

**Submission
No 553**

INQUIRY INTO IMPACT OF THE WESTCONNEX PROJECT

Name: Mr John Bartholomew

Date Received: 17 September 2018

SUBMISSION

**INQUIRY INTO THE IMPACT OF
THE WESTCONNEX PROJECT**

PREPARED BY:
JOHN BARTHOLOMEW

Chairperson
Committee for Public Accountability
NSW Legislative Council,
NSW Parliament

Dear Reverend Nile MLC,

Please find enclosed my submission to the Inquiry into WestConnex Impacts.

Please publish my name and submission on the parliamentary website.

Yours sincerely,

John Bartholomew

My submission is particularly relevant to Terms of Reference a) b) c) e) f) g) i) and j).

It raises serious issues of public accountability that need urgent investigation.

Introduction

WestConnex is the most expensive and least effective means of addressing Sydney's chronic traffic congestion problems that has yet been conceived by any NSW government body. It seems much formed to serve as a revenue stream for a tollway operator, cited as it is of the confluence of two of the most profitable existing tollways coming from Western Sydney, and with potential access to the traffic coming to the airport or CBD from the main Northern and Southern routes as well.

There is a fundamental conflict between the interests of a tollway operator and a group of transport experts working to reduce or eliminate congestion on the roads of a growing city. The expert group wants to find a way to increase traffic flow, which requires minimising vehicle numbers using roads in periods of peak demand, while the tollway operator makes the most money when vehicle density is at its highest and traffic is at a crawl. WestConnex is perfectly adapted to the needs of a tollway operator while hostile to the interests of drivers who want to move quickly around Sydney.

This submission deals with the process by which the search by transport experts for a lasting solution to Sydney's congestion problems was taken over by the corporate interests of a tollway operator to the detriment of Sydney's road and rail users, businesses, taxpayer and residents.

I wish to thank the Public Accountability Committee for their interest in this matter, which is one of the greatest importance to the continued viability and liveability of our city.

Premier Barry O'Farrell's government was elected by an historical majority on March 26, 2011 following 16 years of Labor Government. That Labor Government had made many promises to build rail projects in and around Sydney in those 16 years. Those projects were much needed and popular when announced, but that government's failure to build all but one of them (the Epping to Chatswood line – 13kms) is part of what led to their rout in 2011.

In the first session of Parliament (May – July 2011) the new government passed two acts that are significant to this enquiry:

1. The Environment Protection and Assessment Act (Part 3A) Repeal Act;
2. The Infrastructure New South Wales Act.

Both these acts were central to the platform taken to the election by the Liberal Party, however, neither act fulfilled the promises made on their behalf in that campaign.

1. The Environment Protection & Assessment (EP&A) Act:

The Liberals were elected promising to repeal Part 3A of the EPA Act on the promise of giving decision making in development decisions back to the community. The EP&A (Part 3A Repeal) Bill did not just repeal Part 3A, but added a large amount of new legislation, the main effect of which seems to have been to extend and intensify the defects of the previous legislation, and eliminate the good effects of the remaining environmental protections in the act. Secrecy was extended and accountability and responsibility requirements were eliminated.

Section 115U enabled the Minister to declare almost anything (above certain low cost thresholds) to be State Significant Infrastructure (SSI).

Section 115V states “any SSI can be declared Critical State Significant Infrastructure if the Minister thinks it is essential for economic environmental or social reasons”.

The question arises how are the grounds for such a declaration established?

There appears to be no requirement for the Minister to hold this belief on grounds provable by evidence or even rational grounds. A declaration however removes the rights of the public and grants great power to the Minister.

- a) Section 115V, through Sections 115ZG and 115ZH nullifies the requirement for CSSI to comply with a range of regular planning laws, directions, notices and or orders.
- b) Section 115ZK removes the right of third parties (the public) to appeal to the Court in relation to wrongful declaration of SSI or CSSI on false grounds, any breach of approval conditions of CSSI or a breach of any Act in respect of planning legislation that must otherwise be applied consistently.

Section 115ZK(3) effectively places CSSI projects above the law: “the *conditions* of approval under this part for CSSI are conditions that may only be enforced by or with the approval of the Minister (whether under third party appeal, Judicial review jurisdiction or any other proceedings)”.

Section 115ZJ removes all possibility of judicial review of a CSSI project if the basis for seeking review can be concealed for three months. “The validity of an approval or other decision under this part cannot be questioned in any legal proceedings in which the decision may be challenged except those commenced in the Court within three months after public notice of the decision was given”. In the two decades prior to this new legislation being drafted, many large transport infrastructure projects that lacked merits with low BCRs and weak business cases had wasted billions of taxpayers’ dollars and greatly increased the costs of mobility within Australian capital cities. This legislation made that waste more likely to occur as it has done with WestConnex.

The Department of Planning and Environment (NSW) says this on its website:

“Can the decision of the consent authority [for SSI] be appealed?”

Applicant appeal rights:

There is no provision for merit appeals by applicants against SSI determinations.

Objector's appeal rights:

There is no provision for merit appeals by objectors against SSI determinations.

Judicial review:

Anyone can appeal the legal validity of a decision if they consider that there has been a breach of the EP&A Act 1979 in making the decision. The appeal must be made within three months of the decision being notified.

Third party appeal rights are not available in relation to CSSI.

Further information can be found in the Development Assessment Appeal Rights Fact Sheet." <https://www.planning.nsw.gov.au/.../Files/.../Factsheets.../fact-sheet-development-asses...>

Councils and communities were promised by the new government that they would be involved in decision-making processes in a more meaningful way. Instead they were completely sidelined by the new planning process which led to WestConnex

This legal process had the effect of allowing the project to not meet Secretary's Environmental Assessment Requirements (SEAR's), and appears to have arisen from the seeming intention to evade those requirements. This turned the planning process into a rubber stamping exercise that effectively excluded the public interest from consideration. Regardless of intent, most of the SEARs were evaded by WestConnex.

The assessment process of SSI begins with:

- An SSI application is received by the Department
- The Department prepares Secretary's Environment Assessment Requirements (SEARS) which outline what must be addressed in an EIS.
- The proponent prepares an EIS to address the SEARS (Source: Department of Planning and Environment website June 18th, 2018).

Secretary's Environmental Assessment Requirements

1. The EIS must include... the following ...e) An analysis of any feasible alternatives to the project.

Note 2: Alternatives to the project are different project, which would achieve the same project objective(s) including the consequences of not carrying out the project. For example, alternatives to a road project may be a rail project in the same area and alternate routes for the road. "

This binding requirement was never fulfilled in any WestConnex EIS document or Business Case. Despite thousands of objections on exactly this ground including by major Councils and transport experts, the Planning Department simply falsely stated that the requirements had been met without providing evidence.

(Does this raise implications that could include a consideration of Section 307B and 307C of the NSW Crimes Act – Convey false information to a government authority; create a false document?)

“Returning Decision making to the community “

Councils in areas of Sydney affected by WestConnex continued to represent their rate payers concerns by opposing WestConnex. This is one of the reasons behind some of the later amalgamations by the Baird government. Leichhardt, Ashfield and Marrickville Councils were also stripped of elected representation for 18 months, and an administrator was appointed from the Planning Ministry for that time. This removed the last doubt that the government had no intention of honouring its promise to “give decision making back to communities”.

The EP&A Act changes provided the legal cover needed by government to force a worthless project onto a reluctant community. The removal of the right to appeal to the Court on the basis that a proposed infrastructure project lacked merit (as WestConnex certainly did, once the details became visible) appears to have been part of a predetermined plan.

IF THE PUBLIC’S RIGHT TO JUDICIAL REVIEW ON THE BASIS OF MERIT HAD BEEN RETAINED, WESTCONNEX WOULD HAVE BEEN SWIFTLY REJECTED.

Once this legislation was passed, all citizens’ rights to investigation or complaint about a bad plan were eliminated leaving the public exposed to nearly 6 years and many billions of public dollars of wasted on a tollway project that will only be of any benefit to its major contractors and the tollway operator.

Question: No reasons have ever been provided to the public to explain on what basis decision by the Minister to declare stages of WestConnex to be CSSI were taken. Where are those documents? Could it be that the only reason was to remove WestConnex from the oversight of the courts or regulatory agencies?

The Committee should call for all documents relevation the Minister for Planning declarations that Stages of WestConnex should be CSSI and publish them.

Question: Was WestConnex declared to be CSSI mainly because that shielded it from legal challenge on the basis of its lack of merits, and enabled it to violate or ignore planning laws and regulations that it would have had to comply with but for its CSSI status?

The SEARs exist to test the concept, provide evidence for the proponent's case and reveal any unacceptable unforeseen impacts underlying a new SSI project before a lot of public money is allocated to it.

Like judicial review the SEARs provided another check against bad projects being funded by government if they had been enforced or even taken seriously.

The first requirement is to list and analyse alternative projects that would achieve the same project objectives as the proposed project, in this case WestConnex.

WestConnex had from 7 to 12 project objectives, depending which document from what stage of the project's development you are reading. The following list is taken from page 4 of WestConnex, Sydney's Next Motorway Priority, produced by Infrastructure NSW October

2012, so can reasonably be expected to be the original set of officialy stated project goals.

These challenges are not new and have been the subject of many investigations and consultations by transport and urban planning experts over the past decade. If Sydney is to address this diverse range of problems and challenges, it will need an integrated transport solution that can deliver on a number of key objectives drawn from understanding these challenges. The objectives of WestConnex are to:

1. Support Sydney's long-term economic growth through improved motorway access and connections linking Sydney's international gateways and Western Sydney and places of business across the city.
2. Relieve road congestion so as to improve the speed, reliability and safety of travel in the M4 and M5 corridors, including parallel arterial roads.
3. Cater for the diverse travel demands along these corridors that are best met by road infrastructure.
4. Create opportunities for urban renewal, improved liveability, and public and active transport improvements along and around Parramatta Road.
5. Enhance the productivity of commercial and freight generating land uses strategically located near transport infrastructure.
6. Fit within the financial capacity of the State and Federal Governments, in partnership with the private sector.
7. Optimise user pays contributions to support funding in a way that is affordable and equitable.

Goals 1 and 3 both contain unnecessary language that effectively excludes any non-road alternatives.

This appears to be an attempt to evade the Secretary's requirement that an "environmental impact statement must include . . . (e) an analysis of any feasible alternative to the project . . . which would achieve the same project objectives".

What would be the point of wording infrastructure project goals to mandate a roads outcome when the main problems to be solved by the project (refer objectives 2, 4, 5 & 6 above) are most likely to be dealt with more cost effectively, for longer, and with far less collateral damage by a rail project?

The WestConnex project objectives are introduced by these sentence: "These challenges are not new and have been the subject of many investigations and consultations by Transport and Urban Planning experts over the past decade."

It is clear from this that INSW knew that there had been many studies conducted by transport and urban planning Experts into exactly the same problems that body has been tasked with solving. All of these investigations came to the conclusion that more roads were incapable of reducing traffic congestion in the older parts of Sydney (Referred to by INSW as the “Global Economic Corridor”) and that investment and expansion of the suburban rail network was necessary, as well as light rail and active transport. These measures had been restated and brought right up to date for the expert Advisory Panel that had been working for Transport for NSW for around a year, and published in the DRAFT NSW Long Term Transport Master Plan (LTTMP) in September 2012.

Why did INSW ignore or reject all the expert advice that they had to hand, and explicitly rule of the modes of transport they knew would fix Sydney’s congestion problems, while insisting on building another road which would fail that goal and only cater to Transurban’s appetite for more toll revenue? (See FY 2013 Annual report).

2. Infrastructure New South Wales:

In 2011, the new government set up a special body, Infrastructure NSW, to make the crucial choices about transport infrastructure priorities. The Chairperson, **Nick Greiner**, directly appointed by the Premier, had a strong connection to the toll road and construction industries dating back to the period after his resignation as NSW Premier in 1992 and his involvement in the boards of Baulderstone Hornibrook and engineering firm Bradken amongst other companies.

(<https://www.smh.com.au/national/nsw/premier-calls-in-greiner-as-his-can-do-man-to-help-rebuild-the-state-20110429-1e0t2.html>)

Other Directors also had relationships with Transurban or other road related businesses.

David Gonski sat on the Board of Governors of the Future Fund which in March 2012 had emerged as the largest single holder of Transurban shares.

(<https://www.investsmart.com.au/investment-news/future-fund-buys-up-big-in-toll-stock/28709>)

Max Moore-Wilton declared an interest in the Register of Directors' Interests in Sydney Airport Corporation that derives a large part of its income from parking fees at Sydney Airport. Road access to the airport was originally a fundamental justification for the project.

Roger Fletcher has interests in logistics, freight and concrete.

Carolyn Kay sat on the board of another logistics company Brambles and non-executive director of Allen Linklaters that won later big contracts with WestConnex.

Five of the six non-governmental Directors of Infrastructure NSW had significant in road related companies or the tollroad industry.

The CEO of Infrastructure NSW was **Paul Broad**, who is known for his work in water infrastructure. He is a staunch Greiner loyalist, and has expressed hostile attitudes towards rail infrastructure. (<https://www.smh.com.au/politics/federal/with-broad-and-greiner-driving-us-chaos-is-just-around-the-corner-20121007-27770.html>)

It is worth noting here that **Tony Shepherd** was appointed as the first Chairperson of the all male WestConnex Delivery Authority Board when that was later formed in 2014. Shepherd had been involved in several tollways through being CEO of Transfield Services and was an inaugural director of Transurban.

The continuity of the involvement of the tollroad industry raised questions about the motivation of the Board's prioritisation of WestConnex.

From a public interest point of view the Board of Infrastructure NSW lacked the breadth of views and depth of experience on the full range of transport infrastructure that is necessary for adequately balanced and informed decision-making. From a governance

point of view a strong and long standing relationship between Chair and CEO creates the risk that any opinion or interest or prejudice held by those two office bearers is likely to be pushed through normal board processes potentially overwhelming the views of other directors. The known prejudices or interests in favour of roads held by a majority of the other directors made the selection of WestConnex ahead of better, cheaper, safer, more sustainable projects that were already on the menu a near certainty.

Les Wielinga, Department Head of Transport for NSW was brought onto the Board of INSW in September 2011 (although this is not reflected in the Register of Director's Interests – his name does not appear) to provide a bridge between the transport bureaucracy and INSW. Wielinga resigned from INSW in July 2012.

In August 2012, the SMH reported

The state's top transport bureaucrat has resigned from the body drawing up a 20-year infrastructure plan for NSW, signalling a big split over the O'Farrell government's agenda.

The split emerges from competing views about the relative importance of public transport or motorway projects to be built in Sydney in the next 20 years.

But sources said the departure confirmed and sharpened a tension that had been building since the early days of the government.

One said Mr Wielinga resigned because Transport for NSW and Infrastructure NSW would soon release competing visions for Sydney and agreeing to both would be a conflict of interest. Another said Mr Wielinga's position had become untenable.

Transport for NSW, under the Minister, Gladys Berejiklian, should release its draft 20-year transport plan this month and a final one in November. Infrastructure NSW, chaired by the former premier, Nick Greiner, will hand the government its 20-year strategy in September.

Mr Wielinga's departure cements expectations that there will be little common ground between the reports. Infrastructure NSW's report is expected to make few recommendations about new public transport projects. Instead it will prioritise the construction of tolled motorways in Sydney. But the Transport for NSW document will emphasise the need for a second rail crossing for Sydney Harbour and commit to building light rail through the CBD and to the eastern suburbs, among other projects.

"They are recommending stuff contrary to the masterplan," a source said of Infrastructure NSW.....

Mr Wielinga, who will remain director-general of Transport for NSW, was left off the board of Infrastructure NSW when it was set up in July last year to identify the most needed projects. His departure leaves the organisation without a representative from the transport bureaucracy.

The board has five private-sector representatives and the heads of the departments of Planning, Premier and Cabinet, Trade and Investment, and Treasury. Paul Broad is the chief executive.

The tension between Transport for NSW and Infrastructure NSW was illustrated in June when Ms Berejiklian, with the Premier, Barry O'Farrell, and Mr Wielinga, announced the latest plan for the north-west rail link. That plan was a commitment to a second rail crossing for the Harbour after the north-west link was finished. But on the same day, Mr Greiner said the second rail crossing should be delayed as long as possible.

<https://www.smh.com.au/national/nsw/collision-course-transport-boss-quits-20120803-23kt2.html>

Question: Who if anyone advised Premier O'Farrell in his choice of Directors for Infrastructure NSW?

Question: Who if anyone, oversaw compliance by Directors with the normal governance requirements such as recording all interests in the Register of Directors Interests?

Question: An inspection of the Register of Interests did not reveal shareholdings for this period. Why is this? Were all Directorships recorded?

Question: How was the tension between INSW and Les Wielinga handled by the INSW Board and the NSW government?

Infrastructure New South Wales (INSW) Act:

The second piece of legislation relevant to this inquiry passed through the first sitting of NSW Parliament in June 2011 (in which the government had overwhelming dominance) was the infrastructure NSW Act.

The objects of the INSW Act are:

- a) *"To secure the efficient, effective, economic and timely planning, co-ordination, selection, funding, implementation, delivery and whole of lifecycle asset management of infrastructure that is required for the economic and social well-being of the community, and*
- b) *To ensure that decisions about infrastructure projects are informed by expert professional analysis and advice".*

These objects appear by the prioritisation of WestConnex not to have been met. There does not appear to have been any sincere attempt at meeting them from the reports commissioned and produced, as well as those ignored, by INSW.

The establishment of INSW as an independent body of experts that would use their collective expertise and experience to directly advise the Premier on infrastructure priorities. and even publish reports critical of the Premier if he failed to act as they

recommended, should have produced a similar result to that produced by TfNSW Expert Advisory Panel.

- Section 25(2) even appears to make the Premier accountable to INSW Board for his decision based on its advice.
- Section 24 provides some 'options' that may be included in Sectoral State Infrastructure Strategy Statements – why are these not requirements, as they seem to be basic steps to any infrastructure planning?

Section 11, General and Specific Functions of INSW, gives INSW total, beginning-to-end control and oversight of projects it recommends, and that are adopted by the Premier (not Parliament or Government). This includes assessing risks in all aspects of a project (SS.(h),

- “to provide advice to the premier on economic or regulatory impediments to the efficient delivery of specific infrastructure projects or infrastructure projects in specific sectors” (ss.(i))
- “to provide advice on appropriate funding models for infrastructure (ss.(j)).
- “to co-ordinate the infrastructure funding submissions of the State and its agencies to the commonwealth government and to other bodies” (ss.(k))
- “to carry out reviews of completed infrastructure projects at the request of the Premier (ss.(l))

Section 11 gives INSW a total power to foist the most worthless infrastructure projects on NSW, and to occupy all the positions in which responsibility for detecting bad projects would normally be vested, and then to write the final assessment of a dud project, stating that it was successful. Whether or not this was what was intended when this legislation was drafted, it is what has happened in the case of WestConnex.

NSW is far from being free of criminal groups seeking opportunities to obtain free money, as the Banking Inquiry has revealed. Its government should be aware of its responsibility to guard public money from such individuals or groups, yet through the creation of Infrastructure NSW and Restart NSW, the giant fund into which all the proceeds from the sales of public assets (the so-called “asset recycling” scheme) are deposited, a honeypot has been created that makes billions of public dollars freely available to any group that can gain significant influence over INSW’s board. (See NSW Crimes Act for definition of Criminal Group 93S) The lack of checks and balances against this in the EP&A (part 3A) Repeal Bill and Infrastructure NSW Act passed in mid-2011 gives every taxpayer in NSW good reason to be alarmed.

- Section 33 reveals that INSW can take over another government agency’s functions in relation to the carrying out of a major infrastructure project, including the assets, rights and liabilities that go with that project.

Question: This seems an extraordinary power for a body without normal checks and balances to be given. What if INSW wants to take over a rival project to sabotage it, in line with Transurban's third listed threat on its wish list that it doesn't want "existence and development, or changes to, competing roads, feeder roads and other means of transport." (FY 13 Annual Report Page 22).

The INSW Act seems to go much further than an Act merely aimed at cutting through bureaucratic red tape and departmental faction fights would need to.

- The INSW Act makes INSW much more of a hands on body than Infrastructure Australia was set up to be.
- The INSW Act has a much less rigorous approach to governance and responsibility than provisions for Directors in the Corporations Act.
- This sets INSW up to be taken over by heavily influenced by industries that benefit from gold-plated government infrastructure contracts.
- This seems to be exactly what happened.

INSW Act Section 5.34 Acquisition of Land

Section 34(3) removes the oversight role of Parliament and the requirement to gazette parliament's decision on whether or not a major project is expedient:

- (3) *Sections 34-37 of the Public Works Act do not apply to, or in respect of, a major infrastructure project to which a project authorisation order relates.*

This provision enables a government to conceal facts about WestConnex (or any other project) from parliament and prevent an opposition from evaluating the worth of a major project (their role under Sections 34-37 of the Public Works Act) before it is approved by government. It abolishes the transparency and accountability that was:

- Recommended by 2006 Lane Cove Tunnel Inquiry
- Recommended by 2014 Productivity Commission Report into Infrastructure
- Promised by Opposition Leader O'Farrell in the 2011 Election.

Question: Who (if anyone) advised and influenced Premier O'Farrell to make INSW much more focused on catering to the desires of industry (builders and toll road operators) than to the needs of the public and the economy between 2009 and 2011?

The Committee should call for all documents relating to the setting up and operation of INSW.

Section 32(5) enables INSW to take over other department's projects, no questions asked. I hope the Committee looks closely at its powers and the way they have been applied.

Granting such powers to a body that is dominated by private interests, surely exposed the public to great and unnecessary risk.

The creation of INSW, obviously based on Infrastructure Australia (at least superficially) indicates a desire to take advice on infrastructure projects from a body of recognised experts in that field, or at least to be seen to be doing so.

In 2011 – 2013 Infrastructure Australia had been working on the problem of how to get freight from Port Botany/Airport to western industrial centres (within Sydney at least):

Professor Peter Newman:

“I was on the Board of Infrastructure Australia – the Federal Government’s infrastructure funding agency for a couple of years and we had been struggling with Sydney and its traffic and freight issues.

We were trying especially to improve access to its Ports and Airport. Various proposals came in that included potential roads to fix the freight issue. You could never get a benefit cost ratio above 0.4, which is pathetic. You just don’t build projects like that.

Next we heard that a grab bag of roads has been pulled together to bring cars into the equation because that was the only way to make the BCR add up. That’s not a great way to plan a city, because essentially what you’re saying is – lets just find something that gets a better BCR and it must be good.

Then there was the problem – who’s going to back this? And suddenly along came Tony Abbott who said “I’ll do it – I’ll make it part of my Roads of the 21st Century” out of the blue we had the biggest road project in the world.

This really dropped out of the sky. It had nothing to do with Infrastructure Australia’s processes, nothing to do with our strategic approach to building transport, nothing about getting better economic productivity, let alone sustainability.”

[Professor P Newman, Eco Transit News October 2015 (from an earlier article)]

Question: If the NSW government was so keen to get the best infrastructure advice it could that it set up INSW, why did it refuse to listen to the advice about roads in general and WestConnex in particular that was coming from Infrastructure Australia, just such an expert panel (much more qualified than INSW) that already existed and that had particular experience working on exactly the problem that WestConnex claims to be the answer to?

This advice was available from the first days of the O’Farrell Government, and

remained the same until the late 2013 purge of Infrastructure Australia by incoming Prime Minister Abbott, who removed all the technical experts and replaced them with people with a known propensity towards roads.

- *Another expert body offering good advice was working for Transport NSW 2011 – 2012 was the*
-
- Was INSW planned well prior to the 2011 & 2013 elections (as it would have been clear to the toll road industry including the Board and CEO of Transurban for a long time that both Federal and State Labor Governments were going to suffer routs in 2011/2013) as a vehicle for Transurban/Leighton and other companies to capture and capture the planning process in NSW for their own ends?
- **If so, It has worked superbly in this capacity, while it has been a complete failure as an expert advisory body.**

Question: Why did NSW Government also ignore:

- a) *Every existing group of transport experts?*
- b) *Expert Advisory Panel working for Transport for NSW? This included Michelle Ziebots, Stuart White, Ron Christie, Garry Glazebrook..*
- c) *Recognised experts with the transport Infrastructure community?*
- d) *Expert advice available from:*
 - i) *Kyeemagh Chullora Roads Inquiry (1980), which went for 2 years and heard in great depth from all sides of exactly the same issue (how to move freight west from Port Botany)?*
 - ii) *Recommendation from 2014 Productivity Commission Report into infrastructure project costs as per extracts below from said report:*

From Page 5 of report:

“Decisions need to be evaluated carefully to ensure that long term net benefits [of infrastructure projects] are not undermined in the pursuit of short term gains, including political ones”.

From Page 6 of report :

A key message of this report is that there is a fundamental need for a comprehensive overhaul of the poor processes currently used in the development and assessment of infrastructure investments particularly, but not exclusively, by governments. The costs of poor project selection and delivery will be exacerbated if governments decide to increase their infrastructure investment programs without reforming their governance regimes.

Recommendation 2.3 (from page 106) Productivity Commission Report 2014 states:

“All governments should commit to subjecting all public infrastructure investment proposals above \$50 million to rigorous cost benefit analyses that are publicly released and made available for due diligence by bidders. In general, analyses should be done prior to projects being announced. If a project is announced before analysis is done, for example in the lead up to an election, this should be conditional on the findings of a subsequent analysis.”

As these extracts show, the Productivity Commission report provided a strong reason for caution but instead it was ignored when it was released in mid 2014. It was another of many red flags that were all ignored in the rush to siphon billions of dollars to WestConnex against all outside advice.

In 2011-2012 the NSW Government was spoiled for choice when it came to independent expert bodies, current and past (in the form of existing reports) that had excellent advice to offer concerning Sydney’s transport needs. All of this advice appears to have been ignored by that Government.

When they set about choosing the Directors for their new advisory board (INSW), experts with a strong technical background across a wide range of infrastructure types were not selected. Those who were selected had very little technical expertise in anything but procuring or managing infrastructure projects at the highest and most remote level. That is a very unusual way to assemble a panel capable of offering good advice.

One thing the INSW board members were well qualified for was assessing the financial arrangements for major infrastructure projects. All of the board members would have been able to spot a defective business case for instance but WestConnex had a highly defective business case in 2012-2013, but nobody at INSW seems to have noticed this. In late 2015, it acquired another defective business case, which also received much well-informed criticism which was again ignored by government.

It took the NSW Auditor General to point this out in his December 2014 report, and even when the evidence that that business case was thoroughly flawed was published, still the NSW Government (by this time led by Premier Baird) chose to take no action to stop further government money being wasted. WHY?

Instead the NSW Government parried every publicly expressed concern about the many defects of WestConnex by claiming loudly (and falsely) that the project was “on time and on budget”, and repealing other claims about alleged time savings

and economic benefits that were contradicted by both the business cases and all the EIS documents released up to that time.

In one Parliamentary farce I witnessed the government even used its numbers to amend a motion in the Legislative Assembly condemning the many abuses of process and waste of taxpayers' money on WestConnex so that it became an absurd "3 cheers for our management of WestConnex" sham. Every opportunity presented to the NSW Government between 2011 and the establishment of this inquiry, to have a proper look at WestConnex and check to see if it offers real benefits and value for money in exchange for the taxpayers billions, has been squandered .WHY?

All Governments break promises made to their voters sooner or later. It's more rare to see a government breaking a promise made to its principal financial supporters, especially those who donate regularly, and who perhaps may offer other kinds of assistance.

In 2016, then Senator Lee Rhiannon published a report on road lobby political donations that is relevant to this Inquiry in that it may suggest what hidden influences were acting on political decision makers.

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

Many of the Coalition's most prolific and regular donor corporations have done very well out of infrastructure contracts. The biggest of all is WestConnex. These companies include: Transurban, Leighton, John Holland, Boral, Baulderstone Hornibrook and others. This does not take account of toll road player and financial advisor Macquarie and various major accountancy consultancies such as Deloitte and Price Waterhouse.

There may be more. We don't know how much was hidden. The ICAC Hearings into political corruption in 2014 heard that the Liberal Party had encouraged illegal donations to be funnelled to it via laundering agencies like the Free Enterprise Foundation and 8X5 (FEF provided \$787,000 from 2010 to 2014).

In 2014, when the NSW Parliament was considering holding an inquiry into WestConnex, the SMH reported that Robert Borsak of the Shooters' and Fishers party had changed his position after the Minister for Roads Duncan Gay assured him that Ashfield Park, near his home, would no longer be affected. This is an example of planning on the run for political ends. It leaves the public wondering what other major planning decisions have been made on non legitimate grounds.

<https://www.smh.com.au/national/nsw/westconnex-inquiry-knocked-on-head-to-save-park-20140625-zsl9l.html>. (See back to Productivity Commission recommendations on page 15.)

As stated before Nick Greiner was advising Barry O'Farrell both before and after the 2011 election. Mr O'Farrell apparently referred to Greiner as his "can-do man (Sydney Morning Herald April 30, 2011

<https://www.smh.com.au/national/nsw/premier-calls-in-greiner-as-his-can-do-man-to-help-rebuild-the-state-20110429-1e0t2.html>]. O'Farrell appears to have become somewhat dependent on Greiner for advice and support. What better way to repay Greiner and ensure his continued assistance than by setting him up with his own advisory panel consisting mostly of individuals with similar ideological views? NSW is based on legislation that suits Greiner's "can-do" attitude, and is lax enough to accommodate his "gung-ho and devil take the hindmost" mode of working/decision making. (Greiner Unloads , AFR November 18th, 2010 <https://www.afr.com/news/politics/national/nick-greiner-unloads-20101117-j5a11>)

The then Labor MP and Shadow Infrastructure Minister Linda Burney made an observation similar to this in her speech on the INSW Bill on June 1, 2011.

It is true that the bill creates an infrastructure agency, but it does not take the politics out of infrastructure decision-making.

This bill could be dubbed the "Barry Bill".

Infrastructure NSW is not independent and certainly not above political interference. We need only to read

between the lines to find out that it is not as transparent as the Premier stated on 26 May in this House. He stated

that this bill allows for the creation of an independent agency that will "take the politics out" of infrastructure

decision-making and place infrastructure planning and decision-making "in the hands of experts.

The current bill does not leave the Premier or the board of Infrastructure NSW open to accountability or transparency. There should be a definitive checks and balances process—not a Barry's-word-is-final process. Indeed the bill also states that any project over \$100 million will be commandeered by Infrastructure NSW, and that would be the majority of projects. It does not allow for a community consultation process through Infrastructure NSW. Rather, through commandeering projects Infrastructure NSW also commandeers any facilities of government agencies to enable Infrastructure NSW to exercise its function. Part 5, clause 32 (b) states:

Indeed, without a visible community consultation process, the community will not be able to voice its concerns over the implantation of particular infrastructure projects.

There needs to be a stronger level of accountability for the community and the relevant department to allow for a checks and balances process.

The strategy reviews should happen more frequently on an annual basis and should be made public, not just when the Premier feels it is appropriate. This provision could lead to the Premier hiding information that should be public knowledge....

Part 2, clause 1 June 2011 LEGISLATIVE ASSEMBLY 1669 8 defines the make-up of the Board of Infrastructure New South Wales, which will include a chairperson. We already know that the selection of the chairperson was decided well before introduction of the bill. That person is Nick Greiner, a former disgraced Premier of New South Wales.

Nick Greiner's Appointment

The appropriateness of appointing Nick Greiner to the Board of INSW is raised in relation to his conduct in a number of business matters during this period. Below is a selection of newspaper articles and quotes taken from said articles:

Just after Greiner was appointed to Chair INSW Board, he was involved in what a Federal judge described as a 'bid rigging deal.'

[Bradken – SMH 26/3/13 Nick Greiner Entangled in Deceptive Deal – Georgia Wickins] <https://www.smh.com.au/business/nick-greiner-entangled-in-deceptive-deal-20130326-2grul.html>

Greiner Concealment Ends in \$21 Million Damages 20/3/13

In July 2011, shortly after being appointed Chairperson of INSW, Mr Greiner involved himself in "misleading or deceptive conduct" that resulted in a company he was affiliated with winning a "fee" by engaging in a bid-rigging scam. The Court action that arose from this was reported in March 2013, while Mr Greiner was still INSW's Chairperson. Investor Smart reported:

Former NSW Premier Nick Greiner, was "evasive and hostile" when asked to give evidence over his involvement in an elaborate bid rigging deal between two companies he is linked to, a Federal Court Judge said.

The companies are mining services firm Bradken and Castle Harlan. Mr Greiner is a Director of Castle Harlan's Australian affiliate, CHAMP.

Mr Greiner, Chairman of INSW, and Bradken Managing Director Brian Hodges were involved in Bradken's "misleading or deceptive conduct," the Judge said.

<https://www.investsmart.com.au/investment-news/greiner-concealment-ends-in-21m-damages/34492>

The SMH reported that Mr Greiner, Bradken and Mr Hodges were ordered to pay \$21.6 million to Swiss company PALA. The judge found Mr Greiner had used his

positions at the companies to hoodwink PALA into selling its mining parts manufacturer – Norcast – for less than it was worth.

In reasons for her judgement . . . Justice Michelle Gordon said Mr Greiner had intimate knowledge of the deal that resulted in his affiliated firm winning a “fee”.

“Put simply, Greiner was involved in and had knowledge of the essential elements from the start to finish”, she said.

[His] subjective, operative purpose was equally to ensure that Castle Harlan [to which Greiner is affiliated] made a bid.”

Bradken [of which Greiner is Chairman, according to his disclosure in INSW’s Register of Directors Interests] expressed an interest in buying Norcast in 2011. It claimed it was excluded from the sale process in which Castle Harlan purchased Norcast for \$190 million. Hours later, Castle Harlan sold it to Bradken for \$202 million and pocketed the difference. Norcast told the court it would have received US \$22.4 million more if Bradken had been the buyer.

Mr Greiner is the Deputy Chairman of Castle Harlan’s Australian affiliate CHAMP. When cross examined over an email detailing a deal between Castle Harlan and Bradken, Mr Greiner was “hostile and eventually contended that he did not recall what he meant”. In the email, Mr Greiner tells Castle Harlan Chairman, Leonard Harlan and Co President Howard Morgan, Bradken’s involvement “would not be disclosable [sic] to the ASX until the deal was effectively done”.

Justice Gordon said Bradken had tried to be discreet about the scheme by leaving few records of conversations. “Norcast relied upon Bradken’s silence about the bidding provision” she said. “Bradken represented that it was not involved in Castle Harlan’s acquisition of [Norcast]. That conduct was misleading and deceptive.”

<https://www.smh.com.au/business/nick-greiner-entangled-in-deceptive-deal-20130326-2grul.html>

The email tendered in evidence and quoted from above, reveals that in 2011, the man who had been given supreme power to determine which infrastructure projects would receive billions of dollars of NSW public funds was prepared to misuse his knowledge of the regulatory system in order to gain money for himself or an associate by gaming the system. Justice Gordon found that he had been “involved in and had knowledge of the essential elements from the start to the finish” of a scam by which he had hoodwinked another corporation out of many millions of dollars. This is certainly the “gung-ho and devil take the hindmost” attitude, which Mr

Greiner had proudly attributed to himself in an interview in 2010, at work. ["Greiner Unloads" SMH late 2010]

Greiner's "hostile and evasive" behaviour under cross examination, combined with his email to his associates at Castle Harlan suggesting that they could and should outfox the law by moving swiftly, indicates a likelihood that while he objectively knew that what they were doing was illegal, the prospect of such an easy gain at someone else's expense was too good an opportunity to pass up. Nick Greiner had after all, been committed to self-betterment through "wealth creation" for his entire adult life.

This raises very important questions because of the unusual laxity of the INSW Act in regard to governance standards and requirements (notably the absence of penalties for directors making decisions about the allocation of billions of dollars of public money based on conflicts of their interests, potentially amounting to an encouragement to do so, meant that all Directors and especially the Chairperson had to be people of the highest standard of integrity and trustworthiness, or the O'Farrell Government's entire infrastructure budget risked being plundered behind a veil of secrecy. The article quoted from above about bid rigging is also relevant because the same law (Competition and Consumer Act 2010) that outlaws bid rigging, Section 44ZZRA and Section 44ZZRD also appears to outlaw the 'no- compete' clauses that are said to be in some Transurban's toll concessions contracts and are certainly on that company's 'threats and opportunities' wish list published in its Annual Report 2012-13 p.22).

Nick Greiner is currently a consultant to Transurban. <http://www.nickgreiner.com.au/>

One of the Chairmanships listed by Nick Greiner in the INSW Register of Director's Interests is Play Up Interactive Entertainment. Just like with Transurban, Greiner's involvement with this online gambling company dated from its own earliest days (2007) in 2008 he told the Financial Review [AFR 14/3/16 "Malcolm Turnbull, Nick Greiner and the \$1M loan"]:

"[Luke Bunbury] wanted someone with grey hair to give advice on planning and building the business. I liked his ideas and saw the potential".

"The idea was for millions of people to wager small amounts of money with friends and fellow punters and play online games of skill and chance while watching live sport, with PlayUp taking a cut along the way".

In 2007 Greiner helped raise \$5 million from investors. In late 2008 and early 2009 another capital raising pulled in \$15 million. A parade of celebrities and BRW Rich Listers subsequently invested millions individually, including Malcolm Turnbull, who invested \$1 million on 22/5/12.

The following day Greiner wrote to Turnbull, then Shadow Communications spokesman in the Federal Parliament, saying “PlayUp is not, nor has any intention of becoming involved in any business that falls within the general definition of interactive gaming or gambling.

The letter also said that, “PlayUp and its subsidiaries are not currently engaged in any business activities that require it to hold a gambling licence under the laws of any jurisdiction in which it operates”.

<https://www.smh.com.au/politics/federal/turnbull-investment-raises-concerns-20130824-2sift.html>

Company documents confirm that “live, social gaming against sport, via mobile remains at the heart of the proposition” [Playup Business Update 2010].

This was backed up by the former Chief Executive of Playup’s European subsidiary “peer to peer gambling and gaming was always part of the plan”.

[The Age, via Newcastle Herald 26.1.16] – *“it appears that Mr Greiner’s letter to Mr Turnbull was intended to get him out of an awkward position (he had reportedly argued in Shadow Cabinet (in May 2012) against a crackdown on sports betting advertising) by misleading his Liberal Party colleagues and potentially the Parliament.*

“[PlayUps] Management discussed a future stock market float and told investors in 2012 that revenue was forecast to reach almost \$350 million in the 2014 financial year and \$1.34 billion the year after. Earnings before interest, tax, depreciation, and amortization as fore cast at \$318 million in 2013-14 and \$1.26 billion a year later” (AFR 14/3/16)

Just like with the WestConnex project, PlayUp got investors excited with wildly inflated forecasts of benefits that were never to be realised. By 2013 Mr Turnbull approached PlayUp to sell his shares, held in the Greiner led company called REVO Nominees.

“Questions are being asked about a highly unusual deal struck in late 2014 between [Turnbull and Greiner] which eventually led to Turnbull converting his share into a loan – secured against all of REVOs assets, and with an annual interest rate of 12%.”

“No other shareholders were offered such a deal”

“A spokesman for the [by 2016] PM said: ‘The company for its own reasons decided to cause REVO Nominees to buy the shares, with payment to be made on the completion of its capital raising or in 12 months, whichever came earlier” (AFR 14/3/16)

By the 2014 date at which the 1 –shareholder-only loan deal was struck, PlayUp was failing to pay its staff their wages and superannuation. Investors were apparently not

told of this by the board of PlayUp. Any capital raising must have been conducted on the basis of empty promises of future profits.

“The Australian Financial Review has learned the several hundred thousand dollars worth of repayments on the Turnbull loan, by now secured, were being made during the first half of 2015 – even while PlayUp employees were not being paid their salaries or superannuation. By then, Greiner had resigned from the PlayUp board and cut all ties with the company, save for a small shareholding he still holds today [2016]”

“Former employees, owed about \$3.7million, creditors owed millions more and shareholders who had dreamt of making a fortune from a mooted stock market listing will not be so lucky [as Malcom Turnbull]. A report by the liquidator last week [March 2016] revealed REVO owed staff more than \$330,000 in unpaid superannuation, the ATO was owed \$145,057 dollars and the Victorian Stare Revenue Offices \$122,446 for unpaid payroll tax.” (AFR <https://www.afr.com/news/politics/malcolm-turnbull-nick-greiner-and-the-us1-million-loan-20160309-gnf5yr>)

The PlayUp/REVO saga appears to be of a massive business failure, based on unjustifiably optimistic earnings forecast at best, and a Ponzi scheme at worst (with one privileged investor being repaid in preference to others or the paying of wages to staff out of whatever new capital could be raised).

The second half of this story takes place after Greiner and Broad resigned from Infrastructure NSW in mid 2013, but it clearly demonstrates Greiner’s poor business judgement and cynical methods at the time that he was chair of INSW and responsible for prioritising billions of dollars worth of infrastructure investments in the best interests of the public. Who was protecting the taxpayers’ (who in Greiner’s world would be the shareholders of NSWInc) interest and was appropriate due diligence being applied to INSW and WestConnex decisions?

The above two stories about the appointed chairperson of INSW’s dubious corporate activities only came to light because both involved his premeditated deceptions of high-profile individuals, one a Russian oligarch, the other the Communications Minister and later PM Malcolm Turnbull) amongst others. Both enterprises ended in court cases in which evidence was tendered that highlighted Mr Greiner’s untrustworthiness with other people’s money, and the critical period of both stories were prior to and concurrent with his time as chairperson of INSW, a body whose lax governance required its chairperson and directors to possess exemplary integrity.

Both stories demonstrate a willingness on Greiner’s part to act improperly to make risky and questionable businesses prosper.

Question for the Inquiry

- If Nick Greiner was advising the Leader of the Opposition Barry O'Farrell prior to the 2011 NSW election what was the exact nature, extent, and duration of that advice both prior to and after that election?
- Was WestConnex pushed by Greiner to O'Farrell either before or after the election as appears to have been done, and what written or other evidence of this has been concealed from the public?
- Premier O'Farrell must have been aware of Greiner's alleged and reported on improper corporate activities, either before or during Greiner's two years as chairperson of INSW. Why did O'Farrell either choose Greiner for this position, or not sack him from it, when he became aware of his constitutional unsuitability for it? What due diligence procedures were applied to this and other WestConnex appointments?
- Did Greiner also advise O'Farrell of who else to nominate as directors and CEO of INSW

Order From Cabinet to not Consider Rail Alternative to WestConnex

Another question must be explored, based on leaked information that the NSW government clearly intended to be kept secret.

According to a Transport for NSW memo obtained through GIPA in 2016 by the Sydney Morning Herald, and publicly revealed in an SMH article date 26 September 2016 [Failure in Critical Options Analysis] the NSW cabinet had ordered that rail alternatives to WestConnex, in spite of the fact that such consideration of alternatives was a legal requirement.

It's not clear exactly when this order was made because the document referred to is cabinet-in-confidence. Were there other versions of this order that has similar effect on decision-making? The answer to this question can only be obtained by this enquiry by an order to produce all similar orders. I submit that this should be done, as this order reflects a decision by the NSW cabinet to override the overriding obligations aimed at ensuring that large-scale public expenditure is always done with a view to obtaining the best value for money available for the public.

This order was made by a cabinet whose members had:-

- Often stated that the states budget was in such a bad way that it needed 'repair' (almost any statement in 2010, 2011, 2012)
- Vigorously pushed an austerity budget for NSW, even going so far as to propose scrapping pensions to ex-premiers who were otherwise on comfortable incomes. This indicated a shortage of public money inconsistent with a major splurge on the most expensive and wasteful of transport options.

- Publicly acknowledged that public rail infrastructure had to be built to 'reduce congestion on the roads' (O'Farrell's election night victory speech at Parramatta Leagues Club 26-3-11) (Hansard – reading speech of INSW Act 1-6-2011 in which Mr Mark Coure (Lib Oatley) said "Traffic congestion on major arterial roads has increased. Why? Because Labor failed to build major public transport infrastructure" ... "The 12 rail lines that Labor promised and axed, which would have assisted Oatley constituents..."

Nick Greiner sat in on cabinet meetings in his capacity as INSW chairperson. He had previously been involved in toll roads. He was also known to be advising the premier directly on a range of matters, and to be well-regarded by Premier O'Farrell for his advice.

Greiner was perhaps in all the right places to have a motive for pushing an order not to consider rail alternatives. WestConnex would not have withstood comparison with a cheaper (both to build and use), cleaner (less pollution and lower carbon emissions), safer and much more sustainable set of well overdue extensions to Sydney's rail network. He certainly used his position at INSW to argue against rail and against any competition to WestConnex and toll roads in general.

Question for the Inquiry

Who precipitated the order from NSW cabinet to not consider rail alternatives to WestConnex?

Why were the directors at INSW not compelled to record all their interests in the INSW Directors Register as required in the INSW Act? Where are the shareholdings listed?

Why is this register not a book (as required by the same act) but merely a ring binder with updated material in it, nothing pre-dated August 2018 when I looked at it on 17 August 2018?

The order from cabinet not to consider rail alternatives is hard to understand as anything other than a misuse of public office. It fits in with a pattern of rushing headlong to build a tollway regardless of the consequences.

But if that order originated with a person or group that was already consciously involved in a plan to swindle NSW out of many billions of dollars in exchange for a demonstrably worthless megaproject, when many far better transport projects compiled by a team of genuine experts after a year or more of research were already on the menu at a lower price, and higher BCR, then has a more serious misuse of office been committed? This is where the Committee in investigating the flaws in the governance and accountability of WestConnex should consider whether offences of Misconduct in Public Office have been committed. The elements of this offence are spelled out in a recent Criminal Law Journal article by David Lusty, 'Revival of the Common law offence of misconduct in public office.' <https://www.accountabilityrt.org/wp-content/uploads/2015/02/Lusty->

Prioritising any of the rail projects in the Sept 2012 NSW LTTMP would have cost NSW less money, produced more time saving for both road and rail users, and prevented thousands of tonnes of deadly gases and particulates of invading the respiratory systems of hundreds of thousands of Sydney's residents over decades.

On the other hand, the prioritisation of Westconnex ensures that traffic would become at least six kilometres per hour slower (EIS Stage 1) across the Sydney road system, congestion would be up to 50 % worse that it was in 2012 on many major arterial roads in Sydney (ibid) , the costs of transport for drivers and freight would skyrocket, harming the economy, and pollution and road accidents would claim more lives every year.

WestConnex was and clearly remains the project least able to reduce Sydney 's congestion all those in either of the two NSW LTTMP (Sept and Dec 2012) , by far the most expensive and the one with least support from transport experts, the most land-hungry and the one that will generate the highest levels of morbidity among Sydney's population.

It fails extravagantly to fulfil any of the transport priorities set out by O'Farrell during his 2011 elation campaign, or any of the project goals subsequently confected to make it appear necessary that it s a wonder how it managed to get through all the checks and red flags that exist to prevent the bad decisions of the past recurring. These include :

- Recommendations from previous inquiries
- Objections from Councils all along the proposed route
- Criticisms from politicians in parliament and other public figures
- Public criticism of unfixable flaws in the case for WestConnex from Ron Christie (14.10 2012) (Ex RTA and Transport for NSW CEO) and urban planning expert Tim Williams, urban planning who as CEO of the Committee for Sydney criticised WestConnex and RMS and was subsequently bullied into silence by the then Minister for Roads Duncan Gay. <http://www.wendybacon.com/2015/roads-lobby-chooses-ratrunk-rather-than-toll-on-way-to-corporate-dinner/>
- Federal and State Auditor General reports
- Mounting criticism in the media that simply batted away with insubstantial and expensive PR campaigns.
- Royal Commissions, judicial and other parliamentary inquiries such as the Lane Cove tunnel Inquiry 2006.
- The Major Projects Assurance Framework - a seven gateway program developed by Infrastructure Australia and adopted by the NSW government in 2011 and 2012
- Input of expert groups such as the Transport for NSW Expert Advisory Group who produced the Draft LTTMP in September 2012

- The legal tradition of judicial review of projects on a merit basis that had been incorporated into the NSW EP& A Act but was restricted by the SSI provisions.
- Recommendations in, for example, Productivity Commission reports and their recommendations to independently review plans and business cases prior to signing contracts for construction.
- Legal requirements and political undertakings to consult extensively with the public on infrastructure.
- The EIS process through which the public, community groups and councils are invited to comment on or object to the proposal. 99.9% of approximately 25,000 submissions were opposed to WestConnex.
- Tens of thousands of signatures on parliamentary petitions.
- Due diligence considerations that could have arisen from the civil litigation that arose from failed tollway projects such as the Clem 7 litigation in which serious material relevant to the conduct of AECOM and Leighton Contractors was in evidence. <https://newmatilda.com/2016/05/18/tunnel-collapse-the-insider-emails-that-show-westconnex-in-a-new-light/>
-

All these precautionary provisions to stop bad projects were overcome or bypassed, by WestConnex.

INSW jettisoned good planning, careful research, genuine consultation, seeking the best value for public money, and neglected to ensure that any good effects will be spread wide enough, and last long enough, to justify the public expense and inconvenience to commuters and local communities.

Question: How did this occur and who was responsible?

Next, I will examine a sequence of events that took place behind the veil of secrecy of a PPP that would never have been revealed if not for a diligent Auditor General's work.

3. Business Case - Misleading and deceptive conduct?

The following information is taken from the Time Line from page 20 of the NSW Auditor General's Report into WestConnex (2014) and the more detailed investigations contained in the pages of the report. This is a critical document relevant to the terms of reference.

Timeline (Quotes from the report are in green italics and commentary is in ordinary text)

24 October, 2012:

Sydney Motorways Project Steering Committee (SMPSC) is formed.

Peter Duncan AM CEO RMS is appointed as its chair person

SMPO begins work on the business case that the Minister for Roads Duncan Gay says will prove that WestConnex is viable.

15 May 2013

The Government confirmed its support for one consistent Gateway review system for capital projects and for proposed arrangements for conducting Gateway reviews on capital projects. Infrastructure NSW would be responsible for Gateway reviews on projects costing \$100 million or more using Transport for NSW's Investment Gating and Assurance Framework for Transport for NSW infrastructure projects.

Infrastructure NSW would be able to determine its role in such reviews, such as selection of the review team, acting as a reviewer, or participating as an observer.

28 May, 2013

NSW government approved including in the budget of 1.8 b in capital expenditure over the forward estimates to 2016 and 2017 subject to government consideration of the business case

The government had already been working on the business case for 7 months.

14 June, 2013

The Silver (Preliminary- Business Case review was finalised, commenting that the business case was less developed than expected and raising 39 recommendations to be addressed.

see 19 July 2013 entry)

See NSW Auditor General's report on :

- Lack of cooperation with gateway review team by SMPO /RMS
- Refusal or failure to deliver requested documents
- Other essential documents withheld documents until there was insufficient time to assess them

This was the only gateway review that was conducted by an independent and expert gateway review team. Two others should have been conducted prior to this. These were:

- Concept stage (Gate 0) and
- Gate One (Strategic Assessment).

but they were not carried out.

The NSW Auditor General found no evidence to suggest the government had cancelled or withdrawn the gating or assurance framework (as outlined in the AG's report) and as designed by Infrastructure Australia (MPAF) to prevent waste of public money on projects that turned out to be financial failures.

The NSW AG's report reveals that the result of this Gateway Review was there was 5 red traffic lights (project development must be halted to address critical defects) and four yellow lights and of nine with no green lights. These warning signs were ignored by SMPO/RMS who appeared to have been unconcerned about the consequences.

WHY? This has never been explained.

21 June, 2013

Two peer reviewers were appointed from the previous gateway review panel to quote 'carry out WestConnex business case peer review and assist Sydney's motorways project office to complete the business case in accordance with the revised delivery plan'.

This gave the two peer reviewers a serious conflict of interest (as the NSW AG noted) the would have rendered them incapable of producing a genuinely independent peer reviews had any of the four remaining gateway reviews taken place

This 'Revised Delivery Plan' would appear to be a Plan to disable future Gateway Reviews.

Who made this plan? Is this the plan that appears in the NSW government's reply to the NSW AG's letter. (Both reproduced in the NSW AG Report.)

25 June 2013:

The preliminary (silver) business case review outcomes were discussed at the SMPSC meeting.

This is 11 days after a disastrous review result for WestConnex that should have shut the project down or at the very least led to an emergency meeting. No such meeting seems to have occurred and grossly deficient project seems to have rolled on regardless. WHY?

WestConnex ia as a major spending priority and commitment for the NSW government.

Question

Were any Ministers informed of the disastrous review result or was this news suppressed? If so, by whom and why?

9 July 2013

Project director emailed traffic analysts expressing concerns about late stream 2 traffic data, delaying the business case . Stream 2 is investment grade analysis. Stream one is a lesser grade of analysis.

16 July, 2013

A business case overview was presented to the SMPSC with an invitation to comment by 17 July.

July 17 was the following day. Was this a gross violation of the Committee's responsibility or a conscious plan to mislead the government?

Minutes noted that following the inclusion of any outstanding comments the Steering Committee will have endorsed the business case as complete against the overall objective and suitable for redelivery to the NSW government for its consideration a month and two days after a disastrous review that required stoppage of Business case and the WestConnex Steering Committee are only being offered an overview of the business case

The steering committee are given 24 hours to comment on the business case or the overview of it and regardless of what those comments are, the majority or the chair has decided that a seriously defective business case is complete against the overall objectives and " suitable for delivery" to the government.

How could the Steering Committee make a decision to approve a business case that was riddled in at least 39 defects in 24 hours? Why were the Steering Committee only given an overview and not the full business case and peer review?

17 July, 2013

Date of the financial appraisal attached to the final Business Case, based on Stream One Sub investment grade) traffic data.

Minutes of SMPSC (see previous entry) show that SMPSC had already committed to endorsing the Business Case without even second rate traffic data. With what justification?

This shows a grossly negligent or complicit steering committee but it also might show that the Committee is being kept in the dark.

19 July, 2013

Peer Reviewers send RMS and SMPC their comment on the final Business Case as t 17 July 2013.

Actions on many of the Recommendations based on the Silver (Preliminary) Business Case finalised 5 weeks previously) were listed as incomplete.

The two peer reviewers met with the CEO RMS [Peter Duncan] in his capacity as the Chair of SMPSC) and the SMPO Director to provide final advice on project on addressing Preliminary Business Case review recommendaitons. RMS advise that outstanding actions identified in the Recommendaitons table were closed out and there was not formal sign-off.

The Peer reviewers engaged by SMPO to “assist it complete the Business Case in accordance with the’ revised delivery plan’ are telling SMPO that the WestConnex Business case is incomplete as at the date when the WestConnex steering Committee has endorsed the business case as complete when assessed against the overall objectives.”

Peter Duncan appears to have kept his steering committee ignorant of critical defects in the business case. The Inquiry needs to look closely at his involvement in these events.

Peer reviewers met with the Chair of SMPSC and SMPO Director to underline fundamental defects with the business case . Both these two senior men appear to have ignored this latest warning (of many) and decided to press on against all advice.

24 July 2013

The date of Economic Appraisal Report attached to the Business Case (based on Stream One (sub investment trade) traffic data.

25 July, 2013

Date of final Stream One traffic analysis attached to the business case.

26 July, 2013

Traffic Peer reviewer raised concerns about his inability to do any progressive peer reviews to date.

Apparently the people doing the traffic data work had not had time to interact with the Peer Reviewer owing to large workloads and very tight deadlines which seem to have been a feature of WestConnex planning process. (see NSWAG’s report).

<https://www.smh.com.au/national/nsw/damning-report-into-westconnex-motorway-released-by-nsw-auditor-general-20141218-129r7t.html>

<https://www.smh.com.au/national/nsw/westconnex-has-a-numbers-issue-what-are-they-20140404-36400.html>

SMPO Director formally submitted the final business case to the CEO RMS (in his capacity as the Chair of SMPSC) indicating “The business case is suitable complete (false statement— see 19 July 2013) and the Project Office’s work has undergone the following rigorous reviews (another false statement).

- *Independent experts have been engaged to peer review the infrastructure solution, traffic data analyses and capital cost estimates.*
- Independent experts raise concerns about their inability to do any progressive peer reviews on traffic data analysis. (See above).
- *A formal gate review of the Silver business case resulting in 39 recommendations to complete the final version of the business case.*
- This is misleading and deceptive as only 14 of those recommendations were acted upon and some of the rest were so serious that they required the project to be closed down until the defects were dealt with. (See June 14 entry.)
- *Two Peer reviewers were engaged to ensure the final version of the business case addressed the 39 recommendations of the Gateway Review.*
- The peer reviewers were engaged but they were not given time to do this work. See entry of 19 July: RMS advise that outstanding actions in the Recommendations table were closed out and there was no formal sign-off.
- *SMPC and delegates reviewed and commented on the final business case.*
- See 16 July 2013 SMPSC saw only an overview of the business case and SMPSC show they decided to endorse it prior to comments being made.

26 July 2013

Business case submitted to Minister for Roads and Ports Duncan Gay.

The business case was:

- In incomplete form despite being misnamed ‘formal’.
- lacking Investment Grade Traffic Data that would not show up for months after this date.
- accompanied by the misleading and deceptive letter from SMPO Director quoted above. It is possible that the Minister read only this letter

It is reasonable to conclude from the events revealed in the NSW AG Report that the CEO of RMS in his capacity of Chair of SMPSC (Peter Duncan) and the Director of SMPO (Paul Goldsmith) deliberately misled the Roads Minister with false statements to the effect that a hopelessly defective business case, which they knew to be based on sub investment grade traffic data that formed the basis for most of the claimed benefits of WestConnex.

It is not clear whether the Roads Minister was a willing dupe or in on the plan to mislead the parliament about the state of the WestConnex business case.

It is clear that the misrepresentations of fact, knowingly made by the CEO of RMS Peter Duncan and the Director of SMPO Paul Goldsmith played a pivotal role in the foisting a worthless megaproject on the NSW government and the tax payers and drivers of NSW. The only beneficiaries of this action would be the major contractors and the tollway operator.

Conflicts of Interest?

It is worth noting that Paul Goldsmith long term RMS executive left the NSW Sydney Motorway Project for the WestConnex Delivery Authority where he was acting CEO. After a short period with his own consultancy PG Transport Infrastructure, he joined major construction firm Parsons Brinckerhoff which was taken over by WSP Partners. WSP Partners were awarded a \$13 million contract for RMS's Sydney Gateway project in May 2018. <https://tenders.nsw.gov.au/rms/?event=public.cn.view&CNUUID=9F514F88-E4A8-1401-87775C4EFC67BAD8>.

It is also worth noting that Jason De Souza who from April 2011 until October 2012 was the Senior Policy Advisor for the then Premier Barry O'Farrell, joined the Minister for Roads as his chief of Staff in October 2012. Three years later in October 2015, he became director of major projects at Lend Lease, which has recently been granted the contract for the construction of the Stage 3 WestConnex.

This is another example of unacceptable conflicts of interest and overlap between organisations and companies that bedevil WestConnex. These should be investigated by the Committee.

Conclusion

As I have researched this submission as an ordinary resident of Sydney, I have been appalled by the frequency and ease with which laws and public accountability procedures are ignored with impunity in the development of this project.

I thank the Committee for their efforts and look forward to a thorough going investigation.