

West Gate Tunnel dispute veers towards 'full-flung fight'



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Transurban's stoush with its West Gate Tunnel builders is headed for a Supreme Court fight at the end of July if the tollroad company cannot sort out who will pay for \$1 billion in cost blow-outs on the Melbourne tollroad project.

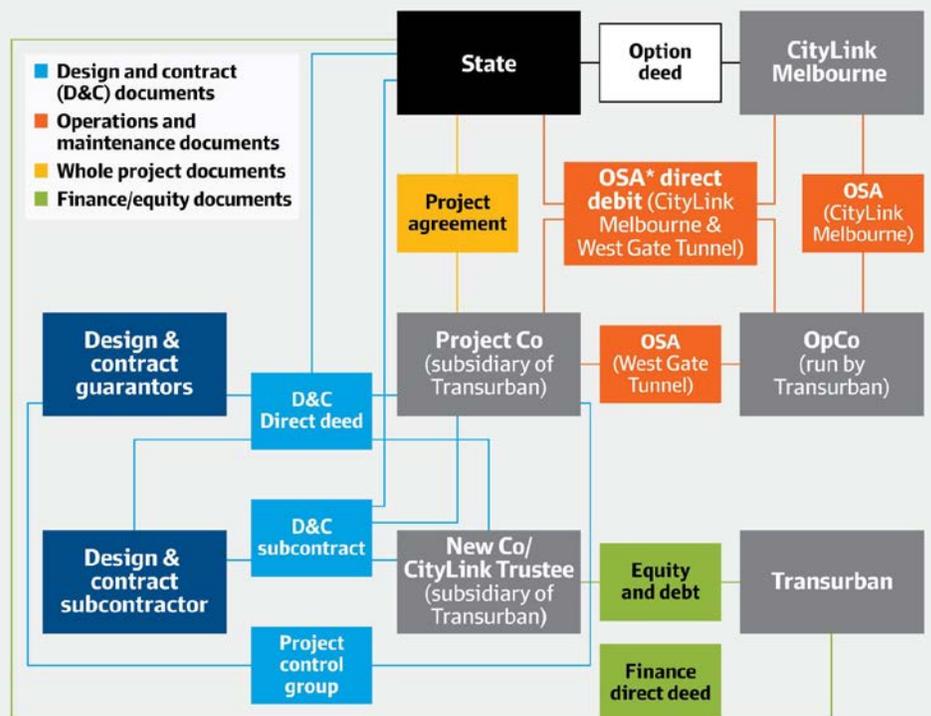
Justice Kevin Lyons on Friday ordered the companies into mediation on July 13 to try to resolve whether a dispute could be handled by arbitrators before proceeding with further court hearings. Preliminary arguments will start on July 27 if mediation fails.

A bitter and costly legal battle would be detrimental to all parties involved in the \$6.7 billion road project – and possibly Transurban shareholders – and could expose flaws in how risk was allocated in the project's complex structure.

Victoria's transport infrastructure minister, Jacinta Allan, said on Friday that the government would take part in the court proceedings after Justice Lyons called on the state to join.

Justice Lyons urged all parties to use mediation to resolve the issues over arcane contract clauses before it turned into "a full-flung fight".

West Gate Tunnel Project contract arrangements and relationships
Project Co is responsible for the management of the D&C subcontract awarded to CPB and John Holland. The State is a party to that contract for the limited purpose of making a contribution to the cost of the West Gate Tunnel.



*Operating services agreement

SOURCE: WEST GATE TUNNEL PROJECT SUMMARY

Ms Allan said Transurban and its builders, CIMIC's CPB Contractors (owned by Spain's Grupo ACS) and John Holland (owned by China Communications Construction Company), should "stop having these battles in courts, stop fighting with each other".

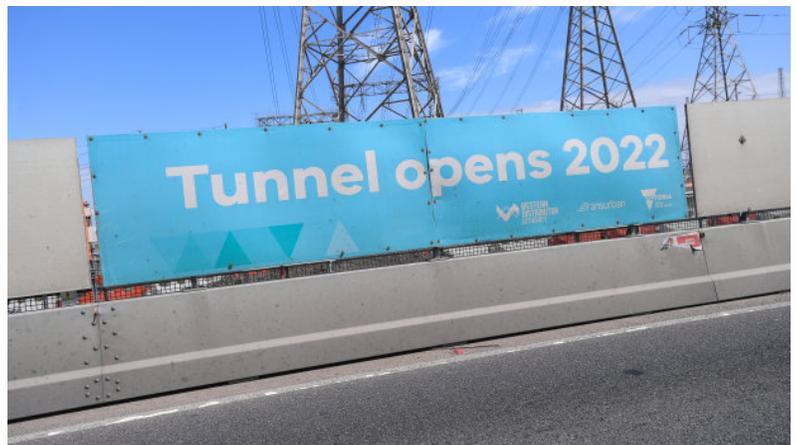
But Transurban has also recently filed legal proceedings against CIMIC and John Holland over a separate matter in Queensland, claiming defects in drainage infrastructure in Brisbane's Airport Link tunnel, which opened in mid-2012 and was built by Leighton Holdings (the entity now known as CIMIC that formerly owned John Holland.) The tunnel is now owned and operated by Transurban.

The 17-kilometre West Gate Tunnel project, which includes twin tunnels connecting the West Gate Freeway and the Port of Melbourne precinct, was pitched as an idea by Transurban to the Victorian government in March 2015 – just a few months after Daniel Andrews' Labor government was voted into office with an election pledge to scrap another road project, the East West Link.

By December 2015 the state government had entered exclusive negotiations with Transurban and two years later, the tollroad group signed a contract to design, build, finance and operate the West Gate Tunnel.

CPB and John Holland, which had been named as preferred bidders to build the road in April 2017, signed a separate design and construction sub-contract with Transurban around the same time in December 2017.

Competitors to Transurban say the tollroad group, which is contributing \$4 billion to the total cost of the new motorway in return for the rights to toll and operate it until 2045, got a good deal.



Because the West Gate Tunnel was Transurban's idea, rather than the government's, the project wasn't put out to a competitive tender. **Justin McManu**

To help pay for the West Gate Tunnel, the state government agreed to pump in \$2.65 billion and extend Transurban's existing concession on Melbourne's CityLink tollroad, which leads from the airport to the CBD, by 10 years to 2045, forcing motorists to keep paying tolls.

Because the West Gate Tunnel was Transurban's idea, rather than the government's, the project wasn't put out to a competitive tender like most other public-private partnerships.

Infrastructure developers are now raising questions over whether the Victorian government and Transurban paid enough attention to construction risks.

"You just wonder if everybody didn't take their eye off that ball because they were so focused on the value of the concession and the unsolicited proposal process," one infrastructure financier told *AFR Weekend*.

Division of risk

The [project summary](#) released by the state government outlines various risks. Transurban carries risks of complying with planning approvals, construction and design, and "a general change in law".

The government carries the risk of a "project specific change in law or change in policy" and both parties share the risk for costs relating to the management and removal of contamination on site and force majeure events.

But the risk division is evidently not clear enough to be settled easily after new policies were introduced after contracts were signed by the state's Environment Protection Authority on the handling of [per-and polyfluorinated alkyl substances \(PFAS\)](#) – chemicals used in firefighting foams – found on the construction site.

Removing and disposing of PFAS contamination is costly. Figuring out who is responsible for paying is complicated by the fact that the risk allocation in Transurban's contract with the builders may not mirror the risk allocation in Transurban's contract with the state government.

CPB and John Holland tried [to scrap their sub-contract](#) with Transurban earlier this year [by citing "force majeure"](#) and want the dispute over who pays settled as soon as possible by an independent arbitrator.

Because the builders' contract is with Transurban, any payments ordered by the arbitrator would have to be made by the tollroad company.

But Transurban (which asked the state government in March if it could also declare force majeure on its own contract but was told it couldn't terminate) says it is not responsible for the additional costs and doesn't want to go to arbitration.

So it is arguing that cost blow-outs should be settled within a "linked" claim process outlined in the sub-contract, which requires it to pass on builders' claims to the state government.

But the government does not want to pay, so it has rejected all the builders' claims. With all parties standing their ground, the scene looks set for a lengthy court battle.

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