

## Case Note

*Millers Point Community Assoc. Incorporated v Property NSW [2017] NSWLEC 92*

### The Sirius Building Case

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#### Abstract

The July 2017 decision by the NSW Land and Environment Court in *Millers Point Community Assoc. Incorporated v Property NSW*<sup>2</sup> concerns a challenge by a community group advocating for heritage and social housing within Millers Point NSW, to the 2016 decision by the NSW Minister for Heritage to decline to list the social housing apartment building known as the Sirius Building<sup>3</sup> on the NSW State Heritage Register, a register established under s31 of the NSW *Heritage Act* 1977. This is an uncommon example of a heritage listing decision being litigated, and provides a number of important judicial insights into the heritage listing process in NSW. The case considers several matters which have never been previously tested before the courts in this context. These include the consideration of "undue financial hardship" and the duties of the Minister when deciding on a heritage listing.

#### Background to the case

The Sirius Building is a multistorey social housing apartment building built in the late 1970s and first opened to social housing tenants in February 1980. At the time of opening, priority residency was given to residents of The Rocks and Millers Point areas of NSW who had resided in the area prior to July 1972. 24 of the 79 apartments were initially tenanted by people from this category<sup>4</sup>, with the remainder drawn from the general social housing waiting list at the time. The complex is located prominently next to the southern approach to the Sydney Harbour Bridge and many of the apartments feature spectacular views across Sydney Harbour. The NSW Government made a decision to sell the site in 2014<sup>5</sup>, on the basis that the building did not meet current standards for social housing, and that the funds from its sale would be used to build a much larger number of social housing dwellings elsewhere in NSW. Implicit in that decision to sell was that the site would be redeveloped.

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<sup>2</sup> Handed down 25 July 2017 by Molesworth AJ. <https://www.caselaw.nsw.gov.au/decision/5976c0a7e4b074a7c6e176a0>

<sup>3</sup> 36 - 50 Cumberland Street The Rocks, NSW

<sup>4</sup> Sydney Cove Redevelopment Authority (1980) *Annual Report*.

<sup>5</sup> The Hon Pru Goward, Minister for Family and Community Services (2014) *Media Release – High Cost Harbourside Assets to be Sold for a Fairer Social Housing System* (19 March 2014)

The Sirius Building has 79 apartments and could house up to approximately 200 tenants<sup>6</sup>. The NSW Land and Housing Corporation (LAHC), an entity under the Department of Family and Community Services (FACS), is the current lessee for the building and estimated that the proceeds of sale could fund up to 800 new social housing units. Property NSW, the owners of the building on behalf of the NSW Government, asserted that the State heritage listing could reduce the sale price of the site by up to \$70 million, resulting in a consequential reduction in the funds available for social housing. A listing on the NSW State Heritage Register would mean the whole of the building could not be demolished (NSW *Heritage Act* 1977 – hereafter ‘the Act’- s63(2)) and there would be a variety of restrictions on the changes that could be made to the place. In that situation, future changes would require the consent of the Heritage Council of NSW (s57).

The proposed sale of the Sirius Building caused concern among some segments of both the local community and the heritage advocacy community, for reasons ranging from the loss of social housing in Millers Point to the loss of a (debatably) Brutalist architectural structure<sup>7</sup> to concerns over the scale of what would replace the building. This led the National Trust of Australia (NSW) to nominate the building for the NSW State Heritage Register in 2014 under s33 of the Act<sup>8</sup>. Following a protracted consideration of the heritage listing nomination by the Heritage Council of NSW, and detailed submissions to the Heritage Council both for and against the listing<sup>9</sup>, the Heritage Council resolved to recommend the building for listing to the Minister for Heritage on the following basis:

[The Heritage Council of NSW] *considers that the Sirius Building is of state significance, under two criteria, for its aesthetic and rarity values.*<sup>10</sup>

The decision to list, or not list, a place on the NSW State Heritage Register ultimately rests with the Minister administering the *Heritage Act* (s31(2)); at the time this was the Hon Mark Speakman. There are a series of matters within the Act that the Minister must consider in the making of a decision regarding a proposed listing (s32(1)). There are a similar range of considerations for the Heritage Council when making a recommendation to the Minister, however consideration of these matters by that body is not mandatory (s33(2))<sup>11</sup>. Ultimately Minister Speakman determined not to list the building on the following grounds:

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<sup>6</sup> There has been an ongoing process of relocating tenants or not letting out vacant apartments since the decision to sell in 2014. Goward (2014) pg 4 noted there were 101 tenants in the Sirius Building as of March 2014. As of June 2017 it was reported there were only two tenants remaining in the building. Dominica Sanda (2017) ‘Push to save Sirius, Sydney’s controversial brutalist landmark’ *Domain* (7 June 2017).  
<https://www.domain.com.au/news/push-to-save-sirius-sydneys-controversial-brutalist-landmark-20170607-gwlyoo/>

<sup>7</sup> Rodrigo, R (2015) *Aesthetics as a Practical Ethic*. *Fabrications: The Journal of the Society of Architectural Historians, Australian and New Zealand*, 25(2): 234-261. In an interview with the design architect Mr Tao Gofers cited in that article Gofers indicates the building was not specifically designed as a Brutalist structure. Various submissions to the Heritage Council argued both for and against the building being classified as a Brutalist building.

<sup>8</sup> Heritage Council of NSW State Heritage Register Committee (2014) Minutes of Meeting 3 December 2014. <http://www.environment.nsw.gov.au/resources/heritagebranch/heritage/heritagecouncil/shr%20committee-minutes-dec2014.pdf>

<sup>9</sup> In the interests of disclosure, the author was engaged by the NSW Department of Family and Community Services (the parent agency of the NSW Land and Housing Corporation) to review the heritage significance of the Sirius Building and, after coming to the conclusion that the building did not meet the criteria for State heritage significance, to argue the Department’s position against heritage listing in front of the Heritage Council of NSW in October 2015. He did not participate in the court case in any way.

<sup>10</sup> Heritage Council of NSW Resolution 2015-131, 2 December 2015 Pp 6-7.  
<http://www.environment.nsw.gov.au/resources/heritagebranch/heritage/heritagecouncil/council-minutes-dec2015-425.pdf>

<sup>11</sup> In this instance, the Heritage Council indicated it did not take into consideration any matters other than the significance of the place. Heritage Council of NSW (2015) pg 7.

- *I consider that the Building may meet the threshold of State heritage significance on aesthetic grounds, however note there are conflicting views as to whether as an example of Brutalist architecture it is of such merit as to be of State heritage significance.*
- *I consider that the Building may be a rare product arising from a particular combination of historical circumstances, however as to one aspect of these circumstances I note that it is not the only example of the late Brutalist architectural style in social housing by its architect.*
- *I consider that in this case whatever the heritage significance of the Building, even at its highest (including even if it reached a threshold for State heritage significance), this is outweighed by the undue financial hardship its listing would cause to its owners, by diminishing what would otherwise be its sale value (possibly by in the order of \$70 million), which would potentially represent foregone funds for additional social housing.<sup>12</sup>*

This decision was challenged by the Millers Point Community Association Incorporated (MPCAI) on the basis that the decision was improperly made, as the Minister did not correctly consider the relevant matters, particularly whether the decision to list would cause “undue financial hardship” to Property NSW, FACS and, by extension, the social housing system of NSW.

### Issues as trial

MPCAI, represented by the Environmental Defender’s Office, sought an order quashing the Minister’s decision to not list the Sirius Building on a variety of grounds, but particularly that the Minister improperly considered the matter of “undue financial hardship” in reaching his decision and therefore committed legal error<sup>13</sup>.

Consideration of “undue financial hardship” is mentioned in s32(1)(d) as one of the matters the Minister must consider in any proposed State heritage listing process<sup>14</sup>. Similarly, the Heritage Council may consider submissions on this issue, among others, under s33(2)(d) when considering whether or not to recommend a listing to the Minister. There has never been a clear test as to what constitutes “undue financial hardship” nor are there any guidelines as to how this matter would need to be addressed. The first and second respondents (Property NSW and the LAHC respectively) had made submissions to the Heritage Council on this matter using a variety of economic and property experts. Ultimately the Heritage Council opted to only consider matters relating to significance and did not consider any of the other matters in s33(2)(d)<sup>15</sup>.

The Minister, in his reasons for not listing the Sirius Building, stated:

*I consider that in this case whatever the heritage significance of the Building...this is outweighed by the undue financial hardship its listing would cause to its owners...<sup>16</sup>*

<sup>12</sup> The Hon Mark Speakman, Minister for Heritage (30 July 2016). It is worth noting that s34(1) of the Act requires the Minister make a decision within 14 days of receiving the Heritage Council’s recommendation, however this decision was not made for more than 6 months after the recommendation. In the end the Applicant did not make an issue of this and conceded the delay alone was not sufficient to invalidate the decision. The Court noted that adherence to statutory timeframes is “desirable”. [2017] NSWLEC 92 at 12.

<sup>13</sup> [2017] NSWLEC 92 at 5. See also points at 30 and 40-48

<sup>14</sup> This consideration was introduced into the *Heritage Act* in 1998 as part of a suite of amendments which established the State Heritage Register.

<sup>15</sup> Molesworth AJ at 101 notes that the Heritage Council is obligated to consider all submissions received, in accordance with s 33(1)(d), but by dint of the wording in s 33(4) the consideration of the matters raised in that section is optional. In this instance, it thus seems the Heritage Council itself erred by not addressing the matters raised in submissions received in accordance with s33(1)(d), however it remained open for the Heritage Council to ignore the matters in s33(4). This is a useful clarification for future listing considerations by the Heritage Council but ultimately had no bearing on this matter.

<sup>16</sup> Speakman (2016)

What is clear from the Minister's published reasons are two things: firstly, the matter of "undue financial hardship" was paramount in the decision-making and, secondly, the Minister did not come to his own view as to the significance of the building, as evidenced in the phrase "whatever the significance of the building". Both of these became key points in the judge's decision to find the Minister had erred. The Minister further introduced contradictory views into his reasons by stating that the building "*may meet the threshold of State heritage significance on aesthetic grounds*", but then discounting this on the basis that there was no broad agreement on that point.<sup>17</sup>

### **Holdings by the Land and Environment Court**

The trial judge found that the Minister had erred in the decision-making process by improperly considering the question of "undue financial hardship"<sup>18</sup>. The judgement established a series of tests with respect to the question of "undue financial hardship" which had not previously been articulated and which are highly instructive for future consideration of this issue in the context of heritage listing<sup>19</sup>. The trial judge was emphatic on the point that, firstly, financial loss could not be equated with "hardship":

*it cannot be maintained that financial loss simply equates with financial hardship. Financial loss may, or may not, result in financial hardship. It depends on all of the circumstances.*<sup>20</sup>

And, later:

*A predicted lower financial return from a property sale is not "hardship" in and of itself. Such a financial loss, even of a very significant magnitude, might pose no hardship at all to a particular owner.*<sup>21</sup>

The fact that a heritage listing may restrict the theoretical higher value of a place for a different or more intensive use was not, on its own, a sufficient demonstration of hardship. Furthermore, the judgement split the test into two parts: firstly, would the heritage listing cause "financial hardship"? That hardship, again, would need to be more than theoretical, or even actual, financial loss, and furthermore would need to be backed up with evidence of the particular financial circumstances of the ultimate beneficial owner. In the case of the Sirius Building, that is the NSW Government.

Secondly, the judge took the view that if "financial hardship" was established, it was then necessary to consider if that hardship be characterised as "undue"<sup>22</sup>. The judgment contemplates a circumstance where there could in fact be a demonstration of financial hardship, but that the significance of the place and the benefits which would flow from its heritage listing were such that the hardship needed to be accepted, that it was not "undue". The Court makes no specific findings as to whether that consideration might apply with respect to the Sirius Building, but does cite the Sydney Opera House and Sydney Harbour Bridge as examples where, irrespective of any financial hardship, the need to conserve them would not cause "undue" hardship.<sup>23</sup> A comparative analysis of these relativities is therefore always required to fulfil the requirements of the test established in this case.

With respect to the Sirius Building, the Court found that, as the ultimate beneficial owner of the site was the NSW Government, it was not possible to argue that the heritage listing would cause financial

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<sup>17</sup> Speakman (2016)

<sup>18</sup> [2017] NSWLEC 92 at 111-149

<sup>19</sup> [2017] NSWLEC 92 at 114, 116, 117 119, 127, 128, 130, 131 and 134.

<sup>20</sup> [2017] NSWLEC 92 at 134

<sup>21</sup> [2017] NSWLEC 92 at 130

<sup>22</sup> [2017] NSWLEC 92 at 138-149

<sup>23</sup> [2017] NSWLEC 92 at 138-139

hardship to the State of NSW<sup>24</sup>. The judge noted that decisions about what entities own particular government assets, whether agencies were on-budget or off-budget or how the government chose to expend funds and make up shortfalls were ultimately political decisions<sup>25</sup>. Any “hardship” was illusory and essentially self-imposed. On that basis, the specific question as to whether that hardship was “undue” was irrelevant, and thus the Court has established a precedent where it is not possible for government instrumentalities to argue that the costs of heritage conservation represent “financial hardship”. This is a significant issue for the management of government-owned heritage (or potentially historic) assets.

On the question of “financial hardship” more broadly, the Court acknowledged that this test may be problematic for wealthy owners, be they individuals or corporate in nature<sup>26</sup>. In future, owners will need to demonstrate evidentially that a State Heritage Register listing will cause financial hardship, rather than mere financial loss<sup>27</sup>. But by establishing the separate test in relation to the question as to whether the hardship is “undue”, it requires there to be a weighing up of the benefits of the heritage listing against the financial hardship, and thus it is also necessary to demonstrate that the benefits of listing will *outweigh* the hardship consequences. This too is important, as it does not allow for the making of ambit claims of spurious heritage value, as such places would fail the “undue” test by not providing sufficient societal benefits from listing.

The other question the Court engaged with was whether the Minister needed to come to a view regarding the heritage significance of a place nominated for listing<sup>28</sup> (while acknowledging it was not specifically necessary to rule on the issue<sup>29</sup>). The Court took the view that there are two paths for the Minister to consider when a recommendation for listing is received from the Heritage Council: to list, or not to list<sup>30</sup>. In circumstances where the Minister chooses to list a place, it is sufficient for the Minister to accept the Heritage Council’s recommendation. Where, however, the Minister chooses not to list a place, the Minister must first come to his or her own decision regarding the significance of the place, as that was the primary basis of the Heritage Council’s recommendation<sup>31</sup>, *in addition* to considering the other criteria under s32(1). It also remains open for the Minister to find that a place is State significant but to decline to list it on other grounds, e.g. those under s32(1). The Minister may also refer the matter to the Planning Assessment Commission and seek their views on the recommendation for listing (s34(1)(b)).

The failure in this instance was that the Minister decided to have an “each-way bet”, by indicating the disputed question of the significance of the place. The Minister’s reasons neither accept nor reject the Heritage Council’s recommendations on significance. By specifically stating “whatever the significance” of the place in his reasons for declining to list the Sirius Building, this demonstrated the Minister failed to come to a conclusion as to whether the building was of State heritage significance.

### **Impact of the Court’s decision**

The decision of the Land and Environment Court in this matter clarifies a number of points which have long been ambiguous in NSW heritage law. Closing off the “financial hardship” argument to NSW government instrumentalities is, on its own, an important clarification, as the argument about how

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<sup>24</sup> [2017] NSWLEC 92 at 115, 118

<sup>25</sup> [2017] NSWLEC 92 at 188

<sup>26</sup> [2017] NSWLEC 92 at 124-128

<sup>27</sup> [2017] NSWLEC 92 at 120-123

<sup>28</sup> [2017] NSWLEC 92 at 108-109

<sup>29</sup> [2017] NSWLEC 92 at 150

<sup>30</sup> [2017] NSWLEC 92 at 85-87

<sup>31</sup> [2017] NSWLEC 92 at 108

government heritage management should be funded is a recurring issue. It is now clear that the NSW Government cannot use the “financial hardship” provisions of the *Heritage Act* as a reason not to conserve a significant place, because it is too expensive, could be sold for a higher value without listing or does not fall within the funding priorities of a particular agency. And while it does potentially disadvantage very wealthy owners in terms of the “financial hardship” test, the “undue” test still requires a weighing up of the costs and benefits which flow from a potential State Heritage Register listing. One can conceive of a situation, say a rural property of modest circumstances containing an historic homestead nominated for listing, where the owners could be faced with a choice between “conserve the listed building” or “feed the cows”. In that instance, the question of “financial hardship” would be much clearer, but the Court has now established a high bar and the need for clear evidence in any hardship argument. Similarly, had the Sirius Building been owned by a community housing provider rather than the NSW Government, it may have been possible to make out a financial hardship argument.

It seems that in relation to the Sirius Building, had the Minister either selected another reason for not listing, such as the long-term conservation of the item being unnecessary, or it being incapable of reasonable or economic use (both considerations under s32(1)), or had merely stated “having reviewed the recommendation of the Heritage Council and the submissions on behalf of the Department of Family and Community Services I agree with the FACS submissions that the building is not of State heritage significance” then the challenge to the decision not to list would have been much more difficult. Arguably there may be a need for judicial consideration of the other matters under s32(1) of the Act, but at present there is none. Ultimately, by equivocating over the significance of the building, as well as improperly considering the question of “financial hardship”, the decision was not properly made and thus open to challenge.

The decision to list the building has been remitted to the (new) Minister for Heritage<sup>32</sup> to be remade in accordance with the law. Regardless as to whether the decision is made to list or not list the building, the clarity the Court has brought to some of these previously unexamined areas of the NSW heritage listing process will allow for a much more robust consideration of heritage listings into the future.

#### **CASE UPDATE**

The new Minister for Heritage, the Hon Gabrielle Upton, remade the decision to not list the Sirius Building on the State Heritage Register in October 2017.<sup>33</sup> The final resident left the building in January 2018<sup>34</sup> and the building is now up for sale.<sup>35</sup> Its fate remains to be determined.

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<sup>32</sup> Now the Hon Gabrielle Upton. [2017] NSWLEC 92 at 155(2)

<sup>33</sup> The Hon. Gabrielle Upton (27 October 2017) *Sirius Apartment Building – 36 – 50 Cumberland Street The Rocks, Decision pursuant to Section 34(1) of the Heritage Act 1977*. <http://www.environment.nsw.gov.au/heritageapp/minister.aspx>

<sup>34</sup> “Last resident at Sydney’s Sirius given fond farewell.” *The Guardian* (27 January 2018) <https://www.theguardian.com/australia-news/2018/jan/27/last-resident-at-sydneys-sirius-given-fond-farewell>

<sup>35</sup> The Hon. Anthony Roberts (7 December 2017) *Media release: For sale: Sirius Building Goes to Market*. <http://www.planning.nsw.gov.au/News/2017/For-Sale-Sirius-Building-Goes-To-Market>