



Court Strikes Down Declaration of Heritage Listing

Authors: Greg Lee, Chloe Howard & Ekaterina Oglos

Key Takeaways

- Decisions by consent authorities to list buildings in the state's heritage register are vulnerable to legal challenge if the decision is not supported by reasons which have 'regard to any statutory requirements applying to the decision'.
- Consent authorities need to ensure that all mandatory considerations are identified in its published reasons to comply with obligations under the *Environmental Planning and Assessment Act 1979*.
- If a consent authority has listed a building in the heritage register, careful review needs to be undertaken to determine whether the decision has been made lawfully.

Background

- In July 2020, a development application was lodged by IOF Custodian Pty Limited atf the 105 Miller Street North Sydney Trust (**Applicant**) with North Sydney Council to demolish and redevelop the MLC Building.
- In September 2020, the Heritage Council resolved to give notice of its intention to consider listing the MLC Building on the NSW heritage register pursuant to s 33(1) of the *Heritage Act 1977* (NSW) (**Heritage Act**).
- In November 2020, it was resolved that the MLC Building was of state heritage significance.
- In May 2021, it was determined that the MLC Building was to be listed on the NSW heritage register pursuant to s 34(2) of the Heritage Act.
- The reasons given for the decision to list the MLC Building on the NSW Heritage Register was as follows:
 - *MLC Building North Sydney is of state heritage significance for its importance to the architectural and cultural history of NSW as an outstanding example of a seminal building associated with the evolution of high-rise office design in Sydney and NSW, utilising construction and structural techniques not previously used in Australia.*
 - *Listing will provide for the identification and registration of this item of state heritage significance.*
 - *Listing will promote an understanding of the state's heritage.*
 - *Listing will encourage the conservation of this item of the state's heritage.*
- The Applicant commenced proceedings in August 2021 challenging the decision, including that the Minister failed to take into account a relevant consideration being the mandatory consideration in s 32(1)(c) and s 32(1)(d) of the Heritage Act.
- Such failure was evidenced by the published reasons which, it was agreed, did not refer to the mandatory relevant considerations.

The Decision

In reviewing the reasons published by the Minister, the Court confirmed that the Minister was required to consider the mandatory considerations as required by the Heritage Act, and therefore, if the reasons did not contain any reference to the mandatory considerations, it was open to the Court to find that those matters had not been taken into account when the Minister had made the decision to place the MLC Building on the register.

In publishing these reasons, it was the Court's view that those reasons should, in most cases, be regarded as the complete reasons for the decision. A failure to include reference to a matter in the reasons could infer that the matter was not taken into account.

Further, the Court held that the mandatory considerations were not a mere formality, but were essential requirements to be considered by the Minister in determining whether a building should be placed on the register.

In this case, the reasons did not contain any reference to whether, by placing the MLC Building on the register, the building would be incapable of reasonable or economic use (s 32(1)(c)), or whether the listing would cause undue financial hardship to the owner, mortgagee or lessee of the building (s 32(1)(d)). Pursuant to s 32 of the Heritage Act, these were required to be considered by the Minister in making the decision to list the building on the register.

The Court held that the reasons were evidence that these considerations had not been taken into account by the Minister, as the reasons did not contain any reference to the s 32 considerations.

Accordingly, the Court ordered the Heritage Council to remove the MLC Building from the heritage registrar.

The decision can be read in full here: [IOF Custodian Pty Limited aff the 105 Miller Street North Sydney Trust v Special Minister of State \[2022\] NSWLEC 86](#).