

**Supplementary
Submission
No 388b**

INQUIRY INTO IMPACT OF THE WESTCONNEX PROJECT

Organisation: Leichhardt Against WestCONNEX LAW

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To Fred Nile, Chair
Public Accountability Committee Inquiry into the Impact of WestConnex Project
Legislative Council of NSW Parliament

Compulsory Acquisition for the WestConnex Project

Dear Mr Nile

1. This submission relates to the Terms of Reference of the Inquiry relating to the compulsory acquisition of property for the Westconnex project (**Project**).
2. This submission is submitted by Leichhardt Against WestConnex (**LAW**), a community group formed in August 2016, representing over 1,000 Leichhardt residents opposed to the WestConnex Project. LAW is not associated with any political party.
3. Due to the sensitive content of this submission, LAW requests that the names of the co-convenors who authored this submission are not published.

Introduction

4. Issues with the NSW Government's acquisition of homes and businesses and for the WestConnex Project generally have been well-chronicled in the media, with the then Premier admitting in June 2016 that the Government has not handled the consultation and property acquisition for Westconnex 'as well as it should': [Mike Baird offers mea culpa on Westconnex consultation](#)
5. It will be argued in this submission that the negligent and poor management of the Project by RMS has worsened the outcome for those whose home or businesses have been acquired. This same poor management has also contributed to cost blowouts for acquisitions and - unbelievably - the acquisition of a number of homes that will never be used for the Project. This raises legal issues as to whether the Government is acting outside its powers in its acquisitions for major projects.
6. The emotional and financial toll of losing one's home or business means that it is critical that the Government's processes are fair, transparent and defensible. Unfair treatment of dispossessed landowners also increases cost, leading to protracted negotiations, and in some cases, legal proceedings in the Land and Environment Court. The public as taxpayer and the individual whose home or business is taken, has the right to expect that acquisitions are carried out in a responsible manner that seeks to minimise the cost exposure of the taxpayer, while treating the those impacted fairly.

Russell Review

7. It is important to bear in mind that the State Government had ample warning and time to implement reasonable reforms to the compulsory acquisition process, having been alerted to issues as a result of the [Review of the Land Acquisition \(Just Terms Compensation\) Act 1991](#) ('Russell Review')¹. Although drafted in February 2014, for two years the Government refused to publicly release the Russell Review until forced to do so due to public pressure²:
 - [Damning report on NSW Government housing acquisitions marked 'never to be released', documents reveal \(Daily Telegraph\)](#)
 - [Landmark review of compulsory acquisition kept secret by Baird government \(SMH\)](#)
8. The Russell Review recommends amending the *Land Acquisition (Just Terms Compensation) Act 1991 (Just Terms Act)* to confer on landholders greater negotiating rights; increasing the accountability of the acquiring agency; and introducing a more affordable appeal process. The NSW Government response to the Russell Review resulted in some changes to the process, as set out in its Response: [Review of the NSW Land Acquisition \(Just Terms\) Compensation Act 1991 and Housing Acquisition Review](#)
9. However, it is submitted that the compulsory acquisition process remains deeply flawed and that the Government proceeded with hundreds of acquisitions for WestConnex without properly reforming the process. Of particular note is the process by which the Government engages the same pool of valuers to assign 'market value' to properties, resulting in an increased number of cases landing in the Land and Environment Court: [Warning of 'unfair' process unheeded as government forges ahead with property resumptions - SMH - 10 January 2016](#)

Poor Project planning

10. The poor project planning by the Roads and Maritime Service (**RMS**) of WestConnex and the behaviour of the unaccountable private sector delivery agent, Sydney Motorway Corporation (**SMC**), is submitted to have led to an even worse outcome for those impacted by an already unfair system of compulsory acquisition.
11. The hallmark of WestConnex has been bad planning, with constant changes to the route and a lack of transparency in its processes. The cancelling of the Camperdown interchange and the last minute decision to add a tunnel along Victoria Road (resulting in 27 more acquisitions) is

¹ A Parliamentary Committee chaired by Liberal MP Matt Kean issued the warning as part of a report calling for an overhaul of the compulsory acquisition and land valuation system in early 2013.

² Media reports state that the then Premier Mr Baird was advised by his Property Minister Dominic Perrottet to keep the Russell Review secret, because the report's recommendations on how to create a fairer process could lead to delays in a raft of major infrastructure projects such as WestConnex:

evidence of the flawed and seemingly unplanned manner in which this Project has been rolled out. As we will discuss, there is also a clear disconnect between the project proponent, RMS and the delivery body, SMC, which is also evident throughout this process. At the Australian Financial Review's National Infrastructure Summit, WestConnex was discussed as an example of 'poor planning processes': [Infrastructure Summit 2016: Westconnex under fire for poor process](#). There are many similar commentaries in the media, many by independent experts, extremely critical of the delivery of this project.

Cost Blowout

12. It is submitted that the cost blow-out with this Project in respect to compulsory acquisitions is directly attributable to the maladministration of this Project by the Government. The Government's poor handling of the Westconnex Project, with a number of material changes in the tollway route and design, along with delays in releasing detailed plans, has increased the exposure of the taxpayer with respect to cost of acquisitions. As reported by the SMH, the financial statements of the RMS disclose that since 2012 the value of court cases (expressed as a potential liability in the agency's financial statements) has increased from \$52 million to almost \$658.9 million in 2017. Current cost statistics are not known. Media reports suggest that the State Government payout for 318 properties) compulsorily acquired (with a further 24% of properties to be acquired) for Westconnex could hit \$1 billion: [Daily Telegraph - 13 September 2016](#).
13. There is also lack of transparency as to the cost of the compulsory acquisitions in terms of how such cost is accounted for on the overall project cost which, despite material changes to the project and documented cost blow-outs, continues to be publicly stated by the Government as approximately \$16.8 billion.
14. It also appears that the Government has not taken into account potential risk in acquiring development sites, another cause of cost blow-out. In October 2017, for example, the SMH reported that the Government's potential legal bill arising from compulsory acquisitions had increased to more than \$650 million, as a result of developer rezoning submissions: [Legal bill for forced property purchases jumps to more than \\$650 million](#). Desane and Gillespie, businesses on Lilyfield Road Rozelle, both of which are due to be acquired for the construction of the M4-M5 Link, submitted development proposal and rezoning applications **after** the Project was announced but before the release of the detailed plans. In the case of Desane this increased the amount payable from approximately \$20 million up to a purported amount of \$200 million.
15. In other instances the Government has acted in a manner that exposed the taxpayer to drastically increased compensation. In one notable case, the RMS wrote to the leaseholder (Tdrahciel Pty Ltd) in August 2016 advising that the site on Government-owned land at Darley Road Leichhardt (which had been leased and left derelict and unoccupied for many years) was required for a WestConnex tunnelling site. That same month commercial negotiations between the leaseholder and the RMS to acquire the site commenced. Approximately two weeks after

this meeting, dozens of workers turned up at the site and undertook a major renovation reported to be between \$5-7 million in value. A new business, a Dan Murphys bottle shop (one of the largest in Australia) opened up just in time for the bumper Christmas trade.

16. LAW warned RMS at the time much higher compensation would be payable if they did not advise the leaseholders that any material improvements or the opening of an entirely new business, would be at the leaseholder's own risk. This call was not heeded and the leaseholder publicly stated that likely compensation was in the vicinity of \$50 million. The amount of compensation for a lease of a derelict Government-owned site without a business would have been minimal. The behaviour of the Government drastically increased the taxpayer's exposure to include business extinguishment and/or business relocation costs as well as loss of profits. This story was the subject of several media reports, including the SMH, Daily Telegraph and four reports on Channel 10 News:

[SMH: The mystery of the bottle-shop, the WestConnex tunnel, and the \\$50m bill](#)

[Daily Telegraph: Westconnex accused of favouring new bottle shop over a high school for tunnel site to avoid paying massive compensation bill](#)

Acquisitions made without legal authority

17. It is further submitted that the RMS has, as part of the Westconnex Project (and likely in the case of other infrastructure projects) acquired properties in a manner that is outside of its statutory powers. The most high profile and current example of this possible misuse of statutory powers is the proposed acquisition of the Desane site in Rozelle: [Desane Properties Pty Limited v State of New South Wales](#) (**Desane Decision**).
18. It has been reported that the Government's decision to attempt to acquire the property from Desane without proper legal authority may delay acquisitions for other major infrastructure projects, noting that there are 16 major government authorities across 5 different departments who are authorised to acquire land for a public purpose (such as a new road or rail line): [Major delay risks for hospital, transport projects due to legal tussle](#)
19. While the NSW Government has announced that it will appeal the Desane Decision, the legal position and findings, as disclosed in the Supreme Court decision are current law. In the Desane Decision, the Court held that the Proposed Acquisition Notice (**PAN**) issued by the RMS was invalid as it did not properly identify the 'public purpose' for which the property was to be acquired. The Court held³ that a person whose property was to be acquired '*has a right in point of justice to know precisely for what it was needed as a public purpose*'. The Court concluded that the PAN was of '*no statutory effect for failure to state the public purpose for which the property was to be acquired*' (Desane Decision at 261).

³ Citing the decision of *Jones v The Commonwealth of Australia* [No 2](1965) 112 CLR 206

20. The Court went on to consider whether the PAN was invalid for the reason that it was given for a purpose ‘beyond and extraneous’ to the power relied on by the RMS to give it. Whether a power is exercised for an improper purpose is a question of fact and is not to be ‘lightly inferred’ (Desane Decision at 289). In finding for Desane, the court held that ‘RMS’ intentions are ‘*ill defined. They may never be realised.*’ It found that the purpose of acquiring the property to provide 10 hectares of open space and green parkland ‘*is ulterior to the purpose for which the PAN could properly be given.*’ (Desane Decision at 294). The Court further rejected as ‘unsustainable’ the contention by RMS that the PAN was valid because the property adjoins or lies in the vicinity of other land proposed to be acquired (Desane Decision at 33).

Significance of the Desane decision

21. The Desane Decision is instructive on a number of levels. Firstly, it demonstrates the poorly planned nature of the Project, with constantly changing plans (some of which are material in nature); it shows the high-handed manner in which the RMS will take a property without really knowing what it will be used for and if it is even required for the relevant project. It is clear from the Desane Decision that the RMS did not know the purpose for which the land would be acquired with any certainty at the time they issued the PAN (and for some time afterwards) and that there was a chance that the entire project at that site would not even proceed.
22. The Desane Decision also discloses a failure to provide proper and accurate information (or information at all) to affected parties.
23. Significantly, the Desane Decision is evidence that the RMS has issued PANs in circumstances where the the Government has not finalised its plans, with no designs even drafted or released for the proposed project site. The decision to issue PANs prior to the finalisation of designs creates the very real risk that properties will be acquired that will not be needed for the tollway, or will not have a sufficient nexus to the project so as to be within power. In this regard it is noted that several homes acquired in Walker Avenue Haberfield have subsequently turned out to be excess to needs. It is an inexcusable breach of public trust to forcibly acquire a home or business for an improper purpose and the Government needs to be held to account for this negligent behaviour.
24. The Committee should ask the RMS if it has conducted an audit of the properties that it has acquired (or announced an intention to do so) where the Project is still under early development and in circumstances where major aspects of the project are not decided.
25. It is also clear from the Desane decision that the RMS considers that it is acting appropriately when it issues a PAN in circumstances where the project is not yet legally approved (the M4-M5 Link was not approved until 27 April 2018, nearly two years after the commencement of the Desane acquisition).

26. In the Desane Decision the Court found that the RMS is required to know the purpose of the acquisition before issuing the PAN and to clearly communicate the purpose of the acquisition to the affected party. Aside from the financial impact of acquiring properties without a proper purpose, it is clear from the evidence in the Desane decision, that the affected parties were provided with misleading, inaccurate information over an extended period of time. The high-handed manner in which the Government viewed its powers is patent from the findings. It is submitted that this attitude carries across the treatment by the RMS of all affected applicants.
27. In practical terms this means that it is likely that some homeowners and businesses have been dispossessed and paid compensation in circumstances where this simply should not have occurred. The reason we object to the issuing of PANs at such an early stage as it increases the very real risk that properties will be acquired which ultimately will not be needed. The fact that government agencies such as the RMS have acquired properties at too early a stage in the project, that then turn out not to be required is patent from the Russell Review included a recommendation for affected owners to have the opportunity to purchase back their acquired property.

Acquisition before approval

28. Since the inception of the WestConnex Project, homes and business have been acquired before the relevant Stage of WestConnex has been approved in accordance with the requirements of the *Environmental Planning and Assessment Act 1979 (EPA Act)*.
29. Of particular note is the announced planned acquisition of 27 homes in Rozelle as part of the \$7.2 billion third stage of WestConnex (M4-M5 Link). See media reports at the time :[New tunnel under Victoria Road at no extra cost, government says](#) The plans to acquire these homes were announced in The NSW Premier and the Minister for Roads publicly announced the inclusion of the Iron Cove Link to the project on 21 July 2016 (without any prior community consultation). Remarkably the Government also claimed that; '*The new tunnel is a wonderful addition...it won't cost a cent more*' (then Minister Duncan Gay). The Project approval for Stage 3 was not given until nearly two years after this announcement, in April 2018.
30. Again, as in the case of Desane, the planned acquisitions were announced prior to publication of detailed designs of the Project, let alone approvals. Although we are not privy to the exact dates the PANs were issued, this occurred well before the approval of the EIS for the M4-M5 Link.

Questions

31. The Committee is requested to call in the RMS officials responsible for overseeing the acquisition process for WestConnex to provide:
 - *Details of the homes and businesses that were acquired before EIS approval of the Project (for each Stage);*

- *How many homes and businesses that have been acquired have turned out to be excess to needs. And of those, in what % of cases were affected owners were offered the opportunity to buy-back these properties and the outcome of that process.*
 - *Detail of audits and checks that the Government has undertaken with respect to the 400+ plus properties and businesses acquired for the Project to ensure that they were undertaken in accordance with the law (including as enunciated in the Desane Decision).*
32. The RMS needs to be held publicly accountable for its actions and to report to the Committee on the taxpayer exposure and financial toll to individuals that it has caused through its handling of compulsory acquisitions for the Westconnex Project.