

FURTHER AMENDED STATEMENT OF CLAIM

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Equity
List	Commercial List
Registry	Sydney
Case number	2021/88654

TITLE OF PROCEEDINGS

First Plaintiff	Darren Mitchell
Second Plaintiff	Rosaline Mitchell
First defendant	Roads and Maritime Services (ABN 76236371088) Now known as Transport for New South Wales)
Second defendant	Registrar General

FILING DETAILS

Filed for	Plaintiffs
Legal representative	Darian Iacono
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TYPE OF CLAIM

Declaration – Land – Other

Note: In this pleading amendments made in the Amended Statement of Claim are denoted by single underlining and striking through. Further amendments made to this Further Amended Statement of Claim are denoted by double underlining and striking through.

RELIEF CLAIMED

1. A declaration that the second defendant is liable to pay ~~compensation damages~~ under s 120 ~~and/or compensation pursuant to~~ s129 of the *Real Property Act 1900* (NSW) ("**RPA**") for the Plaintiffs' land and the Group Members' lands- (being the interests in substratum land identified in this Amended Statement of Claim) in respect of the purported compulsory acquisition of their lands the substratum of the Plaintiffs' land and the Group Members' land (together "**Lands**") by the First Defendant said to be pursuant to section 177 of the *Roads Act 1993* (NSW) ("**Roads Act**") and/or the purported subdivision of those Lands by the ~~F~~first Defendant ~~and leave pursuant to 132 (2)(b) of the Real Property Act for that purpose.~~

1A An order that the First and Second Defendants pay damages under s 120 of the RPA for the Lands in respect of the purported compulsory acquisition of their lands by the First Defendant said to be pursuant to section 177 of the Roads Act and/or the purported subdivision of the Lands.

1B A grant of leave to the Plaintiffs pursuant to 132(2)(b) of the RPA to commence proceedings against the Second Defendant for compensation pursuant to section 129 of the RPA.

1C An order as against the Second Defendant that the Plaintiffs be paid compensation from the Torrens Assurance Fund pursuant to section 129 of the RPA.

2. Further and in the alternative a declaration that the purported Substrata Subdivisions (referred to in Schedule 1) of the ~~Plaintiffs' land and Group Members' Lands~~ are not valid in that each contained an error on the face of the record by purporting to contain a statement of intention to dedicate a public road under s 48 of the *Roads Act* when the purpose was not for the dedication of a public road under the *Roads Act* ("**The False Declarations**").

3. Further and in the alternative, a declaration that the purported Subdivisions were not validly authorised to be registered by s 9 of the Roads Act because there were no true statements of intention to dedicate the specified land as a public road.
4. A declaration that at the time of the making the False Declarations, the First Defendant: knew that the False Declarations were false; or in the alternative; knew that the statutory formalities for executing the dealings, the subject of the statements of intention, had not been satisfied; or in the further alternative and made the said False Declarations recklessly without caring whether they were true or false.
5. Further and in the alternative, a declaration that:
 - a. The plaintiffs and the Group Members are each entitled to an estate in fee simple in the substratum ~~S~~subdivision of each's land.
 - b. The plaintiffs and the Group Members are each entitled to be registered as the proprietor of the estate in fee simple in the ~~said S~~substratum ~~S~~subdivision of each's land.
6. Further in the alternative to prayer [5]:
 - a. declaration that the First Defendant holds the whole of the substratum ~~S~~subdivision of the ~~L~~Lands, on trust for each of the Plaintiffs and the Group Members;
 - b. ~~A~~an order that the First Defendant execute memoranda of transfer under the ~~Real Property Act~~ RPA in registrable form transferring the Substratum Subdivision of the ~~L~~Lands to the Plaintiff and the Group Members; and
 - c. an order that the First Defendant account to the Plaintiffs and the Group Members for any benefit it has obtained as a result of it having the legal title to, possession, use and enjoyment of the Lands whilst holding them on trust for the Plaintiffs and the Group Members.

~~7. A declaration that the use of the land described in the purported Substratum Subdivision as Lots (see Schedule 1) by the Defendant is a trespass.~~

8. A Declaration that the function of carrying out the construction of a road for the purposes of the WestConnex project being conferred on ~~RMS~~ the First Defendant, by operation of s 64(1A) and 71 of the Roads Act is null and void in circumstances where the tunnels forming parts of WestConnex, pursuant to the Declaration ~~is~~ are not a 'road' by virtue of s52 (3) of the Roads Act.

8A Damages as against the First Defendant for breach of the statutory duty imposed on it by section 179(1) of the Roads Act.

9. A ~~D~~declaration that the first defendant is liable to the plaintiffs and the Group Members in damages or equitable compensation for fraud to be quantified by ascertaining the profit made by the first defendant from the fraudulent acquisition of their ~~L~~ands.

9A An order that the First Defendant pay compensation

9B Interest on damages or compensation calculated in accordance with section 100 of the Civil Procedure Act 2005 (NSW).

10. Such other orders as the Court thinks fit.

11. Costs.

NATURE OF THE DISPUTE

12. This is a representative proceeding brought by the plaintiffs on behalf of themselves and the Group Members (as defined in paragraph 18 below). ~~other persons whose land was fraudulently Lands were acquired by the First Defendant for the WestConnex tunnel.~~

13. The proceeding arises from the circumstances disclosed by admissions made by the First Defendant and other evidence.

14. In summary, the First Defendant purported to subdivide land proposed to be compulsorily acquired (~~“the lands”~~) in order to acquire only the substratum thereof and avoid paying compensation for same. The First Defendant obtained registration by the Second Defendant of plans of subdivision by fraud through the making of false and untrue representations, which it knew to be false or was recklessly indifferent as to their truth.
15. The First Defendant knew that the statutory formalities for executing the dealings had not been satisfied. In the alternative, the First Defendant made the representations recklessly without caring whether they were true or false.
16. The plaintiffs seek relief on behalf of themselves and the Group Members (as defined in paragraph 18 below), ~~other owners of the lands~~ (~~“Group Members”~~). There are in excess of ~~3,000~~ 7 Group Members.

ISSUES LIKELY TO ARISE

17. The questions of law and fact common to the claims of the Group Members are, with respect to the First Defendant:

- ~~1. Whether the First Defendant executed a deed known as M4 M5 Link Project Deed (~~“Deed”~~) under which WCX M4 M5 LINK PT Pty Limited and WCX M4 M5 LINK PT Pty Limited are respectively in broad terms to design and construct tunnels from Haberfield to St Peters together with certain ancillary works (~~“Mainline Tunnel”~~) being stage 3A and 3B of the WestConnex M4 M5 Link.~~
- ~~2. Whether a tollway is not a road or road related area.~~
- ~~3. Whether the First Defendant is obliged to pay compensation for the lands compulsorily acquired by it.~~
- ~~4. Whether the First Defendant fraudulently obtained registration of plans of subdivision by the Second Defendant.~~

- ~~5. Whether in order to enliven s 62 of the Land Acquisition (Just Terms Compensation) Act substratum land must be subdivided in order for it to be separately compulsorily acquired.~~
 - ~~6. Whether the only power for the First Defendant to lodge a plan of subdivision subdividing the land was that a person may open a public road by causing a plan of subdivision or other plan that bears a statement of intention to dedicate specified land as a public road to be registered in the office of the Registrar General.~~
 - ~~7. Whether the Mainline Tunnel is a road or road related area.~~
 - ~~8. Whether the Plaintiffs and the Group Members are entitled to commence proceedings as a consequence of the First Defendant's fraud.~~
 - ~~9. Whether the plaintiffs and the Group Members are entitled to compensation from the Torrens Assurance Fund as a consequence of the First Defendant's fraud.~~
 - ~~10. Whether as a result of the First Defendant's fraud it holds the lands fraudulently acquired in trust for the plaintiffs and the Group Members.~~
 - ~~11. Whether pursuant to the deed referred to in 1. above the First Defendant is not constructing the Mainline Tunnel and thus s62 of the Land Acquisition (Just Terms Compensation) Act does not apply.~~
 - ~~12. Whether the First Defendant acquired the lands for the purpose of resale and thus s179 of the Roads Act 1993 prohibited compulsory acquisition of the Land.~~
- i. Whether the First Defendant entered into a deed known as M4-M5 Link Project Deed with WCX M4-M5 Link PT Pty Limited and WCX M4-M5 Link AT Pty Limited ("**Project Deed**") for the to design and construction of tunnels from Haberfield to St Peters with certain ancillary works being stage 3A and stage 3B of the WestConnex M4-M5 Link ("**Mainline Tunnel**").

- ii. Whether the statements of intention on the deposited plans (“**Statement of Intention**”) pursuant to section 9 of the *Roads Act 1993* (NSW) (“**Roads Act**”) and section 195C of the *Conveyancing Act 1919* (NSW) (“**Conveyancing Act**”) on each of the plans of subdivision listed in Schedule 1 (“**Plans of Subdivision**”) include the words:
 - a. Statement of Intention to dedicate public roads.....acquire/assume land ...Lots to inclusive are required for freeway under section 48 of the Roads Act 1993?
- iii. Was the Mainline Tunnel by order published in the NSW Government Gazette on 17 August 2018 (“**Order**”) validly declared to be a tollway as defined in the Roads Act 1993?
- iv. Did the Mainline Tunnel, by virtue of the Order, cease to be a public road?
- v. Was Mainline Tunnel ever validly declared to be a “freeway” pursuant to section 48 of the Roads Act?
- vi. Was the Mainline Tunnel ever validly declared to be a “main road” pursuant to section 46 of the Roads Act?
- vii. Is the Mainline Tunnel not a “road” or “road related area” within the meaning of section 4(1) of the *Road Transport Act 2013* (NSW)?
- viii. Was the First Defendant empowered to lodge the Plans of Subdivision with the Second Defendant?
- ix. Did the First Defendant believe that the Statement of Intent was untrue or was it recklessly indifferent to the truth of the Statement of Intent?
- x. Was it the First Defendant’s intention to avoid paying compensation for the compulsory acquisition of the substrata of the Lands by obtaining registration of the plans of subdivision in the manner set out in this Further Amended Statement of Claim?

- xi. Did the First Defendant fraudulently obtain registration by the Second Defendant of the plans of subdivision?
- xii. Did the First Defendant, after registration of the plans of subdivision, compulsorily acquire title the substrata lots of the Lands?
- xiii. Did the First Defendant fraudulently acquire title to the Lands?
- xiv. If so, are the Plaintiffs and the Group Members entitled to damages, equitable or statutory compensation from the First Defendant?
- xv. Did the First Defendant, pursuant to the Project Deed, lease the substrata of the Lands to WCX M4-M5 Link PT Pty Limited and/or WCX M4-M5 Link AT Pty Limited ("**Lease**")?
- xvi. What was the quantum of the consideration paid for the Lease?
- xvii. What is the quantum of the damages to which the Plaintiffs and the Group Members are entitled?
- xviii. Does or did the First Defendant hold the substrata of the Lands on trust for the Plaintiffs and the Group Members?
- xix. Is the First Defendant as trustee liable to account to the Plaintiffs and the Group Members for any benefit it has derived by reason of its having legal title to, possession, use and enjoyment of the Lands?
- xx. Was the First Defendant responsible for the construction of the Mainline Tunnel?
- xxi. If the First Defendant did not fraudulently acquire title to the substrata of the Lands, does section 62 of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) ("**Acquisition Act**") apply to the acquisition of the substrata of the Lands?

- xxii. If section 62 of the Acquisition Act does not apply, are the Plaintiffs and the Group Members entitled to compensation pursuant to section 37 of the Acquisition Act?
- xxiii. If the First Defendant did not fraudulently acquire the substrata of the Lands, did it acquire the substrata of the Lands for resale?
- xxiv. If the First Defendant did acquire the substrata of the Lands for resale, did section 179 of the Roads Act prohibit compulsory acquisition thereof by the First Defendant?
- xxv. If section 179 of the Roads Act prohibited the compulsory acquisition of the Lands, are the Plaintiffs and the Group Members entitled to damages from the First Defendant for breach of the statutory duty imposed by section 179(1) of the Roads Act?
- xxvi. If the Plaintiffs and the Group Members are entitled to damages from the First Defendant, is the consideration paid pursuant to the Deed the damages to which they are entitled?

17A The questions of law and fact common to the claims of the Group Members are, with respect to the Second Defendant:

- i. Are the Plaintiffs and the Group Members entitled to compensation from the Torrens Assurance Fund?
- ii. If the Plaintiffs and the Group Members are entitled to compensation from the Torrens Assurance Fund, what is the quantum thereof?

PARTIES AND RELEVANT PERSONS

The Plaintiffs and Group Members

18 The proceedings are commenced as a representative proceeding pursuant to Part 10 of the *Civil Procedure Act 2005 (NSW)* (~~CPA~~) on behalf of the plaintiffs and all persons who or which:

18.1 ~~suffered loss or damage by or resulting from the fraud by the First Defendant pleaded in~~ had their Lands subdivided by the registration of the deposited plans listed in Schedule 1 of this Further Amended Statement of Claim (ASOC); and

18.2 are not any of the following:

- a. a party related to the defendants;
- b. an entity associated with the defendants;
- c. an officer or close associate of the defendants;
- d. a Chief Justice, Justice or Registrar of the Supreme Court of New South Wales or the High Court of Australia; or
- e. an officer or employee of, or other legal practitioner engaged by the law firm of &Legal.

referred to herein as “the Group Members”.

PLEADINGS AND PARTICULARS

1. The Plaintiffs (~~Plaintiff~~) are natural persons and are entitled to sue and be sued.
2. The First ~~e~~ Defendant (~~RMS~~) is and was at all material times a statutory corporation and NSW government agency and is entitled to sue and be sued in its corporate name and style.
3. The Second Defendant is and was at all material times an instrumentality of the government of New ~~e~~ South Wales and is entitled to sue and be sued in its corporate name and style.

WestConnex project

4. The First Defendant executed a deed known as WestConnex M4-M5 Link Project Deed under which WCX M4-M5 LINK PT Pty Limited and WCX M4-M5 LINK AT Pty

Limited are respectively in broad terms to design and construct tollway tunnels from Haberfield to St Peters together with certain ancillary works ("**Mainline Tunnel**"), being stage 3 of WestConnex, and operate and maintain the motorway to be known as WestConnex M4-M5 Link, being both stages 3A and 3B of WestConnex.

Particulars

- i. WestConnex M4-M5 Link Project Deed.

EPA Approval

5. On 17 April 2018, planning approval for the carrying out of the Westconnex M4-M5 Link was granted pursuant to section 5.19 of the Environment and Planning Assessment Act 1979 ("**EPA Act Approval**").
6. The Mainline Tunnel the subject of the EPA Act Approval includes an underground on-ramp tunnel that will connect the remainder of the Mainline Tunnels to Wattle Street at Haberfield ("**the Tunnels**").
7. The Tunnels will be or are located under the surface of the lands owned by the Plaintiffs described in paragraph [8] below and the lands owned by the Group Members.

Plaintiffs' land

8. The Plaintiffs until the time described in paragraph [38] hereof were the registered proprietors of the whole of the land (unlimited as to depth) held under the *Real Property Act 1900* ("**RPA**") located at 11 Miller Street, Haberfield (~~the~~ "**Plaintiffs' Land**").

Tollway

9. Pursuant to section 52(1) of the *Roads Act 1993 (NSW)* ("**Roads Act**"), the Minister may, by order published in the Gazette, declare:

- a. any road that is owned by ~~RMS~~ the First Defendant and that is designed to facilitate the movement of motor traffic; or
- b. or any road proposed to be constructed on land owned or to be owned by ~~RMS~~ the First Defendant:

to be a tollway (“**Tollway**”).

10. Any public road that is declared to be a Tollway ceases to be a public road by virtue of the declaration.

Particulars

- i. Section 52(2) of the Roads Act.

11. By virtue of s 52 (3) of the Roads Act a Tollway is not a “road or road related area” within the meaning of section 4 (1) of the *Road Transport Act 2013 (NSW)* for the purposes of any Act or law, or any provision of an Act or law, prescribed by the regulations for the purposes of this section.

12. On 17 August 2018, pursuant to section 52(1) of the Roads Act, an order was published in the Gazette declaring the proposed road to be constructed in the Mainline Tunnel (including the On Ramp Tunnel) to be a Tollway as defined in the Roads Act (“**Declaration**”).

13. By virtue of sections 52(2) and 52(3) of the Roads Act, the Declaration rendered the Mainline Tunnel not to be a public road; or a “road or road related area” within the meaning of section 4(1) of the *Road Transport Act 2013 (NSW)* for the purposes of any Act or law, or any provision of an Act or law, prescribed by the regulations for the purposes of this section.

Subdivision

14. An owner of an interest in land which is validly divested, extinguished or diminished by an acquisition notice is entitled to be paid compensation in accordance with ~~this~~

Part 3 of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (“**Acquisition Act**”) by the authority of the State which acquired the land.

Particulars

ii. Section 37 of the *Land Acquisition (Just Terms Compensation) Act 1991* (“**Acquisition Act**”).

15. However, pursuant to section 62 of the *Acquisition Act*, if the land under the surface is compulsorily acquired under the *Roads Act* for the purpose of constructing a tunnel, compensation is not payable (subject to subsection (1) of section 62 of the *Acquisition Act*) unless the surface of the overlying soil is disturbed, or the support of that surface is destroyed or injuriously affected by the construction of the tunnel, or any mines or underground working in or adjacent to the land are thereby rendered unworkable or are injuriously affected.

Particulars

iii. Section 62 of the *Acquisition Act*.

16. In the premises, to enliven section 62 of the *Roads Acquisition Act*, and thereby excluding compensation otherwise payable under section 37 of the *Roads Acquisition*, the substratum land must be subdivided in order for it to be separately compulsory acquired.

17. At all material times, the only power for the First Defendant to lodge a subdivision sub-dividing the Land was that a person may open a public road by causing a plan of subdivision or other plan that bears a statement of intention to dedicate specified land as a public road (including a temporary public road) to be registered in the office of the Registrar-General.

Particulars

i. Section 9 of the *Roads Act*.

18. “Public road” for the purposes of section 9 of the Roads Act means any road that is opened or dedicated as a public road, whether under the Road Act or any other Act or law, and any road that is declared to be a public road for the purposes of this Act.

Particulars

i. Section 4 and Schedule 2 of the Roads Act.

19. The First Defendant purported to register the Deposited Plans in Schedule 1 hereto (the ~~e~~Deposited ~~p~~Plans). The purported registration of the ~~e~~Deposited ~~p~~Plans divided the ~~p~~Plaintiffs’ ~~l~~Land and the Group Members’ ~~l~~Lands each into three lots, being the two underground lots beneath the surface of each lot (acquired by the First Defendant) and the surface of each lot.

Particulars

i. Deposited Plans in Schedule 1

20. In accordance with section 9 of the Roads Act and section 195C of the *Conveyancing Act 1919* (NSW) (“**Conveyancing Act**”), the ~~e~~Deposited ~~p~~Plans were each required to contain a statement showing which roads (if any) shown on the ~~e~~Deposited ~~p~~Plans were intended to be dedicated to the public (“**Statement of Intention**”) in order to be registered by the Second Defendant.

Particulars

i. Section 9 of the Roads Act

ii. Section 195C(d)(i) of the Conveyancing Act.

21. The Statement of Intention on each Deposited Plan in Schedule 1 included, amongst others, the following relevant words—(~~Statement of Intention~~):

a. “*Statements of Intention to dedicate public roads...acquire/assume land...Lots...to...inclusive are required for freeway under section 48 of the Roads Act 1993*”.

22. A 'Freeway', as referenced in the Statements of Intention means a road that is declared to be a freeway by an order in force under section 48 under the Roads Act.

Particulars

ii. Section 4, Schedule 2 and section 48 of the Roads Act.

23. In accordance with the section 48 of the Roads Act, the Minister may, by order published in the Gazette, declare to be a freeway any main road that is designed to facilitate the movement of motor traffic.

24. The Minister has not declared the Mainline Tunnel ~~has not been declared~~ to be a 'Freeway' pursuant to section 48 of the Roads Act and at all material times the First Respondent knew that the Minister had not and had no intention of making such a declaration.

25. A 'main road' means a road that is declared to be a main road by an order in force under section 46 of the Roads Act.

26. In accordance with section 46 of the Roads Act, the Minister may, by order published in the Gazette, declare to be a main road: any public road, or any other road that passes through public open space and joins a main road, highway, freeway, tollway, transitway or controlled access road.

27. The Minister has not declared the Mainline Tunnel ~~has not been declared~~ to be a 'Main Road' pursuant to section 46 of the Roads Act and at all material times the First Respondent knew that the Minister had not and had no intention of making such a declaration.

28. The First Defendant published notices in the NSW Government Gazette regarding the Substratum Land.

29. In the premises, the Mainline Tunnel, is not and is not intended to be:

a. a 'Main Road', or, a 'Freeway' but is a 'Tollway' as a consequence of the Declaration, as pleaded at paragraph [13] above;

- b. a 'public road' as a consequence of the Declaration, as pleaded at paragraph [13] above; and
- c. a "road" or "road related area" within the meaning of section 4(1) of the Road Transport Act 2013 (NSW) for the purposes of any Act or law, or any provision of an Act or law, as pleaded above.

Fraud

30. In the further premises, at all material times the Statements of Intention contained representations (**Representations**) that:

- a. Were false and untrue in that, as pleaded above, the Mainline Tunnel, as a consequence of the Declaration, is a Tollway not a Freeway and not a 'public road':
- b. Were false and untrue in that a Tollway is not a "road" or "road related area" within the meaning of section 4 (1) of the Road Transport Act 2013 for the purposes of any Act or law, or any provision of an Act or law; and
- c. Were made after the Declaration.

Particulars

- i. Statements of Intention;
- ii. WestConnex M4-M5 Link Project Deed;
- iii. On 17 April 2018 (prior to the Representations) planning approval for the carrying out of the Westconnex M4-M5 Link was granted pursuant to section 5.19 of the Environment and Planning Assessment Act 1979 (NSW) for a Tollway;
- iv. On 17 August 2018 (prior to the Representations), pursuant to section 52(1) of the Roads Act, an order was published in the

Gazette declaring the proposed road to be constructed in the Mainline Tunnel (including the On Ramp Tunnel) to be a Tollway as defined in the Roads Act.

31. At the time of the making of the Representations described in paragraph [30] the First Defendant fraudulently:

- a. knew that the said Representations were false; or in the alternative;
- b. knew that the statutory formalities for executing the dealings had not been satisfied; or in the further alternative
- c. made the said Representations recklessly without caring whether they were true or false.

Particulars

- i. The relevant officers of the First Defendant made the Statements of Intention knowing that the Land was to be used for a Tollway not a Freeway by reason of having knowledge or being in a position to acquire knowledge of:
 - a. WestConnex M4-M5 Link Project Deed including without limitation clause 7.6 thereof;
 - b. On 17 April 2018 (prior to the Representations) planning approval for the carrying out of the Westconnex M4-M5 Link was granted pursuant to section 5.19 of the Environment and Planning Assessment Act 1979 for a Tollway; and
 - c. On 17 August 2018 (prior to the Representations), pursuant to section 52(1) of the Roads Act, an order was published in the Gazette declaring the proposed road to be constructed in the Mainline Tunnel

(including the On Ramp Tunnel) to be a Tollway as defined in the Roads Act.

32. The First Defendant made the Representations described in paragraph [30] with the fraudulent intention that the Second Defendant would register the eDeposited ePlans and that the First Defendant would thereby obtain a benefit by being able to exercise its power of compulsory acquisition under s 177 of the Roads Act in relation to only the substratum parcels of land so divided and thereby:

- a. Hhaving the benefit of the reduced compensation regime under s 62(2) of the Acquisition Act by engaging the power to acquire only the substratum parcel of land; and/or
- b. Hhaving the benefit of the value of the payments in the WestConnex M4-M5 Link Project Deed without paying compensation for the substratum of land acquired; and/or
- c. Hhad those benefits where the power under s 9 of the Roads Act and s 195C of the Conveyancing Act could only be satisfied exercised by the making of the false Representations falsely in circumstances where there had been a prior declaration of the Tollway and the entry into WestConnex M4-M5 Link Project Deed.

Particulars

- i. The First Defendant proceeded to issue Proposed Acquisition Notices (“PANs”) for only the substratum parcels of the Lands purportedly pursuant to s 177 of the Roads Act;
- ii. The First Defendant at all material times claimed in aid the provisions of s 62(2) of the Acquisition Act to deny any claim for compensation by the Plaintiff;
- iii. The First Defendant entered into the WestConnex M4-M5 Link Project Deed and took the benefits under that Deed, sought the EPA Act eApproval under the EPA and made the eDeclaration of

Tollway knowing it would need to acquire the Lands for the purposes of permitting the construction of the tunnel and knowing it would do so by subdivision.

33. Relying upon and induced by the said Representations the Second Defendant registered the eDeposited ePlans (“Registrations”).

34. As a result of the fraudulent conduct pleaded in paragraphs 31 and 32 above (“Fraud”) and the Registrations the Plaintiffs and the Group Members have:

- a. lost their right, title and interest in and to the Substratum Land and the benefit of the same and were thereby deprived of it; and
- b. have otherwise suffered loss and damage.

35. As a consequence of the Fraud and the Registrations, causing the Substratum Land being brought under the provisions of RPA, the Plaintiffs and the Group Members are entitled to ~~commence proceedings in the Supreme Court against~~ damages as against the First Defendant for the recovery of loss and damages suffered.

Particulars

- ii. See Substratum Land (see paragraph [38] below); and
- iii. Section 120 of the RPA.

36. In the alternative, as a consequence of the Fraud and the Registrations, causing the Substratum Land to be brought under the provisions of RPA, the Plaintiff and the Group Members are entitled to payment of compensation from the Torrens Assurance Fund as against the Second Defendant.

Particulars

- i. Sections 129 and 132 of the RPA.

37. In the further alternative, as a result of the Registrations, the First Defendant holds the whole of the Lands, on trust for the Plaintiffs and the Group Members.

37A The First Defendant is liable to account to the Plaintiffs and the Group Members in equity for any benefit it has obtained as a result of it having the legal title to, possession, use or enjoyment of the Lands whilst holding them on trust for the Plaintiffs and the Group Members.

Acquisition Improper Purpose

38. Notwithstanding the matters pleaded above, the First Defendant purported to issue ~~Proposed Acquisition Notices~~ (“PANS”) to the Plaintiffs and the Group Members in respect of two lots beneath the surface of each of their land making up the Land described in ~~(Schedule 1)~~ (“**Substratum Land**”).
39. The PANS stated that the ~~Substratum~~ Land was to be acquired “for the purposes of the Roads Act in connection with the construction, operation and maintenance of WestConnex M4 – M5 Link tunnels”.
40. In purported compliance with section 177 of the Roads Act, the First Defendant published notices in the gazette regarding the Substratum Land, acquiring the same.
41. Once acquired, a roads authority may carry out road work on any public road for which it is the roads authority and/or on any other land under its control.

Particulars

- i. Section 71 of the Roads Act.

42. The Roads Act defines “carrying out road work by reference to “roads” generally.

43. For the purposes of section 71 of the Roads Act, “~~R~~oad work” is very widely defined and specifically includes “the construction, erection, installation ... of ... road work”.

Particulars

- i. Section 4 and Schedule 2 of the Roads Act.

44. ~~RMS The First Defendant~~ may, for the purposes of ~~the carrying out of a project approved under Part 3A, State significant development for which development consent has been granted under Part 4, or~~ “State significant infrastructure” approved under Part 5.1, of the *Environmental Planning and Assessment Act 1979*, exercise the functions of a roads authority with respect to any road.

Particulars

ii. Section 64(1A) of the Roads Act.

45. The Mainline Tunnel as part of the WestConnex project was approved as State significant infrastructure under Part 5.1 of the *Environmental Planning and Assessment Act 1979* (NSW).

46. ~~The purpose of s~~ Section 64(1A) of the Roads Act ~~is to~~ confers on ~~RMS the First Defendant~~ “the functions of a roads authority” in respect of a road where ~~RMS the First Defendant~~ is not “the roads authority” for that road under s 7 of the Roads Act.

~~46A and s~~ Section 71 of the Roads Act empowers a “roads authority” to “carry out road work” “on any public road for which it is the “roads authority” and “on any other land under its control”.

47. However, as pleaded above:

a. ~~On 17 August 2018, pursuant to section 52(1) of the Roads Act, an order~~ The Declaration was published in the Gazette ~~declaring the proposed road to be constructed in the Mainline Tunnel (including the On Ramp Tunnel) to be a ‘tollway’ as defined in the Roads Act (Declaration); and~~

b. ~~By~~ virtue of sections 52(2) and 52(3) of the Roads Act, the Declaration rendered the Mainline Tunnel not to be a public road; or a “road” or “road related area” within the meaning of section 4(1) of the *Road Transport Act 2013* (NSW) for the purposes of any Act or law, or any provision of an Act or law, prescribed by the regulations for the purposes of this section.

48. In the premises, the function of carrying out the construction of a road for the purposes of the WestConnex project being conferred on ~~RMS~~ the First Defendant, by operation of s 64(1A) and 71 of the Roads Act, is null and void in circumstances where the Mainline Tunnel, pursuant to the Declaration is not a 'road' (**Improper Purpose**).

49. As a consequence of the Improper Purpose, the Substratum Land (~~below~~) was brought under the provisions of RPA, the Plaintiffs and the Group Members have suffered loss and damages are entitled to ~~commence proceedings in the Supreme Court~~ damages as against the First Defendant for the recovery of loss and damages suffered.

Particulars

- i. ~~See Substratum Land~~ (see paragraph [389] above); and
- ii. Section 120 of the RPA.

ALTERNATIVE CLAIM

50. In the alternative, as a consequence of the Improper Purpose, causing the Substratum Land (~~below~~) being brought under the provisions of RPA, the Plaintiffs and the Group Members are entitled to payment of compensation from the Torrens Assurance Fund as against the Second Defendant.

Particulars

- ii. Section 129 of the RPA.

51. In the further alternative, as a result of the Registrations the First Defendant holds the whole of the Land, on trust for the Plaintiffs and the Group Members and is liable to account to them for any benefit thereby derived.

FURTHER ALTERNATIVE CLAIM

52. ~~In the further alternative, the First Defendant has executed a deed known as WestConnex M4 M5 Link Project Deed under which WCX M4 M5 LINK PT Pty Limited and WCX M4 M5 LINK AT Pty Limited are respectively in broad terms to~~

~~design and construct tollway tunnels from Haberfield to St Peters together with certain ancillary works (**Mainline Tunnel**), being stage 3A of WestConnex, and operate and maintain the motorway to be known as WestConnex M4-M5 Link, being both stages 3A and 3B of WestConnex.~~

Particulars

~~i. WestConnex M4-M5 Link Project Deed.~~

56. In the further alternative, ~~the~~ First Defendant has purported to invoke section 62(2) of the Acquisition Act in order to avoid its obligations to pay compensation to the Plaintiffs.

Particulars

~~i. Proposed Acquisition Notices~~ PANs served on the plaintiffs

57. Section 62 of the Acquisition Act only applies if the First Defendant is the entity constructing the M4 – M5 Link tunnel.

58. Pursuant to the WestConnex M4-M5 Link Project Deed, the First Defendant ~~is~~ did not constructing the M4 – M5 Link tunnel.

59. The First Defendant ~~is~~ is pursuant to section 37 of the Acquisition Act, liable to pay compensation to the Plaintiffs and the Group Members for the compulsory acquisition of the Lands.

~~60. The Plaintiffs and the Group Members claim compensation payable calculated in accordance with section 58 of the Acquisition Act, being the depreciation in the market value of the land remaining in their ownership after the compulsory acquisition of the Substrata of the Lands (~~section 58 Land Acquisition (Just Terms Compensation Act 1991)~~).~~

SECOND FURTHER ALTERNATIVE CLAIM

61. Section 179 of the Roads Act ~~1993~~ prohibits the compulsory acquisition of land for the purpose of resale.

62. Pursuant to the WestConnex M4-M5 Link Project Deed, the First Defendant sold the land compulsorily acquired by it.

63. The First Defendant's purported compulsory acquisition of the land was prohibited by section 179 of The Roads Act 1993 and is null and void.

64. The plaintiffs and the Group Members ~~claim~~ are entitled to damages from the First Defendant for breach of the statutory duty imposed by section 179(1) of the Roads Act.

64A Alternatively the First Defendant holds the lands on trust for the plaintiffs and the Group Members and is liable to account to them for any benefit thereby derived.

SIGNATURE OF LEGAL REPRESENTATIVE

~~This Amended Statement of Claim does not require a certificate under clause 4 of Schedule 2 to the Legal Profession Uniform Law Application Act 2014.~~

I certify under clause 4 of Schedule 2 to the Legal Profession Uniform Law Application Act 2014 that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim for damages in these proceedings has reasonable prospects of success.

I have advised the plaintiffs that court fees may be payable during these proceedings. These fees may include a hearing allocation fee.

Signature



Capacity

Solicitor

Date of signature

27 July 2021

NOTICE TO DEFENDANT

If you do not file a defence within 28 days of being served with this statement of claim:

- You will be in default in these proceedings.
- The court may enter judgment against you without any further notice to you.

The judgment may be for the relief claimed in the statement of claim and for the plaintiff's costs of bringing these proceedings. The court may provide third parties with details of any default judgment entered against you.

HOW TO RESPOND

Please read this statement of claim very carefully. If you have any trouble understanding it or require assistance on how to respond to the claim you should get legal advice as soon as possible.

You can get further information about what you need to do to respond to the claim from:

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at www.lawaccess.nsw.gov.au.
- The court registry for limited procedural information.

You can respond in one of the following ways:

- 1 If you intend to dispute the claim or part of the claim**, by filing a defence and/or making a cross-claim.
- 2 If money is claimed, and you believe you owe the money claimed**, by:
 - Paying the plaintiff all of the money and interest claimed. If you file a notice of payment under UCPR 6.17 further proceedings against you will be stayed unless the court otherwise orders.
 - Filing an acknowledgement of the claim.
 - Applying to the court for further time to pay the claim.
- 3 If money is claimed, and you believe you owe part of the money claimed**, by:
 - Paying the plaintiff that part of the money that is claimed.
 - Filing a defence in relation to the part that you do not believe is owed.

Court forms are available on the UCPR website at www.ucprforms.justice.nsw.gov.au or at any NSW court registry.

REGISTRY ADDRESS

Street address	Law Courts Building, Queens Square Sydney
Postal address	GPO Box 3, Sydney NSW 2001
Telephone	9230 8111

AFFIDAVIT VERIFYING

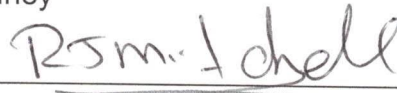
Name Rosaline Mitchell
Address 11 Miller Street, HABERFIELD NSW 2045
Occupation Unemployed
Date 27 July 2021

I say on oath:

- 1 I am the second plaintiff. I am also authorised to swear this affidavit on behalf of the first plaintiff.
- 2 I believe that the allegations of fact in this Further Amended Statement of Claim are true.

SWORN at Sydney

Signature of deponent



Name of witness Darian Iacono

Address of witness Level 3, 376 New South Head Road, Double Bay, NSW
2028

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.
- 2 I have known the deponent for at least 12 months.

Signature of witness



This affidavit was electronically sworn, signed and witnessed over audio visual link using Zoom software in accordance with section 14G(2) of Part 2B of the *Electronic Transactions Act 2000* (NSW) and the witness:

- (a) witnessed the deponent sign or initial the affidavit with its exhibit and take the oath in real time;
- (b) confirms that the signature was witnessed by signing the document or a copy of the document;
- (c) is reasonably satisfied that the document the witness signed is the same document, or a copy of the document signed by the signatory; and
- (d) confirms that the document and any annexures or exhibits to it are an electronic copy, not an original.

FURTHER DETAILS ABOUT PLAINTIFFS

First plaintiff

Name Darren Mitchell
Address 11 Miller Street
HABERFIELD NSW 2045

Second Plaintiff

Name Rosaline Mitchell
Address 11 Miller Street
HABERFIELD NSW 2045

Legal representative for plaintiffs

Name Darian Romano Iacono
Practising certificate number 42822
Firm & Legal
Contact solicitor Darian Iacono
Address Level 3, 376 – 382 New South Head Road
DOUBLE BAY NSW 2028
Telephone (02) 9328 2944
Email diacono@andlegal.com.au
Electronic service address diacono@andlegal.com.au

DETAILS ABOUT DEFENDANT

First defendant

Name Roads and Maritime Service
Address 27 – 31 Argyle Street
PARRAMATTA NSW 2150

Second defendant

Address McKell Building
2 – 24 Rawson Place
SYDNEY NSW 2000

SCHEDULE 1

Deposited Plan Nos.

1248055

1248057

1249365

1249366

1249423

1249424

1249425

1249502

1253589

1249579

1249588

1249592

1249777

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