

Addressing Illegal Phoenix Activity

Across Entities

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Senior Executive Director
Corporate Management Branch
Australian National Audit Office
19 National Circuit
BARTON ACT 2600

Or via email:

communication@anao.gov.au.



Canberra ACT
29 March 2019

Dear Mr President
Dear Mr Speaker

In accordance with the authority contained in the *Auditor-General Act 1997*, I have undertaken an independent performance audit across entities. The report is titled *Addressing Illegal Phoenix Activity*. Pursuant to Senate Standing Order 166 relating to the presentation of documents when the Senate is not sitting, I present the report of this audit to the Parliament.

Following its presentation and receipt, the report will be placed on the Australian National Audit Office's website — <http://www.anao.gov.au>.

Yours sincerely



Grant Hehir
Auditor-General

The Honourable the President of the Senate
The Honourable the Speaker of the House of Representatives
Parliament House
Canberra ACT

AUDITING FOR AUSTRALIA

The Auditor-General is head of the Australian National Audit Office (ANAO). The ANAO assists the Auditor-General to carry out his duties under the *Auditor-General Act 1997* to undertake performance audits, financial statement audits and assurance reviews of Commonwealth public sector bodies and to provide independent reports and advice for the Parliament, the Australian Government and the community. The aim is to improve Commonwealth public sector administration and accountability.

For further information contact:
Australian National Audit Office
GPO Box 707
Canberra ACT 2601

Phone: (02) 6203 7300
Fax: (02) 6203 7777
Email: ag1@anao.gov.au

Auditor-General reports and information about the ANAO are available on our website:
<http://www.anao.gov.au>

Audit team

Tracey Martin
Nathaniel Loorham
Sonya Carter
Amanda Reynolds
Elizabeth Wedgwood
Chiara Edwards
Lachlan Fraser
Andrew Morris

Contents

Summary and recommendations.....	7
Background	7
Conclusion	8
Supporting findings	9
Recommendations	11
Summary of entity responses	11
Key messages from this audit for all Australian Government entities	12
1. Background	13
Nature and impact of illegal phoenix activity	13
Phoenix Taskforce	14
Rationale for undertaking the audit	17
Audit approach	17
2. Phoenix Taskforce governance	19
Has a charter been established and implemented to support effective coordination and collaboration?	19
Have effective information sharing arrangements been established and used by Taskforce members to support intelligence and operational matters?	25
Have guidelines been developed to support coordinated intelligence and operational matters?	29
Have barriers to addressing illegal phoenix activity been identified and associated strategies implemented?	31
3. Strategies and processes to combat illegal phoenix activity	36
Does the Phoenix Taskforce have effective strategies and processes in place to address potentially illegal phoenix activities?	36
Does the Phoenix Taskforce have effective processes for selecting compliance and enforcement cases and making referrals to other bodies such as the Serious Financial Crime Taskforce?	42
Has the Phoenix Taskforce effectively progressed its compliance, enforcement and prosecution activities?	48
4. Performance measurement arrangements.....	54
Has the Phoenix Taskforce established arrangements to adequately assess its effectiveness?	54
Does the Phoenix Taskforce regularly monitor and report against performance indicators, baselines, targets and benchmarks?	60
Appendices	67
Appendix 1 Entity response	68
Appendix 2 Taskforce member entities.....	73
Appendix 3 Phoenix Taskforce disclosure request and approval processes	75
Appendix 4 Law reform proposal 2017 and status of individual recommendations acceptance and implementation.....	76

Summary and recommendations

Background

1. Illegal phoenix activity occurs when a new company is created to continue the business of a company that has been deliberately liquidated to avoid paying its debts, including taxes, creditors and employee entitlements.¹ Illegal phoenix activity impacts employees, creditors, competing businesses and the Government, with direct costs estimated at between \$2.85 billion and \$5.13 billion for 2015–16.²
2. Australian Government activities to address illegal phoenix activity date back to the 1970s and 1980s in relation to Bottom of the Harbour schemes. The first major intergovernmental arrangement occurred in 2011 with the establishment by the Australian Taxation Office (ATO) of an Inter-Agency Phoenix Forum to address illegal phoenix behaviour. This was not a prescribed taskforce for the purposes of the Taxation Administration Regulations and the ATO consequently faced considerable limitations in sharing information with other forum members about potential phoenix cases.
3. In response to the information sharing limitations for tax officers, the Phoenix Taskforce (Taskforce) was established on 17 November 2014 through an amendment to the Taxation Administration Regulations.³ The Taskforce's purposes are to: bring together key Government entities to allow the effective exchange of information and a collaborated approach to mitigate and deter fraudulent phoenix behaviour; and develop a course of action and preferred alternatives. The Taskforce also has five goals and deliverables.⁴
4. In December 2018, the Taskforce comprised 13 Commonwealth entities and 21 state and territory government entities working together through information sharing and data matching to identify, manage, monitor and take enforcement action against suspected illegal phoenix operators. The Taskforce Steering Committee has five members; the ATO, Australian Securities and Investments Commission (ASIC), Fair Work Ombudsman, Department of Jobs and Small Business, and Australian Border Force. The ATO provides the Chair and secretariat services for the Taskforce and the Steering Committee.

1 Australian Taxation Office, *Illegal Phoenix Activity* [Internet], available from <https://www.ato.gov.au/General/The-fight-against-tax-crime/Our-focus/Illegal-phoenix-activity/> [accessed February 2019].

2 PricewaterhouseCoopers, *The Economic Impacts of Potential Illegal Phoenix*, July 2018, p. ii. [Internet], available from https://www.ato.gov.au/uploadedFiles/Content/ITX/downloads/The_economic_impacts_of_potential_illegal_Phoenix_activity.pdf [accessed February 2019].

3 The Taxation Administration Regulations 2017, regulation 67, includes the Phoenix Taskforce as a prescribed taskforce for the purposes of section 355-70 of the *Taxation Administration Act 1953*.

4 The goals (and equivalent deliverables) are to: protect the public finances of Australia by identifying, designing and implementing cross entity strategies to mitigate and deter fraudulent phoenix activity; coordinate the enforcement of state and federal laws against egregious fraudulent phoenix activity; enable the effective sharing of information, knowledge and experience across taskforce entities; support the reform of administrative practice, policy and where applicable, recommend legislative changes; and promote community awareness as a means of increasing voluntary compliance and community confidence.

Rationale for undertaking the audit

5. The Australian National Audit Office selected illegal phoenix activity for audit because the activity imposes considerable costs on the Australian community (estimated up to \$5.1 billion for 2015–16), is a long-standing problem and requires extensive cooperation between government entities, which is often challenging to implement. The audit was intended to provide assurance on whether the Phoenix Taskforce is effectively addressing illegal phoenix activity at a whole-of-government level.

Audit objective and criteria

6. The audit assessed the effectiveness of the Phoenix Taskforce to combat illegal phoenix activities.

7. The audit criteria are:

- Does the Phoenix Taskforce have effective governance arrangements?
- Has the Phoenix Taskforce developed and implemented effective strategies and processes to combat illegal phoenix activities?
- Do the Phoenix Taskforce performance measurement arrangements enable it to assess effectiveness?

Conclusion

8. The Phoenix Taskforce is making progress against its purposes and goals in combating illegal phoenix activity, including through implementing cross-entity strategies, increasing the exchange of information between Government entities on potential cases, collaborating in the conduct of compliance cases and progressing reforms to strengthen compliance powers. Most member entities advised the ANAO that taskforce participation has provided them with benefits in addressing phoenix risks. Importantly, the ATO has significantly increased the amount of tax revenue collected from illegal phoenix operators through audits it has conducted. However, Taskforce joint compliance and enforcement operations are at relatively early stages and have not yet demonstrated major results.

9. Governance arrangements are generally fit for purpose, and support the development of strategies and conduct of operational activities to address illegal phoenix activity as a multi-entity taskforce. These arrangements include the Charter, and the structure and responsibilities of the Steering Committee and working groups. Arrangements are in place for the ATO to share its information with other Taskforce members. The Phoenix Taskforce has an ongoing strategy to develop proposals for law reforms that would help overcome barriers to it addressing illegal phoenix activity, including in sharing information.

10. The Phoenix Taskforce has developed and is implementing a suite of strategies and processes to combat illegal phoenix activity. This includes commencing 16 Top Phoenix Target operations where agencies from across government work together to address some of the most egregious cases of illegal phoenix activity. Although some successes have been reported, most strategies have only recently been created and it cannot yet be determined if the Taskforce has had a substantial effect in combatting illegal phoenix activity given the size of the problem.

11. Performance measures are in place and an evaluation has been conducted of the Phoenix Taskforce, but misalignment of the Evaluation Framework to the stated purposes and goals of the Phoenix Taskforce has undermined the assessment of effectiveness. There is detailed internal quarterly reporting on progress to the Phoenix Taskforce Steering Committee and half-yearly reporting to the Minister. Taskforce outcomes are published on the ATO's website.

Supporting findings

Phoenix Taskforce governance

12. The Phoenix Taskforce has developed, implemented and updated a Taskforce Charter to reflect the evolving focus of the Taskforce in collaborating on illegal phoenix matters. The Charter is supported by members exchanging letters to agree to participate in the Taskforce and accepting the *Statement of Principles for Information Exchange*. Member participation involves the ATO undertaking most activities on behalf of the Taskforce, with Steering Committee members providing support and guidance for operational and some strategic matters, and other members participating on an opt-in basis. Arrangements for working groups, including terms of reference and membership, have not been clearly articulated.

13. Partially effective information sharing arrangements have been established to support the Taskforce's intelligence and operational matters. Establishing the Phoenix Taskforce under taxation legislation has enabled the ATO to share information on potential high-risk phoenix operators with other Taskforce entities. The extent of this information sharing by the ATO has increased dramatically, from two instances in 2014–15 to 687 instances across 28 entities in 2017–18, when a single disclosure encompassed as many as 4412 companies and trusts related to 110 persons of interest. The ANAO's analysis identified instances of inconsistency with the ATO's disclosure process requirements. The ATO also shares non-protected information at Taskforce meetings and through its website on aspects of the Phoenix Taskforce strategies, activities and successes.

14. Most Taskforce entities' legislation prevents them from sharing information with all Taskforce member entities or the ATO from 'on-disclosing' the shared information to other members. These provisions limit the intelligence and operational activities of the Taskforce. Records of information shared with the ATO by Taskforce agencies and any on-disclosure limitations are not centrally maintained.

15. The ATO has developed and issued guidance to member entities to support the coordination of Phoenix Taskforce operations. However, there is limited guidance on developing intelligence for the Taskforce (beyond information sharing) or to support decision-making at intelligence and operational working groups when selecting cases to pursue.

16. Barriers to addressing illegal phoenix activity have been identified over a number of years, including by the ATO, other Taskforce members and research entities such as the Productivity Commission. Building on previous legislative reforms, in 2017 the Phoenix Taskforce Steering Committee developed a law reform proposal that was progressed by Treasury. Seven reforms were accepted by Government, with two implemented and five introduced to Parliament as legislation for consideration. The Taskforce has an ongoing program of work to propose law reforms to help overcome barriers to it addressing illegal phoenix activity.

Strategies and processes to combat illegal phoenix activity

17. The Phoenix Taskforce, through the work of the ATO, has developed a suite of strategies and processes to address illegal phoenix activities across the regulatory spectrum of educate, engage and enforce. While there have been some successes, most strategies have not been in place long enough to produce significant impacts. The Australian Securities and Investments Commission developed its own strategy, which focused on addressing illegal phoenix activity in its role as a corporate regulator. No other Phoenix Taskforce members reported having specific strategies or processes to address illegal phoenix activity.

18. The Phoenix Taskforce has mostly effective risk-based processes for the selection of matters that are referred for compliance and enforcement activities. The ATO's risk-based processes are used to identify matters to be referred to the Phoenix Taskforce's Intelligence and Operational Working Groups. However, the Working Groups do not have further risk and materiality concepts to apply when selecting suitable individuals to become Top Phoenix Targets. Where phoenix matters involve potential breaches of criminal law, the Phoenix Taskforce, through the ATO, has established processes for referring the matter for treatment.

19. The ATO, as the lead entity of the Phoenix Taskforce, and ASIC both manage programs of business as usual compliance activities. Under these programs, in 2017–18: the ATO completed 340 reviews and audits of phoenix operators and collected \$190 million in cash (which was a large increase on \$17 million collected in 2014–15); and ASIC completed 53 investigations and banned 45 company directors relating to illegal phoenix activity. Since adopting an operational focus in August 2016, the Phoenix Taskforce has commenced 16 cross-entity operations under its Top Phoenix Targets Strategy, which target some of the most egregious illegal phoenix operators. These operations have had initial successes, such as in raising liabilities and issuing garnishees, but have not run their course in progressing through civil or criminal enforcement and prosecution activities.

Performance measurement arrangements

20. The endorsed Phoenix Taskforce Evaluation Framework is not adequate as it does not clearly assess achievement of the Taskforce's purposes and goals, instead focusing on effectiveness of high-level treatment strategies (output groups). An evaluation was conducted in February 2018 that identified mixed effectiveness in achieving Taskforce strategies. The evaluation noted shortcomings in effectiveness measures and supporting data, which are being addressed.

21. The Phoenix Taskforce monitors and reports on Taskforce activities in a detailed quarterly report to the Steering Committee, which was introduced in 2017–18. A separate quarterly report to the Minister was introduced at the same time. The reports have an action and activity focus and do not include performance indicators from the Evaluation Framework. While the reports include some statistics, they rarely report these statistics against baselines, targets and benchmarks. The reports reflect all phoenix activities of the ATO, some activities of the Steering Committee and other members involved in operations. The majority of Taskforce members do not contribute to Taskforce reporting, and there is no consolidated reporting of the extent of Taskforce members' efforts and their successes overall in combatting illegal phoenix activity.

Recommendations

Recommendation no.1

Paragraph 2.37

The Phoenix Taskforce provides guidance to clarify the basis on which intelligence and operational working groups refer, and recommend pursuing, potential illegal phoenix cases.

Phoenix Taskforce Steering Committee entity response: *Agree.*

Recommendation no.2

Paragraph 3.40

The Phoenix Taskforce captures lessons learnt from its operations, and refines future operations accordingly to support their effective conduct.

Phoenix Taskforce Steering Committee entity response: *Agree.*

Recommendation no.3

Paragraph 4.9

The Phoenix Taskforce:

- (a) aligns the purposes, goals and outcomes in its Charter and Evaluation Framework;
- (b) ensures the purposes and goals clearly state the outcomes the Taskforce seeks to achieve; and
- (c) includes baselines or targets for performance indicators in the Evaluation Framework.

Phoenix Taskforce Steering Committee entity response: *Agree.*

Summary of entity responses

22. The proposed report was provided to the five Phoenix Taskforce Steering Committee entities listed at paragraph 4 and an extract of the proposed report was provided to the Department of the Treasury. The ATO provided a response on behalf of the Phoenix Taskforce, the summary response is set out below. The Department of the Treasury also provided a summary response which is set out below. All Steering Committee entities confirmed with the ANAO that they supported the ATO's response. The full responses from entities that provided a formal response are reproduced at Appendix 1.

Australian Taxation Office (on behalf of the Phoenix Taskforce)

The ATO welcomes the audit findings and considers the report supportive of the Phoenix Taskforce's overall approach to combating illegal phoenix activity which has a significant impact on the Australian community and government.

The audit recognises the progress that the Phoenix Taskforce and the ATO are making by engaging in a whole-of-government approach to combat illegal phoenix activity. This includes implementing cross-agency strategies, increasing the exchange of information between government entities, collaborating in the conduct of compliance cases and progressing potential law reform. As noted in the audit report, the ATO has also significantly increased the amount of tax revenue collected from illegal phoenix operators through its audits.

The ANAO audit found the Phoenix Taskforce is making progress against its purposes and goals in combating illegal activity, while acknowledging that the Taskforce's joint compliance approaches to addressing illegal phoenix activity have not been in place long enough to fully determine their impact. The audit identified opportunities to improve Taskforce guidance, information sharing,

intelligence, candidate development, debriefs, performance measurement and evaluation processes.

The ATO agrees with the three recommendations contained in the report. We are already implementing a number of measures to address these recommendations and suggestions.

The ATO notes the ANAO's comments regarding inconsistencies in the management of information disclosures to Taskforce members and is taking steps to automate and improve the processes. The ATO welcomes the ANAO's comments regarding improvements to our processes, but we consider that no legislative breaches have occurred.

Department of the Treasury

The Treasury welcomes the ANAO's assessment of the effectiveness of the Phoenix Taskforce to combat illegal phoenix activities, and its examination of law reform efforts in this area.

While the report does not contain any recommendations for Treasury, we will consider the key insights from the report in the context of our policy responsibility for relevant corporations and tax laws and for law reform to combat illegal phoenix activity.

Key messages from this audit for all Australian Government entities

23. Below is a summary of key messages from this audit that may be relevant for the operations of other Australian Government entities.

Performance and impact measurement

- In designing performance measures for a program, the measures should enable an assessment of the achievement of the program's objectives (or outcomes) and be consistent with key corporate governance documents, such as the corporate plan.

Governance and risk management

- The governance of multi-agency taskforce activities involved effective arrangements to support information sharing and cross-entity collaboration, including:
 - a clear and regularly updated Charter that established among other things purposes and goals, and roles and responsibilities;
 - an arrangement that supported collaboration between entities, in the form of a *Statement of Principles for Information Sharing* to which member entities agreed;
 - a Steering Committee to provide: assurance and oversight; endorsement of key operational matters; formulation and implementation of strategic projects; and effectiveness monitoring against program objectives;
 - clear links between working groups, committees and forums at different levels of program responsibility to ensure pathways for issue and risk communication and escalation;
 - multi-agency operation plans that set out shared intelligence, allocation of tasks, and planned outcomes; and
 - quarterly reporting on progress and outcomes.

1. Background

Nature and impact of illegal phoenix activity

1.1 Illegal phoenix activity occurs when a new company is created to continue the business of a company that has been deliberately liquidated to avoid paying its debts, including taxes, creditors and employee entitlements.⁵ Sometimes referred to as fraudulent phoenix behaviour, illegal phoenix activity is distinct from standard phoenix activity where corporate structures are replaced for legitimate business purposes.

1.2 Illegal phoenix activity impacts employees, creditors, competing businesses and the Government.⁶ It has particular impacts on:

- tax revenue — reduced Commonwealth and State taxation revenue, including income tax, goods and services tax and payroll tax;
- employee entitlements — reduced superannuation and other entitlements;
- compliant businesses — phoenix operators receive an unfair advantage by ‘undercutting’ competitors due to their artificially low cost structures;
- contractors/sub-contractors — non-payment for work performed. This can have a flow on effect resulting in business failures and financial distress; and
- Government expenditure — increased spending on monitoring and enforcement.

1.3 Since 1996, there have been three main estimates of the cost of illegal phoenix activity:

- in 1996, the Australian Securities Commission estimated the cost to the Australian economy to be as much as \$1.3 billion annually⁷;
- in 2012, the Fair Work Ombudsman estimated the total impact to be between \$1.78 billion and \$3.19 billion per annum⁸; and
- in 2018, PricewaterhouseCoopers estimated the annual direct cost to the Australian community to be between \$2.85 billion and \$5.13 billion for 2015–16.⁹

5 Australian Taxation Office, *Illegal Phoenix Activity* [Internet]. The *Phoenix Taskforce Charter*, September 2017, also notes ‘in some instances of phoenix activity only one entity within a group of companies will be liquidated, whereas in other cases the corporate group covering the whole business will be stripped of assets and liquidated. Due to the diversity of phoenix activity, it is difficult to precisely define’.

6 Phoenix Taskforce Charter (September 2017, p. 3) and the Australian Taxation, *Illegal Phoenix Activity* [Internet].

7 Department of the Treasury, *Action against fraudulent phoenix activity*, Proposals Paper, November 2009.

8 PricewaterhouseCoopers prepared a report for the Fair Work Ombudsman titled *Phoenix Activity: Sizing the problem and matching solutions* in June 2012.

9 PricewaterhouseCoopers, *The Economic Impacts of Potential Illegal Phoenix* [Internet], July 2018, p. ii.

Phoenix Taskforce

The precursor Inter-Agency Phoenix Forum

1.4 Australian Government activities to address illegal phoenix activity date back to the 1970s and 1980s in relation to Bottom of the Harbour schemes¹⁰, and includes the Cole Royal Commission into the Building and Construction Industry in 2003.

1.5 To assist in addressing illegal phoenix activity, the Department of the Treasury (Treasury) sought a range of reforms in 2009. Four of the 11 proposed law reforms were introduced between 2010 and 2012 through amendments to legislation.¹¹

1.6 During the period that law reforms were considered and introduced, the Australian Taxation Office (ATO) established an Inter-Agency Phoenix Forum (the Forum) to address illegal phoenix behaviour. Adopting a whole-of-government approach to addressing phoenix risk was consistent with Government expectations and ATO strategic approaches. The Forum was led by the ATO, with the first meeting held in March 2011. The terms of reference for the Forum were developed in 2011, establishing the purpose of the Forum as:

...bringing together key government agencies in order to identify, design and implement cross agency strategies to mitigate and deter fraudulent phoenix activity.

The Inter-Agency Phoenix Forum (the forum) will also assist the ATO in delivering on a Government commitment to address fraudulent phoenix behaviour, with particular emphasis on delivering on specific commitments to government during the 2011-2015 financial years. The forum will achieve this through the timelier sharing of “intelligence” and also by Agencies jointly focussing on the more egregious phoenix operators.¹²

The ATO’s information disclosure restrictions affecting the Inter-Agency Phoenix Forum

1.7 Section 355-25 of the *Taxation Administration Act 1953* (Tax Act) states that it is an offence for a taxation officer to disclose protected information to another entity.¹³ However, under section 355-70 of the Tax Act, protected taxation information can be disclosed to an officer of a Prescribed Taskforce for the purposes of the Taskforce (where a Taskforce can be prescribed in the Taxation

10 Bottom of the Harbour schemes involved lawyers and accountants (known as promoters) advising their clients (company directors and owners) to strip assets from a company, transfer them to another company, and let the first company become bankrupt. By doing this, company directors and owners avoided paying employees, creditors and the ATO. Michael West, ‘Tax Avoidance as bad as bottom of the Harbour schemes’, Sydney Morning Herald, 10 February 2015. [Internet], available from <https://www.smh.com.au/business/tax-avoidance-as-bad-as-bottom-of-the-harbour-schemes-20150210-13adf3.html> [accessed February 2019].

11 For example, automating the application of the Director Penalty Regime so that directors are personally liable to remit income tax withholding amounts for company employees (PAYG W) three months from the date that the obligation to remit tax arises if the company has not reported those amounts.

12 Inter-Agency Phoenix Forum, *ATO Consultative Forum — Charter*, June 2011, p. 5.

13 Section 355-30 of Schedule 1 of the Tax Act states that protected information means information that was disclosed or obtained under or for the purposes of a taxation law that relates to the affairs of an entity, and identifies or is reasonably capable of being used to identify the entity. The meaning of ‘entity’ includes taxation officers, individual taxpayers, companies, consolidated groups, trusts, tax agents, legal practitioners, and public officers. *Taxation Administration Act 1953* [Internet], Volume 2, Schedule 1, Chapter 5 — Administration, Compilation No. 159, 1 January 2019, available from https://www.legislation.gov.au/Details/C2019C00056/Html/Volume_2#_Toc535585628 [accessed February 2019].

Administration Regulations). Section 355-70 of the Tax Act includes that section 355-25 does not apply if:

- the record is made for or the disclosure is to a prescribed taskforce; and
- the record or disclosure is for or in connection with a purpose of the prescribed taskforce, where a major purpose of the taskforce must be protecting the public finances of Australia.¹⁴

1.8 Almost immediately the Forum recognised significant limitations on information sharing in relation to potential phoenix cases, including on the ATO's information sharing powers under section 355 of the Tax Act, as it was not a prescribed taskforce.

1.9 The Forum considered and initially dismissed the idea of seeking to establish a prescribed taskforce under the Tax Act in June 2011. However, the issue of establishing a prescribed taskforce was reconsidered in November 2011, leading to individual Forum member entities canvassing support from their executive for a prescribed taskforce. By April 2012 members of the Forum reported that their entities would support the establishment of a taskforce to address the difficulty of information sharing between government entities. Over the subsequent 24 months, the ATO wrote to Forum entities about the establishment of a Taskforce seeking a formal response to the proposal. By March 2014 a proposal had been made to Government to establish a prescribed taskforce to overcome restrictions on the dissemination of the ATO's information. The ATO intended that, once approved, the Taskforce arrangement would enable the ATO to act as a clearing house where it would receive information and then disclose the information to other Taskforce entities (where such on-disclosure was not prohibited by the originating entity).

Establishing the Phoenix Taskforce

1.10 The Phoenix Taskforce was established on 17 November 2014 through an amendment to the Taxation Administration Regulations. The *Taxation Administration Regulations 2017*¹⁵, regulation 67, includes the Phoenix Taskforce as a prescribed taskforce for the purposes of section 355-70 of the Tax Act.

1.11 The Phoenix Taskforce is a prescribed taskforce to 'allow for disclosure of protected tax information by taxation officers to officers of the Taskforce for the purposes of the Taskforce'. On-disclosure rules in the Tax Act continue to protect taxation information once it is disclosed. This means that authorised officers from Taskforce member entities (referred to as 'taskforce officers') may only on-disclose taxation information that was provided by the ATO for taskforce purposes.

14 *Taxation Administration Act 1953* [Internet], Volume 2, Schedule 1, Chapter 5 — Administration, Compilation No. 159, 1 January 2019.

15 *Taxation Administration Regulations 2017* remake the *Taxation Administration Regulations 1976*. *Taxation Administration Regulations 2017* [Internet], available from <<https://www.legislation.gov.au/Details/F2018C00887>> [accessed February 2019]. In *Taxation Administration Regulations 1976*, regulation 48 included the Phoenix Taskforce as a prescribed taskforce.

Operation of the Phoenix Taskforce

1.12 In December 2018, the Phoenix Taskforce comprised 34 Commonwealth, state and territory government agencies working together through information sharing and data matching to identify, manage, monitor and take enforcement action against suspected illegal phoenix operators. There are 13 Commonwealth entities and 21 state and territory entities (see Appendix 2).

1.13 Arrangements for the Phoenix Taskforce include all member entities meeting on an annual or biannual basis at Phoenix Taskforce meetings. A Phoenix Taskforce Steering Committee has also been established and meets on a quarterly basis. There are five Steering Committee members; the ATO, Australian Securities and Investments Commission (ASIC), Fair Work Ombudsman, Department of Jobs and Small Business, and Australian Border Force (in the Department of Home Affairs).¹⁶ The ATO provides both the Chair and secretariat services for the Taskforce and the Steering Committee. The Phoenix Taskforce also works in collaboration with the Serious Financial Crime Taskforce¹⁷ to identify and treat serious financial crime.

Phoenix Taskforce purposes, goals and deliverables

1.14 The Taskforce's purposes are to: bring together key Government agencies to allow the effective exchange of information and a collaborated approach to mitigate and deter illegal phoenix behaviour (thereby protecting the public finances of Australia); and develop a course of action and preferred alternatives.

1.15 The Phoenix Taskforce has five key goals and deliverables with respect to mitigating and deterring illegal phoenix activity, as shown in Table 1.1.

Table 1.1: Phoenix Taskforce goals and deliverables

	Goals	Deliverables
1. Protect the public finances of Australia by identifying, designing and implementing cross agency strategies to mitigate and deter fraudulent phoenix activity. ^a	✓	✓
2. Coordinate the enforcement of State and Federal laws against egregious fraudulent phoenix activity. ^a	✓	✓
3. Enable the effective sharing of information, knowledge and experience across taskforce agencies.	✓	✓
4. Support the reform of administrative practice, policy and where applicable, recommend legislative changes.	✓	✓
5. Promote community awareness and education as a means of increasing voluntary compliance and community confidence.	✓	✓

Note a: The 2018 *Prescribed Phoenix Taskforce Statement of Principles* updates the purposes to refer to illegal rather than fraudulent phoenix activity.

Source: *Prescribed Phoenix Taskforce Charter*, September 2017 and *Prescribed Phoenix Taskforce Statement of Principles*, May 2018.

¹⁶ Due to the Administrative Arrangements Order amendments introduced on 20 December 2017, the Department of Employment, which was a Steering Committee member, became the Department of Jobs and Small Business. For the purposes of the audit report, the ANAO will refer to the Department of Jobs and Small Business throughout the report.

¹⁷ The Serious Financial Crime Taskforce is a multi-agency taskforce targeting serious financial crime in Australia.

Law reform

1.16 In February 2017, the Phoenix Taskforce submitted a law reform proposal to the Minister for Revenue and Financial Services. Subsequently, Treasury released a consultation paper *Combatting Illegal Phoenix Activity* in September 2017, canvassing a range of options for reforms to laws to address illegal phoenix activity. In the 2018–19 Budget, the Government announced a package of reforms to the corporations and tax laws to combat illegal phoenix activity. Two pieces of legislation addressing phoenix law reforms and director identification numbers were introduced to Parliament on 13 February 2019 for consideration and subsequently referred to the Senate Economics Committee.¹⁸ The Senate Economics Committee is due to report on these bills by 26 March 2019.

Rationale for undertaking the audit

1.17 The Australian National Audit Office (ANAO) selected illegal phoenix activity for audit because the activity imposes considerable costs on the Australian Community (estimated as up to \$5.1 billion for 2015–16), is a long-standing problem and requires extensive cooperation between government entities, which is often challenging to implement. The audit was intended to provide assurance on whether the Phoenix Taskforce is effectively addressing illegal phoenix activity at a whole-of-government level.

Audit approach

Audit objective, criteria and scope

1.18 The audit assessed the effectiveness of the Phoenix Taskforce to combat illegal phoenix activities.

1.19 To form a conclusion against the audit objective, the ANAO adopted three high-level criteria:

- Does the Phoenix Taskforce have effective governance arrangements?
- Has the Phoenix Taskforce developed and implemented effective strategies and processes to combat illegal phoenix activities?
- Do the Phoenix Taskforce performance measurement arrangements enable it to assess effectiveness?

1.20 The audit focused on the ATO's and other taskforce entities' (particularly Steering Committee members) contributions to the establishment and operation of Phoenix Taskforce governance arrangements, strategies and processes to combat illegal phoenix activity, and performance measurement arrangements. The audit considered how Taskforce entities collaborate to combat illegal phoenix activities. The audit did not examine the activities of state and territory members of the Phoenix Taskforce, but considered the extent of participation of all member entities in Taskforce activities, and received feedback from nearly all members against the audit objective and criteria. To date the Phoenix Taskforce has mainly coordinated intelligence, with a relatively small number of matters underway. Accordingly, more attention was given to intelligence

18 From 16 August 2018 to 27 September 2018, Treasury consulted on a package of draft legislation relating to reforms to combat illegal phoenix activity. Department of the Treasury, *Reforms to combat illegal phoenix activity — Draft Legislation* [Internet], available from <https://treasury.gov.au/consultation/c2018-t313204> [accessed February 2019].

gathering, strategies for detection, information sharing and performance measurement, with less attention to compliance, enforcement, prosecution and prevention activities.

Audit methodology

1.21 Audit procedures included:

- examining the ATO's records relating to the Inter-Agency Phoenix Forum, Phoenix Taskforce and ATO phoenix activities, including charters and meeting records, risk assessments, strategies, disclosure documents, intelligence and operational policy and guidance, assessments and plans, evaluations, performance measures and reports to Committees and the responsible Minister;
- interviewing and collecting key documentation from Phoenix Taskforce member entities, particularly Steering Committee members, including details of information sharing arrangements, enforcement actions that could be applied to combat phoenix activities, phoenix strategies and referral processes, phoenix work programs, and details of intelligence and enforcement performance measurement; and
- examining the Treasury's records in relation to the 2009 and 2017 consultation processes and the phoenix law reform proposals.

Entities included in the audit

1.22 The ATO was included in the audit as the lead entity and secretariat for the Phoenix Taskforce. The audit team interviewed and sought supporting documentation from nearly all taskforce members. The audit included a greater focus on the Phoenix Taskforce Steering Committee members due to their role in setting the strategic direction of the taskforce and oversight of operations. The audit also included the Treasury due to its role in the Phoenix Law Reforms.

1.23 The audit was conducted in accordance with relevant ANAO auditing standards at a cost to the ANAO of \$637,000.

1.24 The team members for this audit were Tracey Martin, Nathaniel Loorham, Sonya Carter, Amanda Reynolds, Elizabeth Wedgwood, Chiara Edwards, Lachlan Fraser and Andrew Morris.

2. Phoenix Taskforce governance

Areas examined

This chapter examines whether the Phoenix Taskforce has effective governance arrangements in place to address potential illegal phoenix activity.

Conclusion

Governance arrangements are generally fit for purpose, and support the development of strategies and conduct of operational activities to address illegal phoenix activity as a multi-entity taskforce. These arrangements include the Charter, and the structure and responsibilities of the Steering Committee and working groups. Arrangements are in place for the ATO to share its information with other Taskforce members. The Phoenix Taskforce has an ongoing strategy to develop proposals for law reforms that would help overcome barriers to it addressing illegal phoenix activity, including in sharing information.

Areas for improvement

The ANAO made one recommendation aimed at the Phoenix Taskforce clarifying the basis for the intelligence and operational working groups escalating cases. The ANAO also suggests that the Phoenix Taskforce Steering Committee more fully discharge its responsibilities for providing strategic direction and oversight (paragraph 2.9), the Phoenix Taskforce clearly articulate arrangements for its working groups (paragraph 2.16), and the ATO improve controls over its disclosure processes (paragraph 2.28).

Has a charter been established and implemented to support effective coordination and collaboration?

The Phoenix Taskforce has developed, implemented and updated a Taskforce Charter to reflect the evolving focus of the Taskforce in collaborating on illegal phoenix matters. The Charter is supported by members exchanging letters to agree to participate in the Taskforce and accepting the *Statement of Principles for Information Exchange*. Member participation involves the ATO undertaking most activities on behalf of the Taskforce, with Steering Committee members providing support and guidance for operational and some strategic matters, and other members participating on an opt-in basis. Arrangements for working groups, including terms of reference and membership, have not been clearly articulated.

2.1 The Inter-Agency Phoenix Forum and the Phoenix Taskforce have operated under a Charter (or Terms of Reference) that was first agreed in November 2011 and endorsed, subject to ATO approvals, at a Phoenix Taskforce Steering Committee meeting in September 2017. The Charter has been reviewed on several occasions to reflect changes in the nature of the cross-agency arrangements.¹⁹

¹⁹ The ATO advised the ANAO in January 2019 that the Phoenix Taskforce Steering Committee endorsed a Steering Committee Charter in December 2018 to reflect changes to the focus and scope of the Taskforce, and to be more principles-based. The Steering Committee Charter was previously a part of the 2017 Phoenix Taskforce Steering Committee Charter.

2.2 The September 2017 *Prescribed Phoenix Taskforce Charter* includes details of the legal status, context, purpose and goals, information sharing activities, roles and responsibilities, resourcing, termination arrangements and duration of the agreement.²⁰ The Charter does not include performance measures, agreed modes of regular review and evaluation, and approaches to identifying and sharing risks and opportunities. These matters have been largely addressed in supplementary documentation, such as the Evaluation Framework that was agreed by Steering Committee members in 2017, or through agenda items at Taskforce meetings, such as sharing phoenix risks and opportunities.

2.3 Of 28 Taskforce members interviewed by the ANAO in September and October 2018, only eight reported having reviewed charters, frameworks, risk documentation or policy and guidance for the Taskforce at least once.

Membership

2.4 In February 2015, an Inter-Agency Phoenix Forum (and Taskforce) meeting agreed that Taskforce members would be asked to exchange letters rather than enter a more formal memorandum of understanding. This approach was considered fit for purpose.

2.5 Consistent with requirements established in the Charter, the ATO has maintained a register of members²¹ and documentation to evidence the inclusion or removal of members. Documentation also includes correspondence from taskforce entities accepting the invitation to participate in the Taskforce and agreeing to the *Prescribed Phoenix Taskforce Statement of Principles for Information Exchange between Taskforce Agency members*.²²

2.6 Appendix 2 provides a list of members, including the dates of letters of offer from the Chair of the Taskforce, entities' agreement to the Statement of Principles and indication of intent to participate in the Taskforce. Membership increased from 15 member entities in February 2015 to 34 member entities in December 2018.

Roles and responsibilities

2.7 The September 2017 Charter sets out roles and responsibilities for the chair, secretariat, members and Steering Committee. The ATO is responsible for providing the Chair and secretariat for the Taskforce (and its committees and working groups). Members are expected to commit to active participation.

2.8 Roles and responsibilities remained largely unchanged between the initial terms of reference for the Inter-Agency Phoenix Forum and the September 2017 Phoenix Taskforce Charter.

20 This is in line with the ATO's *Chief Executive Instructions for Public Sector Memoranda of Understanding* that require Memoranda of Understanding to be in accordance with better practice principles set out in the withdrawn ANAO *Better Practice Guide on Public Sector Governance*. The Instructions indicate that such agreements can be formal or take the form of an exchange of letters. Arrangements should be fit for purpose.

21 The Member Register also records details of gatekeepers and authorised officers (who can act and make decisions at meetings on behalf of the Taskforce Agency that they represent).

22 The Australian Federal Police has not confirmed by exchange of letters that it wishes to participate in the Taskforce, and has not agreed to the Statement of Principles. The Australian Federal Police is considered to be a Taskforce member as it is listed in the Explanatory Statement to the legislation, consistent with membership requirements in the Taskforce Charter. Some other entities listed in the Explanatory Statement to the legislation, such as the Department of Human Services, are not a listed member of the Taskforce. The ATO advised the ANAO that the Department of Human Services declined to participate in the Taskforce.

A key exception is the introduction of the Steering Committee for the Taskforce in August 2016. When the Steering Committee was introduced its key purpose was to manage the operational issues of the Phoenix Taskforce. In September 2017 this changed to include providing strategic direction for the Taskforce. In January 2019, the ATO advised that the broader Taskforce is largely involved in intelligence-sharing and operational matters. Table 2.1 sets out roles and responsibilities for members and the Steering Committee of the current Charter.

Table 2.1: Roles and responsibilities documented in the Phoenix Taskforce Charter

Position	Roles and responsibilities
Member	<p>The role of members will include:</p> <ul style="list-style-type: none"> – representing the views and concerns of their respective agencies; – providing input into the agenda for meetings; – being committed to act in the best interests of good working relationships between forum members; – acting with due diligence and good faith; – committing to active participation; – providing access to information; – declaring conflicts of interest or roles; – maintaining relationships with key stakeholders; – meeting any needed confidentiality requirements; and – dealing with other members and staff with courtesy and respect.
Steering Committee	<p>The Phoenix Taskforce Steering Committee will provide strategic input and oversight of Taskforce operations.</p> <p>The primary focus of Phoenix Taskforce Steering Committee is to provide strategic input and oversight of Taskforce operations, including, but not limited to, the following:</p> <ol style="list-style-type: none"> 1. assurance and oversight of the taskforce information sharing and referral process; 2. endorsement and monitoring of current taskforce operational matters; 3. formulation and implementation of taskforce strategic projects such as Top Targets Strategy; and 4. monitor the effectiveness of taskforce strategies in mitigating and deterring fraudulent phoenix activity.

Source: *Prescribed Phoenix Taskforce Charter*, September 2017.

2.9 The Steering Committee has continued to manage operational matters, provided input to and oversight of the Top Targets Strategy, commented on the ATO's *Phoenix Strategy*, through ASIC contributed to the Data Fusion Project, and contributed to the development of the Evaluation Framework and its application. However, the Steering Committee has not had a broader role in formulating strategy, providing oversight of information sharing and referrals, or monitoring effectiveness (beyond contributing to and reviewing Phoenix Taskforce Steering Committee Reports).

Resourcing

2.10 The Phoenix Taskforce is not explicitly Budget funded,²³ and each member entity resources its contribution to the Taskforce from business as usual budget allocations.

2.11 The ATO leads the Taskforce, and in 2018 allocated approximately 100 full time equivalent staff to addressing illegal phoenix activity.²⁴ It develops documentation and intelligence, undertakes most activities and leads operations. The ATO considers that all its phoenix work contributes to and cannot be separated from the work and outcomes of the Taskforce. ASIC is the most active other member of the Taskforce, and estimated that in 2018–19 some 29 full time equivalent staff would contribute to phoenix activities, and 3 to specific Taskforce activities.

2.12 The other member entities did not measure their resourcing for phoenix activities but typically advised that total resourcing, including for Taskforce activities such as information sharing, intelligence and operations, would be less than one full-time equivalent staff over a 12 month period.

Governance structure

2.13 Following the establishment of the Phoenix Taskforce in November 2014, the Inter-Agency Phoenix Forum continued to meet and it was agreed that the Phoenix Taskforce would be a standing agenda item at the Forum meetings (a separate meeting was not needed). The Forum ceased on 1 August 2017, and thereafter the meetings were called Phoenix Taskforce meetings.

2.14 The Phoenix Taskforce has established a Steering Committee, four working groups and operation teams. The Taskforce reports through the Steering Committee and the ATO to the Minister. Figure 2.1 provides an overview of the Phoenix Taskforce governance structure focusing on the Taskforce and key committees, working groups, operations and reporting relationships.²⁵

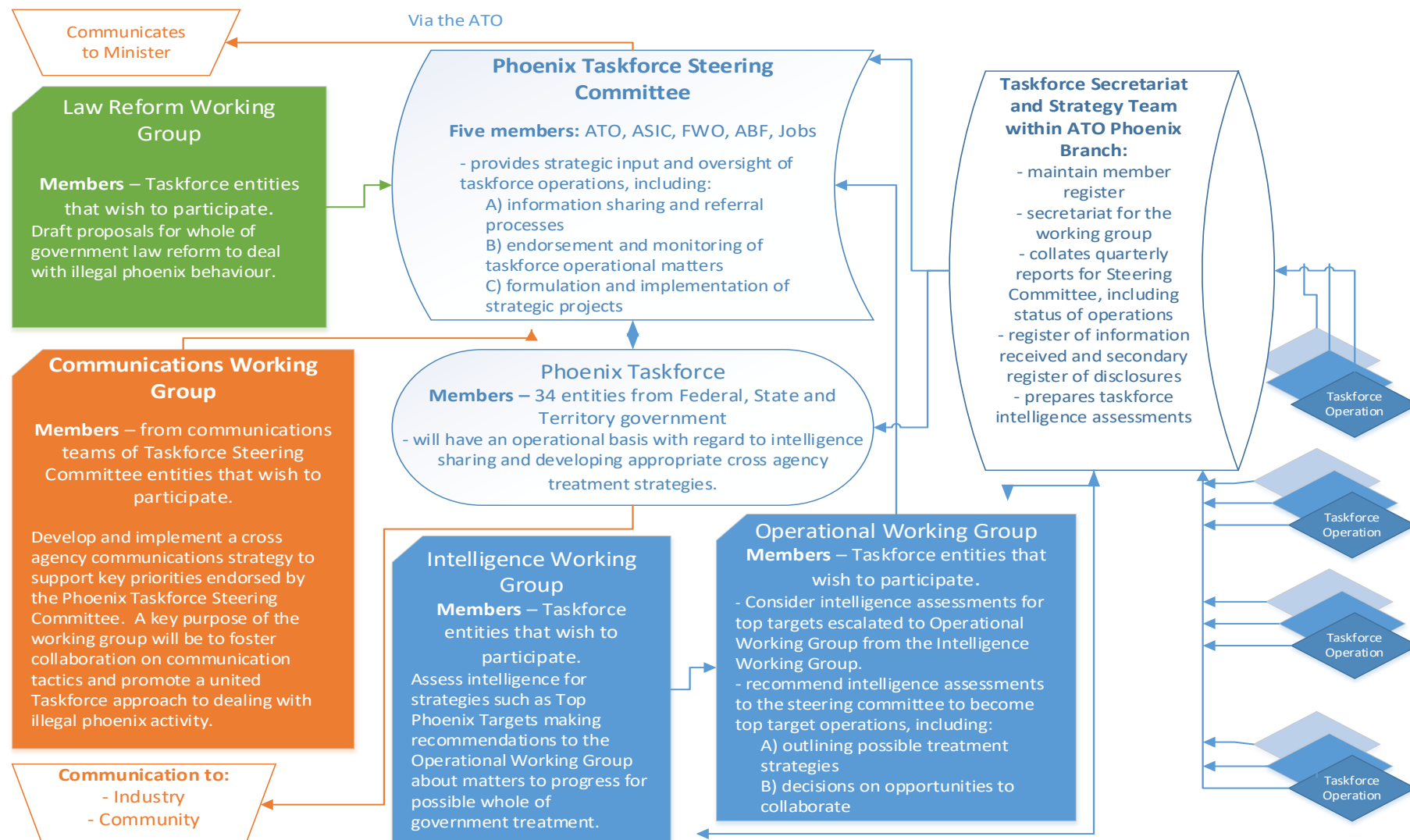
2.15 As discussed previously, the Phoenix Taskforce Steering Committee comprises five entities, was established in 2016 initially to manage operational issues of the Phoenix Taskforce and also became responsible for setting strategic direction when the Forum was ceased in August 2017. From August 2016, working groups were established for law reform, intelligence and operational matters, and a Communications Working Group was established in 2018. Phoenix Taskforce operation teams have been established since 2016.

23 Funding associated with addressing illegal phoenix activity, but not specific to the Phoenix Taskforce, has been provided in the 2013–14, 2015–16 and 2018–19 Budgets totalling \$247.8 million. The ATO advised that approximately half of this funding was provided to the Serious Financial Crime Taskforce, some of which (for approximately 17 full-time equivalent staff) was allocated to deal with illegal phoenix activity.

24 In addition to the 100 full time equivalent staff dedicated to addressing illegal phoenix activity, the ATO advised that it adopts a whole-of-ATO approach in supporting major operations and business as usual work. This involves accessing resources in other business areas, such as Debt, Review and Dispute Resolution, Small Business, Business Reporting and Registration and Intermediaries and Lodgement.

25 In addition to the relationships shown in Figure 2.1, the *Prescribed Phoenix Taskforce Charter* includes that the Taskforce makes referrals to the Serious Financial Crime Taskforce. Further, the Phoenix Strategy describes a relationship between the Phoenix Taskforce and Steering Committee and other ATO committees such as the ATO Tax Crime and Account Integrity Steering Committee and the ATO Phoenix Cross Business Line Stakeholder Group.

Figure 2.1: Governance structure for Phoenix Taskforce committees, working groups and operations



Note: ABF is the Australian Border Force (part of the Department of Home Affairs), FWO is the Fair Work Ombudsman, and Jobs is the Department of Jobs and Small Business.

Source: Based on Taskforce Charter September 2017 and interviews with ATO staff and review of relevant documentation.

2.16 Table 2.2 provides an overview of arrangements for each committee and working group. There are inconsistencies in the governance arrangements established between committees and working groups, including in relation to terms of reference, membership arrangements²⁶, planned meeting frequency compared to meetings held, standing agenda items and documentation of meetings. In January 2019, the ATO advised that the Phoenix Taskforce would develop principles to articulate arrangements for working groups, including terms of reference and membership, noting that the Taskforce takes an agile and dynamic response and aims to reduce red tape.

Table 2.2: Arrangements for Phoenix Taskforce committees and working groups, to November 2018

	Phoenix Taskforce/ Inter-Agency Phoenix Forum	Steering Committee	Working groups	Operation teams
Charter, Terms of Reference or program of work	Yes	Yes	No, except Communications Working Group	Operation Plan and Guidelines
Planned meeting Frequency	Not specified, annual or bi-annual	Quarterly	Not specified	Monthly, and as required
Number of meetings held	29 times in total for both	14 times (either met or deliberated on matters out of session)	2 (Intelligence Working Group) 3 (Operational Working Group) 2 (Communications Working Group)	Varies depending on operation, some monthly, some quarterly
Meeting minutes are maintained	Yes	Yes	Yes for some meetings, except Law Reform Working Group	Varies depending on team lead, usually no record
Standing Agenda items	No, some regular and frequent agenda items	No, regular agenda items	No	No
Members	34 entities	5 entities	Variable, 3 to 26 entities ^a	Variable, 3 to 6 entities

Note a: Membership has been: 5 to 15 entities (Intelligence Working Group); 5 to 26 entities (Operational Working Group); 5 agencies (Law Reform Working Group); and 3 agencies (Communications Working Group).

Source: ANAO analysis of ATO meeting records and interviews with key staff, including secretariats and operation team leads.

2.17 Of 28 Taskforce members interviewed by the ANAO, 26 reported having attended taskforce meetings, with 11 entities reporting making contributions to agenda items at least once. Eighteen of the 28 entities considered there was a culture where members felt comfortable to engage, ask questions and challenge proposals and position in Taskforce meetings. Seventeen entities considered there was sufficient opportunity to participate, contribute, make decisions

26 For example, membership arrangements for the Intelligence and Operational working groups have not been established. Representatives from Steering Committee agencies were initially invited to be members, but in 2017 membership of these two groups expanded based on entity interest and willingness to participate in the Phoenix Top Targets Strategy.

and/or endorse activities. Thirteen member entities reported having attended at least one working group meeting or operation team meeting.

Have effective information sharing arrangements been established and used by Taskforce members to support intelligence and operational matters?

Partially effective information sharing arrangements have been established to support the Taskforce's intelligence and operational matters. Establishing the Phoenix Taskforce under taxation legislation has enabled the ATO to share information on potential high-risk phoenix operators with other Taskforce entities. The extent of this information sharing by the ATO has increased dramatically, from two instances in 2014–15 to 687 instances across 28 entities in 2017–18, when a single disclosure encompassed as many as 4412 companies and trusts related to 110 persons of interest. The ANAO's analysis identified instances of inconsistency with the ATO's disclosure process requirements. The ATO also shares non-protected information at Taskforce meetings and through its website on aspects of the Phoenix Taskforce strategies, activities and successes.

Most Taskforce entities' legislation prevents them from sharing information with all Taskforce member entities or the ATO from 'on-disclosing' the shared information to other members. These provisions limit the intelligence and operational activities of the Taskforce. Records of information shared with the ATO by Taskforce agencies and any on-disclosure limitations are not centrally maintained.

Legislative provisions for information sharing powers

2.18 Prescribing the Phoenix Taskforce under Taxation Administration Regulation permits ATO officers to share taxation information with Taskforce members for the purposes of the Taskforce. Most member entities (26 or more) have information sharing provisions included in the legislation they administer that enables them to share specified information with the ATO. Only 12 member entities can share with all Taskforce members, as sharing provisions generally restrict sharing to a limited number of other Taskforce member entities. In some cases, while information can be shared with the ATO or some other Taskforce members, there are restrictions on this information being further disclosed.²⁷ In all cases, entities had regard to the *Privacy Act 1988* and the Australian Privacy Principles when considering disclosure of information that was of a personal, sensitive and/or protected nature.

Memoranda of understanding

2.19 Information sharing powers under legislation are supplemented in a number of cases by memorandums of understanding (MOUs) between specific member entities to facilitate information sharing activities. In September and October 2018, 18 Taskforce member entities advised the ANAO that they had one or more MoU with one or more Taskforce member entities to

²⁷ Fourteen or more entities had legislative restrictions relating to on-disclosure. For example, Australian Criminal Intelligence Commission information cannot be shared beyond officers specified in a participant list under the *Australian Crime Commission Act 2002*.

support information disclosure. In total, 30 MoUs were in place, of which 25 were examined by the ANAO.

2.20 Of the 25 MoUs provided, four were head agreements with subsidiary agreements between multiple entities²⁸, one was an instrument of authorisation, one was a ministerial authority for information disclosure, one was a letter of agreement and the other 18 MoUs were entity to entity. The stated purpose of each MOU was similar, generally intending to provide for cooperation and mutual assistance through the exchange of information, intelligence and expertise to maximise outcomes through collective compliance, education and/or enforcement activities. Most reiterated each entity's corporate purpose and the relevant sections of the entity's legislation that enabled the sharing of information. Guidance on administrative protocols followed. This included procedures for requesting and receiving information, delegations for authorising the exchange, and how this was to be recorded. All MoUs included commencement and termination dates and a requirement for each entity to make the other entity(s) aware of any amendments to their governing legislation.

Information disclosures made by the ATO for the purpose of the Phoenix Taskforce

2.21 The ATO's disclosures must comply with relevant ATO accountable authority instructions, policy and guidance, and arrangements established for the Taskforce, including the Prescribed Phoenix Taskforce *Statement of Principles for Information Exchange between Taskforce Agency members* and real-time referral processes established by the Taskforce.

Non-tax information disclosures

2.22 The ATO adopts an approach, in circumstances where there are no privacy or confidentiality issues, of making information publicly available. For example, on the ATO's website the Phoenix Taskforce section includes a range of information, including its outcomes, a list of members, a description of illegal phoenix activity and details of work of the taskforce. The section also includes case studies, details of where taxpayers can access help and where to report illegal phoenix activity, and the publication of Inter-Agency Phoenix Forum meeting minutes and documents such as *The economic impact of illegal phoenix activity*.

Protected information disclosures

Number and volume of disclosures

2.23 The number of disclosures from the ATO to other Taskforce members has increased significantly over the life of the Phoenix Taskforce, as shown in Table 2.3.

28 For example, the ATO had a head agreement, and subsidiary agreements with state and territory Taxation and Revenue Commissioners.

Table 2.3: Number of protected information disclosures from the ATO to Phoenix Taskforce entities, 2014–15 to 2017–18

Request / disclosure	2014–15	2015–16	2016–17	2017–18	Total
Request initiated by the ATO	0	16	77	705	798
Request from other member entity	2	20	15	10	47
Entities making requests	2	11	26	28	67
Total requests made	2	36	92	715	845
Requests rejected	0	0	1	0	1
Requests on hand at 30 June	0	2	0	28	30
Total disclosures made^a	2	34	93	687	814

Note a: Total disclosures made in a financial year is calculated by adding total requests made to total requests on hand at the end of the previous financial year, and then deleting requests rejected and requests on hand at the end of the current financial year.

Source: ANAO summary of protected information disclosures reported in ATO annual reports 2014–15 to 2017–18.

2.24 Over the four years since the introduction of the Taskforce, the ATO's annual reports have recorded increases in: the number of Taskforce member entities to which the ATO has disclosed information (two rising to 28 entities); the total number of disclosures (two rising to 687 disclosures); and the average number of disclosures per entity (one rising to 25 disclosures). In the first two years of the Taskforce, most disclosures were initiated by entities other than the ATO requesting information and in the third and fourth year the vast majority of disclosures were initiated by the ATO. The main entities receiving the disclosed information were state and territory revenue offices and ASIC.

2.25 The volume of information shared per disclosure also increased dramatically in 2017 and remained high in 2018. Individual disclosures can contain significant information, for example:

- the ATO has disclosed the same document to 27 agencies and has had approval to make oral disclosures for a particular purpose to 32 agencies; and
- individual disclosures have related to the phoenix behaviours of as many as 4412 companies and trusts related to 110 individuals, 70 entities, 22 groups and/or 19 operations.

Compliance with disclosure requirements

2.26 Appendix 3 sets out the process for disclosing protected information. Under the process, each Phoenix Taskforce entity nominates information 'gatekeepers' who request and receive protected information for that entity for the purposes of the Taskforce. All requests must identify the purpose of the disclosure, the entity to which it relates and the proposed recipient. Requests for documentary disclosures must also include the documents to be disclosed (where the request is ATO-initiated) or a description of the documents required (where initiated by other members). For oral disclosures, the request must specify the ATO officers who will disclose protected information and the time period for which they are authorised to do so. Usually these disclosure authorisations are provided for meetings, including Steering Committee, working group and operation team meetings.

2.27 The ATO Information Disclosure Team handles all requests for disclosure of protected information, including Phoenix Taskforce requests. The Team confirms that the request for

disclosure is to be made to a gatekeeper/authorised officer of the Phoenix Taskforce member entity and is for, or in connection with, a purpose of the Phoenix Taskforce.²⁹ Once satisfied the request is in order, an Information Disclosure Team officer endorses the disclosure of information for phoenix purposes, and then forwards the Phoenix Taskforce disclosure request to a Senior Executive Service officer delegated to make and authorise disclosures under the *Taxation Administration Act 1953*. The delegate may disagree or either: agree that the disclosure of the relevant documents is covered by subsection 355-70(1) for phoenix purposes; or authorise (and agree to) the nominated officers making oral disclosures for a specified time period.

2.28 The ANAO examined the disclosure request and approval process for 262³⁰ of 814 disclosures made between 2014–15 and 2017–18 to determine if they were consistent with the ATO's disclosure process requirements. The ANAO identified instances where elements of the disclosure process were inconsistent with requirements relating to approvals, disclosure periods and disclosure records. Inconsistencies mainly involved oral disclosures, and included:

- 64 oral disclosures where documented authorisation was provided after the disclosure period commenced³¹;
- incomplete records of oral disclosures made. Records of the 42 disclosures made in the sample prior to 1 January 2018 were stored in the Information Disclosure Officers' personal Outlook email folders and subsequently deleted.³² The ATO advised in February 2019 that records of 83 disclosures in the sample were maintained in a folder on the Information Disclosure Team shared drive where access is restricted. Information on that drive was not provided to the ANAO during audit fieldwork. In summary, for the sample of 125 requests for oral disclosure, no records were provided to the ANAO to demonstrate how many oral disclosures were made, when they were made, by whom, to whom, or what they were about; and

29 The ATO's internal *Guidelines of Making Disclosures to Phoenix Taskforce Agencies* advises that disclosures to the Taskforce may only be made for one or all of four purposes. These purposes align to the five goals and deliverables outlined in Table 1.1 of this report (excluding the second goal).

30 The ANAO reviewed all disclosure request records provided by the ATO related to the periods 2014–15 to 2016–17 inclusive. For 2017–18 the ANAO applied statistical sampling to the disclosure request records provided by the ATO (675), using a confidence interval of 5 per cent, a confidence level of 90 per cent and an error rate of 10 per cent. A stratified sample for oral and written disclosures was used to determine the sample size, and a random sample was selected. On this basis, the ANAO examined both disclosures in 2014–15, all 34 disclosures in 2015–16, 84 disclosures in 2016–17 and 142 disclosures (59 written and 83 oral) in 2017–18. The sample comprised 137 written disclosures and 125 oral disclosures.

31 Oral authorisation is documented through a *Section 355-70 Taxation Administration Act 1953 Senior Executive Service Agreement to disclose* document, which at the time of audit fieldwork stated that the disclosure period commences from the date pre-recorded as the beginning of the 'period of approval' in the schedule to the document. The ATO advised that no oral disclosures are made until the requesting officer is advised that the Senior Executive Service officer has authorised the disclosure, notwithstanding that the date of the requested disclosure period on the form may be earlier than the actual disclosure. In January 2019 the ATO amended the oral authorisation template to reflect that the starting date for the oral disclosure is the date on which the disclosure is authorised.

32 The ATO advised in February 2019 that there had been a request to the IT unit to reinstate the records. Late in the audit, the ATO provided access to restored email records of oral disclosures made in 2017.

- one written disclosure where documentation relied upon for approval does not clearly demonstrate the disclosure was agreed.³³

2.29 In February 2019, the ATO advised that while no breaches of the law occurred, in response to the findings in the audit that it had not established adequate recordkeeping arrangements to maintain records of oral disclosures, it was taking steps to improve these recordkeeping processes.

2.30 The ANAO also sought to reconcile total disclosure numbers by year to the reported requests and disclosures in ATO's annual reports. The number of requests and disclosures in 2016–17 and 2017–18 could not be reconciled with the numbers reported in ATO's annual reports. For 2016–17 the number of rejected and on hand disclosure requests could not be reconciled.

ATO Phoenix records of disclosures and information received

2.31 A central record is not maintained of information disclosed to the ATO by Phoenix Taskforce agencies for Taskforce purposes, including details of on-disclosure limitations imposed on information shared with the ATO. Rather, records are kept in various electronic locations in the ATO's intelligence systems and case management systems, and it is not possible to readily consolidate records of intelligence shared in Phoenix cases.

Have guidelines been developed to support coordinated intelligence and operational matters?

The ATO has developed and issued guidance to member entities to support the coordination of Phoenix Taskforce operations. However, there is limited guidance on developing intelligence for the Taskforce (beyond information sharing) or to support decision-making at intelligence and operational working groups when selecting cases to pursue.

2.32 Phoenix Taskforce member entities have internal intelligence and operational management guidance and processes to detect, and if appropriate take action against, potential illegal phoenix behaviour as part of their business as usual activities. Notably, the ATO has a suite of intelligence management guidance, including intelligence assessment and briefing templates, and an *Intelligence Guide*. The ATO's Private Groups and High Wealth Individuals business line has a range of guidance to support intelligence, case selection and case management activities.³⁴ The guidance and templates support decision-making, including decisions to take no further action, escalate intelligence for possible case selection, and decisions to pursue cases and refer as appropriate to other areas within ATO for action.

2.33 The Phoenix Taskforce provides an opportunity for entities to collaborate and undertake joint intelligence and operation management activities. To support these activities the ATO has developed and issued the following Phoenix Taskforce guidance notes and supporting documentation:

33 Instead, in response to a request to consider a number of disclosures, the documentation noted 'Done...there was not a checklist with the [phoenix] matter — so could not sign'.

34 Intelligence processes and guidance include the use of the Phoenix Risk Model and the Risk Assessment Profiling Tool, the Phoenix Tax Evasion Reporting Centre Process Overview, Phoenix Checklist, Phoenix Referral Pathway, Phoenix Triage Procedure and the Phoenix Case Selection Pathway and Active Compliance Procedures, Case Management Guidelines and rules, Case Plan and audit manual.

- *Real Time Referral Process — Guidance Note for Participating Phoenix Taskforce Agencies* (April 2018);
- *Multi-Agency Operations — Guidance Note for Participating Phoenix Taskforce Agencies* (March 2018);
- *Multi-Agency Operations — Guidance Note for ATO Operation Leads and Officers* (March 2018);
- Making an ATO-initiated request to disclose protected information;
- *Phoenix Taskforce Phoenix Hotline — Guideline for referral process* (September 2018);
- presentation on the *Phoenix Taskforce Top 50 — Response Plan*; and
- phoenix taskforce intelligence assessments, operation plans, and operation status report templates.

2.34 These documents provide guidance to member entities on intelligence sharing activities, including procedures for individual joint operation working groups to develop strategies and operational plans and produce quarterly case status reports. They also provide guidance on procedures for ATO staff releasing information to the Taskforce and in general.

2.35 Beyond information sharing guidance and references to intelligence actions in the Real Time Referral Process developed in April 2018, there are no intelligence development guidance notes for the Taskforce. The ATO develops the intelligence assessments for consideration by the Phoenix Taskforce Intelligence and Operational working groups — there is no guidance supporting other entities contributions to these assessments (and as a result, member contributions are not detailed or consistent). The Taskforce Secretariat advised the audit team that the intelligence assessments developed for consideration of phoenix matters by the Intelligence Working Group were not based on ATO or Phoenix Taskforce guidance documentation.

2.36 There is also limited guidance to support decision-making in the intelligence and operational working groups. The Real Time Referral Process advises that matters should be escalated if appropriate. The main guidance that supports decision processes for the Intelligence and Operational working groups is the *Phoenix Taskforce Top 50 — Response Plan*, which includes points for consideration, including the jurisdiction in which the behaviour is occurring and the action the Taskforce will take and what taskforce members will be involved. There would be benefit in the Taskforce developing some criteria to assist with the assessments and ratings to support decisions to proceed with or reject matters considered at working group meetings.

Recommendation no.1

2.37 The Phoenix Taskforce provides guidance to clarify the basis on which intelligence and operational working groups refer, and recommend pursuing, potential illegal phoenix cases.

Phoenix Taskforce Steering Committee entity response: *Agree.*

Have barriers to addressing illegal phoenix activity been identified and associated strategies implemented?

Barriers to addressing illegal phoenix activity have been identified over a number of years, including by the ATO, other Taskforce members and research entities such as the Productivity Commission. Building on previous legislative reforms, in 2017 the Phoenix Taskforce Steering Committee developed a law reform proposal that was progressed by Treasury. Seven proposals were accepted by Government, with two implemented and five introduced to Parliament as legislation for consideration. The Taskforce has an ongoing program of work to propose law reforms to help overcome barriers to it addressing illegal phoenix activity.

2.38 Since 2014, a number of studies, reviews and inquiries have identified barriers to addressing illegal phoenix activity and made recommendations to address these barriers. This work has included the:

- Senate Economics References Committee *Inquiry into Insolvency in the Building & Construction Industry* (2 December 2015);
- Productivity Commission report into *Business set up, transfer and closure* (5 September 2015);
- *Black Economy Taskforce Final Report* (31 October 2017); and
- Productivity Commission report on *Data Availability and Use* (8 May 2017).

2.39 Recommended solutions have included legislative reforms for information sharing, and for greater enforcement powers and penalties relating to security deposits, director penalties, promoter penalties and a phoenixing offence.

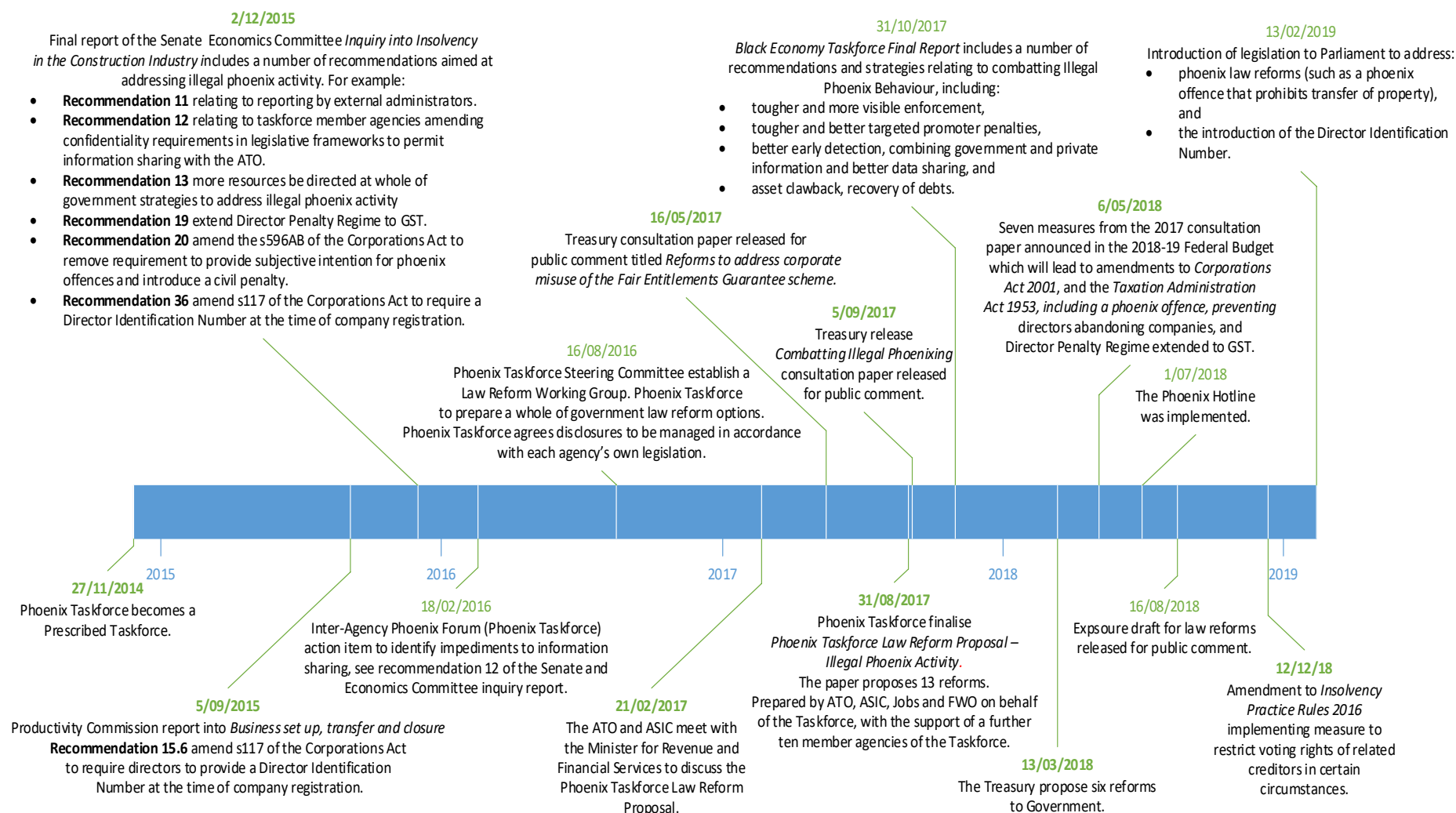
2.40 Between November 2015 and May 2017, the ATO briefed Treasury on areas where it considered reform would assist it to address illegal phoenix activity. The Phoenix Inter-Agency Forum (and Taskforce) has considered some recommendations from these reviews, identified that existing legislation does not provide sufficient tools for the Taskforce to address illegal phoenix activity and had a strategy of pursuing law reform since 2016. In August 2016, the Phoenix Taskforce Steering Committee members formed a Law Reform Working Group. Figure 2.2 provides an overview of the reviews and progression of proposals from the Phoenix Taskforce through Treasury leading to exposure drafts proposing amendments to tax, companies and Fair Entitlements Guarantee legislation and the subsequent introduction of legislation to Parliament.

2.41 In February 2017, the Phoenix Taskforce developed an initial law reform proposal through the Law Reform Working Group and presented the proposal to the Minister for Revenue and Financial Services to progress the law reform. Treasury released a consultation paper *Combating Illegal Phoenix Activity* in September 2017, canvassing a range of options for reforms to laws to address illegal phoenix activity. The consultation period closed on 27 October 2017. Treasury received 50 submissions from a variety of sources, including ASIC, academics, individuals, professional bodies and firms that offer legal, insolvency and liquidation and accounting services. Many reforms suggested by the Taskforce were included in the 2017 consultation paper released by Treasury, although several priority reforms, such as changing the definition of director under the legislation, were not included.

2.42 The 2017 consultation paper outlined 11 areas of reform, with 14 specific proposals. Five of these broad reforms areas had been proposed in an earlier 2009 consultation (mentioned in Chapter 1).³⁵ Seven of the 14 proposals (see Appendix 4) from the 2017 proposal were accepted by the Government and included in the 2018–19 Budget. The Phoenix Hotline was implemented in July 2018 and restricting the voting rights of related party creditors was implemented in December 2018. The draft legislation for the remaining five proposals was released for public consultation between August and September 2018 and was introduced to Parliament on 13 February 2019 and was subsequently referred to the Senate Economics Committee. The Senate Economics Committee is due to report on these bills by 26 March 2019.

35 In November 2009, the Treasury released a proposals paper *Action against Fraudulent Phoenix Activity*. This paper canvassed eight options for possible amendments to taxation law and three options for amendments to corporations' law to address illegal phoenix activity. In the 2009 consultation, 11 areas of reforms were proposed. Three reforms were accepted and implemented through changes to taxation legislation in 2012, and one was progressed through separate reforms (*Tax Laws Amendment (Transfer of Provisions) Act 2010* — security deposits).

Figure 2.2: Key reviews suggesting legislative reform and law reform initiatives since the Phoenix Taskforce was established



Source: ANAO analysis of reviews, reports and Phoenix Taskforce documentation.

Other Phoenix-related legislative changes underway

2.43 Other concurrent processes have also resulted in legislative changes aimed at assisting the Taskforce to more readily address illegal phoenix activity.

2.44 The review of the Fair Entitlements Guarantee Scheme administered by the Department of Jobs and Small Business consulted on a range of measures to address corporate misuse of the scheme in May to June 2017. Draft legislation released in October 2017 includes four new civil penalty provisions, amendments to existing criminal provisions, and an expansion of parties who can initiate civil recovery proceedings. The legislation is currently before the Parliament.

2.45 The Director Identification Number (which supports better matching of director's relationships across companies by government agencies) is being progressed as part of the government's *Modernising Business Registers* process. An initial consultation process was undertaken in July 2017, with a subsequent consultation process conducted from 13 July 2018 to 17 August 2018.³⁶ Consultation on the Exposure draft of legislation closed on 26 October 2018.³⁷ The legislation was introduced to Parliament on 13 February 2019.

Collaboration and coordination

2.46 At the August 2018 meeting of the Taskforce, the ATO proposed that a compendium of tools and strategies be compiled to provide an understanding of member entities roles and powers to address illegal phoenix activity.³⁸ The ATO has also identified other barriers, including:

- reciprocal information sharing arrangements with Taskforce member entities;
- absence of a whole of Commonwealth intelligence repository to host and analyse data; and
- lack of unique identifiers across Commonwealth for data matching and analysis.

2.47 Taskforce member entities advised that barriers to coordination and collaboration include:

- members not having information sharing powers to support intelligence activities;
- difficulty identifying phoenix behaviour (challenges include detecting the behaviour early, determining intent and notifying other Taskforce members of suspected behaviour); and
- difficulty finding relevance as member entities do not have the same focus or do not function on the same scale as Steering Committee members.

2.48 Entities have taken action to address some of these issues. For example, some entities have sought reciprocal information sharing powers to enable sharing with the ATO, while other members have not sought these powers. The Phoenix Taskforce has identified the absence of reciprocal information as a risk to the Taskforce and its strategies, and at times has sought to raise with members the need to address reciprocal arrangements. Such change is dependent on affected member entities seeking legislative change, including government support, on an entity by entity

36 Available from <https://treasury.gov.au/consultation/c2018-t310411/> [accessed 12 December 2018].

37 Available from <https://treasury.gov.au/consultation/c2018-t330649/> [accessed 12 December 2018].

38 In March 2019, the ATO advised the ANAO it was decided at a Phoenix Taskforce meeting in February 2019 that it was impractical to capture and keep current the extensive legislative powers and tools available to each taskforce agency and that the key learnings would be captured and shared in debriefs.

basis, and will be impacted by broader information sharing considerations particularly concerning privacy. The information sharing barrier and its impact on addressing illegal phoenix activity was also identified in the Final Report of the Black Economy Taskforce.³⁹

2.49 Information sharing barriers are a whole-of-government issue that extends beyond the role of the Phoenix Taskforce. Specifically, in March 2017, Productivity Commission Report No. 82, *Data Availability and Use*, proposed the introduction of the Data Sharing and Release Act to create consistent rules for data sharing and release, adopting a risk-based approach, and would authorise the sharing of data within the public sector where legislation is currently a barrier to sharing information.⁴⁰ The Government responded to the proposed Act by indicating it will continue to improve availability and use of data, including streamlining data sharing arrangements, and has committed to taking action in response to a number of recommendations from the report.⁴¹

39 Specifically, the Black Economy Taskforce Final Report indicated a significant issue is that ‘due to insufficient data gathering and sharing of early warning information, regulators are not able to pursue phoenix entities until it is too late and phoenixing has occurred’.

40 Available from <https://www.pc.gov.au/inquiries/completed/data-access/report/data-access.pdf> [accessed 10 December 2018].

41 Available from <http://dataavailability.pmc.gov.au/improving-australias-current-data-system> [accessed 10 December 2018].

3. Strategies and processes to combat illegal phoenix activity

Areas examined

This chapter examines whether the Phoenix Taskforce has effective strategies and processes in place to combat illegal phoenix activities.

Conclusion

The Phoenix Taskforce has developed and is implementing a suite of strategies and processes to combat illegal phoenix activity. This includes commencing 16 Top Phoenix Target operations where agencies from across government work together to address some of the most egregious cases of illegal phoenix activity. Although some successes have been reported, most strategies have only recently been created and it cannot yet be determined if the Taskforce has had a substantial effect in combatting illegal phoenix activity given the size of the problem.

Recommendations and areas for improvement

The ANAO made one recommendation aimed at the ATO using lessons learnt from Top Phoenix Target operations to improve operations in the future (paragraph 3.40). The ANAO also suggests that the ATO monitor newly created industry-based strategies (paragraph 3.13), better define risk and materiality concepts to be applied in selecting Top Phoenix Target operations (paragraph 3.26) and attach timeframes to key deliverables in Top Phoenix Target operational plans (paragraph 3.36).

Does the Phoenix Taskforce have effective strategies and processes in place to address potentially illegal phoenix activities?

The Phoenix Taskforce, through the work of the ATO, has developed a suite of strategies and processes to address illegal phoenix activities across the regulatory spectrum of educate, engage and enforce. While there have been some successes, most strategies have not been in place long enough to produce significant impacts. The Australian Securities and Investments Commission developed its own strategy, which focused on addressing illegal phoenix activity in its role as a corporate regulator. No other Phoenix Taskforce members reported having specific strategies or processes to address illegal phoenix activity.

3.1 The ATO has included phoenix risk as a business, enterprise and strategic risk. Under its enterprise risk management framework, the ATO addresses risk by developing, reporting on and evaluating strategies to mitigate risk. Strategies identified for addressing the phoenix risk in 2011–12 included improving relationships with key internal and external stakeholders (including other government agencies), which would lead to greater levels of collaboration in strategy design, risk mitigation and intelligence exchanges. A key achievement in that year was the establishment of the Inter-Agency Phoenix Forum, as well as promoting phoenix risk through other internal and external forums such as the ATO — ASIC Liaison Forum. Between 2012 and 2018, the ATO further developed existing phoenix strategies and introduced a range of new strategies to address the phoenix risk. Similarly, in 2013 ASIC considered that phoenix was a sufficiently significant issue to develop an ASIC Phoenix Strategy, with the first step being to establish a Phoenix Working Party (now Phoenix Committee). ASIC introduced its first Phoenix Work Program in 2015–16.

3.2 The ATO has made the major contributions to developing and implementing strategies for the Inter-Agency Phoenix Forum and Phoenix Taskforce, and considers that all its phoenix activity contributes to broader government approaches to dealing with the phoenix risk. ASIC has also developed strategies to address the phoenix risk (as discussed above and in paragraph 3.17). Unlike the ATO, ASIC does not view its business as usual activities as constituting the Phoenix Taskforce's body of work.⁴² No other taskforce entities have explicit phoenix strategies.

3.3 The most comprehensive phoenix strategy is the overarching *Phoenix Strategy* developed by the ATO and endorsed by the Phoenix Taskforce in February 2018. While focusing on the ATO, the strategy recognises the various contributions across the ATO and partner agencies to dealing with Phoenix activities.

3.4 The *Phoenix Strategy* contains a work program overview, timeline of activities, opportunities for law reform and innovation, and an outcome and evaluation framework. It also contains additional guidance on the ATO's approach to addressing illegal phoenix activity, such as governance arrangements and plans supporting the strategy.⁴³

3.5 The *Phoenix Strategy* adopts an 'outcomes logic approach'⁴⁴ that focuses on the achievement of five key outcomes (four intermediate and one strategic outcomes). The outcomes were designed in December 2015 as part of an *Inter-Agency Phoenix Taskforce Evaluation Framework*, and endorsed by the Phoenix Taskforce Steering Committee in September 2017. The outcomes are:

- businesses are aware of and comply with legislative requirements;
- agencies collaboratively identify at risk businesses and connect with them to encourage compliance;
- cyclical phoenix operators have their business model disrupted and are either brought back into the system, removed from the business environment or penalised;
- incentives to participate in phoenix activities are removed and there is greater business and consumer confidence; and
- there is a reduction in the incidence and impact of phoenix (the ultimate outcome).

3.6 Consistent with established regulatory models that emphasise the link between non-compliance risk and regulatory action,⁴⁵ the outcomes align with the key approaches of

42 ASIC advised the ANAO that the majority of its activities in addressing Illegal phoenix activity have been own-initiative activities, most of which pre-date the Taskforce's operational activities. In this context, ASIC reports on all its activities that impact illegal phoenix activity, regardless of them being Taskforce or own-initiative activities.

43 The February 2018 strategy remedied a number of shortcomings identified by the ATO in its previous approach underpinned by the ATO *Phoenix Strategic Approach 2015–2020*. These included that it did not align activities and desired outcomes, did not contain robust outcomes-based key performance measures, and was not regularly or holistically reported against to management.

44 An outcomes logic approach describes a strategy in terms of the needs to be addressed; objectives to be achieved; resources and activities needed to achieve the stated objectives; and expected benefits and outcomes.

45 One such model is the Ayres & Braithwaite compliance pyramid (see I Ayres and J Braithwaite, *Responsive Regulation*, Oxford University Press, New York, 1992). The model emphasises a dynamic approach to regulation, whereby sanctions increase in alignment with the severity of the offence.

educate, engage and enforce.⁴⁶ Table 3.1 outlines the link between regulatory approach, risk and relevant Phoenix Taskforce plans or activities.

Table 3.1: Relationship between regulatory approach, risk and action

Approach of the Phoenix Strategy	Non-compliance risk posed by population	Plans or activities
Educate ^a	Low, medium and high	<p><i>Quantification</i> — measure the level of illegal phoenix activity in Australia (for example, through Melbourne University and PricewaterhouseCoopers research).</p> <p><i>Awareness</i> — facilitate understanding of illegal phoenix activity, including its precursors, damage to the Australian economy and avenues to report it.</p> <p><i>Education</i> — inform companies and directors of their financial obligations through social media, the ATO website, videos, events and external presentations.</p> <p><i>Information sharing</i> — share data with Taskforce members to identify companies displaying phoenix risk factors.</p>
Engage ^b	Medium	<p><i>Detection</i> — use data and intelligence to identify companies, directors and others (such as facilitators and promoters) displaying phoenix risk factor.</p> <p><i>Information sharing</i> — refer matters and intelligence between Taskforce members to enable action in accordance with member's powers.</p> <p><i>Industry strategies</i> — target industries at risk through pre-emptive engagement.</p> <p><i>Compliance activities</i> — encourage compliance through increased contact, audits, investigations and scrutiny of the company, director or other person displaying phoenix risk factors.</p>
Enforce ^c	High	<p><i>Operations</i> — Phoenix Taskforce cross-agency operations that target high-risk phoenix operators.</p> <p><i>Compliance activities</i> — monitor compliance through ongoing contact, enhanced reporting (such as monthly rather than quarterly Business Activity Statement reporting) and audits or investigations of the company or director.</p> <p><i>Enforcement (administrative)</i> — including director disqualification, company deregistration and issuance of statutory notices or fines, disciplining of registered liquidators and actions against advisers.</p> <p><i>Enforcement (civil)</i> — including civil penalties under the <i>Corporations Act 2001</i>.</p> <p><i>Enforcement (criminal)</i> — including criminal charges and prosecution under the <i>Criminal Code</i>.</p> <p><i>Law reform</i> — enhance legal powers to combat illegal phoenix activity.</p>

Note a: The educate strategy operates broadly and extends to medium and high-risk populations, as well as to facilitators, professional bodies and industry associations.

⁴⁶ However, as discussed in Chapter 4, the outcomes are not contained in the Phoenix Charter and do not link to the Charter's stated purposes or goals in the Evaluation Framework. Under the Evaluation Framework, the approaches of educate, engage and enforce are defined as output groups.

Note b: The engagement strategy operates broadly and is directed at entities involved in illegal phoenix activity, promoters and facilitators, as well as professional bodies and industry associations.

Note c: The enforcement strategy is directed to entities involved in illegal phoenix activity and extends to promoters and facilitators (for example, deregistration of liquidators). Enforcement activities include state-based civil and criminal remedies.

Source: ANAO analysis.

Implementation of educate, engage and enforce approaches

3.7 By addressing illegal phoenix activity through the risk-related approaches of educate, engage and enforce, the ATO has taken a broad regulatory approach to the problem. Under each approach, the ATO has developed a number of sub-strategies and plans. While some of these focus on a specific risk population, others operate broadly and cut across populations.

3.8 Table 3.2 shows the ATO's strategies and plans, their implementation status and the approach they align to as at November 2018. Most of these are branded as specific to the ATO, while others are branded for the Phoenix Taskforce.

Table 3.2: The ATO's phoenix strategies and plans (November 2018)

Strategy/work plan item	Date of approval	Branded as ATO or Taskforce	Date implemented	Completion or review date	Educate, engage, enforce
Phoenix Strategy	February 2018	ATO	February 2018	Ongoing	All
Phoenix [staff] Capability Strategy	January 2018	Phoenix Taskforce	Not clear	November 2018 ^a	Educate
Phoenix Research Partnerships	Ongoing	ATO	Ongoing	Ongoing	Educate
Communications Strategy ^b	Undated	ATO	July 2018	June 2019	Educate and engage
Law Reform Strategies	Ongoing	Taskforce	Ongoing	Ongoing	Educate and enforce
Phoenix Early Intervention Strategy	May 2018 ^c	ATO	December 2008 ^c	July 2019	Engage
Facilitators and Promoters Strategy	October 2018	ATO	October 2018	June 2019	All
Labour Hire Strategy	September 2018 (draft)	ATO	Not yet implemented	December 2019	Engage
Property and Construction Strategy	October 2018 (draft)	ATO	Not yet implemented	June 2019	All
GST Disengaged Property Developers Strategy	Ongoing	ATO	Ongoing	Ongoing	Engage and enforce

Strategy/work plan item	Date of approval	Branded as ATO or Taskforce	Date implemented	Completion or review date	Educate, engage, enforce
ATO Business as Usual Compliance Program	Ongoing ^d	ATO	Ongoing	Ongoing	Engage and enforce
Top Phoenix Targets Strategy	February 2017 ^e	Taskforce	November 2017	Ongoing	Enforce and engage

Note a: From December 2018, staff capability has been undertaken as part of the ATO's broader Tax Evasion and Crime staff capability development program, which identifies phoenix as a priority topic.

Note b: Phoenix Communications Strategies are developed on an annual basis. The reference in Table 3.2 is to the 2018–19 version of the strategy.

Note c: The first iteration of the Phoenix Early Intervention Strategy was in December 2008, with several iterations since. The most recent iteration is the May 2018 version.

Note d: The ATO's business as usual compliance program is discussed further at paragraph 3.29.

Note e: The Phoenix Taskforce Top Target Strategy is discussed further at paragraph 3.33.

Source: ANAO analysis of ATO documents.

3.9 As shown in Table 3.2, the strategies and plans (under the approaches of educate, engage and enforce) have varying implementation and review dates. The status of individual plans is discussed in further detail below.

Educate strategies

3.10 Since 2012, the ATO has implemented annual communications strategies aimed at raising awareness of illegal phoenix activity within the community. Recent evaluations have found that communication strategies have been successful in building awareness of illegal phoenix activity.⁴⁷ Moving forward, the Phoenix Taskforce has committed to developing a cross-agency communications strategy to promote the Taskforce and its work. A key platform for education involves entities linking their website to the Taskforce website — a number of entities have linked their sites to the Taskforce website, including ASIC.

3.11 As part of the Phoenix Taskforce's law reform strategy, it submitted a draft proposal for a suite of legislative reforms in February 2017. As discussed in Chapter 2, the reforms underwent a stakeholder consultation process during August and September 2018, with the Treasury⁴⁸ considering the results of that process. The ATO also worked with stakeholders through research initiatives, such as the Melbourne University's series of publications on illegal phoenix activity.⁴⁹

3.12 There have also been iterations of a Phoenix Staff Capability Strategy, with the most recent in January 2018. These strategies aim to equip staff with the technical expertise to respond effectively to the risk of illegal phoenix activity. From December 2018, staff capability is being

47 Indicators of awareness included more than three million individual impressions across all advertising platforms in 2017–18 and increased phoenix referrals to the ATO from the public during peak communications.

48 The Department of the Treasury is responsible for taxation-related law reforms.

49 H Anderson, A O'Connell, I Ramsay, M Welsh and H Withers, *Defining and Profiling Phoenix Activity*, Melbourne University, 2014; H Anderson, A O'Connell, I Ramsay, M Welsh and H Withers, *Quantifying Phoenix Activity: Incidence, Cost, Enforcement*, Melbourne University, 2015; H Anderson, I Ramsay, M Welsh and J Hedges, *Phoenix Activity: Recommendations on Detection, Disruption and Enforcement*, 2017.

addressed as part of the ATO's broader Tax Evasion and Crime staff capability development program, which identifies phoenix as a priority area.

Engage strategies

3.13 As shown in Table 3.2, the ATO has recently developed strategies that address industries with a heightened risk of illegal phoenix activity. Specifically, the Facilitators and Promoters, Labour Hire and Property and Construction Strategies were developed in 2018. As at November 2018, only the *Facilitators and Promoters Strategy* had been approved, with the other two strategies still in draft and awaiting approval. Documents provided indicate that the ATO has attempted to address illegal phoenix activities in these industries since at least 2016, although these efforts were haphazard and not supported by formal strategy documents. In the absence of structured performance monitoring arrangements, it is difficult to establish if the activities were effective or if they contributed to achieving desired outcomes. Moving forward, the ATO should monitor its newly created industry-based strategies to obtain a baseline from which future work can be progressed.

3.14 The ATO also has a longstanding Phoenix Early Intervention Strategy for engaging businesses at-risk of phoenixing, with various iterations in place since 2008. Under the strategy, 270 cases were conducted from 2016–17 to late 2018, with more than \$10 million in liabilities raised. A specific focus of the ATO has been addressing goods and services (GST) tax non-compliance in the real property and property construction sectors, where there is a history of companies phoenixing to avoid payment of liabilities.⁵⁰ The GST Disengaged Property Developers Strategy has had initial successes in raising additional liabilities following reviews and audits of operators in the sector. The ATO has strengthened its approach to non-compliance through the introduction of the GST on Settlement Program from 1 July 2018.

3.15 The ATO did not effectively implement the Phoenix Watchlist, an initiative funded in the 2013–14 budget to provide a single risk model across government.⁵¹ The Phoenix Watchlist was established in January 2015, however, in September 2017 it was agreed that it be decommissioned as it was not meeting expectations, primarily due to information barriers and lack of use (its most recent use by a Phoenix Taskforce member was in November 2015). The ATO advised the ANAO that Phoenix Watchlist data was still available, but access to the Watchlist ceased in September 2017, as it required portal access, which was not available to member agencies. The ATO has implemented other measures to alert taskforce members to potential phoenix operators, such as the Phoenix Risk Model and Registration Watch.

Enforce strategies

3.16 The Phoenix Taskforce's enforcement strategies are discussed from paragraph 3.29.

Other Phoenix Taskforce member strategies

3.17 Apart from the ATO, ASIC had the most deliberate approach to addressing illegal phoenix activity of all Phoenix Taskforce members. ASIC, as the government's corporate regulator, focuses on phoenix behaviour as it relates to misconduct by directors, liquidators and other financial service

50 There is a history of Phoenix Property Developers using complex business structures and industry knowledge to evade taxation obligations. This includes taxpayers with repeated insolvencies and debt write-offs.

51 Australian Government, Budget Measures: Budget Paper No. 2: 2013–14, Commonwealth of Australia, Canberra, 2013, p. 43.

operators, or where it relates to deliberate misuse of the corporate form. ASIC develops its own annual business plan to address phoenix behaviour, which is tailored to its specific areas of interest.⁵²

3.18 Although ASIC completes its own work, it has regularly worked with the ATO (and other Phoenix Taskforce members) on Phoenix Taskforce projects. ASIC contributed to the ATO-led phoenix law reform submission to Government, is involved in many of the Phoenix Taskforce Top Phoenix Target operations and has worked with the ATO on a Data Fusion Project to better identify persons involved in illegal phoenix behaviour.⁵³

3.19 The ANAO met with the majority of other members of the Phoenix Taskforce in October 2018 and confirmed that they did not have specific strategies to address potential illegal Phoenix activity. The ATO advised the ANAO in January 2019 that there are opportunities to engage the broader Taskforce membership in the development of strategies, and that this is already occurring in relation to labour hire, promoters and facilitators, and property and construction.

Does the Phoenix Taskforce have effective processes for selecting compliance and enforcement cases and making referrals to other bodies such as the Serious Financial Crime Taskforce?

The Phoenix Taskforce has mostly effective risk-based processes for the selection of matters that are referred for compliance and enforcement activities. The ATO's risk-based processes are used to identify matters to be referred to the Phoenix Taskforce's Intelligence and Operational Working Groups. However, the Working Groups do not have further risk and materiality concepts to apply when selecting suitable individuals to become Top Phoenix Targets. Where phoenix matters involve potential breaches of criminal law, the Phoenix Taskforce, through the ATO, has established processes for referring the matter for treatment.

3.20 Since March 2014, the ATO has identified and rated the risk of potential illegal phoenix operators through a Phoenix Risk Model. In accordance with a set of defined business rules, the model produces a profile that enables the ATO to tailor its activities depending on the risks presented by the population. The Phoenix Risk Model operates alongside intelligence gathering activities⁵⁴ to provide the ATO with information to tailor its anti-phoenix activities.

3.21 The Phoenix Risk Model was reviewed by PricewaterhouseCoopers in October 2015. The review found that the model was logical, evidence-based and defensible in its construction when used as an intelligence tool. Notwithstanding, PricewaterhouseCoopers made 12 recommendations for the model's improvement, which have resulted in modifications being made and tested. The ATO confirmed that it is developing risk rules that will allow it to better target specific potential

52 Australian Securities and Investments Commission, *2017–18 ASIC business plan summary Illegal Phoenix Activity* [Internet], available from <http://download.asic.gov.au/media/4530962/business-plan-summary-2017-18-illegal-phoenixing-activity.pdf> [accessed February 2019].

53 The Data Fusion Project aimed to 'Trial joint use of data, technology, processes and analytics by fusing ATO and ASIC data sets in new ways to deliver improved analytical outcomes, including improved match rates.'

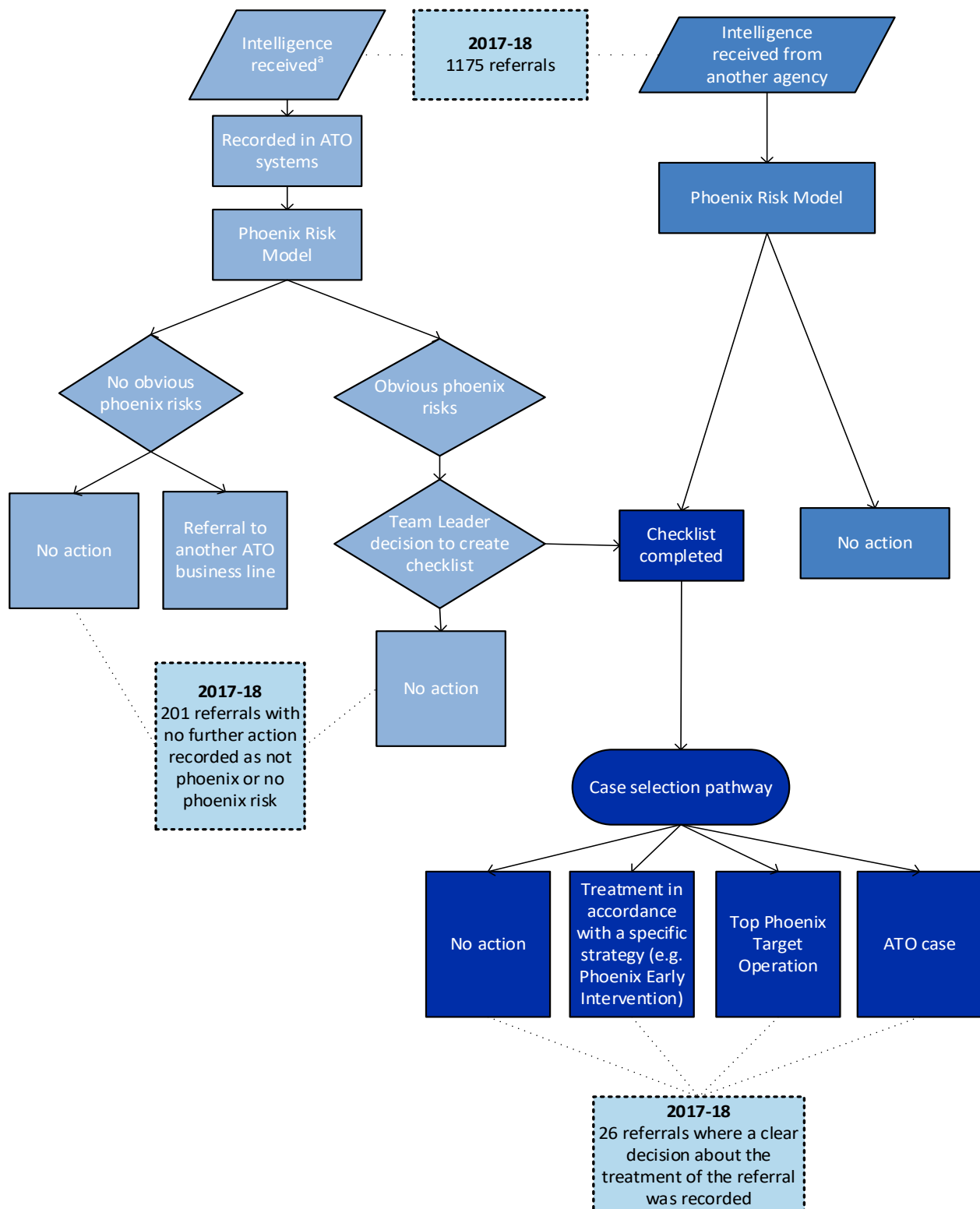
54 Other intelligence gathering includes information from the public (for example, through the Phoenix Hotline), other Taskforce members, third parties (such a liquidator reports) and other internal ATO business lines.

phoenix cohorts, including more accurately identifying cases requiring treatment in accordance with established plans and strategies.

3.22 Following identification of a potential phoenix operator through the Phoenix Risk Model⁵⁵ or intelligence gathering activities, the ATO uses business as usual processes to determine how the matter will progress. In May 2018, the ATO established a Phoenix Referral Pathway and Phoenix Triage Procedure to support consistency in the way it assesses Phoenix matters. Following initial assessments, a decision to deal with the matter in-house, via the Phoenix Taskforce, or to take no further action is made (see Figure 3.1).

55 The Phoenix Risk Model indicates that phoenix activity may be occurring, and further investigation, review and/or audit is required to confirm that phoenix activity has occurred.

Figure 3.1: Overview of the process leading to treatment of potential illegal phoenix activity



Note a: Intelligence received includes referrals from the community (for example, through the Tax Evasion Reporting Centre and the Phoenix Hotline), from other ATO business lines via the Phoenix inbox, as well as from liquidators, intermediaries and other third parties.

Source: ANAO, based upon ATO documents.

3.23 As shown in Figure 3.1, only a small percentage of referrals proceeded to the case selection pathway. For example, in 2017–18 only 227 of 1175 (19 per cent) were progressed to consideration of case selection, and of these 201 (89 per cent) received no further action (see Table 3.3). In 2017–18, only 26 referrals (2 per cent) resulted in either a case being created by the ATO Phoenix Team, referral to another area of the ATO, referral to the Phoenix Case Team or no further action because they were already a phoenix matter.

Table 3.3: The ATO's internal reporting of Phoenix referrals

Number of referrals	2015–16	2016–17	2017–18
Total phoenix referrals to the ATO	557	736	1175
Total with a phoenix risk rating	142 ^a	284	378
Total actioned ^b	76	51	227
Progressed ^c	47	34	26
Not progressed ^d	29	17	201

Note a: In 2015–16, the ATO recorded the priority of the referral as low, medium or high. It did not refer to a Phoenix risk rating.

Note b: Total actioned is the number of referrals where the ATO recorded taking a clear action in relation to the referral.

Note c: Matters progressed include where a case was created, where a case had already been established prior to the referral or where the matter was on-referred to another ATO business line.

Note d: Matters not progressed include where there was no phoenix risk identified or the risk was insufficient to justify further action.

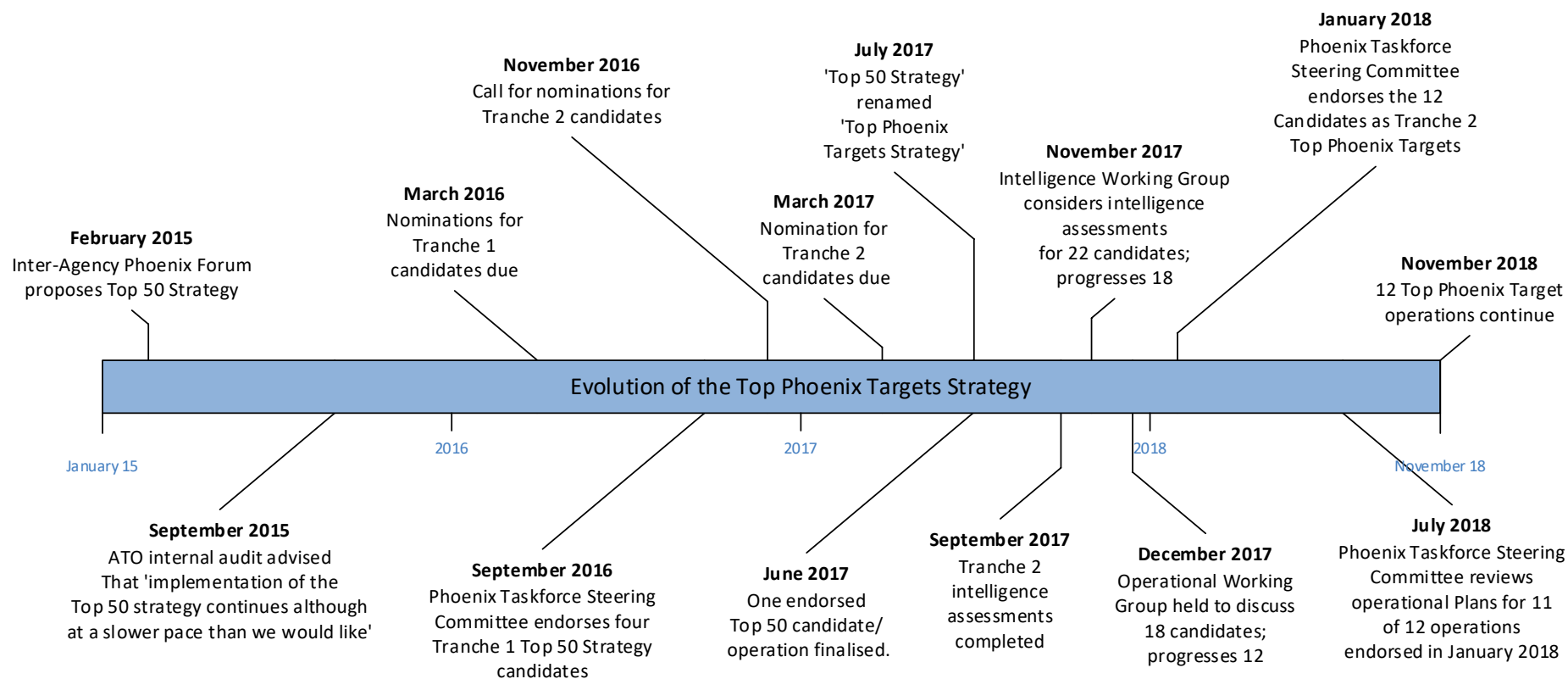
Source: ANAO analysis of ATO's phoenix referrals spreadsheet provided by ATO in August 2018.

Selection of Taskforce matters

3.24 With the Phoenix Taskforce becoming increasingly operational,⁵⁶ it has designed and implemented a Top Phoenix Targets Strategy to mitigate and deter high-risk operators engaging in illegal phoenix activity. Operations conducted under the Top Phoenix Targets Strategy involve Commonwealth and State Government agencies working together to address targets under a whole-of-government approach. The evolution of the Top Phoenix Targets Strategy is shown in Figure 3.2. An initial list of 110 phoenix targets was refined to 22 Top Phoenix Targets presenting the highest risk, involving 1120 insolvency events, 22 bankrupt individuals, \$1.2 billion owed to creditors and \$508.8 million owed to Government. Implementation of the strategy led to four candidates being endorsed to become operations in September 2016 (although one of these matters was finalised in June 2017), with a further 12 operations endorsed in January 2018.

⁵⁶ The increasing operational focus included, in August 2016, introducing an Operational Working Group and the Phoenix Taskforce Steering Committee to oversight operational matters (see paragraphs 2.8 and 2.15).

Figure 3.2: Evolution of the Top Phoenix Targets Strategy (January 2015 to November 2018)



Source: ANAO, based upon ATO documentation.

3.25 For a matter to be selected as a Top Phoenix Target it must be high-risk, as determined by meeting at least one of the following criteria:

- candidate has a high media profile;
- candidate has been highlighted as a phoenix risk by five or more Phoenix Taskforce members; or
- candidate is of high significance to two or more of the following entities: ATO, Australian Criminal Intelligence Commission, Australian Federal Police, ASIC, Fair Work Ombudsman and the Department of Jobs and Small Business.

3.26 Potential matters are referred by individual Taskforce members, including the ATO, and are then analysed by the ATO for relevance to the above criteria.⁵⁷ Matters that satisfy the criteria undergo a comprehensive intelligence assessment,⁵⁸ which is disclosed to likely operation members and an Intelligence Working Group.⁵⁹ The Intelligence Working Group escalates matters it considers appropriate to an Operational Working Group,⁶⁰ which in turn escalates matters to the Phoenix Taskforce Steering Committee for endorsement. The need for an Intelligence Working Group and an Operational Working Group with overlapping roles is not clear, with the ATO advising that there may be no role for the Intelligence Working Group moving forward. There is also opportunity for the ATO to better define the risk and materiality concepts to be applied by working groups to ensure that the most suitable individuals become Top Phoenix Targets. As discussed in Chapter 2, current guidance allows matters to progress 'if appropriate'.

Referral of cases identifying potentially criminal behaviour

3.27 Where potentially criminal behaviour is identified, either through business as usual or Top Phoenix Target compliance activity, the matter (or a part thereof) should be referred to the appropriate area or external body to handle. A benefit of cross-agency Top Phoenix Target operations (discussed from paragraph 3.33 onwards) is that they bring together a range of government agencies, each with their own powers to address illegal phoenix behaviours. Member entities (such as the ATO, ASIC, the Australian Federal Police and state law enforcement agencies) have criminal investigation powers. ATO criminal investigations can be referred to its internal Criminal Investigations Team, the Serious Financial Crime Taskforce⁶¹ or the ATO's Complex Investigations Team (a joint initiative between the ATO and the Australian Federal Police). The ATO advised the ANAO that as at November 2018, the Phoenix Taskforce had made 10 referrals to

57 The tranche 1 (commenced March 2016) request for nominations resulted in the identification of 380 potential targets, of which 23 were matched as having multi-agency risks. Four matters were endorsed by the Phoenix Taskforce Steering Committee for tranche 1. Tranche 2 (commenced March 2017) nominations resulted in 305 potential targets, of which 110 were matched as have multi-agency risks. Twelve matters were endorsed by the Phoenix Taskforce Steering Committee for this tranche.

58 The intelligence assessment is developed by the ATO using internal information sources and information disclosed by other Taskforce members.

59 The inter-agency Intelligence Working Group 'assesses intelligence for strategies such as Top Phoenix Targets making recommendations about those to progress to a possible whole-of-government treatment strategy', see Table 2.2.

60 The Operational Working Group 'outlines the possible treatment strategies for candidates within the taskforce', see Table 2.2.

61 Illegal phoenix activity is a priority of the Serious Financial Crime Taskforce.

the ATO's Criminal Investigations Team, six referrals to the Serious Financial Crime Taskforce⁶², and four referrals to the Complex Investigations Unit. At the same time, the Serious Financial Crime Taskforce had endorsed investigations for three of the referrals from the Phoenix Taskforce and endorsed 15 matters relating to illegal phoenix behaviour. The ATO advised that complex criminal, civil penalty and/or recovery action before the courts may take several years to finalise.

3.28 Prosecution powers are reserved to Commonwealth and state Directors of Public Prosecutions, although some Taskforce entities, including ASIC and the ATO, can prosecute certain administrative and civil offences. Members of a Top Phoenix Target operation can coordinate criminal investigations to enhance the likelihood of achieving a successful prosecution, and have done so as reported in Chapter 4. Table 4.4 indicates that the Taskforce had contributed to 12 criminal convictions from 16 criminal prosecutions as at February 2019.

Has the Phoenix Taskforce effectively progressed its compliance, enforcement and prosecution activities?

The ATO, as the lead entity of the Phoenix Taskforce, and ASIC both manage programs of business as usual compliance activities. Under these programs, in 2017–18: the ATO completed 340 reviews and audits of phoenix operators and collected \$190 million in cash (which was a large increase on \$17 million collected in 2014–15); and ASIC completed 53 investigations and banned 45 company directors relating to illegal phoenix activities. Since adopting an operational focus in August 2016, the Phoenix Taskforce has commenced 16 cross-entity operations under its Top Phoenix Targets Strategy, which target some of the most egregious illegal phoenix operators. These operations have had initial successes, such as in raising liabilities and issuing garnishees, but have not run their course in progressing through civil or criminal enforcement and prosecution activities.

3.29 The ATO's Phoenix Team within the Private Groups and High Wealth Individuals business line performs an annual program of reviews and audits of potential phoenix operators. These business as usual compliance activities have produced a significant increase in liabilities raised and cash collected over the past two years, as shown in Table 3.4.

Table 3.4: The ATO's Private Groups and High Wealth Individuals phoenix compliance program^a

Year	Reviews and audits	Liabilities raised \$ million	Cash collected \$ million
2014–15	226	\$109.7	\$17
2015–16	174	\$187.4	\$41
2016–17	341	\$250.0	\$104
2017–18	340	\$274.6	\$190

Note a: In March 2019, the ATO advised that Private Groups and High Wealth Individuals raised liabilities of over \$925 million and returned around \$371 million in cash to the community and completed over 1,230 audits and reviews for the Phoenix Taskforce from inception (November 2014) to 31 December 2018.

Source: ATO advice.

62 The ATO and ASIC also make referrals to the Serious Financial Crime Taskforce, separate from the Phoenix Taskforce referrals.

3.30 Other ATO business areas also address illegal phoenix activity through business as usual functions.⁶³ An example of this is the ATO Debt Team, which manages debt owed to the ATO. The Debt Team collects debts owed to the ATO by illegal phoenix operators, and put in place a number of specific phoenix-related debt strategies to address the risks posed by phoenix operators (for example, a higher risk of insolvency).

3.31 ASIC's business as usual compliance program involves enforcement action against registered liquidators, directors, companies and facilitators potentially involved in illegal phoenix activity. Outcomes of ASIC's enforcement activities to address illegal phoenix activity between August 2013 and 1 September 2018 are summarised in Table 3.5. In 2017–18, ASIC completed 53 investigations (including joint operations with the ATO) focused on illegal phoenix activity. ASIC also undertakes more general work such as in disqualifying directors of multiple failed companies and prosecuting people who do not keep appropriate records following reports to ASIC from registered liquidators.

Table 3.5: ASIC enforcement action outcomes against illegal phoenix activity and pre-insolvency advisors

Type of enforcement action	Outcomes against registered liquidators, company directors, companies and facilitators (August 2013 to September 2018)
Court proceedings commenced	Two registered liquidators (seeking a Court inquiry). Four company directors charged with breaching their director duties or engaging in fraudulent conduct.
Court decisions	Five registered liquidators (including prohibition, removal and suspension). Two company convictions (failing to produce books to ASIC). Twenty company directors convicted of breaching their director duties or engaging in fraudulent conduct.
Companies Auditors and Liquidators Disciplinary Board decisions	Five registered liquidators (including suspension, cancellation or admonishment).
Enforceable undertakings	Seven registered liquidators (including prohibition and quality reviews).
Director banning	In 2017–18, ASIC banned 45 company directors, many of whom it suspected were involved in illegal phoenix activity.
Liquidator assistance program	In 2017–18, ASIC prosecuted 382 individuals for 734 offences for failure to keep appropriate books and records, which can be a risk indicator for illegal phoenix activity.

Source: ASIC Briefing Paper, October 2018.

3.32 Notwithstanding the increased compliance activity and results from the ATO's Phoenix Team in the past two years, the total amount of compliance activity in the ATO, ASIC and through the Taskforce operations (15 cases⁶⁴ discussed below) is not high in relation to the population of

⁶³ In March 2019, the ATO advised that other areas of the ATO had raised liabilities of over \$260 million and returned over \$141 million in cash to the community and completed over 2,210 audits and reviews relating to phoenix activity from inception (November 2014) to 30 June 2018.

⁶⁴ The Top Phoenix Targets Strategy focused on some of the most significant cases of illegal phoenix activity, as outlined in paragraph 3.24.

individuals potentially involved in illegal phoenix activity. The ATO has estimated this population to be more than 33,000 potential illegal phoenix operators in 2017.⁶⁵ As discussed in Chapter 1 and further in Chapter 4, PricewaterhouseCoopers estimated the annual direct impact of illegal phoenix activity to be between \$2.85 billion and \$5.13 billion for 2015–16. The compliance caseload reflects the resourcing priorities of Phoenix Taskforce members.

Top Phoenix Targets operations

3.33 As mentioned previously, the Phoenix Taskforce has developed and is implementing a Top Phoenix Targets Strategy to address egregious phoenix operators. The strategy involves conducting cross-entity operations, whereby Phoenix Taskforce members work collaboratively to take action against the target. Phoenix Taskforce members with an interest in the target opt-in to the operation, with a commitment to sharing information and working towards shared outcomes. Under the current model, operation members do this through business as usual activities, according to their own legislative powers and responsibilities.⁶⁶ The benefits of conducting cross-entity operations include:

- members have greater access to information;
- the ability to identify, and use a broad range of powers to combat, wrongdoing across Commonwealth and State Government; and
- Taskforce members, phoenix operators and the public seeing illegal phoenix activity being dealt with on a practical level, using a whole-of-government approach.

3.34 As at November 2018, there were 12 active Top Phoenix Target operations with three more having been completed or ceased.⁶⁷ The ATO has led or leads all current operations, with 16 other Phoenix Taskforce members participating in at least one operation. A summary of the 15 operations that were active in 2018 is contained in Table 3.6.

Table 3.6: Top Phoenix Target operations

Operation ^a	Number of Taskforce members?	Plan ^b	Plan date	Industry	Status
A	3	✓	October 2016	Labour Hire and Property & Construction	Operation ceased
B	4	✓	May 2017	Property & Construction	Ongoing
C	6	✓	June 2017	Financial & Insurance services	Completed
D	4	✓	April 2018	Professional Services	Ongoing
E	4	✓	April 2018	Property & Construction	Operation ceased
F	6	✓	June 2018	Property & Construction	Ongoing

65 Estimates are based upon the Phoenix Risk Model and other information available to the ATO. Inclusion in the estimate does not mean that the ATO has assessed the taxpayer as an illegal phoenix operator. This can only be confirmed through further investigative action (for example, reviews and audits of the taxpayer's affairs).

66 For example, if considered appropriate to the circumstances, ASIC will remove or sanction a registered liquidator and that action feeds into the overall operation plan.

67 One operation was completed, with the remaining two being ceased prior to completion.

Operation ^a	Number of Taskforce members?	Plan ^b	Plan date	Industry	Status
G	4	✓	June 2018	Labour Hire and Transport	Ongoing
H	4	✓	June 2018	Property & Construction	Ongoing
I	5	✓	June 2018	Labour Hire	Ongoing
J	5	✓	July 2018	Professional Services	Ongoing
K	5	✓	July 2018	Labour Hire and Property & Construction	Ongoing
L	6	✓	July 2018	Other	Ongoing
M	4	✓	July 2018	Transport	Ongoing
N	5	✓	July 2018	Professional Services	Ongoing
O	5	✓	July 2018	Property & Construction	Ongoing

Note a: Operation names have been omitted.

Note b: One matter endorsed as a Phoenix Taskforce matter has been omitted from the table as, upon further ATO investigation, it was identified that the matter was based on inaccurate data. The matter was finalised by the Phoenix Taskforce Steering Committee prior to it endorsing an operational plan on 30 June 2017.

Source: ANAO analysis of Top Phoenix Target operational plans and status reports.

3.35 Top Phoenix Target operations are underpinned by an operational plan. These plans have elements of the key approaches of educate, engage and enforce, although the nature of targets has meant that the focus of operations is more at the engage and enforce end of the spectrum in practice.⁶⁸ Guidance and templates have been developed to help ensure plans contain sufficient detail and are fit for purpose, with limited additional oversight provided by the Phoenix Taskforce Steering Committee.⁶⁹ All active operation members are expected to contribute to the operational plan, which captures the operation's profile, desired outcomes, deliverables, resourcing and risks.

3.36 Operational plans for Top Phoenix Target operations were of a good standard. For the 15 operational plans observed, all bar one was completed in accordance with Phoenix Taskforce guidance. Key deliverables of the plans were particularly clear and provided a set of actions expected of members to address the target, although these would benefit from consistently attaching a timeframe for completion.

Success of Top Phoenix Target Operations

3.37 From the outset, operations are required to identify the likely wrongdoing by the target(s), including anticipated legislative breaches. This is contained in the Operation Plan, as are the treatment options for Taskforce members. These are in the form of administrative, civil and criminal actions (see Table 3.7).

68 Education is relevant where dealing with people who have inadvertently found themselves involved in the wrongdoing, such as dummy directors.

69 The Phoenix Taskforce Steering Committee provides a limited level of oversight of the Top Phoenix Target Operations. As each agency involved in an operation remains subject to their own responsibilities and governance structures, the Steering Committee has adopted an advisory-only function in relation to operations. Quarterly updates are provided to the Steering Committee for each operation.

Table 3.7: Likely actions against Top Phoenix targets

Operation	Number of Taskforce member entities	Administrative	Civil	Criminal	Number of Taskforce member entities proposing action
A	3	●	●	●	0 ^a
B	4	●	●	●	1
C	6	●	●	●	1 ^b
D	4	●	●	●	1
E	4	●	●	●	0 ^a
F	6	●	●	●	3
G	4	●	●	●	3
H	4	●	●	●	3
I	5	●	●	●	2
J	5	●	●	●	3
K	5	●	●	●	2
L	6	●	●	●	4
M	4	●	●	●	4
N	5	●	●	●	4
O	5	●	●	●	4

KEY: ● Completed, in progress or highly likely ● Possibility of action ● Highly unlikely

Administrative penalty: An action or decision, usually regulatory in nature, taken by a government body. An example is a financial penalty applied due to a taxpayer failing to give a return, notice, statement or other document to the ATO in the approved form by a particular date under section 286-75 of the *Taxation Administration Act 1953*.

Civil penalty: An order imposed by a court against a person who has breached a civil penalty provision. An example is a financial penalty (of up to 250 penalty units for individuals and 1250 penalty units for a body corporate) for a person providing tax agent service while unregistered under section 50-5 of the *Tax Agent Services Act 2009*.

Criminal penalty: An order imposed by a court against a person who has breached the criminal law. An example is a fine of up to 2000 penalty units and/or imprisonment for up to 5 years, for breaching a director's duty to prevent insolvent trading under section 588G(3) of the *Corporations Act 2001*.

Note a: Ceased as a Top Phoenix Target operation, however, ATO-only administrative action continued.

Note b: Completed as a Top Phoenix Target operation, but actions continued.

Source: ANAO analysis, based upon meetings with Top Phoenix Target Operation Leads and Top Phoenix Target Operational Plans.

3.38 During the audit, the ANAO met with 11 Top Phoenix Target operation leads. All operation leads felt that their operation was on track to achieve success, highlighting a number of initial successes, both in addressing targets and in coordinating a whole-of-government approach to a shared problem. Initial successes include:

- raising significant liabilities against targets;
- issuing garnishees;

- performing access without notice actions;
- agreeing to an enforceable undertaking under section 93AA of the *Australian Securities and Investments Commission Act 2001*;
- achieving convictions against targets for breaches of the *Corporations Act 2001*; and
- holding public examinations of targets and other persons of interest.

3.39 However, it remains too early to judge whether operations have achieved their desired strategic outcomes. In the period since the February 2015 inception of the Top Phoenix Targets Strategy only one operation has been completed (November 2018), meaning that there is a limited evidence base to assess the impact of operations. The ATO has also been unable to provide evidence that it is capturing lessons from operations so that future operations can be improved.⁷⁰ Given the innovative multi-agency approach adopted for Top Phoenix Target operations, and most operations are yet to run their course through to civil and criminal prosecution activities, the ATO should consider how it can effectively capture lessons learnt to inform future operations.

Recommendation no.2

3.40 The Phoenix Taskforce captures lessons learnt from its operations, and refines future operations accordingly to support their effective conduct.

Phoenix Taskforce Steering Committee entity response: *Agree.*

⁷⁰ One such lesson is where a Top Phoenix Target operation duplicated pre-existing ATO work, leading to unnecessary additional administration. Another lesson that could be learnt is how to perform certain activities successfully (for example, use of access without notice powers) or coordinate activities across members to have maximum impact.

4. Performance measurement arrangements

Areas examined

This chapter examines whether the Phoenix Taskforce's performance measurement arrangements enable it to adequately assess effectiveness and regularly report on performance.

Conclusion

Performance measures are in place and an evaluation has been conducted of the Phoenix Taskforce, but misalignment of the Evaluation Framework to the stated purposes and goals of the Phoenix Taskforce has undermined the assessment of effectiveness. There is detailed internal quarterly reporting on progress to the Phoenix Taskforce Steering Committee and half-yearly reporting to the Minister. Taskforce outcomes are published on the ATO's website.

Areas for improvement

The ANAO made one recommendation for the Phoenix Taskforce to improve the Evaluation Framework. The ANAO also suggests that the Phoenix Taskforce Steering Committee reports contain trends and achievements against targets where possible (paragraph 4.18) and performance indicators from the Evaluation Framework (paragraph 4.19).

Has the Phoenix Taskforce established arrangements to adequately assess its effectiveness?

The endorsed Phoenix Taskforce Evaluation Framework is not adequate as it does not clearly assess achievement of the Taskforce's purposes and goals, instead focusing on effectiveness of high-level treatment strategies (output groups). An evaluation was conducted in February 2018 that identified mixed effectiveness in achieving Taskforce strategies. The evaluation noted shortcomings in effectiveness measures and supporting data, which are being addressed.

4.1 The Department of Finance's Resource Management Guide 131, *Developing Good Performance Information*, notes that for cross-entity activities, performance information likely to be of most interest from an accountability and strategic perspective is whether the cross-entity common purpose is being achieved.⁷¹ Accordingly, to support performance measurement of cross-entity activities, it is important that there is a clearly expressed purpose that states the outcomes sought for clients, stakeholders and the public. There also needs to be a clear understanding of the relationship between purposes and activities.⁷² Good performance information will use both quantitative and qualitative measures. Effectiveness measurement also considers who has been affected by the activity, to what extent and whether this was intended or not.⁷³ Setting targets helps to define and demonstrate performance. This includes establishing baseline results, and using benchmarks and trends in performance from prior periods or activities.⁷⁴

71 Department of Finance, Resource Management Guide No. 131, *Developing Good Performance Information* [Internet], April 2015, p. 14, available from <https://www.finance.gov.au/sites/default/files/RMG%20131%20Developing%20good%20performance%20information.pdf> [accessed February 2019].

72 *ibid.*, pp. 15–16.

73 *ibid.*, p. 24.

74 *ibid.*, p. 29.

Phoenix Taskforce Evaluation Framework

4.2 In 2015, PricewaterhouseCoopers was commissioned to develop an evaluation framework for the Inter-Agency Phoenix Taskforce. In developing the framework, PricewaterhouseCoopers consulted with key Inter-Agency Phoenix Taskforce members to determine the outcomes they sought to achieve, and to develop and refine performance measures. The framework report was finalised in December 2015, and first considered and endorsed (in principle) by the Phoenix Taskforce Steering Committee in September 2017. The Steering Committee noted that data sources for the framework were to be agreed at later meetings.

4.3 As discussed in Chapter 3, the Phoenix Taskforce Steering Committee also endorsed the ATO's *Phoenix Strategy* in February 2018. The *Phoenix Strategy* includes an evaluation framework that is based on, but different to, the endorsed Evaluation Framework, with a revised program logic approach.⁷⁵ The Phoenix Strategy evaluation framework links to the ATO's strategic objectives while the 2015 Evaluation Strategy refers to Taskforce objectives. Accordingly, the ANAO's examination focused on the endorsed 2015 Evaluation Framework.

2015 Evaluation Framework

4.4 The 2015 Evaluation Framework has outcomes and measures aligned to the Phoenix Taskforce's high-level treatments (output groups) of educate, engage and enforce (see Table 3.1), but does not align the outcomes to the purpose or goals of the Taskforce (outlined in Table 1.1). Instead of presenting the purposes and goals of the taskforce as the objectives, the program logic model describes the Taskforce objectives as:

Disrupt the business environment that allows and incentivises phoenix behaviour. This is achieved through the following:

- Detect (identify through data and intelligence) those who are at risk
- Deter (discourage by showing the consequences) unwanted behaviour
- Dealing with (penalise and remove from the business environment) perpetrators who cannot be deterred
- Deny (do not allow perpetrators to realise) the revenue benefits of phoenix behaviour

4.5 The model should show how inter-dependent activities contribute to an outcome for a purpose, or how a single activity contributes to a purpose. There is an opportunity for the Phoenix Taskforce to improve its performance measurement arrangements to align the Taskforce's purposes and goals and the objectives defined in the Evaluation Framework. This may involve revising the purposes and goals of the Taskforce and/or the objectives.

4.6 The 2015 Evaluation Framework includes five outcomes, including the 'ultimate' outcome of a reduction in the incidence and impact of phoenix (see paragraph 3.5).⁷⁶ These outcomes are

⁷⁵ *ibid.*, p. 17. The guide identifies two generic logic models that apply at different levels to in developing good performance information:

- purpose-level logic models describe how inter-dependent activities focused on a single purpose make contributions to achieving that purpose by combining to make an impact on those with an identified set of needs; and
- activity-level logic models describe the connection between the elements (inputs, outputs and outcomes) that determine how a single activity makes a specific contribution to fulfilling a specific purpose.

⁷⁶ The same outcomes are in the ATO's Phoenix Strategy evaluation framework.

not in the Taskforce Charter, which is the primary governance document for the Phoenix Taskforce. The Taskforce should ensure alignment between purposes, goals and outcomes that are consistent in the Phoenix Charter and Evaluation Framework. In both documents, the Taskforce should ensure that its purpose and goals clearly state the outcomes the Taskforce seeks to achieve for clients, stakeholders and the public (including how things will be different when the need is met and for whom they will be different, and when will stakeholders know that a significant difference has been made, and what will the observed change be).

4.7 The Evaluation Framework is based on a program logic model that asserts it derives outcomes from the Taskforce's need, objectives, inputs and outputs. The outcomes support the Taskforce to determine whether it achieved what it set out to do. For each outcome, the Evaluation Framework establishes measures, indicators and data sources. Table 4.1 provides an overview of the Evaluation Framework measures and indicators.⁷⁷ The Framework listed data requirements and sources but did not provide a baseline or target for any measure. The indicators are generally quantitative in nature with a focus on outputs.

4.8 Four of the 28 Taskforce Members interviewed in September and October 2018 reported contributing to the development of the performance measurement arrangements for the Taskforce. Some Taskforce Members raised concerns about some measures of effectiveness, particularly regarding the extent to which the Taskforce could reasonably draw a conclusion that its activities had deterred individuals who were considering phoenixing from undertaking illegal phoenix behaviour. Most Taskforce members also advised that their entity did not have entity-specific phoenix performance measurement arrangements.

⁷⁷ Measures 6, 7 and 8 were not proposed in the main Framework, but were included in an appendix to the Framework, as they were new measures that were considered either too difficult or costly to measure in the short-term.

Table 4.1: Evaluation framework outcomes, measures and indicators

Outcome <i>The impacts or changes sought or expected as a result of producing the deliverables</i>	Measure <i>A gauge to tell if the outcome has been achieved</i>	Key performance indicator <i>Quantifies the extent to which the outcome has been achieved</i>
Outcome 1 — Businesses are aware of and comply with legislative requirements.	1. Awareness of legislative requirements and illegal phoenix behaviour	1a. Increase in public awareness and understanding in relation to what constitutes phoenix activity and when it is illegal.
	2. Level of compliance for all businesses.	2a. Increase in the proportion of businesses voluntarily reporting liabilities on time. 2b. Increase in the proportion of businesses voluntarily paying liabilities on time. 2c. Reduction in businesses displaying risk factors of non-compliance.
Outcome 2 — Agencies collaboratively identify at risk businesses and connect with them to encourage compliance.	3. Level of information sharing and collaboration.	3a. Increased instances of successful information sharing between agencies. 3b. Increased recognition of the value of the Taskforce.
	4. Involvement with specific businesses to encourage compliance.	4a. Increase of the proportion of the total PRM population that are targets of non-enforcement engagement. 4b. Increased trend in payment/lodgement on time for total PRM population compared to total business environment.
Outcome 3 — Cyclical phoenix operators have their business model disrupted and are either brought back in the system, remove from the business environment or penalised.	5. Illegal behaviour is penalised	5a. Percentage of confirmed and high risk candidate PRM population being involved in prosecutions and non-prosecution director penalties. 5b. Increase in intermediaries and facilitators identified and treated.
	6. Cyclical operators are removed.	6a. Reduction in the newly created entities linked to confirmed phoenix (ATO, ASIC). 6b. Increase in Director disqualifications for conduct related to phoenix behaviour (ASIC).
Outcome 4 — The incentives to participate in phoenix activities are removed and there is greater business and consumer confidence.	7. Confidence in the business environment.	7a. Decrease in complaints relating to phoenix behaviour (ATO, Fair Work Ombudsman, ASIC). 7b. Increase in media sentiment (ATO, ASIC, Fair Work Ombudsman). 7c. Increase in independent measures of confidence relating to likelihood of recovering debts (ATO, ASIC, Fair Work Ombudsman).

Outcome <i>The impacts or changes sought or expected as a result of producing the deliverables</i>	Measure <i>A gauge to tell if the outcome has been achieved</i>	Key performance indicator <i>Quantifies the extent to which the outcome has been achieved</i>
Outcome 5 — There is a reduction in the impact and incidence of phoenix activities.	8. Reduced incidence of phoenix activity.	8a. Reduction in the number of new active entities in PRM population and percentage that are linked to confirmed phoenix and as a percentage of the amount of total businesses (ATO, ASIC). 8b. Reduction in the annual insolvencies with identified breach of directors duties (ASIC).
	9. Reduced impacts of phoenix activity.	9a. Reduction in the amount of written off and current debt for entities in the PRM population, total quantum and as a proportion of total ATO collections (ATO). 9b. Reduction in honest businesses not recovering for goods and services delivered because of phoenix activities (ASIC). 9c. Reduction in employees losing entitlements due to phoenix activities (Fair Work Ombudsman).

Note: PRM population is phoenix risk model population.

Source: Phoenix Taskforce Evaluation Framework, December 2015.

Recommendation no.3

4.9 The Phoenix Taskforce:

- (a) aligns the purposes, goals and outcomes in its Charter and Evaluation Framework;
- (b) ensures the purposes and goals clearly state the outcomes the Taskforce seeks to achieve; and
- (c) includes baselines or targets for performance indicators in the Evaluation Framework.

Phoenix Taskforce Steering Committee entity response: *Agree.*

4.10 *The ATO is committed to improving the Taskforce's evaluation framework and measurement so that we can demonstrate that the Taskforce strategies and activities are effective in achieving the Taskforce purposes.*

Phoenix Taskforce evaluation

4.11 In July 2018, the ATO completed an evaluation of the effectiveness of the Phoenix Taskforce for the period July 2014 to June 2017 using the endorsed Evaluation Framework. The purpose of the evaluation was to assess the extent to which the interagency *Phoenix Strategy* had achieved its intent of reducing the incidence and impact of phoenix activities. The evaluation found that positive results had been achieved in certain areas of the strategy, which have had the desired effect on compliance behaviours, while a number of the Taskforce outcomes had not been met.

4.12 A total of 24 performance indicators were considered across the five outcomes for the Evaluation Framework.⁷⁸ Reported results for the 24 performance indicators were:

- eight (33 per cent) were met;
- eight (33 per cent) could not be analysed because data was not available. A further two performance indicators were assessed as being met, although one of the underlying data requirements was not available;
- one (four per cent) was inconclusive;
- one (four per cent) was partially met; and
- six (25 per cent) were not met.

4.13 A minimum of two performance indicators (and overall 40 to 50 per cent) for each of the five Outcomes were not met and/or not able to be analysed. The evaluation concluded that while a number of objectives had not been met it did not mean that the strategy has not been positive. The report considered measurement of nine performance indicators for Outcomes 4 and 5 were premature, but the evaluation was useful as it identified significant gaps in the data available to measure these indicators.

4.14 The report made nine recommendations aimed at improving the evaluation framework, data collection supporting the Framework, better understanding the cause and effect relationship for some indicators and achieving desired outcomes for the Taskforce.⁷⁹ Following the evaluation,

⁷⁸ Four of these performance indicators were not included in the 2015 Evaluation Framework.

⁷⁹ Other recommendations sought the adoption of the Taskforce Evaluation Framework and strategies by Taskforce Members within their agencies.

in September 2018 the ATO proposed changes to nine performance indicators and/or the data sources for these indicators.

Quantifying the phoenix risk

4.15 To assist with the measurement of Outcome 5, the Phoenix Taskforce has sought to quantify the size of the phoenix problem. In December 2016, the Phoenix Taskforce Steering Committee agreed to consider different evaluation models with respect to quantifying the phoenix problem, and in July 2017 sought to agree on the methodology.⁸⁰ It was expected that this quantification model would be used at intervals by the Phoenix Taskforce to determine the success and effectiveness of the Taskforce over time. The model was finalised in 2018 and is available on the Phoenix Taskforce website as the report on the *Economic Impact of Illegal Phoenix Activity*.⁸¹ The report includes an estimate of the direct costs to business, employees and government (see paragraph 1.3 and paragraph 3.32) and economic impact of phoenix activity on the Australian Economy.⁸²

4.16 Table 4.2 provides the direct cost estimates (with low and high bounds) between 2012–13 and 2015–16. The table shows that direct costs to employees have consistently reduced, there has also been a reduction in direct costs to business, while costs to government have increased over the four years.

Table 4.2: Annual direct cost estimate of potential illegal phoenix activity

	Business \$ million range	Employees \$ million range	Government \$ million range	Total \$ million range
2012–2013	\$1586 to \$3928	\$129 to \$483	\$1095	\$2810 to \$5510
2013–2014	\$1162 to \$3377	\$72 to \$340	\$1621	\$2855 to \$5338
2014–2015	\$1026 to \$2766	\$103 to \$308	\$1372	\$2500 to \$4518
2015–2016	\$1162 to \$3171	\$31 to \$298	\$1660	\$2852 to \$5128

Source: ATO, Fair Work Ombudsman and ASIC, PricewaterhouseCoopers, *The Economic Impact of Potential Illegal Phoenix Activity*, 2018, p. 15.

Does the Phoenix Taskforce regularly monitor and report against performance indicators, baselines, targets and benchmarks?

The Phoenix Taskforce monitors and reports on Taskforce activities in a detailed quarterly report to the Steering Committee, which was introduced in 2017–18. A separate quarterly report to the Minister was introduced at the same time. The reports have an action and activity

80 The model for quantifying the phoenix problem was changed from the 2012 report prepared by PricewaterhouseCoopers for the Fair Work Ombudsman titled *Phoenix Activity: Sizing the problem and matching solutions* in June 2012, see page iii. [Internet], available from <http://www.fairwork.gov.au/ArticleDocuments/763/Phoenix-activity-report-sizing-the-problem-and-matching-solutions.pdf.aspx> [accessed February 2019].

81 PricewaterhouseCoopers, *The Economic Impacts of Potential Illegal Phoenix* [Internet], July 2018.

82 The report estimates the economy wide impacts as a result of illegal phoenix activity in terms of that the total impact to: GDP is between \$1.76 billion and \$3.46 billion; household consumption is between \$1.2 billion and \$2.36 billion; and government revenue is between \$760 million and \$1500 million.

focus and do not include performance indicators from the Evaluation Framework. While the reports include some statistics, they rarely report these statistics against baselines, targets and benchmarks. The reports reflect all phoenix activities of the ATO, some activities of the Steering Committee and other members involved in operations. The majority of Taskforce members do not contribute to Taskforce reporting, and there is no consolidated reporting of the extent of Taskforce members' efforts and their successes overall in combatting illegal phoenix activity.

4.17 In December 2016, the Phoenix Taskforce Steering Committee endorsed a proposal to provide quarterly updates for the Minister⁸³ in line with the Serious Financial Crime Taskforce quarterly reports to the Minister.⁸⁴ On 20 September 2017, the Steering Committee agreed to templates for a Phoenix Taskforce Steering Committee Performance Report linked to the quarterly meeting cycle for the Steering Committee, a six-monthly report to the Minister, and a performance report to be published on the Taskforce website.

Phoenix Taskforce Steering Committee quarterly report

4.18 As at November 2018, a Phoenix Taskforce Steering Committee report had been prepared five times — from Quarter 1 2017–18 to Quarter 1 2018–19. The reports provided detailed updates and progress across 14 areas, shown in Table 4.3. The reports included various statistics⁸⁵ and qualitative descriptions of progress. All of the ATO's phoenix activities were included in the reports, but not all phoenix activities of other member entities. The reports rarely provided trends or achievement against targets or expectations.

Table 4.3: Phoenix Taskforce Steering Committee reporting areas

Reporting area	Nature of information reported
Overview/context	Lists the purpose, outcomes/measures of success and strategies.
Highlights	Key results and anecdotal updates against areas that may include intelligence, enforcement, communication, engagement, risks and hotspots, governance and operational outcomes.
ATO Compliance Activities	Trend information on planned, actual and variance results for liabilities raised and cash recovered for the Serious Financial Crime Taskforce Phoenix activities and ATO Phoenix activities, as well as year to date liabilities raised and cash recovered for phoenix projects, the Serious Financial Crime Taskforce and ATO Phoenix business as usual activities.
Cases and Pipeline/ Serious Financial Crime Taskforce Phoenix Pipeline	The pipeline outlines Serious Financial Crime Taskforce matters that have primary or secondary Illegal Phoenix behaviours, Phoenix Taskforce cases that overlap with Serious Financial Crime Taskforce cases and ATO criminal investigations relating to phoenix behaviours that do not relate to Serious Financial Crime Taskforce matters.

83 The ATO proposed to provide the report to its Minister, and other Steering Committee members were to decide whether to provide the report to their Minister. Steering Committee members advised the ANAO in September and October 2018 that the quarterly report was only provided to the Minister for Revenue and Financial Services (the Assistant Treasurer from 28 August 2018).

84 In July 2017, the Steering Committee agreed to a draft report format for the Phoenix Taskforce, again based on the Serious Financial Crime quarterly report to the Minister.

85 The statistics include key results, liabilities raised and cash collected, number of disclosures and referrals, size of the phoenix population, number of operations, number of investigations and prosecutions, and number of operations.

Reporting area	Nature of information reported
Educate, Engage and Enforce	Progress updates in the reporting period (sometimes replicating prior period updates) relating to the early intervention strategy and industry-based strategies.
Intelligence	Status of real-time referral sharing across taskforce agencies, registration watch, taskforce disclosures, referrals received in 2016–17 compared to the current quarter referrals received through <i>ATOintelligence</i> and the Tax Evasion Reporting Centre, the phoenix risk model, the ATO/ASIC data fusion project and ASIC intelligence sharing.
Top Phoenix Targets	Progress against the Top 50/Top Targets Strategy, including providing details of the current population of Top Targets/Operations, as well as actions taken in relation to ATO clearing house activities, the intelligence working group, Taskforce member agency delivery, multi-entity operations, intelligence sharing, and the involvement of the Complex Investigations Unit.
Operational Update	Status update for each of the Phoenix Taskforce investigations. Information is drawn from Quarterly Status Reports prepared by operation team leaders.
Research	Progress update on key projects, including the Economic Impacts of Illegal Phoenix Activity, the Phoenix Taskforce Evaluation Framework, and the Phoenix Risk Model 2015 review and implementation of recommendations.
Law Reform	Status and timeframe for delivery of recommendations from the Phoenix Taskforce Law Reform Proposal, as well as other Taskforce member initiatives being supported as addressing illegal phoenix behaviour (such as Transparency of Tax Debt, GST on Property Settlement and Reform to the corporations law to address misuse of Fair Entitlements Guarantee).
Communication	Update on the evaluation of the Communication Strategy.
Effectiveness	Listed the first eight measures from the evaluation framework, but referred to this page of the report as under development. <i>Removed from the report in Quarter 3 2017–2018.</i>
Governance	Background the taskforce governance arrangements, including a governance diagram and list of members.
Report Production	Key dates for the Phoenix Taskforce Steering Committee quarterly report and meetings, as well as content coordinators and other stakeholders for report areas.

Source: ANAO summary of the nature of reporting by topic in the Phoenix Taskforce Steering Committee quarterly reports.

4.19 An October 2017 ATO internal audit, *Phoenix Strategy Implementation*, recommended that the ATO develop and implement summary progress reporting around the implementation of the ATO *Phoenix Strategic Approach 2015–2020* and the *Phoenix Strategic Work Program 2017–18* (highlighting achievements from the strategies and any impediments). In response, the ATO committed to implementing regular reporting regarding the performance of the Phoenix Taskforce that is aligned to the Evaluation Framework, and noted the Phoenix Taskforce Steering Committee would have a role in overseeing the reporting by December 2017. The Phoenix Taskforce Steering Committee quarterly report does not include reporting against performance indicators from the Evaluation Framework. The first two quarterly reports included an effectiveness reporting area listing eight measures from the Evaluation Framework that was marked as underdevelopment. The effectiveness reporting area does not appear in later quarterly reports.

4.20 The Phoenix Taskforce Steering Committee Report includes a key results section. The results reported across the five quarterly reports are presented in Table 4.4.

Table 4.4: Key results across the entire Phoenix Taskforce, including direct taxes, for the financial year to date

Key result	30-Sep-17	31-Dec-17	31-Mar-18	30-Jun-18	30-Sep-18
Number of audits and reviews conducted	123	224	263	340	146
Liabilities raised	\$97.9 million	\$214.4 million	\$240.5 million	\$274.6 million	\$82.8 million
Cash Collected	\$36.5 million	\$72.8 million	\$115.6 million	\$190 million	\$33.5 million
Criminal convictions completed	–	5	7	8	4
Criminal prosecutions	2	6	7	8	not reported ^a
Directors banned and disqualified from acting	15	27	34	43	11
1a. Phoenix Groups	20,801	19,953	19,953	19,953	18,277
1b. Number of unique entities linked to Phoenix Groups identified	294,641	316,810	316,810	316,810	304,140
2a. Number of entities linked to high risk phoenix operators	19,940 (6.7%)	40,023 (12.6%)	40,023 (12.6%)	40,023 (12.6%)	35,090 (11.5%)
2b. Number of high risk Phoenix operators linked to entities	665	1164	1164	1164	1020
Estimate of collectable debt from Phoenix High Risk Operators owing to the ATO at the end of the quarter	\$417 million	\$693 million	\$617 million	\$652 million	\$776 million

Note a: In January 2019, ATO's Phoenix Taskforce website reported that there have been four criminal convictions from eight criminal prosecutions.

Source: ANAO summary of the nature of reporting by topic in the Phoenix Taskforce Steering Committee quarterly reports.

4.21 The reports did include trends on progress against commitments for liabilities raised and cash collected for Serious Financial Crime Taskforce and ATO Phoenix matters. Table 4.5 shows that the ATO has exceeded annual planned levels for raising liabilities and collecting cash. Liabilities raised and cash collected are also attributed to the Phoenix Early Intervention Strategy, Labour Hire — Meat Processing activities, Property and Construction activities and Promoter and Facilitator activities.

Table 4.5: Planned and actual liabilities raised and cash collected for Serious Financial Crime Taskforce (SFCT) and ATO Phoenix matters, by financial year

	2015–2016 Liabilities \$ million	2015–2016 Cash \$ million	2016–2017 Liabilities \$ million	2016–2017 Cash \$ million	2017–2018 Liabilities \$ million	2017–2018 Cash \$ million	2018–2019 Year to Date Liabilities \$ million	2018–2019 as at 30 September 2018 Cash \$ million
SFCT Phoenix — Planned	\$6.94	\$0.52	\$34.70	\$3.00	\$57.76	\$15.10	\$34.70	\$5.20
SFCT Phoenix — Actual	\$29.91	\$0.64	\$197.37	\$43.46	\$71.78	\$22.79	\$3.60	\$0.89
SFCT Phoenix — Variance	\$22.97	\$0.12	\$162.67	\$40.46	\$14.02	\$7.69	–\$31.10	–\$4.31
Phoenix — Planned	\$58.85	\$18.87	\$52.63	\$25.79	\$120.75	\$40.62	\$68.20	\$30.00
Phoenix — Actual	\$157.52	\$40.77	\$56.09	\$61.10	\$146.86	\$130.93	\$66.50	\$26.00
Phoenix — Variance	\$98.67	\$21.90	\$3.46	\$35.31	\$26.11	\$90.31	–\$1.70	–\$4.00
Total — Planned	\$65.79	\$19.39	\$87.33	\$28.79	\$178.51	\$55.72	\$102.90	\$35.20
Total — Actual	\$187.43	\$41.41	\$253.46	\$104.56	\$218.64	\$153.72	\$70.10	\$26.90
Total — Variance	\$121.64	\$22.02	\$166.13	\$75.77	\$40.13	\$98.00	–\$32.80	–\$8.30

Note: SFCT is the Serious Financial Crime Taskforce.

Source: Phoenix Taskforce Steering Committee quarterly report Quarter 1, 2018–2019.

4.22 Six of the 28 Taskforce Members interviewed in September and October 2018 reported contributing to the performance reporting for the Taskforce. Member agencies generally reported that they did not have phoenix-specific reporting at an agency level. The Steering Committee anticipates that the increase in operations is considered to be an opportunity for entities other than Steering Committee members to regularly contribute to the Taskforce Quarterly reports, noting that up to 17 entities are involved in Taskforce operations and may in the future be able to report successes linked to these operations.

4.23 The ATO also has a range of internal reports provided to a number of committees and senior managers that include phoenix matters, but not a consolidated phoenix report. This reporting reflects many of the areas included in Steering Committee reports, but has a limited focus. Reporting is not based on the Evaluation Framework.

Minister's quarterly report and ATO website report

4.24 Consistent with the Steering Committee quarterly report, the Minister's quarterly report was introduced for the 2017–18 financial year. Information from the Steering Committee quarterly report forms the basis of the Minister's quarterly report, although the focus of the Minister's report has changed over time and figures reported in the Steering Committee Report and Minister's report are sometimes inconsistent. The Ministers report includes: context for the Taskforce; key results; highlights; and reports against Outcomes 1 to 3 of the evaluation framework without reporting on performance indicators. Outcomes reporting includes some data that would support assessment of performance using performance indicators. The outcomes section also includes reporting against the Top Phoenix Targets project. The reporting is activity-based and has many statistics.

4.25 Some key results from the Minister's Report are provided on the Phoenix Taskforce website.⁸⁶ The Taskforce's most recent quarterly report to Government (April to June 2018)⁸⁷ included the following outcomes:

- a criminal conviction of a director resulting in two months imprisonment; the disqualification of a director for five years;
- 15 active operations (involving: 1006 insolvency events; 11 bankrupt individuals; \$799 million owed to creditors; \$430.3 million owed to government; and promoters and facilitators of phoenix behaviour);
- the introduction of real-time information sharing resulting in a joint agency operation being considered for a group displaying suspected illegal phoenix behaviour; and
- 282 cross-agency disclosures as intelligence and operational working groups share information on the top phoenix targets for the quarter.

4.26 The Phoenix Taskforce website reported results achieved in 2017–18, including: 340 audits and reviews conducted; \$275 million raised in liabilities, \$190 million collected and returned to the community; eight criminal convictions and prosecutions; and 43 directors banned and disqualified from acting. The ATO advised that over the period 1 July 2018 to 31 December 2018, the ATO raised

86 In January 2019, the Phoenix Taskforce website includes Outcomes for July to September 2018, and includes consistent results with those reported in Table 4.4 for the following key result areas: audits and reviews conducted; tax liabilities raised; cash collected; criminal convictions; and disqualified directors.

87 A July to September 2018 quarterly report was not provided to the Minister. The ATO advised the ANAO that it intends to provide a six monthly report (July to December 2018) to the Minister in 2019.

liabilities of over \$160 million and returned \$54 million in cash to the community and completed around 230 audits and reviews relating to illegal phoenix activity.

4.27 There is little reporting either internally or publicly of the totality of member activities to combat illegal phoenix activity, as the focus to date has been on Steering Committee activities. Consolidating the extent of Taskforce members' efforts and successes overall in combatting illegal phoenix activity could provide a better understanding of overall effectiveness and a greater deterrence effect, and inform future compliance strategies and activities.



Grant Hehir
Auditor-General

Canberra ACT
29 March 2019

Appendices

Appendix 1 Entity response

Australian Taxation Office

Ms Lisa Rauter
Group Executive Director
Performance Audit Services Group
Australian National Audit Office
GPO Box 707
CANBERRA ACT 2601

Dear Ms Rauter

**AUSTRALIAN NATIONAL AUDIT OFFICE PERFORMANCE AUDIT - Addressing
Illegal Phoenix Activity**

Thank you for your email correspondence dated 19 February 2019 and for the opportunity to provide comments on the proposed report on Addressing Illegal Phoenix Activity.

The Australian Taxation Office (ATO), on behalf of the Phoenix Taskforce, agrees with the three recommendations as presented in the section 19 report.

Attached is the summary of our comments to be included in the report (Annexure 1) and the ATO response to recommendations (Annexure 2). Also attached are editorial comments for your consideration (Annexure 3).

I would like to thank the Australian National Audit Office audit team for their cooperative and professional manner in working with us on this matter. I look forward to continuing the good working relationship developed in this performance audit.

If you require further information on this matter, please contact Aislinn Walwyn, Assistant Commissioner on (02) 9374 8915 or at aislinn.walwyn@ato.gov.au.

Yours sincerely



Jeremy Hirschhorn
Second Commissioner
Australian Taxation Office

Date: 19 March 2019

Australian Securities and Investments Commission



ASIC
Australian Securities &
Investments Commission

**Australian Securities
and Investments Commission**

Office address (inc courier deliveries):
Level 7, 120 Collins Street,
Melbourne VIC 3000

Mail address for Melbourne office:
GPO Box 9827,
Brisbane QLD 4001

Tel: +61 1300 935 075

Fax: +61 1300 729 000

www.asic.gov.au

Tracey Martin
Senior Director
Australian National Audit Office
GPO Box 707
Canberra ACT 2601

Sent by email: tracey.martin@anao.gov.au

19 March 2019

Dear Ms Martin

**PROPOSED REPORT UNDER S.19 OF THE AUDITOR – GENERAL ACT 1997 - 19
FEBRUARY 2019**

ASIC, as a member of the Phoenix Taskforce (**Taskforce**) welcomes the audit findings and considers the report supportive of the Taskforce's overall approach to combating illegal phoenix activity which has a significant impact on the Australian community and government.

The audit recognises the progress that the Taskforce is making by engaging in a whole-of-government approach to combat illegal phoenix activity. This includes implementing cross-agency strategies, increasing the exchange of information between government entities, collaborating in the conduct of compliance cases and progressing potential law reform.

The ANAO audit found the Taskforce is making progress against its purposes and goals in combating illegal activity, while acknowledging that the Taskforce's joint compliance approaches to addressing illegal phoenix activity have not been in place long enough to fully determine their impact. ASIC also notes that the Taskforce is not separately funded, nor has ASIC received any additional funds to further the operational matters referred to it. The audit identified opportunities to improve Taskforce guidance, information sharing, intelligence, candidate development, debriefs, performance measurement and evaluation processes.

ASIC agrees with the three recommendations contained in the report. The Taskforce and, as appropriate, its member agencies are implementing measures to address these recommendations and suggestions.

We note the ANAO's comments regarding inconsistencies in the management of information disclosures by the ATO to Taskforce members and understand

the ATO is taking steps to automate and improve the processes. We will continue to work with the ATO and other Taskforce members in this regard.

ANAO recommendation	ASIC response
1. The Phoenix Taskforce provides guidance to clarify the basis on which intelligence and operational working groups refer, and recommend pursuing, potential illegal phoenix cases	Agreed
2. The Phoenix Taskforce captures lessons learnt from its operations, and refines future operations accordingly to support their effective conduct	Agreed
3. The Phoenix Taskforce: <ul style="list-style-type: none"> a) Aligns the purposes, goals and outcomes in its Charter and Evaluation Framework; b) ensures the purposes and goals clearly state the outcomes the Taskforce seeks to achieve; and c) includes baselines or targets for performance indicators in the Evaluation Framework 	Agreed The Taskforce is committed to improving the Taskforce's evaluation framework and measurement so that we can demonstrate that the Taskforce strategies and activities are effective in achieving the Taskforce purposes.

We note that the report refers in various places to an operational focus or footing from August 2016. We advised in our letter of 25 January 2019 that the Taskforce only moved to an operational footing in early 2018. While the Taskforce shared a small number of preliminary matters from August 2016, to explore how the Taskforce members could work better together, ASIC considers the Taskforce moved to a true operational footing in February 2018 following the unanimous endorsement by the Phoenix Taskforce Steering Committee of a further 12 matters on 29 January 2018. After the endorsement the lead agency in each matter developed a strategy for the identified targets and the matters were subsequently operationalised. Neither the Taskforce or ASIC received any additional funding to advance this work.

If you have any queries regarding this letter, please contact me via email at thea.eszenyi@asic.gov.au.

Yours sincerely



Thea Eszenyi
Senior Executive Leader
Insolvency Practitioners Stakeholder Team

Department of Jobs and Small Business




Australian Government
Department of Jobs and Small Business

Our Ref EC19-000683

Secretary

Ms Lisa Rauter
Group Executive Director
Australian National Audit Office
GPO Box 707
CANBERRA ACT 2601


Dear Ms Rauter

ANAO performance audit proposed report – *Addressing Illegal Phoenix Activity*

Thank you for your email of 19 February 2019 providing the opportunity to comment on the Australian National Audit Office's (ANAO's) proposed performance audit report *Addressing Illegal Phoenix Activity*.

This department supports the s.19 response provided by the Australian Taxation Office. Accordingly, this department agrees with the three recommendations contained in the report and will work alongside other taskforce agencies to implement those recommendations.

The contact officer in this department is Sue Saunders, Branch Manager, Fair Entitlements Guarantee Branch on (02) 6240 9272 or at sue.saunders@jobs.gov.au.

Yours sincerely



Kerri Hartland
18 March 2019

GPO Box 9880, Canberra ACT 2601 | Phone 1300 488 064 | www.jobs.gov.au | ABN 54 201 218 474



Australian Government
Secretary to The Treasury

19 March 2019

Mr Grant Hehir
Auditor-General
Australian National Audit Office
GPO Box 707
CANBERRA ACT 2601

Dear Mr ^{Grant}Hehir

Proposed ANAO Report: *Addressing Illegal Phoenix Activity*

I refer to your correspondence dated 19 February 2019 containing an extract of the proposed audit report on *Addressing Illegal Phoenix Activity*.

The Treasury welcomes the ANAO's assessment of the effectiveness of the Phoenix Taskforce to combat illegal phoenix activities, and its examination of law reform efforts in this area.

While the report does not contain any recommendations for Treasury, we will consider the key insights from the report in the context of our policy responsibility for relevant corporations and tax laws and for law reform to combat illegal phoenix activity.

I understand that the Australian Taxation Office and the Australian Securities and Investments Commission, as key members of the Phoenix Taskforce Steering Committee, have also been provided with a copy of the report and an opportunity to comment.

Thank you for the opportunity to provide comment on the proposed report.

Yours sincerely

A handwritten signature in black ink, appearing to read 'P. Gaetjens'.

Philip Gaetjens

Appendix 2 Taskforce member entities

1. The Phoenix Taskforce Charter (September 2017) requires the ATO to maintain a register of members. The following information is captured in the register. The ATO also maintains details of gatekeepers and authorised officers for each entity in the register.

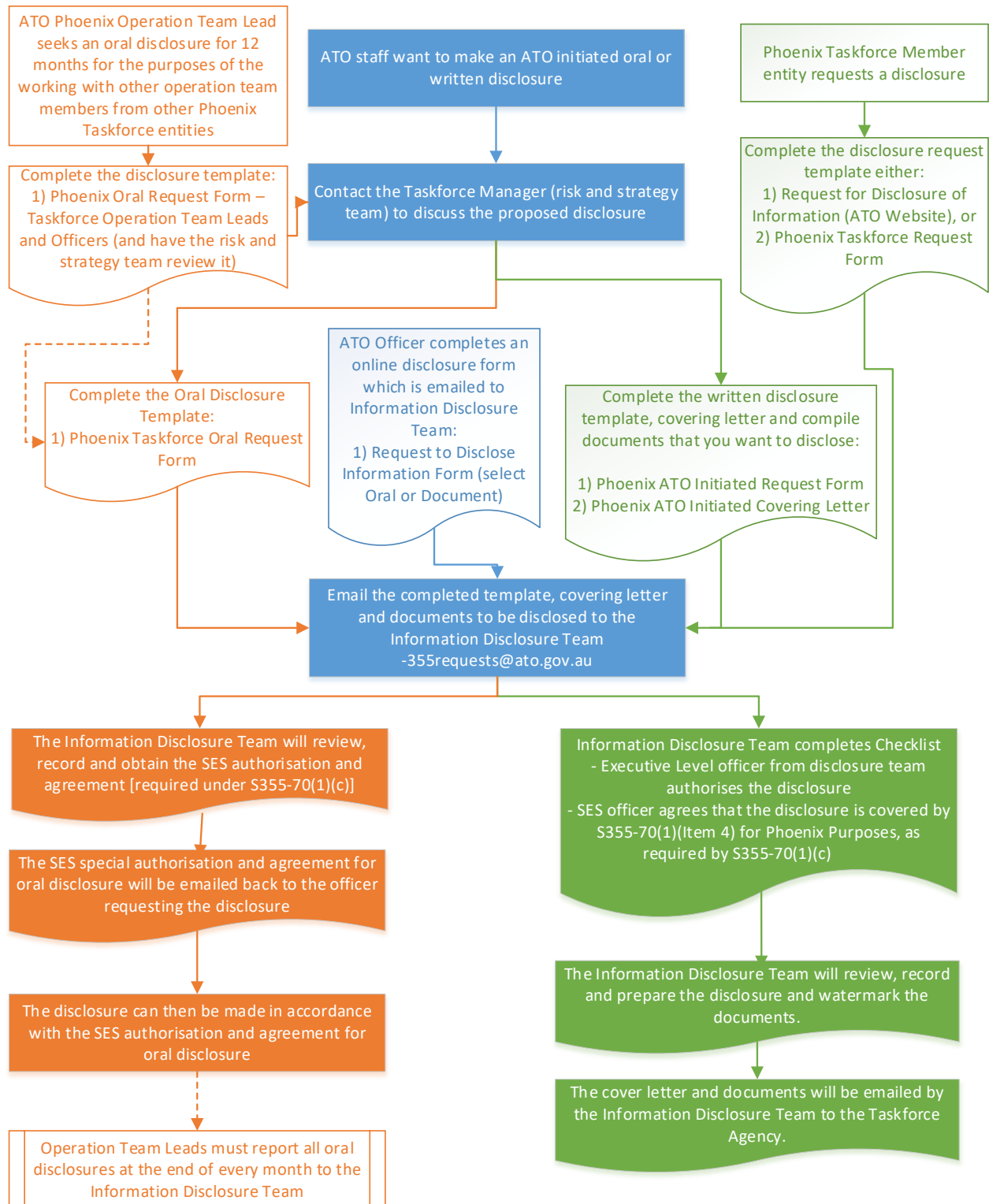
Taskforce member entity	Date offered membership/ requested	Date signed Statement of Principles	Federal or State Entity	Serious Financial Crime Taskforce Member ^a
1. Australian Taxation Office	17-Nov-14 ^a	17-Nov-14	Federal	✓
2. Australian Building and Construction Commission	28-May-15	29-May-15	Federal	✗
3. Fair Work Ombudsman	28-May-15	4-Jun-15	Federal	✗
4. Office of State Revenue Queensland	28-May-15	5-Jun-15	State	✗
5. Australian Border Force/Department of Home Affairs	1-Jun-15	10-Jun-15	Federal	✓
6. Revenue New South Wales	28-May-15	16-Jun-15	State	✗
7. Department of Jobs and Small Business	28-May-15	18-Jun-15	Federal	✗
8. Department of the Environment and Energy	28-May-15	22-Jul-15	Federal	✗
9. Australian Securities & Investments Commission	8-Jun-15	10-Aug-15	Federal	✓
10. Clean Energy Regulator	28-May-15	21-Aug-15	Federal	✗
11. Australian Capital Territory State Revenue Office	28-May-15	4-Sep-15	State	✗
12. State Revenue Office Tasmania	28-May-15	9-Sep-15	State	✗
13. New South Wales Fair Trading	23-Jul-15	30-Sep-15	State	✗
14. New South Wales Police Force	25-Jun-15	1-Oct-15	State	✗
15. State Revenue Office Victoria	1-Jun-15	27-Oct-15	State	✗
16. Office of State Revenue Western Australia	28-May-15	30-Oct-15	State	✗
17. Australian Transaction Reports and Analysis Centre (AUSTRAC)	27-Nov-15	1-Dec-15	Federal	✓
18. Department of Treasury and Finance Revenue South Australia	28-May-15	29-Dec-15	State	✗
19. Territory Revenue Office Northern Territory	28-May-15	14-Jan-16	State	✗
20. Queensland Building & Construction Commission	6-Oct-15	8-Mar-16	State	✗
21. Australian Criminal Intelligence Commission	6-Jul-16	5-Aug-16	Federal	✓

Taskforce member entity	Date offered membership/ requested	Date signed Statement of Principles	Federal or State Entity	Serious Financial Crime Taskforce Member ^a
22. Western Australia Building Commission	22-Aug-16	29-Aug-16	State	✗
23. Return to Work South Australia	16-Sep-16	23-Sep-16	State	✗
24. Australian Competition & Consumer Commission	16-Sep-16	21-Oct-16	State	✗
25. Australian Financial Security Authority	2-Nov-16	8-Dec-16	State	✗
26. New South Wales State Insurance Regulatory Authority	14-Nov-16	20-Dec-16	State	✗
27. Victorian Legal Services Board + Commissioner	8-Jun-17	5-Sep-17	State	✗
28. Victoria Police	6-Sep-17	27-Nov-17	State	✗
29. Australian Federal Police	24-Jun-15	NA	Federal	✓
30. Consumer Affairs Victoria	22-Jun-18	25-Jun-18	State	✗
31. WorkCover Queensland	28-Jun-18	20-Jul-18	State	✗
32. Victorian Building Authority	28-Aug-18	30-Aug-18	State	✗
33. Long Service Corporation (New South Wales)	10-Oct-18	16-Nov-18	State	✗
34. Office of Industrial Relations, Queensland	29-Nov-18	3-Dec-18	State	✗

Note a: Serious Financial Crime Taskforce entities include the Australian Taxation Office, Australian Criminal Intelligence Commission, Australian Federal Police, Attorney-General's Department, Australian Transaction Reports and Analysis Centre, Australian Securities and Investments Commission, Commonwealth Director of Public Prosecutions and Australian Border Force.

Source: ATO Member Entity Register and related documents.

Appendix 3 Phoenix Taskforce disclosure request and approval processes



Source: Adapted from ATO Information Disclosure Team and Phoenix Taskforce disclosure guidance.

Appendix 4 Law reform proposal 2017 and status of individual recommendations acceptance and implementation

Area of reform	When Accepted and Implemented
New phoenixing offence that prohibits the transfer of property.	Accepted, was included in 2018–19 Budget. Legislation was introduced for consideration by Parliament on 13 February 2019.
Extending the Director Penalty Notice regime to GST.	Accepted, was included in 2018–19 Budget. Legislation was introduced for consideration by Parliament on 13 February 2019.
Allowing the ATO to retain refunds in certain circumstances.	Accepted, was included in 2018–19 Budget. Legislation was introduced for consideration by Parliament on 13 February 2019.
Prevent improper backdating of directorship.	Accepted, was included in 2018–19 Budget. Legislation was introduced for consideration by Parliament on 13 February 2019.
Prevent directors abandoning companies.	Accepted, was included in 2018–19 Budget. Legislation was introduced for consideration by Parliament on 13 February 2019.
Restricting the voting rights of related creditors in certain circumstances.	Accepted, was included in 2018–19 Budget. Implemented 12 December 2018 through amendments to the Insolvency Practice Rules (Corporations) 2016.
Instigating a phoenixing hotline.	Accepted and implemented from July 2018.
Identification of high risk operators.	Not accepted or implemented.
Designating a breach of the current provisions in the legislation as 'phoenixing offences'.	Not accepted or implemented.
The ATO to use its garnishee power to recover an amount from a third party to satisfy the amount of the security deposit.	Not accepted or implemented.
Promoter penalties.	Not accepted or implemented.
Director Penalty Notice removal of the 21 day notice period (Priority of taskforce).	Not accepted or implemented.
Appointing liquidator on a cab rank basis. ^a	Not accepted or implemented.
Instigating a government liquidator. ^a	Not accepted or implemented.

Note a: To provide a director with access to an independent registered liquidator who can provide advice on the options available to the director to deal with the company's financial position.

Source: Treasury and ATO documents.