Transurban

Stapled Structures

Treasury Consultation Paper

Transurban Submission

April 2017

Contents

Executive summary

Collaboration between the public and private sectors is a hallmark of successful infrastructure investment programs. Governments' ability to work with the private sector to deliver city-shaping infrastructure is critical to the economic prosperity of modern cities and for decades Australia has championed a public private partnership (PPP) model that is the envy of the world. Significant private investment in infrastructure sourced from domestic and international investors has broadened the scope of investment significantly from what was achievable through government balance sheets alone.

The toll-road sector has exemplified this success, with the private sector contributing more than $34 billion to new projects in Australia over the past three decades. This investment has delivered billions of dollars in economic benefits to Australia's largest cities through the efficient movement of people, goods and services. KPMG has estimated that over a 10-year period the toll road networks of Melbourne, Sydney and Brisbane have delivered more than $52 billion in direct economic, social and environmental benefits. These benefits mean travel-time savings, reliability gains and reduced vehicle operating costs for households and commercial operators. The flow-on benefits of this included more than $37 billion in increased gross domestic product, which in turn flowed through to $15 billion in additional tax receipts to Australia over the 10-year period. By any measure, the benefits from this investment have been significant. Importantly, private-sector contribution to infrastructure has enabled both Federal and State governments to prioritise their budget spending towards areas such as education, health and social welfare.

Successive Australian governments have understood the importance of creating a stable macroeconomic and political environment underpinned by sound fiscal and monetary policy that provide incentives for higher levels of investor participation. This environment, combined with information and advisory services provided by Austrade, the Treasury, the Department of Foreign Affairs and other government agencies has been important in signalling to investors that Australia is open for business.[1] Private capital—domestic and foreign—is sensitive to economic, policy and political circumstances. With intense international competition for capital, Australia's reputation as a stable and low-risk jurisdiction has been a clear differentiator in the marketplace, as evidenced by the significant level of investment in infrastructure in Australia relative to the rest of the world.

The evolution of stapled structures since the 1980s has been instrumental in the successful establishment of Australia's PPP model for infrastructure investment. Infrastructure projects, particularly transport infrastructure, require large upfront investment with investment returns generated over long-term horizons. The large upfront investment results in accounting and tax losses in the early years of an investment, which, in the absence of stapled structures, would otherwise result in investors not being able to generate a return on their investment for many years, often decades. The use of stapling provides the ability for investors to start to recoup their capital and realise cash returns in the early years of an investment, while the project is generating accounting and tax losses.

This is an important investment characteristic afforded by stapled structures that was the key rationale for their initial development and approval in infrastructure investments. The policy underpinning the current treatment of public unit trusts had its genesis in the Statement on the Reform of the Australian Taxation System by the then Treasurer Hon. Paul Keating on 19 September 1985, where he indicated that company tax arrangements would not apply to public unit trusts "which are vehicles for investing in property, equity or securities". It has been an accepted feature of toll road investments for more than 20 years that the long-term nature of toll road assets and the inherently regulated nature of cash flows qualifies the investment in the projects for treatment similar to other activities considered to be primarily passive investment activity.

Transurban has operated as a stapled structure since listing on the Australian Securities Exchange (ASX) in March 1996. More than 70 per cent of our investors are Australian superannuation fund managers and retail investors. In addition, over the past 20 years Transurban has partnered with other domestic and international investors to develop and acquire a number of major toll road investments in Australia, which have also adopted stapled structures for the reasons outlined above. Currently Transurban and its partners have $9 billion worth of projects under construction or in negotiation across its networks in Australia.

Transurban's investment has been made under the assumption of clear and transparent outcomes around the use of stapled structures. Transurban has a long-standing and co-operative relationship with the Australian Taxation Office (ATO), and the ATO has categorised Transurban Holdings Limited as a "lower consequence taxpayer".

1 Business Council of Australia, *Foreign Attraction—building on our advantages through foreign investment*, 2010

Transurban has sought and received multiple favourable ATO private rulings with respect to its investments and structure. Transurban's reliance on the use of the stapled structure has been supported by decades of ATO private and public rulings, Federal Government legislation and the ATO's historic approach with respect to stapled entities.

With decades of established practice and many billions of dollars of infrastructure investment raised under transparent application of stapled structures, any changes to the treatment or availability of stapled structures would likely diminish investment in Australian infrastructure and delay government's ability to deliver on its transport priorities. The slowdown of projects would have macro-economic impacts as cities face significant increases in population and debilitating congestion levels.

Superannuation and foreign pension funds are attracted to infrastructure assets as the cash flows generated from infrastructure investments are relatively stable over the long term and can therefore support the long-term pension obligations of the funds. Any changes to the use of stapled structures in historical investments would impact billions of dollars of superannuation funds currently invested in infrastructure. For example, if the corporate tax rate was applied to established stapled infrastructure trusts in the toll road sector in order to shift the point of tax capture from the security holder to the stapled entity this could significantly reduce the cash flows paid out to security holders, for minimal tax gain. Given the predominant investment valuation methodology applied to toll road investments is a discounted cash flow analysis, which aggregates cash flows over the life of an investment and calculates the net present value of those cash flows, this could create uncertainty over the valuations of the securities of businesses like Transurban with potential consequences for the wealth of hundreds of thousands of people who have invested directly and indirectly through their superannuation.

Importantly, we estimate that the additional tax capture from Transurban would be minimal. Tax is payable in the hands of Transurban's investors upon receipt of distributions from Transurban. This minimal potential incremental tax capture available through the disruption of an established and successful infrastructure investment model needs to be weighed against the secondary impacts that could significantly diminish tax capture more broadly as a result of reduced economic activity.

Recommendation

The use of stapled entities in infrastructure investment is a long established structure with a clear and sound policy rationale. It has been a cornerstone to the success of Australia's PPP model in infrastructure investment for decades. Any changes to this model have the potential to create uncertainty for billions of dollars of private sector investment that has been made over the past 20 years, with potential consequences for the superannuation of hundreds of thousands of Australians. Such changes will also reduce Australia's reputation as a low-risk jurisdiction among investors. In the competitive marketplace for global capital, this would represent the most significant setback to the infrastructure agenda in Australia in decades.

We strongly recommend that the application of stapled structures remains unchanged for nationally significant infrastructure investments. Any concerns relating to the use of stapled structures in unconventional areas needs to be considered and managed through the administering of the current tax laws.

Infrastructure critical to Australia's prosperity

Australia has enjoyed the longest period of economic growth in modern times, with 104 quarters of growth without a recession.[2]

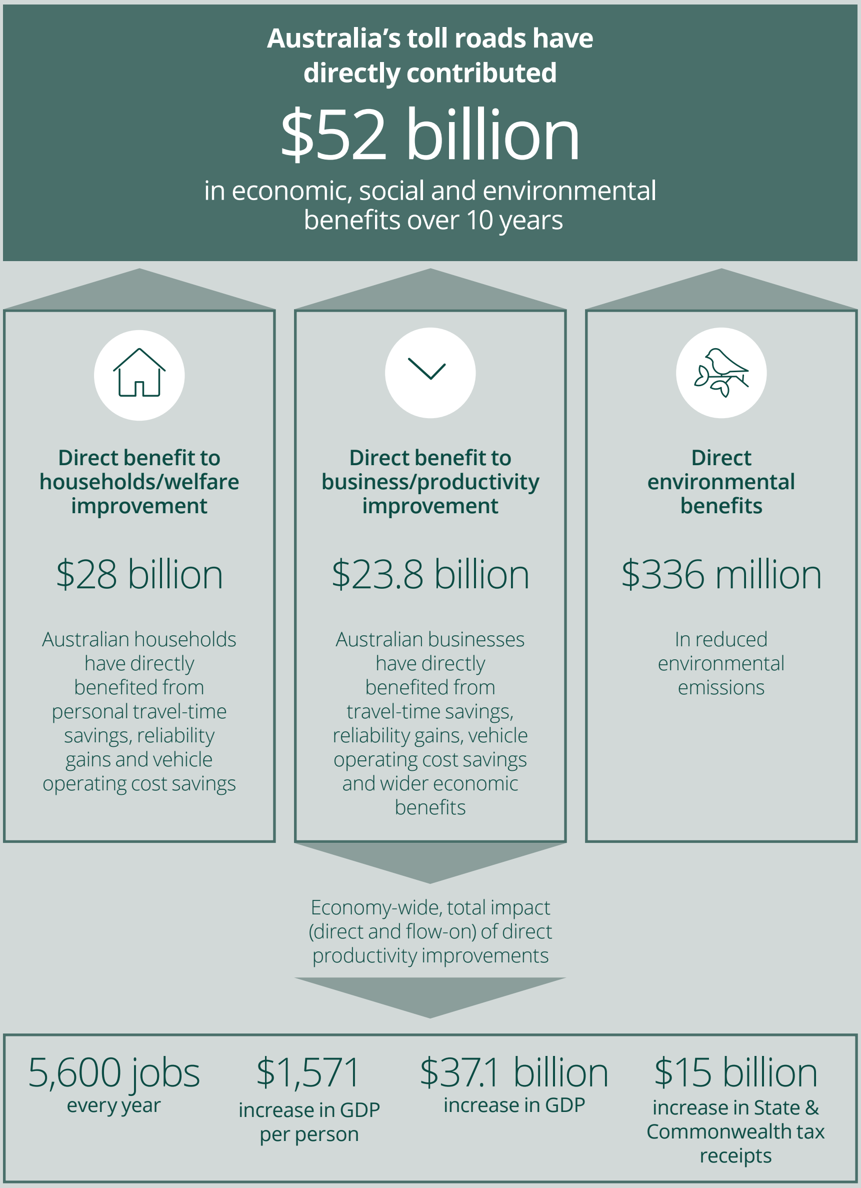
This record prosperity has contributed to Australia's cities being considered the most liveable in the world. Like many countries, Australian cities have become the powerhouses of the economy and effective and efficient infrastructure is critical to ensuring this continues.

Nationally significant infrastructure projects drive far-reaching socio-economic benefits. Australia's toll road sector alone has been estimated to contribute $52 billion in economic, social and environmental benefits and increased gross domestic product by $37 billion over 10 years (refer to Figure 1). Overall, the annual economic benefit of toll roads in Australia has been estimated at $7 billion (refer to Figure 2). Approximately $24 billion of the total benefits are derived from productivity gains due to improved travel times, travel time reliability and reduced vehicle operating costs.

Investments in infrastructure made now and over the next decade provide the foundation of Australia's future economic prosperity and the liveability of our major cities.

By 2031, almost three quarters of Australia's population growth will be in Australia's four biggest cities, which will need to accommodate six million more people.[3] Increased demand will require significant and sustained investment in infrastructure. Successive Australian governments have acknowledged the need to increase infrastructure delivery and governments are now spending record amounts to ensure adequate provision.[4] However, the capital required for infrastructure development is significant and goes well beyond what the public purse is capable of delivering (refer to Figure 3).

Figure 1: Economic contribution



*All $ values are reported in present value terms using Infrastructure Australia recommended real discount rate of 7 per cent, which equates to a nominal discount rate of 9.7 per cent.

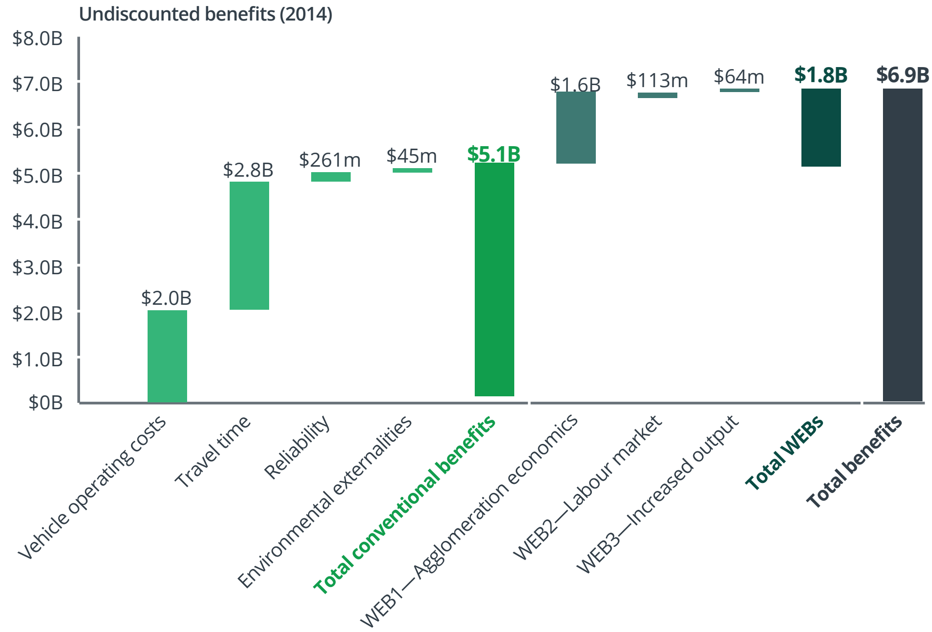
Source: KPMG, 2015

2 As at 1 April 2017

3 Infrastructure Australia, Australian Infrastructure Plan, 2016

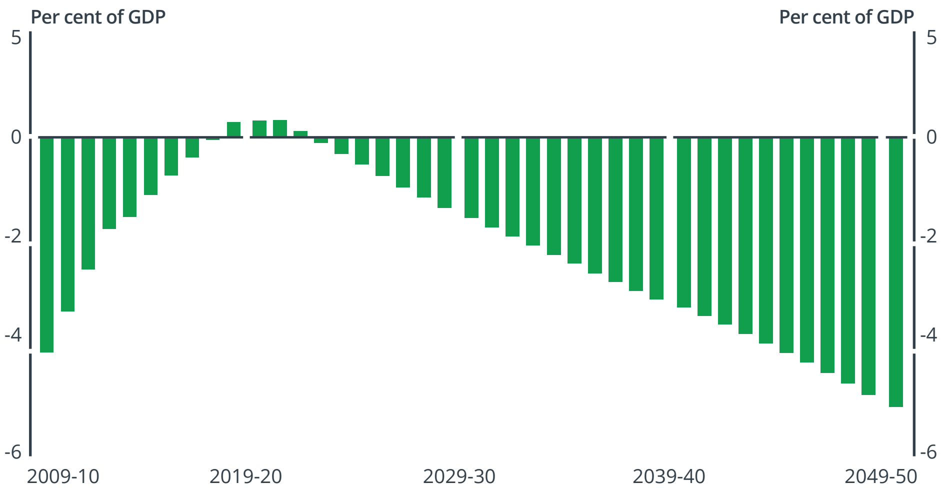
4 The Grattan Institute, Roads to Riches: Better Transport Investment, 2016

Figure 2: Annual direct economic benefits of toll roads in Australia



Source: KPMG analysis

Figure 3: Significant fiscal pressure ahead for governments



Source: Deloitte Access Economics, 'An Intergenerational Report for the States', incorporated within the BCA Submission to the 2011 Tax Forum, October 2011.

Importance of private sector involvement

Over the past 10 years, $52 billion of investment has been made through PPPs to address the growing backlog of infrastructure projects in Australia.[5] Private sector investment now accounts for more than 50 per cent of Australia's total infrastructure spend[6] (refer to Figure 4) and forward projections show that over the next 10 years infrastructure construction spending will be more than $760 billion, with 60 per cent expected to come from the private sector.[7]

Australia's ability to attract investment into infrastructure has been and will continue to be crucial in moving nationally significant projects beyond the drawing board.

The injection of private sector capital and expertise into major projects has allowed governments and communities to benefit from essential infrastructure without government taking on the risk or financial burden. It has allowed governments to free up their balance sheets for social infrastructure and other priorities at a time when they are facing competing funding demands.

Across Australia's toll road sector much of the investment has been funded by the private sector whose investment has delivered a series of nationally significant motorway projects that carry a significant portion of the commuter and the bulk of the freight task every day.

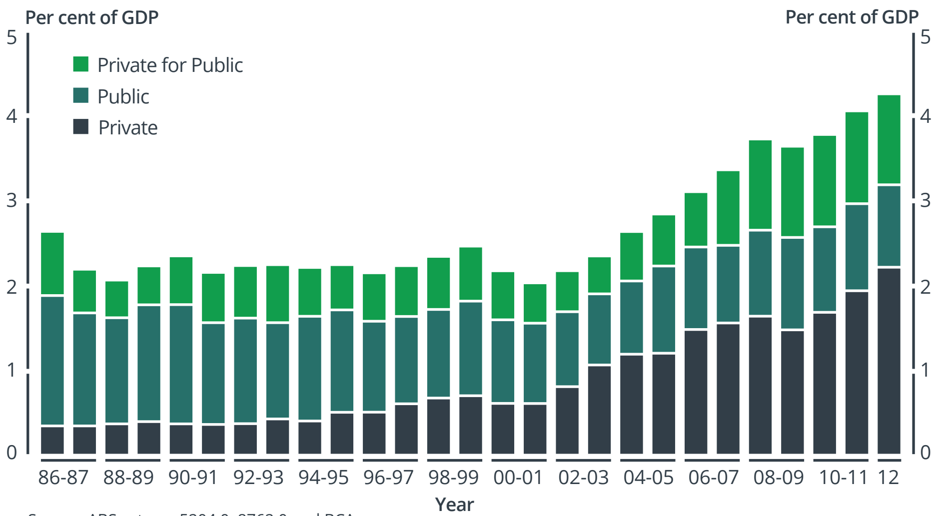
These investments continue to have a profound and long-lasting influence on the economic and physical growth of Australia's major cities in addition to the transportation functions they were designed for. For example, Transurban and its partners have committed $6.8 billion to current infrastructure projects in Australia.

This investment allows governments to re-prioritise their spending towards social infrastructure, healthcare, education and public transport (refer to Figure 5).

Importantly, private sector investment has allowed infrastructure projects to be accelerated by years and sometimes decades, allowing governments to deliver value and benefits to the community sooner. Through Transurban's unsolicited proposal to the New South Wales Government, the NorthConnex project has been brought forward by more than a decade compared to government estimates, with completion now scheduled for 2019.

Creating a regulatory environment that attracts and facilitates private capital into Australia's infrastructure projects has been crucial in delivering the infrastructure Australia requires.

Figure 4: Total infrastructure investment in Australia



Source: ABS cat. no. 5204.0, 8762.0 and BCA.

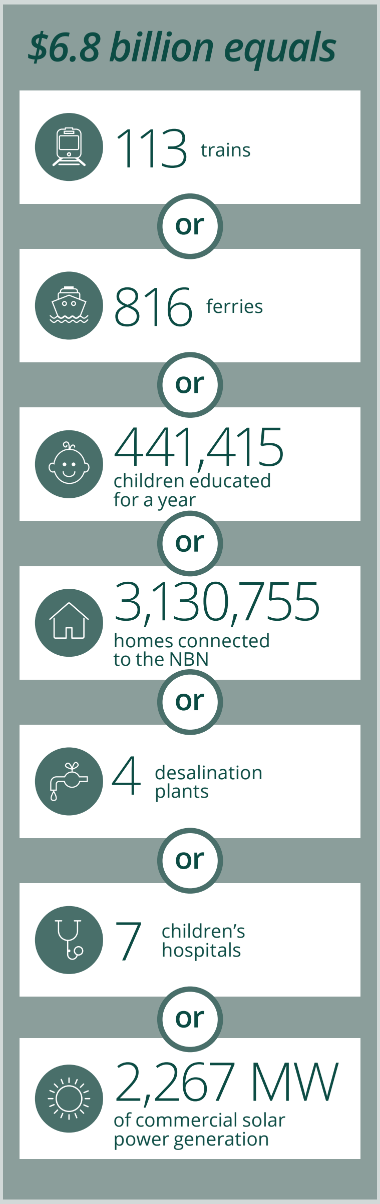
5 Infrastructure Partnerships Australia analysis, 2017

6 Business Council of Australia, Securing investment in Australia's future: infrastructure funding and financing, 2014

7 Deloitte Access Economics data (2013) cited in Business Council of Australia, Securing investment in Australia's future: infrastructure funding and financing, 2014

Figure 5: Private sector contribution

Transurban and its partners' current financial contribution to infrastructure projects in Australia.



Stapled structures in Public Private Partnerships

For decades Australia has reaped the benefits of private investment in infrastructure sourced from domestic and international investors. Since the 1980s, the adoption of the stapled structure model has ensured Australia's international competitiveness in attracting global capital to infrastructure projects, particularly among funds seeking yield-based returns. It has been estimated that the commercial benefits of using stapled structures has led to a doubling in the level of foreign investment in private asset sales across property and infrastructure projects over the past five years to $46 billion.[8]

The success of the model can also be directly linked with the development and take up of PPPs (in which Australia leads the world), arguably, making stapled structures the most important mechanism in attracting investment into transport infrastructure.

Other jurisdictions have different models in place to deliver infrastructure but have had minimal success in attracting private capital compared with Australia's experience. Australia's model is the envy of jurisdictions like the United States of America (USA), which has had limited success in attracting private capital to infrastructure (refer to Figure 6). This has been a factor contributing to the debate in the USA stemming from systemic underinvestment in infrastructure over many years.

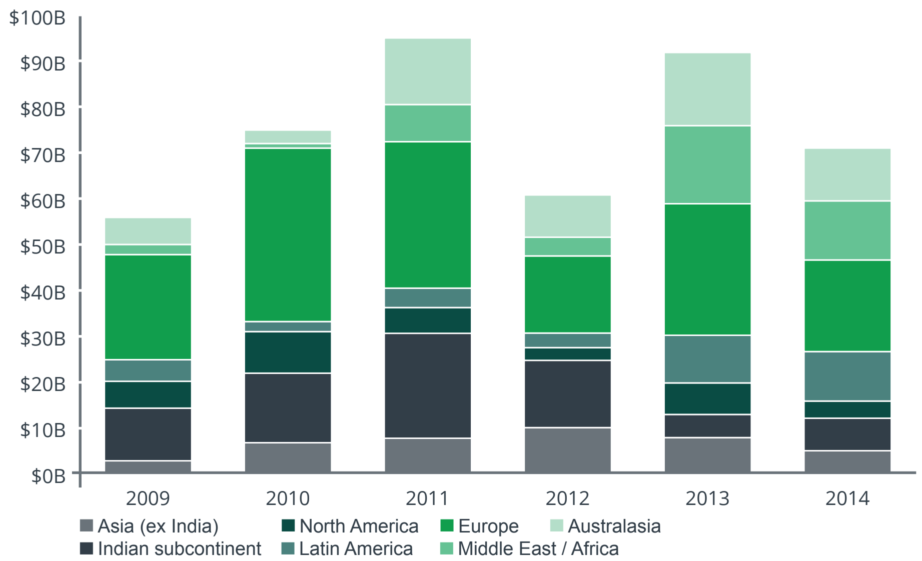
With the resources boom subsiding, Australia's continued economic growth has been and will continue to be underpinned by investments made by government and the private sector into infrastructure.

Attracting investment

An Infrastructure Partnerships Australia survey of domestic and international investors (who collectively owned or managed $150 billion in infrastructure investments) evidenced the heightened appetite for Australian infrastructure investments, with some 95 per cent of respondents reporting a strong likelihood to invest or an interest in Australian opportunities in the near future. The survey also showed that many investors are seeking large exposures to individual projects, with 50 per cent of investors ready to invest more than $1 billion in any single project; and 36 per cent ready to invest more than $2 billion.*

* Infrastructure Partnerships Australia, Perpetual Australian Infrastructure Investment Report, 2015.

Figure 6: Private partnerships volume by region ($ billion)



Source: Dealogic Analysis, 2015.

8 Infrastructure Partnerships Australia analysis, 2017

Impacts from changes to stapled structures

Any changes to the availability of stapled structures has the potential to diminish essential investment in infrastructure.

Investors highlight Australia's long track record in infrastructure, and our stable economic, fiscal and legal frameworks as key features driving interest in our market.[9] Potential regime changes will raise concerns across market certainty; increased cost of capital; project economics; and ability to make a commercial return on investment. It also makes for challenging discussions with foreign investors who invested in structures which were often specifically created at the request of and for the benefit of State and Federal government sponsors.

Reduced capital investment would delay government's ability to deliver on its priorities, which has inevitable flow-on effects to the economy and community.

With massive population growth and urbanisation impacting Australia's major cities, there is a sense that Australia is experiencing an infrastructure deficit which Infrastructure Partnerships Australia has estimated could be as large as $800 billion.[10] In addition, of Infrastructure Australia's top 18 highest priority projects, 11 are road projects.[11]

Supporting the need for more transport infrastructure, road congestion has been estimated to cost $16.5 billion each year as we pay the consequences for workers and freight idling in traffic.[12] Without investment in additional capacity or demand management innovations for current transport infrastructure, the economic extent of congestion costs in our capital cities has been estimated to grow to $30 billion by 2030. In short, Australia has a considerable investment task ahead to ensure investment in infrastructure keeps pace with national growth.

Ensuring Australia's attractiveness to infrastructure investors is of paramount importance and it is imperative that stapled structures are maintained where there is clearly a flow-on effect of enabling higher levels of funding and financing for new infrastructure projects from the private sector.

Minimal increase in tax capture

Since 2002, we estimate that taxes of more than $800 million have been collected at the investor level from Transurban's distributions. We estimate that this is substantially higher than would have otherwise been collected under a conventional company structure because accounting losses prevent the payment of dividends, meaning that investors would not have included any amount of dividend in their taxable income, and tax losses mean a company would not pay corporate taxes for a significant period of time.

Additionally, we estimate that only a marginal increase in tax capture would be expected from Transurban's foreign security holders under proposed changes to stapled groups. We explored a scenario where tax was applied at the trustee level with a refundable credit to investors. The modelling showed the additional tax withheld from foreign investors would be insignificant, noting that no additional tax would be raised from Australian investors. The small potential increase in taxes collected needs to be weighed against the impact on investor sentiment, which will impact investment in Australian infrastructure, and which has flow on effects for the broader economy and productivity.

9 Infrastructure Partnerships Australia, Perpetual Australian Infrastructure Investment Report, 2015

10 Infrastructure Partnerships Australia, Submission to Australia's Future Tax System Review Panel, October 2008

11 Infrastructure Australia, Infrastructure Priority List, 2017

12 Bureau of Infrastructure, Transport and Regional Economics, Traffic and Congestion Cost Trends for Australian Capital Cities, 2015

Delivering policy-driven outcomes: Transurban example

Transurban is the largest listed infrastructure group with a stapled structure and signifies the value that can be derived through the correct application of the model as it was originally intended. That is, with the purpose of attracting investment into infrastructure.

Business overview

Transurban has expanded both nationally and internationally to become a leading developer, operator and long-term concessionaire of toll roads since its establishment in 1996.

We have built a track record of partnering with governments to successfully deliver and manage key road infrastructure. We are recognised for developing innovative and effective solutions to meet the needs of growing cities. Across Sydney, Melbourne and Brisbane we operate 13 toll roads as well as two in the Greater Washington Area, in the USA. Our roads are among Australia's busiest commuter and freight routes with almost two million trips recorded every workday.

Our long-term concessions with governments create a strong incentive for us to actively manage our roads with a view to not only meeting today's needs but the long-term needs of communities.

Since inception, more than $30 billion has been invested into the roads we manage. In addition, we are working to deliver more than $9 billion of new projects, addressing some of Australia's worst congestion and road safety issues and creating thousands of jobs.

In Australia, we are currently partnering with governments on delivering new connections through the NorthConnex Project in Sydney and the West Gate Tunnel Project in Melbourne. We are also working with governments to deliver upgrade projects including the Gateway Upgrade North, Inner City Bypass upgrade, Logan Enhancement Project and CityLink-Tulla Widening. These projects will increase the capacity of existing road infrastructure and significantly improve safety for drivers.

We directly employ more than 1,200 people across Australia and our construction projects create thousands of jobs. For example, NorthConnex will create 8,700 jobs over the life of the project and the West Gate Tunnel Project is expected to generate 5,600 new jobs. The jobs created in the Australian community underpins economic activity and the tax receipts captured by all three levels of government.

Transurban represents one of the most significant infrastructure investment opportunities available to Australian investors. We have more than 100,000 direct security holders, and indirectly hundreds of thousands of Australians invest through their superannuation funds. We are a top 20 company listed on the (ASX). Seventy per cent of our security holders are Australian superannuation funds and Australian individual security holders.

Investment proposition

A key component of our investment proposition is our ability to provide investors with reliable returns on their investment. Typically, investors who are attracted to this type of asset class are those who have a long-investment

Transurban in numbers

15
road assets

$9B
project pipeline

5M
customers

1,192
total lane kilometres managed by Transurban

6B km
travelled on our roads in FY16

8
road development projects under way which will add 448 lane kilometres to our networks

100,000
investors

70%
of investors are Australian superannuation funds and individuals

$900M
in investor distributions in FY16

2,000
employees and contractors

37%
workforce growth in FY16

horizon and desire regular and stable returns, such as life insurance companies, superannuation/pension funds, sovereign wealth funds and individual investors. In particular, pension funds which require long-term, inflation linked cash flows to meet their pension liabilities rely on stapled groups ability to provide stable long-term returns. Transurban also has long-term debt investors who are attracted to the stable returns of the asset class. Currently Transurban's average weighted debt maturity is 9.3 years.[13]

If Transurban was structured as a single corporate entity we estimate that the first dividend it would have been able to provide to investors would have been in 2009, 13 years after listing on the ASX. This is clearly a negative outcome for investors, principally those investors who need cash returns to meet their pension liability obligations.

In addition to the ability to provide stable returns, investors value infrastructure stocks—such as Transurban—on the net present value of their cash flows. Under a stapled structure, because the tax burden is transferred to the investors, there are greater cash flows at the entity level leading to a higher valuation. The predominant investment valuation methodology applied to toll road investments is a discounted cash flow analysis which aggregates cash flows over the life of an investment and calculates the net present value of those cash flows. As such, shifting the level of tax capture (i.e. from investor to entity) would lead to a potential impact on the valuation of infrastructure investments such as Transurban and consequently, on the value of superannuation assets.

Gearing on a pre-tax basis

Lenders (directly or via ratings agencies) focus on various debt serviceability ratios to determine the price and amount of debt that they are willing to lend to infrastructure projects. Broadly, the fact that tax is paid by the investors rather than the project itself means that a lender is generally willing to provide additional funding to the project vehicle. In effect, the level of tax capture (i.e. entity vs investor level) can impact the availability and cost of debt and in turn limit infrastructure investment.

Providing returns to investors

Transurban's business is capital intensive. Any restriction on paying dividends would significantly limit Transurban's ability to raise capital to fund essential road investments. In order to attract equity funding into what is a capital intensive, long-term investment such as a toll road, it is imperative that equity investors are able to receive regular returns in the early years of the investment.

Transurban bears significant upfront cost to build roads in exchange for the right to toll and operate these roads under specific single purpose concessions from State Governments (the State).

The depreciation of the initial capital investment and associated debt funding required leads to accounting and tax losses being generated in the early years of a new project. In such circumstances a company is generally precluded from paying dividends where it is generating accounting losses. A stapled group, comprising corporate and trust entities allows distributions to be made from the trust in the early years of investment to investors. This ensures that the ATO can capture tax receipts, in the hands of investors, which would not otherwise be collected for several years if taxed at the corporate level.

During the concession period, Transurban also undertakes major projects that improve our roads by adding more lanes or technologies that improve road safety and relieve congestion. These activities also require large amounts of upfront capital. A significant portion of this investment is amortised for tax purposes over a 40-year period[14] regardless of the remaining life of the concession period. This means that depending on when the investment is required, a significant part of the investment may never be depreciated for tax purposes, leading to a capital loss at the end of the concession which cannot be transferred to investors.

As the roads mature, the tax losses generated in earlier years are recouped and the roads start to generate positive taxable income and pay actual cash tax at the 30 per cent corporate tax rate. Some of Transurban's roads have reached this phase and are, on an individual basis, taxable. In our experience, depending on traffic, it takes approximately between 10 and 15 years for a toll road to mature and become taxable. Once taxable, the toll road will continue to pay tax to the end of its life.

About Transurban's structure

Transurban has operated as a stapled structure since listing on the ASX in March 1996. Transurban's investors hold stapled securities that comprise one share/unit in each of the following:

- Transurban Holdings Limited - an Australian resident company, is the parent company of the Transurban Group for financial reporting purposes.
- Transurban International Limited an Australian resident company, is the holding company for Transurban's US operations.
- Transurban Holding Trust—an Australian resident unit trust, operates as a flow-through trust for tax purposes that qualifies as a managed investment trust.

Our stapled structure enables us to pay distributions to our investors through the trust.

From an accounting perspective, the cost of construction is capitalised as an intangible asset. Although the toll road project may have accounting revenue and a net cash surplus during the early stages, expenses will generally include significant non-cash items such as the amortisation of the capitalised intangible asset. This generally results in accounting losses through the early life of the investment. Furthermore, due to the typical high level of gearing associated with large-scale infrastructure projects, and the accounting practice to carry the concession assets at their net historical cost, a negative Net Asset position exists for a large period of the toll road's life.

13 As at 31 December 2016

14 Division 43 of *Income Tax Assessment Act 1997* (ITAA97)

The absence of accounting profits and a negative Net Asset position means that section 254T of the *Corporations Act 2001* precludes the payment of a dividend by a company structure where as an alternative structure such as a stapled group can be used instead as it allows the trust to distribute returns to investors. In the context of a toll road project, the use of a company structure would mean that dividends would not be paid during a large proportion of the life of the toll road project.

Although a company can undertake other corporate actions such as a return of capital or share buy-backs in order to overcome section 254T limitations, this is practically not feasible as an ongoing strategy, especially in a publicly listed environment.[15]

Finite life of investments

A toll road project has a finite life and no compensation is paid to Transurban at the end of the concession period when the road reverts to the State. This means that investors' capital must be returned by the end of the concession period. A trust enables the capital contributed by its unitholders to be appropriately returned to its investors (this cannot be practically achieved through a company structure).

As there is no expectation of capital being returned to investors at the end of the project, investors require regular cash flow yields over the operating life of the toll road. From an investor's perspective, the regular cash-flow returns from the project consist of returns from its capital investment (i.e. taxable distributions) and the return of the actual capital invested (tax deferred distributions), prior to the project coming to an end.

The tax deferred component of any distribution from a stapled structure represents the repayment of the initial capital contributed by the equity investors which reduces the cost base of the investment in the stapled entity leading to a larger capital gain on disposal of the investment.

By contrast, under a listed company structure, all the returns from the company may be treated as taxable to the investor, either as a franked or unfranked dividend.[16] Returning the capital invested to investors as unfranked dividends means that investors would be subject to tax not only on the returns from the investment (profits distributed by way of dividends) but also on the capital invested (capital being returned by way of unfranked dividends). This, in effect 'taxes' invested capital rather than only returns on the invested capital.

Stable regulatory environment

Transurban has an open and ongoing dialogue with the ATO in relation to the structure of its projects.

Across the sector there have been numerous private rulings and class rulings by the ATO accepting the use of stapled structures. In addition, Treasury has considered two separate measures, including proposed amendments to the integrity provision within section 974-80[17] and the managed investment trust regime (MIT), which have accepted the use of a stapled structure.

Maintaining the policy-driven outcomes relating to stapled structures to support investment in infrastructure is essential and must not be compromised. Any misuse by 're-characterising active income into passive' to improperly access the stapled regime is not acceptable and—as with the contravention of any tax rules—should not be permitted. This, however, must not compromise the proper application of well-established tax rules by the infrastructure sector and established businesses such as Transurban. Any misuse can be dealt with using existing anti-avoidance provisions in the tax legislation.

Passive income

Transurban derives 97 per cent of its revenue from tolls, which are passive in nature. Toll road projects undertaken by Transurban are investments in land leased from the State for a finite period of time. As part of the project, the respective State provides a lease over a particular parcel of land on which the toll road is to be constructed. Transurban, in turn, provides motorists with a licence to use the land in return for a toll. In our view, the long-term nature of toll road assets and the inherently regulated nature of cash flows from toll road assets qualifies the investment in the projects for treatment similar to other activity considered to be primarily passive investment in land.

The Consultation Paper states that it is consistent with Australia's tax policy setting for real estate investment trusts (REITs) that derive most of their rental income from third party tenants to receive flow-through taxation treatment. The policy underpinning the current treatment of public trusts and real estate has been well established since the mid-1980's when measures were introduced to extend company tax arrangements to public unit trusts. These measures supported the policy intent that the measures applied to those businesses which operate a trade or business, as distinct to those "which are vehicles for investing in property, equity or securities".

The current policy framework and the definition of "eligible investment business" in Division 6C[18] does not account for the passive uses of land undertaken more broadly in the infrastructure sector. Eligible investment business encompasses "investing in land for the purpose of, or primarily the purpose of deriving rent". A strict interpretation of Division 6C would mean that it may not apply to certain investments in real estate that derive its profits via rent, whereas it would apply adversely to other investments in real estate that derive its profits through mechanisms akin to rent.

Transurban does not support a regime that would arbitrarily create distinctions between passive, albeit different uses of land merely due to the interpretation of the term "rent" in Division 6C.

15 These measures even if used intermittently are extremely costly and an inefficient application of resources which would require obtaining Class Rulings from the ATO each time.

16 Section 45B of *Income Tax Assessment Act 1936* (ITAA36) and other anti-avoidance mechanisms impose practical difficulty in undertaking on-going capital returns as a capital management strategy particularly in a listed environment.

17 Section 974-80 of ITAA97

18 Division 6C of ITAA36

Recommendation

Transurban strongly recommends that the arrangements relating to stapled structures remain unchanged for nationally significant infrastructure investments. Any concerns relating to the use of stapled structures in unconventional areas needs to be considered and managed through the appropriate administrative channels and dealt with using the existing anti-avoidance provisions in the tax legislation.

Transurban, as a member of the broader infrastructure community stresses the need for a critical and broadly considered approach to the introduction of any measures to avoid subsequent unintended consequences. Therefore, recognising the issues that Treasury seek to deal with, Transurban is unable to comment on the "alternative measures proposed" by Treasury. In our considered view, the measures proposed have potential to create uncertainty and lead to negative and unintended macroeconomic outcomes.

The period afforded for this consultation was inadequate to consider the complexities associated with this issue and the far-ranging implications. We are willing to work with Treasury to discuss further why we believe the alternatives proposed are not viable and, in our view, may not lead to increased tax being collected.

Transurban asserts that maintaining the policy-driven outcomes to support investment in infrastructure for public benefit must not be compromised. Any measures to deal with misuse of established structures by 're-characterising active income to passive' for private benefit must not taint the sector broadly.

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