

Attn: Proper Officer
1A Eden Pty Ltd
Suite G07, 13 Eden Street,
NORTH SYDNEY NSW 2060

Service: By registered post

14 September 2023

Building Work Rectification Order

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

1A Eden Pty Ltd in relation to “RIGEL” 1A Eden Street, North Sydney (SP 92226) (the Development).

1A Eden Pty Ltd is required to cause building work to be carried out to remediate the potential serious defect 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 NSW 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 included as **Attachment A** to this order.
4. David Chandler, NSW Building Commissioner, is an authorised delegate of the Secretary of the Department.
5. 1A Eden Pty Ltd is the developer of the residential apartment building known as “RIGEL” **1A Eden Street, North Sydney (SP 92226)** for the purposes of section 4(a) of the Act.
6. The Development comprises of alterations and additions to an existing 3-storey commercial building to create a mixed-use development incorporating a café / restaurant, six (6) serviced apartments, and thirty-one (31) residential apartments over basement car parking.
7. On the 01 September 2023 the NSW Building Commissioner, David Chandler, and authorised officer Michael Hall conducted a lawful inspection of the Development.

Requirements in relation to Serious Defects

8. I, David Chandler, under section 33 of the Act, require you **1A Eden Pty Ltd** to do the things specified in column 4 in Table 1 to eliminate, minimise or remediate each respective serious defect described in columns 1, 2 and 3 of Table 1. Each requirement must be complied with by the time set out in column 5 of Table 1:

Table 1: Requirements in respect of Serious Defects

Serious Defect Reference Number	Location of Serious Defect	General description of Serious Defect	Requirement (under section 33(2)(a) & (b)) to carry out the following specified building work or take other action.	Time for compliance with Requirement (time commences as at the date of issue of this Order)
1	Units 107 & 201 bathroom walls. (the defect appears to be common throughout all units)	The ceramic wall tiles in the bathrooms have been spot stuck to the internal walls with adhesive creating voids behind the tile.	The ceramic wall tiles in all bathrooms are required to be installed in the wet areas having a minimum adhesive contact coverage of 90% of the tile in accordance with clause 5.6.4.2 of AS3958.1.	3 months
2	Units 107 & 201 bathroom floors. (the defect appears to be common throughout all units)	The lack of waterproofing design causes moisture to travel from the bathroom above and down the spot stuck tiled walls of the bathroom below causing the inadequately waterproofed tile screed on each bathroom floor level to become saturated with moisture and mould.	The waterproofing membrane in each bathroom is required to be installed in accordance with AS3740.	3 months
3	Unit 304 (the defect appears to be common for all balconies)	Vertical upward termination has not been provided at the enclosed balconies and overflows sizes are inadequate which causes moisture to enter into the units.	The balcony waterproofing is required to be installed in accordance with AS4654.2.	3 months

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.



David Chandler
NSW Building Commissioner
Building and Construction Compliance
NSW Fair Trading, Department of Customer Service

Reasons Building Work Rectification Order

1. These Reasons for Building Work Rectification Order ("Reasons for Order") are with respect to the Order dated 14 September 2023 issued to **1A Eden Pty Ltd** 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, David Chandler, have formed a reasonable belief that the Development has serious defects.
3. I have formed this belief after;
 - Carrying out a visual inspection of the building on Friday 01 September 2023,
 - Reviewing the Interim Occupation Certificate dated 09 December 2015 and the Final Occupation Certificate dated 19 May 2016 which were both issued for Development Consents Land & Environment Court Case umber 10724 of 2013, North Sydney Council's consent number 215/2 and North Sydney Council's consent number 215/3.
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.

Table 2 – basis of reasonable belief as to serious defects

Serious Defect Reference Number	Location of Serious Defect	Building element in which serious defect has been identified	Defect	Reason why defect is a serious defect	Applicable approved plan, Code or Australian Standard
1	Units 107 & 201 bathroom walls. (the defect appears to be common throughout all units)	Waterproofing	The ceramic wall tiles in the bathrooms have been spot stuck to the internal walls with adhesive creating voids behind the tile.	Bathrooms within the development are located one above the other and moisture from the bathroom above and moisture from the shower within the bathroom is causing moisture to travel down the walls, between the voids in the tiles and into the bathroom floor screed bed.	Clause F1.7 of the Building Code of Australia and AS 3740.
2	Units 107 & 201 bathroom floors. (the defect appears to be common throughout all units)	Waterproofing	The lack of waterproofing design causes moisture to travel from the bathroom above and down the spot stuck tiled walls of the bathroom below causing the inadequately waterproofed tile screed on each level to become saturated with moisture and mould.	Moisture is being trapped in the bathroom floor screed bed due to inadequate drainage design resulting in the build-up of mould trapped within the screed creating uninhabitable conditions.	Clause F1.7 of the Building Code of Australia and AS 3740.
3	Unit 304 (the defect appears to be common for all balconies)	Waterproofing	Vertical upward termination has not been provided at the enclosed balconies and overflows sizes are inadequate which causes moisture to enter into the units.	Moisture and stormwater from the balcony is entering into the unit causing the timber flooring to warp.	Clause F1.4 of the Building Code of Australia and AS 4654.1 and AS 4654.2.

Consideration of written representations

5. On the 06 September 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 13 September 2023. The following representations were received:
 - a) Thomson Geer Lawyers on behalf of the Owners Corporation made representations on 11 September 2023 stating that the Order is acceptable to the Owners Corporation.

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

6. I am of the view that a period of 3 months for Defect 1 through 3 (inclusive) 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.
7. Considering the potential consequences as outlined in my Reasons for Order and the order, I give greater weight to the seriousness of the Serious Defects identified and the associated failures to comply with the 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.

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—

- 1) 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
- 2) a defect in a building product or building element that—
 - a. is attributable to defective design, defective or faulty workmanship or defective materials, and
 - b. 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
- 3) a defect of a kind that is prescribed by the regulations as a serious defect, or
- 4) 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*).

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).