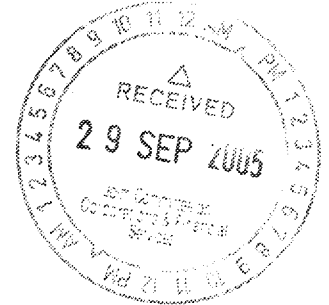




28 September 2005

Committee Secretary
Parliamentary Joint Committee on Corporation and Financial Services
Department of the Senate
Parliament House
Canberra ACT 2600



Dear Sir / Madam

Re: Australian Conservation Foundation – Submission to the Parliamentary Joint Committee on Corporations and Financial Services Inquiry into Corporate Responsibility.

I am writing regarding the letter of 28 September 2005 to the Committee from Transurban Limited, disputing assertions made in the submission of the Australian Conservation Foundation (ACF) regarding Transurban's CityLink project.

In particular, Transurban denies that there is, as we have stated, "an indemnity that effectively prevents Victoria from constructing a rail line from Melbourne to the Melbourne Airport, which would compete with Transurban's more polluting road connection."

We stand by our submission, on the following basis:

- 1) Clause 2.9 of the Concession Deed¹ provides for "redress" mechanisms upon the occurrence of certain events, as set out in Column 1 of the Appendix to the Deed.
- 2) Item 3 of Column 1 of the Appendix to the Deed includes the following events as among the potential triggers for contractual claims:

(c) *The doing of any of the acts or things to which clause 2.4(b) applies², which:*

...
(iv) *has a detrimental effect by reason of the construction of new roads (other than the Exhibition Street Extension) or public transport routes or the alteration of existing or new roads (other than the Exhibition Street Extension) or public transport routes, and which does not result from a breach or failure by the Company, the Trustee or a Contractor;*

(d) *Changes in transport policy which:*

(i) *specifically discriminates against tollways (including the implementation of free or near free public transport across the metropolitan public transport system, but excluding all concessional travel) but not including policies arising from competitive practices initiated by public transport management); or*

¹ Available at www.vicroads.vic.gov.au.

² Clause 2.4(b) applies, among other things, to the State's ability to extend, alter or upgrade existing public transport routes or services; to construct new public transport routes or establish new transport services; and to develop the transport network generally.

(ii) are inconsistent with overall objectives or intentions of the parties as described in clause 2.1, taken as a whole, provided however that this is not to be taken as an assurance that the Company and the Trustee will achieve their Intentions referred to in clause 2.1(b).

...
(f) If the rail link described in paragraph 2 of Exhibit J is developed [ie, link to the airport], that rail link is utilised for the purpose of transporting freight.

- 3) The "redress" mechanisms are triggered if any such event has a "Material Adverse Effect" on the "level or timing of revenues" of the CityLink project, among other things.

The Appendix states that one of the goals of the redress procedures is to "restore the ability of Equity Investors to achieve the Equity Return which would have applied but for the relevant event."

The remedial steps outlined in clause 2.10 include a range of possibilities, up to and including financial compensation by the State. While such compensation is expressed to be a "last resort", it is apparent that the other remedial measures must grant the equity investors the rate of return they would have achieved but for the relevant event. Thus, whether called an indemnity or some other name, the remedial measures envision full compensation of the investors for the entire extent of any financial loss.

- 4) Clause 2.9(a)(i), by reference to Exhibit J, has the effect of excluding from this remedial regime "any development of a new public transport rail link between the central city and Tullamarine Airport as part of the metropolitan heavy rail network."
- 5) This exclusion applies to passenger service only. The Appendix specifies that such a rail line may not carry freight. This is a major limitation, given that one of the expressed purposes of the contract is to facilitate the movement of freight among the Port of Melbourne, the city's rail facilities and the airport.
- 6) An independent audit of Victorian contracts conducted in 2000 included a case study on the Transurban contract. It concluded that:

The terms of the agreement between the State and Transurban place some limitations on the government's freedom to make future transport policy. The Concession Deed clearly stipulates that CityLink is to be central in transport policy and, in particular, that *Transurban is to be compensated if the construction of a heavy rail freight connection to Tullamarine airport adversely and materially affects Transurban's revenue.*³

The audit recommended that the State seek to renegotiate these environmentally damaging provisions; for now, they remain in place.

- 7) While development of a passenger rail line is nominally protected, the extent to which this can be made attractive to passengers and thus to encourage good environmental transport options is constrained by the deed. In particular:

³ Audit Review of Government Contracts, *Contracting, Privatisation, Probity & Disclosure in Victoria 1992-1998: An Independent Report to Government*, May 2000, p. 103, available at <http://www.parliament.vic.gov.au/downloadhansard/pdf/Council/Autumn%202002/Council%20Parl%20Extract%2023%20April%202002%20from%20Book%204.pdf> [emphasis added].

- Service on the rail link could not be free or “near free”. It is unclear how the term “near free” is to be construed, although there is clear scope for disputation.
 - Pricing and other transport policy could not “discriminate” against tollways. It is unclear how this would be interpreted, but a public transit system that is in any way subsidised clearly has the potential to fall afoul of this provision.
 - Transport policy can not be inconsistent with the purposes of the Deed taken as a whole. One of these purposes is that the “Equity Investors derive at least the Base Case Equity Return.” While it is explicitly stated that the investors have no guarantee of achieving such a rate of return, state transport policies (including pricing but also potentially advertising and other operational decisions) that undermine CityLink’s profitability could nevertheless potentially give rise to claims based on this section.
- 8) Thus, while formally the State is not constrained from “developing” a passenger rail link, these constraints and the legal ambiguity surrounding the operation of such a link (pricing policy in particular) seriously limit the extent to which the State can make public transit attractive to passengers. This in turn inhibits, in a practical sense, the construction of a link.
- 9) If anything, our submission understates the harmful environmental effect of the deed. Aside from merely inhibiting a freight rail link *to the airport*, the deed actually impedes the development of public transit generally in the Melbourne area through a variety of mechanisms.

To give just one example, while the deed may well offer nominal protection for the development of a passenger link to the airport, the construction of any other public transit links that materially impair CityLink’s revenue stream, no matter how distant from the project, unambiguously give rise to a claim for financial compensation or other comparable remedies. To be clear: if the State builds fast commuter rail lines from Melbourne to Bendigo and Ballarat, and Transurban can show a materially adverse effect on its revenues, it could have a claim for contractual remedies up to and including compensation.

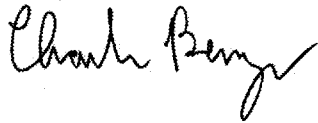
- 10) Lest there be any doubt about Transurban’s willingness to press such claims for compensation, we refer to the \$36 million claim for compensation it filed in 2001 against the State for building a road in the Docklands area that affected CityLink revenue. In response to the filing, Victorian Transport Minister Peter Batchelor stated that “The Kennett Government were reckless. They’ve left behind a trail of damage that’s placing great strains on the budget of Victoria and really sets in place a whole set of liabilities for future Victorian taxpayers to have to meet.”⁴ If willing to press a claim for damages because of a “competing” road, there is no reason to think the same course would not be adopted against the construction of a public transit link that reduced traffic on CityLink.

Again, we stand by our submission. However, we invite Transurban to prove us wrong and to stand by their own statements by publicly waiving any claims for financial compensation or other remedies arising from the construction or operation of any rail link (freight or passenger) to Melbourne airport.

⁴ ABC AM, Victorian CityLink operator lodges compensation claim, 2 March 2001, available at <http://www.abc.net.au/am/stories/s253631.htm>.

Please do not hesitate to contact me regarding this issue on 03 9345 1173 or c.berger@acfonline.org.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Charles Berger". The signature is written in a cursive style with a long, sweeping tail on the "g".

Charles Berger
Legal Adviser

cc: Mr Mike Roberts,
General Manager Corporate Relations and Strategic Marketing, Transurban