



Public Competition Assessment

11 October 2018

Sydney Transport Partners Consortium (including Transurban) - proposed acquisition of a majority interest in WestConnex

The ACCC's decision

1. On 30 August 2018 the Australian Competition and Consumer Commission (**ACCC**) announced its decision not to oppose the proposed acquisition of a majority interest in the WestConnex toll road project by Sydney Transport Partners (**STP**) (a consortium led by Transurban) (the **proposed acquisition**) subject to section 87B undertakings.
2. The ACCC considered that the proposed acquisition, in conjunction with the undertakings, would not contravene section 50 of the *Competition and Consumer Act 2010* (the **Act**).
3. 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 focussed on the impact the proposed acquisition would have on the level of competition for future toll road concessions in New South Wales (**NSW**). In particular, the ACCC considered whether the proposed acquisition would lessen competition by strengthening Transurban's incumbency advantages and preventing an alternative acquirer from establishing a significant toll road presence and therefore competing more vigorously for future toll road concessions.
5. The ACCC also assessed road-on-road competition issues, and whether Transurban's existing toll road interests might compete with the WestConnex roads.
6. Please note that this and other public competition assessments are subject to the following qualifications:
 - The ACCC considers each transaction on a case-by-case basis and so the analysis and decision outlined in one assessment will not necessarily reflect the ACCC's view of another transaction, even where that other transaction may involve the same or a related market.

- As assessments are brief and do not refer to confidential information provided by the parties or other market participants, assessments do not set out all of the issues and information considered by the ACCC, nor all of the analysis and reasons of the ACCC.

The parties and the transaction

The acquirer: Sydney Transport Partners

7. STP comprises Transurban, AustralianSuper Pty Ltd, Canada Pension Plan Investment Board (**CPPIB**) and Tawreed Investments Limited as interest holders.

Transurban

8. In this public competition assessment, a reference to Transurban is a reference to Transurban Group, or an entity controlled by Transurban Group.
9. In NSW, Transurban holds the concessions for the following toll roads:
 - the M2 Motorway
 - the Lane Cove City Tunnel
 - the Cross City Tunnel.
10. Transurban also holds a 50 per cent or greater share in the following NSW toll roads:
 - the NorthConnex Motorway¹
 - the M5 Motorway
 - the M7 Motorway
 - the M1 Motorway (Eastern Distributor).
11. In addition to its toll road assets, Transurban has interests in providers of 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.
12. Transurban holds interests in 15 of 19 toll road concessions in Australia, and seven of nine such concessions in NSW.

Other consortium members

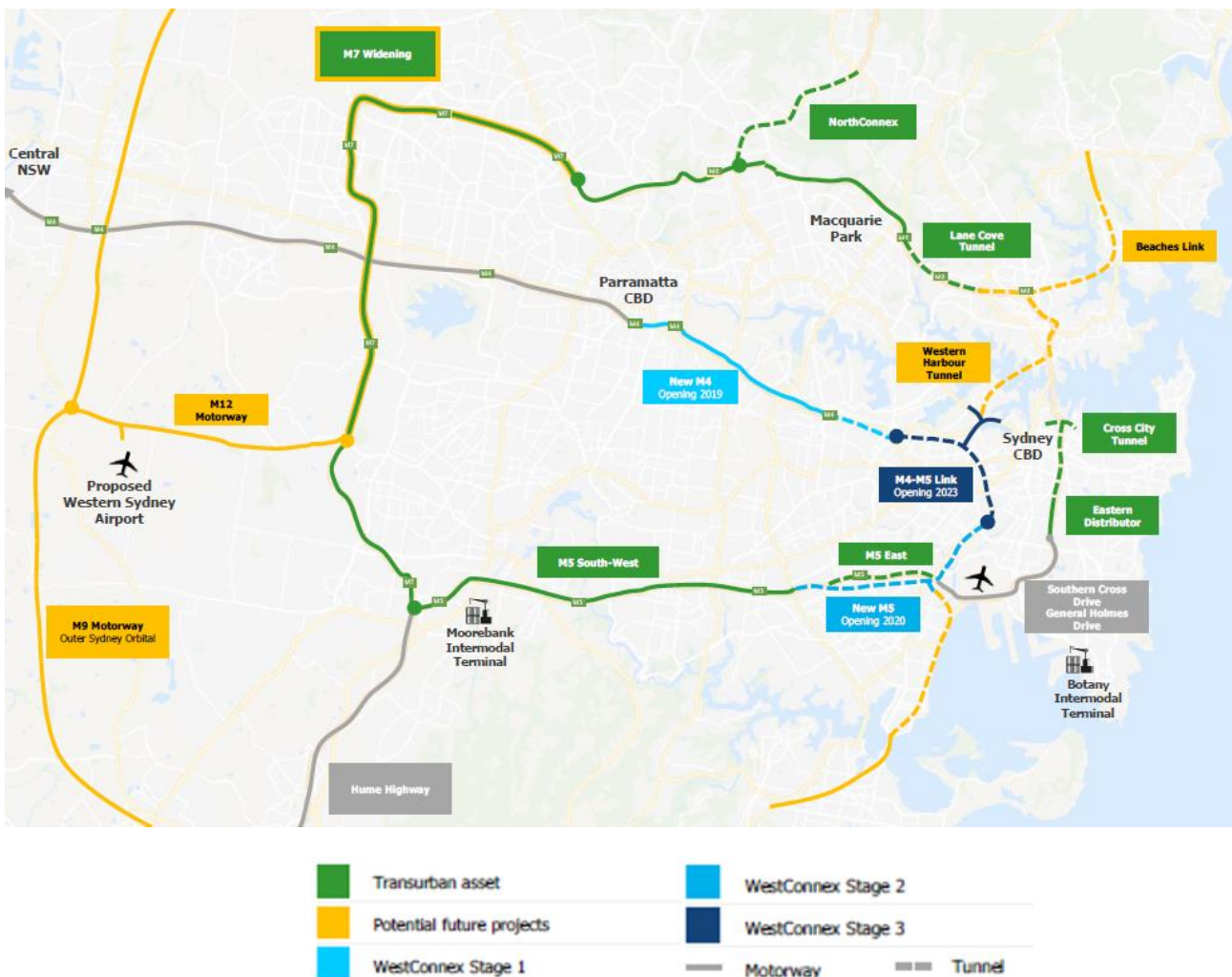
13. Other STP consortium members also have direct or indirect minority interests in a number of toll road assets in NSW or elsewhere in Australia. CPPIB has indirect, minority interests in the M7 and NorthConnex motorways, and Tawreed and AustralianSuper both have a minority interest in Transurban Queensland.

¹ The NorthConnex Motorway is currently under construction with completion expected in late 2019.

The target: WestConnex

14. WestConnex is a partially completed motorway development in Sydney (see **Figure 1 – WestConnex toll roads**). 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.
15. WestConnex will comprise 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 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 the 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 figure 1 below).

Figure 1 – WestConnex toll roads



The transaction

16. In May 2017, the NSW Government commenced a competitive tender process to sell a 51 per cent interest in the three WestConnex concessions. On 31 August 2018, following the completion of the ACCC's review of the proposed acquisition, the NSW Government announced STP as the successful bidder for the WestConnex concessions.

Review timeline

17. The following table outlines the timeline of key events for the ACCC in this matter.

Date	Event
26 February 2018	ACCC commenced review under the Merger Process Guidelines.
6 April 2018	Former proposed decision date of 26 April 2018 delayed to allow provision of information from the Sydney Transport Partners Consortium.
20 April 2018	ACCC received further information from the Sydney Transport Partners Consortium.
17 May 2018	ACCC published a statement of issues outlining preliminary competition concerns.
19 July 2018	Former decision date of 19 July 2018 delayed to allow more time to consider the competition issues and obtain further information from the parties and market participants.
9 August 2018	Draft section 87B undertaking proffered by Transurban. ACCC commenced market inquiries.
21 August 2018	Former proposed decision date of 6 September 2018 brought forward to 30 August 2018 to take into account the NSW Government's timetable for the sale of WestConnex.
30 August 2018	ACCC announced it would not oppose the proposed acquisition, subject to a section 87B undertaking accepted by the ACCC.

18. The ACCC engaged extensively with Transurban and the NSW Government prior to 26 February 2018, but only commenced the public review once it had obtained the necessary information and consent from the parties.
19. The total elapsed time from start to finish was just over six months. The total period, net of time taken by the parties to submit information or documents, was 97 business days.

Market inquiries

20. The ACCC conducted market inquiries with a range of industry participants, including competitors, potential competitors, customers, input suppliers, industry bodies, other regulatory agencies and other interested parties. Submissions were sought in relation to the substantive competition issues and the proposed undertaking.

Statement of issues

21. On 17 May 2018, the ACCC published a statement of issues outlining its preliminary view that the proposed acquisition may reduce competition due to the following:
- An alternative acquirer of WestConnex would result in two major toll operators in Sydney that would likely compete strongly for future toll road concessions.
 - The proposed acquisition would strengthen the incumbency advantages that Transurban currently holds for acquiring toll road concessions in NSW.
 - The proposed acquisition may prevent an opportunity to establish road-on-road competition between toll roads in the Sydney region, which may result in lower tolls and/or increases in service levels.

Industry background

Toll roads in Australia

22. 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. 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.
23. Toll road concessions have in the past generally been awarded following a competitive bidding process. However, toll road concessions can also be awarded in response to an unsolicited proposal, otherwise known as a market-led 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.²
24. 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 and Lane Cove Tunnel concessions and an increase to the heavy vehicle multiplier on these toll roads

² 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*, Queensland Treasury, July 2017.

- 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
- West Gate Tunnel (Vic) (December 2017): awarded to Transurban in exchange for an extension of the CityLink concession.

Traffic data and modelling

25. Traffic modelling and forecasting are key inputs into bids for toll road concessions as they enable estimates of toll revenue over the concession period to be made. The level of confidence in traffic forecasts is critical and has tangible impacts, most importantly on the required rate of return for equity contributors.
26. There is an inherent degree of uncertainty when forecasting traffic flows and revenues for toll road concessions. Forecasts rely on demand assumptions about growth to accurately predict traffic flows and revenues. Traffic models are calibrated and validated using existing road-use data, including traffic count data and trip/travel pattern data.

Traffic count data

27. Traffic count data is data that measures the number and type of vehicles that pass by a certain point. It is used for the following purposes in traffic modelling:
 - Calculation of annualisation factors – strategic models (i.e. models designed to forecast traffic demand on future toll roads) generally model an average work day. Annualisation factors are used to convert the average workday forecast into an annual traffic forecast.
 - Validation – comparing actual traffic counts at points across the road network with model forecasts of traffic counts at the same locations.
28. Traffic count data in the Sydney area can be obtained from the following sources:
 - Induction loop and traffic survey data collected by RMS³ on public roads (at approximately 1,700 locations)
 - Induction loop data collected by toll road owners (located on the toll roads and on some entry/exit ramps)
 - Gantry data collected by toll road owners (there are approximately 30 gantries on NSW toll roads in which Transurban has an interest)

³ Roads and Maritime Services, a NSW Government agency that manages the operations and programs of NSW's roads and waterways.

- Non-RMS traffic surveys conducted on public roads using various forms of technology (e.g. cameras, counting tubes across roads).
29. Gantry data is collected by equipment mounted on gantries located on toll roads. This equipment detects electronic tags (**e-tags**), classifies vehicles and photographs vehicles. The photographs are used to match a vehicle to an account or licence plate number where no e-tag is detected. The equipment mounted on gantries collects the following information relevant to traffic modelling:
- Passages (i.e. the number of vehicles that pass under the gantry)
 - Vehicle class (i.e. light or heavy vehicle)
 - Passage date and time
 - E-tag ID and status
 - Front and rear photos of vehicles.
30. Gantry data is collected for the primary purpose of billing customers for their use of toll roads. As such, the data is very accurate.
31. Induction loop data is captured by electromagnetic loops embedded in roads. Induction loops collect the following data:
- Passages (i.e. the number of vehicles that pass over the loop)
 - Passage date and time
 - High-level vehicle type data.
32. Induction loop data is collected primarily for government planning purposes. Due to the less sophisticated nature of electromagnetic loops, the traffic count data collected by induction loops is not as accurate as gantry data.
33. Further, induction loops are embedded in roads and are easily damaged, resulting in no data being recorded. Because of the large number of induction loops, and because they are used primarily for government planning (as opposed to billing customers), loops are not maintained to the same standard as gantries.
34. Although induction loop data is available at more locations, it is less accurate and less reliable than gantry data.

Trip/travel pattern data

35. Trip or travel pattern data (referred to here as “trip data”) is data that describes trips taken by vehicles through a network.
36. Trip data could be used for the following purposes in traffic modelling:
- Calculating travel times and speeds

- Identifying travel patterns of vehicles on toll roads
 - Creating entry-exit matrices for toll roads by time of day, day of week and vehicle type
 - Understanding user behaviour data, including willingness-to-pay, value-of-time, toll elasticity parameters, frequency of usage, impact of service changes or toll pricing changes (including discounts or rewards) and monthly expenditure on tolls.
37. Understanding travel times and user behaviour, in particular willingness-to-pay and value-of-time, is vital for traffic modelling as it allows modellers to create accurate origin/destination matrices which are used to determine which vehicles will travel on which roads, including the new road being modelled.
38. Trip/travel pattern data can be obtained from public sources or can be readily acquired, including from the following sources:
- TomTom/Google/mobile phone travel time data
 - Sydney Household Travel Survey
 - ABS Journey to Work data
 - Revealed and stated preference surveys.

Electronic tolling

39. 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 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 journey on the toll road. A vehicle's trip data captured by tolling gantries on the toll roads is passed to "back-end" trip processing systems which validate trips and convert this to a toll charge.

Market definition

40. The ACCC's starting point for delineating relevant markets to assess the competitive effects of the proposed acquisition involves identifying the products actually or potentially supplied by the parties to the acquisition. The ACCC then focuses on areas of activity where competitive harm could occur as a result of the proposed acquisition.
41. The ACCC's assessment focussed on the impact of the proposed acquisition on:
- competition for future concessions to construct and/or operate toll roads in NSW or nationally
 - competition for the supply of road services to motorists for various origin/destination combinations in the Sydney region.

42. Both of these markets are discussed in detail below.
43. In addition to these two markets, the ACCC also considered the likely impact of the proposed acquisition on the:
- supply of electronic tolling services to motorists
 - acquisition of specialised engineering services for toll roads.
44. As there was no e-tag business included in the sale of WestConnex, Transurban's presence in electronic tolling through its e-tag businesses was not directly relevant to the ACCC's competition assessment. The ACCC therefore considered that the proposed acquisition was unlikely to have any material impact on competition for the supply of electronic tolling services to motorists in NSW.
45. The ACCC considered that it was likely that the supply of specialised engineering services for toll roads forms part of a broader national market for infrastructure construction services. Given this broader market, in which there are a number of significant acquirers in addition to Transurban, the ACCC concluded that the proposed acquisition was unlikely to substantially lessen competition in relation to the acquisition of specialised engineering services for toll roads.

Market for toll road concessions

46. 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. The identification of a market in any given case is generally purposive and directed to the problem or issue at hand.⁵
47. In this review, the ACCC considered 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 also considered that the geographic dimension of the market was likely to be state-based. The reasons for this approach are discussed in detail below.

Unsolicited proposals are part of the market for toll road concessions

48. The ACCC previously considered toll road acquisitions in the context of a *bidding* market for toll road concessions. At the time of these previous decisions, the impact of the acquisitions of toll road concessions on the ability of the acquirer to be successful with unsolicited proposals in the future was not raised as a significant issue. However, market participants 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.

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 See *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].

49. The ACCC considered 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 Therefore, the ACCC concluded that all methods of obtaining toll road concessions, however sought or granted, form part of the relevant market.

Geographic dimension

50. The ACCC has previously considered a national market in respect of toll road concessions. 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 as was defined in previous merger investigations in this industry.
51. However, the identification of the relevant market needs to be directed to the problem or issue at hand. In the present case, the key competition concerns relate to NSW, in particular:
- Incumbency advantages in NSW, arising from NSW traffic models and NSW traffic data
 - Incumbency advantages in NSW when submitting unsolicited proposal by leveraging an existing toll road asset in NSW.
52. For these reasons, the ACCC considered the most relevant geographic dimension to be state-based for the purpose of assessing the proposed acquisition, while noting the possibility for the market to have a national dimension.

Market for the supply of road services to motorists

53. The ACCC analysed the likely effect of the proposed acquisition on the supply of road services to road users, in particular focussing on whether the Transurban and WestConnex toll roads were likely to be substitutable for some road users.

Areas of overlap between WestConnex and other toll roads

54. The ACCC had not previously considered competition between toll road operators as part of a review of toll road concession acquisitions as no two toll roads appeared to be sufficiently substitutable for motorists. However, the close proximity of some of the existing Transurban-controlled roads and WestConnex led the ACCC to examine the impact of the acquisition on competition between toll roads.

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

55. The ACCC considered whether there were certain origin/destination combinations where WestConnex was likely to be a substitute for other toll roads for motorists. The ACCC considered 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.
56. Examples of relevant origin/destination combinations are provided in the competition analysis section below.

Public roads

57. The ACCC recognised that un-tolled public roads could sometimes be a substitute for toll roads, depending on the circumstances of each origin/destination route in question and the time of travel.
58. However, the ACCC considered that un-tolled alternate routes are generally unlikely to provide a close substitute for toll roads. The ACCC's analysis indicated that the proportion of motorists that would readily substitute between public roads and toll roads in the Sydney region is typically very small. This is likely because toll prices appear to be set well below the level that would lead a large number of motorists to switch to using a public road instead given the travel time benefits of using the toll road.

Future with and without the acquisition

59. 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, the ACCC considers the effects of the acquisition by comparing the likely future state of competition 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.
60. The ACCC's analysis was conducted on the assumption that if the proposed acquisition by Transurban did not proceed, 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.

Competition for future toll road concessions

61. As was noted above, a key competition issue considered by the ACCC was the impact the proposed acquisition would have on the level of competition for future toll road concessions in NSW. In particular, the ACCC focused on whether the proposed acquisition would lessen competition by:
 - strengthening Transurban's incumbency advantages to such an extent that other parties would be reluctant to compete for future toll road concessions, and/or

- preventing a rival bidder from gaining similar incumbency advantages (given the significant size of WestConnex) and therefore competing more vigorously for future toll road concessions.

62. The ACCC examined four sources of such incumbency advantages:

- exclusive access to data from existing NSW toll roads
- traffic modelling capability and expertise, due to ownership of existing NSW and other toll roads
- lower costs of finance based on the perception of financiers (debt providers and equity partners) that Transurban has significant exclusive data and superior traffic modelling capability
- strong position to negotiate unsolicited proposals with the NSW Government.

63. The ACCC also recognised that the NSW Government has significant countervailing power which may limit any lessening of competition for future toll road concessions.

Traffic data

64. Transurban's exclusive data includes traffic count data from toll gantries on its NSW toll roads, which is not available to competitors for toll road concessions. This data is used by Transurban for calibrating and validating its Sydney traffic model. The ACCC considered that this was likely to give Transurban a competitive advantage when bidding for toll NSW road concessions due to:

- Transurban having greater confidence in its forecasts because of its ability to use this data to validate and calibrate its models
- the perception of financiers that Transurban has access to exclusive data that makes its forecasts more reliable, which leads to lower finance costs for Transurban compared to its rivals.

65. During the WestConnex bid process, rival bidders obtained access to induction loop count data for Transurban's toll roads, but not gantry count data. Loop count data is less accurate and reliable than gantry count data.

66. Some market participants claimed that Transurban could use additional data from toll gantries as part of the traffic modelling process to calculate trip patterns. For example, in theory, the specific details and times of individual trips, and the time taken to travel, can be calculated from gantry data. However, the ACCC found that Transurban does not currently use gantry data for this process. Further, there are other substitutable sources of data (e.g. TomTom data) for travel time information.

67. The ACCC concluded that the only exclusive data that gives Transurban a competitive advantage is traffic count data from Transurban's toll gantries. This data enables Transurban to calibrate and validate its Sydney traffic model with greater confidence, which gives Transurban and financiers more confidence in the model's revenue forecasts compared to the estimates from other potential

bidders, which ultimately allows Transurban to access finance on more favourable terms than its competitors.

68. The additional exclusive data that Transurban has access to, such as individual trip data, is unlikely to provide Transurban with any competitive advantage, is not currently used by Transurban for traffic modelling, and there are alternative sources of this data available.
69. As discussed below in the Undertaking section, the section 87B undertaking accepted by the ACCC ensures that Transurban's exclusive traffic count data from the toll gantries on its toll roads will be published. This will give others access to Transurban's gantry data and enable potential bidders for future NSW toll road concessions to calibrate and validate their traffic models to the same level of confidence as Transurban.

Traffic Modelling

70. In relation to traffic modelling, the ACCC noted that Transurban commits significant resources to its own in-house traffic modelling capabilities, including employing traffic modelling experts on a full time basis. Some market participants considered that this gives Transurban a significant advantage over its competitors when bidding for toll road concessions. Unlike competing bidders for future toll road concessions, Transurban has an operating model of Sydney traffic that has been used and refined over time. It appears that Transurban and its financial backers have greater confidence in the traffic forecasts predicted compared to other bidders, which impacted Transurban's costs of finance.
71. Rival bidders for projects like WestConnex do not always have in-house modelling capabilities and rely on third parties for their traffic modelling and forecasting, which can be more time consuming than doing modelling in-house. However, overseas companies with experience in constructing and operating toll roads, such as Cintra, do have their own in-house modelling teams.
72. Although industry participants perceive Transurban's modelling capabilities to be significantly superior to the modelling of its competitors, the ACCC found that Transurban's modelling expertise and models could be matched by competitors because:
 - there is a large pool of global traffic modelling experts that Transurban's competitors could employ to conduct modelling, and
 - the models used by rival bidders for WestConnex were similar to Transurban's in terms of methodology and data inputs.
73. Therefore, the ACCC considered that modelling capabilities were not likely to be a significant barrier to bidding for future toll road concessions.
74. The ACCC considers, however, that if rival bidders do not have sufficient time to develop models and do not have access to reliable data, Transurban's modelling capabilities are likely to provide it with a competitive advantage when compiling bids for future toll road concessions.

75. The ACCC considers that the NSW Government could and should allow enough time for rival bidders to engage traffic modelling expertise and build a reliable traffic model when running tender processes for future toll road concessions.

Financiers' perceptions

76. The ACCC found that financiers, including debt providers and equity partners, perceive that Transurban has significant exclusive data and superior traffic modelling capability, leading to lower costs of finance for Transurban.
77. The section 87B undertaking to publish the exclusive data (discussed further below) which Transurban uses in its modelling will assist in addressing these perceptions. In relation to perceptions about Transurban's superior traffic modelling capability, the ACCC considers that this is largely driven by Transurban's history of successful investments in toll roads (and the experiences of some other toll road concession holders around Australia who have failed to accurately forecast traffic causing financial difficulties).
78. While these perceptions do give Transurban an advantage, it is an advantage that arises from a history of making investments which are perceived as sound by the industry, not market power from its existing assets. Competition policy is concerned about the exercise of market power rather than a business being successful on its merits.

Leveraging existing toll roads to make successful unsolicited proposals

79. The ACCC considered whether the proposed acquisition would further strengthen Transurban's ability to leverage its existing toll road assets to submit successful unsolicited proposals to the NSW Government.
80. The ACCC's primary concern was whether the proposed acquisition would cement Transurban as the only party likely to make successful unsolicited proposals for new toll road concessions in NSW. If an alternative bidder acquired WestConnex, then there would be two major toll road companies in NSW who could potentially compete via unsolicited proposals.
81. The outcome of unsolicited proposals is ultimately at the discretion of the State Government. Transurban is the only entity to have an unsolicited proposal accepted in Australia for the construction of a new toll road since the construction of the Sydney Harbour Tunnel was completed in 1992. Recent examples include NorthConnex in NSW (2014) and West Gate Tunnel in Victoria (2017). However, the ACCC is aware of the NSW Government rejecting multiple unsolicited proposals from Transurban and other toll road operators.
82. The ACCC considered that whoever was successful in acquiring WestConnex would likely gain some advantage in acquiring certain future toll road concessions in NSW, in particular those that connect to WestConnex. The ACCC is also of the view that Transurban and the NSW Government would be less likely to consider extending existing concessions as part of future unsolicited proposals as the concession end dates for all Transurban-controlled toll roads in

NSW are so far into the future (earliest end date is December 2035)⁷ that the revenue from these assets at the end of these concessions is very uncertain.

NSW Government countervailing power and improvements governments can make to encourage more competition for toll roads in future

83. The ACCC considers that, as the sole vendor of toll road concessions in NSW, the NSW Government has significant power when deciding whether and how to enter into transactions for toll road concessions, and how to incentivise competition for concessions.
84. There are several ways in which the NSW Government can exercise its countervailing power to level the playing field for a given toll road concession and facilitate a competitive market for toll road concessions. The sale of WestConnex itself demonstrates some of the ways in which the Government can encourage competitive bids for toll road concessions. WestConnex was sold as a partially completed project, which lessened some of the risks faced by bidders, thereby encouraging competitive bids. In addition, the NSW Government provided access to the SMC traffic model and some exclusive traffic data, prohibited bidders from securing debt finance on an exclusive basis and prohibited the leveraging of existing toll road assets as part of any bid.
85. However, further improvements to sales processes and policy settings would further level the playing field in future.
86. The ACCC considers that other parties are able to build models and obtain modelling expertise that are comparable to those of Transurban, but only if the State Government allows enough time in its process. The ACCC therefore considers that the NSW Government should ensure that bidders have sufficient time to construct, calibrate and validate their models when formulating toll road concession bid processes. Otherwise the NSW Government risks not having a genuinely competitive bid process.
87. The ACCC found that competitive bid processes for new toll roads are more likely to lead to positive outcomes for taxpayers and motorists compared to new toll roads awarded through the unsolicited proposal process.
88. The guidelines published by the NSW Government for unsolicited proposals, which are subject to change at the State's discretion, place significant weight on the "uniqueness" of an unsolicited proposal. The ACCC considers that this criterion allows discretion in its interpretation.
89. The ACCC considers that it is not appropriate for competition law to deal with issues that a government can readily resolve. The ACCC therefore considers that unsolicited proposals should only be accepted by governments in truly unique circumstances that benefits taxpayers, such as where a toll road operator proposes to upgrade their existing toll road, and that the uniqueness criterion should be applied restrictively to ensure the best outcome for taxpayers.

⁷ Excluding the M5 Motorway concession, which after it ends in December 2016 will transfer to the WestConnex concession.

90. Other measures that the NSW Government and other state governments could implement include:
- where possible, ensuring that gantry count data (and any other relevant data held by toll road operators) is shared with rival bidders for future toll road concessions
 - including data sharing obligations in future toll road concessions and, where possible, amending existing concessions
 - while concessions remain as currently drafted, seeking consent for data sharing early in the bid process, and not imposing strict requirements on rival bidders in order to access that data.

Conclusions on competition for toll roads

91. The ACCC considered that, with the undertaking data commitments (discussed below) competition would be sufficient for future toll roads, such that the proposed acquisition will not substantially lessen competition.
92. While Transurban does have incumbency advantages due to ownership of other roads, the undertaking assists in addressing these advantages. The ACCC did not consider that (after taking into account the section 87B undertaking data commitments) any decrease in competition for future toll roads was sufficient to cause a substantial lessening of competition in breach of section 50 of the Act. Furthermore, the NSW Government has countervailing power and can make changes to further improve competition for toll roads in future.

Undertakings

93. The section 87B undertakings given by Transurban require it to publish traffic data that will assist all bidders to compete for future toll road concessions and allow them to calibrate and validate their traffic models to a similar level of confidence as Transurban.
94. As discussed above, bidders with existing toll road concessions have incumbency advantages in acquiring further ones. If a rival consortium acquired WestConnex, there would have been only two players with these advantages in Sydney. However, with the undertakings, all potential bidders will be able to calibrate and validate their models to the same level of confidence as Transurban for new toll road concessions in NSW.
95. The undertakings accepted by the ACCC require Transurban to:
- publish 15-minute-interval traffic count gantry data for all NSW toll roads in which Transurban has an interest, except the M5 West Motorway
 - publish a more aggregated traffic dataset for the M5 West Motorway, if Transurban is unable to publish the more detailed gantry data for that toll road
 - publish historical traffic data dating back 10 years (from the Control Date as defined in the undertaking) for each Transurban NSW toll road

- publish an interim update to data in the event the NSW Government announces a future NSW toll road concession sale process and the data is not due to be updated within six weeks
 - correct any identified errors in the published data
 - appoint an auditor, who would be required to conduct comprehensive audits of Transurban's compliance with the undertaking.
96. The undertaking does not require Transurban to publish data that it obtains through its toll road concessions but does not use in its traffic modelling and forecasts, such as individual trip data that shows the duration and length of trips on toll roads. Reliable individual trip data is available from other sources, such as TomTom and Google. However there are review mechanisms in the undertaking to ensure that the undertaking remains effective in achieving its objectives.
97. The ACCC also accepted undertakings from the other STP consortium members to support Transurban's undertaking. The undertakings from them require those consortium members to give their consent to allow Transurban to publish WestConnex and other relevant traffic data pursuant to Transurban's undertaking.

Road-on-road competition

98. The ACCC also analysed the potential impact of the proposed acquisition on competition to supply toll road services to drivers. The ACCC focussed on whether there was the potential for competition between some of Transurban's existing toll roads and WestConnex that could potentially lead to lower tolls or higher levels of service if they had separate ownership.
99. Competition between toll roads could result in tolls below the cap or improved services (e.g. reliability, user experience, payment mechanism, incident response, customer service). Although toll road concession deeds generally specify maximum charges that can be levied on motorists, they do not prevent price competition below the cap.
100. The ACCC considered that, in order for WestConnex and another toll road to be treated as substitutable, it would be relevant to consider whether or not a proportion of motorists making certain trips (i.e. certain origin/destination combinations) would choose one toll road in response to a price drop or increase in the service quality (e.g. levels of traffic congestion management, how safe or clean the road is) over another toll road.
101. The ACCC analysed:
- whether each category of road users (e.g. motorcyclists, passenger vehicles, taxis, vans and trucks) might be willing to substitute between the two networks; and⁸

⁸ For example, trucks are prohibited from or may be too large to use some public roads, and tolls represent a small proportion of the total cost of operating the vehicle. Therefore, trucks are likely to use the quickest route irrespective of the price of tolls and un-tolled public roads are unlikely to be a substitute.

- how the time of day can influence the route choices made by road users and the potential for substitution.⁹
102. The ACCC identified two main routes that had the potential to be substitutes for some road users given their proximity to each other:
- Transurban's Lane Cove Tunnel/M2/M7 and the WestConnex M4
 - Transurban's Eastern Distributor and the WestConnex M4-M5 Link.
103. Based on information from market participants, including traffic modelling results, the ACCC concluded that the proposed acquisition was unlikely to substantially lessen competition for the following reasons:
- there is unlikely to be a significant degree of substitutability of Transurban and WestConnex toll roads for any categories of road users and therefore the contestable market is likely to be very small
 - given the number of contestable road users is small relative to the total number of road users of these segments, it was unlikely that any potential harm arising from the loss of potential road-on-road competition would be substantial
 - Transurban was unlikely to have the ability to target those road users for whom Transurban and WestConnex toll roads are substitutes (i.e. they would not be able to price discriminate to a significant extent)
 - the toll caps are well below the profit maximising tolls that would be used if there were no caps. Therefore, even if competition might lead to a small reduction in tolls at certain times or for certain trips if a hypothetical situation where tolls were un-capped (and the toll companies could set tolls at whatever level they wanted), the caps mean that no reduction in tolls is likely.

Conclusion

104. Based on the above analysis, the ACCC concluded that the proposed acquisition of WestConnex by STP, in conjunction with the data publication undertakings, would not be likely to have the effect of substantially lessening competition in any market.

⁹ For example, some motorists use toll roads in the morning for their trip to work due to the greater time certainty associated with travelling on a tolled road, but do not use the toll road for the return trip home.