

**AMENDED CROSS-CLAIM**

**AMENDED STATEMENT OF CROSS-CLAIM**

**COURT DETAILS**

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

**TITLE OF PROCEEDINGS**

Plaintiff	<b>Rosa Maria Colagrossi</b>
Defendant	<b>Transport for New South Wales (ABN 18 804 239 602)</b>

**TITLE OF THIS CROSS-CLAIM**

Cross-claimant	<b>Transport for New South Wales (ABN 18 804 239 602)</b>
<u>First-named first cross-defendant</u>	<b><u>ALTRAC Light Rail Partnership (ABN 37 399 764 913 1 Pty Ltd (ACN 603 192 203))</u></b>
<u>Second-named first cross-defendant</u>	<b><u>ALTRAC Light Rail 2 Pty Ltd (ACN 603 194 476)</u></b>
<u>Third-named first cross-defendant</u>	<b><u>ALTRAC Light Rail 3 Pty Ltd (ACN 603 190 601)</u></b>
Second cross-defendant	<b>Acciona Infrastructure Australia Pty Ltd (ACN 140 915 251)</b>

**FILING DETAILS**

Filed for	<b>Transport for New South Wales, cross-claimant</b>
Legal representative	<u>James Lonsdale, Acting Crown Solicitor for NSW</u> <u>Colleen Palmkvist, Lander &amp; Rogers</u>

Legal representative reference      PCN 44817-21082714-D01 PCN: 43091 NSW Ref:  
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Frequent User ID                          AG4NSW

### RELIEF CLAIMED

1. Declaration that the First Cross-~~Defendant is~~Defendants are liable to indemnify the Cross-Claimant under cl 6.2(b)(iii) of the Sydney Light Rail Project Deed dated 17 December 2014 (**Project Deed**) with respect to any loss claimed by the Plaintiff in these proceedings for private or public nuisance for which the Cross-Claimant is liable and caused by the First Cross-~~Defendant's~~Defendants' failure to comply with cl 6.2(b)(ii) of the Project Deed.
2. Declaration that the First Cross-~~Defendant is~~Defendants are liable to indemnify the Cross-Claimant under cl 38.1(b) of the Project Deed with respect to any loss claimed by the Plaintiff in these proceedings for private or public nuisance for which the Cross-Claimant is liable and caused by the First Cross~~Defendant's~~Defendants' failure to comply with the terms of the Project Deed.
3. Damages.
4. Contribution from the First and Second Cross-Defendants pursuant to s 5 of the *Law Reform (Miscellaneous Provisions) Act 1946 (NSW)* or, further or alternatively, equitable contribution.
5. Pre-judgment interest pursuant to s 100 of the *Civil Procedure Act 2005 (NSW)*.
6. Costs.
7. Any other orders that the Court sees fit.

### PLEADINGS AND PARTICULARS

1. The Cross-Claimant is and was at all material times:
  - (a) a New South Wales Government Agency constituted as a statutory corporation pursuant to section 3C of the *Transport Administration Act 1988 (NSW)*;

- (b) is able to sue in its corporate name pursuant to section 50(1)(c) of the *Interpretation Act 1987* (NSW) and section 4 of the *Crown Proceedings Act 1988* (NSW);
- (c) has the status, privileges and immunities of the Crown; and
- (d) is a public authority within the meaning of that term in Part 5 of the *Civil Liability Act 2002* (NSW) (CLA).
2. The ~~F~~First ~~C~~Cross-defendant (~~D~~Defendants (collectively, **ALTRAC**) ~~is~~are and ~~was~~were at all material times:
- (a) ~~a partnership between ALTRAC Light Rail 1 Pty Limited ACN 603 192 203 (ALR Trustee 1) in its capacity as trustee of ALTRAC Light Rail Trust 1, ALTRAC Light Rail 2 Pty Limited ACN 603 194 476 (ALR Trustee 2) in its capacity as trustee of ALTRAC Light Rail Trust 2 and ALTRAC Light Rail 3 Pty Limited ACN 603 190 601 (ALR Trustee 3) in its capacity as trustee of ALTRAC Light Rail Trust 3; and~~
- (a) the partners in a partnership known as ALTRAC Light Rail Partnership ABN 37 399 764 913; and
- (b) ~~each of ALR Trustee 1, ALR Trustee 2 and ALR Trustee 3 is a~~  
~~company~~companies duly incorporated under the *Corporations Act 2001* (Cth) and liable to be sued in ~~its~~their corporate name.
3. The ~~S~~Second ~~C~~Cross-~~D~~Defendant (**Acciona**) is and was at all material times a company duly incorporated under the *Corporations Act 2001* (Cth) and liable to be sued in its corporate name.

### Project Deed

4. On 17 December 2014, the Cross-Claimant and ALTRAC entered into a deed titled "Sydney Light Rail Project Deed" (**Project Deed**) with respect to the Sydney Light Rail project (**Project**).
5. The Project was to be delivered in two packages of works, being the Early Works package and the package referred to as the SLR PPP that was to be carried out in accordance with the terms of the Project Deed.

### Particulars

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

6. Under the Project Deed, ALTRAC was required to carry out, among other activities, the design and construction of the physical works, assets, systems and deliverables comprising the Sydney Light Rail, including the trackwork, rail structure, interchange facilities, terminus facilities and maintenance and stabling facilities for the Project, including Temporary Works (as defined in the Project Deed). (**SLR Works**).

### Particulars

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

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

### Particulars

Clause 54.1 of the Project Deed

### Contract claims against ALTRAC

8. 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

Section 144C of the *Roads Act 1993* (NSW)

9. On 2 October 2015, RMS granted an approval (**RMS Approval**) for the Cross-Claimant 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 in Kingsford and Randwick via Surry Hills 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.
10. ALTRAC is required to:
- (a) comply with, carry out and fulfil all licences, permits, consents, approvals, declarations, nominations, waivers, determinations, exemptions, certificates or permissions from any authority (**Approvals**) in performing its obligations under the Project Deed, including the RMS Approval; and

- (b) ensure that its contractors comply with, carry out and fulfil the conditions and requirements of all Approvals, including the RMS Approval.

**(Compliance with Approvals Term)**

**Particulars**

Clause 6.2(b)(ii) of the Project Deed

11. In performing its activities, including its obligations under the Project Deed, ALTRAC was required to:
- (a) prevent nuisance and unreasonable noise, dust, vibration and disturbances; and
  - (b) not interfere with the passage of people and vehicles, access to any premises, car parks, roads or pedestrian ways or the operations or activities carried out on or adjacent to the ~~Construction~~ SLR Site (as defined in the Project Deed) (~~Construction Site~~), except to the extent and for such periods that such interference:
    - (i) is required for unforeseeable reasons of public health or safety, in which case ALTRAC must restore the access as soon as possible; or
    - (ii) has been agreed between residents or business adjacent to the ~~Construction~~ SLR Site and the Cross-Claimant.

**(Prevention of Nuisance Term)**

**Particulars**

Clause 9.6(a) of the Project Deed

12. Under the Project Deed, ALTRAC was also required to:
- (a) take all necessary precautions to ensure that the SLR Works, including the Temporary Works, did not unduly interfere with the activities of local residents and businesses adjacent to, or within the vicinity of, the Project Site (as defined in the Project Deed) (**Project Site**); and
  - (b) to promptly take all reasonable action to mitigate any adverse effect upon any of the activities of local residents and businesses adjacent to, or within the vicinity of, the Project Site, or the safety of those residents, business owners or any other people.

**(No Interference Term)**

**Particulars**

Clauses 9.11(b) and (d) of the Project Deed

13. Under the Project Deed, ALTRAC was also required to comply with, and ensure that its contractors complied with, the Planning Approvals and all Environmental Notices (as defined in the Project Deed) as well as any approvals required in order to release or emit anything from the Project SLR Site into the air or water or onto the ground or otherwise into the environment or to emit any substantial noise or vibrations.

**(Environmental Compliance Term)**

**Particulars**

Clause 11.5(c) of the Project Deed

14. Under the Project Deed, ALTRAC was required to construct the SLR Works and the Temporary Works in accordance with the other requirements of the Project Deed, which included the Compliance with Approvals Term, the Prevention of Nuisance Term, the No Interference Term and the Environmental Compliance Term.

**(Construction Compliance Term)**

**Particulars**

Clause 15.1(a)(iv) of the Project Deed

15. ALTRAC warranted to the Cross-Claimant under the Project Deed that the SLR Works and the Temporary Works would be completed in accordance with, and satisfy the requirements, of the Project Deed which included the Compliance with Approvals Term, the Prevention of Nuisance Term, the No Interference Term, the Environmental Compliance Term and the Construction Compliance Term.

**(Construction Warranty)**

**Particulars**

Clause 15.2(c) of the Project Deed

16. If, which is denied in the Amended Defence to Amended Statement of Claim, the Cross-Claimant is liable to the Plaintiff and/or any of the Private and/or Public Nuisance Group Members in these proceedings for any private or public nuisance caused by, contributed to or involving the SLR Works or the Temporary Works carried out in constructing the Project not complying with the RMS Approval or any other relevant Approval, then ALTRAC has breached one or more of the Compliance with Approvals Term, the Environmental Compliance Term and the Construction Compliance Term.
17. If, which is denied in the Amended Defence to Amended Statement of Claim, the Cross-Claimant is liable to the Plaintiff and/or any of the Private and/or Public Nuisance Group Members in these proceedings for any private or public nuisance caused by, contributed to or involving any:

- (a) unreasonable noise, dust, vibration and disturbances caused by the SLR Works or Temporary Works performed by ALTRAC or its contractors, or
- (b) undue interference with the passage of people and vehicles, access to any premises, car parks, roads or pedestrian ways or the operations or activities carried out on or adjacent to the Construction Site,

then ALTRAC has breached the Prevention of Nuisance Term, the No Interference Term and the Construction Compliance Term.

- 18. By reason of any breaches of the Compliance with Approvals Term, the Prevention of Nuisance Term, the No Interference Term and the Environmental Compliance Term as pleaded in paragraphs 16 and 17 above, ALTRAC has breached the Construction Warranty.
- 19. By reasons of ALTRAC's breaches as pleaded in paragraphs 16 to 18 above, ALTRAC has caused the Cross-Claimant loss and damage.

#### **Particulars**

The Cross-Claimant has suffered loss to the extent that it is, or will be, liable to the Plaintiff, the Private and/or Public Nuisance Group Members for any private or public nuisance.

#### **Indemnity for loss caused by breach of Compliance with Approvals Term**

- 20. Under the Project Deed, except to the extent prohibited by law, ALTRAC must indemnify the Cross-Claimant against any loss suffered by the Cross-Claimant out of, or in any way in connection with, a failure by ALTRAC to comply with its obligations under, inter alia, the Compliance with Approvals Term.

#### **(Approvals Indemnity)**

#### **Particulars**

Clause 6.2(iii) of the Project Deed

- 21. The Cross-Claimant repeats paragraphs 16 to 19 above.
- 22. In the premises, to the extent that the Cross-Claimant has, or will, suffer loss in the form of any liability to the Plaintiff in these proceedings for private or public nuisance caused by ALTRAC's failure to comply with the Compliance with Approvals Term, ALTRAC is liable pursuant to the Approvals Indemnity to indemnify the Cross-Claimant against that loss.

#### **General indemnity for loss by ALTRAC**

- 23. Under the Project Deed, ALTRAC must indemnify the Cross-Claimant from and against any loss incurred by the Cross-Claimant arising out of or in any way in connection with

any breach or failure to comply with the terms of, inter alia, the Project Deed or any fraudulent, negligent or other wrongful act or omission by ALTRAC.

**(General Indemnity)**

**Particulars**

Clause 38.1(b) of the Project Deed

24. The Cross-Claimant repeats paragraphs 16~~5~~ to 19 above.
25. In the premises, to the extent that the Cross-Claimant has, or will, suffer loss in the form of any liability to the Plaintiff in these proceedings for private or public nuisance caused by any breach or failure to comply by ALTRAC with the terms of the Project Deed, ALTRAC is liable pursuant to the General Indemnity to indemnify the Cross-Claimant against that loss.

**Claim for contribution as joint and several tortfeasors from ALTRAC and Acciona**

26. If and to the extent that the Cross-Claimant is liable to the Plaintiff and/or any of the Group Members for loss and damage arising from a private nuisance as pleaded in paragraphs 15-17 of the ASOC (which is denied), and/or a public nuisance as pleaded in paragraphs 18-21 of the ASOC (which is denied), then solely for the purposes of its cross-claim against ALTRAC and Acciona the Cross-Claimant pleads as follows.

**The Project Deed and work done by ALTRAC**

27. The Cross-Claimant repeats paragraphs 4 to 7 above.
28. In the premises, ALTRAC ~~was the Cross-Claimant's contractor~~ which under the Project Deed was required to, and did, design and construct the Project and carry out the SLR Works and the Temporary Works.

**The D&C Contract**

29. On or about 17 December 2014, ALTRAC on the one part and Acciona and Alstom Transport Australia Pty Ltd (**Alstom**) on the other part (~~together, the D&C Contractor~~) entered into a contract titled "Sydney Light Rail D&C Contract" (**D&C Contract**).

**Particulars**

The D&C Contract is in writing, dated 17 December 2014, and was executed as a Deed.

30. Under the D&C Contract, ~~the~~:
  - (a) Alstom and Acciona were designated the "D&C Contractor" and were jointly and severally liable to ALTRAC for each obligation and liability under the D&C Contract.

**Particulars**

D&C Contract, cl 1.17.



- (b) The D&C Contractor, and therefore Acciona, was required to design and construct the SLR Works.

**Particulars**

D&C Contract, cl 4.4, 13.1 and 15.1

- (c) The "SLR Works" were defined as the physical works, assets, systems and deliverables that the D&C Contractor must design, construct, manufacture, install, test and commission under this deed including works relating to the Project but excluding the "Temporary Works" as defined, and included jack hammering and any excavation works required for the Project.

**Particulars**

D&C Contract, cl 1.1.

- (d) The D&C Contractor, and therefore Acciona, was required to design and construct the Temporary Works.

**Particulars**

D&C Contract, cl 13.1 and, 15.1.

- (e) "Temporary Works" were defined to mean:
- (i) any temporary physical works required for the purpose of performing the Delivery Activities, but which do not form part of the SLR Works including:
1. temporary works required for the D&C Contractor's internal uses within the Construction Site that do not impact on public safety (such as crane foundations / sheetpile walls (provided they are not holding up road etc));
  2. temporary works that border the public areas but have low impact on public risk outcomes (such as traffic diversions, temporary hoardings);  
and
  3. those which have the potential to cause major disruption or have a high public safety risk (eg crane lift across the Eastern Distributor); and
- (ii) the Accommodation Requirements (Temporary).

**Particulars**

D&C Contract, cl 1.1.

- (f) In performing the D&C Contractor's Activities, including designing and constructing the SLR Works and Temporary Works, the D&C Contractor, and therefore Acciona, was required to:

- (i) prevent nuisance and unreasonable noise, dust, vibration and disturbances; and
- (ii) not interfere with the passage of people and vehicles, access to any premises, car parks, roads or pedestrian ways or the operations or activities carried out on or adjacent to the SLR Site, except to the extent and for such period that such interference:
  1. was required for unforeseeable reasons of public health or safety, in which case the D&C Contractor was to restore the access as soon as possible; or
  2. had been agreed between residents or businesses adjacent to the SLR Site and the Cross-Claimant.

**Particulars**

D&C Contract, cl 9.6

- (g) "D&C Contractor's Activities" was defined to mean all things or tasks which the D&C Contractor is, or may be required to do to comply with its obligations under the D&C Contract, whether or not the performance of such things or tasks is subcontracted by the D&C Contractor to another person, including the Delivery Activities (but excluding the O&M Contractor's Activities (with some exceptions) and any work to the existing IWLR other than the Interface Works.

**Particulars**

D&C Contract, cl 1.1.

- (h) "SLR Site" was defined to mean the Construction Site during the Delivery Phase and the Permanent Light Rail Corridor during the Operations Phase.

**Particulars**

D&C Contract, cl 1.1.

- (i) "Construction Site" was defined to mean the Project Site and the Temporary Areas.

**Particulars**

D&C Contract, cl 1.1.

- (j) "Project Site" was defined to mean the land (including the subsurface land) and airspace more particularly described in the "Project Site" in Appendix 2 (Construction Site).

**Particulars**

D&C Contract, cl 1.1.

- (k) "Section" was defined to mean that section of the Construction Site specified as a "Section" as set out in Schedule B6 (Section Access Schedule).

**Particulars**

D&C Contract, cl 1.1.

- (l) ALTRAC granted to the D&C Contractor, and therefore Acciona, a non exclusive Construction Site Licence to use and occupy, and to permit the D&C Contractor's Contractors to use and occupy each Section of the Construction Site for the purpose of performing the D&C Activities in accordance with and subject to the terms set out in the D&C Contract.

**Particulars**

D&C Contract, cl 12.1

- (m) Save in respect of D&C Project Plans for which an initial version was included in Schedule F to the Project Deed, the D&C Contractor, and therefore Acciona, was required to submit initial versions of the D&C Project Plans 5 Business Days prior to the times required by SPR Appendix 43 (Project Plan Requirements) to enable ALTRAC to submit those plans to the Cross-Claimant at the times required by SPR Appendix 43.

**Particulars**

D&C Contract, cl 8.2(b)(ii)

- (n) The term "D&C Project Plans" was defined to mean the plans (or part thereof) listed in SPR Appendix 43 (Project Plan Requirements) including all subsidiary plans and supporting documents and information, which are necessary to enable the D&S Contractor to perform the D&C Contractor's Activities.

**Particulars**

D&C Contract, cl 1.1.

- (o) The D&C Contractor, and therefore Acciona, was required to prepare a Construction Environmental Management Plan applicable to the Delivery Phase 60 Business Days from the date of the D&C Contract to be updated "Annually until Completion".

**Particulars**

D&C Contract, SPR, Appendix 43, cl 2(a) and Table 1, item 2

(p) The Construction Environmental Management Plan to be prepared by the D&C Contractor, and therefore Acciona, was required to include as separate sub-plans (among others) a:

- (i) Construction Noise and Vibration Management Plan; and
- (ii) Dust and Air Quality Management Plan;

**Particulars**

D&C Contract, SPR, Appendix 43, cl 3.1.3(k)

(q) The D&C Contractor, and therefore Acciona, was required to implement and comply with each D&C Project Plan which had been, in relation to the Delivery Activities:

- (i) certified or deemed to have been certified by the D&C Independent Certifier under clause 8.5(b)(ii)(B); or
- (ii) submitted to ALTRAC's Representative, where ALTRAC's Representative had not issued a notice under clause 8.5(a) within 24 Business Days following submission of the D&C Project Plan.

**Particulars**

(i) D&C Contract, cl 8.7(b); and

(ii) D&C Contract, cl 11.6 (the "Environmental Plan" is D&C Project Plan and includes, relevantly, the Construction Environmental Management Plan (clause 1.1 and SPR, Appendix 43)).

(r) The D&C Contractor, and therefore Acciona, in performing the D&C Contractor's Activities, was required to comply with all applicable laws and to ensure that the D&C Contractor's Contractors complied with all applicable laws.

**Particulars**

D&C Contract, cl 6.1.

(s) During the Delivery Phase, the D&C Contractor, and therefore Acciona, was required to:

- (i) obtain and maintain, and ensure that the D&C Contractor's Contractors obtained and maintained, all Approvals required to perform the D&C Contractor's Activities; and
- (ii) comply with, carry out and fulfil, and ensure that the D&C Contractor's Contractors complied with and carried out and fulfilled, the conditions and requirements of all Approvals relevant to the D&C Contractor's Activities.

**Particulars**

D&C Contract, cl 6.2(b)(i) and (ii).

- (t) "Approvals" was defined to include, relevantly, any Environmental Protection Licence which applies to the D&C Contractor's Activities.

**Particulars**

D&C Contract, cl 1.1.

- (u) "Environmental Protection Licence" was defined to mean an environmental protection licence granted under the *Protection of the Environment Act 1997* (NSW).

**Particulars**

D&C Contract, cl 1.1.

- (v) "Delivery Phase" was defined as the period commencing on the date of Financial Close and ending of the Date of Final Completion.

**Particulars**

D&C Contract, cl 1.1.

- (w) The D&C Contractor, and therefore Acciona, was required to promptly commence performance of the Delivery Activities to achieve Completion by the Date for Completion and diligently to progress the Delivery Activities.

**Particulars**

D&C Contract, cl 17.1, 17.2

- (x) The D&C Contractor, and therefore Acciona, was required to update the Delivery Program and take all reasonable steps to prevent the cause of any delay or avoid or minimise the consequence or duration of any delay but is not required to incur any additional expense or apply any additional resources to do so.

**Particulars**

D&C Contract, cl 17.5

31. The Construction Noise and Vibration Management Plan was prepared by the D&C Contractor, and therefore Acciona, in about 2015 (**Construction Noise and Vibration Management Plan**).

**Particulars**

ALR Construction Noise and Vibration Management Plan SLR-D&C-MIO-PLN-001020, November 2015, Revision 0 and subsequent revisions.

32. The Construction Noise and Vibration Management Plan established various noise management levels for different sections of the Project, and set various limits and targets for the purposes of the D&C Contractor, and therefore Acciona, minimising noise and vibration impacts generated during the performance of the D&C Activities.
33. The Dust and Air Quality Management Plan was prepared by the D&C Contractor, and therefore Acciona, in about 2015 (Dust and Air Quality Management Plan).

**Particulars**

Dust and Air Quality Management Plan, Revision 0, and subsequent revisions.

34. The Dust and Air Quality Management Plan established various measures to be implemented by the D&C Contractor, and therefore Acciona, for mitigating dust and air quality impacts of the D&C Activities.
35. Environmental Protection Licence (No 20699) dated 8 April 2016, prescribed limits and operating conditions, including in relation to noise, dust and vibration and was issued under the *Protection of the Environment Act 1997* (NSW) (Environmental Protection Licence (No 20699)).

**Particulars**

Environmental Protection Licence (No 20699) dated 8 April 2016.

36. Environmental Protection Licence (No 20699) was a law, Approval and Environmental Protection Licence under the D&C Contract.
37. By reason of the matter pleaded in paragraph 36 above and the terms pleaded in paragraphs 26 and 30(s) and 30(t) above, the D&C Contractor, and therefore Acciona, was required to comply with Environmental Protection Licence (No 20699) in performing the D&C Contractor's Activities and during the Delivery Phase.
38. In the premises, by reason of its entry into the D&C Contract with ALTRAC, Acciona undertook to ALTRAC and was required, in order to discharge its obligations to ALTRAC, to plan, design, and execute the construction of the Project, including:
- (a) planning and designing the construction of the Project (including the SLR Works and Temporary Works) and diligently progressing the construction of the Project, so that completion of the Project was achieved by the Date for Completion or otherwise without substantial delay;
  - (b) determining and putting into effect appropriate work methods for construction work, including excavation work (including jackhammering) and temporary works such as the erection of light towers, screening for light spillage and erection and placement of hoardings;

- (c) ensuring that construction work was carried out in a way that did not create a nuisance or unreasonable noise, dust, vibration or disturbances, and was in accordance with any applicable laws or approvals, including approvals relating to noise, dust and vibration;
- (d) ensuring that the construction work did not interfere with the passage of people and vehicles, access to any premises, car parks, roads or pedestrian ways or the operations or activities carried out on or adjacent to the Construction Site, except to the extent and for such period that such interference was occupying the Construction Site, including roads and areas adjacent to neighbouring residents and businesses.

Acciona has in fact planned, designed and executed the construction of the Project

39. To the extent that the SLR Works and Temporary Works have been performed or completed, Acciona has planned, designed and executed the construction of the Project (including the SLR Works and Temporary Works).

#### **Particulars**

Acciona, together with Alstom, was at all material times and continues to be the D&C Contractor under the D&C Contract, and has attempted or purported to perform its obligations under the D&C Contract.

Acciona planned, designed and executed the construction of the Project on the Adjoining Land

40. The Plaintiff's Premises are bounded by two Sections as set out in Schedule B6 (Section Access Schedule) to the Project Deed and the D&C Contract, being:
- (a) PS-SE17, which is the intersection of Todman Avenue and Anzac Parade in Kensington (Intersection); and
  - (b) PS-SE18, which is comprised of the part of Anzac Parade public road reserve between Todman Avenue and Doncaster Avenue, including parts of Darling Street and Addison Street public road reserve in Kensington.
41. On or around 2 February 2016, Acciona notified ALTRAC pursuant to clause 12.3(e) of the D&C Contract that it would commence occupation of PS-SE18 from 2 May 2016.

#### **Particulars**

Letter from Mike Millar, Project Director, D&C Contractor, to Glenn Bentley, ALTRAC dated 2 February 2016

42. On or shortly after 2 May 2016, Acciona:
- (a) obtained a non-exclusive Construction Site Licence to use and occupy, and to permit its sub-contractors to use and occupy, PS-SE18, subject to restrictions upon

the access, occupation and use of such Section, including a requirement to obtain road occupancy licences if required; and

- (b) commenced use and occupation of the land comprising PS-SE18.

**Particulars**

Clause 4.4 and definition of "SLR Works" in cl 112.1 of the D&C Contract

43. 30. — In the premises, Acciona was the Cross-Claimant's sub-contractor which under the D&C Contract was required to, and did, carry out the SLR Works. On 2 January 2016, the Section Access Date for the Intersection, Acciona obtained a non-exclusive Construction Site Licence to use and occupy, and to permit its sub-contractors to use and occupy, the Intersection, subject to restrictions upon the access, occupation and use of such Section, including a requirement to obtain road occupancy licences if required.

**Particulars**

Clause 12.1 of the D&C Contract

44. Acciona must obtain approval from the NSW Transport Management Centre (TMC) for any road occupancies and closures required to perform the D&C Contractor's Activities.

**Particulars**

Clause 12.5 of the D&C Contract

45. Acciona obtained road occupancy licences for the Intersection for the following dates:
- (a) 8 April 2017 to 25 April 2017; and
- (b) 10 November 2018 to 19 November 2017.

**Particulars**

Road Occupancy Licence No. 530039

Road Occupancy Licence No. 751382

Road Occupancy Licence No. 862692

46. By reason of the matters in paragraphs 39 to 45 above, since 2 May 2016:
- (a) Acciona used and occupied the part of the Construction Site adjoining the Plaintiff's Premises (including the road) (Adjoining Land); and
- (b) planned, designed and / or executed the SLR Works and the Temporary Works (including determining work methods and executing items of work) on the Adjoining Land in respect of which the Plaintiff alleges the Cross-Claimant is liable in nuisance.



Acciona is liable to Plaintiff and Private Nuisance Group Members in private nuisance

47. By reason of the matters pleaded in paragraphs 39 to 46 above, if, as alleged in paragraphs 15 to 17 of the ASOC, which is denied, the Plaintiff and Private Nuisance Group Group Members suffered unreasonable interference with their enjoyment of their respective interests in land by the construction of the Project, then Acciona, as the person who:

- (a) planned, designed and constructed the Project (including planning, designing and executing the construction of the SLR Works, determining work methods and executing particular items of work, including in respect of the Temporary Works); and/or
- (b) occupied the relevant land (including the road);

as pleaded in paragraphs 39 to 46 above, is liable to the Plaintiff and Private Nuisance Group Members in the tort of private nuisance for that interference.

**Particulars**

The Plaintiff and Private Nuisance Group Members particularise the alleged unreasonable interference as “[d]amage to and obstruction of roadways and footpaths through road closures and erection of hoardings”, by “excessive noise”, “excessive vibration” and “excessive dust” caused by “construction on the Project”, by “[l]ight spillage from light towers used on the Project without adequate screening”.

Acciona was the occupier of the roadways and footpaths during the construction of the Project when construction was carried out, it carried out any work capable of causing “damage to and obstruction of” such roadways and footpaths, carried out the erection of hoardings, carried out all construction works capable of (without admission) causing noise, vibration, dust and light spillage impacts, determined the screening of light towers, was responsible for planning and designing the construction work.

The Plaintiff particularises the interference as the digging of holes with jackhammers along the front of the Plaintiff’s Premises (causing excessive noise and dust on the Plaintiff’s Premises), barricades built on Anzac Parade which impeded access to the Plaintiff’s Premises by customers, the impeding of vision and obstruction of access to the Plaintiff’s Premises due to the parking of heavy machinery and the placement of large blocks of concrete, and the obstruction of roadways on Anzac Parade and Todman Avenue, excessive noise, vibration (including late at night) and dust, as well as light spillage from local towers.

So far as the Plaintiff is concerned, Acciona used and occupied the part of the Adjoining Land (including the road) from 2 May 2016 and carried out the planning, design and construction of the Project (including determining work methods and executing items of work, including in respect of the Temporary Works) in respect of which the Plaintiff alleges the Cross-Claimant is liable for nuisance, including, if it be established, jackhammering, erection and placement of hoardings, erection and placement of light towers and screens, parking heavy machinery, placing blocks of concrete and blocking roadways.

The Cross-Claimant is unable to give better particulars at this stage of what work Acciona did on the Adjoining Land because the Cross-Claimant is not a party to the D&C Contract and therefore does not have any direct supervision or control over the SLR Works or Temporary Works carried out by Acciona on the Adjoining Land. The Cross-Claimant does not hold the following documents:

- (i) construction records including site diaries;
- (ii) details of subcontractors to Acciona undertaking SLR Works or Temporary Works in specific locations; or
- (iii) details of the work methods used by Acciona when constructing the SLR Works or Temporary Works, including work method statements.

The Cross Claimant reserves the right to provide further and better particulars when it has obtained documents in the nature of those mentioned above.

31. — If, as the Acciona is liable to Plaintiff alleges and Public Nuisance Group Members in public nuisance

48. By reason of the matters pleaded in paragraph 4547 above, if, as alleged in paragraphs 18 to 1721 of the Amended Statement of Claim (ASOC), the construction of the Project, being the SLR Works, and the delay in completion of the SLR Works, has caused a substantial and unreasonable obstruction or inconvenience to the public in the exercise of public rights amounting to public nuisance (which is denied) then Acciona, as the entity who carried out the relevant work (including determining work methods and executing particular items of work, including in respect of the Temporary Works), occupied the relevant land (including the roads) and was responsible for planning and designing the construction work in accordance with the D&C Contract is liable to the Plaintiff and Public Nuisance Group Members in the tort of public nuisance for that interference.

### **Particulars**

The Plaintiff and Public Nuisance Group Members allege public nuisance on the basis of the damage to and obstruction of roadways and footpaths through road closures and erection of hoardings.

The Cross-Claimant repeats the particulars to paragraph 47 above insofar as they concern damage to roadways and footpaths, road closures, and erection of hoardings.

The Cross-Claimant is unable to give better particulars at this stage of what work Acciona did in the part of the Construction Site adjoining the Group Members' Premises because the Cross-Claimant is not a party to the D&C Contract and therefore does not have any direct supervision or control over the SLR Works or Temporary Works carried out by the Cross-Defendant on the Adjoining Land. The Cross-Claimant does not hold the following documents:

- (i) construction records including site diaries;
- (ii) details of subcontractors to Acciona undertaking SLR Works or Temporary Works in specific locations;
- (iii) details of the work methods used by Acciona when constructing the SLR Works or Temporary Works, including work method statements.

The Cross Claimant reserves the right to provide further and better particulars when it has obtained documents in the nature of those mentioned above.

ALTRAC is liable to Plaintiff and Private Nuisance Group Members in private nuisance

49. By reason of the matters pleaded in paragraphs 4 to 7, and 27 to 28 above, if, as alleged in paragraphs 15 to 17 of the ASOC, which is denied, the Plaintiff and Private Nuisance Group Members suffered unreasonable interference with the Plaintiff's and the Private Nuisance Group Member's their enjoyment of their respective interestinterests in land located inby the vicinityconstruction of the Project amounting to private nuisance (which is denied), then, if and to the extent that the Cross-Claimant is liable for loss and damage arising from the alleged private nuisance (which is also denied):

- (a) ALTRAC is jointly and severally liable with the Cross-Claimant for that same loss and damage, then ALTRAC, as the contractor entity who was required to, and did, carry out the SLR Works; and design and construct the Project
- (b) Acciona, is jointly and severally liable withto the Cross-ClaimantPlaintiff and Private Nuisance Group Members in the tort of private nuisance for that same loss and damage as the sub-contractor who was required to, and did, carry out the SLR Works. interference.

32. ~~— If, as the ALTRAC is liable to the Plaintiff, alleges and Private Nuisance Group Members in paragraph public nuisance~~
50. By reason of the matters pleaded in paragraphs 4 to 7, and 27 to 28 above, if, as alleged in paragraphs 18 to 21 of the ASOC that, the construction of the Project, being the SLR Works, and the delay in completion of the SLR Works has caused a substantial and unreasonable obstruction or inconvenience to the public in the exercise of public rights amounting to public nuisance (which is denied), then, if and to the extent that) then ALTRAC, as the entity who was required to, and did, carry out the design and construction of the Project, is liable to the Plaintiff and Public Nuisance Group Members in the tort of public nuisance for that interference.
- ALTRAC's and Acciona's liability to make contribution
51. If, as alleged in paragraph 15 to 17 of the ASOC, the Cross-Claimant is liable for loss and damage arising from the alleged private nuisance (which is also denied):
- (a) ALTRAC is jointly and severally liable with the Cross-Claimant for that same loss and damage by reason of the matters pleaded in paragraph 49 above; and
- (b) Acciona is jointly and severally liable with the Cross-Claimant for that same loss and damage by reason of the matters pleaded in paragraph 47 above.
52. If, as alleged in paragraph 18 to 21 of the ASOC, the Cross-Claimant is liable for loss and damage arising from the alleged public nuisance (which is also denied):
- (a) ALTRAC is jointly and severally liable with the Cross-Claimant for that same loss and damage as by reason of the contractor who was required to, matters pleaded in paragraph 50 above; and did, carry out the SLR Works; and
- (b) Acciona is jointly and severally liable with the Cross-Claimant for that same loss and damage as the sub-contractor who was required to, and did, carry out the SLR Works, by reason of the matters pleaded in paragraph 48 above.
53. In the premises, if and to the extent which the Cross-Claimant is liable for private and/or public nuisance to the Plaintiff and/or Private and/or Public Nuisance Group Members, the Cross-Claimant is entitled to claim contribution to the extent the Court finds to be just and equitable, pursuant to ss 5(1)(c) and 5(2) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) from:
- (a) ALTRAC as a joint and several tortfeasor in respect of that same damage; and
- (b) Acciona as a joint and several tortfeasor in respect of that same damage.
54. Further or in the alternative to the matters pleaded in paragraph 51 above, if and to the extent which the Cross-Claimant is liable for private and/or public nuisance to the Plaintiff and/or Private and/or Public Nuisance Group Members, then:

- (a) the liabilities of the Cross-Claimant the subject of the claims are of the same nature, and to the same extent as, the liabilities of ALTRAC the subject of the claims;
- (b) further and in the alternative to sub-paragraph (a) above, the liabilities of the Cross-Claimant the subject of the claims are of the same nature, and to the same extent as, the liabilities of Acciona the subject of the claims;
- (c) by reason of the matter pleaded in sub-paragraph (a) above, the Cross-Claimant is entitled to, and claims, compensation from ALTRAC in such amount as the Court finds to be equitable;
- (d) further and in the alternative to sub-paragraph (c) above, by reason of the matter pleaded in subparagraph (b) above, the Cross-Claimant is entitled to, and claims, compensation from Acciona in such amount as the Court finds to be equitable;  
and
- (e) further and in the alternative to sub-paragraphs (c) and (d) above, by reason of the matters pleaded in sub-paragraphs (a) and (b) above, the Cross-Claimant is entitled to, and claims, compensation from ALTRAC and Acciona in such amount as the Court finds to be equitable.

#### **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 this statement of cross-claim has reasonable prospects of success.

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

Signature

Colleen Palmkvist, James Lonsdale, Lander &  
Rogers Acting Crown Solicitor for NSW

Solicitor for the cross-claimant

Capacity *CP*Signed in my capacity as a solicitor  
employed in the office of the said~~James Lonsdale~~ Colleen Palmkvist *CP*

Date of signature

5 April 2019

**NOTICE TO CROSS-DEFENDANTS**

If you do not file a defence you will be bound by any judgment or order in the proceedings so far as it is relevant to this cross-claim.

**SERVICE IN AUSTRALIA BUT OUTSIDE NEW SOUTH WALES**

This statement of claim will be served on a defendant in Australia, but outside New South Wales. The ~~plaintiff~~ Plaintiff intends to proceed under the *UCPR*.

**HOW TO RESPOND**

**Please read this statement of cross-claim very carefully. If you have any trouble understanding it or require assistance on how to respond to the cross-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 cross-claim or part of the cross-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 cross-claimant all of the money and interest claimed.
  - 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 cross-claimant 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 <http://www.ucprforms.justice.nsw.gov.au/> or at any NSW court registry.

#### REGISTRY ADDRESS

Street address	Law Courts Building Queens Square, Sydney NSW 2000
Postal address	GPO Box 3, Sydney NSW 2001
Telephone	1300 679 272

**AFFIDAVIT VERIFYING**

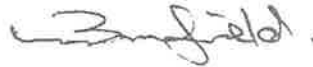
Name Michael Barnfield  
 Address C/- Level 43, 680 George Street, Sydney NSW 2000  
 Occupation Public Servant  
 Date 21 December 2018

I affirm:

- 1 I am the Director Delivery, Sydney Light Rail Project for Transport for New South Wales.
- 2 I believe that the allegations of fact in the statement of cross-claim are true.

AFFIRMED at Sydney

Signature of deponent



Name of witness

Dominic Mueller

Address of witness

c/- 680 George St, TfNSW, Level 43, Sydney NSW 2

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:

NSW Driver licence No. 4868SL

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.]



**PARTY DETAILS**

A list of parties must be filed and served with this statement of cross-claim.

**PARTIES TO THIS CROSS-CLAIM****Cross-claimant**

**Transport for New South Wales, cross-claimant**

**Cross-defendants**

**ALTRAC Light Rail Partnership, 1 Pty Limited (ACN 603 192 203), first-named first cross-defendant**

**ALTRAC Light Rail 2 Pty Limited (ACN 603 194 476), second-named first cross-defendant**

**ALTRAC Light Rail 3 Pty Limited (ACN 603 190 601), third-named first cross-defendant**

**Acciona Infrastructure Australia Pty Ltd, second cross-defendant**

**DETAILS ABOUT CROSS-DEFENDANTS THAT ARE NEW PARTIES****First cross-defendant defendants**

**Name ALTRAC Light Rail Partnership (ABN 37 399 764 913)**

Being a partnership between:

**ALTRAC Light Rail 1 Pty Limited  
(ACN 603 192 203)**

**ALTRAC Light Rail 2 Pty Limited  
(ACN 603 194 476)**

**ALTRAC Light Rail 3 Pty Limited  
(ACN 603 190 601)**

**Address Level 8, 136 Exhibition Street  
Melbourne VIC 3000**

**Second cross-defendant**

**Name Acciona Infrastructure Australia Pty Ltd  
(ACN 140 915 251)**

Address

174 Turner Street

Port Melbourne VIC 3207