



Land and Environment Court
New South Wales

Case Name: IOF Custodian Pty Limited atf the 105 Miller Street
North Sydney Trust v North Sydney Council

Medium Neutral Citation: [2023] NSWLEC 1207

Hearing Date(s): 2, 5-9, 12-16 and 21 December 2022; 17-19 January
2023

Date of Orders: 03 May 2023

Decision Date: 3 May 2023

Jurisdiction: Class 1

Before: Dixon SC

Decision: The Court orders:
(1) The appeal is dismissed.
(2) Development application no. 147/20 for the
demolition of the existing MLC Building and
construction of a new 27-storey commercial building at
105-153 Miller Street, North Sydney is determined by
refusal of consent.
(3) The exhibits are returned except for A, B and 1.

Catchwords: APPEAL – development application – demolition of the
heritage item being the MLC Building in North Sydney’s
CBD – heritage significance

Legislation Cited: Conveyancing Act 1919, s 88K
Environmental Planning and Assessment Act 1979, ss
1.3, 4.15, 8.7, 8.11
Heritage Act 1977, ss 4A, 31, 32, 34
Land and Environment Court Act 1979, s 39
North Sydney Local Environmental Plan 2001, cl 48(5)
(repealed)
North Sydney Local Environmental Plan 2013, cll 1.2,
4.3, 4.6, 5.10, 6.4

Cases Cited:	<p>Bunnings Properties Pty Ltd v Ku-ring-gai Council (No.4) [2017] NSWLEC 1238</p> <p>Chief Executive, Office of Environment and Heritage v Clarence Valley Council [2018] NSWLEC 205</p> <p>IOF Custodian Pty Limited atf the 105 Miller Street North Sydney Trust v Special Minister of State [2022] NSWLEC 86</p> <p>Kentucky Fried Chicken Pty Ltd v Grantidis (1979) 140 CLR 675; [1979] HCA 20</p> <p>Milne v Minister for Planning (No 2) [2007] NSWLEC 66</p> <p>PJM Group Pty Ltd v Ku-ring-gai Council [2022] NSWLEC 1170</p> <p>Stannards Marine Pty Ltd v North Sydney Council [2022] NSWLEC 99</p> <p>Zhang v Canterbury City Council (2001) 51 NSWLR 589; [2001] NSWCA 167</p>
Texts Cited:	<p>Australian Standard 1170.4 Structural design actions, Part 4: Earthquake actions in Australia</p> <p>Heritage Office and Department of Urban Affairs and Planning, 1996, Heritage Assessments, NSW Heritage Manual</p> <p>North Sydney CBD Public Domain Strategy 2020</p> <p>North Sydney Development Control Plan 2013</p> <p>The Burra Charter: The Australia ICOMOS Charter for Places of Cultural Significance 2013</p>
Category:	Principal judgment
Parties:	<p>IOF Custodian Pty Limited atf the 105 Miller Street North Sydney Trust (Applicant)</p> <p>North Sydney Council (Respondent)</p>
Representation:	<p>Counsel:</p> <p>P Larkin SC with H Grace (Applicant)</p> <p>T Robertson SC with R White (Respondent)</p> <p>Solicitors:</p> <p>King & Wood Mallesons (Applicant)</p> <p>HWL Ebsworth Lawyers (Respondent)</p>
File Number(s):	2021/245302
Publication Restriction:	Nil

JUDGMENT

- 1 In 1815, Convict architect, Francis Greenway envisaged a bridge being “thrown” from Dawes Battery to the north shore, “whereupon a town would be built, which, with those already rising on the harbour's southern rim, will form a grand whole such as will surprise anyone entering the Harbour”.
- 2 The MLC "skyscraper" (MLC), when erected in 1957 and viewed from the same perspective, dominated the North Sydney skyline and boldly declared modernist planning daring use of materials and technology as well as function-over-fussy-ornamentation. It was a contemporary architectural statement described at the time as "a glossy beacon of modernity".
- 3 Today, the mid-twentieth century building seems to have shrunk; to have retreated from the busy Miller Street thoroughfare; to have been diminished by the competing offices and apartment blocks that obscure it. Yet, in that context, the Council argues that the MLC's heritage value is not only retained but heightened. Moreover, having regard to its heritage significance, the Council submits that the permanent, irreversible loss of the MLC, as proposed by the applicant, IOF Custodian Pty Limited at the 105 Miller Street North Sydney Trust, in this development application appeal will cause significant harm to the environment. It contends that the proposed development is in fundamental conflict with the aims in cl 1.2(2) of the North Sydney Local Environmental Plan 2013 (NSLEP), and the objectives as set out in cl 5.10(1) which seek to conserve and protect the built heritage of North Sydney.
- 4 Notwithstanding the acceptance of the MLC's considerable heritage significance, the applicant contends that the existing building has reached the end of its design life. As such, it submits that the public interest in developing the site and the financial burden of refurbishing the building, either in whole or part, mean that it is “not reasonable to conserve” the heritage item. By reference to Section 13.8 of the North Sydney Development Control Plan 2013 (NSDCP) and the evidence more generally, the applicant claims that no rational user of land is likely to refurbish the building, with the consequence that the building will be land banked - to degrade progressively at increasing levels of vacancy on this strategically crucial site in North Sydney's CBD (Tcpt,

21 December 2022, p 1004(26-31)). On that basis, the applicant argues that the retention of the MLC is not economically feasible for this applicant, or any future hypothetical owner. Therefore, the public interest in conservation is outweighed by the public interest in redeveloping the site as proposed.

- 5 In appealing from the Council's deemed refusal of its DA (147/20), the applicant seeks development consent for the demolition of the heritage item and consent for the proposed replacement building. It submits that the two components of its application are interrelated because in determining whether it would not be reasonable to retain the existing heritage building, the Court needs to have regard to the public interest in, and the strategic importance of, the proposed development (ACS dated 23 December 2022 at par 5). For its part, the Council contends that only if the Court grants consent to the demolition of the MLC is it necessary to determine the merits of the proposed new building for the site (COS dated December 2022 at par 56).

Decision

- 6 For the reasons that follow, I have decided to refuse development consent to the application and to dismiss the appeal.

The proposal

- 7 When proposing demolition, the notation to Section 13.8 of the NSDCP invites the lodgement of plans for the replacement building so that the applications can be assessed concurrently. The applicant has taken up this invitation and lodged development plans for a proposed replacement building. The updated Statement of Environmental Effects (SEE), filed on 23 December 2021, describes the proposal in the following terms:

- “• Site preparation works including demolition of all existing structures, bulk excavation and tree removal.
- Construction and use of a 27-level commercial building, comprising:
 - publicly accessible lower ground floor and ground floor containing retail tenancies, commercial lobby, passive recreation and dining facilities;
 - 24 commercial office levels; and
 - mid and top of building plant levels.
- Embellishment of the ground plane with a significantly enhanced public domain, including:

- redesigned public open space fronting Miller Street; and
- redesigned interface and increased area to Brett Whitely Place.
- Construction and use of two basement levels, including:
 - driveway access from Denison Street;
 - 123 parking spaces; and
 - 802 bicycle parking spaces and associated end of trip facilities.
- Extension and augmentation of services and infrastructure as required.”

(ACS at par 2)

- 8 Further detail for the new building can be understood from the architectural plans prepared by Bates Smart (Ex A at Tab 4) and the updated SEE prepared by URBIS (Ex A at Tab 35) and the Design Report (Ex A at Tab 5).
- 9 The proposal will have a maximum building height of RL 188 (180m) which is an increase of 63m over the site’s mapped building height of RL 125 under cl 4.3 of the NSLEP. As the development will not generate additional overshadowing to the Miller Street Special Area and reduces shadowing to Brett Whiteley Place zoned RE1, when compared to the current position, Clause 6.3(3) of the NSLEP makes a concession for the height of a building located in the North Sydney Centre that exceeds the maximum mapped height under cl 4.3 where any increased overshadowing does not have an impact in the circumstances described in the subclause.
- 10 Clause 6.4 of the NSLEP, with reference to the North Sydney Centre Map stipulates a 12.5 m setback for Miller Street. There is a proposed awning which sits over the setback more than 1.5m in height. The Council also argues that the building works in the basement at levels 1 and 2 and Denison ground floor retail contravene the provision.
- 11 A request to vary the standard in cl 6.4 under cl 4.6 is before the Court (Ex A at Tab 35 (Appendix N)).

Background

- 12 The background against which the DA is to be considered is relatively uncontentious. The following summary provides context to the parties’ competing submissions. As the principal but not the sole focus of the evidence was directed to the heritage significance of the MLC, much of the background

material to which I refer is directed to the significance that has historically been directed to that building.

The site and locality

- 13 The site is legally described as Lot 2 in DP 792740, and has a street address at 105-153 Miller Street, North Sydney. The Lot is rectangular in shape with a total area of 6640m². There are two street frontages: Miller Street to the west, and Denison Street to the east. Each road frontage is approximately 100m. Two public open spaces adjoin the site—Brett Whiteley Place to the south, which contains several access connections to the Greenwood Arcade and onto North Sydney Station; and the Miller Street Special Area (incorporating on the site) to the west facing Miller Street.
- 14 The site is occupied by an existing commercial building (the former MLC building) and associated turfed public domain. The MLC is 14 storeys and has a modular mass with a large north south oriented western wing, a central core and a smaller eastern wing setback from the southern boundary.
- 15 The site is located within the B3 Commercial Core zone pursuant to the provisions of the NSLEP. It is part of the Central Business District Neighbourhood, and also part of the North Sydney Planning Area pursuant to the Area Character Statement provisions of the NSDCP.
- 16 The site forms part of an important intersection comprising the corner of Miller Street, the Pacific Highway and the now closed section of Mount Street (Brett Whiteley Place). Three of the four buildings forming this intersection are heritage items identified in the NSLEP, namely the MLC on the site, the Greenwood Building at 101 Miller Street, and the Post Office Building at 92 Pacific Highway. These heritage buildings have been identified as forming a critical character and identity for North Sydney in the CBD.
- 17 There are also a number of existing, and under-construction commercial developments proximate to the site including:
 - to the east at 1 Denison Street - a 37-storey commercial office building (under construction);

- to the north at 155-189 Miller Street - the Victoria Cross Metro Station site including a 57-storey commercial office building above the station development (under construction);
 - to the northwest at the corner of Berry Street and Denison Street at 65 Berry Street is an existing 20-storey commercial building;
 - to the northeast at 79-81 Berry Street is a mixed-use development (Beau Monde); and
 - to the west at 173 Miller Street is the Northpoint Tower comprising a 43-storey commercial building.
- 18 It is apparent that the Council's planning controls and strategies are all centred on the retention of the MLC and acknowledge and celebrate its relationship with the other heritage items on the other corners. And, with construction underway for the Victoria Cross Metro Station immediately to the north of the site, the controls anticipate that the site will form an important connection between the existing North Sydney Rail Station and the future Metro Station. In that regard the North Sydney CBD Public Domain Strategy dated 22 September 2020 (Strategy), which sets the public domain strategy for North Sydney, seeks to develop a chain of laneways that will connect the CBD, north to south, and link the existing and proposed spaces. Relevantly, Denison Street and Elizabeth Place are identified as part of this chain of laneways.
- 19 To accommodate the increased flow of pedestrians due to the new station, the Council intends to pedestrianize some of these laneways by rearranging traffic flows and closing parts to traffic completely. Part of this work has already commenced with the construction of 1 Denison Street and the Metro Station southern portal. At p96 of the Strategy, it shows Denison Street from Mount Street through to the new link in the Metro Station to become pedestrian only. Page 3 of the Strategy deals specifically with Denison and Spring Streets and notes that works in these streets are identified as a high priority, so the laneways are upgraded for the opening of the Metro Station.
- 20 The Strategy also records that the treatment of the laneway system is to improve routes and provide activation with outdoor opportunities for work, dining, and retail. The intention is to make the CBD more pedestrian friendly. To that end, the Strategy includes design principles which seek to activate the southern part of Denison Street with awnings and new trees – with the intention

of offering an urban space, with activation on the edges (Strategy at pp 18-21). The Strategy also deals with capturing the sun in the southern portion of Denison Street in winter.

- 21 While the Council's planning expert gave oral evidence that the implementation of the Strategy in this area is not imminent nor certain and would require Transport for NSW approval (Tcpt, 9 December 2022, pp 407(49)-408(8)), the Strategy is relevant as part of the public interest because the concept plan shows the southern portion of Denison Street at the rear of the site as a trafficable carriageway and the top end pedestrianised. As I observed at the site view and as identified in the image in Figure 1 of the Traffic JER (Ex 18 at par 44), there is an existing on street loading dock, and car park entry for the MLC in the northern end of Denison Street in the area intended to be pedestrianised. The proposed building to replace MLC seeks to relocate the car park entry for that building to the south. The applicant contends that this will materially improve the Council's ability to deliver pedestrian infrastructure in Denison Street compared to the current position. The applicant contends that the unacceptable and unsafe conflict of cars from the loading dock/car park of the MLC and pedestrians from the Metro Station when operational will persist unless the MLC is demolished as proposed (ACS at par 263). It submits that this important public benefit weighs in support of demolition of the MLC in this appeal.
- 22 The Council contended that the applicant could obtain access to the MLC car park and avoid any car/pedestrian conflict via a breakthrough wall from the adjoining Victoria Cross (157 Miller Street) site car park as anticipated by the conditions of the Victoria Cross consent.
- 23 Notwithstanding the evidence demonstrating the significant practical difficulties associated with accessing the MLC car park from Victoria Cross – its unworkability because of non-compliances with Australian standards for a facility of this nature (Tcpt, 8 December 2022, p 310(19-21)), and the fact that a MRV could not exit the site without impacting a structural column (Ex H at p 2; Tcpt, 8 December 2022, p 308(16-19)) there is no opportunity currently for such legal access. The evidence is that the applicant could not progress this

option because the adjoining owner, Victoria Cross did not agree to such access, and cannot be required to give access and/or an easement where it is not “reasonably necessary for the effective use or development” of the site: s 88K of the *Conveyancing Act 1919*. There is an existing driveway access, and the applicant should not be required to gain access via 157 Miller Street as a precondition to developing its land.

The MLC

- 24 The MLC was built in 1957 and has been listed in the various local environmental planning instruments applicable to the site as a heritage item since 1989, well before the applicant purchased the site. It is currently listed in Sch 5 of the NSLEP as a heritage item of State significance. (I note that the evidence refers to the listing as being of local significance. However, on 30 June 2021 the listing was amended under the NSLEP to be a heritage item of State significance). The Statement of Significance relevant to that listing describes the Item in the following terms:

“The first high rise office block in North Sydney and the largest for a number of years after its construction. Seminal building on subsequent high-rise design in Sydney and utilised construction and structural techniques not previously used in Australia. First use of curtain wall design; first use of modular units in Australia. Major landmark in North Sydney. The interior, exterior and landscape setting are of significance.”

(Ex A at Tab 36)

- 25 In summary, the NSW Heritage Inventory entry for the MLC building now includes the following summary Statement of Significance:

“The first high rise office block in North Sydney and the largest for a number of years after its construction, the MLC Building in North Sydney is a seminal building on subsequent high-rise design in Sydney and utilised construction and structural techniques not previously used in Australia. With the first use of a curtain wall design and the first use of modular units in Australia, its use of exceptional modernist building materials in the curtain wall façade and terracotta glazed bricks are representative of the Post-War International style of architecture that predominated in these early commercial high-rise buildings.

The architect, Walter Osborn McCutcheon’s desire for his buildings to integrate modern art within the fabric of the design is demonstrated by the inclusion of significant artists such as Andor Mészáros and Gerald Lewers. As a result, and despite subsequent modifications, the interior, exterior and landscape setting are of high aesthetic, technical and representative significance.

The building is also of historical, associative and aesthetic significance as an important work by a significant firm of architects Bates Smart and McCutcheon, and master builders Concrete Constructions, and as a landmark site at North Sydney which signified the transformation of the centre of North Sydney from Nineteenth Century town to the second commercial hub of metropolitan Sydney from the late 1950s.”

(COS at p 9)

- 26 As the listing identifies, the architect, Walter Osborn McCutcheon of Bates Smart & McCutcheon, Melbourne was a prominent Australian architect and an acknowledged leader of modern design in a post-war period. His MLC “national flagship headquarters” as described in the Conservation Management Plan (CMP) and by the evidence of David Logan, an expert called by the Council, is said to have been influenced by his time in the New York office of Skidmore Owings and Merrill, and the design of the UN Secretariat Building (1950), Lever House New York (1952), and Le Corbusier: Centrosoyus in Moscow (1928-33) and the Ministry of Agriculture in Rio De Janeiro (1936-42).
- 27 McCutcheon and Bates Smart’s work for the MLC company over the years, is documented in a series of interviews with former Bates Smart engineers and architects and is the subject of a 1998 unpublished essay, by Professor Alan Ogg entitled “MLC Buildings” (CMP at Appendix 12). In the essay the author credits McCutcheon with changing the established norms of the design and construction of Australian office high rise. It also records McCutcheon’s misgivings about the unexpected heat load gained through the curtain wall, as a consequence of the 100m long elevation facing due east and due west and the impact on the structural design and the cost of the build.
- 28 This issue with the orientation of the building has been the subject of academic comment by Associate Professor Jennifer Taylor and others (Ex A at Tab 5). They report that McCutcheon sought to avoid the heat problem in the future by issuing an edict within the Bates Smart practice “...that no building designed by BSM was to be orientated in the east west direction” (CMP at Appendix 12 p 8). Mr Vivian, the applicant’s architect in oral evidence and in his Design Report referred to this issue, and after describing it as “...a mistake in the siting of the building” offered this as a further reason in support of the demolition option. However, Mr Vivian’s view about the orientation issue (“the mistake”) has not diminished the assessed heritage significance of the building today nor

did it displace the reported adulation for the unveiling of the MLC building which on completion in 1957 was praised for the following features:

- A triumph of light weight construction (Ex 12 at Tab 11 (c))
- At 14 storeys high the largest steel structure building in the Southern hemisphere
- A headquarters building for the MLC with 42,000m² of office space
- A building with a rigid steel frame with hollow steel floors and articulated cores
- Australia's largest commercial air conditioning installation
- A curtain wall of glass and prefabricated anodized aluminium spandrels
- Vermiculite plaster fireproofing, stamped metal ceilings
- Double glazing using anti actinic heat resisting glass outer and plate glass inner, ten inches apart
- Facing materials including glazed terracotta, marble, granite and mosaic tiles
- Public art incorporated into the building and its curtilage (Ex 12 at Tab 6)

Conservation Management Plan (CMP)

- 29 The CMP for the MLC was prepared by Jackson Teece Chesterman Willis in May 1998 (Ex 12 at Tab 4). It was commissioned by the former owner and compiled by Mr McKenzie following consultation with several people including Andrew McCutcheon, the son of the original architect, and the architectural historian Professor Alan Ogg. (Both Professor Ogg and Mr McKenzie are non-expert objectors to the application).
- 30 The CMP documents an assessment of the exterior and interior of the MLC, carried out in accordance with accepted methodologies and adopts the definitions in the Burra Charter: The Australia ICOMOS Charter for Places of Cultural Significance 2013 (Burra Charter) (Ex 12 at Tab 4 p 9 par 1.2 and p 125 par 7.2). Relevantly, it identifies the building and its curtilage as having National Architectural, Historic and Technical Heritage Significance, and Regional Social Significance due to:
- the pioneering excellence and influence of its architectural conception;
 - its association with the expansion of the MLC company; and
 - its ground-breaking use of lightweight materials, prefabrication, fire-proofing materials, air conditioning and modular design.

(Ex 12 at Tab 4 CMP p 8).

- 31 The executive summary in the CMP describes the MLC in the following terms:

“The building was designed by Bates, Smart & McCutcheon, arguably Australia’s foremost practitioner of commercial office buildings in the International Modern Style then so favoured by corporations in Australia, USA and elsewhere. The design owes much to the influential projects and writings of Le Corbusier, Mies and Gropius as well as the architectural processes adopted by the major New York based commercial architectural practise of Skidmore, Owings and Merrill. Designed during 1954, demolition commenced in early 1955 with approval from North Sydney Council in July 1955 followed by completion in July 1957. It was officially opened by the Prime Minister of Australia R G Menzies in August 1957.

The building is in essentially good condition having been well and properly maintained by MLC since completion of construction. In response to various requirements, it has undergone a series of changes, the most notable of which are the strip out of the internal finishes to the office floors, the new entrance configuration at Miller Street, the new shops configuration at Denison St, the new street awnings at Mount and Denison Streets and the infill of the MLC staff spaces at Ground Floor level...”

(CCS at par 58)

- 32 The CMP acknowledges the MLC Sydney as the largest of the three MLC office buildings designed by Bates Smart & McCutcheon, Melbourne, in association with local architectural firms, and built in the years 1954-57. The CMP also records that the MLC building in Adelaide, Beacon House is retained as a heritage item on the City Register, but the Perth building has undergone considerable change.
- 33 As to be expected, the CMP outlines courses of action to be followed in the consideration and development of long-term use, care and maintenance of the MLC such that its significance is retained and enhanced but not diminished (Ex 12 at Tab 4 p 125 par 7.1). To that end, the CMP incorporates Conservation Policies which have been formulated on an understanding of the heritage significance of the building and its curtilage and the need to permit and encourage the future use of the building in such a manner as to limit the impact of unacceptable changes.
- 34 The CMP records that the Policies seek to:
- retain and enhance the character and quality of the building and its site
 - facilitate introduction of uses compatible with the character and quality of the building and its site

- nominate intrusive components in need of modification or removal
- nominate a person responsible for the long-term co-ordination of conservation processes.

- 35 Guided by the articles of the Burra Charter, the central tenet of the CMP is “to do as much as is necessary to care for the place and to make it useable but otherwise change it as little as possible so that cultural significance is retained”.
- 36 The heritage provisions in Section 13 of the NSDCP, which are relevant, also expressly acknowledge the influence of the Burra Charter. The NSDCP states:

“Council acknowledges the principles and practices recommended by the Burra Charter in the conservation of items of cultural heritage and have informed the preparation of this section of the DCP. The Burra Charter provides guidance for the conservation and management of places for those who provide advice, make decisions about, or undertake works to places of cultural significance, including owners, managers and custodians.

When preparing a development application, the principles of the Burra Charter should be applied. It advocates a cautious approach to change: *do as much as is necessary to care for the place and to make it useable but otherwise change it as little as possible so that cultural significance is retained*. In the event of any inconsistencies between the Burra Charter and the DCP, the DCP will prevail.”

(emphasis in original) (CCS at par 22)

Heritage significance grading in the CMP

- 37 Spaces, elements, and fabric of the MLC have been graded to assess its heritage significance using the terminology and methodology of the Burra Charter and the Heritage Assessments, NSW Heritage Manual – Heritage Office and Department of Urban Affairs and Planning, 1996. The grading is based on documentary evidence, physical evidence, and comparative assessments in line with prescribed criteria (Ex 12 at Tab 4 CMP p 106). These principal spaces and elements of significance are identified on a series of architectural plans (CMP at par 5.4) that need to be read with the Schedules in Section 5.4.2 of the CMP.
- 38 Spaces, elements, and fabric are said to be significant if one or more of the following four principal criteria are evident: Aesthetic, Historical, Technical/Research and Social. (There are also some additional matters of representativeness, and rarity among other criteria).

- 39 The identification of spaces, elements, and fabric as having heritage significance has not frustrated considerable adaptation of the MLC for contemporary use. The evidence is that during the period of its ownership, the MLC company, undertook works. These works were generally undertaken in response to three factors: changing commercial needs generated by development of the surrounding commercial district; changes in work practices and conditions within the building; coupled with evolution of building regulations (Ex 12 at Tab 4 CMP p 107). The changes, however, were carried out under the Conservation Policies within the CMP. In that regard, it is to be noted that General Policy 1.2 in the CMP provides that “*The Statement of Significance shall be accepted as one of the bases for future planning and work*”. General Policy 1.4 provides that “*Before any works are undertaken on the building or its site, gather all evidence and seek further documentary and physical evidence as necessary in order that all future decisions related to conservation works have a sound basis in fact*”. General Policy 1.5 requires “*All work shall be undertaken on the basis of known evidence; conjecture, guesswork or prejudice is unacceptable*”. General Policy 1.8 provides that “*the treatment of existing structure, components, spaces, fabric, services, finishes, fittings and contents shall be in accordance with their assessed significance and as follows:*”

Assessed significance	Acceptable Conservation Processes
Significant	<p>Preservation, restoration or reconstruction.</p> <p>Adaptation may be acceptable provided:</p> <ul style="list-style-type: none"> - the proposed use is consistent with past use(s) and - the quantum of change resulting is minimal in scope and entails minimal impact on adjoining or adjacent significant spaces, fabric and services.
Some significance	Preservation, restoration, reconstruction or adaptation.

Slight significance	Preservation, restoration, reconstruction or adaptation.
Intrusive	Modification or removal in order that the significance of the building is enhanced, but subject to existing and future use requirements.

(Ex 12 at Tab 4 CMP pp 126-7)

- 40 Policies for Future Uses – Policy 2.1 provides “*Uses with access, subdivision or services requirements which would require major intrusion into, and alterations to, significant fabric and result in distortion of the character of the building are unacceptable*”.
- 41 Policy 4.5 provides “*Upgrading of the building in response to the provisions of the Building Code of Australia shall take into account the heritage significance of the building*”.
- 42 Policies for Management - Policy 6.2 provides that there “*shall be ongoing commitment to make adequate financial resources available for the engagement of persons able to provide relevant and experienced conservation advice*”.
- 43 Policy 6.4 provides that “*These shall be an ongoing commitment to make adequate financial resources available for the development and implementation of a planned maintenance program to involve regular inspections and testing of all fabric and services with prompt follow-up maintenance and repair if needed*”.
- 44 Policy 6.5 provides that “*Where network or maintenance is proposed, undertake any necessary additional research before or during planning for the work in order that the decision-making process is properly and adequately informed*”.
- 45 And, under the heading Policy for Removed and Demolished Items, the CMP Policy 8.1 explains that – “*in order that the significance of the place is not diminished it is essential that items and fabric be professionally assessed*”.

- 46 Finally, the CMP envisages that the plan will be reviewed as the need arises but no later than 2003. The evidence is that no review has taken place.

Physical condition of the MLC as described in the CMP

- 47 At the time the CMP was prepared, the MLC had already stood for 40 years. Overall, it was found to be in good condition, having been well and properly maintained both internally and externally. Nonetheless, it is fair to say that some critical and major building elements were identified as needing substantial remedial work in order that the service life, particularly of the building envelope, be extended (CMP at p 123 par 6.4). In particular, the terracotta cladding, glazed aluminium curtain walls were assessed as in fair condition while the roof membrane which was assessed as in fair to poor condition.
- 48 Appendix 10 to the CMP records the MLC building maintenance works and costings undertaken by Lendlease, the owner between the years of 1987-1996.
- 49 Schedule 11 of the CMP lists the building approvals for the MLC. It records that in May 2006 the Council approved DA 1213/96 for façade refurbishment at a cost of \$960,000.
- 50 However, there is limited evidence of the works undertaken to renew any of the elements of the building until 2001. Albeit, as the Council submits, the owner of the building in 2019 held the EVC Preliminary Refurbishment Study (EVC) for the MLC (Ex D) which identified services that would be out of date and in need of renewal and other services that had one or two years left.

The 2001 works to the MLC under the CMP

- 51 That said, important changes to the MLC did take place in 2001 when, by reference to the CMP, the restoration of the façade of the building was directed by Bates Smart, and the renovation of the interior by Bligh Voller Neild, architects as part of the Campus MLC redevelopment. Restoration and renovation work that in 2002 saw the Campus MLC development win the Royal Australian Institute of Architects (RAIA) NSW Award for Interior Architecture and the 2002 the RAIA National Interior Architecture Award for the refurbishment of the building. The Jury Citation describing the works as a “...masterstroke of the interior redesign was the interconnecting glass wall stair

rising through the heart of the building”. A design element described as “...taking advantage of the original sophisticated steel structure to link the floors thereby reinforcing the culture of the teamwork and camaraderie visually and physically.”

- 52 In determining whether to grant consent to the demolition and new build option proposed in the DA, the Council contends that the MLC’s current significance must be considered in light of the MLC’s recent contribution to Australian office design, and its proven ability to be sympathetically updated to meet modern requirements, as demonstrated by the 2002 Architecture Awards.

The NSW Heritage Council

- 53 In addition to the initial locally identified heritage significance, as previously stated the Heritage Council has determined that the MLC is of State significance (Ex 8 at p 792; CCS at par 41), because it has assessed that the building satisfies six of the seven criteria under s 4A(4) of the *Heritage Act 1977* (Heritage Act), with the heritage values of the Miller Street wing being of particular significance (Ex 13 at Annexure P p 491).
- 54 On that basis, on 9 February 2021, the Heritage Council recommended that the Minister for Heritage list the MLC on the State Heritage Register. Before making that recommendation, the Heritage Council notified the applicant of its intention to list the building and, as I understand the evidence, the applicant objected to the proposed listing. As a consequence, the Minister commissioned a peer review of the applicant’s submission. The peer review comprised a heritage significance assessment by PTW Architects and an economic feasibility assessment by URBIS. As it happened, the peer review process confirmed the State significance of the MLC (Ex 13 at Annexure P pp 205 and 729).
- 55 On 21 February 2021, the Minister requested, pursuant to s 34(1)(b) of the Heritage Act, that the Independent Planning Commission (IPC) review the recommendation for listing on the State Heritage Register (Ex 13 at p 491). In May 2021, the IPC recommended that the MLC be listed on the State Heritage Register. Its recommendation was cognisant of the evidence of the applicant objecting to the listing.

- 56 On 31 May 2021, the Special Minister of State directed the listing of the MLC on the State Heritage Register pursuant to s 34(2) of the Heritage Act. On 4 June 2021, the Heritage Council gave notice in the Gazette that the item known as the “MLC Building North Sydney (former)” had been listed on the State Heritage Register.
- 57 On 15 July 2022, the applicant filed Class 4 proceedings challenging the Minister’s decision. It contested that the Minister had acted in breach of his obligations in a material way by failing to consider relevant matters under subss 32(1)(c) and 32(1)(d) of the Heritage Act: *IOF Custodian Pty Limited atf the 105 Miller Street North Sydney Trust v Special Minister of State* [2022] NSWLEC 86 at [105]. The Court upheld the applicant’s claim declaring that the MLC listing on the State Heritage Register was invalid and of no effect and directed (the Class 4 decision at [109]) that the MLC listing be removed.
- 58 Given that the Court’s decision was founded upon a procedural defect in the listing on the State Heritage Register, that determination did not alter the determination by the Heritage Council that the MLC is of State heritage significance. In that regard, I accept that s 39(4) of the *Land and Environment Court Act 1979* requires the Court to have regard to any relevant Act, which includes the Heritage Act. The Heritage Act provides a statutory foundation for ascribing State significance to a building independent of the item being listed by the Minister in the State Heritage Register under Pt 3A subss 31(1) and (2) of the Heritage Act. Accordingly, the heritage determination retains force under the LEP and EPA Act, the Heritage Council’s determination of the MLC’s State heritage significance, as outlined in its most recent submission dated 22 November 2022 and provided pursuant to s 21(2)(b) of its Act, affirming the Statement of Heritage Significance recommended by it to the former Minister, is relevant in weighing my assessment of this DA (Ex 4 at p 460).

Objector evidence (evidence from submitters who are not experts in the proceedings)

- 59 The heritage significance of the building is also recognised on a number of professional non-statutory lists such as the Australian Institute of Architects Register of Significant Twentieth Century Architecture (Item 105) (Ex 13 at par 37). This Register records the Item in the following terms:

“The MLC Building is an outstanding example of modern architecture in Australia in the post – World War 11 period being the first high rise office building incorporating “light weight” construction, curtain wall façade & modular design.”

- 60 I am required as part of the public interest to take account of the various submissions including those from objectors such as the Institute of Architects, the National Trust of Australia (Ex 13 at pars 45-47), and Docomomo Australia (Ex 13 at pars 38-43), and other eminent architects and academics and local submitters who regard the MLC as having significant heritage value and object to its demolition on that basis (Ex 42 and Ex 4).
- 61 Some of these objectors spoke to their earlier submissions at the site view. Mr Frank Howarth, the Chair of The Heritage Council of New South Wales was one of them. He referred to the Statement of Significance for the LEP listing and its acknowledgment that the building is widely considered to be a seminal work in the development of high-rise buildings in Australia for its use of ground-breaking design and construction features. He highlighted the building’s distinctive curtain wall façade and terracotta glazed bricks, light weight steel framework and the use of modular open plan spaces. Mr Howarth also emphasised the building’s historical value as an important work by the noted architectural firm Bates Smart & McCutcheon (Ex 42 at Annexure A).
- 62 Ms Jane Alexander spoke on behalf of the National Trust of Australia (Ex 4 at p 87; Ex 42 at Annexure B), as did Professor James Weirick, Emeritus Professor from the School of Built Environment, Faculty of Arts, Design & Architecture at the University of New South Wales, (Ex 4 at pp 290 and 449; Ex 42 at Annexure C). Each of these objectors endorsed the Heritage Council’s assessment of the MLC’s State heritage significance and critiqued the costing analysis of the three development options in the Quantity Surveyors (QS) report dated 31 August 2022 prepared by Stephen Bolt of WT Partnership filed with the DA. Each non-expert objector presented a detailed submission for the retention and refurbishment and conservation of the building and opposed the demolition option with Professor Weirick heralding the building as:

“...landmark and to be celebrated as a great work of architecture and a great work of 20th Century urbanism, as magnificent in the 21st century as it was at its official opening by Prime Minister Menzies on 22 August 1957, as the

largest office building in Australia. A wonder of its time, and it is still the most iconic office building in north Sydney today”.

- 63 Dr Scott Robertson, President of Docomomo Australia spoke to that organisations’ submission endorsing the Heritage Council’s assessment of State heritage significance, and the MLC’s national significance before he challenged the veracity of the costings for the refurbishment option set out in the Bolt report (Ex 4 at pp 14, 119 and 449). Ms Derani Lewers, the daughter of the artists Gerald and Margo Lewers, who were commissioned to create the sandstone sculpture garden for the MLC, addressed the Court onsite and objected to the demolition of the building. She spoke about the architect Walter McCutcheon’s integration of modern art within the fabric of the design of the MLC including the Andor Mészáros’ bronze relief sculptures on the external walls of the building and her parents’ work which would be lost if demolition were to proceed. The Court also received objector evidence from a past employee of the Campus MLC who gave some insight into her experience working in the building.
- 64 In short, it is fair to say, that the views expressed by these objectors at the site hearing to a large extent mirrored the heritage concerns expressed in a majority of the written submissions lodged with the Council and now before the Court. Other submitters focussed on the adverse amenity impacts of the proposed new development. Impacts anticipated by the height of the replacement building such as view loss from some of the Alexander Apartments, increased overshadowing of streets and public spaces Brett Whiteley Place, the loss of the grassed public domain on Miller Street and the removal of the established canopy trees within that area.

Heritage evidence of Mr Logan and Mr Elliott

- 65 While I accept that a determination about the heritage significance of the Item is a matter for the Court’s determination under cl 5.10(4) of the NSLEP, I acknowledge the general agreement of the parties’ heritage experts Mr Logan and Mr Elliott, retained by the applicant, as to the heritage significance of the building. I also appreciate, as the Council submits, that there is almost unanimity within the architectural and heritage historian’s objector submissions

that the MLC is of local, State and that some believe it has national heritage significance.

66 In the Heritage JER, Mr Logan said that he considers:

“...the MLC buildings to be a rare high rise modern movement office building... [and] the best surviving example of a Post -War International Style office building in NSW. [and]... regarded as one of the best two examples in Australia, the other being the ICI building Melbourne, which posted dated the MLC building. Both buildings were seminal works within their respective states. Both have been identified by the peak heritage body of each state (the Heritage Council of NSW and the Heritage Council of Victoria respectively), as having at least State level heritage significance, with the ICI Building also formally recognised by the Australia Heritage Council as having National level heritage significance.”

(Ex 13 at pp 9-10 par 17)

67 Mr Elliott also acknowledged the heritage significance of the MLC at both a local level and as ticking six of the seven boxes for State heritage significance (Tcpt, 14 December 2022, p 739(20-25)). Relevantly, he also endorsed his earlier assessment that:

“The MLC Building is considered to be a landmark commercial building in Australian architecture for its introduction of (then) revolutionary curtain wall design by Sir Osborne McCutcheon as well as many other overseas construction technologies”.

68 As a former conservation planner in the employ of North Sydney Council in 2003, Mr Elliott gave evidence of his involvement with earlier DAs for alterations and additions to the MLC. While he had earlier supported adaptive reuse rather than demolition, he said that opportunity for partial demolition had now passed as it was no longer a viable option. Ultimately, the applicant submitted that there are superior examples of MLC buildings in the same style by Bates Smart & McCutcheon in Adelaide and Brisbane and a superior example of a Post-War International style office building in the ICI Building in Melbourne which has national significance. Mr Elliott also thought it particularly relevant that the originating architectural firm were actually redeveloping the site some 50 years later and spoke of some sort of “architectural blood line” being continued (Tcpt, 14 December 2022, p 738(40-47)). He said that proposal’s design references the building that it replaces (Ex A at Tab 5 p 7). He supported the several recommendations identified in the reports that would conserve the heritage significance of the MLC notwithstanding its demolition.

The recommendations he made are now proposed by way of condition (Ex A at Tab 36 p 7).

- 69 Mr Logan's evidence is that the application and accompanying heritage reports fail to demonstrate that sympathetic upgrading cannot be achieved as an alternative to demolition (Ex 13 at par 80). It is his expert view that the applicant has not satisfactorily addressed the specified matters in Section 13.8 Control P2(a) and (b) of the NSDCP and thereby has failed to satisfactorily demonstrate why it is not reasonable to conserve the heritage item.

The DA

- 70 The process of seeking development commenced with a pre-lodgement meeting with Council staff on 2 September 2019 and subsequent pre-lodgement assessment by the North Sydney Design Excellence Panel.
- 71 The DA as such was lodged with the Council on 7 July 2020 and notified in accordance with Council's policies between 17 July 2020 and 7 August 2020. Seventy-seven individual submissions were received by the Council, with 76 objecting to the proposed demolition of the existing building on heritage grounds. A petition with 1,489 signatures objecting to the proposed demolition, again on heritage grounds was also received. The North Sydney Design Excellence Panel then assessed the DA on 11 August 2020 but no decision was given.
- 72 On 27 August 2021, the applicant commenced this Class 1 appeal on a 'deemed to have been refused' basis under ss 8.7 and 8.11 of the *Environmental Planning and Assessment Act 1979* (EPA Act). The DA was subsequently amended following the Class 4 decision to reflect the fact that it was no longer designated development. The amended DA was then renotified from 12 – 26 September 2022 and the Council received one further written objection.

The HIS filed with the DA

- 73 The applicant submitted a Heritage Impact Statement (HIS) dated 28 November 2019 with the DA (Ex A at Tab 18). This HIS acknowledged the local heritage listing and referred to the Statement of Significance for the listing

in the NSLEP. Unsurprisingly, it concluded that the proposal would have a direct major adverse impact on the MLC through total demolition.

- 74 An updated HIS dated 14 December 2021 was filed as part of an amended application after the appeal had been lodged. It referred to the NSW Heritage Inventory Summary Statement of Significance for the building (Ex A at Tab 36) which analysed the MLC's heritage significance against the Heritage Council's criteria, which the heritage experts agreed is relevant.

“SHR Criterion (a) – Historical significance:

“The MLC Building that was built in 1957 as MLC's state headquarters to the design of the architects Bates Smart McCutcheon, is a seminal work in the development of high-rise buildings in Australia. Significant on a local and state level as it was marked as beginning the transformation of North Sydney from low-scale commercial town to the high-rise second CBD of Sydney. It used construction and detailing techniques not previously seen in Australia with the use of curtain wall design and the first use of modular units.”

SHR Criterion (b) – Associative significance:

“The work is an example of the work of the architects Bates Smart McCutcheon who were influential in the design of high rise buildings in Australia. Example of the building work of Concrete Constructions Pty Ltd, who were a major construction firm in New South Wales from 1916 and built many significant buildings in Sydney. McCutcheon's desire for his buildings to integrate modern art within the fabric of the design is demonstrated by the inclusion of significant artists such as Andor Mészáros (bronze bas-reliefs), and Gerald Lewers (front garden and stones).”

SHR Criterion (c) – Aesthetic importance:

“The building is a key building in the development of high rise buildings and is considered to be one of the first true high-rise buildings in Australia, making the MLC Building of national significance. Its use of exceptional modernist building materials in the curtain wall façade and terracotta glazed bricks are representative of the Post-War International style of architecture that predominated in these early commercial high-rise buildings. McCutcheon's desire for his buildings to integrate modern art within the fabric of the design is demonstrated by the inclusion of significant artists such as Andor Mészáros (bronze bas-reliefs), and Gerald Lewers (front garden and stones).”

SHR Criterion (d) – Social significance:

“The building has no special associations though it is held in high regard by the building and architectural community.”

SHR Criterion (e) – Research potential:

“The building is well-documented and understood. The scale of the building would preclude any archaeological remains being extant. The MLC building was the largest office building in Australia on its completion in 1957 and in its design, construction and approach, it is a most influential and important piece of architecture of national significance.”

Criterion (f) – Rarity:

“The building is a significant piece of modern architecture of rare quality, it is a rare example of its size, scale and age statewide.”

Criterion (g) – Representativeness:

“This item is assessed as historically representative locally. This item is assessed as aesthetically representative regionally. This item is assessed as socially representative regionally.”

(Ex 13 at pp 7-8 par 8)

- 75 Despite the listing on the State Heritage Register (since removed for the reasons explained above at [53]-[57]) the author of the amended HIS, Vault Heritage Consulting, affirmed that demolition was an acceptable outcome despite the resultant impact it will have on the heritage listing of the site, subject to the imposition of appropriate heritage conditions in relation to archival recording, retention of significant items of movable heritage and appropriate heritage interpretation of the site (Ex A at Tab 36 pp 6-7).
- 76 The author of the amended HIS contended “consideration of the heritage impacts cannot be evaluated in isolation and must be balanced against other planning considerations, including the relevant considerations and objectives of the EPA Act which promote the orderly and economic use and development of land”.
- 77 The report supports demolition after regard to:
- the State cultural heritage significance attributed to the MLC, as outlined above at [74], particularly the “curtain wall façade and terracotta glazed bricks”, will be reduced as the heritage fabric will likely need to be wholly replaced with the new fabric – refer to “DA Report” prepared by Bates Smart dated 18 February 2020 (which I understand will be annexed to the December iteration of the Ethos Urban’s SEE), and the “IPC Review Report” prepared by Bates Smart and dated 18 April 2021;
 - the extent to which several aspects of the original fabric of the MLC have been substantively changed since the building’s construction (i.e. the extensive reconfiguration of the interior spaces – identified as Campus MLC – and recognised with various architectural awards in 2002) resulting in a greatly altered design to the original building. Those changes included:
 - (i) changes to the interior fit out and finishes;
 - (ii) removal of the goods lift;
 - (iii) redesign of the lobby including its vertical subdivision;
 - (iv) removal of the bridge from Miller Street;

- (v) division and repurposing of various internal spaces;
 - (vi) replacement of ceiling fabric and light fittings;
 - (vii) removal of internal sliding glass on the entirety of the curtain walls;
 - (viii) significant internal changes in order to achieve a fire-rating upgrade and the introduction of new services;
 - (ix) alterations to the main entrance with the removal of the former stairs from Street level to Level 1 and the building no longer being accessed from the lower ground floor;
 - (x) opening up of the forecourt;
 - (xi) removal of rock garden within the landscaped area; addition of intrusive awnings over the footpaths on the side and rear street frontages; and
 - (xii) a subsequent extensive refurbishment of the building's interior undertaken in 2013, which has resulted in an almost complete strip-out of the original fabric on all floors;
- the competitive commercial office market extant within North Sydney and the apparent deficiencies of the c.1950s design of the MLC against more contemporary commercial offerings in terms of environmental performance, occupant facilities etc – see “Social and Economic Assessment and Strategy” prepared by Ethos Urban dated June 2021, which I understand will be annexed to the December iteration of the Ethos Urban’s SEE); and
 - balancing such heritage-based considerations with the “orderly and economic use and development of land” under the EPA Act.

The Design Report filed with the DA

- 78 The heritage significance of the MLC was also dealt within the Design Report (Ex A at Tab 5 p5). It acknowledges the heritage significance of the MLC (Ex A at Tab 5 p 86) and the fact that the building could “theoretically be refurbished to create a ‘facsimile’ of the original” but concludes that there are “several public domain issues associated with the existing building” (Ex A at Tab 5 p 6) which justify demolition, namely: refurbishment will not make an improved contribution to the public domain, not remove the dangerous conflicts with Metro passengers, nor resolve flooding issues affecting the site (Ex A at Tab 5 p 6).
- 79 In accepting that demolition of a heritage item should not be taken lightly, the Design Report justifies demolition of the MLC because:

“/ the building’s need to be stripped back to its structural frame and rebuilt
 / the refurbishment will involve new technologies (ie. unitised curtain wall vs
 crafted curtain wall; ventilated tile façade vs composite masonry façade)
 fundamentally changing the buildings tectonic
 / the floorplate is unsuitable to contemporary office use and sub-division
 / the original design was acknowledged by the original design architect, Sir
 Osborne McCutcheon, as being flawed in the orientation of an unprotected
 glazed wall to the west
 / superior examples of MLC Buildings by Bates Smart & McCutcheon exist in
 Adelaide & Brisbane
 / the existing building is flawed in its urban design relationship with Miller
 Street and Denison Street
 / the existing building regularly suffers flooding from 100 year rain events,
 which cannot be ameliorated within the site
 / the existing building is a substantial under-utilisation of the site relative to the
 neighbouring context and given the Governments investment in Metro
 / the proposal offers substantial public benefits and urban design
 improvements
 / the proposal is philosophically sympathetic to the original MLC”
 (ACS at pp 24-25; Ex A at Tab 5 p 54)

- 80 The report, consistent with Mr Vivian, the applicant’s architect’s evidence to the Court, emphasises that Bates Smart was at all times highly aware of the importance and legacy of the pioneering piece of architecture that the MLC represents. As Mr Vivian explained to the Court, the applicant had intended to retain the building and release it in 2017, but a tenant could not be found (Tcpt, 14 December 2022, p 690(15-29)). A further complicating factor, if the building was to be retained, was the necessity to carry out extensive interior works in the event that a single tenant for the whole building could not be found. As Mr Vivian said “you’d need security doors to the lifts. And I believe you may need reconfiguration of the bathrooms because they’re entered at east and west from the floor plate so that one could enter at the eastern and come in someone else’s tenancy on the west” (Tcpt, 14 December 2022, p 712(8-12)).
- 81 Having tried and failed to get a tenant the applicant submits that there is simply not a market for this building in its current configuration.
- 82 Ultimately, Mr Vivian said that the decision of the Design Board of Bates Smart to proceed with the commission was based on the following two principles and design philosophy:

“1. That we are convinced that every avenue to retain the building has been explored &

2. That the replacement be of equal or greater significance in the development of innovation office typologies in Australia.

Our aim is to design a building in the spirit of MLC that is a pioneering building for the 21st century as MLC was for the late 20th century. Creating a new legacy for North Sydney in the 21st Century.

To achieve that our design process creates the largest public space in north Sydney, while significantly improving solar access to Brett Whiteley Place. The urban room, market hall and atrium will be naturally ventilated. Naturally ventilated social spaces constructed from timber hang in the atrium with landscaped terraces encouraging a return of biodiversity to the city”.

(Ex A at Tab 5 p 86)

83 In Section 5, the Design Report discusses variations of three broad options for the redevelopment of the site in response to Section 13.8 P2(b) of the NSDCP. Firstly, refurbishment of the existing building, secondly, extension of the east wing (either by additions or demolition and replacement), and thirdly, the demolition of the entire building and a new building. A costing analysis of each option, prepared by QS Stephen Bolt of WT Partnership dated 31 August 2022, was submitted in support of the DA.

84 The applicant submits that the Design Report demonstrates, with detailed reasons, the case for demolition following a documented consideration of 7 alternative designs - starting with the 2002 DA. The comparison matrix in Section 5.1 (annexed to this judgment as Annexure 1) summarises the consequences of each alternative design under the headings of planning, public benefit, relationship to original MLC building and development and concludes that the proposed demolition and redevelopment is the preferred option as the other options did not satisfy the following criteria:

“/ increase solar access to Brett Whiteley Place (RE1 zone)

/ extend and revitalise the Miller Street Special Area through raising levels to match street level

/ create a covered public space as an extension of the Miller Street Special Area creates a covered connection between Victoria Cross Metro and Greenwood Plaza, linking the two train stations

/ provide through-site links to connect the pedestrianized streets of Miller Street & Denison Street

/ provide additional cultural amenity to North Sydney

/ provide a next generation in office typology

...

/ utilise City of Sydney's density levels to meet density demands for the 21st century

/ provide a minimum total NLA of 60,000sqm

/ provide a minimum FSR of 10:1 from the current 4.5:1* (FSR: City of Sydney 4.5:1, Vic Cross Metro 13.3:1 , 1 Denison St 18.4:1)"

(ACS at p 26 par 66)

- 85 The updated SEE also seeks to explain why the demolition and proposed development option is to be preferred. It contains further analysis of four of the alternatives from the Design Report and sets out further reasons why they are not acceptable (Ex A at Tab 35 pp 17-21). And, after listing the unsympathetic changes to the MLC over time (Ex A at Tab 35 p 67) the report concludes that the integrity of MLC has been adversely affected (ACS at par 27).
- 86 The updated SEE also contends that the assessment of this DA requires consideration of heritage as balanced against other planning considerations including the objectives of the EPA Act and concludes that "in light of the unreasonable cost burden on the land owner to reconstruct the heritage item ... and after an evaluation under s 4.15 of the EPA Act the strong merits of the proposal outweigh the impact of the loss of the State and locally listed heritage Item" (Ex A at Tab 35 p 92; ACS at pars 68-69).
- 87 The applicant argued on the evidence of the QS and valuation evidence that the unreasonable cost burden to reconstruct the heritage Item to an A-grade building in order to attract a tenant was a factor which supported demolition. This evidence was interrogated at length at the hearing.
- 88 The applicant argues on the evidence in its Social and Economic Strategy in the Updated SEE that the MLC does not support contemporary trends in office design to support workforce wellbeing and that the building is not designed with contemporary standards of worker wellbeing in mind. The redevelopment of the site to include facilities, spaces and design elements to support worker wellbeing and satisfaction will enhance the health, productivity and the resilience of the workers at this site (Ex A at Tab 21 p 37). A comparative table setting out benefits associated with the refurbishment option, hybrid option and the redevelopment option is included in the Updated ESS at Figure 1 (Ex A at Tab

21 p 38). The replacement development is included in the table and assessed as having the potential of making a significant contribution to the transformation and renewal of the North Sydney CBD and the Miller Street Precinct consistent with strategic State and local government investment in the Victoria Cross Metro Station and the like.

Feasibility

89 The feasibility experts Mr Hill and Mr Lawrie used the joint reports of the façade / engineering experts and the QS experts to analyse the refurbishment options as well as the redevelopment options.

The scope of works costed

90 The MLC has two primary facades:

- Aluminium curtain wall to the east (annex) and west (main blocks), facing east and west (Curtain Walls); and
- Terracotta cladding units to the east, west and core (tower) block shear walls, facing north, south and east (Terracotta Walls).

91 The façade experts agreed on the scope of works to the Curtain Walls (Ex 12 at pp 10-11) and recommended retention and remediation works to achieve a design life of 25 years (Ex 12 at p 18). The caveat to that evidence was the possibility of unknown defects which may increase the costs. A risk which the applicant submitted would need to be taken into account when purchasing the building and would likely depress the value of the land.

92 The defects in the Terracotta tiles on the shear walls were also identified (Ex 12 at p 13) and the expert recommended removal rather than refurbishment which offered a design life, with maintenance, for this element of 50 years. It was also agreed that the roof membrane on Levels 1, 12 and 15 be replaced (Ex 12 at pp 16-18).

93 The brief for the refurbishment works was adopted from Mr Vivian's Design report summary (Ex 11 at p 3).

94 In summary, the MLC Building would be required to be taken to its structural frame and rebuilt to provide a serviceable building for the next 50 years. This process would essentially result in a facsimile of the existing building, whereby it is rebuilt to look the same as the existing building however using today's

technology such as unitised curtain walls. At this point the heritage value of the original building is questionable because Mr Vivian believes that "...for the MLC building to attract A grade tenants, paying A grade rent or premium rents in North Sydney the building would need to be refurbished to contemporary PCA A grade standards, made flexible to allow for a contemporary fit out and multiple tenants, and have a design life of 50 years" (Tcpt, 13 December 2022, p 587 (19-22)).

- 95 The terms A-grade and B-grade buildings are tools used for marketing stock. In this case, the Social and Economic Assessment refers to them when analysing the commercial office floorspace in North Sydney. The report identified "around 290,000m² of stock considered as prime (premium A grade quality), and accounting for 35% of all commercial stock North Sydney with the remaining 65% being secondary stock". The report concludes that new development has increased the provision of premium A-grade stock available in Paramatta and Chatswood and highlighted the shift required in the quality of commercial stock floorspace for the North Sydney CBD in order to compete with major office markets such as the Sydney CBD, Macquarie Park and Paramatta (Ex A at Tab 21 p 40).
- 96 While Mr Grose accepted that "economic viability is essential in the retention of aging commercial buildings to enable the palimpsest of the city to enrich the fabric of urban life" he was firm in his belief that "it is unreasonable to expect an A grade return from a building of this age and that the building could be offered as B grade space" (Ex 12 at p 5). A view that Mr Hill held in respect of the modified EVC refurbishment option subject to a precommitment from a tenant, as I will explain later.

Costs of carrying out the refurbishment option, the hybrid option and the redevelopment option

- 97 The CIV estimate dated 9 February 2020 for the proposed development was \$559,747,538 inclusive of GST.
- 98 With further information the applicant amended the application to include the QS report costings:
- Original refurbishment option - \$197,575,133

- Hybrid Option - \$528,285,310
- Redevelopment option - \$591,132,764

99 The QS experts then refined these figures after new information from the façade engineers report and agreed to a range of what the likely costs would be:

Option	Mr Bolt (Applicant)	Mr McSweeney (Council)	Difference
Refurbishment	\$151,802,562	\$138,761,293	(\$13,041,269)
Hybrid	\$504,923,941	\$462,521,735	(\$42,402,206)
Redevelopme nt	\$608,571,237	\$688,136,275	\$79,565,038

100 The supplementary QS report records after review that the EVC report adopted a completely different methodology to that adopted in the original report. EVC performed a gap analysis specifically aimed to assess the costs to provide a minimal upgrade tenancy space that is repaired and retained for 5-year lease and an alternative to upgrade for a 10-year lease (5 plus 5). The refurbishment option included in the original QS JER provides a substantial upgrade having regard to the actual condition of the building that includes renewal of lift installation, replacement of the external tiles façade, major refurbishment to the existing aluminium façade external landscaping and planting. Those matters were not taken into account in the EVC report (Ex 30 at pars 15-16). The table submitted into evidence prepared by the QS experts summarised costings of the modified EVC refurbishment option, which covered the EVC scope of works plus replacement of tiles. An approach which Mr McSweeney said invited a degree of risk – that the works left out would be required and should be accounted for in the feasibility assessment (Tcpt, 16 December 2022, p 951(18-31)).

The Feasibility of each option

101 The feasibility report analysed market rents for each option, the rental yield for each option and the economic viability of each option. The agreed rental yield for each as detailed in the table below.

	(Original) Refurbishment Option	Hybrid Option	Redevelopment Option
High cost	4.0%	4.7%	4.9%
Low cost	4.1%	4.9%	5.2%

102 This represents the expected return for each option relative to the total development costs for each option. While each option is expected to return a positive yield, in order to determine whether any of the options are feasible the experts compared the rental yields with the “as if complete” capitalisation rate (yield on cost) method. The “cap rate” is the minimum return below which a rational actor in the market would not deploy their capital on a project because they could achieve a greater return on that capital elsewhere and at less risk.

103 Mr Lawrie gave evidence that the positive margin between yield on cost (rental) and cap rate (as if complete) will determine the projects viability. He said “...Market evidence ... suggests the yield on cost would need to be at least greater than 75 to 100 basis points above the cap rate for project viability. This difference reflects the development profit for the level of risk taken by the developer” (Ex 14 at par 49).

104 Mr Hill then disagreed with the cap rate adopted by Mr Lawrie.

105 Mr Lawrie adopted a Cap rate of 6% for the refurbishment option, 4.75% for the hybrid option and 5.25% for the redevelopment option. Whereas Mr Hill ultimately adopted a cap rate of 5.25% for the refurbishment option. The table at Ex 14 par 62 summarises the effect of the experts’ opinions.

- 106 Using the yield on cost method, the evidence, regardless of the cap rate used and the QS estimates preferred, is that the refurbishment option is not viable. The Hybrid option is not viable.
- 107 On both parties' evidence, the redevelopment option is viable regardless of whose QS evidence is used in the sense that it would return more than the minimum rate of return that the market would require for the investment – (although Mr Hill thought it unlikely using current market assumptions of rental allowances that a speculative office development would be viable).
- 108 The evidence then considered the residual land method – as preferred by Mr Lawrie. The results of that analysis are set out in Figure 2 of Ex 14.
- 109 In summary, the evidence is that the residual land value approach produces a residual land value of between \$16.5 million to \$27 million. A range which Mr Lawrie explained is significantly lower than the land's book value at \$263.8 million and therefore demonstrates that if the current owner was to undertake these works, they would suffer financial hardship based on the \$263.8 million (Ex 14 at par 66). This means a future owner needs to purchase the site for between \$16.5 million to \$27 million for the works to be viable (Ex 14 at par 67).
- 110 Mr Lawrie expressed the view that a sale for this amount was unlikely, and it would be more valuable to land bank rather than spend between \$138,761,293 and \$151,802,562 to refurbish the MLC. A scenario, that the applicant submits is likely to occur if demolition is not permitted for the current and any future owner, to refurbish when they could expect higher returns with a lower investment (ACS at par 150).
- 111 On that basis, Mr Lawrie said that unless the refurbishment option, the EVC refurbishment option, the hybrid option or the redevelopment option would result in a land being more valuable than something in the vicinity of \$70 million to \$110 million (on Mr Lawrie's analysis), it would be economically irrational for any reasonable actor to pursue any of those options. They would be better off not spending anything on refurbishment and simply land bank.

- 112 The evidence then turned to whether the site should be valued like a development site for the original refurbishment or the modified EVC refurbishment options because they would require about \$100 million of capital expenditure and involve all the risks that are typically associated with a development site – or whether they should be valued as a passive investment because the building would be retained and altered and improved.
- 113 The applicant contended for the RLV approach because the nature and extent of the refurbishments required, and cost would mean the site risk profile is more aligned with a redevelopment site than a passive – maintenance investment.
- 114 Whereas Mr Hill remained of the opinion that the DCF approach was correct for these options and followed the Cushman & Wakefield valuation methodology. When Mr Hill applied the DCF method the land value was at \$194 million for the modified EVC option (Tcpt, 21 December 2022, p 1083(2-17); p 1064(18-28)). When he applied the RLV method, the land value was at \$120 million.

What is the value of the land applying the RLV method to the modified EVC refurbishment option?

- 115 The difference between the experts on the application of the RLV method to the modified EVC method is identified in Ex Y.
- 116 The key differences were based on disagreement about the total net rent, cap rate, incentives development margin targets, development margin actuals, project IRR Target ad Project IRR (Tcpt, 21 December 2022, p 1098(34-45)).
- 117 Mr Lawrie said that the development margin for the modified EVC refurbishment option would be 1%. A hypothetical purchaser would spend \$292,758,559 to receive a return of \$2,912.423 and given the risk was of that opinion the development margin would be 20%. On that basis, the EVC refurbishment option is unviable.
- 118 Mr Hill gave evidence that the development margin would be 15.1% on a development cost of \$325,117,041 and projected a gross realisation of \$374,261,391.

Total net rent

- 119 In the original feasibility study, the experts agreed the total net rent per annum would be \$21,520,030 for the original refurbishment option (Ex 14 at par 25).
- 120 Mr Lawrie used this net rent as the baseline when determining the likely net rent for a reduced scope of works (EVC refurbishment) and came to view that there would be a 5% reduction in the net rent payable in this lower quality refurbishment (Tcpt, 21 December 2022, pp 1091(30)-1092(2)). However, Mr Hill did not believe that “upgrades to lifts and services would affect the rents “because he could not tell the difference between, from a tenant’s perspective, of getting a bargain basement rent, [what] the difference would be in the quality of the building, differences between those two briefs. I agree there [is] a difference in cost. But cost does not necessarily translate to rent” (Tcpt, 21 December 2022, p 1092(30-33)).
- 121 The effect of accepting Mr Lawrie’s evidence on the likely total net rent on Mr Hill’s analysis is Hills’ is a drop in his projected gross realisation, development profit and development margin. Given Mr Hill’s analysis that the development profit was only of 0.1% above the development margin if rent is dropped to Mr Lawrie’s level, the applicant submits that it is unlikely the development would remain viable.

Lease term

- 122 The experts disagreed about the term of the lease for the purpose of calculating incentives. Mr Hill assumed the term of the lease would be 100% of leases for 5 years plus 5-year term option such as an educational tenant. Mr Lawrie gave evidence of 50% of the lease 5 years and 50% would be 10-year leases.

Development margin target

- 123 The difference between the experts on this criteria came down to risk (Tcpt, 21 December 2022, pp 1120(45)-1121(8)).
- 124 Mr Hill justified a lower target at 15% margin and 18% IRR on the basis of his view that the refurbishment option with a tenant in mind would be less risky than the redevelopment option without a precommitment from a prospective

tenant. And, if there was no tenant in mind for the refurbishment option then he accepted Mr Lawrie at 20%. Ultimately, Mr Hill's evidence was that he would not undertake the refurbishment option unless he had 70% of tenancies pre-committed. He would land bank and wait for a tenant (Tcpt, 21 December 2022, p 1129(12-15)).

- 125 Accepting the fact that there is an empty building with no tenant, the applicant submitted Mr Lawrie's rates should be accepted. The upshot of all this is that both feasibility experts agreed without a tenant it would not be feasible to pursue the modified EVC refurbishment option. However, if a tenant turns up Mr Hill assesses this modified EVC option as feasible.

Capitalisation rates

- 126 Again, the experts disagreed.
- 127 Mr Lawrie had a capitalisation rate of 6.875% and Mr Hill adopted 5.75% based on comparable.
- 128 In defence of his position, Mr Lawrie said that delta between the costs in the original refurbishment and the modified EVC refurbishment and the real possibility that the investor would be up for significant costs after 10 years a higher Cap was justified to account for those costs (Tcpt, 21 December 2022, pp 1134(21)-1138(9)).
- 129 In fact, his evidence was "There is no comparable to MLC where you have to spend \$100 million with the real possibility that in ten years time you're going to have to fork out almost half again" (Tcpt, 21 December 2022, p 1145(22-25)).

Conclusions of the feasibility experts

- 130 In summary, the feasibility experts Mr Lawrie and Mr Hill were agreed whether you adopted the Bolt or McSweeney QS estimates (Ex 16, Table at par 145) that the original refurbishment option was not financially feasible (Ex 14). At par 53 Mr Hill's gave evidence that "using current market assumptions of rental allowances and incentives, it is unlikely that any speculative office development would be viable" (Ex 14). Mr Lawrie said that "...on all measures - residual land value and yield on cost [the original refurbishment] option does not

demonstrate economic viability for the owner or any likely future owner”. These experts also agreed that the hybrid option was not financially feasible (Ex 14).

- 131 Ultimately, the differences between the QS experts regarding the likely costs for this option was immaterial because Mr Hill and Mr Lawrie were agreed that the modified EVC refurbishment option was not feasible with Mr Hill taking the opposite view with *a tenant pre-committed to leasing the building*. In that regard, Mr Hill gave evidence that an educational tenant such as a university might be interested in leasing the large floorplate of the existing building. Although conceding that this option would more likely be attractive if the refurbishment was to a B-grade building rather than the A-grade building as proposed by the applicant.
- 132 That said, without a committed tenant these experts agreed that the applicant and hypothetical owner would likely spend a minimum to maintain the building whilst obtaining whatever rent could be achieved with a view to redevelopment in the future (Tcpt, 21 December 2022, pp 1004(38)-1005(1); 1130(50)-1131(8)). On that basis, the applicant contends that the only option apart from land banking is the redevelopment option.
- 133 The feasibility of the redevelopment option was then discussed, and the experts seemed to agree that it was feasible. However, as the applicant points out I do not need to resolve the feasibility of the redevelopment option. Section 13.8 of the NSDCP Control P2 requires the applicant to prove that it is not reasonable to conserve the building based on a consideration of alternative options not being acceptable.

Contentions

- 134 The Amended Statement of Facts and Contentions lists and particularises 22 contentions. They were addressed by the following experts in various statements and joint expert reports:

Expertise	Applicant	Council	JER Ex No/s.
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Façade Engineering	Bruce Wymond	Paul Connett	12
Stormwater	Tim Henderson	Stephen Gray	17
Architecture	Philip Vivian	James Grose	11
Traffic	Jonathan Busch	Tom Steal	18
Wind	Tony Rofail	Matthew Glanville	21
Urban Design	Alec Tzannes	Gabrielle Morrish	19
Quantity Surveying	Stephen Bolt	Niall McSweeney	16
Arboriculture	Peter Castor	Catriona Mackenzie	10 and 31
View Impact	Chris Bain	Stacey Brodbeck	20 and T
Town Planning	Michael Rowe	Deborah Laidlaw	15
Feasibility/ Land Economists	Richard Lawrie	Martin Hill	14, 29 and 36
Heritage	Malcolm Elliot	David Logan	13

(ACS at par 16)

The starting point for an assessment of the heritage of the MLC

135 Fortunately, the parties have agreed that the starting point for an assessment of this application is cl 5.10 of the NSLEP. The provision is set out below.

5.10 Heritage conservation

Note—

Heritage items (if any) are listed and described in Schedule 5. Heritage conservation areas (if any) are shown on the Heritage Map as well as being described in Schedule 5.

(1) **Objectives** The objectives of this clause are as follows—

- (a) to conserve the environmental heritage of North Sydney,
- (b) to conserve the heritage significance of heritage items and heritage conservation areas, including associated fabric, settings and views,
- (c) to conserve archaeological sites,
- (d) to conserve Aboriginal objects and Aboriginal places of heritage significance.

(2) **Requirement for consent** Development consent is required for any of the following—

- (a) demolishing or moving any of the following or altering the exterior of any of the following (including, in the case of a building, making changes to its detail, fabric, finish or appearance)—
 - (i) a heritage item,
 - (ii) an Aboriginal object,
 - (iii) a building, work, relic or tree within a heritage conservation area,
- (b) altering a heritage item that is a building by making structural changes to its interior or by making changes to anything inside the item that is specified in Schedule 5 in relation to the item,
- (c) disturbing or excavating an archaeological site while knowing, or having reasonable cause to suspect, that the disturbance or excavation will or is likely to result in a relic being discovered, exposed, moved, damaged or destroyed,
- (d) disturbing or excavating an Aboriginal place of heritage significance,
- (e) erecting a building on land—
 - (i) on which a heritage item is located or that is within a heritage conservation area, or
 - (ii) on which an Aboriginal object is located or that is within an Aboriginal place of heritage significance,

(f) subdividing land—

- (i) on which a heritage item is located or that is within a heritage conservation area, or
- (ii) on which an Aboriginal object is located or that is within an Aboriginal place of heritage significance.

(3) **When consent not required** However, development consent under this clause is not required if—

(a) the applicant has notified the consent authority of the proposed development and the consent authority has advised the applicant in writing before any work is carried out that it is satisfied that the proposed development—

- (i) is of a minor nature or is for the maintenance of the heritage item, Aboriginal object, Aboriginal place of heritage significance or archaeological site or a building, work, relic, tree or place within the heritage conservation area, and
- (ii) would not adversely affect the heritage significance of the heritage item, Aboriginal object, Aboriginal place, archaeological site or heritage conservation area, or

(b) the development is in a cemetery or burial ground and the proposed development—

- (i) is the creation of a new grave or monument, or excavation or disturbance of land for the purpose of conserving or repairing monuments or grave markers, and
- (ii) would not cause disturbance to human remains, relics, Aboriginal objects in the form of grave goods, or to an Aboriginal place of heritage significance, or

(c) the development is limited to the removal of a tree or other vegetation that the Council is satisfied is a risk to human life or property, or

(d) the development is exempt development.

(4) **Effect of proposed development on heritage significance** The consent authority must, before granting consent under this clause in respect of a heritage item or heritage conservation area, consider the effect of the proposed development on the heritage significance of the item or area concerned. This subclause applies regardless of whether a heritage management document is prepared under subclause (5) or a heritage conservation management plan is submitted under subclause (6).

(5) **Heritage assessment** The consent authority may, before granting consent to any development—

- (a) on land on which a heritage item is located, or
- (b) on land that is within a heritage conservation area, or
- (c) on land that is within the vicinity of land referred to in paragraph (a) or (b),

require a heritage management document to be prepared that assesses the extent to which the carrying out of the proposed

development would affect the heritage significance of the heritage item or heritage conservation area concerned.

(6) **Heritage conservation management plans** The consent authority may require, after considering the heritage significance of a heritage item and the extent of change proposed to it, the submission of a heritage conservation management plan before granting consent under this clause.

(7) **Archaeological sites** The consent authority must, before granting consent under this clause to the carrying out of development on an archaeological site (other than land listed on the State Heritage Register or to which an interim heritage order under the Heritage Act 1977 applies)—

- (a) notify the Heritage Council of its intention to grant consent, and
- (b) take into consideration any response received from the Heritage Council within 28 days after the notice is sent.

(8) **Aboriginal places of heritage significance** The consent authority must, before granting consent under this clause to the carrying out of development in an Aboriginal place of heritage significance—

- (a) consider the effect of the proposed development on the heritage significance of the place and any Aboriginal object known or reasonably likely to be located at the place by means of an adequate investigation and assessment (which may involve consideration of a heritage impact statement), and
- (b) notify the local Aboriginal communities, in writing or in such other manner as may be appropriate, about the application and take into consideration any response received within 28 days after the notice is sent.

(9) **Demolition of nominated State heritage items** The consent authority must, before granting consent under this clause for the demolition of a nominated State heritage item—

- (a) notify the Heritage Council about the application, and
- (b) take into consideration any response received from the Heritage Council within 28 days after the notice is sent.

(10) **Conservation incentives** The consent authority may grant consent to development for any purpose of a building that is a heritage item or of the land on which such a building is erected, or for any purpose on an Aboriginal place of heritage significance, even though development for that purpose would otherwise not be allowed by this Plan, if the consent authority is satisfied that—

- (a) the conservation of the heritage item or Aboriginal place of heritage significance is facilitated by the granting of consent, and
- (b) the proposed development is in accordance with a heritage management document that has been approved by the consent authority, and
- (c) the consent to the proposed development would require that all necessary conservation work identified in the heritage management document is carried out, and

(d) the proposed development would not adversely affect the heritage significance of the heritage item, including its setting, or the heritage significance of the Aboriginal place of heritage significance, and

(e) the proposed development would not have any significant adverse effect on the amenity of the surrounding area.

136 The effect of cl 5.10(2)(a)(i) is that development consent is required for the demolition of the MLC.

137 Relevantly, cl 5.10(4) sets a consideration which is a precondition to consent. It provides:

The consent authority (the Court) must, before granting consent under this clause in respect of a heritage item ... consider the effect of the proposed development on the heritage significance of the item ...concerned. This subclause applies regardless of whether a heritage management document is prepared under subclause (5) or a heritage conservation management plan is submitted under subclause (6).

138 An interpretation of cl 5.10(4) that promotes the objectives of the clause in preference to other constructions is required. In this case, the relevant objectives are in subcll (1)(a) to conserve the environmental heritage of North Sydney, and (b) to conserve the heritage significance of heritage items and heritage conservation areas, including associated fabric, settings and views.

139 The Dictionary to the NSLEP defines “heritage item” to mean a building, work, place, relic tree, object, or archaeological site the location and nature of which are described in Sch 5. The MLC is such a heritage item within the definition.

140 Demolition of heritage items is also addressed by Section 13.8 of the NSDCP. The relevant objectives of that policy provision are:

“O1 To ensure that heritage items and buildings which positively contribute to the significance and character of a heritage conservation area retained.

O2 To outline the criteria which need to be considered by Council should the applicant still seek to demolish the heritage item or building which positively contributes to a heritage conservation area.”

141 The relevant NSDCP Controls state:

“P1 Heritage items must not be demolished and demolition will not be supported by Council.

P2 Despite P1 above, Council may consider the demolition of a heritage item, but only where an applicant can satisfactorily demonstrate:

(a) why it is not reasonable to conserve the heritage item taking into consideration:

- (i) the heritage significance of the property; and
- (ii) the structural condition of the building; and
- (iii) pest inspection reports; and
- (iv) whether the building constitutes a danger to the public.

Note: a report from a qualified quantity surveyor is required where the costs of retention are part of the justification for the proposed demolition.

- (b) that alternative options to demolition have been considered, with reasons provided as to why the alternatives are not acceptable.

Note: plans of the replacement building are to be lodged concurrently so that the applications can be assessed concurrently.”

142 In opening, the Council submitted that Section 13.5 of the DCP is also relevant to my assessment. It deals with protecting heritage significance and states that “Council does not support demolition of heritage items as a matter of principle” (Ex 6 Vol 2 at p 1398). While relevant, I accept, as the applicant submits, that Section 13.8, which controls demolition of heritage items, has greater significance for this application which proposes demolition. Noting, that the heritage experts also acknowledge that the objectives of Section 13.8 were more directed toward adaptive reuse and retaining items of heritage significance (Tcpt, 14 December 2022, pp 744(41)-745(3)).

143 Having highlighted the relevant provisions and policies dealing with heritage, it would be amiss of me not to record the balance of the planning framework:

- (1) *Environmental Planning and Assessment Act 1979* (EPA Act)
- (2) State Environmental Planning Policy (Infrastructure) 2007
- (3) Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005
- (4) State Environmental Planning Policy No 55—Remediation of Land
- (5) NSLEP - Relevant provisions include:
 - (a) Clause 1.2 Aims of Plan
 - (b) Clause 2.3 Zone objectives and Land Use Table – the zoning of the land is B3 Commercial Core. The proposed development is permissible with consent on land.
 - (c) Clause 4.3 Height of buildings
 - (d) Clause 4.6 Exceptions to development standards – a request to vary the height control is required pursuant to this clause

- (e) Clause 5.10 Heritage Conservation
- (f) Clause 6.1 North Sydney Centre Objectives of Division
- (g) Clause 6.2 Land to which this Division applies
- (h) Clause 6.3 Building heights and massing
- (i) Clause 6.4 Miller Street setback
- (j) Clause 6.10 Earthworks
- (6) NSDCP - Relevant provisions include:
 - (a) Part B, Section 2 Commercial and Mixed Use Development
 - (b) Part B, Section 8 Outdoor dining and display of goods on the footpath
 - (c) Part B, Section 9 Advertising and signage
 - (d) Part B, Section 10 Car parking and transport
 - (e) Part B, Section 12 Access
 - (f) Part B, Section 13 Heritage and Conservation
 - (g) Part B, Section 14 Contamination and Hazardous Building Materials
 - (h) Part B, Section 18 Stormwater Management
 - (i) Part B, Section 19 Waste Management
 - (j) Part C, Section 2 North Sydney Planning Area
- (7) North Sydney CBD Public Domain Strategy 2020
- (8) North Sydney Place Book – Stage 1 Public Spaces Vision
- (9) North Sydney Centre Review, Public Domain Review 2015

Overview of the Council's position

144 Accepting that built heritage is part of the environment to be protected and sustainable management of built heritage is specifically promoted by the objects of the EPA Act, the Council contended that the proposed demolition of the MLC and its replacement with a different building is in direct conflict with the EPA Act. In fact, the Council goes as far as to submit that the amendment of the EPA Act to include the objective in s 1.3(f) – to specifically promote the “*sustainable management of built and cultural heritage*”, implies a “sea change” in the approach to the exercise of discretionary powers conferred by the EPA Act and instruments under it. As such, the Council submits that the playing field is no longer level where heritage is concerned. Instead, objective (f) “tilts” a construction of the EPA Act which favours the management of heritage over

competing uses of land. For that reason, the Council submits that whether the built heritage will be sustainably managed, and can be sustainably managed to persist over time, becomes a pivotal matter.

- 145 Ultimately, the Council contended that the applicant's financial focus in the hearing to justify the demolition avoids, rather than addresses, that issue. Complaints about the financial costs of ongoing management, the requirement for an upgrade to meet supposed market demands which might be appropriate for a new build and a restrictive class of lessee, due to the physical characteristics of the existing building, are simply irrelevant.
- 146 In short, the Council contends that the financial costs to an owner of maintaining and repairing the MLC must be distinguished from the economic impacts in the locality which is a specific consideration under s 4.15(1)(b). Profitability of individual businesses are not planning considerations, and a comparison between the management costs of the heritage item and the anticipated profits from the proposed redevelopment of the site cannot be taken into account in a planning appeal as the applicant contends. They are irrelevant considerations – (albeit the Council submitted that in some Court decisions they have wrongly allowed such comparisons: *Bunnings Properties Pty Ltd v Ku-ring-gai Council (No.4)* [2017] NSWLEC 1238 (CCS at par 11)).
- 147 As far as the Council is concerned, the costs of maintenance of the MLC should have been factored into the purchase price well before the purchase, particularly as the building was already listed as a heritage item at the time of purchase.
- 148 This emphasis on the conservation of built heritage in the EPA Act is also said to be underlined by the aims of the NSLEP and the objectives which seek to conserve and protect the built heritage of North Sydney and ensure that development does not adversely affect its significance.
- 149 As it presently stands, development consent is required for the demolition of the MLC which is listed in Sch 5 of the NSLEP.
- 150 Consistent with the aims of the NSLEP, the objectives of cl 5.10, as expressed subcl (1) include::

- (a) To conserve the environmental heritage of North Sydney
- (b) To conserve the heritage significance of heritage items and heritage conservation areas, including fabric, settings, and views

...

- 151 The Council contends that the guiding principles in Section 13.8 of the NSDCP (referred to above at [140]-[141]) make it plain that demolition of a building is not an option unless the building is of little heritage significance, unsafe or beyond repair. It submits that the applicant cannot avoid the burden of heritage maintenance through demolition. As the Heritage Council's assessment that the MLC is of State heritage significance, that circumstance needs to be a focal point for consideration: *Zhang v Canterbury City Council* (2001) 51 NSWLR 589; [2001] NSWCA 167, and afforded appropriate weight in the Court's assessment of this DA.
- 152 The Council emphasises that cl 5.10(4) of the NSLEP requires that the Court acting as the consent authority before granting consent under the clause in respect of a heritage item "...must consider the effect of the proposed development on the heritage significance of the item ...". The Council submits that its incontestable, on the evidence before me, that the demolition of the MLC would have a significant, irreversible, detrimental impact on the heritage significance of the item.
- 153 The Council further submits that question is not, as the applicant suggests in closing, that in terms of heritage significance and feasibility, the ultimate issue is "whether retention and refurbishment is reasonable" (ACS par 26). Rather, having regard to cl 5.10(4) and the provisions of the NSDCP, the ultimate questions are what is the heritage significance of the building (cl 5.10(4)) and whether, in light of that significance, it is appropriate to consent to its demolition.

Overview of the Applicant's position

- 154 The applicant rejects the Council's interpretation of the EPA Act provisions in favour of the conservation of heritage items, such as the MLC. It invites me for to follow an orthodox approach to statutory interpretation and not give special significance to the objective in s 1.3(f) over and above other objectives of the EPA Act. It dismisses the suggestion that the "level playing field" has been

abandoned in circumstances where the applicable planning framework that governs the issue including, critically s 4.15 of the EPA Act and Section 13.8 of the NSDCP need to be considered. It contends that the Council has not explained how the object in s 1.3(f) of the EPA Act should influence the construction of any particular provision of the EPA Act or any delegated legislation such as the NSLEP made under it. Therefore, the applicant rejects the Council's submission that there is no longer a level playing field where heritage is concerned (CCS at par 4) and submits that the applicable planning framework for the exercise of the Court's discretion is s 4.15 of the EPA Act and Section 13.8 of the NSDCP.

- 155 In short, the applicant submits that the Court has a discretion to grant development consent and the discretion is constrained by the applicable statutory and planning framework.
- 156 The applicant further submits that the Council totally misrepresents its case because it never submitted that development consent should be granted because it "does not wish to shoulder the burden of heritage management" or because "it would earn less by keeping the building than redeveloping the site". The applicant's case, on the evidence, is simply that it is not reasonable to conserve the heritage Item because, objectively assessed it is not financially feasible for any owner to conserve the MLC in whole or in part and the benefits of the new build outweigh conservation. To the extent that the Council suggests (in CCS at par 8) that a more stringent standard of proof applies to this application for demolition of this heritage Item, it submits that this should be rejected. The applicant also rejects the suggestion by the Council (CCS at par 10), that matters of leasing and potential rental income - which are crucial to the feasibility to conserve the existing building are irrelevant to the exercise of the Court's discretion. Financial hardship is relevant to "the public interest" under s 4.15(1)(e) of the EPA Act. The fact that the profitability of individuals (or the applicant) are affected at the same time as the use of the land (the building) is affected is relevant. In this case, the building will deteriorate progressively with increasing levels of vacancy and ultimately be land banked in a strategic location within the North Sydney CBD because no rational user of land is likely to refurbish it (Tcpt, 21 December 2022, pp 999(35)-1000(28);

1004(26-31); 1063(23-24)). That prospect, it is submitted, must be relevant to the Court's discretion in respect of demolition. The cases of *Kentucky Fried Chicken Pty Ltd v Grantidis* (1979) 140 CLR 675; [1979] HCA 20 and *Milne v Minister for Planning (No 2)* [2007] NSWLEC 66 are submitted as demonstrating the relevance of the public interest in this context.

157 To that end, the applicant submits that the adverse effects are established by financial evidence as it addresses the likely conduct of any rational commercial actor (ACS in Reply at par 8). When all is said and done, the applicant submits that the financial implications of conservation transcend the applicant's private interests because the uncommercial nature of any refurbishment option means that if redevelopment is not permitted, any rational actor is likely to land bank the site leading to a suite of disbenefits for the locality and the public (ACS in Reply at par 9). And the objective financial viability of the various alternative options to demolition are clearly relevant as they are directly called up by Section 13.8 P2(b) of the NSDCP. That is, the Court "...may consider the demolition of a heritage item, but only where an applicant can satisfactorily demonstrate ... alternative options to demolition have been considered with reasons provided as to why the alternatives are not acceptable." The applicant submits that the Court may have regard to those matters under s 4.15(1)(a)(iii) of the EPA Act.

158 The applicant also submits that it is irrelevant to have regard to the earlier version of the NSLEP in cl 48(5) of the North Sydney Local Environmental Plan 2001 (repealed) for the purpose of construing cl 5.10(4) as contended by the Council (CCS at pars 13-14). The clause in force is the starting point and the relevant yardstick for present purposes, particularly where cl 5.10(4) is plain; there is no dispute about its construction.

Findings – the ultimate question – whether conservation of the MLC would be unreasonable

159 Let me start by making it clear that I agree with the applicant that the earlier heritage provision in cl 48(5) of the NSLEP now replaced by cl 5.10 is not relevant to the assessment of the DA. The latter provision in its present terms is the provision I am required to apply to the determination of this DA.

- 160 Additionally, there is no reason in this appeal to rely on the Court's planning principles, even as modified, to apply to a site outside a conservation area. The NSDCP is specific and prescribes relevant matters. In that circumstance, a non-binding planning principle cannot displace the relevant provisions of the NSDCP as called up by s 4.15(1)(a)(iii) of the EPA Act.
- 161 As the Council submitted, having regard to the evidence of Mr Logan (Ex 13 at pars 123-148) the applicant's original HIS prepared by RPS Group dated 28 November 2019 and the Updated HIS prepared by Vault Heritage Consulting dated 14 December 2021 did not follow the requirements for the preparation of a heritage impact statement outlined in the NSDCP. Nor did they follow conservation principles and accepted methodologies. As such, I find their conclusions of little assistance for the necessary heritage impact assessment of the DA.
- 162 As Mr Logan states in the joint report, cl 5.10 of the NSLEP anticipates that heritage items listed in Sch 5 will be retained. The NSLEP does not prohibit demolition, however, as is clear from the public's response in this case, there is an expectation within the community and in accordance with the heritage principles that when heritage items are listed, every effort will be made to retain them and that demolition would only be approved in circumstances addressed both in cl 5.10, particularly cl 5.10(4) and also in Section 13.8 of the NSDCP.
- 163 That said, the only mandatory consideration under cl 5.10(4), before making any decision about the heritage item, including demolition, is the heritage significance of the Item and the effect of demolition on the Item.

Assessment of the heritage significance of the MLC

- 164 The appropriate starting point is therefore an assessment of the heritage significance of the MLC. Based on the evidence as summarised above at [24]-[28], [30], [53]-[55], [67] and [74], I find that the MLC is of State heritage significance.
- 165 As the various heritage significance assessments have confirmed, and as Mr Logan records in the joint report, the MLC's importance resides in its:
- Many design and construction innovations, in addition to the curtain walling;

- Technological and research values, including its ground-breaking structural systems;
- Historic values;
- Associations, with the pre-eminent architects Bates Smart and McCutcheon;
- Aesthetic values (additional to the curtain walling) including its form, size “crystalline character, and expansive open plan layout;
- Social values, including importance to the architectural and heritage communities; and
- Representative and educational values as a seminal building of the Modern Movement and the history of architecture in Australia.
- (Ex 13 at p 159)

166 Further, the fact that the building satisfies six of the criteria in the Heritage Council’s Recommendation to List, and Mr Elliott ‘s acknowledgment, that the MLC is of State significance. The IPC so concluded determination to that effect (Ex 8 at p 396), and there is almost unanimity within the professions of architecture and heritage historians that the MLC is of State, if not national, heritage significance.

167 It follows that the complete demolition of the MLC will have significant, irreversible heritage impacts.

168 Having determined the heritage Item’s significance (cl 5.10(4)), and the effect of the proposed development I may nonetheless consider the demolition of the MLC if the applicant can satisfactorily demonstrate the matters in Section 13.8 Control P2 of the NSDCP namely:

“(a) why, it is not reasonable to conserve the heritage item taking into consideration:

- (i) the heritage significance of the property; and
- (ii) the structural condition of the building; and
- (iii) pest inspection reports; and
- (iv) whether the building constitutes a danger to the public.

(b) that alternative options to demolition have been considered, with reasons provided as to why the alternatives are not acceptable.”

169 In that consideration I accept as the Council submits that the controls in the NSDCP do not require a comparison between the conservation of the building and the replacement building. The notation after Control P2(b) inviting plans of

the replacement building to be lodged concurrently so that the applications can be assessed concurrently similarly offers a practical way forward in the event of an approval of the application for demolition. This must be the case because to justify demolition without any understanding of its likely replacement would be illogical. Nevertheless, the case for demolition is a necessary first and to be considered in accordance with the relevant matters called up under s 4.15 of the EPA Act.

- 170 Focussing upon the provision of Section 13.8 P2 of the NSDCP in terms of criteria (a), the Council submits that the applicant has not satisfactorily demonstrated why it is not reasonable to conserve the MLC. It submits that there is no evidence to satisfactorily demonstrate the structural inadequacy of the building. While the applicant relied on the evidence of Mr Connett and Mr Wymond to justify structural inadequacy on the basis that the MLC does not comply with current seismic standards it was ultimately conceded that AS 1170.4 Structural design actions, Part 4: Earthquake actions in Australia is not likely to apply to this heritage building (Tcpt, 13 December 2022, p 587(19-31)). Relevantly, Policy 4.5 of the CMP provides that “upgrading of the building in response to the provisions of the Building Code of Australia shall take into account the heritage significance of the building”. The recent tenancy of the building by NAB until the expiration of its lease also lends support to a presumption of structural integrity in the absence of evidence to the contrary.
- 171 There is no evidence of pest inspection reports demonstrating any pest issues with the building (criteria (a)(iii)) nor is there any satisfactory evidence to demonstrate that the building constitutes a danger to the public. While the façade engineers’ report included a caveat that they could not rule out the possibility of latent defects that could manifest in cladding failure, they did not state that the tiles falling off the buildings in various locations presented a danger to the public. Moreover, they were certain in their joint evidence that the tiles could and should be replaced, accepting that they had been repaired in previous years. They also agreed that the reinforced concrete shear walls may be kept and that the terracotta cladding to the walls should be replaced using similar looking terracotta cladding and mortar. This new cladding would in turn allow for waterproofing of the walls and with those repairs the evidence is that

the design life (with maintenance) could be extended to 50 years. The experts said that there is no water ingress through the curtain wall based on their investigations (Ex 12 at p 10) and that the aluminium curtain and spandrel cladding can, and should be, retained and remediated (Ex 12 at p 12). Remediation works have been prepared and recommended which allow for an estimated design life of 25 years (Ex 12 at p 19).

- 172 There is also a recommendation for the blue painted cladding on the rooftop blade walls to be tested for asbestos, and if necessary, replaced with a CFC board – potentially extending that element's design life for 25 years (Ex 12 at pp 10-17). But again, no evidence of a present danger to the public or an issue with the structural condition of the building.
- 173 It is to be noted that the loading dock and parking area is an existing arrangement and presumably approved. That said, there is simply no satisfactory evidence to demonstrate that the present use of this area constitutes a danger to the public. Particularly, as the Metro Station is yet to be operational, and at the Court view I observed the MLC car park as essentially vacant and the loading dock seemingly occupied by the vehicles of builders from the surrounding construction sites. The evidence about a potential pedestrian/car conflict generated by the building was directed to a time when the Metro is operational and Denison Street pedestrianised as anticipated by the Council's Strategy. An environment, that Ms Laidlaw conceded was not imminent nor certain and dependent upon consent from TfNSW (ACS in Reply at par 38.2).
- 174 Finally, the fact that the NAB occupied the MLC up until the expiration of its lease supports a finding that the building in 2023 continues to have structural integrity, albeit requiring urgent maintenance and repair and updating. As such, the applicant has not satisfactorily demonstrated why it is not reasonable to conserve the building after a consideration of evidence in respect to the matters in P2(a).
- 175 I now turn to Control P2(b) in Section 13.8 which requires the applicant to satisfactorily demonstrate that alternative options to demolition have been

considered, with reasons provided as to why the alternatives are not acceptable.

- 176 I have earlier referred to Mr Vivian's evidence and the various alternative options outlined in the Design Report and compared in the comparative matrix table (see [28] above and Annexure 1) which he addressed orally at the hearing and explained why each of these options on p 73 of the Design Report were not capable of being pursued (Tcpt, 14 December 2022, p 714(5-14)). Critically all but one of these options would involve overshadowing of Brett Whiteley Place which would have meant that the development would not have been entitled to exceed the height limit in cl 4.3 of the NSLEP. The updated SEE also gives an understanding of the extent of the investigations undertaken by the applicant including QS costings of the various alternatives (Ex B at Tab 13). The applicant submits that evidence is extensive and satisfactorily demonstrates that alternative options to demolition have been considered, with reasons provided as to why these alternatives are not acceptable. In that regard, I accept Mr Vivian's evidence that none of the hybrid options would comply with the height controls with the effect that they would not be permissible development (Tcpt, 14 December 2022, p 724(19-22)). I also accept that detailed consideration has been given to options since 2015 (as summarised in the Design Report at pp 72 -73) noting that the partial demolition of the MLC the proposed hybrid scheme with which Mr Elliott was engaged has also been addressed.
- 177 That said, the Council submits that insufficient options have been considered by the applicant and other options are available which conserve the building in line with the NSDCP and the Burra Charter principles of "...doing as much as necessary to care for the building and to make it usable but otherwise change it as little as possible". For example, the application has failed to consider alternative options to redevelopment in accordance with the NSDCP controls, NSLEP and the principles of intergenerational equity including adaptive reuse of the building which preserves its essential and most significant heritage features utilising the provision in cl 5.10(10) (Tcpt, 15 December 2022, pp 808(20-25); 809(1-5)).

- 178 The Council is critical of the applicant's refurbishment option which requires a strip out – complete removal of the external façade and subsequent reconstruction of the façade as a faithful reproduction of the original, replacement of lifts, air conditioning (albeit in the existing apertures) – essentially an instruction to refurbish the building to a substantially A-grade (being a high-class fit out) building, and compliant with current codes rather than remedy the defects in the building to an expected B-grade level for a building of this age (Tcpt, 15 December 2022, pp 813(35-50); 814(25-41); 817(10-20)). The costings in the tables to the Bolt and McSweeney report (Ex 16) are all based on an A-grade refurbishment, despite the evidence of Mr Grose and Mr Hill that the building is older than 20 years and would normally be a B-grade building refurbishment. The refurbishment cost for this option in Ex B Tab 13 p 5 as costed by Mr Bolton is \$197,757,133 – a costing that he accepted when considering the heritage management philosophy in the NSDCP and the CMP was based on a scope of works to do as much as possible (Tcpt, 15 December 2022, p 830(40-50)).
- 179 In the supplementary report (Ex 30) the experts examine the difference in costings with the EVC report and their original report (Ex 16) and confirm that their costings for the refurbishment option covers more extensive work including removing and replacing services, which the EVC report did not. Even when consideration was given to the extent of the works required by the facade experts, the cost assessment was reduced for the refurbishment option to \$151,802,562 (Mr Bolt) and Mr McSweeney at \$138,761,293 (the difference relating to the extent of the works and tiling of the gable ends).
- 180 As such, the Council submits, the exercise for the costing of the refurbishment option in the Bolt report (Ex B at Tab 13) or by either QS in the first joint report or the revised costings did not refer to the CMP or a heritage specification document or scope of conservation works. The normal starting point in determining the scope of work that is needed, having regard to the heritage objectives as Mr Logan states in his evidence.
- 181 I accept the evidence of Mr Logan that the applicant's approach does not retain the identified heritage significance of the Item because it does not reference

minimal intervention in accordance with the Burra Charter which is adopted by NSDCP and heralded in the relevant CMP. The applicant submits that the NSDCP permits demolition of heritage items if certain criteria are satisfied. It says it will always be the case that the heritage significance will be impacted when demolition is proposed. The issue for the Court is not simply whether heritage significance will be impacted but whether the criterion for demolition is satisfied in the circumstances of the case. It is submitted that the factors weighing in favour of demolition in this case are the economic reality that it is not feasible to retain and conserve the existing building based on that economic evidence namely:

- The QS have agreed that the cost of refurbishment would be in the range of \$138,761,293 to \$151,802,562.
- The QS are agreed that the cost of redevelopment would be in the range of \$608,571,237 to \$688,136,275.
- The proposition of refurbishment (based on the evidence summarised earlier) is not economically viable for the owner or any likely future owner
- The proposition that demolition is justified because the retention and refurbishment options would not reasonable

182 Mr Vivian explains in the Design Report all of the economic evidence is based on a brief of maximising an economic return for the client. Clearly, this is entirely reasonable were it not for the fact that the site contains a highly significant and assessed State heritage item. In the economic analysis this fact is not even referred to and the CMP is ignored. It is difficult to reconcile a justification for the demolition of the MLC on the basis of “the substantial public interest and strategic benefits associated with the proposal that will not be realised if the MLC was retained” (ACS at p 30). Section 13.8 anticipates a case for demolition upon satisfactory demonstration of particular criteria. There is no reference in the section to the requirement to consider the economic benefits of the proposed development outweighing the impact of the loss of a State heritage Item as a reason why it is not reasonable to conserve the heritage Item.

183 Relevantly, the cost of an A-grade refurbishment is not the commencing economic point from which to conclude that it is not reasonable to conserve the MLC. As Mr Grose so eloquently stated in his evidence “It is unreasonable to

aspire to making a refurbished building of this age appropriate to the commercial metrics of a contemporary building” (Ex 11 - refurbishment option).

- 184 As that refurbishment option has not been considered, by reference to the CMP or a schedule of conservation works prepared by a heritage expert, I do not accept that the costed scope of works reflects a realistic schedule of works required to conserve the MLC as an office building. As Mr Logan explained, the cost allowed for the heritage item to be upgraded to meet a new building code is not a requirement and the standard is usually achieved in other ways (Tcpt, 14 December 2022, p 744(10-15)). I accept Mr Logan’s criticism of the applicant’s approach to the refurbishment option and consider the failure to prepare a scope of works that is informed by a heritage expert to be a significant flaw in the applicant’s alternative options in addressing the control as provided in P2(b) of Section 13.8 of the NSDCP.
- 185 Without a proper analysis of the adaptive reuse of the MLC based on the principles in the Burra Charter, or a heritage scope of works, I do not accept that the applicant has satisfactorily demonstrated the alternative options to demolition. The applicant has not provided reasons objectively assessed, as to why the refurbishment option is not acceptable.
- 186 It needs to be acknowledged that the delay in the applicant’s production of the EVC report and the valuation by Cushman & Wakefield (Ex D) was an unnecessary complication in this case. It necessitated additional reports and additional evidence from the QS and valuers. And, because the EVC report did not take account of the replacement of the external tiles and the refurbishment to the aluminium façade, further costing needed to be prepared and adjusted to November 2022 (Ex 32). Not unsurprisingly, the costings based on the hybrid of the EVC works and the additional works, as advised by the engineers, were lower than the original estimates by the QS - at \$100 million (Bolt) and \$80 million (McSweeney). Although, ultimately this difference had little impact as the valuers ultimately adopted common figures as to the reasonable development costs for option B with Mr Lawrie at \$97,151,171 and Mr Hill at \$101,056,774.70 (Ex 36 at par 11).

- 187 That said, Mr Bolt's redevelopment option which was costed on a CIV approach excluded developer contingencies, finance costs, and inflation (Tcpt, 16 December 2022, p 922) albeit he thought an allowance of 20.4% for contingencies was reasonable. As such, it is fair to say, as the Council submits, that the Bolt estimate costs for the CIV are an underestimate.
- 188 Mr Hill's final valuation evidence to the Court, after carrying out calculations for all three options was that the refurbishment option (subject to a tenant commitment) is the most viable and profitable option for the applicant when compared to the redevelopment option cost of \$797 million (Ex 36 at par 24 and Ex 29 at Appendices E, F and G). That is, there is scope for a consideration of a refurbishment option with no change to the envelope of the building and upgraded to an "upper B grade" building with 5-star energy rating and 4-star water rating. This is relevant when one considers the evidence given by the valuers.
- 189 For the reasons submitted by the Council (CCS at pars 103-130) and based on the evidence of Mr Hill, I accept that the DCF method used by Cushman & Wakefield is the appropriate valuation method for valuation of the MLC as an asset on a going concern basis. I accept that the RLV method is only used for valuing property which is to be redeveloped or improved. An improvement is not repairs to, or maintenance of, an existing capital asset. The EVC scope of works could not be described as improvements but rather they are repairs and maintenance and should be valued as such. On that basis, I accept that the applicant's valuer has adopted an incorrect methodology, in justifying it on the basis of a valuation standard for a development property (IVS 410, par 20.1(d)). Therefore, as the Council submits "the treatment of the existing building as a development property collapses, and the valuation of it on that basis is worthless".
- 190 As such, this viable refurbishment alternative to demolition lends further support to the finding that the applicant is unable to demonstrate that there is no acceptable alternative to demolition.
- 191 In forming that view I do not accept as the applicant contends that the scope of works for the refurbishment option was properly informed by heritage

considerations because the façade experts “Mr Wymond and Mr Connett both have heritage expertise” (ACS in Reply at par 43). The evidence is that the various adaptive reuse options started from the wrong premise in order to realise the highest potential rents rather than having regard to the CMP policies and the conservation of this significant heritage item. As the Council submits the applicant’s failure to demonstrate adaptive reuse but to instead seek to justify demolition based on commercial returns from an entirely new A grade office building is contrary not only to the statutory controls but the conservation principles in the Burra Charter adopted by the NSDCP.

192 In closing, the applicant submitted in respect to particular 2(c)(iii) that while the DA does not advance the protection of North Sydney’s built heritage – to the extent that it comprises the MLC, the demolition is nevertheless justified by the materials supporting the application and the applicant’s submissions (ACS at par 78). That proposition, however, is not made out by the evidence. Mr Logan’s criticism of the application relates to supporting documents which ignore the policies of the CMP, the general thrust of which he said remains applicable, given the buildings extraordinary significance (Ex 13 at pars 113-121). I accept his expert assessment.

193 The evidence is that the revised refurbishment option based on the EVC report costs substantially less than the original refurbishment option relied upon by the applicant and without further interrogation of that option it has not been satisfactorily demonstrated that alternative options to demolition have been considered and reasons provided as to why they are not acceptable. The criterion for demolition is therefore not satisfied.

194 In *PJM Group Pty Ltd v Ku-ring-gai Council* [2022] NSWLEC 1170, I accepted that the applicant does not need to exhaustively examine every alternative to satisfactorily demonstrate why it is not reasonable to conserve the heritage item. What is “reasonable” will turn on the facts of the case.

195 In considering the public interest in support of retention of this highly significant heritage Item the financial impost on the owner while relevant that public interest is not overrun by interest in the replacement building that would result from the approval of the DA. It may be the case as the applicant submits on the

evidence of Mr Rowe that the site is “the single largest and best opportunity in North Sydney to deliver on the NSW government’s strategic planning imperatives” (Ex 15 at 3.52). There are various public benefits of the proposal under headings such as:

- the public domain (being public space),
- urban design,
- environmental and public domain (transport connections) workplace,
- key benefits in “delivering a new office building that exhibits design excellence and contributes to the architectural legacy of the North Sydney CBD” (ACS at pp 17-19) and
- “the existing building at 105 Miller Street does not support contemporary trends in office design to support workforce wellbeing” and “has not been designed with contemporary standard of the worker wellbeing in mind the associated social and economic public benefits are then referred in support of demolition” (Ex A at Tab 35; updated SEE at p 77; Ex A at Tab 21 pp 37-38).

196 However, these matters are not relevant in assessing the significance of the heritage Item and the case for its demolition under the relevant controls.

197 The applicant’s submissions that economic and financial considerations bear upon my consideration of an assessment of the heritage significance of the MLC are misplaced in this development appeal (ACS at pars 22 and 25). They are clearly relevant under s 34 of the Heritage Act in the consideration of the economic and financial burden imposed on an applicant before a listing on the State Heritage Register, as the evidence before me suggests (Ex 8 at p 466) – although I make no finding in that regard as it is not a relevant matter.

198 As the applicant succinctly puts it “the issue for the Court is not simply whether heritage significance will be impacted but whether the criterion for demolition is satisfied in the circumstances of this case”. For the reasons stated, I do not accept that the applicant has satisfactorily demonstrated why it is not reasonable to conserve the heritage Item taking into consideration the matters in Section 13.8 P2(a) and (b) that it has been satisfactorily demonstrated that alternative options to demolition have been considered, with reasons provided as to why the alternative are not acceptable. After a consideration of the matters under s 4.15 of the EPA Act including the public interest which embraces the principals of ecologically sustainable development and

intergenerational equity: *Stannards Marine Pty Ltd v North Sydney Council* [2022] NSWLEC 99 at [188] and [189]; and mindful of the particular relationship between heritage conservation and intergenerational equity as identified in *Chief Executive, Office of Environment and Heritage v Clarence Valley Council* [2018] NSWLEC 205 at [27], the evidence weighs against the grant of consent to the application for demolition under cl 5.10(4) of the NSLEP. The appeal is dismissed.

199 The Court orders:

- (1) The appeal is dismissed.
- (2) Development application no. 147/20 for the demolition of the existing MLC Building and construction of a new 27-storey commercial building at 105-153 Miller Street, North Sydney is determined by refusal of consent.
- (3) The exhibits are returned except for A, B and 1.

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S Dixon

Senior Commissioner of the Court

Annexure 1 (300956,

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Amendments

04 May 2023 - Correction to typographical errors at [64] and [198].

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