Presentation to
BRI Ferrier Property & Construction Networking Event
Sydney
Thursday, 26 July 2018
By Phil Montrone
Managing Director
Desane Group Holdings Ltd

Good evening,

Before I begin my conversation with you tonight, I would like to acknowledge the traditional owners of the land on which we stand, their elders, past and present.

Tonight I would like to talk about our Company's recent landmark battle with the NSW Government on the compulsory acquisition of our flagship property located in Rozelle. In discussing this matter with you, I am outlining factual evidence of our case.

Amongst a number of other properties, we own a 5,200 square metre property in the Sydney suburb of Rozelle. Being a property company listed on the Australian Securities Exchange, we always look for the highest and best use for our properties and just like many of you in this room, we apply for rezoning applications for residential development.

In June 2015, we submitted with the NSW Department of Planning a Masterplan rezoning proposal for a $300 million residential and commercial development of our Rozelle property. The proposal would also have allowed the rezoning of neighbouring properties owned by Gillespie Cranes and Swaddling Timber. The Department of Planning was slow in progressing the application and by February 2016, we began asking questions of the Department in regards to our planning application.

The primary Judge, in his decision in our case, said **"By all accounts, the Department of Planning neglected to progress the application. At a meeting with representatives of that Department on 31 May 2016, an apology for mishandling was given to Desane."**

Unbeknown to us, on 18 April 2016, senior RMS officials wrote a memo to NSW Cabinet, requesting urgent powers of acquisition for our Company's property, stating, amongst other things, **"Proposals are being advanced by the current owners for the redevelopment of these properties for residential use, and it is preferable that early certainty is given to the affected landowners in order to manage potential future compensation risks."**

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

Thus the story of the compulsory acquisition of our property commenced, many months before the formal announcement and negotiations with our Company began.

On 27 July 2016, our Company met with three officials from RMS, where they formally and for the first time, explained that RMS intended to compulsorily acquire our property for WestConnex. When we asked if they knew about our planning proposal with the Department of Planning, the RMS officials said they didn't know anything about it. When we asked what they intended to use the property for, they were vague and non-committal.

One of the three RMS officials present at that meeting was later **described by the primary judge as "Sergeant Schultz".** His Honour stated that remarkable (or perhaps unremarkably given the state of design and lack of detail of the project) this senior communications officer of the RMS was unable to provide any meaningful information as to how and why the project would impact our property.

At this point, sensibly, we suggested the NSW Government take a lease.

With regards to the compulsory acquisition process, we did not know much about the process. What we subsequently found out, was that before RMS acquires a property, **they set about a systemic profiling of the owners**. Following the profiling, they place property owners in one of three categories, namely, **high risk, medium risk and low risk**. The category you are placed in then dictates the communication programme which RMS will use to engage with you.

Our Chairman and I and our Company were classified as high risk, as a result of being an ASX listed company and having access to media and to elected officials.

Thus began the statutory Section 10A so-called six months genuine attempt to negotiate. In our case, because we were classified as high risk, the RMS brief was not to engage with us and to allow the six months negotiation period to expire without any meaningful engagement or negotiations.

In March 2017, not having been able to meet with any RMS official, except their valuer and planner, we received an offer from RMS out of the blue for $18.4 million for our property. No doubt you are aware that our response to that offer was to brief two highly respected independent valuers, who estimated the property to be valued at between $90 million and $100 million based on its development potential.

In May 2017, we received from RMS a proposed acquisition notice (PAN) which gave us just three months to accept the offer or be gazetted and proceed down the compulsory acquisition path - and eventually to the Land and Environment Court, to argue about the compensation value for our property. As you know, this process is fraught with lots of uncertainty.

So, at the beginning of August 2017, with three weeks left to the date of being gazetted, our Company proceeded to seek an injunction against the acquisition in the NSW Supreme Court, to prevent RMS from compulsorily acquiring our property. The injunction was granted by **NSW Supreme Court Judge David Hammerschlag** and a November 2017 hearing date was set.

The primary judge granted us wide access to Government and RMS documents. This document discovery resulted in 17 court volumes and 6,000 pages of discovered evidence. Many of the documents were heavily redacted. **900 documents could not be discovered because they were conveniently stamped with "Cabinet in Confidence".**

Not satisfied with Desane gaining the granting of the injunction, RMS moved to compulsorily acquire the eleven remaining tenants occupying our property, thus denying our Company, for a period, rental income of approximately $2 million. Today as I speak to you, we are the sole occupiers of a 5,200 square metres of office and warehouse space which once was a thriving business park.

Following further Government delay-tactics, the hearing was moved to February 2018 and resulted in a nine-day court hearing, including one day for the Court to inspect our property. Myself and my co-director, Rick Montrone, were called to the witness stand and four senior Government bureaucrats were also cross-examined.

With regards to my and Rick's testimony, the primary judge commented in his judgement that we were truthful witnesses.

After nine days of Court hearing, the primary judge concluded that there was no clarity as to the RMS's purpose for the acquisition of our property. He said, **"as best as it appears, the RMS intends to use a sliver of the property for a utilities corridor. An easement would no doubt have sufficed to achieve this requirement, absent of the parkland commitment."** The primary judge found **"that absent the purpose to provide the open space and green parkland, the property acquisition notice would not have been given and the acquisition would not have proceeded".**

On 1 May 2018, the primary judge handed down his findings, in our Company's favour, in a 92-page judgement. On the same day, the Premier of NSW, Gladys Berejiklian, was interviewed in national media regarding the decision and she said **"The RMS of course needs to respect what the Court's decided and I expect them to move forward in a positive way"**.

On 18 May 2018, the Crown Solicitor informed Desane that the RMS would appeal the primary judge's decision. The three-day Court of Appeal hearing was held on 28 and 29 June and 3 July 2018. As of today, the Court of Appeal judgement is pending. **Should it be said that Ms Berejiklian's word is not her bond?**

On 22 May 2018, the primary judge handed down the orders, declaring the property acquisition notice served by RMS was invalid and of no statutory effect and that the RMS pay Desane all legal costs of the proceedings as well as interest on costs.

We have concluded that the compulsory acquisition of our property, was one of hundreds of properties in NSW being compulsorily acquired where there was no purpose stated, potentially invalidating all these acquisitions.

During the Court of Appeal hearing, the NSW Chief Judge asked the senior counsel for RMS **"Would it be sufficient for an acquisition to be valid for your client to think the property may be required as distinct from would be required?"**

The RMS senior counsel answered **"As a realistic possibility, we would say yes, because that's for a proper purpose. In other words, one of the things of an organisation concerned with roads can do is land bank."**

The senior counsel for RMS argued that the public misunderstood the absolute power of an organisation such as his to acquire land.

As you have heard, Government departments believe that they only need to think about needing your property for them to compulsorily acquire your property. According to the Appeal Court

transcript, they don't even need to have a detailed purpose and – the Government can land bank properties – think of the possibilities.

Whilst a number of different purposes were put forward by RMS to compulsorily acquire our property, we are still none the wiser. All we know for sure is that the final purpose is for the delivery of parkland. Whilst the Environmental Impact Statement, approved in April 2018 by the Department of Planning, for the WestConnex Rozelle Interchange, the approval contains a provision that in the event that the interchange does not proceed for political or economic reasons, then **our property and our neighbours' property will be developed under the Bays Precinct Transformation Plan for residential and employment purposes, with the proposed Sydney metro station being located in close proximity to our property**. The future possibilities of this land bank are endless.

I will therefore leave it to your imagination the real purpose for RMS compulsorily acquiring our property and our neighbours', Gillespie's Cranes' and Swaddling Timber's properties. These three properties make up in total over 12,000 square metres of prime developable land being one traffic light away from the CBD. Under the Masterplan rezoning proposal submitted to the Department of Planning back in 2015, the sites would have delivered 600 residential apartments and approximately of 5,000 square metres of commercial and retail facilities. I believe the primary judge did make his mind up in delivering a landmark judgement in our favour of what he thought might be the real purpose of the proposed acquisition. **When considering that the Balmain Tigers site on Victoria Road Rozelle is also currently under compulsory acquisition by RMS, the Government has removed from the market over 800 residential units from the Rozelle precinct in a one kilometre radius.**

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Well, ladies and gentlemen, if you are in the business of private property ownership or property development, you have competition – and the new competitor is the NSW Government which is armed with absolute and unfettered power to compulsory acquire your property, just by thinking that they may need your property.

We hope that our Company's decision to challenge the RMS's compulsory acquisition powers and our success in obtaining a judgement in our favour in the Supreme Court in NSW, will result in more fair, equitable and compassionate treatment of private property owners. At the very least, we have certainly put the NSW Government on notice that there is a real problem within some of those agencies.

Our Company may have more to say regarding private property being compulsorily acquired by Government departments at the forthcoming NSW Parliamentary Inquiry, which has been established by the NSW Upper House on the WestConnex project and the property compulsory acquisition relating this project.

In concluding, I would say that our case could be described as a Star Wars Trilogy:

- Star Wars has been played, through the Supreme Court challenge and the handing down of the primary judge's judgement;
- we are now watching the Empire Strikes Back, with the NSW Government and RMS deciding to appeal the primary judge's decision; and
- after this, we could be watching The Return of the Jedi.

I would like to thank Brian Silvia, Peter Krejci and the BRI Ferrier executive team for inviting me to speak and for hosting this event.