



Building Consent Authority Complaint 2017/001 against the Waikato Building Consents Group¹

1. The matters of complaint

- 1.1 This is a complaint under Part 3 Subpart 1 of the *Building Act 2004*² (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations and Assurance, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.
- 1.2 The complaint was lodged by A Light (“the complainant”) under section 200 of the Act, and was received by the Determinations and Assurance Group of the Ministry on 23 December 2015. The complaint is against the Waikato Building Consents Group (“the WBCG”).
- 1.3 I note the WBCG is not a registered building consent authority (“BCA”) for the purposes of the Act. However, as the WBCG represents seven BCAs collectively for the purpose of providing information via a website, this complaint is considered to be lodged against the following BCAs:
 - Hauraki District Council
 - Otorohanga District Council
 - Matamata–Piako District Council
 - Waikato District Council
 - Waipa District Council
 - Waitomo District Council
 - Hamilton City Council.
- 1.4 The substance of the complaint concerned what the complainant considered to be a misstatement of information on the WBCG’s website, specifically a brochure entitled “Changing the use of a building”³. The information in question concerns sections 114 and 115 of the Act regarding a change of use under the *Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005* (“the Change of Use Regulations”).
- 1.5 The complainant considered that the information on the website directed people to a more onerous level of compliance with the Building Code when converting a garage to a sleep-out than is in fact required under the Act. The complainant considered this advice to be contrary to the Act and determinations issued by the Ministry. The complainant sought a change to the information on the website to conform to the Act and its associated regulations.

¹ As representing a group of seven building consent authorities.

² The Building Act, Building Code, past complaint decisions and guidance documents issued by the Ministry are all available at www.building.govt.nz or by contacting the Ministry on 0800 242 243.

³ Version 2014-06-26 downloaded by the complainant from the WBCG website <http://buildwaikato.co.nz/>

- 1.6 I note that although sections 114 and 115 of the Act relating to a change of use are a territorial authority function, the information on the WBCG website was in relation to building consent process and requirements, and this is a BCA function. As such, I consider the complaint application to fall within the scope of a complaint that is able to be lodged under section 200(1) of the Act.
- 1.7 The complaint relates to the BCAs' functions under section 48 of the Act (relating to processing applications for building consents), and under regulations 7(2)(a) and (g) of the *Building (Accreditation of Building Consent Authorities) Regulations 2006* ("the BCA Regulations"). I discuss this legislation in more depth in paragraph 4.1.
- 1.8 This complaint considers the provision of the information on the WBCG website and the policies and procedures that underpin the provision of that information, as well as the way the inquiries regarding the accuracy of that information were managed and the policies and procedures that are in place to manage such inquiries.

2. Background

- 2.1 The WBCG has a website on which it provides information on behalf of the seven BCAs it collectively represents. The website holds information about all aspects of the building consent process, including changing the use of a building; what constitutes a change of use in terms of the Act and its regulations; and what impact this has on compliance with the Building Code and the requirement to apply for a building consent, among other things. The situation where a garage is being converted to a habitable space, such as a sleep-out, is one of the situations canvassed.
- 2.2 My understanding of the background is that there was discussion on an online public forum about what was required in order to gain building consent in a change of use situation. As a result of this, a third-party member of the public (who is not the complainant) contacted one of the seven BCAs and referred to the information about change of use provided on the WBCG website. An officer of this BCA responded to the third party in an email dated 16 December 2015, stating that the WBCG was satisfied that the information provided on its site was accurate.
- 2.3 As I understand the situation, the complainant then decided to pursue the question of whether or not the information on the website was accurate, but he did not contact the WBCG or any of its constituent BCAs about this. As a result, he was unaware that the WBCG knew that corrections were required, and had scheduled for the change of use information to be reviewed against the legislation.
- 2.4 On 16 December 2015, in an email to the Ministry, the complainant raised his concerns about the accuracy of the information. The Ministry responded to the complainant on 23 December 2015 to the effect that it had been assured by the WBCG that it was reviewing whether the information needed changing, and that this review would be completed when key personnel returned from leave.
- 2.5 On 23 December 2015, the complainant lodged a complaint about the matter with the Ministry.
- 2.6 On 15 January 2016, the WBCG advised the Ministry that the content of the website and associated brochure had been amended. It noted that the content of its public information is reviewed annually, and that the brochure had been identified in October 2015 as needing changes in relation to the regulations concerning changes of use. The WBCG later submitted that the website information is 'constantly being reviewed' in addition to the scheduled maintenance of information.

2.7 On 26 January 2016, the Ministry notified the parties that it had accepted the complaint application under section 200(2) of the Act on the following grounds:

The alleged failure of the WBCG to give information (written or electronic) to a person who wants to apply for a building consent, including information relating to a change of use.

3. Submissions

3.1 The complainant and the WBCG have made extensive and detailed submissions regarding this complaint application, including in response to two drafts of the complaint decision issued to them for comment.

3.2 The first draft, issued on 15 February 2016, concluded there was insufficient evidence that the WBCG (acting on behalf of seven BCAs) had failed to perform its functions under the Act, and the complaint was not upheld. On 7 March 2016, the WBCG accepted the draft with some amendments proposed. The WBCG noted that the complaint process had informed the WBCG that it needed to strengthen its process for auditing public information.

3.3 On 15 May 2016, I sought further information from the WBCG in respect of its functions under regulations 7(2)(a) and (g) of the BCA Regulations, specifically the policies and procedures that were current at the time the issue was raised (December 2015) that:

- ensured the upkeep and accuracy of information provided on the website
- related to handling queries about the accuracy of information on the website.

3.4 The WBCG provided the requested documentation on 21 June 2016, along with screen prints of the previous 'Contact us' page of its website and noting the subsequent changes.

3.5 I took into account the submissions received from the complainant and the WBCG, and issued a second draft on 21 July 2016. The second draft concluded there was sufficient evidence the WBCG (acting on behalf of seven BCAs) had failed in performing its functions associated with regulation 7(2)(a) of the BCA Regulations, but acknowledged that the WBCG acted in a receptive and timely manner to correct the information. The second draft required the BCAs provide a report to the Ministry in six months' time (refer paragraph 0).

3.6 In the following paragraphs I have summarised the main points of the submissions received from the complainant and the WBCG that relate to the BCAs' functions of giving information and the receiving and managing inquiries.

3.7 The complainant

- The WBCG has failed to perform its function of conveying to the public accurate information that reflects and informs owners of their obligations under the Building Act.
- The WBCG is responsible for being properly informed of the requirements of the Act and associated regulations, and for being up to date with its public statements and policy recommendations.
- The WBCG's website information was incomplete and misdirects owners as to the requirements for converting a garage to a sleep-out. The website makes no reference to the Change of Use Regulations.

- The complainant listed what he considered to be specific ‘misstatements’ on the WBCG’s website.
- The complainant noted that an officer of one of BCAs had responded to an email from a third party and stated that the information on the website was correct.
- Although the WBCG has made some changes the current information is still not accurate.
- The complainant considered there is no ‘good reason’ for having inaccurate and misleading information in the public domain.

3.7.1 The complainant also raised concerns that misinformation on the website would be causing home owners considerable expense and that the WBCG may have acted on the interpretation expressed in the website, including enforcement by way of issuing notices to fix or prosecuting owners.

3.8 The WBCG

- Prior to the complaint being lodged the complainant did not notify the WBCG either directly or via the contact page on the website to submit suggestions, report problems, or provide feedback.
- The reasons for the inaccurate information include ‘multiple inconsistencies and non-alignments across the legislative documents, and incorrect information being given to the BCAs’. Given that references to ‘regulations’ within the Act are generally to the Building Code, and the classified uses being defined in Clause A1 of the Building Code, it was logical and reasonable to conclude that changing an outbuilding (garage) to a habitable space was a change of use. On that basis, the WBCG considers it unjust to uphold the complaint.
- The WBCG had previously advised the Ministry on 22 December 2015 that the matter would be looked into and that if the information needed changing, it would be changed.
- The information was under review (11 January 2016) and changes were planned to take place ‘within the next few weeks’.
- The content of the website and brochure have been reviewed (15 January 2016) (The proposed changes were attached for the Ministry’s information.)
- The content of public information is reviewed annually.
- The website has been updated to accurately reflect the Change of Use Regulations.
- Negligence implies actions that could result in harm. The WBCG denies it has acted negligently in this case. Instead, it has sought to meet the requirements of the Building Act section 4(2)(b) and (c) to ensure that any harmful effect on human health is prevented or minimised and ensuring that each building is durable for its intended use (see following paragraph regarding health and safety concerns).

3.8.1 In its submissions the WBCG also raised its concerns regarding: health and safety issues relating to converting garages to habitable spaces: the wording and structure of the Act and its regulations: various use classifications in the regulatory framework including the “lawfully established use” in Form 2: and the broad changes in use

allowed for under the Change of Use Regulations: ... I note that the Ministry will address these issues with the WBCG as separate matters from this complaint.

- 3.8.2 The WBCG noted that the BCAs have informed their respective employees of the issue in order to prevent any erroneous actions being taken based on an incorrect interpretation of the legislative requirements.

4. Discussion

4.1 The legislation

- 4.1.1 Under section 203 of the Act, the Chief Executive has specified powers regarding a complaint. For a complaint to be upheld, after conducting an investigation and considering the submissions made by a BCA, I must be satisfied the BCA has failed without good reason to properly perform its functions or has been negligent in performing those functions.
- 4.1.2 The functions of a BCA include issuing building consents, notices to fix and code compliance certificates, and inspecting building work for which it has granted consent. A BCA's functions in relation to building consents are detailed in sections 48 to 52 of the Act, and in relevant regulations under the Act.
- 4.1.3 The BCA Regulations set out a number of additional requirements that BCAs are required to comply with, including having policies, procedures and systems for performing its building consent functions.
- 4.1.4 In the current case, the complaint relates to the processes that the WBCG followed in providing and maintaining up-to-date and accurate information on its website for prospective building consent applicants, including the information on the website itself and the brochure available as a pdf document from the website. This provision of information to potential building consent applicants is an important part of a BCA's building consent functions.
- 4.1.5 Regulation 5 of the BCA Regulations provides that a BCA's policies, procedures and systems for performing its building consent functions must be in writing or electronic and "appropriate for their purposes".
- 4.1.6 More detail is provided in Regulation 7, and the relevant parts provide:

7 Performing building control functions

- (1) A building consent authority must have policies and procedures for performing its building control functions.
- (2) The policies and procedures must cover the following:
 - (a) giving the following information, in writing or electronically, to a person who wants to apply for a building consent:
 - (i) how to apply for a building consent; and
 - (ii) how an application for a building consent is processed; and
 - (iii) how building work is inspected; and
 - (iv) how building work is certified; and
 - ...
 - (g) receiving and managing inquiries about building control functions, in addition to the inquiries that are received and managed under paragraph (a);

- 4.1.7 The effect of regulations 5 and 7 of the BCA Regulations is to require a BCA performing building consent functions to have policies and procedures that are in writing or electronic, are appropriate for their purposes, and provide information to prospective building consent applicants about matters such as how to apply for a building consent and how a building consent application is processed.
- 4.1.8 The WBCG submitted that Regulation 7 of the BCA Regulations does not apply to the complaint lodged because the regulation is in respect of giving information to a person “*who wants to apply for a building consent*” and this does not apply to: whether a person needs a building consent, or: the question of whether there is a change of use.
- 4.1.9 I am of the view that the WBCG has taken too narrow a view of Regulation 7. The obligation in regulation 7 is not limited to people who make specific inquiries of a BCA. Regulation 7 requires a BCA to provide generic information about the building consent process to any person who might be thinking of applying for a building consent. The information must be appropriate to the purpose so it should be widely available, easy to understand, relevant and accurate.
- 4.1.10 Information provided by a BCA to owners and other potential building consent applicants about the building consent process will ensure owners can inform themselves of the requirements for a building consent before they make an application. This will help owners to make an application that contains all the relevant information required by the BCA and allow the BCA to process the application within the timeframe required by the Act.

4.2 The complaint process

- 4.2.1 I have undertaken enquiries on this matter including collecting evidence by:
- providing the WBCG with an opportunity to make submissions and provide a formal written response to the complaint
 - providing the complainant and the WBCG the opportunity to make further submissions on two drafts of this decision prior to issuing the final decision.
- 4.2.2 I have performed a careful and extensive review of the information collected and submissions provided to determine whether there is evidence of a failure and/or negligence on the part of the BCA.

4.3 Analysis: Regulation 7(2)(a)(i): giving information

- 4.3.1 I have reviewed the information contained in the brochure as it appeared at the time the complaint was lodged with the Ministry (“the first brochure”)⁴, and the information as it currently appears in both the website and the latest version of the brochure⁵ (“the updated brochure”).
- 4.3.2 The WBCG has acknowledged that the wording of the information provided did not accurately reflect the legislative requirements that apply in respect of converting a detached garage to a habitable space – in that the respect the complaint is upheld.
- 4.3.3 The WBCG has taken steps to amend the wording on the website, which now states ‘... it would be wise for the owner to consider meeting the Building Code requirements for a habitable space...’ While the change in wording means that the statement is no longer incorrect, I strongly suggest that the WBCG make it clearer to

⁴ Version 2014-06-26 downloaded by the complainant from the WBCG website <http://buildwaikato.co.nz/>

⁵ <http://www.buildwaikato.co.nz/index.asp?pageID=2145881060>, and WBCG Broch-05 version 2016-03-30

the reader that the list of Building Code “requirements” below are not mandatory requirements.

- 4.3.4 The brochure however is yet to be amended; it currently states
- ... the habitable space still needs to meet the Building Code requirements for a habitable space as near as reasonably practical, especially in the following areas:
- [the brochure goes on to list items such as damp proof membrane under the slab, finished floor levels in relation to ground, insulation and underlay, structural consideration, and compliance of window and door openings to E2/AS1 – these are not requirements of the Building Code unless building work is being carried out to those elements]
- 4.3.5 In light of this I now require the WBCG to make the appropriate amendment to the brochure in order to address the inaccurate information and replace the version currently available on its website with a corrected version (refer also 4.3.3 above). The WBCG is to notify the Ministry and the complainant when this action has been completed.
- 4.4 Analysis: Regulation 7(2)(g) receiving and managing inquiries**
- 4.4.1 It is my understanding that the complainant did not directly inform the WBCG of the inaccuracies in the information provided on its website. I consider that the appropriate way to inform an owner of a website about concerns with its content would be to use the ‘Contact Us’ section of that website or contact the owner directly. Because the complainant did not formally complain to the WBCG, I do not need to analyse the WBCG’s discharge of its functions in relation to regulation 7(2)(h) (which relates to policies and procedures for receiving and managing complaints).
- 4.4.2 I have, however, considered the WBCG’s actions in relation to regulation 7(2)(g), with regards to the third party who contacted an officer of one of the constituent BCAs about the accuracy of the website content. The officer replied that the information on the website was accurate (see paragraph 2.2).
- 4.4.3 The WBCG has procedures in place for situations where a member of the public raises a concern or a matter is raised by one of its constituent BCAs. The procedure now specifies that where the concern relates to a possible error on the WBCG website, the matter should be referred to the correct manager within the WBCG ‘for investigation and action’. This clarification of the procedure was made in response to the current complaint. While this course of action may have been the intent of the procedure prior to this, it was not specified. I do not know whether or not the officer in this particular case advised the WBCG about the third-party query. Under the procedure, even as it stood at the time the inquiry was made, he should have done. However, in my opinion, the failure by one officer to follow the procedure (assuming this is what happened) does not constitute a broader failure by the WBCG to exercise its function in this regard.
- 4.4.4 Having been advised by the Ministry of the complainant’s concerns, on 22 December 2015 the WBCG advised that the website content was to be reviewed. I do not consider this response constitutes a failure by the WBCG to exercise its functions under regulation 7(2)(g) in receiving and managing inquiries about building control functions. In my opinion, the WBCG acted in a receptive and timely manner once it became aware of the concerns.

5. Matters outside the scope of this complaint

- 5.1 The complainant has questioned why the Ministry has not investigated whether any enforcement action has been taken by a BCA in reliance on the inaccurate information on the website and to the detriment of a building owner.
- 5.2 I note that this was not the subject of the complaint (refer paragraph 2.6). However, the findings of this investigation and the comments made in the WBCG submissions have broader implications with respect to the performance of the seven BCAs' with regard to the functions under:
- sections 48 to 51 of the Act – in relation to the level of compliance sought by the BCAs in granting building consents for conversions of garages to sleep-outs
 - sections 164 to 166 of the Act – in relation to the BCAs issuing notices to fix for garages that have been converted to sleep-outs.
- 5.3 Although these matters fall outside this particular complaint investigation, I am of the view the interpretation of the change of use regulations and related issues warrant further review by the Ministry. This review will be conducted separately as part of the Ministry's ongoing process of ensuring BCAs are fully aware of their obligations under the Act when processing applications for building consents, and that these requirements are readily available to owners and others intending to carry out building work.
- 5.4 If at any time an owner feels they have been issued with a notice to fix incorrectly, or denied a building consent or have been required to comply to a level not required by legislation in order to have building consent granted, the procedure would be to apply to the Ministry for a determination on the matter under section 177.

6. Decision

- 6.1 I conclude there is sufficient evidence that the WBCG, acting on behalf of seven BCAs, has failed in performing its functions under the Act and associated regulations (specifically regulation 7(2)(a) of the *Building (Accreditation of Building Consent Authorities) Regulations 2006*).
- 6.2 The WBCG, having been notified directly of the inaccurate information on its website, acted in a timely manner to correct it. I am satisfied the WBCG has taken steps, and will continue to take steps with the assistance of the Ministry, to address the inaccurate information.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 27 January 2017.

Yours sincerely

John Gardiner
Manager Determinations and Assurance