

CAS Ref: 10525139

Attn. the Proper Officer  
Lane Cove Municipal Council  
(ABN 42 062 211 626)  
PO Box 20 Lane Cove NSW 1595

Service: By registered post and by email

Issued on: 29 August 2023  
Date of modification: 23 May 2024

# Building Work Rectification Order

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

Lane Cove Municipal Council (ABN 42 062 211 626) is being given this Building Work Rectification Order (“Order”) in relation 1-5 Pottery Lane, Lane Cove NSW 2066 (SP 95221) (“the Building”).

Lane Cove Municipal Council (ABN 42 062 211 626) is required to cause building work to be carried out to remediate the potential serious defect as set out below in 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 Matthew Whitton is an authorised delegate of the Secretary of the Department.
4. WN Developments (ACN 146 752 007) and Lane Cove Municipal Council (ABN 42 062 211 626) are the developers of the residential apartment building known as 1-5 Pottery Lane, Lane Cove NSW 2066 (SP 95221) for the purposes of section 4 of the Act. The Building is a

residential apartment building containing one tower of seven storeys and a 6-level basement carpark.

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. A building element has the same meaning as in the *Design and Building Practitioners Act 2020*. 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, Matthew Whitton, am the decision maker for this Building Work Rectification Order (**the Order**). I have decided to issue the Order to **Lane Cove Municipal Council (ABN 42 062 211 626)** because I have formed a reasonable belief under s 33(1) of the Act that building work at the Building was carried out in a way that could result in a serious defect in a residential apartment building as set out in this Order.

## Description of serious defect

### 8. Defect 1 – Waterproofing – Substrate and fall

On 10 March 2022, authorised officers of the Department conducted an inspection pursuant to s20 of the Act in the Building. At the roof top levels of the building, the following was observed:

1. that there were areas of ponding water retained on the surface due to insufficient falls to the stormwater drain outlets.
2. that there were formwork imprints trapping water near skylights and hairline cracks throughout the membrane of the rooftop slab.
3. that there was a poor surface finish of the roof slab with exposed aggregate visible in multiple locations. The membrane has worn away at the peaks of the sharp protrusions.
4. The roof membrane has failed in multiple locations, liquid membrane on roof has emulsified in places as a result of long-term water ponding.
5. No upward termination at the doorway to the fire stairs at the roof.

The issues described in the observations recorded above are a serious defect because they are a defect in a building element (waterproofing) that is attributable to a failure to comply with the following:

**Australian Standard 4654.2-2012 Waterproofing membranes for external above-ground use – Design and installation, Section 2 Design, and installation, 2.5 Substrate, 2.5.3 Types of substrates, 2.5.3.1 Fully bonded or liquid-applied which states:**

*“The preparation of the substrate for fully bonded or liquid-applied membranes shall result in the surface of the substrate being smooth, without protrusions, voids, or formwork distortions, and clean, dry, and free from dust and contamination.*

**Australian Standard 4654.2-2012 Waterproofing membranes for external above-ground use – Part 2: Design and installation, section 2 Design and installation, subsection 2.5 Substrate, clause 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.”*

**Australian Standard 4654.2 appears as a standard referenced in the BCA Volume One, 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 to prevent 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.”*

## Building Work to be Carried Out

9. **Lane Cove Municipal Council (ABN 42 062 211 626)** must carry out building work, or cause building work to be carried out as follows:
- a. Remediate Defect 1 by:
    - i. Attend plant, equipment, and ancillary fixtures to ensure continued operation throughout the remedial works.
    - ii. Survey the roof top substrates to determine high / low spots.
    - iii. Grind existing membrane from slab, prepare the substrate and ensure there are compliant falls to drain toward stormwater drain outlets.
    - iv. Install a new UV stable waterproofing system including all termination detailing, angles, flashings, cappings, etc.
    - v. Re-position and secure the roof top plant, equipment and ancillary fixtures and re-commission to original condition.
    - vi. Make good any consequential damage

## Period for Compliance with Order

10. The **work** specified in paragraph 9 of this Order must be completed within the following periods from the amendment date of this Order.
- a. **Defect 1 – 6 months.**
11. **Lane Cove Municipal Council (ABN 42 062 211 626)** must notify Jasmine Yeung, Senior Compliance Officer, in writing, by email sent to [ocaudits@customerservice.nsw.gov.au](mailto:ocaudits@customerservice.nsw.gov.au) within 2 business days of the work being completed.

## Duration of this Order

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

## Modification of this Order

13. Elizabeth Stewart, Acting Director Building and Construction Compliance, Building Commission NSW is an authorised delegate of the Secretary of the Department.
14. On 23 May 2024, this Order was by modified by Elizabeth Stewart pursuant to section 38 of the Act.



Matthew Whitton  
**Director Practitioner Compliance**  
**Building Commission NSW**

## REASONS FOR THE ORDER

### Reasonable belief and serious defect

1. I, Matthew Whitton, 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 Defect 1 in the Order, that in the Building it has a potential serious defect.
2. Defect 1 -The substrate and fall as described above in the Order, is a serious defect in a building element (waterproofing) that is required to achieve compliance with **Australian Standard 4654.2-2012 Waterproofing membranes for external above-ground use – Design and installation, Section 2 Design, and installation, 2.5 Substrate, 2.5.3 Types of substrates, 2.5.3.1 Fully bonded or liquid-applied, and clause 2.5.2 Falls**. I have formed this belief after reviewing a copy of the audit report dated 28 April 2022 section 5.2-5.8 in which I observed pictures of poorly prepared substrate, no upward termination at the fire door stairs and pooling water on the surface of the roof.

### Period for Compliance

3. I am of the view that the following periods are a reasonable period for compliance in all the circumstances for the rectification work required by the Order to be carried out.
4. The work specified in paragraph 9 of the Order above must be completed within the following period from date of this Order.
  - a. **Defect 1 – 6 months.**
5. I have formed this belief balancing the risks that the serious defect pose 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 periods of compliance above are sufficient to conduct the following works
  - a. Remediate Defect 1 by:
    - i. Attend plant, equipment, and ancillary fixtures to ensure continued operation throughout the remedial works.
    - ii. Survey the roof top substrates to determine high / low spots.
    - iii. Grind existing membrane from slab, prepare the substrate and ensure there are compliant falls to drain toward stormwater drain outlets.
    - iv. Install a new UV stable waterproofing system including all termination detailing, angles, flashings, cappings, etc.
    - v. Re-position and secure the roof top plant, equipment and ancillary fixtures and re-commission to original condition.
    - vi. Make good any consequential damage.

### Consideration of written representations

6. On 11 May 2023, a notice of intention to issue a building work rectification order, including a draft copy of the Order was served on Lane Cove Municipal Council, the Office of the Registrar General, the Certifier, and the Owners Corporation.

7. Lane Cove Municipal Council, the Office of the Registrar General, and the Certifier were invited to provide written representations relating to the Order to the Department by 5pm on 18 May 2023.
8. The Owner's Corporation was invited to provide written representations relating to the Order to the Department by 5pm on 1 June 2023.
9. On 18 May 2023, Lane Cove Municipal Council provided written representations to the Department. The submissions included the following information:
  - a. Lane Cove Municipal Council acknowledged receipt of the correspondence from the Department dated 11 May 2023.
  - b. The Department had not provided Lane Cove Municipal Council with "*any information regarding the results of that investigation*" being the inspection carried out on 10 March 2022 by the Department.
  - c. Lane Cove Municipal Council submitted that "*the appropriate course for the Department to take, to remediate the relevant defects, is to issue any necessary BWRO on WN Developments and not Council*".
  - d. Lane Cove Municipal Council further submitted that "*no time for compliance should be imposed on Council as the appropriate course for the Department to take, to remediate the relevant defects, is to issue any necessary BWRO on WN Developments and Council*".
10. I have considered the above submissions from Lane Cove Municipal Council and have decided to proceed with the Order, noting the following:
  - a. The submissions do not address any issues with the Order.
  - b. It is noted that a notice of intention and an accompanying draft building work rectification order issued to WN Developments were served on Lane Cove Municipal Council on 24 January 2023. Lane Cove Municipal Council has not requested a copy of the audit report or any other information from the Department at any point prior to or after the service of those documents.
  - c. The submissions do not explain why "*no time for compliance should be imposed on Council*" beyond reiterating the assertion that the appropriate course for the Department is to issue the Order on WN Developments and not the Council.
  - d. Under s 33 of the Act, the Department has the power to give a building work rectification order to a developer, being the person who contracted or arranged for, or facilitated or otherwise caused, (whether directly or indirectly) the building work to be carried out.
  - e. It is appropriate to issue the Order to Lane Cove Municipal Council as it is a developer of the Building.
11. On 31 May 2023, the Owners Corporation provided written representations to the Department asking for the building work under page 3 paragraph 9(a) to be amended to read:
  - (iii) "*grind existing membrane from slab, prepare the substrate and ensure there are compliant falls to drain toward stormwater drain outlets.*"

(iv) *“Install new UV Stable waterproofing system including all termination detailing, angles, flashing, cappings etc.”*

12. I have considered the Owners Corporation’s representations and have modified the Order in accordance with s 48(1)(b) of the Act.
13. Extension of time received from the Developer on 15 May 2024 following on from request received on 6 March 2024. Both extension requests were approved. Developer notified that no further extension will be granted.

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

14. I have considered all of the circumstances. I accept that the order requires considerable further 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 unit in having the building constructed to the Australian Standards and BCA so as to prevent in respect of:
  - a. Defect 1: To prevent the degradation of the Building
15. Considering these potential consequences as outlined in this order, I give greater weight to the seriousness of the defect and failure to adhere to the Australian Standards and BCA, and the benefits arising from remediating them and I find that it is appropriate, in the exercise of my discretion, to require **Lane Cove Municipal Council (ABN 42 062 211 626)** to carry out the building work described, within the period specified in the above Order.