



BEYOND THE IMPASSE

OUTA's Submission to the Gauteng Advisory Panel on Socio-economic Impact of e-tolls

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Table of Contents

1.	INTRODUCTION & SETTING THE SCENE	Page 2
2.	HISTORICAL OVERVIEW	Page 4
3.	DEFINITIONS & CLARIFICATIONS	Page 10
	• The South African Roads Agency	
	• The User Pays principle and I.T.S.	
4.	GAUTENG's E-TOLL CHALLENGES	Page 12
	• Grounds for opposition to e-tolling of GFIP	Page 14
5.	THE SUCCESS FACTORS OF USER PAYS I.T.S.	Page 20
6.	INTERNATIONAL I.T.S. EXAMPLES & CASE STUDIES	Page 24
7.	THREE BURNING ISSUES	Page 27
	• Informations Ethics	Page 27
	• Odious Taxation	Page 28
	• Crisis of Legitimacy	Page 29
8.	THE WAY FORWARD	Page 31
	• OUTA's Proposed Solutions	Page 32
9.	CONCLUSION	Page 34
10.	BIBLIOGRAPHY	Page 36

ANNEXURES:

1.	FUEL LEVIES	Page 37
2.	E-TAG RESEARCH & COUNTS	Page 38
3a.	Letter to Sanral Board : GFIP Construction Cost Collusion.	Page 39
3b.	Response from Sanral – via Werksmans (Attorney)	Page 41
4a.	TABLE OF COMPLAINTS – Summary Breakdown.	Page 43
4b.	Examples of complaints	Page 44
5.	Table of E-Toll Costs and Income (Sanral)	Page 48
6.	Escalating Costs of GFIP	Page 49

1. INTRODUCTION & SETTING THE SCENE

We have titled this submission “Beyond the Impasse” to express a genuine desire to work with stakeholders to achieve an accommodation with Sanral and the Transport authorities that has unfortunately eluded us since the Opposition to Urban Tolling Alliance (OUTA), came into existence in February 2012.

At the outset we wish to state that South Africa needs Sanral. Outa has no desire to see the considerable institutional memory and competence that Sanral has accumulated over the past 16 years lost. We do not see Sanral as our enemy. In the same way that the Mayor of Bogata said he wanted his citizens to love the city of Bogata for what it could be, rather than hated for what it had become, we have the same attitude to Sanral. We want Sanral to become an inclusive, transparent roads agency that serves the nation, facilitates economic development and promotes social justice and equity, exactly as the Preamble to the Constitution expresses it.

This document is a new updated and revised edition of OUTA’s “E-tolls at an Impasse” position paper which we published at the end of February 2014. In the positive climate of engagement that Premier Makhura has initiated, we trust OUTA’s input will shed light on the many issues which have culminated in the current problems surrounding the e-toll scheme. We note that whilst our confrontation with Sanral and the State has been adversarial in nature, we trust that this is noted in the context of trying to be more ‘developmental’ rather than ‘judgemental’.

Our intent has always been to highlight the gap between that which Sanral positively espouses and our reading of its actual performance. Additionally, we have consulted and researched far and wide to test our assumptions. We have also sought to engage with the Parliamentary Portfolio Committee on Transport to signal our willingness to participate in collaborative measures and deal constructively with the consequences. Insofar as we perceived evidence of maladministration, dishonesty and governance failure, knowing that such allegations could only be addressed through a legal adversarial process overseen by of an impartial authority, these were reported to the Office of the Public Protector. She has been very busy with other matters and our expectation is that her good office may at some stage enable a direct engagement with Sanral to discuss the issues and concerns we have raised for some time now.

This panel is not a court of law, and we have no expectation of the panel to play any role in that matter. We are simply here to contribute our assesement of the socio-economic consequences of e-tolling. We are here to talk economics rather than law and politics.

To date, our research, observations and learning about the decisions and mechanics surrounding the Gauteng e-toll scheme, has led us to a heightened resolve that whatever the legal and political dimensions about the issues, it is fundamentally an economic issue, and must be dealt with as such.

A SOLUTION IN SEARCH OF A PROBLEM?

This report argues that the decision to embark on the Gauteng Open Road Tolling (GORT) system to finance the Gauteng Freeway Improvement Project (GFIP) was a 'solution in search of a problem'. It was a funding mechanism that was not researched thoroughly enough, nor tailored to the social environment, political climate and economic context that it depended upon for its viability.

That there was a need for a bold initiative to address the traffic congestion problems of Gauteng, after years growth and a lack of pace in addressing public transport infrastructure needs, there can be no doubt. That bold decisions were taken to leverage whatever modern communications technology could offer is deserving of applause. However to introduce an ITS at the scale intended and with the considerable complexity that the GORT scheme embodied, required something beyond intelligence. It required *wisdom* borne out of prudent research, the careful testing of assumptions and above all an open, transparent engagement and accountability to all stakeholders, most especially the users who would be expected to pay for it.

In outline, our assessment is that:

- Of **eight critical success factors** (see section 5 of this paper for explanation of these) which appear relevant to virtually all Intelligent Transport Systems (ITS) innovations globally, the GORT is in trouble on virtually all counts.
- That the situation has become a serious problem requiring urgent resolution, which also requires understanding and addressing the issues that caused the problem in the first place.
- That neglect to do so will bring further unintended consequences that will more than likely be unpleasant, the most serious being the further erosion of the legitimacy of the State and the problems that poses for peace, social stability and economic prosperity in the future.

The empirical data that has spawned the information to give shape to our knowledge base comes from complaints queries and comments from members of the public¹; comments posted on online media reports; discussion with a cross section of members of the public; papers written by academics; interaction with journalists; observations and research conducted by OUTA members; and from the vast reservoir of attitude and opinion expressed in the social media cauldrons. OUTA has a Face Book page that has over 31,000 'friends', who broadcast and share views, opinions and messages with both OUTA and their respective networks.

Our interpretation and assessment of the situation has been greatly assisted by reading academic research, notably the work done by Ms Erin Hommes and Dr Marlene Holmner, to glean critical success factors from international experiences in the implementation of Intelligent Transport Systems. To distil some wisdom from the vast body of knowledge we have been further inspired by the insights and conceptual thinking of leading Systems-Thinkers including Peter Senge, Russell Ackoff and Stafford Beer.

¹ At the time of writing these numbered over 11,000 individual complaints which OUTA has received or were channelled through OUTA's complaint portal to SANRAL. See Table and examples in Annexure 4a&b

2. HISTORICAL OVERVIEW

To understand how we can get out of the impasse, we need to understand how we got into it. What follows is OUTA's understanding of the relevant history.

Following years of positive economic growth and migration from other parts of the country and Africa, the Gauteng freeway network required upgrading and expansion to address the growing problem of congestion. In 2004², SANRAL, even though it was primarily responsible for the national roads network that links all the major urban centres, claimed/obtained a jurisdictional mandate from the Gauteng Provincial and Metropolitan authorities to address the need for Gauteng's freeway upgrade, referred to as the "Gauteng Freeway Improvement Plan" (GFIP).

GFIP went through initial stages of planning and the Cabinet gave the go ahead in 2008 for an upgrade of 187 km's of public freeways that linked Johannesburg, Pretoria and Ekurhuleni. The initial ambition was to complete the work in time for the 2010 FIFA World Cup, but this proved impossible, given the demand on the construction industry to construct soccer stadia and open the first line for the high speed *Gautrain* between Sandton and OR Tambo International Airport. Nevertheless by dividing the overall work plan into sections, tenders were awarded to different contractors and consortia and a start was made in the latter half of 2008. Construction progressed through to 2011, with a three-month break taken in mid-2010 because of the demands of the FIFA World Cup.

GFIP & Construction Cost Collusion³

The initial capital cost in 2006 was estimated to be R6,4 billion, but over the five year life of the project, increased almost three fold to around R18bn for the road upgrade itself, excluding an additional R2bn or so for the e-tolling infrastructure and other incidentals. In February 2013, the Competition Commission exposed the collusive practices of the construction cartel which impacted negatively on the price the state (and therefore the public) have paid for the GFIP construction costs. The Competition Tribunal confirmed on 22 and 23 July 2013 of various consent orders relating to tender collusion cartels in the construction industry, enabling SANRAL to pursue possible claims against the persons or organisations involved in such cartels and who had admitted to tender collusion for work commissioned by SANRAL

To date, a year after receiving confirmation and approval to proceed with action against the collusive construction practices, society awaits the detailed news of SANRAL'S compelling and stringent plan of action to retrieve the GFIP construction overcharges – estimated to be several billions of Rands. In this regard, OUTA has also written to the Chairperson of the Sanral Board (Ms Tembakazi Mnyaka at the time) to seek feedback as to what the progress (if any) of this expected action (see Annexure 3a), dated 11 June 2014, to which we received a reply from Mr David Hertz of Werksmans (Sanral's Attorney), which offered little explanation to our question (see Annexure 3b). We certainly expected a transparent approach from Sanral, and that society should be provided with regular updates as to their progress on this public matter.

² Sanral Declaration of Intent 2005-2008 Pg. 27 (<http://www.nra.co.za/content/Declaration.pdf>)

³ See Annexure 6: table & graph of rising costs of GFIP since 2006

In the interest of public accountability to taxpayers and users of the roads, OUTA believes that SANRAL is too close to the problem and that an independent enquiry is needed to investigate the extent of the over-charging, with a view to set in motion a process to recover the monies. It is also important to note here that had the GFIP construction costs been contained to a substantially lower sum, perhaps the decision to implement a complex, expensive and onerous ITS based collection system may never have been approved by the Executive authorities.

From the outset, mitigating against the success of e-tolling in Gauteng was the practical reality that the public transport simply did not exist as a viable alternative. The congestion problem was untypical of situations where it has worked in other cities, in that Gauteng's e-toll plan was never intended to solve an inner city congestion problem and it did nothing to reduce the sovereignty of the four-seater motor car. It in fact further elevated it by providing wider roads and (supposedly) faster intersections, and further enriched the already prosperous road construction industry and making it more attractive to entice more vehicles onto the widened freeways, thereby inducing freeway congestion to similar levels within a few years.

Changing and talking on the run.

Sanral's initial launch date of Gauteng's e-toll system was April 2011, which was postponed following a public outcry at the concept and tariffs proposed. The SA Vehicle Renting and Leasing Association (SAVRALA) had engaged with SANRAL from late 2010 and most of 2011, to seek answers and a solution to the pressing challenges and concerns which the car rental industry foresaw with the e-toll scheme. The GFIP Steering Committee⁴ was set up in April 2011 to engage with various stakeholders and assess the objections. Following a rushed (some labelled it farcical) after-the-fact engagement process, the GFIP Steering Committee reported back in June 2011 by announcing that e-tolling would continue, however they would reduce the tariff from 50c/km to 40c/km for light passenger vehicles. Minibus Taxis were set at 11c / km. In their view, this tariff reduction should have placated the public anger and sentiment.

A further two launch dates during 2011 were postponed and in February 2012, Treasury announced that e-Tolling would continue and an allocation of R5,8bn made toward the GFIP project, to reduce the (light vehicle) tariff to 30c / km and that Public Transport, along with privately owned Minibus Taxis would also receive 100% exemption. Some maintain the move by SANRAL to exempt the Minibus Taxis was to avert a clear confrontation by this largely unregulated industry, who had expressed their dissatisfaction toward the authorities on other matters by conducting drive-slows and disruptions to freeway traffic.

Despite the announcement that taxis have free passage, in February 2014, Sanral's ability to provide the Taxi's with full exemption has come under pressure and the National Taxi Alliance has denounced the e-toll plan as a result of its maladministration⁵. Sanral also announced in March 2014, that 46,000 taxis in Gauteng had been registered and issued with their 100% exemption e-tags. This equates to approximately 42% of the estimated 110,000 taxi's in Gauteng. We believe that virtually none of these tags can be found on the taxis. Short of having to conduct another manual count of taxis with tags, the real question is why this information not available to society?

⁴ GFIP Steering Committee Report – 30 June 2011

⁵ <http://www.timeslive.co.za/thetimes/2014/01/31/taxi-drivers-to-strike-in-protest-against-e-tolling>

In February 2012, Sanral announced the launch date, 30 April 2012, against stiff and militant opposition from Cosatu who saw no benefit to their members and cash poor families. In parallel with the political mobilization by Cosatu, an alliance of business associations formed the Opposition to Urban Tolling Alliance – OUTA⁶ to mount a legal challenge to seek a judicial review of the lawfulness of e-tolling. While court proceedings to obtain an interdict to suspend the commencement of e-tolling were underway, Cosatu and the ANC (represented by Minister of Transport Mr Sibusiso Ndebele) agreed to suspend the launch by two months.

Court Challenge⁷ and another failed talk shop.

OUTA's legal challenge was to initially seek a temporary interdict on the launch of e-tolling, which it did on 29 April 2012, followed by a judicial review of the decision to implement the system on the basis that far too many transgressions of citizens' rights and seemingly inappropriate decisions had occurred. In short, OUTA's members believed the system being introduced was not being conducted in the best interests of society. With E-tolling on hold, behind the scenes moves were afoot to broker an out of court discussion and possible agreement between Minister Ndebele and OUTA chair Wayne Duvenage, in the hope that sufficient common ground might be found to cancel the court battle and go back to the drawing board. A week after the court granted OUTA the interdict to halt the launch of e-tolls, on the 8th May 2012 Sanral CEO Mr Nazir Alli tendered his resignation, setting stage set for a negotiated solution. However this was abruptly terminated when a few weeks later, the Executive declined to accept Mr Alli's resignation and shortly thereafter, President Zuma redeployed Minister Ndebele and Deputy Minister Cronin out of the Transport Ministry in mid-term. Mr Ben Martins was appointed in his stead and a year later, Minister Dipuo Peters took over.

An Inter-ministerial committee (IMC) was formed under Deputy President Kgalema Motlanthe in May 2012 to conduct another retrospective consultation process with civil society organizations, to try and placate criticism.

Urgent recourse was also taken to obtain a Constitutional Court ruling to overturn the interdict. The Deputy Chief Justice handed down a unanimous judgement finding that the North Gauteng High Court had trespassed on the domain of a legitimate exercise of Executive powers, and rescinded the interdict (but did not interfere in the judicial review process). Sanral argued in August 2012 at the Con Court, that it was ready to start e-tolling within two weeks and it urgently needed to do so. Yet they failed to launch for another 15 months, despite being given the right to do so.

OUTA had no quarrel with the principle that the Court wished to underscore, being the necessary separation of powers between the Executive, Judicial and Legislative arms of government. Even though OUTA disagreed with the Executive decision to introduce e-tolling in the first place, they never questioned the prerogatives and powers of the Executive to execute. Now, nearly two years later, it has become clear that the pre-conditions for a successful introduction of e-tolling the GFIP were not present, and that it would have been prudent for the Executive to have exercised its powers to instead follow a less risk-prone alternative.

⁶ See www.oua.co.za

⁷ A summary of the merits and course of OUTA's legal challenge is provided in Part C of submission document.

Sanral however succeeded in November 2012 to also persuade the High Court to find against OUTA's review application, despite OUTA's assertion that Sanral had "deliberately deceived" the public when the Minister proclaimed the relevant roads as toll roads. Sanral's Counsel hit back calling for a crippling costs order to punish OUTA for alleged "vexatious motives" in making such an allegation. The High Court obliged and awarded a punitive costs order against OUTA.

A year later the Supreme Court of Appeal heard OUTA's appeal. The punitive costs order was overturned, but the Court ruled that it could not, in law, condone the late application and therefore was not authorized to rule on arguments of alleged unlawfulness. Having already once had the expense of funding a round in the Constitutional court, OUTA could not afford to match Sanral's litigation by attrition strategy and opted not to seek further recourse to the Constitutional Court.

Instead, OUTA's management committee decided it would better serve the public interest as a watch-dog monitoring role. This would ensure that OUTA challenges Sanral's claims, propaganda and fabrications, as well as empowering citizens to assert their constitutional rights to freedom of expression, access to information, privacy and other rights entrenched in the Constitution. This approach would in turn have the impact of providing society with information to inform their consciences before deciding whether or not to buy e-tags, in a spirit of civil courage. By reminding citizens that human rights do not belong to government, but instead to the people, OUTA sought to promote a human-rights culture of civil courage on the e-toll matter.

E-Tolls are launched - The proof is in the eating.

The e-toll system eventually started on 3 December 2013, following fifteen months filled with regulatory changes and preparations as a result of Sanral's failure to initially conduct a proper Regulatory Impact Assessment (RIA). How Sanral could have claimed readiness for a 30 April 2012 launch, let alone April 2011 (their first planned launch), is now patently nonsensical. In hindsight, OUTA's legal challenges and delays to the e-toll launch had done Sanral a favour, for had they launched in April 2012, the mess we are experiencing today would have been far worse then.

Enforcement – AARTO or Criminal Procedures Act?

Another major complexity Sanral faces concern the confusion over the regulatory framework for dealing with people who don't pay. The system was initially designed on the assumption that defaulters would be sanctioned under the Administrative Adjudication of Road Traffic Offences Act (AARTO), but when it became clear that this regulatory framework had not been adopted by all three municipal jurisdictions affected (Johannesburg, Tshwane and Ekurhuleni) and left problems of inconsistency, the only valid legislation that has uniform application is the Criminal Procedure Act (CPA). This meant that non-payment of e-tolls was implicitly regarded as criminal rather than civil matter. This heralded similar complications that Prohibition faced in the United States of America in the 1920's: criminalising behaviour that cannot be sanctioned by due legal process, is to invite greater problems. Legislation was passed to make the criminalisation the non-payment of e-tolls not only implicit but explicit.

Believing that since the Legislature had passed a law, Sanral asserted that since the prerogatives of Executive Power had also been affirmed by the Constitutional Court, any further challenge to its determination to proceed would amount to disrespect for the rule of law. However, OUTA continued to assert that since its main legal argument (that the original tolling decision was declared unlawfully) has not been ruled upon - having

gathered significant evidence thereof throughout the earlier legal case - it would prepare for that argument to be brought as a defence when the first user of the e-tolled pays was criminally prosecuted for refusing to pay e-tolls⁸. The fact that SANRAL have mentioned legal summonses were being filed, planned or discussed (in June 2014), means that litigation - and a further escalation of legal bills - is far from over. Fortunately the authorities have intervened and the Minister of Transport recently announced that Sanral may not proceed with e-toll prosecutions (for now). In the absence of summonses and litigation by Sanral against non-payment, the system is doomed and will further lose many of the 39% odd members of the public who are paying their e-toll bills, as many of these e-tagged road users have become compliant under duress and fear of prosecution.

Many of the problems were predicted.

Believing that all necessary and sufficient conditions for the system to succeed were in any event not present, OUTA cautiously monitored the launch and commencement of the e-tolling process to see if its predictions of the unworkability of the system would prove valid. It is important to note here that during SAVRALA's (South African Vehicle Renting and Leasing Association), engagements with Sanral over numerous months during 2010 and 2011, the myriad of expected administration challenges that society and Sanral and law enforcement agencies would encounter, are pointed out on Page 13 in this document. At the time, Sanral denounced SAVRALA's concerns, implying that these matters would all be in hand by the time e-tolling got underway. Needless to say, we were not surprised when Sanral listed some of these exact issues as being problematic for the system in February 2014. In addition, false & cloned license plates were becoming a bigger problem for the metro police & safety authorities, as announced by Johannesburg Metro Police spokesperson, Wayne Minaar within a few months of e-tolls.⁹ To excuse these issues as "teething problems" was disingenuous of Sanral.

Minister Dipuo Peters has since the launch, added her stern voice to also scold Sanral for the billing problems during a special sitting of the Parliamentary Portfolio Committee on Transport in the first quarter of 2014. Sanral CEO Nazir Alli admits to problems and thereby contradicts his assertions made during the 2012 court process at which he repeatedly assured the public that Sanral was ready to efficiently commence e-tolling, barring a few "teething problems". This is a further indication of serious maladministration by SANRAL executives and a matter for the Sanral Board and higher level Transport Authorities to urgently address, because it signifies how little research was done to assess the impact of (the well-known inaccuracies of) the e-Natis system on the e-tolling process. OUTA raises concerns that Sanral executives merely blame their problems on e-Natis inaccuracies, when they were warned of this problem. As a State Owned Enterprise, we believe their 'owner' should now hold Sanral accountable, especially since they had over 30 additional months since their initial launch date of April 2011, to and assess the implications thereof and iron out problems.

Furthermore, the seriousness of this lack of data integrity, together with threatening

⁸ While news of Sanral's plans to begin with prosecutions surfaced during June and July of 2014, the Minister of Transport instructed Sanral to halt these planned actions in July 2014, as a result of the ongoing billing problems and new offers for relaxed conditions of payment.

⁹ See this excerpt and YouTube clip with the spokesperson of the Johannesburg Metro Police (Mr Wayne Minaar): E-tolls exacerbates problems of false / cloned vehicle license plates: <https://www.facebook.com/SABCNewsOnline/posts/10152155602946543>

messages and wasteful billing has affected tens of thousands of people from all over the country. During February 2014, large logistic companies and other businesses started to add their voices by condemning the fiasco and complaining of the additional administrative burden related to e-tolls. This has necessitated redirecting vital resources toward pricing challenges and more complex fleet management. These issues were also been pointed out to Sanral by SAVRALA in 2011.

Civil Society defies the ‘unjust’ law.

Since the launch of e-tolling on 3 December 2013 in Gauteng, a significant volume of freeway users have refrained from registering with the system or fitting e-tags to qualify for the discounts. OUTA’s estimates of 39% compliance after eight months after operation, extrapolates that over 1,5 million of the 2,5 million freeway users were not fitted with e-tags (i.e. over 60%), signalling that the rejection of the system by the public was holding strong.

Sanral’s multi million rand advertising campaign throughout 2013 and 2014, coupled with an offensive SMS, postal and PR messages to intimidate non-tagged users with threats of criminal records and roadblocks, appeared not have had the desired effect of driving compliance to the volumes required by Sanral. It is OUTA’s opinion that SANRAL’s arrogant and offensive strategy also served to widen the divide between the people and the state over the issue whilst massive errors, inconsistencies, hacked databases and faults in the billing system since its launch left users astonished, angry and bemused. Sanral in turn were left with mounting outstanding bills and a credibility problem. In February 2014, President Zuma scolded Sanral for the errors and told them to sort them out fast.

OUTA and the media¹⁰ had also previously exposed Sanral’s deliberate deception and misinformation over e-tag penetration made by their spokesman, Vusi Mona in July 2011¹¹. Again, later in the same month, Mr Mona made grossly misleading public statements about how many kilometers or gantries one would need to traverse, in order to achieve the maximum cap of R450.00¹². Misleading statements and claims of this nature does serious damage to the credibility of the state and its institutions.

In OUTA’s opinion, as of Mid-2014, around 60% of the Gauteng Freeway users had evidently exercised their right to freedom of choice to be regarded as ‘alternate users’, and to risk whatever consequences followed. OUTA furthermore projects that the e-tag penetration rate for Gauteng has stabilised at around the 39 to 40% mark, and even if the process of attempting to criminalise the public through court action for non-payment, we believe such intimidation will not drive the number much above 55 to 60%. These levels are a far cry from the yields they need to achieve (closer to 90%), in order for the system to become viable.

It is this outline assessment that has prompted OUTA to the conclusion that an

¹⁰ http://www.itweb.co.za/index.php?option=com_content&view=article&id=65332

¹¹ Mona claimed a 60% growth in e-tag sales as a result of their marketing campaign. OUTA pointed out that their figures were incorrect, but Sanral remained silent on their disputed claims.

¹² Mona claims “If you are one of those paying the maximum amount [R450 cap], you will have traveled through 301 gantries and done an average of 2 760 km during the month on the e-tolled roads”. When OUTA checked on the Sanral e-toll system, using three different routes, we calculated approximately 1598 km, through almost half the number of gantries (average of 163) reached the R450 cap (R443). <http://www.oua.co.za/site/sanral-continues-to-mislead-public-on-etolls/>

emergency intervention is required by the Transport authorities to arrest what has become an embarrassing fiasco for the country. Nevertheless, we support encouragement rather than condemnation and are reminded that Gauteng did not become the largest urban economy in Africa without extraordinary resourcefulness and innovation. OUTA believes we can still tap into that latent creative synergic potential to escape the e-tolling impasse.

3. DEFINITIONS AND CLARIFICATIONS

THE SOUTH AFRICAN NATIONAL ROADS AGENCY LIMITED (SANRAL),

Sanral is a State Owned Entity (SOE) established in 1998 as a corporatized company accountable to a Board of Directors appointed by the Minister of Transport, as well as to the Companies Act which defines the fiduciary responsibility of board members.

Sanral's mandate is to ensure the National Road infrastructure is developed and maintained. It receives revenue from two sources, the National Treasury and from tolling, the latter being to implement the user pay principle. Sanral operates a number of long distance tolled roads itself by subcontracting the operation and management to service providers on a tender basis. Where traffic volumes and social economic circumstances justify it, tolling concessions may be awarded to commercial private sector consortia in Public Private Partnerships in *Build Operate and Transfer* (BOT) agreements to develop new road construction initiatives and to upgrade and maintain existing roads.

OUTA does not question the important role that Sanral's must play to harness the efficiencies of the private sector to serve the State in its obligation to provide and maintain a good national road network. Much of OUTA's critique of the e-tolling system has been centred on its high costs, inefficiency and leadership issues of transparency and accountability to the people of South Africa.

THE USER PAY PRINCIPLE AND INTELLIGENT TRANSPORT SYSTEMS (ITS).

We do not have any fundamental problem with the rationale for the "User Pays" Principle. The question is a matter of which of the available user-pay options are in the best interest of society. Neither do we oppose the logic of an ITS that uses available electronic tolling technology to more decisively implement the principle so long as it does indeed ease major urban congestion, address environmental and socio-economic challenges, and promote the integration of urban transport systems and a more productive urban economy overall. Advocates of ITS innovations espouse such goals as the normative intent¹³.

Ordinarily, the application of a user-pay system is a generally acceptable means to pay for infrastructure usage (electricity, water etc.). We understand the efficiency

¹³ We use the term normative in the sense of what is intended, the ideal, based on a common value consensus, such as the is stated in the first clause of the Constitution.

benefits that modern electronic information technology can yield. It makes theoretical sense. Combining radio communication technology to identify a vehicle fitted with a RFID e-tag and Automatic Number Plate Recognition (APNR) technology offers efficient automation possibilities. The speed and efficiency makes for a compelling argument to justify the investment in the costly technology. But the vendors of the technology have to guarantee - rather than just promise - an efficient operation which is able to ensure that all users pay, and that those who don't, are efficiently sanctioned.

High Compliance Required From Outset

International experience with e-toll based revenue collection innovations suggest that if more than 15% of users default in payment and are not justly sanctioned, the system is heading for trouble. This factor is indicated by experience in the Portugal SCUT e-tolled roads system which was problematic at 19% non-compliance¹⁴. It must be noted that this article on the failing e-toll system in Portugal, was highlighted to SANRAL and the Transport authorities by OUTA through South African media in June 2013, some six months prior to Gauteng's e-tolling system being turned on. One would imagine that lessons from this fresh example of what might and could have transpired in South Africa, would have elicited prompt action by SANRAL to send a team of experts to Portugal, to learn about the issues and problems within the Portugal system, prior to switching the system on in Gauteng. To date, there is no evidence that SANRAL undertook such action.

At this juncture, it appears that Sanral have realised their initial compliance level target of over 93% (as indicated during the responding affidavits by Sanral during the OUTA court challenge) have now been abandoned and they have revised their target to achieve an e-tag take-up threshold at a much lower rate, and thereby assume that sufficient numbers of the 'alternate' users will make up the revenue shortfall through payment at the higher punitive tariffs. This approach, OUTA maintains, is an extremely worrying situation as it assumes that; (a) Sanral will achieve the revised % e-tag compliance (unknown to the public as Sanral will not divulge this information); and (b) sufficient numbers of the balance of non-tagged users will pay, to make up the shortfall of funds required. We hope the next Auditor General's audit report of Sanral will provide information that shows that Sanral's actual and projected GORT revenues have been closely analysed and examined in terms of the factual compliance rates.

Furthermore, in their advertising in April 2014, Sanral thanked over 1,2 million South Africans for buying e-tags, which implied that (a) they had sold 1,2 million tags to users of the freeways and (b) an impression that road users were largely accepting of the scheme. A complaint was laid by OUTA to the Advertising Standards Authority (ASA)¹⁵, because we believed this figure was false and misleading and at variance with OUTA's research findings of the number of unique vehicles in use on the freeway network with e-tags. We found that the percentage of the traffic on the freeways which were tagged, was at the time only between 35 to 39%¹⁶. We extrapolated the percentage (39%) to the average number of freeway users per month at 2,5million motorists (figures supplied by Sanral), and obtained a figure of approximately 975,000 vehicles with tags

¹⁴ See article and quotes from Estradas de Portugal (EP) roads chief António Ramalho reflected in The PortugalNews.com <http://www.theportugalnews.com/news/dead-loss/28626>

¹⁵ See this story in Eye Witness News: <http://ewn.co.za/2014/06/02/Sanral-ads-pulled-due-to-lack-of-evidence>

¹⁶ Results of OUTA's tagged vehicle counts research is attached as Annexure 2.

on the freeways in Gauteng. This was a far cry from Sanral's claims of 1,2 million tags.

Furthermore, OUTA's count of e-tags was relatively accurate in that the number of tags counted on cars at freeway off-ramps in February 2014 was confirmed by answers given by the Minister of Transport to a parliamentary question on 5th March 2014.¹⁷

The media has been awash with criticisms, complaints, angry protests, blog sites, polls, songs and jokes, all of which indicates a society uniting in their disgust and rejection of the system. While the crescendo of rejection may bring a half-smile to concerned critics, the real issue is that Gauteng desperately needs an Intelligent Transport System, combined with an efficient integrated public transport network to alleviate traffic congestion, reduce carbon emissions and generate a productive and efficient environment to get people and goods to and from their daily destinations, thereby promoting a long term solution for this region's transport problems.

We argue that the manner in which Sanral and the authorities have introduced the present ITS, has robbed this economic powerhouse of the opportunity to introduce a potentially successful and acceptable ITS funding mechanism, in conjunction with the developments of a **viable** integrated public transport system to address road congestion. Essentially the expected failure of the GORT system will not only leave Gauteng the poorer, but may also discredit the successful future introduction of e-tolling / Intelligent Transport Systems in other parts of the country and even globally.

4. GAUTENG'S E-TOLL CHALLENGES

Although questions abound as to why the cost of the freeway upgrade escalated so dramatically, from OUTA's conversations with many critics and detractors¹⁸ of the Gauteng e-toll project, it is clear that they all understand and accept that the R20 billion upgrade has to be paid for. The hotly debated question is how? What methods of raising funds were available and which was the most equitable? Which option would pose the least financial and other burdens on society, balanced against the long term need for the urban economy to become ever more productive?

A truly 'intelligent' Intelligent Transport System would need to not only promise but guarantee that;

- (a) Less costly alternatives exist for those who cannot afford to pay and therefore cannot have access to the road infrastructure. Satisfying that condition in Gauteng would require:
 - i. A tangible improvement in the safety, efficiency and range / extent of existing bus and train public transport systems.
 - ii. A tangible improvement in the safety and efficiency of private mini-bus taxis.

¹⁷ On Wednesday 5th March 2014, in response to parliamentary questions, Minister of Transport Dipuo Peters said that the average number of e-Tags fitted to vehicles making use of the Gauteng Freeways was "between 23% and 28,6% as at February 1st 2014

¹⁸ Numerous statements on record from Labour unions; the Southern African Catholic Bishops Conference; the South African Council of Churches; Business formations; Opposition political parties; Academics; the Media and Civil Society leaders; Political Representatives and former Sanral executives,

(b) The costs of e-tolls (collection process) has relevance and reasonableness in relation to:-

- i. The costs relating to the collection process as a percentage of the total debt to be repaid over time.
- ii. The credibility and trust surrounding the cost of the original debt. The e-tolled roads remain public roads and must therefore be stewarded as a public asset for the long benefit of society. Knowing what we do today about the GFIP construction collusion, may require a transparent and decisive independent enquiry to investigate the extent the escalation of the GFIP construction costs, attributable to collusive practices in the construction industry.

We believe that had a meaningful and widespread interactive planning process occurred before the e-tolling decision was taken in 2007, Sanral and the Government may very well not be in the impasse it now finds itself in.

Some of the problems the system is experiencing since launch, were raised in 2010 & 2011 by OUTA's members and others, these being:-

- An inaccurate e-Natis database feeding into the Sanral e-toll system.
- Complexities and inefficiencies in the system generating inaccurate billing.
- Exacerbated false license plate tampering and cloning.
- Dissention over the high costs of collection relative to the debt to be serviced.
- An onerous dispute resolution mechanism.
- Additional administrative inefficiencies, burdens and conditions of the system on business and the public alike.
- Complex pricing and discounts system.
- High and unmanageable levels of non-compliance.

Notwithstanding, Sanral asserted that they had the mandate to go ahead, displaying excessive confidence in their own judgement and contempt for the concerns raised, advice given or the lesson on offer from other problematic e-toll cases elsewhere in the world. This has now left the public at considerably at risk. In terms of corporate governance principles the Sanral board of directors has left the Gauteng Regional and higher level authorities with a serious crisis of public confidence and negative socio-economic impact on the province. Society now has the right to hold the higher level authorities accountable and to insist that the Sanral board explains why it did not insist that its Executive Officers discharged the agencies constitutional requirements of meaningful engagement with stakeholders, conducting thorough research and taking heed of the pertinent issues and warnings offered both from some advisors and many critics.

Failure to have done so has opened the following grounds for society to oppose the GORT decision.

1. The rationale for the decision of the e-Toll proposal was neither transparent nor convincing:

Hommel & Holmner refer to a report that was commissioned by Sanral some two years *after* the approval of the GFIP, by Standish, Boting & Marsay¹⁹ (2010), which emphasized that inadequate transport networks would constrain the economic development potential of Gauteng, and that an improved road network funded by a user-pay system may improve the long term economic development prospects while ensuring a more 'fair' system for road users²⁰.

While economic feasibility studies by transport economists have a contribution to providing theoretical underpinnings that are useful in the conceptual planning stage, Small and Verhoef (2007) as well as Button (1993) point out that the practical demands on urban road usage are more complex. They require a more grounded and intensive modelling analysis to test the validity of working assumptions made in the process of theoretical abstraction. This is especially important insofar as assumptions are made about probable impacts on those in the lower income bracket who have little or no disposable income, and cannot afford the costs of road transport, yet lack an adequate public transport network as an affordable alternative (Button 1993, Small & Verhoef 2007). "The Poor" (and for that matter the rich) are reduced to an abstraction of financial measurement to fit the theoretical model rather than as people who are protagonists of their own development²¹.

Prior to the decision being taken in 2007/8, Sanral claims they followed due process required of them. OUTA argues that by placing one advert in six regional newspapers in October 2007, allowing the minimum period of 30 days from 14 November to 14 December 2007 for the public to comment was grossly insufficient, and as a result, only 28 responses were received from 3.5 million motorists in Gauteng. This process was repeated again from April to June 2008 for the R21 section of the freeway, for which only 2 responses were received.

SANRAL's response in court was to also refer to a number of mentions and press clippings about their plans to toll the GFIP, as if to imply this as being meaningful dialogue and engagement with society on the matter. Furthermore, we asked why no invitations for thorough engagement sessions were forthcoming from SANRAL to large fleet management organisations, such as South African Vehicle Rental and Leasing Association (SAVRALA), Road Freight Association (RFA), the Retail Motor Industries (RMI), and other pertinent entities. SAVRALA members together form the biggest body of vehicle buyers in the country. Neither the

¹⁹ Standish, B. (2010). *An economic analysis of the Gauteng Freeway Improvement Scheme*. Report for Sanral

²⁰ OUTA is grateful for the willing engagement of Andrew Marsay, who has educated us on the normative intent and logic of ITS's and e-tolling.

²¹ See Smith P, and Max-Neef M, (2011) *Economics Unmasked: From Power and Greed to Compassion and the Common Good*. Green Books. Devon. For a six minute introduction of Manfred Max-Neef's thinking see this YouTube lecture <http://youtu.be/jjTvd0Yg2hk>.

representative body nor their constituent members were ever meaningfully consulted on the plan. In addition, SANRAL failed to meaningfully engage with organised Labour and disadvantaged organisations such the QuadPara Association of SA (QASA), who representing people with disabilities and already experience a severe constraint on their right to freedom of movement. The disabled public rely on use of the tolled roads and feel unjustly discriminated against because the system is still to this day, unable to accommodate exemptions for people with disabilities.

2. Inadequate Public Transport:

Gauteng's public transport infrastructure is currently inadequate to cater as an alternative to even a small percentage of the current 2,5 million freeway users. According to the Gauteng City Region Observatory, a partnership between the City of Johannesburg and the two universities of Witwatersrand and Johannesburg, only 10% of commuters make use of bus and train services whilst 42% make use of the city's Minibus Taxi system and 42% use cars. In addition, the current public transport network has been described as failing the users within Gauteng. Furthermore, President Jacob Zuma acknowledged this from first-hand experience when on 14 June 2012 he personally tested the Public Transport services by travelling on it for a day.

Although the new high speed **Gautrain** now links 9 stations between the two cities of Pretoria and Johannesburg with OR Tambo International Airport in a narrow North / South corridor, and serves around 45,000 commuters a day, this is only between 12-15% of the daily road commuter traffic between the two cities²² and less than 3% of the total Gauteng freeway users. Although since e-tolling has commenced there has been an expected increase in passengers using the Gautrain (approximately 10% according to Business Report), until the rail network expands to cater for West – East and other corridors, and unless the tariffs are reduced to serve a larger portion of the population, the Gautrain cannot be regarded as an affordable or convenient public transport alternative for the majority of citizens who currently rely on minibus taxis and private cars to commute to and from work.

Moreover the Gautrain is not generating sufficient revenue to meet its obligations and as another embodiment of the “user pay principle” appears to be way below the requisite number of users who can pay the fares to make it profitable. The Gautrain fell short of its revenue targets by over R800m in 2012 and R500m in 2013.

These hearings are taking place in the good offices of the Gautrain, and it has not escaped our notice that to a large extent the scrapping of e-tolling will harm the financial viability of the Gautrain. While OUTA would not like to see the Gautrain end up becoming a permanent financial drain on Gauteng's finances because passenger numbers fall consistently below the forecasted rates, to peg the fortunes of the Gautrain (which was also has a controversial history) with e-tolling will only serve to compound the problems. OUTA is willing to

²² Business Report. 17 December 2013.

constructively engage with the Gautrain consortium and the Gauteng transport authorities based on this principle: transport economics must serve people. People must not become servants of transport economics.

3. Economic equity of e-tolls vs the fuel levy in South Africa.

With a significant reliance on vehicle usage for daily commuting, the question arises as to how social infrastructure should then be funded in this context of pressure being placed on the national fiscus for broader and pressing challenges. To date in South Africa, urban road 'social' infrastructure has been paid through national treasury allocations, boosted by the equitable user pays mechanism of the fuel levy, which dictates that the more you drive, the more you contribute to the fuel levy.

The Fuel Levy table provided in Annexure 1²³, provides one with an overview of the revenues generated by the fuel levy in South Africa. From this table, one will see that since the construction of the GFIP began in 2009 Tax Year, the fuel levy revenues have more than doubled from just under R25bn then to an expected revenue of R52bn in the current tax year ending February 2015.

In addition, it must be noted that SANRAL receives significant revenues generated on the long distance (rural) "stop-pay-go" (or boom down) tolling projects (N3, N1, N4 etc.)²⁴. In some instances, these boom down toll-booths have crept closer to the urban peripheries (such as the Bakwena Toll Plaza North of Pretoria), to capture the higher masses of peri-urban road users, where a boom-down mechanism is still operable.

The introduction of a purely open and free flow tolling system is a new concept to South Africa and its success will rely on a number of factors, the most important of all being:

- High degree of compliance through a willing and committed public participation.
- Workability – from very efficient administration systems.

Questions around the true e-toll collection costs

There is uncertainty and debate surrounding Gauteng's e-toll administration costs, from Sanral's R12bn²⁵ (or 17%) over the 24 year period. OUTA's estimates the cost of e-toll collection to be around R1,3 billion per annum, based on the tender awarded to the Electronic Tolling Company JV (ETC) at around R6,5 billion of the R10bn, related to operational costs of collection over a five year period, with eight years to write off some of the capital ITS costs in excess of the R6,5 billion.

Furthermore, the document (as supplied by Sanral in court papers) in Annexure 5 questions the sincerity of SANRAL's claim that the e-toll collection costs only

²³ See Annexure 1, which contains a table of fuel levy revenues.

²⁴ Most of these long distance tolled routes have had their capital expenses paid off, but the tariffs continue to increase and income from these feed into Sanral's revenue stream.

²⁵ See Annexure 5 which contains a copy of the breakdown of e-toll revenue as supplied by Sanral in court papers

amount to 17% of the revenue. This document depicts the e-toll revenue and costs shown in the third and fourth line of figures, of R6.194bn (VPC Capital and Operating Expenses) and R12.170bn (Toll related Capital & Operational Expenses). This in turn equates to total of R18.364bn – which is equal to R25,7% of the R71.396bn revenue forecasted by Sanral over 24 years. This questionable claim by Sanral and the debate around the true and full costs pertaining to e-toll administration & collection, adds further weight to the lack of trust in Sanral's ability to be transparent and honest on such matters.

This table was also supplied in the court arguments, at the time when Sanral was projecting an e-tag and payment compliance level of 93%. The current low compliance levels (by more than half) will drive the cost of collection significantly higher than they had anticipated.

Fuel levy logic

Standish *et al* (2010)²⁶ acknowledge that the fuel tax is the most efficient in terms of an immediate cost to benefit relationship, because no additional collection costs are necessary to fund the admin & operations of tolling. Sanral argues that, since the national fuel levy would have to be applied uniformly to all motorists, non-Gauteng motorists would be unfairly paying toward the upgrade and maintenance of Gauteng roads that they do not use. However this argument rests on a false assumption, which fails to take into account the fact that the entire country stands to benefit from a more productive and efficient Gauteng economy which translates to the benefit South Africa as a whole. The Organisation for Economic Co-operation and Development (OECD), in a 2011 report states that the Gauteng region contributes 34% to South Africa's Gross Domestic Profit (GDP). In addition, 52.2% of national research and development takes place in the province. As a result 75% of Gauteng's tax contributions to Treasury flow out of this region for the benefit of other provinces. Clearly the rest of the country benefits from Gauteng's productivity, which is aided by improved freeway networks.

Moreover increase costs of business transport from e-tolls will also add to the price of commodities, consumer goods and services, a matter already surfacing in the financial results of large business entities (Checkers, Supergroup, Combined Motor Holdings), within a short period after the launch of e-tolls. The poor will most certainly experience the effect of negative economic pressures from e-tolling.

The fuel levy on the other hand, attracts **zero** administration fees and if indeed Treasury is unable to find the R1,9bn required to service the GFIP bond of R20bn and paid over 20 years (including interest) from the current annual R47bn fuel levy income (see Annexure 1 for fuel levy table), then an addition of R0.09c to the national fuel levy will, according to OUTA's calculations, produce the additional revenue required from estimated 23bn litres of fuel (Petrol and Diesel) sold per annum.

4. Road expansion induces road demand and further congestion:

A study conducted on Intelligent Transport Systems in transitional and

²⁶ Standish B. (2010). *An economic analysis of the Gauteng Freeway Improvement Scheme*. Report for Sanral, see www.nra.co.za.

developing countries by Shah and Dal (2007)²⁷ found that construction of ever more efficient road networks leads to “induced demand”. In systems-thinking terms this is referred to a loop of self-reinforcing “positive feedback”. Extending and expanding existing road networks invites further motorization, which in turn leads to increased congestion and greater safety issues, and the need for yet further extension projects. The ever increasing burden leads to the increasing demand for non-renewable natural resources, increasing pollution and fossil fuel emissions, moving the society further away from the desired need of an integrated public transport system. Besides the burden on the natural environmental, the quality of life suffers.

Using data for 24 California freeway projects across 15 years, Robert Cervero²⁸ found that; *Roadway investments spur new travel and in effect, fail to relieve traffic congestion, known as induced demand. Traffic increases are explained in terms of both faster travel speeds and land-use shifts that occur in response to adding freeway lanes and simple mode structures have often been used to reach the conclusion that road investments provide only ephemeral congestion relief, with most added road capacity absorbed by increases in traffic. Based on model outputs, it generally takes 2 to 3 years for development activity to respond to the addition of lane miles, and another 3 years for urban business and residential development activity to take place along new nodes or improved traffic corridors.*

5. Weak Economic Arguments:

Dr Roelof Botha, an academic economist and strong advocate of e-tolling has argued that the time saved by users of a decongested road network has a significant productivity benefit that he quantifies in financial terms as R2.1 billion annually. The long term boost to the SA economy would by his calculation be some R26.5 bn over 20 years, (assuming 5% inflation), "which is 32 percent higher than the total cost of the project". He assumes that this value of economic productivity for the average freeway users is generated from time saved and other vehicle running and maintenance costs, which computes at a benefit to cost ratio of 8,4:1. This claimed benefit was sourced from the Economic Analysis of the Gauteng Freeway Improvement Scheme, prepared in August 2010 by the Graduate School of Business (University of Cape Town) for both the South African National Roads Agency and the Provincial Government of Gauteng. Their research made use of input compiled from a 2007 feasibility study on behalf of Sanral. This ratio was also presented in 2011 GFIP Steering Committee Report.

This return has been downplayed by many other reputable economists (Chris Hart and Azar Jamine and others) as well as being questioned by members of the public who comment in online articles. Sanral has also had the benefit of around three years of GFIP in full operation (since 2011) to measure and confirm the ratio claims for freeway users, but they have not done so yet. Furthermore, the validity of such projections rely on assumptions that the public transport system

²⁷ See Shah, A.A. and Dal, L.J. 2007. Intelligent transportation systems in transitional and developing countries. IEEE. August 2007: 27-33.

²⁸ Cervero, R. (2001). University of California Transportation Center *Road Expansion, Urban Growth, and Induced Travel: A Path Analysis*.

will provide a viable alternative to keep the e-toll roads uncongested throughout the period and that users will pay the e-toll bills.

Dr Botha's needs to respond to the problem of induced congestion with a more convincing case and Sanral needs to be held accountable to a more credible and impartial authority, lest they be simply respond to the induced demand by putting up the e-toll fees to finance an additional lanes to Gauteng's freeway network every 5 to 8 years. This action, which will serve the interests of the road construction industry very well, is highly impractical and will not serve the greater good of society or the planet.

Furthermore, on 31 October 2011, the Minister of Transport (Mr Sibusiso Ndebele) replied in the National Assembly, to a question posed by the Democratic Alliance (Question no. 2598), which questioned the claimed 8,4:1 benefit to cost ratio of the GFIP project. Minister Ndebele responded as follows:-

"As can be seen, the key assumption of the 2007 feasibility study was that the GFIP project would reduce congestion. In my considered view, and in retrospect, the original feasibility study did not sufficiently weigh up international evidence suggesting that freeway expansion often does not – in the medium term – resolve congestion challenges, and often induces greater demand.

It also failed to consider alternative solutions to congestion – improved public transport provision, moving more freight onto rail and a curb on urban sprawl. The project benefits to road users may, therefore, unfortunately not be forthcoming. This is the subject of further assessments and consultations by the Department of Transport and a Cabinet task team."

With the above controversies and concerns in mind, one can accept that society (particularly in Gauteng), has entirely plausible and legitimate grounds for their rejection of the GORT scheme. Their views cannot be 'solved' by economic modelling and engineering, and neither can it be 'absolved' by excusing whatever wrong-doing may have occurred. Integral to finding a solution to the current impasse, will be the genuine display of a good quality of leadership that acknowledges the significant errors and assumptions it has made and one that sincerely displays a capacity for learning from experience. If this learning is to be developmental and restorative, it will require a willingness to be confronted, and responsive to the truth, however embarrassing and awkward it may first appear to be.

While legal adversarialism comes into its own in matters of determining guilt or innocence of a person accused of a crime, it is less helpful in determining whether a decision by an organ of state in the executive arm of government was indeed good, bad or indifferent. The judiciary has in the 'lawfare' phase awarded Sanral only one sound legal judgement. It has affirmed the separation of powers and affirmed the right of the executive to execute its own policy decisions, and to take whatever consequences flowed. Policies are made and unmade in the Legislative Arm of Government. The elections have shown what the Gauteng electorate think about the e-tolling decision. While OUTA is not politically aligned, we could not ignore the fact that e-tolling has proved to be a political hot potato, and to generate light rather than heat, we have sought to steer the discourse around e-tolling into a space more conducive to truthful enlightenment than party political contestation.

5. THE SUCCESS FACTORS OF 'USER PAY' I.T.S.

The Department of Information Sciences of the University of Pretoria proved very helpful to help OUTA put things into a wider perspective.

“Some documented success factors for the implementation of Intelligent Transport Systems (ITS), include the presence of strong advocates and public support; weak opposition; a single agency overseeing the project; a good public transportation system in place; simple and affordable pricing systems using proven technology; environmental monitoring and protection; and comfort factors that create confidence amongst users (Carnevale & Crawford 2008; Jarašūniene 2010)²⁹.” Dr Marlene Holmner and Ms. Erin Hommes. University of Pretoria Department of Information Sciences.

From the academic literature on Intelligent Transport Systems, University of Pretoria researchers Hommes & Holmner, have identified **eight success factors**, which OUTA take to be critical for any e-tolling venture to successfully innovate the conceptual invention of an Intelligent Transport System in any context. Based on Hommes and Holmner's abbreviated listing OUTA has amplified them into eight affirmative statements of importance. OUTA makes no claim that these are the last word on the matter, but we have been surprised and encouraged that so far these have not been challenged. In due course they may be, in an appropriate academic discourse, and we look forward to their further refinement.

1. **Public support needs to be extremely high with strong advocates promoting acceptance.**

OUTA's findings are that public support for GORT is extremely low, at around the 40% of freeway users being tagged and / or paying for use of the freeways, some eight months since implementation. The professional research organisation Ipsos, conducted research which displayed the public sentiment of low support to get e-tags (38%) and the public's opinion to have the roads funded by alternative means (58%)³⁰. This we attribute to a dismal and meaningless public engagement program conducted in 2007/8, along with Sanral's lack of transparency, numerous confusing claims on e-tag sales³¹ and embarrassing PR blunders, all of which have compounded the lack of trust by the public.

The signs of negative public sentiment toward the scheme were also clearly displayed during the three public engagement sessions held by Sanral and the Department of Transport in November 2012 to try and win over support. At the time,

²⁹. Hommes, E and Holmner, M, June 2013. Intelligent Transport Systems: privacy, security and societal considerations within the Gauteng case study. In *Innovation: Journal of appropriate librarianship and information work in Southern Africa*. Issue 46, UKZN.

³⁰ Polls conducted by Ipsos prior to the launch: <http://www.ipsos.co.za/SitePages/Etoll%20Adoption.aspx>.

³¹ Misleading e-tag sales from Sanral, reported by ITweb on 1 July 2013: http://www.itweb.co.za/index.php?option=com_content&view=article&id=65332

the Government Gazette (#35756 & 35755) published the proposed tariffs and exemptions and invited public comment. More than 12,000 submissions were made. This is one of the highest public submission responses ever to a notice in the Government Gazette.

Given that the system relies on personal information of users it is especially important that any threats to the right to privacy is countered by strong advocates from academic and civil society circles. Only a few academic economists and consultants have been willing to endorse the GORT.

2. **Oppositional forces must be weak.**

When the tolling decision was taken in 2008 the opposition thereto was indeed weak. A mere 28 comments were apparently recorded when the decision was gazetted. However this was due to Sanral having avoided any substantial debate by only placing the regulatory notices once, in six newspapers, some of these placed in the business section of these newspapers - out of plain sight of the public. From 2010 when the Gantries started to appear, questions that ought to have been asked and answered three years previously, began to surface and opposition mobilised.

Besides OUTA's opposition, the GORT has been heavily opposed by COSATU, the SA Chamber of Commerce & Industry, Business Unity SA, the Southern African Catholic Bishops Conference, the SA Council of Churches, the Southern African Faith Communities Environment Institute, the Black Management Forum, the SA Local Government Association, the QuadPara Association of SA, and other civil society organisations. Even strong opposition within the governing party was evident. The ANC Youth League denounced e-tolling in 2011 and again in 2012³². While the previous Premier of Gauteng supported the e-toll decision, the newly elected Premier, Mr David Makhura is on record (18 February 2011³³) as voicing his concerns and strong criticism

3. **Tangible comfort factors must be immediately felt to create confidence.**

Users who pay for a decongested traffic experience need to experience satisfaction. If they don't, their complaint may or may not be heard by Call Centre staff, but it will nevertheless travel by word-of-mouth. Social media further accelerates the spread of bad news. The Automobile Association recently tested the comparative experience of using the freeways and alternative routes and concluded in a recent article concluded:

Every time we tried a different route we kept coming to the same conclusion – in off-peak hours there is less case for using toll roads than one might believe. And in peak traffic, the freeway gridlock makes it a no-brainer – you need to decide whether to pay Sanral to sit in their traffic or sit in town traffic for free? Perhaps

³² See <http://www.ancyl.org.za/show.php?id=8235>,

³³ See <http://www.iol.co.za/news/south-africa/gauteng/toll-costs-reveal-two-faces-of-anc-1.1027432#.UwzIXuOSySo>,

there may be exceptions and we look forward to hearing members' experiences comparing routes. But from what we can see, the exceptions will only end up proving the rule. And the rule is that restricting access to roads by financial means is just plain wrong³⁴.

Not only are the comfort factors absent, but many e-tag users have become very uncomfortable because of failure by Sanral to reassure them of the security of personal information. The following link to an article by Jon Tullet, a seasoned Information Management journalist writing for IT Web, reflects three security breaches having occurred in the Sanral e-toll website before and since e-tolling commenced:

http://www.itweb.co.za/index.php?option=com_content&view=article&id=70981, .

4. Alternative public transportation systems should be adequate and reliable.

This is not the case in Gauteng and the research conducted by Hommes & Holmner clearly indicates that good public transport alternatives should exist for an ITS to work, and revenues of ITS's substantially channelled toward investment in the further improvement of their integrated public transport systems. It would have been prudent in terms of the logic of an ITS for the State to have borrowed money to initially finance a sound integrated urban transport system to meet Gauteng commuter needs, where after the introduction of an ITS / e-toll system could have been contemplated.

5. The pricing systems should be simple and the billing system user friendly.

The fact that the GORT system has failed on this criterion is now self-evident, given the scolding Sanral has received from both President Zuma and Minister Peters, more than once, on the billing error fiasco. This was in response to public outrage. OUTA has received a steady stream of complaints from vehicle owners and have tested these perceptions against random interviews to gauge the general understanding of the various elements of tariff calculations based on; vehicle classifications; time of day discounts; time of week discounts; high use additional discounts; discounts related to period of payment; user classifications (tagged, standard, alternate); payment methodologies etc.).

The pricing system is so complicated especially for 'alternative users' that it has led to the suspicions that this was a deliberate ploy to manipulate users to sign Sanral's Terms and Conditions and buy an e-tag. One respondent (a highly respected human rights attorney) believes that the combination of a 'very juicy carrot' (substantial discounts for tagged users) with the 'very big stick' (a punitive tariff of 4.8 times the discounted tariff) was "idiotic" especially given the lack of widespread support. "People may have responded to the threat of a penalties for late payment, but it would have had to be reasonable. The penalty tariff is so exorbitant many people will simply refuse to pay. Sanral is creating the very scenario it is trying to avoid.

³⁴ <http://www.aa.co.za/about/press-room/press-releases/rediscovering-the-road-less-travelled.html>

Widespread civil disobedience.”

Discussions with people from poorer areas around Gauteng, appear to know very little about how the e-toll system and its pricing structures apply. It appears that vehicle owners residing in townships are generally not densely connected to the internet and do not live close to or shop where the Sanral Customer Service Centres are located, making them less aware of how the e-toll scheme should be complied with. This raises questions of a possible discriminatory practice and that Sanral is risking further allegations of human rights infringements.

6. The soundness of the technology and data needs to be extremely reliable.

Sanral CEO Nazir Alli has himself admitted that the data base has “let us down”. This contradicts his repeated assurances over the past three years that the system was technologically sound and ready for business. While he has apologised to the public and asked for patience, one has yet to hear his apology for his mistaken assurance, or his explanation as to why he was so confident before the system commenced, and why he did not use the two and a half year delay to conduct data integrity tests and systems trials.

7. Environmental benefits and costs must be monitored and managed.

A major justification for the cost of ITS’s lies in the promise of not only reduced traffic congestion (because people move to public transport options) but the consequent reduction in greenhouse gas emissions to combat global warming. A major complaint from users concerns the waste of paper and colour printing resources in printing invoices and statements for small amounts that bear no relation to the estimated cost of the printing. Many people even received invoices which displayed an amount owing as “R0.00”

8. A single agency with unquestioned legitimacy and authority should be responsible for implementation.

At the outset of the GFIP upgrade, Sanral was indeed regarded as a strong and credible agency and this is probably the only factor they had in their favour. Today, their strength, both in public perception and that of Ratings agencies is questionable. Furthermore since it is a ‘roads agency’ staffed with civil engineers and specialists in road construction, and since the key rationale of an ITS lies in the necessity to ultimately constrain road transport in favour of other less environmentally burdensome transport systems, it is logically perverse to place a roads agency in charge of an ITS.

Judging by the number of court cases that Sanral has had to face, initiated by members of the public, civil society and city management entities (especially during the past few years), indicates a level of frustration being expressed by a cross section of society against this state owned entity.

6. INTERNATIONAL I.T.S. EXAMPLES & CASE STUDIES

Other cities with similar challenges have made progress in overcoming urban traffic congestion, from which South Africa can learn. At the turn of this century Enrique Peñalosa, former mayor of Bogotá, Colombia redefined a successful, developing and productive city on the basis of the approach that *'developed urban environments are not those where the poor travel by car, but where the rich make use of public transport.'* He transformed a city with a reputation as one of the crime capitals of Latin America into a city which loves itself for what it could be, rather than hates itself for what it had become. He showed the humility to learn from the experience of other cities, notably Curitiba in Brazil. We urge readers to view this short video clip of his vision and outcomes at this link: <http://youtu.be/hPf4s2oFnp0>.

Sanral claims to be a learning organisation. When Sanral set out to introduce this ambitious plan, why did the Board not insist upon the conduct of significant research of international examples of successful and failed systems, as one would expect given their risk management responsibilities. If indeed they did, this has not been expressed in their communication to date. Furthermore, it appears that whilst ITS implementations for congestions management in London, Stockholm and Singapore are shining examples of e-tolling success stories, the wisdom behind the successes of these has never been assimilated into Sanral's GORT plans. Case studies of failed, failing or troubled ITS initiatives provide still richer lessons, but it appears that Sanral never applied their minds to these either. Edinburgh, Manchester, Hong Kong, Detroit, California, Australia and more recently Portugal have all attempted to innovate ITS schemes. Some of these heeded the outcomes of their research and halted before they implemented the scheme (Edinburgh & Manchester), while others have failed or are in difficulty and falling far short of their targets.

The preliminary review by Hommes and Holmner of these experiences usefully pinpoint the advantages and the limitations of Intelligent Transport Systems. From this international experience we have written above of what we consider to be the eight most critical success factors in planning and implementing an e-toll based ITS system. Hommes and Holmner cite three examples of successful e-toll user pays ITS systems which raise doubt over the short to medium term success of Gauteng's e-tolling system. The London Inner City Congestion Charge of 2003, (once referred to by Mr Nazir Alli as the success story on which the GORT-ITS is modelled); the Stockholm Congestion Charge system of 2011; and the Singapore road pricing scheme introduced to cut congestion and carbon emissions in 1975.

In summary the following characteristics were very prevalent:

- a. These cities had well-developed and reliable public transport systems before the 'user pays' system was introduced, which gave citizens cheaper and reliable alternatives, so as not to impose financial constraint on their right to freedom of movement.
- b. The primary purpose of the ITS was to reduce congestion, i.e. to discourage road use during peak times. Charges were free outside peak and on weekends.
- c. The revenues from the collection process were used to further improve public

- transport and other congestion easing, and not to upgrade existing motor ways.
- d. Prior public engagement programs were exemplary, inclusionary and conducted extensively, to respect the international benchmark principle of prior free and informed consent insofar as the ITS implied any limitation of citizen rights. Because the citizens were very involved in the requirements, solutions and even pricing of the system, the levels of public confidence were high. In Stockholm, a six month trial period was adopted to give citizens real experience, after which a referendum to gauge the level of acceptance by society to proceed was held. Seventy percent voted in favour and the revenue flow financed improved public transport as well as the construction of a new bypass to further ease congestion.
- e. Strong, transparent and participatory leadership was exercised to gain public trust and support, resulting in high levels of compliance from the very outset.

Virtually none of the above steps were taken by Sanral before implementing GORT.

Turning to the problematic instances Hommes and Holmner found that ITS innovations failed to gain the requisite momentum for success when restrictions were imposed by suddenly charging users for the use of roads when they had become accustomed to free passage. Threats to civil liberties and suspicions of a “stealth tax” left citizens distrustful.

Hommes & Holmner cite the following examples where ITS innovations ran into trouble:

- **Greater Manchester** – 2008. Despite being based on the very same principles and technology that had succeeded in London, and despite having the same stated intent to use revenues for development and funding of improved public transport systems (bus rapid transport and rail), citizens nevertheless were sceptical. They rejected the system because of affordability and a weakened economy at the time. Stephen Glaister of the RAC Foundation (Transport Research Body for the UK) stated its failure was due to negative public perception *‘on the basis of no compensating reductions in taxes or any other charges and a lack of confidence that anything would be different, or that the authorities could be trusted to do what they said they were going to do.’*³⁵.
- **Edinburgh** – A Congestion Charge by way of e-tolls was proposed in 2002 to relieve inner city congestion with the stated intent to use re-invested revenues to improve the public transport system. Notwithstanding, after intense political lobbying and public debate, 75% of citizens rejected the proposal. An investigation into the reasons for the rejection attests to the critical importance of avoiding unnecessary complexity. (Gaunt and Rye: 2005)³⁶
- In **Hong Kong** in mid 80s, congestion charging using e-tags and CCTV was rejected twice, due mainly to pricing, economic climate and privacy issues, despite an initial pilot program and a massive Government communication campaign. The road users also objected to taxi’s being exempted from paying the toll.

³⁵ Report on Governing and Paying for England’s roads for the RAC Foundation by Stephen Glaister – July 2010

³⁶ Allen S, Gaunt M, and Rye T. 2006. *An investigation into the reasons for the rejection of congestion charging by the citizens of Edinburgh*. [O]. Available at http://www.openstarts.units.it/dspace/bitstream/10077/5896/1/Allen_Gaunt_Rye_ET32.pdf

Additional to the above examples cited by Hommes & Holmner, OUTA's research has found other failed or failing cases of ITS implementation across the globe:-

- **Portugal:** Launched in 2012, by Mid 2013 the SCUT (previously free roads) has shown "signs of failure" according to Estradas de Portugal (EP) roads chief António Ramalho³⁷. The report states that 19% of road users were not paying their tolls and 29% of the revenue was being channelled toward collection costs, with revenues falling well below initial study indications.
- **Australia:** According to Paul Grad and Peter Kenyon, Correspondent at Australia's, TunnelTalk discussion forum, on 16 July 2013 they stated that

*"Australia has some of the finest highway tunnels in the world, but for the private investors who trusted traffic usage projections from leading and respected consultancy firms the story has been a tale of insolvency and disappointment. Most of the privately owned toll highway projects constructed in the last 15 years in Australia have fallen into receivership or administration within a short time of opening to traffic when it became clear that toll revenue from actual traffic usage would be well short of covering its contribution to the construction costs. Class action lawsuits are now being initiated by investors who believe they were misled by overly optimistic usage forecasts, and construction companies are becoming wary of bidding future concession projects. Not all toll tunnels in Australia have failed financially. Some have been highly successful. But for all cases of failure, the traffic forecasts were two or three times higher than the actual traffic usage when opened. This has led to the conclusion that there was something wrong with the procurement concept and the financial structure of the toll concessions"*³⁸

A Public Private Partnership approach was adopted by the Brisbane State Government to seek private investment in a costly scheme to build a tunnel to enable motorists to get to the Brisbane International Airport more efficiently. It was assumed the users would pay. However traffic volumes have proved woefully short of projected estimates and the private sector consortium is in financial trouble. The lesson to be learned from the Australian experience is that if the State has to bail out a failed PPP with tax revenues, it ends up with a greater injustice: non-users paying still more.

- **California:** In a paper written by D Arduin and W Winegardner³⁹ in April 2013, the "Foothill/Eastern Transportation Corridor Agency (FETCA) these toll roads presently appear to be unsustainable and likely have been unworkable from their inception". The roads are deeply in debt. The recent reviews "clearly raises significant concerns about the toll roads' sustainability, cost to taxpayers, and ability to relieve traffic congestion."

³⁷ The Portugal News on Line. (2013) .*Dead Loss* Reported to journalist Brendan de Beer

³⁸ Article in Tunnel Talk by Paul Grad – 16 Jul 2013 - <http://www.tunneltalk.com/Discussion-Forum-16Jul13-Australia-PPP-toll-tunnel-crisis.php>

³⁹ Arduin, D and Winegardner W. (2013)*Orange County Toll Roads: Serious Concerns Should Lead to Significant Review by State and Local Officials*. Pacific Research Institute.

- **Taipei & India** and other countries also have examples where e-tolling has been under pressure or has failed.

In all the examples of ITS failures, the following factors were prevalent:

- Lack of acceptance / approval by the public leading to lower than required compliance.
- Projected revenues were not met – initial revenue targets and calculations of compliance and / or usage was too high and not achieved.
- Public distrust and concern about invasion of privacy.
- High proportionate collection cost.

According to an article⁴⁰ dated 10 September 2013, the **Fitch Ratings Agency** explains:

"Public private partnerships can provide public value, but need to be carefully crafted to address all stakeholder concerns. When public private partnerships are viewed to have failed, the issue is often inappropriate transaction design and application." They indicate "a number of failed projects around the world that suffered from overleveraged assets".

7. THREE BURNING ISSUES

From the history of Gauteng's e-tolls and the wisdom from other case studies (successes and failures), we have distilled the following three burning issues that we consider to be the most incendiary.

INFORMATION ETHICS

Since OUTA undertook to channel public complaints to the Public Protector the steady stream of complaints received over the past few months have helped us come to the realisation that what is at stake is much more than an operational efficiency problem, but a human rights challenge, particular with respect to the right to privacy. Besides the excess of 11,000 individuals who have either put their concerns and complainant in writing to us, or channelled their complaint through OUTA's web site to Sanral's complaints department over the past 8 months, we estimate that tens, if not hundreds of thousands of motorists have simply not as yet been notified of any e-toll invoice or amount due by them, due to the maladministration within the GORT system.

Hommes and Holmner caution in their paper on Intelligent Transport Systems⁴¹;

"The advancements in Information and Communication Technologies (ICTs) together with the ability of ICTs to capture and store vast amounts of

⁴⁰Newspaper.com, The. (2013). *Credit Rating Firm Catalogues Toll Road Woes*. [O]. Available at: <http://www.thenewspaper.com/news/42/4228.asp>

⁴¹ Hommes, E and Holmner, M, June 2013. Intelligent Transport Systems: privacy, security and societal considerations within the Gauteng case study. In *Innovation: Journal of appropriate librarianship and information work in Southern Africa*. Issue 46, UKZN

personal information has amplified the risk of this technology being used unethically (Reynolds 2011). These risks necessitated the application of a new set of ethical rules to an intangible world (Capurro 2006). This type of ethics is known as information ethics. To achieve a better understanding of information ethics, the origin and concept of ethics needs to be evaluated.

The word ethics stems from the Greek word Ethos implying the character and spirit with fixed moral attitude/culture that informs the beliefs and socially acceptable practices of a person or society (Britz 1996; Whitman & Mattord 2010). By extension, information ethics is concerned with the moral norms and justice, socially acceptable practices and beliefs concerning information use (Fallis 2007; Britz 2008). This field of ethics has received more attention with the increased development and capabilities of technology as well as enhanced access to information through the growing internet infrastructure (Molnar Kletke & Chongwatpol 2008).

Ordinarily given South Africa's internationally regarded constitution, with a bill of rights which explicitly sets out the normative principles to formulate a properly contextualized information ethics, it is regrettable that Sanral was not deliberately proactive to secure a broad and durable consensus between stakeholders, fleet organisations, faith-based organisations, academics, political parties, unions and civil society organisations, before proceeding with the ITS of the Gauteng Open Road Tolling plan. Had it done so it could have conceivably avoided the present impasse.

Jon Tullett, a senior editor for ITWeb, appealed to OUTA to raise the alarm stating;

"It is coming up on 8 weeks since the last major incident was demonstrated, leaking customer details, and Sanral apparently has yet to establish how many user accounts were compromised, never mind which accounts they were. More to the point, it has neither notified compromised account holders of the crime, nor notified its user base as a whole that their personal data may have leaked".⁴²

In a follow up interview he said that he has "*never in his career as an internationally experienced specialist IT journalist, come across the same level of defensiveness that Sanral executives have shown during his interviews with them.*"

This may sound ominous, but it is perhaps indicative at a subconscious level that Sanral executives are beginning to realize that they are now in *impasse*.

ODIOUS TAXATION

It would appear from the significant resistance across all sectors of society within Gauteng and other parts of the country, that the introduction of e-tolling on an existing urban freeway system that has already been paid for amounts to double taxation. This becomes more problematic when applied to social infrastructure on which citizens rely to commute daily to work and back, so as to earn a living, and in the absence of a safe, reliable and efficient integrated urban transport system. They pay taxes on their earning and have the right to benefits. Urban roads are not the occasional routes one

⁴² Personal correspondence. 9th February 2014 & Sanral in denial" – IT Web, Jon Tullett, 14th February 2014 .

takes on holiday or to visit other cities. This factor alone is a strong motivator for urban commuter road development to be funded using general and fuel levy taxation.

Furthermore, this logic is supported by the recommendations in the Presidential Review Committee Report on State Owned Entities in May 2013⁴³, which stated in recommendation #21 that “*Funding of social infrastructure, including roads, should have less reliance on the ‘user pays’ principle, and more on taxes.*” This approach not only allows for people to commute to and from work, but also places of worship, sports, schools and recreation without being constrained by affordability and onerous conditions which detract from their quality of life, prosperity and productivity in the urban environment - the precise purpose of social infrastructure.

CRISIS OF LEGITIMACY

In a constitutional democracy the all-important ingredient of *public acceptance* must, of necessity, embody the meaningful pro-active commitment to human rights by political representatives and senior officials. When people in authority (the governors) want the rest of society (the governed) to behave, it matters first and foremost how they themselves behave⁴⁴.

It is a matter of the adherence by the State (and any state owned enterprise such as Sanral) to what sociologists and criminologists term the **Principle of Legitimacy**. In essence this means that the legitimacy of any authority derives from three interrelated warrants:

1. The extent to which people subject to that authority are listened to and respected;
2. A reasonable consistency over time in the laws imposed by the authority;
3. The fair and impartial application of the laws without fear, favour and prejudice. (Discrimination between people may only legitimately occur, if it is manifestly in the interests of the most vulnerable people of society.)

Any shortcoming in the above three warrants is indicative of social injustice which the State, under a democratic constitution such as South Africa’s, must address. Under conditions where a tendency toward de-legitimization exists, any recourse by an otherwise legitimate authority to the use of inappropriate threats, force and coercion to impose authority on any person who is perceived to be disobedient to its law, only serves to further delegitimize its authority. Accordingly, what might otherwise be considered sound measures to bring about law and order in society and foster respect for the rule of law and good citizenship, become precisely the opposite - the cause of further resistance, instability and disorder, the likes of which is taking place on the e-toll matter.

International evidence (and common sense) indicates that for an e-tolling system to work best, *every* user must pay. The current manual boom toll plaza based collection system achieves this even though the manual (or partially automated boom) collection

⁴³ See page 21 of the Executive Summary of the report:
http://www.thepresidency.gov.za/ElectronicReport/downloads/volume_1/volume_1.pdf

⁴⁴ See the latest bestselling book by Malcolm Gladwell, *David and Goliath: Underdogs, misfits and the art of battling giants*. Little Brown and Co. 2013.

process, which lacks the instantaneous efficiency of an automated electronic toll system. However if the users do not buy into an automated system (for whatever reason), and if the State lacks either the legitimacy or the practical capacity to impose sanctions that encourage (not threaten) compliance, the system will be neither financially sustainable nor systemically viable.

In the case of the Gauteng e-tolling system, the Criminal Justice system would never be able to cope with even 10% (250,000) of road-users defaulting, let alone a level of 60% (or some 1,5 million), which is where it currently stands as of August 2014. In our view, when looking into the international systems that fail, even at 80% compliance, those paying become irate with the fact that too many (the other 20%) are not paying and the system starts to spiral downward, slowly at first, but gradually the problem worsens and the collection process quickly becomes too difficult and costly to manage.

If the projected output of the system falls far short of meeting the contractual obligations Sanral has set for the Electronic Tolling Company, the financial subsystem will in turn be under strain and the ramifications for society immense. Sanral will fail to achieve revenues to meet the administration and the interest portion, let alone the capital repayment of the loan. In the OUTA court papers, Sanral mentions their initial expectations to achieve 93% compliance rate, which today can be construed as grossly out of touch with reality, even though this level was very necessary for the system to succeed. It is clear to OUTA that the present executive leadership of Sanral cannot see it is ultimately in Sanral's best interest to be transparent with the exact details of the e-tag penetration rate achieved. It appears that they are terrified of facing the awkward truth that public acceptance is far short of viability or workability in the medium to long term.

Most critically for any system to be or remain viable, the purpose of the system must withstand scrutiny in terms of **ethical legitimacy**. Unfortunately for Sanral, the GORT system finds itself on an even steeper hill, amidst a broader Government legitimacy crisis because of persistent questions about Nkandla, the Spy Tapes, Marikana, the Gupta Wedding Scandal, the Auditor General's report on wasted taxes etc.. These factors have been further compounded by an ailing economy, high fuel prices and a weaker rand, all of which adds more troubled waters to their dilemma, as large numbers of society begin to openly boycott the system in an irate display of defiance against Government and Sanral, for failing to take the users of the system into their confidence.

Minister Peters' may order Mr Alli to fix the operational efficiency problem and cut the wastefulness, however, it will take a lot longer to do than Sanral is prepared to concede, and it will require a quality of leadership that is not prone to self-deception. Apologies to entice compliance will also simply not suffice at this late stage. Moreover Sanral does not help itself by being cagey and scant about the information sought by its critics and secrecy challenges in court. That pattern of denial was evident when their e-toll scrutiny problems began to surface in 2010 and has not abated. Sanral has no commercial competitor and its critics are not the enemy: they are the very people that Sanral is supposed to serve. The continuous lack of transparency displayed by Sanral executives has eroded the very quality that is needed from the human/behavioural subsystem: **trust**.

The operational and strategic viability ultimately depends on what happens at the normative level. Without a sound, incontestable and inclusive normative ethical rationale for e-tolling, solving the strategic and operational problems will ultimately be an exercise in futility, and the impasse will continue.







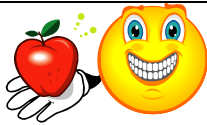
8. THE WAY FORWARD.

A command and control type of management and leadership attempts to force people to submit. However, you can force people to submit, but you can never force them to cooperate.

To garner public support, leaders need to inspire people with a vision for what could be, just as the mayor of London, Ken Livingston did, when he engaged with the citizens of his city to agree to the introduction of an ITS based inner-city congestion charge.

The e-tolling system uses impressive and sophisticated technology, the gantries have architectural design merit, and the roads that have been built are world class. So why the lack of enthusiasm from Gauteng motorists?

This continuum helps explain why.

Opposed	Negatively compliant	Neutral	Compliant	Positively compliant	Enrolled	Committed.
						

The prudence of public participation programs is to give stakeholders the opportunity to interrogate and influence a proposed plan or vision so that they move as far along from the left to the right, before the scheme comes into operation. It is only to the extent that a critical mass of stakeholders are clustered in the right half of the spectrum that any ambitious innovation that requires the support of the public, can hope to succeed. There will always be some who are reluctant to follow, and some who might be violently opposed to it. But the system becomes relatively successful if the majority are supportive, allowing the administrators to concentrate on sanctioning the reluctant and the opposed, knowing that the greater public interest is being served, because the majority are clustered densely along the right side of the continuum.

The fact that the enthusiasm levels of the Gauteng Freeway users is so low, means that it cannot be sustained without considerable application of negative sanctions by the authorities. Even then, if there is lack of moral sanction and ethical underwriting, it will become impossible for the required levels of enforcement to be sustained. South Africa simply cannot return to being a police state.

Thus with empirical evidence from both successful and failed ITS e-tolling cases and the conceptual analysis conducted by OUTA and others, the message ought to be clear that the Gauteng e-toll system was in trouble before it started.

Whereas the examples of success in London, Stockholm and others reflect excellent public engagement programs which garnered the support of society to enable their positive outcomes, those that failed or are in trouble (Manchester, Edinburgh, California,

Portugal, Hong Kong, Australia and others) suffered from poor public acceptance, or high collection costs and shortfall in revenues anticipated. In some cases, these systems started out at well over 80% compliance and still fell short. The GORT system started out with only 15% of users with e-tags fitted and as more corporate and government fleet vehicles became tagged, along with some of the public who did so out of fear, this number grew and stabilised at around the 40% level. Over the past several weeks, OUTA has seen a growing number of people who are enquiring and stating their decisions of 'de-tagging' and opting to defy the system.

We simply cannot see how the Gauteng's e-toll compliance will ever manage to achieve the required levels for success. If Sanral Executives have indeed lowered their sights and making statements that their "targets are being achieved", they are only fooling themselves, and if their higher level authority allows them to perpetuate the self-deception they too become complicit.

E-tolling has proved a highly divisive and controversial issue, partly for reasons that lie outside and beyond the internal logic and rationale of the system. Paradoxically one of the unintended benefits it has brought is to unify Gauteng residents across historical race, class, political alliances and ideological divides, but alas not in support of the system but in *opposition* to it.

The time is over for excuses and rationalisations. The reality is that Gauteng is now a province prone to significant societal conflict over the e-toll decision and this does not bode well for success with the project.

OUTA PROPOSALS.

1. A suspension of e-tolling and an invitation to stakeholders to engage in a facilitated process to imagine what a truly integrated urban transport and congestion management system for Gauteng would look like, to address its future / expected commuter and congestion problems.
2. During the suspension of e-tolling, the following alternative options are considered as a temporary (or permanent) funding alternative:-
 - a. The funds required for the settlement of the bond is paid for out of current fiscus, bearing in mind that the fuel levy has been increased by R0.55c since the completion of the GFIP in 2011/12, which adds a further R12bn to the coffers of Government.
 - b. If indeed these funds proposed in (a) above are not available, then we propose the national fuel levy is increased appropriately (estimate R0.09c per litre) to raise the revenues to meet the GFIP financial commitments of approximately R1,9bn per annum.
 - c. If indeed a National fuel levy is a bridge too far for the authorities to accept - as suggested in (b) above - then we propose a combination of the national fuel levy and an 'inland' fuel levy be adopted. An 'inland' fuel levy will have the effect of concentrating some of the charge to Gauteng motorists, who make up the vast majority of inland motorists. Government has ring-fenced levies on fuel in the past, which suggests there is reason to believe this option can be applied in this instance. We believe this combination of a National Fuel Levy at R0.05c per litre and the Inland Fuel Levy at R0.07c per litre, might be an answer to the funding

option see table below).

- d. A third option takes into account that because the nation as a whole benefits from the productivity and success of the Gauteng Region, some of the GFIP funding should be extracted from the general fiscus. Even those who don't drive benefit from road infrastructure. As such we propose a hybrid of National Fuel Levy (R0.028c) & the Inland Fuel Levy (R0.05c) and General Taxation (R650m per annum) should apply, to raise the estimated R1,9bn required to fund the capital bonds and interest over 20 years:-

The table below gives a breakdown of the calculations of all three options in 2 a, b & c.

ALTERNATIVE FUNDING PROPOSALS FOR GFIP		OPTION 2 (b)			OPTION 2 (c)			OPTION 2 (d)		
		Fuel Levy Increase	Revenue Generated	% to Tot.	Fuel Levy Increase	Revenue Generated	% to Tot.	Fuel Levy Increase	Revenue Generated	% to Tot.
* Funds Required to finance GFIP (pa)	1,900,000,000									
NATIONAL FUEL LEVY (Litres pumped):	22,976,000,000	R0.087	R1,998,912,000	100%	R0.042	R964,992,000	50%	R0.028	R643,328,000	33%
GAUTENG WEIGHTED - "Inland" Fuel Levy: Inland Litres Pumped **	10,339,200,000			0%	R0.093	R961,545,600	50%	R0.063	R651,369,600	33%
GENERAL TAXATION:				0%			0%		R650,000,000	33%
TOTAL ANNUAL REVENUE GENERATED FOR GFIP FUNDING >			1,998,912,000	100%		1,926,537,600	100%		1,944,697,600	100%

* Based on Standard Finance Model of R20bn paid over 20 years (straight line capital depreciation) at interest rate of 12%

** Inland fuel pumped is estimated at 45% of total, of which Gauteng is estimated at 80% of inland fuel pumped and 36% of national volumes (estimates to be verified).

3. Furthermore, we propose that a multi-lateral and multi-party working group of government, business, labour and civil society representatives is established to examine in more detail, the best options for raising the necessary funds for:-
 - a. Repay the bonds and interest for GFIP, over 20 years.
 - b. Extricate the nation from current contracts.
 - c. Combined in this discussion, should be the inclusion of how the region can fund an accelerated improvement / upgrade and expansion of its proposed integrated public transport infrastructure.
 - d. And funding of the planned additional freeways (PWV5, 9, N14 etc.).

4. One should not eliminate the view that if indeed at some stage in the future, when good public transport alternatives are in place, an ITS tolling system may become possible, but only after a thorough public engagement and approval process has been conducted to obtain societies acceptance of this methodology to manage and ease future congestion, the likes of which was successful in Stockholm.

Until then, the e-toll Gantries can be put to good use in the following manner:

 - a) Traffic volume monitoring and redirection.
 - b) Communication to motorists of traffic alerts & congestion.
 - c) Average seep over distance monitoring and law enforcement.
 - d) Surveillance and policing of cloned / false number plates and poor road behaviour.
 - e) Stolen vehicle tracking and policing.

We believe a collaborative effort and approach by all stakeholders on this matter will improve the credit rating of Sanral and will achieve the best possible result for both citizen and the state.

9. CONCLUSION.

In 1893 the government of President Paul Kruger in Pretoria angered the *Uitlanders* who had flocked to Johannesburg to dig for gold by erecting tollgates on the seven major entrances into the Johannesburg gold fields. The diggers complained that these were punitive taxes to provide revenue for the near bankrupt Zuid Afrikaanse Republic, not to maintain the roads. To travel from the one city to the other was a time consuming expedition. One needed a good reason to do so. On the rare occasions that President Kruger did so it made headline news. *The Star* newspaper at the time was filled with angry editorialising and letters complaining about the injustices of the Boer Government on the matter of tolling and a host of other grievances. Seven years later war broke out, that cast an exceedingly long shadow over the entire century that followed.

But for the fact that they are protesting against e-tolling of motor vehicles rather than against toll gates for charging for animal drawn wagons, today *The Star* and other media contain sentiments of anger and outrage that are not too different in substance to what appeared in the 1890's.

Whereas the residents of Pretoria and residents of Johannesburg were in opposite camps in the 1890's today residents from both Tshwane, Johannesburg and other metropolitan areas within the region, are united in their opposition to the 'tax' of e-tolls. Fortunately, in contrast to then, today they are able to do so backed by a non-racial constitution which guarantees their freedom of expression and a host of other fundamental rights which empower the citizens to hold Government accountable.

It is never too late to halt the journey down a dangerous path and embark along a safer and more prosperous route that garners the support of ones people. Persisting and pursuing with the current e-toll journey scheme will further drive a wedge between our Government and its people. The unintended consequences of innocent people being caught up in the mess will pose problems far too serious to contemplate.

There are simply too many factors loaded against Sanral and the governing authorities on this GORT project. The examples on the international stage are there to clearly see why this scheme has an extremely high probability of failure. Furthermore, Sanral's conduct and poor public engagement process at the outset has robbed this society of a wonderful opportunity to have explored the introduction of a world class ITS system, which may have replaced the wider freeway network with a much needed and vastly improved integrated public transport system, or a combined variation / hybrid outcome thereof.

With the real possibility of a meaningful public participation program and collaborative approach to the dilemma, we believe that it is not too late to achieve a genuine and committed societal support of a new plan to settle the debt on the GFIP

loans, whilst addressing the broader issues of Gauteng's traffic congestion going forward.

In publishing this assessment OUTA has gone a step further than simply complaining that those rights and opportunities have been infringed. We have indeed 'cursed the darkness', but have sought to light a candle by exercising responsibility to show due respect for the complexity of the issues, and to suggest a way forward in the hope that those in authority will exercise the necessary leadership, to lead Gauteng out of the impasse.

Wayne Duvenage
Chairperson – OUTA

John GI Clarke
Consultant Social Worker

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ANNEXURE 1. FUEL LEVIES.

FUEL LEVY REVENUES (source SARS & SAPIA)

Tax Year (to Mar)	* Fuel Levy (SARS) R Millions	% Increase	PETROL						DIESEL					
			Incr in April of Year ...	Fuel Levy Tariff	% Increase	For Cal Year of ...	** Litres PETROL Pumped Approx (SAPIA) Millions	% Increase	Incr in April of Year ...	Diesel Levy Tariff As at 31 Dec	% Increase	For Cal Year of ...	** Litres DIESEL Pumped Approx (SAPIA) Millions	% Increase
2003/4	16,652			1.01		2003	10,667		2003	0.85		2003	7,263	
2004/5	19,190			1.11	9.9%	2004	10,985	3.0%	2004	0.95	11.8%	2004	7,679	5.7%
2005/6	20,506			1.16	4.5%	2005	11,165	1.6%	2005	1.00	5.3%	2005	8,115	5.7%
2006/7	21,844	6.5%	2006	1.16	0.0%	2006	11,279	1.0%	2006	1.00	0.0%	2006	8,708	7.3%
2007/8	23,740	8.7%	2007	1.21	4.3%	2007	11,558	2.5%	2007	1.05	5.0%	2007	9,755	12.0%
2008/9	24,884	4.8%	2008	1.27	5.0%	2008	11,069	-4.2%	2008	1.27	21.0%	2008	9,762	0.1%
2009/10	28,833	15.9%	2009	1.50	18.1%	2009	11,321	2.3%	2009	1.35	6.3%	2009	9,437	-3.3%
2010/11	34,418	19.4%	2010	1.68	11.7%	2010	11,455	1.2%	2010	1.53	13.0%	2010	10,170	7.8%
2011/12	36,602	6.3%	2011	1.78	6.0%	2011	11,963	4.4%	2011	1.63	6.6%	2011	11,225	10.4%
2012/13	40,410	10.4%	2012	1.98	11.3%	2012	11,714	-2.1%	2012	1.83	12.3%	2012	11,262	0.3%
2013/14 (Est)***	46,055	14.0%	2013	2.14	8.4%	2013	11,714	0.0%	2013	1.99	9.0%	2013	11,262	0.0%
2014/15 (Est)****	50,512	9.7%	2014	2.34	9.3%	2014	11,714	0.0%	2014	2.19	10.1%	2014	11,262	0.0%

NOTES:

* <http://www.sars.gov.za/About/SATaxSystem/Pages/Tax-Statistics.aspx>

** SAPIA Annual Report 2103

*** Fuel volumes not yet available from SARS / SAIPA. However, conservative use of fuel volumes pumped during 2012/3 tax year and the fuel levies applied for this year, we estimate the fuel levy to generate a minimum of R47,5bn revenue to treasury coffers for the year ending March 2014.

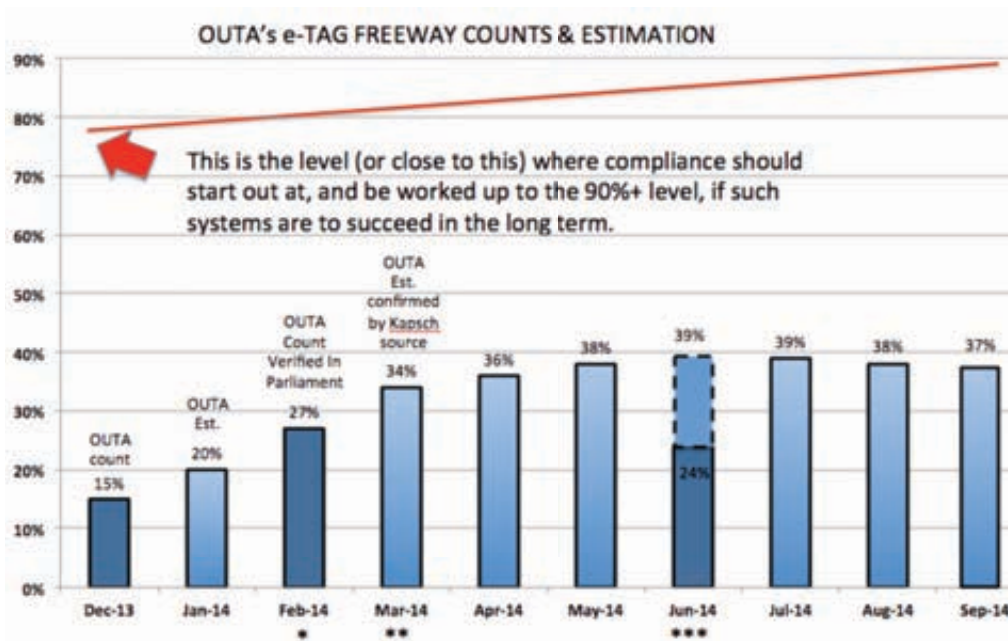
**** Fuel volumes not yet available from SARS / SAIPA. However, conservative use of fuel volumes pumped during 2012/3 tax year and the fuel levies applied for this year, we estimate the fuel levy to generate a minimum of R47,5bn revenue to treasury coffers for the year ending March 2015.

Table 1: Summary of Key Performance Indicators (KPIs)

KPI Category	Description	2013-14			2014-15		
		Value	Target	Notes	Value	Target	Notes
Customer Satisfaction	Percentage of customers satisfied with service	84%	85%	4Q	90%	90%	Target
Operational Efficiency	Percentage of operations completed on time	99%	98%	9T	99%	99%	Target
Financial Performance	Percentage of budget variance	99%	98%	9T	99%	99%	Target
Service Quality	Percentage of service quality complaints resolved	99%	98%	9T	99%	99%	Target

Notes:

1. The data is based on the most recent available information. The figures are estimates and may vary slightly from the actual figures. The data is based on the most recent available information. The figures are estimates and may vary slightly from the actual figures. The data is based on the most recent available information. The figures are estimates and may vary slightly from the actual figures.



Notes:

The data is based on the most recent available information. The figures are estimates and may vary slightly from the actual figures. The data is based on the most recent available information. The figures are estimates and may vary slightly from the actual figures. The data is based on the most recent available information. The figures are estimates and may vary slightly from the actual figures.

ANNEXURE 3B. RESPONSE FROM SANRAL (VIA WERKSMANS).



DELIVERED BY EMAIL

OUTA - Opposition to Urban Tolling Alliance
Attention: Wayne Duvenage
Email: wayneduv@gmail.com

Johannesburg Office
155 5th Street
Sandton 2196 South Africa
Private Bag 10015
Sandton 2146
Docex 111 Sandton
Tel +27 11 535 8000
Fax +27 11 535 8600
www.werksmans.com
enquiries@werksmans.com

YOUR REFERENCE:
OUR REFERENCE: Mr D Hertz/cjf/SOUT3114.114/#3187424v2
DIRECT PHONE: +27 11 535 8283
DIRECT FAX: +27 11 535 8683
EMAIL ADDRESS: dhertz@werksmans.com

14 August 2014

Dear Sir

GAUTENG FREEWAY IMPROVEMENT PROJECT : CONSTRUCTION COLLUSION

- 1 We, as you are aware, represent the South African National Roads Agency (SOC) Limited ("our client"/"SANRAL").
- 2 Our client has handed to us a copy of your letter ("your letter") dated 11 June 2014 for our attention and reply.
- 3 Your letter was forwarded to the Minister of Transport who has requested SANRAL to respond on her behalf,
- 4 It is correct that OUTA has been an adversary of SANRAL for some time. That said, our client has taken note of the content of your letter and instructed us to respond as set out below -
 - 4.1 following the confirmation by the Competition Tribunal on 22 and 23 July 2013 of various consent orders relating to tender collusion cartels in the construction industry, we were retained to advise SANRAL on possible claims against the persons involved in such cartels and who had admitted to tender collusion for work commissioned by SANRAL;
 - 4.2 our client intends to recover from the persons involved in the abovementioned tender collusion any and all damages it may have suffered resulting therefrom;
 - 4.3 our client is not, at this stage, prepared or obliged to disclose the legal advice received (which remains privileged from production) but will respond to your queries, to the extent necessary, once its actions are a matter of public record.

Werksmans Inc. Reg. No. 1990/007215/21 Registered Office 155 5th Street Sandton 2196 South Africa
Directors DG Williams (Chairman) AL Armstrong BA Aronoff DA Arteiro T Bata AR Berman MN Bhengu L Bick GT Bosr TJ Boswell MC Brönn W Brown PF Burger PG Cleland JG Cloete PPJ Coetser C Cole-Morgan D Corbett JN de Villiers GW Driver LJ du Preez RJ Feenstra S Fodor SJ Gardiner D Gewer H Goolam R Gootkin ID Gouws GF Griessel D Hertz J Hollesen VR Hosiosky BB Hotz HC Jacobs TL Janse van Rensburg N Jansen van Vuuren G Johannes S July J Kallmeyer SLG Kayana A Kenny BM Kew N Kirby HA Kotze S Krige P le Roux MM Lessing E Levenstein JS Lochner L Louw JS Lubbe BS Mabasa PK Mabaso PM Madala MPC Manaka PJG Mason H Masondo C Moraitis KO Motshwane TA Mthiyane J Nickig JJ Niemand GA Nott BPF Olivier WE Oosthuizen M Pansengrouw CP Pauw AV Pillay T Potter BC Price AA Pyzikowski RJ Raath L Rood BR Roothman W Rosenberg NL Scott LK Silberman JA Smit JS Smit CI Stevens PO Steyn J Stockwell JG Theron JJ Truter KJ Trudgeon DN van den Berg HA van Niekerk FJ van Tonder JP van Wyk A Vatalidis RN Wakefield DC Walker D Wegierski M Wiehahn DC Willans E Wood BW Workman-Davies **Consultant** JM Bortz

JOHANNESBURG • CAPE TOWN • STELLENBOSCH • TYGER VALLEY



- 5 For the reasons detailed above, we do not intend to respond substantively to your letter or address the interrogatories therein at this stage. Our client's right to do so in due course is reserved.

Yours faithfully

Werksmans Inc
THIS LETTER HAS BEEN ELECTRONICALLY TRANSMITTED WITH NO SIGNATURE.

ANNEXURE 4A. TABLE OF COMPLAINTS - BREAKDOWN.

E-TOLL OUTA COMPLAINTS VIA OUTA

MONTH	* AUTOMATED COMPLAINTS PORTAL	** OUTA WEB SITE	TOTAL
Dec-13		253	253
Jan-14		212	212
Feb-14	657	236	893
Mar-14	3,854	216	4,070
Apr-14	1,931	237	2,168
May-14	956	180	1,136
Jun-14	677	317	994
Jul-14	419	327	746
Aug 14 (to 25)	364	280	644
TOTAL	8,858	2,258	11,116

* OUTA received many complaints from motorists on e-toll billing errors and disputes with SANRAL on the bills received. We therefore felt it prudent to introduce a safe and confidential system which channelled these billing queries through a portal on the OUTA web site, directly to SANRAL, who could then handle the enquiries and respond back to the individual (using their unique reference provided), to answer the complainant. Thus the nature of these complaints were billing queries.

NATURE OF THE VPC DISPUTES	No. OF DISPUTES RAISED	DOCUMENTS RECEIVED BEING QUERIED
Photo evidence provided is not my vehicle:	807	Account Statements: 4,293
Photo evidence provided is unclear to verify if this is my vehicle:	2,871	Copy Tax Invoice: 4,057
The detail provided is insufficient to confirm these charges relate to my vehicle:	4,714	Correspondence Document: 3,452
I require a clear breakdown of each gantry transaction and tariffs to verify if these are my movements:	5,727	Transaction Report: 4,232
I need photo evidence for each gantry event as I think someone has cloned my numberplate:	4,795	Tax Invoice: 1,002
I have no tax invoice for this account:	4,446	
The gantry tariffs displayed on the highway do not match with the charges reflected:	3,497	

** The OUTA web site has a "contact us" page for members of the public to share with us some of their concerns and frustrations. The nature of these complaints are as follows:-

COMMON THEMES OF COMPLAINTS / QUERIES / CONCERNS
Roadblocks - intimidation
Can my Renewal of licence be halted?
Incorrect billing
Alternate rate not advertised
Threats of prosecution from call centre staff
I have an e-tag and my bill is incorrect
I have a paid up e-tag and I'm still getting bills (double billing?)
I've put money into my e-tag account and it never reflected (very common concern raised)
I registered and paid in time to qualify for the Standard rate, yet higher alternative rate was applied. (very common)
Not my car (very common concern)
I simply cannot afford e-tolls (very common complaint)
I've never received a bill, what do I do? (very common)

ANNEXURE 4B. EXAMPLES OF COMPLAINTS.

From: [REDACTED]
Subject: **OUTA Contact Us - Incorrect EToll Billing**
Date: 20 August 2014 12:21:41 GMT+02:00
To: rob@outa

From: [REDACTED]
Subject: OUTA Contact Us - Incorrect EToll Billing

Message Body:
To whom it may concern:

I received an invoice from SANRAL for a vehicle I no longer own for a date that is incorrect. I moved to Cape Town prior to ETolls going live and at the time of the invoice, I was in Cape Town – and no longer the owner of the vehicle.

I just want to know if you need additional evidence (cases like these) and if so, where can I send the invoices to. I will not pay the amounts nor query it.

Regards,

[REDACTED]

--

This mail is sent via contact form on OUTA <http://www.outa.co.za/site>

From: [REDACTED]
Subject: **OUTA Contact Us - e-toll charging 200% interest**
Date: 25 August 2014 08:17:51 GMT+02:00
To: rob@outa

From: [REDACTED]
Subject: OUTA Contact Us - e-toll charging 200% interest

Message Body:
Dear OUTA,

I am at wits end with E-toll as advertised I paid nearly R9600 in the promise that I would be given a 63% discount as a credit within 15 days which should have been in 15 July 2014. They have not credited me and ask me to pay more now which includes 200% interest, I am refusing to pay and telling them that they are no failing me. I am shocked at them charging me 200% and want to know if this is legal and if I can take them to court.

I would be grateful for some advice

Regards

--

This mail is sent via contact form on OUTA <http://www.outa.co.za/site>

From: [REDACTED]
Subject: **OUTA Contact Us - large amount of paperwork for Sanral**
Date: 22 August 2014 08:58:31 GMT+02:00
To: rob@outa

From: [REDACTED]
Subject: OUTA Contact Us - large amount of paperwork for Sanral

Message Body:
Dear OUTA. I recently received a SANRAL e-toll account, for a car that is not mine. I have a sedan, and the photo shows a mini-bus. You reported this to Sanral for me. Now Sanral want to fill out a 2 page forms, get an affidavit signed and send them the original documents. I am self employed, and don't have the time or inclination to do what they request. What the implications of ignoring this unreasonable request ?

--

This mail is sent via contact form on OUTA <http://www.outa.co.za/site>

From: [REDACTED]
Subject: **OUTA Contact Us - support against e-toll**
Date: 27 August 2014 10:52:12 GMT+02:00
To: rob@outa

From: [REDACTED]
Subject: OUTA Contact Us - support against e-toll

Message Body:

i am totally against e-toll because they contribute in stifling the economic growth in the country, as unemployed drivers have to drive around seeking to find jobs or using their vehicles to transport their wares to make a living. henceforth i am not going to pay because i cant afford the e toll fees. Is this government entity expect unemployed drivers to stay at home? Also is the fate of the students and scholars using these roads being considered?

--

This mail is sent via contact form on OUTA <http://www.outa.co.za/site>

From: [REDACTED]
Subject: **OUTA Contact Us - E-TOLL**
Date: 27 August 2014 16:15:51 GMT+02:00
To: rob@outa

From: [REDACTED]
Subject: OUTA Contact Us - E-TOLL

Message Body:

Good day, i am honestly disappointed in what our country is doing to us...i mean the necessity of paying fines, e-tolls, petrols , taxes at the same time is ridiculous...i mean the way the fees are it is really worrying as to how they scale..does this mean we get employed to take the money back to the government? what exactly are they saying to us? i mean really, i am one of those who CANNOT afford this kind of unnecessary expense and am not prepared to do that., they should really sit down and reconsider.,and everyone has their rights, i cannot be forced to pay for using a road with a car that's in my name...how will i save or apply for bond, or support my parents as im the current bread winner? then where is e-toll fitting in my expenses? NO.....NO.....No

--

This mail is sent via contact form on OUTA <http://www.outa.co.za/site>

From: [REDACTED]
Subject: **OUTA Contact Us - E-toll. Vpc acc no.10921015696**
Date: 27 July 2014 19:10:45 GMT+02:00
To: rob@outa

From: [REDACTED]
Subject: OUTA Contact Us - E-toll. Vpc acc no. [REDACTED]

Message Body:

From December 2013 I received statements from Sanral that I owe them for using e-toll up to now about R6000. The problem is that I am staying in Durban not Johannesburg and never used the E-toll. I have send Sanral about 15 emails, phoned them on several times explaining to them that I live in Durban driving a 2013 Ford Figo and not a Honda Ballade about a late eighties model according to their photo evidence. Furthermore this person is using the E-toll at Tembisa, Kempton Park. The only answer and reply I get from them is that I remain responsible for paying this statement although everyone but them can see its a false number plate. As they got all my details from the E-natis computer why can't they see it's not my vehicle. Please forward this to them maybe you will have more luck with them as they are threatening me now with this unpaid e-toll statement.

Thank you

[REDACTED]

--

This mail is sent via contact form on OUTA <http://www.outa.co.za/site>

From: [REDACTED]
Subject: OUTA Contact Us - e- tolls
Date: 24 July 2014 13:20:39 GMT+02:00
To: rob@outa

From: [REDACTED]
Subject: OUTA Contact Us - e- tolls

Message Body:

My wife inherited a 1992 model car a year ago from her aunt after her aunts husband died. The car was registered in July 2013 into my name. At irregular intervals I use the R21, Ni and N14 and receive the inappropriate and confusing paperwork from Sanral. The prices charged are inconsistent and the pictures inconclusive to the drivers ID. I therefore ask them to forward me an invoice by registered mail and better quality pictures. To date these requests were ignored and hence I could not pay. I am an unregistered user and will remain so for a long time to come,

My wife received a phone call from her 86 year old aunt yesterday as to why she is receiving Sanral invoices for her late husbands car she knows was registered into my name a year ago. Can you explain that please. Does this mean that the OEM's are not getting invoiced by Sanral if the car owners fail to pay?

This system is corrupt and run by a dictatorship. Please, billing dead people and harassing widows – can it get worse?

Please, I need some guidance as I would like to give these morons a piece of my mind. Harassing old ladies!!!

--

This mail is sent via contact form on OUTA <http://www.oute.co.za/site>

From: [REDACTED]
Subject: OUTA Contact Us - Etoll acc
Date: 24 July 2014 19:48:05 GMT+02:00
To: rob@outa

From: [REDACTED]
Subject: OUTA Contact Us - Etoll acc

Message Body:

Im writing to you on behalf of my daughter. who is 18 years old and studies at Tuks she also stays at res. She received etoll accounts. The invoices show Modderfontein, Rivonia etc. Her car is at home. The photos also does not look like her car and the no plate doesnt look the same(numbers). MY worry is that if she doesnt pay the amount they will blacklist her and she is still so young she cannot afford to have a blacklisted name at such a young age. I sometimes use the car to go to my present work and take the Van Buuren offramp from Germiston to avoid etolls especially with her car, and thats the furtherest I will drive with her car.

Please advice.

Many thanks

[REDACTED]

--

This mail is sent via contact form on OUTA <http://www.oute.co.za/site>

From: [REDACTED]
Subject: OUTA Contact Us - Billing
Date: 24 July 2014 10:59:16 GMT+02:00
To: rob@outa

From: [REDACTED]
Subject: OUTA Contact Us - Billing

Message Body:

I asked why i was billed for a heavy vechile and after months they answered me that it was the correct bill according to the government gazette published.I live in a small town and this paper is not for sale here .Can you please inform me if they are allowed to do this.I think it is not fair since i don't use this road every day.

--

This mail is sent via contact form on OUTA <http://www.oute.co.za/site>

From: [REDACTED]
Subject: **OUTA Contact Us - The burden of proof for using toll roads**
Date: 21 July 2014 15:56:46 GMT+02:00
To: rob@outa

From: [REDACTED]
Subject: OUTA Contact Us - The burden of proof for using toll roads

Message Body:

Hello

Normal business practice requires that invoices show what has been bought. In the case of etolls is it reasonable to expect road users to TRUST SANRAL and its systems and to simply pay whatever they demand?
I would submit that it is not reasonable to expect a consumer to pay an account for toll fees FOR MULTIPLE TRIPS AND MULTIPLE GANTRIES where an attached photograph shows the consumers vehicle under a single unidentified gantry on a single date which does not cover the other dates of trips on the account.
I would therefore demand that EVERY gantry is identifiable on the photograph that shows my vehicle and that I receive a photo for every single gantry passed on every single trip I make. Without this, I would be being expected to TRUST Sanral admin which would be very unwise after having experienced the electricity billing shambles of the Joburg Metro.
Perhaps you could advise whether this is a reasonable demand. (not that I intend to pay unless I am summonsed to do so on principal)
regards
[REDACTED]

PS how does Outa know that people with etags are actually paying their bills or are the etags done on debit orders?

--
This mail is sent via contact form on OUTA <http://www.outa.co.za/site>

From: [REDACTED]
Subject: **OUTA Contact Us - Info please**
Date: 21 July 2014 09:33:29 GMT+02:00
To: rob@outa

From: [REDACTED]
Subject: OUTA Contact Us - Info please

Message Body:

This might sound silly, but...

I live in Cape Town and refuse to register for etoll. End of May, till end of first week of June in jhb/Pta. To date I have not received an invoice from them, and when I want to check if there is any balance against my name on the SANRAL sight, it demands from me to register before I can check the balance.

I don't want to register, no reason to as I live in the Cape.

But they say you must pay within 7days, but dont have an invoice?

Just another example of how fraudulent and broken their system is.

Do I just ignore, till I get locked up for it, because I did not get it?

--
This mail is sent via contact form on OUTA <http://www.outa.co.za/site>

From: [REDACTED]
Subject: **OUTA Contact Us - e Toll Statements**
Date: 18 July 2014 07:49:44 GMT+02:00
To: rob@outa

From: [REDACTED]
Subject: OUTA Contact Us - e Toll Statements

Message Body:

How do I get a detailed E toll statement from SANRAL if I am not registered?
Tried phoning SANRAL they can't help if you are not registered.They need a 16 digest ID number which I don't have.
Tried the kiosk in Killarney mall and 4only a total amount owing could be provided.

--
This mail is sent via contact form on OUTA <http://www.outa.co.za/site>

ANNEXURE 6. ESCALLATING COSTS OF GFIP

The Ever Changing Costs of the Gauteng Freeway Improvement Project (GFIP)

SOURCE DOCUMENT >	SANRAL Declaration of Intent 2005 - 2008, based on 2004 costs	SANRAL Documents to Dept of Transport in 2006	SANRAL Letter to Minister Of Transport 10 Jan 2008	SANRAL (Founding Affidavit of Appeal to Cons Court) June 2012	Lastest Media notifications - Including E-Toll Capital Costs	Adjusted to exclude contingencies, gantries etc
	2004	2006	2008	2011	2102	2012
GFIP ROAD CAPITAL COSTS (R Bn)	R 4.500	R 6.400	R 11.800	R 16.900	R 20.630	R 17.900
ROAD DISTANCE	340	185	185	194	194	194
# of Lanes (Est over length of GFIP)	6.5	8.7	8.7	8.7	8.7	8.7
# of Lane KMs	2,210.0	1,609.5	1,609.5	1,687.8	1,687.8	1,687.8
Cost per Lane KM	R 2,036,199	R 3,976,390	R 7,331,469	R 10,013,035	R 12,223,012	R 10,605,522
% Increase on previous 2004 figure		95%	260%	392%	207%	421%

NOTE 1: These figures have all been supplied by SANRAL

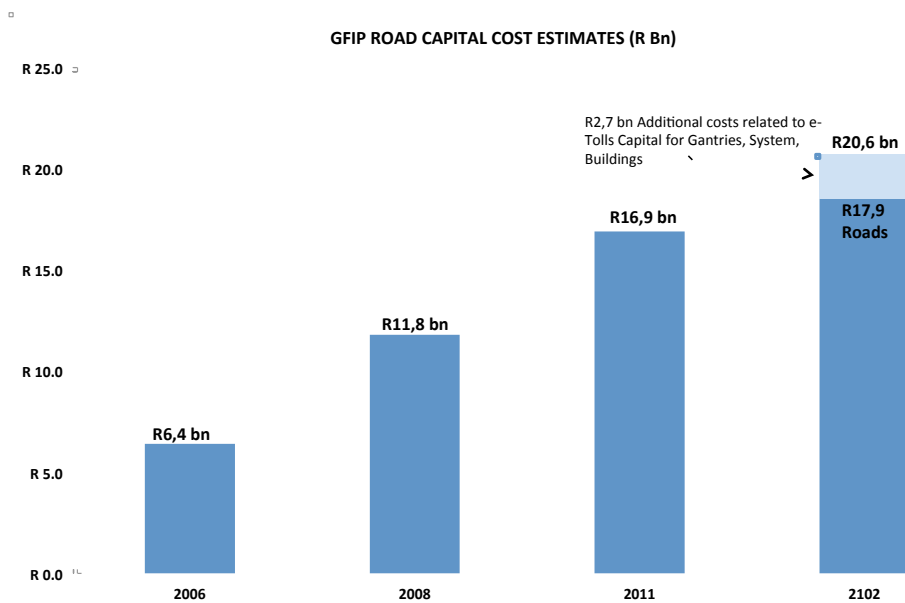
NOTE 2: Granted the scope of the plan may have varied somewhat to justify some of the increase.

NOTE 3: Granted, there could have been inflationary pressures above the norm which added to the higher costs

NOTE 4: Despite Notes 2 & 3 above, there are enough concerns which warrant an independent enquiry into the ever changing and seemingly exorbitant costs of the GFIP construction

NOTE 5: This is compounded by the current competition Commission and HAWKS investigations which have revealed collusion with in the industry players who were involved in GFIP Construction

NOTE 6: The distance reflected in 2004 of 304 km included other Gauteng freeways planned, beyond Phase 1 of 185km



PART C:

OUTA'S LEGAL CASE

An overview and summary of the merits, case developments and why OUTA maintains the Gauteng e-toll decision is unlawful.

MEMORANDUM

IN RE: THE UNLAWFULNESS OF E-TOLLING

DATE: 20 MAY 2014

-
- I am asked to provide a memorandum outlining the reasons why e-tolling on the Gauteng's freeways is unlawful.
 - Before doing so, it is necessary that I highlight three things.
 - First, I am mindful that the memorandum has been requested in order to be submitted to the Public Protector (and the Gauteng E-Toll Advisory Panel), as part of its input for investigation.
 - For this reason, I want to stress that the content hereof is drawn from affidavits and annexures thereto exchanged in various stages of the litigation between the *Opposition to Urban Tolling Alliance ("OUTA") and Others v The South African National Roads Agency Limited ("SANRAL") and Others* as well as the record filed by SANRAL and the Department of Transport pursuant to Rule 53 in the review.
5. In other words, the content hereof is taken from and can be referenced to documents filed of record under oath. This does not apply, of course, to facts that emerged or came into being after the filing of papers. But there are not many of the latter referred to or relied on.
 6. Second, this being a memorandum only, references to, or the attachment of, supporting documents are omitted. The underlying documentation can be provided to the Public Protector and assistance given with the identification of the most important documents in due course, should a decision be made to investigate the complaint.
 7. Third, in any memorandum on the unlawfulness of e-tolling in Gauteng, it is necessary to bear in mind the effect of the decision by the Supreme Court of Appeal in *Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Ltd and Others* [2013] ZASCA 148 ("*OUTA SCA*").
 8. In *OUTA SCA*, the SCA dismissed the application by OUTA and its co- applicants ("*OUTA*") for review.
 9. The SCA did so, however, on the basis of delay in bringing the review before Court and without reaching a decision on the merits.
 10. The effect of *OUTA SCA* (and OUTA's decision not to appeal to the Constitutional Court), therefore, is that the door has closed on the setting aside of e-tolling by a court on account of being unlawful in an administrative law review.
 11. The fact that in *OUTA SCA* the merits were not reached, however, means that the question of whether e-tolling is lawful or not has not yet been decided. In this regard, it is noteworthy that the SCA declined to affirm the clearly wrong decision by Vorster AJ in the High Court - the High Court judgment appealed against.

12. While the question of whether e-tolling is unlawful will, thanks to *OUTA SCA*, not be decided in an administrative law review, it may be in due course be decided in a criminal or civil court, however, should SANRAL resort to legally coercive means to enforce e-tolling.
13. This is because, according to the doctrine of collateral challenge, the State cannot enforce invalid or unlawful administrative action against an individual. Here unlawful administrative action includes administrative action that the courts have refused to set aside on account of delay.
14. Should an individual who is prosecuted for e-tolling raise the collateral or defensive challenge that e-tolling is unlawful, the court will have no discretion but to enquire into the same merits which were avoided by the SCA, and will have no choice but to decide whether e-tolling is unlawful.
15. A useful coincidence is that a high profile collateral or defensive challenge of the kind under discussion was successfully brought precisely in the context of tolling in *S v Smit* 2008 (1) SA 135 (T).
16. In that case, the accused had refused to pay toll on multiple occasions on the N4 and was charged with the offence of using a toll road without paying toll. The accused raised the defence that the declarations of the road as a toll road were invalid because of a failure on the part of SANRAL to conduct a proper public participation process as required by the SANRAL Act. The accused succeeded in showing in evidence that SANRAL indeed had not consulted as it was obliged to do and that, therefore, the toll declaration in question was unlawful. He was thus acquitted on the charges proffered against him.
17. In summation, in light of *OUTA SCA*, when the unlawfulness of e-tolling is referred to herein, the actual, substantive invalidity of the administrative action that underlies the e-toll system is what is being referred to.
18. This invalidity may form the basis of a successful collateral challenge to e-toll enforcement. If such challenge were to be successful, SANRAL will not be able to enforce e-tolling unless the invalidity of the toll declarations is suspended by the court pending the lawful re-introduction of e-tolling by SANRAL and/or the Department of Transport.
19. But until such time as a collateral challenge is brought, by virtue of *OUTA SCA*, the toll declarations, and therefore e-tolling, will be presumed to be lawful and road users will be liable to pay toll until such time as SANRAL and/or the Department of Transport, pursuant to a decision either made in the political process or as a result of the intervention of institutions protecting democracy, or both, decides to repeal tolling on Gauteng's freeways.
20. With that as an introduction, I turn to set out the reasons why e-tolling is unlawful.

FIRST GROUND: FAILURE TO COMPLY WITH THE MANDATORY PROVISIONS OF SECTION 27 OF THE SANRAL ACT

21. SANRAL failed to conduct the public participation process required by Section 27 of the SANRAL Act as a necessary precondition to declare a road a toll road.
22. SANRAL did go through the motions of publishing a notice of intent to toll the seven

sections of national road making up the GFIP (Gauteng Freeway Improvement Project) network as toll roads, but what they did fell far short of the requirements of Section 27 of the SANRAL Act read alone, and read in light of PAJA and Section 33 of the Constitution.

23. Before turning to the particular ways in which SANRAL failed the requirements of Section 27 of the SANRAL Act, it is helpful to stand back and consider the process followed by SANRAL.
24. In early October 2007, SANRAL published notice of intent to toll six sections of the N1, N3, N4 and N12 in approximately six newspapers.
25. The notices were published in a single edition of the newspapers.
26. In addition, SANRAL published the same notices in the Government Gazette.
27. SANRAL did nothing further to bring the notice of intent to toll to the attention of the public who were provided 30 days in which to respond.
28. Upon the expiry of the 30 days, SANRAL had received a total of 30 responses from the public.
29. SANRAL dealt with the content of the responses in its application to the Minister to declare the six sections of national road a toll road.
30. In April 2008, SANRAL published notice of intent to toll the seventh section of national road, namely, the R21, which, until recently, had been a provincial road, to be a toll road.
31. SANRAL published notice of intent to toll in two newspapers, namely, the Pretoria News and the Star, as well as in the Government Gazette.
32. SANRAL received two responses from the public within the 30 day period in which the public were given to respond to the notice of intent to toll.
33. In the two applications to the Minister, the first made in January 2008, in respect of the six sections of the N1, N2, N4 and N12, and the second in July 2008, in respect of the R21, SANRAL informed the Minister that they had properly consulted with the public.
34. But the public participation processes - both of them - had been completely meaningless.
35. The requirement of, and standard for, procedural fairness is settled law: “[Procedural fairness] is concerned with giving people an opportunity to participate in the decisions that will affect them, and – crucially – a chance of influencing the outcome of those decisions. Such participation is a safeguard that not only signals respect for the dignity and worth of the participants, but is also likely to improve the quality and rationality of administrative decision-making and to enhance its legitimacy.” (See the CC decision of *Joseph* and the SCA decision in *Mobile Telephone Networks*).
36. It must be fair and meaningful. And when a public participation process prescribed by an Act is not fair, the administrator must abandon it and instead follow a process that is fair in terms of section 4 of PAJA.

37. SANRAL did not do this. It could not afford to - for reasons I will return to.
38. The public participation process conducted was meaningless. It was not even lip service to the requirements of the SANRAL Act read with PAJA.
39. The GFIP network is used by a million road users each day, and a total of about 2.5 million users over the course of a month (so we have learnt from SANRAL).
40. All of those users would be directly and materially affected by the tolling of the roads and most of them have no choice but to use the roads on a daily basis, the alternatives not being adequate.
41. The public participation processes were entirely inadequate to inform the public, and Gauteng's road users, of what was in store for them and to provide them an opportunity to comment thereon and influence the decision to be made.
42. The fruits of this failure were seen in the massive public outcry in February 2011 with the publication of the tariffs notice informing the public how much they were to pay to use Gauteng's freeways, the belated attempts by the Department of Transport and the Gauteng Provincial Government to consult with the road-using public, and several public acknowledgments by the Minister of Transport to the effect that consultation with the public initially should have been better.
43. But how did SANRAL fail in law?
44. SANRAL failed in three ways.
45. Firstly, the content of the notice of intent to toll published by SANRAL was materially defective.
46. Section 27 of the SANRAL Act, properly interpreted, requires SANRAL to provide notice of the "*proposed declaration*" which should inform the public at least of the essentials of the project to be undertaken, that the road would be upgraded, that the approximate capital cost of the project would be R20 billion, that the project would be funded entirely through tolling and that the indicative cost of tolls to be paid would be 50 cents a kilometre.
47. All of this information was in the hands of SANRAL and the Department of Transport and had been communicated to the Cabinet.
48. None of this information found its way into the notice of intent to toll.
49. Instead, the notices informed the public that SANRAL would toll "*an existing road*" (which led a number of the persons responding to the notices to question why the road would be tolled for the reason that it had already been paid for with taxpayer's money).
50. There was no appreciation shown by any of the 32 respondents to the notice of the magnitude and cost of the project, and not a single response mentioned or showed any knowledge of the indicative cost toll of 50 cents per kilometre.
51. Several of the members of the public decried the lack of information and the lack of effort

on the part of SANRAL to inform the public of its plans.

52. The consequence of the defective content was that the public were not in a position to make meaningful comments and representations in response to the notice. They were unable, and had no opportunity, to influence the decision that would materially affect them.
53. Because of the defective content of the notices, the public participation process was rendered quite meaningless.
54. The second respect in which SANRAL failed the requirements of the SANRAL Act was the obligation to publish the notice generally.
55. SANRAL made no real effort whatsoever to properly inform the public, and in particular the road using public, of its intention to toll the GFIP network.
56. SANRAL could easily have done so by setting up signs beside the highways and/or off ramps in the manner it has so efficiently done for e-tag registration and informing road users of their obligation to pay toll.
57. The PAJA regulations provide that, where necessary, in order to bring notice to the attention of those persons who would be affected by the administrative action concerned, the administrator should make use of other media to provide notice and provided examples of radio, television and so on.
58. SANRAL has used all of these for the e-tag registration and in order to publicise payment of e-toll.
59. But it did not do so at the crucial stage at which the public should have been informed of its intent to toll.
60. The notice in respect of intent to toll the R21 was published only in two newspapers, the Star and the Pretoria News, in the business section of the international section of both of these newspapers.
61. The notice of intent to toll published in respect of the six sections of the N1, N3, N4 and N12 were, similarly, published only in a single edition of several newspapers, namely, the Star, the Sowetan, the Sunday Times, the Beeld, the Pretoria News. Furthermore, the notice was placed in the inner pages of these newspapers with no indication on the front of the newspapers that it contained the crucial notice.
62. A single notice sent out once and giving only 30 days to the public to react for a project of this magnitude was clearly and materially inadequate – especially when the entire group of persons most affected is right on SANRAL's doorstep and could easily and effectively be informed.
63. The third respect in which SANRAL failed to comply with the requirements of Section 27 of the SANRAL Act interpreted in light of PAJA and Section 33 of the Constitution, was that SANRAL provided insufficient time for the public to respond.
64. Section 27 of the SANRAL Act provides that the notice must be displayed for not less

than 30 days, in other words, the 30 day period is a minimum.

65. SANRAL provided the public with 30 days, but this was manifestly too short, especially in light of the defective notice and the inadequate publication, to allow the public to do its own investigation and meaningfully comment and make representations on the notice.
66. The reason for SANRAL's short cutting the public participation process would emerge in the Rule 53 Record. SANRAL was under self-confessed pressure to have Gauteng's freeways ready for the World Cup in 2010.
67. The correspondence exchanged between SANRAL and the Minister of Transport in the 12 months, or so, leading up to the public participation processes make repeated reference to the imperative of World Cup 2010 and to the increasingly "*tight timelines*" in which to comply with the SANRAL Act.
68. SANRAL sacrificed proper compliance with the law in favour of getting ahead with the project at all costs.
69. The Minister, in turn, looked the other way. The Minister should, at the very least, on being informed of the totally inadequate public participation process that had been conducted for a project of this magnitude, have sent SANRAL's applications back to it and required it to comply with the SANRAL Act.
70. Both failed in their obligation to the law and to the public.
71. It is to be noted that SANRAL trenchantly argue that they complied with the SANRAL Act, and that Section 27 requires no more than what SANRAL did by way of a public participation procedure. SANRAL's argument is plainly a *post hoc* justification for the failure to meaningfully consult. Moreover, SANRAL's interpretation of Section 27 renders the procedure meaningless and unfair, which implies only that SANRAL was bound by PAJA to follow a different and fair process, which SANRAL did not.
72. The consequence is that the toll declarations are invalid, and therefore unlawful, on the strength of Sections 2(b) & (c) of PAJA.

SECOND GROUND: THE MINISTER OF TRANSPORT FAILS TO CONSIDER THE COSTS OF TOLL COLLECTION

73. The second ground on which the toll declarations can be impugned is the failure of the Minister of Transport to consider the costs of toll collection before making his decision in terms of Section 27 of the SANRAL Act to approve the declaration of Gauteng's freeways as toll roads.
74. The cost of toll collection, which is a massive cost, is in many ways the main difference between tolling and other forms of road funding.
75. The other forms of road funding, whether by direct funding from the fiscus, the fuel levy, vehicle or licence fees, or a combination of the above, all do not entail the massive cost in administration of toll collection.
76. Open road tolling, or e-tolling, has an excessively high cost. On SANRAL's version, the

cost of e-tolling is 90% of the capital cost of the first phase of GFIP. On OUTA's version, the cost of e-tolling is closer to 149% of the capital cost - one and a half times the R 20 billion cost of the road upgrades themselves.

77. What was clear from the early stages in the OUTA application, and confirmed in the Rule 53 record, was that the Minister of Transport did not have the cost of toll collection placed squarely before him in SANRAL's application for approval.
78. In the application before the Minister, the cost of toll collection was absent - only the capital cost of the tolling infrastructure, a relatively small amount of R1.5 billion, was set before him.
79. This led OUTA and its co-applicants to allege in the founding and supplementary founding affidavits that the Minister had failed to consider the cost of toll collection before he approved tolling.
80. This failure on the part of the Minister takes on added significance in view of the power of approval he exercises in granting SANRAL approval to declare a road a toll road. The Minister, in exercising that power, stands between SANRAL and the public as a moderator and safeguard, protecting the public from a project that might be burdensome to them.
81. In the answering affidavits delivered on behalf of SANRAL, it was baldly alleged that the Minister was informed of the collection costs.
82. But the affidavit filed on behalf of the Department of Transport, which was deposed to by the Director-General, George Mahlalela (who was not even employed by the Department at the time), failed to pertinently deal with OUTA and its co-applicants' allegations in this respect.
83. This failure was pointed out by OUTA and its co-applicants in reply and heads of argument were filed by all parties on the case as presented.
84. The heads of argument were filed five weeks before the review.
85. Four days before the review was heard, the Department of Transport filed an affidavit by the Minister of Transport saying that he did consider the collection costs.
86. But the affidavit by the Minister of Transport only confirmed that he had failed in his duty.
87. This is because the costs that the Minister of Transport said he considered were not the costs of toll collection as calculated by the specialist toll consultants and included on page 69 of its report which had been annexed to the application for the Minister of Transport's approval.
88. Rather, the Minister had considered, so he said, the costs of toll collection as had been contained in a promotional document from two years before, the 2006 proposal, which contained only estimates of the costs of the project and in which, in one line, it was said that "*the cost of operations and maintenance is R200 million per year*".

89. The problem with what the Minister of Transport pointed to is that the single sentence was bereft of any empirical foundation, was, in the terms of the document, an estimate and not the product of specialist study, and also gave no insight into what proportion toll operations would cost and what proportion would go to maintenance.
90. To make matters worse, it was also unclear what "*maintenance*" referred to.
91. SANRAL sought to argue that maintenance referred to maintenance of the toll systems, and therefore was part of the tolling cost, but the text of 2006 proposal indicated to the contrary: that the maintenance referred to was routine road maintenance and fixing of potholes.
92. The Minister of Transport then went further to say that he considered this (unacceptably vague) figure as one of "*a myriad of considerations*" when he approved SANRAL's application to declare Gauteng's freeways toll roads.
93. In other words, he had relativized this massive cost component, which would materially impact upon, and be felt by, Gauteng's road users, to one of a myriad (literally "ten thousand") of considerations.
94. What made it even worse is that the R200 million per year figure, even if taken as SANRAL wanted the court to interpret it, was materially out of proportion to the actual cost of tolling. The R200 million per year figure worked out to an estimate of 21% of the capital cost, not 90% according to SANRAL's version, and certainly not 149% as had been determined by OUTA on the basis of SANRAL's contract with the toll operator, ETC.
95. In other words, the Minister of Transport had, on his own version, failed to properly consider the massive added cost of e-tolling collection that the public would be burdened with. What he did consider was a vague estimate, and on its own terms, not the product of proper specialist studies or feasibility reports. He did not exercise his duty as a safeguard and moderator on behalf of the public.
96. His approval of the toll declarations was invalid and unlawful on account of the above failure (in terms of section 6(2)(e)(iii)&(vi) of PAJA), as well as irrational in view of the power he exercised (within the meaning of the *Simelane* decision of the Constitutional Court) with the consequence that the toll declarations themselves are invalid.

A WORD ON THE COSTS OF E-TOLLING

97. Before moving to deal with the next ground, it is important that it be drawn to the attention of the Public Prosecutor that SANRAL's conduct in relation to the costs of e-tolling was frankly disgraceful throughout the course of the litigation, and warrants thorough investigation.
98. OUTA invited SANRAL, as early as the founding affidavit in the interim interdict proceedings, to disclose the true cost of e-tolling to the court and to the public, together with its contract with toll operator, ETC.
99. SANRAL not only failed to disclose the contract, it presented an unacceptably vague version on the costs.
100. SANRAL then modified, if not wholly changed, its version, before the Constitutional Court

- and still refused the ETC contract to OUTA.

101. When OUTA obtained part of the ETC contract and presented it to the court in its supplementary answering affidavit, SANRAL modified its version again.
102. OUTA had also called upon SANRAL to disclose its toll model and calculations to OUTA and to the court in its answering papers in order that the figures it had presented to the Constitutional Court could be verified. SANRAL refused to do so.
103. OUTA then succeeded in compelling SANRAL to produce the ETC contract. In its replying papers, OUTA demonstrated how SANRAL's version was contradicted by the ETC contract, and that the costs of toll collection, according to the ETC contract, worked out to about 149% of the capital cost, a mammoth R30 billion (when the cost of the GFIP was in the region of R 20 billion).
104. SANRAL responded in a further affidavit with an *ipse dixit* response by Nasir Ali and its toll consultant - with no supporting documentation and no disclosure of its toll model and calculations - in an effort to rebut OUTA.
105. Meanwhile, OUTA had provided the figures SANRAL had provided to the court to an independent roads and toll expert, Bernal Floor, who demonstrated that the figures provided by SANRAL, on how much the intended to recoup from the public by means of tolling, were not sustainable. Although the expert declined to do so in the affidavit itself, using instead the term "not sustainable", he confided in OUTA and its legal representatives that the amount that SANRAL had said it would recover from the public had obviously been deliberately deflated.
106. The refusal of SANRAL to take OUTA, or the court, into its confidence was perpetuated with the outright refusal of SANRAL to disclose the results of the "dry runs" of the e-tolling system. This would have disclosed the actual amount of motor vehicles using the GFIP and the classes of such vehicles and, in turn, permitted the court and OUTA to determine the actual amount of revenue that SANRAL would be earning in e-tolls.
107. A late attempt by OUTA to compel the production of this information before the review was met with trenchant opposition and a refusal to disclose.
108. The consistent failure of SANRAL to play open cards with the court and the public, the contradictions and the modifications of its version on costs, all of which may be traced through the affidavits filed of record, warrants an investigation by the Public Protector for the sake of the public who are to bear such costs.

THIRD GROUND: FAILURE BY SANRAL AND THE MINISTER OF TRANSPORT TO CONSIDER ALTERNATIVE FUNDING MECHANISMS

109. A closely related ground for impugning the validity of the toll declarations (to the failure to consider costs), was the failure by SANRAL and the Minister of Transport to consider alternative methods of funding the upgrades of Gauteng's freeways.
110. The Rule 53 record shows that the 2006 proposal, in which the Gauteng Freeway Improvement Project is proposed, made only reference to possible alternative methods in "outline" and on its own terms contemplated further investigation of such methods.

111. Tolling, as a funding mechanism, was by contrast, dealt with in detail. It was clear that the 2006 proposal was not so much a proposal for the upgrade of the roads as a tolling proposal.
112. The Rule 53 made clear that there was thereafter in fact no consideration of any alternative methods, but that SANRAL and the Department of Transport moved immediately to tolling and to the obtaining of Cabinet's approval for the Gauteng Freeway Improvement Project as a state-funded toll road.
113. Both in SANRAL's material, and in the material of the Department of Transport, as well as the memorandum set before Cabinet, there was a distinct absence of information relating to alternative methods.
114. The applications before the Minister of Transport for the approval of the toll declarations in January and July 2008 followed suit.
115. There was no comparative cost layout, and no indication of what the project would cost should it have been funded by the fiscus, the fuel levy or a combination of other mechanisms. This failure to consider alternatives was inexcusable given the massive cost and administratively burdensome nature of the open road tolling option which was therefore literally blindly proceeded with as a result.
116. Although the affidavit filed on behalf of National Treasury sought to make out that Cabinet had specifically considered and rejected the fuel levy as a funding option when it approved GFIP as a toll project in July 2007, there was nothing to this effect in the affidavits of SANRAL and the Department of Transport.
117. Tellingly, subsequent to the filing of all papers and while the matter was on appeal, the Minister of Transport in a formal written response to a parliamentary question acknowledged that the fuel levy had not been considered as a funding option at the time the decision was made to toll.
118. The failure to consider alternative funding mechanisms was not pressed in the review or before the SCA because of the decision of the Constitutional Court in *National Treasury and Others v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) ("*OUTA CC*").
119. SANRAL and Treasury had succeeded on a partial record (not including the Rule 53 record) and in the urgent proceedings to convince the Constitutional Court that SANRAL had been bound by the prior policy decision of cabinet to fund Gauteng's freeways by means of tolling.
120. In doing so, SANRAL and Treasury relied on the wording of Section 25 of the SANRAL Act which refers to the fact that it must perform its functions "*within the framework of government policy*" which was argued and accepted to include a decision such as the Cabinet's.
121. But "*government policy*" was sold to the Constitutional Court in the urgent appeal without a proper interpretation of what "*policy*" referred to in the SANRAL Act.
122. Counsel for OUTA and the co-applicants would, shortly before the appeal to the SCA, discover that the whole policy argument which had been accepted by the Constitutional Court was contradicted by the plain terms of the SANRAL Act which, in Section 39 of the

Act, sets out how the policy in terms of which SANRAL is to function is to be formulated and published.

123. There is no such policy, and the Rule 53 record contained none.
124. The closest that any document in the Rule 53 record could come to being a policy document was the 1996 White Paper on National Transport Policy (published two years before the SANRAL Act of 1998) which provided that road funding should be by means of a ring-fenced fuel levy and, only "*where appropriate*", tolling.
125. The same White Paper also specified that socially necessary road infrastructure, which must include road infrastructure in urban areas, should be funded from the fiscus.
126. The Rule 53 record further revealed that SANRAL had made its decision to proceed with GFIP as a toll project *before* Cabinet had given its approval.
127. OUTA lodged supplementary heads of argument in the SCA dealing with the policy point. But it was too late, and frankly the SCA seemed to have made up their minds by that stage that they were not going to assist OUTA.
128. At the hearing, Justice Brandt said in terms: "*If SANRAL unduly fettered their decision of course that would be a ground to set it aside. Had you included this earlier we could have considered it. But this is a whole new argument.*"
129. The failure to consider alternative methods of funding the much needed upgrades is a separate and additional basis on which the toll declarations can be impugned for being invalid.
130. SANRAL and the Department of Transport grossly failed to follow a responsible decision making process in the interests of the public. The failure to consider alternative methods of funding, now formally confirmed by the Minister of Transport on record in parliament (so I am informed), implies that both the Minister's approvals, and the resultant toll declarations, are invalid and unlawful, and that the approval of the toll declarations was invalid and unlawful (in terms of section 6(2)(e)(iii)&(vi) of PAJA) and irrational (within the meaning of the *Simelane* decision of the Constitutional Court).

FOURTH GROUND: UNREASONABLENESS

131. The fourth ground on which the validity of the toll declarations can be impugned is unreasonableness.
132. OUTA have been advised, and have understood, that this ground would probably not succeed in the courts because of the extremely high threshold for unreasonableness and irrationality in our law, and because the courts would be very reluctant to set aside e-tolling on these grounds when e-tolling was a Cabinet approved project and SANRAL and the executive were saying that it was possible.
133. The ground was nevertheless persisted with because, in the final analysis, OUTA were correct. It was hoped that the court, on seeing this, would be more inclined to assist OUTA and the public on the other grounds.

134. The challenge on this ground is as follows.
135. An inherent feature of open road tolling, the world over, is non-compliance.
136. The international benchmark is 7% but in the South African situation it is expected to be higher. SANRAL accepts as much, but optimistically (or unrealistically) sets non-compliance rates at 10%.
137. The problem for SANRAL is that even on a 10% rate of non-compliance, there would be between 230 000 to 250 000 users per month who SANRAL would have to enforce toll collection against.
138. The sheer numbers making use of Gauteng's freeways implied that tolling would be so administratively burdensome that it would be unworkable.
139. South Africa simply does not have the manpower or the courts to enforce e- tolling.
140. SANRAL's answer was to lay out plans for how it would enforce toll collection but, considered objectively, it was clear that enforcement of toll collection would not be possible and would turn out to be a mess.
141. SANRAL at one stage (in their further affidavit) relied on the figures for the issuing of notices of traffic offences by the Johannesburg Metropolitan Police, but the success rate for collection of fines, OUTA responded, was less than 9% - despite all incentives.
142. A number of OUTA's predictions on unworkability have come true since December 2013, when SANRAL commenced e-tolling. The chief operating officer of ETC resigned 6 weeks after the system went live, and SANRAL has made a public apology for its mess with billing.
143. There has been only a 40% uptake in e-tag registration (if SANRAL is to be believed) and there are reports in the media that there is a defaulter's bill in excess of R 500 million.
144. SANRAL is a long way off from the levels of non-compliance predicted and relied upon, on oath, namely 10% non-compliance.
145. The toll declarations are unlawful because the choice of e-tolling on Gauteng's freeways, given the sheer numbers and the anticipated non- compliance rates (although the actual rates are even worse), make this choice of funding mechanism in the case of GFIP unreasonable within the meaning of Section 6(2)(h) of PAJA as interpreted by the Constitutional Court in *Bato Star*.
146. It is a real concern to OUTA, and should be for the public,
 - 146.1 what costs are being wasted on the burdensome and unworkable system of collections;
 - 146.2 how SANRAL intend to fund the shortfall caused by non-compliant users in the interim and long term;
 - 146.3 whether SANRAL intends to simply raise the cost of e-tolls to make compliant

users fund non-compliant users;

146.4 whether funds will be drawn from other toll projects.

A WORD ON CROSS SUBSIDIZATION

147. The old National Roads Act, the predecessor to the SANRAL Act, also provided for the introduction of tolling, but:
- . 147.1 required that an alternative route be provided; and
 - . 147.2 prescribed that the tolls collected on a road could only be used on that road.
148. The SANRAL Act has done away with the alternative route requirement.
149. It also no longer restricts the use of toll revenues collected on a particular road for that road. The result is that tolls collected on the N3 can be used to fund the GFIP, and the GFIP can be used to fund the N3 or any other road within SANRAL's toll portfolio (The only limitation is that toll money cannot be used on non-toll roads.)
150. SANRAL have, in the litigation in the Western Cape High Court concerning the Wine lands N1/N2 Toll Project, stated on oath that it manages the use of toll revenues in this fashion (so I am informed).
151. The hair-raising question is what has become of the user pays justification? What controls are there to prevent SANRAL from raising the cost on the N3, or N2 in Kwa Zulu Natal in a matter unrelated to the costs of those sections of road, and for the purpose of funding other toll projects? And what is to stop SANRAL from doing the same in the case of GFIP, if not now, then in future, contrary to SANRAL and Government's user pays justification.
152. Cross-subsidization is a feature of the current toll regime that should commend itself to the Public Protector as worthy of investigation in the interests of the public.

FIFTH GROUND: DISCRIMINATION AGAINST PERSONS WITH DISABILITY

153. The individuals who have arguably suffered the most as a result of the introduction of e-tolling are the members of the QuadPara Association of South Africa, and the constituency represented by QASA. These include, in the main, quadriplegics and paraplegics ("persons with disability").
154. Persons with disability have been placed in an untenable position by e-tolling.
155. As is explained in the papers filed of record, persons with disability are entirely dependent on private transport and on using Gauteng's freeways.
156. This is because the transport alternatives available to others (taxis, Metrorail, buses, Gautrain, and so on) are not accessible to them.
157. Over 70% of persons with disability are black and 99% are unemployed. They survive on a disability grant of R 1200.

158. They have no other option but to utilise private transport, which entails relying on, and paying for, private road users to transport them.
159. They cannot be exempt from paying e-tolls (the technology available does not permit it).
160. They are compelled to bear the cost of e-tolls using by using the inadequate disability grant.
161. The impact upon them is plainly disproportionate relative to persons in higher income groups and able bodied persons of low income groups for whom alternative methods of transport are accessible.
162. Persons with disability, possibly the most vulnerable of the previously disadvantaged communities, were entirely overlooked by SANRAL and Government in establishing e-tolling in Gauteng. There was no consultation with them and no attempt made to consider their position or accommodate them within the planning and implementation of the scheme.
163. Although SANRAL has met with representatives of QASA on several occasions subsequent to the institution of the litigation, SANRAL have been unable to present a solution that ameliorates their position. SANRAL cannot. The system and the technology available does not allow it.
164. E-tolling may be challenged as unlawful on the basis that it unfairly discriminates against persons with disability and infringes section 9 of the Constitution.

POSSIBLE FURTHER GROUND: EXCESSIVE COSTS

165. A possible further ground for the unlawfulness of e-tolling may be the unconstitutionality and possible corruption within the procurement process.
166. I am informed that there is evidence available that points to an exponential inflation in the construction costs of GFIP.
167. I am informed further that the Competition authorities have declared that there was anti-competitive behaviour in the form of collusion and bid-rigging by construction firms that had the effect of artificially raising the prices paid by SANRAL for the construction of the GFIP.
168. I am not possessed of the facts, still less of documents and statements on oath filed of record, and am therefore unable to express an opinion on whether there exists here a viable further ground for challenging the lawfulness of e-tolling.
169. In theory, however, should the costs of GFIP be hyper-inflated because of SANRAL's own negligence or collusion (SANRAL, better than any other, knows the costs of road construction), this may give rise to successful challenges to e-tolling on the basis of the infringement of the property clause and/or the procurement clause in the Constitution.

AFFIDAVITS FILED OF RECORD AND HEADS OF ARGUMENT

170. The full record of review containing all affidavits and annexures as well as the Rule 53 record filed by SANRAL and the Minister of Transport can be made available to the

Public Protector.

171. The same applies to the heads of argument filed by all parties at the various stages of the litigation.

AUTHOR'S NOTE

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This memorandum is not the product of the writer hereof only. It is the product of the combined work and views over time of the following senior and junior counsel: Alistair Franklin SC, Mike Maritz SC, Alfred Cockrell SC, Adrian d'Oliveira, Adrian Friedman, and Kevin