HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No. S20 of 2025

BETWEEN: HUNT LEATHER PTY LTD ACN 000 745 960
First Appellant

ANCIO INVESTMENTS PTY LTD ACN 136 917 041
Second Appellant

and

TRANSPORT FOR NSW
Respondent

No. S21 of 2025

BETWEEN: HUNT LEATHER PTY LTD ABN 46 000 745 960
First Appellant

SOPHIE IRENE HUNT
Second Appellant

ANCIO INVESTMENTS PTY LTD ABN 50 319 048 217
Third Appellant

NICHOLAS ZISTI
Fourth Appellant

and

TRANSPORT FOR NSW ABN 18 804 239 602
Respondent

RESPONDENT'S SUBMISSIONS

PART I CERTIFICATION

1. These submissions, which respond to the submissions of the Appellants filed on 13 March 2025 (**AS**), are in a form suitable for publication on the internet.

PART II ISSUES

2. In addition to the matters identified at AS [2(a),(c)], the issues that arise on the appeal are:

   (a) did the Court of Appeal err in finding that the appellants failed to prove facts sufficient to demonstrate that the construction of the Sydney Light Rail (**SLR**) caused an unreasonable interference with the use and enjoyment of their land for which Transport for NSW (**TfNSW**) should be held legally responsible (cf AS [2(b)]);

   (b) was the use of land along the route of the SLR for the purposes of construction of that project common or ordinary as opposed to exceptional;

   (c) is TfNSW not liable to the appellants because any nuisance arising from the construction of the SLR was authorised by statute; and

   (d) was s 43A of the *Civil Liability Act 2002* (NSW) engaged on the facts of this case.

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

3. No s 78B notice is necessary.

PART IV FACTS

4. TfNSW is a NSW Government agency that is constituted as a corporation pursuant to s 3C of the *Transport Administration Act 1988* (NSW) (**TA Act**): AJ [1] (**CAB 424**). Under s 3E(1) of the TA Act, TfNSW has the functions set out in Sch 1 to that Act.[1] Additionally, s 104O(1) of the TA Act provides that "TfNSW may develop light rail systems, or facilitate their development by other persons".[2] TfNSW was responsible for planning and procuring the construction of the SLR: PJ [8]-[9] (**CAB 14**). TfNSW did not itself undertake any construction work: AJ [1] (**CAB 424**). The project was delivered by a private consortium (**CSY**) pursuant to a "Project Deed" and back-to-back "Design & Construct Contract" executed in December 2014: AJ [1], [10]-[11] (**CAB 424, 427**).

5. TfNSW's counter-party under the Project Deed was an entity nominated by CSY referred to as "OpCo": PJ [201] (**CAB 61**). Attached to the Project Deed was an "Initial Delivery Program" (**IDP**), which was a forecast program that identified the activities to be undertaken

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1 See in particular cl 1(a), (c), (d), (k); 3(1)(a), (c) and (2); 9(1); and 13(1) of Sch 1 to the TA Act.

2 Note that under s 104N(1) of the TA Act, "a ***light rail system*** is a system for the provision of light rail services along a route declared" as such by regulation made under s 104N(2). The route for the SLR was the subject of a declaration made on 11 September 2015: see PJ [731] (**CAB 198**) and *Transport Administration (General) Amendment (Light Rail) Regulation 2015* (NSW).

in each section of the project (referred to as "fee zones"), their order and estimated duration: AJ [15] (**CAB 428**). OpCo was required to update the program at least monthly: AJ [19] (**CAB 429**). The IDP was not contractually binding (although there was an incentive regime in the Project Deed, the IDP formed no part of it): AJ [19] (**CAB 429**).

6. The three most significant elements of the planning law scheme that regulated construction of the SLR (and within which TfNSW exercised its powers to facilitate the development of the SLR) were: (i) the assessment and approval regime in Pt 5.1 of the *Environmental Planning & Assessment Act* 1979 (NSW) (**EPA Act**),[3] which applied to "State Significant Infrastructure" (**SSI**); (ii) the mechanism by which Roads and Maritime Service (**RMS**) provided consent for the necessary works on public roads under Div 3 of Pt 9 of the ***Roads Act** 1993* (NSW); and (iii) the development agreements with local councils under which TfNSW obtained licences to enter and occupy roads and footpaths: AJ [9] (**CAB 426**).

7. Approval under the EPA Act: The SLR was declared to be "critical SSI" (for the purposes of s 115V of the EPA Act) pursuant to cl 16 and Sch 5 of the *State Environmental Planning Policy (State and Regional Development) 2011*.[4] This confirmed that no development consent was required under Pt 4 of the EPA Act: s 115ZF(1) (see also s 104P(2) of the TA Act). However, Ministerial approval of the development was required and could be made subject to conditions: see ss 115W and 115ZB of the EPA Act.

8. In June 2013, TfNSW made an application for approval of the SLR pursuant to s 115X(1) of the EPA Act. The application acknowledged that the project would have various construction impacts, including that there would be interference with local amenity (due to noise, vibration, air quality, traffic and reduced visual amenity) and disruption to access of private property and businesses: PJ [126]-[127] (**CAB 44**); **RBFM 12, 13-20**. TfNSW was required to prepare an "environmental impact statement" (**EIS**), which was publicly exhibited: **RBFM 23-313**. Chapter 6 of the EIS set out in detail the proposed nature of the construction activities (including planned construction hours): **RBFM 38-51**. In June 2014, the Secretary of the NSW Department of Planning & Environment provided an environmental assessment report for the SLR (as required by s 115ZA). This report responded to public submissions and dealt specifically with concerns about access to neighbouring properties and noise and vibrations during construction: **RBFM 336-339**.

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3 Note that the EPA Act was substantially amended by the *Environmental Planning and Assessment Amendment Act 2017* (NSW), which commenced on 1 March 2018. In addition to re-numbering the EPA Act's provisions, that legislation "implement[ed] a range of reforms to improve the environmental planning and assessment system in NSW and to re-organise, revise and simplify the provisions" of the EPA Act: see page 1 of the Explanatory Note to the Environmental Planning and Assessment Bill 2017.

4 See *Environmental Planning and Assessment Amendment (Light Rail Project) Order 2013* (NSW).

9. On 4 June 2014, the Minister of Planning granted approval for development of the SLR pursuant to s 115ZB of the EPA Act.[5] The approval was subject to conditions, including "in respect of noise and vibration and, specifically, construction noise mitigation": PJ [175] (**CAB 56**). The conditions included detailed requirements for construction activities that dealt with (inter alia) construction hours (conditions B2-B4); the preparation of impact statements and management plans for construction noise and vibration (conditions B5 and B89(b));[6] an obligation to "implement all reasonable and feasible noise mitigation measures" to achieve objective "construction noise management levels" (conditions B6-B10); vibration limits (conditions B14-B15); monitoring of construction noise and vibration levels (condition B16); property access (conditions B24-B25); parking offsets and management (conditions B29-B32); and mitigation of impacts on third party properties and businesses (conditions B83-B85 and B89(f)[7]): **RBFM 349, 358-360, 362, 364-365, 377-381**.

10. RMS Approval: The construction of the SLR was undertaken on public roads with the consent of RMS: *Roads Act*, ss 138(1) and 144C(1)-(2). Under s 139(1)(d), consent "may be granted on such conditions as [RMS] thinks fit". RMS granted consent for the SLR on 2 October 2015, subject to conditions including that: (i) the approved activities were to be carried out with skill and care consistent with best industry practice; (ii) construction was to be completed as soon as reasonably practicable; and (iii) obstruction and any inconvenience to the public was to be minimised: PJ [972]-[973] (**CAB 256-257**); **RBFM 708-709**.

11. Development agreements with local councils: By operation of s 115ZF of the EPA Act and ss 104P(2) and 104Q(2) of the TA Act, TfNSW did not require the consent of local councils to carry out the development of the SLR. However, because TfNSW did not own the roads on which the SLR was to be built, in 2013 and 2014 it entered into development agreements with local councils under which it obtained licences to enter and occupy the relevant roads and footpaths: AJ [7], [9] (**CAB 426**). Under those agreements, TfNSW agreed to design the works in accordance with requirements that aimed to minimise the impacts of construction on business operations and residential amenity: AJ [13] (**CAB 428**).

PART V ARGUMENT

INTRODUCTION

12. The central problem with the appellants' claims in this proceeding is that "they failed to prove a critical integer of their case" (AJ [97] (**CAB 454**)). They did not provide a factual

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5 The SSI approval conditions were updated six times between June 2014 and February 2017: **RBFM 349**.
6 See **RBFM 393 - 596** for the Construction Noise and Vibration Management Plan.
7 See **RBFM 597 - 680** for the Construction Business Management Plan.

basis for the Court to conclude *when* (if ever) a prima facie legitimate activity (construction of the SLR) began to give rise to an unreasonable interference with the use and enjoyment of their land. In an attempt to evade that critical failure, the appellants seek to have this Court endorse a novel approach to the tort of nuisance in which determinative significance would be given to an assessment, in the abstract, as to whether a defendant's use of land is common or ordinary. That approach is neither supported by the authorities nor sound in principle. For the reasons that follow, the appeal should be dismissed.

13. The structure of these submissions is as follows:

(a) ***First***, some short observations about the manner in which the appellants have framed their claims in this proceeding (see [14]-[24] below).

(b) ***Secondly***, TfNSW's response to the appellants' arguments under ground 1 (see [25]-[51] below) and ground 2 (see [52]-[63] below) of the notice of appeal (**NoA**).

(c) ***Thirdly***, TfNSW's arguments under the notice of contention (**NoC**), which provide additional reasons why the result arrived at by the Court of Appeal should be upheld (see [64]-[91] below).

(d) ***Fourthly***, TfNSW's response to ground 3 of the NoA, which concerns whether litigation funding costs can be recovered as damages (see [92]-[101] below).

Important features of the appellants' claims in this proceeding

14. The decisions of the Courts below and the parties' arguments in this appeal must be understood against the background of the following eight points about the nature of the appellants' claims and the forensic choices made by the parties in respect of those claims:

15. ***First***, the appellants' claim was that the construction activities necessary to construct the SLR gave rise to an actionable nuisance either *in and of themselves* or by reason of the prolonged duration for which they occurred: PJ [51] (**CAB 23**).[8] That is, there was no allegation in this proceeding: (i) that the construction methods used to build the SLR were novel or unusual (and gave rise to a substantial and unreasonable interference on that basis); or (ii) that the interference caused by construction of the SLR was greater on a day-by-day basis than could be expected for a project of this magnitude: PJ [58] (**CAB 25**).

16. ***Secondly***, TfNSW did not itself undertake the construction work. However, the appellants asserted that it should be held legally responsible for a nuisance because, by entering into the Project Deed in the circumstances that it did, TfNSW procured others to engage in the construction activities that caused the complained of interference: PJ [53], [82]; AJ [49]-[53]

[8] Third Further Amended Statement of Claim filed on 26 October 2022 (**3FASOC**) at [15] (**RBFM 971-972**).

(**CAB 24, 32, 439-440**). These circumstances included alleged shortcomings in the planning work undertaken by TfNSW and the contractual incentives included in the Project Deed.[9]

17. ***Thirdly***, notwithstanding the previous point, the appellants repeatedly stated that it was no part of their case to show: (i) negligence in the planning or procuring of the construction of the SLR; or (ii) that reasonable precautions were not taken in relation to the construction that occurred: PJ [71] [78], [91]-[92], [98]-[99], [812] (**CAB 28, 30, 36, 37-38, 220**).

18. ***Fourthly***, the appellants neither pleaded nor obtained findings that the construction activities said to have given rise to an actionable nuisance involved a failure to comply with the detailed conditions set out in the SSI approval, which are summarised at [9] above and which governed *how* construction of the SLR was to occur. The appellants *did* assert (in the context of their public nuisance claim) that TfNSW had failed to comply with the conditions attached to the RMS Approval (see [10] above): PJ [975] (**CAB 257**). However, the primary judge held that the appellants had not established "that the defendant failed to comply" with those conditions: PJ [979] (**CAB 257**).

19. ***Fifthly***, at first instance (as in this Court), the appellants' primary case was that an actionable (private) nuisance arose for the entire period that construction of the SLR caused a substantial interference (**Entire Period Claim**). The appellants claimed that the use of the light rail corridor for activities necessary for the construction of the SLR was an extraordinary use of land such that, applying the approach of Lord Leggatt JSC in ***Fearn*** *v Board of Trustees of the Tate Gallery* [2024] AC 1, there was a nuisance for the entire period: PJ [90]-[92] (**CAB 35-37**). This was referred to as "Case A".

20. The appellants did advance an alternative "Case C", which asserted that, even if the Court found that the activities at issue involved a common or ordinary use of land, the onus fell to TfNSW to show that the construction work was undertaken with reasonable precautions. However, on this alternative case the appellants: (i) accepted that "the question becomes for what duration is the continuation of such works reasonable"; and (ii) contended that the IDP should be accepted as the benchmark for what is a reasonable period: cf PJ [934] (**CAB 247**).[10] For this reason, Case C was a **Partial Period Claim**.

21. ***Sixthly***, the primary judge (i) accepted that the use of roads for the construction of a light rail was "exceptional" rather than common or ordinary (PJ [656] (**CAB 183**)); but (ii) considered that this factor was not determinative because the majority position in *Fearn* did

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9 See 3FASOC at [9]-[12F], [14B]-[15] (**RBFM 966-972**).

10 See Plaintiff's Outline in Reply dated 13 December 2022 at [46]-[48] (**RBFM 1008-1009**). See, also, Transcript, Hunt Leather Pty Ltd v Transport for NSW (12 December 2022) at 2045.39-2048.6; (13 December 2022) at 2066.44-2068.33 (**RBFM 1011-1014, 1016-1018**).

not reflect Australian law. His Honour concluded that an objective assessment of reasonableness, having regard to a range of matters, is "fundamental to the law of nuisance": PJ [651]-[652] (**CAB 182**). Having thus rejected the Entire Period Claim, the primary judge went on to uphold a variation on the Partial Period Claim because he accepted that a document prepared by the appellants' programming expert (Mr Mark Griffith), which was referred to as the "**Amended IDP**", provided "an appropriate measure for determining the point at which the interference with the land became unreasonable": PJ [936] (**CAB 248**).

22. The primary judge also: (i) rejected the evidence of the appellants' utility expert as to what TfNSW "should have done" to discover more utilities as "less than compelling" (PJ [358]-[360] (**CAB 106**)); (ii) generally accepted (at PJ [466]-[468] (**CAB 132**)) the evidence of TfNSW's utilities expert (Mr Sampson), which included that TfNSW "completed the subsurface investigation works in accordance with good industry practice" and that fully excavating the route of the SLR to investigate all unknown utilities prior to construction would have been "extremely invasive" and "quite impracticable" (PJ [432]-[435]; AJ [61], [66]-[67] (**CAB 122-123, 443-445**)); (iii) held that the "alternative delivery model" propounded by the appellants (which involved treating utilities under an early works contract) was not viable: PJ [780]-[788] (**CAB 213-214**); and (iv) found that potential counter-parties were not willing to accept a greater proportion of the contractual risk associated with delays from utilities than TfNSW had negotiated with OpCo under the Project Deed (PJ [348], [448]-[449], [754], [794], [929], [940(2)] (**CAB 127, 203, 215, 246, 249**)). Despite these findings, the primary judge concluded that TfNSW was responsible for a nuisance because it "entered into the Project Deed at a time when it did not know the extent of the utilities risk and on terms which offered little deterrence to the D&C contractor from overstaying in a fee zone": PJ [943] (**CAB 250**).

23. ***Seventhly***, in the Court of Appeal TfNSW's grounds of appeal were understandably directed at the Partial Period Claim that had been upheld by the primary judge. The Court of Appeal allowed the appeal on a factual basis, namely that (i) the appellants had not demonstrated that the Amended IDP represented what was "reasonably achievable" and (ii) in any event, what was "reasonably achievable" did not delineate the point beyond which construction became "unreasonable": AJ [84]-[97] (**CAB 451-454**). In light of the finding in (i) and those of the primary judge referred to at [22] above, the appellants have not proved that TfNSW could (let alone should) have done anything differently to reduce the period of interference.

24. ***Eighthly***, in the Court below the appellants brought a cross-appeal in respect of Case A (see **CAB 410-415**). However, at the hearing senior counsel for the appellants made submissions

on a number of occasions that were equivocal on the question of whether the appellants pressed for damages calculated on that basis.[11] For that reason, it is understandable why the Court of Appeal dealt with the appellants' arguments based on *Fearn* together with ground 5 of TfNSW's appeal (with the result that their Honours' substantive reasons for dismissing the Entire Period Claim are at AJ [118]-[121] (**CAB 461-462**)).

RESPONSE TO GROUNDS 1 AND 2 OF THE NOTICE OF APPEAL

NoA Ground 1 (AS [11]-[26]) – should the test for private nuisance be re-formulated?

25. Under ground 1 of the NoA, the appellants seek to have this Court uphold the Entire Period Claim that was advanced as Case A at trial (see [19] above). The appellants' central contention is that, for all cases in which a private nuisance is alleged, there will be an actionable nuisance where there is "a substantial interference with a plaintiff's enjoyment of land caused by a use of land by a defendant which is not common or ordinary": AS [11], [13]. In addition, they submit that, even if the defendant's use of their land is common or ordinary, it will give rise to an actionable nuisance if it causes a substantial interference and was not "conveniently done". The appellants contend that this represents the "settled" test for private nuisance, as articulated by Bramwell B in ***Bamford*** *v Turnley*:[12] AS [12].

26. As will be developed in greater detail below, the test for liability for private nuisance posited by the appellants, as they would apply it in this case, suffers from two defects:

    (a) ***First***, it makes the same error as the judgment of Lord Leggatt JSC in *Fearn* in that the appellants incorrectly suggest that liability in private nuisance can be determined by application of a "mechanistic rule" that narrows the Court's focus to the question of whether the defendant has used their land in a common or ordinary manner.[13]

    (b) ***Secondly***, it contemplates that the inquiry into whether a defendant's use of land is common or ordinary should proceed by way of an assessment in the abstract as to whether the land use is unusual or idiosyncratic (as opposed to a wider-ranging consideration of whether, having regard to all of the circumstances, the use is of a kind that produces an interference that the claimant should not have to put up with).

27. Neither of these propositions finds support in the historical case law, properly understood, or the decisions of Australian courts. Further, the second proposition is contradicted by a fair reading of the judgment of Lord Leggatt JSC in *Fearn* (on which the appellants rely) for

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11 Transcript, Transport for NSW v Hunt Leather Pty Ltd (1 July 2024) at 69.44-48; (2 July 2024) at 89.34-42, 45-47, 127.36-38; 3 July 2024 at 2.25-27 (**RBFM 1020, 1022, 1023, 1025**).

12 (1862) 3 B & S 62 at 83-84.

13 See *Fearn* [2024] AC 1 at [241] (Lord Sales JSC).

reasons that are explained below at [65]-[69] (under ground 1(a) of the NoC).

28. The true position is that the determination of whether there is an actionable nuisance has always required Courts to consider "a question of compound facts, which must be looked to to see whether or not" the defendant's activity "did or did not occasion so serious an injury as to interfere with the comfort of life and enjoyment of property".[14] The appellants' arguments to the contrary illustrate the dangers of seeking to apply the words of an historical judgment as if it were a statute.[15]

(i) Historical authorities on private nuisance

29. Private nuisance emerged in its present form in the late 19th century.[16] As part of this evolution, the Courts recognised that property-holders had no *absolute* right to enjoy their land free from any interference with its amenity.[17] As Fleming explains, "[o]ften the conflict [was] between residential land use and industrial development … [t]he eventual compromise of the latter 19th century was to seek reconciliation in the notion of 'reasonable use'".[18]

30. *Bamford* itself concerned the use of brick kilns on the defendant's land.[19] At trial, Cockburn CJ directed the jury that, following *Hole v Barlow* (1858) 4 CBNS 334, they should find for the defendant "if they thought that the spot was convenient and proper, and the burning of bricks was, under the circumstances, a reasonable use by the defendant of his own land".[20] The judgments of Williams J (with whom Erle CJ, Keating J and Wilde B agreed) and Bramwell B both held that it is not an answer to a claim that a defendant is making reasonable use of their land (assessed from their own perspective).[21]

31. The plurality explained that "the true doctrine is, that whenever, *taking all the circumstances into consideration*, including the nature and extent of the plaintiff's enjoyment before the acts complained of, the annoyance is sufficiently great to amount to a nuisance according to the ordinary rule of law, an action will lie, whatever the locality may be".[22] Critically, the plurality: (i) required consideration to be given on the facts to all the circumstances; and (ii) placed no particular onus on the defendant on any issue.

32. Bramwell B's reasoning is subtly different in that it suggests that where a defendant has

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14 *St Helen's Smelting Co v Tipping* (1865) 11 HL Cas 642 at 652 (Lord Cranworth).
15 *Fearn* [2024] AC 1 at [243] (Lord Sales JSC).
16 See JF Brenner, "Nuisance Law and the Industrial Revolution" (1974) 3(2) *JLS* 403; J McLaren, "Nuisance Law and the Industrial Revolution — Some Lessons from Social History" (1983) 3 *OJLS* 115.
17 See *Fearn* [2024] AC 1 at [122]; EW Garrett and HG Garrett, *The Law of Nuisances* (3rd ed, Butterworth & Co, 1908) at 5-6.
18 JG Fleming, *The Law of Torts* (8th ed, Law Book Co Ltd, 1992) at 418.
19 *Bamford* (1862) 3 B & S 62 at 62.
20 *Bamford* (1862) 3 B & S 62 at 65.
21 *Bamford* (1862) 3 B & S 62 at 77-78, 87-88.
22 *Bamford* (1862) 3 B & S 62 at 77 (emphasis added).

caused "a sensible diminution of the comfortable enjoyment" of the plaintiff's property there will be an actionable nuisance unless the defendant can justify or excuse their actions by showing that their activities were "conveniently done" in "the common or ordinary use and occupation of land".[23] However, it is important not to overstate the divergence between the judgments of Bramwell B and the plurality. Bramwell B did not suggest that the test for liability involved a narrow inquiry into whether the defendant's use of land is unusual in the abstract. So much is clear from his Lordship's statements that it was legitimate to consider: (i) whether the activities in question were done for a legitimate purpose (as opposed to "wantonly or maliciously"); and (ii) whether the activities in question were "conveniently done".[24] Further, the emphasis that Bramwell B placed on the need for "a rule of give and take, live and let live" demonstrates that he did not have in mind an inflexible principle that would operate without regard to all the relevant circumstances of the case.[25]

33. The decisions that followed *Bamford* did not apply a one-size-fits-all test for nuisance focussed only on the question of whether the defendant's use of their land was common or ordinary. Courts continued to emphasise the need for a careful inquiry into all of the circumstances in which the alleged nuisance was said to have arisen. For example, in *Sturges v Bridgman*, Thesiger LJ said that "[w]hether anything is a nuisance or not, is a question to be determined not merely by an abstract consideration of the thing itself, but in reference to its circumstances".[26] Similarly, Erle CJ (who had formed part of the plurality in *Bamford*) explained in *Brand v Hammersmith Railway Co* that:[27]

> The cause of action, if any, lies in the excess of the damage beyond *what is considered reasonable after taking into account the circumstances of time and place*, the quantity of annoyance, and the relation of adjoining properties to one another.

34. ***St Helen's Smelting Co*** *v Tipping* (1865) 11 HLC 642; 11 ER 1483 is a particularly important decision. That case concerned damage to the claimant's trees resulting from fumes from a copper smelting works. Lord Westbury LC drew a distinction (which can still be seen in the authorities[28]) between cases where "the alleged nuisance produces material injury to property" and cases where "the thing alleged to be a nuisance is productive of sensible personal discomfort".[29] That distinction was significant for two reasons.

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23 *Bamford* (1862) 3 B & S 62 at 83.
24 *Bamford* (1862) 3 B & S 62 at 83.
25 *Bamford* (1862) 3 B & S 62 at 84.
26 [1879] 11 Ch D 852 at 865. See, also: *Attorney-General v The Sheffield Gas Consumers' Company* (1853) 3 De G M & G 304 at 339; and Garrett, *The Law of Nuisances* at 5-10.
27 (1867) LR 2 QB 223 at 247(Erle CJ). Note that this judgment was not delivered due to Erle CJ's resignation.
28 See *Robson v Leischke* (2008) 72 NSWLR 98 at [54], [169]; ***Wildtree Hotels*** *Ltd v Harrow London BC* [2001] 2 AC 1 at 12G-H; D Rolph et al, *Balkin & Davis* (6th ed, LexisNexis, 2021) at [14.8]-[14.10].
29 (1865) 11 HLC 642 at 650; 11 ER 1483 at 1486.

35. ***First***, in *St Helen's Smelting Co* itself, Lord Westbury LC said that, in the second category (i.e. loss of amenity cases, such as the present), whether or not a nuisance has arisen "must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs".[30] This is because:[31]

> If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, and which are actually necessary for trade and commerce, and also for the enjoyment of property, *and for the benefit of the inhabitants of the town and of the public at large*. (emphasis added)

36. Thus, locality may be taken into account as part of assessing all the circumstances for cases of interference with amenity. However, what is particularly significant is the reason given by Lord Westbury LC for that conclusion. Critically, his Lordship indicates that the tolerance which the law attributes to a hypothetical claimant is calibrated by reference not just to the need for reciprocity (i.e. each party's appreciation that they may in turn want to inflict inconveniences on the other party[32]) but also by the obvious point that land uses have broader social ramifications such that individuals' attitudes are informed by their understanding of: (i) the public benefit of some disruptive activities; and (ii) the desirability of those activities occurring in localities where they are commonplace.[33]

37. The ***second*** reason that the distinction between material injury cases and interference with amenity cases matters was articulated in *Gaunt v Fynney* (1872) 8 Ch App 8. That case concerned an alleged nuisance by noise and vibration caused by manufacturing activities in a silk mill.[34] Lord Selborne LC stated that "[n]eighbours everywhere … ought not to be extreme or unreasonable either in the exercise of their own rights or in the restriction of the rights of each other" and that "everything is to be looked at from a reasonable point of view".[35] The Lord Chancellor went on to refer to the two categories of cases identified in *St Helen's Smelting Co* and explained that, for cases based on loss of amenity, "a nuisance of this kind is much more difficult to prove".[36] His Lordship then observed that:[37]

> A nuisance by noise (supposing malice to be out of the question) is emphatically a question of degree … Such things to offend against the law, must be done in a manner which, beyond fair controversy, ought to be regarded as exceptive and unreasonable.

38. Following *Gaunt v Fynney*, the correct view is that, at least for nuisance cases based on loss

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30 (1865) 11 HLC 642 at 650; 11 ER 1483 at 1486. See, also, M Davies, "Private nuisance, fault and personal injuries" (1990) 20 *WALR* 129 at 133-134; RA Buckley, *Buckley: The Law of Negligence and Nuisance* (6th ed, LexisNexis, 2017) at [11.04]-[11.05].

31 (1865) 11 HLC 642 at 650; 11 ER 1483 at 1486.

32 cf *Fearn* [2024] AC 1 at [34]-[35].

33 See, also, *Clarke v Clarke* (1865) LR 1 Ch App 16 at 18.

34 *Gaunt v Fynney* (1872) 8 Ch App 8 at 9-10.

35 *Gaunt v Fynney* (1872) 8 Ch App 8 at 11, quoting *St Helen's Smelting Co* (1865) 11 HLC 642 at 653; 11 ER 1483 at 1488 (Lord Wensleydale).

36 *Gaunt v Fynney* (1872) 8 Ch App 8 at 11.

37 *Gaunt v Fynney* (1872) 8 Ch App 8 at 12.

of amenity, the claimant must prove facts that establish that the interference with their use or enjoyment of land is unreasonable.[38] For that reason, pleading precedents such as *Bullen & Leake* contain no suggestion that the onus rests on the defendant to establish a defence that their interference with the claimants' use and enjoyment of their land was reasonable.[39]

39. The authorities described at [33]-[38] above confirm that, in the aftermath of *Bamford*, Courts did not apply a test for liability in private nuisance that involved a narrow focus on whether the defendant's use of their land was common or ordinary. Rather, the question of whether the defendant's use of land was common or ordinary was regarded as but one facet of an overarching test concerned with the reasonableness of the alleged interference.

40. *Ball v Ray*, which the appellants rely on at AS [20], reflects this approach. In that decision, which concerned whether the stabling of horses gave rise to a nuisance, Mellish LJ stated that the determinative question was whether the noise of horses was one which "we must reasonably expect, and must to a considerable extent put up with".[40] Lord Selborne LC's judgment was to similar effect. His Lordship considered that the key question was whether "that which is unreasonable has been done here" and it was as part of determining that question that he considered whether the defendant was putting his property to "the ordinary purposes for which it and all the different parts of it were constructed".[41]

41. The judgment of Vaughan Williams J in ***Harrison*** *v Southwark & Vauxhall Water Co* provides a particularly clear illustration that the observations of Bramwell B in *Bamford* were not regarded as stating the whole law of nuisance in the late 19th century. The alleged nuisance in that case was noise and vibration due to the use of pumping equipment to construct a tunnel.[42] Vaughan Williams J considered it important that the works were being undertaken for construction or demolition purposes, rather than "in sheer wantonness", because "the law, in judging what constitutes a nuisance, does take into consideration both the object and duration of what is said to constitute the nuisance".[43] Further, his Honour stated that it was appropriate to take into account whether the defendant has "use[d] all

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38 See *Wildtree Hotels* [2001] 2 AC 1 at 13B; Rolph, *Balkin & Davis* at [14.10]; Davies, "Private nuisance, fault and personal injuries" at 332-336; I Field, "Uncommon and Unordinary: An Australian perspective on the *Fearn* decision" (2024) 4 *JCL* 31 at 47 (fn 52); M Lee, "The Public Interest in Private Nuisance: Collectives and Communities in Tort" (2015) 74 *CLJ* 329 at 356. Compare the position for damage to property cases stated in *Kraemers v Attorney-General (Tasmania)* [1966] Tas SR 113 at 122-123.

39 See, e.g C Dodd and TW Chitty (eds), *Bullen and Leake's Precedents of Pleadings* (6th ed, Sweet & Maxwell, 1905) at 451-460, 889-890; IH Jacob (ed), *Bullen and Leake and Jacob's Precedents of Pleadings* (12th ed, Sweet & Maxwell, 1975) at 708-719, 1234-1236.

40 *Ball v Ray* (1873) LR 8 Ch App 467 at 471.

41 *Ball v Ray* (1873) LR 8 Ch App 467 at 471. See, also, *Clarey v Principal and Council of the Women's College* (1953) 90 CLR 170 at 176.

42 *Harrison* [1891] 2 Ch 409 at 409-410.

43 *Harrison* [1891] 2 Ch 409 at 411.

reasonable skill and care to avoid annoyance to [their] neighbour by the works".[44]

(ii) Subsequent Australian decisions

42. As the Court of Appeal pointed out at AJ [119]-[121] (**CAB 461-462**), none of the leading Australian decisions have endorsed the proposition that the test for liability in private nuisance is focussed on a narrow inquiry into whether the defendant's use of their land is unusual. The Australian cases require a wider-ranging assessment of whether there has been "a material interference, beyond what is reasonable in the circumstances, with the plaintiff's use or enjoyment of the land or of the plaintiff's interest in the land".[45]

43. In this Court, the leading decision is *Gartner v Kidman*, which was a case in which the defendant blocked a drain on his land with the result that a considerable area of the plaintiff's land remained under water in the wet season.[46] The plaintiff claimed that, by preventing the escape of water that would naturally have flowed out, the defendant was responsible for a nuisance.[47] Windeyer J (with whom Dixon J agreed) quoted from *Bamford* in the context of a discussion of what is meant by the phrase "natural use" in nuisance cases concerning riparian rights of drainage.[48] Notably, Windeyer J observed that "[b]y 'conveniently done' the learned Baron meant, no doubt, done in a reasonable and proper manner" — immediately indicating that his Honour considered that Bramwell B's formulation encompassed an assessment of whether the activities were, in all the circumstances, reasonable.[49] On the next page, Windeyer J stated the rule to be applied in the case at hand in terms that emphasised the centrality of reasonableness (rather than common or ordinary use):[50]

> … the law is, I think, that [a land owner] may block [the natural flow of surface water] by any works on his own land, so far as they are reasonably necessary to protect his land for his reasonable use and enjoyment; but that in doing so he must not act recklessly of his neighbour so as to cause wanton damage.

44. His Honour went on to explain that this rule reflected the extent to which:[51]

> The idea of reasonableness, that is basic to so much of the common law, is firmly embedded in the law of nuisance to-day. Pronouncements concerning the scope of nuisance as a tort avoid stating rights and duties as absolute. In respect of both what a man may do and what his

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44 *Harrison* [1891] 2 Ch 409 at 411. See, also, *Andreae v Selfridge & Co* [1938] 1 Ch 1 at 5-6; and ***Don Brass*** *Foundry Pty Ltd v Stead* (1948) 48 SR (NSW) 482 at 487.

45 *Brown v Tasmania* (2017) 261 CLR 328 at [385] (Gordon J). See, also, *Don Brass* (1948) 48 SR (NSW) 482 at 487; ***Southern Properties*** *(WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management* (2012) 42 WAR 287 at [118]; ***Gales Holdings*** *Pty Ltd v Tweed Shire Council* (2013) 85 NSWLR 514 at [132], [138], [279]; *Queensland v MVBSF Pty Ltd* (2019) 2 Qd R 146 at [193]-[195].

46 (1962) 108 CLR 12 at 21.

47 *Gartner v Kidman* (1962) 108 CLR 12 at 38.

48 *Gartner v Kidman* (1962) 108 CLR 12 at 44.

49 *Gartner v Kidman* (1962) 108 CLR 12 at 44.

50 *Gartner v Kidman* (1962) 108 CLR 12 at 46. See, also, at 48: "What is a natural use is a question to be determined reasonably having regard to all the circumstances, including the purposes for which the land is being used and the manner in which the flow of water was increased".

51 *Gartner v Kidman* (1962) 108 CLR 12 at 47.

neighbour must put up with, its criteria are related to the reasonable use of lands in question.

45. Thus, far from embracing a test for liability in nuisance that focuses on the narrow question of whether a defendant's use of land is common or ordinary (as is suggested at AS [18]), Windeyer J endorsed expressly the proposition that what is required is a wider-ranging assessment of whether the defendant's activities have given rise to an interference that ought to be regarded as unreasonable in all the circumstances.

46. Further support for the view that Australian law requires an assessment of whether the interference caused by the defendant's activities is unreasonable (having regard to the circumstances and widely shared societal attitudes) is provided by *Elston v Dore*. In that decision, Gibbs CJ, Wilson and Brennan JJ endorsed the following passage from *Sedleigh-Denfield v O'Callaghan*[52] as "the proper test to apply in most cases":[53]

> A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society.

(iv) Additional reasons why the approach of the majority in Fearn should <u>not</u> be adopted

47. As outlined above, the approach adopted by Lord Leggatt JSC in *Fearn* (and contended for by the appellants) is inconsistent with the existing authorities. It is a "novel" approach that "goes against conventional understanding" and involves a "recast[ing of] the law on reasonable interference".[54] There are four other reasons why it should not be adopted:

48. ***First***, as Lord Sales JSC explained in the same decision, "elevating one factor (whether the defendant's use of its land is common and ordinary) to unjustified prominence" would "seriously distort the tort" by "plac[ing] excessive weight on one side of what is an inextricably two-sided relationship".[55] Such a narrow approach cannot "provid[e] a solution across the whole range of cases with which the law of nuisance has to deal" and "would cause stultification of development of land to an unnecessary and unjustified degree".[56]

49. ***Secondly***, the concepts of a "common or ordinary use" (in the law of nuisance) and a "natural use" (for the purposes of the rule in *Rylands v Fletcher* (1868) LR 3 HL 330) are closely related: AJ [126] (**CAB 463**).[57] One of the primary reasons why this Court concluded that the rule in *Rylands v Fletcher* had been subsumed by the tort of negligence was because the

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52 [1940] AC 880 at 903 (Lord Wright).
53 (1982) 149 CLR 480 at 487-488. See, also, *Hargrave v Goldman* (1963) 110 CLR 40 at 62.
54 J Lee, "Different views of nuisance" (2023) 139 *LQR* 535 at 538-539.
55 *Fearn* [2024] AC 1 at [227], [245]. See also [228]-[229].
56 *Fearn* [2024] AC 1 at [230], [232]. See also [231], [233]-[242].
57 See, also, *Gartner v Kidman* (1962) 108 CLR 12 at 44; ***Cambridge Water Co*** *v Eastern Counties Leather plc* [1994] 2 AC 264 at 299E-H.

concept of "non-natural use" lacked "objective content" such that the application of that concept had "degenerate[d] into an essentially unprincipled and ad hoc subjective determination of whether the particular facts of the case fall within undefined notions of what is 'special' or 'not ordinary'".[58] The same criticisms can be made about the concept of common or ordinary use; this provides a compelling reason not to install this concept as the determinative test in all cases of private nuisance.

50. ***Thirdly***, and relatedly, Bramwell B's concept of a judicially determined common or ordinary use of land was developed at a time when there was "no general system of statutory development control".[59] In contemporary Australia, statutes carefully regulate permissible uses of land, taking into account the interests of neighbours.[60] The notion that judges should turn their attention away from these regimes and instead give determinative weight to their own assessment of whether a given land use falls within the amorphous concept of "common or ordinary" is difficult to reconcile with the prescriptive nature of these statutes. For reasons developed further below (at [78]-[81]), applying a reasonableness test for nuisance, into which can be integrated consideration of whether there is statutory permission for a land use, is preferrable because it more effectively achieves a coherent interplay between statute and the common law of nuisance.

51. ***Fourthly***, the Australian cases recognise that the fact that a defendant's activity has public utility, while it may not excuse a nuisance,[61] can inform the assessment of whether a claimant ought to be expected to put up with the interference in question.[62] The evaluation of what interference with the use and amenity of land is reasonable properly takes into account not only neighbours' expectations of what they ought to tolerate from each other, but also "the social background of the time" in which parties interact (see [35]-[36] above).[63] The appellants' approach provides no opportunity for these matters to be considered as part of determining liability and their suggestion (at AS [24]) that they can be taken into account at the remedial stage is misconceived. Under Australian law, unlike the position in England,[64]

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58 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 540 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

59 ***Lawrence*** *v Fen Tigers Ltd* [2014] AC 822 at [161] (Lord Sumption JSC).

60 See, eg, in NSW a non-exhaustive overview of the regulatory regime governing land use includes: (i) various forms of planning instruments provided for by Pt 3 of the EPA Act; (ii) the development consent regime under Pt 4 of the EPA Act; and (iii) the provisions of the *Contaminated Land Management Act 1997* (NSW) (as to which see *Kane & Co (NSW) Pty Ltd v Idolbox Pty Ltd* [2024] NSWCA 278 at [25]-[30]).

61 *Bamford* (1862) 3 B & S 62 at 84-85.

62 ***Munro*** *v Southern Dairies* [1955] VLR 332 at 337; *Painter v Reed* [1930] SASR 295 at 303-304; *Southern Properties* (2012) 42 WAR 287 at [118]; ***Woodhouse*** *v Fitzgerald* (2021) 104 NSWLR 475 at [48].

63 *Munro* [1955] VLR 332 at 337 (Sholl J). See, also, C Sappideen, et al, *Fleming's The Law of Torts* (11th ed, Lawbook Co, 2024) at [19.80], [19.110].

64 See *Fearn* [2024] AC 1 at [114], [127]-[129] and *Lawrence* [2014] AC 822 at [120]-[124].

the question of whether a claimant in nuisance should be awarded damages in lieu of an injunction is determined by application of "general equitable principles that depend essentially on the balance of justice *between the parties*" [65] (not matters of public interest). The position in this jurisdiction remains that:[66]

> The Court has always protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer is able and willing to pay for the injury he may inflict. Neither has the circumstance that the wrongdoer is in some sense a public benefactor (e.g., a gas or water company or a sewer authority) ever been considered a sufficient reason for refusing to protect by injunction an individual whose rights are being persistently infringed.

NoA Ground 2 (AS [27]-[44]): was an unreasonable interference demonstrated in this case?

52. Under ground 2 of the NoA, the appellants contend that, if the majority approach in *Fearn* does not represent the law of Australia, this Court should nonetheless allow the appeal: AS [27]-[44]. The appellants advance two variations of this argument: (i) even applying a broader test of objective reasonableness, TfNSW failed to prove that it took all reasonable precautions such that the Court of Appeal ought to have upheld the Entire Period Claim (AS [27]-[37]); and (ii) in the alternative, the appellants seek to re-instate the primary judge's award of the Partial Period Claim (AS [37]-[44]).

(i) The new variant on the Entire Period Claim (AS [27]-[37])

53. The essence of the appellants' argument under the first variant of ground 2 of the NoA is that it was incumbent on TfNSW to obtain a finding that it took all reasonable precautions to minimise any interference with businesses and residents along the route of the SLR and that, if it failed to do so, the interference arising from the construction activities is deemed to be unreasonable for the entire period that it occurred. This argument should be rejected for the following reasons.

54. ***First***, as explained at [20] above, at first instance the appellants: (i) conceded that, if the question of whether the interference caused by construction activities was unreasonable arose for consideration as part of Case C, the Court would have to conclude *when* the interference became unreasonable; and (ii) contended that the IDP was the correct benchmark. Having made that concession and advanced Case C in that form before the

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65 ICF Spry, *Equitable Remedies* (7th ed, Lawbook Co, 2007) at 640 (emphasis added). See, also, *Break Fast Investments Pty Ltd v PCH Melbourne Pty Ltd* (2007) 20 VR 211 at [41]-[49], [74]-[81], [88]-[99]; MJ Leeming et al, *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (5th ed, LexisNexis Butterworths, 2015) at [24-110]-[24-115].

66 *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 at 315-316 (Lindley LJ). See, also, *Smethurst v AFP* (2020) 272 CLR 177 at [273]; and Leeming, *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* at [21-095] where the decision in *Miller v Jackson* [1977] QB 966 (in which damages were awarded in lieu of an injunction having regard to the public interest in the cricketing activities that were sought to be enjoined) is described as "a judicial aberration worthy of note".

primary judge, it is not open to the appellants to now seek to advance the case in a new form as an Entire Period Claim in this Court.[67]

55. ***Secondly***, this argument suffers from the vice that the Court of Appeal was at pains to decry: namely, it fails to appreciate that it is the unreasonableness of the interference arising from a defendant's use, not the unreasonableness of the defendant's conduct, that a plaintiff must establish: AJ [137]-[146] (**CAB 467-469**). The reason that the appellants' claim failed was not because the Court of Appeal "demanded in effect that the appellants prove that the respondent had not taken all reasonable precautions" (AS [36]) but, rather, because the appellants failed to provide a factual basis for the Court to conclude *when*, if at all, the interference arising from construction activities became unreasonable: AJ [95], [97] (**CAB 454**). The Court of Appeal's reasoning in this respect merely reflected the facts that: (i) unreasonableness of interference was an integer of the appellants' cause of action for nuisance based on loss of amenity (such that they had to prove facts to satisfy the Court of that matter);[68] and (ii) as was described at [15] above, the appellants made the forensic decision to allege that the construction gave rise to a nuisance, not because it was conducted in some specifically unreasonable way, but because it went on too long.

56. ***Thirdly***, contrary to the suggestion at AS [36], the Court of Appeal did not impose a prescriptive onus on the appellants effectively to prove negligence on the part of TfNSW. Indeed, their Honours repeatedly emphasised that parties are free to make forensic decisions as to how they will seek to establish (or rebut) unreasonableness in a nuisance case: AJ [105], [134] (**CAB 457, 466**). In cases where construction works are said to have caused a nuisance, a plaintiff may, for example, point to the manner in which the construction is undertaken (for example, by the use of a novel or irregular technique, at night time, or outside the conditions of the relevant development consent).[69] The Court of Appeal did acknowledge that the question of whether a defendant took reasonable care in relation to the construction may be "relevant to the inquiry" (such that either party may attempt to prove or disprove that fact[70]): AJ [149] (**CAB 470**). However, their Honours were clear that that factor was neither a necessary element of the cause of action nor a complete "defence"[71] in every nuisance case: AJ [147], [149] (**CAB 469-470**).

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67 See *O'Connor v O'Connor* [2022] NSWCA 97 at [68]-[71], [78]-[82].

68 See *Currie v Dempsey* (1967) 69 SR (NSW) 116 at 125 and the cases and material cited at [38]-[39] above.

69 *Harrison* [1891] 2 Ch 409 at 411

70 In this regard, it is notable that there are divergent views as to which party bears the onus of proving or disproving reasonable precautions: compare *Harrison* [1891] 2 Ch 409 at 411, 414 and *Wildtree Hotels* [2001] 2 AC 1 at 13B with *Andreae v Selfridge & Co* [1938] Ch 1 at 9 and *Hiscox Syndicates Ltd v The Pinnacle Ltd* [2008] EWHC 145 (Ch) at [30].

71 As noted at AS [33], in *Fearn* [2024] AC 1 at [166], Lord Sales JSC said that where a defendant can show

57. ***Fourthly***, at AS [35] the appellants place particular reliance on the Court of Appeal's citation of *Andreae v Selfridge & Co* at AJ [151] (**CAB 471**). In that case the plaintiff established by evidence that certain parts of the defendant's construction gave rise to an unreasonable interference by virtue of the "unreasonable hours" of construction and the fact that "the quantity of dust and grit let loose" by use of a specific type of hammer "was quite insufferable".[72] Sir Wilfrid Greene MR expressly rejected the notion that it should be presumed that the entire period of construction was actionable (see 6-7), however he accepted that those parts of the defendant's construction referred to above caused an interference that was prima facie actionable (at 8-9). It was at that point that the Master of the Rolls suggested that an evidentiary burden shifted to the defendant because, if it were to rebut the plaintiff's evidence of unreasonable interference, it could only do so by showing that reasonable precautions had been taken. Here the appellants never crossed the threshold of establishing that the construction activities were inherently unreasonable or continued for an unreasonable period such that no question of a shifting evidentiary onus arose. In other words, the mere fact that TfNSW did not prove that it took reasonable care in relation to the SLR cannot fill the gap that arose by reason of the appellants' failure to prove an integer of their causes of action (namely, unreasonable interference).

58. ***Fifthly***, the appellants' view of the law — in which construction activities that give rise to a substantial interference will be presumed to be unreasonable until a defendant proves otherwise — would be open to abuse and would undermine statutory regimes for development consent. Almost all construction substantially interferes with the amenity of neighbouring properties. There would be obvious practical problems if any inconvenienced neighbour could sue for an injunction; lead evidence that construction has occurred; and then throw onto the defendant the substantial forensic burden of proving all the ways that they have taken reasonable care: cf AJ [101] (**CAB 456**).

(ii) The alternative attempt to re-instate the Partial Period Claim (AS [37]-[44])

59. The evidence on which the appellants rely to prove the point in time at which the interference caused by the construction of the SLR became unreasonable is the Amended IDP. After a careful review of the underlying material (see AJ [32] (**CAB 434**)), the Court of Appeal correctly held that this evidence did not come up to proof: AJ [97] (**CAB 454**). For the following reasons, there is no basis to disturb that finding:

60. ***First***, contrary to AS [42]-[43], the Amended IDP was <u>not</u> Mr Griffith's expert

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that its use of land was common or ordinary and amounted to acts conveniently done it will have a "defence". That language is inaccurate (not least because, as the Court of Appeal pointed out, the reasonableness of a defendant's use of land from its own perspective does not excuse it from liability in all cases) and was not adopted by the Courts below. See, again fns 37 and 38 above.

72 *Andreae v Selfridge & Co* [1938] 1 Ch 1 at 8, 9

assessment of "how long the construction works would have taken" or "what was achievable" had further utility surveys been undertaken. It was a version of the D&C contractor's initial forecast program (the IDP) that was "corrected" to reflect the "contingencies" or "allowances" that a reasonable programmer would have included in the program, had certain facts been known at the time of entry into the Project Deed: AJ [37]-[38] (**CAB 436**). The error at PJ [495] and [936] (**CAB 138, 248**) was that the primary judge conflated what were "reasonable allowances" for a forecast program, on certain factual assumptions, with what was "reasonably achievable". As the Court of Appeal observed "TfNSW was not sued for negligently compiling the IDP": AJ [46] (**CAB 438**). The IDP was an irrelevant metric for assessing what was a reasonable construction period in light of real-world events.

61. ***Secondly***, AS [7] places a convenient gloss on the assumptions underlying the Amended IDP. Those assumptions were twofold: first, "that there was complete or substantially complete identification of all utilities along the route before construction commenced" (AJ[41] (**CAB 437**)); and second, that TfNSW had reached concluded agreements with utility providers regarding treatment methods prior to entry into the Project Deed: PJ [487] (**CAB 136; RBFM 715**). However, the primary judge accepted the evidence of TfNSW's utility expert (Mr Sampson) that: (i) "it was almost impossible to accurately confirm the location of all potentially impacted utility assets along the SLR corridor ahead of a detailed design and the commencement of construction" (AJ [61]-[67] (**CAB 443-445**)); and (ii) utility owners such as Ausgrid would not have committed to any treatments in advance of a completed detailed design: PJ [437]-[438], [548], [785] (**CAB 123-124, 159, 214**). Accordingly, not only is it wrong to say that Mr Griffith's evidence was "unanswered" (AS [44]), in fact the feasibility of the assumptions underlying the Amended IDP were positively disproved.

62. Mr Griffith, who was not a utilities expert (AJ [25] (**CAB 431**)), and whose opinion regarding the insufficiency of investigations was based merely on "the fact so many unknown utilities were encountered during construction" (AJ [60] (**CAB 443**)), could not identify "what additional surveying should have been undertaken" to achieve the knowledge which the Amended IDP assumed: AJ [59] (**CAB 442**). Contrary to AS [40]-[41], the Court of Appeal did not impose an "onus" on the appellants to prove that all utilities could have been identified pre-construction — their Honours simply observed that, if the appellants wanted the Court to accept that the estimates in the Amended IDP were achievable, then they had to show that TfNSW could have acquired the knowledge about utilities that Mr Griffith assumed was possible, without causing further substantial

interferences: AJ [92] (**CAB 453**). Not only did the appellants fail to establish that proposition, it was comprehensively rebutted by the evidence of Mr Sampson summarised at [22] above and at PJ [431]-[435]; AJ [66] (**CAB 121-123, 444**).

63. ***Thirdly***, even if the Amended IDP had represented what was "reasonably achievable" (which it did not), it is one thing to say that a timeframe is "achievable" and another to say that any interference beyond that point is "unreasonable" (or should not be put up with): AJ [44] (**CAB 437**). Contrary to AS [42], the Court of Appeal's observation that construction cannot become actionable solely on the basis that it takes a few months longer than scheduled (AJ [40] (**CAB 437**)), did not suggest that there could be "no nuisance in the case of overly long construction works". The Court was simply recognising that there must be some degree of tolerance between a duration that is estimated (or even achievable) and the point beyond which it becomes "unreasonable".

ARGUMENTS ADVANCED UNDER THE NOTICE OF CONTENTION

64. The submissions in respect of the NoC (**CAB 670-673**) fall into three categories, being: (i) ***First***, submissions responding to the Entire Period Claim (grounds 1(a)-(c) of the NoC); (ii) ***Secondly***, submissions that provide further reasons why TfNSW should not be held liable for causing an unreasonable interference with the appellants' use and enjoyment of their land (grounds 1(d), 2 and 3 of the NoC); and (iii) ***Thirdly***, an argument based on s 43A of the *Civil Liability Act 2002* (NSW) (**CL Act**) (ground 4 of the NoC).

Ground 1(a)-(c) of the NoC — responses to the "Entire Period Claim"

(i) Construction of the SLR was a common or ordinary use of land (grounds 1(a) and (c))

65. This ground of the NoC is primarily directed at a scenario in which this Court concludes that the determinative test for liability in private nuisance is whether the defendant's use of their land is common or ordinary. While both Courts below concluded that the construction activities that occurred along the route of the SLR amounted to an "exceptional" use of land, they did so in circumstances where they did not consider that conclusion to have the significance attributed to it by the appellants: PJ [657]; AJ [125]-[126] (**CAB 184, 463**).

66. The primary judge considered that the construction activities in question were an exceptional use of land because: (i) TfNSW was not a roads authority; and (ii) the laying of rail tracks on roads was unusual (having not occurred in the Sydney CBD since 1958): PJ [653], [655] (**CAB 183**). The Court of Appeal reached the same conclusion on the different basis that the construction activities prevented public access to the road and required planning

permission: AJ [123]-[124] (**CAB 463**).[73] Noting the different purpose of the consideration of this issue by the Courts below, this reasoning goes no further than a high-level characterisation of what was involved in constructing the SLR.

67. By contrast, the authorities contemplate a more granular investigation into what the defendant has done and whether it exceeds what is permitted under the "rule of give and take, live and let live".[74] Indeed, the reason that Bramwell B's formulation from *Bamford* of a "common and ordinary use" has been referred to interchangeably with the notion of a "reasonable user"[75] is that both have always been understood as requiring careful assessment of the activities in question "having special regard to the circumstances and surroundings of the defendant's property".[76] Lord Leggatt JSC's reasoning in *Fearn* itself included nuanced analysis as to what is meant by an "exceptional" use of land and whether the viewing gallery in that case met that description: see [20], [36]-[41], [50]-[52], [74]-[75]. As part of that discussion, his Lordship observed (at [37]) that "[t]he right to build (and demolish) structures is fundamental to the common and ordinary use of land, involving as it does the basic freedom to decide whether and how to occupy the space comprising the property".

68. The shortcomings of the reasoning in the judgments below is shown up by a comparison to *Andreae v Selfridge & Co*. In that case, the trial judge concluded that, because the scale of the excavations and demolition required to build a department store was extensive, the entirety of the construction project involved an extraordinary use of land.[77] That high-level assessment bears some similarity to the approaches of the Courts below (particularly that of the primary judge). Sir Wilfrid Greene MR explained that the trial judge had erred by failing to engage in a much closer analysis as to whether "the type of demolition, excavation and construction in which the defendant company was engaged" was of a sufficiently "abnormal and unusual nature".[78] The Master of the Rolls went on to say:[79]

> … it is part of the normal use of land, to make use … in the matter of construction, of what particular type and what particular depth of foundations and particular height of building may be reasonable, in the circumstances, and in view of the developments of the day.

69. In the present case, the correct analysis is as follows: construction activities are prima facie an ordinary use of land which neighbours must put up with unless they are conducted in

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73 The extreme results that would be produced by combining this approach to identifying extraordinary uses of land with the test for liability for private nuisance articulated by Lord Leggatt JSC in *Fearn* [2024] AC 1 at [27]-[28] are obvious: any construction that required development consent and gave rise to a substantial interference with a neighbour's use and enjoyment of their land would trigger liability in nuisance.

74 *Bamford* (1862) 3 B & S 62 at 84 (Bramwell B).

75 See, eg, *Cambridge Water Co* [1994] 2 AC 264 at 299D-F; *Woodhouse* (2021) 104 NSWLR 475 at [31].

76 Garrett, *The Law of Nuisances* at 169, see, also, 172.

77 [1938] 1 Ch 1 at 5-6.

78 [1938] 1 Ch 1 at 6.

79 [1938] 1 Ch 1 at 6.

some identifiably unreasonable way. This reflects the significant public benefits associated with construction (especially so in the case of a public infrastructure project that has improved the amenity of Sydney's streets: PJ [809], [916] (**CAB 219, 243**)). It is of no consequence whether *what is being constructed* is unusual in nature, particularly if it has been authorised by statute (and, in any event, the use of the streets of an Australian city for trams is not irregular). This default characterisation of construction as common or ordinary should prevail for the entire period at issue in circumstances where the appellants: (i) neither pleaded nor proved that the construction of the SLR was carried out in a novel or unusual manner or in a way that exceeded or failed to comply with the extensive conditions attached to the relevant approvals (see [15] and [18] above); and (ii) failed to show that the SLR could or should have been constructed in a shorter period of time (see [59]-[63] above).

(ii) A substantial interference for an extended period due to the construction of the SLR was authorised by statute (ground 1(b))

70. At AJ [127]-[134] (**CAB 464-466**), the Court of Appeal concluded that TfNSW would not have been in a position to avoid liability on the basis that the construction of the SLR was authorised by statute[80] because it had not shown that "the time which was taken [to construct the Sydney Light Rail] was inevitable". The Court here was responding to a submission made by TfNSW that it could rely on statutory authorisation of the construction of the SLR as an answer to the Partial Period Claim upheld by the primary judge. Thus, there was no occasion to consider how these principles operated in relation to the Entire Period Claim. The analysis in that context is quite different. For the reasons that follow, the Court should find that TfNSW is not liable for the Entire Period Claim.

71. That no cause of action will arise for a nuisance authorised by statute "was established by a series of 19th century cases concerned with the operation of railways under statutory powers".[81] The cases indicate that where a nuisance: (i) results from activities that have been specifically authorised by statute (including as to the manner in which they are to be carried out);[82] or (ii) is the inevitable outcome of some thing or activity that Parliament has required to be undertaken, then then there can be no liability in nuisance.[83]

72. Statutory authority "does not avail against a claim that the creation of a nuisance has been

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80 See, eg, *Southern Properties* (2012) 42 WAR 287 at [122]-[123]; *Melaleuca Estate Pty Ltd v Port Stephens Council* [2006] NSWCA 31 at [48]-[57].

81 *Allen v Gulf Oil Ltd* [1981] AC 1001 at 1017E (Lord Keith of Kinkel).

82 See *Metropolitan Asylum District v Hill* (1881) LR 6 App C 193 at 211, citing *Hammersmith Railway Co v Brand* (1869) LR 4 HL 171; Garrett, *The Law of Nuisances* at 212-213.

83 See *The Manchester Ship Canal Company Ltd v United Utilities Water Ltd (No 2)* [2024] 3 WLR 356 at [18]; *Manchester Corporation v Farnsworth* [1930] AC 171 at 183.

brought about by negligence".[84] Careful consideration must be given to: (i) what is the precise nature of the nuisance claim brought by the plaintiff; and (ii) what activities are authorised by the relevant statute. The judgments in *London and Brighton Railway Co v* ***Truman*** make clear that, even where the statute has given some discretion to the statutory authority as to the manner in which it is to exercise its powers to do a thing that would always be liable to give rise to a nuisance, then, provided there is no allegation of negligence, there will be no actionable nuisance merely because the extent of the inconvenience or annoyance suffered by the plaintiff could possibly have been lessened or avoided.[85] Implicit in this reasoning (and the need to take a "common sense" approach to assessing whether a nuisance was inevitable) is that there is no requirement for a defendant to negative every conceivable criticism of the manner that the activities that caused the nuisance were carried out.

73. In this case, the appellants disavowed any suggestion that they were seeking to prove that the construction of the SLR had been undertaken negligently: see [17] above. TfNSW had the function and power to facilitate the development of the SLR under s 104O(1) of the TA Act to the TA Act (see [4] above), subject to an approval regime which placed limits on TfNSW's exercise of that power as is expressly contemplated by s 104P (see [6]-[11] above). The approvals obtained for the SLR precisely regulated the route on which it could be built and when and how that could take place. As these principles of statutory authority are being considered in the context of the Entire Period Claim (which asserts that the <u>whole</u> of the construction activities gave rise to a nuisance right from the outset), the relevant question is whether the authorisation of the project as a whole necessarily carried with it statutory authority to cause a substantial and unreasonable interference of the kind complained of (as opposed to whether it was inevitable that construction would take precisely as long as it did).

74. In circumstances where the route and manner of construction was specifically authorised by a statutory regime (see [4], [9]-[10] above), on one view that is sufficient to demonstrate that no liability in nuisance can arise (see [72] above). In any event, contrary to AS [30], there was significant material from TfNSW to demonstrate that it was clear from the project's earliest stages that construction would be <u>disruptive and lengthy</u>: PJ [113], [126]-[127], [140], [149], [156], [158], [260]-[261], [367]-[368], [417]-[418], [458], [793] (**CAB 41, 44, 47, 49, 51, 52, 81, 108, 119, 129, 215**). On the specific issue of the problems associated with utilities — which the Courts below accepted was a cause of the prolonged period of

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84 *Allen v Gulf Oil Ltd* [1981] AC 1001 at 1018B-C.

85 (1885) 11 App C 45 at 50-53, 57, 60, 64-65. See, also, Buckley, *Buckley: The Law of Negligence and Nuisance* at [23.03]; Dodd, *Bullen & Leake* (6th ed) at 454; and Garrett, *The Law of Nuisances* at 225-226. As was said in *Harrison* [1891] 2 Ch 409 at 414-415 (Vaughan Willams J): "the statute has authorised the execution of the work, together with all things reasonably necessary for the execution thereof".

construction of the SLR (PJ [779]; AJ [110]-[114] (**CAB 212, 459-460**)) — the evidence of TfNSW's programming expert was that "[t]he time it took to deal" with these problems was always likely to have "had a similar effect on the overall completion of the project as actually occurred": AJ [43] (**CAB 437**). Taking a common-sense approach, it was clearly unavoidable that construction of the SLR (in a manner consistent with the applicable development approvals) would give rise to a substantial interference with the use and enjoyment of neighbouring properties. In light of the fact that the question of statutory authority is being considered in the context of the Entire Period Claim, and the reasoning in *Truman* (see [72]-[73] above), there is no need for TfNSW to show that there was nothing it could have done to make the period of interference shorter (cf AJ [132]-[133] (**CAB 466**).

Grounds 1(d), 2 and 3 of the NoC — further reasons TfNSW was not responsible for a nuisance

75. As was explained at [23] above, the reasoning of the Court of Appeal understandably focussed on deficiencies in the essential factual findings that underpinned the primary judge's upholding of the Partial Period Claim: AJ [84]-[97] (**CAB 451-454**). Grounds 1(d), 2 and 3 of the NoC provide additional reasons, consistent with the judgment the Court of Appeal, for concluding that TfNSW was not responsible for an actionable nuisance (in respect of either the Entire Period Claim or the Partial Period Claim).

76. At [56] above, these submissions set out how the Court of Appeal conceived of the elements of private nuisance and what a plaintiff must prove (which is consistent with ground 3(a) of the NoC). Critically, the plaintiff is required to plead and prove how, and in what respects, a substantial and unreasonable interference with their use and enjoyment of land has arisen. In this case, the critical problem for the appellants is that they did not prove facts that could give the Court a basis to conclude *when (if ever)* the interference caused by the construction activities for the SLR commenced to be or became unreasonable. The Amended IDP suffers from the deficiencies identified at [59]-[63] above and there is no other evidence which the appellants can point to that can serve that function (see ground 2(a) of the NoC).[86]

77. There were practical ways available to the appellants under which they could have sought to prove unreasonable interference, for example, by showing that, during the construction of the SLR, there was non-compliance with the conditions imposed on the statutory approvals described at [9]-[10] above. As noted at [18] above, they failed in such attempt.

78. As was referred to obliquely at AJ [124] and [152] (**CAB 463, 471**), it is appropriate for the

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[86] Note that the IDP itself cannot provide a benchmark for when interference resulting from construction activities ceased to be reasonable because it was a forward-looking estimate. To conclude otherwise would transform nuisance into a strange form of negligent misrepresentation: AJ [46] (**CAB 438**).

Courts to treat as highly relevant to the assessment of whether an activity has given rise to an unreasonable interference the fact that the activity in question was permitted by a statute concerned with the use of land. In particular where such a regime has imposed conditions on the manner and period in which an activity can occur that standard should be treated as "relevant, but not determinative, when deciding if interference is substantial and unreasonable".[87] It is true that a number of English decisions have deprecated treating the fact that a defendant has obtained a grant of planning permission for an activity as a decisive consideration when assessing liability in nuisance.[88] However, three points should be noted:

79. ***First***, statements made about different statutory regimes and planning processes in other jurisdictions should not be transposed into Australian law unthinkingly. For example, the planning process in *Fearn* gave no consideration to the very interference that was the subject of the nuisance claim (overlooking).[89] By contrast, in this case the planning process — including the EIS and the environmental assessment report, which the Minister was required to consider[90] — incorporated detailed consideration of potential inconvenience to neighbouring properties arising from the construction of the SLR (see [8] above).[91]

80. ***Secondly***, even the English decisions recognise that where a planning instrument contains conditions (for example limiting noisy activity to certain hours) that "may be of real value"[92] in providing criteria for determining whether the activity has exceeded "what objectively a normal person would find it reasonable to have to put up with".[93]

81. ***Thirdly***, Australian law recognises the necessity of common law and statute operating as a "coherent and interlocking whole".[94] The need for coherence cuts both ways. That is, Courts should not only be alive to the danger of statutory schemes being used "to cut down private law rights".[95] They also must be mindful of the potential for the efficacy of planning legislation to be undermined by an expansion of the common law of nuisance.

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87 *Ammon v Colonial Leisure Group Pty Ltd* (2019) 55 WAR 366 at [131] (Murphy, Mitchell and Beech JJA).

88 See *Barr v Biffa Waste Services Ltd* [2013] QB 455 at [46(ii)]; *Lawrence* [2014] AC 822 at [81]-[95], [156], [165]; *Fearn* [2024] AC 1 at [109]-[110], [201].

89 *Fearn* [2024] AC 1 at [110].

90 See s 115ZB(2) of the EPA Act and *Community Action for Windsor Bridge Inc v NSW Roads and Maritime Services* [2015] NSWLEC 167 at [102], [105].

91 See also, the Construction Noise and Vibration Management Plan (**RBFM 393-596**) and Construction Business Management Plan (**RBFM 597-680**) required under condition B89 of the Minister's approval.

92 *Lawrence* [2014] AC 822 at [96] (Lord Neuberger P), [224] (Lord Carnwath JSC).

93 *Barr v Biffa Waste Services Ltd* [2013] QB 455 at [72] (Carnwath LJ).

94 MJ Leeming, "Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room" (2013) 26(3) *UNSWLJ* 1002 at 1014. See, eg, in the related area of duties of care owed in the exercise of statutory powers *Electricity Networks Corporation t/as Western Power v Herridge* (2022) 276 CLR 271 at [27], [32].

95 *Lawrence* [2014] AC 822 at [92] (Lord Neuberger P).

82. Therefore, the facts that: (i) construction of the SLR was permitted under statute; and (ii) the appellants did not prove any breach of applicable conditions, are relevant (even if not determinative) in a conclusion that there was no unreasonable interference in this case (see grounds 1(d), 2(b) of the NoC).

83. Finally, as the Court of Appeal explained at AJ [49]-[53] (**CAB 439-440**), the basis on which any liability in respect of the Partial Period Claim was to be attributed to TfNSW was that, knowing the risk of delays arising from the discovery of unknown utilities and the need to reach agreement on treatment methods with utility providers, it entered into the Project Deed on terms which contained insufficient disincentives for delayed occupation of fee zones: PJ [939]-[946]; (**CAB 248-251**). This required the appellants to show not only that TfNSW had "actual or constructive knowledge of the state of affairs which resulted in the nuisance" (i.e. that there was a risk of delays due to utilities), but also that, by reason of its planning errors (in particular, its contracting conduct) it failed "to take reasonable steps to prevent it" (see ground 3(b) of the NoC).[96]

84. Critically, the primary judge held that the market would not have accepted contractual terms more favourable to TfNSW: see [22(iv)] above. There was no evidence in the Amended IDP or otherwise to demonstrate the extent to which TfNSW's contracting conduct failed to mitigate (let alone caused) any particular delay (let alone delays beyond the estimates in the Amended IDP). In short, the appellants simply failed in their endeavours to prove that the length of construction (and concomitant interference) was unreasonable; that is, that it could and should have been made shorter by TfNSW not making identifiable planning or contracting errors. For these reasons, ground 3(b) of the NoC provides a further reason why TfNSW should not be held liable for the Partial Period Claim.

Ground 4 of the NoC — section 43A of the *Civil Liability Act 2002* (NSW)

85. TfNSW alleged that its "acts or omissions in planning for, procuring, and contracting for the SLR" and "its acts in undertaking or authorizing or permitting, or contracting for, the undertaking of the Works" were undertaken (or not undertaken) in the exercise (or failure to exercise) of a "special statutory power" such that s 43A of the CL Act was engaged and, to establish liability, the appellants had to prove *Wednesbury* unreasonableness.[97] The text of s 43A of the CL Act can be found at AJ [161] (**CAB 473-474**).

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96 See *The Manchester Ship Canal Company Ltd v United Utilities Water Ltd (No 2)* [2024] 3 WLR 356 at [8]-[13]; *Torette House Pty Ltd v Berkman* (1940) 62 CLR 637 at 659; *Goldman v Hargrave* (1966) 115 CLR 458 at 461. Unless both elements are proved then no fault, which is "almost always" a necessary element in nuisance, will have been shown: *Gales Holdings* (2013) 85 NSWLR 514 at [139] (Emmett JA).

97 Defence to 3FASOC filed on 7 November 2022 at [21U] (**RBFM 1002**).

86. The primary judge held that TfNSW could not rely on s 43A of the CL Act because: (i) "there is no role for s 43A to play in these proceedings" in which the plaintiffs had sued in nuisance and so did not need to prove a failure to exercise reasonable care (PJ [701]-[706] (**CAB 191-193**)); (ii) TfNSW's liability in nuisance was not "based on" its exercise of any statutory power but rather its "creation of the state of affairs that resulted in the substantial and unreasonable interference" (PJ [715]-[717] (**CAB 195**)); and (iii) in any event, the powers executed by TfNSW when planning and procuring the development of the SLR were not "special statutory powers" (PJ [737]-[746] (**CAB 200-201**)). The Court of Appeal affirmed the reasoning in (i) and (iii) in particular at AJ [174]-[181] (**CAB 478-479**).

87. The primary judge made a finding (at PJ [756] (**CAB 203**)) that, if s 43A had applied, he "would not have accepted that the acts or omissions of the defendant were 'so unreasonable' according to the standard which must be applied in s 43A". The proper analysis as to why s 43A is engaged proceeds as follows (and when combined with the finding at PJ [756] provides a complete answer to both the Partial and Entire Period Claims):

88. ***First***, the "acts or omissions which give rise to liability"[98] in this case are: (i) the construction activities that caused the interference with the appellants' use and enjoyment of their properties; *when combined with* (ii) TfNSW's acts in procuring those activities by entering into the Project Deed on the terms said by the appellants to be deficient (see [16] above): see PJ [713], [716], [939]-[946] (**CAB 195, 248-251**). The planning and procurement acts in (ii) were an essential pre-condition for TfNSW's liability in nuisance because they were the basis on which TfNSW was attributed with legal responsibility for the wrong. Additionally, it must be appreciated that the construction activities in (i) were not merely the end-product of a chain that TfNSW initiated: these activities were the manifestation of TfNSW's exercise of the power under s 104O(1) of the TA Act, to develop or facilitate development of a light rail system, as effected through the mechanism of a contract (being the Project Deed). That exercise of power continued while the Project Deed remained on foot (during the period TfNSW procured the construction activities at issue).

89. ***Secondly***, the acts described in (i) and (ii) in the preceding paragraph were both instances of TfNSW's exercise of the power conferred by s 104O(1) of the TA Act. That power is "special" within the meaning of s 43A(2). Plainly, persons generally are not authorised to develop a light rail system on public roads: PJ [737] (**CAB 200**).[99] That s 104O(1) confers a special statutory authority is confirmed by the dispensation from the need for development

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98 *Curtis v Harden Shire Council* (2014) 88 NSWLR 10 at [244] (Basten JA).

99 cf *Curtis v Harden Shire Council* (2014) 88 NSWLR 10 at [248].

consents under Pt 4 of the EPA Act and local governmental approvals provided for by ss 104P-104Q. It was the exercise of TfNSW's power under s 104O(1), (within the constraints imposed by the approvals under the EPA Act and the *Roads Act* described at [7]-[10] above), that permitted the construction activities at issue to be carried out.

90. ***Thirdly***, the declaration of a route for the SLR under s 104N(2) on 11 September 2015 was not a pre-condition to the exercise by TfNSW of the power in s 104O(1): contra PJ [739]-740] (**CAB 200**). Section 104N(2) does not in terms impose such a pre-condition (indeed, it contemplates that a route may be declared in respect of an *existing* light rail system). Other features of the TA Act also point against that result. Most relevantly, under s 104L "develop" is defined to include preparatory activities such as financing a light rail system.

91. ***Fourthly***, the scope of s 43A's operation: (i) is not limited to causes of action that have as an element a failure to exercise reasonable care; and (ii) *does* encompass nuisance claims: cf AJ [176]-[179] (**CAB 478-479**).[100] The provision applies expressly in all proceedings for civil liability in tort (not just negligence): see ss 40 and 43A(1). Further, although s 43A was enacted in response to a particular decision, which did concern a claim in negligence,[101] the second reading speech suggests that it was intended to address a broader concern that decision-makers should not act too conservatively when deciding whether to exercise their powers out of a fear of incurring liability in tort.[102] The facts of this case provide an excellent example of the mischief to which s 43A is directed. TfNSW's decision to contract with OpCo on the best terms available, having undertaken the degree of investigations considered optimal, represented its best assessment of how its functions should be exercised in the public interest. The intended operation of s 43A was to ensure that Courts do not step in to second-guess whether such a decision should have been delayed (in the hope that further information or better terms might become available) unless it is clear that TfNSW's decision was affected by *Wednesbury* unreasonableness. The fact that TfNSW was ultimately sued in nuisance rather than negligence does not determine whether the provision is engaged.

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100 The statements in earlier decisions that could be read as contradicting these propositions, and which were relied on at PJ [694]-[695] and AJ [173], [175] (**CAB 190, 477, 478**) are either not directly on point because they were made in the context of judgments considering the operation of s 43A in relation to negligence claims (see *Della Franca v Lorenzato* [2021] NSWCA 321 at [8], [107], [147]; *Bankstown City Council v Zraika* (2016) 94 NSWLR 159 at [109]; and *Precision Products (NSW) Pty Ltd v Hawkesbury City Council* (2008) 74 NSWLR 102 at [172]) or do not, when read in context, rise as high as suggesting that no claim in nuisance could be based on the exercise or failure to exercise a statutory power within the meaning of s 43A (see *Gales Holdings* (2013) 85 NSWLR 514 at [196]-[197], [283]-[284]).

101 See *Presland v Hunter Area Health Service* [2003] NSWSC 754.

102 New South Wales, Legislative Council, Hansard, 4 December 2003 at 5835-6.

RESPONSE TO GROUND 3 OF THE NOTICE OF APPEAL (AS [45]-[58])

92. Ground 3 of the NoA contends that the appellants should be entitled to recover by way of damages a reasonable commission payable to their litigation funder. As is acknowledged at AS [45], this issue only arises if ground 1 or 2 of the NoA is upheld.

93. The factual context for ground 3 of the NoA is that certain group members entered into a litigation funding agreement (**LFA**), which provided that the funder would pay all legal costs and disbursements; meet any adverse costs order; provide any security for costs; and provide "litigation management services": AJ [183] (**CAB 480**). In return for these benefits, group members promised that, upon receipt of a "Resolution Sum", they would reimburse the litigation funder for the costs it had paid and pay a "Funder's Commission" ranging between 25% and 40% of the Resolution Sum (in the circumstances, the fee was 40%): AJ [183].

94. The necessary conditions for damage to be compensable in nuisance are that the damage was caused by the alleged nuisance and was of a kind that was reasonably foreseeable.[103] As in negligence, the causation inquiry involves "attributing legal responsibility" and extends beyond "a question of historical fact as to how particular harm occurred" to encompass "a normative question as to whether legal responsibility for that particular harm occurring in that way should be attributed to a particular person".[104] In the context of private nuisance, although some consequential damages may be awarded,[105] the nature of the tort defines the scope of liability.[106] In particular, it is "[t]he effect of the interference" with the plaintiff's interest in land that "provides a measure of damage regardless of whether the nuisance was by encroachment, direct physical injury or interference with the quiet enjoyment of land".[107]

95. The Courts below were plainly correct to conclude that it is inapt to characterise the Funder's Commission as a "loss" (for which the appellants must be compensated) when it is in fact the quid pro quo that group members agreed to pay the funder in return for the benefits described at [93] above: PJ2 [109]-[11]; AJ [196]-[198] (**CAB 389-390, 484-485**). A fortiori, this *consideration* passing from the appellants to their funder forms no part of the interference with the appellants' use and enjoyment of their land, which determines the applicable measure of damages in nuisance: see [94] above and PJ2 [118] (**CAB 391**). In

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103 *Overseas Tankship (UK) Ltd v Miller Steamship Company Pty Ltd (No 2)* [1967] 1 AC 617 at 636-640; *Gales Holdings* (2013) 85 NSWLR 514 at [277]-[280].

104 *Wallace v Kam* (2013) 250 CLR 375 at [11]. See, also, *March v E & MH Stramare* (1991) 171 CLR 506 at 509, 515-518, 523 524; *Travel Compensation Fund v Tambree t/as R Tambree & Associates* (2005) 224 CLR 627 at [45].

105 See Sappideen, *Fleming's The Law of Torts* at [19.250].

106 cf A Beever, *The Law of Private Nuisance* (Hart Publishing, 2013) at 153-155.

107 *Brown v Tasmania* (2017) 261 CLR 328 at [385] (Gordon J). Thus, personal injury damages are not recoverable in nuisance: see Sappideen, *Fleming's The Law of Torts* at [19.250] and the cases cited therein.

terms of the specific criticisms that the appellants make of the Court of Appeal's reasoning:

96. ***First***, contrary to AS [52]-[53] the question of whether group members' decision to enter into the LFA was "voluntary" is not properly limited to considering whether "the appellants had other options to vindicate their rights". The point made by the Court of Appeal was that group members who entered into LFAs made a free and informed decision to participate in the litigation on a risk-free basis knowing that, in order to do so, they would have to pay a percentage of any recoveries to the funder. There is no reason why some group members should be able to inflate their entitlement to damages relative to other claimants merely by deciding to outsource their legal costs and potential liability to meet an adverse costs order: see AJ [195] (**CAB 484**). These considerations are sufficient to break any causal chain and put the Funder's Commission beyond the proper scope of TfNSW's liability in nuisance.

97. In this regard, the decisions of this Court in respect of whether a plaintiff in a personal injury case may recover additional expenses required to manage a damages award are particularly instructive. In *Nominal Defendant v* ***Gardikiotis***, the plurality explained that:[108]

> … the question whether a need results from an accident is essentially a question of common sense: it is not a question to be answered by application of the "but for" test … it is contrary to common sense to speak of the accident causing a need for assistance in managing the fund [of damages] … in circumstances where her intellectual abilities are not in any way impaired.

98. Critically, common question 10 was framed on the basis that group members would not be required to show "that it was the nuisance of the defendant which rendered them impecunious so as to be unable to pursue their claims without the benefit of litigation funding": PJ2 [7]; AJ [184], [194] (**CAB 369, 480, 483**). Having regard to that detail, although absent the nuisance the appellants would not have sought to litigate, it would be contrary to common sense to say that TfNSW's interference with the appellants' use and enjoyment of their land caused a need for the appellants to enter into an agreement "to pursue litigation against the defendant on a cost and risk free basis": PJ2 [118] (**CAB 391**).

99. ***Secondly***, the Court of Appeal was correct to identify that allowing recovery of a funding commission as damages would give rise to the moral hazards identified at AJ [199] (**CAB 485**). The appellants criticise this reasoning on the basis that they only seek recovery of a "reasonable" commission: AS [56]. However, the Court has no discretion to decide whether a particular funding commission recoverable as damages should be reduced to a "reasonable" percentage (as opposed to deciding whether responsibility for an expense actually incurred by a claimant can properly be attributed to a tortfeasor).[109] Further, this

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108 (1996) 186 CLR 49 at 52. See, also, 54-55, 60-61, 66; ***Gray*** *v Richards* (2014) 253 CLR 660 at [2]-[4].

109 *Gray* (2014) 253 CLR 660 at [46].

argument merely sidesteps the more fundamental policy issue, which is that allowing recovery of the funder's fee as damages has the potential to distort the market's assessment of what a reasonable funding commission is (such that, in the longer term, a requirement that a commission must be "reasonable" according to the market could provide little protection).

100. ***Thirdly***, contrary to AS [57] the Court of Appeal did not state that litigation funding costs are legal costs. Rather, their Honours pointed out that the Funder's Commission represented a payment to acquire services relating to litigation (including legal services): AJ [202] (**CAB 486**). Costs are, in their ordinary sense, "the expenses to which a party is put in litigation".[110] Under statute, for reasons of policy, only some litigation expenses are recoverable as costs.[111] The Court of Appeal was right to be alive to the danger that permitting litigation expenses that are not recoverable as costs to be recouped as damages could allow recovery "by a side wind"[112] (and in a way that evades the supervisory costs jurisdiction).

101. ***Fourthly***, the Court of Appeal was correct to identify a "conceptual difficulty" with the recovery of the Funder's Commission as a "loss": AJ [205]-[206] (**CAB 487**). In addition to the temporal problems identified by the Courts below, consideration of what would be the effect of the terms of the LFA if ground 3 of the NoA is upheld is revealing. If a group member's damages award were increased to cover the Funder's Commission, under the LFA the funder would remain entitled to 40% of that increased award.[113] Thus, the group member would still not be fully indemnified for the commission (and indeed, the shortfall would be exacerbated if, contrary to [99] above, the Court exercised a discretion to award some smaller "reasonable" commission as in that scenario the funder would remain entitled to 40% of the total award). These results highlight the conceptual confusion in the appellants' approach.

PART VI NOTICE OF CONTENTION

102. See [64]-[91] above.

PART VII ESTIMATE

103. TfNSW estimates that it will require up to 4 hours to present its oral argument.

Dated 3 April 2025

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110 *Potter v Dickenson* (1905) 2 CLR 668 at 678 (Griffith CJ).
111 *Potter v Dickenson* (1905) 2 CLR 668 at 678; *Cachia v Haines* (1994) 179 CLR 403, 410-11, 415.
112 *Anderson v Bowles* (1951) 84 CLR 310 at 323. See L Merrett, "Costs as Damages" (2009) 125 *LQR* 468.
113 See **RBFM 888, see 894, 908, 909 and 949**.

ANNEXURE TO RESPONDENT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
Australian legislation and statutory instruments					
1.	*Civil Liability Act 2002* (NSW) No 22	Version in force from 3 June 2013 to 1 July 2015	ss 40, 43A	Version in force at the time TfNSW entered into a deed for the design, construction, testing and commission, operations and maintenance of the Project (Project Deed)	17 December 2014: date the Project Deed was signed. Note: There were no relevant amendments during the construction of the SLR.
2.	*Transport Administration Act 1988* (NSW) No 109	Version in force from 01 May 2013 to 1 July 2013	ss 3C, 3E(1), 104L-104Q and Sch 1 (cl 1(a), (c), (d), (k); 3(1)(a) and (c); 9(1) and 13(1))	Version in force at the time TfNSW made an application for approval of the SLR as "State Significant Infrastructure" (**SSI**) pursuant to s 115X(1) of the EPA Act.	June 2013: date of TfNSW's State Significant Infrastructure Application. Note: There were no relevant substantive amendments during the construction of the SLR.
3.	*Transport Administration (General) Amendment (Light Rail) Regulation 2015* (NSW)	As made	Entire instrument	Version in force at the time that the route for the SLR was the subject of a declaration.	11 September 2015: date the route for the SLR was declared.
4.	*Environmental Planning and Assessment Act 1979* (NSW) No 203 (**EPA Act**)	Version in force from 8 March 2013 to 25 June 2013	Pts 4 and 5.1,	Version in force at the time TfNSW made an application for approval of the SLR as SSI pursuant to s 115X(1) of the EPA Act.	June 2013: date of TfNSW's SSI Application.

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
5.	*Environmental Planning and Assessment Amendment (Light Rail Project) Order 2013* (NSW)	As made	Entire instrument	Version in force at the time TfNSW made an application for approval of the SLR pursuant to s 115X(1) of the EPA Act.	17 May 2013: date SLR declared to be critical SSI.
6.	*Environmental Planning and Assessment Amendment Act 2017* (NSW)	As made	Entire instrument	To indicate the substantial amendments made to the EPA Act from 1 March 2018	1 March 2018
7.	*Roads Act 1993* (NSW) No 33	Version in force from 4 June 2015 to 1 June 2016	Div 3 of Pt 9, ss 138(1), 139(1)(d), 144C(1)-(2)	Version in force at the time the Roads and Maritime Services granted an approval for TfNSW to carry out the design, construction, test and commission of the SLR on public roads.	2 October 2015: date of RMS Approval.
8.	*State Environmental Planning Policy (State and Regional Development) 2011*	Version in force from 20 May 2013 to 24 October 2013	Cl 16 and Sch 5	Version in force at the time TfNSW made an application for approval of the SLR pursuant to s 115X(1) of the EPA Act.	June 2013: date of TfNSW's SSI Application.