Land and Environment Court
New South Wales

Medium Neutral Citation:	**Stannards Marine Pty Ltd v North Sydney Council [2022] NSWLEC 99**
Hearing dates:	2, 3, 4, 5, 6, 9, 10, 11 and 26 May 2022
Date of orders:	08 August 2022
Decision date:	08 August 2022
Jurisdiction:	Class 1
Before:	Preston CJ
Decision:	The Court orders:

In the relocatable shed appeal, Proceedings No 2022/36839:

(1) By 22 August 2022, the parties are to confer and if possible agree on the conditions of development consent for the relocatable shed and air quality pollution control system, which are to reflect the findings of this judgment, and file the agreed conditions.

(2) If the parties are not able to agree on the conditions of consent, by 22 August 2022, each party is to file in Court and serve on the other parties the party's version of the conditions of consent.

In the floating dry dock appeal, Proceedings No 2021/63136:

(1) The appeal is dismissed.

(2) Development application No 57/2019 for the mooring and use of a floating dry dock and associated infrastructure works at 6 John

Street, McMahons Point, is determined by refusal of consent.

Catchwords:

APPEAL – development application for the use of a relocatable shed at existing boatyard – structural integrity of shed – acoustic and air quality impacts –impact on land contamination – visual and heritage impacts – consistency with zone objectives

APPEAL – development application for the mooring and use of a floating dry dock at existing boatyard – visual and landscape character impacts – statutory provisions recognising harbour as public asset of national and heritage significance to be protected for public good, for existing and future generations – public trust – intergenerational equity – unacceptable visual and landscape character impacts

Legislation Cited:

Environmental Planning and Assessment Act 1979 ss 4.15, 4.16, 8.7
Environmental Planning and Assessment Regulation 2021 cl 32(3) of Schedule 3
Interpretation Act 1987 cl 30A
North Sydney Development Control Plan 2013 sections 10, 13 of Part C, section 13 of Part B
North Sydney Local Environmental Plan 2013 cll 2.3, 2.4, 5.10, 6.8, Part 1 of Schedule 5
Protection of the Environment Administration Act 1991 s 6
State Environmental Planning Policy (Biodiversity and Conservation) 2021 cll 10.1, 10.4, Part 10.2, Chapter 10
State Environmental Planning Policy (Resilience and Hazards) 2021 cl 4.6
Sydney Harbour Foreshores and Waterways Development Control Plan 2005 Parts 1, 3, 4
Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005

Cases Cited:

Addenbrooke Pty Ltd v Woollahra Municipal Council [2008] NSWLEC 190
Bushfire Survivors for Climate Action Inc v Environment Protection Authority (2021) 250 LGERA 1; [2021] NSWLEC 92
Illinois Central Railroad v Illinois 146 US 387 (US Sup Ct, 1892)
Re Sydney Harbour Collieries Co (1895) 5 Land Appeal Court Reports 243
Rose Bay Marina Pty Ltd v Woollahra Municipal Council [2013] NSWLEC 1046

Society for the Protection of the Harbour Ltd v Town Planning Board [2003] 2 HKLRD 787; [2003] HKCFI 220
Stannards Marine Pty Ltd v North Sydney Council (2021) 250 LGERA 318; [2021] NSWLEC 66
Telstra Corp Ltd v Hornsby Shire Council (2006) 146 LGERA 10; [2006] NSWLEC 133
Tenacity Consulting v Warringah Council [2004] NSWLEC 140
Town Planning Board v Society for the Protection of the Harbour Ltd (2004) 7 HKCFAR 1; [2004] HKCFA 27
Willoughby City Council v Minister Administering the National Parks and Wildlife Act (1992) 78 LGERA 19

Texts Cited:

Tim Bonyhady, 'A Usable Past: The Public Trust in Australia' (1995) 29 *Environmental & Planning Law Journal* 329

Berry Fong Chung Hsu, 'A Public Trust Doctrine for Hong Kong' (2011) 15 *New Zealand Journal of Environmental Law* 89

Joseph L Sax, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention' (1969-1970) 68 *Michigan Law Review* 484

Joseph L Sax, *Defending the Environment: A Handbook for Citizen Action* (Vintage Books, 1971)

Catherine Redgwell, "Principles and Emerging Norms in International Law: Intra- and Inter- generational Equity" in CP Carlarne, KR Gray and R Tarasofsky (eds) *The Oxford Handbook of International Climate Change Law* (OUP, 2016) 185

WH Rodgers, 'Bringing People Back: Toward a Comprehensive Theory of Taking in Natural Resource Law' (1982) 10 *Ecology Law Quarterly* 205

E Brown Weiss, "Intergenerational Equity: A Legal Framework for Global Environmental Change" in E Brown Weiss (ed) *Environmental Change and International Law: New Challenges and Dimensions* (UN University Press, 1992)

	E Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Inter-generational Equity* (UN University Press, 1988)
Category:	Principal judgment
Parties:	Stannards Marine Pty Ltd (Applicant) North Sydney Council (Respondent) Friends of Sydney Harbour (Objector 1) The Owners of Strata Plan 63626 (Objector 2) Dr Ronald Blombery (Objector 3) The Owners of Strata Plan 48674 (Objector 4) The Owners of Strata Plan 48675 (Objector 5) Waverton Public Lands and Waters Protection Association Inc (Objector 6) Mr Michael Stevens (Objector 7)
Representation:	Counsel: Mr A Galasso SC with Ms J Reid (Applicant) Mr T To (Respondent) Ms L Sims (Objectors 2, 3, 4, 5, 7) Mr J Molyneux (agent) (Objector 1) Mr B Donald (agent) (Objector 6) Solicitors: Alice Spizzo Advisory (Applicant) HWL Ebsworth Lawyers (Respondent)
File Number(s):	2021/63136 & 2022/36839
Publication restriction:	Nil

JUDGMENT

The proposed redevelopment of a boatyard

1 Stannards Marine Pty Ltd (Stannards) own land known as 6 John Street, McMahons Point (the land) and lease other land and waters in Berrys Bay, part of Sydney Harbour (the water lease area). Noakes Group Pty Ltd (Noakes) operates a boatyard on the land and in the water lease area. There are two existing approvals, development consent 1164/90 granted by North Sydney Council under Part 4 of the *Environmental Planning and Assessment Act 1979* (EPA Act) for a boat building and repair facility on the land (the 1990 consent) and an approval issued by the Maritime Services Board (MSB) under Part 5 of the EPA Act on 15 November 1990.

Noakes Boatyard – Figure 2 Aspinall's Visual Impact Assessment, p 2.

2 Noakes wishes to modify its activities at the existing boatyard in two ways. First, it wishes to moor and use an existing floating dry dock it has already purchased in the water lease area. The existing floating dry dock is currently moored in White Bay, Balmain. Noakes will use the floating dry dock to carry out repair and maintenance of boats, particularly of larger vessels not as easily accommodated in the existing boatyard, including on the slipway. On 5 March 2019, Stannards lodged Development Application 57/2019 for the mooring and use of the floating dry dock in the water lease area.

3 Second, Noakes wishes to use an existing relocatable shed in new locations at the existing boatyard, within which it will carry out repair and maintenance of smaller vessels. The relocatable shed will be modified to connect to a new air quality pollution control system to reduce air pollution emanating from the relocatable shed. The key feature of the air quality pollution control system is a carbon filtration system which will be connected to the relocatable shed and three other sheds through piping. On 23 December 2021, Stannards lodged Development Application 456/21 to use the existing relocatable shed and to install the air quality pollution control system in the relocatable shed and existing sheds 1, 3 and 4.

The appeals against the refusals of the proposed redevelopment

4 On 1 September 2020, the Sydney North Planning Panel refused the development application for the floating dry dock. On 4 March 2021, Stannards appealed to this Court under s 8.7 of the EPA Act (the floating dry dock appeal). The development application for the floating dry dock has been amended subsequently. On 9 February 2022, Stannards appealed to the Court under s 8.7 of the EPA Act against the deemed refusal of the development application for the relocatable shed and the air quality pollution control system (the relocatable shed appeal).

5 The development for which development consent is sought in the floating dry dock appeal involves designated development. One of the types of development that cl 32(3) of Schedule 3 to the Environmental Planning and Assessment Regulation 2021

describes as designated development is development for the purposes of a boat repair or maintenance facility. A "boat repair or maintenance facility" is defined in cl 32(4) to mean "a facility at which vessels are repaired or maintained out of the water and includes slipways, hoists or other facilities". The mooring and use of the floating dry dock to repair or maintain vessels in the water lease area is development for the purposes of a boat repair or maintenance facility.

6 Various objectors to this designated development applied and were held to be entitled to be heard on the floating dry dock appeal: *Stannards Marine Pty Ltd v North Sydney Council* (2021) 250 LGERA 318; [2021] NSWLEC 66. These objectors were the owners of nearby residential properties who might be adversely affected by the proposed development. They were the Owners of Strata Plan 63626, the Owners of Strata Plan 48674, the Owners of Strata Plan 48675, Mr Michael Stevens and Mr Ronald Blombery (the resident objectors). They were represented at the hearing by Ms L Sims of counsel. Other objectors were two environmental non-governmental organisations, the Friends of Sydney Harbour (FOSH) and the Waverton Public Lands and Waters Protection Association Inc (WPLWP). Mr Molyneux and Mr Donald acted as agents for these organisations respectively.

7 The floating dry dock appeal was heard together with the relocatable shed appeal.

The disposal of the appeals

8 I have determined to uphold the relocatable shed appeal and grant development consent to the use of the relocatable shed and the installation of the air quality pollution control system, subject to conditions. I have determined to dismiss the floating dry dock appeal and refuse development consent to the development application to moor and use the floating dry dock in the water lease area. I will deal first with the relocatable shed appeal before I deal with the floating dry dock appeal. Before discussing either appeal, however, I will summarise the applicable statutory instruments.

The applicable environmental planning instruments and development control plans

9 The land and the water lease area are subject to different environmental planning instruments. The land is subject to North Sydney Local Environmental Plan 2013 (NSLEP). NSLEP zones the landward side of the land IN4 Working Waterfront but leaves the jetties and the saw-toothed concrete dock built over the water unzoned. The water lease area is subject to State Environmental Planning Policy (Biodiversity and Conservation) 2021 (Biodiversity and Conservation SEPP). This SEPP zones the waters of Berrys Bay, including the water lease area, W1 – Maritime Waters. The W1 zoning extends beyond the water and over the area of the land that is unzoned under NSLEP.

10 Development for the purpose of "boat building and repair facilities" is permitted with consent on land zoned IN4 under NSLEP (cl 2.3 and Land Use Table at the end of Part 2 of NSLEP). Any development may be carried out with development consent on the

unzoned land under NSLEP (cl 2.4(1) of NSLEP). Development for the purpose of "boat repair facilities" is permitted with consent on land and waters zoned W1 under the Biodiversity and Conservation SEPP (cl 10.15 and the Table of the Biodiversity and Conservation SEPP).

11 Different development control plans also apply to the differently zoned land. For the land that is zoned IN4 and the unzoned land under NSLEP, the provisions of North Sydney Development Control Plan 2013 (NSDCP) apply.

12 For the land that is zoned W1 under the Biodiversity and Conservation SEPP, which includes the area of the land that is unzoned under NSLEP, a former development control plan continues to apply. Chapter 10 of the Biodiversity and Conservation SEPP contains provisions transferred from the former Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 (Sydney Harbour SREP). The transfer of these provisions of the Sydney Harbour SREP did not affect the operation of the provisions and they are to be construed as if they had not been transferred: cl 1.4 of the Biodiversity and Conservation SEPP and cl 30A of the *Interpretation Act 1987.* At the time of transfer, Sydney Harbour Foreshores and Waterways Development Control Plan 2005 (Foreshores and Waterways Area DCP) was the adopted development control plan, which contained more detailed provisions to accompany Sydney Harbour SREP. The Foreshores and Waterways Area DCP applies to the waterways and adjoining land within the Foreshores and Waterways Area identified on the maps in Chapter 10 of the Biodiversity and Conservation SEPP. The transfer of the provisions of Sydney Harbour SREP to Chapter 10 of the Biodiversity and Conservation SEPP did not repeal the Foreshores and Waterways Area DCP, so that it continues to apply to the land zoned W1 under the Biodiversity and Conservation SEPP.

13 I will address the particular controls of these instruments and development control plans, insofar as they are relevant, when I evaluate the contentions.

The relocatable shed appeal

The relocatable shed appeal contentions

14 As is often the case, the Council's contentions were refined during the course of the hearing from those set out in the Council's statement of facts and contentions dated 28 March 2022. By the close of the hearing of the relocatable shed appeal, the Council pressed four contentions:

(a) the structural integrity of the relocatable shed;

(b) the acoustic impacts of the relocatable shed;

(c) the air quality impacts of the relocatable shed; and

(d) the impacts of the relocatable shed on land contaminated land.

The structural integrity of the relocatable shed

15 The relocatable shed is an existing shed. As the name suggests, the shed is able to be moved. The amended plans (drawings A003 Issue 11; A004 Issue 14; A006 Issue 10; A010 Issue 7; A011 Issue 7; and A012 Issue 4) identify the two locations between which the relocatable shed is permitted to be moved. When in use, the relocatable shed will be located on the existing hardstand to the north of Shed 1. When not in use, the relocatable shed will be located on the existing hardstand between Sheds 2 and 3.

16 The amended plans (drawing A020 Issue 7) show the shape of the shed to be cuboid with a triangular prism roof. The shed is 19.66m long and 7.25m wide, with the walls having a height of 4.8m to the pitch set out of the roof and a further 0.985m to the ridge of the roof. The roof and a triangular section at each end wall, as well as the upper sections of the long sides of the shed, are Colorbond sheeting. Beneath the Colorbond sheeting on the long sides and the triangular section at each end wall, retractable PVC curtains will be installed. The raising of the PVC curtains, especially in the end walls, will allow boats to be moved in and out of the relocatable shed. There will be a PVC pedestrian egress door integrated into the façade of the PVC curtain at each end wall.

17 On the end wall that will be the southern end wall when the relocatable shed is in its use position, there will be a socket into which will be inserted a pipe connecting the relocatable shed to Shed 1 as part of the air quality pollution control system. The carbon filtration system itself, an integral part of the air quality pollution control system, will be installed on two precast concrete raft foundations (4000 x 6300mm) to the north of Shed 3 in the vicinity of the existing wash bay. The pipes will connect the relocatable shed to Shed 1, then by further pipes to the carbon filtration system. Separate pipes will connect Sheds 3 and 4 to the carbon filtration system.

18 The relocatable shed only needs to be connected by the pipe to the carbon filtration system when it is being used in its use position to the north of Shed 1. There is no utility in connecting the relocatable shed to the carbon filtration system when it is in the not-in-use position between Sheds 2 and 3.

19 Stannards engineer, Mr Zlatko Gashi, gave evidence explaining the structural adequacy and integrity of the relocatable shed as now specified in the amended drawings. The shed will be sufficiently affixed or weighted so as to avoid being blown away during high wind conditions. The Council's evidence was not to the contrary.

20 Proposed conditions of consent will require Stannards to certify the structural adequacy and integrity of the relocatable shed. Stannards proposed an operational condition, condition C12, that would need to be satisfied prior to the issue of a construction certificate:

> "C12. An updated detailed structural engineering report is to be provided identifying and certifying:
>
> (a) the structural suitability of the Relocatable Shed and its suitability for its proposed modification, use and relocation between the wash bay and north of Shed 1 and its affixation;

> (b) the recommended strengthening works for structural compliance identified in the M+G Consulting report dated 27 April 2022; and
>
> (c) any required additional structural and strengthening measures to accommodate any air quality encapsulation measures and acoustic mitigation treatments or structures identified in condition AA1 above."

21 The Council had proposed a similar condition, although as a deferred commencement condition (proposed condition AA3). I see no need for the structural engineering report to be submitted before the development consent can operate; rather it will be sufficient to submit it before the issue of a construction certificate.

22 I consider that the amended drawings and specifications for the relocatable shed, the engineer's evidence and the requirement for a structural engineers report will be sufficient to demonstrate the structural adequacy and integrity of the relocatable shed.

The acoustic impact of the relocatable shed

23 The enclosure of the relocatable shed by Colorbond sheeting and PVC curtains is intended to address the air quality impacts, not the acoustic impacts, of the activities conducted in the relocatable shed. Mr Gauld, Stannards' acoustic expert, stated that an acoustic assessment of the relocatable shed has not been undertaken. He accepted that in order to keep the acoustic impacts manageable, certain noisy activities should not be conducted in the relocatable shed. To this end, Stannards identified in the Plan of Management dated 22 December 2021 and in their proposed conditions of consent the activities that should be permitted to be carried out in the relocatable shed and the activities that should not be permitted to be carried out, including sandblasting.

24 Stannards submitted that the noise emitted from the activities conducted in the relocatable shed would be regulated by both the existing noise conditions in the 1990 consent as well as new conditions of consent for the relocatable shed.

25 As to the existing conditions, Stannards noted that all activities carried out in the existing boatyard, including any activities that would be undertaken in the relocatable shed will continued to be regulated by the noise conditions of the 1990 consent. The approval of the use of the relocatable shed will modify the existing development consent to this extent, but it does not change the existing noise limits imposed by the 1990 consent.

26 Condition D34(i) sets the general noise levels for the operation of the boatyard. In part, condition D34(i) provides:

> "Save for the activities provided for in and conducted in accordance with Condition D34B, the operation of the development should not generate noise levels measured at the boundary of any neighbouring residential developments which exceed:
>
> - At John Street L10 = 57 dB(A)
> - At Dumbarton Street L10 = 45 dB(A)
> - At Munro Street L10 = 49 dB(A)"

27 As stated, condition D34(i) is subject to condition to D34B, which provides:

> "(i) There shall be no sand-blasting or spray-painting of vessel hulls other than in the worksheds provided for that purpose, save where the vessel to be sand-blasted or spray-painted will not fit in the sheds or is incapable of being lifted into those sheds by

> the travel lift. Such vessels shall be spray-painted or sand-blasted only on the northern slipway and only once adequate screening as set out in a letter from Richard Dinham to the Council dated 15 October 1990 is provided.
>
> (ii) Sand-blasting on the northern slipway shall not be carried out on Saturdays and shall be carried out on a maximum of five (5) days per calendar month or, alternatively, sixty (60) days per annum and only between the hours of 9.00am to 3.00pm, Mondays to Fridays.
>
> (iii) Steel grinding on the northern slipway shall not be carried out on Saturdays and shall be carried out on a maximum of five (5) days per calendar month or, alternatively, sixty (60) days per annum and only between the hours of 8.00am to 4.00pm, Mondays to Fridays. For the purposes of this Condition D34B(iii) 'steel grinding' shall mean steel grinding carried out on one boat, albeit intermittently for a period in excess of one hour."

28 The conditions of the 1990 consent also required the applicant to undertake noise abatement measures. Condition D34(i) generally required:

> "The Applicant shall undertake noise abatement measures for the workshops and worksheds so as to minimise undue disturbance to the surrounding area."

29 Condition D34C deals with the Handibin bay:

> "D34C Handibin Bay is to be acoustically treated to muffle and contain noise. All handibin emptying is to be carried out during permitted operating hours."

30 Condition 34D requires the workshops and worksheds to be acoustically treated:

> "D34D The workshops and worksheds are to be acoustically treated. Walls and ceilings to be treated so as to achieve compliance with the limits contained in Condition D34(i). Non-opening windows are to be fitted to worksheds and worksheds are only to be operated with main doors closed."

31 As to the new conditions, Stannards proposed conditions that should be imposed if development consent were to be granted to the use of the relocatable shed.

32 First, Stannards accepted a deferred commencement condition in Part A that the Council had proposed requiring an acoustic assessment of not only the relocatable shed but also of noise emissions under current operations on the entire site. Proposed condition AA1 requires an acoustic assessment to be undertaken to identify the required acoustic upgrading of the relocatable shed for certain activities proposed to be conducted in the relocatable shed. Proposed condition AA1 provides:

> "Prior to the issue of a construction certificate, an acoustic assessment is to be undertaken to identify the required acoustic upgrading of the relocatable shed for the following activities, which are proposed in the Relocatable Shed:
>
> (a) spray painting and soda blasting of vessels (including preparation) to isolated damaged areas which are otherwise too large to fit in an existing shed (up to a maximum area of $10m^2$, and encapsulated using tarpaulins);
>
> (b) anti-foul application (administered by roller, brush or airless spray only, and must be encapsulated/screened);
>
> (c) topside polishing of vessels;
>
> (d) shaft and propeller works;
>
> (e) internal works to vessels;
>
> (f) shipwright works;
>
> (g) fabrication works; and
>
> (h) electrical works."

33 Second, Stannards proposed an operational condition A4 requiring the carrying out of specified noise abatement measures in order to satisfy various conditions of the 1990 consent and the Environment Protection Licence Notice 10893 (EPL Notice) issued by

the Environment Protection Authority (EPA). The intent of this condition was to reduce the noise emissions from the whole site.

34 Third, Stannards proposed an operational condition G7, requiring Stannards, prior to the issue of an occupation certificate, to prepare and submit to the Council for approval a detailed Operational Management Plan (OMP) for the use of the relocatable shed (RS). The Operational Management Plan is to clearly demonstrate:

> "(a) how the RS will be moved between the two proposed locations, being the designated work position and the wash bay – ie whether by hand or mechanically or otherwise, and complete details of the means and method of relocating the RS including a swept path diagram, noise levels from mechanical devices and the duration of the moving process;
>
> (b) how the RS will be transported between locations 'carefully and without overstressing the frame'. The proposed method must be certified by a structural engineer;
>
> (c) clear and specific meteorological criteria, particularly with regard to wind speeds and wind forecasts, to be used prior to moving the RS between locations, to ensure that the RS is not moved or used during periods of potential high wind;
>
> (d) full details and specifications of all tie-down connections in both locations, approved by a structural engineer;
>
> (e) hull blasting and water pressure cleaning of boats is only to occur in the approved existing wash bay. The OMP must provide that hull blasting and water pressure cleaning of boats must not occur outside the approved Wash Bay and provide a schedule of activities which regulates the use of the Wash Bay when it is being used to store the relocatable shed;
>
> (f) the OMP must specify how blasting/water pressure cleaning of boats can occur in the approved wash bay when it is proposed to be occupied by the relocatable shed and a schedule of activities which prescribe when hull blasting will occur in the wash bay if vessels cannot [fit] inside the relocatable shed when it is located in the wash bay;
>
> (g) a detailed regular maintenance schedule to ensure the durability and safety of the shared structure, approved by a structural engineer."

35 Fourth, Stannards proposed another operational condition I2, which requires:

> "I2 The ongoing use of the premises approved under this consent must comply with all conditions pertaining to noise and vibration specified in this consent."

36 Fifth, Stannards proposed two operational conditions, conditions K1 and K2, specifying the activities that are and are not permitted to be undertaken in the relocatable shed. The activities Stannards proposed should be permitted by condition K1 are:

> "(a) spray painting of vessels (including preparation) to isolated damaged areas which are otherwise too large to fit in a shed (up to a maximum area of $10m^2$, and encapsulated using tarpaulins;
>
> (b) anti-foul application (administered by roller, brush, or airless spray only, and must be encapsulated/screened);
>
> (c) topside polishing of vessels;
>
> (d) shaft and propeller work;
>
> (e) internal works to vessels;
>
> (f) shipwright work;
>
> (g) sodablasting;
>
> (h) grinding conditions;
>
> (i) any other activity which has a SWL [sound weighted level] of 86 dB(A) or less; and

(j) electrical works."

37 It can be seen that this list of activities differs from the list of activities that Stannards had proposed in Condition AA1. The list in condition K1 omits fabrication works but adds sodablasting, grinding works and any other activity which has a sound weighted level of 86 dB(A) or less.

38 The activities Stannards proposed should not be permitted by condition K2 was limited to "sandblasting".

39 Sixth, Stannards proposed noise conditions, based on the noise conditions in the existing 1990 consent, which would limit the noise that could be emitted from activities carried out in the relocatable shed:

> "K3 Noise emitted from the Relocatable Shed and/or the Air Quality Pollution Control System, when measured or calculated the nearest noise sensitive receivers as an LAeq (15 minute) are not to exceed:
>
> (a) 57 dB(A) at John Street;
>
> (b) 35 dB(A) at Dumbarton Street; and
>
> (c) 49 dB(A) at Munro Street.
>
> The LAeq (15 minute) is to include any correction for the annoying noise characteristics in accordance with Fact Sheet C of the Noise Policy for Industry.
>
> The Relocatable Shed when in use is restricted to the location identified on the plan annexed and marked 'B'.
>
> K4 The use of the Northern Slipway must be in accordance with Conditions 34B(i),(ii) and (iii) of the 1990 Consent.
>
> K5 The Handibin Bay and the Existing Sheds are to be acoustically treated in compliance with Conditions 34C and 34D of the 1990 Consent."

40 Seventh, Stannards proposed, in its schedule of suggested modifications of the 1990 consent, a new condition of consent for the relocatable shed:

> "Prior to the use of the relocatable shed with any machinery or equipment capable of generating a sound power level of greater than 85 dBA, the relocatable shed shall be altered to include retractable PVC curtains on the existing open sides and Colorbond sheeting to provide a roof enclosure.
>
> Use of the relocatable shed with any plant or machinery capable of generating a sound power level greater than 85 dBA shall be used only where any opening to the relocatable shed has an area of not less than $2m^2$ and not more than $4m^2$."

41 Stannards submitted that together, the existing noise conditions of the 1990 consent and the new noise conditions of the consent for the relocatable shed, will ensure that noise emitted from the relocatable shed will be acceptable.

42 The Council contested that Stannards had established that the noise emitted from the relocatable shed will be acceptable.

43 The Council first took issue with some of the activities that Stannards proposed should be permitted to be undertaken in the relocatable shed. These were sodablasting and fabrication works identified in proposed condition AA2 and sodablasting and grinding conditions proposed in condition K1. Council submitted that fabrication works had been excluded as being unacceptable by the parties' acoustic experts. Sodablasting had not

been nominated as an activity in the development application for the relocatable shed and has not been acoustically assessed. “Grinding conditions” lacks specificity as an activity and has the potential to be unacceptably noisy.

44 The Council disagreed with many of Stannards’ proposed conditions of consent. The Council had proposed other deferred commencement conditions in addition to proposed condition AA1 requiring an acoustic assessment of the relocatable shed. The Council had proposed condition AA2 requiring an acoustic assessment report of noise emissions from the entire site and any management strategies/noise controls to limit noise emissions from the site in order to comply with condition D34(1). Stannards proposed deleting this deferred commencement condition as the operation of the existing boatyard is currently required to comply with the noise conditions of the 1990 consent.

45 The Council proposed a deferred commencement condition AA5 requiring an operational management plan for the relocatable shed. Stannards proposed that such a condition should be an operational condition, not a deferred commencement condition, and should be complied with prior to the issue of an occupation certificate. This is Stannards’ condition G7. The Council, somewhat inconsistently, had also proposed condition G7 requiring the submission and approval of an operational management plan for the use of the relocatable shed prior to the issue of an occupation certificate.

46 The Council disputed Stannards’ proposed noise conditions K1 to K4. The Council disagreed with the activities that Stannards had identified could be undertaken in the relocatable shed in condition K1 and that should not be permitted in condition K2. The Council contended that sodablasting and grinding conditions should not be permitted.

47 The Council also disagreed with the noise limits proposed by Stannards in condition K3. The Council’s proposed noise limits were:

> “(a) 44 dB(A) at John Street
> (b) 35 dB(A) at Dumbarton Street; and
> (c) 39 dB(A) at Munro Street”

48 The Council had proposed conditions M1 and M2 modifying the noise conditions of the 1990 consent, but Stannards had deleted these conditions. The Council’s proposed condition M1 modified the noise levels specified in condition D34(1) to convert them from being L10 levels to LAeq levels. The acoustic experts had agreed that this conversion involved reducing the L10 levels specified in condition D34(1) by 10 dB(A). There was also an error in the noise level specified in the 1990 consent for John Street,

being 57 dB(A) rather than 54 dB(A). The Council corrected this error by specifying in proposed condition M1 the noise level for John Street as being 10 dB(A) less than 54 dB(A), ie 44 dB(A).

49 The Council's proposed condition M2 modified condition D34D of the 1990 consent to require the workshops and worksheds to be acoustically treated to comply with the noise limits in condition D34(i) as modified.

50 Stannards sought to delete the Council's proposed conditions M1 and M2 as it had separately proposed conditions modifying the 1990 consent. Amongst the modifications suggested, Stannards proposed first that condition D34 be amended to add a new subcondition after D34(i):

> "The use of the relocatable shed shall not generate noise in excess of 43 dB(A) at John, Dumbarton and Munro Streets."

51 Second, Stannards proposed that condition D34B(i) be replaced with:

> "There shall be no sand-blasting, soda blasting or spray-painting of vessel hulls other than in the workshops and the relocatable shed provided for that purposes, save where the vessel to be sand-blasted, soda blasted or spray-painted will not fit in those sheds or is incapable of being lifted into those sheds by the travel lift. Such vessels shall be spray-painted or sand-blasted only on the northern slipway and only once adequate screening as set out in a letter from Richard Dinham to the Council dated 15 October 1990 is provided."

52 Third, Stannards proposed that condition D34D be replaced with:

> "The workshops and worksheds are to be acoustically treated. Walls and ceilings to be treated so as to achieve compliance with the limits contained in Condition D34(i). Non-opening windows are to be fitted to worksheds, and worksheds are only to be operated with any opening to the worksheds having an area of not less than $2m^2$ and not more than $4m^2$ whenever plant or machinery is used that is capable of generating a sound power level greater than 85 dBA."

53 The Council disagreed with these suggested modifications of the noise conditions of the 1990 consent. As to the inclusion of a new condition after D34(1) that the use of the relocatable shed is not to emit noise in excess of 43 dB(A) at John, Dumbarton and Munro Streets, the Council submitted that this was inconsistent with the acoustic evidence. Condition D34(1) sets a whole-of-site noise control and it is inappropriate to specify a particular noise control for the use of the relocatable shed. The Council submitted that the only changes that should be made are first, to condition D34(1) to convert the L10 levels to LAeq levels (by deducting 10 dB(A)) and correct the error in the noise level for John Street and secondly, to amend condition D34D to require the workshops and worksheds to be acoustically treated to comply with the noise limits in condition D34(1) as modified.

54 The Council disagreed with Stannards' suggested replacement of condition D34B(1) as being inconsistent with the acoustic evidence. The suggested replacement condition would permit sandblasting and sodablasting in the relocatable shed but the Council submitted these activities should not be permitted, as they would not be permitted by conditions K1 and K2 of the consent for the relocatable shed. The acoustic experts had

agreed that sandblasting should not occur in the relocatable shed and has not been acoustically assessed. Sodablasting was not proposed in the development application and has not been acoustically assessed.

55 The Council disagreed with Stannards' suggested replacement of condition D34D. The amendment proposed, that the worksheds are only to be operated with "any openings to the worksheds having an area of not less than $2m^2$ and not more than $4m^2$ whenever plant or machinery is used that is capable of generating a sound power level greater than 85 dBA", has not been acoustically assessed. The Council also opposed Stannards' suggested new condition requiring the installation of retractable PVC curtains on the relocatable shed and that any opening to the relocatable shed have an area of not less than $2m^2$ and not more than $4m^2$ before any plant or machinery is used in the relocatable shed capable of generating a sound power level greater than 85 dB(A). The Council noted that Mr Gauld, Stannards' acoustic expert, had acknowledged that no acoustic assessment has been undertaken of the relocatable shed, let alone an acoustic assessment with the retractable PVC curtains or the restricted area of the opening suggested.

56 I consider that the acoustic impacts of the use of the relocatable shed will be acceptable if appropriate conditions of consent are imposed. I will identify what I consider are the matters that should be addressed by the conditions of consent. The parties can submit revised conditions of consent incorporating these matters.

57 First, the location at which the relocatable shed is permitted to be used will be as specified in the amended plans. These plans fix the source of noise emissions from the relocatable shed. The general condition of consent requiring the development to be carried out in accordance with the plans will ensure that the relocatable shed can only be used in the specified location. This can be confirmed by a specific condition, such as proposed condition K3, that the relocatable shed when in use be restricted to the location shown on the plan.

58 Second, an acoustic assessment must be undertaken to identify the required acoustic upgrading of the relocatable shed for the activities that will be permitted to be carried out in the relocatable shed. This acoustic assessment should be required by a deferred commencement condition, such as proposed condition AA1. It should not be undertaken pursuant to an operational condition of consent prior to the issue of a construction certificate. Any acoustic upgrading identified in the acoustic assessment may well go beyond the installation and use of the proposed retractable PVC curtains and the restriction of the area of any opening to be not less than $2m^2$ and not more than $4m^2$. Another condition of consent should require the relocatable shed to be

acoustically upgraded to satisfy all recommendations in the acoustic assessment. This upgrade should be required before the issue of an occupation certificate and hence any use of the relocatable shed.

59 Third, the activities permitted to be carried out in the relocatable shed should not include fabrication works, sodablasting, sandblasting, water/hull blasting activities, or grinding activities. All of these activities should be excluded from the list of activities permitted to be carried out in the relocatable shed by condition K1 and should be included in the list of activities that are not permitted to be carried out in the relocatable shed by condition K2. These activities should also be excluded from the list of activities that are to be the subject of the acoustic assessment required by deferred commencement condition AA1.

60 Fourth, a detailed operational management plan for the use of the relocatable shed should be prepared and submitted to the Council for approval prior to the issue of an occupation certificate, as proposed in condition G7. The operational management plan should demonstrate the matters specified in proposed condition G7.

61 Fifth, the noise limits should be those specified in the noise conditions in the 1990 consent, adjusted to be LAeq levels instead of LA 10 levels, and to correct the error for the noise level for John Street. These noise levels will be:

(a) 44 dB(A) at John Street;

(b) 35 dB(A) at Dumbarton Street; and

(c) 39 dB(A) at Munro Street.

62 Condition D34(i) of the 1990 consent should be modified by a condition of consent for the relocatable shed to accord with these noise levels. In addition, a particular condition, such as proposed condition K3, should be imposed limiting the noise emitted from the relocatable shed and the air quality pollution control system, when measured and calculated at the nearest noise sensitive receivers, to be the same levels. Condition D34D of the 1990 consent should be modified to require the walls and ceilings to be treated so as to achieve compliance with the limits contained in condition D34(i) as modified by the conditions of the consent for the relocatable shed.

63 Sixth, the existing conditions of the 1990 consent, other than condition D34(1) and condition D34D, which should be amended as I have just indicated, should continue to apply to regulate noise emissions from activities carried out on the whole site, including the use of the relocatable shed. There may be no harm in reinforcing the need to comply with the existing requirements in conditions 34B(i), (ii) and (iii), 34C and 34D of the 1990 consent, such as is proposed in conditions K4 and K5.

64 However, I do not consider that Stannards' suggested modifications of the existing conditions to require undertaking of the noise abatement measures required by the 1990 consent and the EPL notice, should be made. Stannards and Noakes are under an existing legal obligation to comply with both the 1990 consent and the EPL notice. If Stannards or Noakes has failed to comply fully with either the development consent or

the EPL notice, the responsible regulatory authority, the Council in the case of the 1990 consent, and the EPA in the case of the EPL notice, has the function of enforcing compliance by various means. These means include issuing an administrative order under the relevant statute, such as a development control order under the EPA Act, bringing civil enforcement proceedings to restrain and remedy any breach of the relevant statute by failing to comply with the development consent or EPL notice, or bringing criminal proceedings for an offence against the relevant statute by failing to comply with the relevant consent or EPL notice. Such action could have been taken at any time after a breach has occurred and can still be taken now for any ongoing breach. It is not necessary to impose a condition on the consent for the relocatable shed or to modify the conditions of the 1990 consent to require compliance with the 1990 consent or the EPL notice.

65 For similar reasons, I do not consider the Council's deferred commencement condition requiring an acoustic assessment of noise emissions from the entire site and to identify management strategies and noise controls to limit noise emissions to bring the site into compliance with the conditions of the 1990 consent, to be appropriate. It is the function of the Council, as the relevant regulatory authority under the EPA Act, to ascertain whether the existing boatyard is being carried out in accordance with the 1990 consent. If the Council ascertains, including by undertaking the acoustic assessment it has suggested in the deferred commencement condition, that the existing boatyard is being carried out in breach of the development consent, it can take the appropriate enforcement action.

66 I consider that if conditions of consent are imposed addressing the matters I have raised the acoustic impacts of the use of the relocatable shed will be acceptable.

The air quality impacts of the relocatable shed

67 As I have earlier described, the relocatable shed is proposed to be fitted with retractable PVC curtains to enclose the relocatable shed when it is in use and to connect the shed by a pipe to Shed 1 as part of the proposed air quality pollution control system. The Council supported the installation of the air quality pollution control system, not only in the relocatable shed but also in Sheds 1, 3 and 4, as this will reduce the air quality impacts from the existing boatyard. The Council's concern was that

Stannards should demonstrate that the stated operation parameters for the Fowlerex Air Quality Pollution Control System can be achieved before development consent is granted.

68 The parties' air quality experts, Mr Galvin for Stannards, and Mr Kellaghan for the Council, agreed in their joint expert report dated 13 April 2022 that the use of the relocatable shed and the air quality pollution control system will result in acceptable air quality impacts. They recommended the imposition of conditions of consent to ensure that air quality impacts are appropriately managed.

69 In light of the air quality experts' evidence, the Council proposed a series of conditions, incorporating the air quality experts' recommended conditions as well as other conditions, to address the potential air quality impacts. To ensure the initial and ongoing effectiveness of the air quality pollution control system, the Council proposed conditions requiring the verification and ongoing testing of the air quality pollution control system as well as conditions regulating the use of the relocatable shed and the existing sheds in order to mitigate air quality impacts (proposed conditions I6 to I21).

70 Stannards agreed to the imposition of the Council's suggested air quality conditions, although it suggested some minor wording changes. The Council agreed with some but disagreed with others of the suggested wording changes. I will deal with this debate in a moment.

71 The EPA provided, by letter dated 16 March 2022, its general terms of approval for the use of the relocatable shed and the use of a carbon filtration system, part of the air quality pollution control system. A number of these conditions address air quality impacts, including potentially offensive odour (conditions L4.1 and L4.2), dust (condition O3.1), emissions from blasting and painting activities (conditions O4.1 to O4.5) and undertaking an Air Quality Risk Assessment (condition U2.1). These general terms of approval would be imposed as conditions of consent for the relocatable shed and air quality pollution control system (proposed condition J1).

72 I consider that the air quality impacts of the use of the relocatable shed can be adequately managed by the imposition of appropriate conditions of consent. Again, I will identify the matters that should be addressed in the conditions of consent. The parties can submit revised conditions of consent incorporating these matters.

73 First, conditions of consent should fix the location at which the relocatable shed can be used to be that shown on the amended plans north of Shed 1. This confines the source of air quality impacts from the relocatable shed to that location.

74 Second, conditions should ensure installation of the PVC curtains and the encapsulation/enclosure of the relocatable shed as well as the physical connection of the shed to the piping of the air quality pollution control system, whenever the relocatable shed is in use (such as is proposed in condition I6). Furthermore, when activities likely to generate air quality impacts are being undertaken in the relocatable

shed, the shed should be maintained at negative pressure and with air extracted into Shed 1 to allow treatment of emissions by the air quality pollution control system (as proposed in conditions I13 and I14).

75 Third, conditions should ensure the preparation and submission to the Council of a verification testing plan which outlines how the effectiveness of the air quality pollution control system will be tested against the performance guarantees for the Fowlerex Air Quality Pollution Control System and then the submission to the Council of a verification testing report which outlines the results of the testing and demonstrates that the air quality pollution control system does achieve these performance guarantees (proposed conditions I7 and I8).

76 Fourth, the conditions should limit the activities that may be carried out in the relocatable shed to those that are permitted to occur in the relocatable shed. I have earlier found the activities that should and should not be permitted in the relocatable shed. These will be identified in the revised conditions K1 and K2. The conditions should provide that the relocatable shed cannot be used for the activities identified as being permitted to occur in the shed until the testing and verification of the air quality pollution control system has been approved by the Council (such as is proposed in condition I10).

77 Fifth, the conditions should require the ongoing performance of the air quality pollution control system to be tested annually and in response to any complaint about odour or air quality emissions (such as is proposed in condition I11). The testing report should be provided annually and within 1 week of a complaint being made. This is the timeframe suggested by the Council. Stannards had suggested a longer period of 28 days after a complaint has been received. The Council disagreed, saying that this would delay the timely response to a complaint. I agree with the Council's shorter period of 1 week.

78 Sixth, the conditions should address the activities that can be carried out in the existing Sheds 1, 3 and 4 and the conditions under which the activities can be carried out in those sheds in order to minimise cumulative air quality impacts. Proposed conditions I12, I13, I15 and I16 have this purpose. Another condition should limit certain air polluting activities, such as sandblasting and spray painting, to be carried out only in one single shed at a time so as to ensure the effective performance of the air quality pollution control system (such as is proposed in condition I20).

79 Seventh, the conditions of consent should address the design and operation of the air quality pollution control system. These will include some of the conditions I have earlier referred to. There should also be a condition requiring emissions to be ducted to a high stack (such as is proposed in condition I17). A condition should fix the hours of operation of the air quality pollution control system, which will be based on the hours of

conducting certain air polluting activities in the relocatable shed or Sheds 1, 3 and 4, which are connected to the air quality pollution control system (such as is proposed in condition I18).

80 The Council suggested the hours of conducting the activities be between 9am and 3pm, so as to allow sufficient time afterwards for residual emissions to be treated in the air quality pollution control system. Stannards suggested extending the finishing time to 5pm. The Council opposed this extension as it would not allow sufficient time for ventilation to continue so as to achieve the desired air quality before the ventilation stack air quality system ceases at 6pm. Taking a precautionary approach, I agree with the Council's suggested finish time of 3pm.

81 Eighth, the EPA's general terms of approval for the use of the relocatable shed and the air quality pollution control system should be imposed as conditions of consent.

82 The Council did suggest another condition, which was opposed by Stannards, that no work on boats should be carried out outside the existing Sheds 1 to 4 or the relocatable shed. I consider this condition is inappropriate. The 1990 consent permits work on boats outside of the existing sheds, including on the existing slipway and hardstand. The consent to use the relocatable shed at the specified location will provide authority to carry out work on boats at another location outside of the existing Sheds 1 to 4. The consent to use the relocatable shed should not otherwise restrict the work permitted to be carried out on boats by the 1990 consent.

83 The imposition of conditions of consent addressing these matters should manage the air quality impacts of the relocatable shed.

The impact of the relocatable shed on land contamination

84 The Council raised concern that the use of the relocatable shed at the designated use position north of Shed 1 might mobilise land contaminants and adversely impact water quality on the site and in the adjacent waters of Berrys Bay. When in use, the shed is to be positioned on the existing hardstand north of Shed 1. Although the hardstand is sealed, the Council raised concern that the seal has not been demonstrated to be still intact. If the seal is broken or disturbed, washing down of the hardstand in and downhill of the relocatable shed may cause polluted water to infiltrate the soil and fill beneath the hardstand as well as mobilising any existing contaminants in the soil and fill. The contaminated water may flow to the waters of Berrys Bay. The Council submitted that the integrity of the seal of the hardstand, and whether the soil and fill beneath the hardstand is contaminated, need to be investigated before development consent to the use of the relocatable shed can be granted.

85 The Council referred to cl 4.6(1) of State Environmental Planning Policy (Resilience and Hazards) 2021 (Resilience and Hazards SEPP) which precludes a consent authority granting consent to the carrying out of any development on land unless:

> "(a) it has considered whether the land is contaminated, and

> (b) if the land is contaminated, it is satisfied that the land is suitable in its contaminated state (or will be suitable, after remediation) for the purpose for which the development is proposed to be carried out, and
>
> (c) if the land requires remediation to be made suitable for the purpose for which the development is proposed to be carried out, it is satisfied that the land will be remediated before the land is used for that purpose."

86 The Council submitted that there has been no analysis or assessment of the hardstand or the soil and fill beneath the hardstand to determine whether the land is contaminated and, if contaminated, whether the land is suitable in its contaminated state to be used for the purpose for which the relocatable shed is proposed to be carried out.

87 Stannards responded that cl 4.6(1) of the Resilience and Hazards SEPP does not preclude the grant of consent to the use of the relocatable shed on the hardstand. The parties' contamination experts, Dr Reynolds for Stannards and Mr Norris for the Council, agreed in their joint expert report of 14 April 2022 that the development application for the relocatable shed assumed the contaminated state of the existing shipyard. An earlier contamination assessment by Jacobs in 2019 concluded that soil and fill beneath the shipyard is likely to be contaminated as a result of past site activity. Whilst Mr Norris noted that the there was insufficient information to assess the nature or extent of that contamination, Dr Reynolds considered that such information is not required to be considered in determining the suitability of the area of hardstand to be used for the relocatable shed, provided the seal of the hardstand has not been broken. Dr Reynolds noted that the site is sealed and there is no evidence that the concrete or other sealing material will be broken or disturbed by the activities to be carried out in the relocatable shed.

88 On these assumptions, the contamination experts agreed that "land contamination concerns are adequately resolved provided that no works to break the concrete and paver seal occurs. If any disturbance to the concrete and paver seal of the shipyard occurs additional assessment would be required." (p 12).

89 Stannards submitted that on this evidence, the Court can, in satisfaction of cl 4.6(1) of the Resilience and Hazards SEPP, grant consent to the use of the relocatable shed. Pursuant to paragraph (a), the Court is able to consider whether the land is contaminated. The contamination experts agreed that the soil and fill beneath the hardstand is likely to be contaminated as a result of past activities at the boatyard. On the basis that the land is contaminated, pursuant to paragraph (b), the Court can be satisfied that the land is suitable in its contaminated state for the purpose for which development is proposed to be carried out. The use of the relocatable shed in the hardstand area will be for the same purpose of boat building and repair facilities as the existing boatyard. The use of the relocatable shed will not involve any change of use of the site, so that cl 4.6(2) and (3) of the Resilience and Hazards SEPP do not apply. The contamination experts agreed that the area of hardstand on which the relocatable shed will be positioned is suitable in its contaminated state for the purpose of boat building and repair facilities, provided the seal of the hardstand is not broken. Stannards

submitted that the movement of the relocatable shed to and from the use position north of Shed 1, and the use of the relocatable shed in that position, will not cause the seal of the hardstand to be broken.

90 If, contrary to this intention not to break the seal of the hardstand, the seal were to be broken, Stannards submitted a condition of consent can be imposed requiring any disturbed contamination to be remediated. The Council had proposed, and Stannards had amended, condition C7 which provides:

> "Prior to the release of the Construction Certificate, in the event of the ground surface being disturbed, such that any contamination in those areas of the site where the Relocatable Shed is proposed to be affixed and the area where the Air Quality Pollution Control System is to be constructed, those areas must be remediated in accordance with:
>
> (a) an approved Remedial Action Plan; and
>
> (b) State Environmental Planning Policy No. 55 – Remediation of Land (Resilience and Hazards) 2021; and,
>
> (c) the guidelines in force under the Contaminated Land Management Act.
>
> Within thirty (30) days after the completion of the remediation works, and prior to the issue of any construction certificate, a notice of completion, including validation and/or monitoring report is to be provided to Council. This notice must be consistent with State Environmental Planning Policy (Resilience and Hazards) 2021.
>
> Prior to the issue of any Construction Certificate, the validation and/or monitoring report is to be independently audited and a Site Audit Statement issued. A copy of the Site Audit Statement is to be provided to the Certifying Authority and Council (if Council is not the Certifying Authority). The audit is to be carried out by an independent auditor accredited by the Environment Protection Authority. Any conditions recorded on the Site Audit Statement must be complied with at all times."

91 Stannards submitted that this condition does not impermissibly defer consideration of the matters in cl 4.6(1) of the Resilience and Hazards SEPP to after the grant of consent. Clause 4.6(1) can be considered before granting consent, in the manner earlier explained. That consideration empowers the Court to grant consent to the use of the relocatable shed. The condition of consent serves a different purpose of ensuring that, if the land becomes no longer suitable in its contaminated state to be used for the relocatable shed, because the seal of the hardstand is broken, the land will be remediated so as to be made suitable for the use of the relocatable shed.

92 I agree with Stannards that consent can and should be granted to the use of the relocatable shed. As required by cl 4.6(1)(a) of the Resilience and Hazards SEPP, I consider that the soil and fill beneath the area of hardstand where the relocatable shed is to be used is likely to be contaminated as a result of past activities at the boatyard. That area of likely contamination is sealed by concrete, pavers or other sealing material, isolating the contamination from surface activities. Although the Council expressed concern about the integrity of the seal of the hardstand in this area, there

was no evidence that the seal had in fact been broken or disturbed. Both the observational evidence and the contamination experts' evidence is that the area is sealed by concrete, paving or other sealing material.

93 The area is currently used for the purpose of boat building and repair facilities, as part of the existing boatyard. The use of the relocatable shed in that area will not involve any change of use.

94 In these circumstances, I am satisfied that the area of the site on which the relocatable shed is to be used is suitable in its contaminated state to be used for the purpose of boat building and repair facilities. This area of the site does not require remediation in order to be made suitable to be used for this purpose. The preconditions in cl 4.6(1) of the Resilience and Hazards SEPP are satisfied and development consent is able to be granted to the use of the relocatable shed.

95 I consider it is appropriate to impose a condition of consent requiring remediation of any contaminated land in the event that the seal of the hardstand is broken or disturbed. This condition can be to the effect of proposed condition C7, although the language should be improved.

The visual and heritage impacts

96 The Council had raised in its statement of facts and contentions the visual impact and heritage impact of the relocatable shed. By the conclusion of the hearing, however, those contentions were only faintly pressed, if at all. The reason was that the amended plans had specified not only the design of the relocatable shed but also the two locations in which the relocatable shed would be positioned. The use position is on the hardstand to the north of Shed 1. The not-in-use position is between Sheds 2 and 3 in the wash bay. The visual impact and heritage impact of the relocatable shed in either of these positions is able to be ascertained. In both positions, the visual impact and heritage impact will be acceptable.

97 The scale, form, design and siting of the relocatable shed are all compatible with the existing buildings and structures at the boatyard. The relocatable shed will be read as being a similar but smaller building to the existing sheds and will be located in both the use position and not-in-use position adjacent to one or more of the existing sheds.

98 The 1990 consent had approved erection of larger buildings in the location of the use position. These larger buildings have not been erected. The relocatable shed in its use position will present as a smaller, less visually intrusive building than the larger buildings approved by the 1990 consent.

99 The position of the relocatable shed in either the use position or not-in-use position will have no appreciable impact on the heritage significance of any heritage item or heritage conservation area. The boatyard and sandstone cliff behind the boatyard are listed as local heritage items in Schedule 5, Part 1 of NSLEP (items I0483 and I0484), the description being "Stannard Bros Shipyard and associated industrial buildings". The heritage experts agreed that the local heritage value of the boatyard lies not in its built

form but in its association with the boat building and repair activities that have been historically carried on at the site. The addition of one more shed, the relocatable shed, in which boat building and repair activities will be carried out involves a continuation of, not a conflict with, this historic use of the boatyard. There are a number of local heritage items listed in Schedule 5, Part 1 of NSLEP that are in the vicinity of the boatyard. These include the sandstone cliff behind the boatyard, two historic houses on hills either side of the boatyard, and more remote items to the west across Berrys Bay. The relocatable shed will have no appreciable impact on any of these heritage items. The boatyard is in the vicinity of, but not within, a heritage conservation area, the Union, Bank and Thomas Streets Conservation Area, but the relocatable shed will not impact that conservation area.

100 The same conclusion can be reached for the air quality pollution control system. Most of this system will not be visible from external viewpoints, although the stack is likely to be visible. Nevertheless, the scale, form, design and siting of the stack will be compatible with the existing built form and will not be visually intrusive.

101 In forming my opinion of the acceptability of the visual impact and heritage impact of the relocatable shed and the air quality pollution control system, I have taken into consideration: (a) the matters in cl 10.3 and cl 10.4 and, insofar as relevant, the planning principles in cl 10.10(f), cl 10.11(d) and cl 10.12(e) of the Biodiversity and Conservation SEPP; (b) the existing character and desired future outcome for development in Waverton/Wollstonecraft Planning Area, and the John Street Waterfront Neighbourhood, in section 10 and subsection 10.8 respectively of Part C of NSDCP; and (c) the matters relating to heritage in cl 5.10(1) and (4) of NSLEP and section 13 of Part B of NSDCP.

Consistency with zone objectives

102 I have also had regard, as required by cl 2.3(2) of NSLEP, to the objectives for development in Zone IN4 when determining the development application for the use of the relocatable shed and the air quality pollution control system. The first objective is to "retain and encourage waterfront industrial and maritime activities" and the fourth objective is "to encourage employment opportunities". Approval of the use of the relocatable shed and the air quality pollution control system will facilitate the ongoing operation and viability of the existing boatyard, thereby furthering these objectives.

103 The second objective is not applicable. The third objective is to "ensure that development does not have an adverse impact on the environmental and visual quality of the foreshore". The use of the relocatable shed in either the use or not-in-use

positions will not have an adverse impact on the environmental or visual qualities of the foreshore, for the reasons I have given earlier. The same conclusions can be reached for the air quality pollution control system, also for the reasons I have given earlier.

104 The fifth objective is "to minimise any adverse effect of development on land uses in other zones". The use of the relocatable shed and air quality pollution control system will have no adverse effect on land uses in other zones.

105 I have also had regard to cl 6.8 of NSLEP, which specifies more particular objectives and matters to be considered in determining whether to grant consent to development on land in Zone IN4. I am satisfied that the use of the relocatable shed and air quality pollution control system will not be inconsistent with any of the matters in cl 6.8(2)(a), including the size of the site where the development is to be situated; the proximity, scale and height of surrounding development; or the scenic, environmental and cultural qualities of the site and its surrounding area, for the reasons I have given earlier. I am also satisfied that the relocatable shed and air quality pollution control system are not likely to have a significantly adverse effect on public views and views from surrounding properties, or natural features on or adjoining the site, such as cliff lines, bushland and significant trees. My reasons are not only those I have given earlier but also because the relocatable shed and air quality pollution control system will be located in the existing boatyard and will have no impact on any natural features on or adjacent to the site.

Development consent to the relocatable shed should be granted

106 For these reasons I consider that development consent should be granted to the use of the relocatable shed and the air quality pollution control system. The conditions of consent will need to be settled. I have identified many of the matters in respect of which conditions should be imposed. The parties' draft conditions on these matters can be used as a basis for settling the conditions of consent, although amendments to these conditions as well as new conditions may need to be proposed in order to accord with my findings. The conditions of consent should include the other conditions proposed in the parties' draft conditions of consent dealing with matters that were not in issue. The language of the conditions should be corrected to improve clarity of expression, consistency of referencing, and grammar and syntax.

107 I will direct the parties to agree on the conditions of consent or, failing agreement, to provide competing versions of the conditions of consent, within a specified time frame. I will then determine the development application for the use of the relocatable shed and the air quality pollution control system by the grant of development consent subject to conditions that I will settle.

The floating dry dock appeal

The floating dry dock appeal contentions

108 The Council and the intervening resident objectors and environmental organisations oppose the grant of development consent to the floating dry dock. These parties framed their contentions in their respective statements of facts and contentions in various ways but the contentions can be grouped into these categories:

(a) the visual impact upon the public and private domains;

(b) the impact on the landscape character;

(c) the heritage impact;

(d) the operational constraints and risks of the floating dry dock;

(e) the impacts on the aquatic ecologic environment;

(f) the acoustic impact;

(g) the air quality impacts; and

(h) stormwater and waste water management.

109 The first three issues are related. The floating dry dock is a very large and obtrusive vessel that would be moored in a constrained bay of high visual and landscape character and of national and heritage significance. The floating dry dock is said to have significant visual, landscape character and heritage impacts.

110 The fourth and fifth issues also overlap to a degree. The physical constraints of the waterway of Berrys Bay in which the floating dry dock would be moored, particularly the size and configuration of the water lease area and the shallow depth of the sea bed in this area, necessitate slewing the floating dry dock into and out from its mooring position in order to load and unload vessels for repair and maintenance. This slewing of the floating dry dock is operationally constrained and risks disturbing the sea bed and mobilising contaminated sediments. The increased turbidity, sedimentation and contamination, in turn, risk causing harm to the aquatic ecology of the bay.

111 The final three issues concern noise, air and water pollution. The boat repair and maintenance activities proposed to be carried out in the floating dry dock will generate noise, air pollutants and water pollution. At issue is whether adequate measures have been taken to mitigate these acoustic, air quality and water quality impacts.

112 For reasons I will shortly give, I find that the floating dry dock, both in the mooring position and the loading and unloading position, will have such unacceptable visual and landscape character impacts that development consent should be refused. The floating dry dock is too large and obtrusive for this northern arm of Berrys Bay.

113 These findings concerning the unacceptable visual and landscape character impacts of the floating dry dock are dispositive of the floating dry dock appeal. Whether or not the floating dry dock is likely to cause the other impacts claimed by the respondents of the

aquatic ecological environment impacts, the acoustic, air quality or water quality impacts, or the impacts on heritage items, cannot influence the outcome of the appeal. Even if I were to find that the floating dry dock were not to have these unacceptable environmental impacts, this still would not justify granting development consent to the mooring and use of this visually intrusive and obtrusive vessel in Berrys Bay, part of Sydney Harbour, of high visual and landscape character and national and heritage significance. It is simply the wrong place for a vessel of this large size.

The planning framework for assessing the visual and landscape character impacts

114 The visual and landscape character impacts of the floating dry dock need to be evaluated having regard to the planning framework. There are both regional and local controls. The regional controls are in the Biodiversity and Conservation SEPP and the Foreshores and Waterways Area DCP. The local controls are in NSLEP and NSDCP.

Biodiversity and Conservation SEPP

115 Starting with the regional controls, Chapter 10 of the Biodiversity and Conservation SEPP contains the transferred provisions of Sydney Harbour SREP. Chapter 10 applies to land within the Sydney Harbour Catchment shown on the Sydney Harbour Catchment Map (cl 10.2(1)). Within the Sydney Harbour catchment is the Foreshores and Waterways Area, which includes the land shown on the Foreshores and Waterways Area Map (see definition of "Foreshores and Waterways Area" in Schedule 12 Dictionary for Chapter 10). Part of the land and the whole of the water lease area are shown on the applicable maps to be within both the Sydney Harbour Catchment and the Foreshores and Waterways Area. Land within the Foreshores and Waterways Area is allocated to nine zones, one of which is Zone W1 – Maritime Waters. Part of the land and the whole of the water lease area is within Zone W1 – Maritime Waters.

The aims of Chapter 10 for Sydney Harbour

116 The aims of Chapter 10 with respect to the Sydney Harbour Catchment are stated in cl 10.1(1):

> "(a) to ensure that the catchment, foreshores, waterways and islands of Sydney Harbour are recognised, protected, enhanced and maintained—
>
> (i) as an outstanding natural asset, and
>
> (ii) as a public asset of national and heritage significance, for existing and future generations,
>
> (b) to ensure a healthy, sustainable environment on land and water,
>
> (c) to achieve a high quality and ecologically sustainable urban environment,
>
> (d) to ensure a prosperous working harbour and an effective transport corridor,
>
> (e) to encourage a culturally rich and vibrant place for people,
>
> (f) to ensure accessibility to and along Sydney Harbour and its foreshores,
>
> (g) to ensure the protection, maintenance and rehabilitation of watercourses, wetlands, riparian lands, remnant vegetation and ecological connectivity,

(h) to provide a consolidated, simplified and updated legislative framework for future planning."

117 The aims in cl 10.1(1) are expressed as evaluative standards or norms that are to be achieved. The principal aim in cl 10.1(1)(a) is illustrative and will be analysed. There are two components: the action "to ensure" and the object of the action "the catchment, foreshores, waterways and islands of Sydney Harbour are recognised, protected, enhanced and maintained (i) as an outstanding natural asset, and (ii) as a public asset of national and heritage significance, for existing and future generations". The verb "ensure" bears its ordinary meaning of "2. to make sure or certain to come, occur etc. 3. to make secure or safe, as from harm" (Macquarie Dictionary): see *Bushfire Survivors for Climate Action Inc v Environment Protection Authority* (2021) 250 LGERA 1; [2021] NSWLEC 92 at [39]. The object of the action to ensure is the recognition, protection, enhancement and maintenance of the specified natural elements of Sydney Harbour as assets with the specified values, both "an outstanding natural asset" and "a public asset of national and heritage significance". This is the evaluative standard or norm that is to be ensured, that is to say, to be made sure or certain to come about or occur.

118 The individual words and phrases of this evaluative norm in cl 10.1(1)(a) are exacting. There must be protection. As the Hong Kong Final Court of Appeal noted in *Town Planning Board v Society for the Protection of the Harbour Ltd* (2004) 7 HKCFAR 1; [2004] HKCFA 27 at [34], "protection" of the harbour, Victoria Harbour in that case, requires the harbour to "be kept from harm, defended and guarded." There must be enhancement. To enhance is "1. to raise to a higher degree; intensify; magnify 2. to raise the value or price of" (Macquarie Dictionary). To enhance the specified natural elements of Sydney Harbour is to improve the environmental and visual qualities and raise the value of the natural elements of Sydney Harbour that contribute to it being an outstanding natural asset and a public asset of national and heritage significance. There must be maintenance. To maintain is "1. to keep in existence or continuance; preserve; retain 2. to keep in due condition, operation or force; keep unimpaired" (Macquarie Dictionary). To maintain the specified natural elements of Sydney Harbour is to conserve the environmental and visual qualities and value of the natural elements of Sydney Harbour in their present state.

119 What is to be protected, enhanced and maintained is Sydney Harbour and its natural elements as "an outstanding natural asset" and "a public asset of national and heritage significance". To label Sydney Harbour as an "asset" is to recognise its value. To describe it as "outstanding" is to recognise that its value as an asset is exceptionally high. To identify it as a "natural" asset is to recognise that it was not created artificially by humans but is part of nature. Together, to recognise Sydney Harbour as an outstanding natural asset is to recognise it as a natural geographic phenomenon of exceptionally high value.

120 This outstanding natural asset is stated to be a public resource. Sydney Harbour is recognised as a "public asset" with "national and heritage significance." The identification of Sydney Harbour as a "public asset" is to recognise not only that it is

part of the public trust, as I explain below, but also a community asset available to be used and enjoyed by the public generally. The identification of Sydney Harbour's national significance is to recognise its significance not just to the people of Sydney but to all the people of the nation of Australia. The identification of Sydney Harbour's heritage significance is to recognise that "it is inherited as a legacy from previous generations and is to be transmitted from generation to generation": *Town Planning Board v Society for the Protection of the Harbour Ltd* at [33]. By describing Sydney Harbour in such special terms, the Biodiversity and Conservation SEPP has given legal recognition to Sydney Harbour's "unique character": *Town Planning Board v Society for the Protection of the Harbour Ltd* at [35].

121 The evaluative standard or norm – the aim – established by cl 10.1(1)(a) is expressed in "clear and unequivocal language". The legislative intent so expressed makes the aim "a strong and vigorous one". By prescribing such an aim, the Biodiversity and Conservation SEPP has accorded to Sydney Harbour a "unique legal status": *Town Planning Board v Society for the Protection of the Harbour Ltd* at [35] and *Addenbrooke Pty Ltd v Woollahra Municipal Council* [2008] NSWLEC 190 at [46]-[48].

The principles for the Foreshores and Waterways Area

122 Chapter 10 adopts certain principles for the purpose of enabling these aims to be achieved in relation to the Foreshores and Waterways Area. The principles are stated in cl 10.1(2):

> "(a) Sydney Harbour is to be recognised as a public resource, owned by the public, to be protected for the public good,
>
> (b) the public good has precedence over the private good whenever and whatever change is proposed for Sydney Harbour or its foreshores,
>
> (c) protection of the natural assets of Sydney Harbour has precedence over all other interests."

123 The principles emphasise what the aims establish, that Sydney Harbour is a public resource, owned by the public, which is to be protected for the public good. The principles also prioritise the public good over private good, in the ways stated in paragraphs (b) and (c).

Planning principles for strategic planning

124 Part 10.2 of the Biodiversity and Conservation SEPP also specifies planning principles for the Sydney Harbour Catchment (cl 10.10) and the Foreshores and Waterways Area (cl 10.11). These principles are required to be considered and, where possible, achieved in the preparation of environmental planning instruments and development control plans under Part 3 of the EPA Act and in the preparation of environmental studies and master plans for the purposes of the EPA Act (cl 10.9(2)). Nevertheless, a consent authority would be permitted by the Biodiversity and Conservation SEPP to, although not required to, consider the principles in determining a development application for development on land within the Sydney Harbour Catchment and the Foreshores and Waterways Area. Consideration of these planning principles is,

however, required by the Foreshores and Waterways Area DCP in determining all development applications within the Foreshores and Waterways Area (see discussion below).

125 The planning principles stated in cl 10.10 for land within the Sydney Harbour Catchment, of relevance to the mooring and use of the floating dry dock in Berrys Bay, include:

> "(a) development is to protect and, where practicable, improve the hydrological, ecological and geomorphological processes on which the health of the catchment depends,
>
> (b) the natural assets of the catchment are to be maintained and, where feasible, restored for their scenic and cultural values and their biodiversity and geodiversity,
>
> (c) decisions with respect to the development of land are to take account of the cumulative environmental impact of development within the catchment,
>
> …
>
> (f) development that is visible from the waterways or foreshores is to maintain, protect and enhance the unique visual qualities of Sydney Harbour,
>
> (g) the number of publicly accessible vantage points for viewing Sydney Harbour should be increased".

126 The planning principles stated in cl 10.11 for land within the Foreshores and Waterways Area, of relevance to the mooring and use of the floating dry dock in Berrys Bay, include:

> "(a) development should protect, maintain and enhance the natural assets and unique environmental qualities of Sydney Harbour and its islands and foreshores,
>
> …
>
> (d) development along the foreshore and waterways should maintain, protect and enhance the unique visual qualities of Sydney Harbour and its islands and foreshores".

127 These planning principles underscore the need for development to protect, maintain and enhance the natural assets and the unique environmental and visual qualities of Sydney Harbour and its islands and foreshores.

The objectives of the W1 Zone

128 The Foreshores and Waterways Area of Sydney Harbour Catchment is divided into nine zones, one of which is Zone W1 – Maritime Waters. The objectives of Zone W1 – Maritime Waters are set out in the Table to cl 10.14 as being:

> "The objectives of this zone are as follows—
>
> (a) to give preference to and protect waters required for the effective and efficient movement of commercial shipping, public water transport and maritime industrial operations generally,
>
> (b) to allow development only where it is demonstrated that it is compatible with, and will not adversely affect the effective and efficient movement of, commercial shipping, public water transport and maritime industry operations,
>
> (c) to promote equitable use of the waterway, including use by passive recreation craft."

Consistency with the aims of Chapter 10 and the objectives of the W1 Zone

129 The aims of Chapter 10 set out in cl 10.1 and the objectives of Zone W1 – Maritime Waters set out in the Table to cl 10.14 need to be considered by the Court in determining whether to grant or to refuse development consent to the floating dry dock. Indeed, cl 10.14(2) sets a precondition that must be satisfied before the Court can grant development consent:

> "Except as otherwise provided by this Chapter, the consent authority must not grant development consent to any development unless satisfied that it is consistent with the aims of this Chapter and the objectives of the zone in which it is proposed to be carried out."

130 The Court must therefore form the opinion of satisfaction that the mooring and use of the floating dry dock in Berrys Bay, which is part of Sydney Harbour, is consistent with both the aims of Chapter 10 in cl 10.1(1) of the Biodiversity and Conservation SEPP and the objectives of Zone W1 – Maritime Waters, before the Court has power to grant development consent to the floating dry dock. That opinion of satisfaction of consistency of the proposed development with the aims in cl 10.1(1) might not readily be able to be formed for large-scale, visually intrusive developments having regard to the terms in which the aims in cl 10.1(1) are expressed. As earlier explained, the aims establish in exacting terms the evaluative standards or norms that must be achieved. Finding that a proposed development "is consistent" with achieving these evaluative standards or norms may be difficult. An opinion of satisfaction of consistency with the objectives of Zone W1 – Maritime Waters may, however, be more easily formed having regard to the less demanding terms in which those objectives are expressed.

Matters for consideration before granting consent

131 Division 2 of Chapter 10 of the Biodiversity and Conservation SEPP sets out the matters that must be taken into consideration by the consent authority before granting consent to development in the Sydney Harbour Catchment: cl 10.18. Of relevance to assessing the visual and landscape character impacts of a proposed development are the matters in cl 10.23 and 10.24. Clause 10.23 addresses foreshore and waterways scenic quality:

> "The matters to be taken into consideration in relation to the maintenance, protection and enhancement of the scenic quality of foreshores and waterways are as follows—
>
> (a) the scale, form, design and siting of any building should be based on an analysis of —
>
> (i) the land on which it is to be erected, and
>
> (ii) the adjoining land, and
>
> (iii) the likely future character of the locality,
>
> (b) development should maintain, protect and enhance the unique visual qualities of Sydney Harbour and its islands, foreshores and tributaries,
>
> (c) the cumulative impact of water-based development should not detract from the character of the waterways and adjoining foreshores."

132 Clause 10.24 addresses maintenance, protection and enhancement of views:

> "The matters to be taken into consideration in relation to the maintenance, protection and enhancement of views are as follows—
>
> (a) development should maintain, protect and enhance views (including night views) to and from Sydney Harbour,
>
> (b) development should minimise any adverse impacts on views and vistas to and from public places, landmarks and heritage items,
>
> (c) the cumulative impact of development on views should be minimised."

Foreshores and Waterways Area DCP

133 The Foreshores and Waterways Area DCP provides guidance on giving effect to the aims of Chapter 10 of the Biodiversity and Conservation SEPP with respect to Sydney Harbour Catchment generally and the Foreshores and Waterways Area particularly; facilitating development that is permissible under that instrument; and achieving the objectives of land zones under that instrument, including Zone W1 – Maritime Waters: see s 3.42(1) of the EPA Act.

134 Part 1 of the Foreshores and Waterways Area DCP explains the framework and application of the plan. Section 1.1 notes at the outset that:

> "Sydney Harbour and its tributaries is one of Australia's greatest cultural and commercial resources. This area, which includes the Parramatta and Lane Cove Rivers and Middle Harbour, constitutes a valuable natural and cultural resource, and acts as a major transport corridor, flora and fauna habitat and recreation area. It is also a significant natural scenic feature."

135 The Foreshores and Waterways Area DCP applies to the Foreshores and Waterways Area defined and mapped in Sydney Harbour SREP, now Chapter 10 of the Biodiversity and Conservation SEPP. The Foreshores and Waterways Area DCP identifies as the "principal aim" of Sydney Harbour SREP, now Chapter 10 of the Biodiversity and Conservation SEPP, the aim in cl 10.1(1)(a) "to ensure that the catchment, foreshores, waterways and islands of Sydney Harbour are recognised, protected and maintained as an outstanding natural asset and public asset of national and heritage significance for existing and future generations" (section 1.1). The Foreshores and Waterways Area DCP gives guidance on giving effect to this aim.

136 The Foreshores and Waterways Area DCP needs to be taken into consideration in determining development applications within the Foreshores and Waterways Area (section 1.1). The DCP established performance-based criteria and guidelines relating to matters such as foreshore access, visual and natural environments, recreation and maritime uses with the aim of:

> "- protecting ecological communities within the area covered by SREP (Sydney Harbour Catchment) 2005;
>
> - ensuring that the scenic quality of the area is protected or enhanced;
>
> - providing siting and design principles for new buildings and waterside structures within the area; and
>
> - identifying potential foreshore access locations in the area." (section 1.1).

137 The Foreshores and Waterways Area DCP explains that:

> "Inherent in the DCP's performance-based criteria and guidelines is the intent of a set of principles that have been developed as part of the State Government's overall strategy for guiding planning and development in the Foreshores and Waterways Area."

138 These principles are the planning principles for the Foreshores and Waterways Area set out in cl 10.11 of the Biodiversity and Conservation SEPP. These principles are reproduced in section 1.1 of the Foreshores and Waterways Area DCP. Of particular relevance to assessing the visual and landscape character impacts are the principles in (a) and (d) that:

> "- development should protect, maintain and enhance the natural assets and unique environmental qualities of Sydney Harbour and its islands and foreshores…
>
> - development along the foreshores and waterways should maintain, protect and enhance the unique visual qualities of Sydney Harbour and its islands and foreshores."

139 These principles are required to be considered in determining development applications within the Foreshores and Waterways Area (section 1.1, section 1.2, section 1.3 and Appendix B). Appendix B summarises the matters that the former Sydney Harbour SREP, now Chapter 10 of the Biodiversity and Conservation SEPP, requires to be considered when determining development applications and notes where these provisions are addressed in the Foreshores and Waterways Area DCP. The part of Appendix B dealing with foreshores and waterways scenic quality and maintenance, protection and enhancement of views is reproduced below:

Assessment Criteria under SREP (Sydney Harbour Catchment) 2005 – Matters for Consideration	**Relevant Clause in SREP**	**Relevant Part in this DCP**
Foreshore and waterways scenic quality		
the scale, form, design and siting of any building should be based on an analysis of: (i) the land on which it is to be erected, and (ii) the adjoining land, and (iii) the likely future character of the locality,	25(a)	Various landscape character types (1–16) in Part 3. Part 4 (sections 4.4 and 4.5). Part 5 (sections 5.3 and 5.4).
development should maintain, protect and enhance the unique visual qualities of Sydney Harbour and its islands, foreshores and tributaries	25(b)	Various landscape character types (1–16) in Part 3. Part 4 (sections 4.4 and 4.5). Part 5 (sections 5.3 and 5.4).

the cumulative impact of water-based development should not detract from the character of the waterways and adjoining foreshores	25(c)	Various landscape character types (1–16) in Part 3. Part 4 (sections 4.4 and 4.5). Part 5 (sections 5.3 and 5.4).
Maintenance, protection and enhancement of views		
development should maintain, protect and enhance views (including night views) to and from Sydney Harbour,	26(a)	Various landscape character types (1-16) in Part 3. Parts 4 & 5
development should minimise any adverse impacts on views and vistas to and from public places, landmarks and heritage items,	26(b)	Various landscape character types (1-16) in Part 3. Parts 4 & 5
the cumulative impact of development on views should be minimised.	26(c)	Various landscape character types (1-16) in Part 3. Parts 4 & 5

140 Part 3 of the Foreshores and Waterways Area DCP deals with landscape assessment. Part 3 provides guidance for a consent authority in considering the visual impact of development from the waterway and foreshores. Section 3.5 sets out the methodology to be used for considering the visual impact for a development.

> "To determine whether a proposal is satisfactory, consideration will need to be given to:
>
> - the visual impact factors identified in Section 3.1;
>
> - the general aims in Section 3.2; and
>
> - the statement of intent and performance criteria for the relevant landscape character type outlined in Section 3.4."

141 Section 3.1 identifies the visual impact factors that should be taken into consideration. Section 3.1 notes that:

> "The visual impact of a development will vary depending on:
>
> - the nature of the proposal—its height, width, siting, scale, colour, reflectivity and function;
>
> - the landscape setting in which it is proposed;
>
> - the degree of change created—whether it will be minimal or not; and
>
> - the ability of the proposal to integrate with the landscape character."

142 Section 3.2 identifies the general aims:

"All development should aim to:

• minimise any significant impact on views and vistas from and to:

– public places,

– landmarks identified on the maps accompanying the DCP, and

– heritage items;

• ensure it complements the scenic character of the area;…"

143 The map to Part 3 divides the Foreshores and Waterways Area into different landscape character types. The landscape character types were defined by analysing the different landscape elements that contribute to the character of the area. Performance criteria have been devised for each landscape character type. The landscape character types and their performance criteria are specified in section 3.4.

144 The water lease area of Berrys Bay in which the floating dry dock is proposed to be moored and used is identified on the map as Landscape Character Type 11. This landscape character type applies to the industrial areas of Sydney Harbour. The existing boatyard operated by Noakes no doubt led to this designation as Landscape Character Type 11. Further out of Berrys Bay is a different landscape character type, Landscape Character Type 9, which applies to the natural foreshores of Sydney Harbour.

145 Section 3.3 of the Foreshores and Waterways Area DCP notes than more than one landscape character type might need to be considered in assessing the visual impact of a development from the waterway and foreshores:

> "If the development site is on the border of more than one landscape character type, the development should be considered in the context of the statement of character and intent and performance criteria for all relevant landscape character types. The performance criteria that have been devised, apply from the waterway to the ridgeline viewed from the waterway. As the distance a development is sited from the foreshore increases, the number of landscape character types that could relate to the site to increase. The landscape character types which dominate the site's context should be considered when determining which landscape character types would apply to development sited away from the foreshore."

146 This is relevant in this case. Whilst the floating dry dock is proposed to be moored and used at a location identified as Landscape Character Type 11, from some viewpoints the floating dry dock will be viewed in the context of Landscape Character Type 9 as well as Landscape Character Type 11. Nevertheless, from most viewpoints, Landscape Character Type 11 will dominate the site's context.

147 The statement of character and intent for Landscape Character Type 11 is:

> "These areas have a high level of development largely comprising waterside industrial uses and have a strong visual presence within the Harbour. The important contribution made to the vitality and diverse activity on the Harbour by these elements needs to be recognised. Development has been designed and sited with regard to the natural features of the area; their importance within the landscape character needs to be maintained."

148 The performance criteria for Landscape Character Type 11 are:

> "Any development within this landscape is to satisfy the following criteria:
>
> - design and mitigation measures are provided between incompatible land uses to minimise noise and amenity impacts;

> - views of the remaining natural elements along the foreshore and behind existing development are preserved in a continuous unbroken line to soften the impact of the built form;
>
> - the maritime nature of industrial uses on the harbour is preserved. Pressure for these uses to relocate is minimised. New developments adjoining maritime activities are designed and sited to maintain compatibility with existing maritime activities;
>
> - it is designed to maintain the scale and height of existing development and to have regard for the visual dominance of the islands and the industrial elements within the harbour; and
>
> - the existing character, natural, cultural and heritage features of the islands are retained."

149 Insofar as the floating dry dock might be able to be viewed from some viewpoints in the context of Landscape Character Type 9, the statement of character and intent for Landscape Character Type 9 is:

> "These areas are significant because they contain natural foreshores interspersed with more developed areas and provide a key feature and visual variety to the total landscape. The natural shoreline has significant visual features. However, it is also developed with swimming pools, retained edges and boat sheds. Sections of vegetated skyline have been preserved. The intent is to retain these natural features and only encourage development that is consistent with the scale, design and siting of that which exists."

150 The performance criteria for Landscape Character Type 9 are:

> "Any development within this landscape is to satisfy the following criteria:
>
> - it is sited so remaining rock outcrops, cliff lines or vegetated shorelines are protected and not obscured;
>
> - it is sited to ensure that the continuous line of any natural feature is preserved and remains the dominant feature in the landscape;
>
> - it is sited and designed to maintain the vegetation cover on the upper slopes and ridgelines;
>
> - major points and entrances to the bays are preserved in their natural state;
>
> - existing character, natural, cultural and heritage features of the islands are retained; and
>
> - colours should match native vegetation as closely as possible with trim colours drawn from natural elements such as tree trunks and stone."

151 Part 4 of the Foreshores and Waterways Area DCP contains guidelines for water-based and land/water interface. The general requirements apply to all water-based and land/water interface developments, while the requirements for specific types of developments only apply to those developments.

152 Section 4.2 specifies the general requirements that must be considered for all water-based and land/water interface developments. These include that "development does not dominate its landscape setting". This reinforces the statement in s 4.1 that: "Individual private facilities should not be visually dominant. Development should complement rather than compete with the other established elements."

NSLEP

153 I turn now to the local controls. As I have earlier identified, parts of the water lease area and the land within which jetties and the saw-toothed concrete dock have been built over the water are within the unzoned land under NSLEP, while the balance of the land is in Zone IN4 – Working Waterfronts. The floating dry dock itself would be moored and

used in the water lease area, and hence partly in the unzoned land, while facilities for the operation of the floating dry dock, including the air quality pollution control system and water treatment system, will be located in Zone IN4.

154 In deciding whether to grant development consent to any part of the development in the unzoned land, the Court, exercising the functions of the consent authority:

> "(a) must consider whether the development will impact on adjoining zoned land and, if so, consider the objectives for development in the zones of the adjoining land, and
>
> (b) must be satisfied that the development is appropriate and is compatible with permissible land uses in any such adjoining land" (cl 2.4(2) of NSLEP).

155 The adjoining zoned land is zoned IN4. The objectives for development in Zone IN4 are:

> "- To retain and encourage waterfront industrial and maritime activities.
>
> - To identify sites for maritime purposes and for activities that require direct waterfront access.
>
> - To ensure that development does not have an adverse impact on the environmental and visual qualities of the foreshore.
>
> - To encourage employment opportunities.
>
> - To minimise any adverse effect of development on land uses in other zones."

156 The consent authority must also have regard to these objectives for development in Zone IN4 when determining a development application for any part of the development to be carried out on land in Zone IN4: at cl 2.3(2) of NSLEP.

NSDCP

157 NSDCP provides guidance on giving effect to the aims of NSLEP, facilitating development that is permissible under that instrument, and achieving the objects of zones under that instrument, including Zone IN4. NSDCP only applies to the land that is zoned under NSLEP. Section 10 of Part C provides the character statement for the Waverton/Wollstonecraft Planning Area. The foreshores of Berrys Bay, including the Noakes boatyard, are within the Waverton/Wollstonecraft Planning Area. The character statement of this Planning Area notes the existing character of the foreshores:

> "The foreshores of the Planning Area are generally protected from development by recreational and bushland buffers, with the minor exception of maritime industrial activities which are reliant on a land/water interface."

158 The character statement identifies the desired future outcome for development in the Waverton/Wollstonecraft Planning Area. Development should result in:

> "- redevelopment of sites respects the existing built form and maintains the character of the area. This includes any alterations and additions to existing buildings…
>
> - future maritime uses having a minimal impact on residential amenity".

159 Development should satisfy certain environmental criteria, including:

> "- the remaining natural foreshores and water courses are conserved and protected, and pedestrian access to these areas is extended and improved…
>
> - mechanical noise and other industrial noise is controlled, to protect the ambience of natural features"

160 Development should satisfy certain quality built form criteria, including:

> "- any development reflects and reinforces the existing distinctive built form/landscape areas and distribution of accommodation types
>
> - development in foreshore areas is carefully designed to consider the existing topography and not disrupt views from neighbouring properties
>
> - significant views from lookouts and other vantage points are not obscured by structures or landscaping".

161 The Waverton/Wollstonecraft Planning Area is broken down into a number of neighbourhoods. One of these is the John Street Waterfront Neighbourhood, which includes the existing Noakes boatyard. The significant elements of this neighbourhood include the land use of maritime industrial and commercial activities, the natural features of Berrys Bay, and the views and vistas that are to be preserved and where possible enhanced are the views to Sydney Harbour and beyond.

162 The desired future character of the John Street Waterfront Neighbourhood includes a diversity of "waterfront industrial buildings and structures, hard stands, wharves and jetties, administrative buildings, car parking." The desired built form is described in terms of form, massing and scale; siting; and other features. These include:

> "P2 Building height is minimised to preserve public and private views…
>
> P5 Buildings are generally located against the cliff with a setback from the cliff for access and maintenance."

The public trust and intergenerational equity in protecting Sydney Harbour

163 Both Chapter 10 of the Biodiversity and Conservation SEPP and the Foreshores and Waterways Area DCP contain provisions giving legislative recognition to the concept of the public trust and the principle of intergenerational equity. The Biodiversity and Conservation SEPP and the Foreshores and Waterways Area DCP are forms of delegated legislation, being made under the principal Act of the EPA Act.

164 The concept of the public trust derives from the Roman property law concept of *res communis.* These are things, which by their nature are part of the commons that all of the public have a right in common to access and use, such as the air, running water, the sea and harbours, and which cannot be appropriated to private ownership. Ownership of these common natural resources is vested in the state as trustee of a public trust for the benefit of the people. The state, as trustee, is under a fiduciary duty to deal with the trust property, being the communal natural resources, in a manner that is in the interest of the general public, who are the beneficiaries of the trust. According to Sax, the idea of a public trusteeship rests on three related principles:

> "First, that certain interests – like the air and the sea – have such importance to the citizenry as a whole that it would be unwise to make them the subject of private ownership. Second, that they partake so much of the bounty of nature, rather than of individual enterprise, that they should be made freely available to the entire citizenry without regard to economic status. And, finally, that it is a principal purpose of government to promote the interests of the general public rather than to redistribute public goods from broad public uses to restricted public benefit.": Joseph L Sax,

> *Defending the Environment: A Handbook for Citizen Action* (Vintage Books, 1971) 165. See also Joseph L Sax, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention' (1969-1970) 68 *Michigan Law Review* 471, 475, 484-485.

165 Sax suggests that public trusteeship constrains the government in its dealing with and management of property subject to the public trust in at least three ways. First, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public. Secondly, the trust property must not be sold. Thirdly, the property must be maintained for particular types of uses, such as navigation, recreation or fishery: J L Sax, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention' at 477.

166 Chapter 10 of the Biodiversity and Conservation SEPP recognises "the catchment, foreshores, waterways and islands of Sydney Harbour" as the corpus of a public trust. The principal aim with respect to the Sydney Harbour Catchment recognises these natural elements of Sydney Harbour to be "an outstanding natural asset" (cl 10.1(1)(a)(i) and "a public asset of national and heritage significance" for existing and future generations (cl 10.1(1)(a)(ii)). The Foreshores and Waterways Area DCP gives effect to this principal aim (section 1.1). Chapter 10 of the Biodiversity and Conservation SEPP adopts the principles for the purpose of enabling the aims to be achieved in relation to the Foreshores and Waterways Area. These principles recognise Sydney Harbour as "a public resource, owned by the public, to be protected for the public good" (cl 10.1(2)(a)); "the public good has precedence over the private good whenever and whatever change is proposed for Sydney Harbour and its foreshores" (cl 10.1(2)(b)); and "protection of the natural assets of Sydney Harbour has precedence over all other interests" (cl 10.1(2)(c)). These aims and principles encapsulated the idea of public trusteeship of Sydney Harbour.

167 The concept of the public trust has been invoked in cases concerning proposed activities in or change of harbours. Examples are to be found overseas in the United States and Hong Kong and in New South Wales concerning Sydney Harbour itself.

168 In an early public trust case, *Illinois Central Railroad v Illinois* 146 US 387 (US Sup Ct, 1892); 13 SCR 110 (1892), the US Supreme Court held that the Illinois legislature could not derogate the control and management of the harbour of the State of Illinois and vest absolute interest in a private person. Such a conveyance violated the public trust over the lands held in trust by the State. The Supreme Court held that the State holds the title to the lands under the navigable waters of Lake Michigan "in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties": 146 US 387 at 452.

169 The Supreme Court observed that the holding of the title to the lands under navigable waters in trust does not preclude some dealing with the lands, such as by construction of wharves, docks and piers and the grant of leases or licences for such purposes:

> "The interest of the people in the navigation of the waters and in commerce upon them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels of the submerged lands; and, so

> long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State.": 146 US 387 at 452.

170 The Court contrasted such dispositions of lands under navigable waters for public purposes from "the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay, or of a sea or lake": 146 US 387 at 452-453. The Court held that:

> "Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.": 146 US 387 at 453.

171 Turning to the harbour in question, the Court found:

> "The harbor of Chicago is of immense value to the people of the State of Illinois in the facilities it affords to its vast and constantly increasing commerce; and the idea that its legislature can deprive the State of control over its bed and waters and place the same in the hands of a private corporation created for a different purpose, one limited to transportation of passengers and freight between distant points and the city, is a proposition that cannot be defended.": 146 US 387 at 454.

172 The Court noted that the area of the submerged lands proposed to be ceded to the railroad company was more than a thousand acres, being three times the area of the outer harbour": 146 US 387 at 454.

173 The Court held that a grant of this kind of the submerged lands was invalid:

> "But the decisions are numerous which declare that such property is held by the State, by virtue of its sovereignty, in trust for the public. The ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole people of the State. The trust with which they are held, therefore, is governmental and cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining.": at 146 US 387 at 455-456.

174 The Court considered that: "This follows necessarily from the public character of the property, being held by the whole people for purposes in which the whole people are interested": 146 US 387 at 456.

175 The importance of Hong Kong's harbour, known as Victoria Harbour, has been recognised by legislation and judicial decisions: see Berry Fong Chung Hsu, 'A Public Trust Doctrine for Hong Kong' (2011) 15 *New Zealand Journal of Environmental Law* 89. Section 3(1) of the Protection of the Harbour Ordinance states that: "The harbour is to be protected and preserved as a special public asset and a natural heritage of Hong Kong people, and for that purpose there shall be a presumption against reclamation in

the harbour". Section 3(2) requires: "All public officers and public bodies shall have regard to the principle stated in subsection (1) for guidance in the exercise of any powers vested in them."

176 In *Society for the Protection of the Harbour Ltd v Town Planning Board* [2003] HKCFI 220; [2003] 2 HKLRD 787, the Society for Protection of the Harbour Ltd challenged decisions of the Town Planning Board to allow the reclamation of certain areas of the harbour for the provision of roads, a waterfront promenade, a harbour park, and the reprovisioning of various facilities. Following the public exhibition of the proposed reclamation, numerous written objections to the plan were lodged. The Board made limited amendments to the draft plan, and submitted the draft plan to the Chief Executive in Council for approval. These were the decisions challenged by the Society. At first instance, the Board submitted that s 3 of the Ordinance required the decision-maker to undertake a weighing exercise for the purpose of deciding whether the public benefits of the proposed reclamation outweighed the need to preserve the harbour. If so, the presumption against reclamation would be rebutted. Chu J held that the Board had misinterpreted the Ordinance: at [65], [78], [110]. She held that the presumption against reclamation would only be rebutted where there was a compelling, overriding and present public need for reclamation, there was no viable alternative to reclamation, and the proposed reclamation involved minimum impairment to the harbour: at [50]. She granted an order of certiorari to quash the decisions in question, and remitted the matter to the Board to reconsider the draft plan and the objections: at [111]. The Board appealed that decision.

177 The Court of Final Appeal upheld this interpretation of the Ordinance: *Town Planning Board v Society for the Protection of the Harbour Ltd.* The Court (Li CJ, Bokhary, Chan and Ribeiro PJJ and Mason NPJ) upheld Chu J's decision that s 3(1) established a "statutory principle recognising the harbour as a special public asset": at [32]. In exercising their powers, the Court held that public officers and public bodies had to have regard to the principle in s 3(1): at [38]-[39]. The Court upheld Chu J's determination that the presumption against reclamation could only be rebutted by establishing an "overriding public need for reclamation", no reasonable alternative to the reclamation, and minimum impairment to the harbour: at [44]-[49].

178 The Court of Final Appeal elaborated on the unique character of the special public asset of Hong Kong Harbour:

> "As was observed at the outset, the harbour is undoubtedly a central part of Hong Kong's identity. It is at the heart of the metropolis both physically and metaphorically. The statute characterises this in the most distinctive terms. It is recognised not merely as a public asset but as a 'special' one. It is something extraordinary. The recognition does not stop there. It is further acknowledged to be a natural heritage. 'Natural' in that it was not created artificially by man but is part of nature. A 'heritage' in that it is inherited as a legacy from previous generations and is to be transmitted from generation to generation. The harbour as a special public asset and natural heritage is declared to belong to Hong Kong people. This reinforces its character as a 'public' asset. It is a community asset and as such, is to be enjoyed by the people of Hong Kong. By representing the harbour in such special terms in the statute, the legislature was giving legal recognition to its unique character.

> It is because of its unique character that the harbour must be protected and preserved. The meaning of these words in the statutory principle is plain. There must be protection, that is, it must be kept from harm, defended and guarded. And there must be not merely protection. There must also be preservation. Preservation connotes maintenance and conservation in its present state. What must be emphasised is that under the principle, what is to be protected and preserved is the harbour as a special public asset and a natural heritage of Hong Kong people.
>
> It is manifest that in enacting the statutory principle, the legislature was giving legal recognition to the great public need to protect and preserve the harbour having regard to its unique character. The principle is expressed in clear and unequivocal language. The legislative intent so expressed is to establish the principle as a strong and vigorous one. By prescribing such a principle, the legislature has accorded to the harbour a unique legal status.": at [33]-[35].

179 Closer to home, Sydney Harbour has been recognised as being a public asset of national and heritage significance. Two judicial decisions make this clear.

180 At the end of the 19th Century, Sydney Harbour was faced with the threat of coal mining. A coal mining company, Sydney Harbour Collieries Company, applied for mining leases over the foreshores of Sydney Harbour. The company was unsuccessful in obtaining a mining lease along the foreshore from Mosman to Neutral Bay but was successful in obtaining a mining lease between Athol Gardens and Bradleys Head: see Tim Bonyhady, 'A Usable Past: The Public Trust in Australia' (1995) 29 *Environmental & Planning Law Journal* 329 at 334-335. Before the company could start coal mining at Bradleys Head, it needed a wharfage lease so that it could ship its coal to market. The company appealed against what it considered to be onerous conditions on which the Land Board had granted the wharfage lease, including what it considered to be an excessive annual rent.

181 The NSW Land Appeal Court, in its judgment in *Re Sydney Harbour Collieries Co* (1895) 5 Land Appeal Court Reports 243, recognised the duty of the government, as trustee, to protect the public asset of Sydney Harbour:

> "…It would be the duty of the Government not only to take the greatest care to protect both present and contingent public interest, but also to obtain the best consideration for the temporary alienation of frontages which, if the Crown would be in law a trustee, it holds in trust for the health, recreation, and enjoyment of an enormous and ever-increasing population": at 251-252.

182 Similarly, the Court later observed that the Crown "occupies a position in relation to public lands something in the nature of a trustee under an obligation to dispose of or alienate those lands, whether permanently or temporally, only in the interest and for the benefit of the people of this Colony": at 255.

183 Although the Court was only considering the grant of the wharfage lease and not the mining lease, it expressed its disapproval of the proposal to mine foreshore public land:

> "But the Government ought not to be expected to consent to the temporary alienation of this piece of foreshore, and of the larger joining underwater area, until, at least, all privately-owned sites had been exhausted. And even then, the propriety of parting with this prominent piece of the harbour, in order that it may be converted into a permanent eyesore, and remain a hideous blemish on the people's inheritance, seems to be more than questionable, for the erection in Athol Bight of the usual machinery and appliances for the haulage and shipment of coal, and the collection of hovels that always hang on the pits mouth, means a transformation not to be described by words.": at 259.

184 The Court noted the scarcity and irreplaceability of the foreshores and waterways of Sydney Harbour:

> "In the next place, the rapid expansion of the metropolis on the south and north shores of the harbour, coupled with the fact that although the extension of the city landward is practically unlimited, the foreshores and waterways cannot be correspondingly extended, affords a very strong reason for refusing this lease. In the course of a generation the population of Sydney and its suburbs will probably exceed 500,000, and in two generations some 700,000 or 800,000. That is a fact which would rather suggest the resumption of the foreshores than their alienation, unless in very exceptional circumstances when some imperious and paramount public purpose must be satisfied at any cost. But no consideration in the nature of rent could afford any compensation or consolation for the disfigurement of a harbour which we have all been taught to cherish as one of nature's choicest masterpieces.": at 259.

185 More recently, Biscoe J of this Court in *Addenbrooke Pty Ltd v Woollahra Municipal Council* recognised that "Sydney Harbour is one of the most beautiful harbours in the word. It provides pleasure not only to local residents and mariners but to many visitors from Australia and abroad": at [5].

186 Biscoe J noted that the public importance of Sydney Harbour had been acknowledged in Sydney Harbour SREP, which "attributes significance to Sydney Harbour as a whole and looks to its protection, enhancement and maintenance as an outstanding natural asset and a public asset of national and heritage significance for existing and future generations": at [46]. Biscoe J found that Sydney Harbour SREP accords to Sydney Harbour "unique legal status", comparable to the unique legal status accorded to Hong Kong's Victoria Harbour by the Hong Kong legislature: at [47]. Biscoe J referred to the Hong Kong Court of Final Appeal's consideration of Victoria Harbour, earlier quoted, finding that the comments apply similarly to Sydney Harbour: at [48].

187 The concept of the public trust is related to the principle of intergenerational equity, one of the principles of ecologically sustainable development. The principle of intergenerational equity is that "the present generation should ensure the health, diversity and productivity of the environment are maintained or enhanced for future generations": s 6(2)(b) of the *Protection of the Environment Administration Act 1991* (POEA Act). The relationship between the concept of the public trust and the principle of intergenerational equity is that the public trust had been described as "the strongest contemporary expression of the idea that the legal rights of nature and of future generations are enforceable against contemporary users": WH Rodgers, 'Bringing People Back: Toward a Comprehensive Theory of Taking in Natural Resource Law' (1982) 10 *Ecology Law Quarterly* 205 at 239, 240 and Catherine Redgwell, "Principles and Emerging Norms in International Law: Intra- and Inter- generational Equity" in CP Carlarne, KR Gray and R Tarasofsky (eds) *The Oxford Handbook on International Climate Change Law* (OUP, 2016) 185 at 191.

188 Intergenerational equity is based on three principles: E Brown Weiss, "Intergenerational Equity: A Legal Framework for Global Environmental Change" in E Brown Weiss (ed) *Environmental Change and International Law: New Challenges and Dimensions* (UN University Press, 1992) 385-412. First, the "conservation of options" principle requires each generation to conserve the diversity of the natural and cultural resources base in order to ensure that options are available to future generations for solving their problems and satisfying their needs: at 402-404. Second, the "conservation of quality"

principle requires each generation to maintain the quality of the earth such that it is passed on in no worse condition than it was received: at 404-405. Third, the "conservation of access" principle requires each generation to give its members "equitable rights of access to the legacy of past generations and should conserve this access for future generations": at 401 and 405.

189 From the three principles are derived five duties on the present generation: the duty to conserve resources; the duty to ensure equitable use; the duty to avoid adverse impacts; the duty to prevent disasters, minimize damage and provide emergency assistance; and the duty to compensate for environmental harm: E Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Inter-generational Equity* (Transnational Publishers, 1989) 51-60 and see Catherine Redgwell, "Principles and Emerging Norms in International Law: Intra- and Inter-generational Equity", 190.

190 Chapter 10 of the Biodiversity and Conservation SEPP recognises the need to afford intergenerational equity. An essential aim is to ensure the catchment, foreshores, waterways and islands of Sydney Harbour are "protected, enhanced and maintained" not only as "an outstanding natural asset" but also as "a public asset of national and heritage significance", "for existing and future generations" (cl 10.1(1)(a)(ii)). The language of this aim accords with the premise of intergenerational equity that the present generation is to ensure the health, diversity and productivity of the environment is maintained or enhanced for future generations. That the beneficiary of the action required includes future generations is expressly stated at the end of the paragraph. But it is also implied by the language in which the action required is described. As I have earlier explained, the identification of Sydney Harbour as a "public asset" with "national and heritage significance" recognises its status as a community asset available to be used and enjoyed by all of the people of Australia but also that it is inherited as a legacy from previous generations and is to be transmitted from the existing generation to future generations. To protect, maintain and enhance Sydney Harbour as an outstanding natural asset and as a public asset of national and heritage significance is to implement each of the principles of conservation of options, conservation of quality and conservation of access for the benefit of future generations.

Assessment of visual and landscape character impacts

191 It is against this planning framework that the proposed visual and landscape character impacts of the proposed development of the floating dry dock needs to be assessed. I will address these impacts in three steps: the nature of the proposed development of the floating dry dock, the landscape setting in which the development is proposed, and the impacts of that development on that landscape setting.

The impacting development

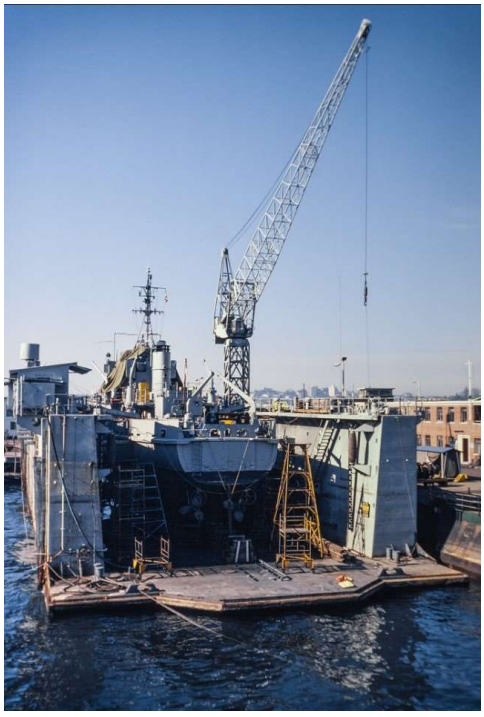
192 I start with the nature of the proposed development. The floating dry dock is a function-built vessel, its function being to repair and maintain boats whilst being moored in the harbour. The floating dry dock was one of two, 1000 tonne floating dry docks commissioned by the Royal Australian Navy (Navy) between 1940 and 1944. It was constructed by Morts Dock and Engineering Co in Sydney in 1942. Upon completion in 1944, the floating dry dock was handed over to the Navy. By this time, World War II had ended and the floating dry dock could not be assigned to its intended role with the British Pacific Fleet Train for mobile combat repairs. The floating dry dock was moored at Garden Island and was an active part of the Garden Island naval repair facility throughout most of its lifespan. It provided additional berthing for repairs of naval vessels. In 1993, the floating dry dock was subject to a major refit, extending its service life. The floating dry dock was decommissioned from naval service in 2011. Thereafter it remained at Garden Island unused and deteriorated. Noakes purchased the floating dry dock in December 2014 and subsequently refurbished it with a view to using it at its boatyard in Berrys Bay (RPS Group, 'Noakes Floating Dry Dock, Heritage Significance Assessment', 6 December 2021).

Noakes FDD at Garden Island prior to being decommissioned 2000 – Figure 1 RPS Group Report, p 3.

193 The modifications of the floating dry dock that were undertaken by Noakes were substantial, including the physical shortening of the length of the structure; the extensive removal of plant rooms and other enclosed rooms on the upper wall of the port side; and the removal of large hinged trusses that cantilevered from the walls at either side of the bow end that could be swung together once a vessel was berthed in the dock, to create a walkway past the bow of the vessel contained in the dock (Dr Pollard's Landscape Character and Visual Impact Analysis, p 13).

Existing FDD to be relocated – Figure 7 Aspinall's Visual Impact Assessment, p 12.

194 The large bulk and scale of the floating dry dock is a result of its necessary functional capacity, servicing large maritime vessels. Mr Aspinall, Stannards' visual expert, described this as a case of "form following function". This is true in two respects. The form of the floating dry dock does follow the function of being a vessel servicing boats whilst being moored on the harbour, but the large bulk and scale of this particular floating dry dock follows the function of servicing very large boats, particularly Navy vessels, such as the RAN 'Minehunter', for which the floating dry dock was purpose-built. This floating dry dock was built in World War II to undertake mobile combat repairs of Navy vessels but when this did not occur, was instead used at the very large-scale Garden Island naval repair facility to repair very large Navy vessels. The floating dry dock was not built to repair small to medium boats or to be used at small to medium-scale boatyards in a small, confined bay, such as Berrys Bay.



Minesweeper in floating dry dock 1980 – Figure 1 RPS Group Report, p 3.

195 Dr Pollard, the Council's visual expert, noted that the floating dry dock's cultural heritage value relates to its use for maintenance and repair of Navy and other military vessels at Garden Island and other military sites. Its proposed relocation to a small commercial boatyard confuses and dilutes the social and cultural heritage of the existing boatyard and does nothing to enhance the social or cultural value of the floating dry dock (joint expert report of the heritage and visual experts, pp 13-14).

196 The overall shape of the floating dry dock is an open-ended box with thick walls on the long sides. The floating dry dock is constructed of steel and painted in a battleship grey colour. It is about 59.2m long and 18.8m wide. It has a maximum height of 11.5m. Of this height, approximately 2m of the vessel is below the waterline, giving a visible height of 9.5m.

197 The wall elements and hull below the internal floor of the floating dry dock contain tanks into and out of which water can be pumped. The floating dry dock is lowered into the water by pumping water into the tanks in the hull and the side walls of the vessel. The boat to be repaired or maintained is then moved into the floating dry dock and secured. The maximum length of a vessel that can be accommodated is 60m, with a beam of 12.5m, which results in a vessel tonnage of 750T. Water is then pumped out of the tanks to create buoyancy, raising the floating dry dock.

198 To mitigate acoustic impacts, the floating dry dock will be fitted with acoustic curtains at both ends and across the top of the floating dry dock, in order to enclose the floating dry dock when noise-generating boat repair or maintenance is carried out. To mitigate air quality impacts, the floating dry dock will be enclosed/encapsulated and fitted with a

carbon filtration system to capture odours and air pollutants. These acoustic and air quality mitigation measures to enclose and encapsulate the floating dry dock will add to the bulk and scale of the floating dry dock.

199 The Council, in its contentions, described the floating dry dock as "monolithic". The parties' heritage and visual experts commented on this description. Mr Outram, Stannards' heritage expert, accepted that:

> "The 'monolithic' nature of the FDD is the common form for such structures as they are not designed for aesthetic appeal but to provide the relevant dimensions and ancillary features for their use. By their nature, not all of these structures may be aesthetically pleasing and this can be seen in other areas such as Garden Island and Cockatoo Island where *commodity* takes precedence over *delight.* However, they reflect the maritime tradition of Sydney Harbour and their rather brutal structures provide strong evidence of their workings. They have an industrial charm that adds to the character of the Harbour." (Joint expert report of the heritage and visual experts, p 8).

200 Mr Aspinall, Stannards' visual expert, reiterated that the shape of the floating dry dock is a direct result of its function. He considered the description "monolithic" carried "unnecessarily negative connotations". He noted the dictionary definition of monolithic as "too large, too regular or without interesting differences". He considered this description not to be relevant to the floating dry dock, "which has obvious irregularities and differences around its 4 elevations" (p 8). He also proposed that a significant proportion of the appearance of the floating dry dock will be made up of the vessel that is being maintained within the floating dry dock. These vessels will be of various sizes and designs.

201 Mr Brady, the Council's heritage expert, agreed that the floating dry dock is monolithic in nature although he accepted that this monolithic nature is part of its "inherent aesthetic character". But herein lies the problem. This monolithic nature of the floating dry dock has a significant impact on the smaller scale and detail of the established boatyard and surrounds (p 8).

202 Dr Pollard, the Council's visual expert, considered that the floating dry dock is "more building-like than boat-like" and that "its height and presence in the proposed location will be similar to that of a large, unarticulated building" (p 10). He continued:

> "The scale and form of the FDD are substantially out of character with the north arm of Berrys Bay. The introduction of the FDD to the area would represent a departure from the operational approach and appearance of the boatyard, in favour of a large scale, more industrial approach to servicing larger vessels".

203 I accept that the floating dry dock can be described as monolithic – it is too large, too regular and without interesting differences. This rather brutal, building-like vessel is a product of form following function – it was purpose-built to service very large Navy vessels at very large-scale naval repair facilities such as Garden Island.

204 Because the floating dry dock is to be moored within the water lease area, an additional movement is required to use the floating dry dock in this location. The floating dry dock needs to be slewed out of its mooring position closer to the wharf and jetties of the boatyard into the loading/unloading position inside but adjacent to the western boundary of the water lease area. After loading or unloading of the boat to be repaired or maintained, by the process described, the floating dry dock needs to be slewed back

closer to the wharf and jetties of the existing boatyard. The process of slewing and loading/unloading takes 5-6 hours. Submerging and loading would be undertaken on a flood tide and as close as practical to a high tide. Floating the floating dry dock would be undertaken on an ebb tide. Slewing is not tidally dependent.

205 The need to moor the floating dry dock near the wharf and to slew the floating dry dock into and out from the mooring position necessitates removing two jetties and reducing the length of a third jetty and displacing the mooring of numerous boats in the area of mooring and slewing of the floating dry dock. This adds to the impact of the development.

The impacted environment

206 Second, the landscape setting in which the floating dry dock is proposed to be moored and used needs to be described. The landscape character of Berrys Bay and its foreshores are described in the Foreshores and Waterways Area DCP and NSDCP. I have set out earlier these descriptions. The parties' visual experts, Mr Aspinall for Stannards and Dr Pollard for the Council, added their own descriptions.

207 Mr Aspinall describes the "visual context" in his Visual Impact Assessment dated December 2021. Mr Aspinall's description was limited to identifying only those characteristics of the landscape setting as he saw to be relevant to his assessment of the existing views from selected private properties and public spaces likely to be affected by the floating dry dock. Mr Aspinall's assessment was essentially an assessment of the visual impact rather than an assessment of the landscape character impact.

208 Mr Aspinall's initial description of the context of the site was:

> "In terms of the context of the site, surrounding the site is a relatively broad diversity of land uses. Generally, east of the site are residential land uses, of low-medium density, including three storey apartment buildings – see Figure 3. To the west of the site are marine related uses. The topography is generally from east to west and therefore slopes down towards Berrys Bay, with certain properties benefitting from water views. Another maritime facility, Dolphin Wharf, opposite the site, moors vessels for various periods of time, currently occupied by the ferry, 'South Steyne'.
>
> The site is located within close proximity of other marina facilities, used for commercial and private uses, demonstrating the appropriateness of the proposal within the context of the site. Berrys Bay escarpment and its associated pathways are above this and other marine-related uses are further south-west of the site. The railway line aligns the top of the escarpment and there is substantial sandstone cliff face from this towards the shipyard itself. Beyond this is Dumbarton Street. Residential property also aligns the top of the escarpment to the west. Residential property also aligns the top of the escarpment to the west, along Balls Head Road and Larkin Street below.
>
> The subject site is identified as a heritage item, and there are also a number of other heritage items within the vicinity of the site." (pp 4-5).

209 Mr Aspinall's later description of the visual context was similar:

> "Within the Road context, development is predominantly 1, 2 and 3 storey individual dwelling houses and small apartment buildings, orientated to maximise ocean and district views. The subject property is not [sic] heritage listed.
>
> Within the urban context, there is a diverse fabric consisting of predominantly low density residential, with wide Roads and mature, established landscaping.

> The iconic views from Berrys Bay are to main harbour to the south and southeast. These are relatively unaffected by the visual impact of the current design proposal. There are a small number of locations where view loss can be assessed, but for the mostpart [sic], this assessment relates to the visual impact of the new proposal." (p 9).

210 In the joint expert report of the heritage and visual experts, Mr Aspinall proposed that the views to the site from the houses and public viewing locations to the west of the site across Berrys Bay, can be separated into three visual zones:

> "1. The water in the Bay, including the boats and other floating structures.
>
> 2 The foreshore and associated developments, with a backdrop of a steeply sloping topography, including a sandstone cliff, as described earlier in this report. This component of the site's environs is effectively 'capped' by the railway line and Dumbarton Street.
>
> 3. The raised residential streetscape above the site, mostly contained within the Union, Bank and Thomas Streets Conservation Area." (p 23).

211 Mr Aspinall considered the qualitative visual values of these zones to be different. The intermediate zone 2 is the "working" zone in terms of activity, being transport and industry, against the backdrop of the vertical sandstone cliff. Mr Aspinall considered that the floating dry dock would be viewed as being within zone 2 (p 41).

212 Mr Aspinall assessed the visual impacts of the proposed floating dry dock within this visual context.

213 Mr Aspinall identified what he termed "roadscapes" within the local and surrounding areas. He suggested that the roadscapes "are typical of a well-established suburban area, that being focused on public amenity" (p 9). His intention in doing so was not clear, although it may have been to identify the view locations that the roadscapes afforded.

214 More importantly, Mr Aspinall selected view locations for his local view analysis, including private viewing locations from areas and residences adjoining the site, public viewing locations, and roads and pathways across Berrys Bay to the west. These selected view locations were used for his photomontage images, depicting the view from the selected locations without and with the floating dry dock. Mr Aspinall opined as to what he considered was the impact of the floating dry dock on the views from these selected view locations.

215 Mr Aspinall otherwise asserted that the iconic views from Berrys Bay are to the main harbour to the south and the south east and that "these are relatively unaffected by the visual impact of the current design proposal". (p 9).

216 Dr Pollard's assessment of the landscape character of Berrys Bay and its surrounds in his Landscape Character and Visual Impact Analysis filed 6 April 2022 was far more comprehensive than that of Mr Aspinall. Dr Pollard explained that the landscape character of a place "relates to the built, natural and community aspects that make a place unique". The landscape character of a place is more than its visual appearance. Although a place's visual presentation is clearly a central means of perceiving a place, it is not the only way it is perceived. Dr Pollard noted that "individual, fixed point 'views' to a place are more a representative approximation of our perception of an area,

whereas we typically take in our environment by moving about in it, and layer visual impressions with other sensory input over time, to create a cognitive 'map' or impression of a place." (p 3).

217 Dr Pollard described the built, natural and community aspects that give Berrys Bay its landscape character (pp 3-5). As to the natural aspects, Dr Pollard stated:

> "Physically, Berrys Bay opens to the main body of the Harbour to its south-eastern side, with Goat Island being located in the open water immediately to the south. The Bay has two relatively compact arms – one to the west and the other to the north. Both are steep sided, with the northern arm being a narrow body of deep water that terminates in a level area that is known as Waverton Park. The subject site is located to the east side of the north arm of the Bay. The steepness of the landforms rising up from the narrow northern Bay provide a space that is quite intimate, with activity on one side of the Bay, being readily visible from the opposite side." (p 3).

218 As to community aspects, Dr Pollard referred to the creation of public spaces on the foreshores of Berrys Bay. To the south of the boatyard is Sawmillers Reserve on the foreshore of the bay. There is a popular coastal walking path, the North Sydney Circle Walk, which passes through Sawmillers Reserve along the waterfront to the southern boundary of the existing boatyard at Munro Street, at which point the walk deviates around the boatyard via Dumbarton Street to John Street and then along the foreshore at Waverton Park at the northern end of Berrys Bay.

219 To the west of Berrys Bay is Carradah Park, a very attractive landscaped park created on the former BP Petroleum tank farm site. Multiple walking paths traverse the park. Excellent views are available from multiple points along the walkways and lookouts, across Berrys Bay to the boatyard. The walkways and lookouts at the upper levels of Carradah Park, adjacent to Larkin Street, are connected by stairways to multiple lower pedestrian walks, as well as to Waverton Park at the northern end of Berrys Bay. These public walkways connect with other walkways along the regenerated and natural foreshores to Balls Head.

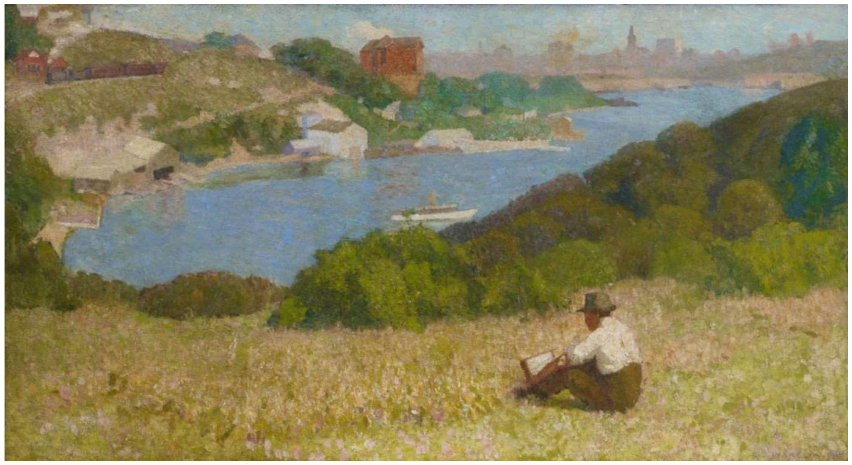
220 Dr Pollard stated that these public spaces and walking paths are utilised by a broad range of residents and visitors (p 8). Dr Pollard noted that the waters of Berrys Bay itself are often used by residents and visitors, in both small crafts and kayaks, as well as larger yachts and motor craft, some of which moor in the bay (p 8).

221 The cognitive map or impression of a place is created by an appreciation of not only the visual and environmental aspects of the place but also by its historical, social and cultural attributes. Dr Pollard referred to both the Aboriginal and European cultural heritage of Berrys Bay (pp 3-4). Dr Pollard also referred to the role of artists in describing the aesthetic character of Berrys Bay. Dr Pollard stated:

> "Berrys Bay has been favoured by artists over a period of almost two centuries as an attractive '*en plein air*' subject for a wealth of remarkable artworks, including drawing, painting and print-making (etchings). Noted artists who have chosen Berrys Bay as a subject have included Conrad Martins, pioneering photographer Harold Casneaux, Julian Ashton, William Ashton, Elioth Gruner, Lionel and Percy Lindsay, Sidney Long, Roland Wakelin, Roy de Maistre, Lloyd Rees and contemporary artist Cameron Sparks.

> A number of local artists have also lived in or near Berrys Bay, including William Ashton (Larkin Street) and Lloyd Rees (Waverton and McMahons Point, where a lookout is named in his honour).” (p 6).

222 Dr Pollard included reproductions of some artworks, including a painting by Roland Wakelin, looking from Carradah Park adjacent to Larkin Street towards Berrys Bay, with the boatyard shown on the eastern shore (p 7) and works by Lloyd Rees of Munro Street descending to the foreshore south of the boatyard (p 7) and Balls Head from across the Bay (p 8).



Roland Wakelin, ‘Down the hills to Berry’s Bay’ (1916) (Owned by the Art Gallery of NSW) – Figure 2, Dr Pollard’s Landscape Character and Visual Impact Analysis, p 7, noting Stannards Boatyard to left.

223 Dr Pollard used these built, natural and community aspects that give Berrys Bay its landscape character to define the Landscape Character Zone in the area of the existing boatyard. Dr Pollard considered the Landscape Character Zone “to be defined by the foreshores of the north arm of the Bay, and includes the landforms surrounding the Bay and overlooking it. The character of this northern arm of the Bay is more enclosed and of a more intimate scale than the somewhat broader western arm” (p 5). Dr Pollard defined the immediate Landscape Character Zone as:

> “The Bay area north of a line between the northern section of Sawmillers Reserve and the southernmost extent of the former BP tank farm (Balls Head Road), east to the houses on the eastern side of Dumbarton Street, north near Woolcott Street and upper Waverton Park, and west just beyond the houses on the western side of Larkin Street. Other areas beyond the defined zone, including the waters in the southern section of the Bay closer to the Harbour, will have views towards the north arm of the Bay and the FDD and are potentially impacted by the proposal, but for the purpose of considering Landscape Character, are not considered to be immediately sited within the spatially more intimate area of the northern arm of the Bay.” (p 5)

Landscape Character Zone of north arm of Berrys Bay – Figure 1, Dr Pollard's Landscape Character and Visual Impact Analysis, p 6.

224 Dr Pollard also described the visual character of the existing boatyard:

> "The existing Stannards Boatyard and the vessels being worked on are visually intriguing, and have considerable variety. One's eye (and often ear) are drawn to this activity as it is dynamic, and attention tends to stay upon it as it is visually interesting. Boats currently vary in age, scale and function, from historic ferries and former Sydney Hobart winning racing yachts, to modern Police and smaller Navy vessels, Sydney Harbour ferries, and a variety of pleasure-craft. The activity both on the dock and on vessels moored at the Boatyard's jetties is constantly changing. The size of vessels under maintenance is currently limited by the physical constraints of the boatyard, including lifting capacity and physical space.
>
> The concrete-decked jetties that extend in parallel rows from the saw-toothed planned main platform of the dock, are themselves an attractive formation, and boats moored alongside them contribute to a rhythmic order of vessels that is interesting and pleasing to the eye. It is not dissimilar to the patterns seen in photographs of the early days of boat building in the area, when boats were either pulled up onto the shoreline in parallel rows, or on slipways." (p 9).

225 Dr Pollard cautioned about placing too much reliance on the assignation under the Foreshores and Waterways Area DCP of Landscape Character Type 11 for Berrys Bay. Dr Pollard noted that:

> "The Landscape Character Type 11 was assigned to Berrys Bay at a time when the western side of the Bay was classified as an industrial area, and the mapping accompanying the categorisation reflects this condition. By way of comparison, Landscape Character Type 11 was also assigned to Woolloomooloo Bay at the time. Approximately 75% of the waterfront of Woolloomooloo Bay has a highly industrial/military character, and includes Garden Island and HMAS Kuttabul, which often has very large vessels docked at it. The foreshores on the eastern and southern side of the Bay [Woolloomooloo Bay] are entirely hard paved, and contain extensive multi-level car parking and a busy road…In my opinion the classification [of Berrys Bay] was not particularly accurate at the time of its assignment, and became less so with the extensive landscape work that was undertaken at Carradah Park on the former BP site." (Joint expert report of the heritage and visual experts, p 30).

226 I accept Dr Pollard's description of the landscape character of the northern arm of Berrys Bay and his definition of the Landscape Character Zone.

The visual and landscape character impacts

227 Third, the impacts of the proposed floating dry dock on the impacted environment need to be assessed. An assessment of the impact on the landscape character of an area is separate from an assessment of the visual impact. Landscape character impact assessment is the assessment of the impact on the aggregate of an area's built, natural and cultural character or sense of place while visual impact assessment is the assessment of impact on views.

228 Notwithstanding this difference in assessment of landscape character impact and visual impact, Mr Aspinall, Stannard's visual expert, primarily undertook an assessment of the visual impact of the floating dry dock. This was evidently the focus in his Visual Impact Assessment dated December 2021, as the title of his report shows. By reason of Mr Aspinall's participation in the joint conference of the visual experts, he did address to a degree the impact of the floating dry dock on the landscape character of the area, but even then this assessment was shaped by his visual impact assessment. Dr Pollard, the Council's visual expert, on the other hand, distinguished the assessment of the impact on the landscape character from the assessment of the visual impact of the floating dry dock, and separately assessed each type of impact.

229 I will start with Dr Pollard's assessment of the landscape character impact in his Landscape Character and Visual Impact Analysis. Dr Pollard used the methodology in Transport for NSW, *Guideline for landscape character and visual impact assessment,* Environmental impact assessment practice note EIA-NO4 (2020) (EIA-N04). Dr Pollard noted that the method to measure both the landscape character impact and the visual impact is based on the combination of the sensitivity of the existing area or view to change and the magnitude (scale, contrast, quality, distance) of the proposal on that area or view (EIA-N04, p 11). Dr Pollard explained that "sensitivity" refers to "the qualities of an area, the number of existing receivers, and how sensitive the existing character of the setting is to the proposed nature of change" (p 11). "Magnitude" refers to "the physical scale of the project, how distant it is and the contrast it presents to the existing condition… As well as physical scale, magnitude considers issues of contrast with the existing area and design quality" (p 13). The combination of sensitivity and magnitude will provide the rating of the landscape character impact for a project or individual character zone or visual impact for individual viewpoints (EIA-N04, p 12). The ratings for sensitivity and magnitude range from negligible, low, moderate to high. These ratings for sensitivity and magnitude can be displayed in a rating matrix to generate a combined rating (Figure 7 of EIA-N04). For example, a high sensitivity with a high magnitude will give a high combined rating.

230 Dr Pollard identified the sensitivity of the Landscape Character Zone he had earlier identified (which I have quoted earlier) as being high. This assignation derived from "the remarkable physical and social aspects of the area" (the qualities of the landscape character zone identified by Dr Pollard); the numerous "receivers", both residents of

and visitors to the area, who value highly the qualities of the area; and the sensitivity of the existing character of the area to the change that would be caused by the floating dry dock (pp 11-13).

231 Dr Pollard elaborated on these three factors influencing sensitivity. His explanation of the qualities of the area and the number of existing receivers built upon his earlier description of the landscape character (which I have summarised earlier). His explanation of the sensitivity of the existing character to change did provide new insights:

> "The sensitivity of the area arises in large part from the tight spatial arrangement of the north arm of the Bay, and the steeply rising rock landforms on its opposing eastern and western sides. The Bay narrows towards the turfed, oval area of Waverton Park, at the Bay's northern end. Beyond the oval, the Park rises steeply through a stand of mature trees to another fairly open Park area adjacent to Woolcott Street. The Bay's natural forms and topography, and its open southern end to the Harbour, have been sufficiently robust in their beauty to accommodate various waves of small-scaled industry and other development without being inherently devalued. However, larger scaled insertions, such as the BP tank farm, during its presence over decades, did cause demonstrable degradation – which fortunately has now been reversed." (pp 12-13).

232 Dr Pollard assessed the magnitude of the impact of placing the floating dry dock in a modestly-scaled bay and the associated demolition works to enable it to be moored in location, to be high (p 14). Dr Pollard considered that:

> "The dock is a very large structure that, unlike the vessels commonly worked upon in Stannards, is largely devoid of any interesting form, craftsmanship, and detail. This has become even more the case since the recent works were carried out to the FDD. Its proposed location adjacent to the main concrete platform of the existing concrete-capped dock, will necessitate the complete removal of two of the main jetties at the centre of the existing dock, and the shortening of a third. This demolition will result in the shape of the "saw-toothed' outer edge of the existing concrete platform ceasing to have any useful purpose, and the attractive form of the parallel jetties will be lost. More significantly, the opportunity to moor a considerable number of vessels against the jetties proposed for demolition will physically remove a particularly attractive, changing situation from the boatyard. The number of boats moored to the jetties identified for removal varies with the size of vessels being worked upon, but aerial photos indicate that typically in the order of nine vessels are moored to these jetties.
>
> Furthermore, the sheer bulk of the floating dry dock will obstruct visual access from many locations, to the remaining concrete-capped dock and vessels being worked on in this area" (p 14).

233 Dr Pollard noted that the combination of high sensitivity and high magnitude will provide the rating of the impact upon the landscape character of this Landscape Character Zone, which necessarily will also be high (p 15).

234 In the joint expert report of the heritage and visual experts, Dr Pollard expressed the view that:

> "The scale and form of the FDD are substantially out of character with the north arm of Berrys Bay. The introduction of the FDD to the area would represent a departure from the operational approach and appearance of the boatyard, in favour of a larger scale, more industrial approach to servicing larger vessels. The vessels currently moored undergoing maintenance or awaiting access to the four sheds would be reduced substantially in number, and those that remain will be obscured from many viewpoints." (pp 8-9).

235 Dr Pollard considered that:

> "The scale of the FDD and its considerable unarticulated massing are out of character with the area in which it is proposed to be situated – that is in the waters of the north arm of the Bay towards its narrowest and most sensitive point." (p 26).

236 Dr Pollard considered that the floating dry dock would be out of character with the desired future character of the relevant neighbourhoods under NSDCP (p 26). He further considered that the floating dry dock would be "quite inconsistent" with the Foreshores and Waterways Area DCP, including section 4.2, and "will inevitably be visually dominant in this small cove, due to its significant bulk, scale and heavy-industrial character" (pp 27, 28).

237 There are no practical means of usefully modifying the design or location of the floating dry dock. The floating dry dock is already built and cannot be modified to mitigate its potential impact on the landscape character of the area. The floating dry dock has to be moored within the water lease area, if it is to be used at the existing boatyard. There can be, therefore, no appreciable reduction in the adverse impacts of the floating dry dock on the landscape character of the area (Dr Pollard's Landscape Character and Visual Impact Analysis, p 15).

238 Mr Aspinall responded in the joint expert report that part of the landscape character of Berrys Bay is "as a vibrant working harbour", where vessels of varying functionality and shape should be encouraged (p 8). The shape and form of the floating dry dock reflects its function for maintaining and repairing large vessels (p 8). The industrial maritime use of the floating dry dock is consistent with the maintenance of a working harbour (p 13). The shape and form of the floating dry dock that results from this function, although larger and different to other vessels in Berrys Bay, will not cause the floating dry dock to be out of character with Berrys Bay as a working harbour.

239 Mr Aspinall also considered the scale of the floating dry dock to be comparable to the scale of existing buildings and structures of the boatyard. The existing buildings are effectively enclosed and have little visual articulation, similar to the enclosure and lack of articulation of the floating dry dock. The colours and finishes of the floating dry dock are characteristic of the general maritime environment within Sydney Harbour and will sit comfortably in this particular boatyard setting (p 12). The visual nature of the boatyard reflects the maritime industry, and specifically boat maintenance, so that the floating dry dock can be considered as maintaining the existing maritime industrial activities (pp 13, 21). The floating dry dock will become a working element of the existing boatyard (p 16). Mr Aspinall considered that the size and scale of the floating dry dock will be commensurate with the activity undertaken in it, the maritime location and the heritage context of the existing boatyard (p 22).

240 Turning to the visual impact of the floating dry dock, Dr Pollard identified views from both private properties and public places that may be impacted by the floating dry dock. Dr Pollard considered that the visual impacts of the floating dry dock from private

properties will be high and not reasonable (p 25 of his Landscape Character and Visual Impact Analysis) and the adverse visual impacts from viewpoints in public places are in the range of medium to high (p 26).

241 Public domain views of the floating dry dock will be available from both land and water within Berrys Bay and from the surrounding public parks and reserves. Views will also be obtained from some streets, including the lower terminus of John Street and the western end of Munro Street, either side of the boat yard, and Larkin Street across Berrys Bay. Dr Pollard referred to his earlier analysis of the extensive range of views to Berrys Bay and the boatyard and the landscape character of Berrys Bay and how it is perceived. Views of the floating dry dock will be available from private properties on Commodore Crescent, John Street and Munro Street on the eastern side of Berrys Bay and Larkin Street on the western side of the Bay.

242 Dr Pollard identified 11 key locations of viewpoints in public places and private properties (shown on Figure 11). Locations 1, 2 and 3 are in Carradah Park to the west of the Bay; locations 4, 5 and 6 are along the foreshore of Waverton Park to the north of the Bay; location 9 is along the public walkway from Sawmillers Reserve on the foreshore of the Bay to the south of the boatyard; location 7 is from the historic house “Monte Cristo” at 3 Commodore Crescent; location 8 is from the apartment at 1/11 John Street to the north of the boatyard; and locations 10 and 11 are from apartments 3 and 5 of 18 Munro Street to the south of the boatyard.

243 Dr Pollard prepared photomontages to depict the views from these locations with and without the floating dry dock (in Appendix A). Dr Pollard assessed the extent of visual impact on the views from these public places and private properties using two different, although overlapping, methodologies. The first methodology was that suggested for assessing view loss from private properties in *Tenacity Consulting v Warringah Council* [2004] NSWLEC 140 and view loss from the public domain in *Rose Bay Marina Pty Ltd v Woollahra Municipal Council* [2013] NSWLEC 1046. The second methodology was that suggested in EIA-N04, which Dr Pollard used to assess the impacts of the floating dry dock on landscape character.

244 Using the first methodology, Dr Pollard assessed all viewpoints located in public places as having adverse impacts greater than medium and in the range of medium to high. Of the seven public place viewpoints, two locations, viewpoint 3 in Carradah Park and viewpoint 6 in Waverton Park, have adverse impacts at the high end of the range. Dr Pollard opined that the public domain view impact of the floating dry dock will be so significant that “what remains after the development (if approved) is not sufficient to understand and appreciate the nature of significant elements (the boatyard and its

surroundings in) – nor will it be possible to the current extent, to appreciate the unique character and heritage of the northern cove of Berrys Bay with the proposed works completed and the floating dry dock in place" (p 22).

245 Dr Pollard assessed the impact on views from the identified private properties to be, at the least, at the high end of the range. For the heritage-listed house "Monte Cristo" at 3 Commodore Crescent, the private open space proximate to the dwelling's southern and western verandas affords the most expansive and attractive views of Berrys Bay. These views can be considered "outstanding" and "iconic". Dr Pollard assessed the overall impact of the floating dry dock on these iconic views to be at the high end of the range. No views from other parts of the property, interior or exterior, can compensate for the degradation of views from the private open space (p 23).

246 For the apartment at 1/11 John Street, the private deck running along the southern face of the apartment affords most attractive views of Berrys Bay. Dr Pollard assessed the overall impact of the floating dry dock to this highly attractive view to be high to devastating. No views from other parts of the property, interior or exterior, can compensate for the degradation of views from the deck space and the adjacent interior (p 24).

247 For apartments 3 and 5 at 18 Munro Street, the extensive balcony of each apartment, apartment 3 being immediately below apartment 5, faces west overlooking Berrys Bay with some smaller openings to the north onto Munro Street overlooking the boatyard. In each apartment, the extensive apartment affords the most attractive and dynamic views, although views are also available from the living area and kitchen. Dr Pollard assessed the impact of the floating dry dock to this attractive view to be at the high end of the range (for apartment 3) and towards the high end of the range (for apartment 5). What views might be available from other spaces in these apartments cannot compensate for the degradation of views from the balcony space and the adjacent living area interior (p 24).

248 Dr Pollard considered that the floating dry dock that causes these high view impacts from private properties is not reasonable (p 25).

249 Using the second methodology for the assessment of view impacts from public places, Dr Pollard assessed the sensitivity change and the magnitude of change for each viewpoint in the same way as he did in assessing the impacts on landscape character. He assessed all viewpoints to exhibit a high level of sensitivity to the changes that would be brought about by the floating dry dock. Dr Pollard found that:

> "This arises for all locations from the high quality surrounding landscape character, the very large scale of the FDD, and the limited spatial volume of the Bay, due to its narrowness and confined area. In respect to public place Locations 1, 2, 3, 4, 5, 6, and 9, the number of receivers (pedestrians in the main, but also water craft users) making use of the public areas from which the views are obtained is a consideration of sensitivity." (p 26).

250 Dr Pollard explained that another way of expressing the high level of sensitivity of the area to change is to say that "the *visual absorption capacity* of Berrys Bay, especially its northern arm, is very limited in respect to very large structures – due to its modest scale

and steep sided topography. It is a very 'intimate' landscape space." (p 26).

251 Dr Pollard assessed the magnitude of change for each viewpoint also to be high. Dr Pollard explained:

> "Introducing a large, unarticulated, slab-sided structure into the zone, that is not only of a greater bulk and scale than vessels in the Bay, but that also is devoid of their elegance of form, design and detail, cannot help but bring about adverse impacts.
>
> The Planning Panel in its refusal noted the '*significant expansion in the facility's capacity and operations*'. This is reflected in the overall size of the FDD that envelopes the vessels of considerable scale within its confines. Many aspects of adverse impact arise from the contrast of the FDD's unarticulated form and scale with that of the eastern cove of the Bay itself, and the built form and local features around it. The maritime service component of the Bay is a vital part of its character, which has been recognised in a number of the relevant instruments as being a very positive attribute that warrants protection. It is also part of the area's rich heritage. However, while the broad activity of working on vessels is long standing in the area, the subject proposal and its significantly different scale, fundamentally changes the nature of the activity to a considerably more intensive *utilitarian maritime industrial character*.
>
> These impacts are exacerbated by the physical removal of jetties which form part of the heritage item and the loss of opportunity for vessels to be moored at them as currently occurs. From many locations the FDD also will obscure interesting views to the vessels on the remaining working platform of the existing boatyard." (p 26).

252 Dr Pollard's overall visual assessment was that:

> "All Viewpoints located in public places are assessed as having adverse impacts greater than *medium*, and are in the range of *medium to high*. Of the total of seven public place Viewpoints, two locations in particular – Viewpoints 3 and 6 – are at the *high* end of the range." (p 26).

253 Mr Aspinall's view impact analysis involved his assessing the visual impact from his selected view locations in public places and private properties shown in Figure 4 of his Visual Impact Assessment. Mr Aspinall prepared photomontage images of the views from these locations with and without the floating dry dock (pp 14-31 and Appendix A).

254 Although Mr Aspinall set out a method of assessment of the visual impact (in s 3.2.1), including scales of values (in Figures 9 and 10), he did not explain how he had applied this method of assessment, if he did at all, in his Visual Impact Assessment. Instead, Mr Aspinall described qualitatively his assessment of the visual impacts from certain locations.

255 For view loss from private properties, Mr Aspinall concluded:

> "The views from John Street and Commodore Street are already filtered through screening of mature trees and other neighbouring buildings. The FDD would cause some minor-to-moderate view loss for views from some rooms in some dwellings at 11-13 John Street, the precise impacts on which would need to be assessed with access to those buildings. Commodore Street is significantly higher and view loss is minimal, as will be observed in the visual impact photomontaged views and also with reference to the existing views below, Figures 15 to 18. Based on photomontages prepared to accord with the Land and Environment Court of NSW practice note for preparation of photomontages, it appears unlikely the dwellings in 16-18 Munro Street would experience significant visual impacts, such as view loss, since the views to the north

> are already largely obscured by the variety of vessels moored at the Stannards Marine Facility at various times. There would, however, be a degree of visual impact from a new vessel being located at Stannards Marine." (pp 38-9).

256 Mr Aspinall added in the joint expert report of the heritage and visual impacts that "view loss and visual impact is minor from all of these locations and limited to low value elements" (pp 51, 52).

257 For the impact on views from public places, Mr Aspinall drew on his photomontages to observe that:

> "… the impact on views from public places, most notably from Waverton Park and [the] foreshore walk through Carradah Park to the east [sic, west] of the subject site are minimal. There is no loss of water view and many of the vistas are partially screened by mature landscaping" (p 45 of his Visual Impact Assessment).

258 Mr Aspinall added in the joint expert report of the heritage and visual experts that:

> "When shown in context, within the panoramic images, the visual impact is minor-to-moderate in most instances, particularly when observed within the context of a busy working boatyard." (p 49).

259 Mr Aspinall added in the joint expert report:

> "The small amount of view loss from public locations is confined to low-value elements along the foreshore of the Bay, or of the public park. View loss from the western side of the bay if [sic, is] limited to small elements of the boatyard itself." (p 52).

260 Mr Aspinall considered that the floating dry dock, when viewed from the west, would be visually compatible with the maritime maintenance facility. Mr Aspinall identified three "elevational zones of visual content", being the elevational zones he said a viewer would view the eastern side of the Bay (p 41 of his Visual Impact Assessment). Zone 1 is the water in the bay, including the boats and other floating structures. Zone 2 is the foreshore and associated developments, with the backdrop of a steeply sloping topography, including the sandstone cliff, capped by the railway line and Dumbarton Street. Zone 3 is the raised residential streetscape above the boatyard and Zone 2. Mr Aspinall considered the intermediate zone 2 to be the "working" zone, which includes the working maritime maintenance facility of the existing boatyard and its large maintenance sheds.

261 Mr Aspinall considered that the floating dry dock would be read in elevation when viewed from the west across Berrys Bay as being part of Zone 2. The floating dry dock would be seen to be part of the existing boatyard and its large maintenance sheds. Mr Aspinall considered the floating dry dock relates to the scale and height of the buildings within the existing boatyard, the most dominant of which are the four maintenance sheds at the rear of the site. Additionally, he was of the opinion that the floating dry dock reflects the industrial elements of the harbour through its "form follows function" design (p 42). Mr Aspinall considered that the relationship between the floating dry dock and the large maintenance sheds and the cliff behind are acceptable in the context of visual compatibility (p 41).

262 Mr Aspinall was not concerned with the removal of certain jetties and the displacement of mooring for vessels in order to moor the floating dry dock in the water lease area, as this is "an inevitable result of any new development" involving the relocation of a floating vessel (p 43).

Findings on the visual and landscape character impacts

263 I find that both the landscape character impacts and the visual impacts of the floating dry dock will be high. I accept the findings and reasoning of Dr Pollard in this regard.

264 Both the landscape character impacts and the visual impacts of the floating dry dock can be evaluated by having regard to a combination of the sensitivity to change of the existing area (the landscape character zone of Berrys Bay and its foreshores) and the views from public and private properties and the magnitude of change, in terms of scale, contrast, quality and distance, of the floating dry dock on that area and those views (see EIA-N04, pp 11-12). For the reasons Dr Pollard has given, which I have summarised above and accept, the sensitivity of the existing area and the views to change is high and the magnitude of change to the area and the views is high, so that the combined rating of both the landscape character impacts and the visual impacts will be high (EIA-N04, p 12). This is the highest rating available in the rating matrix (Figure 7 of EIA-N04).

265 I do not accept Mr Aspinall's opinions discounting the visual impacts of the floating dry dock from public places to be minimal and from private properties to be minor to moderate or his sparse and spare statements about the landscape character impacts of the floating dry dock being minor and limited to low value elements. Mr Aspinall's methodology and assessment were defective in at least four respects.

266 First, Mr Aspinall focused on the visual impacts and not also on the landscape character impacts. Visual impact assessment is separate from landscape character impact assessment and both forms of assessment needed to be undertaken. Mr Aspinall did not undertake formally a landscape character impact assessment in the manner undertaken by Dr Pollard, so as to identify the affected landscape character zone, assess the sensitivity of that area to change and the magnitude of change caused by the floating dry dock, and evaluate the combined rating of the landscape character impacts of the floating dry dock. Indeed, it was not apparent that Mr Aspinall used any methodology for assessing the landscape character impact of the floating dry dock.

267 Second, Mr Aspinall focused on individual, fixed-point views of the area in which the floating dry dock is to be moored and failed to assess the landscape character of the area. A viewer perceives the landscape character of an area by viewing the area not only from individual viewpoints but also by moving about and viewing the area from multiple viewpoints and over multiple timeframes, and then layering these visual impressions with other sensory inputs, including the sounds and smells of the area. Mr Aspinall did not undertake this multi-viewpoint, multi-timeframe and multi-sensory assessment of the landscape character of the area.

268 Third, Mr Aspinall's assessment of the visual impact from public places and private properties was affected by his use of panoramic images that diminished the size, bulk and scale of the floating dry dock's visual impact. The photographs that Mr Aspinall

relied on were produced by a wider angle, 35mm Focal Length (FL) lens. Whilst this focal length and field of view can provide a contextual understanding of an area, the images produced imply a greater distance of the viewer from objects in the view than is perceived by the naked eye and more voluminous spaces (Dr Pollard in the joint expert report, p 30). Hence, the visual impact of the floating dry dock would be far greater than Mr Aspinall's photomontaged images depicted. In contrast, Dr Pollard's photographs were produced by a 50mm FL lens on a 35mm full-framed camera. A 50mm FL provides the most accurate spatial impression (Dr Pollard in joint expert report, p 30). Dr Pollard's photomontaged images depict more accurately the visual impacts of the floating dry dock from the various public places and private properties. These visual impacts are high, as Dr Pollard explained.

269 Fourth, Mr Aspinall's assessment of the visual impact from public places was limited to his assessment of the visual impact from certain viewpoints in Carradah Park immediately to the west of the boatyard. Mr Aspinall's identified three "elevational zones of visual content" from these viewpoints. This ignored that most views from public places and private properties of the existing boatyard and the waterway in which the floating dry dock would be moored will not be viewed in elevation. Mr Aspinall presented the "elevational views" as 2-dimensional and suggested that the floating dry dock would be viewed in elevation as sitting within the intermediate zone 2. This overlooks the fact that his three elevational zones are 3-dimensional spaces and not 2-dimensional, flat representations.

270 Zone 1 is the water in Berrys Bay with its boats and structures such as jetties. This zone is closer, and would be viewed as being closer, to the viewer at viewpoints in Carradah Park. The floating dry dock would be moored in the water lease area in Berrys Bay, which is in this zone. The viewer will have a full view of the floating dry dock in the waterway projecting beyond the existing hardstand and maintenance sheds of the boatyard towards the viewer. The existing boatyard is in Mr Aspinall's zone 2, the foreshore and associated developments, including the hardstand and maintenance sheds of the existing boatyard. The floating dry dock moored in the waterway of Berrys Bay will be closer to the viewer and perceived to be distinct from and larger than the more distant maintenance sheds and other structures of the existing boatyard. It will not be read as being another structure or maintenance shed built on the foreshore. Put simply, the floating dry dock will not be viewed as being within zone 2. This undermines Mr Aspinall's assertion that the floating dry dock will recede into and be seen as part of the existing boatyard.

Unacceptability of the high visual and landscape character impacts

271 For the floating dry dock to cause such high landscape character impacts and high visual impacts, as Dr Pollard has found and I have accepted, is unacceptable. The unacceptability can be appreciated by having regard to the Biodiversity and

Conservation SEPP and the Foreshores and Waterways Area DCP, and the concept of the public trust and the principle of intergenerational equity embodied in these statutory instruments.

272 The high landscape character impacts and high visual impacts of the floating dry dock are inconsistent with, amongst others, the aim in cl 10.1(1)(a) of the Biodiversity and Conservation SEPP. This aim includes ensuring that the waterways of Sydney Harbour, which includes Berrys Bay, are "recognised, protected, enhanced and maintained (i) as an outstanding natural asset and (ii) as a public asset of national and heritage significance, for existing and future generations". The mooring and use of the floating dry dock in the water lease area of Berrys Bay will not protect, enhance or maintain, but instead will harm and diminish the value of, Berrys Bay, both as an outstanding natural asset and as a public asset of national and heritage significance.

273 The introduction of a large, unarticulated, building-like vessel, which is clearly a human artifact, in the confined, natural waterway of Berrys Bay cannot protect, enhance or maintain that waterway as an outstanding natural asset, as I have earlier explained those words and phrases, but rather will have the opposite effect. The asset of this waterway of Sydney Harbour will be made less natural and of lower value.

274 The mooring and use of the floating dry dock in the waterway also affects the waterway's status as a public asset of national and heritage significance. The floating dry dock's presence in the waterway emphasises the alienation of an area of the public resource of Sydney Harbour for private purposes. The grant of the water lease already alienated the public from being able to use and enjoy the water lease area. But the mooring and use of the floating dry dock in this water lease area will exacerbate the alienation of the waterway from the public and the appropriation of the public waterway as a private asset. The public waterway will clearly be seen to be used for the private purpose of maintaining and repairing boats for commercial gain.

275 The national and heritage significance of Sydney Harbour as a public asset is thereby diminished. As I have earlier explained, the identification of Sydney Harbour's national significance is to recognise its significance not just to the people of Sydney, but to the people of the nation of Australia, now and in the future. The identification of Sydney Harbour's heritage significance is to recognise that Sydney Harbour has been inherited by the present generation as a legacy from previous generations and is to be transmitted by the present generation to future generations. That is made clear by the express words "for existing and future generations" in cl 10.1(1)(a)(ii). The high landscape character impacts and high visual impacts of the floating dry dock will diminish both the national and heritage significance of this waterway of Sydney Harbour.

276 The waterway of Berrys Bay has been especially recognised as being of aesthetic value. Its openness, both in the sense of not having permanent structures in the waterway and in the sense of being open to use and enjoyment by the public, has been recognised not only by Chapter 10 of the Biodiversity and Conservation SEPP and the

Foreshores and Waterways Area DCP, but also by artists in artworks depicting the bay. The openness of the waterway is one of its unique visual qualities, recognised in the statutory instruments and depicted by artists in their artwork. The grant of the water lease did allow for a few jetties to be constructed and for the associated mooring of boats in the water lease area. But such use of the water lease area is far less intense and obtrusive than the mooring and use of the very large floating dry dock. The intrusion of this large-scale, maritime industrial vessel in the intimate and open landscape space of Berrys Bay will adversely affect this unique visual quality.

277 The aim in cl 10.1(1)(a) is given effect through the principles in cl 10.1(2) of the Biodiversity and Conservation SEPP. The mooring and use of the floating dry dock is inconsistent with all three principles. As I have indicated, the floating dry dock will alienate an area of the public resource of Sydney Harbour for private good, instead of protecting it for the public good. This also infringes the principle that the public good should have precedence over the private good whenever and whatever change is proposed for Sydney Harbour. The introduction of the very large floating dry dock will also undermine the naturalness of the waterway of Berrys Bay, contrary to the principle that protection of the natural assets of Sydney Harbour should have precedence over all other interests.

278 The mooring and use of the floating dry dock also offends certain of the planning principles in cl 10.10 of the Biodiversity and Conservation SEPP for land within the Sydney Harbour catchment. The introduction of the floating dry dock in the waterway of Berrys Bay diminishes the natural assets of Sydney Harbour catchment, contrary to the principle in cl 10.10(b) that the natural assets of the catchment are to be maintained and, where feasible, restored for their scenic and cultural values. The visual obtrusiveness and intrusiveness of the floating dry dock is also inconsistent with the principle in cl 10.10(f) that development that is visible from the waterways or foreshores is to maintain, protect and enhance the unique visual qualities of Sydney Harbour. For the reasons given by Dr Pollard, the floating dry dock will be visible from the waterway and foreshores of Berrys Bay and will have a high visual impact.

279 For similar reasons, the floating dry dock is inconsistent with the planning principles in cl 10.11(a) and (d) for land within the Foreshores and Waterways Area. The mooring and use of the floating dry dock in the waterway of Berrys Bay neither protects, maintains or enhances the natural assets and unique environmental qualities of Sydney Harbour nor maintains, protects or enhances the unique visual qualities of Sydney Harbour.

280 Similar findings should be made regarding the relevant matters for consideration in cl 10.23 and cl 10.24 of the Biodiversity and Conservation SEPP. In relation to the maintenance, protection and enhancement of the scenic quality of foreshores and waterways, the floating dry dock will not maintain, protect and enhance the unique

visual qualities of Sydney Harbour, contrary to cl 10.23(b), and the cumulative impact of the floating dry dock with other water-based development will detract from the waterway of Berrys Bay and adjoining foreshores, contrary to cl 10.24(c).

281 In relation to the maintenance, protection and enhancement of views, the floating dry dock does not maintain, protect or enhance views to or from Sydney Harbour or minimise any adverse impacts on views and vistas to and from public places, landmarks and heritage items, contrary to cl 10.24(a) and (b). The reasons are those given by Dr Pollard, which I have accepted and added to in my earlier discussion.

282 These findings that the floating dry dock is not consistent with the aim of cl 10.1(1)(a) of the Biodiversity and Conservation SEPP precludes the grant of development consent to the floating dry dock. Clause 10.14(2) of the Biodiversity and Conservation SEPP establishes a precondition to the grant of development consent. The Court, exercising the function of the consent authority, must not grant development consent to any development unless it is satisfied that the development is consistent with the aims of Chapter 10. For the reasons I have given, I am not satisfied that the mooring and use of the floating dry dock in the waterway of Berrys Bay is consistent with one of the aims of Chapter 10, the aim in cl 10.1(1)(a), of the Biodiversity and Conservation SEPP. In this circumstance, development consent must not be granted to the floating dry dock.

283 The high landscape character impacts and high visual impacts of the floating dry dock are also inconsistent with the Foreshores and Waterways Area DCP. The DCP recognises Sydney Harbour as “one of Australia’s greatest cultural and commercial resources”, “a valuable natural and cultural resource” and “a significant natural scenic feature” (section 1.1). The DCP established performance-based criteria and guidelines with the aim of, amongst other things, “ensuring that the scenic quality of the area is protected or enhanced” (section 1.1). These performance-based criteria and guidelines implement the planning principles for the Foreshores and Waterways Area in cl 10.1 of the Biodiversity and Conservation SEPP. These principles are to be considered in determining development applications for development within the Foreshores and Waterways Area (section 1.1, 1.2 and Appendix B). The matters for consideration are the matters in cl 10.23 and cl 10.24 of the Biodiversity and Conservation SEPP.

284 For the reasons I have given earlier, regarding foreshore and waterway scenic quality, the floating dry dock will not maintain, protect or enhance the unique visual qualities of Sydney Harbour and the cumulative impact of the floating dry dock with other water-based development will detract from the character of the waterway of Berrys Bay and adjoining foreshores. Regarding maintenance, protection and enhancement of views, also for the reasons I have given earlier, the floating dry dock will not maintain, protect and enhance views to and from Sydney Harbour or minimise any adverse impacts on views and vistas to and from public places, landmarks and heritage items.

285 Dr Pollard’s assessment of the landscape character impact and visual impact serves as the assessment required under Part 3 of the Foreshores and Waterways Area DCP. Dr Pollard’s assessment gives consideration in substance to the matters required by

section 3.5 of the Foreshores and Waterways Area DCP, although not necessarily always in those terms.

286 In particular, Dr Pollard considered the visual impact factors identified in section 3.1, being the nature of the proposed development of the floating dry dock, the landscape setting in which the floating dry dock is to be located, the degree of change created and the ability of the floating dry dock to integrate with the landscape character. I accept Dr Pollard's analysis of these visual impact factors, which I have summarised earlier. Dr Pollard considered the general aims in section 3.2, which include minimising any significant impact on views and vistas from and to the public places, landmarks and heritage items and ensuring the development compliments the scenic character of the area. For the reasons Dr Pollard gives, which I accept, the floating dry dock does not achieve these general aims.

287 Dr Pollard addressed the statement of intent and performance criteria for the relevant landscape character type, Landscape Character Type 11. Dr Pollard noted that this landscape character type was adopted at a time when Berrys Bay had greater waterside industrial uses than it does today. In particular, the BP Petroleum tank farm on the western side of Berrys Bay has been removed and the foreshore revegetated to now have a more natural landscape character. This leaves the existing Noakes boatyard as the only remaining waterside industrial use in the north arm of Berrys Bay. Landscape Character Type 11 is therefore no longer, if it ever was, the appropriate landscape character type for the northern arm of Berrys Bay.

288 Nevertheless, the statement of character and intent for Landscape Character Type 11 includes a requirement that development be designed and sited with regard to the natural features of the area and to maintain their importance within the landscape character. The floating dry dock does not do this. An important natural feature contributing to the landscape character is the open waterway of Berrys Bay. The floating dry dock intrudes into and alienates an area of this waterway, diminishing its landscape character and visual quality.

289 Section 4.2 of the Foreshores and Waterways Area DCP specifies general requirements that must be considered for all water-based and land/water interface developments. These include that "development does not dominate its landscape setting". This reinforces the statement in section 4.1 that "individual private facilities

should not be visually dominant". The floating dry dock is inconsistent with these requirements, as it will dominate its landscape setting and be visually dominant, as Dr Pollard has demonstrated.

290 As I have earlier noted, these statutory provisions in Chapter 10 of the Biodiversity and Conservation SEPP and the Foreshores and Waterways Area DCP are statutory recognitions of the concept of the public trust and the principle of intergenerational equity. The floating dry dock is inconsistent with both this concept and this principle.

291 The concept of the public trust that the government holds certain common natural resources, such as harbours and navigable waters, in trust for the benefit of the public constrains the government in its dealings with and management of the natural resources. One of these constraints is that ownership of the navigable waters of the harbour and of the lands underneath them are held in trust for the benefit of the whole people of the State. The trust with which the waters and lands are held cannot be alienated, except as to such parcels as are used in promoting the interest of the public therein or which can be disposed of without any substantial impairment of the public interest in the lands and waters remaining: *Illinois Central Railroad v Illinois* at 453, 455-456.

292 In the present case, there has been a grant of a water lease over an area of Berrys Bay adjacent to the existing boatyard and authority to construct the existing jetties and concrete-capped dock and to moor boats in that area for the purpose of maintaining and repairing boats. Such dealings with the land and water in the water lease area do not impair the public interest in these and other lands and waters of Berrys Bay to the same extent as would result from the grant of development consent to the mooring and use of the very large floating dry dock in that area.

293 The mooring of the floating dry dock would require the removal of two jetties and the reduction in length of a third jetty, and the displacement of moorings of numerous boats. The use of the floating dry dock would require the slewing of the floating dry dock from its mooring position to its loading and unloading position adjacent to the western boundary of the water lease area, and vice versa. In combination, the whole of the water lease area would be alienated to the private purpose of the maintenance and repair of boats for commercial gain.

294 This mooring and use of the floating dry dock will also adversely affect the lands and waters of Berrys Bay and the adjoining foreshores. The floating dry dock will cause high impacts on the landscape character of Berrys Bay and adjoining foreshores, as well as high visual impacts from public places and private properties around Berrys Bay. These high impacts diminish the public's use and enjoyment of, and hence public interest in, the waterway of Berrys Bay.

295 Such considerations are relevant to be taken into account in the exercise of the statutory power in s 4.16 of the EPA Act to grant development consent to a development that will adversely impact the property the subject of the public trust: see analogously, *Willoughby City Council v Minister Administering the National Parks and*

Wildlife Act (1992) 78 LGERA 19 at 34. In determining a development application, the consent authority is to take into consideration the provisions of any environmental planning instrument and any development control plan that apply to the land to which the development application relates (s 4.15(1)(a)(i) and (iii)). The Biodiversity and Conservation SEPP and the Foreshores and Waterways Area DCP apply to the land and water in which the floating dry dock is to be moored and used. As I have noted earlier, cl 10.1(1)(a) and cl 10.1(2) of the Biodiversity and Conservation SEPP encapsulate the idea of public trusteeship of Sydney Harbour. To take these statutory provisions into account in determining the development application for the floating dry dock involves having regard to the idea of the public trust embodied in the provisions.

296 The principle of intergenerational equity is also a relevant consideration to be taken into account in determining whether to grant development consent to the floating dry dock. Under s 4.15(1)(a)(i) of the EPA Act, a consent authority is required to take into consideration the provisions of any applicable environmental planning instrument. The Biodiversity and Conservation SEPP is an applicable environmental planning instrument. Clause 10.1(1)(a)(ii) of the Biodiversity and Conservation SEPP states as an aim ensuring that the waterways and foreshores of Sydney Harbour are protected, enhanced and maintained as a public asset of natural and heritage significance, "for existing and future generations". This aim embodies the principle of intergenerational equity. Under s 4.15(1)(e) of the EPA Act, the consent authority is required to take into consideration "the public interest". The public interest includes the principles of ecologically sustainable development: *Telstra Corp Ltd v Hornsby Shire Council* (2006) 146 LGERA 10; [2006] NSWLEC 133 at [124]. The facilitation of ecologically sustainable development is also an object of the EPA Act: s 1.3(b). One of the principles of ecologically sustainable development is the principle of intergenerational equity: s 6(2)(b) of the POEA Act and *Telstra Corp Ltd v Hornsby Shire Council* at [116].

297 The mooring and use of the floating dry dock in the waterway of Berrys Bay would not be consistent with the principle of intergenerational equity in at least two ways. First, the high landscape character impacts and high visual impacts of the floating dry dock are inconsistent with the conservation of quality principle that requires the present generation to maintain the quality of the waterways and foreshores of Sydney Harbour such that they are passed on to future generations in no worse condition than they were received from the past generation. If the floating dry dock were to be approved, the waterway of Berrys Bay and the adjoining foreshores will be passed on in a worse condition than they are currently.

298 Secondly, the high landscape character impacts and high visual impacts of the floating dry dock are inconsistent with the conservation of access principle that requires the present generation to give its members equitable rights of access to the legacy of past generations and to conserve this access for future generations. If the floating dry dock were to be approved, the legacy of the waterway of Berrys Bay and its foreshores in their current condition that the present generation has inherited will not be conserved

and transmitted to future generations in their current condition. Future generations will not be able to use and enjoy the same landscape character and visual qualities of the waterways and foreshores of Berrys Bay. These impacts on intergenerational equity can be avoided by refusing development consent to the floating dry dock.

Development consent to the floating dry dock should be refused

299 The mooring and use of the floating dry dock in the waterway of Berrys Bay will cause high landscape character impacts and high visual impacts. These high impacts are unacceptable having regard to Chapter 10 of the Biodiversity and Conservation SEPP and the Foreshores and Waterways Area DCP, and the concept of the public trust and the principle of intergenerational equity embedded in these statutory instruments. Development consent to the floating dry dock should be refused on these grounds alone. In particular, as I am not satisfied that the floating dry dock is consistent with one of the aims of Chapter 10 of the Biodiversity and Conservation SEPP, the aim in cl 10.1(1)(a), I am precluded by cl 10.14(2) of the Biodiversity and Conservation SEPP from granting development consent to the floating dry dock.

300 In this circumstance, it is not necessary to decide whether the floating dry dock will also have unacceptable environmental impacts in other respects, in the various ways argued by the Council and the intervenors. Regardless of whether or not the floating dry dock would have these other environmental impacts, the result would be the same – development consent should be refused to the floating dry dock.

Resolution of the appeals

301 In the relocatable shed appeal, I have determined that development consent should be granted to the relocatable shed and the air quality pollution control system, but the conditions of consent need to be settled before I can grant consent. I will direct that the parties confer and, if possible, agree on and provide to the Court conditions of consent that reflect my findings. If agreement is not possible, the parties should provide to the Court their competing versions of the conditions and I will decide on the conditions of consent that should be imposed. I will then uphold the appeal and grant development consent subject to these conditions.

302 In the floating dry dock appeal, the appeal should be dismissed and development consent refused. I will make these orders now.

303 The Court orders:

In the relocatable shed appeal, Proceedings No 2022/36839:

(1) By 22 August 2022, the parties are to confer and if possible agree on the conditions of development consent for the relocatable shed and air quality pollution control system, which are to reflect the findings of this judgment, and

file the agreed conditions.

(2) If the parties are not able to agree on the conditions of consent, by 22 August 2022, each party is to file in Court and serve on the other parties the party's version of the conditions of consent.

In the floating dry dock appeal, Proceedings No 2021/63136:

(1) The appeal is dismissed.

(2) Development application No 57/2019 for the mooring and use of a floating dry dock and associated infrastructure works at 6 John Street, McMahons Point, is determined by refusal of consent.

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Decision last updated: 08 August 2022