

Submission to the Productivity Commission

Consumer Law Enforcement and Administration

30 August 2016

The Australian Construction and Justice Group

Summary

Despite what the numerous “tough stance” media releases from NSW Fair Trading would have consumers believe, Fair Trading NSW regularly fails to protect consumers from incompetent builders and trades people. These failures directly result in severe financial and even physical harm to individual consumers in the order of hundreds of thousands of dollars each.

Fair Trading NSW regularly fails to adequately deal with consumer complaints. This directly results in hundreds of thousands of dollars of harm to individual consumers and millions of dollars of harm to NSW taxpayers via the failing SI Corp insurance scheme.

The Fair Trading licence register is inaccurate and misleading and this results in consumers not being adequately informed & warned about certain licenced companies and persons. Consumers are wrongly led to believe that licenced builders and trades are capable when Fair Trading knows they are not.

Fair Trading process failures actually disable NSW consumers from making adequately informed choices, and then it fails to protect them when problems occur. As a consequence, the home building compensation scheme is in melt-down, being overloaded with massive claims and it is a severe and un-necessary drain on NSW taxpayers.

NSW Fair Trading has much to do and improve to regain the trust and faith of NSW building consumers.

Recommendations

The Federal Treasurer ought to recommend that the Productivity Commission carry out a detailed review of State home building legislation and its administration and the home owners warranty insurance schemes and ultimately, propose improvements via a rationalised national regulatory framework.

In addition to the normal public notice processes, notice of a PC review ought to be emailed by the Productivity Commission to every consumer that has complained to a State Fair Trading type authority about a building matter within the last 7 years.

The Productivity Commission ought to enquire with all State authorities that have, or that may be investigating Fair Trading processes for further detail and information on Fair Trading and building law problems. This would include the various Ombudsman's offices and perhaps authorities such as ICAC to obtain up to date information.

Fair Trading NSW Fails to Fulfil Objectives of Australian Consumer Law

The Productivity Commission issues paper outlines six operational objectives from COAG for good consumer law. Fair Trading NSW fails to fulfil those objectives as detailed:

1. *"Ensure that consumers are sufficiently well-informed to benefit from and stimulate effective competition"*

The Fair Trading register is inaccurate and misleading. Some builders rely on the 'appeal to authority' fallacy and even appear to use it as a low cost yellow pages add. The register may say that a builder is good when in reality he/she is bad – but consumers unwittingly accept the register as truthful and complete.

2. *"Ensure that goods and services are safe and fit for the purpose for which they were sold"*

When Fair Trading inspectors inspected homes there were serious defects and contract non-compliances that they said was OK or that were too hard to now fix and consumers were wrongly persuaded to accept product that was not fit for purpose and that did not conform to the contract.

3. *"Prevent practices that are unfair"*

When you complain to the fair trading officer about a builders grossly unfair behaviour, they say that is a contractual matter that they can't get involved with. Fair Trading fails to prevent unfair practices.

4. *"Meet the needs of consumers who are most vulnerable or are at the greatest disadvantage"*

When a consumer signs a contract with a builder they become extremely vulnerable to a builders misbehaviour and incompetence. Home owners may suffer hundreds of thousands of dollars of losses at the hands of an unscrupulous builder or tradesperson, yet Fair Trading do very little or nothing to help. People lives and finances are destroyed.

5. *"Provide accessible and timely redress where consumer detriment has occurred"*

When detriment has occurred or is clearly going to occur, Fair Trading could step in and take firm action with the builder to get the work back on track. But they don't. They instead wash their hands of the matter and refer the victim to NCAT which they know takes months and much effort and much legal expense to progress. For many, it is too costly or too difficult or their health cannot cope with it, so they have to give up. Redress is not financially accessible nor is it timely in NSW.

6. *“Promote proportionate risk based enforcement”*

When a builder is clearly bad; having had numerous complaints, terminations, NCAT cases and when Fair Trading even say there may be liquidity concerns for a builder they do not provide enforcement that is proportionate to the risk and consumers and subcontractors become severely hurt.

If home owners warranty insurance was still underwritten by private firms like QBE, Calliden etc, then they would be well within their rights to seek compensation from Fair Trading for failing to control risk and take adequate action under the Home Building Act. If private insurers were losing money then maybe Fair Trading would act properly. But governments are hard to sue and nowadays, the HBCF is funded by NSW taxpayer. The whole thing has degenerated into a massive man made “externalisation” scheme.

NSW Ombudsman Reviews into Fair Trading

The NSW Ombudsman investigated Fair Trading in 2006-2007 over building regulation failures very similar to our own recent experiences. The outcome is detailed in a 2007 Ombudsman report that was published for a time by the NSW Senate and that is now appended as an integral part of this submission.

That report detailed major wrong doing and failures within Fair Trading NSW and severe harm done to affected consumers. The report ultimately made recommendations to change the laws and many other recommendations in favour of affected consumers and appears to have been the catalyst for the NSW Senate inquiry into the operations of the Fair Trading home building service.

More recent examples of gross failure by Fair Trading to protect and respond to consumers over an extended period of around 7 years (approx. 2009 to 2016) has resulted in an even larger number of consumers (10 to 20) being very badly hurt by just one builder and this has led to yet another Ombudsman investigation into Fair Trading. The scale of harm done in this case will eclipse the harm detailed in their 2007 report.

NSW Senate Inquiry into Fair Trading

In 2007 a NSW Senate committee ran an inquiry into the operations of the home building service in Fair Trading. That inquiry found significant problems in building regulation.

See here: <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2279>

As authorities normally do, Fair Trading responded to the recommendations made by the Senate committee, accepting some recommendations and rejecting others. That Senate review ultimately led to changes in the Home Building legislation in 2015.

But, as exemplified by the severe harm still done to many consumers since then, it is evident that the changes to the law and Fair Trading processes did not go far enough or they failed to resolve the real problems.

Had that Senate inquiry been carried out and written with greater consideration of both COAG and NSW good regulation guidelines, then it is likely that more of the Senate recommendations would have been accepted and implemented by Fair Trading, resulting in greater consumer protection, less red tape for builders and trades and, lower complaint rates and reducing insurance claim rates.

The Productivity Commission asks for information on state by state differences. One of the things the Senate report did was to show that other State building regulation regimes are much better than the NSW regime. If the NSW system is indeed outdated and inadequate and other States are clearly better then it would make sense that NSW be encouraged by the Productivity Commission and COAG to bring its laws into line with other States via agreement to a federal model (based for example on the Queensland model).

Home Building Compensation Fund is bleeding money – and Fair Trading can not say why.

In 2015 Fair Trading published a discussion paper covering the problems facing the Home building compensation fund.

http://www.fairtrading.nsw.gov.au/biz_res/ftweb/pdfs/About_us/Have_your_say/Home_building_compensation_fund_discussion_paper.pdf

The HBCF is bleeding money at a rate of knots and they need to stem the flow.

The discussion paper has some hall-marks of a pre-regulatory impact statement. However Fair Trading's paper focused far too much on consequences and resolutions of symptoms and failed to properly identify and address root causes.

The Fair Trading report writers looked to everything but their own process failures and flawed risk management for the cause of the bleeding HBCF. In our opinion this paper failed to properly detail the real reasons behind a failing HBCF fund, and our stories can help lay bare the truth.

Real NSW Consumers experience with the Fair Trading licence register

The Fair Trading licence register is seriously flawed. If the register says your builder is bad then he probably is bad, but if it says he is good or OK then it does not actually mean he is good or OK. We strongly recommend that consumers do not rely on the register to assess if a builder or tradesperson is good or OK.

Fair trading instruct consumers to check the licence register before contracting with a builder or trades person. But the register is inaccurate and misleading causing consumers to make ill-informed decisions.

If using the licence register, users need to be aware of the following serious shortcomings of the licence register:

1. The register does not necessarily link your builders current company or even his name, back to his prior company licences. Some of those companies may now be insolvent with cancelled licenses. The register does not reveal or reasonably identify 'phoenix' activity.
2. The licence register sometimes does not show that a person was a director of a company when they were! Fair Trading data conflicts with ASIC data. Also compounding this problem, a person can discontinue as a director and/or secretary of a company and that change may not show up in ASIC for more than a year. In one instance, a directorship change did not show up in ASIC registers for more than 15 months.
3. One would naturally expect that a search for a person's name in the register will also bring up all instances of where their name is associated with a company. But it does not do that.
4. The register does not list the number of complaints there are against a builder, or that there have been an unacceptably or relatively high number of complaints relative to the amount of work they do. While the legislation does not require that, it is not helpful for consumers. Fair Trading tell those that question the data, that it is not reasonable that the number and content of complaints be made public. If that is the truth, then why is it that other product and service rating web-sites, such as Product Reviews do it all the time and with good success?
5. Sometimes after a dispute has failed to resolve, Fair Trading will refer a consumer to the Tribunal (NCAT) to resolve the matter. The number of referrals to NCAT is not listed in the register and if you phone or write to ask about them they will not tell you.
6. The number of NCAT cases brought against a builder, or even that there have been any NCAT cases is not shown in the register, and if you phone or write to ask about NCAT cases they will not tell you.
7. When NCAT makes an order against a builder and if it is not complied with then that fact gets listed on the register. But as soon as the builder informs Fair Trading that it has been complied with, true or not, Fair Trading delete the non-compliance from the register – and all traces of the NCAT order on the builder are removed! And Fair Trading furthermore do not always verify compliance with the affected consumer before they delete the record, but rather just trust the builder.
8. If NCAT makes an order for the builder to pay the consumer money and if it is not complied with after 28 days, then the licence is suspended. But when the builder tells Fair Trading he has complied, then all records of there having ever been a suspension are deleted! Fair Trading furthermore do not always verify that the money is actually in the

consumers account when they delete the record. And if you call or write to ask Fair Trading if there have been any prior suspensions they will not tell you about them.

9. Licensee personal data, such as address, is often out of date and inaccurate. FT rely on the builder to update it. There can be circumstances where it benefits a builder to not have his current details accurately listed; for example when subcontractors, debt collectors and consumers seeking to serve documents. Even when FT know the information is wrong and are provided with up to date information, they still do not update it or indicate that it is not verified as correct.

10. The register sometimes shows that there are zero home owners warranty claims paid in relation to a builder when in fact several claims have been paid. A paid claim is a sign that there has been much defective work and is important for consumers decision making. And even though a licence may be cancelled or expired, it is relevant that the correct claims data still be listed so that when the builder has a new clean company, consumers can have some chance of understanding the capability or lack thereof, of a builder they are considering.

Furthermore the concept of recording number of “paid” claims is flawed because the time it takes for a claim to be processed and paid can take a very long time, and in the meantime a consumer who should have been informed goes uninformed. The register should instead records number of notices of loss, number of claims made, number of claims agreed to be paid and it should eventually list the value of the claims settled.

11. The register does not show how many consumers have applied for a home owners warranty claim in relation to a builder.

12. The register may state that during some time period that a builder was restricted to doing work that does not require home owners warranty insurance. What this really means (in case you are new to this) is that the builder can not sign contracts over \$20,000. However, users need to know that sometimes the data about when the builder was restricted is sometimes inaccurate and it depends on the builder properly informing Fair Trading about eligibility, which a builder may not do.

General suggestions:

If you want to check your builders’ risk of insolvency then do not rely on the Fair Trading register. Instead go to the ASIC Connect website and look up your builders company there. You may need to pay for some documents. Also check ASIC data re-sellers.

If you want to check if your potential builder is “eligible” for getting home owners warranty insurance or not, don’t rely on Fair Trading, instead call the insurer QBE, or iCare HBCF.

If you want to find out what companies your guy has really been involved in then ditch the Fair Trading register and go to an ASIC data re-seller website (such a Creditor Watch Express) and pay for a directorship report.

If you want to find out if your potential builder is any good or not then skip Fair Trading and instead go to a website like “Product Reviews” where consumers complaints and comments are not “censored” by an authority like Fair Trading. Or, best of all make sure you get

glowing references from several of his prior customers. If he says he cannot give you his prior clients names and numbers, for example for “privacy reasons” then just show him the door.

Fair Trading Dispute Resolution is a Failure:

If you are unlucky enough to land a bad builder or tradesperson and need to complain to Fair Trading about building problems then they will after several weeks send an inspector to your house to “mediate”. Based on our own experience, be careful of the following:

1. The inspector may run the “mediation” as a verbal process, making no reference to the complaints you submitted, or the contract specifications, the DA, BCA, or Australian Standards or even the Fair Trading guide to standards and tolerances! You (most likely not an expert in building) will be asked to state your concerns and the builder then is given carte blanche to respond to that. This verbal process strongly favours the builders point of view and is incapable of dealing with more complex or technical matters.
2. You may even be encouraged by the inspector to accept that defects are already too difficult to rectify no matter how blatantly non-compliant or defective they are. The inspector may even suggest ridiculous solutions that do not comply with building legislation.
3. Fair Trading inspectors will avoid going into matters that are purely contractual and not of a technical nature, even if a major concern raised is a contractual matter. They will prefer to refer you to the tribunal/court process for resolution.

In encouraging you to go to NCAT, and thereby leaving them alone, Fair Trading officers may tell you that the Tribunal process is DIY and not costly or not as costly as a normal court. This may be relatively true, but NCAT processes are still very costly and very stressful. Don't go there if you can help it.

4. The inspector may write up the mediation outcome as an “agreement” rather than an “order”. You may not be made aware of the difference until much later. Don't accept that weak nonsense. The builder can simply ignore an 'agreement' or later claim he did not agree to it. Insist that the inspectors document be written up as an “Order” from the beginning no matter if the issues are big or small.
5. The inspector may end the document with the phrase with words to the effect “Fair Trading can be of no further assistance in this matter”. If you can, strike that out, because they can and should continue to help if you continue to have problems.
6. Your complaint file may be automatically archived off to some far away place like Tweed Heads. Do not assume your issue will stay active until you and FT have verified compliance and resolution. If you need to get Fair Trading back out you will need to get them to retrieve the file from archives, and to do that you will need to raise a new complaint on their website!

7. Even if Fair Trading well and truly knows that your builder/tradie is incompetent and even at risk of insolvency, rather than admit fault for not having acted sooner and rather than take appropriate action to cancel or suspend a builders licence as required under the Home Building Act, they may instead offer to “mediate” between you and the builder – whereby an outcome would be that he would go back to work on your house – even if you have already terminated the contract!

Don't just take our word that Fair Trading are a failure. The NSW Senate said so back in 2007. Check it for yourself: Google; "Inquiry into the operations of the Home Building Service" or just click here

<https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2279>

There are indeed good building people in the office of Fair Trading but there are seriously bad systemic problems at Fair Trading that may mean that you will not get fair dealings. Don't be fooled by much positive news of Fair Trading hammering wedding dress makers and other fraudsters.

Compare home building laws to other protection laws such as Work Place Health and Safety laws

Fair Trading regulatory culture and processes around building regulation is to let harm happen and then defer victims to costly courts and then insurance schemes to attempt to repair that harm.

Home building regulation lacks harm prevention and risk management that is for example at the heart of Workplace health and safety regulations.

If Workplace health and safety legislation operated with a similar degree of prevention verses cure as home building regulations do, the WHS legislation would be a laughing stock and WorkCover funds would be bled dry just like the home owners warranty insurance funds are.

Fair Trading's application of procedural fairness and prevention of consumer (and subcontractor) harm are out of balance.