



Statement of Issues

17 May 2018

Sydney Transport Partners – proposed acquisition of a majority interest in WestConnex

Purpose

1. Sydney Transport Partners (**STP**), a consortium in which Transurban Group (**Transurban**) has a majority interest, proposes to acquire a majority interest in the WestConnex toll road project in Sydney (the **proposed acquisition**).
2. This Statement of Issues:
 - gives the preliminary views of the Australian Competition and Consumer Commission (**ACCC**) on competition issues arising from the proposed acquisition;
 - identifies areas of further inquiry;
 - provides all interested parties with an opportunity to comment; and
 - invites interested parties to submit comments and information to assist our assessment of the issues.

Overview of ACCC's preliminary views

3. The legal test which the ACCC applies in considering the proposed acquisition is in section 50 of the *Competition and Consumer Act 2010*. Section 50 prohibits acquisitions that would have the effect, or be likely to have the effect, of substantially lessening competition in any market.
4. The ACCC divides its preliminary views into three categories, 'issues of concern', 'issues that may raise concerns' and 'issues unlikely to raise concerns'. For this matter, there are two 'issues that may raise concerns' and two 'issues unlikely to raise concerns'.

Issues that may raise concerns

Competition for toll road concessions

5. The ACCC is concerned that the proposed acquisition may substantially lessen competition for concessions to construct, own and/or operate toll roads in NSW or nationally.
6. Incumbent toll road operators have significant advantages in bidding for subsequent concessions. Advantages arise due to control of detailed traffic data and the ability to leverage existing concessions when seeking new concessions.
7. Transurban (or a Transurban-controlled entity) holds 15 of 19 toll road concessions in Australia and seven of nine concessions in NSW. Transurban's resulting incumbency advantages are evidenced, for example, by the fact that Transurban is the only entity that has been granted a toll road concession in Australia on the basis of unsolicited proposals to a state government since 1987.¹
8. If the acquisition does not proceed, the ACCC considers that an alternative bidder will likely acquire WestConnex. Given the significant size of WestConnex (which comprises three separate tolling concessions and 33km of motorway), this will mean there will be two major toll operators in Sydney (Transurban and the alternative acquirer of WestConnex). These two operators will likely compete strongly for future toll roads. On the other hand, if the proposed acquisition proceeds, it will both strengthen the incumbency advantages that Transurban currently holds for acquiring toll road concessions and prevent the establishment of a large rival toll road operator.
9. In considering these issues, the ACCC understands that the NSW Government is able to constrain Transurban to some extent. The ACCC is continuing to consider whether the NSW Government is sufficiently likely to exercise any such ability, such that competition concerns are not likely to arise.

Competition between toll roads

10. The ACCC is also concerned that the proposed acquisition may substantially lessen competition in the markets for the supply of road services to motorists on various origin/destination combinations in the Sydney region.
11. The sale of WestConnex may present an opportunity to establish competition between toll roads in the Sydney region. The ACCC considers that WestConnex and some of the existing Transurban-controlled toll roads may be substitutable for motorists on certain origin/destination combinations. If an alternative bidder were to acquire WestConnex, it would likely impose competitive constraint on existing Transurban-controlled toll roads, and vice versa. Tolls may be lowered due to this competition, and/or service levels (such as in relation to congestion management) increased.

Issues unlikely to raise concerns

12. At this stage, the ACCC's preliminary view is that the proposed acquisition would be unlikely to substantially lessen competition in the market for the supply of electronic tolling services to motorists in NSW. Currently Transurban and NSW Roads and Maritime Services (**RMS**) both have a significant e-tag customer base in NSW. While

¹ A joint venture between Transfield and Kumagai Gumi was granted the Sydney Harbour Tunnel concession in 1987 following an unsolicited proposal to the NSW Government in 1986.

the proposed acquisition may increase Transurban's e-tag customer base, as some new users of toll roads may purchase a Transurban e-tag in order to travel on WestConnex, the ACCC's preliminary view is that this increase is unlikely to be material.

13. It is also the ACCC's preliminary view that the proposed acquisition would be unlikely to substantially lessen competition in the market for the supply of specialised engineering services for toll roads. It appears that these services form part of a broader national market for infrastructure construction services, in which there are a number of other significant acquirers of these services.

Making a submission

14. The ACCC is seeking submissions from interested parties, particularly on the following key issues:
 - the nature and size of incumbency advantages and how they manifest, for example, in an enhanced ability to acquire further concessions to construct, own and/or operate toll roads;
 - whether the proposed acquisition would further strengthen Transurban's incumbency advantages in obtaining more toll road concessions in NSW or nationally;
 - the impact on competition of a non-Transurban entity acquiring WestConnex;
 - the extent to which the NSW Government would have the ability and incentive to constrain Transurban post-acquisition; and
 - the extent to which WestConnex may be a substitute for the existing Transurban-controlled toll roads for motorists on some origin/destination combinations, and the extent to which the operators of these roads may compete if WestConnex were acquired by an alternative bidder.
15. Detailed discussion of these and other issues, along with specific questions, is contained in this Statement of Issues.
16. Interested parties should provide submissions by no later than 5pm on 31 May 2018. Responses may be emailed to mergers@acc.gov.au with the title: "*Submission re: STP/WestConnex - attention Tim Byrne/Daniel McCracken-Hewson*". If you would like to discuss the matter with ACCC officers over the telephone or in person, or have any questions about this Statement of Issues, please contact Tim Byrne on (03) 9658 6440 or Daniel McCracken Hewson on (03) 9290 1482.
17. The ACCC anticipates making a final decision by 19 July 2018, however, this timeline can change. To stay up to date with changes to the timeline and to find relevant documents, interested parties should visit the Mergers Register on the ACCC's website at www.acc.gov.au/mergersregister.

Confidentiality of submissions

18. The ACCC will not publish submissions regarding the proposed acquisition. We will not disclose submissions to third parties (except our advisors/consultants) unless compelled by law (for example, under freedom of information legislation or during court proceedings) or in accordance with s155AAA of the *Competition and Consumer Act*

2010. Where the ACCC is required to disclose confidential information, the ACCC will notify you in advance where possible so that you may have an opportunity to be heard. Therefore, if the information provided to the ACCC is of a confidential nature, please indicate as such. Our [Informal Merger Review Process Guidelines](#) contain more information on confidentiality.

About ACCC ‘Statements of Issues’

19. A Statement of Issues published by the ACCC is not a final decision about a proposed acquisition, but provides the ACCC’s preliminary views, drawing attention to particular issues of varying degrees of competition concern, as well as identifying the lines of further inquiry that the ACCC wishes to undertake.
20. A Statement of Issues provides an opportunity for all interested parties (including customers, competitors, shareholders and other stakeholders) to ascertain and consider the primary issues identified by the ACCC. It is also intended to provide the parties to the proposed acquisition and other interested parties with the basis for making further submissions should they consider it necessary.

Timeline

Date	Event
26 February 2018	ACCC commenced review under the Merger Process Guidelines.
19 March 2018	Closing date for submissions from interested parties.
6 April 2018	Former proposed decision date of 26 April delayed to allow provision of requested information from the Sydney Transport Partners Consortium.
20 April 2018	ACCC received further information from the Sydney Transport Partners Consortium.
17 May 2018	Release of Statement of Issues.
31 May 2018	Closing date for submissions relating to Statement of Issues.
19 July 2018	Proposed date for announcement of ACCC’s decision.

The parties

Sydney Transport Partners

21. STP comprises Transurban as the majority interest holder, and AustralianSuper Pty Ltd, Canada Pension Plan Investment Board (**CCPIB**) and Tawreed Investments Limited as minority interest holders.

Transurban

22. Transurban is listed on the Australian Securities Exchange (**ASX**), and is Australia's largest toll road operator. Transurban's operations include the development, ownership, management and operation of toll roads in Australia and the United States. Transurban (or a Transurban-controlled entity) holds 15 of 19 toll road concessions in Australia and seven of nine concessions in NSW.²
23. In NSW, Transurban holds a majority interest in the following toll roads:
- the M2 Motorway;
 - the Lane Cove City Tunnel;
 - the Cross City Tunnel; and
 - the M1 Motorway (Eastern Distributor).
24. It also holds a 50 per cent share in the following NSW toll roads:
- the NorthConnex Motorway;
 - the M5 Motorway; and
 - the M7 Motorway.
25. In addition to its toll road assets, Transurban has interests in electronic tolling service providers that provide electronic tolling and tag issuing services under a number of brands. In NSW, Transurban has an interest in the *E-way*, *Roam* and *Transurban Linkt* brands.
26. Transurban also has agreements to provide tolling services to the Sydney Airport Corporation Limited, Interlink and WSO Co Pty Limited.

Other consortium members

27. Other STP consortium members also have direct or indirect minority interests in a number of toll road assets in NSW or elsewhere in Australia. AustralianSuper has minority interests in Transurban and Transurban Queensland. CCPIB has indirect, minority interests in the M7 and NorthConnex motorways, and Tawreed has a minority interest in Transurban Queensland.

WestConnex

28. WestConnex is a partially completed motorway development in Sydney. The Sydney Motorway Corporation (**SMC**) currently holds, through a trust structure, the three concessions to build, operate and toll the motorways. SMC's shares are held by the NSW Government.
29. WestConnex comprises approximately 33 kilometres of interconnected motorways and road upgrades, which will improve and extend the M4 motorway from Parramatta to Sydney Airport and duplicate the M5 East corridor. It is being completed in three

² The two non-Transurban controlled concessions are for the Sydney Harbour Tunnel (held by Kumagai Gumi, Tenix Group and Transfield Services) and the Sydney Harbour Bridge (held by the NSW Government).

separate stages, each of which has (or will have) a tolling concession. These concessions will run until 2060.

- Stage 1 involves the concession rights in respect of the WestConnex M4.
- Stage 2 involves the concession rights in respect of WestConnex M5, including the New M5 motorway, the M5 East and the M5 West.
- Stage 3 involves the concession rights in respect of the WestConnex M4 – M5 Link, the Rozelle Interchange and Iron Cove Link (see **Map 1** below).

Map 1 – WestConnex toll roads



The proposed transaction

30. The NSW Government is conducting a competitive tender process for WestConnex. The winning bidder will acquire a 51 per cent interest in the three WestConnex concessions.

Industry background

Toll roads in Australia

31. Toll road concessions are typically long-term contractual arrangements between a toll road operator and the relevant state government under which the operator constructs, operates and/or maintains a toll road in return for the right to collect toll revenue from motorists using the toll road to which the concession relates. The concession deeds differ from road to road. For example, there might be a different pricing structure depending on the size and nature of the toll road or different prescriptions as to the level

of administrative fees that can be levied on motorists. Generally, toll road concessions set the maximum price that the toll road operator can charge motorists for using the toll road.

32. Toll road concessions have in the past generally been awarded following a competitive bid process. However, toll road concessions can also be awarded in response to an unsolicited proposal. An unsolicited proposal is a proposal from a private entity to a state government in relation to an infrastructure project for which the government has not requested proposals. In relation to toll roads, an unsolicited proposal can be for either a toll road that has been identified as a potential project by the relevant state government, or a proposal for a toll road that has not previously been identified by the government. A number of state governments have published guidelines for making unsolicited proposals.³
33. Transurban has been awarded the following five toll road concessions or toll road upgrade projects after submitting unsolicited proposals to the relevant state governments:
 - NorthConnex (NSW) (March 2014): awarded to Transurban in exchange for an extension of the M7/Lane Cove Tunnel concessions and an increase to the heavy vehicle multiplier on these toll roads;
 - CityLink upgrades (VIC) (August 2015): awarded to Transurban in exchange for an extension of the CityLink concession;
 - Logan Enhancement Project (Qld) (November 2016): awarded to Transurban in exchange for an increase to the heavy vehicle multiplier on the Logan and Gateway Motorways;
 - Inner City Bypass Upgrade (Qld) (March 2017): awarded to Transurban in exchange for an increase to the heavy vehicle multiplier on the Go Between Bridge, the Clem Jones Tunnel and Legacy Way; and
 - West Gate Tunnel (VIC) (December 2017): awarded to Transurban in exchange for an extension of the CityLink concession.

Electronic tolling

34. All toll roads in Australia employ Electronic Tolling Collection (**ETC**) technology to capture the information of vehicles that travel on the roads. Motorists must use an electronic tag (**e-tag**) or a pass (e.g. where a video image is taken of the motorist's licence plate and an invoice sent post-transaction) when driving on toll roads. These e-tags and passes allow a toll road's ETC infrastructure to capture a vehicle's travel on the toll road. A vehicle's trip data captured by tolling gantries on the toll roads will be passed to "back-end" trip processing systems which will validate trips and convert this to a toll charge.
35. In the next step, the toll charge information will be passed to the issuer of the e-tag or pass for collection of payment. E-tag issuing entities may or may not be linked to a particular toll road. E-tag issuing entities have accounts with motorists, issue motorists with e-tags or passes, and bill and collect payments from motorists for their use of toll

³ For example, *Unsolicited Proposals, Guide for Submission and Assessment*, NSW Government, August 2017; *Market-led Proposals Guideline*, Victorian Government, November 2017; *Market-Led Proposal Guidelines*, July 2017, Queensland Treasury.

roads. Systems set up to manage e-tags and customer accounts are commonly referred to as C3 infrastructure. This infrastructure is separate from ETC systems.

36. In summary, when a motorist travels on a toll road with an e-tag or pass, the ETC infrastructure captures the trip and calculates the toll, and the motorist is then billed by the issuing entity using its C3 infrastructure.

Interoperability and roaming fees

37. All existing owners and operators of toll roads in Australia are signatories to the *Memorandum of Understanding – Electronic Toll Collection (MOU)* in respect of ETC systems. Provision exists for new concession holders to become a party to the MOU. The principal object of the MOU is to ensure that each toll road operator employs an ETC that is interoperable with the ETC systems operated by each other party to the MOU, thus to enable all e-tags to be used on all toll roads. A number of concession deeds also explicitly require interoperability.
38. The MOU requires toll road operators to enter into bilateral “roaming agreements” with each other tag issuer, which govern the provision of interoperability between the contracting parties.
39. The MOU and roaming agreements provide a general right for parties to recover the “reasonable costs” of providing interoperability. This is done through the imposition of a roaming fee.
40. Roaming fees are levied by e-tag issuers when their e-tags are used for travel on a non-aligned toll road (i.e. a road where the concession is not held by the e-tag issuer or the issuer’s affiliated entity). The purpose of the roaming fee is to reimburse the costs incurred by an e-tag issuer in providing interoperability, including costs for the collection and remission of relevant toll revenues. Roaming fees charged by e-tag issuers are borne by toll road operators and, under provisions of the relevant concessions deeds, cannot be passed on to motorists. That means motorists travelling on toll roads are charged the same rates, regardless of whether they use an e-tag issued by the toll road operator or an e-tag from another issuer.
41. The MOU does not specify the actual level of roaming fees. Rather, this roaming fee is determined by bilateral negotiation between the relevant parties.
42. As a general rule, the more e-tag customer accounts an entity holds, the more roaming fees it is likely to receive, and on the other hand, the more toll roads an entity controls, the more roaming fees it is likely to pay.

Previous ACCC decisions

Transurban’s proposed acquisition of BrisConnections

43. On 26 November 2015, the ACCC decided not to oppose Transurban’s proposed acquisition of BrisConnections. The ACCC considered the acquisition in the markets for the supply of electronic tolling services to motorists, the supply of tolling services to holders of toll road concessions, and the bidding market for the award of concessions for toll road construction and operation. The ACCC concluded that the proposed acquisition was unlikely to substantially lessen competition in any relevant market.

Transurban's proposed acquisition of the Queensland Motorway Group

44. On 4 April 2014, the ACCC decided not to oppose Transurban's proposed acquisition of the Queensland Motorway Group. The ACCC considered the acquisition in the market for the supply of tolling services to holders of toll road concessions and in the national bidding market for the award of concessions for toll road construction, ownership and/or operation. The ACCC found that the proposed acquisition was unlikely to substantially lessen competition in either of these markets.

Transurban's proposed acquisition of Connector Motorways Group

45. On 20 April 2010, the ACCC decided not to oppose Transurban's proposed acquisition of Connector Motorways Group. The ACCC considered the proposed acquisition in the context of the markets for the provision of electronic tolling services to motorists in New South Wales, the provision of tolling services to toll roads in New South Wales, and toll road construction and ownership in Australia. The ACCC found that the proposed acquisition was unlikely to substantially lessen competition in any of these markets.

Transurban's proposed acquisition of Sydney Roads Group

46. On 8 March 2007, the ACCC decided not to oppose Transurban's proposed acquisition of Sydney Roads Group. The ACCC considered the potential impact of the proposed acquisition on the market for toll road construction and ownership, and the market for provision of tolling services to motorists. The ACCC found that the proposed acquisition was unlikely to substantially lessen competition in either of these markets.

Future with and without the acquisition

47. Section 50 of the Act prohibits mergers or acquisitions that would have the effect or be likely to have the effect of substantially lessening competition in a market. In assessing a proposed acquisition pursuant to section 50 of the Act, the ACCC considers the effects of the acquisition by comparing the likely future state of competition post-acquisition if the acquisition proceeds (the "with" position) to the likely future state of competition if the acquisition does not proceed (the "without" position) to determine whether the proposed acquisition is likely to substantially lessen competition in any relevant market.
48. If the proposed acquisition by STP does not proceed, the ACCC considers it likely the WestConnex concessions would be acquired by an alternative bidder. This would result in another entity holding three significant toll road concessions in NSW. The competition implications of this are discussed below.

Market definition

49. The ACCC's starting point for delineating relevant markets, to assess the competitive effects of the proposed acquisition, involves identifying the products and geographic regions actually or potentially supplied by the parties to the transaction. The ACCC then focuses on areas of activity where competitive harm could occur as a result of the proposed acquisition.
50. The ACCC is considering the impact of the proposed acquisition on competition for:
- concessions to construct, own and/or operate toll roads in NSW or nationally;

- the supply of road services to motorists for various origin/destination combinations in the Sydney region;
- the supply of electronic tolling services to motorists in NSW or nationally; and
- the supply of specialised engineering services for toll roads.

51. The relevant markets for analysing these issues are discussed below.

Market for toll road concessions

52. In its previous assessment of acquisitions of toll road assets, the ACCC applied a national bidding market for toll road construction, ownership and/or operation.⁴ This market definition should be viewed in the context of those specific acquisitions at the time. As noted by the Courts, the identification of a market in any given case is generally purposive and directed to the problem or issue at hand.⁵ In the present case, the ACCC's preliminary view is that the market for toll road concessions includes concessions that are acquired following a competitive bidding process as well as concessions that may be obtained through unsolicited proposals. The ACCC is also considering whether the geographic dimension of the market is likely to be national or state-based.

Whether unsolicited proposals are part of the market for toll road concessions

53. The ACCC previously considered toll road acquisitions in a *bidding* market for toll road concessions. At the time of these previous decisions, the impact of unsolicited proposals on competition for future toll road projects was not raised as a significant issue. However, during this review, market participants have raised concerns that the proposed acquisition would give Transurban an increased ability to offer to develop and operate new toll roads through unsolicited proposals to the NSW government.

54. The ACCC is considering whether an unsolicited proposal is a separate and distinct unilateral approach to the state government that does not involve a market or competition. At this stage, the ACCC considers that unsolicited proposals are not isolated from competitive bidding processes for toll road concessions. Unsolicited proposals and bidding processes are both mechanisms for obtaining toll road concessions and when assessing an unsolicited proposal, it is open to the government to decide whether to proceed with the proposal or to conduct a competitive bidding process instead.⁶ The possibility of the government conducting a competitive bidding process necessarily places a degree of constraint on unsolicited proposals. Therefore, the ACCC's preliminary view is that all methods of obtaining toll road concessions, however sought or granted, form part of the market.

Geographic dimension

55. The ACCC is considering whether the geographic dimension of the market is national or state-based.

⁴ See for example, *Transurban Consortium: Proposed acquisition of the assets of the Queensland Motorways Group* (ACCC Mergers Register reference #53791), 4 April 2014; *Transurban consortium – proposed acquisition of BrisConnections including the AirportLinkM7 toll road in Brisbane* (ACCC, Mergers Register reference #58422), 26 November 2015.

⁵ *Australian Competition and Consumer Commission v Australia & New Zealand Banking Group Limited* [2015] FCAFC 103 at [136]; *Flight Centre Limited v Australian Competition and Consumer Commission* [2015] FCAFC 104 at [118].

⁶ See for example, *Unsolicited Proposals, Guide for Submission and Assessment*, NSW Government, August 2017, page 3.

56. The ACCC has previously considered a national market. The ACCC understands that toll road developers and operators (both actual and potential) are effectively able to compete for toll road concessions from any location in Australia (or internationally), as there is generally no requirement for toll road operators to have any established infrastructure or other associated assets in the relevant state where the toll road is to be developed. These factors point towards the market being national.
57. However, as stated above, the identification of the relevant market needs to be directed to the problem or issue at hand. In the present case, given the key competition concerns relating to the acquisition of toll road concessions appear to be state-specific, it is possible that the relevant market is state-based. As discussed in detail below, the ACCC is concerned that the proposed acquisition will prevent the establishment of a new, strong rival incumbent toll road operator in NSW. Further, market participants have raised concerns that the proposed acquisition would increase Transurban's ability to have unsolicited proposals accepted by the NSW Government by leveraging its toll road assets in NSW. Market participants have also raised concerns that the proposed acquisition would increase Transurban's holding of NSW-specific traffic data, and that this would increase Transurban's ability to accurately model traffic flows for future toll road opportunities in NSW, thereby increasing Transurban's advantage in competing for future toll road concessions in NSW.
58. The ACCC considers that Transurban's increased incumbency advantages from the proposed acquisition (relating to unsolicited proposals or traffic data) relate primarily to NSW. However, Transurban (or a Transurban-controlled entity) holds 15 of the 19 toll road concessions Australia-wide, and the proposed acquisition could increase Transurban's competitive advantages in acquiring toll road concessions across Australia.
59. For these reasons, the ACCC is still considering whether the relevant geographic dimension is state-based or national.

Market for the supply of road services to motorists

Whether there exist markets in which WestConnex and other toll roads may compete

60. The ACCC has not previously considered competition between toll road operators as part of a review of toll road concession acquisitions. This was because no two toll roads previously considered by the ACCC appeared to be sufficiently substitutable for motorists.
61. In the present case, market participants have stated that the sale of WestConnex presents an opportunity to establish competition between toll road operators in the Sydney region, and that the proposed acquisition may foreclose competition between WestConnex and the existing Transurban-controlled roads. However, the ACCC is also considering whether each toll road is a separate market for providing toll road services to motorists meaning that WestConnex will not compete with existing Transurban-controlled toll roads in the Sydney region.
62. At this stage, the ACCC considers that there may be markets for the supply of road services in the Sydney region in which WestConnex and some of the existing Transurban-controlled roads compete.
63. A key element in considering whether there are such markets is whether WestConnex may be a substitute for other toll roads for motorists on some origin/destination combinations. The ACCC considers that these origins and destinations are likely to be

certain geographic areas (e.g. Sydney CBD, Hills District, etc.) rather than exact entry and exit points of toll roads. The ACCC considers that in order for WestConnex and another toll road to be treated as substitutable, it will be relevant to consider whether or not a proportion of motorists in the relevant origin/destination combinations would choose a toll road in response to a price increase or a drop in service quality (e.g. levels of traffic congestion management, how safe or clean the road is) at another toll road.

64. Examples of relevant origin/destination combinations are provided in the competition analysis section below.

Whether public roads are part of the markets

65. The ACCC is considering whether un-tolled alternate routes provide logistical choices and impose constraints on toll roads. Market inquiries indicate that in the Sydney region, public roads do not provide a material or sufficient constraint on toll roads as they are more congested, move traffic materially slower, and provide less predictable travel times. In addition, much heavy freight is prevented from using parts of the public network by regulation.
66. In the present case, the ACCC's preliminary view is that generally public roads are unlikely to be substitutable for WestConnex or the existing Transurban-controlled roads. However, this will depend on the circumstances of each origin/destination route in question, and the ACCC is still considering the constraint imposed on different routes by public roads. Also, the ACCC's preliminary view does not preclude a scenario where a route comprising both a toll road and a public road may be a substitute for another toll road for a particular origin/destination combination and therefore they may belong to the same market.

Market for supply of electronic tolling services to motorists

67. The product dimension of the market for the supply of electronic tolling services provided by e-tag issuers is e-tags issued to motorists and the management of motorists' accounts. The ACCC considers that the geographic dimension of the market is state-based. While the interoperability arrangements between toll road operators means that an e-tag issued in one state may be used on a toll road in another state, the ACCC understands motorists in a state rarely purchase an e-tag from another state in order to travel on toll roads in their home state.

Market for the supply of specialised services for toll roads.

68. Some market participants have stated that Transurban is the near-monopoly acquirer of certain specialised engineering services for toll roads (e.g. road tunnel operation and maintenance services), and that the proposed acquisition would increase Transurban's position as an acquirer of these services.
69. The ACCC is considering whether toll road operators participate in a segment of the broader market for the acquisition of infrastructure construction services, and whether this market is national or state-based. At this stage, the ACCC's preliminary view is that the supply of specialised engineering services for toll roads forms part of a broader national market for infrastructure construction services.

Issues that may raise concerns: impact on competition for toll road concessions

Overview of competition concerns

70. The ACCC is concerned that the proposed acquisition may substantially lessen competition for concessions to construct, own and/or operate toll roads in NSW or nationally.
71. Given the scale and geographic positioning of WestConnex, the proposed acquisition would significantly increase Transurban's holding of toll road concession assets in NSW (and nationally). The proposed acquisition would also prevent the establishment of a new, strong rival incumbent toll road operator that would otherwise gain some incumbency advantages of the kind held by Transurban and be well-placed to compete strongly for future toll road concessions.
72. Transurban leverages advantages from its existing toll road assets to acquire further toll road concessions, either through competitive tender processes or by unsolicited proposals to state governments. Market participants have raised concerns that the proposed acquisition would further strengthen Transurban's incumbency advantages to such an extent that its competitors would effectively be foreclosed from competing for future toll road concessions in NSW, regardless of whether concessions were granted following a competitive tender process or an unsolicited proposal.
73. The ACCC is continuing to assess the extent to which the proposed acquisition would increase Transurban's incumbency advantages in acquiring toll road concessions. In particular, the ACCC is considering the extent to which the proposed acquisition would strengthen Transurban's:
 - ability to offer unsolicited proposals that are accepted by the NSW Government;
 - access to traffic data that is crucial for bidding for future toll roads; and
 - potential ability to set high roaming charges.
74. These issues are discussed in turn below.

Unsolicited proposals

Unsolicited proposals for toll road concessions

75. The NSW Government's *Unsolicited proposals: Guide for submission and assessment (the NSW Guide)* sets out the criteria a private entity must meet when submitting an unsolicited proposal in NSW. A key criterion is the "uniqueness" of the proposal. In effect, a proposal will be deemed to be unique when, on the whole, it is not capable of being delivered by other suppliers.
76. While the NSW Guide does not limit what can be considered "unique", the ACCC understands that Transurban is the only entity since 1987 that has been awarded a toll road concession following an unsolicited proposal in NSW and elsewhere in Australia,⁷ and that its successful proposals have involved leveraging its existing toll roads assets

⁷ A joint venture between Transfield and Kumagai Gumi was granted the Sydney Harbour Tunnel concession in 1987 following an unsolicited proposal to the NSW Government in 1986.

as a “unique” feature.⁸ In particular, the ACCC understands that Transurban can offer “unique” proposals to the NSW Government that are partly financed by:

- the extension of the term of an existing concession over an existing toll road;
- an increase in tolls or toll multipliers on existing concessions; and/or
- an agreement to waive contractual remedies or rights to redress under existing concession deeds.

77. Market participants have submitted that such proposals may be attractive to the government because they result in much lower upfront costs incurred by the government.

Impact of the proposed acquisition on unsolicited proposals

78. At the moment, Transurban appears to be the only entity that has a realistic chance of submitting “unique” unsolicited proposals to the NSW Government that leverage existing toll roads. Following the proposed acquisition, Transurban would have more toll road assets to leverage for unsolicited proposals for future toll roads.

79. In addition, the ACCC understands that unsolicited proposals are more likely to be accepted if the proposal has a physical connection with an existing toll road of the entity making the proposal. Some market participants have stated that WestConnex connects with some of the potential future toll roads that the NSW Government is considering and the proposed acquisition would therefore increase Transurban’s ability to secure concessions for those toll roads through unsolicited proposals.

80. Some market participants have also stated that the proposed acquisition would increase Transurban’s access to traffic data that are needed to evaluate potential new toll road opportunities and therefore increase its ability to submit unsolicited proposals for new toll road concessions.

81. On the other hand, if the proposed acquisition did not proceed and another bidder acquired the WestConnex concessions, there would be another entity holding significant toll road concession assets in NSW. In this scenario, there would be another entity in addition to Transurban that could leverage existing toll roads to submit unsolicited proposals to the NSW Government. This entity would be able to submit “unique” unsolicited proposals in competition with Transurban. In addition, the entity would be more likely to submit unsolicited proposals for road designs that are beneficial to the NSW Government but are not in Transurban’s interests (e.g. because they would reduce traffic flows on Transurban’s existing toll roads).

Government’s powers and incentives to constrain Transurban

82. The ACCC considers that as a sole vendor of toll road concessions in NSW, the NSW Government is likely to have significant power when entering into transactions for toll road concessions. In addition, the NSW Government has the ability to place restrictions around the conduct of toll road operators.

83. The NSW Government sets the criteria for assessing unsolicited proposals and has control over the assessment of unsolicited proposals for toll road concessions (including

⁸ In Victoria, the criterion is also referred to as “uniqueness”. See the Victorian State Government’s *Market-led Proposals Guideline* (November 2017), pages 11 and 14. In Queensland, the criterion is referred to as “justification for direct negotiation”. See the Queensland Government’s *Market-Led Proposal Guidelines* (July 2017), page 5.

deciding whether to accept or decline the unsolicited proposal, and whether to conduct a competitive tender process instead of accepting a proposal). The NSW Guide states that “the Government will generally only consider proposals where both the proposal and its proponent have unique attributes such that others could not deliver a similar proposal with the same value-for-money outcome”.⁹ The NSW Guide also states that “where the Government assesses a proposal as not meeting the criteria, including uniqueness, the Government reserves its usual right to go to market”.¹⁰

84. The ACCC is further considering the extent of the NSW Government’s powers to constrain Transurban. Critically, the ACCC is also considering the extent to which the NSW Government is likely to use its powers to constrain Transurban, taking into account the incentives it faces.

Traffic data

85. In modelling the value of future toll road concessions, data about current traffic on existing roads is required for forecasting traffic demand for future roads. Therefore, traffic data is a key input for any potential acquirer when seeking to obtain a toll road concession.
86. Market participants have stated that Transurban already has a significant incumbency advantage in relation to traffic data. They are concerned that this incumbency advantage would be further strengthened if Transurban were to acquire WestConnex, and that the proposed acquisition would prevent the establishment of a rival incumbent toll road operator that generates significant traffic data.
87. Transurban (or a Transurban-controlled entity) currently holds seven of the nine toll road concessions in NSW. This gives Transurban a large amount of precise data about traffic flows on existing toll roads, which can be used to forecast traffic demand for a future road. In addition, Transurban has a large e-tag customer base through its *E-Way*, *Roam*, and *Transurban Linkt* e-tag brands, which gives Transurban a large amount of information about individual toll road users. Market participants have stated that in forecasting traffic demand for future toll roads, this information about individual users can be combined with traffic flow data Transurban holds, to allow Transurban to analyse toll road users’ travel patterns with reference to their demographics and places of residence or business.
88. Market participants are concerned that the proposed acquisition would increase the two sets of traffic data that Transurban holds. Post-acquisition, Transurban would have more toll roads to generate traffic flow data. Also, post-acquisition, Transurban’s e-tags would be generating data over a significantly expanded road network and give Transurban enhanced ability to analyse toll road users’ travel patterns.
89. The ACCC understands that Transurban’s competitors for toll road concessions in NSW have access to certain traffic data provided by the NSW Government or RMS, as well as certain aggregate traffic data made publicly available by Transurban. The ACCC considers it is likely that post-acquisition, other potential acquirers of future toll road concessions would continue to receive these types of traffic data for their evaluation of future concessions.
90. However, market participants have stated that they currently do not, and for future toll road concessions would not be able to, have access to more granular level data about

⁹ *Unsolicited Proposals, Guide for Submission and Assessment*, NSW Government, August 2017, p. 3.

¹⁰ *Ibid.*

traffic flows on Transurban-controlled toll roads (e.g. data about entry and exit locations and time for each trip), which would enable them to produce more accurate traffic forecasts. Market participants have also stated that they currently do not, and for future toll road concessions would not, have access to the data about individual e-tag users held by Transurban's e-tag business. As such, it is likely that for all future toll road concession opportunities in NSW, Transurban would hold significantly more detailed and accurate traffic data than its competitors.

91. The ACCC is assessing the importance of various types of traffic data in evaluating toll road concessions, and the extent to which the proposed acquisition would increase Transurban's advantage in competing for future toll road concessions through its increased holding of traffic data.
92. The ACCC is also considering the extent to which the NSW Government is likely to constrain Transurban post-acquisition in relation to its use of traffic data. In particular, the ACCC is considering whether the NSW Government has both the ability and incentive to reduce Transurban's incumbency advantages by requiring it to make more of its traffic data available to other potential acquirers of future toll roads, through amendments to existing concession deeds or through legislation.

Roaming fees

93. Market participants have raised concerns about the effect of the proposed acquisition on roaming charges and the potential impact of higher roaming charges on competition for future toll road concessions.
94. Market participants have noted that Transurban currently controls a large number of toll road concessions in NSW and has a significant e-tag customer base. Market participants are concerned that this may give Transurban incentives to set higher roaming fees, and also give it bargaining power in negotiating roaming fees. Competitors for toll road concessions must factor in roaming fee costs when evaluating future concessions. In addition, the potential for Transurban to increase roaming fees is a risk that must be priced into evaluations. As a result, market participants have stated that they are in a disadvantageous position when competing with Transurban for toll road concessions.
95. Market participants have raised the concern that the proposed acquisition would increase Transurban's bargaining power and its ability to raise roaming fees and therefore further disadvantage other bidders in competition for future toll road concessions.
96. The ACCC is considering the extent to which, as mandated by the MOU entered into between all toll road operators in Australia, roaming fees are a form of cost recovery for operators to ensure interoperability between Australian toll roads. The ACCC is also considering whether Transurban has the incentive or ability to derive profit from these fees, and the materiality of roaming fees in the overall development and operation of a new toll road.
97. The ACCC understands that as a general rule, the more e-tag customer accounts an entity holds, the more roaming fees it is likely to receive, and the more toll roads an entity controls, the more roaming fees it is likely to pay. In NSW, Transurban may receive significant amounts of roaming fees due to its large e-tag customer base. On the other hand, RMS also has a significant e-tag customer base in NSW, and therefore Transurban as a holder of a large number of toll road concessions is likely to be a payer of significant amounts of roaming fees. This is likely to continue to be the case post-

acquisition. The ACCC's preliminary view is that this may limit Transurban's ability and incentive to charge higher roaming fees post-acquisition. However, the ACCC is further investigating this issue.

98. The ACCC is also further considering whether the NSW Government, through toll road concession deeds or through legislation, has the incentive to limit increases to roaming fees.

Invitation for comments

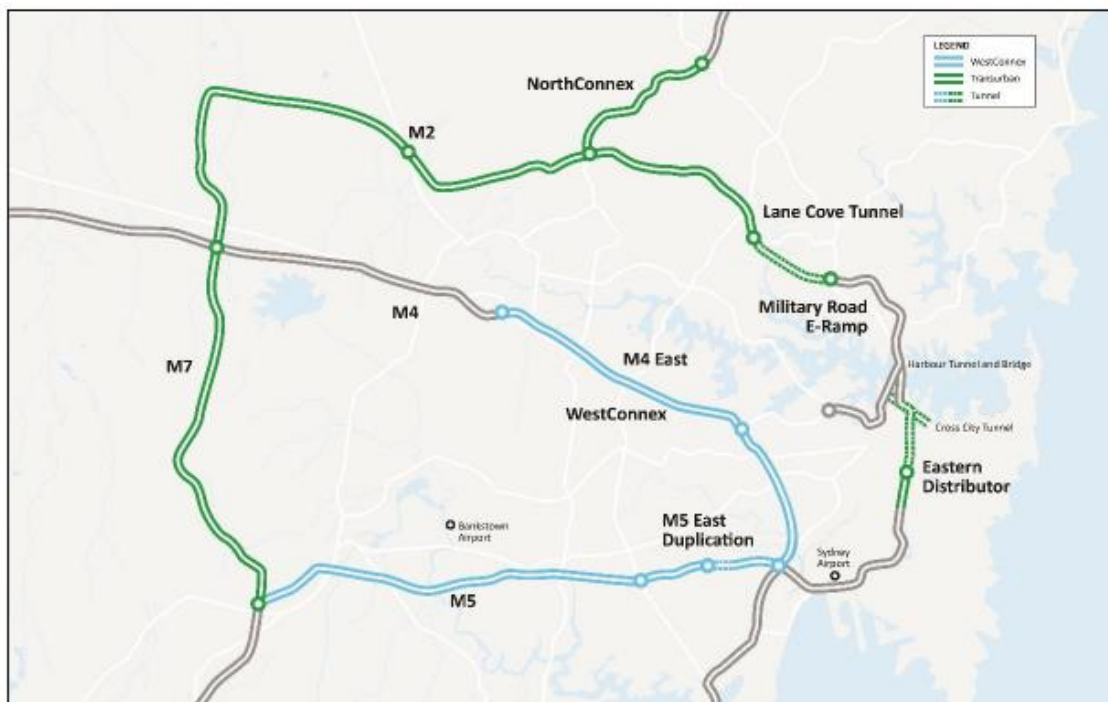
The ACCC invites comments from market participants on the above issues. In particular, market participants may wish to comment on the following:

- a. the extent to which the proposed acquisition would increase Transurban's ability to obtain toll road concessions in NSW or nationally in competitive tender processes, and how it would do so;
- b. the impact of a non-Transurban entity acquiring WestConnex on competition to construct, own and/or operate toll roads in NSW or nationally
- c. the extent to which the proposed acquisition would increase Transurban's ability to submit successful unsolicited proposals to the NSW Government, and how it would do so;
- d. whether entities that do not hold toll road concessions in NSW could submit successful unsolicited proposals for toll road concessions in NSW;
- e. whether having two major toll road operators in Sydney would result in competing unsolicited proposals being submitted to the NSW Government (potentially with designs that are contrary to the interests of the other operator);
- f. the ability and incentive for the NSW Government to constrain Transurban's incumbency advantages in relation to winning toll road concessions via competitive tender processes or unsolicited proposals;
- g. the importance of various types of traffic data in evaluating toll road concession opportunities;
- h. whether Transurban's holding of traffic data provides it with an advantage in competing for toll road concessions, and the extent to which the proposed acquisition would increase such an advantage;
- i. the ability and incentive for the NSW Government to compel Transurban to provide more detailed traffic data to other potential acquirers of toll road concessions;
- j. whether roaming fees represent a material cost in the overall development and operation of a toll road;
- k. whether the proposed acquisition will increase Transurban's ability or incentive to increase roaming fees; and
- l. whether the NSW Government has the ability and incentive to limit increases in roaming fees.

Issues that may raise concerns: impact on potential competition between toll roads in the Sydney region

99. As discussed above, the ACCC considers that WestConnex and some of the existing Transurban-controlled toll roads may be substitutable with each other, and therefore may competitively constrain each other.
100. Toll road concession deeds generally specify maximum charges that can be levied on motorists, but do not prevent price competition below the cap. If it is established that WestConnex and an existing Transurban-controlled toll road are substitutable, the proposed acquisition could foreclose competition on price and service levels (e.g. level of traffic congestion) between the operators of these toll roads.
101. The ACCC is considering whether it is commercially realistic for a toll road operator to charge motorists tolls that are lower than the maximum amount permitted to be charged under the relevant concession deed, and therefore whether there would be price competition between toll roads if WestConnex were awarded to an alternative bidder. The ACCC understands that there are a number of international examples where motorists have received discounts as a result of competition between toll road operators.
102. As per Map 2 below, WestConnex will provide east-west and north-south routes in the Sydney region, and may potentially be substitutable for the Transurban-controlled M2, M7, Eastern Distributor and Cross City Tunnel toll roads.

Map 2 – WestConnex and Transurban-controlled roads (Sydney region)



103. The ACCC is further assessing the extent to which WestConnex may be substitutable for the existing Transurban-controlled roads for a number of origin/destination combinations, including those listed in Table 1 below.

Table 1 – Origin/destination combinations

Origin	Destination
Sydney CBD	Parramatta CBD / Blacktown
Sydney CBD	Sydney Airport
Sydney CBD	Badgery's Creek Airport
Sydney CBD / Sydney Airport	Central NSW
Hills District / Macquarie Park	Hume Highway
Badgery's Creek Airport / Western Sydney	Sydney Airport
Hills District / Macquarie Park	Sydney Airport
St Mary's intermodal terminal (IMT)	Sydney CBD
Moorebank IMT / Minto IMT	North Sydney / Macquarie Park
Western Sydney IMT	Sydney CBD
Bankstown IMT / Botany IMT	Sydney CBD
Bankstown IMT / Botany IMT	Parramatta CBD / Blacktown

104. The ACCC notes that some market feedback has indicated that while WestConnex may give some motorists hypothetical alternative journeys via more than one toll road, it will not materially affect traffic flows on Transurban's existing toll roads in Sydney.
105. The ACCC is also considering the extent to which providing high quality service maximises traffic flows and therefore whether toll road operators are incentivised to provide high quality service even in the absence of competition.

Invitation for comments

The ACCC invites comments from market participants on the above issues. In particular, market participants may wish to comment on the following:

- a. the extent to which WestConnex may be a substitute for any of the M1, M2, M5, M7, Lane Cove City Tunnel, Cross City Tunnel or NorthConnex motorways for motorists on some origin/destination combinations; and
- b. if WestConnex were awarded to an alternative bidder, the extent to which this alternative bidder would compete with Transurban for contestable motorists.

Issues unlikely to raise concerns

Supply of electronic tolling services to motorists

106. The ACCC's preliminary view is that it is unlikely that the proposed acquisition would substantially lessen competition in the market for the supply of electronic tolling services to motorists in NSW.
107. The ACCC understands that currently Transurban and RMS both have a significant e-tag customer base. The ACCC also understands that RMS' e-tag business will not be sold as part of the bidding for WestConnex.
108. While the proposed acquisition may increase Transurban's e-tag customer base as some new users of toll roads may purchase a Transurban e-tag in order to travel on WestConnex, the ACCC's preliminary view is that this increase is unlikely to be material, as the ACCC understands that motorists' holding of e-tag accounts in Sydney is close to saturated. Therefore, the ACCC's preliminary view is that the proposed acquisition is unlikely to have a significant competition impact on the market for the supply of electronic tolling services to motorists in NSW.

Supply of specialised services for toll roads

109. The ACCC's preliminary view is that it is unlikely that the proposed acquisition will substantially lessen competition in the supply of specialised engineering services for toll roads. This is because, as mentioned above, it appears that these services form part of a broader national market for infrastructure construction services, in which there are a number of significant acquirers in addition to Transurban.

Invitation for comments

The ACCC invites comments from market participants on the above issues. In particular, market participants may wish to comment on the following:

- a. the extent to which the proposed acquisition may increase Transurban's e-tag customer base and impact on competition for the supply of electronic tolling services to motorists in NSW; and
- b. whether specialised engineering services for toll roads form part of the broader market for infrastructure services or are a separate market.

ACCC's future steps

As noted above, the ACCC now seeks submissions from market participants on each of the issues identified in this Statement of Issues and on any other issue that may be relevant to the ACCC's assessment of this matter. Submissions are to be received by the ACCC no later than 31 May 2018 and should be emailed to mergers@acc.gov.au. In the subject line of the email, please include the following words "*Submission re: STP-WestConnex - attention Tim Byrne/Daniel McCracken-Hewson*".

The ACCC will finalise its view on this matter after it considers submissions invited by this Statement of Issues.

The ACCC intends to announce its final view by 19 July 2018. However, the anticipated timeline may change in line with the *Informal Merger Review Process Guidelines*. A Public Competition Assessment for the purpose of explaining the ACCC's final view may be published following the ACCC's public announcement to explain its final view.