

Attn. the Proper Officer
Atlas Capital & Equities Pty Ltd (ACN 615 257 166)
75 Old Pittwater Road
BROOKVALE NSW 2100

Service: By registered post and by email

14 July 2022

Building Work Rectification Order

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

Atlas Capital & Equities Pty Ltd (ACN 615 257 166) is being given this Building Work Rectification Order (“Order”) in relation to 257 – 259 Condamine Street, Manly Vale, NSW, 2093 (Lots 6 & 7 in DP1109903) (“the Building”).

Atlas Capital & Equities Pty Ltd is required to cause building work to be carried out to remediate the potential serious defects as set out in paragraph 9 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 the Building or that the Building has a serious defect, 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. **Atlas Capital & Equities Pty Ltd (ACN 615 257 166)** is the developer of the residential apartment building known as 257 – 259 Condamine Street, Manly Vale, NSW, 2093 (Lot 6 & 7 DP1109903) (the Building) for the purposes of section 4(a) of the Act.
5. 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.
6. 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.
7. On 30 June 2022, a notice of intention to issue the Order and a draft copy of the Order was served on the Developer, the Local Council, the Certifier and Registrar General. The parties were invited to provide submissions to the Department relating to the Order by 6 July 2022. On 6 July 2022, submissions were received from the legal representative for the Developer, no submissions have been received from the Local Council, the Certifier or the Registrar General as of making this Order.

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 this Order to **Atlas Capital & Equities Pty Ltd** because I have formed a reasonable belief under s 33(1) of the Act the Building has a serious defect as set out in this Order.

Description of serious defect

9. **Defect 1 – The installation of a waterproofing membrane system with insufficient vertical upward termination at the balcony doors.**

On 1 July 2021, authorised officers of the Department conducted an inspection pursuant to s 20 of the Act in the Building. At the top floor balconies (third level) of the Building, it was observed that

there was insufficient vertical upward termination of the waterproofing membrane, at the balcony door sills. This is a serious defect because it is attributable to a failure to comply with the following Australian Standards:

Australian Standard 4654.2-2012 Waterproofing Membranes for External Above Ground Use, Section 2 Design and Installation, 2.8 Termination of membranes, 2.8.1 Upward terminations, 2.8.1.1 Height, which states:

“Where the membrane termination is to prevent water entry, the finished height of the membrane above the finished surface level shall be sufficient to prevent water, including wind driven, flowing over the top of the membrane.”

Building Work to be Carried Out

10. **Atlas Capital & Equities Pty Ltd** must carry out building work, or cause building work to be carried out as follows:

- a. Remediate Defect 1 on the third floor balconies by:
 - i. As required remove the balcony door suites, cladding, balcony tiles, tile screed bed to enable sufficient access.
 - ii. Prepare the substrate and install a compatible waterproofing system to the balcony with sufficient vertical upward termination to prevent water, including wind driven water, flowing over the top of the membrane.

Rectification in accordance with the BCA Volume One, Australian Standard 4654.1 Waterproofing membranes for external above-ground use — Materials, Australian Standard 4654.2 Waterproofing membranes for external above-ground use — Design and installation.

Period for Compliance with Order

11. The work specified in paragraph **10** of this Order must be completed as follows:

- a. Defect 1 – 13 November 2022

Conditions of this Order

12. **Atlas Capital & Equities Pty Ltd** must notify Greg O’Mara, Principal Compliance Officer, in writing, by email sent to 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, has formed a reasonable belief for the purposes of s 33(1) of the Act in relation to Defect 1 in the Order, that in the Building, there is a serious defect.
- 2) Defect 1 - The installation of a waterproof membrane with insufficient vertical upward termination at the balcony doors as described above in paragraph 9 of the Order, is a serious defect in a building element (waterproofing) that is required to achieve compliance with Australian Standard 4654.2-2012 Waterproofing Membranes for External Above Ground Use, Section 2 Design and Installation, 2.8 Substrate, 2.8.1 Upward terminations, 2.8.1.1 Height. I have formed this belief after reviewing a copy of the Audit Report dated 03 September 2021 section 1.1.1(a) and 1.1.1(b) in which I observed evidence of water entry and damage on the ceiling of the level below the balcony and an inadequate height difference between the external finish level and the internal floor level due to a waterproof membrane with insufficient vertical upward termination.
- 3) I have also formed this belief after reviewing the report of Ken Winton Building Consultants dated 24 May 2022 provided by the Developer which outlines the serious defect outlined at paragraph 9 along with a scope of works to rectify serious defect.

Period for compliance

- 4) I am of the view that a period of 4 months for Defect 1 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 no residents occupying this Building thus will expedite the Building Work. I am of the view that a period of 4 months for Defect 1 is sufficient to conduct the following works:
 - a) Remediate Defect 1 on the third floor balconies by:
 - i. As required remove the balcony door suites, cladding, balcony tiles, tile screed bed to enable sufficient access.
 - ii. Prepare the substrate and install a compatible waterproofing system to the balcony with sufficient vertical upward termination to prevent water, including wind driven water, flowing over the top of the membrane.

Consideration of written representations

- 5) On 30 June 2022, a notice of intention to issue the Order and a draft copy of the Order was served on the Developer, the Local Council, the Certifier and Registrar General. The parties were invited to provide submissions to the Department relating to the Order by COB 6 July 2022. On 6 July 2022, submissions were received from the legal representative for the Developer, no submissions have been received from the Local Council, the Certifier or the Registrar General as of making this Order.
- 6) The Developers legal representative provided me with two submissions on 6 July 2022 which included the following information (**Developers Representations**).
 - a) There was insufficient time to respond to the order.
 - b) The Developer does not understand the force of the Order and that the 19 July 2021 BWRO has already been complied and should be lifted.

- c) The Order does not specify the defect or why works completed are deficient.
 - d) The Order does not consider delays caused by the Department
 - e) The proposed Order does not consider untenanted residential and commercial tenancies, significant costs and the Developer is unable to refinance whilst the order is in place.
 - f) Consent to a further BWRO relating to the rectification of the level 3 balconies as identified at paragraph 9 of the BWRO on the following conditions:
 - (1) Defects are identified in writing relating to the rectification waterproofing to date as covered by the Certificate of Warranty from Crown waterproofing dated 22 June 2022
 - (2) The new BWRO specify level 3 balconies
 - (3) The withdrawal of the existing BWRO and PO
- 7) I have reviewed the Developers Representations and make the following observations:
- a) There was insufficient time to respond to the order
 - i) The Developer was provided with 6 days to provide any submissions in relation to the Order. The Developer did not request an extension to the period of time to respond to the Notice of Intention to issue the order. I am aware that a previous order was issued upon the Developer on the 19 July 2021 with two defects which included mechanical services and waterproofing. The only material changes in this Order from the order of 19 July 2021 are a reduction to one defect for waterproofing and a change in building work required (which was adopted from the report of Ken Winton Building Consultants dated 24 May 2022 which I note was provided to the Department by the Developer). I am of the view that there has been a reasonable time provided to the Developer to respond to the Notice of Intention to issue this Order.
 - b) The Developer does not understand the force of the Order and that the 19 July 2021 BWRO has already been complied and should be lifted.
 - i) I consider that the effect of this Order is plain on its face. Despite the Developer's actions after the Order dated 19 July 2021 was issued the defect in respect of waterproofing termination height remains noting the following:
 - (1) The original waterproofing membrane installed atop the third floor balconies is a self-adhesive bitumen impregnated sheet membrane (Class III type).
 - (2) This original membrane outlined in the Order dated 19 July 2021 did not have sufficiently vertical upward termination to prevent water entry internally.
 - (3) The Developer caused works to be carried out in an effort to rectify this inadequate vertical upward termination. The works undertaken included localised de-construction of the windows / doors / cladding adjoining the balcony and application of a Class I type membrane onto the Class III type membrane.
 - (4) The works to extend the original Class III type membrane included the application atop with a Class I type membrane. Class III type membrane has high extensibility whereas the Class I type has low extensibility.

- (5) The application of a Class I type membrane atop a Class III type membrane will result in failure where movement in the Class III type membrane cannot be accommodated by the Class I type membrane which has much less extensibility.
 - (6) The materials used to undertake the repairs and extension of the original Class III type membrane are from a different manufacturer than that of the original membrane.
 - (7) The junction of the new work has been undertaken at the junction where the original membrane was of inadequate vertical upward termination height.
 - (8) The work undertaken in an effort to rectify this issue is defective because the new products applied atop the original membrane to extend the membrane do not form part of the membrane manufacturer's installation requirements and therefore cannot be demonstrated to achieve compliance to Australian Standard 4654.1, Australian Standard 4654.2 and the manufacturer's tests.
 - (9) The non-compliant and incompatible rectification works will likely result in failure of the waterproof membrane at the junction of the repair being the inadequate termination height.
 - (10) This Order identifies clearly identifies the serious defect and the appropriate building work required to remediate the serious defect.
- c) The Order does not specify the defect or why works completed are deficient.
- i) I consider that this Order sufficiently and clearly outlines at paragraph 9 the defect, serious defect, location and remediation which are the subject of this order.
- d) The Order does not consider delays caused by the Department
- i) There are no delays apparent to me sufficient to require that this Order not be issued.
- e) The proposed Order does not consider untenanted residential and commercial tenancies, significant costs and the Developer is unable to refinance whilst the order is in place.
- i) At paragraph 8 for the 'Reasons for the Order' I have taken into account the construction work cost and given this moderate weight. The construction work cost takes into account the totality of costs and includes the need to delay residents moving into their residences, finance costs and untenanted commercial space.
- f) Consent to a further BWRO relating to the rectification of the level 3 balconies as identified at paragraph 9 of the BWRO on the following conditions:
- (1) Defects are identified in writing relating to the rectification waterproofing to date as covered by the Certificate of Warranty from Crown waterproofing dated 22 June 2022
- I have reviewed and considered the Certificate of Warranty. Despite the warranty there remains a serious defect apparent to me that requires remediation, given the potential consequences.
- (2) The new BWRO specify level 3 balconies
- I consider that it is appropriate to limit the Order to level 3 balconies.

(3) The withdrawal of the existing BWRO and PO

I consider that the issuing of this order should result in the withdrawal of the Order dated 19 July 2021 and accompanying Prohibition Order. I will revoke those orders on finalising this Order.

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

- 8) I have considered all of the circumstances. I accept that the order requires 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 future occupiers of the building in having the building constructed to the Australian Standards so as to ensure in respect of:
- a) Defect 1 - The ingress of water and continuing degradation to the affected areas and structure of the building.

Considering these potential consequences as outlined in this order, I give greater weight to the seriousness of the defect and failure to adhere to the Australian Standards and the benefits arising from remediating the defects and I find that it is appropriate, in the exercise of my discretion, to require **Atlas Capital & Equities Pty Ltd** to carry out the building work described in paragraph 10 of the Order within the period specified in paragraph 11 of the Order.