



Australian Government
Australian Taxation Office

Committee Secretariat
Senate Standing Committees on Economics
PO Box 6100
Parliament House
CANBERRA ACT 2600

17 April 2015

For your consideration

**Senate Economics References Committee – inquiry into insolvency in the
Australian construction industry**

Dear Dr Dermody

Thank you for your letter dated 15 January 2015 inviting the ATO to make a submission to this inquiry.

Our submission is attached for the Committee's consideration. We would of course be pleased to provide further information to assist the Committee, if required.

The ATO has no objection to its submission being made public.

Yours sincerely

Cheryl-Lea Field
Deputy Commissioner
Service Delivery Debt

ATO submission – Inquiry into insolvency in the Australian construction industry

April 2015



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Executive Summary

1. In administering the taxation and superannuation systems we recognise the need to work with the community, industry groups and other regulators to fulfil our role.
2. The building and construction sector is an important part of the Australian economy and this sector impacts on the lives of many Australians - both when it works effectively and when sector participants' behaviour leads to them not meeting their obligations. For the purposes of the scope of our submission, we have focused on taxpayers associated with businesses in the building and construction industry including head contractors and sub-contractors who provide building and construction services and small business tradespeople. In addition, due to the connection with the construction industry we have also included some risk findings associated with certain property developers.
3. ATO experience indicates that the economic circumstances within this sector and resulting social norms contribute to this compliance behaviour. In particular, the tight margins across the industry, the longer payment terms offered by larger businesses to sub-contractors and the market competition for clients in the business-to-consumer component appear to increase the likelihood of non-compliance and accidental or intentional insolvency. In addition, the 'domino effect' impacts of insolvencies by an entity higher in a supply chain can result in the businesses of suppliers and sub-contractors also failing, harming business owners and employees of those businesses lower in the supply chain.
4. The ATO bases its approach to compliance with tax and superannuation systems on understanding particular behaviours of taxpayers in the relevant sector, supporting those who want to comply by making it easier to do so and making it harder for others not to comply with their obligations.
5. While the majority of participants in the building and construction industry willingly meet their taxation and superannuation obligations, we continue to observe lower-than-average compliance in this sector, especially for mid-tier and smaller operators. The direct impact of this non-compliance on the ATO's administration of the taxation and superannuation systems and the wider harm from resulting insolvencies are relevant to the terms of reference of the Inquiry.

6. As a result of these issues, we have a specific and ongoing focus in our compliance activities on the building and construction industry, especially in dealing with systemic non-compliance such as:
 - a) Dealing with fraudulent 'phoenix' operators and facilitators¹, who repeatedly liquidate businesses, while accumulating personal wealth – noting recent whole-of-government strategies and prescribed 'phoenix information-sharing taskforce';
 - b) Dealing with 'disengaged' phoenix property developers who de-register or liquidate entities at or after the point of sale of properties that should have been subject to GST; and
 - c) Dealing with lower levels of compliance in the small business segment, in particular issues relating to outstanding lodgments, omitted income (including the cash economy), as well as late payment of taxes and high levels of tax debt.
7. In some instances, when the ATO takes steps to ensure that a business properly pays its tax, this may cause the business to recognise they are already insolvent. This can occur after compliance activity initiated due to concerns about unpaid tax, outstanding lodgments, cash economy, phoenix or any other activity. This is probably an indicator the business model was never viable. The ATO does not set out to make businesses insolvent, but where a business is not viable and ceases trading as a result of collection action, this addresses community concerns about unfair financial and competitive advantages against honest businesses and reduces further unpaid obligations accruing for suppliers, sub-contractors and employees.
8. We also recognised there are lower levels of compliance relating to payment obligations in this sector, which has led us to re-focus on improved methods of securing payments aimed at preventing businesses from gaining an unfair financial advantage. We do this by taking firmer and timelier action when we need to, for example initiating bankruptcy and wind-up action where there is evidence that a taxpayer is trading whilst insolvent or intentionally not paying, and looking to use other statutory powers where businesses have failed to pay employee superannuation entitlements or remit amounts withheld from wages.

¹ Phoenix behaviours are estimated to cost the Australian community between \$1.79B and \$3.19B per annum – see PriceWaterhouseCoopers report for the Fair Work Ombudsman from 2012

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9. Importantly, in the building and construction industry, the small business segment has lower payment-on-time rates and higher levels of tax debt and insolvency. The ATO is the petitioning creditor in about 16% of insolvencies, about 99% of insolvent entities have a debt to the ATO.
10. Responding to the challenges of this industry, the ATO worked with Government to implement the Taxable Payment Reporting System which achieved significant improvements (e.g. \$2.3 billion in additional reporting in 2012-13) in lodgment and reporting of liabilities in the business-to-business component of this sector, together with some improvement in collections. Similarly, as part of a suite of wider improvements to the law to better deal with phoenix operators, we worked with Government to implement the 2012 changes to the director penalty regime (which makes directors personally liable for non-payment of amounts withheld from employee's wages and superannuation guarantee obligations), resulting in improvements to reporting of liabilities, but slightly lesser improvements in payments – both within and outside this industry. However, the economic circumstances in this sector and the endemic nature of non-compliant behaviours in the industry require ongoing focus and investment across government agencies to address these risks, including working across government and through the ongoing evaluation of the effectiveness of our laws.
11. Developing a cross-government agreement on what constitutes phoenix behaviour, based on emerging work from academics at Melbourne University, should enhance the collaboration between agencies to share information and to deal with higher-risk phoenix conduct. In addition the ability for better information sharing on phoenix behaviour and other forms of serious financial crime would be beneficial, including where these risks arise in the building and construction industry.
12. We remain open to further opportunities to improve the system and are continuing to work with Treasury and other agencies on proposals for improvement.

Objective of the ATO submission

13. The Senate Economics References Committee is to conduct an 'inquiry into insolvency in the Australian construction industry'. The terms of reference cover the scale and incidence of insolvency in the Australian construction industry.

14. The ATO appreciates the opportunity to provide this submission to the Committee, as we see insolvencies in the building and construction industry as impacting on the health and integrity of the Australian economy and the welfare of all Australians. Where businesses fail because of poor business practices or lack of capability by business operators, this is a matter of concern because of the harm done to creditors of those businesses (whether suppliers, sub-contractors, employees or government agencies like the ATO). However, where such insolvencies result from intentional or systematic planning to become insolvent, we see this as a serious threat to the integrity of our financial, employment, regulatory, taxation and superannuation systems – harming both these creditors and all Australians.
15. This submission will provide some background information, based on the ATO's experience, on issues relating to taxation and superannuation in the building and construction industry.

ATO's observation of the building and construction industry

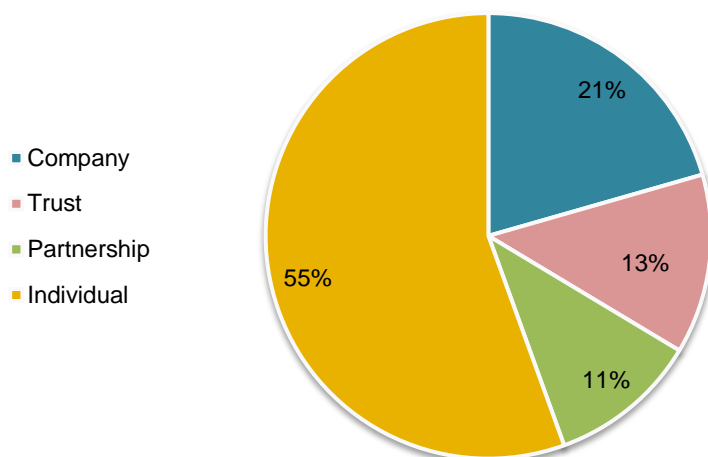
16. The ATO's submission focuses on taxpayers associated with businesses in the building and construction industry including head contractors and sub-contractors who provide building and construction services and small business tradespeople who have incorporated. This industry is spread across 25 ANZSIC codes, that are listed in appendix 3. In addition, due to the connection with the construction industry we have also included some risk findings associated with certain property developers.
17. The building and construction industry has a significant number of contractors, the majority of which are small business operators. Whilst the contractors have high levels of industry specific technical skills, they mostly have limited business support and are often time poor. This may lead to poor record keeping and challenges understanding the financial aspects of their business.
18. Dun & Bradstreet research² shows that businesses were paying their bills in an average of 53 days, more than three weeks beyond standard 30 day terms. Large companies were the slowest to pay their bills, taking an average of 56 days. Also, the

² Dun & Bradstreet research - December 2013 quarter

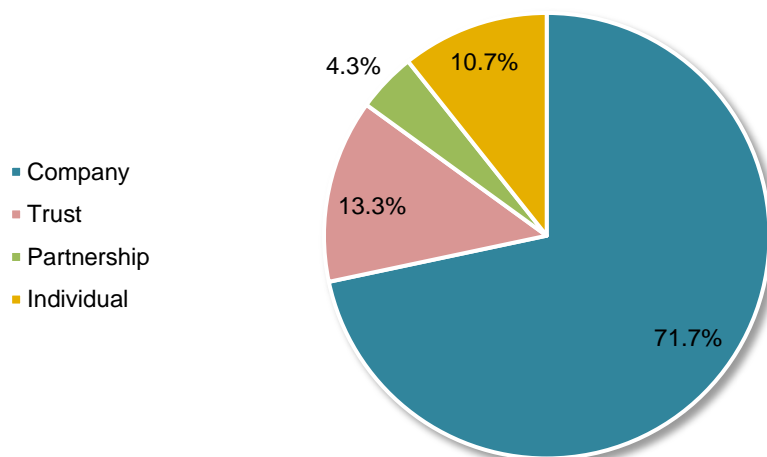
recent Dun & Bradstreet Business Expectations Survey for Q2 2015 noted 34% of businesses reported having a customer or supplier that became insolvent, or was otherwise unable to pay them in the past year. Whilst these surveys were of the broader business community, the construction industry would be faced with similar challenges.

19. Through its administration of the tax system the ATO has observed that overall, just over 50% of the taxpayers associated with the building and construction industry are individual taxpayers, most of these would be sub-contractors and tradespeople. The next largest group is companies at just under 21%, however these companies make up about 80% of the debt owed to the ATO. Due to the project-based nature of the construction industry, where new entities may be started for each project, some entities identified by the ATO as 'micro entities' will be related to a large private group or high wealth individual.
20. There are around 600,000 active taxpayer entities in the building and construction industry. About 330,000 building and construction entities have a debt to the ATO, the majority of these will, with significant administrative support and assistance from the ATO, pay these debts within a year of the amount becoming overdue.
21. For the construction industry the total debt holdings with the ATO is about \$5.5 billion of which \$3.9 billion is collectable and \$1.5 billion is associated with insolvent businesses.

Number of construction entities by entity type



Debt holdings by entity type



Integrity of the tax and superannuation system

22. For the tax and superannuation systems to work, we need the community's confidence they are fair for everyone.
23. The vast majority of individuals and businesses pay their taxes and meet their superannuation obligations. A small minority do not, imposing an unfair burden on the rest of the community.

24. We want to make it easy for people to participate in the tax and superannuation systems, and difficult not to. We do this by:
 - a) fostering willing participation through improved services
 - b) dealing with non-compliance, taking care to strike the right balance between encouragement and enforcement according to individual circumstances.
25. We try to strike the right balance between encouragement and enforcement, based on:
 - a) risk – the likelihood of non-compliance and the amount of revenue or superannuation at stake
 - b) transparency – the extent to which a person is honest and open about their tax and superannuation affairs
 - c) behaviour – whether a person shows signs of non-compliance, such as failing to pay their liabilities on time or shortly after.
26. Where people are open about their tax and superannuation affairs and meet their obligations in a timely way, we offer a lighter touch experience that should result in less effort for them in meeting their obligations.
27. For those who are not able to meet their obligations or are not willing to do the right thing, we tailor our activities – such as our escalating approach to debt collection, including providing support and assistance through to timely firmer action – according to their behaviour and the level of risk. For particular areas of risk, like phoenix operators, this tailored approach can include warnings, earlier application of enforcement provisions, more intensive audits and even criminal investigations or prosecutions.

Key risks and challenges in the construction industry

Business model challenges

28. The building and construction industry has a significant number of contractors, the majority of which are small business operators. Whilst the contractors have high levels of industry specific technical skills, they mostly have limited business support and are

often time poor. This may lead to poor record keeping and challenges understanding the financial aspects of their business.

29. In addition, it is a highly competitive and cyclical industry, with significant pressure on margins in the supply chain. This leads to tight terms of trade, higher debt levels and impacts the incidence of insolvency.
30. Dun & Bradstreet research³ shows that businesses were paying their bills in an average of 53 days, more than three weeks beyond standard 30 day terms. Large companies were the slowest to pay their bills, taking an average of 56 days.
31. The recent Dun & Bradstreet Business Expectations Survey for Q2 2015 noted 34% of businesses reported having a customer or supplier that became insolvent, or was otherwise unable to pay them in the past year. The ATO has observed instances where a single insolvency higher in a supply chain has resulted in up to 44 lower tier sub-contractors and suppliers facing financial distress, with many also becoming insolvent.
32. Whilst these were surveys of business, the construction industry would be faced with similar challenges.

Phoenix issues in the construction industry

33. Phoenix issues in the building and construction industry are widely understood to be relevant to the work of the ATO and other regulators. Bruce Collins QC, in his Inquiry into Construction Industry Insolvency in NSW Final Report (2012), laid out the following challenge to the Commonwealth entities responsible for administering and regulating such activities:

“Surely there is more work in this area to be done by the Australian Tax Office and ASIC to ensure that the honest operators in the industry, that is the overwhelmingly proportion of contractors, subcontractors and suppliers, get a better deal. The flight of the phoenix is prevalent in the building and construction industry in NSW.”

³ Dun & Bradstreet research - December 2013 quarter

Definition of fraudulent phoenix behaviour

34. The ATO has previously described “fraudulent” phoenix activity as:

*the evasion of tax and/or superannuation guarantee liabilities through the deliberate, systematic and sometimes cyclical liquidation of related corporate trading entities.*⁴

35. The ATO sees fraudulent phoenix behaviours as a serious threat to the integrity of the tax and superannuation systems and regards this as a form of serious financial crime, which deserves special attention. However, the question of what constitutes illegitimate, illegal, or fraudulent ‘phoenix’ behaviour and how this should be distinguished from normal business insolvencies is something all regulators struggle with to some extent. A consistent, shared, cross-government agreement as to what constitutes phoenix behaviour should facilitate collaboration between agencies to share information and to deal with higher-risk phoenix conduct.

36. The issues faced in understanding and recognising phoenix activity is evident in the five categories of phoenix behaviour described by the University of Melbourne. The ATO is working closely with Melbourne University and has led discussions across government agencies to explore adopting these categories as the basis for a shared framework to describe, understand and differentiate different aspects of potential phoenix behaviour.

Melbourne University – Defining & Profiling Phoenix Activity (2014)

37. In 2014 the University of Melbourne commenced a project funded by the Australian Research Council, entitled ‘Phoenix Activity: Regulating Fraudulent Use of the Corporate Form’.⁵

38. Melbourne University has described five categories of phoenix behaviour⁶:-

1. The legal phoenix, or business rescue
2. The problematic phoenix

⁴ FWO – Phoenix Activity – Sizing the problem and matching solutions (June 2012)

⁵ University of Melbourne, Defining & Profiling Phoenix Activity (December 2014)

⁶ Ibid p2

3. Illegal type 1 phoenix: intention to avoid debts formed as company starts to fail
4. Illegal type 2 phoenix: phoenix as a business model
5. Complex illegal phoenix activity

Impact of fraudulent phoenix behaviour on the ATO

39. The ATO has had a sustained focus on phoenix company arrangements and maintains a focus on serial offenders who use deliberate and fraudulent methods to evade their tax and superannuation guarantee obligations. We also look to detect new and emerging phoenix behaviour, to help to identify early signs of potential phoenix operators, so that we can apply deterrence strategies.
40. It is difficult to accurately estimate the economic cost of fraudulent phoenix behaviour. However, in 2012 PricewaterhouseCoopers published a report prepared on behalf of the Fair Work Ombudsman which considered the cost to employees, business and government revenue from fraudulent phoenix activity during the 2009-10 year. The total cost (which excluded unpaid Superannuation Guarantee) was estimated to be between \$1.79 billion and \$3.19 billion per annum. While these estimates are not solely focused on the building and construction industry, the ATO experience indicates that a very large proportion of phoenix operators are found to be within this industry sector.
41. Importantly, as the current Melbourne University research highlights, the ATO recognises that some phoenix operations are 'learned behaviours' that start out as routine legitimate individual insolvencies because of poor business management or adverse economic events, but become part of an ongoing business model of repeated insolvencies over time. Identification of those participating in fraudulent phoenix behaviour is particularly problematic due to the bigger and more systematic operators often engaging in tactics that mask their activities amongst legitimate corporate insolvencies.
42. Phoenix behaviour also results in unfair competition, as phoenix operators have an unfair financial advantage due to lower costs (as they do not pay employee entitlements or taxes). These unfair financial advantages can lead to other businesses pursuing similar behaviour in order to remain competitive with phoenix operators.

43. Many phoenix operators abuse the employment system by not meeting employee entitlements – as the employer is accumulating wealth or living a wealthy lifestyle funded through the non-reporting and/or non-payment of tax and superannuation liabilities. They are also likely to not be meeting other employer obligations, such as payroll taxes, worker's compensation insurance, employee leave entitlements and appropriate employee wages. These behaviours harm employees and the community.
44. Phoenix operators may also not meet their Goods & Services Tax (GST) obligations, while exploiting the ability to claim Input Tax Credits either within the phoenix entity or through an associated entity (see Property Developers section).
45. The ATO has observed a trend over recent years for the use of special purpose vehicle trusts being used by property developers who mischaracterise their receipts on capital account (rather than revenue) so as to exploit concessional taxation of capital gains – leaving each special purpose vehicle trustee company to become de-registered or liquidated soon after the development is completed.

Phoenix issues relating to developers of property

46. Some property developers fail to meet their GST obligations to report and pay GST on property sales after having claimed GST credits on the development. Some also fail to register or cancel a GST role prior to paying the GST received on the property transactions. In most cases these developers also fail to meet their income tax obligations arising from the sale of the property.
47. The most egregious of these 'disengaged' property developers display phoenix type behaviours in their use of systematic, deliberate, and cyclical insolvency to avoid GST obligations on property transactions.
48. Property development is unlike other ongoing businesses that continuously claim GST credits while also declaring GST payable from sales. Property development has a life cycle of:
 - a) High GST (input tax) credit refund claims early and through much of the life of a development

b) Sales at the end of the development with GST payable only once properties are sold.

49. Figure 1.1 shows the potential compliance pathways for a ‘disengaged’ phoenix property developer. Some property developers may be avoiding lodging, reporting and paying their liabilities because of business and financial pressures. Their intention may not be to deliberately avoid meeting their liabilities, and with targeted and appropriate compliance intervention may choose to comply.

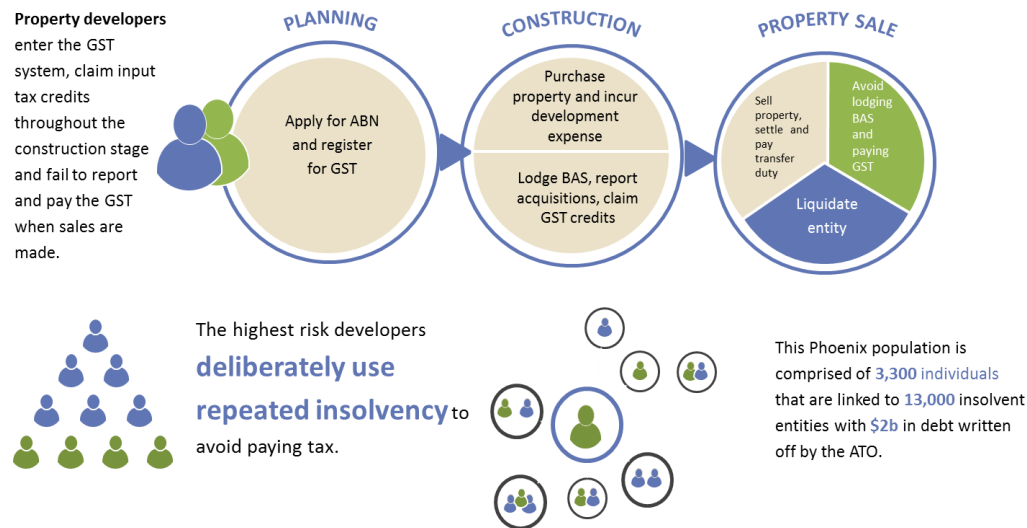
Figure 1.1: Property developer life cycle



Incidence of Phoenix Behaviour in property development

50. We have identified 3,355 individuals who have a history of insolvency in the property development industry. These individuals have been in control of more than 13,000 entities with more than \$2 billion in debt written off by the ATO. These insolvent entities have also previously claimed \$1.3 billion in GST credits in the past 4 years. The controllers of these entities and their private groups form part of the ATO’s phoenix risk population.

Figure 1.2: Phoenix Property Developers



51. While this is a relatively small sub-group of the overall GST property developer population, the behaviours exhibited by the individuals controlling these entities are more deliberate and more entrenched. The treatment strategies required to deal with their non-compliance are more resource intensive and use harder edge compliance tools to influence their behaviour.
52. The ability of the ATO to manage the risk presented by property developers engaged in phoenix activity is impacted by several factors that, whilst legal, create opportunities for exploitation, including:
 - a) As noted above, GST credits are claimed at the commencement and throughout the development with GST liabilities only arising once the properties are sold and settled.
 - b) The use of corporate structures to limit the personal liability of directors and shareholders. In the absence of employees and assets (outside of the property itself) linked to these companies, there are minimal consequences for the individual that controls these entities.
 - c) Using a new entity for each new development provides legitimate advantages for property developers in that it limits the risk to a single corporate structure. It also makes it more difficult for a true compliance picture of the individual and their broader economic group to be developed (but see further commentary on this point under challenges in the regulatory framework in tackling phoenix behaviour).

- d) Ability to change BAS reporting from monthly to quarterly at the point of sale provides an opportunity to delay reporting and paying the GST on the property sale.
53. A phoenix operator will aim to complete a development, cease lodgment once sales begin and commence liquidation proceedings as soon as the sales have been completed. If the liquidation process is fast enough, or if the taxpayer avoids detection, the taxpayer may be able to liquidate the company without ever creating an outstanding amount on the ATO record.
54. In order to deal with this situation, the ATO must therefore either have prior knowledge the taxpayer is going to disengage and liquidate, or be able to act quickly to mitigate the risk. However, without real time property data, shorter reporting periods and an effective view of a taxpayer's network and previous compliance history across all their entities, this can be difficult to detect.
55. The ATO works closely with and receives external property data from State and Territory land titles and revenue offices. However, this data only identifies sales after they have occurred and is limited in use (for compliance purposes in dealing with Phoenix activity) to where the transaction has been matched to an entity registered for GST purposes on ATO systems.
56. The ability to intervene in real time (or at least a timely manner) would allow the ATO to more successfully address phoenix operators before they redistribute profits realised from property developments in order to fund the activities of other entities, future developments and to fund their lifestyle without any significant fear of the consequences.
57. Our current approaches are reliant on the ATO's ability to identify and intervene with high risk developers earlier in the property development lifecycle for new entities being registered and linked to the individual phoenix operator to maximise our opportunity to collect GST when sales occur.

Small business issues, including the cash economy

58. Dealing with lower levels of compliance in the small business segment, in particular issues relating to outstanding lodgments, omitted income (including the cash economy), as well as late payment of taxes and high levels of tax debt requires significant administrative effort from the ATO. Over half of the construction industry will have debts with the ATO and generally the ATO will have to work with these business for up to a year to manage payment of the overdue amount.
59. In addition record keeping and the accurate reporting of income are issues in the sector. The ATO's approach to the cash economy includes a focus on businesses in industries where there is a higher proportion of cash transactions, such as in some parts of the building and construction industry. There are approximately 1.6 million small and micro businesses operating across a range of industries where cash transactions are prevalent, with just under 400,000 in the building and construction industry. Generally, most businesses in these industries report their cash receipts, however, a percentage of high risk operators do omit or under-declare income.
60. The building and construction industry is an industry where there is a significant prevalence of cash transactions and ranks in the ATO's top 10 industries from an omitted income risk perspective. This is borne out by ATO audit results with some of the largest tax adjustments and penalties in the cash economy activities arising from construction industry audits.

Small business industry advice/concerns regarding the cash economy

61. Consultation with Industry peak bodies and operators has identified two key areas of concern for industry:
 - a) Unlicensed/unregistered operators advertising services through social media outlets in the micro and small business market drawing business away from legitimate operators;
 - b) Operators using deliberate tax evasion activities such as omitted income, cash-in-hand wages and non-payment of superannuation as part of their business model to improve competitiveness in tendering, resulting in 'crowding-out' of legitimate operators and setting market expectations at an unsustainably low level.

Scale and incidence of debt in the construction industry

62. There are around 600,000 active taxpayer entities in the building and construction industry. About 330,000 building and construction entities have a debt to the ATO, the majority of these will, with significant administrative support and assistance from the ATO, pay these debts within a year of the amount becoming overdue.
63. In the building and construction industry, the overall level of voluntary payment on time is low at 81% for activity statement and 44% for income tax liabilities in terms of the 'value of liabilities'. This compares to the overall payment performance of taxpayers at 89.2% of the 'value of liabilities due' paid on time and 95.5% paid within 90 days. In the building and construction industry it takes about 360 days to achieve a 95% level of liabilities paid.
64. For the construction industry the total debt holdings with the ATO is about \$5.5 billion. This represents about 16% of the total debt owed to the ATO. \$3.9 billion of this amount is collectable debt and \$1.5 billion is associated with insolvent businesses.
65. Businesses operating as companies make up about 21% of the construction businesses that have debts with the ATO, but the amounts owed by these companies represents about 72% of the amount of debt owed to the ATO.
66. In the construction industry 78.59% of the insolvent tax debt relates to businesses that were in existence for at least 4 years. Only about 21.4% of insolvent debt related to business that had been operating for less than 4 years.
67. NSW has 38.7% of the construction industry's insolvent tax debt value and Queensland and Victoria also contribute significantly to the constructions industry's insolvent debt value with 20.0% and 23.4% respectively.
68. The ATO initiated 15.8% of the total company wind-ups in the 2013-14 year and the company was in the construction industry, but was a creditor in 98.6% of the total company wind-ups as reported by the Australian Securities and Investments Commission (ASIC) in the construction industry.
69. When the ATO initiates bankruptcy the average value of ATO debt is about nine times the average value of ATO debt where other creditors initiate bankruptcy and when the

ATO initiates wind-up the average value of ATO debt is nearly four times the average value of ATO debt where other creditors initiate wind-up.

70. Since the GFC the ATO primarily focused on supporting businesses that have been unable to pay on time. We have been hesitant to use our legal recovery powers, resulting in a growing number of businesses not paying us at all. These businesses are gaining an unfair financial advantage over others, either by trading insolvent or by intent.
71. For these individuals and businesses, we are now adopting a more timely and firmer approach to prevent debts from escalating. This will prevent those who don't pay from gaining an unfair financial advantage over those who pay on time.
72. The percentage of insolvent tax debt written off as irrecoverable at law attributed to the construction industry is around \$463 million for the 2011-12 year and \$884 million for the 2012-13 year. In 2013-14 around \$545 million was written off as irrecoverable at law.

ATO approaches and tools for dealing with non-compliance

73. As explained above, the ATO has a specific and ongoing focus in our compliance activities on risks within the building and construction industry, especially in dealing with systemic non-compliance covering:
 - a) fraudulent 'phoenix' operators and facilitators⁷, who repeatedly liquidate businesses, while accumulating personal wealth – noting recent whole-of-government strategies and prescribed 'phoenix information-sharing taskforce';
 - b) Dealing with 'disengaged' phoenix property developers who de-register or liquidate entities at or after the point of sale of properties that should have been subject to GST; and

⁷ Phoenix behaviours are estimated to cost the Australian community between \$1.79 billion and \$3.19 billion per annum – see PriceWaterhouseCoopers report for the Fair Work Ombudsman from 2012

- c) Dealing with lower levels of compliance in the small business segment, in particular issues relating to outstanding lodgments, omitted income (including the cash economy), as well as late payment of taxes and high levels of tax debt.
74. The following section outlines our strategies to deal with these areas of compliance risk and the tools we use in our engagement with the building and construction industry to ensure correct reporting of liabilities and payment of resulting debts.

ATO's strategy to address phoenix risks

75. The ATO's strategy to address the phoenix risk has a number of aspects:

a. Phoenix population identification and risk assessment

76. The ATO has recently implemented, a sophisticated system-based Phoenix Risk Model that provides a demographic and risk-based profile of the overall potential and confirmed phoenix population. This Phoenix Risk Model also access the ATO's Group Wealth System which enables the ATO to link associated entities within private group structures to entities suspected of being phoenix operators. By running this data against the ATO debt management data, we are now able to more accurately identify which connected private groups and their controlling minds may be illegitimately building their wealth through fraudulent phoenix behaviours. This analysis indicates that there are around 19,800 potential phoenix groups (72% of which contain at least one building or construction entity), with links to around 360,000 entities (17% of which are building or construction entities), of which 1,600 have been rated as high-risk. These linked entities represent about \$1.8 billion in debt owed to the ATO, although this is not all as a result of confirmed phoenix behaviour.

b. Inter-Agency Phoenix Forum

77. The Inter-Agency Phoenix Forum enhances whole-of-Government strategies to deal with, and intelligence sharing about, potential phoenix operators and those networks of facilitators who support them. Outcomes from this Forum include sharing of information between the ATO and Department of Employment where those accessing the Fair Entitlements Guarantee scheme on multiple occasions have their ATO risk rating increased and the ATO and ASIC working together on a network of liquidators, tax agents and their clients who appear to be significant phoenix operators.

c. Prescribed Phoenix Taskforce

78. The government prescribed a Phoenix Taskforce on 17 November 2014⁸ to permit better collection and dissemination of information between participating agencies. The prescription of the cross-agency Phoenix Taskforce will provide further opportunities to address phoenix behaviour from a whole of government perspective. The ATO is in the process of arranging the dissemination of data from the Phoenix Risk Model to participating agencies to help them to better target potential phoenix operator entities and their controlling minds. Importantly, while this prescription process allows the ATO to disseminate information about potential phoenix operators to participating agencies, it does not empower those other agencies to disseminate information to the ATO or a third agency in the taskforce.

d. Phoenix Watchlist

79. In the 2013-14 Federal Budget the Government announced funding for the creation of the Phoenix Watchlist. The Registrar of the Australian Business Register (ABR) has worked with government agencies, particularly the ATO, to create the watchlist. The Phoenix Watchlist is a register of known or suspected phoenix operators and it can be accessed by participating State and Federal Government agencies. The watchlist was first made available on 2 January 2015. The ATO has already provided information regarding 154 confirmed Phoenix operator groups with 2,184 linked entities through the Phoenix Watchlist and is working to provide further information over time.

e. Major case strategy

80. By more effectively sharing information about phoenix operators and those who facilitate their activities between agencies, the cross-agency Phoenix Taskforce and the Phoenix Watchlist will enable Government agencies to better target those entities who pose the greatest threat to the regulatory, employment and revenue systems.
81. An important focus in this major case strategy for the ATO is a focus on fraudulent phoenix operators in the building & construction industry, where we see controllers and their associates accumulating substantial personal wealth and engaging in lavish

⁸ ATO Media Release – ATO leads taskforces on serious financial crime (6 March 2015)

lifestyles while leaving behind significant debts to the ATO in entities that have been liquidated or deregistered.

f. Facilitators of phoenix behaviours

82. The ATO and other regulators see that there are important risks to the system posed by entities that facilitate fraudulent phoenix behaviours. Some of these facilitators play an overt and readily identifiable role within the system, such as registered tax agents for entities that may be fraudulent phoenix entities or liquidators appointed to manage the insolvency of such entities. However, there are a number of other, less visible, players – such as lawyers, financial planners and the emerging role of ‘pre-insolvency advisors’, who may also be facilitating fraudulent phoenix behaviours. Collectively, the agencies in the Phoenix Taskforce see these facilitators are an important leverage point for collective action.

g. Industry engagement strategies

83. Whole-of-government approaches have seen agencies work together both to engage industry players and to target fraudulent phoenix behaviour. For example, the Australian Securities and Investment Commission, the ATO, the Fair Work Ombudsman and Fair Work Building & Construction (FWB&C) are engaging with head construction contractors through a head contractors’ round table discussion group to discuss how those contractors can work with regulators to better manage the exposure of their projects to phoenix operators lower in the contractor chain. Concurrently, ASIC, the ATO and FWB&C are engaging with relevant head contractors involved in two significant construction projects, regarding potential phoenix activity.

h. Communication and deterrence strategies

84. The ATO and the other agencies in the Phoenix Taskforce are working together to implement a joint communication and marketing strategy to both deter potential phoenix behaviour and to reassure the community that Government agencies are dealing effectively with this risk.
85. We are continually looking at better ways to communicate warnings to the community about potential phoenix operators and to convey specific deterrent messages to current phoenix operators and phoenix facilitators about the severe consequences of

such behaviours, emphasising the growing risks of detection through the Phoenix Taskforce.

i. Education and awareness

86. As part of our engagement with the phoenix risk population and our wider education strategies with our debt population, the ATO has been communicating increasingly with entities that are becoming delinquent in their lodgment and payment obligations, where these entities are displaying early signs of potential phoenix behaviours.
87. The ATO has become more responsive to these earlier signs of potential problems and is focusing on providing education and assistance to company directors around the risks of becoming subject to the Director Penalty regime.
88. As part of the phoenix strategy, we have been piloting stronger 'early intervention' warning messages to directors of recently established entities which have an identified association with a number of previous insolvencies that may indicate phoenix behaviours.

Strategies to deal with phoenix property developers

89. Due to the industry context, the strategies we use to deal with phoenix property developers are labour-intensive and relatively costly because of the inability to collect GST liabilities before the sale transactions are completed and the special purpose entities are deregistered or liquidated.
90. As a result, the ATO attempts to identify higher-risk entities from intelligence we gather and uses garnishee notices and other 'firmer action' to recover any debts raised – which can only be done where we can identify expected sales and where there is a prior debt for the taxpayer from a previous transaction.
91. GST is not covered by the director penalty regime as Pay-As-you-Go (Withholding) or Superannuation Guarantee liabilities may be, meaning that we cannot make directors personally liable for their special purpose vehicle's GST obligations – allowing phoenix property developers to intentionally plan to evade those obligations.

92. In the 2010-11 Federal Budget the ATO received funding to initiate the “Working together to improve Voluntary Compliance” program, a six year initiative designed to improve the rate of cash collections of GST.
93. The funding is used to manage programs with a focus on improving the receipt of lodgments, tackling GST related fraud and dealing with property developers that have disengaged from the tax system.
94. In 2013-14 the whole program raised an additional \$1.72 billion in GST liabilities through compliance activities and collected an additional \$2.12 billion through debt collection activities. These results exceed the four year commitments of \$1.52 billion in GST liabilities and \$325.2 million in GST debt collections.
95. Liabilities relating to ‘disengaged’ property developers for the 2013-14 year included more than \$188 million in GST. GST cash collections improved from a rate of 35.8% in 2012-13 to 48.7% in 2013-14.
96. The improved cash collection rates are a direct result of the deliberate and intentional early compliance interventions with ‘disengaged’ property developers. This strategy is resource intensive but still sees more than 50% of the GST liabilities remain uncollected.

Evaluation

97. While the ATO is allocating resources to deal with the systemic non-compliance by phoenix property developers, our approaches under the current law are costly and resource-intensive, given the ‘after-the-fact’ nature of current detection and collection mechanisms. We remain open to improvements to the system that would make collection of GST liabilities from phoenix property developers easier.

Small business issues, including the cash economy

98. The ATO has a comprehensive approach to dealing with small business issues, in particular issues relating to outstanding lodgments, omitted income (including the cash economy), as well as late payment of taxes and high levels of tax debt.

99. We are continuing to engage with industry associations to support small businesses in this sector to comply with their taxation and superannuation obligations and to promote a level playing field where social norms are that non-compliant operators should not enjoy a competitive advantage over compliant taxpayers.
100. This year we have also conducted more than 100,000 lodgment compliance actions where building industry contractors had not lodged income tax returns or activity statements by the due date. This activity generated \$209 million in additional liabilities.
101. While we have a wider strategy to deal with cash economy risks outside this sector, in 2013-14 ATO cash economy field teams undertook 1,045 building and construction audits resulting in nearly \$26 million in tax adjustments and penalties. To March this year cash economy income teams have undertaken 854 audits in the construction industry generating \$12.7 million in tax adjustments and penalties.
102. We have also written to 35,000 building and construction businesses we identified as operating primarily in the business-to-consumer component of this sector and where these businesses exhibit some of the higher characteristics of omitted income.

Contracting and taxable payments reporting

103. To help to address compliance risks in this sector, we worked with Government to introduce the taxable payments reporting system in the building and construction industry for payments made on after 1 July 2012. Businesses in the industry are required to report payments they make to other businesses (including contractors) for building and construction services.
104. The taxable payments reporting system is aimed at:
 - a) assisting contractors to meet their income tax obligations,
 - b) improving compliance with tax obligations by contractors in the building and construction industry, and
 - c) creating a level playing field for businesses and improving tax fairness within the industry, by ensuring compliant businesses are not disadvantaged by those who can undercut prices because they do not pay the correct amount of tax.

105. Building and construction industry businesses with reporting obligations have responded well to the system. For the first full year of system operation, they reported 1.58 million transactions valued at \$163 billion. The availability to the ATO, of this valuable information, and the knowledge among contractors that the information is reported, has driven significant improvements in compliance by contractors. This has had a positive impact on levelling the playing field across the building and construction industry, reducing unfair competition from businesses that do not pay their fair share of tax.
106. To assist with compliance, the ATO has made information on payments available through our pre-filling service for individual contractors and their tax agents to review when completing their tax returns, making it easier for these contractors to correctly report their incomes.
107. As of 31 December 2014, approximately 102,000 annual tax payments report lodgments had been received for 2012–13. For the 2013-14 year, over 96,000 businesses lodged their 2013-14 annual report, reporting over 1.55 million transactions valued at \$216.5 billion, paid to over 487,000 businesses.
108. Additional income tax and GST liabilities of \$2.3 billion for 2012–13 have been voluntarily reported to the ATO by businesses whose incomes were reported under the taxable payments reporting system. This amount is comprised of:
- a) Lodgment of returns \$265 million
 - b) Goods and services tax \$506 million
 - c) Pay as you go withholding \$1,128 million
 - d) Pay as you go instalments \$357 million
109. The figure of \$2.3 billion reflects an increase in liabilities reported by businesses in the building and construction industry that:
- a) received taxable payments that were reported, and/or
 - b) reported taxable payments to the Tax Office.
110. Specific increases cannot be attributed solely to the impact of the taxable payments reporting system. However, it is likely that the majority of the increase flows from the

introduction of the reporting system, the communication and education program, together with acceptance of the system by reporting businesses.

111. We have also identified a number of apparent compliance risks where additional liabilities could be secured through direct compliance activity:
112. **Tax return lodgment** – 76,000 contractors with reported payments still have not lodged a 2012–13 tax return and 21,000 have one or more 2012–13 activity statements unlodged.
113. **Omitted income** – 53,000 contractors have lodged 2012–13 tax returns but appear to have reported less income in their tax returns than they have been reported to have received.
114. **GST compliance** – 84,000 contractors, without an active GST registration have been reported to have received payments that include GST.
115. **Invalid or missing ABN** – 53,000 transactions (3.4%) did not include an ABN or the quoted ABN was invalid. The value of these transactions is \$1.3 billion and this amount is unlikely to have been included in contractor tax returns.
116. The system was introduced in the building and construction industry following an extensive analysis, over a number of years, of information sourced from invoices paid by businesses in the construction industry. The analysis examined those payments and whether or not the businesses that received the payments correctly accounted for them in income tax returns or business activity statements. The analysis demonstrated significant compliance problems in the industry, particularly amongst individual contractors.

ATO approach to debt management including insolvency

117. We have increased efforts and improved productivity in managing debt. However, the total amount of outstanding debt has continued to rise in recent years. The community has also told us they want firmer treatment of tax debtors who don't pay in order to ensure fairness for all taxpayers.

118. In response, we have modified our debt collection strategy, bringing it into line with community expectations. Some parts of our new strategy include:
- a) Increasing help and support for people who are trying to do the right thing – giving them better information, additional tools and a more empathetic hearing. We now have online payment facilities (including for credit cards), SMS reminders, and we're taking a more flexible and tailored approach to dealing with clients so payment arrangements are better suited to individual circumstances.
 - b) Our research and community feedback shows that we need earlier intervention to prevent debts from escalating beyond people's control. In response, we're improving our follow-up and regular communication with people to ensure they stick to their repayment arrangements and prevent things getting worse. We're picking up the phone to taxpayers earlier to ensure they understand how to meet their obligations.
 - c) Focusing on businesses' viability and their ability to meet future obligations, including expanding our use of viability assessments to support taxpayers who want to work with us but also where taxpayers have a poor payment history or present a risk of non-payment.
 - d) Taking firmer and timelier action when we need to, for example initiating bankruptcy and wind-up action where there is evidence that a taxpayer is trading whilst insolvent or intentionally not paying, and looking to use other statutory powers where businesses have failed to pay employee superannuation entitlements or remit amounts withheld from wages "amounts held in trust".
119. The ATO is a major creditor in a significant number of voluntary administrations and liquidations and has extensive experience as an unsecured creditor. This experience extends from understanding debtors' behaviour to nurturing enduring relationships with the insolvency industry and other regulators such as ASIC and the Australian Financial Security Authority (AFSA), in addition to our liaison with those agencies in our role as a regulator.
120. The ATO's approach to Insolvency is covered in Practice Statement Law Administration (PS LA) 2011/16: Insolvency - collection, recovery and enforcement issues for entities under external administration.

Director Penalty regime

121. The Director Penalty Regime was introduced as part of the *Insolvency (Tax Priorities) Legislation Amendment Act 1993*. These changes abolished the Commissioner of Taxation's priority in relation to certain tax debts and established a new regime to allow the recovery of certain debts earlier and more effectively.
122. The regime has been subject to a number of amendments since 1993, the most recent being in 2012 where the regime was amended to strengthen directors' obligations to cause their company comply with its existing PAYG withholding obligations and Superannuation Guarantee requirements. In 2013-14, the ATO issued Director Penalty Notices in relation to just over 1,500 businesses in the construction industry.
123. In brief, under the current legislation, the director penalty regime applies a legal responsibility to directors to ensure the company meets its pay as you go withholding and superannuation guarantee obligations. Once a director penalty notice is issued to them, directors may become personally liable to a penalty equal to unpaid PAYG withholding or superannuation guarantee amounts. The intention of the regime is to encourage directors to ensure the company is lodging and paying on time.
124. When we issue a director penalty notice to a director, we describe the options available to the director to have the director penalties remitted. The director has 21 days in order to act on the notice. They can pay the debt in full, appoint an administrator or appoint a liquidator to wind up the company. Where one of these actions take place and the company has reported its PAYG withholding and Superannuation Guarantee Charge (SGC) obligations within three months of the due date, the director penalty will be remitted.
125. Where the company does not comply by the relevant due date and the above-mentioned options do not occur, the directors become personally liable. After the 2012 amendments, those failing to report their obligations within three months become subject to the 'lockdown' provisions of the director penalty regime that makes it more difficult for them to have the penalty remitted.
126. The ATO accepts cash flow difficulties may make it difficult for a company to pay on time. In these circumstances, the ATO's preference is to work with directors to address

the company's tax and superannuation debts before they escalate and become unmanageable. If a DPN has been issued and subsequently the company enters into an agreed payment arrangement to pay the debt, recovery action against the director would not proceed while the arrangement was in place and being adhered to.

127. The ATO is seeing an increased reporting of liabilities through lodgment of activity statements, especially where the ATO has coupled this with communications about director penalty notices. We are sensitive to the risk that directors may report their liabilities to avoid a director penalty 'lock down', but not follow up with payment. We are better targeting debt collection activities to focus on such cases, where they arise – especially for potential phoenix operators and other taxpayers who may be involved in systemic non-compliance with their debt obligations.
128. We remain open to further improvements in our ability to collect debts from entities associated with phoenix operators and other recurring instances of serial insolvency.

Challenges in addressing key risks in the construction industry

129. There are a number of other challenges the ATO faces in identifying, managing and treating fraudulent phoenix behaviour. These include:

Use of Special Purpose Vehicles (SPVs)

130. Corporate structures can be used to limit profits or liabilities of a business to a single entity. This is a legitimate business decision which allows for a level of security for the business, beneficiaries and investors. However, this legitimate structure may also be used mischievously as part of phoenix structuring to conceal ownership and limit collection options.
131. Entities set up in this way are referred to as 'special purpose vehicles' (SPVs). SPVs can be defined as "entities (typically companies or trusts) created within an economic

group, specifically for a particular or defined project (for example, a construction project) for a limited period”.⁹

132. Typically SPVs in the property industry have the following characteristics –

- a) New entity for each new development
- b) May have employees (in which case employee entitlements for PAYG(W) and Superannuation Guarantee may not be met) or use sub-contractors
- c) No assets outside of the development
- d) May have non-arm's length relationships with other entities involved in the development i.e. construction or management entity
- e) May have an employing company and a related company holding all assets or large secured charges over the assets of the employing company

133. These characteristics not only provide protection from any debts or liabilities relating to a failed development, they also provide an opportunity for mischief by reducing the ATO's ability to build a long term compliance picture for the entity. This limits the ability for the ATO to apply harsher or more targeted compliance treatments based on the history of non-compliance within the economic group of entities under the control of a specific individual.

134. The use of SPVs and corporate structures do not in isolation indicate that there is any mischief or attempt to avoid tax obligations. They do however present an added level of complexity in the identification and treatment of risk.

135. We have seen wealthy individuals controlling multiple substantial property development projects who use an ongoing model of repeated SPVs for each development, leaving those SPVs as empty shells when each development is complete. We are closely monitoring such private groups and applying close engagement strategies to deal with apparent non-compliance in current projects. However, this work is more difficult to replicate for smaller operators, as it is labour-intensive and relatively costly to deliver.

⁹ GST large market taxpayer definition

Limited debt recovery options

136. The practice of limiting the assets held within a corporate structure limits the debt recovery opportunities once there has been a debt raised. Structuring a business or group of businesses in this way is a legitimate business decision and cannot be interpreted as an indicator of phoenix behaviour, though this is a common trait amongst confirmed phoenix operators. Again, the issue of understanding and proving the intent behind this behaviour is critical to be able to determine if it represents phoenix behaviour.

Identifying the ‘controlling mind’ and the use of ‘dummy’ directors

137. Determining the individual that is the ‘controlling mind’ behind phoenix behaviour and their associates who may also profit from such behaviour is also challenging. Individuals may remove themselves as the director of a company though they may be the ‘controlling mind’ by still having effective control over the company and its operations. They may also still have a financial benefit through share holdings or other arrangements, or they may even have nominee shareholders to conceal any apparent involvement with the company. This behaviour is often demonstrated by individuals who have had previous failed businesses and who may be in danger of being identified by ASIC as a disqualified director¹⁰.
138. When installing alternate individuals as directors, the controlling mind may use persons known to them e.g. spouse, children etc. or provide financial incentives for apparently unconnected individuals to hold the role. We have seen instances where junior employees (receptionists, cleaners or casual backpackers) have been listed as directors, without any understanding of their responsibilities. This practice again makes it difficult to assess the true compliance history for an entity or individual and limits recovery or prosecution opportunities where the individual cannot be located or holds no assets.

¹⁰ Bankruptcy and other Corporations Act breaches can deem an individual ineligible to hold the role of director <http://asic.gov.au/for-business/your-business/are-you-eligible-to-operate-a-business/>

Identifying and dealing with the role of facilitators

139. As mentioned above, some facilitators are more visible in the data, such as tax agents for statements or returns lodged with the ATO, or liquidators working on the insolvency of a particular company. However, there are a range of intermediaries who operate in the system whose roles are less visible, such as lawyers, financial planners and the growing (and unregulated) category of ‘pre-insolvency advisors’ or ‘business rescue consultants’. The lack of transparency about the roles of these less-visible intermediaries makes it more difficult to identify whether they may be facilitating phoenix behaviours by their clients, or not.
140. When a facilitator is identified, even if they are in a regulated role, there are still issues with working out which are the most appropriate sanctions to apply against their conduct. There is no specific offence of facilitating fraudulent or illegal phoenix behaviour, so regulators like the ATO either fall back on specific referrals to the relevant regulator (like the National Tax Practitioners’ Board for tax agents or ASIC for liquidators) or working to prove a Commonwealth Criminal Code 1995 offence (like obtaining property by deception under section 134-1 of the Code, aiding, abetting, counselling or procuring an offence under section 11-2(1) or conspiring to commit an offence under section 11-5(1)). For unregulated intermediaries, the only option is that of such Criminal Code offences.

Opportunities for improvements to the system

141. Ongoing investment by government agencies needs to continue to address the endemic risks in the building and construction industry such as phoenix, the omission of cash payments, non lodgment of returns and the failure to pay debts, to protect the community and the economy, along with the regulatory, employment and revenue systems. The focus of the ATO and other agencies on these risks is intended to help to shift social norms in this sector of the economy and to provide assurance to the community that intentional and deliberate non-compliance is being dealt with effectively by government.
142. In administering the tax and superannuation systems, the ATO still remains open to potential legislative reform to better deal with systemic, intentional and deliberate non-compliance by fraudulent phoenix operators (including phoenix property developers).

ATO Submission – Senate Economics References Committee April 2015

We are continuing to work with Treasury and other agencies on these issues and are keen to consider recommendations that may flow from this Inquiry.

Glossary

ATO market segment terminology:

- *Micro entities/enterprises* - turnover < \$2 million per annum
- *Small to Medium Enterprise* (turnover > \$2 million and < \$250 million per annum)
- *Large enterprises* (turnover > \$250 million per annum)

Collectable debt is debt not subject to dispute or associated with insolvency

n.e.c. – not elsewhere classified

PAYGW is Pay As You Go Withholding, a system that collects tax from the payments made to employees so they can meet their tax liabilities

Appendix 1 - Past consideration of phoenix issues

143. The problem of fraudulent phoenix activity in Australia, both generally and in specific industries, has been considered on a number of occasions by a range of bodies. These reviews have confirmed that fraudulent phoenix behaviour poses a serious problem. The most significant of these previous reviews are noted below.

Cole Royal Commission (2003)

144. In 2003, the prevalence and problems of fraudulent phoenix activity in the building and construction industry were considered by the Royal Commission into the Building and Construction Industry (the Cole Royal Commission). The Cole Royal Commission heard evidence from a range of organisations, noting that there was evidence of significant phoenix activity in the industry, often associated with tax avoidance and the avoidance or underpayment of workers' compensation premiums.¹¹

Treasury – Phoenix Proposals Paper (2009)

145. Treasury released a paper in November 2009 entitled 'Action against Fraudulent Phoenix Activity – Proposals Paper'. The paper called for public comments and feedback, in particular on the need for legislative amendments to address illegal phoenix activity and on the relative merits of a variety of proposals.¹²

FWO – Phoenix Activity – Sizing the Problem & Matching Solutions (2012)

146. In 2012 PricewaterhouseCoopers published a report prepared on behalf of Fair Work Ombudsman which considered the cost to employees, business and government revenue from fraudulent phoenix activity during the 2009-10 year. The total cost (which excluded unpaid Superannuation Guarantee) was estimated to be between \$1.79 billion and \$3.19 billion per annum.¹³

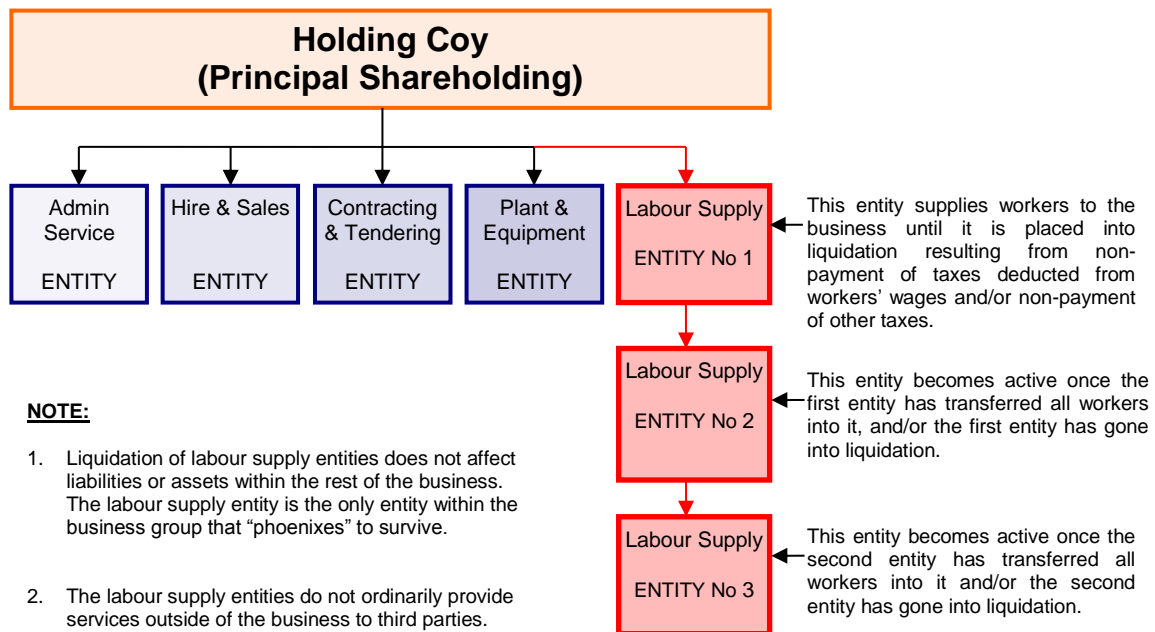
¹¹ Commonwealth, Royal Commission into the Building And Construction Industry – Final Report (2003)

¹² Treasury, Action Against Fraudulent Phoenix Activity – Proposals Paper (November 2009)

¹³ PwC, *Phoenix activity: Sizing the problem and matching solutions*, June 2012

Appendix 2 – Phoenix entity structure

Diagram of a typical business structure that is commonly utilised by fraudulent phoenix operators:



Appendix 3 – Construction industry by ANZSIC code

There are 25 different groups within the construction industry, ranging from house construction and other residential construction to fire and security alarm installation services.

ANZSIC code	Description
30110	House construction
30190	Other residential building construction
30200	Non-residential building construction
31010	Road and bridge construction
31091	Swimming and spa pool construction or installation
31099	Other heavy and civil engineering construction n.e.c.
32110	Land development and subdivision
32120	Site preparation services
32210	Concreting services
32220	Bricklaying services
32330	Roofing services
32240	Structural steel erection services
32310	Plumbing services
32320	Electrical services
32330	Air conditioning and heating services
32340	Fire and security alarm installation services
32390	Other building installation services
32410	Plastering and ceiling services
32420	Carpentry services
32430	Tiling and carpeting services
32440	Painting and decorating services
32450	Glazing services
32910	Landscape construction services
32920	Hire of construction machinery with operator
32990	Other construction services n.e.c.