

## **FURTHER AMENDED STATEMENT OF CLAIM**

### **COURT DETAILS**

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

### **TITLE OF PROCEEDINGS**

Plaintiff	<b>Rosa Maria Colagrossi</b>
Defendant	<b>Transport for New South Wales</b>

### **FILING DETAILS**

Filed for	<b>Rosa Maria Colagrossi, Plaintiff</b>
Legal representative	Rick Mitry, Mitry Lawyers
Legal representative reference	RM:13137
Contact name and telephone	Amanda Charchar (02) 9222 2833
Contact email	amanda.charchar@mitry.com.au

### **HEARING DETAILS**

These proceedings are listed for an initial case conference at 9:00am on the Wednesday after the expiration of 42 days from the filing of this statement of claim.

### **TYPE OF CLAIM**

Nuisance

## RELIEF CLAIMED

- 1 Damages.
- 2 Interest.
- 3 Costs.
- 4 Such further or other order as the Court thinks fit.

## PLEADINGS AND PARTICULARS

### Parties

- 1 This proceeding is commenced as a representative proceeding pursuant to Part 10 of the *Civil Procedure Act 2005* (NSW) (CPA) on behalf of the plaintiff and all persons:
  - (a) who or which:
    - (i) hold, or have held, an interest in land in the vicinity of the public works project known as the CBD and South East Light Rail project (the **Project**); and
    - (ii) have suffered loss or damage by reason of the defendant's' interference with their enjoyment of their interest in land as pleaded in this statement of claim  
**(Private Nuisance Group Members)**; and or
  - (b) who or which have suffered loss or damage as pleaded in paragraph 19 below by reason of the defendant's' interference with public land through the carrying out of the Project as pleaded in this statement of claim (**Public Nuisance Group Members**); and
  - (c) are not any of the following:
    - (i) the defendant's;
    - (ii) an officer or employee of the defendant's;
    - (iii) a Chief Justice, Justice or Registrar of the Supreme Court of New South Wales or the High Court of Australia; or
    - (iv) an officer or employee of, or other legal practitioner engaged in connection with these proceedings by, the law firm Mitry Lawyers;  
**(Group Members)**.

2 At the time of commencing this proceeding, there are seven or more Group Members who have claims against the defendant within the meaning of section 157 of the CPA.

3 The plaintiff:

- (a) is, and has been since about September 2006, the owner and manager of “Kensington Pharmacy and Newsagency” (the **Kensington Business**) and located at 182 Anzac Parade, Kensington (the **Kensington Premises**);
- (b) conducts, and has since September 2006 conducted, the Kensington Business as a sole trader (ABN 77 394 303 775); and
- (c) holds, and since September 2006 has held, a lease over the Kensington Premises.

4 The defendant:

- (a) is a NSW Government Agency constituted as a statutory corporation pursuant to section 3C of the *Transport Administration Act 1988* (NSW) (**TAA**);
- (b) by operation of section 13A(1)(a) of the *Interpretation Act 1987* (NSW) (**Interpretation Act**), has the status of the Crown; and
- (c) may be sued pursuant to section 50(1)(c) of the *Interpretation Act* and or section 5(2) of the *Crown Proceedings Act 1988* (NSW).

### The Project

5 On or about 1 December 2012, the defendant published:

- (a) the NSW Long Term Transport Master Plan (the **Master Plan**); and
- (b) a report entitled “Sydney’s Light Rail Future: Expanding public transport, revitalising our city” (the **Light Rail Future Report**).

6 In the Master Plan and the Light Rail Future Report, the defendant announced that:

- (a) ~~the NSW Government~~ the NSW Government was proceeding with a new light rail line extending from Circular Quay through George Street to Central Station and to the University of NSW via Anzac Parade and Alison Road (being the Project);
- (b) construction on the Project would take place in stages, with city streets closed in sections to minimise disruption to residents, businesses and commuters; and

(c) construction on the Project would likely take between five and six years to complete.

7 On or about 30 June 2014, the defendant entered into a contract for the carrying out of certain early works (**Early Works**) for the purposes of the Project.

**Particulars**

Contract entitled "Formal Instrument of Agreement" between the defendant and Laing O'Rourke Australia Construction Pty Ltd dated 30 June 2014.

8 The Early Works commenced in about October 2014.

9 On or about 17 December 2014, the defendant entered into a deed for the design, construction, testing and commission, operations and maintenance of the Project (**Project Deed**).

**Particulars**

Deed entitled "Sydney Light Rail Project Deed" between the defendant and the ALTRAC Light Rail Partnership, being a partnership between ALTRAC Light Rail 1 Pty Limited ACN 603 192 203 in its capacity as trustee of ALTRAC Light Rail Trust 1, ALTRAC Light Rail 2 Pty Limited ACN 603 194 476 in its capacity as trustee of ALTRAC Light Rail Trust 2 and ALTRAC Light Rail 3 Pty Limited ACN 603 190 601 in its capacity as trustee of ALTRAC Light Rail Trust 3, dated 17 December 2014 (**ALTRAC**).

10 Under the Project Deed, construction of the Project was due to be completed by 16 March 2019.

**Particulars**

Clause 17.2 of the Project Deed.

10A At all material times, ALTRAC sub-contracted the civil construction works phase of the Project to Acciona Infrastructure Australia Pty Ltd (**Acciona**).

**Particulars**

(a) Contract entitled "Sydney Light Rail D&C Contract" between ALTRAC, Acciona and Alstom Transport Australia Pty Ltd (**Alstom**) dated 17 December 2014 (**D&C Contract**).

(b) Pursuant to the D&C Contract, Acciona was contracted to perform design and construction works on the Project in respect of civil works and Alstom

was contracted to perform design and construction works on the Project in respect of rolling stock.

- 11 On or about 28 May 2015, the defendant announced that:
- (a) the Project route had been divided into 31 individual zones to minimise, as much as possible, the impacts of construction in any one area; and
  - (b) major construction on the Project was expected to start in September 2015 and to complete in mid 2018.

#### **Particulars**

CBD and South East Light Rail Project Update May 2015, published by the defendant on or about 28 May 2015.

- 12 Major construction on the Project commenced on or about 23 October 2015.

#### **Delays in the civil works caused by the defendant**

- 12A In or around March 2015, and again in or around May 2015, Acciona advised the defendant, in substance, that:
- (a) it had received a document from Ausgrid that set out Ausgrid's requirements for the treatment of its utilities (**Ausgrid Guidelines**);
  - (b) the Ausgrid Guidelines differed significantly from the treatment of Ausgrid's utilities that had been developed and agreed between the defendant and Acciona (as recorded in Schedule F8 to the relevant project documentation);
  - (c) the new Ausgrid Guidelines would result in:
    - (i) a substantial change to the scope of works for the Project;
    - (ii) an estimated delay of 865 days (over two years and four months) to the completion of Project; and
    - (iii) an estimated additional cost of around \$426 million to the civil construction works

(collectively, **Ausgrid Scope Changes**).

#### **Particulars**

- (i) ~~Evidence of Bede Noonan, managing director of Acciona, to the NSW Parliament Public Accountability Committee on 4 October 2018, at pages 3, 5.~~

~~(ii) Further particulars may be provided following discovery and evidence.~~

12B A substantial cause of the Ausgrid Scope Changes was the defendant's failure, despite repeated reviews recommending that it be done, to finalise agreements with stakeholders such as utility providers (including Ausgrid) and local councils to complete the Project's design and scope of works prior to entry into the Project Deed.

#### Particulars

- (a) NSW Auditor-General's Report, *Performance Audit: CBD and South East Light Rail Project* dated 30 November 2016, at page 13.
- ~~(b) Evidence of Bede Noonan, managing director of Acciona, to the NSW Parliament Public Accountability Committee on 4 October 2018, at page 18.~~
- (c) The admissions contained in paragraphs 21a and 21b of Section C of the defendant's Commercial List Response in Supreme Court of NSW proceedings no 2018/99002 brought by Acciona against the defendant.
- (d) Sydney Light Rail Urban Domain Reference Group Meeting 10 minutes (9 December 2015), which record as "Lessons Learned" from the Project "[g]reater council and major stakeholder engagement prior to the EIS" and the "[i]mportance of understanding the invisible constraints such as underground utilities and drainage, to avoid unrealistic visions." (page 6).
- (e) Sydney Light Rail Urban Domain Reference Group report titled "Lessons for Light Rail" dated 1 February 2016 which records "Visions were promoted before understanding the real constraints of the project - the underground utilities and drainage. The project is then blamed or delayed when it can not deliver the unrealistic expectations." (page 3).
- (f) Further particulars may be provided following discovery and evidence.

12C During the course of the civil construction works, the defendant has issued Acciona with approximately 60 directions to change the scope of those works (**Project Scope Changes**)

#### Particulars

- ~~(a) Evidence of Bede Noonan, managing director of Acciona, to the NSW Parliament Public Accountability Committee on 4 October 2018, at pages 2-3.~~
- ~~(b) Further particulars may be provided following discovery and evidence.~~

- 12D A substantial cause of the Project Scope Changes was the failure by the defendant to effectively plan and procure the Project between 2011 and 2014.

**Particulars**

- (a) NSW Auditor-General's Report, *Performance Audit: CBD and South East Light Rail Project* dated 30 November 2016, at pages 2, 3, 9-12.
- (b) Sydney Light Rail Urban Domain Reference Group report titled "Lessons for Light Rail" dated 1 February 2016 which records "The CSELR project is incurring high prices and design delays as the inevitable detailed design changes (the 'unknown unknowns') go through an onerous contract modifications process." (page 1) and states that more of these latent issues should have been flushed out in a one year competitive design process.
- (c) Further particulars may be provided following discovery and evidence.

- 13 Since the commencement of construction on the Project, the defendant has made repeated public statements to the effect that the Project would be operational by 2019.

**Particulars**

- (a) CBD and South East Light Rail Project Update September 2016, published by the defendant on or about 30 September 2016 ("The project will be completed and operating in 2019.").
- (b) Statements made by Marg Prendergast, Coordinator General of the defendant, to Australian Associated Press on or about 5 June 2017, to the effect that although work in seven out of ten zones along George Street had failed to meet completion dates, the Project was still "on track for overall completion in early 2019".
- (c) Webpage titled "CBD and South East Light Rail", published by the defendant on or about 13 October 2017 and available at <https://www.transport.nsw.gov.au/projects/current-projects/cbd-and-south-east-light-rail> ("The CBD and South East Light Rail is expected to complete and begin service in 2019.")
- (d) Further particulars may be supplied following discovery and evidence.

- 14 On or about 19 April 2018, the defendant publicly confirmed that a program of works provided by ALTRAC indicated an end date of March 2020 for construction on the Project.

- 14A ~~On As at 4 October 2018, Mr Bede Noonan of Acciona informed the NSW Parliament Public Accountability Committee that the current schedule for completion of the Project was May 2020.~~
- 14B The delays in the completion of the Project have largely been caused by delays to civil construction works phase of the Project (**Civil Works Delay**).
- 14C Each of the Ausgrid Scope Changes and the Project Scope Changes are a substantial cause of the Civil Works Delay.

#### **Particulars**

- ~~(a) Evidence of Bede Noonan, managing director of Acciona, to the NSW Parliament Public Accountability Committee on 4 October 2018, at pages 2-3.~~
- ~~(b) Further particulars may be provided following discovery and evidence.~~
- 14D In the premises of paragraphs 12B, 12D and 14C above, a substantial cause of the Civil Works Delay has been the defendant's conduct in:
- (a) failing to finalise agreements with stakeholders such as utility providers (including Ausgrid) and local councils to complete the Project's design and scope of works prior to entry into the Project Deed; and
  - (b) failing to effectively plan and procure the Project between 2011 and 2014.

#### **Private Nuisance**

- 15 Through its conduct in:
- (a) authorising or permitting the construction of the Project; and or
  - (b) causing the Civil Works Delay,

the defendant has caused a substantial and unreasonable interference with the Plaintiff's and the Private Nuisance Group Members' enjoyment of their respective interests in land located in the vicinity of the Project (**Private Nuisance**).

#### **Particulars**

- (i) Damage to and obstruction of roadways and footpaths through road closures and erection of hoardings, causing a substantial decrease in customers of businesses operated by, or operating on land owned by, Private Nuisance Group Members.
- (ii) Excessive noise caused by construction on the Project.
- (iii) Excessive vibration caused by construction on the Project.



- (iv) Excessive dust caused by construction on the Project.
- (v) Light spillage from light towers used on the Project without adequate screening.
- (vi) Prolongation of the above impacts by reason of the Civil Works Delay.
- (vii) Further particulars may be provided following discovery and evidence.

16 By reason of the Private Nuisance, the plaintiff and Private Nuisance Group Members have suffered, and continue to suffer, loss and damage.

#### **Particulars**

- (a) The plaintiff:
  - (i) experienced a significant decline in customers and sales at the Kensington Business from the commencement of construction on the Project in Kensington, as the Kensington Premises are located on Anzac Parade, being part of the route of the Project, the construction works impeding foot traffic and reducing the amenity of the surrounding neighbourhood, including the Kensington Premises;
  - (ii) to meet the reduced customers and sales, had to reduce staff at the Kensington Business as she was unable to meet her debts associated with the Kensington Business due to the decline in sales and customers;
  - (iii) in the period since construction commenced, experienced total economic loss in the Kensington Business from the matters set out above of approximately \$660,000;
  - (iv) experienced non-economic loss in the form of mental anguish and distress at the demise of the local business she had developed and built since 2006.
- (b) Particulars of Private Nuisance Group Members' loss and damage will be completed following the determination of common questions, but includes:
  - (i) Loss of revenue from businesses operated by Private Nuisance Group Members due to drop in customers and consequential loss of profits and the value of business goodwill.

- (ii) Loss of rent of premises owned by Private Nuisance Group Members due to failure of businesses operated from their land.
- (iii) Consequential losses from the failure and closure of businesses operated by Private Nuisance Group Members and or operated from land owned by Private Nuisance Group Members.
- (iv) Loss of amenity.
- (v) Relocation expenses.
- (vi) Mental anguish and distress.

17 In the premises, the defendant is liable to pay damages to the plaintiff and Private Nuisance Group Members for the tort of private nuisance.

### **Public Nuisance**

18 Through its conduct in:

- (a) authorising or permitting the construction of the Project; and or
- (b) causing the Civil Works Delay,

the defendant has caused substantial and unreasonable obstruction or inconvenience to the public in the exercise of public rights, namely by the damage to and obstruction of roadways and footpaths through road closures and erection of hoardings (**Public Nuisance**).

19 By reason of the Public Nuisance, the Plaintiff and Public Nuisance Group Members have suffered, and continue to suffer, loss and damage.

### **Particulars**

- (a) The particulars at paragraph 16(a) are repeated.
- (b) Particulars of Public Nuisance Group Members' loss and damage will be completed following the determination of common questions, but includes:
  - (i) Loss of revenue from businesses operated by Public Nuisance Group Members due to drop in customers and consequential loss of profits and the value of business goodwill.
  - (ii) Loss of rent of premises owned by Public Nuisance Group Members due to failure of businesses operated from their land.
  - (iii) Consequential losses from the failure and closure of businesses operated by Public Nuisance Group Members and or operated from land owned by Public Nuisance Group Members.

- (iv) Loss of occupation in businesses operated in the vicinity of the Project.

- 20 The loss and damage suffered by the plaintiff and Public Nuisance Group Members is substantial and appreciably greater in degree than that suffered by the general public.
- 21 In the premises, the defendant is liable to pay damages to the plaintiff and Public Nuisance Group Members for the tort of public nuisance.

### Common Questions

- 22 The questions of fact or law common to the claims of Group Members are:
- (a) Whether the defendant's failure to finalise agreements with stakeholders such as utility providers (including Ausgrid) and local councils to complete the Project's design and scope of works prior to entry into the Project Deed was a substantial cause of the Ausgrid Scope Changes as pleaded in paragraph 12B.
  - (b) Whether the defendant's failure to effectively plan and procure the Project between 2011 and 2014 was a substantial cause of the Project Scope Changes as pleaded in paragraph 12D.
  - (c) Whether each of the Ausgrid Scope Changes and the Project Scope Changes was a substantial cause of the Civil Works Delay as pleaded in paragraph 14C.
  - (d) Whether, by authorising or permitting the construction of the Project and or causing the Civil Works Delay, the defendant has caused a substantial and unreasonable interference with the Plaintiff's and the Private Nuisance Group Members' enjoyment of their respective interests in land located in the vicinity of the Project, as pleaded in paragraph 15 above.
  - (e) Whether, by authorising or permitting the construction of the Project and or causing the Civil Works Delay, the defendant has caused substantial and unreasonable obstruction and or inconvenience to the public in the exercise of public rights, as pleaded in paragraph 18 above.

### SIGNATURE OF LEGAL REPRESENTATIVE

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 plaintiff that court fees may be payable during these proceedings. These fees may include a hearing allocation fee.

Signature

Capacity

Date of signature

  
Solicitor on record  
6/6/19.

## NOTICE TO DEFENDANTS

**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](http://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](http://www.ucprforms.justice.nsw.gov.au) or at any NSW court registry.

**REGISTRY ADDRESS**

Street address	Law Courts Building 184 Phillip St Sydney NSW 2000
Postal address	GPO Box 3, Sydney NSW 2001
Telephone	1300 679 272

**AFFIDAVIT VERIFYING**

Name Rick Mitry  
 Address 1/167 Castlereagh St Sydney NSW 2000  
 Occupation Solicitor  
 Date 6 June 2019

I say on oath

- 1 I am the solicitor for the Plaintiff.
- 2 I believe that the allegations of fact in the statement of claim are true.


SWORN at Sydney

Signature of deponent

Name of witness

Address of witness

Capacity of witness

  
 Amanda Charehar  
 1/167 Castlereagh St Sydney NSW 2000  
 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. [~~OR, delete whichever option is inapplicable~~]  
~~#I did not see the face of the deponent because the deponent was wearing a face covering, but I am satisfied that the deponent had a special justification for not removing the covering.\*~~
- 2 #I have known the deponent for at least 12 months. [~~OR, delete whichever option is inapplicable~~]  
~~#I have confirmed the deponent's identity using the following identification document:~~

Identification document relied on (may be original or certified copy) †

Signature of witness

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

[\* The only "special justification" for not removing a face covering is a legitimate medical reason (at April 2012).]

[† "Identification documents" include current driver licence, proof of age card, Medicare card, credit card, Centrelink pension card, Veterans Affairs entitlement card, student identity card, citizenship certificate, birth certificate, passport or see Oaths Regulation 2011.]

[on separate page]

**FURTHER DETAILS ABOUT PLAINTIFF****Plaintiff**

Name Rosa Maria Colagrossi  
Address 182 Anzac Parade  
Kensington NSW 2033

**Legal representative for plaintiff**

Name Rick Mitry  
Practising certificate number 10900  
Firm Mitry Lawyers  
Address 1/161-167 Castlereagh St  
Sydney NSW 2000  
  
Telephone 02 9222 2833  
Fax 02 9222 2855  
Email [rick@mitry.com.au](mailto:rick@mitry.com.au)  
Electronic service address [rick@mitry.com.au](mailto:rick@mitry.com.au)

**DETAILS ABOUT DEFENDANTS****Defendant**

Name Transport for NSW  
Address 18 Lee St  
Chippendale NSW 2008