

**Submission
No 104**

INQUIRY INTO ROAD TOLLING

Organisation: Toll Redress
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Inquiry into Road Tolling

Submission prepared by Toll Redress

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1. Purpose of this submission

Toll Redress is a business entity that was formed to research tolling systems, consult with stakeholders, and assist consumers who have been affected by the tolling industry. After advocating for nearly two years on road tolling issues, we established Toll Redress to conduct further research and provide further assistance to the thousands of people who have contacted us from around Australia.

Other submissions by community groups and individuals will likely adequately cover the Terms of Reference listed for this inquiry and will cover a variety of issues New South Wales currently faces. We believe we can provide unique insight into some of these Terms of Reference but also into other related matters that will be of interest to policymakers, stakeholders and consumers.

These insights are drawn from extensive research and observations made from the case studies of a number of affected people in NSW and all around Australia.

2. Transurban Limited

Transurban Limited is an Australian toll road company operating in Queensland, New South Wales, Victoria and Virginia (USA)¹. They have a monopoly on toll roads in Australia and are an ASX listed billion dollar company. They began in Victoria and their longest-serving government arrangement is Melbourne's CityLink, where they entered a Public-Private Partnership (PPP) in 1995².

Along with CityLink, they operate the Roam and RoamExpress network in NSW and the go via network in QLD. They hold lucrative contracts with state governments and agreements with the NSW Government are under concession until 2035 (Cross City Tunnel), 2048 (Eastern Distributor), 2048 (Hills M2), 2026 (M5 South West), 2048 (Lane Cove Tunnel) and 2048 (Westlink M7).

¹ Transurban Limited, <https://transurban.com/our-operations/our-roads>

² The Age, 'Transurban the making of a monster', <http://www.theage.com.au/victoria/transurban-the-making-of-a-monster-20160512-gotjm9.html>

3. Contract negotiations: how they are negotiated and opportunities to increase public scrutiny and accountability of these negotiations

Toll road contracts in Australia normally operate under Public-Private Partnerships (PPPs). Contract negotiations around toll roads are not made public and frequently classed as 'commercial-in-confidence'. The outcomes of the contract negotiations, such as new agreements, are also considered commercial and not released to the public.

This eliminates the public's ability to understand what the State has signed them up for and to scrutinise the new deals, and makes it difficult for the media to act as the fourth estate and uphold their duty to report on matters of public interest.

There have been clear examples of questionable practices in toll road contract negotiations interstate. With Victoria's bungled East-West Link project, Transurban approached the state government with an unsolicited proposal³ and a promise to fix the political mess the government was in. Transurban proposed toll road Western Distributor, which included a funding model with a contract extension for Transurban's CityLink of 10 years⁴. These negotiations, despite the controversy at the time, are hidden to the public.

Westconnex negotiations are also hidden to the public, despite the huge public interest in the project and mounting pressure by action groups.

Professor Graeme Hodge, a Monash University professor, has written several articles about PPPs and was quoted in *The Scandal* last year about the secrecy of the deals made by governments and private companies. Professor Hodge said:

"The real question is whether or not you allow Transurban to be as influential as it is currently - and I would say as secret as it is currently - when it does deals.

"It all comes down to what deal has government done in your name as a citizen."⁵

³ The Age, 'Melbourne to get new western suburbs toll road', <http://www.theage.com.au/victoria/melbourne-to-get-new-western-suburbs-toll-road-20151208-gli7pj.html>

⁴ The Age, 'Melbourne to get new western suburbs toll road', <http://www.theage.com.au/victoria/melbourne-to-get-new-western-suburbs-toll-road-20151208-gli7pj.html>

⁵ The Scandal, 'Hiding the public from Public-Private Partnerships', <http://thescandal.com.au/news/transurban/transurban-a-case-for-a-senate-inquiry-31-8-2016>

In September last year, Greens Senator Janet Rice motioned for an increase in transparency of tolling agreements held with the government⁶. Her motion received 14 ayes and 54 noes⁷. No one from the Australian Labor Party or Liberal National Party supported the motion.

If more information was readily available and our Senators had more exposure to the issues, this motion would have had a much greater chance of passing. We think educating the Senate is an essential part to addressing the issues surrounding transparency.

The Sydney Morning Herald has reported that community groups are the least likely to gain access to information through the Right To Information process. This means that the public could not access agreements through their elected representatives (Senator Rice's motion), and could not access information through government process.⁸

SMH also reported that under the Baird Government, the Roads and Maritime Services saw a doubling of the "secrecy" excuse to block public access to documents, applying it in 514 cases. The private sector, however, was less likely to be blocked for "secrecy" reasons to access government documents, and were more likely than any other group to gain access.⁹

Under the current system and in addition to blocking individuals and those representing the community from accessing government documents, there is no accountability because there is no transparency. While this lack of transparency continues, the private sector will continue to enjoy soaring profits at the expense of Australian toll road consumers.

If the word 'public' is to carry any meaning in the term Public-Private Partnerships, all PPP agreements and negotiations should be made publicly available and easily accessible online, as well as in libraries.

⁶ Parliament of Australia, Senator Rice motion, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;db=CHAMBER;id=chamber%2Fhansards%2F281d54bc-cf9c-4ec8-899c-1df197bb4473%2F0095;orderBy=_fragment_number,doc_date- rev;page=0;query=Dataset%3Ahansards,hansards80%20Date%3A12%2F9%2F2016;rec=0;resCount=Default

⁷ Parliament of Australia, 'The Senate divided', http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;db=CHAMBER;id=chamber%2Fhansards%2F281d54bc-cf9c-4ec8-899c-1df197bb4473%2F0098;orderBy=_fragment_number,doc_date- rev;page=0;query=Dataset%3Ahansards,hansards80%20Date%3A12%2F9%2F2016;rec=0;resCount=Default

⁸ The Sydney Morning Herald, 'Baird government labelled 'secret state' as information increasingly blocked', <http://www.smh.com.au/nsw/baird-government-labelled-secret-state-as-information-increasingly-blocked-20160227-gn56hb.html>

⁹ The Sydney Morning Herald, 'Baird government labelled 'secret state' as information increasingly blocked', <http://www.smh.com.au/nsw/baird-government-labelled-secret-state-as-information-increasingly-blocked-20160227-gn56hb.html>

An additional measure would be to ensure more accountability is laid upon the relevant Ministers, Treasurers and Premiers who sign off on these agreements.

It is interesting to observe that the government saw fit to have laws in place to hold builders and developers accountable for their projects for 6 years (or potentially longer) after completion¹⁰. Yet, it appears that ex-NSW Premier Mike Baird can sign off on billions of dollars worth of road developments that have seen one problem after another, but seemingly walks away without consequences regardless of ongoing impact to the community.

Concession deeds in Australia can be as much as 50 years and are often signed off by people who will have been retired for 30 years by the time the deed has expired. This is concerning because everyone being rewarded or remunerated by the deal is motivated to do the deal and get paid, despite the fact that most or all of them will be long gone before the true effects of the deal are realised.

Legislation that supports consequences to the relevant politician or party that approve of decisions that end up being against the public interest, could help protect the public and improve accountability for politicians in Australia.

4. Opportunities to increase assurances to the public that tolling arrangements represent the fairest possible outcome

For there to be genuine opportunity to assure the public that tolling arrangements represent the fairest possible outcome, tolling arrangements must first represent the fairest possible outcome. At current times, this is not the case.

The private sector appears to benefit greatly from the PPPs with toll roads, and the public only appears to suffer.

Currently, Australians have over \$1 billion in toll penalty debt¹¹. This does not include money owed to the tolling operator. This only includes unpaid toll debt that sits with government departments, meaning the true amount of toll debt is much greater again.

We have surveyed disaffected consumers of toll roads and it is clear that the

¹⁰ Fair Trading, NSW Government, 'Home Building Amendment Act 2011', http://www.fairtrading.nsw.gov.au/Factsheet_print/About_us/Legislation/Changes_to_legislation/_Home_Building_Amendment_Act_2011.pdf

¹¹ A Current Affair, 'Toll Rort', <https://www.9now.com.au/a-current-affair/2016/clip-cisjf9f6m00150hmvqc7oo2u9/1724fd01-8972-4693-918f-f226b72f115d>

current tolling arrangements are unfair. The most common grievances are regarding the “outrageous” fees and fines for missing a toll payment, the escalation process to the state government and debt collectors, faulty e-Tags, not receiving toll non-payment notices and then being fined heavily, and poor customer service experienced by local and international call centres and customer service representatives. We also hear many instances of consumers wanting to pay their tolls and make their best efforts to do the right thing, but find themselves in debt – in some cases, upwards of \$100,000.

From what we have seen it is a misconception that the bulk of unpaid toll debt in Australia is a result of delinquent motorists. Systemic issues that significantly contribute to the public owing \$1 billion in toll penalties and even more that sits with private toll companies, is a matter that needs to be reviewed immediately.

Apart from substantial toll debt, these tolling arrangements also greatly disadvantage the wider community. Non-compete clauses should be struck from all toll operator contracts with the State, as this is far away from “the fairest possible outcome” for the public.

Former NSW Auditor-General Tony Harris said on a Four Corners program in 2006:

“You do close your options down because the government then has to enter agreements with the private owners not to develop public transport options over the life of a contract – 30 or 40 years. I mean 30 or 40 years ago we were still running trams in Sydney. It’s a long period of time. Most of the people in Sydney were not there 30 or 40 years ago. In 30 or 40 years time the same thing will happen. Most people in 30 or 40 years time in Sydney will not be around at the time these contracts were sold.¹²”

The government has entered into PPPs with toll road operators, with it being their responsibility to meet the public’s needs and to act in the public interest. According to Mr Harris, the government is agreeing not to develop public transport options over the life of a toll road contract. We have seen all over Australia that toll road contracts are generously extended when operators offer to do maintenance and construction on government roads. It appears this could be a considerable factor in the lack of an efficient, effective public transport system.

¹² Four Corners, ‘Tony Harris’, <http://www.abc.net.au/4corners/content/2006/s1573798.htm>

5. An examination of road tolling arrangements in overseas jurisdictions

Shadow tolls are also a matter for policymakers to consider. They are payments resulting from PPPs, paid to private toll road companies from government funds. This practice is based on how many vehicles use the toll road and is protected by a contractual agreement. The private company accepts obligations and risks of the construction and operation of the toll road, and in return receives periodic shadow toll payments. This can be in place of or in addition to tolls paid by motorists.¹³

One argument for the shadow tolling system is that it could eliminate the need for consumers to pay tolls directly, or reduces the toll payment by the consumer. This is not necessarily the case - The burden of the payment of tolls is then shifted to the Government, and that money ultimately comes from the taxpayers.

The shadow toll-funding model is common in Europe and Britain, with the general consensus indicating it is bad value for the taxpayer. In one treasury report in the UK, it was determined that the cost of capital for a typical shadow tolling project was over 8% which was double the long term government gilt rate of approximately 4%. They concluded it represented significant cost to taxpayers¹⁴

We cannot determine if shadow tolling or a similar model is being used in Australia in addition to the user-pay system that is currently in place. However, what we do know is that calling for a toll-free period after a road has been constructed is a popular call made by groups and politicians. While a toll-free period may eliminate consumers paying tolls directly, unbeknownst to them, they may still be paying. There needs to be greater transparency around “toll-free periods” and clear information on if, when, where and how the secret shadow tolling system in Australia works.

It's concerning to note that our Australian-owned Transurban, that operates most of the toll roads in NSW, have disrupted the community in a very short space of time since they began doing business in Virginia, USA. Transurban filed 26,000 lawsuits against drivers in 2014 alone¹⁵. Transurban lost cases for

¹³ https://www.fhwa.dot.gov/ipd/revenue/road_pricing/resources/selective_use_shadow_tolls.aspx

¹⁴ http://www.bettertransport.org.uk/sites/default/files/research-files/Problems_with_Private_Roads_FinalWeb.pdf

¹⁵ Fox 5, 'Defense attorney unveils strategy to challenge huge E-ZPass Express Lane fines', <http://www.fox5dc.com/news/1448817-story>

exceeding the statute of limitations¹⁶, and have been caught using “non-lawyers”¹⁷ to represent them. A judge ruled “non-lawyers” could not and cannot represent Transurban, however they still engage them to negotiate court settlements.

This is what has happened when the toll road operator was given too much control in the tolling industry - they were allowed to be their own enforcer. Transurban have hinted about having a National Enforcement Agency for unpaid tolls in Australia. We believe they will lobby the government to privatise it and award them the tender.

6. Any other related matter

a. Government influence

Operating 13 toll roads in Australia (six in New South Wales), Transurban has a monopoly on toll roads. One of their advisors is ex-Premier of NSW Nick Greiner¹⁸, and the company enjoys similar strong relationships with those in government across the country.

Through our research, we discovered that a concerning number of current Transurban employees came from various influential government departments. We observed a similar pattern with ex-Transurban employees moving into government jobs, and in some cases, have ended up in decision-making positions. Their recruitment strategies seem to find favour with those previously holding government positions, which could present undue influence and intimate knowledge of systems, allowing them to engineer better outcomes for their profit-driven agenda.

Transurban CEO Scott Charlton also sits on the Board of Roads Australia alongside the CEO of the Roads and Maritime Services, Ken Kanofski, and his counterparts in Victoria and Queensland¹⁹.

Through their investor presentations, Transurban has indicated they are advocating for a user-pay system where motorists pay for every

¹⁶ Washington Post, ‘Judge drops case of woman accused of failing to pay beltway express lane tolls’, https://www.washingtonpost.com/local/crime/judge-drops-case-of-woman-accused-of-failing-to-pay-beltway-express-lane-tolls/2015/04/09/b07cd8c0-de29-11e4-be40-566e2653afe5_story.html?utm_term=.c5870d10529b

¹⁷ United States District Court Eastern District of Virginia, Alexandria Division, ‘Class Action Complaint’, <http://web.archive.org/web/20150824180436/http://www.hausfeld.com.php54-1.dfw1-1.websitetestlink.com/TransurbanComplaint.pdf>

¹⁸ Nick Greiner, <http://www.nickgreiner.com.au/>

¹⁹ Roads Australia, <http://www.roads.org.au/About-Us/Our-Board>

kilometre they drive. They want this implemented within five years. Government body Infrastructure Australia recently released a report backing this plan²⁰, and Prime Minister Malcolm Turnbull also backed the plans²¹.

Transurban has conducted themselves in such a manner that has them in first place for any such system to be implemented – they already have a monopoly on existing tollways and have conducted research on the user-pay system they propose.

Our own research has indicated that under Transurban’s plan to toll all roads, motorists will be worse off, particularly those struggling financially. Under their model, motorists pay for what they use. This means that those who live upwards of 50km out of the city - because they cannot afford to live closer to the CBD where there are higher paying jobs - will end up paying much more to drive to work than their richer peers who live 5-20km from the city.

Despite this logic, Prime Minister Turnbull has backed these plans, further dividing communities and making it more difficult for those struggling to live comfortably.

b. Political donations

Transurban Limited has donated to the Liberal National Party and the Australian Labor Party, as well as state branches of each.²² Their history of donations could be the reason why Transurban receives so much political favour in their private operations.

Transurban has also been in trouble for making illegal campaign contributions in the USA, where they operate two toll roads. They donated \$172,000 to 90 campaigns in Virginia, USA over three years²³. They admitted to making these illegal donations. Regardless of their impropriety, they subsequently won the concession deed.

²⁰ Infrastructure Australia, ‘Australian Infrastructure Plan’ (page 83)
http://infrastructureaustralia.gov.au/policy-publications/publications/files/Australian_Infrastructure_Plan.pdf

²¹ News.com.au, ‘Malcolm Turnbull puts microscope on roads, rail in new infrastructure review’,
<http://www.news.com.au/national/politics/malcolm-turnbull-puts-microscope-on-road-rail-in-new-infrastructure-review/news-story/4ba88e3eda647c8ebc875bf4b365bc40>

²² Australian Electoral Commission, ‘Donor Annual Return 2015-16’
<http://periodicdisclosures.aec.gov.au/Donor.aspx?SubmissionId=60&ClientId=23182>

²³ Washington Post, ‘Toll road firm makes illegal contributions’, http://www.washingtonpost.com/wp-dyn/content/article/2008/07/02/AR2008070203200_pf.html

c. Tolling Customer Ombudsman

The Tolling Customer Ombudsman (TCO) service is meant to provide an independent service to disaffected toll road customers who wish to dispute a decision made by a toll road operator. It is important to note that the TCO does not have the same powers as other Ombudsmen services - once an unpaid toll escalates to the state government (the State Debt Recovery Office in NSW), the TCO has no powers to intervene or freeze further escalation.

The implementation of the TCO service and the legitimacy of its current operation have raised concerns, and further points to a problematic tolling system in need of review.

Over the past 12 years, the TCO service has never been a member of the Australia New Zealand Ombudsman Association (ANZOA), which is Australia's peak body of Ombudsmen²⁴.

In a publication written by ANZOA, they reference concern about "Ombudsman" bodies that do not conform to the accepted model and are inappropriately described as an Ombudsman office.

The policy statement reads:

"Our view is that a body should not be described as an Ombudsman unless it complies with six essential criteria addressing independence, jurisdiction, powers, accessibility, procedural fairness and accountability."²⁵

As the TCO is not responsible to an independent board of industry and consumer representatives and that it operates as a for-profit organisation (as it operates under Lorimax Pty Ltd – a business that the lead Ombudsman is a director of), it appears the TCO would not meet Independence and Accountability criteria.

If Australia's peak body of Ombudsmen would not describe the TCO as a legitimate Ombudsman, it cannot be expected that Australian toll road customers trust this service.

Further to missing key criteria of ANZOA's policy statement, the

²⁴ The Scandal, 'The need to establish an official tolling ombudsman service', <http://thescandal.com.au/news/transurban/the-need-to-establish-an-official-tolling-ombudsman-service-31-8-2016>

²⁵ Australia New Zealand Ombudsman Association, 'ESSENTIAL CRITERIA FOR DESCRIBING A BODY AS AN OMBUDSMAN', http://www.anzoa.com.au/assets/anzoa-policy-statement_ombudsman_essential-criteria.pdf

implementation and history of the TCO raise pertinent questions about the agenda behind the TCO service and its independence.

According to the TCO's September 2012 - February 2013 Review, the TCO was the idea of a Transurban's spokesperson, who was a driving force in its establishment²⁶. This spokesperson had previously worked as a spin-doctor for a former Victorian Premier.²⁷

The agenda behind creating the TCO service is clear, given it was 'driven' by someone whose job it is to be concerned with media and public image, rather than with disaffected customers experiencing poor service at the hands of the toll road operator.

Until recently, the 'independent' TCO website was also owned by Transurban Limited. Transurban was listed as the Domain Registrant, while the Registrant was a Transurban employee.

If the TCO was truly independent of Transurban, their publications might provide more critical discussion and informative data. The TCO's six-monthly reviews provide minimal detail that is hard to follow and understand.

It is important that any and all data that could point toward identifying the overarching cause of tolling problems be made publicly available. And it seems that the TCO does not publish semantic and critical data on toll road complaints to ensure stakeholders are able to identify the root of the problem.

The TCO also does not have a dedicated fax machine, and instead uses the one at the Hawthorn Post Office.

If a customer wishes to call the TCO, a 1800 number is supplied but operating hours are not referenced on the website. The TCO also does not publish an office address online and when asked for it by customers, does not usually provide it.

A Brisbane City councillor wrote to Transport and Main Roads Minister Mark Bailey, seeking an independent ombudsman service in place of the existing TCO. On 25 October 2016 in council proceedings, Councillor Amanda Cooper said:

"I myself wrote to Minister Mark Bailey on 9 September, so more than six weeks ago, and sought his support for the appointment of

²⁶ Tolling Ombudsman, 'TCO Review', <http://www.tollingombudsman.com.au/TCO%20Review%20-%20Sep%2012%20to%20Feb%2013.pdf>

²⁷ The Sydney Morning Herald, 'Yes it's a tough job but someone has to sell it', <http://www.smh.com.au/national/yes-it-is-a-tough-job-but-someone-has-to-sell-it-20100106-lubz.html>

a tolling ombudsman that is independent of the commercial toll operators and independent of government. Unfortunately, I did this because I think this is a genuine issue. We certainly have determined that the existing Tolling Customer Ombudsman who operates is actually paid for by Transurban, which may be perceived to be somewhat of a conflict of interest for them to be operating in this particular space. I suggested in my correspondence to the Minister that this role could be a role very similar to that of the Queensland Ombudsman. Unfortunately, six weeks later, he still has not responded to my letter to him.”²⁸

d. Administration fees

In 2001, Transurban increased their Administration Fee for non-payment of tolls in Victoria. They did this without seeking permission from the State.²⁹ In 2002, as a reactive measure, the Victorian Government engaged an accounting firm which found a cost-based fee of between 28 and 93 cents could be justified.³⁰

They then agreed that the Administration Fee no longer had to be cost-based and that it should be set at a level which acts as a deterrent for road users who fail to carry their e-tags.³¹

Contrary to this, in Queensland, the Transport Infrastructure Act says "an Administration Charge ... for a toll must not be more than reasonable cost ... of issuing a notice for, and collecting the unpaid toll and administration charge for the toll."³²

²⁸ Brisbane City Council, 'Minutes of Proceedings', 25 October 2016, <https://www.brisbane.qld.gov.au/sites/default/files/20161102-council-minutes-post-recess-25-october-2016.doc>

²⁹ Auditor General Victoria, 'Report on Public Sector Agencies', 2003-2004, page 60, <http://www.audit.vic.gov.au/publications/2004/20040526-Financial-Statement-and-other-audits-for-Balance-Dates-other-than-30june-2003.pdf>

³⁰ Auditor General Victoria, 'Report on Public Sector Agencies', 2003-2004, page 67, <http://www.audit.vic.gov.au/publications/2004/20040526-Financial-Statement-and-other-audits-for-Balance-Dates-other-than-30june-2003.pdf>

³¹ Auditor General Victoria, 'Report on Public Sector Agencies', 2003-2004, page 60, <http://www.audit.vic.gov.au/publications/2004/20040526-Financial-Statement-and-other-audits-for-Balance-Dates-other-than-30june-2003.pdf>

³² Transport Infrastructure Act 1994, Section 93, page 104, <https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/T/TranstInfA94.pdf>

Transurban also made acknowledgment of this on a national level in August 2016 - "These fees are required to reflect the actual cost associated with issuing these Invoices/Notices..."³³

The Administration Fees gazetted in Queensland sit at \$23.46 per unpaid toll.³⁴ Administration Fees attract a similar cost in Victoria and New South Wales. Transurban sometimes issue over 100 unpaid tolls - each with an Administration Fee - in the same letter, causing the Administration Fees to run into thousands of dollars.

Since 2002, there have been great advancements in technology which have led to a reduction in the cost of communicating with customers and issuing notices electronically. Yet, even if we were to disregard the technological advancements and were to apply the CPI to the Administration Fee, an Administration Fee surely would not cost anymore than a maximum of \$5.

Clearly, the toll road operators are abusing the Administration Fee provisions available to them and misusing the legislation by issuing many Administration Fees at once, which any reasonable person would conclude is many times the true cost.

7. Final Word

It is concerning that toll road operators such as Transurban have so much influence over government decisions, and that the deals are enshrined in secrecy. Toll roads are a fast growing cancer throughout our road network in Australia. We fear that if we don't act now, the damage will be irreversible. Hopefully inquiries such as this will help us find our way into remission.

³³Tolling Ombudsman, 'Reference: TCO Review 1st September 2015 - 29th February 2016' (page 2), <http://www.tollingombudsman.com.au/TU%20Response%20-%20Sep%2015%20to%20Feb%2016.pdf>

³⁴Queensland Government, Queensland Government Gazette (page 507), <https://publications.qld.gov.au/dataset/9bb0d005-e583-442d-aa4d-26879250e105/resource/9985c1bd-0fa4-403b-ab9d-83b5c372b475/download/08.04.16---combined.pdf>