

**DEFENCE TO THE THIRD FURTHER 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**

First Plaintiff	<b>HUNT LEATHER PTY LTD ACN 000 745 960</b>
Defendant	<b>TRANSPORT FOR NSW</b>

**FILING DETAILS**

Filed for	<b>Transport for NSW, the Defendant</b>
Filed in relation to	the Third Further 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 Third Further Amended Statement of Claim filed on 24 October 2022 ~~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 First Plaintiff is identified by reference to Australian Company Number ACN 000 745 960; and
  - (b) otherwise, does not admit the paragraph.
- 3A The Defendant does not know and cannot admit paragraph 3A of the Third Further Amended Statement of Claim.
- 3B In answer to paragraph 3B, the Defendant;
  - (a) admits that the Third Plaintiff is identified by reference to Australian Business Number 50 319 048 217; and
  - (b) otherwise does not admit the paragraph.
- 3B(2) The Defendant does not know and cannot admit paragraph 3B(2) of the Third Further Amended Statement of Claim.
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) was 16 March 2019;
    - (ii) the Longstop Date (as defined in the Project Deed) was 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 was 16 March 2019;
    - (iv) ALTRAC is otherwise required to achieve Completion (as defined in the Project Deed) by the Longstop Date, which was 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 cls 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:

- (vi) 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.

- (vii) 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. In respect of paragraph 12B, the Defendant:

- (a) says that paragraph 12B proceeds on premises that:

- i. schedule F8 to the Project Deed recorded agreed (as between the Defendant and ALTRAC, or between the Defendant and Acciona), final and (or) certain treatment works, or objectively clear treatment requirements, for all Ausgrid utilities;
- ii. the Ausgrid Guidelines were validly or lawfully issued by Ausgrid under the Ausgrid Deed that was executed by Ausgrid and the Defendant on or around 5 February 2015, such that those guidelines were binding on the Defendant under that Ausgrid Deed;
- iii. the Ausgrid Guidelines constituted a lawful Direction by or on behalf of the Defendant to ALTRAC under the Project Deed (and in turn, Direction to Acciona under the Design & Construct Contract);
- iv. the Ausgrid Guidelines caused a substantial change in the scope of ALTRAC's and Acciona's works for the Project;
- v. the Ausgrid Guidelines caused delay of, or approximating, 865 days to Completion under the Project Deed and the D&C Contract;
- vi. the Ausgrid Guidelines caused the cost of works under the Project Deed (and / or D&C Contract) to be increased by or around "\$426 million to the civil construction works";

- (b) denies each of those premises to paragraph 12B;
- (c) says that an additional premise to paragraph 12B; namely, that the Ausgrid Guidelines differed "significantly" from "the treatments of Ausgrid's utilities" in Schedule F8, is meaningless and embarrassing;
- (d) says that the phrase "regarding the treatment of utility assets" in the paragraph lacks content and specificity;
- (e) says that the phrase "regarding the treatment of utility assets" in the paragraph does no more than identify the subject matter of the alleged required utility provider agreements;
- (f) says documents and reports referred to in the particulars to the paragraph (individually or in combination) do not specify the content of the allegedly required utility provider agreements, nor do they specify objectively clear criteria from which it can be inferred what the precise content of those agreements allegedly had to be as at or before 17 December 2014 (the date of execution of the Project Deed and D&C Contract);
- (g) says that by that paragraph, and paragraph 12A or otherwise, the Plaintiffs do not specify industry accepted standards for the treatment of all Ausgrid utilities, in force as at 17 December 2014, that they allege had to be incorporated in "agreements" between the Defendant and utility providers "regarding the treatment of utility assets";
- (h) denies that the Ausgrid Guidelines:
  - a. specified Ausgrid's, or accepted industry-wide, standard utility treatments, or utility treatment requirements, for all Ausgrid utilities to be treated as part of the SLR Works, as at or before 17 December 2014 (the date of execution of the Project Deed);
  - b. specified objectively certain or clear utility treatments, or treatment requirements, for all Ausgrid utilities along the SLR Works alignment;
  - c. specified required utilities treatments, or objectively certain treatment requirements, for all Ausgrid utilities that ALTRAC (and Acciona) was obliged to perform under the Project Deed (and the D&C Contract);
  - d. recorded, or were of themselves, a Direction by the Defendant to ALTRAC under the Project Deed for ALTRAC (and in turn, Acciona) to carry out all or any utility treatment that might have been stated or described in those Guidelines;

- (i) says for each and all (and any combination) of those reasons, the allegations in paragraphs 12B are denied, and further:
- (j) says that:
- a. By the definitions clause 1.1 of the Project Deed:
- i. "OpCo's Activities" meant all things or tasks which OpCo (ALTRAC) was, or may be, required to do to comply with its obligations under the Project Deed, whether or not the performance of such things or tasks is subcontracted by ALTRAC to another person, including the Delivery Activities and the Operations Activities;
- ii. "Completion" had the meaning given in clause 19.4 (Requirements for Completion), which by reason of clause 19.4(e), included the obligation to complete the Utility Services Works as per clause 19.6(a);
- iii. "Utility Service" meant any service and includes any utility, facility or item of infrastructure for the provision of water, electricity, gas, ethane, fuel, telephone, drainage (including piped, open or subsoil drains), sewerage, industrial waste disposal, lighting, CCTV and electronic communications service; and
- iv. "Utility Service Works" meant the construction, modification, removal, protection or relocation of Utility Services all of which are to be coordinated, designed and/or constructed by ALTRAC and handed over to TfNSW, an Authority or any other person in accordance with the Project Deed.
- b. By clause 9.17(a)(ii) of the Project Deed, ALTRAC agreed that it would investigate, protect, relocate, modify and provide for all Utility Services necessary for it to comply with its obligations under the Project Deed.
- c. By clause 9.17(d) of the Project Deed [and Subject to clause 26.1 (Entitlement to claim compensation) and clause 27 (Relief Events)] ALTRAC agreed to be responsible for, and assumed the risk of, all additional work, increased costs and any other Loss, delay or disruption (including any delay in achieving Completion) it suffered or incurred arising out of or in any way in connection with the existence, location, condition and availability of all Utility Services required for the execution of OpCo's Activities.
- d. By clause 19.6(a) of the Project Deed, ALTRAC agreed that:



- (a) Each discrete part of the Utility Services Works would not be regarded as complete unless ALTRAC had provided to TfNSW's Representative:
- (i) a written notice from the Authority which has jurisdiction over the discrete part stating that the Authority was satisfied that the discrete part was complete; or
  - (ii) if ALTRAC was unable to obtain a notice required under clause (i) despite having used its best endeavours to do so:
    - (A) a statement from ALTRAC to the effect that:
      - (aa) the discrete part of the Utility Services Works was complete and ALTRAC had notified the relevant Authority of this matter; and
      - (bb) the relevant Authority had failed or refused to provide the written notice required under clause (a)(i) above despite being given 15 Business Days to provide the notice requested by ALTRAC; and
    - (B) a written confirmation from the Independent Certifier that the Utility Services Works are complete.
- e. By clause 9.17(a)(ii) of the Project Deed and cl 1.4 of Schedule B4 to the Project Deed, ALTRAC agreed to comply with, carry out and fulfil all of the obligations, conditions and requirements of the Defendant in each Utility Provider Agreement (being those between the Defendant and each of Ausgrid and Sydney Water Corporation) as if it were the Defendant in any such Utility Provider Agreement, and whether that agreement had been entered into before the Project Deed or was executed after the date of the Project Deed, so as to ensure that the Defendant could fully meet its obligations under each such Utility Provider Agreement; and
- f. Says further that by cl 1.12 of Schedule B4 to the Project Deed, ALTRAC:
- i. agreed to bear the full risk of complying with the obligations assumed by it under Schedule B4 (Requirements of Utility Provider Agreements);
  - ii. agreed to bear the full risk of any acts or omissions of a Utility Provider or its employees, agents, contractors or officers; and
  - iii. agreed that it would not be entitled to make any claim against the Defendant, and that the Defendant would not be liable upon, any Claim

arising out of or in any way in connection with the risks that it assumed under cl.1.12 of Schedule B4, or any acts or omissions of a Utility Provider or its employees, agents, contractors or officers.

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

- (a) says that as at the date of this defence, 52 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, and says further that:

- (a) the Plaintiffs have elected to seek to establish liability by reference to contractual modifications limited only to four modifications (numbered 25, 33B, 40A and 59) in three Fee Zones (5, 6 and 29) along the SLR Work alignment; and
- (b) in those circumstances the Plaintiffs are estopped from in future contending, or it would be an abuse of process for the Plaintiffs in the future to seek to contend, that any other modifications in these three Fee Zones, or any modifications in any other Fee Zones, constitute a failure by the Defendant to effectively plan and procure the Project between 2011 and 2014.

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

- (a) says that the Plaintiffs have not identified what "unknown utilities" were encountered in Fee Zones 5, 6 and 29, that actually had the effect of prolonging the occupation of each or any of those Fee Zones;
- (b) says that the Plaintiffs have not, in the case of each such "unknown utility", identified how, in what way, and for what period the "civil construction works" in each such Fee Zone were prolonged, and for how long; and accordingly
- (c) denies the paragraph; and further
- (d) says that by making this allegation only as regards only Fee Zones 5, 6 and 29, the plaintiffs are estopped from in future contending, or it would be an abuse of process for the plaintiffs in the future to seek to contend, that any other "unknown utilities" in these Fee Zones, or any other Fee Zones, "prolonged the occupation of" those or any other fee zones.

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

- (a) repeats paragraphs 12E(a) and 12E(b) above.

- (b) says that the Plaintiffs have not identified and delineated the "Utilities Prolongation"; and therefore denies the paragraph;

and further:

- (c) denies that subparagraph (a) accurately summarises the relevant terms of the Project Deed, or effect of those terms, concerning Utility Works Events, Relief Events and Compensation Events (be it for "the Project as a whole" or Fee Zone occupation);
- (d) denies that the terms of the Project Deed operated such that ALTRAC (and Acciona) were "allocated no risk in respect of unknown utilities";
- (e) says that by the terms of the Project Deed, "risk in respect of unknown utilities" was transferred to ALTRAC (and Acciona);
- (f) repeats paragraph 12B(i) and
- (g) otherwise denies the paragraph.

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:

- (d) 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.
- (e) 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.
- (f) 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 Plaintiffs have refused, despite request, to provide any or better particulars of the alleged exceedances and therefore denies paragraph 15.
16. In answer to paragraph 16, the Defendant:
- (aa) says that the First Plaintiff's amended claim for 'impacts' continues now for twelve months after the cessation of Fee Zone occupation for Fee Zone 5 (December 2018);
  - (a) says that, on 28 May 2018, the First Plaintiff executed a deed poll in favour of the Defendant (**First Plaintiff's Ex Gratia Deed**);
  - (b) the terms of the First Plaintiff's Ex Gratia Deed included the following:
    - (i) without admission of liability, the Defendant made a payment of ex gratia financial assistance of \$198,686 (inclusive of GST, if applicable) (**First Plaintiff's Ex Gratia Payment**) to the First Plaintiff; and
    - (ii) the First Plaintiff agreed that the First Plaintiff's Ex Gratia Payment would be set off against any claim or claims which the First 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 Sophie Hunt dated 21 May 2018 and executed by Ms Sophie Hunt and Ms Elizabeth Hunt on 28 May 2018.
  - (iii) The First Plaintiff's claims of private nuisance (pleaded at paragraphs 15 to 17 of the Third Further Amended Statement of Claim) and public nuisance (pleaded at paragraphs 18 to 21 of the Third Further Amended Statement of Claim) (together, "**Claims**") are claims against the Defendant arising from or in connection with any disturbance or impact as a result of the Project.
  - (iv) Pursuant to the Set Off Term, if any damages are payable to the First Plaintiff by the Defendant with respect to the Claims (which is denied), those damages are to be set off against the First Plaintiff's Ex Gratia Payment.
- (c) says that the Third Plaintiff executed deed polls in favour of the Defendant on the following dates (together, **Third Plaintiff's Ex Gratia Deeds**);
  - (i) 5 October 2017;
  - (ii) on or around 25 June 2018;
  - (iii) 23 October 2018;
  - (iv) 7 November 2018; and
  - (v) 16 May 2019.
- (d) the terms of the Third Plaintiff's Ex Gratia Deeds included the following:
  - (v) without admission of liability, the Defendant made the following payments of ex gratia financial assistance to the Third Plaintiff (inclusive of GST, if applicable):
    - (A) \$20,400 on or around 5 October 2017;
    - (B) \$40,800 on or around 25 June 2018;
    - (C) \$81,600 on or around 23 October 2018;

(D) \$81,600, half of which (being \$40,800) was paid 8 November 2018 and the remainder (a further \$40,800) was paid on or around 10 January 2019); and

(E) \$27,200 on or around 16 May 2019.

(together, the **Third Plaintiff's Ex Gratia Payments**)

(vi) on each occasion, the Third Plaintiff agreed that the Third Plaintiff's Ex Gratia Payments would be set off against any claim or claims which the Third 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 Khing Thai (undated) and executed by Mr Nicholas Zisti on 5 October 2017.
- ii. Letter from Transport for NSW addressed to Mr Nick Zisti dated 21 June 2018 and executed by Mr Zisti (undated).
- iii. Letter from Transport for NSW addressed to Mr Nick Zisti dated 7 November 2018 and executed by Mr Zisti on 7 November 2018.
- iv. Letter from Transport for NSW addressed to Mr Nicholas Zisti dated 15 May 2019 and executed by Mr Zisti on 16 May [2019].

(vii) The Third Plaintiff's Claims are claims against the Defendant arising from or in connection with any disturbance of impact as a result of the Project.

(viii) Pursuant to the Set Off Term, if any damages are payable to the Third Plaintiff by the Defendant with respect to the Claims (which is denied), those damages are to be set off against the Third Plaintiff's Ex Gratia Payments; and

(e) Denies that the litigation funder's commission on any damages that the Plaintiffs may recover is "a cost of obtaining funding" or is otherwise or in any way recoverable in law as damages; and

(f) The Defendant otherwise denies the paragraph.

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. Sections 138 and 144C of the Roads Act.
  - 21D. On 2 October 2015, RMS granted consents and approvals (**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. [Not used].
- 21F. To the extent that the RMS Approval applies to works comprising one or more of the five activities identified in s 138 of the Roads Act (**s 138 Activities**), the approval was granted to the Defendant under ss 138 and 144C of the Roads Act.
- 21G. To the extent that the RMS Approval applies to works;
- (a) comprising "road work" and/ or "traffic control work"; and
  - (b) that are not section 138 Activities,
- to the RMS appointed the Defendant as an independent contractor to perform those works for the RMS under s 253 of the Roads Act (which included performing the functions under ss 64, 71, 72, 87(1) and 87(4) 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 Third Further 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 Third Further Amended Statement of Claim 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.
- 21PP. Further, and in addition to or alternatively to paragraphs 21L to 21O above:
- (a) Paragraph 21T(a) below is repeated.
  - (b) Pursuant to ss 5 and 13(A)(i) of the Interpretation Act 1987 (NSW), as a NSW Government Agency the Defendant was vested with the status, privileges and immunities of the Crown, including those of the State of New South Wales.
  - (c) Section 3D of the TA Act stated the objectives of the Defendant, which relevantly included the objective to *plan for a transport system that meets the needs and expectations of the public.*
  - (d) By s.3E and clause 1 of Schedule 1 of the TA Act specified that the functions of the Defendant (a NSW Government Agency per s.3C of the TA Act) which included:
    - (i) *Transport planning and policy;*
    - (ii) *The administration of the allocation of public funding for the transport sector;*
    - (iii) *The planning, oversight, and delivery of transport infrastructure;*
    - (iv) *Co-ordination of capital works programs and budgets across the transport sector;*
    - (v) *Contracting, on behalf of the State, with public transport agencies or the private sector, for the delivery of transport services; and*
    - (vi) *Co-ordinating and carrying out the procurement of transport infrastructure and transport vehicles, rolling stock and vessels.*
  - (e) Transport infrastructure for the purposes of the TA Act was defined in s.3 to mean *infrastructure used for or in connection with or to facilitate the movement of persons and freight by road, rail, sea, air or other mode of transport*" (**Transport Infrastructure**).
  - (f) The definition of Transport Infrastructure encompassed light rail infrastructure.

- (g) By section 3E and clause 3 of Schedule 1 of the TA Act, the Defendant was vested with functions and powers as regards Transport Infrastructure to:
- (i) develop, establish, hold, manage and maintain transport infrastructure on behalf of the State;
  - (ii) hold, manage, maintain and establish assets associated with transport infrastructure developed or proposed to be developed by TfNSW;
  - (iii) make and enter into leases or licences, or other arrangements, with persons for developing transport infrastructure; and
  - (iv) provide goods and services to the bus, rail, ferry or other transport industries.
- (h) By section 3E and clause 3(2) of Schedule 1 of the TA Act, the Defendant's statutory power to develop Transport Infrastructure included the functions and power to:
- (i) carry out development for the purposes of or incidental to transport infrastructure (including development of land in the vicinity of transport infrastructure);
  - (ii) facilitate, manage, finance or maintain any such development, and
  - (iii) carrying out any function ancillary to any such development, and
- for the purposes of that clause.
- (iv) "development" was defined to mean development within the meaning of the Environmental Planning and Assessment Act 1979 (NSW) or an activity within the meaning of Part 5 of that Act ;and
  - (v) "transport infrastructure" was defined to also include:
    - (a) infrastructure associated with the use or operation of transport infrastructure, and
    - (b) retail, commercial and residential development associated with or developed in conjunction with transport infrastructure.
- (i) By section 3E and clause 9(1) of Schedule 1 to the TA Act, the Defendant was granted the function and power to make or enter into contracts or arrangements with any person in connection with the exercise of TfNSW's functions.
- (j) The statutory powers held by the Defendant and referred to in sub-paragraphs (g), (h) and (i) above were "special statutory powers" as defined in s.43A(2) of the Civil Liability Act, 2002 (NSW).

- 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:

- (ii) 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
- (iii) the Defendant's general allocation of resources is not open to challenge by the Plaintiffs 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 Plaintiffs 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 Plaintiffs' claim, the Defendant says that:

(aa) paragraphs 21K to 21PP, and in particular paragraph 21PP(j), are repeated:

- (a) the Defendant is a public authority as defined by the CLA, and for the purposes of s.43A of that Act, in that;
  - (i) under the TA Act, that is authorised by Parliament to exercise functions and powers to plan for, procure, contract for, and (or) carry out transport infrastructure development, including light rail infrastructure and light rail systems, and additionally to operate light rail systems;
- (c) the statutory powers referred to in sub-paragraphs (aa) and (a)(i) above are within the meaning of "special statutory power" under section 43A of the CLA;
- (d) the Works were authorised by the powers in sub-paragraphs (aa) and (a)(i) above;
- (e) at the time of planning for, procuring, contracting for the SLR, and also at the time the Works were undertaken, section 43A of the CLA provided 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*

- (f) The Defendant's acts or omissions in planning for, procuring, and contracting for the SLR (including the acts and omissions now alleged in paragraphs 12A to 12F of the Third Further Amended Statement of Claim), and its acts in undertaking or authorizing or permitting, or contracting for, the undertaking of the Works, was not so unreasonable that no authority having the special statutory powers referred to in (aa) and (a)(i) above could properly consider the acts or omissions by the Defendant and alleged by the Plaintiffs to have caused damage, to be a reasonable exercise or failure to exercise those powers.

### **Mitigation**

21V Says in further answer to the First Plaintiff's claim and the Second Plaintiff's claim (or either of them), that the First Plaintiff, further and in the alternative, the Second Plaintiff failed to mitigate the alleged loss and damage by causing the wooden doors at the entry of the Strand Store to be:

- (a) replaced with, or to be encased in, glass doors;
- (b) further or in the alternative, opened and closed by door attendants,
- during the course of the Project.

### **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 104Q~~ of the TA Act.
- (c) Whether the planning for, procurement of, and contracting for, the SLR, and (or alternatively) 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

7 November 2022

**AFFIDAVIT VERIFYING**

Name Larissa Jones  
Address C/- Level 43, 680 George Street, Sydney NSW 2000  
Occupation Director Legal, Construction and Major Projects  
Date 7 November 2022

I affirm:

1. I am the Director Legal, Construction and Major Projects for Transport for NSW.
2. I believe that the allegations of fact contained in the defence to the Third Further Amended Statement of Claim (**Defence**) are true.
3. I believe that the allegations of fact that are denied in the Defence are untrue.
4. After reasonable inquiry, I do not know whether or not the allegations of fact that are not admitted in the Defence are true.

AFFIRMED at Sydney

Signature of deponent



Name of witness

Candice Day

Address of witness

c/ Lvl 19, 123 Pitt Street, Sydney, 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.
- 2 I have confirmed the deponent's identity using the following identification document:

Driver Licence - Licence No. 1475609/

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

Name	Transport for NSW
Address	Lander & Rogers Lawyers Level 19, 123 Pitt Street SYDNEY NSW 2000

### Legal representative for filing party

Name	Colleen Palmkvist
Practising certificate number	43091
Firm	Lander & Rogers Lawyers
Contact Solicitor	Michael Williams
Address	Level 19 123 Pitt Street SYDNEY NSW 2000
DX Address	DX 10212 SYDNEY
Telephone	(02) 8020 7773
Fax	(02) 8020 7701
Email	miwilliams@landers.com.au
Electronic service address	Not applicable