

Attn: Proper Officer
109 466 793 Pty Ltd (ACN 109 466 793)
c/o – WLP Restructuring
02 Australia Square SE 21
Level 21
264-276 George Street
SYDNEY NSW 2000

CAS Ref: 11100591

Service: By registered post and by email

23 April 2024

Building Work Rectification Order

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

109 466 793 Pty Ltd (ACN 109 466 793) is being given this Building Work Rectification Order (Order) in relation to address 91 Arthur Street, Rosehill NSW 2142 (SP 89697, formerly Lot 1/3 DP 205251) (the Development).

109 466 793 Pty Ltd (ACN 109 466 793) is required to cause building work to be carried out to remediate the serious and/or potential serious defects as set out below in this Order.

Failure to comply with the requirements in 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 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, Matt Press, Director (Building Compliance, Building Commission NSW, Department of Customer Service) am an authorised delegate of the Secretary of the Department.
5. **109 466 793 Pty Ltd (ACN 109 466 793)** is the developer of the residential apartment building at **91 Arthur Street, Rosehill NSW 2142 (SP 89697, formerly Lot 1/3 DP 205251) (the Development)** for the purposes of section 4(a) of the Act.
6. The Development consists of a four-storey residential flat building, comprising 32 residential units over basement parking.
7. On 6 October 2023, authorised officers conducted a lawful inspection of the Development.
8. On 6 February 2024, a notice of intention to issue a building work rectification order, including a draft copy of the Order, was served on the Developer, Local Council, Office of the Registrar General, Owners Corporation and Certifier.

Requirements in relation to Serious Defects

9. I, Matt Press, under section 34(1) of the Act, specify the standard of building work to be done in respect of the serious defects referenced in column 1 of Table 1 below and under section 34(1A) of the Act require that **109 466 793 Pty Ltd (ACN 109 466 793)** do the things specified in column 5 of Table 1 below in respect of those serious defects. Each requirement must be complied with by the time set out in column 6 of Table 1:

Table 1: Requirement in relation to specified standard

Serious Defect Ref No.	Location of Serious Defect	Description of Serious Defect	Specified standard of building work (s 34(1)(a))	Requirement (s 34(1A))	Time for compliance with Requirement from the date of issue of this order (s 39(1))
1.	Façade of units 6, 21, 23 and 25	Water is entering into habitable areas of the building through the building façade wall, windows, and doors	Ensure water is prevented from entering into habitable areas of the building	<p>Within the time period specified in column 6,</p> <p>Stage 1 Submit a written report to the OC Audit team via email to ocaudits@customerservice.nsw.gov.au</p> <p>The written report required to be submitted must:</p> <ul style="list-style-type: none"> i) be prepared by a suitably qualified and experienced person or specialist appropriate to the subject areas of the building, being a waterproofing/façade consultant; ii) be prepared with consideration to this Order and the Reasons for this Order; and iii) detail the specific building work necessary to eliminate the serious defect and meet the specified standard. <p>Stage 2 Carry out the work to rectify the serious defect in accordance with the written report submitted in compliance with Stage 1 and make good any resultant consequential damage.</p>	<p>Stage 1: 1 month</p> <p>Stage 2: 3 months</p>

2.	Unit 25	Water is leaking into the master bedroom from the ensuite	Ensure that water is prevented from penetrating from the ensuite into other parts of the SOU	<p>Within the time period specified in column 6,</p> <p>Stage 1 Submit a written report to the OC Audit team via email to ocaudits@customerservice.nsw.gov.au</p> <p>The written report required to be submitted must:</p> <ul style="list-style-type: none"> i) be prepared by a suitably qualified and experienced person or specialist appropriate to the subject areas of the building, being a waterproofing consultant; ii) be prepared with consideration to this Order and the Reasons for this Order; and iii) detail the specific building work necessary to eliminate the serious defect and meet the specified standard. <p>Stage 2 Carry out the work to rectify the serious defect in accordance with the written report submitted in compliance with Stage 1 and make good any resultant consequential damage.</p>	<p>Stage 1: 1 month</p> <p>Stage 2: 3 months</p>
3.	Unit 17 balcony	Water is leaking on unit 17 balcony from waterproofing failure on balcony of unit 25	Ensure water is prevented from leaking onto the balcony of unit 17	<p>Within the time period specified in column 6,</p> <p>Stage 1 Submit a written report to the OC Audit team via email to ocaudits@customerservice.nsw.gov.au</p> <p>The written report required to be submitted must:</p> <ul style="list-style-type: none"> i) be prepared by a suitably qualified and experienced person or specialist 	<p>Stage 1: 1 month</p> <p>Stage 2: 3 months</p>

				<p>appropriate to the subject areas of the building, being a waterproofing consultant;</p> <p>ii) be prepared with consideration to this Order and the Reasons for this Order; and</p> <p>iii) detail the specific building work necessary to eliminate the serious defect and meet the specified standard.</p> <p>Stage 2</p> <p>Carry out the work to rectify the serious defect in accordance with the written report submitted in compliance with Stage 1 and make good any resultant consequential damage.</p>	
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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 is listed above in accordance with section 67 of the Act.



Matt Press
Director Building Compliance
Building Commission NSW

Date: 23/04/24

Reasons for Building Work Rectification Order

1. These Reasons for Order are with respect to the Order dated 23 April 2024 issued to **109 466 793 Pty Ltd (ACN 109 466 793)** 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, Matt Press, have formed a reasonable belief that the Development has serious defects.
3. I have formed this belief after reviewing:
 - (a) An inspection report dated 26 October 2023 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 6 October 2023;
 - (b) Specialist inspection report titled “Report and Scope on water ingress to unit 25” dated 4 December 2022 by George Farah, Unified Building Group Pty Ltd;
 - (c) Specialist inspection report titled “Apartment 25 Investigation” ref PMC0460D/2022 dated 15 August 2022 by Peter Menassa Construction and Maintenance Pty Ltd;
 - (d) Specialist inspection report titled “Water ingress Inspection report” dated 30 October 2023 rev 01 by Total Building Engineering Solutions, and
 - (e) Specialist report ref Job#10583 dated 23 October 2023 by FJ Group Facilities Maintenance.
4. My belief is also based upon the following matters, set out in Table 2. I note that Column 1 of Table 2 refers to the Serious Defect with corresponding numbering that appears in Table 1 of the Order, located as described in the corresponding Column 2 of Table 1.

Table 2 – Basis of reasonable belief as to serious defects

Serious Defect Ref No.	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.	A component of a building that is part of the building enclosure, being 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)	Water is entering into habitable areas of the building.	Water leaks have been confirmed in the “Water ingress report” dated 30 October 2023 at various locations through the building façade. Water should be prevented from entering into habitable areas of the building.	The water penetration demonstrates a failure to comply with BCA 2012 Volume One, Section F Health and Amenity, Part F1 Damp and weatherproofing and the following performance requirements, FP1.4 which states: <i>“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.”</i>	The water penetration has caused damage to habitable areas of the building, including: 1. Unit 25 is currently uninhabitable. 2. Unit 21 includes signs of water leak from the façade. 3. Units 21 and 25 show water stains and damage carpets in the bedrooms. 4. Gyprock linings have been removed for inspection.
2.	Waterproofing	Water is leaking from the ensuite to the bedroom	Ensuite bathroom should be sufficiently waterproofed to prevent the penetration of water into habitable areas of the building	Water leaks from the bathroom demonstrate a failure to comply with BCA 2012 Volume One, Section F Health and Amenity, Part F1 Damp and weatherproofing	The water leak has caused damage to the floor finishing of the bedroom, rendering it uninhabitable

				<p>and the following Performance requirements, FP1.7 which states:</p> <p><i>“To protect the structure of the building and to maintain the amenity of the occupants, water must be prevented from penetrating-</i></p> <p style="padding-left: 40px;"><i>(a) behind fittings and linings; and</i></p> <p style="padding-left: 40px;"><i>(b) into concealed spaces, of Sanitary compartments, bathrooms, laundries and the like.”</i></p>	
3.	Waterproofing	Water is leaking on unit 17 balcony from the balcony above (unit 25 balcony)	There are signs of leaching through the concrete cracks observed in the soffit of the unit 17 balcony, which is below unit 25	<p>Water leaks from the bathroom demonstrate a failure to comply with BCA 2012 Volume One, Section F Health and Amenity, Part F1 Damp and weatherproofing and the following Performance requirements, FP 1.6 which states:</p> <p><i>“Overflow from a bathroom, laundry facility or the like must be prevented from penetrating to—</i></p>	If the leaking through the cracks in the concrete slab continue, there is a risk of premature failure due to reinforcement corrosion and spalling of concrete

				<p><i>(a) another sole-occupancy unit used for sleeping accommodation; and</i></p> <p><i>(b) a public space,</i></p> <p><i>in a storey below in the same building.</i></p>	
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Consideration of written representations

5. On 6 February 2024, a notice of intention to issue a building work rectification order, including a draft copy of the Order, was served on the Developer, Local Council, Office of the Registrar General, Owners Corporation and Certifier.
6. The Local Council and Office of the Registrar General did not make any submissions.
7. On 27 February 2024, the Owners Corporation submitted a written representation, in that they have requested the department to further pursue another landowner, being Success 88 Pty Ltd [ACN 48 144 988 334]. Success 88 Pty Ltd has been deregistered. No further action can be taken.
8. On 27 February 2024, the appointed liquidator to the developer (WLP Restructuring) were granted an extension of time to make submissions (12 March 2024). No submission was provided.
9. In these circumstances, I am satisfied it is appropriate to issue the Order.

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

10. Considering the potential consequences as outlined in my reasons and the order, I give greater weight to the seriousness of the Serious Defects identified and the associated failures to comply with the BCA and 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.

11. I have considered all 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.
12. I am of the view that the periods above for Defect 1 through 3 (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 of time it will take to carry out the specified actions.

Attachment A

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

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*.

owner's 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 —

- (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.

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.

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.

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.

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).

Notes about this Order

- A person is not required to obtain consent or approval under the *Environmental Planning and Assessment Act 1979* to carry out work in compliance with a requirement of a Building Work Rectification Order.
- It is an offence to fail to comply with this Order. The maximum penalty for a company is 3,000 penalty units and in addition, for every day the offence continues, 300 penalty units. For an individual the maximum penalty is 1,000 penalty units and in addition, for every day the offence continues, 100 penalty units.
- You may appeal to the Land and Environment Court against this Order within 30 days after this Order is given, unless the Land and Environment Court grants leave for it to be made after that time. Lodging an appeal does not operate to stop the effect of this Order unless ordered by the Court.
- You are entitled to be given reasons for this Order, unless it has been given in an emergency. The reasons have been included within this Order and are not provided separately.
- The Secretary has given the following persons notice of the making of this building work rectification order:
 - o the relevant local council,
 - o if the local council is not the certifier in relation to the building work—the principal certifier,
 - o if you are not the owner of the land concerned—the owner of the land concerned,
 - o if the order relates to a strata building—the relevant owners corporation,
 - o any other person prescribed by the regulations.
- This Order specifies a time by which, or period within which, the order must be complied with. This Order continues to have effect until it is complied with even though the time has passed, or the period has expired, unless any requirement under this Order is revoked.