



- Changes to the wording of Condition A7 Hours of operation to allow for an extension of hours; and
- Removal of Condition A4 Time Limit Approval.

By the Modification Request¹, we also note the admissions that there would be increases in traffic (and presumably on our part, also parking) as a consequence of the boat storage.

Executive Summary

1. The Modification Request involves a different use or an activity of a different nature being carried out to that originally approved. Consequently, the environmental impact of that use or activity was never assessed in the grant of approval for the Approved Project. The current (unlawful) use of the site for dry boat storage is giving rise to boating safety/navigational issues and substantial assessment of the environmental consequences of the proposed dry boat storage use is required. Accordingly, it cannot be said that the Modification Request will have "limited environmental consequences beyond those which had been the subject of assessment" in the Approved Project.
2. Absent the modification having limited environmental consequences beyond those which had been the subject of assessment in the Approved Project there is no jurisdiction or power under s75W of the *Environmental Planning and Assessment Act 1979 (EPA Act)* to approve the Modification Request. Accordingly, whether or not the Modification Request is consistent with one or more of the objectives of the Port and Employment Zone under *Sydney Regional Environmental Plan No.26 – City West (SREP 26)* becomes irrelevant.
3. Further and additionally, the provision of 176 dry boat storage bays will result in a project that is "radically different" to the Project Approval. It is not within the Minister's power to approve a modification to a proposal that is radically different to the Project Approval.
4. Irrespective of these matters, the Modification Request is deficient and lacking in detail such that the Minister could not approve it even if there was power to do so.
5. White Bay 6 is simply an inappropriate site for dry boat storage.

No power or jurisdiction

6. In our view, the Modification Request is beyond the scope of the Minister's power under s75W. Our reasons for this view follows.
7. It is well understood that:
 - (a) The leading authority on the scope of the modification power in section 75W is *Barrick Australia Ltd v Williams* [2009] NSWCA 275 at [53] – [54];
 - (b) The Minister is the relevant decision maker; and
 - (c) The Minister must be satisfied that the modified proposal will have only limited environmental consequences beyond those which have been the subject of assessment under the original approval.

¹ Page 2, 7th bullet point

8. Having made these observations, we note the Court has made it clear that the Minister has an obligation to be satisfied that the request for modification of a project falls within the scope of s75W, as was stated by Basten JA in *Barrick* at [38]:

"38. The preferred construction of s75W is that it confers on the Minister an implicit obligation to be satisfied that the request falls within the scope of the section."

9. Additional to the above, the Minister's obligation to be satisfied that the request falls within the scope of s75W must not only be reasonably open on the facts but must also take into account all relevant considerations. This will include all the usual merit considerations, such as visual impacts, carparking and the like as well as unique considerations to the request such as vessel movements and vessel wash, together with the environmental consequences arising from the proposed changes to the **nature of the use of the approved project to include a dry boat storage facility.**
10. In our view, the proposed modification to the approved project is beyond the scope of the power in s75W of the EPA Act as:
- (a) The only project to which Part 3A of the EPA Act applies is that project which was declared by the Minister pursuant to s75B of the EPA Act. Relevantly, the declared project was for a "marine refuelling and supply facility";
 - (b) The only project which can now be modified under s75W is the project which was approved by the Minister on 12 June 2009 ("Approved Project"). Relevantly, the approved project was described in the instrument of approval as the Construction of a Marine Refuelling and Supply Facility;
 - (c) The Approved Project did not include the provision for permanent dry boat storage², or at least not in the way now contemplated;
 - (d) The Modification Request seeks to modify the Approved Project to include development for the purposes of permanent dry boat storage for up to 176 boats; and
 - (e) The environmental impact of the proposed use of the land as a dry boat storage has not been the subject of environmental assessment as part of the assessment process for the Approved Project. It is a different use of the land to that of a refuelling facility and is a use which is likely to have more than limited environmental consequences which require assessment.
11. For example, a dry boat storage facility could reasonably be expected to generate additional car movements for those customers coming and going from their boats. So much is evident by the proposed increase in carparking set out in the Modification Request.
12. Further, and more particularly, it can also reasonably be expected that the stored boats will involve additional boat movements – both in and out of the facility and potential safety/navigational issues given the proximity of the cruise ship terminal as well as additional wash. The environmental consequences of these additional boat movements (and antecedent increased wash) were not the subject of assessment of the Approved Project as they were not then proposed.
13. In our submission, substantial assessment is now required of the environmental consequences of the additional boat movements arising from the proposed dry boat

² see Director General's Assessment Report dated February 2009 at p19

storage facility in the Modification Request. For example, the Director-General's Requirements for our client's approved dry boat storage facility at Rozelle Bay included assessment requirements for our client to undertake its EIS in accordance with, and taking account of the matters within, the Departments EIS Guidelines for Marinas and Related Facilities. Those guidelines include a range of items relevant for assessment but which have not been dealt with by the assessment in respect of the Project Approval or the Modification Request. In particular under those guidelines our client was required to assess the impacts of a range of issues including water transport issues as follows:

- a) the effect of construction and operation including the increased boating activity generated by the proposal on:*
 - i) commercial shipping, navigational lanes and markers; the need for changes to signage or markers*
 - ii) naval waters and activities*
 - iii) commercial fishing grounds and aquaculture*
 - iv) ferries (vehicular and passenger); routes, terminals and pick-up points*
 - v) sea planes; aerodromes, terminals, fuelling or parking areas*
 - vi) recreational boating, fishing, swimming, baths, boat hire, boat ramps, public wharves*
- b) boating safety issues, including:*
 - i) the navigable width of the marina entrance, layout and widths of interior channels, warning signs, speed limits, channel maintenance*
 - ii) rescue and emergency services*
 - iii) provision for educational and informational material such as signage, brochures, maps and notices detailing:*
 - local aquatic hazards*
 - safety measures and procedures relating to refuelling, spillage, rescue*

14. There having been no assessment of any those impacts referred to above it cannot be said, and the Minister could not reasonably form the requisite opinion, that the modified proposal will have only limited environmental consequences beyond those which have been the subject of assessment under the original approval.
15. In fact, somewhat misleadingly, the Modification Request advances the proposition that the Modification Request will have limited environmental impacts³. This claim by the proponent is surprising considering the carparking nearly triples, there will now be 176 stored boats and the waterfront appearance will now be inundated with dry boat storage racks where previously there were none.
16. In our view, properly considering the changed nature of the proposed use, the Minister, and indeed any person in the Ministers position, acting reasonably and having regard to the relevant law and facts of this matter, would come to the same conclusion – that is, that:
 - (a) The Modification Request is not a request to modify the existing Approved Project; and
 - (b) The Modification Request, involving a new and or different use of land which has not been the subject of any previous environmental assessment, the changed nature of the use cannot properly be said to have limited environmental consequences beyond those which have been the subject of assessment under the original approval.
17. In our submission, detailed environmental assessment is required and this is beyond the scope of a s75W modification application and, accordingly, a fresh application under Part 4 of the EPA Act is required.

³ See, for example, section 3.3.2, page 24, first paragraph

18. It follows that, in our view, any approval of the Modification Request is beyond power and would be susceptible to legal challenge by way of judicial review proceedings in the Land & Environment Court.

Continued unlawful use

19. White Bay 6 has been used unlawfully to store boats. This is evident by the penalty infringement notice issued by the Department to White Bay 6 and the undertaking given by that Company to the Department. That use is either as a separate use (as dry storage) or in breach of the Approved Project, which did not include dry boat storage. Accordingly, the use of the subject land for dry boat storage (at least in excess of 50 boats) constitutes a breach of the EPA Act.
20. Whilst we accept that past unlawful use is not, of itself, a relevant consideration⁴, this does not mean, however, that past use – without any consideration of its unlawfulness – cannot ever be relevant⁵. Indeed, the Court has held that the environmental impacts of past conduct (regardless of whether it is unlawful) is a relevant consideration in assessing a prospective use for which consent is sought⁶.
21. The site has been operating unlawfully as a dry boat storage in close proximity to the cruise ship terminal without the imposition of the appropriate regulatory controls or safeguards relating to navigation and in particular the Roads and Maritime Services “Big Ships” policy. We are instructed that, in the absence of the implementation of appropriate controls and safeguards, it is reasonable to expect that there has been boating safety/navigational issues arising from the unregulated use of the site for dry boat storage on the land. In our submission, these boating safety/navigational issues arising from the past unlawful use should be fully investigated and assessed consistently with the Big Ships policy and in a manner consistent with the assessment requirements for our client’s dry boat storage facility (as outlined at paragraph 13 above).
22. Any safety and navigational incidences arising from the past unlawful use of the site in our submission are relevant and highlight that the environmental consequences from the proposed change of use of the Approved Project for dry boat storage are not limited and substantial assessment is required.

Merit Considerations

23. In addition to the legal impediments that we have raised above, the Modification Request should not be approved for a number of merit related matters, details of which follow.

Traffic & Parking

24. The original proposal included carparking for 30 vehicles contained within the site in an area outside of the day to day operations of the facility.
25. The modified proposal now proposes to introduce carparking within the operation areas of the facility including the storage placement area. This gives rise to a conflict between the operators and boat owners. No assessment of these impacts has been undertaken, nor has any management plan been proposed.

⁴ See *Jonah Pty Limited v Pittwater Council* (2006) 144 LGERA 408

⁵ *Jonah* at [37]

⁶ *Jonah* at [38]

26. Added to this is the question of whether adequate car parking has been proposed (even assuming the proposed areas could be so used, which we maintain they cannot).
27. The Australian Standard for marinas sees a parking requirement for dry boat stores of between 0.2 to 0.4 spaces per vessel stored.
28. This equates to a need for between 35 and 70 spaces for the dry boat use alone. Add to this the car parking requirement for the other proposed uses on the site and it can easily be seen that the proposed number of car parking spaces will not meet the demand the project generates.
29. The car parking need is increased by the inappropriate nature of the site. It is effectively an island with no direct access from a public road. All access is via the port and is restricted. This means that there are no direct public transport solutions for the site. Similarly, pedestrian access is restricted and, when available, pedestrians must transit the port before arriving at the proposed facility. These facts lead to the reality that private car access is the only practical means of access to the proposed dry boat store. As such the demand for parking will be high and higher than what is proposed by the Modification Request.

Boat Safety – Vessel Management

30. The increase in the number of vessels stored to from 50 to 176 will cause a substantial increase in vessel numbers entering and exiting the facility. The EA states that the number leaving will be staggered due to the capacity constraints of the fork lift truck. It remains silent on the fact that this capacity constraint will limit the ability of the facility to lift returning boats from the water as they arrive back at the facility. The nature of boating, and the weather on Sydney Harbour, is such that on a summer weekend most of the boats return at the end of a day. If a southerly buster arrives as, is often the case, the facility will see all the boats return, mostly at the same time.
31. When this occurs up to 40 boats will arrive at the facility. The lifting constraints of the fork lift trucks, and the limitation on water berth numbers, will see boats waiting in open water for berths to become available.
32. This scenario will be occurring in an extremely busy part of the harbour that is occupied by cruise ships, ferries, commercial and recreational water craft, all of which have to negotiate a bottle neck in the waterway.
33. The proposed facility does not have the capacity to safely manage the risks associated with this situation and the EA is deficient in its lack of detail and expert advice around vessel management.

Visual Impact

34. The visual assessment that has been carried out compares the proposal in the Modification Request to modification 4⁷. This is the incorrect test. The assessment must be carried out against the Project Approval.
35. Contrary to what is set out in the Modification Request, the Project Approval did not permit a building that was 11.4m in height, but rather one that had a maximum height

⁷ See Figure 5.2

of 9.8m which height decreased at the western end. This fact alone shows the flaw in the visual assessment.

36. Furthermore, the visual assessment has been carried, with regards to the harbour front storage, not against the Project Approval, but rather against what is (unlawfully) existing.

Modification Request not compared against the Project Approval

37. In a large number of instances, the Modification Request has not been compared against the Project Approval.
38. For example, and without being exhaustive, the:
- (a) Project Approval did not authorise dry boat storage as a standalone enterprise. The Modification Requests suggests that it did;
 - (b) Modification Request compares the built form elements to modification 4; and
 - (c) The visual assessment has been compared against either modification 4 and or unlawful structures;

Inadequate information/assessment

39. In addition to the merit consideration listed above we submit that following assessment items are either inadequate and or do not exist:
- (a) The EA provides that the rise in number of boats stored to 176 will have no further impact. On any assessment, this could not be the case as a rise to this capacity will increase vessel movements and the need for car parking. Both these factors will have consequential impacts on traffic, noise, air pollution and most importantly vessel management;
 - (b) The EA fails at all to assess the impact on vessel movements, both in and out of the facility, including upon arrival back at the facility;
 - (c) The EA fails completely to assess the impact from wash due to the increase in the number of boats;
 - (d) The reports justifying the need are out of date and do not reflect the actual demand as evidenced by Sydney Boathouse now in year 4 of trade and having only reached 60% occupancy of the first of 2 dry stores;
 - (e) The EA suggests that vessel movements will be the subject of an updated VMP incorporated into an updated MTMP (even though no maritime assessment concerning the increased number of vessels has been carried out). As the matter stands, neither the VMP or the MTMP are included in the EA or Modification Request. Leaving such essential and important matters for later determination will render the proposal uncertain (and defective in a legal case)⁸; and

⁸ See *Farah v Warringah Council & Ors* [2006] NSW LEC191. See also *Weal v Bathurst City Council* (2000) LGERA 181 & *Remath Investments No.6 v Botany Bay Council* (No.2) unreported.

- (f) No assessment at all has been carried out regarding internal vehicle and pedestrian safety/conflict, particularly given the proposed carparking spaces and arrangements.

Summary

40. Leaving aside the legal impediments outlined earlier in this submission precluding the Minister from approving the proposal, we submit that White Bay 6 is not a site suited to dry boat storage. This is why it was specifically prohibited by Ports as a use in the original expression of interest tender. Its land and water areas are too small to safely handle the numbers of boats being proposed. The adjacent waterway is narrow, constrained and heavily used by large commercial craft. The location of the adjacent cruise terminal and fuelling facility intensifies vessel traffic in the area. It is not well connected to the road network as access can only be gained via the port and as such is restricted. There are no public transport links to the site. These factors compound to create a high demand for onsite parking which cannot be met by the size of the site.

We look forward to your response.

Should the Department receive a response to this letter/submission would you kindly let us know so that we might respond accordingly?

In the meantime, should you wish to discuss this matter please do not hesitate to contact Jason Hones of our office.

Yours faithfully
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