



QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION

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Your Ref:

Our Ref: **AD-316721**

5 June 2015

Dr Kathleen Dermody
Committee Secretary
Senate Economics References Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Dr Dermody

**RESPONSE TO THE SUBMISSION OF THE SUBCONTRACTORS' ALLIANCE TO THE
SENATE INQUIRY INTO INSOLVENCY IN THE CONSTRUCTION INDUSTRY**

Thank you for providing the Queensland Building and Construction Commission (Commission) with the opportunity to respond to comments made about the Commission in the Subcontractors' Alliance's submission to the Senate Inquiry into insolvency in the construction industry.

The Commission appreciates that the submission of the Subcontractors' Alliances will be published. The Commission consents to the publication of its response to the comments made by the Subcontractors' Alliance.

Please note that the Commission has not endeavoured to respond to all of the issues raised by in the Subcontractors' Alliance's submission. The response is limited to those comments directly related to decisions and conduct of the Commission and former Queensland Building Services Authority in the delivery of regulatory functions.

Please do not hesitate to contact me should you require any additional information or assistance.

Yours faithfully

Kellie Lowe
Acting Commissioner

Senate Inquiry into Insolvency in the Construction Industry

Response of the Queensland Building and
Construction Commission to the
Submission of the Subcontractors' Alliance

Introduction

The Queensland Building and Construction Commission (Commission) is a statutory body established on 1 December 2013 as the regulator of Queensland's building and construction industry. Prior to its establishment, the former Queensland Building Services Authority (BSA) regulated the industry.

The Commission is established under the *Queensland Building and Construction Commission Act 1991* (QBCC Act). In addition to its functions under the QBCC Act, the Commission administers functions under the *Building Act 1975*, *Building and Construction Industry Payments Act 2004* and *Domestic Building Contracts Act 2000*.

The Commission currently administers the licensing framework for building and trade contractors, building certifiers, pool safety inspectors and workers performing plumbing, drainage and fire protection work.

The Commission also provides dispute resolution services, including financial dispute resolution services, insurance services and education and training services to industry participants and consumers.

Opportunity to respond

The Commission appreciates the opportunity to respond to comments made in the Subcontractors' Alliance's submission to the Senate Economics References Committee Inquiry into insolvency in the Australian construction industry. The Commission is familiar with the Inquiry's terms of reference.

The Commission's response is limited to the comments of the Subcontractors' Alliance which relate directly to the Commission's conduct and the delivery of its regulatory functions.

Licensing requirements

The Queensland licensing framework for building and trade contractors is established under the QBCC Act. Prior to 1 December 2013, the relevant legislation was known as the *Queensland Building Services Authority Act 1991* (QBSA Act). Licence classes and the licensing prerequisites for each class are prescribed by the *Queensland Building and Construction Commission Regulation 2003* (formerly known as the *Queensland Building Services Authority Regulation 2003*).

Applicants seeking a contractor's licence under the QBCC Act must hold technical and managerial qualifications, a minimum level of experience in the licence scope of work and meet certain financial requirements which are set out in a policy made by the Queensland Building and Construction Board (QBC Board). In addition, the applicant must be fit and proper to hold a licence and not otherwise precluded from holding a licence under the QBCC Act. As companies cannot hold qualifications or experience, companies are required to appoint a nominee holding at least a nominee supervisor's grade of licence to meet the licensing requirements.

Financial requirements for licensing

The *Financial Requirements for Licensing Policy* (FRL policy) applied at the time of, and in the years leading up to, the financial failure of Walton Construction (Qld) Pty Ltd. The FRL Policy was a policy of the previous Queensland Building Services Board which applied up until being replaced on 1 October 2014 by the QBC Board's 'Minimum Financial Requirements Policy'.

Under the FRL Policy, licensed contractors were required to maintain a minimum level of liquidity and hold a minimum value of net tangible assets to support their Allowable Annual Turnover (AATO). The FRL Policy established financial categories which set the AATO for licensees based on the level of net tangible assets held by the licensees of each financial category. Licensees were not permitted to exceed their AATO amount. If a higher turnover was required, the licensee needed to apply for a higher AATO with evidence that the licensee held the required level of net tangible assets for the higher AATO.

Depending on a contractor's financial category, a declaration, independent review report or audit report was required to be provided on licence application and renewal as evidence that the contractor satisfied the financial requirements set out in the FRL Policy. Independent review reports and audit reports were required to be prepared by an "Appropriately Qualified Person" or "AQP" as defined by the FRL Policy.

The complexity of the report and the qualification of the person preparing the report increased with the financial category. Licensees with an AATO of \$300,000 or less could provide a declaration as to their compliance with the financial requirements. Contractors with an AATO of more than \$300,000 were required to provide an Independent Review Report or if the company was required to be audited under the *Corporations Act 2001*, an Audit Report prepared by a registered company auditor was required to be provided.

Exclusion from licensing

Currently, the QBCC Act excludes individuals with a relevant financial event from holding a contractor's licence for a period of 5 years after the financial event. The QBCC Act exclusion applies to any individual who in the previous 5 years:

- has taken advantage of the laws of bankruptcy or become bankrupt; or
- was the director, secretary or influential person of a company at, or within 1 year immediately before, the company has had a provisional liquidator, liquidator, administrator or controller appointed or has been wound up or ordered to wound up.

If an individual has been excluded twice for a relevant financial event, the individual is permanently excluded under the QBCC Act from holding a contractor's or nominee supervisor's licence and cannot be the director, secretary or influential person of a QBCC licensee.

Presently, the QBCC Act provides a limited opportunity for an individual to make an application to the Commission for an exclusion for a relevant event not to be applied. To be successful, the individual must establish that the individual took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the relevant event.

Reforms to the provisions under the legislation regarding excluded individuals will commence from 1 July 2015. These reforms include reducing the exclusion period following an insolvency event from 5 years to 3 years.

Under the QBCC Act a licensed contractor must not have an excluded individual as a director, secretary or other influential person. If an individual holds such a role at the time of exclusion, the licensed company is provided notice of the individual's exclusion and given the opportunity to remedy the situation to prevent the company's licence from being cancelled.

In circumstances where an administrator is appointed to a licensed contractor, steps are taken in relation to the company's licence and its company officers. However, the company's licence is not normally automatically suspended or cancelled. Once an administrator has been appointed to a company, the administrator becomes personally liable for debts incurred by the company from the date of the appointment. The administrator will assess the company's financial circumstances and, in appropriate circumstances, may enable the company to continue to trade if this will optimise the recovery of funds for the benefit of creditors. The immediate suspension or cancellation of a licensee's licence would prevent the administrator from taking this course of action in appropriate circumstances.

Walton Construction (Qld) Pty Ltd (In Liquidation)

Walton Construction (Qld) Pty Ltd (In Liquidation), herein referred to as 'Walton Qld', held a 'Builder – Open' contractor's licence with the former BSA. Walton Qld had been licensed with the BSA since 2002. On 3 October 2013, Walton Qld entered voluntary administration. Walton Qld's licence was cancelled on 7 November 2013.

At all relevant times, Mr Craig Walton was the director, secretary and company nominee of Walton Qld. Mr Walton was first licensed with the BSA in 2002. Mr Walton held a nominee supervisor's licence in the class of 'Builder – Open' with the BSA and subsequently the Commission. Mr Walton was also the director of related entity, Walton Construction Pty Ltd. Walton Construction Pty Ltd was not licensed with the BSA or Commission.

On 27 August 2013, Mr Walton became the nominee for two further entities: Peloton Builders Pty Ltd (Peloton Builders) and Peloton Maintenance Pty Ltd (Peloton Maintenance).

Peloton Builders was subsequently registered with the Australian Securities and Investment Commission (ASIC) as Tantallon Constructions Pty Ltd and Peloton Maintenance registered as Lewton Maintenance Services (Queensland) Pty Ltd. Peloton Builders and Peloton Maintenance are no longer licensed by the Commission.

Mr Walton's nominee supervisor's licence was cancelled on 7 November 2013 after he became an excluded individual under the QBSA Act due to the appointment of administrators to Walton Qld. Mr Walton will remain an excluded individual until 3 October 2018.

Liquidation and Public Examination

Lawlor Draper Dillon were appointed as administrators of Walton (Qld) and related entity Walton Construction Pty Ltd. On 29 July 2014 Grant Thornton Australia Limited (Grant Thornton) were appointed as liquidator for both companies.

Grant Thornton successfully made application for a public examination into the financial failure of Walton Qld and Walton Construction Pty Ltd. In general, public examination proceedings are funded through voluntary contributions from creditors.

The Commission is not a creditor of either company and accordingly is not entitled to receive any dividend if the liquidator is successful in recovering any monies. However, the Commission accepts that the reasons for the collapse of the Walton Qld and its related entity should be the subject of a comprehensive investigation by the liquidator. The Commission has committed \$329,501 towards the funding of the public examination. It is the Commission's understanding that without its funding contribution the public examination would not occur as there were no creditors in a position to provide funding assistance.

The Commission has delivered all requested documents and information relating to Walton Qld and the Peloton entities to the liquidators. The Commission is cooperating fully with the liquidator's enquiries.

Licensing decisions

2012 and 2013 renewal and extension of time to provide audit report

The QBCC Act (and formerly the QBSA Act) requires licensed contractors to meet prescribed financial requirements at all times. Prior to 1 October 2014, the FRL Policy applied. Under the FRL Policy, Walton Qld was required to provide the BSA with an audit report from a registered company auditor to show that it satisfied the financial requirements for licensing at each renewal.

In 2012, Walton Qld's licence was due for renewal on 30 September 2012.

On 7 September 2012, the BSA received a request on behalf of Walton Qld for an extension of time, until 31 October 2012, for the provision of the audit report and supporting financial documents required for renewal. The BSA approved the requested extension on 12 September 2012. The completed licence renewal notice and renewal fee was received from Walton Qld on 27 September 2012.

On 19 October 2012, the auditor for Walton Qld requested a further extension of time, until 17 December 2012, to provide the audit report and financial documents. On 6 November 2012, the BSA wrote to Walton Qld requesting draft financial statements to support the requested extension of time. The BSA required the draft financial statements to be provided by 20 November 2012.

On 14 November 2012, the BSA received the requested draft financial statements for Walton Qld, with Walton Qld reiterating its request for an extension until 17 December 2012 for lodgement of the audit report and financial documents. The BSA approved this extension on 15 November 2012.

The BSA received the financial documentation required for renewal on 13 December 2012, including the audit report and audited financial statements. On 14 December 2012, the BSA received an updated audit report from Walton Qld.

The BSA renewed Walton Qld's licence on 14 December 2012 after being satisfied that Walton Qld had demonstrated compliance with the FRL Policy and had met all other requirements for licence renewal.

Walton Qld's licence was next due for renewal on 30 September 2013. On 6 September 2013, the BSA received a request on behalf of Walton Qld seeking an extension of time until 30 November 2013 to provide financial information. Ultimately, the extension was not required as Walton Qld entered voluntary administration on 3 October 2013.

Due to Walton Qld's annual turnover, it was required to provide an audit report prepared by a registered company auditor and audited financial statements to demonstrate that it satisfied the financial requirements for licensing. Audit reports can take time to prepare and report preparation can be delayed due to other reporting obligations of the licensee or auditor.

ASIC company audit reports are due at the end of October each year. As the audit report to be provided for licence renewal needed to be completed by a registered company auditor, it was not uncommon for companies with annual renewal due at the end of September to have difficulties in obtaining an auditor's report due to the workload and demand for auditing services around this time.

The BSA granted each extension requested on behalf of Walton Qld because it believed such a position was appropriate in all the circumstances.

Licensing of Peloton entities

On 22 August 2013, the BSA received separate licence applications for Peloton Builders and Peloton Maintenance. Each entity appointed Mr Walton as nominee. Mr Walton was not a director or company officer of either entity. The BSA reviewed each application independently, finding that each entity met the eligibility requirements for licensing.

On 27 August 2013, the BSA approved the licence applications of Peloton Builders and Peloton Maintenance and issued the respective licences. The licensing of the two Pelton entities occurred before the BSA became aware of Walton Qld being placed into voluntary administration on 3 October 2013. Walton Qld's licence was due to be renewed on 30 September 2013.

On 3 October 2013, Walton Qld entered voluntary administration prompting the BSA to take action against the licences of Walton Qld and Mr Walton in accordance with the requirements set out in the QBSA Act.

On 8 October 2013, Peloton Builders appointed a new nominee. Mr Walton formally ceased to be the entity's nominee on 11 October 2013.

On 7 November 2013, Mr Walton's licence was cancelled due to his status as an excluded individual under the QBCC Act.

As a result of Mr Walton's exclusion and licence cancellation, Peloton Maintenance no longer had a nominee. On 7 January 2014, the Commission suspended Peloton Maintenance's licence prior to cancelling its licence on 17 February 2014.

On 8 April 2014, Peloton Builders entered voluntary administration. On 12 May 2014, the Commission suspended Peloton Builders' licence, cancelling its licence on 15 May 2014.

Commission response to statements made by the Subcontractors' Alliance

The Subcontractors' Alliance is critical of the Commission and former BSA in relation to its licensing decisions relating to Walton Qld and the Peloton entities. At paragraph 20 of the Alliances' submission it states:

"There is evidence of Walton requesting 4 extensions of time from the [BSA] in the 12 month period from July 2012 to July 2013 to provide financial information to support his QLD builder's licen[c]e and bewilderingly had those requests approved. Walton's builder's licen[c]e for his phoenix company was granted in August 2013 whilst the last of those EOT's were in place. The report to creditors for WCQ indicated the phoenix company would make a loss of \$5 million".

The Subcontractors' Alliances' submission refers to the report of Jonathon Sive. Mr Sive's report forms Attachment A to the Subcontractors' Alliance's submission.

The Commission's, and the BSA's, decisions to suspend or cancel a licence are subject to legal requirements. Licence suspension or cancellation without appropriate cause can have substantial impacts on the licensee, its consumers, subcontractors and other stakeholders. The circumstances relating to the BSA's decision to grant the extensions of time requested on behalf of Walton Qld for the provision of the auditor's report for the 2012 and 2013 renewal periods are previously outlined in this submission.

The Commission denies that the granting of extensions of time to enable Walton Qld's auditor to provide financial information for the 2012 and 2013 licence renewals resulted in the failure of the company or the accrual of losses to creditors.

Three of the extension of time requests referred to by the Subcontractors' Alliance relate to the 2012 renewal of Walton Qld's licence, with two requests seeking an extension up to 17 December 2012. The BSA received the audit report and the audited financial statements for Walton Qld prior to renewing the licence on 14 December 2012. Based on the 2012 audit report, the BSA was satisfied that Walton Qld met the financial requirements for renewal.

With reference to the 2013 renewal period, Walton Qld had until 30 September 2013 to provide the audit report. A single extension of time was requested by Walton Qld's auditors in relation to this renewal. The request for an extension until 30 November 2013 was approved by the BSA on 9 September 2013. However, due to the appointment of administrators on 3 October 2013, the extension was not required. At the time of approving the extension of the time, the BSA had no grounds or reasons to refuse the request.

The QBCC Act provides for the immediate cancellation of a licence in very limited circumstances. Based on the information available to the BSA at the time the extensions of time were granted, there was no basis for the BSA to consider the immediate suspension or other suspension of Walton Qld's licence.

The Commission rejects any assertion that the BSA acted inappropriately in issuing licences to Peloton Builders and Peloton Maintenance in August 2013. Both entities met the prerequisites for licensing and, on the information available to the BSA at the time it was considering the licence applications, there were no grounds to reject the licence applications.

The Commission further rejects comments made by the Subcontractors' Alliance which imply that large construction companies are given preferential treatment. The Commission is an independent regulator and applies the law consistently without reference to the size, location, or nature of the contractor or licensee.

The Commission refers to comments regarding recent amendments to the *Building and Construction Industry Payments Act 2004* (BCIP Act) and makes comment about changes to the adjudication process (paragraph 26.2); the alleged removal of statutory debt and lien provisions (paragraph 26.3); and alleged conflicts of interest in the State's functions (paragraph 29).

The 2014 amendments to the BCIP Act did not remove statutory debt and lien provisions. However, claimants who did not receive a payment schedule in response to a payment claim are now required to give the respondent an additional opportunity to provide a payment schedule prior to lodging an application for default judgement with the Courts for the amount claimed.

Under the amendments, the Adjudication Registrar appointed under the BCIP Act is responsible for the allocation of adjudication applications to registered adjudicators. The Adjudication Registrar is also a Commission officer. Neither the Commission nor the Registrar decides payment disputes. The responsibility for the adjudication of applications remains with the independent adjudicators registered under the BCIP Act.

The amendments to the BCIP Act commenced in late 2014. There was extensive consultation prior to the amendments being progressed. The Commission facilitated consultation and access to a discussion paper. An independent consultant was appointed to review issues, consult with stakeholders and make findings and recommendations for consideration by Government. The amendments were progressed through the normal government processes before being passed by the Queensland Government.

Attachment A – Report of Jonathon Sive

Mr Sive makes various claims which suggest that the BSA and Commission gave Walton Qld preferential treatment, inappropriately granted extensions of time and, by licensing the Peloton entities, knowingly permitted an arrangement whereby Mr Walton could remove assets from Walton Qld.

The Commission rejects all assertions that it, or the former BSA, acted inappropriately in the performance of its regulatory functions.

The Commission has reviewed the BSA's files in relation to its decisions relating to Walton Qld and the Peloton entities:

- The BSA had no grounds to believe that Walton Qld was not entitled to be licensed prior to the appointment of administrators on 3 October 2013.
- The BSA's decision to license Peloton Builders and Peloton Maintenance was made on the assessment of their individual applications against the licensing criteria set out in the QBSA Act. The decision to license Peloton Builders and Peloton Maintenance was made prior to Walton Qld's proceeding into administration on 3 October 2013.
- The BSA found that each entity had demonstrated that it met the applicable eligibility requirements and was not aware of any circumstance that would prevent the entities from being licensed. The BSA could not be aware of events such as Walton Qld's voluntary administration, in advance of the directors appointing administrators to the company.

The Commission does not condone the practices of phoenix companies. The QBCC Act contains exclusion, including permanent exclusion, provisions which are designed to prevent the use of phoenix companies in Queensland's building and construction industry.

Mr Walton has been excluded under the QBCC Act until 3 October 2018, being 5 years from the date that Walton Qld entered voluntary administration. Mr Walton cannot hold a contractor's or nominee supervisor's licence with the Commission during his exclusion period. Mr Walton cannot be the director, secretary, nominee or influential person for a company licensed under the QBCC Act.

Mr Sive makes various comments about transactions and other dealings involving Mr Walton, Walton Qld and other associated entities and implies that the BSA/Commission had contemporaneous knowledge of such transactions. Although more information is coming to light as to concerns held by external entities

about Walton Qld prior to the appointment of administrators, the BSA was not privy to such concerns when making decisions, prior to 3 October 2013, relating to the licensing of Walton Qld and the Peloton entities.

Mr Sive further states the ‘record reflects that creditors of Walton Construction Queensland raised concerns, numerous and serious concerns about the conduct of Walton Constructions Queensland almost a year prior the collapse’. Mr Sive does not provide any details supporting this allegation. As previously indicated the BSA/Commission did not have grounds to believe that Walton Qld did not satisfy the FRL Policy.

Mr Sive also refers to a report of Deloitte Touche Tohmastu dated 25 March 2013 which he states was the result of an independent review conducted for the NAB. Mr Sive states the report “makes known to National Australian Bank that the NAB’s security position is dire”. Although the report predates the licensing of the Peloton entities and the voluntary administration of Walton Qld, the BSA was not privy to the report or of the concerns raised within the report.

Future Steps

The Commission will continue to fully cooperate with the liquidator’s investigations into the circumstances surrounding the financial failure of Walton Qld and Walton Construction Pty Ltd. The public examination into the financial failure of the companies is currently scheduled to commence in August 2015.