

Attn: Proper Officer
Ozone Cronulla Pty Limited
(ACN 620 484 933)
Level 11, 5 Hunter St
SYDNEY NSW 2000

Service: By email

Issue Date: 01 May 2023
Date of Modification: 14 February 2024

Building Work Rectification Order

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

Ozone Cronulla Pty Ltd (ACN 620 484 933) as a trustee for the Ozone Cronulla Unit Trust (ABN 78 681 724 812) is being given this Building Work Rectification Order (Order) in relation to 5-9 Ozone Street, Cronulla, NSW (Lot 2, D, 20; DP No. 202936, 366048, 839823; SP48254) (the Development).

Ozone Cronulla Pty Ltd (ACN 620 484 933) as a trustee for the Ozone Cronulla Unit Trust (ABN 78 681 724 812) is required to cause building work to be carried out to remediate the potential serious defects as set out in below in this Order.

Failure to comply with the requirements in this Order is a criminal offence contrary to s 33(9) of the Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 (NSW) which provides a maximum penalty of 3,000 penalty units and in addition, in the case of a continuing offence, 300 penalty units for each day the offence continues (in the case of a body corporate) and in any other case a maximum penalty of 1,000 penalty units and in addition, in the case of a continuing offence, 100 penalty units for each day the offence continues.

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 serious defect.
3. Section 3 of the Act defines a serious defect. Section 3 of the Act also defines the term “building element” by reference to the *Design and Building Practitioners Act 2020 (DBP Act)*. Section 4 of the Act defines the term “developer”. Section 6 of the Act provides the building work to which the Act applies. Relevant excerpts from sections 3, 4 and 6 of the Act and section 6 of the DBP Act are **Attachment A** to this order.
4. I, Matthew Whitton, Assistant Building Commissioner & Director (Building & Construction Compliance: NSW Fair Trading, Department of Customer Service) is an authorised delegate of the Secretary of the Department.
5. Ozone Cronulla Pty Ltd (ACN 620 484 933) as a trustee for the Ozone Cronulla Unit Trust (ABN 78 681 724 812) is the developer of the residential apartment building known as 5-9 Ozone Street, Cronulla, NSW (Lot 2, D, 20; DP No. 202936, 366048, 839823; SP48254) (the Development) for the purposes of section 4(a) of the Act.
6. The Development comprises of a Class 2/7a/10b multi-unit residential building, containing 38 units, with basement carpark. The Act applies to building work at the Development.

7. On 8 November 2022 and 10 February 2023 authorised officers conducted a lawful inspection of the Development.
8. On 14 April 2023, a Notice of Intention to issue the Order, including a draft copy of the Order, was served on the Developer, Local Council, Office of the Registrar General, and Certifier. The Developer, Local Council, Office of the Registrar General, and Certifier were invited to provide written representations relating to the Order to the Department by 21 April 2023.
 - a. The Developer provided submissions on 21 April 2023.

Requirements in relation to Serious Defects

9. I, Matthew Whitton, under section 33 of the Act, require you Ozone Cronulla Pty Ltd (ACN 620 484 933) as a trustee for the Ozone Cronulla Unit Trust (ABN 78 681 724 812) to do the things specified in column 4 in Table 1 to eliminate, minimise or remediate each respective serious defect described in columns 1, 2 and 3 of Table 1. Each requirement must be complied with by the time set out in column 5 of Table 1:

Table 1: Requirements in respect of Serious Defects

Serious Defect Reference Number	Location of Serious Defect	General description of Serious Defect	Requirement under section 33(2)(a) to carry out the following specified building work	Time for compliance with Requirement commencing from the date of modification of this Order
1	Balconies - Whole of property	Inadequate thickness of the bond breaker applied between the vertical and horizontal junction	<p>Ensure that the thickness of the bond breaker applied between the vertical and horizontal junction can accommodate differential horizontal movement (shear) between the vertical and horizontal substrate as required by <i>Australian Standard 4654.2 Waterproofing membranes for external above-ground use Design and installation</i> by:</p> <ol style="list-style-type: none"> 1. Suitably preparing the substrate in accordance with the membrane manufacturer's recommendations. 2. Apply appropriate bond breaker to the corners to achieve the specified dimensions. 3. Apply new waterproofing membrane over and lap onto existing in strict accordance with the membrane manufacturer's specifications. 4. Apply multiple coats where required to achieve the minimum specified dry film thickness. 5. Rectify any consequential damage. <p>Make good any consequential damage in accordance with BCA Volume One and the <i>Building Code of Australia</i> and <i>AS4654.2 - 2012 Waterproofing membranes for external above-ground use Design and installations</i></p>	6 weeks
2	(Defect 2 from original BWRO has been closed)			
3	Unit 104, balcony	Inadequate waterproofing system, being inadequate fall in the substrate/structural slab towards the drain point	Ensure adequate waterproofing system to properly drain the stormwater to drainage outlets and to provide adequate fall in the substrate to drain the water as required by	6 weeks

			<p><i>Building Code of Australia: Part F1 Damp and Weatherproofing, Deemed-to-Satisfy provision F1.4 External above ground membranes, the Australian Standard 4654.2: Waterproofing membranes for external above-ground use Design and installation Section 2 - Design and installation, 2.5 Substrate, 2.5.2 Falls, and the approved Architectural design drawing titled "Waterproofing Plan – Level 1", Drawing No. A5065, issue A, declared dated 20 May 2022 by PBD Architects by:</i></p> <ol style="list-style-type: none"> 1. Survey high and low spots. 2. Grind back high spots via abrasive means and top low spots with a non-shrink, featherable topping screed to achieve falls. 3. Suitably prepare the substrate in accordance with the membrane manufacturer's specifications. <p><i>Make good any consequential damage in accordance with the Building Code of Australia and AS4654.2 - 2012 Waterproofing membranes for external above-ground use Design and installations</i></p>	
4	(Defect 4 from original BWRO has been closed)			

Duration of this Order

10. This Order remains in force until it is revoked by the Secretary.
11. This order is given on the date that it is given in accordance with section 67 of the Act.

Modification of this Order

12. Matt Press, Director Building and Construction Compliance, Building Commission NSW is an authorised delegate of the Secretary of the Department.
13. On 14 February 2024, this Order was modified by Matt Press pursuant to section 38 of the Act.



Matthew Whitton
Director Practitioner Compliance
Building Commission NSW

Reasons for Building Work Rectification Order

1. These Reasons for Order are with respect to the Order dated 01 May 2023 issued to Ozone Cronulla Pty Ltd (ACN 620 484 933) as a trustee for the Ozone Cronulla Unit Trust (ABN 78 681 724 812) under the *Residential Apartment Buildings (Compliance and Enforcement Powers Act 2020)* (the **Order**). These Reasons for Order adopt the Background to the Order and any definitions within the Order, unless otherwise specified in the Reasons for Order.
2. I, Matthew Whitton, have formed a reasonable belief that the Development has serious defects.
3. I have formed this belief after reviewing:
 - a. An inspection report dated 19 December 2022 prepared by authorised officers of the Department, who conducted an inspection of the Development pursuant to s 20 of the Act in the Building on 8 November 2022 and 10 February 2023;
4. My belief is also based upon the following matters, set out in Table 3. I note that Column 1 of Table 3 refers to the Serious Defect with corresponding numbering that appears in Table 1 & 2 of the Order, located as described in Column 2 of Table 1 & 2 of the Order.

Table 2 – basis of reasonable belief as to serious defects

Serious Defect Reference	Building element in which serious defect has been identified	Defect	Reason why defect is a serious defect	Applicable approved plan, Code or Australian Standard	Consequences of serious defect
1	Waterproofing	Inadequate bond breaker fillet at corners.	Failure to comply with the relevant Australian Standard (Australian Standard AS4654.2-2012: <i>Waterproofing membranes for external above-ground use</i>).	<p>Building Code of Australia: Volume One, Part F1 Damp and Weatherproofing, Deemed-to-Satisfy provision F1.4 External above ground membranes, Deemed-to-Satisfy provision F1.4 which states:</p> <p><i>“Waterproofing membranes for external above ground use must comply with AS 4654.1 and AS 4654.2.”</i></p> <p><i>Australian Standard 4654.2-2012: Waterproofing membranes for external above-ground use Design and installation, Section 2 - Design and installation, 2.1 General, 2.12 Changes in Direction or Upstands, which states:</i></p> <p><i>"Any changes in the membrane's direction from horizontal to vertical shall meet the requirements of Clause 2.3. The membrane system shall be designed to accommodate differential horizontal movement (shear) between the vertical and horizontal substrate.</i></p> <p><i>Australian Standard 4654.2-2012: Waterproofing membranes for external above-ground use Design and installation, Section 2 - Design and installation, 2.7 Fillets</i></p> <p><i>"Fillets shall be used when a membrane changes from a horizontal to vertical or vertical to vertical plane.</i></p> <p><i>Note: The cove should be dimensioned as a 40mm x 40mm fillet/cove for ‘sheet’ membranes and a 15 mm× 15 mm fillet/bond breaker for ‘liquid’ membranes."</i></p>	The inadequate bond breaker fillet size could cause the membrane to fail at that location, leading to entry of water into the Building which will cause dangerous and unhealthy conditions.

2	(Defect 2 from original BWRO has been closed)				
3	Waterproofing	Lack of adequate falls	Failure to comply with the relevant Australian Standard (Australian Standard AS4654.2-2012: <i>Waterproofing membranes for external above-ground use</i>)	<p>Building Code of Australia: Volume One, Section F Health and Amenity, Part F1 Damp and Weatherproofing, Deemed-to-Satisfy provision F1.4 External above ground membranes, which states:</p> <p><i>“Waterproof membranes for external above ground use must comply with AS4654.1 and AS4654.2.”</i></p> <p>Australian Standard 4654.2-2012, Waterproofing membranes for External above ground use, Section 2 - Design and installation, 2.5 Substrate, 2.5.2 Falls, which states:</p> <p><i>"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.</i></p> <p><i>The fall shall be in the structural substrate or formed by a screed over the structural substrate.</i></p> <p><i>NOTE: Falls for surface drainage shall be no flatter than 1 in 100.”</i></p>	Water pooling and/or entry which could cause unhealthy or dangerous conditions, lost of amenity for occupants and undue dampness or deterioration of building elements must be prevented from entering the Building.
4	(Defect 4 from original BWRO has been closed)				

Consideration of written representations

5. The Developer provided submissions on 21 April 2023, stating:

- a. They “*note and acknowledge the failures of communication from our former builder in response to previously raised defective works and methodology*” and confirm that the “*previously raised items and alleged lack of responsible cooperation with the building commissioner’s office was one of the elements that led to use taking the balance of works away from*” the builder; and
- b. That they are working with the new builder to have “*a steps program that is in place to ensure successful re-commencement and completion of the development*” with “*no works...will...be proceeding onsite until a satisfactory outcome has been achieved with the items raised by the OBC and any other issues that arise during this transition process*”/

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

6. I am of the view that the periods above for Defect 1 through 4 (inclusive) are reasonable periods for compliance in all the circumstances for the specified actions required by the Order to be carried out. I have formed this belief balancing the risks that the serious defects pose against the period it will take to carry out the specified actions.
7. Considering the potential consequences as outlined in my reasons, I give greater weight to the seriousness of the Serious Defects identified and the associated failures to comply with the BCA, the Australian Standards, and the approved plans and the benefits arising from remediating the Serious Defects and I find that it is appropriate, in the exercise of my discretion, to make the Order to carry out the specified actions in the Order within the time specified in the Order.
8. I have considered all of the circumstances. I accept that the Order requires specified actions that are likely to be costly. I give this consideration moderate weight. However, the cost to the developer must be balanced against the benefit to the occupiers to be gained from identifying the specific building work that will eliminate the Serious Defects.

Attachment A

Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020.

Section 3 Definitions

(1) In this Act —

approved plans, in relation to building work, means the following —

- (a) approved plans and specifications issued with respect to a construction certificate or complying development certificate for the building work under the *Environmental Planning and Assessment Act 1979*, together with any variations to those plans and specifications for the purposes of those certificates effected or approved in accordance with that Act,
- (b) regulated designs under the *Design and Building Practitioners Act 2020*,
- (c) any other plans prescribed by the regulations for the purposes of this definition.

Building Code of Australia has the same meaning as in the *Environmental Planning and Assessment Act 1979*.

Building Commissioner means the Building Commissioner referred to in section 61.

building element has the same meaning as in the *Design and Building Practitioners Act 2020*, and includes any element of a building that is prescribed by the regulations for the purposes of this definition.

building product means any product, material or other thing that is, or could be, used in a building.

building work — see section 5.

building work rectification order — see section 33.

class of building means a building of that class as recognised by the *Building Code of Australia*.

completion, in relation to building work, means the date that the occupation certificate for the building or part of a building to which the building work relates was issued.

Department means the Department of Customer Service.

developer — see section 4.

expected completion amendment notice — see section 8.

expected completion notice — see section 7.

expected date — see section 7(2).

function includes a power, authority or duty, and **exercise** a function includes perform a duty.

occupation certificate means an occupation certificate issued under the *Environmental Planning and Assessment Act 1979*.

owners corporation for a strata scheme means the owners corporation for the strata scheme constituted under the *Strata Schemes Management Act 2015*.

prohibition order — see section 9.

rectification bond — see section 28.

residential apartment building means a class 2 building within the meaning of the *Building Code of Australia*, and includes any building containing a part that is classified as a class 2 component, but does not include any building or part of a building excluded from this definition by the regulations.

Secretary means the Secretary of the Department.

serious defect, in relation to a building, means —

- 1) 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
- 2) a defect in a building product or building element that —
 - a. is attributable to defective design, defective or faulty workmanship or defective materials, and
 - b. 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
- 3) a defect of a kind that is prescribed by the regulations as a serious defect, or
- 4) the use of a building product (within the meaning of the *Building Products (Safety) Act 2017*) in contravention of that Act.

stop work order — see section 29.

strata building means a building containing a lot or part of a lot that is the subject of a strata scheme.

strata plan has the same meaning as in the *Strata Schemes Development Act 2015*.

strata scheme has the same meaning as in the *Strata Schemes Development Act 2015*.

Note. The *Interpretation Act 1987* contains definitions and other provisions that affect the interpretation and application of this Act.

(2) Notes included in this Act do not form part of this Act.

Section 4 Meaning of “developer”

For the purposes of this Act, a **developer**, in relation to building work, means any of the following persons, but does not include any person excluded from this definition by the regulations —

- (a) the person who contracted or arranged for, or facilitated or otherwise caused, (whether directly or indirectly) the building work to be carried out,
- (b) if the building work is the erection or construction of a building or part of a building — the owner of the land on which the building work is carried out at the time the building work is carried out,
- (c) the principal contractor for the building work within the meaning of the *Environmental Planning and Assessment Act 1979*,
- (d) in relation to building work for a strata scheme — the developer of the strata scheme within the meaning of the *Strata Schemes Management Act 2015*,
- (e) any other person prescribed by the regulations for the purposes of this definition.

Section 6 Act applies only to residential apartment building work

- (1) The exercise of any function under this Act applies only to building work in respect of a residential apartment building that —
 - a. is or was authorised to commence in accordance with a construction certificate or complying development certificate issued under the *Environmental Planning and Assessment Act 1979*, or is required to be authorised by a construction certificate or complying development certificate, and
 - b. has not been completed or has been completed within the period of 10 years before the exercise of that function.

- (2) The regulations may provide that a specified provision, or specified provisions, of this Act extend to other classes of buildings (within the meaning of the *Building Code of Australia*).

Design and Building Practitioners Act 2020.

Section 6 Building elements

- (1) For the purposes of this Act, ***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.

- (2) The regulations may exclude things from being building elements for the purposes of this Act.

- (3) In this section —

above grade wall means a wall above the level of the ground surrounding a building.

below grade wall means a wall below the level of the ground surrounding a building.

building enclosure means the part of the building that physically separates the interior environment of the building from the exterior environment, including roof systems, above grade and below grade walls (including windows and doors).