

Chapter 5

Interactions of commercial considerations and government policy

5.1 The arrangements for toll roads in Australia interact with a large number of areas of government policy. The most obvious are infrastructure and urban amenity, but there are also impacts on environment, health and general living standards and the legal system. There may also be broader considerations around safeguarding the revenue stream and also about transparency and the danger of corruption of processes.

Selection of projects, builders and operators

5.2 Tollways are by their nature major pieces of urban infrastructure which link with other infrastructure. They involve many considerations which cannot be resolved simply.

5.3 In general, the need for a transport link will be identified years in advance in high-level planning processes.

5.4 In years gone by, governments would make a series of decisions: what priority to attach to the problem, whether the link would be rail or road, the various technologies to be employed, how people affected by the project would be treated (including consultation processes), when the project would go ahead, and whether funds from general revenue or a special loan or bond would be used for the project. Tenders would be called with detailed specifications, and contracts would be let to private sector construction companies. At least in theory, all of these processes would have been public.

5.5 Public-Private Partnerships or PPPs have been an important element in risk-sharing between government and business, and they have been used particularly in road provision. Toll roads have emerged as a way for governments to save money, or at least move expenditure out of the budget, in times of fiscal constraint. While this may have been effective in ensuring finance, it may also have led to a reduction in scrutiny of how proposals are adopted.¹

5.6 The old linear planning process is not necessarily followed now. Processes vary from state to state, so the following discussion proceeds largely by reference to specific examples. A project by project approach is suggested by the operations of Infrastructure Australia, the body established by the Commonwealth Government in 2008 'with a mandate to prioritise and progress nationally significant infrastructure'.² This approach is also suggested by the establishment, announced in the 2017–18 Budget, of the 'Infrastructure and Project Financing Agency, to assist in the identification, development and assessment of innovative financing options for

1 See, for example, Inner Melbourne Planning Alliance, *Submission 35*, p. 2.; Transurban, *Submission 27*, pp. 9–14.

2 Infrastructure Australia website, <http://infrastructureaustralia.gov.au/> (accessed 21 July 2017).

investment in major infrastructure projects'.³ It is possible that this project-by-project approach, rather than holistic planning processes, is itself a function of reliance on PPPs.

5.7 A series of commercial failures of toll roads has confirmed that there are issues in the scrutiny process. In particular, the failures have confirmed the well-established observation of 'optimism bias'. The forecasts of traffic on a proposed new road are frequently far too high, especially for the first few years after completion. One submitter suggests that it is realistic to assume that traffic will be 60 per cent of the forecast.⁴

5.8 Similarly, there is a systematic tendency to underestimate the costs of building a motorway. Costs are projected with an estimate of the probability of overruns. The Grattan Institute says that what proponents say is a cost level that has a 90 per cent chance of being achieved is actually more likely to have an 81 per cent chance.⁵

5.9 While these errors have been treated as commercial issues, they are also relevant to the decision to build a road at all. Inflated traffic forecasts mean that the forecast overall benefits to the community are also inflated; cost estimates that are too low similarly understate the cost to the economy. The fact that the errors in forecasting are greater for toll roads does suggest that the commercial interests involved may be influencing the calculation of value.⁶

Market-led proposals

5.10 The Westgate Tunnel project and the proposed NorthConnex link in Sydney are both the result of unsolicited proposals by Transurban. Several other major Transurban projects, including the CityLink Tulla widening in Melbourne and the Logan Enhancement project in Queensland, were also market led proposals.⁷ As Transurban's submission points out, both of the current projects are consistent with longstanding transport master plans, and both state governments have requirements in place for rigorous assessments of such 'market led' proposals.⁸

5.11 It is important that the market led proposal process explore alternative ways of achieving similar outcomes. This is to ensure that public outcomes are maximised and that private interests do not dominate the motivation of proposals.

3 Commonwealth of Australia, *Budget Measures: Budget paper no. 2 2017–18*, p. 141.

4 Professor David Hensher, *Submission 1*, [p. 2].

5 Ms Marion Terrill, Transport Program Director, Grattan Institute, *Committee Hansard*, 3 August 2017, p. 3.

6 Bureau of Infrastructure, Transport and Regional Economics, *Review of Traffic Forecasting Performance, Toll Roads*, June 2011, Executive Summary.

7 Transurban, *Submission 27*, p. 28.

9 Department of Infrastructure and Regional Development, *Toll Roads in Australia*, Bureau of Infrastructure, Transport and Regional Economics, September 2016.

Impacts on planning and urban amenity

5.12 Modelling by Ernst & Young and KPMG shows that motorways have created benefits for individual drivers and for cities, largely by reducing travel times. The adoption of the toll road model has enabled the bringing forward of beneficial projects.⁹

5.13 Transurban notes that:

In all of our project proposals, we look for ways to address broader policy considerations such as providing active transport corridors, and urban green spaces, and reducing vehicle emissions at the ground level, while avoiding the need for the compulsory acquisition of homes.¹⁰

5.14 Professor David Hensher observes that toll roads are often required to meet conflicting objectives of community welfare and profit maximisation.¹¹ Similarly, the City of Sydney says:

The opportunity for a project to be delivered and funded by user charges can overwhelm considerations of need, or whether a project is the best approach to fixing an identified problem. A project may make financial or commercial sense and still not be aligned with agreed economic, environmental and social outcomes.¹²

5.15 It has been pointed out above that the acceptance by governments of market-led proposals for motorways has potential to disrupt orderly planning processes. It was also noted that many of the processes, and much of the discussion, around toll roads encourage a focus on individual projects. This could be at the expense of broader questions of urban design, as well as limiting the state government's ability to fund other projects.

5.16 The Westgate Tunnel project's community consultation process was criticised as providing a framework for trading the benefits and impacts of the proposal between the toll road and non-toll road users and between different communities within the region, rather than for overall strategic assessment.¹³

5.17 Some submitters expressed concern that big-picture issues such as the objective of reducing the total amount of road traffic had been neglected.¹⁴ On some projects there had been no full comparison with alternatives such as rail. It has been argued that this is the case with the proposed F6 motorway linking Sydney and Wollongong:

9 Department of Infrastructure and Regional Development, *Toll Roads in Australia*, Bureau of Infrastructure, Transport and Regional Economics, September 2016.

10 Transurban, *Submission 27*, p. 7.

11 Professor David Hensher, *Submission 1*, [p. 1].

12 City of Sydney, *Submission 33*, p. 1.

13 Alison and James Whitten, *Submission 11*, p. 7.

14 Dr John Stone, *Submission 15*; [name withheld] *Submission 4*.

The planned toll road linking Sydney and Wollongong has been costed at an extraordinary \$18 billion – almost \$12 billion more than the rail alternative that would cut the journey to about one hour.¹⁵

5.18 EcoTransit Sydney argued that reliance on motorways at the expense of rail would reduce the attractiveness of Sydney as a global city, especially its liveability and capacity to attract large scale investors.¹⁶ Mr Paul Jeffery also judged them to have negative effects:

Spending vast amounts of public money on toll roads systems at the cost of public transport is a blight on Australia [and] will reduce the liveability of our cities with every kilometre built.¹⁷

5.19 A common criticism of tollways, and of the process of deciding to build them, is the failure to account for induced traffic. New roads may make marginal trips more possible, they can result in land use changes, and they can extend city boundaries. Along with the 'optimism bias' in forecasts is an overstatement of the cost of doing nothing.¹⁸

5.20 A further criticism is that tolls cause people to travel on alternative routes, which may be residential and are certainly smaller and less able to cope with a high volume of traffic. This is particularly the case with trucks, where the tolls are much higher. This causes problems of noise and safety as well as wear and tear on less well made roads.¹⁹

5.21 In some cases the two effects, induced traffic and rerouted traffic, coincide. For example both the Melbourne Westgate Tunnel and the Sydney Cross City Tunnel have been criticised for bringing more traffic into city areas, where local councils are trying to discourage traffic.²⁰

5.22 The CityLink project is an example of profound impacts on urban form. The initial problem to be solved was gridlock in Melbourne streets in the early 1990s:

...all these unconnected freeways were depositing unprecedented volumes of traffic into the CBD. The freeways were linked by residential and city streets, which were handling traffic volumes up to 80 per cent greater than their capacity.²¹

15 P Martin, 'More than Westconnex: F6 Extension to cost \$18 billion', *Sydney Morning Herald*, 4 July 2017, <http://www.smh.com.au/nsw/more-than-westconnex-f6-extension-to-cost-18-billion-20170704-gx49zp.html> (accessed 11 September 2017).

16 EcoTransit Sydney, *Submission 13*, p. 1, p. 2.

17 Mr Paul Jeffery, *Submission 14*.

18 Public Transport Users Association, *Submission 30*, p. 5.

19 Associate Professor Russell Thompson, *Submission 9*, p. 1.

20 Public Transport Users Association, *Submission 30*, p. 3; City of Sydney, *Submission 33*, p. 3.

21 Institution of Engineers Australia (Victoria Division), *Journey and Arrival: the story of the Melbourne CityLink*, 2002, Parliamentary Library link <http://dpl/Books/2002/114407.pdf>

5.23 The CityLink project did not just relieve congestion, but changed the dynamics of the city:

CityLink was not just important to the Melbourne road network, it was its new spine, linking its far flung south-eastern suburbs with its west, and Melbourne Airport to the north.²²

Impacts on living standards

5.24 The impact of tolls on household budgets has been dealt with in Chapter 4. Tolls exacerbate other factors that adversely affect living standards, including stagnant wages and rising housing and energy costs.

5.25 Tolls are more inequitable than these other factors. People living in some places pay tolls, while those in other places do not. In many cases the inequity is exacerbated by the fact that toll roads serve areas that are less affluent than the average. Thus, tolls function as a regressive tax.²³ In general, governments in Australia espouse equal treatment and progressivity in taxes.

5.26 The enforcement of tolls and the treatment of unpaid tolls place a further burden on individuals, who are often faced with debts which are disproportionate to both their infringement and their means. This might attract the interest of government consumer protection bodies, except that the handling of unpaid tolls is dealt with in the original toll concession agreements, and the actions that lead to very bad outcomes are made by state governments or courts. It can be disowned by toll road operators:

Similar to a traffic infringement or a parking fine, it goes through the state...once our customers fall into that system it's not good for our customers and it's not good for Transurban...²⁴

Impacts on the courts

5.27 The impact of the enforcement of tolls on the court system has been discussed in Chapter 4. In Victoria, it is such that it is delaying the processing of other, more serious matters.

5.28 It appears that toll road operators do not pay for the enforcement of fines—properly so, in the sense that the enforcement is part of the criminal justice system.²⁵ But the costs they impose are an implicit subsidy to the operators.²⁶

22 R Millar and B Schneiders, 'Transurban: the making of a monster', *The Age*, 14 May 2016, <http://www.theage.com.au/victoria/transurban-the-making-of-a-monster-20160512-gotjm9.html> (accessed 26 July 2017).

23 Mr Denis Nelthorpe, Chief Executive Officer, WESTjustice, *Committee Hansard*, 3 August 2017, p. 61; see also the description of the transport planning task by Mr Richard Bolt, Secretary, Department of Economic Development, Jobs, Transport and Resources (Victoria), *Committee Hansard*, 3 August 2017, p. 62.

24 Mr Scott Charlton, Chief Executive Officer, Transurban, *Committee Hansard*, 3 August 2017, p. 42.

25 State Penalties Enforcement Registry (Queensland), General overview of the tolling enforcement process, additional information received 1 August 2017, p. 3

Impacts on environment and health policy

5.29 To the extent that toll roads increase the amount of car traffic by both increasing the total number of trips and by substituting for public transport, they increase the difficulty of meeting carbon emissions targets. They may also lead to reduced air quality.²⁷

5.30 Motorways may also substitute for walking or cycling, or make walking or cycling more difficult. This has been argued with regard to the Westgate Tunnel project.²⁸ Most governments aim to promote cycling and walking for health reasons.

5.31 These are, of course, products of motorways in general, not specifically toll roads. The existence of a commercial consideration does create proponents with strong vested interests.

Constraints on flexibility

5.32 All of the impacts on policy discussed above are exacerbated by the nature and length of the contracts negotiated.

5.33 The most obvious examples are the restrictive provisions such as 'no compete' clauses and compensation clauses which have been mentioned above. They take away certain options, such as the development of effective and efficient public transport.

5.34 Toll concessions tend to be contained in long term contracts, typically 30 to 40 years. This puts a huge constraint on the ability of governments to operate flexibly. A particular example in this inquiry has been with regard to the impacts of unpaid tolls and the actions taken to pursue infringements. Mr Denis Nelthorpe told the committee:

We are currently talking to the state government about changing that law, but it has been consistently said...that if the state government does anything that reduces road usage or compliance then it is suggested that there are clauses in the concessions agreements that would allow clawback by the toll companies.²⁹

5.35 Professor David Hensher notes this inflexibility particularly with regard to the ability to move to a more rational system of fixing tolls:

One of the great errors in the current tolling model has been the political decision to prescribe a unit toll rate which is indexed over time by the consumer price index. This has resulted in ring fencing on a crucial mechanism that is capable of recognising the need to adjust the toll to ensure that the travel time savings are delivered commensurate with the

26 Mr Denis Nelthorpe, Chief Executive Officer, WEstjustice, *Committee Hansard*, 3 August 2017, p. 55.

27 Friends of the Earth and Public Transport Not Traffic, *Submission 20*.

28 Alison and James Whitten, *Submission 11*, p. 15.

29 Mr Denis Nelthorpe, Chief Executive Officer, WEstjustice, *Committee Hansard*, 3 August 2017, p. 56.

value (to the users) of those time savings relative to the non-tolled route(s), given travellers' value of travel time savings.³⁰

5.36 More generally,

The overwhelming majority of the toll road corridors we have are privately held and are the subject of either a sovereign contract or a sovereign concession deed. That means the price to motorists was set at the time those roads tendered and is set in the contract.³¹

5.37 This inflexibility will obviously be a problem in any attempt to develop network-wide road pricing.

Impacts on transparency

5.38 In the 'old' model of planning and commissioning infrastructure outlined above, there would have been consultation at each stage. The decision to build a road would have been subject to debate, before commercial considerations arose.

5.39 The commercial dealings would have been by public tender. The outcome desired would have been publicly specified. While each tender document would have been confidential, the tendering process would have been governed by strict rules and would have been fully auditable. Further, the tendering process itself, while never perfect, imposes a pricing discipline on tenderers: they have to assume that a rival tender will be for the lowest possible cost plus margin.

5.40 Evidence to this inquiry suggests that processes for toll roads have been less transparent. A market led proposal by its nature is made before open consultation. If the state government is immediately placed into a position where it is negotiating conditions with a commercial operator, confidentiality on both sides makes sense in terms of the bargaining situation:

Certainly, in disclosing information...the need to balance public transparency versus valid commercial-in-confidence considerations is weighed by the state in deciding how much to disclose.³²

5.41 Further, Transurban argues that commercial confidentiality is necessary to protect companies' competitive advantage, and diluting it would reduce the attractiveness of infrastructure projects to investors such as superannuation funds. It might also contravene rules governing listed companies, which are limited in what prospective financial information they can disclose.³³

5.42 The Victorian government has a process of preparing business cases for various proposals, encompassing all transport modes, and comparing the costs and

30 Professor David Hensher, *Submission 1*, [p. 2].

31 Mr Brendan Lyon, Chief Executive Officer, Infrastructure Partnerships Australia, *Committee Hansard*, 3 August 2017, p. 34.

32 Mr Richard Bolt, Secretary, Department of Economic Development, Jobs, Transport and Resources (Victoria), *Committee Hansard*, 3 August 2017, p. 62.

33 Transurban, *Submission 27*, p. 22.

benefits of the alternatives. In order to increase transparency, the business cases are published. The process allows for independent scrutiny and peer review.³⁴

5.43 However, the processes have been criticised by Mr William McDougall, who in the past has worked for the Victorian government as a peer reviewer for the economics of the Westgate Tunnel project. His reservations about the project have been discussed in Chapter 3. When he raised questions about some techniques, all of which tended to increase the modelled benefit of the road, he was moved to another area of work.³⁵

5.44 Mr McDougall had also worked for project proponents. His experience suggested that the government was working to justify the Transurban proposal rather than to analyse it objectively.

I worked for one of the bidding teams on CityLink and then I worked briefly on another team bidding for EastLink, on modelling and forecasting processes. And that was on the other side of the fence, if you like, working for private sector teams bidding to win a contract to build these projects. And in those processes there was a lot of concern that we had about the way the modelling and forecasting was being made to look as optimistic as possible. I think that sort of issue is well known, but I had never really come across it before, on this side of the fence in particular. On the government side of the fence, where this was supposed to be an independent assessment by the government of a proposal presented to them by Transurban, the private sector, it seemed to me to be geared up as a process really of seeking ways to get the project up rather than doing a properly independent and [impartial] assessment of the project's benefits. The way I was taken off the work when we did raise those concerns confirmed, for me anyway, that there was more interest in getting the project through than on doing the work properly.³⁶

5.45 A lack of transparency makes it difficult for the public to understand the decisions of government, or to mobilise against particular proposals. EcoTransit Sydney argues that when public money is being used, commercial confidentiality is irrelevant:

...Sydney Motorways Corporation remains absolved of all public scrutiny because its status is that of a private corporation, even though the government is funneling billions of dollars directly into its development of WestConnex...³⁷

5.46 Infrastructure Australia establishes a priority list of infrastructure proposals or projects—they are described as both—which it says:

34 Mr Richard Bolt, Secretary, Department of Economic Development, Jobs, Transport and Resources (Victoria), *Committee Hansard*, 3 August 2017, p. 62.

35 Mr William McDougall, *Committee Hansard*, 3 August 2017, pp. 17–23.

36 Mr William McDougall, *Committee Hansard*, 3 August 2017, p. 25.

37 EcoTransit Sydney, *Submission 13*, p. 3.

...supports transparent, evidenced-based decision making, enabling decision-makers to select the projects that deliver the most community benefits.³⁸

5.47 The priorities appear to be generated by a benefit-cost assessment of proposals submitted to it, by federal, state and local governments, and by private proponents. Projects are added to the list only when a business case is submitted. It does not appear to compare alternative solutions to infrastructure problems that are being addressed by the proposals.

Specific example: WestConnex, Sydney

5.48 The WestConnex project in Sydney has also attracted criticism. The submission of NoWestConnex Public Transport (NoWPT) points out that several of the parties involved with the WestConnex proposal had been associated with previous failures: AECOM had a history of wrong traffic forecasts, and Leighton Holdings (now CIMIC Group) had been involved with the Clem7 project in Brisbane:

The basis of their selection is unknown. What is known is that after both large multinational corporations were involved in the first phase of planning WestConnex they were both awarded contracts for major parts of the design and construction of stages 1 and 2, and in the case of AECOM, for delivering the critical element of public scrutiny, the Environmental Impact Statements for both stages.³⁹

5.49 Ms Wendy Bacon also points to the involvement of these companies and others including Macquarie and suggests poor public policy decision making, exacerbated by commercial interests.⁴⁰ She argues that there has been no evaluation of WestConnex in comparison with public transport or other solutions.⁴¹ She concludes that the decision was made to go ahead with the road before the analysis was done. The project was declared to be of 'critical state significance' and the processes were abbreviated.⁴² Ms Bacon argues that modellers decide first what answers are needed and then develop a model to arrive at them.⁴³

5.50 The Australian National Audit Office was critical of the Commonwealth's role in funding the WestConnex project:

The upfront payment and approach to agreeing and adjusting milestones for later payments did not adequately protect the Australian Government's financial interests. Additionally, the provision of the concessional loan did

38 Infrastructure Australia, Infrastructure Priority List, February 2017, <http://infrastructureaustralia.gov.au/policy-publications/publications/files/Australian-Infrastructure-Plan-2017.pdf> (accessed 30 August 2017).

39 NoWestConnex Public Transport (NoWPT), *Submission 25*, p. 2.

40 Ms Wendy Bacon, *Submission 32*, pp. 11–13.

41 Ms Wendy Bacon, *Submission 32*, p. 2.

42 Ms Wendy Bacon, *Submission 32*, p. 3, p. 4.

43 Ms Wendy Bacon, *Submission 32*, pp. 8–9.

not achieve the Australian Government's objective of bringing Stage 2 of the project forward by approximately two years. The WestConnex project had not proceeded fully through the established processes to assess the merits of nationally significant infrastructure investments prior to Australian Government funding being committed.⁴⁴

44 Australian National Audit Office, *Submission 5*, [p. 2].