

# Submission to Australian Competition and Consumer Commission (ACCC).

Re a review of the proposed acquisition of **Horizon Roads Pty Ltd**, which holds the concession to operate EastLink, by **Transurban**.

April 2023

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## Background: About the Victorian Transport Action Group (VTAG)

This submission is made by the Victorian Transport Action Group (VTAG), an independent forum focused on solutions to Victoria’s transport challenges.

Members of VTAG have expertise across passenger and freight transport, urban and regional planning, State and Local Government, I.T. and the environment, engineering, architecture, and urban design.

VTAG through its membership, has an extensive network of connections in state, local government, industry, and academia across planning and public transport that it draws on for insights into the complexity of transport issues and seeks to provide options for equitable, practical, and constructive solutions.

VTAG’s interest in the proposed acquisition of the Horizon stake in Eastlink by Transurban is to ensure the maintenance of a competitive environment for the development and maintenance of Toll Roads in the State of Victoria. Our primary concerns are public interest issues relating to the effective operation of our transport system.

As a not-for-profit organisation, to the best of our knowledge neither VTAG nor its members have any commercial relationship with Transurban, Horizon Roads or Eastlink.

## Toll road construction and ownership

As set out in VTAG's letter to the ACCC of 13 February 2022, asking that the ACCC undertake an inquiry into the proposed acquisition of EastLink, VTAG submitted:

"Transurban already has a virtual monopoly operating nearly all of Australia's 21 toll roads."

Transfield, a Southeast Asian Engineering firm, in consortium with Japan's Obayashi group under a Transurban joint venture consortium, successfully bid in the early 1990s to build and operate City Link. City Link was originally presented as a BOOT project to build, own, operate and then transfer the asset to the public as the final owners. To date, there have been repeated extensions of the concession deed. The extensions have been prompted by bids to build more tollways, and/or widen existing freeways with tollways sections. These are intended to achieve its strategy to maintain and expand its revenue stream, with the result that the CityLink concession deed is now extended to 2047.

### Transurban Builds Its Influence

Transurban's power and funding capacity from assured ongoing toll revenue from CityLink has enabled its massive growth and expansion to other States, with a majority interest in eight out of nine tollways in Sydney, all seven tollways in Brisbane and all Melbourne tollways other than Eastlink. However, the most significant consequence of Transurban's near monopoly position is the extent to which its growth in control and power over toll roads in Victoria, has distorted Government and other decision making to undermine effective transport and urban planning and investment in more sustainable means of transport both passenger vehicle and freight.

VTAG notes the decision of the ACCC of 30 August 2018 on Transurban's bid to acquire Sydney's WestConnex and its finding that there would not be a substantial lessening of competition in breach of Section 50 of the Competition and Consumer Act was based on an undertaking by Transurban to publish designated traffic data from its interests that would be available to rival bidders.

VTAG views this as a narrow basis for finding against any lessening of competition. It does not adequately consider other elements of Transurban's dominant position that impacts adversely on competition based on its market power from ongoing toll revenues, relationships with key consultancies and law firms, and a too close a relationship with government, which has skewed decision-making to unduly favour Transurban over alternatives.

Access to traffic data is only part of the picture. It is how data is used, the expertise and persuasiveness of those assessing and presenting implications, compiling models and the assumptions behind such modelling. This in circumstances where Transurban has dominance in its long-term relationship securing its supportive reports through the major consultancies, engineering firms and senior lawyers. Alternative contenders scramble to

find firms and experts who are not conflicted by having a recent relationship with Transurban or Government decision makers. Others, if involved in challenging their decision making, are concerned they might be excluded in the future.

### Broader Impacts of Transurban Market Power

ACCC needs to consider Transurban's broader market power. Transurban portrays itself as "*having leading capabilities in network planning/forecasting, community engagement, development/delivery, technology application, operations and customer management*". Government agencies, especially in transport have lost much of their expertise and role in these matters, with successive restructuring, contracting out, and recruitment into the private sector, with staff losses of policy analysts, senior engineers, and transport personnel. Many fundamental elements of project development are left to Transurban.

Our concern is that an ACCC decision on a limited basis of commercial concentration does not deal with the broader problem of Transurban's monopoly position and the impact on critical government decision making about Melbourne's future. The application of section 50 of the Act should have regard to the objectives and purpose of the *legislation to enhance the welfare of Australians by promoting fair trading and competition*.

Although it is reported that the Horizon Road Shareholders agreement precludes a toll road operator purchasing the stake in Eastlink, the application of this exclusion and whether this clause would hold is not clear.

VTAG argues that it is critical for the ACCC to assess this Transurban bid and use its powers under Section 50 of the Competition and Consumer Act 2010 to rule against its acquisition of the Horizon/Eastlink stake on the grounds that this acquisition will have the effect of substantially lessening competition in the market including the public transport market.

VTAG views this ACCC inquiry as integral to remedying the effect of Transurban's monopoly position to control the direction of Victorian government urban and transport planning. The Government has, arguably, allowed Transurban's freeway vision to shape transport planning for Melbourne.

The adverse competitive effects would apply as regards:

- Future competitive processes for toll road development and ownership because Transurban has huge resources through its dominant market position in Victoria and ongoing lucrative toll revenue. It also has capacity to leverage its existing networks to undercut competitor bids for the Eastlink toll road stake. Its dominance in Eastern Australia reflects both this strategy and dominance.
- Its contacts and influence on the Government and its advisors have enabled distortion of transport decision-making against the broader public interest and contrary to legislative requirements under the Victorian *Transport Integration Act 2010*, as well, contrary to the vision for sustainable planning and transport

enshrined in *Plan Melbourne*, pursuant to the State's Planning and Environment Act.

- Its power through its consultancy connections (PWC, S&P) has enabled it to present data in a way that seems to demonstrate it can offer a superior solution, contrary to a proper objective cost benefit analysis undertaken by more objective government processes and other consultants which Transurban has managed to get sidelined. This applies to project development (e.g. the West Gate Tunnel build discussed below) and toll pricing increases (viz the 10% per annum increases discussed below).
- Its capacity to fund projects from toll revenues in a way that its projects can be excluded from scrutiny by Infrastructure Australia.
- Embedding selective inequality between parts of the city that pay no or lower tolls (many more affluent areas) and those that pay high tolls (more disadvantaged areas without effective access to public transport).

### Growth of Transurban Power Across the Road Network

Instrumental in Transurban's expansion was its ability to negotiate away, for a modest sum, an initial restriction on using CityLink technology in future projects elsewhere. Transurban in 2001, negotiated a variation in its agreement with the Victorian Government to release it from a 'single purpose' (to operate CityLink) for \$10 million in 2001, payable over three years: see <https://www.afr.com/companies/transurban-plans-development-spin-off-20011022-k168m>

The Victorian State Government unwittingly, for a mere \$10 million, acceded to Transurban's request to this change which led to the people of Victoria funding tollways in the rest of Eastern Australia and in North America.

The CityLink project is regarded as having created leading-edge technology in road tolling, the first in the world using full electronic tolling for a toll road with more than 10 entry and exit points. Other elements for Transurban taking on risks of construction and an untried tolling system were State guarantees against future State Government decisions impacting CityLink profitability such as the State building parallel roads that gave motorists cheaper alternatives (see *Journey and Arrival: The story of the Melbourne CityLink*, Institution of Engineers Australia, (Victoria Division) 2002, Pages 15- 20).

With its funding power, Transurban has been able to negotiate extensions of the City Link contract; this has been a key component of agreements to build further toll road upgrades and extensions to the Monash M1 Freeway, Tullamarine Freeway and most recently, building the West Gate Tunnel. Such ongoing toll revenue has further enabled Transurban to keep expanding its reach in Eastern Australia and expand into overseas markets to build the Washington Pennsylvania expressway and secure further projects in the US and Canada.

Transurban's business strategy is to be a partner of choice for governments to build and operate tollways and to extend existing freeways with new tolled sections linked to its tollways in Eastern Australia.

This is set out in several strategy documents such as this 2016 report "Positioning for the Future" [https://www.transurban.com/content/dam/investor-centre/02/2016\\_InvestorDay\\_presentation.pdf](https://www.transurban.com/content/dam/investor-centre/02/2016_InvestorDay_presentation.pdf)

The ACCC is referred to this strategy the company plan for expansion to regulate tolling on key new arteries of Melbourne to achieve a monopoly position - by reference to the below Transurban diagram for Melbourne from the *Positioning for the Future* strategy report.



The City Link contract in Melbourne for Transurban has provided the means by which Transurban has been able to secure a monopoly position with the Transurban report identifying revenues from CityLink as outperforming in \$s any other tollway revenue-raising in eastern Australian States. This is why Transurban is so keen to keep extending the City Link Concession Deed and extend this to other tollways.

It is highly instructive to consider the lens of other nations on the Transurban contractual relationships with the Victorian State Government gleaned from Transurban presentations as below:

- A senior Transurban manager, with a French background, presented at the State Library of Victoria on Bastille Day 2016, identifying the company's expansion from Australia into the US. Asked by a French resident in Melbourne, whether Transurban had sought to expand into Europe, the response was that the European nations were not interested in their model!

- At a Transport Technology World Congress at the World Trade Centre in 2016, Singaporean Managers hearing Transurban present at a Congress, examined the data presented on toll revenues v. expenditure. *They were stunned that Victoria allowed this model, astounded that toll revenue was not going into State revenues to fund hospitals, schools, railways and housing and other needed infrastructure - as they would in Singapore.* They were adamant Victoria was being short-changed and that their Land Transport Authority (LTA) and political leadership would not countenance such a private sector funding model in Singapore to public detriment! They could not comprehend a State leadership so lacking in financial acumen and consideration of the public interest!

CCC is asked to examine Transurban's reports to ascertain toll price revenue raised by it in the context of expenditure and traffic growth and to table the extent of the transfer of funds since the opening of City Link in July 1999 to date from tolls paid by the people of Melbourne to enable Transurban to expand throughout Melbourne, to other Eastern States and the USA.

#### Transurban Expansion from Melbourne Base

The ACCC has asked for submissions to address competitive processes as regards toll road development, ownership, and operation in Victoria. However, these issues as they relate to the Transurban bid for Horizon/ Eastlink, need to be addressed not just in relation to Victoria, but to Australia more broadly. Toll revenues have enabled Transurban profits to be exported to expand from Melbourne into other Eastern States dominating the Sydney and Brisbane Networks - see below from the above 2016 Strategy Report.

Transurban is positioning itself in Melbourne and other Eastern States to secure other tollways, link these to its tollways and to other freeways to have these as the dominant means of city transport. Understandable from a corporate management and shareholder perspective, regulators including ACCC need to consider the broader public policy implications.

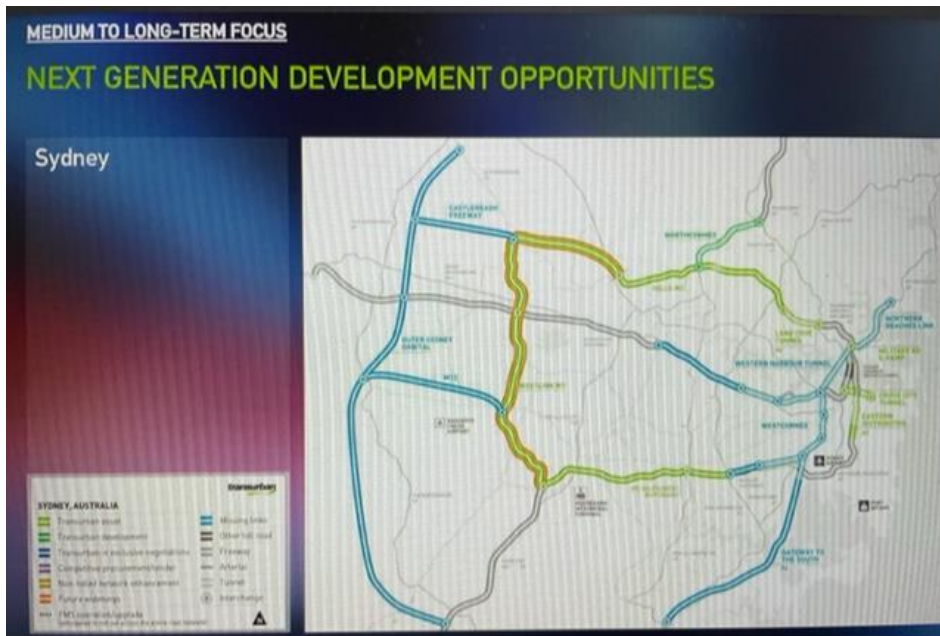
For the ACCC, this includes the longer-term impacts on competition, not only as regards tollway ownership and operations, but the impacts for competition with public roads, public transport and planning decision making. A related major consideration is the ongoing consequential high costs for users, of transport dependency.

Another highly significant impact is how such a monopoly impacts and significantly reduces the capacity for Victoria governments, urban planners, and transport planners to shape Melbourne in a sustainable way to meet environmental safeguards geared to overcoming our climate emergency.

This includes their mandatory requirements under the Victoria Transport Integration Act 2010 (sections 6-28) to have regard to the Act's transport system vision, objectives, and decision-making principles in exercising its powers and making decisions impacting the transport system. The ACCC is asked to recognise in its decision on this matter, that Transurban's strategy undermines the capacity and even makes it impossible for

governments, urban planners, and transport planners to do the above in accordance with the above Act.

In pursuit of its Strategy on development opportunities outlined in 2016, Transurban has since achieved control of 8 of the 9 motorways in Sydney with plans to extend its links to ensure that extensions of all other key motorways have Transurban tolled sections.



In Brisbane, Transurban has control of all seven tollways, with similar plans to connect these with other city motor ways with tolled sections.





Revenues with significant volumes from the lucrative City Link Concession Deed, now extended to 2047, have funded expansion into the North American Eastern Seaboard commencing with the Greater Washington Area Network.

Rather than toll profits being retained in the nation and re-invested in domestic local infrastructure including public transport, more and more monopoly super profits are exported. This is while the State falls into increasing debt seeking to fund infrastructure projects from insufficient revenues and is pulling back from significant committed projects such as Airport Rail. Significantly, Airport Rail would help reduce congestion on freeway links to the airport and impact toll revenue.

There is major concern that with the further acquisition, even more toll revenues will continue to be exported rather than directed to help fund the major backlog in Victorian infrastructure projects for schools, hospitals, public housing, and public transport.

This is a critical issue for the efficiency and effectiveness of the finances of the State of Victoria which should be applied in the interests of the people of Victoria.

Public interest questions have been raised in the media re the State's relationship with Transurban and its financing model (Royce Millar/Ben Schneiders 14/6/16: <http://www.theage.com.au/victoria/transurban-the-making-of-a-monster-20160512-gotjm9.html>).

#### Conflicts of Interest?

The ACCC is also referred to conflict of interest issues also raised in the above article over beneficial extensions of the Transurban contract and excessive tolling system in light of former Labor Government Advisors, working for Transurban. The question arises whether these former senior advisors have been able to be employed by Transurban without adequate safeguards covering undue influence.

In terms of the issue raised by the ACCC re the extent to which the proposed acquisition would impact the ability of Transurban's rivals to compete for future toll road development, ownership, and operation, Transurban, with its existing dominant position in Victoria, can be seen to be unrivalled in this regard. The acquisition of the Horizon/Eastlink stake would guarantee its monopoly role.

#### West Gate Tunnel Example

On the other issue raised by the ACCC as to the extent to which the Victorian government can influence or control future competitive processes for toll road concessions, the Victorian Government in theory had a choice in determining Transurban's market led bid for the West Gate Tunnel project (WGTP), in lieu of the far more modest build of the previously approved West Gate Distributor.

Instead, despite substantial public critiques of 28 transport and urban planners from the University of Melbourne and RMIT, the Melbourne City Council, other local governments, prominent consultants, the Grattan Institute, and community groups, demonstrating a

weak business case on cost benefit analysis, the State Government acceded to Transurban's bid to expand this western project into a far more substantial build as a private toll road.

ACCC is referred to the attached analysis of the WGTP by VTAG transport experts in 2017:

*"The WGTP market-led proposal has been designed largely as a mega-road project, eleven times greater than the original West Gate Distributor project, now partly completed, as proposed by the Labor Party in its election policy platform in 2014.*

*The major proponent of the WGTP, Transurban, stands to gain massively from a design that favours the integration of the project infrastructure with CityLink and includes an extension of its concession deed for a further 15 years, without calling for competitive tenders....*

*VTAG submits that the WGTP will not address critical needs or deliver optimal outcomes for Victorians. It recommends that it be substantially reduced in size and properly planned as part of a comprehensive multi-modal solution...*

*The WGTP does not provide a second Yarra River crossing. It only crosses the Maribyrnong River that already has 11 crossings.*

*Moreover, the Government's enlarged Webb Dock redevelopment, without a rail line connection, will increase West Gate Bridge traffic. For this reason Melbourne Port is seeking reinforcement of West Gate Bridge for 109 tonne Super B-double mega trucks and to build WestLink, as the current WGTP does not address the requirement to transport large volumes of container traffic.*

*Transurban's proposed WGTP design creates a mega-road cluster. To link City Link, major arterials and the M80 Western Ring Road, the West Gate Freeway will be widened to 16 lanes plus 4 emergency lanes (at the widest point). The tunnel is to be widened further to 6 lanes plus 2 emergency lanes. Emergency lanes can be converted in future to operational lanes as is now happening with City Link Tullamarine Widening in Kensington.*

*The proposed over design of the West Gate Freeway, tunnel lanes and on-off ramps are excessive and will attract additional road traffic to the inner west and north, and to Melbourne CBD – all contrary to long-standing policies to reduce road traffic in these areas. This will force people and businesses to pay increasing private road tolls. With Transurban's desire to move and toll individual vehicles, there is no efficiency plan that maximises people flows or reduces the number of low-occupancy vehicles on the roads.*

This 2017 analysis of the WGTP proposed by Transurban, warrants very close reading by the ACCC as part of this inquiry as an example of Transurban control over decision-making in its favour, notwithstanding multiple adverse consequences at excessive cost for the people of Melbourne and Victoria but benefitting Transurban and its further control of the State's tollway development.

Apart from this, it has been reported that the Government was misled as to the costs of the WGTP in large part due to environmental requirements and additional costs of handling and disposal of contaminated excavations. These were identified at a \$4Billion cost overrun to near \$11 Billion compared with the contracted cost in 2017 of \$6.7Billion, with the State incurring substantial extra costs in excess of \$2Billion.

<https://www.theage.com.au/national/victoria/west-gate-tunnel-project-faces-4b-blowout-amid-contaminated-soil-crisis-20210615-p5812g.html>.

With its approval of Transurban's WGTP, the Government also agreed to extend the lucrative City Link Concession Deed to enable Transurban to collect CityLink tolls to 2047. This further demonstrates the dominant role played by Transurban.

The acquisition of Eastlink by Transurban would further consolidate its dominant position. It is considered this would ensure Transurban as the unrivalled bidder to construct connections between its tollways resulting eventually in total domination of tollway travel across Melbourne.

## Regulatory Weakness

Regarding regulatory or other constraints that could limit concerns relating to future competitive processes for toll roads, there are regulatory processes under the Planning and Environment Act, Environment Effects Statement requirements, Transport Integration Act, and other legislation. However as the WGTP demonstrates, notwithstanding the requirements of legislation, decisions ultimately lie with government whose discretion on project selection and approval dominates, irrespective of legislative requirements, merit, and adverse consequences for urban and transport planning.

Yet such constraints would not seem applicable to the case of Transurban acquiring a share in Eastlink through a sale process. Hence the importance of the ACCC's role in examining this Transurban bid and considering the identified adverse competition impacts that would be generated by the extension of Transurban's near monopoly to also cover Eastlink.

### Impacts on Land Use Planning

It is well established that the pattern of metropolitan transport infrastructure is highly influential in determining the shape of urban development. This is demonstrated by the way railways determined suburban development along rail corridors in the 19th century.

Although government claims to set the framework in which Transurban operates, there is no Victorian Transport Plan that informs how and why the pattern of freeways being developed is to be accorded priority. No such Plan informed the basis of transforming the previously endorsed modest Western Distributor project for Melbourne's West into Transurban's bid to build a massive West Gate Tunnel and elevated freeway connections funneling more and more traffic into City Link and the Tullamarine Freeways with consequences for their further widening. VTAG views the WGT approval as an example of regulatory weakness in constraining the exercise of Government discretion in project approval.

In short, Transurban through its tollway monopoly giving it extensive funding powers and

its relationship with the government and its advisors, is able to exert undue political influence to set the direction of Melbourne planning according to its strategy for expansion, contrary to sound planning.

This is a profound problem in terms of competing policy visions for Melbourne's development. If Transurban's proposed acquisition of Horizon's Eastlink stake were to succeed, it would further impose its vision of freeway development on Melbourne through new tollways further connecting these freeways to direct the shape of Melbourne.

Transurban seeks to privatise metropolitan transport policy so as to maximise its profits and use Victoria's regulatory weaknesses as a springboard to continue to export its model of tollway development elsewhere. It does not, nor should it, have the wider city-shaping goals of a State Government.

As experience in the public transport sector shows, privatisation may be effective within a strong regulatory framework, and preferably for delivering concrete goals against a clear budget and timeframe, within the context of transparent public governance. But a private corporation should not occupy the policy role that elected governments are there to serve.

The de facto ceding of key high-level decisions in transport and urban planning to a private corporation, that can then use this power to increase and spread its profits, power and influence has never been a proposition sanctioned by the Victorian or other Australian electorate.

**There is an opportunity for the ACCC to help curtail further Transurban dominance and adverse consequences for Melbourne's development through prohibiting Transurban acquiring a stake in Eastlink.**

## Supply of electronic tolling charges to motorists

VTAG appreciates there are some contractual and regulatory limits on the tolls and other fees and charges that can be charged to motorists on Victorian toll roads. However, Transurban's power is such that it has been able to extract approvals for toll increases averaging 10% per annum over decades. *This is despite CPI in the vicinity of 2% over that time and other organisations - e.g. local governments - restricted to annual increases in the order of 2%.*

Victorian motorists can question an individual toll charge and seek to negotiate with Linkt on the basis of an error to ask for an individual fee waiver or contest a charge in the Courts. Otherwise motorists are not able to avoid toll payments for using the Transurban toll roads.

Motorists reliant on travel across Melbourne using tollways for business, trade or commuting, pay up to \$106 per week, a light commercial vehicle \$230 and heavy commercial vehicle \$426. There is no provision for monthly, annual, or other reduced passes for the low-income users.

For some, tolls are a business expense; in other cases, toll payments are covered through employers providing a vehicle or covering travel outlays. Accumulating over the working week substantial toll fees are a costly expense. This is especially so for people who have no effective access to public transport and/or are suffering financial hardship.

Enforcement of payment is another major financial advantage for Transurban provided by the Government as the State enables court resources to be used to enforce toll payments. This places extra burdens and stress on the court system.

The ACCC is referred to annual reports on the burdens and adverse repercussions placed on judicial processes by this added role for the Courts. It is not clear how this is factored into returns to the State from toll revenues. The ACCC is asked to seek this information from the State.

As to the existence of any regulation/contractual arrangements constraining attempts by Transurban to increase toll or other fees, the ACCC is requested to examine the assessment processes by the State Government and the rigour applied by regulators when considering such increases compared to decisions on build and operating costs. That toll increases have been in the order of 10% per annum, far in excess of CPI/inflation, indicates loose regulation also in this regard.

## Road-on-road competition

As indicated earlier, it is a major concern to urban planners that Melbourne's transport and urban planning is, in effect, being delegated to Transurban led project planning. The shape of Melbourne's future is being dictated by major road projects built by Transurban rather than a vision on how Melbourne should develop. This is contrary to effective planning for Melbourne as a city. This was highlighted by planners in the case of the WGT.

Its virtual monopoly position in Melbourne, Sydney and Brisbane has given Transurban unparalleled private sector sway over transport and planning and priorities. We reiterate that this is counter-productive to effective planning for Melbourne as a city.

Aspirations by the Melbourne City Council, communities and transport and urban planners to limit personal commuter traffic through the central city are compromised by Transurban's *raison d'être* based on expanding throughput of vehicles in congested areas to use its toll roads.

The successive widening of freeways adding new freeway lanes and on and off ramps funded by Transurban induces traffic to create more congestion. It is not a solution to congestion. The Tullamarine Freeway was originally built with two lanes in each direction, that is 4 lanes. Successive widening has resulted in 8-10 lanes. It is Melbourne's busiest freeway carrying up to 210,000 vehicles per day.

From a transport planning perspective, through traffic should be directed away from local roads to public transport or to freeways. Charging tolls does the reverse, making arterial roads like Punt Road, and Bell Street and road continuations from these, as alternatives to the tolled route, more congested than they otherwise would be.

Transurban has the objective to maximise orderly throughput of vehicles while ensuring its toll roads are well-maintained and as reliable as possible to optimise journey times and make use of its tollways more attractive than congested public roads.

Part of toll revenue is applied to payment for cleaner, better maintained roads as well as to ramp metering controls to ration the numbers of vehicles entering its tolled freeways to regulate vehicle flow for steady journey time. Congestion is thus managed so as to motivate drivers to continue to use its tollways.

Transurban can use its increasing market power to discourage public interest measures which would limit its revenue sources by challenging incentives for multi-occupant vehicles and applying dedicated bus lanes on tollways and community service obligations. For this reason, there is no dedicated bus lane on the Tullamarine Freeway to the airport; this is the primary cause of SkyBus delays during peak times. Nor is there a continuous emergency lane as emergency lanes have been incorporated into toll-paying traffic lanes. Further, is the omission of sections of noise attenuation treatments to protect adjoining properties on some extensions as would be required on State freeway projects.

Dedicated public transport lanes able to carry substantial passenger loads speedily on congested freeways, especially via bus rapid transit (BRT), light rail or heavy rail transit are the most effective and sustainable means of mass transit in cities to deal with congestion. The ongoing exorbitant toll fee structure dominated by Transurban allowing high standard of maintenance and investment in expanding tollways undermines funds available for public transport development and for public roads.

In principle, public transport is an alternative to tolled roads. However, over decades of tolling, putting aside the dampening of public transport use due to COVID, investment in public transport has not kept up with population expansion and demand. The substantial toll revenues being directed to shareholders and for Transurban's expansion outside Victoria, limits the revenue stream to support public transport improvements and for improved maintenance of public roads. Hence the public infrastructure gap compounds over decades.

## Other Issues

Another concerning issue is the impact of Transurban tolling on the coming shift to road user charging as internal combustion engines using petrol or diesel are replaced by electric and autonomous vehicles. Transurban's 2016 Strategy document referred to earlier identifies "*road user charging inevitable – Transurban preparing for change*". Its dominance in the field of charging technology and government enforcement of its tolls will provide competitive advantages to it in the development of road user charging on public roads. This provides a further basis for Transurban dominance in Melbourne's transport system.

Transurban in its Strategy report anticipated a 10-25% increase in motorway capacity including through designated lanes for platooned or connected autonomous vehicles. Added induced demand to access tollways means more traffic at tollway entries and exits, which is a major cause of congestion on public roads.

The examples of added congestion on the Punt Road and Bell Street exits and are pertinent in this context. Induced congestion on tollways also generates more and more demands for widening with more and more lanes, to move largely sole occupant vehicles.

## Conclusion

Although benefits can be identified to car drivers and trucking from City Link, and extensions to the Monash and Tullamarine Freeways funded by Transurban, VTAG re-iterates that it is against the public interest to allow any further concentration of Transurban's power over toll roads.

Transurban entered the market to fund the building of key freeways the State considered it could not afford to do. Its plans to operate freeways for lucrative toll income through a process of using its market power has enticed unwitting governments into more and more tollway development to Transurban's financial benefit while limiting the Government's revenue stream. VTAG's views this as substantially lessening capacity for competition between different modes of transport and cross subsidies for more sustainable alternatives.

An ACCC decision as sought is also integral to remedying the effect of Transurban's monopoly position to adversely impact the direction of Victorian government urban and transport planning contrary to the vision, objectives and decision-making principles of the Victorian Transport Integration Act.

Accordingly the ACCC is asked to curtail anti-competitive monopoly control by preventing the acquisition by Transurban of Horizon/Eastlink which would exacerbate the adverse consequences identified in this submission.

Victorian Transport Action Group.

VTAG Submission re:  
Australian Competition and  
Consumer Commission (ACCC)  
Statement of Issues 29 June 2023.  
On proposed acquisition by  
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of **Horizon Roads**

VTAG July

2023



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## Toll road construction and ownership

### Issues of Concern raised by ACCC.

VTAG welcomes the ACCC Statement of Issues setting out concerns that Transurban’s proposed acquisition of Horizon Roads may substantially lessen competition for concessions to construct, own and/or operate toll roads in Victoria.

VTAG in its initial submission of 21 April 2013 argued that it was critical for the ACCC to apply its powers under Section 50 of the Competition and Consumer Act 2010 to rule against Transurban’s acquisition of the Horizon/Eastlink stake on the grounds that adverse competitive effects for toll road development and ownership.

VTAG emphasised this was because Transurban has huge resources through its dominant market position in Victoria, government contacts and ongoing lucrative toll revenue to challenge competitor bids for the Eastlink toll road stake. Transurban’s dominance in Eastern Australia already reflects this. Transurban dominance would be even further assisted in the market for toll road concessions if it took over the Horizon Roads Eastlink stake.

VTAG commends the ACCC for its rigour in examining the arguments in submissions on adverse competitive impacts for Melbourne and Victoria were this bid to succeed.

VTAG turns to address key anti-competitive elements in the issues of concern raised by the ACCC. We also emphasise other anti-competitive impacts for the ACCC's further consideration.

1. Competition in the market for future toll road concessions from Transurban's current and future incumbency advantages should it acquire the Horizon share of Eastlink.

In this context, VTAG re-iterates its earlier submissions of 21 April 2023, that:

- Transurban has huge resources through its dominant market position in Victoria and ongoing lucrative toll revenue to dampen and also challenge competitor bids for the Eastlink toll road stake.

As reported in the Australian Financial Review (AFR - 23 February 2023), potential competitors know "*Transurban has a 100 per cent track record in Australian tollroad auctions in the past decade, and don't want to waste six or 12 months' work putting together a bid only to be beaten by the obvious (and arguably most logical) owner.*"

The AFR also reported that "*Investors are in a similar position*" - that "*sources close to IFM said it had failed to burst Transurban's stranglehold on Australian motorways in the past, and it was done trying.*"

However, it is understood that potential rival bidders, investors including infrastructure funds are considering potential bids, in light of the ACCC Interim findings. The market has been heartened by the concerns raised by the ACCC in its 29 June 2023 Statement of Issues intimating it might rule against Transurban being able to acquire an Eastlink share.

These reports indicate how Transurban's incumbency advantages and track record to a near monopoly position have already served to dampen competition in the market.

VTAG submits the logical conclusion is that if the ACCC does not rule against Transurban in this case, its further acquisition of another toll road stake in Melbourne would be a significant limiting factor against the emergence of a key rival for future toll road concessions in Victoria.

Conversely, VTAG submits that if the ACCC finds Transurban's dominant incumbency position would substantially lessen competition in the present bid and its bid is thus unsuccessful, this finding would support greater competition in the present market and for future toll road concessions.

As the ACCC poses in its Statement of Issues (Paragraph 8), an alternative to Transurban with "*a majority interest in Horizon Roads, as an operational enterprise in Victoria, could provide a non-Transurban entity with the opportunity to gain some of the capabilities and incumbency advantages held by Transurban, including its traffic modelling capabilities and leverage them to bid competitively for future toll road concessions in Victoria.*" This is

the logical outcome of an ACCC ruling against Transurban in its current bid. Competition in the market would be enhanced – not undermined.

Another important element of competitive disadvantage for a future bid by another entity if Transurban was able to acquire EastLink and thus hold a monopoly position, would be financiers' perception of added risk of an unsuccessful bid such that financiers would increase the costs of finance to the non-Transurban entity. The latter would thus be at a considerable disadvantage as regards higher costs of finance than Transurban.

This is the reverse of the point made by the ACCC in its Statement of Issues (Paragraph 79) that a non-Transurban entity with Horizon Roads *"would be able to find equity partners and access equity on similarly favourable terms to Transurban which may reduce its costs of finance and allow it to bid more competitively for future toll road concessions in Victoria"*.

## 2. Victorian Government Capacity to constrain Transurban in Future Toll Road Concession sale processes.

- VTAG in its April 2023 submission (Pages 5, 9-11), highlighted how Transurban had been able to negotiate extensions of the initial lucrative City Link contract as a key component of successive unsolicited bids, to build toll road upgrades and extensions to the Monash M1 and Tullamarine Freeways and market-led proposal to build the West Gate Tunnel (WGT). Escalating costs particularly of the latter have demonstrated the Government's failure to properly assess Transurban's unsolicited bid for this project overly relying on modelling, costings and other information and inadequate contingencies presented by and for Transurban.
- VTAG pointed out (Page 5) that Transurban's power through consultancy connections had enabled it to present data and argument in a way that seems to demonstrate it can offer a superior solution, contrary to a proper objective cost benefit analysis undertaken by more objective government processes and other consultants which Transurban has managed to get sidelined.
- VTAG in April 2023 identified regulatory weaknesses within the Victorian Government with decisions made contrary to transport and planning legislative requirements processes under the Planning and Environment Act, Transport Integration Act, and other legislation (Page 11) .  
And that notwithstanding these requirements, decisions ultimately lie with government whose discretion on project selection and approval dominates, irrespective of legislation, merit, and adverse consequences for urban and transport planning. When challenged on such adverse consequences, Courts have been reluctant to call this out. Rather, judicial interpretations of mandatory legislative requirements have been determined in such a way as to endorse wide breadth for Ministerial discretion rather than calling out a breach.
- VTAG has identified an adverse element of Transurban capture of Government decision-making through interrelationships, reliance on consultancies and staffing shifts. The

Responsible Department has lost much of its expertise with over a decade of restructuring/reorganisation and staffing shifts, its best staff often attracted to salaries and conditions in accounting firms, consultancies and other agencies. Government assessments have been deferred to commercial consultancies with conflicting interests and private sector career interests resulting in skewed and compromised public interest decision making and accountability under commercial confidentiality.

- VTAG takes the opportunity to refer the ACCC to a 2015 report of the Victorian Auditor General on the Government's final approval of Transurban's unsolicited 2012 bid to widen CityLink and the Tullamarine Freeway to Melbourne Airport. Approved by the prior Napthine Government, the project had been put on hold by a new incoming Government 2014, but then was ultimately approved in April 2015.

The Auditor-General questioned the rigour of the financial assessment with little evidence of value for money for the State. The \$1.3B cost, with a Government spend of \$250M and Transurban contributing a mere \$850M for the widening in exchange for a one-year extension of the City Link Concession Deed bringing in an extra \$3.2B in tolls, was based on an inadequate assessment of the business case with exaggerated safety benefits. This was particularly so given the removal of emergency lanes used by emergency vehicles and as a refuge for vehicle breakdowns/incidents. (VAGO Report 19 August 2015: "*Applying the High Value High Risk Process to Unsolicited Proposals*").

The Victorian Auditor General's Office was similarly critical of the West Gate Tunnel market-led proposal cost/benefit to the State (VAGO Report 27 November 2019: "*Market-led Proposals*"). The Department of Treasury and Finance response defended its position on the data. However, it is pointed out that Treasury economic assessments on cost/benefit are deficient and were made without regard to industry sector impacts requiring more specific knowledge of broader parameters for proper cost/benefit assessment.

In any event, VAGO reviews invariably occur years after contract completion when it is too late to alter the outcome - only learn for the future. Yet frequently VAGO reports are dealt with via a general response with no real change for subsequent appraisals with parallel deficiencies continuing.

- These circumstances of policy failure highlight the importance of the ACCC as an organisation separate and independent from the Victorian Government, with decision-making based on federal legislative requirements as part of checks of power between the State and Federal systems. State decision-making favouring Transurban by supporting its monopoly position, made adversely against the public interest and compromising proper land use and transport planning and cost-benefit analysis, should not be condoned by the ACCC but called out for the adverse consequences of lessening competition.
- Infrastructure Australia is another body that can play a role in more rigorous cost-benefit analysis reviewing applications for financing State infrastructure projects. However, as VTAG pointed out in its April 2023 submission (Page 5), Transurban's capacity to fund

infrastructure projects from toll revenues means *"its projects can be excluded from scrutiny by Infrastructure Australia."* Hence the importance of this ACCC inquiry

- VTAG (pages 11-12) pointed out the profound problem of a private corporation being allowed to occupy the policy role of elected governments through Transurban's undue influence in being able to impose its vision of freeway development in Melbourne. Transurban's vision is for new relatively short, tolled sections connecting successively enlarged freeways which direct the shape of Melbourne contrary to committed planning policy directions of expanded public transport use and shifting freight to rail.

This has meant project-led planning instead of planning-led project determination. There is opportunity for the ACCC to help curtail further Transurban undue dominance and adverse consequences for Melbourne's development through recognising the anti-competitive impacts of its proposed acquisition of Eastlink's stake. Such acquisition by Transurban would compound the profound problems identified by VTAG and other policy analysts.

- Having more than one experienced private toll road operator in Melbourne would enhance competition. VTAG strongly supports the ACCC observation on this (Paragraph 50) that *"Without the acquisition, an alternative toll road owner/operator could leverage the existing management capabilities and expertise held by Horizon Roads to contest the incumbency advantages that would otherwise be held solely by Transurban, including by further developing traffic modelling capabilities and expertise and the ability to access lower cost finance. An alternative toll road owner/operator with its own incumbency advantages is likely to increase competition for future toll road concessions in Victoria."*
- VTAG is not in a position to detail the extent to which this would be the case, but submits that logically, the Government would be required to engage in a more exacting assessment against decision-making parameters in order to settle on judgments between Transurban and another alternative experienced toll road operator testing one bid against the other.

Having only one experienced contender combined with reduced Government expertise is a major limitation on the exercise of such rigour. VTAG looks to the ACCC to apply its own rigour to support market competition of toll roads in Melbourne, Victoria.

#### Market definition

The ACCC in its Statement of Issues discusses market definition for the purposes of considering the impact of the proposed acquisition on competition. It said that the market in terms of geographic dimension is Victorian state-based (Paragraphs 51-60) *"while noting the possibility for the market to have a national dimension"*.

VTAG accepts the focus on Victoria but argues there is more than a possibility of a national dimension, rather a probability. A potential Transurban corporate monopoly in Victoria would provide an advantage in its bidding for toll roads beyond Victoria.

This has already been the case in Transurban's successful bids to build/purchase tollways in other Eastern States, namely New South Wales and Queensland. We cite again the IFM

response reported by the AFR at page 3 above on being deterred from joining this bid in Victoria due to its experience of unsuccessful bids in these other states. Therefore, the outcome in this Victorian case can also be expected to be a factor for bids in other states, including any proposed new tollways in South Australia and West Australia, particularly given Victoria's common border with South Australia and dominance of freight traffic from Victoria in both States.

#### Price competition between toll roads

VTAG notes the ACCC preliminary view in its Statement of Issues that Transurban's proposed acquisition is unlikely to impact price competition between CityLink and EastLink toll pricing (Paragraphs 110-113). ACCC considered that "*toll prices in Australia are typically set significantly below the profit maximising level.*"

This may be accepted on principle, but VTAG is not aware of evidence for such conclusion from toll income. Although there are contractual and regulatory limits on toll increases and other fees and charges on Victorian toll roads, Transurban is able to increase toll pricing quarterly while prices do not reduce for deflation; so tolls can increase greater than CPI. This and expanded use of tollways through key linkages and limited alternatives, has meant toll revenue has increased greater than CPI.

#### High Toll Costs for regular users and market segments

With only occasional toll road usage overall by motorists, dividing the total number of motorists using tollways means the impact of toll price increases may seem limited. However, Transurban pricing strongly impacts particular market segments. Regular business and trade users pay very hefty tolls. Transurban's definition of light commercial vehicles (LCV) covers any two-axle rigid vehicle with a cab chassis and 1.5 - 4.5 tonnes mass. This low weight from a mere 1.5 tonnes includes typical smaller trade vehicles with tolls of up to \$230 per week while a heavy commercial vehicle pays up to \$426 per week. As well as trade vehicles, the definition of LCV encompasses SUV and HiLux passenger vehicles used by families and farmers despite these having comparable weight and length to many ordinary passenger cars.

The Transport Workers Union has been highly critical of Transurban's excessive profits and the adverse impacts of high tolls and high increases (eg 3.3% in one quarter) on the operating costs of drivers on thin margins on top of high fuel prices, high cost of finance and cost of living pressures (Australasian Transport News 4 July 2023 "*TWU criticises Transurban Road Toll Increases*")

Transurban particularly targets tolled links to high volume freight and road trip destinations such as distribution centres, ports, and access to untolled highways and the airport. Travel time pressures on tradies and delivery drivers, and the pressures of meeting busy flights whether for passengers or just-in-time freight demands, combined with Transurban's strategic development of tolled roads between these key destinations, means untolled alternative routes are not realistic.

Deviations from tolled links involve indirect detours with restricted speeds, traffic lights and truck height/weight limits, barriers and increasing local traffic management measures such as turn limits, road narrowing, bicycle lanes, kerb extensions, roundabouts, humps, and no-through roads. GPS use can assist navigation via detours. But time pressures and

ease of the direct tolled link mitigates against use of alternatives by regular time-poor drivers.

The pressures on delivery drivers making in the order of 46 deliveries, and even up to 80 deliveries per day across Melbourne, are immense. High tolls are particularly onerous on owner/drivers – truck, taxi or uber. Pressures of meeting delivery schedules over long shifts of 10-12 hours per day to meet high costs are a major factor in accidents involving such drivers, particularly trucking. This factor extends to accidents in longer non-tolled sections.

In a point also relevant to section 2 above, accident costs and other costs on non-tolled roads have not been attributed to toll imposed pressures in non-discerning Government cost benefit/analyses of unsolicited Transurban bids; whereas broader benefits in non-tolled sections across Melbourne (and Victoria) have been included. Such weaknesses were pointed out by VAGO in its reports on Government assessments of Transurban bids.

VTAG is informed that one medium-sized delivery business (one example of many such businesses in trucking) is paying \$250,000 per month and \$6M per annum in tolls for deliveries around Melbourne. Although a tax-deductible business expense, this business is examining relocation to reduce high up-front operating costs and pressure on drivers in order to remain competitive.

The high cost of tolls for freight operations in Sydney has been highlighted recently in an independent inquiry for the NSW Government. Australian Logistics Council CEO and freight expert, Hermione Parsons, told the inquiry tollways "do not work for the freight industry" due to cost, efficiency, and productivity issues.

"The increased costs [of tolls] with decreased productivity is forcing freight back to the secondary road network," she said, adding that local restrictions nevertheless seek to limit use of suburban roads by large freight vehicles. The inquiry was also told of hardship from high tolls experienced by drivers in the Sydney's western suburbs  
<https://www.abc.net.au/news/2023-07-12/nsw-tolls-inquiry-trucks-forced-onto-suburban-streets/102592974>

As regards this inquiry for Melbourne, the ACCC is asked to give far greater weight to the impact of the proposed acquisition by Transurban on competitive activity as regards tradesmen and freight operators who are regular users of tollroads. Tight travel time demands and the fact that Transurban tollroads are especially targeted to key freight destinations and direct linkages to and from high-use untolled freeways and roads, increase the likely impacts on this group.

Transurban benefits substantially from high-use untolled freeways feeding seamlessly into its shorter tolled sections; yet its maintenance responsibilities only cover shorter tolled sections managed to high standard to maximise customer attraction.

Transurban research and investor reporting shows a substantial increase in recent years to on-line purchasing with increasing freight deliveries, and a greater shift to private vehicle travel arising from the COVID pandemic. Transurban recent investor reports indicate this is continuing.

Another factor for consideration in price competition between Transurban tollways and Eastlink is the way Transurban has structured works to combine exits ostensibly to save construction costs, but designed to capture users, particularly infrequent users, onto tolled sections. The placement of exits and their impact on adjoining local areas is an important issue for local governments managing the adjacent road networks.

An example is the Bulla road Exit on the busy M1 from Melbourne Airport combined with a very lengthy non-intuitive Bell Street exit. This captures less frequent users who missing the Bell Street exit, are then forced to drive some 10 kms from the former separated Bulla Road exit to the next exit, Brunswick Road.

The limited number of exits over this distance significantly adds to congestion on Bell Street. The bank up of vehicles paralleling the M1 for several kms, makes congestion on this exit highly visible to act as a deterrent to even more frequent drivers, to choose to remain on the M1 to pay the toll when they would otherwise have exited at a separate Bell Street exit nearer to their destination. This adds to unnecessary traffic on the tolled link and added traffic on an unnecessary return trip either on the tollway or a non-tolled road – bringing added costs to Victoria in road maintenance, time and other travel costs.

While the limited placement of exits and associated placement of toll points on the Tullamarine section of CityLink is questionable, Eastlink by contrast has far more exits and if one is missed, there is another just a short distance away. The risk is raised that if Transurban acquires Eastlink it may well engineer a similar exit strategy to capture infrequent drivers with its non-intuitive and fewer exits to pay more tolls.

The matters discussed above have all combined to produce a healthy profit margin for Transurban toll operations well above CPI.

The Transurban policy of maximising toll revenue through excessive toll charging systems should not be condoned by the ACCC through a decision allowing its extension to acquire EastLink, thereby expanding Transurban's monopoly position in Victoria and more broadly in Eastern Australia.

The ACCC inquiry should look to the future and an expected shift to the State imposing a far lower and fairer levy for all road use through road user charging whether on freeways or State roads generally. This was covered in the Other Issues section of VTAG's April Submission (Pages 14-15) but not addressed by the ACCC to date.

Required is a tollway system that does not have the disbenefits a virtual monopoly has already imposed of excessive charges geared to structuring freeways to maximise profits benefitting a privileged sector who can afford its high costs, but imposing huge travel costs on others who cannot. This, as indicated above, encourages another disbenefit of some to many regular users avoiding tollroads that should be used for efficient deliveries, commuting and all users of the transport system. Necessitated is a far improved competitive balance between road and rail freight deliveries, sole occupant and multi-occupant vehicles, and private and public transport.

Allowing Transurban to acquire Eastlink, thereby extending its monopoly position would further undermine that required balance with other modes of transport through a fair tolling, road user charge and transport system. Greater competition and a public interest regulatory framework should be expected to generate reduced road user costs and operating costs for the range of tollway - freeway users.



## Competition and Public Transport

The ACCC in its Statement of Issues, has not considered impacts on competition with public transport. Putting aside the dampening of public transport use due to COVID, VTAG pointed out in its April 2023 submission (Page 14) that over decades of tolling, investment in public transport had not kept up with population expansion and demand.

As a general principle, every penny of State funding provided to construct or subsidise the building of toll roads, regardless of whom operates them, is money denied to Public Transport. The North East Link is one example where, whilst there is an argument to link Melbourne's arterial roads, it comes at the expense of building or improving rail and tram services or substantially upgrading bus services. It has also come at the expense of funding to shift of more freight to rail; the latter has substantially declined alongside Transurban's focus connecting tolled links between freight distribution centres other high use freight and other travel destinations and existing freeways.

More roads are obviously popular with those who can afford to drive a vehicle, but it widens the inequality gap for those on limited incomes, those with physical challenges, the young and elders of our community that rely on public transport.

VTAG further re-iterates that substantial toll revenues directed to shareholders and Transurban's expansion, has the impact of limiting revenue streams to support public transport, rail freight and improved maintenance of public roads, providing DDA compliance for public transport, or adding to essential public assets such as housing, hospitals and schools.

Thus Melbourne's public infrastructure gap continues to compound, especially in providing enhanced public transport to less affluent parts of Melbourne.

## Conclusion

The ACCC in its Statement of Issues has identified sufficient concerns to support a finding that Transurban's proposed acquisition of Horizon Roads would substantially lessen competition in significant respects regarding the present sale of Eastlink and for future toll road concessions. VTAG submits this would apply to both Victoria and interstate. If Transurban acquired Horizon Roads, it would also have substantially greater influence and advantage in unsolicited proposals to secure further extensions of the City Link or Eastlink concession.

The latter is a major issue given Transurban's track record in presenting the Government with strategic unsolicited proposals for widening and linking existing freeways that have effectively sewn uplinks between untolled freeways and key freight and travel destinations such that use of alternatives is unrealistic. Acquisition of Horizon Roads would clearly enhance Transurban's monopoly position and power over Melbourne's toll roads and significantly limit competition by discouraging present and future bids.

The ACCC is also asked to give greater weight to other matters - the cost impact of the proposed acquisition by Transurban on competitive activity as regards tradesmen and freight operators as well as the impact on commuters without effective access to public transport who are regular users of tollroads due to tight travel time demands.

Also, the fact that Transurban tollroads are cleverly targeted to linking key freight and other destinations with direct linkages to and from high-use untolled freeways and roads.

Finally, VTAG submits there are many broader public interest policy concerns underlying the importance of a rigorous decision by the ACCC in this case under Section 50 of the *Competition and Consumer Protection Act 2010*.

Victorian Transport Action Group

July 2023