

INQUIRY INTO IMPACT OF THE WESTCONNEX PROJECT

Organisation: Desane Properties

Date Received: 3 September 2018

Submission to the NSW Legislative Council Public Accountability Committee

Re: Inquiry into the impact of the WestConnex project

August 2018



**Rev. the Hon Fred Nile, MLC
Committee Chair
Public Accountability Committee
NSW Legislative Council**

Re: Inquiry into the impact of the WestConnex Project

Dear Reverend Nile,

I am pleased to provide your inquiry with this written submission on behalf of Desane Properties Pty Ltd ("Desane") - a wholly owned subsidiary of ASX listed Desane Group Holdings Limited. For more than twenty years, Desane has been the owner of a 5,274m² commercial property at 68-72 Lilyfield Road, Rozelle. The property, along with a number of other private commercial properties on Lilyfield Road, Rozelle has been earmarked for compulsory acquisition as part of the WestConnex Project.

This submission will focus upon part (d) of the Terms of Reference, being *the compulsory acquisition of property for the project*.

In addition to the making of this written submission, I formally request the opportunity to give oral evidence directly to the Committee on behalf of Desane in order to constructively participate and contribute to this important parliamentary process and ensure Committee members are properly informed in their Inquiry.

Reference will be made in this submission to content in the judgement of *Desane Properties Pty Limited v State of New South Wales [2018] NSWSC 553, 1 May 2018 (Hammerschlag J)*.

This integral Inquiry is welcomed by Desane, as it will hopefully contribute to achieving genuine reform of what is truly an un-transparent and complex system of compulsory acquisition in NSW. I thank you in advance for your consideration.

Yours sincerely,

**Professor John Sheehan AM
Chairman
Desane Group Holdings Limited**

TABLE OF CONTENTS

FURTHER WORK NEEDED	Error! Bookmark not defined.
OUR STORY: THE DESANE COMPULSORY ACQUISITION.....	7
RECOMMENDATIONS.....	10
CONCLUSION	13
APPENDICES.....	14
APPENDIX 1.....	14
APPENDIX 2.....	29
APPENDIX 3.....	31
APPENDIX 4.....	40
APPENDIX 5.....	42

FURTHER WORK NEEDED

Desane Group Holdings Limited (“Desane”) is listed on the Australian Securities Exchange (**ASX: DGH**). For over 30 years it has been an active participant in the Sydney metropolitan property market.

The Chairman of Desane, Professor John Sheehan was actively involved in the day-to-day proceedings involving the Rozelle compulsory acquisition. Professor Sheehan is a practising Chartered Town Planner and Certified Practising Valuer who **specialises in the area of compulsory acquisition law and practice**. He holds Adjunct Professorships at the University of Technology Sydney (UTS) and Bond University, and is the former Deputy Director of the Asia-Pacific Centre for Complex Real Property Rights at UTS.

Professor Sheehan is also the former Chair of the Australian Property Institute's (API NSW) Government Liaison Committee and has prepared submissions to both State and Commonwealth Government inquiries on a range of varied topics such as the 2018 Financial Services Royal Commission, and the 2014 David Russell SC Review of the Land Acquisition (Just Terms Compensation) Act 1991.

Previously Professor Sheehan was an Acting Commissioner with the Land & Environment Court of NSW and a Member of the Queensland Land Tribunal.

In both Desane and Professor Sheehan’s opinion the amendments recommended by the then Customer Service Commissioner Mr Michael Pratt AM and then adopted by the NSW Government in 2016 were superficial and minor, aimed at placating affected parties in the short-term rather than trying to achieve genuine, lasting and effective reform in order to address substantial shortcomings in the system.

For example, one of the recommendations by Michael Pratt AM adopted by the NSW Government was for a new role of Personal Manager Acquisitions (“PMA”) to be trained through a whole of government Operational Centre of Excellence for acquisitions. This role would provide each land owner with a single point of contact within government and facilitate a more personal approach to navigating the land acquisition process to embed increased accountability and transparency throughout the process.

In Desane’s case, the PMA appointed for the proposed compulsory acquisition of its Rozelle Property was not a PMA as envisioned by the Pratt recommendation – that is, one being a person trained from the Operational Centre of Excellence. The PMA instead was a long standing communications consultant contracted by Transport for NSW and the RMS to complete communications, stakeholder management and community consultation tasks and activities across infrastructure projects, including WestConnex.

The communications consultant in question, Mr Steve Brien, the Principal and owner of Steve Brien Communications Pty Ltd has, we understand has been awarded approximately \$6 million in contract work by Transport for NSW and the RMS since June 2016. In Desane’s opinion Mr Brien’s interests lie in protecting the Government agency position he represents, not in advocating on behalf of the dispossessed land owner subject to a compulsory acquisition process.

During his few communications with Desane, Mr Brien stuck to pre drafted ‘scripts’ and added nothing to the process of genuine negotiations – totally contrary to the intention of the Pratt recommendations and the adoption of Section 10a(2) of the Just Terms Act.

His Honour Justice Hammerschlag in Desane v State of NSW (2018 NSWSC 553) was particularly scathing of the communication technique employed by RMS, stating that when Mr Brien and other officers of RMS met with Desane on 27 July 2016, they remarkably were unable to provide any meaningful information as

to how and why the project would impact the Property. His Honour went on to describe Mr Brien as the television comedy character Sergeant Schultz from Hogan's Heroes.

HIS HONOUR: *I'll tell you what I think Mr Brien's purpose was, that was to say nothing. His purpose was to absolutely say nothing. He knew nothing. He did a Sergeant Schultz.*(Court Transcript Day 9 at 518)

It was alarming to learn that during the period of supposed "genuine negotiations" (subject to S10A(2) of the JTC Act) with Desane, RMS utilised a risk assessment system as part of its acquisition management. The manner of communication, frequency of communication, level of personnel involved, differed depending on where the affected party sat in the so called "risk matrix". Desane was classified as "red", which signified a high-risk stakeholder which had to be managed more closely due to its access to media and political representatives, which in turn meant that Desane was to be provided with limited information, by a specified and limited group of people, who followed carefully scripted statements in meetings, in order to minimise any media or political fall-out (the "Sergeant Shultz" approach).

This was evident in the fact that the PMA for Desane was a contracted, extremely well remunerated, external communications consultant with absolutely no directly relevant experience in the field or process of compulsory acquisitions.

The current Premier of NSW Gladys Berejiklian MP, commenting in the media regarding the Desane case in the hours after the 1 May 2018 NSW Supreme Court decision, was quoted as saying:

" what is in doubt is the way we treat people moving forward, and I expect the RMS to listen to what the court said". (SMH 1 May 2018).

Despite numerous Government sanctioned Reviews, Reports and Committees – the approach and culture of the relevant government agencies tasked with the process of compulsory acquisition of land in NSW – that is **"the way we treat people"** can in no way be described as world class.

In the NSW Government response to the 2014 Russell Review, it was stated:

"To complement the work of Mr Russell and to enhance the Government's response, in 2016 the Premier asked the NSW Customer Service Commissioner, Michael Pratt AM to separately undertake a review of the land acquisition process from the point of view of the land owner, business owner or resident with a view to further improve the experience of people whose property is being acquired by government."

*These reforms will be supported by a **structural shift** within Government. To ensure appropriate oversight over the acquisition process, the **Minister for Finance, Services and Property** will be provided with additional responsibility to oversee acquisitions across Government. As the Minister with oversight of acquisitions, this role will have responsibility for ensuring that the land acquisition process is applied **fairly and empathetically** across government. The Minister will also work closely with the Customer Service Commissioner on developing a more strategic approach to acquisitions.*

*Key to providing oversight of acquisitions undertaken across government will be the creation of the **Property Acquisitions Standards Group** within the Department of Finance, Services & Innovation (DFSI). The functions of this group will include auditing the performance of agencies, setting standards for resources and acquisition processes and collecting and reporting on data from acquiring authorities. This Group will also provide advice on and support a more strategic approach to acquisitions."*

In Desane's opinion, DFSI has not provided either Transport for NSW or RMS with any direction or oversight, and those two agencies responsible for the overwhelming majority of compulsory acquisitions have continued with business as usual. The comments of Premier Berejiklian on 1 May attest to this.

The Government response to the majority of the Russell Review recommendations was that *"further work needs to be undertaken, including consultation with impacted stakeholders before it can determine support or otherwise"*.

This was following a comprehensive Parliamentary committee report, an extensive review by Mr Russell SC, and continued complaints by adversely affected parties from all walks of life. The Government it appears is not genuine about implementing meaningful reform in the face of what has been described as the nation's largest infrastructure investment. What eventuated in the Desane case was therefore not surprising in the least...

OUR STORY: THE DESANE COMPULSORY ACQUISITION

Desane first developed its 5,274 sqm property situated at 68-72 Lilyfield Road, Rozelle into a major multimedia business park in 1997 and for 20 years, it was the home of Staging Connections and a number of other major media, film and technology companies.

The site is bounded by the City West Link to the south, Lilyfield Road to the north, Balmain Road to the west and White Bay to the east.

In June 2015, Desane lodged a Planning Proposal with the NSW Department of Planning & Environment ("DPE") as the relevant planning authority to rezone the Property to *Mixed Use* from its existing SREP26 - Ports & Employment zoning in line with the NSW Governments *The Bays Precinct Transformation Plan (BPTP)*.

The mixed-use proposal had the potential to provide up to 200 residential apartments, including some commercial and retail space with permanent employment for over 100 local workers (commercial, retail and child care) as well as delivering affordable housing apartments in line with the Government's plans for the area.

The BPTP identifies the former rail yards as providing an opportunity for mixed housing as well as public spaces and employment uses.

The Desane Planning Proposal currently remains undetermined by the DPE. However, the Planning Proposal was being progressed by DPE at the time the proposed acquisition process was commenced by RMS in early 2016.

Two other privately-owned commercial properties along Lilyfield Road, Rozelle – being 80-84 Lilyfield Road owned by Gillespie Cranes and 92-94 Lilyfield Road, Rozelle owned by Swadling Timbers, have already been acquired by the RMS as part of the planned property acquisitions for the area. Both of these properties had also lodged Planning Proposals for mixed use developments consistently with the other. In total, the private properties make up nearly 1.5 hectares of land abutting the disused Rozelle Rail Yards (owned by the NSW Government).

Unbeknown to the private owners, on 18 April 2016, RMS wrote a memo to NSW Cabinet entitled "WestConnex Stage 3 (M4-M5 Link) – Strategic Property Requirements at Rozelle", requesting approval for the acquisition of the Rozelle properties, stating, amongst other things, *"Proposals are being advanced by the current owners for the redevelopment of these properties for residential use, and it is preferable that early certainty is given to the affected landowners in order to manage potential future compensation risks."* Desane Properties Pty Limited v State of NSW (NSWSC 553) at 43.

On 28 June 2016, an internal RMS email directed to the then RMS Program Director of Stage 3 for WestConnex stated *"I had a chat with the Department of Planning and explained our position.....Planners have been appointed by the owners of the three properties in Rozelle to seek a rezoning. The planners have prepared a rezoning submission which the Department of Planning will comment upon but have asked that we provide comment.....As we are unable to do this before the project is announced. Nonetheless I did say we will provide a holding statement if possible, although it will not be able to be sent from RMS"*.

It is Desane's view that the RMS intended to directly circumvent the Rozelle Planning Proposals in order to minimise the risk of large compensation payments to the owners.

As Desane understands and as was admitted in evidence by the RMS, from about July 2016 the Property was earmarked to form part of the new Rozelle Park as part of the NSW Government's commitment to 10 hectares of new open space in the Rozelle Rail Yard Precinct. This new Rozelle Park will form part of Stage 3 of the WestConnex Project.

However there is not, in Desane's opinion a permanent or operational Roads Act requirement for the Desane property.

Desane formally met with both RMS and SMC in June 2017 on a proposed alternative to the outright acquisition of the property. This included the possibility of the RMS leasing the Property on a short to medium term basis with suggested property access arrangements in line with the WestConnex EIS.

At that time, Desane did not seek any form of compensation (given that it appeared the property would not likely be affected by tunnelling or any other permanent or operational infrastructure). No communication to the contrary was ever provided to Desane by RMS. Infact, little communication regarding the proposed acquisition was ever received from RMS. Therefore Desane requested that the PAN be withdrawn and for the NSW Government or RMS to enter into a sensible alternative – one that would allow the WestConnex project to proceed and Desane retain ownership of the land.

In June 2017, unbeknown to Desane (later discovered through court) the RMS wrote to SMC enquiring whether RMS could lease the Property. The SMC Project Director of WestConnex M4-M5 Link replied:

"I'm inclined to say no. We are already struggling to get to the 10 (ha) without this site. It's fine margins at this point been mindful the commitment is up to 10 hctrs".

Desane took action against the NSW Government, RMS and SMC in the NSW Supreme Court challenging the legality of the PAN three weeks prior to the expiration of the PAN and the planned gazettal of the Property by RMS.

Following His Honours verdict of 1 May 2018, Desane Chairman, Professor John Sheehan declared:

"We have always maintained that the RMS did not have any true purpose for the compulsory acquisition of our property and today we were vindicated by the Court's Judgement."

The Government subsequently announced that it would appeal the decision, an action which commenced in late June 2018, with a decision reserved as at the date of this submission.

In the NSW Court of Appeal, the RMS argued that the giving of a valid Proposed Acquisition Notice ("PAN") is not a necessary pre condition to the valid acquisition of property under the Land Acquisition (Just Terms Compensation) Act 1991 (NSW), and that in issuing the PAN to Desane, RMS was not actuated by an improper purpose, being for the proposed 10 hectare Rozelle Park. Instead RMS argued the property would be used as part of the proposed new park and "might" be used as part of a construction site for works associated with WestConnex Stage 3 (Rozelle Interchange). The phrase "might be needed" was still a proper purpose, according to the RMS under the Roads Act 1993.

During the appeal, Mr Noel Hutley SC, for the RMS, argued that the public misunderstood the absolute power of an organisation such as his to acquire land, and that one of the things an organisation concerned with roads can do is **"land bank"** (court transcript NSW Court of Appeal - RMS v Desane Properties Pty Ltd Day 1 (28 June 2018) at 47).

It was also RMS's view that a PAN is simply a "For Your Information" for dispossessed landowners – and that a PAN should not be required to state the actual public purpose for an acquisition or identify the legislation which confers the power of an acquisition.

Adversely affected property owners across NSW would be dismayed at such views expressed from Government officials particularly when dealing with the sensitive issue of compulsory acquisition of property from parties' far more powerful than them.

Firstly, imagine the enormous powers conferred upon a State agency, if they were simply to decide to "land bank" a series of major properties along a proposed planned precinct or future growth area irrespective of whether a public purpose infrastructure project ever proceeded (that is, received planning approval, funding allocation and design and construct plans).

During evidence in the NSW Court of Appeal, Mr Hutley SC for RMS confirmed *"but times change, economics change, governments change. These sorts of projects are planned and expected to a relatively high degree of certainty they'll go forward in some form, but you know, things change and therefore, there was that uncertainty to its configuration, which was ongoing because it's a massive project which was evolving"*.

Secondly, the statement of the public purpose should not be left to implication or necessary intendment. Landowners should be given the information necessary to enable them to be satisfied that the proposed acquisition is lawful and to determine whether the purpose is relevant to the relevant heads of compensation under the Just Terms Act.

It is our understanding, that should the RMS overturn the Desane decision in the NSW Court of Appeal the NSW Government will immediately introduce legislation to amend the form of a PAN required to notify the owner of land that it intends to commence the compulsory acquisition process under Section 11 of the Land Acquisition (Just Terms Compensation) Act 1991. Under the amending legislation a PAN will say nothing about the public purpose or identify the power in which an agency can legally acquire land in NSW.

On 15 March 2018, by Government Gazette No. 31, for example the Minister for Finance approved a new form of PAN under Section 11.

That new form of PAN makes no reference to the public purpose, and no provision for one to be identified which in Desane's opinion would devastate a basic protection of private property rights under the Just Terms Act.

More information on the Desane judgment in the Supreme Court of NSW

Please note: Appendices 1 and 3 are intentionally lengthy in their content.

Appendix 1 contains relevant media articles pertaining to the case and associated matters.

Appendix 3 contains relevant and pertinent excerpts from the Desane Court judgement and hearing.

The intent of providing more information rather than less in this regard is to provide a feel for the substantive issues in a detailed manner, to convey what was actually transpiring, and the reaction and actions by relevant parties, and the wider community. This is appropriate information for the Appendices and for ease of reference makes the task of the interested person easier in terms of accessing relevant information in one place.

RECOMMENDATIONS

In addition to recommendations legislated by the NSW Government following the Russell Review into the Land Acquisition (Just Terms Compensation) Act 1991, the majority of which Desane believes are neither significant nor meaningful in nature, the following recommendations should to be implemented by the NSW Government following this inquiry:

1. All Proposed Acquisition Notices (“PAN”) issued in NSW should remain consistent with Section 11, of the Land Acquisition (Just Terms Compensation) Act, 1991; which states:
 - i) Part 2 - the public purpose for which the land to be acquired is proposed to be used e.g. “WestConnex M4-M5 Link Rozelle Interchange” and not simply state “a public purpose” as was previously stated under various forms of government issued PANs; and
 - ii) Part 3 - the power of the acquiring authority to acquire the land the subject of a notice, should also include an identification of the relevant statutory powers e.g. Roads Act 1993

The Desane case left too much to be inferred by the landowner when reading the PAN. For the benefit of doubt and to ensure landowners receive fair treatment during the compulsory acquisition process, the NSW Government should commit to providing landowners with more detailed information about the project and the direct need for the property for the project when the formal acquisition process commences.

2. The six (6) month fixed negotiation process currently legislated under Section 10A(2) of the Just Terms Act should not commence until the landowner is first provided with an opening offer of compensation by the acquiring authority to purchase land rather than the current practice that the fixed negotiation process commences when the landowner is first advised that the acquiring agency intends to acquire the land. In Desane’s case, nine months was expended from the first contact by RMS (July 2016) to the initial offer of compensation being sent by RMS (March 2017). RMS claimed that the 6 month period for negotiation had already expired when issuing the PAN to Desane in May 2017.

Desane recommends that an amendment to Section 10A(2) be made to ensure the period of negotiation commences immediately following the issue of an offer of compensation by the acquiring authority. This would ensure the acquiring authority was both genuine in its need to acquire the property for a public purpose and also ensures a genuine attempt to come to agreement by allowing more time for the landowner to consider any offer as part of the negotiations.

3. That the landowner and the acquiring authority, during the fixed six month compulsory negotiation period, conduct **at least two face-to-face meetings (with an agreed set of minutes)**, with a view to negotiation of an appropriate compensation figure.

The Desane case was an example of RMS officials using minutes of meeting which were inconsistent with Desane’s minutes of those same meetings. This allowed RMS officials to misrepresent Desane’s position to Ministers and their staff in various internal correspondences.

Representatives of the acquiring authority must also have the requisite delegated authority to make relevant and necessary decisions pertaining to the process, and they must possess relevant qualifications, skills, knowledge and experience in compulsory acquisitions.

This would avoid the situation where communication officers with no relevant experience are assigned to communicate and negotiate highly sensitive acquisitions.

4. In relation to the fixed negotiation period of 6 months (S10A(2)), before any step can be taken to compulsorily acquire land under the Land Acquisition (Just Terms Compensation) Act 1991, or under any other cognate legislation, **Ministerial discretion as to amendment of the period for genuine attempts to negotiate must be removed as this unfettered power undermines the very basis of the proposition.**
5. To encourage acquiring authorities to plan their acquisitions carefully to avoid needlessly acquiring excess land or “land banks”, acquisition procedures should not be commenced by an acquiring authority until such time as a project has been given planning approval by the relevant planning authority. The Desane case was an example of the RMS using the identified “strategic need” of the Rozelle Property under all circumstances as justification to gain consent from the relevant Minister for the commencement of a compulsory acquisition process. When subsequently the strategic need for the Desane property did not exist – due to a significant change in the WestConnex Project plans, the RMS did not advise the relevant Minister of this change and the resultant impacts on the timing of the need for the Property and the compulsory acquisition process. Had planning approval been given prior the compulsory acquisition process commencing, then both the agency and the owner would have had a far better understanding of the purpose for the Property for the public purpose.
6. That **a new compulsory acquisition process be adopted, so as to afford procedural fairness**, as currently procedural fairness is not adequately incorporated into the Just Terms Act. This must include:
 - Notice of the applicable procedures and substantive criteria;
 - The opportunity to put a case;
 - Disclosure of any adverse information that is credible, relevant and significant to the decision to be made; and
 - The opportunity to refute such information.
7. To improve the overall performance and consistency of acquiring authorities and genuinely ensure greater transparency, the responsibilities currently within the domain of the Minister for Finance, Services and Property for the general oversight of acquisitions across government should be wholly transferred to **a new independent statutory office holder** who is obligated to act in the best interests of all parties in the process in a fair, just and equitable manner.

This could be completed by employing a Chief Valuation Commissioner (Valuation Review/Compulsory Acquisitions) to replace the role of the Office of the Valuer General (who reports to the Minister for Finance, Services and Property) to ensure that there is adequate separation of the original valuation and review functions. The Chief Valuation Commissioner should have the power to quash and order new valuations. Above the Commissioner there should be an **Acquisition Ombudsman** who will provide regular reports of the valuation system and can deal with complaints from members of the public regarding the acquisition process.

8. The Property Acquisitions Standards Group should collect and publish whole-of-government land acquisition data **quarterly** on their new land acquisition website to ensure the performance of government is more readily open to public scrutiny, including the extent to which land is acquired through agreement rather than compulsorily. This quarterly reporting mechanism should be overseen by a new independent statutory office holder.

9. The 'Centre for Property Acquisitions' should be transferred from Transport for NSW to the NSW Department of Premier and Cabinet and the NSW Government should take a **genuinely whole-of-government approach to the acquisition of land in the public interest.**

Wherever possible, these recommendations should be legislated.

CONCLUSION

In writing this submission, Desane represents the public interests of all participants subject to the current compulsory acquisition processes, particularly families, small businesses, and the wider community.

As is evidenced by the Desane case, the system is still manifestly slanted heavily in favour of Government agencies.

The processes, approach, culture and attitudes Desane encountered in its dealings with the RMS can be best described as uncommercial and unprofessional. The NSW Supreme Court proceedings shed light on a manifestly flawed system overseen by senior government officials.

In short, Desane believes the NSW Government has not been genuine in achieving meaningful and effective reform with the compulsory acquisition process following the recommendations made by various reviews into the system. The very fact this Inquiry has been called in relation to the WestConnex Project only highlights this fact.

It is with much hope and anticipation that Desane wish the Committee and their work on this important Inquiry success in highlighting and ensuring the Government finally takes action to ensure a fair, just, and equitable compulsory acquisition system is put in place to ensure NSW is seen as the compassionate state - not just the infrastructure state.

Yours in trust,

Professor John Sheehan AM
Chairman
Desane Group Holdings Limited

APPENDICES

APPENDIX 1

MEDIA COVERAGE OF THE DESANE CASE AND RELATED MATTERS

- **Blow to WestConnex after state loses legal battle over acquisition**

Sydney Morning Herald, By Matt O'Sullivan, 1 May 2018

Property developer Desane has succeeded in its legal battle to stop the NSW government from forcibly acquiring its land in Sydney's inner west for WestConnex, in a setback to the state's plans for the final stage of the \$16.8 billion toll road project.

In a blow to the government's use of compulsory acquisition powers, the NSW Supreme Court has ruled that a proposed acquisition notice issued by Roads and Maritime Services for Desane's 5274-square-metre property on Lilyfield Road in Rozelle had no statutory effect.

Under plans for the final stage of WestConnex, Cabinet agreed in July 2016 to turn 10 hectares of land on the western half of the disused Rozelle Rail Yards into parkland. A month later, Desane was told that the government wanted to acquire its property, which abuts the old rail yards.

In his judgment, Justice David Hammerschlag said the road authority's intentions for the property were ill-defined and "may never be realised".

And the justice said the purpose to acquire the land for 10 hectares of open space and parkland was "ulterior to the purpose for which the [property acquisition notice] could properly have been given".

"I find that absent the purpose to provide the open space and green parkland, the [notice] would not have been given and the acquisition would not have proceeded," he said.

The judgment comes just days after the government revealed it had granted planning approval for the final stage of WestConnex, despite the fact that the final shape of a major underground interchange for the project at Rozelle is yet to be decided.

WestConnex has been controversial in the city's inner west because of the acquisition of more than 400 homes and businesses for the project. Homeowners who have been forced out have complained that they have been compensated at below market value, leaving them unable to purchase in the suburbs in which they lived, in many instances for decades.

NSW Labor deputy leader Michael Daley said the judgment was "very embarrassing" for the Berejiklian government because it clearly outlined "confusion that has been reigning in the government in relation to the Rozelle interchange".

"This government has broken the law ... and this government has essentially tried to steal land from a company for an improper purpose," he said.

“We would hope that the government would review all of the compulsory acquisition notices, but don't hold your breath.”

Premier Gladys Berejiklian said the case was a matter for Roads and Maritime Services, and the agency would take heed of the judgment and consider its options.

“There is no doubt that the project will continue but what is in doubt is the way we treat people moving forward, and I expect the RMS to listen to what the court said,” she said.

Ms Berejiklian said the roads authority had other options for the parkland at Rozelle as part of the third stage of WestConnex.

Desane chairman John Sheehan welcomed the judgment and said the company had questioned the true purpose of the roads authority's proposed acquisition from day one.

- **Jamie Parker MP, Greens Party, Member for Balmain, press release**

Desane wins landmark case against NSW

Property developer Desane has won a landmark case against the NSW government after successfully fighting compulsory acquisition of its land.

Commenting on the court's ruling, Jamie Parker MP for Balmain says:

“I welcome the court's decision today. It's neither fair nor just to acquire properties without good reason. Thankfully, the government has now been told that it's not legal either.

“This ruling demonstrates just how desperate the government is to steamroll through the inner west in order to wrap up WestConnex so it can be sold off.

“Roads and Maritime Services and Sydney Motorway Corporation had sought to buy Desane's land as part of WestConnex but the property had been earmarked for parkland rather than forming part of the motorway itself.

“Not only has the government ignored the evidence that this polluting tollway won't fix Sydney's transport problems but now it's been proven that they can't even follow their own laws.

“This decision will bolster property owners to challenge compulsory acquisitions in court which means the government may well be facing a costly quagmire in future.”

- **Inner-West Labor**

LEGAL CHALLENGE LAUNCHED TO WESTCONNEX STAGE 3 PROPERTY ACQUISITIONS

Posted by Darcy Byrne on August 16, 2017

Today's legal challenge in the Supreme Court, to the acquisition of properties in the Rozelle Goods Yard for Stage 3 of Westconnex is a massive blow to the Berejiklian Government and jeopardises the entire project.

The Court has held over the case until November, preventing the compulsory acquisition from proceeding within weeks, as the Government had arrogantly intended.

In blatantly seeking to rip-off and not properly compensate long standing local businesses like Gillespies Cranes, Swadlings Timber and Hardware and the Desane Group the Government has gone too far and imperilled their own project.

Having steamrolled their way through homeowners in Haberfield and St Peters the Government is now mistakenly taking on someone their own size in the form of these brave businesses in Rozelle.

The challenge by Desane Group to the Government's compulsory acquisition is set to prove what we've all suspected – that taking businesses and homes without prior planning approval is unjust and improper.

With at least four unfiltered smoke stacks proposed in our community and long standing local businesses and homeowners being forcibly evicted, the people of Rozelle and Lilyfield have had enough of the Government's incompetent and destructive implementation of Westconnex.

The hypocrisy of the Government promising that there's "no way in hell" that unfiltered smoke stacks will be located near school on the northern beaches while recklessly approving them near our children's schools has rightly caused outrage and resentment.

Having advertised that the Environmental Impact Assessment for Stage 3 of Westconnex would be placed on public exhibition today the Government has now decided to keep it under wraps.

Given this Government is so inept and secretive how can they expect local people to put up with the pollution, job losses and destruction of public space Westconnex brings to their neighbourhoods?

- **The Urban Developer - Tuesday 20 March, 2018**

Property Stoush Over '\$100m' Proposed WestConnex Site Continues

Residential property developer Desane has successfully extended its court-imposed injunction on the NSW government, preventing it from compulsorily acquiring a large inner-city tract of land for the construction of WestConnex infrastructure until a Supreme Court judgment is made.

Desane has been battling with the NSW Roads and Maritime Services (RMS) over the compulsory acquisition of the company's flagship property at 68-72 Lilyfield Road in Rozelle since August 2017.

The government originally offered the ASX-listed property group \$18.4 million for the site, which the government said represented current market value.

The dispute commenced when the Desane refused the offer and organised their own valuation, which returned a figure of more than \$100 million based on the site's development potential.

A nine-day Supreme Court trial, presided over by Justice Hammerschlag, concluded on Thursday 8 March.

Desane chairman Professor John Sheehan said the company is still no closer to understanding the true reason the NSW government wants their Rozelle property.

"The NSW government and RMS should take the opportunity to engage with our company on proposed sensible alternatives, so that Desane can get on with the business of creating value for its investors as well as its mum and dad shareholders," Sheehan said.

"Lowballing"

At the heart of the dispute is the 5,200-square metre parcel of land in Rozelle that is earmarked as part of the construction of the WestConnex infrastructure.

The property brawl between private land owners and the state government extends to Timber merchant Swadlings, a 100-year-old family business, and Gillespies, a crane hire firm over their Lilyfield Road, Rozelle sites.

The parties involved believe they have been offered "lowball" valuations by the NSW Valuer general to buy them out through compulsory acquisition.

An RMS spokesperson told the Sydney Morning Herald that the property at 88-90 Lilyfield Road at Rozelle, occupied by Swadlings Timber, is required for M4-M5 Link Rozelle Interchange.

"The M4-M5 Link Environmental Impact Statement shows the land as required for a temporary construction and tunnelling site, and at the project's completion, will be returned to the community as part of up to 10 hectares of open green space."

A spokesman said Swadlings is still in talks with the government and waiting for the Valuer General to offer a determination on the amount RMS has offered.

During the Supreme Court trial, Desane settled its accessorial liability claims against both the State of NSW and the Sydney Motorway Corporation resulting in an outcome where each party carried their own legal costs in the proceedings. The Supreme Court judgment is expected to be handed down by mid- to late-April 2018.

- **Australian Financial Review - September 23, 2016**

WestConnex: what could go wrong?

by Jenny Wiggins

The man in charge of Australia's most expensive road ever has no doubt it will be worth the whopping \$16.8 billion price tag.

When WestConnex is completed in 2023, the benefits for motorists used to daily traffic jams on one of Sydney's key bitumen arteries, Parramatta Road – the major east-west road of metropolitan Sydney, linking Parramatta with the CBD – will be "phenomenal", promises Dennis Cliche, chief executive of Sydney Motorway Corporation (SMC).

"You will be able to get on that motorway and travel from Parramatta to the airport in 40 minutes with no traffic lights," Cliche tells *AFR Weekend* from the 33rd floor of a skyscraper in downtown Sydney. "You can get virtually to Melbourne with no traffic lights!"

The Canadian-born Cliche is a smart and polished executive who has a degree in engineering as well as an MBA. He is keen to promote WestConnex – Australia's biggest infrastructure project – as "a good-news story", complaining that "minor protests" from people who don't like it get all the headlines.

The NSW government, which is selling off the state's electricity businesses so it can invest \$20 billion in transport, schools and hospitals, has pitched WestConnex as "a game changer" for Sydney that will ease congestion on the city's snarled roads, cut through the city's classic urban sprawl, and allow workers in the western suburbs to more easily get to jobs in the east.

- 5 years
- 1 Day

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Premier Mike Baird has stubbornly vowed to "push through" with the motorway to show the state can deliver on its promises – unlike a previous premier, Bob Carr, who got a reputation for announcing ambitious projects, such as railways along the beaches, but never building them.

Sydney's booming population— which is forecast to hit almost 10 million by 2036 – has made the government anxious to catch up for lost time and get on with WestConnex. It claims the new road system will save drivers "100,000 hours of travel time a day".

Big road projects are always controversial – Victoria's \$8 billion East West Link motorway was scrapped last year due to community opposition – and the Baird government wants to make WestConnex a success. But as road headers – machines popular with the mining industry for digging large holes – start tunnelling into the ground in some of Sydney's oldest neighbourhoods, community resentment is growing, with more people questioning whether the motorway will make Australia's biggest city a better place to live in.



Artist's impression of the eventual Rozelle interchange with greenery above the tunnels. Some 27 homes in Rozelle are being acquired to make way for the interchange and the widening of Victoria Road. Supplied

Haberfield has wide, tree-lined streets, and genteel Federation homes. Free-standing double brick houses, designed with front verandahs and sewerage connections, were marketed as "Slum-less, Lane-less, Pub-less" when the Sydney suburb was established in 1901.

"It was the first garden suburb developed, so very different to early Paddington," says Graham Quint, the National Trust's advocacy director. "They incorporated gardens and larger houses and it was pretty well intact until WestConnex happened to it."

Some 427 residential and commercial properties are being acquired by the NSW government to build WestConnex, with 78 homes in Haberfield knocked down to make way for the road, including 53 in the suburb's Heritage Conservation Area. Tall walls have been built at the end of residential streets to cordon off construction sites but they don't block out the beeping sound of trucks – which have seized parts of local parks so they have somewhere to turn around – as they load up earth and rubble, or the noise of machines drilling underground.

Because WestConnex has been demarcated a "State Significant Infrastructure" project, the government can take whatever buildings it wants, although a public outcry forced the SMC to abandon initial plans for taking the state heritage-listed Yasmar Estate, which was built in the 1850s, and Ashfield Park, which was created in 1885. The park has avenues of Canary Island date palms and is one of the few public open spaces in Ashfield.

Around 78 homes in genteel and quiet Haberfield have been knocked down to make room for exit and entry ramps.

The Haberfield homes have been demolished to create space for the motorway's entry and exit ramps there, and a ventilation stack that will pump out fumes from its twin tunnels. The ramps will have three lanes in each direction (22 kilometres of the 30-kilometre road will be underground).

The SMC has hung blue banners on the fences around construction sites with the words "Easing congestion in Haberfield" and "Returning streets to Haberfield locals". But residents say that rather than connecting suburbs, WestConnex is destroying communities.

Gino Soglimbene, the owner of Pappardelle Ristorante, says he feels as if the motorway has "taken over" his restaurant, which has been cordoned off by construction workers. "At times our business is hidden and my customers call to check if we are open as it is difficult to see through all the roadworks, earth-moving machinery and the herds of fluoro vests," he says.

Soglimbene decided to shut down the Italian restaurant for three days in early September due to the construction noise, despite missing out on several days' income.

Community anger

Sharon Laura, who bought a house in Haberfield in 2011 and is now surrounded by four construction zones, is angry that despite wading through thousands of pages of environmental impact statements and raising concerns about the motorway, the government does not appear to be listening to the community. She explains, "The community was never given a choice to actually reject the concept or the project; we were only ever allowed to comment or choose from options that were all OK to the government," she says. "Consultation has been a sham from the word go."

Some residents who lost homes claim they were not paid fair prices for their homes by the government and are considering legal action, while those left behind, such as Danielle Fletcher, complain the only compensation they have received for enduring the constant noise and vibration of drilling – "it's bang bang bang bang bang inside the house" – is free movie tickets. "I was insulted by that," Fletcher says.

Amy Raneri, who has four children and lives near Haberfield Primary School, doesn't like local streets filling up with the cars of WestConnex workers and chainsaws going off in the middle of the night. "They chopped down a beautiful fig tree at 12.30am. This suburb is really unique, and they've wrecked it, they really have."

WestConnex has three stages with the most crucial stage - 3 - being the last one to be finished. If this stage isn't completed, the main purpose of the motorway is undermined.

Raneri says she would be "all for" the motorway if she thought it would be a good piece of infrastructure. "I criss-cross the city every day for various reasons, and if I thought it was going to work, I'd be happy to just wear it. But I don't see how it is going to make any difference. Dropping all that traffic on to two lanes on the City West Link? It doesn't make any sense to me."

The master plan

WestConnex, which will be tolled, is being built in three stages.

The first stage, which will cost \$4.3 billion, involves widening Sydney's M4 motorway – which runs through Parramatta up to the Blue Mountains – and extending it to Haberfield with two new 5.5-kilometre tunnels, each 5.5 metres high. The widening is expected to be completed in the first half of 2017, and the tunnels are expected to open in 2019.

The second stage, due to open in 2020 at a cost of \$4.5 billion, is being built further south. The existing M5 motorway will be widened, and nine-kilometre tunnels will take drivers west to St Peters, exiting into a tangled interchange next to Sydney Park. WestConnex will not actually go into the CBD or to Sydney Airport or nearby Port Botany, but the SMC has set aside \$800 million to improve road links to the airport and port as part of the project – a mix of existing and upgraded roads and new infrastructure – dubbed "Sydney Gateway".

It is only in the third and final stage of the project, which involves building 9.2-kilometre tunnels at a cost of \$7.2 billion, that the first and second stages of WestConnex will link up. Until it opens in 2023, cars headed into the CBD or to the airport will have to leave the first stage of the motorway at Haberfield and get on the existing City West Link, a link road that is an alternative to Parramatta Road and which is already congested during peak hours and at weekends.

Bridge faces extra traffic

The WestConnex business case also forecasts that while reducing traffic on some Sydney roads, car numbers will actually increase on other parts of the road network after the motorway is built. An additional 18,000 vehicles each weekday are expected on the Anzac Bridge, which leads from the western suburbs into the Sydney CBD until another harbour crossing, the proposed Western Harbour Tunnel, is eventually built.

No peak-hour pricing for the Westconnex tunnel: Dennis Cliche. Dominic Lorrimer

Cliche says the sequencing of the WestConnex stages is not ideal. "I don't know if you have seen the IA report?" he asks. "If you were a traffic planner, and only looked at that, you wouldn't have built it this way."

He acknowledges that Sydneysiders "will suffer for a couple of years" until the third stage is completed but claims that is the necessary "trade-off" to get the motorway built as fast as possible: "If you would have said, 'Well let's wait until the state can fund it', you never would have this thing finished in the next 20 or 30 years."

Infrastructure Australia, an independent statutory body established by the federal government in 2008 to review big projects and provide better long-term infrastructure planning, released an evaluation of WestConnex's business case in April, warning that Sydney will experience the "broader benefits" of the motorway only when its final link is complete.

"Unless Stage 3 is delivered, the full benefits of the project will not be realised and the value for money of investments already made on Stages 1 and 2 will be diminished," the infrastructure body said.

Former NSW premier Nick Greiner, who was chairman of Infrastructure NSW when it recommended an earlier version of WestConnex to the NSW government in 2012 at a cost of \$10 billion, agrees. "It clearly would be totally absurd to not build Stage 3, because it makes it a coherent part of the network rather than sort of spokes of the wheel, which is what the M4 and the M5 duplication represent," Greiner says.

The logic behind the three-stage motorway plan is "build it, sell it; build it, sell it", Cliche explains. By tolling the first stage and then selling part or all of it at some unspecified date after it is completed, the government – which is spending most of the money from the sales of its electricity businesses on other projects – is hoping to raise enough cash to pay for most of the next stage.

The sale of the second stage will pay for the third stage, the thinking goes, enabling the NSW government to avoid taking on debt and keep its highly coveted AAA credit rating. NSW Roads Minister Duncan Gay told the government's 2016-17 Budget Estimates inquiry in late August that by funding WestConnex with tolls, the state would reap "huge economic benefits, with minimal up-front costs".

Funding challenge

The federal government gave NSW, which is initially putting \$3.6 billion of taxpayers' money into WestConnex, a \$1.5 billion grant to get going on the first stage, and a \$2 billion loan to begin the second. Preparation works on Stage 2 have already started, with tunnelling expected to commence by the end of the year.

Banks and other investors are wary of putting money into new toll roads, because they have been burnt on previous investments. Brisbane's Airport Link and Clem Jones Tunnel as well as Sydney's Cross City Tunnel – which is relatively empty most of the time due to high car toll fees of \$5.39 one way – and Lane Cove Tunnel all ended up in administration after traffic flows (and consequently tolling revenues) fell far short of forecasts.

So the government made the M4 the first stage of WestConnex because it had been tolled until 2010 – making it easier to estimate how many cars will use the motorway when it opens, Cliche says.

"We know that traffic has grown on the corridor, we knew what traffic was with tolls so therefore you could make a pretty logical extension to say what will it be when it's tolled – which is all very important for us to be able to finance the rest of the project."

The WestConnex business case forecasts 132,400 vehicles will use the tunnels built in the first stage each weekday by 2031.

Similarly, the SMC was able to get financing from some banks for the second stage because the M5 is already tolled. The SMC secured a \$1.5 billion loan from a consortium of Australian and international banks to pay for some of the second stage and the loan has subsequently been syndicated to nine additional investors, which the SMC says "highlights market confidence in WestConnex".

Cars will pay 42¢ a kilometre to use WestConnex with tolls for the whole motorway capped at about \$7.95 in 2015 dollars. But toll fares will increase annually 4 per cent or the rate of the national consumer price index, whichever is greater – national CPI rose just 1 per cent in the year to June 2016 – which means cars could be paying about \$100 a week to drive to and from Parramatta and the city by 2023. Trucks will pay three times as much.

The NSW government has acknowledged there is a risk that drivers will balk at paying to use WestConnex, with Gay telling the Budget Estimates inquiry that "in the short term, people will try to avoid tolls". But most drivers would eventually accept it, Gay argued. "As has happened in the past people will evaluate it, and make the decision whether it is worthwhile to use the toll roads or not. My feeling is that the majority of them will go back to the toll road."

Picking tolls over jams

Tom Spiteri, a small business owner who is annoyed he did not receive more compensation or help with relocating after being forced to shift his floor tiles shop, My Tiles, off Parramatta Road to make way for WestConnex, says he's happy to pay tolls to get to his destination quicker.

"I travel all over Sydney, I understand how bad the roads are ... I could be doing other things rather than sitting in traffic."

WestConnex's business case forecasts travel times between Sydney's west and south-west regions to the airport and port will improve by "10 to 20 minutes" for drivers using the motorway in morning peak hour. But Chris Standen, a research analyst at the University of Sydney's Institute for Transport and Logistics Studies, says WestConnex's traffic forecasts are "very optimistic".

"We've seen with the Lane Cove Tunnel and Cross City Tunnel that people don't really like paying tolls, especially if the time savings are minimal, which they will be with WestConnex."

Standen says Sydney motorists are already paying lots of tolls to get around the city, including on the Hills M2, the M5 South-West Motorway, the Westlink M7, the Harbour Bridge and Tunnel, the Eastern Distributor, the Lane Cove Tunnel and the Cross City Tunnel. Unlike the Harbour Bridge – which is a necessary route for most cars travelling from Sydney's CBD to its northern suburbs unless they take a big detour – motorists considering WestConnex will have other roads to choose from, he says.

Standen also argues Sydney doesn't really need another toll road from the western suburbs because it already has the M5, which gets congested because private vehicles can claim cash back on the tolls they pay. Transport planners could operate the M5 more efficiently by tolling all vehicles or creating "high-occupancy toll lanes" within the motorway, keeping other lanes free, he says. "That gives people a choice."

The main beneficiary of WestConnex is likely to be Australia's biggest roads company, Transurban, which already operates most of Sydney's toll roads and has expressed interest in adding the motorway to its rapidly expanding network, Standen forecasts. "In all probability, it will be sold to them at a fire-sale price and then it will be a cash cow."

The SMC says WestConnex's business case has taken into account the fact drivers are already paying "multiple tolls" around Sydney.

Call for more information

Jodi McKay, NSW Member for Strathfield and Labor's transport spokesman, says Labor supports the first two stages of WestConnex "in principle" and removing traffic from Parramatta Road, but is worried that drivers won't use the new motorway. She wants more information on how exactly the government will pay for the project.

"We haven't been able to find out when they intend selling the first stage; what they've said is: 'We'll get [traffic] up to a certain level and then we'll sell it'. When is that going to happen and what is the level of traffic and income that you're going to get to before you even look at selling it?"

Labor also wants more information on how toll prices are set, measured and reviewed. But a Transparent Tolling Bill introduced by Labor in June requiring any future NSW tolling agreements to be reviewed by an independent regulator, such as the Independent Pricing and Regulatory Tribunal, was defeated.

WestConnex's business case was released in late 2015 but forecast tolling revenues as well as design, construction, operations and maintenance costs for each stage were redacted. Cliche says if the SMC made the cost estimates public, it wouldn't get competitive bids when it puts parts of the motorway up for sale. "It's really important that we protect the commercial interest."

The SMC was established as a proprietary limited company in August 2014 and is answerable to its shareholders – the NSW Treasurer and the NSW Minister for Roads. It is not a state-owned corporation, so its information disclosure is governed by the Corporations Act, not the NSW government. But the SMC says it is subject to the Public Finance and Audit Act.

Gay told the Budget Estimates inquiry that the SMC was created under the Corporations Act so it could borrow from the private sector, and it "did not have to" answer questions before Parliament.

Public transport lessons

John Morandini, a retired engineer and former specialist adviser on transport strategy to the NSW government, says WestConnex completes "missing links" in Sydney's road networks that have been on the agenda for decades. But he says building roads to solve traffic congestion has a fatal flaw: eventually the new roads fill up, and the congestion comes back.

Morandini says better public transport is the key to getting rid of traffic, and that Sydney should apply lessons learnt during the Sydney Olympics, when the number of buses operating in the city was increased. "The system operated very well because there was this additional public transport on the roads which attracted a proportion of car users, and reduced the traffic congestion even though the roads were moving more people."

The City of Sydney, run by mayor Clover Moore, opposes the motorway, arguing it is a "1950s solution" to 21st-century transport needs.

The National Trust's Quint is among those mystified as to why the government didn't consider other transport options more seriously before proceeding with WestConnex. "If they were tunnelling this thing, why didn't they tunnel rail where you can move lots of people and get a much better bang for your buck?"

Infrastructure Australia also queried why NSW did not undertake "a more robust analysis" and consider "a broader set of options" for Sydney's long-term transport needs.

Morandini believes Australia needs to make "a philosophical shift" on transport. "I've spoken to politicians and their answer [on why we keep building tollroads] is: 'We need to keep cutting ribbons, we need to have infrastructure that we can point to, and buses aren't sexy, so we're not going to be attracted to that sort of proposition'. It's a psychological barrier that needs to be gotten over."

Tim Williams, chief executive of think-tank Committee for Sydney, says the broader issue arising from WestConnex is how cities "appraise" infrastructure. "Before we decide whether a particular project stacks up, we must do a mode-neutral appraisal of options – comparing the relative benefits of road, rail and other options," Williams says. "Crucially, this appraisal must not be determined by how we fund each option – tolling provides a funding mechanism for roads but not a justification."



WestConnex by the numbers

Seeking 'right balance'

Greater Sydney Commission chief commissioner Lucy Turnbull, who made news headlines in August when she told ABC Radio's Wendy Harmer that she was "not aware" heritage houses were being demolished in Haberfield, is more circumspect, arguing infrastructure development needs to "strike the right balance between protecting our homes and heritage and building a Greater Sydney that will work well for future generations".

"Now that Stages 1 and 2 of WestConnex are under way, we need to make sure that the opportunities to increase investment in safe cycling and greater walkability in the suburbs along the WestConnex route are prioritised," Turnbull says.

Greiner initially wanted WestConnex to be an urban renewal project as well as a motorway project, and the WestConnex Delivery Authority (WDA) was established in 2013 to deliver it. But the WDA was shut down in 2015 and responsibility for its delivery handed over to the SMC – which had been created to finance WestConnex – and the focus on urban renewal disappeared.

Garry Bowditch, executive director of an infrastructure think-tank at the University of Sydney's John Grill Centre, says WestConnex is a good project but should be "more than just a road" and be developed alongside public transport networks and affordable housing. "There is an urgent need to link the construction of the road to how it will proactively shape Sydney as a better place to live and work," Bowditch says.

Cliche, who was brought in as WDA's chief executive in mid-2014, says one of the challenges he faces is that "WestConnex was sold as the solution to everything".

"It was probably oversold in that regard," he says, adding other agencies are now looking at urban renewal and public transport.

"UrbanGrowth is working on the Parramatta Road strategy ...Transport for NSW is working on public transport and the Greater Sydney Commission is charged with looking at the broader mandate."

Cliche argues that WestConnex will create more space for public transport on Parramatta Road because it will take cars off the road, putting them underground in a tunnel. "Our design [of WestConnex] has been done in such a way that we can enable kerbside running and centre-lane running of rapid transit, whether it's buses or light rail."

Destroying homes 'hardest thing'

Cliche, who moved to Sydney from Melbourne to join the WDA and has been looking for a new home near the city's northern beaches, also defends the destruction of houses to build WestConnex, saying the corporation "looked extensively for every bit of land", including dump sites, before bulldozing homes.

He refers to the Sydney Harbour Bridge, which was designed by John Bradfield and built between 1924 and 1932.

"There were 800 properties on either side of it. Bradfield said, in one of his articles, that the hardest thing in building the Sydney Harbour Bridge was taking people's homes. And I totally empathise with that."

When choosing contractors to build the first stage of WestConnex, applicants were scored "favourably" if they came up with proposals with "minimum property take". (Contractors were involved in choosing the final locations of motorway entry and exit points.) "So if anybody came in and said: 'I could do this cheaper, better, quicker but I'm going to take two times the homes', we said: 'Sorry, that won't work'."

But with the first and second stages of WestConnex under way, residents in the path of the final stage are gearing up the fight.

Residents in inner-city suburbs say they are not "nimbys" but would prefer money to be put into public transport, pointing out the NSW government has also been trying take freight off roads, weakening the justification for using the motorway as a freight transport route. "Their own plans and own advisers are saying you have to shift it onto rail and you shouldn't be using trucks," says Leichhardt resident Cassi Plate.

A new group, Leichhardt Against WestConnex, is rallying on Saturday to protest the SMC's plans for construction and tunnelling sites in its neighbourhood, while residents of Forest Lodge and Glebe say they are horrified by early plans to put an exit ramp from WestConnex's tunnels near the University of Sydney.

Jan Wilson, chair of the Coalition of Glebe Groups, says the ramp will add 33,000 more cars to Parramatta Road.

Acquisitions under scrutiny

The Leichhardt group says it believes the government is already negotiating with owners of commercial properties along the proposed route for the third stage and may have broken the law by announcing the acquisition of homes in Rozelle before submitting an environmental impact statement.

"LAW believes that Roads and Maritime Services may be acting outside its powers by proceeding with property acquisitions for Stage 3 prior to approval of this stage of the project under the Environmental Protection Act," says Catherine Gemmell, the group's convener.

The government announced in July that 27 homes in Rozelle would be acquired to make way for a motorway interchange and the widening of Victoria Road. The SMC says all property acquisitions have been carried out in accordance with the Land Acquisition (Just Terms Compensation) Act.

Residents also complain that plans for the motorway keep changing and they are left in the dark until the last minute.

Cliche says "the route isn't final" until the SMC has signed design and construction contracts. "It's a fool who has their head in the sand and doesn't change scope when they realise they can do something better ... There are certain things that can move."

He says the new proposal to build an underground interchange at Rozelle Rail Yards and put a new park on top was better than the previous route, which had more entry and exit points along Parramatta Road.

"We're pretty sure there won't be any more residential property acquired, there could be some more commercial property to enable us to deliver Stage 3 ... I'm always reluctant to say 'never' but at this point in time we think that's the end."

Hot topic for election

Cliche also plays down concerns the government will not be able to finance the final stage of WestConnex, saying he's "very, very confident" it will happen.

Infrastructure Australia has already warned there are "material risks" associated with the third stage's estimated costs – considered the most technically difficult part to build – including "ground conditions" for tunnelling.

The SMC, which hired Macquarie Capital as a financial adviser this year, is looking at financing options for the final stage, such as whether the government could provide a bridge fund so it could get going early, Cliche says. "There is a whole bunch of things we're looking at ... everything's on the table, as it should be."

SMC will have spent almost \$100 million by the end of this financial year on planning, geotechnical analysis and financial modelling for the final stage, which it is hoping will start construction by 2019.

That will put it smack bang in the middle of the next state election, which is due in March 2019. If residents continue to protest against the motorway – the WestConnex Action Group has been occupying construction sites such as Sydney Park in St Peters and campaigning on social media – and traffic on the first stage does not live up to expectations, the road is likely to become an election issue.

NSW Labor has said it does not support the third stage of WestConnex because it believes the money could be better spent on public transport.

But it has also said it will not tear up any deals done by the government to avoid replicating what happened in Victoria after the Andrews government took over and cancelled East West Link – forcing the state to pay \$339 million in compensation to construction companies that had already started work.

"That is part of the predicament that we will find ourselves in because we have no doubt that what this government will do is ensure that contracts are signed prior to the next election," McKay says. "That locks us into a position that may not be the one that we support."

In the meantime, some residents are giving up on Sydney. Haberfield's Fletcher, who has two daughters and has lived in Sydney's inner west most of her life, has closed her shop selling vintage homewares, Retro Spectrum, in St Peters, and has started to look at houses to rent in Thirroul near Wollongong on the south coast. "I feel kind of damaged," she says. "All there is around me is concrete and construction."

- ***"WestConnex Legal Battle" - Ross Greenwood Nine News Sydney - 7 March 2018***

Long-time owners of two sites in Sydney's Rozelle are preparing to fight the NSW government's compulsory acquisition of their land for the WestConnex motorway project.

The two sites at 92-94 Lilyfield Road and 80-84 Lilyfield Road are next to ASX-listed developer Desane's landholding at 68-72 Lilyfield Road which is currently contesting their resumption in the Supreme Court.

The pending battles concern timber and hardware company Swadlings and the crane business Gillespies.

The combined Swadlings and Gillespies sites of nearly 6500 square metres can yield about 200 apartments.

The companies took their fight to Ross Greenwood at Channel 9 News.

Like Desane, both groups had sought a masterplan residential rezoning of the land with the NSW Department of Planning which was abandoned when the Roads and Maritime Services ordered the compulsory acquisition last September.

The RMS wanted the land for "a staging area for trucks and equipment", they said. They had a potential buyer who was prepared to pay \$24 million for the sites and provide a timely relocation. The government offered them less than \$3 million and the companies would have to fork out their own relocation costs.

"The Planning Department was attempting to adopt a well thought out masterplan approach but RMS came over the top and usurped this approach with its resumption of land," a Swadlings spokesman told Fairfax Media.

"There was also a delay in the rezoning application process ahead of the compulsory acquisition of the property.

"If Swadlings cannot get a fair and reasonable outcome in the current discussions it will be forced to pursue every possible legal avenue."

Swadlings is a 100-year-old family business, said it was "watching closely the outcome of the Desane court case".

The RMS said both the sites were required for M4-M5 Link Rozelle Interchange.

"These properties were compulsorily acquired last September with the Valuer General determining the compensation in line with the Land Acquisitions (Just Terms Compensation) Act," a spokesman said.

"The M4-M5 Link Environmental Impact Statement shows the land as required for a temporary construction and tunnelling site, and at the project's completion will be returned to the community as part of up to 10 hectares of open green space."

The NSW government had taken steps to compulsorily acquire the inner city residential land owned by ASX-listed developer Desane for the WestConnex motorway project, even though it had no firm plans to use it for the project, a NSW court has heard.

Desane has fought the compulsory acquisition of its landholding at 68-72 Lilyfield Road in Rozelle – an area earmarked for residential development and mixed use urban renewal – since August.

After mediations with the government fell through to consider a lease of the land or alternatives, Desane started proceedings at the Supreme Court of NSW last Monday.

During a cross-examination, former Roads and Maritime Services (RMS) project director Daniel Powrie, who was involved in the third stage of the project, told the court motorway plans showed Desane's site "was not impacted", that is, not required for tunnelling.

The government had earlier said the site would be used as a "car park" for staff.

Desane's site could yield a \$100 million 200-apartment project.

APPENDIX 2

NSW AND COMMONWEALTH PARLIAMENT – MENTIONS OF DESANE

- **Ms Jenny Aitchison, the State Member for Maitland, asked a question of Premier Berejiklian in Legislative Assembly Question Time on 23 May 2018, titled *Government Contract and Project Management*.**

The question referred to the legal action by Desane Group Holdings over compulsory acquisition, and asked when will the Government stop punishing small businesses for its mistakes?

The Premier chose not to answer the substantive question and avoided specific reference to the case altogether.

- **In a Question on Notice, number 2201, titled - Roads, Maritime and Freight - RMS LEGAL COSTS –** Lynda Voltz, to the Minister for Roads, Maritime and Freight, asked about RMS legal costs on the Desane case and associated matters, but the Minister and Government chose to hide behind the ongoing legal proceedings and did not provide any relevant answers.
- In her Second Reading Speech on the **PUBLIC ACCOUNTABILITY LEGISLATION AMENDMENT (SYDNEY MOTORWAY CORPORATION) BILL**, Ms Jodi McKay, the NSW Shadow Minister for Transport and Roads, specifically referred to the Rozelle interchange as a good example of what is wrong with the WestConnex project:

A week ago the Supreme Court made a decision in the case of Desane, which took on the Government over its land. Effectively, the court found that the Government tried to steal that land because it needed it for some mysterious purpose associated with WestConnex. The only problem is that the Government could not tell us what that was.

That is why this bill is so desperately needed; issues like that need to be known by the community. I say to every member in this place that they have a duty to support their communities and they have a duty to support this bill.

- **Australian Parliament House, Hansard, Thursday, 10 May 2018**
Page: 3789

Mr ALBANESE (Grayndler) (11:20): I rise again to express concern at the lack of proper planning by the New South Wales government for the WestConnex project. This project has been characterised by bad planning and incompetence, and inferior and sometimes, quite frankly, misleading community consultation processes. Perhaps uniquely, it is a project in which they started building the tunnel without knowing where the tunnels would come up, something that will be studied by governments in future years. **The bad planning was exemplified by the New South Wales Supreme Court's decision last week that the New South Wales state government's acquisition of property in the Rozelle goods yards was invalid. The Desane Group, whose property was located at 68-72 Lilyfield Road, had taken action. This is a massive blow to the state government. It undermines their future acquisition powers and shows that the government simply does not have its act together.**

It follows a series of debacles: the underpayment of residents who had their properties voluntarily or, in some cases, compulsorily acquired; changes to the route and to where the dive sites for the project would be, including the quite extraordinary proposal to have a dive site almost on the grounds of Sydney Secondary College Leichhardt Campus; changes to where the stacks are and a refusal to filter the stacks, unlike what the state government said about stacks for roads near schools on the north shore of Sydney, which should be filtered; and proposals to use parks or ovals for the project. Ashfield Park, Petersham Oval and Blackmore Oval have all been threatened at various times. Good infrastructure requires you to plan first, then get the financing, then start construction. This has happened in the opposite direction. The fact that Infrastructure Australia had this project on

its priority list calls into question its processes as well, because it goes neither to the port nor to the airport, which were the objectives of this project.

APPENDIX 3

Pertinent and relevant excerpts of note from cross examination and judgment in the Supreme Court (*Desane Properties Pty Limited v State of New South Wales [2018] NSWSC 553, 1 May 2018, Hammerschlag J*)

“Compulsory acquisition of private property is no light matter” (page 55)

p.6

On 26 May 2017, RMS purported, under cover of a letter of that date, to give Desane a PAN for the Property.

Desane argues that the PAN is of no effect because:

- (a) it fails to comply with the requirements of the Just Terms Act;
- (b) there was in existence no sufficiently formed proposal for acquisition by RMS for the purposes of the Roads Act;
- (c) if there was a sufficiently formed proposal for the purposes of the Roads Act, RMS had an improper purpose in giving the PAN because, in truth, it was actuated by the purpose of using the Property for open space and green parkland, which is not a purpose of the Roads Act.

p.8

In June 2015, it lodged a proposal with the Department of Planning, to re-zone the Property from Port and Employment to B4 Mixed Use, which would permit the development of residential apartments, retail and commercial space. The proposal envisaged some 200 apartments, retail and commercial space and a 90-place childcare centre. Desane has developed apartments nearby. **By all accounts, the Department of Planning neglected to progress the application. At a meeting with representatives of that Department on 31 May 2016, an apology for mishandling it was given to Desane.**

p.10

On 23 March 2016, RMS, represented by Ken Kanofski, its Chief Operating Officer – later Chief Executive, and SMC, represented by its Chief Executive, Dennis Cliche, signed a non-legally enforceable Memorandum of Understanding (MOU) in connection with Stage 3.

Under the heading ‘Property’, the MOU includes the following:

RMS will acquire all the temporary and permanent land required for the Project. During the Development Phase, SMC will provide RMS of details of potential land requirements (Lot and DP) to the extent these are known. RMS and SMC will work together to identify any land requirements that are "strategic" in nature - that is, will be required under any plausible scenario for the delivery of Stage 3. RMS may seek Government approval to commence the acquisition process for Strategic Land in 2016/17. Except for Strategic Land, RMS expects that property acquisition will not commence until a Preferred Tenderer is selected, or comfort is otherwise obtained that the property will in fact be required.

p.15

Then, at a meeting on 21 July 2016, the Cabinet agreed that the M4-M5 Link would deliver 10 hectares of 'park ready' land on the western half of the Rozelle site, and noted that the remainder of the site would include significant further additional open public space as part of the WHT. The Cabinet submission defined 'park ready' to include:

- Construction of podium and land-bridges to connect regraded land
- Structural and architectural treatments
- Capping and drainage
- Pedestrian and cyclist pathways
- General soft landscaping and planting.

pp.15-16

On 21 July 2016, the Government issued a media release titled 'New inner west park and tunnel link announced' (the media release). The timing and contents of this release play a not insignificant role in the case.

A large stretch of new parkland will provide significant green space for Sydney's inner west and an underground connection will be built to take traffic off congested Victoria Road, under the new details of the concept design for the WestConnex interchange at Rozelle. Premier Mike Baird and Minister for Roads Duncan Gay revealed the details of the interchange, which will be built largely under the disused former Rozelle Rail Yards. This will allow for the majority of the interchange to be grassed over with a new large park and returned to the community. "This will be a game-changer," Mr Baird said. On or about 13 April 2017, AECOM produced final reference designs. Amongst them is a design for the Interchange which shows the only surface impact on the Property as being the use (which I assume to be on the surface) of a sliver of it at its edge for a utilities corridor.

p.22

On 3 May 2017 the Governor approved a recommendation made by the Minister for Roads, Maritime and Freight that the Property be acquired by compulsory process.

p.24

On 26 May 2017, RMS gave the PAN to Desane.

p.25

On 3 July 2017, Kanofski directed a briefing paper to the respective Ministers for WestConnex and Roads, Maritime and Freight in connection with the possibility of RMS considering temporary leasing arrangements for properties to be acquired. He identified four private properties, including the Property, as being required to be acquired for M4-M5 Link work adjacent to the Rozelle Rail Yards.

p.27

On 15 August 2017, the Minister declared WestConnex to be critical State significant infrastructure.

p.28

The EIS contains the following section:

The Rozelle Rail Yards site is bounded by City West Link to the south, Lilyfield Road to the north, Balmain Road to the west and White Bay to the east. The Bays Precinct Transformation Plan identifies the former rail yards as providing an opportunity for mixed housing as well as public spaces and employment uses. The Bays Precinct Transformation Plan also identifies the potential for opportunities provided by the redevelopment of the Rozelle Rail Yards for integration and connection of communities to the north and south through the creation of public open space and improved connections between Lilyfield and the waterfront. While the

project is consistent with The Bays Precinct Transformation Plan vision for the creation of new open spaces, provision of new pedestrian and cyclist links, connecting communities and the acknowledgment of the rail heritage of the area, it is inconsistent with the Plan with respect to the development of the Rozelle Rail Yards for mixed housing and potentially also for employment uses. The reasons for the project being inconsistent with this vision (sic) can be attributed to the nature of the project and the geographical area required for its construction and operation and also the commitment made by the NSW Government (announced in July 2016) that the project would deliver up to 10 hectares of new open space and active transport links for the community. Should the project not proceed, the Rozelle Rail Yards would likely be developed in accordance with The Bays Precinct Transformation Plan, including the provision of public spaces, employment uses and mixed housing (emphasis added).

p.29

On 13 September 2017, SMC produced a drawing outlining the components of public open space that contribute to the 10 hectares of parkland. The drawing shows the entirety of the Property as useable public space. Areas for motorway operational facilities shown on the drawing do not impact the Property.

pp.29-30

On 22 September 2017, Kanofski provided a written briefing to the respective Ministers for WestConnex and Roads, Maritime and Freight, entitled 'M4-M5 Link Interface with Bays Precinct Masterplan.' The Briefing stated, amongst others:

Analysis: Roads and Maritime and Urban Growth, in consultation with Sydney Motorway Corporation (SMC), the Department of Premier and Cabinet and the office of the Minister for WestConnex have agreed to a number of principals for a development of the New Rozelle Park and the surrounding areas. These are detailed below. Attachment A outlines how the 10 ha of green space committed to by Government will be achieved. Key issues Interface between M4-M5 Rozelle Interchange Project and Urban Growth Bays Precinct Masterplan Roads and Maritime and Urban Growth in consultation with SMC, the Department of Premier and Cabinet and the office of the Minister for WestConnex have agreed the following. 1. Roads and Maritime will make relevant arrangements to designate Urban Growth as the entity that will have responsibility for the New Rozelle Park post M4-M5 Rozelle Interchange completion (potential staged handover)... ... 3. The final design of the New Rozelle Park must include 10 hectares of green space as agreed by Cabinet and outlined in the M4-M5 Environmental Impact Statement. The formal design will be in compliance with the M4-M5 Planning Approval and managed by Roads and Maritime (as Proponent) ... 8. If the preferred design for the WestConnex M4-M5 Link works does not result in the final motorway and utilities footprint being within the agreed 'permanent land take area', Roads and Maritime will work (sic) include a priced option in the final contract prior to execution, that provides for utilities to be relocated outside the development area as part of the works by the Stage 3B contractor (emphasis added).

On 31 October 2017, the responsibility for delivering Stage 3B was transferred from SMC to RMS.

pp.30-31

DEALINGS BETWEEN DESANE AND RMS, AND RELATED MATTERS, LEADING UP TO THE PAN

The first time Desane was informed that the Property was located in proximity to WestConnex Stage 3 was on 26 July 2016 when Desane's planning consultant Elise Crameri of AFP Corporation was sent a document by the Department of Planning, under cover of a letter in connection with Desane's re-zoning application, showing this. Not surprisingly, Desane felt a sense of grievance at becoming aware of this important development in this way, after a public announcement.

On 27 July 2016, the Montrones and others met with representatives of RMS, including Steven (Steve) Brien who held a position described as Senior Communication and Stakeholder Engagement Lead for the Motorways development branch of RMS.

pp.31-32

Rick Montrone says that Brien was asked why RMS was interested in the Property and what it would be used for, to which Brien responded:

We can't give you exact details at this stage. However, the site would be used for a variety of uses including truck access, warehousing, site office or concrete batch plant during construction.

Rick Montrone says that the following exchange occurred between Crameri and Brien:

Crameri: Where will the property lie in relation to the proposed infrastructure? Why is it that the property is actually needed, can you provide us plans or details of the proposed road infrastructure? Brien: We cannot provide details on the tunnel network, nor can we tell you at this stage if a tunnel would be going directly underneath the property. Crameri: The acquisition needs to be related directly to the intended use of the land otherwise the site should be excluded. Brien: We don't have details of tunnel networks. We are only here to let you know that your property is required for the project.

Phil Montrone says he suggested, as an alternative to acquisition, RMS leasing the Property on a short or long-term basis during construction and returning it to Desane at the end.

Brien gave evidence and was cross-examined. Inconsistently with his position as the person charged with communication with Desane, but consistently with his apparent inability to furnish meaningful responses to the questions asked of him at the meeting, he was vague as a witness. There were some variances between his evidence and that of the Montrones. I prefer their evidence.

On 29 July 2016, Desane wrote to the Hon. Duncan Gay MLC, Minister for Roads, Maritime and Freight. They wrote, amongst others:

We understand that various proposals for the road network are being prepared by RMS and therefore it may be possible, with some minor revisions to the infrastructure plans, to avoid the outright acquisition of our Property. We understand that vast areas of public land are available in the vicinity of our Property and as a result, we request that other options be fully considered by the NSW Government prior to settling on a proposal that requires the acquisition of our Property.

On the same day, Desane, by email, requested a meeting with the Minister.

The Minister never replied. No meeting took place.

p.33

On 16 August 2016, Beverley Magpayo of RMS emailed Tony Dixon, Parris and Brien, all of RMS, about Desane:

Let me know as well once you've spoke to Matt re: Is there going to be any residual land available? Construction work details & what permanent structures will sit on their land? Depending on the answers to my above questions, this will be the justification as to why their proposal of entering into a lease or hand back of residual land, partial acquisition is not possible.

Dixon replied, amongst other things:

We have spoken with Matt regarding the Desane Group Property at 64 – 72 Lilyfield Road, Rozelle and can confirm his response that: • The property is required for the Project • The requirement, while not yet fully detailed, is expected to be for permanent infrastructure • There will not be residual land remaining following completion of the Project • Noting again that design is not yet finalised, the expectation is that the land will be used to site access ramps as well as a connection between M4M5 Link and the planned HarbourLink project.

pp.33-34

On 2 June 2017, Jones wrote to Tom Kennedy of SMC:

Tom. Hopefully quick question. If the land currently owned by Dasane (sic) property - light industrial to tight of Gordon st (sic) - was given back to the owner on completion for development can we still achieve the 10 hctr requirement? Ta

Kennedy replied as follows:

Hi Peter I'm inclined to say no. We are already struggling to get to the 10

Jones emailed Powrie:

Dan. Follow up on yesterday - view is we would struggle to achieve the 10 hctr without this site. It's fine margins at this point been mindful the commitment is up to 10 hctrs (sic).

P.44

On 14 June 2017, the Montrones met with Jones, Powrie and another RMS officer.

Rick Montrone says he asked a number of questions which Jones did not answer but responded by talking about unrelated matters. Having observed Jones in the witness box, I have no difficulty in accepting this evidence.

p.61

An authority of the State does not have open slather. If the compulsory processes under the Just Terms Act are to be invoked, they must be invoked in the mode which the grant of power imposes.

p.62

On 10 April 2018, whilst this judgment was reserved, I was informed that on 15 March 2018, by Government Gazette No. 31, the Minister approved a new PAN form. I was informed that the parties agreed that this fact has no bearing on the issues in the proceedings and that no further submissions concerning it were appropriate. I observe that the new form makes no reference to public purpose, and no provision for one to be identified.

p.64

Desane argues that the Minister's power to approve a form (and for that matter, the power of the Governor to make a regulation prescribing a form) under s 15(a) is one to approve a form which properly serves the purposes of the Just Terms Act. It argues that a form which does not inform the recipient of the public purpose for which the land is to be acquired; but states that it is for a public purpose, without identifying that public purpose, does not properly serve the purposes of the Just Terms Act and is invalid as beyond power.

p.76**THE PARTIES' CONTENTIONS**

Desane puts that RMS' dominant purpose was to acquire the Property to create open space and green parkland, which purpose was improper because it is not one for acquisition under the Roads Act.

Desane puts that as at the date of the PAN the state of uncertainty with respect to any purpose of RMS to use the Property as a construction site was so uncertain as not to qualify for the description of a proposal for acquisition of land, within the meaning of ss 10(1) and 10A of the Just Terms Act, for any of the purposes of the Roads Act.³⁴

The two contentions are closely connected because if there was no legally cognisable purpose to use the Property as a construction site, RMS' only legally cognisable purpose would have been to create open space and green parkland. Also, if there is more than one purpose, the relative strength (or weakness) of each is a relevant factor in assessing the dominant position (or otherwise) of each such purpose. The less defined, or the more flimsy, the purpose, the weaker its influence.

pp.77-78

As to the absence of any proposal for acquisition for the purposes of the Roads Act, Desane points to the following facts:

- it was in contemplation, and had been from as early as November 2016, that the project might not proceed
- by 3 April 2017, the WHT site location and configuration, which had been the strategic reason and rationale for acquisition referred to in the 24 March 2016 briefing of Jones to Cliche, had changed significantly and the design was to change by moving the WHT ramps further to the West
- there was no planning approval and activities cannot be carried out without it
- there was no final design
- no design and construct tenderer had been selected
- no process was on foot to find such a tenderer
- there would be no final design until one was produced by a design and construct tenderer who was prepared to produce it and construct according to it
- since mid-2016, RMS had articulated differing and sometimes inconsistent purposes for which it has said it intends to use the Property, including permanent infrastructure, major infrastructure construction, truck access, warehousing, site office, concrete batch plant during construction, road corridor, dive cut and cover portal, light vehicle parking, utility diversion, relocation of utility services and water retention
- RMS was unable to tell Desane the precise way the Property was to be used as a construction site, and provided Desane varying and inconsistent information about this. In its written argument, RMS describes this as Desane's no purpose case.

In contrast to its somewhat amorphous purpose for acquiring the Property to be used as a construction site, from at least 21 July 2016 RMS has had the unqualified and fixed purpose to acquire the Property to provide 10 hectares of open space and green parkland as publicly committed to by the Government. The PAN was given to effectuate that purpose. That purpose is ulterior to the purpose for which the PAN could properly have been given.

I find that absent the purpose to provide the open space and green parkland, the PAN would not have been given and the acquisition would not have proceeded.

p.83

There appears to have been no suggestion at this time that the provision of open space and green parkland, comprehending the Property or at all, was part of RMS' purpose. To the contrary, designs in existence at this time contemplated the destruction of the Property for tunnel portals.

The parkland and public open space idea appears to have made its debut in mid-2016. The idea was clearly seen as pivotal, so much so that it warranted a dedicated Government announcement with an artist's impression on 21 July 2016. The announcement referred to the space as 'park ready.'

It is not in dispute that the green space in the artist's impression covers the Property.

Manifestly, construction, and its implications, of the Rozelle Interchange is a matter of public importance and sensitivity. So too is the provision of public open space and green parkland, especially in the context of a significant infrastructure project which may be thought to be controversial.

pp.84-91

On 26 July 2016, the Cabinet approved a tunnel re-alignment and revised Rozelle Interchange that would deliver around 10 hectares in a park ready solution over the top of the road infrastructure at the Western half of the Rozelle site and noted that the WHT Final Business Case would include options for the provision of significant further additional public open space at the Rozelle site.

The 7 November 2016 Kanofski briefing to the Minister recognised that property acquisitions would commence before planning documents were placed on public display and before planning approval, which may increase the likelihood of adverse media articles and political representations.

The November 2016 review of environmental factors for Site Management Works, made reference to the possibility of the M4-M5 Link project not proceeding.

Design of the Rozelle Interchange had not yet even reached concept stage. It was far from certain that the Rozelle Interchange would proceed, and the form it might ultimately take and the footprint it might cover were speculative.

Yet, the Government made a public and unequivocal commitment to provide 10 hectares of open space and green parkland, in an area which included the Property.

To use the words of the erstwhile Premier of this State, this was 'a gamechanger.' The game had changed because the provision of public open space had become a driver for the design of the Rozelle Interchange and for the acquisition of the Property.

Consistently with this, Kanofski's briefing to the Ministers on 22 September 2017 states that the final design of the 'New Rozelle Park must include 10 hectares of green space as agreed by Cabinet and outlined in the M4-M5 Environmental Impact Statement.' It also states that if 'the preferred design for the WestConnex M4-M5 Link works does not result in the final motorway and utilities footprint being within the agreed 'permanent land take area', Roads and Maritime will work (sic) include a priced option in the final contract prior to execution, that provides for utilities to be relocated outside the development area as part of the works by the Stage 3B contractor.' Kanofski was not called.

Critically, if the Property turned out not to be required as a construction site, it was still going to be available to meet the public commitment.

Thus, RMS contemplated that the Property might not be in the final motorway and utilities footprint because of the necessity to use it to provide open space, for which purpose it would nevertheless be acquired.

It is not necessary to divine whether the Rozelle Interchange will one day proceed. Despite its complexity and the many imponderables, including finding someone to design and construct it and finding someone to buy the Government's 51% stake of SMC to fund it, Powrie's view was that it will.

What is significant is that RMS intends to acquire the Property even if the Rozelle Interchange does not go ahead, and thus has a purpose to acquire the land even if the Roads Act is to play no role.

By contrast, the acquisition will nevertheless proceed even if any purpose under the Roads Act becomes incapable of realisation. An acquisition in those circumstances would be to provide open space and green parkland or to develop it under the Bays Precinct Transformation Plan. These are not purposes of the Roads Act.

Supportive of the conclusion that the parkland had become a driver is the following evidence given by Jones:

(T 274.43-275.20) Q. The first time you provided an underlying design to achieve this pretty picture was five months later, correct? **A.** So I understand the point here. No. We produced - we've had a number of designs, which I'm sure you've seen through here, in terms of the underlying road infrastructure. They all result in a surface treatment. This surface treatment is as applicable to that design at that point in time as it is to the design six months later, as it will be in a year's time as Roads and Maritime Services go through the solution. It's about how you leave a site when you've completed the road

Q. I don't mean to be offensive and I'm not aware of any designs before 21 July 2016 which show a design solution to achieve this outcome? **A.** This was the first time we fully articulated the park solution as what would be left on the surface. **Q.** But what I'm trying to get from you is there is no (sic) - are you aware of any drawings that achieve this outcome at the time it was announced? **A.** This is the first time the park solution was demonstrated through. **Q.** The question is a simple one. Are you aware of any design diagrams that achieve this outcome at the time this photo montage was published? **A.** Any of the underlying engineering we produced all the way through this project will be capable of supporting this solution. **HIS HONOUR Q.** That's not an answer to the question. I direct you to answer it. **A.** There was no specific design for the park until this date. **(T 276.39-277.30) Q.** So what happened is this, I put to you. Amongst a variety of possibilities of ongoing consideration in respect of designs you produced, your team produced this picture, correct? **A.** Mm-hmm. **Q.** You gave it to RMS, correct? **A.** Yes. **Q.** RMS then released it to the public, correct? **A.** Yes. **Q.** RMS then came to you and said, "Achieve this," correct? **A.** Certainly once you've been through that process of design and release, that became part of our project scope, yes. **Q.** The answer to my question is a simple yes, isn't it, that is, the RMS releases the pretty pictures to the public, then said to you, "Design us something that fits this pretty picture," correct? **A.** So to answer the question as directly as I can, certainly the park became part of our scope of work, what we were required to do. **Q.** I'm sorry, you're obviously a clever man, much more subtle than I, but you agree, don't you, as a simple proposition, the RMS released this document to the public and then came to you and said, "Achieve this outcome," is that right? **A.** Yes, you can characterise it that way. **Q.** Thank you. From that point in time, you understood this client was insistent on the achievement of a very large area of open space in the inner west of Sydney, correct? **A.** Yes, absolutely.

Q. You understood that this client had an aspiration to achieve an outcome of this project whereby the inner west of Sydney would be blessed with at least 10 hectares of open space, correct? **A.** That's a result of the project. **Q.** I put it to you RMS didn't care whether it was the result of the project or not. **OBJECTION (CLARKE). QUESTION REJECTED PRITCHARD:** Fair enough, as long as I've put it to someone on his side. **320**

Much later, on 3 July 2017, Kanofski briefed the respective Ministers for Westconnex and Roads, Maritime and Freight in connection with the possibility of leasing the property, rejecting it. His briefing was that the M4-M5 Link infrastructure would occupy most of the sub-surface of land, albeit that landscaping would be provided to mitigate environmental impacts. Somewhat contradictorily, he went on to say that the final

infrastructure would need to be determined by the successful design and construct tenderer. **Desane did not have the opportunity to cross-examine Kanofski.**

Unsurprisingly, or perhaps inevitably, shortly thereafter, the necessity (or desirability) of moving the permanent and temporary footprints of WHT emerged. After all, the presence of tunnel stubs on the Property would not – to say the least – have sat easily with the provision of open space.

A Rozelle Interchange reference design, at this time, showed the surface of the Property as being impacted to the extent of a sliver identified as a utilities corridor (this was also the extent of the direct impact in the AECOM designs of 13 April 2017). A proposed WHT site plan also produced did not indicate impact on the Property in any way.

Also supportive of the conclusion that the parkland provision had become a driver for the acquisition of the Property are the email exchanges amongst Jones, Kennedy and Powrie in June 2017, in the context of Desane's request to seek an alternative solution to full scale acquisition, which reflect the fact that without the Property there would be difficulty in meeting the 10 hectare commitment.

In my view, it is improbable that RMS would have sought to acquire the entirety of the Property (which it currently values at over \$20 million) where only a sliver of it would be used, but for its open space and green parkland purpose. RMS has throughout known that Desane wished to negotiate a solution which obviated the necessity for the permanent taking of the whole of the Property.

All of the above considerations drive to the conclusion that the PAN would be invalid as having been given for an improper purpose.

APPENDIX 4

Aerial of the Desane property at 68-72 Lilyfield Road Rozelle

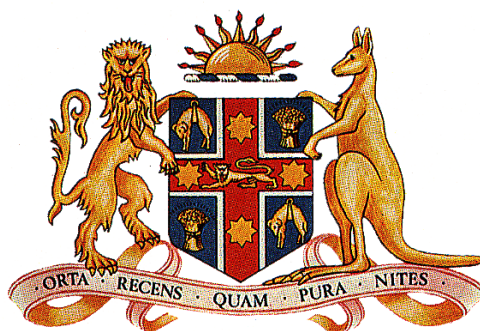


Image of the Master Plan Rezoning Proposal for 68-72 Lilyfield Road Rozelle



APPENDIX 5

Gazette Number 31 & Gazette Number 49



Government Gazette

of the State of

New South Wales

Number 31

Thursday, 15 March 2018

The New South Wales Government Gazette is the permanent public record of official NSW Government notices. It also contains local council, private and other notices.

From 1 January 2018, each notice in the Government Gazette has a unique identifier that appears in square brackets at the end of the notice and that can be used as a reference for that notice (for example, [n2018-14]).

The Gazette is compiled by the Parliamentary Counsel's Office and published on the NSW legislation website (www.legislation.nsw.gov.au) under the authority of the NSW Government. The website contains a permanent archive of past Gazettes.

To submit a notice for gazettal – see Gazette Information.

GOVERNMENT NOTICES

Land Acquisition (Just Terms Compensation) Act 1991

Approved Forms

The forms in the Schedule have been approved for the following purposes under the *Land Acquisition (Just Terms Compensation) Act 1991*:

Form 1 – Proposed Acquisition Notice (Section 11)

Form 2 – Claim for Compensation (Section 39)

All previous approved Proposed Acquisition Notice forms and Claim for Compensation forms are revoked.

Victor Dominello
Minister for Finance, Services and Property.

SCHEDULE

Form 1

[What follows after these parentheses is Form 1 and is for use from date of appearance in Gazette until superseded. Footnotes are for assistance of the Authority when using the form and are not part of the form and words may need to be varied in any particular case as indicated by a footnote. Authorities are encouraged to provide information in accompanying letters and assistance to landowners in dealing with questions. Authorities are also encouraged to make reasonable attempts to provide information to landowners during the six month period referred to in s 10A(2).]

LAND ACQUISITION (JUST TERMS COMPENSATION) ACT, 1991

SECTION 11

Proposed Acquisition Notice

This is a proposed acquisition notice for the purposes of s.11 of the *Land Acquisition (Just Terms Compensation) Act 1991* ("the Act"), which provides you written notice of the intention of the Authority specified below to acquire land by compulsory process.

TO: (insert names and addresses of owners of land as defined in section 4).

1. The [insert name of authority] ("the Authority") proposes to acquire the whole¹ of your interest in the land located at [insert street address or other convenient description].
2. A description sufficient to identify the land which it is proposed to be acquired including title details of the land is in the schedule which follows.
3. The period within which the land will be compulsorily acquired is as soon as practicable after 90² days from the date of this notice (see ss 13(1) and 14(1)).
4. If you wish to claim compensation for the acquisition you are requested to lodge with the Authority a claim for compensation. If you wish to lodge a claim for compensation you must lodge it before [insert a date more than 60 days after the date of this notice (see s.15(e))].

¹ [if not whole of the interest amend as appropriate]

² [if a shorter period has been determined under s.13(2) amend as appropriate]

5. A claim for compensation, should you wish to make one, must be in the form which accompanies this notice and is entitled Claim for Compensation.³
6. Compulsory acquisition of land is a significant matter and you may wish to consult a lawyer and consider the terms of the Act as to your rights (a link to a website which has the Act is www.legislation.nsw.gov.au). You may wish to contact the Authority for further information and you may find that there is further information publicly available on the website of the Authority or at <http://www.propertyacquisition.nsw.gov.au/>.

SCHEDULE REFERRED TO IN PARAGRAPH 2

[particulars of title]
[full description of land]
[and part to be acquired]

[Authority to sign and complete form in the manner it ordinarily signs and completes documents]

³ [make sure that a blank Claim for Compensation physically accompanies this notice and is in the current form pursuant to s.39(2)]

Form 2

LAND ACQUISITION (JUST TERMS COMPENSATION) ACT 1991

SECTION 39

Claim for Compensation

TO: (insert authority name and address) }

FROM: (name and address of claimant) } To be
} completed

1. Description of land } by the
a) Address } Authority
b) Title particulars }

2. What is your interest in this land?

- | | |
|------------------------------------------------|------------------------------------|
| <input type="checkbox"/> Registered Proprietor | <input type="checkbox"/> Mortgagee |
| <input type="checkbox"/> Lessor | <input type="checkbox"/> Licensee |
| <input type="checkbox"/> Lessee | <input type="checkbox"/> Other |
| <input type="checkbox"/> Residential Tenant | |

3. If you ticked box "Other" provide full details here of your interest in the land.

4. Are you aware of any other persons or corporations that may have an interest in this land?

Tick appropriate box

- ☐ YES
- ☐ NO

5. If you ticked the "YES" box in 4, provide here full details including name, address, nature and extent of interest.

6. Compensation for your interest in the land that has been compulsorily acquired will be determined by the Valuer General. You may provide here details of any matters that should be taken into account by the Valuer General when determining the amount of compensation payable to you.

You should consider each of the following compensation items and where appropriate indicate the amount claimed:

- | | |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------|
| a) the market value of the land on the date of its acquisition | \$ |
| b) any special value of the land to the person on the date of its acquisition | \$ |
| c) any loss attributable to severance | \$ |
| d) any loss attributable to disturbance | \$ |
| e) the disadvantage resulting from relocation | \$ |
| f) any increase or decrease in the value of any other land of the person at the date of acquisition which adjoins or is severed from the acquired land by reason of the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired | \$ |
| g) any other matter | \$ |
| Total compensation claimed: | \$ <u> </u> |

7. State short description of documents of title (leases, mortgages, etc.) which support your claim to your stated interest in the land.

8. Provide the following information:

a) Names and addresses of persons having custody of the above documents.

b) Where can the above documents be inspected?

c) If documents are held or in the custody of someone other than the claimant, in what capacity does that other person hold or have custody of the documents?

d) Name and address of your solicitor or agent.

Signature(s) of claimant(s)

Date

The following statutory declaration must be completed by the claimant(s):

STATUTORY DECLARATION

OATHS ACT 1900, NINTH SCHEDULE DECLARATION

NEW SOUTH WALES

Name in Full I/we,

Residence of.....

do hereby solemnly declare and affirm that the information supplied by me/us in paragraphs 1 to 8 above is correct.

And I/we make this solemn declaration, as to the matter (or matters) aforesaid, according to the law in this behalf made and subject to the punishment by law provided for any wilfully false statement in any such declaration.

TAKEN and declared at in)

[include State] this day of)

..... 20 before me)

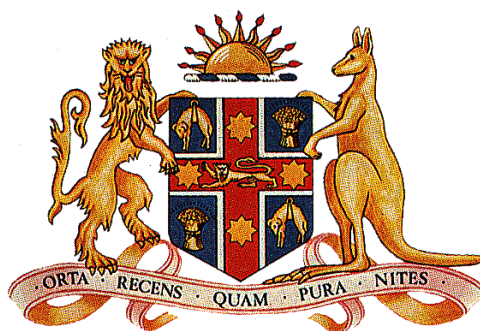
CLAIMANT(S)

.....

Qualified witness

NOTES

1. If this Notice of Claim is not returned to this Authority by [insert date] the Valuer General will determine your interest without the benefit of information you may have been able to provide.
2. The services of a solicitor, qualified valuer and/or accountant may be of assistance in providing information relating to question 6. Where appropriate claims should be supported by relevant business records.
3. No compensation will be payable to you until you have satisfactorily completed this Claim for Compensation form and returned it to [insert Authority/Department].
4. It is a criminal offence to supply false information in this Claim for Compensation.
5. A qualified witness for the purpose of declaring or affirming this declaration is a person stated in s21 of the *Oaths Act 1900* to be so qualified. These persons are the Registrar General, a Deputy Registrar General or any justice of the peace, notary public, commissioner of the court for taking affidavits, Australian legal practitioner authorised by s27 (1) of the *Oaths Act 1900* to take and receive any affidavit, or other person by law authorised to administer an oath.



Government Gazette

of the State of
New South Wales

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The New South Wales Government Gazette is the permanent public record of official NSW Government notices. It also contains local council, private and other notices.

From 1 January 2018, each notice in the Government Gazette has a unique identifier that appears in square brackets at the end of the notice and that can be used as a reference for that notice (for example, [n2018-14]).

The Gazette is compiled by the Parliamentary Counsel's Office and published on the NSW legislation website (www.legislation.nsw.gov.au) under the authority of the NSW Government. The website contains a permanent archive of past Gazettes.

To submit a notice for gazettal – see Gazette Information.

GOVERNMENT NOTICES

[What follows after these parentheses is Form 1 and is for use from its date of appearance in Gazette until superseded. Footnotes and parts in square parentheses are for assistance of the Authority when using the form and are not part of the form and words may need to be varied in any particular case as indicated by a footnote. Authorities are encouraged to provide information in accompanying letters and assistance to landowners in dealing with questions. Authorities are also encouraged to make reasonable attempts to provide information to landowners during the six month period referred to in s 10A(2). Authorities should seek legal advice in completing this form, particularly in relation to part 2 and part 3 of the schedule.]

LAND ACQUISITION (JUST TERMS COMPENSATION) ACT, 1991

SECTION 11

Proposed Acquisition Notice

This is a proposed acquisition notice for the purposes of s.11 of the *Land Acquisition (Just Terms Compensation) Act 1991* ("the Act"), which provides you written notice of the intention of the Authority specified below to acquire land by compulsory process.

TO: (insert names and addresses of owners of land as defined in section 4).

1. The [insert name of authority] ("the Authority") proposes to acquire the whole¹ of your interest in the land located at [insert street address or other convenient description].
2. A description sufficient to identify the land which is proposed to be acquired including title details of the land is in part 1 of the schedule which follows.
3. The Authority proposes to utilise the land which is proposed to be acquired for the purpose identified in part 2 of the schedule which follows.
4. The basis of the power of the Authority to acquire that land is identified in part 3 of the schedule which follows.

¹ [if not whole of the interest amend as appropriate]

5. The period within which the land will be compulsorily acquired is as soon as practicable after 90² days from the date of this notice (see ss 13(1) and 14(1)).
6. If you wish to claim compensation for the acquisition you are requested to lodge with the Authority a claim for compensation. If you wish to lodge a claim for compensation you must lodge it before [insert a date more than 60 days after the date of this notice (see s.15(e))].
7. A claim for compensation, should you wish to make one, must be in the form which accompanies this notice and is entitled Claim for Compensation.³
8. Compulsory acquisition of land is a significant matter and you may wish to consult a lawyer and consider the terms of the Act as to your rights (a link to a website which has the Act is www.legislation.nsw.gov.au). You may wish to contact the Authority for further information and you may find that there is further information publicly available on the website of the Authority or at <http://www.propertyacquisition.nsw.gov.au/>.

SCHEDULE REFERRED TO ABOVE

Part 1:

[Insert particulars of title or other basis so as to describe the land or part of land to be acquired]

Part 2:

[Insert purpose for which the land to be acquired is proposed to be used]

Part 3:

[Insert basis of the power of the Authority to acquire the land the subject of this notice, which should include an identification of the relevant statutory powers]

[Authority to sign and complete form in the manner it ordinarily signs and completes documents]

² [if a shorter period has been determined under s.13(2) amend as appropriate]

³ [make sure that a blank Claim for Compensation physically accompanies this notice and is in the current form pursuant to s.39(2)]