

Our Ref: ARB:BES:277

Your Ref:

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Attention: David Glasgow  
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3 May 2018

Dear Anthea

**Re: SSD 7388 MOD 6– IMAX Redevelopment Option No. 2 - Section 96 (2)  
Modification Application to modify the consent**

We act for the owners of Strata Plan 49249 which comprises the major residential development known as One Darling Harbour. One Darling Harbour is located at 50 Murray Street, Sydney and is home to approximately 750 residents.

It is our clients' submission that the application for modification of SSD 7388 to further extend the hours of construction works for the IMAX redevelopment so as to allow for noise generating construction work to take place 24 hours per day 6 days a week and permit delivery of materials to the site during the night time period, ought not be approved.

In summary:

1. Permitting any construction noise to occur between midnight and 6am Monday to Saturdays is unreasonable, unjustified and entirely inappropriate in an area recognised as Sydney's premier tourist destination and housing large numbers of hotels and residential buildings.
2. The proponent has failed to provide any adequate justification for the proposed further extension of construction hours. As noted by the EPA in its submission on the Mod 4 application "*Convenience or the need to make up lost time ...are not considered viable justifications for the need to undertake construction works outside of standard construction hours*".

3. Construction work is already permitted to occur outside standard construction hours. The proponent has already had approved an extension of construction hours to permit works from 6am until midnight Monday to Saturdays (Mod 4 Application). It is relevant to note that the acoustic assessment for the current modification application was finalised within days of the grant of approval for Mod 4 Application. The previous extension to construction hours was granted on the basis any works outside the extended construction could only be “internal works” (i.e. after the completion of the external shell and the sealing of the entire floor shielded) and no deliveries were to take place outside standard construction hours. It is difficult to understand on what basis these controls could be considered no longer necessary.
4. Our clients maintain their opinion expressed in their submission on the Mod 4 Application that the acoustic modelling used to establish the criteria for assessment of the impacts of the additional construction hours is unreliable and cannot be relied upon as a proper basis for any analysis of impacts

Our clients’ detailed submissions are set out below.

## 1. Character of the Area

The Darling Harbour area is of State and Regional significance and is a designated tourism and entertainment precinct. It is marketed as a celebration space and leisure complex. It is also home to our clients’ 750 plus residents and many other residential developments, including the new Darling Square. The area has also undergone significant transformation in recent years with the development of the Sydney International Convention, Exhibition and Entertainment Precinct and the Sofitel hotel on the other side of Tumbalong Park to the IMAX Project. In addition to sleep disturbance and amenity issues, the proposed extended hours of construction would also conflict with performance times at the ICC Theatres.

Extending the hours of construction noise to 24 hours per day (except for Sundays and public holidays) is entirely inappropriate, contrary to the public interest and an unreasonable imposition on the residents living in, and tourists staying at, and visiting the area.

## 2. Lack of Justification for further extension of hours

Construction of the Project is already permitted to occur well outside standard construction hours. Under the modified consent, construction is already permitted 6am – midnight Monday to Saturdays. This already exceeds the standard construction hours prescribed by the City of Sydney for areas outside the City Centre and by the Environment Protection Authority (EPA).

- The Project site is outside the “City Centre” as defined by the City of Sydney Code of Practice 1992: Construction Hours/ Noise within the Central Business District of Sydney (**Council Code**). For areas outside the City Centre construction work is to

take place between the hours of 7.30am and 5.30pm Mondays to Fridays and 7.30am and 3.30pm Saturdays<sup>1</sup>

- The Department of Environment and Climate Change NSW Interim Noise Guidelines 2009 (**EPA Guidelines**) provides the following recommended standard hours for normal construction (excluding blasting): Monday to Friday 7 am to 6 pm Saturday 8 am to 1 pm. The EPA in its submission on the Mod 4 Application has confirmed the application of the EPA Guidelines.

Standard construction hours provide community and government expectation regarding hours of work. They should not be exceeded without strong justification and a clear benefit to the public.

Section 2.3 of the EPA Guidelines provides a framework for assessing construction outside the recommended hours. It provides:

*“The five categories of works that might be undertaken outside the recommended standard hours are:*

- *the **delivery of oversized plant or structures** that police or other authorities determine require special arrangements to transport along public roads*
- ***emergency work** to avoid the loss of life or damage to property, or to prevent environmental harm*
- ***maintenance and repair of public infrastructure** where disruption to essential services and/or considerations of worker safety do not allow work within standard hours*
- ***public infrastructure works** that shorten the length of the project and are supported by the affected community*
- *works where a proponent demonstrates and justifies **a need to operate outside the recommended standard hours.***

*In the last two categories, the proponent should provide the relevant authority with clear justification for reasons other than convenience, such as to sustain operational integrity of road, rail and utility networks. The relevant authority may be the same as the government organisation undertaking the works.*

*In general, only works undertaken on public infrastructure need to be undertaken outside the recommended standard hours. This need is typically based on a requirement to sustain the operational integrity of public infrastructure, as works to restore operation of the infrastructure provide benefit to the greater community (that is more than just local residents). Examples of public infrastructure are:*

- *transport—railways, roads, ferries, airports*
- *utilities—water, electricity or gas, sewerage or drainage.*

*The proponent should address in reports prepared under the environmental impact assessment (EIA) process any expected need to undertake work outside the standard hours. Consultation required under the EIA process allows community views to be considered when deciding whether the need to work outside standard hours has been adequately justified.”*

<sup>1</sup> <http://www.cityofsydney.nsw.gov.au/business/regulations/health-and-safety/construction-site-noise>

[Emphasis added]

The Proponent suggests in its application that the proposed works fall within the last two categories listed in section 2.3 of the EPA Guidelines. It is our clients' submission that this is not the case:

- The construction of a privately operated retail and entertainment area, hotel and residential apartments is not “public infrastructure”;
- No need to operate outside standard hours (including the further extended hours has been justified. Instead, the proponent's submission demonstrates that:
  - the construction activities already have an unreasonable impact on public (including tourist) amenity during the daytime (due to the extensive and intrusive construction footprint);
  - by inference there may be a potential for the duration of this daytime impact to be mitigated at the expense of increasing night time impacts on short and long term residents; and
  - due to site constraints, it has extremely limited ability to implement any effective noise mitigating strategies.

The proponent has inferred that the potential for a reduction in the overall duration of the construction period provides some justification for the proposed extension of construction hours. The Proponent provides no information on the current construction duration (under the approved modified consent) or how that might be reduced should the further modification be approved. Without quantification of this potential impact it is impossible for any consent authority to weigh the public interest considerations as required.

It would seem unreasonable and unjustified that the residents of and visitors to Darling Harbour should bear the burden of the site constraints known by and created by the proponent. It is also relevant to note that the proponent has provided no additional justification for further extension of hours and the grant of additional delivery hours when one compares the “justification” provided for the Mod 4 Application<sup>2</sup> with that annexed to this application.

### **3. Lack of justification for additional impact**

The modification proposes the removal of restriction on delivery hours and the removal of restrictions on night time work. These restrictions were proposed in the Mod 4 Application as a means of justifying the extension to construction hours sought in that application.

It is relevant to note that in the RTS on the Mod 4 Application the proponent provided the following justification for permitting internal night-time works.

Clarification has been sought from the City of Sydney regarding the definition of the proposed ‘sealing’ as part of its submission. To this respect, it is noted that the above revised conditions

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<sup>2</sup> Comparison of Appendix M with Response to Submission Attachment B

will help to clarify that internal hours subject to Condition D2 will be undertaken following completion of the external shell and the sealing of the entire floor.

The above revised condition wording enables a condition framework which ensures that development will comply with appropriate noise levels through assessment against the Category Periods contained within Council's policy, which ensures that adequate noise levels are provided to facilitate acoustic amenity. This condition wording also invokes the 'Recommended Noise Management Controls' outlined at Section 5 of the originally submitted Construction Hours Noise Assessment by Acoustic Logic. Finally, the above condition ensures that construction noise impacts continue to be reinforced in accordance with Condition D25.

It is unclear why the constraints championed in the Mod 4 Application ought be removed.

#### **4. Unreliability of noise modelling**

It is our clients' view that the deficiencies in the modelling identified in the report prepared by Mr. Richard Haydon of Acoustic Dynamics and annexed to our clients' submission on the Mod 4 Application are still unresolved. Mr Haydon's report concludes:

- impacts on other nearby sensitive receivers such as our clients, and the Novotel, Ibis and Sofitel hotels have not been considered; and
- the unattended noise logging data provided in the Acoustic Logic report is not appropriate to establish the project-specific construction noise criteria, specifically, the logging location and use of unattended noise data from May 2012 is not representative of the existing noise environment which includes sensitive residential noise receivers.

For these reasons, the construction noise objectives set out in the Acoustic Logic report need to be re-evaluated. There is no reasonable basis for the Proponent's conclusion that there will be no adverse acoustic impacts arising out of the proposed modification.

We note that the further information provided in the RTS on the Mod 4 Application did not address these concerns and that the current environment surrounding the IMAX is different from that referenced in the modelling:

- The International Convention Centre construction is complete and construction noise associated with this project has ceased;
- New public uses proximate to the IMAX including those associated with the ICC have commenced operation.

From a practical perspective, reliance on a roof mounted noise monitor (at street level to the Western Distributor) would seem a poor basis for setting existing background noise levels.

#### **5. Conditions**

The proposed extension of construction hours is unreasonable and unjustified. Should the consent authority nevertheless determine to approve the modification, the conditions proposed by the proponent are inadequate and do not even reflect the commitments made in its application. They will also be extremely difficult to monitor and enforce. What is required is an absolute prohibition on intrusive noise outside standard hours, a

requirement to submit and have approved a revised noise management plan and conditions requiring the proponent to undertake regular independent noise monitoring and noise testing of equipment and publish the results of those tests. Any further extension of the construction hours for the project could only be contemplated under the most stringent conditions.

## **Conclusion**

The proposed modification is entirely without merit, contrary to applicable guidelines and could not be approved by any consent authority acting reasonably.

Yours faithfully

**Beatty Legal**



Andrew Beatty

Director

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