

**Submission  
No 50**

## **INQUIRY INTO ACQUISITION OF LAND IN RELATION TO MAJOR TRANSPORT PROJECTS**

**Organisation:** RAW (Rozelle Against WestConnex)

**Date Received:** 1 July 2021

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<http://rozelleagainstwestconnex.org>

## Submission by RAW (Rozelle Against WestConnex)

to the

### **INQUIRY INTO THE ACQUISITION OF LAND IN RELATION TO MAJOR TRANSPORT PROJECTS.**

#### **LEGISLATIVE COUNCIL PORTFOLIO COMMITTEE NO. 6 – TRANSPORT AND CUSTOMER SERVICE. TERMS OF REFERENCE.**

1. That Portfolio Committee No. 6 - Transport and Customer Service inquire into and report on the acquisition of land by Transport for New South Wales and related agencies in relation to major transport projects, with particular reference to:

(a) The response of agencies to the Russell and Pratt Reviews into the Land Acquisition (Just Terms Compensation) Act 1991,

(b) The conduct of agencies in acquiring:

- (i) land for the WestConnex Project,
- (ii) land for metropolitan rail projects,
- (iii) land for any project related to the Western Sydney Airport,
- (iv) land for the Parramatta Light Rail Projects (Stages One & Two),
- (iv) land zoned as commercial land acquired between 2015 and 2020,

- (v) land for the North Wilton estate acquired by Landcom,
- (vi) any other specific land acquisitions that may give rise to community concerns about current government process

(c) How government agencies identify land for acquisition and the extent to which the price of the land and the identity of landowners are taken into account when determining the route and sites for such projects,

(d) How government agencies conduct direct negotiations with landholders in relation to purchasing land/properties prior to, or in parallel with, the compulsory acquisition process, and the extent to which such process is fair, unbiased and equitable,

(e) The interaction of the planning, infrastructure and transport planning systems of government to support best practice outcomes for the NSW community,

(f) Whether government agencies are adequately protecting the public against 'land-banking' and other speculative practices undertaken by persons or interests seeking to profit from future transport projects and rezoning decisions,

(g) Whether, and what legislative or other measures should be taken by the government to capture the uplift in land/property value created as a result of such transport projects,

(h) The conduct of agencies and government in relation to the determination of the route of the M9 (Outer Sydney Orbital), and

(i) Any other related matters.

## **Committee Membership:**

**Ms Abigail Boyd** MLC The Greens. Chair

**Hon Mark Banasiak** MLC Shooters, Fishers and Farmers Party. Deputy Chair

**Hon Scott Farlow** MLC Liberal Party

**Hon John Graham** MLC Australian Labor Party

**Hon Mark Latham** MLC\* Pauline Hanson's One Nation

**Hon Shayne Mallard** MLC Liberal Party

**Hon Taylor Martin** MLC \*\* Liberal Party

**Hon Daniel Mookhey** MLC Australian Labor Party\*

\*The Hon Mark Latham MLC is a participating member from 11 March 2020 for the duration of the inquiry.

\*\* The Hon Taylor Martin MLC substituted for Hon Sam Faraway MLC from 19 April 2021 for the duration of the inquiry.

## Introduction.

**RAW** thanks the committee for the opportunity to make a submission and it is hoped that the findings of the committee will reflect the wishes of the landowners of this country who have had the ownership of their land negated by the use of the SSI legislation.

It is universally held that land is owned from the boundary of the plot to the centre of the earth, but *not so* here in some Australian States. With the simple stroke of a SSI pen, landowner's rights are vanquished.

It is particularly telling that even in a small South East Asian country such as Malaysia, the rights of individual landowners are respected. See the following documentary for more detail.

<https://www.youtube.com/watch?v=QWjrM7kOVNU>

Major infrastructure requiring substratum acquisition in Kuala Lumpur and in many other parts of the world is only used as a last resort and the landowner is invariably compensated accordingly.

This recent multipurpose road and flood mitigation tunnel was constructed in Kuala Lumpur SOLELY under Government owned land, so as to avoid both disruption to private landowners during construction, and the subsequent use of the tunnel; and also so as to avoid compromising the value of the private land, as well as having to pay compensation to the affected landowners.

This approach resulted in a circuitous, longer and more expensive route, but the rights of its citizens were safeguarded.

In this respect we lag significantly behind what many would see as a third world country.

**RAW** contends that the NSW Government has failed its citizens in relation to items: 1 b (i), 1 b (iv), 1 (d), 1 (g), 1 (e), 1 (f), 1 (g) and 1 (i) in terms of;

- The construction of the controversial WestConnex project – a multi-billion dollar 33 kilometre road and tunnel project in Sydney that is currently under construction, is a case in point (cf. Haughton and McManus2019).
- The City of Sydney (2017) estimates that the total cost will be around \$45.6 billion, not the \$16.8 billion quoted. As the business case is commercial in confidence the true cost may never be known.
- The direct Point A' to 'Point B' route often contains houses, business premises, open space, stands of trees, people and cars. Underground projects can displace, appropriate, pollute and disrupt just as surface projects do.

- More than 400 homes in Sydney's inner-west were acquired and destroyed to make way for the tunnel component of the project (Barwell 2017),
- House prices have dramatically fallen in suburbs directly affected (Stapleton 2017).
- Residents who complained of noise pollution from the project were sent earplugs by the WestConnex developer as a form of 'noise mitigation' (Browne 2017).
- The project also includes more than 50 unfiltered ventilation stacks to extract car fumes from the tunnel, many of which will be close to schools, pre-schools, playgrounds and homes, which has sparked residential health concerns (Kiejda 2017).
- The location for the dumping of the 3.2 million cubic metres of spoil (material excavated to make the tunnel), has also caused controversy, most notably with plans to move 9000 tonnes per day of spoil from the tunnel to Port Kembla, 80 kilometres south of Sydney, a move that has sparked anti-pollution campaigns in the area (Coote 2018).
- The sub stratum acquisitions by the State and then the privatisation of the underground by selling the projects to private investors, is how the land compulsorily acquired under SSI, is dealt with in NSW.
- Land owning citizen's rights essentially ignored.
- The recognition of impacts only superficially explored.
- The diminution of land value has been completely ignored.
- The loss of market value of a property due to the tunnel(s) beneath it.
- The lack of payment of ANY, let alone adequate compensation for sub stratum acquisition by a private company, under the guise of SSI.
- The methods used to issue compulsory acquisition notices (often two security guards accompanying a person in a suit who issues the compulsory acquisition notice).
- The take it or leave it offer of payment of approximately 60% of the current market value of a property.
- The issuing of an EIS *prior* to the design of the project, which is a cart before the horse approach and an obvious denial of natural justice.
- The public consultation process that is designed to divide and conquer and proved to be simply a box ticking exercise, with no impact on the EIS design.

- Community information sessions staffed by marketing people who are unable to answer specific questions.
- The failure to hold public meetings.
- The unwillingness to even consider alternative solutions.
- The refusal of contractors to attend community organised public meetings unless resident spokespersons are denied a position at the table,
- The denial of genuine and informed members of resident's groups to attend the compulsory community/contractor meetings, even though this remains a statutory requirement.

## Who really owns the underground?

*Cuius est solum, eius est usque ad coelum et ad inferos.*

Between 2015 and 2017, hundreds of Sydney residents received letters from the New South Wales (NSW) State Government, informing them that the 'sub-surface property' below their homes was going to be compulsorily acquired without compensation to make way for the WestConnex project (Haylen 2015; Barwell 2017).

The NSW Government can legally do this, thanks to special provisions in the Land Acquisition (Just Terms Compensation) Act of 1991 (Mangioni 2008).

While initial estimations said that the WestConnex tunnels would be between 20 and 30 metres beneath properties, an updated map in 2019 showed that the tunnels would be just 12 metres under some properties (Gorrey2019).

In reality in parts of Lilyfield the tunnels are just 6 metres below some properties.

Jo Haylen, the local state MP for many of these Ashfield residents, condemned these acquisitions, complaining that *"in other states, homeowners are compensated for the acquisition of their land, which they are deemed to own right to the core of the earth. The Just Terms Compensation Act leaves NSW land-owners without the same rights as other Australians"*. (Haylen 2015).

Clearly the Just Terms Compensation Act is a bitter and ironic misnomer.

As implied in this scenario, in particular with the state MP's claim of owning '*right to the core of the earth*', Australian subterranean common laws, like many of those around the world, are crafted in tension with the Latin maxim *cuius est solum, eius est usque ad coelum et ad inferos* ('*whoever owns the soil owns also up to the heavens and down to the centre of the earth*'). (Gunn et al. 1997).

However, the emerging subterranean ownership regimes in the wake of this legalistic wrangling varies greatly between, and within, countries.

In New South Wales, the government has made a special provision in the Land Acquisition Act of 1991 that allows for the compensation-free acquisition of easements or rights for tunnels under properties deemed to be State Significant Infrastructure. No specific depths are articulated in the Act providing the government avoids damaging the property, or disturbing the surface soil.

Queensland is unique in that it operates with horizontal strata and therefore makes volumetric acquisitions, usually with compensation, based on the Acquisition of Land Act 1967, when it requires subsurface land for underground urban projects (Gunn et al. 1997).

## **Who is entitled to subterranean access?**

In most cities, gaining access to much of the urban underground space is highly restricted or regulated through a range of fortifications and forms of surveillance (Garrett 2010).

There is also a political economy of access, most acutely demonstrated with the development of tunnels for vehicular transport. Sydney's WestConnex project is emblematic of this. To gain access to the tunnel, a toll needs to be paid (and a registered vehicle owned).

And, although the road system was developed using public monies, 51% of the Westconnex road system was sold to a private sector consortium for AU\$9.3 billion dollars, significantly short of the cost of the project, reported to be AU\$45 billion when the project is completed.

The foreign owned private consortium will then be able to draw revenue from tolls of the WestConnex road and tunnels for another 40 or more years.

Christopher Standen, a transport analyst, described it as the *'biggest waste of public funds for corporate gain in Australian history'*, noting that the poorer motorist would be economically excluded from its regular use, while the *'ultimate beneficiary will be a corporation that pays no company tax and employs very few people'* (Standen 2018).

The story of WestConnex, thus, in short, is one of a State government using public funds and state laws to acquire surface properties and the underground to develop an underground road tunnel using public funds that is then sold to a private company at a fractional cost of the project, so that they can put a toll on the road and extract profits from motorists.

Access is governed by the profit imperatives of a private sector venture. (Garrett, Melo Zurita, and Iveson 2020)

Legacy et al. (2018) note that WestConnex' s construction is illustrative of how the outsourcing of planning to private entities has implications for how politics and participatory

democracy function in an urban environment. There are a limited few who have access to the planning, designing and ownership of these forms of underground development.

Broader public participation is largely limited to paying a toll to use the tunnel: their role is that of a consumer, not the one of a citizen. Restrictions on access also challenge the notion of *sub terra nullius* – they confirm the fullness of meanings, beings and experiences. In the city, such restrictions trigger questions of who can access, use and enjoy underground spaces.

Privatisation from the rock, soil and water to the underground malls and train stations is capitalising extracted territory. (Garrett, Melo Zurita, and Iveson 2020).

### **The politics of ‘Nothingness’**

The underground with these urban dynamics, therefore, is no longer a space where resources are located, as earlier mining speculated, but underground itself has been converted into a resource (Pereira 2015; Kearnes and Rickards 2017).

Thus, the rendering of the underground, discursively, economically and legally as *sub terra nullius* is a political project: a project in terms of how value can be extracted from claims of nothingness. (Garrett, Melo Zurita, and Iveson 2020).

This conceptualisation of sub stratum as *sub terra nullius*, is in itself controversial. To challenge this concept of nothingness, there are a number of critical questions to ask.

### **What already exists underground? Who will get dispossessed and affected by the development?**

As with other forms of subterranean exploitation, *sub terra nullius* is a political calculation that erases the materiality of the underground (Mitchell 2011) (Australian Geographer).

Like all development interventions, urban underground projects have impacts that create an uneven spatial geography of ‘winners’ and ‘losers’, impacts that can often be ignored or underestimated due to an apocryphal narrative that subterranean developments offer a means to avoid conflicts associated with surface development.

Underground urban development is volumetric, and as the example of Westconnex shows, it interacts with surface social lives in numerous ways: displacing houses, ventilation shafts, creating spoil. (Garrett, Melo Zurita, and Iveson 2020).

Because the tunnels are almost completely unlined, groundwater will leak into them continuously. This groundwater will be pumped out to a treatment plant and will be lost to the local water table. The stated design assumption is that this water loss will amount to as much as 32,000L/year for every metre of tunnel and this will continue year-in and year-out for the life of the tunnel.



Average water table draw-downs are predicted to be at least 30m in the region 250m either side of the tunnel. Salt water intrusion is also to be expected in low lying areas close to the harbour such as in Rozelle adjacent to the Rozelle Interchange. (M5East EIS, Appendix R, Chapter 6)

The creation of what amounts to huge, unlined, agricultural drains will have a devastating impact on the root systems of established trees, causing their slow death which will be accelerated during periods of drought. This will further eliminate the take up of carbon dioxide, thus diminishing the release of oxygen and increasing the release of greenhouse gases and raising the suburban temperature, hence exacerbating the impacts of climate change. Extensive damage to persons and property will inevitably result.

These impacts need to be debated and considered, and there needs to be much more public participation in the underground urban project decision-making process. Who should own the underground and how it should be acquired justly and utilised for the public good.

There has also been an increased global tendency of privatising subterranean spaces in cities (Garrett, Melo Zurita, and Iveson 2020).

This is despite public monies often being used for underground infrastructure development. Given their critical role in the liveability and function of cities, there is a strong argument to be made that underground urban space should be a public good, not a private entity (Garrett, Melo Zurita, and Iveson 2020)

And therefore critical research and thinking is needed to challenge current neoliberal trends afflicting many underground urbanism projects. Who will/could/should have access to the urban underground?

This is a key urban justice question, particularly given the aforementioned tendency of privatisation.

## **CONCLUSION**

**RAW** is in total agreement that mechanisms that allow greater public input into how underground urban spaces are shaped, imagined and used are required. (cf. Iveson2007; Low and Iveson2016)

**RAW** agrees that we need governance practices that are not subject to the logics of accumulation that unevenly distribute access based on who can pay.

By asking and engaging with these questions, urban scholarship can explore ways to move subterranean urban development away from a techno scientific tunnelling decision-making process to one that engages with the social, cultural, political and economic implications of urban infrastructural projects. (Garrett, Melo Zurita, and Iveson 2020)

**RAW** wishes to acknowledge the significant contribution made to this Parliamentary submission by the many campaigners against WestConnex and especially by Dr Maria de Lourdes Melo Zurita (2020): Challenging sub terra nullius: a critical underground urbanism project, Australian Geographer, DOI: 10.1080/00049182.2020.1723829 and the Environment and Society Group at the University of New South Wales (UNSW), Sydney.

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