



Law Council  
OF AUSTRALIA

# Exploitation of general and specialist cleaners

Education and Employment References Committee

25 July 2018

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The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

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- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

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The Secretariat serves the Law Council nationally and is based in Canberra.

## Acknowledgement

The Law Council is grateful to the Law Institute of Victoria for its contribution to this submission, as well as input received from its Business and Human Rights Committee.

## Introduction

1. The Law Council of Australia welcomes the opportunity to provide input to the Senate Education and Employment References Committee (**the Committee**) in relation to its inquiry into the exploitation of general and specialist cleaners working in retail chains for contracting or subcontracting cleaning companies (**the Inquiry**). This submission is primarily informed from input received by the Law Institute of Victoria's Workplace Relations Section.
2. The Committee has been tasked with examining the exploitation of general and specialist cleaners working in retail chains for contracting or subcontracting cleaning companies, with particular reference to:
  - (a) frameworks at both Commonwealth and industry level to protect workers from harm, including exploitation, wage theft, underpayment, wage stagnation and workplace injury;
  - (b) measures designed to ensure workers have adequate representation and knowledge of their rights;
  - (c) compliance with relevant workplace and taxation laws, including the effectiveness and adequacy of agencies such as the Fair Work Ombudsman and the Australian Taxation Office;
  - (d) practices including 'phoenixing' and pyramid subcontracting; and
  - (e) any related matters.
3. The timing of the Inquiry is significant. Over the past five years, the treatment of migrant workers in Australia has become a notable human rights issue.<sup>1</sup> The exploitation of international students and backpackers, in particular, has been the focus of attention, due to a number of court cases,<sup>2</sup> investigations,<sup>3</sup> and media reports.<sup>4</sup> As relayed by the Fair Work Ombudsman (**FWO**) in 2016, migrant workers frequently feature among the worst examples of exploitation that have been encountered.<sup>5</sup>
4. Commercial cleaning is a diverse sector. Predominantly, cleaning services are outsourced by organisations. This is aimed at increasing the efficiency of operational costs. Labour hire cleaning contractors employ workers to provide a cleaning service to such organisations. The workers are assigned to clean for the host organisation, who pay the labour hire contractor a fee for providing the on-hire cleaners.
5. In terms of entry requirements, the sector has minimal language or skill set barriers. This can make the sector attractive to migrants, international students and young people.

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<sup>1</sup> Marie Segrave, *Exploited and Illegal: Unlawful Migrant Workers in Australia* (July 2017) Monash University, 11.

<sup>2</sup> See *Fair Work Ombudsman v S & A Enterprises (QLD) Pty Ltd & Anor* [2017] FCCA 3332.

<sup>3</sup> See 'Slaving Away: The Dirty Secrets Behind Australia's Fresh Food' (Four Corners / Australian Broadcasting Authority, 2015).

<sup>4</sup> See Ben Doherty, 'Hungry, poor, exploited: Alarm over Australia's import of farm workers', *The Guardian* (3 August 2017).

<sup>5</sup> Fair Work Ombudsman, 2016, 2015-16 Fair Work Ombudsman's Annual Report <[www.fairwork.gov.au/about-us/access-accountability-and-reporting/annual-reports](http://www.fairwork.gov.au/about-us/access-accountability-and-reporting/annual-reports)>.

6. Research into the sector has revealed a high proportion of disadvantaged workers, many of whom possess poor English and literacy skills.<sup>6</sup> Consequently, workers may be unaware of their rights and entitlements, or lack familiarity in seeking help from legal services. In addition, workers may express reluctance to speak out for fear of being dismissed. This fear may be exacerbated should they live in regional areas of high unemployment. These consequences may be particularly problematic given the rate in which reports of unfair dismissal, underpayment, and exploitation have emerged from the sector.
7. In *Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2)*,<sup>7</sup> a cleaning service provider, Grouped Property Services (**GPS**), was found to have contravened the *Fair Work Act 2009* (Cth) (**Fair Work Act**) by failing to adhere to minimum employment standards. This included not paying award wages. GPS, in denying liability, argued that it was not the employer of any workers whom the allegations had been made. Rather, they were employees of National Contractors Pty Ltd, a labour hire contractor. Katzmann J described this arrangement as a 'sham',<sup>8</sup> and described the treatment of some employees as 'slaves'.<sup>9</sup>
8. In 2018, the FWO released a report into the labour procurement arrangements in Tasmanian supermarkets (**Woolworths Inquiry**).<sup>10</sup> The Woolworths Inquiry found cleaners were paid below minimum hourly rates and were not issued pay slips, that 84 percent of employment records were either inaccurate, or not kept at all, and uncovered evidence of unrecorded and unreported cash in hand payments by subcontractors.

## Frameworks to protect cleaners in retail chains

### Commonwealth level

#### *Fair Work Act*

9. The Fair Work Act governs the relationship between employees and employers in Australia. It provides a safety net of minimum entitlements, enables flexible working arrangements, and prevents discrimination against employees.
10. The Cleaning Services Award sets the minimum hourly rate for a Level 1 full-time cleaner at \$20.21. However, as revealed in the Woolworths Inquiry, some cleaners have been paid as little as \$14 per hour.<sup>11</sup>
11. In response to community concern about the exploitation of migrant workers in 7-Eleven stores, the Commonwealth Parliament passed the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth) (**the Amending Act**). Features of the Amending Act which are applicable to the exploitation of cleaners include:

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<sup>6</sup> United Voice, 'Cutting Corners: Cleaners' Struggle for Justice with Victorian Shopping Centres' Contract Cleaning System' (2011) 10.

<sup>7</sup> [2017] FCA 557.

<sup>8</sup> Ibid [2].

<sup>9</sup> Ibid [456].

<sup>10</sup> Fair Work Ombudsman, 'An inquiry into the procurement of cleaners in Tasmanian supermarkets' (February 2018), 5.

<sup>11</sup> Ibid.

- increased penalties for serious contraventions involving deliberate and systematic underpayment of workers;<sup>12</sup>
- increase of the maximum civil penalties for employees who make or keep employee records that the employer knows are false or misleading,<sup>13</sup> or who provide a payslip that the employer knows is false or misleading;<sup>14</sup>
- strengthened the FWO's powers so that they can more effectively investigate breaches of workplace laws;<sup>15</sup>
- makes franchisors and holding companies responsible for underpayments by their franchises or subsidiaries, where they knew or should have known of contraventions and failed to take preventative steps;<sup>16</sup> and
- outlawed 'cashback' practices, where workers are ordered by their employer to make payments from their wages back to their employer.<sup>17</sup>

### Industry level

#### *Cleaning Accountability Framework*

12. The Cleaning Accountability Framework (**CAF**) is an industry-led body that works with businesses across all stages of the labour supply chain within the cleaning industry. Through its certification scheme and compliance and audit tools, CAF aims to identify best practice in the procurement of labour within the cleaning industry, and to work with industry support businesses to implement best practice processes and to meet their compliance obligations under both the CAF Code of Conduct and workplace law. Having completed its pilot phase in 2017, it is yet to be seen whether and how CAF continues and expands in 2018.
13. The Law Council recognises that the labour hire industry is a significant employer of Australians. Further, that there are legitimate reasons for businesses to utilise labour hire arrangements. That said, there is undoubtedly a problem when some arrangements are operating almost entirely outside the Fair Work Act.

### National Labour Hire Licensing Scheme

14. Although the Law Council supports the principle of the CAF, it is submitted that a national labour hire licensing scheme be established in Australia.
15. The Law Institute of Victoria has advised the Law Council of the Victorian Parliament's recent passing of the *Labour Hire Licensing Act 2018* (Vic) (**Licensing Act**). This follows the introduction of similar legislation in Queensland,<sup>18</sup> and South Australia.<sup>19</sup> The objective of the Licensing Act is to ensure that all providers are legitimate businesses. Further, that such businesses can meet strict licensing standards. The licensing standards measure a provider's past and future capacity to comply with workplace, superannuation, tax, safety and migration laws.

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<sup>12</sup> *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* Schedule 1, Part 1.

<sup>13</sup> *Ibid* [Part 6]. In addition, in the Woolworths Inquiry, it was noted that cleaners were often paid in unrecorded cash-in-hand payments with no payslips provided.

<sup>14</sup> *Ibid*. See also: *Fair Work Ombudsman v JS Top Pty Ltd & Anor* [2017] FCCA 1689.

<sup>15</sup> *Ibid* [Part 4].

<sup>16</sup> *Ibid* [Part 2].

<sup>17</sup> *Ibid* [Part 3].

<sup>18</sup> *Labour Hire Licensing Act 2017* (Qld).

<sup>19</sup> *Labour Hire Licensing Act 2017* (SA).

16. Obligations which arise from the Licensing Act, and which attract significant civil penalties if breached, include:

- providers of labour hire services must operate with a license. The definition of those who 'provide labour hire services' is narrow. It focuses on those arrangements which are conventionally understood as third-party provision of labour to a host business; and
- host businesses must only use those labour hire services which are licensed. Licensed providers will be listed on a Public Register.

17. In addition, a Labour Hire Licensing Authority will be established, with inspectors having strong investigatory and enforcement powers.<sup>20</sup> This contrasts with the other two states, whose licensing schemes are administered by the Queensland Office of Industrial Relations,<sup>21</sup> and South Australia's Business and Consumer Services.<sup>22</sup>

18. The Law Institute of Victoria has kindly produced the following table which lists the features of similar legislation in Queensland and South Australia:

Jurisdiction	Details
Queensland	<p><i>Labour Hire Licensing Act 2017:</i></p> <ul style="list-style-type: none"> <li>• Establishes a mandatory licensing scheme for all labour hire providers.</li> <li>• A 'labour hire service' does not include recruitment and permanent placement services, volunteering arrangements, workplace consultants, genuine subcontracting arrangements (e.g. those often used in the building and construction industry), businesses that supply 'high income employees', or 'in-house employees' who temporarily work another business.</li> <li>• A labour hire provider includes a contractor who supplies workers to a farmer or fruit grower to pick produce, an employment agency who on-hires temporary administration staff to a business.</li> <li>• License fees are calculated according to the total amount of wages or salaries paid to labour hire workers during the previous financial year.</li> </ul>
South Australia	<p><i>Labour Hire Licensing Act 2017:</i></p> <ul style="list-style-type: none"> <li>• Establishes a mandatory licensing scheme for all labour hire providers.</li> <li>• Provides examples of what does and does not constitute a labour hire service</li> <li>• Provision for strong financial penalties or imprisonment for breaches of labour hire obligations</li> <li>• The establishment of a Commissioner with monitoring and enforcement functions.</li> <li>• Unions and designated employer organisations are able to appeal against licences being issued to someone who is not a fit and proper person.</li> </ul>

<sup>20</sup> *Labour Hire Licensing Act 2017* (Vic).

<sup>21</sup> Above n 18.

<sup>22</sup> Above n 19.



### International human rights standards

19. The Inquiry's terms of reference do not specifically address international human rights however there are standards and mechanisms which have increasing ramifications for businesses which are acting inconsistently with these, even where that is not specifically prohibited by a nation's laws.<sup>23</sup>
20. The Committee's consideration of exploitation of cleaners working in retail chains should, accordingly, be aware of these standards and mechanisms. Where the Committee understands that serious human rights abuses are not being prevented by 'frameworks at both Commonwealth and industry level', 'compliance with relevant workplace and taxation laws' or 'the effectiveness and adequacy of agencies such as the Fair Work Ombudsman and the Australian Taxation Office', then the Committee should recommend these be modified and strengthened.
21. The Law Council notes that internationally, there has been a shift away from simply ensuring companies comply with national law towards companies meeting international legal standards and expectations of responsible business conduct, like the United Nations Guiding Principles on business and human rights (**UNGPs**). The UNGPs are global standards for responsible business, that enshrine the three 'pillars' of the state duty to protect human rights, the company responsibility to respect human rights, and greater access to remedy for victims of human rights abuses. The UNGPs were unanimously endorsed by the United Nations Human Rights Council in June 2011, with the Australian Government co-sponsoring this resolution.
22. Further, as a member of the Organisation for Economic Cooperation and Development (**OECD**), Australia is committed to implementing the OECD Guidelines for Multinational Enterprises, which includes establishing a National Contact Point to receive complaints against Australian companies and Australian companies operating abroad.<sup>24</sup>
23. These international standards provide a framework for responsible business conduct in a global context consistent with applicable laws and internationally recognised criteria. The Law Council considers that it is important for Australia to align its strategy on business on human rights with international efforts, and the current inquiry should have regard to international standards relevant to this issue.

### **Pyramid contracting**

24. It is not uncommon for retail chains to engage independent contractors to provide cleaning services, driven by pricing pressures, lower margins and high competition within the industry pushing profit margins downwards.<sup>25</sup>
25. A business' engagement and payment of the contractor may be wholly compliant and in accordance with the terms of its service agreement with the principal contractor. The retail chain may also have a service agreement that places a limit on the number of levels of subcontracting allowed.

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<sup>23</sup> Particularly through the UN's *Guiding Principles on Business and Human Rights* (annex to UN doc A/HRC/17/31, 21 March 2011), and the OECD's *Guidelines for Multinational Enterprises* (25 May 2011), both of which the Australian Government support.

<sup>24</sup> Organization for Economic Cooperation and Development (OECD), *Guidelines for Multinational Enterprises 2011 Edition* (2011) | [11].

<sup>25</sup> Fair Work Ombudsman, *An inquiry into the procurement of housekeepers by four and five star hotel groups*, May 2018, 9 citing IbisWorld, *IBISWorld Industry Report N7311 Commercial Cleaning Services in Australia*, 2015, 7.

26. However, subcontracting – especially multiple levels of subcontracting – can create an environment that allows non-compliance to flourish. There is a pressure on every level of the subcontracting business to make a profit, coupled with a common belief that complex business structures can be deliberately used to hide non-compliance, facilitates exploitation of those at the bottom of the subtracting chain, who are often already a vulnerable demographic.
27. Two common practices are subcontractors requiring cleaners to provide an ABN under the pretense of being employed as an independent contractor, when they are in fact employees; and one cleaner being provided with the wages for all employees, for them to redistribute to their fellow employees in cash. In at least one case reported by the FWO, cleaners were asked to pay any tax refunds they received back to the employer in cash.<sup>26</sup>
28. It is a known practice of sub-contractors (often several contracts removed from the engaging retail chain) to pay wages to cleaning staff “cash in hand” in order to deliberately avoid meeting tax, superannuation or other responsibilities (such as penalty rates).
29. Paying cash in hand wages also allows those companies to minimise or avoid paying income tax. The Australian Taxation office (**ATO**) estimates that Australia’s black cash economy costs the nation up to \$25 billion each year.<sup>27</sup>
30. The ability of the ATO to regulate cash-dominated industries is limited, and the cleaning industry is no exception, with former ATO audit manager Chris Segue conceding ‘for many decades now, the cleaning industry has been a poster child for rampant tax evasion practices’.<sup>28</sup>
31. The Law Council suggests that the incidence of cash in hand wage payment would be somewhat addressed by a commensurate reduction (via regulation) of pyramid subcontracting within the cleaning industry.
32. Where businesses employ cleaners directly as employees they will be covered either by the General Retail Industry Award 2010, or by an enterprise agreement that provides uniform conditions of employment (for example, this is the arrangement adopted by Coles Supermarkets).
33. The less removed cleaners are from the engaging business, the better the ability of that business to have knowledge of and monitor the workplace conditions and payment of cleaners. Conversely, where cleaners are increasingly removed from oversight by the engaging business due to multiple levels of subcontracting, this can create an environment prone to exploitation.
34. The following diagram produced by the FWO illustrates a labour supply chain involving multiple subcontracting parties:<sup>29</sup>

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<sup>26</sup> Fair Work Ombudsman, ‘*An inquiry into the procurement of cleaners in Tasmanian supermarkets*’ (February 2018), 23.

<sup>27</sup> Nick Tabakoff, ‘ATO Blitz to Clean Up ‘Black Cash’ Economy’ The Australian (online), 4 January 2018 <<https://www.theaustralian.com.au/national-affairs/treasury/ato-blitz-to-clean-up-black-cash-economy/news-story/1281ed075cc8c8aa9612c8346e8d92ed>>.

<sup>28</sup> Ibid.

<sup>29</sup> Fair Work Ombudsman, ‘*An inquiry into the procurement of cleaners in Tasmanian supermarkets*’ (February 2018), 16.

Retail Chain	
Contractor A	
Contractor B	
Contractor C	
Contractor D	
Cleaners with ABNs (engaged as 'independent contractors' who may in fact be employees at law)	Cleaners who on-pay other cleaners in cash

35. In the Woolworths Inquiry, it was found that the contract price paid by Woolworths was sufficient to meet employee minimum entitlements, but only if there were no more than two levels of contracting. In fact, there was in fact up to four levels of subcontracting, in breach of the terms of Woolworths' own service agreement. The FWO observed that "the multiple layers of people involved in the payment of workers and the insufficient records provided to the inquiry made it difficult for the FWO and the supermarket to identify the true employer in some instances."<sup>30</sup>
36. Multiple levels of subcontracting may also be used to disguise sham contracting: the deliberate misclassification of employees as independent contractors, when they are at law employees, in order to avoid paying employee entitlements. Sham contracting provisions are contained in the Fair Work Act, with penalties for their breach. Sham contracting provisions encompass both employees and subcontractors:

*Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd [2015] HCA 45*

*Quest South Perth Pty Ltd (Quest) employed two housekeepers. Quest later entered into a contract with a subcontractor, which provided that the subcontractor would employ the housekeepers to provide cleaning services to Quest as independent contractors of the subcontractor. Quest represented to the housekeepers that they were employed by the subcontractor as independent contractors. The duties performed by the housekeepers did not change.*

*The Federal Court was of the view that section 357 of the Act should be interpreted to apply only to misrepresentations about the contract of employment between the employer and the employee. By engaging a subcontractor to allegedly employ the housekeepers, Quest was easily able to avoid the operation of the section.*

*The High Court considered the interpretation of section 357 of the Act should be wider than was considered by the Federal Court, to include subcontractors, to properly capture sham contracting arrangements:*

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<sup>30</sup> Ibid.

*“Who might be the counterparty to the represented contract for services, and whether that counterparty might be a real or fictional entity, is correspondingly immaterial to the operation of the provision.*

*To confine the prohibition to a representation that the contract under which the employee performs or would perform work as an independent contractor is a contract for services with the employer would result in section 357(1) doing little to achieve its evident purpose within the scheme of Pt 3-1. That purpose is to protect an individual who is in truth an employee from being misled by his or her employer about his or her employment status. It is the status of an employee which attracts the existence of workplace rights.”<sup>31</sup>*

37. The Woolworths Inquiry attributed the extent of the subcontracting and resulting non-compliance to the failure of Woolworths to regularly and comprehensively conduct inspections and audits at its stores to ensure that the terms of their service agreement were in fact being met, observing that “there is little utility in establishing governance arrangements if they are not going to be enforced by active, regular and frequent management interventions.”<sup>32</sup>
38. In the 2015-16 year, the cleaning industry was the third-highest sector by matters litigated by the FWO, accounting for 14 percent of the total litigation actions commenced by the FWO.<sup>33</sup>
39. The circumstances in which someone may be knowingly involved in non-compliance with the Fair Work Act is set out in section 550 and provides the FWO with the ability to bring court proceedings against accessories to non-compliance, which can include companies ‘in a position of power within the same supply chain as the employing entity, such as a head contractor.’<sup>34</sup>
40. However, establishing that company was knowingly involved in non-compliance with the act may be a high burden, requiring the FWO to prove, for example, that the amount paid to contractors was insufficient to the extent that a breach of the minimum wage obligations was inevitable.
41. Some have suggested that this encourages businesses ‘not to ask too many questions’, in order to protect themselves from accessorial liability for the breaches of their subcontractors.<sup>35</sup> It has also been suggested that the true enforcement power lies in the FWO’s power to investigate bring breaches to light that often results in considerable negative publicity for the business involved, rather than through legal proceedings.
42. In addition to the power to commence litigation, the Law Council notes the ability of the FWO to enter into enforceable undertakings and compliance partnerships with contraveners to improve workplace and employment systems and achieve compliance.
43. Of the underpayments recovered for workers by the FWO in the 2015-16-year, 30 percent were recovered by enforcement action, and 15 percent by compliance activities,

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<sup>31</sup> *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] HCA 45, 4-5 [15]-[16].

<sup>32</sup> Fair Work Ombudsman, ‘*An inquiry into the procurement of cleaners in Tasmanian supermarkets*’ (February 2018), 24.

<sup>33</sup> Fair Work Ombudsman, 2016, 2015-16 Fair Work Ombudsman’s Annual Report <[www.fairwork.gov.au/about-us/access-accountability-and-reporting/annual-reports](http://www.fairwork.gov.au/about-us/access-accountability-and-reporting/annual-reports)>.

<sup>34</sup> Fair Work Ombudsman, ‘*An inquiry into the procurement of cleaners in Tasmanian supermarkets*’ (February 2018), 17.

<sup>35</sup> Ewin Hannan, ‘Supermarket Cleaners Exploited in Subcontracting Rort’ *The Australian* (online), 19 February 2018 <[www.theaustralian.com.au/news/inquirer/supermarket-cleaners-exploited-in-subcontracting-rort/news-story/f647bdcfafb22d6021619749a1b36999](http://www.theaustralian.com.au/news/inquirer/supermarket-cleaners-exploited-in-subcontracting-rort/news-story/f647bdcfafb22d6021619749a1b36999)>.

with the balance recovered through education and dispute resolution (39 percent) and early intervention (16 percent).<sup>36</sup>

### Recommendations

- **Legislation should limit the subcontracting arrangements to a maximum of two levels to ensure sufficient controls are in place.**
- **The Cleaning Accountability Framework, having completed its pilot phase in 2017, should be expanded to include additional testing sites (such as supermarkets and other retail venues) for development of the four and five-star ratings systems.**

## Phoenix activity

44. There is diversity in the definition of phoenix activity.<sup>37</sup> For the purposes of this memorandum, the Law Council adopts the definition provided by the PWC Report:<sup>38</sup>

*The deliberate and systematic liquidation of a corporate trading entity which occurs with the fraudulent or illegal intention to avoid tax and other liabilities, such as employee entitlements and continue the operation and profit taking of the business through another trading entity.*<sup>39</sup>

45. It is important to note that there is a distinction between lawful phoenixing, which can occur when a company becomes insolvent for any number of reasons in the ordinary course of its business, and illegal or fraudulent phoenix activity that is engineered with the intent to deliberately avoid liabilities. Illegal or fraudulent phoenixing is a criminal offence.

46. The difficulty in addressing fraudulent phoenix activity is twofold: firstly, the fact that insolvency and phoenixing is often legitimate makes it difficult to identify illegal phoenix activity; and secondly, the inherently 'after the fact' nature of enforcement is resource intensive, with limited opportunities to anticipate, deter and prevent illegal phoenix activity before it has taken place.

47. The ATO has a number of strategies to identify and regulate phoenix activity, the majority of which rely on collaboration and information sharing across government departments and agencies, including an Inter-Agency Phoenix Forum, Phoenix Taskforce, and Phoenix Watchlist.<sup>40</sup>

48. However, the ATO concedes that their 'approaches under the current law are costly and resource-intensive, given the 'after the fact nature of current detection and collection mechanisms'.<sup>41</sup>

49. In examining similar issues in the Australian construction industry, the Senate Committees on Economics concluded that the current framework for information sharing

<sup>36</sup> Fair Work Ombudsman, 2016, 2015-16 Fair Work Ombudsman's Annual Report <[www.fairwork.gov.au/about-us/access-accountability-and-reporting/annual-reports](http://www.fairwork.gov.au/about-us/access-accountability-and-reporting/annual-reports)>.

<sup>37</sup> Senate Standing Committees on Economics, Parliament of Australia, *Insolvency in the Australian Construction Industry*, 2015.

<sup>38</sup> PricewaterhouseCoopers, *Phoenix Activity: Sizing the Problem and Matching Solutions*, 2011, 1 [1.1]

<sup>39</sup> *Ibid*, ii.

<sup>40</sup> See Australian Taxation Office, Submission No. 5 to the Senate Standing Committees on Economics, Parliament of Australia, *Insolvency in the Australian Construction Industry*, 2015, 20-23 [75-88]

<sup>41</sup> *Ibid*, 24 [97].

between regulators “is often not sufficient to detect illegal phoenix activity and regulators rely on information from the public to detect and identify such behavior”.<sup>42</sup> For example, while the prescription process of the Phoenix Taskforce allows the ATO to share information with participating agencies, those agencies are not empowered to provide information to the ATO or a third agency within the taskforce,<sup>43</sup> and is significantly constrained by inter-agency dissemination of information by legislated confidentiality provisions.<sup>44</sup>

50. The Law Council considers that the complexity of identifying and regulating illegal phoenix activity necessitates proactive, creative and innovative responses from regulators.

51. It is therefore submitted that identifying illegal phoenixing behaviour necessitates whole-of-government information sharing and dissemination. Where this is obstructed by confidentiality laws, the Law Council suggests that legislative restrictions be amended to facilitate and promote information sharing and dissemination between government agencies and the ATO.

#### **Recommendations**

- **Legislative confidentiality restrictions inhibiting the ability for the ATO to receive information from the Australian Securities Investments Commission and other key governmental agencies should be amended to better assist in the anticipation, identification and prevention of illegal phoenix activity.**
- **Any amendments to promote improved information sharing should also be matched with appropriate resourcing and engagement with industry to increase the ability of regulators to anticipate and deter fraudulent phoenix activity.**

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<sup>42</sup> Senate Standing Committees on Economics, Parliament of Australia, *Insolvency in the Australian Construction Industry*, Report, 2015, 79 [ 5.70].

<sup>43</sup> PricewaterhouseCoopers, *Phoenix Activity: Sizing the Problem and Matching Solutions*, 2011, 21 [78].

<sup>44</sup> *Ibid*, 78 [5.64].