

## DECISION

### Summary and outcome

- The complainant, Mr N, lived in Sydney. His initial complaint made in 2022 was about damage done to his car by virtue of a pothole on M5 East tollway on 19 April 2022. He then lodged the current complaint on 12 January 2023 following a period of contact between Mr N and Linkt in respect to the alleged damage to his car.

Mr N pointed out that the process with Linkt to sort out the matter prior to the TCO being involved took a significant amount of time and he felt he received a pro forma response from Linkt. In an earlier email on 24 November 2022, he states:

“I am very disappointing that it has taken 5 months to receive a form letter response. You are obviously very busy dodging many valid claims. The tyre damage is not alleged...you have the details on the damage.

You have video cameras on that piece of road. The road was clearly riddled with potholes at least 10 days before my tyre got slashed. Look at the video.

Please escalate this to your supervisor.

I pay way too much in to use the M5. The payment obliges you to provide a road that is fit for purpose. You have taken my money but failed to provide me a safe road in return.

I am not interested in your maintenance program...I am interest in a safe road any day you take my money top use it. Your road failed me on the day.

I will pursue this as far as it takes to get a satisfactory resolution”

- Presently, Mr N wants an amount of \$560 from Linkt for the damage done to his car which includes the cost of the tyre plus time spent pursuing the claim.
- Linkt’s position was that the damage done to Mr N’s car was not caused because of a pothole on M5 East tollway. Linkt’s position in short is that there is no evidence that supports Mr N’s claim. Linkt suggests that it has discharged all of its duties to road users in relation to the condition of and monitoring the toll road subject to Mr N’s claim.

## Background

- The complainant, Mr N, first made a complaint to the Tolling Customer Ombudsman (TCO) in January 2023 in respect to the damage to his vehicle.
- The view of Mr N is that categorically the damage to his car was done by a pothole on the M5 East tollway.

- In his application to the TCO Mr N stated that:

“My damage was due to the road being unfit for a purpose...a road which I pay a lot of money to use.

There were a patch pf 30+ potholes that could not be avoided at the location highlighted in my claim. It was like that for weeks. Finally a deep pothole slashed my tire.

Linkt knew it was unfit for purpose as this section of road was completely resurfaced about 2 weeks after my tyre was slashed.

They claim they have no historical footage of that patch of road. I find that hard to believe.

Linkt are in the wrong on this and they know it.”

- Linkt, on 8 May 2023, stated that:

“As per our previous correspondence to Mr N, the outcome of the investigation was that WestConnex does not accept liability for the alleged damage caused by a pothole. WestConnex conducted a review of the information available to us, including incident logs at the time Mr Noman claims damage was sustained to his vehicle whilst travelling on the M5E on 19 April 2022.

WestConnex has no records of this incident logged in our system or any CCTV footage as records are kept for a certain period of time, therefore we do not have any footage of this incident.

There is no evidence a pothole on our motorway caused the damage. As previously advised, WCX attends to potholes within an appropriate timeframe.

We acknowledge the frustration experienced by Mr N however, Mr N will need to approach his insurance company.”

- Linkt, in that email referred to an earlier email to Mr N on 24 November 2022, in that email it was stated that:

“WCX does not accept any liability for the alleged tyre damage caused by a pothole. We attend to all identified potholes in an appropriate time.

As part of the routine maintenance procedures for the motorway, the maintenance teams conduct regular inspections, repair potholes, seal any cracks, and patch pavement, with such activities being typical road management practices in the Australian industry. In addition, a continuous improvement program in place for the motorway, which includes:

- a rolling program of road surface improvements. These include pavement rehabilitation, pothole repairs, patching, correcting surface distortions, rectifying

defects and wear and tear on the road surface, removing moss from the shoulders, enhancing line markings and any repairs required to eliminate hazardous conditions.

- an ongoing program of re-sheeting various sections of the motorway. This includes removing and recycling existing asphalt and then applying a new asphalt layer to provide a like-for-like re-surfaced pavement.
- surface conditions are being continuously reviewed. Ventia and its subcontractors have recently changed the product used for crack sealing repairs to a product that has reduced reflective glare whilst remaining compliant with Transport for NSW standards. Additionally, we have refreshed the line marking in sections of the motorway to improve visibility of the lanes.

We reiterate that ensuring the safety of road users on the M5 East Motorway remains the highest priority.....”

- Mr N responded to that email on the same day, his response is set out in para 3 above.
- After prompting from the TCO for a response from Linkt in respect to the Linkt explaining their program for maintaining the quality of the road before the alleged incident, Linkt provided the following explanation on 8 August 2023:

“As mentioned in our correspondence to Mr N on 24 November 2022, as part of the routine maintenance procedures for the motorway, the maintenance teams conduct regular inspections, repair potholes, seal any cracks, and patch pavement, with such activities being typical road management practices in the Australian industry.

During the time period identified by Mr N, Sydney had unprecedented levels of rainfall which caused increased and exaggerated deterioration of asphalt road surfaces. This was the situation not only in Sydney but in most of NSW, as widely reported in the media. Resheeting was scheduled for that section of the M5 East for May 2022, however, WestConnex (**WCX**) was unable to begin works due to the heavy rains which would result in the asphalt not “sticking”.

WCX undertook the following precautions during this time:

- We expended approximately 320 bags of cold mix to maintain the M5 East in a safe manner. Unfortunately, the heavy and persistent rains degraded the cold mix at an increased rate, which was outside of our control.
- We continued using cold mix regularly to fill any emerging potholes.

When the heavy rain subsided, Traffic Management Centre approved our closure for the M5 East and we undertook resheeting works in the relevant section of the M5 East. This took several months to complete due to the continuing rains, approvals for road closures and availability of contractors.

WCX believes we have acted in accordance with our duty of care to road users and we maintain our position that we are not liable for the alleged tyre damage.”

- Mr N responded to the Linkt email:

“..... I am back to where I was 11 months ago .....

- Linkt keep calling my tyre “alleged”...I have provide photos and invoices for replacement
- I am aware it was raining during that period...a mine field of potholes was there for many weeks until one got me.
- “WCX has no records of this incident logged in our system or any CCTV footage as records are kept for a certain period of time, therefore we do not have any footage of this incident”. They say there is no record of an incident on the day but are unable to produce images of the condition of the road at the location of the incident. If they checked for an incident a view of the road would have been there.

The system really seems to be broken. \$25-\$30 a day in tolls and all I request is a fit for purpose road. Linkt would rather make up poor excuses than take responsibility.

The 2 parties are not going to agree....”

- Linkt replied on 22 August 2023:

“Linkt has further responded to your email dated 11 August as follows:

“Thank you for your email of 10 August 2023.

As previously advised in our email of 3 August 2023, WCX believes we have acted in accordance with our duty of care to road users and we maintain our position that we are not liable for the alleged tyre damage”.

- Mr N confirmed subsequently that he didn’t agree with Linkt and that the matter had been going on too long and that the lack of a Linkt response during the dispute process was a deliberate delaying tactic by Linkt.

## Current position of the parties

- Mr N stated that he wants Linkt to pay the outstanding amount of \$560 for the damage to the tyre and the 4 hours time he spent getting the tyre fixed.
- Linkt states, whilst it understands Mr N is frustrated that this matter has taken some time to resolve, it considers that it discharged appropriately its duty of care to Mr N as a road user and therefore does not owe Mr N anything else.
- Linkt considers that it has acted appropriately at all times in discharging their duty to Mr N and has kept the toll road in good repair and fit for use for toll road users.

## Discussion

- The issues in this complaint are (a) whether Linkt owed a duty of care to Mr N as the owner of a vehicle that used a road for which CityLink was responsible; (b) whether Linkt breached that duty of care in respect of Mr N; and (c) whether Linkt is liable for the damage done to Mr N’s vehicle.

- When making a decision, I am required to examine all the available information and to reach an outcome which is fair to both parties and is based on the “balance of probabilities”. This means that where the parties do not agree on an issue, I need to decide whether it is more likely than not that a particular event did, or did not, happen.
- From examining all the information and based on a review of what is fair in the circumstances, I am satisfied that the following is what most likely occurred.
- As a general observation, the matters relating to this decision were complicated by the fact that during the time of the incident Sydney had very inclement weather and unprecedented levels of rainfall which caused unusual deterioration of asphalt roads throughout NSW and in particular in Sydney. It would seem that Resheeting of the road was scheduled for that section of the M5 East for May 2022. However, Westconnex was unable to begin these works due to the amount of heavy rains during the period which I understand may result in the asphalt not sticking. Despite this, Westconnex undertook the following precautions during this time:
  - expended approximately 320 bags of cold mix to maintain the M5 East in a safe manner. Unfortunately, the heavy and persistent rains degraded the cold mix at an increased rate, which was outside of our control.
  - continued using cold mix regularly to fill any emerging potholes.

After the heavy rain subsided, Traffic Management Centre approved our closure for the M5 East and Westconnex undertook resheeting works in the relevant section of the M5 East. This took several months to complete due to the continuing rains, approvals for road closures and availability of contractors.

- In my view, the crucial evidence in this case is that Mr N has not established that Linkt has breached its duty of care to Mr N in my objective view, Mr N has not adduced any evidence that shows that Linkt has breached that duty of care.

## Determination

- I am satisfied that, in the circumstances, Mr N has not established grounds for his complaint against Linkt in respect to this matter.
- Linkt is required to have in place a management plan that will reduce the likelihood of such damage happening. Such a plan should ensure that a road authority has taken such care in all the circumstances that could be reasonably required to ensure that the relevant part of the public road was not dangerous for traffic. Linkt have demonstrated that there is such a plan, and it has acted in accordance with that plan.
- State Governments have entered into contracts with companies to construct and be responsible for the management of public roads under tolling arrangements as opposed to borrowing funds and using taxpayers’ money to repay the loans. Such arrangements are not deemed under the law to impose greater liability upon them than other road authorities. Accordingly, Linkt’s

obligation to the users of its road is no greater than those of other responsible road authorities.

- Linkt cannot, like any road authority, be strictly liable for all damage done to vehicles travelling on its roads at any time. This would mean that it would virtually be required to guarantee that all vehicles that travel on its roads would not or could not suffer damage. This would be an impossible risk management situation and not one that could be reasonably expected of Linkt or any responsible road authority.
- Linkt has an obligation to develop and maintain a road management plan and processes that met reasonable requirements to ensure that the relevant part of the toll road of Linkt was not dangerous to traffic. It has done this in accordance with its duty of care.
- Having said all that Linkt did take a considerable amount of time to resolve the issue. This is particularly the case prior to the TCO being involved in the matter. As discussed with Linkt previously, it remains of fundamental importance to consumers that their matters are dealt with in a timely and efficient manner. Accordingly, on the basis of the above, I recommend that Linkt make a goodwill offer of \$300 to Mr N given the delays in resolving the dispute. There are some reasons why this matter has taken some while to resolve but the onus is on Linkt to ensure effective turnaround times for these disputes.
- I remind the parties that under the TCO process, my decision is not binding on Mr N and that he can seek relief in any other forum.
- When responding to consumers, complaints management staff have a responsibility to properly investigate the matters being raised and provide clear responses, supported by relevant evidence. In my view, the Linkt resolution team has reasonably discharged this responsibility in the present circumstances.
- I note that Mr N has acted in good faith in relation to this matter and acknowledge that he had an honest belief that his car was damaged by a pothole on the toll road the subject of the determination. He has been clear, thorough and constant in his communications with the TCO and Linkt during this process.

**Phillip Davies**  
**Tolling Customer Ombudsman**

**Dated: 11 April 2024**