Submission
No 56

INQUIRY INTO CROSS CITY TUNNEL

Organisation:

Name: Mr Malcolm Duncan

Telephone:

Date Received: 18/01/2006

Theme:

Summary

Partially Confidential

SUBMISSION TO JOINT COMMITTEE INTO THE CROSS-CITY TUNNEL (CCT)

MALCOLM B. DUNCAN

18 JANUARY 2006

Note: 1. It is requested that Appendix 3 of this submission not be made public until the Committee has submitted a final report.
2. This submission does not purport to give legal advice and any reliance placed on opinions expressed in it is at the reader's own risk.
3. The views expressed in this submission are the personal views of the author except where otherwise indicated.

CONTENTS

A.	SYNOPSIS	Page 2
B.	EVOLUTION OF A DINOSAUR	Page 2
C	THE COMMITTEE'S TERMS OF REFERENCE	Page 3
D	POLICY CONSIDERATIONS IMPINGING ON PPPs RELEVANT TO THE CCT MODEL	Page 5
E	SANCTITY OF CONTRACT	Page 6
F	CONDUCT OF RTA	Page 7
G	COMMERCIAL CONFIDENTIALITY	Page 8
H	THE CONSEQUENCES OF THE PROJECT AS BUILT	Page 9
I	COMMUNITY CONSULTATION ("CC")	Page 14
J	TRAFFIC MODELLING – TWO WRONGS DON'T MAKE A RIGHT	Page 16
K	EVIDENCE GIVEN TO THE COMMITTEE IN DECEMBER	Page 17

L UTILITARIAN BENEFITS CAPABLE OF ARISING OUT OF THE INQUIRY — Page 18

M SUMMARY OF FORMAL RECOMMENDATIONS — Page 19

Appendix 1 - RELEVANT CV OF THE AUTHOR — Page 21

Appendix 2 – A PERSONAL VIEW OF THE CCT EXPERIENCE — Page 22

Appendix 3 - FURTHER QUESTIONS THAT SHOULD BE ASKED OF WITNESSES WHO APPEARED IN DECEMBER — Page 28

A. SYNOPSIS

This submission gives a brief outline of the history of the development of the CCT followed by a consideration of the Terms of Reference and relevant Policy Considerations arising out of the formulation and implementation of the project.

After analysing the contractual difficulties and the terms of the contract, it makes specific recommendations as to the solutions that may exist to the traffic chaos caused by the project and the contract.

B. EVOLUTION OF A DINOSAUR

B1 The first point to be made is that the CCT as built is not the CCT as approved either at the EIS or Supplementary EIS ("SEIS") stage. Accordingly, the finished product has never been on public display or the subject of detailed public comment.

B2 The original proposal envisaged a Western Portal which allowed traffic from the West to access the city as it always had done via a variety of routes. Essentially, that has not changed and Eastbound traffic wanting to bypass the city to emerge at any of the three mooted exit points (College Street, the Kings Cross Tunnel or Rushcutters Bay) could always do so relatively easily. The Eastern Portal was originally designed to emerge at College Street which, even with the proposed narrowing of William Street, still allowed the traditional access to the city

from the East via the alternative routes of Cowper Wharf Road and Sir John Young Crescent.

B3 The EIS modified the Eastern entry/exit so that the Eastern Portal shifted to the East to the Kings Cross Tunnel. This still preserved the Woolloomooloo access to the city.

B4 The SEIS however produced a disaster. Like it or not, there is a need for traffic (both passenger and commercial) to enter the CBD. Under the Eastern Portal/Woolloomooloo modifications the SEIS effectively made it impossible for a smooth flow of traffic from Cowper Wharf Road either to the city or the Harbour Tunnel/Bridge. Traffic wishing to enter the central CBD from the east could not use the CCT and was effectively channelled into William Street which was still to be narrowed in accordance with the original proposal.

B5 The SEIS has been further modified but associated footpath widening around the Victoria Street/Darlinghurst Road intersection (the true Kings Cross) and the modifications to the intersections of Sir John Young Crescent/Cowper Wharf Road and Shakespeare Place/Macquarie Street with associated changes to traffic signals and phasing have made access to the CBD proper a nightmare. In addition, changes to the phasing of the traffic lights between McLachlan Avenue and Ocean Street along New South Head Road have produced traffic jams the like of which I have never before encountered (and I have spent the majority of my life in the Eastern suburbs).

B6 It is now apparent that the essential flaw in the project is that it does not allow access to the CBD where the traffic actually wants to go. Clearly, the "traffic modelling" about which Mr Wilson gave evidence is plain wrong (see J below). While there is certainly resistance to the level of the toll, I get the strong anecdotal impression that people from the East do not use it because it does not take them where they want to go i.e. the CBD. These are not the sorts of people who begrudge a toll. This impression is reinforced by the extremely low uptake rate during the toll-free period. Living where I do, for example (the northern end of Victoria Street with a garage in Woolloomooloo) it is still quicker to get to the CBD by surface than to drive to Rushcutters Bay only to be spat out at Bathurst Street. Getting home, however is another matter entirely.

C THE COMMITTEE'S TERMS OF REFERENCE

1 (a)

It is clear that the negotiations were done by the RTA. Despite the hours I have spent going through the released documents, I have seen no evidence that the then Premier, Mr Scully, Mr Knowles, the then Treasurer or the Cabinet Standing Committee on the Budget was ever

given a copy of the contract or briefed on its essential terms. Accordingly, they can have had no role in negotiating the terms: *nemo dat quod non habet.*

RECOMMENDATION: It is submitted that the Committee should censure the persons named above for wilful ignorance and recommend that appropriate procedures be implemented whether under the Public Finance Administration Act or otherwise to ensure that no such thing occurs in the future.

1 (b)
It is clear from the produced documents and the evidence to the Committee that there was no public consultation as to the terms of the contract or its substance (particularly Clauses 18 and 19 and the underwriting of the RTA's obligations under the contract by the Government which, had they been public prior to signing, would have created a public scandal). Indeed, the RTA went to extraordinary lengths to keep those details secret even to the extent of including in Clause 18.1 that the surface restrictions were not to be commenced until after the CCT opened.

1 (c)
The evidence reveals that this was a farce. The RTA was so strapped for cash that it took the only up-front payment offered even on unfavourable terms in the long run.

RECOMMENDATION: The Committee should recommend that the Auditor General be asked to investigate the financial records of the RTA as at July to December 2002 to determine what its true financial position was and whether there was a real need in the public interest to require an up-front payment.

1 (d)
This is addressed below at F1 and G.

1 (e)
See 1 (a) and the discussion at G below.

1 (f)
See below at D, E and G. It beggars belief that for what eventually amounted to a payment of some $140M, all of which was expended on CCT associated works anyway, a Public Authority with the Charter responsibilities such as those imposed on the RTA could seriously

contemplate entering into a contractual arrangement which locked it in to no road changes on certain vital routes servicing the most densely populated area in the Commonwealth for a period of 30 years. It is even more astonishing that in a system of presumed responsible government no-one turned his mind to the potential budgetary effects of this deal and their propensity to bind the capacity of future Parliaments to act. The "Change in Law" clause embodied in Clause 21 (b) of the 2002 contract is just extraordinary. In my career I have been fighting governments of all persuasions for something over 20 years now and I can say unequivocally that this is the worst piece of public administration I have ever seen and I have lived through 10 Premiers and 9 Prime Ministers.

1 (g)
See below *passim*.

D POLICY CONSIDERATIONS IMPINGING ON PPPs RELEVANT TO THE CCT MODEL

D1 UP-FRONT PAYMENTS ("U PAY") BY CONTRACTORS

D1.1 Interestingly enough, from my reading of the evidence, this has emerged as the principal policy consideration arising out of this reference. While there is no suggestion that this in any way constitutes corruption in this case, the principle it raises appears novel in that, if I read the evidence correctly, this is the first such project in which a Government instrumentality has been paid to allow a project to be constructed for the ultimate public benefit.

D1.2 The policy issue as I see it is that U PAY has the potential to subvert the Constitutional requirements relating to the Consolidated Fund (Constitution Act Part 5; see Egan 6/12/05 pp 44-5). The Consolidated Fund will always be needed for appropriations for non-profit making institutions essential to society such as Schools and Hospitals. Anything which has the potential to undermine that base needs to be treated warily.

D1.3 U PAY will presumably only exist in a corporatised State instrumentality environment. They lead to the potential for corruption and leave open a way of avoiding close Parliamentary scrutiny through the Appropriation Bill process (Constitution Act s 45 and see Twomey A. *The Constitution of New South Wales* Federation Press, Sydney 2004 pp 561-3).

D1.4 This raises serious questions about the operation of s 13A of the Public Finance and Audit Act 1983 and the Public Authorities (Financial Arrangements) Act 1987 and the Committee might well recommend that a review of this legislation be undertaken with a view to assessing this new development in what is essentially public finance which avoids payment into the Consolidated Fund. Similar considerations may be generally applicable to the M7 and Lane Cove projects notwithstanding that they are outside the strict terms of reference under which the Committee is charged. The Committee may also wish to provide recommendations as to guidelines to be introduced to ensure proper Parliamentary scrutiny of these funds, their collection, investment and expenditure. It may be appropriate that such oversight be exercised by the Auditor General.

D2 THE CHANGE IN LAW CLAUSE – CLAUSE 21 (b)

D2.1 On one view, this may be void for public policy as a fetter on the sovereignty of Parliament but why should the poor benighted NSW taxpayer have to pay to test the proposition in Court when it should never have been allowed in the contract in the first place? It is rather difficult to avoid the impression that the CCT consortium saw the RTA coming.

E SANCTITY OF CONTRACT

E1 Philosophically, there are two views about the law of contract. There is the traditional view repeatedly espoused by the Chief Justice of the High Court first articulated by him when he was Chief Justice of New South Wales that the law should hold people to their contractual bargains. I respectfully disagree and subscribe to the view that a contract is an agreement which, at law, gives a right to damages for its breach. The latter view is shared by most of the robber barons who operate in the commercial world. It is actually the way commerce works in practice.

E2 I note that the evidence reveals that the RTA and Treasury officers seem almost superstitiously to adhere to the Chief Justice's view. I suspect the witness Greiner is of a different hue – at least these days they don't let him near any timber businesses. It may, in practical terms, simply be a difference between operating in the real world of cut and thrust commerce and not. Be that how it may, there is nothing sacred about this contract and both the witnesses Carr and Greiner would remember the precedent well.

E2.1 Yates and Darling Harbour

E2.1.1 I happened to be in the gallery in the Assembly the night Carr, then Environment Minister in the Wran Government moved the Bill to resume a strategic parcel of land owned by Mr Yates without compensation so that Carr's little mate Laurie Brereton could build the stately pleasure palace he had decreed at Darling Harbour. Greiner was Leader of the Opposition at the time.

E2.1.2 Notwithstanding the legislation Yates did ultimately succeed in gaining some compensation but only after he had lost his business. I should be surprised if Mr Brereton were on his Christmas cigar list.

E2.2 Legislative requirements/regime

E2.2.1 This was possible because the Constitutional position is that it is only the Commonwealth that is required to give fair compensation for the resumption of private property. Committee members might recall that a Referendum proposal put by the Hawke government to extend that principle generally throughout the Commonwealth failed in 1988 along with a raft of other sensible reforms. Since, the State Parliament has passed legislation to provide for compensation but an Act could still be passed specifically exempting a resumption of CCM's property from the operation of the Resumption Act providing for no compensation whatsoever. That seems a little harsh and is why my Party has adopted a policy of buyout at cost. Nevertheless it is not only an option but a powerful bargaining chip.

E2.3 To Compensate or not to Compensate?

E2.3.1 The witness Egan would go into paroxsysms at the thought of resumption without compensation. What would happen to the State's credit rating? Such are the nightmares of those affected by managerialism. My frank view is that Poors need NSW more than NSW needs a bunch of beancounters but, on balance, the fair thing is to provide compensation.

F CONDUCT OF RTA

F1 Release of documents

F1.1 The manner in which the RTA answered the Council's order to produce documents was outrageous and contemptible in the face of the Parliament. The documents were not sorted, indexed or in chronological order. This made it much harder to sift through them and wasted many hours. They were presented like a dog's breakfast and piecemeal. It is a disgrace.

F1.2 The RTA's failure to comply with the spirit of Ministerial Conditions of Approval [Conditions 11 (d) - (f), 12 (b) – (d)] and the question of misrepresentations/lack of frankness is dealt with in Appendix 2.

G COMMERCIAL CONFIDENTIALITY

G1 Hush, Hush, Whisper Who Dares?

G1.1 Questions of National security, unfettered Cabinet discussions, real questions of privilege, and the private sex lives of consenting adults apart, secrecy is bad public policy. It breeds conspiracy theories. Nevertheless, there are circumstances in which confidentiality is acceptable.

G2 The proper application of the concept

G2.1 The negotiating stages in arriving at any bargain are a legitimate ground for confidentiality. Commercial reality is such that one does not want one's competitors stealing a march by way of unfair advantage. That is the (quite proper) rationale for tender processes. There is also a legitimate role for the protection of such things as patents prior to registration or the preservation of interests in intellectual property. The policy question is: "How far should it be taken?"

G3 A model for public scrutiny

G3.1 Public administration is a matter of balancing "the need to know against the right to know" - seems to be a phrase that echoes in the dulcet tones of Sir Humphrey somewhere in the recesses of my mind.

G3.2 Dr Schott (7/12/05 p 14) said in evidence:

> [release should be permitted] when the contract is executed. We cannot release while we are in the middle of negotiations.

I agree with the latter but not the former. A major public infrastructure project such as is under consideration here is not some mere commercial

transaction: it has the potential to affect all taxpayers in the State whether they use the facility or not. They have a legitimate interest in knowing what it is about. Because of the overwhelming public interest in such projects, an adequate protocol needs to be developed for dealing with them. The Committee should give consideration to developing such a protocol and recommending its parameters.

G3.3 It is submitted that the commercial interests of all parties would be adequately protected in circumstances such as these by the conduct of the ordinary tender process, the selection of a successful tenderer and the execution not of a formal contract but binding Heads of Agreement followed by the release of a draft contract for public comment and, if appropriate, amendment to reflect that comment. The execution of Heads of Agreement subject to terms is a perfectly normal commercial process familiar to any commercial lawyer.

G3.4 The sheer number of drafts of the 2004 Variation to the contract is testament both to the fact that contracts are not written in stone and the capacity of both sides to engage in negotiations over details after an in principle agreement has been reached. While this is not a reflexion on Dr Schott because she expressed her view comprehensibly, the evidence of the Lord Mayor (9/12/05 p 22) that contracts should be made public immediately after signing is facile and demonstrates a lack of understanding of basic contractual principles.

H THE CONSEQUENCES OF THE PROJECT AS BUILT

H1 It should be readily conceded at the outset that, because of Sydney's topography and current traffic volumes, there is no "best" solution to the overall traffic problem. The remedies suggested below for the problems identified are the "worst best solutions" for very difficult problems. Were it not for the attitude of the RTA and its officers throughout the project, I might even find it in me to have some sympathy for the difficult task they face. However, given their obdurate and bloodyminded refusal to adopt perfectly rational solutions or even discuss them, I shall direct my compassion elsewhere.

H2 It should also be said, in fairness, that the CCT is a fine piece of engineering and, for what it does, an effective solution. What it does most effectively is carry traffic that wants to bypass the CBD entirely. Unfortunately, most of its assumed target traffic does not want to do that.

H3.1 CURRENT INTERSECTION HOTSPOTS

H3.1.1 Bathurst/Harbour Streets

For reasons beyond me, the "left turn at any time with care" sign at the western exit of the tunnel to turn into Bathurst Street has been replaced by a traffic light.

H3.1.2 Bent/Macquarie/Shakespeare Place

As committee members have already noted in hearings, this is a disaster. It is exacerbated by the lunacy of installing a further pedestrian traffic light at the left turn from Shakespeare Place to Macquarie Street. This traffic signal seems to be out of phase with a set of lights that heretofore coped reasonably well with a very difficult intersection (except in evening peaks on Thursday and Friday.)

Cowper Wharf/Sir John Young/Palmer/Crown

To describe the current arrangements as anything other than deranged (and dangerous with it) would invite Scheduling under the Mental Health Act. There is no conceivable reason for the current arrangements and they certainly do not impinge on the Tunnel or Clauses 18 or 19 of the 2002 Contract. In those circumstances, they can only be seen as an act of malice on the part of the RTA. As the released documents clearly show that is the public servant who is directly responsible for these arrangements, in fairness, he should be called before the Committee to justify them.

H3.1.3 Riley/Yurong Parkway/St Mary's Rd/College

This is now a significant feeder route to the north and centre of the CBD. The roundabout which was temporarily placed at the end of Sir John Young Crescent and has now been replaced with lights was popular with the community and Yurong Parkway was a significant pressure relief to feed local traffic directly into William Street to access the City south via College. The timing cycle at the lights at St Mary's/College is too short and causes significant backup of traffic. This is a disaster as it is now the only convenient access point to Market Street for local traffic or those smart enough to come from the East.

H3.1.4 Bourke/Cathedral/Palmer/Crown

Effectively this is now the only route right into William Street West of the Top of the Cross. It is one lane, bisected by the ED offramp for access to William and shared by what is now the only route for the 311 bus. Many elderly and disabled people depend on that route as their only form of transport.

H3.1.5 Wylde/Macleay/Greenknowe/Ward

Effectively one lane each way, interrupted by anyone reverse parking, again shared in part by the 311 and the only safe access to the Eastern Portal of the Tunnel to travel West from Potts Point and Elizabeth Bay two of the most densely populated areas in the country (no doubt a contributing factor to why no-one is using it).

H3.1.6 New South Head/O'Neill

This stretch from a point level with Waratah to the U turn to the Eastern Portal to travel West/right turn to Paddington is a merging disaster. The timing cycle on the lights (three sets) is inadequate and the pavement is not marked far enough back nor are there sufficient overhead signs to show motorists which lane they should be in and when. The confluence of traffic entering from Roslyn Street, Kings Cross Tunnel, the CCT and the Ward Avenue ramp exacerbates the problem with some vehicles having to traverse the entire width of a 5 lane road in a very short distance.

H3.1.7 Darlinghurst/Victoria at the top of William

As far as I can see there is no contractual requirement for the current narrowing in this area which could possibly trigger an MAE. What it is doing is congesting Darlinghurst Road South for no noticeable benefit. It is certainly not reducing Westerly flow into William Street.

H3.1.8 Bourke/William

The closure of Bourke Street South is irrational. It forces East Sydney traffic further down into an already almost impossibly crowded Crown Street. It would make more sense to remove the right turn from William into Bourke St North and bring traffic South down Victoria, right into Liverpool, right into Bourke and into the ED that way. Bourke St North could then be restored to two way.

H3.1.9 William to George

It is submitted that we just have to accept that these intersections are stuffed. Short of building a mid length entry to the CCT, nothing can be done without banning cars.

H3.1.01 Druitt between Kent and Clarence – my absolute favourite

See the KX minutes of 6 June 2005 Meeting 25 at p 10. Under the current Road Rules under the Road (Safety and Management) Act this stretch of road is available for use by any vehicle.

H4 PROPOSED SOLUTIONS

H4.1 H3.1.1 is solved by reinstating the "turn left at any time with care".

H4.2 H3.1.2 – in addition to H4.4 below, remove the left turn traffic signal at Shakespeare/Macquarie Street and return the lights to their old phasing.

H4.3 H3.1.3 – in addition to H4.4 below, remove the two Westernmost parking spaces on the South of St Mary's, replace them with a left turn only lane and a "turn left at any time with care/left turn on red permitted after stopping" sign and change the phasing preferably forcing pedestrians underground instead of using the South crossing in College and change the phasing on the lights.

H4.4 Community demands for the Woolloomooloo Solution

The community has unanimously passed the following resolutions at public meetings held since the CCT opened:

1. Open Bourke Street
2. Harbour Tunnel: re-open public access from Sir John Young Crescent
3. William Street: closing from 6 lanes to 4. Retain 5 lanes for peak "tidal flow"
4. William Street: re-open rear lanes for business access
5. Install a Roundabout at Bourke and Cowper Wharf Road

6 & 7. Reinstate the 5-way Roundabout at Sir John Young and St Mary's Road and full two-way access to Yurong Parkway (Boomerang Cresc)

8. Remove the unnecessary lane barriers that prevent direct access from Cowper Wharf Road to Macquarie Street; expand U-turn bay

at Shakespeare Monument
9. Druitt St monitoring and modification needed. No narrowing of Park Street
10. Traffic safety measures in "toll avoider" routes
11. Neild Ave/Rushcutters Bay: fix bottlenecks and address pedestrian safety
12. Re-design the entire above ground road configuration to a slow traffic flow (40K per hour). This will enable better sequencing of traffic lights. If cars want to move faster, they can use the tunnel (80K).

This deals substantially with H3.1.2, H3.1.3 and H3.1.4 above.

RECOMMENDATION: It is submitted that the Committee endorse the Public's call for the above changes and recommend they be implemented forthwith.

H4.5 H3.1.5 – there is no best worst solution

H4.6 H3.1.6 – mark the pavement back to the Tunnel exit and erect overhead signs approximately level with Waratah

H4.7 H3.1.7 – restore the original configuration

H4.8 H3.1.8 – reopen Bourke and remove the right turn from William to Bourke. Return North Bourke to two-way.

H5 Adequate pavement marking and signage

H5.1 All approaches and exits to and from the tunnel portals and approaches to routes that require lane changes for a particular destination should have pavement marking as far back as possible (preferably at least 500 metres) and adequate overhead signage. The current signage within the CCT is inadequate.

RECOMMENDATION: It is recommended that the Committee adopt the traffic solutions outlined in H4 and H5 and recommend they be implemented by the RTA

H6 Taxation Reform Party (NSW) Inc ("TARP") Policy

H6.1 TARP, of which I am Chairman has resolved to adopt the following as policy:

1. Immediate resumption of the projects without compensation under the Resumption Act.
2. The payout of the builders/operators at cost.
3. The immediate closure of the Cross-city Tunnel until access/egress points are built in the centre of the city making the project economically viable.
4. Re-opening of the Tunnel at a toll that will pay for the projects over 40 years."

H6.2 As this is a political question of great financial and budgetary consequence, I am content to leave this to the electorate at the 2007 election. It is to be noted however that the issue has been seriously canvassed with the RTA by Messrs Clayton Utz by letters dated 10 and 11 October 2005. The resumption proposal with compensation is, subject to budgetary constraints, feasible. The cost would be recouped out of the toll. It should be noted that, on the figures presented to Treasury by Ernst and Young acting for the RTA in December 2004, in the event of an MAE, the total cost to Government over the period of the contract could amount to $5.808B over 30 years not adjusted for inflation. That would have a devastating effect on the State's road budget for decades.

I COMMUNITY CONSULTATION ("CC")

I1 GENERALLY

I1.1 Lack of coherent definition

I1.1.1 While politicians like the Lord Mayor prate about CC, in practice, it means little more to them than gathering a group of people together in a room or public place (in whatever numbers) reading them an ill-prepared (and usually irrelevant) speech sometimes backed up by "reports" from experts so redolent with jargon or bureaucratese as to have no informational content whatsoever and saying "*Veni, vide, consului*" (I came, I saw a few people, I deliberated). Although judging from the transcript of the Lord Mayor's evidence to the Committee (9/12/2005 pp 22-37), given the trouble she has with English, I doubt she has Latin.

I1.1.2 The Macquarie Dictionary defines consult: 1. to seek counsel from; ask advice of. 2. to refer to for information. 3. to have regard for (a person's interest, convenience, etc) in making plans;
And consultation as: 1. the act of consulting; conference. 2. a meeting for deliberation. 3. an application for advice to one engaged in a profession,

especially to a medical practitioner. 4. *Colloquial (euphemistic)* a lottery, especially if held in another State.

I1.1.3 Notwithstanding the dictionary definitions, there is no statutory or regulatory definition of CC in NSW. It is effectively meaningless. Apart from my personal experience (see Appendix 2) with the RTA's implementation of the concept which makes definition 4 seem quite plausible, it would appear that the conditions of consent embodied in the Planning Minister's condition 11 (d) – (f) imply definitions 1 and 3 of consult and 1 of consultation.

I1.1.4 While there remains the statutory hiatus in which CC remains ephemeral and open to wide (almost Delphic) interpretation, it is an essentially meaningless concept. 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. This has obvious benefits to both groups because, on the one hand it limits the extent to which the proponent of a project must go, protects it from the unreasonable demands of loonies in the Public domain, establishes an objective test and enables the Public to form reasonable expectations of the extent to which it can have an influence on Public infrastructure that it has to live with, often on its doorstep, long after the last construction vehicle has trundled into the distance and the last dollar has been banked by the builder. Is it possible?

I1.2 The BHP/Commonwealth EPA Model

I1.2.1 While any private individual has constraints on his time and limited resources in copying paper alone and while I do not pretend to have made an exhaustive study of the subject, the best CC model I have come across is one used by BHP for large, often intrusive, mining and construction projects sometimes in remote communities. The model can be obtained from the Commonwealth EPA. It is, in my submission, an appropriate template from which a statutory model could be devised to generate a checklist satisfying the requirements I have outlined above.

I1.3 Mere lip service

I1.3.1 In the absence of such a model, it is all too easy to try the patience of well-meaning members of the Public such as those of us who were appointed to the various Community Liaison Groups ("CLGs") for the CCT. Community representatives need to be able to see that they are

being listened to, their views are being taken into account and, if there is a rational reason for rejecting them (cost, engineering, impracticability etc) it is properly and clearly articulated rather than just being dismissed out of hand as happened so often on this project (see Appendix 2).

I1.4 The need for provision of meaningful information

I1.4.1 While the proposition may be considered somewhat controversial especially to those experienced at doorknocking, not all people are idiots. As a barrister with a broad background and many areas of expertise, one of those areas is articulating in as simple and direct terms as possible complex legal concepts to laymen. While I concede it is not always possible to abandon jargon entirely, there is no harm in providing more information rather than less. The conscientious layman will take the time to research the matter and try to understand it if the explanation is not clear. The dismissive approach adopted by some "experts" of "I know what I am talking about you wouldn't understand" (of which Mr Wilson from Masson Wilson Twiney P/L is a consummate exemplar) is not only gratuitous, it is bound to sow discontent if not contempt. This is particularly so if the "expert" is proved wrong as Mr Wilson so spectacularly has been.

RECOMMENDATION: It is recommended that the Committee formulate and recommend for adoption throughout the NSW Public Service and the Government a Community Consultation model which sets out the necessary and sufficient conditions requisite for Community Consultation to be said to have taken place successfully.

J TRAFFIC MODELLING – TWO WRONGS DON'T MAKE A RIGHT

J1 It is asserted in the evidence both by the RTA witnesses, Sansom and Wilson that all modelling was conducted on the basis of the figures supplied in the original EIS. Sansom asserts that the base financial model was so derived. Logically, both sides cannot be right as the discrepancies are too great. That is not to say that there are grounds to suspect anyone is lying on that basis alone.

J2 What can be said objectively is that both sides were drastically wrong. From my reading of the transcript and my dealings with Wilson in person, he is considerably more humble on oath than not.

J3 On his own admission his modelling is not worth the enormous number of trees that have died bringing it to the public attention. While I have no objective evidence to support the supposition, I suspect that what happened is that (probably) the RTA collected the raw data on traffic flows simply by counting the number of cars travelling each way on New South Head Road (or possibly at the intersection of William and College originally), the number travelling into the city from the West and exiting to the West and blithely assumed they were crossing the city without actually knowing where they were going. That, at least would be consistent with the data we are seeing now the Tunnel is open. It would be of great public benefit if the Committee could clear this aspect up so that no similar mistakes are made in the future.

K EVIDENCE GIVEN TO THE COMMITTEE IN DECEMBER

K1 It is very difficult to reconcile some of the evidence given by RTA executives and Treasury representatives with objective reality as measured by the released documents.

K2 The witness Hannon said (6/12/05):

> the risk borne is borne by the private sector, not by the Government

K2.1 This is at odds with the combination of Clauses 18, 19 and 21 of the 2002 contract and irreconcilable with the report (to be found in Box 4 of the 5 most recently released boxes) dealing with the summary of the main contracts associated with the project which says:

> Under the Public Authorities (Financial Arrangements) Act Deed of Guarantee of 18 December 2002, between the Minister for Roads (on behalf of the State of NSW), the RTA, the Trustee, the Company, the Borrower, the debt financiers' Facility Agent and the Security Trustee, the State of NSW has unconditionally and irrevocably guaranteed the RTA's performance of all its obligations under the Project Deed, the Agreement to Lease, the Land Lease, the Company Lease, any lease of additional land as defined in the Agreement to Lease, the RTA Deed of Charge, the RTA Consent Deed, the Deed of Appointment of Independent Verifier, the Contractor's Side Deed the Operator's Side Deed and any other documents approved by the Treasurer in the future.
> This guarantee is a continuing obligation. It will remain in force until seven months after the term of these contracts or seven

> months after any earlier termination of the contracts, even if the RTA is discharged from any or all of its guaranteed obligations under the contracts for any reason whatsoever…

If this is "no cost to government" the phrase needs serious modification. Who on earth gave the guarantee and why? The evidence has not yet addressed this issue.

K3 Graham said (7/12/05 p 18 second answer):

> …which may not be the base financial model.

K3.1 This is simply incorrect. The base financial model is specifically referred to in clause 18.3 and it was the model as at 2002. The question to which this was an answer may, arguably, be falsely premised. On one view of the contract, any MAE (however trivial) which could not successfully be renegotiated could give rise to a total liability under the contract. That was the force of the advice Clayton Utz gave in its letters of 10 and 11 October 2005 mirrored in Forward's Memo of 13 October to Tripodi.

K4 Assessing Dr Goldberg's evidence, particularly without seeing him, is very difficult. I am no lover of conspiracy theories. Experience generally teaches that if it is a choice between a conspiracy and a stuff-up, go for the stuff-up every time. If, however, he is right, this is a scam of Enron proportions.

K4.1 The committee has a choice, as I see it: simply say thanks very much or extend the inquiry to involve an independent forensic accountant and other experts.

K5 I think I have dealt adequately with the informational content of the Lord Mayor's evidence in sufficient detail elsewhere.

L UTILITARIAN BENEFITS CAPABLE OF ARISING OUT OF THE INQUIRY

L1 The following are broad (and one should have thought relatively uncontroversial) recommendations that could be made by the Committee for the benefit of the citizens of NSW generally:

- the recommendation that a statutory or regulatory definition of Community Consultation be adopted by the parliament, and particularly, the determination of a set of necessary and sufficient

criteria that have to be met before the requirements of Community Consultation can be said to have been met in any particular context

- the recommendation that the question of up-front fees for public works be referred for consideration as to whether they should be controlled through the Consolidated Fund, together with a review of the operation of the Public Finance and Audit Act and the Public Authorities (Financial Arrangements) Act and a reference to ICAC pursuant to s 13 for formulation of public sector strategies to minimise the risk of corruption in relation to such payments
- the recommendation that all public contracts be reviewed by the Auditor General and approved by him before signing
- the recommendation of a review of private consultancies (lawyers, accountants etc) to formulate a protocol for identifying potential conflicts of interest at an early stage and eliminating them with any necessary vetting procedure to be overseen by the Solicitor General
- the recommendation of a protocol for selecting a preferred tenderer, signing heads of agreement with that tenderer and submitting draft contracts for public scrutiny for a fixed period before the contract is executed

M SUMMARY OF FORMAL RECOMMENDATIONS

RECOMMENDATION: That the recommendations in L be adopted by the Committee

RECOMMENDATION: It is submitted that the Committee should censure the persons who were the relevant Ministers at the time of the signing of the contract for wilful ignorance and recommend that appropriate procedures be implemented whether under the Public Finance Administration Act or otherwise to ensure that no such thing occurs in the future.

RECOMMENDATION: The Committee should recommend that the Auditor General be asked to investigate the financial records of the RTA as at July to December 2002 to determine what its true financial position was and whether there was a real need in the public interest to require an up-front payment.

RECOMMENDATION: It is recommended that the Committee adopt the traffic solutions outlined in H4 and H5 and recommend they be implemented by the RTA.

RECOMMENDATION: **It is recommended that the Committee formulate and recommend for adoption throughout the NSW Public Service and the Government a Community Consultation model which sets out the necessary and sufficient conditions requisite for Community Consultation to be said to have taken place successfully.**

Appendix 1 - RELEVANT CV OF THE AUTHOR

Malcolm Bruce Duncan, 49, holds degrees in Arts and Laws from the University of Sydney and has practised as a Barrister at the Private Bar since 12 February 1988. At the time he became a member of the Sir John Young Crescent CLG in about January 2003 he was a prominent Community figure, President of the Kings Cross Chamber of Commerce and Tourism Inc, Member of 2011 Residents' Association, Honorary Counsel to the Kings Cross Community and Information Centre Inc, an Independent candidate for the seat of Bligh, a resident and conducted his chambers in the area.

He remains a resident and still practices as a Barrister from Victoria Street Chambers, 170 Victoria Street, Potts Point, is a committee member of 2011 Residents' Association, remains Honorary Counsel to the Community Centre and has recently been elected as the founding Chairman of the Taxation Reform Party (NSW) Inc. He will be known to members of the Committee.

Appendix 2 – A PERSONAL VIEW OF THE CCT EXPERIENCE

By nature, lawyers are suspicious creatures. My personal and professional dealings with government over the whole of my working life and particularly in the last 20 or so years in the law battling bureaucracies and Governments of all political hues have done nothing to allay those suspicions. I had taken little but passing interest in the CCT proposals as they had been mooted, announced, re-announced, altered, put off etc over a period of some 11 years. I had not inspected either the EIS or the SEIS. When, however, it appeared that a tender had been accepted and I saw a newspaper advertisement for members of Community Liaison Groups ("CLGs") for the CCT project, given my position as President of the Chamber of Commerce and a deep-seated desire to ensure that what looked like a worthwhile project did not go the same way as the Eastern Distributor and completely destroy local traffic in the area in which I was born, live and love, my spouse (who makes her own submission and, at the time, was Secretary of 2011 Residents' Association and teaches at St Vincent's College) and I determined to apply.

Formation of the groups/structure

The CLGs were divided into five with an overall traffic committee consisting solely of public servants. Community representatives were to be appointed to committees for Sir John Young Crescent/Cowper Wharf Road ('JYCCW"), Kings Cross ("KX"), a group covering the East Sydney area south of William Street ("SS"), a Darling Harbour Group ("DH") and an Air Quality Control Group ("AQC").

Blind Man's Bluff: Divide and conquer

This structure had, to me, all the hallmarks of the classic divide and conquer strategy enabling those controlling the Groups selectively to hive off information so that no overall or co-ordinated picture would be available to the Community generally. I adopted two counter measures: I applied to join JYCCW, while my spouse applied to join KX and I proceeded to lunch (on a strictly confidential basis) two of the key liaison personnel from Cross City Management ("CCM") and its builder – and very pleasant and informative lunches they were.

Because the cut and cover work was the first impact on residents and local traffic, JYCCW was the first to commence meetings in January

2003. We were handed a document titled "Charter and Procedures" ("the Charter") and informed that a "CLG Coordinator" had been appointed to chair meetings. This, with no disrespect to the individuals concerned, is a new form of parasite which feeds (no doubt at vast expense) off the CC/Alternative Dispute Resolution gravy train. They are to be found in hotel function rooms, dark-panelled offices and in other dreary surroundings acting a mediators with the explicit (but usually hopeless task) of controlling people like me.

Here I should note that all the community representatives gave selflessly of their time (and in many cases quite considerable expertise) without recompense or much more than hollow thank yous at the end of the exercise by which time I think it would be fair to say we had become firm enemies of most of the parasites who were ordered to be there on full pay by their employers or were, like Mr Wilson, receiving fat consultancy fees for feeding us what has, in the event (as I suspected all along) turned out to be complete bullshit of such low grade that not even roses could benefit from it.
The Charter contained a great deal of guff and we were asked to endorse it. I recall we asked for further time to consider it.
Amongst the guff was the following:

> The role of the CLGs is advisory, issues and suggestions raised by members will be considered by the project team in making decisions. The ongoing decision process of the project team needs to take into account:
>
> - Legislative requirements;
> - management objectives; and
> - input from the community and stakeholders [this reference to Vampires was only to take on true significance later in the course of the project] via the Community Liaison Groups, Government Agency Liaison Group, Service Authority Liaison Group, Traffic and Transport Liaison Group and the Air Quality Community Consultative Committee; and
> - input from broadly based community relations activities.
>
> The CLGs are not decision-making bodies and it is not a requirement that consensus be reached amongst members on issues discussed...

It then went on to refer to condition 11 of the Minister's consent which relevantly provides:

> 11. (d) allow the Groups [CLGs] 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-General; ...

To one versed in the English language, that condition sounds terribly like the Macquarie definitions contained respectively in 1 of each definition cited above.

None of this happened in any satisfactory fashion. The minutes speak for themselves as to the endlessly boring childish "presentations" we were given and often we were deluged with huge amounts of paper and reports which from time to time had buried in them relevant information although that was not brought to our attention. It was done more in the Yes Minister style of the second last file in the red box containing an out of order document which allowed the increasingly mendacious Mr Seeto from the RTA to say months later "But you were given that information." In passing, I should note here that I have had reports that RTA representatives are telling other community groups that the Bourke Street closure was approved by the community members on KX. If that report is true, the assertion is false. I take a very dim view of public servants lying in the course of their employment particularly to the Public whom they are meant to serve. The later minutes of KX actually record a number of instances where community members were misinformed at best carelessly, at worst in a deliberate attempt to deceive.

As the meetings continued month after month and all suggestions (some quite constructive) were ignored or discounted on the basis that the project had to be built as approved (a demonstrable lie given the changes that have been implemented subsequent to the approval e.g. the Cowper Wharf/Sir John Young intersection), the community members became more restive and frustrated with the whole procedure. My casual habit of cross-examining people from time to time caused resentment among the public servants particularly when it resulted in them being caught out.

The community members adopted a further strategy of caucusing before and after meetings and maintaining the contacts we had in other CLGs. This confirmed that the divide and conquer strategy was actively being employed by the RTA, CCM and the Bulfinger Group. Information was not being passed officially between groups and repeated requests for an

overall traffic plan of the completed project were consistently ignored or excuses provided as to why they could not be produced. I still find it difficult to credit that one can engage in a major traffic infrastructure project without any idea where the traffic using it is coming from or going to. Of course, one did not know at that stage that Clauses 18 and 19 of the contract executed on 18 December 2002 were being deliberately withheld from us. I recall saying to Peter Wolstenholme after he refused to produce a copy of the contract on commercial in confidence grounds: "I'll get it eventually." He replied words to the effect "You'll never see it." It was a great thrill to sit in the office of the Clerk of the Council late one afternoon last year after days of searching and come across Box 9 of 10, hold a copy of the executed contract in my hands and photocopy the relevant clauses.

It was about that time that I proposed to Wolstenholme the traffic solution to the Woolloomooloo interchange problems which has now been adopted by acclaim at public meetings. Nothing was done. It is a simple and effective solution which would allow free flow of traffic in the area and reduce congestion on Macquarie Street.

Further frustrating meetings followed for some months until, in an act of desperation to get rid of one of the Community members CCM determined to abolish SJCW and transfer some of its members to other CLGs. It was at that stage that I was transferred to KX. That in itself was interesting because it underlined the true nature of the divide and conquer strategy: while the attention of SJCW had been constantly misdirected to minor localised problems at the expense of an overall traffic management plan, the attention of KX was directed squarely at the Eastern Portal and surrounds. None of the bureaucrats was particularly interested in considering how people other than those coming from the East could enter the Tunnel and the fact is that most people in the areas most directly affected by the construction phase and affected by the result for at least the next 30 years are not easily able to do so. We have suffered all the pain for none of the benefit.

The Dalek solution: Destroy, Confuse, Exterminate

Having destroyed SJCW and effectively stifled any sensible debate about overall traffic movements outside the Tunnel catchment, the major emphasis moved to misdirection and inundation with irrelevant trivia. There was much discussion of whether there would be three parking spots or four and the like. A group of quite talented community members

with planning and architectural experience, in their own time and at their own expense, redesigned the façade of the Eastern Portal and had the design adopted. Unfortunately, it has been finished with such cheap materials that it is already taking on a derelict air. Traffic lane configurations were also altered at the behest of this group's untiring efforts and endless further meetings.

Any constructive suggestions about altering the construction project to establish better or new links with the ED for example were rejected out of hand. The City Council became involved and things deteriorated further through bureaucratic inertia and the stupidity of the Lord Mayor. The footpath upgrade at the corner of William St and Darlinghurst/Victoria at the top of the cross outside the Kings Cross Hotel was delayed for months because the Lord Mayor personally intervened to stop a tree being disturbed. Perhaps she wanted to talk to it.

An examination of the minutes of the KX meetings from about March or April last year will reveal the increasing hostility between the members of KX divided along the lines of Community v bureaucrats. Notwithstanding the clear terms of the Minister's consent, CCM decided to push the terminate button. The last minutes posted to the CCM website were for July last year.

There are still evaluations to be conducted at the 6 month after opening mark but there will be no CLGs to satisfy the Minister's requirements.

I should add one further thing about notification. We were often told that leaflets had been distributed to all "affected" households for various stages of the works. Under cross-examination, it was revealed that except in a very few instances (where only a few people were directly affected) that task was sub-contracted. No community member of KX ever received one and I do not recall finding any at my chambers at any stage. The explanation for that is relatively simple. Having personally letterboxed the electorate of Bligh in both the 1999 and 2003 elections, I know how densely populated the area is. In the immediate Tunnel catchment most of the buildings are security buildings with no access to post boxes. Leafleting is a waste of time. None of the bureaucrats knew that, of course, because they simply did not have sufficient local knowledge.

All-in-all, the experience was a frustrating waste of my valuable time designed to practice on the community members so that CCM and its cohorts could tick the box. None of them lives here, none of them

drives here and none of them could give a stuff about the place. The feeling has become mutual. Although I did rather enjoy drafting the pleadings for my proposed injunction to prevent CCM breaching the Trade Practices Act by distributing deceptive and misleading brochures – unfortunately we did not get to Court (despite a lively exchange of correspondence between myself and Messrs Allen Allen and Hemsley) as the delay in opening meant that they had to pulp the brochures anyway.