For MOD 8, the City has made a detailed submission to the Department prior to its Assessment Report being released. This follow up submission expands on relevant key issues in light of the Department’s Assessment Report and the expert Barangaroo Design Advisory Panel Review.

Maintaining trust, confidence and certainty in the NSW planning system is achieved from consistent, detailed and justified decision-making, especially in relation to tough and challenging proposals.

The City of Sydney has supported a balanced redevelopment of Barangaroo (East Darling Harbour) from the outset and undertook a number of early studies. The site is highlighted for strategic renewal in the City’s 2008 plan Sustainable Sydney 2030.

The City has over 30 hotels in the development pipeline exceeding in aggregate 5000 rooms. A State Significant Development concept plan for a new 6 star hotel, part of a new $550 million development at Circular Quay was recently approved by the City as delegate of the Minister. The City has supported more than $20 billion worth of quality development over the last decade and have robust design excellence and public inclusion processes.

Setting aside all other issues, the fundamental issue is the siting of a private tower on waterfront parkland, dominating and overshadowing the long held vision of a continuous foreshore promenade. The spatial intrusion on the foreshore is dramatic. The location is neither necessary nor is it an obligation. And unless the PAC agrees otherwise, it is against the law. There are no property rights at play here, nor can a refusal on merit be appealed. The granting of a second restricted gaming license did not guarantee the exact site, with the planning approvals risk in the Unsolicited Proposal assessment solely allocated to the proponent.

There could easily be an iconic hotel facing Darling Harbour within the B4 zone without taking from the public. There should have been a publicly engaged site selection process as recommended by Sussex Penn. This did not happen.

There is clear failure in the assessment to consider site suitability and the broader public interest. North eastern views of the Opera House for 66 apartments and VIP guests at the expense of permanent foreshore parkland for Sydneysiders cannot be a defendable trade-off under the EP&A Act.
Recommendation

The s75W modification application should be refused having regard to the following:

A. Locating a 275m high, 77,500m² tower on land zoned RE1 public waterfront parkland (and cove) rather than within the available B4 development zone fails public interest and site selection considerations and the relocation process did not reflect the Sussex Penn Review recommendation or BDA Review Response.

B. Proposing a public park away from the waterfront on the most highly contaminated site location being subject of EPA Declaration 21122 of Remediation Site 3221 (the former gasworks site) and subject to future uncertain applications, makes its use as a park vulnerable to a level of contamination containment this may not be achieved or feasible; or in the alternate the space may merely be the embellishment of a private basement car park roof.

C. The extent of concept plan change is in effect a new concept plan or substantially different concept for the land to be developed and exceeds the confines of ‘limited environmental consequences beyond those which have been the subject of assessment’ being the construed scope of a s75W modification in accordance with views of the NSW Court of Appeal.

D. The assessment requirements for transitional Part 3A applications to consider the public interest and site suitability are not met.

E. The maximum floor space density for the site limited by previous approvals and as assessed by the Planning Assessment Commission itself in formal advice to the Minister is ignored and is not met.

F. The failure to remove future construction on the pier over the harbour with uncertain scale and development intentions; and the inclusion of GFA to be allocated but counted as public open space, and failure to retain the quantum of genuine public open space generally.

G. The poorly reasoned and scoped Environmental Assessment Report and the failure to compare the proposed changes to the originally approved concept plan (as well as the failure to properly consider affordable housing as set out in 2.3.3 in A Plan for Growing Sydney) imperils the PAC’s decision-making by diminishing the PACs ability to rely on it as a thorough and sound assessment.

Outline

MOD 8 refers to a modification application for the complete redesign of the northern part of Barangaroo South. The changes will accommodate up-scaled residential and an up-scaled hotel resort at the expense of public waterfront parkland. It exceeds floor space and height controls and alters the zoning. The modification constitutes a new concept for the undeveloped part of Barangaroo South, and it is open to the PAC alone to determine that the extent of change to the principles, controls and the concept plan intent as considered prior to this application, goes beyond the scope of a modification and therefore the PAC to approve. An assessment of the
consequences of the application against the original concept plan has not been made, nor has the site suitability and public interest been assessed; and the expert Design Advisory Panel's recommendations have been generally rejected.

The MOD 8 application should be refused as it lies outside the reasonable scope of a s75W modification according to factors observed by the NSW Court of Appeal.

A different application which includes a hotel (with or without restricted gaming) up to 50,000m² within the B4 development zone preserving the waterfront public parkland is available without disturbing the original intent of the approved concept plan.

In refusing the application, the PAC could consider providing guidance on:

- maximum density (the current maximum assessed by the PAC for the site allowing for Wynyard Walk and Metro Rail is 506,300m²)
- locating development including any future hotel complex within the B4 zone
- reducing the scale and ground level bulk of individual blocks
- other policy concerns raised by the expert DAP review
- inclusions and exclusions in public open space calculations
- capping of car parking
- capping tourist floor space
- minimum affordable housing consistent with the demand and opportunity

2011 Sussex Penn Review and the on-water hotel relocation

1. The 2010 MOD 4 application reflects the Lend Lease (LL) tender bid for Barangaroo South. It involved changing the boundary of the site, altering the Sydney Harbour Regional Environmental Plan (to permit prohibited uses in the harbour), altering the SEPP’s zoning and development standards and altering the concept plan layout, principles, controls and commitments. It demanded a wide-ranging use of discretionary decision-making powers of a dimension recommended by the ICAC to be determined by the Planning Assessment Commission (PAC). The application was determined by the Planning Minister which exposed MOD 4 to administrative challenge.

2. To mediate the administrative challenge brought by the Australians for Sustainable Development, the incoming Planning Minister announced in May 2011, an independent review of the ‘reasonableness of the process’ – the August 2011 Sussex Penn Review. The Review introduction notes –

   “The concept of a representative democracy is that we elect parliaments to make the rules about how competing objectives are balanced. The concept of a civil society is that these rules are applied fairly and that those affected by decisions are provided with information about competing objectives, have an opportunity to put forward their views, and have their view considered in determining the outcome”. [SP Review p2]

3. The current MOD 8 application is justified as a response to one of twenty nine recommendations in the Sussex Penn Review. The Review concluded amongst
other things that the approval to modify the Concept Plan and EPIs to allow building in Darling Harbour, while possibly lawful, was poor public policy. This means that the Department’s Report recommended poor public policy at a time when an ICAC policy report (from a Taskforce of which the Department was part) specifically recommended that the Minister’s executive discretion under Part 3A be curtailed.

4. In relation to the harbour hotel on a pier, the Review notes –

“It is difficult to believe that parliament intended that the Minister should be able to approve by Executive Order, a project which was prohibited by State Planning Policy and by Regulations applying to the Part of the Planning Act designed to facilitate State significant projects”. [SP Review p36]

“In this case, it is the view of this Review that given the nature of the prohibitions overridden, the Minister’s actions had the effect of undermining confidence in a variety of related laws and decisions and therefore not good public policy”. [SP Review p37]

“While Lend Lease has zoning and Concept Plan approval for the hotel in the harbour, this Review suggests that it would be a significant demonstration of goodwill to relocate the hotel to elsewhere on the site. At the very least, we believe that Lend Lease and the Government should agree to abide by the outcome of a specially constituted Design Review Panel which should be asked to review the merit of the location of the hotel with a publicly accessible process as if the rezoning had not occurred”. [SP Review p37]

5. The phrase ‘significant demonstration of goodwill’ suggests the reversal from water back to land should not entail unfair leverage or seek undue benefit. In terms of options, at least one already existed as Lend Lease (LL) had previously identified a location for the hotel within the B4 development zone in their conforming tender bid, the general basis for MOD 4. There are no specific or even implied suggestions in the Sussex Penn Review that the hotel could or should be located outside of the Concept Plan development zone, that it needed to be larger or that it needed to be commercially underpinned by VIP restricted gaming. These changes and arguments in favour have since been introduced by the proponent at their own election.

6. The Barangaroo Delivery Authority (BDA) developed its own set of responses in November 2011 to the Sussex Penn Review – The BDA Board’s detailed response to the Premier in relation to Sussex Penn (the Response). Some Sussex Penn recommendations were simply noted, others modified, others agreed. In relation to the hotel, the Sussex Penn proposal that ‘Lend Lease and the Government should agree to abide by the outcome of a specially constituted Design Review Panel which should be asked to review the merit of the location of the hotel with a publicly accessible process as if the rezoning had not occurred’ was not followed through by the BDA or the proponent as Sussex Penn intended.

7. Part 8.3 of the BDA Response, endorsed by the NSW Premier in Jan 2012, says –
“Community involvement in the relocation process will consist of consultation with the City of Sydney and key stakeholders, and public display of the recommended location prior to any decision being made.” [BDA Response p34]

“The Authority and Lend Lease have agreed to a review of the merits of any recommended alternative hotel location and will discuss with key stakeholders prior to consultation with the community and preparation of any planning applications”. [BDA Response p34]

8. Despite this affirmation, there was no publicly accessible process prior to an internal agreement between the parties to locate an enlarged (and non-conforming) hotel on land zoned waterfront parkland. City of Sydney Council officers were briefly consulted, and an alternate position within the B4 zone for the hotel resort was put forward to the BDA CEO. [Refer to paragraph16]. However, at the relevant time, CoS officers were not given the opportunity to present to the BDA Board arguments for an alternate location setback from the waterfront in the B4 zone.

Does the Crown hotel need to be on waterfront public parkland?

9. It is not appropriate or necessary for the significantly enlarged hotel to be located on the RE1 waterfront parkland. The redevelopment of East Darling Harbour (Barangaroo) has been presented as balanced trade-offs between economic, cultural and recreational public benefits for the people of Sydney. This is evident in the NSW Government brief for the 2005 two stage international urban design competition, the 2007 Concept Plan application and its terms of approval, and in the publicity and media releases from SHFA, the BDA and the NSW Government.

10. As a result of public tender and execution of the March 2010 Project Development Agreement (PDA), MOD 4 essentially reformats the approved Concept Plan with the design and construct bid of LL designed by Rogers/Lippmann for that part of the site called Barangaroo South. It also removed the Temporary Cruise Terminal (which was relocated to White Bay). This included the bid option of an over-water hotel of 33,000m² positioned to maximise views of the Opera House.

11. In MOD 8, the RE1 waterfront parkland and cove area within Barangaroo South is coveted by the proponent as the most desirable location on for their hotel despite not being available for development. This has been accepted by the BDA. By relocating the hotel resort to the most northerly and most westerly corner of LL’s development site in the public RE1 zone, the proponent seeks to maximize private value by maximizing views to the Opera House to the north of the Highgate building. Due to the significant increase in scale from 33,000m² to 77,500m² and height increase from 170m to 275m, it also seeks additional unobstructed views to the Opera House, main harbour and heads over the Highgate building. This generates a much greater ‘iconic’ Opera House view share than what the current hotel obtains.

12. The gaming license does not guarantee the site to Crown. From 2012, the Crown Sydney Hotel Resort Unsolicited Proposal (UP) successfully obtained over a series
of stages support for a new VIP restricted gaming license for either 20,000m² GFA or up to 20% of the total floor area. The VIP gaming was said to be necessary to underpin the commerce of a premium six star hotel provided by Crown under an Exclusive Dealing Arrangement with LL, although the obligation to build a hotel offering sat with LL and the planning approval risk with Crown.

13. Until now, the whole-site Concept Plan as amended by the MOD 4 approval (and since modified a number of times up to MOD 7) has the waterfront recreational zone RE1 intact. The current distinction between public and private remains broadly consistent with the original concept plan zoning – public waterfront to the west and north and private commercial development to the east and south, against Hickson Road. According to the State’s July 2013 Stage 2 UP Assessment Report, the planning approvals risk is solely allocated to Crown. [UP Assessment p25]

14. Setting aside the legal, process and specific building design and scale issues, the key siting issue is whether the location is preferable in the public interest compared to available development land within Barangaroo South. Alternative sites can preserve the waterfront public parkland. The proposal forward of the concept plan development zone line is exceptionally prominent for a large non-public building (a building legally required to exclude general public access to gaming levels above ground level; for 6 star guests and 66 very large apartments).

15. The proposed northerly waterfront location and height makes the tower highly visible from the main harbour, Circular Quay, the Opera House and the Harbour Bridge. This is not automatically a negative; however it needs to be fully appreciated as the scale will redefine the postcard image of Sydney and Darling Harbour. The proposal physically blocks southerly views from the new headland park and visually terminates the northerly outlook from the long promised foreshore promenade from the south. Consistent with the expert DAP review, the proposal is overly dominant – and not fitting in. It overshadows Waterman’s Cove and the public promenade edge at the time of year and the time of day that matters the most.
16. The proposal has continued to grow – site area 6,204m² up from 6,000m²; GFA 77,500m² up from 72,000m² and 275m up from 250m high at competition stage (and 235m high at pre competition). The complex doesn’t even fit within the RE1 zone and so the water cove is reduced. There is a lack of transition and setbacks, the obstruction of the upper Gas Lane view line at the northern end (a feature of the Concept Plan) with considerable intrusion of structure and private licensed areas within the waterfront promenade. This latter point is now proposed to be addressed by overhanging boardwalks over the harbour edge zoned W1 in the SREP.
17. The waterfront site choice is unnecessary as there is ample available land within the B4 development zone and within the current maximum floor space and which preserves better public open space. Different siting could respect the public planning gains already publicised and communicated by the BDA and LL over a number of years. The proponent’s site choice is contrary to the principles, objectives and controls to date and importantly, the strategic intent of the Concept Plan.

18. The idea of the waterfront being promoted by Crown as an opportunity to be had is largely a matter of timing. If the waterfront park had been built and opened the MOD 8 proposal would be akin to seeking planning permission for a hotel on Pirrama Park or Hyde Park on the basis that the development needs such a location for maximum views and to be ‘iconic’. The fact that the public parkland outcome has not been built (although the commercial outcomes are well underway) makes this part of the Concept Plan vulnerable. The Barangaroo Design Advisory Panel noted –

“Any assessment of built form and public domain must place at its centre the notion of public benefit – that for a development to be viable it must provide a net improvement in the lives of the people it affects.” [SP Review p8]

19. A key contention reiterated in this submission, is that genuine public benefits in the form of high quality public recreational open space on the waterfront which has been heavily communicated to the public is being traded away for a contaminated site within the EPI Declaration area.

20. The EPI Declaration Area is the most contaminated part of the overall site and is subject to EPI Management Order 20151402. There is reasonable uncertainty that the alternate site will be made completely suitable for a public park due to containment challenges; or in the alternate, is the landscaped roof slab of a carpark.

21. At issue with MOD 8 is public trust in the planning system, certainty and timeliness in revised contamination treatment, two SEPPs, an EPI, a long standing competition winning Concept Plan approach based on principles, objectives and urban design controls that need to be changed; provisions that regulate transitional Part 3A projects, Court of Appeal observations and the Minister’s delegated powers which sit with the Planning Assessment Commission (PAC).

**Does the scope exceed s75W modification?**

22. A relevant and crucial matter for the PAC to decide is whether the changes sought are limited in nature so as to render the application a modification. In making its decision, the PAC must actively and intellectually engage with the facts and circumstances that determine the extent of environmental consequences at play. In November 2009, the NSW Court of Appeal in *Barrick Australia v Williams* observed that the power of the Minister for Planning (or his delegate) to grant modifications to Part 3A projects under s75W is for them to decide and should only be used for changes that have ‘limited environmental consequences beyond those which had been the subject of assessment’ (of the original project assessment).
23. In MOD 4, the Department focused on floor space creep as the measure of limited. In MOD 8, there is much more at stake, a wholesale revision, and arguably the comparison of new consequences should be made against the original concept plan. The changes are not of limited environmental impact compared to either MOD 7 or the original concept plan.

24. The reasons the application exceeds limited environmental consequences beyond the subject of the assessment (of the original project assessment) includes: gross floor area increase well above the original concept plan and PAC assessed maximum; a new 275m high waterfront mixed-use tower on prohibited land; a relocated Harbour Pier with significant GFA (but as yet stubbornly undefined ‘community’ uses) in a revised RE1 zone (a land use zone being applied over water which together are currently prohibited by more than one EPI); significant additional parking above TMAP capacity; double height residential towers (exceeding residential floor space cap) and the removal of waterfront public parkland and the Southern Cove water space in the location and to the extent specifically required by the Competition Jury and the Department; and the proposed Hickson Park on the Declared Remediation Site – potentially a turfed roof of a basement car park between tall towers.

25. Furthermore, the environmental consequences are as significant as imaginable - the scale of the ‘iconic’ tower will intentionally change the overall Sydney skyline on land where no development was envisioned. For these reasons, and contrary to the Department’s advice, the application cannot be considered to be within the scope of a modification under s75W. As with MOD 4, if the PAC were to approve and exceed the s75W principles, the decision could be open to judicial review.

Have the relevant transitional Part 3A provisions been taken into account?

26. Setting aside the primary issue that the PAC should not approve a modification with the extent of unconsidered environmental consequences proposed, there are other process issues that have not been taken into account.

27. For example, this application is made under transitional Part 3A arrangements contained in Schedule 6A of the EP&A Act. Clause 2A of Schedule 6A to the Act makes it clear that the Minister (in this case the PAC) is authorised to take the public interest into account when deciding whether or not to approve the carrying out of a project or to give approval for a Concept Plan under Part 3A before or after the repeal of Part 3A.

28. The Regulations that apply to transitional Part 3A projects in cl 8B list the matters for environmental assessment and Ministerial consideration. These include:

   a. an assessment of the environmental impacts of the project

   b. any aspect of the public interest that the Secretary considers relevant to the project

   c. the suitability of the site for the project
d. copies of submissions received by the Secretary in connection with public consultation under s75H or a summary of the issues raised in those submissions

29. Again, setting aside the s75W scope barrier, given the:

a. changes to the EPIs (a poor public policy issue in Sussex Penn)
b. changes to the concept plan layout, principles, controls and ‘commitments’
c. rejection of the expert DAPs review by the Department and proponent other than the incorporation of a potentially lucrative public viewing area
d. failure to follow the hotel site relocation process as recommended by Sussex Penn
e. public interest authorisation in Sch. 6A cl 2A of the Act and the requirements of cl 8B of the Regulations

it would be prudent if not necessary for the PAC to explicitly consider and evaluate the public interest and site suitability in its decision-making.

Have the key public interest issues been evaluated?

30. The public interest issues have not been properly evaluated. As noted, there has been extensive publicity over the years about the community outcomes derived from the project – the quantum and quality of public open space and in particular the headland park and the waterfront parkland alongside the public promenade and coves. In MOD 8, a critical element is proposed to be traded off against an inferior outcome, Hickson Park. This significant trade-off has not been evaluated and the public interest has not been properly considered in the Department’s Report. The Report appears to focus on evaluating private interests.

31. Setting aside the s75W scope barrier, the proposed hotel tower replaces approved unobstructed deep soil waterfront parkland enjoying 180 degree harbour outlook, and at the Southern Cove, a 270 degree outlook (north, west and south). This parkland is capable of being formally dedicated in perpetuity as it has no private development beneath. In MOD 8, this is to be replaced by Hickson Park. It will sit directly below three or possibly four towers (depending on the outcome of Barangaroo Central). So-called Hickson Park is only likely to be secured by a public access easement or limited height stratum subject to conditions that would allow the park to be removed and replaced, for example, when the roof membrane fails. A landscaped basement roof does not offer deep soil planting and can have poor drainage and exhausts venting from the car park below. Alternatively, it will be on ground within the hot spot of the former Gasworks identified by the EPI as the Declared Remediation Area under the Contaminated Land Management Act.

32. MOD 8 also removes the large southern cove water space previously required by the competition jury and Department at Concept Plan approval. It is to be replaced in
part by a smaller Waterman’s Cove relocated further to the south that will be overshadowed by Crown’s waterfront tower (which itself enjoys unobstructed solar access) during the days and hours that solar access is required for public enjoyment. The Report’s support for the relocation of the waterfront parkland to Hickson Road is made without comparison to what is lost. It is argued that Hickson Park location would be wind protected, whereas it might well be exposed to significant downdrafts caused by towers without podiums. In the past, exposure to harbour winds has not been considered a concern, making public parkland located well away from the water’s edge an advantage (as suggested). This is particularly inconsistent in view of Headland Park and Barangaroo Central parkland.

33. There is no evaluation in the assessment Report of site suitability as a primary issue given the development is currently prohibited and involves the replacement of a future foreshore public park with little overshadowing, open water views and deep soil landscaping by a 275m high mixed use exclusive hotel resort. This raises the question of who the strategic planner for the site is as distinct from the delivery authority, the proponent and the consent authority. There is no evaluation of the site suitability having regard to available land for development for such uses within Barangaroo South. The expert DAP’s review also raises siting concerns in their consideration that are not fully translated into its recommendations.

34. Secondary merit issues as noted by CoS and the expert DAP Review relate to block size, podium scale, ground level open permeability, parking, lack of negotiated additional public benefit and lack of appropriate affordable housing for key workers (despite contractual mechanisms already in place for this to be increased). Furthermore, the siting of the hotel tower outside the development zone (trading public good for private gain) has also enabled the request for additional high value residential floor space in MOD 8.

35. By relocating the hotel to the east in a harbour-facing location but within the current B4 zone and development line, a key siting issue is resolved and the hotel obligation can still proceed. Refer to Attachment A.

Is the proposal consistent with relevant PAC assessments to date?

36. The proposal is not consistent with previous PAC assessment. The PAC has made two reviews/assessments (February 2009 and March 2014) in relation to the Barangaroo project. This proposal significantly exceeds the maximum floor space set by the Planning Assessment Commission at MOD 2.

37. In February 2009, the PAC released its ‘review of the reasonableness of recommendation’ of a similar Departmental Report and Terms of Approval to the current MOD 8 Report, recommending approval of MOD 2. The 2008 MOD 2 application by SHFA aimed to increase the gross floor area by 120,000 m² from 388,300m² to 506,300m² without design or envelope changes. It was argued on the basis of investment in public transport (a transport gain consistent with the required modal split) and demand. The City’s submission was that this level of additional floor
space could not be absorbed without significant envelope change. The subsequent MOD 4 envelope changes proved this prediction to be accurate.

38. MOD 2 was broadly argued on the basis of space demand and public transport – ferry services, a new pedestrian connection to Wynyard station and a new metro rail line under the site with a station on site. Given the increased transport provision, the presumed demand for large floor plate commercial office space, the PAC found in favour of the Department’s assessment and supported the GFA increase but with the following important qualification in its assessment at Issue 2 –

“Whilst the DG’s Report permits a redistribution of the GFA between Blocks 2, 3, 4 and 5, the GFA of 211,907m² on Block 2 should be capped due to its already very high level of development. The total approved GFA for Blocks 2, 3, 4 and 5 can be redistributed between the blocks, but should not exceed the total approved GFA and no increase to be allowed on Block 2”.

39. The reference to 'total approved GFA' for the whole site by the PAC is 506,300m². The public transport provision on which this PAC assessment was made then is the same public transport provision as proposed today. There is likelihood of further change to come¹.

The second PAC referral was for the determination of MOD 6 in 2014. The Department advised the PAC of the MOD 6 changes to road layouts, car parking rates, building forms and treatment of community floor space.

The PAC did not allow the 12,000m² community GFA to become a maximum as requested by the proponent or for it to be excused from the calculation of GFA. It also agreed that the fixing of parking rates should not happen at that time (in advance of MOD 8). The current application seeks a considerable increase in private vehicle parking allocation, which is at odds with both the Department’s and PAC’s views prior to and at MOD 6.

Should the pier be retained and approved as a development site in an RE1 zone with such uncertain scale, floor space and land use?

40. While the hotel is to be enlarged and relocated, a building is still proposed for the pier. The salient discussion points at cl 4.2 in the Sussex Penn Review refer to the Minister’s actions and decision to approve that part of the development that protruded into Darling Harbour as poor public policy by approving what was contrary to a long held policy position to prohibit new uses in the Harbour. The Review notes that any building proposed in the harbour (whether it be a hotel or other significant use) was until MOD 4 prohibited and –

“constrained by the provisions of 8N of the Regulations which provide that if a

¹ Currently there is a Barangaroo Delivery Authority tender encouraging developer proponents to increase the adjoining Barangaroo Central floor space by a further 90,000m² above the current MOD 8 uplift ahead of any PAC or Ministerial determination to do so.
project, or part of a project is located in an environmentally sensitive area of State significance (including coastal waters) and would normally be prohibited then the Minister could not approve a Concept Plan for the project or the project itself. Thus if the hotel” [or other building] “in the Harbour had been part of the original Concept Plan in 2007, the Minister could not have approved it”. [SP Review p36]

“The hotel could be, and was, approved in 2010, however, because all of these provisions could, and have been, overridden by an amendment to the SEPP (Major Development) which could be, and was approved by the Governor in Council on the recommendation of the Minister. The provisions of the SEPP, are that the Minister can decide, even without any process (cl 8(6)), to include any area within the provision of the SEPP”. [SP Review p36]

41. It appears the PAC is being requested to again revisit the Minister’s actions and approve as a Concept Plan modification even more uncertain land use (of at least 3000m² GFA) protruding into the Harbour through the same ‘poor policy’ avenue previously used to approve the hotel on the pier at MOD 4. If there is to be a pier, it should have no GFA allocated to it – it should be a people’s pier without building. The pier over water in Darling Harbour, even without a substantial building on it, should not be counted as open space in any application or future PAC advice as it distorts the original site area and meaning of open space.

Should the PAC rely on the Department’s Assessment (SEA) to make a robust approval?

42. The PAC should not rely on the Department’s Assessment (SEA). Setting aside the legal and policy issues referred to, evaluation reversals compared to earlier MODs, omissions, the Department’s Report, does not provide the PAC with sufficiently balanced information. The constant siding with the proponent on weak grounds in concert with the almost complete rejection of the expert DAP Review by relatively inexpert planning staff has no similar precedent, other than the perhaps precedent involving the MOD 4 Report which, being acted on by the Minister as recommended by the Department, was subsequently found to be ‘poor public policy’ in favour of the proponent and the decision exposed to judicial review.

43. Concerns with the Report have been noted by the community, planners and the media. A recent report in the Sydney Morning Herald on 9th April 2016 *Icon of impartiality put to test by Packer’s casino*, makes the following observations –

“What is surprising is the Department’s response. Planning bureaucrats took Crown’s side on each of the points over the considered view of the design experts whose job it was to advise them. It’s a heavily contested area, but it is difficult to think of a more blatant example of a Department being captured by commercial interests. Or perhaps it is more accurate to think of it this way: a Department being heavily influenced by a furious lobbying campaign”. [SMH News Review p35 April 9-10]

44. Large projects based on widely consulted concept plans are necessarily staged over time. The responsibility of planning consent authorities is to balance the public and private interests through those stages; to manage change yet protect the concept
and project integrity through development stages. Once commenced, and especially after significant public involvement and engagement, it is not appropriate to trade away the already banked public outcomes.

45. The Report lacks detailed justification or reasoned analysis. It is at best descriptive and relies heavily on the proponent’s responses and challenges to the expert DAP’s advice. It does not evaluate what is lost or given up, yet the proponent has no legal, property or zoning permissions to rely on in gaining it. Many of the Report’s conclusions – that the sweeping changes proposed are on balance generally reasonable and acceptable – are given without proper justification. Rather a repetitive preference is given to the proponent’s rebuttal of the Department’s own experts. As previously noted, the transitional regulations around public interest and site suitability are not referenced nor adequately covered in the assessment.

46. As a result, the Report does not consider genuine options or how the proposal might be adjusted, sited or mitigated (except in the most minor and insignificant ways) to maintain the broader public interest and recreational benefits already gained. The planning benefits in the form of waterfront parkland have already been obtained for generations of Australians who will neither be a VIP resort member or a 6 star hotel guest. Rather, the assessment ultimately supports the height as is, scale as is and location as is, of what is an overly prominent exclusive tower on foreshore parkland where there are no rights, strategic planning aims or any specific metro plan justifications for this site choice.

47. There has also been inconsistent assessment and messaging of the Barangaroo Concept Plan modifications by the Department to date. It demonstrates that the Department’s Report fails to acknowledge the origins and analysis that went into the previous Concept Plan assessments or the existing views of the PAC on maximum floor space and other matters. Refer to Attachment B.

48. Overall, the Report does not meet the expected requirements for a balanced assessment under the EP&A Act and the PAC should exercise appropriate caution. Independent assessment and expertise is required for development assessment and where the Department has played the function of planning consultant for a Government-led project it is strongly advisable that an independent assessment and determination is made as suggested in the City’s submission.

Has the Affordable Housing allocation been properly assessed?

49. We suggest not. The developer is contractually required at Clause 9.19 (a) in the Project Development Agreement (PDA) to provide at a minimum 2.3% of residential developable GFA as Key Worker Housing in buildings situated along Hickson Road.

50. Clause 9.19 (b) of the PDA entitles the BDA at its election to request a further 1,518 m² of key worker housing at an agreed price structure (absent development profit) to be paid by the BDA.
51. Clause 9.19 (c) of the PDA enables the developer and the BDA to consider other opportunities for providing Key Worker Housing within blocks 1, 2, 3 and 4 on the basis that it is additional to the permitted GFA at the time and is built without a normal developer return.

52. Since the Barangaroo PDA was agreed in 2010, the NSW Government released its 2014 metro plan *A Plan for Growing Sydney*. At Action 2.3.3 under *Deliver More Opportunities for Affordable Housing* the Plan says –

“Government will provide affordable housing on Government-led urban renewal projects and on Government-owned sites to meet the shortfall of affordable housing”

53. This is a clear and unequivocal statement. The Department does not reference the need or the PDA which contemplates an increase in affordable housing on the site for key workers. The strategic intent in the 2014 Metro Plan is also not referenced in the assessment as it relates to the development of Government-owned land. No assessment is made of the likely generation of key workers by the 24 hour operation of the mixed-use resort complex in addition to the hospitality and security staff that will be required. The very nature of the 24 hour tourist related operation (appropriately sited) would very likely draw on the services of key workers.

**Conclusion**

54. The PAC’s role includes improving transparency and independence as the key planning body in NSW. As an impartial determining authority, the City requests that the PAC thoroughly consider the legal, process and merit issues that surround the modification application for a hotel on public parkland and interrogate the reduction of public benefits arising from the proposal.