Linfox Australia Pty Ltd and Commissioner of Taxation (Taxation) [2019] AATA 222 (22 February 2019)

Administrative Appeals Tribunal

ADMINISTRATIVE APPEALS TRIBUNAL	**)**	
	)	No: 2017/4041
TAXATION AND COMMERCIAL DIVISION	**)**	

Re: Linfox Australia Pty Ltd
Applicant

And: Commissioner of Taxation
Respondent

DIRECTION

TRIBUNAL: Justice J Jagot, Deputy President

DATE OF CORRIGENDUM: 25 February 2019

PLACE: Sydney

The Tribunal directs the Registrar, pursuant to subsection 43AA(1) of the *Administrative Appeals Tribunal Act 1975*, to alter the text of the decision in this application, such that:

1. Counsel for the Respondent, listed on page 23 of the decision, be changed to include Ms K Deards SC, such that it will read as follows:
   "Mr S Lloyd SC, Ms K Deards SC, Mr M Cosgrove"

.....[SGD].....
Justice J Jagot, Deputy President

Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division: TAXATION & COMMERCIAL DIVISION

File Number(s): **2017/4041; 2017/4042; 2017/4043; 2017/4044; 2017/4045**

Re: **Linfox Australia Pty Ltd**

APPLICANT

And **Commissioner of Taxation**

RESPONDENT

DECISION

Tribunal: **Justice J Jagot, Deputy President**

Date: **22 February 2019**

Place: **Sydney**

The parties confer and file agreed or competing proposed orders finalising the matter within seven (7) days.

.....[SGD].....

Justice J Jagot, Deputy President

CATCHWORDS

TAXATION – fuel tax credits – whether use of fuel for travelling on toll roads answers description of fuel "to use, in a vehicle, for travelling on a public road" – whether use of fuel in powering air conditioning answers description of fuel "to use, in a vehicle, for travelling on a public road" – whether fuel tax credit "taken into account" in assessment of net fuel amount – whether objection stated in sufficient detail – decision under review should be affirmed

LEGISLATION

Fuel Tax Act 2006 (Cth) ss 43-5, 43-10, 47-5
Taxation Administration Act 1953 (Cth) s14ZU

CASES

Australian Hospital Care (Latrobe) Pty Ltd v Commissioner of Taxation [2000] FCA 1509; (2000) 105 FCR 20
Cajkusic and Others v Commissioner of Taxation [2006] FCAFC 164; (2006) 155 FCR 430
Hazelwood Power Partnership v Latrobe City Council [2016] VSCA 129; (2016) 218 LGERA 1
Newington v Windeyer (1985) 3 NSWLR 555
Re Linfox Australia Pty Ltd and Federal Commissioner of Taxation [2012] AATA 517; (2012) 89 ATR 931
Statewide Roads Ltd v Holroyd City Council (1996) 39 NSWLR 115
Szajntop v Commissioner of Taxation (1993) 42 FCR 318

SECONDARY MATERIALS

Explanatory Memorandum to the Fuel Tax Bill 2006 (Cth) and Fuel Tax (Consequential and Transitional Provisions) Bill 2006 (Cth)
Explanatory Memorandum in relation to the Road Charges Legislation Repeal and Amendment Act 2008 (Cth)

REASONS FOR DECISION

Justice J Jagot, Deputy President

22 February 2019

THE ISSUES

1. In this matter four issues concerning the *Fuel Tax Act 2006* (Cth) (the **FTA**) must be resolved. The issues are:

    1) whether the road user charge in s 43-10 of the FTA applies to fuel acquired for use in a vehicle for travelling on certain toll roads, the M2 Motorway, the Go Between Bridge, Eastlink, and the Sydney Harbour Tunnel;

    2) whether the road user charge in s 43-10 of the FTA applies to fuel acquired for use in powering air conditioning units in the heavy vehicles in the applicant's fleet;

    3) whether, as a result of the operation of s 47-5 of the FTA, the applicant has ceased to be entitled to certain fuel tax credits; and

    4) whether the applicant's objection was effective for the period ended 30 July 2012.

2. No primary facts are in dispute. The parties also agreed how the proceedings should be conducted as set out in a letter dated 9 January 2019. A copy of that letter is **attachment 1** to these reasons for judgment.

3. The parties filed extensive written submissions. The length of these reasons for decision does not reflect the detail of those written submissions. This is not to say that the issues are straightforward. They are not. Issues of statutory construction are often difficult and reasonable minds may reach different conclusions about the preferable construction of a statute. I do not propose, however, to address arguments that are immaterial or of marginal weight to my primary conclusions. As will become apparent, all facts relevant to the various alternative arguments of the parties are agreed so there is also no need for me to find or recite at length the facts (or deal with the alternative arguments given that I

accept two of the primary arguments for the respondent in respect of issues (1) and (2) respectively and two of the primary arguments for the applicant in respect of issues (3) and (4) respectively).

4. My conclusions in the present case are:

   1) the road user charge in s 43-10 of the FTA applies to fuel acquired for use in a vehicle for travelling on the toll roads;

   2) the road user charge in s 43-10 of the FTA applies to fuel acquired for use in powering air conditioning units in the heavy vehicles in the applicant's fleet;

   3) the applicant has not ceased to be entitled to certain fuel tax credits as a result of the operation of s 47-5 of the FTA; and

   4) the applicant's objection was valid when lodged and thus for the period ended 30 July 2012.

THE STATUTORY SCHEME

5. By s 2-1 the FTA:

> *provides a single system of fuel tax credits. Fuel tax credits are paid to reduce the incidence of fuel tax levied on taxable fuels, ensuring that, generally, fuel tax is effectively only applied to:*
>
> *(a) fuel used in private vehicles and for certain other private purposes; and*
>
> *(b) fuel used on-road in light vehicles for business purposes.*

6. The Dictionary in s 110-5 defines certain terms including the following:

> ***fuel tax credit** means an entitlement arising under section 41-5, 41-10 or 42-5.*
>
> ***motor vehicle** has the meaning given by section 995-1 of the Income Tax Assessment Act 1997.*
>
> *taxable fuel means:*
>
> *(a) fuel in respect of which duty is payable under:*
>
> *(i) the Excise Act 1901 and the Excise Tariff Act 1921; or*
>
> *(ii) the Customs Act 1901 and the Customs Tariff Act 1995; or*

7. By s 105-1 Guides form part of the FTA but s 105-10(2) provides that a Guide may only be considered in interpreting an operative provision to determine the purpose or object

underlying the provision, confirm the ordinary meaning of the text, determine the meaning if the provision is ambiguous or obscure or determine the provision's meaning if the ordinary meaning is manifestly absurd or unreasonable.

8. By s 40-5(1) the object of Ch 3 (Fuel tax credits) of the FTA is to:

> *provide a single system of fuel tax credits to ensure that, generally, fuel tax is effectively only applied to:*
>
> *(a) fuel used in private vehicles and for certain other private purposes; and*
>
> *(b) fuel used on-road in light vehicles for business purposes.*

9. Section 41-5 is the source of any entitlement to a fuel tax credit the applicant may hold. Section 41-5(1) says:

> *You are entitled to a fuel tax credit for taxable fuel that you acquire or manufacture in, or import into, Australia to the extent that you do so for use in *carrying on your *enterprise.*

10. It is common ground that the applicant acquired taxable fuel for use in carrying on its enterprise (a trucking business). It is also common ground that none of the disentitling provisions in Subdiv 41B apply but one of those provisions is material given its terms. The material provision is s 41-20 which says:

> *You are not entitled to a fuel tax credit for taxable fuel to the extent that you acquire, manufacture or import the fuel for use in a vehicle with a gross vehicle mass of 4.5 tonnes or less travelling on a public road.*

11. Division 43 is central. By s 43-5(1) the "amount of your fuel tax credit for taxable fuel (other than a fuel tax credit to which you are entitled under Division 42A) is the amount (but not below nil) worked out using" a specified formula referring to the "amount of *effective fuel tax" as an integer. By s 43-5(2) the amount of effective fuel tax that is payable on the fuel is the amount worked out by another formula referring to fuel tax amount as an integer. The fuel tax amount is defined as the "amount of fuel tax that was or would be payable on the fuel at the rate in force on the day worked out using the table in subsection (2A)".

12. Section 43-10 is the key provision for issues (1) and (2). It provides:

> *1A This section applies to taxable fuel other than fuel that you acquire, manufacture or import for use in aircraft.*
>
> *…*

*3 To the extent that you acquire, manufacture or import taxable fuel to use, in a vehicle, for travelling on a public road, the *amount of your fuel tax credit for the fuel is reduced by the amount of the road user charge for the fuel.*

*4 However, the *amount is not reduced under subsection (3) if the vehicle's travel on a public road is incidental to the vehicle's main use.*

…

*7 The *amount of road user charge for taxable fuel is worked out using the following rate:*

*(a) if no rate has been determined by the *Transport Minister – 21 cents for each litre of the fuel;*

(b) otherwise – the rate determined by the Transport Minister.

*8 For the purposes of subsection (7), the *Transport Minister may determine, by legislative instrument, the rate of the road user charge.*

*9 Before the *Transport Minister determines an increased rate of road user charge, the Transport Minister must:*

(a) make the following publicly available for at least 60 days:

(i) the proposed increased rate of road user charge;

(ii) any information that was relied on in determining the proposed increased rate; and

(b) consider any comments received, within the period specified by the Transport Minister, from the public in relation to the proposed increased rate.

*10 However, the *Transport Minister may, as a result of considering any comments received from the public in accordance with subsection (9), determine a rate of road user charge that is different from the proposed rate that was made publicly available without making that different rate publicly available in accordance with that subsection.*

*11 In determining the *road user charge, the *Transport Minister must not apply a method for indexing the charge.*

*12 The *Transport Minister must not make more than one determination in a financial year if the effect of the determination would be to increase the *road user charge more than once in that financial year.*

13. Division 44 concerns increasing and decreasing fuel tax credits, in effect, acknowledging that fuel may be acquired for one purpose and not used for that purpose, enabling adjustments to be made as necessary.

14. Division 47 is headed "Time limit on entitlements to fuel tax credits". Section 47-1, the Guide (and thus subject to s 105-10(2)), is in these terms:

> *Your entitlements to fuel tax credits cease unless they are included in your assessed net fuel amounts within a limited period (generally 4 years).*

However, this time limit does not apply in certain limited cases.

15. Issue (3) concerns s 47-5(1) of the FTA as follows:

> *You cease to be entitled to a fuel tax credit to the extent that it has not been taken into account, in an *assessment of a *net fuel amount of yours, during the period of 4 years after the day on which you were required to give to the Commissioner a return for the tax period or fuel tax return period to which the fuel tax credit would be attributable under subsection 65-5(1), (2) or (3).*

16. Chapter 4 concerns common rules including for net fuel amounts. By s 60-5 your net fuel amount is worked out using a formula referring to total fuel tax credits which is defined to mean "the sum of all fuel tax credits to which you are entitled that are attributable to the period". Part 4-2 of Ch 4 concerns the attribution rules for attribution of credits to tax periods.

Issue (1) – toll roads

17. The nub of the issue between the parties is this – the applicant contends that the toll roads are not "a public road" within the meaning of the FTA and, in particular, s 43-10(3) while the respondent contends that those toll roads are "a public road" within the meaning of the FTA including s 43-10(3).

18. As noted, the facts are not in dispute. The respondent provided an appendix to its submissions identifying the relevant facts relating to each toll road. The applicant agreed that the appendix was an accurate factual summary of what must be extensive contractual and related documents concerning the construction, operation, maintenance and other legal arrangements applying to each of the toll roads. The appendix is **attachment 2** to these reasons for decision.

19. For my purposes it is sufficient to record the following, adopted from the competing submissions:

    1) the object of the existence of the toll roads is for the public to use them;

    2) because the construction and/or operation of the toll roads involved some form of "public-private partnership", this object is achieved through contractual arrangements by which the road is to be kept open for use by the public;

3) by this means, the public is generally entitled as of right to use the toll roads;

4) by the same contractual arrangements and other arrangements which vary between toll roads, persons using the roads become subject to an obligation to pay a toll to the operator of the toll road, the obligation being enforceable by various means;

5) the toll road operator's purpose in operating the toll roads is to make a profit; and

6) by the contractual arrangements, the operator of the toll road is responsible for the costs of maintaining the roads for the duration of the operator's right of operation (generally commensurate with the term of the leasehold and/or other legal interests in the land on which the road is located vested in the operator), following which the roads revert to be the responsibility of one or more government entities.

20. The applicant's position is this. The toll roads are operated by a private entity for profit and are maintained by that private entity. In the context of s 43-10(3) of the FTA, in particular the function of the road user charge in that provision, the toll roads are not "public roads".

21. The respondent's position is this. "Public roads" must take the same meaning throughout the FTA. In the context of the FTA as a whole it is apparent that any road which the public may generally access as of right is a public road within the meaning of the FTA. The fact that on exercising that general right of access an obligation to pay a toll arises does not lead to a different conclusion. Nor does the fact that the toll is paid to a private operator who is responsible for the costs of maintaining the road during the period of the operator's relevant rights lead to a different conclusion as the determinative criterion of a public road, for the purpose of the FTA, is that the road be generally accessible to the public as of right, which these roads are.

22. The parties accepted that the phrase "public road" and, indeed, "public", did not have any fixed meaning, but would take meaning from context. The parties each referred to numerous cases, all in different contexts, in which the qualifier "public" has been given different meanings by reference to various indicia, including the principal matters on which the parties relied for their competing arguments and more: for example, *Hazelwood Power Partnership v Latrobe City Council* [2016] VSCA 129; (2016) 218 LGERA 1, *Australian*

Hospital Care (Latrobe) Pty Ltd v Commissioner of Taxation [2000] FCA 1509; (2000) 105 FCR 20, and *Statewide Roads Ltd v Holroyd City Council* (1996) 39 NSWLR 115.

23. Given the specific context of the FTA, it is not apparent to me that the indicia found to be determinative in the many cases to which the parties referred are apt to determine the present case. Nor do I accept that concepts relating to the dedication of a public road at common law are material. Roads in Australia have long since been regulated by statute: for example, *Newington v Windeyer* (1985) 3 NSWLR 555. Nothing in the FTA suggests that common law notions of a road dedicated to the public have any role to play in the construction of the phrase "public road" in the FTA. The same conclusion must apply to the many different statutes which contain definitions of "public road". Those definitions operate for the purpose of the specific statute. There is no definition of "public road" in the FTA.

24. It follows that the orthodox approach of construing the term "public road" in the context of the FTA as a whole should be adopted. The term appears in a number of provisions of the FTA, including ss 41-10(4)(a), 41-20, 41-25(2)(c), 43-8(4)(c), and 43-10(4). Each party contended that the various uses support their inconsistent positions about the preferred meaning of the term.

25. The essence of the applicant's argument is that because the purpose of s 43-10(3) is to reduce the fuel tax credit by the amount of the road user charge, "public road" is to be understood in the context of the road user charge. A logical inference from this is that a public road is one maintained at public expense, as it is the public cost of maintaining roads used by heavy vehicles which provides the logical connection between the use and the charge. The applicant submitted that this was supported by the exclusion of incidental travel on a public road in s 43-10(4). Further, s 43-10(7)-(12), concerning the determination of the road user charge by the Transport Minister, is consistent with this need for maintenance at public expense.

26. In support of this position the applicant called in aid the decision in *Re Linfox Australia Pty Ltd and Federal Commissioner of Taxation* [2012] AATA 517; (2012) 89 ATR 931 (***Linfox [2012]***) at [49] that the "purpose of the road user charge is to recover part of the cost of road construction and maintenance costs attributable to heavy vehicles (that is, those with a gross vehicle mass of more than 4.5 tonnes), with the remainder of the costs attributed

to heavy vehicles being recovered through registration charges". The applicant also called in aid the legislative history of fuel tax regimes, the Explanatory Memorandum to the *Fuel Tax Bill 2006* (Cth) and *Fuel Tax (Consequential and Transitional Provisions) Bill 2006* (Cth), the Explanatory Memorandum in relation to the *Road Charges Legislation Repeal and Amendment Act 2008* (Cth) which introduced s 43-10(7)-(12), the related second reading speech, and documents and determinations of the National Transport Commission as referred to in the Explanatory Memorandum and second reading speech. Suffice to say that these documents refer to concepts such as the road user charge being set in accordance with the National Transport Commission's heavy vehicle charging determination process, heavy vehicles paying their fair share of road construction and maintenance costs (and no more), and, in the National Transport Commission's documents, toll roads being excluded from the expenditure calculation by the National Transport Commission to avoid double counting in accounting for heavy vehicles paying their fair share of road construction and maintenance costs. As the applicant put it, all of this shows that the purpose of the road user charge was to "reimburse the public purse for road expenditure occasioned by the damage caused by heavy vehicles to roads not already financed through tolls". Otherwise, heavy vehicles would be paying twice, once through the toll and once because of the road user charge.

27. These considerations lend some weight to the applicant's preferred construction. Ultimately, however, I am not persuaded by the applicant's approach because it is the legislation which must be construed. The process of construction must be in the context of the legislation as a whole and the circumstances in which it operates but the text cannot be ignored or some other text substituted. The road user charge is to be as determined by the Transport Minister and, if not so determined, is the rate specified: s 43-10(7). The rate is determined by legislative instrument: s 43-10(8). While there are some procedural and substantive constraints on the Transport Minister, the power is not confined to the determination of a charge to recover the costs of road construction and maintenance. No doubt the power is not unconfined, but nothing in the text of the provision or the FTA as a whole suggests that the power is available for governments (be they the Commonwealth, State, Territory or local) to recover only the costs to them of the construction and maintenance of roads. It may be accepted that this object, for governments to recover the cost of construction and maintenance of roads, lies at the centre of the determination-making power. But the applicant's approach involves assuming that this object, in effect, exhausts the entire scope of the power. It is this confining of the power which I am unable

to accept. On this basis, while the logical connection between heavy vehicle use and recouping the cost to government of road construction and maintenance is plain, nothing suggests that it exhausts the scope of the power. Once this is accepted, there is no sound reason for concluding that the exclusory indicia on which the applicant relied (the road being operated for private profit and the private operator being responsible for maintenance costs during the term of the operator's rights) are decisive.

28. Similarly, what should be recognised is that it is unsurprising that the extrinsic material (if all of it be such) on which the applicant relies should focus on current practices and the fact that recoupment of road construction and maintenance costs has been central to those practices. It may also be accepted that it was anticipated that the road user charge under the FTA would be set in accordance with the National Transport Commission's determination process. These, however, are all policy statements. They are not irrelevant, but they cannot be substituted for the text of the FTA which makes no reference to the National Transport Commission's determination process and vests in the Transport Minister a broad power to determine a road user charge. That power should not be confined in the way the applicant's case would require, to a power to permit nothing more than government recouping the cost to it of constructing and maintaining roads. This should not be done because nothing in the text or context supports such a constraint on the scope of the power. The power permits more than this; what that more may be is confined only by the express provisions of the statute (s 43-10(9)-(12)) and by necessary implication from the scope, purpose and objects of the Act as a whole.

29. On this basis there is insufficient justification from the statutory text, construed in context, to understand "public road" to mean a road for which government is responsible for construction and maintenance costs or a road which is not operated with the object of yielding profit to a private entity.

30. Construed in the context of the FTA as a whole, I consider that a broader meaning of "public road" is to be preferred. First, the meaning should reflect the breadth of the determination making power of the Transport Minister. Second, the meaning should operate sensibly for all provisions. Take ss 43-10(3) and (4) as an example. If a public road excludes privately operated toll roads such as the four examples in the present case then the exclusion in s 43-10(4) becomes fraught. The "public road" travel required to be incidental to the vehicle's main use would exclude travel on private toll roads. Section 41-

20 is another example. This is intended to be a disentitling provision for vehicles under 4.5 tonnes. Yet if public road does not include a privately operated toll road then travel by such a vehicle on such a road would not be subject to the disentitlement. To put it another way, a vehicle under 4.5 tonnes travelling on a private toll road would be entitled to a fuel tax credit for such travel when, by s 2-1(b), it is apparent that fuel tax is to be applied to "fuel used on-road in light vehicles for business purposes". Contrary to the applicant's arguments, this reference (and others) to "on-road" indicates that "public road" takes a meaning consistent with the respondent's proposed construction of roads generally accessible as of right to the public.

31. This meaning also accords with the breadth of the power of the Transport Minister to make a determination of a road user charge. That is, the road user charge is deducted from fuel tax credits relating to travelling on a public road. I am unable to accept that by necessary implication this power is confined to roads for which government must pay the costs of construction and maintenance and which are not operated for any element of private profit. The criterion which the respondent proposes, that a public road is one on which members of the public are generally entitled as of right to travel, accords with the breadth of the power of the Transport Minister, enables the provisions of the FTA as a whole to operate harmoniously, and, to my mind, involves no manifest absurdity or unreasonableness. Take the applicant's example of double counting for example. The applicant's point is that it makes no sense for a heavy vehicle to have to pay a toll from which the operator of the toll road must maintain the road and to also be liable to a road user charge to be used to maintain the road. Again, this approach assumes that the limits of the road user charge are set by the costs of constructing and maintaining roads. I accept that these considerations may be at the centre of the power, but not that they fix the limits of the power to determine a road user charge. It is not difficult to conceive of other external costs generated by heavy vehicles using roads which the public is generally entitled to access as of right. It is apparent that the National Transport Commission itself is well aware of those issues and the difficult policy questions to which they give rise. The relevant point for present purposes is that nothing in the FTA indicates that the criteria proposed by the applicant for the determination of a road user charge limit the exercise of the power and thus confine the meaning of "public road" within the FTA. It may also be noted that it is well known that there are public toll roads. I raised with the applicant the Sydney Harbour Bridge which is generally understood to be a tolled public road with the toll being paid to government not a private entity. Would it not be "double counting" for a

heavy vehicle to pay that toll and yet also be liable to the road user charge on the applicant's approach? This suggests the double counting issue is a distraction because government constructed and maintained roads may also be tolled.

32. The respondent's construction also has the merit of making practical commercial sense. A road either is or is not one which the public is generally entitled to travel on as a matter of right, even if the exercise of the right gives rise to an obligation to pay a toll or the right is only exercisable on paying a toll. Provided the latter conditions themselves apply generally, so no member of the public who wishes to travel on the road (consistent with generally applying legal requirements) is prevented from satisfying the obligation or condition, it may be said that the public can generally use the road as of right. In most if not all cases these matters will be apparent to the heavy vehicle driver by the fact of travelling on the road and no more. No further inquiry will need to be made. On the applicant's approach, however, the heavy vehicle driver must obtain copies of and delve into the interstices of enormously complex contractual documents to ascertain the details of the public-private partnership by which the road was constructed, is operated and is maintained. A construction which avoids this impracticality, which is of a different order from the fact that the driver or driver's company must keep records of fuel acquisitions and use for the FTA to function, is to be preferred.

33. In the case of the toll roads in question, the M2 Motorway, the Go Between Bridge, Eastlink, and the Sydney Harbour Tunnel, there is no question that they are generally accessible to the public. They are fully integrated into the overall public road system presumably in order to ensure public accessibility, albeit subject to the obligation or condition of paying the toll. In my view, for the reasons given, this is sufficient to make them public roads within the meaning of the FTA. As a result, it is unnecessary to discuss the various alternative arguments, none of which I find persuasive. Issue (1) should be resolved in the respondent's favour.

Issue (2) – air conditioning units

34. Again, the facts are not in dispute. The applicant has a fleet of heavy vehicles. Those vehicles have air conditioning available in the driver's cabin. To power an air conditioning unit the engine needs to deliver extra torque to it, using more fuel than it would do otherwise. Some drivers use air conditioning and some do not, and some use it at

different times depending on the circumstances. As a result, the same trip along a public road may use more or less fuel as a result of the use of air conditioning or not.

35. The parties also agree this. Section 43-10(3) requires the fuel to be acquired to use in a vehicle and the fuel to be acquired for travelling on a public road. The dispute is about the meaning of "for travelling on a public road". As with many such disputes, the issue between the parties is the level of generality or specificity which should be applied to give the phrase meaning.

36. The applicant bases its approach, that fuel used to power the air conditioning units in the driver's cabins is not fuel acquired "for travelling on a public road", on reasoning supported by *Linfox [2012]*. In that case the Tribunal held that the fuel acquired to power the refrigeration trailers on the back of trucks (which were powered by a diesel unit separate from the engine) was not fuel acquired for travelling on a public road. I say nothing about the result in that case. Given the competing submissions of the parties, however, it is necessary to say this:

    1) As noted, the parties agreed (and I accept that) the Tribunal in *Linfox [2012]* must be correct at [31] that there are two relevant conditions – "first, the fuel must be acquired to use in a vehicle; and secondly, the fuel must be acquired to use for travelling on a public road".

    2) I agree with the observations at [33]-[34] that the word "for" in the phrase "for travelling on a public road" means for the purpose of travelling on a public road.

    3) As to [36] of the Tribunal's reasons, I agree that there is a difference between fuel acquired to use "for travelling" on a public road from fuel acquired to use in, while or in the course of travelling on a public road, but it seems to me that the difference is that the first concept, "for travelling", is broader than and thus encompasses the other concepts of, "in, while or in the course of travelling on a public road". As a result, I am unable to agree with the Tribunal at [43] that comparing s 43-10(3) and s 41-20 (which says acquire fuel for use in a vehicle travelling on a public road) discloses an intention to "narrow the reach of" s 43-10(3) compared to s 41-20. I would reach the opposite conclusion that, if anything the reach of 'for travelling" in 43-10(3) is broader than "travelling" in s 41-20.

4) Otherwise, for the reasons already given above I am unable to agree that a purpose, even a central purpose, of the road user charge, "to recover part of the cost of road construction and maintenance costs attributable to heavy vehicles" (at [49]) is a legitimate reason to confine the meaning of expressions used in the statute beyond that apparent from the text read in context.

5) As a result, I am unable to agree with the Tribunal at [43] that "for travelling on a public road" is confined to the meaning of propelling a vehicle on a public road.

6) I also would not confine "travelling on a public road" in s 41-20 to such a meaning.

37. The primary meaning of "travel" is "to go from one place to another; make a journey": Macquarie Dictionary, Online Edition. In the act of a heavy vehicle going from one place to another on a public road there is more than mere propulsion involved. The vehicle does not travel merely by the engine propelling the wheels. It travels, and can travel, because it has a driver controlling the steering, headlights, indicators, windscreen wipers, brakes, and air conditioning to ensure the driver can remain comfortable. In my view, fuel acquired for use in a vehicle for all these purposes is fuel "for travelling". As I do not accept the limitation of mere propulsion, I see nothing anomalous in the fact that two heavy vehicles may make the same journey and use the same amount of fuel for mere propulsion but different amounts of fuel due to the use of air conditioning by one driver and not the other. This is still fuel acquired "for travelling". To my mind, it is the applicant's approach which unjustifiably parses the statutory language by dividing the concept of fuel acquired to use in a vehicle for travelling on a public road into fuel used for propulsion in contrast to fuel used for other operations all of which are part of the going from one place to another.

38. I accept that the relevant qualification is "for travelling on a public road". The respondent made submissions directed to the question of acts preliminary to travelling on a public road, such as carrying out a safety check with the engine idling on a private road, for instance, within an industrial site or complex. I do not propose to say anything about this issue because it does not directly arise in this matter and could only be resolved on particular facts and circumstances. Any observations I make about preliminary activities on private roads or internal driveways would be liable to misuse. What does directly arise in the present case is whether fuel used in air conditioning the driver's cabin on the journey along a public road is within s 43-10(3) and in my view it is. Issue (2) should also be resolved in favour of the respondent.

Issue (3) – cessation of entitlement

39. Section 47-5(1), set out above, is repeated here for convenience:

> *You cease to be entitled to a fuel tax credit to the extent that it has not been taken into account, in an *assessment of a *net fuel amount of yours, during the period of 4 years after the day on which you were required to give to the Commissioner a return for the tax period or fuel tax return period to which the fuel tax credit would be attributable under subsection 65-5(1), (2) or (3).*

40. The respondent's case is that the applicant has ceased to be entitled to fuel tax credits for each credit, in effect, not quantified in an assessment within the specified four year period. As the respondent put it at paras [163]-[164] of its submissions:

> *An "assessment" has, by s 110-5, the meaning given in the Income Tax Assessment Act 1997 (the **1997 Act**), which by s 995-1 relevantly provides that "assessment … of an *assessable amount, means an ascertainment of the assessable amount".The term "assessable amount" is defined by s 995-1(1) of the 1997 Act and has the meaning given by s 155-5(2) of Schedule 1 to the Taxation Administration Act 1953, and includes "a *net fuel amount".*
>
> *This means that s 47-5 of the Fuel Tax Act, in referring to an "*assessment of a *net fuel amount", requires there to have been an ascertainment of the entity's net fuel amount, which, given the formula set out above, includes ascertaining the fuel tax credits an entity is entitled to.*

41. The contrary argument, proposed by the applicant, is that s 47-5 extinguishes only the capacity to claim an entitlement to a fuel tax credit, and does not affect the resolution of an existing dispute about the quantum of a claimed fuel tax credit. The respondent rejected that argument for a number of reasons including:

1) Section 47-5(1) operates "to the extent that" the credit has not been taken into account which indicates that the part taken into account in an assessment survives and the part not taken into account in the assessment expires. The section apportions the continued substantive entitlement.

2) The applicant's attempt to distinguish between the entitlement to the credit and the amount of the credit is false. The entitlement is to a particular amount.

3) In its returns, which became deemed assessments, the applicant reduced its entitlement by applying the road user charge (excluding only diesel used to keep trailers refrigerated). As the respondent put it at para [170] of its submissions:

> *The result is that the part of the fuel tax credit that the taxpayer now says is available to it (namely, the amount of the road user charge*

which it did not take into account) was not taken into account in reaching the net fuel amount the taxpayer recorded in its activity statement (and which became a deemed assessment). It must follow that that part of the fuel tax credit was not "taken into account in an assessment of a net fuel amount" within s 47-5.

4) In other words, the applicant did not "take into account" the fuel tax credits it now claims in its returns and thus did not do so in any assessment – which is why s 47-5 is engaged.

5) This approach, the respondent said at para [171] of its submissions:

> *[i]s consistent with the purpose recorded in the explanatory memorandum for the introduction of s 47-5. Prior to the introduction of the provision there was "no effective limitation period for claiming … fuel tax credits": paragraph [1.7], set out at AS [220]. While the former regime gave taxpayers flexibility and minimised the need for revisions to prior returns, it was seen to be "important to balance certainty and consistency generally for GST and fuel tax credits by limiting the time for revising liabilities and entitlements": memorandum at [1.8] (see AS [220]). Further, the memorandum for the Indirect Tax Laws Amendment (Assessment) Bill 2012, as a result of which s 47-5 was amended, explains that Division 47 was enacted "to provide finality": at [1.123].*

6) This approach does not give rise to an incontestable tax or absurd results as taxpayers have other options available to prevent the expiration of credits including lodging an objection to the deemed assessment under Pt IVC of the *Taxation Administration Act 1953* (Cth) (the **TAA 1953**) or applying to amend the assessment: s 155-45 of Sch 1 to the TAA 1953. There is also the option of the Commissioner making a determination under s 60-10 of the FTA.

42. The applicant submitted that the respondent's approach read s 47-5 in isolation from its broader context. According to the applicant:

1) The section operates against a background in which, but for the section, a taxpayer could claim an entitlement to a fuel tax credit for any historical acquisition of fuel indefinitely. The section is not concerned with the amount of any credit but the taking into account of any entitlement to a credit within the time limit specified.

2) Read in the context of the tax law as a whole, including PT IVC of the TAA 1953, it is apparent that the section is not concerned with the quantification of fuel tax credits which have been taken into account in an assessment of a net fuel amount. If it were otherwise the substantive entitlement might be extinguished before an

objection or appeal as to quantum has been determined. There is no justification for this interpretation of the provision which provides finality in respect of claiming fuel tax credits for historical acquisitions of fuel, not finality by extinguishing an entitlement which has been claimed.

3) In the applicant's words at para [232] of its submissions:

> *there is nothing in the text, context or purpose of s 47-5 of the FTA to suggest that, where a taxpayer has engaged their rights under Part IVC of the TAA to challenge an assessment of net fuel amount, the section operates so as to deprive a taxpayer of those rights and to override the important constitutional protection accorded by Part IVC, including the provisions ins 14ZZL and 14ZZQ. Indeed, it would lead to absurd results if s 47-5 of the FTA operated to deny a taxpayer any relief in the nature of a refund after a four-year period had elapsed, notwithstanding Part IVC proceedings being on foot. If the legislation applied in that way, a taxpayer would be faced with the invidious decision as to whether to:*
>
> *a. lodge their return such as to claim a particular net fuel amount on the basis of the correctness of an argument that remained untested in the courts, and in that event risk being exposed to penalties and interest lest that argument ultimately be rejected by the courts; or*
>
> *b. lodge their return on a more conservative basis, that is predicated on a lesser entitlement than that which is claimed by them under Part IVC, and in that event risk that any ultimate vindication of their claimed entitlement by an appellate court will be illusory by reason of the passage of time, barring them from obtaining any practical relief.*

43. These competing submissions involve an issue of both construction and fact. One of the construction issues is, what does a "fuel tax credit" which has "not been taken into account in an assessment of a net fuel amount of yours" mean? The respondent would have it that, having regard to the terms of ss 47-5 and 60-5, this means the net fuel amount has not been quantified in an assessment. In the scheme of the FTA as a whole, which permits adjustments (Div 44) and attributions to tax periods (Div 65), I find this prospect unlikely. It may be accepted that in its returns the applicant applied the whole of the road user charge to its fuel tax credits excluding the fuel used to refrigerate trailers, but I do not see how this means the fuel tax credit for the net fuel amount was not "taken into account" in the deemed assessments. It was taken into account as a relevant integer. And it is against that taking into account which the applicant objected.

44. On this basis, the applicant's construction is to be preferred. Provided the historical acquisition of fuel and a claimed associated fuel tax credit is taken into account in the

assessment, whether or not the net fuel amount is itself quantified in the assessment, s 47-5(1) is not engaged. An acquisition may be "taken into account" in a variety of ways. The way the applicant in the present case took the claimed associated fuel tax credit into account was to deduct from it the road user charge assuming that only the fuel used to air condition trailers was not to be included in that charge. The assessment nevertheless took into account the fuel tax credits, enabling the applicant to adopt the path it did – to lodge an objection to the assessment.

45. For these reasons issue (3) should be resolved in the applicant's favour.

Issue (4) – valid objection?

46. As the applicant explained at paras [234]-[235] of its submissions:

> *Pursuant to s 14ZW(l)(bg) and s 155-35(2)(a) of Schedule 1 to the TAA, any objection to the assessment of net fuel amount for the tax period ended 31 July 2012 was to be lodged within 4 years of the date of the assessment concerned; that is, by 21 August 2016 (noting that the Applicant's 31 July 2012 BAS/fuel tax return was lodged on 21 August 2012, which was the date of the deemed assessment of net fuel amount under s 155-15 of Schedule 1 to the TAA).*[101]
>
> *The Commissioner accepts that a valid objection was lodged on 7 September 2016, in relation to the tax periods in issue ranging from l August 2012 to 30 June 2016, when the supplementary submission in support of its objection at T5-62 as provided: Respondent's SFIC at [29.2].However, the Commissioner contends that there was no valid objection lodged within time, for the tax period ended 31 July 2012, as the grounds stated in the Objection dated 19 August 2016 did not meet the requirements of s 14ZU(c) of the TAA*

47. Section 14ZU of the TAA 1953 provides that:

> *A person making a taxation objection must:*
>
> *(a) make it in the approved form; and*
>
> *(b) lodge it with the Commissioner within the period set out in section 14ZW; and*
>
> *(c) state in it, fully and in detail, the grounds that the person relies on.*

48. The basic requirement is that the Commissioner's attention must be directed to the respects in which the taxpayer contends the assessment is erroneous and the reasons for this contention: *Cajkusic and Others v Commissioner of Taxation* [2006] FCAFC 164; (2006) 155 FCR 430 at [17] citing *HR Lancey Shipping Co Pty Ltd v Commissioner of Taxation* (1951) 9 ATD 267 at 273. Whether an objection is sufficient for this purpose is to

be decided in the particular factual context including by reference to information otherwise available to the Commissioner: *Szajntop v Commissioner of Taxation* (1993) 42 FCR 318.

49. From the objection lodged on 19 August 2016 it was apparent that the applicant claimed that it was entitled to a fuel tax credit under s 41-5 of the FTA greater than that disclosed in the fuel tax return for the period and to the extent the fuel tax credit for the period has been reduced by the amount of the road user charge that reduction should be eliminated in full or reduced. In other words, the Commissioner's attention was being directed to the applicant's view that its application of the road user charge to everything except for fuel used to refrigerate trailers was wrong. The objection itself did not specify why this was wrong but the objection was not made in a vacuum. As between the Commissioner and the legal and accounting representatives for the applicant and numerous others in this industry there was a long history of discussions including the scope of *Linfox [2012]*. From 30 October 2012, on behalf of the applicant and many others in in the industry, the Commissioner had been informed that there was an issue about "fuel used for purposes other than travelling on a public road". This was in the context of the focus on fuel which was used to propel a vehicle along a public road alone being fuel to use, in a vehicle, for travelling on a public road in *Linfox [2012]*. It is apparent the Commissioner understood the nature of this issue as relating to fuel used for purposes other than travelling on a public road not being reduced by the amount of the road user charge: see the Commissioner's letter dated 9 November 2012 which, although for a different purpose, discloses the Commissioner's understanding of the industry-wide issue.

50. By 27 February 2015 it was clear to the Commissioner that fuel used to power cabin air conditioning was claimed to be used for a purpose other than travelling on a public road on behalf of numerous industry participants including the applicant. The fact that potential other uses were also referred to does not change the fact that by 2015 the Commissioner knew fuel used to power air conditioning in the cabin was one reason many in the industry, including the applicant, considered the fuel tax credits claimed in returns to be wrong. Later in July 2015 the issue was expanded upon in a submission sent on behalf of numerous industry participants again including the applicant. The proposition remained that all fuel beyond that necessary to move the vehicle lawfully on a public road was not subject to the road user charge which meant that fuel used to power air conditioning was not so subject. The same submission also noted that there was another issue about the status of certain roads as public roads which would be dealt with separately. A further

submission in September 2015 provided yet more information including that fuel used in travelling on a toll road, T-way or similar road should not be the subject of the road user charge because if the toll operator pays for maintenance this would involve "double dipping by the ATO".

51. It may be accepted that on 7 September 2016 the applicant lodged a submission in support of the objection which referred only to the issue of fuel used to power the air conditioning in the cabins. However, no doubt given the extensive earlier communications, when the Commissioner came to request further information about the objection on 9 September 2016, having received the submission on 7 September 2016, the Commissioner referred to "your objection application dated 19 August 2016, about your assessments of net fuel amount with respect to reductions in fuel tax credits by the amount of the road user charge in relation to fuel used for the purpose of cabin air conditioning and toll roads".

52. In the overall context, the Commissioner must have known the reason why the applicant objected to the assessment – because the applicant was one of numerous industry participants who had been involved in an extensive discussion and submission process with the Commissioner to the effect that only fuel acquired to propel a vehicle along a public road (not a toll road where the toll operator had to pay for maintenance) was subject to the road user charge. The further information the Commissioner sought on 9 September 2016 involved a request for the detailed arguments to be made and clarification as to whether any issues other than air conditioning of cabins and toll roads was involved in the objection. The Commissioner must be taken to have known that those issues were involved in the objection.

53. In these circumstances, I am unable to accept any of the respondent's arguments to the effect that the objection failed to comply with s 14ZU(c) of the TAA 1953. It is not to the point that the applicant was one of hundreds of industry participants represented by the same legal and accounting firm in the extensive discussion and submission process with the Commissioner. Nor is it to the point that those discussions canvassed issues (such as engine idling) which were not pursued. The point is that against the background of the discussions the Commissioner must have known on receipt of the objection that the applicant's case was precisely as had been identified – the road user charge did not apply to fuel used for cabin air conditioning and on travelling on toll roads which were

maintained by the toll operator. The evidence discloses that the Commissioner understood this to be the substance of the objection as at 9 September 2016 despite only having received a submission on 7 September 2016 dealing with the cabin air conditioning issue. The fact that the Commissioner subsequently dealt with the objection on the more limited basis of cabin air conditioning does not alter the fact that the objection, considered in the circumstances in which it was lodged, directed the Commissioner's attention to the assessment of fuel tax credits being erroneous and the reasons for that error, being the application of the road user charge to fuel acquired to power air conditioning in cabins and to travel on toll roads maintained by the toll operators which was claimed to involve "double dipping".

54. For these reasons issue (4) should be resolved in the applicant's favour.

CONCLUSIONS

55. As set out in attachment 1, given the above conclusions, it appears to me that the only appropriate order is that the objection decision be affirmed. The parties may have seven days to consider these reasons and notify me whether different or additional orders are required.

I certify that the preceding 55 (fifty -five) paragraphs are a true copy of the reasons for the decision herein of Justice Jagot, Deputy President

……[SGD]……

Associate

Dated: 22 February 2019

Date(s) of hearing:	**29 – 30 January 2019**
Counsel for the Applicant:	**Mr J De Wijn QC, Ms TC Phillips**
Solicitors for the Applicant:	**Deloitte Legal Pty Ltd**
Counsel for the Respondent:	**Mr S Lloyd SC, Mr M Cosgrove**
Solicitors for the Respondent:	**Australian Government Solicitor**

Australian Government Solicitor
Level 42, MLC Centre
19 Martin Place Sydney NSW 2000
GPO Box 2727 Sydney NSW 2001
T 02 9581 7777 F 02 9581 7778 DX 444 Sydney
www.ags.gov.au

Canberra
Sydney
Melbourne
Brisbane
Perth
Adelaide
Hobart
Darwin

Our ref. 17006675

9 January 2019

Associate to the Honourable Justice Jagot

By email:

Dear Associate,

LINFOX AUSTRALIA PTY LTD V COMMISSIONER OF TAXATION
Administrative Appeals Tribunal – Proceedings No 2017/4041-4045

1. We are writing this letter, with the agreement of the applicant, to indicate matters which are agreed between the parties for the purposes of the above proceeding, which is listed for hearing before Justice Jagot on 29 January to 3 February 2019.

2. The parties have approached the proceedings before the Tribunal, including in relation to the preparation of their evidence, on the basis that issues of "principle" will be addressed by the Tribunal, with issues relating to "quantification" to be dealt with by the Commissioner on any remitter from the Tribunal, if that is appropriate.

3. In this connection, the parties intend to ask that the Tribunal adopt an approach, which has been agreed between the parties, which is set out in this letter below.

4. Without attempting to reframe the issues as identified by the parties in their respective amended statements of facts, issues and contentions (each a **SFIC**), the issues of "principle" referred to above can be broadly summarised as follows:

   4.1. **Issues 1 and 2:** Whether the road user charge in s 43-10 of the *Fuel Tax Act 2006* applies for fuel acquired, or used, in powering air conditioning units in heavy vehicles in the applicant's fleet? (Issues 1 and 2 of each SFIC.)

   4.2. **Issues 3 and 4:** Whether the road user charge in s 43-10 of the *Fuel Tax Act 2006* applies for fuel acquired, or used, in vehicles for travelling on certain toll roads (discussed below)? (Issues 3 and 4 of each SFIC.)

   4.3. **Issue 5:** Whether the applicant has ceased to be entitled to credits (or parts of credits) as a result of s 47-5 of the *Fuel Tax Act?* (Issue 5 in each SFIC.)

   4.4. **Issue 6:** Whether the applicant's objection was effective for the period ended 30 July 2012 (and if not, what is the consequence)? (Issue 6B in the respondent's SFIC; this issue is not addressed in the applicant's SFIC.)

5. In this connection, the parties intend to ask that the Tribunal adopt this course:

5.1. First, the Tribunal decide Issues 1 and 2 by reference to whether, in the circumstances disclosed by the applicant's evidence, s 43-10(3) of the *Fuel Tax Act 2006* applies to reduce the applicant's entitlements to any fuel tax credits to which it was entitled. In this respect, some of the circumstances may be within s 43-10, and others not.

5.2. Secondly, the Tribunal decide issues 3 and 4 by considering whether four identified roads are each a "public road" within the meaning of s 43-10(3) of the *Fuel Tax Act 2006*, those roads being: (a) the M2 Motorway; (b) the Go Between Bridge; (c) Eastlink; and (d) the Sydney Harbour Tunnel.

5.3. Thirdly, the Tribunal decide Issues 1, 2, 3 and 4 *without* requiring the applicant to quantify the extent of any additional amounts of fuel tax credits, or the amount of any decreasing adjustments, to which it says it is entitled if it is otherwise successful, in part or in full, in relation to any of those Issues.

5.4. Fourthly, it follows that the parties ask that the Tribunal make no findings in relation to any other elements of the provisions *or* quantification, for example:

5.4.1. Whether or not the applicant has any decreasing adjustments.

5.4.2. The number of vehicles in the applicant's fleet which exceed a gross vehicle mass of 4.5 tonnes).

5.4.3. What an appropriate calculation methodology is or may be.

5.5. Fifthly, rather the parties propose to ask the Tribunal to set aside the objection decision and remit the matter back to the Commissioner for determination in accordance with directions, pursuant to s 43(1)(c)(ii) of the *Administrative Appeals Tribunal Act 1975*, in any of these circumstances:

5.5.1. The applicant is successful in relation to Issues 1 & 2 (on the basis of paragraph 5.1) and/or Issues 3 & 4 (on the basis of paragraph 5.2).

5.5.2. The applicant is partially successful in respect of the issues, owing to:

a. establishing that some, but not all, of the circumstances in which the applicant used fuel in its vehicles for powering air conditioning units does not result in s 43-10 applying; and/or

b. establishing that one or more, but not all, of the M2 Motorway, the Go Between Bridge, Eastlink and/or the Sydney Harbour Tunnel are not a "public road" within s 43-10.

5.6. Sixthly, in the event the applicant is only *partially* successful in relation to one or more of the above issues, any remitter would therefore not extend to so much of the applicant's case or circumstances in respect of which it was unsuccessful, (for example, if the applicant succeeds in showing three roads are not public roads, but does not succeed on one, the remitter would not capture the last road; and the same applies to circumstances of air conditioning use).

5.7. Seventhly, the parties have further agreed that, on any such remitter:

5.7.1. The Commissioner will consider quantification in relation to any roads or circumstances in respect of which the applicant was successful (that is, in respect of the matters expressly dealt with by the Tribunal).

5.7.2. The Commissioner will apply the Tribunal's reasoning in relation to public roads to other toll roads which the applicant contends are not "public roads".

5.7.3. The Commissioner will apply the Tribunal's reasoning in relation to fuel acquired, or used, in powering air conditioning units in heavy vehicles in the applicant's fleet to other circumstances involving the applicant's acquisition or use of fuel for such air conditioning units.

5.8. Eighthly, if the applicant is not successful in relation to Issues 1, 2, 3 and 4, on the basis set out in paragraphs 5.1 and 5.2 above, the parties also agree, and would therefore ask the Tribunal to decide, that the objection decision be affirmed under s 43(1)(a) of the *Administrative Appeals Tribunal Act 1975*.

5.9. Ninthly, the parties request that the Tribunal consider and make any necessary findings to determine whether the applicant has ceased to be entitled to credits (or parts of credits) under s 47-5 of the *Fuel Tax Act 2006* and whether the applicant's objection was not effective for the period ended 30 July 2012 (that is, Issues 5 and 6 in paragraph 4 above).

5.10. Tenthly, to the extent any order is required under s 14ZZK of the *Taxation Administration Act 1953* for the applicant to advance any arguments in relation to the above issues, the Commissioner will consent to any such order. Whether there is any (further) need for this can be determined after the parties have put on their written submissions in advance of the hearing.

6. The parties also note that, to the extent their respective SFIC is inconsistent with the approach indicated above, that the parties agree on the course set out above.

7. The parties note that in order to make an order under s 43(1)(c)(ii) of the *Administrative Appeals Tribunal Act 1975*, if it is appropriate to do so, the Tribunal must remit the matter to the Commissioner for reconsideration "in accordance with any directions or recommendations" of the Tribunal. The parties appreciate that may be difficult in this case to frame directions or recommendations, if any, to give effect to the requested approach. The parties offer to assist the Tribunal in framing any such directions or recommendations to give effect to the Tribunal's reasoning.

8. Please feel free to contact me if you have any queries.

Yours sincerely

EMMA WHAN
Senior Executive Lawyer

T 02 9581 7581 F 02 9581 7778 M 0415 510 022

emma.whan@ags.gov.au

APPENDIX – THE TOLL ROADS

THE M2 MOTORWAY

202. The M2 Motorway is 20.1 kilometres in length, opened in May 1997, and provides a route between the lower North Shore and North West regions of Sydney. It is a tolled road. It is part of the Sydney Orbital Network.

203. The M2 Motorway Project Deed was entered into on 26 August 1994 (the **Project Deed**).[27] The parties were the Roads and Traffic Authority of New South Wales (the **RTA**), the Honourable Bruce G Baird MP (Minister for Transport and for Roads), Hills Motorway Limited (**Hills**) and Perpetual Trustees Australia Limited (the **Trustee**). The Trustee was trustee of The Hills Motorway Trust (the **Trust**), in respect of which unit holders would invest. Later, the project ownership changed, and the RTA's functions were taken over by Roads and Maritime Services. It is convenient simply to refer to Hills, the Trustee and the RTA, despite these changes.

204. Clause 2.1 of the Project Deed sets out the "Policy and intent", including:[28]

> *(a) It is the New South Wales government's policy to increase private sector participation in the provision of essential infrastructure, including the New South Wales roads system. The objectives of this policy are to:*
>
> *(i) enhance and modernise the public infrastructure of New South Wales for the benefit of the people of New South Wales;*
>
> *(ii) safeguard the public interest in infrastructure projects in which the private sector participates;*
>
> *(iii) procure that that infrastructure is available to the public at the least cost to the government;*
>
> *(iv) increase efficiencies in the operation of that infrastructure; and*
>
> *(v) provide sound opportunities for private sector investment.*

205. The Project Deed required the Trustee and Hills to "finance, design and construct" the "Trust Road" and "Company Road", respectively: cl 2.2(a) and (b).[29] These roads are relevantly defined as the "permanent works to be designed and constructed on" the "Trust Land" and "Company Land",

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27 CAL-1, Tab 2, p7.
28 CAL-1, Tab 2, p23ff.
29 CAL-1, Tab 2, pp29-30.

respectively: cl 1.1.[30] That Trust and Company Land constitute the "Land", and the "M2 Motorway" is defined by reference to that Land (cl 1.1):[31]

> ***M2 Motorway*** *is the permanent works designed and constructed on the Land in accordance with this deed.*

206. Hills is required to "operate, maintain and repair the M2 Motorway": cl 2.2(b)(ii).[32] Subject to two irrelevant clauses, Hills "may levy a toll on M2 Motorway users from the M2 Motorway Commencement Date": cl 8.4(a).[33]

207. The RTA was to provide leases of the Trust Land and Company Land to the Trustee and Hills respectively, as well as a "concurrent lease" of the Company Land to the Trustee: cll 1.1, 4.1.[34] The Trustee, as lessor, and Hills, as lessee, were also required to enter into a sub-lease: cl 4.7.[35]

Changes to the project documentation

208. The project documentation concerning the M2 Motorway has undergone a number of amendments or additions for a variety of reasons, associated with refinancing project debt; changes in structure and ownership; advertising on the Motorway; interfaces with other roads; changes to the Motorway (for instance, conversion of a portion from two to three lanes); electronic tolling; major upgrading; remediation works; and the addition of a new on-ramp. The RMS has released an "Updated summary of M2 motorway contracts",[36] which "summarises the main contracts, from a public sector perspective".[37]

209. In connection with the M2 Motorway upgrade,[38] Hills had to "design, construct, commission and complete the M2 Upgrade": cl 5.1(a) of the M2 Motorway Upgrade Project Deed.[39] The Project Deed remained in force,

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30 CAL-1, Tab 2, p19 and p9.
31 CAL-1, Tab 2, p13 and p15.
32 CAL-1, Tab 2, pp29-30.
33 CAL-1, Tab 2, p56.
34 CAL-1, Tab 2, p9, pp18-19, p42.
35 CAL-1, Tab 2, p46.
36 EW-1, Tab 22.
37 EW-1. Tab 22, p863 at 1.1.
38 The changes effected by the deed for the M2 upgrade (see CAL-1, Tab 13) did not materially alter the parts of the clauses of the Project Deed to which express reference or reliance is made by the Commissioner. References made are to the Project Deed.
39 CAL-1, Tab 11, p23.

except to the extent varied by the upgrade deed: cl 6.1.[40] The "M2 Motorway", and other terms and condition, were, by that deed, redefined or varied in a Consolidated Project Deed so as to reflect the upgrade:

> ***M2 Motorway*** *is the permanent works designed and constructed on the Land in accordance with this deed and on and from the date on which a M2 Upgrade Stage reaches m2 Upgrade Construction Completion, includes that M2 Upgrade Stage.*[41]

The assumption of risk by the "public"

210. The M2 project and the ongoing operation of the M2 Motorway involved and involves the assumption of risk by both private and public interests.

211. The parties to the Project Deed acknowledged that Hills and the Trustee "are required to assume certain risks relating to the cost of the Project", that Hills "is required to assume certain risks relating to the revenue generated", but that Hills and the Trustee "are not required to assume all the risks relevant to the cost of the Project and the revenue generated": cl 2.1(c).[42]

212. Namely, if the project was "materially adversely" affected (cl 2.1(d)) by various circumstances or occurrences, the parties had to negotiate in good faith to achieve certain outcomes: cl; 2.1 (g) and (h). While the parties acknowledged that they should "each have maximum flexibility" in any such negotiations, this included, for example, "altering the allocation of risk" and "varying the parties' financial contributions": cl 2.1(i)(iii), (iv).[43]

213. Similarly, the RTA also assumed specifically identified risks. In particular, the RTA indemnified Hills and the Trustee against the Motorway commencing later than 30 December 1997 in certain circumstances: cl 7.14.[44]

214. The Auditor-General also identified a number of risks borne by the RTA in a report made to the Legislative Assembly, in response to a resolution it had made requiring a review of the terms of the M2 contracts.[45]

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40 CAL-1, Tab 11, p25.

41 The term "Land" was also varied to reflect the "M2 Upgrade Land": CAL-1, Tab 11, p16.

42 CAL-1, Tab 2, pp24-25.

43 CAL-1, Tab 2, pp24-27, 29. This is qualified as a result of the m2 upgrade deed. The qualification is: "(except to the extent such financial contributions relate to the design, construction and completion of the M2 Upgrade)".

44 CAL-1, Tab 2, pp55-56.

45 See EW-1, Tab 5, p271 for a table outlining identified risks.

215. Furthermore, it was a condition precedent in the Project Deed that the Minister execute a guarantee under s 22B of the *Public Authorities (Financial Arrangements) Act 1987 (NSW)* in respect of the RTA's obligations under the project documents: cl 1.11(f). A guarantee under s 22B involves the Crown in right of New South Wales guaranteeing the "due performance" by an authority (here, the RTA) in relation to arrangements it has entered into. Such a guarantee was given. A further approval was given the purposes of the upgrade of the M2 Motorway.[46]

The cost borne by the "public"

216. The M2 project also involved substantial cost to the RTA.

217. The RTA provided the land upon which the Motorway was to be constructed. The RTA had to *acquire* land for the purpose of the M2 Motorway project. Clause 3.1(b) provides:[47]

> *The RTA must be the registered proprietor of the Land by the M2 Motorway Commencement Date, free of all encumbrances, easements or rights of way (other than easements for Services and existing roads) which would materially prejudice the Company's or the Trustee's ability to perform its obligations under the Project Documents.*

218. When the Project Deed was executed in 1994 the RTA was not yet the registered proprietor of a number of parcels of land. This is indicated by the "Land Acquisition Schedule" which is Exhibit G to the Deed: cl 1.1.[48] The parcels (pp134-151) with a red circle were to form part of the permanent M2 corridor (see p3), and a number of those parcels were recorded as owned by entities other than the RTA: for instance, see those numbered 1, 2, 3a and 3b on map m2cad_11.dc (p 134) and the related table (p 4).[49]

219. The RTA acquired land by private treaty and otherwise. For instance, the RTA acquired by transfer DP 58/238503 for $188,000;[50] DP 1/228807 for

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46 See letter from the Honourable David Borger, Minister for Roads, to the Honourable Eric Roozendaal MLC, the Treasurer; see also the documents signed by the Treasurer for the purposes of ss 20 and 22 of the Act, dated 25 October 2010.

47 CAL-1, Tab 2, p39.

48 The Exhibit is at CAL-3, Tab 2, p2ff.

49 The page numbers in this sentence refer to those in CAL-3, Tab 2.

50 EW-1, Tab 41 (see also Tabs 39 and 40).

$384,400;[51] DP 5/238045 for $286,000;[52] DP 4/238045 for $291,500;[53] DP 8/238045 for $332,900;[54] DP 129/13443 for $187,600;[55] and acquired DP 3/565881 under the *Land Acquisition (Just Terms Compensation) Act 1991*.[56] The M2 Motorway is situated on or adjacent to each of those parcels: see Whan at 29-33; EW-1, Tabs 60-63. The RTA spent $122 million on land.[57]

220. Similarly, in relation to the M2 upgrade, a brief from the Chief Executive of the RTA to the Minister for Roads requesting the Minister's endorsement to enter into project contracts in relation to the upgrade to the motorway, recorded that "the RTA identified it will be incurring costs of property acquisition necessary for the upgrade work, estimated at up to $4.5million and ongoing project management costs during construction".[58]

221. Under the Project Deed, the RTA was also obliged to provide a financial contribution. It was substantial. The RTA was obliged to "design and construct" works relevant to the M2 Motorway: cl 2.17(a).[59] This involved earthworks as well as stormwater drainage pipework and culverts.[60] For this purpose, the RTA was obliged to enter into the "Project Management Services Deed" requiring Hills Construction to procure the design and construction of those works: cl 2.17(b)(i).[61]

222. The Financial Statements of the RTA (the **RTA Financial Statements**) record that the RTA paid Hills Motorway the following amounts:[62]

a) $10 million in October 1994.

b) $20 million in September 1995.

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51 EW-1, Tab 44 (see also Tabs 41 and 42).
52 EW-1, Tab 47 (see also Tabs 45 and 46).
53 EW-1, Tab 53 (see also Tabs 51 and 52).
54 EW-1, Tab 56 (see also Tabs 54 and 55).
55 EW-1, Tab 59 (see also Tabs 57 and 58).
56 EW-1, Tab 50 (see also Tabs 48 and 49).
57 EW-1, Tab 66, Extract of "Auditor-General's Report to Parliament 1997 Volume Two", p1157.
58 Brief dated 24/10/10, p3.
59 CAL-1, Tab 2, p38.
60 "Scope of Works and Technical Criteria" (Exhibit K to the Project Deed): see cll 1.2(c)(i) & (ii) on pp26-27 of CAL-3, Tab 6 (see also p57, being Schedule 2 of that document).
61 CAL-1, Tab 2, p38.
62 The Notes to the 1996 RTA Financial Statements (contained in the Annual Report) record that "the RTA has undertaken to procure a defined scope of works, valued at $66.5 million": EW-1, Tab 64, p1100.

c) $19.3 million in April 1996.

d) $15.2 million in June 1996.

The amounts total $64.5 million, after some discounts for early payments.

223. The expenditure made by the RTA "for associated roadworks" totalled $112 million.[63]

224. The 1997 Annual Report for the RTA also reports that the RTA's then cost to date for the M2 Motorway was $224 million in "land acquisitions, RTA capital contribution and project management".[64] The RMS publication, *Updated summary of M2 motorway contracts*, similarly states that the "RTA contributed $232.6 million to the cost of acquiring land for and building the M2 motorway, including land acquisitions valued at $120 million".[65]

225. The NSW Auditor-General's 1997 report to Parliament also reported:[66]

> *In August 1994, agreements were signed with Hills Motorway Ltd to finance, design, construct, operate, maintain and repair a 20 km tollroad. The [Roads and Traffic] Authority expended a total of $234m on the project on land acquisition, $122m and associated roadworks, $112m. The private sector contribution to the construction cost of the Motorway was $470m. The Motorway opened to traffic on 26 May 1997.*
>
> *Under the terms of the Project Deed, ownership of the M2 Motorway will revert to RTA on the earlier of the achievement of specified financial returns or 45 years from the commencement date of 26 May 1997.*

The public interest and public responsibility

226. Aside from statements in the M2 Project Deed concerning policy objectives, the deed demonstrates an object of ensuring the public interest in the M2 Motorway and its operation is safeguarded. One example of this is cl 8.3 (in paragraph 255), which required Hills to keep the Motorway open

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63 EW-1, Tab 66, Extract of "Auditor-General's Report to Parliament 1997 Volume Two", p1157.

64 EW-1, Tab 65, p1148.

65 EW-1, Tab 22, p867.

66 EW-1, Tab 66, Extract of "Auditor-General's Report to Parliament 1997 Volume Two", p1157.

for the continuous passage by the public (notwithstanding it would likely always, if not generally, be in Hill's interest to do so). Other examples are:

a) Hills must give a report to the RTA every six months in relation to all maintenance and repair works carried out, with "details of the procedures and materials used": cl 9.2.[67]

b) Hills must inspect the Motorway at least once a month to determine its state of repair: cl 9.3.[68]

c) Hills must promptly give the RTA a detailed written report of "any material damage to or defect or disrepair in the Premises of which it is aware": cl 9.4(a), and, subject to the deed, the RTA "may reasonably direct" Hills to correct any material damage to or defect or disrepair in the premises: cl 9.5(a), and Hills must act and report: cl 9.5(b).[69]

d) Hills must give the RTA a statement of anticipated periodic maintenance and capital works expenditures to be incurred in the succeeding 12 month period each financial year: cl 9.8, and hold funds in a bank account in the circumstances stated in cl 9.9.[70]

e) Hills was required to keep "books of account" and other records (cl 16.1(a)), which it had to ensure are "available to the RTA at all reasonable times for examination, audit, inspection, transcription and copying" (cl 16.1(b)).[71]

f) Hills was also required to give the RTA a "cash flow profit and loss statement" at the end of each quarter, "showing the result of the operation of the M2 Motorway for the immediately preceding quarter and for the financial year to date": cl 16.2.[72] Hills was also required to give an independently audited profit and loss statement after the end of each financial year: cl 16.4.[73]

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67 CAL-1, Tab 2, p59.
68 CAL-1, Tab 2, p59.
69 CAL-1, Tab 2, p60.
70 CAL-1, Tab 2, Pp60-61.
71 CAL-1, Tab 2, p83.
72 CAL-1, Tab 2, p83.
73 CAL-1, Tab 2, p84.

g) Hills was also required to give the RTA "the average daily traffic figures for a particular month before the 10th Business Day of the next month": cl 16.3(a).[74]

h) Hills was required to "prepare and give to the RTA an operation, maintenance and repair manual: (a) in accordance with the Scope of Works and Technical Criteria; and (b) otherwise reasonably acceptable to the RTA": cl 8.2.[75] This manual was to cover a number of matters and was to "detail to the satisfaction of the RTA the procedures that will ensure that the facilities will be maintained to a standard comparable with other metropolitan motorways, and that the criteria set out in clause 2.3(g) of this Scope of Works and Technical Criteria can be met": cl 5.4 of Exhibit K to the Deed.[76]

227. The RTA could also take action in circumstances where it considered there was a threat to the safety of the Motorway users or other members of the public: cl 9.6, subject to giving notice and a reasonable period elapsing.[77]

228. The public interest in the operation and maintenance of the M2 Motorway is consistent with the Project Deed envisaging the Motorway be operated beyond the "Term". In particular, the Motorway was to effectively revert to the RTA, and was to so revert in an appropriate condition to allow its use.

229. That is, at the end of the "Term", Hills and the Trustee "must transfer the M2 Motorway" and other assets to the RTA "in accordance with the Scope of Works and Technical Criteria": cl 14.7,[78] which requires that "[a]t the end of the Term, the M2 Motorway must be in first class condition as described below …": cl 5.5 of Exhibit K to the Project Deed.[79]

230. Furthermore, the Term of the project is variable. It is based on the return received by Trust Investors, such that if certain levels of return are met by certain dates, the M2 Motorway may revert at an earlier time.[80] In this way, the private profit element in the project is potentially capped, such that it can be inferred that the private participation – in particular, the

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74 CAL-1, Tab 2, p83.
75 CAL-1, Tab 2, p56.
76 CAL-1, Tab 6, p9.
77 CAL-1, Tab 2, p60.
78 CAL-1, Tab 2, p76.
79 CAL-3, Tab 6, pp13-14.
80 See the definition of "Term" in cl 1.1 of the Project Deed (CAL-1, Tab 2, p18) and the definition of "Term" in the Trust Lease (CAL-1, Tab 6, pp6-7).

private financial contribution – was rewarded to enable the project to commence, without leaving unrestrained the extent of the profit to be made, as may be expected to ordinarily be the case in a purely private venture.

231. The Term is defined by cl 1.1 of the Project deed as ending "on the day the Term ends under the Company Lease, the Trust Lease and the Trust Concurrent Lease", which is tiered based on the return to Trust Investors. The Term is either the 36th, 39th, 42nd or 45th anniversary of the M2 Commencement Date: see "Term" in cl 1.1 of those leases (Exhibits A to D to the Project Deed[81]). The effect of this is that the private sector profit is "capped", at least up until the 42nd anniversary of the commencement date.[82]

Policy objectives

232. The M2 Motorway was the subject of State transport and development policy. The Project Deed discloses as much in cl 2.1(a), which is set out at paragraph 204 above. Clause 2.1(b) then goes on to say, in part, that the "parties' intention in entering into the Project Documents is to provide the M2 Motorway as an integrated part of the essential public transport infrastructure of New South Wales to meet the policy objectives set out in clause 2.1(a): …".

233. Similarly, the prospectus for potential investors in the Trust (**Trust Investors**) reported:[83]

> *The M2 Motorway has been identified by the RTA as providing the following key strategic benefits:*
>
> - *It supports the development of Parramatta as an alternative major business centre.*
> - *It links the North West Region with the employment, commercial and educational areas of Parramatta, Macquarie, North Ryde and the Lower North Shore.*
> - *It will greatly improve access to Macquarie from the West, including Parramatta, and the Central Coast.*
> - *It will provide a more direct cross-regional route from the Epping area to the major employment areas of the Lower North Shore and Chatswood.*

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81 CAL-1, Tabs 3 to 6.

82 The M2 Upgrade Deed involved an alteration to the Term, and hence these provisions.

83 EW-1, Tab 4, p195.

- *It will offer potential for urban containment in the Macquarie/North Ryde Carlingford and Dundas areas.*

An important element in the development of the M2 Motorway corridor is the residential growth in Rouse Hill. The continued development of the Rouse Hill area is a key government priority, as disclosed in the document released in October 1993 by the New South Wales Department of Planning entitled "Sydney's Future":

> "The remainder of the land covered by the Rouse Hill Development Area is to be given a high priority. Planning for this sector is the most advanced. To date land has been rezoned for 20,000 homesites out of a total of about 70,000 potential lots. Development within the later stages of Rouse Hill needs to be given further consideration, particularly in relation to transport issues."

234. That the M2 Motorway project was the subject of, or was relevant to, State policy is also indicated by the environmental impact statements obtained by the RTA, and referred to in policy documents.[84] For instance, one such document is the *Roads 2000* policy document which commences with a statement from the Minister for Roads[85] which refers to the "Castlereagh Freeway":

> *Roads 2000 is a breakthrough for planning in New South Wales. For the first time we have a realistic plan for road development to the year 2000. …*
>
> ***Completion of three major East-West Freeways to bring our city closer together.*** *…*
>
> *The Castlereagh Freeway from Seven Hills to North Ryde linking to the city via an improved Epping Road and the new Gore Hill Freeway.*

235. After the Minister's statement, a map[86] shows *inter alia* a new freeway between Old Windsor and Epping Roads, labelled as the "Castlereagh Freeway" – that is, a new freeway between the roads which the M2 Motorway now links. The map also shows that the Castlereagh Freeway is an "Orbital Route".[87] It is apparent from this that the proposed Castlereagh Freeway was an earlier iteration of what became the M2 Motorway.[88]

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84 Little, CL-1, Tab 9.
85 EW-1, Tab 1, p1.
86 EW-1, Tab 1, p2.
87 See also the "Sydney Region Concept Plan" at Whan, EW-1, Tab 1, p8.
88 See also paragraph 239 below.

236. In *Roads 2000*, the "Strategies to develop the Sydney Network" include:[89]

> ***Catering for Growth***
>
> ***Support the growth areas of Sydney by developing strong arterial links to the established suburbs and by developing the road network in growth areas.*** *…*
>
> - *Construct the Castlereagh Freeway from Seven Hills to North Ryde.*
>
> *...*
>
> ***Improved Travel***
>
> ***Develop primary routes linking regional centres to foster their development, create truck routes around town centres and improve cross-city travel.***
>
> - *Develop a new Orbital Route linking all major incoming highways.*

237. And in relation to "Developing the Road System", *Roads 2000* states:[90]

> - *Construct the Castlereagh Freeway from Seven Hills to North Ryde and connect to the city by an up-graded Epping Road and the Gore Hill Freeway.*
>
> ***Relieve Congestion***
>
> ***Relieve severe congestion points by localised road widening or grade separation, especially on major routes.***
>
> *...*
>
> - *Intersections with the Castlereagh Freeway at Beecroft Road, Pennant Hills Road, Windsor Road and Old Windsor Road.*
>
> *...*
>
> *Construction of the bypass of Epping as an early project of the Castlereagh Freeway.*

238. Another example of a policy document referred to in the environmental impact statements is the Metropolitan Strategy[91] (and that document, entitled *Sydney into its Third Century*, is at Whan, EW-1, Tab 6).

239. Further, subsequent to execution of the Project Deed, the Auditor-General reported to the Legislative Assembly, in response to a resolution it made requiring a review of the terms of the M2 contracts.[92] The report contained a history of "[t]he M2, also known as the F2, Castlereagh Freeway and the

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89 EW-1, Tab 1, p7.
90 EW-1, Tab 1, p9.
91 CL-1, Tab 9, pp48, 50.
92 EW-1, Tab 5, p229.

Northwest Transport Link", stating that it "has been part of the State's transport strategy since the 1950s".[93] In considering "Integration Issues" – that is, "the extent to which the M2 can be seen to complement, or at least not conflict, with other State objectives, strategies or priorities"[94] – the Auditor-General advised that "the M2 appears to be generally consistent with the broad objectives outlined in current macro planning documents in several ways", including that "its apparent high priority for the RTA seems to correlate with the short-term priority allocated to the development of the Macquarie-Parramatta-Castlereagh Corridor in the ITS" (being the *Integrated Transport Strategy*, extracts of which are at Whan, EW-1, Tab 3).[95]

240. The relevance of the M2 Motorway to various State policies is also evident in later policy documents which are referred to in the 2010 Environmental Assessment which related to the Major M2 Upgrade (the **Upgrade EA**).[96]

241. The Executive Summary to the Upgrade EA explains,[97] *inter alia*:

> ***Why is it needed?***
>
> *The M2 Upgrade project provides essential improvements to a key link in the Sydney Orbital Motorway network which would support the significant growth planned in Sydney's north west and the 'global arc'. At present the performance of the M2 Motorway is, especially during peak periods, of concern to many users. Users pay a toll to use the M2 Motorway and subsequently they have an expectation that travel times should be lower and feel that they may not be obtaining value for money.*
>
> *The project is consistent with the goals and objectives described in key NSW Government strategy documents, including the State Plan and Metropolitan Strategy. …*
>
> ***How would it satisfy this need?***
>
> *The project objectives were designed to facilitate outcomes that satisfy the strategic need for the project. The objectives are to:*
>
> *Support the NSW Government's State Plan, Metropolitan Strategy, Urban Transport Statement and State Infrastructure Strategy. …*

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93 EW-1, Tab 5, p253.

94 EW-1, Tab 5, p307.

95 Though, the Auditor-General also considered conflicts at EW-1, Tab 5, pp308-311, concluding (at p311) that the form of contract "provides some conflict, at least in theory, with other policy objectives set out in the Integrated Transport Strategy" which, "[i]n practice … may not be significant.

96 EW-1, Tab 20.

97 EW-1, Tab 20, p726.

242. The "Overview" in the "Introduction" to the Upgrade EA states *inter alia*:[98]

> *The M2 Motorway plays a key role in Sydney's Orbital network, linking Sydney's north west to the lower north shore and Sydney's CBD. The M2 Motorway was a priority section of the Orbital route identified in the Department of Main Roads publication* Roads 2000 *(1987), which included a strategic plan for Sydney's road needs to the year 2000. Upon opening in 1997, the M2 Motorway provided much needed accessibility and capacity for commuter, commercial, freight and road-based public transport, thereby reducing travel times and peak hour congestion.*
>
> *The NSW Government's* Urban Transport Statement *(November 2006) identifies the efficient movement of people and goods in and around Sydney as a key transport objective and identifies the M2 Motorway as a key part of the Macquarie Park to Port Botany Economic corridor. The proposed upgrade would relieve current congestion, thereby facilitating more efficient movement of people and goods and would also be consistent with potential future development of an M2 Motorway to F3 Freeway connection.*

243. The *Urban Transport Statement*[99] referred to in the above quotation identifies "Macquarie Park – North Sydney/Central Sydney – Sydney Airport/Port Botany" as one of Sydney's "major transport corridors",[100] with the M2 Motorway as one of the "Major routes".[101] See also paragraph 248 below.

244. The Upgrade EA also sets out a "Strategic justification and project need":[102]

> *At the time of construction, the M2 Motorway was a priority section of the 'Sydney Orbital Route' identified in the Department of Main Roads publication* Roads 2000 *(1987), which included a strategic plan for Sydney's road needs to the year 2000. Upon opening, the M2 Motorway provided much needed accessibility and capacity for commuter, commercial, freight and road-based public transport, thereby reducing travel times and peak hour congestion. It also serviced heavy vehicle and public transport demand, in the absence of a rail line. The need and justification for the M2 Motorway enhancement relates to servicing residential and employment growth in Sydney's North West Growth Centre and the deficiencies of the existing arterial road network, which was operating at or near capacity in the early 1990s.*

The *Roads 2000* document is discussed at paragraphs 234 to 237 above.

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98 EW-1, Tab 20, p730.
99 EW-1, Tab 13.
100 EW-1, Tab 13, p569 (see also pp56-568).
101 EW-1, Tab 13, p569.
102 EW-1, Tab 20, p739 (heading 2.1.1).

245. Under the heading “Support economic growth”, the Upgrade EA states:[103]

> *As described in the Sydney Metropolitan Strategy, titled* City of Cities: A Plan for Sydney’s Future *(December 2005) (Metropolitan Strategy), the M2 Motorway plays an important and strategic function in providing high quality access between Sydney’s north west and the ‘global arc’, spanning from Macquarie Park, Chatswood, St Leonards, North Sydney, Sydney CBD, Sydney Airport and Port Botany. …*

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103 EW-1, Tab 20, p741.

246. The Metropolitan Strategy (*City of Cities: A Plan for Sydney's Future*[104]) referred to in that quotation explains that "[t]he Government has a vision for the shape of Sydney in 2031" and states "eight key elements" of the vision, including:[105]

> *2. STRONG GLOBAL ECONOMIC CORRIDOR*
>
> *The corridor of concentrated jobs and activity in centres, from North Sydney to Macquarie Park and the City to Airport and Port Botany has been the powerhouse of Sydney and Australia's economy. Sufficient zoned land will be provided for business and enterprise in locations with high quality transport access.*

247. A map in that Strategy shows the global economic corridor,[106] and that corridor is "described as Sydney's 'global arc' (the concentration of linked jobs and gateway infrastructure from Macquarie Park through Chatswood, St Leonards, North Sydney and the CBD to Sydney Airport and Port Botany)".[107] The Strategy states year 2031 employment capacity targets which includes, for the North West subregional area, 99,000 new jobs,[108] including 55,000 in Macquarie Park,[109] which is described as a "Specialised Centre"[110] (see also the Upgrade EA[111]). One of the "actions" for the Strategy is to establish the capacity targets for strategic centres;[112] and to support centres with transport infrastructure.[113] Another action is to strengthen the economic role of the orbital motorway network (which includes the M2 Motorway), with particular work indicated in relation to the M7 and M5.[114]

248. The Strategy also seeks to establish a network of strategic bus services, with this involving a network of 43 strategic bus corridors,[115] which involves the M2 Motorway. Strategic corridors 6, 9, 14 and 21[116] fall within the Macquarie-Park – North Sydney/Central Sydney – Sydney Airport/Port

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104 EW-1, Tab 8.
105 EW-1, Tab 8, p426.
106 EW-1, Tab 8, pp428-9.
107 EW-1, Tab 8, p451.
108 EW-1, Tab 8, p436.
109 EW-1, Tab 9, p471.
110 EW-1, Tab 9, p468 and 471.
111 EW-1, Tab 20, pp741-742 at 2.1.3 ("Support economic growth") and 2.1.4 ("Provide for population growth").
112 EW-1, Tab 9, p470ff. Macquarie Park was one of the "strategic centres": p471.
113 EW-1, Tab 9, p482.
114 EW-1, Tab 9, p485.
115 EW-1, Tab 10, p506.
116 EW-1, Tab 10, p508.

Botany "major transport corridor" identified in the *Urban Transport Statement* (see paragraph 243 above),[117] which in turn refers to and was partly based on the Strategy. Further, three of the four subregional strategies refer to the M2 Motorway,[118] and all four strategies are discussed in the Upgrade EA.[119]

249. In relation to "NSW Government plans and strategies", the Upgrade EA further states (under the heading "State Plan") that:[120]

> *The project would contribute to the following Priorities in the State Plan, titled* A New Direction for Sydney *(November 2006a):*
>
> - Priority P2 – Maintain and invest in infrastructure: *… The M2 Motorway needs to be enhanced to serve the growth in commuter and freight traffic. The project would contribute to the maintenance of, and investment in, infrastructure required for growth across NSW. …*
> - Priority E3 – Cleaner air and progress on greenhouse gas reductions: *The project would improve traffic flow on the M2 Motorway and reduce traffic on some existing alternative routes to the M2 Motorway. Reducing traffic congestion on the M2 Motorway and surrounding road network would potentially result in reduced vehicle emissions and a net reduction in greenhouse gas emissions. Improving public transport facilities through faster travel times, improved access points and more potential route options may also generate greenhouse gas emission savings by encouraging the use of public transport. …*
> - Priority E7 – Improve the efficiency of the road network: *The project would improve traffic flow on the M2 Motorway and reduce traffic on some existing alternative routes to the M2 Motorway. This would increase peak period travel speeds along the M2 Motorway.*
> - Priority S7 – Safer Roads: *An enhanced and widened M2 Motorway with increased capacity would result in safer trips on the M2 Motorway and the surrounding network, including improved safety for pedestrians, cyclists and local traffic.*

250. That State Plan (which is called *A new direction for NSW*[121]) refers to those priorities at Whan EW-1, Tab 12, p532. Further, the M2 Motorway is of specific concern to priority E7 (Improve the efficiency of the road network).

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117 EW-1, Tab 13, p569 (see also pp566-568).

118 EW-1: Tab 14, Pp574, 581 (Inner North); Tab 15, pp593, 596-8 (North); Tab 16, pp606, 612, 614-6 (North West). It is not discussed in the West Central strategy: Tab 17.

119 EW-1, Tab 20, pp746-78.

120 EW-1, Tab 20, p744.

121 EW-1, Tab 12.

In considering priority E7, the Plan reports that "average travel speeds" are measured based on Sydney's seven major road corridors, including "M2, Epping Road, Gore Hill Freeway and Harbour Tunnel route between Hawkesbury River (Brooklyn) and the Eastern Distributor toll gates".[122]

251. Similarly, the *Metropolitan Transport Plan*, *Connecting the City of Cities*[123] provides under "What we will deliver": "An extra lane in each direction on the M5 and M2 Motorways."[124] The Plan also appears to identify the Motorway as a "Strategic Bus Corridor".[125] The Upgrade EA explains under the heading "Metropolitan Transport Plan":[126]

> *To meet travel demand generated by planned growth in the [N]orth [W]est, the Metropolitan Transport Plan specifically commits to the delivery of an extra lane each way on the M2 Motorway within the next ten years, and identifies the M2 Motorway as a strategic bus corridor. The project would deliver the additional eastbound and westbound lane in the sector of the M2 Motorway proposed to be upgraded, and, through the introduction of a transit lane and interchange upgrades the project would facilitate improved bus services in the M2 corridor.*

See also the "Strategic Bus Corridor Strategy" section of the Upgrade EA.[127]

252. More recently, the *NSW Long Term Transport Master Plan*[128] (2012) was released. The Minister's message described it as "the first integrated transport strategy we have had in NSW"[129] and the Plan specifically refers to the widening of the M2 Motorway.[130] There have been two updates to this plan (in 2013 and 2014), the former of which makes an express reference to the M2;[131] the latter which does not.[132]

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122 EW-1, Tab 12, pp538-541, especially p540.
123 EW-1, Tab 19.
124 EW-1, Tab 19, p709.
125 EW-1, Tab 19, p708; see also pp706 and 707 in relation to "Better Bus Connections" and those corridors.
126 EW-1, Tab 20, p749.
127 EW-1, Tab 20, p748.
128 EW-1, Tab 21.
129 EW-1, Tab 21, p787.
130 EW-1, Tab 21, pp798, 833-4, 838, 841-2.
131 EW-1, Tab 23, p989.
132 EW-1, Tab 24.

Integration with the road network and access to the Motorway by the public

253. As the above material indicates, the M2 Motorway was to, and does, form part of the Sydney Orbital Network. Amongst other things, the Motorway is and was accessible, and integrated with, the surrounding road network.

254. This is indicated by the pictures referred to in the affidavit of Emma Whan.[133] This is also indicated by the Motorway's prominent position on maps at different points in time, including in street directories in 2005 and 2006,[134] as well as in a New South Wales government publication of August 2017, *Your guide to using the Sydney Motorway Network*.[135] Similarly, the M2 Motorway has signage consistent with other roads.[136]

255. There was also a contractual requirement that the road be open for public access. Clause 8.3 of the Project Deed provided:[137]

> *During the Term, the Company must keep the M2 Motorway open to the public for the continuous passage of vehicles unless:*
>
> *(a) the RTA agrees otherwise in writing; or*
>
> *(b) it is necessary to close the M2 Motorway because of:*
>
> *(i) the requirements of any relevant Authority;*
>
> *(ii) a Force Majeure Event; or*
>
> *(iii) a material threat to the health or safety of M2 Motorway users.*

THE SYDNEY HARBOUR TUNNEL

256. The Sydney Harbour Tunnel is a tolled tunnel. It opened in 1992.

257. The project to build and operate the tunnel was effected by numerous agreements, including (1) an Ensured Revenue Stream Agreement;[138] (2) a Net Bridge Revenue Loan Agreement;[139] (3) a Design and Construction

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133 Whan at paragraph 26; and EW-1, Tabs 27 – 34.

134 EW1, Tabs 7 and 11.

135 EW-1, Tab 25.

136 Whan, paragraph 26; EW-1. Tabs 26, 35, 36, 37 and 38.

137 CAL-1, Tab 2, p56. The provision differed under the 2010 upgrade deed, and contained additional exceptions referrable to the upgrade, though the part set out above was materially the same: CAL-1, Tab 13, pp69-70.

138 CAL-6, Tab 1 (Vol 1 of 1).

139 CAL-6, Tab 2 (Vol 1 of 1).

Agreement;[140] (4) an Operation, Repair and Maintenance Agreement;[141] and (5) a Lease.[142] A feasibility study for the tunnel explained that:[143]

> *The key features of the proposed organisational and financial structure are:*
>
> - *Transfield and Kumagai will form a special purpose company called the Sydney Harbour Tunnel Company ("SHTC") to design, construct, finance and operate the Tunnel (the "Project"). Transfield and Kumagai will be the ultimate beneficial shareholders in the SHTC.*
> - *The SHTC will be granted a lease in respect of the floor of the Harbour and associated areas over and through which the Tunnel and roadworks will pass (the "Lease") and will enter into associated construction and operation agreements. ...*

258. The parties to the Lease were the Commissioner of Main Roads and the Sydney Harbour Tunnel Company Ltd (**SHTC**). The "purpose" of the lease was "to facilitate the design, construction, operation, repair and maintenance of the Tunnel": cl 2.3.[144] The lessee, SHTC, had obligations in relation to the design of the tunnel: cl 4.1;[145] obligations in relation to its construction: cl 4.2; and required SHTC to enter into a design and construction agreement with the "Joint Venture", being a venture between Transfield (SHTJV) Pty Ltd (**Transfield**) and Kumagai Gumi Co Ltd (**Kumagai**): cl 4.5(a)[146] That agreement was entered into between those parties and SHTC, in order to satisfy the lease obligations.[147]

259. Clause 5.1 of the Lease envisaged the use of the relevant land for the purposes of the "design, construction, operation, repair and maintenance of the Tunnel".[148]

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140 CAL-6, Tab 9 (Vol 1 of 1).
141 CAL-6, Tab 11 (Vol 1 of 1).
142 CAL-6, Tab 5 (Vol 1 of 1).
143 EW-3, Tab 1, p5.
144 CAL-6, Tab 5, p107 (Vol 1 of 1).
145 CAL-6, Tab 5, pp109-111 (Vol 1 of 1).
146 CAL-6, Tab 5, p114 (Vol 1 of 1).
147 CAL-6, Tab 9 (Vol 1 of 1).
148 CAL-6, Tab 5, pp117-118 (Vol 1 of 1).

260. Furthermore, under the Lease, SHTC was required to "operate, repair and maintain the Tunnel" during the "Tunnel Site Term": cl 6.1(a),[149] which is a period expiring on 31 August 2022, which represents a concession period.[150]

The assumption of risk by the "public"

261. The tunnel project, as well as the ongoing operation of the tunnel, involved and involves the assumption of risk by both private and public interests.

262. Under the Net Bridge Revenue Loan Agreement, the Commissioner for Main Roads agreed to lend amounts to the SHTC on stated dates: cl 2.1.[151]

263. The amounts were repayable on 31 December 2022 *or* later: cl 2.2, and the loan to the SHTC was interest free: cl 2.3.[152] The amount loaned under this agreement, for a period in excess of twenty years, is $222.6 million.[153]

264. Similarly, under the Ensured Revenue Stream Agreement, which was between the Honourable Laurence Brereton (Minister for Public Works and Ports and Minister for Roads) and the SHTC, the Crown granted to the SHTC "the right to receive an amount calculated in accordance with" a formula: cl 2.1,[154] which is the excess of the expected revenue for the tunnel over and above the toll recepts for the tunnel and another amount.

265. It follows from those arrangements that the State of New South Wales bears a substantial risk in relation to the operation of the tunnel. In that respect, in 1994, the New South Wales Auditor-General furnished a report to the Legislative Assembly on private participation in the provision of public infrastructure: the Roads and Traffic Authority. Amongst other detailed analysis of the arrangements concerning the tunnel, the Auditor-General considered the "Sharing of Tunnel's Risks and Benefits", and explained:[155]

> ***21.6.3 Sharing of Tunnel's Risks and Benefits***
>
> | | *Roads and Traffic Authority* | *Transfield-Kumagai Group* | *Bondholders* |
> |---|---|---|---|
> | ***RISKS*** | | | |

149 CAL-6, Tab 5, p120 (Vol 1 of 1).
150 CAL-6, Tab 5, p104 (Vol 1 of 1) – definition of "Tunnel Site Term".
151 CAL-6, Tab 2, p28 (Vol 1 of 1).
152 CAL-6, Tab 2, p28 (Vol 1 of 1).
153 EW-3, Tab 4, p339; EW-3, Tab 5, p350; EW-3, Tab 6, p364.
154 CAL-6, Tab 1, p8 (Vol 1 of 1).
155 EW-3, Tab 6, p382.

Construction Risk	*Partial* *Total*	*Primary*	*No*
Operating/Revenue/Traffic Risk	*Primary*		*No* *Partial*
Financing Risk		*Partial*	
BENEFITS			
Traffic Benefit	*Yes*	*No*	*N/A*
Interest Income	*No*	*Yes*	*Yes*
Construction Profits	*No*	*Yes*	*N/A*
Tunnel Ownership	*Yes*	*No*	*N/A*

The table indicates that, while certain risks and benefits reside with the Transfield- Kumagai group, the majority of risks and benefits (post construction) lie with the authority.

This would suggest that ownership of the Tunnel is with the Authority, rather than the Transfield-Kumagai Group. This view was also adopted by NSW Treasury in its 1992- 93 Consolidated Financial Statements.

266. The RTA Annual Reports, for the years ended 30 June 2007,[156] 2009,[157] 2013[158] and 2016[159] recorded carrying amounts in relation to the Tunnel of $659.050m, $706.100m, 807.451m and $952.578m, respectively.

The cost borne by the "public"

267. The cost borne to the public in relation to the Sydney Harbour Tunnel is indicated above. However, in addition to the $222.6 million loaned to the SHTC interest-free, the State is required to make payments under the Ensured Revenue Stream Agreement. In the New South Wales Auditor-General's report for 1993 it is reported, in relation to that agreement, that:[160]

Under the Ensured Revenue Stream Agreement the Authority is required to make ongoing monthly payments to the Company until September 2022, calculated in accordance with a set formula, to meet its financial obligations in connection with the operation of the Tunnel. These payments do no constitute loans and accordingly not recoverable. The Authority is applying the Harbour Bridge toll revenue for these ongoing payments. To June 1993 the authority had paid $35.8m pursuant to this agreement.

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156 EW-3, Tab 7, pp470-471.
157 EW-3, Tab 8, p635.
158 EW-3, Tab 9, p814.
159 EW-3, Tab 10, p925.
160 EW-3, Tab 5, p350.

268. Further, as the Department of Main Roads leased the land used for the tunnel to the SHTC, it was necessarily the case that the Department had to obtain the necessary title. A title search records the owner of the relevant land on to have been the Roads and Traffic Authority as at 1 October 1998.[161]

269. In addition to the above, the Commissioner for Main Roads was required to "ensure that the Design and Construction Funds are increased to cover the increase in the cost of design and construction of the Tunnel including a reasonable allowance for profits and overheads caused thereby", in specified circumstances: cl 4.6(c); see also cl 4.6(d) for another situation.[162]

The public interest and responsibility

270. The terms of the Lease agreement with the Commissioner for Main Roads demonstrates an object of ensuring the public interest in the Sydney Harbour Tunnel and its operation is safeguarded. For example:

a) Changes could not be made to the Scope of Works and Design Criteria absent the written agreement of the Commissioner for Main Roads: cl 4.1(g).[163]

b) A "Project Programme" was required to be submitted to the Commissioner for Main Roads, "showing in reasonable detail the activities and sequences planned to achieve Completion": cl 4.2(f).[164]

c) The Commissioner for Main Roads had a "right to inspect all Drawings and Specifications for the purpose of monitoring compliance with the Scope of Works and Design Criteria": cl 4.3(a).[165]

d) The Lessee was required to enter into a design and construction agreement, which was subject to approval by the Commissioner for Main Roads: cl 3.5(a).[166]

e) The Lessee was required to give the Commissioner for Main Roads "prompt notice" of "any serious accident to or serious defect or want

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161 EW-3, Tab 11, p973ff.
162 CAL-6, Tab 5, p115-117 (Vol 1 of 1).
163 CAL-6, Tab 5, p111 (Vol 1 of 1).
164 CAL-6, Tab 5, p112 (Vol 1 of 1).
165 CAL-6, Tab 5, p113 (Vol 1 of 1).
166 CAL-6, Tab 5, p114 (Vol 1 of 1).

of repair in any of the buildings structures facilities devices contrivances services to or fittings forming part of the Tunnel or the Lessee's Plant which is likely to cause" certain dangers or risks, unless the defect or want of repair can be and is promptly remedied: cl 5.4.[167]

f) The Commissioner of Main Roads had a right of inspection for the purposes of ascertaining compliance with an Operation, Repair and Maintenance Agreement: cl 6.9.[168]

Policy objectives

271. The Sydney Harbour Tunnel Report on Environmental Impact Assessment explains, under a heading concerning land-use and transport plan, that:[169]

> *The DMR [Department of Main Roads] has recently completed a major study of road needs of NSW, entitled "Roads 2000". Part of the strategy for the Sydney region is the development of an orbital route, the eastern most part of which comprises the Harbour Bridge and a second Harbour crossing in close proximity to the Bridge.*
>
> *"Roads 2000" provides several strategies for developing the Sydney road network, in particular the strategy for catering for growth in the outer areas of the City. But another important part of the strategy is to improve access in the Sydney CBD and to provide bypass routes to remove through traffic from the City Centre to foster its role as the focal point for the Sydney region.*
>
> *The DEP's "Centres policy for the Sydney Region" proposes, inter alia, that the Sydney CBD/North Sydney be promoted as the dominant regional centre in the Sydney region.*
>
> *It is likely that the Harbour Tunnel will enhance the development of the Sydney CBD and North Sydney, and will also facilitate further commercial development in the North Sydney-St Leonards axis. It could help halt or reverse the decline of employment in the City of Sydney.*
>
> *In regard to other proposals of the "Centres Policy" to promote Parramatta as a second regional centre, and to promote subregional centres, it is considered that the Tunnel will have little adverse effect. The policy to promote Parramatta and sub-regional centres as office centres requires a programme of incentives for successful implementation. Whilst land-use does respond to transportation constraints, and congestion on the Harbour Bridge could ultimately force a redistribution of land-use, this is considered to be a most inefficient and undesirable means of achieving the objective of decentralisation of jobs.*

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167 CAL-6, Tab 5, p118 (Vol 1 of 1).
168 CAL-6, Tab 5, p122 (Vol 1 of 1).
169 EW-3, Tab 3, pp38-39.

272. The *Roads 2000* policy document, referred to in that quotation, describes some of the "main improvements" which it deals with, including "[t]he Second Harbour Crossing to eliminate Sydney's worst bottle-neck".[170]

273. The environmental impact assessment later reports on the Department of Main Roads' responses to submissions received in relation to the environmental impact statement, which includes the question "Does the Tunnel proposal fall within recommended works in the Department of Main Roads "Roads 2000" document?" After explaining that transportation planning is conducted through the Ministry of Transport and a committee, the response was (emphasis added):[171]

> *The "Roads 2000" Plan, recently published, was prepared by Department of Main Roads and has been developed using the up-to-date publications of State and city growth patterns developed by the joint effort of the Departments mentioned.* ***The Plan includes a Second Harbour Crossing.***

Integration with the road network and access to the Motorway by the public

274. The Sydney Harbour Tunnel was to, and does, form part of a broader road network. The tunnel is and was accessible, and integrated with, the surrounding road network.

275. This is indicated by the pictures referred to in the affidavit of Emma Whan.[172] This is also indicated by the tunnel's prominent position in a UBD street directory of Sydney for 1994.[173] Similarly, the Sydney Harbour Tunnel has signage consistent with other roads.[174]

276. The lessee and lessor also entered into an Operation, Repair and Maintenance Agreement, under which the lessee agreed to keep the Tunnel open subject to unforeseen events:[175]

> *4.1 <u>Company to keep Tunnel open</u>*
>
> *Subject to Clause 10, the Company agrees that as and from the Commencement Date and unless otherwise agreed in writing by the Commissioner it shall at all times of the*

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170 EW-1, Tab 1, p1; see also p7.
171 EW-3, Tab 3, p193.
172 EW-3, Tabs 12 – 21.
173 EW-3, Tab 22.
174 EW-3, Tabs 15, 20 and 21.
175 CAL-6, Tab 11, p333 (Vol 1 of 1).

day and night during the Operating Period keep the Tunnel open, or produce that the Tunnel is kept open to the public for the passage of vehicular traffic.

EASTLINK

277. The Mitcham-Frankston Freeway Concession Deed (the **Eastlink Deed**) was entered into on 14 October 2004.[176] The parties were the Honourable Peter Batchelor MP (Minister for Transport), ConnectEast Nominee Company Pty Ltd as a trustee (the **Eastlink Trustee**), ConnectEast Pty Ltd (**ConnectEast**), the latter two of which were described as **Concessionaires**.[177]

278. The Background to the Eastlink Deed explains *inter alia*:[178]

> *A On 1 May 2003, the State called for expressions of interest for the delivery of a project for the design, construction, finance, lease, operation, maintenance, repair and handover of the Facilities, including the provision of the Tolling System and the Customer Services.*
>
> *B Pursuant to the SEITA Act, SEITA [Southern and Eastern Integrated Transport Authority] was established to facilitate the Project on behalf of the State.*
>
> *C On or about the date of this Deed and after completion of a public bid process, the State approved and confirmed the Concessionaires as the preferred bidders for the Project.*
>
> *D The State's and the Concessionaires' intentions are to implement the Project by entering into, and performing their respective obligations under the Project Documents, which have been prepared and negotiated on the premises that:*
>
> *(i) the Project is being undertaken by the private sector to deliver significant benefits to the community in terms of positive economic, social and environmental outcomes;*
>
> *(ii) the Project is being implemented in accordance with the Partnerships Victoria policy and the Mitcham Frankston Project Act 2004 (Vic);*
>
> *(iii) private funding is to be used for the Project; and*
>
> *(iv) the Freeway is to be handed over to the State at the end of the Concession Period. ...*

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176 CAL-4, Tab 3, p383 (Vol 2 of 6).

177 There were three amending deeds to the Eastlink Deed: CAL-4, tabs 38, 39 and 40. The changes effected by those deed did not materially alter the parts of the clauses of the Eastlink Deed to which express reference or reliance is made by the Commissioner. Reference is made to the Eastlink Deed.

178 CAL-4, Tab 3, pp383-384 (Vol 2 of 6).

F The Facilities are a component of the State's policy to improve public and private transport services within the Mitcham-Frankston corridor. The Facilities represent a major initiative within that corridor.

G The Project objectives include the following:

(i) delivery of a major integrated transport route serving the Mitcham- Frankston corridor in a safe and efficient manner, including:

(a) linking the Transit Cities, Principal Activity Centres and Major Activity Centres (identified in the State's Melbourne 2030 vision) in the Mitcham-Frankston corridor; …

(h) integrating the Project with the existing and future surrounding transport network; …

(iv) achievement of value for money for the State in the delivery and operation of the Project and delivery of a value for money outcome for road users and the general public; …

H The State and the Concessionaires have agreed that:

(i) the State will grant the Trustee the right, and impose on the Trustee the obligation, to finance, plan, design, construct and commission its Works and its Temporary Works;

(ii) the State will grant to ConnectEast the right, and impose on ConnectEast the obligation, to finance, plan, design, construct and commission its Works and its Temporary Works; and

(iii) the State will grant to ConnectEast the right, and impose on ConnectEast the obligation, to operate, maintain and repair the Freeway and to maintain and repair the Maintained Off-Freeway Facilities and provide the Customer Services,

on the terms and conditions of this Deed and the other Project Documents.

279. Each Concessionaire was required to carry out its "Construction Activities": cl 16.1(a),[179] which meant "all things and tasks which the Concessionaire is, or may be required to do … arising out of or in connection with the design, construction and commissioning of its Works and its Temporary works … or … otherwise to comply with its obligations under this Deed with respect to its Works and its Temporary Works": Schedule 1.[180] The Works, were,

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179 CAL-4, Tab 3, p406 (Vol 2 of 6).

180 CAL-4, Tab 3, p513 & (Vol 2 of 6) – definition of "Construction Activities".

relevantly, "all of the physical things and works which that Concessionaire must design, supply, construct, install, produce or complete.[181]

280. During the "Concession Period", ConnectEast was required to "operate, maintain and repair each Freeway Section": cl 24.1.[182] By section 194 of the *Eastlink Project Act 2004*, EastConnect was permitted to fix, charge and collect tolls on the road:

> *The Freeway Corporation may fix, charge and collect tolls for the use of a vehicle in a toll zone and toll administration fees but may do so only in accordance with this Act and the Agreement.*

281. Subject to various contingencies, the State agreed to procure that the Governor in Council "grants to the Trustee a lease in relation to the relevant Freeway Section": cl 12.1.[183] The Eastlink Deed also permitted a sub-lease to be entered into between the Trustee and ConnectEast: cl 12.5(a).[184]

282. The State was entitled, under the lease to the Trustee, to nominal rent: Crown Freeway Lease, cll 7.1(a);[185] Schedule 1,[186] though "Additional Rental" was payable in circumstances identified in cl 39 of the Eastlink Deed: cl 7.1(c).[187] In particular, cl 39.1(a)1 required that:[188]

> *The Trustee must pay to the State, as additional rent and licence fees under the Freeway Leases and Land Licences, a proportion of the amount by which the aggregate revenue derived by the Concessionaires (or any of their Subsidiaries) in each relevant period under clause 39.4 (Relevant periods) exceeds that projected for the same period in the Projected Revenue Profile.*

The assumption of risk by the "public"

283. The Eastlink project, and the ongoing operation of the freeway, involved and involves the assumption of risk by both private and public interests.

284. The Ministers and public authorities of the State of Victoria were obliged, by s 25 of the *Eastlink Project Act 2004*, to "do all things necessary and

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181 CAL-4, Tab 3, p532 (Vol 2 of 6).
182 CAL-4, Tab 3, p422 (Vol 2 of 6).
183 CAL-4, Tab 3, p400 (Vol 2 of 6).
184 CAL-4, Tab 3, p402 (Vol 2 of 6).
185 CAL-4, Tab 23, p706 (Vol 2 of 6).
186 CAL-4, Tab 23, p712 (Vol 2 of 6) – definition of "Rent".
187 CAL-4, Tab 23, p706 (Vol 2 of 6).
188 CAL-4, Tab 3, p446 (Vol 2 of 6).

practicable … to ensure the State and all its public authorities facilitate, on behalf of the State, the implementation of the Agreement; and … to enable the State to discharge its obligations under the Agreement".

285. Clause 45 of the Eastlink Deed deals with a "Key Risk Management Regime".[189] The Concessionaries "may provide the State with notice" of "Possible Key Risk Events" which have or will have a "Relevant Effect", and this requires, subject to other clauses, the parties, including the State, to "negotiate in good faith to determine a redress which will … enable FinCo or the Concessionaires (as applicable) to … pay or repay the Project Debt … and … give to the Equity Investors … the Base Case Equity Return": cl 45.4.[190] That may involve a financial contribution by the State: cl 45.9.[191]

The cost borne by the "public"

286. The Eastlink project also involved substantial cost to the State of Victoria.

287. The State of Victoria expended monies on land (including before the project commenced) and on other things. The *Report of the Auditor-General on the Finances of the State of Victoria, 2004-05* reports, at 82-83, that:[192]

> *The financial impact of this project on the state's finances in 2004-05 was an overall net cost of $282.4 million, consisting of:*
>
> *• the value of state land ($218 million) leased to the consortium for the 39-year period for nominal consideration was expensed when the construction commenced*
>
> *• the value of state works ($100 million) contributed to the consortium were expensed*
>
> *• an amount equivalent to the impact of favourable movements in interest rates on the consortium's financing arrangements up to the point of financial close was paid to the state ($15.6 million)*
>
> *• a contribution by the consortium was due to the state ($20 million) and was subsequently received and paid into the Public Transport Trust Fund to be used by the state to provide public transport and other facilities in the Mitcham-Frankston corridor.*
>
> *The financial impact of the project on the state's finances in future years will be:*
>
> *• works completed by the consortium and contributed to the state will be recognised as a state asset when construction is complete (expected in 2008)*

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189 CAL-4, Tab 3, p452ff (Vol 2 of 6).
190 CAL-4, Tab 3, pp452-453 (Vol 2 of 6).
191 CAL-4, Tab 3, p454 (Vol 2 of 6).
192 EW-4, Tab 2, pp200-201.

> • *the freeway and associated land will be recognised as a state asset when the contract expires in 2047. In the meantime, it will be disclosed as a contingent asset in the government's Annual Financial Report.*
>
> *A report by my Office on the results of a review of the progress of this project will be tabled in parliament at a later date.*

288. Further, a substantial portion of the sum referred to above had been expended on land previously acquired for the freeway. In a Public Accounts and Estimates Committee report to Parliament entitled *Report on the 2004-05 Budget Outcomes* in April 2006, reference was made to the Auditor- General's report for 2004-05 and the costs to the State, in these terms:[193]

> *In the Auditor-General's November 2005 report on the state's finances, it was stated that the financial impact of the project on the state's finances in 2004-05 was a net cost of*
> *$282.4 million.* ***The Committee asked the department to explain the reasons for the variation between the government's estimated cost of around $150 million and the Auditor-General's estimate of costs to date of $282.4 million****.*
>
> *Apart from certain other variances,* ***the department advised that the largest single difference between the amounts is the value of the land previously acquired for the project, which was not taken into account because the construction contract had not been signed at the date of property acquisition****.*

289. To facilitate the project on behalf of the State of Victoria, the Southern and Eastern Integrated Transport Authority (**SEITA**) was established. That body is discussed below. SEITA's 2004 and 2005 Annual Reports record expenditure.[194]

The public interest and responsibility

290. Aside from statements in the Eastlink Deed concerning policy objectives, the deed demonstrated an object of ensuring the public interest in the freeway and its operation is safeguarded. One example of this is cl 26.1 which required, subject to cl 26.2,[195] ConnectEast to "keep all traffic lanes [of an opened section] in their entirety open to the general public for the safe, efficient and continuous passage of vehicles".[196] Other examples are:

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193 EW-4, Tab 3, p297.
194 EW-4, Tab 4 (p721); and Tab 5 (p779).
195 Clause 26.2 was replaced by the third amending deed: CAL-4, Tab 40, p2733.
196 CAL-4, Tab 3, p423 (Vol 2 of 6).

a) The State could monitor each Concessionaire's performance in accordance with any monitoring provisions in the "VIPP Statement": cl 60.2,[197] which refers to a statement under the *Victorian Industry Participation Policy*: see cl 1 of Schedule 1.[198]

b) The Concessionaires were required to give the state "Project Plans"; and to review and if necessary update those plans periodically: cl 62. An objective of each such plan was for "ConnectEast to explain how the Concessionaires plan to perform the Construction Activities".[199]

c) Before opening a section of the freeway, ConnectEast was required to give the State a budget in relation to a "Maintenance and Repairs Account" for the remainder of the financial year and next financial year: cl 31.2(a), and must give further budgets prior to the commencement of succeeding financial years: cl 31.2(b).[200]

d) ConnectEast was required to establish the above account, at a financial institution approved by the State, and give details of that account to the State: cl 31.3.[201] ConectEast was required to provide the State "records of expenditure" from that account: cl 31.3(d).[202]

e) ConnectEast was required to report to the State more broadly. Under cl 64.1 it was required to "keep proper books of account and all other records … the Concessionaire has relating to the Project", and to make those available to the State.[203] Clause 64.2 required the submission of "a monthly report signed by an authorised representative of the relevant Concessionaire" which dealt with a range of matters, including "a management overview addressing the overall progress of the Construction Activities and Operation Activities" and, for completed sections, further information such as "a Safety Audit Report" and "a summary of traffic figures".[204]

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197 CAL-4, Tab 3, p484 (Vol 2 of 6).
198 CAL-4, Tab 3, p532 (Vol 2 of 6).
199 CAL-4, Tab 3, p486 (Vol 2 of 6).
200 CAL-4, Tab 3, p425 (Vol 2 of 6).
201 CAL-4, Tab 3, p425 (Vol 2 of 6).
202 CAL-4, Tab 3, p425 (Vol 2 of 6).
203 CAL-4, Tab 3, p489 (Vol 2 of 6).
204 CAL-4, Tab 3, p489 (Vol 2 of 6). Clause 64.2 changed under the third amending deed (CAL-4, Tab 40, p2733).

Policy objectives

291. In 2003, the Victorian Parliament passed the *Southern and Eastern Integrated Transport Authority Act 2003* under which SEITA was established: s 6, being an authority which represented the Crown: s 7. The Act concerned "The Project", which was defined by s 4 as follows:

> *In this Act, a reference to the Project is a reference to the project for an integrated transport corridor connecting the Eastern Freeway to the Frankston Freeway including tunnels under the Mullum Mullum Creek and a link with the Ringwood By-Pass.*

292. The functions of SEITA are listed in s 19, and include "to facilitate, on behalf of the State, the development of the Project" (paragraph (a)); "to seek and evaluate submissions from persons interested in undertaking the Project" (paragraph (b)); "to negotiate with persons interested in undertaking the Project" (paragraph (c)) and "to make recommendations in relation to contractual arrangements …" (paragraph (d)), amongst others.

293. In SEITA's 2003/2004 Annual Report, under the heading "Statutory Information" the report identified "Related Policies" in respect of which it was said that "[p]olicies issued by the Victorian Government provide the framework within which SEITA operates. Some of the more significant government policies are noted below."[205] Those policies include:

a) *Growing Victoria Together*.

b) *Victoria: Leading the Way (Economic Statement, April 2004)*.

c) *Melbourne 2030*.

d) *Partnerships Victoria*.

294. The Victorian Treasury and Finance website has a page concerning policy, guidelines and templates, including "Past policies", which includes the "Partnerships Victoria Policy – June 2000", which was, judging from the website, the relevant policy in force at the time of the above SEITA report.[206]

295. Amongst other things, the *Partnerships Victoria* policy document explains that, for its public-private partnerships, which are to be assessed under the policy,

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205 EW-4, Tab 4, pp714-715.

206 EW-4, Tab 6, p813.

"[t]he Government is committed to ensuring that each partnership project is assessed against the public interest": at 8.[207]

296. The *Melbourne 2030* document is referred to in the Eastlink Deed, in the background section, stating that "[t]he Project objectives include … linking the Transit Cities, Principal Activity Centres and Major Activity Centres (identified in the State's *Melbourne 2030* vision) in the Mitcham-Frankston corridor": cl G(a).[208] The *Melbourne 2030* vision document explains that policy 1.1 is relevant to the topic "Transit Cities"; policies 1.1, 1.2, 8.1 and 8.3 are relevant to "Principal Activity Centres" and "Major Activity Centres".[209] In discussing "[t]he strategic framework" for the policy, it is explained that "[p]riority for future road investments will be given to [inter alia] … completing the Scoresby Integrated Transport Corridor", that is, Eastlink.[210]

297. The *Growing Victoria Together* policy, which is also referred to in the SEITA report, states that "[p]riority actions" in relation to "[g]rowing and linking all of Victoria" include to "[b]uild faster, better, more accessible transport and communication links", and explains that "[w]e have already":[211]

> *Committed funding to the Scoresby Integrated Transport Corridor to provide freeway and public transport improvements from Ringwood to Frankston*

298. Similarly, the *Victoria: Leading the Way* policy document explains that:[212]

> *The Government has successfully procured 10 projects under the Partnerships Victoria framework.*
>
> *These projects have an approximate capital expenditure value of $1 billion. Five further projects, with an approximate combined capital expenditure value of $2.5 billion, are currently progressing through the Partnerships Victoria framework.*
>
> *The five projects are: the Mitcham-Frankston Freeway, Emergency Alerting Systems, Royal Melbourne Showgrounds Redevelopment, Royal Women's Hospital Redevelopment and the Central Highlands Water Re-use Project.*
>
> *The Mitcham-Frankston Project is recognised as Australia's largest urban road project and is currently ranked amongst the world's top Public-Private Partnership ventures. The project will provide a significant boost to the economic activity in this major growth*

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207 EW-4, Tab 7, p825.
208 CAL-4, Tab 3, p383ff (Vol 2 of 6).
209 EW-4, Tab 8, p1024.
210 EW-4, Tab 8, p881.
211 EW-4, Tab 9, p1053.
212 EW-4, Tab 10, p1073 (left column).

corridor, which contains 43 per cent of Melbourne's manufacturing and production activity. Peak time savings of up to 35 minutes will be possible on some trips using the new road. The project is scheduled for delivery in 2008.

Integration with the road network and access to the Motorway by the public

299. Eastlink was to, and does, form part of a broader road network. Eastlink is and was accessible, and integrated with, the surrounding road network.

300. This is indicated by the pictures referred to in the affidavit of Emma Whan.[213] This is also indicated by the Eastlink's prominent position in a Melway street directory of Greater Melbourne for 2012.[214] Similarly, Eastlink has signage consistent with other roads.[215]

301. There was also a contractual requirement that the road be open for public access. Clause 26.1 of the Eastlink Deed states:[216]

> ***26.1 Continuous opening***
>
> *Subject to clause 26.2 (Closure in certain circumstances), after ConnectEast has opened a Freeway Section for public use, ConnectEast must keep all traffic lanes of that Freeway Section in their entirety open to the general public for the safe, efficient and continuous passage of vehicles during the Concession Period whether or not Tolling Completion with respect to the Section has occurred.*

302. In addition, Eastlink is a "public road" pursuant to the *Roads Management Act 2004* (Vic), to the extent it is declared under s 143 of the *Eastlink Project Act 2004*. Road declarations were made by the Minister for Roads and Ports under that provision on 27 June 2008[217] and 15 September 2009,[218] and presumably other times. A register of public roads is required to be kept under s 19 of the *Roads Management Act 2004*, and Eastlink is so recorded.[219] A members of the public individually is "entitled as of right" to pass along a road, whether that road be a "public road" or not: see s 8 of that Act.

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213 EW-4, Tabs 14-23.
214 Whan, EW-4, Tab 24.
215 EW-4, Tabs 18 to 23.
216 CAL-4, Tab 3, p423 (Vol 2 of 6).
217 EW-4, Tab 34, p1136ff.
218 EW-4, Tab 35, p1160ff.
219 EW-4, Tab 36, p1164ff, especially p1169.

THE GO BETWEEN BRIDGE

303. The Go Between Bridge is a bridge in Brisbane city, opened on 5 July 2010.[220] The Bridge was originally owned and operated by the Council, but subsequently, in 2013, it entered into a concession arrangement.

304. The Go Between Bridge was constructed pursuant to a "Project Alliance Agreement" between Brisbane City Council, Macmahon Construction, Seymour Whyte Construction, Bouygues Travaux Publics and Hyder Consulting. This was referred to as the "Hale Street Link Alliance".[221]

305. That agreement (the **Alliance Deed**) explained in its "Background" that:[222]

> *A Council proposes to construct a tolled road traffic bridge between Hale Street at Milton and South Brisbane (**Hale Street Link project**) to relieve traffic congestion and improve safety and reliability in the Brisbane inner city road network*
>
> *B Council has determined that an alliance focussing on an integrated project team motivated by a strong incentive-based delivery approach is needed to deliver the Project and meet Council's objectives for the Hale Street Link project.*
>
> *C Council has selected Macmahon, Bouygues, Seymour Whyte and Hyder as its NOPs [which means a non-owner participant] to form an alliance with Council.*
>
> *D We have agreed to form the Hale Street Link Alliance to achieve Outstanding Performance in each of our Alliance Objectives in the manner and on the terms set out in our Agreement.*

306. The Alliance was required to develop and deliver a "Project Development Phase Report": cl 5.1, which the Council was required to accept or reject: cl 5.2. The report was to include estimated and approved costs; a program demonstrating the methodology to bring the works to completion; detailed design documentation of the works completed to date; a design management plan identifying the methodology for completion of the design of the works; and other information: see Schedule 6.1.[223]

307. The Council was "the owner with ultimate accountability for the Works": cl 9.1, and had certain "Reserved Powers" as a result: cl 9.2.[224] The Works were described in Schedule 2, and include the bridge, as follows:[225]

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220 EW-2, Tab 1, p1.
221 CAL-5, Tab 1, p1ff (Vol 1 of 7).
222 CAL-5, Tab 1, p6 (Vol 1 of 7).
223 CAL-5, Tab 1, p82ff (Vol 1 of 7).
224 CAL-5, Tab 1, p21-22 (Vol 1 of 7).
225 CAL-5, Tab 1, p57 (Vol 1 of 7).

The Hale Street Link Alliance must provide a cross-river vehicle, cycle and pedestrian bridge link from Milton to South Brisbane connecting the arterial roads of Coronation Drive and Hale Street to Merivale and Cordelia streets and Montague Road. Council has carried out a detailed Impact Assessment Statement and conducted extensive public consultation regarding the proposed Hale Street Link and its associated conceptual details. ...

308. A Project Scope document, which was Annexure 2 to the Alliance Deed, include part concerning the Council's requirements. That included the following "Strategic Outcomes", set out in cl 1.1 of that Annexure:[226]

The objectives of the Council in developing the Hale Street Link are to:

- *enhance the effectiveness of Brisbane's Inner city arterial road network, and provide additional cross river capacity on a tolled user pays facility through a direct arterial link between Hale Street and Coronation Drive at Milton and the one way couplet of Merivale Street and Cordelia Street and Montague Road at South Brisbane;*
- *complement public transport services by maintaining acceptable levels of service on the shared road network;*
- *encourage active and health transport (i.e. cycling and walking) through better linkages and expanded opportunities of cycling and walking paths for commuting and recreational purposes;*
- *integrate and enhance connectivity and provide a greater choice of trip making for journeys across the river, improving accessibility to and from the cultural, education, residential and business precincts in South Brisbane;*
- *enhance the urban renewal re-development potential of South Brisbane and West End;*
- *manage the level of available off and on-street parking within the South Brisbane Peel Street precinct;*
- *control the through traffic in South Brisbane, Highgate Hill and West End.*

309. The Go Between Bridge was constructed using funds borrowed, by the Brisbane City Council, from the Queensland Treasury Corporation.

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226 CAL-5, Tab 2, p92 (Vol 1 of 7).

310. On 11 September 2013, the Council entered into a "Framework and Transition Deed" (the **FT Deed**) with GBB Operations Pty Ltd and LW Operations Pty Ltd concerning the Go Between Bridge and Legacy Way, respectively.[227] We are concerned with the Go Between Bridge only.

311. The FT Deed relevantly provided by cl 5.1(a) that:[228]

> *(**Payment**): In consideration of the grant by Council to the GBB Concessionaire of the rights in clause 3.1 of the GBB Concession Deed, the GBB Concessionaire must pay the GBB Concession Consideration to Council at the following times:*
>
> *(i) within 10 Business Days of GBB Financial Close, the GBB Concession Upfront Payment; and*
>
> *(ii) within 60 Business Days of the GBB Y5 Calculation Date, the GBB Concession Future Payment.*

312. On the 19th of December 2013, Brisbane City Council and GBB Operations Pty Ltd entered into a Concession Deed (**Concession Deed**).[229] Clause 3.1 provided:[230]

> ***3.1 Grant of Concession***
>
> *Council grants the Concessionaire the Concession for the Concession Period subject to, and in accordance with, this deed.*

313. The "Concession" is defined by cl 1.1 to mean "the right for the Concessionaire to … operate, maintain and repair the Tollroad; and … levy Tolls and impose User Charges for or in connection with the use of the Tollroad".[231] The "Concession Period" was defined by cl 1.1 by reference to the earlier of the dates in cl 2.2, but relevantly was the 50th anniversary after a "Commencement Date", subject to termination of the deed or variation of the period, if applicable.[232]

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227 CAL-5, Tab 4, p652 (Vols 3 and 4 of 7).

228 CAL-5, Tab 4, p692 (Vol 2 of 7).

229 The Concession Deed was varied by two subsequent deeds: CAL-5, Tabs 7 and 8). The changes effected by those deed did not materially alter the parts of the clauses of the Concession Deed to which express reference or reliance is made by the Commissioner. Reference is made to the Concession Deed.

230 CAL-5, Tab 6, p1815 (Vol 5 of 7).

231 CAL-5, Tab 6, p1783 (Vol 5 of 7).

232 CAL-5, Tab 6, p1815 (Vol 5 of 7).

The assumption of risk by the "public"

314. Prior to the arrangements changing in 2013, the project was a public project, conducted by an alliance with private entities. There can be no doubt that there was risk assumed by the Council in relation to the bridge's construction; and the Council was also responsible for its operation.

315. However, even following the change in arrangements, the public still assumed risk. The Concession Deed, in its Background, recognises that "[t]his deed sets out the terms on which … the risks associated with the Concession are allocated as between Council and the Concessionaire".[233].

316. At a minimum, cll 19.6, 19.7 and 19.10 of the FT Deed recognise the possibility of the Council being subject to warranty claims, over and above thresholds.[234]

The cost borne by the "public"

317. The Annual Financial Statements of Brisbane City Council for June 2010 reported, in notes concerning major projects, the following:[235]

> ***Go Between Bridge (Hale Street Link)***
>
> ***(i) Background***
>
> *In May 2008 Council awarded Hale Street Link Alliance the contract for the design and construction of the Go Between Bridge (GBB). The estimated cost of the project is*
>
> *$327.3 million (excluding interest). From 5 July 2010, following completion, GBB will operate as a toll road.*
>
> ***(ii) Project Costs***
>
> *Project costs (including interest) of $317.6 million (2009 - $174.2 million) have been incurred to 25 June 2010, including $300 million (2009 - $157.2 million) recognised as capital work in progress (refer note 13) according to Council's policy as stated in note 1.(o). The remaining project costs of $17.6 million (2009 - $17.0 million), including planning and development costs, have been expensed.*
>
> *$20.8 million due to the Hale Street Link Alliance for early completion of the project has been included in trade creditors and accruals (refer note 15).*
>
> ***(iii) Project Funding***

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233 CAL-5, Tab 6, p1779 (Vol 5 of 7).
234 CAL-5, Tab 4, p758-9 (Vol 2 of 7).
235 EW-2, Tab 17, p146.

The project has been funded by borrowings of $250.3 million (2009: $169.5 million) from Queensland Treasury Corporation, including $14.6 million (2009: $5.9 million) redrawn from a repay and redraw facility. As at 25 June 2010, $16.1 million (2009:
$14.6 million) relating to GBB was available in this facility (refer note 16.(d)(iii)).

A loan of $1.5 million advanced to the Hale Street Link Alliance in the prior year was repaid by 25 June 2010.

The public interest and responsibility

318. There can be no doubt that a road constructed by the Alliance, and operated by the Council, on land owned by the Council, prior to the change in arrangements in 2013, was conducted in and for the public interest.

319. Further, even following the change in arrangements, the Concession Deed demonstrates an object of ensuring the public interest in the bridge and its operation is safeguarded. The Go Between Bridge was required to be kept open for use by the public, subject to exceptions. Clause 11.1(a) of the Concession Deed provides:[236]

> *11.1* ***Obligation to operate maintain and repair***
>
> *(a)* ***(General obligation****): The Concessionaire must operate, maintain and repair the Tollroad throughout the Concession Period so that:*
>
> *(i) all Vehicular Traffic Lanes of the Tollroad are open to the public at all times (except as permitted under clause 11.2) for the safe, efficient and continuous passage of Vehicles;*
>
> *(ii) all pedestrian and cycling paths forming part of the Tollroad are open to the public at all times (except as permitted under clause 11.2) for the safe, efficient and continuous passage of pedestrians and cyclists;*

320. In addition, there was a Key Performance Indicator assessment system in place, which required the Concessionaire to meet performance indicators: cl 11.12. This required and requires the calculation of "KPI Credits" at the end of each financial year, which involves reference to "KPI Demerit Points".[237] Relevantly, KPI Credits can be applied by the Council towards funding "[t]oll-free periods for motorists using the Tollroad" and "community infrastructure", amongst other things: cl 11.12(g).[238]

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236 CAL-5, Tab 6, p1842 (Vol 5 of 7).
237 CAL-5, Tab 6, p1850 (Vol 5 of 7).
238 CAL-5, Tab 6, p1853-4 (Vol 5 of 7).

321. Similarly, similar to the other roads, there were additional provisions which ensured the public interest in the bridge was maintained. For example:

a) The Concessionaire was required to give the Council quarterly reports on the "Concession Activities": cl 11.6,[239] which is defined to include all things the Concessionaire is required to do to comply with its obligations, including the operation, maintenance and repair of the Tollroad; and also means the levying of Tolls and the imposition of User Charges in accordance with the Concession Deed: cl 1.1.[240]

b) The Concessionaire was required to have its compliance with a "Quality Management Plan and Environmental Management Plan" audited at intervals not exceeding 12 months, and to deliver copies of the audit report to the Council: cl 6.4.[241]

c) The Concessionaire was required to give the Council a detailed written report of any material damage or "Defect" or disrepair of the Tollroad of which it is aware, with related information: cl 11.10.[242]

d) The Concessionaire was required to provide to the Council quarterly reports detailing "Tollroad User Services and the Tollroad User Complaints", as well as its compliance with cl 12.6 which concerns the standard of service: cl 12.10.[243] Further, the Concessionaire was the subject of an annual audit: cl 12.11.[244]

e) The Concessionaire was required to keep books of account, which were available for inspection: cl 30.1, and was required to provide audited financial statements and cash flow and profit and loss statements to the Council: cl 30.2.[245]

f) The Council also had various "step-in" rights: for example, cl 34.[246]

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239 CAL-5, Tab 6, p1846 (Vol 5 of 7).
240 CAL-5, Tab 6, p1783 (Vol 5 of 7).
241 CAL-5, Tab 6, p1824 (Vol 5 of 7).
242 CAL-5, Tab 6, p1849 (Vol 5 of 7).
243 CAL-5, Tab 6, p1862 (Vol 5 of 7).
244 CAL-5, Tab 6, p1862-4 (Vol 5 of 7).
245 CAL-5, Tab 6, p1926-1927 (Vol 5 of 7).
246 CAL-5, Tab 6, p1948ff (Vol 5 of 7).

Policy objectives

322. The Go Between Bridge was an initiative arising out of Campbell Newman's "Moving Brisbane" policy,[247] which was part of Mr Newman's mayoral election campaign, and which announced "TransApex".[248]

323. Although the bridge was not part of the initial "Moving Brisbane" policy document, it is reflected on the "TransApex" website, which explains:[249]

> TransApex *is Council's long-term plan to improve cross-city travel in Brisbane. It will provide new river crossing and connect existing motorways and major arterial roads.*
>
> *The* TransApex *ringroad is a key part of Lord Mayor Campbell Newman's balanced plan to tackle traffic congestion in Brisbane.*
>
> *Five new transport links will fill fundamental gaps in Brisbane's road network to allow cross-city traffic to bypass the CBD: …*[250]

324. One of the five listed "new transport links" was the "Hale Street Link", which was described in the "*TransApex* projects" sub-website as follows:[251]

> *Hale Street Link is a cross-river connection between Hale Street at Milton and Cordelia and Merivale Streets and Montague Road at South Brisbane. Due to open in mid-2010, it will:*
>
> - *provide public transport, pedestrian and cycle opportunities*
> - *allow motorists travelling to South Brisbane to avoid up to four sets of traffic lights between the ICB or Milton Road and the Peel/Merivale Street intersection or Montague Road*
> - *allow motorists travelling north from South Brisbane to avoid up to six sets of traffic lights between Peel/Cordelia Streets intersection or Montague Road to the ICB or Milton Road*
> - *carry up to 21,000 vehicles per day in 2021*
> - *support future residential development and urban renewal*
> - *provide four additional traffic lanes, a pedestrian path and cycle link across the Brisbane River to increase accessibility to some of Brisbane's popular recreational, cultural and educational precinct*

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247 EW-2, Tab 2.
248 EW-2, Tab 2, p7ff.
249 EW-2, Tabs 3 to 9.
250 EW-2, Tab 3, p11.
251 EW-2, Tab 7, p15.

325. The "*TransApex* benefits" sub-website explained the policy generally:[252]

> *By filling the existing gaps in our motorway network, the TransApex ringroad will:*
>
> - *ease congestion in our inner and middle suburbs*
> - *create an additional 16 traffic lanes across the Brisbane River*
> - *result in faster, safer and more reliable cross-city trips that bypass the CBD*
> - *improve congestion on existing surface roads providing opportunities for more reliable public transport*
> - *provide better access to key growth areas such as the Australia TradeCoast.*

326. The "Hale Street Link" can be understood as a reference to what became known as the Go Between Bridge, at least in part. In a media release dated 2 December 2009 on Campbell Newman's website, it was stated that:[253]

> *Lord Mayor Campbell Newman's Go Between Bridge now spans the Brisbane River after the final section of concrete was poured on the bridge deck today. …*
> *The bridge is scheduled to open to motorists mid 2010.*
> *The $370 million Go Between toll bridge is one of the Lord Mayor's major 'TransApex' bridge and tunnel projects, designed to help traffic bypass Brisbane's CBD.*
> *Other projects in the Lord Mayor's TransApex program include:*
>
> - *CLEM7 tunnel from Woolloongabba to Bowen Hills*
> - *Northern Link (from the Western Freeway at Toowong to the Inner City Bypass)*
> - *Airport Link (from Woolloongabba to the East-West Arterial at Toombul)*
> - *East-West Link (from the Pacific Motorway at Buranda to the Western Freeway).*

327. Those projects, plus the "Hale Street Link", make up the five "new transport links" identified in the "*TransApex* projects" website referred to above.

328. In another media release, dated 4 July 2010, the opening was announced:[254]

> *In the early hours of tomorrow morning (Monday), Lord Mayor Campbell Newman will welcome the first traffic on the Go Between Bridge. …*

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252 EW-2, Tab 5, p13.

253 EW-2, Tab 11, p20. See also the media release at EW-2, Tab 14, p26, which indicates that the Go Between Bridge was part of the Lord Mayor's TransApex program.

254 EW-2, Tab 10, p18.

The Go Between Bridge is part of the Lord Mayor's suite of major road projects that will deliver a new inner city bypass road network, taking traffic away from the CBD and easing traffic congestion.

A $42 million saving in the construction cost of Go Between Bridge has been passed on to motorists with Council being able to reduce the expected toll price.

Cars will be charged $1.50 from opening until 31 December 2010 and then $2.00 from 1 January to 30 June 2011. From July 2011 the toll of $2.35 plus CPI will come into effect.

329. Further, Annexure 10 of the Alliance Deed contained a Communication and Consultation Framework, which recognised the significance of the project to the Lord Major's *TransApex* Plan. For instance, it provided that:[255]

The Alliance should be cognisant of the full breadth and complexity of Council's communication task. However, for the purposes of the Alliance's communications activities, Council's key messages can be summarised as follows –

… The Hale Street Link is part of the Lord Mayor's TransApex *Plan, and will result in reduced congestion and improved accessibility to and from the South Brisbane/West End precinct; …*

330. It was also stated, under the heading "2.3 Integration" that:[256]

The Hale Street Link is an integral part of Lord Mayor Campbell Newman's TransApex Plan *for Brisbane, which aims to strategically redistribute traffic to create an efficient and free-flowing road network. TransApex is a series of road links forming an inner ring-road system around the city and Brisbane's inner suburbs.*

331. The name of the bridge was also publicly voted on. In a media release dated 15 September 2009, residents were reminded of the opportunity to vote:[257]

Time is running out for residents to put their stamp on Brisbane and name the Hale Street Link bridge. …

The shortlisted names include a range of names with historical, geographical and cultural relevance. Votes are being collated through the Name That Bridge website and by phone, email and post, with the winning name being announced in the weeks after closing.

To vote for name that bridge:
Visit website: www.namethatbridge.com …

255 CAL-5, Tab 2, pp203-204 (Vol 1 of 7).
256 CAL-5, Tab 2, p199 (Vol 1 of 7).
257 EW-2, Tab 12, p22. See also the media release At EW-2, Tab 13, p24.

332. The “namethatbridge.com” website reported the outcome as follows:[258]

> *The Hale Street Link bridge’s permanent name will be the **Go Between Bridge**. The name was selected following a vote which attracted almost 5800 votes.*
>
> *The name was originally short-listed for two reasons. Firstly, as a cross-river connection allowing us to easily 'go between' Milton and South Brisbane and secondly, as a reference to The Go-Betweens – an internationally influential band from Brisbane. …*
>
> *The name was shortlisted, alongside 10 others, from a large number of suggestions put forward by the community. The shortlisted names were put to a vote between 31 August and 20 September 2009*

Integration with the road network and access to the road by the public

333. The Go Between Bridge was to, and does, form part of a broader road network. It is and was accessible, and integrated with, the surrounding road network.

334. This is indicated by the pictures referred to in the affidavit of Emma Whan.[259] This is also indicated by the Eastink’s prominent position in a UBD street directory of Brisbane for 2012.[260] Similarly, the Go Between Bridge has signage consistent with other roads.[261]

258 EW-2, Tab 15, p28.
259 EW-2, Tabs 21-27.
260 EW-2, Tab 28.
261 EW-2, Tabs 22 and 27, especially