



NSW Ombudsman

Final Report

Report under Section 26 of the *Ombudsman Act*

Department of Commerce

Investigation into:

1. The processing of all licence applications by [the builder] and companies associated with him, including any variations, renewals and restorations.
2. The maintenance of the Public Register under the *Home Building Act 1989* and the *Home Building Regulation 2004*.
3. Disciplinary actions taken against [the builder] and companies associated with him.

Date: 6 January 2006

Please note: Names of officers of the Department of Commerce (Office of Fair Trading) have been omitted according to a resolution of General Purpose Standing Committee No 4.

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1. THE COMPLAINANTS

[The complainants]

2. THE PUBLIC AUTHORITY THE SUBJECT OF INVESTIGATION

The Department of Commerce¹

3. THE CONDUCT THE SUBJECT OF INVESTIGATION

1. The processing of all licence applications by [the builder] and companies associated with him, including any variations, renewals and restorations.
2. The maintenance of the Public Register under the *Home Building Act 1989* and the Home Building Regulation 2004.
3. Disciplinary actions taken against [the builder] and companies associated with him.

4. THE COMPLAINT

On 14 May 2002 [the complainants] entered into a contract with a company by the name of [the builder's company] Pty Ltd to build a family home in Dural. [The builder's company] was owned by [the builder]. The contract price was \$425,520 and the house was to be finished by 24 December 2002.

Before signing the contract the complainants confirmed with the Office of Fair Trading (OFT) by telephone that the company's building licence was valid and that no penalties or insurance claims were noted against it.

When construction failed to reach lock up stage a year after entering into the contract, the complainants commenced action against [the builder's company] on 20 May 2003 in the Consumer Trader and Tenancy Tribunal (CTTT). The case before the CTTT took 17 months to conclude.

On 10 September 2004 the CTTT issued orders to [the builder's company] requiring the company to pay \$275,777 plus costs as agreed or as assessed to the complainants. The \$275,777 was made up of estimated costs of completion and rectification of \$308,111.87 minus the undrawn balance of the contract, which was \$45,534.80 plus \$9,200 in liquidated damages plus \$4,000 solatium.

[The builder's company] failed to comply with the order. Subsequent action in the district court by the complainants has confirmed the company had no funds or assets to pay the debt.

In January 2004 the complainants undertook a search of [the builder's] history on the Australian Securities and Investments Commission (ASIC) database and Baycorp Advantage, the business intelligence and information broker. They found that [the builder] had been a director of three other companies prior to [the builder's company]. Two of those companies, [the builder's previous company 1] Pty Ltd and [the builder's previous company 2] Pty Ltd, were liquidated. They also discovered [the builder's previous company 1] had three insurance claims noted against it on the OFT's online Public Register (See 6.4 for a more detailed discussion of the Public Register).

¹ This investigation spans conduct of both the former Department of Fair Trading and the Department of Commerce's Office of Fair Trading. The Department of Commerce was made the subject of investigation in both its current capacity and as the public authority that succeeded the Department of Fair Trading and inherited its functions and responsibilities in regard to home building licensing and regulation.

On 14 January 2004 [the complainants] lodged a complaint against [the builder's company] with the OFT. In their letter to the Manager-Licensing and the Commissioner for Fair Trading they said:

Prior to signing the contract with this building company we checked the licence for [the builder's company] and noted that the licence was current and that there had been no complaints about the company. We felt that this information, coupled with the fact that they had secured Home Owners Warranty Insurance, assured us of the company's financial viability and ethical conduct.

As consumers we are shocked to discover that this was not to be the case and that the Director of this company, [the builder], has a history of poor management, insurance claims, and clear failure with regard to honouring his financial obligations.

On 16 August 2004 the complainants made an ex-gratia payment application to the OFT and the Minister for Fair Trading. The application was based on two grounds. Firstly, that incorrect action taken by the OFT in issuing the licence to [the builder's company] led the complainants to act to their financial detriment. Secondly, that a moral obligation existed on the OFT to make a payment. The complainants argued the Director-General could not have been satisfied that [the builder] was a fit and proper person to hold a contractor licence at the time the licence was issued to [the builder's company]. Clause 19(1)(b)(v) of the *Home Building Regulation 1997* states:

Before a licence is issued, the Director-General must be satisfied that any individual who is an applicant, and each individual who is a member of a partnership, and each director of a corporation that is a member of a partnership or of a corporation, that is an applicant: is a fit and proper person to hold the licence and is otherwise of good character...

They argued that [the builder]'s prior involvement in two failed companies, with three paid out insurance claims was readily available to the OFT from its own databases at the time [the builder's company] application was assessed and consequently should have formed part of the considerations in the decision about whether [the builder's company]'s licence application should have been approved. They further argued [the builder] could not have been considered a fit and proper person to hold a licence had his prior history been taken into account. They said [the builder]'s character and reputation were both indicative of likely future conduct and he clearly presented a foreseeable risk to homeowners. They argued that the prior liquidations indicated that [the builder] was prepared to walk away from financial obligation, while the insurance claims were indicative of his lack of competence as a builder and a supervisor.

On the second ground, the complainants said the following:

As consumers, we trusted the Department of Fair Trading – a Department that markets itself as the Consumer Protection Agency... As consumers we simply knew that prior to signing a contract with a builder you should do a licence check to ensure that the licence is valid. We sincerely thought that if a company had been granted a licence by the Department of Fair Trading then the company must have been reputable and competent. Like a lot of people, we had high regard for government departments and sincerely thought that obtaining a licence would involve extensive background checks on the builder and the company... The Department was also aware that men like [the builder] were ending one corporate entity, then establishing new entities and applying for corporate licences. The Minister assured Parliament just six months before the [the builder's company] licence was issued that he was committed to stopping this type of conduct. "One of my major concerns has been the apparent ability of shonks to continue to operate in the industry or, if they are disqualified, their ability to reappear with another licence as another entity. The Government acknowledges these shortcomings and is committed to overcoming them." (Mr John Watkins, Minister for Fair Trading, Minister for Corrective Services, and Minister for Sport and Recreation – Home Building Legislation Amendment Bill Second Reading NSW Legislative Assembly Hansard Article No.9 of 31 May 2001).

On 19 October 2004 [the complainants] lodged a complaint with this office. At this point they stated they had spent two and a half years making mortgage repayments to the bank as they had drawn down on 90 percent of the loan. At the same time the house was uninhabitable and they were also paying \$450 a week in rent and had spent close to \$45,000 in legal fees for the CTTT case.

They were subsequently able to move into the house in June 2005 after gaining approval to increase their mortgage to pay for some rectification and completion costs. The exterior of the house was not completed. The complainants have advised they will not be able to keep up with mortgage repayments beyond 2006 and will have to sell the house. The complainants calculated their quantifiable losses as at 11 June 2005 as \$364,618.08 plus compound interest, having taken into account the insurance pay out (see below) and the undrawn balance of funds on the contract.

On 5 November 2004 The Hon Reba Meagher MP, the then Minister for Fair Trading declined to approve the complainants' application for an ex-gratia payment. Ms Meagher said: 'I am satisfied that Fair Trading acted in good faith in accessing [sic] the material provided by [the builder].'

The Minister asked her department to assist with the complainants' insurance claim.

Just before Christmas 2004 Vero Insurance paid the complainants \$200,000, being the maximum sum that was claimable under the Home Owners Warranty Insurance policy. Vero Insurance settled the claim after receiving completion quotes from three of their panel of builders that far exceeded the capped sum.

On 4 February 2005 [the complainants' lawyers] submitted a fresh ex-gratia payment application on behalf of the complainants to the then new Minister for Fair Trading, the Hon John Hatzistergos MP. The Minister deferred making a decision on the application until our inquiries have been completed.

5. THE INVESTIGATION

As a result of [the complainants'] complaint and our concern about the extent of checks made by the OFT in relation to contractor licence applications, we made written preliminary inquiries with the Director-General of the Department of Commerce.

In our letter dated 22 November 2004 we asked a number of specific questions about the checks conducted when the licence application for [the builder's company] was being assessed, as well as general questions about the assessment procedures. We also canvassed a way of resolving the complainants' situation. We asked the Director-General to respond within 28 days.

On 20 December 2004 we received an acknowledgement letter and advice that a response would be provided as soon as possible.

On 25 February 2005 after several telephone calls, we received the documentation we requested but not the response to our questions.

On 29 March 2005 we received a response. The response raised further concerns about what checks were required, what was actually checked, as well as the integrity of data available to the general public through the OFT's online Public Register of licences (See point 6.4 below).

Having considered the issues raised by the complaint and the response to our preliminary inquiries we decided to make the conduct set out in section 3 the subject of investigation.

On 4 May 2005 a notice of investigation pursuant to s16 of the *Ombudsman Act 1974* was issued to the Director-General of the Department of Commerce.

Requirements for the production of statements of information and documents were issued pursuant to section 18 of the *Ombudsman Act* on 4 May 2005 and 7 July 2005. Additional information was requested on 29 July 2005. Documents obtained from the Office of Fair Trading included licensing procedure manuals, applications and various other documents from

the license files of [the builder] and companies associated with him as well as investigation files relating to [the builder].

We examined four OFT files relating to [the builder], including:

- [the builder]'s personal licence file
- [the builder's previous company 1] Pty/Ltd licence file
- [the builder's previous company 2] Pty/Ltd licence file and
- [the builder's company] Pty/Ltd licence file.

The four files span a period of over ten years from July 1991 when [the builder]'s personal licence was approved to 2001/2002 when the licence for [the builder's company] was approved and renewed.

The period we examined saw a number of major changes in the regulation of the building industry including:

- the dissolution of the Building Services Corporation (BSC) in May 1997
- the take over of the BSC's licensing functions by the Department of Fair Trading (DFT) from 1995 onwards
- the privatisation of the old statutory insurance schemes, which continued to be administered and finalised by the Fair Trading Administration Corporation (FTAC)
- the abolition of DFT on 2 April 2003 and creation of the Office of Fair Trading (OFT) under the umbrella of the Department of Commerce. All the functions and responsibilities of the Department of Fair Trading in regard to home building regulation were transferred to the OFT.

This period also saw a number of changes in the home building legislation including several amendments to the *Home Building Act 1989* (the Act) and Home Building Regulation.

We examined the information appearing on the Public Register under s120 of the Act as far as it relates to information contained in the four files relating to [the builder].

We examined the OFT's investigation into the conduct of [the builder] and [the builder's company].

On 15 September 2005 we provided the Director General of the Department of Commerce and the Commissioner for Fair Trading with a statement of provisional findings and recommendations prepared by the investigation officer for submissions. An extract of that statement setting out the summary of evidence was also provided to the complainants. Both parties made written submissions, which have been taken into consideration in the preparation of this report.

6. RELEVANT MATTERS

6.1. Overview of the licensing regime

The OFT is responsible for promoting fair trading and protecting consumers within the home building industry. The Home Building Service within OFT maintains the policy and regulatory framework for the NSW Home Building Industry. The regulatory framework operates through the Act and the Home Building Regulation. According to the OFT's website it:

- plays a major role in promoting fair trading
- protects consumers within the NSW residential building industry

- is responsible for setting and maintaining the standard of competence for builders and tradespeople working in the industry.

Anyone who contracts, subcontracts or advertises to do the below categories of work must have a contractor licence:

- residential building work where the labour and materials content is more than \$1,000;
- electrical wiring work
- plumbing, draining and gas fitting work
- air conditioning and refrigeration work (except plug-in appliances)
- where the contract price for the building materials exceeds \$1,000 for the supply of kit homes, garages, carports and sheds.

To gain a contractor licence an applicant must show the OFT that they have:

- satisfactory technical skills and work experience, and
- that they are a fit and proper person to hold a licence.²

The functions of the Director-General³ are set out in section 106 of the Act:

The Director-General has the following functions:

- (a) to promote and protect the interests of owners and purchasers of dwellings (including the purchasers of kit homes) and users of water supplies, sewerage systems, gas, electricity, refrigeration and air conditioning,
- (b) to set, assess and maintain standards of competence of persons doing residential building work or specialist work,
- (c) to complement the work of industry organisations, public authorities and educational institutions in promoting standards,
- (d) to give general advice and guidance to the public,
- (e) to monitor the operation of insurance provided for the purposes of this Act.

6.2. The administration of the licensing regime

The issuing of licences and the requirements applicants must satisfy before they can be issued with a contractor's licence is regulated by the Act and the Home Building Regulation.

Licensing staff perform the transactions in the course of licensing and the daily administration of the regime, which includes the initial issue of a licence, annual renewals, restorations, variations, cancellations and so on. The OFT manages 170,000 licences and deals with between 300 and 400 licence applications every week.

The Licensing Procedure Manual is the principal policy/procedure document that gives guidance to licensing staff on issues such as what needs to be checked when a new licence application is assessed. There have been three editions of the manual: 1996, 2002 and 2005.

When the DFT took over the licensing function of the BSC, it retained various forms used by the BSC and made minimal changes to them. It appears the procedure manual of 1996 was also largely unchanged compared to the BSC manual as some references to the BSC remained in the text. The manual was reviewed in 2002 to cover some of the amendments to the legislation, but largely followed the same format and processes as the 1996 manual.

² Adapted from OFT's website.

³ The Director General is defined in the Act as the Commissioner for Fair Trading, Department of Commerce (who heads the OFT), or if there is no such position in the Department, the Director General of the Department.

The licensing procedures are currently undergoing major changes.

The licensing computer database is referred to by the manuals and OFT staff as BSS (Building Services System).

6.3. History of [the builder]'s licences

6.3.1. [The builder]'s personal licence (licence number 00000)

6.3.1.1. *Summary of transactions on the licence file*

The predecessor of DFT, the BSC, first granted [the builder] a provisional licence for the work categories of carpentry and joinery on 3 July 1991. The licence was provisional because [the builder] did not satisfy the business management course requirements for the licence. A letter sent to him dated 8 July 1991 stated that the licence would not be renewed unless an acceptable business management qualification had been obtained.

Since 21 July 2003 [the builder]'s licence has been endorsed with a condition 'only for contracts not requiring Home Warranty Insurance'.

There are two concluded complaints on [the builder]'s licence: [reference number 1] and [reference number 2] in December 1996 and February 1997, respectively.

Complaint [reference number 1] resulted in an approved statutory insurance claim for \$16,720 (95/0000) that was paid out on 3 December 1997. It appears [the builder] failed to rectify building defects.

6.3.1.2. *Provisional status of licence*

Section 38 of the Act, which was the same in the BSC Act, states the following:

- (1) The Director-General may, but only if the Director-General considers that special circumstances exist, issue an authority to an applicant even though the applicant does not meet a requirement imposed by or under this Act for the issue of the authority.
- (2) When any such authority is issued, the Director-General is required to indicate, in a notice served on the applicant, that it is a provisional authority.
- (3) The Director-General may cancel the provisional nature of an authority at any time by serving notice to that effect on the holder of the authority.
- (4) The Director-General may cancel a provisional authority at any time by serving notice of cancellation on the holder of the authority.

The procedure manual (1996) specified that a provisional status of a licence could be extended for a further period of time to allow the provisional licensee to obtain the required qualification. The manual did not specify the length of any additional period.

In June 1992 the BSC approved [the builder]'s request for a 12-month extension to the provisional licence status.

[The builder]'s licence was then renewed or restored annually, but remained provisional until 30 March 1995 when his application to vary the licence to a builders' work category was approved. [The builder] satisfied the educational requirements for the builders' licence at this time.

6.3.1.3. *The statutory insurance claim 95/0000*

There is a record of one insurance claim associated with [the builder]'s personal licence. The insurance claim was approved pursuant to one of the old statutory insurance schemes, known as the Comprehensive Insurance Scheme (CIS) under Part 6 of the *Building Services Corporation Act 1989* (BSC Act).

Section 98 of the BSC Act provided for the recovery of the amounts paid under the scheme. The repealed s98 stated:

- (1) Any amount paid by the Corporation under BSC Insurance may be recovered by the Corporation in a court of competent jurisdiction as a debt from the person by whom the residential building work concerned was done or contracted to be done.
- (2) ...
- (3) If there is an unsatisfied judgment against the holder of a licence that was obtained by the Corporation pursuant to this section, the Corporation may suspend the licence until the judgment is satisfied.
- (4) After considering the circumstances of the case, the Corporation may decide:
 - (a) not to attempt to recover an amount under this section, or
 - (b) to accept any amount in satisfaction of its right to take recovery action under this section.
- (5) There is no appeal under this Act against suspension of a licence under this section.

The Building Services Corporation was dissolved on 1 May 1997 by the *Building Services Corporation Legislation Amendment Act 1996*, which also changed all other references to the BSC Act to be references to the *Home Building Act 1989*.

While the BSC did not cease to exist until 1 May 1997, the DFT had commenced taking over various functions of the BSC as early as 1995.

The amending Act constituted the Fair Trading Administration Corporation (FTAC), which is a statutory body representing the Crown. The assets and liabilities of the BSC were transferred to FTAC when it was dissolved. With the creation of the FTAC, the statutory insurance schemes were privatised and the insurance policies have since then been underwritten by private insurers. As a result the FTAC is only responsible for claims under policies that applied prior to 1 May 1997 under the statutory schemes. FTAC took over the recovery of claims paid out under the CIS pursuant to s98 of the BSC Act.

Despite the discretionary nature of s98, it has been the policy of DFT and FTAC to attempt recovery of all paid out insurance claims. According to the FTAC Insurance Claims Policy and Procedure Manual (February 2002) all claim payments were subject to assessment for debt recovery action. In cases where such action was initiated by FTAC it was fed into DFT's coordinated compliance activities and could lead to action under the Act against the licensee. This could impact on the ability of the contractor to hold or renew their licence. If a matter was not settled or finalised within 90 days, it was referred to the Home Building Management Committee to determine appropriate further action. The Home Building Management Committee could refer a matter to legal services providers or the debt could be written-off. It has been the practice of the Building Services Corporation and then FTAC since 1994 to attempt recovery of claim payments from the contractor responsible for defective or incomplete work.

We asked the OFT for more information about the insurance claim and whether recovery from the contractor was attempted. The outcome of this process had an impact on subsequent licence applications by the builder. We received the following information:

- A notice of termination was served on [the builder] on 19 June 1997. The insurance claim was registered on 21 April 1997, approved on 15 August 1997 and paid on 3 December 1997.
- The first letter of demand was sent to [the builder] on 26 March 1998. There is no response from [the builder] on the OFT file. The next letter of demand on file is dated 9 March 2000. On 10 April 2000, a debt recovery officer held a meeting with [the builder] and his solicitor. The minutes refer to this being the second meeting (there is no record of the first on file).

- The minutes state that [the builder] commissioned an independent technical report by Tyrrells Property Inspections. [The builder]'s solicitor stated that there had been money owing under the contract, which had been settled out of court. It was also alleged that the claimants had a relative rectify the work and that they had received a benefit by claiming work had been done that had been completed by the original contractor.
- After further assessment it was found that some of the items claimed were not justified. On 31 August 2000, a further letter was written to the contractor seeking settlement of the debt and advising that his liability had been reduced to \$8,472. There is no response on file.
- A final notice claiming the total debt of \$16,720 was sent to the contractor on 13 November 2000.
- The debt was written off in April 2002 on the basis that it was not commercially viable to pursue.

6.3.2. [The builder's previous company 1] Pty Ltd (Licence number 00000)

6.3.2.1. *Summary of transactions on the licence file*

[The builder's previous company 1] first applied for a company builder's licence in November 1995. The licence was approved on 21 December 1995. The directors of [the builder's previous company 1] were [the builder] and [the builder]'s father.

[The builder's previous company 1] was incorporated on 29 May 1990 as [name] Pty Limited and changed its name to [the builder's previous company 1] on 29 January 1992.

On 16 April 1998 [the builder] resigned as the nominated qualified supervisor for [the builder's previous company 1].

On 29 April 1998 DFT wrote to [the builder's previous company 1] stating the following:

Please note that pursuant to section 22 1(a) of the Home Building Act 1989, a Licence is taken to have been cancelled if 30 days, (or such longer period as has been agreed upon between the licensee and the Department) expires, during which there has not been a nominated supervisor for the Licence.

The OFT's licensing database, the Building Service System (BSS) was updated to reflect the fact that the supervisor left on 29 April instead of 16 April 1998.

On 11 May 1998 DFT Project Officer, , requested an ASIC company extract for [the builder's previous company 1]. ASIC provided information that [the builder's previous company 1] had been placed under external administration on 15 April 1998. Ms then entered an alert on the internal BSS database to show the company was in liquidation. She used code 'LIQ'.

On 12 May 1998 Ms wrote to the liquidator of [the builder's previous company 1] to the effect DFT had recently received information that [the builder's previous company 1] was placed into liquidation on 15 April 1998. She requested a formal surrender of the licence, as the company was no longer trading.

On 2 June 1998 Ms wrote again to the liquidator. She advised them that as the company had been without a supervisor for a period greater than 30 days, the contractor licence had been cancelled pursuant to s22(1)(a) of the Act. She repeated her request for the liquidator to complete the surrender form and return the licence card.

On 2 June 1998 Ms also wrote to [the builder's previous company 1] and advised the company the licence had been cancelled pursuant to s22(1)(a) of the Act. In this letter Ms requested that the contractor licence be returned rather than surrendered.

Despite the advice to the company and the liquidator, the DFT did not update BSS to reflect the cancellation.

On 30 June 1998 Ms [redacted] telephoned the liquidator. The liquidator said that they had attempted to contact the company on four occasions and did not have their records.

On 15 July 1998 [the builder's previous company 1] wrote back to Ms [redacted] and enclosed the surrender form and the licence card.

The licence record on BSS was noted as 'surrendered' on 15 July 1998, which was three months after the nominated qualified supervisor had resigned.

There are three concluded complaints under the [builder's previous company 1] licence: C97/0000, C97/0001 and C97/0002 (concluded on 3 February 1998, 8 January 1998 and 17 April 1998, respectively).

Complaint C97/0002 resulted in a statutory insurance claim C97/0000 for \$10,815, which was approved on 30 March 1999. The reason for this claim is stated as 'insufficient finances'.

There are also two external insurance claims recorded for the licence.

6.3.2.2 The finalisation of the [the builder's previous company 1] licence on BSS

Despite Ms [redacted] letters of 2 June 1998 purporting to cancel the [builder's previous company 1] licence, the [builder's previous company 1] licence was finalised on BSS as 'surrendered' three months after the nominated qualified supervisor resigned and no new supervisor was appointed, and three months after the company was placed under external administration.

Section 22 of the old BSC Act stated:

22 Automatic cancellation of licences

(1) A licence is to be taken to have been cancelled:

- (a) if 30 days (or such longer period as has been agreed on between the licensee and the Corporation) expire during which there has not been a nominated supervisor for the licence, or
- (b) if the licensee is an individual or a partnership and the individual or any individual who is a member of the partnership becomes subject to a sequestration order, or
- (c) if the licensee is a partnership and (without the prior approval of the Corporation given for the purposes of this section) there is any change in its membership, or
- (d) if the licensee is a corporation and it becomes subject to a winding up order (whether or not on its own application) or ceases to exist because of its being dissolved or otherwise.

(2) Subsection (1) (a) applies only in respect of a licence that authorises its holder to contract to carry out residential building work or specialist work.

On 1 May 1997 the *Building Services Corporation Legislation Amendment Act 1996* commenced and as a result of amendments to section 22, financial requirements for licensees were no longer taken into account under the Act. The amending Act omitted section 22(1)(d), and stated:

Section 22 Automatic cancellation of licences

(1) A licence is taken to be cancelled if:

- (a) 30 days (or such longer period as has been agreed on between the licensee and the Director-General) expire during which there has not been a nominated supervisor for the licence, or
- (b) the licensee is a partnership and (without the prior approval of the Director-General given for the purposes of this section) there is any change in its membership (other than because of death).

In response to the changes in legislation and the amendment of section 22, on 6 June 1997 a memo was sent to all DFT processing staff (). The memo stated the following procedure had to be followed in relation to finalising liquidated companies on BSS:

On receipt of notification that a company has been placed in Liquidation the following action is to be taken.

1. Check that the ACN of the liquidated company matches the ACN on the Licence file. If a match then
2. Place an alert 'Liquidation' (Liq) on the Licence Record through the Licence Maintenance Menu.
3. (i) If the company was placed in Liquidation before 1 May 1997:
 - (a) update the Licence Status History to cancelled under section 22 (code = CA06) and status date to date of Liquidation
 - (b) send letter advising licence has been cancelled and request the surrender and return of the Licence Card (Standard letter A attached).
- (ii) If the company was placed in Liquidation on or after 1 May 1997 send letter requesting the surrender and return of the Licence Card. (Standard letter B attached).

Standard letter 'B' stated the following:

As the company is no longer trading, the DFT requests that the licence be formally surrendered. A surrender form has been enclosed which should be completed and returned together with the Licence card.

The above procedure did not specify how a licence for a company liquidated after 1 May 1997 was to be finalised on BSS, ie what licence status code should have been used. In practice, the licence status 'surrender' was used.

Section 45 of the Act states that the holder of an authority may surrender it by delivering it to an office of the Department of Fair Trading with a written notice that it is surrendered. Section 45 has not been amended and was the same in the BSC Act.

The surrender of an authority under section 45 of the Act is voluntary* as opposed to other types of licence finalisations such as cancellations or suspensions.

This is evidenced by the response we received from the former Commissioner for Fair Trading in response to the following question:

When the assessing officer of the [builder's company] licence application noted that two previous corporate licences for [previous company 1] and [previous company 2] were surrendered was he/she required to make further inquiries? If yes, please advise what further inquiries were made. If not, please explain why surrendered licences are not subject to scrutiny.

The former Commissioner answered: 'No. It was not a required procedure at the time to investigate the reasons for the **voluntary** surrender of a licence (emphasis added).'

That surrendered licences were seen as voluntary by DFT and consequently were not scrutinised when applications for new licences were assessed is further evidenced by the fact the officer who assessed the licence application for [the builder's company] did not check the licence histories for either [the builder's previous company 1] or [the builder's previous company 2] (See 6.3.4.2 below).

The surrender requested by DFT in the case of [the builder's previous company 1] was not voluntary, it was a request to an entity that not longer traded to return the licence card.

6.3.2.3 Failure to cancel [the builder's previous company 1] licence pursuant to s22 (1)(a) of the Act

[The builder] resigned as the nominated qualified supervisor of [previous company 1] on 16 April 1998. According to s22 (1)(a) of the Act the licence was taken to have been cancelled 30

days after this date, on 16 May 1998. As [previous company 1] did not nominate another supervisor in response to the written request by the OFT, the licence should have been cancelled after that date. In fact, Ms [redacted] two letters dated 2 June 1998 state that the licence had been cancelled pursuant to s22 (1)(a). However, the officer failed to effect the cancellation on the BSS and the licence remained current for six more weeks until 15 July 1998. The DFT officer failed to comply with the legislation by not cancelling the [the builder's previous company 1] licence.

6.3.3. [The builder's previous company 2] Pty Ltd licence history (00000)

6.3.3.1. *Summary of transactions on the licence file*

On 3 April 1998 [the builder] and [another person] applied to DFT for a company builder's licence for [the builder's previous company 2] Pty Ltd. [the builder's previous company 2] was registered with ASIC on 24 November 1997. A notification of initial appointment of officeholders was attached to the licence application and showed that [the builder] and [the other person] were the directors of the company as at 24 November 1997, which was the date of the officeholder notification.

Question 10 on the DFT licence application sought information about the company directors' financial histories. The question asked:

Has any director/member in the last 7 years been bankrupt or assigned their property to pay debts or ever been a director or manager of a company which was wound up, placed in receivership or under official management or entered into other arrangements with creditors due to insolvency?

The OFT records show the applicants answered 'no' in response to question 10 despite the fact [the builder's previous company 1] was being wound up at this time.

As there was some doubt about the correct registered address for the company, the assessing officer filled out an application for intelligence information on 30 April 1998 and received a company extract from ASIC. The company extract showed that [the builder's father] became a director of [the builder's previous company 2] on 26 March 1998. However, DFT records do not include this information.

There are no complaints or insurance claims recorded against [the builder's previous company 2].

DFT records show that the nominated qualified supervisor left [the builder's previous company 2] on 17 April 2000 and the licence was surrendered on the same date.

ASIC records show the following details about [the builder's previous company 2] P/L:

- placed under external administration on 16 March 2000
- the court appointed liquidator resigned on 10 July 2000
- the company was deregistered on 4 December 2000
- [the builder] ceased to be a director on 25 February 1999
- Mr F ceased to be a director on 3 September 1999
- [the builder's father] was the only remaining director until 17 January 2000.

6.3.3.2. *Assessment of the [the builder's previous company 2] application*

According to the procedures manual (1996) data entry operators, who did the initial preparation of the application file and then handed it to the processing officers, were required to make the following checks on BSS:

- applicant address
- supervisors names
- directors names
- partners names
- trading/business name

If a match was found for any of the above categories of names, the data entry operator was required to record these names on a form called 'application search check sheet'. The officer was then required to record any insurance claims, breaches and complaints for any of the names that were matched to the current applicant through a search of BSS.

The officer processing the [the builder's previous company 2] application recorded and printed out the two complaints under [the builder]'s personal licence ([reference numbers]).

The assessing officer did not print out or record the statutory insurance claim relating to [the builder]'s licence.

The officer recorded the number for the [previous company 1] licence on the application search check sheet and noted that [the builder] was a nominated supervisor for that company. The officer did not record the three complaints against [the builder's previous company 1].

The assessing officer printed out a name details report, which showed [the builder]'s personal licence and also showed that he was a director of [the builder's previous company 1].

6.3.3.3. Check of paid out insurance claims

As discussed in 6.3.1.3 it was DFT's policy to attempt recovery of all paid out insurance claims unless the claim did not arise from any fault by the contractor who carried out the work, or the debt was irrecoverable due to bankruptcy or liquidation.

The Licensing Procedure Manual (1996) describes the procedure licensing staff were required to follow when processing and assessing new applications if they came across a paid out insurance claim. Point 6.1.4.11 of the manual states:

Where an INSURANCE CLAIM has been lodged regarding work undertaken by the applicant, the Processing Officer:

- ticks the appropriate box on the Check Sheet
- checks the Insurance Claims Enquiry Screen to ascertain if the claim was approved or declined
- if the claim was approved, ascertain the amount paid out and if recovery action was waived, or if any monies have been recovered
- if recovery action is required but not yet finalised, immediately refers the matter to the Debt Recovery Unit for further action. The Licence/Certificate Application cannot be finalised until a suitable arrangement has been made.

NOTE: Should any of the required Licence, Application, Breach, Complaint, Claim files not be attached, the Processing Officer:

- updates the status code ...
- returns the Application to the Data Entry Operators for attachment of the appropriate files.

The insurance claim against [the builder]'s personal licence was paid out on 3 December 1997. The application for the [the builder's previous company 2] licence was processed and assessed in the period between 3 April and 12 May 1998. There is no Insurance Claim report attached to the assessment documentation along with the other computer printouts.

The officers failed to follow the above procedures. The licensing staff either did not check for or failed to identify the previous insurance claims. No insurance claim report was attached to the application file. The processing officer did not return the application for the attachment of appropriate files.

The first demand letter for the recovery of the insurance claim against his personal licence was issued to [the builder] on 26 March 1998. OFT's procedures provide that the licence application for [the builder's previous company 2] should not have been finalised until a suitable arrangement had been made with [the builder] in relation to the claim.

6.3.3.4. *Licence history of [the builder's previous company 1] and the assessment of the licence application for [the builder's previous company 2]*

As discussed in point 6.3.3.2 the data entry operator was required to do a name search and identify matching names for the applicant, supervisor and directors and/or partners. If an application in the same name existed, the data entry operator was required to follow this procedure:

- retrieve any previous Licence/Application file(s) stored at St Leonards:
 - where the previous file(s) are in the same name as the current Application, these files are permanently attached together in chronological order with the new Application being upper most.
 - where the previous file(s) are NOT in the same name as the current Application, then a new file is created for the current Application, and the associated file(s) are tied behind this new file (eg where the applicant is a director of a previously or currently licensed company).

Although the [the builder's previous company 1] licence number was recorded on the application search check in the 'directors' column, none of the complaints against [the builder's previous company 1] were recorded or printed out or attached to the application. They clearly did not form part of the assessing officer's considerations and decision about whether the [the builder's previous company 2] licence should be approved.

The procedures manual only required the checking of files that matched the names of the directors and supervisor. In this case that meant checking [the builder]'s personal licence.

The checking procedure was not wide enough to include any other companies the directors had been associated with.

6.3.3.5. *Recording of additional director of [the builder's previous company 2]*

According to clause 26(b) of the *Home Building Regulation 1997* a corporation that is the holder of a licence must notify the Director-General in writing within 7 days if there is a change of directors and the particulars of the change including the name, date of birth and address of each new and former director.

The Licensing Procedure Manual (1996) required companies to provide a current certified copy of the company's return of directors (ASIC Form 304) to notify any change in officeholders. Any new directors appointed had to complete a statement of particulars of director/member form and supply two character references.

The initial appointment of officeholders' form that was submitted with the [the builder's previous company 2] application in April 1998 was dated 24 November 1997. However, there were no procedures that would require only the most recent officeholder form to be submitted with an application. This lack of procedure allowed the third director of [the builder's previous company 2] at the time of the application not to be recorded and scrutinised by DFT staff.

6.3.3.6. The liquidation of [the builder's previous company 1] in the assessment of [the builder's previous company 2]

The DFT became aware of the liquidation of [the builder's previous company 1] one day before the licence application for [the builder's previous company 2] was approved. No communication about the liquidation occurred between the officer who finalised [the builder's previous company 1] licence and the officers who approved the [the builder's previous company 2] licence.

6.3.3.7. The surrender of [the builder's previous company 2] licence

The OFT records show that the nominated qualified supervisor left on 17 April 2000 and that the licence was surrendered on the same day. However, the Public Register records that [the builder] was the nominated qualified supervisor for [the builder's previous company 2] from 7 April 1998 to 17 December 1999. In a fax dated 22 June 2004 [the builder] sent to the OFT he stated he had resigned as the nominated qualified supervisor of [the builder's previous company 2] on 17 December 1999 and notified the DFT at the time.

We asked the OFT to provide us with any surrender forms and supervisor resignations. The OFT advised there is no material on the [the builder's previous company 2] licence file relating to the surrender of its licence including any surrender form. There is also no advice on the file at the time that [the builder's previous company 2] was liquidated. There appears to be no record of [the builder]'s resignation as the nominated qualified supervisor in December 1999.

If [the builder] and the Public Register are correct, [the builder's previous company 2] licence should have been cancelled on or after 17 January 2000, but remained valid until 17 April 2000, when it was noted as surrendered.

6.3.3.8. The recording of the liquidation of [the builder's previous company 2]

The liquidation of [the builder's previous company 2] occurred in March 2000, but was not recorded on DFT records until May 2004.

We asked the former Commissioner to explain how the OFT becomes aware of companies placed in liquidation and to explain why there was no notation on [the builder's previous company 2]'s file that it was in liquidation.

The former Commissioner advised the OFT becomes aware of companies having been placed into liquidation in the following ways:

Through reports or complaints received from Fair Trading officers, consumers or members of the public

By means of searches conducted by Fair Trading when investigations of a licensed entity are under way

By means of searches conducted when licensees notify Fair Trading that their companies are under administration etc. (Licenses are required to immediately inform Fair Trading of such matters and renewal forms require licensees to state whether a company has gone into liquidation or receivership. It is noted that, in the case of [the builder's previous company 2], [the builder] had stated "No" to that question in June 1999 when restoring the licence. The company was placed under external administration in March 2000.) and

Through regular searches conducted of newspapers by the Regulatory Analysis and Assessment Branch of the Home Building Service. These searches identify licensed entities which are subject to liquidation or bankruptcy proceedings. However, this activity has only been in place since 2004.

...

Additionally, an alert was not placed on the licensing database to prevent renewal or restoration of the company's licence and to inform Home Building Service staff if related licence applications were later made. This would be the usual practice. It would appear therefore, that Fair Trading was simply not (made) aware of the liquidation proceedings. Given arrangement that have been put in place since that

time, this would be unlikely to occur again, but it cannot be ruled out because of the split between Fair Trading's licensing system and the company regulatory regime overseen by the Commonwealth's Australian Securities and Investment Commission.

6.3.4. [The builder's company] Pty Ltd (Licence number 0000)

6.3.4.1. *Summary of transactions on the licence file*

On 30 November 2001, [the builder] applied for a company builder's licence for [the builder's company]. [The builder's company] was registered on 19 September 2001. [The builder] was the sole director of [the builder's company] and the nominated qualified supervisor. The licence was approved on 7 December 2001.

On 18 March 2002 the condition 'only for contracts not requiring home owners warranty insurance' was lifted from the licence.

Question 10 on the DFT licence application sought information about the company directors' financial histories. The question asked:

Has any director/member in the last 7 years been bankrupt or assigned their property to pay debts or ever been a director or manager of a company which was wound up, placed in receivership or under official management or entered into other arrangements with creditors due to insolvency?

The OFT records show the applicant answered 'no' in response to question 10 despite the fact [the builder's previous company 1] and [the builder's previous company 2] had both been liquidated. There was one other complaint recorded against [the builder's company] - C2004/0000. The complainant alleged a series of more than ten construction defects, which were mostly confirmed by the OFT inspector. The OFT issued a rectification order to the company but subsequently finalised the complaint with no further action because the complainant decided to take the matter to the CTTT rather than wait for the company to rectify the defects.

6.3.4.2. *The assessment of [the builder's company] licence*

At the time the [the builder's company] licence was approved, some changes had already occurred in the way licences were assessed, however the Licensing Procedure Manual was not officially updated until July 2002. In response to our request to provide the Procedure Manual that was in force at the time [the builder's company] licence was approved, the OFT provided the 2002 manual. Therefore, it is our assumption that the procedures as described in this manual were adopted in practice beforehand. In any case, the difference between the 1996 and 2002 versions of the manuals is minimal.

The officer processing the [the builder's company] application printed out the following information from the OFT computer database:

1. licence profile report for [the builder's] personal licence (00000);
2. concluded complaints for [the builder's] personal licence;
3. a breach report file for [the builder's] personal licence; and
4. insurance claim history report for [the builder's] personal licence.

The 'Enter Application Details' section of the Licensing Procedure Manual (2002) prescribed what needed to be noted on the application search check sheet. The application search check sheet was one of the forms that had to be filled out for every new application by the processing officer. The manual states:

- (the Data Entry Operator) notes the Application Search Check Sheet as follows:

NAME ENQUIRIES note the file number(s) and tick that a match was found

INSURANCE	note the claim number of any claim(s) for this name and tick that a match was found
BREACHES	note the Breach number of any Breaches for this name and tick that a match was found and obtains the relevant file
COMPLAINTS	note the complaint number of any complaints for this name and tick that a match was found and obtains relevant file(s)
PARTNER	note the file number(s) and tick that a match was found
DIRECTORS	note the file number(s) and tick that a match was found
LICENCE NO:	note the licence/certificate number of any licences/certificates for this name and tick that a match was found
EXPIRY DATE:	note the relevant expiry date of each licence for this name
OTHER RECORDS:	ie history records too old for the computer system
	<ul style="list-style-type: none"> - retrieves any previous licence/application file(s) stored at Head Office: - where the previous file(s) are in the same name as the current application, these files are permanently attached together in chronological order with the new application being uppermost. - where the previous file(s) are NOT in the same name as the current application, then a new file is created for the current application, and the associated file(s) are tied behind this new file (eg where the applicant is a director of a previously or currently licensed company). - The papers are placed on the file in the following orders:
	Application (including all attached documentation)
	computer printouts
	Application Search Check Sheet
	Licence Application Check Sheets (2 pages)
	Outstanding Summary Sheet (uppermost)
	NOTE: If a Licence/Application file is stored at Repository, it is ordered through the Records team.
	<ul style="list-style-type: none"> - enters the details of the Application onto the system using the New Licence Application Screen using the existing name/address code(s).

The procedures manual did not explicitly require a search of any other licences in names other than the names of the directors or nominated qualified supervisor.

As a result only the following information was actually recorded on the [the builder's company] application search check sheet:

1. the licence number for [the builder]
2. one complaint against [the builder] recorded as 94/[0000] instead of 96/[0000].

The officer failed to record the second complaint against [the builder] or the insurance claim.

The licence profile report for [the builder]'s personal licence lists him as a director of both [the builder's previous company 1] and [the builder's previous company 2]. Both licences are noted as surrendered on this report. The report does not note the alert that was on the [the builder's previous company 1] licence about its liquidation. The procedures manual states that alerts are displayed on every screen whenever any officer accesses a licence record. However, it appears the alerts are not in fact displayed when licences appear in a list as part of another licence. The alert would have been displayed on a 'licence profile report' or a 'quick licence check' for [the builder's previous company 1]. Neither of these reports was printed out.

On 19 January 2004 in his briefing to the former Commissioner about [the complainants'] complaint, Mr , then Manager Builder Licensing, stated the following:

When processing the application for [the builder's company] Pty Ltd in November/December 2001, the delegated officer again noted that the two previous company licences had been surrendered however was unaware that both companies had been subsequently liquidated.

It is clear the reason the officer was unaware of this was not because the information was not available on the database, but because the two licences were not interrogated. It was also not a requirement to check the history of surrendered licences.

In the investigation notice we asked the following questions about the checks performed:

Q: Were the checks performed at the time the [the builder's company] licence application was processed in any way different from what was prescribed by the procedures manual in force at the time?

The former Commissioner's answer to this question was 'no'.

Q: When the assessing officer of [the builder's company] licence application noted that two previous corporate licences for [previous company 1] and [previous company 2] were surrendered was he/she required to make further inquiries? If yes, please advise what further inquiries were made. If not, please explain why surrendered licences are not subject to scrutiny.

A: No. It was not a required procedure at the time to investigate the reasons for the voluntary surrender of a licence. However, there were normal procedures incorporated to check whether there had been any complaints history against [the builder] and the previous companies. Those checks were made. Those checks revealed [the builder]'s complaint/penalty fine and the one insurance claim that was paid against him.⁴

Q: Please comment on whether you consider the licence assessment and checking measures used in relation to [the builder's company]/[the builder] in 2001 were satisfactory?

A: The licence assessment and checking procedures in place in 2001 were regarded at that time as being satisfactory having regard to the relevant legislation. There have been a number of amendments to the legislation since that time and new procedures have been or are being developed as part of ongoing procedural reviews.

The licence application assessment procedures are, to a great extent, defined by the legislative requirements for seeking prescribed information from applicants. Since its introduction, the Home Building Act 1989 has been monitored, reviewed and amended regularly.

6.3.4.3. The consideration of the insurance pay out for [the builder]'s personal licence

As already discussed in point 6.3.1.3 in regards to the insurance claim under [the builder]'s personal licence, the procedure manual required the assessing officer to check whether recovery action was required and finalised. If the recovery action was required but not yet finalised, the application could not be finalised until suitable arrangements had been made.

A demand letter was sent to [the builder] on 31 August 2000 for the settlement of the insurance claim. He did not respond. On 13 November 2000 a final demand letter was sent for the whole amount of the claim. Again [the builder] did not respond. At the time [the builder's company] licence application was being assessed, no suitable arrangement had been entered into for the repayment of the debt. Consequently, [the builder's company] licence application should not have been approved at this time.

We asked the OFT whether there was an interface between the BSS and the debt recovery function that would have allowed the licensing staff to see whether recovery action was finalised. We were told the BSS does not allow licensing staff to see whether debt recovery is under way, but the OFT was looking at developing that capacity. In the meantime, licensing relies on the insurance section to bring matters to their attention administratively and licensing will take action against license holders who renege on repayment agreements or try to avoid payment in the first place. Usually this involves refusing to renew licenses.

⁴ The fine the Commissioner was referring to did not actually belong to [the builder] but to another person by the same name. This fact was recorded on the file.

However, at the time the letter of demand dated 31 August 2000 was issued, [the builder]'s personal licence had expired on 3 July 2000. On 7 September 2000, [the builder] restored his licence with a cheque that was dishonoured. The licence was eventually restored on 17 October 2000. There appears to have been no communication between insurance and licensing.

According to the licensing procedure manual, it was the processing officer's responsibility to ascertain whether recovery action was finalised and if it had not refer the matter to debt recovery and halt the approval of the new licence application. The manual did not give any guidance on how to perform the insurance check.

6.3.4.4. Home Owner Warranty Eligibility Certificate

On 18 March 2002 [the builder's father] sent a fax to OFT attaching a copy of the confirmation from HIA Insurance Services of [the builder's company]'s eligibility for Home Owner Warranty Insurance. A copy of the same letter was given to counter staff at OFT's Parramatta office on 15 March 2002 by [the builder's father]. This copy was received by Home Building on 20 March 2002. The HIA letter is dated 13 March 2002, it was faxed to [the builder's company] on the morning of 14 March 2002. There is no original certificate of eligibility on file or any evidence that it was sighted. The condition 'only for contracts not requiring Home Owner's Warranty Insurance' was lifted on 18 March 2002, the day of [the builder]'s fax.

The licence application form states the following in relation to insurance certificates:

Please tick only one of the below boxes and supply if required the original of a certificate from an approved insurer evidencing holding, or being eligible to obtain, Home Warranty Insurance (Note – copies, certified copies and facsimiles of certificates will not be accepted).

HWI eligibility certificates were also required to be presented at licence renewal stage. There is no record on file of any further HWI eligibility certificates. At the time the condition 'only for contracts not requiring Home Owner Warranty Insurance' was lifted from the [the builder's company] licence, the OFT accepted a fax copy of the certificate contrary to its own procedures.

6.3.5. General

6.3.5.1. The requirement to be a fit and proper person to hold a licence

Section 19 of the Act at the time the application for a licence for [the builder's company] was approved provided that:

- (1) An individual, a partnership or a corporation may apply to the Director-General for a licence authorising its holder to contract to do such one or more of the following things as may be specified in the application:
 - (a) to do residential building work,
 - (b) ...
 - (c) ...
- (2) An application for a licence is to be accompanied by such particulars as are required by the Director-General concerning:
 - (a) the fitness, ability and capacity of the applicant to carry out contracts for which the licence is required, and
 - (b) the arrangements made or proposed by the applicant to ensure that all work done under those contracts will be done or supervised by appropriately qualified individuals.
- (2A) ...

(3) ...

Section 20 of the Act stated:

- (1) After considering an application, the Director-General must:
 - (a) issue a contractor licence to the applicant, or
 - (b) reject the application by serving on the applicant a notice setting out the reasons for rejecting the application.
- (2) The regulations may fix or provide for the Director-General to determine standards or other requirements that must be met before any licence is issued or before a licence of a particular kind is issued.
- (3) The Director-General must reject an application for a licence if:
 - (a) the Director-General is not satisfied that any such requirement would be met were the licence to be issued, or
 - (b) ...
 - (c) ...
- (4) (Repealed)

...

Clause 19 of the Home Building Regulation 1997 provides:

- (1) Before a licence is issued, the Director-General must be satisfied that:
 - (a) ...
 - (b) any individual who is an applicant, and each individual who is a member of a partnership, and each director of a corporation that is a member of a Partnership or of a corporation, that is an applicant:

...

- (i) is a fit and proper person to hold the licence and is otherwise of good character, and

Section 20(2) of the Act provides that the Director-General may determine standards or other requirements that must be met before any licence is issued or before a licence of a particular kind is issued. Clause 19 of the Regulation sets out such requirements. Section 20(3)(a) provides that the Director-General must reject an application for a licence if 'the Director-General is not satisfied that any such requirement would be met were the licence to be issued'. One of the requirements is that an applicant or each director of a corporation that is an applicant be 'fit and proper' (cl 19(c)(v)).⁵

We asked the OFT to explain what standard is applied in practice to satisfy the Commissioner that an applicant is a fit and proper person to hold a licence when applications or licences are assessed and during disciplinary proceedings against licence holders.

The Commissioner provided the following answer:

The fitness and propriety of a person are qualities which are assessed having regard to the licensing legislation. Fair Trading is aware that courts have noted that the "test for fitness and propriety is not simply a test as to whether the applicant himself is a fit & proper person, but specifically whether he is a fit & proper person to hold the particular licence he is seeking. It is therefore necessary to direct attention not only to his own character but also to the purpose of the regulatory regime."

In assessing fitness and propriety, the assessor must consider the nature of the duties of the applicant, in this case a building contractor, and the purpose of the legislation, in this case consumer protection against financial loss and protection against risk to consumer and public safety. The standard applied for disciplinary proceedings in general is similar to that for licensing purposes.

⁵ Based on *Burke -v- Director General, Department of Fair Trading* [2001] NSWADT 179 (1 November 2001)

While criminal history, bankruptcy, and the level of risk to consumers and others, as well as conduct in terms of existing licence holders' compliance record are taken into account, applications are received and assessed "on face value" and having regard to the penalties provided in the Crimes Act regarding falsification of information and documents. Certain additional background checks are conducted on a random basis. However, the principal concern is that the applicant has the appropriate skills and practical experience, as well as eligibility for home warranty insurance (unless the licence is endorsed with a condition that restricts work to jobs not requiring home warranty insurance).

Fair Trading is in the process of drafting new guidelines and procedures for the assessment of applications for both new and renewed authorities. These guidelines will have direct correlation to the new provisions in the *Home Building Amendment Act 2004* that commenced on 29 April 2005.

While it is correct that the Act itself does not give much guidance on this issue, there is case law that does.

In an Administrative Decisions Tribunal review of a decision by the Director-General to refuse a contractor's application for a Qualified Supervisor Certificate the Director-General submitted that 'fitness and propriety to hold a Qualified Supervisor Certificate requires the applicant to have the three characteristics of honesty, knowledge and ability (*Hughes & Vale Pty Ltd -v- NSW* (No 2) (1955) 93 CLR 127).⁶ The Tribunal accepted his submission.

In addition, the Judicial Member made the following observation:

In the matter of *Australian Broadcasting Tribunal -v- Bond and Ors* (1990) 170 CLR 321, the High Court was of the view that where there is a legislative requirement to be 'fit and proper' in relation to a licence of some kind "... the requirement takes its meaning from the activities which the person is or will be authorised to engage in by virtue of the licence and the ends to be served by those activities" and that "... depending on the nature of the activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur" (at 380). The Court considered that "... the question whether a person is fit and proper is one of value judgement and in that process the seriousness or otherwise of particular conduct is a matter for evaluation by the decision maker" (at para 63).

Among other things the Director-General relies upon a number of responses provided by Mr Burke in his application form to support a finding that Mr Burke does not possess the honesty required to hold a certificate under the Act. ... answers to question nine on application of 24 February 2001 incorrectly records 'no' in answer to the question whether Mr Burke has ever been refused or previously disqualified from holding a certificate.

6.3.5.2. The random checking of information provided by applicants of contractor licences

The Independent Commission Against Corruption (ICAC) report into certain applications made to the Department of Fair Trading for building and trade licences (November 2003) stated that a standard check was made by the OFT on 10 percent of the applications it received, for example, to ensure an applicant was not bankrupt. However, the former Commissioner of OFT gave evidence to the Budget Estimates Committee on 15 September 2004 that suggested the OFT checks 100 percent of applications in relation to information related to a person's previous directorships.

We were concerned about apparently conflicting information concerning the proportion of applications thoroughly checked by OFT to ascertain the veracity of information provided by the applicant, particularly in relation to any involvement with failed companies.

In our preliminary inquiries we asked the following question:

What were the procedures in 2001 in terms of both the percentage of applications checked and the type of checks performed to ensure the information provided on the application, in relation to involvement in previous companies that were subject to liquidation or winding up orders, was accurate?

⁶ *Burke -v- Director General, Department of Fair Trading* [2001] NSWADT 179 (1 November 2001)

We received the following answer:

All licence applications were checked against information within databases and other forms held by the Department. Any application that disclosed issues relating to bankruptcy and/or liquidation were automatically the subject of company and/or bankruptcy related searches. In addition, ten percent of all licence applications (whether or not there was a disclosure of bankruptcy or liquidation) were the subject of such searches.

In our investigation notice we asked the OFT to explain how the 10 percent sample is selected and received the following answer:

The sample selection system requires that the data is entered and given a number, which is generated at random. Each application number that ends with a certain numeral is subjected to a police search (criminal), and those ending in a different numeral are subject to a bankruptcy search.

Our analysis of the procedures manual, the assessment forms and the checks performed on [the builder]'s various applications suggests that prior to 2005 licence applications underwent only a random criminal record check. The check sheet did not require a random check of bankruptcies and liquidations. According to the application check sheet the following checks were made about the applicant:

- Age (to ascertain applicant was over 18 years of age)
- Criminal record
- Licence previously refused/cancelled
- Breach/complaints/insurance history

Next to the 'criminal record' there was a date field to indicate the date the search was ordered. There was no equivalent field for liquidations or bankruptcies.

The processing of [the builder]'s applications shows not all applications were systematically checked against information held in OFT's databases either.

The sample selection system the former Commissioner described in his answers only came into being after new licensing procedures were introduced in 2005. This procedure is only contained in the new draft procedures and does not appear in either of the two previous procedures manuals. However, it must be remembered that the legislation did not require the DFT to take into account the financial histories of applicants in the period from 1997 to 2001.

6.4. The Public Register

The Public Register is maintained by the OFT pursuant to section 120 of the Act. Section 120 in part provides:

- (1) The Director-General is to maintain a register of:
 - (a) particulars of contractor licences, building consultancy 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.

Since the latest amendments to the Act, pursuant to section 120(4) the Director-General also has the discretion to remove or amend any particulars that are proven to be 'false, erroneous, misleading or unfairly prejudicial to the holder of the contractor licence...'

Clause 80 of the Home Building Regulation 2004 prescribes what particulars must be included on the Public Register in respect of contractor licences, building consultancy licences, supervisor certificates, tradesperson certificates and owner-builder permits. Reproduced below is the section relating to contractor licences only.

For the purposes of section 120 of the Act, the register must include the following registered particulars:

(a) in respect of contractor licences:

- (i) the name, date of birth and business address of contractor licence holder,
- (ii) the contractor licence number and a description of work the contractor licence authorises the holder to contract to do or the kind of kit home the contractor licence authorises the holder to contract to supply (as may be appropriate),
- (iii) the date of issue and current expiry date,
- (iv) conditions endorsed on the contractor licence, if any, and date of any alteration to the conditions,
- (v) variations of the description of the work the contractor licence authorises the holder to contract to do, or the kind of kit home the contractor licence authorises the holder to contract to supply (as may be appropriate), and the date of the variations,
- (vi) whether the contractor licence, if held by an individual, is an endorsed contractor licence,
- (vii) 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,⁷
- (viii) if the holder is a partnership, the names, dates of birth and addresses of the members of the partnership,
- (ix) if the holder is a corporation, the names, dates of birth and addresses of the directors of the corporation,
- (x) 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,
- (xi) 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,
- (xii) the results of any relevant determination under Part 4 of the Act,
- (xiii) the results of any prosecutions against the holder under the Act,
- (xiv) the number of insurance claims paid in respect of work done, or kit homes supplied, by the holder,⁸
- (xv) details of any penalty notices issued to the holder,
- (xvi) any instance of non-compliance with a Tribunal order to do work or to pay money,
- (xvii) details of any public warnings issued regarding the holder under section 23 of the Act,
- (xviii) details of any formal cautions issued to the holder regarding his, her or its conduct,
- (xix) any cancellation or suspension of the contractor licence, whether made under the Act or the *Fair Trading Act 1987*,⁹

The Register is made available to the public through OFT's website licence check facility or through phoning the OFT.

The website advises people to always check the licence number of a contractor they wish to engage to make sure the contractor has a valid and current licence that is suitable for the type of work to be done. The licence check page of the website also lists some of the particulars that are found listed under a licence number.

The licence check page warns users that it is legally possible for a licensee to have, or have had, more than one licence number either as an individual or a company. In order to comprehensively research the history of a licensee the website suggests that searches should be conducted on directors, members of partnerships, nominated supervisors as well as individual names and partnership or company names. It suggests conducting a 'partnership or

⁷ Since 1 September 2004

⁸ Since 1 September 1997

⁹ xv – xix since 1 January 2002

company name search' to establish all corporate licences the licensee may hold **or may have held, or been associated with** (emphasis added). The name search purports to provide details of all licences associated with a licence holder, however, as the example of [the builder] demonstrates, this is not always the case. Currently the search facilities on the OFT website do not enable a consumer to obtain an accurate list of all licence entities that a person is or was associated with. It is also not possible to obtain information about other companies a licence holder was the nominated supervisor for prior to 1 September 2004. This is because clause 80(vii) that requires this information to be included in the Public Register was only inserted in the regulation on 1 September 2004.

For example, a consumer is not able to obtain from the online Public Register the facts that [the builder] was the nominated supervisor of [the builder's previous company 1], [the builder's previous company 2], [the builder's company] and another company by the name of [a building company] because these companies predated the introduction of clause 80(vii).

There is no warning on the OFT's website of this limitation.

Consumers may also be misled by the omission of details on the Public Register or their not being up-to-date. For example, a number of particulars required to be recorded in the Public Register did not appear under [the builder's] personal and company licences at the time we issued the statement of provisional findings and recommendations on 15 September 2005. The following particulars were missing:

- the statutory insurance claim for [the builder]'s personal licence
- the name of [the builder's father] as director of [the builder's previous company 2]
- one external insurance claim for [the builder]'s personal licence

In addition, the fines following the completion of the internal review of show cause proceedings were noted on the Public Register on 7 September 2005 instead of 2 August 2005. Apart from this, the non-compliance with two Tribunal orders took four months to be posted on the Public Register in both cases. While the first delay was caused by [the builder]'s advice that he complied with the order, there is no explanation for the second delay (See point 6.4.1 below for a more detailed discussion).

Since 15 September 2005, the additional external insurance claim under [the builder]'s personal licence has been added into the Public Register.

The complainants provided a copy of a licence check from the online Public Register for [the builder's previous company 1] dated 19 October 2004. This licence check lists two external insurance claims. There was no information on the OFT file that explains why the insurance payouts were removed from the Public Register since October 2004. In its submission on our provisional report, the OFT said it had received advice from Vero Insurance on 13 October 2004 that the external claims against [the builder's previous company 1] originally recorded in the Building Service System on its advice, were in fact not paid.

The Public Register is an informational subset of the BSS. Certain information that is entered by the Licence Processing Branch from licence applications (eg names, addresses, directors, supervisors details, etc) transfer to the Register automatically without manual intervention. Disciplinary matters such as penalties, insurance claims and CTTT orders are recorded by the Building Investigation Branch of the Mediation Services and Compliance Division.

While the system is reliant on the timeliness of information received from the CTTT and in some cases the licence holders, OFT has not implemented any performance standards for maintaining the timeliness and integrity of data on the Public Register outside the automated updates apart from general monitoring of workloads by managers.

The OFT also told us the BSS is currently being purged of any incorrect data and will be upgraded to an Oracle 9 system. The OFT said this would enhance the accuracy and reliability of the system and improve performance standards.

6.4.1. External insurance claims on the Public Register

We asked Vero Insurance (Vero) to confirm how many claims it paid out for [the builder]'s personal licence and [the builder's company]. We were advised a claim for over \$130,000 was paid out for [the builder]'s personal licence on 17 December 2004 and another claim for over \$97,000 was paid on 30 June 2005. The [the builder's company] licence had no other approved claims in addition to the one by the complainants.

As there were no external insurance claims noted against [the builder] on the Public Register we asked Vero to explain how information about paid out claims is communicated to the OFT. Vero told us that until July 2004 a monthly finalised claims report was emailed to the OFT. However, during the period July 2004 to August 2005 Vero sent no reports to the OFT due to a change in staff responsibilities at Vero and staff changes at the OFT. Vero told us the OFT did not request any reports during this time and had they been asked for reports they would have complied with the request.

As a result of our inquiries Vero reinstituted its claims reporting and sent a report to the OFT on 10 August 2005, which included information about the claim against [the builder] that was finalised in June 2005. This insurance claim against [the builder] was consequently noted on the Public Register, however the one finalised in December 2004 was only added after our provisional report due to the gap in reporting by Vero.

In relation to its collection of information about external insurance claims the OFT advised:

Fair Trading does receive and retain information regarding the number of insurance claims received by an insurer, where that information is provided by insurers. However, not all insurers provide such information or provide it on a regular or complete basis. The information held by Fair Trading is accordingly incomplete and does not provide an accurate indication as to the number of claims received during a calendar year.

The Act confers on the Director-General (now Commissioner) a responsibility to monitor the operation of the insurance scheme. As part of this monitoring role, the Minister for Fair Trading approved certain conditions of approval for private providers of insurance. Among other matters, the conditions include immediate and annual reporting requirements. Under these requirements approved insurers are required to report to OFT any claim paid against a licence holder.

In addition, according to clause 80 (xiv), the OFT must include details of insurance claims against licence holders on the Public Register.

The OFT advised the following about the current status of reporting by approved insurers:

Arising from the implementation of the recommendations of the *NSW Home Warranty Insurance Inquiry* the interim Scheme Board is overseeing the development of market practice guidelines and claims handling guidelines including data reporting requirements. Compliance with these insurer governance provisions will also form part of amended conditions of approval to provide home warranty insurance in New South Wales which commenced on 1 September 2004.

The market practice guidelines came into force on 1 September 2004. It is intended that the claims handling guidelines will come into effect on 1 September 2005. The requirements for the reporting by insurers of data in relation to claims will commence on 30 September 2005. Data is required on claims and policies from insurers in order for the operation and financial progress of the scheme to be appropriately monitored to ensure that it is operating effectively for homeowners, builders and government.

A comprehensive specification manual and spreadsheet templates for reporting of data have been drafted. The provision of data in a standard format on a regular basis means that policy and claims information, ..., should be available for publication in the future.

6.4.2. The recording of non-compliance with the CTTT order

On 20 May 2003 the complainants took action against [the builder's company] at the CTTT. On 29 August 2003, the CTTT issued the first order to [the builder's company] for the payment of \$2,500 and rectification of a number of defects by 12 September 2003.

The orders warn licence holders it is their responsibility to notify the OFT in writing that the order has been complied with. The order says 'the fact that you have not complied will be recorded with the other information kept about you and your business in the register kept under section 120 of the *Home Building Act 1989*.'

On 12 September 2003 [the builder] sent a letter to the OFT saying:

As holder of Licence No 00000 our company is responsible for notifying your department that we have complied with the CTTT order dated 3 September 2003 relating to the above matter.

There was no supporting documentation attached to the letter to show actual compliance.

On 15 September 2003 the CTTT adjourned a hearing but noted that [the builder's company] had failed to comply with the order made by the Tribunal on 29 August 2003.

On 13 October 2003 [the builder] sent a further letter to OFT stating he complied with a Tribunal order dated 18 September 2003. There was no order by the CTTT on this date.

On 11 November 2003 [the builder] sent a third letter stating he had complied with a Tribunal order dated 4 November 2003. Again, there was no order by the CTTT on this date.

The OFT records were noted to record compliance.

On 15 December 2003, the complainants wrote to the CTTT and stated:

We, the Applicants in the above matter, wish to advise the Tribunal that the Respondent has failed to comply with the Notice of Order provided by Ms [redacted] on August 29th 2003. We ask that the Director General be informed of the non-compliance. Further, we note that in his letter to the Tribunal dated September 12th, [the builder] has knowingly made a false statement with regard to compliance with this Order.

The complainants supplied a photographic report in support of their statement to the CTTT and also included an Inspection Report from Hornsby Council that confirmed that the works had failed inspection.

In January 2004 [the complainants] complained to the OFT that the non-compliance with the CTTT order did not appear on the Public Register. Following their complaint the records were amended to reflect the non-compliance. The complainants were told the builder falsely stated he had complied hence the non-compliance was not noted on the Public Register. The register did not reflect the non-compliance for four months and was only corrected after the complaint by the homeowners.

On 10 September 2004 the CTTT issued the final order to [the builder's company] for the payment of \$275,777.07 plus costs by 10 October 2004. The CTTT and the homeowners supplied documentary evidence to the OFT that this order was also not complied with.

In their submission following our provisional report, the complainants provided the following chronology of their correspondence with OFT about the non-compliance with the second CTTT order.

On 13 September 2004 the complainants forwarded the Findings and Order to OFT's Mr [redacted] by email.

On 16 September 2004 Mr [redacted] acknowledged receipt of the Orders.

On 27 September 2004 the complainants forwarded Mr [redacted] a copy of the reasons that supported the CTTT orders. Receipt was acknowledged the same day.

On 11 October 2004 the complainants wrote to the CTTT Registrar advising that [the builder's company] had failed to comply with the orders. They asked the Registrar to advise the OFT of this.

On 11 October 2004 the complainants wrote to the Minister about the failure to comply with the orders. The letter was also copied to various people at the OFT and the Director-General. A separate letter was also sent to the General Manager of the Home Building Service.

On 15 October 2004 in a briefing to the Minister OFT acknowledged that no payment had been made.

On 20 October 2004 the CTTT Registrar advised the complainant that a copy of their letter has been given to the OFT.

On 28 October 2004 the General Manager Home Building Service wrote to the complainants thanking them for formally advising the OFT that [the builder's company] had failed to comply with the orders.

On 22 February 2005 the complainants wrote to the OFT asking why the non-compliance with the CTTT order and the external insurance claim had not been recorded on the Public Register.

The non-compliance with the CTTT orders was finally recorded on the Public Register four months later, on 24 February 2005.

We asked the former Commissioner to provide a detailed description of the communication process about orders and compliance issues between the OFT and the CTTT. We received the following answer:

The CTTT is responsible for providing OFT/HBS with notice of any orders made against the holder of an authority under the Home Building Act 1989 (viz, building or trade contractor licence, or supervisor or trade certificate). Each CTTT registry provides a copy of all CTTT orders issued.

Orders in respect of licensees must be recorded on BSS. Therefore, when CTTT refers a notice of an order to the HBS, the Licence Review Branch of the HBS must first check the licence status of the party against whom the order was made. Each order must contain a compliance date.

HBS liaises with the CTTT as and when necessary to ensure the accuracy of information. If the builder fails to comply with the CTTT order by the due date, the information that the order is outstanding will be retained on the BSS. This information then automatically transfers to the Public Register. Upon receiving from the licensee written notification that an order is satisfied, the BSS is updated and the record of order is automatically deleted from the Public Register.

Licensed builders who have complied with an order must inform OFT in writing of the fact and date of such compliance so that the notice of the order may be removed from the public register. (However, the information remains on the BSS database as internal information for history of complaints, etc).

Mediation Services and Compliance Division of the HBS receives and analyses the monthly CTTT Orders Report.

A check is undertaken to see whether a complaint file has been registered for those shown on the Report. A copy of the CTTT order is placed on file. A letter is sent to the complainant to confirm whether the order has been complied with. If the order has been complied with, there is no further action.

If the order has not been complied with, then a compliance assessment is undertaken, having regard to the value of the order, the extent of the defective work and the complaint history of the licensee, in order to determine the action to be taken.

In response to the question about what is required in way of proof by a builder to show compliance with a CTTT order we received the following answer:

The requirement to prove compliance with a CTTT order is that the licensee must send written notice to the OFT of such compliance. At the bottom of a CTTT order is a warning for the licensee (or other party named) that non-compliance is an offence.

We also asked whether any crosschecking is done with either the homeowners or the CTTT records to verify compliance has in fact occurred:

CTTT does not have any further involvement, unless the matter is re-listed with the Tribunal for a hearing for the same matter.

When a CTTT order is received and no information is received from the builder as to compliance with the order the Home Building Service writes to the consumer to ascertain if the order has been complied with. If it has not been complied with, consideration is given as to disciplinary or other action. Where the builder writes to advise compliance with the order there is no crosschecking with the consumer. However, action is taken against the builder if the consumer advises that the order has not been complied with.

6.5. The OFT's investigation into [the builder] conduct

After [the complainants] made a complaint to the OFT in early 2004, the OFT commenced preliminary investigations into the conduct of [the builder's company] and [the builder].
[redacted] was the officer initially assigned to the investigation.

In an investigation report dated 16 April 2004 Mr [redacted] recommended that a notice to show cause be issued to [the builder's company] and [the builder]. Mr [redacted] report recommended that [the builder]'s making of false statements in connection with an application for licence, non-compliance with the *Environmental Planning and Assessment Act 1979* and breaches of statutory warranties under the Act be included as grounds for disciplinary action to be taken against his personal licence.

On 30 April 2004 Mr [redacted] wrote a memo to Ms [redacted], Manager Building Licensing recommending immediate cancellation of the licences for [the builder's company] and its supervisor, [the builder], pursuant to section 43 (1)(b) of the HBA. The section provides the Director-General may cancel an authority if 'the authority was issued, renewed or restored in error (whether as a result of ... a misrepresentation or not).'

In the memo dated 30 April 2004 Mr [redacted] also made the following comments about the approval of the [the builder's company] licence:

An assessment of [the builder's company] application date 28 November 2001 in conjunction with the ASIC extract clearly indicates that the current licence held by [the builder's company] was issued in error. It appears that [the builder] may have mislead [sic] the Office in the application form by incorrectly marking question No 10, disclosing any previous involvement with corporations that have been subject of wind up proceedings.

An alert be placed on the renewal of the contractor license of [the builder] (licence number 00000) in relation to a possible breach of the Act.

On 18 May 2004 Ms [redacted] sent a letter to [the builder] advising him that the company licence for [the builder's company] had been cancelled pursuant to section 43(1)(b) of the Act as the licence was renewed or restored in error.

On 9 June 2004 Ms [redacted] sent a letter to [the builder] advising him the OFT was 'considering whether or not his individual licence should be cancelled due to his failure to disclose facts relating to the history of his involvement with previous licenses/companies.' Ms [redacted] invited [the builder] to attend an interview on 22 June 2004.

On 22 June 2004 [the builder] sent Ms [redacted] a fax disputing the facts of his involvement in failed companies.

On 22 June 2004 OFT's [redacted] and [redacted] interviewed [the builder]. In the interview the officers asked [the builder] about his involvement in [the builder's previous company 1], [the builder's previous company 2] and [another company in which the builder was a nominated supervisor]. Questions were asked about these companies' financial situations and [the builder]'s provision of misleading information on various DFT licence applications. [The builder] mainly emphasised that [the builder's previous company 1] was voluntarily wound up and that he was no longer a director of [the builder's previous company 2] when it was liquidated. In response to questions about past insurance claims, [the builder] stated he had a meeting with DFT and thought that had been sorted out, as he was never

pursued for repayment. The interviewers also stated the OFT had grave concerns about the manner [the builder] operated companies for a short time, wound them up and then started up new companies. [The builder] denied any deliberate wrongdoing and blamed the events on circumstances beyond his control.

The interview tapes were never transcribed by the OFT and there are no file notes relating to the interview on the OFT investigation file. The above description of the interview was ascertained from our own examination of the interview tapes.

There is no activity on the investigation file, at least in the format given to us, between June and October 2004.

On 29 October 2004, Principal Investigator, prepared a breach report for disciplinary action against [the builder]. The report recommended that a notice to show cause be issued to [the builder]. In the comments section of his report Mr said:

[The builder] as the sole director of [the builder's company] Pty Ltd has direct responsibility for the actions and activities of the company. His actions in dealing with [the complainants] amount to gross improper conduct. This conduct is further compounded by the deceptive manner in which he has obtained the licences not only for this company but [previous company 1] and [previous company 2]. The value of the detriment suffered by [the complainants] put [the builder]'s actions is in the upper end of the seriousness scale.

On 18 November 2004 issued a show cause notice to [the builder's company]. The grounds for disciplinary action were: breach of statutory warranty to do work in a proper and workmanlike manner, failure to do work with due diligence and within the time stipulated in the contract and failure to comply with a CTTT order for the payment of \$275,777.07 to the complainants.

On 18 November 2004 Mr also issued a notice to show cause to [the builder]. The grounds for taking disciplinary action were identical to those against [the builder's company] by virtue of [the builder] being an officer of the corporation. The provision of false and misleading information on licence applications and in correspondence about compliance with CTTT orders had not been included as grounds for disciplinary action.

[The builder] was invited to make submissions by 7 January 2005, which he did. In his submission [the builder] claimed among other matters that the CTTT ignored reports by Hornsby Shire Council that the works complied with the Building Code of Australia and that they were constructed in accordance with council's conditions of approval. [The builder] further claimed the defect reports by independent building consultants that were accepted by the CTTT as evidence were baseless. [The builder] claimed that he did in fact comply with the Tribunal order. [The builder] did not provide any evidence to support these claims.

On 7 April 2005 Mr issued a notice of decision for both show cause notices. [The builder's company] received an aggregate penalty of \$25,000, made up of \$15,000 for two breaches of statutory warranties and \$10,000 for failure to comply with the Tribunal order.

[The builder] received an aggregate penalty of \$5,500, made up of \$4,500 for the two breaches of statutory warranties and \$1,000 for failure to comply with a Tribunal order. In addition, [the builder]'s licence was varied to include a condition to complete a course of training in building site supervision within 12 months from the date of the notice of decision.

In considering what disciplinary action should be taken against [the builder], the delegated officer took into account [the builder]'s record as a holder of a contractor licence. Apart from the current disciplinary proceedings, the officer took into account two complaints made against [the builder] and the insurance claim of \$16,720.

Following the service of the notices in April 2005, the Public Register was updated to show that the licence holders were fined.

On 9 May 2005 [the builder] appealed against the notice of decision to penalise his personal contractor licence. [The builder] denied improper conduct and claimed he had solid ground to challenge the Tribunal's decision. [The builder] also claimed he had no knowledge of the insurance claim of \$16,720 recorded against him.

On 11 May 2005 [the builder's father], appealed the notice of decision to fine [the builder's company]. In his appeal [the builder's father] claimed the company was found to have no property or remaining assets after an examination at Parramatta District Court. [The builder] also claimed the Tribunal's decision was incompetent and seriously in error. [The builder] did not provide evidence to support these claims.

After the appeals were received the notations about the fines on the Public Register were removed until the outcome of the internal review.

On 15 July 2005 the internal review was finalised and upheld the original decisions on all grounds. The internal review outcome was served on [the builder] and [the builder's company] on 26 July 2005.

[The builder] had a right of appeal to the ADT within 28 days of the notice of decision being served.

Section 62 of the Act prescribes the types of disciplinary actions that may be taken against a holder of an authority as follows:

- (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 Director-General, 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 asked the OFT to provide us with any guidelines that are used by investigation and compliance staff to guide their use of discretion in what disciplinary actions they apply to what types and levels of breaches. We were told there were no guidelines, and the outcomes of disciplinary actions were based solely on the experience of compliance officers.

The disciplinary outcomes chart provided by the OFT for 2004/2005 shows that fines made up roughly 51% of all disciplinary outcomes, while disqualifications represented 17%, reprimands and formal cautions made up 8% each, no further action and conditions 5% each and cancellations represented 2% of the outcomes.

7. CONCLUSIONS

According to OFT's website there are currently 170,000 current contractor licences in NSW issued under the *Home Building Act*. With this volume of licences and increases in new applications annually OFT faces a significant task in managing the licensing and regulatory function and has to balance checking arrangements with the need to provide timely customer service within available resource constraints.

While we accept that no regulatory regime can completely eradicate fraud and dishonest dealings by those it is supposed to police, the licensing regime as it has operated until the beginning of 2005 has been largely based on trust and accepted licence applications on 'face value'. The background checking of builders has been far less thorough than the majority of homeowners would expect given the OFT has sole responsibility for regulating who enters and remains in the homebuilding industry.

In a recent ADT case the following was said about the functions of the Act and what a contractor's licence represents to the general public:

The Home Building Act 1989 is essentially a consumer protection act which regulates residential building work in NSW. It provides for the licensing and regulation of those engaging in residential building work, and makes provision as to their competence, fitness and solvency, and for their discipline. It regulates contracts for residential building work, both as to their content and who may enter them. It implies non-excludable warranties as to the quality of residential building work and services undertaken in NSW, and provides a mechanism for the resolution of disputes relating to residential building work. It establishes a mandatory home warranty insurance scheme to provide protection to those who enter contracts for residential building work, and who own homes constructed or renovated under those contracts. By issuing contractor licences and certificates the Commissioner represents to members of the public that the contractor meets the fitness, competency and solvency requirements of the Act and is authorised to do the work specified in his or her licence: s.21(1)(a).¹⁰

Clearly, the responsibility of the OFT and the expectations of the general public is that it will provide an efficient but robust enough regulatory and licensing regime that will guarantee to the consumer the protections afforded by the Act.

Our investigation focussed on four licence applications and it is possible that they may not be representative of the whole system. However, the time-span of these applications coupled with our analysis of the overall licensing procedures and other supporting evidence such as the OFT's answers to our questions suggests the patterns evident in the processing of these four applications are indicative of systemic failures within the licensing regime.

However the investigation was to an extent concerned with the past and we acknowledge that since the beginning of 2005 the OFT has done considerable work to strengthen the licensing procedures. In its submission on our provisional report the OFT provided more information about processes that have already been reviewed or changed since the investigation began. Some of these changes have eliminated the need for specific recommendations that we foreshadowed in our provisional report. The level of guidance provided to staff who process and assess licence applications has been significantly increased. A new licensing manual is also being prepared. These changes are welcome but there is still more that needs to be done to properly fulfil the obligation upon the Commissioner for Fair Trading to protect the interest of owners and purchasers of dwellings and users of utilities.

The complainants claimed the DFT failed to properly scrutinise the licence application of [the builder] and [the builder's company], failed to access the information it had in its possession about [the builder]'s prior history and failed to consider whether he was a fit and proper person to hold a licence. Thus, they argued, it failed to protect them from foreseeable risk associated with [the builder] and incorrectly issued a licence to [the builder's company]. Our investigation has substantiated these claims.

¹⁰ *Janicky v Commissioner of Fair Trading, Officer of Fair Trading* [2005] NSWADT 177 (4 August 2005)

While the OFT was misled by the information [the builder] provided on his licence application for [the builder's company], the investigation has shown that an inadequate system of checks in place at the time the licence application was assessed as well as the failure of DFT staff to perform the checks that were required and follow the procedures that were in place undermined the verification process and the proper assessment of that licence application.

The multiple licence numbers given to holders of personal licences and related entities such as companies and/or partnerships with no adequate cross-referencing among the different related entities also made the checking task more laborious and significantly increased the probability that relevant information was not taken into consideration in assessing the licence application. As a result a licence that should not have been issued on the basis of OFT's own policy and procedure was issued. That licence and the associated data on the Public Register misled the complainants and failed to alert them to material concerns that would have given them cause to review their intention of contracting with [the builder's company], which they did to their subsequent detriment.

7.1. Inadequate procedures for the checking of related licences

As detailed in the analysis of [the builder]'s applications, the procedures in place at the time did not clearly require the checking of licence histories of related companies. If the applicant was a company, only the previous conduct of the company's directors and nominated supervisors under their personal licences was required to be checked and taken into consideration in the decision on whether to approve the new application. This was inadequate.

For example, the licence history of [the builder's previous company 1] was directly relevant to and should have formed part of the considerations in deciding whether to approve [the builder's previous company 2] application, but it did not. Similarly, the conduct of both of these companies was highly relevant in the consideration of whether the application for [the builder's company] should have been approved. [The builder], one of the two known directors of [the builder's previous company 2], was also a director and nominated qualified supervisor of [the builder's previous company 1] and only director and nominated supervisor of [the builder's company]. To say that the conduct of a previously licensed company, whose director was also the director and nominated supervisor of the current applicant, should not be taken into account as part of the assessment of a new application is unreasonable given the Director-General's function to protect the interests of owners and purchasers of dwellings and to assess and maintain standards of competence of persons doing residential building work.

In its submission on our provisional report the OFT advised us that all related companies and licence entities are now checked when new licence applications are assessed.

7.2. Inadequate procedures to assess the fitness and propriety of applicants to hold a licence

Through the analysis of procedures and by the former Commissioner's own admission we found there were no real procedures in place for assessing the fitness and propriety of a licence applicant at the time the various licences associated with [the builder] were issued.

Although in 1998 financial circumstances of builders were not taken into account when issuing licences, the fitness and propriety of a person to hold a licence should have formed part of the considerations in whether a licence application should be approved. Clause 19(1)(b)(v) of the Home Building Regulation 1997 states:

Before a licence is issued, the Director-General must be satisfied that any individual who is an applicant, and each individual who is a member of a partnership, and each director of a corporation that is a member of a partnership or of a corporation, that is an applicant: is a fit and proper person to hold the licence and is otherwise of good character,...

[The builder]'s involvement in the management of a liquidated company and failure to disclose the fact on the licence application for [the builder's previous company 2] should have formed part of the assessment of whether he was a fit and proper person to hold a licence. The officers assessing the [the builder's previous company 2] application did not take these facts into consideration although they were available in DFT's records. Similarly, this conduct, the involvement in two companies that were wound up and provision of further misleading information on the application for [the builder's company] should also have formed part of the assessment of whether [the builder] as its sole proprietor and nominated supervisor was a fit and proper person to hold a licence, but it did not.

These considerations were not taken into account because there were no procedures in place to guide officers assessing the application on how to determine whether the applicant was a 'fit and proper person' despite this being a requirement of the legislation.

When assessing [the builder]'s fitness and propriety to hold a licence the assessor appears to have relied solely on two character references, taken at face value, that at the time were required to be attached to the application by [the builder's company]. The character references did not contain phone numbers and one of them only gave a PO Box number as an address. They say nothing about the authors or the nature of the relationship between the authors and [the builder]. The references were not checked.

The former Commissioner confirmed that the principal concern when approving a licence application is that the applicant has the required skills and is eligible for Home Owner Warranty Insurance. Given the absence of guidelines on how to assess an applicant's fitness and propriety and the fact that thorough checking of information available on BSS was not a required procedure, it is difficult to see how the officer could have met the mandatory requirement of being satisfied that the applicant was a fit and proper person to hold a licence.

In its submissions the OFT advised the following:

Character references for applicants are no longer required and are not considered if proffered. Guidelines for staff are now in place relating to criminal convictions and their relevance to what may constitute fitness and propriety and being of good character. The need for guidelines on other matters to be taken into account in regard to fitness and propriety and good character is being assessed and these will be prepared, if required. As the Ombudsman's Office would be aware, routine criminal checks are conducted on 10% of all applications as a risk management approach endorsed by the Audit Office. Under current arrangements, it is considered that conducting criminal checks of all applicants would mean a significant slowing of the application process. However, online checks are expected to be available under the new Government Licensing System which will encompass building licensing by late 2006. At that stage, all applicants can be subject to this checking.

We do not consider criminal checks alone to be sufficient in assessing an applicant's fitness and propriety to hold a licence. Consideration should be given to developing more comprehensive guidelines based on 'case law' precedents dealing with what constitutes fitness and propriety in the licensing context.

7.3. Incorrect approval of the [the builder's company] licence

The combination of the failure of licensing officers to follow procedures and the actual procedures being inadequate and too narrow led to the incorrect approval of the [the builder's company] licence, a view supported by the admission of OFT's own investigative staff. Firstly, the procedures required that new applications not be approved if there were any unrecovered insurance claims by the applicant or the director if the applicant was a company. This requirement was not followed in either the case of [the builder's previous company 2] or [the builder's company]. Secondly, because the procedures did not explicitly require the officers to take into consideration the conduct of previously licensed related companies, even though this information was available internally, the officer who approved the [the builder's company] application could not have carried out an adequate assessment of whether the

applicant was a fit and proper person to hold a licence. The OFT failed to consider matters that it was reasonably expected to consider, ie the conduct of previously licensed related entities. Furthermore, the failure to cancel both the [the builder's previous company 1] and [the builder's previous company 2] licences had an impact on the incorrect approval of the [the builder's company] licence.

The lack of guidance on what constitutes 'fitness and propriety' also contributed to this error in judgement.

Had the procedures required the checking of all related previously licensed entities the assessor would have become aware of material facts that would have cast the applicant in a very different light in assessing his fitness and propriety to hold a licence. At least the following history would have been evident:

- the nominated supervisor had two complaints and one statutory insurance claim
- recovery of the insurance pay out was required but not finalised
- the sole director was involved in the management of two failed companies within 3 years of the application
- one of the companies had three complaints and three paid out insurance claims against it
- the director had claimed he had never been a director or manager of a company which was wound up, placed in receivership or under official management or entered into other arrangements with creditors due to insolvency, when in fact he had been associated with two companies that had been liquidated
- the complaints against the director involved both defective workmanship and financial mismanagement.

Most of this information was not accessed or taken into consideration.

Although errors and omissions will sometimes occur in high volume processing areas such as licensing, there is clear evidence of a failure to follow procedures in all four application files reviewed as part of this investigation. This is indicative of a level of care, caution and due diligence below the standard the public expects of the OFT.

In its submission to our provisional report the OFT claimed there could be no certainty that the licence for [the builder's company] would not have been granted. It put forward a number of supporting reasons including:

- if the applicant had provided a satisfactory explanation of why the companies had failed and his role in those events, he may still have been granted a licence under the procedures applying at that time
- two complaints over a period of ten years were not considered significant
- the single insurance claim under [the builder's] personal licence was not significant and had been written off
- the fact that [the builder] is alleged to have provided incorrect information to Fair Trading in the application (which only emerged after the licence was granted) cannot legitimately be considered as a reason for the licence application to have been refused
- the complaints against [the builder's previous company 1] were resolved with one leading to a small insurance claim that was not pursued for debt recovery. Advice from Vero Insurance on 13 October 2004 was that the external claims against [previous company 1] originally recorded in the Building Service System on its advice, were in fact not paid

- it is unclear whether the refusal of the [the builder's company]'s licence on the above grounds may not have been subsequently overturned as a result of an internal review or through an approach by the applicant to the Administrative Decisions Tribunal.

I do not find this a persuasive argument.

Firstly, the discrepancy in the information emerged after the licence was granted. It should have been discovered in the checking procedures as part of the licence assessment process.

Secondly, it seems to me that the validity of [the builder]'s answers to question 10 on the licence application form clearly is a matter material to the assessment of him being a fit and proper person to hold a licence, particularly given the OFT's awareness and concern about the so called 'phoenix companies' in the broader home building context.

Thirdly, the insurance claim had not been written off at the time the licence for [the builder's company] was approved in December 2001. The claim was written off in April 2002 after several unsuccessful attempts at recovery. The OFT's own procedures manual stated that if recovery action of an insurance pay out was required but not yet finalised, that matter was to be immediately referred to the Debt Recovery Unit for further action. The licence application could not be finalised until a suitable arrangement had been made. Proceeding to issue the licence despite the existence of an unfinalised insurance claim breached OFT's own procedures. This issue was discussed in sections 6.3.3.3 and 6.3.4.3 in greater detail.

Fourthly, the advice from Vero about the validity of the insurance claims for [the builder's previous company 1] was only received in 2004, while the licence for [the builder's company] was granted in 2001. At the time OFT considered the application, those purported insurance claims were a relevant consideration.

Finally, had the licence been refused and the matter appealed to the ADT the validity of the issue could have been contested. The fact that a refusal of a licence application may result in an internal review request or an appeal to the ADT cannot be a relevant consideration favouring approval of an application.

7.4. Incorrect use of the 'surrender' code to finalise licences

The surrendering of licences is a voluntary process and enables licensees to hand in their licences and cease trading. OFT has confirmed that at the time the [the builder's previous company 2] licence was surrendered it was the occasional practice of Fair Trading to request that licences be surrendered where companies were going into liquidation. While OFT says this practice is no longer happening, it did have unfortunate consequences.

In the case of [the builder's previous company 2], [the builder's previous company 1] and an unknown number of other entities, the 'surrender' code was used on the OFT's licensing database to finalise the licences of companies that went into liquidation. Not only did this practice misrepresent the true circumstances of why the licences were no longer operative, it undermined the proper assessment of subsequent related licence applications.

On 10 August 2001 the *Home Building Legislation Amendment Act 2001* amended section 22 of the Act as follows:

- (1) The Director-General must, subject to the regulations, cancel a contractor licence that authorises its holder to contract to do residential building work or specialist work, or both (whether or not it also authorises the holder to contract to supply kit homes for construction by another person) if:
 -
 - (d) the holder of the contractor licence is a corporation and it has become the subject of a winding up order under the *Corporations Law*.

The requirement to cancel licences of liquidated companies was followed by amendments to clause 19 of the *Home Building Regulation 1997* (amended by the *Home Building Amendment Regulation 2001*) on 1 January 2002 that placed restrictions on the issue of new licences to applicants associated with failed businesses. These provided:

(1B) Before a licence is issued, the Director-General must be satisfied that the applicant or, in the case of an applicant that is a partnership, any partner of that applicant or, in the case of an applicant that is a corporation any director of that corporation:

...
(b) was not bankrupt or was not a director or person concerned in the management of a company when the company was the subject of a winding up order, or when a controller or administrator was appointed, within a period of 3 years before the date of the application, unless the Director-General is satisfied that the person took all reasonable steps to avoid the bankruptcy, liquidation or administration, ...

The DFT appears to have had full knowledge that licences of liquidated companies were being finalised on BSS as 'surrendered' during a period of over three years when they were in fact or should have been designated as 'liquidated'. Notwithstanding this, the procedures did not require officers assessing new applications to scrutinise previous associated 'surrendered' licences.

The failure to have procedures that ensured that all previous and associated licences that had been surrendered were scrutinised by licensing staff when assessing new licence applications undermined DFT's ability to comply with clause 19 (1B)(b) of the *Home Building Regulation 1997* after the amendment in January 2002. The former Commissioner stated during the investigation that 'with the commencement of the Home Building Service in 2003 ... licence surrender or expiry issues are examined in the overall assessment of the activities of individuals and other entities to determine whether those surrender or expiry activities are relevant for future licence applications.' There, however, is no evidence that this practice has been formally incorporated into the current licensing procedures.

Section 45 of the Act states the holder of an authority may surrender it by delivering it to an office of the Department of Fair Trading with a written notice that it is surrendered. Although there is no legislative requirement for providing reasons for surrendering a licence, the reasons are required to be advised by the licensee in the surrender form. The DFT had no procedures in place to scrutinise either the reasons for licence surrender or who surrendered a licence. For example, there are no procedures that would require staff to establish whether the person surrendering the licence was the actual holder of that licence. This issue becomes relevant when analysing the surrender of the licence for [the builder's previous company 2]. At the time the licence was surrendered, there were no remaining directors and no nominated supervisor. The licence should have been cancelled and recorded as such. However, the lack of procedures in this regard would have made it difficult for staff not to accept a surrendered licence. This does, however, raise the question of whether the surrender form in use by the OFT should be revised to include check box surrender reasons that would include issues such as bankruptcy, winding up orders etc that are important for OFT to be aware of for future reference purposes.

7.5. Inadequate procedures to ensure debt recovery information is accessible to and checked during licence application assessment

During the period when the licences examined by this investigation were assessed, there were no procedures in place to ensure adequate communication between insurance debt recovery and licensing. Clearly, this was not a satisfactory situation. This led to [the builder]'s debt being written off during a period when he was issued with two new licences. Had there been adequate procedures in place, the new licence applications may have acted as leverage to

collect the debt. The fact that debts were outstanding also should have prevented the issue of new licences according to the procedures in place.

In its submission to our provisional report the OFT advised that a Home Warranty Insurance Secretariat has been established within Fair Trading to better manage insurance issues including debt recovery. Procedures are now being developed for effective communication between licensing and insurance on claims and debt recovery. This includes examining the feasibility of amending the Building Service System to provide a debt recovery file capacity. In the meantime, interim communication arrangements between the two areas have been implemented to ensure insurance matters are considered in the licence application and renewal processes.

7.6. Failure to follow established procedures for Home Warranty Insurance eligibility certificates

Although [the builder]'s Home Warranty Insurance eligibility certificate was genuine, the willingness of OFT's staff to accept a fax copy of the certificate to lift the monetary cap for contracts not requiring Home Owner Warranty Insurance of \$12,000 against its own procedures is a serious concern.

The OFT further advised us that only original insurance certificates can now be used as proof of insurance eligibility. In the absence of an original certificate, checks are made with insurance companies as to the validity of the certificate. In addition, Fair Trading has already implemented a system whereby insurers regularly report on eligibility.

We note the requirement to submit originals only was in place in 2002, yet it was not followed in the case of [the builder's company].

7.7. Inadequate measures to show compliance with CTTT orders

A builder has to write to the OFT to say he has complied with a CTTT order. No proof of compliance and no crosschecking with the homeowners was done by the OFT at the time [the builder's company] failed to comply with the first CTTT order in 2003. However, if the builder did not notify the OFT that he had complied with the order, the OFT would write to the homeowners to check whether the order had been complied with. This was the practice despite the fact orders warn licence holders that non-compliance would be recorded against them even if they had complied but failed to notify the OFT.

The consequence of such a system, as illustrated by this case, is that incorrect information can be posted to the Public Register and the non-compliance is not available on the licensee's internal record either. The incorrect information relating to [the builder's company] remained on the Public Register for four months and was only removed due to action by the complainants. The [the builder's company] licence was also routinely renewed in December 2003 despite the fact the company failed to comply with a CTTT order.

In a recent ADT case the Judicial Member had the following to say about the importance of compliance with CTTT orders:

At the same time, compliance by licensed contractors with orders made by the Consumer Trader and Tenancy Tribunal in its home building jurisdiction is an essential part of the legislative scheme for the regulation of the home building industry, and the protection of consumers engaging contractors to perform residential building work. Non-compliance with orders of the Consumer Trader and Tenancy Tribunal is improper conduct and merits disciplinary action.¹¹

¹¹ Harb v Commissioner of Fair Trading, Office of Fair Trading [2005] NSWADT 171, before Molony P

We have been advised by the OFT since our provisional report that this area of licensing has been reviewed and compliance with an order is now not recorded unless documentary or verbal proof is obtained from the relevant consumer. This is a welcome reform.

7.8. Lack of accuracy of information on the Public Register

The regulation makes the listing of certain particulars (as discussed in 6.4 above) about a licence on the Public Register compulsory. Apart from this legislative requirement, the existence of, for example, an insurance claim on a licence record may have an impact on a consumer's decision whether to contract with a licensee. In addition, the accuracy of the information that is found on the Public Register has an impact on the ability of a contractor to renew their licence and/or apply for a new licence either in New South Wales or other jurisdictions. Finally, information collected from insurers and the CTTT about orders has important implications for compliance and disciplinary matters.

In its submissions on our provisional report the OFT conceded that information relating to external insurance claims on the Public Register is incomplete. The OFT stated that in the context of the NSW government efforts to attract insurers back into the home warranty market after the HIH/FIA failure, it was simply not possible to take a completely inflexible approach with insurers over the reporting matter. The OFT further advised that negotiations are continuing with insurers and when the required data is provided any gaps in the Building Service System record will be amended.

We note the advice we received from Vero Insurance that the OFT did not request outstanding claims reports during the period Vero stopped reporting. The legislation places the onus on the OFT to proactively seek the information about insurance claims and make it publicly available.

The OFT also accepted that some delays may occur in updating the Public Register as a result of reliance on third parties such as insurance companies and the CTTT for information. While we have been unable to ascertain the extent of delays in updating outstanding CTTT orders, in this case there was no delay by the CTTT in providing information about its orders and the non-compliance by [the builder's company] with the second order. Nevertheless, in the case of the second order there was a delay in updating the Public Register in excess of four months. The absence of performance standards for updating the Public Register is an area that also needs attention.

7.9. The results of determinations on the Public Register

After the completion of show cause proceedings against [the builder] and [the builder's company] the Public Register was noted with the words 'this licensee has been fined' in accordance with clause 80(xii) of the Home Building Regulation. After [the builder] applied for an internal review of the determination, this notation was taken off the Public Register until the internal review was finalised. Although the fines were confirmed and the notice of decision following the internal review was served on [the builder] on 26 July 2005, there was a six-week delay before the fines were re-posted on the Public Register on 7 September 2005.

While it may be argued that procedural fairness for licence holders might require that determinations not be posted on the Public Register while subject to internal review, fairness towards consumers might equally dictate that a fine determination stay on the register but be notated as subject to review. The OFT should explore ways in which to satisfy the requirements of procedural fairness while guarding against the potential for licence holders to "buy time" by submitting unmeritorious internal review requests to take advantage of OFT's current practice. This is especially a concern since internal reviews can take several months to complete. A determination on the Public Register may impact on a consumer's decision

whether to contract with a particular licence holder and it is important that it contains accurate and timely information.

The OFT has acknowledged the problematic nature of this issue and advised us that the current procedures are being reviewed.

7.10. Inadequate guidance on use of discretion in dealing with show cause matters

While outcomes other than fines are possible through disciplinary proceedings (eg licence cancellation or disqualification), the OFT considers that, in most cases, monetary penalties are appropriate to ensure compliance in future. It is noted that in the case of prosecutions, the only remedy available to the court is to issue fines. In 2004-05 while 11 entities were fined, two were permanently disqualified and one cancelled. In addition, the failure to pay monetary penalties can lead to licence suspension and ultimately cancellation and this is not uncommon. In 2004-05, 348 licences were cancelled for this and other non-disciplinary reasons.

While compliance staff may be experienced, principles of good administrative practice would suggest that OFT should develop some guidelines on the choice of appropriate disciplinary penalties to guide the discretionary decision making of its compliance staff to better ensure that disciplinary outcomes are both appropriate and consistent.

7.11. Incomplete investigation of [the builder]'s conduct

In the investigation into the conduct of [the builder] we observed a clear shift from a recommendation to cancel his licence to a decision to impose an aggregate penalty of \$5,500 and a requirement to complete a course of training. There is no indication on the file as to why and how this shift occurred or why the OFT decided not to include its concern that [the builder] had supplied misleading information in licence applications as grounds for disciplinary proceedings.

It is difficult to see why conduct that had been deemed by OFT's Principal Investigator as 'gross improper conduct... in the upper end of seriousness' was found to warrant a penalty of only \$5,500 and a course of study in supervision rather than one of the more serious determinations such as cancellation or disqualification.

It is also difficult to understand why [the builder]'s involvement in a number of failed building companies did not lead to a consideration of whether he should be disqualified from being 'an officer of a corporation that is the holder of an authority.' It is of concern that the delegated officers did not appear to turn their minds to these issues. While it may have been inappropriate to investigate in depth [the builder]'s significantly older conduct, given the OFT's records indicate an apparent pattern of licence applications being made by entities associated with [the builder] close to times other entities he was involved with were failing or were wound up, one would have expected that the investigation and disciplinary process would have included some form of risk assessment of the likelihood of [the builder] engaging in similar conduct in the future to guide the appropriate choice of disciplinary action.

We could see no evidence of how the interview with [the builder] in June 2004 formed part of the considerations in the investigation. Given that [the builder] denied any clear responsibility in the management of the companies that were liquidated, we expected to see a copy of the liquidators' reports to verify or counter his claims. The investigators did not request the reports.

The OFT has advised us that it was considered at the time there was insufficient evidence to support offences relating to misrepresentations on the licence applications for [the builder's company]. Since the complainants have supplied further information to the OFT, the OFT has decided to reopen the matter in relation to the provision of false information to Fair Trading

and a number of other issues. The investigation will include an examination of any liquidators' reports.

7.12. OFT's duty of care to the complainants

At the time the licence for [the builder's company] was approved, Fair Trading was aware of and concerned about the so-called 'phoenix company' phenomenon in the broader home building context. It would also have been aware of the risk associated with multiple related licences that were not cross-referenced on the Public Register. This knowledge as well as its role under the Act placed a responsibility on it to counter foreseeable risk to homeowners by ensuring its licence assessment process was comprehensive.

While the mere fact of holding a licence has never been a guarantee that a licensee's work and behaviour will be satisfactory, and OFT cannot and does not give such a warranty, along with the disclosure of relevant information held in the Public Register about licence holders, it is the prime consumer protection filter that citizens rely upon to inform their potential dealings with building contractors. In fact the OFT itself describes the 'golden rule' of choosing a builder as making sure they have a valid licence. The Commissioner has a statutory obligation to protect the interests of owners and purchasers of dwellings, and to set, assess and maintain the standards of competence of persons doing residential building work. The public therefore expects that the licensing system under the control of the Commissioner will itself be robust and that the staff tasked with processing licence applications will apply due diligence in properly assessing applications before licences are issued.

The OFT, as the chief regulator of the industry, has a two-fold responsibility: namely ensuring it has adequate procedures and policies to enable its officers to determine which applicants appropriately qualify for a licence; and secondly, to ensure those policies and procedures are followed. Neither was true in this case. The investigation has shown that the checking procedures themselves were inadequate and that not all the procedures that were in place were followed.

At the time [the complainants] sought information about [the builder's company], instructions applying to Fair Trading staff allowed for the following information to be provided:

- details of the licence/licensee;
- disciplinary or other determinations on cancellations, suspensions, disqualifications, cautions, fines, public warnings,
- non-compliance with tribunal orders; and
- insurance claims.

The [the complainants] did conduct a licence check with Fair Trading before they entered in the contract with [the builder's company] and were assured that its licence was valid and that there were no penalties or insurance claims against it. They were reasonably entitled to believe on that basis that [the builder's company] and its sole proprietor [the builder] had the necessary qualifications and competence to undertake the work they wished to be done, that there were no alerts about insurance claims or disciplinary or other determinations that might lead them to question the suitability of engaging the company, and that the company and its sole proprietor was a fit and proper person to hold the licence and was otherwise of good character.

Even so, a prudent consumer, particularly those contemplating home building contracts worth hundreds of thousands of dollars, would be expected to not only seek such information from the official data base of the registration authority but also to make independent inquiries of the contractor as to these and other relevant considerations before entering into contracts.

In this regard, Fair Trading through brochures and advice posted on its website, advises consumers among other things to:

- ask people for their personal recommendation
- ask other people in the industry, and
- ask the relevant industry association for a list of names.

Importantly, it is also suggested that consumers ask the builder for the addresses of previous houses they have renovated or built and ask the owners if they were satisfied with the results. Questions about other work underway at the time of contemplating engagement are also recommended. Enquiries of this sort obviously inform an assessment of the competency, history and viability of the builder. The complainants in fact did undertake a number of such enquiries.

This advice recognises the fact that remedies for poor workmanship or breach of building contracts ultimately lie in actions against the contractor that the consumer will be forced to take if such things eventuate. Given the limitations of the compulsory insurance scheme, the well known precariousness of the financial viability of many building firms and the potential even for consumers to be misled by representations made by contractors, there is always an inherent risk in contracting for such work for which the consumer has to take some responsibility for accepting.

Accordingly, it is not appropriate to blame Fair Trading *entirely* for the problems experienced by [the complainants]. On balance, however, Fair Trading has conceded following our provisional report that it would be correct to say that changes made to the licensing procedures since the issuing of the licence to [the builder's company], and particularly over the past two years, may have produced a different outcome in relation to the company's licensing status and that of [the builder]. The Director General of the Department of Commerce further conceded that while his legal advice was that there is no legal reasons why OFT should compensate the complainants, special circumstances existed in this case that led him to conclude there was a moral obligation to do so. Having regard to all the circumstances, I can only agree that it is appropriate that the OFT take some moral responsibility for sharing the losses suffered by the complainants.

8. FINDINGS

I find that the former Department of Fair Trading:

- at the time of the issue of the licence to [the builder's company], did not have adequate procedures for checking previous conduct of applicants for building licences against information contained in its own databases, particularly in relation to 'surrendered' licences
- incorrectly issued a contractor licence to [the builder's company] Pty Ltd in breach of its own licensing assessment procedures

and that the Department of Commerce:

- failed to thoroughly investigate the complaints made against [the builder]
- failed to take sufficient steps to ensure the records of insurance claims against licence holders on the Public Register were accurate and timely

and that such conduct is unreasonable in terms of section 26(1)(b) of the *Ombudsman Act 1974*.

9. RECOMMENDATIONS

9.1 Not only have the complainants suffered direct losses arising from their contract with [the builder's company], they have also suffered related losses, including unanticipated rent, legal costs and increased costs of borrowing. They have also suffered the distress associated with these events and the interruption to their normal lives and time away from their business occasioned by the need to pursue proceedings at the CTTT and complaints to both Fair Trading and this office. Having found the failures on the part of Fair Trading contributed to these losses, I recommend that the department make an ex-gratia payment pursuant to section 26A of the *Ombudsman Act 1974* to [the complainants] to compensate them in part for these losses and the distress and inconvenience they have been forced to suffer.

9.1.1 I further recommend that the compensation should be assessed under the following heads of damage, and at a **minimum** be:

- one half of the quantifiable net losses related to rectification and completion works taking account of the undrawn contract funds and the insurance payment
- one half of the fees and interest occasioned from the increased borrowings related to rectification and completion works (projected forward for at least five years based on the current interest rate)
- one half of the quantifiable legal fees and expert witness fees associated with the proceedings in the CTTT
- the quantifiable legal fees associated with preparation of the initial and revised claim for compensation made to the Minister
- one third of the unanticipated rent occasioned between the contract completion date and the date the complainants were granted an occupation certificate
- a nominal payment of \$10,000 for the stress and bother the complainants experienced as a result of the failure of the contractor to complete the works as specified and having to pursue legal and other avenues to remedy the situation.

9.1.2 I further recommend that an independent assessor be appointed by the department to determine the quantum of the compensation.

9.1.3 I further recommend that the assessor should invite and consider a submission from [the complainants] as part of the process of determining the quantum of their losses.

9.1.4 I further recommend the department make all reasonable efforts to determine the quantum of the ex-gratia payment within two months of the date of this report and to ensure the payment is made within four months of the date of this report.

This recommendation should not be taken as a precedent and has been made in light of the facts relating to this particular case only.

9.2 I recommend that guidance be incorporated into the licensing procedures on how to assess an applicant's fitness and propriety to hold a licence.

9.3 I recommend that the current review of licensing in the NSW home building industry conducted by Irene Moss and Kevin Rice explore the possibility of a unique licence number being issued to all related entities based on the Victorian model.

- 9.4 I recommend that the OFT request information about approved external insurance claims for all unreported periods from approved insurance providers and update the Public Register accordingly within four months of the date of this report. In the meantime a warning should be placed on the online Public Register alerting users that information about insurance claims is not complete and is currently undergoing a review.
- 9.5 I recommend that the capacity of the Public Register to enable consumers to research the history of other licences a trader may have previously held or been associated with be enhanced.
- 9.5.1 In particular, the OFT should consider modifying the individual name search so that it returns not only 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.
- 9.5.2 I further recommend that the OFT consider retrospectively adding to licence details in the Public Register where the holder of a licence was 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. The OFT may wish to consider licence renewal time as an opportunity to update particulars of older records in line with the current requirement under clause 80(vii) of the Home Building Regulation 2004. By way of illustration, if adopted, this recommendation would result in [the builder's previous company 1], [the builder's previous company 2], [the other company in which the builder was a nominated supervisor] and [the builder's company] all being listed as associated entities under the personal licence of [the builder]. This would counter the current weakness of the system with allows multiple licence numbers to exist for related entities without cross-referencing on the Public Register.
- 9.6 I recommend that OFT develop a procedure to guide the determination of outcomes for disciplinary proceedings against licence holders.
- 9.7 I recommend that the OFT 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.
- 9.8 I recommend the OFT consider reviewing the licence surrender form to include self-disclosure checklists of reasons for the surrender that would assist the OFT's intelligence gathering about problematic traders.
- 9.9 I recommend that the OFT review its procedures for updating information on the Public Register, and introduce some performance standards to help ensure the timeliness of all data not automatically updated.

Requirement under section 26(5) of the *Ombudsman Act 1974*

I require the Director General of the Department of Commerce to notify me of any action taken or proposed in consequence of this report no later than 7 April 2006.

Greg Andrews
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NSW Ombudsman

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