

Attn. the Proper Officer  
89 Ebley Street Pty Limited  
ACN 602 206 600  
'Tower 2 Darling Park' Level 16  
201 Sussex St  
SYDNEY NSW 2000

Service: By registered post and by email

8 June 2023

# Building Work Rectification Order

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

89 Ebley Street Pty Limited ACN 602 206 600 is being given this Building Work Rectification Order ("Order") in relation to 73-89 Ebley Street, Bondi Junction NSW 2022 (as regards the part being SP100091) ("the Building").

89 Ebley Street Pty Limited is required to cause building work to be carried out to remediate the potential serious defects as set out in paragraphs 8 to 19 of this Order.

Failure to comply with 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 the Building or that the Building has a serious defect, they may order the developer to rectify building work to remediate the serious defect or potential defect.
3. Mr David Chandler is an authorised delegate of the Secretary of the Department.
4. 89 Ebley Street Pty Limited ACN 602 206 600 is the developer of the residential apartment building at 73-89 Ebley Street, Bondi Junction NSW 2022 (SP100091, SP100092) (**the Building**) for the purposes of section 4(c) of the Act.
5. Under section 3 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.
6. Under s 6(1) of the *Design and Building Practitioners Act 2020* a 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.

#### **Decision to issue a building work rectification order**

7. I, David Chandler, am the decision maker for this Building Work Rectification Order (**the Order**). I have decided to issue the Order to 89 Ebley Street Pty Limited because I have formed a reasonable belief under s 33(1) of the Act the Building has the serious defects as set out in this Order.

#### **Description of serious defects**

##### **8. Defect 1 – Waterproofing**

On 26 July 2022, authorised officers of the Department conducted an inspection pursuant to s 20 of the Act in the Building. In relation to a select number of balconies of the Building (but in particular the balconies of units 401, 402 and 302), the following observations were made:

- (a) there was evidence of water penetration from the balconies to the habitable areas of numerous units;
- (b) several units that were inspected had evidence of water penetration in the form of waterlogged carpet, water damaged floating floor and staining to skirtings. Some units inspected had carpet removed and staining was evident on the concrete floor slab and *smooth edge* carpet edging grips;
- (c) the balconies were tiled with a pedestal tiling system laid over a waterproofing membrane on a concrete substrate and upon lifting pedestal tiles on several balconies, it was revealed that water was ponding on the membrane, indicating that there was insufficient fall in the substrate;
- (d) observations at the threshold sills of sliding door sills to balconies revealed that the upward termination of the membrane at door thresholds was turned up against the sill profile of the

sliding door track, rather than proceeding under the sill profile or meeting with the sill flashing. This effectively blocked the drainage weepholes in the sill assembly and trapped water in the track;

- (e) authorised officers also noted that waterproofing on balconies of the Building had been turned up on the front of the metal wall cladding, thereby impeding the natural drainage of any flashing detail in the wall. It was therefore apparent to the authorised officers that any water collected by the door sill assembly would penetrate under the waterproofing membrane and track to areas on the inside of the habitable space of the dwelling and also the habitable areas of the units below.

The water penetration issues, inadequate waterproofing system, evidence of water penetration and damage to internal lining as described above is a serious defect because it is a defect in a building element (waterproofing) that is attributable to a failure to comply with the following:

**AS 4654.2-2012 Waterproofing Membranes for External Above Ground Use: Clause 2.8. Termination of membranes, 2.8.1 Upward terminations, 2.8.1.1 Height**, which states:

*"Where the membrane termination is to prevent water entry, the finished height of the membrane above the finished surface level shall be sufficient to prevent water, including wind driven, flowing over the top of the membrane."*

And **clause 2.5 Substrate, 2.5.2 Falls**, which states:

*"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."*

*The fall shall be in the structural substrate or formed by a screed over the structural substrate."*

AND

**AS 2047 Windows and External Glazed Doors in Buildings, clause 7.2.2 Flashing**, which states:

*"Flashing shall be incorporated into the building envelope where it is necessary –*

- a) To restrict water from entering into the interior of a building from the exterior;*
- b) To restrict water passing across a cavity to the inner leaf; or*
- c) To shed water through cladding to the outer face."*

AND

**BCA Volume 1, Section F Health and Amenity, Part F1 Damp and weatherproofing, Performance Requirement FP1.4 Weatherproofing** which states:

*"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."*

## 9. Defect 2 – Waterproofing

On 26 July 2022, authorised officers of the Department conducted an inspection pursuant to s 20 of the Act in the Building. Authorised officers made the following observations:

- (a) there was evidence of damage to plasterboard linings in the habitable areas of numerous single occupancy units due to water penetration from the roof areas of the Building;
- (b) unit 305 of the Building had been vacated and deemed uninhabitable due to excessive mould conditions within that unit;
- (c) the ballast covered roof over units 305 – 308 of the Building revealed water ponding on the roof area;
- (d) the flashing detail around the roof perimeter of the Building revealed that the flashing fails to proceed through the brick parapet wall, thereby failing to prevent water migrating through the brickwork to habitable areas below;
- (e) observations of the roof over unit 402 revealed that a metal capping over the perimeter hob had been joined lengthways along the top, with water laying on the capping;
- (f) observations of metal deck roofing over the lift shaft revealed that the metal roof sheets had been laid with negative fall, with water ponding on the sheets;
- (g) inspection of planter boxes on rooftop gardens and balconies revealed that overflow provisions had not been installed and membranes inside planters do not extend 100mm above the soil level.

The inadequate waterproofing system, evidence of water penetration and damage to internal lining as described above is a serious defect because it is a defect in a building element (waterproofing) that is attributable to a failure to comply with the following:

**BCA Volume 1, Section F Health and Amenity, Part F1 Damp and weatherproofing, Performance Requirement FP1.4 Weatherproofing** which states:

*"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."*

The work also fails to satisfy the following provisions of **AS 4654.2- 2012 Waterproofing Membranes for External Above Ground Use: Clause 2.5 Substrate, 2.5.2 Falls**, which states:

*"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."*

*The fall shall be in the structural substrate or formed by a screed over the structural substrate.*

**Clause 2.13 Planter Boxes**, which states:

*"The membrane shall be sealed to the drainage outlet. It shall extend vertically to a height of 100mm above the soil or fill level.*

*Notes: 1. The planter should be provided with a suitable overflow."*

AND

**AS3700 Masonry Clause 4.7.3 Damp Proof Courses (DPCs) and Flashings**, which states:

*"DPCs and flashings shall be incorporated in masonry construction to-*

- (a) *Provide a barrier to the upward or downward passage of moisture through masonry;*
- (b) *Prevent moisture from entering into the interior of a building from the exterior;*
- (c) *Prevent moisture passing across a cavity to the inner leaf; and*
- (d) *Shed moisture through masonry to the outer face."*

10. **Defect 3 – Waterproofing**

On 31 August 2022, authorised officers of the Department conducted an inspection pursuant to s 20 of the Act in the Building. Uncontrolled water penetration was noted in the basement car park of the Building in various locations, including but not limited to:

- (a) storage cage 39;
- (b) at the rear of storage cage 29;
- (c) in the mechanical room of the Building, the exhaust fan motor had ceased due to water damage;
- (d) cracks in the transfer slab; and
- (e) around service penetrations in the transfer slab.

The inadequate waterproofing system and the evidence of water penetration and damage internally as described above is a serious defect because it is a defect in a building element (waterproofing) that is attributable to a failure to comply with the following:

**BCA Volume 1, Section F Health and Amenity, Part F1 Damp and weatherproofing, Performance Requirement FP1.4 Weatherproofing** which states:

*"A roof and external wall (including openings around windows and doors) must prevent the penetration of water that could cause-*

- (c) Unhealthy or dangerous conditions, or loss of amenity for occupants: and*
- (d) Undue dampness or deterioration of building elements."*

11. **Defect 4 – Waterproofing**

On 31 August 2022, authorised officers of the Department conducted an inspection pursuant to s 20 of the Act in the Building. The following observations were made:

- (a) In unit 302 of the Building there was evidence of water damage to the carpet and the floor surface outside the bathroom doorway of that unit. It was apparent to the authorised officers that an effective waterstop had not been installed at the doorway of that unit.
- (b) In units 302, 308 and 105 of the Building there were holes cut through wet area walls and marble shelving had been removed, and in unit 402 of the Building a toilet pan had been removed. The authorised officers were advised that these works had all been undertaken by contractors (engaged by the owners of the affected units) for investigative purposes. These inspection holes uncovered water ingress with entry points from neighbouring wet areas.

The failure to continue perimeter flashing around the base of door frame styles of wet areas as described above is a serious defect because it is a defect in a building element (waterproofing) that is attributable to a failure to comply with the following:

**Table F1.7 of BCA Volume One, 2019** which states:

*"Waterproof walls/floor junctions in wet area outside shower area."*

And,

**Clause 3.9.1.2(a) of AS 3740-2010** which states:

*"A water stop that has a vertical leg finishing flush with the top of the finished floor level shall be installed at floor level openings. The floor membrane shall be terminated to create a waterproof seal to the water stop and to the perimeter flashing."*

**BCA Table F1.7 and AS 3740 form the deemed to satisfy provisions for the performance requirement FP 1.7. Performance Requirement FP1.7** states:

*"To protect the structure of the building and to maintain the amenity of the occupants, water must be prevented from penetrating-*

*(a) behind fittings and linings; and*

*(b) into concealed spaces,*

*Of sanitary compartments, bathrooms, laundries and the like."*

## 12. **Defect 5 – Fire Safety Systems**

On 31 August 2022, authorised officers of the Department conducted an inspection pursuant to s 20 of the Act in the Building. In respect of the façade of the Building, it was observed that:

- (a) a number of spandrels were measured to not extend 600mm above the slab level; and
- (b) upon measuring the external brickwork it was determined by authorised officers that the bricks were 85mm from brick to brick. As there were typically 8 bricks in height between openings this meant that the spandrel height was typically 680mm.

The inadequate spandrel installations as described above is a serious defect because it is a defect in a building element (fire safety systems) that is attributable to a failure to comply with the following:

**Clause C2.6 of the BCA**, which states:

*"Any part of a window or other opening in an external wall is above another opening in the story next below and its vertical projection falls no further than 450 mm outside the lower opening (measured horizontally), the openings must be separated by –*

*I. a spandrel which –*

*a. is not less than 900 mm in height; and*

*b. extends not less than 600 mm above the upper surface of the intervening floor; and*

*c. is of non-combustible material having an FRL of not less than 60/60/60; or..."*

## 13. **Defect 6 – Fire Safety Systems**

On 3 August 2022, authorised officers of the Department conducted an inspection pursuant to s 20 of the Act in the Building. Upon inspection of the basement level of the Building it was observed that

several penetrations had not been installed with the correct fire stopping for the purpose of maintaining an integrity and insulation rating.

The failure to properly fire stop penetrations as described above is a serious defect because it is a defect in a building element (fire safety systems) that is attributable to a failure to comply with the following:

Clause C1.1 of the BCA requires compliance with Specification C1.1 of the BCA which outlines the Fire Resistant Levels (FRLs) applicable to building elements.

Clause C3.15 of the BCA requires that services passing through fire rated building elements must be protected with fire stopping systems to maintain the required FRL.

**BCA Volume One, Section C Fire Resistance, Part C3 Protection of openings, Deemed-to-Satisfy provisions: C3.15 Openings for service installations**, which states:

*“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:*

*(a) Tested systems*

*(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.*

*(b) ... (c) Compliance with Specification C3.15 ...”*

#### 14. **Defect 7 – Fire Safety Systems**

On 26 July 2022, authorised officers of the Department conducted an inspection pursuant to s 20 of the Act in the Building. Upon inspection of the service cupboards and risers of the Building it was observed that the penetrations to the service cupboards had not been installed adequately.

The failure to properly fire stop penetrations to service cupboards as described above is a serious defect because it is a defect in a building element (fire safety systems) that is attributable to a failure to comply with the following:

Clause C3.15 of the BCA requires that services passing through fire rated building elements must be protected with fire stopping systems to maintain the required FRL.

**BCA Volume One, Section C Fire Resistance, Part C3 Protection of openings, Deemed-to-Satisfy provisions: C3.15 Openings for service installations**, which states:

*“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:*

*(a) Tested systems*

*(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.*

*(b) ... (c) Compliance with Specification C3.15 ..."*

Clause C1.1 of the BCA requires compliance with Specification C1.1 of the BCA which outlines the Fire Resistant Levels (FRLs) applicable to building elements. Building elements must comply with the FRLs outlined in Specification C1.1 of the BCA.

15. **Defect 8 – Fire Safety Systems**

On 26 July 2022 authorised officers of the Department conducted an inspection pursuant to s 20 of the Act in the Building. The authorised officers observed in the fire stairs and in a selection of single occupancy units, that door jambs had not been adequately core filled.

The failure to adequately core fill door jambs as described above is a serious defect because it is a defect in a building element (fire safety systems) that is attributable to a failure to comply with the following:

**Australian Standard 1905.1-2015 Components for the protection of openings in fire-resistant wall Part 1: Fire resistant doorsets, Section 5 Installation, 5.3 Metal doorframes in masonry walls, 5.3.2 Backfilling of metal door frames**, which states:

*"Unless an alternative method of fixing has been demonstrated by a full-scale standard fire resistance test, metal door frames used in the construction of a fire-rated doorset for masonry construction, frame head and jamb cavities shall be backfilled by thoroughly and progressively grouting with cement mortar, concrete, a non-shrink grout or with material with a temperature of fusion not less than 1000°C".*

**Australian Standard 1905.1** appears as a standard referenced in **the BCA Volume One, Section C Fire resistance, Specification C3.4 Fire doors, smoke doors, fire windows and shutters, Clause 2. Fire doors**, which states in part:

*"A required fire door must—*

*(a) comply with AS 1905.1;"*

**Specification C3.4 Fire doors, smoke doors, fire windows and shutters, Clause 2. Fire doors**, is a pathway that can satisfy the **BCA Volume One, Section C Fire resistance, Performance Requirement CP2**, which states in part:

*"(a) A building must have elements which will, to the degree necessary, avoid the spread of fire—*

*(i) to exits; and*

*(ii) to sole-occupancy units and public corridors; and*

*(iii) between buildings; and*

*(iv) in a building".*

Therefore, because the installation does not comply with the referenced Australian Standard 1905.1, the BCA Volume One Performance Requirement cannot be shown to have been satisfied.

16. **Defect 9 – Structural Systems**

On 26 July 2022 authorised officers of the Department conducted an inspection pursuant to s 20 of the Act in the Building. The following observations were made in multiple locations in the basement of the Building:

(a) uncontrolled cracking of 2mm to 4mm in the basement slabs and soffits of the Building; and



- (b) some cracks had migrated through the full depth of the suspended post tension slab with water permeating through.

The cracking identified in multiple locations in the Basement of the Building and as otherwise described above is a serious defect because it is a defect in a building element (structural systems) that is attributable to a failure to comply with the following:

**Australian Standard 3600-2009 Concrete structures, Section 2 Design procedures, actions and loads, 2.3, Design for serviceability, 2.3.3, Cracking** which states:

*"2.3.3.1 General Cracking in concrete structures shall be controlled so that structural performance, durability and appearance of the structure are not compromised."*

**Australian Standard 3600 appears as a standard referenced in the BCA Volume One, Section B Structure, Deemed-to-Satisfy provision B1.4 - Determination of structural resistance of materials and forms of construction** which states:

*"The structural resistance of materials and forms of construction must be determined in accordance with the following, as appropriate: ... (b) Concrete: (i) Concrete construction (including reinforced and prestressed concrete): AS 3600."*

#### 17. Defect 10 – Structural Systems

On 31 August 2022, authorised officers of the Department conducted an inspection pursuant to s 20 of the Act in the Building. In the basement of the Building it was observed that the slab soffit (in multiple locations) was exposed and unprotected reinforcement was also observed in the slab soffit.

The unprotected reinforcement as described above is a serious defect because it is a defect in a building element (structural systems) that is attributable to a failure to comply with the following:

**Australian Standard 3600- 2009, Concrete structures, Section 4, Design for durability 4.10 Requirements for cover to reinforcing steel and tendons, 4.10.3 Cover for corrosion protection 10.4.3.1 General** which states:

*"For corrosion protection, the cover shall be not less than the value given in accordance with Clauses 4.10.3.2 to 4.10.3.7."*

In accordance with clauses 4.10.3.2 to 4.10.3.7 depending on exposure classification and concrete characteristic strength, required cover varies between 20mm to 70 mm.

#### 18. Defect 11 – Building Essential Services

On 26 July 2022, authorised officers of the Department conducted an inspection pursuant to s 20 of the Act in the Building. Whilst inspecting the ground floor hot water plant room of the Building, it was observed that there was an exhaust system that was serving the hot water plant room without any make up air path. There was also no door grilles or openings in the room for make-up air.

The inadequate ventilation system as described above is considered a serious defect because it is a defect in a building element (building essential services) that is attributable to a failure to comply with the following:

**AS 1668.2 The use of ventilation and air conditioning in buildings Part 2: Mechanical Ventilation in Buildings, Section 1.5 Combinations Ventilation Systems** which states:

*"Ventilation systems may be combined to meet the requirements of this standard. Possible combinations include*

- a. *Mechanical supply with mechanical exhaust*
- b. *Mechanical supply with natural relief*
- c. *Natural make-up with mechanical exhaust"*

19. **Defect 12 – Building Essential Services**

On 26 July 2022, authorised officers of the Department conducted an inspection pursuant to s 20 of the Act in the Building. Whilst inspecting the ground floor main switch room of the Building, it was observed that there was no natural or mechanical ventilation serving the main switch room.

The failure to ensure the installation of adequate ventilation to the main switch room of the Building is a serious defect because it is a defect in a building element (building essential services) that is attributable to a failure to comply with the following:

**BCA Volume 1 (2019), Section F Health and Amenity and the following Performance Requirements:**

i. *"FP4.3 Outdoor air supply*

*A space in a building used by occupants must be provided with means of ventilation with outdoor air which will maintain adequate air quality." Automatic fire suppression systems which states:*

ii. *"FP4.4 Mechanical ventilation to control odours and contaminants*

*A mechanical air-handling system installed in a building must control-*

*a. The circulation of objectionable odours; and*

*b. The accumulation of harmful contamination by micro- organisms, pathogens and toxins."*

iii. *"FP4.5 Disposal of contaminated air*

*Contaminated air must be disposed of in a manner which does not unduly create a nuisance or hazard to people in the building or other property."*

## Building Work to be Carried Out

**NOTE: The *Design and Building Practitioners Act 2020* applies to the remediation work under this order. In brief, it requires that there be declared designs by registered practitioners before building work commences and that the designs be uploaded to the NSW Planning Portal. Any variations made to the building work must be reflected in the declared and uploaded designs.**

20. **89 Ebley Street Pty Limited** must carry out building work, or cause building work to be carried out as follows:

(a) **Remediate Defect 1 by:** Developer to undertake, including but not limited to -

1. All balconies to be inspected by a suitable and qualified registered specialist to submit a written report and certificate of compliance. The report is to provide evidence all balconies have been inspected, identify and certify balconies (if any) that have been constructed in accordance with the requirements of the BCA and Australian Standards and provide rectification detail design for balconies requiring rectification."
2. Rectify the defects to comply with the requirements of the relevant BCA Volume One applicable standards and in accordance with specialist report.
3. Make good any consequential damage.
4. Demonstrate compliance of remediation works by providing evidence including but not limited to comprehensive photographs of work in progress, installer compliance certificates and any third-party inspection reports.

(b) **Remediate Defect 2 by:** Developer to undertake, including but not limited to -

1. The entire roof top is to be inspected by a suitable and qualified registered specialist to submit a written report and certificate of compliance. The report should be prepared in consideration to this order and provide details the specific building works necessary to meet the specified standard.
2. Rectify the defects to comply with the requirements of the relevant BCA Volume One applicable standards and in accordance with specialist report.
3. Make good any consequential damage.
4. Demonstrate compliance of remediation works by providing evidence including but not limited to comprehensive photographs of work in progress, installer compliance certificates and any third-party inspection reports.

(c) **Remediate Defect 3 by:** Developer to undertake, including but not limited to -

1. All planter boxes to be inspected by a suitable and qualified registered specialist to submit a written report and certificate of compliance. The report should be prepared in consideration to this order and provide details the specific building works necessary to meet the specified standard.
2. Rectify the defects to comply with the requirements of the relevant BCA Volume One applicable standards and in accordance with specialist report.
3. Make good any consequential damage.

4. Demonstrate compliance of remediation works by providing evidence including but not limited to comprehensive photographs of work in progress, installer compliance certificates and any third-party inspection reports.
- (d) **Remediate Defect 4 by:** Developer to undertake, including but not limited to -
1. Rectify the defect to comply with the requirements of the relevant BCA Volume One and applicable standards.
  2. Make good any consequential damage.
  3. Demonstrate compliance of remediation works by providing evidence including but not limited to comprehensive photographs of work in progress, installer compliance certificates and any third-party inspection reports.
- (e) **Remediate Defect 5 by:** Developer to undertake, including but not limited to -
1. Developer to engage a suitable and qualified registered specialist to submit a written report and certificate of compliance. The report should be prepared in consideration to this order and provide details the specific building works necessary to meet the specified standard.
- If applicable, the following steps should be undertaken:
2. Rectify the defects to comply with the requirements of the relevant BCA Volume One applicable standards and in accordance with specialist report.
  3. Make good any consequential damage.
  4. Demonstrate compliance of remediation works by providing evidence including but not limited to comprehensive photographs of work in progress, installer compliance certificates and any third-party inspection reports.
- (f) **Remediate Defect 6 by:** Developer to undertake, including but not limited to -
1. Rectify the defect to comply with the requirements of the relevant BCA Volume One and applicable standards.
  2. Make good any consequential damage.
  3. Demonstrate compliance of remediation works by providing evidence including but not limited to comprehensive photographs of work in progress, installer compliance certificates and any third-party inspection reports.
- (g) **Remediate Defect 7 by:** Developer to undertake, including but not limited to -
1. Rectify the defect to comply with the requirements of the relevant BCA Volume One and applicable standards.
  2. Make good any consequential damage.
  3. Demonstrate compliance of remediation works by providing evidence including but not limited to comprehensive photographs of work in progress, installer compliance certificates and any third-party inspection reports.
- (h) **Remediate Defect 8 by:** Developer to undertake, including but not limited to -
1. Rectify the defect to comply with the requirements of the relevant BCA Volume One and applicable standards.

2. Make good any consequential damage.
  3. Demonstrate compliance of remediation works by providing evidence including but not limited to comprehensive photographs of work in progress, installer compliance certificates and any third-party inspection reports.
- (i) **Remediate Defect 9 by:** Developer to undertake, including but not limited to -
1. Rectify the defect to comply with the requirements of the relevant BCA Volume One and applicable standards.
  2. Make good any consequential damage.
  3. Demonstrate compliance of remediation works by providing evidence including but not limited to comprehensive photographs of work in progress, installer compliance certificates and any third-party inspection reports.
- (j) **Remediate Defect 10 by:** Developer to undertake, including but not limited to -
1. Rectify the defect to comply with the requirements of the relevant BCA Volume One and applicable standards.
  2. Make good any consequential damage.
  3. Demonstrate compliance of remediation works by providing evidence including but not limited to comprehensive photographs of work in progress, installer compliance certificates and any third-party inspection reports.
- (k) **Remediate Defect 11 by:** Developer to undertake, including but not limited to -
1. Rectify the defect to comply with the requirements of the relevant BCA Volume One and applicable standards.
  2. Make good any consequential damage.
  3. Demonstrate compliance of remediation works by providing evidence including but not limited to comprehensive photographs of work in progress, installer compliance certificates and any third-party inspection reports.
- (l) **Remediate Defect 12 by:** Developer to undertake, including but not limited to -
1. Rectify the defect to comply with the requirements of the relevant BCA Volume One and applicable standards.
  2. Make good any consequential damage.
  3. Demonstrate compliance of remediation works by providing evidence including but not limited to comprehensive photographs of work in progress, installer compliance certificates and any third-party inspection reports.

### **Period for Compliance with Order**

21. The work specified in paragraph 20 of this Order must be completed as follows:

- (a) Defect 1 – Within 180 days of issuance of this Order.
- (b) Defect 2 – Within 180 days of issuance of this Order.
- (c) Defect 3 – Within 120 days of issuance of this Order.
- (d) Defect 4 – Within 180 days of issuance of this Order.
- (e) Defect 5 – Within 90 days of issuance of this Order.
- (f) Defect 6 – Within 60 days of issuance of this Order.
- (g) Defect 7 – Within 60 days of issuance of this Order.
- (h) Defect 8 – Within 120 days of issuance of this Order.
- (i) Defect 9 – Within 60 days of issuance of this Order.
- (j) Defect 10 – Within 90 days of issuance of this Order.
- (k) Defect 11 – Within 120 days of issuance of this Order.
- (l) Defect 12 – Within 120 days of issuance of this Order.

### **Conditions of this Order**

22. 89 Ebley Street Pty Limited must notify Chris Lentholt, in writing, by email sent to [projectintervene@customerservice.nsw.gov.au](mailto:projectintervene@customerservice.nsw.gov.au) within 2 business days of the work required by this Order being completed.

### **Duration of this Order**

23. This Order remains in force until it is revoked by the Secretary.

David Chandler



**NSW Building Commissioner**  
**Department of Customer Service**

## REASONS FOR THE ORDER

### Reasonable belief and serious defects

I, David Chandler, an authorised delegate of the Secretary of the Department, have formed a reasonable belief for the purposes of s 33(1) of the Act in relation to Defects 1 to 12 in the Order, that in the Building has serious defects.

1. **Defect 1** - the water penetration issues, inadequate waterproofing system, evidence of water penetration and damage to internal lining as described in paragraph 8 of the Order, is a serious defect because it is a deficiency in a building element (waterproofing) that are required to achieve compliance with the performance requirements as particularised in paragraph 8 of the Order. I have formed this belief after reviewing a copy of the Audit Report dated 21 October 2022 section 1.1 in which I also observed photographs which depicted water damage (at the bedroom to balcony door of unit 401), the presence of mould (unit 402), water damage (to the ceiling in unit 302), water penetration (to unit 302, causing undue damage and deterioration of carpet), the membrane turned up against the door sill profile at the unit 302 balcony door, the membrane turned up against the outside of the external wall lining on the balcony of unit 401 and as otherwise particularised in section 1.1 of the Audit Report and paragraph 8 of the Order.
2. **Defect 2** - the issues as described in paragraph 9 of the Order, is a serious defect because it is a deficiency in a building element (waterproofing) that are required to achieve compliance with the performance requirements as particularised in paragraph 9 of the Orders. I have formed this belief after reviewing a copy of the Audit Report dated 21 October 2022 section 1.2 also observed photographs of a high level moisture reading in unit 401, water damage to the carpet in unit 305, severe water damage to the plasterboard lining and carpet in unit 305, water ponding on the rooftop (in particular over unit 308) and metal deck roof of the Building, together with a photograph depicting the planter boxes on the balconies and garden areas not having been installed with correct overflow provisions, and as otherwise particularised in section 1.2 of the Audit Report and paragraph 9 of the Order.
3. **Defect 3** – the inadequate waterproofing system and the evidence of water penetration and damage internally as described in paragraph 10 of the Order, is a serious defect because it is a deficiency in a building element (waterproofing) that are required to achieve compliance with the performance requirements as particularised in paragraph 10 of the Order. I have formed this belief after reviewing a copy of the Audit Report dated 21 October 2022 section 1.3 in which I also observed photographs which depicted the pooling of water on the concrete slab within storage cage 39, along with water penetration and staining at the rear of the storage cage 29, water leaking around a service penetration in the basement of the Building, water ponding on the floor in the mechanical room and water penetration through a crack in the transfer slab and as otherwise particularised in section 1.3 of the Audit Report and paragraph 10 of the Order.
4. **Defect 4** – the failure to continue perimeter flashing around the base of door frame styles of wet areas as described in paragraph 11 of the Order is a serious defect because it is a deficiency in a building element (waterproofing) that are required to achieve compliance with the performance requirements as particularised in paragraph 11 of the Order. I have formed this belief after reviewing a copy of the Audit Report dated 21 October 2022 section 1.4 in which I observed photographs which depicted water escaping from the bathroom of unit 302, together with damage caused to the bathroom by contractors for investigative purposes, along with photographs showing moisture within the service void between the bathroom and the ensuite to unit 302. I also observed an extract of Figure 3.3 from AS 3740 showing detail of waterproofing at floor level openings and as otherwise particularised in section 1.4 of the Audit Report and paragraph 11 of the Order.
5. **Defect 5** – the inadequate spandrel installations as described in paragraph 12 of the Order, is a serious defect because it is a deficiency in a building element (fire safety systems) that are required to achieve compliance with the performance requirements as particularised in paragraph 12 of the Order. I have formed this belief after reviewing a copy of the Audit Report dated 21 October 2022 section 2.2.

6. **Defect 6** – the failure to properly fire stop penetrations as described in paragraph 13 of the Order, is a serious defect because it is a deficiency in a building element (fire safety systems) that are required to achieve compliance with the performance requirements as particularised in paragraph 13 of the Order. I have formed this belief after reviewing a copy of the Audit Report dated 21 October 2022 section 2.3 in which I also observed a photograph which depicted inadequate penetrations to the basement level of the Building and as otherwise particularised in section 2.3 of the Audit Report and paragraph 13 of the Order.
7. **Defect 7** – the failure to properly fire stop penetrations to service cupboards as described in paragraph 14 of the Order is a serious defect because it is a deficiency in a building element (fire safety systems) that are required to achieve compliance with the performance requirements as particularised in paragraph 14 of the Order. I have formed this belief after reviewing a copy of the Audit Report dated 21 October 2022 section 2.4.
8. **Defect 8** – the failure to adequately core fill door jambs as described in paragraph 15 of the Order, is a serious defect because it is a deficiency in a building element (fire safety systems) that are required to achieve compliance with the performance requirements as particularised in paragraph 15 of the Order. I have formed this belief after reviewing a copy of the Audit Report dated 21 October 2022 section 2.5.
9. **Defect 9** – the cracking identified in multiple locations of the Building and as described in paragraph 16 of the Order, is a serious defect because it is a deficiency in a building element (structural systems) that are required to achieve compliance with the performance requirements as particularised in paragraph 16 of the Order. I have formed this belief after reviewing a copy of the Audit Report dated 21 October 2022 section 2.5.
10. **Defect 10** – the cracking identified and as described in paragraph 17 of the Order, is a serious defect because it is deficiency in a building element (structural systems) that are required to achieve compliance with the performance requirements as particularised in paragraph 17 of the Order. I have formed this belief after reviewing a copy of the Audit Report dated 21 October 2022 section 3.1 in which I also observed photographs which depicted uncontrollable cracking in the slab soffit beside the basement mechanical room and water permeating through the basement slab soffit above the basement carpark driveway and as otherwise particularised in section 3.1 of the Audit Report and paragraph 17 of the Order.
11. **Defect 11** – the inadequate installations as described in paragraph 18 of the Order, is a serious defect because it is a deficiency in a building element (building essential services) that are required to achieve compliance with the performance requirements as particularised in paragraph 18 of the Order. I have formed this belief after reviewing a copy of the Audit Report dated 21 October 2022 section 5.1 in which I also observed photographs which depicted the hot water plant room not having any visible make up air path and the exhaust system serving the hot water plant room not having door grilles or openings in the room itself for make-up air, and as otherwise particularised in section 5.1 of the Audit Report and paragraph 18 of the Order.
12. **Defect 12** - the failure to ensure the installation of adequate ventilation to the main switch room of the Building described in paragraph 19 of the Order, is a serious defect because it is a deficiency in a building element (building essential services) that are required to achieve compliance with the performance requirements as particularised in paragraph 19 of the Order. I have formed this belief after reviewing a copy of the Audit Report dated 21 October 2022 section 5.2 in which I also observed photographs which depicted there being no ventilation serving the main switch room, and as otherwise particularised in section 5.2 of the Audit Report and paragraph 19 of the Order.

#### **Period for compliance**

13. I am of the view that a time periods as set out in paragraph 21 of the Order are reasonable periods for compliance in all the circumstances for the rectification work required by the Order to be carried out. I have formed this belief balancing the risks that the serious defect poses against the period of time it will take to give effect to the rectification work. I am aware that there are residents occupying this location as the Building is completed which will delay rectification work. I am of the view that the



time periods as set out in paragraph 21 of the Order are sufficient to conduct the work as particularised in paragraph 20 of the Order.

### Consideration of written representations

14. On 24 November 2022 a notice of intention to issue the Order and a draft copy of the Order was served on the Developer, Waverley Council ("**Local Council**"), the Owners of Strata Plan No 100091 ("**Owners Corporation**") and Brendan Bennett ("**Private Certifier**"). The parties were invited to provide submissions relating to the draft copy of the Order.
15. The Developer provided the Department with written submissions in the form of an email dated 19 December 2022 ("**Initial Developer Representations**") which included the following:
  - (a) that the Developer accepted that the defects identified in the draft copy of Order were "serious defects";
  - (b) that the Developer had engaged an external consultant to project manage the rectification of all defects (including those identified in the draft copy of the Order ("**Developer's Consultant**"), with the Developer's Consultant engaged to advise on the works required to rectify the defects;
  - (c) that the Owners Corporation had commenced legal proceedings against the Developer in relation to, among other things, the serious defects identified in the draft copy of the Order ("**Legal Proceedings**");
  - (d) that the Legal Proceedings were effectively on hold whilst the parties negotiate and agree the defects and methodology for rectification;
  - (e) that the Developer expected to be in a position to put forward a comprehensive undertaking or revised form of orders by early February 2023;
16. The Department granted an extension of time to the Developer to 30 January 2023 for a substantive response.
17. The Developer provided the Department with written submissions in the form of an email dated 13 February 2023 ("**Subsequent Developer Representations**") which included the following:
  - (a) a restatement of the Developer's Initial Developer Representations – notably those items in subparagraphs 15(c) and (d) of this Order;
  - (b) that a final Order not be made at that point in time on account of the Legal Proceedings;
  - (c) that the draft copy of the Order was in some respects, excessive and in particular remediation action items in respect of Defects 1 and 2, concerning the waterproofing of all balconies, rooftop areas and planter boxes as opposed to those specific where there were defects identified.
18. Members of the strata committee of the Owners Corporation provided written submissions by way of letter dated 12 December 2022 ("**Owners Corporation Representations**") which included the following:
  - (a) that the reports prepared by consultants engaged by the Owners Corporation ("**OC Consultants' Reports**") contained further serious defects in excess of the 12 identified in the draft copy of the Order ("**Additional Serious Defects**");
  - (b) that the serious defects in the OC Consultants' Reports were reported in more detail than those contained in the draft copy of the Order;

- (c) that the scope of works in respect of serious defects 1, 2 and 4 in the draft copy of the Order was a limited scope of works;
  - (d) that in respect of the balance of serious defects in the draft copy of the Order the scope of works set out to remediate those serious defects was insufficiently prescriptive;
  - (e) that the draft copy of the Order did not identify the exact location of all of the serious defects.
19. I have reviewed and considered the Developer Representations and the Owners Corporation Representations.
20. I make the following observations in relation to the Developer Representations:
- (a) given the Developer is a party to legal proceedings with the Owners Corporation in relation to the defects in the Building and thus on notice of the fact that there are serious defects in the Building (of which this Order identifies 12) I am of the view that the Developer has had a reasonable period of time to consider the defects identified in this Order and the rectification works and time periods for completing such works, and I refuse the request to withhold the making of this Order;
  - (b) further, the inspection report undertaken is not comprehensive inspection of all locations for defects. The presence of serious defects in some locations indicates that all of the locations should be inspected as outlined and not that the fix should be limited as suggested by the developer;
  - (c) that the draft copy of the Order (concerning building work to be carried out to rectify the serious defects) reflected the actions required as they were set out in the Audit Report and that I am of the view that the building work to be carried out to rectify the serious defects as set out in this Order are reasonable and appropriate.
21. I make the following observations in relation to Owners Corporation Representations:
- (a) I acknowledge that there may be Additional Serious Defects;
  - (b) I acknowledge that the OC Consultants' Reports may record the serious defects in more detail than those contained in the draft copy of the Order however the draft copy of the Order reflected the serious defects as they were set out in the Audit Report and that I am of the view that the serious defects as set out in this Order and contained in the Audit Report are reasonable and appropriate;
  - (c) that the draft copy of the Order (concerning building work to be carried out to rectify the serious defects) reflected the actions required as they were set out in the Audit Report and that I am of the view that the building work to be carried out to rectify the serious defects as set out in this Order are reasonable and appropriate;
  - (d) that the draft copy of the Order reflected the relevant locations of the serious defects as they were set out in the Audit Report and that I am of the view that the locations of the serious defects as set out in this Order are reasonable and appropriate.

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

22. I have considered all of the circumstances. I accept that the order requires considerable further construction 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 benefit to the occupiers of the units which comprise the Building in having the Building constructed to the approved plans and in accordance with the Building Code of Australia and the relevant Australian Standards so as to ensure in respect of:

- (a) Defect 1 – that the balconies of the Building are appropriately weatherproofed and waterproofed so as to prevent unhealthy or dangerous conditions, or loss of amenity to occupants or undue dampness or deterioration of building elements;
- (b) Defect 2 – that the rooftop and external walls of the Building be free from water penetration and consequent unhealthy or dangerous conditions, or loss of amenity to occupants or undue dampness or deterioration of building elements
- (c) Defect 3 – that the rooftop and external walls of the Building be free from water penetration and consequent unhealthy or dangerous conditions, or loss of amenity to occupants or undue dampness or deterioration of building elements;
- (d) Defect 4 – that single occupancy units of the Building be appropriately waterproofed and otherwise free from water penetration to protect the structure of the Building and maintain the amenity of the occupants;
- (e) Defect 5 – that the façade of the Building be rectified so as to resist and reduce the spread of fire within the Building;
- (f) Defect 6 – that the penetrations in the basement of the Building be rectified so as to resist and reduce the spread of fire within the Building;
- (g) Defect 7 – that the penetrations in the service cupboards and risers of the Building be rectified so as to resist and reduce the spread of fire within the Building;
- (h) Defect 8 – that the core fill door jambs in the fire stairs and single occupancy units of the Building be installed in a compliant manner so as to resist and reduce the spread of fire within (and structural damage to) the Building;
- (i) Defect 9 – that the cracking identified in the basement of the Building be rectified so as to ensure the structural reliability and durability of the Building;
- (j) Defect 10 – that the unprotected reinforcements in the slab soffit located in the basement of the Building be rectified so as to ensure the structural reliability and durability of the Building;
- (k) Defect 11 – that the hot water plant room be appropriately ventilated;
- (l) Defect 12 – that the main switch room be appropriately ventilated.

## **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:
  - the relevant local council,
  - if the local council is not the certifier in relation to the building work—the principal certifier,
  - if you are not the owner of the land concerned—the owner of the land concerned,
  - the Registrar-General,
  - if the order relates to a strata building—the relevant owners corporation,
  - 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.