



# **CLAUSE 4.6 VARIATION REQUEST NORTH SYDNEY LOCAL ENVIRONMENTAL PLAN 2013 CLAUSE 6.4 MILLER STREET SETBACK**

**SYDNEY METRO VICTORIA CROSS STATION  
OSD**

6 SEPTEMBER 2019  
FINAL  
PREPARED FOR LENDLEASE (VICTORIA CROSS) PTY LTD



**URBIS STAFF RESPONSIBLE FOR THIS REPORT WERE:**

Director	Stephen White
Associate Director	Ashleigh Ryan
Project Code	P%7580
Report Number	Final

# TABLE OF CONTENTS

1.	Introduction .....	1
2.	Assessment Framework .....	2
2.1.	Clause 4.6 of North Sydney Local Environmental Plan 2013 .....	2
2.2.	NSW Land and Environment Court: Case Law .....	2
3.	The Proposed Development .....	5
3.1.	Sydney Metro .....	5
3.2.	Concept SSD DA (SSD 17_8874) .....	6
3.3.	Detailed SSD DA (SSD-10294) .....	6
4.	Site and Locality .....	9
4.1.	Site Context and Location .....	9
4.2.	Site Description .....	9
5.	Extent of Contravention .....	15
6.	Clause 4.6 Variation Request: Miller Street Setback .....	17
6.1.	Clause 6.4 Miller Street Setback .....	17
6.2.	Key Questions .....	18
6.3.	Consideration .....	18
6.3.1.	Clause 4.6(3)(a) – Compliance with the Development Standard is Unreasonable or Unnecessary in the Circumstances of the Case .....	18
6.3.2.	Clause 4.6(3)(b) – Are there Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard? .....	19
6.3.3.	Clause 4.6(4)(a)(ii) – Will the Proposed Development be in the Public Interest Because it is Consistent with the Objectives of the Particular Standard and Objectives for Development within the Zone in Which the Development is Proposed to be Carried Out? .....	20
6.3.4.	Clause 4.6(5)(a) – Would Non-Compliance Raise any Matter of Significance for State or Regional Planning? .....	21
6.3.5.	Clause 4.6(5)(b) – Is There a Public Benefit of Maintaining the Planning Control Standard? .....	21
6.3.6.	Clause 4.6(5)(c) – Are there any other matters required to be taken into consideration by the Secretary before granting concurrence? .....	21
7.	Conclusion .....	23
	Disclaimer .....	24

## FIGURES:

Figure 1 – Sydney Metro Alignment Map .....	5
Figure 2 – Proposed development (artist's impression) .....	8
Figure 3 – Site Context .....	9
Figure 4 – Site Aerial .....	10
Figure 5 – Site Photos .....	11
Figure 6 – Key Surrounding Developments .....	13
Figure 7 – Surrounding High Rise Built Form .....	14
Figure 8 – Comparison of approved and proposed Miller Street Setback .....	15
Figure 9 – Proposed modifications to approved Miller Street Setback (envelope diagram) .....	16
Figure 10 – North Sydney Centre Map .....	17

## PICTURES:

Picture 1 – View from the north-west at the Miller and Berry Street intersection .....	11
Picture 2 – View from the north-west at Berry Street .....	11

Picture 3 – View from the West (Miller Street).....	11
Picture 4 – Internal view from the east (Denison Street).....	11
Picture 5 – View from the south-west .....	12
Picture 6 – View from the south (MLC Building).....	12
Picture 7 – View of the southern portion from the north-east (Denison Street).....	12
Picture 8 – View of the southern portion from the south-east (Denison Street).....	12
Picture 9 – MLC Building (immediately south) .....	13
Picture 10 – Genworth Building (to the south).....	13
Picture 11 – Rag and Famish Hotel (to the north).....	14
Picture 12 – Brett Whiteley Place (to the south).....	14
Picture 13 – 1 Denison Street (left), 100 Mount Street (centre) and 177 Pacific Highway (right) .....	14
Picture 14 – Approved Miller Street Setback contravention (Concept Approval building envelope).....	15
Picture 15 – Proposed Miller Street Setback contravention (proposed modified Concept Approval building envelope) .....	15
Picture 16 – Proposed Miller Street Setback contravention (detailed design) .....	15

## **TABLES:**

Table 1 – Assessment of Compliance with Land Use Zone Objectives .....	20
--	----

# 1. INTRODUCTION

This clause 4.6 variation request has been prepared to support a State Significant Development (**SSD**) Development Application (**DA**) for the construction of a commercial mixed-use Over Station Development (**OSD**) above the new Sydney Metro Victoria Cross Station. This request has been prepared by Urbis on behalf of Lendlease (Victoria Cross) Pty Limited, the applicant of the SSD DA.

The SSD DA is a detailed application lodged following the determination of a Concept SSD DA (SSD 17\_8874) for the maximum building envelope of the OSD on the site. This maximum building envelope is proposed to be modified through a concurrent section 4.55(2) modification application to the Concept SSD DA.

This written request provides justification for the development sought within the Detailed SSD DA to vary the 'Miller Street setback' development standard prescribed for the site under clause 6.4 of *North Sydney Local Environmental Plan 2013 (NSLEP)*. It is noted that the maximum building envelope currently approved within SSD 17\_8874 (**Concept Approval**) already varies the Miller Street setback development standard. The proposed setback the subject of this variation request is within the approved envelope under the Concept Approval. Notwithstanding this, this clause 4.6 variation is submitted with the Detailed SSD DA for abundant caution and as a matter of good practice for planning assessment.

As stated in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 (Initial Action)* at [25], clause 4.6(3) does not require the consent authority to form its own opinion of satisfaction regarding the matters identified in clause 4.6(3)(a) and (b), but only indirectly must be satisfied that the applicant's written request has adequately addressed those matters. This request does that, and therefore the consent authority is open to be satisfied that subclause 4.6(3) has been met.

Sections 6.3.3-6.3.6 of this request provides material to assist the consent authority to reach satisfaction that the development is consistent with the objectives for development within the B3 Commercial Core zone under clause 4.6(4) and usefully addresses the matters that the consent authority need to address under clause 4.6(5) when exercising the function of the Secretary.

## 2. ASSESSMENT FRAMEWORK

### 2.1. CLAUSE 4.6 OF NORTH SYDNEY LOCAL ENVIRONMENTAL PLAN 2013

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

- *to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- *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 DA 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 requires that the consent authority consider a written request from the applicant, which demonstrates:

- 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.*

Furthermore, the consent authority must be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone, and the concurrence of the Secretary has 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.*

[Note: Concurrence is assumed pursuant to Planning Circular No. PS 18-003 Variations to Development Standards dated 21 February 2018].

This document forms a clause 4.6 written request to justify the contravention of the Miller Street setback development standard in clause 6.4 of the NSLEP. The assessment of the proposed variation has been undertaken in accordance with the requirements of the NSLEP, clause 4.6 Exceptions to development standards.

### 2.2. NSW LAND AND ENVIRONMENT COURT: CASE LAW

Several key New South Wales Land and Environment Court (NSW LEC) planning principles and judgements have refined the manner in which variations to development standards are required to be approached.

The correct approach to preparing and dealing with a request under clause 4.6 is neatly summarised by *Preston CJ in Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*, duplicated for ease of consent authority reference as follows:

[13] *The permissive power in cl 4.6(2) to grant development consent for a development that contravenes the development standard is, however, subject to conditions. Clause 4.6(4) establishes preconditions that must be satisfied before a consent authority can exercise the power to grant development consent for development that contravenes a development standard.*

[14] *The first precondition, in cl 4.6(4)(a), is that the consent authority, or the Court on appeal exercising the functions of the consent authority, must form two positive opinions of satisfaction under cl 4.6(4)(a)(i) and (ii). Each opinion of satisfaction of the consent authority, or the Court on appeal, as to the matters in cl*



4.6(4)(a) is a jurisdictional fact of a special kind: see *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707; [2004] NSWCA 442 at [25]. The formation of the opinions of satisfaction as to the matters in cl 4.6(4)(a) enlivens the power of the consent authority to grant development consent for development that contravenes the development standard: see *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135; [2000] HCA 5 at [28]; *Winten Property Group Limited v North Sydney Council* (2001) 130 LGERA 79; [2001] NSWLEC 46 at [19], [29], [44]-[45]; and *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 at [36].

[15] The first opinion of satisfaction, in cl 4.6(4)(a)(i), is that the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by cl 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)). The written request needs to demonstrate both of these matters.

[16] As to the first matter required by cl 4.6(3)(a), I summarised the common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary in *Wehbe v Pittwater Council* at [42]-[51]. Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary.

[17] The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: *Wehbe v Pittwater Council* at [42] and [43].

[18] A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: *Wehbe v Pittwater Council* at [45].

[19] A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: *Wehbe v Pittwater Council* at [46].

[20] A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: *Wehbe v Pittwater Council* at [47].

[21] A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: *Wehbe v Pittwater Council* at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in *Wehbe v Pittwater Council* at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.

[22] These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.

[23] As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.

[24] The environmental planning grounds relied on in the written request under cl 4.6 must be "sufficient". There are two respects in which the written request needs to be "sufficient". First, the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on

environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [31].

[25] The consent authority, or the Court on appeal, must form the positive opinion of satisfaction that the applicant's written request has adequately addressed both of the matters required to be demonstrated by cl 4.6(3)(a) and (b). As I observed in *Randwick City Council v Micaul Holdings Pty Ltd* at [39], the consent authority, or the Court on appeal, does not have to directly form the opinion of satisfaction regarding the matters in cl 4.6(3)(a) and (b), but only indirectly form the opinion of satisfaction that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3)(a) and (b). The applicant bears the onus to demonstrate that the matters in cl 4.6(3)(a) and (b) have been adequately addressed in the applicant's written request in order to enable the consent authority, or the Court on appeal, to form the requisite opinion of satisfaction: see *Wehbe v Pittwater Council* at [38].

[26] The second opinion of satisfaction, in cl 4.6(4)(a)(ii), is that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. The second opinion of satisfaction under cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under cl 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in cl 4.6(4)(a)(ii), not indirectly satisfied that the applicant's written request has adequately addressed the matter in cl 4.6(4)(a)(ii).

[27] The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).

[28] The second precondition in cl 4.6(4) that must be satisfied before the consent authority can exercise the power to grant development consent for development that contravenes the development standard is that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (cl 4.6(4)(b)). Under cl 64 of the *Environmental Planning and Assessment Regulation 2000*, the Secretary has given written notice dated 21 February 2018, attached to the *Planning Circular PS 18-003* issued on 21 February 2018, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

[29] On appeal, the Court has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b), by reason of s 39(6) of the *Court Act*. Nevertheless, the Court should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: *Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 at 100; *Wehbe v Pittwater Council* at [41].



## 3. THE PROPOSED DEVELOPMENT

### 3.1. SYDNEY METRO

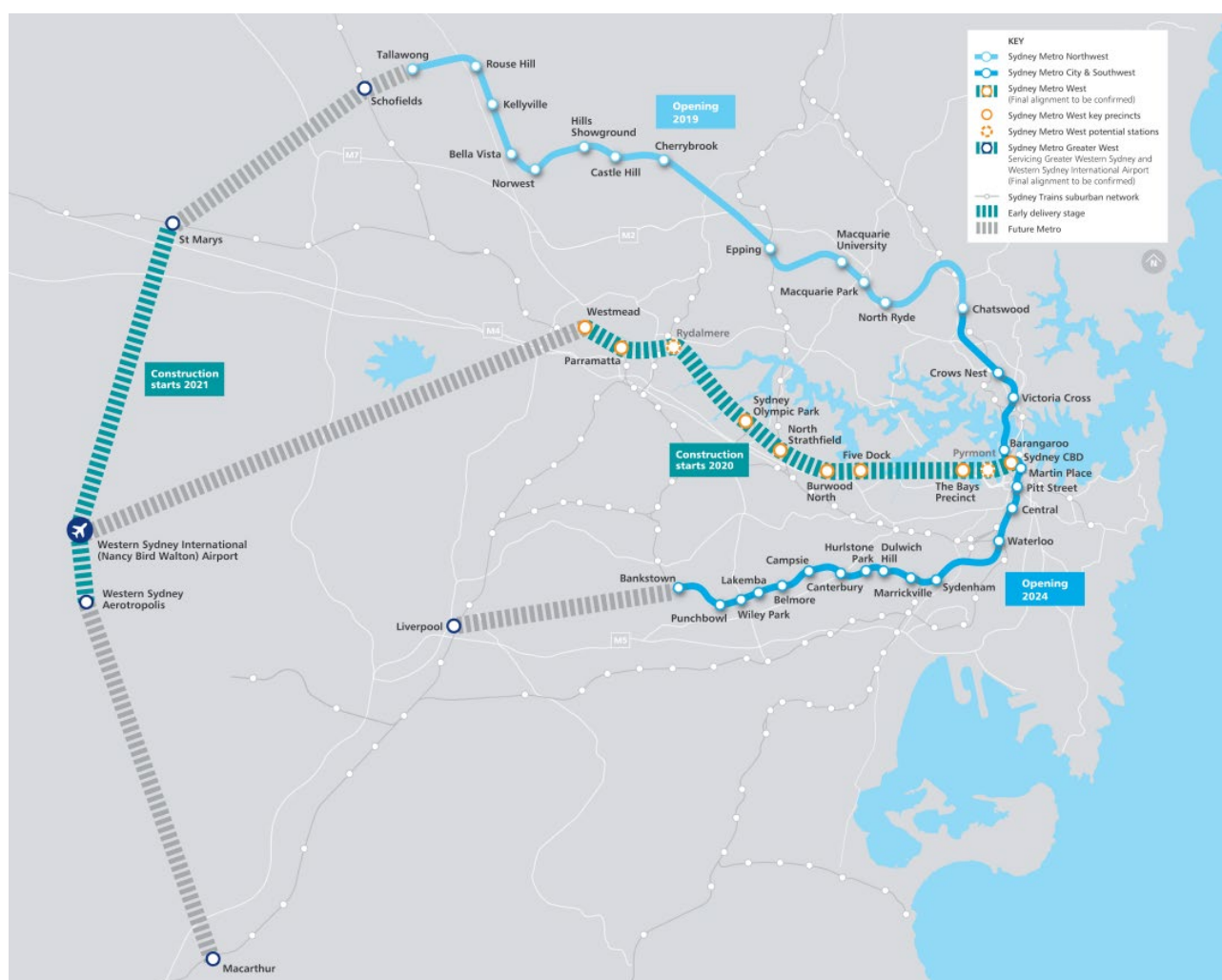
Sydney Metro is Australia's biggest public transport project. Services started in May 2019 in the city's North West with a train every four minutes in the peak. Metro rail will be extended into the CBD and beyond to Bankstown in 2024. There will be new metro railway stations underground at Crows Nest, Victoria Cross, Barangaroo, Martin Place, Pitt Street, Waterloo and new metro platforms under Central.

In 2024, Sydney will have 31 metro railway stations and a 66 km standalone metro railway system – the biggest urban rail project in Australian history. There will be ultimate capacity for a metro train every two minutes in each direction under the Sydney city centre. The Sydney Metro project is illustrated in **Figure 1**.

On 9 January 2017, the Minister for Planning approved the Sydney Metro City & Southwest - Chatswood to Sydenham project as a Critical State Significant Infrastructure project (reference SSI 15\_7400) (CSSI Approval). The terms of the CSSI Approval includes all works required to construct the Sydney Metro Victoria Cross Station, including the demolition of existing buildings and structures on both sites. The CSSI Approval also includes construction of below and above ground improvements with the metro station structure for appropriate integration with the OSD.

With regards to CSSI related works, any changes to the “metro box envelope” and public domain will be pursued in satisfaction of the CSSI conditions of approval and do not form part of the scope of the detailed SSD DA for the OSD.

Figure 1 – Sydney Metro Alignment Map



Source: Sydney Metro

## 3.2. CONCEPT SSD DA (SSD 17\_8874)

The Minister for Planning granted development consent to SSD 17\_8874 for Concept Approval of a commercial mixed-use OSD above the new Sydney Metro Victoria Cross Station on 18 December 2018. This concept development consent includes conceptual approval for:

- A maximum building envelope, including street-wall and setbacks for the over station development
- A maximum building height of RL 230 or 168 metres, providing:
  - Approximately 40 commercial storeys and 2 additional storeys for rooftop plant for the high-rise portion of the building envelope
  - Approximately 13 storeys for the lower eastern portion of the building envelope at RL 118 or 55 metres
- A maximum gross floor area (**GFA**) of 60,000sqm, excluding station floor space
- Basement car parking for a maximum 150 parking spaces

Following Sydney Metro's appointment of Lendlease (Victoria Cross) Pty Limited as the preferred development partner to deliver the Victoria Cross Station OSD, and ongoing design development, minor modifications to the approved building envelope are now required to accommodate the detailed design.

A modification application to the Concept SSD DA has therefore been lodged concurrently with the Detailed SSD DA. The section 4.55(2) modification application seeks consent for the following amendments to the approved building envelope:

- Reduction in the massing and overall dimensions of the building cantilever above the Miller Street special area setback;
- Relocation of building massing from the low-rise levels of the tower, north of the through-site link, to the high-rise levels of the tower;
- Increasing the setback of the tower from the MLC Building by 10 metres;
- Reduction of the Berry Street setback from 5 metres to 4.5 metres, extending the building envelope marginally to the north; and
- Increase in the total GFA across the site to 61,500sqm.

## 3.3. DETAILED SSD DA (SSD-10294)

The Detailed SSD DA (**SSD-10294**) seeks approval for the detailed design of the OSD above the new Sydney Metro Victoria Cross Station. The Detailed SSD DA is consistent with the Concept Approval (**SSD 17\_8874**) granted for the maximum building envelope on the site, as proposed to be modified.

The Detailed SSD DA seeks development consent for:

- The design, construction and operation of a new commercial office tower with a maximum building height of RL 230 or 168 metres (42 storeys). The commercial tower includes 61,500sqm of GFA, excluding floor space approved in the CSSI.
- Physical integration with the approved Sydney Metro works including:
  - Structures, mechanical and electronic systems, and services; and
  - Vertical transfers.
- Use of spaces within approved Sydney Metro envelope for the purposes of:
  - Retail tenancies;
  - Commercial office lobbies and space;
  - 161 car parking spaces within the basement for the purposes of the commercial office and retail use, with a maximum of 150 of those car parking spaces relating to the OSD;

- End of trip facilities; and
- Loading and services access.
- Provision and augmentation of utilities and services.
- Provision of rooftop business identification signage zones.
- Stratum subdivision (staged).

The proposed development provides A-grade commercial floorspace in a singular tower form to deliver an integrated development where the OSD, Sydney Metro Victoria Cross Station and the public domain function together.

The proposal responds to the key site constraints, such as surrounding heritage-built form and visual and view impacts (solar access and overshadowing), to deliver an integrated OSD which exhibits design excellence as illustrated at **Figure 2**.

The proposed development is detailed further in the Environmental Impact Statement (**EIS**) submitted with the detailed SSD DA, and in the Architectural Plans (**Appendix C**) and Design Report (**Appendix E**) prepared by Bates Smart.

Figure 2 – Proposed development (artist's impression)



Source: Bates Smart



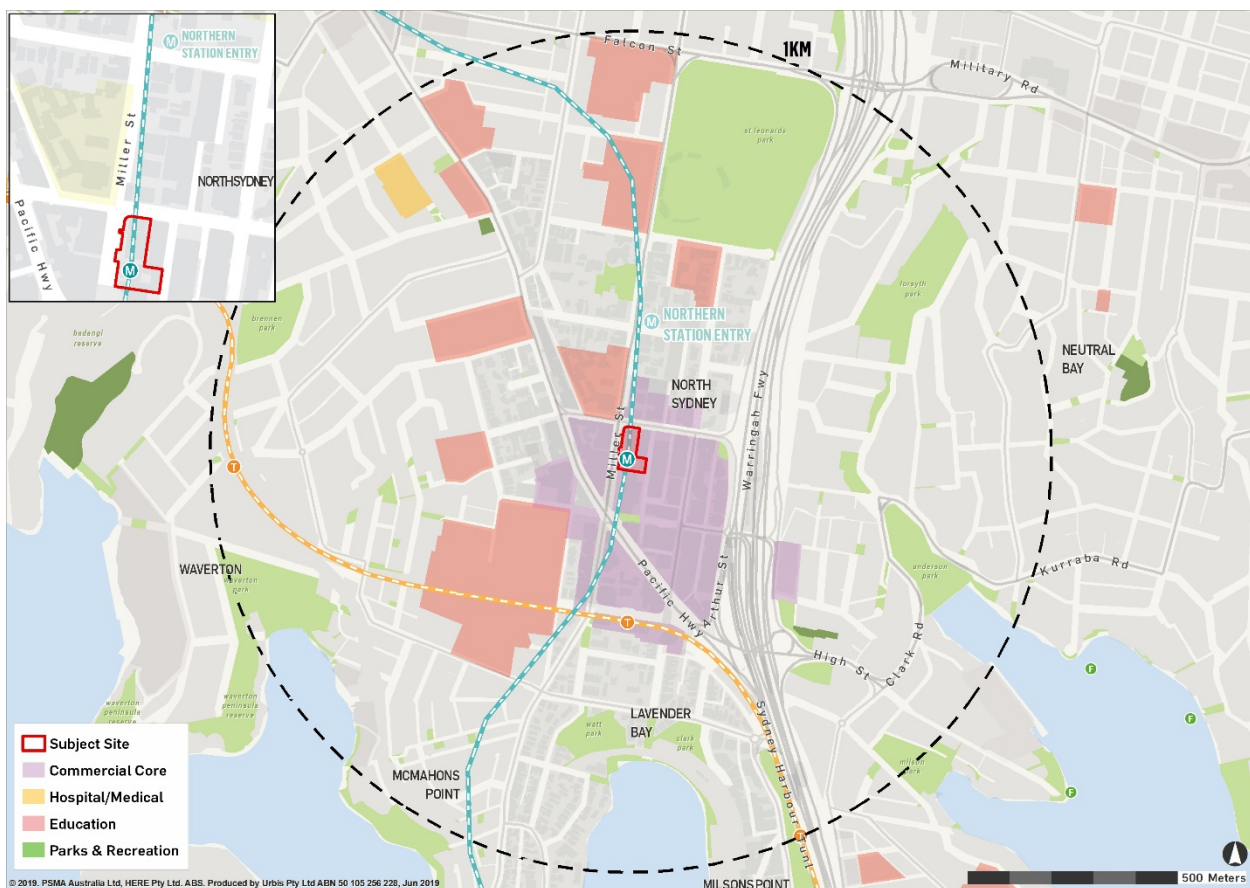
## 4. SITE AND LOCALITY

### 4.1. SITE CONTEXT AND LOCATION

The site is generally described as 155-167 Miller Street, 181 Miller Street, 187-189 Miller Street and part of 65 Berry Street, North Sydney (**the site**). The site is centrally located within the North Sydney Centre which forms part of the North Sydney Local Government Area (**LGA**). The North Sydney CBD is situated approximately 3 kilometres north of Sydney CBD and 5 kilometres southeast of Chatswood (refer **Figure 3**).

North Sydney Centre is a “strategic centre” as identified in Sydney’s overarching strategic plan, *A Plan for Growing Sydney*. It is Sydney’s third largest commercial precinct, after Sydney CBD and North Ryde/Macquarie Park, functioning as a fundamental component of the cities Global Economic Corridor. The area is characterised by a consolidated commercial core (with key public open spaces), views to Sydney Harbour and Sydney CBD, a skilled labour force and surrounding high-amenity residential and mixed-use precincts.

Figure 3 – Site Context



### 4.2. SITE DESCRIPTION

The site is situated on the south-east corner of the Berry Street and Miller Street intersection (see **Figure 4**), North Sydney. The site is an irregular shaped allotment with street frontages of approximately 37 metres to Berry Street, 34 metres to Denison Street and 102 metres to Miller Street, yielding an overall site area of approximately 4,815 square metres. The Miller and Berry Street frontages contain a series of street trees within the footpath areas.

The site occupies various addresses/allotments and is legally described as follows:

- 155-167 Miller Street (Strata Plan (SP) 35644) (which incorporates lots 40 and 41 of SP 81092 and lots 37, 38 and 39 of SP 79612)
- 181 Miller Street (Lot 15 in Deposited Plan (DP) 69345, Lot 1 & 2/DP 123056, Lot 10/DP 70667)

- 187 Miller Street (Lot A/DP 160018)
- 189 Miller Street (Lot 1/DP 633088)
- Formerly part 65 Berry Street (Lot 1/DP 1230458)

The allotments include a series of easements affecting parts of the land for stormwater drainage and sewer, as outlined within the Site Survey submitted with the Detailed SSD DA. The existing easements however do not impede the construction of the proposed development.

Figure 4 – Site Aerial



### 4.3. EXISTING DEVELOPMENT

Prior to the demolition of all buildings across the site under the terms of CSSI Approval, the site was previously occupied by a mix of low-rise retail and mid-rise office developments. These are briefly discussed below:

- **155-167 Miller Street (formerly Tower Square)** – Previously comprised a two-storey shopping centre between Miller and Denison Street, including restaurants, cafes, retail shops, basement parking and an outdoor eating area;
- **181 Miller Street** – Previously comprised a 14-storey commercial tower with a frontage to Miller Street. Retail premises occupied the lower levels with office spaces above. There was a consistent setback with no pronounced podium;
- **187 Miller Street** – Previously comprised a two-storey shop (Jewellers) with frontage to Miller Street. The Jewellery shop was listed as a heritage item in *NSLEP 2013*;
- **189 Miller Street** – Previously comprised a seven-storey commercial building with frontage to Miller Street. Retail premises occupied the lower levels with office spaces above. There was a consistent setback with no pronounced podium; and



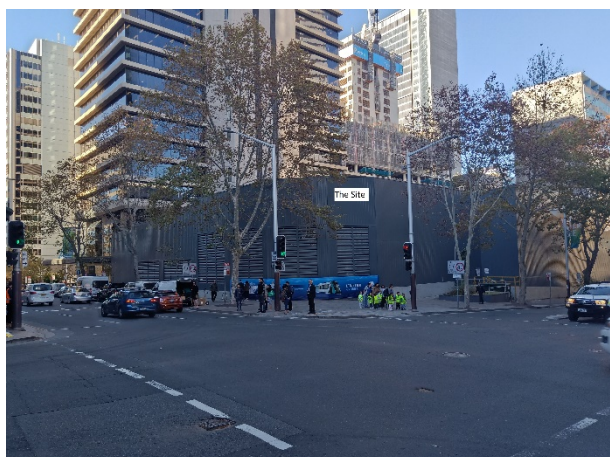
- **Part 65 Berry Street** – Previously comprised an access way to 65 Berry Street and no buildings / structures. The site was bounded by external walls of Tower Square and 65 Berry Street.

The previous site conditions displayed a pattern of development with very little consistency in scale, form or alignment. Mid-rise commercial buildings were abutting low-rise retail/food and drink premises, intertwined with an outdoor eating area.

Denison street is frequently used by pedestrians as a thoroughfare during peak times and is anticipated to support increased pedestrian traffic once Victoria Cross Station is constructed. The current pathway conditions are narrow and illegible due in part to the presence of construction hoardings, and overall is considered to be a poor interface for pedestrians and vehicles using the road.

As discussed, all the buildings / structures previously on the site have now been demolished under the CSSI Approval for the Victoria Cross Station. Construction of the Victoria Cross Station is currently underway on the site and the site is occupied by a large temporary shed structure (see **Figure 5**).

Figure 5 – Site Photos



Picture 1 – View from the north-west at the Miller and Berry Street intersection



Picture 2 – View from the north-west at Berry Street



Picture 3 – View from the West (Miller Street)

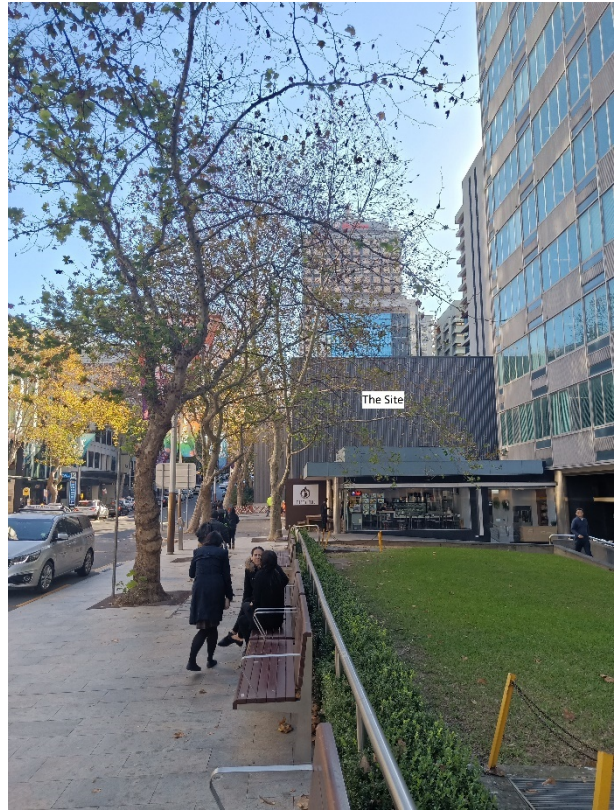


Picture 4 – Internal view from the east (Denison Street)





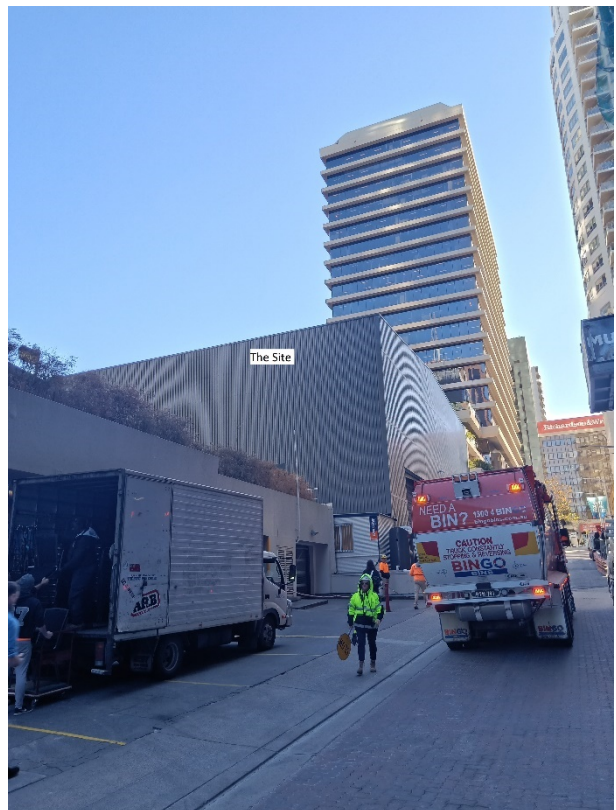
Picture 5 – View from the south-west



Picture 6 – View from the south (MLC Building)



Picture 7 – View of the southern portion from the north-east (Denison Street)



Picture 8 – View of the southern portion from the south-east (Denison Street)



## 4.4. SURROUNDING DEVELOPMENT

The surrounding context is characterised by a mix of mid to high density commercial developments, interspersed with lower scale heritage items, educational institutions (e.g. Australian Catholic University), retail developments and civic uses such as the North Sydney Council Chambers (Miller Street). One isolated residential building form exists in the centre which is considered an uncharacteristic land use in the wider context. The site is generally bound as follows:

- **North** – Berry Street directly to the north along with the heritage listed Rag & Famish Hotel. Further north beyond the hotel are high density residential and commercial developments.
- **South** – The site abuts the heritage listed MLC commercial office building to the south with higher density commercial developments towards North Sydney Station and Greenwood Plaza.
- **East** – Group House (65 Berry Street) and Denison Street are situated immediately east of the site. Immediately east of Denison Street are the Alexander Apartments, a 36-storey residential building. Further east are similar high-density commercial developments towards the Warringah Freeway and Cahill Expressway.
- **West** – Miller Street abuts the site to the west along with various high-density commercial buildings. The Pacific Highway is located further to the west.

Existing surrounding buildings are shown in **Figure 6** below.

Figure 6 – Key Surrounding Developments



Picture 9 – MLC Building (immediately south)



Picture 10 – Genworth Building (to the south)





Picture 11 – Rag and Famish Hotel (to the north)



Picture 12 – Brett Whiteley Place (to the south)

The recent emergence of a high-density commercial built form typology within the North Sydney centre is strengthening a future high-rise commercial core character to which this proposal will positively contribute towards. Recently completed or currently under construction large scale office buildings are illustrated in **Figure 7**, with notable high-rise developments listed below:

- 1 Denison Street (RL. 213) – A-grade commercial tower DA approved and currently under construction (Bates Smart);
- 100 Mount Street (RL. 200) – A-grade commercial tower DA approved and currently under construction (SOM and Architectus);
- 177 Pacific Highway (RL. 195) – A-grade commercial tower completed 2016 (Bates Smart); and
- 77 Berry Street (RL. 180) – Alexander Apartments, an existing residential tower.

Figure 7 – Surrounding High Rise Built Form



Picture 13 – 1 Denison Street (left), 100 Mount Street (centre) and 177 Pacific Highway (right)

Source: Bates Smart

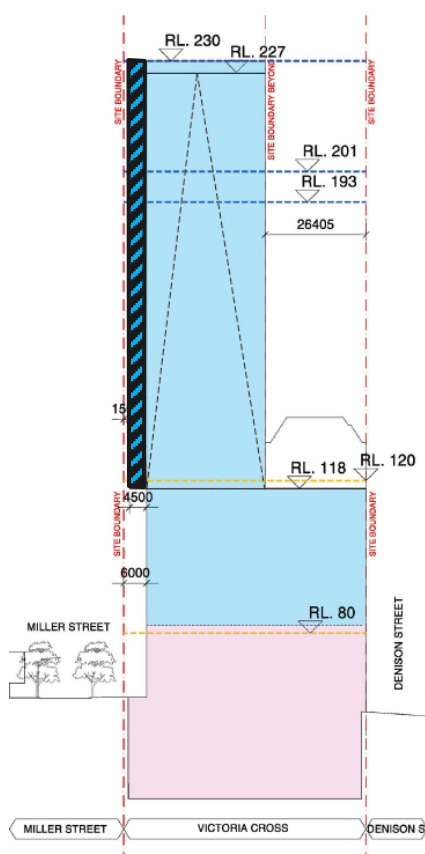
## 5. EXTENT OF CONTRAVENTION

In determining the Concept SSD DA the Minister for Planning approved a variation to the Miller Street setback prescribed in clause 6.4 of NSLEP. The approved building envelope provides a minimum 6m setback for its podium, however, contains a cantilever over the setback area up to 4.5m deep, which is described as an "articulation zone". The non-compliance proposed in the Detailed SSD DA relates to a portion of the west elevation between a height of RL 118 and RL 230 which is contained wholly within the area of non-compliance.

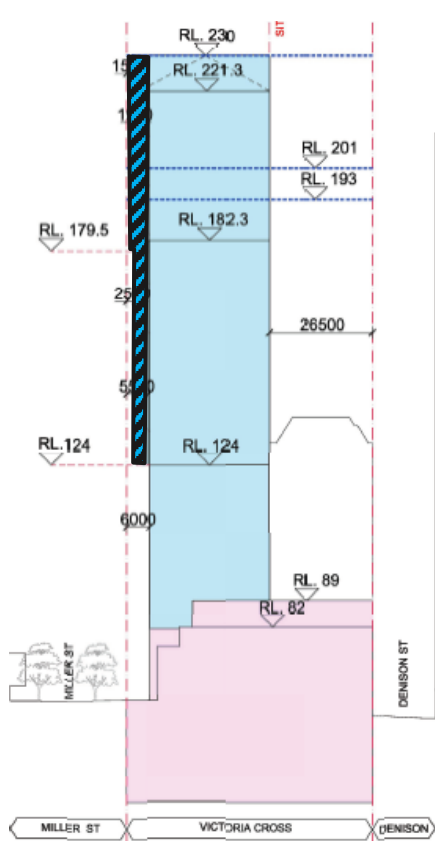
The Concept Approval building envelope has a minimum setback of 6 metres up to a height of RL 118. The proposed amended Concept Approval building envelope as modified increases the extent of that minimum 6 metre setback up to a height of RL 124. The Detailed SSD DA proposes a building which has a setback of 6 metres up to a height of RL 126 which conforms to both the existing and proposed modified Concept Approval.

The geometry of the cantilever in the Detailed SSD DA is also proposed to be reduced from the Concept Approval building envelope between RL 124 and RL 179.5 to reflect the detailed design of the OSD tower. The proposed amended Concept Approval building envelope does not change in this zone. We note that the full extent of the approved "articulation zone" was not envisaged to be maximised within the detailed design of the Victoria Cross Station OSD, and therefore the reduction in cantilever zone in the Detailed SSD DA is appropriate. A comparison of the approved variation to the Miller Street setback and the revised Miller Street setback is illustrated at **Figure 8** (variation to control shown hatched).

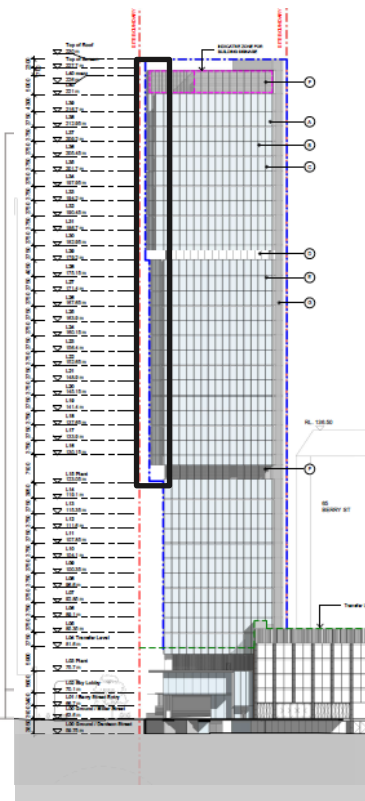
Figure 8 – Comparison of approved and proposed Miller Street Setback



Picture 14 – Approved Miller Street Setback contravention (Concept Approval building envelope)



Picture 15 – Proposed Miller Street Setback contravention (proposed modified Concept Approval building envelope)

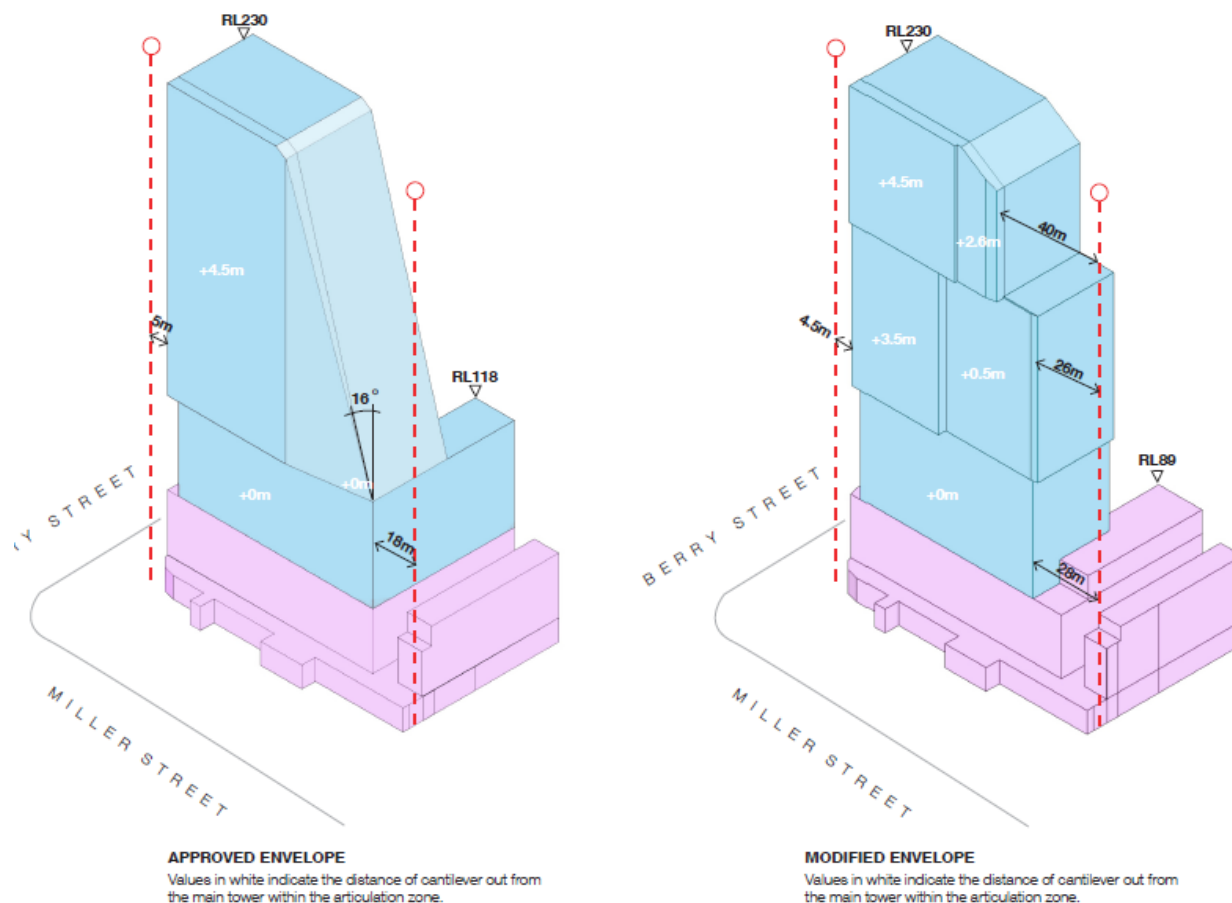


Picture 16 – Proposed Miller Street Setback contravention (detailed design)

As illustrated at **Figure 8**, the proposed development results in a reduced cantilever over the Miller Street setback area than previously approved. The effect of this is an increased setback of 2.5 metres under the

Detailed SSD DA as opposed to 1.5 metres under the Concept Approval. From a 3D view it is illustrated that parts of the proposed western facade will overhang the Miller Street setback area by only 0.5m, whereas parts of the façade will cantilever over the setback area by up to 4.5m (as approved). The image prepared by Bates Smart at **Figure 9** illustrates the proposed changes to the approved Miller Street setback area (in envelope form). As a result of the proposed modification to the Concept Approval building envelope, the volume of the cantilever over Miller Street will be reduced by 9,500m<sup>3</sup> (approximately).

Figure 9 – Proposed modifications to approved Miller Street Setback (envelope diagram)



Source: Bates Smart

The clause 4.6 variation submitted with the Concept SSD DA was considered well founded by the NSW Department of Planning, Industry and Environment (**NSW DPIE**) and the Minister for Planning. As the proposed contravention of the Miller Street setback area is less than previously approved, it follows that the proposed contravention will be considered well founded in that it will also:

- Meet the primary objective of the control which is to provide a setback at street level with respect to the established streetscape and to contribute to the public domain along Miller Street, being a highly pedestrianised north-south main street in North Sydney Centre.
- Provide (with the proposed station entry and CSSI works) the required minimum 6m setback up to a greater height of RL 124, supporting public enjoyment and sense of space of the front setback area and contribution to the public domain, including future integration with the station entrance and active retail uses along Miller Street.
- The proposed cantilever zones at the southern end of the façade ensure compliance with the NSLEP sun access plane requirements to protect solar access to Greenwood Plaza and Miller Street. The submitted shadow study (at **Appendix B** of the **EIS**), indicates 60sqm of solar access gain along Miller Street at midday winter solstice compared to the existing development on the site prior to demolition occurring in accordance with the CSSI Approval.



## 6. CLAUSE 4.6 VARIATION REQUEST: MILLER STREET SETBACK

The following sections of the report provide an assessment of the request to vary the development standard relating to the Miller Street setback in accordance with clause 4.6 of NSLEP.

### 6.1. CLAUSE 6.4 MILLER STREET SETBACK

The objective of clause 6.4 as set out in clause 6.4(1) of the NSLEP is:

*“to maintain the established setback and landscaped setting on the eastern side of Miller Street between McLaren Street and Mount Street.”*

As per the terms of clause 6.4(2) development consent must not be granted for the erection of a building on land within the Miller Street setback area unless the building will be less than 1.5 metres in height and the part of the building that will be on the land is only used for access to the building or landscaping purposes. The extent of the Miller Street Setback area is illustrated at **Figure 10** below.

Figure 10 – North Sydney Centre Map



Source: NSLEP 2013

As demonstrated above, the site is required to achieve a minimum setback of 6m from Miller Street, with a maximum 11.5 metre setback required at the small, irregular projection in the middle portion of the frontage.

## 6.2. KEY QUESTIONS

### Is the Planning Control a Development Standard?

The Miller Street setback control prescribed under clause 6.4 of the NSLEP is a numeric development standard capable of being varied under clause 4.6 of NSLEP.

### Is the Development Standard Excluded from the Operation of Clause 4.6?

The development standard is not excluded from the operation of clause 4.6 as it is not listed within clause 4.6(6) or clause 4.6(8) of NSLEP.

### What is the Underlying Object or Purpose of the Standard?

The objectives of the standard are clearly established in the LEP as set out in **Section 6.1** of this report.

## 6.3. CONSIDERATION

### 6.3.1. Clause 4.6(3)(a) – Compliance with the Development Standard is Unreasonable or Unnecessary in the Circumstances of the Case

The common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary are listed within the ‘five-part test’ outlined in *Wehbe v Pittwater [2007] NSWLEC 827*. These tests are outlined in Section 2.2 of this request (paragraphs [17]-[21]).

An applicant does not need to satisfy each of the tests or ‘ways’.

The development is justified against one of the Wehbe tests as set out below.

#### Test 1: The objectives of the development standard are achieved notwithstanding non-compliance with the standard

The proposed development achieves the objective of the development standard as described below notwithstanding non-compliance with the setback standard.

- It is apparent that the objective of the standard is to maintain an existing setback and landscaped setting at the ground and lower levels, and to preserve a specific streetscape character.
- The proposed development maintains the established setback on the eastern side of Miller Street between McLaren and Mount Streets up to a height of RL 126 which delivers a landscape setting through the lower portions of the CSSI and OSD envelope.
- The start of the cantilever over the Miller Street Setback area exceeds the height of the adjacent heritage listed MLC building and therefore maintains the established setback on the eastern side of Miller Street and prevailing setbacks of adjacent buildings.
- Given that the proposed reduced setback begins at a height of RL 126, or approximately 14 storeys above street level, the streetscape would not be affected by the proposed cantilever in either terms of landscaping area or building setback.
- The proposed setback above RL 126 would have negligible impacts compared to a compliant scheme in terms of built form, public domain, landscaping, overshadowing, view or heritage impacts as demonstrated within **Section 6.3.2** and represents an increase in the setback already approved under the Concept Approval. Given the impacts of the proposed cantilever are negligible, compliance with the standard would not achieve a better planning outcome.
- As the proposed cantilever starts at RL 126, technical compliance with the standard would not help to achieve the objective of the standard as it relates to streetscape and street level characteristics. Therefore, compliance with the standard is unreasonable and unnecessary in the circumstances of the case.

It is further noted that the minimum height of the proposed modified Concept Approval building envelope and the minimum height of the building in the Detailed SSD DA above the street setback are both greater than the approved building envelope that was established in the Concept SSD DA (SSD 17\_8874).

In summary, achieving compliance with the standard is unreasonable and unnecessary (clause 4.6(3)(a)) as notwithstanding the non-compliance, the development is consistent with the objectives of the standard (clause 4.6(4)(a)(ii)).

**Test 2: The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary**

Not relied upon.

**Test 3: The underlying objective or purpose of the standard would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable**

Not relied upon.

**Test 4: The development standard has been virtually abandoned or destroyed by the council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable**

Not relied upon.

**Test 5: The zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary**

Not relied upon.

**6.3.2. Clause 4.6(3)(b) — Are there Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard?**

There are sufficient environmental planning grounds to justify the proposed variation to the development standard, including the following:

- The development is consistent with the Objects of the *Environmental Planning and Assessment Act 1979* by promoting the orderly and economic use and development of the land promoting and delivering good design and amenity of the built environment. This is achieved through the provision of an 'A grade' / 'premium grade' commercial office building integrated with the Sydney Metro Victoria Cross Station development which is sympathetic of adjacent heritage items and the surrounding environment.
- The proposed development achieves the objective of the development standard prescribed in clause 6.4 of the NSLEP as described through **Section 6.3.1** and achieves the objectives of the B3 Commercial Core zone as described within **Table 1**.
- The proposed setback above the Miller Street setback area contributes to the achievement of the building's design excellence as established through the endorsed Design Excellence Process. The proposed development contributes to the skyline with a modulated western elevation that has a reduced volume compared to the approved "articulation zone" of the western elevation.
- The proposed varied cantilever creates greater visual interest compared to a compliant 6m vertically extruded tower form which would result in a sheer wall to Miller Street with no benefit at street level.
- The beginning of the reduced setback exceeds the height of the MLC Building to the south, allowing the lower levels of the tower to reference the building scale and height of the adjacent heritage listed MLC Building.
- The primary objective of the control is to manage the ground and lower level setbacks and streetscape character, rather than air space above ground. A proposal which is fully compliant with the standard would not contribute to achieving the ground plane objective of the standard.
- The proposed setback will have negligible material impacts compared to a compliant scheme in terms of built form, landscaping, overshadowing, view or heritage impacts as:
  - The proposed setback would cause no unreasonable heritage impacts. The cantilever has been reduced in bulk and scale above a height of RL 126 and therefore will only cause minor visual impact to surrounding heritage items as direct views to the MLC Building and nearby Rag & Famish Hotel will not be obstructed from street level to the top of both the existing buildings.

- The proposed development would cause no net increase in overshadowing to surrounding Special Areas, Zone RE1 Public Recreation Land or any other sensitive area. On the contrary, the proposed development will cause less overshadowing to the Miller Street Special Area than development on the site prior to the demolition of buildings on the site in accordance with the CSSI Approval.
- The setback from Miller Street substantially exceeds the minimum requirements for the 28 metre long southern part of the site between the tower form and the MLC Building.
- Given its relatively minor extent, the reduced setback above RL 124 would not cause a significant reduction in sky views viewed from the public domain.
- The design of built form on the site achieves a much greater setback than required in the southern 28 metre section of the site between the tower form and the MLC Building. This enables a material increase in sky views from the public domain compared to a fully compliant tower building which would occupy more of the Miller Street frontage. Together with the proposed reduction in the cantilever area, the development creates a greater sense of openness to the sky than a larger complying building. The increased southern setback and stepped form of the tower are not required within the NSLEP but are included to open sky views to the public domain delivered in the CSSI Approval and provide additional curtilage to the adjacent heritage listed MLC Building.
- The proposed building envelope cantilevers above the private domain only which is to be provided as publicly accessible land as part of the CSSI Approval. As such, the non-compliance does not have any impact on the ability of the compliant setback at the base of the envelope to perform the landscaping and activity sought by the standard. The non-compliance occurs approximately 14 storeys above ground level and does not preclude the satisfaction of the intent of the standard by the CSSI.
- The proposed built form adheres to the Design Guidelines required of the Detailed SSD DA as described at Section 8.1.1 of the EIS.

In conclusion, there are sufficient environmental planning grounds to justify contravening the development standard.

### **6.3.3. Clause 4.6(4)(a)(ii) – Will the Proposed Development be in the Public Interest Because it is Consistent with the Objectives of the Particular Standard and Objectives for Development within the Zone in Which the Development is Proposed to be Carried Out?**

The proposed development is consistent with the objectives of the development standard as outlined within **Section 6.3.1** of this Request.

The proposal is also consistent with the land use objective that applies to the site under NSLEP as demonstrated within **Table 1** below. The site is located within the B3 Commercial Core zone.

Table 1 – Assessment of Compliance with Land Use Zone Objectives

<b>Objective</b>	<b>Compliance</b>
<i>To provide a wide range of retail, business, office, entertainment, community and other suitable land uses that serve the needs of the local and wider community.</i>	The proposed development serves the needs of the local and wider community by providing an increase in commercial floor space including retail premises and office premises within the commercial core of the North Sydney Centre.
<i>To encourage appropriate employment opportunities in accessible locations.</i>	<p>The proposed development encourages employment in a highly accessible location as it is positioned immediately above the approved Metro station and within proximity to North Sydney Station, bus routes, taxis and active transport networks for walking and cycling.</p> <p>The variation to the Miller Street setback area allows for the delivery of additional commercial office floor plates that encourages additional</p>

Objective	Compliance
	employment opportunities on the site compared to a compliant scheme.
<i>To maximise public transport patronage and encourage walking and cycling.</i>	<p>The proposed development promotes public transport use and encourages active transport use through minimising private car parking provision on site and enabling users of the OSD to efficiently access the new Metro station and surrounding public transport and active transport options.</p> <p>As described in the Concept SSD DA modification application, the amended building envelope and Detailed SSD DA design delivers highly accessible and visible Metro Station entrances, notwithstanding the proposed variation to the Miller Street setback area.</p>
<i>To prohibit further residential development in the core of the North Sydney Centre.</i>	The proposal does not include any residential development on the site.
<i>To minimise the adverse effects of development on residents and occupiers of existing and new development.</i>	<p>The proposed development minimises adverse effects on residents of existing development in relation to overshadowing, privacy and visual impacts. Specifically, the proposed variation to the Miller Street setback does not adversely impact the amenity of existing residents or occupiers of existing or approved surrounding residential development as the overall building envelope has been reduced compared to the approved building envelope.</p> <p>Views and visual impacts are also further addressed within <b>Section 8.1.4</b> of the Detailed SSD DA EIS, which demonstrates that the proposed variation to the Miller Street setback does not unreasonably impact views from the public domain or surrounding residential properties.</p>

The proposal is considered to be in the public interest as the development is consistent with the objectives of the development standard, and the land use objectives of the zone.

#### **6.3.4. Clause 4.6(5)(a) – Would Non-Compliance Raise any Matter of Significance for State or Regional Planning?**

The proposed non-compliance with the Miller Street setback development standard will not raise any matter of significance for State or regional environmental planning.

#### **6.3.5. Clause 4.6(5)(b) – Is There a Public Benefit of Maintaining the Planning Control Standard?**

The proposed development achieves the objectives of the Miller Street setback development standard and the land use zoning objectives despite the non-compliance, and the contravention has been demonstrated to be appropriate and supportable in the circumstances of the case.

As such, there is no public benefit in maintaining the development standard in the circumstances of this case.

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

The Planning Circular PS 18-003, issued on 21 February 2018, outlines that consent authorities for SSD may assume the Secretary's concurrence where development standards will be contravened.

Nevertheless, there are no known additional matters that need to be considered within the assessment of the clause 4.6 request and prior to granting concurrence, should it be required.



## 7. CONCLUSION

This variation request is made pursuant to clause 4.6 of the NSLEP. For a request to meet the requirements of clause 4.6(3) of NSLEP, it must:

- adequately demonstrate that compliance with the Miller Street setback standard is unreasonable or unnecessary in the circumstances of the project on the site; and
- adequately demonstrate that there are sufficient environmental planning grounds to justify contravening the Miller Street setback standard.

This request contains justified reasoning supporting conclusions in respect of the above two matters, specifically that:

- Objectives of the development standard in respect of maintaining the established setback and landscaped setting on the eastern side of Miller Street will be achieved, notwithstanding that above the height of RL 124 the numeric setback will be exceeded, and in doing so establishes that compliance with the standard is unreasonable or unnecessary. Strict compliance with the development standard is unreasonable and unnecessary in circumstances where the proposed Detailed SSD DA is consistent with the approved envelope and provides a greater setback above the height of RL 126 than that provided under the approved envelope and a greater setback for the 28 metre long southern portion of the site.
- There are sufficient environmental planning grounds to support the proposed development, in that the approved Concept SSD DA included a similar request to exceed the setback area, and the amended proposal reduces the extent of the approved non-compliance with the setback area, and the proposed setback does not adversely impact the ability to deliver a significant setback and landscape setting on the eastern side of Miller Street. Further, the Detailed SSD DA proposal maintains appreciation of the adjacent local heritage items, including the MLC Building and Rag & Famish Hotel, through retention of clear sight lines up to a height of RL 126 which is consistent with the approved envelope.

In view of the above, we submit that the proposal is in the public interest and that the proposed clause 4.6 variation request to the Miller Street setback development standard prescribed by clause 6.4 of NSLEP be supported.

# DISCLAIMER

This report is dated 6 September 2019 and incorporates information and events up to that date only and excludes any information arising, or event occurring, after that date which may affect the validity of Urbis Pty Ltd's (**Urbis**) opinion in this report. Urbis prepared this report on the instructions, and for the benefit only, of Lendlease (Victoria Cross) Pty Ltd (**Instructing Party**) for the purpose of Clause 4.6 Variation Request (**Purpose**) and not for any other purpose or use. To the extent permitted by applicable law, Urbis expressly disclaims all liability, whether direct or indirect, to the Instructing Party which relies or purports to rely on this report for any purpose other than the Purpose, and to any other person which relies or purports to rely on this report for any purpose whatsoever (including the Purpose).

In preparing this report, Urbis was required to make judgements which may be affected by unforeseen future events, the likelihood and effects of which are not capable of precise assessment.

All surveys, forecasts, projections and recommendations contained in or associated with this report are made in good faith and on the basis of information supplied to Urbis at the date of this report, and upon which Urbis relied. Achievement of the projections and budgets set out in this report will depend, among other things, on the actions of others over which Urbis has no control.

In preparing this report, Urbis may rely on or refer to documents in a language other than English, which Urbis may arrange to be translated. Urbis is not responsible for the accuracy or completeness of such translations and disclaims any liability for any statement or opinion made in this report being inaccurate or incomplete arising from such translations.

Whilst Urbis has made all reasonable inquiries it believes necessary in preparing this report, it is not responsible for determining the completeness or accuracy of information provided to it. Urbis (including its officers and personnel) is not liable for any errors or omissions, including in information provided by the Instructing Party or another person or upon which Urbis relies, provided that such errors or omissions are not made by Urbis recklessly or in bad faith.

This report has been prepared with due care and diligence by Urbis and the statements and opinions given by Urbis in this report are given in good faith and in the reasonable belief that they are correct and not misleading, subject to the limitations above.

