



TRANSPORT:FOREVERYONE

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18th July 2023

Submission re: Transurban/Horizon Roads

For attention of: **Ninad Kulkarni/Tim Byrne**

Introduction

This inquiry submission is made by the *Transport 4 everyone* (T4e) group, an independent group of concerned transport and planning experts interested in sustainable transport in the context of global climate crisis following our submission to you in April 2023 calling for this inquiry.

We appreciate the thoroughness in approach by the ACCC in conducting its inquiry under *Section 50 of the Competition and Consumer Act 2010*, and the detailing of issues of concern. They are:

6. *“The ACCC is concerned that the proposed acquisition may substantially lessen competition for concessions to construct, own and/or operate toll roads in Victoria.”*
7. *“The ACCC is considering whether Transurban has incumbency advantages from holding toll road concessions, and the extent to which the proposed acquisition could increase those incumbency advantages.....”*
8. *“The ACCC is also concerned that the proposed acquisition may prevent the emergence of a key rival to Transurban for future toll road concessions.....”*
9. *“The ACCC is also considering the extent to which the Victorian Government can constrain Transurban in future toll road concession sale processes.”*

(ACCC 2023, p. 2)

We provide comment on these points identified as potential concerns.

We believe if Transurban were permitted to purchase a controlling interest in East Link then an already disastrous lack of accountability and failure to protect the public interest will be further ‘locked in’ and the state will never be able to regain its proper role in planning the state and capital city transport system, particularly in this period of climate crisis. Further, we see the interconnected nature of the roads network at a national level particularly as Transurban is the dominant toll road owner for the entire eastern corridor of Australia.

Further, we assert that successive Victorian Governments have demonstrated preferential treatment to Transurban from the company’s origin in 1999 in providing commercial protections, providing the services of a public body (Civic Compliance) for toll billing service to the present time with the unusual West Gate Tunnel Project structure embedded into the machinery of Government. We also draw your attention to the even more unusual structure of the North East Link Project (NEL) which shut out public scrutiny of the largest infrastructure project in the state. We argue the Victorian Government cannot be relied on to protect the broader public interest in planning and in open and transparent governance practices in relation to large road

infrastructure under its 'Big Build' programme.

1. Risk to market competition of Transurban's 'incumbency advantage'

Toll road construction and ownership - anti competitive practices

Transurban is a monopoly actor already in possession of part ownership of and is operator for 21 toll roads in the country. Transurban have exclusive control of the *CityLink* and West Gate Tunnel Project (*WGTP*) toll roads, which are the principal freight on road routes connecting the airport and the Port of Melbourne. If Transurban acquired controlling interest in East Link (another key link in the ring of major freight routes) this would elevate Transurban's dominance across major links in the supply and logistics destinations in this city. This will have detrimental effects on possibility of other bidders to the market.

The adverse competitive effects include impacts on future competitive processes for toll road development and ownership because Transurban dominates the Victorian market (as well as the Australian eastern corridor) with disproportionate resources and toll revenue. This means they can undercut competitor bidding for a toll road to protect their dominant position in the market and the potential competitor will not waste the time and money in bidding evidenced in the WestConnex sale process in Sydney which you have identified.

We believe that it is only a matter of time that the Victorian Government will divest of the North East Link (NEL) project and that it will be sold at a much-reduced rate because the market showed no interest in taking on this \$16.5 billion project at the outset.¹ This will mean that in the event of the state divesting in this project once completed, Transurban if it has control interest in East Link, will complete its monopoly over freight transport routes (particularly high-performance heavy vehicles (HPHV) which attract higher tolls under the current Concession Deed) for the greater city of Melbourne and Victoria. This is not in the public interest on two counts.

Firstly, as the market has shown no interest in developing the NEL project, and the state will bear the costs of construction and community back lash due to the uniquely untransparent nature of the Environmental Effects Statement (EES) process for this project and the reduced sale price.²

¹ A 26-kilometre tolled motorway connecting the M80 ring road (currently not tolled) to City Link (tolled motorway) across the north of the city, the Eastern Freeway (M#), currently not tolled and to East Link (tolled motorway) in the south east of the city

² The NEL tender process was uniquely structured in such a way that awarded the exclusive right to design and construct the project to the successful tenderer. The EES process was bundled with community consultation pre design of the road and remains the only avenue for community to provide comment. What this means is that the successful tenderer has developed the design of the project under the protection of 'commercial in confidence' throughout the entire project development and construction stages. The affected community is blocked by local Government, VicRoads and the North East Link Authority from any data or information on the project.

Secondly the extent of Transurban's control of the road system particularly the freight network along the Australian eastern corridor with access and egress to Brisbane, Sydney and Melbourne's ports and supply links under Transurban's control.

Further, the failed East-West Link (EWL) Project, developed and commissioned by the Napthine LNP Government (2012-14) was discontinued in 2014 by the incoming ALP Government, has its planning approval and will be a shovel ready project when the political will shifts. The Victorian ALP Government has signalled its intention to deliver this project (2018) which connects with the M3 currently a 'free'way, and it presents as another link in encircling of connected tolled freight routes of Melbourne from the northwest in land freight warehousing, the southeast manufacturing and the Port of Melbourne and airports (Tullamarine and Avalon) supply and logistics sectors links.

2. Victorian Government's capacity to constrain Transurban in future road concession sale processes.

Failure in Victoria Government assessment processes

We argue we cannot rely on Victorian Government processes to protect the public interest in the assessment of new infrastructure and in reviewing projects.

This has led to a corporate actor controlling transport and land-use planning decision making through a 'project led' process. Transurban is a transnational corporation expanding its global interests on the back of excessive tolls that Melbournians have been locked into, underwritten by Transurban's control of the *CityLink* Concession Deed. Transurban's interests are exclusively profits NOT public interest.

The failure in the Victorian Government to carry out accurate assessments and auditing of infrastructure projects is well documented. For instance, the Victorian Auditor-General concluded

"DTF has not consistently applied the HVHR process to unsolicited proposals. DTF's guidance falls short of ensuring a rigorous assessment of the likely benefits of unsolicited proposals, and of providing the transparency needed to enable affected stakeholders and the wider community to understand the full impacts."

VAGO, 2015

VAGO reports however are retrospective and the recommendations have no legislative force. Tim Pallas, Victorian Treasurer, famously denounced the damning findings of the VAGO 2019 WGTP report, publicly stating the Auditor General is wrong, *"We have grave concerns about the report, its our view that it is illogical, incoherent and in many places impossible to implement"* (Source The Age, p.3, Timna Jacks Thursday 28th November 2019).

Further, we draw attention to a point made by VTAG in their July 2023 submission that because of Transurban's considerable resourcing capacity to fund infrastructure projects it will not be

subject to the scrutiny of Infrastructure Australia. Essential services are too important to not be subject to authoritative public interest reviews.

Transurban's unprecedented contacts and influence on the Government and its advisors has created a distortion of decision making against the broader public interest evidenced in:

The Westgate Tunnel Project (WGTP) was submitted as an 'unsolicited bid' by Transurban in which the Victorian Government permitted a corporate actor to be embedded into the machinery of government through the Western Distribution Authority (WDA³) within a mega government department, Department of Economic Development, Jobs, Transport, and Resources (DEDJTR) between 2017 – 2019. This gave Transurban unprecedented access to all the machinery of government resources and political influence.

Despite an EES process and recommendations by the IAC (2017), and numerous calls by the affected community submissions, a filtration system on the WGTP was not required as a condition of the project. We understand this is the only tunnel project of its type without a filtration system for the exhausted fumes from the tunnel that travel over dense areas of suburban housing, schools and child centres. The grounds the Minister for Planning, who held exclusive decision powers, gave for not accepting this recommendation was cost to the project (a project owned by a private corporation).

The final WGTP design was for a much larger project than was necessary (from a \$500 million Western Distributor project to \$10.3 billion project) vastly extended to suit Transurban's interests to connect the M1, from Werribee to Pakenham with the new WGTP toll road to its existing *CityLink* toll road with key freight routes and access and egress to the Port of Melbourne under the control of one toll road corporation. This created three large project components on public roads that the public purse paid for and which Transurban has controlling tolls rights to.

The original legal protections secured by Transurban from Government includes business risks for construction and an untried tolling system. The State also provides a guarantee against future State Government decisions impacting *CityLink* profitability such as the State building parallel roads that gave motorists cheaper alternatives (Institution of Engineers (IoE) Australia, (Victoria Division) 2002, P. 20).

³ The Western Distributor Authority (WDA) is a public administrative office formed on the 16 June 2016 under the Public Administration Act 2004 as part of the Department of Economic Development, Jobs, Transport and Resources (DEDJTR). The role of the WDA is to manage the delivery of the Western Distributor Project, which includes the Western Distributor, which was assessed through an Environment Effects Statement (EES) process, and the Monash Freeway Upgrade and Webb Dock access improvements. Source: <<https://www.planning.vic.gov.au/environmental-assessment/major-transport-projects/western-distributor-project>>

Transurban's control over the stable of consultancy connections and the practice of sidelining of independent consultants that have presented a more critical examination of data (Senate Inquiry submission, McDougall, 2017).

This means is that Transurban has effectively taken control of presentation of transport options, (ones that are consistent with Transurban's business interests) and often exclusive negotiating conditions with Government relying on manipulation of data in ways that gives the appearance of superior solutions. However, these are not rigorously tested through a proper objective cost benefit analysis process by independent consultants. They are also not tested against broader urban planning criteria particularly including the need to decarbonise cities to meet State and Federal government commitments to net zero emissions. This applies to project development (e.g., the West Gate Tunnel Project (WGTP) build) and toll pricing increases.

History of Transurban's favoured position with the Victorian government.

This is evident in the acceptance of Transurban's WGTP instead of the Western Distributor project, in which the government effectively handed to Transurban established public roads from Werribee to Pakenham into its ownership and control, a new tunnel and road direct connection to its other toll road, *CityLink*, in large part funded by the public purse.

The Government agreed to extend the lucrative *CityLink* Concession Deed to enable Transurban to collect *CityLink* tolls to 2047.

This is also evident in the resolution of the commercial dispute between Transurban and the WGTP construction company, John Holland Venture, concerning the cost of contaminated spoil between by the Victorian Government. This was despite Premier Andrews and Treasurer Tim Pallas' statements in the press to the effect that seriously contaminated spoil (unbelievably not discovered during the EES process but only after construction commenced) was a matter between Transurban and the John Holland Joint Venture. This held up works several years (new completion date moved from December 2022 to 2025), and involved the state in

- pressuring Bulla Shire to accept PFAS contaminated spoil (soil) that never breaks down and needs to be stored in perpetuity above ground.
- the public purse contributing a further \$132,374,000 (West Gate Tunnel Agreement Third Amending Deed, p. 2,) to resolve a commercial issue between private companies.
- and the enactment of the *West Gate Tunnel (Trucks Bans and Traffic Management) Act 2019* (Vic).

To resolve a number of delivery issues arising during construction, the State and Transurban announced that an in principle settlement had been reached between the State, Transurban and the Design and Construct (D&C) Subcontractors (CPB Contractors - John Holland Joint Venture) for the West Gate Tunnel Project on 17 December 2021.

In March 2022, the State and Transurban entered into amending and settlement deeds to formally document the resolution of various commercial issues related to the project (Amending and Settlement Deeds). The State will contribute an additional \$1.9 billion, Transurban will contribute \$2.2 billion and the D&C Subcontractors will forego revenue and

profit margins on the project as part of the settlement. Construction is expected to be completed by late 2025.

(Source: Carey 2019)

This further demonstrates the dominant role played by Transurban and the failure of the Victorian Government to protect Victoria's fiscal and public broader planning interests.

Transurban's power is such that it has been able to extract approvals for toll increases in the latest most recent Concession Deed amended version which was gazetted on 24 March 2022. This is despite CPI movements in the vicinity of 2% over that time and other organisations – e.g., local governments - restricted to annual increases in the order of 2% (Fristacky, VTAG 2023).

In February 2019, the government signed the Melbourne City Link Thirty-seventh Amending Deed (Amending Deed) which varies the Melbourne City Link Concession Deed by:

- *extending the pre-existing CityLink concession from 14 January 2035 to 13 January 2045.*
- *increasing the current toll escalation rate applying to CityLink tolls from CPI to a fixed toll escalation rate of 4.25 per cent per annum. This rate applies from 1 April 2019 to 31 March 2029 with toll escalation of CPI thereafter.*
- *introducing a new high productivity freight vehicle truck toll class (large truck and trailer combinations) from the opening of WGTP*

(Source: Parliamentary Budget Office (PBO) response to request by Michael O'Brien)

Privatising profits and socialising the costs:

The public purse is bearing the 'strengthening cost' of upgrades to bridges and roads in the networks to support HPHV whilst the road corporation and private freight on road owners are profiteering through control of the supply and logistics industry rather than government leading the way to provide more sustainable public transport and heavy freight on rail.

The loss of revenue to fund more sustainable modes of transport has been lost to corporate profits facilitated by the Government enabling corporate interests by multiple extensions to the *CityLink* Concession Deed

Handing Urban Planning to a Toll Road Corporation

The most significant consequence and major concern to urban planners is that Melbourne's transport and urban planning is being delegated to Transurban through project-led planning. The shape of Melbourne's future is increasingly dictated by major road projects built by Transurban rather than a properly developed integrated transport and planning strategy for Melbourne. This is contrary to effective planning for Melbourne as a city. This concern has been highlighted by planners, academics, and urban designers in the WGTP, the NEL project and the practice of privileging Transurban in 'exclusive negotiations' (Transurban, 2017).

Conclusion

Transurban entered the market to fund key freeways in the 1990s when the State was willing to outsource the activity to a private corporation. Its plan to operate motorways for toll income and use its market power to entice governments into more and more tollway development underwritten by publicly funded strengthening works required for HPHV freight vehicles on roads, to its financial benefit. This weakens competition between different modes of transport and ability of government to provide cross subsidies to fund for more sustainable alternatives. It is critical that sustainable models for passenger and freight options are not locked out in this age of climate crises.

Accordingly, the ACCC is urged to curtail anti-competitive monopoly control by preventing the acquisition by Transurban of a controlling interest in Horizon/Eastlink which would exacerbate the adverse consequences identified in this submission. We urge the ACCC to consider the risk to the public interest, not through the narrow lens that the Victorian Treasury and Department of Finance apply (DtF; WGTP Appendix 4) by taking full account of the implications of the climate crisis, the urgent need to decarbonise our cities and resist monopoly corporate actors blocking the necessary transition to sustainable public and active transport and heavy freight on rail.

Yours sincerely,

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Transport for Everyone is an alliance of existing transport and planning organisations, combined with individuals with an acknowledged expertise in transport, land use planning and sustainable community and economic development.

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