



Department of
Infrastructure, Planning and Natural Resources

**REPORT ON THE ASSESSMENT OF DEVELOPMENT APPLICATION
DA-164-7-2004-i PURSUANT TO SECTION 80 OF THE
ENVIRONMENTAL PLANNING AND ASSESSMENT ACT, 1979**

**Proposal by Cameron Brae Pty Ltd to Expand and Regularise
its Existing Marina Operations at Berowra Waters, in the
Hornsby Local Government Area**

March 2005

EXECUTIVE SUMMARY

Cameron Brae Pty Ltd lodged a development application with the Department of Infrastructure, Planning and Natural Resources on 5 July 2004 for the proposed expansion and regularisation of the Berowra Waters Marina in the Hornsby local government area. The development application includes a Statement of Environmental Effects which has been notified and publicly exhibited in accordance with the requirements of the *Environmental Planning and Assessment Act 1979*.

On 20 December 2001, the then Minister for Planning granted consent to four development applications (DAs) at Berowra Waters. The DAs sought to upgrade and redevelop three existing marinas and to construct and use a car park at Berrilee. The Association for Berowra Creek commenced legal proceedings before the Land and Environment Court (L&E Court) against two of the Minister's consents (extension of the Berowra Waters Marina and the car park at Berrilee). On 21 February 2003, the L&E Court upheld the appeal and declared the two consents invalid.

The L&E Court found that the DA for the Marina should have been assessed as designated development and the car parking conditions of consent were invalid because they defer consideration of a key issue. The Court's determination left the development proposal open for reconsideration.

In relation to the subject development application, the Department has formed the opinion that the proposal constitutes an *alteration or addition* to the existing development and that the alterations and additions proposed by the Applicant will not significantly increase the environmental impacts of the previously approved development. Further justification is outlined in Appendix A.

The current development application is classified as State significant, non-designated and non-integrated development. The Minister for Infrastructure and Planning is the consent authority for State significant development and will determine the development application.

The Applicant proposes to expand and regularise the current Marina operations by:

- extending the two Marina arms further to the east along the south shoreline of Dusthole Bay by the installation of additional floating pontoons;
- surrendering of an additional 7 swing moorings to off-set the additional 7 fixed Marina berths;
- formalising the use of the Marina to berth a total of 78 vessels in permanent private berths;
- formalising the use of a charter ferry berth (berth No. 79);
- formalising continuation of a charter ferry operation from the Marina;
- using the 'fuel wharf' to provide a maximum of 4 'short stay' berths at the Marina;
- improving after hours security in the Marina car park through the installation of security gates and grilles;
- using the existing car park facility on site to park up to 44 vehicles by using stacked parking during peak periods; and
- formalising the continued use of the ground floor of the Marina building as a showroom, chandlery, two offices, storeroom and a café with outdoor seating.

The Department publicly exhibited the development application and accompanying Statement of Environmental Effects from 27 August 2004 to 27 September 2004. During the exhibition period the Department received submissions from 46 parties (including government agencies, community groups and the public). Key issues raised by submitters are as follows:

- inadequate parking provisions;
- objection to regularisation of activities at Berowra activities;
- increase in number of vessels moored not appropriate; and
- no provision for pump-out facility;

In its assessment of the proposal, the Department has taken into consideration all the issues raised by all submitters and concludes that the key issues for consideration are parking/traffic and the need to provide for a sewage pump-out facility to mitigate water quality impacts. Should the proposal be approved by the Minister, the Department recommends a number of conditions of consent to alleviate parking impacts, including that the Applicant employ a parking attendant to operate the proposed stack parking arrangements and to also implement an independent audit program to assess the effectiveness of the parking provisions. The Applicant would also be required to install a pump-out facility which would be used by all boats berthed at the Marina which have holding tanks.

The Department recommends that the Minister approve the development application subject to conditions.

TABLE OF CONTENTS

1. INTRODUCTION	1
1.1 Background	1
2. DEVELOPMENT PROPOSAL	2
2.1 Location.....	2
2.2 Site Description	2
2.3 Unlawful Structures and Uses.....	3
2.4 Proposed Development.....	4
3. STATUTORY PLANNING FRAMEWORK.....	5
3.1 Permissibility	5
3.2 Minister's Role.....	5
3.3 Legislative Context.....	5
3.4 Relevant Environmental Planning Instruments	6
4. ISSUES RAISED IN SUBMISSIONS	8
5. CONSIDERATION OF ENVIRONMENTAL ISSUES.....	9
5.1 Transport and parking	12
5.2 Regularisation	14
5.3 Water Quality	15
5.4 Visual Impacts.....	16
5.5 Flora and Fauna.....	16
5.6 Environmental Management	17
6. SECTION 79C CONSIDERATION	17
7. RECOMMENDED CONDITIONS OF CONSENT	17
8. CONCLUSIONS	18
9. RECOMMENDATIONS	18
APPENDIX A – CONSIDERATION OF DESIGNATION OR NOT	1
APPENDIX B – SECTION 79C MATTERS FOR CONSIDERATION	3

1. INTRODUCTION

1.1 Background

On 5 July 2004, Cameron Brae Pty Ltd (the Applicant) lodged a development application with the Department of Infrastructure, Planning and Natural Resources (the Department) for the expansion and regularisation of operations of the existing Berowra Waters Marina (the proposal) in the Hornsby local government area. The Berowra Waters Marina has operated on the subject site for more than 30 years.

There are two current development consents granted by Hornsby Shire Council which relate to the site:

- consent granted on 26 February 1981 for the *rebuilding and construction of a Marina*; and
- consent granted on 19 November 1981 (No 391/81) for the *rebuilding of the premises to incorporate supermarket, workshop, fast foods, laundry and offices on Level 1; a restaurant, kitchen and amenities on Level 2; and a residence on Level 3 with a two-level car park adjoining-together with a marina*.

These consents do not specify an approved number of berths but they do allow for up to 100 berths provided a swing mooring is relinquished and a car parking space is provided for each berth. Due to irregularities in relation to approved uses at the site, the Applicant sought clarification and regularisation of current operations in a Development Application (DA) lodged with Hornsby Council in March 2000. Following the exhibition of the DA by Council, the then Minister for Urban Affairs and Planning declared that certain types of marina development in the Sydney Region to be State significant development. Therefore the DA was referred to the Minister for determination.

On 20 December 2001, the then Minister for Planning granted consent to four DAs at Berowra Waters. The DAs sought to upgrade and redevelop three existing marinas and to construct and use a car park at Berrilee. The Association for Berowra Creek commenced legal proceedings before the Land and Environment Court (L&E Court) against two of the Minister's consents (extension of the Berowra Waters Marina and the car park at Berrilee). On 21 February 2003, the L&E Court upheld the appeal and declared the two consents invalid on procedural grounds (the Association did not have legal standing to lodge a merit appeal).

The L&E Court found that the DA for the Marina should have been assessed as designated development and the car parking conditions of consent were invalid because they defer consideration of a key issue. The Court's determination left the development proposal open for reconsideration.

The development would be designated, *prima facie*, because the existing marina is classified as designated under clause 23, Part 1 Schedule 3 of the *Environment Planning and Assessment Regulations 2000* (the Regulation). However, the Applicant has argued that it is an alteration or addition within the meaning of clause 36 of Part 2 Schedule 3 of the Regulation. The Department has considered the proposal under the heads of consideration under clause 36 of Part 2 Schedule 3 of the Regulation and agrees that the proposal is an alteration/addition that would not significantly increase the impacts of the existing development. Therefore, the proposal is treated as not designated.

In February 2004, Hornsby Council approved an application from Cameron Brae modifying consent No. 391/8. The modification application sought to provide a remote car park for the Marina at 69-73 Bay Road, Berrilee, in lieu of the site originally identified for the remote car parking facility (and the subject of court proceedings against the Minister's determination and a DA for such).

This report represents the Department's assessment of the proposed development, in accordance with the *Environmental Planning and Assessment Act 1979*. The Department recommends approval of the development application subject to a number of conditions.

2. DEVELOPMENT PROPOSAL

2.1 Location

The Berowra Waters Marina is located on Lot 258, DP 721561 and Crown lease No. 1968/18, Bay Road, Berowra Waters. The Marina is on the western side of Berowra Waters in a bay known as Dusthole Bay.



Figure 1: Berowra Waters Marina (to the right of the picture)

2.2 Site Description

The existing Marina building is composed of a three-storey building featuring different uses:

- Level 1: showroom & office, chandlery shop, manager's office, storeroom and a café which includes an outdoor seating area (the approved uses for this floor are: supermarket; fast food outlet; offices; laundry; hire boat shop and workshop).
- Level 2: restaurant, office and staffroom.
- Level 3: three bedroom residence.

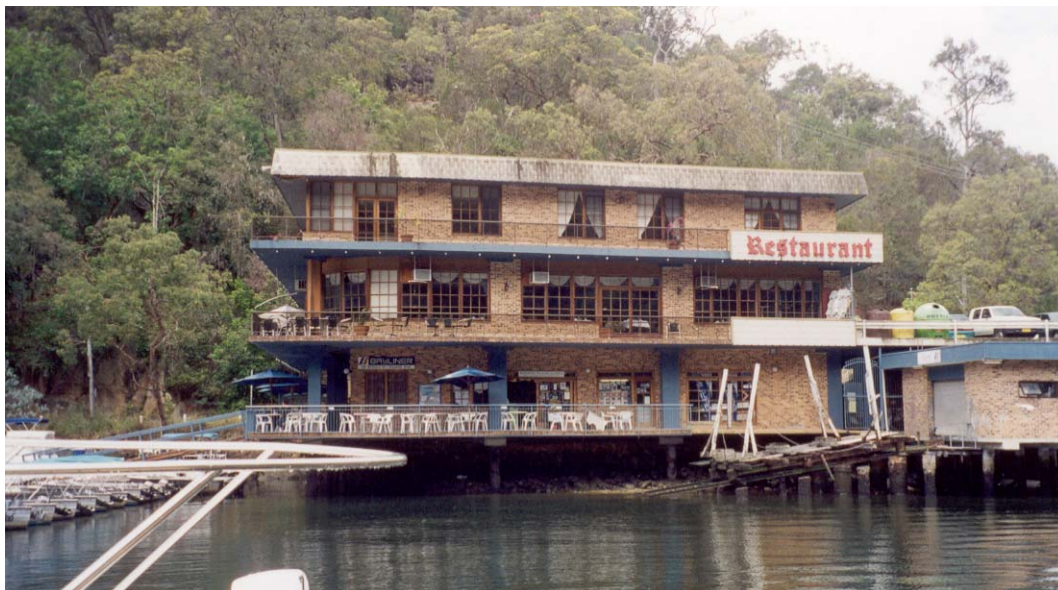


Figure 2: Berowra Waters Marina Building

Adjacent to the marina building, there is a two-storey car park which provides 32 car spaces. There is also a shed and slipway. The rest of the site is composed of two marina arms which run in an east-west direction from the Marina building along the southern shoreline of Dusthole Bay. The pontoons accommodate 72 berths and do not include provisions for hire boats (15) and 'short stay berths.'¹ Ancillary facilities to the Marina include: three underground fuel tanks and the fuel wharf.

The site is surrounded by bushland, water and a number of houses on the opposite side of Bay Road to the south-east of the Marina. A public car park is located to the west of the Marina together with a boat launching ramp and an open space area known as Dusthole Reserve. This area is Crown land under the control and management of Hornsby Council.

2.3 Unlawful Structures and Uses

In 1999, Council conducted an audit of the marina's works and operations. This audit identified several unlawful structures and uses at the marina.

The unlawful structures included the:

- (a) Marina and fuel pontoons, which were all built in a different configuration to the approved configuration without modifying the original development consent²;
- (b) Works associated with converting the supermarket/fast food outlet into a café with outdoor seating;
- (c) Internal modifications to level 1 of the marina building (to integrate the office space and the boat sales, hire, and supply facilities); and
- (d) Internal modifications to level 2 of the marina building.

The unlawful uses include the:

- (a) Use of the supermarket/fast food outlet as a café with outdoor seating;
- (b) Use of the existing car park to park up to 44 vehicles using stacked parking;
- (c) Use of the marina pontoons to provide berthing for a charter ferry and to conduct charter ferry operations (the Macquarie Princess); and
- (d) Use of the marina pontoons to berth up to 67 boats (when, strictly speaking, the marina only has consent to berth 32 boats, based on the available parking).

There is some doubt about whether these approvals provide for the use of the marina pontoons to berth up to 15 hire boats. The Applicant argues that the hire boat operations have been on the site since the 1960s. The Department accepts this argument, particularly since DA 391/81 approved a "hire boat shop" in the marina building.

The audit report recommended that Council:

- (a) Direct the Applicant to reduce the number of boats at the marina to comply with the consent;
- (b) Seek legal advice on its ability to enforce the parking requirements in DA 391/81;
- (c) Take no action concerning the fuel wharf;
- (d) Direct the Applicant to close the café until the use is approved;
- (e) Take no action concerning the minor internal modifications on Level 1 and 2 of the marina building; and
- (f) Direct the Applicant to stop the charter ferry operations until the use is approved.

These recommendations have not been implemented. Council seems to have decided not to take any action against the unlawful structures and uses so long as the Applicant is actively trying to legitimise or regularise these structures and uses.

On 15 October 1999, the Applicant lodged a DA with Council for a similar proposal at the marina, but subsequently withdrew this application following a public meeting on 26 November 1999.

It then lodged the DA for this proposal on 20 March 2000 with Hornsby Council which was subsequently referred to the Department for assessment, pursuant to the then Minister for Urban Affairs and Planning's declaration in relation to certain marina developments.

¹ refers to temporary mooring of vessels. The occupants would be using the facilities at the Marina and the stay would not be longer than two hours.

² Both Council and the then Department of Land and Water Conservation approved the different alignment at the Building Application stage; but the original consent was never modified. In strictly legal terms, therefore, these pontoons are classified as unauthorised works, even though two public authorities approved the change.

2.4 Proposed Development

The Applicant proposes to expand and regularise the current Marina operations by:

- extending the two Marina arms further to the east along the south shoreline of Dusthole Bay by the installation of additional floating pontoons;
- surrendering of an additional 7 swing moorings to off-set the additional 7 fixed Marina berths;
- formalising the use of the Marina to berth a total of 78 vessels in permanent private berths;
- formalising the use of a charter ferry berth (berth No. 79);
- formalising continuation of a charter ferry operation from the Marina;
- using the 'fuel wharf' to provide a maximum of 4 'short stay' berths at the Marina;
- improving after hours security in the Marina car park through the installation of security gates and grilles;
- using the existing car park facility on site to park up to 44 vehicles by using stacked parking during peak periods; and
- formalising the continued use of the ground floor of the Marina building as a showroom, chandlery, two offices, storeroom and a café with outdoor seating.

Should the Minister determine to approve current development application, the scope of the proposed development would address the currently unlawful structures/use as described in section 2.3.

3. STATUTORY PLANNING FRAMEWORK

3.1 Permissibility

The existing Berowra Waters Marina is located partly on land and partly on water. Under the *Hornsby Local Environmental Plan 1994* (the LEP) the land is zoned Business D (Aquatic Service Centre) while the water-side is unzoned. The types of developments for which the Applicant is seeking regularisation can be classified as *car park*, *marina* and *restaurant* which are permissible with consent under Clause 20(1) of the LEP.

The land development is permissible with consent and it is also State significant development under the Minister's declaration. Section 76A(8) of the Act makes the water-based development both permissible with consent and State significant development.

Therefore, the proposed development is permissible with consent.

3.2 Minister's Role

The Minister for Infrastructure and Planning is the consent authority for the proposed development by virtue of a ministerial declaration made by the then Minister for Urban Affairs and Planning on 10 April 2001 regarding certain marina development in the Sydney Region.

3.3 Legislative Context

In accordance with the provisions of the *Environmental Planning and Assessment Act 1979* (the Act) and the *Environmental Planning and Assessment Regulation 2000* (the Regulation), the proposed development is non-designated development, non-integrated and State Significant development.

Non Designated Development

A court challenge by the Association for Berowra Creek Inc. against the previous development application lodged by the Applicant was successful. The Land and Environment Court determined that the consent authority had not given consideration to the application of clause 35 Part 2 Schedule 3 of the *Environment Planning and Assessment Regulations 2000*. Clause 35 states that:

Development involving alterations or additions to development (whether existing or approved) is not designated development if, in the opinion of the consent authority, the alterations or additions do not significantly increase the environmental impacts of the total development (that is the development together with the additions or alterations) compared with the existing or approved development.

Therefore, the Court determined that the proposed development remained designated development due to the consent authority's lack of consideration of clause 35. Although the Court invalidated the Minister's consent, the proposal was left open for reconsideration on its merits.

In relation to the present development application, the Department has formed the opinion that the proposal constitutes an *alteration or addition* to the existing development and that the alterations and additions proposed by the Applicant will not significantly increase the environmental impacts of the previously approved development. Full details of this consideration are provided in Appendix A.

All requirements of the Act have been met in relation to exhibition and notification of the subject non-designated development proposal.

Non-Integrated Development

The development application lodged by the Applicant indicated that the proposal was integrated development since it required a permit under Part 3A of the *Rivers and Foreshores Improvement Act 1948*. The proposal was advertised and exhibited as integrated development.

After investigation by the Natural Resources section of the Department, advice has been received that the proposal does not require a Part 3A permit since the works that would ordinarily require such a permit are fully contained within Crown Land. Therefore, the proposal is not classified as integrated development under section 91 of the Act.

State Significant Development

The proposed development constitutes State significant development, as defined by section 76A(7) of the *Environmental Planning and Assessment Act 1979*. The proposal is State significant development by virtue of a declarations of State significance made on 10 April 2001 by the then Minister for Urban Affairs and Planning in relation to marina development. The declaration applies to:

Marina development located in Sydney Harbour, Middle Harbour, North Harbour, Botany Bay, Port Hacking, Broken Bay, or any associated tidal waters that involves:

- (a) the establishment of a new permanent boat storage facility on the waterway with support facilities on an adjoining area of land or waterway; or
- (b) alterations of additions to an existing permanent boat storage facility on the waterway with support facilities on an adjoining area of land or waterway.

The proposal is classified as marina development since it is an alteration and addition to an existing permanent boat storage facility on a tidal waterway of Broken Bay, with support facilities on the adjoining area of land and the waterway.

Therefore, the proposal is classified as State significant development under section 76A(7)(b)(iii) of the Act and the Minister for Infrastructure and Planning is the consent authority for the development application.

3.4 Relevant Environmental Planning Instruments

The assessment of the proposed development is subject to the following key environmental planning instruments (EPIs) and deemed EPIs:

- *Hornsby Shire Local Environmental Plan 1994*;
- *Sydney Regional Environmental Plan No. 20 – Hawkesbury-Nepean River (No. 2 – 1997)*; and
- Hornsby Development Control Plan - River Settlements; and
- Hornsby Development Control Plan – Car Parking.

Consideration of the proposed development in the context of the objectives and provisions of these environmental planning instruments is outlined below and further examined in detail in Appendix B.

Hornsby Shire Local Environmental Plan 1994

The proposed development would be located on land zoned as Business D (Aquatic Service Centre) and on unzoned land (water). The proposal is permissible with consent under the *Hornsby Shire Local Environmental Plan 1994* (LEP). The proposal also complies with the objectives of the zone to:

- (a) encourage economic growth and employment opportunities;
- (b) accommodate the retail, commercial, service and social needs of the community that uses the Hawkesbury River and its tributaries; and
- (c) encourage development that improves the health, vitality and aquatic, cultural and social environments within business centres and adjacent areas.

Sydney Regional Environmental Plan No. 20

Sydney Regional Environmental Plan No. 20 – Hawkesbury-Nepean River (No. 2 - 1997) (SREP 20) applies to land on which the proposed development is to be undertaken. SREP 20 aims to: *protect the environment of the Hawkesbury-Nepean River system by ensuring that the impacts of future land uses are considered in a regional context.*

SREP 20 also includes a comprehensive list of specific planning issues that the consent authority must take into account when determining a development application to which SREP 20 applies.

Specifically, Clause 11(13) of SREP 20 contains additional matters in relation to marinas which the consent authority must consider:

- (a) The need for a condition of consent requiring centralised pumping stations.
- (b) Whether the proposed development will have an adverse effect on drainage patterns or cause shoreline erosion or accretion.
- (c) Whether the proposed development will have an adverse effect on any natural wetlands or flora and fauna habitats.
- (d) Whether there are satisfactory arrangements for the collection, storage, treatment and subsequent disposal of sewage, liquid wastes and bilge water.

- (e) Whether the proposed development incorporates measures to prevent the escape into the waterway of fuels, oils, grease, anti-fouling chemicals and other chemicals.
- (f) Whether the water depth adjacent to any proposed marina or other related land and water shoreline facility is adequate, and if not, the adequacy of the proposed means by which water depth will be maintained.

These additional matters for consideration are discussed in section 5 of this report and in Appendix B.

4. ISSUES RAISED IN SUBMISSIONS

The Department publicly exhibited the development application and accompanying Statement of Environmental Effects from 27 August 2004 to 27 September 2004. During the exhibition period the Department received submissions from 46 parties. Submitters can be characterised as follows:

- **four State and local government bodies:** Hornsby Shire Council; NSW Maritime Authority (former NSW Waterways Authority); Department of Primary Industries and the Roads and Traffic Authority;
- **six community groups:** Association of Berowra Creek; Berrilee Progress Association; Anglers Action Group; Thornleigh/Normanhurst Residents Group; Hornsby Conservation Society and the Galston Area Residents' Association
- **two non-government organisations:** Nature Conservation Council of NSW and the Total Environment Centre
- **thirty-four private individuals.**

None of the State and local government bodies making submissions in relation to the proposal expressly indicated a position of support or opposition to extension and regularisation of activities at Berowra Waters Marina. These submissions did, however, outline a number of issues that the respective parties considered should form key components of the environmental impact assessment of the proposed development. A number of these submissions also detailed conditions recommended for imposition on the proposal should the Minister determine to approve the proposal. Key issues raised in submissions from Government entities include:

- water quality issues, in particular that the proposal does not include a 'waste collection facility and recommend that the Applicant be required to install a sewage pump-out facility which should be available to the public (NSW Maritime and Natural Resources section of DIPNR); and
- parking and traffic issues (Council and RTA).

Hornsby Shire Council has not indicated whether it supports or opposes the proposed development, but has provided comments to the Department on a number of issues. These comments generally relate to traffic and parking, hours of operation and external finishes. Council also recommends that an ecological survey assessment is prepared on the proposed marina extensions and that the on-site wastewater management system is upgraded.

Of the 42 submissions received by the Department from private individuals, community groups and non-government organisations, 39 objected, one supported the proposal and two provided conditional support. Key issues raised by these parties can be summarised as follows:

- inadequate parking provisions proposed. Neither stack parking nor remote parking would assist the existing problem;
- objection to regularisation of activities at Berowra activities especially due to non-compliance by Applicant of exiting conditions of consent;
- increase in number of vessels moored not appropriate;
- no provision for pump-out facility;
- transport to site difficult, Berowra Waters Road often closed and there is no public transport;
- inadequate flushing time at the Marina – 39 days;
- site already at 'natural limit'. Berowra Waters is already overcrowded. Marina should be scaled back and not expanded;
- using crown lands for commercial gain – not in the public interest;
- Hornsby Council staff have previously objected to expansion of the Marina;
- the existing café does not have approval;
- concerns with lack of emergency/fire provisions; and
- the development would have an undesirable impact on the character and environment of Berowra Waters, particularly on the estuarine environment and biodiversity.

5. CONSIDERATION OF ENVIRONMENTAL ISSUES

The Department has undertaken a detailed review of the information supplied by the Applicant in the Statement of Environmental Effects (SEE) and additional information, and issues raised in submissions received in response to the public exhibition of the development application. It is important to note that the environmental impacts assessed are for the extension to the Marina and change in use and not an assessment of the impacts of the existing development at Berowra Waters. In light of these considerations, the Department has been able to complete a preliminary screening of environmental planning and assessment issues associated with the proposed development. Issues have generally been considered in the context of the assessed environmental planning significance of matters outlined in the Statement of Environmental Effects, and the level of interest, concern or complexity of matters raised in submissions. A combination of these considerations has been used to develop the preliminary screening table reproduced as Table 1 (over). The primary purpose of the preliminary screening is to ensure focussed consideration of key issues associated with the proposed development, with an appropriate level of detail applied depending on the relative importance of the issue under consideration.

From review of the Statement of Environmental Effects, the Department has nominated environmental planning issues as key, major, moderate or low significance in the context of environmental planning and assessment. In all cases, a conservative approach has been applied and in the case of any doubt, a precautionary approach has been taken to ensure that at worst, issues have been overestimated rather than assigned a lower significance. As a general indication, levels of environmental planning and assessment significance have been applied as follows:

- **Key significance** – those issues of fundamental importance to the proposal. Resolution of these matters is considered fundamental to achieving acceptable environmental and public health and amenity outcomes, and in some cases may include tests or requirements that must be met by the proposal before it could be determined.
- **Major significance** – those issues representing the most significant environmental impacts associated with the proposal. Assessment has either indicated that relevant criteria or outcomes cannot be met, or compliance is predicted to be marginal. These issues also include matters for which there remains some doubt as to the assessment approach or outcomes.
- **Moderate significance** – those issues assessed as meeting relevant criteria or outcomes, but with a significant residual impact that needs to be mitigated and managed.
- **Low significance** – those issues that are either not associated with the proposal, clearly within acceptable environmental criteria, and/ or are the subject of well-established and applied environmental management measures. These issues also include those matters that could be easily and effectively addressed through conditions of consent, should the Minister determine to approve the proposed development.

All issues identified as having moderate, major or key significance as a result of the Department's consideration of the Statement of Environmental Effects have been carried forward for further assessment. In addition, issues raised in submissions have been considered both in the context of the frequency of occurrence and the level of concern expressed. Similar definitions have been used to characterise the significance of issues raised in submissions:

- **Key significance** – issues raised in the majority of submissions, issues representing primary public concern or the subject of detailed public comment or criticism.
- **Major significance** – issues raised in most submissions or subject to specific comment on a fundamental component of the proposal.
- **Moderate significance** – issues raised in detail in some submissions or as a general statement across the majority of submissions.
- **Low significance** – not raised in submissions, or only noted in a cursory manner.

Regardless of the assessed significance of issues from the Statement of Environmental Effects, any matter identified as being of major or key significance from public submissions has been carried forward for further detailed assessment. Preliminary screening, including comments on the screening and identification of matters for further assessment, is outlined in Table 1.

Table 1 - Screening of Environmental Impacts for Detailed Consideration

Issue	Assessed Environmental Significance	Assessed Public Interest/ Concern	Comment
Transport and Parking	Key significance	Key significance	<p>The parking issue is the number one concern outlined in submissions received by the Department. Berowra Waters presently experiences parking demand from residents, commercial interests and the community who use the publicly available facilities. In the Statement of Environmental Effects, the Applicant argues that after taking into account the requirements of the <i>Berowra Waters Plan of Management</i> and Hornsby Council's Car Park Development Control Plan, the proposal would increase car parking demand by 12 spaces. To alleviate the car parking problem, the Applicant proposes a number of initiatives which include: limiting the number of seats at the café to 70; restrict the hours of operation of the Charter Ferry and introduce stack parking. The Department supports these initiatives as means of alleviating the car parking problem and recommends a number of conditions of consent to alleviate impacts should the Minister approve the proposal.</p> <p>Carried forward for further assessment – section 5.1</p>
Regularisation	Key significance	Major significance	<p>The proposed development seeks to regularise marina operations at Berowra Waters. Consent granted by Hornsby Council in 1981 did not specify the number of approved berths at the Marina but the consent does mention that up to 100 berths are allowed. The Applicant now seeks to clarify and regularise current activities at the Marina. The development application requests approval for 78 permanent berths plus one berth for the Charter Ferry as well as formalising approved uses on the ground floor of the Marina building. The Department notes that the <i>Environmental Planning and Assessment Act 1979</i> does not make provisions for retrospective approval but the Act does make provisions for the consent authority to consider the development application on its merit and that the prior unlawful use should not be given consideration.</p> <p>Carried forward for further assessment – section 5.2</p>
Water Quality	Major significance	Moderate significance	<p>In terms of the water quality at the Marina, most submissions which referred to this issue as an area of concern, recommended that the Applicant install a sewage pump-out facility. Should the development application be approved by the Minister, the Department recommends that the Applicant be required to install a public sewage pump-out facility. The Department also accepts the Applicant's argument that the water quality would not be adversely impacted and may in fact improve due to the surrendering of the swing moorings.</p> <p>Carried forward for further assessment – section 5.3</p>
Visual Impacts	Moderate significance	Low significance	<p>The proposed development would only consist of the eastward extension of the marina arms and the addition of seven floating pontoons. The Department is satisfied that the additional pontoons would blend with the existing Marina layout. The number of vessels would remain constant. The proposal does not involve physical changes to the appearance of the existing Berowra Waters building or structures on the land side of the Marina.</p> <p>Carried forward for further assessment – section 5.4</p>
Flora and Fauna	Moderate significance	Low significance	<p>Due to the replacement of swing moorings with floating pontoons, the Applicant claims that scouring of the seabed would be eliminated and that as a result the land and aquatic flora and fauna would not be adversely impacted. The Department of Primary Industries has assessed the proposal and concludes that the marine vegetation would not suffer and fish passage would not be obstructed.</p> <p>Carried forward for further assessment – section 5.5</p>

Air	Low significance	Low significance	The SEE indicates that the proposed development will have no adverse impact on the air quality of the locality. Only one submission (from the public) raised issues of odours from the Marina. The Department recommends that should the proposal be approved, the Applicant be requested to install a pump-out facility and prepare a Wastewater Management Plan.
Noise and Vibration Impacts	Low significance	Low significance	The proposed development is unlikely to generate offensive noise and only one submission (from the public) highlighted noise concerns. Should the Minister determine to approve the proposal, the conditions of consent would require that the Applicant ensures that the Marina does not generate offensive noise and that Construction and Operational Noise Management Plans are prepared.
Hazards and Risk Impacts	Low significance	Low significance	The proposed development is not considered to be potentially hazardous development, and as such, a Preliminary Hazard Analysis was not prepared for the proposal. The Applicant holds a licence with the Environment Protection Authority for its fuelling facility.
Emergency access and Fire management provisions	Low significance	Low significance	A small number of submissions raised the issue of emergency access and fire management provisions. Concerns were raised due to the sometimes limited access to the site and due to the narrow and winding roads. Should the proposal be approved, the Department recommends that the Applicant prepare an Emergency Management Plan.
Socio-Economic Impacts	Low significance	Low significance	The Department considers that the proposal is unlikely to generate significant socio-economic impacts through employment or investment. The estimated cost of the development is only \$80,000 and there will only be a small number of construction jobs generated. The Applicant has indicated in the SEE that formalising the café operations and ferry operations would encourage tourism which would assist in maintaining the existing level of employment.
Waste Generation and Management	Low significance	Low significance	The Statement of Environmental Effects does not address the issue of waste generation and management. Should the Minister approve the proposal, the Department recommends that the Applicant be required to submit a Waste Environmental Management Plan for both construction and operation, including addressing the waste generated by the café, offices and chandlery shop.
Impacts on Heritage	Low significance	Low significance	The proposed development site is not characterised by items of indigenous and non-indigenous heritage significance.

5.1 Transport and parking

Applicant's Position

The Statement of Environmental Effects (SEE) notes that the limited amount of car parking at Berowra Waters during peak periods is a major constraint to future development. The peak periods are defined to be between 11am and 3pm on Saturdays, Sundays and public holidays during the warmer months.

The Applicant has considered the *Berowra Waters Plan of Management* to address the issue of car parking. The Plan seeks to address the car parking issue by trying to strike a balance between the residential, commercial and recreational parking demands in the area. The Plan proposes the introduction of car parking fees to modify behaviour and increase parking supply. Specifically for commercial development, the Plan uses a *nominal limit* for each commercial facility, including Berowra Waters Marina. The Plan does acknowledge that commercial interests in the area would rely to a significant extent on the public parking at Berowra Waters.

The SEE also demonstrates consideration of Hornsby Council's Car Parking Development Control Plan (DCP). The Applicant prepared a table comparing the parking standards as per DCP against the nominal limit as identified in the *Berowra Waters Plan of Management*.

PEAK PARKING DEMAND					
Approved		Proposed		Nominal Limit	
Use	Spaces	Use	Spaces	Use	Space
Hire Boats	1	Chandlery etc	2		
Workshop	1			Workshop	2
Laundry					
Offices	1			Offices	2
Fast Food	3	Cafe	14		
Supermarket	10			Shops	11
Restaurant	27	Restaurant	27	Restaurant	32
Residence	2	Residence	2	Residence	2
60 berths	36	78 berths	47	60 berths	36
15 hire boats	9	15 hire boats	9	15 Hire Boats	9
		Charter Ferry		Charter Ferry	50
Total	90	Total	102	Total	144

The above table shows that the proposal would increase the peak parking demand by 12 spaces. This demand would be offset by the proposed stack parking arrangements. Stack parking would increase the number of car parking places at the existing car parking facility to 44 vehicles, would only operate during peak periods and be operated by a car parking attendant.

In addition, the Applicant proposes two initiatives to assist the car parking demand at the Marina. One initiative is to limit the seating at the café to 70 seats. The second initiative is to limit the operation of the Charter Ferry so that it does not operate during peak times and to limit its maximum capacity to 100 passengers.

The Applicant concludes that the proposal has been designed to ensure that the net effects will not intensify peak parking demand and that the public car park can accommodate off peak demand.

Issues Raised in Submissions

Most submissions received by the Department consider car parking to be the number one issue of concern. These concerns include: using the public car park to service private commercial interests, especially when the public car park already provides the parking for the Waterview Restaurant; public space is being used for private commercial gain and that this is not in the public interest. Also the parking proposed by the Applicant does not take into account the 15 hire boats and the BBQ boat. Other submissions mention the restricted road access constraints into the Marina, especially due to the steep escarpment and narrow roads. Another source of concern expressed in the submissions is that the Applicant has no intention of using the remote car park approved by Hornsby Council in February 2004 (the Department's position provides further information on this issue).

The Roads and Traffic Authority has raised concerns regarding the provision of stack parking. The submission notes that a car parking attendant would be in attendance when stack parking is utilised but due to the confined area of the parking area, vehicles may need to reverse onto Bay Road. The Authority finds this unacceptable. Hornsby Council recommended all parking and access must comply with the relevant Australian Standard and a Traffic and Parking report must be prepared to address parking and traffic issues.

Department's Position

The Applicant has responded to the issues raised by the Roads and Traffic Authority and has indicated that the stack parking arrangement proposed avoids the need for motor vehicles to reverse onto Bay Road. Hornsby Council's recommendations have been dealt with through conditions of consent, should the Minister grant consent to the proposal. The Department recommends that the Applicant provide an independent audit of the parking provisions. The audit report would consider the adequacy of the parking provisions and consideration of any alternative/additional parking measures which may be reasonably implemented within the confines of the consent. The Applicant would also be required to draft a Traffic and Parking Management Plan and to design parking and access to the car park in accordance with the relevant Australian Standards.

It is important to note that parking only becomes a major issue during peak times. During off peak times the public car park can comfortably accommodate demand. The critical issue then becomes how to deal with peak parking demand. To offset the expected increase in demand (12 spaces according to the above table), the Applicant proposes to: limit the seating of the café to 70; limit the operation of the Charter Ferry so that it does not operate at peak times; and use of stack parking.

Under the original consent (DA 112/80) granted by Hornsby Council, the Marina was required to provide one car space for each marina berth, either on-site or at a remote car park. The Applicant has obtained consent from Hornsby Council for a remote car park at Berrilee (69-73 Bay Road). Berrilee is located two kilometres from Berowra Waters. The remote car park has approval for 41 car park spaces and one bus space. This development consent is outside the scope of the subject development application but is related in that it is an initiative which alleviates the car parking problem should demand outstrip supply at the main marina site. A shuttle bus service to convey patrons from the remote car park to the Marina would operate seven days per week from 7am to 7pm. Hornsby Council granted a deferred commencement consent and indicated in the conditions of consent that the car park would only operate as overflow parking for motor vehicles belonging to customers and patrons of the Berowra Waters Marina.

The *Berowra Waters Plan of Management* is specific in indicating that remote car parking is not the preferred solution and should only be considered once all feasible options cannot proceed within a reasonable time. The Applicant has considered other options but has decided to follow with the remote car parking option. The Department is satisfied that the Applicant has explored all options. Submissions received by the Department mention that the Applicant has no intention of operating the remote car park. The Applicant has written to the Department regarding this concern and gives assurance that it is *actively pursuing implementation of the consent*.

The Department is satisfied with the approach followed by the Applicant and recommends that, should consent be granted by the Minister, the Applicant be requested to:

- provide a maximum of 44 car parking spaces at the Marina Car Park;
- employ a car parking attendant during peak times;
- ensure that no cars are parked on the entry and exit ramps of the car park at any time;
- provide an independent audit of the parking provisions as required by the consent at a time to be nominated by the Director-General. The report shall consider the adequacy of the parking provisions in relation to demand and if necessary, recommend any alternative/additional parking measures that may be reasonably implemented within the confines of the consent.
- design and construct all internal road works, including the associated parking facilities and loading bays, in accordance with the relevant RTA and Council standards and codes, including AS 2890.1-1993 and AS 2890.2-1989;
- install signage to demarcate all vehicle movements within the site; and
- prepare a Traffic and Parking Management Plan.

5.2 Regularisation

Applicant's Position

The subject development application seeks to regularise marina operations at Berowra Waters. The current development consent granted by Council does not set a specific limit on the number of berths at the Marina but allows for up to 100 berths, provided a swing mooring is relinquished and a car parking space is provided for each berth. Since the consent was granted by Council in 1981, questions have arisen regarding approved berth numbers and possible irregularities regarding approved uses on the site. Therefore, the Applicant seeks to clarify and regularise activities at the Berowra Waters Marina.

The Applicant seeks consent for 78 permanent berths plus one berth for the Charter Ferry. The proposal involves the surrender of seven swing moorings to offset the proposed seven permanent berths. The development application proposes to extend the existing marina arms in an easterly direction.

The development application also requests the formalisation of approved uses for the ground floor as follows:

- showroom & office
- chandlery shop;
- manager's office;
- storeroom; and
- a café which includes an outdoor seating area (maximum seating of café is 70 (includes both indoor and outdoor seating)).

The Applicant also requests the regularisation of the operation of the Charter Ferry – 'the Macquarie Princess.'

The Applicant concludes that the development application seeks to formalise activities which have been conducted on the subject site for many years and that approval would be unlikely to cause any perceptible changes to the current operations of the Marina.

Issues Raised in Submissions

Regularisation of the activities at the Marina has also been of great concern in most submissions received from the public with some calling it 'staggering' and 'offensive', expressing the view that it would amount to sanctioning years of illegal activities, and that it would set a dangerous precedent and undermine the NSW planning system. A number of submissions also mentioned the Applicant's alleged multiple breaches of existing conditions of consent.

Department's Position

The *Environmental Planning and Assessment Act 1979* does not make provisions for development consent to be granted retrospectively but under section 109A of the Act there is a distinction between the *unlawful erection of a structure* and the *unlawful use of land or a structure*. Section 109A reads:

1. *the use of a building, work or land which was unlawfully commenced is not rendered lawful by the occurrence of any subsequent event except:*
 - (b) *the granting of development consent to that use.*

Therefore, the development application must be assessed on its merits and the prior unlawful use should not be given consideration.

As previously mentioned, the Act does not provide for retrospective approval for unlawful structures but a person may obtain a section 149 Building Certificate from Council. The certificate differs from a development consent or building approval for a structure, in that it confers certain forms of legal immunity on the structure (section 149E of the Act) rather than granting consent for the structure. It is important to note that the section 149 certificate does not make an unlawful structure lawful but simply makes it immune from certain types of legal action for, in some cases, a period of seven years.

The Applicant would be required to submit a structural engineer's certificate to the Department, certifying that the proposed works are in accordance with the relevant requirements of the BCA and AS 3962-2001 *Guidelines for the Design of Marinas*.

In order to regularise the activities at Berowra Waters Marina, the Department recommends a number of conditions of consent should the Minister decide to grant consent to the development application. Key conditions of consent include:

- the Marina shall provide for a maximum of 78 vessels in permanent berths in a two marina arms configuration and a charter ferry berth (No. 79). The fuel wharf may be used for a maximum of 4 'short stay' berths;
- before commissioning the new berths, the Applicant shall relinquish 7 swing moorings to NSW Maritime;
- only one charter ferry shall operate from Berowra Waters Marina. The maximum carrying capacity of the charter ferry shall be 100 passengers. The charter ferry may not operate on Saturday, Sundays and Public Holidays between 11am and 3pm; and
- the Applicant shall use the Ground Floor of the Berowra Waters Marina building for the purposes of: a showroom; a chandlery shop; offices (2); a storeroom and a café with outdoor seating.

The Department also recommends that the Applicant obtain annual independent environmental audits which would be required to be forwarded to the Director-General within one month of completion.

5.3 Water Quality

Applicant's Position

The Applicant has indicated that the water quality of Berowra Creek would not be impacted by the proposal because the proposed extension of the marina arms would not disturb the seabed since piling would not be required. The proposal only involves the installation of floating pontoons (7) which would replace the existing swing moorings. The existing swing moorings cause scouring of the seabed from movement of the mooring chains. Therefore the replacement of the swing moorings with floating pontoons would improve water quality and improve the state of the disturbed land on the seabed.

The Applicant notes that the number of boats berthed at the Marina would not increase, therefore water quality impacts would not be increased due to the proposal.

The SEE also outlines that the proposal would not give rise to additional water emissions from the development site.

Issues Raised in Submissions

A small number of submissions from the public mentioned that the proposal would have serious consequences for the estuary due to spillage of oils or petrol, human waste or litter and that Dusthole Bay already has lengthy tidal flushing times.

The Total Environment Centre raised concerns about the amount of raw sewage being discharged into Berowra Creek and that the proposal does not make provisions for the pump out system for boats moored at the Marina.

Hornsby Council also recommended the installation of a pump-out facility to manage the projected increase in wastewater and to ensure that sewage/wastewater from vessels is disposed in an ecologically sustainable manner.

Department's Position

The Department concurs with the Applicant's conclusion that the proposed floating pontoons would reduce the impact on the seabed and, consequently, reduce water quality impacts.

The Department agrees with comments in the submissions received by the Department regarding the need for a pump-out facility and recommends that, should the proposal be approved by the Minister, a condition of consent for the proposal includes that the Applicant provide a public sewage pump-out facility. In correspondence received by the Department, the Applicant has indicated that the request is acceptable. The Department also recommends that the Applicant should:

- ensure that all boats at the Marina with holding tanks, including the Charter Ferry, be required to use the sewage pump-out facilities;
- encourage owners of boats berthed at the Marina to install holding tanks if they do not have them; and
- prepare a Wastewater Management Plan.

5.4 Visual Impacts

Applicant's Position

The Statement of Environmental Effects indicates that the proposal will not involve physical changes to the appearance of the existing Berowra Waters building or structures on the land side of the marina.

Any visual impacts on the water side of the marina are confined to:

- eastward extension of the marina arms; and
- seven additional floating pontoons and services within those pontoons.

The appearance of the proposed floating marina arms will be similar to the existing arms and the extent of visible open water will increase as a result of the proposed development. These changes, when placed in the context of the existing marina, are relatively minor. The Applicant notes that the additional marina berths are achieved by the surrender and removal of existing swing moorings and that this could be regarded as having an offsetting and beneficial visual or scenic impact. The changes to the appearance of the site resulting from the proposal will occur in the context of a site that is already used for the purposes of a marina and has been used for a considerable period of time. In terms of the impact on neighbouring properties, the proposal would not impact on their solar access, views or visual privacy.

The Applicant concludes that the proposed development will be similar in appearance to the existing marina, would not increase the overall number of boats berthed and would not have adverse impacts on the scenic value of Berowra Waters.

Issues Raised in Submissions

Hornsby Council recommended that any external finishes should blend with the natural environment and be non glare. Submissions from other Government agencies did not comment on the visual aspects of the proposal.

A small number of submissions from the public raised concerns regarding visual impacts of the proposal. These concerns mainly relate to issues of overcrowding and over-development clashing with the natural beauty of the area.

Department's Position

The proposal does not add extra buildings or works to the site but does involve the addition of seven floating pontoons. The Department is of the opinion that the visual impacts of the additional pontoons are not significant since Berowra Waters Marina already contains floating pontoons for 71 permanent berths. The seven additional berths would blend in within the existing marina and provide uniformity.

Also the number of boats berthed at the Marina would remain constant due to the surrender of the seven swing moorings.

Should the Minister approve the proposal, the Department recommends that all lighting associated with the proposal be mounted, screened and directed in such a manner so as not to create a nuisance and be done in accordance with the relevant Australian Standard.

5.5 Flora and Fauna

As previously discussed, the proposal involves the replacement of swing moorings with floating pontoons. Piling, which would disturb the seabed, would not be used. The floating pontoons would eliminate scouring of the seabed which can lead to adverse impacts on aquatic flora and fauna. The SEE notes that the new pontoons would not change the marina berths environmental impacts and may in fact be potentially beneficial. The Applicant concludes that it is also likely that the new marina floating pontoons would provide habitat for aquatic flora and fauna.

The SEE notes that a marine ecology survey has not revealed the presence of seagrasses in the vicinity of the Marina.

Issues Raised in Submissions

Only a small number of submissions mentioned concerns regarding flora and fauna. Concerns such as shading of aquatic plants and altering of tidal currents were mentioned.

Hornsby Council recommended that an ecological survey be prepared to determine the existence of seagrass beds, reeds and other protected habitat which may be impacted by the proposed seven additional marina berths.

The Department of Primary Industries has assessed the proposal and since it does not involve dredging, reclamation, harm marine vegetation or obstruct fish passage, it does not have objections to the proposal.

Department's Position

The Department is satisfied with the Department of Primary Industries' assessment that the proposal would not adversely impact land or aquatic flora and fauna, especially marine vegetation or fish habitat. In order to safeguard marine vegetation and fish passage, should the proposal be approved by the Minister, the Department recommends that the Applicant should ensure that no marine vegetation is shaded or damaged by structures or works and fish passage should not be obstructed without a permit from the Department of Primary Industries. The Department also recommends that the Applicant draft a detailed Erosion and Sediment Control Plan for the proposed works.

5.6 Environmental Management

The Marina does not currently have Environmental Management Plans. The *Berowra Waters Plan of Management* recommends that all commercial development at Berowra Waters should have an Environmental Management Plan which is audited regularly.

Consequently, should the Minister approve the development application, the Applicant should be asked to prepare a number of Environmental Management Plans which cover the construction and operation activities of the Marina. The Applicant would also be required to prepare annual independent environmental audits. These audit reports would be required to be submitted to the Director-General within one month of the Audit.

6. SECTION 79C CONSIDERATION

Section 79C of the Act sets out the matters that a consent authority must take into consideration when it determines a development application.

The Department has assessed the DA against these heads of consideration (see Appendix B), and is satisfied that:

- the proposal is consistent with the relevant provisions in the *Hornsby Shire Local Environmental Plan 1994*; *Sydney Regional Environmental Plan No. 20 – Hawkesbury-Nepean River (No. 2 – 1997)* and *Hornsby Development Control Plan – Car Parking*
- the proposal would not result in any significant environmental or socio-economic impacts;
- the site is suitable for the proposal development; and
- the development is likely to be in the public interest.

7. RECOMMENDED CONDITIONS OF CONSENT

Should the Minister approve the development application, the Department has drafted recommended conditions of consent (tagged "C"). The conditions take into consideration the issues raised by the community, public authorities and Council.

The proposed key conditions of consent are summarised below:

Limits of Operation

Berowra Waters Marina

- the Marina shall provide for a maximum of 78 vessels in permanent berths in a two marina arms configuration and a charter ferry berth (No. 79). The fuel wharf may be used for a maximum of 4 'short stay' berths.

- before commissioning the new berths, the Applicant shall relinquish 7 swing moorings to NSW Maritime.

Charter Ferry Operations

- only one charter ferry shall operate from Berowra Waters Marina. The maximum carrying capacity of the charter ferry shall be 100 passengers.
- the charter ferry may not operate on Saturday, Sundays and Public Holidays between 11am and 3pm.

Approved Uses

- the Applicant shall use the Ground Floor of the Berowra Waters Marina building for the purposes of: a showroom; a chandlery shop; offices (2); a storeroom and a café with outdoor seating.

Parking

- the Applicant shall provide a maximum of 44 car parking spaces at the Marina Car Park.
- the Applicant shall employ a car parking attendant during peak periods.
- the Applicant shall provide an independent audit of the parking provisions as required by the consent at a time to be nominated by the Director-General. The report shall consider the adequacy of the parking provisions in relation to demand and if necessary, recommend any alternative/additional parking measures that may be reasonably implemented within the confines of the consent.
- the Applicant shall ensure that no cars are parked on the entry and exit ramps of the car park at any time.
- the Applicant shall install signage to demarcate all vehicle movements within the site.

Sewage pump-out facility

- prior to the commissioning of the new berths, the Applicant shall commission and install a public sewage pump-out facility at the Marina. Written confirmation of installation of the pump-out facility shall be forwarded to the Director-General within one month of installation.

The Department has provided a copy of the recommended conditions to the Applicant and has taken into account the Applicant's comments.

8. CONCLUSIONS

The Department has assessed the DA, SEE and submissions on the DA.

The proposed development offers several benefits, especially regularising current activities at the Marina and providing fixed berths which are popular with boat owners. Substituting floating pontoons for the swing moorings would stop scouring of the seabed. However, the proposed development does have the potential to generate several impacts, particularly in regards to parking and water quality.

The Department has considered these issues and is satisfied that the potential impacts of the development could be effectively managed and/or mitigated through the recommended conditions of consent and the implementation of construction and operational management plans.

Consequently, the Department recommends that the Minister should approve the DA subject to conditions.

9. RECOMMENDATIONS

It is recommended that the Minister:

- (a) consider the findings and recommendations of this report (tagged "C");
- (b) approve the DA subject to conditions, under Section 80 of the Act by signing the attached Instrument of Consent (tagged "D").

Endorsed:

Patricia Cabezas
Environmental Planning Officer

Sam Haddad
Deputy Director General

APPENDIX A – CONSIDERATION OF DESIGNATION OR NOT

CLAUSE 36 OF PART 2 OF SCHEDULE 3 OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT REGULATION 2000

Factors which the consent authority must take into consideration when determining whether a development involving alterations or additions to development is designated or not

Clause 36 (a) – Impact of the existing development having regard to factors including:

- (i) *previous environmental management performance, including compliance with the conditions of any consents, licences, leases or authorisations by a public authority and compliance with any relevant codes of practice.*

There is some concern about the previous compliance with existing consents for Berowra Waters Marina, mostly by previous owners of the marina. As indicated earlier in Section 2, there are a number of unlawful structures at the marina; and in recent years, the Applicant has continued to conduct a number of unlawful uses at the marina.

The unlawful structures include the:

- (a) Marina and fuel pontoons, which were all built in a different configuration to the approved configuration without modifying the original development consent³;
- (b) Works associated with converting the supermarket/fast food outlet into a café with outdoor seating;
- (c) Internal modifications to level 1 of the Marina building (to integrate the office space and the boat sales, hire, and supply facilities); and
- (d) Internal modifications to level 2 of the Marina building.

In terms of the Marina and fuel pontoons, the Department is satisfied that the scale and nature of these pontoons are generally in accordance with the approved pontoons, even though the configuration of these pontoons differs from the configuration that was approved in the original DA. In addition, it believes that the fact that both Council and the then Department of Land and Water Conservation approved the existing configuration at the Building Application stage should be taken into consideration, even though the original consent was never formally modified. Consequently, the Department is satisfied that the impacts associated with the existing configuration of these pontoons would be much the same as the approved configuration, and would therefore not significantly increase the environmental impacts of the total development compared with the approved development.

It is important to note that although the consent was not complied with, the building approval from Council and the then Department of Land and Water Conservation was complied with by the owners of the Marina. It is not possible to comply with both at the same time.

In terms of the internal modifications to the Marina building, the Department believes that these are fairly minor changes that would have little or no impact on the approved development.

The unlawful uses include the:

- (a) Use of the supermarket/fast food outlet as a café with outdoor seating;
- (b) Use of the existing car park to park up to 44 vehicles using stacked parking;
- (c) Use of the marina pontoons to provide berthing for a charter ferry and to conduct charter ferry operations (the Macquarie Princess); and
- (d) Use of the marina pontoons to berth up to 67 boats.

These unlawful uses have increased the parking impacts of the approved development. Parking is in short supply during peak periods at Berowra Waters and is a major source of conflict between residents, business owners, and visitors in the area.

However, the Applicant is proposing to regularise these uses and address the parking impacts with the current DA and the remote car park at Berrilee approved by Hornsby Council. The potential impacts associated with this proposal are considered in detail in Section 5 of the Report.

³ Both Council and the Department of Land and Water Conservation approved the different alignment at the Building Application stage but the original consent was never modified. In strictly legal terms, therefore, these pontoons are classified as unauthorised works, even though two public authorities approved the change.

(ii) *rehabilitation or restoration of any disturbed land;*

There is no land requiring rehabilitation or restoration.

(iii) *the number and nature of all past changes and their cumulative effects.*

The number and nature of all past changes and their cumulative effects have been addressed above under (i).

Clause 36 (b) - The likely impact of the proposed alterations or additions having regard to factors including:

(i) *the scale, character or nature of the proposal in relation to the development;*

The proposed alterations/additions would marginally increase the scale, character and nature of the existing development. The Department is satisfied that these marginal increases are acceptable and that any potential impacts such as parking/traffic and water quality can be mitigated through appropriate conditions of consent (see Section 5).

(ii) *the existing vegetation, air, noise and water quality, scenic character and special features of the land on which the development is or is to be carried out and the surrounding locality;*

The proposed alterations/additions would not generate significant impacts on the existing vegetation, air, noise and water quality, or the scenic character and special features of the land on which the development is proposed to be carried out and the surrounding locality (see assessment in Section 5).

(iii) *the degree to which the potential environmental impacts can be predicted with adequate certainty.*

The potential environment impacts can be predicted with adequate certainty, and could be mitigated or managed subject to the appropriate conditions of consent. It is also important to note that the impacts can be well predicted because, although 'unlawful', most impacts are currently occurring, therefore, the impacts are obvious and predictable (see Section 5).

(iv) *the capacity of the receiving environment to accommodate changes in environmental impacts.*

The Department believes that the receiving environment could easily accommodate the changes in environmental impacts (see Section 5). As indicated above (iii), the impacts are already been experienced by the receiving environment. The Department has recommended measures such as the need for a sewage pump-out facility to further alleviate any impacts on the environment at Berowra Waters.

Clause 36 (c) – Any proposals

(i) *to mitigate the environmental impacts and manage any residual risk.*

The Department considers that the environmental impacts associated with the proposed alterations/additions to be minor, and is satisfied that they can be mitigated and managed with appropriate conditions of consent (see Section 5). Key mitigation measures include the requirement for a sewage pump-out facility and the preparation and implementation of a series of Environmental Management Plans covering both construction and operation.

(ii) *to facilitate compliance with relevant standards, codes of practice or guidelines published by the Department or other public authorities.*

The Department has recommended conditions of consent to facilitate compliance with the *Berowra Waters Plan of Management*, the BCA, and *AS 3962-2001 Guidelines for the Design of Marinas* (see Section 5 for full details). In addition, the Department has recommended further conditions requiring the Applicant to commission an independent environment audit of the marina every 12 months, which would be submitted to the Director-General for review.

Conclusion

This detailed assessment concludes that the proposed alterations and additions to the marina would not significantly increase the environmental impacts of the total development compared with the existing or approved development, and that the environment impacts of the proposal can be either mitigated or managed.

Consequently, the Department believes that the Minister should consider and determine that the proposal is non-designated development.

APPENDIX B – SECTION 79C MATTERS FOR CONSIDERATION

The following assessment is based on the matters listed for consideration under section 79C(1) of the *Environmental Planning and Assessment Act 1979*.

(a) The provisions of:

(i) any environmental planning instrument;

State Environmental Planning Policy No 11		
1.	Under Clause 5 of the SEPP, a consent authority must consult with or take into consideration in determining a DA any representations from the RTA on the DA.	The DA was referred to the RTA, which does not object to the proposal.
Hornsby Shire Local Environmental Plan 1994		
1.	The objectives of the Business D (Aquatic Service Centre) Zone are: (a) to encourage economic growth and employment opportunities; (b) to accommodate the retail, commercial, service and social needs of the community that uses the Hawkesbury River and its tributaries; and, (c) to encourage development that improves the health, vitality and aquatic, cultural and social environments within business centres and adjacent areas.	The proposed development is consistent with the objectives of this zone.
2.	Under Clause 15 of the plan, the maximum Floorspace Ratio for development in the Business D (Aquatic Service Centre) zone is 0.5:1.	Complies.
3.	The objective of Clause 20 Waterways is to protect the amenity of foreshore areas and control development within flood prone areas.	Consistent. The amenity of foreshore areas is maintained and where environmental impact is predicted, amenity is protected through conditions of consent requiring detailed Management Plans. See section 6 and proposed conditions of consent.
Sydney Regional Environmental Plan No.20 Hawkesbury – Nepean (No.2-1997)		
1.	The aim of this plan is to protect the environment of the Hawkesbury-Nepean River system by ensuring that the impacts of future land uses are considered in a regional context.	Consistent
2.	Under Clause 4 of the plan, a consent authority determining an application for consent to the carrying out of development on land to which this plan applies must take into consideration: (a) aim of this plan, and (b) the strategies listed in the Action Plan of the Hawkesbury-Nepean Environmental Planning Strategy, and (c) whether there are any feasible alternatives to the development or other proposal concerned, and (d) the relationship between the different acts of the development or other proposal and the environment, and how these impacts will be addressed	Each of these factors has been considered and, where relevant, addressed in Section 5.

	and monitored.	
3.	<p>Under Clause 4 of the plan, a consent authority must take into consideration the following specific planning policies and recommended strategies:</p> <p>(1) Total catchment management :</p> <p>(a) Consider the impact of the development concerned on the catchment.</p> <p>(b) Consider the cumulative environmental impact of development proposals on the catchment.</p> <p>(2) Environmentally sensitive areas:</p> <p>(a) Minimise adverse impacts on water quality, aquatic habitats, riverine vegetation and bank stability.</p> <p>3) Water Quality:</p> <p>(a) Quantify, and assess the likely impact of, any predicted increase in pollutant loads on receiving waters.</p> <p>(b) Consider the need for an Erosion and Sediment Control Plan (to be in place at the commencement of development) where the development concerned involves the disturbance of soil.</p> <p>(5) Cultural Heritage</p> <p>(a) Encourage development which facilitates the conservation of heritage items if it does not detract from the significance of these items.</p> <p>(7) Riverine scenic quality</p> <p>(a) Maintain areas of extensive, prominent or significant vegetation to protect the character of the river.</p> <p>(11). Recreation and tourism</p> <p>(a) Provide a wide range of recreational opportunities along the river which are consistent with conserving the river's natural values and character.</p> <p>(b) Minimise conflicts between recreational uses</p> <p>(c) Consider the availability of, or need to provide, land for vehicle parking and for suitable access (including access for cars and buses), for boat service areas and for water, electricity and sewage disposal.</p> <p>(d) Consider the environmental impact of ancillary services for recreation and tourist developments, such as amenities blocks and vehicle parking.</p> <p>(e) Consider the visual impact of development on the surrounding area.</p>	<p>Each of these factors have been considered and, where relevant, addressed in Section 5 and in the proposed conditions of consent.</p> <p>In particular, where an environmental impact is expected, the Department considers that those impacts can be adequately managed and mitigated through appropriate conditions of consent.</p> <p>The Department recommends as conditions of consent that the Applicant prepare an Environmental Management Plan containing:</p> <ul style="list-style-type: none"> - Berthing Management Plan; - Charter Ferry Management Plan; - Traffic and Parking Management Plan; - Noise Management Plan; - Wastewater Management Plan; - Solid Waste Management Plan (and pump out facility accessible to all vessels in the area); - Fuel Management Plan; and - Emergency Management Plan. <p>and a Construction Management Plan containing:</p> <ul style="list-style-type: none"> - Sediment Control Plan <p>amongst other things.</p>
4.	<p>Under Clause 11 (13) of the plan, a consent authority should consider :</p> <p>(a) The need for a condition of consent requiring centralised pumping stations.</p> <p>(b) Whether the proposed development will have an adverse effect on drainage patterns or cause shoreline erosion or accretion.</p>	<p>Each factor was considered and, where relevant, addressed in Section 5 and in the proposed conditions of consent.</p> <p>The Department recommends a condition of consent requiring the applicant to prepare a Sediment Control Plan as part of a Construction</p>

APPENDIX B

	<p>(c) Whether the proposed development will have an adverse effect on any natural wetlands or flora and fauna habitats.</p> <p>(d) Whether there are satisfactory arrangements for the collection, storage, treatment and subsequent disposal of sewage, liquid wastes and bilge water.</p> <p>(e) Whether the proposed development incorporates measures to prevent the escape into the waterway of fuels, oils, grease, anti-fouling chemicals and other chemicals.</p> <p>(f) Whether the water depth adjacent to any proposed marina or other related land and water shoreline facility is adequate, and if not, the adequacy of the proposed means by which water depth will be maintained.</p>	<p>Management Plan.</p> <p>The Department further recommends a condition of consent requiring the Applicant to install a sewage pump out facility for use by all of the vessels at the Marina.</p>
5.	<p>Under Clause 11(15) of the plan, a consent authority should consider:</p> <p>(a) The need for an Erosion and Sediment Control Plan.</p> <p>(b) The need for a Vegetation Management Plan.</p>	<p>The Applicant is required to prepare and implement a detailed Erosion and Sediment Control Plan for the proposed works.</p>
6	<p>Under Clause 11(17) of the plan, a consent authority should consider the need for ongoing monitoring of the system or work.</p>	<p>See proposed conditions of consent</p>

(ii) any draft environmental planning instrument that is or has been placed on public exhibition and details of which have been notified to the consent authority;

N/A

(iii) any development control plan;

The proposal is generally consistent with:
Hornsby River Settlements DCP; and
Hornsby Car Parking DCP.

The Department's assessment has considered the above development control plans and is satisfied with the Applicant's proposed measures to mitigate impacts especially in regards to car parking. The Department also recommends measures to alleviate both car parking impacts and water quality impacts (refer to Section 5).

(iv) any matters prescribed by the regulations that apply to the land to which the development application relates.

In relation to (iii), Clause 92 of *the Environmental Planning and Assessment Regulation 2000* requires the following matters to be taken into consideration by a consent authority in determining an application:

92(a) The Government Coastal Policy (where relevant)

N/A.

92(b) In the case of a DA for the demolition of a building, the provisions of Australian Standard AS 2601-1991: The demolition of structures, as in force 1 July 1993.

N/A.

APPENDIX B

Under Clause 93 of the Regulation, a consent authority must be satisfied that the building complies (or will, when completed, comply) with the fire safety provisions that are applicable to any change of use.

The proposal involves a change of use (to a café on the ground floor of the building). The Department is satisfied that the building could comply with the fire safety provisions for the proposed change of use. The conditions require the Applicant to obtain an occupation certificate for the proposed café.

(b) *the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,*

See Section 5.

(c) *the suitability of the site for the development,*

Berowra Waters Marina has been operating on the same site for more than 30 years and it is located in a picturesque setting which has encouraged much tourism to the area. The site is suitable for the proposed development and any traffic/transport and environment impacts can be mitigated through appropriate conditions of consent.

(d) *any submissions made in accordance with this Act or the regulations,*

See Section 5.

(e) *the public interest.*

The Department is satisfied that the benefits of the proposal would outweigh its costs, and therefore believes it is generally in the public interest.