

Chapter 6

The Collapse of Walton Constructions

6.1 Owing to the pyramidal structure of the construction industry in Australia, the failure of businesses up the contractual chain can affect contractors and subcontractors further down the chain, as well as suppliers, developers and other participants within the industry. The failure of one business can push others over the fiscal cliff, ultimately resulting in significant financial cost to individuals throughout the industry. The committee heard many instances of this occurring. This chapter explores in depth the collapse of a long-standing construction business; Walton Constructions (Qld) Pty Ltd (Walton's), which collapsed on 3 October 2013. The failure of this company caused widespread, and in some cases irreparable, damage to contractors, subcontractors and suppliers.

6.2 In examining this case study, it is important to remember the words of Mr Graham Cohen, Manager, TC Plastering: 'for every failure on the big end of town there are a multitude of small house type builders who go to the wall. Although the amounts are not as big for the small subcontractors, it can be pretty severe.'¹ Mr Cohen continued:

The subcontract system delivers really good value for homebuyers and investors. They are the winners. Unfortunately, too often, the subbie and the suppliers are the losers. The most numerous and the most vulnerable of this group are the subbies.²

6.3 The study of the collapse of Walton Constructions (Qld) prompts discussion on specific areas for potential legislative reform. Broader possible areas for reform to protect subcontractors will be addressed in chapters 7 to 12.

Background

6.4 Walton Construction was founded in Melbourne in 1993 by Mr Craig Walton. In 2002 the company expanded, registering a Queensland arm—Walton Constructions (Qld) Pty Ltd. Mr Glenn Franklin, PKF Lawler, indicated that at its height, the Walton group had substantial turnover, approaching \$300 million.³

6.5 In 2011–2012, revenue dropped and the company recorded a loss of \$14.6 million. This period marked the beginning of the end for Walton Constructions. In November 2012, the National Australia Bank (NAB), Walton's main financial backer, reviewed its financial support for the company, commissioning Deloitte to prepare a report on Walton's financial viability. In 2013 the company won a major project in Melbourne but NAB refused to provide a five per cent bank guarantee, so a

1 *Official Committee Hansard*, 31 August 2015, p. 21.

2 *Official Committee Hansard*, 31 August 2015, p. 21.

3 *Official Committee Hansard*, 29 September 2015, p. 28.

competitor took over the project.⁴ Rumours began to spread in the industry and developers abandoned the company, drying up critical cash flow.

6.6 Walton engaged the Mawson Group, a business management consultancy, to advise it. In the lead up to the eventual collapse in October 2013, Mawson directors worked with Walton directors to transfer projects to two new companies: Lewton Asset Services Pty Ltd and Peloton Builders Pty Ltd (later renamed Tantallon Constructions Pty Ltd). According to Mr Jonathan Sive, 31 projects with a total estimated completion cost of \$61 million were transferred.⁵ The Subcontractors Alliance contended that the unprofitable projects remained with Walton.⁶ Lewton Asset Services and Tantallon Constructions have both since been liquidated, 'owing more subcontractors around \$4 million and the transferred employees from the old company wages and entitlements of another \$1 million'.⁷

6.7 After the Walton group went into administration, the Mawson Group referred the case to insolvency practitioners Lawler Draper Dillon (now renamed PKF Lawler). The Mawson Group had generated significant fees for Lawler Draper Dillon by referring six other jobs to it in the previous two years.

6.8 On those grounds, some creditors questioned the independence of PKF Lawler and held a vote to replace it. They lost this vote after a company associated with Mawson, QHT Investments, voted in support of the liquidators. Mr Patrick McCurry, director of Mawson, was also director of QHT Investments. QHT Investments had gained creditors voting rights as a result of buying \$18.9 million worth of Walton debt for \$30,000 two weeks before the company was placed in administration. The question of value of debt assignments will be addressed in chapter 12.

6.9 ASIC was also concerned about the relationship between the Mawson Group and PKF Lawler. Mr John Price, ASIC, explained the two concerns ASIC held:

The first concern was in relation to the level of disclosure that had been provided about existing relationships that they had with other parties who were involved in the various transactions. The second concern that we raised was that there was a perception that the original insolvency practitioners might not be seen to be independent. The reason for that was they actually had a relationship with the party that had provided some of the pre-insolvency advice or restructuring advice for Walton Construction that that insolvency practitioner would subsequently need to look back at and examine.⁸

6.10 In *ASIC v Franklin (liquidator), in the matter of Walton Construction Pty Ltd (in liq)* [2014] FCA 68, a single judge of the Federal Court dismissed the proceedings.

4 *Official Committee Hansard*, 29 September 2015, p. 30.

5 Jonathan Sive, *Submission 18*, Attachment 1, p. 7.

6 Subcontractors Alliance, *Submission 18*, p. 4.

7 Subcontractors Alliance, *Submission 18*, pp. 4–5.

8 *Proof Committee Hansard*, 28 September 2015, p. 34.

On appeal, in *ASIC v Franklin* [2014] FCAFC 85, the Full Court of the Federal Court upheld ASIC's concern relating to the liquidator's independence, but dismissed ASIC's concern in relation to the disclosure point.

6.11 The Court held that a reasonable fair-minded observer might reasonably apprehend that, because of the liquidator's prior referral relationship with the Mawson Group, which had influenced their appointment as liquidators of the companies, and the liquidator's (perceived) interest in not jeopardising their future income, they might not discharge their duties with independence and impartiality.⁹ PKF Lawler was subsequently replaced by Grant Thornton. A public examination of the collapse of Walton Constructions is scheduled to be held in December 2015 in the Federal Court.

The National Australia Bank's relationship with Walton Constructions

6.12 Companies within the Walton Construction group had been customers of NAB since the 1990s. Submissions and witnesses before the committee suggested that NAB could have—or should have—done more to prevent Walton Constructions (Qld) from operating long before it collapsed. In the minds of these witnesses, NAB knew, or should have known, the precarious financial situation facing Walton's. NAB's failure to appoint a receiver at an early stage meant more unsuspecting subcontractors contracted with Walton's and were caught up in the eventual collapse.

6.13 In November 2012, NAB commissioned Deloitte to prepare a report to advise the bank on its exposure to Walton and to assess Walton's financial position. Mr Michael McCann, Partner at Grant Thornton, considered that a report of this type would be prepared where there is 'some concern'. Mr McCann speculated that 'presumably, part of that may have been the financial status of the 2012 financial statements, which had some issues which would have been of concern'.¹⁰ However, Mr McCann did note that the preparation of such a report is 'a very normal process' and 'very regular'.¹¹ Indeed, Mr Geoff Green, Head of Group Strategic Business Services, NAB, explained that such a report is a 'general report that we have done in around three-quarters of the files that we get involved in'.¹²

6.14 NAB received the report on 25 March 2013. Mr Green informed the committee that the report showed that Walton Constructions 'had no tangible assets',¹³ 'a year-to-date loss of about \$2.4 million and was experiencing liquidity problems'.¹⁴ However, it 'also showed that the business had a net surplus of assets, and there was no indication that Walton Constructions was not paying its debts as and when they fell

9 *ASIC v Franklin* [2014] FCAFC 85, [124]–[126] (White J).

10 *Official Committee Hansard*, 31 August 2015, p. 45.

11 *Official Committee Hansard*, 31 August 2015, p. 46.

12 *Proof Committee Hansard*, 4 November 2015, p. 32.

13 *Proof Committee Hansard*, 4 November 2015, p. 25.

14 *Proof Committee Hansard*, 4 November 2015, p. 23.

due.¹⁵ Mr Green explained that the report recommended that Walton's needed more equity, or that they should pursue a sale.¹⁶

6.15 Mr Green informed the committee that Walton's assured NAB in April 2013 that they were preparing a sale to a third party. Mawson advised Walton's on this strategy. Mr Green acknowledged that an officer of NAB introduced Mr Craig Walton to the Mawson Group.¹⁷ In September 2013, Walton's then told NAB that they had secured a sale to a third party who would take on Walton's workforce. NAB was also informed that a 'small number' of unprofitable contracts would be assigned to a related party.¹⁸

6.16 Walton's asked NAB to consent to the sale. After Walton failed to provide further information, including copies of the contracts, NAB declined to consent to the sale on 1 October 2013. Nevertheless, on 3 October, Walton's indicated that they intended to proceed with the sale, prior to the appointment of a liquidator later that day. Mr Green continued:

[Walton's] also indicated that they would be transferring \$1.3 million from a NAB account with credit funds to a company called Peloton. They told us that this transfer would secure the employment of 89 Walton's employees, and they told us that the relevant union had been consulted about that and supported that transaction. They also told us that the payment would fund the completion of those contracts, which would, ultimately, allow the release of bank guarantees worth \$3.18 million.¹⁹

6.17 Mr Green explained that NAB processed the transfer, as it appeared to be a legitimate transaction. However, according to Mr Green:

We have since found out that both of the sale contracts had already been signed at the time that they were seeking our consent to the sales. We have also found out that many of those assigned contracts were later reassigned to Walton Constructions and left with the insolvent shell. As a consequence of that, the \$1.3 million that was paid was not used to fund the completion of those contracts or the retention of the employees.²⁰

6.18 Two questions were raised in relation to NAB's relationship with Walton Constructions: first: what did NAB know; and second, if NAB suspected that Walton's was trading insolvent, what should they have done?

What did the National Australia Bank know?

6.19 Walton Constructions entered administration on 3 October 2013. As noted above, NAB was in possession of a report prepared by Deloitte on 25 March 2013, indicating that Walton's was experiencing liquidity problems. Many witnesses

15 *Proof Committee Hansard*, 4 November 2015, p. 23.

16 *Proof Committee Hansard*, 4 November 2015, p. 27.

17 *Proof Committee Hansard*, 4 November 2015, p. 26.

18 *Proof Committee Hansard*, 4 November 2015, p. 23.

19 *Proof Committee Hansard*, 4 November 2015, p. 23.

20 *Proof Committee Hansard*, 4 November 2015, p. 23.

contended that NAB *must* have known the true scale of Walton's financial problems, and introduced Walton's to Mawson in order to protect NAB's interests.

6.20 Mr Glenn Franklin, Partner at PKF Lawler, was appointed administrator on 3 October 2013. On 22 July 2014, he resigned as liquidator on the basis of the Full Federal Court's decision.

6.21 Although Mr Franklin eventually stepped down as liquidator, he had already begun his examination of Walton Constructions. Mr Franklin informed the committee that when PKF Lawler reviewed Walton's financial information that they had access to, they 'determined that the companies were both insolvent from 30 June 2012 and potentially before then'.²¹ That is, Walton's could have been operating insolvent for about 15 months before a liquidator was appointed. Mr Franklin estimated that the value of Walton's trading operation in this period 'would be millions of dollars, in terms of the loss'.²² Mr Franklin continued:

I have discussed this on many occasions with the creditors and the committees that have been formed in relation to this: in the months before my appointment—and, again, this is going to be part of the examination—there was a significant upscaling in certain projects, including the Coles Nambour project, where, instead of scaling down works, it seems that works were escalating.²³

6.22 Mr Franklin explained the significance of this escalation of projects:

It seems like there was a disregard at that particular point for the subcontractors on that site. They incurred significant losses without any warning and then the company was closed at that point.²⁴

6.23 As was noted earlier, an officer of NAB had introduced Walton's to the Mawson Group. Mr Franklin agreed with the proposition that this means one of NAB's business banking managers essentially recommended that Mawson try and restructure the business when it was operating whilst insolvent.²⁵

6.24 Many other witnesses before the committee questioned NAB's knowledge. Mr Jonathan Sive agreed with the proposition that NAB knew there was a problem and got the Mawson Group to assist Walton Construction to transfer assets and contracts to the two new entities, Lewton Asset Services and Peloton Builders.²⁶

6.25 Further, evidence before the committee indicates that on 7 July 2012, Walton's auditor, Mr Norman Metz, emailed an officer at NAB and said 'our mutual client was enhancing the monthly financial reporting'.²⁷ This was one week after Mr

21 *Official Committee Hansard*, 29 September 2015, p. 30.

22 *Official Committee Hansard*, 29 September 2015, p. 34.

23 *Official Committee Hansard*, 29 September 2015, pp. 34–35.

24 *Official Committee Hansard*, 29 September 2015, p. 35.

25 *Official Committee Hansard*, 29 September 2015, p. 33.

26 *Official Committee Hansard*, 31 August 2015, pp. 14 and 16.

27 NAB, answer to questions on notice, 4 November 2015 (received 24 November 2015), Annexure C. See also: *Proof Committee Hansard*, 4 November 2015, pp. 24 and 32.

Franklin believes Walton was trading insolvent. Mr Geoff Green, NAB, accepted that the reference to a mutual client was Walton Constructions, but suggested that 'enhancing' 'means improving. That is not necessarily the same thing as cooking the books'.²⁸ Mr Green noted further that NAB was unaware that Walton's advisor had subsequently resigned from Walton's Management Advisory Board.²⁹

6.26 Indeed, in testimony before the committee, Mr Green was adamant that NAB did not know the true position of Walton Constructions, and did not recommend that they consult with the Mawson Group in order to protect their investment. Mr Green disputed Mr Franklin's suggestion that Walton's were trading while insolvent from 30 June 2012, and that NAB should have known that was the case, on two grounds:

The first is that a liquidator can do a forensic analysis later on to determine the point of insolvency, but that does not necessarily mean that it will be evident to the people at the time. The second is that we are aware that PKF Lawler Draper Dillon were without a significant amount of financial information. We know that because the second liquidator has asked us for that information and told us about other information they have been pursuing. I am not sure how the first liquidator arrived at that conclusion on incomplete information.³⁰

6.27 Mr Green also rejected the allegation that NAB introduced Walton's to the Mawson group in order to protect their investment in Walton Constructions. Mr Green explained:

The introduction of Mawson's was the provision of the name...Craig Walton responded with an email that said words to the effect of 'I am aware of them because they work closely with one of my other advisers.' He also said, 'we will be going through a shortlisting process to choose advisers', so they were looking at several advisers, and our banker encouraged him to go through a proper process in his selection.³¹

6.28 Mr Green maintained that the collapse of Walton Constructions, including the stripping of assets into new companies 'has been very disappointing to us and to everyone else connected with Walton Constructions',³² but that NAB had no reason to suspect this would occur at the time. Many witnesses remain unconvinced.³³

What should the National Australia Bank have done?

6.29 Witnesses before the committee contended that NAB should have done two things in order to protect the interests of subcontractors subsequently caught up in Walton's collapse: first, place Walton's into administration; and second, inform the

28 *Proof Committee Hansard*, 4 November 2015, p. 32.

29 *Proof Committee Hansard*, 4 November 2015, p. 30. See also NAB, answer to questions on notice, 4 November 2015 (received 24 November 2015), p. 2.

30 *Proof Committee Hansard*, 4 November 2015, p. 24; p. 30.

31 *Proof Committee Hansard*, 4 November 2015, p. 30.

32 *Proof Committee Hansard*, 4 November 2015, p. 23.

33 See, for example, Mr. Leonard Willis, Director, P&W Enterprises Ltd, *Official Committee Hansard*, 31 August 2015, p. 25.

regulator of their suspicions. Witnesses argued that, instead, NAB acted to protect its own interests.

Appointing an administrator

6.30 Mr Franklin informed the committee that 'normally', if banks are concerned that their position is in 'serious trouble or could potentially get into a worse problem' they would seek to have a receiver appointed.³⁴ As noted above, Mr Franklin considered that Walton Constructions was operating while insolvent on 30 June 2012 and the Deloitte Report indicating that Walton's had no tangible assets was received by NAB on 25 March 2013. If NAB had sought to have a receiver appointed in July 2012 or March 2013, rather than when it eventually collapsed in October 2013, 'millions of dollars' would not have been lost.³⁵

6.31 However, witnesses before the committee noted that the decision to place a company into insolvency is one not to be made lightly. Mr Green explained that NAB is 'very slow to go to formal insolvency appointment because, firstly, it is an irreversible process and, secondly, it quite often locks in the worst outcome'.³⁶ In any event, Mr Green explained that because of an administrative oversight in registering its General Security Agreement, NAB was unable to appoint an administrator over the Queensland arm of the Walton's group before 3 October.³⁷

Informing the regulator

6.32 In light of NAB's relationship with Walton Constructions, a question was raised as to whether NAB should have informed the regulator (the Queensland Building and Construction Commission—QBCC) of Walton's precarious financial situation. As the following section will address, it is not clear whether the QBCC was ever informed that Walton was in financial difficulty. Whether the Corporations Act should be amended to create a legal obligation on banks to inform the regulator on this point will be addressed in more detail in chapter 12.

6.33 Without endorsing the proposal, Mr Chesterman, QBCC, acknowledged that information is critical and any information 'which raises issues about whether or not a licensee meets the financial requirements for licensing is gold'.³⁸

6.34 Mr Michael McCann, Grant Thornton, agreed that in 'some senses' it would be better if NAB had advised the regulatory bodies that there was a problem with the financial status of Walton Constructions. However, Mr McCann explained that it is a 'complex question'. He explained:

...it is obviously good to advise the regulators of issues so that there can be early intervention. Having said that, I can imagine a bank would have a conflict over that in terms of its confidentiality agreements with its

34 *Official Committee Hansard*, 29 September 2015, p. 31.

35 *Official Committee Hansard*, 29 September 2015, p. 34.

36 *Proof Committee Hansard*, 4 November 2015, p. 26.

37 *Proof Committee Hansard*, 4 November 2015, pp. 25, 29.

38 *Official Committee Hansard*, 31 August 2015, p. 38.

customers and, also, perhaps, its own interests. In some circumstances, their priority interest may be to look after their shareholders return as opposed to precipitating a collapse which might be to the detriment.³⁹

6.35 Mr McCann informed the committee that without knowing the precise obligations of NAB in this regard, he could imagine that there would be 'repercussions' if NAB—or any company—'did advise and they were wrong or if something they said precipitated a collapse unfairly'.⁴⁰ Mr Glenn Franklin, PKF Lawler, agreed that this 'might be an issue for law reform'.⁴¹

6.36 Mr John Winter, ARITA, considered that 'the moral question and the legal one are obviously two very different ones'. Mr Winter explained that:

...banks and other commercial parties are limited in what they can disclose, outside of having to report a criminal activity, by the Privacy Act and by other obligations that are placed on them. If you come across material like this within a contractual relationship you simply can't just send it on. Our members, on the other hand, have a statutory responsibility to report on those things, if they are formally appointed.⁴²

6.37 Speaking more broadly, Mr Winter also noted that it may make strategic sense for a business experiencing financial distress to keep that information close to its chest. He explained that 'there is a challenge around whether or not it is a good thing to have that information out there, because it might end up having a run on a company that you would otherwise be able to turn around'.⁴³ Mr Price, ASIC, agreed, explaining that while 'in some circumstances' initiatives like this may help, it may also 'result in companies entering into administration at the first sign of any possible problem'.⁴⁴

Committee's view

6.38 The committee appreciates the difficult decision that a bank has in determining whether to appoint an administrator to a company in financial stress. Doing so may doom a business that had a real prospect of turning things around. Nonetheless, the committee considers that in making this decision, financial institutions should pay more attention to the danger that innocent individuals will be caught up in the eventual collapse of a company that should have been placed in external administration at an earlier date.

6.39 Economists recognise the importance of overcoming information asymmetries to ensure the proper functioning of markets. This understanding underpins the requirement that public companies lodge their financial reports with ASIC each year. The committee notes that in this case, an information asymmetry existed between

39 *Official Committee Hansard*, 31 August 2015, p. 47.

40 *Official Committee Hansard*, 31 August 2015, p. 48.

41 *Official Committee Hansard*, 29 September 2015, p. 31.

42 *Proof Committee Hansard*, 28 September 2015, pp. 14–15.

43 *Proof Committee Hansard*, 28 September 2015, p. 15.

44 *Proof Committee Hansard*, 28 September 2015, p. 31.

NAB and subcontractors engaged with Walton's, which allowed NAB time to protect their interests. It may be the case that imposing an obligation on financial institutions to inform the relevant regulators, or the market more broadly of the financial situation of companies that they are involved with, will create a more efficient market. The committee will examine in more detail proposed amendments to the Corporations Act to require financial institutions to inform the regulator of the precarious financial situation of businesses in chapter 12. Any recommendation on this point will also be provided there.

Problem of pre-insolvency advice

6.40 As noted above, Walton engaged the Mawson Group in the lead up to its collapse in October 2013. Walton transferred its projects into two new companies: Lewton Asset Services Pty Ltd and Peloton Builders Pty Ltd (later renamed Tantallon Constructions Pty Ltd). As noted earlier, Mr Sive informed the committee that 31 projects with a total estimated completion cost of \$61 million were transferred,⁴⁵ while the unprofitable projects remained with Walton.⁴⁶

6.41 The committee heard that many corporate advisory firms engage in pre-insolvency advice about how companies in financial stress can restructure. This is legal and can be beneficial in ensuring that a business remains an ongoing concern. However, the committee also heard evidence from contractors,⁴⁷ liquidators,⁴⁸ academics,⁴⁹ and the regulator that some of these firms may advise companies 'how to phoenix', or how to avoid paying their debts.

6.42 ASIC informed the committee that unscrupulous liquidators and businesses advisors 'can and do facilitate illegal phoenix activity'. They can do so by:

- advising directors or officeholders on how to remove assets fraudulently from one company to another;
- advising the directors or officeholders on how to structure companies to avoid paying their liabilities; or
- registered liquidators not meeting their statutory duty to investigate a failed company's affairs properly, adequately record their external administration and report offences to ASIC.⁵⁰

6.43 In the case of Walton Constructions, Mawson Group were materially involved in the transactions which resulted in the transfer of assets to companies which they owned. This potentially goes beyond mere pre-insolvency advice and from facilitation to actual participation.

45 Jonathan Sive, *Submission 18*, Attachment 1, p. 7.

46 Subcontractors Alliance, *Submission 18*, p. 4.

47 Subcontractors Alliance, *Submission 18*, p. 5.

48 Mr Glenn Franklin, PKF Lawler, *Official Committee Hansard*, 29 September 2015, p. 40.

49 Associate Professor Michelle Welsh, *Official Committee Hansard*, 29 September 2015, p. 5.

50 ASIC, *Submission 11*, p. 27.

Committee's views

6.44 The committee is concerned that unscrupulous liquidators and business advisors appear to be able to facilitate illegal phoenix activity. In the case of Walton's, it has serious concerns over the relationship between NAB and Walton Constructions. While it is likely NAB were aware of the true financial position of Walton's—and accordingly, they acted to protect their interests—it is not clear whether NAB were aware of Craig Walton's intentions to transfer assets from Walton Constructions into two connected entities. This is the key point. If NAB knew—or suspected—Walton was planning this action, the committee believes NAB may have facilitated illegal phoenix activity.

6.45 The Walton Constructions collapse is an example of an insolvency where there are serious concerns about what ASIC referred to as 'pre-insolvency advice'. That is, where distressed companies may receive advice to restructure in such a way that deprives creditors of their money when the company concerned eventually enters administration. The committee is concerned that the provision of such advice is, in part, being provided by insolvency practitioners who have been deregistered by ASIC for disciplinary reasons, but who are able to play a pre-insolvency role because the pre-appointment field is not specifically regulated. The committee will take a detailed look at the problem of pre-insolvency advice in chapter 12.

Licensing—a failure of the regulator?

6.46 Although chapter 7 will address in detail proposed reforms to the licensing regime governing the building and construction industry, the Walton Construction's case study raises specific issues. Walton Constructions, like all companies, was required to hold a licence before operating in Queensland. The QBCC explained the requirements for applicants seeking a contractor's licence under the then legislative regime:

Applicants...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...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.⁵¹

6.47 Licensing carries out a gatekeeper function for the industry, preventing individuals with either limited ability or capacity from operating. This is a crucial function, placing safeguards on the construction industry's low barriers to entry and thus helping to protect participants from being caught up in preventable insolvencies.

6.48 Witnesses before the committee were concerned that the QBCC failed in its gatekeeper duties, enabling Walton Constructions (and its phoenix companies: Peloton Builders and Lewton Assets) to continue operating long after it should have become clear it was facing considerable financial difficulties. The precise charge was made by the Subcontractors Alliance, who noted that between 2012 and 2013 Walton

51 QBCC, *Submission 19*, p. 3.

Constructions applied and was granted four extensions of time to provide financial information necessary for licensing.⁵²

6.49 As has been noted above, the Deloitte Report released to NAB in March 2013 indicated that Walton's had no tangible assets; although it did indicate that the business had a net surplus of assets. Further, Mr Glenn Franklin, PKF Lawler, considered that Walton's was trading insolvent from 30 June 2012.

6.50 Mr Leonard Willis, a Queensland-based subcontractor, explained the significance of the licence extensions. He argued that 'if they had acted and cancelled or conditioned Walton's licence then many of the creditors who have subsequently lost money would not have lost that money'.⁵³ Mr Jonathan Sive, a barrister and registered adjudicator, agreed, explaining that the extensions 'permitted...Mr Walton sufficient time to fraudulently convey property of the estate out of the reach of creditors'.⁵⁴

6.51 The QBCC argued that at all times it followed proper procedure in granting requests for extension of time from Walton. In its submission, the QBCC stated that the then-Building Services Authority (BSA) 'had no grounds to believe that Walton Qld was not entitled to be licensed prior to the appointment of administrator on 3 October 2013'.⁵⁵ The QBCC further denied 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'.⁵⁶

6.52 The frequency of extensions granted to Walton Constructions, in light of its subsequent collapse, concerned a number of witnesses before the committee. Mr Willis considered that the then-BSA (now QBCC) had been 'negligent',⁵⁷ while Mr Sive believed that the QBCC 'should have had a better handle of what was going on'.⁵⁸ Mr Michael Ravbar, Secretary CFMEU Queensland, considered the collapse of Walton Constructions a 'spectacular failure of the regulator'.⁵⁹

6.53 Mr Michael Chesterman, Adjudication Registrar, QBCC, reiterated to the committee that the BSA had received no evidence that suggested the precariousness of Walton Constructions. Mr Chesterman explained that the regulator 'rel[ies] upon

52 Subcontractors Alliance, *Submission 18*, p. 5.

53 *Official Committee Hansard*, 31 August 2015, p. 29.

54 Jonathan Sive, *Submission 18*, Attachment 1, p. 2

55 QBCC, *Submission 19*, p. 7.

56 QBCC, *Submission 19*, p. 7.

57 *Official Committee Hansard*, 31 August 2015, p. 28.

58 *Official Committee Hansard*, 31 August 2015, p. 14.

59 *Official Committee Hansard*, 31 August 2015, p. 3.

intelligence coming out of the marketplace' and in this case 'there was nothing...that brought into question their entitlement to be licensed'.⁶⁰

6.54 Many witnesses refuted Mr Chesterman's explanation. Mr Graham Cohen, a subcontractor from Queensland, considered that Walton's situation 'was fairly well known' even to subcontractors not working for them.⁶¹ However, Mr Cohen acknowledged that this information may not have filtered through to the regulator: '...it might have been like no-one told the husband his wife was playing up. While we spoke about it amongst ourselves, we never ever told the QBCC'.⁶²

6.55 Mr Chesterman's and Mr Cohen's comments reiterate the findings in chapter 5, which identified intelligence as critical to identify and detect suspected illegal phoenix activity early.⁶³ Similarly, Recommendation 14 emphasises that regulators must 'increase engagement efforts with industry participants aimed at increasing and enhancing information flows'.⁶⁴

6.56 Some submissions and witnesses also believed that Walton's size was an important factor in their receiving the extensions.⁶⁵ Mr Sive considered that Walton Constructions received special treatment,⁶⁶ while Mr Ravbar claimed it was an example of 'the big end of town get[ting] treated specially'.⁶⁷ Mr Chesterman disputed this characterisation. He explained that, in fact, as a regulator the QBCC has 'an obligation to put under a sharper focus those companies who can cause greater damage and harm to subcontractors and suppliers because of their size'.⁶⁸ Walton's because of its size, was required to provide financial audits—something that smaller companies were not required to provide.⁶⁹

6.57 In any case, it is important to note that licensing is a limited mechanism. In relation to the financial requirements for licensing, Mr Chesterman explained that they 'have always been minimum financial requirements for licensing. They operate in different ways at different times, but they are always reflective of a position, essentially, back in time'.⁷⁰ While Walton's may have met the conditions on the licensing date, that is no indication that they would remain financially viable through

60 *Official Committee Hansard*, 31 August 2015, p. 37. See also p. 38: 'We were not receiving information from the subcontractors and suppliers or any of the other creditors, potential creditors, that brought into question. Those are the facts of the matter. We suspend or cancel licences, as I have just demonstrated here, all the time for not paying debts or not meeting the financial requirements for licensing'.

61 *Official Committee Hansard*, 31 August 2015, p. 29.

62 *Official Committee Hansard*, 31 August 2015, p. 29.

63 See above, paragraph 5.69.

64 See Recommendation 14.

65 Subcontractors Alliance, *Submission 18*, p. 1.

66 *Official Committee Hansard*, 31 August 2015, pp. 14–15.

67 *Official Committee Hansard*, 31 August 2015, p. 3.

68 *Official Committee Hansard*, 31 August 2015, p. 44.

69 QBCC, *Submission 19*, p. 4.

70 *Official Committee Hansard*, 31 August 2015, p. 35.

the course of their licence. Licensing is 'just a snapshot in time',⁷¹ and current, accurate information is more critical.

Committee's views

6.58 The committee is not in a position to know for certain whether the Queensland regulator gave preferential treatment to Walton Constructions. It is also not clear whether the regulator was aware of—or suspected—Walton's precarious financial situation when it approved the licensing extensions. It does appear likely, however, that information widely held throughout the industry concerning the financial stability of Walton Constructions either did not filter through to the regulator or was not understood to be important. The consequence of this failure is lamentable—many more subcontractors were ensnared in the collapse of Walton Constructions. The committee believes that all regulators should do more to ensure the financial viability of licence holders, particularly via random financial health spot-checks throughout the life of the licence.

Recommendation 15

6.59 The committee recommends that licensing regulators should undertake random financial health spot-checks throughout the life of a licence-holder's licence. Where a business fails to meet the standards required, it should be required to show cause as to why its licence should not be conditioned, downgraded, suspended or cancelled, depending on the extent to which the business has not met required standards.

Impact of Walton Constructions Collapse

6.60 Many subcontractors suffered substantial financial loss because of Walton Constructions' collapse. Evidence before the committee suggests that Walton's owed approximately \$70 million to 1,350 creditors across a number of projects in Queensland and Victoria.⁷²

6.61 Ms Kylie McIllroy, Subcontractors Alliance, explained the consequences that befell one subcontractor who lost approximately \$2.5 million as a result of the collapse of Walton Constructions.

...[A]t the end of the day, Mark [Stevens], who had two businesses, lost both of those businesses. In the end, his relationship did not survive. He lost a property. The end result was that he ended up sleeping in a car for a period of time. The scaffold and formwork that was left on site became a court dispute. He had to fight for ownership of the formwork and the scaffold. He had to identify that it was his property. So the court costs escalated to a point where he could not pay for them and went into liquidation himself.⁷³

71 Mr Michael Chesterman, QBCC, *Official Committee Hansard*, 31 August 2015, p. 41.

72 *Official Committee Hansard*, 12 June 2015, p. 26.

73 *Official Committee Hansard*, 12 June 2015, p. 21.

6.62 There were also serious flow-on effects. Ms McIlroy and Mr Edward Stelling, EcoClassic Group Pty Ltd noted further that the collapse of Mr Stevens' business naturally led to his staff losing their employment.⁷⁴

6.63 The collapse of Walton's had an enormous impact on Mr Stelling and his wife. Mr Stelling explained that their business lost \$880,000 in direct costs, and approximately \$2.5 million in prepared projects that had to be jettisoned. In addition, Mr Stelling owes the ATO \$200,000. This substantial cost proved a significant setback to their business from which they are yet to recover:

We were expanding—we had already moved to bigger premises, all that sort of stuff—and the cost is still being felt today. The problem is that you have all of these suppliers who want to be paid, and if you struggle you lose your creditworthiness and your credibility with them. It was just stop-start stop-start for quite a while after that, and we are still suffering today. We owe our landlord half of that money. It was costing me half a million dollars a year to rent large premises for what we were doing. We owe him half that money now; we are on a five-year lease and we have three years of that to go.⁷⁵

6.64 As chapters 3 and 4 illustrated, the economic impact had broader non-economic effects too. Mr Stelling explained how he is unable to afford stem cell treatment for his wife, who suffers from multiple sclerosis.⁷⁶

6.65 Mr. Les Williams, Subcontractors Alliance, was also caught up in Walton's collapse. Mr Williams's company was engaged in the Coles Nambour project on the Sunshine Coast. While Mr Williams lost \$696,000, subcontractors across the entire project were owed \$3 million plus.⁷⁷

6.66 Mr Williams believes that this debt was incurred at a time when individuals were aware that Walton's was either insolvent or about to become insolvent: 'that debt was incurred in August and September 2013 when Walton, its advisers and the National Australia Bank were all aware Walton was liquidating'.⁷⁸

6.67 Mr Leonard Willis, a Queensland subcontractor, who appeared before the committee in Brisbane, detailed the impact that Walton's insolvency had on him. Mr Willis lodged a claim in November 2012 for money owed, totalling \$3,980,728.85, plus interest and costs; 'allowing for interest and costs as of the date of Walton entering into administration, this amount was in the order of \$6 million'.⁷⁹

6.68 Witnesses before the committee documented examples of poor payment practices and intimidation on behalf of Walton Constructions. As chapter 2 documented, the power imbalance between large and small contractors can increase

74 *Official Committee Hansard*, 12 June 2015, p. 21.

75 *Official Committee Hansard*, 12 June 2015, p. 28.

76 *Official Committee Hansard*, 12 June 2015, p. 28. See paragraph 4.3.

77 *Official Committee Hansard*, 12 June 2015, p. 19.

78 *Official Committee Hansard*, 12 June 2015, p. 19.

79 *Official Committee Hansard*, 31 August 2015, p. 24.

the difficulties subcontractors face in obtaining payments due. The committee heard that subcontractors who resorted to the courts to force Walton's to pay monies owed were threatened by expensive delaying tactics. Mr Willis noted his experiences:

Around mid-2011, Mr Darren Edwards, a litigation consultant engaged by my company as part of the legal team briefed to recover the debts due by Walton under their contract with me, met with Mr Robert Jennings, who was then a Walton director and general manager of Walton Queensland. Mr Edwards subsequently informed me that during this discussion, Mr Jennings said to him, 'Tell Lenny that we are going to spend a few \$100,000 a year on our lawyers to drag this out while we restructure. Then we will wind up and he will not get a cent.'

That was exactly the approach taken to the subsequent litigation by Walton—frustrate and delay without properly addressing the issues.⁸⁰

6.69 The collapse did not impact on all creditors equally. As chapter 2 illustrated, secured creditors receive money in priority over unsecured creditors. Mr Geoff Green, NAB, informed the committee that he did not expect that NAB would lose money as a result of Walton's collapse, but agreed that unsecured creditors would do 'pretty badly'.⁸¹

Conclusion

6.70 The committee is concerned by the impact of the collapse of Walton Constructions on hundreds of subcontractors and their families. This concern is amplified by the suggestion that Walton may have been trading while insolvent, drawing in many more innocent subcontractors, before its eventual collapse. Further, NAB, which acted to protect its interests and does not expect to lose any money from Walton's collapse, may have had inside knowledge of Walton's true financial position which it chose not to release.

6.71 While holding these concerns over the conduct of certain parties related to the Walton Construction collapse, the committee notes that there are proceedings on foot in the Federal Court of Australia by way of a Public Examination of the circumstances surrounding the Walton's collapse in accordance with the relevant provisions of the *Corporations Act 2001*. The committee is hopeful that the Public Examination will reveal all the circumstances surrounding the collapse and that if any wrong-doing is disclosed, it is prosecuted to the full extent of the law.

6.72 The committee reiterates its view that the legislative and regulatory framework within which the building and construction industry operates must be better oriented to protect subcontractors. Where protection fails, enforcement action must be quick, effective and constitute a significant deterrent.

80 *Official Committee Hansard*, 31 August 2015, p. 25.

81 *Proof Committee Hansard*, 4 November 2015, p. 30.

