

**CROSS-CLAIM
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	Rosa Maria Colagrossi
Defendant	Transport for New South Wales (ABN 18 804 239 602)

TITLE OF THIS CROSS-CLAIM

Cross-claimant	Transport for New South Wales (ABN 18 804 239 602)
First cross-defendant	ALTRAC Light Rail Partnership (ABN 37 399 764 913)
Second cross-defendant	Acciona Infrastructure Australia Pty Ltd (ACN 140 915 251)

FILING DETAILS

Filed for	Transport for New South Wales, cross-claimant
Legal representative	James Lonsdale, Acting Crown Solicitor for NSW
Legal representative reference	PCN 44817 21082714 D01
Contact name and telephone	Bruce Cantrill, (02) 9224 5128
Contact email	crownsol@csso.nsw.gov.au
Frequent User ID	AG4NSW

RELIEF CLAIMED

1. Declaration that the First Cross-Defendant is 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 failure to comply with cl 6.2(b)(ii) of the Project Deed.
2. Declaration that the First Cross-Defendant is 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 Defendant's 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).
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 first cross-defendant (**ALTRAC**) is and was 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

- (b) each of ALR Trustee 1, ALR Trustee 2 and ALR Trustee 3 is a company duly incorporated under the *Corporations Act 2001* (Cth) and liable to be sued in its corporate name.
3. The second cross-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 (**SLR Works**).

Particulars

Definition of "Delivery Activities" and "SLR 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 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 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 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 comply 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 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 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 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 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 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 15 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. The Cross-Claimant repeats paragraphs 4 to 7 above.

27. In the premises, ALTRAC was the Cross-Claimant's contractor which under the Project Deed was required to, and did, carry out the SLR Works.
28. 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**).
29. Under the D&C Contract, the D&C Contractor was required to design and construct the SLR Works.

Particulars

Clause 4.4 and definition of "SLR Works" in cl 1.1 of the D&C Contract

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.
31. If, as the Plaintiff alleges in paragraph 15 to 17 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 interference with the Plaintiff's and the Private Nuisance Group Member's enjoyment of their respective interest in land located in the vicinity 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 as the contractor who was required to, 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.
32. If, as the Plaintiff alleges in paragraph 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 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 the contractor who was required to, 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.
33. 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.

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	James Lonsdale, Acting Crown Solicitor for NSW Solicitor for the cross-claimant
Capacity	Signed in my capacity as a solicitor employed in the office of the said James Lonsdale

James Lonsdale 

Date of signature 21.12.2018

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 cross-defendant in Australia, but outside New South Wales. The cross-claimant 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.
- 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

BRUCE CANTRILL

Address of witness

5/60-70 ELIZABETH STREET, SYDNEY

Capacity of witness

Solicitor

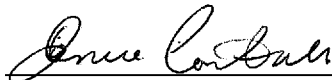
And as a witness, I certify the following matters concerning the person who made this affidavit (the **deponent**):

- 1 I saw the face of the deponent.
- 2 I have confirmed the deponent's identity using the following identification document:

DRIVERS LICENCE

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, first cross-defendant

Acciona Infrastructure Australia Pty Ltd, second cross-defendant

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

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