



CAS Ref: 10684982

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

4 August 2023

## Building Work Rectification Order

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

**Mentmore 313 Pty Limited (ACN 606 784 267) is being given this Building Work Rectification Order (Order) in relation to address 33-37 Mentmore Ave Rosebery NSW 2018 (Lot 3337 DP 628724).**

**Mentmore 313 Pty Limited (ACN 606 784 267) is required to cause building work to be carried out to remediate the serious defects as set out in 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, sections 5, 6 and 8 of the DBP Act and clauses 16 and 17 of the *Design and Building Practitioners Regulation 2021* are provided at **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. **Mentmore 313 Pty Limited (ACN 606 784 267)** is the developer of the residential apartment building known as ‘**The Laneways**’ **33-37 Mentmore Ave Rosebery NSW 2018 (Lot 3337 DP 628724) (the Development)** for the purposes of section 4(a) of the Act.
6. The Development is a class 2 and class 7a 5-storey residential apartment building consisting of 4 separate buildings of 118 units with underground carparking. The Act applies to building work at the Development.
7. On 17 February 2023 and 17 March 2023, 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 **Mentmore 313 Pty Limited (ACN 606 784 267)** 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.                                  | Adjacent sole occupancy unit entry doors and service cupboard doors to each lift door of levels 1, 2, 3, 4, and 5. | No vertical termination of the membrane above the finished floor level | Prevent the entry of water into the lift shaft, sole occupancy units and service cupboards | <p>Within the time period specified in column 6,</p> <p><b>Stage 1</b><br/>Submit a regulated design from a registered façade engineer or architect based on the design concepts submitted on 16 May 2023 titled:</p> <ul style="list-style-type: none"> <li>Lobby enclosure preliminary design intent details – 33-37 Mentmore St Rosebery by RSS Facades Pty Ltd dated 27/4/23</li> <li>Proposed Enclosure of “Open-Air” lobbies – 33-37 Mentmore Ave Rosebery, by RSS Facades Pty Ltd dated 04/04/2023</li> </ul> <p>to the OC Audit team via email to <a href="mailto:ocaudits@customerservice.nsw.gov.au">ocaudits@customerservice.nsw.gov.au</a> and upload the regulated design to the NSW Planning Portal in accordance with the DBP Act.</p> | <p>Stage 1:<br/>1 month</p> <p>Stage 2:<br/>4 months</p>                         |

|  |  |  |  |   |  |
|--|--|--|--|---|--|
|  |  |  |  | <b>Stage 2</b><br>Carry out the work in accordance with the regulated design submitted in compliance with Stage 1 and make good any resultant consequential damage. |  |
|--|--|--|--|---|--|

#### **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.



Matthew Whitton  
**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 4 August 2023 issued to **Mentmore 313 Pty Limited (ACN 606 784 267)** 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) A building work rectification order issued on the developer dated 3 March 2023;
  - b) The design concepts prepared in response to that building work rectification order, being:
    - i. Lobby enclosure preliminary design intent details – 33-37 Mentmore St Rosebery by RSS Facades Pty Ltd dated 27/4/23
    - ii. Proposed Enclosure of “Open-Air” lobbies – 33-37 Mentmore Ave Rosebery, by RSS Facades Pty Ltd dated 04/04/2023
  - c) An inspection report dated 7 March 2023 prepared by authorised officers of the Department, who conducted an inspection of the Development pursuant to s 20 of the Act in the Building on 17 February 2023.
4. My belief is also based upon the following matters, set out in Table 2. I note that Column 1 of Table 2 refers to the Serious Defect with corresponding numbering that appears in Table 1 of the Order, located as described in the corresponding Column 2 of Table 1.

**Table 2 – Basis of reasonable belief as to serious defects**

| <b>Serious Defect Reference No.</b> | <b>Building element in which serious defect has been identified</b> | <b>Defect</b>  | <b>Reason why defect is a serious defect</b>   | <b>Applicable approved plan, Code or Australian Standard</b>   | <b>Consequences of serious defect</b>  |
|-------------------------------------|---|--|--|--|--|
| 1.                                  | Waterproofing   | No vertical termination of the membrane above the finished floor level | The inadequately applied waterproofing membrane means that water could penetrate into the lift shaft, sole occupancy units and service cupboards | <p>Australian Standard 4654.2:2012 - Waterproofing membranes of external above ground use – Design and Installation - Section 2 Design and installation, 2.8 Termination of membranes, states:<br/> <i>"2.8.1 Upward terminations<br/> 2.8.1.1 Height<br/> Where the membrane termination is to prevent water entry, the finished height of the membrane above the finished tile surface level shall be sufficient to prevent water, including wind driven, flowing over the top of the membrane."</i></p> <p>Australian Standard 4654.2 appears as a standard referenced in the BCA Volume One, Section F Health and Amenity, Part F1</p> | Water penetration could cause undue dampness, unhealthy conditions, and lack of amenity for occupants. |

|  |  |  |  |  |  |
|--|--|--|--|--|--|
|  |  |  |  | <p>Damp and Weatherproofing, Deemed-to-Satisfy provision F1.4 which states:<br/> <i>“Waterproofing membranes for external above ground use must comply with AS 4654.1 and AS 4654.2”.</i></p> <p>Deemed-to-Satisfy provision F1.4 is a pathway that can satisfy the BCA Volume One, Section F Health and Amenity, Part F1 Damp and Weatherproofing, Performance Requirement FP1.4, which states:<br/> <i>“A roof and external wall (including openings around windows and doors) must prevent the penetration of water that could cause-</i><br/> <i>a. Unhealthy or dangerous conditions, or loss of amenity for occupants; and</i><br/> <i>b. Undue dampness or deterioration of building elements.”</i></p> <p>As the installation does not comply with the referenced Australian Standard 4654.2, the BCA Volume One Performance Requirement</p> |  |
|--|--|--|--|--|--|

|  |  |  |  |   |  |
|--|--|--|--|---|--|
|  |  |  |  | cannot be shown to have been satisfied. |  |
|--|--|--|--|---|--|

### **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, and Certifier. The served parties were invited to provide written representations relating to the Order to the Department by 6 July 2023.
6. On 6 July 2023, the Developer made written representations in response to the draft Order. No other written representations were received.
7. In summary, the Developer submits that:
  - a. In response to the building work rectification order dated 3 March 2023, the Department and the Developer have been in communication about the rectification of the serious defect. The Developer has engaged consultants to prepare the regulated designs and will provide them to the Department.
  - b. They have had every intention of rectifying the items as identified, as evidenced by their engagement with the Department.
  - c. The Order is the same as referenced in the building work rectification order dated 3 March 2023.
8. The Developer accordingly requests that this Order not be issued.
9. I have considered the Developer's representations. The Developer has undertaken steps to provide the documentation requested. I agree that the serious defect identified is the same as in the building work rectification order dated 3 March 2023. However, that order required the production of a report. The Developer has complied with the terms of that order and it will be revoked. This Order requires the Developer to submit regulated designs and carry out work in accordance with those designs. The terms of the orders are different and in my view, it is appropriate to issue this Order.

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

10. 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.

11. 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.
12. I am of the view that the period above for Defect 1 is a reasonable period 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***

#### **5 Regulated designs**

- (1) For the purposes of this Act, ***regulated design*** means —
  - (a) a design that is prepared for a building element for building work, or
  - (b) a design that is prepared for a performance solution for building work (including a building element), or
  - (c) any other design of a class prescribed by the regulations that is prepared for building work.
- (2) The regulations may prescribe the form and content of regulated designs or regulated designs belonging to a particular class.
- (3) The Minister may, by order published in the Gazette, specify particulars that are additional to those (if any) prescribed by the regulations for regulated designs or regulated designs belonging to a particular class.
- (4) An order under subsection (3) is to be made available on the website of the Department as soon as practicable after it is published in the Gazette.

#### **6 Building elements**

- (5) For the purposes of this Act, building element means any of the following —
  - (d) the fire safety systems for a building within the meaning of the Building Code of Australia,
  - (e) waterproofing,

- (f) 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),
  - (g) a component of a building that is part of the building enclosure,
  - (h) those aspects of the mechanical, plumbing and electrical services for a building that are required to achieve compliance with the Building Code of Australia,
  - (i) other things prescribed by the regulations for the purposes of this section.
- (6) The regulations may exclude things from being building elements for the purposes of this Act.
- (7) 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).

## 8 Compliance declarations

- (1) In this Act, **design compliance declaration** means a declaration in the form and manner prescribed by the regulations as to the following —
- (a) whether or not a regulated design prepared for building work complies with the requirements of the *Building Code of Australia*,
  - (b) whether or not the design complies with other applicable requirements prescribed by the regulations for the purposes of this subsection,
  - (c) whether or not other standards, codes or requirements have been applied in preparing the design,
  - (d) any other matter prescribed by the regulations.
- (2) In this Act, **principal compliance declaration** means a declaration in the form and manner prescribed by the regulations as to the following —

- (a) whether or not a design compliance declaration has been provided in accordance with this Act for each regulated design prepared for the building work,
  - (b) whether or not each design compliance declaration has been provided by a registered design practitioner whose registration authorises the practitioner to provide a declaration as to the matters to which the declaration relates,
  - (c) any other matter prescribed by the regulations.
- (3) In this Act, **building compliance declaration** means a declaration made in the form and manner prescribed by the regulations as to the following —
- (a) whether or not the building work complies with the requirements of the *Building Code of Australia*,
  - (b) whether or not the building work complies with other applicable requirements prescribed by the regulations for the purposes of this subsection,
  - (c) if the building work does not comply with the requirements referred to in paragraph (a) or (b), the steps required to be taken to ensure compliance,
  - (d) for a regulated design used for the building work, whether or not the design was prepared by a registered design practitioner and the building work was built in accordance with the design,
  - (e) whether or not a design compliance declaration has been obtained in relation to regulated designs used for the building work,
  - (f) whether or not a registered principal design practitioner was appointed in relation to the building work,
  - (g) whether or not a principal compliance declaration was obtained in relation to the regulated designs and design compliance declarations relating to the building work,
  - (h) any other matter prescribed by the regulations.

## ***Design and Building Practitioners Regulation 2021***

### **16 Lodgment on NSW planning portal before building work commences**

- (1) For the purposes of section 107(2)(e) of the Act, a building practitioner must provide the following documents to the Secretary in the approved way before commencing building work —
- (a) copies of the construction issued regulated designs for the building work,
  - (b) copies of the design compliance declarations, made by a suitably authorised registered design practitioner for each of the construction issued regulated designs,
  - (c) if a registered principal design practitioner is appointed for the building work — a principal compliance declaration, made by a suitably authorised registered principal design practitioner, for the construction issued regulated designs.

Maximum penalty — 200 penalty units for a body corporate or 100 penalty units for an individual.

- (2) A registered building practitioner satisfies the practitioner's obligation to provide documents under this clause if —
- (a) the practitioner gives written authorisation for the documents to be provided on the practitioner's behalf by an appropriate practitioner in connection with the building work, and
  - (b) the appropriate practitioner who is authorised provides the documents to the Secretary in accordance with this clause.

- (3) In this clause —

***appropriate practitioner*** in connection with building work means —

- (a) if a registered principal design practitioner is appointed for the building work — the registered principal design practitioner, or
- (b) the registered design practitioner for the building work.

### **17 Lodgment on NSW planning portal after building work commences**

- (1) For the purposes of section 107(2)(e) of the Act, a building practitioner must provide the following documents to the Secretary in the approved way no later than 1 day after commencing a variation to building work —
- (a) a copy of each design compliance declaration given under section 9(3)(b) of the Act for a varied regulated design,



- (b) a copy of the varied regulated design,
- (c) a copy of each design compliance declaration obtained under section 20(3) of the Act for a new building element or performance solution,
- (d) a copy of the regulated design for the new building element or performance solution.

Maximum penalty — 200 penalty units for a body corporate or 100 penalty units for an individual.

- (2) It is a defence to a prosecution for an offence under subclause (1) if the defendant satisfies the court that the defendant had a reasonable excuse for the alleged failure to provide the documents.
- (3) A registered building practitioner satisfies the practitioner's obligation to provide documents under this clause if —
  - (a) the practitioner gives written authorisation for the documents to be provided on the practitioner's behalf by an appropriate practitioner in connection with the building work, and
  - (b) the appropriate practitioner who is authorised provides the documents to the Secretary in accordance with this clause.
- (4) In this clause —
  - (a) **appropriate practitioner** in connection with building work means —
    - (a) if a registered principal design practitioner is appointed for the building work — the registered principal design practitioner, or
    - (b) the registered design practitioner for the building work.