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By Email

Dear Charmian

Confidential and Privileged

7 Macquarie St Parramatta – EPBC Act Referral

1 Background

We have been instructed that Coliv Macquarie Pty Ltd as trustee for the Coliv Macquarie Property Trust (**Coliv Macquarie**) proposes to develop land at 7 Macquarie Street, Parramatta NSW 2150 (**Land**). Coliv Macquarie has sought our advice on whether a referral under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) is required for the proposed development in the context of the proposed height of the development fronting Macquarie Street and the Land's proximity to the Parramatta Old Government House and Domain.

The proposed development is described in DA/199/2024, being the demolition of existing structures and construction of a 16 storey mixed use development comprising retail, office and co-living accommodation with 273 rooms (**Development**). The Development will be 3 storeys and 14 metres at the Macquarie Street front.

The Development is in the vicinity of the Old Government House and the Government Domain, Parramatta, which is inscribed on the National Heritage list and also forms part of the inscription of "Australian Convict Sites" on the World Heritage List.

The heritage listings are the subject of the "Conservation Agreement for the protection and conservation of the World Heritage Values and National Heritage Values of the Australian Convict Sites, Old Government House and Domain, Parramatta NSW" (2016) (**Conservation Agreement**).

Our advice is set out below. It presents our legal opinion. We have relied on the description of the proposed development and its height (in metres and storeys) provided to us by Coliv Macquarie.

2 Executive summary

A referral under the EPBC Act for the Development on the basis of its proposed height and storey-count fronting Macquarie Street is *not required* because:

- the proposed height and storey-count (being 14 metres and 3 storeys) of the Development is consistent with the relevant development standard in the Conservation Agreement of 14 metres and less than the maximum number of storeys, being 4 storeys; and
- the action is therefore exempt from the need for approval under the EPBC Act despite the proximity of the Development to the World and National Heritage Listed Old Government House and Domain.

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3 An action may be taken without approval (or referral) if declared in a conservation agreement

3.1 Referral of actions likely to have a significant impact on matters of national environmental significance

The EPBC Act regulates impacts on matters of national environmental significance. Section 68(1) of the EPBC Act provides that “a person proposing to take an action that the person thinks may be or is a controlled action must refer the proposal to the Minister [for the Environment, Commonwealth] for the Minister’s decision whether or not the action is a controlled action.”

A “controlled action” may be described as an action, such as a development, that is likely to have a significant impact on a matter of national environmental significance. Those protected matters include, *inter alia*:

- the world heritage values of a declared World Heritage Property (s 12(1)(b)); or
- the National Heritage values of a National Heritage place (s 15B).

If an action is determined to be a controlled action, approval under Part 9 of the EPBC Act will be required in order to carry out that action.

3.2 Exemption from the requirement for approval (and referral)

Approval is not required if Part 4 of the EPBC Act allows the person to take the action without an approval: ss 12(2)(b) and 15B(8)(b).

Section 37M (a provision within Part 4 of the EPBC Act) provides that a person may take an action without approval if the action is included in a class of actions declared in a conservation agreement, in accordance with section 306A, not to require approval.

The recitals to the Conservation Agreement provide that it was entered into pursuant to the EPBC Act.

It follows that, if the Development is an action included in a class of actions declared within the Conservation Agreement, the Development would not require approval under the EPBC Act, and consequently would not require referral to the Minister for the Environment.

3.3 Obtaining certainty

To obtain certainty where an action is assessed on a preliminary basis as not likely to significantly affect a matter of national environmental significance or otherwise not likely to require approval under the EPBC Act, it is open to a proponent to refer an action to the Minister on the basis that it is not considered to be a controlled action under section 68(2).

4 The Conservation Agreement declares a class of actions may be taken without approval

4.1 The Conservation Agreement

Clause 4 of the Conservation Agreement provides that:

- Pursuant to section 306A of the EPBC Act, the Minister declares that actions in the Class of Actions do not require approval under Part 9 of the EPBC Act for the purposes of the Specified Part 3 Provisions.*
- In making the declaration under clause 4(a), and pursuant to section 306A(2) of the EPBC Act, the Minister is satisfied that the actions in the Class of Actions are not likely to have a significant impact on the Protected Matters.*

The Conservation Agreement sch 2 cl 1.2 defines the Class of Actions as

Development to be carried out on or within the Highly Sensitive Area that:

- (a) Complies with the Highly Sensitive Area Controls; and
- (b) The carrying out of which is authorised by a Development Consent granted after the Commencement Date.

It follows that the Development will fall within the Class of Actions if:

- (a) It is carried out on or within the Highly Sensitive Area;
- (b) It complies with the Highly Sensitive Area Controls; and
- (c) It is authorised by a development consent for DA/199/2024.

4.2 The Development would be carried out within the Highly Sensitive Area

The definition of Highly Sensitive Area refers to the map marked as Figure A of Annexure A of the Conservation Agreement.

As set out in the map below, being Figure 16 of the Heritage Impact Assessment for DA/199/2024 dated 11 December 2023, the Land is within the Highly Sensitive Area.

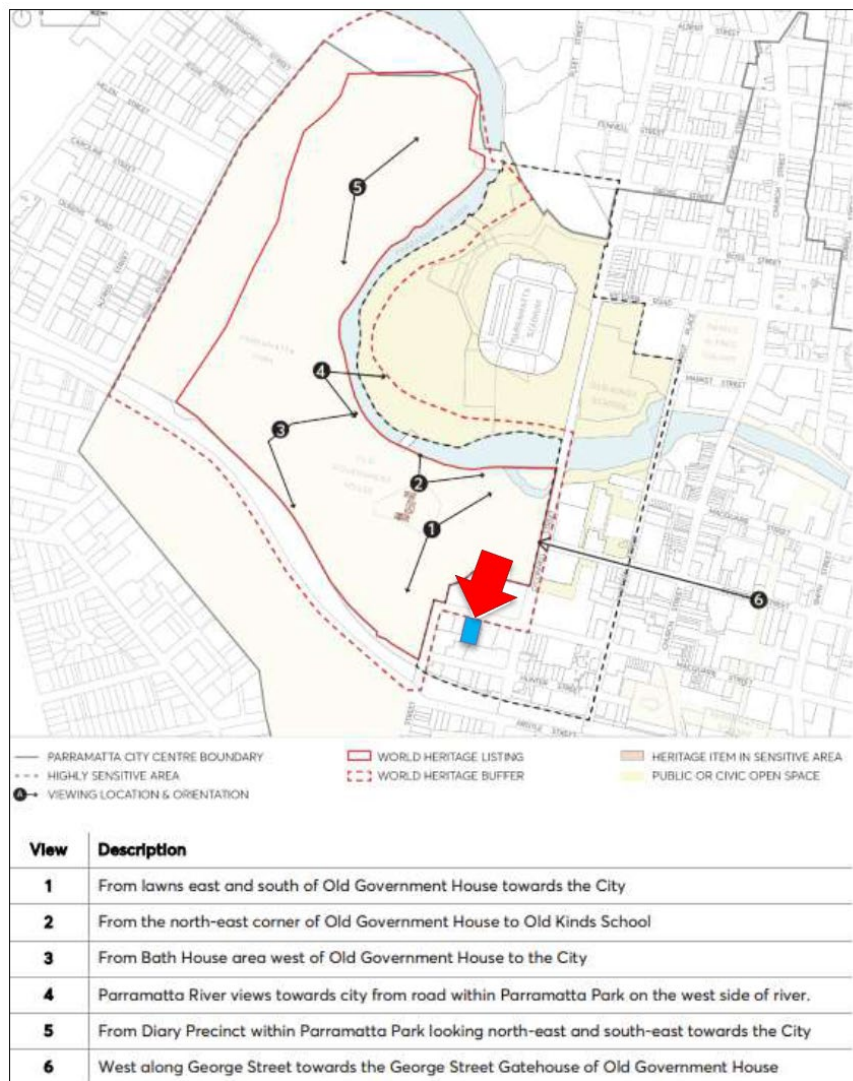


Figure 16: Old Government House and Domain view corridors. The site is shaded blue and marked by the red arrow.



4.3 The Development would comply with the Highly Sensitive Area Control for street frontage height

The definition of Highly Sensitive Area Controls refers to various controls set out in the *Parramatta City Centre Local Environmental Plan 2007 (LEP)* in the form it was in as at 18 June 2015, which are extracted in Annexure B to the Conservation Agreement.

The Land falls with 'Area B' of the map set out in Annexure B Figure 4.3.3.7.6. It follows that the relevant controls that apply to the Land are set out below the heading on page 58 of the Conservation Agreement, with the heading 'Area B'.

Area B control (a) provides that *"The street frontage height for podiums, setbacks to the street, side and rear boundaries must comply with figures 4.3.3.7.8, 4.3.3.7.9 and 4.3.3.7.10."*

Figure 4.3.3.7.9 relevantly identifies the appropriate street frontage height for the Land as "4 storeys/14m frontage as per Fig 7".

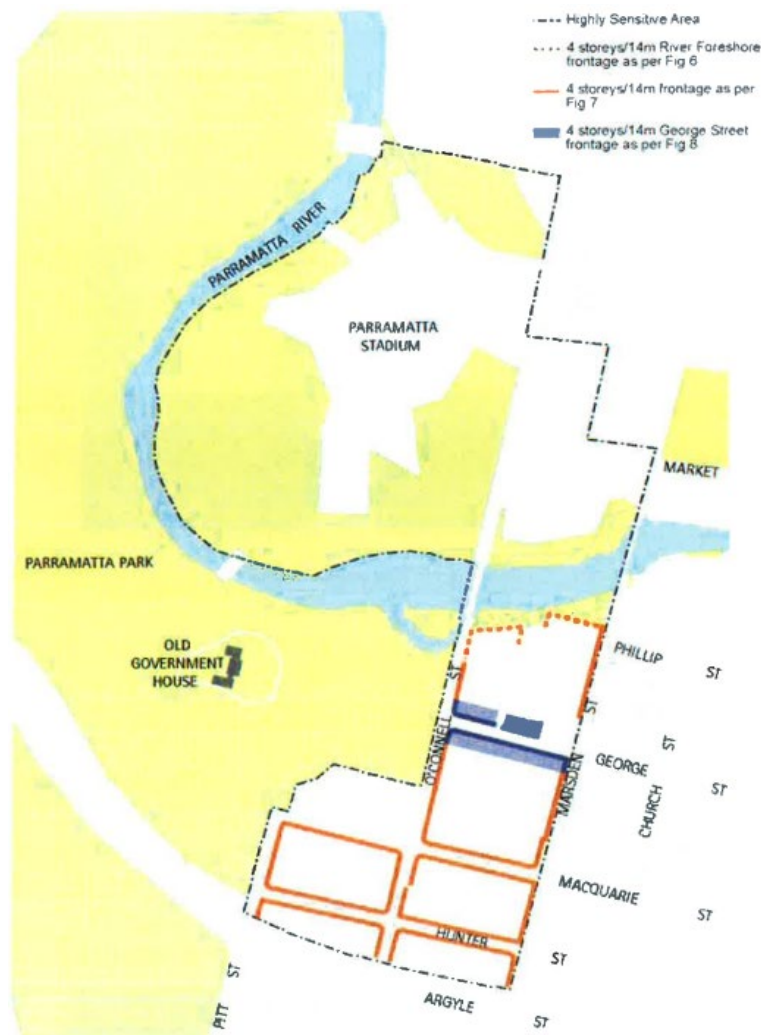


Figure 4.3.3.7.9 Street/River Frontage Heights (Podiums)

The reference to "Fig 7" in figure 4.3.3.7.9 appears to be a relic of the LEP, as there is no figure 7 in Annexure B. Rather, the appropriate Annexure B reference appears to be Figure 4.3.3.7.12, which is set out below:

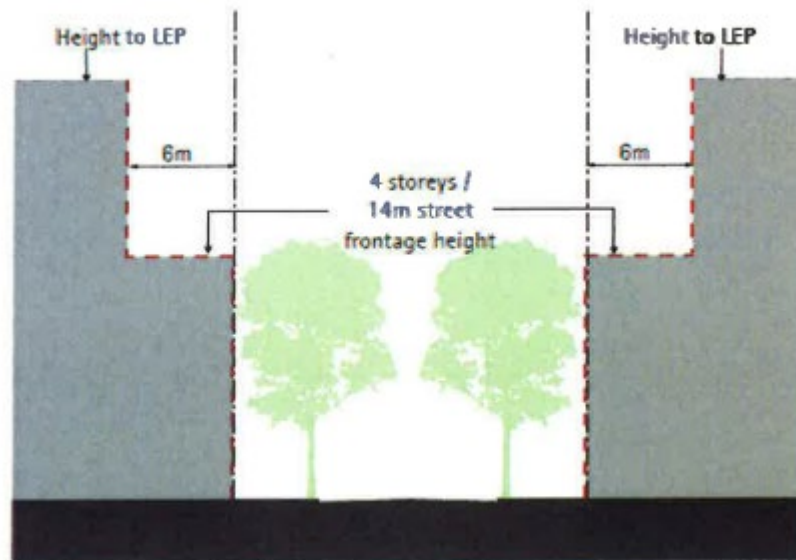


Figure 4.3.3.7.12 4 storeys/14 metre street frontage height

We have been instructed that the Development proposes a frontage height of 14 metres, comprising 3 storeys.

In our view, the ordinary and natural meaning of a “4 storeys / 14m” is “4 storeys or 14 metres”. As a development standard, that would be applied as a maximum of 4 storeys or 14 metres.

The Development proposed is consistent with the height limit in metres and is less than the height limit by number of storeys. In our view, it complies with the relevant Highly Sensitive Area Control in the Conservation Agreement.

We have been provided with a copy of an email from Parramatta City Council containing an extract of an email from the Commonwealth Department of Climate Change, the Environment, Energy and Water (DCCEEW). In the extract, a DCCEEW assessment officer provided advice consistent with this view, stating:

Page 58 of the Conservation Agreement (and associated figures) provide the controls for street frontage height for podiums, setbacks to the street, and side and rear boundaries for Area B of the Highly Sensitive Area. The street frontage height for Area B is 4 storey / 14 metres. Based on the information available to the department, the proposed 3 storey / 14 metre street frontage height is not likely to be noncompliant with the controls outlined in the Conservation Agreement. The department notes, the height of the proposed development is 14 metres, which is in accordance with the Conservation Agreement, we consider the height in metres is the key metric in this regard, not the number of storeys.

We have been instructed by the developer’s planner that all other aspects of the Development are compliant with the Conservation Agreement standards.

4.4 Development Consent for DA/199/2024 has not been granted

At this stage, the consent authority has not approved DA/199/2024.

5 The Development falls within the Conservation Agreement “Class of Actions” and does not require referral under the EPBC Act

For the reasons set out above, once DA/199/2024 is approved by the consent authority, the Development will fall within the “Class of Actions” provided for in the Conservation Agreement, because the Development:

- (a) would be carried out on or within the Highly Sensitive Area;



- (b) would comply with the Highly Sensitive Area Controls; and
- (c) would be authorised by a development consent for DA/199/2024.

It follows that the Development would not require approval under the EPBC Act, pursuant to section 37M.

Consequently, the Development would not be a controlled action for the purposes of section 67, and would not need to be referred to the Minister under section 68 of the EPBC Act.

Yours sincerely

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