

FURTHER AMENDED DEFENCE TO AMENDED STATEMENT OF CLAIM

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Common Law Division
List	General
Registry	Sydney
Case number	2018/263841

TITLE OF PROCEEDINGS

Plaintiff	ROSA MARIA COLAGROSSI
Defendant	TRANSPORT FOR NEW SOUTH WALES

FILING DETAILS

Filed for	Transport for New South Wales , the Defendant
Filed in relation to	the Amended Statement of claim filed by the Plaintiff
Legal representative	Colleen Palmkvist, Lander & Rogers Lawyers
Legal representative reference	COP:MWI:2076580
Contact name and telephone	Michael Williams (02) 8020 7773
Contact email	miwilliams@landers.com.au

PLEADINGS AND PARTICULARS

In relation to the Amended Statement of Claim filed on 9 November 2018 (**ASOC**), the Defendant pleads as follows.

Parties

1. In answer to paragraph 1, the Defendant denies that the persons identified in the paragraph have suffered loss or damage on the bases alleged and otherwise does not admit the paragraph.
2. The Defendant does not admit paragraph 2.
3. In answer to paragraph 3, the Defendant:
 - (a) admits that the Plaintiff is registered on the Australian Business Register as an “individual/sole trader” in respect of the trading name “kensington pharmacy and newsagency” identified by reference to Australian Business Number 77 394 303 775; and
 - (b) otherwise, does not admit the paragraph.
4. The Defendant admits paragraph 4 and further says that by operation of section 3C of the *Transport Administration Act 1988 (NSW) (TA Act)* and section 13A of the *Interpretation Act 1987 (NSW)* the Defendant:
 - (a) is a corporation that may be sued pursuant to section 50(1)(c) of the *Interpretation Act 1987* and section 5(2) of the *Crown Proceedings Act 1988*;
 - (b) has the status, privileges and immunities of the Crown; and
 - (c) is a public authority within the meaning of that term in Part 5 of the *Civil Liability Act, 2002 (NSW) (CLA)*.

The Project

5. The Defendant admits paragraph 5.
6. The Defendant admits paragraph 6.
7. The Defendant admits paragraph 7.
8. In answer to paragraph 8, the Defendant:
 - (a) says that some early works commenced in or about September 2014;
 - (b) says that the initial early works were not in proximity to businesses or residences; and
 - (c) otherwise denies the paragraph.

Particulars

- i. Early works started at Tramway Oval on or about 1 September 2014, although those works were not in proximity to businesses or residences.
9. The Defendant admits paragraph 9.
10. In respect of paragraph 10, the Defendant:
 - (a) says that under the Project Deed:
 - (i) the Date for Completion (as defined in the Project Deed) is presently 16 March 2019
 - (ii) the Longstop Date (as defined in the Project Deed) is presently 16 March 2021, two years after the Date for Completion;
 - (iii) ALTRAC is required to use its best endeavours to achieve Completion by the Date for Completion, which is presently 16 March 2019;
 - (iv) ALTRAC is otherwise required to achieve Completion (as defined in the Project Deed) by the Longstop Date, which is presently 16 March 2021;
 - (v) Completion occurs when the physical works, assets, systems and deliverables that ALTRAC must design, construct, manufacture, install, test and commission under this deed have passed a final performance test and have been certified as required under cl 19.4 and is not the same as Final Completion under cl 19.10; and

Particulars

- i. Definitions of "*Date for Completion*", "*Longstop Date*", "*Original Date for Completion*" and cll 17.2(a), 17.2(b), 19.4 and 19.10 of the Project Deed.
 - (b) relies on the whole of the Project Deed; and
 - (c) otherwise denies paragraph 10.
- 10A. In answer to paragraph 10A, the Defendant:
 - (a) says that on or about 17 December 2014, ALTRAC on the one part and Acciona and Alstom Transport Australia Pty Ltd (**Alstom**) on the other part, as the D&C Contractor, entered into a contract titled "Sydney Light Rail D&C Contract" (**D&C Contract**);

- (b) says that under the D&C Contract, the D&C Contractor was required, amongst other things, to design and construct the "SLR Works" (as defined in the D&C Contract) and hand the SLR Works and "ETS Equipment" (as defined in the D&C Contract) back to OpCo;

Particulars

- i. D&C Contract, cl 4.4.

- (c) relies on the whole of the D&C Contract; and
- (d) otherwise denies the paragraph.

11. In respect of paragraph 11, the Defendant:

- (a) admits the making of the announcement described in sub-paragraph 11(a);
- (b) says that the CBD and South East Light Rail Project Update May 2015 states that "Major construction begins September 2015 – Major construction expected to complete mid 2018"; and
- (c) otherwise denies paragraph 11(b).

12. In answer to paragraph 12, the Defendant:

- (a) says that 23 October 2015 was the first day on which George Street was closed to traffic on account of the Project; and
- (b) otherwise, does not admit the paragraph.

Alleged delays in the civil works caused by the defendant

12A. In respect of paragraph 12A, the Defendant:

- (a) says that:
 - (i) on 25 May 2015, it received a letter from ALTRAC (**ALTRAC Letter**) which annexed a claim from the D&C Contractor on 20 May 2015 entitled "Claim for OpCo Initiated Modification – OpCo Direction constitutes a Modification (cl 57.1 – Notice of Claims" (**D&C Claims Letter**);
 - (ii) the D&C Claims Letter claimed that if the Ausgrid Guidelines amounted to a direction under the D&C Contract, then this was a modification of the D&C Contract and claimed the following compensation with respect to the modification:
 - (A) an extension of time of 865 days to the Date for Completion; and

- (B) \$423,963,512.00;
- (iii) the D&C Claims Letter stated that the Ausgrid Guidelines had not been formally issued by ALTRAC to the D&C Contractor and the position of the D&C Contractor was that the Ausgrid Guidelines did not amount to a direction under the D&C Contract;
- (iv) the D&C Claims Letter also stated that the claim for compensation was made without prejudice to its position that the Ausgrid Guidelines were not a direction under the D&C Contract; and
- (v) the ALTRAC Letter requested immediate clarification of the status of the Ausgrid Guidelines from the Defendant and otherwise relied upon the notices enclosed with the ALTRAC Letter in the event that the Defendant asserted that the Ausgrid Guidelines amounted to a direction or other formal instruction under the Project Deed;

Particulars

- i. Letter from ALTRAC to Transport for NSW dated 25 May 2015, and its enclosures.

(b) further says that:

- (i) on 1 June 2015, the Defendant wrote to ALTRAC and informed it that the Ausgrid Guidelines should not be treated as a direction formally issued under the Project Deed and no such direction had been given;

Particulars

- i. Email from Transport for NSW to ALTRAC dated 1 June 2015.
- (ii) on 24 July 2015, ALTRAC and the D&C Contractor both unconditionally withdrew their claims in relation to Ausgrid Guidelines; and

Particulars

- i. Letter from ALTRAC to Transport for NSW dated 24 July 2015, and attached letter from the D&C Contractor to ALTRAC dated 24 July 2015.

(c) otherwise denies the paragraph.

12B. The Defendant denies paragraph 12B.

12C. In respect of paragraph 12C, the Defendant:

- (a) says that as at the date of this defence, 44 modifications (some of which contain subcategories) have been issued by the Defendant in relation to the SLR Works required to be carried out by ALTRAC under the Project Deed; and
 - (b) otherwise denies the paragraph.
- 12D. The Defendant denies paragraph 12D.
- 13. In respect of paragraph 13, the Defendant:
 - (a) admits that it made the statements referred to in the documents particularised to paragraph 13 and relies on the whole of each of those documents; and
 - (b) otherwise denies the paragraph.
- 14. In respect of paragraph 14, the Defendant:
 - (a) admits that ALTRAC provided a program of works that indicated a forecast completion date of March 2020 for construction of the Project; and
 - (b) says that on 23 March 2018, the Defendant formally rejected ALTRAC's program indicating a forecast completion date of March 2020; and
 - (c) otherwise denies the paragraph.
- 14A. In respect of paragraph 14A, the Defendant:
 - (a) admits that Mr Noonan informed the NSW Parliament Public Accountability Committee (**Committee**) that the current schedule for total project completion with trams running and passengers on them was May 2020 and that Acciona notified TfNSW in August 2018 that the official completion date was May 2020;

Particulars

- i. Evidence of Bede Noonan, managing director of Acciona, to the Committee on 4 October 2018, at pages 4 and 19.
 - (b) says that Mr Troughton, Deputy Secretary of Infrastructure and Services of the Defendant, also informed the Committee that the program showing a completion date of May 2020 had been rejected by the Defendant; and

Particulars

- i. Evidence of Stephen Troughton, Deputy Secretary of Infrastructure and Services, Transport for NSW, to the Committee on 4 October 2018, at page 40.
 - (c) otherwise denies the paragraph.

14B. The Defendant denies paragraph 14B.

14C. The Defendant denies paragraph 14C.

14D. The Defendant denies paragraph 14D.

Alleged Private Nuisance

15. In answer to paragraph 15, the Defendant says that the Plaintiff has refused, despite request, to provide any or better particulars of the alleged exceedances and therefore denies paragraph 15.

16. The Defendant denies paragraph 16.

17. The Defendant denies paragraph 17.

Alleged Public Nuisance

18. The Defendant denies paragraph 18.

19. The Defendant denies paragraph 19.

20. The Defendant denies paragraph 20.

21. The Defendant denies paragraph 21.

No Public Nuisance

21A. Further and in the alternative, in answer to paragraphs 18 to 21, the Defendant says that for the reasons set out in paragraphs 21B – 21J below, the Defendant has not interfered with the public's rights of passage on public roads, and accordingly the claim for public nuisance fails.

21B. The common law right of persons to pass along public roads is subject to such restrictions as are imposed by or under the *Roads Act 1993 (NSW)* (**Roads Act**) or any other Act or law.

Particulars

i. Section 5 of the Roads Act.

21C. The Roads and Maritime Services (**RMS**) has the authority to grant approval in respect of the carrying out or use of works or the taking of other action in connection with the development or operation of a light rail system.

Particulars

i. Section 144C of the Roads Act.

- 21D. On 2 October 2015, RMS granted an approval (**RMS Approval**) for the Defendant to carry out the design, construction, testing and commissioning of:
- (a) a new light rail system running from Circular Quay to Central Station via George St, and on Kingsford and Randwick via Surry Hill and Moore Park, including stops, terminus facilities and interchanges;
 - (b) public domain works, including a pedestrian zone in George St from Hunter St to Bathurst St; and
 - (c) adjustments to existing public roads, traffic control works, associated infrastructure and existing utility services affected by the construction of the light rail system
- (Works).**
- 21E. The RMS Approval provides for the Defendant to undertake the Works as a contractor to RMS.
- 21F. To the extent that the RMS Approval applies to works comprising a Light Rail System, approval was granted to the Defendant under s 144C of the Roads Act.
- 21G. To the extent that the RMS Approval applies to works comprising road work and traffic control work, approval was granted to the Defendant under ss 64, 71, 72, 87(1), 87(4) and 253 of the Roads Act.
- 21H. The public's right of passage to pass along the public roads to which the RMS Approval applies is subject to, and has been curtailed by, the exercise of the powers under the Roads Act in granting the RMS Approval.
- 21I. By reason of the matters in paragraphs 21B to 21H above, in carrying out, authorising or permitting the Works the subject to the RMS Approval, the Defendant does not interfere with any of the public's rights of passage on public roads.
- 21J. Further, by reason of the matters in paragraphs 21B to 21I above, carrying out, authorising or permitting the Works the subject to the RMS Approval is taken not to constitute a public nuisance.

Particulars

- i. Section 141 of the Roads Act 1993

Statutory Authority

- 21K. Further and in the alternative, and in answer to the whole of the Amended Statement of Claim, the Defendant says that for the reasons set out in paragraphs 21L–21S below, the Defendant relies on statutory authority in doing any of the acts alleged in paragraphs 7, 9,

10A, 15 and 18 of the ASOC and any interference with the right to enjoyment of private land or inconvenience to users of a public road is the inevitable consequence of the exercise of that statutory authority.

- 21L. Section 104N of the TA Act authorises the making of regulations that may declare the route of a *light rail system* (as defined in the TA Act).
- 21M. Pursuant to the power in s 104N, clause 82A of the *Transport Administration (General) Regulation 2013* (NSW) has been made which declares a route for the Sydney Light Rail.
- 21N. The route for the Sydney Light Rail that has been declared under clause 82A of the *Transport Administration (General) Regulation 2013* (NSW) includes George Street, Devonshire Street, Anzac Parade and Alison Road, and includes the full width of those streets and roads and the stratum above and below the surface (**Light Rail Route**).
- 21O. The Defendant is authorised by section 104O of the TA Act to *develop and operate*, within the meaning of those terms in the TA Act, the Sydney Light Rail.
- 21P. It was and is inevitable that the development of the Sydney Light Rail pursuant to the Defendant's authority to do so would and will result in disruption to the public's right of passage along the Light Rail Route.
- 21Q. To the extent that any effect on public passage along the Light Rail Route has been caused by the carrying out of development for the Sydney Light Rail it was and is the inevitable consequence of the exercise of the Defendant's statutory power to carry out such development.
- 21R. To the extent that any other work done by the Defendant on the Light Rail Route constitutes road work or traffic control work that has affected public passage along the Light Rail Route this has been authorised by the RMS Approval under the Roads Act.

Particulars

- i. The Defendant repeats paragraphs 21A to 21J above.
- 21S. It is the inevitable consequence of the exercise of the powers to restrict access to parts of the Light Rail Route to facilitate construction of the Sydney Light Rail pleaded above, that access is affected.

Public Authority

- 21T. For the purposes of the defences of *Statutory Authority* pleaded at paragraphs 21K to 21S above and *Special Statutory Power* pleaded at paragraph 21U below the Defendant says:
- (a) the Defendant is a public authority as defined in section 41 of the CLA and pleaded in paragraph 4(c) above;

Particulars

- i. The Defendant is a Government agency, constituted by section 3C of the TA Act;
 - ii. The Defendant is, accordingly:
 1. the Crown (within the meaning of the *Crown Proceedings Act 1988*), for the purposes of section 41(a) of the CLA;
 2. a public authority for the purposes of section 41(e) of the CLA; and
 3. a person having public official functions or acting in a public official capacity for the purposes of section 41(e1) of the CLA;
- (b) the functions required to be exercised by the Defendant are limited by the financial and other resources reasonably available to it and the Defendant relies on section 42 of the CLA in the allocation of those resources;
- (c) further to sub-paragraph (b) above:
- (i) the steps that the Defendant might have taken so as to avoid possible consequences of the exercise of its statutory authority are and were constrained by the resources reasonably available to it; and
 - (ii) the Defendant's general allocation of resources is not open to challenge by the Plaintiff for the purposes of determining the reasonableness of the Defendant's conduct the subject of these Proceedings;
- (d) further to sub-paragraph (b) above:
- (i) any question as to the reasonableness of the Defendant's conduct in exercising its special statutory power is and was constrained by the resources reasonably available to it; and
 - (ii) the Defendant's general allocation of resources is not open to challenge by the Plaintiff for the purposes of determining the reasonableness of the Defendant's conduct the subject of these Proceedings.

Special Statutory Power

21U. Further, and in the alternative, in answer to the whole of the Plaintiff's claim, the Defendant says that:

- (b) the Defendant is a public authority as defined by the CLA;
 - (i) the Defendant is the only authority that is authorised by Parliament to develop and operate light rail systems under the TA Act;
 - (ii) the powers referred to in sub-paragraph (i) above are within the meaning of "special statutory power" under section 43A of the CLA;
 - (iii) the Works are authorised by the powers in sub-paragraph (i) above;
 - (iv) Section 43A of the CLA provides that:

"... any act or omission involving an exercise of, or failure to exercise, a special statutory power does not give rise to a civil liability unless the act or omission was in the circumstances so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power";
and

- (b) the carrying out, authorising or permitting of the Works is and was not so unreasonable that no authority having the special statutory power could properly consider any act or omission by the Defendant, alleged by the Plaintiff to have caused damage, to be a reasonable exercise or failure to exercise that power.

Contractual Set-Off

21V. On 23 October 2018, the Plaintiff executed a deed poll in favour of the Defendant (**Ex Gratia Deed**).

21W. The terms of the Ex Gratia Deed included the following:

- (a) without admission of liability, the Defendant made a payment of ex gratia financial assistance of \$111,540 (inclusive of GST, if applicable) (**Ex Gratia Payment**) to the Plaintiff; and
- (b) the Plaintiff agreed that the Ex Gratia Payment would be set off against any claim or claims which the Plaintiff had, has or may have had against the Crown in right of the State of New South Wales and all its NSW Government agencies including the Defendant, and its contractors, arising from or in connection with any disturbance or impact as a result of the Project (**Set Off Term**).

Particulars

- i. Letter from Transport for NSW addressed to Ms Rosa Colagrossi dated 19 October 2018 and executed by Ms Rosa Colagrossi on 23 October 2018.

- 21X. The Plaintiff's claims of private nuisance (pleaded at paragraphs 15 to 17 of the ASOC) and public nuisance (pleaded at paragraphs 18 to 21 of the ASOC) (together, "**Claims**") are claims against the Defendant arising from or in connection with any disturbance of impact as a result of the Project.
- 21Y. Pursuant to the Set Off Term, if any damages are payable to the Plaintiff by the Defendant with respect to the Claims (which is denied), those damages are to be set off against the Ex Gratia Payment.

Proportionate Liability

22. ~~Further and in the alternative, the Plaintiff's claim of:~~

- (a) ~~private nuisance (pleaded at paragraph 15 to 17 of the ASOC) (**Private Nuisance Claim**) is an "apportionable claim" within the meaning of Part 4 of the CLA as a claim for economic loss in an action for damages arising from the Defendant's alleged failure to take reasonable care (which is denied); and~~
- (b) ~~public nuisance (pleaded at paragraphs 18 to 21 of the ASOC) (**Public Nuisance Claim**) is an "apportionable claim" within the meaning of Part 4 of the CLA as a claim for economic loss in an action for damages arising from the Defendant's alleged failure to take reasonable care (which is denied).~~

23. ~~The Defendant repeats the admission of entry into the Project Deed pleaded in paragraph 9 above.~~

24. ~~The Project was to be delivered in two packages of works, being the Early Works package and the package referred to as the SLR PPP that was to be carried out in accordance with the terms of the Project Deed.~~

Particulars

~~Recitals (A) and (C), and definition of "Project" in cl 1.1 of the Project Deed~~

25. ~~Under the Project Deed, ALTRAC was required to carry out OpCo's Activities, which includes, among other activities, the design and construction of the physical works, assets, systems and deliverables comprising the Sydney Light Rail, including the trackwork track work, rail structure, interchange facilities, terminus facilities and maintenance and stabling facilities, as well as associated temporary works.~~

Particulars

Definition of "OpCo's Activities", "Delivery Activities", "SLR Works" and "Temporary Works"
in cl 1.1 of the Project Deed

26. — Under the Project Deed:

- (a) — ALTRAC could subcontract the performance of its obligations in accordance with clause 54 of the Project Deed;
- (b) — however, ALTRAC remained liable to the Defendant for the acts and omissions of its contractors in carrying out those obligations as if such acts or omissions were acts or omissions of ALTRAC.

Particulars

Clause 54.1 of the Project Deed

Private Nuisance Claim

27. — In premises, ALTRAC was required to, under the Project Deed, and did, and continues to, carry out and construct the Project.

28. — If, notwithstanding the denials and non-admissions pleaded above, the allegations in paragraphs 15 to 17 of the ASOC are established, then the Defendant pleads that:

- (a) — ALTRAC which was required to, and did and continues to, carry out the SLR Works and the Temporary Works, also caused a substantial and unreasonable interference with the Plaintiff's and Private Nuisance Group Members' enjoyment of their respective interests in land located in the vicinity of the Project, and is therefore liable to the Plaintiff and Private Nuisance Group Members on the same basis and for the same damage as the Defendant; and
- (b) — Acciona is also liable to the Plaintiff and Private Nuisance Group Members on the same basis and for the same damage as the Defendant, and in that refers to and repeats, as if incorporated into this Amended Defence in full, the allegations in paragraph 47 of the Amended Cross-Claim.

29. — Not used.

30. — By reason of the matters pleaded in paragraphs 27-28:

- (a) — ALTRAC is a "concurrent wrongdoer" within the meaning of Part 4 of the CLA in respect of the Private Nuisance Claim; and

(b) — Acciona is a "concurrent wrongdoer" within the meaning of Part 4 of the CLA in respect of the Private Nuisance Claim.

31. — The Defendant's liability for the Private Nuisance Claim should be reduced to nil, or limited to such other amount that the Court considers just, or just and equitable, having regard to the extent of the Defendant's responsibility for the loss or damage (if any) suffered by the Plaintiff and/or the Private Nuisance Group Members, and the Court may not give judgment against the Defendant for more than that amount.

Public Nuisance Claim

32. — If, notwithstanding the denials and non-admissions pleaded above, the allegations in paragraphs 18 to 21 of the ASOC are established, then the Defendant:

(a) — repeats paragraph 27 above; and

(b) — says that Acciona is also liable to the Plaintiff and Public Nuisance Group Members on the same basis and for the same damage as the Defendant, and in that refers to and repeats, as if incorporated into this Amended Defence in full, the allegations in paragraph 48 of the Amended Cross Claim.

33. — By reason of the matters pleaded in paragraph 32:

(a) — ALTRAC is a "concurrent wrongdoer" within the meaning of Part 4 of the CLA in respect of the Public Nuisance Claim; and

(b) — Acciona is a "concurrent wrongdoer" within the meaning of Part 4 of the CLA in respect of the Public Nuisance Claim.

34. — The Defendant's liability for the Public Nuisance Claim should be reduced to nil, or limited to such other amount that the Court considers just, or just and equitable, having regard to the extent of the Defendant's responsibility for the loss or damage (if any) suffered by the Plaintiff and/or the Public Nuisance Group Members and the Court may not give judgment against the Defendant for more than that amount.

Common Questions

35. The Defendant does not admit paragraph 22.

36. The following questions of fact or law are common to the claims of the Group Members:


(a) Whether the public's right of passage to pass along the public road to which the RMS Approval applies is subject to, and has been curtailed by, the exercise of the powers under the Roads Act granting the RMS Approval.

- (b) Whether disruption of the public's right of passage along the Light Rail Route was the inevitable consequence of the development of the Sydney Light Rail pursuant to the defendant's authority to do so under s 104O of the TA Act.
- (c) Whether the Works and/or the SLR Works were authorised by a special statutory power under s 43A of the CLA.

SIGNATURE

Signature of legal representative

Colleen Palmkvist, Lander & Rogers
Solicitor for the Defendant



Date of signature

3 June 2019

AFFIDAVIT VERIFYING

Name Michael Barnfield
Address C/- Level 43, 680 George Street, Sydney NSW 2000
Occupation Public Servant
Date

I affirm:

1. I am the Director Delivery, Sydney Light Rail Project for Transport for New South Wales.
2. I believe that the allegations of fact contained in the further amended defence are true.
3. I believe that the allegations of fact that are denied in the amended defence are untrue.
4. After reasonable inquiry, I do not know whether or not the allegations of fact that are not admitted in the amended defence are true.

AFFIRMED at Sydney

Signature of deponent



Name of witness

MICHAEL DAVID WILLIAMS

Address of witness

19/123 PITT STREET, SYDNEY, NSW 2000

Capacity of witness

Solicitor

And as a witness, I certify the following matters concerning the person who made this affidavit (the deponent):

- 1 I saw the face of the deponent.

I have confirmed the deponent's identity using the following identification document:

NSW DRIVER LICENCE NO. 48685L

Identification document relied on (may be original or certified)

Signature of witness



Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.

DETAILS ABOUT FILING PARTY

Filing party

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