

**Item 4.****Development Application: 89-105 Kent Street, Millers Point****File No.:** D/2018/1008**Summary**

<b>Date of Submission:</b>	29 August 2018
<b>Applicant:</b>	Brooke Bailey of Gallagher Jeffs
<b>Designer:</b>	Wilson Associates
<b>Developer:</b>	The Langham
<b>Owner:</b>	City of Sydney
<b>Cost of Works:</b>	\$17,735.05
<b>Zoning:</b>	R1 - General Residential: development is permissible with consent
<b>Proposal Summary:</b>	<p>Use part of the public footway on Kent Street for outdoor seating in association with the licensed hotel 'The Langham'.</p> <p>Proposed hours of use are 6.30am to 12.00 midnight, Thursdays to Saturdays inclusive, and 6.30am to 11.00pm, Sundays to Wednesdays inclusive.</p> <p>Footway Application FA/2018/155 is being assessed concurrently.</p> <p>This application is Integrated Development requiring the approval of the NSW Heritage Council under the Heritage Act 1977. The Heritage Council has issued General Terms of Approval for the proposal. The application is reported to the Local Planning Panel as the proposal is located on a footway owned by the City of Sydney.</p> <p>It is recommended that approval be issued for the use of the outdoor dining area subject to conditions that ensure that a clear path of pedestrian travel is maintained and reduced operating hours.</p>

- Proposal Summary (continued):** It is recommended that the size of the outdoor dining area be reduced to 12sqm and operating hours be reduced to between 7.00am and 10.00pm daily.
- Summary Recommendation:** The development application is recommended for approval, subject to conditions.
- Development Controls:**
- (i) Sydney Local Environmental Plan 2012 (Gazetted 14 December 2012, as amended)
  - (ii) Sydney Development Control Plan 2012 (in force on 14 December 2012, as amended)
  - (iii) City of Sydney Outdoor Dining Policy and Guidelines
- Attachments:**
- A. Recommended Conditions of Consent
  - B. Selected Drawings

## Recommendation

It is resolved that consent be granted to Development Application No. D/2018/1008 subject to the conditions set out in Attachment A to the subject report.

## Reasons for Recommendation

The application is recommended for approval for the following reasons:

- (A) The proposed development is consistent with section 4.15 of the Environmental Planning and Assessment Act 1979, in that it satisfies the provisions of Sydney Local Environmental Plan 2012 and Sydney Development Control Plan 2012 and for the reasons outlined in the report submitted to the Local Planning Panel.
- (B) Conditions are recommended that reduce the size of the outdoor dining area to ensure a clear path of travel is provided and the hours of operation of the outdoor area are restricted to 10pm daily to ensure that the use of the footway area is only possible in association with the consumption of food.

## Background

### The Site and Surrounding Development

1. A site visit was carried out by staff on 11 September 2018.
2. The site in which the outdoor seating area is associated is rectangular, with an area of approximately 2,307sqm. It has a primary street frontage to Kent Street and secondary street frontages to High Street and High Lane. A four storey building, known as 'The Langham', is contained within the site.
3. Surrounding land uses are predominantly residential, with some restaurants, cafes, and licensed premises. The site is not a heritage item but is located within the State Heritage listed Millers Point and Dawes Point Village Precinct Conservation Area (SHR: 1682). The site is also located in the Millers Point/Dawes Point Conservation Area (C35) under the Sydney LEP 2012.
4. Photos of the site and surrounds are provided below:



**Figure 1:** Aerial image of subject site and surrounding area



**Figure 2:** Site viewed from Kent Street



**Figure 3:** Looking north along Kent Street



**Figure 4:** Pedestrian crossing at site



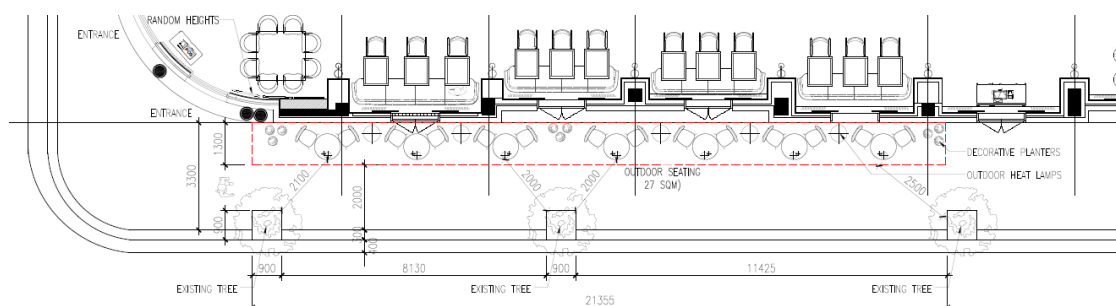
**Figure 5:** Corner of Kent Street and High Street



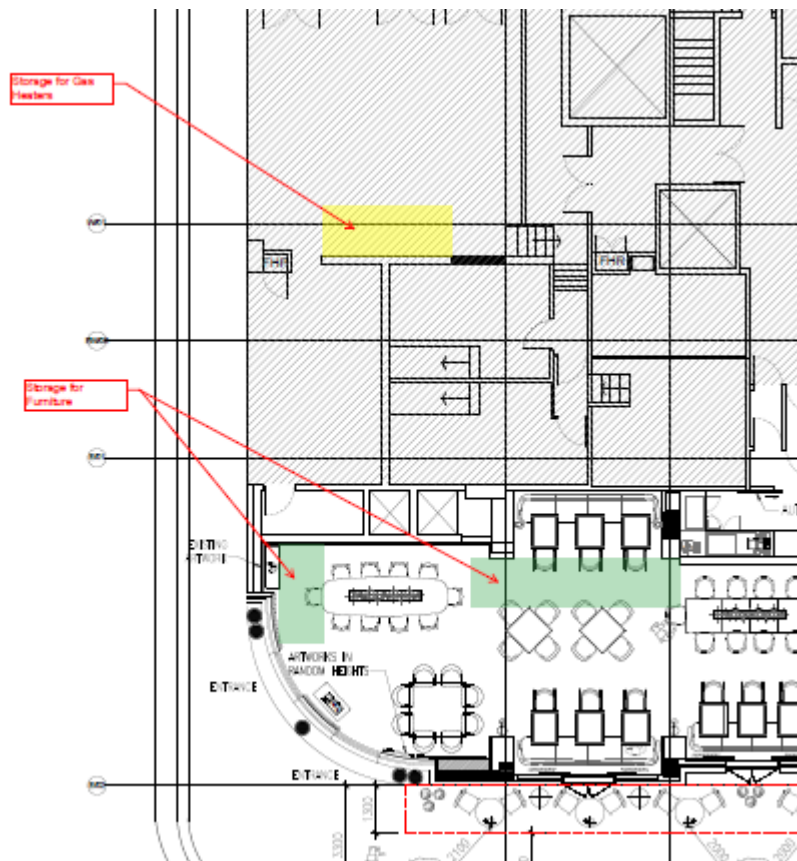
**Figure 6:** Looking south along Kent Street

## Proposal

5. The application seeks consent to use part of the Kent Street footway outside the Langham Hotel for outdoor dining.
6. The proposal is to use 27.8sqm of the footway of Kent Street so that seven outdoor tables, 14 outdoor chairs, 9 decorative planter boxes, and five outdoor heat lamps are provided.
7. The proposed hours of operation of the outdoor dining area are 6.30am to 12.00 midnight Thursday to Sunday and 6.30am to 11.00pm Sunday to Wednesday.
8. Development consent is required for the use of the footway for outdoor dining purposes as the existing bar/restaurant operates under a hotel licence.
9. The proposed outdoor dining area is outlined in dotted line below:



**Figure 7:** Proposed footway area to be used



**Figure 8:** Proposed outdoor furniture storage areas (marked in green and yellow)

### Heritage Act 1977

10. The proposal is integrated development under the Heritage Act 1977, as the subject site is located within the State Heritage listed Millers Point and Dawes Point Village Precinct Conservation Area (SHR: 1682).
11. A copy of the application was referred to the Heritage Council on 29 August 2018 in accordance with Clause 66 of the Environmental Planning and Assessment Regulation 2000.
12. On 27 November 2018, the Heritage Council of NSW issued General Terms of Approval subject to the recommended conditions, which have been included in the determination (Schedule 3).

### History Relevant to the Development Application

13. On 26 November 1990, development consent D/1990/346 was granted for the construction of a four storey hotel with two basement levels, including 100 hotel rooms, cafe, restaurant, bar, office space and staff facilities.

**Economic/Social/Environmental Impacts**

14. The application has been assessed under Section 4.15 of the Environmental Planning and Assessment Act 1979, including consideration of the following matters:

- (a) Environmental Planning Instruments and DCPs.

**Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 (Deemed SEPP)**

15. The site is located within the designated hydrological catchment of Sydney Harbour and is subject to the provisions of the above SREP.

16. The Sydney Harbour Catchment Planning Principles must be considered in the carrying out of development within the catchment. The key relevant principles include:

- (a) protect and improve hydrological, ecological and geomorphologic processes;
- (b) consider cumulative impacts of development within the catchment;
- (c) improve water quality of urban runoff and reduce quantity and frequency of urban run-off; and
- (d) protect and rehabilitate riparian corridors and remnant vegetation.

17. The site is within the Sydney Harbour Catchment and eventually drains into the Harbour. However, the site is not located in the Foreshores Waterways Area or adjacent to a waterway and therefore, with the exception of the objective of improved water quality, the objectives of the SREP are not applicable to the proposed development. The development is consistent with the controls contained with the deemed SEPP.

**Roads Act 1993**

18. The proposal is consistent with the requirements for footway restaurants under the Road Act 1993. Subject to conditions, the provision of outdoor dining will not result in unreasonable impacts on adjoining roadway users or the public domain.

**Smoke-Free Environment Act 2000**

19. Under the Smoke-Free Environment Act 2000 and associated regulations, smoking is not permitted in outdoor areas which are available to be used for dining. If an area is to be used for smoking, signage must be provided to indicate that no food is allowed to be consumed in that area.

20. As approvals under Section 125 of the Roads Act 1993 relate specifically to the use of footways for restaurant purposes, footway dining areas approved under that legislation must be available for dining at all times and cannot be used for smoking.

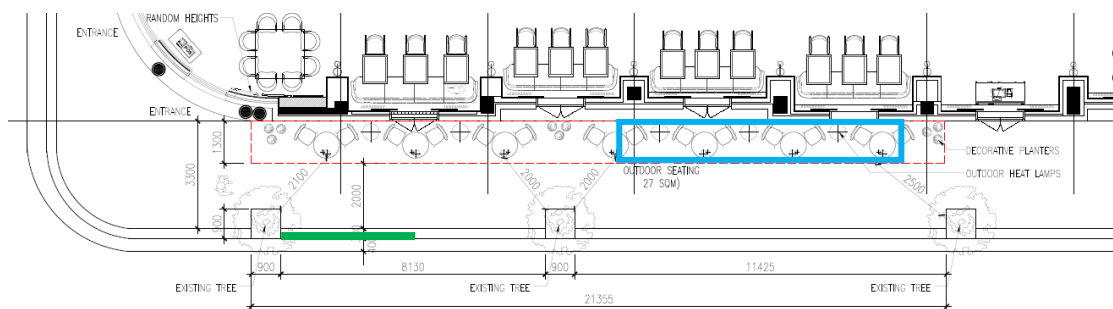
**City of Sydney Outdoor Dining Policy and Guidelines**

21. The proposal is generally consistent with the requirements for outdoor dining under the Outdoor Dining Guidelines 2016.

22. The application proposes an outdoor dining area 27.8m<sup>2</sup> in area (21.36m in length and 1.3m in width) along the building line. The footway upon which the outdoor dining is proposed has trees adjacent the road and provides access to a pedestrian crossing.



23. As per Provision 3.2 of the guidelines, a 2m clear path of travel is required for streets. The proposed outdoor dining does not fully comply with this requirement. Certain sections of the footway are landscaped with trees. The clear path of travel space between the proposed outdoor dining area and trees is 1.4m, which is noncompliant with the City of Sydney's Outdoor Dining Guidelines. In sections which are not affected by trees a clear path of travel of 2.7m is maintained. To address this noncompliance it is recommended the size of the outdoor dining area be reduced, so that no outdoor dining is adjacent to existing landscaping / street trees and a minimum clear path of travel for pedestrians of 2m is maintained.
24. The pedestrian crossing is pictured in Figure 4 and is located at the green line shown in Figure 9. Provision 3.3 of the guidelines states in areas of high pedestrian volume, Council may not allow outdoor dining if not suitable. As per the guidelines, it is important to maintain safe, dignified and equitable access to the pedestrian crossing for all pedestrians and other uses travelling along the street.
25. It is recommended approval is not given for outdoor dining located adjacent the pedestrian crossing as there is not adequate space for pedestrians. Reducing the proposed outdoor dining area will ensure an unobstructed path of travel from the footway to the crossing for all pedestrians, including pram-users or disabled pedestrians. The amendment of the outdoor dining area to ensure a consistent, 2m clear path of travel, is also supported by Council's Public Domain unit.



**Figure 9:** Amended outdoor dining area

26. The outdoor seating is located next to a taxi zone. The proposed outdoor dining is located 2m from the curb. This is considered an appropriate amount of space to ensure taxis can be accessed. This complies with the kerb clearances as per Provision 4.5 and is considered an appropriate.
27. The location of the outdoor dining area adjacent to the building line is consistent with other outdoor dining approvals along Kent Street, including seating outside 127-153 Kent Street, Millers Point (FA/2017/219) and 33-35 Kent Street, Millers Point (FA/2017/233).

### **Draft Sydney Development Control Plan - Late Night Trading 2018**

28. A draft-late night trading development control plan is currently on exhibition. As a draft DCP amendment, this is a consideration for the subject development proposal. The intended outcome of this amendment is to assist in encouraging diverse late night trading in the city to meet the social and cultural needs of the community, while managing the effects of these uses on the neighbourhoods in which they are located.

29. Under the draft DCP, the subject site is located in a New City Living Area. The draft DCP suggests that this area will have base trading hours between 10.00am to 8.00pm, with extended hours between 9.00am to 10.00pm. These proposed DCP trading hours have been considered in the assessment of this application.

### Sydney LEP 2012

30. The site is located within the R1 - General Residential zone. The proposed use is defined as outdoor dining associated with a 'hotel' / 'food and drink premises' and is permissible.
31. The relevant matters to be considered under Sydney Local Environmental Plan 2012 for the proposed development are outlined below.

#### Compliance Tables

Development Control	Compliance	Comment
5.10 Heritage conservation	Yes	The subject site is located within a heritage conservation area.  See discussion under the heading Issues.

### Sydney DCP 2012

32. The relevant matters to be considered under Sydney Development Control Plan 2012 for the proposed development are outlined below.

2. Locality Statements – Millers Point
The subject site is located in the Millers Point locality. The proposed outdoor dining is considered to be in keeping with the unique character of the area and design principles in that it retains and conserves the heritage significance of the area, and building, and maintains existing views and vistas into and out of the precinct.

3. General Provisions	Compliance	Comment
3.1 Public Domain Elements	Yes	Adequate space for pedestrian use can be provided, subject to conditions.
3.9 Heritage	Yes	The existing building is located within a heritage conservation area. See discussion under the heading Issues.
3.14 Waste	Yes	A condition has been recommended for the proposed development to comply with the relevant provisions of the City of Sydney Guidelines for Waste Management in New Development.

3. General Provisions	Compliance	Comment
3.15 Late Night Trading Management	Yes	See discussion under the heading Issues.

## Issues

### Heritage

33. The site is located within a Conservation Area, the State Heritage listed Millers Point and Dawes Point Village Precinct Conservation Area (SHR: 1682) and is therefore subject to the heritage provisions of the City of Sydney Local Environmental Plan (LEP) 2012 and Development Control Plan (DCP) 2012. The site is also located in the Millers Point/Dawes Point Conservation Area (C35) under the Sydney LEP 2012.
34. The proposal generally complies with the relevant aims, objectives and controls of the LEP and DCP. The outdoor seating is temporary and removable, and will not have a detrimental effect on the heritage significance of the area.
35. The application proposes outdoor chairs, tables, decorative planter boxes, and heat lamps. The Heritage Council, in their General Terms of Approval, conditioned the installation of moveable chairs and tables is permitted but "*additional elements like movable heaters and umbrellas*" are not. As such, the proposed outdoor heat lamps and decorative planters will not be approved.

### Late night trading

36. The proposed hours of operation for the outdoor dining area are 6.30am to 12.00 midnight, Thursday to Saturday and 6.30am to 11.00pm, Sunday to Wednesday.
37. The premises is a Category A premises, operating under a hotel licence with a capacity of over 120 persons. The site is not located in a late night trading area but the matters for consideration, under Section 3.15.3, are relevant to the proposal.
38. There are several outdoor dining approvals located within the vicinity of the subject site. The trading hours of surrounding outdoor dining areas range from 7.00am to 11.00pm.

Application	Outdoor dining location	Outdoor dining approved hours
FA/2017/219	'The Local Eatery', 127-153 Kent St, Millers Point	7.00am – 10.00pm Monday to Sunday
FA/2017/233	'Captain Cook Hotel', 33-35 Kent St, Millers Point	8.00am – 11.00pm Monday to Saturday 10.00am – 10.00pm Sunday
FA/2017/158	'Argyle Street Patisserie', 21-29 Kent St, Millers Point	7.00am – 9.00pm Monday to Sunday

FA/2017/208 & D/2016/1115/A	'Argyle Bar', 1-7 Argyle Pl, Millers Point	7.00am – 10.00pm Monday to Saturday 7.00am – 9.00pm Sunday
-----------------------------	--	---

39. The local area is close to the CBD but predominantly residential, with some restaurants, cafes, and licensed premises located nearby. The provision of outdoor dining is thus compatible with the character of the area.
40. The Plan of Management demonstrates acceptable protocols will be put in place to mitigate noise exceedances generated by patrons of the outdoor dining area. These measures together with the recommended conditions that reduce the size of the outdoor area from 27sqm to 12sqm and restricting the operating hours to between 7.00am to 10.00pm daily will ensure that there are no unacceptable impacts.
41. The chairs and tables will need to be placed inside the building at 10.00pm by staff from the Langham and will be stored within the south eastern corner of the ground floor as shown on the plan titled "*F&B Area - Ground Floor*" (refer to Attachment B Selected Drawings).

#### **Other Impacts of the Development**

42. The proposed development is capable of complying with the BCA.
43. It is considered that the proposal will have no significant detrimental effect relating to environmental, social or economic impacts on the locality, subject to appropriate conditions being imposed.

#### **Suitability of the site for the Development**

44. The proposal is of a nature in keeping with the overall function of the site. The premises are in a commercial/residential surrounding.

#### **Internal Referrals**

45. The conditions of other sections of Council have been included in the proposed conditions.
46. The application was discussed with the Heritage Specialist; Building Services Unit; Environmental Health; Licenced Premises; and Public Domain; who advised that the proposal is acceptable subject to the recommended conditions.

#### **Notification, Advertising and Delegation**

47. The application constitutes integrated development and as such the application was notified and advertised for 30 days between 10 September 2018 and 11 October 2018 in accordance with the provisions of Environmental Planning and Assessment Regulations 2000. As a result of this notification a total of seven submissions were received raising the following issues:
  - (a) Outdoor dining hours from 6.30am until midnight does not suit the residential area and will result in noise at unreasonable times. Builders cannot start work until 7.00am so a café should be subject to the same restrictions.

- (b) A fixed set of hours, seven days per week, 8.00am to 10.00pm, should apply to the outdoor dining to be consistent with other outdoor dining areas along Kent Street. While the Captain Cook Hotel has Council approval for longer hours they have elected to close at 10.00pm and open at 8.00am which has been appreciated by the community.
- (c) Considering the strategic residential location, permitted hours should be reduced to between 8.00am and 9.00pm. This is supported by the Noise Impact Assessment, which predicts noise exceedance.
- (d) Noise from patrons of The Langham, using outdoor seating on the public footpath on Kent Street, will result in neighbouring resident's loss of amenity, sleep, right to privacy and quiet enjoyment of one's home.
- (e) NSW Legislation states noise from parties cannot be heard in adjoining properties. Intoxicated people will not respect noise restrictions.
- (f) There will be an increase in noise from patrons leaving The Langham. There are already noise issues with patrons returning from other hotels in the area. A venue cannot control patrons once they leave a premises.
- (g) The Langham is trying to capitalise on patrons leaving the hotels closing earlier in the area. These people will be rowdy and disturb the quiet area.

**Response** - The objections are noted. Allowing 12sqm for outdoor dining, as opposed to the proposed 27.8sqm of space, is not considered to generate an unacceptable amount of noise.

The acoustic report prepared by JHA Consulting Engineers, Titled '*Langham Hotel Restaurant Outdoor Eating Area*' and dated 21/08/18, concludes that the City of Sydney and Liquor and Gaming NSW noise level criteria will be met in scenarios where patrons are talking with 'normal' and 'raised' vocal effort. In the situation where patrons are talking with 'loud' vocal effort, the noise level criteria will be exceeded. In these situations, as described in the Plan of Management, action will be taken to mitigate the situation.

Council's Licensed Premises Specialist and Environmental Health Specialist consider the Plan of Management acceptable. The operation of the outdoor dining area is to comply with several conditions including noise conditions, compliance with the Plan of Management, and compliance with the Acoustic Report. Additionally, a condition of consent requires management to ensure the behaviour of patrons entering and leaving the premises does not detrimentally affect the amenity of the neighbourhood. Noise impacts are also mitigated by the amended outdoor dining area, which reduces the proposal from 27.8sqm to 12sqm of outdoor dining space.

The hours of operation that have been recommended (7.00am to 10.00pm) are consistent with the operating hours of neighbouring premises and the context of the area, which has a mix of residential, food and drink, and retail uses. Patrons leaving other premises in the area will only be able to use the Langham's outdoor dining area until 10.00pm.

Finally, there will be ability under the footway dining permit (FA/2018/155) to rescind the lease if management are unable to appropriately manage any issues causing significant detrimental impact to the amenity of residents and businesses in the area.

- (h) The outdoor dining area will leave very little space for pedestrian travel. It is already difficult to get past the Langham hotel with visitors and staff waiting or mingling around the hotel entrance.
- (i) Waiting staff servicing the outdoor dining area will cause inconvenience.
- (j) It is hard enough getting past 'The Local Eatery', without having to do the same past The Langham.
- (k) The outdoor dining would be inappropriate as there is a taxi rank outside the entrance of the hotel.

**Response** - In Council's assessment of the footway, it was recognised the outdoor dining area did not maintain a 2m clear path of travel, as required under City of Sydney's Outdoor Dining Guidelines. Consequently, the proposed outdoor dining area is amended. The area has been reduced to 12sqm. This provides over the requisite 2m of space for pedestrians and leaves adequate space for the taxi rank.

Subject to compliance with the conditional consent, it is considered there is sufficient space, visibility, and clearance so the outdoor dining area will not be a safety issue for patrons, staff, and pedestrians.

The proposed outdoor dining area is located adjacent to the building line. This is consistent with other outdoor dining along Kent Street, ensuring a consistent path of travel for pedestrians.

- (l) Considering the width of the footpath, a maximum of two persons per table should be the necessary requirement. Outdoor seating should be conditioned to limit the area to 14 persons.

**Response** - Furniture must be within the recommended 12sqm space, as per the Outdoor Dining Guidelines and recommended conditions.

- (m) The restaurant inside The Langham is usually empty and there is no internal demand from The Langham guests for this space.
- (n) There are many food and drink premises in the area, use of the footway for this purpose is not necessary.

**Response** - Whilst there are several food and drink premises in the area, and the applicant may have a large amount of dining space inside the premises, the applicant still has the right to apply for outdoor dining on the footway area.

- (o) The applicant will want to install umbrellas for inclement weather.

**Response** - Umbrellas are refused under the NSW Heritage Council's General Terms of Approval.

- (p) There is a wind tunnel along Kent Street.

**Response** - The proposed outdoor dining is unlikely to exacerbate this issue.

- (q) The Langham has not tried to engage with affected neighbours to try and mitigate negative impacts of the proposal.

**Response** -Public consultation has been undertaken by the City of Sydney in accordance with Schedule 1 of Sydney Development Control Plan 2012.

- (r) The development will attract more people to the area and put more pressure on limited street parking, which is also going to be affected by the Barangaroo development.

**Response** - The objection is noted. The availability of street parking is not a matter for consideration. The application does not propose a significant increase of patrons for the premises.

- (s) Residents should be put before the demands of large corporations.

**Response** - The objection is noted.

### Public Interest

48. It is considered that the proposal will have no detrimental effect on the public interest, subject to appropriate conditions being proposed.

### S61 Contribution

49. The cost of the development is under \$200,000 and the development is therefore not subject to a levy pursuant to the Central Sydney (Section 61) Contributions Plan 2003.

### Relevant Legislation

50. The Environmental Planning and Assessment Act 1979.  
51. The Heritage Act 1977.

### Conclusion

52. The proposal is to use 27.8sqm of footway on a daily basis between 6.30am and 12.00 midnight, Thursdays to Saturdays, and 6.30am to 11.00pm, Sundays to Wednesdays.
53. The proposal is recommended to be amended to address concerns raised by Council staff regarding a clear path of pedestrian travel and hours of operation. This involves reducing the proposed outdoor dining area to 12sqm and limiting the hours of operation to between 7.00am and 10.00pm daily.
54. The amended proposal is generally consistent with the objectives, standards and guidelines of the relevant planning controls. Conditions of consent are recommended to address any potential impact from the uses on surrounding residential amenity.

55. Accordingly, the development application is recommended for approval, subject to conditions.

**GRAHAM JAHN, AM**

Director City Planning, Development and Transport

Rose Pardey, Cadet Planner