

Attn: Proper Officer
Mentmore 313 Pty Limited (ACN 606 784 267)
Suite 204, 460 Church Street
Parramatta NSW 2150

Service: By registered post and by email:

18 July 2023

Prohibition Order

Section 9 of the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020*

This Prohibition Order is being made in relation to the residential apartment buildings, located at **33-37 Mentmore Ave Rosebery NSW 2018 (Lot 3337 DP 628724) (the Building)**. This order prohibits

- the issue of an occupation certificate in relation to the Building until the Order is revoked by the Secretary.

Please read this Prohibition Order carefully and comply with the conditions by the date specified.

Failure to comply with this Order or its conditions 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. The Building is a residential apartment building to which the Act applies pursuant to s 6 of the Act.
3. **Mentmore 313 Pty Limited (ACN 606 784 267)** is the developer of the Building for the purposes of s 4 of the Act.
4. No occupation certificate has been issued in relation to the Building.

5. Matthew Whitton is an authorised delegate of the Secretary of the Department.

Powers under the Act

6. Under s 9(1) of the Act, the Secretary of the Department, or their authorised delegate, may make an order prohibiting the issue of an occupation certificate in relation to a residential apartment building and/or the registration of a strata plan for a strata scheme in relation to a residential apartment building if any one or more of the following apply:
- a. the expected completion notice required to be given to the Secretary under the Act was not given or was given less than 6 months before the application for the occupation certificate was made (unless the expected completion notice was duly given under s 7(3) of the Act),
 - b. an expected completion amendment notices of a new expected date required to be given to the Secretary under the Act was not given or was given less than 6 months before the application for the occupation certificate was made,
 - c. the Secretary is satisfied that a serious defect in the building exists,
 - c1. a rectification bond required under the terms of an undertaking given by the developer relating to the residential apartment building has not been provided to the Secretary,
 - d. any building bond required under s 207 of the *Strata Schemes Management Act 2015* in relation to the building has not been given to the Secretary,
 - e. the developer failed to comply with a direction of an authorised officer under section 17 or 18 of the Act.
 - f. other circumstances prescribed by the regulations for the purposes of s 9(1)(f) of the Act exist.
7. Under s3 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.
8. A building element has the same meaning as in the *Design and Building Practitioners Act 2020*. Section 6 of the *Design and Building Practitioners Act 2020*, Building elements, relevantly states:
- (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.

What are the reasons for making this Order?

9. A building work rectification order has been made in relation to the Building dated 21 June 2023 and has not been revoked.

Consideration of written submissions

10. The Developer, Certifier, Local Council and Office of the Registrar General were served with a draft copy of the order on 27 June 2023. The parties served were invited to provide a response by 4 July 2023. The Developer provided a response on 6 July 2023. No other served parties made representations.
11. The Developer's response was received outside of the timeframe set down for representations. The Developer's representations refer to ss 44, 46 and 47 of the Act. It is noted that those sections concern a building work rectification order under s 33 of the Act rather than a prohibition order under s 9 of the Act.
12. The representations concern the building work rectification order that was issued on 21 June 2023. The Developer was invited to and previously provided a response to that order on 28 May 2023 (set out at [5]-[11] of the reasons for building work rectification order).
13. The Developer asserts that the order should not be issued as:
- a. a prohibition order dated 3 March 2023 has been issued and has not been revoked;
 - b. The items in the building work rectification order dated 21 June 2023 overlap with the items in the Audit Report dated 7 March 2023, and
 - c. An occupation certificate cannot be issued through the Planning Portal while the Audit Report is still open.

14. Although provided late I have considered the Developer's representations. I am satisfied that it is appropriate in the circumstances to issue the prohibition order. The serious defects have not been rectified and the building work rectification order remains on foot.

What Order is being made?

15. I, Matthew Whitton, an authorised delegate of the Secretary, am satisfied that a building work rectification order has been made in relation to the Building dated 21 June 2023 and has not been revoked and accordingly make an Order under s 9 of the Act prohibiting the issue of an occupation certificate in relation to the Building.

How long is the Order in force?

16. This order remains in force until it is revoked by the Secretary or their authorised delegate.



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

Notes about this Order

- **An occupation certificate issued in contravention of this prohibition order is invalid.**
- **It is an offence for a principal certifier (other than a council) to issue an occupation certificate in contravention of this order. The maximum penalty for a company is 1,000 penalty units. For an individual the maximum penalty is 200 penalty units.**
- **A penalty notice of \$3,000 for an individual or \$11,000 for a corporation may be issued if a principal certifier (other than a council) issues an occupation certificate in contravention of this prohibition order.**
- **A developer in relation to the residential apartment building to which this prohibition order applies may appeal against this order to the Land and Environment Court within 30 days of the notice of the order being given unless the Court grants leave allowing an appeal to be made after that time. Lodging an appeal does not, except to the extent that the Land and Environment Court otherwise directs, operate to stay action on the order.**