

Attn: Proper Officer
STM123 No. 8 Pty Ltd (ACN 134 663 433)
Tower 2' L14
101 Grafton Street
BONDI JUNCTION NSW 2022

CAS Ref: 11113540

Service: By registered post and by email

01 March 2024

Building Work Rectification Order

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

STM123 No. 8 Pty Ltd (ACN 134 663 433) is being given this Building Work Rectification Order (Order) in relation to address 43A Captain Pipers Road Vacluse (Lot 1 DP 1230444, SP 95693) (the Development).

STM123 No. 8 Pty Ltd (ACN 134 663 433) 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. **STM123 No. 8 Pty Ltd (ACN 134 663 433)** is the developer of the residential apartment building at **43A Captain Pipers Road Vaucluse (Lot 1 DP 1230444, SP 95693) (the Development)** for the purposes of section 4(a) of the Act.
6. The Development consists of a single building containing six residential units and one level of basement car parking.
7. On 28 September 2023, authorised officers conducted a lawful inspection of the Development.

Requirements in relation to Serious Defects

8. 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 2 below and under section 34(1A) of the Act require that **STM123 No. 8 Pty Ltd (ACN 134 663 433)** 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 Reference 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.	Unit 4	Moisture and rising dampness present in the unit door and window areas.	Ensure window and door areas are free from rising damp	<p>Within the time 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 expert; 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 1 2 months</p> <p>Stage 2 3 months</p> <p>Stage 3 4 months</p>

				<p>Stage 2 Submit via email to ocaudits@customerservice.nsw.gov.au fully coordinated designs and specifications for the required building work including submission of any required regulated designs in accordance with the <i>Design and Buildings Practitioners Act 2020</i>.</p> <p>Stage 3 Carry out the work to rectify the serious defect in accordance with the written report and designs and specifications submitted in compliance with Stage 1 and 2, and make good any resultant consequential damage.</p>	
2.	Units 1, 2, 3, 4 and 6	Water is penetrating through the corners of doors and window frames, causing staining of carpets	Ensure that water is prevented from penetrating into habitable areas of the building	<p>Within the time 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 expert; ii) be prepared with consideration to this Order and the Reasons for this Order; and 	<p>Stage 1 2 months</p> <p>Stage 2 3 months</p> <p>Stage 3 4 months</p>

				<p>iii) detail the specific building work necessary to eliminate the serious defect and meet the specified standard.</p> <p>Stage 2 Submit fully coordinated designs and specifications for the required building work including submission of any required regulated designs in accordance with the <i>Design and Buildings Practitioners Act 2020</i>.</p> <p>Stage 3 Carry out the work to rectify the serious defect in accordance with the report and designs and specifications submitted in compliance with Stage 1 and 2, and make good any resultant consequential damage.</p>	
3.	In front of front door of Units 1, 2, 3 and 4	There is no drainage in front of the door, causing water to penetrate inside the units during heavy rainfall	Ensure water is prevented from penetrating inside the front door of the units	<p>Within the time 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> <p>i) be prepared by a suitably qualified and experienced person or specialist appropriate to the subject areas of the building, being a registered</p>	<p>Stage 1 2 months</p> <p>Stage 2 3 months</p> <p>Stage 3 4 months</p>

				<p>building practitioner (Façade Engineer);</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 Submit fully coordinated designs and specifications for the required building work including submission of any required regulated designs in accordance with the <i>Design and Buildings Practitioners Act 2020</i>.</p> <p>Stage 3 Carry out the work to rectify the serious defect in accordance with the report and designs and specifications submitted in compliance with Stage 1 and 2, and make good any resultant consequential damage.</p>	
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Duration of this Order

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

A handwritten signature in black ink, appearing to read 'Matt Press', with a stylized, cursive script.

Matt Press
Director, Building Compliance
Building Commission NSW
Department of Customer Service

Reasons for Building Work Rectification Order

1. These Reasons for Order are with respect to the Order dated 1 March 2024 issued to **STM123 No. 8 Pty Ltd (ACN 134 663 433)** 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 3 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 28 September 2023.
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 Reference No.	Building element/product 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.	Building enclosure	Moisture and rising dampness present in the unit door and window areas.	Moisture and rising damp has penetrated into habitable areas of the building and caused undue dampness and loss of amenity for occupants.	The moisture/rising dampness within the Units door/window area demonstrates a failure to comply with the BCA Volume One, Section F Health and Amenity, Part F1 Damp and weatherproofing,	Unhealthy conditions, and a loss of amenity for occupants. Undue dampness and deterioration of building elements.

				<p>Performance Requirement FP1.4 Weatherproofing which states:</p> <p><i>“A roof and external wall (including openings around windows and doors) must prevent the penetration of water that could cause —</i></p> <ul style="list-style-type: none"> <i>(a) unhealthy or dangerous conditions, or loss of amenity for occupants; and</i> <i>(b) undue dampness or deterioration of building elements.”</i> 	
2.	Building enclosure	Water is penetrating through the corners of doors and window frames	Water has penetrated through the building enclosure and caused damage to carpets	<p>The moisture/rising dampness within the Units door/window area demonstrates a failure to comply with the BCA Volume One, Section F Health and Amenity, Part F1 Damp and weatherproofing, Performance Requirement FP1.4 Weatherproofing which states:</p> <p><i>“A roof and external wall (including openings around windows and doors) must</i></p>	Unhealthy conditions, and a loss of amenity for occupants. Undue dampness and deterioration of building elements.

				<p><i>prevent the penetration of water that could cause —</i></p> <p><i>(a) unhealthy or dangerous conditions, or loss of amenity for occupants; and</i></p> <p><i>(b) undue dampness or deterioration of building elements.”</i></p>	
3.	Waterproofing	There is no drainage in front of the door, causing water to penetrate inside the units during heavy rainfall	There is insufficient drainage present to prevent the penetration of water to the inside of the units. There is staining on the doors showing previous water penetration.	<p>The Absence of drainage in front of the front door causing water ingress inside the units demonstrates a failure to comply with the BCA Volume One, Section F Health and Amenity, Part F1 Damp and weatherproofing, Performance Requirement FP1.2 which states:</p> <p><i>“Surface water, resulting from a storm having an average recurrence interval of 100 years must not enter the building.”</i></p>	Water has previously penetrated into the building and is likely to do so again, causing unhealthy conditions, and a loss of amenity for occupants.

Consideration of written representations

5. On 6 December 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, Certifier and Owners Corporation.
6. On 15 December 2023, the chair of the strata committee, on behalf of the Owners Corporation, provided representations. The Owners Corporation provided a copy of a series of expert reports prepared in relation to a claim for major defects under the *Home Building Act 1989*. The Owners Corporation requested that the defects identified in the expert reports be added to the Order.
7. I have considered the representations of the Owners Corporation and determined it is not appropriate to modify the Order. The serious defects set out in the Order above are those identified by authorised officers of the Department during their inspection. The reports provided by the Owners Corporation have been prepared for the purposes of a different legislative scheme (that is, a major defect claim under the *Home Building Act 1989*). In those circumstances, it is not appropriate to include them in the present Order. However, it is open to the Department to pursue further regulatory action at a later date.
8. The Developer also provided submissions on 10 January 2024 and 5 February 2024.
9. On 10 January 2024, in summary, the Developer made the following submissions:
 - (a) Due to the Christmas shutdown period and given expert availability, the Developer was not afforded sufficient opportunity to prepare a substantive response to the matters identified in the proposed Order;
 - (b) Based on the above, the Developer was not in a position to agree or disagree with the Order;
 - (c) The matters are subject of NSW Civil and Administrative Tribunal proceedings, concerning alleged defects that exist in the Development, with a hearing date to be advised at some point after 7 March 2024;
 - (d) At hearing, the Developer will seek an order for the builder to rectify and defects confirmed by the Tribunal;
 - (e) Given the alleged defects are already the subject of existing proceedings, the most appropriate forum to determine the scope of works is the Tribunal, and
 - (f) In the alternative, the Developer sought additional time to prepare a substantive response to the Order.
10. On 5 February 2024, the Developer wrote to the Department seeking a further extension of time, of an additional six weeks,

to provide a response to the Order. This was on the basis of ongoing settlement discussions arising out of the proceedings in the Tribunal, which were purported to continue for six weeks. The further extension of time request was declined on 19 February 2024.

11. I have considered the Developer's representations. No representations have been provided going to the substance of the Order. I acknowledge the ongoing proceedings in the Tribunal concerning a claim made under the *Home Building Act 1989*. However, I note that the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* operates in a separate and distinct regulatory scheme, and there is no impediment to an Order being contemplated in the presence of concurrent proceedings under a different regulatory scheme.
12. In circumstances of ongoing litigation relating to alleged defects (albeit under a different regulatory scheme), it is not clear why the Developer has been unable to respond to the substance of the Order. I am satisfied, however, that the Developer has had sufficient opportunity to do so.
13. Accordingly, as the Developer has not provided any submissions going to the substance of the Order, and I am of the view that it is not appropriate to amend the Order as requested by the Owners Corporation, I am satisfied that it is appropriate to issue the Order as set out above.

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

14. 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.
15. 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.
16. I am of the view that the periods above for Defect 1 through 5 (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*.

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 —

- (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).