provided by the builder's solicitor states:

The major reason for his bankruptcy was a failed property development. He was able to negotiate a position with most of his secured creditors but... despite efforts to come to some sort of arrangement with [one secured creditor] he was unable to do so.

...

[The builder] always strove, in our experience, to pay his creditors. However, it got to a stage in 2006 where his property development business had failed and he had no alternative, due to the intransigence of one particular creditor, other than to declare himself bankrupt.

Discussion

It is relevant in deciding the weight to be attached to the solicitor's letter that the solicitor was acting for the builder. By contrast, the trustee reports were prepared by independent accountants and appear to constitute more reliable evidence. The Licensing Procedures Manual does not provide clear guidance about what evidence should be relied upon for determining whether cl 28(2) applies, though the reference to the 'accountant's report' suggests that the decision should be based upon the trustee reports.

It is not apparent from the application assessment sheet included on the builder's file how the assessing officer reached their conclusion that he had taken all reasonable steps to avoid insolvency. No details were recorded about the steps he had taken to avoid bankruptcy, as stipulated in the Licensing Procedures Manual. Although the file included the 2006 report from the controlling trustee, the 2006 report from the liquidator, and the 2009 solicitor's letter as mentioned above, it is unclear how this evidence was used and weighted by the assessing officer to make the decision to approve the authority. The assessment sheet does not demonstrate that the decision was based on all relevant considerations or that the legislation was applied correctly. Such lack of transparency makes it impossible to conclude that a sound decision-making process was followed.

An application for the company's contractor licence was made on 5 February 2010, nominating the builder as qualified supervisor. At the time of the company's application, another person was director of the company. As the builder was not the director, his history of bankruptcy and company liquidation was not relevant to the company's contractor licence application.

3.4.1. 2011 failure to notify change of director

The builder became director of the company on 1 August 2011. The company was required under cl 34 of the Home Building Regulation 2004 (now repealed) to notify Fair Trading within seven days but failed to do so. Where Fair Trading receives notice of the change in company details, the Licensing Procedures Manual requires the licensing branch to make an assessment of the new director's fitness and propriety in accordance with the application process.⁴⁹

At this time, the builder was still within three years of his discharge from bankruptcy. This meant Fair Trading could not be satisfied that the company met the fitness and propriety requirements contained in cl 25(1)(a)(xiii) of the 2004 Regulation. It would have been necessary to reassess the company's eligibility for a contractor licence by considering whether cl 26(3) applied. Clause 26(3) gives Fair Trading discretion to issue a contractor licence if satisfied the relevant person took all reasonable steps to avoid bankruptcy, and that there was no evident risk to the public caused by the company's inability to complete contracts. While the builder was previously found to have taken reasonable steps to avoid bankruptcy during his licence application, it is impossible to determine in hindsight whether the company would have satisfied the risk assessment at the time.

Fair Trading first became aware that the builder had become director of the company in February 2013, by which time more than three years had passed since he was discharged from bankruptcy. It appears Fair Trading only discovered the change in directorship after undertaking a credit check, due to the large number of complaints received and concerns the company was experiencing financial difficulties. An alert was placed on GLS to notify the licensing branch that a detailed assessment was required before the licence could be renewed on 21 March 2013.

The licensing branch wrote to the builder, as director of the company, on 4 March 2013 and again on 26 March 2013 requesting an explanation as to why the company did not notify Fair Trading of the change in directorship. The company had also failed to notify Fair Trading of its change of address and the first letter was returned to sender. The letter notes the builder had become director within three years of his bankruptcy and would therefore have needed to meet additional requirements for the company's licence to continue.

The builder's solicitor responded by letter dated 27 March 2013 claiming that the builder had not known of the notification requirement and was apologetic and remorseful for the oversight. It seems Fair Trading was satisfied with the solicitor's explanation and proceeded with the licence renewal process without pursuing the breach further.

Discussion

In light of the fact that the change in director had the potential to render the company ineligible for a contractor licence, it was a significant omission for the builder not to notify Fair Trading. No formal compliance action was taken in relation to the breach of cl 34, although it does appear to have been considered. An email on the licence file dated 28 February 2013 from the Business Systems Officer states:

There are no false declarations which we can pursue and looking into our legislation I could not find any recourse for [the builder] not notifying the department of changes to the company licence.

While the legislation may not have specified a penalty for breach of cl 34, the omission goes to the licensee's fitness and propriety, and there may have been grounds for disciplinary action under s 56 of the Act.

49. Licensing Procedures Manual p.85.

Schedule 2, cl 4 of the Act now makes it a condition of corporation contractor licences to notify the Secretary of any change of director within seven days. This means failure to notify Fair Trading of a change in directorship can result in a penalty notice under s 36(2) of the Act. Even so, it is problematic that Fair Trading relies solely on traders to inform them of a change of director. It would be too easy for unscrupulous traders to circumvent the financial checks which have been put in place to ensure public safety. Supplementary information gathering needs to be considered.

In this case Fair Trading only became aware of the change in directorship after a large number of complaints prompted them to make inquiries into the company. By this time, the builder had been director for over 18 months and arguably the company had already caused significant harm to the public, based on the complaints received during that time.

In the Ombudsman's 2006 investigation report we recommended Fair Trading 'explores the possibility of automated information exchange with ASIC and/or other information brokers in relation to changes in company officeholders and external administrations of companies that are licence holders.'

If Fair Trading had received information from ASIC alerting them to the fact the builder had become director of the company, a licence review, including the necessary risk assessment, could have been carried out sooner.

While Fair Trading accepted the recommendation at the time, we understand from our meeting with the Assistant Commissioner that automated information exchange with ASIC was found not to be viable for a number of reasons. The Assistant Commissioner told us that all company licence applicants must now attach an up-to-date ASIC company extract to new applications. However, as company extracts are not required for licence renewals, this practice does not address the risk that Fair Trading may inappropriately renew a licence on the basis of incorrect company information.

While there are likely to be technical challenges to information sharing between ASIC and Fair Trading, the potential benefits to the GLS make the matter worth revisiting. There may have been technical advances to improve information sharing since this option was last explored. In its response of August 2017, Fair Trading has indicated it is open to revisiting this matter.

3.4.2. Assessment of complaint history

At the time of the builder's 2009 supervisor certificate licence application, cl 25(1)(a)(vii) of the 2004 Regulation provided that before issuing a contractor licence or supervisor certificate, Fair Trading must be satisfied the applicant 'has not had what the Director-General considers to be an unreasonable number of complaints made against him, her or it'. Clause 39A(1)(f) contained an identical requirement for the renewal and restoration of authorities, which usually occurs every three years.

The Licensing Procedures Manual clearly states when assessing officers should make further inquiries into a trader's complaint history, but does not provide much guidance about how they should carry out their assessment once the information is obtained. The manual states:⁵⁰

[Less than] 3 complaints may be disregarded for assessment purposes unless there is evidence of substantial breaches associated with the complaints or the number of complaints involves the majority of work undertaken by the licence holder.

[Greater than] 3 complaints will require further enquiry: Assessing officers are to consider:

- *the nature of the complaints;*
- *the level of detriment to consumers...*

50. Licensing Procedures Manual p.110.

While the procedure outlined in this section recommends refusing an application where the officer determines there is an unreasonable number of complaints,⁵¹ the Internal Review section of the Manual states, on page 129:

Generally, complaints on their own would not withstand scrutiny at the ADT and the reviewer would have to argue convincingly why a complaint is both unreasonable and significant enough to preclude the grant of an authority.

This contradicts the clear meaning of clauses 25(1)(a)(vii) and 39A(1)(f), which provide that an unreasonable number of complaints is in itself sufficient grounds to refuse a licence application or renewal. No case law is provided to support this assertion.

Additional guidance is provided in the policy document, 'Assessing an unreasonable number of complaints against an applicant.' As with the manual, this document provides considerable guidance about when the assessing officer should obtain further information from the applicant, but does not go into detail about how the officer should weigh up the information obtained. The policy document states:

STEP 9 Making the decision

Decide if

- *The applicant's complaint history is the sole issue relating to an applicant's fitness*
- *What impact does the complaint history [have] on the applicant's overall fitness; and how does it impact?*
- *Is there a risk to the public if the applicant is given the authority and responsibility to perform work on residential property; and what is the risk?*

Discussion

It is unclear from the builder's supervisor's certificate application assessment sheet which previous licences were reviewed to assess whether there was an unreasonable number of complaints. In any case, the assessment sheet suggests the builder was not found to have an unreasonable number of complaints made about either him or a company with which he had prior involvement. The same finding appears to have been made in relation to the company licence application.

By the time the company's contractor licence was due for renewal in March 2013, Fair Trading had received eight complaints about the company, and concerns about the company's finances were being investigated by the BIB. The licensing branch placed an alert on GLS in February 2013, which appears to have been triggered by an email from the Principal Building Inspector, DRIB. Consequently, the March 2013 licence renewal was not processed automatically and was postponed pending further enquiries.

3.4.3. The company's 2013 licence renewal

The company's contractor licence came up for renewal on 21 March 2013. As discussed in Part 4.3.1, the licensing branch wrote to the company on 4 March 2013 and again on 26 March 2013, requesting an explanation for the builder's failure to notify Fair Trading that he had become director of the company. At this time, Fair Trading also asked him to provide details about the complaints made against the company, to be considered for the renewal of the licence. The letter states:

NSW Fair Trading's records also indicate that [the company] has, to date, been the subject of a number of complaints, eight (8) in total...

51. Licensing Procedures Manual p.111.

For the renewal of Licence Number ... to be considered the following information is to be provided:

1. ...
2. Detail the circumstances that existed at the time the complaints were lodged;
3. Detail of what [the company] did to try and avoid the lodgement of the complaints
4. Detail whether each of the complaints was settled to the satisfaction of the customer
5. If the customer was not satisfied, details of the circumstances of these complaints that led to them not being settled to the satisfaction of the customer.
6. Detail of what... you would do differently if the same set of circumstances arose again;

This letter appears to be in accordance with the procedure outlined in the policy document 'Assessing an unreasonable number of complaints against an applicant'. A list of complaints was provided to the builder separately the following day. Summaries of these particular complaints are at Appendix B.

The BIB also wrote to the builder at the same time requesting information regarding the solvency of the company, with a view to issuing a show cause notice if the company could not demonstrate it could complete its current contracts.⁵²

The builder's solicitor responded to the licensing branch in two letters dated 27 March 2013, received on 3 April 2013. The letters provided the builder's version of events in relation to each of the complaints, as well as two disputes which were before the tribunal at the time. The solicitor also provided supporting documents, including tribunal documents and copies of the builder's correspondence with clients.

On 12 April 2013 the builder attended Fair Trading's offices to present information in response to BIB's inquiries. The file note for the meeting shows he presented information about money he was owed by clients for contracts which were under dispute and various lines of credit he had access to. He also advised he had \$50,000 - \$60,000 available in bank accounts although did not provide any evidence of this. The file note states:

Taken in good faith, it would appear from the information provided by [the builder] in regard to the current financial position of [the company], that the company is not insolvent and has available approximately \$250,000 of credit via trade suppliers accounts and cash at [the] bank to continue to trade. The company claims it has approximately \$93,000 in outstanding invoices issued to customers.

It should be noted that if current CTTT claims lodged against the company totalling \$230,000 are found in favour of the consumers the [company's] financial situation would be verging on insolvent.

In April 2013, after receiving advice from the BIB that the company was solvent, the licensing branch approved renewal of the company contractor licence for one year. The file note recording the licensing officer's decision states:

In respect to the complaints details of each complaint and the possible resolution to the matters has been provided and at this stage are acceptable.

[The BIB investigator and the Manager Dispute Resolution] met with [the builder] today 12 April 2013. [The BIB investigator] advised that information provided by [the company] was accepted in good faith. [The company] does not appear to be insolvent at this time and are able to carry out works until their licence is renewed.

52. BIB field Investigation report, 15 April 2013.

Discussion

There was information available to Fair Trading in 2013 that the company did not satisfy the fitness and propriety requirements under the Act in two ways, financial status and unreasonable number of complaints.

At the time of the licence renewal, the following information was available to Fair Trading, which could be considered to have an impact on the fitness and propriety of the builder as a director of the company:

- He had been an undischarged bankrupt from April 2006 to April 2009.
- He had been a director of company B, an externally administered body corporate.
- He had been involved in two other companies (A and C) that had been subject to court winding up proceedings.
- He had not informed Fair Trading when he became director of the company in 2011, and this could have been justification for disciplinary action under the Act.
- The company had been the subject of eight complaints between 2011 and 2013.
- The company was involved in two ongoing tribunal proceedings, and money orders were being sought by both applicants.

The adequacy of the BIB's inquiries into the company's solvency during the licence renewal process is questionable. The BIB's assessment was contingent on the tribunal finding in favour of the company and an unsubstantiated claim by the builder that he had \$50,000 - \$60,000 in bank accounts. The assessment was made in the face of ongoing and potentially very expensive tribunal proceedings. In the circumstances the BIB's finding that the company had sufficient solvency appears to have been made by giving the company the 'benefit of the doubt', without adequate consideration being given to the risk to the public. Although the investigation officers could not have known at the time, the tribunal proceedings resulted in two money orders made against the company in December 2013, totalling around \$100,000.⁵³

It is also concerning that the company's complaint history does not appear to have been given adequate consideration. The documents on the file suggest that the builder's explanation, provided via his solicitor, was accepted without consideration being given to the consumers' side of the story, or even Fair Trading's own records of the complaints. There is no recorded assessment of the level of detriment to consumers or the risk to the public. It does not appear that the application was determined in accordance with the Licensing Procedure Manual and the 'Assessing an unreasonable number of complaints' policy document.

Fair Trading's own complaint records show that a number of the relevant complaints were substantiated by DRIB inspectors, and resulted in complaint inspection advice and on one occasion a rectification order being issued. The solicitor's letter of 27 March 2013 suggests that in each case the company had attempted to resolve the complaints but had been prevented from doing so by the consumers themselves, for example by denying access, withholding progress payments and in some cases, direct interference and harassment. The letter states:

Our client has no cancellations or suspensions, no disciplinary actions, no outstanding CTTT orders, no prosecutions, no infringement notices on its licence record and no insurance claims or public warnings. Our client has always co-operate[d] with NSW Fair Trading inspectors.

This is somewhat different to the picture painted by Fair Trading's own complaint records, which suggest the company did not cooperate with DRIB officers and failed to adhere to mediated agreements or comply with rectification orders.

53. HB12/24099 and HB12/44676.

It appears Fair Trading did not undertake any inquiries to substantiate the version of events provided in the solicitor's letter. If so many of the company's customers were withholding payments and denying access, this would suggest, on its face, there was a problem with the way the company was carrying out its business. If it were substantiated that customers had prevented the company from completing the work, Fair Trading should have considered whether those actions were reasonable before making a finding that 'details of each complaint and the possible resolution to the matters... at this stage are acceptable'.

Further inquiries were necessary at the time to obtain a more comprehensive understanding of the consumers' complaints. The inquiries undertaken by the licensing branch were insufficient for the purpose of determining whether the number of, and the seriousness of those complaints made against the company were so unreasonable as to warrant refusal of the licence renewal.

From a review of the complaint records held by Fair Trading it appears there was evidence of an unreasonable number of complaints at the time the licence was renewed and the explanation provided by the solicitor should not have been given such weight as to prevail over Fair Trading's own records of the complaints. While further inquiries were necessary to gain a comprehensive understanding of the complaints, there was sufficient evidence available to justify refusing the licence renewal on the grounds of an unreasonable number of complaints.

The Licensing Procedures Manual advises that refusing an authority on the sole basis of complaint history is unlikely to withstand an appeal to the tribunal. That view does not accord with the legislative requirement. Clause 39A(1)(f) of the 2004 Regulation states that before renewing a contractor licence, Fair Trading must be satisfied the licence-holder has not had an unreasonable number of complaints made against it. In my opinion, cl 39A(1)(f) was not met in this case.

Fair Trading has told us that it is currently working on creating a new assessment checklist with the purpose of assisting staff to document decision making in relation to licence renewal assessments. While this is positive, Fair Trading has not provided detail on what these checklists will cover, how they will improve the assessment process, or when the checklists will be completed and implemented.

3.4.4. Automated procedure for licence renewals

We were told by staff that licence renewals will be approved automatically unless there is an alert placed against the licence in GLS requiring Fair Trading to undertake further enquiries before renewing the licence.

Alerts are added to the system manually by senior staff in the licensing branch where they receive intelligence of a possible issue with an authority holder requiring follow up action at a later time.⁵⁴ The intelligence may be received externally from a member of the public or internally via an audit or complaint investigation. The issue 'could be related to insolvency, compliance, criminal records, close associate, fitness and proprietary, no nominated supervisor etc'. The text of the alert will describe what action should be taken and when. Once the alert is placed against the licence on GLS it is then actioned at such time as is required by the alert description.

The licence renewal procedure⁵⁵ suggests that licence renewals will only be manually assessed where there is an alert against the licence requiring action (as was the case for the company in 2013) or where the applicant has changed their details or declared an 'occurrence', such as an insurance claim, criminal conviction or tribunal order. The procedure states that if an occurrence or change in details is declared, the renewal is referred to the licensing branch, which will review GLS for alerts, tribunal

54. Document titled EAC 20 - Alerts.

55. Licensing Procedure Manual p.74.

orders and insurance claims and will undertake a detailed assessment if necessary. Applicants are warned it is a criminal offence to make a false declaration. The procedure also states the licensing branch 'will conduct regular audits of renewals to identify any false declarations'.

The legislation clearly requires the same fitness and propriety standards to be met for licence renewals as for applications. It is difficult to see how Fair Trading can enforce the same standards and apply the same level of scrutiny to renewals when it relies on traders to declare particulars which may be detrimental to their interests. It may be the case that most traders will make declarations honestly, but the regulatory system should be designed to identify those traders who are unscrupulous and non-compliant.

The Act states that Fair Trading must refuse a licence or certificate if it is not satisfied as to the fitness and propriety particulars contained in ss 33B – 33D. Given the wording of the Act, it is inadequate for Fair Trading to rely on advice from traders in relation to these particulars. While the audit process and alert procedure do, to some extent, mitigate the risk of Fair Trading overlooking a licence renewal requiring manual assessment, there should be stronger protections in place.

It is acknowledged there are likely to be resource constraints preventing Fair Trading from manually processing every licence renewal. However, Fair Trading already collects significant amounts of intelligence relevant to licence renewals, such as complaints, compliance actions, tribunal orders and insurance claims. It is therefore foreseeable that this information could be used to automatically raise alerts on GLS which prompt the licensing branch to undertake a manual assessment. Improvements to Fair Trading's intelligence analysis capacity discussed earlier in this report (for example, better record keeping for complaints and automatic information exchange with the Home Building Compensation Fund and ASIC), better accessibility of information and integration of the various databases could also improve the system's ability to identify licence renewals which require manual assessment.

3.4.5. The company's 2014 licence renewal

Fair Trading's 2013 decision to renew the company's licence for one year, instead of the standard three, did go some way to recognising there were concerns with the company's fitness and propriety to hold the licence. As BIB had found the company's ongoing solvency was dependent on the outcome of the tribunal proceedings, the decision to issue a one-year licence allowed time for those proceedings to be finalised before reassessing the company's eligibility for a contractor licence.

While this may seem a reasonable way for Fair Trading to proceed, there is no evidence on the file to suggest that a detailed assessment was carried out before the company's licence was renewed the following year.

The company's licence was due for renewal again in March 2014. It appears the licensing branch sent a Notice to the company to provide further information and supporting evidence on 27 February 2014. We do not know what information Fair Trading requested as the Notice was not in the documents provided to this office. However, the builder's solicitor responded to the Notice on 6 March 2014 providing information about actions taken by the company to comply with the tribunal order one discussed earlier. There is no licence assessment on the file; a handwritten note on a printed email states 'licence renewed' and the officer's initials.

The documents on the file suggest the company's contractor licence was renewed in March 2014 on the basis of a letter from the applicant's solicitor stating the outstanding tribunal order had been complied with. When we sought further information from Fair Trading, it responded in August 2017 by stating that 'The assessing officer examined tribunal order [number], which was recorded against the company's licence, and determined it had been complied with'. We note that this order appears to have

been deemed as complied with after receiving information from the builder's lawyer, as discussed in Part 4.1.2. There is no record that the assessing officer considered how the company's solvency may have been affected by compliance with the order.

If, as it appears, the company's licence was renewed in March 2014 without any reassessment of the company's financial situation and without revisiting the complaint history, the precaution taken in 2013 of renewing the licence for one year does not appear to have served any continuing purpose as a consumer protection measure.

From the information we reviewed, **by March 2014 further intelligence was available to Fair Trading which significantly impacted the company director's fitness and propriety to hold a contractor licence.**

First, in December 2013 the tribunal made two money orders. Given that the BIB had identified in April 2013 that the company was not in a strong financial position and would be verging on insolvent if the claims before the tribunal at the time were found in favour of the consumers, further inquiries should have been made into the solvency of the company before renewing the licence.

From the limited documents on the file, it seems the licensing branch requested information about the outstanding tribunal order only for the purpose of determining whether it had been complied with, and did not consider the impact of the two new tribunal orders on the solvency of the company. There is no evidence the officer dealing with the licence renewal was aware of the concerns identified by Fair Trading staff the previous year.

Second, the complaint files we viewed show three new complaints had been made about the company by March 2014. In one case, the company failed to comply with a rectification order and an education letter was issued. In another, a complaint inspection advice was issued by the inspector. Additionally, one of the complaints the subject of Fair Trading's March 2013 inquiries had been referred for compliance action due to the company's failure to comply with a rectification order. This also resulted in an education letter being issued to the company.

The information available suggests a concerning pattern of conduct by the builder and his company that should have attracted much stronger scrutiny and action by Fair Trading. This includes during his initial application for a supervisor certificate licence, the company's application for a renewal of its contractor licence in 2013, and the subsequent application for renewal in 2014.

4. Conclusions

The evidence collected in this case suggests that the systems and processes of Fair Trading fall short of best practice and may be inadequate to protect consumers from unscrupulous builders who are determined to take advantage of the system's weaknesses.

We are particularly concerned about:

- the apparent lack of rigour in updating the public register
- the lack of comprehensive guidance for considering complaint handling, compliance and disciplinary information in assessing an applicant's fitness and propriety to hold an authority, and
- the sufficiency of the licence renewal process.

The complaint under investigation highlighted that Fair Trading is not publishing information on the public register required by s 120 (3) of the Act and cl 69 of the Regulation. The information Fair Trading records on the public register does not have sufficient detail and contemporaneous information to make it fit for purpose, that is, to provide consumer protection and help stop the actions of unscrupulous builders. The current CAS database requires improvement to enhance its intelligence gathering and analytical capacity to better manage information and alerts on builders of interest who should be subject to increased scrutiny earlier.

The licence assessment for the company carried out by Fair Trading in March 2014 was inadequate. In light of the concerns identified by the BIB in 2013 and the decision by licensing to renew the licence for one year only, a thorough reassessment of the company should have been conducted in March 2014. This should have included further inquiries into its current financial situation and further consideration of the number and nature of complaints about the company.

I conclude that there were sufficient grounds to refuse the renewal application for the following reasons:

- the tribunal orders made in December 2013 were likely to have impacted on the company's solvency
- there is evidence to suggest one of the tribunal orders was in fact outstanding at the time, and
- further complaints received about the company called into question the company director's fitness and propriety to hold the contractor licence.

Fair Trading's decision to approve the company's licence renewal in March 2013 had a significant financial impact on the complainant and his family. The decision was made despite Fair Trading having access to compelling information that the company did not satisfy fitness and propriety requirements under the Act.

In addition, over a period of years the complainant has suffered the distress associated with attempting to resolve the building issues, interruption to his and his family's normal life, detriment to his health and time away from his employment occasioned by the need to work on the home that he contracted the company to build, and to pursue complaints made to Fair Trading, and then the Ombudsman.

The evidence indicates that up to five other customers of the company signed contracts during or after March 2013. These customers may also have suffered financial and emotional impacts that could have potentially been avoided if the 2013 licence renewal had not been approved. While contracting and building carries an inherent risk that cannot be wholly mitigated through licensing or compliance and enforcement, the current systems must be strengthened to improve consumer protection.

Members of the public have a right to expect a high standard and robust checking procedures by regulatory agencies whose function is to protect the public. In relation to building regulation, this means the public should be able to rely on the accuracy and completeness of the information available on the public register.

5. Findings

Fair Trading failed to:

- publish information on the public register that is required under s 120 of the *Home Building Act 1989*
- update the public register in a timely fashion, which made the register unfit for purpose
- appropriately process licence applications and renewals by the builder and companies associated with him, and
- properly handle complaints from members of the public about the builder and companies associated with him.

Having regard to the evidence and the conclusions I have reached, I find that the conduct of NSW Fair Trading was unreasonable and otherwise wrong within the meaning of s 26(1)(b) and (g) of the *Ombudsman Act 1974*.

6. Recommendations

Considering the above conclusion and finding, I make the following recommendations pursuant to s 26(2) of the *Ombudsman Act 1974*:

6.1. Customers of the company

Recommendation One

- a) I recommend that Fair Trading issue a formal apology and make an ex-gratia payment pursuant to section 26A of the *Ombudsman Act 1974* to the complainant and his family to compensate them, at least in part, for the losses and the distress they have experienced and the inconvenience they have suffered.
- b) I recommend that the compensation should be assessed under the following heads of damage, and at a minimum be:
 - all of the quantifiable net losses related to the repair of building work over and above the compensation received through icare's HBCF, and
 - a payment of an amount for the stress and disruption experienced as a result of the failure of Fair Trading to take appropriate action.
- c) I recommend that Fair Trading write to each of the other customers of the company that entered into contracts with the company during or after March 2013 and invite them to submit a claim for compensation for consideration by Fair Trading.
- d) I recommend that an independent assessor be appointed by Fair Trading to determine the quantum of the complainant's claim and any other claims for compensation received.
- e) I recommend Fair Trading make all reasonable efforts to determine the quantum of the ex-gratia payments within three months of the date of receiving itemised claims from any customers and to ensure any payments are made as soon as practicable after the date of the determination.

6.2. The licence process

Recommendation Two

I recommend that, as a matter of priority, Fair Trading take action to ensure that historical data is transferred from previous licensing systems to the OneGov licensing database, or to another ongoing database, and that this historical information be available to the public through the public register.

Recommendation Three

I recommend that Fair Trading improve its access to information about companies and directors by taking action to set up automated information exchange with ASIC, or take other appropriate action that will achieve a similar result.

Recommendation Four

I recommend that Fair Trading, with the assistance of NCAT, take action to improve information exchange between the two agencies in relation to orders made to companies and individual licence holders. This should be done with the view to improving the quality, quantity and relevance of the information available on the public register.

In regards to this recommendation, I will be writing to the President of NCAT to request that consideration be given to assisting Fair Trading to implement this recommendation.

Recommendation Five

I recommend that Fair Trading consider retaining the history of delayed compliance with NCAT orders on the public register.

Recommendation Six

I recommend that Fair Trading publish further identifying information about licence holders and company directors on the public register, in order to be consistent with cl 69(2)(h) of the Regulation. Specifically, that Fair Trading ensures the names, dates of birth and addresses of the directors of the corporation are recorded on the register.

Recommendation Seven

I recommend that Fair Trading develop a fact sheet and/or 'tips' section, or other written guidance that outlines what other searches consumers can perform or what other information they can seek out in order to form a more complete understanding of a trader's compliance history and to enable consumers to make a more informed decision about whether to employ a particular tradesperson. Any such information should be accessible from all the relevant search pages on the public register.

6.3. Complaint handling, compliance and disciplinary processes

Recommendation Eight

I recommend that Fair Trading undertake a review of CAS with the view of enhancing its intelligence and search capabilities and take action to enhance the integration of its various databases. I note that this recommendation is in the process of being implemented, as Fair Trading has commenced a CAS replacement project.

6.4. Licence assessment process

Recommendation Nine

I recommend that Fair Trading finalise as a matter of priority the development of the internal guidance document to assist staff in assessing fitness and propriety.

Recommendation Ten

I recommend that Fair Trading make the following changes to its licence renewal process:

- a) Fair Trading ensures manual processing of the next licence renewal is required when a renewal was for a shorter period of time than sought by the licence holder, and

- b) Fair Trading ensures manual processing of the next licence renewal is required if a tribunal order is recorded against the licence holder in the previous licence renewal period.**

Recommendation Eleven

I recommend that Fair Trading complete and implement the licence assessment checklist that is referred to in its response to this office dated 25 August 2017.

Recommendation Twelve

I recommend that Fair Trading use intelligence gathered from information sharing with ASIC referenced in recommendation three, to assist in determining licence renewal applications.

Recommendation Thirteen

I recommend that Fair Trading update its Licensing Procedures Manual to reflect changes made as a result of any reform or changes as a result of this investigation.

7. Reporting requirement

I require DFSI to advise the Ombudsman's office in writing of its response to these recommendations within four months of the date of this report, and report on progress of its implementation of the recommendations two monthly thereafter until such date as all recommendations have been implemented.

I acknowledge that Fair Trading has already indicated its intention to accept the recommendations, and has provided evidence to demonstrate that it has commenced work on implementing a number of the recommendations as noted above.

8. Appendices

8.1. Appendix A: Relevant legislation

Clause 69 of the Home Building Regulation 2014 provides that the following particulars are to be included on the public register.

- (1) For the purposes of section 120 of the Act, the register must include the particulars specified in this clause.
- (2) The following particulars must be included in respect of a contractor licence:
 - (a) the name, date of birth and business address of the contractor licence holder,
 - (b) the contractor licence number and the category of residential building work or specialist work that the contractor licence authorises the holder to contract to do,
 - (c) the date of issue and current expiry date,
 - (d) the conditions endorsed on the contractor licence, if any, and the date of any alteration to the conditions,
 - (e) whether the contractor licence, if held by an individual, is an endorsed contractor licence,
 - (f) if the holder is the nominated supervisor of the holder of another contractor licence, the name and contractor licence number of that other contractor licence holder, the date of the consent declaration and the date of ceasing to be a nominated supervisor, if ceased,
 - (g) if the holder is a partnership, the names, dates of birth and addresses of the members of the partnership,
 - (h) if the holder is a corporation, the names, dates of birth and addresses of the directors of the corporation,
 - (i) the name, type of authority and authority number held by any nominated supervisor for the contractor licence, the date of the consent declaration and the date of ceasing to be nominated supervisor, if ceased,
 - (j) if the holder has been exempted from a requirement in relation to nominated supervisors, the date of the order and revocation of the order, if any,
 - (k) the results of any relevant determination under Part 4 of the Act (other than any determination that no further action be taken),
 - (l) the results of any prosecutions against the holder under the Act (other than any prosecution that does not result in the holder being found guilty of an offence under the Act),
 - (m) the number of insurance claims paid in respect of work done by the holder,
 - (n) details of any penalty notices issued to the holder,
 - (o) any instance of non-compliance with a Tribunal order to do work or to pay money,
 - (p) details of any public warnings issued regarding the holder under section 23 of the Act,
 - (q) details of any formal cautions issued to the holder regarding his, her or its conduct,
 - (r) any cancellation or suspension of the contractor licence, whether made under the Act or the *Fair Trading Act 1987*.
- (3) The following particulars must be included in respect of a supervisor certificate:
 - (a) the name, date of birth and residential address of the holder,
 - (b) the certificate number and the category of residential building work or specialist work that the certificate authorises the holder to do and to supervise,
 - (c) the date of issue and current expiry date,
 - (d) the conditions endorsed on the supervisor certificate, if any, and the date of any alterations to the conditions,

- (e) if the holder is the nominated supervisor of a contractor licence holder, the name and contractor licence number of that contractor licence holder, the date of the consent declaration and the date of ceasing to be a nominated supervisor, if ceased,
- (f) the results of any relevant determination under Part 4 of the Act (other than any determination that no further action be taken),
- (g) the results of any prosecutions against the holder under the Act (other than any prosecution that does not result in the holder being found guilty of an offence under the Act),
- (h) the number of insurance claims paid in respect of work done by the holder as the holder of a contractor licence,
- (i) details of any penalty notices issued to the holder,
- (j) any instance of non-compliance with a Tribunal order to do work or to pay money,
- (k) details of any public warnings issued regarding the holder under section 23 of the Act,
- (l) details of any formal cautions issued to the holder regarding his or her conduct,
- (m) any cancellation or suspension of the supervisor certificate, whether made under the Act or the *Fair Trading Act 1987*.

Cl 25 of the Home Building Regulation 2004 (now repealed) provides that the general requirements for obtaining authorities under the *Home Building Act 1989*:

- (1) Before an authority (other than an owner-builder permit) is issued, the Director-General must be satisfied that:
 - (a) each relevant person in relation to the application for an authority:
 - (i) is not disqualified from holding the authority or an authority of the kind applied for, or from being a member of a partnership or a director of a corporation that is the holder of the authority or an authority of the kind applied for, and has not been so disqualified within 3 years before the date of the application, and
 - (ii) is not a debtor under a judgment for money owed to the Director-General or the Administration Corporation that has not been satisfied, and
 - (iii) is not a debtor under a judgment for money that has not been satisfied where the judgment is for the payment of money in relation to a building claim under Part 3A of the Act or the payment of money to an insurer in relation to a claim relating to home warranty insurance (within the meaning of Part 6 of the Act), and
 - (iv) is not (and has not been within the period of 3 years before the date of the application) a director of a corporation that is a debtor under a judgment for money as referred to in subparagraph (iii), and
 - (v) is not subject to any order of a court in relation to a building claim under Part 3A of the Act that has not been satisfied within the period required for satisfaction of the order, and
 - (vi) is not subject to any order of the Tribunal that has not been satisfied within the period required by the Tribunal, and
 - (vii) has not had what the Director-General considers to be an unreasonable number of complaints made against him, her or it, and
 - (viii) has not had what the Director-General considers to be an unreasonable number of formal cautions given to him, her or it, and
 - (ix) has not had what the Director-General considers to be an unreasonable number of penalty notices issued against him, her or it (being penalty notices for offences under the Act that were not dealt with by a court and dismissed), and
 - (x) has not carried out work in respect of which the Director-General considers an unreasonable number of insurance claims have been paid, and
 - (xi) was not a director of, a partner of, or a person concerned in the management of, a body corporate or partnership that was disqualified from holding an authority within 3 years before the date of the application, unless the Director-General is satisfied that the applicant took all reasonable steps to prevent the conduct that led to the disqualification, and

- (xii) except in relation to an application for a tradesperson certificate—is not an undischarged bankrupt and is not a director of, or a person concerned in the management of, an externally-administered body corporate (within the meaning of the *Corporations Act 2001* of the Commonwealth) except in a case of a voluntary winding up of the body corporate, and
 - (xiii) except in relation to an application for a tradesperson certificate—within the period of 3 years before the date of the application, was not an undischarged bankrupt and was not a director of, or a person concerned in the management of, an externally-administered body corporate (within the meaning of the *Corporations Act 2001* of the Commonwealth) except in a case of a voluntary winding up of the body corporate, and
 - (b) the applicant, if an individual, is not an apprentice or a trainee.
- (2) For the purpose of subclause (1) (a), each of the following persons is a relevant person in relation to an application for an authority:
- (a) the applicant,
 - (b) if the applicant is a partnership:
 - (i) every partner of the applicant, and
 - (ii) if a member of the partnership is a corporation—every director of that corporation,
 - (c) if the applicant is a corporation—every director of the applicant.

8.2. Appendix B: Complaint records

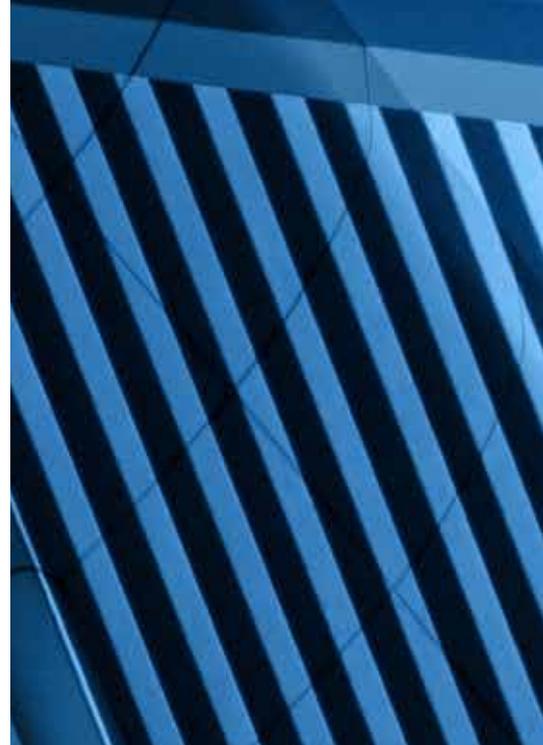
CAS Ref	HBCF reference	Date complaint received by Fair Trading	Recorded issues	Branch that dealt with complaint	Recorded outcome of complaint in Fair Trading system	Description of the complaint and outcome
5818661	none	29 June 2011	Delay	CSD	Redress offered/accepted	Redress offered and accepted
5827333	none	11 July 2011	Unsatisfactory Non performance of service	DRIB	Resolved	Builder terminated contract on 19 July 2011. Inspector found defective work but no action was taken. Complainant advised they would be taking the matter to court.
5801872	none	12 January 2012	Unsatisfactory Non performance of service	DRIB	Resolved	Complainant contacted Fair Trading alleging builder was no longer complying with resolution to previous complaint (581661). Agreement reached during mediation.
6061485	HBCF11709276	15 August 2012	Delay	RAAB	Finalised in division	Reported possible financial difficulties. Assessment by RAAB. No action taken but matter recorded for intel. Licensing branch advised.
6397547	HBCF12800096	15 November 2012	Unsatisfactory performance	DRIB	Resolved	Concerns about insolvent trading, unpaid subcontractors, incomplete work and multiple defects. Also raised concerns about other properties and tribunal proceedings. Site inspection held and agreement reached for completion of work. Inspector issued Complaint Inspection Advice (CIA). CIA not complied with and complainant referred to tribunal. Complainant continued to contact Fair Trading demanding that action be taken against trader.
6382242	none	27 November 2012	Defective work	DRIB	Resolved	Rectification order issued to repair defects. Appears trader was given extension to comply. Trader wanted a further extension but this was refused. Non-compliance with rectification order referred for compliance action. Education letter sent to trader on 22 May 2013 under ss 18B(1)(a) and 48E HBA. Letter returned to sender and was later rescinded for unclear reasons.

CAS Ref	HBCF reference	Date complaint received by Fair Trading	Recorded issues	Branch that dealt with complaint	Recorded outcome of complaint in Fair Trading system	Description of the complaint and outcome
6399162	HBCF11724644	21 November 2012	Incomplete work	DRIB	Resolved	Complainant reported bankruptcy
6424928	Own motion file created by Fair Trading to investigate concerns around solvency of the company	11 February 2013	Conduct not listed	BIB	No further action	Referral from DRIB to investigate insolvency concerns. BIB monitoring file created. Investigation by BIB concurrent to inquiries by licensing branch with regard to the company's licence renewal application. Licence renewal placed on hold while inquiries were carried out. Investigator also looked at address details not being updated and Fair Trading correspondence returned to sender. Investigation carried out informally. BIB and DRIB officers met with the builder on 12 April 2013 and were satisfied he had demonstrated the company was not insolvent. It was noted that if the tribunal claims before the CTTT at the time were found in favour of the applicants the company would be 'verging on insolvent'. Appears contractor licence was renewed on same day as meeting.
6350182	none	19 February 2014	Conduct not listed	DRIB	Resolved	Work stopped on site due to contractual dispute. Appears to have been resolved and work recommenced once licence renewal approved. Also raised concerns about financial problems and possible insolvent trading. Trader had requested smaller, more frequent progress payments due to 'cash flow problems'. This aspect of complaint joined with 6424928 to be investigated by BIB. Appears complaint reopened in February 2014. Email on file 31 March 2014 stating rectification order will be issued.
6570271	HBCF11724644	24 May 2013	Incomplete work	CAU	Resolved	Rectification order issued but not complied with by due date. Education letter issued. Appears to have been joined with another file for disciplinary action but circumstances unclear.

CAS Ref	HBCF reference	Date complaint received by Fair Trading	Recorded issues	Branch that dealt with complaint	Recorded outcome of complaint in Fair Trading system	Description of the complaint and outcome
6689118	HBC11709276	8 August 2013	Conduct not listed	RAAB	No further action	Complainants reported matters before tribunal and court judgments against the builder's companies. Assessment conducted by RAAB. No further action taken because financial issues already considered by BIB and licensing branch and no outstanding tribunal orders.
6696407	none	27 August 2013	Defective work	DRIB	Resolved	Complaint from property next door to worksite about damage to plumbing. CIA issued.
7008708	HBCF13761908	6 June 2014	Unsatisfactory non-performance of service	DRIB	Resolved	Contractual issues raised. Site meeting held and agreement reached. No defects.
7168301	HBCF13845816	16 September 2014	Delay	CAU	Resolved	After mediation a rectification order was issued which was not complied with. Matter referred to CAU for disciplinary action on 16 February 2015. Register shows builder found guilty of improper conduct under s 56(c) and fined \$3000 in February 2016. The company fined \$6000.
7213109	HBCF13761908	29 September 2014	Unsatisfactory non-performance of service	DRIB	Resolved	Defects in laundry. Site inspection and mediation. CIA issued.
7306248	HBCF13761908	1 December 2014	Unsatisfactory non-performance of service	DRIB	Resolved	Complaint about waterproofing on balcony. Site inspection held and rectification order issued. RO returned to sender and not complied with. Non-compliance assessed by Co-ordinator Technical Inspections. No further action taken because rectification order had not been issued in accordance with the Act. Defects the subject of this complaint eventually referred to CAU for disciplinary investigation.

Abbreviations used in this document

ASIC	Australian Securities and Investments Commission
BIB	Building Investigation Branch
CAS	Customer Assistance System
CAU	Compliance Assessment Unit
CTTT	The Consumer, Trader and Tenancy Tribunal, now the NSW Civil and Administrative Tribunal (the tribunal)
DFSI	Department of Finance, Services & Innovation
DRIB	Dispute Resolution & Inspection Branch
GLS	Government Licensing System
HBCF	Home Building Compensation Fund (Insurance & Care NSW)
HBS	Home Building Service
icare	insurance & care NSW
NCAT	NSW Civil and Administrative Tribunal (the tribunal)
RAAU/RAAB	Regulatory Analysis and Assessment Unit / Branch



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