



21 April 2021

MLC BUILDING, NORTH SYDNEY (FORMER) Section 34 *Heritage Act 1977* Review Report

1. INTRODUCTION

1.1. Minister's request

- [1] On 25 February 2021, the NSW Independent Planning Commission (the **Commission**) received a request from the Minister for the Public Service and Employee Relations, Aboriginal Affairs, and the Arts (the **Minister**), to conduct a review relating to a recommendation from the Heritage Council of NSW to list the MLC Building, North Sydney (former) on the State Heritage Register (**SHR**) under section 32(2) of the *Heritage Act 1977* (the **Act**).
- [2] Professor Mary O'Kane AC, Chair of the Commission, nominated Adrian Pilton (Chair) and Dr Peter Williams to constitute the Commission in conducting the review.

1.2. Statutory requirements

- [3] The Commission has been requested by the Minister, in accordance with section 34(1)(b) of the Act, to conduct a review and provide a report as specified in clause 21 of the Heritage Regulation 2012 (**Heritage Regulation**).
- [4] Certain requirements related to the Commission's review are set out in section 36 of the Act, as follows:
 - (1) *At a review conducted by the Independent Planning Commission each of the following is entitled to appear before the Commission either personally or, unless otherwise provided by the regulations, by an Australian legal practitioner or agent—*
 - (a) *an owner, mortgagee or lessee of land to which the proposed listing will apply or of land on which is situated the building, work or relic (being a relic that is attached to or forms part of land) that will be subject to the proposed listing,*
 - (b) *an owner of a relic (not being a relic that is attached to or forms part of land) or moveable object that will be subject to the proposed listing,*
 - (c) *the council of the area in which the item or precinct concerned is situated,*
 - (d) *the Heritage Council,*
 - (e) *the Secretary of the Department of Premier and Cabinet or a nominee of the Secretary,*
 - (f) *any other person with the leave of the Commission.*
 - (2) *At the conclusion of the review, the Independent Planning Commission is to provide a report in writing to the Minister containing a summary of the submissions made to the review, the findings of the Commission with respect to those submissions and a recommendation as to how those submissions should be dealt with. The Minister is to make copies of the report available to the public after the Minister decides whether or not to direct the listing.*
- [5] This report constitutes the report required by section 36(2) of the Act.

1.3. Terminology

- [6] Where this report refers to submissions made by '**North Sydney Council**' this is a reference to submissions made by the Council's professional staff, not to submissions made by its elected officials.
- [7] Where reference is made in this report to submissions made by the '**Building owner**' it is a reference to submissions made by or on behalf of the owner of the freehold (being the '105 Miller Street North Sydney Trust') by its trustee (IOF Custodian Pty Ltd). The IOF Custodian Pty Ltd is shown as the owner in the Heritage Council's 5 February 2021 Agenda. The Commission also notes that Oxford Investa Property

Partners (OIPP) is shown on the Investa website as being the sole owner of the building¹.

- [8] The Commission notes the observation of Molesworth AJ in *Millers Point Community Assoc. Incorporated v Property NSW* [2017] NSWLEC 92 decision at [115] that in considering matters related to the ownership of nominated heritage buildings:

To adopt an unanalytical approach could conceivably invite artificial arrangements of financial affairs by the owner of a nominated heritage building, say by the creation of \$1 companies devoid of real assets as a tactical manoeuvre or perhaps the making of financial arrangements so that funds are not available, thereby creating an artificial hardship situation.

- [9] The Commission does not suggest any such artificial arrangements have occurred in the present case. The judgment of Molesworth AJ does however suggest that an analysis of the owner of the building may require a decision maker to go beyond only noting the specific entity that is the named owner of the building. The Commission does not have sufficient evidence before it to make exhaustive findings regarding the financial status of the owner in this regard and has accordingly made findings and recommendations based only on the evidence before the Commission.

2. BACKGROUND

- [10] On 4 September 2013, the MLC Building, North Sydney (former), was endorsed by the Heritage Council as part of a priority list for further investigation of its potential State heritage significance, under the former Modern Movement thematic listing program. On 5 May 2020, the State Heritage Register Committee (SHRC), under delegation from the Heritage Council, resolved to activate the proposed listing from the Modern Movement heritage study.
- [11] A Development Application (DA 147/20) was made to North Sydney Council on 7 July 2020 by Investa Office Developments Pty Ltd for the site. The Development Application proposes the demolition of the MLC Building and the construction of a 27-storey commercial building in its place. The DA has not yet been determined by the Sydney North Planning Panel, as North Sydney Council has identified a number of issues in relation to the proposed development that remain either non-compliant or requiring further information, in addition to the heritage concerns.
- [12] In relation to the heritage issues raised by the DA, a North Sydney Council briefing note to the Planning Panel identified a number of concerns, including the following:
- The proposed demolition of a heritage item that is assessed as having national heritage significance and is capable of conservation and continued use, cannot be supported.*
- The proposal will remove a building identified in Council's Public Domain Strategy as contributing to North Sydney's heritage character. It will also result in the loss of a building that has been identified as a potential state item by Heritage NSW, as a 'Significant Twentieth Century Building' by the Australian Institute of Architects and by DOCOMO [sic] as a nationally significant building, and that is unique within North Sydney. The proposal is also contrary to the Conservation Management Plan for Lend Lease Interiors, by Jackson Teece Chesterman, Willis Consultants Pty Ltd that was prepared for the building.*
- It is recommended that the application be withdrawn or refused.*
- [13] On 7 July 2020, the National Trust of Australia (NSW) requested an Interim Heritage Order (IHO) be made for the building in response to the threat it perceived that the DA posed to the building's heritage value.
- [14] The SHRC considered the IHO on 4 August 2020 and recommended that the Minister make the IHO. The SHRC also determined to give Notice of Intention to List the building (including its curtilage to the property boundary) on the SHR on 1 September 2020.
- [15] Submissions concerning the possible listing of the building were sought from 9 September to 8 October 2020.
- [16] The Heritage Council received 25 submissions in support of the listing and one objection (being the owner).
- [17] The owner submitted against listing on the following broad grounds (considered in detail in sections 4-6 below):
- The building fails to meet the threshold for State significance for meeting any of the assessment

¹ <https://www.investa.com.au/properties/105-151-miller-street> accessed on 18 May 2021.

criteria used by the Heritage Council to assess heritage places (i.e. those gazetted pursuant to section 4A(4) of the Act).

- Listing the building on the SHR would render the MLC Building incapable of 'reasonable or economic use' applying section 32(1)(c) of the Act.
- Listing on the SHR would constitute 'undue financial hardship', applying section 32(1)(d) of the Act.

[18] The owner's submission to the Heritage Council objecting to the SHR listing was accompanied by expert reports and advice from Bates Smart (architects), Ethos Urban (planning and economics) and WT Partnership (cost estimates).

[19] As part of its deliberations concerning the possible listing of the site on the SHR, the Heritage Council requested that the owner's submission objecting to the SHR listing be the subject of a peer review. Peer reviews were prepared by PTW Architects and Urbis.

2.1. Site description

[20] The MLC Building, North Sydney (former) ('the **building**' or 'the **MLC Building**'), is located at 105-153 Miller Street, North Sydney, within the North Sydney CBD.

[21] The MLC Building was completed in 1957 in the Post-War International Modernist style. It was designed by architect Sir Walter Osborn McCutcheon of the firm Bates Smart & McCutcheon.

[22] The building has been listed as a heritage item of local significance in Schedule 5 of the North Sydney Local Environmental Plan 2013 since about 1989. It is located opposite four other buildings listed in Schedule 5, and in the vicinity of several others.

[23] In broad terms, the building comprises three distinct structural elements:

- the Miller Street wing (sometimes called 'the west wing'), being about 101m long, 17m wide and 14 storeys tall (plus two below ground level);
- the Denison Street wing (sometimes called the 'east wing') being slightly shorter and about 55m long and 15m wide; and
- a central tower accommodating the lifts.

[24] All parties agree that the three elements have different levels of heritage significance, and that the Miller Street wing is the most significant part of the ensemble. This has implications for possible future redevelopment of the site, especially where partial demolition may be desirable to achieve commercial viability (a matter discussed in detail in section 5.4 below).

[25] In 2000, the facade was restored by Bates Smart and the interior renovated in 2001 by Bligh Voller Nield as part of the 'Campus MLC' redevelopment. Campus MLC won the 2002 RAIA NSW Interior Architecture Award and the 2002 RAIA National Interior Architecture Award.

[26] Notwithstanding these renovations, the MLC Building has experienced a decline in physical condition. This includes deterioration of the tiles on the north and south elevations and changes to the western curtain wall that have resulted in the failure of some gaskets and some water ingress, among other issues.

[27] The MLC Building adjoins two public open spaces: Brett Whitely Place on the south, and a narrow grassed area on the western side of the site designated 'the Miller Street Special Area'. The avoidance of overshadowing of Brett Whitely Place and the retention of the Miller Street Special Area were important considerations for North Sydney Council (discussed in section 5.3 below).

[28] The MLC Building's eastern facade fronts Denison Street, which is presently a narrow and poorly activated street used for vehicular access, but its improved activation is planned as part of the adjacent Victoria Cross Station redevelopment, which is predicted to result in increased pedestrian movements and enhanced retail opportunities.

2.2. Summary of the Heritage Council of NSW recommendation

[29] In a recommendation to the Minister dated 5 February 2021, the NSW Heritage Council advised that the MLC Building is of State heritage significance and that the Minister should direct the listing of the item on the SHR.

[30] The Statement of Significance included the following:

The former MLC Building, North Sydney is of state heritage significance as Australia's first post-war office block in respect of its design, materials & mode of construction. Completed in 1957 it was the first high rise office block in North Sydney and the largest in NSW for a number of years after its construction, and is a seminal building associated with the evolution of high-rise office design in Sydney and NSW. It is the earliest surviving curtain wall building in Australia.

It was designed and constructed by architectural firm Bates Smart and McCutcheon (Architect Sir Walter Osbourne McCutcheon [sic], Engineer Harvey H Brown) utilising construction and structural techniques not previously used in Australia. This includes the first use of a curtain wall design, the first use of modular units in Australia, fully rigid steel frame structure combined with 'light weight' construction of hollow steel floors resulting in reduced construction loads, cost & time. Its significance is also found in its design intention as a people oriented design with natural light, transparency and amenity being high in the design considerations. It is a building lending itself to adaptation to changes in workplace behaviour and requirements for over 60 year [sic] as attested by its acclaimed, award winning interior refit in the 2002 and 2010.

The building, especially the Miller Street wing, is representative of the Post-War trends in modern offices with the provision of food (cafeteria, lounge and dining) and recreation (squash, billiards, theatre, roof top garden) spaces for its 5000 workers. It is a landmark site which signified the transformation of the center [sic] of North Sydney from C19th town to the second CBD of Sydney.

The former MLC Building North Sydney, most particularly the widely recognised iconic Miller Street wing, is of state heritage significance for its significant landmark qualities. It has state level heritage values for its use of exceptional modernist building materials such as the curtain wall facade and terracotta glazed bricks that are representative of the Post-War International style of architecture that predominated in early commercial high-rise buildings. McCutcheon's desire for his buildings to integrate modern art within the fabric of the design is demonstrated in the Miller street wing's exterior facade and frontage, through the inclusion of works by significant artists such as Andor Meszros and Gerald Lewers and the design of the forecourt garden by Gerald and Margo Lewers on the Miller Street frontage. As a result, and despite subsequent modifications, the building and its Miller Street landscape setting are of high aesthetic, technical and representative significance.

The building is also of associative significance as the (then) NSW's head office of Mutual Life & Citizens Assurance Company Limited (MLC). It is also potentially of state heritage significance as an important work by a significant firm of architects Bates Smart and McCutcheon, and master builders Concrete Constructions.

[31] The Heritage Council assessed the MLC Building as satisfying six of the seven heritage assessment criteria gazetted pursuant to section 4A(4) of the Act, being:

- a) *an item is important in the course, or pattern, of NSW's cultural or natural history.*
- b) *an item has strong or special association with the life or works of a person, or group of persons, of importance in NSW's cultural or natural history.*
- c) *an item is important in demonstrating aesthetic characteristics and/or a high degree of creative or technical achievement in NSW.*
- d) *an item has strong or special association with a particular community or cultural group in NSW for social, cultural or spiritual reasons.*
- f) *an item possesses uncommon, rare or endangered aspects of NSW's cultural or natural history.*
- g) *an item is important in demonstrating the principal characteristics of a class of NSW's cultural or natural places, or cultural or natural environments.*

[32] The Heritage Council indicated that the appropriate boundary for the listing is the existing property boundary (being all of Lot 2 on Deposited Plan 792740).

3. THE COMMISSION'S CONSIDERATION OF SUBMISSIONS

3.1. Written submissions received by the Commission

[33] As part of its review process, the Commission sought written submissions from the public from 19 February 2021 until 30 April 2021. The building owner was given an additional seven days (until 7 May 2021) to make a final submission. These written submissions have been made available on the Commission's website.

Table 1 – Written Submissions

Submitter	Date of submission	Date available on Commission's website
Urban Taskforce	17 March 2021	17 March 2021
Matt Zanello	24 March 2021	1 April 2021
Committee for North Sydney, including: <ul style="list-style-type: none"> • "The MLC Building: A key element in the North Sydney city centre's sense of place" (dated 23 March 2021) • "Information – The significance of the MLC Building in North Sydney" by Professor Geoff Hanmer (undated) 	26 March 2021	1 April 2021
Dean Cassiato	26 March 2021	1 April 2021
Urban Taskforce	30 March 2021	31 March 2021
Committee for North Sydney, including: <ul style="list-style-type: none"> • "Supplementary submission" (dated 1 April 2021) • "The MLC Building Devalued – Response to Investa's submission to the Heritage Council" (dated March 2021) • "The MLC Building in 2040" (dated March 2021) • "The MLC Building Vs Alternatives" (dated March 2021) 	1 April 2021	6 April 2021
Samuel Shepherd	1 April 2021	1 April 2021
David Ghannoum	1 April 2021	6 April 2021
Green Building Council of Australia	1 April 2021	6 April 2021
Andrew Hoyne	1 April 2021	6 April 2021
John Hancox: <ul style="list-style-type: none"> • "The MLC Building in 2040" (dated March 2021) 	19 April 2021	20 April 2021
Debra Berkhout	19 April 2021	3 May 2021
Committee for North Sydney, including: <ul style="list-style-type: none"> • "Information – The significance of the MLC Building in North Sydney" by Professor Geoff Hanmer (undated) 	20 April 2021	3 May 2021
Eugenia (Genia) McCaffery	20 April 2021	27 April 2021
Bruce Donald	20 April 2021	28 April 2021
Angus Finney	21 April 2021	29 April 2021
Andrew Parker	22 April 2021	3 May 2021
Jon Cook	22 April 2021	30 April 2021
James Claridge	22 April 2021	1 May 2021
Docomomo Australia	22 April 2021	1 May 2021
Peter Moffitt	23 April 2021	1 May 2021

Committee for North Sydney	23 April 2021	1 May 2021
John Evans	23 April 2021	1 May 2021
Building owner, including: <ul style="list-style-type: none"> Ethos Urban – “Economic and Planning Review” (dated 6 May 2021) Bates Smart – “105 Miller St IPC Review” (dated 8 April 2021) Investa/IOF Custodian Pty Ltd – “Submission to Heritage NSW” (dated 8 October 2020) WT Partnership – “105 Miller Street Refurbishment Order of Costs” (dated 5 October 2020) Enstruct Group Pty Ltd – “Impact of the Victoria Cross Metro Station on Miller Street Flooding” (dated 6 May 2020) 	7 May 2021	10 May 2021

3.2. The Commission’s meetings

[34] As part of its review process, the Commission met with the parties set out in Table 2. All meeting transcripts and inspection notes have been made available on the Commission’s website.

Table 2 – Commission’s Meetings

Meeting	Date of meeting	Date transcript/notes made available on Commission’s website
Building owner including its legal counsel (King Wood & Mallesons), Bates Smart, and Ethos Urban	12 April 2021	14 April 2021
Heritage Council Chair and Heritage NSW	14 April 2021	20 April 2021
Committee for North Sydney	14 April 2021	20 April 2021
North Sydney Council – professional staff	21 April 2021	23 April 2021
North Sydney Council – elected councillors	21 April 2021	23 April 2021
Site Inspection	13 April 2021	21 April 2021

3.3. Additional material considered by the Commission

[35] In this review, the Commission has carefully considered the material identified in Table 3, along with other documents referred to in this advice. All of this material has been made available on the Commission’s website.

Table 3 – Additional material

Material	Date of material	Date available on Commission’s website
Ministerial briefing (Recommendation to List) from the Heritage Council of NSW, including: <ul style="list-style-type: none"> Attachment 1A – Location map Attachment 1B – Curtilage map Attachment 1C – Recommendation to List (dated 5 February 2021) Attachment 1D – Heritage Council resolution (dated 5 February 2021) Attachment 1E – Submissions (to Heritage Council) 	9 February 2021	5 March 2021

<ul style="list-style-type: none"> • Attachment 1F – Submission from building owner (to Heritage Council) dated 8 October 2020, which included: <ul style="list-style-type: none"> ○ Annexure A – Report by WT Partnership entitled “Refurbishment Order of Costs”, dated 5 October 2020. • Attachment 1G – Draft direction to list on the State Heritage Register 		
<p>Additional documentation provided by North Sydney Council:</p> <ul style="list-style-type: none"> • GML Heritage assessment (dated 2 October 2020) • North Sydney Council Conservation Planner comments (dated 10 September 2020) • Sydney North Planning Panel Briefing Report (undated) • In House Meeting Minutes re: withdrawn DA 667/02 (dated 7 May 2003) • North Sydney Council Conservation Planner comments (dated 14 March 2003) • Bates Smart - “Campus MLC Extension” elevations (dated 19 May 2003) 	Various	23 April 2021 and 27 April 2021
<p>Correspondence from the Building Owner (in response to request for additional information by the Commission), including:</p> <ul style="list-style-type: none"> • WT Partnership - “Proposed State Heritage Listing of MLC Building” (dated 28 April 2021) • Ethos Urban – “Proposed State Heritage Listing of MLC Building (former) North Sydney” (dated 28 April 2021) • Norman Disney & Young – “Consultant Advice” (dated 28 April 2021) 	28 April 2021	29 April 2021
<p>Correspondence from the Chair of the Heritage Council of NSW entitled “further information regarding MLC building (former), North Sydney, requested by IPC Panel”, including:</p> <ul style="list-style-type: none"> • PTW Architects – “MLC Building North Sydney - Review of owner objection to State Heritage listing” (dated February 2021) • “Floor-to-ceiling height” detail mark-up (undated) 	28 April 2021	28 April 2021

3.4. Statutory considerations

[36] The Commission’s review was undertaken in accordance with section 36 of the *Heritage Act 1977*. This report has been structured to align with the matters required to be considered by the Minister under section 32 of the Act in determining listing on the SHR, namely:

- **Is the building of State heritage significance** (see section 4 below)? This considers the following provisions of the Act:
 - the recommendation of the Heritage Council that the item should be listed (section 32(1)(a)).
 - whether the long-term preservation of the item is necessary (section 32(1)(b)).
- **Is the building capable of reasonable or economic use** (see section 5 below)? This considers the following provision of the Act:
 - whether the listing would render the item incapable of reasonable or economic use (section 32(1)(c)).
- **Would listing result in undue financial hardship** (see section 6 below)? This considers the following provision of the Act:

- Whether the listing would cause undue financial hardship to the owner, mortgagee or lessee of the item or the land on which the item is situated (section 32(1)(d)).

4. IS THE BUILDING OF STATE HERITAGE SIGNIFICANCE?

4.1. Owner's submissions

[37] In its submission to the Heritage Council, dated 8 October 2020, the owner stated:

As the owner of the MLC Building, we strongly object to it being listed on the State Heritage Register for several reasons, including that: the item does not satisfy the yardstick of having significance to the State pursuant to section 4A of the Heritage Act with previous heritage studies only noting its significance to the North Sydney area ...

[38] In the same submission, the owner also stated that:

We accept that at the time of the initial listing in circa 1989 the MLC Building was assessed and found to be an item of local heritage significance on the basis set out in the statement of significance because of its significance to the local area.

[39] The owner further noted in its submission to the Heritage Council that the building's condition has deteriorated since its inclusion on the North Sydney local heritage register.

[40] At the meeting to the Commission, the owner reaffirmed its position that the building does not meet the threshold for State significance.

[41] In a subsequent written submission to the Commission (7 May 2021), the owner identified what it considered to be eight specific defects in the Heritage Council's assessment of the MLC Building's State significance. The owner's position is reproduced verbatim below (the owner begins each observation by quoting that part of the Heritage Council's assessment that it objects to, followed by its reply):

- *Is "Australia's first post war office block in respect of its design, materials and mode of construction" (emphasis added). The building is not the first post war office block in the State or in New South Wales. It is the first one of this exact design, materials and mode of construction. The same conclusion applies to all other office blocks erected after the war which were individually designed.*
- *Was a "seminal building associated with the evolution of high-rise office design in Sydney and NSW" but does not explain how or why the building was important at State level as opposed to local level and does not distinguish the building from other buildings in the State which were similarly associated with the evolution of high-rise office design.*
- *Was "designed by Bates Smart and McCutcheon". That firm has designed and continues to design many buildings. McCutcheon, the architect responsible for the MLC building, regarded this building as being poorly designed such that later intervention was necessary to go some way to address the design deficiencies.*
- *Utilised "construction and structural techniques not previously used in Australia". While this may be so, the building is just one of many buildings from the period that used these techniques and further, it is not the best example of these techniques as is made clear in the History section of the inventory listing.*
- *"...lend[s] itself to adaptation to changes in workplace behaviour and requirements for over 60 year (sic)". As is apparent from the analysis undertaken by Bates Smart and presented to the Panel, the building has only ever been occupied by a single tenant and is no longer capable of adaptation to accommodate current needs of whole building tenants and is incapable of being reasonably divided into smaller tenancies given the long, narrow floorplates in the building.*
- *Is "representative of post-war trends" but is one of many buildings in this category of less significance than others of its time, none of which have been included on the State register.*
- *Has State level heritage values for its "use of exceptional modernist building materials such as the curtain wall facade and terracotta glazed bricks". As indicated in the presentation to the IPC by Bates Smart those materials cannot be retained and need to be wholly replaced if the building is to remain. Use of new fabric to replace heritage fabric will inevitably lessen the heritage significance of the building, rather than raising its significance to State level.*
- *Is of "associative significance as the (then) NSW's head office of Mutual Life & Citizens Assurance Company Limited". That association was of significance locally within North Sydney but will be lost when MLC vacates the building and moves to its new premises. The appropriate State level association with MLC is the former MLC building in Martin Place, not this building.*

[42] In its submissions to both the Heritage Council and Commission, the owner emphasised the poor condition of the physical fabric of the structure, which the owner states to be failing, and would require significant replacement to bring the building back to a tenable condition. In the owner's words, to address the structure's physical defects this would:

... involve stripping the building back to its structural frame and then rebuilding the MLC Building as a facsimile of the original with new materials and technology (owner's submission dated 8 October 2020, page 5).

[43] The physical interventions identified by the owner's submission as being necessary included:

- Building services and lifts require replacement;
- Curtain wall facades need to be removed to replace failing rubber gaskets on east and west sides;
- Terracotta tiles failing and require replacement or significant physical intervention; and
- Fire rating below mechanical services (and above ceilings) require removal to replace aging services.

[44] By inference, the owner asserted that substantial replacement of original fabric may irretrievably impact the 'integrity' and/or 'authenticity' of the structure as a heritage item, rendering it to be something less than of State heritage significance.

[45] The Commission notes that 'integrity' is a measure of the wholeness and intactness of a place's cultural heritage and its attributes.

[46] Relatedly, 'authenticity' refers to how credible or truthful the different sources of information about a place's heritage values are, having regard to such things as form and design, materials and substance, use and function, techniques and management systems, location and setting, spirit and feeling, and other internal and external factors (paraphrasing Article 82 of the Operational Guidelines for the Implementation of the World Heritage Convention).

4.2. Heritage Council submissions

[47] In response to the owner's submissions on heritage significance, the Heritage Council emphasised the research underpinning its assessment and the statement of significance.

[48] In response to the owner's emphasis on the replacement of original fabric (effectively an assertion that substantial replacement of deteriorated fabric would so compromise the MLC Building's integrity and/or authenticity that the site cannot be regarded as being State significant), the Heritage Council:

- relied on the reports by PTW Architects and Urbis to query the level of physical intervention that would be required to repair the structural deficiencies; and in any event
- stated that *'the council really determined that the architectural design is key to its heritage significance, and therefore relatively extensive replacement of the fabric would be quite reasonable without impacting on the significance'* (Meeting transcript, 14 April 2021, P-5, Line 3).

[49] This position reflects that of one of the peer reviewers of the owner's submission (PTW Architects), who conclude in their report (dated February 2021, page 15):

Apart from any considerations that the extent of refurbishment required may not be as extensive as asserted, this statement assumes that all the cultural significance sits within the 'original' fabric and removal and replacement is not part of managing change. As with the Hyder review of the Arup report on the glazed tiles (see p14), conservation and upgrading of any material requires judicious repair and sometimes replacement eg stonework - some elements may be patched, some elements may be replaced without major adverse impact to the cultural significance of the building as a whole.

4.3. North Sydney Council submissions

[50] North Sydney Council commissioned its own heritage assessment of the site (by GML Heritage, dated 2 October 2020). Its conclusions are consistent with those of the Heritage Council i.e. the site is of at least State heritage significance.

4.4. Public submissions

- [51] The Commission received 24 written submissions (including one from the building owner). These were a mixture of private citizens, professional bodies and advocacy groups.
- [52] The bulk of the public submissions were in favour of listing the site on the SHR (there were roughly twice as many supportive submitters as those opposed to listing). Those in favour of listing tended to emphasise the building's aesthetic and historic significance, as well as its rarity and representativeness, and used the following words to describe the building: beautiful, classic, unique, landmark, iconic, design excellence.
- [53] Those submitting against listing on the SHR were often developers or companies within the development industry. Their focus was typically on the costs of refurbishment, the 'dangerous' precedent that listing would set, and the opportunities that demolition would provide for North Sydney. Some of those submitters disagreed with the Heritage Council's assessment of the building's aesthetic significance, emphasising instead that it was in poor condition and no longer fitted within the prevailing streetscape because the streetscape has changed considerably since 1957.
- [54] Mayor Gibson stated that the MLC Building is '*literally falling to pieces*' and is regarded by constituents that she has spoken to as '*ugly*'.
- [55] Councillor Zoe Baker (councillor for the Wollstonecraft Ward in which the MLC Building is located) encouraged the Commission to accept the recommendations of the Heritage Council, Institute of Architects and the Committee for North Sydney. Councillor Baker emphasised '*the rarity and the importance*' of the Miller Street curtain wall elevation and noted that North Sydney has a '*very small CBD [with] very few heritage buildings*'.
- [56] The Committee for North Sydney described the MLC Building as being of national significance. It stated that the replacement of original fabric was just part of the '*unfolding story of the building*'. The Committee for North Sydney described the MLC Building as '*an unmatched asset to the city's sense of place, to its prestige, to its sustainability credentials, to its ability to attract creative and design professionals, and to the character of the heart of the city centre*', matters that go to the aesthetic, historic and social significance of the building.

4.5. Commission's findings

- [57] As noted in section 2.2 (above), the Heritage Council assessed the building as satisfying six of the seven assessment criteria used to assess NSW heritage places. A site must satisfy at least two of the seven criteria to be listed on the SHR (although where a site satisfies only one criterion, listing will commonly occur).
- [58] The owner's submissions did not constitute a detailed heritage assessment of the site, addressing each of the assessment criteria gazetted pursuant to section 4A(4) of the Act.
- [59] Of the eight 'defects' identified by the owner in the Heritage Council's significance assessment:
- Some are based on the flawed assumption that a site must be the 'best example' of a type or trend, or not of 'less significance' than other presently unlisted buildings, to be listed on the SHR. That is not a requirement.
 - One statement may exaggerate the facts as presented, i.e. that McCutcheon (the architect), '*regarded this building as being poorly designed*' when McCutcheon's concern appears to have been restricted to the building's west-facing orientation. Rather, as a letter included in another submission of Bates Smart observes, '*Architecturally it is acknowledged as being an excellent example of development of Post War II commercial office in Australia. Its specific features that create its [sic] significance are being a landmark building based on an innovative next generation office typology, having large office floorplates with a clearly expressed core, providing a clarity of organisation and form ...*' (letter of Bates Smart dated December 2019, in the building owner's submission dated 7 May 2021).
 - The submission that the MLC Building would lose its associative value after MLC vacated the building is not necessarily correct because associations can continue long after a tenant departs (or, say, a designer dies).
 - Some relate to the MLC Building's significance relative to other buildings in a comparative sense, but

limited reference is made to the comparative analysis undertaken by Heritage NSW in supporting the statement of significance.

- [60] The owner's focus on the physical fabric did not take account of the other attributes that are considered in relation to assessments of authenticity and integrity.
- [61] It is the view of the Commission that the MLC Building is of State heritage significance by virtue of satisfying the six criteria expressed in the Heritage Council's Recommendation to List dated 5 February 2021.
- [62] It is the opinion of the Commission that:
- The replacement of many elements of original fabric (especially parts of the Miller Street curtain wall) appears to be required to rectify physical deficiencies within the structure,
 - This could constitute a level of adverse heritage impact, but
 - It would probably not be necessary to completely strip the building back to the basic frame and then reconstruct a new facade to match the existing, therefore
 - The adverse heritage impacts associated with the replacement of even substantial elements of physical fabric would not rise to a level such that the building would cease to be of State significance, because
 - The significance of the building does not reside solely in its physical fabric, and in any event, the replacement of original fabric merely constitutes part of a building's typical life through cycles of maintenance and repair.
- [63] Even if quite substantial replacement of original fabric were required, this would not necessarily reduce the building's significance below State level. This would include the landmark tiled facades (which include tiles in poor condition), provided a like-for-like replacement philosophy were observed.
- [64] If the Minister determined to list the building on the SHR, it would be appropriate to list it on the SHR as Lot 2 on Deposited Plan 792740, as recommended by the Heritage Council.

5. REASONABLE OR ECONOMIC USE

5.1. Floor-to-floor and floor-to-ceiling heights as a possible constraint on reasonable or economic use

Owner's submissions

- [65] The owner stated that even with significant refurbishment, the MLC Building could never be characterised as anything more than a B-Grade building (which, it submitted, would be uncompetitive in the North Sydney market).
- [66] A number of reasons were provided for this assessment, especially what the owner identifies as sub-standard floor-to-floor heights. Specifically:

The floor-to-floor heights of the commercial levels are 3.57m, well below a contemporary floor-to-floor height of 3.75m - 3.9m. This results in compromised floor to ceiling heights below PCA [Property Council of Australia] A Grade (2.7m) when measures are introduced for the building to reach BCA compliance, and the mechanical system is upgraded to a contemporary standard (quoting Powerpoint submission of Bates Smart for the owner during meeting with the Commission, 12 April 2021, page 17).

- [67] A critical part of the 'mechanical system' upgrade referred to by the owner is the replacement of the aging air conditioning system. The owner submitted that the existing air conditioning infrastructure is physically integrated into the building in such a way that the existing fire rating needs to be removed and replaced (among other physical interventions).
- [68] The Commission sought clarification from the owner about the key drivers for the proposed upgrade in a request for information on 12 April 2021, as follows:

In its submission and during the site visit, the building owner indicated that an upgrade is necessary for the building's air conditioning services, which has implications for the fire rating, floor thicknesses, and floor-to-ceiling heights. In its submission the building owner indicated that as part of the services upgrade it would be necessary to introduce a new and more flexible system to assist with 'future leasing' (Mr Vivian, transcript, page 8, line 20)

and 'future tenant flexibility' (Powerpoint accompanying the owner's submission).

Acknowledging that this may impact future tenancy flexibility, can the owner clarify whether it is nevertheless physically possible to replace the existing air conditioning services without significantly impacting the placement of the fire rating, the floor-to-ceiling heights and floor thicknesses? [Note that PTW considers that this appears to be the case (page 14) based on the DA drawings and information gathered from a 1998 refurbishment].

- [69] The owner's reply (through Norman Disney & Young, dated 28 April 2021) emphasised that the 'mechanical services would require a significant upgrade to comply with the requirements of PCA 3rd Edition Premium Building, NCC 2019 and Australian Standard requirements' and that the upgrade is an 'opportunity for tenant led changes'. It observed that 'the current mechanical services do not provide adequate zoning and provisions suitable for tenant's expectations of a PCA Premium & A Grade building'.
- [70] In other words, a key driver for the physical interventions proposed by the owner is future tenant flexibility. Therefore, it is assumed by the owner that in addressing the air conditioning system's deficiencies, at least an A-Grade status for the building is a critical outcome. This has not been demonstrated (as is discussed further below).

Heritage Council submissions

- [71] The peer review reports by both PTW Architects and Urbis were prepared for the Heritage Council having regard to DA drawings and the like, but without the benefit of site access.
- [72] Subject to that constraint, the Heritage Council submitted that the physical intervention described in relation to the upgrade of the fire rating and services by the owner may not be as necessary or physically impactful as submitted by the owner, such that floor-to-ceiling heights need not change significantly from their present state.
- [73] Also, relying on information provided by PTW Architects, the Heritage Council's submission identified what it considered to be flaws in the assumptions underpinning the owner's calculations concerning floor-to-ceiling heights. Specifically, the owner's submission 'assumes that the zone for mechanical ducts would be continuous across the whole ceiling plane', where in fact (see letter to the Commission dated 28 April 2021):
- major ducts usually run in zones or bands, allowing higher areas of ceiling between the bands;
 - the tenant services zone (assuming that this is for electrical services) could be designed, in most areas, to run between the ducts with some crossovers that could be expressed as bulkheads; and
 - service trays/runs could be left exposed and expressed.
- [74] Therefore, the Heritage Council submitted, the ceiling plane could be profiled to provide areas that are closer to 2.7m high rather than an overall 2.4m high.

Commission's findings

- [75] The owner's submission in relation to fire rating and some services upgrades was predicated on the assumption that those upgrades are critical to achieve A-Grade status for the building. It is not necessarily the case that an A-Grade building outcome is critical (as discussed in section 5.4 below).
- [76] It is the opinion of the Commission that in physical terms, a fire rating upgrade may not be needed given that the building is presently rated. In any case, there appear to be options in an upgrade for profiling of the ceiling to create spaces with higher floor-to-ceiling heights than those calculated by the owner.
- [77] Further, the owner's submission in relation to floor-to-floor heights is predicated on the assumption that significant physical changes to the structure's floors would be required for BCA (Building Code of Australia) compliance (including the addition of concrete to the existing floor slabs). However, it was not demonstrated that BCA compliance is required. Under Division 8 of the *Environmental Planning and Assessment Regulation 2000* (clauses 93 and 94), there is no requirement to meet the current BCA unless:
- the building is the subject of a direct order from Council with respect to occupant safety;
 - there is a change of use, at which time the Council may consider fire protection matters relative to the BCA; or
 - rebuilding, alteration, enlargement or extension is proposed (that constitutes more than half the volume of the building), at which time Council is to take into consideration whether the building should be made BCA compliant.

- [78] The Commission was not advised that North Sydney Council is proposing to make a direct order to make the building BCA compliant in relation to fire safety.
- [79] A change of use is unlikely.
- [80] As discussed in section 5.4 below, the demolition and replacement of the east wing may be necessary to achieve a commercially viable outcome. This may trigger BCA compliance at the discretion of North Sydney Council. The Commission received no submissions from Council directly on this matter but the Council expressed general sympathy with the concept of the demolition and replacement of the east wing, and fire safety issues do not appear to have been an issue when the 2003 DA was made for such a proposal.
- [81] For additional observations on fire upgrades in heritage buildings see section 6.4 below.
- [82] In conclusion, the Commission considers that:
- the upgrade of the fire rating as part of services upgrades as described in the owner's submission would be principally aimed at achieving a Premium or A-Grade status for the building, which is not necessarily required;
 - in any event, the floor-to-floor and floor-to-ceiling heights that would be achieved upon an upgrade (of fire rating and services) need not be as compromised as described in the owner's submission because there are options for profiling the ceiling plane; and
 - nevertheless, the floor-to-floor and floor-to-ceiling heights in a listed MLC Building would fall short of those required of an A-Grade building.
- [83] This would embed the MLC Building as a B-Grade building within the North Sydney market. Whether or not this would render the site incapable of reasonable or economic use is discussed further in section 5.4 below.

5.2. The floor plate as a possible constraint on reasonable or economic use

Owner's submission

- [84] The owner submitted that the floor plate configuration of the MLC Building's west wing (being a long and narrow rectangle measuring 101.3m x 17.2m) is not conducive to subdivision to create accommodation that is desirable to tenants in the contemporary North Sydney market (paraphrasing Powerpoint submission of Bates Smart for the owner presented during its meeting with the Commission, 12 April 2021).
- [85] The owner's architects (Bates Smart) expressed the challenge presented by the long and narrow floorplate of the MLC Building (west wing) as follows (at page 15 of the Powerpoint presentation presented during its meeting with the Commission on 12 April 2021):
- ... [it] creates a sense of disconnect, which is considered to be unsuitable for contemporary office use and subdivision.*
- [86] This sense of disconnection, the owner submitted, would be compounded by the subdivision of the west wing into spaces for, say, three tenants or three core teams:
- The challenge is each of those teams just go to the core and bathrooms and back, and it doesn't help in terms of collaboration and meeting people. It actually creates separate zones ... (Transcript of meeting, P-9, line 47, 12 April 2021).*
- [87] Taking the west and east wings together, the owner's representatives submitted:
- ... it's [the sense of disconnection] further exacerbated by its H-shape plan, where you've got people on one side of the building versus the other side and no means to move through or ways to encourage them (Transcript of meeting, P-9, line 47, 12 April 2021).*
- [88] The owner noted in its submission that the comparanda for the MLC Building that were provided in the Heritage Council's proposed statement of significance, are generally smaller and shorter than the MLC Building's floor plate and therefore more desirable as tenancies (for example, Lever House is 50 x 17m, ICI House is 63 x 18m, and the Inland Steel Building is 54 x 18m).

Heritage Council submission

- [89] In its submission, the Heritage Council argued that the floor plate challenges are resolvable through good design, which is assisted by the inherent flexibility of the MLC Building. The Heritage Council stated:

The Council [i.e. the Heritage Council] is also very flexible of how building interiors are treated. I think our view in general terms for a building like this is that it's the public areas of the building that are of the greatest significance. And what happens within the particular privately used office floors, there is a great deal of flexibility, as has already happened in there. Most of those floors have been significantly altered.

- [90] In support of this view, one alteration as part of the Campus MLC development won the 2002 RAIA NSW Interior Architecture Award and the 2002 RAIA National Interior Architecture Award (although the owner challenged the success of the refurbishment as a working space based on feedback they have received from workers in the building).

Public submissions

- [91] Mayor Gibson emphasised that one of her aims was *'reinvigorating our CBD'* which, in her view, would be made more difficult if the MLC Building was listed on the SHR. Mayor Gibson stated that she wanted the *'absolute best office space'* because *'nobody in our CBD should be working in a B or C-grade building'*. Mayor Gibson also stated that the MLC Building *'uses vast amounts of energy'*.
- [92] The Committee for North Sydney considered that the building's floor plate was suitable for internal subdivision and tenancing.

Commission's findings

- [93] The Commission considers that the unusual floor plate configuration of the MLC Building does pose challenges for the owner in terms of subdivision for tenancies or single-tenant users. This may impact the desirability of the floor plate in the North Sydney market and reinforce its status as a B-Grade building. However:
- it would not preclude future tenancies in a variety of forms;
 - the challenges to finding suitable tenants are resolvable through design responses; and
 - a CBD in a large city will typically include a mix of commercial buildings (Premium, A-Grade, B-Grade and C-Grade), and this is desirable. It is unrealistic to expect a situation where *'nobody in our CBD should be working in a B or C-grade building'*, as was expressed by one submitter.

5.3. Other physical issues as possible constraints on reasonable or economic use

Owner's submissions

- [94] The owner submitted that the above challenges to finding tenants for a refurbished, listed building would be compounded by other issues including:
- The Miller Street wing of the MLC Building faces west. It was submitted by the owner that this presents them with challenges in relation to heating and cooling within the structure. Specifically, it was submitted that *'there are two layers of glass, an inner and an outer, with blinds in between. And the inner layer was added during construction when it was realised that the building faced west and had no sunshades, and that the glass curtain wall would not cope with the heat load, and so it was too late to upgrade the air-conditioning system, and so an inner layer of glass was added to the system'* (Mr Vivian of Bates Smart for the owner, transcript, P-7, lines 10-14). The owner submitted that this reinforces the need for air conditioning upgrades, increases costs, and presents challenges for maintaining a comfortable ambient temperature for tenants. This submission was supported by Mayor Gibson who said that the MLC Building *'uses vast amounts of energy'*.
 - Some rubber gaskets used in the glazed facade on the Miller Street and east elevations have failed with the result that there are some water ingress issues. The owner submitted that this issue cannot be sustainably addressed through a maintenance program. Rather, the owner submits, the facades must be removed to replace the rubber gaskets and, in large part, replaced.
 - The MLC Building was constructed prior to earthquake design codes. Therefore, if refurbished, *'the existing building's lateral structure will not comply with the current earthquake loading requirements'* (Powerpoint presentation with verbal submissions at the owner's meeting with the Commission, 12 April 2021, page 12). The owner submitted that this would require a costly engineering response.
 - There is regular flooding of the reception area on the Miller Street elevation during heavy rain events.

- The retail space on the sunken ground floor level along Miller Street is highly undesirable for tenants.
- There are poor connections with Brett Whitely Place on the MLC Building's southern elevation which presents a blank face to the public domain.
- The Denison Street ground level, which has historically functioned as a 'back of house' area for the building (deliveries, services etc.), would sit uncomfortably with the proposed activation of Denison Street as part of the Victoria Cross Station redevelopment.

Heritage Council submissions

[95] In relation to these issues, the Heritage Council made the following submissions:

- Heat implications of west facing facade – The western facade is the most significant attribute of the site in heritage terms, particularly its design. However, even if replacement of substantial parts of its original fabric are demonstrated to be necessary, that would be appropriate in heritage terms and would not reduce the MLC Building's heritage significance below State level.
- Leaks on Miller Street and east glazed facades – The PTW Architects peer review report for the Heritage Council questioned the suggestion that replacement of the facade was necessary. Rather, it noted that the curtain wall facade was refurbished in 2000, including corrosion treatment, insertion of new glass panels, introduction of new flashing, addition of new ducted skirting, and the likely introduction of the failing rubber gaskets (which appear to be non-original elements) (PTW Architects report, dated February 2021, page 14). PTW Architects conclude: *'Therefore it is likely that replacement of some deteriorated elements can again occur without complete replacement'*. In any event, the Heritage Council expressed the opinion that even substantial replacement of original fabric need not so adversely impact significance that the MLC Building would cease to be State significant because the building's significance rests in attributes other than its fabric (especially design).
- Denison Street functionality – all parties appeared to agree that there were challenges in resolving the interface between the current Denison Street frontage and the activities on the street itself, which are envisaged to increase significantly with the completion of the Victoria Cross Station development.

North Sydney Council submissions

[96] North Sydney Council made the following submissions in relation to the issues raised by the owner:

- Flooding – Council's records indicate that flooding in this location is rare. Flooding is caused by its stormwater system blocking and causing an overflow in very high storm events. Council also submitted that this issue is being addressed through upgrades, including additional inlets and a new detention tank. This will, the Council submitted, considerably reduce the risk of flooding occurring at the western side of the MLC Building in the future (Transcript of Council's meeting with the Commission on 21 April 2021, P-10, lines 1-20).
- Retail space at lower level of the western elevation – Representatives of North Sydney Council disputed the suggestion that it was difficult to fill tenancies on the lower level of the Miller Street elevation. This submission appears to have been based on personal observation by Council officers and anecdotal data.
- Connections with Brett Whitely Place – The utilisation of Brett Whitely Place is an important part of the Council's vision for the area.

Public submissions

[97] Mayor Gibson was concerned that the MLC Building is an impediment to the activation of 'laneways' in the CBD, including Denison Street. The Mayor also stated that the Miller Street spaces were below street level, which she considered was a problem for making that side of the building an active space.

[98] The Committee for North Sydney's recollection was that the retail spaces on the Miller Street elevation had been well-tenanted until quite recently.

Commission's findings

[99] It is the Commission's opinion that:

- Heating issues can be resolved through the air conditioning upgrades that are proposed for the

building, as well as upgrades to the curtain wall (acknowledging that this would likely result in increased cost to the owner).

- Substantial physical intervention is likely to be required to the curtain wall on the Miller Street facade to address some of the issues raised by the owner. This may require replacement of substantial areas of original fabric (although the experts disagreed on the extent of the original fabric requiring replacement). In any event, the Commission considers that even substantial replacement of original fabric would be consistent with the MLC Building's listing on the SHR because its significance also rests in attributes other than its fabric (especially design).
- The owner did not demonstrate that compliance with earthquake codes was necessary (see also section 6.4 below on the issue of earthquake code compliance).
- North Sydney Council advises that steps are in place to address the flooding issue on Miller Street.
- All parties agreed that the completion of the Victoria Cross Station development is likely to significantly increase pedestrian traffic on either side of the site. It is possible that this would increase the attractiveness of the Miller Street lower level tenancies, if it is accepted that they are presently unattractive to tenants. It is also unclear to what extent the COVID-19 pandemic may have impacted tenancy rates on the lower level of the Miller Street elevation.
- The concerns raised by the owner about the ongoing activation of Brett Whitely Place, and the issues the owner raised in relation to the interface between the Denison Street elevation and Denison Street itself, assume that the entire south elevation and the east wing will have to be retained and conserved without significant alteration if the listing to the SHR proceeds. That is not necessarily the case, as is discussed at section 5.4 below. If the east wing were demolished and redeveloped, the issues along Denison Street could be resolved through design responses. This would also provide opportunities for new connections to be created with Brett Whitely Place on the eastern part of the site.

[100] In other words, it is the opinion of the Commission that the additional issues raised by the owner in relation to finding a reasonable or economic use for the site are manageable through engineering, maintenance and design responses.

5.4. B-Grade Status as a constraint on reasonable or economic use

Owner's submissions

[101] The owner submitted that in its experience, B-Grade buildings in North Sydney are undesirable tenancies and therefore a refurbished MLC Building would be difficult to tenant, rendering it incapable of reasonable or economic use.

[102] The owner submitted (in a letter to the Heritage Council dated 8 October 2020, page 6):

In order to fund the conservation works, we have been advised by Ethos Urban (Economics) that we would have to achieve a rental return at 50%-100% above market rent to ensure that the MLC Building remains a viable commercial investment with an acceptable annual rate of return to the owner. We have been further advised that we would require a rental return in the order of 40% over the market rent to just breakeven. These rental returns are considered unlikely to be achieved for the MLC Building (even after the conservation works have been undertaken) in the current or future markets as the building would be considered a B grade asset when compared with modern Class A-grade buildings.

[103] In response to the suggestion of the Heritage Council, North Sydney Council and others that the eastern side of the site could be the location of an A-Grade building upon the demolition and replacement of the east wing, the owner submitted that this would create connection issues between the east and west wings, including challenges in tying the two wings together through the central tower which accommodates the lifts. The owner submitted that the problem would be in large part due to the difference in floor-to-floor heights between the 1950s west wing and a contemporary redeveloped east wing.

Heritage Council submissions

[104] The Heritage Council submitted that its preferred position is that the entire MLC Building be retained and conserved, but it stated that it would not necessarily be opposed to the demolition and redevelopment of the east wing in certain circumstances. This would provide the owner with Premium or A-Grade accommodation on the site. The Heritage Council submitted that the west wing is the most significant heritage element of the

ensemble and that that is reflected in the statement of significance underpinning its recommendation to list the building on the SHR.

- [105] In relation to the building owner's submission that the demolition and redevelopment of the east wing would create connection issues between the east and west wings, the Heritage Council (relying on advice from PTW Architects), presented engineering and design options that could overcome this issue.
- [106] The owner's assertions regarding the market for B-grade buildings in North Sydney were not entirely consistent with the submission of the Heritage Council which relied on statistical analysis presented in the Urbis report that:
- B-Grade buildings actually dominate the North Sydney market,
 - Recent vacancy rates are in the order of 10% and are trending downwards, and
 - There are identified drivers for increased demand for buildings such as a refurbished MLC Building into the future.
- [107] Nevertheless, Urbis submitted (through a Heritage Council reply to a request from the Commission for more information, dated 28 April 2021) that its '*market advice broadly aligns*' with Ethos Urban's in relation to (quoting Urbis):
- *Building grades and market positioning,*
 - *Current market conditions and trends in North Sydney towards high grade (Premium and A Grade) office stock,*
 - *The current market preferences of tenants for A Grade accommodation over B Grade Accommodation.*
 - *Market rental levels for B Grade office buildings quoted by Ethos Urban are generally in line with the range quoted by Urbis, However we note that they have quoted a slightly lower rate for A Grade office accommodation, albeit still within our adopted range.*
- [108] Further, Urbis notes that '*we [Urbis and Ethos Urban] agree that when taking account of the likely maintenance and rectification works based on cost estimates provided by the owner, a full heritage listing is likely to be unviable*' i.e. both economists agree that retention and refurbishment of a listed MLC Building in its entirety (the west wing, east wing and tower) would be commercially non-viable.
- [109] This conclusion is based on the cost estimates provided by the owner, which the Heritage Council questioned.
- [110] On Urbis's interpretation, which was supported by the Heritage Council, a critical difference between the assessments of the economists (Urbis and Ethos Urban) is that where Urbis considered the commercial viability of a 'hybrid' approach (i.e. retain the west wing and demolish and redevelop the east wing), Ethos Urban's economist for the owner did not factor that potential approach into its conclusions, even though Bates Smart for the owner considered the approach in design terms.
- [111] Urbis and the Heritage Council concluded that the 'hybrid' approach is commercially viable and would yield at least an A-Grade structure on the site for the owner.

North Sydney Council submissions

- [112] North Sydney Council submitted that:
- ... there's a mix of tenancies available in North Sydney, occupancy styles, and certainly whereas the Council does see A-grade uses as being preferable, the marketplace demands all – B and C-grade – and, indeed, we currently have some pre-discussions going on about a very significant and new commercial building which will aim at slightly below A-grade, so B-grade plus if you would, to address what they perceive as a – a – a need in the market. So it's sort of horses for courses, you know. The building could quite easily be re-let* (Transcript, 21 April 2021, P-6, lines 23-29).
- [113] Representatives of North Sydney Council were relatively positive about the potential for a DA for the demolition and redevelopment of the east wing. They noted that when such a development application was made in 2003 it was not opposed by Council on heritage grounds (Transcript of meeting with the Commission dated 21 April 2021, P-9, line 27). The principal planning objection at that time, Council submitted, was the overshadowing of Brett Whitely Place that the proposed development would have caused.
- [114] North Sydney Council emphasised that in 2003, additional overshadowing of Brett Whitely Place was

expressed in the Local Environmental Plan (**LEP**) as a prohibition. Clause 6.34 of the LEP has since been amended such that some overshadowing from a redeveloped east wing of the MLC Building would be permissible. Council representatives indicated that demolition and replacement of the Denison Street wing warrants to be *'re-explored now'* because under the amended LEP such a proposal *'may well get up'* (Transcript of meeting with the Commission on 21 April 2021, P-7, line 13-15).

Public submissions

- [115] Mayor Gibson emphasised that one of her aims was *'reinvigorating our CBD'* which, in her view, would be made more difficult if the MLC Building were listed on the SHR. Mayor Gibson stated that she wanted the *'absolute best office space'* because *'nobody in our CBD should be working in a B or C-grade building'*.
- [116] Although its strong preference was to retain the entire ensemble, the Committee for North Sydney accepted that demolition of the east wing may be appropriate in some circumstances if its replacement were sympathetic to the Miller Street wing.

Commission's findings

- [117] The Commission concludes that:
- Listing of the building as proposed by the Heritage Council is appropriate on the basis of a consideration of reasonable or economic use, including both the west and east wings.
 - The retention and conservation of the MLC Building in its entirety (west wing, east wing and tower) may reduce the number and variety of reasonable and economic uses available to the owner, but is unlikely to entirely preclude options for reasonable or economic use.
 - The statement of significance proposed by the Heritage Council indicates that the east wing is of relatively less significance than the west wing (although still highly significant). This provides the owner with some redevelopment options, including the possible demolition and redevelopment of the east wing. All parties agree that this would constitute an adverse heritage impact. However, both the Heritage Council and North Sydney Council indicated that it is possible, provided all alternatives (including attempts at retention and conservation) had been demonstrated to have been exhausted, and any new development was sympathetically designed having regard to the west wing.
 - Demolition and redevelopment of the east wing would give the owner a Premium or A-Grade status building on the site.
 - Objections to the redevelopment of the east wing site that were raised in 2003 (principally overshadowing of Brett Whitely Place) have been overcome by subsequent amendments to the LEP.
 - Objections to the linking of the west wing with a redeveloped east wing through the central lifts tower can be overcome through engineering and design.
 - Therefore, it has not been demonstrated that a reasonable or economic use for a listed building is not possible.
- [118] The Commission also notes that the submissions of the owner, Heritage Council and North Sydney Council (and other submitters) concerning the potential for reasonable or economic use of the MLC Building, require accurate forecasting of future market demand and the economic environment. Understandably, this has resulted in different conclusions in the submissions, which rely on different assumptions and reflect different levels of optimism and risk aversion.
- [119] The North Sydney tenancy market appears to be particularly dynamic at present. Further, the market for MLC Building tenancies may be positively impacted by the completion of the Victoria Cross Station development, adjacent to the site (although other Premium and A-Grade buildings in the vicinity, which the MLC Building would need to compete with, would also be positively impacted).
- [120] The result is that the Commission was necessarily provided with predicted market trends because full certainty in this regard was impossible for any party to achieve in its submissions.

6. UNDUE FINANCIAL HARDSHIP

6.1. Owner's submissions

[121] The owner submitted that the listing of the building on the SHR would result in undue financial hardship applying section 32(1)(d) of the Act. A number of reasons were presented for this submission.

[122] The owner said (in a submission dated 7 May 2021):

The Economic Assessment prepared by Urbis (Economic Assessment) (relied upon by the Heritage Council) is not consistent with the principles outlined in the decision of Millers Point Community Assoc. Incorporated v Property NSW [2017] NSWLEC 92 (Sirius Decision). Specifically, the economic analysis considers the impact on the value of the site and not whether there is "undue financial hardship" to the owner (s32(1)(d)). The analysis only considers the value of the MLC Building based on a number of different scenarios – this is not a sufficient analysis on whether the owner will suffer financial hardship or whether that is "undue" having regard to the item's heritage significance.

A proper analysis would instead have weighed up on one hand all elements of financial hardship including both reduction in value and the financial outlay in the amount of \$212M that will be required to be spent upgrading the MLC Building against the heritage significance of the MLC building and on the other hand, a consideration of the degree of significance of the MLC building to the State of NSW (assuming it does reach the State significance threshold, which is disputed) and the circumstances which apply whereby works necessary to upgrade the building to allow its future use will result in a fake replica of the original item, with little remaining heritage significance.

[123] Also, the owner emphasised that the MLC Building is the owner's sole asset which, it submitted, compounded the financial hardship that listing would cause for the owner. Specifically, in its letter of 8 October 2020 to the Heritage Council, Investa indicated that:

The MLC Building is the owner's only real property asset' and that 'The MLC Building is owned by the 105 Miller Street North Sydney Trust (the registered proprietor is IOF Custodian Pty Limited as trustee for the 105 Miller Street North Sydney Trust) (Trust).

[124] Ms Townsend, solicitor for the owner, also made that observation in the owner's meeting with the Commission (Transcript page 4, line 40).

[125] The Commission sought clarification on this point because the Investa website describes the site as being in the full ownership of Oxford Investa Property Partners (**OIPP**).

[126] In reply, the owner advised (in a letter to the Commission dated 28 April 2021):

IOF Custodian Pty Ltd atf 105 Miller Street North Sydney Trust became the registered proprietor of the MLC Building in February 2020, when it acquired the property in a related party transaction as part of an internal restructure from IOF Custodian Pty Ltd atf Miller Street North Sydney Trust.

Both the 105 Miller Street North Sydney Trust and the Miller Street North Sydney Trust are or were single asset trusts and were at least since July 2011. Prior to 2011 the building was not owned, operated or managed by Investa, and we do not have complete information about the ownership structure prior to that change in ownership.

[127] The Commission notes that the present DA for the site was lodged on 7 July 2020, 4-5 months after 105 Miller Street North Sydney Trust became the registered proprietor of the MLC Building (in February 2020). It is not clear if that transaction was made in anticipation of the DA and no submissions were made in that regard.

[128] The owner submitted costings prepared by WT Partnership for the refurbishment of the MLC Building in the amount of \$212M. This figure is significantly higher than Ethos Urban's cost estimate of \$120M made in the Statement of Environmental Effects lodged with the existing DA. The Commission sought clarification on this point and the owner advised (relying on information provided by WT Partnership) that:

The estimate prepared by WT Partnership (WT) in October 2020, was to address the likely capital cost to refurbish the building to comply with current building standards and extend the life of the asset to be comparable to a newly built asset (50-year design life) (Letter dated 28 April 2021).

[129] In the cover letter, the owner clarified that:

Note that the direction to cost a design life of 50 years was provided having regard to a potential State Listing which requires the building to be refurbished to a higher minimum standard. The earlier cost plan, quoted in the SEE and prior to the potential listing, did not assume State Listing and therefore costed a refurbishment to a

standard far less than would be necessary with a State Listing.

- [130] WT Partnership explained its \$212M costing (as opposed to the lower \$120M costing in the Statement of Environmental Effects), on the following basis:

The current building does not comply with fire standards. On the advice of structural engineers, WT included to remove the internal structure, strengthen the existing columns and foundations, and construct a new structure to meet current standards. This would also provide the building a design life equal to 50 years.

Structural engineering advice received indicates that the building also does not comply with the current earthquake codes. As the building does not comply, WT included strengthening to the building by way of an external lateral system, providing the most economical solution to achieve this strengthening. This again upgraded the design life of the building.

Due to the extent of demolition and rebuild, the consideration was given to update and improve primarily the Fire Engineering Services to code and all other engineering services to a standard to ensure the building is competitive in the North Sydney leasing market. This was included by WT within the costings.

In comparison to the other costs presented, where it appears as a refurbishment cost only with a limited design life substantially lower than 50 years, which we have assumed is maintaining existing infrastructure and with no major replacement of plant; except the chiller.

The Façade costing included for the removal and reconstruction as a faithful reproduction of the original, ensure it met all codes especially fire and Section J requirements.

In compiling the estimate, WT presented the costs to reflect a Design and Construct Contractor delivery, providing an indication of the total design and construct price could be, with the principals' costs shown separately. This approach was different to the other costings, where it represents a possible cost for the refurbishments works only with no consideration for principals' costs, such as design, project management and statutory fees.

The chart below [not included herein] illustrates areas of material difference between the two cost plans noted in the IPC query, illustrating the variances are in large part due to the extent of structural and services works required to ensure compliance with current codes and a design life of 50 years. Note the difference also includes an amount of escalation given the \$120M estimate was prepared in 2017.

- [131] The owner submitted that the financial hardship that it would suffer as a result of listing would augment previous expenditure incurred as a result of a decision made by the Heritage Council in 2013:

All these costs were incurred after the 2013 decision by the Heritage Council not to list the MLC Building on the State register (Letter from Investa of 8 October 2020).

- [132] Other written submissions (from Multiplex and Urban Taskforce) made the same assertion. This assertion that the Heritage Council resolved in 2013 not to list the MLC Building on the SHR is considered by the Commission at section 6.4 below.

- [133] The Commission was also directed by the owner to a judgment of the NSW Land Environment Court in which 'undue financial hardship' as stated in s 32(1)(d) of the Heritage Act had been judicially considered (*Millers Point Community Association Incorporated v Property NSW and Others* [2017] NSWLEC 92). This matter (raised in both oral and written submissions) related to the proposed SHR listing of the Sirius Apartment Building at The Rocks ('Sirius').

6.2. Heritage Council submissions

- [134] The Heritage Council disputed the costings (of \$212M) presented by the owner for the refurbishment of the building. Relying on information provided by PTW Architects, the Heritage Council identified a number of costs that it considers appear to be over-estimates or unnecessary, including such things as the replacement of:

- the fire rating;
- the Miller Street curtain wall in its entirety; and
- the signature tiled elevations in their entirety.

- [135] The Heritage Council expressed its position in its meeting with the Commission as follows (Transcript 14 April 20201, P-12, lines 13-15):

It [retention] may have a lesser economic return than bulldozing and rebuilding, but it [the owner] would not lose financially, and therefore, on our view, it would not be subject to economic hardship.

[136] In relation to the owner's submission that the MLC Building required work to meet relevant codes, the Heritage Council's submission included the observation by PTW Architects (February 2021, page 14) that such costs are not peculiar to heritage buildings:

Augmentation to meet current codes is the norm for the upgrading of any existing building, noting that the required safety outcomes can often be achieved in a number of different ways.

[137] In relation to the matter of ownership as it relates to undue financial hardship, the Heritage Council stated in its meeting with the Commission (Transcript of 14 April 2021, P-12, lines 25-30) that:

Investa went into this with its eyes open. The building ownership history for the last 20-odd years, or 10 or 15 years, seems to be a series of related party transactions rather than an open market sale. But I don't think Investa could say that it did not know or its due diligence should have given it to know that the building was definitely of local significance, and, by 2013, was of state significance as well. So I think economic hardship has to be read in that context as well.

[138] In relation to the statement made a number of times by the owner (and by Multiplex and Urban Taskforce) that it had incurred costs as a result of a 2013 decision by the Heritage Council not to list the MLC Building on the SHR, the Heritage Council denies that any such decision was ever made or communicated. Specifically, the Heritage Council submitted (Transcript of meeting with the Commission on 14 April 2021, P-4, lines 5-24):

In 2013, the then-Heritage Council endorsed a priority list to be progressed to the State Heritage Register listing under a theme of modern movement. And I want – I might mention here that the current approach of the Heritage Council is to see the State Heritage Register as a curated collection of heritage excellence of New South Wales. So we will go through and we look at various themes, we look at gaps, we look at things that, indeed, might be overrepresented as well. And in 2013, the [Heritage] council looked at what was called and is still called the modern movement theme.

Because the work in the background to list something is pretty extensive and takes quite a lot of time from the staff here in particular, we will tend to focus on – once we've got a target list, and the MLC Building was very clearly on our target list and we had said it is of state significance in 2013. And this is contrary to what Investa actually asserted. It was clearly identified in 2013 as of state significance. We will focus on buildings and places that are more likely to be under threat or aren't otherwise protected. At that time the MLC Building was – was – listed on North Sydney's LEP as under local significance and was not then under threat. And indeed it was the threat of the DA coming in for demolition which triggered the council to consider the particular building.

6.3. North Sydney Council submissions

[139] In its meeting with the Commission, North Sydney Council stated (Transcript P-06, line 20):

The current owners have been aware of the issues of maintenance for quite a number of years, and – and really for me, and certainly from a professional point of view, the state listing won't change that burden.

6.4. Commission's findings

[140] In relation to assertions from the owner, the Urban Taskforce and Multiplex that the Heritage Council decided in 2013 not to proceed with listing of the MLC building on the SHR, no evidence supporting this assertion was found by the Commission on examination of the minutes of the Heritage Council meeting of 4 September 2013. Similarly, no evidence has been presented to the Commission to verify the assertion of removal of the building at any time from SHR listing consideration.

[141] Although a physical inspection of the site by the Heritage Council was not undertaken, it is the Commission's opinion that there was adequate information obtainable from the owner's plans to reach a conclusion that the cost estimate provided by the owner (\$212M) may over-estimate the refurbishment costs.

[142] Nevertheless, if the \$212M figure is accurate, it assumes that the east wing would be retained, which is not necessarily the case if the MLC Building is listed. If the east wing were demolished, the WT Partnership costings would need to be reduced to the extent that they include costings for the east wing's refurbishment.

[143] It is not clear what the owner is referring to where it states that it briefed WT Partnership to prepare costings 'having regard to a potential State Listing which requires the building to be refurbished to a higher minimum standard'. The listing of a building on the SHR does not in itself impose on the owner a significantly 'higher minimum standard' of maintenance and repair than is placed on the owner of any other building (Part 3 of the *Heritage Regulation 2012*). It is possible that the owner is referring to the additional costs that may be

associated with, for example, integrating contemporary materials with 1950s materials. However, WT Partnership appears to have taken it to mean that the MLC Building would need to be upgraded to be compliant with contemporary fire standards and earthquake codes, among other things. This flawed assumption has significantly increased the costings provided by the owner.

- [144] It is the Commission's opinion that the listing of a building on the SHR does not necessarily compel the owner to upgrade the building's fire safety measures to be BCA compliant, nor does it necessarily require changes to make a heritage building earthquake code compliant. Insofar as the minimum standards of maintenance and repair in Part 3 of the *Heritage Regulation 2012* require additional fire protections, these are limited to a situation where the building may be unoccupied for a continuous period of 60 days (clause 12, *Heritage Regulation 2012*).
- [145] Similarly, in relation to fire management upgrades in heritage buildings, the NSW Government guideline document entitled Information Sheet 8.1 – Fire and Heritage (NSW Heritage Office) states:
- In upgrading heritage buildings, consideration should be given to the need to preserve significant fabric. This may require solutions which utilise the performance-based nature of the BCA by addressing the Performance Requirements with an Alternative Solution or meeting the prescriptive requirements of the "deemed to satisfy" (DTS) provisions (page 5).*
- [146] The owner's costings make no reference to an 'Alternative Solution' or the DTS provisions or other engineered responses to the building's heritage significance.
- [147] Part 3 of the *Heritage Regulation 2012* does require that the owner carry out 'essential maintenance and repair ... (being maintenance and repair necessary to prevent serious or irreparable damage or deterioration) ... whenever necessary' but it is assumed that the owner would do that whether or not the building is listed (see also guideline document prepared for the NSW Heritage Office, Minimum Standards of Maintenance and Repair, 1999).
- [148] In relation to the issue of 'undue financial hardship', the Commission has considered the Sirius judgment, which was referred to by both the owner and the Heritage Council in their submissions. In its judgment in Sirius, the Court (at [113]) concluded that there are two steps to the exercise of considering whether a listing would cause undue financial hardship. The first is a consideration of whether the listing would cause the owner to experience or suffer financial hardship. The second is a consideration of whether the 'financial hardship would be 'undue' when assessed against the contextual heritage values of the building recommended for listing. 'Understanding that there are two yardsticks relevant to the proper consideration of undue financial hardship is critical' (emphasis by the Court) (at [113]).
- [149] In terms of the first yardstick, the Court held that financial 'hardship' was more than economic 'loss' or 'detriment'. The choice of the word 'hardship' was intentional, and indicates something more severe than loss, detriment, difference or diminished value (at [119]). Indeed, the Court found that the Minister had misconstrued the meaning of 'financial hardship', since he equated financial loss with financial hardship (at [127]).
- [150] The second yardstick is a consideration of whether the financial hardship is 'undue'. Here the Court said (at [138]) that 'undue' requires 'financial hardship' to be considered within a particular context – a heritage values context. So, a financial hardship might be found, but is not undue, due to the building's heritage values. Thus, this requires 'a balancing exercise: to compare the merits of listing a building against any established financial hardship consequences of so doing' (at [141]). The Court then goes on to point out that if the Minister considers that there is no financial hardship, then consideration of the word 'undue' is completely unnecessary (at [141]).
- [151] On the basis of this approach enunciated by the Court, the Commission is of the opinion that, while listing will result in some financial loss to the owner, this will not be so severe as to constitute 'financial hardship'. Thus, in the absence of financial hardship, consideration of the question of 'undue' is redundant.
- [152] If not redundant, and if a consideration of 'undue' is necessary, the Commission notes that the owner submitted that 'a proper analysis' of undue financial hardship would require weighing up:
- The reduction of value as well as the financial outlay in the amount of \$212M; against
 - The 'degree of significance of the MLC Building' to NSW in circumstances where necessary upgrades would result in a 'fake replica'.

[153] In the Commission's opinion:

- The \$212M costings may over-estimate the costs of refurbishment.
- The MLC Building is of State significance.
- Refurbishment would not result in the creation of a 'fake replica' (rather, the building's significance would remain at State level).

[154] Further, in 'weighing up' the degree of significance of the MLC Building to NSW, no reference was made by the owner to the value of the public benefits of heritage-listed commercial buildings like the MLC Building in a large city (for example, see Valuing the Public Benefits of Heritage Listing of Commercial Buildings, report prepared by Applied Economics for the NSW Heritage Office, 2000).

[155] If it were determined that 'financial hardship' was demonstrated by the owner's submissions, it is the opinion of the Commission that it would not be 'undue' having regard to the State significance of the MLC Building, even if refurbishment required replacement of substantial elements of original fabric.

[156] The Commission again notes the observation of Molesworth AJ in the Sirius decision at [115] that in assessing 'undue financial hardship':

To adopt an unanalytical approach could conceivably invite artificial arrangements of financial affairs by the owner of a nominated heritage building, say by the creation of \$1 companies devoid of real assets as a tactical manoeuvre or perhaps the making of financial arrangements so that funds are not available, thereby creating an artificial hardship situation.

[157] In relation to the submission that the MLC Building is the owner's sole asset, and that this compounds the financial hardship that the owner may experience, the Commission restricts its findings in respect of that submission to the observations that the present owner:

- Is likely to have been aware of the potential for heritage issues at the time that it purchased the building, including the potential for costly refurbishment.
- Became the registered proprietor 4-5 months before the existing DA was lodged, possibly with demolition as a development option in mind.

7. CONCLUSIONS AND RECOMMENDATIONS

[158] As noted in section 1 above, s 36(2) of the Act states:

At the conclusion of the review, the Independent Planning Commission is to provide a report in writing to the Minister containing a summary of the submissions made to the review, the findings of the Commission with respect to those submissions and a recommendation as to how those submissions should be dealt with. The Minister is to make copies of the report available to the public after the Minister decides whether or not to direct the listing.

[159] It is the Commission's finding that the Heritage Council has demonstrated that the MLC Building is of State significance and should be listed on the SHR (section 4.5 above).

[160] It is the Commission's finding that the replacement of many elements of original fabric (especially parts of the Miller Street curtain wall) appears to be required to rectify physical deficiencies within the structure. However, the adverse heritage impacts associated with the replacement of even substantial elements of physical fabric would not rise to a level such that the building would cease to be of State significance (section 4.5 above).

[161] It is the Commission's finding that the owner has not demonstrated that a listed MLC Building would be incapable of reasonable or economic use. The physical interventions required to upgrade the services need not be as physically impactful as the owner has submitted, the unusual floor plate does not preclude a tenable subdivision, and the other issues raised by the owner (heating and cooling, flooding, interfaces with Brett Whitely Place and Denison Street, earthquake code compliance, and repairs to the curtain wall) are all manageable through engineering, maintenance and design responses (sections 5.1 to 5.4 above).

[162] This would reinforce the building's B-Grade status which, when coupled with refurbishment costs, may compromise its commercial viability. If that is the case, it is the Commission's finding that there remains the option of demolition of the east wing, and its replacement with a Premium or A-Grade building. This would significantly enhance the building's options for reasonable or economic use.

- [163] With respect to the issue of undue financial hardship, it is the Commission's finding that the owner's cost estimates appear to overestimate what it would cost to refurbish the building. Those costings do not account for the possible demolition of the east wing and are based on flawed assumptions, including the assumption that a refurbished MLC Building would need to comply with contemporary fire standards and earthquake codes (section 6.4 above).
- [164] Although the listing of the MLC Building would occasion the owner financial loss, it is the Commission's finding that it would not amount to financial hardship. If it were the Minister's opinion that it would amount to financial hardship, it is the Commission's finding that it would not be 'undue' having regard to the heritage significance of the building and its value to NSW (section 6.4 above).
- [165] It is the Commission's recommendation that the MLC Building should be listed on the SHR. If the Minister determined to list the building on the SHR, the Commission recommends that it be listed as Lot 2 on Deposited Plan 792740, as recommended by the Heritage Council.



Adrian Pilton (Chair)
Member of the Commission



Dr Peter Williams
Member of the Commission