

Chapter 5 Negotiation of contracts and project tendering methodology

The Committee's terms of reference require it to address the role of government agencies in relation to the negotiation of the contract, and the methodology used by the Roads and Traffic Authority (RTA) for the project tendering and subsequent contract negotiation. The RTA was the principal Government agency involved in the negotiation of the various contracts which form the basis of the project. This chapter examines the processes used by the RTA in the negotiation and tendering process and the involvement of other Government agencies in those processes.

Role of government agencies in the negotiation of the contracts

5.1 The Cross City Tunnel project is complex and has wide ranging impacts in a variety of areas. A large number of government and other organisations were involved to some extent in the planning and development process. There were also multiple occasions during the project when input from the community was sought, which this Report covers in Chapter 6.

The Roads and Traffic Authority

5.2 The RTA is the lead Government agency for the Cross City Tunnel project. The RTA prepared the initial proposal (the 'short tunnel'), detailed in the October 1998 document *Cross City Tunnel, Improving the Heart of Sydney*¹⁴⁴, released by then Minister for Roads the Hon Carl Scully, and then Premier the Hon Bob Carr.

5.3 The tunnel model envisaged in a subsequent document, the *Cross City Tunnel – Environmental Statement*, released in September 1999, included alterations to the Government's original model and incorporated features of Sydney City Council's preferred model.¹⁴⁵ The preparation for the Environmental Impact Statement (EIS) for this model (the 'long tunnel') was coordinated by the RTA. The RTA also conducted the public consultation process associated with this EIS and prepared the 2001 *Cross City Tunnel Representations Report*, summarising comments received during the consultation process, and the 2001 *Cross City Tunnel Preferred Activity Report* detailing the RTA's preferred project option, for the information and consideration of the Department of Planning.

5.4 Following a number of modifications to the initial proposal that arose as a result of the RTA accepting the 'long 80 tunnel' proposal of the CrossCity Motorway Consortium, the RTA was also responsible for preparing the 2002 *Cross City Tunnel Supplementary Environmental Impact Statement*, conducting the associated public consultation process and producing the 2002 *Cross City Tunnel Supplementary Representations Report* and associated 2002 *Cross City Tunnel Preferred Activity Report*.¹⁴⁶

¹⁴⁴ Submission 1, Roads and Traffic Authority (RTA), p11

¹⁴⁵ Submission 1, p11

¹⁴⁶ Submission 1, p4

- 5.5 Simultaneous with the development and planning process for the Cross City Tunnel, the RTA was responsible for identifying consortia interested in financing, designing, constructing, operating and maintaining the tunnel, and selecting a successful proposal. An Evaluation Panel and a Review Panel were established to determine a short list of consortia, with similar panels then used to assess the detailed shortlisted proposals. The RTA then conducted contract negotiations with the successful consortium.¹⁴⁷

The Department of Planning (formerly Department of Urban Affairs and Planning, formerly Department of Infrastructure Planning and Natural Resources)

- 5.6 The Department of Planning issued the requirements for the preparation of the initial EIS, and assessed the information provided by the RTA following their submission of the 2001 *Cross City Tunnel Representations Report* and the 2001 *Cross City Tunnel Preferred Activity Report*.
- 5.7 The Minister for Planning issued the planning approval for the initial project in October 2001, which included 240 Planning Conditions of Approval.
- 5.8 The Department of Planning also assessed the *Cross City Tunnel Supplementary Environmental Impact Statement*, following the submission by the RTA of the 2002 *Cross City Tunnel Supplementary Representations Report* and the 2002 *Cross City Tunnel Preferred Activity Report* for the modified 'long 80 tunnel' project.
- 5.9 The Minister for Planning issued the planning approval for the modified project in December 2002, which included a total of 292 Planning Conditions of Approval, most of which were the same as those for the initial project.¹⁴⁸

Office of Financial Management and Treasury Corporation

- 5.10 The Office of Financial Management of NSW Treasury is 'the arm of NSW Treasury that advises the Treasurer and the NSW Government on state financial management policy and reporting, and on economic conditions and issues.'¹⁴⁹ Treasury Corporation (T-Corp) is 'the central financing authority for the New South Wales public sector'¹⁵⁰.
- 5.11 Treasury and T-Corp advised the RTA on financial issues throughout the project's tender and negotiation process. Representatives from Treasury were on the RTA's Evaluation Panel and Review Panel for consideration of consortia and for consideration of detailed proposals from shortlisted consortia.

¹⁴⁷ Submission 1, p11

¹⁴⁸ While there are a total of 292 Planning Conditions of Approval listed in Schedule 2 of the *Environmental Planning and Assessment Act 1979: Modification of an Approval granted under section 115B of the Environmental Planning and Assessment Act 1979*, 27 of them exist only as numbers, with the substance deleted. This is presumably to avoid confusion when comparing the Planning Conditions of Approval of the 'long tunnel' with those of the modified 'long 80 tunnel'.

¹⁴⁹ Office of Financial Management website www.treasury.nsw.gov.au

¹⁵⁰ Treasury Corporation website, www.tcorp.nsw.gov.au

5.12 Treasury and T-Corp provided advice to the RTA on 'key decisions regarding financial aspects of the transaction during the tender and negotiation processes.'¹⁵¹

5.13 Mr John Pierce, Secretary of Treasury, was more specific in his evidence to the Committee:

We are very involved in the process up to the point of the Government's accepting a preferred proponent, participating in evaluation panels and so on. At the point of a recommendation going to the budget committee—that being the result of the evaluation, recommending that it go ahead as a PFP and identifying the preferred proponent—the responsibility for finalising the contracts and negotiations with the preferred proponent tends to rest with the agency responsible, in this case the RTA.

...

We tend to be very involved up to the decision about the preferred proponent and less involved when it gets down to the nitty gritty legal things.¹⁵²

5.14 The Treasurer issued approval to enter into the project as a joint financing arrangement, as required by the *Public Authorities (Financial Arrangements) Act 1987*. This approval was issued in December 2002, and further approval was issued in December 2004 when the base toll was raised by 15 cents.

Department of Environment and Conservation (includes Environment Protection Authority)

5.15 A submission from the then Environment Protection Authority (EPA) was attached to the requirements for the preparation of the initial EIS, issued by the Director General of the then Department of Urban Affairs and Planning to the RTA.

5.16 The EPA also provided input to the RTA on the initial environmental impact statement, and input to the Department of Planning in relation to the Planning Conditions of Approval issued to the RTA.¹⁵³

5.17 Ms Lisa Corbyn, Director General of the Department of Environment and Conservation (DEC), described the involvement of DEC and the then EPA:

The Department of Environment and Conservation's main role as a regulator is twofold: First, advising the Department of Planning on air quality, noise and water quality issues, on the environmental assessments and on the conditions of consent. Second, issuing the environment protection licence for the construction of the cross-city tunnel.¹⁵⁴

¹⁵¹ Submission 1, p13

¹⁵² Mr John Pierce, Secretary, NSW Treasury, Evidence, 1 February 2006, p53

¹⁵³ Submission 1, p13

¹⁵⁴ Ms Lisa Corbyn, Director General, Department of Environment and Conservation, Evidence, 7 December 2005, p20

Council of the City of Sydney

- 5.18** Sydney City Council prepared and released the *Cross City Tunnel Alternative Scheme* in April 1999, a major feature of which included extending the tunnel under William Street to the Kings Cross Tunnel.
- 5.19** Many of the features of this proposal were incorporated into the RTA's 'long tunnel' proposal, effectively doubling the length of the tunnel. Sydney City Council worked with the RTA during the preparation of the initial 'long tunnel' proposal.
- 5.20** Sydney City Council were also party to the Gateways Agreement with the RTA, which proposed major urban design changes to William Street as part of a broader plan for improving the urban design of major entry roads to the CBD.¹⁵⁵

South Sydney Council

- 5.21** The South Sydney Council no longer exists as an entity, having been incorporated into the Sydney City Council.
- 5.22** South Sydney Council developed a program for the 'Revitalisation of William Street' and was a member of the William Street Project Steering Committee. The William Street Project Steering Committee membership was comprised of representatives from South Sydney Council, Sydney City Council, RTA, the William Street Taskforce, and the Department of Planning, and was established to coordinate efforts and plans aimed at improving the urban amenity of William Street.¹⁵⁶

Ministry of Transport (formerly Department of Transport) and State Transit Authority

- 5.23** The Department of Transport provided input into traffic and public transport arrangements associated with the project.
- 5.24** Mr Jim Glasson, Director General of the Ministry of Transport, in evidence to the Committee said that, while the Ministry had no direct role in the contract negotiation, the Department had two principal roles, being:

[C]ommenting on the environmental impact statements, both the original and the subsequent amended one, and participation within the public transport committee that was formed as part of the project.¹⁵⁷

- 5.25** Mr Roger Wilson, Acting Chief Executive of the State Transit Authority, in evidence to the Committee said that 'State Transit has had a long involvement with the project by participation as a stakeholder in various statutory and consultative planning processes.'¹⁵⁸

¹⁵⁵ Submission 1, p12

¹⁵⁶ Submission 1, p7

¹⁵⁷ Mr Jim Glasson, Ministry of Transport, Evidence, 2 February 2006, p68

¹⁵⁸ Mr Roger Wilson, STA, Evidence, 2 February 2006, p68

Sydney Harbour Foreshore Authority

- 5.26 The Sydney Harbour Foreshore Authority (SHFA) consulted frequently with the RTA in relation to the design of the western end of the project and the location of the ventilation stack.
- 5.27 Dr Rob Lang, Chief Executive of SHFA, in evidence to the Committee said that:

Our role in the project is as an affected landowner as the cross-city tunnel emerges in its western end in part of our lands at Darling Harbour. At all times our engagement with the consortium project, the CCT project, and the RTA was in that context, as an affected landowner. We are not a proponent, designer, planner or advocate, and at all times our efforts were really focused on just two things. The first was minimising disruption to our precinct and attendant businesses during the construction. The second was maximising the quality of the amenity and urban design elements that were approved for the tunnel that lay within the precinct.¹⁵⁹

Department of Health

- 5.28 The Department of Health provided input into the air quality and tunnel ventilation, through working with DEC. NSW Health provide information to DEC on in-tunnel air quality standards.¹⁶⁰

State Contracts Control Board/Department of Public Works and Services

- 5.29 A representative of the State Contracts Control Board was on the RTA's Review panel for the project.

Rail Infrastructure Corporation, State Rail Authority, Energy Australia, Royal Botanic Gardens and Domain Trust

- 5.30 The Rail Infrastructure Corporation, State Rail Authority, Energy Australia, Royal Botanic Gardens and Domain Trust had requirements associated with providing access to land or provision of other consents necessary for the project.

Methodology for tendering and contract negotiation

- 5.31 The RTA were the principal government agency involved in the tendering process and the subsequent contract negotiation with the Cross City Motorway consortium.

¹⁵⁹ Dr Rob Lang, Chief Executive, SHFA, Evidence, 2 February 2006, p80

¹⁶⁰ Ms Corby, Evidence, 7 December 2005, 21

Capacity and skills of the RTA

- 5.32** Mr Les Wielinga, the RTA's Director of Motorways, in evidence to the Committee said that a specialist team was established to conduct the negotiations with the consortia. The team included both in-house skills from RTA, skills from other government departments and specialist skills from the private sector:

For example, we bring in appropriate legal skills. We bring in financial advice from outside as well, other commercial advice if we need it, and we also bring in specialist technical advice... it is a combination of technical, commercial, financial and economic skills ... and the team varies over the life cycle both in development of the project and in the actual tendering and negotiation process.¹⁶¹

- 5.33** Mr Paul Forward, former CEO of the RTA, highlighted the role of the private sector advisors engaged as part of the tendering and negotiation process:

[W]hilst there is a strong team within the RTA and the organisation has a strong history, I would not underestimate the ability of the private sector in terms of our advisors to assist in those commercial negotiations. They are a strong part of the project team. They not only see the RTA's projects but they actually see the full gamut of projects in the commercial sector and are able to bring a very focused commercial mind to these projects.¹⁶²

- 5.34** Many witnesses to the inquiry were complimentary about the abilities of the RTA team. For example the former Treasurer, the Hon Michael Egan, said in evidence to the Committee that:

I believe the RTA, the Treasury, T-Corp and all the others did an absolutely sterling job and I congratulate them for it.¹⁶³

- 5.35** The Hon Nick Greiner, former NSW Premier, was also complimentary about RTA expertise:

I think the RTA is probably the most competent State Government instrumentality in this private infrastructure area. ... In my opinion, both commercially and technically, the RTA is generally very competent.¹⁶⁴

- 5.36** Mr Dennis O'Neill, Chief Executive Officer, Australian Council on Infrastructure Development, also agreed, stating that the RTA offered 'best practice' in the area of PPPs:

The Roads and Traffic Authority is nationally deemed to be highly experienced and probably offering best practice in the area of PPP roads.¹⁶⁵

¹⁶¹ Mr Les Wielinga, Director, Motorways, RTA, Evidence, 6 December 2005, p4

¹⁶² Mr Paul Forward, former Chief Executive, RTA, Evidence, 6 December 2005, p5

¹⁶³ Hon Michael Egan, former NSW Treasurer, Evidence, 6 December 2005, p38

¹⁶⁴ Hon Nick Greiner, former NSW Premier, 7 December 2005, p42

¹⁶⁵ Mr Dennis O'Neill, Chief Executive Officer, Australian Council on Infrastructure Development, Evidence, 3 February 2006, p54

- 5.37 While many witnesses provided complimentary opinions of the RTA's expertise, Professor Tony Blackshield, in evidence to the Committee, expressed some misgivings about the capacity of the RTA and its private sector legal contractors to take into account constitutional principles when considering such PPP contracts:

[T]he perspective that a private firm brings to such matters – even when it is a private firm that has had considerable experience in such matters – is not necessarily primarily directed to the kind of constitutional principles that I am talking about...¹⁶⁶

- 5.38 Mr Bob Sendt, NSW Auditor General, while acknowledging that the 'RTA has built up a body of expertise that is generally delivering better outcomes', commented in evidence to the Committee that:

It is widely recognised that the private sector can afford to pay salaries significantly greater than what is on offer in the public sector. They can get the best experts to sit around the table and government may often be at a disadvantage.¹⁶⁷

- 5.39 Prof Richmond, in evidence to the Committee said that the establishment of the Premier's Department Infrastructure Implementation Group was intended to address this skill deficiency in government agencies without the large project experience of the RTA:

[W]e ... have a hand on the shoulder of the agency to give them the benefit of some of the high-level specialist advice that is available from some people that are in the unit and the consultants that we can bring in, who are people with very extensive experience in the delivery of infrastructure projects.¹⁶⁸

- 5.40 The Committee will consider the issue of the roles of government agencies and their capabilities in relation to contract negotiation for PPPs in its second report.

Tendering process - methodology

- 5.41 The RTA has maintained that the methodology behind the contract negotiation and project tendering is consistent with that required by the NSW Government under the *Working with Government Guidelines*, a NSW Government policy issued in November 2001.

- 5.42 In evidence to the Committee on 6 December 2005, the Acting Chief Executive of the RTA Mr Mike Hannon, said:

The manner in which [the RTA] implemented the cross-city tunnel project transaction was consistent with best practice standards for public agencies.¹⁶⁹

¹⁶⁶ Professor Tony Blackshield, Emeritus Professor, Macquarie University, Evidence, 2 February 2006, p75

¹⁶⁷ Mr Bob Sendt, NSW Auditor General, Evidence, 2 February 2006, p53

¹⁶⁸ Professor David Richmond, Special Advisor, Infrastructure Implementation Group, Premier's Department, Evidence, 2 February 2006, p59

¹⁶⁹ Mr Mike Hannon, Acting Chief Executive, NSW RTA, Evidence, 6 December 2005, p3

5.43 Dr Kerry Schott, Executive Director for Private Projects and Asset Management, NSW Treasury, in evidence to the Committee outlined succinctly the steps taken by government departments following the *Working with Government Guidelines*:

For privately financed projects, government agencies and departments are required to comply with the Government's "Working with Government" guidelines for privately financed projects. Treasury is responsible for the administration of these guidelines. The guidelines set out a three-stage project consisting of an initial seeking of expressions of interest and short-listing stage followed by a request for detailed proposals. The final stage involves negotiations and execution of contracts with the preferred proponent. Throughout the various tendering phases Treasury is actively involved. Typically for these sorts of project, Treasury is a member of the project steering committee and is represented on the evaluation panel. On the cross-city tunnel project, Treasury was a member of the review panel overseeing the whole process and was represented on the group that assists financial aspects of the tender.¹⁷⁰

5.44 For the first stage of the tendering process, the RTA called for registrations of interest from consortia in September 2000. Registrations of interest were received from 8 consortia.¹⁷¹

5.45 The registrations of interest were evaluated by an assessment panel, membership of which included RTA representatives, a representative of NSW Treasury and a principal of Evans and Peck Management. The assessment panel was assisted by a number of private organisations providing advice: Clayton Utz, legal; Arthur Anderson, financial; Evans and Peck Management, technical; and Corporate Scorecard, financial rating advice.¹⁷²

5.46 The activities of the assessment panel were overseen by a review panel, whose membership included:

- Mr Mike Hannon, then RTA Director Road Network Infrastructure (currently acting Chief Executive of the RTA)
- Mr Graham Read, then RTA corporate counsel (who has since left the RTA)
- Mr Danny Graham, Principal Adviser, Infrastructure, NSW Treasury (currently Director, Private Finance Projects, NSW Treasury)
- Mr Alan Griffin, then Chairperson of State Contracts Control Board
- Mr Rory O'Connor, probity auditor, Deloitte Touche Tohmatsu
- Mr John Tyrill, probity auditor, John Tyrill and Associates.¹⁷³

¹⁷⁰ Dr Kerry Schott, Executive Director, Private Projects and Asset Management, NSW Treasury, Evidence, 7 December 2005, p2

¹⁷¹ RTA, *Cross City Tunnel Summary of contracts*, June 2003, p10

¹⁷² RTA, *Cross City Tunnel Summary of contracts*, June 2003, p10

¹⁷³ RTA, *Cross City Tunnel Summary of contracts*, June 2003, p10

- 5.47** The assessment panel used pre-determined and weighted criteria to evaluate the proposals, including:
- Design and construction capability (weighted at 27%)
 - Financial capacity (weighted at 22%)
 - Project features (including approvals, traffic management, environmental impacts, community liaison, issues management and risk management; weighted at 17%)
 - Project finance (including experience, delivery record and strategy for equity, debt funding, structure and risk allocation; weighted at 12%)
 - Organisation (roles and structures within the consortium, roles and relationships; weighted at 5%)
 - Tollroad management (experience, key personnel and commitment; weighted at 9%)
 - Operation and maintenance (weighted at 8%)¹⁷⁴
- 5.48** The *Cross City Tunnel Summary of Contracts*, from which this information is drawn, did not specify who determined the criteria and allocated weightings.
- 5.49** The shortlisted consortia were the CrossCity Motorway consortium; the E-Tube consortium; and the Sydney City Tunnel Company.¹⁷⁵
- 5.50** In June 2001, the RTA issued a Request for Proposals, following which the three consortia submitted detailed proposals. The Request for Proposals included draft versions of the Project Deed, a *Scope of Works and Technical Criteria* document, an outline RTA Consent Deed, and a *Site Access Schedule*.
- 5.51** The proposals submitted included conforming and non-conforming proposals. The RTA's initial EIS received planning approval on 3 October 2001. The Planning Conditions of Approval were made available to the consortia and the closing date for submissions was extended to 24 October 2001.
- 5.52** Mr Danny Graham, NSW Treasury, explained in evidence to the Committee one of the purposes of providing these tender documents:
- In the tender documents that went to the three bidders the development costs and business consideration fees were identified as potential areas that were available if there was excess revenue over cost in the concession. All bidders had the opportunity to bid on either the development costs or the business consideration fee. One bidder bid on both. Two other bidders did not bid an up-front contribution.¹⁷⁶
- 5.53** The issue of consortia bidding on a 'business consideration fee', and the implications of that process, will be addressed in a later section of this chapter.

¹⁷⁴ RTA, *Cross City Tunnel Summary of contracts*, June 2003, p10

¹⁷⁵ RTA, *Cross City Tunnel Summary of contracts*, June 2003, p10

¹⁷⁶ Mr Danny Graham, Director, Private Finance Projects, NSW Treasury, Evidence, 7 December 2005, p11

- 5.54** The assessment panel that reviewed the proposals submitted by the shortlisted criteria included:
- Mr Les Wielinga, then General Manager, Private Infrastructure RTA (currently Director Motorways, RTA)
 - Mr Garry Humphrey RTA then General Manager, Motorway Services (currently General Manager Infrastructure Projects, RTA)
 - Mr Kevin Pugh, then Senior Manager, Corporate Finance, NSW Treasury Corp
 - Mr Peter Gemell, Principal, Evans and Peck Management.¹⁷⁷
- 5.55** The panel was assisted by Clayton Utz, legal advice; Evans and Peck Management, commercial and technical advice; Anderson Consultants, financial advice; Mr Frank Perry, Acting General Manager of the RTA's Economic Services and Support Branch; Mr Peter Bannister, Treasury; and other 'specialist advisers on specific issues' including RTA staff.¹⁷⁸
- 5.56** As in the first stage of the tendering process, a review panel oversaw the assessment panel. The review panel included:
- Mr Mike Hannon, then RTA Director Road Network Infrastructure (currently Acting Chief Executive, RTA)
 - Mr Graham Read, RTA corporate counsel
 - Mr Danny Graham, Principal Adviser, Infrastructure, NSW Treasury (currently Director, Private Finance Projects, NSW Treasury)
 - Mr Alan Griffin, then Chairperson, State Contracts Control Board
 - Mr Brett Skinner, Director Finance, RTA (from January 2002)
 - Mr Peter Gifford, probity auditor (PAJI Pty Ltd), assisted by Mr Ed Shestovsky and Mr Phil Armessen from the Department of Public Works.¹⁷⁹
- 5.57** The assessment process for the tender included:
- A 'comparative value' assessment against the Public Sector Comparator
 - A 'non-price assessment' against weighted pre-determined criteria including:
 - Design and construction (30%)
 - Project structure, participants and organisation (25%)
 - Initial project plans (25%)
 - Operation and maintenance (10%)
 - Initial traffic management and safety plans (10%)¹⁸⁰

¹⁷⁷ RTA, *Cross City Tunnel Summary of contracts*, June 2003, p11

¹⁷⁸ RTA, *Cross City Tunnel Summary of contracts*, June 2003, p10

¹⁷⁹ RTA, *Cross City Tunnel Summary of contracts*, June 2003, p11

¹⁸⁰ RTA, *Cross City Tunnel Summary of contracts*, June 2003, p11

5.58 The *Cross City Tunnel Summary of Contracts*, from which this information is drawn, did not specify who determined the criteria and allocated weightings.

5.59 The RTA's assessment and review panels concluded that:

The proposals submitted by the CrossCity Motorway consortium would represent better value for money than the 'public sector comparator' and the proposals submitted by the other two proponents.¹⁸¹

5.60 The preferred proposal was a non-conforming proposal, the 'long 80 tunnel'. The implications of this preference were that a Supplementary EIS had to be completed to obtain approval from the then Minister for Urban Affairs and Planning. Chapter 4 provides detail on the planning implications of this decision.

Implications of a non-conforming preferred proposal

5.61 The critical changes between the original project as reflected by the EIS and the final project as reflected by the Supplementary EIS relate to the nature of the tunnel itself (deeper, faster, longer) and the nature of the road changes in the local area. However, it is evident to the Committee that the community did not fully comprehend the road changes and their potential impacts. This issue is explored further in Chapter 6.

5.62 One of the major changes involved removing access to the Harbour crossings from Sir John Young Crescent and Cowper Wharf Road. These changes were not part of the original project as discussed with the community in the build-up to the EIS. They have a significant negative impact on the lives of residents of the affected community (particularly in those areas bounded by the tunnel's portals to the east and to the west), evidenced by the many submissions received from residents of that area.

5.63 In evidence to the Committee, the Lord Mayor of Sydney, Clover Moore, commented that:

in 2002 it became clear that the project was off track following changes during the tender process that resulted in a revised scheme that was more environmentally damaging and imposed unacceptable impacts on local residents.

...

proposed changes were a result of a \$100 million financial package paid to the State Government with a tenderer benefiting from the changes designed to maximise revenue; replace a previously approved project that required the Government to contribute \$40 million for a more beneficial scheme

...

new traffic conditions were being introduced that were not related to improved amenity, but designed to force drivers into the tunnel or require them to use more convoluted routes.¹⁸²

¹⁸¹ RTA, *Cross City Tunnel Summary of contracts*, June 2003, p12

¹⁸² Ms Clover Moore, Lord Mayor of Sydney, Evidence, 9 December 2005, p23

5.64 The RTA, in its submission and during evidence given to the Committee, emphasised that changes to William Street and a number of other streets were assumptions relied upon by all tenderers when preparing their proposals. However, there were clearly additional road changes associated with the Supplementary EIS and the successful project. Some of those changes were reversed during the brief consultation period prior to the Project Deed being entered into. The negotiations between the RTA and CCM to derive a ‘no cost to government’ solution to these changes directly led to a higher toll, examined in a later section of this chapter.

5.65 Mr Chris Wilson, a partner with the RTA’s traffic consultants Massey Wilson Twiney, suggested that the CCM proposal incorporated road changes that were not part of the original EIS:

My recollection was some additional road works that were required to be pulled out of their project specification to bring it more in line with the EIS approved scheme. There was a point in negotiation that required input on the effects of pulling those additional works that they wanted to have in those to bring it back to the EIS approved scheme. I evaluated what effect that may have on the traffic forecasts.¹⁸³

5.66 However, the Committee notes that the only change sought by CCM concerned limiting vehicle movements at Cowper Wharf Rd. That change was publicly exhibited as part of the SEIS, but was not approved by the RTA, as published in the Preferred Activity Report.

Conclusions

5.67 The Committee has seen no evidence to suggest that the RTA conducted the tendering process and the contract negotiations in anything other than a professional manner. Comments from a wide range of witnesses have indicated to the Committee that the RTA has an excellent reputation for the development and delivery of major PPP projects.

5.68 The Committee notes that the probity auditor appointed to oversee the tender process advised the RTA that the evaluation process had been planned and conducted with ‘the highest level of probity applied to all aspects.’¹⁸⁴

5.69 It is clear, however, that the RTA conducted their negotiations against the background of a very strong imperative from the Government to deliver the project at ‘no cost to Government’, which is likely to have resulted in the selection of the ‘long 80 tunnel’ over the original scheme. The Committee accepts that the resulting tunnel is technologically superior and the different construction technique resulted in less impact on the local area, but it is not convinced that the proposal was ‘better’ when considered in light of the primary objectives of the project.

¹⁸³ Mr Chris Wilson, Director, Massey Wilson Twiney, Evidence, 9 December 2005, p2

¹⁸⁴ RTA, *Cross City Tunnel: Summary of contracts*, June 2003, p12

The function of the Public Sector Comparator in the tender process

- 5.70** The *Working with Government Guidelines* state that a Public Sector Comparator (PSC) is ‘a model of the costs (and in some cases, revenues) associated with a proposal under a government financed method of delivery.’¹⁸⁵ The guidelines continue with the direction that the PSC ‘will be developed for all proposals to assist the Government determine whether a private finance arrangement offers superior value for money over traditional methods of government delivery.’¹⁸⁶
- 5.71** ‘Traditional methods of government delivery’ can include elements of private sector provision – the PSC might incorporate the contracting out of the development and construction elements of the project while retaining the operation and maintenance elements, for example.¹⁸⁷
- 5.72** In the case of the Cross City Tunnel, Mr Danny Graham, Director, Private Projects for the NSW Treasury, explained, in evidence to the Committee, that:
- The PSC was a joint development between the RTA and Treasury, primarily because this was the first time we had actually approached it using a commercial policy framework. What we were doing there was developing a fully project-financed model as though it was a Government delivered project through a government corporation, so we worked with RTA. Treasury worked on the finance attributes—the debt equity structures, the rates of return expected, et cetera—and the RTA worked on the technical aspects—the engineering construction costs, the ongoing operations and maintenance costs—and we used the RTA's estimate of traffic flow for the toll revenue equation.¹⁸⁸
- 5.73** Once developed, the PSC is compared against private proposals for specific projects. In the case of the Cross City Tunnel, the PSC was compared against the various proposals put forward by the three short-listed consortia.
- 5.74** Professor Bob Walker, Professor of Accounting at the University of Sydney, in his evidence to the Committee, highlighted a possible limitation of the PSC in that it focuses on the financial aspects of a project. Professor Walker said:

Cost benefit analysis should look at the wider impact of a particular project on the community as a whole. The cost benefit analysis was not reflected, as I recall, in the contract summary and the material published in relation to the public sector comparator was largely confined to a few lines in a footnote on page 11 of the contract summary. I think that is unsatisfactory in the interests of public sector accountability.¹⁸⁹

¹⁸⁵ NSW Government, *Working with Government: Guidelines for Privately Financed Projects*, November 2001, p45

¹⁸⁶ NSW Government, *Working with Government Guidelines*, November 2001, p45

¹⁸⁷ NSW Government, *Working with Government Guidelines*, November 2001, p45

¹⁸⁸ Mr Graham, Evidence, 7 December 2005, p12

¹⁸⁹ Professor Bob Walker, Professor of Accounting, Evidence, 1 February 2006, p15

- 5.75** The PSC was prepared on the basis of the requirements of the original EIS and the Minister's Planning Conditions of Approval. When the RTA's Evaluation Panel selected the non-conforming 'long 80 tunnel' as its preferred proponent, it had to modify the PSC and the proposals of other consortia to provide a comparison of similar projects.
- 5.76** The RTA's *Cross City Tunnel Pre-Signing Report* stated that:

The Evaluation Panel has concluded that the proposed financial transaction with CCM represents value for money and continues to represent better value for money when compared with the Public Sector Comparator and the Reserve Proponent [Sydney City Tunnel Company – the tenderers of the proposal rated second]. In each case, the necessary adjustments were made to ensure the consistency and relevance of the comparisons.¹⁹⁰

Conclusions

- 5.77** Despite seeing a number of documents relating to the comparison of the private sector proposals with the PSC, the Committee remains unclear about the way in which the comparison was conducted.
- 5.78** The *Working with Government Guidelines* refer to 'qualitative considerations' that are taken into account in the comparison with private sector proposals, including 'any wider net benefits or costs that a private finance arrangement may entail'. A specific example provided, pertinent to the Cross City Tunnel, is 'earlier or more flexible provision of important infrastructure services.'¹⁹¹
- 5.79** The Committee is not aware of any analysis of the comparison conducted in the case of the Cross City Tunnel leading to the decision that the CCM 'long 80 tunnel' proposal represented better value than the PSC.
- 5.80** The Committee has reservations about the process employed by the RTA in comparing the preferred proposal with the Public Sector Comparator. We accept the principle that allowing non-conforming proposals increases the potential to maximise innovative approaches from the private sector. However, the Committee is concerned that the uncertainties deriving from a different project (in terms of revised Minister's Planning Conditions of Approval) make a comparison between the PSC and other consortia difficult.
- 5.81** The Committee will further investigate the issue of the PSC in the second stage of its Inquiry.
- 5.82** In addition to the time and expense associated with completing a new Supplementary EIS, the proposal which was approved by Government (through the Budget Committee on Cabinet) has been substantially altered, without the Government re-assessing it to ensure it continues to meet its primary objectives. This issue is discussed in Chapter 4.

¹⁹⁰ RTA, *Cross City Tunnel Pre-Signing Report*, undated, p19

¹⁹¹ NSW Government, *Working with Government Guidelines*, November 2001, p46

Recommendation 6

That the Summary of Contracts for future infrastructure projects include a summary of the comparison of the Public Sector Comparator with private sector proposals. The summary should:

- outline the criteria used in the comparison and relative weightings assigned to those criteria
 - include details of the analysis conducted against the criteria.
-

Estimates of traffic flows

5.83 Since the Cross City Tunnel opened on 28 August 2005, there has been considerable media and community interest in the low volume of traffic using the tunnel.

5.84 Traffic consultants Masson Wilson Twiney Pty Ltd, provided all the traffic figures for the RTA. The Environmental Impact Statement for the 'long tunnel' forecast traffic figures using the tunnel daily of 69,600 in 2006 and 77,600 in 2016.¹⁹² These figures were revised in the Supplementary EIS, with the figures for the 'long tunnel' recalculated at 86,300 for 2016. Traffic forecasts for the 'long 80 tunnel' were 101,700 for 2016.¹⁹³

5.85 The CrossCity Motorway's traffic estimates, calculated by Hyder Consulting, were higher, with a figure of 'up to 90,000' by 2006 cited in CCM's submission to the Committee.¹⁹⁴

5.86 By way of explanation of the difference in traffic estimates, Mr Wilson, Director of Masson Wilson Twiney Pty Ltd, said in evidence to the Committee:

There is a time lag between when I prepared the forecast and when the consortia prepared the forecast. They do have the opportunity of updating some of their land use information and because they may take optimistic views of how road networks are developed and the like, that is where the differences come in. ... within the realms of modelling, you could say that one is as good as the other.¹⁹⁵

5.87 Mr Les Wielinga, Director Motorways for the RTA said in evidence to the Committee that:

The feature of all the traffic projections was that in around 2016 they were very similar, but with different assumptions about how it would go between the starting time and the 2016 projection.¹⁹⁶

¹⁹² RTA, *The Cross City Tunnel Environmental Impact Statement*, August 2000, Summary, p16

¹⁹³ RTA, *The Cross City Tunnel Supplementary Environmental Impact Statement*, August 2002, p4.6

¹⁹⁴ Submission 38, CrossCity Motorway Pty Ltd, p2

¹⁹⁵ Mr Wilson, Evidence, 9 December 2005, p6

¹⁹⁶ Mr Wielinga, Evidence, 6 December 2006, p12

- 5.88** Mr Peter Sansom, then Chief Executive Officer of CCM, in evidence to the Committee, gave details of traffic figures for the tunnel for Friday 2 September 2005 and Friday 2 December 2005:

We started at 20,000 vehicles a day on the Friday of the first week and last Friday we had 31,000 vehicles through.¹⁹⁷

- 5.89** The Committee heard evidence from Mr Chris Wilson that ‘one of the complications we have at the moment is that we are going into the Christmas holiday period and the numbers are all over the place at the moment.’¹⁹⁸

- 5.90** Mr Sansom estimated the figures for the day in which he was giving evidence to the Committee (6 December 2005):

I will stab that somewhere between 27,000 28,000 will be today's figures. I will indicate to you that next Friday's figures will be somewhere between 31,000 and 32,000.¹⁹⁹

- 5.91** At the more recent February hearings of the Committee, Mr Sansom provided updated figures for the week beginning January 30 2006:

On Monday there were 26,380 vehicles through the cross-city tunnel. On Tuesday this week there were 27,388 vehicles. On Wednesday there were 29,292 vehicles. On Thursday there were 29,550 vehicles, and I expect today there would be somewhere between 30,000 and 31,000 vehicles through the cross-city tunnel.²⁰⁰

- 5.92** The Committee notes that the figures estimated for a Friday in February 2006 were in fact less than those estimated for a Friday in December 2005, which suggests a flat ramp in the ramp-up period.

- 5.93** It is unclear the extent to which the traffic volumes through the tunnel were influenced by community boycotting of the tunnel, called for by community groups, radio personalities and political groups. The Committee notes that the Woollahra Council were unsuccessful in passing a resolution to encourage residents of Woollahra to boycott the tunnel on Monday 13 February.

- 5.94** In his evidence to the Committee, Mr Garry Bowditch, Project Director with Infrastructure Partnerships Australia referred to a Standard & Poor’s study into traffic modelling on ‘104 international toll roads, bridges and tunnels’:

The study has confirmed the existence of overforecasting asset use—or what is commonly referred to in the industry as optimism bias...On average, across all toll

¹⁹⁷ Mr Peter Sansom, former Chief Executive Officer, CCM, Evidence 6 December 2005, p77

¹⁹⁸ Mr Wilson, Evidence, 9 December 2005, p4

¹⁹⁹ Mr Sansom, Evidence 6 December 2005, p79

²⁰⁰ Mr Sansom, Evidence, 3 February 2006, p65

roads, bridges and tunnels, forecasts overestimate traffic in the first year by 20 to 30 per cent.²⁰¹

- 5.95** One of the elements of the PSC, used to compare the cost of providing the infrastructure through the public sector with that of the private consortia's proposals, is revenue, determined through traffic estimates. The PSC for the Cross City Tunnel relied on estimates of traffic flow produced by traffic analysts Masson Wilson Twiney Pty Ltd.
- 5.96** The consortia provided their own traffic estimates. There was considerable difference between the estimates provided in the EIS and Supplementary EIS by the RTA, and those relied on by the successful consortium CCM in their proposal. One of the consequences of the higher figure estimated by CCM was that they would earn greater revenue more quickly and therefore had the potential to offer a Business Consideration Fee to the RTA as part of their proposal. This was one reason for the proposal being considered better value for money than the PSC.
- 5.97** As many witnesses have pointed out, if the tunnel fails to deliver the anticipated volume of traffic then the loss of revenue is the complete responsibility of the consortium. The Hon Nick Greiner, in evidence to the Committee, stated this point very clearly:

There was substantial risk transfer in this process. The company of which I am chairman [Bilfinger Berger Australia], and a sister company, took a construction risk and, unfortunately, we had a fatality, various things went wrong, and we made far from a satisfactory profit—essentially no profit. We took that construction risk and that is the way it works. Of course, the private sector has taken the patronage risk and, as we all hear and read every day, it may well be seen not to have got it right, at least not in the short term. Whatever happens, the private sector has taken the patronage risk, so the public has a piece of infrastructure and whether it is used sufficiently or not, that risk is taken by the providers of the equity and, indeed, by the providers of debt.²⁰²

- 5.98** The former Premier, the Hon Bob Carr, in evidence to the Committee, put it even more directly:

the risk is borne entirely by the private sector.²⁰³

- 5.99** In evidence to the Committee, two witnesses claimed that the capacity of the Cross City Tunnel was not sufficient to allow for the projected traffic estimates of either CCM or the RTA. Dr John Goldberg commented:

Basically it boils down to this: you cannot stuff enough cars onto a roadway, paying tolls, to produce the revenue necessary to pay the expenses and the dividends to investors.²⁰⁴

²⁰¹ Mr Garry Bowditch, Project Director, Infrastructure Partnerships Australia, Evidence, 3 February 2006, p48

²⁰² Hon Nick Greiner, Evidence, 7 December 2005, p41

²⁰³ Hon Bob Carr, former Premier, Evidence, 6 December 2005, p36

²⁰⁴ Dr John Goldberg, Evidence, 9 December 2005, p21

- 5.100** Ms Michelle Zeibots, in a detailed presentation to the Committee drawing on her experience as a doctoral student at the University of Technology Sydney's Institute for Sustainable Futures, where she specialises in before and after studies of urban motorway development and the emergence of induced traffic growth, told the Committee of her concern that:

some of the traffic volume estimates that have been put forward by the consortium appear to be above what we would classify as the ceiling capacity for the road.²⁰⁵

- 5.101** Mr Chris Ford, Director Traffic and Transport, RTA, in response to the suggestion that the ceiling capacity of the tunnel was less than the traffic estimates, discussed in evidence to the Committee, the use of expansion factors in calculating ceiling capacity:

In the evidence that was tendered yesterday, an expansion factor derived from the Sydney Harbour Bridge was applied to the lane capacities to return the ceiling capacity for the cross-city tunnel. An assumption in determination of the expansion factor was that, in fact, there were nine traffic lanes on the Sydney Harbour Bridge; in fact, there were only eight traffic lanes at the time the analysis was undertaken. The expansion factor, using the same analysis, was increased from 10 to 11.5 and, using the same calculations, would generate a ceiling capacity of 90,000 rather than the 80,000 quoted yesterday. At the very least I have some issues with the calculations.²⁰⁶

- 5.102** The Committee recognises that creating traffic projections for major projects is complex. The accuracy of such projections relies on assumptions made by traffic experts. Different experts may generate different assumptions and therefore different projections for the same projects.

- 5.103** The difficulties in accurately forecasting traffic volumes was demonstrated by Ms Zeibots revising the estimates she provided to the Committee the day after giving evidence.

- 5.104** The report of the independent auditor, Ernst & Young, confirmed that the calculations used in determining the Base Case Financial Model were methodologically correct and consistent, however the report does not examine the figures and assumptions used:

Our audit did not extend to a validation of the assumptions. The assumptions are the responsibility of a variety of parties. We have evaluated the tax and accounting assumptions for consistency with accounting standards, tax regulations and the Ernst & Young tax and accounting opinions. We have not otherwise assessed the reasonableness of my assumptions. We have agreed certain assumptions that were sourced from the Project Documents (only to the extent set out in Section 3.4) to those documents - however, no validation procedures beyond this have been conducted.²⁰⁷

Conclusions

- 5.105** While the Committee accepts that the patronage risk for the CCT has been transferred to CCM in the case of the Cross City Tunnel, and that therefore there is no direct and financial impact on the Government if the tunnel fails to meet its estimated traffic levels.

²⁰⁵ Ms Michelle Zeibots, Transport Planner, Evidence, 1 December 2005, p81

²⁰⁶ Mr Chris Ford, Director Traffic and Transport, RTA, Evidence, 2 February 2006, p24

²⁰⁷ Ernst and Young, *Financial Model Audit Report*, 19 December 2002, p4

- 5.106** The Committee has heard conflicting evidence on whether or not the Cross City Tunnel has the capacity to provide for the traffic volumes estimated by the RTA and all other consortia. The Committee is concerned that the estimated flow of the successful proposal varied so significantly from the RTA's estimates. It is incumbent on the RTA to interrogate optimistic claims given the obvious impacts on factors such as toll pricing and surrounding traffic conditions.

Recommendation 7

That the NSW Roads and Traffic Authority request that CrossCity Motorway place daily and monthly Cross City Tunnel traffic use figures on their website.

Business Consideration Fee

- 5.107** The Business Consideration Fee (BCF) is the term given to the payment by CCM to the RTA at the time the parties entered into the Project Deed.
- 5.108** A BCF of \$96.86 million was paid by CCM to the RTA²⁰⁸. An undated RTA update on 'negotiations and options concerning the Business Consideration Fee'²⁰⁹ describes the BCF as being 'intended to cover RTA costs associated with the Project and also for the ongoing right to operate the Tollway during the Term.'²¹⁰
- 5.109** In evidence to the Committee, Mr Wielinga described the BCF as being intended 'to cover RTA costs associated with delivering the project'.²¹¹
- 5.110** The former Treasurer, the Hon Michael Egan, in evidence to the Committee, described the intent of the BCF more generally:
- [W]hen the private sector undertakes one of these massive projects, there are also of course ancillary expenses which the government is up for. I think it is important, if we are not going to keep fleecing the public purse, that the public authorities that are responsible for these ancillary infrastructure and services should be recouping for their expenditure.²¹²
- 5.111** The Committee notes that there has been a shift in the way in which the BCF has been characterised, and that the emphasis during the hearings and in the submissions received has been on the BCF being for cost recovery, not as a fee to grant an 'ongoing right to operate the Tollway'.²¹³

²⁰⁸ RTA, Answers to questions taken on notice, 13 February 2006, p8

²⁰⁹ RTA, *Roads and Traffic Authority: Cross City Tunnel*, undated brief, p1

²¹⁰ RTA, *Roads and Traffic Authority: Cross City Tunnel*, undated brief p1

²¹¹ Mr Wielinga, Evidence, 6 December 2005, p55

²¹² Hon Michael Egan, Evidence, 6 December 2005, p43

²¹³ RTA, *Roads and Traffic Authority: Cross City Tunnel*, undated brief p1

- 5.112** The Hon Bob Carr, in his evidence to the Committee, suggested that the term ‘business consideration fee’ did not accurately describe the fee’s intent:

It is wrongly called a business consideration. I think that is falling nomenclature. The principle is this. The RTA should see that with future roads projects, unlike the M2, there is a full recouping of its expenses from the private consortium. That is an absolutely valid principle. The Government does that now.²¹⁴

- 5.113** Mr Danny Graham, Director of Private Finance Projects, NSW Treasury, in evidence to the Committee stated:

In the tender documents that went to the three bidders the development costs and business consideration fees were identified as potential areas that were available if there was excess revenue over cost in the concession.²¹⁵

- 5.114** This evidence, and the shift in definition of the ‘business consideration fee’, suggests to the Committee that there was an intention, at least in the initial stage of the tendering process, that this be a fee over and above the costs associated with the project.

- 5.115** Mr Sendt, NSW Auditor General, indicated in evidence to the Committee, that detailed examination of what constituted the Business Consideration Fee was a part of the performance audit his office is conducting into the Cross City Tunnel:

That payment has been described in various terms. It has been described as compensation for expenditure made; it has been described as a business consideration and I think maybe other terms were used. What we are trying to do is get to the nub of what that was designed to represent.²¹⁶

We will be looking to see what made up the \$96 million and whether it was for cost incurred or whether it was at the other extreme, effectively the consortium paid to win the job.²¹⁷

- 5.116** The quantum of the Business Consideration Fee changed over the course of the contract negotiations between CCM and the RTA. The original figure provided to the RTA as part of the consortium’s proposals following the original EIS (the ‘long tunnel’) was \$100.1 million. This figure changed following the acceptance by the RTA of the consortium’s ‘long 80 tunnel’, which did not conform to the original EIS and required a Supplementary EIS. As a consequence of the differing Minister’s Planning Conditions of Approval, and later requirements imposed by more stringent air quality standards (the construction of a third tunnel for ventilation purposes, valued at \$37 million) and through community consultation (improvements to the Eastern portal ‘lid’ and re-instatement of a right hand turn from Cowper Wharf Road to the harbour crossings), CCM reduced the amount of the BCF they proposed to pay the RTA.

²¹⁴ Hon Bob Carr, Evidence, 6 December 2005, p32

²¹⁵ Mr Graham, Evidence, 7 December 2005, p11

²¹⁶ Mr Sendt, Evidence, 2 February 2006, p52

²¹⁷ Mr Sendt, Evidence, 2 February 2006, p56

- 5.117** Due to the ‘no cost to government’ policy, the RTA entered into negotiations with CCM to increase the BCF, allowing an increased toll escalation regime to enable CCM to recover the BCF. The impact of this and subsequent negotiations on the toll is covered later in this chapter.

Conclusion

- 5.118** Following a request from the Committee, the RTA provided a detailed line-by-line breakdown of the BCF. The breakdown indicates that the BCF has been used to meet costs arising from the project, such as work on utility networks affected by the tunnel and cost recovery for project preparation costs.²¹⁸
- 5.119** If the BCF did include a component for the ‘right to operate the Tollway’, then the Committee is concerned that this represents an unnecessary imposition on the road users, as the toll will necessarily be increased to recoup the cost of the fee. The Committee believes this approach would make the fee an alternative source of revenue for the Government, revenue which is provided inequitably by the road user.

Recommendation 8

That any policy of charging private consortia a fee for a ‘right to operate’ a piece of infrastructure be expressly discontinued.

Setting the toll level

- 5.120** While the RTA set the initial toll level in documents (including the EIS) provided to tenderers for the project, the toll level has been subject to variations as the scope of the project changed over time. The process by which the RTA set the initial toll was explained in the *IIG Review*:

[T]he RTA determines in advance of going to tender what the toll for a toll road will be, on the basis of benefit-cost analysis which grosses up the benefits for the expected number of road users, and includes this benchmark in Requests for Tender – and in EIS documentation.²¹⁹

- 5.121** The toll level was initially set at \$2.50 for all vehicles (at March 1999 prices), subject to quarterly increases linked to the Consumer Price Index.²²⁰ Westbound vehicles leaving the Tunnel at the Sir John Young Crescent exit were to pay a lesser amount - \$1.10, also linked to CPI. These tolls were announced by then Premier, the Hon Bob Carr, in September 1999.
- 5.122** The first variation to the toll was the move to allow differential pricing for heavy vehicles, charged at double the rate of ordinary vehicles - \$5.00 one way, \$2.20 for heavy vehicles exiting at Sir John Young Crescent. Tolls for heavy vehicles were also linked to CPI increases.

²¹⁸ RTA, Answer to question taken on notice, 6 December 2005, p2

²¹⁹ Infrastructure Implementation Group, *Review of Future Provision of Motorways in NSW*, December 2005, p24

²²⁰ RTA, *Cross City Tunnel Summary of contracts*, June 2003, p4

5.123 This variation in the toll was included in the Supplementary Environmental Impact Statement, prepared by the RTA following the acceptance of the 'long 80 tunnel' proposal.

5.124 The RTA's *Pre-Signing Report* explains the context for the next variation in the toll level:

In the period since the nomination of CCM as preferred Proponent a number of changes to the Project scope and terms of the Project Deed have been required. The most significant of these changes have resulted from more stringent standards imposed by PlanningNSW following the issue of requirements for a Supplementary Environmental Impact Statement in May 2002. In addition the project has been subject to additional costs arising from the need to preserve road network flexibility, changes to the international insurance market, additional requirements imposed by Government infrastructure owners and other matters²²¹

5.125 The *Pre-Signing Report* continues:

To maintain the financial transaction on the basis that there is no cost to Government going forward a financial package has been negotiated with CCM whereby CCM has agreed to finance these additional costs by the application of a toll escalation regime which entitles CCM to minimum defined annual increases in tolls ²²²

5.126 The RTA's *Finalisation Report* detailed the extent of the agreed toll escalation:

The [toll escalation] regime provides for a minimum 4% toll escalation from September 1998 to December 2011 and a minimum 3% escalation from January 2012 to December 2017. No minimum escalation is provided for after December 2017.²²³

5.127 The final increase in the toll occurred following the signing by the RTA and CCM of the First Amendment Deed. By late 2004, it was evident to the RTA that the project costs likely to be incurred by the RTA would exceed the value of the development and administration costs estimated at the time of execution of the *Cross City Tunnel Project Deed* which were to be financed by the Business Consideration Fee.²²⁴

5.128 In exchange for \$35 million of works to be performed by CCM, the RTA agreed to allow an increase to the base toll of \$0.15, bringing the base toll to \$2.65 for cars and \$5.30 for heavy vehicles, subject to the existing toll escalation regime of 4% to December 2011, and 3% from January 2012 to December 2017.²²⁵

5.129 The then Treasurer, who approved the increase under the *PAFA Act*, in evidence to the Committee, was sanguine about the impact of the increase:

[T]he agreement which the RTA and the consortium came up with was that the money that the RTA would have to outlay on the 240 planning conditions, which turned out to be more costly than they expected, including the additional lane on the

²²¹ RTA, *Pre-signing Report*, Undated, p16

²²² RTA, *Pre-signing Report*, Undated, p17

²²³ RTA, *Finalisation Report*, Undated, p3 of cover brief

²²⁴ RTA, *Cross City Tunnel: Summary of First Amending Deed*, November 2005, Section 1.2.1

²²⁵ RTA, *Cross City Tunnel: Summary of First Amending Deed*, November 2005, Section 2.2.2

ANZAC Bridge, I said—or Carl Scully first raised it with me. He said, "This is something which the users of the tollway should pay. Therefore I propose that we negotiate with the consortium. They will undertake these works on our behalf and we will enable them to lift the toll by 15¢." It is not great amount of money. It is the cost of a third of a cigarette or about five per cent of a schooner of beer.²²⁶

5.130 The Committee notes that the Ernst & Young advice to the RTA in December 2004 states that the 15¢ increase would result in a change in toll revenue from \$5,500,430,000 to \$5,808,600,000 over the course of the project term. This is an increase of \$308,199,000.²²⁷

5.131 Information about the toll increases has not been widely available to the community. References to toll increases have not mentioned that the increases were greater than CPI, in fact even in evidence to this Committee CCM only referred to CPI increases. Mr Peter Sansom, the then Chief Executive of CCM, explained in evidence to the Committee, the level of the current toll without reference to the higher-than-CPI rate of escalation:

The \$2.50 base toll was the toll in 1999 dollars and that was increased with one amendment deed to be essentially \$3.56 if you include the impact of CPI.²²⁸

5.132 Mr Skinner, Director Finance of the RTA, in evidence to the Committee, explained the level of the toll as follows:

A point of clarification: in terms of where the toll would be now, the \$3.56 that is currently being offered is in line with the base arrangement of 1999 dollars. In fact, if you allow for the CPI base on that arrangement I think a \$3.56 maximum toll is probably still better value than what it could have been if you adjusted it for CPI.²²⁹

5.133 In evidence provided to the Committee in February 2006, Mr Skinner clarified his statements, adding that when reflecting on the value of the toll he was not referring only to CPI but also to the increasing value of weekly earnings:

The statements I made at the previous hearing reflected the potential value of the toll at \$3.56 at the moment. The tolling regime that is actually in place, which was stress tested against the other proponents, allowed for a floor of 1 per cent per quarter, which is the 4 per cent you are referring to, or the higher of the CPI. My comments about the value were more along the lines of what \$3.56 would be worth in today's affordability, I suppose. I suppose it is something that I was contemplating more along the lines of average weekly earnings, if you like, which actually increased significantly between 1999 to 2006. Really, what I was trying to indicate was that the \$3.56 at the moment, compared to the \$2.65 back in 1999, is better value than what it would be in regard to maybe a comparison with the average weekly earning, which has increased much higher than CPI.²³⁰

²²⁶ Hon Michael Egan, Evidence, 6 December 2005, p50

²²⁷ Advice contained in letter to Mr Gary Humphrey, RTA, from Ernst & Young, December 2004

²²⁸ Mr Sansom, Evidence, 6 December 2005, p74

²²⁹ Mr Brett Skinner, Director Finance, RTA, Evidence, 6 December 2005, p14

²³⁰ Mr Skinner, Evidence, 2 February 2006, p42

5.134 The IIG *Review* commented that:

the RTA may have overestimated the (early) perceived value to its users.²³¹

5.135 This conclusion led to a specific recommendation in the IIG *Review*, which the Committee endorses:

RTA project assessment should include value for money (i.e. the toll) for the user as a specific and appropriately weighted evaluation criterion.²³²

Calculation of toll escalation

5.136 A number of Committee members raised issues about the calculation of the toll and the toll escalation formula. At the time of this report, the issues had not been resolved with the RTA, and are still being investigated.

Impact of toll increases

5.137 As the scope of the project changed over time, so the cost of the project increased. The original toll level of \$2.50 each way increased by the rate of inflation (Consumer Price Index) every quarter from 1999 through to the contract period end (2035) was modified through negotiation between the RTA and CCM in order to allow CCM to recoup the extra project costs through the tolls.

5.138 This approach has resulted in higher tolls than were initially envisaged. The allowable minimum rate of escalation of the toll was increased above the CPI level to ensure that CCM could provide the RTA with the Business Consideration Fee, to cover the extra costs that arose from the Supplementary Environmental Impact Statement.

5.139 Mrs Margaret Hamilton, member of the Central Community Liaison Group, in evidence to the Committee, noted the impact of the tolls as she saw it:

It is not the tunnels that people object to; it is the high tolls. People would much rather travel with no traffic lights swiftly to their destinations, but are being caught in the traffic because they see the tolls as too high. ... [T]he solution is not to re-open the rat run but to encourage cars to avoid city streets by making tolls fairer.²³³

5.140 Ms Lucy Robertson, private citizen, in a submission to the Committee, concurred:

[L]ike many other Sydneysiders, I feel the cost of the toll on the CCT is excessive. ... At the moment, I refuse to use the CCT because the cost of the toll vastly outweighs any benefit it has to me.²³⁴

²³¹ IIG *Review*, December 2005, p24

²³² IIG *Review*, December 2005, p9

²³³ Mrs Margaret Hamilton, Evidence, 3 February 2006, p37

²³⁴ Submission 44, Ms Lucy Robertson, p1

- 5.141** Surveys conducted by the NRMA on the toll levels indicated that this was a popular perception:

78% felt the \$3.56 toll indexed to increase 4 times a year was unfair.²³⁵

- 5.142** Mr Garry Bowditch, Project Director of Infrastructure Partnerships Australia, in evidence to the Committee, characterised the resistance to the toll as identifying a need for CrossCity Motorway to try to find the right ‘value proposition to attract and sustain patronage’:

In terms of the value proposition, it can come in terms of marketing of the value of the tunnel to its customers, how to attract patronage, the interface between both permanent, that is tag, and casual users, and how those casual users can be enticed into the tunnel in a way that is not intrusive to them.²³⁶

- 5.143** Mr Paul Forward, former Chief Executive of the RTA, in evidence to the Committee, commented that toll levels had to be considered in the context of time savings:

The issue of the toll is very much about people's ability to pay and the value that they seek from that toll. One needs to take it back and look at the time savings. If people are going to save 20 minutes, then they make a judgment as to whether that 20 minutes or 15 minutes is worth paying the toll for. What we have noticed on other road projects is that, over time, people start to consider that decision in a fairly rational way and make their choice. So whilst it is a maximum toll, it is the toll that was felt could be set in reflection of the time savings the people would acquire through using the tunnel.²³⁷

- 5.144** Mr Sansom, former Chief Executive of CCM, in evidence to the Committee, believed the toll represented good value:

We believe the cross-city tunnel's toll price presents good value in terms of savings, less wear and tear on motor vehicles and savings in petrol.²³⁸

- 5.145** Mr Hannon, Acting Chief Executive of the RTA, in evidence to the Committee, commented that:

It should be remembered though that this is the cap toll so it is completely at the discretion of the consortium what level they set.²³⁹

- 5.146** Given that the increased escalation of the toll was set to allow the CCM to recoup the BCF, and by implication maintain their desired level of profitability, it is unlikely that the consortium would reduce the level of the toll. CCM have, however, foregone one of their permitted increases under the toll escalation regime:

²³⁵ NRMA Motoring and Services 2005, *Motorists say Cross City Tunnel fees “unfair” – NRMA Survey*, NRMA media release 1 September 2005

²³⁶ Mr Bowditch, Evidence, 3 February 2006, p50

²³⁷ Mr Forward, Evidence, 6 December 2005, p53

²³⁸ Mr Sansom, Evidence, 3 February 2006, p64

²³⁹ Mr Hannon, Evidence, 6 December, p4

We have the right to increase the toll every quarter and we have elected to have a moratorium on any future increases until at least 1 July next year. So currently it is less than what it should be.²⁴⁰

5.147 However, evidence was provided to the Committee from Mr Chris Wilson about the effect of a reduction in the toll: preliminary analysis has indicated that should the toll for the main tunnel be decreased to \$2.90 for cars, the resultant additional traffic would likely result in a revenue-neutral outcome.²⁴¹

Conclusions

5.148 There appears to have been little consideration by the RTA of the impact on the community of the higher toll, and the negative implications for road users of the changes to the road networks that resulted from the construction of the tunnel.

5.149 The CCM website provides detail on the quantum of the toll, but does not explain how the amount was arrived at other than to say ‘the toll was set by the RTA’.²⁴² It would be in the public interest for CCM to provide a clearer understanding of how the toll level is calculated. The lack of openness about the level of the toll and the way in which it is calculated only increases public suspicion of toll roads.

5.150 The Committee believes that the public has the right to know how the toll is calculated. That information should at least be available on the website of the toll-road operator. The Committee notes that the amount of the toll is not advertised on entry to the tunnel, which is an obvious oversight and should be rectified immediately.

Recommendation 9

That any information relevant to an increase in toll pricing resulting from contract variations should be transparent and publicly available. The information should include:

- the original toll price proposed
 - toll price projections for each period where a price escalation or Consumer Price Index increase is provided in the contract
 - the price component of specific contract variations that increase the toll price.
-

5.151 One of the consequences of adopting the ‘long 80 tunnel’, when combined with the effect of the Government’s ‘no cost to government’ policy, is that, through the subsequent negotiation process, the tolls have increased to a level that may act as a disincentive to potential users. It is possible that the toll, even if it had remained at the level set in the EIS, would still be a disincentive. This indicates that the RTA and CCM over-estimated the value motorists would place on the tunnel’s benefits.

²⁴⁰ Mr Sansom, Evidence, 6 December 2005, p85

²⁴¹ Tabled document, RTA, *Review of Post Opening Traffic Demand for Cross City Tunnel*, December 2005, p1

²⁴² CrossCity Motorway website ‘Frequently Asked Questions’: www.crosscity.com.au

- 5.152** The insistence on a ‘user-pays’ tunnel with ‘no cost to government’ may have undermined the ability of the project to meet its primary objectives of reducing congestion in central Sydney. A limitation of using a PPP to deliver the infrastructure is that there is no government controlled flexibility to modify the toll to meet those primary objectives – in fact, the only alternatives available to the Government to increase tunnel use (apart from buying back the tunnel, or employing ‘shadow tolls’) is to apply greater restrictions to the surface roads in an attempt to further encourage motorists to use the tunnel.
- 5.153** The Committee acknowledges that projects of this nature have a ‘ramp-up’ phase that can last years before the traffic volumes reach their estimated levels, as has been demonstrated in the case of previous toll roads. Despite the current stagnation in traffic volume, it is highly likely that patronage will increase over time, and the extent of that increase cannot be determined at this stage.
- 5.154** The lack of traffic in the tunnel is to a large extent a result of the high toll. The transfer of the patronage risk for the tunnel to the private sector, while understandable in its intention to avoid the risk of a revenue shortfall, implies that the only important risk is that of financial exposure. The cost of failing to meet the primary objectives of the project is the continuing traffic congestion in the CBD. If the government had retained the patronage risk, it would also have retained control over toll pricing and could have made the adjustments to the toll recommended by its own traffic consultants (the traffic consultants, in a report to the RTA, recommended lowering the toll to \$2.90 to increase patronage²⁴³) in order to encourage use of the tunnel.
- 5.155** While the IIG *Review* addresses many of the issues raised in this First Report, the Committee believes that the operation of two of the recommendations of the IIG *Review* - to abandon the ‘no cost to government’ policy, and to retain control over the road network - will lead to this kind of PPP road project being more expensive for Government in future. The MAE clauses contained in the Cross City Tunnel Project Deed provide a level of certainty to the private sector, who account for the consequent lower levels of risk. If full control of the road network is kept by Government then the pricing to cover the increased risk for the private sector will be reflected in higher PPP costs. One consequence of this may be an increase in the strength and popularity of arguments asserting that the traffic risk is best borne by the Government, with future large road projects operating as limited PPPs, leaving the operation of the road to the Government.

²⁴³ Tabled document, RTA, *Review of Post Opening Traffic Demand for Cross City Tunnel*, December 2005, p1

Chapter 6 Community involvement

The terms of reference for the Inquiry require the Committee to examine the extent to which community consultation processes determined the substance of the Cross City Tunnel contract. In this chapter the Committee examines the effectiveness of the consultation and the impact of the consultation on the project. The Committee also examines the more general issue of communication with the community by Government, the Roads and Traffic Authority (RTA) and the CrossCity Motorway (CCM).

Opportunities for community input into the project

- 6.1** Opportunities for community consultation to contribute to changes in the Project Deed between the RTA and CCM for the construction of the ‘long 80 tunnel’ are by definition limited to the consultation phases up to the point at which the Project Deed was entered on 18 December 2002.²⁴⁴
- 6.2** It is important to note, however, that as a consequence of Planning Conditions of Approval 11 issued by the then Minister for Infrastructure, Planning and Natural Resources, a number of Community Liaison Groups were to be established.²⁴⁵
- 6.3** The RTA was required to:
- (c) allow the Groups to make comments and recommendations about the implementation of the development and environmental management plans, monitor compliance with conditions of this approval and other matters relevant to the operation of the development during the term of the consent;
 - ...
 - (e) ensure that the Groups have access to the necessary plans and information for such purposes;
 - (f) consider the recommendations and comments of the Groups and provide a response to the Groups and Director-General²⁴⁶
- 6.4** These Community Liaison Groups did not have any direct input into the substance of the Project Deed, however they had an impact on the tunnel as it was eventually constructed, and on the changes to the surface streets. Accordingly, the Committee will briefly examine the role of these groups in a later section of this chapter.
- 6.5** As Chapter 2 demonstrates, the Cross City Tunnel project has a long history. There have been opportunities for public comment on the project, both during the project’s initial conceptual

²⁴⁴ RTA, *Cross City Tunnel Project Deed*, December 2002, p1

²⁴⁵ *EP&A Act: Modification of an Approval granted under section 115B of the Environmental Planning and Assessment Act 1979*, December 2002, Schedule 2, Condition 11

²⁴⁶ *EP&A Act: Modification of an Approval granted under section 115B of the Environmental Planning and Assessment Act 1979*, December 2002, Schedule 2, Condition 11

phase through to the more detailed Environmental Impact Statement (EIS) and Supplementary Environmental Impact Statement (SEIS) phase, the planning elements of which are discussed in Chapter 4.

- 6.6** The two EIS processes provided the best opportunity for community consultation in relation to the Cross City Tunnel project as a whole. The EIS and Supplementary EIS provided extensive detail on all aspects of the proposed project. The RTA, as proponent for the project, collated all feedback (representations) received from the public during the exhibition periods and provided it to the Department of Urban Affairs and Planning (as it was in 2000) and the Department of Planning (as it was in 2002) in Representations Reports. The Representations Reports summarised the feedback received, and were accompanied by the representations themselves. The RTA also provided Preferred Activity Reports to the Department of Planning which outlined the modifications to the EIS and Supplementary EIS which they made as a result of the representations and ‘further technical studies’.²⁴⁷
- 6.7** The then Department of Urban Affairs and Planning (2000) and Department of Planning (2002) reviewed both the representations themselves and the RTA’s Representations Reports, and Preferred Activity Reports. The Director General prepared publicly available reports to the Minister for each of the EIS and Supplementary EIS Representations Reports and Preferred Activity Reports, providing an analysis of both the issues raised by the community, and the summary of those issues by the RTA.
- 6.8** The Committee believes that the Planning process provided a good opportunity for public comment, and the review of the RTA’s analysis of those issues it identified from the community representations by the Department of Planning was a valuable process for ensuring accuracy and transparency.

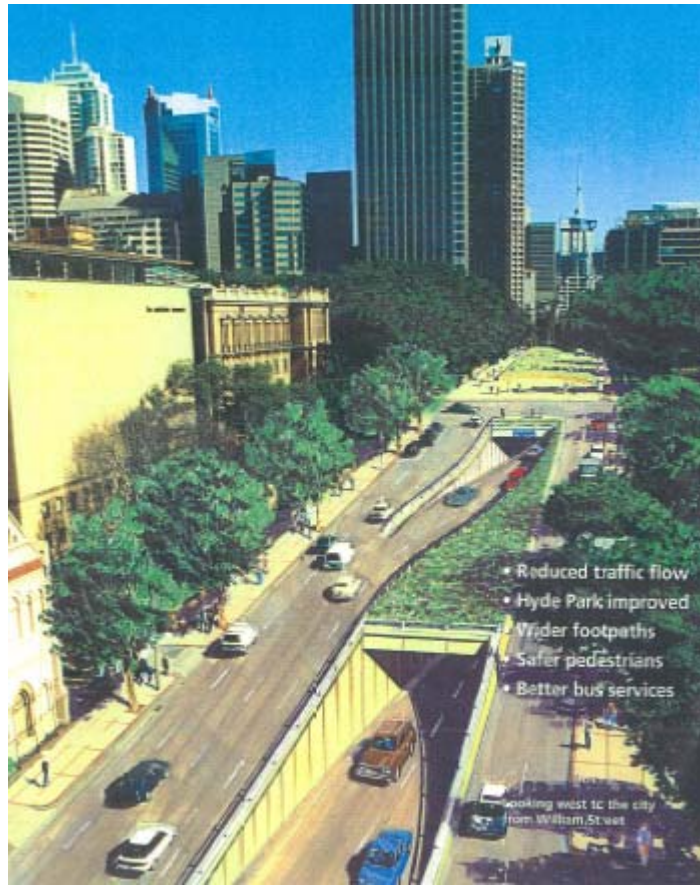
Consultation before the Cross City Tunnel project was approved

- 6.9** In October 1998, the ‘short tunnel’ concept was outlined in *The Cross City Tunnel: Improving the heart of Sydney* brochure. The concept was displayed in the Skygarden Arcade in Pitt Street Mall, and a three-month period for comment was provided. 7,800 people visited the display.²⁴⁸ Figure 6.1 displays the cover of the brochure, with an artist’s representation of the completed tunnel.

²⁴⁷ *Cross City Tunnel Proposed Modifications to Approved Project: Director General’s Report Prepared under Section 115C of the Environmental Planning and Assessment Act 1979*, Director General Department of Infrastructure, Planning and Natural Resources, 2002, p iii

²⁴⁸ Submission 1, RTA, p16

Figure 6.1 The 'short tunnel' emerging from Hyde Park



Source: Submission 1, RTA, Appendix 2

- 6.10** In September 1999, a brochure titled *Cross City Tunnel environmental assessment* was distributed by the RTA. This brochure incorporated many of the changes suggested by the Sydney City Council's *Cross City Tunnel Alternative Scheme*, most importantly involving an extension of the tunnel from the 'short tunnel' eastern exit at College Street near the Australian Museum, to the 'long tunnel' eastern exit at Kings Cross Tunnel. 22,000 copies of the brochure were distributed, with an enclosed reply paid comment form. A toll free information line, community discussion sessions and a display at Customs House, Circular Quay were part of the communication process.²⁴⁹
- 6.11** The RTA has stressed that the changes that constituted the 'long tunnel' were a consequence of feedback received from the original 'short tunnel' proposal. Mr Mike Hannon, Acting Chief Executive, in evidence to the Committee stated:

[T]here was an enormous amount of reaction to a report which was produced by the Roads and Traffic Authority back in 1998, which at that point in time had the tunnel finishing near the intersection of College and William streets. ... numerous groups came together to complain that what we were doing was effectively discharging a huge amount of traffic at that point at the corner of College Street and William Street. ... At the time there were enormous protests around the streets, and they [Sydney City

²⁴⁹ Submission 1, p16

Council] said that Sydney deserves a better cross-city tunnel and their argument was that we should not finish the tunnel at College Street as indicated. They indicated that the tunnel should extend all the way through to Kings Cross and they argued that this would have given the opportunity to allow William Street to be upgraded by the city as a special boulevard. They talked about allowing access for buses and the like and basically making that boulevard a significant feature of the city—basically a gateway to the city.

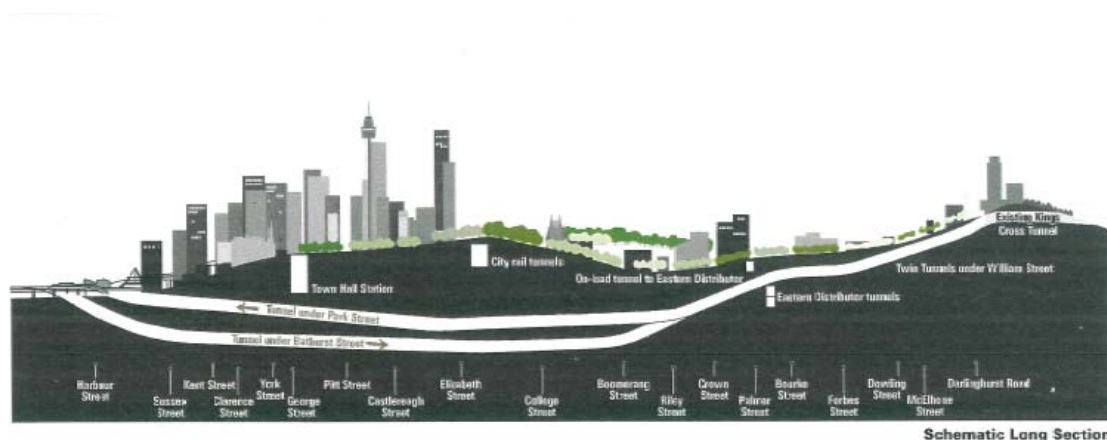
They actually produced a report in 1999, submitted that to government and sought comment. As I said, there was an enormous amount of consultation with the Chamber of Commerce, the task force, the William Street committees and the like. At the end of the day, while the Government put out the report in 1998 suggesting that it be a short tunnel, the decision was made at that point in time to make it a longer tunnel. But the objectives I talked about in my opening address was very much about improving the environmental quality of public spaces within central Sydney, improving ease of access and reliability of travel within Sydney. An important one was doing a lot of things for the bus and basically the public transport lobby as well.²⁵⁰

6.12 Ms Clover Moore, Lord Mayor of the Sydney City Council, in evidence to the Committee confirmed that the Council had been vocal in calling for a long tunnel:

Since the mid 1990s ... the City of Sydney has advocated for the construction of the cross-city tunnel. The city has clearly articulated its aims in supporting the tunnel, the removal of traffic from surface streets to improve travel times through the central area and to allow the reallocation of road space in the CBD for public transport, pedestrians and cyclists.²⁵¹

6.13 The initial EIS for the Cross City Tunnel (the ‘long tunnel’) was on public display from 2 August to 6 October 2000. The EIS was advertised in the media and exhibited at 17 locations and on the RTA website.²⁵² Figure 6.2 shows a diagrammatic representation of this tunnel.

Figure 6.2 The ‘long tunnel’



Source: *The Cross City Tunnel Environmental Impact Statement*

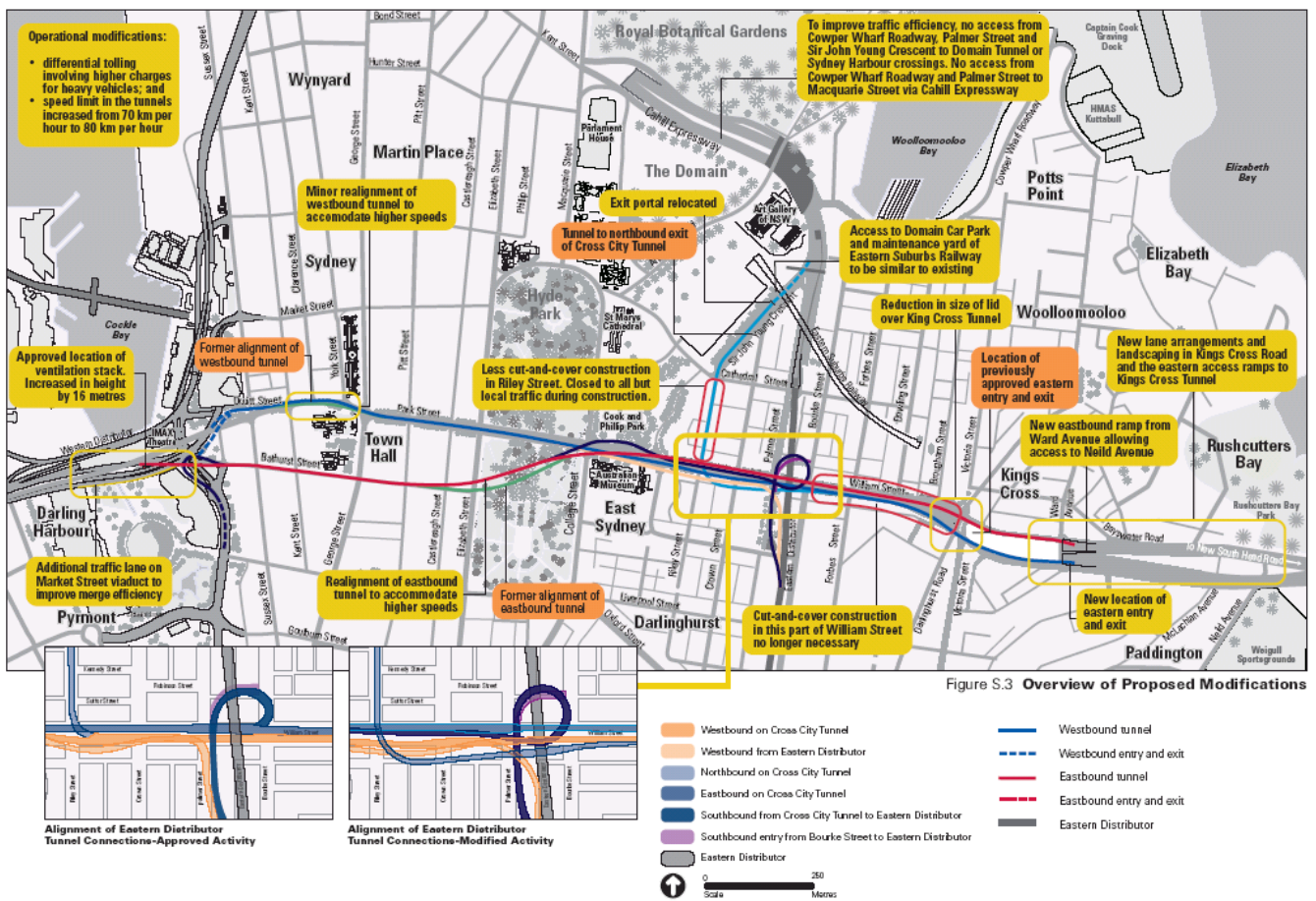
²⁵⁰ Mr Mike Hannon, Acting Chief Executive, RTA, Evidence, 6 December 2005, pp5-6

²⁵¹ Ms Clover Moore, Lord Mayor, Sydney City Council, Evidence, 9 December 2005, p23

²⁵² Submission 1, p16

- 6.14 The *Cross City Tunnel Representations Report*, summarised the 196 representations received during the public consultation period and included the *Cross City Tunnel Preferred Activity Report*. The Preferred Activity Report incorporated 20 modifications to the project as it was represented in the EIS, a direct result of the public consultation.
- 6.15 Following the selection of the CrossCity Tunnel Consortium’s proposal, which did not conform to the EIS, the RTA prepared a Supplementary EIS for the Cross City Tunnel (the ‘long 80 tunnel’), which was on public display from 1 August to 31 August 2002.²⁵³
- 6.16 The Supplementary EIS was displayed at 19 locations and on the RTA website, with a toll-free information line available. 5000 brochures were distributed. The map at Figure 6.3 shows the ‘long 80 tunnel’, as described in the SEIS.

Figure 6.3 The ‘long 80 tunnel’



Source: *Cross City Tunnel Supplementary Environmental Impact Statement*

6.17 The RTA received 1,012 representations which were summarised in the *Cross City Tunnel Representations Report for the Supplementary Environmental Impact Statement*.²⁵⁴ The large number of submissions received in relation to the ‘long 80 tunnel’ indicates the level of awareness of that there was concern in the community about the differences this option represented over the ‘long tunnel’.

6.18 Ms Clover Moore expressed this view in her evidence to the Committee:

A critical turning point occurred for the cross-city tunnel project when the original approved project was abandoned in favour of a revised project proposed by the preferred tenderer. The \$100 million incentive paid to the Government by the Cross City Motorway consortium for a more environmentally damaging project replaced a previously approved project that required the Government to contribute \$40 million for a more beneficial outcome. That was the key point in this whole project.²⁵⁵

6.19 The representations received by the RTA from the community, which included one from Sydney City Council, covered a broad range of issues. The report of the Director General of the then Department of Planning to the Minister for Planning commented that, although at least half of all representations supported the proposal in principle, there were many issues of concern:

The Proponent received 1012 representations to the Supplementary EIS. Whilst more than 50% of the representations supported the proposal in principle, many objected to specific elements such as stack emissions, traffic impacts, noise and the eastern portal locations. A primary concern was impacts on local neighbourhoods due to increased traffic and noise and air pollution.²⁵⁶

6.20 The Director General’s report provided an analysis of the key issues raised and the way in which they were categorised and identified in the RTA’s Supplementary Representations Report:

Generally, the issues discussed in the Supplementary Representations Report under each category were similar to those identified by the Department in its independent review of representations. Some issues were categorised differently resulting in varying numbers of representations cited²⁵⁷

6.21 The Director General’s report noted the impact of the proposal on amenity of local streets and pedestrian spaces:

²⁵⁴ *Cross City Tunnel Proposed Modifications to Approved Project: Director General’s Report Prepared under Section 115C of the Environmental Planning and Assessment Act 1979*, Director General Department of Infrastructure, Planning and Natural Resources, 2002, p iii

²⁵⁵ Ms Moore, Evidence, 9 December 2005, p25

²⁵⁶ Director General, Department of Infrastructure, Planning and Natural Resources, 2002. *Cross City Tunnel Proposed Modifications to Approved Project: Director General’s Report Prepared under Section 115C of the Environmental Planning and Assessment Act 1979*, p iii

²⁵⁷ Director General, Department of Infrastructure, Planning and Natural Resources, 2002. *Cross City Tunnel Proposed Modifications to Approved Project: Director General’s Report Prepared under Section 115C of the Environmental Planning and Assessment Act 1979*, p14

Six hundred and sixty-one representations considered that the modified proposal would have a negative effect on local neighbourhoods due to increased traffic and associated noise, pollution and visual impacts.²⁵⁸

6.22 A full list of the road changes proposed in the SEIS that differ from those in the EIS is attached at Appendix 4. This Appendix also includes details of road changes not in the SEIS, recommended in the RTA's Preferred Activity Report and approved by the Minister.

6.23 Ms Moore pointed out that a number of the road changes in the SEIS were not part of the original proposal (as described in the EIS for the 'long tunnel') and had not undergone 'proper analysis and public consultation' prior to being included in the SEIS.²⁵⁹ The opportunity for consultation in relation to these specific changes was therefore limited to the exhibition period for the SEIS – a statutory one month period in August 2002.

6.24 The list of proposed road changes is extensive. Ms Moore provided one example of a change with significant repercussions:

[T]he loss of northbound access from Crown Street and Palmer Street via Sir John Young Crescent to the Sydney Harbour Bridge and the harbour tunnel.²⁶⁰

6.25 Mr Peter Sansom, former Chief Executive of CCM, in discussing road changes associated with the 'long 80 tunnel' in evidence to the Committee commented that:

The long 80 proposal, selected by the RTA as the preferred option, involved some consequential road changes. These included the widening of Bayswater Road, obviously, and also some adjustments to the Market Street viaduct to improve the traffic flows. The only other change in our long 80 proposal related to a right-hand turn from Cowper Wharf Road into the Domain area and then the Harbour Bridge crossings. We proposed that that right-hand turn be banned.²⁶¹

6.26 Mr Sansom went on to explain that as a result of the community representations the requested Cowper Wharf Road change 'has been taken away so the right hand turn [is] permissible.'²⁶²

6.27 A number of other changes occurred as a result of the public representations, including:

- alterations to traffic arrangements in Woolloomooloo;
- alterations to the Sir John Young Crescent tunnel exit;
- provision of a land bridge over the eastern portal.²⁶³

²⁵⁸ Director General, Department of Infrastructure, Planning and Natural Resources, 2002. *Cross City Tunnel Proposed Modifications to Approved Project: Director General's Report Prepared under Section 115C of the Environmental Planning and Assessment Act 1979*, p13

²⁵⁹ Ms Moore, Evidence, 9 December 2005, p25

²⁶⁰ Ms Moore, Evidence, 9 December 2005, p25

²⁶¹ Mr Peter Sansom, former Chief Executive, CCM, Evidence, 3 February 2006, p66

²⁶² Mr Peter Sansom, former Chief Executive, CCM, Evidence, 3 February 2006, p66

²⁶³ Director General Department of Infrastructure, Planning and Natural Resources, 2002. *Cross City Tunnel Proposed Modifications to Approved Project: Director General's Report Prepared under Section 115C of the Environmental Planning and Assessment Act 1979*, pp1-2

6.28 A full list of all road changes is included in Appendix 4.

6.29 Figure 6.4 shows the land bridge over the eastern portal of the Cross City Tunnel.

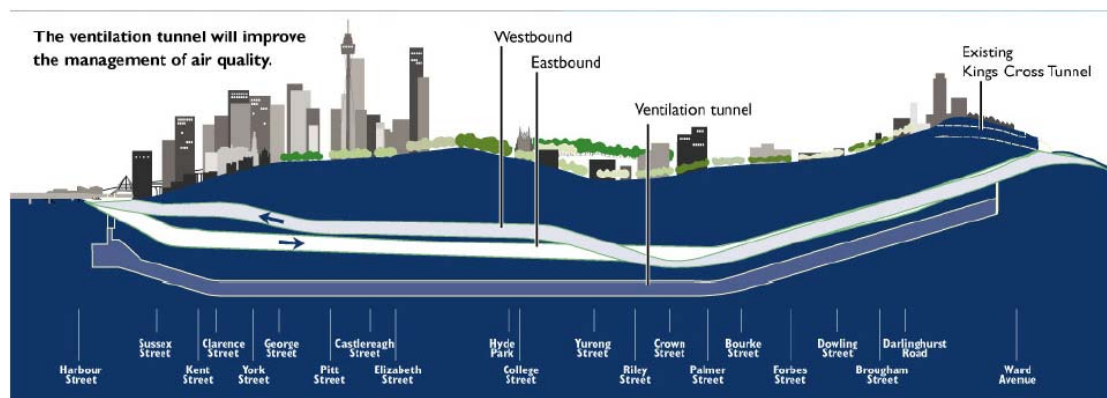
Figure 6.4 Land bridge



Source: Cross City Tunnel Preferred Activity Report for the Supplementary Environmental Impact Statement

6.30 A number of other modifications which did not arise from representations but from other agencies were suggested by the RTA in the Preferred Activity Report, and were approved. The most substantial of these was the ventilation duct, a separate tunnel built to ensure the CCT could meet stricter air quality standards.²⁶⁴ Figure 6.5 shows a diagrammatic representation of the final tunnel, with ventilation duct.

Figure 6.5 The 'long 80 tunnel' with the ventilation tunnel.



Source: www.rta.nsw.gov.au

²⁶⁴ RTA, Cross City Tunnel Preferred Activity Report for the Supplementary Environmental Impact Statement, November 2002, p7-3

Conclusions

- 6.31** Evidence presented to the Committee has indicated that the Cross City Tunnel has suffered from a poor public relations campaign. The community, by the time the tunnel opened, were not convinced that the benefits of the tunnel matched the toll pricing.
- 6.32** It is also clear that the community did not fully understand the implications of the opening of the tunnel, a situation exacerbated by the significant road changes proposed in the Supplementary EIS. These changes produced a very different scenario from that proposed in the initial EIS. The relatively short period of time available for the affected community to digest the changes has also contributed to the anger and sense of frustration expressed in submissions to, and by witnesses before, the Committee.
- 6.33** A continuity of consultation and information throughout all stages of the project may have minimised the hostile reaction to the tunnel on opening.
- 6.34** The Committee endorses the IIG *Review* recommendations relating to consultation, in particular the need for a seamless process of consultation throughout all phases of the project.

Consultation during project construction with Community Liaison Groups

- 6.35** A number of community consultation groups were established by Baulderstone Hornibrook Bilfinger Berger Joint Venture to satisfy the conditions of approval for the project.²⁶⁵ The Kings Cross CLG, the Central CLG (initially two separate CLGs, the South Sydney CLG and the Sir John Young Crescent CLG), and the Darling Harbour CLG were established.
- 6.36** The Charter and Procedures document of the Community Liaison Groups states that:
- The role of the CLGs is advisory, issues and suggestions raised by members will be considered by the project team in making decisions. ... The CLGs are not decision making bodies and it is not a requirement that consensus be reached amongst members on issues discussed.²⁶⁶
- 6.37** One of the explicit selection criteria for applicants was a '[w]illingness to accept the approved status of the project and to contribute constructively within the constraints of the project's conditions of approval.'²⁶⁷
- 6.38** CLG members were selected by a panel, convened by an 'independent community relations specialist'.²⁶⁸
- 6.39** The Air Quality Community Consultative Committee (AQCCC) was also established, to 'provide a forum for the RTA and affected stakeholders to discuss and share information about air quality and associated issues'.²⁶⁹

²⁶⁵ Minister for Infrastructure, Planning and Natural Resources, Planning Approval Condition 11

²⁶⁶ Cross City Tunnel *Charter and Procedures*, Cross City Tunnel, Community Liaison Group, February 2003, p3

²⁶⁷ Cross City Tunnel *Charter and Procedures*, Cross City Tunnel, Community Liaison Group, February 2003, p5

²⁶⁸ Cross City Tunnel *Charter and Procedures*, Cross City Tunnel, Community Liaison Group, February 2003, p5

²⁶⁹ *Terms of Reference and Protocol*, Air Quality Community Consultative Committee, p3

- 6.40** The Committee acknowledges the commitment and concern for the local area shown by members of the CLGs. It is also acknowledged that the selection criteria requiring an acceptance of the ‘approved status of the project’ is only reasonable given the project and its parameters had been approved and the role of the CLGs was to make comments and recommendations about the implementation of development and environmental plans and monitor compliance with the conditions of planning approval.

Local Community Consultation

- 6.41** The Committee heard extensive and conflicting evidence about the extent and effectiveness of community consultation in relation to the Cross City Tunnel. The frustration expressed by Ms Suzanne O’Connor, a member of one of the Community Liaison Groups established by Baulderstone Hornibrook Bilfinger Berger Joint Venture to satisfy the Planning Conditions of Approval Number 11, is common to many of the submissions and much of the evidence received by the Committee:

No one from any of the organisations on the committee seemed to be able to produce guidelines or definitions of the phrase community consultation.²⁷⁰

- 6.42** Mrs Margaret Hamilton, member of the Central CLG, in evidence to the Committee, while complimentary of Baulderstone Hornibrook Bilfinger Berger (the construction joint venture) was not as complimentary of the RTA, saying ‘the RTA has patently not had any respect for local residents.’²⁷¹
- 6.43** Ms Catherine Lyons, a long time resident of Potts Point, commented in her submission to the Committee that she felt that ‘CCT did everything to conceal and nothing to inform or consult. ... I feel “they” just told us (eventually) how it was going to be.’²⁷²
- 6.44** Mr Barrie Shepherd, also a resident of Potts Point, in his submission to the Committee, agreed with this position:

My impression is that the process that actually took place was one of no consultation and tantamount to a deliberate misinformation programme by way of a “no information” policy from these important players. It is particularly worrying that RTA and City of Sydney Council, represented by the Mayor, who is also the communities local Member, appear to have deliberately kept public consultation to a minimum by not publishing, in an easily available forum, real information about the plans for road closures and changes associated with the CCT. These organisations should have had their responsibilities for public accountability highest in their culture.²⁷³

²⁷⁰ Submission 35, Ms Suzanne O’Connor, former member of Kings Cross CLG, p2

²⁷¹ Mrs Margaret Hamilton, Evidence, 3 February 2006, p37

²⁷² Submission 31, Ms Catherine Lyons, p1

²⁷³ Submission 32, Mr Barrie Shepherd, p1

- 6.45** Darlinghurst resident Dr Norman Thomson stated in his submission that he perceived the lack of consultation on street changes by the City of Sydney and the RTA to be ‘amazing’:

It is totally inappropriate to make such changes without community input before they can take place.²⁷⁴

- 6.46** This feeling was not limited to private citizens. Woollahra Council were critical of the level and effectiveness of public consultation on the project:

Council considers that the public consultation process for the Cross City Tunnel project was not conducted meaningfully. Public comments/views were either ignored or were brushed aside and decisions were made without due consideration of the public’s viewpoint ... the views of Council, which is a representative for the whole Municipality of Woollahra, were also ignored or brushed aside²⁷⁵

- 6.47** The NRMA also contended that there were serious flaws with the community consultation process, with Mr Peter Steele, Deputy CEO, stating that the NRMA:

[R]ecommend that the NSW Government: Comprehensively review its current processes for undertaking community consultation and communication in relation to the design, construction and operation of road infrastructure in NSW.²⁷⁶

- 6.48** Ms Elizabeth George was particularly critical of the consultation process in relation to the specific road changes in her submission to the Committee on behalf of the Cross City Tunnel Action Group:

Although the outline of some of the specific detail was known to some of the community, the full extent of the proposed traffic changes were carefully concealed and the people of the eastern suburbs were unaware of the extent of the road closures/narrowing that were to occur in an attempt to “force” them to use the CCT, and the implications that this would have for their travel to and from the city. William Street is now a traffic nightmare.²⁷⁷

- 6.49** The lack of awareness of the community of the complexity of the project and the implications of the associated road changes was confirmed by Ms Wanda Jaworski, who in her submission on behalf of the 2011 Residents Association said:

[A]t all stages public authorities and elected representatives failed to reveal the full scope of road closures and traffic restrictions associated with the project, especially after the 2002 revisions.²⁷⁸

- 6.50** The format of the information provided was seen to contribute to the difficulty for the community to be involved in the consultation process. In a submission from Action City East

²⁷⁴ Submission 42, Dr Norman Thomson, p2

²⁷⁵ Submission 36, Woollahra Council, p4

²⁷⁶ Submission 54, Mr Peter Steele, Deputy CEO, NRMA, cover letter.

²⁷⁷ Submission 40, Ms Elizabeth George, p2

²⁷⁸ Submission 52, Ms Wanda Jaworski, 2011 Residents Association, p4

(ACE), an umbrella group representing 2011 Residents Association, Darlinghurst Residents Action Group, Residents of Woollahra and the Darlinghurst Business Partnership, Ms Jo Holder was critical of both the RTA and the City of Sydney Council:

Of particular concern is that the RTA and City of Sydney Council, represented by the Lord Mayor and Member for Bligh, appear to have deliberately kept public consultation to a minimum by not publishing, in an easily available forum, real information about the plans for road closures and changes associated with the CCT.²⁷⁹

6.51 Mr Malcolm Duncan, a member of the Kings Cross Community Liaison Group, pointed out in his submission that:

the finished product has never been on public display or the subject of detailed public comment.²⁸⁰

6.52 Clr Kerri Huxley of Woollahra Council also was concerned about lack of information from Lord Mayor and Member for Bligh Ms Clover Moore MP:

Despite numerous letters or submissions Clover may have made to the State Government or to the submissions, that is all we have seen of our local representative. The general feeling is great dissatisfaction, that this should never have occurred.²⁸¹

6.53 Specifically in relation to community consultation on air quality matters both in the context of the Lane Cove and Cross City Tunnels, Dr Ray Kearney, a representative of the Lane Cove Tunnel Action Group, commented in his submission to the Committee that:

In hind-sight, such controlled ‘community consultation’ was simply a mechanism to justify the RTA saying broadly “extensive community consultation took place” but in fact the process was highly exclusive while the issues of the select consultative meetings were sanitized and orchestrated by the RTA where truth was always elusive and information equivocal.²⁸²

6.54 Dr Kearney applied these comments more broadly:

Experience has shown that community consultation is a sham. Community members are constantly frustrated by their inability to achieve any real community benefit in a system that uses consultation merely to report through pretty presentations merely to meet the letter of the McOA [Minister’s Conditions of Approval] and to be able to say in answer to public criticism, that consultation has occurred.²⁸³

6.55 Ms Elizabeth George agreed with this opinion, calling consultation ‘tokenistic and opportunistic; not democratic’.²⁸⁴

²⁷⁹ Submission 53, Ms Jo Holder, Action City East, p3

²⁸⁰ Submission 56, Mr Malcolm Duncan, p2

²⁸¹ Clr Kerri Huxley, Woollahra Council, Evidence, 3 February 2006, p25

²⁸² Submission 41, Dr Ray Kearney, Lane Cove Tunnel Action Group, pp4-5

²⁸³ Submission 41, p10

²⁸⁴ Submission 40, p3

- 6.56** In responding to the concerns of local community members, Mr Les Wielinga, Director Motorways for the RTA, in evidence to the Committee stressed the difficulties involved in community consultation:

It is important to emphasise that issues like this are difficult to deal with. We do get a range of views from the community about what the right outcome should be. It is very important to us that we fully understand the issues. We get to understand those issues by discussion with community people. We try, as a matter of course, to agree a process with them up front. We try to get a maximum amount of participation. We try to develop a logical process for making the decision and involve them in it. But very, very often at the end of the day the RTA makes a call because of the range of views and we explain why we made that call in the report, such as the condition 288 report that goes on the web site.²⁸⁵

Conclusions

- 6.57** The Committee is aware of the diversity of opinion within the area in relation to the benefits and costs of surface road changes resulting from the Cross City Tunnel project.
- 6.58** The anger and frustration expressed by many members of the CLGs indicates that the role of these groups has not been adequately explained, and that expectations are unrealistically high. The community anger at the large number of changes associated with the 'long 80 tunnel' is likely to have been reflected in the CLGs, comprising as they did local residents arguably most affected by the local road changes.
- 6.59** The Committee believes that some of the community anger and frustration arises from consultation occurring at too late a stage, and the complexity of the information provided to them.

Proposed solutions to public consultation problems

- 6.60** A number of witnesses and submissions have suggested possible solutions to address the dissatisfaction of the community with consultation in relation to projects such as the Cross City Tunnel.
- 6.61** In a submission to the Committee from the Royal Australian Institute of Architects, Dr Deborah Dearing commented that consultation at all stages of a project is ideal:

The ideal process would include stakeholder consultations and information sessions throughout all stages and clearly demonstrate that the proposal is justified in terms of the public interest and needs.²⁸⁶

²⁸⁵ Mr Les Wielinga, Director Motorways, RTA, Evidence 2 February 2006, p27

²⁸⁶ Submission 39, Dr Deborah Dearing, Royal Australian Institute of Architects p3

6.62 The IIG *Review* similarly recognises the need for improved consultation processes:

The Review also proposes that the RTA, in conjunction with the relevant parties to a PPP contract, should develop a seamless process of consultation and stakeholder management through all phases of the project. Such processes should target an appropriate balance between involvement of general community, stakeholder, householder and road user groups.²⁸⁷

6.63 Ms Monique Roser, NSW President of the Planning Institute of Australia, went even further in her evidence to the Committee, suggested that consultation should occur not just during the planning phases of a major project but also in the contract negotiation phase. Ms Roser in evidence to the Committee stated:

In our view, the cross-city tunnel experience has demonstrated that robust public consultation is required not only for the planning approval phase, as is required by legislation, but also for the contract negotiation phase and the direct and indirect impacts of contract conditions need to be thoroughly and clearly understood in the decision-making process. The PIA's position is that in relation to the approvals phase, particularly those that will be funded through PPP mechanisms, projects should be subject to a rigorous, open and transparent approval process, particularly through the use of things like commissions of inquiry.²⁸⁸

6.64 While agreeing with the notion of transparency, Ms Roser's opinion was not shared by the representatives of the Australian Council for Infrastructure Development and Infrastructure Partnerships Australia who also gave evidence to the Committee as part of the same panel:

In fact the statement made by the Planning Institute of Australia in support of release of commercial terms before they have been settled and the involvement of community consultation in the commercial negotiation of these deals, is, I would say, absolutely ridiculous! ... Full transparency once a contract is signed but definitely no community consultation over the commercial terms of concession deeds—not even for PPPs. By implication it would absolutely disrupt all government contracting if you applied that principle across the notion of large contracts.²⁸⁹

6.65 The NRMA, in its submission to the Committee, recommended that the consultation be broadly inclusive of a range of community perspectives:

[W]hat is required is a process whereby the community is engaged and, to the greatest extent possible, widespread community views and preferences are incorporated into the project. It is important that consultation involves the entire community and not just the noisy minority.²⁹⁰

²⁸⁷ Infrastructure Implementation Group, *Review of Future Provision of Motorways in NSW*, December 2005, p33

²⁸⁸ Ms Monique Roser, NSW President, Planning Institute of Australia, Evidence, 3 February 2006, p49

²⁸⁹ Mr Dennis O'Neill, Chief Executive Officer, Australian Council on Infrastructure Development, Evidence, 3 February 2006, p49

²⁹⁰ Submission 54, p2

- 6.66** Mr Malcolm Duncan's suggestion, in his submission to the Committee, was to re-visit how community consultation is judged to be successful:

What is essential is to formulate a paradigm or even a sort of checklist which enables both the proponent of a project and the community affected by it objectively to determine that the necessary and sufficient conditions have been fulfilled.²⁹¹

Conclusions

- 6.67** The Committee believes that community consultation and involvement in large-scale infrastructure projects such as the Cross City Tunnel is critical. The strength of feeling from the community about the inadequacy of the consultation in relation to the CCT project development, construction and operation is such that the methods of consultation used should be reviewed in line with the current evidence based best practice consultation theory.
- 6.68** The clear message from the CCT experience is that some members of the community living in the area affected by the surface road changes associated with the tunnel felt that they had been ignored, misinformed, and treated with indifference or even contempt.

Recommendation 10

That the Government review existing community consultation practices, particularly in relation to major infrastructure projects, and develop standardised, plain English guidelines available to the community defining 'community consultation' in relation to such projects.

Recommendation 11

That the Government refer the issue of community consultation to the Standing Committee on Social Issues to conduct a review of the experiences of New South Wales residents with consultation processes, and perform a comparative study of best practice consultation methods.

Accessing the Cross City Tunnel and Signage

- 6.69** While much of the evidence before the Committee has highlighted the 'funneling' effect of road changes associated with the Cross City Tunnel project, there was also concern about the difficulty of accessing the tunnel, particularly for those people living within the area bounded by the east and west portals. Clr Kerri Huxley, Woollahra Council, said:

as I move throughout the inner city and eastern and south-eastern communities I am repeatedly being told about the difficulties of actually finding access to it and how it closes people out from reasonable traffic routes they may normally take.²⁹²

- 6.70** The problem of access is exacerbated by the proliferation of new signage, some of which is not helpful in providing instruction to motorists on how to access both Cross City Tunnel

²⁹¹ Submission 56, p15

²⁹² Clr Huxley, Evidence, 3 February 2006, p26

entries and other major routes. The Chairman and members of the Committee enhanced their understanding of community confusion in relation to access and signage on their site visit to the area on 13 February 2006.

Specific Road Changes

6.71 The Committee has heard considerable evidence from members of the community critical of the road changes that have occurred as a result of the Cross City Tunnel. While the Committee's terms of reference are not intended to cover an in depth examination of every road change that has occurred as a consequence of the Cross City Tunnel, two road changes have been identified to illustrate the depth of community feeling, opportunities for consultation and the impact on the community that road changes can bring about.

6.72 Members of the Committee conducted a site visit on 13 February 2006 which included affected surface streets of central Sydney. They visited the two specific examples detailed below.

Sir John Young Crescent

6.73 One of the changes as a result of the completed Cross City Tunnel project been removal of free access to the Sydney Harbour Tunnel and the Sydney Harbour Bridge from Sir John Young Crescent. Road users are now required to either use the Cross City Tunnel, the Cowper Wharf Roadway or the Macquarie Street access.

6.74 The map at Figure 6.6 shows the location of Sir John Young Crescent and details the road changes.

6.75 The Supplementary EIS banned direct access from both Cowper Wharf Road and Sir John Young Crescent, however access from Cowper Wharf Road was re-instated following community consultation during the Supplementary EIS public exhibition.

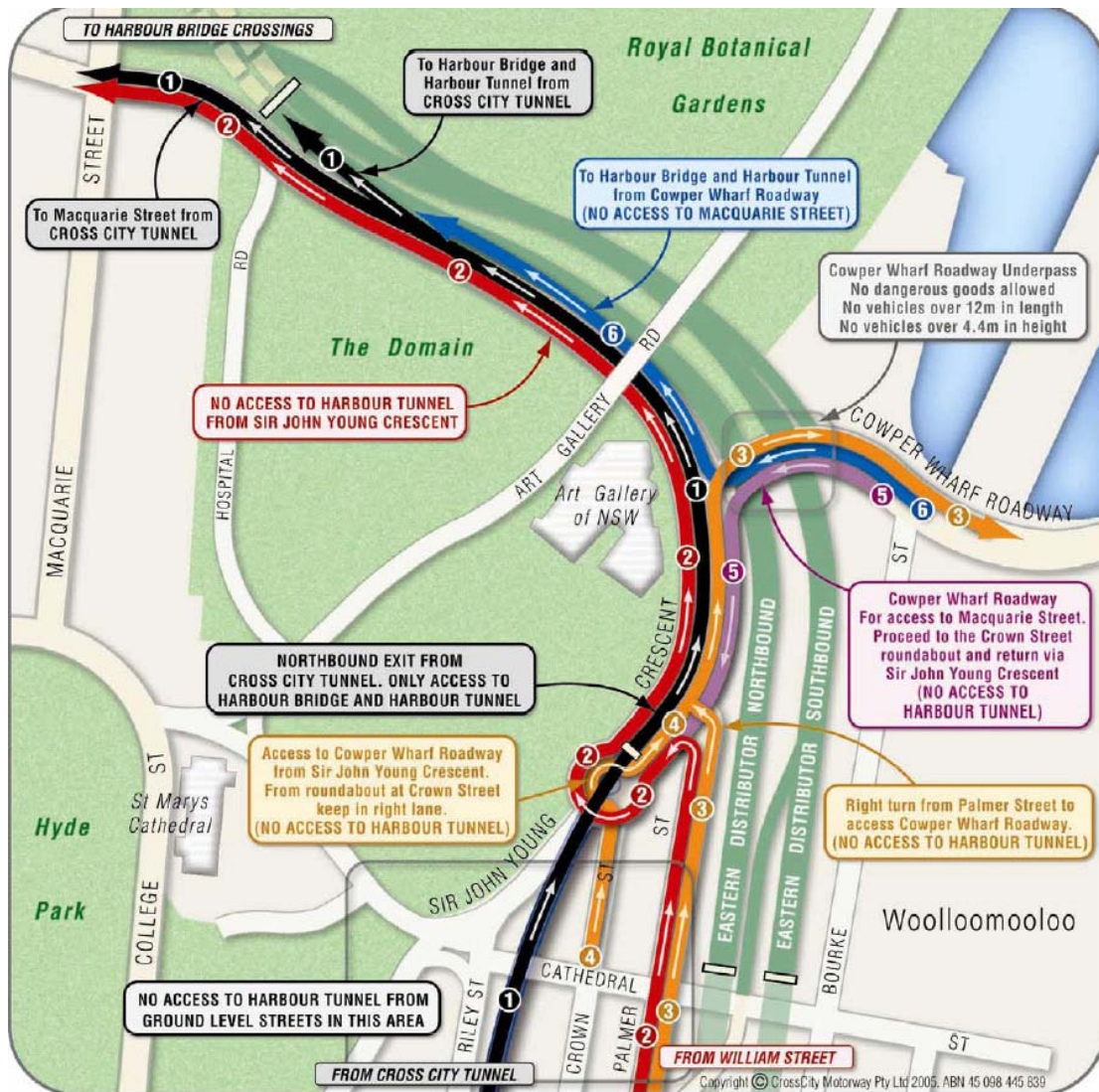
6.76 In his evidence to the Committee, Mr Alan Limbury was critical of the RTA's decision not to also re-instate the direct access to the Harbour crossings from Sir John Young Crescent. He posed the following question:

[W]hy would use of the new lane for access to the Harbour Tunnel by traffic from Sir John Young Crescent create unacceptable congestion while traffic using the same new lane from Cowper Wharf Road (regulated by the same road) would not?²⁹³

6.77 Mr Limbury cited the RTA's response to this question, which included a number of factors – that traffic congestion would result from queuing back from the Cahill Expressway ramp, and that the reinstatement would result in greater traffic volumes through the local area.

²⁹³ Submission 5, Mr Alan Limbury, p3

Figure 6.6 Sir John Young Crescent street changes.



Traffic Flow to the Harbour Bridge, Harbour Tunnel and Macquarie Street from the Cross City Tunnel and William Street

- 1** Cross City Tunnel to Harbour Bridge, Harbour Tunnel and Macquarie Street
- 2** Palmer Street to Macquarie Street via Sir John Young Crescent
- 3** Palmer Street to Cowper Wharf Roadway via Sir John Young Crescent
- 4,2** Crown Street to Macquarie Street via Sir John Young Crescent
- 4,3** Crown Street to Cowper Wharf Roadway via Sir John Young Crescent
- 5,2** Cowper Wharf Roadway to Macquarie Street via Sir John Young Crescent
- 6** Cowper Wharf Roadway to Harbour Bridge and Harbour Tunnel

Source: www.rta.nsw.gov.au

Bourke Street

6.78 The closure of Bourke Street to the south at the intersection with William Street, and to the north other than to access the Eastern Distributor, has clearly divided the residents of the area.

6.79 The then Department of Infrastructure, Planning and Natural Resources identified potential problems related to the impact of a right turn ban from William Street to Bourke Street north and access to the Eastern Distributor, suggested as part of the ‘long 80 tunnel’:

[T]he Director-General of the Department of Infrastructure, Planning and Natural Resources undertook an independent examination of the traffic impacts of the project described in the Cross City Tunnel Supplementary EIS. The resulting report ... noted that as the Cross City Tunnel would not provide direct access to the Eastern Distributor, the proposed full-time right turn ban at Bourke Street places an unnecessary restraint for Eastern Distributor bound traffic during off-peak periods.²⁹⁴

6.80 Consequently, the then Minister for Planning, the Hon Andrew Refshauge, imposed Planning Condition of Approval 288:

288. The proponent shall submit a report within 18 months from the Approval investigating the feasibility of allowing right-hand turn movements from William Street into Bourke Street. The report shall identify ways of limiting rat-runs using Bourke Street, the option to prohibit right turns at various times of the day (for example during peak periods 6 am to 10 am and 3 pm to 7 pm) and any other required traffic management measures. The findings of the report shall be implemented to the satisfaction of the Director-General.²⁹⁵

6.81 The *Cross City Tunnel: Response to Minister’s Condition of Approval 288* was prepared by Parsons Brinckerhoff for the RTA and completed in December 2004.²⁹⁶ The *Response to Minister’s Condition of Approval 288* summarised consideration of four options, from maintaining a ‘G-loop’ (where traffic accessing the Eastern Distributor would be required to turn right into Crown Street northbound, right again into Cathedral Street eastbound, right again into Bourke Street southbound and right into the Eastern Distributor) to allowing a right turn from William Street directly into Bourke Street northbound and closing Bourke Street southbound.

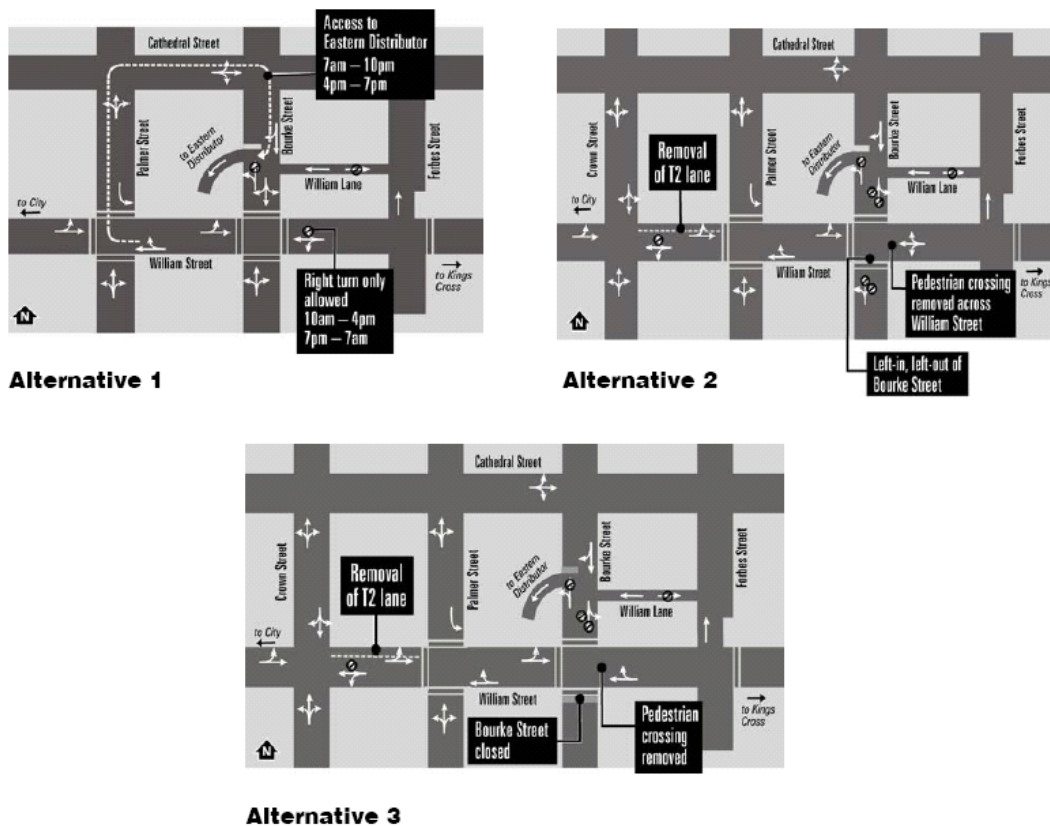
6.82 The maps at Figure 6.7 show the location of Bourke Street and detail the various alternatives considered in the *Response to Minister’s Condition of Approval 288*.

²⁹⁴ RTA, *Cross City Tunnel: Response to Minister’s Condition of Approval 288*, December 2004, pp1-4

²⁹⁵ *Environmental Planning and Assessment Act 1979: Modification of an Approval granted under section 115B of the Environmental Planning and Assessment Act 1979*, December 2002, Schedule 2, Condition 288.

²⁹⁶ RTA, *Cross City Tunnel: Response to Minister’s Condition of Approval 288*, December 2004

Figure 6.7 Bourke Street alternatives



Source www.rta.nsw.gov.au:

6.83 The options were assessed against criteria developed from the assessment objectives and community feedback on the options:

- reduce traffic congestion on William Street
- reduce through-traffic in Bourke Street
- improve accessibility to the Eastern Distributor on-ramp
- minimise impacts on other road users
- reduce impacts on the community.²⁹⁷

6.84 The *Response to Minister's Condition of Approval 288* clearly identified that there were divisions within the community over which option was most appropriate:

The consultation process highlighted the fact that there are a number of conflicting community positions regarding the best way to resolve issues associated with the feasibility of the right turn and rat runs on Bourke Street.

From the review of submissions it was apparent that some residents in East Sydney and Darlinghurst supported proposals that involved closure of Bourke Street (south

²⁹⁷ RTA, *Cross City Tunnel: Response to Minister's Condition of Approval 288*, December 2004, p iv.

of William Street). Conversely, road closures were not widely supported by other residents in Darlinghurst, Woolloomooloo and Kings Cross.²⁹⁸

6.85 According to the 2011 Residents Action Group, the closure of Bourke Street ‘has isolated Woolloomooloo and has had the effect of turning some of the streets in Darlinghurst into ‘ghost’ streets.’²⁹⁹

6.86 Mrs Margaret Hamilton, a member of the Central Community Liaison Group, disagreed:

The calls to re-open Bourke Street and the Palmer Street access to the bridge eliminate the possible benefits to local residents who have put up with 10 years of construction from the Eastern Distributor, followed by the Cross City Tunnel.³⁰⁰

6.87 In relation to consultation on this particular road change, Ms Jo Holder, co-convenor of community group Darlinghurst Resident’s Action Group, was clear in her evidence to the Committee that in relation to road changes generally and Bourke Street specifically:

[O]ur only consultation was an informal invitation to meet with CCT-RTA representatives on 15 December 2005 [2004] about closing Bourke Street. At that meeting we were told that the report was already completed and on its way to the Minister for Planning.³⁰¹

6.88 The Committee notes the extensive consultation undertaken by the RTA concentrated on people who were to be most affected by the change. DRAG was outside that immediate area.

6.89 Mr Malcolm Duncan, a former member of Kings Cross Community Liaison Group, told the Committee, in relation to the Bourke Street closure, that:

we were told we had approved of it. We had not. We did not know anything about it and they claimed that there had been community consultation. If there had been community consultation it certainly was not with our CLG.³⁰²

6.90 The Committee notes that the Minutes of the 5 April 2004 meeting of the Kings Cross CLG record a completed action item referring to a presentation by Parsons Brinckerhoff (the consultants preparing the RTA’s *Response to Minister’s Condition of Approval 288*) on ‘MUAP 288’.³⁰³ Mr Duncan is recorded as being present in the minutes of the meeting.

²⁹⁸ RTA, *Cross City Tunnel: Response to Minister’s Condition of Approval 288*, December 2004, pp4-9

²⁹⁹ Submission 52, p3

³⁰⁰ Mrs Margaret Hamilton, Evidence, 3 February 2006, p37

³⁰¹ Ms Jo Holder, co-convenor Darlinghurst Resident’s Action Group, Evidence, 1 February 2006, p35

³⁰² Mr Malcolm Duncan, former member of the Kings Cross CLG, Evidence, 1 February 2006, p29

³⁰³ Minutes of Kings Cross Community Liaison Group meeting 5 April 2004, p18

- 6.91** Mr Sam Harding, who is a resident of Rushcutter's Bay, in his submission to the Inquiry said that:

The closing of Bourke Street from William Street has made it a lot more difficult to simply move around the local area because it has isolated both Darlinghurst in the west and Woolloomooloo in the north.³⁰⁴

- 6.92** Not all the evidence received by the Committee was against the closure of Bourke Street. Ms Sue Pynenburg, Business Manager for Sydney Church of England Girls Grammar School, said in evidence to the Committee that:

Some of the parents have indicated that it might take them a few extra minutes to reach their destination after they have dropped off children. However we believe that the safety of children, air quality and the possibility of creating a grid lock situation in William Street are far more important issues than perhaps some people taking a little extra time to reach destinations.³⁰⁵

- 6.93** The closure will be reviewed for effectiveness at 6 and 12 month intervals from the opening of the CCT:

Following implementation, the RTA will monitor traffic, pedestrian and cyclist conditions of the affected intersections for a period of 12 months from the opening of the Cross City Tunnel, and report at six monthly intervals on the effectiveness of the measures and any additional means to maximise fulfil [sic] the stated objectives.³⁰⁶

- 6.94** Mr Wielinga outlined to the Committee the RTA's position in relation to this required monitoring:

[W]e are required by the Department of Planning to undertake a review at six months and 12 months. Recently the RTA project team that is working on this sent a community consultation process out for community comment. It may have already been mentioned here in the last couple of days. The RTA is seeking comment on that. In that document—which we are happy to provide you with a copy of—it details how the RTA proposes to go about it, what it is going to take into account and those sorts of things. We have asked the community members for comment on it.³⁰⁷

Conclusions

- 6.95** The Committee has witnessed the strength of feeling in the community around this issue during the hearings, and has heard from members of the community on both sides of the issue. There is a clear division of opinion within the community in relation to the effects of the closure of Bourke Street. In Chapter 7, the Committee considers the issue of public control of the road network and recommends that the RTA review all road changes in light of the primary objectives of the Cross City Tunnel project. The Committee does not believe it is

³⁰⁴ Submission 19, Mr Sam Harding, p2

³⁰⁵ Ms Sue Pynenburg, Business Manager, SCEGGS Darlinghurst, Evidence, 2 February 2006, p8

³⁰⁶ RTA, *Cross City Tunnel: Response to Minister's Condition of Approval 288*, December 2004, pp5-1

³⁰⁷ Mr Les Wielinga, Director Motorways, RTA, Evidence 2 February 2006, p27

appropriate to make recommendations about specific road changes, including whether Bourke Street should be opened or closed.

6.96 The Committee regrets and is disappointed at the degree of animosity evidenced by community groups with opposing views on the status of Bourke Street, and notes that it may severely impact on the success of consultation.

6.97 The Committee acknowledges the difficulties faced by the RTA in reaching a decision in this situation and notes that a process has been established to ensure that the final decision on the status of the Bourke Street intersection with William Street is taken after full consideration of the range of community views.

Recommendation 12

That the NSW Roads and Traffic Authority ensure that the community consultation process in relation to Bourke Street's future status is inclusive and considers the wide variety of opinions and views in the community. The process should be conducted with a view to addressing the opposing views and if possible develop a consolidated position.

Recommendation 13

The trial closure of Bourke Street ends on 28 February 2006. The Committee recommends that the NSW Roads and Traffic Authority immediately reopen the street while the review is being conducted.

Chapter 7 Public control over the road network

One of the major public concerns in relation to the Cross City Tunnel is that it represents a loss of control over the public road network. This chapter examines this issue.

Is there public control of the road network?

- 7.1** The Premier, the Hon Morris Iemma MP, has publicly stated that ‘Never again will we surrender control of our road network’.³⁰⁸ In view of the Premier’s failure to accept repeated invitations to appear before the Committee to clarify his comments, the Premier’s comments appear to confirm the widely held public perception that the road changes were implemented at the request of CrossCity Motorway (CCM), and had the primary intention of ‘funnelling’ traffic into the Tunnel.
- 7.2** The recent Premier’s Department Infrastructure Implementation Group *Review of Future Provision of Motorways in NSW* released in December 2005 specifically recommended that:
- An overriding imperative is to ensure the government maintains control of the road and transport network. Accordingly, the contract relationship must in no way fetter the rights of the Government, nor give rise to compensation, if the government increases public transport patronage and/or expands the capacity of the existing arterial road.³⁰⁹
- 7.3** Professor David Richmond, Special Advisor to the Infrastructure Implementation Group, in evidence to the Committee, stated that the recommendations of his review have been adopted by the Government:
- These recommendations have been adopted by the Government and are now currently in the process of being implemented as Government policy. They represent a significant shift in the policy position, which drove, if you like, the procurement process for projects like the cross-city tunnel.³¹⁰
- 7.4** One of the specific recommendations of the IIG *Review* refers explicitly to retaining discretion over local road changes:

Local road changes must remain at the total discretion of government. As a general rule, the closure and/or alteration of existing local roads should not be for the purpose of directing traffic onto the toll road. Any closures/ alterations should ensure that through traffic is not encouraged to use local roads rather than the toll road or the alternative arterial route.³¹¹

³⁰⁸ ‘Report gives NSW room to manoeuvre’, *Australian Financial Review*, 9 December 2005, p11

³⁰⁹ Infrastructure Implementation Group, *Review of Future Provision of Motorways in NSW*, December 2005, p8

³¹⁰ Professor David Richmond, Special Advisor, Infrastructure Implementation Group, Evidence, 2 February 2006, p59

³¹¹ IIG *Review*, December 2005, p8

7.5 The Committee endorses the Government’s adoption on December 8 2005 of this recommendation by the IIG *Review of Future Provision of Motorways in NSW* for future projects.

7.6 The Committee also notes that the NSW Auditor General is currently undertaking a performance audit of the Cross City Tunnel, which will more closely consider:

whether the RTA had proper processes in place for deciding what roads to close or what road restrictions to put in.

...

Ideally, the process they should have in place would be one that takes account of those considerations—that is, reducing traffic in parts of the city and parts of the suburbs immediately to the east as opposed to traffic measures that were designed to improve the financial viability of the tunnel.³¹²

7.7 While the public perception has been that control of public roads has been ‘handed over’ to the private sector, and the subsequent actions of the Government appear to give credence to that perception, evidence to the Committee from the RTA, former members of the Government, CrossCity Motorway and others suggests that the issue is more complex.

7.8 Mr Peter Sansom, former Chief Executive of CCM denied that CCM had responsibility for the road changes:

It has been suggested that CCM had sought a number of road changes as part of the CCT project in an attempt to “funnel” traffic into the CCT. CCM rejects any suggestion that CCM is responsible for road closures and that they were made for that purpose.³¹³

7.9 Government agencies, former Ministers and the former Premier involved in the project have consistently said that the changes to the road network were principally intended to meet the project’s overall primary objectives:

- to improve the environmental quality of public spaces within Central Sydney
- to improve the ease of access and reliability of travel within Central Sydney
- to improve the reliability and efficiency of travel between areas east and west of Central Sydney.³¹⁴

³¹² Mr Bob Sendt, NSW Auditor General, Evidence, 2 February 2006, p50

³¹³ Submission 38, Mr Peter Sansom, former Chief Executive, CCM, p2

³¹⁴ RTA, *Cross City Tunnel Environmental Impact Statement*, August 2000, Summary, p5

7.10 The Hon Craig Knowles in evidence to the Committee described the road changes as necessary to meet the primary objectives of the Cross City Tunnel contained in the EIS:

[U]nless what I will call the freed-up new capacity of CBD road space was quickly reinforced for public transport use then it would be inevitable that private motor vehicles quickly would fill it up again and you would end up causing more congestion, not less and, of course, go counter to the principal objective of the tunnel proposal.³¹⁵

7.11 The former Treasurer, the Hon Michael Egan, said in his evidence to the Committee that the reality was in fact the reverse of public perception that control of public roads had been 'handed over' to the private sector. Mr Egan stated:

The planning changes, the traffic lane restrictions, preceded the building of the tunnel. They were not put there for the purposes of the tunnel. The tunnel was put there to enable those traffic changes to be implemented.³¹⁶

7.12 The former Chief Executive of the RTA, Mr Paul Forward, in evidence to the Committee agreed that the desire for some of the road changes preceded the Cross City Tunnel concept:

In fact, the desire for road changes – the road closures – many of these preceded the Cross City Tunnel concept itself. They were issues that were raised by very many people in the community. A distinguished group of architects, urban designers ... the Council of the City of Sydney, the South Sydney City Council, were all demanding of the RTA that this road space be captured early so that, over time, traffic did not grow and then occupy that additional space...³¹⁷

7.13 Mr Forward's understanding was confirmed by Mr Brett Skinner, Director of Finance, RTA, in evidence to the Committee, when he stated:

[T]he actual planning approval was completed before the detailed proposals submitted for the project ... The significant decisions in relation to the traffic arrangements were made as part of the planning approval process.³¹⁸

7.14 In response to questions relating to the number of intersections with traffic light changes, Mr Hannon said in evidence to the Committee that:

that would total approximately 400 intersections. Every intersection in the city would have undergone changes to cycle time and green time depending on traffic densities.³¹⁹

7.15 The Committee notes that CCM met with the RTA to discuss changes to traffic light phasing.

³¹⁵ Mr Knowles, former Minister for Infrastructure, Planning and Natural Resources, Evidence, 3 February 2006, p2

³¹⁶ Hon Michael Egan, Evidence, 6 December 2005, p47

³¹⁷ Mr Paul Forward, Evidence, 6 December 2006, p53

³¹⁸ Mr Brett Skinner, Director, Finance, RTA, Evidence, 6 December 2005, pp15-16

³¹⁹ Mr Mike Hannon, Acting Chief Executive, RTA, Evidence, 2 February 2006, p29

7.16 Ms Monique Roser, NSW President of the Planning Institute of Australia, in evidence to the Committee, agreed that the Cross City Tunnel was a good opportunity to make other changes to roads in central Sydney. Ms Roser stated that:

In our view, the cross-city tunnel provided a once-in-a-generation opportunity to improve the city's streets to benefit road users, pedestrians and public transport users. We thought that the anticipated reduction in traffic along Park and William Streets provided opportunities for those thoroughfares to become green boulevards with increased bus lanes, bicycle lanes, widened footpaths, et cetera. Such treatments obviously would provide a fitting entrance to the city from the east and would complement the City of Sydney Council's efforts to upgrade the amenity of Kings Cross.³²⁰

Figure 7.1 William Street upgrade.



Source: www.rta.nsw.gov.au

³²⁰ Ms Monique Roser, NSW President of the Planning Institute of Australia, Evidence, 3 February 2006, p49

- 7.17** The Hon Dr Andrew Refshauge, former Minister for Urban Affairs and Planning, confirmed that changes to bring about improvements in urban amenity were part of the Government and Sydney City Council's long standing plan for the area:

[I]n all of the discussions from, I think, back in 1990 the city council and the State Government suggested a tunnel, because they wanted to look at the access to Sydney from the east. William Street was to be dramatically changed to reduce the traffic able to come down William Street, expand the footpath and provide better public transport options by the T-ways, which were effectively a partial busway. That would mean there would be better public transport options, it would reduce the capacity for cars to come in and it would provide a better public environment for William Street.³²¹

- 7.18** Mr Paul Levins, General Manager, Corporate Affairs for Bilfinger Berger Australia described the tunnel as 'a deliberate attempt to decongest CBD streets':

That has been referred to as funnelling, a term that has now accrued derogatory connotations, because critics have used it to suggest that this traffic movement is about increasing the profit to the private sector. It is not. ... What the tunnel is about is an urban amenity program that was well consulted on and considered. ... To the extent the traffic changes give preference to drivers using the tunnel, that has occurred because the policy imperative was to take as many cars off the CBD streets.³²²

- 7.19** Mr Sendt, NSW Auditor General, in his evidence to the Committee confirmed the project's objectives and clarified that the current performance audit would consider whether the road changes were consistent with those objectives:

... it has always been talked of in terms of getting traffic off the surface streets of the CBD and inner-city suburbs. That obviously involved to some extent a mixture of carrot and stick approach. The carrot is the provision of the tunnel, which clearly substantially lessens the time it takes to get from one side of the CBD to the other. But— particularly given the complexity of the tunnel and the high cost, and hence the high toll—while there is a carrot in terms of better travelling times, there is also a penalty in terms of what is perceived by the public to be a fairly high toll for a fairly short road. So there needed to be road restrictions and road closures in order to achieve the Government's objective of getting traffic off the surface streets.³²³

³²¹ Hon Dr Andrew Refshauge, former Minister for Urban Affairs and Planning, Evidence, 3 February 2006, p13

³²² Mr Paul Levins, General Manager, Corporate Affairs, Bilfinger Berger Australia, Evidence, 3 February 2006, p74

³²³ Mr Sendt, Evidence, 2 February 2006, p50

7.20 The Hon Dr Andrew Refshauge succinctly provided a possible explanation for the extent of community opposition to the surface road changes as a result of the Cross City Tunnel project:

From my experience as a member of Parliament I have never found people who have said to me, "I want more traffic on my street or the road I go on." They want less. In that sense they would prefer to have less traffic on the city. I believe human nature would think it is better if someone else is the one that does not come in, rather than themselves.³²⁴

Fetters on the discretion of the RTA

7.21 A number of clauses in the *Cross City Tunnel Project Deed* refer to the RTA's right to manage the road network and perform its functions – in particular, clauses 2.3 and 18.1.

7.22 Clause 2.3(a) clearly states that nothing in the Project Deed will fetter the discretion of the RTA:

2.3 RTA as an authority

(a) Subject to clause 2.3(b), the Trustee and the Company acknowledge and agree that:

(i) nothing in this Deed or in any of the Project Documents will in any way unlawfully restrict or otherwise unlawfully affect the unfettered discretion of RTA to exercise any of its functions and powers pursuant to any legislation; and

(ii) without limiting clause 2.3(a)(i), anything which RTA does, fails to do or purports to do pursuant to its functions and powers under any legislation will be deemed not to be an act or omission by RTA under this Deed and will not entitle the Trustee or the Company to make any Claim against RTA arising out of the subject matter of the Deed and the other RTA Project Documents.³²⁵

7.23 Clause 18.1 explicitly protects the right of the RTA to make changes to the road infrastructure and to public transport arrangements:

18.1 No restrictions on RTA

Nothing in this Deed will in any way limit or restrict the ability or power of the RTA or the Government, directly or through any Authority to:

(a) develop, construct, operate and/or maintain directly, by sub-contractors or otherwise, other tollways, tunnels, freeways and other roads in New South Wales;

(b) maintain, manage, change or extend the Sydney road and transport network or traffic or transport system;

(c) extend, alter, close or upgrade existing public transport routes or services;

³²⁴ Hon Dr Andrew Refshauge, Evidence, 3 February 2006, p15

³²⁵ RTA, *Cross City Tunnel Project Deed*, 18 December 2002, clause 2.3(a)

- (d) extend, alter or upgrade existing public transport routes or establish new transport services;
- (e) develop the transport network generally;
- (f) implement Government policies; or
- (g) otherwise do anything which, subject to this Deed, they are empowered to do by Law.³²⁶

7.24 Legal advice provided to the RTA by Mr Bret Walker SC, a copy of which was provided to the Committee, is that these clauses act to prevent the RTA from being fettered from taking action in relation to the road network:

The provision made by clause 18.1 of the Project Deed is clear and unequivocal. The Project Deed expressly preserves all existing discretions and permits their due exercise.³²⁷

The issue of government liability to pay compensation for future road changes

7.25 Legal advice provided to the RTA by the legal firm Clayton Utz noted that while clause 18.1 prevented the Project Deed from restricting its power to ‘manage the transport network’ there ‘may however be financial consequences for RTA in doing so’.³²⁸ The Clayton Utz advice goes on to state that:

The Project Deed sets out in clauses 18.2 - 18.4 various local road traffic arrangements, connections to the Tunnel and traffic arrangements on feeder roads which, if changed by RTA in the future, may lead to RTA being obliged to provide certain financial or other relief to CCM.³²⁹

7.26 There are a large number of local road traffic arrangements, a detailed list of which can be found at Appendix 4. Maps referring to the area appear after Chapter 2. Changes to the East Sydney area include the narrowing of William Street and the restriction of lanes from general traffic use to Transit and Bus lanes, and restrictions in the Kings Cross Tunnel. The maintenance of traffic connections to the Cross City Tunnel are also included in the list, to ensure that the ‘number of general traffic lanes and transit lanes’ are not reduced.³³⁰

7.27 Clause 19.2 of the Project Deed provides that if any of the local road traffic arrangements listed in clauses 18.2-18.4 are changed and result in a ‘material adverse effect’ (MAE), then the RTA and CCM will ‘negotiate in good faith’ to restore the company to the situation they would have been in if the change had not occurred.³³¹

³²⁶ RTA, *Cross City Tunnel Project Deed*, 18 December 2002, clause 18.1

³²⁷ RTA, *Contractual Arrangements for the Cross City Tunnel: Memorandum of Advice*, December 2005, p8

³²⁸ email from John Shirbin, Clayton Utz to Les Wielinga and Graham Read, RTA, 8 October 2005, p1

³²⁹ email from John Shirbin, Clayton Utz to Les Wielinga and Graham Read, RTA, 8 October 2005, p2

³³⁰ RTA, *Cross City Tunnel Project Deed*, 18 December 2002, clause 18.2-18.4

³³¹ RTA, *Cross City Tunnel Project Deed*, 18 December 2002, clause 19.2

7.28 According to an email exchange between John Shirbin, Clayton Utz, to Les Wielinga and Graham Read, RTA, an MAE occurs if the change materially and adversely impacts CCM's ability to:

- Carry out the Project;
- Repay the project debt; or
- Pay the projected return to equity investors.³³²

7.29 The advice to the RTA from Clayton Utz notes that:

The potential financial exposure to RTA under the MAE provisions may be particularly high in present circumstances where the trading performance of the CCT is below that projected in the Base Case Financial Model. If a change to a traffic arrangement is made which triggers the MAE provisions, there is a risk that CCM will ascribe to the change an effect which would maximise the liability of RTA under the MAE provisions. Indeed, CCM is assisted in this respect as the definition of equity return provides that where there is insufficient historical information, the projections in the Base Case Financial Model are used.³³³

7.30 This advice suggests that while the RTA retains nominal control of the public road network, the financial cost of exercising that control may be so high as to effectively result in a loss of control.

7.31 Professor Tony Blackshield, Emeritus Professor and constitutional law expert, considered this perspective during his evidence to the Committee. He concluded that:

The argument would be that a public servant who knows that a particular decision he or she is likely to make would have the effect of landing the government with the liability for heavy compensation might well be deterred from making that decision, and so his awareness about liability might effectively operate as a fetter on discretion, just as much as an explicit fetter would do. That is the argument.³³⁴

7.32 Prof Blackshield rhetorically asked:

[D]oes the cross-city tunnel contract effectively fetter the discretion of either the Roads and Traffic Authority or other levels of government to make changes to the regime in relation to the tunnel? The answer is that, no, it does not fetter those discretions.³³⁵

³³² email from John Shirbin, Clayton Utz to Les Wielinga and Graham Read, RTA, 8 October 2005, p2

³³³ Email from John Shirbin, Clayton Utz to Les Wielinga and Graham Read, RTA, 8 October 2005, p3

³³⁴ Professor Tony Blackshield, Evidence, 1 February 2006, p73

³³⁵ Prof Blackshield, Evidence, 1 February 2006, p71

7.33 In relation to the question of the degree of compensation payable, Prof Blackshield contended that the provisions of clause 19.2 established an onerous compensation regime and that:

probably this is not binding and that probably any compensation would have to be assessed on more general principles and not the particular terms set out in clause 19.2.³³⁶

7.34 Prof Blackshield stressed that there was uncertainty around the legal arguments he discussed with the Committee, particularly in relation to the level of compensation payable, but contended that the effect of the uncertainty was to strengthen the Government's negotiating position in the event of an MAE change:

It is not correct to say that, whatever happens, the Government is now irrevocably bound either to accept the existing arrangements or to pay massive compensation. ... the developers might well be prepared to accept a lower level of compensation rather than face the possibility of not getting any compensation at all.³³⁷

7.35 Prof Blackshield summarised the effect of the clauses in the contract succinctly:

This is not the kind of contract that says, "I promise not to make any changes, and if I do make them I promise to pay you compensation". In a contract of that kind the likelihood is that both promises would be unenforceable. Rather, this is a contract that says, "We don't promise not to make any changes but we do promise that if our changes have a material adverse effect we will compensate you according to that clause".³³⁸

7.36 The Committee notes that the project's aims since the original EIS have consistently involved changes to William Street. The road changes could be characterised as the RTA exercising its control over the road network, as the project's principal objectives related to reducing the amount of traffic in the CBD and thus improving the environmental amenity of the area.

7.37 Despite the extensive evidence presented to the Committee demonstrating that the purpose of the Cross City Tunnel project was clear since its inception, and included modifications to surface streets to improve urban amenity – particularly changes to William Street – there remains a strong public perception that the road changes have occurred in order to 'funnel' traffic into the Cross City Tunnel for the purpose of ensuring the financial viability of the project.

7.38 Mr Craig Tansley, a resident of Darlinghurst, in his submission to the Committee succinctly stated a common community perception that '[m]any roads were closed purely so the owners of the CCT could make more money, and they should be re-opened immediately'.³³⁹

7.39 Ms Lucy Robertson agreed in her submission, suggesting that 'the road closures, especially those on William Street, have no purpose but to force motorists into the tunnel'.³⁴⁰

³³⁶ Prof Blackshield, Evidence, 1 February 2006, p71

³³⁷ Prof Blackshield, Evidence, 1 February 2006, p71

³³⁸ Prof Blackshield, Evidence, 1 February 2006, p73

³³⁹ Submission 43, Mr Craig Tansley, p1

7.40 Mr Richard Gration, a local resident, contends in his submission that:

the primary motivation of the closures was not the benefit of the local community but to increase profits by funnelling traffic into the Cross City Tunnel through forced local road closures.³⁴¹

7.41 The view of individuals in the community was shared by the NRMA, who stated in their submission that ‘Many of the road changes are designed to funnel traffic into the tunnel and limit the viability of alternative routes into, and across, the CBD.’³⁴²

7.42 Despite the extensive publicity that the project received in the lead up to the project commencement, especially the proposed changes to William Street, it seems that many members of the public did not fully understand the impact of the changes would be to make existing free journeys through the area more difficult and time consuming.

7.43 This situation was compounded by the fact that the changes associated with the initial project were not the same as those associated with the final project. There were less opportunities for consideration by the community of the road changes associated with the ‘long 80 tunnel’ project. The new proposal contained many significant changes that would affect the community in new and far-reaching ways. These changes were not presented to the community in their entirety, and as a consequence the final project created community anger. This issue is dealt with in greater detail in Chapter 6.

Implications for future provision of public transport

7.44 The Committee notes that public concern relating to public control of the road network extends to concern over limitations to the future provision of public transport options. New public transport initiatives which do have a material adverse effect on tunnel traffic may lead to compensation to CCM from the Government. In a letter from Clayton Utz to the RTA they say:

The Project Deed for the Cross City Tunnel project between Roads and Traffic Authority and CrossCity Motorway explicitly recognises the government’s unrestricted capacity to manage and upgrade the public transport network. To quote from the Project Deed: “Nothing in this Deed will any way limit or restrict the ability or power of RTA or the Government, directly or through any Authority to”:

- extend, alter or upgrade existing public transport routes or services;
- construct new public transport routes or establish new transport services; or
- develop the transport network generally.

³⁴⁰ Submission 44, Ms Lucy Robertson, p1

³⁴¹ Submission 9, Mr Richard Gration, p1

³⁴² Submission 54, NRMA, p4

Further, CCM will have no rights to compensation under the Project Deed if:

- there is increased patronage of existing public transport routes and services; or
- there are initiatives for new public transport routes or services introduced which do not have a material affect on traffic capacity on connections to and from the Cross City Tunnel.³⁴³

7.45 In response to a question relating to money potentially payable to the CCM for MAEs caused by improving public transport, taken on notice during the Committee's hearing on 1 February 2006, Dr Kerry Schott, Executive Director, Private Projects and Asset Management Directorate, confirmed that:

Nothing in the CCT Deed will in any way limit or restrict the ability or power of Government, directly or through any Authority to:

- (a) extend, alter, close or upgrade existing public transport routes or services;
- (b) construct new public transport routes or establish new transport services;
- (c) develop the transport network generally; or
- (d) implement Government policies.³⁴⁴

7.46 The Committee notes that, according to evidence before the Committee, the Government retains the power to improve public transport services in the area, including the future provision of light rail, if such provision meets the strategic transport planning objectives of Government.

Conclusions

7.47 The Committee agrees that the changes made to the road network are intended to funnel traffic into the Cross City Tunnel. However, the Committee believes that this is consistent with the project's primary objectives - to reduce traffic in central Sydney and thus improve urban amenity, as stated in the original EIS. The outcomes, however, have been more severe in creating disruptions than is acceptable to the community. The fact that the funnelling potentially leads to the financial benefit of the private operator is a consequence of the project being delivered as a PFP. If the project had been delivered by Government then the traffic would still be funnelled into the tunnel to pay a toll.

7.48 The understandable anger and frustration of the community that has been expressed since the tunnel opened in August 2005 and which was very clearly expressed during the Committee's inquiry, is a result of this funnelling and a lack of direct, toll-free alternative routes.

³⁴³ Letter from Clayton Utz to RTA, 12 October 2005

³⁴⁴ Answers to questions on notice taken during evidence 1 February 2006, Dr Kerry Schott, NSW Treasury, Question 4, p2

7.49 The Committee notes the similarities between the Cross City Tunnel and the Eastern Distributor projects. As Mr Forward told the Committee:

It is difficult to come to a conclusion in the very early stages of a project like this. ... People criticised the Eastern Distributor in the early days. Most people in Sydney now do not know how we can operate a city as complex as Sydney without the Eastern Distributor. ... It takes at least two years to work through the ramp up and at least two years for the benefits to be understood.³⁴⁵

7.50 The Committee believes that the public perception that the Government is contractually locked into existing road changes is understandable, given the lack of information available to the community about the potential for road change reversals. Many of the surface road changes could probably be reversed without the need for compensation to be paid to CCM. Even major changes such as the William Street 'boulevard' could be reversed, with the amount of compensation payable ranging from very little to a lot depending on the legal interpretation of the relevant clauses of the Project Deed. However, the Committee believes that the primary objectives of the project – to address the continuing traffic congestion of the city of Sydney – are important to the future viability of the city.

7.51 Further, the Committee notes that the NSW Audit Office is conducting a performance audit of the Cross City Tunnel project that will examine in closer detail the processes used by the RTA to impose road changes.³⁴⁶

7.52 The Committee believes that, notwithstanding the high toll levels and traffic congestion on surface streets, the Cross City Tunnel is an impressive feat of engineering excellence that will be considered an essential part of Sydney's road infrastructure for decades to come.

Recommendation 14

That the NSW Roads and Traffic Authority immediately reverse the traffic measures identified in Appendix 5 of this report and categorised as category B, C or D and further investigate reversing those referred to as category A as soon as possible.

Recommendation 15

That the Government continue to encourage the operators of the Cross City Tunnel to lower the toll. A reduction of the toll to \$2.90, as suggested by the NSW Roads and Traffic Authority's traffic consultants, would be revenue neutral and improve patronage of the tunnel.

³⁴⁵ Mr Forward, Evidence, 6 December 2005, p10

³⁴⁶ NSW Auditor General, *Auditor General's Report to Parliament 2005, Volume 4*, p5

Chapter 8 Public release of documents and ministerial accountability

This chapter examines issues that have arisen from the Cross City Tunnel project in relation to both the public release of contractual and other documents relevant to public private projects, and the communication and accountability mechanisms between the RTA and the Government, including Ministers and their staff.

Public release of contractual and associated documents

8.1 The Committee's terms of reference require it to inquire into the public release of contractual and related documents concerned with public private partnerships for large road projects. Concerns have been raised in relation to the public disclosure of documents relating to the Cross City Tunnel, including:

- delays to the tabling in Parliament of the *Cross City Tunnel: Summary of Contracts* and *Cross City Tunnel First Amendment Deed: Summary of Contracts*
- commercial-in-confidence and public interest aspects of releasing certain information in contract summaries.

Cross City Tunnel Project Deed

8.2 The RTA and the Cross City Motorway consortium signed the final Cross City Tunnel Project Deed on 18 December 2002. According to *Working with Government: Guidelines for Privately Financed Projects*³⁴⁷, the summary of contract should have been provided to the Auditor-General one month later in January 2003, and the audited summary of contract tabled in Parliament by the Minister for Roads by March 2003.

8.3 The RTA stated in its submission to the Committee that they:

met with the Auditor-General on 3 March 2003 and explained that if the terms of the Cross City Tunnel project had been made public during the negotiations of the Lane Cove Tunnel Project Deed, those negotiations would have been compromised.³⁴⁸

8.4 The *Cross City Tunnel: Summary of Contracts* was provided to the Auditor-General in June 2003, and tabled in Parliament on 29 February 2004,³⁴⁹ following finalisation of the Lane Cove Tunnel negotiations in December 2003. In justifying delaying publication of the summary of contracts, the RTA informed the Committee that 'the decision to table the contract after the conclusion of the Lane Cove Tunnel negotiations was made to protect taxpayers' interests'.³⁵⁰

³⁴⁷ Premier's Memorandum, No M2000-11, *Disclosure of Information on Government Contracts with the Private Sector*, NSW Government, November 2001, www.premiers.nsw.gov.au

³⁴⁸ Submission 1, RTA, p21

³⁴⁹ NSW Legislative Assembly, *Votes and Proceedings*, 19 February 2004

³⁵⁰ Submission 1, p21

- 8.5 The former Chief Executive Officer of the RTA, Mr Paul Forward, in evidence to the Committee, stated that:

We were under strict instructions to deliver best value for the taxpayer and there were some issues in that contract summary with regard to the risk sharing and we did not want to be exposed in terms of the other parties in the Lane Cove Tunnel project being aware of that risk profile, and that was part of the negotiations. So we felt that we would be at a disadvantage...³⁵¹

- 8.6 Mr Forward also stated, when asked about who, if anyone, informed the Premier's Department that the RTA would not be complying with the Premier's Memorandum 2001-11 on disclosure of documents, that 'I did not inform the Premier's office .. No, I informed the Minister [for Roads].'³⁵²

- 8.7 The Auditor-General's *Report to Parliament 2005 Volume Four* listed some recent privately financed project contracts and when they were provided to the Audit Office, and subsequently tabled in Parliament, including three negotiated by the RTA: the Cross City Tunnel, the M7 and the Lane Cove Tunnel. Of these RTA projects listed, none had been either supplied to the Auditor-General within the 30 day limit, or had subsequently been tabled in Parliament within the 90 days following submission to the Auditor-General.

- 8.8 While acknowledging a number of reasons why the summaries of contract may not be submitted within the required period, including some beyond the control of the Minister, the Auditor-General does not make mention of any special circumstances surrounding the disclosure of information in the contract summaries, and states that 'Except for the last reason [lack of legislative provision that would allow summaries to be tabled when Parliament is not sitting], Ministers should have tabled most of the contract summaries significantly earlier than dates shown.'³⁵³

Cross City Tunnel Project First Amendment Deed

- 8.9 The Cross City Tunnel First Amendment Deed was finalised on 23 December 2004, following the Treasurer's approval granted under section 20 of the *Public Authorities (Financial Arrangements) Act 1987*. In its submission to the Committee, the RTA indicated that 'at the time the First Amendment Deed was signed, RTA was not of the understanding that it was required to prepare a contract summary.'³⁵⁴

- 8.10 In evidence to the Committee Mr Paul Forward, stated that the Premier's directive is silent on variations to contracts, and that:

This was a variation to a contract, not a new contract. It was the RTA's interpretation that we had acted correctly at that particular point in time.³⁵⁵

³⁵¹ Mr Paul Forward, Evidence, 6 December 2005, p7

³⁵² Mr Forward, Evidence, 6 December 2005, p18

³⁵³ NSW Audit Office, *Auditor General's Report to Parliament 2005, Volume Four*, tabled 16 November 2005, p4

³⁵⁴ Submission 1, RTA, p21

³⁵⁵ Mr Forward, Evidence, 6 December 2005, p7

- 8.11** Mr Forward also stated that ‘I had advice from internal RTA people and I also had verbal advice from Treasury’, that there was no requirement to disclose amendments or variations to existing contracts.³⁵⁶ Mr Forward’s evidence to the Committee reiterates advice he gave to the Minister for Roads that:

neither policy contains a requirement that amendments or variations to existing contracts be disclosed. Further, the RTA has been advised that there is not a practice within Government of routine disclosure of amendments to existing contracts and it has not been asked by Treasury to prepare a summary of the Amending Deed for publication. While the Premier’s Memorandum refers to ‘all contracts’ it does so in the context of disclosure of information following the initial tender and contract award process.³⁵⁷

- 8.12** Documents tabled in the Legislative Council show that the question of whether the Cross City Tunnel Project First Amendment Deed is a contract to which Premier’s Memorandum M2000-11 – Disclosure of Information on Government Contracts with the Private Sector applies was referred by the Minister for Roads on 27 October 2005 to the Crown Solicitor for advice. The advice states that:

I have little doubt that the Deed of Variation [the First Amendment Deed] is a contract to which the Premier’s Memorandum would apply ... Nothing in the Premier’s Memorandum indicates some narrow or technical meaning is intended in relation to the “contractual arrangements” covered by the Premier’s Memorandum which would exclude an agreement between parties contained in a deed or an agreement contained in a deed to vary an earlier agreement contained in a deed.³⁵⁸

- 8.13** The Cross City Tunnel First Amendment Deed was tabled in the Legislative Council on 27 October 2005 in response to an order for papers under standing order 52. In a media release on the same day, the Minister for Roads, the Hon Joseph Tripodi MP, stated that ‘the NSW Government is determined to be open and upfront about the Cross City Tunnel deal’ and that:

The First Amendment Deed is of such significance that it should have been disclosed: The contract summary for the primary contract has been on the Treasury website for more than a year. The amending deed was executed in December 2004 and information about the deed should have been publicly available by April 2005 at the latest.³⁵⁹

- 8.14** In the same press release on 27 October 2005, the Minister for Roads stated in relation to Mr Forward’s resignation from the role of Chief Executive of the RTA, that:

The failure of the RTA to provide accurate advice to me as Minister, and to make the document public as required, was a very grave mistake, and one that cannot be overlooked. The people of NSW are entitled to expect that government agencies

³⁵⁶ Mr Forward, Evidence, 6 December 2005, p9

³⁵⁷ Correspondence from Mr Paul Forward, CEO, RTA to the Hon Joe Tripodi MP, Minister for Roads, 27 October 2005, tabled in the Legislative Council on 16 November 2005

³⁵⁸ Crown Solicitor, Advice: Disclosure of Deed of Variation – Cross City Tunnel, 27 October 2005, tabled in the Legislative Council on 16 November 2005

³⁵⁹ Minister for Roads, Media Release, ‘RTA Chief Executive Stands Down’, 27 October 2005

comply with guidelines requiring transparency in commercial deals. Mr Forward did not disclose to me the existence of this contract and failed to mention it in written advice he gave to me on October 13 it is simply unacceptable, given the level of public interest in this issue, that the Chief Executive neglected to inform me as the Minister of the existence of a very important document.³⁶⁰

- 8.15** The Cross City Tunnel First Amendment Deed Summary was posted on the Treasury website, www.treasury.nsw.gov.au, in November 2005.

Government policy on disclosure of documents

- 8.16** The Government policy on what information contained in government contracts with the private sector should be disclosed and what information should remain confidential is contained in the Premier's Memorandum No 2000-11: *Disclosure of Information on Government Contracts with the Private Sector*, and the *Working with Government Guidelines*.³⁶¹ Premier's Memorandum 2000-11 states that:

Agencies must ensure that ... for contracts over \$5 million involving private sector financing, land swaps, asset transfers and similar arrangements a summary of the main items of the contract listed in Schedule 1 and 2 is routinely released within 90 days of award of the contract.³⁶²

- 8.17** The following schedule 1 and 2 items are to be routinely disclosed for contracts over \$5 million dollars:

- details of contract (description of project to be completed or goods/services to be provided or property to be transferred; commencement date of the contract; the period of the contract)
- the full identity of the successful tenderer including details of cross ownership of relevant companies
- the price payable by the agency and the basis for future changes in this price
- the significant evaluation criteria and the weightings used in the tender assessment
- provisions for re-negotiation
- details of future transfers of assets of significant value to the government at no or nominal cost and details of the right to receive the asset and the date of the future transfer
- the identification and timing of any assets transferred to the contractor by the agency
- all operation and/or maintenance provisions in the contract
- the basis for changes (price variation clauses) in the price payable by the agency

³⁶⁰ Minister for Roads, Media Release, 'RTA Chief Executive Stands Down', 27 October 2005

³⁶¹ NSW Government, *Working with Government: Guidelines for Privately Financed Projects*, November 2001

³⁶² Premier's Memorandum, No 2000-11, *Disclosure of Information on Government Contracts with the Private Sector*, NSW Government, November 2001

- the results of cost-benefit analyses of the successful tender
- the risk sharing in the construction and operational phases of the project, quantified in net present value terms (where possible) and specifying the major assumptions involved
- significant guarantees or undertakings between the two parties, including loans entered into or agreed to be entered into
- to the extent not covered above, the remaining key non-commercial-in-confidence elements of the contractual arrangements.³⁶³

8.18 Items not to be disclosed in summaries of contracts are:

- the contractor's financing arrangements
- the contractors cost structure or profit margins
- items of the contractor having an intellectual property characteristic
- any other matters where disclosure would place the contractor at a substantial commercial disadvantage with its competitors both at the time of entering into the contract and at any later date when there could be an effect on future competitive arrangements.³⁶⁴

8.19 The *Working with Government Guidelines*, issued in November 2001, provides additional requirements for privately financed projects, that include:

A contract summary is to be made available to the Auditor-General for audit within 30 days of the contract becoming effective. Within 90 days of receipt by the Auditor-General, the audited contract summary will be tabled in Parliament by the responsible Minister. After tabling, the availability of the contract summary will be advertised in the Public Notices.³⁶⁵

8.20 The Committee notes that, significantly, the *Working with Government Guidelines* also state that the contract summary should include 'the price to be paid by the public, and the basis for future changes in this price'.³⁶⁶

8.21 Mr Danny Graham, Director, Private Financed Projects, NSW Treasury, outlined the rationale for how contract information is provided in summaries. In evidence to the Committee, Mr Graham said:

The contract summary we produce for privately financed projects is a more comprehensive summary of the project. It will take you from the start to the finish of the project. That was our intention—describe the full process that was followed, not just the final contract. If you read the contract summary, you will see it talks about the evolution of the project, the different stages of approval and what happened in those

³⁶³ Attachment to Premier's Memorandum No 2000-11, 27 April 2000, p 2

³⁶⁴ Attachment to Premier's Memorandum No 2000-11, 27 April 2000, pp 2-3

³⁶⁵ NSW Government, *Working with Government Guidelines*, November 2001, p27

³⁶⁶ NSW Government, *Working with Government Guidelines*, November 2001, p27

stages, and the summary of the contract finally entered into. Our objective was to make it more amenable to people to understand how the project had evolved, how we got the decisions, and the contract that was available.³⁶⁷

8.22 Mr Graham also explained how the treatment of summaries evolved from recommendations of the Public Accounts Committee:

The PAC said it wanted the contract summary certified by the Auditor-General, which is the case. The Auditor-General certifies that it is a true and fair reflection of the full contracts and lists all the contract documents that he has reviewed in relation to the contract summary. Secondly, it was to be tabled in Parliament and, thirdly, it was to be made available to the public through public notices and, in this day and age, on web sites. We have taken on board all those recommendations from the PAC.³⁶⁸

8.23 During the course of examining witnesses, the Committee canvassed the issue of public disclosure of the full text of contracts. In relation to this, Dr Kerry Schott, Executive Director, Private Projects and Asset Management, NSW Treasury stated that:

It was certainly never our intention to use the contract summary to not divulge information. If there is some sense that perhaps we should also be letting loose the whole contract, for whatever reason, we would be happy to consider that after the contract is executed, and excluding commercial in confidence matters, of which there are not necessarily very many.³⁶⁹

8.24 In its recent review, the Infrastructure Implementation Group provides details of revised protocols for the public release of contracts under consideration by the Government. These protocols, in the form of draft guidelines have been included in this Report at Appendix 6. Key changes to the current policy of relevance to this inquiry include:

- For contracts with an estimated value over \$5 million ... the complete contract, less any commercial-in-confidence material, and any information provided under Schedules 1 and 2 which is not in the complete contract, are routinely disclosed within 60 days of the contract becoming effective
- If there is an amendment to a contract valued at over \$100,000 (as distinct from a variation under the contract) that changes the information already routinely disclosed, the agency must ensure the amended information is made public within 60 days of such amendment
- Schedule 1 has been amended to include: Summary information used in full base case financial model such as pricing formula for tolls or other usage charges.

8.25 The Committee notes that the draft guidelines include the requirement to publicly disclose details of the 'risk sharing in the construction and operational phases of the contract'. Given that the RTA has stated that it did not follow the existing guidelines specifically in order to prevent disclosure of risk allocation in relation to the Cross City Tunnel which it believed would compromise ongoing negotiations in relation to the Lane Cove Tunnel project, the

³⁶⁷ Mr Danny Graham, Director, Private Projects, Evidence, 7 December 2005, p15

³⁶⁸ Mr Graham, Evidence, 7 December 2005, p15

³⁶⁹ Dr Kerry Schott, Executive Director, Private Projects and Infrastructure, NSW Treasury, Evidence, 7 December 2005, p15

Committee is concerned that the proposed guidelines may not adequately address this issue, and that the possibility of similar situations may arise in future. The Infrastructure Implementation Group proposal that agencies release a list of documents that are not to be publicly released within the stipulated period, with a timetable for future release if that is to occur, may be an adequate compromise solution.

8.26 The IIG *Review* endorsed the draft guidelines and in addition proposed that:

- details of all amendments and material variations to existing major PFP contracts be released
- all project deeds and other agreements signed on behalf of the government with consortia be released, with a clear timetable, agreed to by the Auditor-General, for the public release of these documents
- documents signed with consortia that are not to be disclosed should be specified in a list with reasons for non-disclosure, and if/when they will be released in future
- the guidelines be mandatory for all agencies

8.27 The Auditor-General, in his *Report to Parliament 2005 Volume Four*, made the following recommendations in relation to the contract summaries:

The Government should:

- introduce a standard template for contract summaries
- introduce legislation to:
 - cover key aspects of the Guidelines, particularly those relating to contract summaries and other disclosures
 - require Ministers to table the Audit Office review of a PFP contract summary at the same time they table the summary in Parliament
 - require the timely tabling of contract summaries, preferably within 30 days of the Audit Office report being signed
 - clarify the ability of Ministers to table contract summaries if Parliament is not sitting
 - require Ministers to table revised contract summaries in Parliament if any significant changes take place. This revised summary should also be subject to review by the Audit Office before tabling.³⁷⁰

8.28 The Committee supports the IIG *Review* proposals and the changes they would make to the Government's draft guidelines. In addition, the Committee reinforces the need for the Government to consider the Auditor-General's recommendations. The specific recommendation of the Auditor-General, that the guidelines be legislated to ensure clarity and certainty, will be examined in the Committee's second report.

³⁷⁰ NSW Auditor General *Report to Parliament 2005*, Part 4

Recommendation 16

That the Government finalise the revised guidelines for public release of documents, taking into consideration the recommendations of the Infrastructure Implementation Group's *Review of Future Provision of Motorways in NSW* and the Auditor General.

Recommendation 17

That the revised guidelines for the public release of documents clarify the status of amendments or variations to existing contracts.

Impact of non-release of documents

- 8.29** The RTA, in both its submission and in evidence to the Committee, has stated that 'the RTA followed the Government's guidelines, including the *Working with Government Guidelines* for all aspects of the project's development and its implementation.³⁷¹ However, there has been considerable adverse public reaction to the toll level and to the manner in which the increase to the base toll was handled, providing an indication of the perceived lack of transparency and accountability in relation to the toll increase.
- 8.30** The Committee notes the RTA's evidence that they met with the Auditor-General to explain the delay in tabling the Cross City Tunnel summary of contract, and that the reasons for doing so were stated by the RTA to be in the public interest. The Committee believes that the failure to provide the public with information that materially altered the costs passed onto Cross City Tunnel users, with potentially broader implications for other parts of the road network, did not follow the spirit of the *Working with Government Guidelines* and may not have been in the public interest.

Conclusion

- 8.31** The management of the public release of documents by the Government has raised questions as to whose role it was to inform the public of a significant and politically sensitive issue. It may also have contributed to adverse public reaction to the Cross City Tunnel. In this regard, the Committee notes that significant Cross City Tunnel milestones were announced by either the Premier, or a Government Minister. Changes to the project plans at various stages, the decision to call for tenders, the selection of short-listed bidders and the initial toll are all examples. This might have raised a reasonable public expectation that the Minister for Roads, or other member of the Executive, would announce, or cause to be announced, the change in the base toll level. In doing so, the Committee reflects that, had the increased toll been announced in a timely manner, and with sufficient explanation, the extent of the adverse reaction to the discovery may have been substantially reduced.

³⁷¹ Mr Michael Hannon, Acting Chief Executive Officer, RTA, Evidence, 6 December 2005, p3. See also Submission 1, RTA, p 4, p 20, p 21, p 22

Cross City Tunnel documents tabled in Parliament

8.32 The Legislative Council has made two orders for the production of state papers relating to the Cross City Tunnel. Legislative Council standing order 52 states:

- (1) The House may order documents to be tabled in the House. The Clerk is to communicate to the Premier's Department, all orders for documents made by the House.
- (2) When returned, the documents will be laid on the table by the Clerk.
- (3) A return under this order is to include an indexed list of all documents tabled, showing the date of creation of the document, a description of the document and the author of the document.
- (4) If at the time the documents are required to be tabled the House is not sitting, the documents may be lodged with the Clerk, and unless privilege is claimed, are deemed to have been presented to the House and published by authority of the House.
- (5) Where a document is considered to be privileged:
 - (a) a return is to be prepared showing the date of creation of the document, a description of the document, the author of the document and reasons for the claim of privilege,
 - (b) the documents are to be delivered to the Clerk by the date and time required in the resolution of the House and:
 - (i) made available only to members of the Legislative Council,
 - (ii) not published or copied without an order of the House.
- (6) Any member may, by communication in writing to the Clerk, dispute the validity of the claim of privilege in relation to a particular document or documents. On receipt of such communication, the Clerk is authorised to release the disputed document or documents to an independent legal arbiter, for evaluation and report within seven calendar days as to the validity of the claim.
- (7) The independent legal arbiter is to be appointed by the President and must be a Queen's Counsel, a Senior Counsel or a retired Supreme Court Judge.
- (8) A report from the independent legal arbiter is to be lodged with the Clerk and:
 - (a) made available only to members of the House,
 - (b) not published or copied without an order of the House.
- (9) The Clerk is to maintain a register showing the name of any person examining documents tabled under this order.

First order for papers – 2003

8.33 The first order was made by the Legislative Council on June 2003 on the motion of Ms Lee Rhiannon. The order specifically related to contract negotiations for the financing, construction, operation and maintenance of the Cross City Tunnel including:

- (a) the contract between the RTA and the Cross City Motorway Consortium (CCM), signed in December 2002, to finance, construct, operate and maintain the Cross City Tunnel,

- (b) any documents subsequent to the successful tender by CCM relating to contract negotiations between the RTA and CCM concerning the financing of the project,
- (c) any document which records or refers to the production of documents as a result of this order of the House.³⁷²

8.34 The Government complied with the order within the required period, and requested that certain of the documents be privileged, effectively restricting access to these documents to members of the Legislative Council. The President of the Legislative Council in accordance with the resolution of the Legislative Council, referred the documents to an independent legal arbiter, Sir Laurence Street, to consider the claims of privilege. Sir Laurence upheld the claim of privilege on the majority of documents and only a small selection of privileged documents were made public.

8.35 On 13 October 2005, Ms Rhiannon moved that the documents received in response to the 2003 order for papers upon which a claim of privilege remained, be tabled and made public. The motion was narrowly defeated 18 votes to 17, to allow time for further reassessment of those documents.³⁷³ The following sitting day the Legislative Council resolved that, in view of the public interest in matters concerning the Cross City Tunnel, an independent legal arbiter would reassess those documents upon which privilege was upheld in 2003.³⁷⁴ As a result, the documents were again released to Sir Laurence Street.

8.36 In his report, Sir Laurence Street stated that a number of significant things had happened since his initial assessment in 2003. Principally, the Cross City Tunnel contract had been signed and the motorway had been built and was operating. Sir Laurence continued that:

most important of all, the Cross City Motorway, now that it is operating, has attracted a high degree of public concern in relation to a number of its aspects. I note in particular the level of charges and actual and proposed closures of roads and rerouting of traffic. In short, the project is now completed and it is perceived in many quarters to have controversial elements and collateral consequences. These elements and consequences can be legitimately recognized as raising concerns of public interest additional to those under consideration in September 2003.³⁷⁵

8.37 He further stated that ‘a major consideration in favour of the public interest in disclosure of the documents was that the continued non-disclosure had the potential to diminish public

³⁷² Legislative Council, New South Wales, *Minutes of Proceedings, No 12*, 1st Session of the 53rd Parliament, 23 June 2003, item 10

³⁷³ Legislative Council, New South Wales, *Minutes of Proceedings, No 121*, 1st Session of the 53rd Parliament, 13 October 2005, item 8

³⁷⁴ Legislative Council, New South Wales, *Minutes of Proceedings, No 122*, 1st Session of the 53rd Parliament, 18 October 2005, item 12. This was the first time the House had resolved that privileged documents be reassessed by an arbiter.

³⁷⁵ Sir Laurence Street, *Disputed Claim of Privilege – Papers on Cross City Motorway Consortium*, 2nd report of independent legal arbiter, para 8

confidence in the RTA's handling of the project, and in the RTA itself.³⁷⁶ In conclusion he stated that:

concealment is a fertile ground for suspicion and loss of confidence. This is a major element of public interest in the present case. And it demands the total lifting of all the existing constraints on disclosure.³⁷⁷

- 8.38** The advice of Sir Laurence was that privilege granted in September 2003 to some of the documents produced by the RTA was no longer justified in the public interest and should now be denied.³⁷⁸ The documents were consequently tabled in the Legislative Council on 20 October 2005 and, anticipating high levels of media and public interest in the documents, searchable electronic copies were made available on computer disc to the media, members' staff and other interested parties.³⁷⁹

Second order for papers – October 2005

- 8.39** On 18 October 2005, the House agreed to an order for the production of further documents relating to the Cross City Tunnel which had been created since the resolution of the House of 24 June 2003, with particular emphasis on the contracts, financial arrangements and consent deeds relating to the project:

- (a) the contract between the RTA and the Cross City Motorway Consortium (CCM), signed in December 2002, to finance, construct, operate and maintain the Cross City Tunnel,
- (b) the financing of the project including the successful tender by CCM between the RTA and CCM,
- (c) the RTA consent deed, the Project Deed and the Facility Agreement, and
- (d) any document which records or refers to the production of documents as a result of this order of the House.³⁸⁰

- 8.40** In response to this resolution 45 boxes of documents were received by the Clerk on Tuesday 1 November 2005. The documents were tabled in the Legislative Council on 8 November 2005. As with the previous order for papers in relation to the Cross City Tunnel, the government requested that certain of the documents be privileged. This claim was disputed and, in accordance with Standing Order 52 the documents were released to Sir Laurence Street for assessment.

³⁷⁶ Sir Laurence Street, *Disputed Claim of Privilege – Papers on Cross City Motorway Consortium*, 2nd report of independent legal arbiter, para 9

³⁷⁷ Sir Laurence Street, *Disputed Claim of Privilege – Papers on Cross City Motorway Consortium*, 2nd report of independent legal arbiter, para 9

³⁷⁸ Sir Laurence Street, *Disputed Claim of Privilege – Papers on Cross City Motorway Consortium*, 2nd report of independent legal arbiter, p

³⁷⁹ Legislative Council of New South Wales *Procedural Highlights* July to December 2005, p9

³⁸⁰ Legislative Council, New South Wales, *Minutes of Proceedings, No 122*, 1st Session of the 53rd Parliament, 18 October 2005, item 4

8.41 In line with his earlier report, Sir Laurence Street noted that the financial arrangements, the negotiations and administration of the tunnel project were all of public interest. He consequently determined that, in the interest of full and completely informed public discussion, and in light of the demands of open government, transparency and accountability, the public interest in the material being made public outweighed the grounds advanced in support of the claim of privilege.³⁸¹ The documents were subsequently tabled in the Legislative Council on 16 November 2005.

Conclusions

8.42 The Committee considers that the tabling in Parliament of papers has enabled closer scrutiny of the Cross City Tunnel project by Members of Parliament, the public and media. It enabled public access to a range of documents that provide an insight into the technical and practical aspects of development and implementation of a specific privately financed project.

8.43 The IIG *Review* notes that some of the documents that have now been publicly released, including the Base Case Financial models and the full Public Sector Comparator, ‘includes private commercial-in-confidence material and material which could disadvantage the Government or its partners in negotiations presently on foot or in future PFP projects.’ The IIG further suggests that

as these public disclosure processes mature a more detailed analysis and consideration of these classes of documents needs to be undertaken on a case by case basis. This indicates in the first instance that requests for privilege should be argued in the merits of the particular case, albeit in the context of the general Government policy proposal outlined [in the draft guidelines for public disclosure of documents].³⁸²

8.44 In response to this suggestion, the Committee recognises that, as the Arbiter has indicated in his report, the issue of what is public interest privilege is difficult to define, and involves assessing conflicting aspects of ‘public interest’. The Committee notes that the Arbiter indicated, in relation to the decision in September 2003 to uphold the claim of privilege, that his conclusions were ‘essentially focused on the situation as it stood at the time’ and ‘could be described as time-specific’. This approach is consistent with the IIG *Review*’s suggestion that such cases need to be considered on a case-by-case basis.

8.45 The Committee recognises the complexity of issues surrounding the public release of commercially sensitive material, in the context of community expectation that information be available to ensure that accountability and transparency are maintained in the public interest. The Committee, in making recommendations on the public release of contractual and other documents relating to public private partnerships in its second report, will consult with relevant public authorities and examine how the issue is dealt with in other jurisdictions.

³⁸¹ Legislative Council of New South Wales *Procedural Highlights* July to December 2005, p10

³⁸² Infrastructure Implementation Group, *Review of Future Provision of Motorways in NSW*, December 2005, p29

Ministerial accountability

- 8.46** The Committee is required by term of reference 1(f) to report on the communication and accountability mechanisms between the RTA and Government, including the Premier, other Ministers or their staff and the former Premier or former Ministers or their staff.
- 8.47** At an early stage of its inquiry the Committee resolved to invite a range of individuals and organisations to make submissions and give evidence. This was done with the aim of gaining as wide a range of views as possible on the Cross City Tunnel project, and the broader issues around the private provision of public infrastructure, within the brief period allowed by the terms of reference.
- 8.48** The Committee invited current and former Premiers, Treasurers, Ministers, public servants, local government representatives, community groups, interest groups, and a range of subject-matter experts. The Former Premiers the Hon Bob Carr and the Hon Nick Greiner, former Treasurer, the Hon Michael Egan, and former Planning Ministers, the Hon Andrew Refshauge and the Hon Craig Knowles all accepted the Committee's invitation and provided useful evidence that assisted the Committee in the preparation of this first report. The Directors General of the Premier's Department and the Departments of Planning and Environment and Conservation and the Ministry of Transport, as well as the Secretary of NSW Treasury and former and current NSW Auditors General also greatly assisted the inquiry by giving evidence, as did the CEO of the Sydney Harbour Foreshore Authority and the acting CEO of the State Transit Authority. Senior officials from the RTA, including former CEO Mr Paul Forward and current acting CEO, Mr Mike Hannon, also appeared, with current RTA officials appearing on two occasions.
- 8.49** The current Premier, the Hon Morris Iemma MP and Ministers Tripodi, Scully and Sartor were sent three invitations to appear before the Committee, and have consistently declined the invitation. An amendment to the motion establishing the Committee that leave be given to members of either House to appear before and give evidence to the committee was agreed to in the Legislative Council, and passed without debate in the Legislative Assembly. This amendment created an expectation in the Committee, that was reflected in the wider community, that current members including the Premier and Ministers, would appear before the Committee as part of its inquiry. The only current Member of Parliament who accepted the Committee's invitation to give evidence was the independent Member for Bligh, Ms Clover Moore MP.
- 8.50** At its meeting on 1 February 2006, the Committee resolved to provide the Premier and relevant Ministers with written questions relating to the Cross City Tunnel Inquiry for response, without withdrawing the invitation to attend a public hearing of the Committee. The Premier and Ministers have provided answers to questions, which have been published on the Committee website, www.parliament.nsw.gov.au/crosscitytunnel.
- 8.51** In response to the Premier and Ministers declining to appear, the Chairman examined the possibility of summoning the Premier and Ministers to appear. However, under the provisions of s4 of the *Parliamentary Evidence Act 1901*, Members of Parliament cannot be summoned to give evidence before a parliamentary committee.

Conclusion

- 8.52** In declining the Committee's invitation to attend the inquiry, the Premier stated that 'it is appropriate that the Government's thinking on this matter – as on all matters – is publicly aired and questioned.' Mr Iemma continued that:

As Premier there have been numerous opportunities for this to occur, both in the media and in the parliament. In fact, I would say that the issues in this case have been extensively and effectively addressed.

In addition, documents requested by the S.52 Legislative Council Call for Papers have been provided to the Parliament. I would encourage the Committee Members to avail themselves of Hansard's record of questions and answers given on this topic as well as those documents made available in the S.52 Legislative Council Call for Papers.

In view of the substantial amount of information which has already been placed on the public record, I respectfully decline your request to attend and give evidence.³⁸³

- 8.53** The Committee has received similar responses from Mr Tripodi, Mr Scully and Mr Sartor. The Committee is extremely disappointed by the responses received from the Premier and Ministers. While acknowledging the written answers provided to the Committee, the failure of the Premier and Ministers to appear before the Committee has significantly impeded the Committee's ability to properly address its terms of reference and is an example of a breakdown in accountability mechanisms of Ministers.

³⁸³ Correspondence from the Hon Morris Iemma MP, Premier to the Chairman, 18 January 2006. All correspondence between the Chairman and the Premier and Ministers relating to their appearance before the Committee is available on the Committee's website www.parliament.nsw.gov.au/crosscitytunnel.