

Report
Full investigation - *Ombudsman Act 1972*

Complainant	Mr Des and Ms Pru Fowles
Agency	Commissioner for Consumer Affairs
Ombudsman reference	2014/03259
Date complaint received	7 April 2014
Issues	<ol style="list-style-type: none">1. Whether the agency erred in its investigation of a complaint about a builder allegedly operating outside of the scope of his licence2. Whether the agency erred in its communication with the complainants regarding their two complaints

Jurisdiction

The complaint is within the jurisdiction of the Ombudsman under the *Ombudsman Act 1972*.

Section 16 of the Ombudsman Act states that I must not investigate an administrative act if the complaint is made after 12 months from the day on which the complainant first had notice of it (unless in all the circumstances of the case it is 'proper' for me to entertain the complaint). I note that the complainants' initial complaint to the agency was by letter dated 6 February 2013, which was more than twelve months prior to their lodging their complaint with my office. Given that the complainants continued to attempt to resolve their complaints with the agency until January 2014, I consider it proper for me to investigate the complaints.

I note at the outset that it is not my role to investigate the actions of the builder. My role is to determine if the agency has acted in a manner that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

I also note that the complainants have a right to lodge a complaint against the builder in the District Court, setting out matters that are alleged to constitute grounds for disciplinary action under Part 4 of the *Building Work Contractors Act 1995* (the **BWC Act**).

Investigation

My investigation has involved:

- assessing the information provided by the complainants
- seeking a response from the agency
- seeking further information from the complainants and the agency
- seeking information from the City of Onkaparinga (the **council**)
- considering the BWC Act

- considering the Government of South Australia, Consumer and Business Services Commissioner's Guideline 15, Investigations and Inspections Referral Process, dated 5 February 2013
- providing the agency and the complainant with my provisional report for comment
- considering the complainants' response to my provisional report
- preparing this report.

Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were to be upheld. That decision recognises that greater care is needed in considering the evidence in some cases.¹ It is best summed up in the decision as follows:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer² to the question whether the issue has been proved

Response to my provisional report

The agency did not provide a response to my provisional report.

The complainants provided a response to my provisional report by letter dated 18 August 2014. In summary, they advised that they wished to:

- support the general thrust of the report in terms of its described investigations, opinions and recommendations
- clarify the events from December 2012 to February 2014
- confirm the purpose in them approaching the Hon Dr Bob Such MP and the reason for writing to the Hon John Rau MP
- comment on some aspects of the agency's response regarding certain matters.

I have amended my report in response, to the extent that I consider appropriate.

The complainants' response also included a request for the inclusion of a recommendation that the agency reinvestigate their complaint alleging that the builder breached the conditions of his licence.

Background

1. The complainants own a property in the Adelaide Hills (**the property**). Over a number of years, the complainants undertook restoration and repair work to the property themselves.
2. In February 2009 the complainants were granted approval from the council to undertake works to make the property suitable for a commercial business, based on designs that had been prepared by an architect.
3. The complainants submit that the property is a two storey commercial property.

¹ This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at pp449-450, per Mason CJ, Brennan, Deane and Gaudron JJ.

² *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

4. In 2012 the complainants approached a builder (**the builder**) to undertake building work on the property.
5. The builder held a licence under the BWC Act with the following conditions:³

Endorsements and Conditions on Contractor Licence

ANY BUILDING WORK LTD TO:
DOMESTIC BUILDING WORK NOT EXCEEDING ONE-STOREY
CARPENTRY AND JOINERY

6. On 22 December 2011 the builder's licence was cancelled due to non-payment of renewal fees.
7. On 26 April 2012 the builder provided the complainants with a cost estimate for the proposed works. The cost estimate provided an estimate for work which the builder described as being for the 'proposed antiques and collectables / café shop premises'.
8. On 3 June 2012 the complainants entered into a contract with the builder (**the contract**) on the basis of the cost estimate. The complainants were not aware that the builder did not hold a licence at this time.
9. The contract was a standard form Housing Industry Australia (**the HIA**) Cost Plus contract.⁴ The contract included a clause that provided for dispute resolution by the HIA. Unbeknown to the complainants, the builder had ceased being a member of the HIA in November 2011.⁵
10. On 5 July 2012 the builder lodged an application for a new building contractors licence and building work supervisors registration.
11. On 20 July 2012 the builder was granted a licence under the BWC Act. The conditions on this licence were:

Endorsements and Conditions on Contractor Licence

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CARPENTRY AND JOINERY

12. The builder commenced work on the property at the end of July 2012. He continued working on the property until December 2012. The complainants were unhappy with the work and the builder's charges and were unable to resolve their disputes with the builder.
13. On 21 January 2013 the complainants contacted the HIA to effect the dispute resolution process in accordance with the contract. However, the complainants were advised that the builder was not a member of the HIA and therefore assistance from the HIA was not available.⁶
14. In late January 2013 the complainants telephoned the agency with a complaint about the builder. After the complainants explained that the building related to a shop the agency advised them that it could not offer consumer assistance in a matter that

³ The builder had been granted his licence on 4 August 1992.

⁴ August 1994 version.

⁵ The builder became a member of the HIA again on 1 February 2013.

⁶ The complainants have advised my investigation that the HIA has subsequently agreed to provide them with assistance and has been attempting to facilitate mediation between them and the builder, but to date have been unsuccessful in getting the builder to agree to participate.

involves a commercial development. The agency advised the complainants to contact the Builders Licensing Branch in the agency if they wished to make a complaint about the builder's licence. The complainants advised me that they telephoned the agency again later that week to get further advice about reporting the builder to the Builders Licensing Branch. In this conversation they were also advised to seek help from the Office of the Small Business Commissioner. I am unable to determine the exact date of these phone calls from the file records provided to me by the agency.

15. The complainants then contacted the Office of the Small Business Commissioner for assistance in their dispute with the builder. The complainants, in their response to my provisional report, told me that the Office of the Small Business Commissioner advised that it could not assist them because it did not appear that they were operating as a business as they had signed the contract with the builder in their individual names. The complainants are of the view that they entered the contract in their own names, but for commercial purposes, because their names are jointly registered as a partnership.
16. The complainants advise my investigation that they were frustrated that they could not receive assistance from the agency (because it apparently considered them a business) or from Office of the Small Business Commissioner (because it considered them not to be a business).
17. By letter dated 6 February 2013 the complainants wrote to the agency's Supervisor, Builders Licensing, making a formal complaint about the builder operating outside of the scope of his licence. In their letter the complainants outlined what they believed to be eight contraventions of the BWC Act by the builder.
18. On 7 February 2013 the complainants terminated the contract with the builder.
19. On 28 February 2013 an agency compliance officer, Mr Frank Galletta, sent the builder an official warning for allegedly working outside the scope of his licence. The letter advised the builder that the Commissioner had 'information' indicating that the builder had 'held [himself] out as being entitled to contract for building work outside the scope of [his] licence... for entering into a contract for commercial building work exceeding one storey.' The letter required the builder to provide a written submission to the agency by 14 March 2013 'detailing what action' the builder intended 'to take to rectify this matter.'
20. On 14 March 2013 the builder wrote to Mr Galletta, including the following:

I write in response to your letter dated February 28, 2013 in which you serve me with an official warning for allegedly working outside the scope of my Builders Licence [...]. As I discussed with you during our telephone conversation on March 8, 2013 the information you have been furnished with is incorrect and I appreciate this opportunity to present my response.

The contracted works where this alleged breach has occurred are at a property at The building is a single storey split level stone residence dating back to 1880 with a stone barn to one side of the original cottage.

The derelict cottage had been partially restored by the owners, Mr & Mrs Fowles over a twenty year period. All structural work had been completed before I was engaged. Mr & Mrs Fowles had obtained all necessary approvals and completed works as Owner/Builders. To obtain a bank loan to complete the works their bank required a builders [sic] contract.

I was engaged to perform internal works on the cottage with some roof works to the single storey barn with supervision for trades [sic].

...

I consider that my current licence allows for all of the above.

All other works had been or were to be completed by the owners.

My role on this contract was to oversee all works and perform some carpentry on a cost plus basis.

Although Mr & Mrs Fowles do at some time in the future hope to operate their existing on-line Antiques & Collectible business from part of the cottage with a residence in the back rooms where a kitchen, bathroom and bedroom are situated with a view to sub-letting a possible future café in the barn I was not engaged to undertake any commercial construction fit-out. The building as it stands is a residence with the "Barn" being a large empty room with an internal doorway to the cottage.

I have referred to the property in correspondence with their bank as a shop premises as their loan was set up as a commercial loan and also as a complement to their long held dream of one day having an antiques showroom in the front rooms of their cottage. ...

As advised by yourself I have applied for an upgrade to my licence to include two storey and commercial works to avoid any confusion in the future. My application was completed with your office over the phone following our conversation and I am presently collating the references requested.

In consideration of the aforementioned facts I request that your department reconsider the issuing of your official warning. ...

21. On 15 March 2013 Mr Galletta rang Mr Fowles. The file note records the following:

made contact with Des Fowles, introduced myself, listened to his claims that [the builder] has ripped him off by \$28,000 with taxes that were double charged. I asked if he had tried to get onto the ATO with this issue, he claimed that he had, but they could not help him. Informed him that under the Fair Trading Act, I could not let him know what was going on with my investigation file. Suggested that he would need to consider if it would be worth his while taking legal action when he does not have enough behind him to finish the work on his development.

22. The agency has advised my investigation that 'several phone calls took place between late February and throughout March between both compliance staff of CBS and Mr Fowles.' The file details provided by the agency records one such phone call with Mr Fowles, being on 15 March 2013.

23. On 20 March 2013 the complainants emailed Mr Denis Mori, another officer of the agency, requesting information, as follows:

...Frank from your section rang us last Friday to advise that any findings you make in respect to licensing will be kept confidential unless declared public by the Commissioner, because of limitations under the Fair Trading Act. I can understand some of the nuances involved here, but we would like at least some formal communication from you to confirm that you have received our report and will be looking into the matter even if outcomes are to remain confidential. ...

24. On 20 March 2013 Mr Mori emailed the complainants. The email included the following:

...[the builder's] licence enables him to perform any carpentry and joinery and to contract and supervise any single storey residential building. The Compliance Unit is currently investigating [the builder] for unlicensed building work as it appears the work he has performed for yourself is outside the scope of his current licence conditions.

25. On 25 March 2013 the Hon Dr Bob Such MP wrote to the Minister for Business Services and Consumers, the Hon John Rau MP (**the Minister**), on behalf of the complainants, outlining their concerns at seemingly not being able to receive assistance from the agency or from the Office of the Small Business Commissioner.⁷

⁷ The Office of the Small Business Commissioner has subsequently agreed to provide assistance to the complainants and have offered to facilitate mediation between them and the builder. On 16 September 2014 the complainants advised my investigation that they have provided their consent to participate in the mediation, but that the Office of the Small Business Commissioner has been unable to get the builder to agree to participate.

26. On 20 March 2013 the complainants emailed Mr Mori to update him and to request that:

...we would like at least some formal communication from you to confirm that you have received our report and will be looking into the matter even if outcomes are to remain confidential. ...

27. On 27 March 2013 a compliance officer emailed the complainants in response to their email to Mr Mori. The records do not record the name of the officer who sent the email. The email included the following:

Consumer and Business Services (CBS) values the information we receive from the public, and information such as yours assist CBS in working to build confidence in the integrity of the licensed industries within our jurisdictional boundaries. This may include conduct that is unfair, unethical and/or unlawful.

CBS conducts an assessment of every complaint we receive however the secrecy provisions of the Fair Trading Act 1986 preclude our department from commenting on operational matters. As such we are unable to provide further details regarding what action may or not be taken in relation to the information you have provided. ...

28. On 8 April 2013 Mr Galletta wrote the following email to Mr Ronald Parry, Manager Investigations of the agency:

As discussed earlier, I received File... after a seven page written complaint was received from Des & Pru Fowles. They allege the following:[The builder] entered into contract to build whilst unlicensed - Looking into the allegation I discovered that [the builder] had been previously licensed on [...] but due to non payment of renewal fees, it was cancelled on 22 Dec 2011, and he applied for a new licence... which was granted on 20 July 2012, with HIA contract signed on 3 June 2012, and [the builder] taking possession of site at end of July 2012, once licensed. He worked outside scope of licence by working on a two storey commercial building - Building is not commercial and is only single storey over multiple levels up a hill side. The Fowles will eventually reside in 1800's building once renovated plus have one of the front rooms turned into their antique shop. [the builder] displayed a HIA sign when he was not a member - He had rejoined on 1 February 2013.

Used [licence number] on his builder's sign which did not belong to him - [builder] did hold [licence number] & appears old sign, Attachment 2, showed: [licence number] with the second '5' unreadable.

[The builder] used a letterhead with his cancelled [licence number] - [the builder] was using old stationery.

[The builder] used unfair and intimidating tactics to influence signing & payment of invoices to bank - not substantiated.

[The builder] demanded money for goods which were not delivered - the Fowles did not make the payment so they never received the goods.

I decided to send out a warning letter for working outside scope of licence to test the waters. [The builder] responded to notify that the building was an old 1800's built that he contracted to renovate and was not a two storey building, but a single storey building that was on various split levels up a hillside. He stated that he will apply for an upgrade to his current licence to take on multi storey buildings in the future. I have kept the file open awaiting the new endorsement, but after today's discussions I have now closed the file as 'No Breach Detected.'

29. On 9 April 2013 the complainants emailed Mr Mori again requesting information about their complaint. The email included the following:

...today we got a letter from [a law firm] who he [the builder] has engaged to help him on this matter. We wonder how he must have gone about briefing them, as they have contested our assertion he was acting in breach of his licence conditions. They have put it to us that the property is residential, and split level rather than part two storey, so he has been operating within his licence conditions, and the contract was wrongfully terminated....

30. On 24 April 2013 Mr Mike Penfold, Acting Director Investigations and Inspections, emailed Mr Galletta as follows:

I was talking to ... and we have to sign off on a response to the Minister and I was [sic] if you can confirm that:-

It is single storey domestic work. What is the council zoning?

Does the contract comply with s28 of the BWC

Did it require council approval[?]

If yes, is indemnity insurance in place[?]

31. On 24 April 2013 Mr Galletta replied as follows:

As discussed, it may pay to inform... that the building is a single storey, split level stone residence, built circa 1880. I have made contact with the City of Onkaparinga and established that the council zoning for [address] is: Historic Conservation Zone.

The contract was a "Cost Plus" HIA Building Contract, and as to s28 of the BWC Act:

(a) Yes, contract in writing; (b) Yes, contractual terms set out; (c) Yes, name set out; No, licence number (used... cancelled 22/12/2011); (d) No, contract does not state work to be performed; (e) Yes, contract signed; (f) Yes, owner given copy of signed contract; (g) Yes, readily legible.

Council approval was not sought and the Council only have a record going back to 2007 for a shop & 28 person café for the address.

No indemnity insurance.

32. On 8 May 2013 the Minister replied to the Hon Dr Bob Such MP. The response included the following:

I am advised by the Deputy Commissioner, Consumer and Business Services, that there was some confusion whether this matter was domestic or commercial in nature, which resulted in conflicting advice regarding the agency responsible. ...

33. On 20 July 2013 the builder wrote to the agency enclosing an application to upgrade his building licence to include the following conditions:

Contractor Licence:

RESIDENTIAL BUILDING WORK NOT EXCEEDING TWO STOREY

COMMERCIAL BUILDING WORK

Supervisor Registration:

RESIDENTIAL BUILDING WORK NOT EXCEEDING TWO STOREY

COMMERCIAL BUILDING WORK

34. The agency's Technical Officer assessed the builder's application and decided to interview the builder 'to fully determine [his] application for registration as a building work supervisor.'⁸ The builder was interviewed on 1 August 2013.

35. On 16 August 2013 the builder's application to upgrade his licence was approved, with the following conditions:

COMMERCIAL BUILDING WORK LTD TO: FITOUTS

BUILDING WORK LTED [sic] TO NATIONAL CONSTRUCTION CODE CLASS 1 & NOT EXCEEDING TWO STOREY

⁸ Letter from the agency to the builder, dated 10 July 2013.

CARPENTRY AND JOINERY

36. On 24 January 2014 the complainants sent a formal letter of complaint to the agency by registered post (**complaint about the agency**). Their letter included the following:

Our formal complaint to you is as follows:

- i. We do not consider it satisfactory to make a formal complaint to you in writing on a serious matter and then have no formal reply by letter whatsoever.
- ii. Furthermore, you have failed to be proactive in maintaining any form of informal communication with us. There has been no communication without us initiating by way of follow-up phone calls and emails (except for one instance when the investigating officer phoned to tell us we would not be privy to any information regarding the progress or outcome of the investigation, unless information is posted with imprimatur in public media).
- iii. We have not been afforded any explanation as to why [the builder] has not been subject to any apparent disciplinary action. Notwithstanding any limitations pursuant to the Fair Trading Act, we believe you could at least communicate some sort of context as to why there is no recorded disciplinary action, even if the findings of your investigation cannot be fully disclosed.
- iv. We do not understand why [the builder] has been granted the benefit of more favourable licence conditions given the circumstances. Your actions are likely to frustrate our ability to achieve a satisfactory civil remedy in respect to [the builder], and we expect some accountability in this regard.

We request a written reply to this complaint by Friday 28th February 2014.

37. The complainants submit that, as at 4 April 2014, the date of lodging their complaint with my office, they had not received any written acknowledgement or response to their 24 January 2014 complaint about the agency.

Relevant law

38. The following sections of the BWC Act are relevant to this investigation.

6 – Obligation of building work contractors to be licenced

- (1) A person must not–
- (a) carry on business as a building work contractor except as authorised by a licence under this Part;

...

Maximum penalty: \$20,000

7 – Classes of licences

- (1) There are the following classes of licences for the purposes of this Act:
- ...
- (b) building work contractors licence with conditions—a licence authorising a person to carry on business as a building work contractor subject to conditions limiting the work that may be performed under the authority of the licence.

Relevant policy

39. Commissioner's Guideline 15 Investigations and Inspections Referral Process, dated 5 February 2013, is relevant to this investigation:

COMMISSIONER'S GUIDELINE 15

INVESTIGATIONS AND INSPECTIONS REFERRAL PROCESS

BACKGROUND

The Investigations Unit within Consumer and Business Services (CBS) has the specialised expertise necessary to conduct the more complex investigations into cases of alleged non-compliance with the legislation administered by CBS.

INVESTIGATION AND INSPECTIONS (I & I) REFERRAL ASSESSMENT COMMITTEE

- The I & I referral assessment committee has been set up to consider all referrals to I & I.
- Generally, the committee will meet on a fortnightly basis.
- The committee will determine which matters are to be investigated or filed for information and which referrals are to be declined at that time.
- Details on matters that are declined are to be recorded in case similar matters arise in the future.
- The referral assessment committee will send out an email advising if a matter has been taken on and the name of the officer to whom it has been allocated.
- If a matter is declined, the committee will provide reasons.
- In order for the committee to be able to make informed decisions when considering referrals, a referral form must be included.
- A copy of the referral form is included as part of this guideline.

URGENT REFERRALS

- Urgent referrals should be discussed with the Manager Investigations.
- The referral form will still need to be completed, but can be handed to the Manager Investigations.
- Particularly urgent issues (such as itinerant traders etc) can be sent via email to the Manager, Investigations
- If you have any queries about the process in general, or on completing the form, please contact your Supervisor.

Whether the agency erred in its investigation of a complaint about a builder allegedly operating outside of the scope of his licence

40. The complainants' allegations that the builder breached the conditions of his licence clearly warranted investigation. The allegations, if substantiated, would amount to an offence under section 6 of the BWC Act, and carry a maximum penalty of \$20,000.
41. The agency has advised me that a preliminary investigation was conducted by the Intelligence Section of the agency, which then referred it to the agency's Investigations and Inspections Branch. I have been unable to establish the date of the commencement of the preliminary investigation or of the referral to the Investigations and Inspections Branch. The agency said that it considered the following, before determining that 'the matter should be dealt with by way of a written warning':⁹

Consideration was given to all of the evidence available at the time, including:

- The complaint from Mr and Ms Fowles;
- The submission from [the builder];
- Independent evidence gathered by the Compliance Officer;
- No previous complaints or compliance action were recorded against [the builder];

⁹ Letter from the agency to the Ombudsman, dated 17 June 2014.

- The administrative nature of the breaches and civil nature of the allegations; and
- The likelihood of further consumer detriment.¹⁰

42. The agency further advised:

Complaints about breaches of legislation administered by CBS are referred to the Investigations and Inspections Branch of CBS to be actioned.

...

Once the complaint is referred, it undergoes preliminary assessment by the Intelligence Section and is then considered by the Referral Assessment Committee. The complaint may then be:

1. referred for investigation, if a serious breach and/or there is a history of non-compliance;
2. referred to the Compliance Section, if a less serious breach; or
3. recorded for information only.

Mr and Mrs Fowles' complaint was referred to the Compliance Section.

I can advise that since this matter was received in 2013, the operating model in the Compliance Section has changed and a more proactive and investigative role is being undertaken.¹¹

43. The agency has provided me with a document recording the results and recommendations of its preliminary investigation of the complainants' eight allegations.¹² This document is undated. Breaches were recorded for three of the allegations, and one was not dealt with because the document states that it is a civil contractual issue between two businesses.
44. The document records a breach in relation to the allegation that the builder entered into a contract using a cancelled builder's licence number and HIA contract when he was not a member. It states the following:

Searches of the licensing database found that [the builder] was not licensed on the day of signing the contract (June 2012). His licence ... had expired in December 2011 due to non payment of annual licence fees. However he submitted an application on 5 July 2012 and was granted a licence on 20 July 2012... this was prior to any building work being commenced on the Fowles property.

BREACH - this was considered an administrative issue and as [the builder] was licensed before commencing any work was dealt with by way of written warning.

45. The document records a breach in relation to the allegation that the builder's on site signage displayed his previous licence number. It states the following:

Based on email correspondence in the file, [the builder] explained it was an old sign, he was made aware of his obligation to update the BLD licence number.

BREACH - minor breach to be fixed by licence holder (this was dealt with by way of written warning... Please note this is an expiable offence).

46. The document records a breach in relation to the allegation that the builder's letter displays his previous licence number. It states the following:

Based on email correspondence in the file, [the builder] explained it was old letterhead, he was made aware of his obligations to update the BLD licence number.

BREACH - minor breach to be fixed by licence holder (this was dealt with by way of written warning... Please note this is an expiable offence).

¹⁰ Ibid.

¹¹ Ibid.

¹² Agency document recording the results and recommendations of its preliminary investigation of the eight allegations against the builder. Undated. Provided as an attachment to letter from Mr Dini Soulio, Commissioner Consumer and Business Services, to the former Ombudsman dated 17 June 2014.

47. The document records 'no breach' in relation to the allegation that the builder operated outside the scope of his licence:

The conditions of [the builder's] licence allowed for residential building work not exceeding one storey and carpentry and joinery. Contact was made with the City of Onkaparinga council and they confirmed that the building in question was a single storey split level home and was zoned within a historical conservation zone (copy of licence and email - attachment 5)

NO BREACH DETECTED

48. From the information initially provided to my investigation by the agency, I had difficulty determining exactly what steps were taken in the preliminary investigation and what the results of the preliminary investigation were. As such, on 26 June 2014 I requested further information from the agency. Specifically, I asked for clarification of the investigation process. I explained that it was not clear from the information provided whether a preliminary investigation or assessment was conducted, or if the matter was referred to the Inspections and Referral Assessment Committee in accordance with Commissioner's Guideline 15.

49. On 15 July 2014, the agency advised my investigation:

...You will note that Commissioner's Guideline 15 ... is dated 5 February 2013 and the original complaint from Mr and Mrs Fowles was sent 6 February 2013. While it is clear that the matter was referred to Compliance Officers to be actioned, we do not have a record of the formal decision by the Assessment Committee to do so. The Committee was newly established and procedures have been progressively implemented to improve the document flow. All referrals are now directed through the CBSIntel email box and decisions formally recorded...

The initial complaint from Mr and Mrs Fowles was received by Consumer Affairs Branch and was allocated to Compliance Officers in the Investigations and Inspections Branch to be actioned. There was an assessment made of the allegations, the trader's prior history of consumer complaints and compliance history were checked and a warning letter was issued.¹³

50. It appears that the agency's investigation of the complaint was not in accordance with Commissioner's Guideline 15; however, I acknowledge the agency's submission that the guideline had only been in operation for one day prior to the date of the complaint. I assume the agency received the complaint a short time after 6 February 2013.

51. Nonetheless, in my view, the agency's investigation was inadequate. I consider that the agency unreasonably accepted the builder's submission that he had not breached his licence conditions because the property was a residential one storey property.¹⁴

52. I acknowledge that the agency contacted the council and the agency's investigation results record that the council 'confirmed that the building in question was a single storey split level home and was zoned within a historical conservation zone'.¹⁵ However, there is no record of the conversation with the council and the only other reference to it records that the officer 'made contact with' the council and 'established that the council zoning for [address] is: Historic Conservation Zone.' There is no record of the council advising the agency that the property was single storey or residential.

¹³ Email from the agency to Ombudsman SA Investigating Officer, dated 15 July 2014.

¹⁴ I note that in accepting the builder's submission that the property was residential, the agency ought to have provided the complainants with assistance in their dispute with the builder, rather than advising them that it could not because they were acting as a business, not as individuals.

¹⁵ Agency document recording the results and recommendations of its preliminary investigation of the eight allegations against the builder. The document is undated.

53. My office contacted the council on 29 July 2014 and asked if it had any record of the agency contacting it about the property. The council had no record of any such communication, but advised that if it was a simple factual query about the property, the conversation would not have been recorded.
54. In my view, the agency should have been more circumspect in its conclusions, in light of:
- its own advice to the complainants that it could not assist them with their dispute with the builder as it was an issue between two businesses
 - the complainants' advice that the property is a two storey commercial property¹⁶
 - the builder's response that the bank had provided the complainants with a commercial loan.
55. I comment also that, whilst the agency was correct in stating that the property is zoned within a Historical Conservation Zone (within the council's development plan),¹⁷ this does not mean that the property is not a commercial property. The property is located in the Living Policy Area 71 of the Historic (Conservation) (Clarendon) Zone. Objective 1 of this policy area is as follows:
- The purpose of this policy area is briefly outlined as an area comprising those parts of the town that are devoted primarily to residential use. Some existing non-residential uses are interspersed throughout this area. Some additional non-residential use may be anticipated with the preservation of residential amenity serving as the main limiting factor.
56. The complainants have advised my investigation that prior to their undertaking work on the property, it was zoned partially for residential use and partially for commercial use. They submit that they did not require development approval to undertake the building work because the work was within the scope of repair and maintenance. However, they sought development approval from the council because they wished to change the use of the property from being commercial and residential to be entirely commercial.
57. The complainants say that they lodged their development application with the council in December 2007. The council's Development Assessment Panel (**DAP**) considered the application on 26 June 2008 to determine whether the property could be used entirely for commercial purposes, with no residential component. The DAP determined that the property could be used solely for commercial use; and the complainants entered into a Land Management Agreement with the council which commits the property to full commercial use. As such, the complainants have no right to resume any form of residential use for the property.
58. The complainants' development application and the minutes of the DAP meeting are readily available on the council's website.¹⁸ The application clearly states that it was for change in the use of the building to be purely commercial. The application also states that the complainants reside at a separate adjacent property.
59. The agency could have been enlightened by discussing the nature of the property and development approval with the complainants.

¹⁶ See the complainants initial letter of complaint to the agency, dated 6 February 2013.

¹⁷ http://www.sa.gov.au/__data/assets/pdf_file/0003/9282/Onkaparinga_Council_Development_Plan.pdf.

¹⁸ http://www.onkaparingacity.com/events/2008/06/26/development_assessment_panel_meeting_26_june_2008.jsp?display_expired=t

Opinion

On the evidence available to me and for the reasons above, it appears that the agency erred in its investigation of the complaint about the builder allegedly operating outside of the scope of his licence.

In light this, the agency acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

Whether the agency erred in its communication with the complainants regarding their two complaints

60. The complainants made their initial complaint about the builder to the agency on 6 February 2013. The complainants allege that they received no formal acknowledgement of their complaint. They further allege that they only received information in relation to their complaint as a result of their phone calls and emails to the agency.

61. The agency provided the following response to these allegations:

After receiving the initial complaint, several telephone conversations took place between late February and throughout March between both compliance and advice staff of CBS and Mr Fowles. These are referenced within email correspondence contained in the file.

On 20 March 2013, CBS contacted Mr and Mrs Fowles via email, providing advice on [the builder's] licence.

On 27 March 2013, an email was sent to Mr and Mrs Fowles acknowledging their complaint and advising that due to secrecy provisions of the Fair Trading Act 1986, details of the investigation would not be able to be provided.

Several emails were exchanged between Compliance Officers and Mr and Mrs Fowles in March and April 2013. ...

On 25 March 2013, Hon Bob Such MP wrote to the Minister for Business Services and Consumers on behalf of Mr and Mrs Fowles. The Hon John Rau responded to Dr Such on 8 May 2013. ...

Mr and Mrs Fowles were not formally written to when the investigation was completed. The Compliance Officer who was conducting the investigation no longer works in the State Government and so we have been unable to ascertain if any information was provided verbally.¹⁹

62. The agency's records do show that the agency corresponded with the complainants in relation to their initial complaint about the builder. There was also correspondence between the Minister and Hon Dr Bob Such MP. However, this correspondence related to the issue of whether the agency or the Small Business Commissioner should deal with their complaints about the builder.

63. In response to my provisional report, the complainants submitted that the agency only telephoned them once, being on 15 March 2013. They state that all other phone calls and communications were at their instigation. In my view, the agency's records suggest that it did not adequately communicate with the complainants.

64. The agency did not advise the complainants of the results of the investigation into their allegations against the builder, and relied on the limitations of the *Fair Trading Act*

¹⁹ Letter from the agency to the Ombudsman, dated 17 June 2014.

1987, advising the complainants that it could not 'provide further details regarding what action may or may not be taken in relation to the information you have provided' because 'the secrecy provisions of the Fair Trading Act 1986 [sic] preclude our department from commenting on operational matters.'²⁰

65. In my view, the agency could have and should have provided the complainants with a more constructive response, in accordance with good complaint handling practice. This could have occurred without breaching the Fair Trading Act. I note, for example, that the Commissioner can authorise that information be released pursuant to section 96A of the Fair Trading Act.
66. The complainants made their subsequent complaint about the agency in writing on 23 January 2014, and requested a written reply by 28 February 2014. As of the date of this report, I understand that the complainants have received no response from the agency.
67. It appears that the agency did nothing in response to the complaint. The agency has claimed that the error in the dating of the letter was the reason why it did not communicate with the complainants.
68. This claim is not persuasive. I do not consider that the date error on the letter (23 January 2013) is a sufficient reason for the agency not to respond. In my view it would have been obvious that the date of the letter was supposed to be 23 January 2014, and this was confirmed by the agency's date stamp. Also, the letter requested a response be provided by 28 February 2014.
69. Based on the information available to me, it appears that the agency failed to:
 - acknowledge the complainants' complaint about the builder
 - provide the complainants with any information about the outcome of their substantive complaint
 - acknowledge the complainants' complaint about the agency
 - take any action in relation to this complaint
 - communicate with the complainants in relation to their complaint
 - advise the complainants of the outcome of their complaints.

In my view these steps reflect basic and appropriate complaint handling.²¹ I have no doubt the agency would agree with my view.

Opinion

In light of the above, I consider that the agency acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

²⁰ Email from the agency to Mr Fowles dated 27 March 2013.

²¹ See for example, Commonwealth Ombudsman, Complaint Handling - Better Practice Guide, April 2009, page 21; Standards Australia, Australian Standard - Customer satisfaction - Guidelines for complaints handling in organizations (ISO 10002:2004, MOD).

Recommendations

To remedy the errors I have identified above, I recommend under section 25(2) of the Ombudsman Act that the agency:

1. write to the complainants to respond fully to both of their complaints
2. review its investigation procedures and record keeping in relation to this matter and consider whether it is able to reinvestigate the complainants' allegations that the builder operated outside of the scope of licence; and if so, reinvestigate accordingly and in compliance with good complaint handling practices²²
3. implement a complaint handling policy about agency complaints
4. ensure agency staff are reminded of good complaint handling practices.

In accordance with section 25(4) of the Ombudsman Act the agency should report to the Ombudsman by 31 October 2014 on what steps have been taken to give effect to the recommendations above; including:

- details of the actions that have been commenced or completed
- relevant dates of the actions taken to implement the recommendation.

In the event that no action has been taken, reason(s) for the inaction should be provided to the Ombudsman.



Megan Philpot
ACTING SA OMBUDSMAN

25 September 2014

²² Standards Australia, Australian Standard - Customer satisfaction - Guidelines for complaints handling in organizations (ISO 10002:2004, MOD).