Torrens Title Lot – What defines 'land'?

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Two decisions in the Land and Environment Court have recently considered what defines the '*land'* on which a heritage item is situated, and what defines the '*land'* on which an extractive industry was being carried out. Both of these cases are a timely reminder that Courts will not consider 'land' by reference to just their Torrens title lot, but also consider the scope and purpose of any relevant statutory provisions involved in the determination of the DA.

'Land' involving heritage items – *Mulpha Australia Limited v Central Sydney Planning Committee* [2018] NSWLEC 179

In this case, the Court was considering an integrated development application seeking consent to conserve a heritage listed building (both the building and its curtilage is listed on the State Heritage Register), and construct a 16 storey residential apartment building on a differing part of the same Torrens Title Lot. The Heritage Council provided general terms of approval regarding the conservation of the building, but also provided some comments regarding the construction of the residential building on the same site. The applicant began proceedings on the basis that the consent authority was unable to properly determine the DA without the Heritage Council indicating whether it would provide terms of approval in relation to the entire DA.

Pursuant to s 57(1)(e) of the *Heritage Act 1977*, a DA must obtain approval by the Heritage Council before carrying out any development '*in relation to the land'* to which the heritage item is situated. In this instance, the respondent argued that the use of the word '*land'* in these circumstances was limited to the footprint of the building and its curtilage. Despite this, the Court found that the correct approach to defining the term '*land'* under s57(1)(e) is to identify the land which has the nexus to the heritage item, having regard to the lot identification of the land, the ambit of the proposed development, the scope of the listing, or a combination of some or all of these options.

'Land' involving an extractive industry – *Boral Resources (NSW) v Camden Council* [2018] NSWLEC 1623

In this case, Camden Council refused a DA to co-locate a mobile concrete batching plant on the respective lot. The applicant believed that the DA was permissible under clause 7(4) of the *State Environment Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007,* which provides that if extractive industry is already being carried out on the respective land (with development consent) then the concrete works of certain types should also be able to be carried out.

Council concurred that the proposed DA would be on the same *lot* as the current extractive industry, but that it would not occur *on the same land,* but on a separate part of the lot. Pursuant to the wording of cl7(4), the Court determined that the *'land'* referred to must be the land on which the development is being carried out. The purpose of the clause was not to include

development area and or a curtilage. The development consent for the extractive industry in this case permitted the entirety of Lot 100. Noting this, the Court stated there was no reason to dissect the various activities being carried out on the relevant lot and therefore the concrete plant should be consented too.

Both of these cases demonstrate that when a provision of legislation or a statutory instrument involves the consideration of ‘land’ involved in the specific DA, the Court will pay particular attention to the wording of the provision, as well as the statutory context. While in some instances land may be defined by its Torrens title lot (eg. if the relevant legislation/provision states that it is), it cannot be assumed that will always be the case.