

Attn. the Proper Officer  
Toplace Pty Ltd (ABN 63 135 918 491)  
121 Majors Bay Road  
CONCORD NSW 2137

Service: By registered post and by email

02 February 2022

# Building Work Rectification Order

## Section 33 of the Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020

Toplace Pty Ltd (ACN 135 918 491) is being given this Building Work Rectification Order (“Order”) in relation to 11-15 Charles Street, Canterbury NSW 2193 (Lots 9 & 10 DP 578249; Lot 10 DP 828270) (CP SP93087) (“the Building”).

Toplace Pty Ltd is required to cause building work to be carried out to remediate the potential serious defects as set out in paragraph 8 of this Order.

Failure to comply with this Order is a criminal offence.

### Background

1. The Department of Customer Service (**the Department**) administers the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (**the Act**).
2. Under section 33 of the Act, if the Secretary of the Department or their authorised delegate has a reasonable belief that building work was carried out in a manner that could result in a serious defect in relation to the Building, they may order the developer to rectify building work to remediate the serious defect or potential defect.
3. Mr Matthew Whitton is an authorised delegate of the Secretary of the Department.
4. Toplace Pty Ltd (ACN 135 918 491) (**Toplace**) is the developer of the residential apartment building known as 11-15 Charles Street, Canterbury NSW 2193 (Lots 9 & 10 DP 578249; Lot 10 DP 828270) (CP SP93087) (the Building) for the purposes of section 4(a) of the Act.
5. On 24<sup>th</sup> December 2021 a notice of intention to issue the Order and draft copy of the Order was served on the Developer, Local Council, Certifier and Registrar-General. The parties were invited to provide submissions to the Department relating to the Order by 14<sup>th</sup> January 2022. No submissions were received by the 14<sup>th</sup> January 2022 from the Developer, Local Council, Certifier or Registrar-General. The developer sought from the Department for an extension to

provide submissions by the 24<sup>th</sup> January 2022. The request for an extension to provide submissions by the 24<sup>th</sup> January 2022 was granted by the Department to the Developer. No submissions were received from the Developer by the 24<sup>th</sup> January 2022.

6. Under section 3 of the Act a serious Defect in relation to a building, means –
- a. a defect in a building element that is attributable to a failure to comply with the performance requirements of the *Building Code of Australia*, the relevant Australian Standards or the relevant approved plans, or
  - b. a defect in a building product or building element that
    - i. is attributable to defective design, defective or faulty workmanship or defective materials, and
    - ii. causes or is likely to cause—
      - (A) the inability to inhabit or use the building (or part of the building) for its intended purpose, or
      - (B) the destruction of the building or any part of the building, or
      - (C) a threat of collapse of the building or any part of the building, or
  - c. a defect of a kind that is prescribed by the regulations as a serious defect, or
  - d. the use of a building product (within the meaning of the *Building Products (Safety) Act 2017*) in contravention of that Act.
7. Under s 6(1) of the *Design and Building Practitioners Act 2020* a Building element means any of the following:
- a. the fire safety systems for a building within the meaning of the *Building Code of Australia*,
  - b. waterproofing,
  - c. an internal or external load-bearing component of a building that is essential to the stability of the building, or a part of it (including but not limited to in-ground and other foundations and footings, floors, walls, roofs, columns and beams),
  - d. a component of a building that is part of the building enclosure,
  - e. those aspects of the mechanical, plumbing and electrical services for a building that are required to achieve compliance with the *Building Code of Australia*,
  - f. other things prescribed by the regulations for the purposes of this section.

#### **Decision to issue a building work rectification order**

8. I, Matthew Whitton, am the decision maker for this Building Work Rectification Order **(the Order)**. I have decided to issue the Order to Toplace because I have formed a reasonable belief under s 33(1) of the Act that building work was carried out in a manner that could result in serious defects in the Building as set out in this Order.

#### **Description of serious defect**

9. **Defect 1 – The installation of insufficient waterproofing on the external walls, on all levels where the hydraulics riser is located, resulting in water leaking into habitable rooms.**

On 25<sup>th</sup> October 2021, authorised officers of the Department conducted an inspection pursuant to s 20 of the Act in Building C, Level 3 Unit 3101. It was observed that there was water damage of the floor inside the bedroom of unit 3101. It was also observed that the adjoining external

wall to the bedroom of unit 3101, where a hydraulics riser is located, was not sufficiently waterproofed and permitted water entry via a gap at the base of the wall to flow into the adjoining room, which is a component of waterproofing. The gap was observed on all levels of the external wall where the hydraulics riser was located.

This is a serious defect because it is a defect in a building element that is attributable to a failure to comply with the **Performance requirement of the Building Code of Australia (BCA): NCC2014 BCA Volume 1, Section F Health and Amenity, Part F1 Damp and weatherproofing, Performance Requirements FP1.4** which states:

*“A roof and external wall (including openings around windows and doors) must prevent the penetration of water that could cause—*

- (a) unhealthy or dangerous conditions, or loss of amenity for occupants; and*
- (b) undue dampness or deterioration of building elements.”*

**Defect 2 – The installation of a roof on Building A with insufficient falls which could result in water leaking into habitable rooms.**

On 25<sup>th</sup> October 2021, authorised officers of the Department conducted an inspection pursuant to s 20 of the Act in Building A, Level 7 roof. It was observed that there was ponding of water on the roof indicating inadequate fall of the roof to allow water to dissipate. This is a component of waterproofing. Authorised officers were also advised by the building manager that water penetrated the adjoining room during periods of rain.

This is a serious defect because it is a defect in a building element that is attributable to a failure to comply with the Building Code of Australia (BCA) and the Australian Standards as follows: **The Australian Standard 4654.2-2012 Waterproofing membranes for external above-ground use – Part 2: Design and installation, section 2 Design and installation, subsection 2.5 Substrate, clause 2.5.2 Falls** which states:

*“Falls in finishes shall ensure water drains to the drainage outlet. Water shall not be retained on the finished surface with the exception of residual water remaining due to surface tension.*

*The fall shall be in the structural substrate or formed by a screed over the structural substrate.*

**Deemed-to-Satisfy provision F1.4 is a pathway that can satisfy the BCA Volume One, Section F Health and Amenity, Part F1 Damp and Weatherproofing, Performance Requirement FP1.4** which states:

*“A roof and external wall (including openings around windows and doors) must prevent the penetration of water that could cause-*

- (a) Unhealthy or dangerous conditions, or loss of amenity for occupants; and*
- (b) Undue dampness or deterioration of building elements.”*

The deemed to satisfy provision was also not complied with to satisfy BCA Volume One Section F Health and Amenity.

**Defect 3 – The installation of the fire door frames within the fire isolated stairway without a core filled with grout in the jamb cavities.**

On 25<sup>th</sup> October 2021, authorised officers of the Department conducted an inspection pursuant to s 20 of the Act in the fire isolated stairways of the Building. The metal fire door frames, which are part of the fire safety system for a building, emitted contrasting sounds when tapped, indicating inadequate grouting of the fire door jambs.

This is a serious defect because it is a defect in a building element that is attributable to a failure to comply with the BCA and Australian Standard as follows:

**Australian Standard AS 1905.1:2005 (Components for the protection of openings in fire-resistant walls – Part 1: Fire-resistant door sets) Section 5 Installation Clause 5.4 ‘allowable variations for fixing of doorframes’ states:**

*“Where the door frame is to be fixed to the wall, rather than incorporated in the wall as construction progresses, and where the tested specimen construction is as described in clause 5.3, the following shall apply:*

*(a) ...*

*(d) Jamb cavities shall be fully grouted.*

*(e) The head cavity shall be grouted in a manner that will prevent a flame passage across the top of the frame.”*

Australian Standard 1905.1 appears as a standard referenced in the **Performance requirement of the Building Code of Australia (BCA): NCC2014 BCA Volume 1, Section C Fire Resistance, Part C3 Protection of openings, Clause C3.4 Acceptable methods of protection** which state:

*“C3.4 Acceptable methods of protection*

*(a) ...*

*(b) Fire doors, fire windows and fire shutters must*

*comply with Specification C3.4”*

**Specification C3.4 Fire doors, smoke doors, fire windows states:**

*“Specification C3.4 Fire doors, smoke doors, fire windows and shutters.*

## *2. Fire Doors*

*A required fire door must—*

*1. Comply with AS 1905.1; and*

*2. Not fail by radiation through any glazed part during the period specified for integrity in the required FRL.”*

## **Building Work to be Carried Out**

10. Toplace Pty Ltd must carry out building work, or cause building work to be carried out, to:

- a. Remediate Defect 1 by remediating external walls where a riser is located to remove gaps and waterproof to prevent the penetration of water, see BCA Volume 1 and AS 4654.2.
- b. Remediate Defect 2 by removing the existing substrate and waterproof membrane from the roof of Building A and installing a substrate and waterproofing system with adequate fall to ensure it drains to the drainage outlets of the roof see BCA Volume 1 and AS 4654.2 to allow water to dissipate.
- c. Remediate Defect 3 all fire isolated stairways of the Building by fully grouting all door jamb cavities, see BCA Volume 1 and AS 1905.1.

**Period for Compliance with Order**

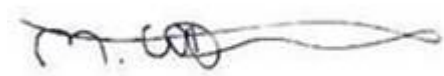
11. The work specified in paragraph 9 of this Order must be completed within 120 days of the date of this Order.

**Conditions of this Order**

12. Toplace Pty Ltd must notify NSW Fair Trading, in writing, by email sent to [ocaudits@customerservice.nsw.gov.au](mailto:ocaudits@customerservice.nsw.gov.au) within 2 business days of the work required by this Order being completed.

**Duration of this Order**

13. This Order remains in force until it is revoked by the Secretary.



Matthew Whitton  
**Director**  
**Building and Construction Compliance**  
**NSW Fair Trading Department of Customer Service**

## **REASONS FOR THE ORDER**

### **Reasonable belief and serious defects**

1. I, Matthew Whitton, an authorised delegate of the Secretary of the Department, have formed a reasonable belief for the purposes of s 33(1) of the Act in relation to Defects 1 to 3 in the Order, that building work was carried out in a manner that could result in a serious defect.
2. Defect 1 The installation of insufficient waterproofing on the external walls, on all levels where the hydraulics riser is located, resulting in water leaking into habitable rooms as described above in paragraph 8 of the Order, is a serious defect in a building element (waterproofing systems of the Building) that are required to achieve compliance with the Building Code of Australia and is a failure to comply with the following: Performance requirement of the Building Code of Australia (BCA): NCC2014 BCA Volume 1, Section F Health and Amenity, Part F1 Damp and weatherproofing. I have formed this belief on reviewing the Audit Report dated 10 November 2021 in Section 6 Audit findings, 1.0 Waterproofing Systems, Item 1.1.4 (a) on pages 10 and 11 contains the authorised officer's observations (including photographs).
3. Defect 2 - The installation of a roof with insufficient falls which could result in water leaking into habitable rooms as described above in paragraph 8 of the Order, is a serious defect in a building element (waterproofing systems of the Building) that are required to achieve compliance with the Building Code of Australia and Australian Standard 4654.2-2012 Waterproofing membranes for external above-ground use – Part 2: Design and installation, section 2 Design and installation, subsection 2.5 Substrate, clause 2.5.2 Falls. I have formed this belief on reviewing the Audit Report dated 10 November 2021 in Section 6 Audit findings, 1.0 Waterproofing Systems, Item 1.1.4 (b) and 1.1.4 (c) on pages 12 to 14 contains the authorised officer's observations (including photographs).
4. Defect 3 The installation of the fire door frames within the fire isolated stairway without a core filled with grout in the jamb cavities. as described above in paragraph 8 of the Order, is a serious defect (Fire safety system) that are required to achieve compliance with the Building Code of Australia (BCA): NCC2014 BCA Volume 1, Section C Fire Resistance, Part C3 Protection of openings, Clause C3.4 Acceptable methods of protection and Australian Standard AS 1905.1:2005 (Components for the protection of openings in fire-resistant walls – Part 1: Fire-resistant door sets) Section 5 Installation Clause 5.4 'allowable variations for fixing of doorframes'. I have formed this belief on reviewing the Audit Report dated 10 November 2021 in Section 6 Audit findings, 2.0 Fire Safety Systems, Item 2.2.51 (a) on page 21 to 23 contains the authorised officer's observations (including photographs).

### **Period for compliance**

5. I am of the view that a period of 120 days is a reasonable period for compliance in all the circumstances for the rectification work required by the Order to be carried out. I have formed this belief balancing the risks that the serious defect poses against the period of time it will take to give effect to the rectification work. I am aware that there are residents occupying this location as the Building is completed which will delay rectification work. I am of the view based on written advice provided by the Principal Compliance Officer Sean O'Hara of the Department that 120 days is sufficient to appoint remediation consultants, investigate the areas affected throughout the building, complete the preparation of a rectification scope of works, appoint suitable contractors and perform the rectification work.

### **Consideration of written representations**

6. On 24<sup>th</sup> December 2021 a notice of intention to issue the Order and draft copy of the Order was served on the Developer, Local Council, Certifier and Registrar-General. The parties were invited to provide submissions to the Department relating to the Order by 14<sup>th</sup> January

2022. No submissions were received by the 14<sup>th</sup> January 2022 from the Developer, Local Council, Certifier or Registrar-General. The developer sought from the Department for an extension to provide submissions by the 24<sup>th</sup> January 2022. The request for an extension to provide submissions by the 24<sup>th</sup> January 2022 was granted by the Department to the Developer. No submissions were received from the Developer by the 24<sup>th</sup> January 2022.

**Why is it appropriate to give the Building Work Rectification Order?**

7. I have considered all of the circumstances. I accept that the order requires considerable further construction work that is likely to be costly, and I give this consideration moderate weight. However, the cost to the developer must be balanced against the benefit to the occupiers of the unit in having the building constructed to the BCA and Australian Standards so as to prevent, in respect of:
  - a. Defect 1: the ongoing ingress of water and continuing degradation to affected areas
  - b. Defect 2: the risk of ingress of water and resulting degradation to affected areas
  - c. Defect 3: the risk of fire circumventing fire doors
8. Considering these potential consequences as outlined in this order, I give greater weight to the seriousness of the defects and failure to adhere to the Australian Standards and BCA, and the benefits arising from remediating them and I find that it is appropriate, in the exercise of my discretion, to require Toplace Pty Ltd to carry out the building work described in paragraph 9 of the Order within the period specified in paragraph 10 of the Order.