

19 May 21

Karl Fetterplace
Department of Planning Industry and Environment
4 Parramatta Square,
Parramatta NSW 2150

Dear Karl

RE: SSD-10464 50-52 Phillip Street New Hotel/Residential Building Stage 1 Concept DA

We are writing to object to the Stage 1 Concept State Significant Development Application (SSDA) for the site at 50-52 Phillip Street Sydney (the site), which was exhibited between 15th April 2021 and 12th May 2021. We are acting on behalf of The Owners Strata Plan 31979, the adjoining property at 56-70 Phillip Street (see **Figure 1**).

The SSDA seeks approval for *'the staged delivery of a new landmark mixed-use luxury hotel and branded residential building in Sydney's Central Business District (CBD)'*. The proposed site (see **Figure 1**) is currently occupied by a 6 storey heritage building, 2 commercial buildings and a 12 storey modern office building which is located to the south of the site, adjacent to 56-70 Phillip Street.

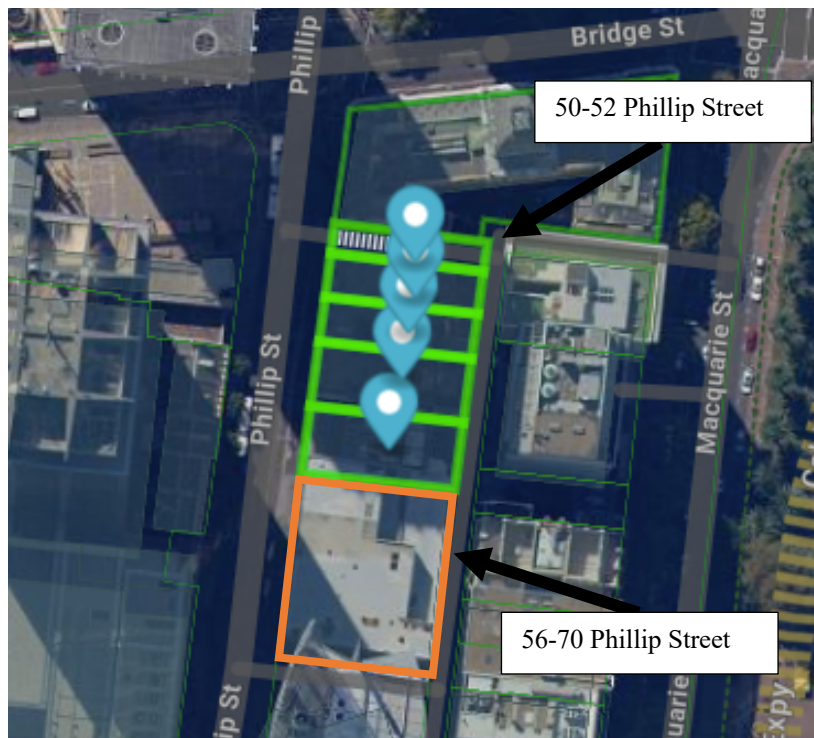


Figure 1: Site Context

Source: Mecone Mosaic

We have reviewed the exhibited documents and have significant concerns in relation to:

- The inappropriate protrusion of the proposed development into the nationally significant Governors' Domain and Civic Precinct, over an item of State heritage significance.
- The implications of the proposed massing upon the orderly and efficient development of the rest of the street block, and in particular our client's adjoining property.

The proposal also raises a number of concerns and non-compliances with Sydney Local Environmental Plan 2012, Sydney Development Control Plan 2021 and the Central Sydney Planning Strategy. Specifically, our objection to the proposal is based on the following issues:

1. Inclusion of Laneway in the Site
2. FSR Attributed to the Laneway
3. FSR Calculation
4. Absence of Clause 4.6 Request - FSR
5. Building Envelope and Sun Access Planes
6. Setbacks – Front and Side
7. Site Isolation (Karavellas Planning Principle)
8. Heritage Impact
9. Heritage Floor Space (HFS) Purchase
10. Traffic Impacts

1. Inclusion of Laneway in the Site

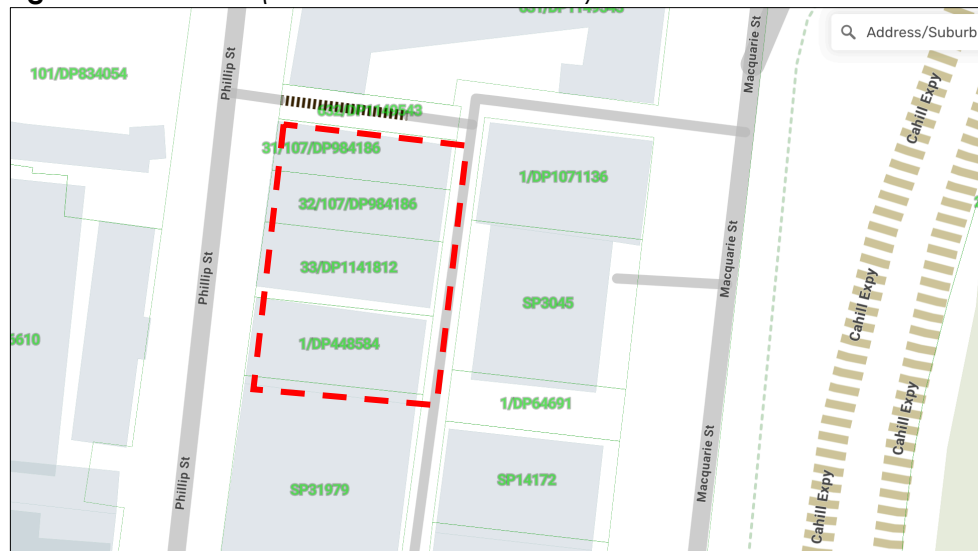
Section 2.2 of the EIS describes the site of the SSDA as follows:

*"The formal address of the site is 50-52 Phillip Street, Sydney, and it is legally described as **Lots 31 and 32 in DP984186 and Lot 33 in DP1141812 (50 Phillip Street) and Lot 1 in DP448584 (52 Phillip Street)**. The site is rectangular in shape with a total area of 1,681.1m². The separate lots within the site are under different ownership, with 50 Phillip Street owned by the NSW Government and 52 Phillip Street owned by Built."*
(emphasis added)

The location of these allotments is indicated at **Figure 1**. Notably, the description of the site does not include Lot 632/DP1149543, which is the covered lane to the immediate north of these allotments. The registered proprietor of Lot 632 is Government Property NSW. Lot 632 does not appear to be limited in stratum (as indicated in the EIS at page 28).

There does not appear to be any reference in the EIS to owner's consent having been obtained from Government Property NSW. As such, the proponent will need to obtain owner's consent from Government Property NSW before any DA can be determined (see clause 49(1)(b) of the *Environmental Planning and Assessment Regulation 2000 (EPA Regulation)*), unless the Planning Secretary has notified the proponent in writing that the development constitutes "public notification development", and notification has been given in accordance with clause 49(2) of the EPA Regulation.

Figure 1 - Cadastre (Source: Mecone Mosaic)




The Site Described in EIS

Notwithstanding the above description of the site, in consideration of the FSR of the proposed development, Section 5.4 of the EIS states:

*“An anomaly in the floor space permissions has been identified in relation to the site. This anomaly relates to a portion of the 52 Phillip Street site which is not provided a ‘mapped’ maximum floor space ratio (FSR) under the Sydney LEP 2012. This anomaly is illustrated in **Figure 33.**”*

The accompanying Figure 33 of the EIS is included at **Figure 2.**

Figure 2 - Extract of Figure 33 of EIS (Annotation of Lot 1 DP 448584 added)



Not only does Figure 33 not include Lot 1 DP448584 (52 Phillip Street), which is described as part of the site above, it also includes Lot 632 DP1149543 (the laneway) which is owned by Government Property NSW as established above.

Our records (Mecone Mosaic) indicate that the various allotments described as being part of the site as having the following areas:

- Lots 31 DP984186: 295 sqm
- Lot 32 DP984186: 306 sqm
- Lot 33 DP1141812: 442 sqm
- Lot 1 in DP448584: 460 sqm
- 632 DP1149543: 202 sqm

The total area of the above allotments, including the laneway is 1,705sqm, or 1,503sqm if the lane is excluded. The EIS claims the area of the site is 1,681.1sqm, presumably including the lane. If the 202sqm of the lane is deleted from the purported 1,681.1sqm metre site area, the site would have an area of 1,479.1sqm.

2. FSR Attributed to the Laneway

As discussed at Section 1 above, Section 5.4 of the EIS describes the white shading of the laneway as an *'anomaly in the floor space permissions'*. A cursory review of the FSR Map to LEP 2012 indicates that most lanes are not coloured, and the white shading of the laneway is therefore not an anomaly. The EIS then goes on to review the 'Exclusions from site area' described in Clause 4.5(4) of the LEP and concludes that as the lane is not precluded from being part of the site area, it should be included in the calculation of the FSR permitted on the site.

The EIS goes on to argue that as there is no FSR shown on the FSR Map for the laneway, the laneway is *"essentially unrestricted in generating floor space"*. The EIS then asserts, however, that it is appropriate to *"apply the same framework for floor space applying to the remainder of the site"*.

The above logic is fundamentally flawed in several regards:

- The laneway is not included in the description of the site to which the application relates.
- If the FSR mapping of the laneway is an anomaly, which it does not appear to be, then it simply means that FSR is not regulated on this land and that any GFA proposed on that land must be considered on its merits.
- An assertion that an anomaly exists in a statutory instrument is not sufficient to ignore the relevant provision. Should it be demonstrated that an anomaly does exist, this can only be dealt with via a planning proposal to correct the anomaly, or through a Clause 4.6 variation request.
- It would be absurd to suggest that an infinite entitlement is established, or that such an entitlement can be transferred to other parts of the site that are subject to an FSR standard.
- There is no basis for the assertion that the FSR standard applicable to adjoining land should be assumed.

If the laneway were part of the site, any GFA proposed on the laneway would need to be considered on its merits and the GFA entitlement of the land coloured on the FSR Map should be calculated on the basis of the area of land so coloured.

3. FSR Calculation

The SEARs for the project state:

1. Statutory and Strategic Context

- o Address all relevant Environmental Planning Instruments, plans, policies and guidelines, including (but not limited to those) outlined at Appendix A.
- o The permissibility of the proposal, detailing the nature and extent of any prohibitions that apply to the development.
- o **Identify compliance with the development standards applying to the site and provide a detailed justification for any non-compliances.**
(emphasis added)

The EIS asserts that a maximum FSR standard of 15:1 applies to the site, 'based on the proposed land uses'. Contrary to the SEARs, and normal planning assessment, the EIS does not provide calculations to demonstrate how the differential 'accommodation floor space' entitlements of the different land uses have been proportionally calculated in accordance with Clause 6.4(2) of the LEP. The site is indicated on the FSR Map to the LEP as being subject to an 8:1 FSR, within Area1, in which 'hotel or motel accommodation' is permitted an additional 6:1 Accommodation Floor Space and 'residential accommodation' is permitted an addition 4.5:1 Accommodation Floor Space.

Section 5.5 of the EIS states that up to 10% additional floor space will be sought for design excellence under clause 6.21 of LEP,

Our calculations on the above basis are provided at Table 1.

Table 1 – Calculation of GFA Potential

	FSR	Proportion of total	Calculation	
Base FSR	8:1	-	8 X 1,479.1=	11,832.8
Residential AFS	4.5:1	18.5%	4.5 x 0.185 x 1,479.1=	1,231.4
Hotel AFS	6:1	81.5%	6 x 0.815 x 1,479.1=	7,232.8
Subtotal	-	-	-	20,297.0
Design Excellence	+10%	N/A	23,068.9 x 0.1	2,029.7
Total				22,326.7
				(+ end of journey space)
Maximum FSR Permitted			(22,326.7/1,479.1)	15.09:1
Proposed FSR			(25,374.50 / 1,479.1)	17.16:1
Purported FSR			(25,374.50 / 1,681.1)	15.09:1
			(15:1 stated in EIS, not 15.09:1)	

In view of the above it is clear that the proposed development – even with up to 10% additional floor space for design excellence – exceeds the applicable FSR standard.

4. Absence of a Clause 4.6 Request

Given the FSR exceedances, the proponent will need to submit a written request under Clause 4.6 of the LEP seeking to justify this contravention of a development standard. Development consent must not be granted unless the consent authority has considered a written request demonstrating that compliance with the development standard is "unreasonable or unnecessary in the circumstances of the case", and that "there are sufficient environmental

planning grounds to justify contravening the development standards". Alternatively, a planning proposal could be lodged to amend the FSR controls under the LEP.

While Clause 4.6 provides for variations to development standards such as FSR, such variations are quite uncommon in the City of Sydney, given the highly detailed testing underpinning the City's controls, and as the FSR framework underpins the Heritage Floor Space regime that funds the conservation of much of the City's historic buildings.

Furthermore, in the absence of a properly constructed and justified Clause 4.6 request from the applicant, the consent authority does not have the legal power to approve the proposed variation to the applicable LEP standard.

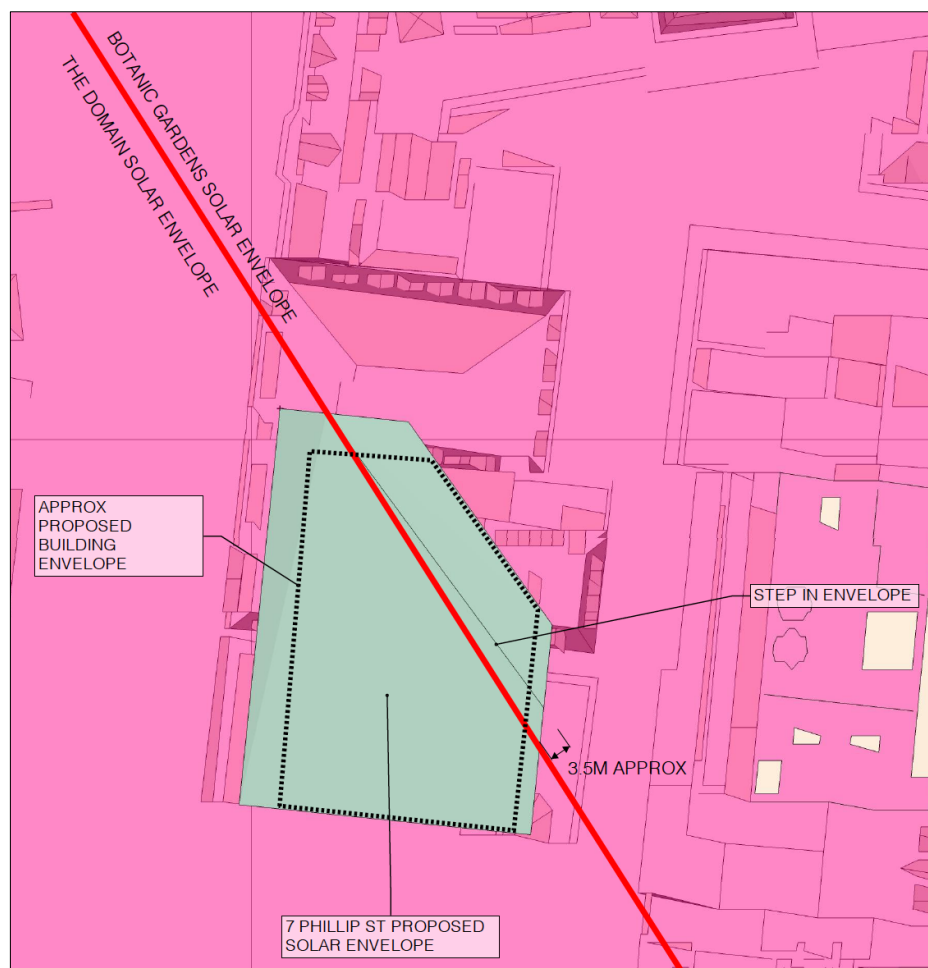
5. Building Envelope and Sun Access Planes

Being located within 'Area 3' on the Height of Buildings Map under the LEP, the maximum height is determined by The Domain and Royal Botanic Gardens Sun Access Planes (SAPs). Clause 6.17 of the LEP prohibits any building protruding above an SAP.

Kann Finch Architects have modelled the sun access planes based on initial extraction file data provided by City of Sydney Council applicable to the site (see **Attachment A**) and confirmed that there are two protrusions above the applicable SAP.

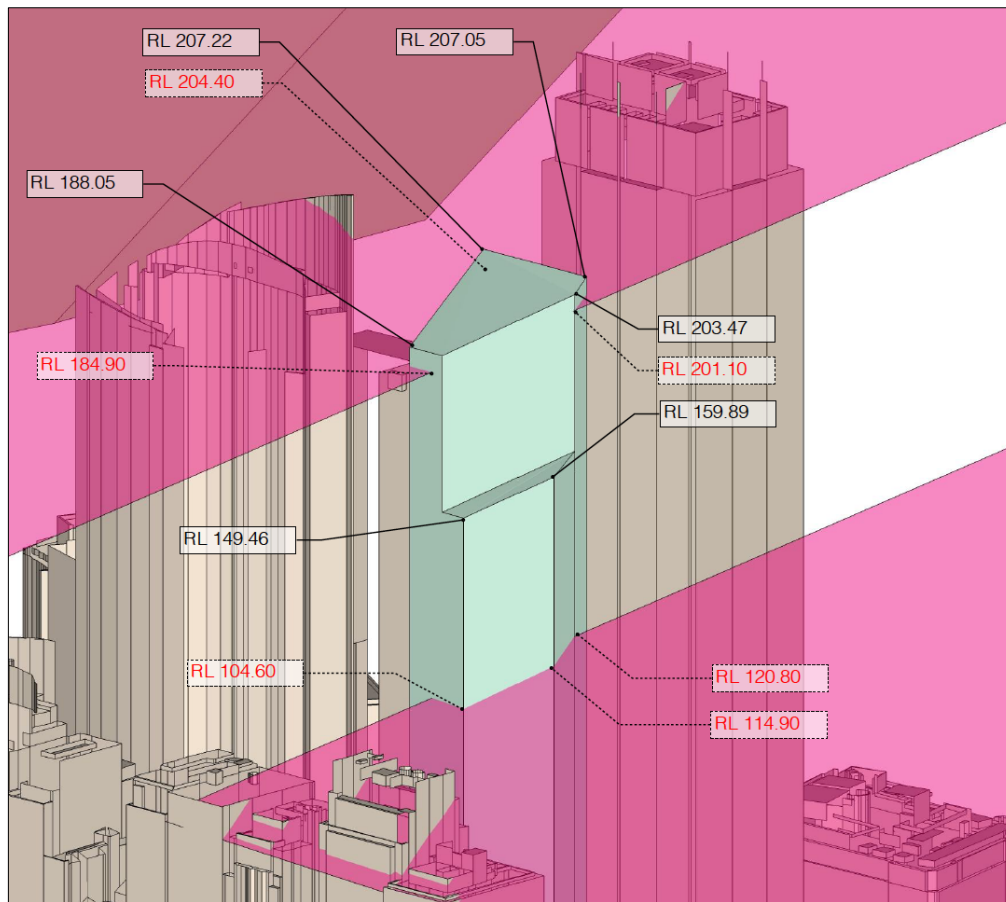
Firstly, the step in the upper level of the building does not align properly with the junction of the two SAPs, resulting in an encroachment that increases from nil in the northwest to 3.5 metres in the southeast, as shown in **Figure 3**.

Figure 3 – Testing of Interface of Domain and Botanic Gardens SAPs



Secondly, the top of the proposed building envelope extends above the Domain SAP, as shown in **Figure 4**.

Figure 4 – Testing of the Domain SAP



The submitted EIS justifies these prohibited protrusions on the basis that:

- The Draft Central Sydney 2020 Planning Proposal revises the SAP co-ordinates.
- The proposal will cast a shadow generally within the shadows cast by the existing context of taller buildings in Central Sydney.
- Section 4.38(3) of the EP&A Act provides that development consent may be granted despite being partly prohibited by an LEP.

In these regards,

- Draft Central Sydney 2020 is yet to be gazetted.
- The protection of key public places through the application of sun access planes is fundamental to the spatial arrangement of Central Sydney.
- It is difficult to see how a proposal could be found to demonstrate 'Design Excellence' pursuant to Clause 6.21 of the LEP if it is not compliant with such fundamental controls.
- While the Act provides for partially prohibited SSD, this provision should not undermine such key controls without clear demonstration that this is required to achieve an outcome of State significance.

6. Setbacks – Front and Side

Sydney Development Control Plan 2012 (the DCP) requires the following setbacks.

Front setbacks

- Weighted average of 8m above street frontage height.
- 10 m above a heritage item (a CMP may require a greater setback)

Side and rear setbacks

- 3m for a commercial building. Walls of commercial buildings without windows do not need to be set back.
- 6m for principal windows or balconies of residential buildings, serviced apartments or hotels; up to 45m in height - 12m above 45m in height
- Side and rear setbacks can be reduced with architectural features provided that:
 - (a) 6m is maintained between the main walls of each building
 - (b) separation is between sections of building walls that include service room windows
 - (c) oblique views are available to site boundaries.

Fronting lanes

- 6m from the centre line of the lane, or more if required.

Figure 5.11 to the DCP 'Separation required between buildings on the same site' is reproduced at **Figure 5**.

Figure 5 - Extract of Figure 33 of EIS (Annotation of Lot 1 DP 448584 added)

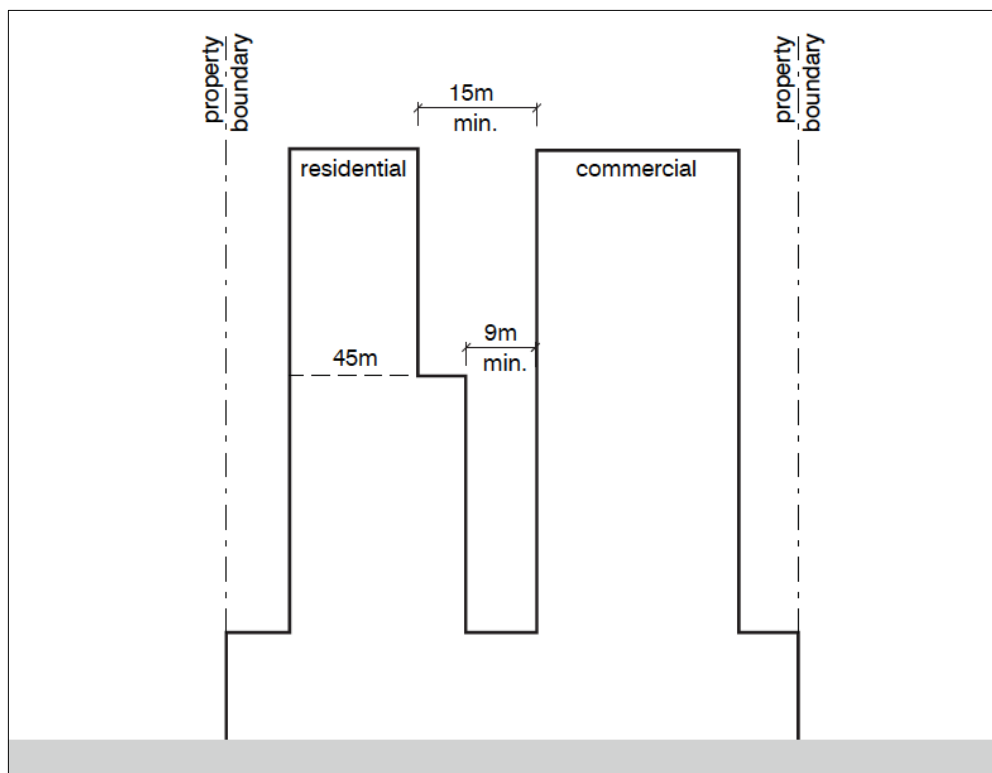


Figure 6 is an image from submitted EIS illustrating the application of these setbacks to the site and **Figures 7** illustrates the implications of the proposed building envelope upon the development potential of our client's adjoining property at 70 Philip Street.

Figure 6 - Extract of FJMT Design Report (p54)

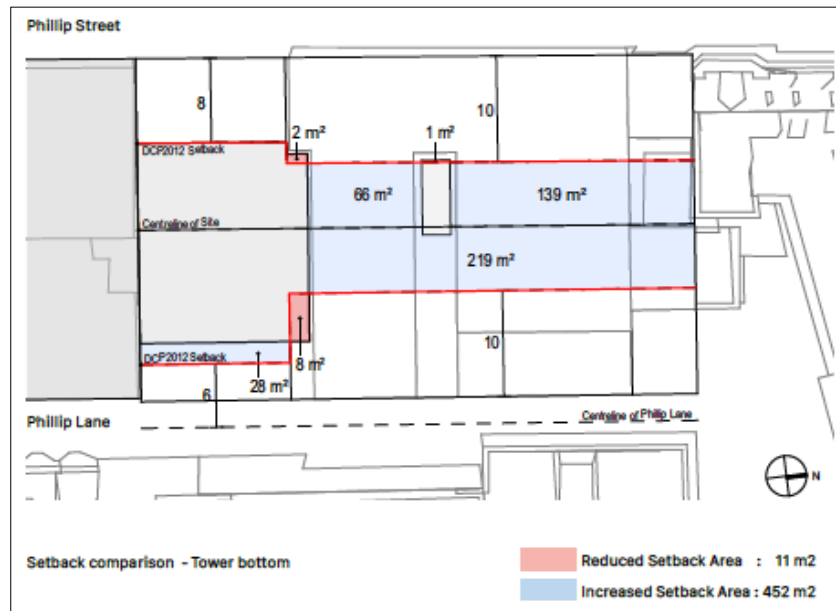
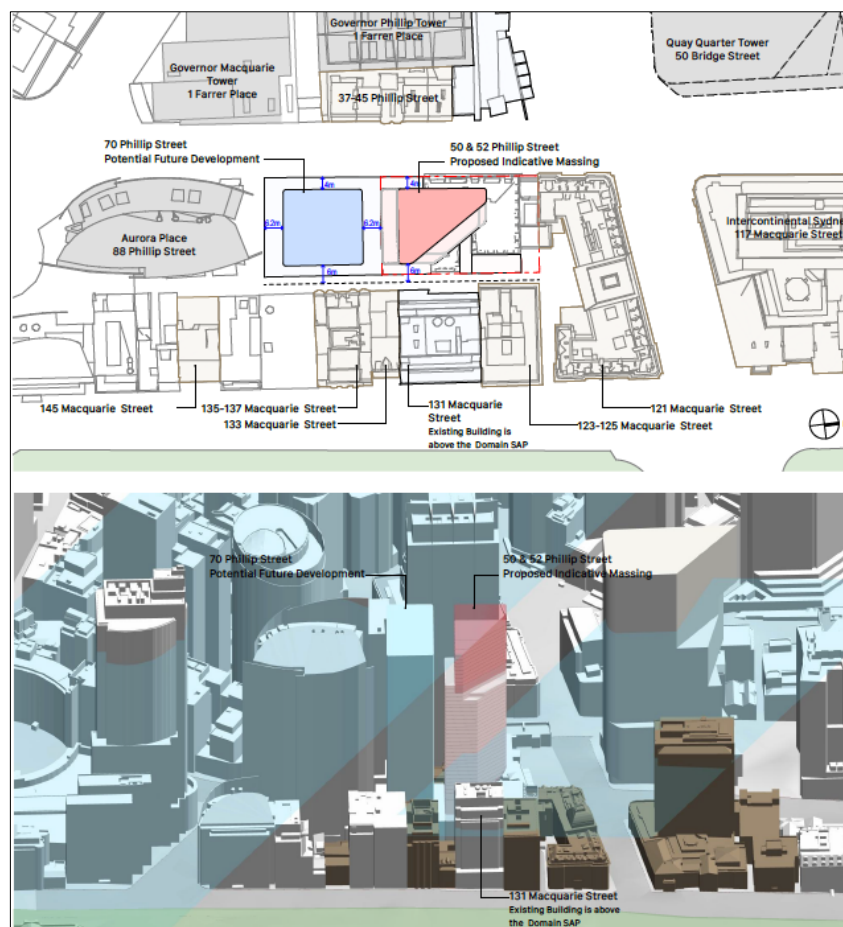


Figure 7 - Extract of FJMT Design Report (p55)



The applicant's own analysis above illustrates the following adverse implications of the proposal upon the future development potential of No. 70 Phillip Street:

- At only 650sqm, the maximum floor plate achievable on 70 Phillip will be too small for efficient commercial office, or other non-residential development.
- A wall of towers with minimal separation will be presented to the eastern edge of the CBD.
- Gaps between buildings are inadequate for solar penetration or view sharing.
- Likely wind concentration impacts of such tall, narrow building separations.

Furthermore, the site and floor plate dimensions and the height of buildings proposed are not appropriate for nil setback arrangements. The resultant tower wall form would be inconsistent with the underlying massing principles of the Central Sydney planning framework.

7. Site Isolation (Karavellas Principle)

In view of the site constraints of 70 Phillip Street discussed above, a single tower over a consolidation of 52-70 Phillip Street would provide a far more rational outcome, with suitable tower separations, view sharing, solar access and without any need to cantilever over buildings of local, State and National heritage significance.

In *Karavellas v Sutherland Shire Council (2004) NSWLEC 251*, the NSW Land and Environment Court, (the Court) established the 'Karavellas' Planning Principle, which provides that where a proposal would isolate an adjoining small site, general questions should be answered relating to the potential for amalgamation. This includes:

- Firstly, is amalgamation of the sites feasible?
- Secondly, can orderly and economic use and development of the separate sites be achieved if amalgamation is not feasible?

In relation to the first question, the principles prescribed by *Brown C in Melissa Grech v Auburn Council [2004] NSWLEC 40* provide the basis for determining a reasonable answer:

Firstly, where a property will be isolated by a proposed development and that property cannot satisfy the minimum lot requirements then negotiations between the owners of the properties should commence at an early stage and prior to the lodgement of the development application.

Secondly, and where no satisfactory result is achieved from the negotiations, the development application should include details of the negotiations between the owners of the properties.

Thirdly, the level of negotiation and any offers made for the isolated site are matters that can be given weight in the consideration of the development application.

While the decision in *Cornerstone Property Group Pty Ltd v Warringah Council [2004] NSWLEC 189* provides clarity to the second question, extending the principles of *Brown C* to state that:

The key principle is whether both sites can achieve a development that is consistent with the planning controls. If variations to the planning controls would be required, such as non-compliance with a minimum allotment size, will both sites be able to achieve a development of appropriate urban form and with acceptable level of amenity.

To assist in this assessment, an envelope for the isolated site may be prepared which indicates height, setbacks, resultant site coverage (both building and basement). This should be schematic but of sufficient detail to understand the relationship between the subject application and the isolated site and the likely impacts the developments

will have on each other, particularly solar access and privacy impacts for residential development and the traffic impacts of separate driveways if the development is on a main road.

The subject application may need to be amended, such as by a further setback than the minimum in the planning controls, or the development potential of both sites reduced to enable reasonable development of the isolated site to occur while maintaining the amenity of both developments.

While No. 70 Phillip Street is not subject to a minimum lot size per say, the required setbacks and other controls would significantly constrain the ability to achieve orderly and efficient development of No. 70 Phillip Street, should the currently proposed development be approved. There does not appear to have been any consideration of site amalgamation in the EIS and therefore the principles as outlined in the 'Karavellas' Planning Principle do not appear to have been satisfied.

8. Heritage Impact

On 9 February 2021, the Governors' Domain and Civic Precinct was included in the National Heritage List under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). As can be seen in **Figures 8 to 10** the proposed development essentially involves a building footprint located just outside the listed Precinct, but with the majority of the building footprint cantilevering into the precinct. The Chief Secretary's Building is indicatively circled in blue in both maps of the Governors' Domain and Civic Precinct.

As such, referral under the EPBC Act will be required if the proposal has the potential to have a significant impact on National heritage values.

Figure 8 – Governor's Domain and Civic Precinct

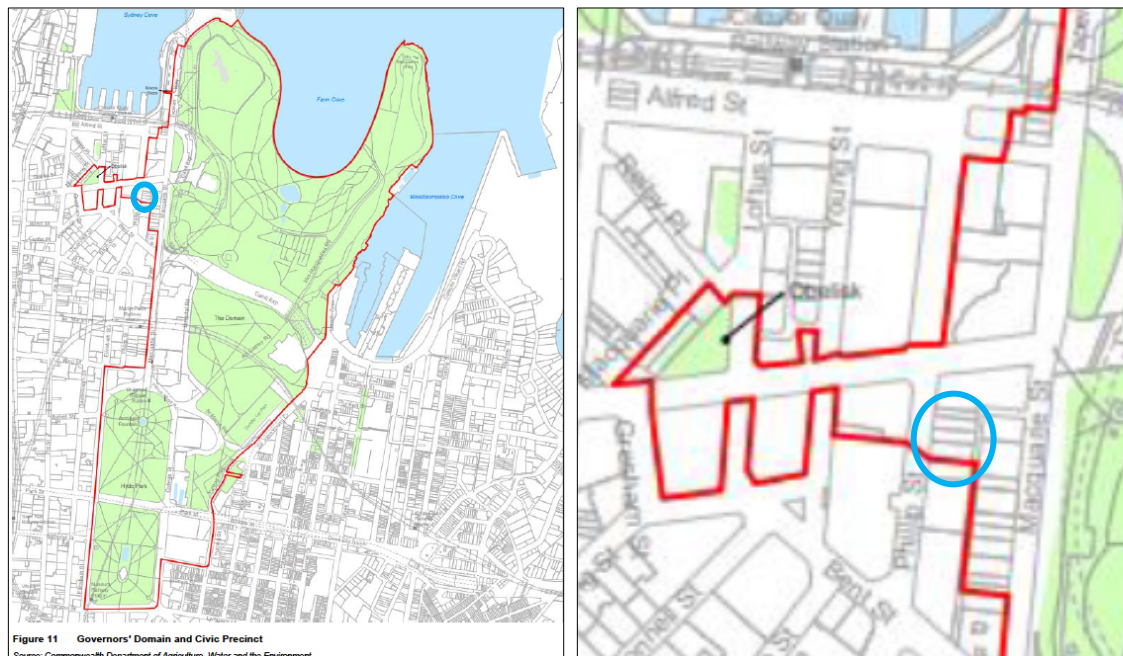


Figure 9 – Encroachment into Governor's Domain and Civic Precinct (Source: FJMT annotated)

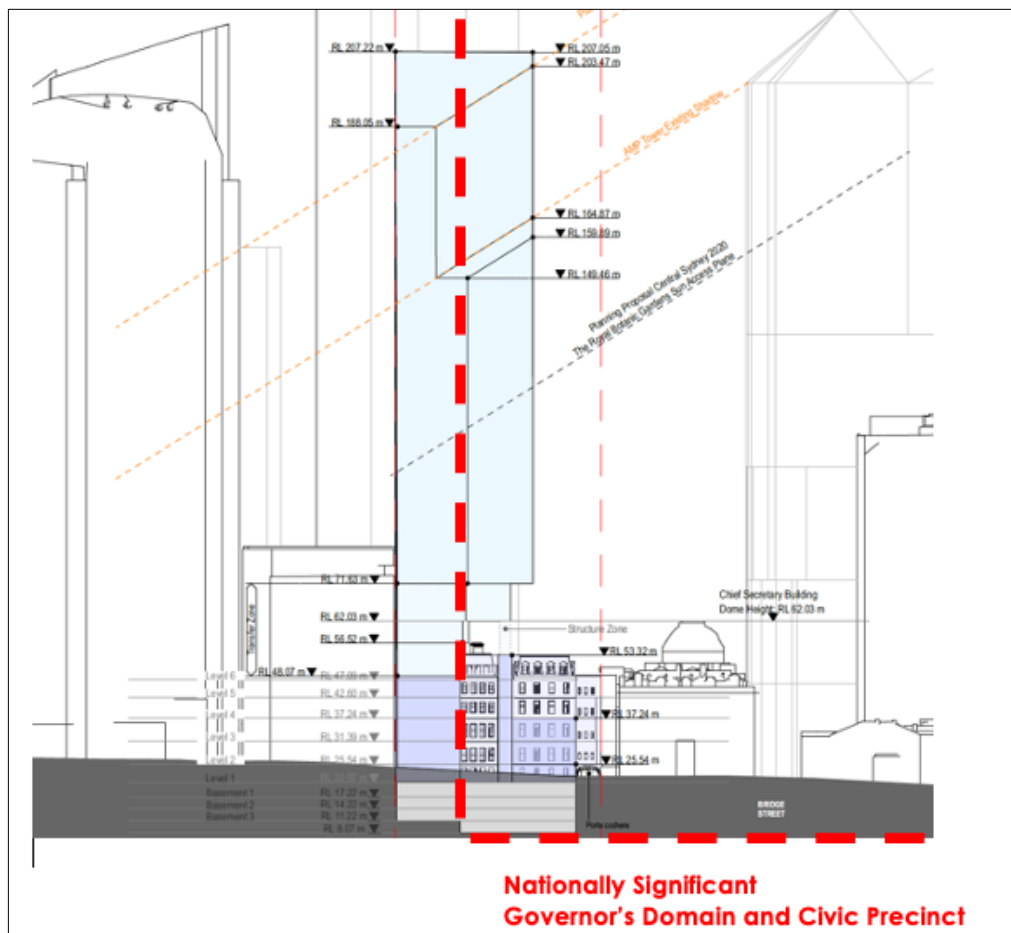


Figure 10 – Governor's Domain and Civic Precinct (Source: FJMT)



Expert Heritage Advice prepared by DFP Planning Consultants is included at **Attachment B**. In addition to providing additional detail in relation to the significance of the site and other buildings within the Nationally significant precinct, the advice raises numerous heritage concerns with the proposal including

- Significance of the Chief Secretary's Building and Public Works Department

The EIS seeks to make a distinction between the heritage significance of the Chief Secretary's Building and the Public Works Department Building, the subject of the proposal, thereby implying that cantilevering over the latter is more acceptable. This distinction in significance is not reasonably established. The two buildings are both major elements of the Nationally significant precinct.

- Dominance of built form to heritage items

DFP note that although there are other tall buildings in the locality none have such a disparate scale in relation to an adjacent heritage building. Furthermore, no such buildings project over such a significant State Heritage item into a Nationally significant precinct.

- Structural Risks

DFP identify the following main areas of concern regarding the proposed structural interventions and the construction process:

1. Basement excavation beside Astor Lane and at 50 Phillip Street;
2. Insertion of a large column in the narrow lightwell at the centre of the building (described in the report as a mega column; and
3. Protection of the roof form and materials.

While a Heritage Structural Construction Methodology Report has been prepared by TTW Engineers, DFP have numerous concerns in relation to the adequacy of the methodology proposed (see **Attachment B**).

- Rationale for Vertical Additions above Public Works Building

The Curtilage Analysis included in the Conservation Management Plan prepared by GBA Heritage contains no discussion about the streetscape context of the Chief Secretary's Building and provides no rationale to inform whether, or how, any vertical additions should be considered.

Further to the above, while there are recent precedents for cantilevering over heritage items within Central Sydney, these have generally been in cases where the physical arrangement of development provided no viable alternative. That is not the circumstance in this case. The subject site could easily be consolidated with 56-70 Phillip Street, providing a rational site for relatively efficient development without isolating any adjoining property, or requiring cantilevering over significant heritage fabric.

More significantly, no such precedents have cantilevered into such a nationally significant precinct.

9. Heritage Floor Space (HFS) Purchase

Fundamental to the FSR and heritage conservation regime within Central Sydney is Clause 6.11(1)(a) of the LEP, which provides that development consent must not be granted to development that utilises accommodation floor space in respect of a building in Area 1, unless an amount of heritage floor space is allocated to the site that is equal to 50% of the accommodation floor space to be utilised. Per clause 6.11(2)(d), the amount of heritage floor space required may be able to be reduced by the lesser of 50% or 1,000m² if the proposed development is the winner of an architectural design competition carried out in accordance with the City of Sydney Competitive Design Policy.

However, the EIS is silent on this provision and has not considered any proposal for the allocation of HFS. Therefore, any consent granted in relation to the proposed development must include a condition requiring the purchase of an amount of HFS equivalent to 50% of the accommodation floor space to be utilised.

10. Traffic Impacts

The Traffic report and application generally have been reviewed by Stantec (formerly GTA Consultants), who have raised numerous concerns with the proposal (see **Attachment C**), including:

- Adequacy of three loading bays to meet the servicing demand of both the hotel and residential development
- Swept path analysis should be updated to confirm:
 - Vehicles on the northern laneway can pass vehicles parked within the porte cochere.
 - Access to each loading bay can be achieved without structure compromising the necessary vehicle clearances.
 - Exiting vehicles from the car stacker can pass any queued inbound vehicles waiting to enter the car stacker.
- Inadequate ramp length for a vehicle to queue to the car stacker.
- Restricted sight lines for vehicles exiting the car stacker and vehicles on Phillip Lane.
- High traffic generation estimates for existing uses mask actual traffic impacts of proposal.
- Traffic generation rates questionably low for a hotel within Sydney CBD.
- Adequacy of the proposed porte cochere to accommodate special events in function rooms.

Given the highly constrained laneway access, proper resolution of all of the above is critical to a safe and efficient environment for pedestrians and vehicles using the lanes

Conclusion

In view of the above, we submit that the development as currently proposed should not be approved, primarily because of:

- The inappropriate protrusion of the proposed development into the nationally significant Governors' Domain and Civic Precinct, over an item of State heritage significance.
- The implications of the proposed massing upon the orderly and efficient development of the rest of the street block, and in particular the isolation of our client's adjoining property.

In addition to the above, the proposal also raises a number of concerns and non-compliances with Sydney Local Environmental Plan 2012, Sydney Development Control Plan 2021 and the Central Sydney Planning Strategy. Specifically, our objection to the proposal is based on the following issues:

- The inclusion of the laneway to the north, without owner's consent or identification of the laneway as part of the site to which the application relates.
- The attribution of FSR potential to land that is shown uncoloured on the FSR Map (i.e. the laneway), the overall calculation of FSR and the absence of a Clause 4.6 variation request mean the consent authority does not have power to approved the proposal.
- Breaching of the Sun Access Planes that are fundamental to the spatial arrangement and solar amenity of Central Sydney.
- The EIS makes no provision for the allocation of Heritage Floor Space.
- Failure to demonstrate design excellence, with specific regard to encroachment of sun access planes and adverse impacts upon national heritage values.
- Inadequate demonstration of acceptable vehicle loading, manoeuvring, sightlines and traffic impacts.

In view of the above, we submit that the application should not and cannot be approved in its current form.

Yours Sincerely,



Ian Cady
Director

Attachments

- A.** Sun Access plane Testing of Proposal prepared by Kann Finch
- B.** Heritage Advice prepared by DFP Planning Consultants
- C.** Traffic Assessment prepared by Stantec (formerly GTA)