

AMP Centre
Level 27
50 Bridge Street
Sydney NSW 2000
AustraliaP.O. Box R126
Royal Exchange NSW 1223
AustraliaTel: +61 2 9225 0200
Fax: +61 2 9225 1595
DX: 218 SYDNEY
www.bakermckenzie.com**Asia Pacific**Bangkok
Beijing
Hanoi
Ho Chi Minh City
Hong Kong
Jakarta*
Kuala Lumpur*
Manila*
Melbourne
Seoul
Shanghai
Singapore
Sydney
Taipei
Tokyo**Europe, Middle East
& Africa**Abu Dhabi
Almaty
Amsterdam
Antwerp
Bahrain
Baku
Barcelona
Berlin
Brussels
Budapest
Cairo
Casablanca
Doha
Dubai
Dusseldorf
Frankfurt/Main
Geneva
Istanbul
Johannesburg
Kyiv
London
Luxembourg
Madrid
Milan
Moscow
Munich
Paris
Prague
Riyadh
Rome
St. Petersburg
Stockholm
Vienna
Warsaw
Zurich**Latin America**Bogota
Brasilia*
Buenos Aires
Caracas
Guadalajara
Juarez
Lima
Mexico City
Monterrey
Porto Alegre*
Rio de Janeiro*
Santiago
Sao Paulo*
Tijuana
Valencia**North America**Chicago
Dallas
Houston
Miami
New York
Palo Alto
San Francisco
Toronto
Washington, DC

* Associated Firm

6 December 2013

Submission - Middle Head Precinct
Sydney Harbour Federation Trust
PO Box 607
Mosman NSW 2088

Dear Sir / Madam,

**Draft Management Plan for Middle Head Precinct (Amendment 1) ('Draft
Amendment')
Proposed Development - Residential Care Facility - Middle Head ('Development
Application')****1. Introduction**

- 1.1 We act for Linda Bergin.
- 1.2 Ms Bergin is the founding president of the Headland Preservation Group. She played a key role in the preservation of the surplus defence lands that were ultimately subject to the Sydney Harbour Federation Trust Act in 2001 ('SHFT Act') and was honoured with a Medal of the Order of Australia for this work in 2010.
- 1.3 Ms Bergin wishes to assert her objection in the strongest terms to the Draft Amendment and the Development Application and has asked us for legal advice in relation to the Draft Amendment and the Development Application.
- 1.4 We note that this letter replaces the letter of objection which we sent to you on 2 December 2013 on behalf of Ms Bergin. We have since become aware that the site area on which the development is proposed to be undertaken was misdescribed in application to be only 11,000 sqm. In fact, that area is between 30,000-40,000 sqm. This letter of objection was amended to take into account this information.

2. Executive Summary

- 2.1 The Draft Amendment and the Development Application would both facilitate the construction of a large, commercial development for private purposes of between 30,000 and 40,000 square metres of public land in a manner that would exclude the vast majority of the public. The scale, form and type of the proposed development is akin to the types of development that first motivated the Headland Preservation Group to take action and that the SHFT Act was designed to prevent.

- 2.2 In our opinion, the Draft Amendment and the Development Application are both inconsistent with the objects of the SHFT Act and the objects of the Sydney Harbour Federation Trust ('**Trust**') and the Trust would not be acting in accordance with its functions if it were to make the Draft Amendment or approve the Development Application.
- 2.3 Further, the Development Application is not consistent with the Sydney Harbour Federation Trust Comprehensive Plan ('**Comprehensive Plan**'). Nor is it consistent with the Sydney Harbour Federation Trust Management Plan - Mosman No. 7 - Middle Head ('**Middle Head Management Plan**'), even if that plan were to be amended by the Draft Amendment.
- 2.4 As a result, it is our opinion that:
- (a) the Trust does not have the power to make the Draft Amendment or to approve the Development Application;
 - (b) the Trust would be acting ultra vires if it were to make the Draft Amendment or to approve the Development Application; and
 - (c) any such decision of the Trust would be appealable in Court.
- 2.5 It is also our opinion that the Minister must approve the proposed activity under the Environment Protection and Biodiversity Conservation Act 1999 (Cth) ('**EPBC Act**') before the activity may commence.
- 3. Trust does not have power to make Draft Amendment or approve Development Application**
- 3.1 The Headland Preservation Group was initially established as a result of community concern in relation to proposals by the Federal Government to sell portions of surplus defence sites on Sydney Harbour for redevelopment.
- 3.2 The SHFT Act was passed and the Trust was developed to manage these lands with the objectives of maximising public access to the sites and preserving the heritage and environmental values of the lands.
- 3.3 The importance of establishing the Trust was outlined by the Prime Minister when he said:
- "...[the establishment of the Trust] will prevent any ad-hoc treatment of the return of the land to the people and it will ensure that there is maximum weight given to the desire of all Australians that the maximum advantage be derived in open space and recreational purposes in relation to the land."*
- 3.4 The importance of this statement is reflected in the fact that it is quoted in the Introduction to the Comprehensive Plan.
- 3.5 These same sentiments are found in the Preamble to the SHFT Act, which states:

"The Parliament intends to conserve and preserve land in the Sydney Harbour region for the benefit of present and future generations of Australians. ... Suitable land with significant environmental and heritage values will be returned to the people of Australia.

The Parliament intends to establish the Sydney Harbour Federation Trust as a transitional body to manage the land and facilitate its return in good order. The Trust will transfer suitable land to New South Wales for inclusion in the national parks and reserves system."

3.6 The objects of the Trust are set out in section 6 of that Act. They are:

"(a) to ensure that management of Trust land contributes to enhancing the amenity of the Sydney Harbour region;

(b) to protect, conserve and interpret the environmental and heritage values of Trust land;

(c) to maximise public access to Trust land;

(d) to establish and manage suitable Trust land as a park on behalf of the Commonwealth as the national government;

(e) to co-operate with other Commonwealth bodies that have a connection with any Harbour land in managing that land;

(f) to co-operate with New South Wales, affected councils and the community in furthering the above objects."

3.7 The functions of the Trust are set out in section 7 of the SHFT Act. They include the following functions:

"(a) to hold Trust land for and on behalf of the Commonwealth;

(b) to undertake community consultation on the management and conservation of Trust land;

...

...

(e) to rehabilitate, remediate, develop, enhance and manage Trust land, by itself or in co-operation with other institutions or persons, in accordance with the plans;

...

(g) to promote appreciation of Trust land, in particular its environmental and heritage values;

(h) to provide services and funding to other Commonwealth bodies in furthering the objects, and performing other functions, of the Trust"

- 3.8 The vision of the Trust is set out in the Comprehensive Plan. It is stated to be:

"To provide a lasting legacy for the people of Australia by helping to create the finest foreshore park in the world and to provide places that will greatly enrich the cultural life of the city and the nation."

- 3.9 On any view, the development proposed to be accommodated by the Draft Amendment and set out in the Development Application is akin to the types of development that motivated the Headland Preservation Group to take action in the first place.
- 3.10 In our opinion, the scale, form and type of the proposed development are all inappropriate for a site that is required to be conserved and preserved for the benefit of present and future generations of Australians.
- 3.11 The proposed development affects a large area of between 30,000 and 40,000 square metres, which is shown marked with a red boundary in Figure 1 - Site location plan (see page 3 of the Planning Assessment Report prepared by Evolution Planning for the applicants, dated October 2013). It involves the demolition of existing buildings and the construction of new buildings. While demolition and construction is not, in and of itself, inconsistent with the objects of the SHFT Act or the Comprehensive Plan, it is the scale of the works that is in issue. The Development Application would result in an increase in the gross floor area from approx. 4,200 square metres (existing) to 7,500 square metres (proposed). As many of the existing buildings are proposed to be demolished, the vast majority of the proposed floor space is new floor space. The application also relates to 122 car spaces. The cost of the works is over \$30 million.
- 3.12 This is a large (in both size and value) commercial development. It is proposed to be carried out on public land.
- 3.13 Further, the form of the proposed development means that public access and use would be actively discouraged for an extended period of time while ever the site is used for private residential / aged care purposes. There will be minimal public access to both the buildings and the landscaped area that forms part of the site. There will be no opportunities for the public to walk through the site or to have general casual access.
- 3.14 This development and proposed use is to be contrasted with the adaptive reuse and lease of other buildings managed by the Trust. In other cases, the leases are short term and the built form is not altered in a way that restricts or limits public access. Some demolition and adaptation of existing buildings has occurred in the past, but there has been nothing on the scale of the proposed development. That the proposed development would restrict access to the existing buildings is not in issue - that is often to be expected with many types of adaptive reuse and lease of buildings that are otherwise considered to be acceptable. What is different about this proposal is that extensive new buildings are to be constructed over land that need not

currently be closed to the public and the landscaped areas around those buildings will also be closed to the public.

- 3.15 The nature of the proposed development is also clearly inappropriate for a short term use. The SHFT Act states that leases must not be entered into for a period that ends after 19 September 2033 without Ministerial approval. A longer lease would be akin to a sale or disposal of the land. A shorter lease is inappropriate for residential accommodation that will be used by people towards the ends of their lives. We are instructed that the proponent told those present at the Terminal Ten Information Meeting on 26 November 2013 that residents would be expected to pay bonds in excess of \$550,000 to be able to reside in the proposed development. The fact that it can currently be anticipated that considerable pressure would be placed on the Trust at the end of the lease to extend the term of that lease both because of the impact of moving vulnerable, elderly people from their accommodation and the scale of the investment by the developer demonstrates that the proposed development is inappropriate on public land.
- 3.16 It is also our opinion that the proposed development would not be consistent with the Middle Head Management Plan, even if it were to be amended as proposed in the Draft Amendment, as:
- (a) The Middle Head Management Plan would state that the 'primary objectives' for the precinct include 'uses for the buildings that help their conservation and are sympathetic to their simple, institutional form and the need to open up the site to the public'. The proposed development will not conserve existing buildings, will not be sympathetic to the simple, institutional form of the existing buildings and will close much of the site to the public.
 - (b) The Middle Head Management Plan would state that the objective for 10 Terminal is to modify, add to and adaptively reuse the buildings in a manner that 'facilitates the conservation and interpretation of their heritage values and that enhances visitor experience of the park, for example: visitor accommodation, dining, functions, offices, studios, education or similar'. The proposed development will not enhance visitor experience of the park as the public will be excluded from a large area of it. Nor does the proposed development constitute one of the uses listed here, or, indeed a similar use.
 - (c) The Middle Head Management Plan would state that the objective for the barracks is to use the buildings for simple visitor accommodation (such as school camps), education, studios or offices. Again, the proposed development does not constitute one of the uses listed here, or, indeed, a similar use.
- 3.17 The Trust's approach to planning is also set out in the Comprehensive Plan. It is stated to be:

"In many planning initiatives, there is an underlying intent to redevelop or to facilitate development for a pre-conceived purpose. In such circumstances, planning seeks to make the new development fit in, minimise the negative impacts, ameliorate unavoidable adverse effects and provide trade off to compensate.

The trust, by contrast, is seeking the most appropriate outcome, inspired by the intrinsic values of the lands, one that will be of most benefit to all Australians now and for the future."

3.18 In our opinion, the Development Application is the type of application one would expect a land owner to lodge in relation to land over which maximum financial and commercial benefit was to be realised. The supporting documents lodged with the Development Application address the negative impacts of the proposed development. They do not consider or assess whether the proposed development would result in the most appropriate outcome for the Australian public. As a result, it is essential that the application be properly assessed by experts independent from the applicant to ensure that the proposed development falls into the second of the two categories referred to above, as it currently appears more likely that it would fall within the first.

3.19 In light of the above, it is our opinion that:

- (a) the Draft Amendment and the Development Application, propose a built form and development that would be **contrary to the intention of the SHFT Act, as set out in the Preamble** to that Act, as the development would detract from the conservation and preservation of land to the detriment of all but a small number of Australians - the Draft Amendment and Development Application propose the use and extensive development land for commercial interests that are inconsistent with the public nature of the land;
- (b) the Draft Amendment and the Development Application propose a built form and development that would be **contrary to the Objects of the Trust, as set out in section 6 of the SHFT Act**, because they would:
 - (i) detract from the amenity of the Sydney Harbour region;
 - (ii) not protect, conserve or interpret the environmental and heritage values of Trust land; or
 - (iii) prevent all but very limited public access to between 30,000 and 40,000 sqm of Trust land;
- (c) **the Trust would not be acting in accordance with its functions if it were to make the Draft Amendment or approve the Development Application.** Sub-section 7(e) of the SHFT Act gives the Trust the function of rehabilitating, developing, enhancing and

managing Trust land. Any 'development' of Trust land must, however, be consistent with the objects of the Trust and the object of the Act, as set out in the Preamble. In our opinion, this development is not;

- (d) the Draft Amendment and the Development Application is **not consistent with the Trust's vision** as the development would result in a significant commercial development over 30,000-40,000 square metres of public land; and
- (e) the difference between the types of uses contemplated in the Middle Head Management Plan and the residential / aged care / private hospital type use proposed in the Development Application is so great that the proposed development is inconsistent with the Middle Head Management Plan, even if it were to be amended as proposed in the Draft Amendment.

3.20 As a result, it is our opinion that the Trust does not have the power to make the Draft Amendment or to approve the Development Application, that the Trust would be acting ultra vires if it were to make or approve those documents and that any such decision would be appealable in Court.

4. Application of EPBC Act

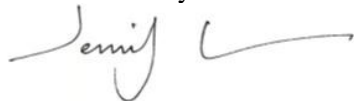
4.1 The Development Application documents lodged by the applicant appear to suggest that the application constitutes an application under section 26 of the EPBC and that the Trust is the approval body for the purposes of that application.

4.2 This is not correct.

4.3 In our opinion, the proposed development would constitute an action on Commonwealth land that would have a significant impact on the environment. As a result such action cannot be taken without the approval of the Minister administering the EPBC Act.

4.4 There is an exemption to this provision where an action is permitted to proceed once it has been authorised subject to a special environmental assessment process. As far as we are aware, the approval process set out in the Comprehensive Plan has not been authorised for those purposes. As a result, the Minister must approve the action before commencement.

Yours sincerely



Jennifer Hughes
Partner

+61 2 8922 5619
Jennifer.Hughes@bakermckenzie.com