

**Submission
No 3**

INQUIRY INTO CROSS CITY TUNNEL

Organisation:

Name: Mr Flash Langley

Telephone:

Date Received: 6/12/2005

Theme:

Summary

Submission to Cross City Tunnel lodged by Flash Langley

“Hefty Toll on the Community”

Alleged overcharging by CCM & RTA - hidden deals without approval nor consultation

SUMMARY:

In 2002 I raised concerns about the financial & project justifications / benefits in my Supplementary Environmental Impact Statement submission. Those concerns appear to have not adequately dealt with at the time. One of those concerns at the time, was the perception the changes leading to the Supplementary EIS were driven around increasing revenue more than public benefit (absence of Triple Bottom Line accounting; Significant cost increase compared with the extra vehicles to use the tunnel)..

Since the 2002 Supplementary EIS, there were changes to the toll charges that were not subjected to community consultation, nor planning approvals.

Following scrutiny of the Cross City Tunnel documents, alleged toll overcharging is occurring:

1. Toll charges are higher than those in the planning approvals. In my opinion the changes to tolling represent a significant change to the project, outside the tolling regime explicitly approved.
2. The RTA has not engaged in public consultation and appears not to have sought a planning change.
3. The primary responsibility and accountability in this case is with the RTA. The RTA is “The Proponent” in terms of the planning approvals. The RTA also accepted the risk for the adequacy of environmental assessment & planning approvals.
4. The CrossCity Motorway has secondary responsibility in this case, in apparently not mitigating this situation (to date).
5. If the RTA or CCM were not aware of this deficiency, then their competence should be questioned. Especially considering the extensive Environmental Management Systems the RTA has...
6. In my opinion, It appears “Commercial-In-Confidence” negotiations between the RTA and CCM created the circumstance where proper community consultation and planning approvals were not engaged. Time pressures on the RTA to complete contract negotiations were a significant factor. CrossCity Motorway is not blameless in my opinion, since it was its significant counter-proposal that led to the need for the Supplementary EIS in 2002 – that put the RTA under greater stress. Regardless, it was no consultation that was the significant factor in the inadequacy of the approvals process.

When the RTA were negotiating further contract variations, it appeared its financial analysis continued to be politically tunnel visioned. Under treasury policy for “at no cost to government” to enhance NSW Government’s credit rating, the RTA negotiated with CCM for changes in tolling to cover the cost changes. The tolling burden on the public (profit to CCM) is far in excess of the costs the RTA was negotiating. In my opinion, the analysis did not review the financial or other burdens of the changes, and was driven with how to trade off the significantly increased costs of the revised proposal. It was the economic analysis on the RTA – CCM relationship that dominated; not community costs.

I seek that the Joint Select Committee rigorously brings to account the former Ministers, the RTA and CrossCity Motorway.

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CRO\$\$ CITY TUNNEL

UNAPPROVED TOLL\$



COIN LUST SENT CRY

\$TOLE

“CROSS CITY TUNNEL” arrangements: “COIN LUST SENT CRY”

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Flash Langley

Tuesday 06 December 2005

Joint Select Committee on the Cross City Tunnel
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Honourable Members,

Outline

In 2002 I raised concerns about the financial & project justifications / benefits in my Supplementary Environmental Impact Statement submission. Those concerns appear to have not adequately dealt with at the time. One of those concerns at the time, was the perception the changes leading to the Supplementary EIS were driven around increasing revenue more than public benefit (absence of Triple Bottom Line accounting; Significant cost increase compared with the extra vehicles to use the tunnel)..

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I seek that the Joint Select Committee rigorously brings to account the former Ministers, the RTA and CrossCity Motorway.

Best regards,

Flash Langley

ff: Details on following pages.

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1 Background: Application of Planning Approvals

1.1 Significance of Planning Approvals

The Conditions of Approval form part of the planning approvals, reflecting a consent agreement between The Proponent (in this case, the RTA) and the NSW Government (administered by the Department of Planning).

The project must be carried out in accordance with all required approvals – including the Planning Approvals. To significantly deviate from the Planning Approval or breach it is illegal.

If The Proponent (RTA) wishes to vary the Planning Approval, it must formally apply to the Department of Planning / Minister for Planning. During that process, the Department of Planning must judge the significance of the proposed change, and recommend the change process. The change process may require public consultation on the proposal.

I acknowledge it is often contentious whether or not something is already approved or prohibited under the Planning Approval. Often disputes arise as a consequence, whether the proposed activity is part of the existing Planning Approval or is a change to the Approval requiring a formal change request.

1.2 Scope & Precedence of the “Planning Approval”

The “Planning Approval” is more than just the schedule of Conditions of Approval.

For the scope of documentation for the Cross City Tunnel's “Planning Approval”, please refer to the Minister of Planning's 12 December 2002 “Schedule 2” Conditions of Approval.

Condition 1 gives the scope and precedence for the huge documentation that comprises “The Approval”.

Whilst the Conditions of Approval for 12 December 2002 are the focal point for the Cross City Tunnel, it too is amended by subsequent Determinations of the Minister for Planning. Some of those determinations are a result of a formal change request to the Conditions of Approval.

Factors to be considered by Environmental Assessments and Planning Approvals are extensive.

Environmental assessment casts a wider net than purely ecological impacts. It assesses total impacts which may include social, economic, political and health impacts.

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1.3 *Completeness of Environmental Planning Approvals*

The scope of the “Planning Approvals” under the Environmental Impact & Assessment Act is necessary but not sufficient. As recognised by part of Condition 1 for the Cross City Tunnel’s Conditions of Approval:

“These conditions do not relieve the Proponent of the obligation to obtain all other approvals and licences from all relevant authorities required under any other Act. Without affecting the generality of the foregoing, the Proponent shall comply with the terms and conditions of such approvals and licences”.

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2 Planning Approval Breaches

2.1 *Background to the Changes in Toll Charges*

In 2002, CrossCity Motorway (CCM) proposed a significant alternative proposal to the arrangements considered in the 2001 EIS. The changes were significant enough to trigger a Review of Environmental Factors or a Supplementary EIS.

During 2002, the RTA negotiated the trade off with costs in dealing with CCM's proposed changes.

In December 2004, the RTA in an Amending Deed agreed to a further change in the toll charges, to cover further variations that would be paid for by CCM.

2.2 *Minimum Toll Escalation breached Planning Approvals*

On 18 December 2002, the RTA agreed a minimum rate of quarterly increases to adjust for changes in scope.

This follows the 2002 Planning Approval on 12 December 2002 which concluded the Supplementary EIS (SEIS).

The minimum rate for toll escalation was not subject to community consultation; and was not included during the Supplementary EIS assessment process. This is despite:

- Increased negotiations around the toll minimum increase amount, in the fourth quarter 2002
- All bidders had included offers (options?) featuring minimum toll increases
- Minimum toll increases featuring in other tunnel projects; again partly as a result of negotiations over project scope changes

References about tolling during the assessment process are either in the context of CPI inflation rates, or were unqualified (just the fixed dollar amount).

It is alleged the minimum toll increases contravene the Planning Approvals, as:

- No claims were in the context of a minimum rate of increase for above inflation rises.
- A majority of claims were for tolls rising with CPI; with the remainder being unqualified in not alluding to any increase
- This issue remains present

In terms of the order of precedence of the planning approval documents, it is sufficient to rely upon the Planning Director-General's Report 2002 to evidence the tolls shall rise with CPI.

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Example:

“Differential tolling (different tolls for different classes of vehicles) is now proposed in place of standard tolls amounts for all vehicles. Charges for heavy vehicles may be double that of cars, which would be \$2.50 (in 1999 dollars)”¹.

2.3 December 2004 Amending Deed breached Planning Approvals

In December 2004, the RTA in an Amending Deed agreed to a further change in the toll charges, to cover further variations that would be paid for by CCM.

This change was done without public consultation, and without revised planning approval. No formal modification for the Planning Approval was sought nor approved for this increase in the base toll amount (1999 dollars).

2.4 Significant Changes, breaching existing Planning Approvals

These increases in tolling have a very significant impact on the toll charges users have to pay during the life of the CrossCity Motorway concession period (till 2035). So apart from the differences between the Planning Approval toll charges and the RTA agreements / actual charges; the significance in the economic impact (to users) is very significant and is not part of the existing Planning Approvals.

These significant changes are outside the existing Planning Approvals and are unapproved.

2.5 Alleged repeated breaches of Condition 2 “Compliance”

The RTA (as Proponent) is obligated under Condition 2 to alert the Director-General of Planning matters such as breaches of the Conditions of Approval (more generally, the Planning Approval). The significant changes to tolling also required a request to Planning for formal Modification prior to implementation.

Condition 2:

The Proponent shall comply with, or ensure compliance with, all requirements of the Director-General in respect of the implementation of any measures arising from the conditions of this approval. The Proponent shall bring to the attention of the Director-General any matter that may require further investigation and the issuing of instructions from the Director-General. The Proponent shall ensure that these instructions are implemented to the satisfaction of the Director-General within such time that the Director-General may specify.

¹ Director-General’s Report December 2002, Section 3.3 “Traffic and Tolling” p8
06 December 2005 Issue 1
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2.6 RTA Allegiance... a case of Public-Private Poisoning?

CrossCity Motorway and the RTA are adverse to any involvement by the Department of Planning; for additional and changed requirements were added for the Supplementary Approval in 2002 – adding further costs to the project (and potential risk). These costs and risks were largely shouldered by the RTA, to further limit the extent of the tender variations.

I believe a similar situation would occur regardless of the form of contracts; for the RTA this situation is not unique to public-private partnerships. Whether a contracted company or private partner has the greater influence would depend on the specifics of the situation.

I can only conclude that the RTA primary allegiance was to itself. Whilst there may be secondary objectives to effectively partner with private enterprise to deliver projects; or last tier considerations for non toll-road users; the RTA primary allegiance appears to be to itself by defending / not exposing. Although the political influence / relationship on the RTA by government ministers may also require analysis.

2.7 RTA’s Environmental Management System / Policy

The RTA has various policies and systems intended for ensuring compliance with Planning requirements and project management.

Of significance is the RTA’s Environmental Management Policy and Environmental Management System, intended to ensure compliance.

I believe that system requires records to be kept of the environmental compliance / whether or not is inside or outside the Planning Approval.

I believe there should be an RTA record in a managed file that would document the RTAs assessment at the time – such as whether the toll changes were part of the approval.

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3 Implications of the RTA’s Breaches of Planning Approvals

3.1 Urgent notification to Planning Director-General required

The RTA shall notify Department of Planning (Condition 2).

Notwithstanding, anyone may bring these alleged breaches to Planning’s DG.

3.2 What modifications to seek, if any?

Avoid rubber stamp attempts – that will probably fail in terms of support.

Broad public consultation is required, including sensible economic analysis.

In my opinion, the Renegotiation provisions may be required to determine a different course of action.

What I find so offensive about the existing approaches to variations is:

1. Planning mechanisms for considering the viability of the project were successively bypassed
2. Whilst the attention was to fund a known amount for variation, the costs to users over a period of time far exceeds alternative financing arrangements.
3. No provisions in the existing arrangement to cap the extra revenue to CCM at the point where the principal, financing costs, administration and acceptable profit allowance have been recouped. Instead, the likelihood is massive gouging of tunnel users over the 30 year concession.

It would be better for the government to finance those costs with lower financing costs; and pay a low but fair amount to account for the break in financing contracts (or easier still, pay out the existing financing arrangements to bring those to an end).

Under no circumstance shall modified planning approval be granted simply because the RTA bypassed seeking original approvals where it would not have otherwise been provided. However, as I have said I don’t think public consultation would agree to the RTA’s method of increasing tolls in the way the RTA agreed to.

3.3 Future Avoidance Measures

Across many projects I have little confidence in the RTA’s motivations or competence. In my opinion their primary interest is only to the RTA.

If they were unwilling or unable to engage in timely, effective community consultation rather than defend project justifications and mould planning consents to their own interests, they do not warrant the responsibilities involved in the work.

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3.4 Other Remedies?

3.4.1 Potential Remedy for “overcharged” Tunnel Users

The current levels of tolls are higher than the planning approved tolls.

A line of individual or collective action involves a claim against CrossCity Motorway (as distinct from progressing to legal action).

Lodging a complaint under “Roads (General) Regulation 2000”,

- Section 23B “Objections in relation to payment of toll”; and where require
- Section 23C “Review of decision on objection”

Put the obligation back on CCM to refund the difference for all affected tunnel users / trips.

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3.4.1.1 Toll Comparison, Fourth Quarter 2005

The toll is charged each time you use the Cross City Tunnel.

The toll that you are charged depends on the size of your vehicle and the route that you take.

Vehicles such as motorbikes, sedans, station wagons, taxis and vehicles towing trailers (for example boats, bikes, caravans, horse floats etc. providing the combined length of the vehicle fits within the size dimensions) are classified as Class 2. Larger vehicles are classified as Class 4.

Class 2: Height: less than or equal to 2.8m Length: less than or equal to 12.5

Class 4: Height: greater than 2.8m Length: greater than 12.5m

Toll charges effective 1 Oct 2005 to 30 June 2006

	Eastbound Tunnel Darling Harbour to Eastern Distributor exit or Rushcutters Bay	Westbound Tunnel Rushcutters Bay to Darling Harbour	Sir John Young Crescent Exit From the East
Class 2	\$3.56	\$3.56	\$1.68
Class 4	\$7.12	\$7.12	\$3.36

Note: all tolls are inclusive of GST.

Maximum tolls that should have been charged, in line with 2002 Planning Approval:

1 Oct 2005 to 31 December 2005

	Eastbound Tunnel Darling Harbour to Eastern Distributor exit or Rushcutters Bay	Westbound Tunnel Rushcutters Bay to Darling Harbour	Sir John Young Crescent Exit From the East
Class 2	\$3.06	\$3.06	\$1.35
Class 4	\$6.12	\$6.12	\$2.69

Note: all tolls are inclusive of GST.

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3.4.1.2 Toll Comparison, Third Quarter 2005

:

Toll charges effective 28 August 2005 to 30 September 2005

	Eastbound Tunnel Darling Harbour to Eastern Distributor exit or Rushcutters Bay	Westbound Tunnel Rushcutters Bay to Darling Harbour	Sir John Young Crescent Exit From the East
Class 2	\$3.53	\$3.53	\$1.66
Class 4	\$7.06	\$7.06	\$3.32

Note: all tolls are inclusive of GST.

Maximum tolls that should have been charged, in line with 2002 Planning Approval:
28 August 2005 to 30 September 2005

	Eastbound Tunnel Darling Harbour to Eastern Distributor exit or Rushcutters Bay	Westbound Tunnel Rushcutters Bay to Darling Harbour	Sir John Young Crescent Exit From the East
Class 2	\$3.04	\$3.04	\$1.34
Class 4	\$6.08	\$6.08	\$2.68

Note: all tolls are inclusive of GST.

3.4.2 Consequences of Legal Action?

Any consideration of legal action / injunctions would closely need to consider the RTA’s responsibilities under the current contracts and the extent to which those contracts are void.

Renegotiation provisions may be enacted as a consequence of RTA’s breaches, or by legal action. I doubt the full extent of the Renegotiation provisions would be enacted where patronage is significantly lower than base case; it is probably a case of reinstating previous entitlements rather than base case predictions.

To be undertaken with caution. I do not recommend! Please seek legal advice.

3.4.3 Land & Environment Court Action?

If the Department of Planning fails to take adequate action against the RTA, then legal action may be taken in the Land & Environment Court... though never an easy option! From 2005, access to the Land & Environment Court I believe is more difficult in many significant cases.