
Appendix J

Interim Clause 4.6 Variation Request

URBIS

INTERIM CLAUSE 4.6 VARIATION REQUEST - FLOOR SPACE RATIO (HEIGHT)

Hunter Street East – Over
Station Development

Prepared for
SYDNEY METRO
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1. INTRODUCTION

This interim Clause 4.6 Variation Request ('the Request') has been prepared to accompany a Concept State Significant Development Application (SSDA 46246213) for the Over Station Development (OSD) at the Hunter Street Station east site (the site). This Request is submitted to the NSW Department of Planning and Environment (DPE).

The Request seeks an exception from the height of building development standard prescribed for the site under clause 4.3 of *Sydney Local Environmental Plan 2012* (Sydney LEP 2012). The variation request is made pursuant to clause 4.6 of Sydney LEP 2012.

It should be noted that a Planning Proposal request has been submitted to the City of Sydney Council to amend the planning controls that apply to both the eastern and western Hunter Street Station sites under the Sydney LEP 2012. Specifically, the new controls are proposed to be included as site-specific provisions in the LEP which will amend the current height standard for the east site to 269.1m. This Planning Proposal request was submitted to the City of Sydney Council in May 2022 and on 28 October the Planning Proposal received Gateway determination from the DPE.

The Concept SSDA proposes a maximum building height of 269.1m (above ground) on the east site, which is consistent with the site-specific height provision outlined in the Planning Proposal request. Therefore, this interim Clause 4.6 Request is intended to be withdrawn from SSD-46246214 upon finalisation and gazettal of the Planning Proposal, as the height proposed within the Concept SSDA is intended to comply with the height standard at the time of gazettal.

This report should be read in conjunction with the Environmental Impact Assessment (EIS) and dated 24 November 2022.

The following sections of the report include:

- **Section 2:** description of the site and its local and regional context, including key features relevant to the proposed variation
- **Section 3:** overview of Planning Proposal request
- **Section 4:** brief overview of the proposed development as outlined in further detail within the EIS and accompanying drawings
- **Section 5:** identification of the development standard which is proposed to be varied, including the extent of the contravention
- **Section 6:** outline of the relevant assessment framework for the variation in accordance with clause 4.6 of the LEP
- **Section 7:** detailed assessment and justification of the proposed variation in accordance with the relevant guidelines and relevant planning principles and judgements issued by the Land and Environment Court
- **Section 8:** summary and conclusion.

2. SITE CONTEXT

2.1. SITE DESCRIPTION

The Hunter Street Station is in the northern part of the Sydney CBD, within the commercial core precinct of Central Sydney and within the Sydney local government area. The Hunter Street Station includes two sites – the west site and the east site. This Request relates to the east site only.

The eastern Hunter Street Station site is on the corner of O’Connell Street, Hunter Street and Bligh Street and in proximity to the new Martin Place Station which forms part of the Sydney Metro City & Southwest due to open in 2024.

The OSD for the eastern Hunter Street Station site relates to the properties at 28 O’Connell Street, 48 Hunter Street, 33 Bligh Street and 37 Bligh Street, Sydney.

The site’s location is shown in Figure 1

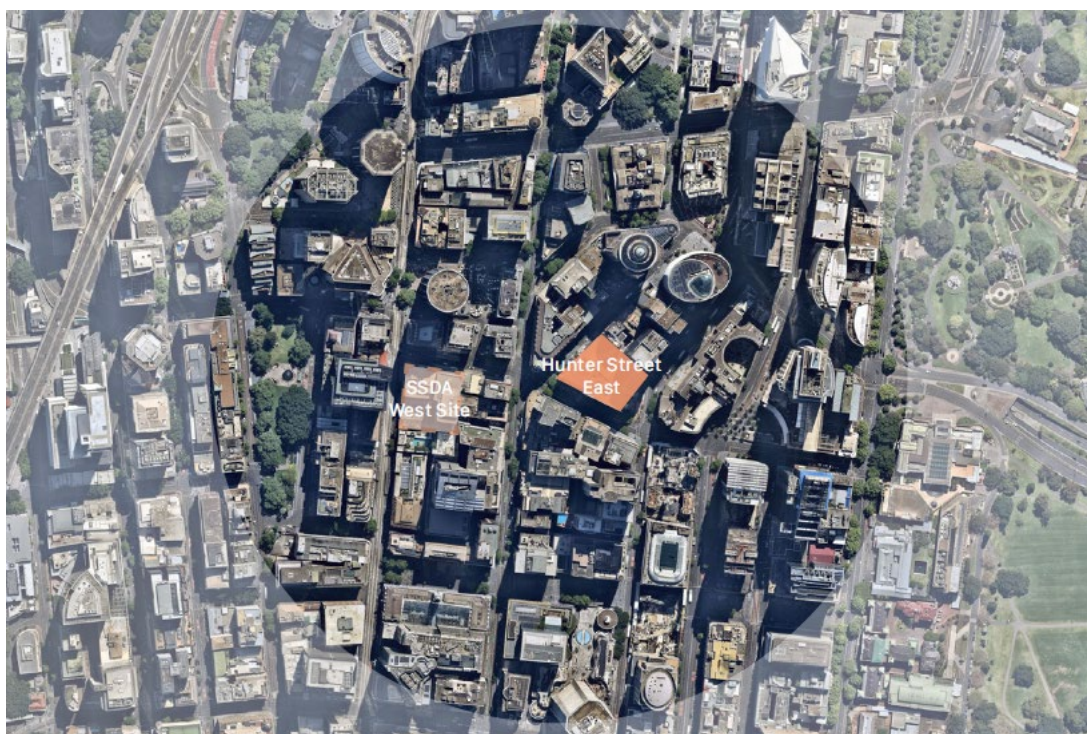


Figure 1 Aerial map of Hunter Street Station precinct

Table 1 sets out the address, and legal description of the parcels of land that comprise the site that is the subject of this clause 4.6. The total site area is 3,694sqm. The site has frontages of around 72m to Hunter Street, 43m to Bligh Street and 66m to O’Connell Street.

Table 1 Site legal description

Address	Lot and DP
28 O’Connell Street, Sydney	Lot 1, DP217112
28 O’Connell Street, Sydney	Lot 1, DP536538
28 O’Connell Street, Sydney	Lot 1, DP1107981
48 Hunter Street, Sydney	Lot 1, DP59871
48 Hunter Street, Sydney	Lot 2, DP217112
33 Bligh Street, Sydney	Lot 1, DP626651

Address	Lot and DP
37 Bligh Street, Sydney	CP and Lots 1-14, 21-31, 33-36, and 40, SP58859
37 Bligh Street, Sydney	CP and Lots 41-49, SP61852
37 Bligh Street, Sydney	CP and Lots 50-57, SP61922
37 Bligh Street, Sydney	CP and Lots 58-65, SP61923
37 Bligh Street, Sydney	CP and Lots 66 and 67, SP63146
37 Bligh Street, Sydney	CP and Lots 67-70, SP63147
37 Bligh Street, Sydney	CP and Lot 72, SP74004
37 Bligh Street, Sydney	CP and Lots 75-82, SP87437
37 Bligh Street, Sydney	CP and Lots 73-74, SP87628
TOTAL SITE AREA – 3,694sqm	

2.2. EXISTING DEVELOPMENT

The site is currently partially occupied for the Sydney Metro City & Southwest construction site. The remainder of the site is currently occupied by commercial office buildings and a range of ground floor business premises including retail, restaurants and cafes, all of which will be demolished to facilitate building the Hunter Street Station (as approved in the Stage 2 CSSI Application).

The existing buildings occupying the site comprise a mix of commercial buildings as follows.

- 28 O'Connell Street – A 19storey commercial office building which was completed in 1972. It is currently occupied by a range of boutique office tenants.
- 48 Hunter Street – A 13storey commercial office building completed in 1961.
- 33 Bligh Street – Demolished in late 2015 to be utilised as a construction site for the Sydney Metro City & Southwest.
- 37 Bligh Street – A 14storey strata-titled commercial office building which includes several retail tenancies at the ground floor.

The lots comprising the site currently have 41 parking spaces distributed as follows:

- 48 Hunter Street – 6 parking spaces
- 28 O'Connell Street – 35 parking spaces.

An additional 45 parking spaces existed in the buildings at 33 Bligh Street before it was demolished in late 2015. In total, there were 86 parking spaces on the lots allocated to the eastern site.

2.3. LOCALITY CONTEXT

2.3.1. Surrounding development

The northern part of the Sydney CBD is a highly developed commercial core with commercial, retail, health, government, and community-based uses, as well as high density residential developments.

Key buildings located in or around the Sydney CBD, include educational facilities, historic buildings and structures, law courts, public gathering spaces and places of worship. Significant areas of open space, such as the Botanical Gardens, the Domain and Hyde Park are also located within or near the Sydney CBD area, as well as the Sydney Opera House and the iconic Sydney Harbour Bridge.

North

The adjacent sites immediately to the north on O'Connell Street are local heritage listed items under Schedule 5 of the SLEP 2012. These include the former Manufacturers House at 12-14 O'Connell Street (I902 in SLEP 2012) and the former Bank of NSW at 16 O'Connell Street (I1903 in SLEP 2012).

The adjacent sites immediately to the north on O'Connell Street are local heritage listed items under Schedule 5 of the SLEP 2012. These include the former Manufacturers House at 12-14 O'Connell Street (I902 in SLEP 2012) and the former Bank of NSW at 16 O'Connell Street (I1903 in SLEP 2012).

The former NSW Club building at 31 Bligh Street is an existing 4-storey building listed on the State Heritage Register (I1676 in SLEP 2012) that is located to the north-east of the eastern Hunter Street Station site. It is currently occupied by the Lowy Institute.

East

Richard Johnson Square is located to the immediate east of the site and is located at the north-western corner of Bligh and Hunter Streets. The Square 'including monument and plinth' is a heritage item of local significance (I1673 in SLEP) under Schedule 5 of the SLEP 2012. The square includes a four-sided sandstone obelisk installed in 1925 in memory of Richard Johnson (appointed 'Chaplain to the Settlement' of NSW in 1786 and sailed with the First Fleet).

Constructed in 1936, the former City Mutual Life Assurance building is an existing 11-storey commercial building at 10 Bligh Street and is listed on the State Heritage Register (I1675 in SLEP 2012). This building is located opposite Richard Johnson Square on the northeast corner of Hunter and Bligh Streets.

The south-eastern corner of Hunter and Castlereagh Streets is currently being utilised as a construction site for the Sydney Metro City & Southwest as part of the integrated station development for Martin Place Station.

South

39 Hunter Street is an 8storey commercial office building with a single basement level known as the former "Perpetual Trustee" building. The building was constructed in 1917 and is listed on the State Heritage Register (I1810 in SLEP 2012). The building is occupied by a single commercial tenant.

West

To the west of the site at 27 O'Connell Street is the 10-storey Radisson Blu Plaza Hotel which comprises traditional heritage architecture and a sandstone façade. This building is located at the intersections of Pitt, Hunter and O'Connell Streets and includes a total of 338 hotel rooms and 26 suites.

This building is listed on the State Heritage Register (located at 64-66 Pitt Street) and is known as the former Wales House (I1915 in SLEP 2012). It was built in the early 1920s by the Fairfax family to house the offices of their newspapers.

2.3.2. Transport and Accessibility

The site is bounded by the following roads:

- O'Connell Street to the north-west
- Bligh Street to the east
- Hunter Street to the south.

Hunter Street is currently a four-lane, two-way undivided local road with a posted speed limit of 40km/h. Parking and loading zones are provided on both kerbside lanes, reducing capacity to a two-lane, two-way road during weekday business hours. Although classified as a local road, Hunter Street supports high volumes of traffic between George Street and Pitt Street. The configuration and movements on Hunter Street have changed over recent years with the development and operation of the CBD and South East Light Rail.

In October 2022 the NSW Government and the City of Sydney announced a trial period closure of George Street between Hunter Street and Grosvenor/Bridge Street to vehicular traffic from 9 January 2023.

O'Connell Street is a four-lane, one-way undivided local road with a posted speed limit of 40km/h. A bus layover facility, coach drop-off zone (for surrounding hotels), parking zone and loading zone occupy kerbside space on both kerbside lanes, reducing capacity to a two-lane, one-way road during weekday business hours. O'Connell Street is used by several public transport bus services and through traffic.

Bligh Street is a one-lane, one-way undivided local road with a posted speed limit of 40km/h. Parking and loading zones are provided on both shoulders, though the wide cross section of the roadway does not impact general traffic flow. Bligh Street is used by several public transport bus services and as a layover for terminating bus routes.

3. PLANNING BACKGROUND - PLANNING PROPOSAL REQUEST

A Planning Proposal request has been submitted to the City of Sydney Council to amend the planning controls that apply to both the eastern and western Hunter Street Station sites under the Sydney LEP 2012. The new controls are proposed to be included as site-specific provisions in the LEP that address the following objectives:

- Contribute towards the establishment of an integrated transport hub within the Sydney CBD which strengthens Sydney's rail network and improves connectivity.
- Facilitate future development that promotes design excellence and is consistent with the objectives of the Central Sydney Planning Framework.
- Deliver high quality employment generating floor space that aligns with the objectives for development within the tower cluster areas (identified within the Central Sydney Planning Framework).
- Delivery employment density alongside the delivery of significant new public transport infrastructure which services the site and surrounding CBD precinct.

The Planning Proposal seeks to insert new site-specific provisions under Division 5 of the Sydney LEP 2012. The new site-specific provisions support the proposed increase in the height of development standard that will apply to the site. The new site-specific provisions require development that seeks to utilise this additional height above the existing Sydney LEP 2012 development standards, to achieve other public benefits and built form outcomes including facilitating the delivery of a non-residential building that would:

- comprise a maximum building height of between RL 238.9 and RL 269.1 (as it varies to comply with the relevant sun access plane controls)
- include a maximum floor space ratio (FSR) of 22.8:1, measured above ground level
- include employment and other non-residential land uses
- require the mandatory consideration of a site-specific Design Guideline within the site-specific SLEP 2012 controls to guide the assessment of the development consent sought under the future Concept SSDA (and subsequent Detailed SSDAs)
- limit the provision of up to a maximum of 70 car parking spaces on the site (a total of 70-spaces are to be provided between the eastern and western Hunter Street Station sites, with the number on each site to be determined in a future detailed SSDA)

The Planning Proposal will also establish an alternative approach to design excellence that responds to the physical and procedural requirements for the integration of the OSD with the Hunter Street Station and broader Sydney Metro West project.

The Planning Proposal request also clarifies the application of clause 6.11 of SLEP 2012 relating to heritage floor space. As per the terms of the Planning Proposal request, if gazetted an amount 8,311.5sqm of heritage floor space will be required to be allocated to the development. This provision of heritage floor space is consistent with the existing provisions outlined in clause 6.11 of SLEP 2012

This Planning Proposal request was submitted to the City of Sydney Council and Central Sydney Planning Committee (CSPC) in May 2022. The Planning Proposal report along with the draft Design Guidelines for the Hunter Street OSDs (draft Design Guidelines), Design Excellence Strategy, public benefit offer, and supporting information was approved by the City of Sydney Council and CSPC on 19 September 2022 for Gateway Determination. The NSW Department of Planning and Environment (DPE) issued a Gateway Determination for the Planning Proposal on 28 October 2022 stating that an amendment to SLEP 2012 to facilitate the OSD at the Hunter Street Station site should proceed, subject to conditions requiring public exhibition of the Planning Proposal.

4. PROPOSED DEVELOPMENT

The Concept SSDA seeks concept development consent for building envelopes and indicative land uses above the Sydney Metro Hunter Street Station east site. The Concept SSDA specifically seeks consent for the following:

- maximum building envelope and built form parameters (including tower envelopes and building setbacks)
- maximum building height of between RL 238.9 and 269.1 (about 58 storeys)
- conceptual land use for the OSD building which, subject to future detailed applications could include:
 - commercial land uses within the tower building envelope
 - commercial and retail land uses within the building envelope for the podium
 - maximum floor space within the proposed OSD building envelope with a total maximum GFA of 84,223m², comprising:
 - around 81,769m² of commercial premises
 - around 1,454m² of retail premises
 - around 1,000m² of station uses (subject to Stage 3 CSSI Application)
- Provision of up to 70 car parking spaces within the podium or tower envelope (a total of 70 spaces are to be provided between the eastern and western Hunter Street Station sites, with the number on each site to be determined in a future Detailed SSDA).
- Loading, vehicular, and pedestrian access arrangements for the OSD.
- utilities augmentation and connections where required (subject to Detailed SSDA(s)).

In addition, the Concept SSDA seeks approval the following strategies and guidelines for consideration in subsequent Detailed SSDA(s):

- ESD sustainability targets
- strategies for utilities and service provision
- strategies for the management of stormwater and drainage

An indicative concept reference design has been prepared illustrating how the site could potentially be developed within the proposed building envelope. As this is a concept development pursuant to section 4.22 of the *Environmental Planning and Assessment Act 1979* (EP&A Act), future approval would be sought for the detailed design and construction of the OSD.

5. VARIATION OF HEIGHT OF BUILDING STANDARD

This section of the report identifies the development standard which is proposed to be varied, including the extent of the contravention. A detailed justification for the proposed variation is provided in Section 7 of the report.

5.1. DEVELOPMENT STANDARD

Under clause 4.3 of the Sydney LEP 2012, the maximum height of building control for the site is 235m.

The site is also subject to the No Additional Overshadowing provisions outlined in clause 6.18 of the SLEP 2012 protecting Martin Place, between Pitt Street and George Street for 14 April–31 August at Midday to 2pm and Pitt Street Mall for 14 April–31 August at 10am to 2pm.

It is noted that the site is located within the mapped tower cluster areas under clause 6.21E, and therefore the site may be eligible for additional height upon the completion of an architectural design competition in accordance with the City of Sydney Competitive Design Policy. This is available if the building height does not exceed the sun access plane controls in clause 6.17, the overshadowing controls in clause 6.18, the view plane controls in clause 6.19 and the view of Sydney Harbour controls in clause 6.19A.

However, the proposed Concept SSDA does not rely upon the tower cluster area provisions to secure additional development uplift on the site and therefore the additional height bonus under clause 6.21E does not apply for the proposal.

The Concept SSDA also does not seek to rely upon the maximum 10 per cent height bonus available under clause 6.21D(3(a)) of the Sydney LEP 2012 as a competitive design process is not required if the consent authority is satisfied that such a process would be unreasonable or unnecessary in the circumstances.

5.2. PROPOSED VARIATION TO HEIGHT

The proposed height for the development is 269.1m, which exceeds the height of building control (under clause 4.3) applicable to the site.

It should be noted that the proposal is consistent with the site-specific height of building provision under the Planning Proposal request. This interim Clause 4.6 Request is intended to be withdrawn upon finalisation and gazettal of the Planning Proposal, as the proposed height will comply with the site-specific height provision as gazetted.

6. RELEVANT ASSESSMENT FRAMEWORK

Clause 4.6 of Sydney LEP 2012 includes provisions that allow for exceptions to development standards in certain circumstances. The objectives of clause 4.6 of Sydney LEP are:

- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

Clause 4.6 provides flexibility in the application of planning provisions by allowing the consent authority to approve a development application that does not comply with certain development standards, where it can be shown that flexibility in the particular circumstances of the case would achieve better outcomes for and from the development.

In determining whether to grant consent for development that contravenes a development standard, clause 4.6(3) requires that the consent authority to consider a written request from the applicant that seeks to justify the contravention of the development by demonstrating:

- (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- (b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

Clause 4.6(4)(a) requires the consent authority to be satisfied that the applicant's written request adequately addresses each of the matters listed in clause 4.6(3). The consent authority should also be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the standard and the objectives for development within the zone in which it is proposed to be carried out.

Clause 4.6(4)(b) requires the concurrence of the Secretary to have been obtained. In deciding whether to grant concurrence, subclause (5) requires that the Secretary consider:

- (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) the public benefit of maintaining the development standard, and*
- (c) any other matters required to be taken into consideration by the Secretary before granting concurrence.*

The concurrence of the Secretary can be assumed to have been granted for the purpose of this variation request in accordance with the Department of Planning Circular PS 18–003 'Variations to development standards', dated 21 February 2018. This circular is a notice under section 55(1) of the *Environmental Planning and Assessment Regulation 2021* and provides for assumed concurrence. A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given.

Consent authorities for SSD may assume the Secretary's concurrence where development standards will be contravened. Any matters arising from contravening development standards will be dealt with in Departmental assessment reports.

This Request demonstrates that compliance with the height of building control prescribed for the site in clause 4.3 of Sydney LEP 2012 is unreasonable and unnecessary, that there are sufficient environmental planning grounds to justify the requested variation, and that the approval of the variation is in the public interest because it is consistent with the development standard and zone objectives.

In accordance with clause 4.6(3), the applicant requests that the height of building development standard be varied (subject to the applicant's position that such a request should not actually be necessary).

7. ASSESSMENT OF CLAUSE 4.6 VARIATION

The following sections of the report provide a comprehensive assessment of the request to vary the height of building development standards in accordance with clause 4.3 of Sydney LEP 2012.

Detailed consideration has been given to the following matters within this assessment:

- Varying development standards: A Guide, prepared by the Department of Planning and Infrastructure dated August 2011.
- Relevant planning principles and judgements issued by the Land and Environment Court.

The following sections of the report provides detailed responses to the key questions required to be addressed within the above documents and clause 4.6 of the Sydney LEP 2012.

7.1. IS THE PLANNING CONTROL A DEVELOPMENT STANDARD THAT CAN BE VARIED? – CLAUSE 4.6(2)

The maximum height of building prescribed by clause 4.3 of Sydney LEP 2012 is a development standard capable of being varied under clause 4.6(2) of Sydney LEP 2012.

The proposed variation is not excluded from the operation of clause 4.6(2) as it does not comprise any of the matters listed within clause 4.6(6) or clause 4.6(8) of Sydney LEP 2012. The site is not located within Area 1 or Area 2 on the Height of Buildings Map.

7.2. IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE? – CLAUSE 4.6(3)(A)

Historically, the most common way to establish a development standard was unreasonable or unnecessary was by satisfying the first method set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827. This method requires the objectives of the standard are achieved despite the non-compliance with the standard.

This was recently re-affirmed by the Chief Judge in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [16]-[17]. Similarly, in *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 at [34] the Chief Judge held that “establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary”.

This Request addresses the first method outlined in *Wehbe v Pittwater Council* [2007] NSWLEC 827. This method alone is sufficient to satisfy the ‘unreasonable and unnecessary’ requirement.

- ***The objectives of the standard are achieved notwithstanding non-compliance with the standard*** (the first method in *Wehbe v Pittwater Council* [2007] NSWLEC 827 [42]-[43])

The specific objectives of the height of building standard as specified in clause 4.3 of Sydney LEP 2012 are detailed in Table 2 below. An assessment of the consistency of the proposed development with each of the objectives is also provided.

Table 2 Assessment of Consistency with Clause 4.3 Objectives

Objectives	Assessment
<i>(a) to ensure the height of development is appropriate to the condition of the site and its context.</i>	The proposed built form is broadly consistent with the Sydney DCP 2012 guidelines for development within the tower cluster areas under clause 6.21E of the Sydney LEP 2012. The proposed planning envelope for Hunter Street Station East tower has been designed to respond to the key architectural features

Objectives	Assessment
	of surrounding heritage buildings. The proposed setbacks consider how the proposal will relate to existing towers on neighbouring sites, the broader city structure and prevailing street alignments.
<i>(b) to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,</i>	The podium design identified in the indicative reference scheme (and subject to design development as part of the CSSI) provides for variation in heights which respond to the existing street wall and key datum lines of the surrounding context. The proposed tower envelope is also responsive to context and the constraints established by the station. The proposed building height has been informed by an Urban Design and Built Form Report prepared by FJMT (Appendix E of the EIS) and details the proposed building envelope (Appendix G of the EIS) and indicative reference scheme for the site (Appendix H of the EIS), demonstrating that the site can accommodate the future OSD without material impact on proximate heritage items and the streetscape. The site is adjacent to the western boundary of Chifley Square Special Character Area. The tower envelope does not create any additional overshadowing over Chifley Square during lunchtime hours from mid-April to mid-August and does not impact on the distinctive character of Chifley Square.
<i>(c) to promote the sharing of views outside Central Sydney</i>	Not applicable to site.
<i>(d) to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,</i>	The site is within Central Sydney and a designated tower cluster area that has been identified as having potential to accommodate increases in in building height and density. The proposed building envelope has been the subject of pedestrian wind comfort and safety and daylight testing to ensure that the built form results in better or equivalent impacts compared to a base case building envelope in accordance with the provisions of the Sydney DCP 2012. Further, the proposed building envelope has been assessed against key urban design considerations including visual impacts, heritage and streetscape characteristics to ensure the built form resulting from the proposed density remains consistent with the local character of the Central Sydney area.
<i>(e) in respect of Green Square—</i>	Not applicable to the site.

Objectives	Assessment
<p>(i) to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and</p> <p>(ii) to ensure the built form contributes to the physical definition of the street network and public spaces.</p>	

The objectives of the development standard are therefore achieved, notwithstanding the variation with the standard in the circumstances described in this variation report.

- **The underlying object or purpose would be undermined, if compliance was required with the consequence that compliance is unreasonable** (the third method in *Wehbe v Pittwater Council* [2007] NSWLEC 827 [42]-[43] as applied in *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 at [24])

Not relied upon

- **The burden placed on the community (by requiring strict compliance with a development standard) would be disproportionate to the (non-existent or inconsequential) adverse consequences attributable to the proposed non-compliant development** (cf *Botany Bay City Council v Saab Corp* [2011] NSWCA 308 at [15]).

Not relied upon.

7.3. ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD? – CLAUSE 4.6(3)(B)

The Land & Environment Court judgment in *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 118, assists in considering the sufficient environmental planning grounds. Preston J observed:

“...in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in the written request must justify contravening the development standard, not simply promote the benefits of carrying out the development as a whole; and

...there is no basis in Clause 4.6 to establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development”

There is an absence of environmental harm arising from the contravention and positive planning benefits arising from the proposed development as outlined in detail above.

There are sufficient environmental planning grounds to justify the proposed variations to the development standard and are discussed in the following sections. The justifications are specific to the areas of noncompliance.

7.3.1. Built form and local character

The proposed building height provides for the future development of an OSD that is generally consistent with the future tower character defined under the Central Sydney Planning Strategy. The Central Sydney Planning Strategy and Schedule 12 of the Sydney DCP 2012 sets the base case envelope for new towers in Central Sydney, providing guidance on street wall heights, building articulation, and tower setbacks. Further to the above, the height of the proposed tower form has been developed and assessed against a range of considerations set out in the Central Sydney Planning Strategy and accompanying Draft Guideline for Site-

Specific Planning Proposals (2020), including sky view factor assessment, wind environment, building separation and privacy considerations, and view and visual impacts.

The proposed building envelope has been assessed against a base case envelope, prepared in accordance with the Strategy and Schedule 12 of the Sydney DCP 2012. The proposed envelope was assessed to result in a generally improved wind and daylight condition as compared to the base case envelope.

The setbacks proposed to Bligh Street and O'Connell Street are consistent with the surrounding context and nearby buildings. The proposed tower is significantly setback from Hunter Street in the southwestern corner of the site. This provides not only a regular floorplate for tenants with a high degree of daylight and amenity, but it also significantly reduces the visual impact of the proposal from Hunter Street and opens vistas to Australia Square

7.3.2. Density and land use intensity

The additional building height proposed on the site will not adversely impact on the amenity of the locality in terms of built form impact, visual impact and overshadowing to public domain. The height variation will deliver a development that is of an appropriate density and land use intensity that is anticipated under the Central Sydney Planning Strategy, to help deliver economic growth, in line with the City's vision and strategies for the area.

7.3.3. Daylight access

The proposed building envelope has been assessed against public domain amenity testing, measuring the extent of sky visible from various points, expressed numerically as sky view factor. The Urban Design and Built Form Report prepared by FJMT included this sky view testing, prepared in accordance with the City's requirements.

The testing demonstrated that the proposal achieves consistency with the requirements of the Central Sydney Planning Strategy, with the proposed envelope showing an increase of 0.018256 of Visible Sky when compared to the base case building envelope.

The sky view analysis demonstrates that the height variation will not adversely impact daylight access to the public domain compared to a compliant built form. As such, the height non-compliance is consistent with the equivalence testing requirements for tower cluster sites, ensuring the future development will maintain an acceptable amenity outcome for pedestrians and the public domain.

7.3.4. Overshadowing

The Sydney LEP 2012 includes provisions preventing new buildings from creating additional overshadowing to protect certain public places, including Martin Place. The proposed building envelope does not overshadow significant public domain areas during the times or areas that are protected by the Sydney LEP 2012, including the adjacent Chifley Square special character area.

The proposed building envelope will however result in minor additional overshadowing to The Domain at the winter solstice outside of the times protected by the Sydney LEP 2012 controls. Overall, the proposed built form complies with the applicable sun access planes for The Domain and Martin Place, and the height variation does not contribute to additional shadow within the time periods and area protected under the Sydney LEP 2012.

7.3.5. View analysis

The proposed building envelopes are accompanied by a Visual Impact Assessment (Appendix O of the EIS) which assesses the visual and view impacts of the proposal. The analysis explored views from and along George Street and from and along Hunter Street. The view analysis also explored the impact of the two Hunter Street Station over station development towers on the cityscape.

The assessment found that the visual impacts of the proposed building envelope was generally compatible with the existing urban character of the surrounding area and the desired future character as outlined by the City. Most locations had capacity to absorb physical change, and the proposed planning envelope does not result in a high or significant visual impact on the public domain.

The photomontages show that in close views the proposed built form will create visual change to the existing composition of some views and block a minor amount of heritage facades in close views. The upper parts of the proposed envelope is likely to be visible in distant views from the west, north and east against a

backdrop of urban development or sky. Notwithstanding, the proposed building envelope allows for 15 per cent articulation, which may result in a more slender appearance of the tower form.

Accordingly, the height variation does not directly contribute to any adverse view impact. The level of visual change has been contemplated by the existing control which allows for tall tower forms similar to the envelope proposed. In addition, with the additional height the future detailed design of the development can deliver a more slender form which will reduce the level of visual impact when compared to the current concept envelope.

7.3.6. Wind Analysis

A Pedestrian Wind Assessment (Appendix N) of the EIS has been undertaken to provide a qualitative assessment of the likely impacts of the proposal on local pedestrian-level wind conditions. Wind speeds at all locations within and around the site are compliant with the intended usage of each area of the proposed development and compliant with the City of Sydney safety and comfort criteria. The height and form of the proposed tower therefore have acceptable impacts in relation to pedestrian wind conditions.

7.4. HAS THE WRITTEN REQUEST ADEQUATELY ADDRESSED THE MATTERS IN SUB-CLAUSE (3)? – CLAUSE 4.6(4)(A)(I)

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3).

Each of the sub-clause (3) matters are comprehensively addressed in this written request, including detailed consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. The written request also provides sufficient environmental planning grounds, including matters specific to the proposal and the site, to justify the proposed variation to the development standard.

7.5. IS THE PROPOSED DEVELOPMENT IN THE PUBLIC INTEREST? – CLAUSE 4.6(4)(B)(II)

Clause 4.6(4)(a)(ii) states development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied the proposal will be in the public interest because it is consistent with the objectives of the development standard and the objectives for the zone.

The consistency of the development with the objectives of the development standard is demonstrated in Table 2. The proposal is also consistent with the land use objectives that apply to the site under Sydney LEP 2012. The site is located within the B8 Metropolitan Centre zone. The proposed development is consistent with the relevant land use zone objectives as outlined in Table 3.

Table 3 Assessment of Compliance with Land Use Zone Objectives

Objective	Assessment
<i>To recognise and provide for the pre-eminent role of business, office, retail, entertainment and tourist premises in Australia’s participation in the global economy.</i>	The height variation will provide additional contemporary commercial floor space, which will contribute to the pre-eminent role of Australia’s participation in the global economy and commensurate with Sydney’s global status by providing new commercial and retail opportunities.
<i>To provide opportunities for an intensity of land uses commensurate with Sydney’s global status.</i>	The height variation provides opportunities for additional commercial floor space, which allows for the efficient development of an important CBD site that is located above new public transport infrastructure. The proposed density is consistent with the Central CBD core characteristic and contribute to Sydney’s global status.

Objective	Assessment
	<p>The proposed built form is consistent with the Sydney DCP 2012 guidelines for development within the tower cluster areas under clause 6.21E of the Sydney LEP 2012. As such, the proposed tower form is commensurate with the anticipated scale and density of development within Sydney CBD and in particular within a tower cluster area.</p>
<p><i>To permit a diversity of compatible land uses characteristic of Sydney's global status and that serve the workforce, visitors and wider community.</i></p>	<p>The height variation provides opportunities for additional commercial floor space, which will be occupied by a diversity of new retail and businesses in the future that serve the workforce, visitor and the wider community.</p>
<p><i>To encourage the use of alternatives to private motor vehicles, such as public transport, walking or cycling.</i></p>	<p>The height variation will not result in the provision of additional car parking spaces above what is allowed under the Sydney LEP 2012 rate and which was located on the site prior to demolition. Therefore the height variation does not hinder the ability of the development to encourage the use of public transport and active transport such as walking and cycling.</p>
<p><i>To promote uses with active street frontages within podiums that contribute to the character of the street.</i></p>	<p>The height variation does not hinder the site's ability to provide retail uses within the podium and the activation of street frontages via these retail uses.</p>
<p><i>To promote the efficient and orderly development of land in a compact urban centre.</i></p>	<p>The height variation demonstrates a more efficient and orderly development of the site in the centre by providing a scale and density of development consistent with the Central Sydney Planning Strategy provisions without compromising public amenity.</p>
<p><i>To promote a diversity of commercial opportunities varying in size, type and function, including new cultural, social and community facilities.</i></p>	<p>The height variation provides the opportunity for a diversity of commercial opportunities varying in size, type and function, which will be developed further as part of the future Detailed SSD.</p>
<p><i>To recognise the important role that Central Sydney's public spaces, streets and their amenity play in a global city.</i></p>	<p>The height variation does not compromise the amenity of Central Sydney's public spaces and can comply with the sun access plane controls for The Domain and Martin Place.</p> <p>The proposed building height and tower form has been informed by an Urban Design and Built Form Report prepared by FJMT (Appendix E of the EIS) and details the proposed building envelope (Appendix G of the EIS) and indicative reference scheme for the site (Appendix H of the EIS), demonstrating that the site can accommodate the future OSD without significant detrimental impact to the streetscape and public domain amenity.</p>

Objective	Assessment
	Further, the proposed building envelope has been the subject of pedestrian wind comfort and safety and daylight testing to ensure that the built form results in better or equivalent impacts compared to a base case building envelope in accordance with the provisions of the Sydney Development Control Plan 2012 (Sydney DCP 2012).
<i>To promote the primary role of the zone as a centre for employment and permit residential and serviced apartment accommodation where they complement employment generating uses.</i>	The height variation promotes the primary role of the zone as a centre for employment by providing additional commercial floors.

7.6. HAS THE CONCURRENCE OF THE PLANNING SECRETARY BEEN OBTAINED? – CLAUSE 4.6(4)(B) AND CLAUSE 4.6(5)

The Secretary can be assumed to have concurred to the variation under Department of Planning Circular PS 18–003 ‘Variations to development standards’, dated 21 February 2018. This circular is a notice under 55(1) of the *Environmental Planning and Assessment Regulation 2021*.

Consent authorities for SSD may assume the Secretary’s concurrence where development standards will be contravened. Any matters arising from contravening development standards will be dealt with in Departmental assessment reports.

The matters for consideration under clause 4.6(5) are considered below.

- **Clause 4.6(5)(a) – does contravention of the development standard raise any matter of significance for State or regional environmental planning?**

The proposed variation to the height of building development standard will not raise any matter of significance for State or regional environmental planning. It has been demonstrated that the proposed variation is appropriate based on the specific circumstances of the case and would be unlikely to result in an unacceptable precedent for the assessment of other development proposals.

- **Clause 4.6(5)(b) - is there a public benefit of maintaining the planning control standard?**

The proposed development achieves the objectives of the height of building standard and the land use zone objectives despite the technical variation to the existing control outlined in clause 4.3 of the Sydney LEP 2012.

The proposed development achieves the objectives of the zone despite the interim non-compliance. There is no public benefit in maintaining development standard and the land use strict compliance with the development standard as there are no unreasonable impacts that will result from the variation.

As the proposed built form is consistent with the Sydney DCP 2012 guidelines for development within the tower cluster areas under clause 6.21E of the Sydney LEP 2012, the interim variation can achieve the desired development outcome envisioned under the Central Sydney Planning Strategy. Strict compliance with the existing height standard outlined in clause 4.3 would significantly restrict the delivery of additional employment generating floor space above a new metro station.

The proposal is consistent with the public interest as it promotes the orderly and efficient use of land. Maintaining the development standard would not result in a public benefit. If the height standard was to be maintained, outcome of the key benefits associated with the proposal will not be achieved.

There is no material impact or benefit associated with strict adherence to the development standard and there is no compelling reason or public benefit derived from maintenance of the standard.

- **Clause 4.6(5)(c) – are there any other matters required to be taken into consideration by the Secretary before granting concurrence?**

Concurrence can be assumed, however, there are no known additional matters that need to be considered within the assessment of the clause 4.6 variation request prior to granting concurrence, should it be required.

8. CONCLUSION

For the reasons set out in this written request, strict compliance with the height of building standard contained within clause 4.3 of Sydney LEP 2012 is unreasonable and unnecessary in the circumstances of the case. Further, there are sufficient environmental planning grounds to justify the proposed variation and it is in the public interest to do so.

It is reasonable and appropriate to vary the height control to the extent proposed for the reasons detailed within this submission and as summarised below:

- The height variation is intended to be temporary as the proposed building height is consistent with the proposed site-specific height provision under the Planning Proposal request, which has received Gateway determination from the DPE.
- The proposed built form complies with the sun access plane and no additional overshadowing controls for The Domain and Martin Place. This demonstrates that the overall development is of a scale consistent with the built form scale envisaged as part of the Central Sydney Planning Strategy, and the height variation does not represent an overdevelopment of the overall site and will not restrict the overall site's ability to protect public domain amenity.
- The height variation will help to deliver additional employment generating floor space in Central Sydney, which will increase Central Sydney's capacity for economic growth.
- Strict compliance with the height control would hinder the ability for the overall site to provide high quality over station development in Central Sydney and restrict the provision of important commercial floor space above public transport infrastructure. The proposal is consistent with the public interest as it promotes the orderly and efficient use of land and integration with public transport infrastructure. Maintaining the development standard would not result in a public benefit.
- The area of non-compliance will not create adverse environmental or built form impact to surrounding developments and the public domain.

For the reasons outlined above, the clause 4.6 request is well-founded. The development standard is unnecessary and unreasonable in the circumstances, and there are sufficient environmental planning grounds that warrant contravention of the standard. In the circumstances of this case, flexibility in the application of the height of building control should be applied.

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