

## Undertaking

Given for the purposes of section 28 of the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW)

Hassall Developments Pty Limited (Receivers and Managers Appointed)  
(in liquidation)

ACN 608 342 712

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# Deed Poll

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**Parties** Hassall Developments Pty Limited (Receivers and Managers Appointed)  
(in liquidation) (ACN 608 342 712) (**Developer**)

## Background

- A. The Developer and Merhis Build Pty Ltd (ACN 610 315 734) are the developer and builder respectively of a residential development, located at 9 Hassall Street, Parramatta (**Building**).
- B. The persons involved in the development, design, construction and certification of the Building are set out in Annexure A.
- C. On 12 November 2020 and 16 and 18 December 2020, authorised officers under the RAB Act conducted inspections of the Building. During the inspections, the authorised officers identified serious defects as listed in Schedule A of the Order.
- D. On 16 March 2021, the Secretary (by way of their authorised delegate) issued notices of a proposed prohibition order to, amongst others, the Developer. The Developer made written representations to the Secretary in respect of the rectification work that had been undertaken and that it intended to be undertaken regarding the serious defects identified in the proposed prohibition order.
- E. On 22 July 2021, the Secretary (by way of their authorised delegate) made a prohibition order under section 9 of the RAB Act (**Order**), in relation to the Building.
- F. The Order:
- (a) identifies serious defects within the Building as listed in Schedule A of the Order, and
  - (b) prohibits the issue of an Occupation Certificate in relation to the Building until the Order is revoked by the Secretary.
- G. As described in Annexure B, the developer engaged various independent experts, consultants, and contractors to rectify the Rectified Serious Defects. On 28 February 2022, the Developer notified the Secretary that it had completed rectification of the Rectified Serious Defects. The reports confirming rectification of the Rectified Serious Defects are included at Annexure B.
- H. On 3 June 2022, Jason Mark Tracy, Sam Andrew Marsden, and Timothy Joseph Heenan of c/- Deloitte, Quay Quarter Tower, Level 46, 50 Bridge Street, Sydney NSW 2000 and "Riverside Centre", Level 23, 123 Eagle Street, Brisbane Qld 4000 were appointed as joint and several receivers and managers (**Receivers**) of the Developer.
- I. On 12 July 2022, Stephen Wesley Hathaway and Philip Raymond Hosking of Helm Advisory, Suite 2, Level 16, 60 Carrington Street, Sydney NSW 2000 were appointed as joint and several liquidators of the Developer.
- J. The Developer has procured a Building Code of Australia Condition Report from City Plan in relation to the Building. A copy of this report was provided to the Secretary on 18 January 2023 and a finalised report provided on 8 August 2023, which is at Annexure C (**BCA Report**). The BCA Report identified, among other things, any Serious Defects in the Building and certain other departures.
- K. Win Senior No.281 Pty Ltd (ACN 626 072 491) is the financier of the Developer.
- L. The Developer has entered into this Undertaking on a voluntary basis.

- M. The Developer has agreed to procure the performance of the Developer Works, being works undertaken to rectify the Serious Defects identified in the BCA Report. The Developer does so without any admission of liability in relation to any Serious Defects.
- N. This Undertaking only seeks to document the status of the Rectified Serious Defects and address the Serious Defects in the common property of the Building.
- O. This Undertaking does not change the role of any certifier engaged in respect of the Buildings under the *Environmental Planning and Assessment Act 1979* (NSW).
- P. The Secretary will revoke the Order following acceptance by the Secretary of this Undertaking, receipt by the Secretary of the Certification(s) in accordance with this Undertaking, and registration of a public positive covenant with respect to each residential strata lot within the Building outlined in clause 4.1(b).
- Q. The purpose of this voluntary Undertaking is to document the undertakings given by the Developer to the Secretary for the purposes of section 28 of the RAB Act.

**The Developer undertakes as follows:**

## **1. Definitions and interpretation**

### **1.1 Definitions**

In this Undertaking, unless the context indicates a contrary intention:

**BCA Report** has the meaning given in the Background to this Undertaking.

**Building** has the meaning given in the Background to this Undertaking.

**Building Element** has the meaning given in the RAB Act.

**Business Day** means a day that is not a weekend or public holiday in Sydney, Australia.

**Certification(s)** has the meaning given in clause 4.3(b).

**Claim** includes any claim, action, proceeding, entitlement, damage, loss, cost, expense or liability incurred by or to be made or recovered by or against any person, however arising, whether present, unascertained, immediate, future or contingent, and whether made by a party to the Deed or a third person.

**Construction Agreement** means the contract between the Developer and Merhis Build Pty Ltd ACN 610 315 734 dated 8 May 2017.

**DBP Legislation** means the *Design and Building Practitioners Act 2020* (NSW).

**Developer Works** means those works undertaken to rectify the Serious Defects.

**Dispute** has the meaning under clause 5.

**Occupation Certificate** has the meaning given in the RAB Act.

**Order** has the meaning given in the Background to this Undertaking.

**RAB Act** means the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW).

**Receivers** has the meaning given in the Background to this Undertaking.

**Rectified Serious Defects** means the serious defects identified in Annexure B that have been rectified as described in Annexure B.

**Secretary** means the Secretary of the Department of Customer Service or their authorised delegate.

**Serious Defects** means any 'serious defects', as defined in the RAB Act, in relation to the Building, that:

- (a) are identified in the BCA Report; and
- (b) the Secretary has notified the Developer in writing must be rectified before the Order is revoked by the Secretary.

**Undertaking** means this document.

## 1.2 Interpretation

In this Undertaking, unless the context indicates a contrary intention:

- (a) **(headings)** clause headings and the table of contents are inserted for convenience only and do not affect the interpretation of this Undertaking,
- (b) **(background)** the background forms part of this Undertaking,
- (c) **(person)** a reference to a person includes a natural person, corporation, statutory corporation, partnership, the Crown and any other organisation or legal entity and their permitted novatees, permitted assignees, personal representatives, and successors,
- (d) **(including)** including and includes (and any other similar expressions) are not words of limitation and a list of examples is not limited to those items or to items of a similar kind,
- (e) **(corresponding meanings)** a word that is derived from a defined word has a corresponding meaning,
- (f) **(singular and plural)** the singular includes the plural, and the plural includes the singular,
- (g) **(references)** a reference to a clause, subclause, exhibit, attachment, or annexure is a reference to a clause, schedule, exhibit, attachment, or annexure to or of this Undertaking and a reference includes all schedules, exhibits, attachments and annexures to it, and
- (h) **(joint and several)** an obligation or liability assumed by, or a right conferred on, two or more persons binds or benefits them jointly and severally.

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## 2. Enforceable Undertaking

The Developer acknowledges and agrees that the undertakings set out in this Undertaking constitute a written undertaking submitted to the Secretary under section 28 of the RAB Act.

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## 3. Actions already taken

Prior to the appointment of the Receivers, the Developer has rectified the Rectified Serious Defects as described in Annexure B.

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## 4. Undertakings

### 4.1 Developer obligations

The Developer agrees to:

- (a) engage appropriately qualified, licensed and insured designers and builders to rectify the Serious Defects; and
- (b) as a condition of revocation by the Secretary of the Order, execute a public positive covenant in accordance with section 88E of the *Conveyancing Act 1919* (NSW) in substantially the same terms as contained in Annexure D, and do all things necessary to permit the registration of the same on the title to each residential strata lot within the Building at the Developer's cost (**Covenant**).

The Secretary and the Developer acknowledge that the Developer may need to transfer title to the Building to a wholly-owned subsidiary of the Developer as part of a corporate reconstruction. The Secretary consents to such transfer for the purposes of the Covenant on the condition that any such subsidiary is the sole proprietor of the residential strata lots within Building.

### 4.2 Design Documentation for Developer Works

The Developer will procure appropriately qualified, licensed and insured designers and builders to prepare design documentation required for the Developer Works (including any engineered design alternative) (**Design Documentation**):

- (a) in accordance with all applicable laws including the DBP Legislation;
- (b) with due skill, care and diligence and by personnel who are suitably qualified and experienced and, where applicable, registered in accordance with the DBP Legislation; and
- (c) so that it is fit for its intended purpose.

### 4.3 Rectification of Serious Defects

- (a) The Developer will ensure that it is a condition of any design, construction or design and construction contract that its counterparty:
  - (i) cannot commence the Developer Works if the Design Documentation does not comply with the requirements of clause 4.2 of this Undertaking;
  - (ii) will ensure that in carrying out any Developer Works it complies with all applicable laws (including the DBP Legislation);
  - (iii) carries out the Developer Works safely and so as to protect persons and property; and
  - (iv) warrants that any Developer Works will:
    - A. be carried out in accordance with Design Documentation prepared under clause 4.2;
    - B. comply with all applicable laws and the Building Code of Australia; and

- C. be carried out in such a manner so that, upon completion of the Developer Works, the Building is fit for its intended purpose.
- (b) Upon completion of the Developer Works, the Developer will:
  - (i) procure certification(s) by a suitably qualified independent person (or persons if necessary) that the Developer Works have been completed in accordance with this Undertaking (**Certification(s)**); and
  - (ii) provide a copy of the Certification(s) to the Secretary.

#### **4.4 Cooperation and testing**

The Developer will ensure that any designer, builder or other contractor engaged by the Developer to perform the Developer Works agrees as a term of its contract with the Developer to:

- (a) give the Secretary and any person authorised by them access to the Developer Works; and
- (b) provide the Secretary with every reasonable facility necessary for the supervision, examination and testing of the Developer Works.

#### **4.5 Sale of Building**

- (a) For a period of 10 years following the issue of an Occupation Certificate must not sell or allow the sale of the Building or a residential lot within the Building, except by the sale of all of the residential lots to the same purchaser or same purchasers holding as tenants-in-common.
- (b) If the Developer sells the Building or a residential lot within the Building following the issue of an Occupation Certificate, the Developer must disclose to any subsequent purchaser that prefabricated bathroom pods have been used in the construction of the Building.

#### **4.6 No limitation**

Nothing in this Undertaking in any way affects or limits the Developer's liability or obligations at law, including pursuant to any statutory warranties.

#### **4.7 Costs**

- (a) The Developer will:
  - (i) carry out all of its obligations under this Undertaking at its cost; and
  - (ii) subject to clause 4.7(b), reimburse the Secretary on demand for all expenses (including legal fees, expert fees, costs and disbursements) incurred in connection with negotiating, preparing and executing this Undertaking (including the costs of carrying out any inspections of the Building, seeking independent advice including expert reports, preparation of any Orders or review of Serious Defects), and any subsequent consent, agreement, approval, waiver, or amendment relating to this Undertaking.
- (b) The Developer will only pay the amounts owing under clause 4.7(a)(ii) if:
  - (i) such costs are reasonable and necessary for the purpose of the Secretary accepting this Undertaking; and

- (ii) the Secretary provides a tax invoice for the amounts actually incurred.

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## 5. Dispute resolution

In the event that any disagreement or difference arises in respect of any matter set out in this Undertaking (**Dispute**), the Developer submits, in good faith, to resolving the Dispute in accordance with the following dispute resolution procedure:

- (a) the Developer or the Secretary may issue the other party with a notice setting out the details of the Dispute (**Dispute Notice**);
- (b) the Developer and the Secretary will make representatives with authority to settle the Dispute available for the purpose of meeting in an effort to resolve the Dispute, and at least one meeting of the authorised representatives must take place within 15 Business Days of service of a Dispute Notice;
- (c) if the Dispute is not resolved in accordance with clause 5(b), any party to the Dispute may refer the Dispute to mediation in accordance with the IAMA Mediation Rules. The mediation is to be conducted in Sydney.

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## 6. Receivers' limitation of liability

- (a) The Receivers are executing this Undertaking as agents of the Developer only and not in the Receivers' personal capacity and, to the extent permitted by law, the Receivers do not assume personal liability in connection with it or any of the Developer's obligations under this Undertaking.
- (b) This Undertaking, and any obligation of the Developer under it, is conditional on, to the extent permissible by law, the Secretary, and the Department of Customer Service:
  - (i) agreeing that:
    - A. the Receivers have not caused, authorised, or permitted any works to be undertaken in relation to the Building or under the Construction Agreement;
    - B. all works carried out in relation to the Building and under the Construction Agreement were carried out prior to the appointment of the Receivers; and
    - C. the Receiver is released personally from all liabilities, demands and Claims arising out of this Undertaking and the transactions contemplated by this Undertaking;
  - (ii) covenanting not to sue the Receivers personally in respect of any liabilities, demands or Claims arising out of this Undertaking and the transactions contemplated by this Undertaking;
  - (iii) agreeing the Receivers are not personally liable for any amount required to be paid pursuant to this agreement, or for any liability, demand or Claim arising out of this Undertaking, or the transactions contemplated by this Undertaking;
  - (iv) agreeing for the purposes of any acknowledgements or agreements as to, or provisions of, limitations of the liability of the Receivers in this agreement, references to the Receivers where the context so permits shall mean and include their present and future firm or firms, partners and employees, and any legal entity or partnership using in its name the



word "Deloitte", any successor or merged firm and the partners, shareholders, officers and employees of any such entity or partnership. Deloitte holds the benefit of this clause on trust for the Receivers and each other person referred to;

- (v) agreeing these limitations of the liability of the Receivers shall continue notwithstanding the Receivers ceasing to act as receivers of the Developer; and
  - (vi) agreeing these limitations of the liability of the Receivers shall be in addition to, and not in substitution for, any right of indemnity or relief otherwise available to Deloitte or the Receivers and shall continue notwithstanding termination of this Undertaking or completion of the transaction contemplated by this Undertaking.
- (c) The Receivers do not in any way adopt or agree to be bound personally by this Undertaking or the transactions contemplated by this Undertaking.
- (d) This clause 6 operates as a Deed Poll in favour of each Receiver and is enforceable by them even though they are not a party to this Undertaking.

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## **7. General**

### **7.1 Governing law and jurisdiction**

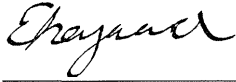
- (a) The laws applicable in New South Wales govern this Undertaking.
- (b) The Developer submits to the non-exclusive jurisdiction of the courts of New South Wales and any courts competent to hear appeals from those courts.

### **7.2 Publication of Undertaking**

The Developer acknowledges that the Secretary may publish this Undertaking in full on its website or otherwise.

Executed as a deed poll.

Executed by HASSALL DEVELOPMENTS PTY LTD (Receivers and Managers Appointed) (in liquidation) ACN 608 342 712 by one of its joint and several receivers and managers in the presence of:



Witness Signature

Eryn Louise Hayward

Witness Name (print)



Signature of Receiver

Jason Mark Tracy

Name of Receiver (print)

16/10/2023

Date

Accepted by \_\_\_\_\_ (Agent of Customer Service under section 28 of the  
Receivers and Managers Appointed (in Liquidation) (Receivers and Enforcement Powers) Act 2020 (NSW) by her  
du \_\_\_\_\_)

Delegate of the Secretary of the Department of Customer Service,  
the Building Commissioner  
David Chandler OAM

Date accepted

