

Attn. Owners Corporation of Strata Plan 1731
(ABN 15 619 185 741)
C/o Strata Logic
Studio 12, Level 5, 35 Buckingham St
SURRY HILLS, NSW 2010

Service: By registered post and by email

16 December 2021

Prohibition Order

Section 9 of the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020*

This Prohibition Order is being made in relation to the residential apartment building, located at 20 Illawong Avenue, TAMARAMA, NSW, 2026 (CP/SP1731) (the Building). This order prohibits

- the issue of an occupation certificate in relation to the Building until the Order is revoked by the Secretary.
- the registration of a strata plan for a strata scheme in relation to the Building until the Order is revoked by the Secretary.

Please read this Prohibition Order carefully and comply with the conditions by the date specified.

Failure to comply with this Order or its conditions is a criminal offence.

A. Background

1. The Department of Customer Service (the **Department**) administers the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (**the Act**).
2. The Building is a residential apartment building to which the Act applies pursuant to s 6 of the Act.

3. Owners Corporation of Strata Plan 1731 (ABN 15 619 185 741) (**the Owners Corporation**) is the owner of the land on which the Building is located.
4. The Owners Corporation is therefore the developer of the Building for the purposes of s 4 of the Act.
5. Building work currently being carried out at the Building is building work as defined in s 5 of the Act.
6. Mr Matthew Whitton is an authorised delegate of the Secretary of the Department.

B. Powers under the Act

7. Under s 9(1) of the Act, the Secretary of the Department, or their authorised delegate, may make an order prohibiting the issue of an occupation certificate in relation to a residential apartment building and/or the registration of a strata plan for a strata scheme in relation to a residential apartment building if any one or more of the following apply:
 - a. the expected completion notice required to be given to the Secretary under the Act was not given or was given less than 6 months before the application for the occupation certificate was made (unless the expected completion notice was duly given under s 7(3) of the Act),
 - b. an expected completion amendment notice of a new expected date required to be given to the Secretary under the Act was not given or was given less than 6 months before the application for the occupation certificate was made,
 - c. the Secretary is satisfied that a serious defect in the building exists,
 - d. any building bond required under s 207 of the *Strata Schemes Management Act 2015* in relation to the building has not been given to the Secretary,
 - e. the developer failed to comply with a direction of an authorised officer under section 17 or 18 of the Act.
 8. Under s3 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.
9. Under s 6(1) of the *Design and Building Practitioners Act 2020* a Building element relevantly 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.

C. What are the reasons for making this Order?

Serious defect in the building exists – section 9(1)(c)

Serious Defect – The installation of fire sprinklers on only two floors of the Building. Fire sprinklers are a fire safety system for the Building and are required on all storeys for the Building.

10. On 22 September 2021 and 8 October 2021, authorised officers of the Department conducted inspections of the Building, pursuant to s 20 of the Act. The Building comprises 9 storeys and has an effective height of approximately 23.645 metres. The Building comprises of 80 units and two penthouses on the top floor.
11. It was observed during the inspection that there were fire sprinklers (which is a fire safety system) installed in the two basement carpark storeys however there were no fire sprinklers installed on the other storeys of the building. One of the authorised officers, Greg O'Mara, prepared a Report (outlining that there were sprinklers on the two basement carpark storeys but no other fire sprinklers) following the inspection dated 5 November 2021 (**the Report**) annexed at Attachment A).
12. I consider that fire safety systems, including, but not limited to, sprinklers, are key building elements. The proper performance of these elements is critical to the safety and integrity of the building that is under construction.
13. The failure to install fire sprinklers on all storeys is a serious defect because it means that a key building element being the fire safety system installed in the Building, fails to comply with the Building Code of Australia (**BCA**) Volume One 2019, Section E Services and Equipment, Part E1 Fire fighting equipment, Deemed-to-Satisfy Provision E1.5 Sprinklers identifies under Table E1.5 Requirements for sprinklers which states:

Occupancy	Where sprinklers are required.
"Class 2 or 3 building (excluding a building used as a residential care	"Throughout the whole building, including any part of another class, if any part of

building) and any other class of building (excluding a building used as a residential care building) containing a Class 2 or 3 part.”

the building has a rise in storeys of 4 or more and an effective height of not more than 25 m.”

14. I Matthew Whitton, an authorised delegate of the Secretary of the Department, am satisfied for the purposes of section 9(1)(c) of the Act that a serious defect in the Building exists, namely the Building does not have fire sprinklers throughout the whole Building as required by the BCA.
15. I have formed this belief after reviewing the Report which contains the authorised officer’s observations and includes photographs of the basement carpark and other floors in the Building. I am satisfied on the evidence before me that fire sprinklers are only located on two floors of the Building, being in the basement carpark.

D. What Order is being made?


16. I, Matthew Whitton, an authorised delegate of the Secretary, am satisfied there is a serious defect in the Building and accordingly make an Order under s 9 of the Act prohibiting the issue of an occupation certificate in relation to the Building.

E. How long is the Order in force?

17. This order remains in force until it is revoked by the Secretary or their authorised delegate.

F. Who has been given notice of the Order?

18. The following persons have been given notice of the making of this order:
- a. the local council: **Waverly Council**,
 - b. the certifier: **Joel Lewis BDC 2335**,
 - c. the developer: **Owners Corporation of Strata Plan 1731**,
 - d. the owner of the land: **Owners Corporation of Strata Plan 1731**,
 - e. the **Registrar-General**,



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

Notes about this Order

- **An occupation certificate issued in contravention of this prohibition order is invalid.**
- **It is an offence for a principal certifier (other than a council) to issue an occupation certificate in contravention of this order. The maximum penalty for a**

company is 1,000 penalty units. For an individual the maximum penalty is 200 penalty units.

- **A penalty notice of \$3,000 for an individual or \$11,000 for a corporation may be issued if a principal certifier (other than a council) issues an occupation certificate in contravention of this prohibition order.**
- **A developer in relation to the residential apartment building to which this prohibition order applies may appeal against this order to the Land and Environment Court within 30 days of the notice of the order being given unless the Court grants leave allowing an appeal to be made after that time. Lodging an appeal does not, except to the extent that the Land and Environment Court otherwise directs, operate to stay action on the order.**

REASONS FOR THE ORDER

A serious defect in the building exists

1. On 15 November 2021, notices of the proposed prohibition order were given in accordance with sections 44 and 45 of the Act.
2. The proposed prohibition order indicated my preliminary reasons as to why a prohibition order should be issued in respect of the Development as follows:
 - (a) fire safety systems are a building element for the purposes of the Act;
 - (b) the version of the BCA applicable to the fire safety systems for the Development is the 2019 version;
 - (c) the 2019 BCA requires sprinklers to be installed on every level of the Building;
 - (d) the Building currently only has sprinklers on two levels, being in the basement carpark; and
 - (e) the Building's fire safety system therefore fails to comply with the requirements of the BCA 2019;
 - (f) the Building therefore has a serious defect under s3 of the Act.
3. Representations were received by email dated 25 November 2021 from Structured Project Management (**SPM**) on behalf of the Owners Corporation of Strata Plan 1731. At the date of this Order, no other representations have been received from either the Certifier or Local Council.
4. SPM provided me with submissions which included the following information: (**Developer's Representations**).
 - a. The first construction certificate (CC) was issued on 18 August 2017 for a partial hydrant and sprinkler line installation.
 - b. A report obtained from Credwell Consulting dated 24 November 2021 advising that the correct BCA applicable to the sprinkler system was BCA 2016 Amendment 1
 - c. That the Local Council did not require the existing building to be upgraded to require the provision of a sprinkler system
 - d. Legal Advice obtained from Norton Rose Fulbright dated 25 November 2021 to the effect the correct BCA for the sprinkler system was the 2016 BCA thus the prohibition order draft is unsound and the Building complies with the fire safety requirements of the 2016 BCA.
 - e. Report from project Hydraulic Engineer of TNA Consulting dated 23 November 2021 addressing the feasibility of the hydraulic works completed in 2017 under the Construction Certificate 1 to be utilized as a supply for a fire suppression system.
5. SPM in summary advised the applicable BCA for the automatic fire suppression system under CC1 is BCA 2016 Amendment 1 and that there is no requirement under the *Environment Planning and Assessment Regulations 2000* to retrospectively upgrade the works to standards applicable to future construction certificates.
6. I have reviewed the Developer's Representations including the supporting reports. In relation to the issues raised in the Developer's Representations, I make the following observations:

- a. The date at which the relevant BCA is applicable is “*the time the application for the construction certificate was made*” cl 145(1)(b) *Environment Planning and Assessment Regulation 2000*;
 - b. The CC “1 Part Hydrant” had a construction certificate application date of the 18 August 2017 for works which comprised of partial hydrant line and sprinkler line installation only. This application did not require consideration of fire safety system for the Building.
 - c. Between 18 August 2017 and 24 June 2019 there were no construction certificate applications for any structural works, only applications for site investigation and demolition
 - d. On 24 June 2019 there was a construction certificate application for structural works - ground to level 7.
 - e. The 24 June 2019 application is therefore the first application which required any consideration of the fire safety system for the Building.
 - f. As the application date for the construction certificate for structural work was made on 24 June 2019, this is the applicable BCA date for consideration of the fire safety system for the Building.
 - g. The BCA 2019 came into effect on 1 May 2019 and is therefore the version of the BCA applicable to the Building.
7. I remain satisfied that the BCA 2019, being the applicable BCA, requires sprinklers to be installed on every floor and that the Building currently only has sprinklers in the two levels of the basement carpark.
 8. I therefore remain of the view that the Building does not comply with the 2019 BCA and, in the absence of any submissions made by the developer to the contrary, that this is a serious defect under s3 of the Act.

Why is it appropriate to give the prohibition order.

9. I have considered all of the circumstances. I accept that the order requires considerable additional building 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 risk to the safety of future occupiers of the units in having the building constructed without a serious defect. I consider the failure to have sprinklers as a component of a fire safety system on all storeys of the Building presents a potential serious risk to the safety of future occupiers of the building if a fire breaks out.
10. Considering these potential consequences, I give greater weight to the seriousness of the failure to adhere to the correct BCA, and I find that it is appropriate, in the exercise of my discretion, to require the Owners Corporation of Strata Plan 1731 to be issued with this prohibition order.
19. I, Matthew Whitton, an authorised delegate of the Secretary, am satisfied there is a serious defect in the Building and accordingly make an Order under s 9 of the Act prohibiting the issue of an occupation certificate in relation to the Building.