

Attn: Proper Officer
HIFU INVESTMENT PTY LTD (ACN 150 040 350)
Suite 87, 26-32 Pirrama Road
Pyrmont NSW 2009

CAS Ref: 10629654

Service: By registered post and email

1 September 2023

Building Work Rectification Order

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

HIFU INVESTMENT PTY LTD (ACN 150 040 350) is being given this Building Work Rectification Order (Order) in relation to address 132-136 Epsom Road, Zetland, NSW 2017 (Lot 1 DP1234006 and SP95732) (the Development).

HIFU INVESTMENT PTY LTD (ACN 150 040 350) 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.

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. 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. **HIFU INVESTMENT PTY LTD (ACN 150 040 350)** is the developer of the residential apartment building known as “Observatory Place” **132-136 Epsom Road, Zetland, NSW 2017 (Lot 1 DP1234006 and SP95732) (the Development)** for the purposes of section 4(a) of the Act.
6. The Development comprises of a 24 storey mixed-use building consisting of 173 apartment units, commercial retail space and underground car parks. The Act applies to building work at the Development because it is a Class 2 Development, is currently occupied and is less than 10 years old.
7. On 13 October 2022, authorised officers conducted a lawful inspection of the Development.

Requirements in relation to Serious Defects

8. I, Matthew Whitton, under section 33 of the Act, require you **HIFU INVESTMENT PTY LTD (ACN 150 040 350)** 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 this order is given)
1	Basement level garbage room penetrations	Penetrations have not been installed with a tested system	i. Install a tested system at each required service penetration.	1 month

9. I, Mr Matthew Whitton, 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 2 below and under section 34(1A) of the Act require that you **HIFU INVESTMENT PTY LTD (ACN 150 040 350)** do the things specified in column 5 of Table 2 below in respect of those serious defects. Each requirement must be complied with by the time set out in column 6 of Table 2:

Table 2: Requirement in relation to specified standard

Serious Defect Reference Number	Location of Serious Defect	Description of Serious Defect	Specified standard of building work	Requirement	Time for compliance with Requirement
2	Unit 101/136 Living room and bedroom Unit 102/136 Living room Unit 301/136 Living room Unit 501/134 Living room Unit 503/134 Living room Unit 301/132 Living room and bedroom Unit 504/132 Living room and bedroom	Water entering through the windows and doors into the habitable living areas of the Building	Ensure water does not enter the building	Within the time period specified in column 5, submit a written report to OC Audits via email to ocaudits@customerservice.nsw.gov.au The written report required to be submitted must: i. be prepared by a suitably qualified and experienced person or façade engineer specialist; ii. be prepared with consideration to this Order and the Reasons for this Order; and iii. Undertake intrusive investigations to determine the entry point of the water. iv. detail the specific building work necessary to eliminate the serious defect.	2 months

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 listed above in accordance with section 67 of the Act.



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

Reasons for Building Work Rectification Order

1. These Reasons for Order are with respect to the Order dated 1 September 2023 issued to **HIFU INVESTMENT PTY LTD (ACN 150 040 350)** 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 13 October 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 13 October 2022.
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 and 2 of the Order, located as described in Column 2 of Table 1 and 2 of the Order.

Table 3– basis of reasonable belief as to serious defects

Serious Defect Reference	Location	Building element	Defect	Reason why defect is a serious defect	Applicable approved plan, Code or Australian Standard	Consequences of serious defect
1	Basement level garbage room penetrations	Fire Safety System	The fire penetrations have not been installed with a tested system	Service penetrations that penetrate a building element which is required to have an FRL needs to be a tested system. In the building the service penetrations in the garbage room have been installed with no system.	<p>BCA Volume One, Section 3 Fire resistance, Part C3 Protection of openings, Deemed-to-satisfy provision C3.15 Openings for service installations, which states:</p> <p>“Where an electrical, electronic, plumbing, mechanical ventilation, air-conditioning or other service penetrates a building element (other than an external wall or roof) that is required to have an FRL with respect to integrity or insulation or a resistance to the incipient spread of fire, that installation must comply with any one of the following:</p> <p>(a) Tested systems</p> <p>(i) The service, building element and any protection method at the penetration are identical with a prototype assembly of the service, building element and protection method which has been tested in accordance with AS 4072.1 and AS 1530.4 and has achieved the required FRL or resistance to the incipient spread of fire”.</p> <p>Deemed-to-satisfy provision C3.15 Openings for service installations is a pathway that can satisfy the BCA Volume One, Section C Fire resistance, Performance Requirement CP8, which states:</p> <p>“Any building element provided to resist the spread of fire must be protected, to the degree necessary, so that an adequate level of performance is maintained—</p>	Fire can spread from the garbage room to other areas of the Building through the penetrations which are not a tested system. Fire spreading could result in damage to property or risk to life.

					(a) where openings, construction joints and the like occur; (b) where penetrations occur for building services”.	
2	Unit 101/136 Living room and bedroom Unit 102/136 Living room Unit 301/136 Living room Unit 501/134 Living room Unit 503/134 Living room Unit 301/132 Living room and bedroom Unit 504/132 Living room and bedroom	Waterproofing	Water is entering the Building	Openings around windows and doors must prevent the penetration of water. In the Building water is penetrating through openings around windows and doors	BCA Volume 1, Section F Health and Amenity, Part F1 Damp and Weatherproofing, Performance Requirement FP1.4 Weatherproofing, which states: <i>“A roof and external wall (including openings around windows and doors) must prevent the penetration of to prevent penetration of water that could cause-</i> <i>(a) Unhealthy or dangerous conditions, or loss of amenity for occupants: and</i> <i>(b) Undue dampness or deterioration of building elements.”</i>	The absence of measures to exclude water from the openings of the windows and doors has caused unhealthy and dangerous conditions for the occupants of the Building.

Consideration of written representations

5. On 18 May 2023, 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 Developer, Local Council, Office of the Registrar General, Owners Corporation and Certifier were invited to provide written representations relating to the Order to the Department by 8 June 2023. This date for Developer submissions was later extended to 9 June 2023. The following occurred:
 - a. No submissions were received as at the date of this Order from the Local Council, Office of the Registrar General, Owners Corporation, and Certifier.
 - b. No submissions were received as at the date of this Order from the Developer.

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

7. I am of the view that the periods above for Defect 1 through 2 (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.
8. Considering the 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 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.
9. 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.