

CAS ref: 10520189

Attn: Proper Officer
Persephone Company Pty Limited (ACN 628 341 597) as receivers and managers
for Hills Shoppingtown Pty Ltd (ACN 103 169 053)
c/- McGrath Nicol
Level 12, 20 Martin Place
Sydney NSW 2000

Service: By registered post and by email:

21 September 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 building known as “Modena” located at 2 Seven Hills Road, Baulkham Hills NSW 2153 (Lot 2 DP 1250374, SP 100612) (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. Hills Shoppingtown Pty Ltd (ACN 103 169 053) is the developer of the Building for the purposes of s 4 of the Act.

4. Persephone Company Pty Limited (ACN 628 341 597) (Persephone) have been appointed as receivers and managers and are mortgagee in possession of property of Hills Shoppingtown Pty Ltd (ACN 103 169 053).
5. No final occupation certificate has been issued in relation to the Building.
6. Matthew Whitton is an authorised delegate of the Secretary of the Department.

Powers under the Act

7. 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.
8. 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.

9. 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.

Consideration of written submissions

- 10. On 4 August 2023, a notice of intention to issue a prohibition order, including a draft copy of the order and the building work rectification order on which it is based, was served on the Developer, Local Council, Office of the Registrar General, and Certifier.
- 11. The Developer, Local Council, Office of the Registrar General, and Certifier were invited to provide written representations relating to the Order to the Department by 11 August 2023.
- 12. Persephone provided written representations on 11 August 2023. Persephone sought that the draft Order not be issued to final, on the basis that the defects identified in the building work rectification order are in the process of rectification and are well progressed. Persephone anticipate that defects will be complete in May 2024, with an explanation of the reason for delay. Persephone sets out a table for rectification of defects that have occurred to date and future target for rectification works still to be undertaken.
- 13. Persephone also raised concern about adverse financial consequences for property owners that currently reside in the building and their capacity to obtain ongoing funding to complete the balance of works.
- 14. I have considered Persephone's representations. I have weighed the competing interests, including the financial implications Persephone allege may occur. Whilst

rectification works have progressed, the building work rectification order remains in place and has not been revoked. The order was issued in 2021 and is not anticipated to be complied with until 2024. In those circumstances, I am satisfied that it is appropriate to issue this Order.

What are the reasons for making this Order?

15. A building work rectification order has been made in relation to the Building dated 15 October 2021 and has not been revoked.

What Order is being made?

16. 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 15 October 2021 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?

17. 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.