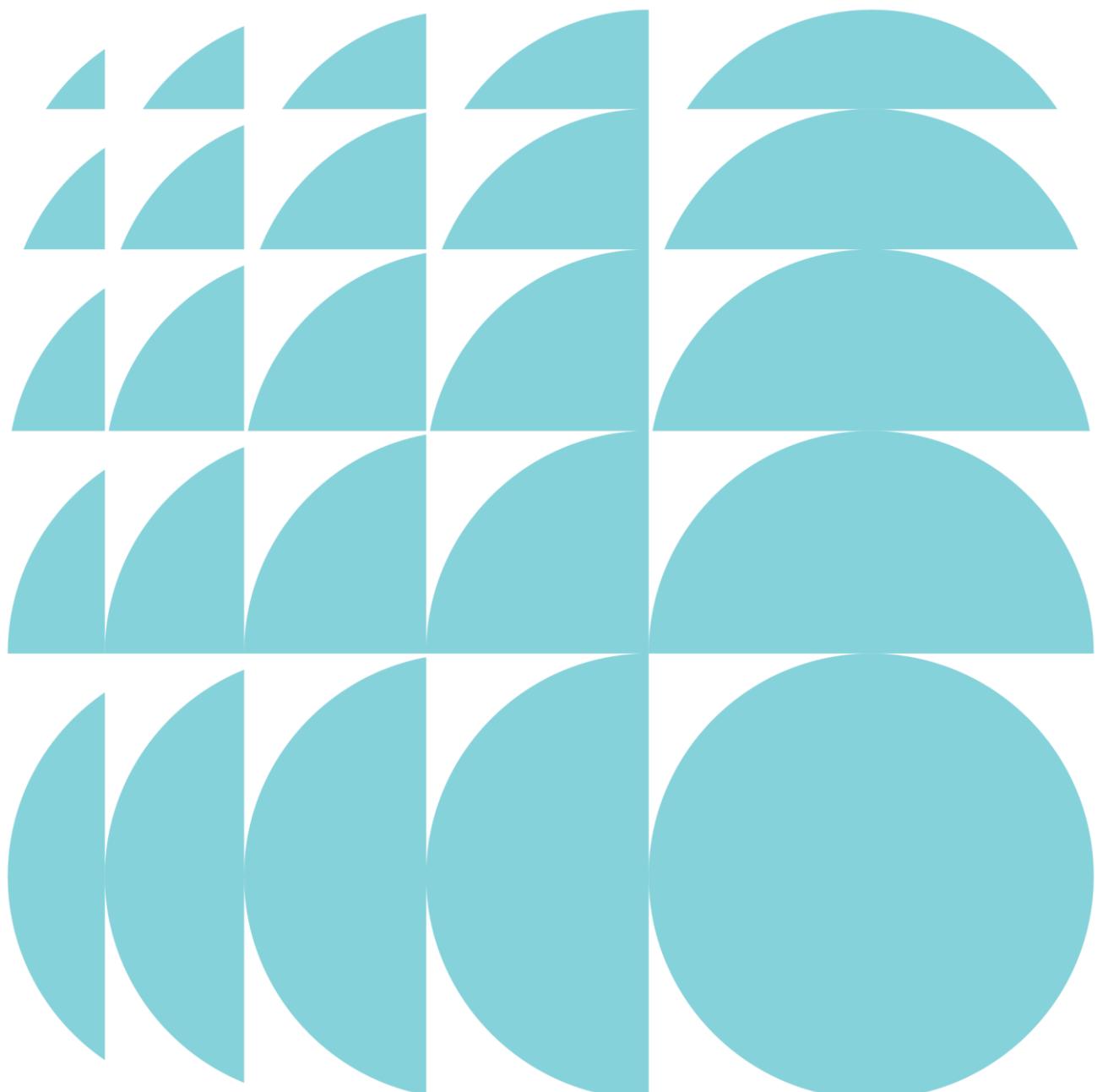


# **Attachment A**

**Revised Clause 4.6 Variation**

28 November 2018 | 15613



---

**CONTACT**

Harry Quartermain Principal hquartermain@ethosurban.com 9409 4908

Reproduction of this document or any part thereof is not permitted without prior written permission of Ethos Urban Pty Ltd.

This document has been prepared by:



Harry Quartermain 20/11/18

Clare Swan

20/11/18

Reproduction of this document or any part thereof is not permitted without written permission of Ethos Urban Pty Ltd. Ethos Urban operates under a Quality Management System. This report has been prepared and reviewed in accordance with that system. If the report is not signed, it is a preliminary draft.

---

**VERSION NO.****DATE OF ISSUE****REVISION BY****APPROVED BY**

Ethos Urban Pty Ltd  
ABN 13 615 087 931.  
www.ethosurban.com  
173 Sussex Street, Sydney  
NSW 2000 t 61 2 9956 6952

---

# Contents

1.0	Introduction	3
2.0	Development Standard to be Varied	4
3.0	Nature of Variation Sought	4
4.0	Clause 4.6(3)(a): Compliance with the Development Standard is Unreasonable or Unnecessary in the Circumstances of the Case	6
4.1	The objectives of the development standard are achieved notwithstanding the non-compliance (First Method)	6
5.0	Clause 4.6(3)(b) There are Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard	12
5.1	Street Activation	12
5.2	Pedestrian Amenity	12
5.3	Defining the Corner	12
5.4	Pedestrian Experience	13
5.5	Consistency with the Objects of the Environmental Planning and Assessment Act 1979	14
5.6	Summary	15
6.0	Clause 4.6(4)(A)(ii) 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 In Which The Development Is Proposed To Be Carried Out	16
6.1	Consistency with the objectives of the development standard	16
6.2	Consistency with the B8 – Metropolitan Centre objectives	16
7.0	Secretary's Concurrence	17
7.1	Clause 4.6(5)(a): Whether a contravention of the development standard raises any matter of significance for State or regional environmental planning	17
7.2	Clause 4.6(5)(b): The public benefit of maintaining the development standard	18
7.3	Clause 4.6(5)(c): Any other matters to be taken into consideration by the Secretary	18
8.0	Conclusion	18

# Contents

## Figures

Figure 1	Floor Space Ratio Summary	5
Figure 2	Historic Development at the site	7
Figure 3	Relationship between proposed development and adjoining 'Blacket' building	13
Figure 4	Council's recognised Through Site Links	14

## Tables

Table 1	Permissible FSR (based on a site area of 3,353m <sup>2</sup> )	4
Table 2	Assessment of Development Against Relevant Local Design Principles	10
Table 3	Assessment of proposed development against the Objects of the EP&A Act	14

## 1.0 Introduction

This Clause 4.6 variation request has been prepared by Ethos Urban on behalf of IOF Custodian Pty Ltd and Brookfield 388 Landowner Pty Ltd. It is submitted to City of Sydney Council (the Council) in support of a Development Application (DA) for a podium redevelopment at 388 George Street, Sydney.

Clause 4.6 of the Sydney Local Environmental Plan 2012 (SLEP) enables Council to grant consent for development even though the development varies a development standard. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

Clauses 4.6 (3) and (4)(a)(ii) requires the consent authority to consider a written request from the applicant that seeks to justify the contravention of the development standard. Clause 4.6(4)(a) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied:

- that the applicant's written request has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- that the applicant's written request has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard; and
- 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 in which the development is proposed to be carried out.

The consent authority's satisfaction in respect of those matters must be informed by the objectives of clause 4.6, which are to provide an appropriate degree of flexibility in the application of the relevant controls and to achieve better outcomes for and from the development in question by allowing flexibility in particular circumstances.

The Land and Environment Court has established a set of factors to guide assessment of whether a variation to development standards should be approved. The original approach was set out in the judgment of Justice Lloyd in *Winten Property Group Ltd v North Sydney Council [2001] 130 LGERA 79* at 89 in relation to variations lodged under State Environmental Planning Policy 1 – Development Standards (SEPP 1). This approach was later rephrased by Chief Justice Preston, in the decision of *Wehbe v Pittwater Council [2007] NSWLEC 827* (Wehbe).

While these cases referred to the former SEPP 1, the analysis remains relevant to the application of clause 4.6(3)(a). Further guidance on clause 4.6 of the Standard Instrument has been provided by the Land and Environment Court in a number of decisions, including:

- *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*;
- *Turland v Wingecarribee Shire Council [2018] NSWLEC 1511*;
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009*;
- *Micau Holdings Pty Limited v Randwick City Council [2015] NSWLEC 1386*; and
- *Moskovich v Waverley Council [2016] NSWLEC 1015*.

In accordance with the SLEP requirements, this Clause 4.6 variation request:

- identifies the development standard to be varied (**Section 2**);
- identifies the variation sought (**Section 3**);
- establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (**Section 4**);
- demonstrates there are sufficient environmental planning grounds to justify the contravention (**Section 5**);
- demonstrates that the proposed variation is in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out (**Section 6**); and

- provides an assessment of the matters the secretary is required to consider before providing concurrence (**Section 7**).

This Clause 4.6 variation request relates to the development standard for Floor Space Ratio (FSR) under Clause 4.4 of the SLEP and should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by Ethos Urban dated March 2018 as well as the supplementary plans submitted to Council since this date. This Clause 4.6 variation request demonstrates that compliance with the FSR development standard is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify variation to the standard.

## 2.0 Development Standard to be Varied

The development standard that is sought to be varied as part of this application is Clause 4.4 of the SLEP, relating to the maximum FSR. Under the SLEP, the site is afforded a base FSR of 8:1 however, several provisions in the SLEP are available to achieve an FSR beyond 8:1, including:

- Clause 6.4 Accommodation floor space:
  - The site is identified as 'Area 1' on the SLEP FSR map where Clause 6.4(b) stipulates that a building used for the purpose of an office premises, business premises or retail premises is eligible for an additional 4.5:1.
- Clause 6.5 Car parking reduction floor space:
  - Clause 6.5 allows any area of a basement previously used for car parking that is being removed for any other use is eligible for the amount of parking being removed as additional floor space.
- Clause 6.6 End of journey floor space:
  - Clause 6.6 stipulates that a commercial building which provides areas dedicated as end of journey facilities is eligible for additional floor space to the value of the area dedicated.

As detailed within the SEE, the proposal does not alter the retail/commercial use of the site and the proposed works result in the removal of six basement car parking spaces (85m<sup>2</sup>) and the provision of a new end of trip facility (419m<sup>2</sup>). Accordingly, the SLEP provides the maximum permissible FSR and gross floor areas (GFA) for the site (without any application under clause 4.6) as set out in **Table 1** below.

**Table 1 Permissible FSR (based on a site area of 3,353m<sup>2</sup>)**

Type of Floor Space	Control	Gross Floor Area	Total FSR
Base Floor Space (cl 4.4)	8:1	26,824m <sup>2</sup>	
Accommodation Floor Space (cl 6.4)	4.5:1	15,088.50m <sup>2</sup>	
Car Parking Reduction Floor Space* (cl 6.5)		85m <sup>2</sup>	
End of Journey Floor Space* (cl 6.6)	Up to 0.3:1	419m <sup>2</sup>	
<b>Total</b>		<b>42,416.5m<sup>2</sup></b>	<b>12.65:1</b>

\* the maximum floor area allowed under cl 6.5 and 6.6 is limited by the amount of floor space affected by the car park reduction or end of journey facility, respectively.

## 3.0 Nature of Variation Sought

The maximum FSR on the site under the SLEP for this application is 12.65:1. The existing building on the site comprises 42,596m<sup>2</sup> of GFA which equates to a total FSR of 12.7:1, therefore the existing building is already in excess of the maximum floor space development standard applicable under the SLEP and any addition (small or large) would require a variation to the maximum FSR development standard through clause 4.6.

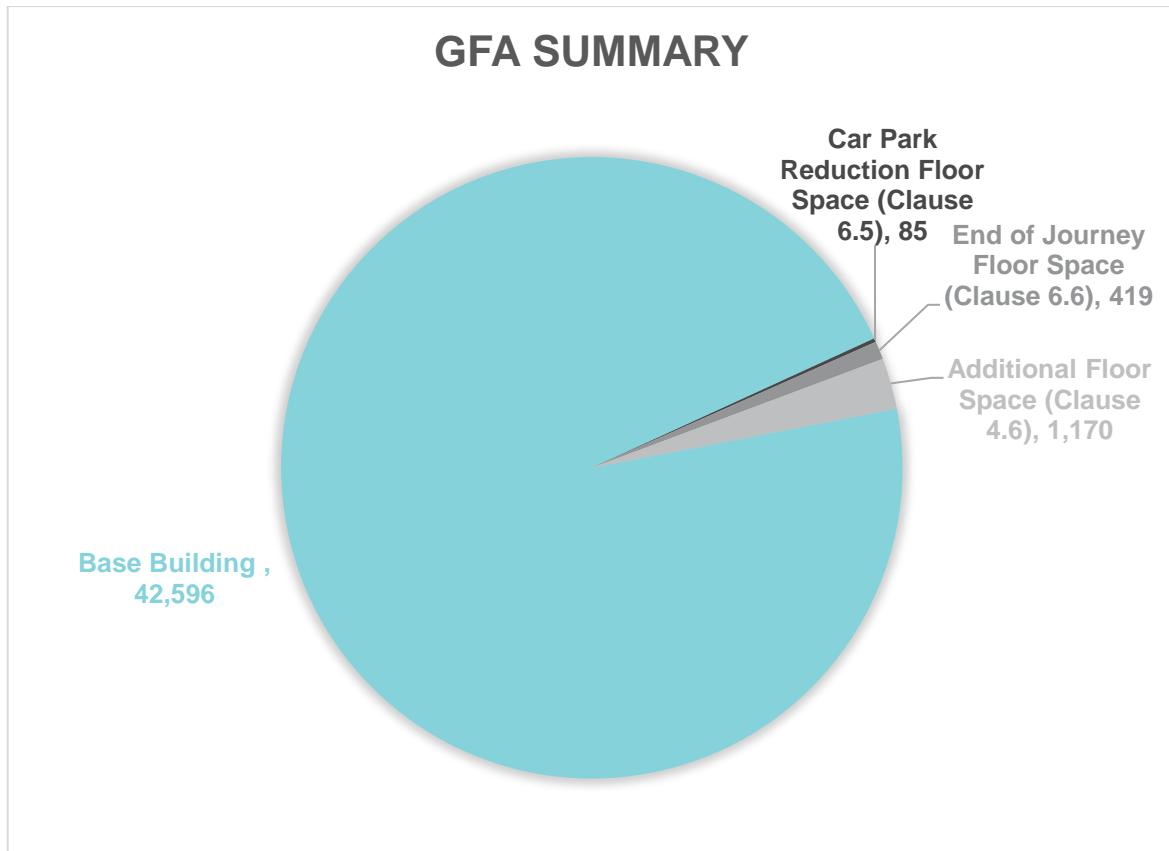
The proposed development seeks consent to increase the total GFA by 1,674m<sup>2</sup> (3.9%) which would result in a total FSR of 13.2:1 on the site. Of this increase, the following aspects would be permissible without the need to seek variation to the development standard under Clause 4.6:

- 419m<sup>2</sup> is categorised as 'End of Journey Floor Space' in accordance with Clause 6.6 of the SLEP; and
- 85m<sup>2</sup> is categorised as 'Car Parking Reduction Floor Space' in accordance with Clause 6.5 of the SLEP.

This variation therefore seeks consent for the balance of the proposed additional floor area, which equates to an additional 1,170m<sup>2</sup> of GFA, which equates to an additional FSR of 0.34:1.

It is noted that the site is subject to a restrictive covenant, in favour of City of Sydney Council, which imposes a maximum FSR of 13.4:1 on the site, measured in accordance with the Central Sydney LEP 1993 or any instrument that replaces that environmental planning instrument. If approved, the total FSR of the site will be 13.2:1 and accordingly, the proposal does not seek to realise the maximum FSR possible under the site's restrictive covenant. A summary of the floor space ratio for which consent is sought is provided below in **Figure 1**.

It is well established in case law that the extent of the numerical variation does not form part of the test required to be exercised under Clause 4.6. Decisions in respect of *Micaul Holdings P/L v Randwick City Council* (55% exceedance of height and 20% exceedance of FSR) and *Moskovich v Waverley Council* (65% exceedance of FSR) support this.



**Figure 1      Floor Space Ratio Summary**

Source: Ethos Urban

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

In Wehbe, Preston CJ of the Land and Environment Court provided relevant assistance by identifying five ways in which it could be shown that a variation to a development standard was unreasonable or unnecessary. However, His Honour in that case (and subsequently in *Initial Action*) confirmed that these five ways are not exhaustive; they are merely the most commonly invoked ways. Further, an applicant does not need to establish all of the ways.

While Wehbe related to objections made pursuant to State Environmental Planning Policy No. 1 – Development Standards (SEPP 1), the analysis may be of assistance in applying clause 4.6 given that subclause 4.6(3)(a) uses the same language as clause 6 of SEPP 1 (see Four2Five at [61] and [62]; Initial Action at [16]).

The five methods outlined in Wehbe are:

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard (**First Method**).
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (**Second Method**).
3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (**Third Method**).
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 (**Fourth Method**).
5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone (**Fifth Method**).

In this instance, the First Method is of particular assistance in establishing that compliance with a development standard is unreasonable or unnecessary.

### 4.1 The objectives of the development standard are achieved notwithstanding the non-compliance (First Method)

The objectives of the maximum FSR development standard contained in Clause 4.4 of the SLEP are:

- a) to provide sufficient floor space to meet anticipated development needs for the foreseeable future,
- b) to regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic,
- c) to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure,
- d) to ensure that new development reflects the desired character of the locality in which it is located and minimises adverse impacts on the amenity of that locality.

The proposal is assessed against the objectives for the FSR development standard below.

#### Objective A - to provide sufficient floor space to meet anticipated development needs for the foreseeable future

The proposed development forms part of a multifaceted campaign of upgrades to the existing building to enhance its ability to attract long term commercial tenants commensurate with the site's location within a centre of commercial activity and adjacent to the pedestrianisation of George Street. With the building (and its existing quantum of floorspace) being approximately 45 years old there is a clear need to execute upgrades to achieve an elevated level of occupancy comfort, so the building can remain competitive with new office occupants in years to come. The capacity of the site to meet future needs requires that there be additional floor space. As noted above, the existing building exceeds the relevant development standard and therefore any addition to this building would require variation to the development standard.

The additional floor space sought will facilitate a new high-quality retail and commercial podium, and commercial lobby, that will reaffirm the site's status within the commercial heart of the CBD and contribute to making Sydney a globally competitive and innovative city.

The Central Sydney Planning Strategy notes that by 2036 we will need close to 420,000 workers accommodated within Central Sydney, steep increases in rents and the conversion of many commercial properties to residential use have recently placed additional strain on the supply of commercial floor space in the Sydney CBD. The proposed development will allow for an increase in commercial/retail GFA in an appropriate location to help meet this projected demand and offset some of the recent CBD commercial to residential conversions.

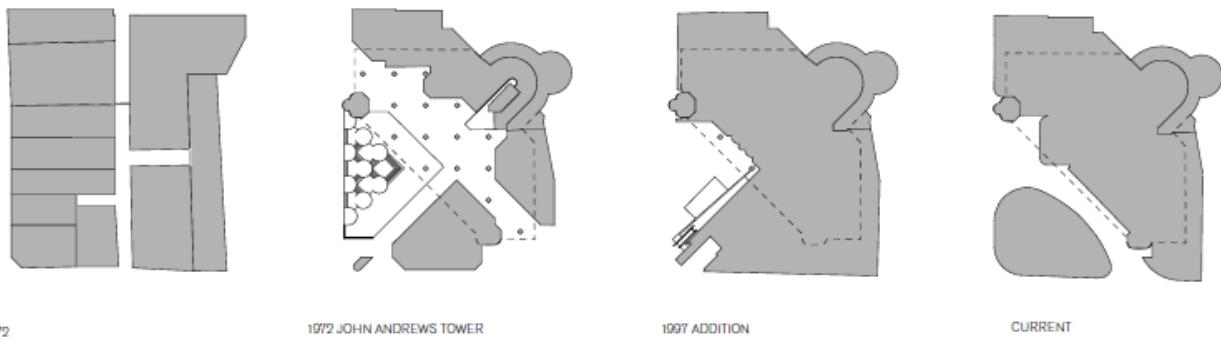
**Objective B - to regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic**

**Density of Development**

The density of the development within the City of Sydney is regulated by the FSR controls within the SLEP. Most commercial developments in the Central Sydney area are able to achieve a maximum FSR of 12.5:1 under the current provisions of the SLEP. This maximum FSR is increased to 13.75:1 if commercial developments can fully utilise the 10% floor space bonus awarded for design excellence and where a competitive design process has been held in accordance with the City of Sydney Competitive Design Policy. Such a process has not occurred in this instance and, consequently, the 13.75:1 maximum is not available (albeit the proposed development does exhibit design excellence). The proposed development would result in a building on the site with a total FSR of 13.2:1, which is less than the maximum theoretically possible under the SLEP 2012 (13.75:1).

**Built Form**

**Figure 2** below illustrates that, historically, the built form of this intersection has provided both definition to the street corner and finer grain opportunities for pedestrian movement through laneways or through-site-links. Both these features were removed as part of the 1997 addition works, which removed the through-site-link and also, in creating the entrance plaza on George Street, destroyed the definition of the street alignment in this location.



**Figure 2      Historic Development at the site**

Source: FJMT

The development now proposed will re-introduce the through-site-link between George Street and King Street and will reintroduce a suitable building form on this significant corner to assist in both defining the street edge and also in complementing the three adjacent corner buildings.

The height and bulk of the modified podium responds to the surrounding urban context, which predominantly comprises retail podiums built to boundary with commercial tower forms above. The additional floor space will facilitate a five storey podium that restores a prominent CBD street corner and is commensurate in bulk and scale to the existing commercial buildings in the locality.

The FSR development standards in the SLEP are supplemented in their control of density and built form in Central Sydney by the provisions of Section 5 of the Sydney DCP. The Objectives of Section 5.1.1 of the Sydney DCP include:

- (a) *Achieve comfortable street environments for pedestrians with adequate daylight, scale, sense of enclosure and wind mitigation.*
- (b) *Physically define the public domain and provide opportunities for street front activities that enhance the public domain.*
- (c) *Encourage flexibility in building design and reinforce the character of Central Sydney and ensure built form is compatible with heritage items and the desired streetscape character.*

The current built-form (pre this proposal) provided by the existing building on the corner of George Street and King Street is generally inconsistent with the bulk and scale of the surrounding buildings, and with similarly significant urban intersections in Central Sydney. Specifically:

- The lack of any building elements along the George Street frontage at the corner with King Street fails to 'physically define the public domain' in this area and does not 'reinforce the character of Central Sydney'; and
- The existing building form of the podium structure along the King Street frontage does not reflect the predominant building scale within this part of the city and does not comply with the current recommendations of the DCP, which stipulate a street frontage height between 20m and 45m with the specific height to have regard to 'the predominant street frontage height of adjacent buildings and buildings in the vicinity'.

The proposed development would allow the building as a whole to better meet the objectives and provisions of the DCP by physically defining the public domain of George Street and King Street and reinforcing the character of Central Sydney in consideration of the surrounding heritage buildings.

In order to achieve this improved relationship with the surrounding buildings, the public domain, and with the provisions of the DCP it is necessary to add a building element, and associated floor space, to the corner of George Street and King Street. As previously noted, because the existing building exceeds the maximum FSR development standard, any addition of floor space to the existing building will require a variation to this development standard under Clause 4.6. The placement of additional floorspace has specifically been chosen for a portion of the site which responds to Council's desired future character objectives of defining the public domain, activating the street and reinforcing the character of the surrounding streetscape.

### **Land Use Intensity**

The proposed development will increase the total GFA on the site, and therefore the land use intensity, by just 3.9%. This is appropriate in the circumstances of this case for two key reasons:

- Firstly, the total FSR of the building (13.2:1) will be less than the total permissible FSR of a commercial building on the site if the development were to have undertaken a competitive design process (13.75:1). Although, as outlined above, the building does exhibit design excellence, it is acknowledged that because no formal competitive design process has been undertaken the total permissible FSR of 13.75:1 does not technically apply to this development. Nevertheless, this fact demonstrates that, in relation to land use intensity, a building of a scale and intensity greater than that currently proposed is envisaged in this location and that therefore this development is consistent with this part of this objective.
- Secondly, the additional floor space, and therefore land use intensity, proposed as part of this development responds to two unique and site-specific aspects. These are:
  - The tangible improvements to the built form that will be facilitated in this location (as outlined above) and therefore the improved relationship of the building as a whole with its neighbours, its context, and with the provisions of the DCP; and
  - The improvements to the public transport network being undertaken in the immediate vicinity through the construction of a new light rail along George Street and a new Sydney Metro, which will include two new stations within 500m of the site.

### **Control Generation of Vehicular Traffic**

The proposed development does not give rise to any additional impacts from vehicle traffic as it reduces the overall number of car parking spaces within the building and, by increasing the overall floor area, reduces the total GFA to

car parking space ratio for the whole building. The site is within a highly serviced locality and the proposal encourages sustainable transport options by removing six vehicle parking spaces and providing a new end of trip facilities.

#### **Control Generation of Pedestrian Traffic**

The provision of a through-site link will improve the CBD pedestrian network by providing a safe and activated pedestrian path between two of the CBD's most active streets.

#### **Objective C - to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure**

The proposed development involves additions to an existing 30 storey commercial tower, however, no works or additional floor space is proposed above Level 5 under this application. As such, in the context of the entire building the proposed 1,674m<sup>2</sup> of floor space uplift is not significant and will not create an intensity of development that is incompatible with the site's CBD location.

As previously noted, the proposed development would result in a building on the site with a total FSR of 13.2:1, which is less than the maximum theoretically possible under the SLEP 2012 (13.75:1). The proposed 3.9% increase in total floor area envisaged by this development application is demonstrably commensurate with the existing and planned infrastructure of the surrounding area.

The site is well located to maximise benefits that will be available from recent significant NSW Government infrastructure investments. Specifically, the site directly adjoins the CBD Light Rail network that is currently under construction and is approximately 250m from the future Martin Place Metro Station.

The Central Sydney Planning Strategy notes that by 2036 we will need close to 420,000 workers accommodated within Central Sydney. In their preparation and endorsement of the commercial growth envisaged by the Strategy Council will have undertaken a reconciliation with existing and planned infrastructure. Therefore our additional 1,674m<sup>2</sup> (1,170m<sup>2</sup> of which is sought as part of this variation request) is a minor consideration in the overall scheme of the CBD and hence limited and marginal impact on existing and planned infrastructure.

#### **Objective D - to ensure that new development reflects the desired character of the locality in which it is located and minimises adverse impacts on the amenity of that locality**

##### **Desired Character of Locality**

The site is located within the Sydney CBD on the periphery of the Martin Place precinct which has a historic reputation as a centre of commercial activity and high heritage value. The proposal does not seek to alter the existing use of the site and will provide a strong well designed podium development to complement the existing tower form.

Although the site is not located within an identified Special Character Area within Central Sydney, it is located adjacent to the Martin Place Special Character Area, the Pitt Street Mall Special Character Area, and the York Street Special Character Area (including Clarence Street and Kent Street). An assessment of the proposed development against the design principles established for these areas by the Sydney DCP is provided in

**Table 2.**

**Table 2 Assessment of Development Against Relevant Local Design Principles**

<b>Design Principles</b>	<b>Comment</b>
<b>Martin Place Special Character Area</b>	
(a) Development must achieve and satisfy the outcomes expressed in the character statement and supporting principles.	The proposed development is not located within any Special Character Area identified within the Sydney DCP. Notwithstanding, an assessment against the most relevant provisions is provided below.
(b) Conserve and enhance the significance of Martin Place as one of Central Sydney's grand civic and ceremonial spaces, and as a valued business location.	The proposed development will enhance the significance of Martin Place by replacing an unsympathetic and uncharacteristic corner element with a new podium structure that is more in keeping with its context.
(c) Retain and enhance the urban character, scale and strong linear enclosure of Martin Place by requiring new buildings to: <ul style="list-style-type: none"> <li>i. be built to the street alignment;</li> <li>ii. have street frontage heights consistent with the prevailing form of buildings in the area; and</li> <li>iii. to have building setbacks above those street frontage heights.</li> </ul>	The proposed development will not directly affect the urban character of Martin Place because: <ul style="list-style-type: none"> <li>It will not affect the street alignment;</li> <li>It will not change the overall building height on the site; and</li> <li>It will reinforce the context of the local street wall heights in the area.</li> </ul>
(d) Protect and extend sun access and reflected sunlight to Martin Place during lunchtime hours from mid-April to the end of August.	The proposed development will not affect direct or reflected solar access to Martin Place.
(e) Provide sun access to significant sandstone buildings in Martin Place to improve the ground level quality of the public space.	The proposed development will not affect direct or reflected solar access to the significant sandstone buildings of Martin Place.
(f) Protect existing significant vistas to the east and west and ensure new development will not detrimentally affect the silhouette of the GPO clock tower.	The proposed development will not affect east/west vista or the silhouette of the GPO clock.
(g) Retain human scale at street level, while respecting and positively responding to the monumental nature of the place.	Although the proposed development will not directly affect the scale of Martin Place, the proposed development has been designed to respect the human scale of the site and will reinstate an appropriate podium building and through site link to the site.
(h) Conserve and enhance the heritage significance of the nineteenth and twentieth century institutional and commercial buildings and their settings	The proposed development will conserve and enhance the significance of the surrounding heritage buildings. A heritage report is appended to the DA.
<b>Pitt Street Mall Special Character Area</b>	
(a) Development must achieve and satisfy the outcomes expressed in the character statement and supporting principles.	The proposed development is not located within any Special Character Area identified within the Sydney DCP. Notwithstanding, an assessment against the most relevant provisions is provided below.
(b) Recognise and enhance Pitt Street Mall as a key element of Central Sydney's retail core.	The proposed development will not detract from Pitt Street Mall's importance as Sydney's retail core. The proposed development will allow the site to more appropriately support this role as a key retail area by delivering a new corner retail outlet.
(c) Retain and improve the urban character and scale of Pitt Street Mall and its sense of linear enclosure by requiring new development to: <ul style="list-style-type: none"> <li>i. be built to street alignment;</li> <li>ii. have street frontage heights consistent with the prevailing form of existing buildings in the area; and</li> <li>iii. have building setbacks above those street frontage heights.</li> </ul>	The proposed development will not directly affect the urban character of Pitt Street Mall because: <ul style="list-style-type: none"> <li>It will not affect the street alignment;</li> <li>It will not change the overall building height on the site; and</li> <li>It will reinforce the context of the local street wall heights in the area.</li> </ul>
(d) Protect and extend lunchtime and late morning sun access to the Pitt Street Mall from mid-April to the end of August.	The proposed development will not affect solar access to Pitt Street Mall.
(e) Enhance permeability within the area by reinforcing and expanding the network of arcades and through-site links in this Special Character Area.	The proposed development will introduce a new through site link and therefore allows for the expansion of the network of arcades

Design Principles	Comment
	and through-site links in (and surrounding) this Special Character Area.
(f) Enhance and encourage the use of the Mall as a major pedestrian space and an informal meeting place.	Through improving and enhancing the pedestrian experience in the vicinity of this Special Character Area, the proposed development will enhance and encourage the use of Pitt Street Mall as a major pedestrian space and an informal meeting place.
(g) Conserve and enhance the heritage significance of the area including the significance of the nineteenth and twentieth century commercial buildings and their settings.	The proposed development will conserve and enhance the significance of the surrounding heritage buildings. A heritage report is appended to the DA.
(h) Protect and enhance the east west vistas along King Street	The proposed development will enhance east/west views and vistas along King Street by replacing an unsympathetic and uncharacteristic corner element with a new podium structure that is more in keeping with its context.

#### York Street Special Character Area (including Clarence Street and Kent Street)

(a) Development must achieve and satisfy the outcomes expressed in the character statement and supporting principles.	The proposed development is not located within any Special Character Area identified within the Sydney DCP. Notwithstanding, an assessment against the most relevant provisions is provided below.
(b) Maintain and enhance the historic fine grain subdivision pattern, and prominent, significant corner buildings.	The proposed development does not alter the subdivision pattern, however it does improve pedestrian permeability through the introduction of a new through site link, and also introduces a new significant corner building. Both these interventions improve the site's compliance with this principle.
(c) Conserve and enhance existing significant views between the area and Darling Harbour, higher level views north to the Harbour Bridge and the significant vistas terminated by the QVB and the Sydney Town Hall, such as those along Mullins Street and York Street.	The proposed development will enhance views and vistas by replacing an unsympathetic and uncharacteristic corner element with a new podium structure that is more in keeping with its context.
(d) Conserve the existing cartways, laneways and courtyards and their heritage significance.	The proposed development will not affect any existing cartways or laneways.
(e) Respond to the historic warehouse and historic commercial typology in the design of buildings.	The proposed development will not affect any historic warehouses.
(f) Conserve historic buildings and reinforce and enhance the setting of the historic buildings in the design of new buildings.	The proposed development will conserve and enhance the significance of the surrounding heritage buildings. A heritage report is appended to the DA.

As noted above, the proposed development will reflect the desired character of the locality as it will allow the building as a whole to better meet the objectives of the DCP by physically defining the public domain of George Street and King Street and reinforcing the character of Central Sydney in consideration of the surrounding heritage buildings.

In order to achieve this improved relationship with the surrounding buildings, the public domain, and with the provisions of the DCP it is appropriate to add a building element, and associated commercial floor space, to the corner of George Street and King Street. As previously noted, because the existing building exceeds the maximum FSR development standard, any addition of floor space to the existing building will require a variation to this development standard under Clause 4.6.

The proposed additional floorspace sought in this Clause 4.6 also better allows the built form on the site to achieve the desired future character of the locality, as expressed under the DCP, as compared to the do nothing (no net increase in GFA) scenario. The SEE details that the proposal is largely consistent with the relevant environmental planning instruments and does not give rise to any adverse environmental impacts in respect to overshadowing, traffic, heritage, wind, reflectivity, stormwater, flooding, noise, waste, economic and social impacts.

## 5.0 Clause 4.6(3)(b) There are Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard

Clause 4.6(3)(b) of the SLEP 2012 requires the consent authority to be satisfied that the applicant's written request has adequately addressed clause 4.6(3)(b), by demonstrating:

*That there are sufficient environmental planning grounds to justify contravening the development standard.*

The environmental planning grounds relied on in the written request under Clause 4.6 must be sufficient to justify contravening the development standard. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (*Initial Action v Woollahra Municipal Council* [24] and *Turland v Wingecarribee Shire Council* [42]).

In this instance the relevant aspect of the development is the additional floor space that exceeds the development standard. It is also pertinent to note that the existing building already exceeds the relevant maximum FSR development standard, and therefore any addition of floor space would require a further variation to that standard.

There are sufficient environmental planning grounds to justify a flexible approach to the application of the FSR control as it applies to the site. In Four2Five, the Court found that the environmental planning grounds advanced by the applicant in a Clause 4.6 variation request must be particular to the circumstances of the proposed development on that site. The applicable circumstances that relate to the site are discussed below.

When it was originally constructed, the John Andrews designed building included a podium and forecourt that defined the street edge whilst enhancing pedestrian connectivity with a through-site link from King Street to George Street (refer to **Figure 2**). However, podium design modifications undertaken in 1997 diminished the strong corner address and removed the public through-site link.

In recognition of the prominent location of the site and the diminished podium qualities, the co-owners of the property appointed world renowned architects, FJMT, to design a podium concept that sympathised and restored key elements of the original intent/design. The resulting building form, which is now proposed, has a number of advantages when compared to the current design, these advantages are summarised below.

### 5.1 Street Activation

Section 3.2.3. of the Sydney DCP specifies Council's requirements relating to activation of street frontages. Within Central Sydney, Council's DCP required 80% of the public domain interface to be 'activated' with entries and window displays to shops and food and drink premises. Although the current building does provide entrances to retail tenancies along King Street, the corner of the site and the George Street frontages are not well activated. The corner of the site is occupied by the escalators required to access the basement level supermarket retail level, and the majority of the George Street frontage is occupied by the private café seating associated with the existing forecourt café. In replacing and relocating these elements, the proposed development is able to deliver a built form that not only activates the entire of the George Street and King Street frontages, but also delivers and then activates a new through-site link. The proposed development therefore improves the overall compliance of the site with the provisions of Section 3.2.3 of the Sydney DCP.

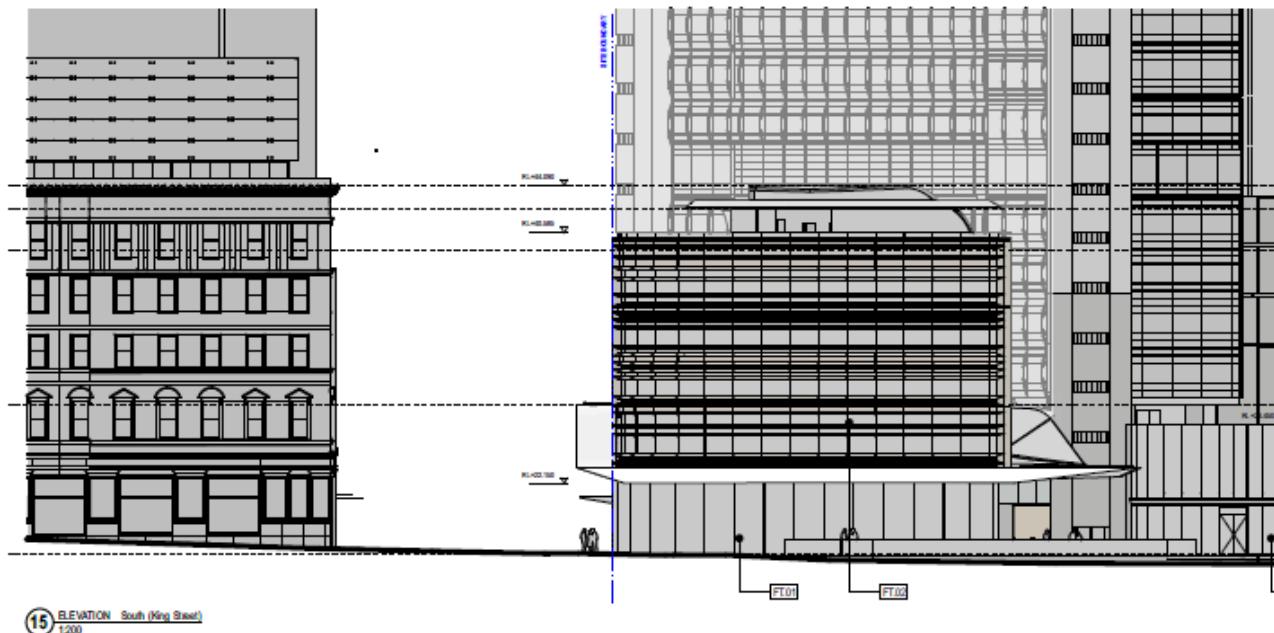
### 5.2 Pedestrian Amenity

Further to the above, Section 3.2.4 of the Sydney DCP requires the provision of a continuous footpath awning to provide weather protection and encourage pedestrian amenity. This continuous awning is not currently provided by the existing building form but would be delivered by the proposed development, thereby improving the compliance of the building as a whole with the provisions of Section 3.2.4 of the Sydney DCP.

### 5.3 Defining the Corner

The current building form on the site, which is not built to its boundary, does not appropriately address the corner of King Street and George Street, one of the most significant intersections in the Sydney CBD. Currently, when walking south along George Street, the existing plaza severs the through site link that was originally provided by

Andrews' design. The extent of ground coverage and building height of this existing corner building is inconsistent with the building scale presented by the neighbouring buildings on the three adjacent corners of this intersection. Specifically (as shown in **Figure 3**) the proposed development would deliver a building form that appropriately responds to the heritage-listed 'Blackett' (Louis Vuitton) building , which is located to the west of the site on the opposite side of George Street. The proposed development would also provide a more appropriate response to the existing building form on the southern side of King Street, where the existing buildings are built to their respective boundaries and help to define the corner of the intersection and provide activated frontages to the pedestrian footpath.



**Figure 3 Relationship between proposed development and adjoining 'Blackett' building**

Source: FJMT

#### 5.4 Pedestrian Experience

In delivering a building that responds appropriately to its immediate neighbours to help define the significant corner of King Street and George Street, activates the pedestrian experience, and provides weather protection with a continuous awning as required by the Sydney DCP, the proposed development will deliver a significant improvement to the pedestrian legibility and experience in this part of Sydney. The delivery of a through site link between King Street and George Street has been acknowledged as being desirable by Council within the Sydney DCP Through Site Links Map (Sheet 14) (Refer **Figure 4**). Although the alignment of the through-site-link proposed as part of the development differs slightly from that noted within the DCP, the action of the connection will be directly comparable. The introduction of the through-site-link will provide an alternative covered pathway from pedestrians travelling north-west or south-east through the city and will therefore provide relief from pedestrian congestion on the footpaths of this intersection.

**Figure 4 Council's recognised Through Site Links**

Source: Sydney DCP

## 5.5 Consistency with the Objects of the Environmental Planning and Assessment Act 1979

In *Initial Action*, the Court stated that the phrase “environmental planning grounds” is not defined, but would refer grounds that relate to the subject matter, scope and purpose of the EP&A Act, including the objects in section 1.3 of the Act. While this does not necessarily require that the proposed development should be consistent with the objects of the Act, nevertheless, in **Table 3** we consider how the proposed development is consistent with each object, notwithstanding the proposed variation of the height development standard.

**Table 3 Assessment of proposed development against the Objects of the EP&A Act**

Object	Comment
(a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,	The proposed development will promote the economic and social welfare of the community through the introduction of a tangible improvement in building form in the area that will respond appropriately to the local heritage items while delivering additional commercial floor area in the City's Metropolitan Centre.
(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,	The proposed development will facilitate ecologically sustainable development by allowing an appropriate addition to an existing commercial building in a location that will have no negative impact on environmental and social considerations and will support the economic health of the City's Metropolitan Centre.
(c) to promote the orderly and economic use and development of land,	The proposed development will promote the orderly and economic use of land by allowing alterations and additions to be made to an existing building that is already in excess of the maximum FSR development standard, to make improvements to the building form and to compliance with the DCP, without the need to make substantial alterations to the existing tower or demolish the existing building.

Object	Comment
(d) to promote the delivery and maintenance of affordable housing,	The proposed development is not relevant to this object.
(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,	The proposed development will have no impact on threatened species or ecological communities.
(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),	The proposed development will allow for an addition to made to an existing building that will replace a corner element that is uncharacteristic and unsympathetic to the surrounding context and to local heritage buildings to be replaced with a more appropriate building element.
(g) to promote good design and amenity of the built environment,	The proposed development has been designed by renowned architects FJMT, with extensive input from the City's Design Advisory Panel, and following an internal design ideals competition. The development promotes good design in this regard. The proposed development will improve pedestrian amenity through the improved activation of the street frontage and through the provision of a continuous pedestrian awning.
(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,	The proposed development will comply with all relevant BCA codes and will promote the health and safety of occupants.
(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,	This object is not relevant to this proposed development
(j) to provide increased opportunity for community participation in environmental planning and assessment.	The proposed development has been publicly notified in accordance with the requirements of Council's DCP.

## 5.6 Summary

In designing the proposed alterations and additions to the existing podium, FJMT have considered the relationship between the original 1972 John Andrews designed tower and the street corners of George Street and King Street. When it was originally constructed, Andrews' tower included a podium and forecourt design that defined the street edge whilst enhancing pedestrian connectivity with a through-site link from King Street to George Street. However, podium design modifications undertaken in 1997 diminished the strong corner address and removed the public through-site link as illustrated at **Figure 2** above.

The height and bulk of the modified podium elements respond to the surrounding urban context, which predominantly comprises retail podiums built to boundary with commercial tower forms above. The five-storey podium envelope is commensurate in bulk and scale to the existing and emerging commercial buildings in the locality.

Accordingly, the proposed development now presents strong street edge qualities and provides tower-to-ground relationship that is more consistent with the requirements of the Sydney DCP and with Andrews' vision for the site. In addition, the through-site link has been reinstated, therefore enhancing pedestrian connectivity and safety.

It is not possible to deliver the numerous and significant improvements listed above without introducing new built form (and therefore GFA) to the corner of the site. Because the existing building, which has an FSR of 12.7:1 already exceeds the maximum permissible FSR (including available bonuses) for this building, which is 12.65:1, in order to avoid the requirement to vary the maximum FSR development standard any development would have to remove GFA from the building. To avoid the requirement to request a variation to the maximum FSR development standard GFA would have to be removed from the building commensurate with any addition, and also equal to the amount of the existing exceedance (0.05:1). This would clearly lead to a sub-optimal outcome and would be likely to undermine the design integrity, form, and functionality of Andrews' existing tower.

By allowing a variation to the 'maximum FSR' development standard in this instance, an opportunity is presented for the proposed development to allocate additional floor space to achieve the benefits discussed above and improve the existing building's relationship with the surrounding development and the relevant DCP controls.

In this regard, there are *sufficient environmental planning grounds to justify contravening the development standard*. The proposed additional floorspace sought in this Clause 4.6 better allows the built form on the site to achieve the desired future character of the locality, as expressed under the DCP, as compared to the do nothing (no net increase in GFA) scenario.

## **6.0 Clause 4.6(4)(A)(ii) 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 In Which The Development Is Proposed To Be Carried Out**

### **6.1 Consistency with the objectives of the development standard**

The proposed development is consistent with the objectives of the FSR development standard, for the reasons discussed in **Section 4.1** of this report.

### **6.2 Consistency with the B8 – Metropolitan Centre objectives**

#### **Objective A - To recognise and provide for the pre-eminent role of business, office, retail, entertainment and tourist premises in Australia's participation in the global economy**

This proposal will facilitate upgrades to an existing commercial building commensurate to contemporary market expectations within the CBD. The proposed development will deliver a built-form outcome that is more consistent with the surrounding buildings, the public domain, and with the provisions of the DCP. In order to achieve this improvement, it is necessary to add a building element, and associated floor space, to the corner of George Street and King Street. Because the existing building exceeds the maximum FSR development standard, any addition of floor space to the existing building will require a variation to this development standard under Clause 4.6.

#### **Objective B - To provide opportunities for an intensity of land uses commensurate with Sydney's global status**

The proposed development involves additions to an existing 30 storey commercial tower, however, no works or additional floor space is proposed above Level 5 under this application. As such, in the context of the entire building the proposed 3.9% increase in floor space uplift is not significant and will not create an intensity of development that is incompatible with the site's CBD location especially in the context of planned infrastructure upgrades such as the Sydney Light Rail.

Further, the Central Sydney Planning Strategy notes that by 2036 we will need close to 420,000 workers accommodated within Central Sydney, steep increases in rents and the conversion of many commercial properties to residential use have recently placed additional strain on the supply of commercial floor space in the Sydney CBD. The proposed development will allow for an increase in commercial/retail GFA in an appropriate location to help meet this projected demand and offset some of the recent CBD commercial to residential conversions.

In delivering the proposed upgrades to the streetscape, the development will vastly increase the amount of activated street frontages in this area. Delivering an activated street frontage directly adjacent to the new light rail will encourage pedestrian activity along the newly pedestrianised George Street. The placement and design of the floorspace therefore enhances the pedestrian experience, encouraging non private vehicle use of the site and locality.

#### **Objective C - To permit a diversity of compatible land uses characteristic of Sydney's global status and that serve the workforce, visitors and wider community**

The proposal does not seek to change the existing commercial use of the building. Rather, it will allow upgrades to an existing building commensurate to current market expectations of commercial buildings within Central Sydney.

The proposed development will generally diversify the commercial floor plate and retail offerings to attract a long-term tenant and will activate the ground plane with a high quality retail layout and a public through-site link.

Furthermore, the proposal will provide premium end of trip facilities to serve the future tenants.

**Objective D - To encourage the use of alternatives to private motor vehicles, such as public transport, walking or cycling**

The site is approximately 250m from Wynyard and Martin Place Railway Stations and adjoins the pedestrianised zone of the CBD Light Rail that is currently under construction. The proposal will also introduce new bicycle parking and end of trip facilities within Level 1 of the existing building and includes the reduction of private car parking spaces. This will encourage future commercial tenants to participate in active and sustainable transport practices in line with the objectives of this zone.

The proposed development increases the quantity of commercial floor area within the building but does not introduce a commensurate increase in the quantity of car parking. By reducing the overall amount of car parking available on the site and introducing new end of trip facilities, the proposal therefore encourages the use of alternatives to private motor vehicles, such as public transport, walking and cycling.

**Objective E - To promote uses with active street frontages on main streets and on streets in which buildings are used primarily (at street level) for the purposes of retail premises**

The site is located on a prominent CBD street corner with a frontage to George Street and King Street. The proposed ground floor retail layout and through-site link will provide activation along these frontages. The retail tenancies will include full height glazing which further encourages visual activation. The proposed development will also allow for the building to provide a more consistent street wall alignment and street frontage to both of the streets on which the site is situated. In order to achieve this objective, additional floorspace under Clause 4.6 is required, to infill the existing forecourt and achieve this objective.

## 7.0 Secretary's Concurrence

Under Clause 4.6(5) of SLEP, the Secretary's concurrence is required prior to any variation being granted. Under clause 64 of the *Environmental Planning and Assessment Regulation 2000*, the Secretary has given written notice dated 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 clause 4.6, subject to the conditions in the table in the notice. We note that none of the conditions in the table apply to the proposed development, therefore the Secretary's concurrence is assumed.

Nevertheless, the following section provides a response to those matters set out in Clause 4.6(5) of the SLEP which must be considered by the Secretary.

### 7.1 Clause 4.6(5)(a): Whether a contravention of the development standard raises any matter of significance for State or regional environmental planning

The variation to the FSR standard of SLEP will not raise any matter which could be deemed to have State or Regional significance. The extent of variation sought is minor in the context of the entire building (3.9% increase) and the resultant total FSR of the building (13.2:1) would be less than the maximum theoretically possible under the SLEP 2012 (13.75:1).

We do note, however, that the proposed development is consistent with the current metropolitan plans for Sydney, including the Sydney Regional Plan and the Eastern District Plan in that it:

- Ensures that the Harbour City remains strong and competitive by ensuring that the building stock is subject to appropriate upgrades when required (Metro Plan Objective 18);
- Allows for investment and business activity to continue within an existing centre (Metro Plan Objective 22);
- Renews a great place and respects the District's heritage (District Plan Priority E6);
- Grows a stronger and more competitive Harbour CBD (District Plan Priority E7); and
- Grows investment and business opportunities in Strategic Centres (District Plan Priority E11).

## **7.2 Clause 4.6(5)(b):The public benefit of maintaining the development standard**

Maintaining the development standard would not result in any public benefit in this situation and the variation sought would not undermine the standard in any event. As detailed within the SEE, the height and bulk of the modified podium respond to the surrounding urban context and the requirements of the Sydney DCP 2012.

The current built-form provided by the existing building on the corner of George Street and King street is generally inconsistent with the bulk and scale of the surrounding buildings, and with similarly significant urban intersections in Central Sydney. Specifically:

- The lack of any building elements along the George Street frontage at the corner with King Street fails to 'physically define the public domain' in this area and does not 'reinforce the character of Central Sydney'; and
- The existing building form of the podium structure along the King Street frontage does not reflect the predominant building scale within this part of the city and does not comply with the current recommendations of the DCP, which stipulate a street frontage height between 20m and 45m with the specific height to be set having regard to 'the predominant street frontage height of adjacent buildings and buildings in the vicinity'.

The proposed development would allow the building as a whole to better meet the objectives of the DCP by physically defining the public domain of George Street and King Street and reinforcing the character of Central Sydney in consideration of the surrounding heritage buildings. The proposed variation to the floorspace standard therefore allows the site to better meet the objectives of the DCP and the desired future character of the area. DCPs are guiding documents prepared to express the desired future character; protect the public interest and are prepared through an extensive public exhibition process. To better meet the objectives of the DCP can be said to improve the development's presentation to the public domain and is in the public interest.

Additionally, it is noted that the site is in need of upgrades and strict numerical compliance would encumber the various community and commercial benefits the proposed works provide. The proposed development will benefit the public in that:

- it will significantly improve the quality of the pedestrian environment within and surrounding the site, including increased permeability;
- it delivers a podium that positively responds to the streetscape and is compatible with surrounding developments;
- it is afforded a high level of access to existing infrastructure such as regional roads, rail and bus networks;
- it enables the opportunity to create a vibrant, accessible place to meet, shop, eat and interact;
- it makes a meaningful contribution to the public realm, supporting the local business community and enhancing the distinctive character of the CBD locality; and
- it enhances and responds sensitively to the rich heritage setting, creating spaces that reflect the civic scale and significance of the immediate precinct.

## **7.3 Clause 4.6(5)(c): Any other matters to be taken into consideration by the Secretary**

None. In accordance with PS 18-003 (Variations to Development Standards), the Secretary's concurrence is able to be assumed as the variation proposed is less than 10%.

## **8.0 Conclusion**

The assessment above demonstrates that compliance with the maximum floor space ratio development standard contained in Clause 4.4 of SLEP is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravening the standard.

It is considered that the variation allows for the orderly and economic use of the land in an appropriate manner, whilst also allowing for a superior outcome in planning and design terms. This Clause 4.6 variation demonstrates, notwithstanding the non-compliance with the maximum FSR development standard, that:

- The development as proposed will deliver a superior built-form outcome in consideration of the site's location and the surrounding buildings;
- The development as proposed will improve the pedestrian environment and increase activation of the street frontages; and
- Compliance with the development standard would be both unreasonable and unnecessary in this instance because the development is able to fully satisfy the objectives of the *B8 Metropolitan Centre Zone* and the objectives of the maximum FSR development standard.

The SLEP applies a maximum FSR for the site of 12.65:1 when taking into account relevant floor space bonuses. The existing development has been lawfully constructed and comprises an FSR of 12.7:1, therefore the existing building is already in excess of the maximum floor space allowable under the SLEP.

The proposal seeks floor space uplift of 1,674m<sup>2</sup> which equates to an FSR of 13.2:1. Of this additional FSR:

- 419m<sup>2</sup> is categorised as 'End of Journey Floor Space' in accordance with Clause 6.6 of the SLEP; and
- 85m<sup>2</sup> is categorised as 'Car Parking Reduction Floor Space' in accordance with Clause 6.5 of the SLEP.

This variation therefore seeks consent for the balance of the proposed additional floor area, which equates to an additional 1,170m<sup>2</sup> of GFA, or an additional FSR of 0.34:1.

The proposed variation of the 'maximum FSR' development standard does not result in an over development of the site or any adverse impacts on the public domain. The proposed additional podium mass is commensurate with surrounding developments and the built form that characterises the locality. It is also consistent with the design approach applied to other commercial buildings within the immediate vicinity.

Consistent with the aim of Clause 4.6 to provide an appropriate degree of flexibility to achieve better outcomes for and from development, a departure from the FSR development standard is considered appropriate in these circumstances.

Despite the numerical non-compliance with the 'maximum FSR' development standard, the proposed development is considered to satisfy the objectives of the development standard and the B8 Metropolitan Centre zone.

The proposal will provide environmental benefits particular to the site through the provision of improved amenity for future tenants of the development and for the office and retail public passing the site generally. On this basis, the Clause 4.6 variation is considered well founded and should be supported.