



**Report of
Investigation into:**

**DEPARTMENT OF LANDS, PLANNING AND THE
ENVIRONMENT
BUILDING ADVISORY SERVICES**

**A report to the Chief Minister under section 153(b) of the *Ombudsman Act*
(March 2013)**

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ACRONYMS

ACT	ACT BUILDERS (NT) PTY LTD
ASIC	AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION
ATO	AUSTRALIAN TAXATION OFFICE
BAS	BUILDING ADVISORY SERVICES, DLPE
BMA	BUILDING MATERIALS AUSTRALIA PTY LTD
BOARD	BUILDING PRACTITIONERS BOARD
DIRECTOR	DIRECTOR OF BUILDING CONTROL
DLPE	DEPARTMENT OF LANDS, PLANNING AND THE ENVIRONMENT

EXECUTIVE SUMMARY

1. Building a home is for many of us the biggest investment we will make in our lives. In many cases, it involves borrowing money by mortgage that will take decades to repay. In the words of the Department of Lands, Planning and the Environment (DLPE), “*If things go wrong the consequences, financially and emotionally, can be devastating.*”¹
2. Parliament has recognised the significance of this investment and the importance of maintaining good building standards by enacting a detailed regulatory scheme in the *Building Act*. However, the investigation of two complaints to my Office has shown that improvements can be made to that scheme and the way it is implemented.
3. In one case, the complainants paid a substantial upfront sum in April 2010 for the purchase and construction of a kit home. No home was constructed and no money returned. The person who they dealt with has left the country and the builder who they thought had been engaged to build their home has denied any involvement or liability. In the other case, the complainants were left with a partly finished house having contracted with a company that was not a registered building practitioner.
4. In both cases, the complainants experienced frustration and delay in their dealings with the ‘builder’ and further delay or inaction after they approached one of the regulators under the *Building Act*, DLPE, Building Advisory Services (BAS).
5. At the time the complaints were made there were two key regulators of building practitioners². The first is the Building Practitioners Board which is responsible for registration of building practitioners, and monitoring compliance with registration requirements and competence to practice and professional conduct of building practitioners. Part of its role is to conduct formal inquiries into the work and professional conduct of building practitioners and if necessary to discipline them³.
6. The second is BAS, headed by the Director of Building Control. The Director has a number of functions, including prosecuting offences against the Act (e.g., for unregistered building), investigating complaints against building practitioners, auditing the work and conduct of building practitioners, and conducting disciplinary proceedings against building practitioners before the Board⁴. If a complaint or audit

¹ DLPE Residential Building Contracts fact sheet:

http://lands.nt.gov.au/_data/assets/pdf_file/0012/30333/Fact_Sheet_8_Residential_Building_Contracts.pdf

² The *Building Amendment (Residential Building Consumer Protection) Act* has from 1 January 2013 introduced a third regulator who deals with consumer protection aspects of residential building, the Commissioner of Residential Building Disputes. However, that role is not central to this report.

³ *Building Act*, section 14. An inquiry by the Board into professional misconduct is separately constituted under Division 3A of the *Building Act*. As such it may well form a quasi-judicial “tribunal” whose administrative actions (apart from unreasonable delay) are excluded from my jurisdiction under section 16(1)(b) of the *Ombudsman Act*. This investigation has not extended to the actions of the Board.

⁴ *Building Act*, section 8.

by BAS raises evidence of an offence against the Act, the Director can prosecute. If it raises evidence of professional misconduct, the Director refers the matter to the Board.⁵

7. Given the importance of this regulatory scheme to Territorians, it is essential that when issues regarding unregistered building, professional misconduct or the fitness of a person or company to be a registered building practitioner are raised, they are investigated and decisively dealt with in a reasonable time frame.
8. A number of factors in these two cases gave rise to delay and inaction on the part of BAS, including:
 - failure to locate or obtain information from key players;
 - conflicting versions of events, including allegations of fraudulent conduct;
 - complications arising from parties acting through companies rather than directly;
 - delays in BAS securing legal advice;
 - limitations in the legislation establishing the regulatory scheme; and
 - differing interpretations as to whether issues were regulatory (and therefore within the realm of BAS and potentially the Board) or contractual (and therefore to be pursued by the complainants).
9. Notwithstanding these complexities, delay and inaction on the part of BAS did a disservice both to the complainants and the broader community.

NEED FOR WELL DOCUMENTED POLICIES AND PROCEDURES

10. Investigations by my Office revealed that improvements can be made in the functioning of BAS through the development of clearly documented policies and procedures. While these should cover the whole range of BAS investigative and prosecutorial functions, I have noted a number of specific issues, including a need for indicative timelines and clear statements of the factors to be considered when deciding whether to prosecute for unregistered building and whether there is evidence that a building practitioner is guilty of professional misconduct.
11. Of course revised policies and procedures will only bear fruit if BAS staff are adequately skilled, trained, resourced and supported to carry out their functions in a timely and professional manner.
12. BAS has already taken a number of steps to improve its systems in this regard. These are described in the DLPE response to Recommendations 1 and 2 of this Report (pages 9-10).
13. I have also discussed in this report a number of potential amendments to the *Building Act* that may improve the regulatory scheme and enhance the powers of BAS.

⁵ *Building Act*, sections 34 and 34F.

UNREGISTERED BUILDING

14. The primary focus of the regulatory scheme in the *Building Act* is on building practitioners operating within its framework. Registration brings a builder within the ambit of BAS investigation and audit functions and the supervision of the Board. It also brings into play a range of consumer protection mechanisms that were significantly enhanced by amendments that commenced on 1 January 2013⁶.
15. The ultimate incentive for a 'builder' to bring themselves within the system is the penalty for unregistered building⁷. Currently, the maximum penalty for building by a person or company who is unregistered is \$5,640. In purely financial terms, this is a minor risk for the 'builder' compared to the profits that can be made from even one building project. A number of jurisdictions have a significantly higher maximum penalty⁸. Consideration should be given to setting a much higher maximum penalty that will act as a compelling incentive to obtain registration.
16. BAS is responsible for prosecuting unregistered building. It is essential that BAS be in a position to quickly and effectively investigate and prosecute unregistered building to ensure the ongoing effectiveness of the regulatory scheme. Even a substantial maximum penalty will only be effective if there is a belief that BAS will take immediate action to prosecute. BAS staff must have good training, clear guidance and readily available legal advice to enable them to take decisive action.
17. It is also important that there be a clear understanding of what constitutes unregistered building, particularly in relation to preparatory acts such as entering into a contract to build. Offence provisions in some jurisdictions specifically refer to contracting to undertake building work. The *Building Act* does not. Consideration should be given to whether the NT provision requires clarification.

REGULATING COMPANY CONDUCT

18. In both cases investigated, issues arose regarding involvement of companies that were not registered as builders. Operating through a company offers enormous advantages to builders. Companies are an effective mechanism to limit liability and allow a person to spread their liabilities or indeed move on from a failed company to a new one. Builders are not slow to take full advantage of company structures to protect their own interests.

⁶ *Building Amendment (Residential Building Consumer Protection) Act*. For more information see: <http://www.consumeraffairs.nt.gov.au/ForConsumers/residentialbuildingdisputes/Pages/default.aspx>

⁷ *Building Act*, section 22.

⁸ See page 17.

19. Entering into an agreement with a company can significantly limit the recourse of an individual consumer in the event that things go wrong. A consumer can find themselves in a position where a company no longer has sufficient assets to redress poor workmanship or failure to perform but the individual they dealt with continues in business under a new corporate entity.
20. The fact that a registered building practitioner is involved somewhere in the process does not lessen the importance of making sure that a company that is entering into a contract to build is appropriately registered, and so making it subject to the regulatory scheme and ensuring that consumer protections are available.
21. Just as builders take professional advice from lawyers and accountants to establish effective company structures to advance their interests, they must also be prepared to do what is necessary to ensure that those structures comply with other legislative requirements, including the *Building Act* and *Regulations*. BAS policies, procedures and publications should emphasise the importance of regulating company conduct.

BUYER BEWARE

22. It is incumbent on the bodies charged with administration of the *Building Act* (DLPE, BAS, the Board and now the Commissioner of Residential Building Disputes) to implement effective ongoing communication strategies to ensure that builders and residential building consumers are informed about potential risks and their rights and responsibilities when engaging or undertaking building work.
23. In that regard, I note that the following useful publications for consumers are available on the DLPE website:

Building and Renovating in the NT - A Consumer Guide
Residential Building Contracts fact sheet
http://lands.nt.gov.au/_data/assets/pdf_file/0012/30333/Fact_Sheet_8_Residential_Building_Contracts.pdf
24. However, it is important for anyone wishing to build a home to themselves take great care when making such a major investment.
25. Territorians wishing to build a home should review the above documents; interrogate the BAS and Building Practitioners Board websites (and the ASIC website if a company is involved), and seek legal advice before paying over any money or entering into a building contract.
26. If they are entering into a building contract with a company, they should use their best efforts to ensure that the company is a registered building practitioner and the person signing on behalf of the company has authority to do so.
27. It is also worth seeking, as far as possible, to form and maintain a personal relationship with the individual registered building practitioner who is undertaking the work and to liaise with them on a regular basis regarding progress.

28. In making these comments I do not wish to suggest that the complainants in these cases were lacking in their efforts or that the primary onus should be on consumers to investigate their builder. It will always be the responsibility of the builder to ensure that they comply with legal requirements. However, consumers should also take care to protect their interests.

CONCLUSION

29. Finally, this report should not be taken as a slight on the building profession in the Northern Territory or as suggesting that there is a widespread problem. As one pair of complainants put it, "There are many fine Building Firms in the Territory, but it is blighted by a few, and it's a few that we need to be protected against".

30. It is essential that people and companies who contract to build and undertake building work operate within the regulatory system, and are appropriately monitored, so that consumers can have confidence in them and can enjoy the regulatory and consumer protections put in place by Parliament.

RECOMMENDATIONS

1. **Building Advisory Services should review and clearly document its policies and procedures for complaint handling, investigation, prosecutions and referral to the Building Practitioners Board, including provision for:**
 - a. **prompt investigation and action in relation to building by an unregistered person or company;**
 - b. **prompt action when a registered building practitioner fails to provide documents or information requested by BAS;**
 - c. **a clear statement of the factors to be taken into account when deciding when to prosecute for building by an unregistered person or company;**
 - d. **emphasis on the importance of regulating company conduct;**
 - e. **indicative timeframes for dealing with complaints;**
 - f. **regular updating of complainants;**
 - g. **timely and effective information exchange with Police and other law enforcement bodies; and**
 - h. **a clear statement of the factors to be taken into account when deciding whether there is evidence that a building practitioner is guilty of professional misconduct that must be referred to the Board.**

DLPE response

The comments in relation to complaint handling and investigation practices by BAS are supported. BAS has over the last twelve months refined its internal processes for complaint handling and acknowledges that additional measures should be documented and put in place to ensure all complaints are investigated promptly and that complainants are regularly advised of the progress of their complaint. The changes implemented to date include a new process management system that prioritises complaints for action which is reviewed on a regular basis by the Audits & Investigations team in conjunction with the Director of Building Control. This is to ensure that all complaints are reviewed and updated for action by investigative staff.

The 'Charter of Principles' that forms part of the BAS complaint handling policy will be revised to include a commitment for regular updating of complainants on the progress of their complaint and time frames for responding to complaints. The content of the BAS webpage will shortly be revised to reflect these commitments.

2. **DLPE should ensure that BAS investigative staff are adequately skilled and trained and BAS is adequately resourced and supported to ensure timely and professional investigation and prosecution.**

DLPE response

The resourcing of staff within the Audits and Investigations unit has been recognised by DLPE as a critical component of the function of BAS. In 2012 the staffing of the unit was increased from 2 permanent staff and 1 temporary position. The staffing of the unit now comprises four full time permanent staff.

Training of BAS investigative staff to provide them with the appropriate skills to undertake their role is considered essential. All staff have either completed a Certificate IV in Audits & Investigations or are in the process of completing this training. Ongoing training of staff will be implemented as part of the annual training review to ensure skills are kept up to date. Investigative staff have commenced working closely with the Prosecutions Unit of the Solicitor for the Northern Territory to further develop their skills in undertaking investigations.

3. DLPE should provide advice to the relevant Minister on amendments to the *Building Act* aimed at improving the building regulatory system, including:

- a. increasing the maximum penalty for building by an unregistered person or company;**
- b. including an express reference to ‘contracting to carry out building work’ in section 22;**
- c. empowering the Director to compel any person who is reasonably believed to have been involved with entering into a contract for, or performing residential building work, to produce documents to or to provide information to BAS;**
- d. any changes necessary to ensure that BAS can investigate and pass on to the Board information relevant to whether a person is fit to be registered; and**
- e. creating an offence of failure to answer a question or giving information or a document that is false or misleading.**

DLPE response

DLPE as part of its ongoing review of the *Building Act* will now provide a briefing to the Minister for Lands, Planning and the Environment on the changes recommended by the Ombudsman.

4. BAS should review the information provided in the course of these Ombudsman investigations to establish whether any person or company should be further investigated, audited or prosecuted for unregistered building or referred to the Building Practitioners Board in relation to their conduct as a registered builder.

DLPE response

BAS has reviewed the information arising from the Ombudsman investigation and from the Building Practitioner Board Inquiry and has determined that the evidence is insufficient to support prosecution of any person or company given the burden of proof necessary.

In regards to the registered building practitioners, Mr Glynatsis and ACT Builders Pty Ltd, the Board of Inquiry did not order that an audit be conducted of either entity. BAS conducted an audit of Mr Michael Baxter and Castleart Pty Ltd in 2012 however neither audit found evidence of professional misconduct or incorrect registration.

The evidence obtained during the Board of Inquiry has been passed on by BAS legal representatives to the NT Police Fraud squad and it is now in their hands.

- 5. BAS should provide a written apology to the complainants in the first case for the time taken to investigate their complaints and failure to keep them adequately informed of progress.**

DLPE response

Following release of the formal notification of decision by the Board of Inquiry the Chief Executive of DLPE will write to each of the complainants offering an apology for the delays experienced in the investigation of their complaints by BAS and lack of regular progress updates. The Board of Inquiry is expected to release this decision in coming weeks.

- 6. DLPE, BAS, the Board and the Commissioner of Residential Building Disputes should maintain co-ordinated, ongoing communications strategies to ensure that builders and residential building consumers are informed of the risks that can arise and of their responsibilities and rights under the *Building Act*.**

DLPE response

BAS has initiated a number of measures to ensure both builders and consumers are informed of their rights and responsibilities under the *Building Act* including publication of the 'Guide to Building and Renovating in the Northern Territory' in December 2011 and preparation of a 'Standards and Tolerances Guide for Residential Building Work' which is due for release by 1 May 2013. Following commencement of the Residential Building Cover Package preparation of updated guides for building practitioners is underway by BAS to ensure that all builders are aware of their statutory responsibilities and shall be made available on the website.

The recommendation in relation to communication between all parties with responsibilities under the *Building Act* is supported and ongoing face to face meetings will be held to discuss improvements to processes and communication.

FIRST COMPLAINT

31. In the first complaint, the central figures are:
- Mr Ioannis (aka John) Glynatsis, who was at the relevant time a registered building practitioner;
 - Building Materials Australia Pty Ltd (**BMA**), controlled by Mr Glynatsis — not a registered building practitioner;
 - ACT Builders (NT) Pty Ltd (**ACT**), at the relevant time a registered building practitioner, controlled by Mr Glynatsis; and
 - Mr Stephen John Stirrup, who took the initial inquiry from the complainants, dealt with them throughout and signed the building contract with the complainants — Mr Stirrup was not a registered building practitioner.
32. In about April 2010 the complainants, a couple close to retirement, saw in a newspaper an advertisement for a method of residential building construction that claimed to be an affordable, quick, easy, strong kit or built residence. The product was called “*Lamina*”. They made contact with the phone number given and met with Mr Stirrup who held himself out as a representative of BMA.
33. The couple paid \$67,644.60 to BMA up front and subsequently entered into a standard Housing Industry Association, Plain Language Building Contract for construction of a house.
34. The contract was signed on 7 July 2010 with the total price being \$225,472. The contract referred to two companies, BMA and ACT. The “Contract Information” page listed both BMA and ACT in the “Builder” section with an additional note stating “BUILDER – ACT BUILDERS (NT)”. The signature page listed ACT as builder, followed by Mr Stirrup’s signature. There was no start or finish date specified in the contract but a finish date of 17 November 2010 was advised by Mr Stirrup by e-mail.
35. Mr Stirrup was not an executive office holder of either BMA or ACT which were both controlled by Mr Glynatsis. However, the quotation Mr Stirrup provided to the complainants on BMA letterhead described him as “Manager”. Mr Stirrup signed the contract but there is dispute as to whether he signed on behalf of one or both the companies and whether he was authorised to enter into a contract on behalf of either.
36. Following signing of the contract many months of frustration, delay and excuses from Mr Stirrup followed for the complainants without work on their home commencing. The complainants assiduously followed up on delays and it is clear from investigations undertaken by my office that the information given on progress by Mr Stirrup was often misleading or simply false.

37. The complainants, frustrated by a failure to either build their home or have their money returned, sought remedies through a number of avenues and agencies.
38. Eventually the complainants engaged a lawyer. On 15 February 2011, the complainant's lawyer sent a letter of complaint to BAS. This complaint alleged that BMA, ACT, Lamina Australia Pty Ltd (Lamina) and their Director Mr Glynatsis had breached the *Building Act* and *Building Regulations*. The complaint also referred to the actions of Mr Stirrup.
39. BAS sought to follow up the complaint with Mr Glynatsis. A BAS telephone file note dated 6 April 2011, records his initial response in the following terms:

“ ... He [Glynatsis] said that Stirrup is a bankrupt and that he has got his building registration details off the internet.

He hasn't signed any contract or paperwork for these people.

He wanted to know whether someone could get his details off the internet. I said yes, if they went to the Building Practitioners Board website they could get his registration number and other details. He believes that this is what has happened.”

40. As is understandable, BAS took this exchange to mean that Mr Glynatsis was denying any association with Mr Stirrup. Following this exchange, Mr Glynatsis failed to provide further information to assist with BAS inquiries until a Board hearing some 19 months later in November 2012.
41. Prior to conducting further inquiries, BAS made a number of requests for legal advice over an extended period. Delays in provision of these advices and time taken to consider them resulted in inordinate delay in progressing the complaint.
42. One obvious next step for BAS would have been to contact Mr Stirrup to attempt to ascertain his version of events. However, Mr Stirrup was not contacted by BAS. (BAS has stated that it first wished to ascertain Mr Glynatsis' version of events before approaching Mr Stirrup.)
43. In the course of this investigation, the Deputy Ombudsman contacted Mr Stirrup, who had by then left Australia. The Deputy Ombudsman first explained the complaint and the response from Mr Glynatsis to BAS, then asked a series of questions. Mr Stirrup's relevant responses and comments are set out below in italics:

Did you have the authority to sign contracts for either ACT or BMA?

- *Yes. I wrote it out (the contract) for BMA.*

The contract is in the name of BMA and ACT?

- *No. The contract is in two parts. BMA was the original supplier to supply the kit (lamina product), and ACT were to be the builder. But that could have*

changed. Once the kit was delivered on-site then ACT would take over the contract, but not until then.

The signature on the contract looks like SSE with the notation of ACT Builders above the signature?

- *That sounds like my signature, but the ACT part would be a typo...*

Did you work for either BMA or ACT?

- *No, it was an informal arrangement. John was paying my rent and bills.*

But you had permission to act for BMA or ACT and enter into contracts?

- Yes.

44. The Deputy Ombudsman also conducted a number of relatively straightforward ASIC and internet searches which readily pointed to a close relationship between Mr Glynatsis and Mr Stirrup.
45. At a Board hearing in November 2012, Mr Glynatsis acknowledged a lengthy association with Mr Stirrup. However, he continued to deny that Mr Stirrup was authorised to enter into a building contract on behalf of ACT and provided information suggesting that Mr Stirrup had acted fraudulently.
46. Depending on the version of the facts accepted, this situation as it has unfolded gave rise to issues of:
 - potential prosecution under section 22 (Building practitioners to be registered) on the part of Mr Stirrup and BMA; and/or
 - referral to the Board to consider whether Mr Glynatsis and/or ACT were guilty of professional misconduct or fit to be registered; and/or
 - potential prosecution for fraud on the part of Mr Stirrup (a matter for investigation by Police).
47. There were clearly a number of factual issues that needed to be investigated and, as far as possible, resolved quickly in order to establish which course the investigation should take. However, the failure to obtain further information from Mr Glynatsis or to seek information from Mr Stirrup, combined with ongoing requests for legal advice and delays in provision of that advice led to lengthy delay in BAS progressing the complaint.
48. Almost a year after their initial complaint to BAS, one of the complainants approached my Office by letter dated 29 January 2012, to investigate action taken by BAS and NT Police. While my Office has been in contact with NT Police regarding the issues raised by the complaint on a number of occasions, it appeared clear that the major issues raised by the complaint concerned BAS, including its interaction with NT Police.

49. By letter dated 3 February 2012, the Deputy Ombudsman raised the following issues of complaint with the Chief Executive of the then Department of Lands and Planning:
- *The excessive time it is taking Building Advisory Services to investigate these companies in regard to breaches of the Building Act NT; and*
 - *Conflicting opinion of the NT Police and BAS in regard to what constitutes fraud.*
50. On 14 February 2012, BAS referred Mr Glynatsis and ACT to the Board in relation to failure to answer questions and alleged professional misconduct relating to issues raised by the complaint to BAS.
51. The Chief Executive of the Department of Lands and Planning, in his response to this Office dated 27 February 2012, acknowledged the timeframe for the referral of the matter to the Board took longer than anticipated. He noted that this delay was due to the need for the Director of Building Control to obtain comprehensive legal advice prior to referral. He also noted that BAS officers initially kept the complainants advised of the progress of their investigation, but acknowledged that the complainants should have been more regularly updated throughout the full course of the BAS investigation.
52. The Building Practitioners Board inquiry⁹ into the conduct of Mr Glynatsis and ACT was eventually conducted in November and December 2012. Mr Glynatsis and ACT admitted failing to answer questions. The maximum monetary penalty for professional misconduct is 40 penalty units (\$5,640). Mr Glynatsis and ACT were each given a civil penalty of \$1,500.
53. With regard to the issues raised in the complaint to BAS, Mr Glynatsis stated that he was not aware of any contract and that Mr Stirrup had no authority to enter into a contract on behalf of ACT. One complainant gave evidence that Mr Stirrup had introduced Mr Glynatsis to him as the builder in August 2010. Mr Glynatsis denied this. There was also evidence of e-mails copied to Mr Glynatsis' email address from October 2010. Mr Glynatsis denied having seen the e-mails, stating that his daughter opened any e-mails for him.¹⁰
54. Although the Board's reasons for decision have not yet been published, my Office has been advised that the Board decided that there was insufficient evidence to make a finding of professional misconduct against Mr Glynatsis or ACT in relation to the issues raised in the complaint to BAS.

⁹ In an inquiry of this nature the Building Practitioners Board is separately constituted under Division 3A of the *Building Act*. As such it may well form a quasi-judicial "tribunal" whose administrative actions (apart from unreasonable delay) are excluded from my jurisdiction under section 16(1)(b) of the *Ombudsman Act*. In any event, this investigation has not extended to the actions of the Board.

¹⁰ The solicitor for Mr Glynatsis submitted that the complainants did not hold the subjective view that they were contracting with Mr Glynatsis or ACT and that they had never met Mr Glynatsis or anyone from ACT prior to or at the time of signing the contract. In that regard, I note that ACT was named in the contract and Mr Stirrup purported to sign the contract on behalf ACT.

55. No action has been taken by BAS to date in relation to BMA or Mr Stirrup who was not contacted by BAS and has left the country. BMA was deregistered as a company in November 2012, limiting any prospect of the complainants recovering the money they have paid. BAS advises that it has passed on information arising from the hearing to NT Police for consideration.

SECOND COMPLAINT

56. In the second case, the complainants entered into a building contract on 3 April 2009 with Castleart Building Company Pty Ltd trading as Michael Baxter Homes (Castleart). Mr Michael Keith Baxter was a registered building practitioner in the Northern Territory at the time but Castleart was not.
57. The contract price, including GST was \$476,610. The finish date for construction was listed in the contract as 30 November 2009 but this was later extended to 30 March 2010. The complainants first began to be concerned about delay and construction issues around Christmas 2009. A series of delays and construction issues ensued over the next year.
58. Ultimately in September 2010, the complainants say that Mr Baxter advised that he would not be completing the works and the complainants took possession of the house in an unfinished state. Mr Baxter subsequently took legal action to recover moneys he claimed to be outstanding from the complainants.
59. The complainants lodged a written complaint with BAS on 4 November 2010 and provided further information to BAS on 25 January 2011. The complainants noted that in February 2010 Mr Baxter had been found guilty by the Board of professional misconduct by reason of his failure to adequately supervise sub-contractors which gave rise to substandard work. They complained that only two months later, in April 2010, the same problem arose with their house.
60. On 15 April 2011, Mr Baxter was found guilty in the Court of Summary Jurisdiction of two counts of forgery and two counts of knowingly uttering forged documents, being glazing certificates required in order to obtain certificates of occupancy, one of which related to the complainants' property. No conviction was recorded but BAS referred this matter to the Board on 20 April 2011.
61. In the course of BAS inquiries, it was identified that Castleart (which was not at that time registered) had entered into five building contracts between 1 January 2009 and 1 January 2011, in breach of the *Building Act*. This potentially raised two issues. The first was whether there should be a prosecution for unregistered building. The second was whether there was evidence of professional misconduct that warranted referral of Mr Baxter to the Board for professional misconduct relating to his facilitating the unregistered company entering into building contracts.
62. By internal BAS memorandum dated 31 May 2011, the Director of Building Control was advised that in the past when complaints had been received regarding unregistered companies entering into building contracts, the companies had been advised of the requirement and allowed time to register. (Castleart did eventually apply for and was granted registration 9 months after being told of the failure to register). The Director was advised that similar matters had not been referred to the Board in the past and it would be inconsistent to do so on this occasion.

63. The memorandum also stated that a Building Note was being prepared to notify practitioners that a company entering into building contracts while not a registered building practitioner would be in breach of section 22(1) of the *Building Act*. It was stated that following the issue of this Building Note companies entering contracts without registration would be prosecuted or referred to the Board for disciplinary action.
64. The Director appears to have accepted that advice and wrote to the complainants on 6 July 2011 indicating that, apart from an issue of 'fraudulent window certification', the issues in dispute were contractual and no further action would be taken on their complaint.
65. Prior to this and separately from their complaint, in February 2011, a BAS officer wrote to one of the complainants, advising that it had come to the attention of BAS that there may have been unapproved building works carried out on their property, namely a blockwork fence. (As noted above, the building works had not been completed at the time that the complainants took possession.)
66. The unapproved building works issue was pursued by BAS over a considerable length of time. Ultimately, the complainants approached my office on 21 May 2012, complaining of failure by BAS to undertake adequate inquiries into their complaint and unnecessary and undue attention in relation to the unapproved building works issue.
67. With regard to the issue of inadequate inquiries, examination of BAS files points to significant delay in addressing the issues raised regarding Mr Baxter and Castleart and concerns regarding the approach of the BAS to prosecutions and referrals to the Board.
68. With regard to the complaint of unnecessary and undue attention, I accept that it was necessary for BAS to pursue the investigation relating to unapproved building works. I acknowledge that this must have proved an annoying and frustrating sequel to the troubles the complainants experienced with the construction of their house.
69. In their comment on my draft report, the complainants restated their view that the investigation was pursued unreasonably. They included further information on events that transpired after their complaint to my office.
70. In light of their comments, I carefully reviewed the investigation file supplied by BAS. BAS efforts to investigate this matter commenced in February 2011 and extended beyond the complaint to my office in May 2012. There is an extensive record of contact and attempted contact with the complainants. The material before me does not show that the approach adopted by BAS was unreasonable although I consider that there could have been better co-ordination between the BAS staff dealing with the two issues.

ISSUES ARISING

71. January 2013 saw the commencement of legislative amendments aimed at significantly improving the protection of residential building consumers in the Northern Territory¹¹. These include additional requirements for registered building practitioners, new consumer guarantee and residential building cover protections and the establishment of a Commissioner for Residential Building Disputes.
72. However, the investigation of complaints to my Office has shown that there remain a number of areas where the system can be improved.

UNREGISTERED BUILDING

73. The regulatory and consumer protection system set out in the *Building Act* is based on builders operating within the system. It is therefore vital that there is sufficient incentive for builders to work within the system by obtaining and maintaining appropriate registration.
74. This is true in relation to 'rogue' builders who may be contemplating undertaking building work entirely outside the system and in relation to individual registered building practitioners who are operating through a company that is not a registered building practitioner.
75. The potential for people to ignore the regulatory scheme is greatly increased if the regulator does not take prompt action to investigate and prosecute unregistered building¹². BAS must have policies and procedures in place to ensure timely investigation and action against unregistered builders.
76. The potential is also increased if the likely penalty for a transgression is proportionately small. The current maximum penalty for unregistered building is 40 penalty units (\$5,640). This will be seen by some as a minimal penalty compared to the profit that can be made from building one house or even the deposit on a house that is not ultimately built.

¹¹ *Building Amendment (Residential Building Consumer Protection) Act*.

¹² **22. Building practitioners to be registered**

(1) A person who is not appropriately registered under this Part must not:

- (a) take or use the title of building practitioner or building practitioner of a particular category of building practitioners (either alone or in combination with any other words); or
- (b) perform a function or exercise a power of, or work as, a building practitioner or building practitioner of a particular category of building practitioner; or
- (c) in any way imply that he or she is:
 - (i) registered under this Part; or
 - (ii) authorised to perform a function or work for which registration is required under this Part.

Maximum penalty: 40 penalty units.

77. It is imperative that there be a penalty for unregistered building of sufficient substance to ensure that builders, prospective builders and building companies bring themselves within the regulatory scheme. A maximum penalty which presents no real deterrent creates limited incentive for builders to take care to comply with the requirements that bring them within the scheme.
78. A number of other jurisdictions have higher maximum penalties. For example, the maximum penalty for:
- carrying out unlicensed building work in Queensland is 250 penalty units (\$27,500)¹³;
 - unlicensed contracting to do residential building work in New South Wales for an individual is 200 penalty units (\$22,000) and for a corporation is 1,000 penalty units (\$110,000)¹⁴; and
 - a person holding himself or herself out to be a registered builder in Victoria is 500 penalty units (\$70,420)¹⁵.
79. It is also of note that the New South Wales provision specifically refers to contracting to undertake building work, as does Western Australian legislation¹⁶. Section 22 of the Northern Territory *Building Act* does not expressly refer to entering into a contract.
80. Consideration should be given to increasing the penalty for unregistered building and making express reference to contracting to carry out building work in section 22.

IMPORTANCE OF REGULATING COMPANIES

81. In both cases investigated, issues arose regarding involvement of companies that were not registered as builders. There were issues as to whether there should be prosecution under section 22. However, the involvement of those companies also served to “muddy the waters”, so that the factual situation was made more complicated, contributing to the uncertainty and delay in BAS dealing with the complaints.
82. In the first complaint, the issue of whether Mr Stirrup had power to contract on behalf of BMA or ACT may have been contested but the evidence clearly showed that moneys were paid to BMA. BMA was not a registered building contractor.
83. From the perspective of the complainants, \$67,644.60 of their money was banked into a BMA account. The evidence of Mr Glynatsis (who controlled BMA) at the Board hearing shows that he does not believe that BMA was bound to do anything in

¹³ *Queensland Building Services Authority Act 1991* (Qld), section 42.

¹⁴ *Home Building Act 1989* (NSW), section 4.

¹⁵ *Building Act 1993* (Vic), section 176(1A).

¹⁶ *Builders Registration Act 1939* (WA), section 4(1)(A)(b).

return for the payment of this money. BMA therefore had no basis to retain this money and would be legally bound to pay it back. This obligation to repay the money would remain regardless of whether anyone subsequently misappropriated funds or goods held by BMA¹⁷.

84. However, the practical enforcement of that legal obligation to the complainants depended on BMA having funds available to repay it. In fact, Mr Glynatsis applied to ASIC for voluntary deregistration of BMA on 8 December 2010. Lawyers for the complainants discovered this and sent a letter of demand to BMA and ACT on 18 January 2011. They also sought from ASIC and were granted a deferral of deregistration action in relation to BMA. However, BMA was ultimately deregistered 8 November 2012 without having repaid any money to the complainants.
85. In the second case, the situation was more straightforward in that the individual registered building practitioner did not dispute that there was a contract to build but was operating through an unregistered company.
86. One BAS officer commented:
- “The issue of registration of a company as a building practitioner is one that many practitioners did not understand. For small companies, the company directors do not differentiate between themselves and the company and do not understand it is a separate legal entity.”*
- [The officer went on to note that a policy had been mailed out on this point to all practitioners in 2008 and is available on the BAS webpage.]
87. While I accept that this may reflect the attitude of some builders, I do not believe it is a reasonable basis for decision making with regard to BAS action in relation to companies and associated registered building practitioners.
88. Operating through a company offers enormous advantages to builders and businesses generally. Companies are an effective mechanism to limit liability and allow a person to spread their liabilities or indeed move on from one failed company to a new one. Builders are not slow to take full advantage of company structures to protect their own interests.
89. Conversely, entering into an agreement with a company can significantly limit the recourse of an individual consumer in the event that things go wrong. A consumer can find themselves in a position where a company no longer has assets to redress poor workmanship or failure to perform but the individual they dealt with continues in business under a new corporate entity.

¹⁷ The solicitor for Mr Glynatsis contended that this analysis is misguided and that the complainants were the victims of a fraud by Mr Stirrup. However, without making a finding to that effect but assuming the facts are as asserted for the sake of argument, the monies were indisputably paid by the complainants and received by BMA. Therefore the victim of any fraud was BMA. The complainants bore no responsibility for this and their legal rights were not altered by any subsequent loss by BMA. They were entitled to be repaid the amount they paid to BMA.

90. If the company the consumer dealt with was not a registered building practitioner (even if the individual they dealt with was) they are not likely to be able to take advantage of the consumer protections in the *Building Act*.
91. This is not a criticism of the use of corporate structures. They have a well-established place in modern business. However, it does serve to stress that ensuring that building regulation is properly implemented with respect to companies is just as important as with regard to individuals.
92. The fact that a registered building practitioner is involved in the process does not lessen the importance of making sure that a company that is entering into contracts to build is appropriately registered, and so making it subject to the regulatory scheme and new protections available to the consumer. Builders should not enjoy the substantial benefits of working through a company structure without also complying with legislative responsibilities in relation to that company.
93. BAS policies should emphasise the importance of regulating company conduct and BAS should reinforce this with registered building practitioners.

NEED FOR TIMELY INVESTIGATION AND ACTION

94. As noted previously, I am satisfied that there was unreasonable delay in the conduct of the BAS inquiries in each case and less than ideal communication with the complainants on progress. This is acknowledged by BAS.
95. For reasons discussed above, it is important that complaints/investigations, particularly with regard to unregistered building, be dealt with in a timely manner in order to ensure public safety and protection of consumers. It is also important to regularly update complainants even if progress has been limited. I consider that the complainants in both cases deserve an apology for the delay in dealing with these matters and the limited updates provided. However, as the complainants in the second case have indicated they do not seek an apology, the recommendation in that regard is limited to the first case.
96. In the first case, significant delays arose while legal advice was sought and considered. Well documented policies and procedures in relation to investigations and actions could significantly reduce the need to obtain legal advice, or at least the scope of advice required, in individual cases.
97. What was clearly needed in the first case was much more vigorous pursuit of information from Mr Glynatsis and Mr Stirrup. While the issue of Mr Glynatsis' failure to answer questions was ultimately referred to the Board, this did not occur until 14 February 2012, shortly after the complaint to my Office. This was almost one year after the initial complaint to BAS and ten months after BAS initial contact with Mr Glynatsis.

98. In my view, potential referral to the Board for failure to provide information is a powerful tool. However, it is only likely to be an effective tool if practitioners understand it will be utilised by BAS without delay in the event of a failure to co-operate. If Mr Glynatsis had been persuaded to provide information earlier it could have assisted both BAS and Police investigations.
99. With regard to Mr Stirrup, BAS states that its approach was to attempt to clarify the evidence of Mr Glynatsis before contacting Mr Stirrup, particularly because there appeared to be an allegation of fraud. It also notes that Mr Stirrup is not a registered building practitioner and could not be compelled to comply.
100. While that may have been its preferred approach initially, I do not consider that it was appropriate to completely dismiss an attempt to contact Mr Stirrup given the failure of Mr Glynatsis to provide information. Contacting Mr Stirrup was an obvious line of inquiry which should not have been delayed indefinitely. The fact that he could not be compelled to provide information was not a reasonable basis for failing to contact him. He was clearly willing to speak to the Deputy Ombudsman when contacted.
101. BAS should develop written policies and procedures on complaint handling, investigation, prosecutions and referral to the Building Practitioners Board that address, among other things, the issues discussed in this report. They should include indicative timeframes for investigation and provision for regular updating of complainants.
102. For example there might be published benchmarks setting out timeframes for acknowledgment of complaint, initial assessment and regular notification (say, at least on a six weekly basis).
103. BAS advises that it has reviewed its investigations processes, in conjunction with senior lawyers from the Department of the Attorney-General and Justice. The Solicitor for the Northern Territory will assist BAS with preparation of briefs of evidence and, where appropriate, prosecute complaints on behalf of the Director of Building Control.

POTENTIAL FOR OVERLAP WITH ALLEGATIONS OF CRIMINAL OR OTHER OFFENCES

104. Just as issues relating to professional conduct and unregistered building can overlap, the first complaint also raised squarely the potential for overlap between such allegations and allegations of criminal conduct. Investigations and information provided pointed to a number of possible additional offences involving:
- fraud;
 - breach of taxation laws relating to BMA's invoicing for receipt of complainant's money yet failure to register for GST purposes; and
 - breach of the *Corporations Act*.

105. On one view, it may be argued that such allegations are a matter for the NT Police, ATO and ASIC (which is undoubtedly true) and the better person to raise them with those authorities is either the complainant or the builder depending on the nature of the allegations.
106. However, this complaint clearly showed that the investigation and outcome of such allegations may be crucial to the progress of BAS inquiries. BAS investigations should not be stymied because allegations might require investigation by another authority, particularly in a situation where not all relevant information has been supplied to that authority.
107. In such a case, it is clearly in the interests of BAS to ensure that relevant information is provided to the authority as soon as possible so that the authority can further its inquiries¹⁸. By doing so, it may well assist BAS to establish important facts that will further its investigations and contribute to consideration of whether a building practitioner has committed professional misconduct or is fit to be registered.
108. Where BAS becomes aware of substantive allegations of criminal or other breaches that may impact on its investigations, it is important that it be in a position to notify and co-operate with relevant law enforcement authorities such as NT Police. BAS should ensure that it has clear procedures in place that promote information exchange and co-operation with such authorities in appropriate circumstances.

PROFESSIONAL MISCONDUCT AND FITNESS TO BE REGISTERED

109. BAS has noted that its chief concern lies with issues relating to registration of builders rather than contractual disputes which are a matter for the owner to pursue, if necessary by way of legal action.
110. I accept that this is in broad terms correct. There are contractual issues, even quite major issues that are a matter for the client and the builder to resolve (although I note that the new consumer protection provisions offer additional avenues for resolution of such issues).
111. However, a history of contractual issues may well give rise to questions regarding professional misconduct or the fitness of a person to be a registered building practitioner. Likewise, the fact that a registered building practitioner fails to comply with legal requirements by operating through an unregistered company may give rise to such questions.
112. The provisions of the *Building Act* dealing with BAS investigation and referral to the Board for professional misconduct are detailed. However, there is little in the way of

¹⁸ In that regard, I note that Information Privacy Principle 2.1 under the *Information Act* permits disclosure of personal information relating to suspected unlawful activity (paragraph (e)) and to law enforcement agencies for various purposes (paragraph (g)).

express reference to the role of the Director when it comes to advising the Board with regard to the broader issue of fitness to be a builder¹⁹.

113. This may encompass factors that are broader than 'professional misconduct' as defined in the *Building Act*, including the issues discussed in the previous paragraph and breaches of other regulatory or criminal laws as discussed above.
114. A combination of factors or history of transgressions that might not individually warrant referral to the Board as professional misconduct may well, when considered together, provide a basis for consideration as to whether a person is fit to be registered as a builder. It is important that BAS be in a position to investigate, inform and advise the Board if such information comes to its notice.

INVESTIGATIVE POWERS

115. There is a seeming anomaly in BAS investigative powers. On the one hand, the Director may require a practitioner or complainant to produce relevant documents. Failure to comply can either be prosecuted as an offence by BAS or referred to the Board as potential professional misconduct²⁰.
116. On the other hand, failure to answer a question or the act of giving information or a document that is false or misleading cannot be prosecuted as an offence by BAS. It can only be referred to the Board as potential professional misconduct.
117. It is not clear why prosecution by BAS should be an option in relation to non-production of documents but not in the other cases. Consideration should be given to extending the offence provision to all of the above situations.
118. It is also of note that BAS has no power to compel production of evidence from individuals or bodies who are not complainants or registered practitioners.
119. This limits the potential to obtain information from bodies such as financial institutions that may assist in an investigation, particularly in relation to investigations of unregistered building. It also means that BAS has no power to compel a person or company suspected of unregistered building to produce documents or provide information to assist with the investigation.
120. It is worth considering whether BAS should have a power to compel a person or company who is reasonably believed to have been involved with entering into a contract for, or performing residential building work, to produce documents or provide information to BAS, including financial records and bank statements of that person or of a corporation of which that person is a director.

¹⁹ Section 24FA of the *Building Act* provides for the Board to take into account reports from people prescribed by regulation when considering whether a person should be registered. However, there does not appear to be any person or entity currently prescribed.

²⁰ *Building Act*, sections 32 and 33.

COMPLAINT AND REPORT PROCESS

121. A person aggrieved by administrative action of a public authority or a person representing them may make a complaint to the Ombudsman²¹.
122. In the first case, the complainants (through their solicitors) complained to BAS by letter dated 15 February 2011. The complainants approached my Office on 29 January 2012. Following preliminary investigations, my Office gave formal notice of investigation to the then Department of Lands and Planning, the relevant Minister and the complainants by letters dated 13 March 2012.
123. In the second case, the complainants complained to BAS by letter dated 4 November 2010 and received a response from BAS on 6 July 2011 indicating that no further action would be taken by BAS. Their complaint also related to subsequent action by BAS in relation to a complaint about their property. The complainants approached my Office on 21 May 2012. The bulk of the conduct at issue arose in the 12 months preceding the complaint to my Office. In the circumstances, I consider that it is in the public interest to deal with the conduct of BAS from the time of the first complaint. My Office gave notice of preliminary inquiries to the Department of Lands and Planning by letter dated 22 May 2012.
124. Under section 153(b) of the *Ombudsman Act*, I may give the Chief Minister a report relating to a particular case investigated by the Ombudsman.
125. A draft report containing a detailed timeline of the events in the first case leading up to the making of the complaint to BAS and the handling of the complaint by BAS was distributed for consultation to DLPE, Mr Glynatsis, Mr Stirrup and the complainants in the first case in August 2012.
126. Following receipt of feedback on the draft report and further information disclosed during the Board hearing in late 2012, a revised draft was prepared. It was distributed to DLPE, Mr Glynatsis, Mr Stirrup, Mr Baxter and the complainants for comment.
127. DLPE responded advising that it accepts the report and has commenced or is in the process of implementing the recommendations. It made a number of comments in relation to the recommendations. They are set out with the relevant recommendations.
128. The solicitor for Mr Glynatsis responded pointing to a number of “factual errors and other misnomers” in the draft report. They are discussed where necessary in footnotes to the text.

²¹ *Ombudsman Act*, section 21.

129. Neither Mr Stirrup nor Mr Baxter responded.
130. The complainants in the first case commented that the Report does nothing to highlight the problem of people continually registering and deregistering multiple companies then hiding behind them to escape the truth (in that regard, note the comments at paragraphs 81-93 above).
131. They stated that action from government departments was far too long and expressed disappointment that all they get is a recommendation to apologise. They also expressed disappointment at the process before the Board. They stated that without prior knowledge of the proceedings it would be very difficult for anyone to understand the complexity of their situation and take action to put regulations in place to prevent a similar situation from happening to someone else (note that DLPE has access to all information provided by the complainants and to the detailed chronology prepared by my Office of the events prior to and in the course of the BAS investigation of their complaint).
132. The complainants in the second case put forward a number of comments. They stated that they did not seek an apology. They want BAS to do its job and be seen to be doing it. They included further comments with regard to BAS staff and Mr Baxter.
133. I have recommended that BAS review the information available to it to establish whether action should be taken against any person or company. BAS has responded to that recommendation (see Recommendation 4 at pages 10-11). I have forwarded to BAS a copy of the complainants' comments on the draft report for its consideration.
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