



Attn: Proper Officer  
Modog Pty Limited (ACN 003 395 471)  
Unit 1, 1 Ridge Street  
NORTH SYDNEY NSW 2060

Service: By registered post and by email

04 July 2023

## Building Work Rectification Order

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

Modog Pty Limited (ACN 003 395 471) is being given this Building Work Rectification Order (Order) in relation to address 144-150 Walker Street North Sydney NSW 2060 (Lots 1, 4, 5, 6 & 7 of DP 2537, Lot 1 of DP 900609 and Lot I of DP 123337, SP 85010) (the Development).

Modog Pty Limited (ACN 003 395 471) 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. Matthew Whitton, Assistant Building Commissioner & Director (Building & Construction Compliance: NSW Fair Trading, Department of Customer Service) is an authorised delegate of the Secretary of the Department.
5. **Modog Pty Limited (ACN 003 395 471)** is the developer of the residential apartment building known as ‘**The Heritage**’ 144-150 Walker Street North Sydney NSW 2060 (Lots 1, 4, 5, 6 & 7 of DP 2537, Lot 1 of DP 900609 and Lot 1 of DP 123337, SP 85010) (**the Development**) for the purposes of section 4(a) of the Act.
6. The Development consists of a new 8 storey building with 28 apartments, commercial retail space, underground car parks and the refurbishment of 4 existing heritage houses.
7. On 13 October 2022, authorised officers conducted a lawful inspection of the Development.

### Requirements in relation to Serious Defects

8. I, Matthew Whitton, under section 34(1) of the Act, specify the standard of building work to be done in respect of the serious defects referenced in column 1 of Table 1 below and under section 34(1A) of the Act require that you **Modog Pty Limited (ACN 003 395 471)** 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**

<b>Serious Defect Reference No.</b>	<b>Location of Serious Defect</b>	<b>Description of Serious Defect</b>	<b>Specified standard of building work</b>	<b>Requirement</b>	<b>Time for compliance with Requirement from the date of issue of this order</b>
1.	All unit balconies	Water damage is present in soffit lining over balconies	Provide adequate overflow provision from all balconies so as to prevent water tracking back under the soffit	<p>Within the time period specified in column 6,</p> <p><b>Stage 1</b> Submit a written report to the OC Audit team via email to <a href="mailto:ocaudits@customerservice.nsw.gov.au">ocaudits@customerservice.nsw.gov.au</a></p> <p>The written report required to be submitted must:</p> <ul style="list-style-type: none"> <li>i) be prepared by a suitably qualified and experienced person or specialist appropriate to the subject areas of the building being a registered façade engineer;</li> <li>ii) be prepared with consideration to this Order and the Reasons for this Order; and</li> <li>iii) detail the specific building work necessary to eliminate the serious defect and meet the specified standard.</li> </ul> <p><b>Stage 2</b></p>	<p>Stage 1: 1 month</p> <p>Stage 2: 2 months</p>

				Carry out the work to rectify the serious defect in accordance with the written report submitted in compliance with Stage 1 and make good any resultant consequential damage.	
2.	Unit 4	Water is penetrating into habitable areas of unit 4	Rectify waterproofing and weatherproofing to prevent the penetration of water	<p>Within the time period specified in column 6,</p> <p><b>Stage 1</b> Submit a written report to the OC Audit team via email to <a href="mailto:ocaudits@customerservice.nsw.gov.au">ocaudits@customerservice.nsw.gov.au</a></p> <p>The written report required to be submitted must:</p> <ul style="list-style-type: none"> <li>i) be prepared by a suitably qualified and experienced person or specialist appropriate to the subject areas of the building being a registered façade engineer;</li> <li>ii) be prepared with consideration to this Order and the Reasons for this Order; and</li> <li>iii) detail the specific building work necessary to eliminate the serious defect and meet the specified standard.</li> </ul> <p><b>Stage 2</b> Carry out the work to rectify the serious defect in accordance with the written report submitted in compliance with Stage 1 and make good any resultant consequential damage.</p>	<p>Stage 1: 1 month</p> <p>Stage 2: 2 months</p>

3.	Unit 5 entrance lobby	Water is penetrating through the flashing of the rotary roof ventilator and into the roof	Install and weatherproof the rotary roof ventilator correctly to prevent the penetration of water	<p>Within the time period specified in column 6,</p> <p><b>Stage 1</b> Submit a written report to the OC Audit team via email to <a href="mailto:ocaudits@customerservice.nsw.gov.au">ocaudits@customerservice.nsw.gov.au</a></p> <p>The written report required to be submitted must:</p> <ul style="list-style-type: none"> <li>i) be prepared by a suitably qualified and experienced person or specialist appropriate to the subject areas of the building being a registered building practitioner;</li> <li>ii) be prepared with consideration to this Order and the Reasons for this Order; and</li> <li>iii) detail the specific building work necessary to eliminate the serious defect and meet the specified standard.</li> </ul> <p><b>Stage 2</b> Carry out the work to rectify the serious defect in accordance with the written report submitted in compliance with Stage 1 and make good any resultant consequential damage.</p>	<p>Stage 1: 1 month</p> <p>Stage 2: 2 months</p>
4.	Fire stairs	Water is penetrating into the fire stairs in a number of locations and has caused	Prevent water penetration into the fire stairs	<p>Within the time period specified in column 6,</p> <p><b>Stage 1</b></p>	Stage 1: 1 month

		deterioration of building elements		<p>Submit a written report to the OC Audit team via email to <a href="mailto:ocaudits@customerservice.nsw.gov.au">ocaudits@customerservice.nsw.gov.au</a></p> <p>The written report required to be submitted must:</p> <ul style="list-style-type: none"> <li>i) be prepared by a suitably qualified and experienced person or specialist appropriate to the subject areas of the building being a registered façade engineer;</li> <li>ii) be prepared with consideration to this Order and the Reasons for this Order; and</li> <li>iii) detail the specific building work necessary to eliminate the serious defect and meet the specified standard.</li> </ul> <p><b>Stage 2</b> Carry out the work to rectify the serious defect in accordance with the written report submitted in compliance with Stage 1 and make good any resultant consequential damage.</p>	Stage 2: 2 months
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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 dark ink, appearing to read 'M. Whitton', with a long horizontal flourish extending to the right.

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

# Reasons for Building Work Rectification Order

1. These Reasons for Order are with respect to the Order dated 04 July 2023 issued to **Modog Pty Limited (ACN 003 395 471)** under the *Residential Apartment Buildings (Compliance and Enforcement Powers Act 2020* (the **Order**). These Reasons for Order adopt the Background to the Order and any definitions within the Order, unless otherwise specified in the Reasons for Order.
2. I, Matthew Whitton, have formed a reasonable belief that the Development has serious defects.
3. I have formed this belief after reviewing:
  - a) An inspection report dated 19 October 2022 prepared by authorised officers of the Department, who conducted an inspection of the Development pursuant to s 20 of the Act in the Building on 13 October 2022.
4. My belief is also based upon the following matters, set out in Table 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 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.	Waterproofing	Water damage is present on soffit lining over balconies	Insufficient overflow provision is provided on all balconies allowing water to track back under the soffit, causing mould and water staining.	The evidence of mould and staining of the soffit demonstrates a failure to comply with BCA Volume 1, Section F Health and Amenity, Part F1 Damp and weatherproofing, Performance Requirement	Staining and deterioration of the soffit lining over balconies, potential damage to structural members, and unhealthy



				<p>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> <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>	conditions cause by the presence of mould.
2.	Waterproofing	Water is penetrating into the habitable areas of unit 4	Water should be prevented from entering into habitable areas of buildings. In the bedroom of unit 4, the carpet underfelt was mouldy, and the carpet gripper was saturated. The windowsill sits below the level of external paving, with minimal upward termination of waterproofing.	<p>The evidence of water penetration into the bedroom demonstrates a failure to comply with BCA Volume 1, 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 prevent the penetration of water that could cause-</i></p>	Unhealthy conditions, loss of amenity for occupants, undue dampness and deterioration of building elements.

				<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	Water is penetrating through the flashing of the rotary roof ventilator and into the roof	The rotary roof ventilator has been improperly installed. Water is penetrating through into the ceiling lining causing damage to building elements.	<p>The evidence of water penetration through the rotary roof ventilator demonstrates a failure to comply with BCA Volume 1, 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 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>	There has been water damage to internal ceilings causing unhealthy conditions, loss of amenity for occupants, undue dampness, and deterioration of building elements.

4.	Waterproofing	Water is penetrating into the fire stairs in a number of locations	The penetration of water has caused deterioration of building elements in the fire stairs.	<p>The evidence of water penetration into the fire stairs demonstrates a failure to comply with BCA Volume 1, 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 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>	Unhealthy conditions, loss of amenity for occupants, undue dampness, and deterioration of building elements.
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### Consideration of written representations

5. On 29 June 2023 a notice of intention to issue a building work rectification order, including a draft copy of the Order, was served on the Developer, Local Council, Office of the Registrar General, Owners Corporation and Certifier. The served parties were invited to provide written representations relating to the Order to the Department by 3 July 2023. No submissions were received from any of the parties.
6. I am satisfied that the Developer has been given an opportunity to provide representations concerning the Order. In circumstances no submissions have been made in response to the draft, I am satisfied that it is appropriate to give the Order.

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

7. 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.
8. 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.
9. I am of the view that the periods above for Defect 1 through 4 (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).