

**Submission
No 386**

INQUIRY INTO IMPACT OF THE WESTCONNEX PROJECT

Organisation: No WestConnex Public Transport Inc. - NoW PT

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Public Accountability Committee Inquiry Impacts of the Westconnex

Part 1 and 2 Introduction

WestConnex has set dangerous precedents for future projects managed by the NSW Government. The WestConnex project has significantly lowered public administrative and management standards due to a lack of transparency, governance and public accountability.

To highlight this claim, No WestConnex Public Transport (NoWPT) wishes to bring focus to the selection of the specialist contractor to provide traffic modelling for use in the WestConnex business case. That contractor is AECOM Australia Pty Ltd.

Relevant Term of Reference

1(a) The adequacy of the business case for the Westconnex project, including the cost-benefit ratio

Part 1 - NSW Government Procurement Processes and Procedures

The importance of procuring the right contractors

Traffic modelling figures are a critical component of any toll roads business case. Its accuracy is vital to the accuracy of the cost-benefit ratio (CBR), the prime measure for determining project viability. Therefore, selecting the contractor to deliver the traffic flow projections is of paramount importance. The contractor's expertise and, more importantly, their past performance on similar projects will ensure a factual business case, positioning the project to deliver the stated objectives and provide true value on investment.

The NSW Government was responsible for and entrusted with undertaking a robust contractor procurement process, with all due diligence being exercised in the final selection of the contractor. Given the poor choice of contractor, it would appear that the NSW Government failed in their obligations, committed significant errors of judgement and exposed the entire procurement process to maladministration.

Due diligence and using past performance as a measure of future success

At the time of contractor selection it was widely known that AECOM were involved in an Australian class action lawsuit over the provision of overly optimistic traffic modelling figures for Queensland toll roads. The lawsuit was initiated by the toll road's investors due to the poor investment returns - a direct result of the difference between the predicted and *actual* traffic flows.

The actual traffic flows for Brisbane's Clem7 RiverCity tunnel were two thirds less than those forecasted. The case alleged that AECOM made forecasts without reasonable grounds, and omitted critical information from the reports published in RiverCity's Product Disclosure Statements (PDS). The matter was eventually resolved in an out of court negligence settlement of approx. AUD \$200 million against AECOM.

Ref: <https://amp.smh.com.au/business/rivercity-ipo-investors-secure-121m-in-succesful-clem7-class-action-20160601-gp8qu4.html>

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Poor contractor selection

At first glance and, at an absolute minimum, the selection of AECOM to provide traffic modelling and forecasting for the WestConnex project could be classified as:

- an act of sheer incompetence;
- failure to perform all required and expected due diligence; and
- a case of gross maladministration.

Recommendation - Tender Procurement and Selection

That the Committee;

- Summon all relevant Departmental Executives and Ministers with portfolio responsibilities for the selection of the WestConnex traffic modelling contractor and seek explanations as to why AECOM was determined to be the most suitable and the reasons for shortlisting and/or discounting of other contractors.
- Investigate the tendering and selection process for the WestConnex traffic modelling contractor and assure the people of NSW that:
 - all required selection processes were properly followed; and
 - the performance and selection criteria used in the tender evaluation process were robust, fit for purpose and constructed to provide the best possible candidate for the project.
- Should investigations conclude there was full adherence to all relevant processes and procedures, then we request the Committee to undertake:
 - An urgent review and overhaul of the current NSW Government procurement and selection processes and procedures, given the gross unsuitability of AECOM to provide traffic modelling.

Part 2 - Forecasting Traffic Flows to Guarantee Investment Returns

A contractor fit for purpose

If a lack of due diligence and/or gross maladministration of the procurement process were not the problem behind contractor selection, then a deeper inspection of events surrounding selection is warranted. If we exclude the before-mentioned factors, it then becomes evident that the contractor selection was fit for purpose - that purpose being to ensure the provision of traffic modelling designed specifically to meet the required levels to achieve a favourable CBR and a justifiable business case.

Documented and systematic contractor behaviour

A look at the Australian projects where AECOM supplied traffic modelling figures shows a clear pattern;

- **Over Estimation**
- **Significantly Reduce Traffic Flows**
- **Poor Financial Performance**
- **Liquidation**
- **Sold at Significantly Reduce Value**

The following table provides a summary of AECOM's forecasting performance across Australian projects

Year	Project	Original Owner	Financial Issues	Owner
2005	Sydney Cross City Tunnel	Cross City Motorways Ltd	Receivership 2006	Transurban
2007	Sydney Lane Cove Tunnel	Connector Motorways	Receivership 2010	Transurban
2010	Brisbane's Clem7	Rivercity Motorway	Receivership 2013	Transurban

Ref: https://en.wikipedia.org/wiki/toll_roads_in_australia

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Producing traffic flows in order to justify financial returns

In 2006 Australia's Macquarie Bank assembled a portfolio of toll roads in the United States, to be managed through their newly-created company, American Roads LLC. The portfolio consisted of:

- Detroit Windsor Tunnel, Michigan
- Montgomery Expressway, Alabama
- Emerald Mountain Expressway, Alabama
- Tuscaloosa Bypass, Alabama
- Beach Express, Alabama

In order to secure competitive financing, the portfolio would need to be classified as AAA financial investment product. To secure this rating Macquarie would need to obtain appropriate financial investment insurance. Macquarie approached Syncora Guarantee Inc., who agreed to provide insurance based on the strength of the expected returns, which were calculated from the forecast traffic flows provided by Macquarie.

The anticipated traffic flows never eventuated and the toll roads failed financially, Syncora Guarantee Inc. suing Macquarie in the New York Supreme court claiming "fraudulent misrepresentations of the objectivity of the traffic and revenue forecasts".

Ref: <http://tollroadsnews.com/news/bankruptcy-reorganization-for-american-roads-not-as-harmonious-as-seems>

Maunsell Australia Pty Ltd (now AECOM) were Macquarie's traffic modeller.

In a judgment published on July 1, 2013, the New York Supreme Court found that there was evidence an undisclosed scheme of "success fees" from Macquarie to AECOM incentivised it to boost traffic forecasts. In other words, the higher the traffic flow projections, the higher the expected investment returns, the higher the fees paid to AECOM. The litigation was settled in 2013 when Syncora Guarantee Inc. agreed to take over Macquarie's interests in the project as compensation.

Ref: http://www.leagle.com/decision/In_NYCO_20130716327/SYNCORA_GUAR_INC_v_ALINDA_CAPITAL_PARTNERS_LLC

AECOM a proven performer in producing optimistic traffic modelling

NoWPT is a community-based volunteer organisation with extremely limited resources. Nonetheless, we were still able to perform sufficient analysis to complete a degree of due diligence that, if required, would have enabled us to make an informed decision as to the performance and character of AECOM. Therefore, one can safely assume that the NSW Government, with its level of resources, would have also performed similar analysis and been likewise informed.

Accepting that the NSW Government was able to acquire, at a minimum, the same level of publicly available information collected by NoWPT, one can only conclude that the appointment of AECOM, as well as other individuals and entities, was a deliberate act in order to achieve a specific outcome. That outcome appears to be the provision of optimistic traffic modelling data that would in turn make the WestConnex business case justifiable. This is a role that AECOM was well equipped to provide and had previously done several times in their recent past.

Influencing outcomes through appointments

AECOM's appointment is not the only one that is questionable. Over the course of the project numerous appointments have been made and decisions taken that have had a direct influence on decisions and/or given the perception of a conflict of interest.

The table below provides a small subset:

Entity	Appointment	Concern
Macquarie Capital	Financial scoping contract until 2070	Fraudulent behaviour US Toll roads
Nick Greiner	Infrastructure NSW	Transurban Advisor
Tony Shepherd	WestConnex Delivery Authority	Ex-Transurban Chairman
Tony Shepherd	Greater Western Sydney Giants AFL Football Club	WestConnex sponsorship deal

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In fact, when one looks at the infrastructure and road lobbyist donations made to both major political parties over the last 15 years, a pattern emerges between appointments made and/or contracts awarded.

Donation Totals 2000-2015

(Political donations and the roadway lobby By the Office of NSW Senator Lee Rhiannon - 27 June 2016)

Ref: https://lee-rhiannon.greensmps.org.au/sites/default/files/160627_donations_roadway_wc_0.pdf

Donor	Amount
Macquarie	\$5,061,170
Leightons	\$3,391,404
Theiss	\$1,009,610
Transurban	\$733,553
Transfield	\$618,534
Boulderstone Hornibrook Pty Ltd	\$612,498
NRMA	\$570,002
Lend Lease	\$525,668
Boral	\$415,082
Holland	\$306,795

Recommendation – Project Appointments

That the Committee;

- Establish the Office of the NSW Infrastructure Ombudsman with responsibility for investigating NSW infrastructure projects and complaints that may arise;
- that the Office of the NSW Infrastructure Ombudsman establish a register of individuals and companies, With previous fraudulent activities and that;
 - a judicial committee be appointed to set the criteria to be used for placement of an individual or a company on said register;
 - individuals and companies, including their subsidiaries, placed on said register be excluded from tendering and providing services for the people of NSW through State Government contracts.
 - the period of exclusion be commensurate to the degree of severity of their fraudulent activities, with a **minimum period of 5 years** or greater if so determined by the judicial committee;
 - a fair and robust appeal process be established to bring sufficient governance to the placement and removal of individuals and companies from said register; and
 - that the information contained on the register be publicly available.
- Summon all relevant Departmental executives and Ministers with portfolio responsibilities, at the time of AECOM's appointment, and investigate the reasons for their appointment given their previous behaviour on similar projects;
- Summon all relevant Departmental executives and Ministers with portfolio responsibilities, at the time of Macquarie Bank's appointment, and investigate the reasons for their appointment given their previous behaviour on similar projects;
- Refer the following appointments to the independent Commission Against Corruption (ICAC) requesting investigation;
 - AECOM : given the contractor's track record in delivering overly optimistic traffic modelling on several toll road projects, did the NSW Government seek out and appoint this contractor in order to justify the WestConnex business case through the provision of overly optimistic traffic modelling.
 - Macquarie Bank: was this organisation's involvement in fraudulent activities in US toll roads overlooked given they are very prominent political donors.

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- Refer the following matters to the Independent Commission Against Corruption (ICAC);
 - the appointment of the Nick Greiner requesting investigation into whether the NSW Government sought to influence the prioritisation of the Westconnex project through the appointment of a former LNP NSW Premier to Infrastructure NSW. Noting that the Westconnex project became a high priority after his appointment.
 - the awarding of Westconnex sponsorship to the Greater Western Sydney Giants AFL Football Club requesting investigation potential inappropriate influencing in awarding of this sponsorship given its chairman, Tony Shepherd, was previously also the head of the Westconnex Delivery Authority.

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Part 3 and 4 Introduction

The use of the classification “State Significant Project” is now being used to classify an ever growing number of projects. These projects seem to operate with significantly lower governance and under structures established to ensure public access to information is virtually impossible. Expediency and not accountability is the priority.

By their very nature state significant projects should be held to much higher standards of governance and accountability, not less, given the very high risks associated with these types of projects.

Relevant Term of Reference

3(c) Consideration of the governance and structure of the WestConnex project including the relationship between Sydney Motorway Corporation, Roads and Maritime Services, the Treasury and its shareholding Ministers

Part 3 - NSW Government Lack of Transparency, Accountability & Governance

State Significant Project - Reducing governance and scrutiny as a means to fast track approvals

The WestConnex project was one of the first to be classified as a state significant project. The original intent and, spirit of the classification, was to define projects delivering significant benefits to the people of NSW, so they may receive special consideration over the projects life and perhaps dispensation from some processes deemed superfluous to a project of such magnitude.

Since WestConnex though, quite a number of projects have been classified as state significant and there is now a public perception that this is merely a classification of convenience used to circumvent due process, in order to avoid public scrutiny and obtain rapid approval. Using this classification in conjunction with the term cabinet in confidence cements the public’s view and has produced very bad outcomes for the people of NSW.

The trend commenced under WestConnex is evident when we look at recently classified state significant projects. A pattern of claiming to deliver dubious benefits, an inability to provide a sound business case, critical decisions being taken prematurely and contracts signed prior to approval is evident.

Project	State Significant Benefit	Perception
Stadiums	Demolishing and re-building two stadiums, which financially cannot be upgraded due to their state of disrepair, in order to place Sydney in a competitive stance to bid for a greater share of sporting events.	Demolishing and re-building stadiums that are currently functionally operational in order to accommodate views of lobbying groups such as the SCG trust and the construction industry.
Powerhouse Museum	Demolishing the current museum and re-building it in Parramatta to provide Sydney’s western suburbs with much need cultural facilities.	Demolishing the current museum to allow the redevelopment of the site and accommodate views of development lobbying groups and the construction industry.

State Significant Project – Approvals without substance

The WestConnex project and, its growing subsidiaries, continue to progress rapidly at the expense of governance and accountability.

The inclusion of the F6 tollway into WestConnex saw a business case written where public transport was deliberately excluded. Leaked cabinet in confidence Transport for NSW communiqués provided specific direction on what the business case should include and excluded in relation to comparative options. Similar directions were given across other toll road projects linked to WestConnex.

Ref: <https://www.smh.com.au/national/nsw/f6-planners-told-to-ignore-public-transport-build-roads-documents-show-20170407-gvqbon.html>

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The Environmental Impact Statement for Stage 3 of WestConnex received over 13,000 submissions, with the overwhelming majority opposing the project. Objections were received from councils, such as the City of Sydney, and NSW Government Departments, such as the Environmental Protection Authority. The main core objection being the lack of construction detail. Irrespective, planning approval was granted based on an EIS that omitted the full design details and included several caveats allowing the incoming builder to determine fundamental conditions – an extremely dangerous precedent for future infrastructure projects.

Ref: <http://www.altmedia.net.au/epa-rejects-westconnex-eis/128946>

Recommendation – State Significant Projects

That the Committee implement the following recommendations;

- Undertake an urgent review of the process for classifying projects as state significant;
- That projects are only classified as state significant after the production of the business case and a review of the objectives, delivery benefits and BCR.
- That the business case review and assessment for compliance as a state significant project, is undertaken by an independent body, possibly office of the Infrastructure Ombudsman, using robust, measurable and publicly known criteria.
- That the assessment criteria for classification as a state significant project is determined by an independent judicial panel, to ensure independence and separation from infrastructure lobbyist and other parties with a vested interest.

That state significant projects, when correctly assessed as per above recommendations, fall under a more robust and detailed governance process, in comparison to non-state significant projects. State significant projects, by their sheer magnitude, expose the people of NSW to significantly higher risk of financial impropriety and environmental impacts.

Part 4 – Creating structures to obscure public scrutiny

The single purpose test

The Australian Taxation Office defines a tax avoidance scheme as an arrangement solely created for the purposes of reducing tax liability. This arrangement is not dissimilar to the NSW Government's creation of a private company, the Sydney Motorways Corporation (SMC), solely to reduce public scrutiny on a Government funded project.

The creation of a private company to manage a fully Government funded project, delivers no benefits to the people of NSW. Its sole purpose being to obscure information surrounding its operations from the people of NSW. As a private company, SMC, operates outside of the scope of the Government Information Public Access Act (GIPA). An act that all other government departments and agencies must abide with and operate under.

The secrecy extends not just over the people of NSW but also over members of parliament. Such is the concern that a private members bill was introduced to amend the GIPA act to redress this situation in February 2016.

Ref: <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#docid/HANSARD-1323879322-72860/link/105>

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Government Ministers hold SMC shares

If a member of parliament, let alone a government minister with direct portfolio responsibilities for distribution of government funds, were to award funding and/or contracts to a company in which they held shares, it would be a conflict of interest in the extreme. What measures are in place to assure the people of NSW that the SMC shareholder arrangement is any different?

The current shareholders of SMC are:

- Stuart Ayres - Minister for WestConnex
- Dominic Perrottet – NSW Treasurer
- Victor Dominello – Minister for Finance

Recommendation – Governance and Oversight

That the Committee;

- Summon all relevant Departmental executives and Ministers, with relevant portfolio responsibilities, and investigate the reasons for;
 - their establishment of a private company to manage and deliver the WestConnex project and;
 - that those summoned assure the people of NSW that the NSW Government's sole purpose for creating the SMC was not to avoid public scrutiny, by providing details of all the benefits this arrangement delivers, over and above, the current standard approach to manage NSW Infrastructure projects;
- Introduce a bill to the NSW parliament amending the GIPA act so that it covers all entities receiving government funding, irrespective of whether those entities are Government or private.
- Refer the following matters to the Independent Commission Against Corruption (ICAC);
 - the creation of the SMC requesting investigation into whether its creation was to conceal matters of public interest from the people of NSW in order to gain benefits for the sale of WestConnex;
 - The sale of WestConnex requesting investigation into whether the NSW government placed pressure on the Australian Competition and Consumer Commission (ACCC) to permit Transurban's purchase to proceed. Noting that Transurban owns 7 of the 9 toll roads in Sydney.
- Call for a judicial enquiry into WestConnex
- Call for a Royal Commission into infrastructure planning and delivery in NSW