AUSTRALIAN CHAMBER OF
COMMERCE AND INDUSTRY

House Economics Standing Committee Inquiry

Tax Laws Amendment (2011 Measures No.8) Bill 2011 [Directors' Personal Liability & Superannuation]

OCTOBER 2011

ABN 85 008 391 795

Canberra Office
COMMERCE HOUSE
24 Brisbane Avenue
Barton ACT 2600

PO BOX 6005 Kingston,
ACT 2604 AUSTRALIA

T: 02 6273 2311
F: 02 6273 3286
E: info@acci.asn.au

Melbourne Office
Level 3, 486 Albert Street
East Melbourne VIC 3002

PO BOX 18008 Collins Street
East Melbourne
VIC 8003 AUSTRALIA

T: 03 9668 9950
F: 03 9668 9958
E: melb@acci.asn.au

W: www.acci.asn.au

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1. ABOUT ACCI

1.1 Who We Are

The Australian Chamber of Commerce and Industry (ACCI) speaks on behalf of Australian business at a national and international level.

Australia's largest and most representative business advocate, ACCI develops and advocates policies that are in the best interests of Australian business, economy and community.

We achieve this through the collaborative action of our national member network which comprises:

- All state and territory chambers of commerce
- 28 national industry associations
- Bilateral and multilateral business organisations

In this way, ACCI provides leadership for more than 350,000 businesses which:

- Operate in all industry sectors
- Includes small, medium and large businesses
- Are located throughout metropolitan and regional Australia

1.2 What We Do

ACCI takes a leading role in advocating the views of Australian business to public policy decision makers and influencers including:

- Federal Government Ministers & Shadow Ministers
- Federal Parliamentarians
- Policy Advisors
- Commonwealth Public Servants
- Regulatory Authorities
- Federal Government Agencies

Our objective is to ensure that the voice of Australian businesses is heard, whether they are one of the top 100 Australian companies or a small sole trader.

Our specific activities include:

- Representation and advocacy to Governments, parliaments, tribunals and policy makers both domestically and internationally;
- Business representation on a range of statutory and business boards and committees;
- Representing business in national forums including Fair Work Australia, Safe Work Australia and many other bodies associated with economics, taxation, sustainability, small business, superannuation, employment, education and training, migration, trade, workplace relations and occupational health and safety;
- Representing business in international and global forums including the International Labour Organisation, International Organisation of Employers, International Chamber of Commerce, Business and Industry Advisory Committee to the Organisation for Economic Co-operation and Development, Confederation of Asia-Pacific Chambers of Commerce and Industry and Confederation of Asia-Pacific Employers;
- Research and policy development on issues concerning Australian business;
- The publication of leading business surveys and other information products; and
- Providing forums for collective discussion amongst businesses on matters of law and policy.

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2. INTRODUCTION

1. The Australian Chamber of Commerce and Industry (ACCI) welcomes the opportunity to provide a written submission in relation to the House Standing Economics Committee inquiry into the Tax Laws Amendment (2011 Measures No. 8) Bill 2011 and the Pay As You Go Withholding Non-compliance Tax Bill 2011 (the Bills).

2. ACCI has only recently become aware of this inquiry and has had a limited opportunity to closely examine the detail and implications of the legislation.[1]

3. ACCI notes that the bills deal with a range of subject matters, however, the purpose of this submission is to address the Committee on aspects of the bills as it applies to imposing new measures on company directors to ensure compliance with superannuation guarantee (SG) obligations.

4. This further submission is made without prejudice to ACCI or its members' views.

[1] A media release announcing the Committee inquiry was published on 19 October and indicated that submissions were due by 26 October.

3. DIRECTORS' PERSONAL LIABLITY & SUPERANNUATION

5. The proposed amendments to existing legislation are complex and detailed. There may be a range of unintended consequences which, through further time and analysis, will be better understood by all stakeholders potentially affected by the proposals.

6. The Committee should note that a number of submissions were made by ACCI members, including Master Builders Australia (MBA), Housing Industry Association (HIA) and Australian Business Industrial (ABI) in an earlier Treasury exposure draft consultation process. ACCI supports those submissions and has concerns that these and other submissions made by various other organisations does not appear to be addressed in the bills. [2]

7. Notwithstanding, there are a range of issues identified as concerns to the business community which should be addressed by this Committee and the Parliament.

8. Our support for the bills is conditional upon these issues being adequately addressed by appropriate amendments to the bills.

Policy Rationale

9. Whilst there is no second reading material available in relation to the bills, the explanatory memorandum (EM) to the bills indicates that the underlying policy intention is as follows:[3]

> Schedule 3 to this Bill strengthens directors' obligations to cause their company to comply with its existing pay as you go (PAYG) withholding and superannuation guarantee requirements. These amendments reduce the scope for companies to engage in fraudulent phoenix activity or escape liabilities and payments of employee entitlements by:
>
> • extending the director penalty regime to make directors personally liable for their company's unpaid superannuation guarantee amounts;
>
> • allowing the Commissioner of Taxation (Commissioner) to commence proceedings to recover director penalties three months after the company's due day where the company debt

[2] Including submissions made by Chartered Secretaries Australia and Ernst & Young to the Treasury exposure draft consultation process.

[3] Explanatory Memorandum, p.4 general outline and financial impact.

remains unpaid and unreported after the three months passes, without first issuing a director penalty notice; and

• in some instances making directors and their associates liable to PAYG withholding non-compliance tax where the company has failed to pay amounts withheld to the Commissioner.

Date of effect: Broadly, these amendments will commence on the day on which this Bill receives Royal Assent.

Proposal announced: These proposals were announced in the 2011-12 Budget, confirming an election commitment of 8 August 2010.

Financial impact: The revenue impact of this measure is as follows:

2011-12	*2012-13*	*2013-14*	*2014-15*
$10m	$60m	$95m	$95m

Compliance cost impact: The compliance costs associated with this measure are estimated to be a small increase in compliance activities for certain directors and their associates. The costs, for the most part, are for companies who would be actively seeking to avoid their tax and superannuation obligations to gain an unfair competitive advantage.

10. The EM outlines the summary of the Regulation Impact Statement as follows:[4]

Regulation impact on business

Impact: This Schedule deters companies from engaging in fraudulent phoenix activities and improves the regulatory environment for businesses that comply with the tax law by paying PAYG withholding to the Commissioner and superannuation guarantee for the benefit of employees.

This is achieved by providing disincentives for companies and their directors that do not comply with their tax law and employee obligations.

Main points:

• These amendments are not expected to increase compliance costs or operating costs for companies or company directors who are already causing their company to comply with its existing tax or superannuation obligations.

[4] Explanatory Memorandum, p.5.

• These amendments reduce the incentive for companies to engage in fraudulent phoenix activities or to avoid payment of liabilities in order to undercut other companies who are complying with their tax and superannuation obligations.

• Expanding the director penalty regime to superannuation guarantee improves the likelihood that employees receive the superannuation contributions they are entitled to.

11. The Assistant Treasurer and Minister for Financial Services and Superannuation, Hon. Bill Shorten MP on 13 October stated that "*[t]he Gillard Government today introduced tax legislation designed to protect workers' superannuation and deter fraudulent 'phoenix company' activity*".[5]

12. ACCI generally supports the Government and Parliament considering targeted, balanced and workable ways in which to reduce the incidence and incentives of directors to engage in fraudulent phoenix activities. Despite the laudable policy rationale underpinning these bills, it appears that the Government has conflated measures to target fraudulent phoenix activities and compliance of existing obligations (such as the obligations contained in the *Superannuation Guarantee (Administration) Act 1992*) on companies. The latter may involve activity by so-called phoenix companies and their directors, it should be considered as separate policy matters to be pursued by separate and targeted policy responses, where evidence suggests that this is necessary.

13. The Australian business community does not support directors engaging in deliberate and fraudulent phoenix activities. Unfortunately, the bills do not appear to target such phoenix activity by company directors, but rather appear to introduce new penalty provisions which would assist the ATO with achieving greater compliance of a company's SG legislation obligations. This is achieved by creating personal liability on directors, where there is either a deliberate breach of the SG legislation or an inadvertent breach which may have been caused by a range of issues associated with the complex administeration on behalf of the Government, of the compulsory SG scheme.

14. Not to be flippant, but many businesses would still view the mandatory role of business in collecting and remitting superannuation to be highly burdensome, complex, where mistakes can easily be made. Many businesses who, in good faith, are attempting to comply with their

[5] Media release, "Protecting Employee Super and Strengthening the Obligations of Company Directors", 13 October 2011.

legal obligations, may be captured by these provisions due to manner by which the bills are drafted to encompass any director of a company involved (whether deliberate, negligent or not) in non-compliance with a company's SG obligations.

15. Best practice regulation should clearly require a Government to justify why legislative measures are required, the cost and benefits associated with those measures, and why non-legislative measures are inadequate to address the clearly defined policy problem.[6] Whilst there is a Regulation Impact Statement (RIS) contained in the EM, there was no consultation with industry or stakeholders, which ACCI is aware of, in relation to the RIS.

No Definition of "Phoenix Activities"

16. Despite a reference in the EM to phoenix activity[7], there is completely absent in the bills any reference to "phoenix activities" or fraudulent conduct. It is unclear why this is so, given that the *raison d'être* is to *"reduce the incentive for companies to engage in fraudulent phoenix activities"* and *"reduce the scope for companies to engage in fraudulent phoenix activity or escape liabilities and payment of employee entitlements"* as outlined in the EM. Whilst there does not appear to be a settled meaning of phoenix activity, there appears to be a number of indicia which encompass the situation.

17. For example, ASIC considers phoenix activity to involve:[8]

- The transfer of assets (such as the business) of a company (the previous company) to a subsequent company in circumstances where the previous company:
    - was unable to pay its debts; and
    - may have been conducted in a manner so as to deprive unsecured creditors equal access to its assets; and
- there is a connection between the management or shareholding of the previous company and the subsequent company.

18. As contained in a recent ATO media release the ATO considers phoenix activities as follows:[9]

[6] See Productivity Commission Discussion Draft, September 2011, "Identifying and Evaluating Regulation Reforms".
[7] Explanatory Memorandum, p.68, para 3.178.
[8] ASIC, REGULATORY GUIDE 109: Assetless Administration Fund: Funding criteria and guidelines (2009), pp.4-5.

> ... some business operators try to use liquidation as a means of avoiding their financial obligations, without risking their assets and with the full intention of resuming business operations through a new entity.
>
> Like the mythical bird, the phoenix, these businesses rise from the ashes and are 're-born' as new entities which essentially continue running the same business.
>
> ...
>
> 'Liabilities are 'parked' in the liquidated business and the underlying business activity is resumed free of liabilities', he said.
>
> ...
>
> 'This type of tax evasion is the deliberate, systematic and sometimes cyclical liquidation of related corporate trading entities and has the potential to severely erode the revenue base and undermine business and community confidence', Mr Konza said.
>
> ...
>
> The arrangements will often involve a group in which each main business function is operated through a separate entity, one of which will supply workers to the entire group. This labour supply entity will withhold taxes from workers, the proceeds of which will be siphoned off and the entity declared insolvent and wound up without paying the withheld amounts to the ATO - and without affecting the assets held elsewhere in the group.
>
> A new labour supply entity is then created, the workers are transferred to it and the process is repeated.
>
> These companies are easy to liquidate or wind up, as they normally hold few, if any, assets.

19. Other descriptions include:

    a. *"phenomenon, where business operations are transferred from one company to another to avoid having to meet liabilities to unsecured creditors (particularly revenue authorities and employees)."*[10]

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[9] ATO media release, *"Phoenix practices are on the radar"* ,http://www.ato.gov.au/corporate/content.aspx?menuid=0&doc=/content/00197432.htm&page=7&h7

[10] Insolvency Reform package released by the Treasury dated 12 October 2005.p.5

b. *"housing individuals, or the directors by name or otherwise, who abuse the corporate form by dissolving one company and creating another to avoid the payment of debt"*[11]

20. ACCI recommends that there be amendments to the bills to ensure that only directors knowingly involved in fraudulent phoenix activities are captured by the new measures. This is particular the case when the Government is attempting to pierce the corporate vale via statute.

21. The absence of a definition in the legislation means that there are a variety of circumstances in which directors who, in good faith, are attempting to comply with their relevant SG obligations, are potentially captured by the new provisions.

22. For example, it appears that a director of a company (whether trading solvent or otherwise) will be personally liable under the new measures in the following scenarios:

    a. A mistake is made in the calculation of a worker's SG contribution to the fund (thus triggering an SG charge penalty). This can arise due to the complexities in calculating ordinary time earnings under SG legislation, or could involve misclassifying a worker as an independent contractor and not as an employee. The latter involves questions of fact and law, which the High Court has indicated is not an easy task at the best of times, even for well-resourced companies with access to dedicated HR and legal expertise. In both cases, partial compliance with SG legislation is attempted, but the full entitlement of the worker's contribution is not received by the fund. A recent case was challenged all the way to the High Court, where the company incorrectly treated workers as independent contractors rather than employees and was liable to years of SG charge penalties.[12]

    b. A mistake is made in relation to choice of fund rules, which means that a contribution is not received by the correct fund and therefore not made under SG laws (thus triggering an SG charge penalty).

    c. A fund returns a contribution or a contribution is not received by the fund (thus triggering an SG charge penalty).

[11] N Couburn, "The Phoenix Re-examined" (1998) 8 AJCL 321 at 322.
[12] Roy Morgan Research Pty Ltd v Commissioner of Taxation [2011] HCA 35.

- **d.** An error has occurred in recognising that a SG shortfall statement is required and is not sent (thus triggering an SG charge penalty).

23. Compliance with SG obligations are different from PAYG, as the employer is not able to control at all times and in all circumstances when a valid contribution is actually "made" into a complying fund. It is understood that there can be times when a contribution is returned from a fund back to the business many months after being initially made. This can occur for a variety of reasons.

24. For example, where a business uses a commercial superannuation fund clearing house, a contribution will be made when it is received by the correct fund. This differs if the business was to use the Government's Small Business Superannuation Clearing House (SBSCH), which is considered received by the relevant fund when made to the SBSCH.

Need for Additional Compliance Measures?

25. To reiterate, ACCI recommends that the Committee clearly separate consideration of how the bills are intended to address fraudulent phoenix activities by directors, as distinct from the enforcement of SG obligations through extending the existing director penalty notice system.

26. In regards to the enhancing enforcement of the SG system, ACCI notes that a Senate Select Committee on Superannuation and Financial Services in 2001, conducted an extensive inquiry into the *Enforcement of the Superannuation Guarantee Charge*.[13] The Committee should note that, as far as ACCI can ascertain, no recommendations of the kind proposed by the bills were made following that extensive and dedicated inquiry into the SG legislation, which culminated in a 131 page report by that Committee. That Committee also heard submissions about the high level of administrative burden imposed on employers, particularly small businesses. Despite these concerns, recommendations were made to increase the frequency of member contributions to funds to quarterly[14]

[13] Senate Select Committee on Superannuation and Financial Services, Final Report "Enforcement of the Superannuation Guarantee Charge", April 2001.
[14] See Recommendation 7, Chapter 4, para 4.53.

and to remove the notional earnings base for calculating SG contributions.[15]

27. Mechanisms for enforcing the SG legislation appear to be working and are adequate to deter deliberate non-compliance. There is no evidence to suggest that they are not sufficient to deter deliberate non-compliance with SG legislation. ACCI notes also that the *Cooper Review* into superannuation made no findings in relation to inadequate enforcement measures.[16] ACCI has been able to locate one relevant recommendation made by the Inspector-General of Taxation in a report to the Assistant Treasurer, titled *"Review into the ATO's administration of the Superannuation Guarantee Charge"*, (March 2010). However, that was not equivalent to a Parliamentary inquiry or review and was mainly directed at the operations and capacities of the ATO in enforcing existing laws. Recommendation 9 of that report indicated that the existing Part 7 penalty regime under the SG legislation should be *"streamlined and better targeted to improve voluntary compliance"* and Recommendation 11 proposed that the *"Government consider ... expanding the director penalty regime to apply to unpaid SGC liabilities of the company"* (emphasis added). It appears that the Government has agreed with Recommendation 11 and is attempting to introduce it through these bills. The policy rationale therefore fits more in line with enforcement of existing SG obligations by solvent companies, rather than addressing phoenix activities by the fraudulent activities of company directors.

28. With respect to existing laws which deal with non-compliance for directors involved in fraudulent phoenix activities, it appears that there are already a number of mechanisms which are available. These are available under general law, corporations law and criminal laws (both civil and criminal sanctions).[17] MBA in their submission to the exposure draft consultation process also relevantly outlined recommendations

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[15] See Recommendations15, Chapter 6, para 6.98 and Recommendation 16, Chapter 6, para.6.99.

[16] The Cooper Review Panel's Final Report – Part 2 (at p.316) noted that *"stakeholders are also vitally interested in the ATO following up with employers to ensure thousands of Australians receive their SG Act entitlements every year"*. In response, the Cooper Review Panel recommended: *"The Government should ensure that the ATO is adequately resourced to continue its existing superannuation responsibilities, including the new functions it will administer under SuperStream and other Panel recommendations."* (Recommendation 10.6) See also (at p.318) Recommendation 10.8:
"The Government should have the Productivity Commission assess and advise on possible improvements to the regulatory framework for superannuation five years after the Government response to this report."

[17] See a summary of relevant provisions contained in "Directors' Duties and Phoenix Companies", by Angela Martin, Senior Associate Allens Arthur Robinson (2007), http://www.aar.com.au/pubs/pdf/insol/pap4apr07.pdf.

made by the Cole Royal Commission into the Building and Construction Commission, and the existing criminal provisions which are apposite to penalising persons involved in fraudulent phoenix activities.[18]

29. ACCI further notes the detailed written submission made by the Law Council of Australia, which suggested that in its view *"the main problem with phoenix activity is that regulating and prosecuting authorities have not routinely attacked phoenix -style fraudulent activity as fraud"* rather than the inadequacy of existing civil and criminal laws available to regulators.[19] The Council indicated that *"there are well targeted existing offences of considerable seriousness under the existing Crimes (Taxation Offences) Act 1980 which could be used to target phoenix activity, and would cover most taxes including: PAYG(withholding), Superannuation Guarantee, GST and FBT"*, in addition to action which could be *"taken under corporations law relating to directors duties"*.[20] The Council concluded by stating that in its opinion, *"the existing sanctions, if pursued with an appropriate vigour, will adequately address the problem phoenix activity"*.[21]

30. There are no details contained in the Regulation Impact Statement as to why existing measures contained in various pieces of legislation governing compliance with superannuation, taxation or corporations laws, are inadequate and that these proposed measures are the only way to address the policy issue. It may be that the answer lies in better targeted industry campaigns, enforcement and greater resources are provided to regulators which are aimed at tackling fraudulent phoenix activities, rather than through changes to the ATO's existing powers.

Piercing the Corporate Veil

31. ACCI is concerned that the measures would pierce the corporate veil where non-compliance is not deliberate or intentional and expose a director to personal liability without sufficient notice and defences available.

32. It would also be inconsistent with other legislation which only allows a civil penalty to be imposed on a natural person, such as a director, where they are knowingly involved in, aided or abetted, counselled or

[18] See in particular para 3.4 of the MBA submission to the exposure draft consultation process.
[19] LCA submission (dated 10 February) to the Government's proposals paper, "Action against fraudulent phoenix activity" (November 2009). http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=B6188A06-1E4F-17FA-D261-F7274EC5DD89&siteName=lca
[20] Ibid.
[21] Ibid.

procured a contravention, induced a contravention, knowingly concerned in a contravention or conspired with others to effect a contravention.[22]

Reducing Compliance Burden on Business

33. The measures would increase the administrative burden on business and increase compliance costs, where directors are required to seek urgent legal advice.

34. It is also unclear whether there is a statutory limitation period whereby the ATO would not be able commence action against a director.

35. The proposals also appear inconsistent with other objectives of the Government to reduce the red-tape burden on business, and a COAG agenda focused on looking at rationalising the application of existing directors' personal liabilities. COAG has agreed to principles proposed by the Ministerial Council for Corporations (MINCO) and to be adopted on a national basis in relation to corporate liability and the circumstances in which directors may also be liable for corporate fault, including the following two principles:[23]

    1. Where a corporation contravenes a statutory requirement, the corporation should be held liable in the first instance.

    2. Directors should not be liable for corporate fault as a matter of course or by blanket imposition of liability across an entire Act.

36. The bills, on the face of it, appear contradictory to these two accepted principles adopted by COAG.

37. The Minister's media release issued on 13 October indicates that "*[t]he amendments balance the importance of ensuring employees receive their entitlements and deterring phoenix activity, against the need to ensure entrepreneurialism and commercial risk taking is not discouraged*".

38. The introduction of new compliance measures in the form proposed, which will personally attach to directors' personal assets, will be yet another disincentive for both existing directors to remain on boards and future directors to consider starting a business or joining an existing business.

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[22] For example, see s.550 of the *Fair Work Act 2009*.

[23] Council of Australian Governments Meeting, 7 December 2009, Business Regulation And Competition Working Group Report Card, number 26.

Commencement

39. Whilst it appears that the new measures would take effect from the date of Royal Assent, ACCI is unclear whether the measures could be applied for actions which occurred prior to this date. ACCI opposes any retrospective application.

40. A prospective date for commencement of the measures will allow businesses and directors to be familiar with the new laws if they are passed by Parliament in its current or amended form.

Other Matters

41. ACCI notes that trade unions and other organisation proposals have sought to extend reach of compliance provisions during the exposure draft consultations.[24] ACCI opposes these suggestions and would ask the Committee to carefully scrutinise these suggestions in the context of the inquiry if they are repeated again.

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[24] See submissions made by Unions NSW, the ACTU, the Australian Institute of Superannuation Trustees to Treasury during the exposure draft consultation process.

4. ACCI MEMBERS

ACT AND REGION CHAMBER OF COMMERCE & INDUSTRY 12A THESIGER COURT DEAKIN ACT 2600 T: 02 6283 5200 F: 02 6282 2439 E:chamber@actchamber.com.au W: www.actchamber.com.au	**CHAMBER OF COMMERCE & INDUSTRY WESTERN AUSTRALIA** PO BOX 6209, HAY STREET EAST EAST PERTH WA 6892 T: 08 9365 7555 F: 08 9365 7550 E: info@cciwa.com W: www.cciwa.com	**VICTORIAN EMPLOYERS' CHAMBER OF COMMERCE & INDUSTRY** GPO BOX 4352 MELBOURNE VIC 3001 T: 03 8662 5333 F: 03 8662 5462 E: vecci@vecci.org.au W: www.vecci.org.au
AUSTRALIAN FEDERATION OF EMPLOYERS AND INDUSTRIES PO BOX A233 SYDNEY SOUTH NSW 1235 T: 02 9264 2000 F: 02 9261 1968 E: afei@afei.org.au W: www.afei.org.au	**CHAMBER OF COMMERCE NORTHERN TERRITORY** CONFEDERATION HOUSE SUITE 1, 2 SHEPHERD STREET DARWIN NT 0800 T: 08 8982 8100 F: 08 8981 1405 E: darwin@chambernt.com.au W: www.chambernt.com.au	**ACCORD** SUITE 4.02, LEVEL 4, 22-36 MOUNTAIN STREET ULTIMO NSW 2007 T: 02 9281 2322 F: 02 9281 0366 E: bcapanna@accord.asn.au W: www.accord.asn.au
BUSINESS SA ENTERPRISE HOUSE 136 GREENHILL ROAD UNLEY SA 5061 T: 08 8300 0000 F: 08 8300 0001 E: enquiries@business-sa.com W: www.business-sa.com	**NEW SOUTH WALES BUSINESS CHAMBER** LEVEL 15, 140 ARTHUR STREET NORTH SYDNEY NSW 2060 T: 132696 F: 1300 655 277 W: www.nswbc.com.au	**AGRIBUSINESS EMPLOYERS' FEDERATION** GPO BOX 2883 ADELAIDE SA 5001 T: 08 8212 0585 F: 08 8212 0311 E: aef@aef.net.au W: www.aef.net.au

CHAMBER OF COMMERCE & INDUSTRY QUEENSLAND
INDUSTRY HOUSE
375 WICKHAM TERRACE
BRISBANE QLD 4000

T: 07 3842 2244
F: 07 3832 3195
E: info@cciq.com.au
W: www.cciq.com.au

TASMANIAN CHAMBER OF COMMERCE & INDUSTRY
GPO BOX 793
HOBART TAS 7001

T: 03 6236 3600
F: 03 6231 1278
E: admin@tcci.com.au
W: www.tcci.com.au

AIR CONDITIONING & MECHANICAL CONTRACTORS' ASSOCIATION
30 CROMWELL STREET
BURWOOD VIC 3125

T: 03 9888 8266
F: 03 9888 8459
E: deynon@amca.com.au
W: www.amca.com.au/vic

AUSTRALIAN BEVERAGES COUNCIL
SUITE 4, LEVEL 1
6-8 CREWE PLACE
ROSEBERRY NSW 2018

T: 02 9662 2844
F: 02 9662 2899
E: info@australianbeverages.org
W:www.australianbeverages.org

AUSTRALIAN MINES & METALS ASSOCIATION
LEVEL 10
607 BOURKE STREET
MELBOURNE VIC 3000

T: 03 9614 4777
F: 03 9614 3970
E: vicamma@amma.org.au
W:www.amma.org.au

CONSULT AUSTRALIA
LEVEL 6, 50 CLARENCE STREET
SYDNEY NSW 2000

T: 02 9922 4711
F: 02 9957 2484
E: acea@acea.com.au
W:www.consultaustralia.com.au

AUSTRALIAN FOOD & GROCERY COUNCIL
LEVEL 2
2 BRISBANE AVENUE
BARTON ACT 2600

T: 02 6273 1466
F: 02 6273 1477
E: info@afgc.org.au
W:www.afgc.org.au

AUSTRALIAN PAINT MANUFACTURERS' FEDERATION
SUITE 1201, LEVEL 12
275 ALFRED STREET
NORTH SYDNEY NSW 2060

T: 02 9922 3955
F: 02 9929 9743
E: office@apmf.asn.au
W:www.apmf.asn.au

LIVE PERFORMANCE AUSTRALIA
LEVEL 1
15-17 QUEEN STREET
MELBOURNE VIC 3000

T: 03 9614 1111
F: 03 9614 1166
E: info@liveperformance.com.au
W: www.liveperformance.com.au

AUSTRALIAN INTERNATIONAL AIRLINES OPERATIONS GROUP
C/- QANTAS AIRWAYS
QANTAS CENTRE
QCD1, 203 COWARD STREET
MASCOT NSW 2020

T: 02 9691 3636
F: 02 9691 2065

AUSTRALIAN RETAILERS' ASSOCIATION
LEVEL 10
136 EXHIBITION STREET
MELBOURNE VIC 3000

T: 1300 368 041
F: 03 8660 3399
E: info@retail.org.au
W:www.ara.com.au

MASTER BUILDERS AUSTRALIA
LEVEL 1, 16 BENTHAM STREET
YARRALUMLA ACT 2600

T: 02 6202 8888
F: 02 6202 8877
E: enquiries@masterbuilders.com.au
W:www.masterbuilders.com.au

AUSTRALIAN MADE, AUSTRALIAN GROWN CAMPAIGN
SUITE 105, 161 PARK STREET
SOUTH MELBOURNE VIC 3205

T: 03 9686 1500
F: 03 9686 1600
E:ausmade@australianmade.com.au
W:www.australianmade.com.au

BUS INDUSTRY CONFEDERATION
SUITE 6
6 LONSDALE STREET
BRADDON ACT 2612

T: 02 6247 5990
F: 02 6230 6898
E: isuru@bic.asn.au
W: www.bic.asn.au

MASTER PLUMBERS' & MECHANICAL SERVICES ASSOCIATION OF AUSTRALIA (THE)
525 KING STREET
WEST MELBOURNE VIC 3003

T: 03 9329 9622
F: 03 9329 5060
E: info@mpmsaa.org.au
W:www.plumber.com.au

NATIONAL BAKING INDUSTRY ASSOCIATION
BREAD HOUSE, 49 GREGORY TERRACE
SPRING HILL QLD 4000

T: 1300 557 022
E: nbia@nbia.org.au
W:www.nbia.org.au

OIL INDUSTRY INDUSTRIAL ASSOCIATION
C/- SHELL AUSTRALIA
GPO BOX 872K
MELBOURNE VIC 3001

T: 03 9666 5444
F: 03 9666 5008

RESTAURANT & CATERING AUSTRALIA
SUITE 17
401 PACIFIC HIGHWAY
ARTARMON NSW 2604

T: 02 9966 0055
F: 02 9966 9915
E:restncat@restaurantcater.asn.au
W:www.restaurantcater.asn.au

NATIONAL ELECTRICAL & COMMUNICATIONS ASSOCIATION
LEVEL 4
30 ATCHISON STREET
ST LEONARDS NSW 2065

T: 02 9439 8523
F: 02 9439 8525

PHARMACY GUILD OF AUSTRALIA
PO BOX 7036
CANBERRA BC ACT 2610

T: 02 6270 1888
F: 02 6270 1800
E: guild.nat@guild.org.au

HOUSING INDUSTRY ASSOCIATION
79 CONSTITUTION AVE
CAMPBELL ACT 2612

T: (02) 6245 1300
F: (02) 6245 1444
W: www.hia.asn.au

E: necanat@neca.asn.au
W:www.neca.asn.au

W:www.guild.org.au

NATIONAL FIRE INDUSTRY ASSOCIATION
PO BOX 6825
ST KILDA CENTRAL VIC 8008

T: 03 9865 8611
F: 03 9865 8615
W:www.nfia.com.au

NATIONAL RETAIL ASSOCIATION
PO BOX 91
FORTITUDE VALLEY QLD 4006

T: 07 3251 3000
F: 07 3251 3030
E:info@nationalretailassociation.com.au
W:www.nationalretailassociation.com.au

AUSTRALIAN HOTELS ASSOCIATION
24 BRISBANE AVENUE
BARTON ACT 2600

T: 02 6273 4007
F: 02 6273 4011
E: aha@aha.org.au
W: www.aha.org.au

PLASTICS & CHEMICALS INDUSTRIES ASSOCIATION
LEVEL 1, 651 VICTORIA STREET
ABBOTSFORD VIC 3067

T: 03 9429 0670
F: 03 9429 0690
E: info@pacia.org.au
W:www.pacia.org.au

PRINTING INDUSTRIES ASSOCIATION OF AUSTRALIA
25 SOUTH PARADE
AUBURN NSW 2144

T: 02 8789 7300
F: 02 8789 7387
E: info@printnet.com.au
W:www.printnet.com.au

VICTORIAN AUTOMOBILE CHAMBER OF COMMERCE
7TH FLOOR
464 ST KILDA ROAD
MELBOURNE VIC 3004

T: 03 9829 1111
F: 03 9820 3401
E: vacc@vacc.asn.au
W:www.vacc.com.au

AUSTRALIAN DENTAL INDUSTRY ASSOCIATION
LEVEL 5, 757 ELIZABETH STREET
ZETLAND NSW 2017

T: 1300 943 094 OR 02 9319 5631
F: 02 9319 5381
E: adia@adia.org.au
W: www.adia.org.au