Dr G Pesce

15 Market Street

Breakfast Point NSW 2137

30 November 2010

NSW Planning

Major Development Assessment

23-33 Bridge St

Sydney 2000

Dear Sir/Madam,

Kendall bay Marina Project Breakfast Point (MP-0006)

Your ref: S07/00082

I refer to the above application and I enclose a Response and Opposing Submission (2 volumes).

The EA, as filed, consists of some 10 volumes of mostly technical material and the time given to respond to it was about 2 months. This proved to be an insufficient period of time within which to properly and fully digest, investigate and reply to it. However, one was finally put together without the final editing and consideration that something of this importance needed. Accordingly, I reserve the right to make any corrections I deem relevant.

I would disclose that I have not made any political donations in the previous two years.

Yours sincerely,

G Pesce

Opposing Submission

Proposed Commercial Marina at Kendall Bay

EA (MP 07_0006).



VOL 1 (NB. Vol 2 is in this binder)

Response to & Opposing Submission

Lodged

By & On Behalf Of

G Pesce

Dip. Crim (Syd); Dip. Lab. Rel & Law (Syd); Dip. Law (BAB); Dip. App. Beh. Sc. (CCHS); BA (Macq); MA (Syd); MA (Prelim)(Syd); LLM (Syd): SJD (UTS).

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Executive Summary: NB Page reference might have altered due to formatting changes.

	ISSUE	Reference
1	The EA claims that the required consultation has taken place. In fact the process adopted did not guarantee that affected land owners had been consulted. Merely referring to a web site or notifying meetings many kilometres away from the affected land is not sufficient compliance with the Director General requirements. The process is tainted by the use of "push" questions and "leading" questions.	Vol 1 p 5.
2	The proposed site has been incorrectly described in the MPA; NSW Maritime land owner's consent in the Director-General requirements and in the EA. The entire process is invalid. And the drawings relied on by NSW Maritime are different to the ones lodged for the MPA and clearly show the manager's office as extending over the seawall and land forming part of the Community Association parcel over which NSW Maritime has no authority. These needs to be considered in the context of the certification given pursuant to the Director General Requirements.	Vol 1. 3, 9, 38-9, 73.
3	Not all land owners have given consent e.g., Community Association DP No 20347 as the relevant representative body of the members and as lessee of the foreshore lot; **or from the members** of the Community Association **as the actual owners as tenants-in-common of the common property (see *Community Land Management Act s 31-33*).** This needs to be considered in the context of the certification given pursuant to the Director General Requirements.	Vol 1. 5, 6, 35, 38-9, 53.
4	This Response & Opposing Submission rejects all of the conclusions in the EA (p2) and asserts that the EA is incomplete and/or insufficient because it failed to consider/or sufficiently consider the following issues:	Vol 1 + 2; Vol 1 pp6-7
	1)The social impact of the proposal on the residents of Breakfast Point and the surrounding localities,	
	2)The social impact on the local community along the Parramatta River and generally arising from being denied the use and enjoyment of a one of the last remaining bays west of the Harbour for the benefit of boat owners who have use of the preponderance of bays for their boats,	
	3)The legal impact arising from the interference with property rights of the members of the *Community Association DP No.20347* in common property that will be used by the marina users,	
	4)The legal impact of interfering with the *Conveyancing Act s 88B* restrictions on the means and reasons for public entry onto the community association parcel and in creating a new entry and exit in the easement,	
	5)The legal impact on the community development legislative scheme arising from the interference of one joint owner of the common property with the rights, title and interest of other joint owners,	
	6)The equitable impact that arises when one of several tenants in common constituting the Community Association DP No 20347 pursuant to the *Community Land Development Act* ss 31 -33 uses community association property for its own commercial purposes without the consent of the other members,	
	7)The financial impact on the *Community Association DP 20347* attributable to wear and tear on the community parcel in general and the seawall in particular,	
	8)The social, cultural, historical and environmental benefit of retaining Kendall Bay as one of the few remaining "natural" bay" in Sydney Harbour for present and future generations and thus giving effect to the principle of intergenerational equity,	

	9)The social, historical, cultural and environmental benefit of retaining Kendall Bay in its current natural state and so giving effect to principles of equity in sharing the benefits of Sydney Harbour between boat users which enjoy almost exclusive use of the bays on its shore west of the Harbour and non-boat users which have very few other places to use and enjoy,	
	10)The ecological and environmental impact of chemical or biological contaminants introduced in the bay by marina users,	
	11)The impact of climate change to the visual impact and "bulk" impact of the .20m added height to the water level and to the combined influence of (1) this increase, (2) the raise of.65m attributable to wind generated waves, and (3) the raise attributable to the tides, on the visual impact; and	
	12)The impact on the valuation of property within Breakfast Point and on the use and enjoyment of its amenities in general and the ensuing trespass directly attributable to marina users.	
	13) The loss of confidence in the assessment system or breach of the law engendered by the implied authorisation to, or the condoning/or connivance in the committal of a trespass on Community Association DP No 20347 parcel that will follow on the grant of approval.	
	14)the environmental impact of using one of the last remaining finite natural resource (bays on the Parramatta River) for a purpose which is never going to be satisfied. Refer claimed demand for marinas in Vol 8. The proposal is detrimental to the environment and to meet the needs of non boat owning public.	
5	As to the specific claim of the EA to meeting demand this is also rejected.	Vol 1pp 7, 11, 22,25, 32-3, 36-7, 55, 58, 60.
6	As to the specific claim in the EA that the proposal will make a positive contribution to the "revitalisation of the bay" this is also rejected.	Vol 1 pp 8, 21, 24-5, 34, 37.37
7	As to the specific claim that the project is consistent with the aims & objectives of Zone W1 this is also rejected.	Vol 1 pp 24, 53, 168
8	As to the specific claim that environmental impacts are minimal and can be suitably managed and mitigated is rejected.	Vol 1pp 10-1 37, 51, 120, 126, 163, 173-
9	As to the specific claim that the proposed remediation blanket will reduce the level of disturbance of contaminants this is also rejected. It is of note that the proposed blanket literally sweeps the contamination under the carpet and is the "second best" solution to a full remediation that is required	Vol 1pp 8, 10, 14,29,30,37, 153
10	As to the claim that the facility will reduce "wave energy" reaching shallow water and hence, reduce the disturbance of the contamination is also rejected. Reference is made to the fact that the proposal is the "second best" one and that full remediation will be better because all of the contaminant will be removed so there will not be any to be disturbed.	Vol 1pp 34, 37

	ISSUE	Reference
11	As to the specific claim that the site is suitable and accessible this also rejected. The site is not available to the public because it would amount to a trespass onto the Community Association DP 20347 parcel.	Vol 1pp 4-5, 8-9, 19, 21-2, 26-7, 36, 38-9, 45, 49, 158, 170, 181
12	As to the specific claim that the proposal will not restrict navigation and other uses this is also rejected.	Vol 1pp 9-10, 25, 37, 41, 49, 53, 57-9,71, 155, 159, Vol 2 attachment 51-3.
13	The proposal is not ecologically sustainable	Vol 1p 10, 125-6, 158
14	It is against the principle of intergenerational equity.	Vol 1p 7, 11-2, 16
15	The consultation process was inadequate and tainted by the use of "push questions" /leading questions that might have had a role to play as part of a marketing campaign but had no place in a consultation process. This issue should be considered in the context of the certification provided pursuant to the Director General Requirements.	Vol 1 pp5, 16-7, 71, 87, 108-117
16	The public benefits claimed in the EA are denied.	Vol 1pp 8, 10, 36, 52
17	As to the operational aspects of the proposal such as parking, storage, deliveries, manager etc it is to be noted that the restrictions on public access apply to managers, contractors and their servants or agents.	Vol 1pp 45, 68, 101
18	Regarding the claim that the proposal is justified this is also rejected. There is a need to find a balance between the needs of boat owners and the needs of non boat owners to use and enjoy a "natural' bay. Bays are a finite resource and there are very few of them left on the Parramatta River; and demand (even if it had been established here) is not a justification for it because, on that principle, there will never be enough bays to satisfy the demand. The justification based on demand is illogical.	Vol 1pp 7, 9, 10, 34, 56, 69, 188
19	As to the findings and conclusions in EA Vol 3	
20	Vol 4 of the EA covers construction & operational matters, Historical, Aboriginal and traffic and parking. The findings and conclusions are rejected because they are not comprehensive; they move on premises not available to it (access not open to the public and to constructions workers etc). It needs to be taken into account that the parking for a marina has to be "on site" and this requirement is not satisfied because the car park and marina are separated by private land.	Vol 1 pp 39, 45, 71, 110-1, 177
21	Vol 5 deals with the visual impact assessment and its conclusions are rejected. The author correctly discloses that it has had other involvement with the project and this gives raise to a reasonable apprehension of bias. It is also rejected on the basis that one person's views on a subjected matter (no matter how hard one tries to dress them up with "apparent rather than real" objectivity) are not to be favoured over those of a person who will have to live with them for days on end.	Vol 1p 4, 10, 19, 23-4, 26, 32, 40, 46-8, 52 65-6, 70, 131, 173-4, 176-7 + Vol 2 pictures

22	Vol 6 covers estuary hydrodynamics etc. The conclusions are rejected because they appear not to take into account (actual mean water depth over which most of the structure will lay; (2) that the results obtained after the placement of the blanket and rocks because the water depth will be reduced by close to half a metre. This notwithstanding the obtained results cannot be diluted by the assumptions relied on because (at least) those assumptions did not make use of data based on the expected lower water depth after the blanket and rocks are in place.	Vol 1 pp13, 66
23	Vol 7 deals with construction and operational plans. These are based on some incorrect assumptions, e.g., right of access onto the Community Association parcel and to that extent is invalid.	Vol 1 pp 68
24	Vol 8 covers the demand for berths and a construction management plan. As to the demand question the ratio underpinning it are rejected and as to the construction plan comment has been about it earlier.	Vol 1pp 68-71
25	Vol 10 covers avian fauna and some other issues. In so far as the avian study is concerned the findings are rejected because they are based on a "desktop" assessment and are inconsistent with actual observation. There is a need to protect migratory birds and to obtain federal Ministerial approval for the project.	Vol 1p 71 +Appendix 1
26	Aquatic flora and fauna are considered to be detrimentally impacted on.	Vol 1 pp 12-5, 64, 138, 157 + appendix 1.
27	The 2005 Concept Plan did not disclose a marina proposal and neither does the promotional and marketing material used by the proponent	Vol 1 pp 86, 95-9, 141 Vol 2 photos.
28	There is no adequate consideration given to the historical and cultural characteristics of Kendall Bay and to its non- boat users; nor to the "private" nature of the proposal (which is trying to masquerade as a "public marina").	Vol 1pp 18, 31, 40, 44, 50, 64, 121, 123, 127, 134, 158-9, 161-3, 166.
29	The proposal does not satisfy the requirements of the EP & A Act s 5 Aims & Objectives regarding the management & protection of the environment; promote social, economic welfare and promote, protect the environment.	Vol 1 pp 124-6
30	The proposal does not satisfy the requirements of the E P & A Act s 79C(1) dealing with the "built" and "natural" environment. In particular with the impact arising from the architectural design of the apartments and house along the foreshore, the "bulk" attributable to the "length x width x height of the marina (the EA confines itself to the length and width; the natural state of the bay creates a visual break from all of the marinas surrounding it of the structure to private land (about 40m from the seawall to the wall of the apartments and less than 30m from the seawall to strata boundary. And its permanent nature.	Vol 1 pp 126-127, 129, 130, 145.

31	The proposal does not promote ecologically sustainable development because the bay is one of the few remaining bays in its "natural" state on the Parramatta River. There is no intergenerational equity when , if the proposal goes through, there will be one less "natural bay" to pass on to the next generation.	Vol 1pp 7, 10-1, 25, 37, 60, 69, 125-6, 158, 188
32	There are a number of negative impacts that argue against the approval of the EA e.g., social, privacy, noise, traffic and access, emergency proposals, economic, valuation etc.	Vol 1pp 17, 34-5, 48, 69, 74, 124-7, 140-2, 167, 182; 128-9, 131-2, 146-7, 150-1; 139; 19, 32-3, 49, 111, 178, 184-6, 202;73,76, 112, 153, 156;38, 112-3, 127, 143-4;13, 144.
33	The proposed site does not satisfy the requirements of the EP&A s 79C(1)(c) to be suitable for the purpose nor is it in the public interest and it lacks equity between boat users and non-boat users.	Vol 1 pp 41, 58-9, 83, 87, 89-90, 95,105, 115, 125, 149,150, 154; 155
34	The proposal is directly inconsistent with the mandatory prohibitions in W1 zone requirements e.g., tourist facilities, mooring pens, water based restaurants otherwise called a kiosk!). This should be considered in the context of the certification given pursuant to the Director General's Requirements.	Vol 1 pp 29, 41, 58, 109,112,169, 173-5
35	There is no justification for the proposal	Vol 1 pp35, 191
36	The font cover of each volume of the Ea has a photo montage that is misleading and deceptive. There does not appear to have any representation of a 25m boat in it. This should be considered in terms of the certification given pursuant to the Director General Requirements.	
37	The public will lose confidence in the assessment system and open it up to derision and ridicule if it is seen to give approval and appears to authorise or condone or connive in the commission of a trespass onto the land not owned by the proponent or NSW Maritime.	Vol 1pp 15

38	Fails to have any or any proper regard to the historical and cultural record of the locality (Aboriginal contact even thought it is used by the proponent in its marketing activities for the residential part (note the marina issue has been left to the end when most of the residential part of the development has been constructed or approved thus, suggesting its negative impact is recognised by the proponent.	Vol 1 pp 13, 24, 29, 36, 45,55, 122, 125, 137, 162,165-8, 171-2
39	The natural state of the bay provides a visual break from all the marinas surrounding it and attests to its return to its pre industrial state.	Vol 1 p 87, 171

Part 1: Response to the EA

In this **Part 1** it is proposed to provide a response to the EA. This will be done in sections corresponding to the individual volumes constituting the EA. In **Part 2** opposing material will be given.

The following section of the Response corresponds to Vol 1 of the EA

The first thing to be considered will be the un-numbered page immediately after the cover. This gives a description of the land to be developed which is as follows:

> "Land to be developed: 16 Peninsular Drive, Breakfast Point and Kendall Bay
>
> Lot No. DP/MPS/Vol/Fol etc: Lot 53 in DP270347 and the area of water within Kendall Bay subject to a proposed NSW Maritime"

This description is different to the one submitted for approval of the MPA and dated 18 April 2007. In that application the description given was,

> "19-21 Tennyson Road Breakfast point" and "Development of a Commercial Marina containing up to 177 Berths in Kendal (sic) Bay adjacent to the Breakfast Point Residential Development"

It would seem that the *MPA approval* and *NSW Maritime approval* was given over the wrong land! Further, in the drawing submitted to NSW Maritime, in seeking its consent, the area of lot 53 was shown as being about double the size shown on other plans. These miss-descriptions are, to say the least, disconcerting and become even more so when one takes into account the omission of any reference to that part of the seawall (lot 55) on which the central arm of the marina is supposed to rest! The whole of the consent and approval process has proceeded on the incorrect description of the land to be developed and of the incorrect land owners' consents required?

Certificate required pursuant to the Director-General's requirements

The EA in the un-numbered (first page) has a certificate consisting of three dot points one of which says,

> "*That the information contained in the statements is neither false nor misleading".*

This certification is noted here because it will be referred to with regularity as the submission progresses.

Submission concerning the EA certification:

Each volume of the EA carries on it a presentation of the proposed marina that does not accord with the size and types of boats that are proposed or envisaged as using the marina. For example, there is no representation of any 25m boats for which the facilities will be available. Furthermore, since there is provision in the proposal (as shown in the drawings submitted with the EA) for boats other than those of lessees or owners of berths to use, such as "day tripper boats" [see DA01], a representation of those boats should also appear in the representation. Similarly, a representation of "ferry vessels" and "destination" boats should appear because of the provision made for them [section 4 page 18 of the EA; and the **Executive Summary** page 1] where it is said,

> "The jetty and pontoon has been designed to enable a ferry stop should future demand show that this is desirable."

The omission, from the representation, of 25m boats, "day tripper boats" (or destination berths) and ferry vessels (day tripper boats and ferry vessel tend to be larger that 25m) is a significant one because **any assessment of the visual impact must proceed on the basis of the largest vessel that will be using the facility** and this would have been known to the proponent and any one else engaged in the preparation of the EA. In so far as "day tripper boats"(destination berths) and ferry vessel are concerned it is not an answer to this part of the submission to say that the facility was included at the request of some authority or other and that it is not intended to allow for that type of usage because once the facility is in place commercial imperatives will take over and they will be used.

Another aspect of the presentation is the angle from which the representation is made. The appropriate angle is one that shows the visual impact and of the "bulk" from one of several known visual points that will be impacted on or that are reasonably likely to be impacted on by the proposal. For example, some of these visual points would be (1) from the Hunters Wharf apartments, (2) from the users of the foreshore walkway, (3) from Cabarita Wharf and (4) from the Manor Homes along the foreshore to mention just a few. What the representation does is diminish the visual impact from these and other visual points and in so doing misrepresent the assessment task that has to be undertaken for the EA.

If there is one undeniable conclusion that one can draw about the representation of the proposed marina on the front cover of the EA volumes is that you would need a magnifying glass to make out the size of the boats represented in it.

The scope and number of the missions are significant and warrant consideration in terms of the certification given under the Director General's requirements.

The Executive Summary and the EA certification:

The Executive Summary, at page 1, states that,

> "The development will provide access for people with a disability and will provide publically available facilities for use by the general public, particularly residents of the local area, thus enhancing the experience of living within the Breakfast Point precinct and the surrounding locality."

Further comment will be made later about this "public" aspect of the proposed use of the facilities but for now, the submission is that this part of the **Executive Summary** is in breach of the certification given pursuant to the Director General's requirements. This is because there is no public access to the *Community Association DP No. 270347* parcel for the purpose of transit to and from the proposed marina. Public access, if available at all is limited to use for the purpose of recreation and not to get on and off a marina. Such usage will breach the *Conveyancing Act s 88B* provisions attached to the development and will breach standard conditions attaching to easements that users have to use the established entry and exit points and cannot create new ones to suit themselves (as will happen under the proposal).

Reference was made in the previous paragraph to the lack of public access to the community parcel as controlled by the *Community Association DP No. 270347*. The reason for this is that the easement in question is what is known as an "easement in gross" which is only available to

councils, the crown, public authorities and certain prescribed corporation (*Conveyancing Act s 88A)*. Such easements are allowed for the purpose of permitting such bodies to carry out public type works e.g., electricity supply or telecommunication. This limitation means that the right cannot be made to cascade down to "members of the public" as currently stated in the easement and, accordingly, the extension to the "public" is void.

For the purpose of completion reference is made to the Executive Summary where it says (page 1),

> *"[Note: This Executive Summary should be read making reference to drawings DA01, DA02, DA03,DA04, DA05, DA06, DA07, DA08 and DA10 by TLB Engineers, AM01 by Giles Tribe, and DA100 and DA200 by Rose Architectural Design (refer* ***Appendix 1****)].*

These drawings carry information regarding "public" access which is inconsistent with what has been said above e.g., DA01 refers to "pedestrian public access" which is part of the *Community Association DP No. 20347* parcel and not available for use by non members of this association.

These limitations on "public" access would have been known to the proponent because it was it that prepared and obtained the necessary development approvals that contained the restrictions on "public" access. Accordingly, to say or by necessary implication say, as the Executive Summary does, that the 'public" can make use of the property of the *Community Association DP No. 270347* for the purpose of using the proposed marina breaches the certification given pursuant to the Director General's requirements.

The Executive Summary and the EA certification:

At page 1 the Executive Summary mentions that there has been "community consultation" concerning the proposal. More will be said about this later but here the point is made that there has been no specific consultation with the **members** i.e., the owners of the "Community Association DP No. 20347" who are the ones directly affected by the proposal, hence to the extent that the **Executive Summary** suggests otherwise this also seems to be inconsistent with the certification given pursuant to the Director General's requirements.

The Executive Summary and the EA certification:

It is claimed (Executive Summary page 2] that,

> "Land Owners' Consents from NSW Maritime and Breakfast Point Pty. Ltd. have been obtained and accompany this Project Application"

This is an important statement. It carries the clear implication that the only land owners' consent that needs to be obtained is that of the named bodies. For reasons to be given later this assertion is incorrect. The consent of the Community Association DP No. 270347 is also required because that body is the controlling authority over the use and management of the *Community Association DP No. 20347* parcel over which users of the proposed marina users will (1) have to traverse to go to and from the marina, (2) the Community Association can require a fence to be erected between

the community parcel and the adjacent land (NSW Maritime). In fact an additional consent is required from the **owners of the common property** within the Community Association parcel i.e., the members of the association who hold title as **tenants-in-common** pursuant to the *Community Land Development Act ss31-33 (pursuant to these provisions the Community Association is the "agent" of the owners but is a land owner). The effect of this is that the Community Association has "management" powers e.g., to decide a question of a fence but since it is not a land owner it cannot give land owners' consent.*

On top of the consent required from the Community Association DP No. 270347 there is a need for the consent of Canada Bay City Council because it is the lessor of the foreshore lot that is leased to the *Community Association*. More will be said about this aspect later but for now it suffices to add that it is not an answer to this part of the submission to say that the lease might contain conditions limiting the authority of the Community Association over the foreshore lot because the main thrust is that there is another land owner that needs to give consent.

Like the earlier submission concerning the **Executive Summary** this part also in apparent breach of the certification given pursuant to the Director General's requirements.

From this point onwards, unless stated to the contrary the numbering will correspond to that used in the EA.

2: Introduction and Scope

It is noted that a number of expert studies have been conducted and some comment will be made about the issues traversed by them later in this submission. Here it will simply be noted that there has not been any study about,
1)The social impact of the proposal on the residents of Breakfast Point and the surrounding localities,

2)The social impact on the local community along the Parramatta River and generally arising from being denied the use and enjoyment of a one of the last remaining bays west of the Harbour for the benefit of boat owners who have use of the preponderance of bays for their boats,

3)The legal impact arising from the interference with property rights of the **members** of the *Community Association DP No.20347* (see Community Land Development Act ss 31-33) in the common property that will be used by the marina users,

4)The legal impact of interfering with the *Conveyancing Act s 88B* restrictions on the means and reasons for public entry onto the community association parcel and in creating a new entry and exit in the easement,

5)The legal impact on the community development legislative scheme arising from the interference of one joint owner of the common property with the rights, title and interest of other joint owners,

6)The equitable impact that arises when one of several tenants in common constituting the Community Association DP No 20347 pursuant to the *Community Land Development Act* ss 31 -33 uses community association property for its own commercial purposes without the consent of the other members,

7)The financial impact on the *Community Association DP 20347* attributable to wear and tear on the community parcel in general and the seawall in particular,

8)The social, cultural, historical and environmental benefit of retaining Kendall Bay as one of the few remaining "natural" bay" in Sydney Harbour for present and future generations and thus giving effect to the principle of intergenerational equity,

9)The social, historical, cultural and environmental benefit of retaining Kendall Bay in its current natural state and so giving effect to principles of equity in sharing the benefits of Sydney Harbour between boat users which enjoy almost exclusive use of the bays on its shore west of the Harbour and non-boat users which have very few other places to use and enjoy,

10)The ecological and environmental impact of chemical or biological contaminants introduced in the bay by marina users,

11)The impact of climate change to the visual impact and "bulk" impact of the .20m added height to the water level and to the combined influence of (1) this increase, (2) the raise of.65m attributable to wind generated waves, and (3) the raise attributable to the tides, on the visual impact; and

12)The impact on the valuation of property within Breakfast Point and on the use and enjoyment of its amenities in general and the ensuing trespass directly attributable to marina users.

13) The loss of confidence in the assessment system or breach of the law engendered by the implied authorisation to, or the condoning/or connivance in the committal of a trespass on Community Association DP No 20347 parcel that will follow on the grant of approval.

14)the environmental impact of using one of the last remaining finite natural resource (bays on the Parramatta River) for a purpose which is never going to be satisfied. Refer claimed demand for marinas in Vol 8. The proposal is detrimental to the environment and to meet the needs of non boat owning public.

3 The Site and Existing Environment

The EA says (page 1) that,

> "By letter dated 16 January 2007, the Department of Planning advised that *"on 29 December 2006, the Director-General of the Department of Planning, as delegate of the Minister for Planning, formed the opinion that the proposed commercial marina is a Major Project to which Part 3A of the Act applies"* (refer **Appendix 2**). The consent authority for the proposed development is the Minister for Planning."

As previously indicated this approval is grounded on the incorrect description of the land to be developed for the marina and, it is submitted, this has the effect of voiding the consent.

4 The Proposed Development

At page 20 the EA identifies the "public benefits" of the proposal. These are said to be,

"• Enhanced access to the waterway for the general public through the provision of pick up and drop off berths.
• Enhanced waterway experience for the general boating public through the provision of day tripper berths.
• Enhanced experience of the Breakfast Point foreshore and enhanced community experience through the provision of the jetty and kiosk.
• Access for people with a disability.
• Reduced disturbance of contaminants in Kendall Bay, resulting in a public health benefit."

As to the first dot point there is nothing in the proposal to suggest that current facilities are insufficient to cater general pick up and drop off of members of the public. A few words were said about "public access" earlier but it is worth reiterating that the *Community Association DP No 20347* parcel is private property and entry by members of the public onto the community association parcel is only permitted (if at all) for limited purposes which do not include getting on and off a boat. The use contemplated by the proposal is unlawful and constitutes a trespass and, in some instances, might also constitute a criminal trespass. The approving authority should be wary of being seen to aid and abet in the commission of a tort or of a criminal trespass. To the extent that the statement implies a "right to use" it should be considered under the certification given pursuant to the Director General's requirements.

What was said in the previous paragraph can be said for the second dot point but one can add the disadvantage, that flows from approval of the proposal, that the area taken up by the marina will be denied (not might be denied) to other water users whether on boats or canoes or kayaks or by being dragged along on skis as well to those who get enjoyment from looking at the clear water of the Bay from anywhere around the Bay or from the apartments along it.

The same thing can be said about the third and fourth dot point as was said for the previous two. As regards the last dot point the first thing that comes to mind is how odd it is. Having boats revving their engines is not going to leave the contaminants undisturbed. It will do the opposite. Just in case the proponent is suggesting that the claimed benefit will flow from the geotextile blanket that it proposes to use, it is pointed out that the entity responsible for the contamination has an order against it to remediate the Bay and the benefit from remediation is a better one to the benefit (and it is not conceded that there is a benefit) flowing from "reduced disturbance".

4.2 Layout

Under this heading the proponent claims, amongst other things, that the layout of the marina will (page 20),

"Allow good access for Sydney Ferries to and from Cabarita Wharf."

This point can be readily disposed off by referring to the letter from Sydney Ferries in opposition to the marina on navigation and safety grounds. The proponent says that the set out has been based on (page 20),

"...NSW Maritime Authority Guidance Note 8.3.02."

Even if one was to accept this as the final say on what is a satisfactory proposal for this Bay the fact is that enquiries with NSW Maritime disclosed that this **Guidance Note is out of date.**

4.5 Waste removal

The issues regarding public entry into *Community Association* property by members of the public applies equally to members of the public who enter the community parcel for the purpose of removing waste. It will amount to a trespass and the approving authority should not be seen to condone or connive in its commission.

4.6 Parking and Delivery

The proposal is that (page 21),

> "vehicles making deliveries to the Marina, will park in the car park in dedicated loading spaces. All items unable to be easily carried from the car park, will be transported in special small vehicles ("golf buggy type") to the marina and kiosk."

This proposal is subject to the same submission made earlier concerning public access. Someone coming onto the community parcel is just as much a member of the public as anyone else who is not a resident here and is committing a trespass if he/she enters for the purpose of making deliveries.

5 Justification for the Proposal

Accepting that the statistics and their interpretation mentioned in the proposal are correct the most obvious conclusion that one can draw from them is that at the presented rate of increase in boat registrations there will not be any bays for use as marinas within a couple of years. Then what? The answer is not the simple one proposed by this EA but it is to make better use of existing marinas. If you know you are going to run out of food next week and there is nothing available in the foreseeable future you don't eat it up all at once but you ration it out to last as long as possible.

5.2 Location and Orientation

It is claimed that (page 26),

> "The marina is away from the main waterway channel along the Parramatta River and a sufficient distance from vessel access paths to and from Cabarita Wharf, to not affect safe navigation by Sydney Ferries vessels, nor significantly affect their timetables.
> The marina has been oriented in a north south direction to be in the visual shadow of the original high level wharf; and in the east west direction, open fairways provide views east along the Parramatta River."

This is a claim that cannot be sustained. The views of Sydney Ferries should be given a lot of weight and that view is against the marina. In terms of available views more will be said about this later but clearly the unqualified conclusion asserted by the proponent cannot stand up to scrutiny as there are significant visual impacts from various points along the foreshore walkway and from

apartments around the Bay. It is odd to imply that the existence of some minor visual channels is a proper substitute for the vista presented by an uncluttered bay.

5.3 Remediation

The EA claims that (page 26),

> "As part of the proposed development, the blanket which will be placed over the bed reduces the risk of bed disturbance and therefore contaminants entering the water column. This is an improvement on the existing situation and one of the public benefits of the project."

The fact is that the party responsible for the contamination has an order against it to remediate the Bay. The proponent will have you believe that sweeping the contamination under the carpet is better that remediating the Bay!

5.4 Public Benefit

This part of the EA repeats material already covered and the same reply given there is applicable here.

5.5 – 5.6 Ecologically Sustainable Development and various principles from the EP&A

The EA relies on the "precautionary principle" for justification of the proposal and the EA says (page 27)

> "The precautionary principle means *"if there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation".*
> The potential environmental impacts of the development have been carefully evaluated and, where considered necessary, mitigating measures have been proposed."

There are at least two comments one can make about this claim. The firstly is that there is nothing in the proposed EA that is supported by this principle. What the principle means is that if there is potentially serious or irreversible damage you can take some remedial action even if the science behind it is uncertain. Here the issue is not one of preventing a serious or irreversible damage it is one of constructing a commercial marina so that the principle does not apply in the way proposed in the EA. In fact, there is a stronger claim for the opposite contention because the EA accepts a second best solution to the contamination (sweeping it under the carpet) in place of the full better solution which is represented by the remediation that AGL (and its successors in title is required to undertake.

5.6 Intergenerational Equity

This is an interesting principle. It falls in the same category as the earlier. It is claimed that (page 27),

> "Intergenerational Equity means that the *"present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for benefit of future generations".*
> The Marina development, which aims to provide boat storage facilities and services to meet

demand for a range of vessel sizes and incorporate environmental controls during construction and operation, is consistent with the objective of social equity, including intergenerational equity."

The first thing to note is that this principle places a duty on the present generation to,
(1) "ensure the health" of the environment. The EA says that this part is satisfied because the marina will provide "boat storage facilities and services". This might be so but it does nothing for the "health" of the environment. The principle goes on to say that,
(2) the present generation should ensure the "diversity" of the environment.

The EA would have it that a marina ensures "diversity" but clearly this cannot be the case because there are marinas all around the Harbour hence diversity already exists. Indeed it is argued that there is a greater need to ensure the "survival" of diversity by having a few bays in the Harbour without boats in them. Bays are a finite resource!

The principle, as cited in the EA, also says that the present generation should ensure the "productivity" of the environment is maintained for future generations. There is no evidence that boats in a marina are more productive than boats not in a marina. The proposed project serves to "shift" (any) productivity from one place to another thus, for example, it merely shifts the fuelling from an existing site to the marina—there's no increased productivity. The same thing can be said for anything else associated with boats.

In the preceding paragraphs the principle relied on in the EA has been examined and the exposition given in the EA has been found wanting. There is, however, another point that should be made about the examination and exposition of the principle and this is that a better way of analysing the principle of intergenerational equity is not to examine the elements of "health, diversity and productivity" in isolation but to do it in terms of how they "maintain" or "enhance" the environment for benefit of future generations. So that it is insufficient to say that the proposal will do this, that or the other if it does not, at the same time, maintain or enhance the environment for future generations. *To provide a boat storage facility or service where one is not currently being provided does not satisfy the requirement for the proposal to maintain or enhance. If anything the current proposal will change the existing environment from a clear water bay to a storage facility and, since the proposal is for a change in the current (natural) status of the bay the proposal cannot enhance the existing environment. Accordingly, the proposal fails both limbs of the intergenerational equity principle*. These requirements, to maintain or enhance, refer back to things and activities being conducted in the Bay at present. At present there are no boat storage facilities or services that can be maintained or enhanced. The EA fails to satisfy this principle.

The EA goes on to say that the proposed facilities are consistent with the "objective of social equity including intergenerational equity". With respect there is no way that this EA satisfies these criteria. It has already been said that Kendall Bay is one of the few remaining clear water Bay west of the Harbour. Just take a Google Earth view of it. The fact is that boat owners have just about taken up all bays as marinas and, if intergenerational equity" means anything it is that this generation has to save this Bay for future generations so that they can see what a bay without boats looks like. Again, in terms of intergenerational equity, the point is that Kendall bay was turned into an industrial bay for more than 100 years and the past generations owe it to the present one to have, to use and enjoy it other than as a commercial marina and pass it on to the next generation in the same state. The same argument is equally strong when used in terms of social equity. Boat owners are not the only ones that should use and enjoy the Bay.

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5.6 Conservation of Biological Diversity and Maintenance of Ecological Integrity

The EA claims that (page 27),

> "Biological diversity refers to the diversity of genes, species, populations, communities and ecosystems
>
> The long term impacts of the proposal on flora and fauna on the site and in the area were found to be minimal and, in some cases, positive. *The containment of contaminated material and the additional surface areas for flora growth on the floating marina structure enhance and benefit fish habitat (italics added).*"

The conclusion implied by the use of the word "minimal" is unwarranted (as the quotations that follow show). In fact there is nothing in Vol 3 that would lead to a characterisation of the long term effects as "minimal" and if there is then that it rejected as unsound and are not justified on the facts. As to the part of the conclusion in italics, that is, with respect, unsound. This is because it moves from the incorrect premise that, without a marina, the bay will remain in its contaminated state. This is clearly not the case because AGL (and its successors in title) has an order against it to remediate the site—a fact that is known to the proponent. In this circumstance, for the proponent to claim that to "contain" the contamination is a better outcome for ecosystems and biological diversity in the bay than to remove it altogether is, with respect, misleading at best and, at worst, utterly naïve. Moreover, the EA seems to completely disregard the effect of the contamination that will invariably be introduced by the marina, for example, chemicals used to protect the boats from barnacles, diesel oils and exotic creature brought into the bay by the boats.

The words quoted underplay the actual findings reported in Vol 3 (page 21): **Marina Operation - Impacts, Mitigation and Management Measures** where it says,

> "4.5.1.1 Potential Impacts
> The wash and wake from boats accessing the proposed marina have the potential to disturb, resuspend and erode sediment in intertidal and shallow subtidal areas and increase turbidity levels within the water column of Kendall Bay. The magnitude of the waves generated by boats depends on the speed, size and displacement of the vessel, the distribution of weight within the vessel, the shape of the hull, volume of the vessel as distributed along its length, the nature of the water body and the habitat through which the vessel is moving (The Green Blue 2008). The effects of increases in turbidity on estuarine organisms have been described previously (Section 4.3.2). Boat wash can also affect the structure of infaunal and epifaunal assemblages (Bishop 2004; Bishop and Chapman 2004; Bishop 2007).
>
> A field-based investigation of the effects of boat wash on turbidity has been undertaken to determine whether boating activities at the proposed marina are likely to cause resuspension of sediments over and above that attributed to background processes (i.e. wind action, tidal currents and wash from existing boat traffic) (Gary Blumberg and Associates 2007). The study showed that when a small boat (11 m) was manoeuvred at four knots underway it had a significant impact on turbidity in shallow water (2 m), but caused only a minimal change relative to background levels at depths of 3 - 5 m. Manoeuvring of a medium boat (14 m) at four knots underway resulted in minimal to small bed disturbance at a depth of 3m and minimal disturbance at depths of 4 m and 5 m. The manoeuvring of a large boat (25 m) had significant impacts on turbidity at a depth of 4 m, but only minimal impacts at a depth of 5 m when underway at four knots. This study indicates that small and medium-sized boats operated at a depth of 4m would not have a significant impact on turbidity. Tests were also performed on boats under full thrust but are not described here, because vessels using the marina are unlikely to be moving at this speed. The significant impacts that were detected were short-lived lasting less than 10 minutes. The cumulative effect of a number of boats leaving or arriving at the marina at the same time or in rapid succession, however, is likely to be much greater."

It can be seen from this that (1) a "significant impact on turbidity" was found to be created by small boats at depths of 2m; for a medium boat there was "minimal to small bed disturbance at depths of 4m and 5m; and "significant impacts" for large boats at 4m. It needs to be born in mind that most of the marina structure will be over water less that 2m in depth so that the only logical conclusion one can draw is that, at depths of 2-3m, most effects would be significant ones (the Estuary Hydrodynamics study in Vol 6 says the marina will be located in "**mean water depths between2.9m and 5.0m"** (p14/15) but, it would appear from figure 3 in the report that the major part of the marina is in an area **under 3.9m in depth**. The deepest part will be were the central arm will be located so it is unrealistic to test boats at that depth and the test results and the conclusion reached in the EA for this depth are misleading/deceptive). What this means is that, from a pure experimental design, the study of the turbidity effect should have been measured, as well at the mean depth, for all sizes of boats (including day tripper boats and ferries) and with the proposed geotextile blanket and superimposed rocks on the surface. In any event, the conclusion concerning the "cumulative effect" gains prominence when the accumulation is not only by reference to the simultaneous movement of boats but also to the singular and simultaneous movement by boats over the life time of the marina.

Turning to the alleged benefit claimed to accrue because of the *additional surface* area provided by the marina structure for flora growth this is not a reasonable conclusion. In fact it seems to be at odds with the destructive effect due to the boat movements, the benefit of that will be outweighed by the negatives mentioned earlier in this paragraph as well as the ones mentioned in the report that (Vol 3 page 13,20), the presence of the marina (as distinct from the construction phase),

> "The floating pontoons, jetties and walkways associated with the marina would shade the water and reduce the amount of light available to photosynthetic organisms in the water column and on the bottom; and
> Subtidal soft bottom habitats and their biota would be disturbed indirectly by changes in the sedimentation patterns within the bay resulting from the marina structure reducing the effects of vessel and wind generated waves."

And of course those due to the negative impact (Vol 3 page 13; 21, Executive Summary page vi) arising from,

> *"Operation of the Marina*
> The combustion of fuel in boat engines, accidental spills of sewage, fuel, motor and other oils and release of toxic components from anti-fouling paints applied to the hulls of boats and marina structures could alter the bioavailability of contaminants in the aquatic environment;
> Boats mooring at the marina may introduce non-indigenous species which could compete with local aquatic flora and fauna.
> Aquatic biota would be disturbed by underwater noise and vibrations generated by the additional boat traffic associated with the marina."

One must not forget that the impact after construction is preceded by an impact during construction which can be destructive of the aquatic habitats and associated biota. This much is conceded by the expert report (Vol 3 Executive Summary page vi),

> "**Loss and/or disturbance of subtidal soft sediment habitats and associated biota**
> The subtidal soft-sediment habitat that currently exists at the Proposed Marina Location would be replaced by layers of basalt rock when the geotextile blanket is installed. Most of the organisms that occur within or on the surface of the soft sediment would perish shortly after the blanket is laid. The loss of this

habitat and associated biota would also reduce the amount of benthic food available for consumption by epibenthic and pelagic organisms.
Approximately 29% of the subtidal soft sediment habitat within Kendall Bay would be affected, but there are extensive areas of these habitats elsewhere in the estuary. The basalt rock would eventually be colonised by benthic organisms, but the assemblages that develop on them would differ from those in the existing fines-dominated habitat. Infaunal assemblages that are more comparable with those occurring at present would develop once sufficient fine sediment has been deposited within the rock matrix.
During and after installation of the geotextile blanket fine sediment particles (less than 74µm) in the upper sediment layer will pass through the geotextile blanket. It is estimated that the amount of sediment penetrating the blanket would be equivalent to a 10 mm thick layer of fine particles within the rock armour immediately above the blanket. During operation of the marina this material has the potential to be resuspended in to the water column, allowing it to be transported within and away from the proposed marina site. It is estimated that the fine material could be transported to the mangrove habitat near the head of the bay and, over a year-long period, could result in the deposition of a maximum of 1 mm of sediment (GbaCOASTAL 2009). It is unlikely that contamination associated with such a small quantity of sediment would have a detectable impact on the mangrove habitat.

The floating pontoons, pilings and jetty forming the structure of the marina would provide artificial habitat for macroalgae and sessile invertebrates, such as mussels, ascidians and sponges and serve as habitats for mobile fish and invertebrates. The marina structures would increase the abundance of taxa found in association with hard substrata within the bay, but not offset the impacts on soft-bottom assemblages resulting from their introduction. The assemblages that develop on the artificial structures would also differ from those on natural hard substrata."

What replaces the destroyed aquatic habitat and biota once everything settles down, if it ever does, will be a new habitat and biota which is an outcome contrary to the principle of to maintain and to protect. Moreover, whether one is talking about the original habitats and biota or any replacements the impact of the marina will be that it will (as Vol 3 Executive Summary) asserts, it produce,

"Shading of the Water Column and Substratum
Impacts due to shading from the proposal are difficult to assess due to a paucity of information on the aquatic flora of Kendall Bay and the variability in the number of boats in the marina at any one time that will cast shadows into the water. Primary productivity in the bay comes from the photosynthetic activity of two types of plants: microscopic, floating algae and diatoms in the water column and attached, foliose algae.
The floating pontoons, jetty and walkways of the marina and boats moored alongside them will shade the underlying water column and reduce the amount of light available to photosynthetic organisms. Because background turbidity in the marina area probably already limits photosynthesis in the water column, and the footprint of the marina covers <17% of the bay, it is unlikely that small, further reductions due to marina structures will have measurable adverse effects on the density, growth and productivity of aquatic flora in the water column. The jetty would shade a small section of the vertical seawall, potentially resulting in a localised reduction in the abundance of macroalgae with localised flow-on effects to the community structure. The algae growing on the seawall along most of the shoreline and small patch of seagrass near Cabarita Wharf would not be affected by the marina."

There will also be the impact from noise generated by the boats and other means. This was recognized in the expert report where it says (Vol 3 Executive Summary),

"Generation of Underwater Noise and Vibrations
"The insertion of the piles needed to support the marina structure, use of barges and construction vessels to lay the geotextile blanket and manoeuvre the floating structures and piles into position, and eventual usage of the marina by motorised boats will increase ambient noise levels. The underwater noise generated by pile-driving hammers has the potential to physically damage fish and decapod crustaceans occurring in the immediate vicinity of the pile being driven into the substratum and disturb animals in the general vicinity of the pile driving operations. The sounds generated by boat propellers and engines also

have the potential to elicit behavioural and physiological responses in fish. The impact of these activities is difficult to assess because of the lack of information on background noise levels in Kendall Bay and on noise levels and vibrations likely to be generated during construction and operation of the marina. Little is also known about the responses of marine organisms, other than mammals, to underwater noise. The noise produced by boats accessing the marina, however, would be similar to that of existing traffic and intermittent in nature, so their impact is unlikely to be significant.
Potential impacts arising from the generation of underwater noise and vibration during construction of the marina would be minimised by limiting the hours that works can take place and the number of piles that may be inserted per day. Consideration should also be given to managing pile driving activities so that the underwater noise generated increases incrementally, reducing the level of underwater noise generated by creating a bubble curtain or screen around the area in which piles are being driven and using a hammer cushion. The impact of the noise generated by boats accessing the marina could be reduced by implementing and enforcing speed restrictions."

One should not forget the impact from,

> ***"Introduction of Non-Indigenous Species***
> The hulls of vessels utilising the marina are a potential pathway for the introduction of nonnative flora and fauna, including marine pests, into Kendall Bay. Marine pest species are of particular concern, because they are able to compete with existing native species, alter local gene pools and/or modify the physical environment. Two known or likely exotic marine species, the yellowfin goby *Acanthogobius flavimanus* and bryozoan *Watersiporasubtorquata*, have already been recorded in Kendall Bay.
>
> The introduction of non-indigenous species could be minimised by prohibiting the cleaning of hulls and discharge of bilge water from boats moored at the marina. Boat owners should also be encouraged to inspect their hulls, anchors, fishing gear and general boating equipment for non-indigenous species, such as *Caulerpa taxifolia* which occurs in Sydney Harbour, and dispose of them in an appropriate manner. A targeted marine pest survey should also be undertaken prior to the marina commencing operations to determine whether any known marine pests are present and provide a baseline for comparison during the operational life of the marina. The biota on the piles and jetty comprising the marina and in the underlying soft sediments should also be inspected periodically to determine whether non-indigenous species have been introduced. The origin of vessels arriving at the marina should be determined so that a list of potential introduced species can be drawn up."

The EA (Vol 3 at 3.4.6) draws attention to the fact that the *Fisheries Management 1994* identifies the current project type as a "threatening process" because it can introduce

> "non-indigenous fish and marine vegetation to the coastal waters of NSW",

This listing in the *Fisheries Management Act* arises because such projects can,

> "cause species, populations or ecological communities that are not currently threatened to become threatened (DPI NSW 2005b). Fouling of boats and boating equipment is one of the mechanisms that can lead to the spread of non-indigenous fish and marine vegetation".

Legislation of this type should not be taken lightly and should be interpreted with a few to providing serious and effective environmental protection. The proponent does not give proper regard to the legislative intention. This would also mean that the finding (vol 3 at 3.4.5) that because,

> "The BIONET database indicates that none of these protected species have been recorded within Canada Bay LGA. It should, however, be noted that these databases only include records from government agencies. The limited sampling undertaken within Kendall Bay by other groups indicates that a member of the Syngnathiformes, the Hairy Pipefish (*Urocampus carinirostris*) was present at the southern end of Kendall Bay in 1988 (The Ecology Lab 1989). This species, however, was not found in the area in 1996 or during the current study.

> Wetlands are protected under Part 6, Clauses 61 - 63 of the Sydney Regional Environmental Plan (SREP) (Sydney Harbour Catchment). The accompanying Wetlands Protection Area Maps (Sheets 2 and 3) indicate there are no protected wetlands along the western foreshore of Kendall Bay adjacent to the Proposed Marina Location. There are, however, protected wetlands at the southern end of Kendall Bay and to the east around Cabarita Wharf and Cabarita Point. A small, sparse patch of the seagrass *Halophila ovalis* was found off the rock platform near Cabarita Wharf during a survey of the distribution of aquatic macroflora within Kendall Bay undertaken in September 2007 (The Ecology Lab, unpublished)"

should not be taken as conclusive (because the present finding is inconsistent with an earlier) and finding the protected wetlands at the southern end of Kendall Bay should not be discounted as it can be impacted on by the movement of the boats, chemical hazards introduced by them and by any introduced species that are incompatible with them.

5.5 Improved Valuation and Pricing of Environmental Resources

The EA says (page 27),

> "This principle is a component of "intergenerational equity" and establishes the need to determine economic values for services provided by the natural environment. The assessment of environmental impacts has recognised the value of environmental resources."

As a statement in aid of an assessment this so called component of "intergenerational equity" is, with respect, difficult follow. It is nothing more than a self-serving conclusion.

6 Consultation

This is an important issue and it will be covered extensively later in this submission. For the present the submission is that the main consultation process utilised has been by way of an internet web site. It would be a fair guess that person who received one of the flyers notifying the availability of the marina site would have thrown it away together with the pizza flyers and the specials flyers for the local market. It is not a suitable means for consultation for an issue of this type.

The EA claims that (page 29),

> "An online community consultation website was the key communication channel employed for the community consultation process. This online consultation tool:
> - allows more people into the conversation, reflecting a range of views,
> - identifies more issues of concern to the community as early in the lifecycle of the project as possible so that they can be addressed by the project team expeditiously; and
> - contributes to building community ownership of the outcomes."

These claims are not acceptable without evidence that individuals were aware of the existence of the site and had the means to access it and were made aware of the impact that it might have on their personal interests. For the same reason the second dot point is of minor if any value and the third dot point impliedly treats the outcome of the use of the private property of the members of the Community Association DP No.20347 as something to be determined and "owned" by the general community. This last point suggests that the consultation process proceeded on the wrong premises and possibly failed to elicit appropriate responses that would have been elicited if the consultation process had been based on the correct premise.

The EA claims that (page 32) part of the consultation process included advertisements that appeared in,

> "*The Village Voice Drummoyne*, a monthly gloss magazine with a circulation of 20,000, is distributed to Abbotsford, Breakfast Point..,"

I have rarely seen this magazine at Breakfast Point.

7 Statutory Context and Planning Controls: Overview

There will be submissions regarding these provisions later. The point is here made that most of the conclusion presented in this part of the EA are disputed and in particular, that the project complies with and satisfies the planning principles of the **Sydney Harbour Catchment Clause 13**. The ensuing comments should be considered in the context of the certification given pursuant to the Director General's requirements,

> "*That the information contained in the statements is neither false nor misleading.*"

With this in mind the submission now turns to the conclusion (at page 39 EA) that the requirement for the development to,

> "...to protect and, where practicable, improve the hydrological, ecological and geomorphological processes on which the health of the catchment depends"

Is satisfied because,

> "The implementation of the proposed Sediment Protection System will improve the health of the aquatic environment which in turn has the ability to rehabilitate nearby wetlands",

is not accepted either as a scientific nor as a logical proposition. As previously pointed out in this submission the proposal cannot be better that the full remediation of the Bay as required by the remediation order. To suggest otherwise id to treat a reader as gullible and unthinking, a proposition that, ipso facto, puts into question the entire thinking behind the EA.

In this section the EA also says that the planning principles of the Harbour Catchment (clause 13), require that (page 39),

> "the natural assets of the catchment are to be maintained and, where feasible, restored for their scenic and cultural values and their biodiversity and geodiversity,"

Is satisfied because,

> "The site is part of a former industrial site. The land component has undergone major brownfield redevelopment and now provides medium-high residential housing. The implementation of the proposed Sediment Protection System will improve the health of the aquatic environment."

The conclusion in the previous paragraph is subject to the same criticism as the previous interpretation given to the requirements of clause 13. Furthermore, the first sentence in this quotation is very instructive—the site **was** part of a "**former industrial site**" so that the principle of maintenance and restoration is applicable to its current status as a "natural" bay without industrial or commercial structures on it and **not as it used to be**. Hence, the proposed marina does not "**maintain**" the "**natural asset**" which is Kendall Bay because it **will destroy** it in the

process of changing it from an "open bay" or a "clear water bay" to one covered by boats. Not only does the proposal fail to "**maintain**" the asset it also falls the second imperative "**to restore**" it to its "**scenic**" and "**cultural values**" specifically mentioned in the planning principles. On any reading of the requirements of the clause it is not possible to reach the conclusion in question. This is something that should be evaluated in the context of the certification provided pursuant to the Director General's requirements.

The EA also refers to the principle in clause 13 that requires a,

> "development that is visible from the waterways or foreshores is to maintain, protect and enhance the unique visual qualities of Sydney Harbour,"

and concludes that (page 39),

> "The development will be visible from the constructed western shoreline, foreshore walkway, medium to high density residential housing within Breakfast Point to the west and southwest on the former AGL industrial site and from the relatively natural southern shoreline consisting of intertidal beach and mangroves, Cabarita Park, Cabarita Rivercat Ferry Wharf and waters of Kendall Bay and Parramatta River."

As for the other parts of the requirements of clause 13, the application of the clause will be considered in detail later, here, it will suffice to limit the submission to denying that the marina proposal satisfies the planning principles because to change the current status of Kendall Bay from one without a marina in it to one having a marina does not "**maintain, protect and enhance**" the unique visual qualities of Sydney Harbour. One does not "maintain" the Bay by destroying it or by completely changing its character. By the same token one does not "protect" it be turning it into something that it is not. Similarly, one does not "enhance" the Bay by changing its very nature from a "clear water bay" to one covered by boats, or from one used and enjoyed by all to one used by a select few (boat owners). The grammatical meaning of the words to, "maintain, protect and enhance" is pretty simple, so why are they not interpreted properly?

The EA concludes (page 40) that the expert assessment,

> "... the intrinsic scenic quality of the site and its surrounding context to be: *"...of a low to moderate rating."*
> With regard to the greatest visual impacts of the Project, the Assessment concludes that in relation to the close range public and private domain viewing locations:
> *"..that there would be visual impacts in the range of medium, medium to high and high for close range public and private domain viewing locations which would be mostly due to the potential presence of the proposed marina in the foreground of the views from these viewing locations and the resultant change it would cause to the view compositions and visual character of those views....That impact is not considered to be such that the application ought to be refused."*

Like the other parts of the EA this aspect will be given full attention later in the submission. At this juncture attention is drawn to the reference to "public" domain and to the conclusion or opinion expressed in the final sentence of the words cited. As far as the "public" domain issue is concerned (this will be taken up later in detail) it is stated that there is no such domain within the *Community Association DP No 20347* parcel and that the entire parcel is private property within a community legislation development scheme. Any suggestion of the existence of "public domain" ownership is denied. More on this aspect will be said later but briefly, any purported public access onto community association property is void.

In so far as the opinion expressed in the final sentence of the quoted words is concerned it is submitted that such an opinion is outside the expertise of the data collector and it is one for the authority making the determination to make. One may be an expert in putting together a report that may be used to make a visual impact assessment but the actual determination as to whether the data is of sufficient impact to reject or approve an application is not for the data collector to make.

Continuing with the clause 13 principles, the EA asserts that the requirement for,

> "the number of publicly accessible vantage points for viewing Sydney Harbour should be increased" ,

and claims (page 40) that,

> "The Project increases the number of publicly accessible vantage points (including disabled access) by providing an opportunity for the public to access and walk along the wharf and arms of the marina."

This is an unusual claim. Being able to walk along the "wharf" does not "increase" the number of vantage points because the "wharf" takes up space and the space where the "wharf" sits covers up the harbour rather than make it available for viewing. As for the "arms of the marina" they also occupy space and that space is not available for viewing and thus, does not "increase" the vantage points. The other point that calls for attention is the reference to the "public" and, as previously stated that question will be taken up in detail later but the fact is that the "public" has no right to access the community association property for the purpose of getting to and from a marina (or at all) and this is a fact that is known to the proponent because it is a development condition that is set out in the *Conveyancing Act s 88B* instrument.

The EA goes on to say (page 40) that clause 13 requires the,

> "development is to protect and, if practicable, rehabilitate watercourses, wetlands, riparian corridors, remnant native vegetation and ecological connectivity within the catchment",

And the EA claims (page 40),

> "... the proposed Sediment Protection System has the ability to improve the health of the aquatic environment."

This issue was dealt with earlier and nothing further need be said here. The EA also claims that the principle embodied in clause 13 require the proposal for the,

> " development is to protect and, if practicable, rehabilitate land from current and future urban salinity processes, and prevent or restore land degradation and reduced water quality resulting from urban salinity."

The EA claims (page 40) that,

> "... the proposed Sediment Protection System has the ability to improve the health of the aquatic environment."

This issue was covered earlier. At this juncture it is only proposed to note that the extensive changes will not protect the land by changing it into something completely different to what is supposed to be protected. In any event the proposed sediment protection system cannot prevent or protect the land from salinity finds its way onto the sediment protection system.

Application of the principles in Foreshores & Waterways Area (Clause 14)

The submission will briefly cover some of the issues mentioned in the EA and the details will be covered later. One of the principles mentioned in the EA is that the,

> "development should protect, maintain and enhance the natural assets and unique environmental qualities of Sydney Harbour and its islands and foreshores,."

The EA asserts (page 40) that the project complies with this requirement because,

> "...the proposed Sediment Protection System has the ability to improve the health of the aquatic environment."

This claim is rejected. Refer to the earlier submission concerning the meaning of the words "maintain, protect and enhance". Furthermore, a "natural" asset is not a description that can be readily attributed to a man made structure like a marina; and there are no "*unique environmental qualities*" in the proposed marinas (there are hundreds if not thousands of them in Sydney Harbour). The proposal does not "protect, maintain and enhance".

Clause 14 also seeks to promote the principle that,

> " public access to and along the foreshore should be increased, maintained and improved, while minimising its impact on watercourses, wetlands, riparian lands and remnant vegetation,"

The EA claims (page 41) that,

> "The Project increases the number of publicly accessible vantage points (including disabled access) by providing an opportunity for the public to access and walk along the wharf and arms of the marina."

This principle is also found under clause 13 and the points made there are appropriate here as well.

The EA refers to the principle in clause 14 that requires the development to consider,

> "access to and from the waterways should be increased, maintained and improved for public recreational purposes (such as swimming, fishing and boating), while minimising its impact on watercourses, wetlands, riparian lands and remnant vegetation,"

The EA asserts that (page 41),

> "The proposal increases access to and from the waterways and improves public recreational boating opportunities particularly for residents of the inner west."

This is denied. Reference is made to earlier submissions concerning "public" access; and in particular to the law prohibiting individuals from creating entry and exit points at will along an easement. Thus, if there is any "public" access to *Community Association DP No 20347* parcel (which is not admitted) it does not extend to permitting users to create entry and exit points along the foreshore walkway (the seawall is part of the community association parcel and not part of the foreshore lot leased from the council). The details of the submission on this point will refer the reader to authority for this claim. In any event, the use of Kendall Bay by the marina users will not

necessarily (there is no evidence to the contrary in the EA document) imply an increase availability of the bay to other boat user (who do not need a marina), to rowers, kayakers, skiers and even some fishermen and swimmers. If anything the marina will reduce the availability of the bay to the marina users. Furthermore, since the marina is proposed to be a commercial marina with no restrictions imposed on users from the "inner west" to claim a "particular" benefit for them is untenable.

Other mater being constant the foreshore lot can only be used for the purpose of recreation and not for the purpose of getting on and off a marina.

Clause 14 requires that the,

> "development along the foreshore and waterways should maintain, protect and enhance the unique visual qualities of Sydney Harbour and its islands and foreshores,"

The EA response to this requirement is to claim that (page 41),

> "The site is part of a former industrial site. The land component has undergone major brownfield redevelopment and now provides medium-high residential housing. The proposed marina is considered a complimentary use to the redeveloped site."

A commercial marina **is not** complementary to the residential development because it gives raise to a trespass onto *Community Association DP 20347* property, because it is not limited to use by the residents and it is entirely inconsistent with the architectural design of the buildings along the foreshore (more on this later).

Clause 14 also requires that,

> "adequate provision should be made for the retention of foreshore land to meet existing and future demand for working harbour uses,"

The EA asserts that (page 41),

> "The proposal does not restrict the future use of foreshore land."

The proposal does nothing of the kind. There are more marinas on the bays of Sydney Harbour, than there are bays without marinas. **Notwithstanding this status, when dealing with a commercial marina the reference to "foreshore land" has to be read down to "public" foreshore land and not to "private" foreshore land as is the case here because there is no apparent intention in clause 14, or elsewhere, to suggest that the planning principles are meant to apply to private land.**

It is a requirement of clause 14 that,

> "water-based public transport (such as ferries) should be encouraged to link with land-based public transport (such as buses and trains) at appropriate public spaces along the waterfront,"

The response to this requirement in the EA is that (page 41),

> "The Project includes a fixed jetty (designed to incorporate a ferry stop). The potential future ferry service would have the ability to link in with the following existing Bus Services located within 1km of the site:..."

This response is cause for concern. The proposed marina adjoins to and, on some of the drawings is shown as extends over the seawall directly onto *Community Association DP No 20347* property, so that any person getting on or off a ferry would be committing a trespass and in some cases a criminal trespass. The proponent does not have the right to approve the commission of a trespass. While one might argue that there is "public" access for certain limited purposes (this is not conceded) as given in the *Conveyancing Act s 88B* instrument that in no way authorises "public access" for the purpose of using *Community Association DP No 20347* property as a transit point to get on and off a boat or ferry (more on this later). Regardless of this point, this principle appears to have been misunderstood by the proponent because it applies to "appropriate public spaces along the waterfront" and the foreshore around Kendall Bay that is within *DP No. 20347* is not "public space".

The EA refers to the principle in clause 14 that requires that,

> "the provision and use of public boating facilities along the waterfront should be encouraged."

The EA response to this is that (page 41),

> "The Project includes casual berthing and day tripper berths for the general boating public."

It is submitted that this is not an answer to the principle in clause 14. The clause specifically applies to "the provision and use of public boating facilities" it does not refer to "commercial boating facilities".

Heritage Conservation: clause 15.

This clause will be considered in detail later. A brief consideration should refer to the principle that (page 41 et seq),

> "Sydney Harbour and its islands and foreshores should be recognised and protected as places of exceptional heritage significance,"

The EA's response to this principle is to identify the former AGL Powerhouse, Cabarita Park and Scots College Boatshed as three affected items and it concludes (page 42),

> *"...that the proposed Marina will be visible from the three historic heritage items, but will not impact on the heritage significance or values of any heritage items in the vicinity...*
>
> *The proposed development will have no impact on the heritage significance of the Former AGL Power House, Cabarita Park or Scots College Boatshed as:*
> *1) The significance of the items lies largely in non-tangible historical and cultural associations.*
> *2) It does not physically impact on the heritage items.*
> *3) While there may be limited impediment to the viewing of Cabarita Park, there will be no impediment from existing public vantage points.*
> *4) The view from the items is not considered to be of historical significance. In the case of Cabarita Park and the Boatshed, the significance lies in views towards the item, which may be enhanced through increased visitation.*
> *5) The location of the development within Kendall Bay means the Marina does not impact on sight lines along Parramatta River.*

No Aboriginal sites were identified as impacted during the desktop survey. Due to the intensive land use it is considered highly unlikely that an Aboriginal site will remain within the Marina footprint.

The EA seems to express a rather cavalier attitude towards the identified sites in dismissing them as having "non-tangible historical and cultural associations". This conclusion is not tenable in the presence of the qualification by the report writer (at page 2),

> ""This assessment is, by its nature, a **subjective interpretation and it is possible that another professional may interpret the historical facts and physical evidence in a different way. In particular, the assessment of visual impact on heritage items can be subject to a number of differing interpretations (bold added)**."

In the context of a limitation of this type it is submitted that, with respect, the better conclusion to have reached would have been one that was clearly qualified and not so conclusive. The way that the EA puts it there is no room for a different view point and that challenges the reliability of the conclusion it placed before the assessor. According to this view, there is no value in anything unless there's a dollar sign in front of these so forget ANZAC day, the Queens birthday, mother's day and religion! The visual impact aspect and the other points in (1) – (4) will be considered later as will clause 15 (b) – (f) which appear not to have received direct attention in the EA.

Maritime Waters zoned W1: clause 16.

The EA says that the objectives of zone W1 are as follows:

> *a) to give preference to and protect waters required for the effective and efficient movement of commercial shipping, public water transport and maritime industrial operations generally,*
> *b) to allow development only where it is demonstrated that it is compatible with, and will not adversely affect the effective and efficient movement of, commercial shipping, public water transport and maritime industry operations,*
> *c) to promote equitable use of the waterway, including use by passive recreation craft."*

The response of the EA to these objectives is to claim that the (page 42),

> "…the Project is consistent with the Objectives of the W1 Maritime Waters zone in that the Project has demonstrated that *"…it is compatible with, and will not adversely affect the effective and efficient movement of, commercial shipping, public water transport and maritime industry operations"* and allows for *"equitable use of the waterway, including use by passive recreation craft."*

This conclusion is not available to the proponent. For one thing by taking about half of the bay (Vol 6 p 14/15 says the proposed geotextile blanket will occupy 5.7 ha of the 10 ha bay) for the use of the marina structure (more if allowance is made for manoeuvring area taken up by boats to get in and out of the berths) it necessarily has reduced the available area for use by non marina users for example, by speed boats that frequently use it and by kayakers. This is not an equitable use of the waterway. Moreover, the objection of Sydney Ferries to the proposal is evidence that there will be an adverse affect on and in the efficient movement of public water transport.

Environment Protection and Biodiversity Act, 1999

The EA correctly states that the *Environment Protection and Biodiversity Act, 1999 (EPBC Act)* requires approval from the Commonwealth Minister for the Environment for actions that will have a significant effect on matters of national environmental significance. These include; wetlands of

international importance; nationally threatened species and ecological communities; and migratory species. The EA asserts that the (page 60),

> "The proposal will not have a significant impact on matters of national environmental significance as listed in the EPBC Act or a significant environmental impact on Commonwealth land and, accordingly, a referral is not required to the Commonwealth Minister for the Environment."

This conclusion is inconsistent with the finding reported in Vol 3 page 9), where it says,

> "The Protected Matters Tool indicates that 14 threatened species listed under the *EPBC Act* 1999 occur within Canada Bay LGA, however, these are all terrestrial species and therefore outside of Cardno Ecology Lab's brief."

And at Vol 3 page 10, the same report refers to a terrestrial threatened species,

> "Only one threatened ecological communities listed under the *EPBC Act 1999* occurs within the Canada Bay LGA, however, this is not relevant to the current study as it is terrestrial."

And it continues,

> The Protected Matters Tool indicates that 13 marine species and 15 migratory species listed under the *EPBC Act* 1999 occur within Canada Bay LGA, however, these are all birds. There are no marine species which will be affected by the development."

The purpose of referring to these findings is that it shows that the claim made in the quotation by the proponent cannot be relied on and to consider this in the light of the certification provided pursuant to the Director General's requirements. Further reference will be made later to the migratory birds issue and the need to obtain ministerial approval.

9 Alternatives Considered

The EA considered and rejected the alternative of doing nothing because:

> 1. "Demand for "wet berth" in Western Sydney remaining unsatisfied;
> 2. The bed of Kendall Bay is unprotected and the risk of contaminant disturbance is greater;
> 3. There would be a navigation hazard along the line of the original."

There is no evidence that "Western Sydney" has an unmet demand and, in any event, there is no requirement that every demand has to be satisfied. Recently, the Reserve Bank of Australia lifted the cash interest rate, which the banks went on to apply with a top up of their own, and yet there was a "demand" from home owners, small business and retails was for no increase. Secondly, the alternative proposed by the proponent is not to leave the Bay "unprotected" but to remediate it which, on any reasoning, is a better option that sweeping the contamination under the carpet. The claim that there would be a "navigation hazard along the line of the original" is an odd one to make at any time and particularly so when Sydney Ferries opposes the proposal. Suitable bays for marinas do not grow on trees. They are a finite resource and saving a few of them for the greater good of the public has more to command it that giving it to boat users.

The other alternatives are nothing but pretend issues designed to make the proposal look good. In fact the alternative it should have considered (and did not) is the one that would make the most

sense and this is to regulate the better use of existing marinas whether private or commercial ones because the finite nature of bays wont allow for the approval of marinas just for the asking..

11 Environmental Assessment

The EA has taken into account a number of planning instruments and other documents. This, however, should not be taken to have been a comprehensive piece of research as a number of important issues have not but should have been taken into account. Some of these have been identified earlier in this submission and, in line with this submission, the reasoning process brought to bear in the analysis of the material has been found wanting.

11.2 Visual Amenity

The EA seeks to cover this issue at page 80. The EA reaches the overall conclusion,

> *"That impact is not considered to be such that the application ought to be refused."*

This conclusion is rejected. Firstly, the approach used is not a comprehensive one in that (a) it does not take any or any sufficient regard of the specific architectural designs of the apartments and homes along the waterfront and go on to assess the visual impact having regard to it; (b) it does not seek to assess the visual impact as against the "vision" claimed by the proponent and relied on it to sell the residential development; and (c) assess the visual impact on the basis required by the regulation i.e., the largest vessels that will use the facility. The visual impact is an important issue and the submission will return to it later on.

The other thing about the EA's conclusion is that the person conducting the assessment has stepped out of its area of expertise. It is not within its province to decide whether the "application ought to be refused" or not. That area of expertise rests with the assessment body.

11.4 Public Access

On this issue the EA states (page 87),

> "The Project does not have any impact on the number of existing accessible vantage points. The Project enhances public access to vantage points on the waterway, by permitting public access along the main spine of the proposed marina to the kiosk at the eastern end of the jetty. This enables viewing of the Parramatta River, foreshores and surrounds from within Kendall Bay. The proposed marina will also provide access for people with a disability and the mobility impaired, generally, improving access to Sydney's waterways for all members of the public.

This conclusion is unacceptable because it represents a continuation of the misrepresentation regarding the rights of the public to enter the Community Association parcel for purposes associated with the marina. There is no such right and the attempt at building up a case in favour of the marina using straw arguments and assertions of this type is not warranted. Access to the *Community Association DP No 20347* parcel for the purpose of using the marina constitutes a trespass and the representation is a matter that should be considered because of its inconsistency with the certification given pursuant to the requirements of the Director General's Requirements (in the first page and at page 63).

11.6 Traffic

The EA tries to minimize the negative perception arising from the traffic construction by referring to *"50 vehicles two-way"* instead of the more obvious and better understood concept of 100 vehicles movements per day. Clearly, the intention is to make people see "50" rather than "100" and it keeps on using that minimizing approach through out the submission.

However described the vehicle movements need to be considered in the context that, in so far as the marina itself is concerned (as distinct from the car park) construction equipment and vehicles cannot access the community association parcel as that is private property and any access for that purpose will constitute a trespass.

The EA claims that (page 92),

> *"**3.12**- Traffic generated by the proposed development will have its greatest effects on weekends when people travel to the marina to use their boats. The majority of vehicles would be inbound in the morning and outbound during the afternoon.*
> ***3.13** – The marina would generate up to some 20 vehicles per hour at these times. This is a low generation, equivalent to an average of one vehicle every three minutes during peak hours.*
> ***3.14** – Such a low traffic generation would not have significant effects on the operation of surrounding roads within Breakfast Point or the external road network. Intersections would continue to operate at their existing good levels of service A/B, with average delays of less than 5 seconds per vehicle.*
> **11.6.1 Site Access and internal roadways:-**
> The main roads within Breakfast Point have been designed and constructed to accommodate buses and pedestrian and cycle links. Vehicular access to the proposed marina car parking area is from the existing Rosewater Circuit. **Section 3.3** of the *Traffic and Parking Report* confirms that *"Good pedestrian access will therefore be provided between the surrounding area and the proposed marina including to the proposed parking area for the marina."*

In line with what was said in the previous paragraph the people travelling to the car park have to travel over community association property (access ways) to get to the car park. These people have no right of access (vehicular or otherwise) to enter the community association parcel for that purpose (*Conveyancing Act s 88B instrument*) and would be committing a trespass to do it. Similarly, these people have no right to use the community association parcel (access ways) for the purpose of going to the marina (and back).

As to the statement in 11.6.1 above it is pointed out that **there are no "roads" within Breakfast Point**—there are only "access ways" and, by definition, these are not "roads". In fact the *Roads Act* has no general application to the *Community Association DP No. 20347* parcel (see *Community Land Development Act s 47; Community Land Management Act s 116*). Moreover, no matter how they were designed there is no evidence that they were constructed for the usage claimed. In fact there are no buses using the "access ways" simply because the access ways are private property and there is no public access. In any event it is worth making it clear that the proposed marina is in Kendall Bay and so it is outside the boundary of the *Community Association DP No 20347* parcel and the marina users have no right to enter the parcel for the purpose of transit to and from the marina.

The restrictions mentioned here are within the knowledge of the proponent and is within the provisions of the community scheme development legislation so there is no excuse for representing the facts in the way it has been done in the EA.

The parking report says (page 93,

> *"We note that a proportion of the berths may be used by residents of the Breakfast Point development. This may reduce the parking demands at the proposed marina as some residents are likely to walk to and from the facility and would therefore not require parking."*

This is not a reasonable ground to take into account. Firstly, it does not conform to reality (residents of Breakfast Point are known to drive to go to the gym located on site) so there is no basis to think that they would walk to the marina and secondly, what if the assumption turns out to be wrong?

Taking into account the preceding material it is clear that the traffic assessment report moved on the incorrect premise and has no evidentiary value.

More on this issue later.

11.9 Avian Fauna

The EA claims that (page 99),

> *"The lack of data or information on bird species or habitat at Kendall Bay indicates that the immediate area of the proposed Inner West Marina development does not represent important bird habitat or support significant numbers of listed species. Therefore, there does not appear to be any grounds to justify dedicated avian surveys in this area. This desktop assessment found that there is unlikely to be a significant impact from the proposed development to any avian species listed under the EPBC Act or theNSW TSC Act."*

It is submitted that this conclusion is not sustainable. Accepting that the reporter did not find data for analysis this does not mean that visual observation or research should not be undertaken. This is what science is all about—to find data where data previously did not exists. More will be said on this point later and at this stage it suffices to say that the conclusion is not supported by the evidence and that (Federal) ministerial approval is required.

11.11 Waste Management

The EA says that (page 99),

> "Three types of waste will be generated from the proposed Project:
> • Solid waste from office activities and kiosk activities.
> • Waste water from kiosk and vessels.
> • Sewage from vessels and toilets in kiosk and manager's office.
> The solid waste will be placed in sealed bins and removed by a waste removal contractor for disposal in an approved site. The bins will be stored on the fixed jetty at the kiosk and marina Manager's office, then transferred by small vehicle to a location near the car park for collection by the waste removal contractor."

The problem with this solution is that, as already stated, the *Community Association DP No.20347* is private property and access to the parcel is limited by the *Conveyancing Act s 88B* restrictions that do not make provision for waste removal contractor entry and any such entry will constitute a trespass.

11.12 Social

The EA claims that (page 100),

> "The proposed development will provide access to vessels for people with a disability."

The response to this is to refer the reader to the previous statement and to the *Conveyancing Act s 88B* restrictions. In passing one may note the obvious intention behind such "motherhood" statement given by a proponent that intends to use other people's property for the advancement of its own commercial undertaking.

Under this same heading the EA asserts that (page 100),

> "The proposed development will increase employment in the area, thereby providing an on-going contribution to the social and economic welfare of the neighbourhood."

There is no reason to suspect this statement to have any currency or meaning other than lead one up the proverbial "garden path" because there is no reason to conclude that only individuals from the "area" are going to apply and be selected to fill vacancies associated with the facility (unless there is a proposal to breach anti discrimination laws). In any event reference is made to the *Conveyancing Act s 88B* restrictions and the question of how these employees (from whatever area they come from) are going to get to and from the marina without trespassing on *Community Association DP No 20347* property? The existences of these restrictions are within the knowledge of the proponent and they should have figured large in the EA documentation and contentions. The fact that they did not calls into question the reliability and validity of the arguments propounded in the EA as well as its obvious inconsistency with the given pursuant to the Director General's requirements

The same thing can be said regarding the further claim of the EA that (page 100),

> "The marina and kiosk will provide a point of interest and meeting place for informal get togethers by locals, both from within the Breakfast Point community and the surrounding suburbs. As a result, it will contribute to a sense of "community" in the locality.
> The provision of "day tripper/destination" berths will provide an improved amenity and enhanced waterway experience for the general boating public."

Of course, it goes without say that the identified issue would not apply to residents of Breakfast Point but there is no escaping the trespass that would be committed by everyone else.

The EA claims that (page 100),

> "The provision of the proposed SPS blanket over the bed of Kendall Bay will reduce the general risk in Kendall Bay of contaminants being released and affecting human health",

is an "odd one" to find under a heading dealing with the "social" impact but, notwithstanding it, it is noted that the EA conveniently does not refer to the contaminants that will, invariably, be introduced by the boats using the marina nor does it make reference to the better outcome that will ensue from the remediation of the Bay if the marina does not go ahead. It is also an "odd" statement to make because it is entirely inconsistent with the expert report dealing with the impact on the aquatic habitats and associated biota (Vol 3 Executive Summary vi) where it says,

> "The laying of the blanket would cause more sediment to be re-suspended and greater increases in urbidity than pile driving, because a relatively large area of bed sediments (57,000 m2) would be disturbed over a prolonged period (30 weeks). The re-suspended sediment and increased turbidity could potentially have adverse effects on pelagic and epibenthic biota"

And (vi),

> "The resuspension of sediments resulting from deployment of the blanket has the potential to release contaminants from surface sediments into the water column, while that resulting from pile driving activities has the potential to release contaminants sequestered in both surface and deeper layers of the sediment. PAHs have a low solubility in water and a strong affinity for particulate matter and are therefore unlikely to be released into the water column in large concentrations. Heavy metals occur in dissolved, colloidal and particulate forms, but are generally more concentrated in sediments. Oxidation of deeper sediments and decomposition of organic matter, including the decay of the organisms trapped under the blanket, could lead to release of heavy metals from sediments. It is consequently suggested that elutriate tests be done to determine the concentrations that might be released into the water column when the geotextile blanket is laid and the piles are inserted. Organisms, such as zooplankton and bivalve molluscs, that feed on suspended particulates are more likely to take up these contaminants than those that are exposed to their water-soluble phases.
> Algae and bivalves are more likely to accumulate these contaminants than fish and crustaceans, both of which have the enzymes necessary to metabolise, eliminate or sequester PAHs and heavy metals. The threat to organisms resulting from elevated concentrations of contaminants on suspended particulate matter would be minimised by using silt curtains to confine and prevent the spread of sediment and turbidity plumes.
> The leaching of toxic components from anti-fouling paints applied to boat hulls, combustion of fuel in boat engines, accidental spillages of fuel, oils, bilge water and sewage, and onboard washing of boats could also introduce contaminants into Kendall Bay. The use of copper-based anti-fouling paints is of particular concern, because a large number of boats moored within a confined area are likely to contribute significant amounts of copper to the water column over an extended period. As the total copper concentrations within the water column already fall between the ANZECC/ARMCANZ (2000) 90% and 80% trigger values, it is recommended that appropriate measures be incorporated into the environmental management plan for the marina to reduce the possibility of greater harm to biota arising."

There is no justification for treating the EA process as something akin to a barrier that a proponent has to get over (by whatever means available) rather than a process in which the proponent presents all the facts and submits them to assessment.

Finally, the EA concludes by saying (page 100),

> "Overall, the proposed development will provide a positive social contribution to the locality and Breakfast Point, generally."

In view of the above and of the lack of detailed analysis of the impact from the point of view of the residents and owners of the *Community Association DP No 20347* parcel (such an obvious omission), the conclusion is without merit.

11.13 Heritage

Under this heading the EA concludes that (page 101),

> "The assessment determined that the proposed Marina will be visible from the three heritage items:
> • The Former AGL Powerhouse (City of Canada Bay LEP No. 383).
> • Cabarita Park – landscape, rotunda and swimming pool (City of Canada Bay LEP No.58).

• Scots College Boatshed (REP No.48)."

This conclusion is incorrect. The structure will be seen from two other heritage sites being the Aboriginal site in Glades Bay and from Cabarita Park. More will be said about this issue later.

The EA has it that the three sites it has identified will not be negatively impacted on because (page 101),

> "The significance lies largely in non-tangible associations. Where the setting of the item is significant, e.g. for Cabarita Park, it is for views *towards* the heritage item. These views will be unaffected by the proposed Marina due to its siting within Kendall Bay, without major impact on sight lines along Parramatta River"

and,

> "• *The significance of the items lies largely in non-tangible historical and cultural associations.*
> • *It does not physically impact on the heritage items.*
> • *While there may be limited impediment to the viewing of Cabarita Park, there will be no impediment from existing public vantage points.*
> • *The view from the items is not considered to be of historical significance. In the case of Cabarita Park and the Boatshed, the significance lies in views towards the item, which may be enhanced through increased visitation.*

This is clearly not a tenable conclusion. The incongruity of surrounding heritage sites i.e., old sites with a commercial undertaking is too stark to require comment. What is "heritage" if not respect for the past as represented by a natural surrounding that links them to the historical area known as Breakfast Point and that meeting with the Wangal people in 1788 who where on the other side of the river when John Hunter and they first laid eyes on each other? It was not a one way vision! And what's that obvious implied downgrading of "non-tangible associations"? God, Queen and Country are similar intangibles as is Motherhood and Christmas. Surely the proponent is not suggesting that these two should be devalued to the level of the crass commercialism that accompanies them!

In addition, one takes issue with the assertion that "views" around Cabarita Park will be "unaffected" because the marina will be in the Bay! This is an unusual proposition. There is no rule of the psychology of perception or of common parlance that requires an impact to be apparent only when looking towards the site rather, nor to require the impact to be a "physical" one rather than a visual one. In any event, from one perspective, it is possible to say that there will be a "physical" because the physical nature of the marina that will get in the way of the vista towards the desired object or horizon and, the fact is that views of Cabarita Park and the Scots College Boatshed will be impacted on by the marina when viewed from the foreshore walkway. The same can be said for the Scots College Boatshed.

The EA also says that (page 101),

> "• *The location of the development within Kendall Bay means the Marina does not impact on sight lines along Parramatta River.*"

This is incorrect. There will be an impact both from the River towards the Breakfast Point walkway and from the walkway to the River. More on this later.

The EA claims that (page 101),

> "The REP requires full assessment if there is potential for the project to impact on Aboriginal heritage. As it is deemed unlikely that Aboriginal sites remain on the western shore of Kendall Bay, there is no requirement to proceed to a full Aboriginal heritage assessment or community consultation. There is not considered to be any need for further Aboriginal archaeological investigations in relation to the proposed Marina."

In so far as this is limited to the actual marina site there is nothing to say about the claim but in so far as it is intended to apply more widely reference is made to the submission earlier under this heading.

11.14.3 Chemical Hazards

It is noted that the chemical hazards listed in the EA do not include hazards from fouling paint and diesel.

11.14.4 Natural Occurrences

The EA has it that (page 103),

> "The heights of the piles and height of the fixed jetty have been determined by accounting for the effects of global warming and the associated climate change effects. Vessels moored at the marina will simply rise and float at whatever water level occurs.
> The marina will not be affected by any natural hazardous events.
> Overall, the marina would not be exposed to significant hazards."

This does not take into account the impact of the boats floating higher in the water on the visual impact attributable to the raise associated with climate change nor to the effect on the visual impact of the **combined affect** of the climate change and high tides. And the EA is dismissive of the potential for "natural occurrences" such as several boats within the marina exploding in series as has happened recently north of the Harbour.

11.15 Economic

The EA claims that (page 104),

> "In relation to the effect on neighbouring marinas, the commercial marinas in the vicinity (River Quays and Cabarita Marina), are at 100% and 94% occupancy (refer to the *Demand Study* at **Appendix 11**). Other commercial marinas near the Sydney CBD are between 88% and 100% occupancy. Having regard for the demand for berths and the current occupancy levels, the Project will have little if any effect on berth occupancy at the marinas nearby."

This admission is important because it shows that there is unused capacity for boat storage facilities in the surrounding area. This is a more valuable basis for deciding demand for the proposed marina. What the proponent relies on is a hypothetical demand rather than actual demand and it is the later that is a more reliable measure of demand. This is particularly so when one takes into account the fact that the hypothetical demand the proponent relies on is based on an aggregate "west of the Harbour" assessment rather than one specifically based on the vicinity of the proposed site.

The EA does not assess the economic impact on the residents of Breakfast Point who will be expected to carry the costs of maintaining the associated facilities including the seawall, the

impact of having strangers enter on their private property, the impact on security and on the value of their property.

The EA goes on to say that (page 104),

> "The marina will provide local financial benefits as it will:
> 1. Create employment directly for a manager and assistants.
> 2. Create work for local service suppliers for both cleaning and on board vessel maintenance."

The reasoning process behind this conclusion has been exposed earlier when dealing with a similar claim and it is rejected. There is an absence of logic or legal basis for the conclusion. Moreover, reference is again made about *the Conveyancing Act s 88B* restrictions on access to the *Community Association DP No 20347* parcel by such persons who will commit a trespass on entry.

The EA lacks reliability and validity on this issue because it says nothing about the negative economic impact on the residents of Breakfast Point who have to provide the access ways, the open areas and the seawall and maintain all of them and, as well, see their property rights undermined by marina users who are not part of the *Community Association parcel*. On this point the EA says that (page 104),

> "The marina will contribute to the cost of maintaining the local community area. The area designated for the marina carpark, being Lot 53 in DP270347, has a Unit of Entitlement of 42 allocated to the lot. Therefore, the operator of the marina will be paying levies to the Community Scheme via this Lot 53 in DP270347 for the upkeep of community assets such as roads and the like.
> The cost for maintaining the marina will be paid by the marina management. The levies for vessels moored in the marina will be determined by taking into account the long term and short term cost for maintaining the marina. The local community will not be responsible for or required to contribute to the maintenance of the marina.

The conclusions contained within the quotation are not acceptable. The area set aside for the car park is part of the *Community Association parcel* and the owner of that lot is and does currently pay levies in accordance with its unit entitlement. Consequently, sitting the car park there will not create or add to the unit entitlement. Moreover, since the unit entitlement is fixed and the levy attracted is based on the unimproved capital value of the lot there is no added benefit to be derived from having the car park there. Accordingly, to the extent that the quotation implies otherwise it is misleading if not deceptive.

In so far as the last sentence in the quotation is concerned it is clearly correct and yet it is misleading because it does not explain that the *Community Association DP No 20347* is required to maintain and make available its property for use by the marina users (whether they use the car park or not).

11.17 Cumulative Impacts

Under this heading the EA claims that (page 106),

> "The cumulative impact of the proposed Marina would be positive, for the following reasons:
> • The community will obtain a fixed jetty to enhance the water experience along the foreshore and an area for informal social gatherings, which, will enhance the sense of

"community" in the locality.
• The general boating public will be provided with destination berths to enhance their enjoyment of the Parramatta River and Sydney Harbour waterway.
• The covering of the bed of Kendall Bay will reduce the risk of disturbance of contaminants.
• The proposed Marina will reduce the wave energy at the near shore areas where sediments containing contaminants could be disturbed.
• There will be a net commercial benefit to local service providers and Cabarita Marina (fuel supply).
• While there will be a small increase in vehicular traffic, the associated noise and maintenance costs will be nominal. The marina will be responsible for its required share of maintenance costs."

A close analysis of these conclusions will find them wanting. Reasons for this have been given throughout this submission. It remains to say that an extra bay with boats on the Parramatta River will not add to the general community "wellbeing" but will, instead, reduce the general "wellbeing" because it will take away one of the last remaining bay without a marina in it. The undeniable position is that boat users completely dominate the use and enjoyment of bays on the Parramatta River at the expense of non boat users.

In so far as "enhancing the sense of community the situation is the opposite. It will divide the community and will encourage litigation because of the trespass onto private property that it will promote and, off course, it is misleading and or deceptive to suggest that the "public" will benefit when the "public" is precluded by the *Conveyancing Act s 88B* restrictions from using Community Association property to get to and from the marina.

The conclusions lack balance because they do not even try to see the situation from the perspective of the people most directly affected i.e., the residents of Breakfast Point and so question the reliability and validity of the arguments presented in the EA.

The same thing can be said regarding the reference to the reduced risk of disturbance of the containments which, on any logical grounds, cannot be a better solution than complete remediation which the polluter has an order to comply with. The absence of logic is also to be found in the conclusion reached in the EA regarding the perceived commercial benefits (see earlier under the earlier heading).

As to the last dot point it is noted that, as in the rest of the EA, this one tries to underplay the negatives and overplay the positives thus, denying it any claim to credibility. The marina will not pay any maintenance costs because it is outside the *Community Association DP 20347* parcel and in so far as the car par can be considered as being part of the marina it will not add to the current levies that the owner has to meet whether there is a car park on it or not.

11.18 Approvals and Licences

The EA lists the "approvals and licences" that it needs for the project but these do not include land owners' consent from the City of Canada Bay Council and the *Community Association DP No 20347* and, to this extent the application is incomplete.

12 Statement of Commitments

12.2 The Site

Under this heading the EA says (page 108),

> "The proposed Project is to be carried out on the "subject site", as shown in **Figure 3**, below, comprising:
> -part Lot 53 in DP 270347; and
> -the area of water within Kendall Bay subject to a proposed NSW Maritime Lease"

It is noted that this description is different to the one submitted for the MPA and NSW Maritime consent and does not include reference to **lot 55 DP No. 20347** which, at one time was in the name of the *Community Association DP No 20347* and was later changed, without approval of the *Community Association*, into the name of the proponent.

12.8 Traffic

Under this heading the EA essentially repeats the claim that (page 115),

> "The lot upon which the Marina car park will be located currently has Units of Entitlement allocated and contributes to Community levies for the upkeep of Breakfast Point Community roads."

A response has already been given to this issue. It is misleading and or deceptive as regards the contribution (since it is payable whether there is a car park there or not). Relevantly, **the marina itself will not contribute any levies because it is outside the Community Association DP 20347 parcel even though the marina users will be using the community parcel to get to and from the facility.** In so far as it refers to "roads" when, in fact, there are no "roads" within the *Community Association parcel* (there are "access ways" which are entirely different).

12.10 Heritage

For this heading the EA says (page 115),

> "As the heritage significance of the heritage items in the vicinity of the subject site will not be affected there is no requirement to provide commitments to mitigate impacts. However, the following are provided to guide the Project more broadly:"

A response questioning this conclusion has been given and no more will be said.

12.11 Public Benefits

The EA claims relating to public access in general. Destination berths, toilets, kiosk, manager's office, sewage pumpout, ferry embarkation and disembarkation is denied since it will amount to a trespass because of the breach of the *Conveyancing Act s 88B* restriction previously discussed.

12.11 Sediment Protection System

Under this heading the EA again asserts that (page 116),

> "The installation of the Sediment Protection System (SPS) will result in the availability of a marina facility to the general public in an area which would otherwise not be available to them.
> The provision of the SPS is in the public interest because it will achieve the land use planning principles and policy considerations that underpin Section 5(a)(ii) of the EP& A Act, by *"promoting and coordinating the orderly and economic use and development of the land."*

It is submitted that the SPS does nothing of the kind suggested in the EA. **It might change the type of use but it does nothing to otherwise make a particular area of the Bay available for use.** For example, with no marina there, a person could use a boat or a kayak to go to the same spot in the Bay that he/she can do with the marina. In fact, **the marina will reduce the available Bay area that a person can use since the area with the marina structure on it is not available for boat, kayak and other use.**

13 Conclusion

Under this heading the EA concludes that (page 117),

> "• The proposed Inner West Marina is a timely response to the much sought after on-water vessel storage within Sydney Harbour.
> • The Project Application demonstrates current and future demand for the proposed marina.
> • The Project is a positive contribution to the revitalisation of Kendall Bay, part of a former waterfront industrial precinct, the foreshores of which over the past decade have been transformed into a waterfront residential estate.
> • On statutory planning grounds, the Project is consistent with the Objectives of the W1 Maritime Waters zone in that the Project has demonstrated that *"...it is compatible with, and will not adversely affect the effective and efficient movement of, commercial shipping, public water transport and maritime industry operations."*
> • In addressing the environmental impacts of the Project and the suitability of the site, the specialist reports have demonstrated that any environmental impacts of the Project are minimal and can be suitably managed and mitigated.
> • In relation to the key issue of contaminated sediments, the proposed remediation approach ("geotextile blanket" over the bed of the proposed marina lease area) will ensure a significantly reduced level of contaminants will be disturbed.
> • The construction of the proposed marina will also reduce the wave energy reaching shallow water and consequently reduce the disturbance of contaminated sediment, a situation which is not managed at present.
> • The site is easily accessible, has sufficient area and dimensions, and is suitable to accommodate the Project.
> • The Project does not restrict the navigation channel for other waterway users or impact on the existing and future opportunities for public recreation.

These conclusions are rejected. As to the first and second dot point the evidence in the EA is that in the vicinity of Kendall Bay there is an excess of supply over demand for boat storage. Moreover, the numerous grounds mitigating against any further expansion of boat storage areas, such as the finite supply of bays and in this particular instance because of the interference with land title rights and interests of other owners not associated with the proponent and the limitations on right of entry into *Community Association DP No 20347* property.

A particular objection is taken to the reference to the "positive contribution to the revitalisation of "...the foreshore". The foreshore is property which is not owned by the proponent and

accordingly, it has no right what-so-ever to "revitalise it. There is no land owner's consent to this.

Contrary to the third dot point the proposal does not "rivitalise" the Bay but instead with revert it to a commercial state from the natural state it has achieved after more than 100 years as an industrial site. This commercial state is incompatible with the residential architecture of the residential estate along the Bay.

As to the fourth dot point the conclusion is rejected because the structure will interfere with the use of Parramatta River by ferries, rowers, canoeists, kayakers, water skiers and others.

As to the fifth dot point the conclusions drawn by the expert reports are not accepted, for various reasons, for example some of them have stepped out of their area of expertise and went on to the point of actually determining the issue (which is for the planning authority to decide).

As to the sixth dot point it is re-iterated that the proposed SPS is a second best proposal and that the best one is for the full remediation of the Bay.

As to the seventh dot point it is not possible to reach this conclusion because there is no assessment of the impact of the propeller movement off the boats alone and the boats and ferries acting together.

The conclusion in the eight dot point is neither here nor there and no more will be said about.

As to the final dot point the conclusion is not supported by Sydney Ferries and should be rejected.

The following section of the Response corresponds to Vol 2 of the EA

Appendix 1

Volume 2 consists of three Appendices of which **Appendix 1** is made up of drawings, photographs, NSW Maritime Authority Plans and hydrographic survey drawings.

Note is taken of the drawings which show that part of the proposed marina structure (the manager's office) extends over the seawall (which is part of the *Community Association DP No 20347* parcel) and on to foreshore walkway over which the *Community Association DP No 20347* holds a lease from the local Council. This is relevant because land owners' consent has not been obtained from these two bodies. One of the drawings that shows this "trespass" is MMPO2 (in vol 10 behind the management plan)

The same drawings have a legend which shows "pedestrian public access" marked on two "access ways". This is relevant because the representation is contrary to the restrictions imposed in the easement for their use pursuant to the *Conveyancing Act s88B*. These restrictions are for entry (which is not conceded) on foot for the purpose of recreation and not for the purpose of transit to a marina. The concession is not made because the easement in question is what is known as an "easement in gross" and these are limited to such bodies as councils and prescribed corporations such as electricity providers and cannot extend to "members of the public" (*Conveyancing Act s 88A).*

Furthermore, as previously submitted easement users are not permitted to create entry and exit points at will (as here) but are limited to using existing entry and exit points and these do not include the points where the proposed marina is to be sited.

Appendix 2

This encloses a letter from Sydney Ferries dated 29 June 2007 expressing concern over the proposal which it "strongly opposes". These concerns are supported by this submission.

The **Appendix** also encloses a letter from *Rowing NSW* dated 7 January 2008 opposing the application because of the impact on rowers and because it is "totally inappropriate" in the area. This objection is also supported by this submission.

Relevantly, **Appendix 2** has a copy of the Director -General's requirements dated 14.1.08 and it identifies the land to be developed to be **"19-21 Tennyson Road Breakfast Point"** which is clearly not the land in the EA (even if one were to disregard the incomplete description mentioned earlier in this submission).

Appendix 3

A document in this **Appendix** is a letter from NSW Maritime that attaches its land owner's consent to the project application. Both the covering letter and the consent refer to the relevant land as being **"19-21 Tennyson Road Breakfast Point"** which makes the same error as the Director-General's description.

Appendix 3 is also relevant because it has a drawing marked "SK 15" which was submitted to NSW Maritime. This shows "pedestrian public access" and 2 areas south of the marina as "vehicle and pedestrian public access". It is re-iterated that there is no "public access" either for pedestrian or for vehicles that can be used by marina users as this will amount to a trespass pursuant to a breach of the easement conditions prescribed under the *Conveyancing Act s 88B*. The same drawing mentioned above (SK 15) shows the proposed car par area as almost twice the size of the area shown in the plans with the EA. This incorrect nature of the description and representation in the drawing would have been a fact taken into account in giving the land owner's consent (by NSW Maritime) and by the Minister and the Director-General (in giving the MPA approval and in issuing the requirements).

It will be recalled that the EA has a certification given pursuant to the Director General's requirements on the first page and these descriptions are clearly inconsistent with that certification.

Following behind drawing SK 15, is another drawing (the descriptive number is not clear-it appears to be SK 13?/SK 17?) that shows the main arm of the proposed marina as extending past the seawall and onto the foreshore lot which is relevant in terms of identifying the affected land and hence, the land owners' consents that need to be obtained. **It is emphasized that the foreshore lot is not land owned by the proponent and it has no right to do anything impacting on it.**

The following section of the Response corresponds to Vol 4 of the EA

This Vol of the EA seeks to assess (a) Construction and Operation, (b) Historical and Aboriginal Heritage and (3) Traffic and Parking.

Construction and Operation

There is a need to distinguish between the construction of the car park and the construction of the marina.

In so far as the car park is concerned that is within the *DP No 20347* and the developer can make use of the common property to assist in the construction because the Community Management Statement provides for it (although one can argue that some of its provisions might be unlawful). However, this is negated by the requirement for the "carpark" to be "on site" which, in this instance, it is not since it is on separate title and on land separated by private property so, it is submitted, that the proponent cannot make use of Community Association property for the purpose of constructing the carpark. The same cannot be said for the marina itself. That structure is outside the scope of *DP No 20347* and the *Community Association DP No 20347 property* cannot be used in that process or for anything else (as previously argued). Any attempt at using it for this purpose will constitute a trespass and might also constitute a criminal trespass. This is because the *Community Association DP No 20347* parcel is private property and is not available for use without consent.

Historical and Aboriginal Heritage

This will be dealt with summarily because it was touched upon as part of the material in Vol 1. The report notes that,

> "This assessment determines whether the proposed Marina is likely to affect an item of Aboriginal heritage significance and therefore require further assessment.
> The assessment determined that the proposed Marina will be visible from the three historic heritage items, but will not impact on the heritage significance or values of any heritage items in the vicinity."

The lack of a significant impact from those items (the Former AGL Powerhouse (City of Canada Bay LEP No. 383); Cabarita Park (City of Canada Bay LEP No.58) and Scots College Boatshed (REP No.48)) is said to arise because (Executive Statement Vol 4 p ES1),

> "1 The significance of the items lies largely in non-tangible historical and cultural associations.
> 2 It does not physically impact on the heritage items.
> 3 While there may be limited impediment to the viewing of Cabarita Park, there will be no impediment from existing public vantage points.
> 4 The view from the items is not considered to be of historical significance. In the case of Cabarita Park and the Boatshed, the significance lies in views towards the item, which may be enhanced through increased visitation.
> 5 The location of the development within Kendall Bay means the Marina does not impact on sight lines along Parramatta River.
> No Aboriginal sites were identified as impacted during the desktop survey. Due to the intensive land use it is considered highly unlikely that an Aboriginal site will remain within the Marina footprint. No further assessment is considered necessary."

A response has already been given to this aspect of the EA hence, here it will be commented on briefly. It is important to note that the report writer, with respect, correctly, noted the limitations of the conclusion it arrived at by stating (page 2),

> "This assessment is, by its nature, a **subjective interpretation and it is possible that another professional may interpret the historical facts and physical evidence in a different way. In particular, the assessment of visual impact on heritage items can be subject to a number of differing interpretations (bold added)**."

While the absence of items of Aboriginal heritage significance, in the site of the proposed marina is not disputed, what is disputed is the impact that the marina will have on Aboriginal sites other than in the marina footprint (more on this later) and the downplaying of the significance of their "non-tangible" nature when there is no statutory backing for that approach to the assessment. In deed the Sydney REP requires consideration of the impact on sites in the vicinity of the proposed development (which is acknowledged at page 3 of the report).

Because the issue will be covered in the Opposing Submission, only a brief reference is made to the non reference to sites within the vicinity and the rejection of an impact from the Parramatta River and the Scots College Boatshed. However, strong objection is taken to the part of the report that falls outside the scope of expertise of the reporter i.e., the part that says (page 1),

> "The Marina will compliment the existing Breakfast Point residential development..."

Clearly, it is not within the area of expertise of a report on Aboriginal heritage to assess the "complementarities" or otherwise of the proposed development and the adjoining residential development and this will need to be disregarded. Unfortunately this type of intrusion finds expression in other parts of the report thus, in dealing with the question,

"Why is the new development required to be adjacent to a heritage item?" as it applied to the former Powerhouse it fell in the trap of seeming to be running the proponent's line, and gives the answer,

> "The proposed Marina is to be located along the western shore of Kendall Bay. The shore in this location is relatively protected and is out of the Parramatta River navigation channel. The remainder of the shoreline associated with the Rose Group redevelopment is unsuitable for a marina as it is within Parramatta River its self and construction of a marina would impinge on the navigation channel."

The marina is "**not required**" to be adjacent to the former Powerhouse and it can easily be in the New Zealand or elsewhere for that matter and yet the answer seems to take it for granted that it is mandated for there to be a marina at that site. This same problem comes up again in relation to Cabarita Park and Scots College Boatshed.

Cabarita Park seems to tick most of the criteria calling for protection e.g., (page 16),

> "The significance of Cabarita Park lies mainly in its historical, non-tangible import to the local community (criterion a). At a State level the Federation Pavilion, now located in the Park, is of historical significance as the structure under which the Federation of Australia was inaugurated on 1 January 1901. There are no views between the Marina and Pavilion.
> Additionally, the Park is of aesthetic significance (criterion c) as it retains some natural foreshore character and is an example of layout and planting from the 1920s and 1930s. At a local level the Park meets criterion f as it contains a rare Victory Coppice of native trees and criterion g as being representative of plantings and layout from the 1930s. The proposed Marina will not affect the historical values, the rarity or the representativeness.
> Views from the eastern foreshore of Kendall Bay will be affected. These views, however, have already been modified by the residential development on Breakfast Point. The proposed Marina is in keeping with the development and will form a riverine aesthetic that is consistent with views in other directions. The main aesthetic element of the Park's significance is the retention of natural foreshore character. This will not be affected by the construction of the Marina as views of the natural foreshore elements will not be obscured when travelling along Parramatta River. The Marina may enhance access to this element by attracting more visitors to the area. The second aesthetic element to the Park's significance is its layout and plantings from the 1920s and 1930s. The proposed Marina will not affect this element of the Park as there will be no physical impact on the Park and views of the plantings from the River will remain unrestricted."

What this seems to be saying is that the park significance is to be assessed by taking it apart and looking at each individual part separately from the other. One can imagine that such an approach can be a useful one in some instances but, it is submitted, this is not one of them. If you take the Rotunda by itself and pour concrete over the rest of the park you no longer have a significant park but you still have the Rotunda and that object has an entirely different value in isolation than it does as part of the park.

The statement that the (page 17),

> "Views from the eastern foreshore of Kendall Bay will be affected. These views, however, have already been modified by the residential development on Breakfast Point. The proposed Marina is in keeping with the development and will form a riverine aesthetic that is consistent with views in other directions."

This is not acceptable. One act of degradation is not a sufficient justification to commit another. There is no "riverine aesthetic"worth talking about (with its noise and pollution of the Bay to mention only two) when compared with an "open bay" with kayaks, canoes, skiers and pelicans floating by to mention a few). In any event that assessment would seem to fall outside the

expertise of a "heritage" report to make. One may also mention the impact from viewers along the walkway as being a negative that should have received some prominence.

The report goes on to say (at page 17),

> "The aesthetic elements of the Park's significance lie in the public's ability to appreciate the foreshore and plantings of the Park, not in views from the Park, which have already been modified by residential development. The proposed Marina may encourage greater visitation to the area, thereby increasing public appreciation of the Park and its historic significance. The proposed Marina is not inconsistent with current development in the area and the Park itself already contains a marina and moored boats are an integral element of the existing vistas."

This is not acceptable. The fact that there has been some modification of the views is not a justification for a further modification. One has to, at least, assess the impact of the further modification rather than simply accept that further modifications are warranted. The public's ability to appreciate the foreshore and plantings of the park will be reduced when one takes views from the foreshore walkway. The reminder of the statement is not meaningful unless a comparison or assessment is made with the level appreciation and enjoyment that the public would experience looking across the Bay without a marina on it. Without such an assessment the claim does not get past being *a non sequitur*. The same thing can be said about the reference to the marina next to the Park.

To the question "How does the new development affect views to, and from, the heritage item? What has been done to minimise negative effects?" the answer is to say (page 17),

> "As the proposed Marina is tucked against the western shore of Kendall Bay, views to Cabarita Park will remain open to people travelling in an easterly direction along Parramatta River, from Breakfast Point and from across the River. For people travelling in the opposite direction, Cabarita Point and the Park itself will screen the Marina for much of their progress, only coming into view as the Park is passing out of view.
> Views from the Park will be affected in as much as they will, potentially, include the Marina. The proposed Marina, however, is consistent with the current vistas and use of the Parramatta River. Views from the Park have, in recent years, been extensively modified towards Breakfast Point with the remediation of the former AGL site and the construction of residential housing. The transformation of the derelict industrial site may be seen as an improvement in the view."

Views to the Park may remain open to people travelling down the River but there is no way that they will remain open to people on the walkway or to residents in the ground floors of Breakfast Point.

It might be correct to say that removal of the "derelict industrial site" was an improvement but this begs the question while raising questions about the reliability and validity of the report because, it would seem indisputable, and that a natural bay without boats would be better than converting it into a commercial one. One would have thought that, from a heritage point of view, a Bay with the history of this one, which the report itself ties to Bennelong, would have more going for it as a "natural bay" than as a commercial one.

The report considers the question, Is the development sited on any known, or potentially significant archaeological deposits? The report provides the following answer (in part)(page 18),

> "The development is known to be sited on the location of the former Kendall Bay Coal Wharf, also known as the Breakfast Point Jetty. The Wharf was archivally recorded prior to its demolition. The potential

> remains for elements of the Wharf, for example piles and items lost off the side of the Wharf, to be present on the River bed. The potential for these items to contribute to our understanding of the AGL site or the Wharf is considered to be limited, given the previous archival recording and the nature of any such deposits, which could be disturbed by the demolition of the Wharf and the actions of the River."

This question is mentioned because it leads to another question which is, why was the wharf removed in the first place? What power did NSW Maritime have to require the proponent to remove the wharf and why did the proponent alter the seawall, as mentioned in the report, for a marina before consent had been given for it?

The report goes on to say (p 18),

> "The significance of Cabarita Park will be unaffected by the proposed Marina. The Marina may increase he public's appreciation, through the attraction of visitors and the provision of an extended viewing platform."

This is mere speculation. There is no supporting evidence and it is inconsistent with expectation. If you take a park and surround it by commercial undertakings the reasonable expectation is that its use and enjoyment would be lower than if it was in a "more open" environment. People go to parks to see and be surrounded by nature not to be surrounded by commercial activities. The rest of the conclusion is equally unsustainable. Why would a marina attract more visitors than seeing the clear blue waters of Kendall Bay and some kayakers or a person in a rubber tube being dragged behind a boat? This is mentioned not to suggest that this conclusion is any safer than the one in the report but to show its inadequacy and judgemental nature.

The assessment of the Scots College Boatsheds follows the same structure and it is said (p 18),

> "*The Scots College Boatshed is significant for its continual use as a rowing shed on the Ryde foreshore of the Parramatta River. The boatshed has been on site since the 1930s and represents the ongoing use of the river in this area for social and competitive rowing since the mid-nineteenth century. The boatshed remains are an important contributor to the collection of foreshore boatsheds that are situated up and down the Parramatta River.*
> The Boatshed is therefore significant historically (criterion a), for its association with River rowing clubs (criterion b), aesthetically as a group of sheds that occupy the foreshore (criterion c), socially for those who have used the Boatshed (criterion d) and as a representative of similar boatsheds in the area (criterion g). The majority of the Boatshed's significance lies in non-tangible historical and social values. The Boatshed holds aesthetic significance for views towards the item, however, views from the Boatshed are not listed. The proposed Marina will therefore not impact on the ascribed values.

The conclusion needs to be read with care because it is limited to "listed views from" the Boatshed and not to "views to" the Boatshed to which the report historically significant, aesthetically significant and socially significant. This means the conclusion is wrong in so far as it relates to views towards the Boatshed. The report should have made this abundantly clear by a better wording of the final sentence. The views of the Boatshed from Breakfast Point will be impacted on. More importantly, the use of the River by the rowers from that school (and others) will be impacted on because of safety issues.

Generally, the conclusions reached in the report on the Boatshed are similar to the conclusions regarding the AGL Powerhouse and Cabarita Park and, accordingly, it is subject to the same types of criticisms and there is no need to go any further here although later, in the Opposing

Submission, the issue will come up again but before leaving this issue reference will be made to the statement that (p 19),

> "Yes, the significance of Scots College Boatshed will be unaffected by the proposed Marina as the nontangible historical and social significance will not be impacted. Additionally it is difficult to view the Marina and the Boatshed at the same time from the River."

The report found that the Boatshed had significant, historical, aesthetic and social importance when views are taken towards the Boatshed. If this is so then it cannot be right to say that the proposed marina, which will block these views, will leave the Boatshed unaffected. One of these claims has to be wrong and both may be wrong but they both cannot be right. The report cannot have it both ways. As to the last sentence what is its import?

Traffic and Parking

The fundamental error in this report is that it moves from the premises that marina users have right of entry into the *Community Association DP No 20347* parcel. As previously stated this parcel is private property and is not available for the use by marina users.

In addition to the law regarding the use of private property there is the additional considerations imposed by the restrictions on use imposed under the provisions of the *Conveyancing Act s 88B*. This limits non resident access to the parcel to persons on foot who enter for the purpose of recreation. Car users do not have the right of entry whether they do so for recreation purposes or not. Hence consideration of traffic and parking are irrelevant as any entry by vehicle is a trespass.

Furthermore, any entry is for the purpose of using the common area of the parcel for the purpose of recreation. To get to a boat i.e., to use the community association common property for the purpose of transit to some other area for the purpose of recreation is not a lawful use under *s 88B.*

As previously submitted easements limit entry and exit to existing easement entry and exit points and no new entry and exit points cannot be created by the easement users. Under the present proposal marina users would be exiting the parcel at the marina arm (when they go from the car park to the walkway and over the seawall to their boats) and would be entering the parcel (when they get off their boats and go over the seawall and onto the walkway and from there to the car park) at points newly created for the marina. This is unlawful and to the extent that the statement implies a "right to use" it should be considered under the certification given pursuant to the Director General's requirements. Further, it is noted that an attempt by Sydney Buses to run buses through the community did not go ahead when the private nature of the property was pointed out to it.

In terms of the easement it is stated that the easement that has been referred to here purports to give members of the public the limited right mentioned above. However, this is not conceded. The easement in question is what is known as "easement in gross." These easements do not capable of giving rights of usage to members of the public. This means that, more likely than not, the limited right previously mentioned may just turn out to illusory.

The *Community Association DP No. 20347* holds a lease over the walkway/foreshore lot from the *City of Canada Bay Council* which is to be used for the purpose of recreation on foot or by bicycle.

Accordingly, any other use of the lot, for example, to get onto or off a marina, will breach the lease and is unlawful. **It is stressed that the proponent is not the owner of this land and it has no right to do anything that will impact on it.**

At page 5 the report claims that the "spine roads" in Breakfast Point are designed to accommodate "bus service." This is no more than an assertion. There is no evidence that the "roads" were built to accommodate bus transport.

A point that has been made previously but, because of the words used in the report, makes it imperative to make it again because it goes to the fundamentals of the report. There are no "roads" in Breakfast Point. There are access ways but these are not roads under the Roads Act and so that members of the public and the assessors should not be under any illusion that being "roads" anyone can use them. Some use amounts to trespass and in some instances this can upgrade to criminal trespass.

At page 7 the report talks about "public transport" and about the "low speed traffic". This is not the everyday experience of residents so that to the extent that it influenced the recommendations it requires re-examination.

At page 9 the report considers the use of the parking facilities by services vehicles. It is reiterated that entry of non resident's vehicles constitutes a trespass.

At page 10 the report considers the vehicular usage during construction of the car park and of the marina. While there is no issue concerning the car park the marina construction is another matter. In submission construction workers and contractors will commit a trespass when using the access ways for work relating to the marina.

The summary of the report has it that (p 12) is clearly predicated on there being a right of public access which is, clearly, an incorrect assumption.

The following section of the Response corresponds to Vol 5 of the EA

Visual assessment report

The visual impact of the proposal is one of great significance and needs to be approached with care because it is, for the most part, a subjective experience. The report in the EA, with respect, correctly concedes as much by saying (p 14),

> "The assessment of visual impacts is a field that requires a degree of subjective judgment and is not completely objective."

This aspect is important because the report, with respect, correctly discloses that (p 9),

> "I have been involved with the Applicant and other consultants at the design stage of the proposed marina and had recommended amendments to the scale and extent of the marina at that time. I also advised the Applicant on limiting the eastern extent of the proposed marina to mitigate potential view loss effects on viewing locations to the south and southeast of the site. The final layout and the eastern extent of the arms of the proposed marina have been considered partly based on my advices to the Applicant and I am generally in support of the overall scale and the extent of the proposed marina."

In other words the author is both judge and advocate of the issue. This gives raise to questions of objectivity which, in the context of a subjective field of study, cannot be confidently disregarded. This is not to say that the conclusions are biased but rather that a fair minded person would not have confidence in its conclusions. With this in mind consider the Executive Summary (p 4) where it says,

> "9. There would be no significant visual exposure of the proposed development from roads with the exception of the southern terminus of Pellisier Road (Putney), Tennyson Road (Tennyson Point), Ross Street (Gladesville) and Wharf Road (Gladesville). The proposed development would be visible from the foreshore reserves located below the southern termini of these streets."

What this appears to be saying is that the (significant) visual exposure from the named roads is diluted by the absence of a (significant) exposure from other roads. With respect nothing can follow from this unless there are other comparable roads that can be used to make the comparison and for this purpose, it is not enough to simply point to a road that is at a similar distance from the site but is over a hill or behind a building. In other words, the impact from the named roads needs to stand on its own i.e., as being the subject of a significant impact. Note that this is not a matter of personal assessment or subjectivity but of logic.

The **Executive Summary** says three levels of assessment were taken. The first was within 100m from the marina, the second within 100m -1000m and the third over 1000m. On this basis it found that the marina (p 5),

> "It would be visible from the foreshore walkway adjacent to the western and southern shoreline of Kendall Bay, Cabarita Rivercat Ferry Wharf, foreshore to the southeast of the Wharf and Putney Point Vehicular Ferry Ramp. It would be visible from the townhouses and apartment buildings in Manors Precinct East and Wharf Precinct in the Breakfast Point residential development and some apartments in Kendall Inlet."

And that,

> "12. The overall effects and impacts rating for the high view sensitivity zone (close range zone within 100m distance from the site) in the public domain were assessed to be high. Highest individual levels of effects were found for close views from the waterway and the foreshore walkway along the western shoreline of Kendall Bay, including the intertidal beaches.
> 13. The overall effects and impacts rating for the high view sensitivity zone in the private domain were also assessed to be high. Highest individual levels of effects and impacts were found for close views from the townhouses and apartments in Manors Precinct East and Wharf Precinct at ground level, decreasing for higher floor levels.
> 14. The reasons of high rating impacts on high view sensitivity zones were mostly due to the potential presence of the proposed marina in the foreground of the views from these locations and the resultant change it would cause to the view compositions and visual character of those views."

And it goes on to say,

> ""15. There would not be unreasonable view loss effects of the proposed marina on the potential visual catchment generally, but there would be potential loss of the views of parts of Parramatta River and the sense of the river sweeping towards Kissing Point Bay when seen from viewing locations along the southern shoreline of Kendall Bay and part of Cabarita Park."
> "16. There would also be view loss effect of parts of Parramatta River and the far shoreline from the foreshore walkway and the ground floors of the residential development adjacent to it, to the west of the site of the proposed marina. The proposed wide fairways assist in maintaining some of the latter views in a view experience which, with the exception of static private views, is a dynamic experience for all viewers and one which is affected along only part of a continuous foreshore access way.

Properly, interpreted these lead to only one conclusion i.e., within 100m there is a "high" visual impact.

Using 100-1,000m as the criteria, it was concluded (p 5),

> "17. The overall effects and impacts rating for the medium sensitivity zone (medium range locations within 100m and 1000m from the site), both in the public and private domains, were assessed to be low, low to medium or medium. A few exceptions to these ratings were the southern end of Tennyson Road and Pellisier Road and Putney Parade on which there would be higher visual effects and impacts.
> 18. There would be a potential view loss effect of the existing views of the constructed western shoreline of Kendall Bay when seen from medium range viewing locations to the southeast, east and northeast. This view loss effect is not considered to be significant due to the constructed nature of the shoreline and the medium and high density residential backdrop of the site when seen from these directions which overall has a low to moderate scenic quality."

There is no reference here to the visual impact from the country club and the Waterfront Park or from the high rise apartment buildings or from the bays across the river and of particular concern is the minimisation of the visual impact by reference to the "constructed nature of the shoreline and the medium and high density residential backdrop." One would have thought that a comparison of the visual impact as the Bay is now with the visual impact with a marina in the Bay would be a better measure of the visual impact of the marina rather then falling back to a subjective assessment of the import of the background.

In terms of the third criteria (1000m+) it was concluded (p 6),

> "19. Low sensitivity zone locations (distant locations at greater than 1km distance from the site) included public domain views. The overall effects and impacts rating for the low visual sensitivity zone were assessed to be low."

There is no dispute with this. What is in dispute is the conclusion i.e., how do you go from the visual impact ranging from medium to high to (p 6 and Table 4.1),

> "22. The proposed development was found to be generally consistent with the provisions of the Planning Instruments relevant to visual impacts."

This is like saying that, high impact + medium impact = low impact!

A reference was earlier made to the potential unreliability of the conclusions reached in the report and, in that context, note should be taken of the comment made concerning the "public benefits associated with the proposed marina (p11)" and to the "Boat Storage Policy" (p 13) These are not a matters that should have intruded in an assessment of the visual impact. They are outside the scope of the report and strongly suggest that one purpose of it is as an advocacy tool rather than as an aid to the assessment.

The report carried out an assessment based on the requirements of the Sydney REP. It looks at the Aims of this instrument and tries to give it meaning by reference to other instruments e.g., the DCP, the SREP and the zoning. This is not acceptable. The Aims must be assessed in their own right and are not subject to and controlled by other instruments. There is no justification for having the issue covered by separate instruments if the one instruments covered it.

The report continues (p 40),

> "To the extent that the zone promotes the use of the waterway for public and private uses among which marinas are permissible, the proposal is considered to enhance and maintain the recognised attributes of the waterway and foreshores.
> In protecting the natural assets, the proposed development has been limited in the distance to which it extends eastward towards the main channel of the Parramatta River. Its eastern extent is approximately limited to the extent to which the former jetty extended in part of the site for the proposed development. While different in character and area, the degree to which the proposal could block views or cause view loss from the waterway, and many foreshore locations, is limited compared to the former wharf's impacts."

This conclusion appears to confuse the meaning of "protect", "enhance" and "maintain". To properly appreciate the way that the report has "lost its way" it is necessary to refer to the aims of the SREP which are quoted at page 40 of the report and they are,

> *"(1) This plan has the following aims with respect to the Sydney Harbour Catchment:*
> *(a) to ensure that the catchment, foreshores, waterways and islands of Sydney Harbour are recognised, protected, enhanced and maintained:*
> *(i) as an outstanding natural asset, and*
> *(ii) as a public asset of national and heritage significance,"*

It is not open to dispute that clause (a) is a proviso applying to (i) and (ii) i.e., the objective is to recognize, protect, enhance and maintain a "natural asset" (here a bay in its natural state) not as a commercial marina. There is nothing natural about a commercial a marina. Furthermore, the asset is to be a "public" one not one limited to use by boat owners at the expense of the public. In addition, you do not protect a "natural" asset by changing nor, can it be "maintained" by changing

it, nor can it be "enhanced" by completely changing its character. In this instance an example of enhancement would be to remediate the Bay rather than sweeping the contamination under the carpet and adding new sources of contamination (anti-fouling paints and exotic creatures etc.). **It is to be noted that the proponent is not the owner of the land being the foreshore so that it cannot do anything on it that would profess to be the right of an owner.**

The report then considers clause (f) which is to,

> "(f) to ensure accessibility to and along Sydney Harbour and its foreshores"

And it concludes that (p 40-41),

> "The proposed development does not have any negative impact on the existing accessibility to and along the Parramatta River channel and its foreshores. It would not affect the navigation channel.
>
> There are a number of public access provisions within the proposed development that would enhance the accessibility to the public asset of Parramatta River."

The claim in the first sentence is not correct. Firstly, the marina will reduce the open water area available for use, secondly it limits its use to people with boats and in this way removes it from public use, thirdly Sydney Ferries has argued against because it will interfere with navigation and safety, fourthly, it has already been pointed out that the public and the boat owners cannot use the facility because it will require them to commit a trespass to do it. **Fourthly, the foreshore lot is not owned by the proponent so it cannot do anything with it without the owners consent (which it does not have).**

The report continues by referring to clause 2 which adopts the principles that,

> *"(a) Sydney Harbour is to be recognised as a public resource, owned by the public, to be protected for the public good,*
> *(b) the public good has precedence over the private good whenever and whatever change is proposed for Sydney Harbour or its foreshores,*
> *(c) protection of the natural assets of Sydney Harbour has precedence over all other interests."*

The report adopts the same argument it did in relation to clause one and seeks to find support in other instruments. There is no need for that. The words are clear and there is nothing to do but give them their normal grammatical meaning. Kendall bay is a "public resource" but the commercial marina leasehold is not. Further, Kendall bay cannot be protected as a "natural asset" if it changed from its natural state to a commercial undertaking. **Reference is again made to the fact that the proponent is not the owner of the foreshore lot.**

At page 41 the report examines the planning principles of the Sydney Harbour Catchment which it gives as being,

> "The relevant planning principles for land within the Sydney Harbour Catchment are as follows:
> *(b) the natural assets of the catchment are to be maintained and, where feasible, restored for their scenic and cultural values and their biodiversity and geodiversity,*
> *(c) decisions with respect to the development of land are to take account of the cumulative environmental impact of development within the catchment,*
> *(f) development that is visible from the waterways or foreshores is to maintain, protect and enhance the unique visual qualities of Sydney Harbour,*
> *(g) the number of publicly accessible vantage points for viewing Sydney Harbour should be increased,"*

The report states that the application complies with (b) because,

> "... it does not have any negative impacts on the overall natural assets of the Parramatta River catchment and thereby it maintains them."

This is not a reasonable interpretation of the provision. The Bay will be changed from it "natural" state into a commercial one. Each bay that is mutated in this way takes something away from the natural assets of Parramatta River. The reasoning advanced by the report would have it that the only way to breach the principle would be if every bay in the River were simultaneously altered to have marinas. This fails the "common sense test". As previously, submitted a change of the Bay from it natural state into a commercial one does not "maintain" the Bay as a "natural asset" nor does it restore it its scenic and cultural values (more on this later) or do anything positive to its biodiversity and geodiversity.

The report goes on to say that the principle is upheld because,

> "The proposed development would be located close to the constructed shoreline and foreshore of Kendall Bay in the context of a totally transformed site that is moving from industrial to residential use. It is located at a distance from the southern shoreline of Kendall Bay which has a relatively greater intrinsic scenic value due to the presence of inter tidal beaches, mangroves and Cabarita Park. The beach and mangrove features have however only recently come into being and may be negatively affected by future remediation work in the inlet. The proposed development would not have any significant negative impact on the scenic quality of this context and would also maintain views to these scenic components from most of its potential visual catchment. It is considered that Arm 8 that is located closer to the natural part of Kendall Bay results in a greater proportional impact on the foreground of the view when seen from locations along the southern shoreline."

The first sentence seems to misunderstand the status of the Bay. The adjoining residential area used to be an industrial one but that is changing into a residential one. But the Bay is, now, in its natural state and it is this state that has to be maintained and if feasible restored. The proposal wants to change this state to a commercial one and that does not satisfy the principle. The interpretation of the principle in the report fails the grammatical test. **Reference is also made to the fact that the proponent is not the owner of the foreshore lot and to the extent that the proposal impacts on the foreshore lot it is unlawful.**

In relation to clause (c) the report says (p 42),

> "The methodology adopted in this assessment (c) specifically addresses the issues of cumulative environmental impact of the development and concludes that what is proposed is within the established character of the settings of the waterway and foreshore and will not cause significant negative cumulative impact effects. The only other large marina in the general vicinity (Westport Marina) is not generally viewed in the same visual catchment and there will not be a significant cumulative effect."

With all due respect, the methodology in the report does nothing of the kind. The answer to this question is very simple. Take a Google Earth picture of the Parramatta River all the way to Sydney Harbour and the preponderance of marinas will be clearly manifest. The cumulative effect of which is that pretty—any year now, there will not be any "natural" bay in the river.

The report deals with clause (f) by claiming that,

> "The development would be compatible (f) with the existing character of the waterway and foreshores and be compatible with maintaining and protecting the unique visual qualities of Parramatta River."

This conclusion cannot be sustained. The clause applies to the bay as it is now and it is this state and form that the principle applies and that the project has "maintain", "protect". And "enhance".

As to clause (g) the report asserts that,

> "The development would not have any negative impact on the number of accessible vantage points available (g), but would also enhance public access to and vantage points on the waterway, by providing better and more inviting public access to the kiosk, new jetty and the main spine of the proposed marina."

On any reading of the plans for the proposal there will be something like (allowance has to be made for the space between the arms of the marina) 360m of viewing space along the walkway that will not be available for viewing and enjoyment of the Bay so, with respect, it is not tenable to say that the proposal will satisfy clause (g).

The planning principle relating to Foreshore Waterways Area (clause 14) are,

> *"(a) development should protect, maintain and enhance the natural assets and unique environmental qualities of Sydney Harbour and its islands and foreshores,*
> *(b) public access to and along the foreshore should be increased, maintained and improved, while minimizing its impact on watercourses, wetlands, riparian lands and remnant vegetation,*
> *(c) access to and from the waterways should be increased, maintained and improved for public recreational purposes (such as swimming, fishing and boating), while minimising its impact on watercourses, wetlands, riparian lands and remnant vegetation,*
> *(d) development along the foreshore and waterways should maintain, protect and enhance the unique visual qualities of Sydney Harbour and its islands and foreshores,*
> *(e) adequate provision should be made for the retention of foreshore land to meet existing and future demand for working use harbours,*
> *(f) public access along foreshore land should be provided on land used for industrial or commercial maritime purposes where such access does not interfere with the use of the land for those purposes,*
> *(g) the use of foreshore land adjacent to land used for industrial or commercial maritime purposes should be compatible with those purposes,*
> *(i) the provision and use of public boating facilities along the waterfront should be encouraged."*

The prior submission under clause 13 applies to (a), (b), (c) and (d) **and to the fact that the proponent is not the owner of the foreshore lot.** The report concedes that in relation to (a) that (P 42),

> "The eastern extents of the northern arms, however, cause a view loss effect on the views of Parramatta River further to the north of Breakfast Point knoll when seen from viewing locations along the southern and south eastern shoreline of Kendall Bay.
> The application makes no change to, maintains and enhances the public access along the foreshore"

The last sentence is of concern because it misrepresents what clause (a) says. If the proposal makes not change then it follows, by force of logic, that it does not enhances. For that to happen there has to be change. In fact there is change adjacent to the foreshore that has a negative impact on the natural asset and it unique environmental qualities because of the negative visual impact which the report admits to elsewhere in it. In any event to satisfy (a) the requirement to "protect", "maintain" and "enhance" have to apply to the "natural asset" and its "environmental qualities" which cannot happen if the views from it are obstructed by a marina. **The sentence is**

also of concern because it implies that the proposal will do things that impact on the foreshore lot when the proponent is not the owner of that lot.

As to (b) the report says,

> "(b) and there is no physical impact on any watercourses, wetlands, riparian land or remnant vegetation. The existing extent and quality of access to and from the waterway is not changed by the application and is therefore maintained, and the proposed development does not diminish, but enhances, the public recreational values of the main Parramatta River channel"

See the submission concerning (a). As to the impact on watercourses, wetlands etc that is something that has to be left with a question mark over it because there is no evidence on how the outflow from the storm water pipes along the seawall will be impacted on by the marina structure e.g., will it force the flow towards the southern end of the bay and/or the eastern side of the Bay and have an impact on the mangroves and vegetation?

As to clause (c) the report claims that,

> "(c). There are provisions for additional public access and public benefits as part of the proposal."

The proposal does nothing of the kind. Reference is made to earlier submission concerning the limitation on "public" access.

The report is silent in respect of clause (d) but, in line with previous submissions, it is submitted that the proposal does nothing to "protect", "maintain" and "enhance".

Regarding clause (e), (f) and (g) the report claims that,

> "The proposed development is in accordance with (e) and does not occupy any significant foreshore land. The development overall makes no significant demands on foreshore space and does not reduce, but arguably increases public access and is therefore compatible with (f) and (g) above."

This submission takes issue with the claim. The proposal blocks 360m of foreshore from possible other use and, on any measure, this is a significant part of the foreshore on the western side of Kendall Bay. If allowance is made for the turning arc of boats getting into and out of the berths this distance is further increased. In addition, to argue, as the report does, that the proposal increases public access to the foreshore is incredulous and laughable as it is to claim that (f) is satisfied (the foreshore should be on industrial or commercial marina land) when the report itself over and over identifies the land residential (and see also the argument against the public access requirement). As to the proposal satisfying (g) that is also rejected and for the same reason that the claim for clause (f) was rejected (the land is not industrial or commercial maritime). For the purpose of removing any doubt it is stated clearly and unambiguously that the land parcel within *Community Association DP No. 20347*, of which the seawall bounding the foreshore lot is residential so that there is no way that an "industrial/maritime commercial" description can be applied to it.

As to the statement that the proposal "does not occupy any significant foreshore land" the fact is that whether the occupation is significant or not, the proponent is not the owner of the foreshore land and it has no right to occupy any part of it.

The report goes on to say that clause (i) is satisfied because,

"The primary aim of the proposal is to increase provision of boating facilities and it therefore satisfies (i) above also."

This claim is also rejected. The clause clearly applies to "public boating facilities" and not to commercial ones were one buys or leases and others are precluded from using the same berth. In this regard see the apparent concession under clause 23(a) where it says "...the marina is a private facility..." The response may well be different if the undertaking was a timed use only (like a car park).

The report purports to deal with the requirements of clause 17 and the Zone No W1 objectives which it identifies as being (p 44).

" (a) to give preference to and protect waters required for the effective and efficient movement of commercial shipping, public water transport and maritime industrial operations generally,
(b) to allow development only where it is demonstrated that it is compatible with, and will not adversely affect the effective and efficient movement of, commercial shipping, public water transport and maritime industry operations,
(c) to promote equitable use of the waterway, including use by passive recreation craft."

From this it goes on to say that,

"The proposed development as far as I am aware does not have any effect on the main navigation channel of the Parramatta River and in that it satisfies (a) and (b). The nature of the proposed development is similar to a maritime industrial operation, albeit it will be in private hands. The proposed development is compatible with the effective movement of commercial shipping, public water transport and maritime industry operations. The proposed development makes provisions for a timber skid for storage of kayaks, dinghies and skiffs. It is thus consistent with (c)."

There is evidence that Sydney Ferries, Rowing NSW and other users are concerned about safety issues. Clause (c) is not satisfied because the uses the report identifies are land based uses for which land owners' consent from *Community Association DP No. 20347* (as lessee and authority responsible for the community association parcel) and from the City of Canada Bay Council (as lessor) has not been obtained. NSW Maritime's consent or the proponent's consent is irrelevant and not material. In any event it is doubtful that (c) would be satisfied because, overall, the marina takes up a significant part of the Bay so that any upside arising from storage provisions, would be balance by the loss of use of the area taken up by the marina.

The report gives attention to clause 22 which deals with "Public access to, and use of, the foreshores and waterways" and it says,

"Subclause 22(a): *development should maintain and improve public access to and along the foreshore, without adversely impacting on watercourses, wetlands, riparian lands or remnant vegetation.*
Subclause 22(b): *development should maintain and improve public access to and from the waterways for recreational purposes (such as swimming, fishing and boating) without adversely impacting on watercourses, wetlands, riparian lands or remnant vegetation.*
Subclause 22(c): *if foreshore land made available for public access is not in public ownership, development should provide appropriate tenure and management mechanisms to safeguard public access to, and public use of, that land."*

The report asserts that,

"As demonstrated above under address to Clause 1, 13 and 14, the proposed development does not have any negative effect on the existing public access to and along the foreshore. It would provide for

additional public access to the proposed new jetty and kiosk and to the main spine of the marina. It also provides a timber skid for the storage of dinghies, kayaks and the like. The proposed development does not have any negative effect on watercourses, wetlands, riparian lands or remnant vegetation. Subclause 22(c) is for others with relevant expertise to address."

The claim refers back to earlier assertions and partially repeats thus, this submission will also refer back to earlier responses with the exception that a submission will be made concerning clause 22(c) because this is the first time that issue has arisen and it has not been touched upon in the report. **Reference is also made to the fact that the proponent is not the owner of the foreshore lot and it has no authority to "develop it.**

Clause 22 (c) is important because it deals with the situation where the foreshore land **"is not in public ownership"** . It has been said before that the seawall is part of the *Community Association DP No 20347 parcel hence it is public land in public ownership.* A reference to the foreshore, in the context of a marina adjacent to it, is without meaning unless it is a reference to the seawall or at least it includes the seawall in which case the same outcome follows i.e., that the requirement of public ownership is not satisfied. It is to be noted that the foreshore lot (as distinct from the seawall) is leasehold in favour of the *Community Association DP No 20347* so that also takes it out of the "public ownership" realm. **For the purpose of removing doubt the foreshore lot is not owned by the proponent.**

The clause goes on to say that if the relevant land is not in public ownership then appropriate tenure and management mechanism to safeguard public access and public use of that land need to be put in place. This condition can never be satisfied because of the lack of public access to and use of the community association parcel which has been mentioned previously. Moreover, the management of the pertinent land is in the hands of the *Community Association DP No 20347* and not in the proponent and this makes it impossible to satisfy this part of the clause.

At page 45 the report deals with the requirements of clause 23 which are,

"Subclause 23(a): *foreshore sites should be retained so as to preserve the character and functions of a working harbour, in relation to both current and future demand."*

In answer to this clause it is claimed that,

"The marina is proposed to be located at the foreshore site of the former jetty... While the marina is a private facility rather than a maritime industrial use, the change has some relationship to a working harbour being retained in the context of changing demand for shipping and an increasing private vessel presence in the waterways generally."

The pertinent part of the assertion is the reference to the "former jetty" and to the non "maritime industrial use" of the proposal. These are pertinent because the requirement to "retain" the current character of the Bay (its natural state) cannot be satisfied by changing its nature to a "non maritime industrial" one. This makes the report's reference to demand an irrelevant one. **As previously stated, it is to be noted that the proponent is not the owner of the foreshore lot and it cannot carry out any development that impact on it without land owner's consent.**

As to clause 23 (c),

"Subclause 23(c): *in the case of development on land that adjoins land used for industrial and commercial maritime purposes, development should provide and maintain public access to and along the foreshore where such access does not interfere with the use of the land for these purposes."*

And the report comments,

"Comment: The land based component of the proposed marina adjoins a former industrial AGL site, which has now been converted to a residential development. The land based component of the proposed development is very small and consists of a small scale single storey building for marina manager's office at the landward end of the new jetty and a kiosk at the water ward end of the jetty.
The proposed development would not have any significant negative effect on existing public access to and along the foreshore and will enhance physical access to the marina itself, which in turn invites higher engagement with views to and from the development site, by a more inviting and better designed quality."

This claim confuses the car park and the marina and both of them. The "land based component" does not adjoin "the former industrial AGL site"- it is part of (within) the former industrial AGL site. Further, part of the "land based component" being the "marina manager's office" at the end of the jetty is in fact on land that is either in part on the seawall in which case the *Community Association DP No 20347* needs to give its land owner's consent or is in part on the leasehold of the Community Association DP 20347 and its land owner's consent is needed as well as that of the lessor (City of Canada Bay Council) and in both cases the building will, by law, belongs to the owners of the land (see drawings submitted to NSW Maritime for its land owner's consent and also drawing MMPO2 in vol 10 behind the management plan)..

As regard the "public access" comment the issue has been mentioned a number of times already and reference back to that part of the submission need only be made here. As to the "higher engagement" point there is no evidence of that and as to the "better designed quality" the only comment is that the proponent might take a dim view of having his residential development described as having a lower design quality that the marina (when it still has a number of apartment to construct and sell).

As to clause 23 (d) the report says,

"Subclause 23(d): *in the case of development for industrial and commercial maritime purposes, development should provide and maintain public access to and along the foreshore where such access does not interfere with the use of the land for those purposes."*

The report claims that this requirement is satisfied because,

"The proposed development has no negative effect on the existing access to and along the foreshore and will increase general public access opportunities to the new jetty and kiosk and to the main spine of the marina."

The question of public access has been considered before and other than to reject the contention in the report nothing else is necessary here.

The report goes on to deal with clause 24 (Interrelationship of waterway and foreshore uses) and says,

"Subclause 24(a): *development should promote equitable use of the waterway, including use by passive recreation craft."*

The report claims that,

> "The proposed development would not have any adverse effect on this aspect. It provides for a timber skid for the storage of kayaks, dinghies and the like. It also provides for recreational activities such as the new kiosk and additional public access."

In fact the proposal does not promote the equitable use of the waterways because just about every bay along the entire length of the Parramatta River is taken up with marinas and the bays that are not are so few that there is a real concern that non boat users have being left out of consideration in the allocation of this resource.

For clause 24 (b) the report says,

> "Subclause 24(b): *development on foreshore land should minimise any adverse impact on the use of the waterway, including the use of the waterway for commercial and recreational uses."*

The report claims,

> "The land based component of the proposed development is very small and enhances the visual experience of the waterway to the general public. It does not have any negative effect on the existing use of the waterway or the use of it for commercial and recreational uses. It includes provision of a potential future public wharf."

With respect this is difficult to follow. The land based component (the car park) is not visible from the marina location so it is impossible for it to "enhance the visual experience of the waterway." As to the rest of the claim, in so far as it applies to the marina, it has the negative impact on views and on use by non boat owners. As to reference to "public" there is nothing to add to what has already been said. **Importantly, note that the clause applies to "development on foreshore land" but in this case the proponent is not the owner of the foreshore lot.**

For clause 24 (e) it is said,

> "Subclause 24(e): *development should avoid conflict between the various uses in the waterways and along the foreshores."*

And the claim is made that,

> "The proposed development would not have any adverse effect on this aspect. Apart from occupying part of the waters of Kendall Bay, it would not affect the waterway use within the main navigation channel of Parramatta River or public access to and along the foreshore."

The evidence is that Sydney Ferries and other users of the river have lodge opposing submissions so the claim can be rejected. At the same time there is a clear conflict between the residents of Breakfast Point who own the seawall and from other the users of the foreshore lot."

For clause 25 (Foreshore and waterway scenic quality),

> "Subclause 25(a): *the scale, form, design and siting of any building should be based on an analysis of:*
> *(i) the land on which it is to be erected, and*
> *(ii) the adjoining land, and*
> *(iii) the likely future character of the locality,"*

The Report comments that,

> "The proposal has been the subject of detailed analysis of design and siting, as well as consideration of the likely future character of the immediate locality, the waterway generally and of boating and boat storage in the near future.
> The marina manager's office is a small scale, single storey structure of a maritime character and compatible with the residential development within Breakfast Point. The kiosk is also a single storey modest scale structure of maritime nature and is compatible within the context in which it would be seen."

The first paragraph is a *non sequitur* and nothing else needs to be said about it. The second paragraph does not deal with (i) and it is incompatible with (ii) in design, architecture, material and usage and it is incompatible with (iii) since it does not assess the structure in terms of the requirement.

For clause 25 (b) the report states (p 47),

> "Subclause 25(b): *development should maintain, protect and enhance the unique visual qualities of Sydney Harbour and its islands, foreshores and tributaries,"*

And that,

> "The content of this clause has been addressed under my address to Clauses 1, 13 and 14. In my opinion, the provision of boat storage as proposed is within the established qualities of the wider Parramatta River context and its siting, form and appearance and would protect its unique visual qualities. The proposal would neither cause significant nor widespread negative impacts on the existing or future character of the setting, nor on the scenic quality of the waterway. There are other examples of such developments present within the wider context such as the Cabarita Westport Marina, River Quays Marina and a private marina further to the north of the River Quays Marina, however these are widely spread and there would not be a significant cumulative impact of the proposal in relation to these facilities. The immediate foreshore context and adjacent residential setting of the site for the proposed development is constructed and is generally of a low to moderate intrinsic scenic quality."

These opinions are rejected for the same reasons as were given for Clause 1, 14 and 14. The report does not address the requirement of the clause i.e., how does the development "maintain, protect and enhance" the unique qualities of the bay by changing them from their natural state to a commercial marina. To claim, as the report does that a structure, longer and wider than the biggest cruise liner in the word, that takes up from a third to a quarter of the bay does not cause significant or widespread negative impacts is so laughable (with respect) that it requires nothing else to be said on the topic.

The reference to the other marinas is an interesting one and the conclusion reached is rejected. The fact that the bay is surrounded by marinas must have a cumulative negative impact. If this fact does not give raise to such an outcome, then nothing will.

In regards to clause 25 (c) the report says,

> "Subclause 25(c): *the cumulative impact of water-based development should not detract from the character of the waterways and adjoining foreshores.'*

And the report comments,

"The proposed development would form part of the view compositions available from within its potential visual catchment. However, it would not dominate or distract a viewer from the views of the other existing visual components of the views of the waterways and adjoining foreshores. It would be visible in the foreground of the views from viewing locations immediately to the west and south, on which it would have relatively greater impact. The higher scenic quality views would still be largely unaffected and retained with the help of the wide fairways proposed between the arms from these viewing locations."

The proposal will detract from natural character of the waterways and from the natural character of Cabarita Park.

Turning to clause 26 (maintenance, protection and enhancement of views) the report claims,

"Subclause 26(a) *development should maintain, protect and enhance views (including night views) to and from Sydney Harbour,"*

And the report says that,

"There would be view loss effects on the waters of Kendall Bay but no significant affect on the views to and from the main navigation channel of Parramatta River, with the exception of view loss of Parramatta River north of the Breakfast Point knoll for viewing locations along the south and south eastern shoreline of Kendall Bay. The proposed wide fairways would assist in retaining and maintaining views to the Parramatta River and far shoreline from the foreshore walkway and from the lower levels of the townhouses and apartments within the Manors Precinct East and Wharf Precinct."

The report misrepresents the meaning of the words in the clause. There is no restriction to the views from the "main navigation channel". The report obviously is of the view that a restriction of that type advances it cause (it does not), but the fact is that the clause has a wide scope- one that encompasses the entire river and there is no justification for the report to narrow it. The attempt by the report to alter the requirements of the clause suggests that, in its proper (wide) meaning there is, in fact, a significant view loss.

The point of the clause is not whether the views are impacted on from the main river channel but the development maintains, protects and enhances them. If the views are altered then the development fails to satisfy the clause. In particular the suggestion that the views from the foreshore walkway and the lower levels apartment and house is so patently at odds with reality that it has no evidentiary value at all. It is just not conceivable that having a 25m boat (the test size required to be used) less than 100m from your floor to ceiling glass balcony and say that it wont have a significant view loss. It is noted that the "photomontages" in the EA in general and this report in particular *do not appear* to contain any 25m boats.

For clause 26 (b) the report says,

"Subclause 26(b): *development should minimise any adverse impacts on views and vistas to and from public places, landmarks and heritage items,"*

The report comments that,

"While there are moderate to high potential view loss effects from a section of the foreshore walkway along the western shoreline of Kendall Bay, the proposed wide fairways would assist in minimising those effects. There is also a view loss effect on views of the Parramatta River further north of the Breakfast Point knoll for viewing locations along the southern and south eastern shoreline of Kendall Bay and part of the Cabarita Park foreshores.
I do not consider that there are such significant or adverse impacts on views and vistas to and from

other public places, landmarks and heritage items within the visual catchment of the proposed development that this sub-clause would be justification for its refusal and steps have been taken to minimise the impacts by limiting the proposed eastern extent of the marina to be mostly similar to the extent to which the former jetty on the site extended in the east direction. Exceptions to this are Arm 8 and some vessels on the extreme eastern sides of Arms 1, 2 and 3. These encroachments are not considered to result in unacceptable impacts."

The conclusion seems at odd with and underplays the negative impacts facts disclosed in the comments and it is rejected.

When dealing with clause 26 (c) the report says,

"Subclause 26(c): *the cumulative impact of development on views should be minimised."*

And it comments,

"The proposed development is assessed to be consistent with this provision in that:
a) It is located with a backdrop of former industrial site and now a medium to high density residential development comprising of town houses and apartments on relatively fl at land;
b) It occupies part of the waters of Kendall Bay against a constructed western shoreline;
c) It is at a considerable distance from the southern shoreline of Kendall Bay which exhibits a relatively more natural character and greater scenic quality, with the exception of Arm 8 which is slightly closer;
d) The proposed eastern extent of the marina is mostly limited to the extent to which the former jetty at the site extended in the east direction, however; there are some small variations to this;
e) Very wide fairways (ranging between 21 to 31.2m) are proposed to maintain views through the proposed marina; and;
f) The proposed vessel size distribution takes into consideration the demand and there are only a small number of vessels ranging from 20 to 25m. There are no vessels proposed to be berthed of size greater than 30m."

These claims are rejected. The type of backdrop in (a), (b) is neither here nor there. The focus is on the proposed development not on existing developments. What is relevant is the cumulative impact of the development on views (not from the nature of the position from where the view is taken). As to (c) the impact from the low level apartments, houses, the future apartments south of Hunters Wharf and along the foreshore walkway do not appear to have been taken into account; and the distance from the southern shore of Kendall Bay would be less than the 100m limit for assessment; the meaning of (d) is not clear; (e) is rejected because the separation of the fairways is only of use when looking directly ahead from them and of no consequence when viewed at an angle; and their width serves to make the marina structure take up more space; and in any event the cumulative impact would be significant. As to (f) it is not meaningful and the size of the boat mentioned does not take into account larger day tripper boats that will use it.

The report looked at clause 27 (boat storage facilities) and says,

"Subclause 27(a): *development should increase the number of public boat storage facilities and encourage the use of such facilities"*

And commented that,

"There is provision of five temporary berths within the proposed marina. A new timber skid is also proposed for the storage of skiffs, kayaks and the like. The proposed kiosk would attract the general public for the usage of these facilities and also to take advantage of the additional public access."

The conclusions are rejected. The critical point is that it is not a "public" boat storage facility. It is a commercial facility which only the owners/lessees of the berths can use (as for other users refer to the restriction on public access to the walkway already discussed. This restriction needs to be kept in mind whenever the report refers to non berth owners/lessees). The remainder of the comment appears to be based on a misunderstanding of the clause and is irrelevant.

The report looks clause 27 (d) and has it that (p 49),

> "Subclause 27(d): *development should avoid the proliferation of private boat storage facilities in and over the waterways by ensuring that all such facilities satisfy a demonstrated demand."*

And comments,

> "The proposed development has the ability to positively respond to the increasing demand for a greater number and size of vessels in the future without leading to an unreasonable increase in area covered by private facilities or alternatively to unexpected or unpredictable visual impacts."

The proposal represents an over use of the bays within Parramatta River being used by marinas. Bays along the Parramatta River are a finite resource. Already the preponderance of bays along the river has been occupied by marinas such that very few bays are to be found without boats in them. This alone is sufficient to call a half to further marinas along the river. The existing marinas need to be used more effectively before any consideration is given to permitting additional marinas to be erected.

The report looks at the Sydney Harbour Foreshores & Waterways Area, Development Control Plan for SREP 2005.

In relation to the Aims of this instrument the report asserts,

> "While there are moderate to high potential view loss effects from a section of the foreshore walkway along the western and southern shoreline of Kendall Bay, the proposed wide fairways would assist in minimising those effects. I do not consider that there are significant negative adverse impacts on views and vistas to and from other public places, landmarks and heritage items within the visual catchment of the proposed development and steps have been taken to minimise these impacts."

It is worth repeating that the fairways are only useful, if at all, if one is looking through them at 90 degrees. They have no impact mitigating effect when looking past them at an angle. As to absence of significant negative adverse impacts this conclusion is not accepted and more will be said on this later. Similarly, for the conclusion that,

> "The proposed development does not cause a significant impact on the character of its immediate visual context as it is located with a backdrop of former industrial site and now a medium to high density residential development comprising of town houses and apartments on relatively flat land against a constructed western shoreline. "

This is rejected because it appears to be influenced by irrelevant considerations i.e., the past industrial nature of the area rather than it current status as a residential development. This view is consistent with and explains the report's reference to and purported application of clause 3.3 (Landscape character types) in the DCP to SREP Sydney Harbour Catchment. This clause identifies the existing character of the foreshore as, "Landscape Character Type 15" and the report notes and takes into account that,

"These areas have a high level of built form characterised by industrial and institutional uses in the foreground and residential development in the background. Part of the Parramatta River Regional Park is located within this landscape.
Development is suitable for these areas provided that the following issues are taken into consideration:
- *the contribution industrial uses make to the economics and vitality of the river and their need for location on the waters edge;*
- *establishment of open space and recreational opportunities;*
- *mitigating against incompatible land uses; and*
- *preserving the mangrove screening along the foreshore and reducing the stark contrast of built elements behind these natural features."*

Clearly, this is not material to the present circumstances because the industrial nature of the land no longer exists and it is now a residential area. This much is recognized in the report but unfortunately it goes on to reach conclusions which are not, for this very reason, available to it because the land use for which the requirements were designed no longer exists. Thus, by doing what it does the report is showing that it is a marketing tool for the proponent rather than a source of material for use in the decision making process.

The same thing can be said for the "performance criteria" considered in the report since they apply to a development within "these areas" i.e., these industrial areas.

When the report turns to Section 4.7 Marinas (Commercial and Private) the comments,

"The Breakfast Point Concept Plan indicates that there was always an intention to have a marina at the location of the former jetty. The Applicant has advised me that all the sale contracts with the present owners of residential developments within Breakfast Point contain information about a future marina at the site. While the form and scale of the marina were not known, it was known by buyers in the estate that a marina would be proposed and built at some time.
There is a substantial visual contrast between the existing and proposed future situation, however in my opinion there was a reasonable expectation that a marina would be part of the future visual context of the site for immediate local viewers. As a result the planned future character of the setting, both supported by the waterway zoning and the Concept Plan, included a marina. As such, the contrast between what exists now and what is proposed is less than would appear to be the case. I consider that the proposed marina is compatible within its immediate background context of the constructed western shoreline of Kendall Bay, the medium to height density residential development on relatively fl at land and the expectations of the planned future character of the site.
In addition, the existing and planned future character of the site based on the Landscape Character Type 15 within the DCP appears to be of industrial and compatible uses without affecting the remaining naturalness of the context. The land based component has similarities within the background residential context."

As to the import or otherwise of the note in the contract more will be said about it later. Here it is relevant because it shows the report's function is that of an advocate rather than that of independent source of material for use by the assessor of the application. The report cannot be both an advocate and judge in the cause without compromising its impartiality. In any event it is not for this report to venture to give a legal opinion as to the meaning and implication of the reference to the marina in the contract. **The report writer no where discloses legal qualification or training to venture such an opinion and should not do without risk to the credibility of the report.**

The report refers to the requirement that,

"*any visual analysis shall consider the impact of the largest motor vessel(s) capable of being berthed at the marina;"*

and comments,

> *"…I* consider that representing the maximum length vessels in the photomontages seems to be realistic but vessels of maximum size (height) for the particular length range while it is a worst case **is too far fetched to be realistic enough to assess objectively and is not reasonable." (bold added).**

It would appear that the report is having regard to personal views rather than sticking to providing useful information for the person who has to make the decision. The fact that it does not take into account day tripper boats of 25m or more or the heights of such boats (they are proposed to be allowed to use the facility) in account takes away any confidence that one can reasonably have with the report.
More will be said later about the impact of the impact of the size of the boats here, it suffice to say that (1) the comments/personal views in the report are rejected and (2) that a perusal of the "photomontages" *does not appear* to show any 25m boats.

For the requirement that,

> "*waterside structures and berthed vessels associated with marinas are not to block views from foreshore public open space or views to foreshore public open space from the waterway;"*

The report comments (p 53),

> *"*The most noticeable view loss effect of the marina would be the loss of the view of parts of the water of Kendall Bay. Views of Parramatta River further north of the Breakfast Point flagstaff knoll would also be affected to a varied extend for viewing locations along the southern and south eastern shoreline of Kendall Bay and part of Cabarita Park.
> The loss of view of the constructed western shoreline of Kendall Bay is not considered a significant negative effect of the proposed marina. Even these views would be maintained through the wide fairways proposed between the arms of the marina. Views to the relatively natural and higher scenic quality southern shoreline of Kendall Bay would be retained for predominantly all of the viewing locations within the visual catchment."

One needs to note that the requirement refers to views "to and from" and yet the report seems to confine itself to views "to" and it downplays the impact from the residential development because of its "constructed" character. There is nothing in the legislative instrument mandating this approach. It fails the "common sense test". The "fairways" suggestion is instructive for what it says about objectivity and capacity to assess its influence since it does not take into account that the views spaces between the arms fails when seen from an angle such as by a person walking along the walkway.

The submission about objectivity is reinforced by reference to the comment in the report over the requirement for,

> "*the bulk and scale of buildings and other structures on land is to be minimised through appropriate mitigating measures including landscaping, articulated walls, detailing of surfaces and by using smaller elements;"*

For this the report says,

> *"*The land-based component of the proposed development is of a very small scale and contains a single storey small scale marina manager's office at the landward end of the new jetty and a single storey moderate scale kiosk at the seaward end of it. The structures would be light weight, of articulated external appearance and of materials and colours compatible with the built context in which they would be seen."

The report is so intent in advocating a position rather than analyzing the issues that, on a criterion for land based buildings (car park), it talks about the manager's office which is supposed going to be on the jetty! But see the earlier comment if the office is, in fact, not on the jetty but on the community association parcel.

A relevant consideration is clause 6.5 (foreshore building line) and the report says,

> *"(1) The objective of this clause is to ensure that development in the foreshore area will not impact on natural foreshore processes or affect the significance and amenity of the area."*

And it comments,

> " The proposed development is consistent with this criterion and the land based component would neither impact on the natural foreshore processes nor affect the significance and amenity of the area."

There may be some confusion here about what the foreshore is. If the foreshore is the part west of the eastern most part of the seawall then that is property within the *Community Association DP 20347* parcel and there is no land owner's consent from it. **The proponent has no right to develop this area because it is not the owner and neither is NSW Maritime**. This should be the end of the matter. If the foreshore means the area east of the eastern most part of the seawall then that is part of the Bay and different issues arise and they have been considered before. The car park is not in issue except to the extent that it is to be used by persons who have no right of entry onto the community association parcel (as previously mentioned).

To the requirement that the,

> *"(3) Development consent may be granted for the following:*
> *(a) the extension, alteration or rebuilding of an existing building wholly or partly in the foreshore area, if the consent authority is satisfied the extension, alteration or rebuilding will not have an adverse impact on the amenity or aesthetic appearance of the foreshore,*
> *(b) the erection of a building in the foreshore area, if the levels, depth or other exceptional features of the site make it appropriate to do so,*
> *(c) development for the purposes of boat sheds, sea retaining walls, wharves, slipways, jetties, waterway access stairs, swimming pools, fences, cycleways, walking trails, picnic facilities or other outdoor recreation facilities",*

the report comments,

> "The proposed development can be approved under these criteria."

This is rejected. **See the above comment regarding ownership of the foreshore**. Why didn't the report writer take this into account and takes things for granted? Isn't the report writer aware of this? If not, why not? These questions should be taken into account under the certification given pursuant to the requirements of the Director General.

Sub-clause (4) requires consideration of (p 55),

> *"(4) Development consent must not be granted under subclause (3) unless the consent authority is satisfied that:*
>
> *" (c) the development will not cause environmental harm such as:*
> *(i) pollution or siltation of the waterway, or*
> *(ii) an adverse effect on surrounding uses, marine habitat, wetland areas, flora or fauna habitats, or*

(iii) an adverse effect on drainage patterns, and
(d) the development will not cause congestion of, or generate conflicts between, people using open space areas or the waterway, and
(e) opportunities to provide continuous public access along the foreshore and to the waterway will not be compromised, and
(f) any historic, scientific, cultural, social, archaeological, architectural, natural or aesthetic significance of the land on which the development is to be carried out and of surrounding land will be maintained."

And the report says,

> "The analysis and assessment of the application as described above has been undertaken with special consideration of the relevant visual criteria (ie, (4)(b), (e) and (f). The application is considered to be satisfactory in this regard."

This is rejected. The EA has ample evidence that there will be contaminants from the marina e.g., from anti fouling agents, introduction of exotic species, etc contrary to the assertion of the report. Furthermore, there will be adverse effects on surrounding use because of social conflict with residents, financial impost on residents, possible impact on draining patterns through the structure impeding the "natural flow" from storm water outlets, conflict between residents and users of the marina and the community association may move to close the limited public access to the foreshore (see earlier comment regarding the easement in gross).

The report gives consideration to Schedule 6 of the LEP (– Transition provisions for certain sites) and comments,

> " The proposed development is associated with Special Transitional Site Precinct B2 of Breakfast Point. The proposal, is entirely water based and is not subject to the specific provisions of the LEP, however the foreshore for 15m back from the top of the sea wall is classified as Precinct B5, Foreshore Public Open Space. The development is adjacent to the latter precinct.
> A relevant objective for both Precincts B2 and B5 is to encourage development that takes advantage of views and view corridors to and from the Parramatta River. The layout of the marina has been considered so as to retain wide fairways between arms of the marina so that significant views are retained toward the northern and north eastern shores of the Parramatta River from a variety of vantage points in both public and private domains, consistent with this criterion."

Contrary to the comment the development is not "entirely water based", there is the car park so it is incorrect to say that it is not subject to the specific provisions in the LEP. Regarding the "foreshore Public Open Space" whatever the classification might be it is (1) not public and it is not open space. The right of entry of members of the public to this lot has already been discussed and is clear and unambiguous. Talk about "private" and "public domain" is indicative of the report venturing into an area outside the scope of its expertise and it should be disregarded. **The report has clearly moved from a consideration of the visual impact and it has allowed itself to be influenced by legal consideration. It cannot do this without completely destroying any claim to impartiality.** In any event as already pointed out the proponent is not the owner of the foreshore lot and it has not authority to "develop" it. More on this issue later.

At page 65 the report summarises its findings thus (bold added),

> "This assessment concluded that there would be visual impacts in the range of **medium, medium to high and high** for close range public and private domain viewing locations which would be mostly due to the potential presence of the proposed marina in the foreground of the views from these viewing locations and the resultant change it would cause to the view compositions and visual character of those views. The close range public domain viewing locations are constituted by the waterway and foreshore walkway along the

western and southern shoreline of the Bay. The close range private domain viewing locations include the townhouses and apartments in Manors Precinct East and Wharf Precinct. The southern shoreline of the Bay is of relatively higher scenic quality and the part of the proposed marina close to this part of the Bay in particular Arm 8 would have a higher impact on this scenic quality. That impact is not considered to be such that the application ought to be refused.

There would not be unreasonable view loss effects of the proposed marina on the potential visual catchment generally, but there would be potential loss of the views of parts of Parramatta River and the sense of the river sweeping towards Kissing Point Bay when seen from viewing locations along the southern shoreline of Kendall Bay and part of Cabarita Park. There would also be view loss effect of parts of Parramatta River and the far shoreline from the foreshore walkway and the ground floors of the residential development adjacent to it, to the west of the site of the proposed marina. The proposed wide fairways assist in maintaining some of the latter views in a view experience which, with the exception of static private views, is a dynamic experience for all viewers and one which is affected along only part of a continuous foreshore access way.

The potential visual impacts of the proposed marina would range from **low, low-to medium and medium** for most of the medium range viewing locations. There would be a potential view loss effect of the existing views of the constructed western shoreline of Kendall Bay when seen from medium range viewing locations to the southeast, east and northeast. This view loss effect is not considered to be significant due to the constructed nature of the shoreline and the medium and high density residential backdrop of the site when seen from these directions which overall has a low to moderate scenic quality.

The proposed development would not have any significant visibility from roads and, if any, is only within the medium and distant ranges. It would be visible from the foreshore reserves at the terminus of some of the streets within Gladesville, Tennyson and Putney localities. These reserves are considered to be high view sensitively locations. There would not be any significant visibility of the proposed development from the Gladesville Hospital and its grounds.

The potential visual impacts of the proposed marina would be **low for most of the distant public** domain viewing locations. There may be private domain viewing locations within the distant range but the impacts on these would be low."

What stands out about this summary is that the "medium" and "high" (up to 100m) impact and the "low to medium" (100-1,000m) impact are said to be negated by the "low" (1000m+) impact. In other words the impact of having boats up to 25m "in your face" negates the impact of that boat being somewhere "over the hill and far away". This conclusion fails the "common sense test". Just try it by allocating a numerical value to each of the findings (low, medium and high).

In part the conclusion reached in the report relies on accepting that the "fairways" between the marina arms "maintain" some of the views. Everything else being equal this means the observer would have to be at 90 degrees angle to the "fairways" to get this benefit. It assumption also fails the "common sense test".

The following section of the Response corresponds to Vol 6 of the EA

This volume deals with "Estuary hydrodynamics". The front page of this report has a picture of Kendall Bay with the Hunters Wharf apartments shown on the right. This picture should be contrasted with the one on the front cover of each volume of the EA which shows a montage of the proposed marina with the boats so small that you would need a magnifying glass to see them properly. Look at the picture in front of the report and imagine the marina superimposed on it and then consider the visual impact.

Some of the content of this report has been referred to in earlier parts of this submission, for example, note has been made to the mean water depths of the bay. Here it is desired to note that the study reports that the water level of the bay will vary depending on the tides, storms, wind and waves. In particular the tide will have an effect of -0.95m to + 1.20m (p 17). Storms may add up to 10cm to the level of the water and the wind can add 1 to 3 cm and waves can add 6 to 9 cm. Climate change was estimated to add 40 cm by 2050.

These measurements are important because of the effect they will all have on the visual impact. None of these influences appear to have been taken into account in the visual impact report.

The report refers to the DEC's requirement (p 38) that the,

> "proposed marina must not cause any additional resuspension of contaminated sediments over and above that attributed to background processes *(DEC letter to TLB, 7/8/07).* Turbidity measurements were made **as a well accepted and practical indicator of suspended sediments** (bold added)"

It then goes on to report (at p 17 of 37),

> "The key findings from the investigation were presented in terms of propeller wash impacts at the unprotected bed *(no scour apron)* for varying water depths:
> • **Two metres** water depth was clearly problematic and is considered unlikely to satisfy DEC's requirements for any of the test vessels.
> • **Three metres** water depth was found to be unacceptable for the large *(24m)* vessel, with mixed compliance exhibited for the small *(11 m)* and medium length *(14 m)* vessels. It appeared therefore that 3 m depth approached the acceptable limit for these two sizes of vessels.
> • In **four metres** of water, the small *(11 m)* and medium *(14 m)* vessels essentially met DEC's requirement, but the large *(24 m)* vessel did not.
> • The small *(11 m)* and medium *(14 m)* vessels clearly satisfied DEC for all manoeuvring in **five metres**, but the large *(24 m)* vessel caused significant turbidity impacts for the case of full thrust starting astern and probably also starting ahead."

In so far as the conclusion relate to water depths of over 4m the results are, in fact, worse than reported. This is because if the tests had been carried out after the blanket and the covering rocks had been in place the depth of the water would have been reduced and the effect of the propeller wash would have been magnified. Thus,
(1)at 2m the result would have been "more than problematic" for any vessel,
(2)at 3m the result would have been "more than unacceptable" since the outcome would have approximated the water level at 2m,
(3)at 4m the result would correspond to the outcome at 3m and
(4)the 5m test neither the small nor the medium vessels would satisfy the DEC requirements because the outcome would correspond more closely to the 4m water level. In relation to this water level it should be reiterated that that depth is confined to the central part of the channel

which is essentially occupied by the central arm of the jetty hence it is not available for use thus restricting the boats of all sizes to water depths of less than 4m.

Overall since the report concedes that the mean water depth in the bay is between 2.9m and 5.0m (p 14 but note that figure 3 in the report suggests that the mean depth is **under 3.9m**) the four and five metre results are probably not useful because that depth is mostly in the central channel where the main arm of the marina will be sited. And yet the larger vessels caused problems. What should have happened is that the study should have been conducted in an environment that approximated the final depth of the water level i.e., .with the blanket and rocks in place.
In the event the report, disappointedly, then goes on to dilute these factual findings by doing carrying out a "desktop" assessment from which it was concluded,

> "This assessment indicated that the daily average turbidity within the KBRS would be elevated by less than 1 NTU over and above an assessment of daily average turbidity equal to 10.2 NTU. The overall turbidity impact of the proposed marina was thus predicted to be small."

This approach is rejected. Either the original test had test significance or it did not. If it did not have significance then there was no reason to perform it and the report should have straight to the "desktop" assessment.

It is not known what effect the placement of the geotextile blanket and rock covering (about 30-40cm thick (Vol 3 p 13) would have had on the factual findings or, for that matter, on the theoretical 'desktop" findings but the thickness of the rocks is such that its effect cannot be underestimated. If you take close to half a metre of water depth into account the negative implications of the previously mentioned results would be greatly magnified. One would normally expected the more shallow water depth –as the result of the blanket and rocks-to magnify the observed results and (possibly the "desktop" results as well) but this is mere speculation.

The following section of the Response corresponds to Vol 7 of the EA

Volume 7 of the EA reports on matters going to the construction and operational management plans.

In terms of the Construction Environmental Plan the report covers emergency response events but it seems to take it for granted that the emergency response personnel can readily enter the private property which is the *Community Association DP No 20347* parcel. In so far as the car park is concerned this is not an issue as that is within DP 20347 but the same cannot be said for the marina.

The report considers the sitting of emergency equipment but, as in the previous paragraph, while this is not an issue over the car park the same cannot be said for the marina. Similar considerations apply to,
(1)the emergency assembly area, and
(2)the location of hazardous materials.

The coverage of the Operational Environmental Management Plan is similarly remiss. It does not seem to be aware that the marina is not on Community Association DP 20347 property and hence, nothing is said about ensuring that the parcel's integrity is maintained free from trespass by the marina management team, its servants and agents.

The following section of the Response corresponds to Vol 8 of the EA

Volume 8 covers "Berth demand study and Construction Management Plan Attachments"

In its "summary and conclusions" the demand study says (p 42),

> "Inner West Marina Sydney is planned to be operated as a commercial marina with berths made available to the wider community and not as a residential marina where berths are generally restricted to use by residents of dwellings within the residential estate."

What this actually means is that it is going to be a private marina for anybody who can afford to buy or lease a berth. This does not make the proposal a "public" marina. By way of analogy consider a car park in which the spaces are sold or leased and compare it with one were the spaces are available by the hour. The former just does not qualify as a "public" car park except to the extent that it is not owned by the council. Similarly, for the proposed marina. If the berths are taken out of circulation through sale or lease they are not available to the "public". Consequently, this argument that the berths will be made available to the wider community is of no consequence or import.

The report goes on to say (p43),

> "Of the 584 berths at the 12 commercial marinas surveyed in June 2009, 550 berths, representing 94.2% of the total, were occupied thereby evidencing the high level of demand for marina berths in the west Sydney area."

In fact what it shows is that there is an over supply. However, this is not the critical point. What is critical is the implied suggestion that every demand has to be met which leads to the obvious conundrum that will have to be faced when the finite supply of bays on the river is exhausted and

berth demand keeps on increasing (a position which on the study on figures will be long before 2030 (at p 30). When that point is arrived at the public will be faced with the realization that it has no "natural" bays for it to use and enjoy while the boat owners will still be clamoring for berths. The negative social and environmental implication of that position should not be underestimated.

Accepting but not conceding the figures in the study the problem with its conclusions is the faulty ratio which is exposed in the previous paragraph. An environmentally sound position as regards the use allocation of bays on the river between boat users and those who wish to enjoy the bays in their natural state is one that recognizes the finite number of bays and that the balance in favour of boat owners cannot be permitted to go any further.

One thing to bear in mind about this demand study (or any other for that matter) is to ensure that "demand" (a preference for) is not confused with "need"(must have). This is the distinction that explains the far greater number of boat ownership when compared with the existence of empty berths (see the excess supply mentioned above). Of course, in assessing the usefulness of the study it needs to be taken into account that it is one-dimensional and in no way does try and assess the demand for "natural bays." For these reasons the data is of limited use.

Because of the fundamentals relied on (above) it is not proposed to analyse all of the data mentioned in the study but it is worth referring to a few examples for the purpose of putting them into a context. Thus, at (p44) the study reports that,

> "West of Sydney Harbour Bridge there is eleven (11) private residential marinas with 371 berths. These berths are generally restricted to use by residents of the property and not available for use to meet the demand of the wider community. Of the 371 berths at the residential marinas only 219 (59%) are occupied."

What this data shows is that (1) alternatives have not been properly assessed. Consideration should be given to finding ways to use this extra supply before one turns to using more of a finite resource. If the price is right these berths will become available; (2) the study is playing around with words "wider community" in a way to make a point that does not really exist since the proposed berths will be locked up by sale or long term lease so they, also, will thereafter not be available to the "wider community". From this perspective a "private residential marina" has no different outcome to a "private commercial marina" which is a more accurate description of the present proposal.

Continuing, with the examples, the study says,

> "The summary of vessel registrations in section 4.1 shows that for the 5-year period 2004 –2009 the average annual growth for NSW was 2.67% pa whilst for the same period the average annual growth for the Sydney Harbour sector was a lower 1.17%pa.
> The following summary shows the expected level of registered vessels at June 2009 for the Sydney Harbour sector by applying the NSW average annual growth rate of 2.67% to the Sydney Harbour sector 2004 base of 16,198 vessels."

For these figures the study had two options available to it. One was to use the average figure for NSW (2.67%) and the other was to use the lower figure of 1.17% for Sydney Harbour. It chose the higher figure. Why this one when the lower one was the more appropriate one since it focused on the same general locality (a better figure would have been one that separated the data between the west of the Harbour and the east of the Harbour)?

Another example comes from the conclusion that,

> "It is anticipated that around 120 of the 172 vessels will be low in profile such as yachts and sports cruisers shown in the photographs. Fly-bridge cruisers are not anticipated to exceed 50 or so in number of approximately 30% of the vessels at the marina."

While it is true that yachts tend to have a low profile they also have masts that are higher than the boat is long so that they don not do much to reduce the "bulk" visual impact and, masts have ropes that continuously bang against the mast and so introduce a noise problem that the residents along the foreshore are not going to be able to escape (night or day).

The final note concerns the photographs forming part of the study. Make what you will of it but not one of them shows a 25m boat.

One can continue with this type of detailed analysis but because the same type of issues arise and because of the problem with the fundamentals not much would be achieved by doing it.

The rest of Vol 8 deals with the "Construction Management Plan" and it says (p 3),

> "The works for the cark park are independent of the other works. However it is envisaged that the car park would be constructed at the same time as the blanket to provide car parking for contractor personnel during construction of the Stages 2 to 6 of the works."

In line with what has been said before such use would be unlawful

In dealing with the topic of "mooring of barges" (p 5) it says,

> "Throughout the construction:
> 1. Limited materials would be stored on site.
> 2. Barge mounted cranes would be used for materials handling.
> 3. Contractor personnel vehicles would temporarily park on the street near the site until such time as the carpark is completed. Then these cars would park in the carpark."

The use of the car park for the purpose of the marina construction would be unlawful for reasons already stated. It needs to be **emphasized that the carpark is supposed to be "on site" of the marina not on separate titles and divided by private property as here**. The same would apply to item (1) and (2) if they are within the Community Association parcel.

To the extent that this and the earlier statement implies a "right to use" it should be considered under the certification given pursuant to the Director General's requirements.

The following section of the Response corresponds to Vol 10 of the EA

This volume reports on the (1) impact on avian fauna, (2) Marina management plan, (3) consultation and (4) navigation issues.

The avian fauna report is based on a "desktop" search. The submission is that a better and more reliable report would have been one based on actual observations. The submission rlies on the observation reported by Dr A Goth which is Appended to it. Consequent on this report the conclusion reached in the Appendix that,

> "This desktop assessment found that there is unlikely to be a significant impact from the proposed development to any avian species listed under the EPBC Act or the NSW TSC Act"

is rejected.

Issues relating to the management plan have already been deal with but there are two additional issues. The first is the use of CCTV cameras which, if facing towards the foreshore would be intruding onto private property and the second, is the emergency land evacuation site shown on the drawing MMP02. The site is on the *Community Association DP 20347* parcel, which is private property, and the proponent should not be allowed to justify the proposal by making use of other people's property. This same diagram shows that the manager's office extends past the boundary of the Community Association parcel and, this is unlawful and the proponent should not be permitted to justify its application by extending it over into the community association parcel.

As to the consultation report, in so far as it relates to the "on-line" process it is completely rejected. This will be dealt with in detail later and here it suffice to say that it should be rejected for its use of "push questions" or leading questions designed to produce a desired reply. It is more of a marketing tool than a consultative one.

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This Part provides more details and supplementary material to that contained in Part 1: Response.

Chapter 1: Introduction

Introduction

The purpose of this Chapter is to introduce the party making this submission, to consider same preliminary aspects of the Major Project Application (*the MPA*) and the NSW Maritime consent and then bring into play some statutory provisions which will impact on the assessment process.

The Major Project Application

By an application dated 18 April.2007 Breakfast Point Pty Ltd (the developer/proponent) lodged an *MPA* for a commercial marina described in Part 3 of the *MPA* as being at,

> "19-21 Tennyson Road Breakfast Point 2137 City of Canada Bay."

In Part 4 of the same application it is said to be sited,

> "in Kendal (sic) Bay **adjacent** to Breakfast Point Residential Development" (emphasis added).

The site known as "19-21 Tennyson Road" it about a kilometre away (as the crow flies) from the bay in question and, in fact, it is on a busy road. The misdescription has been carried forward onto the Director General's Requirements and by NSW Maritime who has given its "land owner's consent" over 19-21 Tennyson Road. If this wasn't so serious it would be funny.

Leaving aside, for the time being, questions of description it would appear that the more accurate description of the site of the proposed marina would be. Notwithstanding the misdescription NSW Maritime gave its consent on 3 July 2008. This approval was given on the basis of a drawing/plan that is different to the one lodged with *the MPA* on 18 April, 2007 even though, as on the original, it is identified as "SK15B" rather than as "Amended SK15B"(or by some other appropriate description).

As just mentioned the consent from NSW Maritime was based on drawing SK15B and on two other plans that did not form part of the documents lodged with *the MPA* of 18 April, 2007 or, to be more precise, that are not displayed as part of *the MAP* on the DoP web site. This is a worry. What happened to governance and transparency? What other documents, not on the DoP web site, were submitted to NSW Maritime or to DoP or both that have not been disclosed?

Governance questions aside there is need for greater precision in identifying the proposed site. It should be identified as per the description given in Part 4 of *the MAP* (together with its own misdescriptions),

> "in Kendal (sic) Bay **adjacent** to Breakfast Point Residential Development" (emphasis added).

There are two misdescriptions here. The first is that there is no such place as "Kendal (sic) Bay" on the Parramatta River near Breakfast Point but there is a Kendall Bay. The second is that drawing SK15B depicts a marina *mostly* adjacent to the Breakfast Point residential development [1] but also on part of the development itself and shows the proposed marina as making use of facilities, the ownership of which, is in the hands of the Community Association DP No 270347 *(the Community Association)*[2] and not the applicant to *the MPA*. More on this later[3].

Precision is imperative and the reason is obvious. A decision needs to be made on the correct facts. The relevant parties and interested persons must know exactly what case to meet. Imprecision can mislead and deceive and in the process misdirect the attention from the real

---

1 This site was commonly known as Mortlake when it was the AGL Gasworks. It is now identified as a strategic site under the *Harbour REP. See Sheet 23.*

2 It's going to be tedious but the words 'community association' are going to appear constantly instead of simply referring to 'community". The reason for this is to distinguish the 'community association property/parcel' from the wider "community."

3 Of course this may not be a misdescription at all but something else!

The assessor needs to be clear that the marina will directly use and impact on the private property of individuals (Community Association DP No 20347) who are not party to the application so that the marina structure will,

(i) make use of private property as a base from which to construct the marina,

(ii) encroach[4] on Community Association property (see drawings previously referred to),

(iii) the marina users will make use of private property to get onto and off the marina and

(iv) the marina, being a commercial undertaking, will impose financial and non financial costs on Community Association members.

Relevant statutory provisions

There are a number of statutory provisions that provide the context within which this submissions needs to be considered and the assessment process undertaken. The first to be noted are the Director's General Requirements pursuant to *the EP&A A s 75F issued in an amended form* on 14.01.2008 and some of these requirements will be explored in the chapter dealing with statutory instruments.

Interested persons

Reference has already been made to the Community Association. It is unnecessary to go into great detail about its legal standing but it should be noted that the Community Association is a corporation constituted by force of the *Community Land Development Act* 1989 s 25[5]. The purpose

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4 For the purpose of clarity if the proponent asserts that it has an easement to encroach (by putting part of the marina structure onto the community association parcel) this would be incorrect. The elements of an easement have to (all) be present at the time when the easement is supposed to have been created. In this instance no land in Kendall Bay was sufficiently identified –if at all-- (either as a servient or dominant tenement) to be capable of being an element in an easement. Therefore, no easement for encroachment exists in so far as it touches on land in Kendall Bay.

5 The section provided, inter alia,

"(1) The registration of a community plan operates to constitute a corporation with the corporation name "Community Association DP No. ...", the number to be inserted being that of the deposited plan registered as the community plan.

:

of this Act is set out in its preamble and is,

> "to facilitate the subdivision and development of land with *shared* property" (italics added)

The companion legislation to the *Community Land Development Act* is the *Community Land Management Act* 1989 (*the CLMA*). *The CLMA s 5* sets out its management role and its membership[6] and by *Schedule 1 cl 2* gives its management functions in the following terms,

> **"2 Management and maintenance of property**
>
> (1) An association must control and manage its open access ways and private access ways, *and all other parts of its association property*, and must do so for the benefit of its members.
>
> (2) Subclause (1) does not authorise any action that would be inconsistent with:
>
> (a) an Act in so far as, under section 116, it applies to an access way, or
>
> (b) a function in so far as, under that section, it may be exercised on, or in relation to, an access way.
>
> (3) An association must properly maintain, and keep in a good and serviceable state of repair, any part of its association property that is an access way.
>
> (4) An association must inform the consent authority if any part of the association property is to be, or is, used for commercial purposes.

---

(4) The membership and the functions of the corporation are as stated in the Community Land Management Act 1989."

6 The section provides, inter alia,

(1)...

(2) The corporation has for its members:

(a) the proprietor of each community development lot in the community plan that has not become subject to a subsidiary scheme, and

(b) the precinct association constituted if such a development lot becomes subject to a precinct scheme, and

(c) the neighbourhood association constituted if such a development lot becomes subject to a neighbourhood scheme, and

(d) the strata corporation constituted if such a development lot becomes subject to a strata scheme."

(3)..."

(5) In this clause:**"access way"** means an open access way or a private access way" (emphasis added).

Sub-clause (1) is of direct relevance to the application at hand. The application seeks to make use of open access ways and, by so doing it **explicitly** requires the consent of the Community Association. There is no doubt about this requirement. *The CLMA Sch 1 cl 2* imposes a duty on the community association to,

> *"control and manage...its association property, and must do so for the benefit of its members" (italics added).*
>
> It is not open to the proponent to treat community association property as a private fiefdom and it must have proper regard to the law, equity and the rights of the co-owners of the community/shared property. If you add to this the provisions of the *CLMA s 61* (the use and enjoyment of one lot must not unreasonably interfere with the use and enjoyment of another lot or obstruct the lawful use of community association property) and *s 110* (owners have mutual duties to each other in how they use and enjoy their lots so as not to cause any nuisance (by noise or otherwise) or hazard or, interfere with the use of access ways) it will be seen that the rights of lot owners is not unfettered; and as the developer is bound by these provisions it cannot take on itself to treat community association property as its own to do as it pleases. This issue will require more consideration when dealing with the rights of the "public" to use the access ways and this will be done later in the submission.

It is worth noting that the Community Association can impose restrictions on "users and uses" of Community Association property. Thus, the *CLMA s 17* provides,

> **"**17 By-laws fixing details of development
>
> (1) The by-laws for a scheme may relate to the control or preservation of the essence or theme of the development under the scheme by:
>
> (a) limiting occupancy under the scheme to persons of a particular description, or
>
> (b) fixing the architectural, building or landscaping styles to be permitted, or
>
> (c) limiting the kind of materials that may be used in buildings and other structures, or
>
> (d) requiring that specified association property be used only for particular purposes, or
>
> (e) **imposing any other kind of restriction (bold added)**.
>
> (2) If a by-law made in accordance with subsection (1) is identified in the by-laws as relating to the control and preservation of the essence or theme of

the scheme to which it relates, it may be amended or revoked only by a unanimous resolution of the association, or the strata corporation, constituted under the scheme " .

These provisions can be used to prohibit,

(i) berth owners from entering Community Association property,

(ii) using any car/trailer parking facilities covered by the community scheme,

(iii) require that any community association property, e.g., access ways, be used only for resident and guest parking only,

(iv) impose any restriction that seems reasonably necessary to preserve the essence and theme of the development, and

(v) it can erect gates on all entry points into community association parcel, or

(vi) a boom gate at the marina,

because it would not be consistent with the essence or theme of a private residential development to allow strangers to use, and by their use to impose, costs and expenses on private individuals for the benefit of a stranger (the applicant).

A close reading of *s 17(2)* makes it clear that the Parliament intended to give the residents the power to "control and preserve" the essence or theme of the development scheme by taking the extraordinary step of authorising the making of by-laws that can be entrenched by requiring a unanimous resolution to amend or revoke. The power in this section prevails over any by-law that purports to impose a limit on the management power of the Community Association.[7]

On any reading of the present situation it is practically and legally impossible to describe the existing "tenure and management mechanism" required by the *Harbour REP cl 22 (c)* as capable of and being able to,

"safeguard public access to, and public use of, that land ".

The provisions in *the CLMA s 17(2)* are backed up by a number of by-laws that show that the "tenure" and "management" question is not in the developer's hands to given or to control. If

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7 This is because by-laws, being "subsidiary" provisions of limited application must give way to provisions in the primary enactment (*Community Land Management Act or Community Land Development Act*) or other law.

anything, the situation is one in which it is up to the Community Association alone (or in conjunction with the Council -which also opposes the marina) to determine. This is made clear by reference to *by-laws 74 and 91.*

By-law 74 gives the general power to the Community Association to,

> *"make and vary rules about the control, management, operation, use and enjoyment of the Community Parcel*[8] *and, in particular, Community Property and any other part of it, including Foreshore Lot any (sic) Community Facility (Rules)"*

There is a special provision in *by-law 74.3* affecting the making or the variation of rules affecting the *Foreshore Lot and the Public Access Easement Site*. The provision is that the Council must give its consent to any variation. The current position taken by the Council is one that suggests that it will co-operate with any change that is deemed necessary to uphold the access rights for the benefit of local residents but not for marina users.

By- law 91 deals with the use of the *Foreshore Lot*. The "*principal use*" of this Lot is as a,

> "foreshore park, recreation area, access trail and landscaped area for the use and enjoyment of the general public and for the general public to pass and repass on *foot or by bicycle*".

To "pass and repass on foot or by bicycle"[9] is not the same thing as by rubbish collection trucks, or boat trailers, vehicles or other means of transport (motorised or otherwise) nor to use it as a means of transit to and from a marina[10]. In fact it would amount to,

(i) a change in the means used to derive the benefit of the easement,

(ii) a change in the use to which the easement was put,

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8 The reference to the community parcel is important because it signifies an intention to cover the entire development and not just the community property within the development. In other words the power extends over lot 55, which is in the name of the developer, and so will be the marina jetty which will encroach (for which see footnote 4) on Community Association property.

9 This description, "on foot or by bicycle" is used regularly in this submission so, to save on repetition, the words "on foot" are found in the easement over Pt lot 1 (being item 15 in the Schedule under s 88B); the words "by bicycle" is found in the lease over lot 501 which is the foreshore walkway; and as indicated in this paragraph the phrase "on foot or by bicycle" is found in the by-law. Thus, from hereon the phrase "on foot or by bicycle" is used as a shorthand reference to all of these reference sources.

10 This would follow from the High Court's decision in Westfield Management Limited v Perpetual Trustee Company Limited (2007) 239 ALR 75; 81 ALJR 1887; [2007] HCA 45 (3 October 2007).

(iii) a change in the nature of the easement from public use to public and private commercial use and a consequential change in,

(iv) the character of the neighbourhood or in the material circumstances surrounding the easement.

Such changes can form the basis for an application to the Supreme Court to vary or extinguish the easement pursuant to *the Conveyancing Act s 89.* Like *by-law 74.3 by-law 91* can only be varied with the consent of the council.

The *Foreshore Lot* is leased by the City Of Canada Bay Council to the Community Association and subject to any contrary intention appearing therein, *by-law 74.3* applies to the foreshore lot and the council needs to give consent to any rules affecting its usage. However, since the council is against the marina, it would be expected that it would not object to any variation designed to stop the marina from going ahead. The thing about the lease over the foreshore lot is that it contains a couple of clauses that would seem to restrain the community association and give rights to the developer and the users of the marina, for example, *clause 2.1 (d)* prohibits the community association from using the land for any purpose other than,

"d) access across the Land to and from any development or other thing on the river side of the Land, for all lawful purposes with or without vehicles; and..."

Taken literally this would make the use of the land to walk parallel to the foreshore a breach of this clause. This provision is likely to be in constraint of trade and in breach of the *Trades Practices Act 1974* because,

(1) it is in restraint of trade since it is unnecessary for the fundamental purpose of the lease,[11]
(2) it is interferes with the proper management of non lease property as required by the Community Land Management Act ,
(3) It affects property not part of the lease,
(4) it takes away rights of the lessee for the benefit not of the lessor but of a person not privy to the lease.

This may also be an appropriate point to refer to clause 2.4 of the lease. This says, "The Lessee must not place or allow to remain on the Premises or any land adjacent to or nearby the Premises any sign or obstruction that may derogate from or limit Public Access."

On one reading this would seem to remove the right of the community association to place a fence or barrier or sign prohibiting entry onto community property from a marina. However, for the reasons given in the previous paragraph this is also likely to be in breach of the *Trade Practices Act 1974.* This clause needs to be read down so that it only applies

11 See the lease clause 2.3 and what it has to say about "public access" (it limits it to the land (lot) in question).

to signs and obstructions that would derogate from the use of the foreshore walkway as a walkway and, it is arguable, it has no application to any steps taken for other purposes, e.g., to stop the walkway from being used as a transit point to and from a marina. It is worth bearing in mind that a commercial marina is not a public enterprise but a private one that itself limits access to and use of the facilities to berth owners.

Another consideration is that the lease is, in fact invalid. This is because, the lot in question is "public land" as defined in the Dictionary to the *Local Government Act 1993 (NSW)* and this "public land", by force of *ss 25-54 Schedule 7*, is required to be classified as either "community" or "operational" land and as "community land" it must not be leased or licensed for more than 21 years. In the present instance the lease is for 299 years hence, it breaches this condition. Moreover, an intention to lease or license "community land" for a period longer than five (5) years has to be preceded by the giving of public notice and, if objection is raised on it, Ministerial consent needs to be obtained (*Local Government Act ss 45-47*). This condition has also been breached.

"Community land" is land that is "subject to a trust for a public purpose" (*Bathurst City Council v PWC Properties Pty Ltd [1998] HCA 59; 195 CLR 566*) and these types of trusts have characteristics of charitable trusts and they attract the protection of the Attorney -General if there is any proposal to the status or usage of the land in question (which the marina proposal will do). On this point it is noted that the *Bathurst City Council case* said (quoting *In re Wedgwood*),

"... the Attorney-General, with or without a relator, is "the proper and...the only competent party to protect the charitable trusts and to seek to enforce them and to look after the interests of the public in those trusts" "(par.39).

There has not been any notification to the Attorney-General and any move against the foreshore lot to use it contrary to it "trust" conditions will be unlawful. Accordingly, the lease is void, the marina proponent cannot provide the secure title to the land as required by the *Harbour REP s 22(c)* and the *Community Association DP 270347* is not restricted in its capacity to seal off the marina jetty from the community parcel.

What these provisions mean is that, other than the residents and occupiers, no one else has the right to use a vehicle on the open access ways in the Community Association parcel. The extent of the rights of the residents and owners to control access to the Community Association parcel can be gauged from the Court of Appeal decision in *State of New South Wales v Koumdjiev* [12] were the court had to decide whether the; had a right to enter on common (strata) property to arrest a person who had earlier refused them entry onto the common property but were later allowed entry by another unit owner. In finding against the police on charges for false arrest and false imprisonment the Court of Appeal held that,

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12 *[(2005)] 63 NSWLR 353*; *Kuru v State of New South Wales* [2008] HCA 26 (12 June 2008)

> *"...subject to the by-laws of a relevant strata scheme, if one unit holder in a strata title building gives a licence to an acquaintance to enter the common property entrance foyer to visit the unit owner's unit, that licence cannot be revoked by another unit holder,* **but a unit holder cannot give a licence, irrevocable by another unit holder, which is not reasonable and incidental to the right of the grantor to possession and use and enjoyment of the common property"** (italics and bold added)."

Save for this exception, and any other provided for under *the CLMA*, the by-laws and the easement **no other individual (who is not a resident/occupier) has a right to use a vehicle on the open access ways and can legally be directed off the Community Association parcel.**

Another statutory provision to be considered in the assessment process is the *Harbour REP. By s 22 (c)* the assessment process has to take into account if the foreshore land[13] is,

> "**not in public ownership**, development should provide appropriate **tenure** and management mechanisms to safeguard public access to, and public use of, that land (emphasis added)."

While the foreshore lot is in public ownership it is subject to a lease for 299 years in favour of the Community Association. The period of the lease is so long as to amount to "freehold title" and without Community Association land owner's consent this requirement (and that in *Schedule 1 cl 1)* cannot be satisfied.

13 Part of the foreshore land is Community Association property and part (the walkway) is owned by the City of Canada Bay Council.

Chapter 2

Land Owner's Consent

&

Rights, Title & Interests

Introduction

Chapter 1 examined *the MPA*, some statutory provisions and by-laws that give the assessment process the title context which it needs to conclude the process.[14] This Chapter will take the submission into the area of land owner's consent and on to the impact on the rights, title and interest of persons not party to the marina application.

Land owner's consent

Land owner's consent is required from,

(i) NSW Maritime,

(ii) Community Association, and

(iii) City of Canada Bay Council.

NSW Maritime land owner's consent: Insufficiency and invalid

Land owner's consent is required from NSW Maritime. This consent has been given. NSW Maritime consent is necessary because it is the owner of the land in Kendall Bay. However, while this consent is a necessary precondition to the proposal being considered it is not a sufficient condition. A simple perusal of the drawings, that were before NSW Maritime at the time it gave its consent and that were relied on by it giving its consent, **clearly show** that part of the proposed marina structure extends (encroaches–for which see footnote 4) on to land that does not belong to NSW Maritime and that is part of the Community Association parcel. It is also **clear** from the same drawings that the marina is entirely dependent on land, which NSW Maritime does not own, for parking facilities and access for berth and other users.[15] This is troublesome. On the one hand NSW Maritime was alert enough to impose a condition to its consent, to wit, for "land tenure arrangement" acceptable to it (more below) but, on the other hand, did not require the applicant to obtain other land owner's consent. **In circumstances where NSW Maritime was fully aware of the limit of its land (boundaries) and being fully aware, from the drawings it relied on to give its land owner's consent, of the interest of the Community Association and the absence of competitive tenders[16], it would be appropriate to ask why it engaged in conduct and/or participated in a process that purported to give apparent validity to and participated in a commercial undertaking (from which it stands to derive a direct financial benefit) that had the effect of alienating the rights, title and interests of a legal person that was not a party to the commercial proposal i.e., the Community Association DP No. 230347.**

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14 The other part is provided by the EP&A Act, the Harbour REP, the Harbour DCP and the local DCP.

15 See Chapter 1.

16 Relevantly, it is rumoured that an option to buy has already been sold by the proponent which suggests that a competitive process could have been more financially rewarding for NSW Maritime. Competitive tendering would have been consistent with NSW Maritime's published commercial leasing policy.

Pre-judgement of the application: the old Wharf

A reference to the authorities is also required not only because of the issues raised in the previous paragraph but because of the removal of the old wharf. That wharf was removed by the proponent at the request or direction of NSW Maritime (as disclosed by the proponent in meetings of residents). This is odd. The old wharf was in Kendall Bay. The proponent was developing DP 270347 which is not in Kendall Bay thus, NSW Maritime had no right or authority to require the proponent to remove of old the wharf as part of the residential development since NSW Maritime has no power or authority over residential developments. Thus, the removal of the old wharf was,

(1) unconnected with the residential development,

(2) unnecessary for the residential development and,

(3) was done for a purpose other than for the residential development.

Why? The wharf was outside DP 270347[17] so it was its removal a preliminary step to the consent to the marina? It is noted that there were no competitive tenders for the development of the bay.

In the event NSW Maritime land owner's consent restrains the applicant from commencing work on NSW Maritime's land unless:

> "(b) there is a land tenure arrangement in place which is suitable to NSW Maritime."

Presumably, the "land tenure arrangement" referred to in (b) is a land tenure arrangement over its own property. That's fair enough. It should look after its own interests. But on further consideration why would one go to the trouble to give its consent and not require "land tenure arrangements" over other affected land without which its own consent would be negated? In any event no such tenure arrangement has been disclosed and the assessment process should not be undertaken without it (a suitable land tenure arrangements might never be reached).

The absence of a comprehensive land owner's consent from NSW Maritime should not obscure or deflect the attention from an obvious defect in the consent itself. The consent is a conditional on an acceptable "land tenure arrangement" being negotiated but the *EP&A Reg 2000 Sc 1 Pt 1 cl 1(i)* [18],

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17 The removal of the old wharf was not part of the Part 3A approval for the 2005 Concept Plan (nor the 2002 Masterplan for that matter) and, realistically , it could not form part of it because DP 270347 does not extend into Kendall Bay. However, the summary of the 2005 Concept Plan prepared by the development's architects has the following entry under the heading "Public ransport':
"Bus/Ferry Interchange
LEP 91 objective Clause 41B (e) encourages the establishment of a ferry wharf, and Clause (f) encourages integrated public transport systems to service the land and adjoining neighbourhoods.
The planning of Breakfast Point makes allowance for the provision of these objectives". To assess the possible impact on the estate see Attachment 68.

This 'planning' is consistent with the removal of the old wharf –a removal that could not go ahead without Maritime's consent. Why require the removal at that time? Incidentally, this is consistent with the pre-application consultation web page statement that the marina design complied with NSW Maritime Guidelines (see Chapter 6 at Q 11) that are currently out of date but, presumably, were current at the time all of this 'planning' was taking place.

18 The *EP&A Reg 2000 Sch 1 Pt 1 cl 1(i)* says:

under which the consent was given, specifies a "consent" not a "conditional consent". To have it otherwise would require the DoP, in assessing the application, to go behind the (qualified) consent and investigate whether it has been complied with or not complied with. That is not the its function. Were it for the DoP to go behind the consent, it would implicitly abdicate its role as assessor and enter the arena of as advocate. The qualified consent seeks to impose this function on it. **It is submitted that the NSW Maritime consent is a nullity.**

For the record, it is noted in passing, that the drawings/plan(s), on which NSW Maritime gave its consent, indicate a reduced number of berths (172 down from 177) for the marina.

Rights title and interests to area not owned by NSW Maritime

Leaving aside the question of validity or otherwise of NSW Maritime's consent the submission will now consider the need for land owner's consent as it applies,

(i) to the Community Association and

(ii) as it applies to the City of Canada Bay Council.

This calls for a consideration of the title to the area affected that lies outside the land owned by NSW Maritime.

It will be recalled that *the MPA* sites the Marina "**adjacent to**" the residential development known as Breakfast Point. Thus, if one were to "take a walk" from the western most boundary of the Parramatta River what would one encounter? Firstly, there would be,

(i)the seawall (and lot 55 which is a section of the seawall currently in the name of the developer and is limited in depth and over/below this lot Pt lot 1 is found).

(ii)Pt lot 501 DP 1052824 being the foreshore walkway (limited in depth and below this stratum there is Pt lot 1 DP 270347).

(iii)a narrow strip (1m wide) being Pt lot 1 DP 270347 in front of the Hunters Wharf strata.

(iv)Hunters Wharf SP 75666 boundary, and

(v) Hunters Wharf apartments.

For most of its length the seawall is part lot 1 DP 270347. For part of its length (in front of Hunters Wharf), a part of it limited in depth and length is identified as lot 55 DP No 270347[19]. Lot 55 is in the name of the developer.[20] It is at lot 55 the proposed commercial marina joins up with the *Community Association* parcel

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"(i) if the applicant is not the owner of the land, a statement signed by the owner of the land to the effect that the owner consents to the making of the application".

You either give consent or you don't. There is no half measure. Pursuant to the provisions of the *Interpretation Act s 8* the singular "owner" needs the plural sense as well.

19 The lot had at least two previous lot numbers before becoming lot 55 on 9.09. 2005 (see sheet 9 of DP No 270347).

(see Attachment 2 being sheet 9 DP 270347 and Note 1 and the "A"-"A" diagram). Interpreting the diagram and notation is not easy but it seems that the area below the seawall and the part of the seawall below the level plane at R.L. 0.5 is still part lot 1 DP 270347. *This "A"-"A" diagram and the notations on it show that the R.L. to the top of the seawall is 1.5 but lot 55 is limited to an R.L. of 0.5 which means that there is still a section of the seawall that is above lot 55 that is Community Association property. Support for this interpretation can be found in the MPA documentation at 5.6 where it says,*

"The level of the jetty will be lower than the public access foreshore zone"

It will be recalled that drawing SK15B clearly shows that part of the marina structure will be on the seawall and extend (encroach–for which see footnote 4) past the western side seawall i.e. on Community Association property or property over which the Community Association has a leasehold title. *Accordingly, the Community Association needs to give its land owner's consent and it has not done so.*

Part lot 501 DP 1052824 is a stratum lot above pt lot 1 DP 270347. This is the foreshore walkway

and is owned by the Council and leased to the Community Association for a period of 299 years. This means that the part of the seawall known as lot 55 is above the land known as Pt lot 1. On its western most boundary lot 55 is contiguous with Pt lot 501 (Community Association leasehold title) and below this it is contiguous with Pt lot 1 which, as already indicated, is Community Association property (freehold title). The practical effect of this is that, because the ordinary meaning of land is "*that in respect of which you have a right from the centre of the earth to the heaven above*"[21], lot 55 is a stratum lot identified by and limited to its physical boundaries and the air space above it -"to the heavens"- remains part of Lot 1 DP 270347 and similarly, the part lot 1 DP 270347 below lot 55 -"to the centre of the earth"- also belongs to the Community Association (see Attachment 3.which is sheet 12 of DP 270347 and the "A"-"A" diagram)[22].

Continuing the walk one next comes across a strip of land known as part lot 1 DP 270347 which, at this point is 1m wide and then continuing further in a westerly direction, one comes to the boundary of the Hunter Wharf strata.

Lot 55 has a mysterious history. Sheet 9 of DP 270347 is dated 6.06.2003 and describes the same area as Pt lot 1 and Pt lot 3. There is a note on sheet 10 of DP 270347 (dated 18.07.2003) which describes these part lots as stratum lots limited in height and depth (Attachment 4). Part lot 1 is community property and lot pt 3 is part of Hunters Wharf strata property. Sheet 3 of DP 270347 is dated 29.03.2005 (Attachment 5) and this describes this same area part lots Pt lot 41. Later this part lot 41 changed to lot 55 (Attachment 6 is sheet 2 DP 270347 of 21.07.2005). The mysterious aspect of this lot is that it went from being part of a lot that was community property (Pt lot 1) and part of

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20 Attachment 1.

21 *Commonwealth v New South Wales* (1923) 33 CLR 1; [1923] HCA 34 (9 August 1923) . The actual maxim is given in Butt Peter., Land Law . 5th ed Thomson LBC. Sydney 2006.: "*cuius est solum eius est usque ad coelum et ad inferos*" which translates into "the person who owns land owns it from the heavens above to the centre of the earth below" at [205].

22 Note the reference to "MC9" which is to an easement for support and attachment.

a lot that was strata property (Pt lot 3) to being a lot (lot 55) that is in private hands in circumstances were the *Community Land Development Act s 31 (1)* provides that,

> "On registration of the plan or dealing by which it is created, association property vests in the relevant association".

If title to this lot is with the Community Association, then the Community Association has to give land owner's consent to its land becoming part of a commercial marina. If title to the lot remains is the developer then the Community Association consent is still required, as an incident of its authority over any "**works**"[23] ,

> "carried out or [that] remains in the Community Parcel".

The applicant for the "works" has to comply with all by-laws[24] [25]. These by-laws are binding on the developer [26] but lest the developer argues that, as a developer, by-*law 8.16*[27] *and 8.17*[28] excuse it from having to obtain Community Association approval for any "works" then, such a submission would be without merit because the developer's rights contained in *by-law 8.16 and 8.17* have no application to the present circumstances. This is because, by force of the definition of "development activities" in by-law 93.2, the rights are confined to,

> "...anything to be done **in connection with development in** the Community Parcel as from time to time determined by the Developer,..." (emphasis added).

However, the construction of the proposed marina is not "**in connection with a development in**" the Community parcel. For the developer to be excused under these provisions there would have to be a development "in" the Community Parcel and the "works" have to be "in connection with the development (which is in the Community Parcel). Thus, the marina does not come any where near being a development that would satisfy by-law 93.2. The Community Association has not given its approval for any "works" and is not likely to give it in the foreseeable future.

For abundance caution it is mentioned that lot 55, in its precursor existence as lot Part lot 1 and Part lot 3, is shown as being subject to an "easement for support & attachment" (see Attachment 3 which is sheet 12 DP 270347) and the *s 88B* schedule item 9 provides that lot 3 is benefited by such

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23 Works is defined in by-law 93.2 as including (a) the **erection of a new structure**, (b) **changing the appearance** of an existing structure, (c) the instillation or attachment of...**any other item that is visible outside a lot**.

24 By-law 8.2

25 By-laws 7 and 8 which are generally known as the Architectural and Landscape Standards.

26 The *Community Land Management Act s 13* provides for the binding effect of the *Community Management Statement.*

27 By-law 8.16 gives the developer all rights necessary to carry out "the Development Activities"

28 By-law 8.17 says that by-law does not affect the developer's rights to carry out Development Activities or require it to obtain approval for them under this by-law.

an easement while lot 1 is burdened by it[29]. The thing to note about this is that the "easement for support and attachment" has both the servient and the dominant lots within DP 270347. Consequently, the proposed marina structure cannot rely on this easement for "support" and "attachment". Whatever easements rights are claimed for lot 55 (or any other lot for that matter) they are only relevant so long as they are,

(i) appurtenant to another lot in DP No. 270347, and

(ii) "accommodate" the dominant tenement and,

NB the seawall is not the subject of an easement for access so that any person having a right of access to the open access ways and to the foreshore walkway cannot exercise such a right (assuming it exists) by going "over the wall" and cross onto the walkway or open access ways.

In so far as Pt lot 1 and Pt lot 3 (lot 55) are concerned if it is asserted that lot 55 (or any other lot) has easement rights connected to land in Kendall Bay the circumstances do not give raise to an easement because the part of the land in Kendall Bay that will ultimately be affected was not, at the time the alleged easement was purportedly created, was nowhere definitively identified. Nor is it now definitely identified. You cannot "reserve" or create an easement by establishing one element of it now and waiting for the day when another constituent element of the easement lot becomes available. To be clear, an easement affecting land in Kendall Bay, for support and attachment, and whether as a dominant tenement or servient tenement to land in Kendall Bay has to be complete in all of its element **at the time of creation. For this reason there cannot, at this time, be any legally effective easement in place affecting land in Kendall Bay.** In any event it is doubtful that an easement for "attachment" is recognised by law and found, on the facts of this case, to exist for land in Kendall Bay. This is because the land in Kendall Bay is not defined nor are the details of the "attachment" specified. Furthermore, there is no way that such an easement can be said to "accommodates" the dominant tenement (as distinct from giving a mere commercial advantage). In other words the alleged easement does not add to the normal enjoyment of the lot as a seawall.[30] See also the part of the submission dealing with "easements in gross" which this seems to exemplify.

Community Association land owner's consent

The drawings/plans that formed the basis for the consent of NSW Maritime show that the proposed structure will extend past the eastern most boundary of the seawall and onto property forming part of the Community Association parcel. The Community Association parcel includes the seawall and the Community Association property includes the areas identified in the drawings/plans that are "open access ways". These "open access ways" are not roads or streets to which the *Roads Act* applies and conditional access to them is currently (there is no justification for concluding the access is unlimited as to time) limited to persons "on foot"[31] and subject to conditions imposed by the Community Association.

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29 If lot 1 is burdened in favour of lot 3 this does not make lot 1 burdened in favour of other lots eg., land in Kendall Bay.

30 *Clos Farming Estates P/L (Rec & Man. Appt) v Easton & anor* [2001] NSWSC 525; upheld on appeal [2002] NSWCA 389.

31 See note under footnote 10.

In addition the Community Association has leasehold tenure over the foreshore walkway. There are conditions on the use of the foreshore walkway but these are not material to the requirement to give consent because "privity" and the right to enforce any condition of the lease does not extend to any one other than the parties to the lease. The important point to make is that neither the lessor nor the lessee has given land owner's consent nor are they likely to give it in the foreseeable future.

So far the focus of the submission has been on the "marina" but, in doing so, no one, particularly the assessor, should loose sight of the fact that there is an implied application for a "*Skid*" that is getting a piggy back ride on the "marina" application. The drawings/plans previously referred to (see also sheet 32 of DP 270347) show this Skid as clearly being on Community Association property and the submissions made regarding the marina application apply equally, and with greater strength, to the proposal for the Skid.

Accordingly, it is submitted that the Community Association needs to give land owner's consent for the marina and for the Skid. To date, only NSW Maritime has given its consent, and for this reason, the consent of NSW Maritime, even if valid-a point which is not conceded, is **not sufficient** for the application to proceed to assessment.

City of Canada Bay land owner's consent

In so far as the *City of Canada Bay Council* is concerned its land owner's consent is required because, it has title to that part of the proposed marina known as the foreshore walkway (subject to a lease to the Community Association) and, it would appear from the drawings/plans relied on by NSW Maritime, that part of the marina structure extend (encroaches–for which see footnote 4) past the seawall and on to this lot and attracts its land owner's consent.

Practical considerations

Reference has been made to the need for the City of Canada Bay Council to give its consent as land owner (lessor of the foreshore lot).

The next practical consideration is that the marina is supposed to be in Kendall Bay "**adjacent to**" the Breakfast Point residential development which means that the marina owners/users cannot get on and off the marina without crossing the boundary line and onto the *Community* Association parcel.

The process of getting on and off the marina is subject to the Community Association control. Some control measures are found in the *Community Land Management Act s 117.*[32] This section provides that the Dividing *Fences Act 1951* has effect:

> "(a) in relation to a community scheme and an owner of land outside the community parcel–as if the community association were the owner of the community parcel, and
>
> (b) ..."

The Community Association **can** require a fence to be put in place along the boundary of lot 55 and the marina and/or along the entire length of the seawall from Kendall Bay to River Quays. *Section 117* makes the title to lot 55 immaterial because the fence is between land (Kendall Bay) that is outside the community association parcel and a lot within the parcel. The cautionary note is that a statutory authority, the owner of Kendall Bay, cannot have a liability for a fence imposed on it (although it can agree to contribute) [33] In other words, if the community association wants a fence, subject to meeting any other requirements, it can have one at its own expense.[34]

For the purpose of completeness a couple of additional issues will be dealt with regarding the dividing fence. On one reading of the DP sheet showing lot 55 it appears that the lot's boundary is from the top of the seawall downwards but on another reading the boundary runs from the bottom of the seawall upwards and finishing below the top of the seawall. In so far as a fence is concerned the following would be the situation. For the first reading the fence could be constructed like any other dividing fence i.e., straddling the boundary of lot 55 and the NSW Maritime land or, in view of clause (a) above, it could be constructed entirely on lot 55 at the option of the community association. If the situation is as described in the second scenario then lot 55 would be irrelevant as the fence could be constructed above its boundary line (as if that lot did not exist and that part of the seawall was community association property.[35]

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32 Refer also to the *CLMA Sc 1 cl 2* wherein it is provided that the Community Association must control and manage the access ways for the benefit of all members. Another perspective would have it that the boat users/owners and their guests could create a nuisance (by noise or otherwise) and/or hazard (with their cars and trailers) and this would breach the mutual duties of co-owners (the developer and the residents) CLMA s 110; as well as unreasonably interfere with the use of other lots or obstruct the lawful use of the common property by other owners.

33 *Dividing Fences Act s 25.*

34 This control function is strengthened by the condition attached to the easement over Pt lot 1 which purports to grant the public a right to enter for the "purpose of recreation" . Consistently with the High Court's decision in *Westfield Management Limited v Perpetual Trustee Company Limited op cit. It* is submitted that entry for the purpose of recreation is not the same as entry for the purpose of going to and from a marina .

35 This "control function" is strengthened by the easement over Pt lot 1 purporting to grant access to members of the public for the purpose of "recreation". It is argued that to use Pt lot 1 as a means of transit to get to the marina does not amount to using the purported easement right for "recreation". This would follow from the decision in *Westfield Management Limited v Perpetual Trustee Company Limited* (2007) 239 ALR 75; 81 ALJR 1887; [2007] HCA 45 (3 October 2007)

Another option is for the Community Association on its own or in conjunction with the City of Canada Bay Council (because of the lease over the foreshore walkway)[36], would be to deny the developer the use of walkway and facilities for the construction (and later use of the commercial marina). In this regard, it is to be noted that any provisions in the *Community Management Statement* purporting to give the developer the right to use community property for development purposes cannot, on any reasonable interpretation, extend to making them available for development outside DP No 270347. An interpretation of that nature would fail the reasonableness test -it cannot be that the property of the Community Association should be made available for development activities outside the community parcel e.g., Catherine Hill Bay![37]

Another possibility would be for an application to the Supreme Court under the *Community Land Development Act s 70*[38] for a variation of the development scheme on the basis that a commercial marina was never part of the Masterplan. An argument based on the Masterplan would find support in the *Community Land Management Act s 15.* This section provides that the development contract has effect as if it had been included in an agreement under seal with covenants to the effect of those set out in *Schedule 2 Part 1.* These covenants are that,

> "...the original proprietor of the land the subject of the community scheme covenants:
>
> (a) with the subsidiary bodies jointly and with each of them severally, and
>
> (b) with the subsequent proprietors jointly and with each of them severally,
>
> that the land will be developed in accordance with the development contract and the development consent.[39]

These provisions are tied up nicely by *s 15(4)* that says that,

> "Any attempt to exclude, modify or restrict the operation of the covenants is void".

The essence of these covenants is that the construction of a commercial marina adjacent to the Community Association parcel; and/or encroaching on the Community Association parcel (for which see footnote 4); and/or the Community Association property; and/or imposing on the Community Association the burden to maintain property and facilities for the benefit of the marina users would be inconsistent with the covenants. This could lead to an action for breach of the covenant in which

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36 It should be noted that any potential restrictions imposed by the lease for the walkway are vested in the lessor (the Council) and since the Council's on 18.11.2008 unanimously resolved to oppose the marina one can reasonably expect its co-operation rather than opposition to any reasonable restrictions on the use of the walkway for construction purposes or for its use by berth owners and marina users. *Furthermore, to the extent that the proponent for the marina purports to rely on conditions in the lease it is pointed out that there is no "privity" between it and the parties to the lease*– and the lease can be set aside at any time by agreement between the parties or by the courts so that it does not provide the necessary security of tenure . In any event all of this depends on there being a valid lease which is not conceded.

37 What distinguishes an act or regulation from a by-law is that a by-law is limited in operation to a particular geographical area, which in this instance, is the area covered by DP 270347. Since the marina is outside the DP any provisions in the CMS that the developer seeks to rely on to help it with the construction of the marina is not, for this reason, available to it.

38 See *Neighbourhood Association DP 285249 v Watson [2008] NSWSC 876.*

39 There is a corresponding covenant from the subsidiary bodies and subsequent proprietors.

the Community Association might argue that a commercial marina and a car park for commercial marina users (as distinct from a car park for resident and visitors use) were never part of the and their existence would be inconsistent with the essence and theme of the development.

To remove doubt, reference is made to the 2002 Master Plan, 2005 Concept Plan and to the drawings on which NSW Maritime based its land owner's consent on. The latter show a car park having an area twice the size of the lot available for it but both the Master Plan and the Concept Plan shows development lots/town houses. Thus, there is a contradiction both in terms of what is to be located there and its size.

The 2002 Master Plan and the 2005 Concept Plan gave the proponent ample opportunity to disclose the intention to seek to develop a commercial marina adjoining to the Breakfast Point residential development and encroaching (for which see footnote 4) and on and making use of Community Association parcel but did not do so. Instead the 2002 Master Plan makes reference to, at p 10,

> "Water Based Activities Includes the refurbished pier, ferry terminal, marina and mooring facilities, rowing/skiff club ramps and other uses outside the subject land subject to Waterways consent" and, on the same page,

it describes the 'Waterfront Activity Precinct' as being,

> "Waterfront related activities related to the water 'Gateway' pier, ferry wharf[40] and boating facilities. Limited shops, restaurants, cafes, an amphitheatre, some offices at upper levels, boutique hotel/conference centre..."

Reading this one would be forgiven for concluding it was referring to something incorporated within the Community Association parcel –it is only the 'Club ramps and other uses' that are said to be 'outside the subject land'- and nor a commercial marina and with something associated with the "pier" (which no longer exists).

The objectives of the 2002 Master Plan, inter alia,

> "To provide a long- term planning framework for Breakfast Point, and facilitate its orderly staged development.
>
> To assist the public to understand the future character of the area."

None of these objectives are satisfied by the current proposal. For one thing the "long-term" plan did not disclose a commercial marina so, to that extent, it was not much of a plan. For another thing

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40`` See Attachment 68.

whatever was disclosed about a "marina" was not carried forward in the Concept Plan and any reader of it would have rightly concluded that it was no longer part of the 'long-term" plan[41].

Similarly, no one, the public included, would be assisted by a Master Plan that, at best, makes a salesman's reference to a facility that has no details or plan with it (as the other proposals in the Master Plan have) and, as before, is not carried forward in the 2005 Concept Plan. The plans in the Master Plan and the Concept Plan would give an entirely "different picture" of the development if a commercial marina was drawn next to the development from the picture is gives without it. If you want to disclose the "long-term" framework fro Breakfast Point you do not keep half of the plan out of sight in your back pocket.

The Concept Plan is *silent* about a marina and, it should be pointed out, that the Concept Plan is the plan that covers all of the undeveloped part of the scheme so it has more relevance that the 2002 Master Plan in terms of disclosing the thinking of the developer. In any event the Concept Plan had the opportunity to disclose a commercial marina at 2.04 where it specifically referred to the "Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 and did not do so. It had another opportunity at 13.05 where it mentioned a "Boat Shed" and said,

> "Subject to necessary authority approval, a low -level water access facility (skid) is proposed within the foreshore park. Council development consent has been granted for a small boat shed."[42]

The proponent thought it reasonable and prudent to mention a "low-level" water access facility but remained silent about the commercial marina. Indeed the word "marina", commercial or otherwise, does not appear in the 2005 Concept Plan. None of the plans forming part of the Concept Plan show any marina or car park for a marina. In fact there are a number of references to the seawall as being community property but no mention is made of the fact that Lot 55 is in the name of the developer. Thus, at 6.04 and the accompanying plan,

> "A 15m wide open space extending the full length of the water frontage of the site is to be dedicated for public foreshore access. This area is immediately behind the sea wall which is owned and maintained under the Community Scheme,"

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41 The 2002 Master Plan, at p27, has a "Phasing Plan" which shows the construction period for "waterfront Activities" as being 2002-2005. That period has come and gone and what was envisaged under "water front activities" has not taken place. It is noted that the specified period preceded the 2005 Concept Plan.

42 This is similar to the statement in the Master Plan, p 24, which mentions waterfront skiff/sailing and/or rowing facilities as "being considered in association with..."a marina in association with the pier." The "pier" has been removed and no longer exists and the "waterfront precinct' which was to include "commercial uses at low level; and to provide interest, variety and counter-balance the scale of the pier" does not exist either and since the pier has been removed the is no need for it to "counter-balance" it. 2002 Master Plan p 17.

and at 8.01 and the accompanying plan,

> "A 15 metre wide portion (Lot DP 1052824) extending full extent the water frontage, behind the sea wall is to be in public ownership43, with maintenance and upkeep the responsibility of the community association under Community Scheme DP 270347."

Perhaps the silence of the proponent regarding the commercial marina may be attributable to the incongruity between a commercial marina and the concept it was trying to sell to the approving authority,

> "To ensure the creation, retention and enhancement of significant vistas to and from the site, and to and from the Parramatta River.
> To maximise views, access and connection to the waterfront.
>
> To ensure that the views of the site from the street and the harbour should form a harmonious vista which includes vegetation in harmony with the buildings and view corridors to and from the water.
> To recognise the unique characteristics, opportunities and constraints of different precincts."[44]

These remarks are similar to the ones in the 2002 Master Plan. For the purpose of this submission the attention is drawn to the words "highly visible" and "extensive views to the River & the City". The Master Plan proposed a number of "view corridors" to Kendall Bay and the Parramatta River [45] and describes the "Parramatta River Visual Catchment" and talks about "water visual connection points" [46] . The irony of these laudable positive picture words is that the "view corridors" and the "water visual connection points" (on the western side of the bay) are, in fact, placed where the views and the visuals run into significant obstruction by the marina. In fact, no matter where these view corridors and water visual connection points are placed there is no running away from obstruction from the marina. The Master Plan should have said something about this.

There is little that need be said about these objectives of the 2002 Master Plan and the Concept Plan 2005 save that,

> (a). a commercial marina does not create, retain and enhance the significant vistas to and from the Parramatta River. This said, it is good to see the proponent concede that the existence of "significant vistas".
>
> (b) neither does a commercial marina maximise the views, access and connection to the waterfront by putting most of the bay under a "car park" for boats and denying most of the bay for the users for individual users and denying all residents and users of the

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43 It is now subject to a lease to the Community Association.

44 Concept Plan 2005 at 4.00. These are the same "Site Planning Objectives" of the 2002 Master Plan at 4.00.

45 Master Plan: "Site Planning Objectives" at 4.00 .

46 At p 18.

foreshore lot of a "clear water" bay. There is nothing inherently good about a marina (except to a mariner!) But there is something inherently good about a "clear water" bay for everyone (including a mariner!).

(c) similarly, it is impossible to see any harmonious vistas from the water. Whatever vistas may be created they are more likely to jar the vision and insult the mind than be in harmony with the buildings hidden by it and from them.

(d) finally, it is next to impossible to give effect to the "unique characteristics, opportunities and constraints" of Hunters Wharf and the foreshore houses by a commercial marina.

All these lead to the conclusion that the proposal is inconsistent with the Master Plan[47] and with the Concept Plan.

One might argue that the possible imposition of restrictions of the type outlined are not matters pertinent to the approval process but, with respect, to grant approval when its effect would be negated it would amount to an abuse of power and bring the Ministry into ridicule and disrepute.

For the purpose of removing any doubts about this part of the submission it is stated clearly and unambiguously that, because the proposed marina and its associated services structures and facilities must cross the boundary line (encroach) into the *Community Association parcel and/or property,*

(i) the *Community Association* will need to be an applicant to the proposal.

(ii) because the Community Association is not an applicant the consent of NSW Maritime does not cover the entire proposal and is insufficient for the proposal to succeed.

(iii) the City of Canada Bay Council needs to give land owner's consent because the proposed structure encroaches on the foreshore walkway over which it has title and without this consent the consent of NSW Maritime is insufficient for the proposal to succeed.

(iv) the City of Canada Bay Council needs to give its consent as the consent authority over that part of the marina that crosses (encroaches) the Community Association parcel boundary line because that part is not covered by the previous **Part 3A** approval nor by the current Part 3A and since it has not given this consent the proposal cannot succeed.

(v) the Minister, in general, and under *Part 3A* in particular, does not have the power to give to the developer access to, or use of or in any way interfere with the rights, title and interests of property owners covered by the *Community Association* without their consent. The argument here is very simple. The Minister cannot give development rights to person A over the rights title and interests in the property of person B without person's B consent or without going through the process of acquisition or resumption to first take away the rights, title and interest of person B and then transferring them to person A.

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47 The 2002 Master Plan is relevant in showing what was the intention at the time but it is the 2005 Concept Plan that is more pertinent because it is the Concept Plan that represents the updated vision of the developer.

For the purpose of removing further doubt arising from the inconsistent description of the site for the proposed commercial marina and Skid contained in the MPA (see above under this heading and in **Chapter 1)** a short comment needs to be made. If the developer claims that the proposed commercial marina is part of the development of DP No. 270347[48] then, it is submitted, that it cannot escape the issue of consent by the Community Association.

Although it has not been specifically touched on, it goes without saying, that to use the seawall for anything other than as a seawall is contrary to its zoning and its function. So that to put a structure on it, as shown in the drawings submitted to NSW Maritime, would breach both of these.

It is further noted that the seawall, at the point where, so it appears, the central arm of the marina would attach/connect/rest encroach (for which see footnote 4) has three buttresses on which, it is assumed, it is intended that the central arm would rest. These buttresses are not shown on any plan as being structures separate from the seawall and as belonging to NSW Maritime or anyone else. This being the case they are part of the Community Association parcel and attract the same submissions as made about the seawall itself.[49]

Provisions in the contract of sale

A short reference should be made to the *Contract for Sale* that residents of Breakfast Point entered into and the easements it refers to that were created under the *Conveyancing Act.* Of the easements the *Contract for Sale* identifies there is one for public access which carries a number of conditions (Attachment 7.0 & 7.1). Because this is an important easement a few details should be provided. The conditions imposed by the easement are shown in the *"Schedule of easements and profit a prendre"* created pursuant to the *Conveyancing Act 1919 s 88B.* By item 15 of this *Schedule* the lot burdened is identified as,

"Lot 1" and the "Lot/s benefited , Prescribed authority benefited "

is shown as "City of Canada Bay Council".

Thus, no "authority" is prescribed other than the City of Canada Bay Council. The *Schedule under s 88B, item* No 15 limits the use to, inter alia,

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48 Some time in 2007, early 2008, the writer inspected the proposed marina application on the web site for the Department of Planning. There were 5 pages to the application. One of those pages made reference to the proposed marina being a development of DP 270347. I printed the application but did not check the number of pages. At a later date I noticed that the page with that statement was missing. On revisiting the web site that page was no longer there, however by perusing the bottom of the pages that were available it was noted that each page is numbered as being one of five pages even though only four pages are shown and only four pages will print. Draw your own conclusion!. Further, at para 3 of this application there is a reference to a "detailed description of the land " being attached but there is no such attachment to the application on the web site.

49 For the purpose of completeness at these three points the seawall is 175cm, 180 cm and 190 cm high (going in a northerly direction). The difference may be due to the uneven bottom of the bay.

(i) being **on foot**[50] and with wheelchairs or other disabled access aids; and

(ii) without animals (except guide dogs or hearing dogs) (emphasis added).

These users " **must not**",

(i) park or stand a motor vehicle or trailer on the burdened lot unless expressly permitted to do so or

(ii) obstruct the use of the lot burdened.

On the basis of condition (a) and (b) the by-laws can prohibit any user of the marina from bringing a vehicle, trailer or construction vehicles and material on the community property unless "*expressly permitted*" and currently there are no by-laws in place to this effect.

The *Schedule* does not identify the "lot benefited" but does refer to the "prescribed authority "to be benefited as the City Of Canada Bay Council but throughout clause 15 of the Schedule there is repeated reference to "the Council and Authorised Users" and at cl 15.6 the Schedule defines "authorised users" as the Council's invitees and other persons authorised by it and "members of the public". In fact, by this process, the developer seeks to cascade rights from the council's rights under an easement in gross to others not capable of attaining rights by way of an easement in gross. In attempting to do this the developer has devolved unlawful rights to "members of the public".

There is no issue (as far as the Council and its servants and agents are concerned) because they might have a need to enter for Council's purposes. The problem arises with the purported extension ("assurance") to "members of the public". To appreciate the point it needs to be noted that a defining characteristic of an easement is that there needs to be a "servient" tenement and a "dominant" tenement (lot benefited). In the existing situation there is no dominant tenement. Where there is no dominant tenement one talks about an "**easement in gross**".[51],[52]

An "easement in gross" is limited to the Crown, a local or public authority and to a prescribed corporation

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50 See note under footnote 10.

51 For what it is worth the present easement started off a s 94 contribution before the council gave it back in return for the easement. The section says:

"(1) If a consent authority is satisfied that development for which development consent is sought will or is likely to require the provision of or increase the demand for public amenities and public services **within the area**, the consent authority may grant the development consent subject to a condition requiring:

(a) the dedication of land free of cost, or

(b) the payment of a monetary contribution, or both" (emphasis added).

52 *Bonvale Enterprises Pty Ltd v Halfpenny Investments Pty Ltd* [(2005)] 62 NSWLR 698; *Trevlind v BMP Manufacturing* [2008] NSWSC 603 (19 June 2008); Butt, Peter. Land Law. Thomson Lawbook Co. Sydney 2006.

(e.g., electricity providers, water provides, telecommunication etc.) as set out in the *Conveyancing Act s 88A*. These types of easements are for limited purposes and are to give the bodies identified in s *88A* the means to enter and carry out appropriate functions. What the developer has attempted to do here is not permissible. It has tried, through the back door, to create an "easement in gross" in favour of an entity, (members of the public),who is not the Crown, local or public authority or prescribed corporation. **Extensions ("assurances") of this types are not available even if there is a lot benefited [53] and they are not available when there is no dominant tenement. In summary, the extension ("assurance") is not permitted because there is no dominant tenement and because such extension is unnecessary for the Council to be able to exercise its easements rights.** The exercise of such boundless creativity by the proponent's legal representatives should go unrewarded.

It is important to keep in mind that the function of the easement is to give a limited right to the Council as against the owners of the servient tenement and not to diminish the proprietary rights of the owners of the that tenement which is what happens if the easement rights are expanded outside the ambit of the "authority benefited". This will give due regard to the importance of the principle of indefeasibility of title under the Torrens system[54], [55].

This is the only reasonable interpretation to give to the provision and, for practical purposes, users of the marina, whether as owners of berths or otherwise, cannot rely on the provisions in the easement to gain access to and use of community association property covered by DP No 270347.

Under the easement the Community Association retains the power to,

"make rules about the use of the site of this easement "

and pursuant to the *Community Management Statement* the,

"Council and Authorised Users must comply with any Rules".

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53 *Trevlind v BMP Manufacturing [2008] NSWSC 603 (19 June 2008)*; *Woodman R & Nettle K.*, The Torrens System in NSW. 2nd Ed LBC Sydney 2003. In those cases were an extension (assurance) of the rights over the easement in favour of "members of the public" and others, they involved both a servient and a dominant tenement. Also note that by the Conveyancing Act s 88A(1A) it is possible for one prescribed authority to "assure" to another prescribed authority but there is silence about an assurance to non authorities. Consider also the effect of the *Conveyancing Act Schedule 4A* and the limits it imposes on "Rights of access" and "Right of Footway"

54 *Westfield Management Limited v Perpetual Trustee Company Limited* (2007) 239 ALR 75; 81 ALJR 1887; [2007] HCA 45 (3 October 2007)

55 *Trevlind v BMP Manufacturing [2008] NSWSC 603 (19 June 2008)*

The importance of this is that there is no security of tenure for marina users because, at any time, the Council and the Community Association may agree to change the easement rights or do way with them altogether or the courts might similarly order.

It is relevant to mention some further wording of the *s88B* instrument. It authorises the Council and authorised users to,

> "pass and repass over the site of this easement:...[and] to remain for the **purpose of recreation**..." (emphasis added)

Words used to expressly grant an easement are construed fairly narrowly. Thus,

> (i) an easement to "pass and repass" between two lots does not extend to going "to and from and across" [56] ;
>
> (ii) while the limitation imposed by the words for the "purpose of recreation" **do not permit entry for the purpose of transit to and from a marina;**
>
> (iii) "right to access" does not include the right to park[57] ; and
>
> (iv) if the terms of the easement do not indicate an access point and a concluding point (as here)[58] **the easement does not give the right to enter the servient tenement at any point along the easement** so that the owner of the servient tenement can fence the land along the easement provided the fence does not prevent reasonable access.[59]

In the present case the proponent (who is not a party to the creation of the easement) is attempting to create an entry point along the easement at Hunters Wharf from land that is not part of a dominant tenement and along which, pursuant to the *Community Land Management Act s 116,* there should be a dividing fence. On the authorities this is not permissible. It amounts to a substantial interference with the rights of the servient lot owner and an excessive use by a non party to the easement.[60]

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56 *Westfield Management Ltd v Perpetual Trustee Company Ltd* (above)

57 *Moncrieff v Jamieson* [2007] 1 WLR 2620.

58 These are identifying characteristics of easements having a servient and a dominant tenement. *Boglari v Steiner School* [2007] VSCA 58.

59 Gale On Easements.18th edition. Sweet & Maxwell London 2008; Boglari v Steiner School [2007] VSCA 58 at [26].

60 *Boglari v Steiner School* (above).

Note that the purpose of the easement is for **"recreation"** which is entirely different to using for a commercial activity. Moreover, at the juncture with the marina, access to the easement cannot be had without first committing a trespass (going over the seawall) into the community association parcel because the seawall itself is not part of the easement. **The word "recreation" is important from another perspective. It is a word of limitation. The proponent is a corporation i.e., it is not a natural person. As a corporation it cannot engage in "recreation" and by necessary implication it cannot use the easement nor, a *fortiorari, r*ely on any purported rights under it.[61] Furthermore, the word "recreation" imposes an unassailable restriction on the owners/users of the marina. They do not make use of or rely on the easement right to "pass and repass" for the purpose of "recreation". What they do is "go to and from" the marina. This is not the same as to pass and repass for the purpose of recreation. In this context it is worth bearing in mind that the High Court has held that a right in an easement "to go, pass and repass for all purposes" is not the same thing as a right to pass and "go to and from and across"[62]. In other words the easement rights will be strictly construed.**

The *Conveyancing Act s 88(1)* provides that an easement created by an instrument after 1 January 1931 against a person who was not a party to its creation to clearly indicate a number of things e.g., the person whose consent is required to release, vary or modify the easement, however, by *s 88(4)* these requirements,

> "do not apply to an easement without a dominant tenement **acquired by or for a prescribed authority** referred to in section 88A, nor to any restriction on the use of land in relation to any such easement."

The relevance of the exemption is that it is limited to *s 88A* easements and any "easement in gross" purportedly created in favour of "members of the public" i.e., not the "authority benefited" will have to comply with *s 88(1)*. The instrument in the *Contract for Sale* does not comply with *s 88(1)* and to the extent that it purports to create an "easement in gross" in favour of "members of the public" it is void.[63]

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61 It is submitted that this is the case even if, as a corporation i.e., not as a natural person, it qualifies as a "member of the public", a point which is not conceded.

62 *Westfield Management Limited v Perpetual Trustee Company Limited* (2007) 239 ALR 75; 81 ALJR 1887; [2007] HCA 45 (3 October 2007).

63 If the easement is the usual "house and garden" variety the person (read the Canada Bay Council and others) who have the benefit of the easement would have a legal duty to maintain the easement. The Council makes no contribution to the maintenance of the open access ways,, the parks and the walkway along the foreshore.

Thus, there are no apparent reasons why the Community Association cannot enact by-laws to impose restrictions on the use of the sea wall[64], walkway or the open access ways that may be used to construct and/or service a commercial marina e.g., it could install a boom gate[65] at the wharf and charge a fee to get on or off; it could charge a fee for trucks or cars going to the marina and set the hours when this could happen and other associated conditions. At the very least any un-authorised crossing of the seawall, without the consent of the Community Association, could amount to a trespass.

For the purpose of removing doubt it is stated that there is no easement for access over the open access ways and/or over the foreshore walkway **that includes the seawall**; **and the easements over the open access ways and the foreshore walkways are limited in their use for the purpose of recreation and to claim or assert a greater right e.g., to use it for the purpose of a commercial marina will be inconsistent with proprietorship and possession of the servient land because it would be giving more than a limited right to use it[66].**

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64 The **seawall** is not an open access way to which the public could claim access rights under the easement.

65 It should be noted that the Community Association charges a fee for the use of the Village Green, Community Hall, Country Club and does so without objection by the developer. In any event see, for example, *Neighbourhood Association DP 285249 v Watson [2008] NSWSC 876.* The boom gate was installed by the developer , who sold lots in the scheme on the basis that residents could have access to the marina then who proceeded to charge a fee and in some instances threatened to sue users for trespass. The validity of these steps were not in issue but its existence was a factor in the court finding that the development scheme was "impractical" and could be varied under the *Community Land Development Act s 70.*

66 Butt. Peter., Land Law. op cit.

Chapter 3

Consultation Process

Introduction

The proponent has carried out a pre-application consultation procedure prior to lodging an application for the approval of the proposed marina. The purpose of this Chapter is to analyse this pre-application consultation process, however, the Chapter seeks to do this in summary fashion and leaves the details for the subsequent chapters.

First Observation

The pre-application consultation was computer based and the web site presented some information and invited participation in the survey. The first page of the web site has the following section:

> "**Process**
>
> The *zoning of the waterway in the area permits the construction of marinas and associated works* pursuant to the Sydney Regional Environment Plan (SREP) Sydney Harbour Catchment 2005.
>
> The proponent has been granted permission by the Maritime Authority of NSW to lodge an application with the Department of Planning to construct and operate a marina with 172 berths and *associated facilities*...."(italics added)

The words in italics are objectionable. They are too wide and misleading. The zoning is a zoning of the waterways and in no way does it apply to land. The current proposal encroaches on land and at least to the extent of the encroachment the reference to the SREP is inappropriate. Furthermore,

> (i) the zoning prohibits marinas with mooring pens (which apply to this marina) , and
>
> (ii) the SREP does not permit any and all works that might be associated with a marina. There are numerous prohibitions for example, tourist facilities and water based restaurants. It is thus, misleading and deceptive to make the type of broad assertions as are made in the web site.

Second Observation

The web site proceeds to refer to the location of the marina and says the following,

> "**Location**
>
> The proposed marina will be located *at Kendall Bay*, on the Parramatta River in the Canada Bay Local Government Area in Sydney's inner west." (italics added)

The statement that the proposed marina will be located at Kendall Bay is only partially correct. As read it clearly implies that it is entirely within the bay and it does not disclose that part of it will encroach on private property. Persons participating in the consultation process will be completely misled by this omission and by the omission of the details and extent that the proposed marina will be dependent on private property and facilities.

Third Observation

The web site contains another section headed:

> "**Proposal**
>
> "….The marina and jetty will provide *public access* and *enhance the foreshore experience* with the kiosk on the end of the jetty for *informal get togethers.*
>
> The development will *provide access for people with disabilities and facilities for use by the general public.* "(italics added)

The reference to "*public access*" can be and is misleading because access to the community parcel is not in the hands of the proponent. It fails to bring to the notice of the respondents to the consultation the factual and legal restrictions on the use of the open access ways by non residents. See other of the Opposing Submission for details.

The reference to *"enhancing the foreshore experience*" is a subjective description designed to bias the result in favour of the proposal.

Similarly, the reference to *access for the disabled* and *the public* is in the nature of a "motherhood" statement designed to elicit biased responses rather than elicit the true thoughts and feelings of the persons completing the survey. At the very least the reference should have been balanced by noting the problems associated with the impact on private property to support a commercial activity of the developer. In any event, the fact that there is nothing in the design drawing approved by NSW Maritime that identifies any specific structure for these particular purposes is evidence of this misleading design of the consultation process. Further, the reference to *public access* is meaningless and misleading because the boats will be privately owned and it is further misleading and deceptive because it does not alert the respondents to the consultation to the restrictions on public access.

The reference to "i*nformal get togethers"* is trying to elicit an emotional response of friendships and fun activities which sits oddly with the prohibition, by the regulations, against water based restaurants. Now it is possible for the proponent to argue that you do not need a water based restaurant to have "informal get togethers" but then you can't have them at a kiosk because kiosk are small facilities more suitable for use by passers-bys than for "informal get togethers". In any event an unqualified statement of the nature contained in the web site is biased.

Fourth Observation

The web site advises that,

> "The construction of the marina development will provide the general and boating public with:
> • Parking
> • Toilets
> • Access for Sailability Australia activities
> • Enhanced access to the waterway through the provision of pick up and drop off berths
> • Enhanced waterway experiences through the provision of day tripper berths
> • Enhanced experience of the Breakfast Point foreshore and enhanced community experience through the provisions of the jetty and kiosk for informal get togethers
> • Access for people with disabilities to vessels at public berths
> • Vessel cleaning and maintenance, and
> • Sewage and waste water pump out.

There will be no provision for refuelling of vessels, and no slip facilities to remove boats from the water for **major** repairs and maintenance.

The works proposed include:
• Construction of a floating structure to provide wet berths for 172 vessels, which will incorporate five destination berths for the general boating public; **to provide a point of interest** west of the Sydney Harbour Bridge.
• A fixed jetty with a **kiosk** at the seaward end; the jetty will be designed to incorporate a **ferry stop** should future demand show that this is desirable, as requested in the Canada Bay Local Environment Plan.
• Installation of a "**geotextile blanket**" over the area covered by the marina to ensure sediments are not disturbed by propeller wash effects.
• A **car park** for 58 vehicles in the area on the west of the existing residential foreshore buildings, which will be dedicated to the use of the marina.
• A small manager's office with some facilities for use by marina users.

The vessels which will be accommodated in the marina will range in size from less than 8 metres, up to 25 metres, with the majority of the vessels being in the range 10 to 16 metres in overall length. The Inner West Marina proposal has been **designed as a result of changing demand for storage of sea vessels in Sydney, and in particular, west of the Sydney Harbour Bridge" (**emphasis added**).**

Parking:

- The reference to "parking" is misleading and deceptive. It does not disclose that the requirement of the regulation is for the parking to be "on site" The failure to disclose this information leads respondents to the consultation to assume that "off site" parking is satisfies the requirements and misleads them into incorrectly evaluating this part of the application and its associated detriments e.g., traffic and access to the open access ways.

Access for Sailability Australia activities.

- This is another "motherhood" statement designed to bias the response. The fact is;
  (a)that the design drawing approved by NSW Maritime does not identify any specific structure for this particular purpose is evidence of this misleading design of the consultation process—one might as well say that it has access for men, for women, children, tall people, short people etc. Get the picture?

  (b) it duplicates the reference to access for people with disabilities (for which there are no special provisions made) which suggests that whoever produced the web site was looking for "acceptable" groups to mention in order to make the proposal "PC" immune because the reference does not show any understanding of what Sailability Australia is concerned with.

- **Enhanced access** to the waterway through the provision of pick up and drop off berths
- **Enhanced waterway experiences** through the provision of day tripper berths.
- **Enhanced experience** of the Breakfast Point foreshore and enhanced community experience through the provisions of the jetty and kiosk for informal get togethers.

The same comments apply to these "enhanced" access and experiences as were made earlier in relation to other "enhanced experiences". There is a complete absence of balance; the "day tripper" berths do not add anything to the services currently available with Sydney Ferries and if

they do not add to the service they do not "enhance" it. The reference to the *kiosk and jetty for informal get togethers* as enhancing the community experience is particularly galling for any one living at Hunters Wharf and having to put up with the noise and, more than this, it could well be a hazard to berth generally and in case of emergency in particular. See also other comments regarding the prohibition against water based restaurants.

- **Access for people with disabilities to vessels at public berths**
  See previous comments on this issue.

- **provide a point of interest west of the Sydney Harbour Bridge.**
  This is another "motherhood" statement and the prior comments apply.

- **designed to incorporate a ferry stop**
  This and some of the other "facilities" identifies the very nature of the marina which is a commercial enterprise designed to further the commercial interests of the developer at the expense of the residents of Breakfast Point and the surrounding community. The old saying about dressing mutton up as lamb applies here. It is a commercial undertaking being dressed up as a public benefit hence the reference to disable access, enhanced experiences etc. If any evidence of this disguise is required just note that nowhere does the web site refer to a commercial marina.

- **Installation of a "geotextile blanket"**
  No approval has been given for this and this should have been made clear to potential respondents to the consultation.

- **A car park**
  Refer to previous comments and in particular to the requirement for the car park to be "on site" and the legal restriction on non residents bringing vehicles onto the community parcel. Moreover the car park has to be "on site" of the marina not on a different DP and on separate titles.

- **designed as a result of changing demand for storage of sea vessels in Sydney, and in particular, west of the Sydney Harbour Bridge.**
- This is an issue that is covered by the Sydney Harbour Boat Storage Policy and **the assertion made is factually incorrect.**

Another part of the consultation web site asks:

> "... **Which issues do you think should be examined as part of the Environmental Assessment?**

- ☐ Views
- ☐ Remediation
- ☐ Economic Impact
- ☐ Public Access
- ☐ Water Safety
- ☐ Other "

What is noteworthy about this section is the limited issues that are specifically identified. Respondents to questionnaires will answer specific questions but are likely to avoid issues that are open ended. Some respondents want guidance on what to think about and some cannot be

bothered to think about issues that are not specifically enumerated—if they were important they would have been singled out by the researcher! Hence this part of the consultation process is also a failure and, deliberately or otherwise, it reflects a biased design of the process.

Analysing the "issues" listed in 0.12 one finds that the consultation survey includes biased prompts for "economic impact", "public access" , "water safety" and "Other issues". Thus, for,

- **Economic impact**
  "There is a high demand for suitable berths in Sydney Harbour, especially west of the Harbour Bridge."

  This is inconsistent with the official data available in the *Boat Storage Policy* and even if it were correct it should not have been included because it forces the focus the thinking and its direction of any respondent in a biased way.

For,

- **Public Access**
  "Access for members of the public to the jetty and foreshore are important..."

This is an odd proposition. The question of public access to the "foreshore" is not something that is dependent on a commercial marina. That issue is already covered by the easements and lease over the foreshore lot. In any event, a commercial marina is not going to affect access to the foreshore in any positive way. In fact it will do the opposite because it will increase the competition for access.. The bias of the prompt is made apparent by the choice of words "are important" and by its suggestion that it will be greater with a commercial marina in place than without one. Prompts should be neutral. In so far as the jetty is concerned this was never an issue that depended on a commercial marina to discharge. There was a wharf in place and it was removed so, clearly, public access to a jetty was not an issue in the past and is not an issue for the proposed commercial marina.

For,

- **Water Safety:**
  "The safety of all water users is important to us and we've given consideration to this issue..."

This is another "motherhood" statement and carries the usual objections that attach to them.

For ,

- **Other;**
  "We believe we've identified the main issues, however, if you would like to raise any other matter, please do so here."

The submission was made earlier that "Other" discourages comment and discourse and this prompt is reinforcing that submission by, in effect, saying "don't bother thinking up other issues we've looked after everything for you".

Pictures shown in consultation web site

The first page of the web site contains five pictures. One of these is about 6.5 cm x 9.5cm while three of the others are 2.5 cm x 1.5cm . They are too small to give a representation capable of full and proper examination.

The main picture is interesting in a number of ways;

(i)one is that it is a mock up of the proposed marina as if viewed from Breakfast Point with a telescope lens so that it "stretches" the foreground to make the boats in the background look further away than they really are. In other words, consistently with the word bias already identified the picture continues the effort to present a misleading and deceptive appearance of the way the proposed marina will look like;

(ii)another interesting observation is that all the boats represented in the mock ups are the same size (small ones) and do not give effect to the regulatory requirement to assess the visual and bulk effect by reference to the size of the largest boat that will use the marina (25m); and

(iii)a third interesting aspect is the time of the day that the picture was taken. Look at the seawall and note the dark mark in the bottom half of the seawall. This mark is the effect left by the MHWM. The MHWM is about 1.5m high so that at high tide the boats will be about 1.5m higher in the water than what they appear in the picture(s). What has happened here is that the mock up of the marina has been superimposed on a picture taken at MLWM and by this method significantly under-represent the visual impact to and from Hunters Wharf and the "bulk" impact of the boats (even allowing for the fact that only small boats are represented in the mock up).

The FQAs

The site has a section on FAQs . There are fourteen of these QAs and, for the most part, the answers continue to perpetrate the slanted nature of the consultation. Some of the more pertinent of these will be considered below, however, this should not be taken to be a concession as regards the other FAQs not directly dealt with here. They too show bias towards the proponent. Thus,

Q1. "What is the proposal?" contains the following;

"*...The marina and jetty will provide public access and enhance the foreshore experience with the kiosk on the end of the existing jetty for informal get togethers.*

The works proposed include:

• Construction of a floating structure to provide wet berths for 172 vessels, which will incorporate five destination berths for the general boating public; to *provide a point of interest west of the Sydney Harbour Bridge.*

• A fixed jetty with a kiosk at the seaward end; the jetty will be designed to incorporate a ferry stop should future demand show that this is desirable, as requested in the Canada Bay Local Environment Plan.

• *Installation of a "geotextile blanket" over the area covered by the marina to ensure sediments are not disturbed by propeller wash effects..." (italics added)*

Comments have already been made concerning most of the slanted commentary in italics but it remains to add that the statement concerning the geotextile blanket" suggests that a decision has already been made about approval of the marina because the proponent has not disclosed that it has made an application to remediate that part of Kendall Bay over which it is proposed to site the marina and covered by the remediation of 22/06/2007. In the absence of such an application and material in support of that type of proposal the consultation process is defective.

Q2. "Where will the proposed marina be?

The proposed marina will be located at Kendall Bay, on the Parramatta River in the Canada Bay Local Government "

This does not disclose that part of the jetty will be within the community association parcel and that the community association has not been consulted nor has it given its approval. Furthermore, it does not disclose the dependence of the marina on the use of community facilities and the impact of it on the community in a financial and non financial sense.

Q4. "Why do we need a marina?

Inner West Marina has been designed as a result of changing demand for storage of sea vessels in Sydney, and in particular, west of the Sydney Harbour Bridge. There has been extensive renewal of harbourside land from industrial use to residential, increasing population and the subsequent demand for recreational use of the River and harbour. "

Comment was previously made on this and it suffices to say that the claim is at odd with the data in the *Boat Storage Policy* document.

Q8. "What will be done to remediate the impacts of previous industrial activity?

Director General's Requirements for the Environmental Assessment of a remediation proposed by Jemena Pty Ltd have been issued. That Assessment has not yet been lodged. Jemena is proposing to remediate parts of the bay. As part of the works for the Marina, and in addition to the works proposed by Jemena, *a geotextile blanket will be installed beneath the marina to ensure sediments are not disturbed by boating activities*. This blanket will be covered with pebbles to keep it anchored and prevent disturbance of sediments by currents, wave effects or marine activity. Also, the marina will result in a reduction of the wave effects which currently disturb the bed on the eastern and southern sides of the Bay. This will reduce the likelihood of disturbance of the bed by waves from vessels using the Parramatta River and from wind generated waves." (italics added)

Refer to Q1 where a similar reference is made. It is presumptuous to say that this aspect "*will be approved*" when no application has been lodged and no investigation of its suitability has been conducted and assessed by the authorities. It suggests that a decision has already been made and this consultation process is a mere formality. It is a further indication of the bias of the consultation process.

Q9. "Will entertainment or "party" boats operate from the marina?

No.

The marina will not be used as a base or a location for the operation of such businesses. The answer to this question needs close analysis. It does not say that party boats cannot use the temporary berths. What it says is that they will not be "based or located" here.

Q10. "Will the marina have an impact on the value of nearby properties?

Experience with marinas in other locations suggests that it is likely that the proposed marina could lead to an increase in the value of nearby properties. "

The consultation process needs to be fair and reasonable. This is not. The answer given is so general that it only serves to mislead and deceive. No-one knows what experience the proponent has had with marinas and whether that experience was with private marinas or commercial ones and whether it is private marinas that add to value (because the berth attaches to the property) whereas commercial marinas do not attach to property and are separate and independent. There are aspects of the current proposal that are peculiar to this one and they are not covered by a bland assertion of the type made here (e.g., the impact and use of private property for the benefit of the developer). The statement serves no purpose other than to mislead and deceive.

Q11. "What is the layout of the proposed marina?

The design of the marina has been developed to:

...

ii. Provide open spaces between lines of moored vessels such that when people walk along the foreshore, their views to the east have *minimal impact.*

iii. *Accommodate the wave environment at the site, particularly as a result of vessels' waves, generated by vessels moving along the main Parramatta River channel.*

iv. Stand well clear of the notional navigation channel required for Sydney Ferries access to the public ferry wharf at Cabarita (italics added)

..."

The layout has been based on the vessel characteristics specified in Australian Standard AS 3962:2001 Guidelines for the Design of Marinas and NSW Maritime Authority Guidance Note 8.3.02.[67] Minimum water depth required in berths and in the fairways has been based on the requirements of the NSW Maritime Authority as set out in Guidance Note 8.3.05, taking into account the wave attenuation effect of the floating structure. "

These assertions have no place in a consultation process. They are opinions rather than facts and there is nothing to guide the respondents on how to evaluate them. They serve no purpose other than to force the respondent to thinking in a way favourable the proponent. Look at the length of the marina and it will be seen to be greater than most skyscraper in the whole world.

The references to standards are meant to add credibility to the statement rather than be a credible and neutral statement. As a bland statement without backup material it does not

67 Inquiry with NSW Maritime brought the reply that this document is out of date!

add to an evaluation of the proposal. It might as well have said that it complies with the A4 international standard for paper used in written submissions and with the standard for the particular font used.

In so far as the reference to the navigation channel is concerned that is a misleading "motherhood" statement. Mere observation of the turning circle of the ferries using Cabarita Wharf (see Attachment 51, 52, 53) shows that the preferred route will be interfered with by the marina.

A closer perusal of clause iii shows that it factually meaningless. What does it mean to say that it will "accommodate the wave environment?" but it does sound good! Phrases like this are better left out and should be left out of any neutral consultation process.

Q12. " What services and benefits will be provided, and will they be available to the general public?

The construction of the marina development will provide the *general and boating public* with:

- Parking
- Toilets
- Access for Sailability Australia activities
- Enhanced access to the waterway through the provision of pick up and drop off berths
- Enhanced waterway experiences through the provision of day tripper berths
- Enhanced experience of the foreshore and enhanced community experience through the provisions of the jetty and kiosk for informal get togethers
- Access for people with disabilities to vessels at public berths
- Vessel cleaning and maintenance, and
- Sewage and waste water pump out.

There will be no provision for refueling of vessels, and no slip facilities to remove boats from the water for major repairs and maintenance. "

Comment has already been made about the bias inherent in the wording of this list.

Q13. "What parking will be provided for marina users?

A car park for 58 vehicles in the area on the west of the existing residential foreshore buildings will be dedicated to the use of the marina. This car park will make levy contributions to the maintenance of roads and facilities within the Community Association, like all other property owners."

The car park does not provide any benefit to the community. Any levies it pays are still due and payable by the owner of the lot whether or not there is a car park there. Furthermore, if the car parking is dedicated for marina users then the statement in Q7 that the marina will provide the general...public" with parking is not correct.

Q14 "What services will be provided at the proposed marina?

As well as safe and secure berths, the services provided for boat owners will sewage and waste water pump out and minor repairs and servicing. ..."

"Safe and secure" berths! It would seem that the proponent is not aware that boats are regularly the object of larceny and fire but clearly that phrase is designed to instil a false sense of security and to slant the responses in a favourable direction. In any event the statement does not inform the respondents of the means by which the sewage and waste is to be removed and who and how the repairs and servicing is to be carried out and in particular inform respondents how community association facilities will be impacted on by it.

Conclusion

In conclusion the pre consultation process was,

(i) meagre in scope,

(ii) slanted to produce a desired result rather than elicit the true thoughts and feelings of the respondents,

(iii) it fails miserably as a neutral and independent process,

(iv) it comes nowhere near at presenting both sides of the argument and in particular fails to address the impact on the residents of Breakfast Point, Kendall Inlet, local residents and river users such as rowers.

(v) it fails to mention even one negative impact of having a commercial marina encroaching on and entirely dependent on community association facilities,

(vi) it fails to mention even one negative financial impact of the residents of Breakfast Point,

(vii) it fails to mention even one negative non-financial impact on the residents of Breakfast Point, and

(viii) it fails to consider that Kendall Bay is one of the few remaining bays this side of the Harbour Bridge that does not have a marina in place and instead assert the existence of a need for a further commercial marina that is contrary to the data disclosed in the Boat Storage Policy ,

(ix) it engages in obfuscation and trots out the usual motherhood statements about the general public, resident use and the disabled,

(x) and while trotting out all the benefits it perceives it fails to disclose, as it knows and as it should, that the by-laws do not allow for access by the public unless on foot or

by bicycle and for the purpose of recreation rather than for transit to and from a marina.

Perhaps the most indictable trait of this Clayton consultative process is that not once does it disclose that it is a commercial marina that is under consideration. In short one does not have to be an expert in psychometrics to see all of its flaws which should be seen in the context of the certification given pursuant to the requirements of the Director General.

CHAPTER 3

THE DIRECTOR'S GENERAL REQUIREMENTS;

THE EP & A ACT ;

SYDNEY REGIONAL ENVIRONMENTAL PLAN (SYDNEY

HARBOUR CATCHMENT) 2005

&

OTHER RELEVANT INSTRUMENTS

Part 1: Introduction: The Director General's Requirements (DGRs)

The Director's General Requirements (*the DGRs)* call for submissions on a number of discrete things. These fall into two distinct classes. In one class are specific requirements of the Director-General not covered elsewhere e.g., by the *EP&A Act* or other statutory provisions, and in the second class are requirements covered by statutory provisions.

The first specific requirements call for a consideration of the 2002 Master Plan. This was done in Chapter 2 and need not be taken further here. Of the others one calls for a,

> "detailed assessment of the key issues specified below and any other significant issues identified in the general overview of the environmental impacts of the proposal (see above), which includes:
>
> > Sa description of the existing environment;
> > San assessment of the potential impacts of the project, including any cumulative impacts from construction activities and from all water related craft that would utilise the marina;
> > Sa description of the measure that would be implemented to avoid, minimise, mitigate, offset, manage, and/or monitor the impacts of the project."

Part 2: The existing environment: "A special place"

Kendall Bay is a small bay on the Parramatta River. On its eastern arm it is bounded by Cabarita Wharf where (mostly) Rivercat style ferries pick up or drop off commuters going as far west as Parramatta and as far east as Circular Quay. Further south from here there is the western end of Cabarita Park and further south there is the residential development of Kendall Inlet made up of three storey apartments, a small sandy beach and a set of mangroves. Behind these mangroves and on the other side of a walkway there is the Admiralty strata that is part of the Breakfast Point residential development.

Continuing in a westerly direction one comes to the easterly part of the Waterfront Park that meets with the western side of the walkway. North of this part of the Waterfront Park there is a site for future three storey apartments. This site is currently an empty one. Further north from here, being on the western arm of the bay, there is a group of apartments called Hunters Wharf. This strata is made up of a front line of two and three story apartments and a second line just behind consisting of five story apartments. Next in line in a northerly direction there are eight houses and next to the most northerly of these houses is the dilapidated AGL Power House. Onwards from the Power House there is a mowed area and across from the walkway running alone side of it the is the geographical Breakfast Point.

The geographical Breakfast Point is of historical significance as the place where Caption John Hunter anchored the *Sirius* and had breakfast insight of a number of members of the Wangal people, meet with them, left them some trinkets and a fire for them to cook mussels with and continued on with his exploration;

> "According to historical records, the suburb name is derived from the first contact between Europeans and the traditional owners of the land, the Wangal Clan. The encounter took place on

5th of February, 1788 during Captain John Hunter's exploration of the Parramatta, while Hunter was having breakfast William Bradley, First Lieutenant on board HMS Sirius, recorded the following entry in the log:

> *We landed to cook breakfast on the opposite shore to them (Breakfast Pt.). We made signs to them to come over and waved green boughs. Soon after which 7 of them came over in 2 canoes and landed near our boats. They left their spears in the canoes and came to us. We tied beads etc. about them and left them our fire to dress their muscles (sic) which they went about as soon as our boats put off."*[68]

In the words of the developer,

> "When the First Fleet arrived in Sydney in 1788, Captain John Hunter set about charting the harbour. His records show that early on the fifth day he sailed west up to what is now the Parramatta River. After about 10 kilometers (sic) he put ashore to make tea and have refreshments. He made his first charting at this spot and so named it — Breakfast Point."[69]

Kendall Bay itself is not a large bay, but it is a pleasant and mostly a calm body of water unobstructed by any object other than a single navigation buoy (Attachment 8.0 & 8.1). It is a pleasant place to look at and enjoy as one walks along the foreshore walkway that runs all around the bay, or from the Country Club and various apartments. Such a scenic view makes the bay one of the few remaining "clear water" bays in Sydney Harbour. With so few "clear water" bays in the Harbour the aim should be to protect it so that there will retain a sense of balance and equity between competing Harbour users. There is neither "balance nor equity" in boat owners having the use of all the bays in the Harbour while users of "clear water" bays miss out. **This is the ontological question.**

A good place to start for an answer to this question is with Attachment 9.1 to9.9 which is a series of Google Earth pictures. The first picture in the series is one taking in the Parramatta River from Meadowbank (there is no use going further west because of the narrowness and shallowness of the river) to the Harbour Bridge. The remaining pictures are close ups of the same stretch of the river but showing the bays and the boats moored in them.

On perusing this picture the first thing that one sees is that there are boats moored all over the river. In some cases they are (not even in bays but) parallel to stretches of land e.g., at Henley's point and, west of Abbotsford and west of Birchgrove to mention but a few instances. Another thing one notices is that some bays have more than one marina, for example, Hen and Chicken Bay has two fixed berth marinas as well as swing moorings marinas. Some marinas are sparsely used while some are heavily used suggesting poor management and allocation[70]. This is an

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68 Wikipedea. References omitted. For a longer description see Coupe Sheena, Concord A Centenary History. The Council of the Municipality of Concord NSW 1983. Powell. Carol., in A River Revived The Parramatta. NSW University Press. Kensington. 1987 at p 61 wrote ,

> "A nice irony had placed the nineteenth-century suppliers of light and heat on the spot where Captain John Hunter had lighted a fire and had breakfast cooked in 1788"

69 Front the developer's web site for Breakfast Point.

70 See requirement of EP & A reg 2000 cl 3 provides:
"3 Analysis of alternatives

aspect that should be investigated before any consideration is given to any new marina proposal. However, in so far as the point made in the previous paragraph is concerned the only truly "clear water" bay west of Meadowbank is Kendall Bay. Majors Bay is mostly empty but there are some moorings on the eastern side of the entrance and so does Yaralla Bay next to it. It is conceded that these two bays , with Brays Bay further west, are mostly empty one reason for this is clear from a close look at the different water colour –they are too shallow and useless without heavy dredging. Some of the bigger bays do have smaller bays that are empty of boats but these are too small for practical purposes, e.g., France Bay and Exile Bay, the bay east of Russell Lea (Half Moon Bay) and an even smaller one north east of Russell Lea (Sister Bay). Dobroyd Point and Rodd Point together would make a reasonable sized bay buy the picture makes it problems fairly obvious.

So what does it all mean? Firstly, it means that there has to be better management of the existing marina resources before even considering opening up another bay to marinas. This would be consistent with the requirements of the *EP& A reg 2000 Sch 2 cl 3*. Secondly, it means that Kendall Bay is the only reasonable sized (if on the small side) "clear water" bay left on the Parramatta River and if this does not call for its preservation then nothing will. If this does not protect the bay then the *Harbour REP, the Harbour DCP* and the *Boat Storage Policy* and the *EP&A Act* are not worth the paper they are written on. These instruments will be nothing but a smoke screen to fool the people into thinking that there is actually an equitable policy in place when in fact there is not.

Prior to 2002, when the City of Canada Bay council approved a Master Plan, for a residential development, the site now known as Breakfast Point had a life as the AGL gasworks. As part of the AGL works there was a large wharf where ship berthed to unload coal. This wharf was removed in about 2005 by order of the Waterways Authority. It has never been replaced. In its present form as a residential development Breakfast Point would be unrecognisable from its former industrial smelly self[71].

The developer of the Breakfast Point residential site is the current applicant for the commercial marina so that it should come as a surprise that, in its guise as a residential developer, the applicant waxed lyrical about,

> "The ultimate harbourfront (sic) lifestyle created by Rose"[72] (Attachment 10 & 63) [73].

The evolution of the AGL site, from an industrial to a residential one, is mirrored by a similar

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An analysis of any feasible alternatives to the carrying out of the development or activity, having regard to its objectives, including the consequences of not carrying out the development or activity."

71 Although some malodorous smells still persist.

72 The developer by "any other name".

73 From a promotional brochure issued by the applicant and entitled "Breakfast Point a sense of place, a feeling of belonging". Interestingly, in all its 34 pages of writing and pictures there is not one mention of a commercial marina or a marina of any kind.

residential development in Kendall Inlet from a previous existence as a paint factory. Clearly, the nature of the land around the bay has undergone a profound change which, it is submitted, should not be disturbed by a reversion back into commercialism.

This short piece of historical and developmental history points to an obvious and significant change in the character and the style of the surrounding bay area and of Kendall Bay itself. A visitor from the days when Kendall Bay was surrounded by gasworks on one side, a paint factory on the other and a huge old timber wharf in the middle, would not recognise the place with the new, modern houses and a "clear water" bay. It would be a social, historical, geographical and environmental tragedy to see this bay spoiled by a commercial marina.

The applicant itself should recognise the irony in creating a fine residential development and accompanying life style it sold to the residents and to now set about to diminish, if not destroy it, by constructing a commercial marina next to it and making use the development for its own use at a cost to them. This might just explain why its promotional literature makes no reference to a marina. Let's not forget that the proponent had a number of opportunities to promote the marina to potential residents but did not do so. One such an opportunity would have been on the on the flip side of Attachment 10 which is a map of the site (Attachment 11 and see also 11.1). It does not show any outline of a proposed commercial marina, or make any mention of it. Neither does Attachment 12, (and for that matter neither does Attachment 13.0, 13.1 & 14)which carries a schedule headed,

"Timeline (sic) and Staging"

going from 1995 to 2013. There is not one reference

The time line goes from 1995 50 2013 and there is not one reference to a commercial marina or to an intention to lodge the application for one. A similar lack of candour, if not disclosure, is found in the applicant's web site for Breakfast Point. Perhaps the absence of disclosure is a reflection of what the developer thought would happen to sales of apartments in Breakfast Point once potential purchasers become aware that they would be responsible for the

maintenance costs of walkways and access ways relied on by the developer to promote its

separate commercial activities from which they did not derive any benefit but stood to lose

rights, title and interest over their property. Take a good look at Attachment 11 because just

above the "*Timeline and Staging*" there is the heading:

> *"Land Title" and the words "All roads and major open spaces are open access to general public 24/7."*

This is incorrect and if not incorrect it is incomplete and misleading and/or deceptive. There are **no "roads"** in the development. There are only "open access ways" and of the major "open spaces" Silkstone Park is not "open access to the public" and the developer knows this. Furthermore, the "open access ways" and the "open access ways" can only be accessed **"on foot"** or by "**bicycle**"[74] and for the purpose of "**recreation**"and while in theory they can be used 24/7 in practice, because the community association can impose conditions on its use, it is unlikely that they would be allowed to be used night and day. An interpretation without limits would mean that drunks, vandals and thieves (all of which have made their presence known at

74 See note under footnote 10.

one time or another) could not be kept out of the estate—a proposition entirely without merit.[75]

PART 3 : Statutory Consideration: The *EP&A Act s 79C*

The objects of *the EP&A Act*

The first piece of pertinent legislation to be considered is the *EP&A Act s 5* which gives the objects of *the EP&A Act* as,

> "(a) to encourage:
>
> > (i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,
> > (ii) the promotion and co-ordination of the orderly and economic use and development of land.,
> >
> > (iii) the protection, provision and co-ordination of communication and utility services,
> > (iv) the provision of land for public purposes,
> > (v) the provision and co-ordination of community services and facilities, and
> > (vi) the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats, and
> > (vii) ecologically sustainable development, and
> > (viii) the provision and maintenance of affordable housing, and
>
> (b) to promote the sharing of the responsibility for environmental planning between the different levels of government in the State, and

75 See also that part of this submission regarding entry by "members of the public" .

(c) to provide increased opportunity for public involvement and participation in environmental planning and assessment."

Clause (a)(i) discloses an objective ,

"for the purpose of promoting the *social* and *economic welfare* of the community and a better environment" (emphasis added),

by the proper management, development and conservation of natural and artificial resources.

The *Interpretation Act 1987 s 33* requires a statute to be given a purposive construction that promotes its objectives[76]. In this context it is difficult to see how a commercial marina promotes social and economic welfare. In terms of *social welfare* a commercial marina benefits the few against the many so that there is no increase in the overall welfare of the community. In terms of promoting the *economic welfare* of the community again it is a case of the few (the proponent and the berths owners) benefiting at the expense of the many (the residents, the rowers and other users of the bay and the users of the walkways) who, as well, incur an ongoing economic burden in the shape of on going maintenance expenses.[77] In terms of economic welfare these costs will have to be deducted from any claimed benefits when making the assessment.

Clause (a) (ii)- (v), (viii) are not pertinent to the issue. This leaves clause (a) (vi) which deals with the *protection* of the environment. This will also be covered under another heading below but it suffices to say that the marina will not satisfy this objective simply because it will add to the existing pollution of the bay thus rendering the word "protection" meaningless. Note that the objective is not to improve the environment but to protect it (by keeping some things out of it?). One can make the same point about the clause's reference to the "protection" of animals and plants.

For the purpose of clarity it is noted that the objective in *clause (a)(vi)* is not restricted to threatened species, populations, ecological communities and their habitats but is inclusive of them.

In *clause (a) (vii)* the objective is to encourage *ecologically sustainable* development. In so far as Kendall Bay is concerned the relevance of this provision is that there are so many marinas in the Harbour in general and around the bay in particular that the level of sustainability of "clear water/natural" bays is at tipping point if it has not been passed already. "natural" bays need to be protected. The first consideration should be to make better use of existing marina facilities before one set out to build another one (*EP& A reg 2000 Sch 2 cl 3)*. With this in mind, *clause (b) and (c)* are not relevant to the present circumstances.

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76 *Minister for Urban Affairs and Planning v Rosemount Estates P/L and Ors* [1996] NSWSC 348 (14 August 1996)

77 See also the submissions under *the EP& A s 79C.*

Environmental impact:

The "natural" and "built" environment from sight points around Kendall Bay.

The *EP&A Act s 79C(1)* gives a set of mandatory considerations to be taken into account in the assessment process. One of these considerations is,

> "(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"

Firstly, it is noted that this is a wide criteria. The "impacts" that are suitable for consideration is only limited by the reference to "locality"[78] and are otherwise unlimited.

In **PART 2** : the existing environment. A special Place- a short description was given that sought to contrast the prior industrial nature of the bay and the surrounding area from the present "clear water" nature of the bay and residential surroundings. Needless to say, in its former state as an industrial bay many coal ships played their way in and out of it. However, that old industrial status has come and gone and one has to take the bay as it is now.

In its restored state the bay gives an unobstructed view [79],

(i) **<u>from Breakfast Point</u>** i.e., the geographical and historical point. This part of the bay has been terraced, landscaped, partly surfaced over, there is a flagpole and a walking track all around at the edge of the water. From here there is a 360 degree view, which as far as relevant includes, the entire bay and the surroundings e.g., Cabarita Wharf, Cabarita Park, Kendall Inlet apartments, the sandy beach at the south end of Kendall Bay and the adjoining mangroves,

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78 The "locality" includes the adjoining area (Addenbrooke Pty Ltd v Woollahra Municipal Council [2008] NSWLEC 1990.

79 See Attachment 15 & 15.1.

Admiralty , Waterfront Park, Hunters Wharf and the house north thereof and the walkway all around the bay.

The proposed marina will significantly obstruct the line of sight to these reference points[80] and for a very large part of the bay a viewer will get a great vista of the "the car park" for boats.

80 See drawing SK15B and the photos in Attachment 15 et seq.

(ii) **<u>from the homes</u> south of *the Point*** (Attachment 16-24) there is the AGL Power House, and are eight two storey houses forming part the Manors Neighbourhood. The neighbourhood houses have a fence delineating its private boundary and fronting them is a landscaped area and hedges that set the neighbourhood property apart from the community association property and the walkway. These houses range in price in excess of four million dollars and so represent a significant investment for the owners. A resident of these houses and a viewer on the walkway now gets a clear and unobstructed view towards Morrison Point, Morrison Bay, Raven Point, Glades Bay, Scot College Boat Shed, SGS Boat Shed, Gladesville, Looking Glass Point, Cabarita Wharf, Cabarita Park, William Beach monument, Cabarita Point, Sander's, Kendall Inlet, the sandy beach and mangroves and of course the Sydney skyline.

The proposed marina will significantly obstruct the line of sight to these reference points. It is of particular relevance and importance to be aware of the fact that ,

(a) the marina will be more "in your face" from these homes (and from the walkway in front of them) than from the sight line taken from *the Point* because, from here, the marina is closer to the homes than it is from *the Point*. The actual distance has been measured at *32.5m from the seawall to the front fence line of these homes and only 17m from the neighbourhood boundary to the front fence.* One effect of being so close to the marina is that the marina will obscure a larger part of the visual field.

(b) the architecture of the homes aimed at giving the residents the full benefit of an easterly aspect and of all of the sights mentioned by constructing the frontage, for both levels, almost entirely of glass. This means that the residents will be deprived of their privacy whenever they are in the front rooms of the house. To get privacy they will have to draw the curtains or pull the blinds or abandon them altogether and move to a back room.

(c) The effect of the high tides will be to make the boats float about 1.5 metre higher so that they will dwarf the homes.

(iii) **<u>from the Hunters Wharf</u>** <u>apartments (Attachment 11.0, 11.1; 13.0 & 13.1; 15 & 15.1; 17; 25.0 -36; 44; 46; 48-51; 53- -59)</u>. This strata is made up of two lines of apartment blocks. The first line

apartments consist of two and three level blocks. These are the closest residential apartments to the proposed marina. The second line of apartments is sited behind the first and consists of five storey blocks. Like the homes the architecture of Hunters Wharf aims to take full advantage of the views across the bay and most of the sight points mentioned in (ii)- the exception being Looking Glass Point and the William Beach Monument. However, when taken from the five storey blocks the sight lines are obviously elevated and more extensive. They now include (as far as relevant) views to d'Albora Marina, Cabarita Point, the Aboriginal middens and the William Beach Monument. From here the there is (almost) the same clear and unobstructed view as that from the homes. The difference is that there will be an additional obstruction when looking towards Morrison Bay and Raven Point.

(iv) Under point (ii) reference was made to the "in your face" **(proximity)** effect the marina will have for residents and users of the foreshore walkway. This "**proximity**" factor will also be present for Hunters Wharf. The first line of apartments are *39.5m from the seawall and 23.5m* from eastern boundary of the Hunters Wharf strata boundary. For the two and three storey apartments the obstruction will, obviously, be greater then for residents and users of the walkway then for the residents of the five storey apartments but will be the same as for the residents of the houses to the north. However, the residents of the five storey apartments will get a birds' eye view of the marina. The privacy issue identified for the house residents will impact on the residents of the first line Hunters Wharf apartments and to a lesser extent to the residents of the five storey apartments. This is because the architectural design sought to take full advantage of the views and floor to ceiling glass front walls have been used.

The residents of Hunters Wharf would get the full impact of the obstruction caused by the marina because they will see its **length, width and height** - a gigantic cubic structure[81]- in all of its glory because the central arm of the marina is centred on

81 With a length of 370m, a width of 200m (using the eight arm of the marina as the criteria and no allowance made for additional space for manoeuvring) and a height of a conservative 7.5m (25m boat) the size is 550,000 cubic metres. At 228m heigh the MLC Centre would be smaller than the marina; at 305m Sydney Tower would be 5m longer than the marina; of the 200 tallest skyscrapers

Hunters Wharf. For the residents (and users of the foreshore walkway) to get unobstructed water views they will have to walk past the full length of the marina. This effect will be greater at high tide because it will add another 1.5 metre to the level the boats will be floating at. Those residents living on elevated parts of the development e.g., level 4 and over at Hunters Wharf, will get the three dimensional obstruction but will see what is left of the bay as "clear water" which is something residents at ground and second (and possibly third levels) will miss out on [82].

Hunters Wharf will suffer an additional impact that all of the other residents will escape. This is the impact from being right opposite the central arm of the marina. This will be the point where all users of the marina will end up whether to get on the boats or to get off. Whether they are there as owners or as guests or as service providers or as commuters; whether simply walking or dragging trolleys ; whether walking quietly or with loud music or laughter or under the influence.

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in the world only 28 of them would be longer than the marina. Imagine that on your front lawn 24/7!

See NationMaster -Encyclopedea .http://www.nationmaster.com/encyclopedia/Tallest-structure. And, at this length of 370m, it is longer than the *Star Princess* liner at 299m, longer than the *Queen Mary 2* at 345m (The Sun-Herald 25/10/09 at p 7 and bigger than the the *Oasis of the Sea* at 360m which is billed as the world's largest cruise liner (Sydney Morning Herald 31/10/09 at p 18).

82 The main focus has been on front line apartment blocks but this is not to say that residents living some distance from the front line apartments and houses, are not affected. The views from five and nine storey apartments will be affected.

(iv) **from future apartments south of Hunters** Wharf (Attachment 37-41; 45; 47-49). There is planning provision for two blocks of three storey apartments to be erected south from Hunters Wharf and from them there would be similar clear sight lines as from Hunter Wharf.

Once the marina is constructed the residents of these apartment blocks will experience similar obstructions as do the residents of Hunters Wharf , with the exception that the **proximity** factor would be reduced for the most southerly of the apartments because of a bend in the seawall in a westerly direction and a bend away from the seawall by the last arm of the marina. On the other hand the **proximity** factor would be the same as Hunters Wharf for the block nearest to Hunters Wharf. Both blocks would be expected to have a greater level obstruction towards Morrison Bay and Raven Point and both would get the full impact of the area covered by the marina because of the perspective of length when looking towards the Point, and the width when looking across the bay and the height when looking towards the sky. The effect of the tide, making the boats float higher in the water, will add about 1.5 metre to the obstruction impact.

In addition, if the architectural design employed for the existing buildings carries through to these apartments i.e., if they will also have wide glass balconies running the entire (or almost the entire) length of the wall as Hunters Wharf does then these too will be impacted by the privacy issue.

Common issues for Hunters Wharf and from future apartments south of Hunters Wharf

Applying specifically to Hunters Wharf and the proposed apartments south of Hunters Wharf (because of the sitting of the central arm of the marina), and slightly less so for the homes north of Hunters Wharf (because there is a wider gap between them and the marina) there will be a significant level of obstruction, if not obliteration of the visual field, for the residents when the sight line is taken from ground level and from the first level. One reason for this extensive level of obstruction is that the height of the boats with their flying bridges, masts, radar and communication antennas, and fishing rods can be as high if not higher than a 2 storey apartment[83]. So that a person (1.7m male and 1.6m female) standing on his/her front door will be looking up at persons on the boats and, a person on the boats will be looking down in residents while residents on the second level will be (at least) at the same level as persons on the boats.

The validity of the submission in the previous paragraph can be gauged from the supporting document from TLB Engineers lodged with *the MPA* entitled a " *Commercial Marina at Kendal (sic) Bay*" which says, at paragraph 2.6, that the vessels using the marina will vary in size from 8 metres to 25 metres and they would,

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83 For the purpose of this submission the nearest two storey apartment building in Hunters Wharf was measured at 2.95m from the ground to the balcony floor of the next floor (of course the better measure would be at eye level of the first level apartment and not the floor of the apartment above). The corresponding height of the nearest three storey apartment was measured at 3.5m. If you then add, between 1.61m and 1.75m, to these measures you get the approximate "eye level" view that a person would have from the second story of either of these two apartment blocks. At this height the viewer would be lower that the height of a 25m boat –refer to paragraph 2.7 in the supporting document lodged for the MPA which gives 4m as the general height for the larger vessels expected to berth at the marina. See also under Visual Impact and Privacy Impact for further submissions. The communication antennas and radar would add about 1.5 metres (and more: see Attachment 53.1 -53.4) to the superstructure of the boats and the high tide would add about another 1.5 metre. See also Vol 2 Attachment 50-50.4.

"**generally** not [be] more than 4m in height" (emphasis added)[84].

With the average height of an adult Australian male at 1.75m and an adult Australian female at 1.61m[85] a resident standing on its front door/balcony **will be significant below the eye sight level of a person on a 25m boat in the marina. Indeed the same thing can be said for a resident standing on its balcony on the second level of his apartment at Hunters Wharf or of the proposed apartments south of Hunters Wharf or from one of the houses.**

Such an outcome will be truly ironic because the developer went to print saying,

> "Hunters Wharf is inspired by Sydney's maritime heritage. Calm blue water and palm trees swaying in the sun- these are the things that make life feel more balanced at Breakfast Point "[86].

There will be little "calm water" to be seen from around these localities, or when coming up the river on a Rivercat, or from across Kendall Inlet, Cabarita Part, Cabarita Wharf and the mangroves on the south end of the bay, from Scot College Boat Shed, from Glades Bay, from Morrison Bay and from Raven Point.

Looking a few years ahead one can expect global warming to play a part in all of this because, in the life time of the marina, the sea level will force the boats to float higher in comparison to the static level of these residences and sight lines. Currently, the tide will add about 1.5 metre to the level of the water in the bay which means that boats will float an extra metre higher. The effect of the tides and its future level will also have a bearing on the extent of the obstruction from these same points.

(v) <u>from Admiralty</u>. (Attachment 38—38.2) These are three storey apartments located on an elevated site South of the bay. There is an unobstructed view of the entire bay towards the western side of the bay, the foreshore walkway, the

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84 para. 2.7.

85 *How Australians Measure Up*. ABS Canberra 1998.

86 Attachment 14.0 & 14.1.

future apartments, Hunters Wharf and the house north of it, *the Point,* to Morrison Bay and to Putney.

From Admiralty the sight lines mentioned will be obstructed and because these apartments are on a high point the marina would be seen in terms of its *length, width and height*. Because of the high location the residents will also get to see the 'day trippers' make their way along the foreshore and fan out in all directions.

(vi) **from the Waterfront Park** (Attachment 39 & 40). This is located south of the bay. Part of it is bounded by native plants and landscaping while another part is lawn joining the foreshore walkway. There is the same range of vistas as from Admiralty with the exception of Putney.

The obstruction of the sight lines from here will be similar to the obstruction level from Admiralty but it will depend on the actual position from which the sightings are taken as part of the park extends to the foreshore walkway and some is set further back and on higher plane. One would easily see the coming and going of the day trippers and boat owners.

(vii) **from the country club** (Attachment 10.0 ; 11.0 & 11.1; 13 & 13.1; 25; 41 to 43). This is situated on a relatively high elevation and has unobstructed views of the foreshore walkway, Hunters Wharf, the homes north of it, the proposed apartments south of it, to the Point, the entire bay, Morrison Point and Bay, Raven Point and Glades Bay.

There is a "cognitive/visual" link between the blue pool of the country club and the blue waters of the bay. The marina would break this link. The bay will no longer be a "clear water" one and it will be seen for what it is - a "car park" for boats. The coming and goings seen from the Waterfront Park would be seen from here as well. The marina will be seen in its entire glory, i.e., length x breath x height.

From this vantage point the vista one gets of Kendall Bay in its present natural state is pretty close to that glimpsed by the developer when it was trying to sell residential apartments at Breakfast Point and wrote,

> "From the Country Club's wide decks looking over breathtaking harbour and city views, you'll find it easy enough to believe that there is nowhere else like this in all Australia" (Attachment 43),

and, on the same page,

> "Over a glass of wine, we soaked in the views. In front of us were so may shades of blue, I felt like I was sitting on a luxury liner heading out into the harbour" (Attachment 43)

further,

> "As the afternoon lengthened, we left the Country Club and took a shortcut down the grassy hill to the harbour. We were met at the bottom by a magical scene of sculls skimming across the water as the first tinges of pink started to colour the sky over the city" (Attachment 25 –quotation just under the pictures).

With the current proposal in play this vision has proved to be a very short sighted one. Within the space of a couple of years the 'rose coloured glasses' are off and the new vision is of a 172 berths commercial marina. By now significant inroad has been made in the sale of the residential apartments this picture is quite incongruous with the "in your face" commercial marina and the financial impost on the residents for the benefit of the commercial undertakings of the developer.

(viii) **<u>Users of the foreshore walkway (</u>**Attachment 32; 36; 38—41; 44—50 & 59). For various points of its length users of the foreshore walkway have a clear vision across the bay to Morrison Bay, Raven Point, Glades Bay, to *the Point*, to Scot College Boat Shed, SGS Boat Shed, Looking Glass Point, Gladesville and the Sydney skyline, to Cabarita Wharf, Cabarita Point, Sanders, William Beach Monument, Cabarita Park, Kendall Inlet and to the mangroves near Kendall Inlet and the southern end of the walkway .

For the users of the foreshore walkway a marina will cause an obstruction that would encompass all of the obstructions previously mentioned but their scope will vary with the speed of travel and the location of the walkers. From some sight points one will get a two dimensional view e.g., length x height and an obstruction of the remaining "clear water" part of the bay behind it. From some other sight points there will be a three dimensional impact i.e., length x breath x height and an obstruction of the remaining

"clear water" part of the bay. The effect of the tides will add about 1.5m and needs to be taken into account as well.

(ix) **from Parramatta River** (Attachment 16-17 & 51-54). When one now looks at the visual field from the northern side of the Parramatta River one now gets an uninterrupted view of the bay and the palm tree lined foreshore walkway, the houses north of Hunters Wharf, Hunters Wharf itself, the mangroves and the little beach at Kendall Inlet. As one approaches from the City there is an unobstructed view of Hunters Wharf, the homes north of them, the area to the south of them and the landscaped foreshore walkway[87]. Traveling east towards the City these same views are available as the ferry turns around the Point into the bay or as it is going past it.

Reference is made to the historical role and importance of the river to the development of the colony and in particular to its recreational role it played at this very site. The river is a significant and busy corridor for commuter transport. The marina will obstruct the views listed (about 1.5 m more at times of high tides) and will be noticeably "in your face" as the ferry comes closer into the bay and the traveller will not get any respite except as the ferry travels further and further away from it. Other users will be similarly affected. It is also a significant and important asset used daily by rowers from several schools and clubs in the vicinity and they, like kayaks users, canoe users, small boat users and ferries will be herded together into a central part of the river with an increased level of risk to their safety (for examples of river and bay users see Attachment 65-67 and 74).

(x) **from Glades Bay** (Attachment 45 & 55). There is an unobstructed view of Kendall Bay, of the mangroves, of the foreshore walkway in front of Hunters Wharf and the homes north of it.

The marina will impact on the vista from Glades Bay by obstructing the views mentioned in (vii). It will also do something quite particular to it. It was mentioned earlier that Glades Bay is the site of Aboriginal drawings and remnants and this should call for special attention being given to maintaining a clear line of sight. But there is something else. *Glades Bay has*

87 See the pictures in the 2002 Master Plan and the brochures referred to here.

a swing mooring marina. ***At present the "clear water" of Kendall Bay provides a much needed visual break from the boats in Glades Bay. Next to Glades bay there is Morrison Bay and this too is a swing mooring marina. A commercial marina will do away with this much needed visual break. Three marinas next to and opposite each other is too much!***

(xi) **<u>from Morrison Bay</u>** (Attachment 44-45; 56 & 57)**.** There is an unobstructed view of Kendall Bay, of the mangroves, of the foreshore walkway in front of Hunters Wharf and the homes north of it.

The marina will impact on the vista from Morrison Bay by obstructing the views mentioned in (vii) and like Glades Bay, it also has a swing mooring marina and opposite Morrison Bay there is the River Quay marina. For Morrison Bay, just like for Glades Bay, the "clear water" of Kendall Bay provides much needed visual relief from moored boats in Morrison Bay, Glades Bay and River Quays . **A commercial marina in Kendall Bay will do away with it. Together, Morrison Bay, Glades Bay and Kendall Bay will take up almost 240 of the 360 degrees on the compass.[88] Looked at in another way three of the four bays around Breakfast Point are currently with marinas. If Kendall Bay joins the group four out of four bays around Breakfast Point will have a marina. With d'Albora Marina at Cabarita Point four out of five bays next to/opposite each other will have marinas and this will increase to five out of five bays if Kendall bay joins the group. An outcome like this shows that there is no 'equity' in the use of scarce natural assets on the Harbour.** Consistently with the requirements of the *EP&A reg 2000 Sch 2 cl 3* alternatives need to be considered, eg., the more effective use of existing marinas, before a new one is constructed.

(xii) **<u>from Raven Point, & Putney</u>** (Attachment 57). As for Glades Bay there is an unobstructed view of Kendall Bay, of the mangroves, of the foreshore walkway in front of Hunters Wharf and the homes north of it and on towards the mangroves, Kendall Inlet and Cabarita Park.

The marina obstruction will have a similar impact from here as there is from the sight lines from Glades Bay.

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88 For the most part the other 120 degrees would be the central corridor in the river.

(xiii) **from Scots College Boat Shed & SGS Boat Shed & Looking Glass Point** (Attachment 22 33-4; 35, 54-55; 58 & 59). The Scots Boat Shed is a heritage listed item in the local DCP. From this and from the SGS Boat Shed and Looking Glass Point there is an unobstructed line of sight from these locations to the foreshore walkway, the Hunters Wharf apartments, to the homes to the north and to the proposed apartments to the south and to the mangroves on the south of the bay.

The marina will obstruct the vista to and from this heritage listed item.

(xiv) **from Cabarita Wharf and Cabarita Park (and walkway in front of it)** (Attachment 15-16; 23-24; 49-53 & 59). From these points one gets clear views of the landscaped gardens and palm tree lined foreshore walkway, the seawall, Hunters Wharf, the homes north of it and to the area proposed for future apartments to the south.

A marina will cause a significant level of obstruction of the points listed. Kendall Bay is a fairly small narrow bay so that there is a proximity factor that causes the marina to impact in a way that a larger bay would not. From the southern end of the bay there will also be an obstruction of Breakfast Point itself and of Morrison Point.

(xv) from Kendall Inlet (Attachment 48). This is a group of three and four storey apartments directly in front of the southern end of Kendall bay. There is a small sandy beach on the other side of the seawall and next to it there is a small stand of mangroves. From here one gets a clear view of the landscaped gardens and palm tree lined foreshore walkway, the seawall, Hunters Wharf, the homes north of it and to the area proposed for future apartments to the south, to Breakfast Point, to Morrison Point and Bay and to part of Glades Bay.

From Kendall Inlet there will be obstruction of most of the palm tree lined foreshore walkway, the seawall, Hunters Wharf, the houses north of Hunters Wharf, of Breakfast Point itself, of Putney and part of Morrison Bay.

(xvi) **General impact** on natural and built environment.

Such will be the extent of the obstruction by the marina that there will be more obstructed views than there was when an industrial wharf was in place and ships played the waters of the bay. At least then the ships were not there all of the time nor did they present a continuous and mostly a static presence as a 172 berth marina will have.

A marina will represent a reversal in the enhancement process that was initiated by the closure of the gasworks, the removal of the old wharf and the paint factory. The environmental enhancement of the bay will take a step backwards to a lower level of functioning. The construction of a commercial marina will make matters worse by ,

(i) disturbing and circulating the pollutants already in the bay, and

(ii) by increasing the number of pollutants. For example, there will be toxins from anti fouling agents used on boats, motor oils, chemicals and diesel to just a mention a few.

The final point to make about the "built" environment is that the walkway around the bay is illuminated by low level lights in bollards which makes for a pretty sight at night. Needless to say this will be lost with a commercial marina which would add its own lights for residents to contend with and that would be unlikely to make for an experience that would lead one to say,

"I still can't quite believe we live on Sydney Harbour. It's pretty special to be able to stroll down to the water to watch the sun rise or set."

(Attachment 13.0 - the caption in quotations on top left side of the picture).

Flora and fauna

No consideration of the "natural" environment would be complete without a reference to the birds, such as,

(i) the blue wren,[89]

(ii) sandpipers,

(iii) godwits,

89 See Attachment 60 for a series of photographs of the Birds of Breakfast Point.& Attachment 61 for Council's sign that lists some of the local birds.

(iv) lorikeets;

(v) honey eaters that feed on the plants along the foreshore walkway;

(vi) cormorants that dive for fish in the bay ,and

(vii) the odd pelican that does the same thing.

The small birds in particular are not likely to survive the competition from any increase in sea gull numbers that a commercial marina is likely to attract with its food scraps, rubbish and litter that it, its users and day trippers will generate while the larger birds will probably succumb to the larger number of gulls. It must have been these birds that made the developer wax lyrical that,

> "Breakfast Point is instilled with a sense of harmony. The migratory European Whimbrel travels a long way to roost in the trees on the harbour's edge. Bring your coffee to this picturesque setting, sit quietly and prepare to meet your local birdlife (sic)" (Attachment 25.1).

Social Impact

The *EP&A Act s 79C(1)(b)* also calls for consideration of the "social" environment and this issue will be taken up here.

By the time the residential development of Breakfast Point is completed it will provide residences for something like 5,000 people. This is a lot of people to be directly affected by a commercial marina in Kendall Bay and one can reasonably expect it to produce a significant impact on the social integrity, cohesion and well-being of the residents of Breakfast Point and adjoining Kendall Inlet with a "spill over" affect on the residents of Mortlake, Cabarita Junction, River Quays.

The locality of Breakfast Point represent a close, quite, cohesive village type residential area. A commercial marina will be a significant disruptive intrusion into the day to day lives of these residents. What is now a quite area for the residents to enjoy, and was sold to them as such by the proponent, will be lost in the din of commercialism and the users of the marina .

The brunt of the social impact will fall mainly on the residents of Hunters Wharf, the residents of the houses north of them and the future residents to the south of Hunters Wharf and to a lesser extent on other residents. It is these residents that will have to put up with the intrusiveness that the users, of what is a separate and distinct commercial undertaking, will make on their lives and their pocket book. These can be expected to be instrumental in reducing their enjoyment of life at Breakfast Point.

A commercial marina would introduce peripatetic individuals into this village life and that will engender social friction because of the peculiar demands that they impose, by their mere presence on private property. In the long run this impact would see itself expressed in negative attitudes by residents and owners towards each other, towards the users of the commercial marina and others providing services to it and towards the transient individuals attracted by a commercial marina.

Some of the demands that can be expected to follow on the backwash of a commercial marina will be,

(i) on pedestrian traffic on the foreshore walkways, the parks (including Silkstone Park[90] which is not available for use by non-residents/owners),

(ii) on the open access ways[91],

(iii) on the cars, trucks and trailers serving or using the marina;

(iv) on car parking on the open access ways. Their use by berth owners, their friends and guests and their use by individuals attracted by or connected with the marina will directly effect the availability of car parking spaces for use by visitors of residents and owners.[92]

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90 This park is not covered by the easement to the Council and is not available for use by the public. However, because there are no fences around the development it is impossible to police its use by anyone connected with or using the commercial marina.

91 These are not the same think as public roads or streets. Access ways are the means by which the community association parcel connects to a public place (Community Land Development Act s 41 and may be closed by a unanimous resolution of the associations whose members are entitled to use the access way (s 44).

92 Some more will be said about car-parking under a different heading but for the moment this reference to them is for the purpose of highlight its impact on social attitudes.

(v) on the levies of residents to meet higher maintenance costs, cleaning and security to mention a few.

Let there be no doubt that the negative impact of these and other demands that are sure to follow a commercial marina there will be an increase in social friction that will far outweigh any imaginable positive benefit to the residents of Breakfast Point. The outcome of such friction will be a loss of social cohesion that may well see a reduction in the number of owner/residents and an associated increase in the number of renters and all the implications that carries for the building of social bonds that go towards creating a strong, cohesive, happy and productive village community . If this turns out to be the case, as it most likely it will be, then it will be an outright ironic if not an outright perverse outcome for 5,000 or so residents to loose out for the benefit of 172 berths[93] in a commercial marina. Say good bye to,

> "Breakfast Point is a world in itself. You come home and you're surrounded by vibrant open space, beautiful buildings and *sparkling harbour*. Everyone here is passionate about the place. Why wouldn't we be? This is the lifestyle you dream about" (italics added) . (Attachment 63)

and ,

> "Breakfast Point is a setting that takes your breath away. From the parks and trails lining the foreshore we have so much space to enjoy our private view over Sydney Harbour." (Attachment 8.0).

There will not be any private views with a commercial marina in Kendall Bay.

One should not lose sight of the fact that residents of Breakfast Point were sold a "life style" that is going to be noticeably diminished if not completely destroyed by a commercial marina. If that comes to pass the irony will be palpable. The same developer who made money by selling a "life style" to the residents now seeks to make money from the same residents (and others) by diminishing if not destroying that "life style." The numerous quotations taken from the promotional material used by the developer, and the 2005 Concept Plan, make it clear that the potential construction of a

93 It is conceded that the number of actual users and associated individuals will be higher than this.

commercial marina never featured in them at all and it would be inequitable to allow the application to go ahead.

Economic Impact 1: on private owners

The *EP&A Act s 79C(1)(b)* also calls for consideration of the "economic" impact on the locality. This issue will be taken up here.

This application for a commercial marina stands out from other applications for commercial marina that have been in the news recently. The signal distinguishing element between the current application and others is that this one will have,

(i) significant negative economic consequences on private individuals who are not a party to the application, and

(ii) who will not derive any economic benefits from it.[94]

This is quite a contrast from the "usual" proposal for a commercial marina that adjoins onto public land, were its users employ public facilities, and the costs of all of these are met from public funds. Here the resulting effect is that,

(i) the marina will be adjacent to private property,

(ii) will encroach[95] on private property , and

(iii) rely on private facilities (walkways, open access ways, parks etc)[96].

A marina will have an economic impact on the residents of Breakfast Point. Their private property will be the object of a take over by commercial interests to which they are not a party. They will have to bear the brunt of meeting the extra costs of maintenance,

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94 Needless to say there will be a significant, negative non-economic impact as well e.g., on the enjoyment of the amenities.

95 The act of encroachment creates a nuisance and hazard for users and breach the "mutual duties" of owners. *Community Land Management Act s 110* . By this same provision owners must not interfere with the use access ways; and by *s 61* lot owners are not to unreasonably interfere with the use of lots or obstruct the lawful use of common property. Something which would happen with a marina. See also footnote 4.

96 The community association is required to control and manage the access ways for the benefit of all members. *Community Land Management Act Sc 1 cl 2.*

cleaning, damage, insurance and security to mention just a few economic imposts. Furthermore, the boats using the marina will most likely, in the long run, cause considerable damage to the seawall (through their wash) and it will be residents of Breakfast Point that will have to meet the repair costs.

Economic Impact 2: property values

Many of the residents and owners of Breakfast Point and Kendall Inlet were attracted these locations because of, to use the developer's own words, the "calm blue water and palm trees" and the picturesque vistas afforded by Kendall Bay. Many of them paid in the millions of dollars for the privilege. A commercial marina will have a negative impact on the value of these properties. Realistically, one would not expect the developer to cavil with this because nowhere does its promotional material for the development make any reference to its intention and moves to construct a commercial marina. A sure sign of the inherent validity of the hypothesis.

To be fair, the contract for sale that each owner to date has entered into, makes a passing reference to the possibility of there being a "marina" but such limited disclosure would be insufficient at law to allow a purchaser to make an **informed decision** (and the legal requirement for each page of the insets to the standard form of Contract for Sale of Land needing to be individually signed or initialled- which it is doubtful any were so initialled or signed on each page). If nothing else it would be deceptive and misleading to equate a "marina" to a commercial marina. Indeed, the developer, as recently as November 2008, had the opportunity to identify it as a commercial marina and chose not to[97]. This apparent reluctance to admit the obvious speaks volumes about the concern of the impact on values and in attracting residents to the development particularly once they realise they will have to carry the burden of maintaining the on-shore facilities for it and all of the other negatives recited in this submission. This last point is important because, **independently of the sufficiency of the notice concerning whether there would or would not be a marina, nothing is said about the marina having to be**

97 Attachment 62. In fact it clearly implies the opposite. In paragraph 1 it says "...a marina to provide a recreational boating facility for the residents of Breakfast Point..." and at paragraph 2 "The proposed marina is the final amenity to be constructed that will truly make Breakfast Point an unparalleled waterfront suburb with unfettered access to Sydney Harbour for her current and future residents..." and at paragraph 4 "It is our intention to provide a world class facility for residents to safely be able to enjoy their pleasure craft in a location near to their homes." See also Attachment 22.

underpinned by community association assets, facilities and maintenance levies for the benefit of the developer and/or strangers to the community development scheme.

Pollution Impact

Kendall Bay is polluted. There is no dispute about this. There is still a Remediation Order in place (dated 25 May 2005) and waiting to be given effect. This order was made because it was found that the bay is contaminated with polycyclic aromatic hydrocarbons and total petroleum hydrocarbons and that these,

> "pose a significant risk of harm (SRoH)"

Some of these contaminants are classified as "human carcinogens" and,

> "It is likely that further development of the area would increase the risk of harm"
>
> and the,
>
> "Disturbance of the sediments would mobilise contaminants and hence increase the risk of harm"

The Remediation Order provides that until it is complied with the Maritime Authority of NSW is to,

> "Refrain from carrying out or causing, permitting or allowing another person to carry out any works or activities at the site that would result in the disturbance, or further disturbance, of the bed sediment of Kendall Bay[98] and the Parramatta River...Examples of the type of works or activities that may come within the scope of this Order include:...boating facilities (for piers, wharves, slipways or marinas)..."

To the existing pollutants one must add for consideration those pollutants that the boats themselves will bring along, such as diesel, anti-fouling agents and treatments, oils or chemicals used by boats and sea creatures not native to the area being brought

98 Other parts of the Order identify the area as "Kendal" Bay.

into the Bay by the boats and/or their users. Some of the pollutants will give off revolting smells. The smell from pollutants released from the water is apparent at present and, if anything, it is likely to increase once a commercial marina is in place. The constant movement of motor boats will serve to continuously churn over and spread the pollutants.

There is a danger that comes from the popularity and fashionable use of words like "pollution." The danger is that people become inured to its meaning and significance in the particular circumstances of this case. So let there be no doubt that the evidence accumulated in relation to the investigation of the remediation of Kendall Bay show that the existing pollutants are a danger to man and animals[99] and this being the case the approval process should be adjourned until all remedial work on the Bay is completed to the required standard. Until then it is a waste of time and resources for all concerned to proceed with the application.

Impact on privacy

The residential development of Breakfast Point has been designed, for the most part, to offer privacy without the intrusiveness of "obvious" fences. Mostly, this is provided by low hedges and open grass spaces with some fencing here and there. The houses north of Hunters Wharf do have fencing to delineate individually owned private property but not to delineate that property from community association property (there is landscaping for this). The two and three storey apartments of Hunters Wharf do not have fences (as such) but there are hedges and landscaping to differentiate private property from strata property and from community association property. The absence of obvious fences or the absence of fences delineating the community association property from strata and private property will encourage marina users to wonder onto places where they should not do so. Many residents will find this prospect unsettling, uncomfortable and outright disturbing. It will help it destroy the peace and quite that draw them to the development in the first place and will do nothing to engender a sense of security.

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99 In part see the Remediation Order attached to NSW Maritime consent approval.

The marina will see an increase in the number of persons who access the community association parcel. Some of them will be the owners and guests of the owners and some will be passengers from ferries who are attracted to the area by the presence of the marina. Some others will be workers and service providers for the marina. They will be walking on and making use of facilities which they would not do if the marina was not there.

The impact on privacy can take a number of forms. One form comes from the fact that 25m boats sit higher out of the water that a person standing on the ground level of an apartment at Hunters Wharf or on the front door of one of the houses north of Hunters Wharf. Indeed a 25m boats will sit higher than a person standing on the second level of an apartment or house in the same localities as previously mentioned. Together with the impact caused by the proximity of the marina to the apartments/houses it means that these residents will not be able to use their living/lounge rooms/bedrooms without being observed, day and night, and if they want some privacy, they will have to draw the curtains or close the blinds to get it. That will pretty well defeat the purpose of having wall to wall glass frontages [100] and the reason for buying on the foreshore in the first place. The point about the glass wall arises from the fact that the architectural standards make use of floor to ceiling and wall to wall sliding doors and windows in order to take full advantage of the sights. Of course with a marina out there this will not afford much if any privacy.

Reference has previously been made to the document from TLB Engineers lodged with *the MPA*. That document is relevant in the context of the impact on privacy because it claims (at para. 3.10) that ,

> "For a distance of 15m landward of the mean high water mark, is a zone of landscaped *public open space* which extends around the whole of Kendal (sic) Bay. West of the **public open space**, medium density residential buildings have been constructed" (emphasis added).

This statement is important for three reasons. Firstly, **it is incorrect**. The mean high water mark is in an easterly direction from the seawall. The seawall is private property/private community

100 See various Attachments relating to Hunters Wharf and the manor houses and note also the comment regarding proximity..

association property and any "open space" does not commence until one goes pass the seawall in a landward direction and the reference to the mean high water mark is incorrect. Secondly, the statement is an admission that the space between the marina and the private community association **surface**[101] property is 15m.[102] . Thirdly, it is important because of the assertion about "**public open space**". In so far as the 'public open space' is concerned the statement is incorrect. The '**space**' is neither "**public**" nor *"**open**"*. It is in fact land now subject to a lease to the Community Association and while the public has **limited** right to use it this does not make it "public" nor "open". The public does not have an interest in land that "public open space" would have. The *Dictionary* to the *Harbour REP* defines "**public open space**" in the following terms,

> " **public open space"** means:
>
> (a) any part of the *public domain* that is set aside for public recreation, or for a temporary use, *and* to which public access is *unrestricted,* or
>
> (b) any part of the *public domain* that is *unfenced and* that is set aside for commercial seating associated with restaurants, cafes or the like, but *does not include* land on which any building (other than a temporary structure) is situated" (emphasis added).
>
> The word "and" in clause (a) is conjunctive so that in order to satisfy the definition of "public open space" the land *must* be part of the public domain and afford unrestricted access to the public. There is no property, that forms part of the Community Association parcel, that is in the **"public domain"**[103] or, for that matter, **any property** to which the

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101 See Chapter 2. There's a stratum at this point.

102 This should not be read to mean that the assertion made by TLB Engineers is correct.

103 Both the Master Plan and the Concept Plan had a go at this issue. The Master Plan says, at p 9, that "open access way" is defined in the Community and (sic) Land Management Act" and that the Act "adopts" the definition of "public place" in the *Local Government Act (the LG Act*) "and can be considered as 'public roads'. This is incorrect. That Act does not give a definition of 'open access way'- it refers to the definition in the *Community Land Development Act which, at s 41*, says an open access way "connects" a public place to community property- note the internal distinction

"public" has "**unrestricted**" access. All access to the community property by no-residents/occupiers is subject to conditions imposed in the by-laws and there is no limitation on what may be imposed.

Similarly, the word "and" in clause (b) is conjunctive and for that clause to satisfy the definition of "public open space" the land *must*

(a) be part of the public domain,

(b) be unfenced *and*

(c) be set aside for commercial seating and not have permanent buildings on it.

Furthermore, **no part of the community association parcel on the foreshore has been set aside,**

" for commercial seating associated with restaurants..."

The clincher to *the definition in clause (b*) is that **all of the land** in the community association parcel has a building on it. All of the community association parcel either has,

(i) a town house e.g., like on development lots, or

(ii) apartments as on strata lots, or

(iii) homes or town houses in neighbourhood lots, or

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between a public place and community property. Furthermore, the *Community Land Management Act* says, at s 116, "an open access way is not a road or road related area or a public place..." Finally, neither the *Community Land Management Act nor the Community Land Development Act* has " adopted" the *Local Government Act* meaning of 'public place' which, if they did, would be rather odd in view of the provisions in s 116 that it is not "a public place".

For its part the Concept Plan, at p 10, says that the Community Land and (sic) Management Act "effectively' makes an 'open access way' a 'public space' -not 'public place' (as in the Master Plan) under the *LG Act*. The words 'public space' do not appear in *the LG Act.*

(iv) is part of lot 1 DP No 270347 and, as such it has on it the country club, the Village Green and the associated buildings, or Silkstone Park and the associated structures.

For the purpose of further clarity, it is to be noted that some parts of the community association parcel "appear" to be vacant e.g., the Waterfront Park, but are not, in fact, vacant because it is part of the same Pt lot 1 DP 270347 that has the country club (and the other structures on it), or the Village Green (and the associated structures) and Silkstone Park (and the structures on it). In other words the Community Association property consists of only one lot (Pt lot 1) although parts of it have been given distinguishing names. The open access ways are also part of Pt lot 1. They are part of the same Pt lot 1 that has the country club, village green etc. This state of affairs is one that would have been known to the developer. It is inconsistent with any notion of "public domain" . *In any event each and every area of open space to which there is a access to the council (and all who take from it) is open to change at any time by agreement between the council and the community association and or by order of the courts so that there is no security of tenure as required for users of the marina.*[104]

The use of the words "public open space" in the document from TLB Engineers is remiss in another aspect. It does not mention that there **are hedges** and an "**embankment**" (there are steps leading up to the boundary of the Hunters Wharf strata) between the so called "public open space" and the residential buildings. For the purpose of the *Dividing Fences Act* [105] these amount to a fence and serve to tighten the definition of "public open space" in clause (b).

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104 See also the submission regarding the (lack of) validity of the council's lease over the foreshore walkway.

105 By *s 3* " fence" means a structure, ditch or embankment, or a hedge..."

This has the unfortunate consequence of encouraging passing users of the foreshore walkway to wonder uncomfortably close to the residential part and so infringe on residents' privacy. NB There are fences around each of the pools at Hunters Wharf and around the country club and around the Village Green and a hedge around Silkstone Park.

Regardless of whether the 15m zone is 'public open space' or not the *inescapable fact* is that 15m away from a commercial marina there are residents who,

(i) paid millions of dollars for their homes and apartments,

(ii) who were looking forward to enjoying the benefit of their labour, who now (iii) find themselves 'eye to eye', or being looked down on by marina users (and others) who might wonder even closer to their property than 15m from the seawall, and

(iv) with the *wall to wall and floor to ceiling glass of the frontage* towards the bay the residents will have to live with blinds and curtains drawn day and night.

To this point the question of the impact on privacy has been approached from the perspective of the residents. However, there is another way to look at it and this is from the point of view of the boat owners. They too need privacy. They might not like to be watched by the residents. They may just want to party in privacy, however, knew before they bought berths that this was a likely outcome for them in a way that the apartment could not know.

The final point to make on this topic is that the impact on privacy will not be a transient one. It will last the life time of the marina.

Security Impact

All persons going to and leaving the marina represent a security risk for the residents of Breakfast Point. Similarly, all persons who are attracted by the marina and find their way onto the Community Association parcel represents an increased risk to the person and property within the parcel. Already, there are regular security incidents in the community association parcel involving larceny from the person, apartments and cars. There are regular acts of vandalism. All of these will be likely to increase with a commercial marina adjoining the site.

To meet the increased security risk to person and property could prove costly for the residents and owners to bear and will have to do it for no direct benefit to them. Early experience of the community association is that a limited security presence covering only a small part of the community association property and operating only at night was

costing about $100,000 pa. A reasonable level of security that a commercial marina would mandate i.e., one taking in all of the community association parcel for 24 hrs. a day would require at least five security officers and easily cost $500,000 pa.

At present many persons gather at night time to fish from Cabarita Wharf. Commuters using the wharf daily find it dirty, littered with fishing lines, food scraps, empty bottles, fish bait, torn newspapers, damaged seats, damaged drinking fountain, damaged life preserver and similar effects of vandalism. A commercial marina would multiply the opportunity for vandalism on that wharf and draw vandals to itself. Such an outcome can reasonably be expected to have a negative security impact on the residents of Breakfast Point, Kendall Inlet and others living in the vicinity of Kendall Bay.

Security should not be narrowly interpreted. The seawall on the eastern side of the bay does not have any security railings. Persons have been seen walking on the rocks that make up part of the seawall. It does not take much imagination to predict that some serious accident will occur. The probability of such an event will increase exponentially with a commercial marina that attracts sightseers, fishermen, and others.

It is noted that Sydney Ferries regularly displays a security presence, and cameras all over the place, at Circular Quay.

The security risk will also shows itself in an increase in the litigation risk profile of both the Community Association and of the individual members who will be called to litigate in order to prosecute or defend an action caused or attributable to marina users or others attracted to the site by the marina.

Emergency Provisions[106]

The drawings from TLB Engineers do not disclose any structure or facilities for use by the police, fire and ambulance services in case of emergencies. There is no structure or facility that individuals either working on the marina, or using it can rely on in case of emergency e.g., to escape to a safe place in the event of, oil and/or chemical spillages, oil and/or chemical fires or indeed from accidents between wharf and vessels, vessels and vessels and vessels and other users of the bay.

Presumably, the proponent, is betting on using facilities on private community association parcel. This would not be surprising seeing the whole enterprise is founded on a reliance on that premises. Emergency facilities should be contained "on-site".

To the extent that the proponent is relying on police patrols of the community association parcel as a security measure for its marina, it needs to be noted that this is not likely to happen because the police do not have a right of entry onto private (or on the community association parcel) property. At common law police will be trespassing if they enter without consent, or enter for a purpose other than to make an arrest or prevent a serious indictable offence. If they do they can be directed off the parcel by any unit entitlement holder or one having the right to possession to property within the parcel.[107] *The Community land Management Act s 116* gives the police a limited right to the "open access ways" but it does not give them the right to step off the open access ways and onto the community parcel.

To the extent that the proponent might seeks to rely on helicopter landings on the community association parcel then it is to be noted that there is no easement in place for such an act and that the community association insurance policy does not provide cover for it.

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106 It is important to note that any motor boat over 10m will have a fuel capacity of over 1,000- 10,000 litres. Thus, while one would expect this factor to vary depending on the model and make Onblue 2009 edition gives fuel capacity for a (a) 9.93m boat as 1,100litres ; (b) a 10.92m boat as 1,330litres; (c) a 11.9m boat as 1,400litres; (d) a 13.3m boat as 2,500litres; (e) a 16.5m boat as 3,500litres; (f) an 18..7m boat as 6,500litres; (g) a 19.91m boat as 8,300litres; (h) a 23.85m boat as 10,200litres. These average at 4,354 litres and for a marina of 172 berths amounts to 748,845 litres. This could prove to be an explosive mixture for a residential development less than 40m away.

107 Sometimes even statutory provisions do not help them. See *State of New South Wales v Koumdjiev [(2005)] 63 NSWLR 353.;*Kuru v State of New South Wales [2008] HCA 26 (12 June 2008)

To the extent that the proponent might seeks to rely on fire trucks having access to community association parcel for access to the marina it is to be noted that there are no hydrant booster valves on the foreshore lot and in any event the marina should have its own. Moreover, for this purpose, the proponent cannot even rely on the limited right that the police have under *s116.*

In terms of ambulance access the point is repeated that the community association parcel is private property and while no one would be mindful of refusing an ambulance entry to the parcel the proponent should not take it for granted. Ambulances cannot even claim the limited right that police can.

Suitability of the Site

The *EP&A Act s 79C(1)(c)* also calls for consideration of the "suitability" of the site. This issue will be taken up here.

Once upon a time, when the surrounding area consisted of industrial factories, it would have been difficult to argue against a commercial marina. It would have been an improvement on the use of Kendall Bay. This argument is no longer available. This is now an established residential area suitable for individual and family enjoyment, of scenic views and the occasional yachting trip or motor boat ride that can make use of Cabarita Wharf. This much would seem to be conceded by the proponent in Attachment 13 where it says,

> " I still can't quite believe we live on Sydney Harbour. It's pretty special to be able to stroll down to the water to watch the sun rise or set."

The site does not have many things going for it as a potential commercial marina site. It is contaminated. It is too small and narrow so that the marina structure takes up too much of the bay. Look at the Google Attachments. The d'Albora Marina which is at Cabarita Point is a readily available comparison. That marina is much smaller. It consists of four arms whereas the proposed one has seven arms and a Skiff. Cognitively compare its apparent size to the size of Kendall Bay and it will be seen that d'Albora would be a very tight fit for Kendall Bay without even making allowance for the turning circle[108] that boats have to do to get in and out of the actual marina structure. Alternatively, the d'Albora structure on to Kendall Bay and get the same answer.

108 This would be expected to be about 25-30m wide.

It is not self contained in terms of car and trailer parking and emergency facilities. As already discussed, and without repeating them, the site cannot satisfy many of the requirements of *the EP&A Act, Harbour REP and the Harbour DCP as well as the local DCP.*

The site is not suitable because it adjoins a private residential development and, independently of this, it is too close to residential property. Also, it is unsuitable because it cannot provide secure long term access to the access ways and to the community association property it needs in order to give practical effect to the concept. And the site is still polluted and the process to overcome this is unsatisfactory (blanket not previously tried on an active marina site) and it will introduce new pollutants of its own.

There is no reasonable way of constructing it without making use of private property or park land.

Public Interest

The next mandatory issue required to be taken into account in the assessment process is found in the *EP&A Act s 79C(1)(e)*. This calls for consideration of the "public interest".

It is very difficult to measure public interest. On the one hand one can count numbers and say that because more people will be negatively effected (the 5,000 or so residents and the thousands of others made up of the residents of Kendall Inlet, the users of Cabarita Park and the hundreds of daily rowers in the river to mention a few [109]) then the majority should prevail but sometimes the public interest is best served helping a minority (the 172 berths users or to the developer and Cbus[110]). Is it not in the public interest for the developer and Cbus to prevail.

The proponent took a commercial risk in setting things up so that the proposed marina would feed off the property rights and well-being of residents of Breakfast Point and impose financial burdens of them for the life of the marina. Indeed the whole set up gives valuable rights away, over what should have been wholly private property, in the guise of easements which have the potential to under mine the concept behind community development schemes. If the open access ways and walkways are like public roads and public parks there is nothing to distinguish community development schemes from ordinary developments except that there is a shift in the maintenance burden from the public to private residents. It cannot be in the public interest to under mine the

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109 There are a number of rowing clubs (schools and commercial ones) in the vicinity e.g., (not in any order) (i) Newington Rowing Shed; (ii) Sydney Womens Rowing Club; (iii) Sydney Rowing Club; (iv) Sydney Boys High School Rowing Shed; (v) Shore School Rowing Shed; (vi) Sydney Grammar School Rowing Shed; (vii) Scots College Rowing Shed.

110 Cbus -the construction industry super fund-is a joint venturer with the developer.

legislative intention behind community development schemes. It cannot be in the public interest to impose an additional burden (maintenance costs) on the residents of community development schemes for the benefit of the proponent in particular.

At present many individuals make use of Cabarita Wharf as a place from which to fish during the night. This is a nightly occurrence. A commercial marina can be expected to draw more fishermen to this Wharf and draw them along the seawall in the expectation that more and bigger fish would be attracted there by the cover provided and food and litter finding its way there. However, the fish in the bay are contaminated and not suitable for eating. Thus, it is not in the public interest to draw attention to the existence of and the taking of contaminated fish.

If the proponent is correct concerning the meaning and implications of the easements then the residents of Breakfast Point get no benefit whatsoever from being part of a community development scheme over what they would have got by living outside the scheme. On the other hand they get the privilege to pay for the separate and independent commercial undertakings of the developer. This cannot be legal, equitable or in the public interest.

The area that the proposed commercial marina will take up is not just the space taken up by the boats while they are moored there but includes space for them to steer in and out of their berths. It is noted that "day trippers" will not be coming on small boats. They will be more like ships than boats. It is not in the public interest to take up so much of what is a "clear water" bay and turn it into a commercial bay with no redeeming features but with many negative ones, for the sole purpose of enriching a few individuals. Nor is it in the public interest to reduce recreational area[111] available for public use and replacing it with a "car park" for boats.

Consideration needs to also be given to the interplay of the area taken up by boats using the marina and the area the boats take up as they all manoeuvre to get in and out of the marina. Together, these will take up a sizeable chunk of the bay which other members of the public will be deprived from using whether as passive recreation or by using small crafts such as canoes, kayaks and other small boats.

It is not in the public interest to impose major running costs on private property owners who do not want a commercial marina and do not stand to gain anything from having a commercial marina on their front door for the benefit of the commercial marina owner.

111 And foreshore use as well.

It is not in the public interest to interfere with the rights title and interest of private property owners (the *Community Association DP No 270347*) who are not party to the application for the single and primary purpose of giving a developer a financial benefit.

The "public interest" formula needs to take cognizance of the potential conflict between boat users and others using the bay and river as well as the potential conflict between boat users and day trippers and local residents. Of course it is *theoretically* possible to set up a management plan to control for these but experience would suggest that once on its way the authorities would lose interest and/or would be too slow to act to make this a suitable solution.

Consideration of the public interest also calls for reference to the risk imposed to navigation because of crowding and from the effect that the wash from boat users will have on the safety of rowers.

PART 4: Matters for Consideration:

Environmental planning instruments

In addition to the matters already covered the *EP&A Act s 79C (a)* requires the assessment process to take into account the provisions of any applicable environmental planning instrument. A relevant planning instrument of this type is the *Sydney Regional Environmental Plan* (*Harbour REP).*

Harbour REP : to recognise, protect, enhance and maintain

The of the *aims* of the *Harbour REP* is set out in *reg 2(1)((a) and it is,*

> "To ensure that the catchment, foreshores, waterways and islands of Sydney Harbour are **recognised, protected, enhanced and maintained**:
>
> (i) as an outstanding natural asset, and
>
> (ii) as a public asset of national and heritage significance, for existing and future generations" (emphasis added).

The emphasised words are a cumulative standard to be applied in the assessment process. They do not appear grammatical as severable requirements. Is Kendall Bay an outstanding natural asset? The *Sydney Harbour Foreshores and Waterways Area Development Control Plan* (the *Harbour DPC*) applies to Kendall Bay and this regulation provides explicit recognition of Kendall Bay as something to be recognised, protected , enhanced and maintained.

In its present state Kendall Bay would satisfy *sub-reg (i)* because a "clear water" bay, by definition, emphasises the "natural" (not man made) aspect of the *sub-reg* while the fact that "clear water" bays are few and far in between emphasises the "outstanding" aspect of it. In this context it should not be without significance that the present "natural" state was achieved after (about) a 100 years as an industrial site so that for the bay to revert from its "natural" state to a commercial one would be inconsistent with the regulatory aim: *to recognise, protect and enhance.*

Because Kendall Bay is one of the last remaining "clear water" bays in Sydney Harbour its "natural" value is self-evident. Hyperbole aside, if Kendall Bay was a specie of flora or fauna existing in similar limited numbers it would not be an over statement to described it as being at the point of extinction and in need of preservation.

In its present state Kendall Bay is an unencumbered "public asset" (whether considered in its own right or as part of Sydney Harbour)[112] but if a commercial marina is constructed on it a significant portion of the bay will be in private hands. It would be incongruous with the aims of the *Harbour REP* for it, on the one hand, to call for the recognition, protection, enhancement and maintenance of a natural asset and, on the other hand, to take a large portion of the same asset out of public hands and degrade its "natural" character by converting it into a commercial marina.

The words "natural and heritage" in clause (ii) unquestionably apply to Sydney Harbour and, by necessary implication, to Kendall Bay just as they applied to Rose Bay[113] in *Addenbrooke Pty Ltd v Woollahra Municipal Council* (*the Rose Bay case*) where the court adopted the words used to describe Victoria Harbour in Hong Kong as,

> "...undoubtedly a central part of Hong Kong's identity. It is at the heart of the metropolis both physically and metaphorically...It is recognised not merely as a public asset but as a special one. It is something extraordinary. The recognition does not stop there. It is further acknowledged to be a natural heritage. *Natural* in that it was not created artificially by man but as part of nature. A *heritage* in that it is inherited as a legacy from previous generations and is to be transmitted from generation to generation. The harbour as a special public asset and natural heritage is declared to belong to Hong Kong people. This reinforces its character as a *public* asset"(at p 14).

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112 *Addenbrooke Pty Ltd v Woollahra Municipal Council* [2008] NSWLEC 1990.

113 Kendall Bay is part of the local government area of Canada Bay and it, like Rose Bay, are identified as having heritage items in the Parramatta River area.

From the self-evident significance of Sydney Harbour it follows that Kendall Bay, which the *Harbour REP* recognises as part of Sydney Harbour, has the status of a public asset of national and heritage significance. However, it is recognised that the *Harbour REP (and the Harbour DCP)* accept that parts of Sydney Harbour might be used for the construction of a marina after an assessment process has been undertaken. The importance of Sydney Harbour, as found in the *Rose Bay case* to exist, means that the starting point for any assessment of a marina application is, at first instance, one against a marina with the onus of proof being with the proponent to discharge.

Harbour REP: other aims

Other aims of the Harbour REP are;

"(b) to ensure a healthy, sustainable environment on land and water,

(c) to achieve a high quality and ecologically sustainable urban environment,

A commercial marina in Kendall Bay will never satisfy *regulation 2(1)(b) and (c)*. The bay is already contaminated to an unhealthy level for humans and animals. A commercial marina will add to the pollutants and to the pollution level.

(d) to ensure a prosperous working harbour and an effective transport

corridor,

Sub-reg 1 (d) will not be satisfied because a marina does not constitute a "working" harbour (if anything it is pretty idle) and moreover, it will interfere with (reduce the operational area of) the existing transport corridor used by ferries, fishing boats and the occasional barge, large tourist and party ferries.
(e) to encourage a culturally rich and vibrant place for people,

Sub-reg 1(e) can only be satisfied if the bay retains its present character. In this regard it is noted that the sub-reg refers to "people" and not to "boats".

(f) to ensure accessibility to and along Sydney Harbour and its foreshores,

Sub-reg 1(f) can only be fully satisfied if the current status of the bay is maintained. A commercial marina limits the use of the bay by taking a significant portion of its "clear water" space out of public access and places it in private hands. By doing this a commercial marina would reduce, by a significant amount, the area that would be available for recreation while simultaneously, increasing congestion and the potential for conflict between the users of the bay. In particular, reference should be made to the number of rowers that daily use the river. They occasionally reach hundreds in the one day and make safety and navigation important considerations.

(g) to ensure the protection, maintenance and rehabilitation of waterways, wetlands, riparian lands, remnant vegetation and ecological connectivity,

Sub-reg 1(g) is in the same category as *sub-reg 1(b)*. A commercial marina does nothing to protect, maintain and rehabilitate the bay. It does the opposite. A commercial marina does nothing to satisfy the "riparian" part of the *sub-reg* and may reasonably be expected to damage the mangroves and the vegetation existing along the southern and eastern side of Kendall Bay. Nor does a marina satisfy that part of the regulation calling for the "rehabilitation" of waterways. In fact the bay was rehabilitated from its industrial state into a "clear water" bay so that by introducing a commercial marina it will be a move inconsistent with its rehabilitation.

(h) to provide a consolidated, simplified and updated legislative framework for future planning.

Harbour REP and Planning principles for Harbour catchment area

The aims of the *Harbour REP* have just been discussed. It now remains to consider the planning principles to be applied. These distinguish between general principles (*reg 13*) and principles applicable to foreshores and waterways. Of the general principles the more pertinent ones are found in *reg* 13 (a), (b), (c), (f) and (j).

In brief reg 13 (a) requires the development to *protect* and where practical to *improve* the hydrological, ecological and geomorphological processes on which the health of the catchment depends. It is hard to see how a commercial marina is going to protect or improve anything in the bay.

Regulation 13(b) requires the *natural assets* to be *maintained* and where feasible, *restored* for their scenic and cultural values and their biodiversity and geodiversity. It has been mentioned before that Kendall Bay is now a "clear water" bay and is in its natural state or as close to it as it has been possible to get it to and yet, the current proposal will see it revert to an "unnatural" state. It is impossible to see how this principle can be satisfied by the proposal but it is possible to find a tie between its present state and its pre-industrial state. For example, from a report written in 1890,

> "Mr Ward's estate was close to Cabarita, and across the mouth of the little bay a fence was constructed, with an opening or gateway. By the closing of this opening, fish, prawns, etc. which were inside could not get out, and were easily caught when the tide ran out. Parties were made up in Sydney to go out to fish when a big haul was expected."[114]

It has been said,

> "A township grew up around the gasworks, and in the 1920's an attractive park and swimming baths were situated on the river and weekends and school holidays found it crowded with people from surrounding areas. The pleasure ground has now disappeared and with it the laughter of those lost yesterdays at Mortlake"[115].

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114 Coupe Sheena., op cit citation at p 113. The author does not identify Kendall Bay as the bay in question but there is no other bay in that vicinity that fits the description (the Ward estate first used the name Cabarita Point in its survey in 1856–see map at p 20) and, in any event, the culture of the surrounding area to Kendall Bay would serve to satisfy the requirement of the regulation.

115 Pollon, Frances (ed)., The Book of Sydney Suburbs. 1988 Cornstalk Publishing Sydney at p 180.

> Cabarita Park was dedicated as a public park in 1880[116] and the way it was, at the time and for some time later, in an "undeveloped wilderness" state. With the building of the ferry wharf at Cabarita Point it came alive and became a favourite place from which to observe major sculling races held on the river. The establishment of the Sanders' boat shed in 1906 helped draw amateur rowers and fishermen to Cabarita and its popularity as a leisure spot increased after 1918 and the closure of adjoining Correys Gardens.[117]

> Amateur sculling has an important connection with the Parramatta River in general and Cabarita Park in particular. The Cabarita ferry wharf[118] was the end point of the GPS Head of the River regatta between 1893 and 1935. It drew huge crowds. Later when professional sculling became popular, enormous crowds went to watch from the Park International Champions like Edward Trickett (in 1876) and William (Bill) Beach sculled there.[119] The Sydney Rowing Club has been at Abbotsford since 1870 and daily and sometimes more than once per day has rowers going pass Kendall Bay. A monument to Beach is situated in Cabarita Park and will be obscured from site lines along the foreshore walkway near the house and the northern apartments of Hunters Wharf.[120]

There are several features of cultural importance around Cabarita Point, for example, there is an Aboriginal midden, the William Beach Memorial, Cabarita Baths, Sanders Boat shed (now d'Albora Marina) and the Federation Pavilion. In the early days,

> "Crowds were no novelty at Cabarita Park, and they gathered to watch the professional sculling,...the GPS rowing regattas ...[and] The sandy beaches on the river front and the hilly area behind provided excellent vantage points from which to view these aquatic events"[121]

and,

> "Correy's Pleasure Gardens had a water frontage to both Kendall Bay and Hen and Chicken Bay...on the Kendall Bay side, visitors could purchase fresh fruit, vegetables and cut flowers"[122].

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116 Coupe S., op cit.

117 Coupe Shenea, op cit at pp 281, 282.

118 Not the current one but the one at Cabarita Point which can be viewed from the north west arm of Kendall Bay at the house north of Hunters Wharf and from the northern parts of Hunters Wharf.

119 Coupe, Sheena., op. cit., pp 264-266; Powell., Carol, op cit. p 11.

120 Blaxell G., The River Sydney Cove to Parramatta. Brush Farm Historical Society. Eastwood 2004. For a sample of current users see Attachment 65-67.

121 Blaxell G op cit at p 125.

122 Blaxell G., op cit at p 127

The cultural connection is further strengthened by the vicinity of Kendall Bay to Glades Bay (right opposite). At Glades Bay there is evidence of Aboriginal open and sheltered occupation, open rock engravings, sheltered stencilled art site and axe grinding[123] and the views of Glades Bay from Kendall Bay will be significantly impacted upon as will the views from Glades Bay to Kendall Bay.

123 Blaxell G., op cit. at p 138; Powell, Carol., A River Revived The Parramatta. NSW University Press. Kensington. 1987.

While the focus on Kendall Bay is important and unavoidable there is value in broadening the scope of attention to the general role of the Parramatta River itself. The river originally served the Aborigines as a source of food and possible pleasure for it is known that they built boats and fished the river and used its resources, such as shellfish (there is a midden at Cabarita Park)[124]. Then, with the coming of white settlers, the river became the means by which the settlers went about searching for good agricultural land which they found at Rose Hill and surrounds and along the river bank, such as at Kissing Point. In its early history the river had a utilitarian character transporting agricultural produce, rocks and other resources to the growing City. In time farm houses gave way to suburban homes, agriculture to industry and eventually industry to services and the need to cater for passengers rather than goods and industrial needs. In fact, these days the River's major role has changed to a means of commuter travel to and from the City,

> "The river highway was no more. Times had changed and the role of the river had changed with them. For some time its role was a negative one: it had become an important byway, something to be polluted, complained about or ignored. Eventually this situation also changed and a new, but this time positive, role was imposed on the Parramatta River."[125]

This evolution was brought about by the supplanting of industry by residential development. In the process one can see the neat connection between Kendall Bay now and its pre and early settlement form. A state which is incongruous with a commercial marina. This residential evolution may, in fact, have gone a bit too far and along the river one tends to find a wall of apartment blocks with little if any open space in between a process which a commercial marina would make more prominent by taking away valuable, natural scenic open waters. The river itself will benefit from this;

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124 See generally, Blaxell G; Powell, C., and Coupe S.,.

125 Powell. Carol., op cit at p 17

> "The newly developed concern could not but benefit both the river itself and the people who might now learn to appreciate and enjoy this major resource. The Parramatta River was beginning to revive. There was still some pollution and there were still some ugly sites on its banks, but the signs of improvement are obvious. The parks on its banks had increased in number, the mangroves were visibly regenerating and local councils no longer suggested their removal. Dead fish were no longer found floating on the surface of the water and the offensive smells that had once plagued riverside residents do so no longer."[126]

But this is not the end of the story. It remains to say that this bit of social cultural history identifies the Parramatta River and the area of Kendall Bay and its surrounds as one of recreation, rowing and spectator sport as well as family picnics and occasions for social engagement. An area for fishing, both by the Aborigines,[127] the colonists and the recreational fisherman of today who nightly gather at Cabarita Wharf. These characteristics have managed to survive, to some extent or another, to today despite the intrusion of the industrial period and now effect should be given to the principle *to protect, improve, maintain, restore and enhance.* To put in colloquial terms one might well hear the call to go "by the water"[128] but not "by the commercial marina". The *proposal is completely out of tune with the context of the direction that the locality is taking and with the direction that the proponent originally sold the residential development to the residents.*

The next requirement (c) is for the assessment process to take into account the *cumulative environmental impact* of developments within the catchment area. Thus, the process must not consider the impact of this development in isolation but in its entire interdependency with other developments that have taken place in the catchment area. It has already been mentioned that Kendall Bay is one of a very few remaining clear water bays in Sydney Harbour so that the cumulative impact warns against any further intrusion of marinas in the catchment. As required by the *EP&A reg 2000 Sch 2 cl3* alternatives need to be considered e.g., the better use of existing marinas, before a new one is constructed.

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126 Powell. Carol., op cit at p 42. There is still some smell around!

127 Blaxell G op cit writes (at p 139) that the Walumedegals clan occupied the site at Glades Bay. It may be reasonably be supposed that they may have also occupied the south side of the river.

128 The meaning of "Cabarita".

The principle embodies in *sub-reg (f)* is for developments that are visible from the waterways or foreshores is to *maintain, protect and enhance* the unique visual qualities of Sydney Harbour. The proposed development is visible from waterways (Parramatta River) and the foreshore of Kendall Bay. The proposal does not maintain, protect nor enhance the unique visual qualities of Sydney Harbour.[129]

By sub-reg *(j)* the development is to protect and if practicable *rehabilitate* watercourses, wetlands, riparian corridors, remnant native vegetation and ecological connectivity within the catchment. It will do nothing to protect and rehabilitate native vegetation and ecological connectivity. Reference can be made to *Wetlands Protection Area Map Sheet 2 and 3 Harbour REP* to note the breaks in the wetlands protection areas near Cabarita Wharf on the eastern shore of Kendall Bay and the southern most area of Kendall Bay. The marina will disrupt the connectivity even further. Reference is also made to the *Harbour DCP* and *Map 3* showing the ecological communities and landscape characters of the area around Kendall Bay. This currently shows terrestrial and aquatic ecological communities all around Kendall Bay and where the proposed marina is supposed to go. It is submitted that the marina will disrupt the connectivity existing for these communities. See also *Harbour REP Part6*.

The Harbour REP and Foreshores and waterways principles

There are specific principles applicable to foreshores and waterways areas. These are set out in *regulation 14.* The more pertinent ones are *sub-reg (a), (d) and (e*). In *sub-reg (a)* it is provided that the ,

> "(a) development should *protect, maintain and enhance the natural assets* and unique environmental qualities of Sydney Harbour and its islands and foreshores," (emphasis added)

129 Even if the requirements were interpreted disjunctively) but instead seeks to change and diminish the unique visual qualities of the Harbour (for the visual qualities see *the Rose Bay Marina* case.

This is similar to provisions in reg 13 (a) & (b) and the same submission as was made there is made here.

reg14 (d) requires,

> "development along the foreshore and waterways should *maintain, protect and enhance* the unique visual qualities of Sydney Harbour and its islands and foreshores," (emphasis added)

The principle in *reg 14 (d)* is similar to the one in *reg 13 (f)* and the same submission applies.

Regulation 14 (e) is an unusual one. It looks at future demand. It says that the principle of planning within foreshores and waterways should,

> "(e) adequate provision should be made for the *retention* of foreshore land to meet existing and future demand for working harbour uses," (emphasis added).

It has already been pointed out that Kendall Bay is one of a very few remaining "clear water" bays in Sydney Harbour. So the question for the assessment is how can this principle be given effect to by using up a limited resource now? In other words, what is going to be left for future generations if they are all used up now? Bays do not grow on trees. What you see is what you get. If Kendall Bay is used for a commercial marina now there will not be any left for meet future generations.

The Harbour REP and heritage conservation principles

The heritage conservation principles that underpin the *Harbour REP* are found in *reg 15.* There are six of them directly applicable to Kendall Bay. These are *sub-reg (a), (d) and (e).*

Sub-reg (a) requires,

> "(a) Sydney Harbour and its islands and foreshores should be *recognised and protected* as places of exceptional heritage significance," (emphasis added)

The heritage significance of the foreshore of Sydney Harbour has already been mentioned under *reg 2 (1)(a).* It remains to be said that, for this as for all other matters

for consideration, the onus of proof is with the proponent to discharge. It needs to show that the marina will recognise the exceptional heritage significance of Sydney Harbour (Kendall Bay) and that it protects it. It is submitted that the marina does not do anything of the kind. In fact it will undermine it.

In terms of *sub-cl (d)* the requirement is ,

> "(d) the *natural, scenic, environmental and cultural* qualities of the Foreshores and Waterways Area should be *protected.*" (emphasis added)

By its very nature a commercial marina will reduce the "natural" state of the foreshore by introducing a man made structure on the natural one in a way that displaces it, covers it, obstructs it, pollutes it and otherwise diminish or destroys its natural state. It does the same thing in terms of its scenic qualities and aesthetics. In terms of environmental qualities a marina will increase the pollutants in the bay, will disturb the existing pollutants and will endanger the mangroves, vegetation and bird life around the bay.

In terms of *cultural qualities* it can be said that society these days places a significant value on the natural environment and does not readily embrace a reversion back of natural resources to commercial ones particularly when the expected benefit is limited to a (very) few. Culturally, the vicinity of the area was always identified with personal and team recreational pursuits even during its time as an industrial site. So that it would be truly ironical if , having survived what industry had to throw at it for over 100 years, and after the surrounding area and Breakfast Point in particular, has been rehabilitated from an its industrial state and the bay is covered by a remediation order, this cultural memory is lost to a commercial marina. The residents who were drawn here by the proponent on the basis of the natural and scenic qualities of the bay should not now loose out to the changed and incongruous vision of the proponent . The change in the character of the locality has been noted by others,

> "From 1788 until the third quarter of the twentieth century the river was also used ...as a waste disposal area and in the later years many parts of the river banks were filled with industrial sites. This usage eventually resulted in the pollution and uglyfying of the local environment...During the last ten years the degenerative process has virtually stopped and the Parramatta River has begun to revive. Today the river is potentially a resource of a different kind. It has a positive role to play in a world which has just become aware of the desirability of preserving its natural and non-built heritage. It has a positive role to play in a world in which leisure time is fast becoming an enforced, rather than a chosen, part of life. The Parramatta River's beauty, contrasts and historic sites offer opportunities for enjoyment and learning to anyone willing to take them up."[130]

130 Powell. Carol., op cit. at p 3.

Sub-reg (e) gives the planning principle as,

> "(e) significant fabric, settings, relics and *views* associated with the heritage significance of heritage items should be conserved," (emphasis added)

Forming part of the *Harbour REP* is a *Heritage Map* and a *Heritage Map Key* for the heritage items on the Sydney Harbour and the Parramatta River. By this principle the views associated with these heritage items need to be protected. The significant word here is "associated". It is unidirectional, thus it catches views to and from the heritage items. The *Heritage Map* shows a number of heritage items for which "views" are negatively impacted by the proposed development. This is *Heritage Item 27, 28 and 48, 49 and 50*[131]

(i) item 27	Former Cabarita Wharf
(ii) item 28	Sanders Marina
(iii) item 48	Scots College Boat Shed.
(iv) item 49	Sydney Grammar School Boat sheds
(v)item 50	Former Gladesville Wharf.

131 Views from item 27, 28 and 50 will be impacted from the second level of the two level apartments at Hunters Wharf and from the second levels from the houses north of Hunters Wharf.

The commercial marina will obstruct the views from these *Heritage Items* and, in turn, the views of this Heritage item from Hunters Wharf, the houses north of Hunters Wharf and the apartments south of Hunters Wharf as built and to be built. Accordingly, the proposed commercial marina will be inconsistent with this *sub- regulation.*

A reasonable summation of the impact of a commercial marina in Kendall Bay, would be that it has an over all negative impact and it does not satisfy the aims and principles of the *Harbour REP.*

Development control of Foreshores and waterways: zone No. W 1

Development control of the foreshores and waterways is achieved by a zoning system that locates Kendall Bay in *Zone No. W1–maritime waters.*

The Zoning objectives are set out in the Table that follows *reg 18. Regulation 17(2)* sets out the objective for any approval to be consistent with the "aims" of the plan and the zonal objectives. The "**Aims**" have already been discussed so it remains to consider the objectives in *reg 17.*

The first objective is,

"(a)"To give preference to and protect waters required for the effective and efficient movement of commercial shipping, public water transport and maritime industrial operations generally."

A marina does not satisfy this objective. On any reading of the objective there is nothing of a commercial shipping nature to a marina, nor public water transport, nor maritime industrial operations.

"(b)to allow development only where it is demonstrated that it is compatible with, and will not adversely affect the effective and efficient movement of, commercial shipping, public water transport and maritime industry operations."

This objective is tied to commercial shipping, public water transport and maritime industry operations and like *reg 17(a)* does not satisfy the objectives. Lest any argument is put forward that a commercial marina is caught by the description "commercial shipping" it is pointed out that "Commercial marina" is defined in the *Dictionary* as a "permanent boat storage facility" (denoting a static facility) which is inconsistent with "shipping" (denoting movement).

"(c)to promote **equitable** use of the waterway, including use by passive craft" (emphasis added).

The meaning to be given to this requirement is effected by the **Table** that follows *reg 18.* The Table includes an approved commercial marina.

The Table also shows that ,

(i) intertidal dredging,

(ii) tourist facilities,

(iii) reclamation works,

(iv) waterfront access stairs, and

(v) mooring pens,[132]

(vi) water based restaurant.

are **not permitted** to be carried out. The **prohibition is mandatory** and yet they are all part of the proposed structure.

To construct the marina there will need to be,

(i) construct the proposed there would need to be intertidal dredging to either remediate the bay or part of it,

(ii) there would need to be intertidal dredging of the bay or part of it to increase the available depth for the boats to use it safely,

(iii) tourist facilities[133],

(iv) access stairs will be needed because the level of the jetty will be lower than the top of the seawall.[134] and because it will be used by day trippers to get off the vessels it escapes the exemption contained in the *Dictionary* which applies to access "to" a vessel,

(v) drawing SK15B shows provisions for a kiosk and waiting area. This is nothing but a water -based restaurant and entertainment facility by another name. It is worth referring to the proponent's own words in relation to this kiosk. In its pre-lodgement consultation web site it says:

> "The marina and jetty will provide...[a] kiosk on the end of the jetty for informal get togethers".

(vi) mooring pens are clearly in breach of the regulation.

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132 See drawing SK15.

133 Note a tourist is not confined to an overseas visitor. Day trippers use of facilities and day tripper use of kiosk and waiting area.

134 Refer to paragraph 5.6 in the MPA submission from TLB where it says, "the level of the jetty will be lower than the public access foreshore zone." Also it goes without say that it is not conceded that the foreshore is subject to "public access" for which see under Chapter 1 and the restricted meaning that should be given to "public".

There are too many prohibited structures and/or proposals in the application. The regulation demands that approval not be granted.

The notion of *equitable use* in *reg 17 (c)* is important. Boat owners have made use of a significant proportion of bays within Sydney Harbour and "clear water" bays are a diminishing asset. Some balance between marina bays and 'clear water' bays needs to be found and the only way to do that is not to approve a marina at Kendall Bay.

By *regulation 20 and 21* there are a number of matters that are required to be taken into account in relation to biodiversity, ecology and environmental protection. These are similar to considerations under the *Harbour REP reg 2 (above)*. In terms of the *Harbour REP* there should be,

(i) the development should protect and enhance terrestrial and aquatic species, populations and ecological communities and particularly avoid physical damage and shading of aquatic vegetation;

The marina will not be able to satisfy this condition. In particular the shading provided by the structure is unavoidable.

(ii) it should promote ecological connectivity;

See under the *Harbour REP reg. 13(j) (above)* for a submission for a related criteria.

(iii) to "avoid indirect impacts on aquatic vegetation (such as changes in flow, current and wave action and changes to water quality) as result of increased access."

The marina structure will impact on flow, current and wave action and the water quality will be diminished e.g., from chemicals and anti-fouling agents used by or on boats.

(iv) The assessment has to consider the *cumulative effect* of the development and not issues in isolation.

While it might be possible for the development to satisfy one or more of the relevant criteria it is submitted that it is next to impossible for it to satisfy all of them and/or their cumulative effect.

Public access to and use of Foreshores and waterways

The question of public access is covered in both the *Harbour REP regulation 22 and in the DGRs.* The content of this *regulation* is all predicated on their being "public access". In the sense used in the *regulation* "public access" does not exists for the foreshore as that is part of the Community Association parcel (see under *Chapter 1 and the part of the submission dealing with the easements*).

As previously argued the right to access given under the easement is limited to the City of Canada Bay Council and any of its servants, agents etc necessary for the Council to carry out its functions. This excludes the "public" at large as used in this *regulation*. Independently, of this interpretation, there should be no doubt that the nature, use and character of the easement will

change from its character as an easement to a local authority to a private **commercial use character that will give the owner of the commercial marina "possession" of that part of the servient tenement at the point of embarkation/disembarkation [135] . A right to possession, whether in fact or at law, is inconsistent with an easement**. A change of this type will attract the power of the courts to vary or extinguish the easement, hence it is meaningless to talk about maintaining it or improving access to the foreshore as required by *reg 22 (a) and (b)*.

Regulation 22 (c), is about providing appropriate *security of and* what remains is to mention *sub-regulation (e)-* to minimise disturbance of contaminated sediments. Kendall Bay is a contaminated site and the movement of boats will cause it to be regularly and continuously disturbed.

By *regulation 25* provision is made for the maintenance, protection and enhancement of the foreshore and waterways scenic quality**.** This is to be achieved by adopting the following considerations,

> "(a) the scale, form, design and siting of any building should be based on an analysis of:
>
> (i) the land on which it is to be erected, and
>
> (ii) the adjoining land, and
>
> (iii) the likely future character of the locality,
>
> (b) the development should maintain, protect and enhance the unique visual qualities of Sydney harbour and its islands, foreshores and tributaries,
>
> (c) the cumulative impact of water-based development should not detract from the character of the waterways and adjoining foreshores.

The characteristics of the land on which the marina is to be located has also been discussed (contaminated and surrounded by ecologically sensitive systems of terrestrial and aquatic environments and heritage sites), the adjoining land has been described as residential and as having local heritage value (Cabarita Park) so it only remains to discuss the future likely character of the locality. This is likely to be residential rather than industrial and a place where individuals will like to go to get a view of the water rather than to get a view of a "car park" for boats.

Finally, when one takes into account the cumulative impact it is impossible to escape the conclusion that the development will detract from the character of the waterways and the adjoining foreshores. It can do no less because the bay will change from its character as a "clear water" bay to (at least in part) a commercial bay. Similarly, the adjoining foreshore will experience a detrimental effect by its sheer size, proximity and the other effects previously discussed.

It is submitted that the development cannot maintain the unique visual qualities of Sydney Harbour (it will diminish and destroy them), it cannot protect the unique visual qualities of Sydney Harbour (it seek to destroy them) and by force of these failures it follows that it cannot enhance them.

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135 Butt. Peter, Land Law. Fifth Edition. Thomson Lawbook Co. Sydney 2006; see also *Westfield Management Limited v Perpetual Trustee Company Limited* (2007) 239 ALR 75; 81 ALJR 1887; [2007] HCA 45 (3 October 2007)

The means by which views are to be maintained, protected and enhanced are given in *reg 26,*

" (a) development should maintain, protect and enhance views (including night views) to and from Sydney harbour,

(b) development should minimise any adverse impacts on views and vistas to and from public places, landmarks and heritage items,

(c) the cumulative impact of development on views should be minimised."

As regards *reg 26 (a)* this is similar to other criteria previously considered but it is worth noting the constant 24/7 impact that the marina will have. **The 24/7 operation is just not compatible with the high quality residential developments surrounding Kendall Bay. It can only have an adverse impact**. As regards (b) and (c) these have also been previously considered .

Requirement for master plan

Regulation 41 provides that a development consent "must not" be granted over a strategic foreshore site unless there is a master plan for the site and the consent authority has taken the master plan into account. Kendall bay is not a strategic foreshore site. The proposed marina will be mostly adjacent to a s strategic site (the old AGL site which is now Breakfast Point) and an encroaching part will be on the old AGL strategic site (drawing SK15B). However, the regulation is silent about developments that are partly on a strategic site and partly not on such a site. Accordingly, since the purpose of the regulation is to give special attention to strategic sites a master plan is required in order not to defeat the regulation by piece meal and subsidiary developments of strategic sites.

Environmental planning instrument: the Harbour DCP

The *EP&A Act s 79C* also calls for consideration of the *Sydney Harbour Foreshores and Waterways Area Development Control Plan 2005 for Sydney Regional Environmental Plan Sydney Harbour Catchment)* (the *Harbour DCP*). The *Harbour DCP*, by clause 3.2, aims to **minimise any significant impact on views and vistas from and to (i) public places and (ii) heritage items**. It will do this by requiring a consideration of environmental effects or impact statements from the perspective of the,

(i) Visual impact -having regard to the landscape character of the area and the nature of the proposal.

(ii) The hours of operation and acoustics

(iii) Soil erosion mitigation measures

(iv) Run-off and storm water control

(v) Vegetation protection measures

(vi) Parking and access

(vii) Transport and traffic impact.

(viii) Bulk and scale of the structure including the size of any vessels associated with it.

(ix) Explain how the proposal satisfies the requirements of the DCP.

Of these (iii) and (iv) are the only ones with no apparent relevance to the present proposal. Of the others the first to be considered is,

Visual Impact

See also under the headings **Environmental impact:** the "natural" environment and **Environmental impact:** the "built" environment.

In considering the visual impact the *Harbour DCP* requires that,

> "any visual analysis shall consider the impact of the **largest motor vessel(s) capable of being berthed at the marina"** (at p 39) (emphasis added).

The supporting documentation lodged with *the MPA* carries a table showing that the marina will make provision for boats up to 25m. However, because the marina makes provision for day tripper vessels to berth at it and because these vessels are generally the size of a ship (i.e., greater than 25m), it means that the visual impact should based on the basis of these larger vessels. Using these larger vessels as the basis for assessment would produce *an adverse visual impact of significant proportion as the largest of these vessels would be several stories high.* [136]

The most obvious landscape characteristic of the area is the scenery presented by the bay, the uninterrupted view of the "clear water" that is the bay and the Parramatta River that combined to create a pristine picture of Harbour and river beauty that is pleasing to the senses and to the eye. It would be, without doubt, this piece of natural Harbour and river scenery that drew residents to Breakfast Point and Kendall Inlet. The nature of the proposal, a 172 berth commercial marina, will overwhelm the aesthetic value and significance of the landscape while providing a significant obstruction of the landscape from every vision point on the compass that one might like to take. A commercial marina would replace the beauty of this landscape with a "car park" for boats.

While the loss of the natural landscape, to a "car park" for boats represents a particular loss to those residents and owners of Breakfast Point and Kendall Inlet who have properties with views of this natural landscape it goes without say, that the same landscape is enjoyed by other residents and owners who live nearby and experience it from a number of vantage points, for example,

1. while walking along the foreshore walkway at Breakfast Point, or

136 For example see Vol 2 Attachment 50-50.4.

2. from Cabarita Park, or
3. from the mangroves on the southern end of the bay (which *the Harbour DCP* identifies as "*Landscape Character Type 15*"(at p 33) and are to be preserved so as to reduce "the stark contrast of built elements behind these natural features." The problem, of course, is that the sheer size of the commercial marina will completely overwhelm the mangroves and diminish it capacity to satisfy the very reason for their preservation.
4 while walking from Kendall Inlet which adjoins the local heritage listed Cabarita Park, or
5. from the Parramatta River when, for example, commuters are waiting on Cabarita Wharf for the ferry[137].

Although the residential development known as Breakfast Point fronts onto Kendall Bay residents from the vicinity use the foreshore walkways.

To the extent that members of the public make use of the foreshore walkway a commercial marina will have the same direct negative impact on them that it has on the owners and residents of Breakfast Point and Kendall Inlet and others using the river ferries, or from sight lines from Glades Bay, Raven Point and others (as previously discussed).

From whatever point on the compass one looks at *towards* the marina one will be met by an *almost solid wall* consisting of,

(i) boats,

(ii) toilet blocks,

(iii) waste facilities,

(iv) fuel pumps,

(v) office,

(vi) storage facilities, and

(vii) kiosk,. and

(viii) sewage pump out

with little or no visibility between them and appearing as one gigantic mass of white,

blinding, reflecting wall forcing nearby residents, river commuters and transient

pedestrians to don sunglasses.

.

The fact that the shape of the Bay has a narrow width it will make the marina a big eyesore and difficult to escape its intrusion into the visual field of anyone from any where on the compass. The marina, with allowance for space for boats to manoeuvre to get in and out of the berths, will take up most of the bay which, on any reckoning amounts to big loss of "clear water". The number

137 This wharf seems to be outside the Bay and on the river.

of large boats, with their flying bridges, masts, radar and communication antennas, fishing roads sticking up in the air and yachts with big masts [138]create a huge blot in the visual field because of their length, their height and their width (see Attachment 53.1 – 53.4).

Hunters Wharf, the houses to the north from it and the proposed apartments to the south, would be particularly affected by this massive and intrusive wall of smelly, noisy boats disgorging people day and night. This is because this residential set of apartment blocks and the homes north of them are quite close to the seawall and hence, to the marina which is almost at eye level with the first two levels of apartments. In fact some of the larger boats will be higher than the two story apartment blocks nearest to the seawall.

It is hard to see how a commercial marina would be in harmony with the surrounding of Cabarita Park, the mangroves and the bushy and palm fringed foreshore walkway that bounds the bay. By its sheer size and proximity it will dominate the bay and the nearby walkway, parks and buildings. **There is no buffer zone between the marina and the residential and this absence makes the marina incompatible with adjoining residential developments let alone the high quality residential development of Breakfast Point and Kendall Inlet**. See the attachments representing the "sales pitch" of the proponent for the Breakfast Point residential development.

A final point on this factor is that *the Harbour DCP, in Appendix D, has Figure "D1"*. This is a one dimensional scale to measure the "*Indicative Potential Visual Impact of Various Developmental Scenarios*". The range goes from low impact on one end of the scale to high impact on the other end. On this scale a "new or extended marina in front of existing residential development" is towards the *high end for visual impact*. The proposed marina would fall on the same *high visual impact end of the scale*.

Another way to measure the visual impact of the proposed marina is to make use of *"Figure D2: Indicative Contribution to Potential Visual Impact*" found at page 70 of the *Harbour DCP* There are six criteria in the figure D2. They are,

i. Location of the viewer,

ii. Distance of view,

iii. Period of view,

iv. Scale or relative size,

v. Spatial relationship and,

vi. Motion of Objects.

There is no doubt over the outcome using this set of criteria. The proposed marina will score in the "**high visual impact**" area for all of the factors except scale or relative size. This is because,

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138 These will easily add 4 metres to the superstructure of the boats. Note that about 64% of the proposed berths are suitable for use by yachts (see table and legend in SK15B).

[i] when the viewer is level with the marina eg., from the seawall the marina and boats would block the view; a similar outcome would be found for the distance effect

[ii] at a point less than 100m; for the period of view criteria,

[iii] the same high visual impact outcome would be obtained because the residents of Hunters Wharf, the harbour side houses to the north and the residents of the yet to be erected apartments to the south, would be affected most of the day; in terms of the scale or relative size criteria

[iv] the impact would be a medium visual impact one because the size of the boats would mostly fall in the range of 10-30m; in terms of spacial relationships

[v] there would be a visual impact because the marina will be situated in a narrow enclosed bay; and the same high visual impact outcome would be obtained for the motion of objects criteria

[vi] because of the high wind speed which would ensure the wind generators would be at full speed and flags would be fully extended and changing regularly and the noise would travel further.

[vii] **because of the absence of any buffer zone between the marina and private property and the residential homes and apartments**.

There are *no "on-site" parking facilities* shown on the plans for the marina. Question of the availability of parking spaces for trailers (there aren't any) and of additional parking for cars aside, would add to the *visual impact*. In particular trailers would be an incongruous sight in a residential development. But it has to be stressed that **there are no "on-site" parking spaces for trailers and cars on the marina.** The plans do show an intention to construct a car parking facility on the community association parcel but it would be a truly perverse use of the English language to equate that with "on site" and, **in any event, to get to the car park, the marina users/owners will have to use the open access ways which they cannot do without breaching the by-law requiring the access to be "on foot or by bicycle" and for the purpose of recreation rather than as a means of transit to and from the marina.**

Amenity

The marina will be a 24/7 operation. It makes provision for day trippers and casual berths. This means that the residents of Breakfast Point will get no respite from any of various impacts mentioned in this submission. In particular visiting vessels can be expected to be arriving and departing at all hours of the day and night. The large cruising vessels will be well lit and can be expected, especially those using the berths at night, to be playing loud music and party noise (see below). T**his impact is just not compatible with the high quality of the residential development that is Breakfast Point and Kendall Inlet.**

Weekends when the families of residents can be expected to use the foreshore walkways and adjoining parks would, instead, be sidelined by the needs of day trippers and party goers.

The Harbour DCP (at p 39) ,

> "commercial marinas are to provide benefits to both the general public and boating public".

There is no apparent benefit identified as being provided for the benefit of the general public in general nor for the general public when "using private land and facilities".

Noise Impact[139]

There will be noise caused by a number of sources originating and solely attributable to the existence of a commercial marina. Some of the noise will be from boats starting, idling the engines and from cruising.

The importance of this cannot be underestimated. At present the Bay is so quite that the instructions called out to rowers using the river can be heard across the bay and while this activity is mainly restricted to early mornings and afternoons the same cannot be said for the users of a commercial marina and visiting vessels who come and go at all times of the day and night. At night and early in the morning the noise will be more obvious and therefore more intrusive because other ambient noise is lower and residents will, consequently, be more aware of it and will reduce the enjoyment they presently derive from living near the bay. For greater clarity, it is mentioned that night time use of a commercial marina is not restricted to berth owners but may and will include other commercial vessels that tour the river and drop off and pick up party goers and others.

The noise that commercial marinas generate is not restricted to engine noise but will include the noise from generators, ropes moving in the wind and by the rocking motion of the waves as they hit against metal masts and as the boats hit against the berths. Over and above the constant noise from these and similar sources there are loud noises that marinas in general and commercial marinas in particular, are notorious for, e.g., from social activities users engage in.

Of course, noise comes not just from boats and boat users but also from others they attract and who can reasonably be expected to make use of the walkways and then wonder off in the direction of the residential part of Breakfast Point and Kendall Inlet. Furthermore, many of the users of a commercial marina will drive onto what are the private residential developments of Breakfast Point and Kendall Inlet to get to their berths and to get onto the boats (whether as owners or as visitors/guests of the owners).

The act of driving and parking into these private residential developments will be expected to generate noise at all times of the day and night and can be reasonably be expected that the people that will be disgorged by these vehicles will themselves generate their own noise. At night time such noise would be particularly grating to residents from the mere noise and particularly disturbing because they are making use of their private property.

One may argue that most boats do not move from their berths for weeks or months at a time but if this is the case it is hard to see how "parking a boat" in the bay will "enhance" the site as required by *regulation 2(1)(a)* of the *Harbour REP*.

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139 For applicable statutory provisions see under the heading "Nuisance and hazards" below.

Faced with so many negative issues for the residents of the private residential developments of Breakfast Point and Kendall Inlet one may reasonably ask and expect a reasonable answer to the question: why should so many residents/owners have to give so much for the benefit of so few i.e. for the benefit of one developer and 172 berth owners? **Where is the equity?**

Vegetation protection

The *Harbour DCP* states the general aim as being to conserve biological diversity by ,

i. Protecting and where feasible enhancing ecological communities particularly wildlife habitats

ii. development is sited to retain native vegetation, wetlands and natural foreshores.

iii. development is accompanied by re-vegetation and rehabilitation of degraded foreshores and,

iv. Development does not impact adversely on water quality.

On the basis of the *Harbour DCP Map 3*, the foreshore of Kendall Bay, satisfies,

i. 1 high level terrestrial type (saltmarsh),

Table 2 of the Harbour DCP expresses the intent to "conserve and enhance" this type of ecological community. Note the use of the conjunctive. The *Harbour DPC* requires that the *"incremental and cumulative effects"* of developments be considered. A commercial marina would not satisfy either of these. A commercial marina preceded by a large residential development would not satisfy either of these because of the continuous and cumulative effect of motors, wash, marine chemicals and other pollutants and any introduced species of a vegetable or aquatic type can destabilise and destroy these communities.

ii. 1 low level terrestrial type (grassland)

In *Table 2 the Harbour DCP* sets the aim as being to conserve and enhance these type of communities and requires for the incremental and cumulative effects of developments to be considered. Of particular importance for these communities are measures designed to "prevent" pollutants from entering the waterway and for any pollutants and any increase in pollutants be of a temporary nature and do not exceed the current pollution and "range of turbidity".

With a commercial marina pollutants are likely to increase for the long rather than for a temporary duration. Moreover, the motors of the boats will ensure that the "turbidity" of the water would be regular and high. It is also likely that the marina structure will interfere with the flow of the tides in ways unmeasured and in ways that can be detrimental to this type of ecological community.

and,

iii. 1 high level aquatic type (rocky platform),

iv. 1 high level aquatic type (mixed rock intertidal and sand),

High level aquatic ecological communities of the types in (iii) and (iv) can be effected by a number of things. Some of these are, (1) the availability of food sources for grazing organisms, (2) plant and algae growth generally and in mudflats and mangroves in particular (something that should be maintained and enhanced) and by (3) the amount of light penetration.

As has been said before a commercial marina will most likely increase the number and amount of pollutants (eg diesel, anti-fouling agents) and existing pollutants are likely to be consistently churned and these singularly or in combination are likely to reduce the amount of light reaching the algae, the grazing organisms and seagrasses. Structures like a marina are likely to change the natural tidal flow in ways detrimental to the ecological communities.

v. 1 medium aquatic type (mixed sandy intertidal and rock platform)

vi. 1 medium level aquatic type (sandy beach) and

vii. 1 medium level aquatic type (mudflats).

For medium level aquatic ecological communities the Harbour DPC says that it is important to protect the food sources of grazing organisms and to ensure that light penetration is not reduced to a level that reduces algal growth in the intertidal zones.

For this type of ecology the performance criteria in *Table 6 of the Harbour DCP* would require that the marina will not adversely affect beach formation, that harmful contaminants are not disturbed or adversely effect birds, fish and invertebrates, that pollutants are not transferred to the intertidal zone nutrient levels are not increased and that suspension of solids is temporary and does not exceed the current range of turbidity. None of these can be safely predicted.

Traffic, Parking and Access

The primary consideration for this topic is that the Community Association parcel is private property and, therefore, the usual agencies and officials that can be called upon to control traffic and parking i.e., the police and council's parking officers [140] are not available for such duties. This means that

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140 This is the situation in practice. The *Community Land Management Act s 116* says,

"(1) An open access way is not a road or road related area or a public place...

(2)...

(3) An open access way is a private road for the purposes of the *Roads Act 1993* and is not a public road for the purposes of that Act.

:..."

"road" or **"road related area"** means a road or road related area within the meaning of the *Road Transport (General) Act 2005* (other than a road or road related area that is the subject of a declaration made under section 15 (1) (b) of that Act relating to all of the provisions of that Act)." The thing about this section is that the experience of the community association is that the relevant authorities refuse to patrol the community association parcel. See also under the "Security" heading.

the Community Association either has to employ parking and traffic control officials or turn a blind eye to infringements. This may sound like a simple solution but in fact there are practical problems with it. Thus, there is the problem of,

(i) cost, and

(ii) there is the problem of enforcement.

It would be a costly exercise for the Community Association to employ traffic and parking control officers. The more obvious costs would be wages, workers compensation, office space, supervision and management control, training for court appearances, legal costs if legal representation is required and so on. Needless to say these costs would have to be borne by the Community Association and not the marina or the general public.

The second point is that while the Community Association would appear to have adequate jurisdiction to control infringements by residents of the Community Association DP 270347 the same cannot be said for jurisdiction over others, eg., users of the marina or anyone attracted to the Community Association parcel because of it.

The combined effect of these two issues is that traffic and parking would be a nightmare.

Limited reference has been made to parking needs. The developer proposes to put a car park on lot 53 DP 270347. Leaving aside the legality/probity of land in the Community Association parcel being used for a separate and independent commercial undertaking outside DP 270347, it is doubtful that there will be sufficient spaces for all berth owners and their guests. Thus, they will spill over onto the community open access ways and so become an impost on the residents.

It is noted that in the drawing SK15B parking is indicated on some access ways and, presumably, the developer intends that these car spaces supplement those in the purpose built car park.[141] However, the proponent cannot rely on these spaces because as part of the community Association "open access ways" they are not available to berth users and their guests. This is because, under the easement that non-resident/owners would presumably rely on to access them, the access has to be *on foot or by bicycle and for the purpose of recreation and not as a transit point to go to and from the marina.*[142] Thus, to park would constitute a substantial interference with the rights of the servient tenement and an excessive use of the easement.[143] Besides this, since the Masterplan was approved the developer has been given consent to add about 300 additional

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141 For an inconsistent act of disclosure see Attachment 16 where , at paragraph 3 it says "No cars, trucks, vans, buses or any other private vehicles will have access to the foreshore walk. This area is controlled by the community association under the terms of its lease with Council."

See also the legend on SK15B marked in red which reads "Vehicle and pedestrian public access" and see that part of the foreshore walkway in front of the houses north of Hunters Wharf and south of Hunters Wharf (opposite the Skiff) that marks out the entire length of the foreshore walkway as "vehicle and pedestrian access".

142 To park on the open access ways would amount to (1) an "over use " of the easement and (2) it is not necessary to drive and park in order to pass and repass on the easement. *Boglari v Steiner School [2007] VSCA 58.*

143 *Boglari v Stainer School.*

residences in the development. Since many families have more than one car it is most likely that they will be parked on the open access ways. Consequently, the number of car spaces available for the use of residents/owners has diminished and it would be inequitable to allow the developer to use the spaces identified in SK15B for marina users when they are needed by residents/owners and their guests.

If these car spaces are not part of the Community Association parcel then they need to be fenced off from the Community parcel.

It has been previously noted that the *Harbour DCP* requires, as part of it environmental management requirements, that **the commercial marina must provide,**

> "Adequate car and trailer parking (based on the number and type of berths, associated activities and number of employees) is to be available **on-site.** Off- site parking is acceptable only where it will not reduce community amenity or generate adverse traffic impacts; and the adverse impacts of traffic and parking generated by boat storage facilities in terms of congestion, safety, air quality and noise are to be minimised" (emphasis added).

Let it be stated clearly and unambiguously, that *there are no on-site car and trailer parking facilities* made available on the marina. To the extent that the developer purports to rely on parking facilities on the Community Association parcel, these are private parking facilities, on private property, on open access ways (not public streets) and neither do they qualify as being "on-site" or "off-site" for that matter.

For the purpose of clarity attention is drawn to the use of the words "open access ways". There is a reason for this. An "open access way" is not a public street to which the *Roads Act* applies (*Community Land Development Act s 47)* but is community property. This point is important not just in reference to car parking but also to highlight that the use of the "open access ways" by pedestrians is a conditional one.

In so far as traffic is concerned there will, no doubt, be an increase in the number of private cars and trailers on the community parcel. This follows from the fact that the berth owners will drive there as will their guests so one can expect an increase in traffic and maintenance costs.

Of course it is likely that the mere presence of the marina will increase the number of sightseers and they will give raise to a proportional increase in traffic and demand for parking.

Other than private motor vehicles the only mode of access will be by public transport i.e., by way of public buses or ferries. The nearest bus stop is next to Cabarita Wharf. There is also a bus stop in Tennyson Road which is about 1 km from the proposed marina. The ferries use Cabarita Wharf which is on the eastern side of Kendall Bay.

There is another aspect of the parking and traffic issue that needs attention. The drawing SK15B, in both of its versions, makes reference to and indicates that there is vehicle and pedestrian public access to portions of the walkway along the foreshore. This is incorrect. There is no public vehicular access and no "public" access except in the limited form previously discussed. **Vehicular access is specifically prohibited by the by-laws**.

This same drawing claims that there is vehicular access for a portion of the foreshore walkway (i) south of the former Power House and in front of four of the houses south from the Power House and for a portion of the foreshore walkway south of the proposed Skid structure. The drawing SK15B does not show how vehicles get to these points of the foreshore that are claimed to have vehicular access when there is no vehicle access to those points. Short of magic or their ability to fly, this is a mystery. Another mystery is how the cars, trailers and boats get to the Skid without

vehicle access? Are the potential buyers/users of the Skid being kept in the dark over the restriction on the use of the access ways to be *or by bicycle and for the purpose of recreation and not transmit*? It has been said before in Chapter 1 and it is worth repeating here. **No one other that the residents/occupiers of the Community Association parcel have the right to bring a vehicle or trailer onto the Community Association parcel and each resident/occupier has a right to enforce this right.**[144]

While still referring to drawing SK15B it should be noted that it identifies the area of proposed marina car park as being about twice the actual size of lot 53 DP No 270347 (Attachment 64 being sheet 32 dated 21.07.2005). Why?

Bulk and Scale

The marina will consist of 8 "arms" of which 6 will have pens on each side of each arm. Two of the arms will have pens on one side only and they will seat on either side of the wharf that will, on its western end, straddle the seawall and on its eastern end there will be a ferry wharf.[145]

The marina will extend into the bay, for the most part, by 200m and will be 370m long.

Taking the biggest boat (25 m) that will berth there as the standard the height of the marina will be 6m and 9m when masts, radar and radio antennae, and fishing rods are taken into account[146]. The draft of one of these boats would be about 1m so, with the effect of the tides adding about 1.5 metre at high tide this means that a 25m boat would "expose" 9.5m of boat, radar and communication antennas would add at least another 1.5m (see Attachment 53.1 – 53.4).[147]

At this juncture it may be appropriate to refer to the documents lodged with *the MPA* where at para 5.6 it is stated,

> "The level of the jetty will be *lower than the public access foreshore zone*. Generally the highest part of the *superstructure of the larger vessels will be lower than the first floor* of the nearest buildings" (emphasis added).

For the purpose of this submission the height of the first line of building on Hunters Wharf were measured at 3m from ground level to top of the balcony floor (from outside). At paragraph 2.7 of *the MPA* it is stated that the larger vessels would, in general, be 4m high (not very likely!) so to suggest that a 25m motor boat would be lower than 3m would be to stretch credulity somewhat.[148]

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144 *State of New South Wales v Koumdjiev [(2005)] 63 NSWLR 353.*

145 Does this mean that there is some arrangement with NSW Maritime to move the present Cabarita Wharf to this site? There is no disclosure of this type in *the MPA or NSW Maritime's* landowner's consent. See Attachment 68 for a view of the possible impact on the residents of the estate.

146 Estimated to add at least 4 metres.

147 The actual height depends on the particular configuration of the boat in question. Thus, in Onblue 2009 edition of Australia's complete boat buyer's guide gives the bridge clearance of a 13.3m boat listed in its guide as 5.95m; that of a 16.5m boat as 6m; for an 18.7m boat as 6.9m; that for a 19.6m boat as 5.95m; that for a 19.91m boat as 7.9m; that of a 20.9m boat as 7.61 ; and that for a 23.85m boat as 8.4m. Add to these the effect of high tide and the true visual impact will become obvious.

148 See footnote 139. **Of course if one is talking about sail boats then the height of the mast is invariably taller than the boat is long so that a 25m sail boat would have a mast taller than 25m. The number of**

If one then adds the effect of the tides (an extra 1.5 metre) the boats will dwarf the first line of apartments at Hunters Wharf, the houses to the north and the future apartments to the south.

In terms of the visual bulk one should not limit the analysis to the length of the boat but should also consider the width, after all one a boat is manoeuvring the effect on the visual field will be derived from the length and the width of the object. A 5m + beam for 20m boats should be expected.

Navigation

Kendall Bay is on the Parramatta River. A marina will interfere with the river navigation and safety especially as regards rowers who use it on a daily basis[149]. The arises risk from (a) the number of existing users, the regular ferry services, the day tripper ferries, the jet boats, the boats using the marina, the individual boat/kayak user and (b) the strong winds that are a common feature of the bay, the sheer number of users and the size of the marina. See the letter from Sydney Ferries and from Rowing NSW opposing the proposal.

Nuisance and hazards

It has been pointed out elsewhere in this submission that the *CLMA ss 61, 110 and Sch 1 cl 2* contain relevant provisions. Thus, *s 61*, is relevant because it provides that the owner of a lot, e.g., lot 55 , must not use it or enjoy it so that it unreasonably interferes with the use and enjoyment of other lots nor must it obstruct the lawful use of community association property. It is argued that the developer, in its use and enjoyment of its lots and of the community association property, of the easements, of the foreshore walkway and lot 55 "unreasonably interferes" with the use of those same easements and foreshore walkway. The "unreasonable" aspect of the interference comes from the encroachment (for which see footnote 4) of the marina structure over the community association parcel, by the presence of the users of the marina berths and their guests (which represent numbers that would not be there and would not access the community parcel from that point[150] but for the marina), by the trespass by such individuals onto community and strata property not the subject of an easement for access and in other ways (as submitted under various headings in this submission). The "unreasonableness" of the interference is further shown by the developer's conversion of the existing use for individual private purposes to a use for commercial purposes.

Furthermore, *s 110,* imposes mutual duties on owners to use their lots so as not to cause a nuisance ("by noise or otherwise") or, a hazard or, interfere with the use of access ways. A "nuisance" is whatever unlawfully annoys or causes damage. A commercial marina and its users have a high propensity to do and do this as they also have a high propensity to and do cause hazards with their cars and trailers (assuming they have a right to bring them onto the community parcel) and as the result of the encroachment (for which see footnote 4) by the marina structure itself. Furthermore, the cars and trailers parked on open access ways would breach the by-laws and *the CLDA.*

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berths suitable for sailing boat amount to about 64% (see table and legend in drawing SK15B).

149 See Attachment 65-67.

150 There is no "natural" access point at this juncture and it is not an access point that users of the walkway need or have a use for. It is clearly for the sole use of the commercial marina.

The CLMA Schedule 1 cl 2 requires the community association to control and manage the access ways and all other parts of the association property for the benefit of members. This obligation will be subverted if one member (the developer) uses the open access ways and community association property solely for its own benefit.[151]

PART 5: Environmental Instruments

Canada Bay Local Environmental Plan 2008

The *Harbour DCP* advises that local environmental plans need to be considered in the assessment process. Accordingly, reference has to be made to the *Canada Bay Local Environmental Plan*.

The *Canada Bay Environmental Plan* (*the Local Plan*) contains a schedule of local environmental heritage items (*Schedule 5).* One of the items in the Schedule is the former AGL Power House which is near the foreshore at Breakfast Point (impact on views to and from the mangroves and Kendall Inlet on the south of the bay). Kendall Park at Cabarita is also listed as a heritage item (impact on views to and from Hunters Wharf, the houses north of Hunters Wharf and the proposed apartments south of Hunters Wharf).

Map ASS 004 attached to the *Local Plan* identifies the land area of Breakfast Point contaminated by acid sulfates and this is directly pertinent for the construction and use of the Skid and of the marina.

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151 The submission from TLB Engineers, and its drawings, shows that the proponent proposes that open access ways be used for parking purposes by marina users. This would amount would deprive the members from using the access ways and might also amount to a hazard.

CHAPTER 5

FINAL SUBMISSION

No justification for commercial marina

The *Harbour REP* and *Harbour DCP* are beneficial instruments designed to recognise, protect, enhance and maintain the unique qualities of Sydney Harbour. One cannot give proper effect to this intention by a slavish genuflection to "demand". The unique qualities of Sydney Harbour are a finite resource and this means that a balance has to be struck between the needs of those members of the public who do not have access to boats or, indeed, to those members of the public who want to use and enjoy a bay in its natural state as against those members of the public who wish to use a bay to store a boat.

The balance between these competing users has swang too much in favour of boat users. A look at the large number of marinas along the Parramatta River will make it abundantly clear that most of the bays along it are being used as marinas of one sort or another. There are very few bays still in their natural state.

The Harbour REP and the Harbour DCP should be given a beneficial interpretation i.e., one in favour of achieving the reasonable balance mentioned above because once they are gone they are gone.

In terms of the impacts to be taken into account It cannot be stressed enough that its not the individual impact or significance of each factor that is important but, as the *Harbour DPC* points out, their cumulative effect. While, for the purpose of collating information it helps to focus on particular elements for consideration, the fact remains that one is dealing with complex issues of ecology, aesthetics, perceptions and value systems to mention a few. These are not to be found or assessed in isolation. They have an interdependency that produces the "environment" but this environment can only exist while a balance between competing interests exists. If Kendall Bay goes the way of marinas that balance will have moved to the point of environmental in-sustainability.

The proposal has significant implication in terms of it affect on private property title as well as significant negative implications for community development schemes because it will allow developments that are not part of community development scheme to take advantage of community scheme property and do it to the detriment of the owners of the community scheme lot.

Finally, it is pertinent to note that on the 31 July 2009 the NSW government announced the building of Australia's largest marina (300 berths) at Homebush Bay. Thus, whatever the strength of the proponent's argument based on need might have been, with this announcement, it has effectively disappeared. This together with other announcements concerning additional marinas at Rozelle and Blackwattle Bay made at about the same time put

the need factor out of consideration. Any further marinas and Parramatta River might just as well be called Parramatta Road.

There is no justification for the proposal.

Appendix 1: **The Protection of Migratory Birds Habitat**

This is a paper prepared by Dr A Goth before the EA was lodged.

THE PROTECTION OF MIGRATORY BIRDS' HABITAT

Introduction [152]

To this point the focus of this submission has been on the "human" element. But clearly there is more to the impact of a commercial marina than the residents. This Chapter shifts the focus on the impact on biodiversity and State and Commonwealth legislation that covers the field.

Biodiversity impacts of the proposed Kendall Bay marina/and remediation.

List of species deserving special attention

Table 1 below summarises the species which are likely to be impacted by the proposed marina.

Table 1.

List of species listed under the *Threatened Species Conservation Act 1995(NSW) or in the Environmental Protection and Biodiversity Conservation Act 1999 (Cth)*

Status: V = Vulnerable, E = Endangered .

BIRD Species	Latin name	Status TSC Act (NSW)	Status EPBC Act (Cth)
Greater Sand-plover	*Charadrius leschenaultii*	V	Not listed
Osprey	*Pandion haliaetus*	V	Not listed
Australasian Bittern	*Botaurus poiciloptilus*	V	Not listed
Broad-billed Sandpiper	*Limicola falcinellus*	V	Not listed
Black-tailed Godwit	*Limosa limosa*	V	Not listed
Painted Snipe	Rostratula benghalensis	E	V

152 The material in this Chapter has been provided by a Breakfast Point resident Dr Ann Goeth who is an expert in this area.

All species listed in Table 1 were observed within a 5 km radius of Kendall Bay (Wildlife Atlas) and might thus also visit Kendall Bay for feeding. A species impact assessment needs to identify whether these latter species do visit Kendall Bay for feeding or breeding. An EPBC Act "Protected Matters Report" for the Painted Snipe shows that this species or its habitat is likely to occur in Kendall Bay. A fauna survey needs to be conducted to confirm whether this species does occur in this locale and surrounds.

Table 2 lists migratory species which are protected by international agreements**.** The data in this **Table** was obtained by creating an *"EPBC Act* [153]*Protected Matters report"* and by searching the *NSW Wildlife Atlas* for records of listed species. Using a search methodology that encompassed Kendall Bay, the neighbouring wetlands in a 5 km radius, and the foreshore surrounding Kendall Bay.

Table 2.

Species of birds protected by international agreements and likely to be affected by the proposed marina. The protective instruments are:

1) CAMBA: China-Australia Migratory Bird Agreement

2) JAMBA: Japan-Australia Migratory Bird Agreement text (JAMBA)

3) ROKAMBA: Republic of Korea - Australia Migratory Bird Agreement

4) BONN: Convention on the Conservation of Migratory Species of Wild Animals

153 This is the Environmental Protection and Biodiversity Act 1999 (Cth).

http://www.cms.int/

BIRD Species	Latin name	Listed under	Known to occur[1]	Might occur[2]
White-bellied Sea-Eagle	Haliaeetus leucogaster	CAMBA	Yes [3]	
Eastern Great Egret	*Ardea modesta*	JAMBA CAMBA	Yes [4]	
Cattle Egret	*Adrea ibis*	JAMBA CAMBA	Yes [4]	
Bar-tailed Godwit	*Limosa lapponica*	Bonn, CAMBA, JAMBA, ROKAMBA	Yes [5]	
Common Greenshank	*Tringa nebularia*	Bonn, CAMBA, JAMBA, ROKAMBA	Yes [6]	
Curlew Sandpiper	*Calidris ferruginea*	Bonn, CAMBA, JAMBA, ROKAMBA	Yes [7]	
Grey-tailed Tattler	*Heteroscelus brevipes(Tringa brevipes)*	Bonn, CAMBA, JAMBA, ROKAMBA	Yes [8]	
Sharp-tailed Sandpiper	*Calidris acuminata*	Bonn, CAMBA, JAMBA, ROKAMBA	Yes [7]	
Latham's Snipe	*Gallinago hardwickii*	BONN, JAMBA, CAMBA ROKAMBA		Yes
Pacific Golden Plover	Pluvialis fulva	BONN, JAMBA, CAMBA ROKAMBA		Yes
Painted SnipeB	Rostratula benghalensis s. lat.	CAMBA Also as V under EPBC Act		Yes

http://www.cms.int/

[1] Known to occur: observed within Kendall Bay by Ann Goeth (a biologist and the author of this chapter).

[2] Might occur: EPBC Act Protected Matters Report shows that this species or its habitat is likely to occur in Kendall Bay A fauna survey needs to be conducted to confirm whether this species does occur in this locale and surrounds.

[3] White-bellied Sea eagles breed in the Homebush Olympic Park and have been observed flying over Kendall Bay on several occasions. They are likely to also feed in Kendall Bay and surroundings.

[4] Both species of Egrets are occasionally observed visiting the mudflats within Kendall Bay for feeding (personal observation by author).

[5] Recent counts, conducted for Canada Bay Council, revealed that up to 350 Bar-tailed Godwits visit Kendall bay and surrounding bays during summer, which makes it the largest known population in Sydney.

[6] A rare visitor to Kendall Bay, observed twice in Summer 2007 (personal; observation by author).

[7] An occasional visitor to Kendall bay, observed three times in Summer 2007 (personal observation by author).

[8] A rare visitor to Kendall Bay, observed once in December 2007 (personal observation by author).

It is to be noted that the Tables in this Chapter only refer to birds but this is not to say that *marine mammals or indeed other mammals, should not be the object of concern or investigation. The submission relies on the proponent to investigate and offer remedies for mammals as well as for the bird species. Similarly, it is also to be noted that* the Tables do not list protected fish[154], for which, the residents' group also relies on the proponent to investigate, report on and offer remedies as appropriate. A species impact statement regarding any fish impact on fish in the area (including sharks (technically not a fish) which are known to occasionally visit Parramatta River) and also fish which use the mangroves in Kendall Bay as breeding grounds.

---

154 They would be covered by the *Fisheries Management Act 1995.*

List of other birds species likely to be impacted on by a commercial marina/and remediation

Table 3 shows a number of other species, not listed as vulnerable, endangered or protected by international agreements, visit Kendall Bay for feeding, roosting or even breeding. A species impact assessment should consider whether the populations of some of these species in Kendall Bay should be considered of local significance, due to the rarity of these species in the wider area and what impact the proposed marina and any remediation effort would have on them.

Table 3

List of other species visiting Kendall Bay

Species	Latin name
Grey Teal	*Anas gracilis*
Chestnut Teal	*Anas castanea*
Pacific Black Duck	*Anas superciliosa*
Darter	*Anhinga melanogaster*
Pied Cormorant	*Phalacrocorax varius*
Little Pied Cormorant	*Phalacrocorax melanoleuco*
Great Cormorant	*Phalacrocorax carbo*
Little Black cormorant	*Phalacrocorax sulcirostris*
Australian Pelican	*Pelecanus conspicillatus*
White-faced Heron	*Ardea novaehollandiae*
Striated Heron	*Butorides striatus*
White Ibis	*Threskiornis molucca*
Black-winged Stilt	*Himantopus himantopus*
Black-fronted Dotterel	*Elseyornis melanops*
Silver Gull	*Larus novaehollandiae*
Common Tern	*Sterna hirundo*
Crested Tern	*Sterna bergii*

Note: All species observed by Ann Goeth during Summer 2007/08.

Likely impact of the proposed commercial marina/and remediation on bird species.

The proposed marina (and remediation process) would cause the following disturbance for the above species:

Habitat destruction:

(a) The proposed remediation would remove large parts of the mudflats where these species feed on. The marina would destroy additional parts of their feeding grounds, especially those visited at low tide.

Noise: Both at day and night

(b) Waders do not usually tolerate boats coming too close when feeding (or cars driving too close for that matter). Some may tolerate a moderate amount of boat traffic on the water during the day, but surveys in the nearby Olympic Park have shown that at night, they are easily disturbed by low level activity that would be considered normal during the day. Lights from boats would be an additional source of disturbance during the night.

Stirring up of sediment.

(c) The stirring up of sediment could impact on the abundance of certain invertebrates that the waders feed on. Invertebrate abundance could also be affected by additional storm water run off and sewerage overflow.

Pollution:

(d) The toxic substances in Kendall Bay, when stirred up, would accumulate in these species' bodies, especially in those higher up in the food chain (sea eagles, pelicans, etc). Studies have shown that this can lead to death or infertility. The increased boat

traffic could also result in increased dumping of rubbish into the bay, some of which can be deadly to seabirds (fishing lines, hooks, etc).

Opposing Submission
Proposed Commercial Marina at Kendall Bay
EA (MP 07_0006).



VOL 2: Attachments

Lodged

By & On Behalf Of

G Pesce

Dip. Crim (Syd); Dip. Lab. Rel & Law (Syd); Dip. Law (BAB); Dip. App. Beh. Sc. (CCHS); BA (Macq); MA (Syd); MA (Prelim)(Syd); LLM (Syd): SJD (UTS).

ATTACHMENTS

Attachment 1

CT for Lot 55. Note item 18 being an easement for support and attachment.

LAND AND PROPERTY INFORMATION NEW SOUTH WALES - TITLE SEARCH

FOLIO: 55/270347

SEARCH DATE	TIME	EDITION NO	DATE
21/2/2009	6:25 PM	3	21/10/2008

LAND

LOT 55 IN COMMUNITY PLAN DP270347
AT BREAKFAST POINT
LOCAL GOVERNMENT AREA CANADA BAY
PARISH OF CONCORD COUNTY OF CUMBERLAND
TITLE DIAGRAM DP270347

FIRST SCHEDULE

BREAKFAST POINT PTY LIMITED

SECOND SCHEDULE (18 NOTIFICATIONS)

1 RESERVATIONS AND CONDITIONS IN THE CROWN GRANT(S)
2 INTERESTS RECORDED ON REGISTER FOLIO 1/270347
3 ATTENTION IS DIRECTED TO THE MANAGEMENT STATEMENT OF THE COMMUNITY SCHEME FILED WITH THE COMMUNITY PLAN
4 THE LAND ABOVE DESCRIBED IS LIMITED IN STRATUM IN THE MANNER DESCRIBED IN THE TITLE DIAGRAM
5 9229851 MORTGAGE TO CAPITAL FINANCE AUSTRALIA LIMITED
6 LAND EXCLUDES MINERALS - SEE CROWN GRANT(S)
7 DP1025319 EASEMENT FOR OVERLAND FLOW PATH APPURTENANT TO THE LAND ABOVE DESCRIBED
8 DP1025319 EASEMENT FOR SERVICES (D) APPURTENANT TO THE LAND ABOVE DESCRIBED
9 DP1025319 RIGHT OF WAY VARIABLE WIDTH (B) APPURTENANT TO THE LAND ABOVE DESCRIBED
10 DP1028070 EASEMENT FOR OVERLAND FLOW PATH APPURTENANT TO THE LAND ABOVE DESCRIBED
11 DP1047145 RESTRICTION(S) ON THE USE OF LAND (C) REFERRED TO AND NUMBERED (3) IN THE S.88B INSTRUMENT
12 DP1047145 RESTRICTION(S) ON THE USE OF LAND (D) REFERRED TO AND NUMBERED (4) IN THE S.88B INSTRUMENT
13 DP1047145 POSITIVE COVENANT REFERRED TO AND NUMBERED (6) IN THE S.88B INSTRUMENT
14 DP1047145 POSITIVE COVENANT REFERRED TO AND NUMBERED (8) IN THE S.88B INSTRUMENT
15 DP1052824 EASEMENT FOR SERVICES APPURTENANT TO THE LAND ABOVE DESCRIBED
16 DP270347 EASEMENT FOR ENCROACHMENT APPURTENANT TO THE LAND ABOVE DESCRIBED (DOC.1)

17 DP270347 EASEMENT FOR SERVICES APPURTENANT TO THE LAND ABOVE

END OF PAGE 1 - CONTINUED OVER

4204846 PRINTED ON 21/2/2009

* ANY ENTRIES PRECEDED BY AN ASTERISK DO NOT APPEAR ON THE CURRENT EDITION OF THE CERTIFICATE OF TITLE.
WARNING: THE INFORMATION APPEARING UNDER NOTATIONS HAS NOT BEEN FORMALLY RECORDED IN THE REGISTER.

LAND AND PROPERTY INFORMATION NEW SOUTH WALES - TITLE SEARCH

FOLIO: 55/270347 PAGE 2

SECOND SCHEDULE (18 NOTIFICATIONS) (CONTINUED)

DESCRIBED (DOC.1)

18 DP270347 EASEMENT FOR SUPPORT & ATTACHMENT APPURTENANT TO THE LAND ABOVE DESCRIBED (DOC.1)

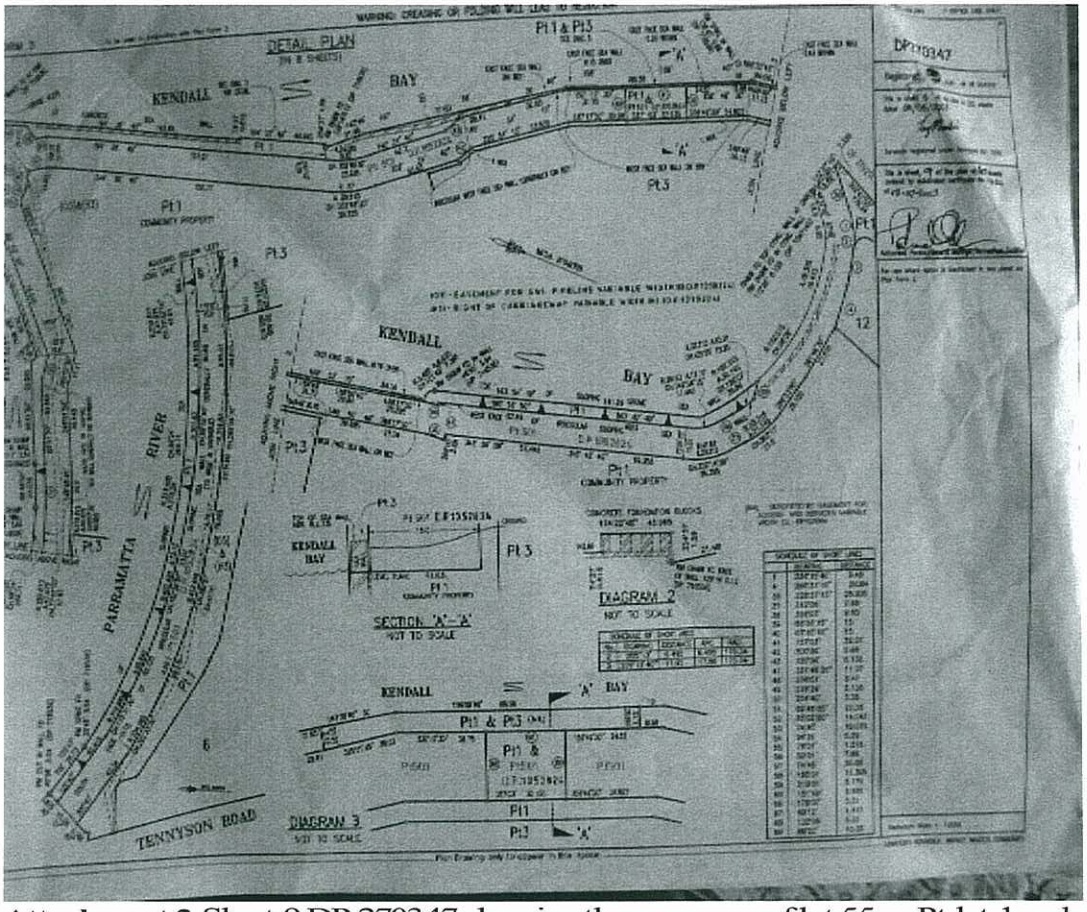
NOTATIONS

UNREGISTERED DEALINGS: NIL

*** END OF SEARCH ***

4204846 PRINTED ON 21/2/2009

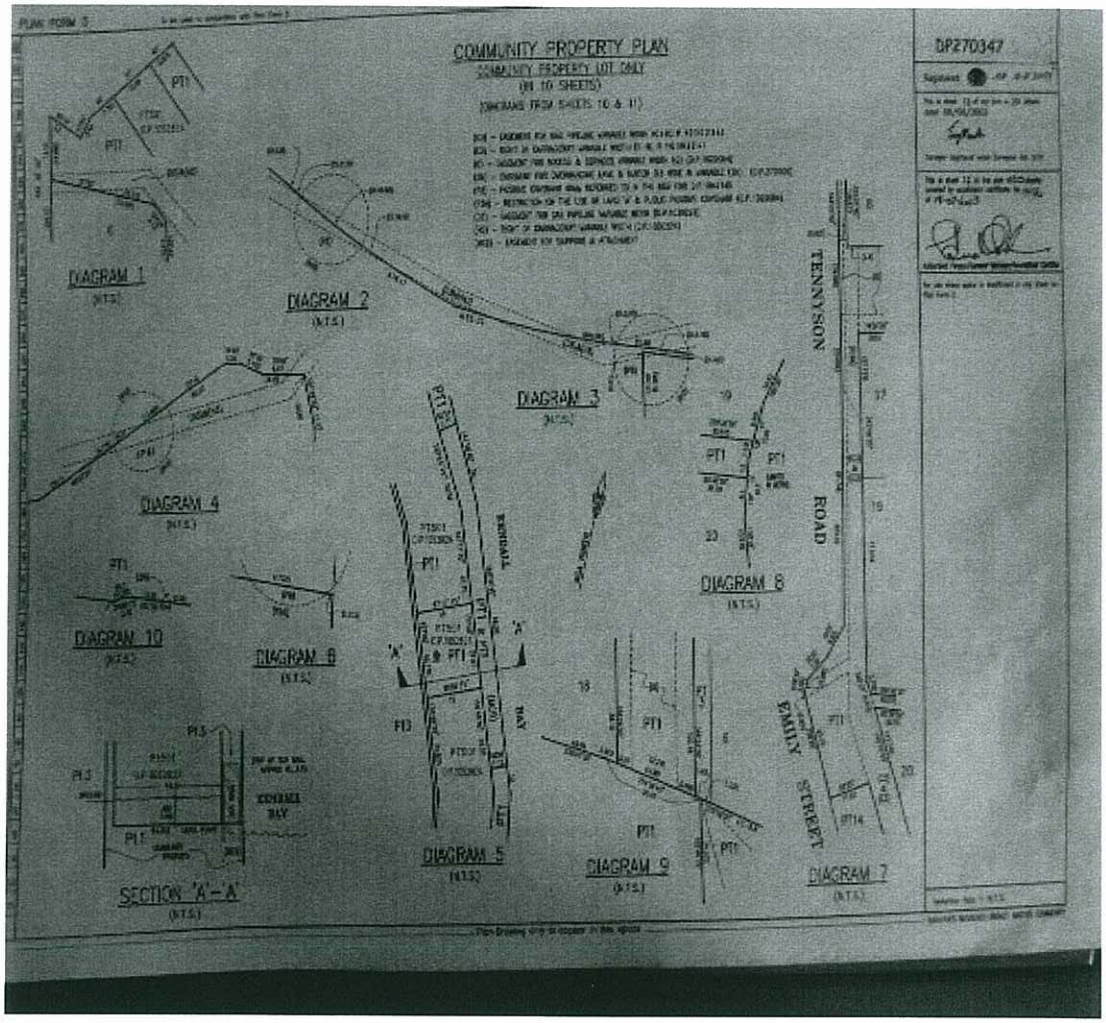
* ANY ENTRIES PRECEDED BY AN ASTERISK DO NOT APPEAR ON THE CURRENT EDITION OF THE CERTIFICATE OF TITLE.
WARNING: THE INFORMATION APPEARING UNDER NOTATIONS HAS NOT BEEN FORMALLY RECORDED IN THE REGISTER.



Attachment 2 Sheet 9 DP 270347 showing the precursor of lot 55 as Pt lot 1 and Pt lot 3.

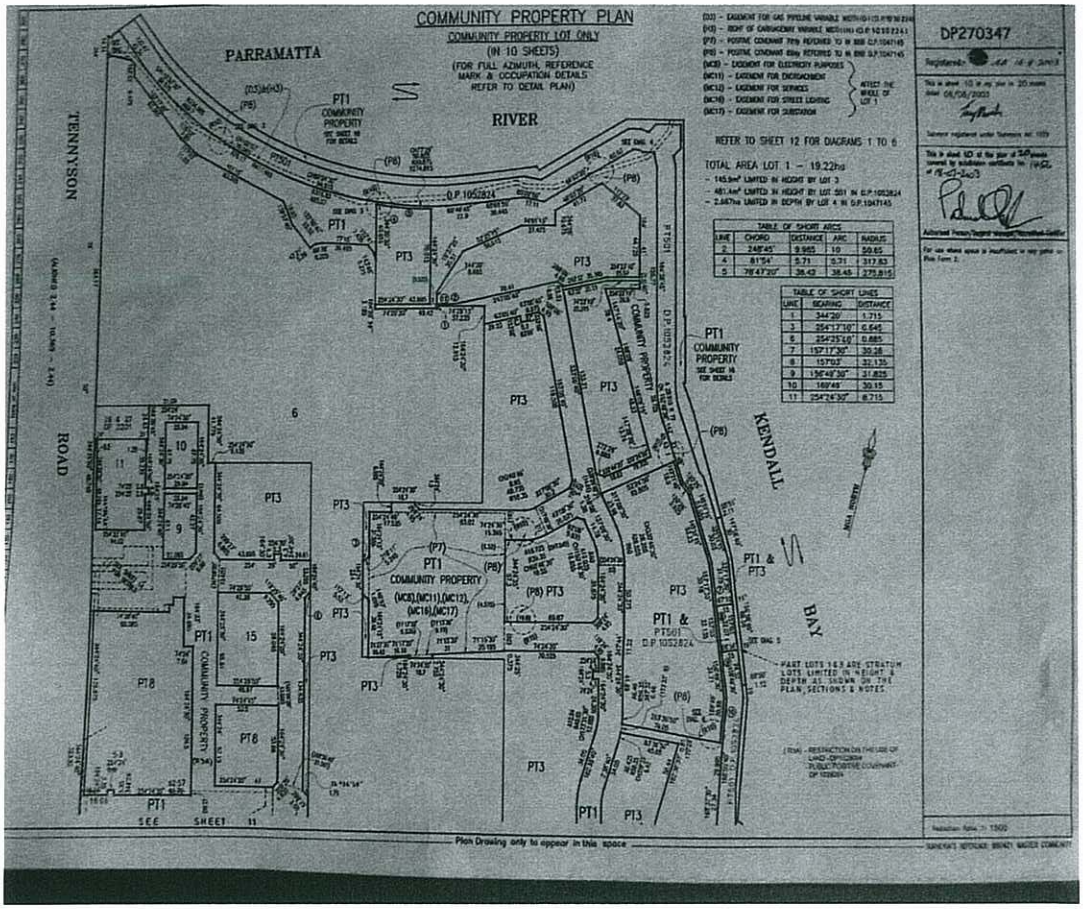
Attachment 3:

Sheet 12 DP 20347 showing Pt lot 1 and Pt lot 3 in diagram 5 and see sectional view in "A"-"A" diagram which also shows "MC9" notation which is a reference to an easement for "support & attachment."



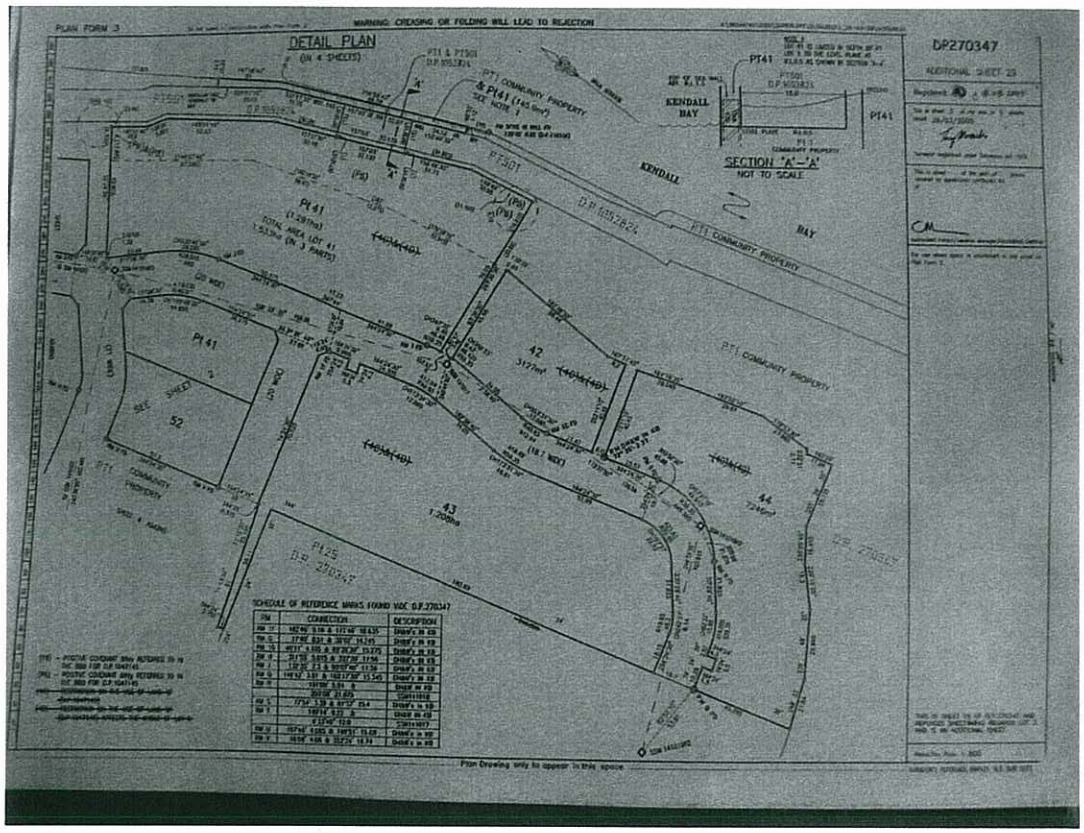
Attachment 4:

Sheet 10 DP 270347 showing Pt lot 1 and Pt Lot 3 as community property (opposite the word Bay).



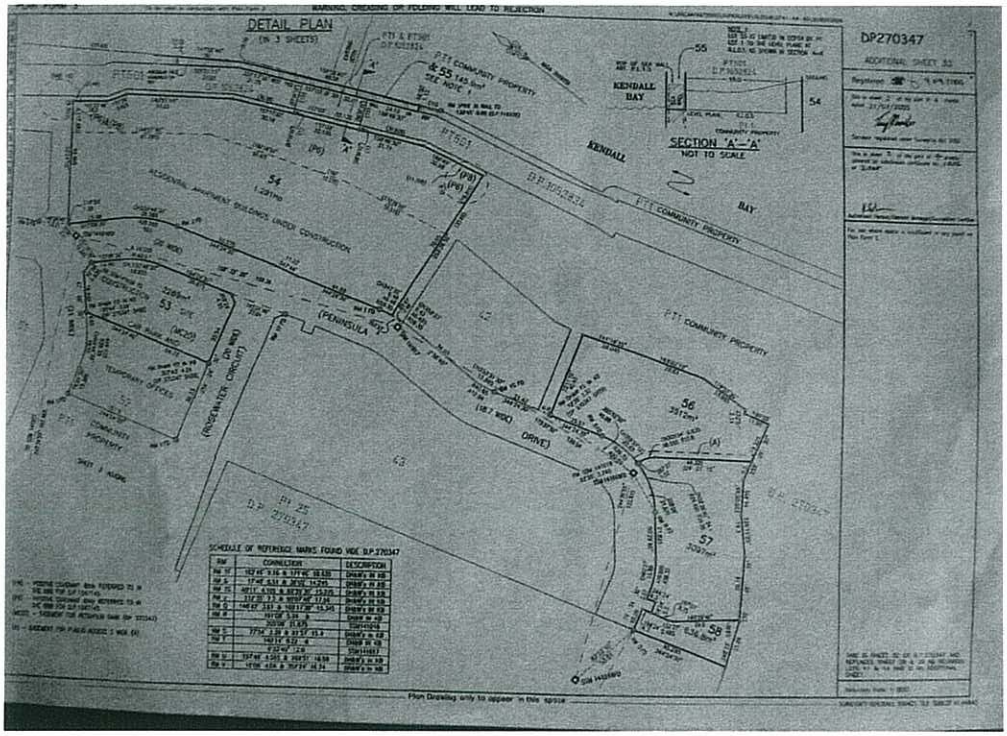
Attachment 5:

Sheet 3 DP 270347 showing lot PT 41 and "A"-"A" diagram where Pt lot 1 and Pt lot 3 were previously shown (top of picture).



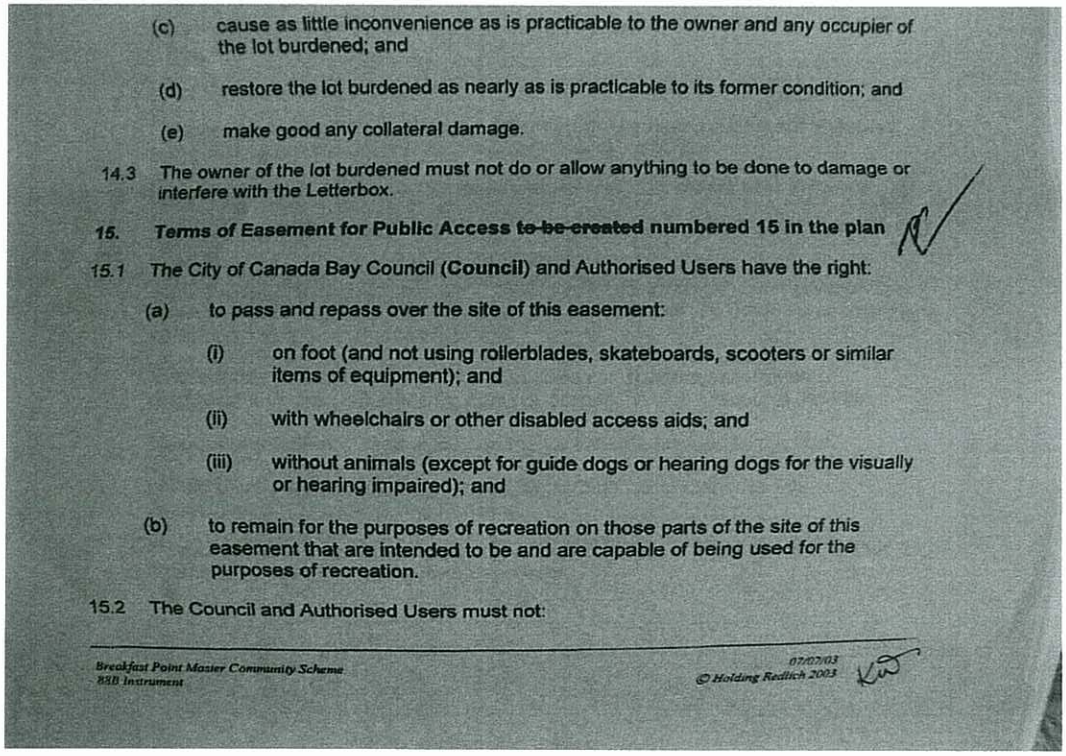
Attachment 6:

Sheet 2 DP 270347 showing lot 55 where previously Pt lot 1 and Pt lot 3 and later Pt lot 41 appeared. See note on "A"-"A" diagram.



Attachment 7.0:

Section 88B instrument. See item 15 being conditions on users of Pt lot 1. Note restriction on use ***"on foot"*** *and for* ***compliance with Rules*** *imposed by the community association and for the use to be* ***restricted to "recreational purposes" and not for transit or for commercial purposes.***



(c) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened; and

(d) restore the lot burdened as nearly as is practicable to its former condition; and

(e) make good any collateral damage.

14.3 The owner of the lot burdened must not do or allow anything to be done to damage or interfere with the Letterbox.

15. Terms of Easement for Public Access ~~to be created~~ numbered 15 in the plan

15.1 The City of Canada Bay Council (**Council**) and Authorised Users have the right:

(a) to pass and repass over the site of this easement:

(i) on foot (and not using rollerblades, skateboards, scooters or similar items of equipment); and

(ii) with wheelchairs or other disabled access aids; and

(iii) without animals (except for guide dogs or hearing dogs for the visually or hearing impaired); and

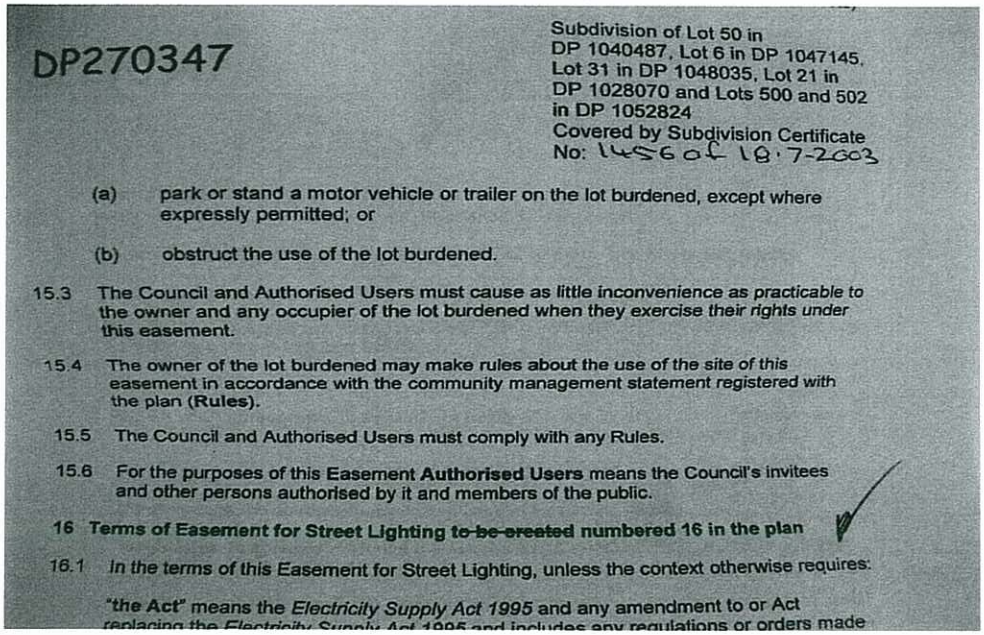
(b) to remain for the purposes of recreation on those parts of the site of this easement that are intended to be and are capable of being used for the purposes of recreation.

15.2 The Council and Authorised Users must not:

© Holding Redlich 2003

Attachment 7.1:

Continuation of Attachment 7.0.



DP270347

Subdivision of Lot 50 in DP 1040487, Lot 6 in DP 1047145, Lot 31 in DP 1048035, Lot 21 in DP 1028070 and Lots 500 and 502 in DP 1052824
Covered by Subdivision Certificate No: 1456 of 18·7·2003

(a) park or stand a motor vehicle or trailer on the lot burdened, except where expressly permitted; or

(b) obstruct the use of the lot burdened.

15.3 The Council and Authorised Users must cause as little inconvenience as practicable to the owner and any occupier of the lot burdened when they exercise their rights under this easement.

15.4 The owner of the lot burdened may make rules about the use of the site of this easement in accordance with the community management statement registered with the plan (**Rules**).

15.5 The Council and Authorised Users must comply with any Rules.

15.6 For the purposes of this Easement **Authorised Users** means the Council's invitees and other persons authorised by it and members of the public.

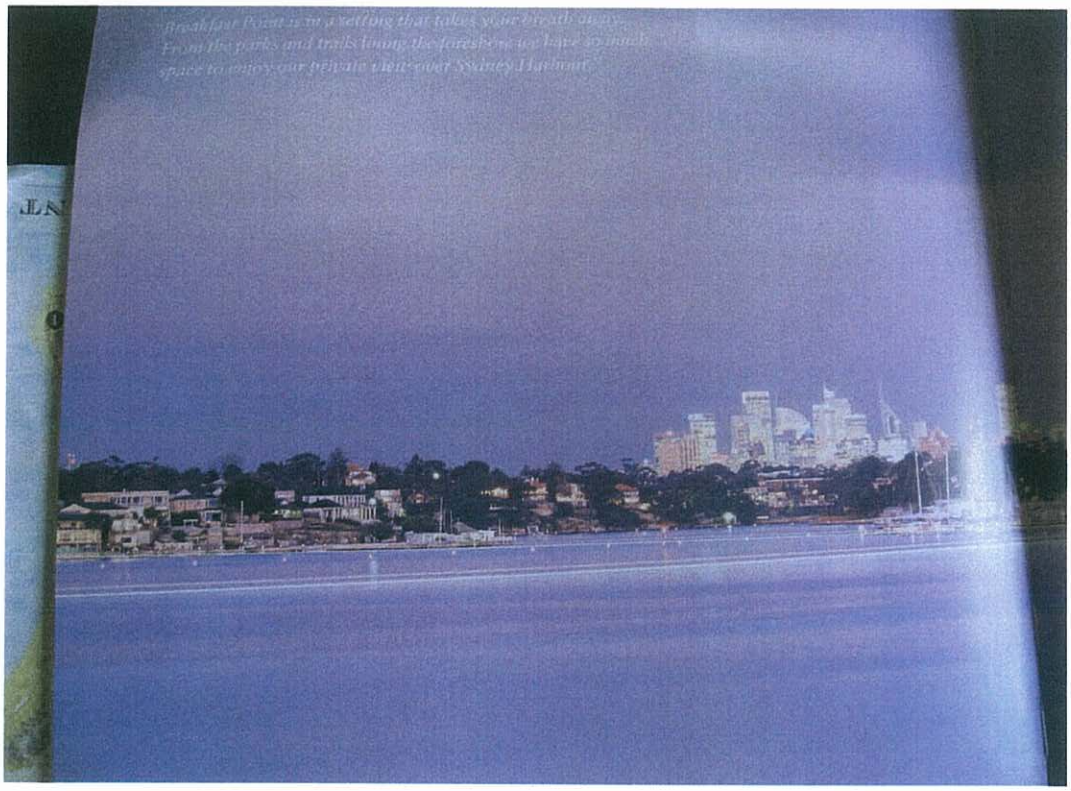
16 Terms of Easement for Street Lighting ~~to be created~~ numbered 16 in the plan

16.1 In the terms of this Easement for Street Lighting, unless the context otherwise requires:

"**the Act**" means the *Electricity Supply Act 1995* and any amendment to or Act replacing the *Electricity Supply Act 1995* and includes any regulations or orders made

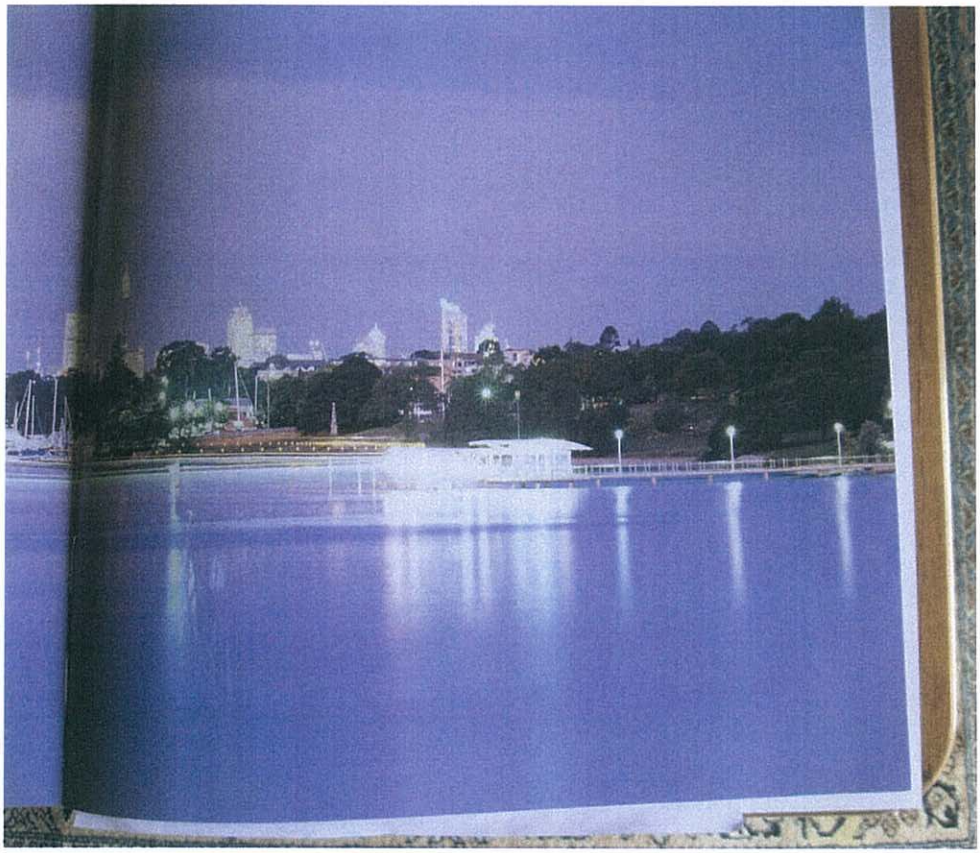
Attachment 8.0: *See also Attachment 8.1 being opposing page):*

*From developer's brochure. Caption reads "**Breakfast Point is a setting that takes your breath away. From the parks and trails lining the foreshore we have so much space to enjoy our private view over Sydney** Harbour". Cabarita Wharf to the right. William Beach Monument to its left, d'Albora Marinas (Sanders) to the centre. Note absence of reference to or representation of a marina.*



***Attachment 8.1**: Opposing page to Attachment 8.0.*

Note absence of any reference to or any representation of a marina.



***Attachment 9.1**:*

Google Earth showing Parramatta River and bays with marinas from Ryde Bridge to Harbour Bridge.



Attachment 9.2:

From Ryde Bridge to Brays Bay.



Attachment 9.3:

Brays Bay top left corner; Yaralla Bay bottom left; Majors Bay bottom right; Mortlake Point in centre with houses with red roofs and marina; River Quays marina bottom right.



Attachment 9.4:

Kissing Point (top left) to Henley (bottom right); Breakfast Point (cleared land bottom left), with River Quays marina to the west of the Point; Kendall Bay next to it; d'Albora Marinas (Sanders) bottom centre; Putney opposite Majors Bay; Morrison Bay, Tennyson Point, Glades Bay, Raven Point, Looking Glass Point opposite marina etc. NB all the marinas surrounding Kendall Bay.



Attachment 9.5:

From south of d'Albora Marinas to Hen and Chicken Bay.



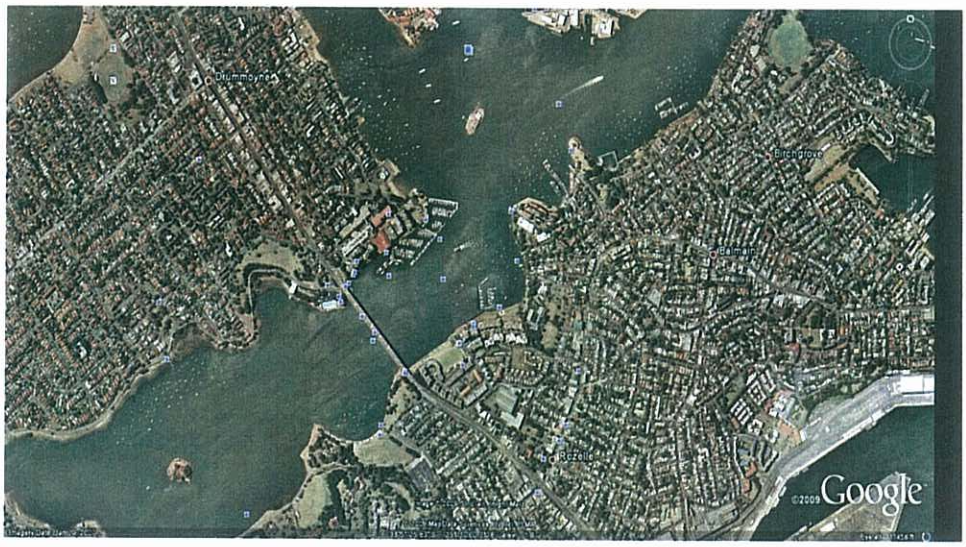
Attachment 9.6

From Henley to Spectacle Island and Cockatoo Island (on the right).



Attachment 9.7

Iron Cove and Iron Cove Bridge.



Attachment 9.8

Cockatoo Island to Darling Harbour.



Attachment 9.9

Cockatoo Island to Harbour Bridge.



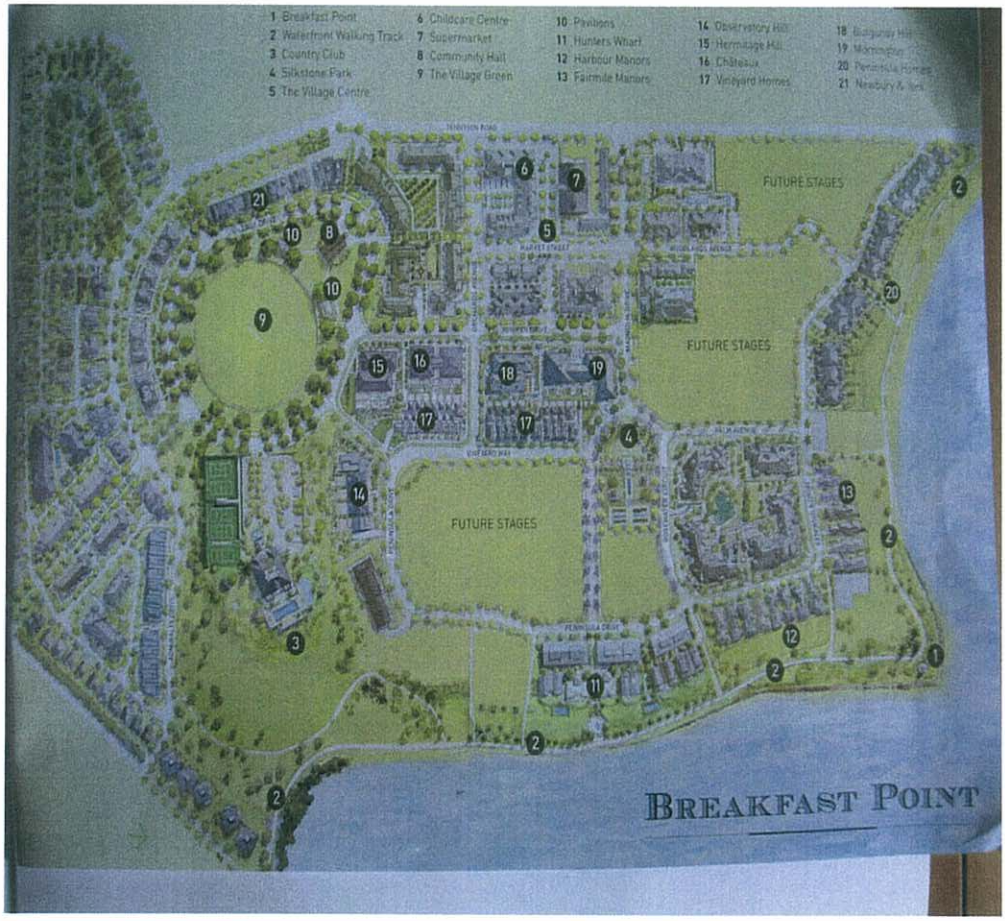
Attachment 10:

From developer's brochure: "The ultimate harbourfront (sic) lifestyle created by Rose." Note absence of any reference to or any representation of a marina.



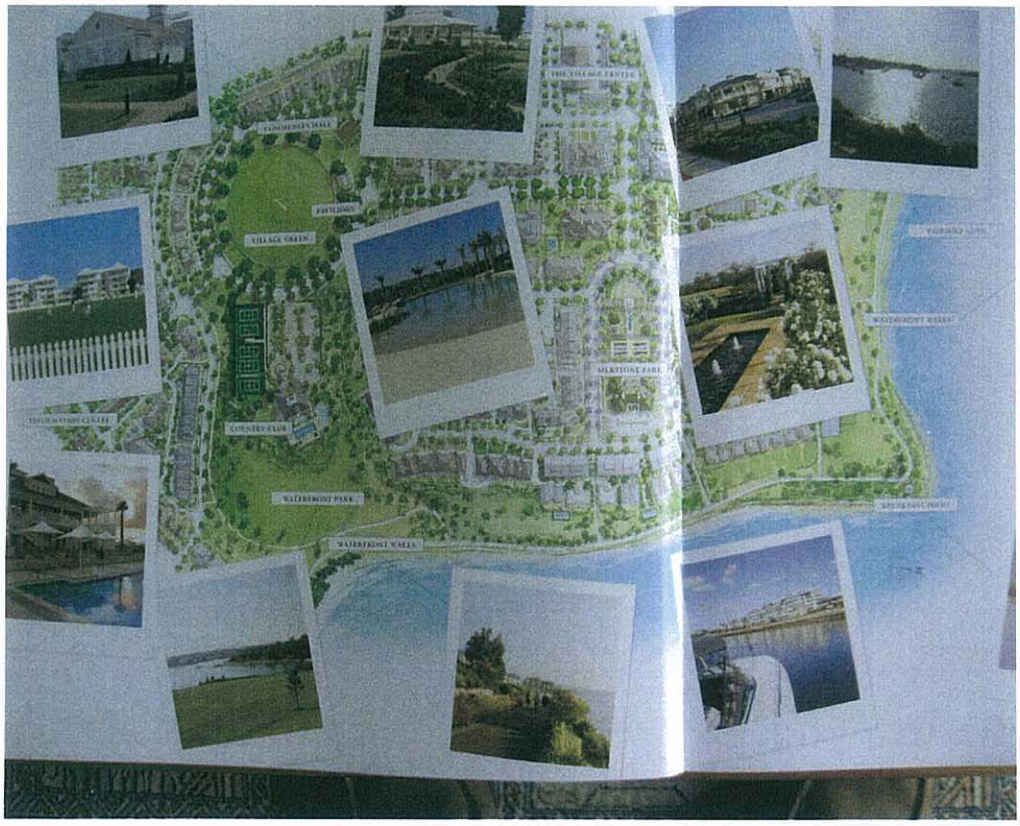
Attachment 11.0

From the developer's brochure. Note absence of any reference to or any representation of a marina.



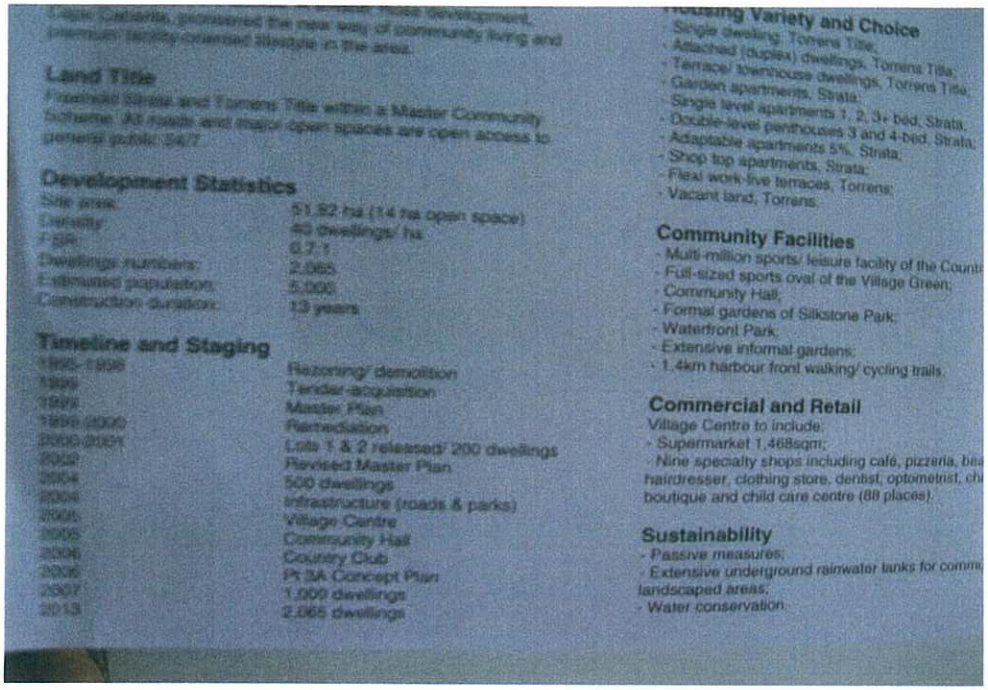
Attachment 11.1

From the developer's brochure. Note the pictures of the water view, the walkway and the boat approaching Hunters Wharf (bottom right without any representation of a marina in front of it). NB absence of any reference to or any representation of a marina.



Attachment 12:

From the developer's brochure. Note under the heading the "Timeline (sic) and staging" there is no reference to a marina. Under the heading "Land Title" it says "...All roads and major open spaces are open access to general public 24/7." There are no "roads" within the estate and there are restrictions on public access to the open access ways and open spaces but these are not mentioned.



Land Title

Freehold Strata and Torrens Title within a Master Community Scheme. All roads and major open spaces are open access to general public 24/7.

Development Statistics

Site area:	51.82 ha (14 ha open space)
Density:	40 dwellings/ ha
FSR:	0.7:1
Dwellings numbers:	2,065
Estimated population:	5,000
Construction duration:	13 years

Timeline and Staging

1995-1998	Rezoning/ demolition
1999	Tender-acquisition
1999	Master Plan
1999-2000	Remediation
2000-2001	Lots 1 & 2 released/ 200 dwellings
2002	Revised Master Plan
2004	500 dwellings
2004	infrastructure (roads & parks)
2005	Village Centre
2005	Community Hall
2006	Country Club
2006	Pt 3A Concept Plan
2007	1,000 dwellings
2013	2,065 dwellings

Housing Variety and Choice

Single dwelling, Torrens Title;
- Attached (duplex) dwellings, Torrens Title;
- Terrace/ townhouse dwellings, Torrens Title;
- Garden apartments, Strata;
- Single level apartments 1, 2, 3+ bed, Strata;
- Double-level penthouses 3 and 4-bed, Strata;
- Adaptable apartments 5%, Strata;
- Shop top apartments, Strata;
- Flexi work-live terraces, Torrens;
- Vacant land, Torrens.

Community Facilities

- Multi-million sports/ leisure facility of the Count
- Full-sized sports oval of the Village Green;
- Community Hall;
- Formal gardens of Silkstone Park;
- Waterfront Park;
- Extensive informal gardens;
- 1.4km harbour front walking/ cycling trails.

Commercial and Retail

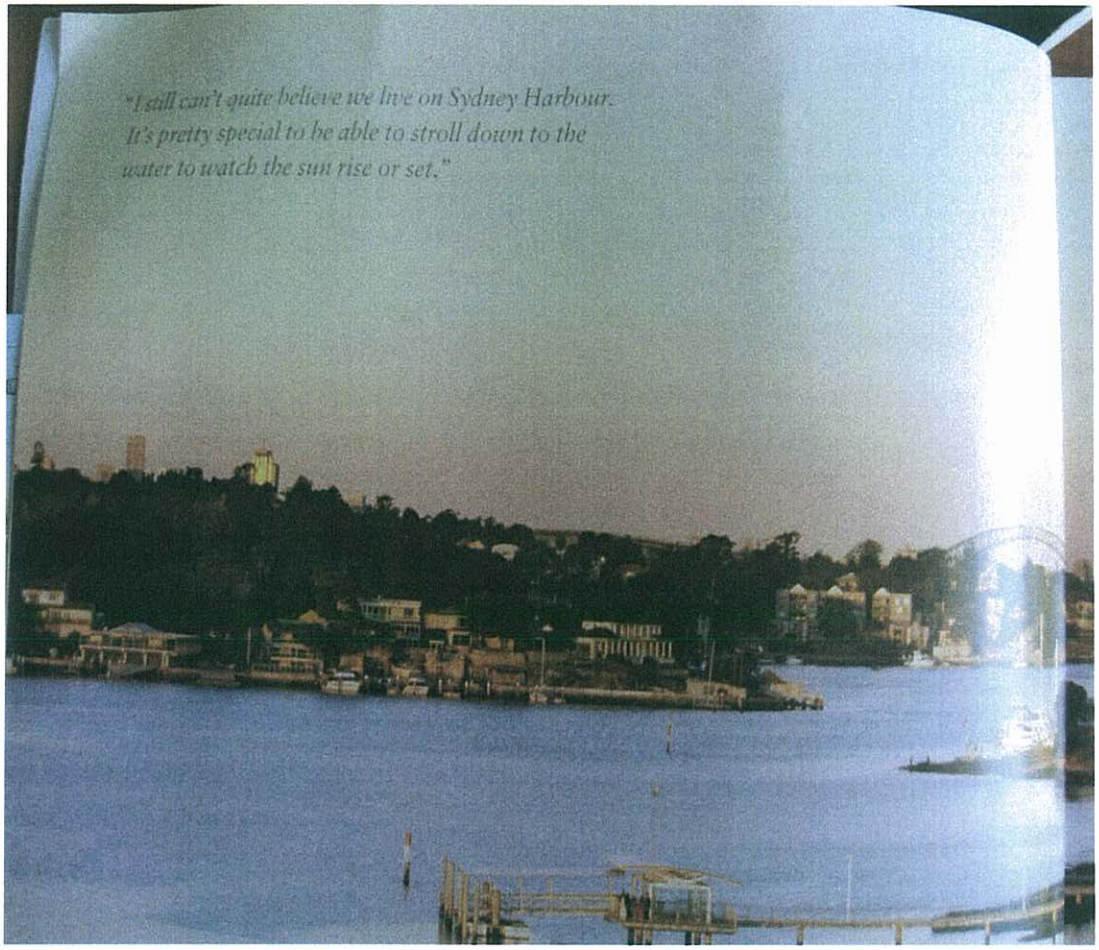
Village Centre to include:
- Supermarket 1,468sqm;
- Nine specialty shops including café, pizzeria, be hairdresser, clothing store, dentist, optometrist, ch boutique and child care centre (88 places).

Sustainability

- Passive measures;
- Extensive underground rainwater tanks for comm landscaped areas;
- Water conservation.

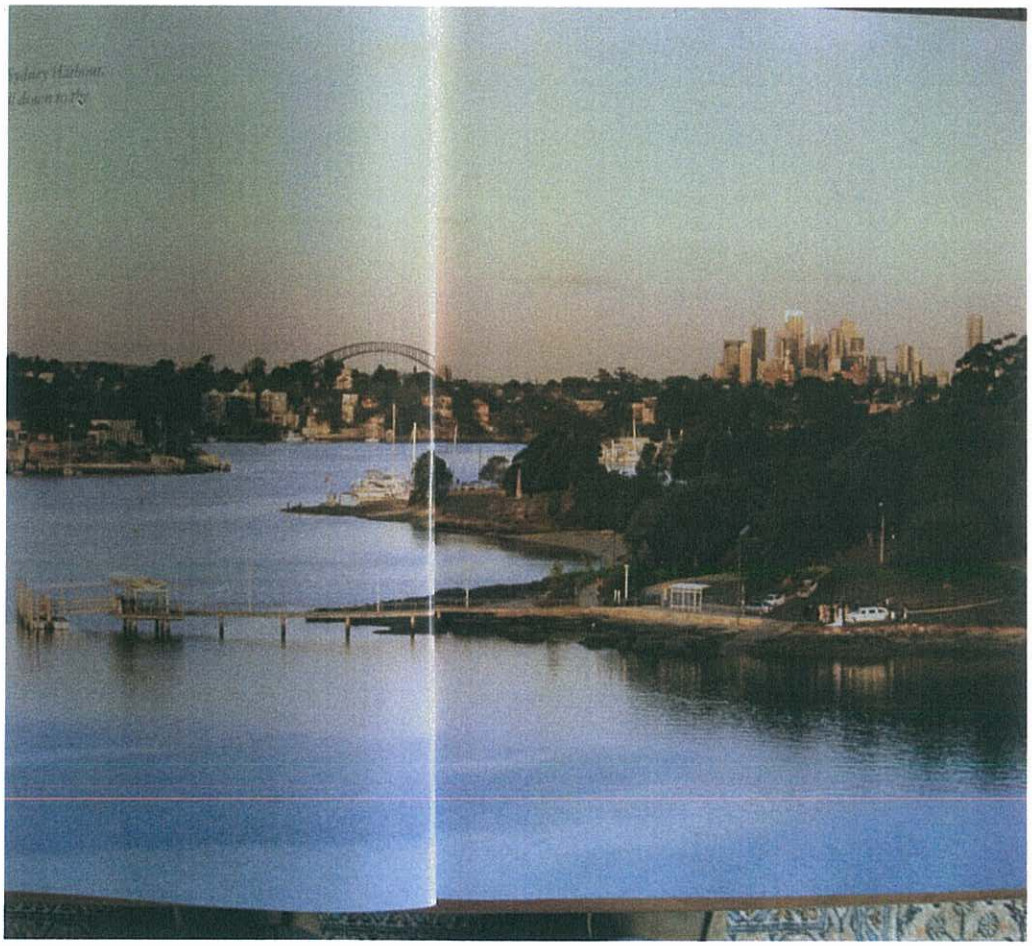
Attachment 13.0 (see also 13.1).

*From developer's brochure: Hunters Wharf . **Note caption.** Cabarita Wharf in foreground; SGS Boat Shed on left. No mention of a marina.*



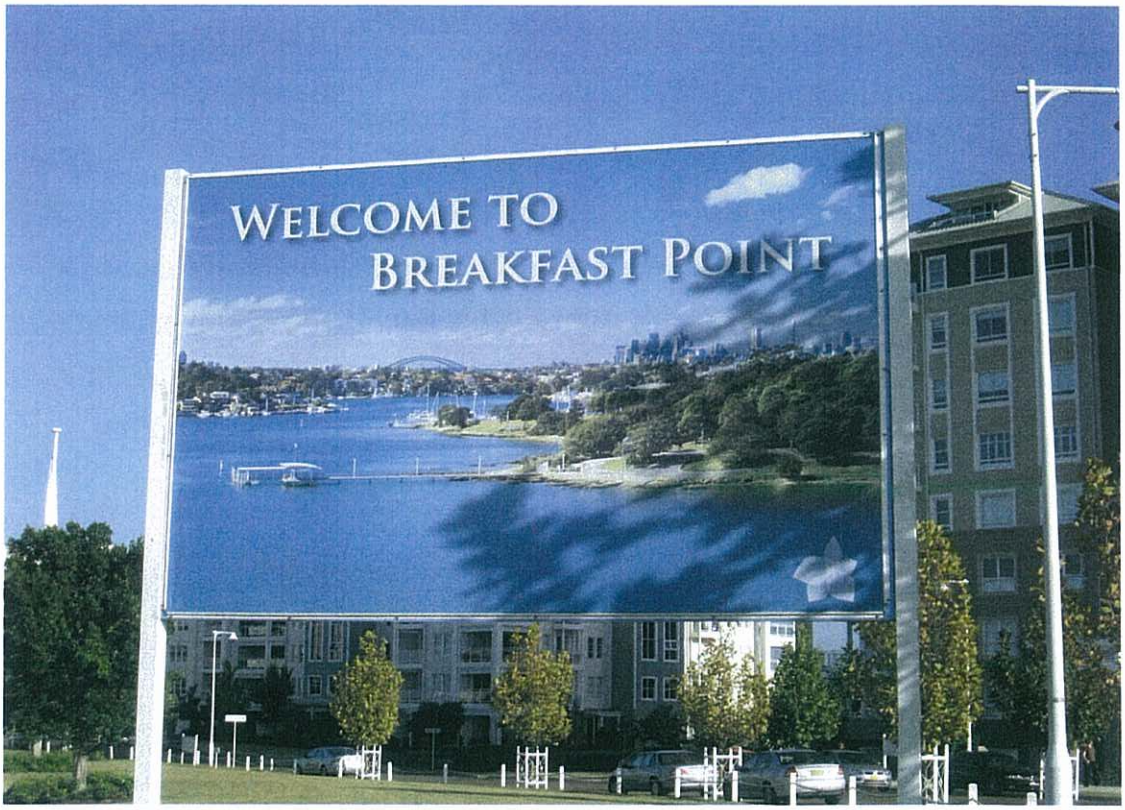
Attachment 13.1.

Adjoining page to Attachment 13.0. No mention of a marina.



Attachment 14:

Proponent's advertising sign for the residential development of Breakfast Point as at 29/3/2009. Note absence of any mention of or representation of a marina.



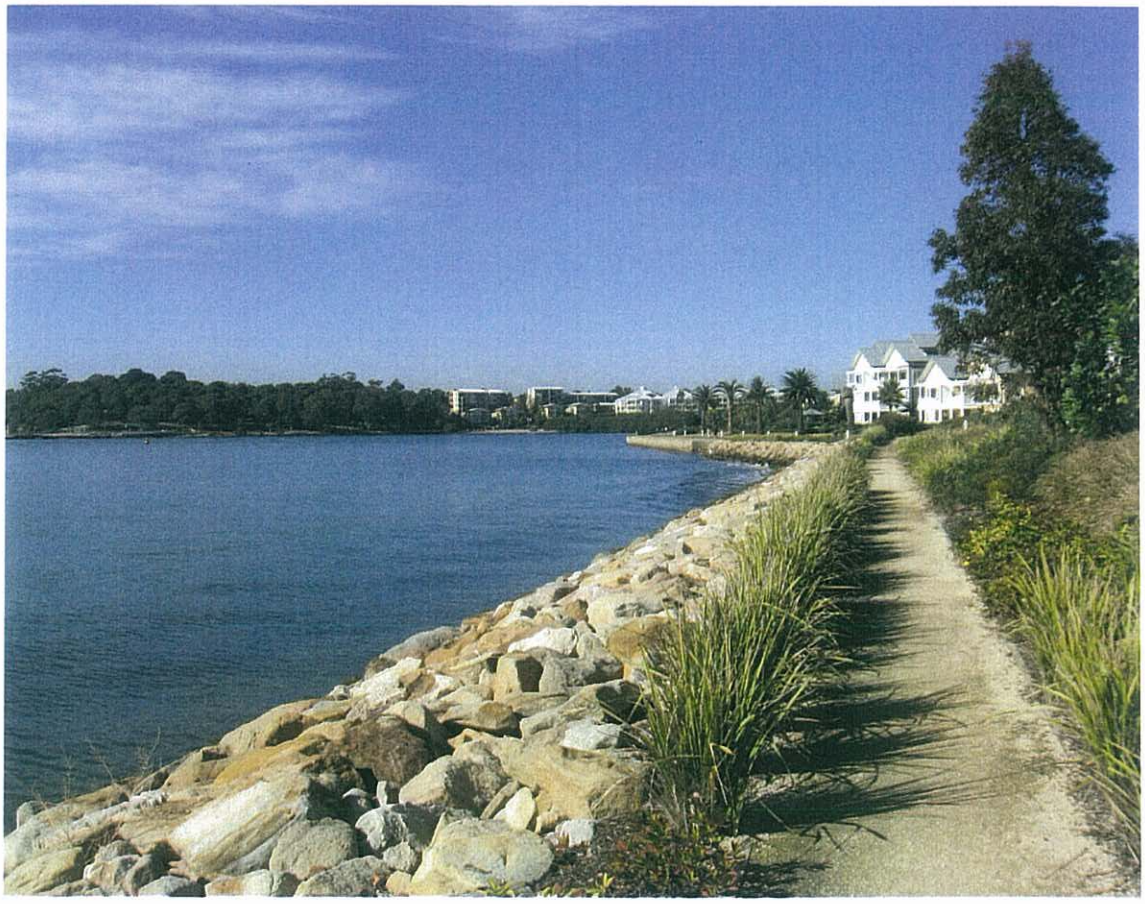
Attachment 15 (see also Attachment 15.1)

FromBreakfast Point looking south towards Kendall Inlet and Admiralty (off centre); Cabarita Park in the centre; Cabarita Wharf on the left. Hunters Wharf can be seen near the bend in the seawall. From this bend in the seawall the marina will reach from one third to one quarter of the way towards BP from where this picture was taken. **By enlarging this picture the marker buoy will be visible in front of Cabarita Park 6.5 cm from the left edge of the picture (only just visible in this small attachment) and between the end of the main wharf and the proposed ferry wharf. The marina structure will be about 40m east from the buoy ie., about 30m closer to Cabarita Park walkway (see drawing SK15B) . Imagine the marina right in the middle of this! Than compare that image with the laudatory words used by the proponent to sell the residential development eg., Attachment 10, 13, 25, 25.1, 42, 43, 63 and see Vol 1 para 4.21 for an example of the developer working in the background to undermine these positive attributes.**



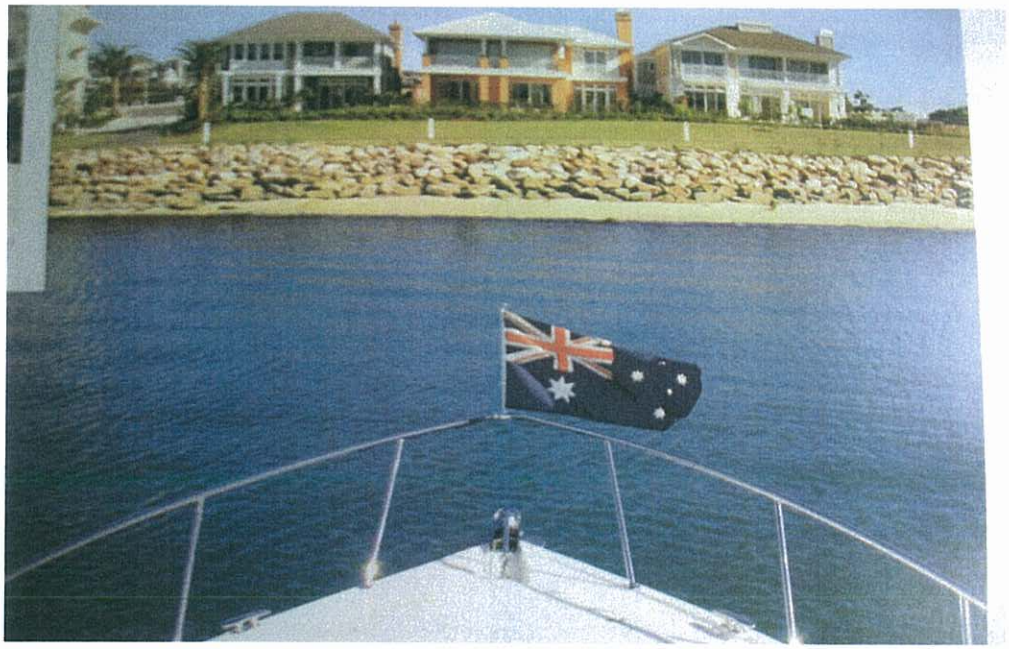
Attachment 15.1

The proposed marina will extend up to (about) the green tree on the right (i.e., the tree in front of the taller darker tree) ie., about 2/3 of the way up from the foreground of the picture. **By enlarging this picture the marker buoy will be visible in front of Cabarita Park 2cm from the edge of the picture (just visible in this small attachment). The marina structure will extend some 40m to the east of the buoy (see drawing SK15B) as measured from the most southern of the proposed piers (near the proposed Skiff) ie., about 45m closer to Cabarita Park. Boats turning into or out off a berth on this pier will be expected to get even closer to Cabarita Park to make a safe turning arc and this will give the marina structure an operational size greater than its physical size.**



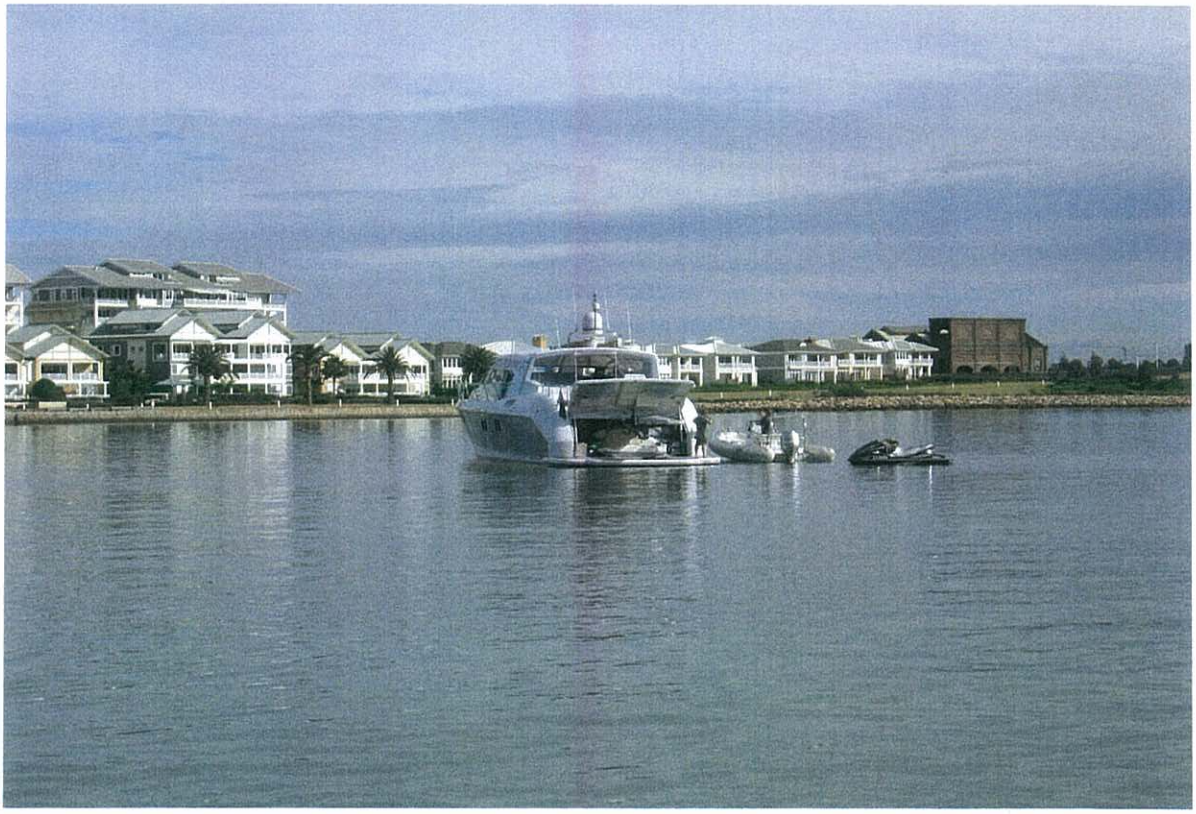
Attachment 16.

From the proponent's brochure. Boat approacing Manor Houses north of Hunters Wharf. **Imagine the marina interposed between the boat and the houses.**



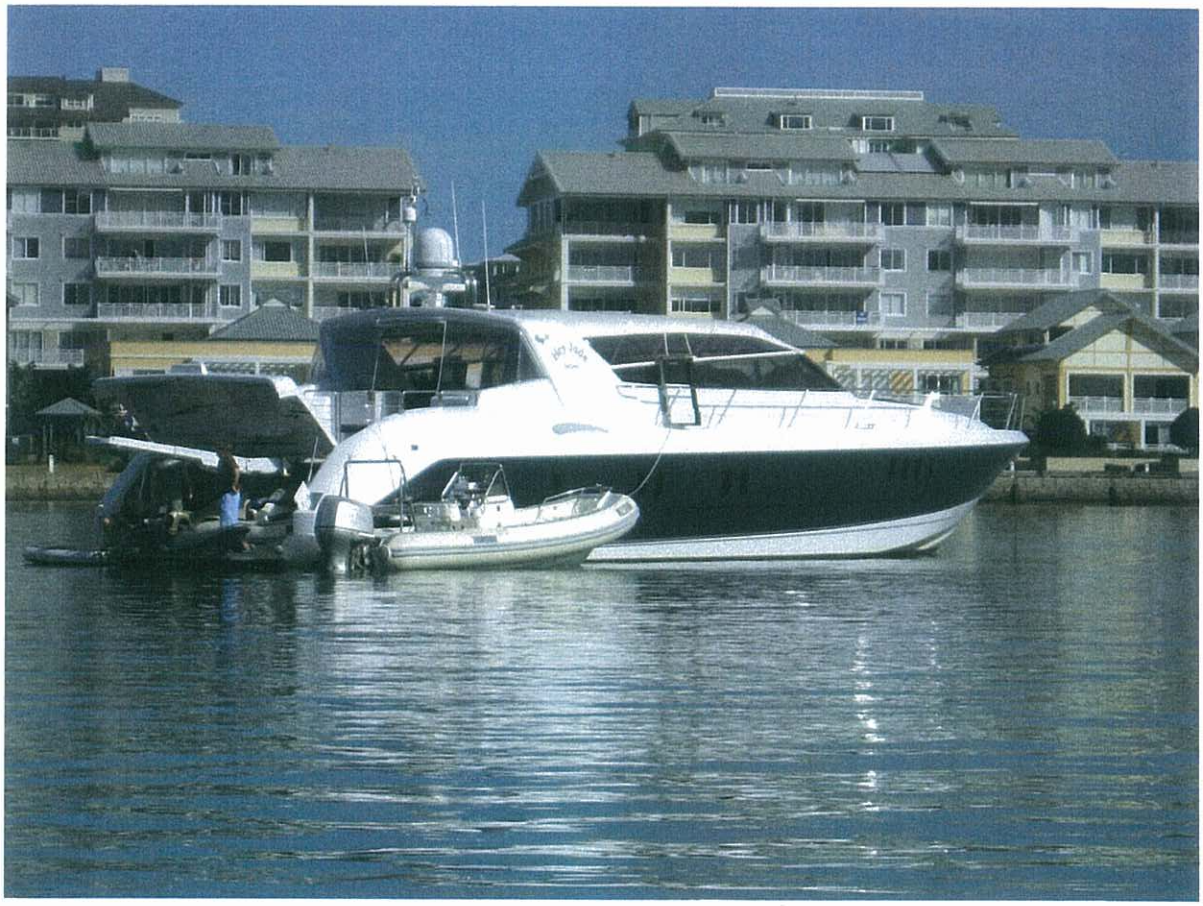
Attachment 16. 1

Pictur of a boat about 15m long and 3.5 to 4m high excluding radar dome and antennas which will add 1.5- 2m to the height. The proposed marina has berths for **25m boats** and under the Harbour DCP a **25m boat would be the minimum size against which the visual impact has to be assessed, however, in fact since it is proposed that day tripper ferries use the marina the standard can be greater as in Attachment 50-50.4.**



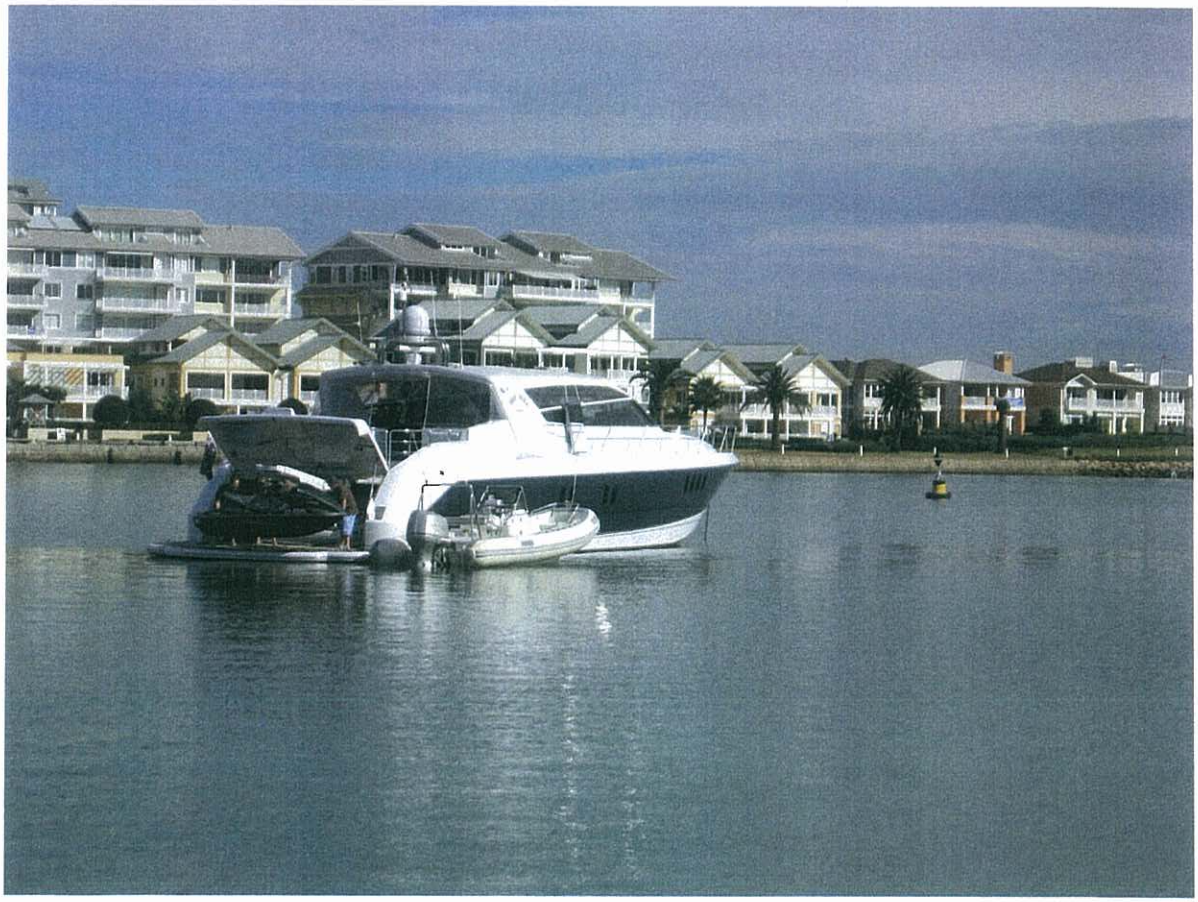
Attachment 17

Visual impact caused by a 15m boat in front of Hunters Wharf. **Legislation requires the assessment to be based on a 25m boat as that is the biggest boat for which porovision is made in the marina.**



Attachment 18

By following an imaginary line from the top of the boat's antennas (abt 1.5 – 2m higher that the boat itself) the visual impact on the house cab be seen. **Note the legislation requires the assessment to be based on the largest boat that can use the marina (25m).**



Attachment 19. *Manor Houses. About 32m from seawall. Note use of wall to wall and floor to cealing glass and the impact on privacy.*



Attachment 19 .1

From seawall. Note use of hedges in place of fences. Note wall to wall and floor to ceiling glass area. With a marina about 32m away the resients will not have any privacy from the boat owners and vice versa.



Attachment 20.

From seawall. Note use of hedges in place of fences. Note wall to wall and floor to ceiling glass area. See comment under Attachment 19. This architectural standard is completely negated by having a marina as close as 32m away as well as creating a detriment for the residents because of the loss of privacy.



Attachment 21.

From seawall. Note use of hedges in place of fences. Note wall to wall and floor to ceiling glass area. See comment under Attachment 20.



Attachment 22

Sight line from in front Manor Houses looking towards Scots College Boat Shed (reflecting roof in the centre). Distance from seawall to front fences of these houses measured at ***32.5m.***



Attachment 23

Sight line towards Cabarita Wharf, Cabarita Park and Kendall Inlet from in front of Manor Houses.
From this point the proposed marina will obscure almost the entire water views..



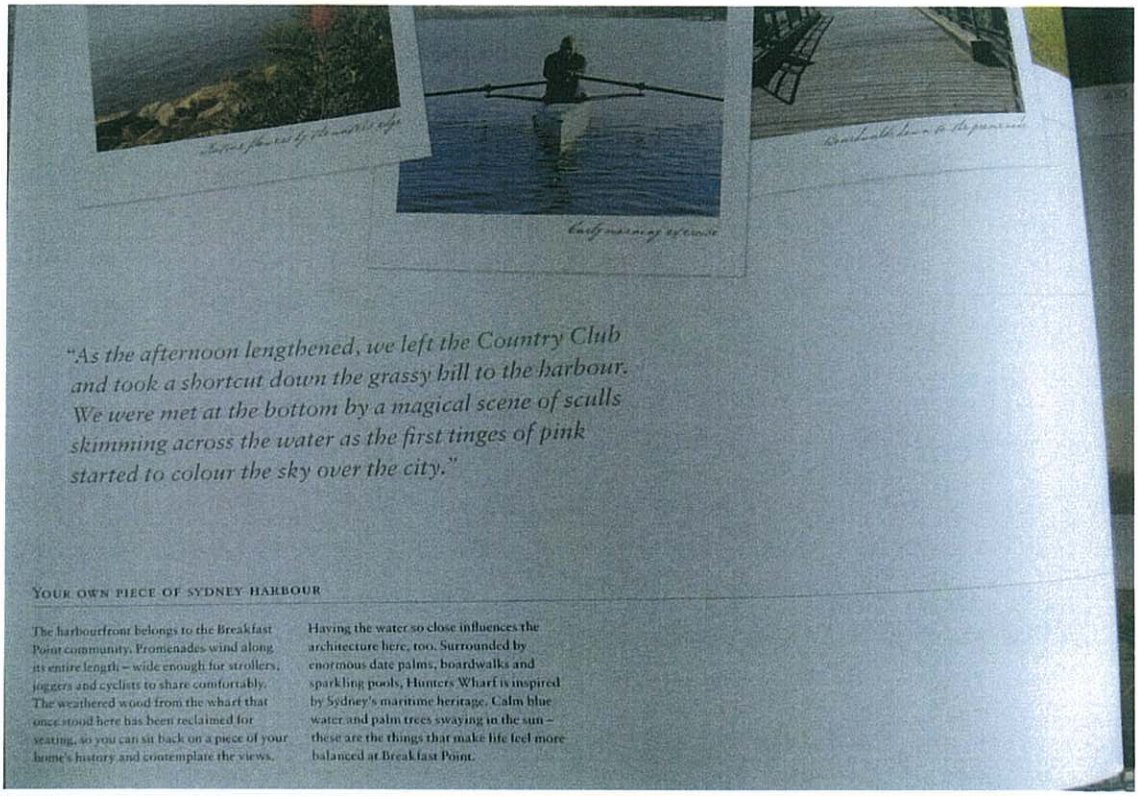
Attachment 24

From front of manor Houses looking towards Cabarita Wharf, Cabarita Park and Kendall Inlet. **From ground level the proposed marina will obscure almost the entire water views from this point.**



Attachment 25.0 (see also 25.1):

*The words in the second column read: "**Hunters Wharf inspired by Sydney's maritime heritage. Calm blue water and palm trees swaying in the sun these are the things that make life feel more balanced at Breakfast Point.**" Also note the **caption** in quotation marks just below the pictures--a marina will put an end to that vision!*



"As the afternoon lengthened, we left the Country Club and took a shortcut down the grassy hill to the harbour. We were met at the bottom by a magical scene of sculls skimming across the water as the first tinges of pink started to colour the sky over the city."

YOUR OWN PIECE OF SYDNEY HARBOUR

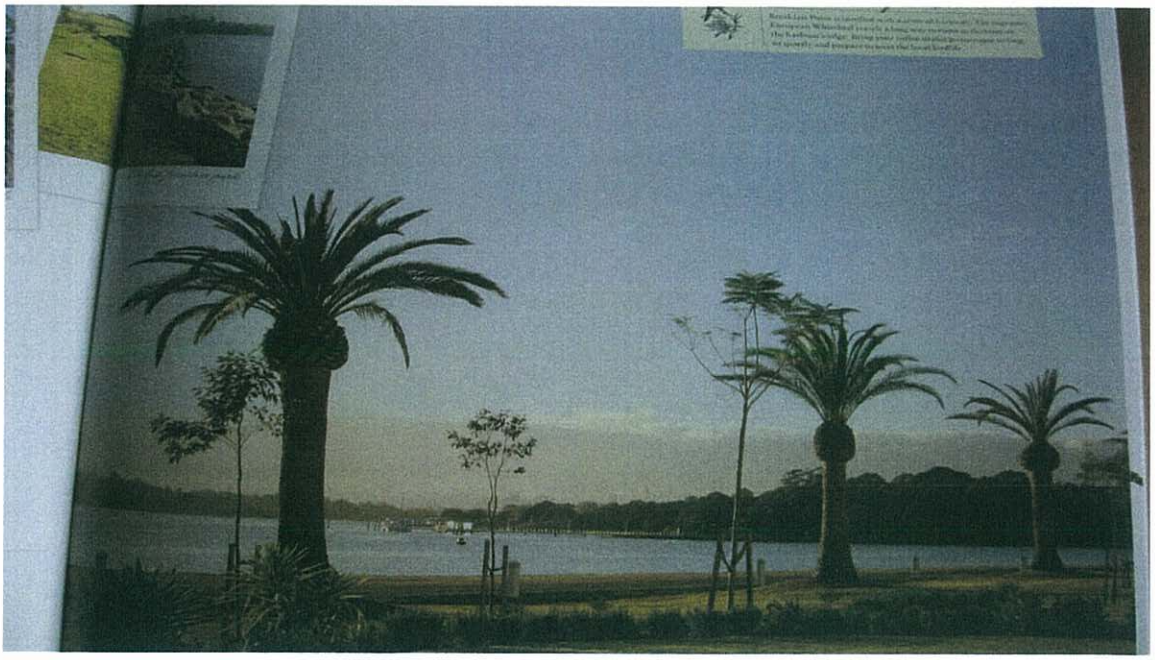
The harbourfront belongs to the Breakfast Point community. Promenades wind along its entire length – wide enough for strollers, joggers and cyclists to share comfortably. The weathered wood from the wharf that once stood here has been reclaimed for seating, so you can sit back on a piece of your home's history and contemplate the views.

Having the water so close influences the architecture here, too. Surrounded by enormous date palms, boardwalks and sparkling pools, Hunters Wharf is inspired by Sydney's maritime heritage. Calm blue water and palm trees swaying in the sun – these are the things that make life feel more balanced at Breakfast Point.

Attachment 25.1

From developer's brochure. Hunters Wharf and Cabarita Park in background. Note reference to the European Whimbrel on the right hand corner . The note reads:

> *"The harbourfront (sic) Breakfast Point is instilled with a sense of harmony. The migratory European Whimbrel travel's a long way to roost in the trees on the harbour's edge. Bring your coffee to this picturesque setting, or sit quietly and prepare to meet the local birdlife (sic)."*



***Attachment 26**:*

***H**unters Wharf. Walkway in foreground. Note how close the private property (hedge) is from the walkway. Note extensive use of glass and the implications in terms of loss of privacy. The palm tree is just within **15m from the seawall** and this is followed by a 1m community association property and then strata property.*



Attachment 27

From seawall. Hunters Wharf with walkway in foreground. Hedge is boundary of private strata property. Note extensive use of glass and the proximity to the walkway. See also the comment under Attachment 26.



Attachment 28

From seawall. Hunters Wharf with walkway in foreground. Note extensive use of glass and the proximity of the walkway. See comment under Attachment 26.



Attachment 29

From seawall. See note under Attachment 26 .



Attachment 30

From seawall Hunters Wharf. Community association property starts at the second palm tree ***(15m from seawall to this point)*** *which is 1m wide . This is followed by Hunter Wharf strata property and then by privately owned strata property.*



Attachment 31

From seawall. Hunters Wharf. Walkway in foreground. The fence/and hedge in the background is strata property. The community association property is a strip 1m wide from this fence going towards the walkway and from that point ***to the seawall is 15m wide****.*



Attachment 32

Looking towards Kendall Inlet**. Hunters Wharf on the right. Distance from seawall to the front of the apartments is **39.5m.** The palm tree is within this **15m** area. This **15m** distance is followed by a **1m** strip which is community association property and thereafter is strata property. **From this point the proposed marina will obscure the entire water views from this point.



Attachment 33
From ground level apartment at Hunters Wharf. Note use of hedges instead of fences. Scots College Boat Shed in centre (reflecting roof). **From ground level the proposed marina will obscure almost the entire water views from this point.**



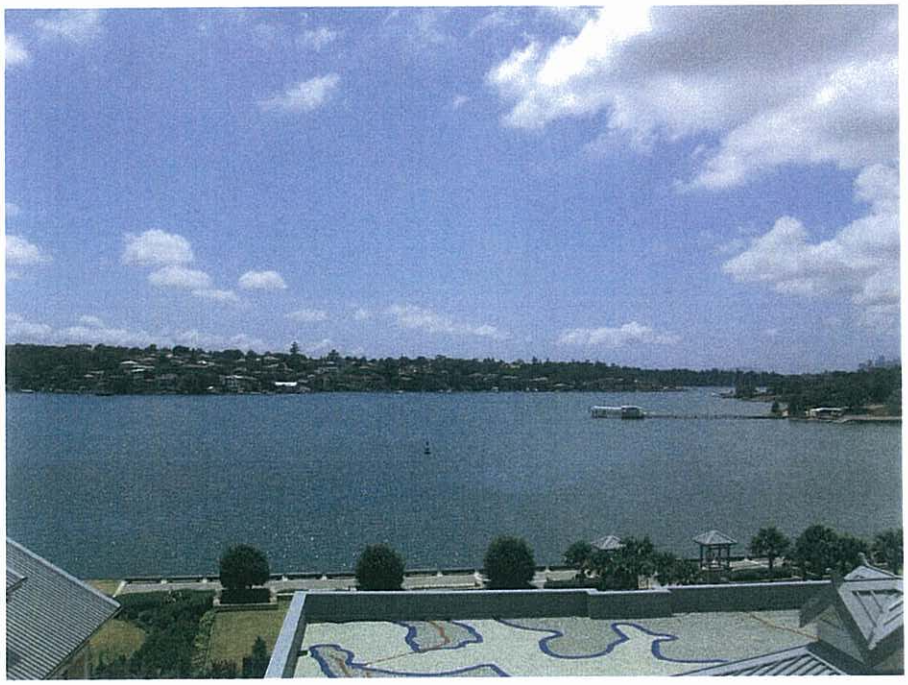
Attachment 34

From side of boundary of private apartment at Hunters Wharf to seawall ***(39.5m away)****. Scots College Boat Shed in centre (reflecting roof).* ***From ground level the proposed marina will obscure almost the entire water views from this point.***



Attachment 35

Hunters Wharf from level 4 apartment. Cabarita Wharf to the right , d'Albora Marinas, William Beach Monument and Aboriginal middens. Towards the centre to the left SGS Boat Shed and Looking Glass Point. To the left off centre is Scots College Boat Shed (reflecting roof) and further to the left Glades Bay and Aboriginal carvings. The ***proposed marina will have a visual impact up to*** *Cabarita* ***Wharf*** *(will be obscured).*



Attachment 36

From level 4 apartment at Hunters Wharf. Cabarita Park across the bay with Kendall Inlet to the right. The proposed marina would have a visual impact to a point past the palm tree on the right. ***From here the proposed marina will obscure almost the entire water views with the possible exception of the area south & east of the fourth palm tree.***



Attachment 37

From the seawall. Behind the fence site of future apartments. Skiff on the seawall about here.



Attachment 38

From Admiralty strata *.The proposed marina will have a visual impact extending up to about half way into the bay and as far south as (part) of the vertical seawall. Putney in the background.* ***From here the proposed marina will obscure almost the entire eastern half of the bay with the exception of the rocky area on the left.***



Attachment 38.1

From Admiralty (level 3). Most of this view from the two trees on the left behind the wire mesh fence (the proposed skiff is about here) will be obscured by the proposed marina.



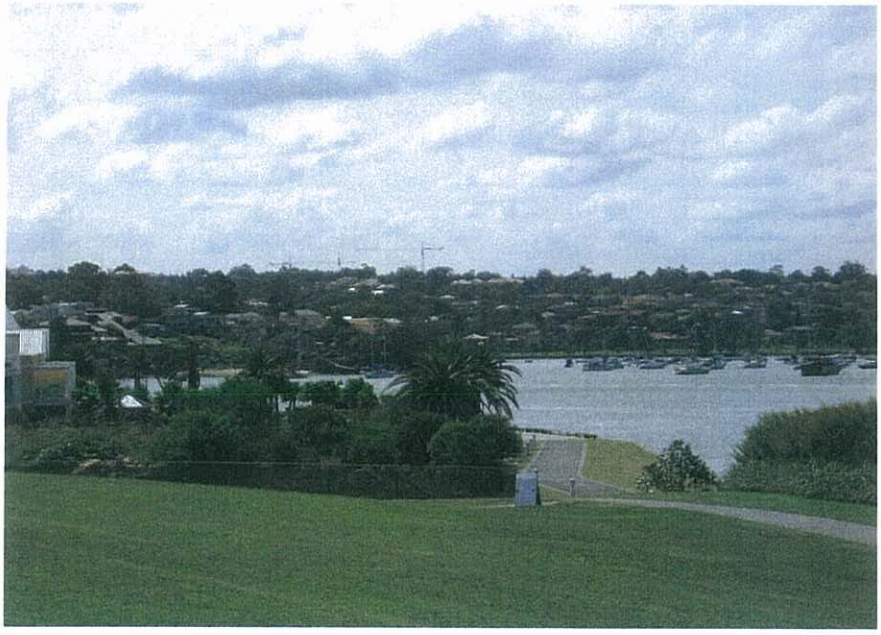
Attachment 38.2

From Admiralty (level 3): late afternoon scene of Kendall Bay looking north with Hunters Wharf on the left. The proposed marina will obscure most of this scene from the left of the balcony post and from about half way from the dark area on the west side of the seawall and south from Hunters Wharf (about the point where the proposed Skiff is to be located). There would also be a negative impact towards Tennyson Point.



Attachment 39.

From Waterfront park. ***From here the proposed marina will obscure almost the entire water views with the exception of the area just north of the small tree on the right.***



Attachment 40

From Waterfront Park. *The proposed marina will impact on the Bay from around the bend in the seawall to about mid-way between the second and third bollard counting from the left of the tree.*



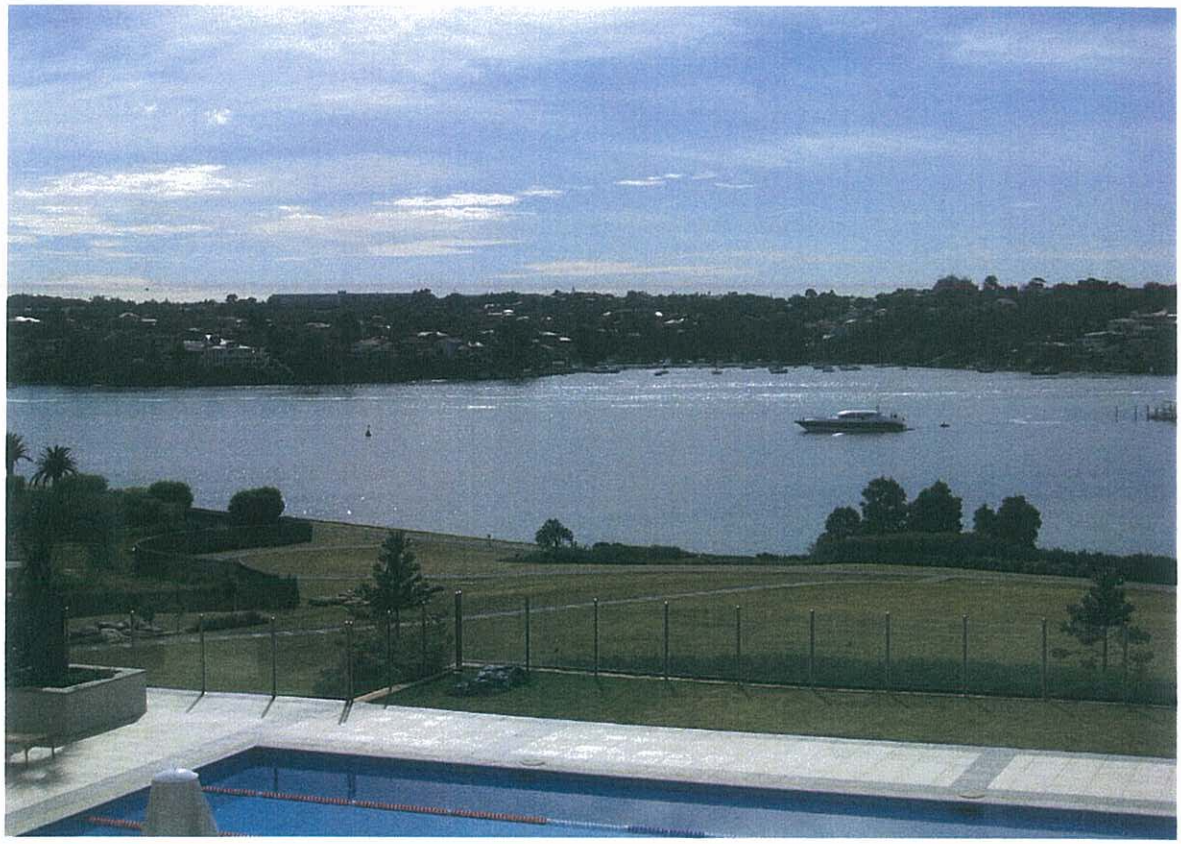
Attachment 41

From country club. *The proposed marina will extend to just east of the marker buoy and as far south as the second tree from the right within the dark fence.*



Attachment 41.1

From the Country Club. *The boat in the picture is about 15m long. The proposed marina structure would extend* ***about 40m to the right of the buoy*** *and to that distance would need to be added the width of the turning channel for boats to get in and out of the berths.*

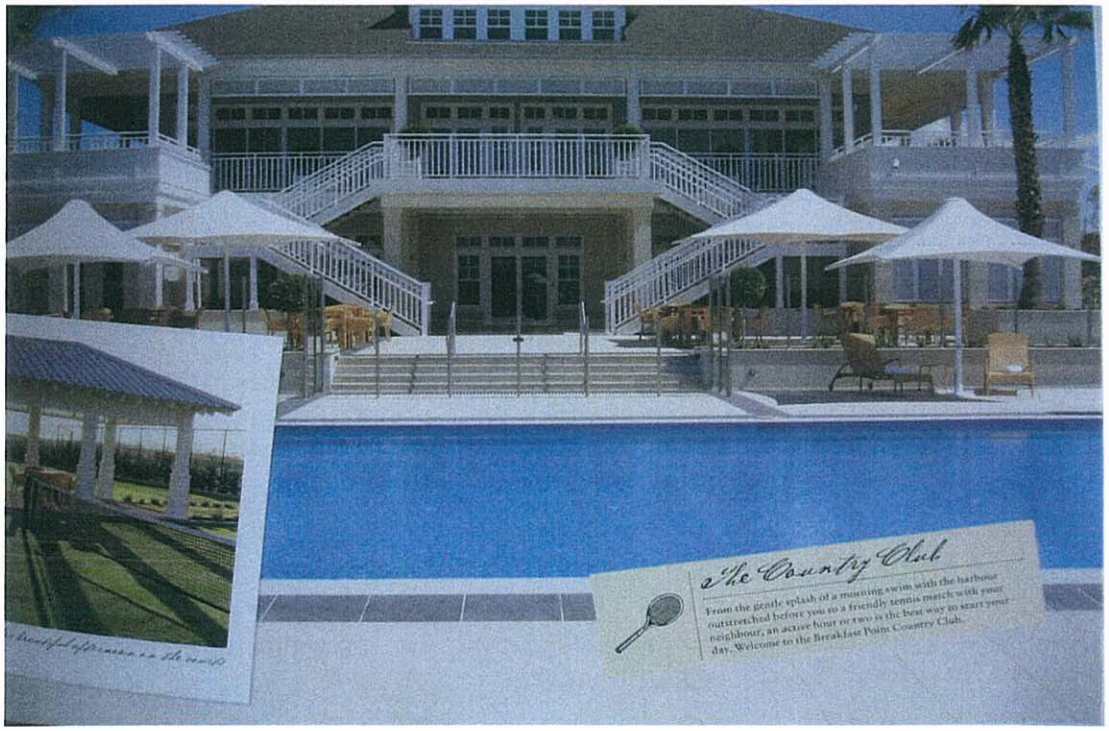


Attachment 42.0 *(see also Attachment 42.1 ,42.2 and 42.3).*

From the developer's brochure. The note on the right corner reads:

"The Country Club From the gentle splash of a morning swim with the harbour outstretched before you to ....."

to which one might add "not with a commercial marina in front of it".



Attachment 42.1 *(see also Attachment 42.0 and 42.2 and 42.3)*

From the proponent's brochure. Imagine the visual impact of a commercial marina to this set of pictures.



Attachment 42.3.

From the proponent's brochure. *Scene from Country Club. Imagine the visual impact of a commercial marina to this set of pictures.*



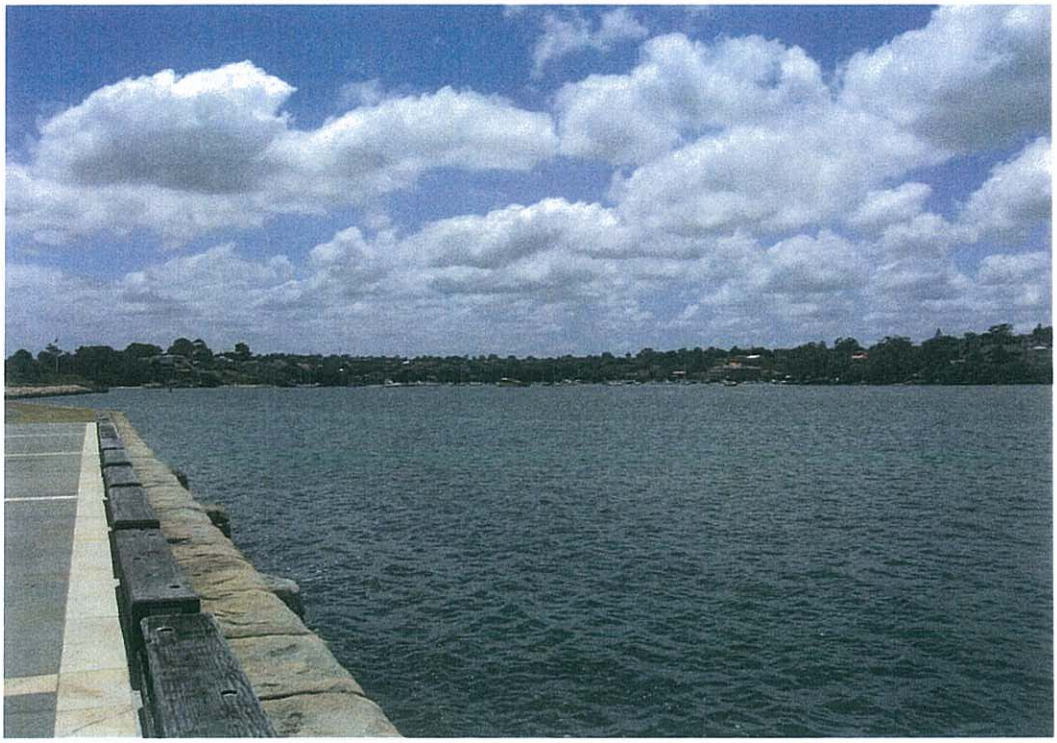
Attachment 43

Note the caption on top of the picture ("Over a glass of wine, we soaked the views. In front of us were so many shades of blue, I felt like I was sitting on a luxury liner heading out into the harbour*"* ***and the one in the third column (****"From the Country Club's wide decks looking over breathtaking harbour and city views, you'll find it easy enough to believe that there is nowhere else like this in all Australia.")* **.**



Attachment 44

From seawall *looking towards* ***Morrison Bay****. Note "protrusions" . Foreshore walkway to the left of the slippers.*



Attachment 45

From seawall *to* ***Morrison Bay*** *to the left, Raven Point to the right, Glades Bay further right. Note boats moored in both bays.*



Attachment 46

From seawall *looking towards the southern end of Kendall Bay (Hunters Wharf on the right of the paved area) , mangroves, Admiralty, Kendall Inlet to the right. To the right of this point on the seawall are the Manor Houses just* ***32.5 m away***



Attachment 47

***From Hunters Wharf** looking across to Cabarita Park and Cabarita Wharf. To the right and south of this point future apartment are planned.*



Attachment 48

From eastern side of mangroves *and opposite* ***Kendall Inlet.*** *Hunters Wharf in the centre. Future apartment south from Hunters Wharf. Putney and Morrison Point to the north of old Power House (dark building on right).*



Attachment 49

***From walkway** opposite Cabarita Park looking towards Hunters Wharf and Manor Houses.*



Attachment 50

***From opposite Cabarita Park**. Note height of the ferry on the right. Such vessels can be expected to dock at the proposed marina. **Note visual impact that this size vessel would have on Hunters Wharf and the manor houses. Note also the dark line on the seawall which represents the high water mark left by the tide.** The level of this line indicates that the picture was taken at low tide and that the visual impact attributable to the vessel would be more dramatic if the picture had been taken at high tide. See also Attachment 51-52.*



Attachment 50.1. *Picture of the same ferry as in Attachment 50 but on a different day. Note the relative size to the Rivercat.*



Attachment 50.2.

Picture of same ferry as in Attachment 50.1 taken on the same day. **Note relative height compared to the seawall. Note the rocks at the bottom of the seawall which attest to the picture having been taken at low tide. Where it otherwise the rocks would be obscured as high tide is about 1.5m higher.**

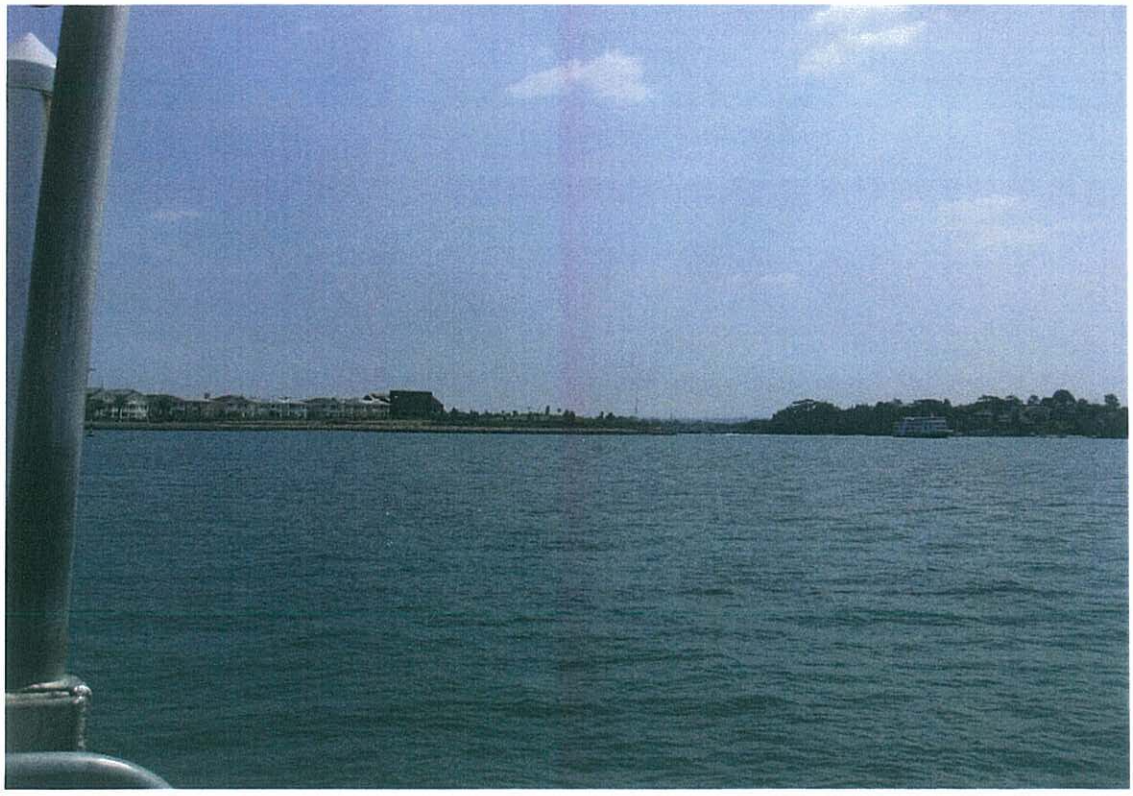


Attachment 50.3.
Picture of same ferry as in Attachment 50.1 taken on the same day. **Note relative height compared to "the Point" and the flag pole on extrme left of the picture. Note the dark line along the seawall left by the tide which attests that the picture was taken at low tide. At high tide the ferry would float about 1.5m higher.**



Attachment 50.4.

Picture of same ferry as in Attachment 50.1 taken on the same day. **The height of the boat is about 8mm. If a measurement of 8mm is taken in front of the houses on the left and the Hunters Wharf apartments on the extreme left it will reach up to the lower part of the roof line for the houses and the to the top of the windows of the apartment. NB buoy on extreme left of picture just beside the pylon. The proposed marina structure will be about 40m from the buoy (and towards the foreground), however, if the 8mm measurement is taken from this point there will not be any significant difference to the visual impact just described.** *Note that this Attachment and 50.1- 50.3 were taken at low tide –see dark line along the seawall. If the pictures were taken at high tide the line would be obscured as the water level would be abot 1.5m higher.*



Attachment 51

From Cabarita Wharf. ***Note the size of the Rivercat and the visual impact and how far south from the manor houses the turning arc of the ferry reaches. These Rivercats are not as high as a 25m motor boat or yacht. Note the dark line on the seawall left by the tide and consider the greater visual impact of the ferry if the picture had been taken at high tide (see Attachment 51.1) .*** *Notice the visual impact vis-a-vis the two individuals standing in the boat and consider the similar visual impact on any individual on the walkway and on the first two levels of the apartments at Hunters Wharf.*



Attachment 51.1

Looking towards Hunters Wharf at high tide. Note absence of dark tide marking on the seawall (as compared to Attachment 51).



Attachment 52

The proposed marina would extend up to the second house from the old AGL Power House (dark building) on the right. ***Note the visual impact on the houses that a boat of such low height as a Rivercat produces and imagine a 25m motor boat or yatch in its place.***



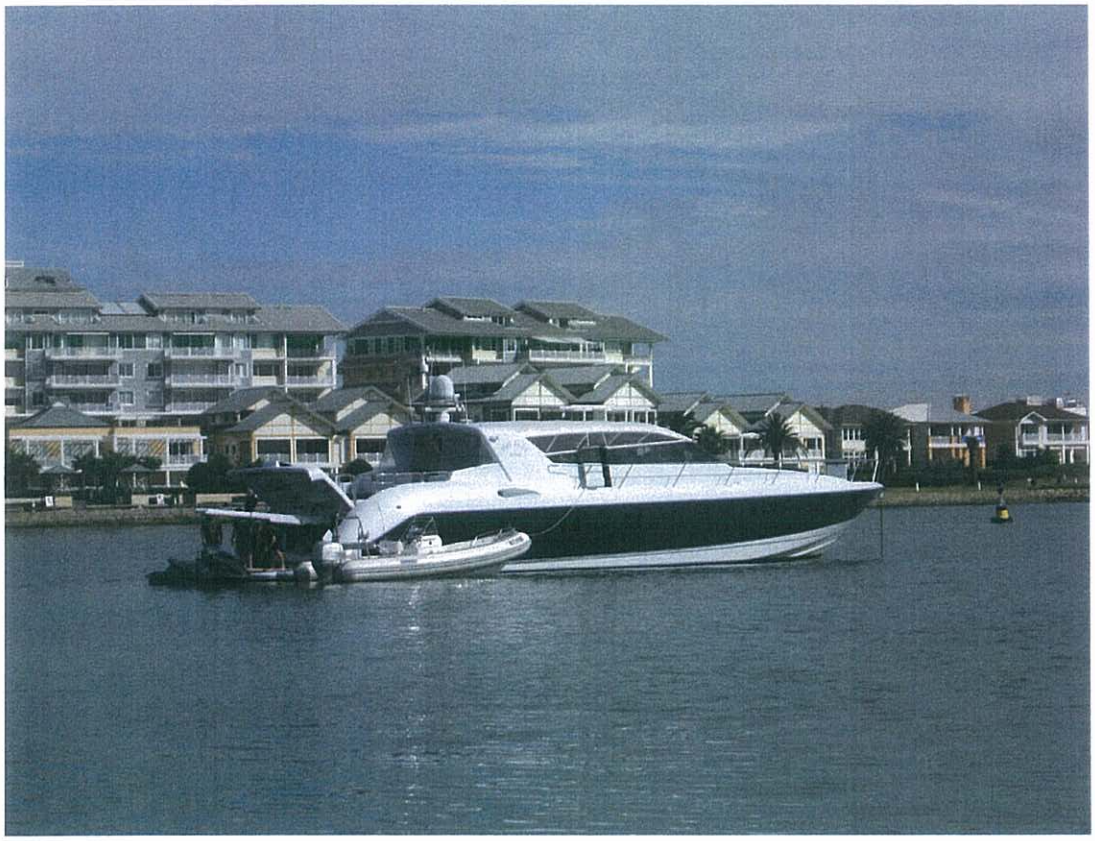
Attachment 53

Note the turning arc of the Rivercat shown as the wake and note how far it extends past the houses.



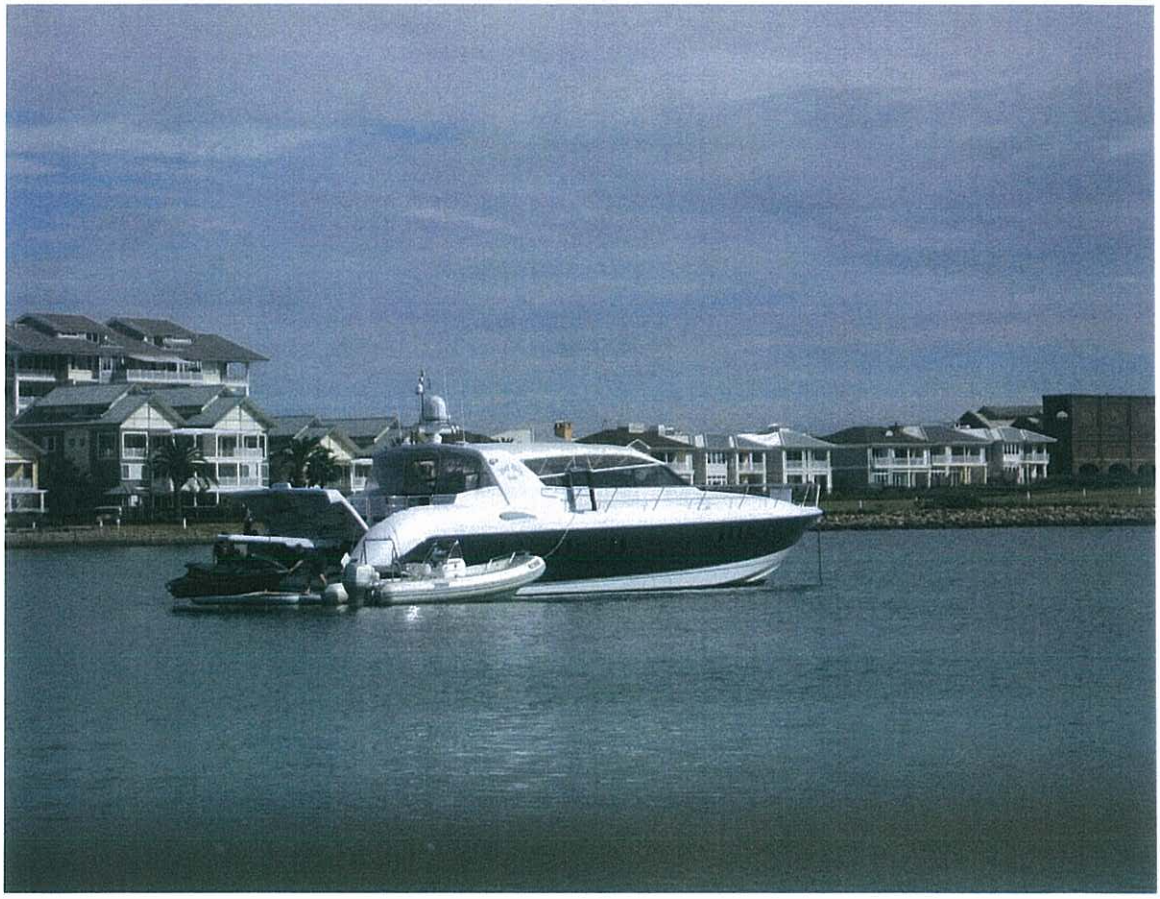
Attachment 53.1

From Cabarita Wharf. Boat is about 15m long. Height of the boat is about 3.5 to 4m to which should be added the height of the radar dome and antennas of about 1.5 – 2m. Note visual impact on Hunters Wharf and follow the line towards the houses. Imagine the scene with a **25m** boat as required by the Harbour DCP when assessing the visual impact.



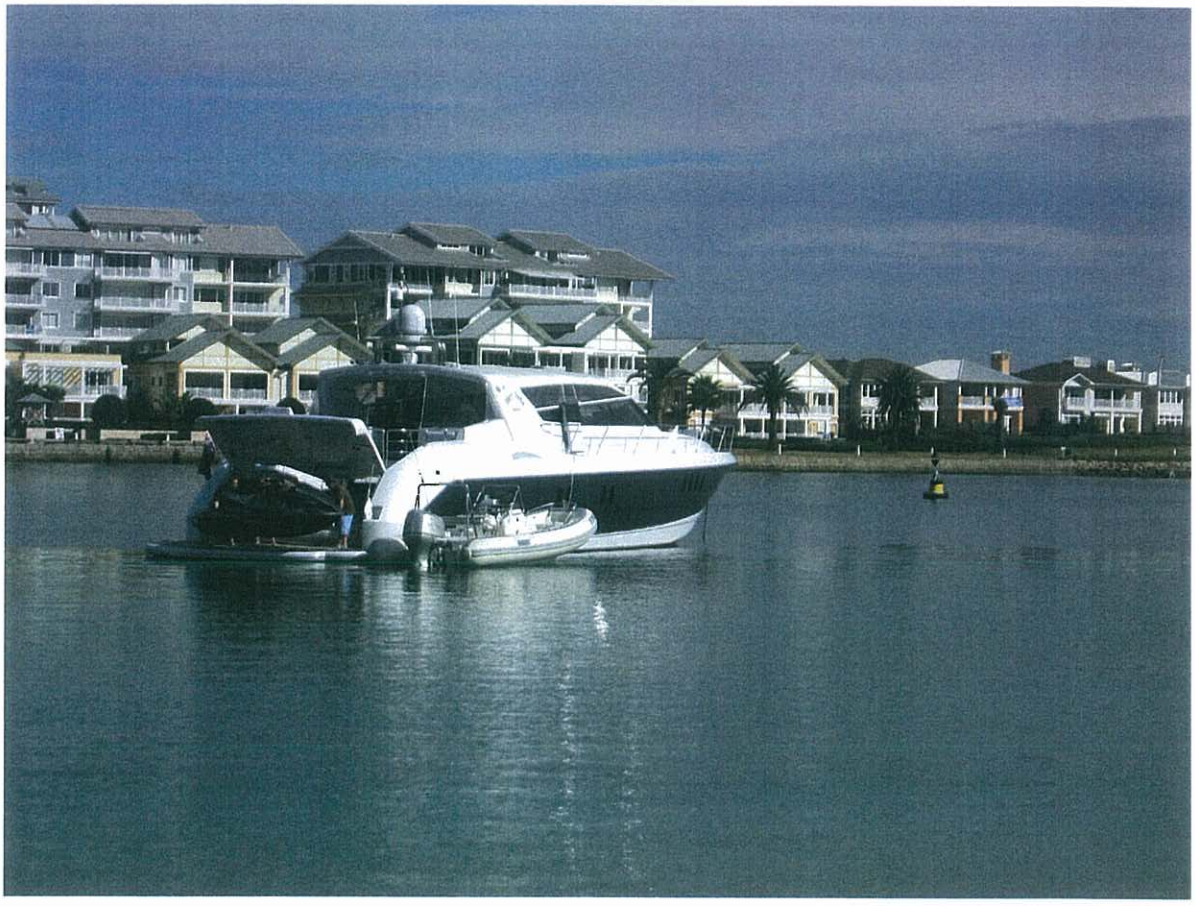
Attachment 53.2

From Cabarita Wharf. Note visual impact on the houses and Hunters Wharf. Note height of the radar dome and antennas. This is the direction in which the boats would sit in the berths. Imagine the scene with a **25m** boat as required by the Harbour DCP (or greater since it is also proposed that ferries use the facilities and some of them are larger than 25m: see Vol 2 Attachment 50-50.4).



Attachment 53.3

From Cabarita Wharf. Note visual impact. Note location of buoy. Boats would sit in the berth in a parallel position to Hunters Wharf. **Imagine the scene with a 25m boat as required by the Harbour DCP (or greater as per Vol 2 Attachment 50-50.4). The marina structure extends about 40m from the buoy** (and towards the front of the picture) and to this needs to be added the space for the turning arc for boats going into and out of a berth).



Attachment 53.4

From Cabarita Wharf. Note visual impact and height of radar dome and antennas. Imagine scene with a **25m** boat as required under the Harbour DCP for the assessment of the visual impact. However, since it is proposed that ferries also use the facilities and some of these are bigger than 25m that is the size against which the visual impact needs to be measured. For this see, for example, Vol 2 Attachment 50-50.4.



Attachment 54

From Looking Glass on the right (not shown) looking towards Breakfast Point.



Attachment 55

***From Glades Bay**. Kendall Inlet to the left of Admiralty (behind mangroves), Cabarita Park and Cabarita Wharf to the left; country Club on the hill off centre to the right.*



Attachment 56

From Morrison Bay . AGL Power House on the right (dark buildings on right); Houses to the left of Power House, Hunters Wharf in centre, space for future apartments off centre on left



Attachment 57

From Putney looking towards Breakfast Point (geographical point); note seawall (to the left of the Point and at right angle to it); Admiralty in the centre; mangroves, Kendall Inlet, Cabarita Park and Cabarita Wharf on the left.



Attachment 58

From Scots College Boat Shed.



Attachment 59

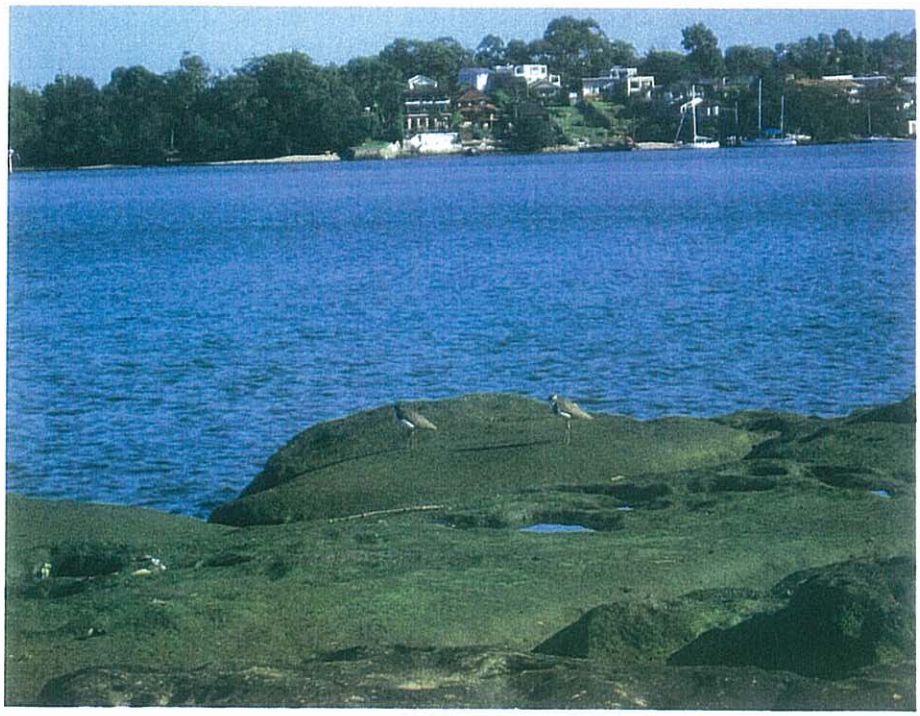
***From Cabarita Park** looking towards Hunters Wharf, Manor Houses and AGL power building. Note William Beach Memorial on the left.*



Attachment 60 Some of the Birds of Breakfast Point

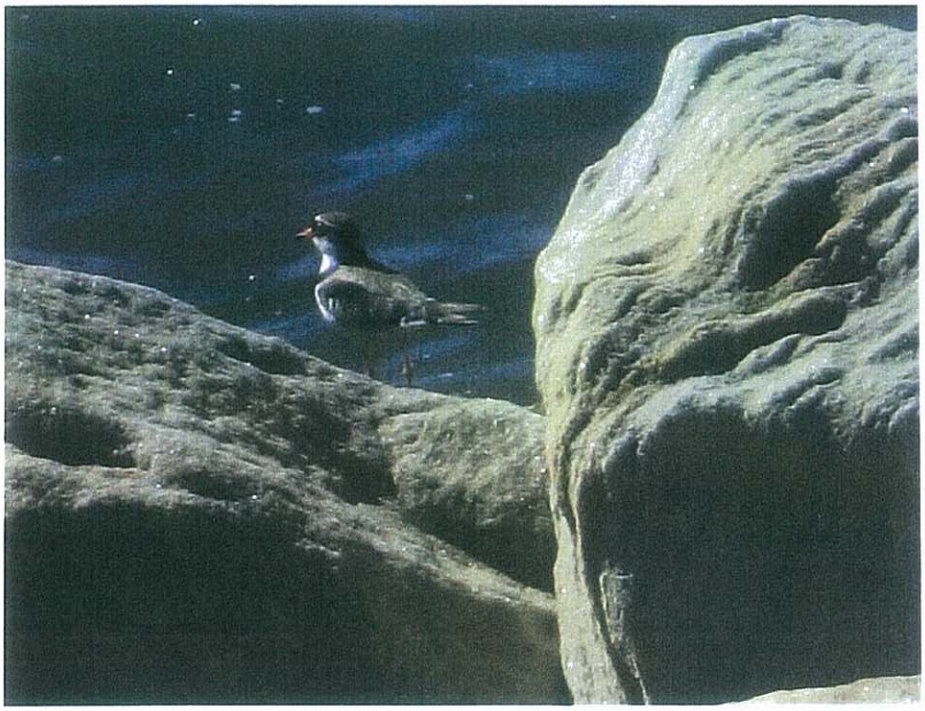
Superb Blue Wren just off the seawall at BP.





Masked Lapwing on eastern shore of Kendall Bay.

Banded Lapwing on the seawall at BP





Honey Eater on walkway at BP

Lorikeets on palm trees at BP.

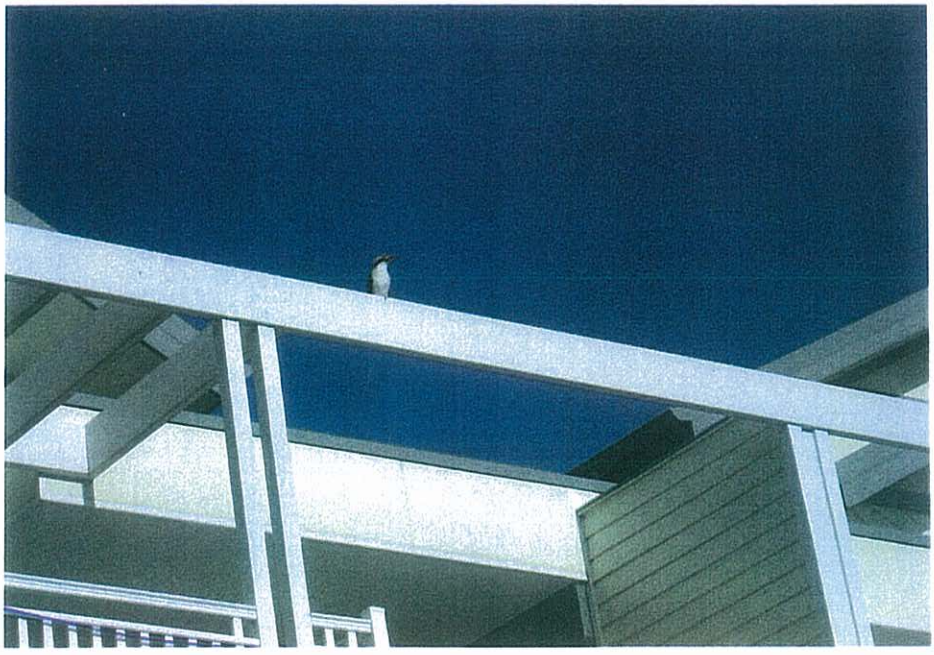




Cormorant in Kendall Bay



Pelicans over Kendall Bay



Kookaburra at Hunters Wharf balcony



European goldfinch on Fairmile Cove side of Breakfast Point.



White Faced Heron on seawall at BP



Swallow at BP



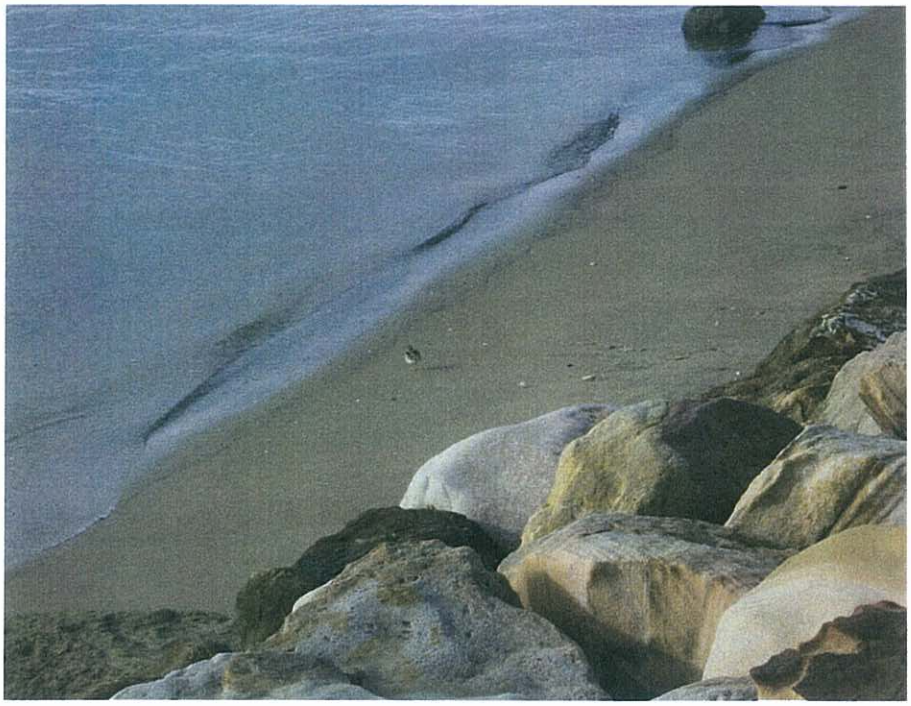
Galah on proposed marina users car park

Yellow Wattlebird near Point and AGL Power House



Restless Flycatcher on construction site at BP





Sandpiper on sandy beach north of Hunters Wharf

Godwits. Internet picture

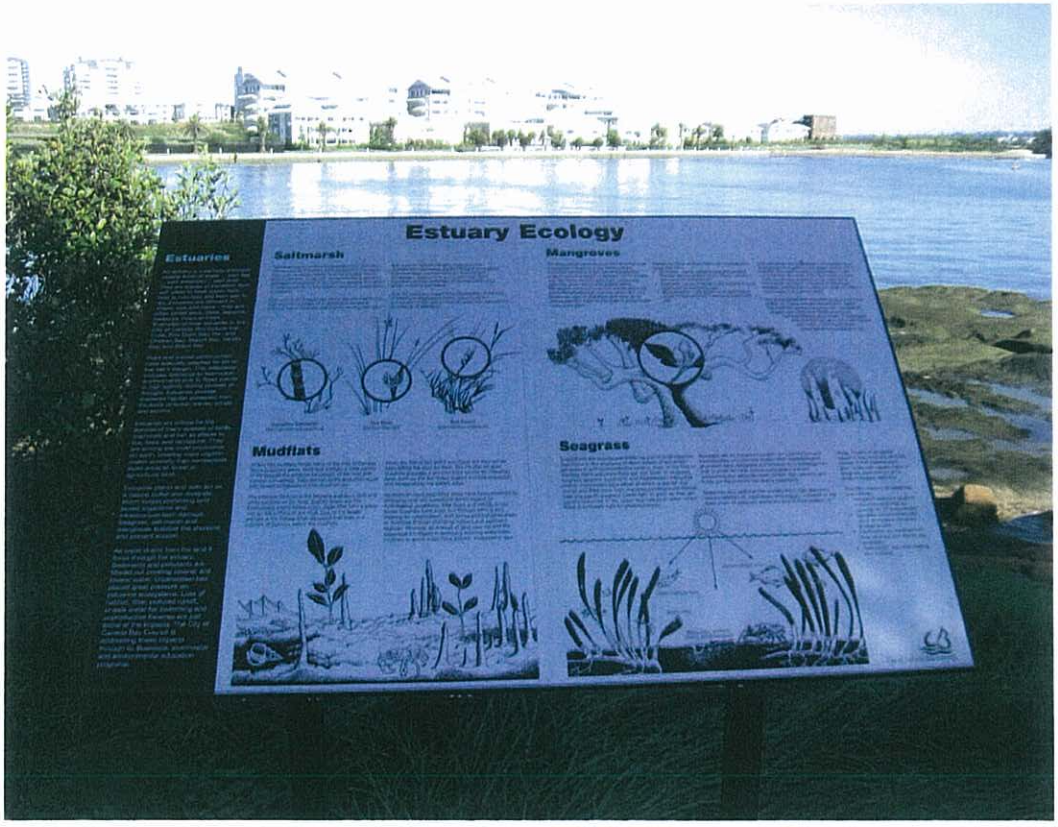




Black-shouldered Kite near Silkstone Park.

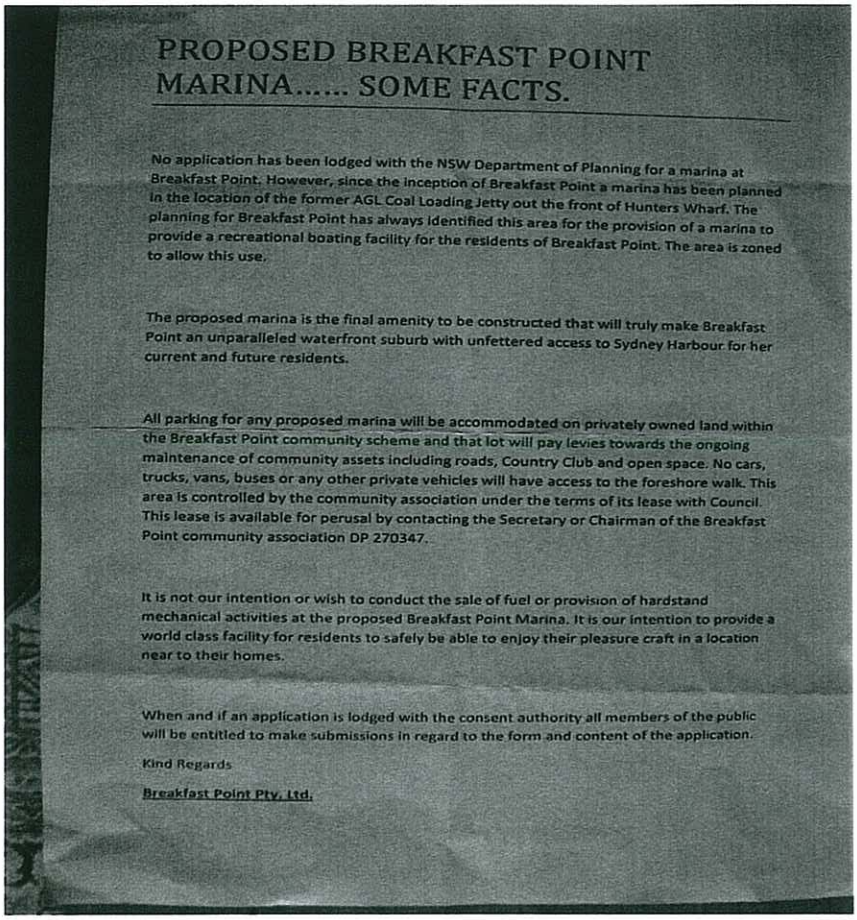
Attachment 61:

Council's sign on eastern shore of Kendall Bay. No longer there. Hunters Wharf in the background. In the third column from the left a list of "local" birds is given which have been included in Attachment 60. The sign also makes reference to protected vegetation and saltmarshes.



Attachment 62:

undated newsletter (but late 2008) from the developer.



PROPOSED BREAKFAST POINT MARINA..... SOME FACTS.

No application has been lodged with the NSW Department of Planning for a marina at Breakfast Point. However, since the inception of Breakfast Point a marina has been planned in the location of the former AGL Coal Loading Jetty out the front of Hunters Wharf. The planning for Breakfast Point has always identified this area for the provision of a marina to provide a recreational boating facility for the residents of Breakfast Point. The area is zoned to allow this use.

The proposed marina is the final amenity to be constructed that will truly make Breakfast Point an unparalleled waterfront suburb with unfettered access to Sydney Harbour for her current and future residents.

All parking for any proposed marina will be accommodated on privately owned land within the Breakfast Point community scheme and that lot will pay levies towards the ongoing maintenance of community assets including roads, Country Club and open space. No cars, trucks, vans, buses or any other private vehicles will have access to the foreshore walk. This area is controlled by the community association under the terms of its lease with Council. This lease is available for perusal by contacting the Secretary or Chairman of the Breakfast Point community association DP 270347.

It is not our intention or wish to conduct the sale of fuel or provision of hardstand mechanical activities at the proposed Breakfast Point Marina. It is our intention to provide a world class facility for residents to safely be able to enjoy their pleasure craft in a location near to their homes.

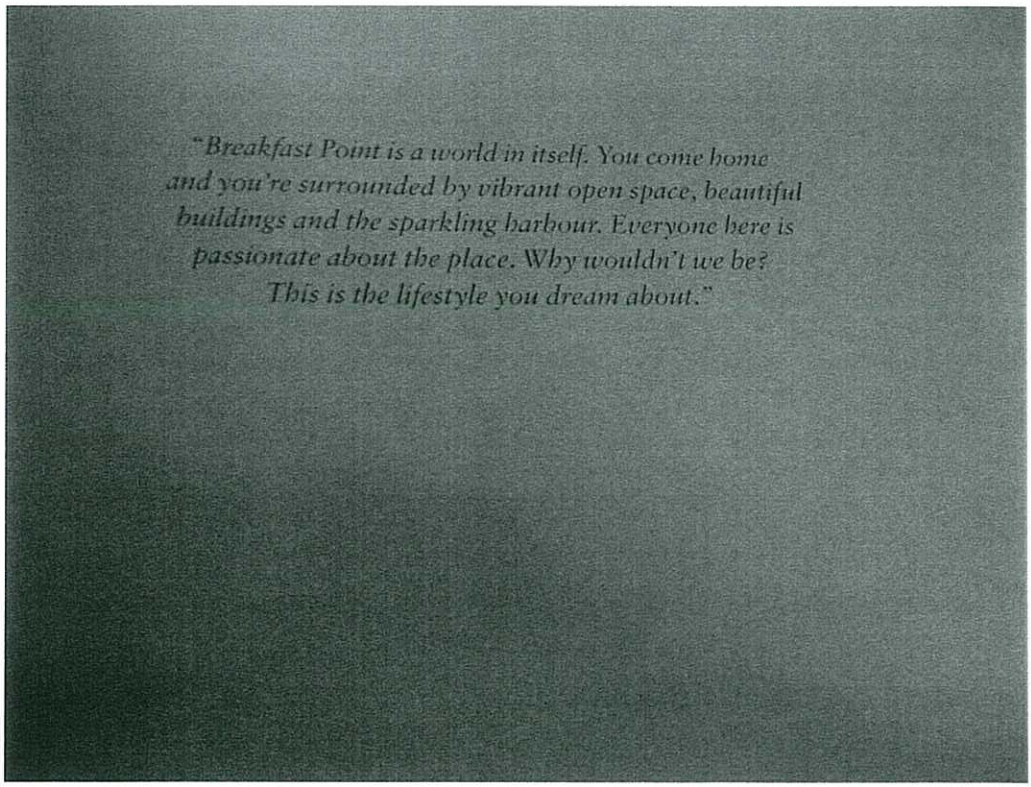
When and if an application is lodged with the consent authority all members of the public will be entitled to make submissions in regard to the form and content of the application.

Kind Regards

Breakfast Point Pty. Ltd.

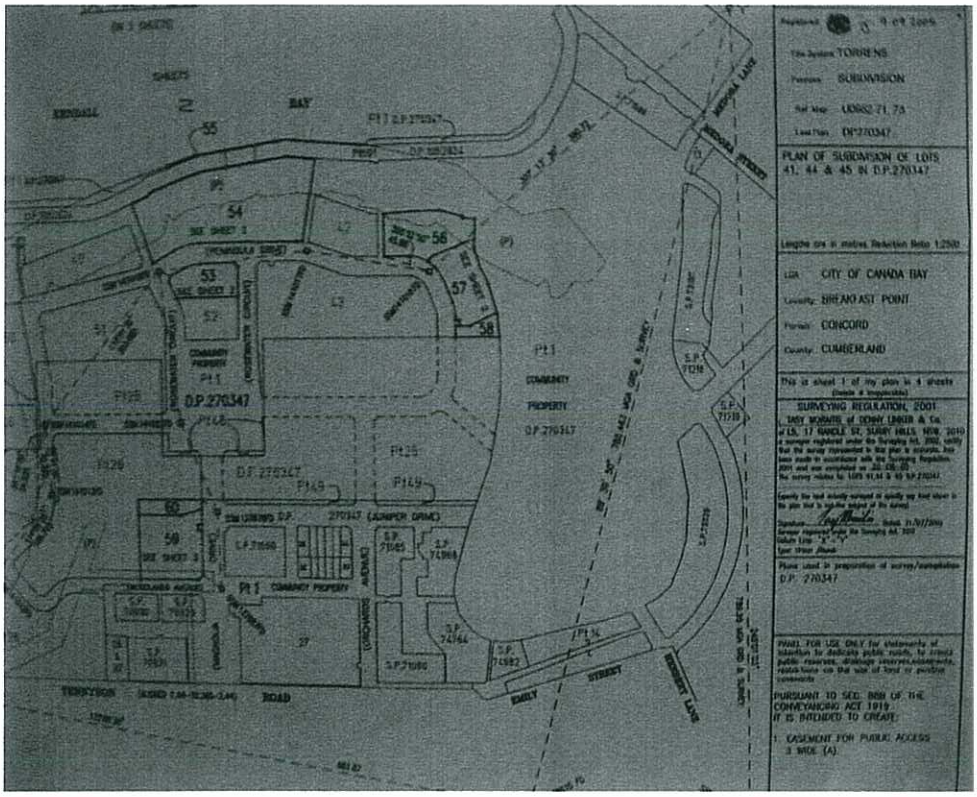
Attachment 63:

From the developer's brochure. Note the reference to "the sparkling harbour" and to "[T]his is the lifestyle you dream about".

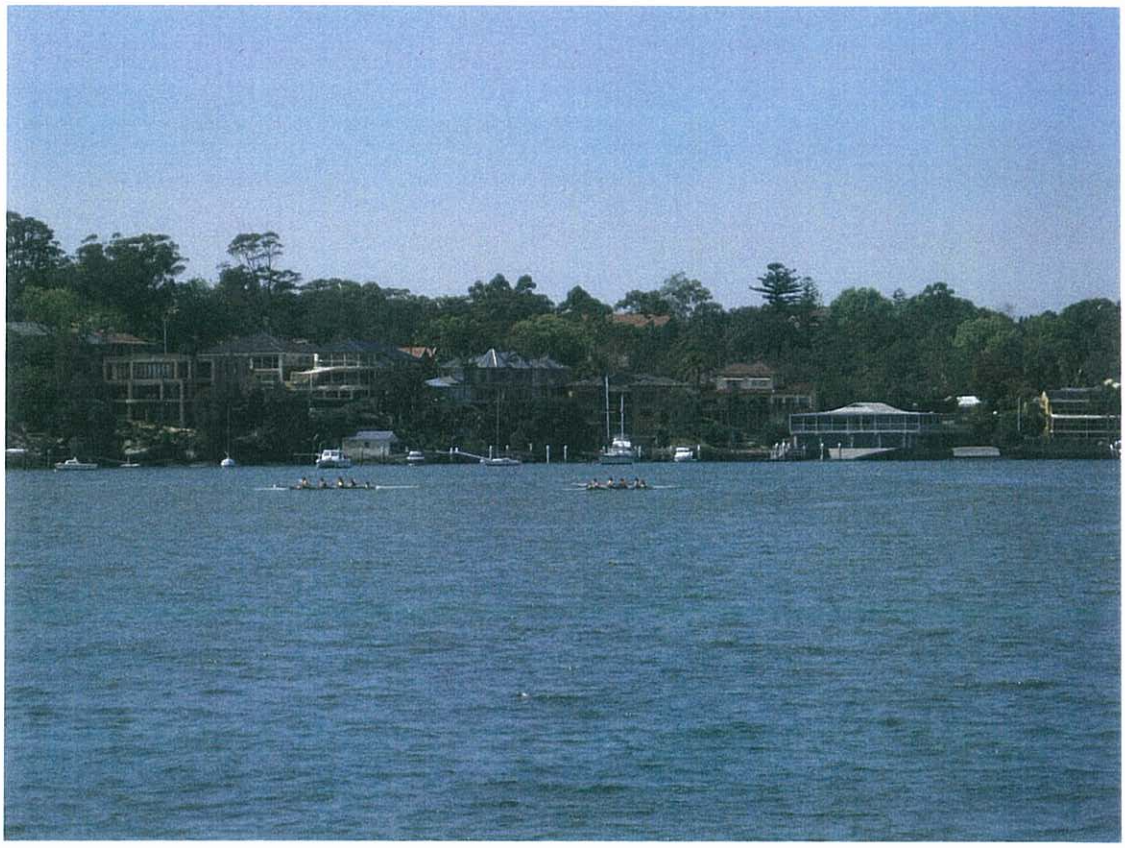


Attachment 64:

Sheet 32 DP 270347 showing lot 53 (proposed marina users' car park) and lot 55. NB: the size of lot 53 as compared with its size in drawing SK15B wherein it appears to be **twice as large!!!**


TORRENS
SUBDIVISION
PLAN OF SUBDIVISION OF LOTS 41, 44 & 45 IN D.P.270347
CITY OF CANADA BAY
BREAKFAST POINT
CONCORD
CUMBERLAND
SURVEYING REGULATION, 2001
D.P. 270347
PURSUANT TO SEC. 88B OF THE CONVEYANCING ACT 1919 IT IS INTENDED TO CREATE:
1. EASEMENT FOR PUBLIC ACCESS 3 WIDE (A)
D.P.270347
COMMUNITY PROPERTY
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P1
P1 D.P.270347
P1 COMMUNITY PROPERTY
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P1 COMMUNITY PROPERTY

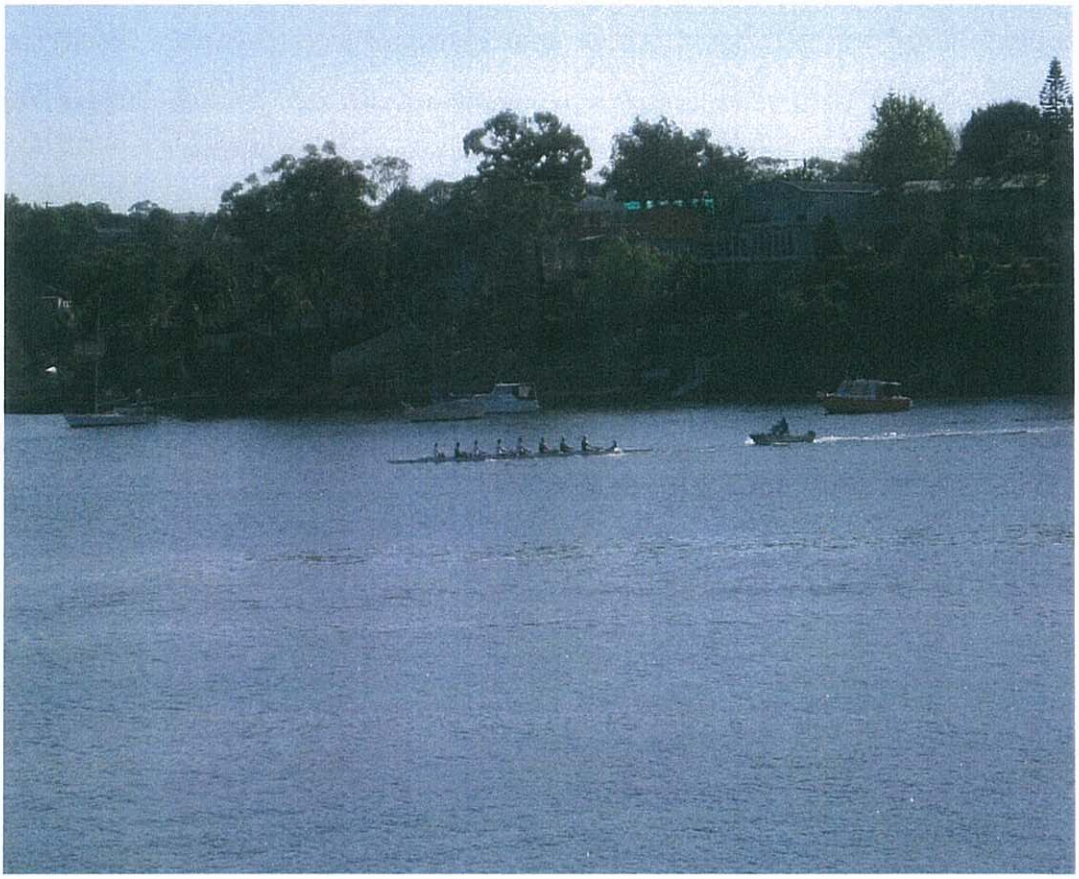
Attachment 65: Rowers. Scots College Boat Shed second building from the right.



Attachment 66: Rowers and canoeists on western side of "the Point".



Attachment 67: *Rowers off Raven Point.*



Attachment 68: *Morning passengers waiting for the Rivercat at Cabarita Wharf. If the marina proposal goes ahead with the ferry/bus interchange (see Vol 1 Chapter 0 at Q 1, 10, 11; and para 2.36 and footnote 21 and bear in mind the attempts by the developer to get a bus route through the estate without Community Association consultation or approval and with full knowledge of the restrictions imposed by the easement) then imagine these passengers going through the estate and the impact on the open access ways in terms of parking and other impacts several times/day and on weekends.*

