

27 October 2017

James Mason  
Financial System Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

Dear James

### **COMBATTING ILLEGAL PHOENIXING ACTIVITY**

The Owners Corporation Network of Australia Limited (OCN) is the peak body representing residential strata and community title owners and occupiers. OCN is therefore a key consumer voice in this review.

OCN welcomes the federal government's proposals to address illegal phoenix activity. In doing this, we would like to draw your attention to a large and vulnerable section of the community that urgently requires the protection these measures aim to provide – purchasers of residential strata properties and their tenants.

Strata is the fastest growing form of residential property ownership in Australia. Over half the new dwellings to be built in our metropolitan areas over the next decades will be strata titled. The growth of this sector raises increasingly important questions over property ownership and governance.

In the years since 2000 we have seen a rapid deterioration in the quality of, particularly, residential buildings. Many pose a threat to life and safety, as illustrated locally by the late 2014 Lacrosse fire in Docklands and internationally by 58 deaths in China and 80 deaths in London due to non-compliant and/or non-conforming building products.

Additionally, issues such as inadequate fire protection creating 'vertical barbecues' and catastrophic waterproofing failures, abound. Consumer redress is extremely difficult, time consuming and expensive. The community is left to bear the cost of litigation in the form of an overwhelmed court system, while the owners bear the enormous financial, physical and emotional cost of remediation after the builder winds up eg a \$2 special purpose vehicle.

In the context of this reform, builders are currently able to put one company into receivership to avoid responsibility for defects rectification, only to commence business under another company name the following day. It is currently impossible to attack the root of the problem; the directors who knowingly exploit the system, endanger lives, and avoid all responsibility.

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To illustrate this point, in NSW only 18% of home building contractor license holders are companies. However, **insolvencies within that 18% of the licensed contractor population somehow accounts for 85.6% of all accepted Home Owners Warranty insurance claims<sup>1</sup>.**

We urge you to address this broader issue of 'phoenix companies' as it relates to the construction industry and consumer protection, and welcome the opportunity to contribute further as needed.

In this submission, we will answer key questions posed by the consultation paper, leaving other questions to those best qualified to respond, and provide a sample of phoenix activity that cost NSW taxpayers dearly via Home Owners Warranty Insurance claims (now the Home Building Compensation Fund after government bailout of accumulated losses to the tune of \$350m last year).

1. 8/10
2. Website portal to report illegal phoenix activity.
3. The benefits to consumers, workers etc are significant.
4. ASIC, with all relevant agencies pointing people to that Agency
5. NSW Fair Trading has a [Complaints Register](#) which lists all companies that received 10 complaints or more in the previous calendar month. This strategy apparently had a positive effect on company standards in the UK.
8. ASIC should retain control
10. Liquidators should report suspected activity to ASIC, for ASIC to issue a notice
12. Failure to comply should be an offence, subject to the appropriate enforcement action at ASIC's disposal – [ASIC enforcement policy](#).
13. Adequate resourcing to deal with all incidents expeditiously, establishing an effective new system.
77. A cab rank should apply to all external administration appointments. Appointment by the entity has been proven to fail dismally in achieving optimal outcomes in, for example, building certification where the certifier is appointed by the developer.

Yours sincerely



Karen Stiles  
Executive Officer

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<sup>1</sup> Table 5.4, Budget Statement 2015-16

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**ANNEXURE 'A'**  
**ANALYSIS OF A SAMPLE OF 2016 NSW HOME OWNERS WARRANTY CLAIMS**  
**INVOLVING COMPANIES**

No.	Observations
1.	License ended 08/07. Two directors have been the directors of a 2 <sup>nd</sup> licensed company with the same name except for 1 letter since 04/06. That 2 <sup>nd</sup> company has been eligible for insurance since 04/10. The same 2 directors have also been the directors of a 3 <sup>rd</sup> licensed company since 12/08. It also has a similar name and has been eligible for insurance since 10/12.
2.	License ended 08/10. A director and the supervisor have been operating through another licensed company since 06/10 which is not eligible for insurance. Same director also operating through a 3 <sup>rd</sup> licensed company since 11/15 which is not eligible for insurance.
3.	License ended 05/14 (5 insurance claims paid). Two directors still operating through a 2 <sup>nd</sup> licensed company which has been eligible for insurance since 12/13.
4.	License ended 03/10 (7 insurance claims paid). One of the directors is operating through similarly named licensed company since 02/09 which has been eligible for insurance since 01/11.
5.	License ended 01/06. No ongoing company licenses.
6.	License ended 08/10. The director and supervisor operated through a 2 <sup>nd</sup> licensed company from 11/10 to 11/13 which was not eligible for insurance.
7.	License ended 05/06 (3 insurance claims paid). No ongoing company licenses
8.	License ended 02/14. (8 insurance claims paid) No ongoing company licenses.
9.	License ended 02/12. No ongoing company licenses.
10.	License ended 08/13. The director and supervisor have been operating through a 2 <sup>nd</sup> licensed company since 08/14 that has been eligible for insurance since 07/15.
11.	License ended 12/07 (6 insurance claims paid). Directors operated through a 2 <sup>nd</sup> licensed company from 08/07 to 08/13 which had insurance eligibility from 07/09. One director still operating through a 3 <sup>rd</sup> licensed company (with a similar name to the second) from 04/13 which has had insurance eligibility since 10/13.
12.	License ended 07/12. No ongoing company licenses.
13.	License ended 11/09 (3 insurance claims paid). The director and supervisor has been operating through a 2 <sup>nd</sup> licensed company from 05/07 which has been eligible for insurance since 01/09 and a third licensed company (with a similar name to the 2 <sup>nd</sup> licensed company) since 08/09 which has not been eligible for insurance.
14.	License ended 02/11 (10 insurance claims paid). No ongoing company licenses.
15.	License ended 05/08. Director and supervisor operating through 2 <sup>nd</sup> licensed company (with similar name) from 04/08 to 04/15 that did not have insurance eligibility and now through a 3 <sup>rd</sup> licensed company (with another similar name) from 03/15 which has been eligible for insurance since 10/15.
16.	License ended 03/11. The supervisor and one-time director has been operating (as supervisor only) through a 2 <sup>nd</sup> licensed company since 03/12 which has had insurance eligibility since 6/12.
17.	License ended 08/11 (5 insurance claims paid). A director has been operating through a 2 <sup>nd</sup> licensed company which has not had insurance eligibility since 11/12 and a 3 <sup>rd</sup> licensed company which has not had insurance eligibility since 11/14.
18.	License ended 05/07. A supervisor has been operating through a second licensed company since 02/07 which has been eligible for insurance for most of that time and is currently eligible.
19.	License ended 02/11 (6 insurance claims paid). No ongoing company licenses.
20.	License ended 12/05. The director and supervisor operated from 08/11 to 08/15 through a 2 <sup>nd</sup> licensed company that was not eligible for insurance.

21.	License ended 05/06. No ongoing company licenses.
22.	License ended 08/08 (3 insurance claims paid). A director and supervisor operated through a 2 <sup>nd</sup> licensed company that was eligible for insurance from 10/08 to 10/12 and has operated through a 3 <sup>rd</sup> licensed company from 09/11 which was eligible for insurance from 10/11 to 06/15.
23.	License ended 01/06. No ongoing company licenses.
24.	License ended 10/05. Director and supervisor operated through 2 <sup>nd</sup> licensed company (#25 below) from 06/07 to 06/12 (5 insurance claims paid). He had a 3 <sup>rd</sup> licensed company from 08/11 to 08/12 which did not obtain eligibility for insurance.
25.	License ended 06/12 (5 insurance claims paid). Director and supervisor operated through a 2 <sup>nd</sup> licensed company from 08/11 to 08/12 which did not obtain eligibility for insurance.
26.	License ended 04/07. No ongoing company licenses.
27.	License ended 04/14. A director and supervisor has been operating through a 2 <sup>nd</sup> licensed company since 03/13 which has been eligible for insurance since 01/14.
28.	License ended 06/06. No ongoing company licenses.
29.	License cancelled 07/15 (notice of resolution to wind up lodged with ASIC in 04/15). Director and supervisor operating through a 2 <sup>nd</sup> licensed company since 02/15 which became eligible for insurance in 02/16.
30.	Administrator appointed 07/12. License still on register. No other ongoing company licenses.
31.	License ended 03/10. The director and supervisor for most of the company's duration has been operating since 11/11 through a 2 <sup>nd</sup> licensed company that has not had insurance eligibility.
32.	License ended 09/15. The supervisor has since then been the supervisor for a 2 <sup>nd</sup> licensed company which became eligible for insurance in 10/15.
33.	License ended 05/14. Director and supervisor was operating through a 2 <sup>nd</sup> licensed company from 10/14 to 02/16 when that company's license was cancelled due to the 1 <sup>st</sup> company's external administration.
34.	License ended 05/14. Director and supervisor has been operating through a 2 <sup>nd</sup> licensed company which has not had insurance eligibility since 05/14.
35.	License ended 04/06. Nominated supervisor has been operating through his own company since 01/02 which has had insurance eligibility at various times including since 04/11.
36.	License ended 07/14 (9 insurance claims paid). A director and supervisor has been operating through a 2 <sup>nd</sup> licensed company that has not had insurance eligibility since 10/13.
37.	License cancelled 11/15. No ongoing company licenses.
38.	License cancelled 01/16. No ongoing company licenses.
39.	Liquidator appointed 10/15 (register lists license as active). No other ongoing company licenses.
40.	License ended 05/15. Director and supervisor operated through a 2 <sup>nd</sup> licensed company that was not eligible for insurance from 02/13 to 02/16 and has been operating through a 3 <sup>rd</sup> licensed company since 02/06 which has been eligible for insurance since 09/09.
41.	License ended 04/13. Some of the directors and a supervisor have been operating through a 2 <sup>nd</sup> licensed company with the same name except for one letter since 07/13. The 2 <sup>nd</sup> company has not had insurance eligibility.
42.	License was from 03/00 to 03/13. One of the directors also operated a 2 <sup>nd</sup> licensed company with similar name from 02/09 to 02/16 which was eligible for insurance throughout that period.
43.	License ended 09/05 (4 insurance claims paid). A director and a supervisor operated through a 2 <sup>nd</sup> licensed company with a very similar name from 06/05 to 06/06. That company did not obtain insurance eligibility. That director also operated through a 3 <sup>rd</sup> licensed company from 1988 to 02/11 which did not have insurance eligibility since 02/2000.