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0. Overview

This is a submission to the review of Infrastructure Australia called by the Minister for Infrastructure, Transport, Regional Development and Local Government.

It recommends:

1. **Functions of advising the Government on infrastructure for Commonwealth purposes, including assessment of proposals, should be undertaken by relevant Departments.**
2. **Functions of advising the Commonwealth on infrastructure for other purposes should be undertaken by the Productivity Commission.**
3. **Proposals including other than Commonwealth purposes should be individually assessed in an open public inquiry led by a Productivity Commissioner.**
4. **Legislation should be amended to abolish Infrastructure Australia, with functions transferred as per (1) and (2) above.**

Reasons follow under:

1. Advisory principles
2. Infrastructure advice
3. The original Infrastructure Australia
4. The changed Infrastructure Australia
5. Conclusions
6. Other comments

Comments and corrections would be welcomed.

1. Advisory principles

The primary principle for advising government is: official advice should not come from potential beneficiaries. This arises from the doctrine of avoidance of conflicts of public duty and private interest from those occupying a position of public trust.

For advice to the Commonwealth on infrastructure, potential beneficiaries include: people engaged in associated industries; representatives – such as officials - from other tiers of government.

As public monies can only be dispensed with authorisation of Parliament, proposals seeking such monies from the Commonwealth should be made available to the Parliament and, therefore, the public.

The relevant audience for advice on spending for Commonwealth purposes is the Government. For other purposes it is Parliament.

Departments advise and represent the Government. They should advise the Government on its infrastructure discretions i.e., infrastructure relating to Commonwealth purposes.¹

They may also advise the Government on other infrastructure, for example on conditions to be proposed to the Senate for attachment to State grants.²

¹ Except for the Parliamentary Departments.

² As the Government is formed from confidence of the majority in the House of Representatives, it is assumed Government wishes for conditions will be accepted by the House.

The Senate should be apprised of other possible views about conditions for State grants. Only a statutory authority can be sufficiently independent of the Government to provide such views.

At present Infrastructure Australia does not publish proposals or assessments. It only publishes short summaries of the latter. The assessments are made without public hearings or submissions and drafts are not available for public debate or correction of factual matters. Its board is collectively responsible for assessments.

An alternative approach of a statutory authority formulating advice is the Productivity Commission's public inquiries into economic and social matters. These inquiries take public submissions and encourage debate and correction of facts and interpretations including through public hearings and draft reports. A full report is published. A responsible Commissioner is identified for each matter.

2. Infrastructure advice

Infrastructure differs from other goods and services as: it can have pervasive effects, not all of which are apparent; it is generally long lived with significant sunk costs.

An intermediate input, its benefits arise from usage. Long-life means rational decisions to instal infrastructure look ahead and rely on estimates of costs and benefits, often over many years. Analysis necessary for competent advice is usually complex.

Long-life means project proposals should arise from plans formed to advance policies. In a growing economy or society, often the question is not whether infrastructure is required but when.

Advice needs to describe costs – opportunities foregone. These usually extend beyond finances into physical preclusion of alternatives and of benefits elsewhere. Advice should estimate benefits specifying usage assumptions.

Physical characteristics of infrastructure determine costs and benefits. Characteristics vary among forms. Advice should comprehensively describe physical characteristics of infrastructure.

Advice on transport infrastructure should cite rules of thumb: interoperability; importance of junctions and exchange points; railway density; induced road demand; not extending motorways into CBDs.

3. Original Infrastructure Australia

3.1 *The supposed problem*

Infrastructure Australia was established in 2008 as part of Labor's then promise to address claimed shortfalls in transport, telecommunications, water and energy – economic - infrastructure.

Its establishment assumed:

- a. many 'shovel-ready' projects for economic infrastructure languished because the former (Howard) Government ignored 'responsibilities';
- b. those responsibilities covered some matters under State control like roads and public transport;
- c. a construction-shortfall infrastructure deficit constrained the economy;
- d. vastly more Commonwealth revenues would come from a resources boom;
- e. Governments determine Commonwealth responsibilities and can spend as they like.

It was a statutory authority comprising a chief executive – 'Coordinator' – and a twelve-member advisory 'board' of industry experts and heads of State and Commonwealth central agencies.

The board was advisory as it is inappropriate for Government or industry representatives to be on a governing board.

As a statutory authority, it was 'independent' of the Government i.e., not a Department.³

The reason for 'independence': a perception Departments were institutionally unable to provide sound infrastructure advice aimed at promoting economic development.

In part, this was because Commonwealth purposes since the early 1970s were in political flux e.g., drifting between attention to regions (Coalition) and cities (Labor). Departments were unable to develop long term plans, notably in transport, partly because they needed to provide advice to advance political priorities. Also relevant was the assumption the Commonwealth's principal responsibility was funding.

A change of Government could lead to reversal of the direction of economic-infrastructure policy. An example is the attitude to urban public transport. A change in Budget conditions or policy could change the extent of 'funding responsibility' especially in discretionary activities.

Nonetheless, the very idea of a statutory authority - which might advise Commonwealth purposes should be stable - was anathema to Departments with functions of advising the Government on economic-infrastructure.

Infrastructure Australia's primary task was supposed to be gatekeeping - advising which of the many well-thought-out projects in State and national plans should gain Commonwealth financial support by answering questions of: what? why? and worth?

The what: a description of what is proposed, the problem it intends to address, and how it came to be identified, including its relation with sector and land use plans. Also, how it is to be delivered.

The why: reasons for Commonwealth involvement.

The worth: benefit:cost assessment, not least to allow comparison of proposals among sectors.

3.2 The real problem

At commencement, Infrastructure Australia sought proposals from the public. Only a handful of many hundreds of responses could answer the 'what' question. That, and an initial 'audit', revealed the real problem was an absence of plans and proposals that made sense.

It was apparent Australia's infrastructure problem was not insufficient spending on meritorious proposals, but meretricious grabs for public funds and votes – pork barrelling - usually involving major roads. Proponents – mostly governments - were generally unable to: make a rudimentary case for their ideas; identify or generate reasonable proposals.

3.3 Tackling the problem

To avoid being continuously swamped by nonsense, Infrastructure Australia sought to limit proposals from States and categorise them from early ideas to ready to proceed. Intermediate categories – real potential and threshold - were for those with a realistic possibility of advancing.

³ Independent in the public policy sense of not being under Government control. However, it could not be financially independent while it received its income as a result of an Appropriation.

It sought to address the inability to develop and explain proposals by ‘working with proponents’ to improve explanations of ‘what’ and demonstrate ‘worth’ by benefit-cost analyses. To save embarrassment, public release of information relating to proposals and assessments was limited.

To address the inability to identify proposals suitable for Commonwealth consideration, Infrastructure Australia published documents emphasising the need for sound policy as a precondition for infrastructure spending – ‘reform and invest’. It also published national plans – ‘strategies’ – like ports, freight and urban transport. Conformance with these would identify nationally significant proposals. The documents were welcomed by industry and community groups but outraged some bureaucrats – for interdicting monument building and showing up decades-long advisory failures.

The above indicates an implicit assumption: the ‘why’ of Commonwealth involvement was national significance. That was satisfied by projects costing more than several hundred million dollars.

Yet States continued to undertake other major projects without seeking Commonwealth involvement. That implied a primary motivation, the truth about ‘why’ for proposals put to Infrastructure Australia, was State rather than Commonwealth interests. States saw opportunity for additional Commonwealth funds and kudos rather than responding to (any) long-term Commonwealth goals. This was reinforced by States having to deal with great uncertainties arising from Commonwealth flux over a considerable period.

Without Commonwealth adoption of ‘strategies’, to the extent Infrastructure Australia was effective, Commonwealth economic-infrastructure policy would largely be set by States.⁴

3.4 Implications

Such roles should have been temporary with Infrastructure Australia soon returning to its original task of publishing its assessments of proposals put to the Commonwealth – rather than helping to generate and write them.

The revelation ‘infrastructure’ was seen as another way of grabbing public funds and votes meant Infrastructure Australia’s role was more important than perceived.

In Australia’s democratic system of responsible government, elected representatives are entitled to spend public monies as they lawfully choose – whether or not recommended by ‘experts’.

To be effective, this system requires the public be told the what, why and worth of significant spending proposals. Infrastructure Australia’s actions implied the public had not been informed about proposals the Commonwealth received from States or initiated itself. There was an infrastructure deficit - in accountability.

On that, few of many State and Commonwealth infrastructure proposals were submitted for Infrastructure Australia review. Possibly those were better explained in terms of what, why and worth than those not submitted.

Maintaining ‘confidentiality’ of details of proposals and assessments diminishes accountability. Hence, after the short period of proponents ‘learning’ how to make decent infrastructure proposals, publication of full details of proposals and assessments would be important not merely to ensure value for money or advance national directions, but to support the system of government.

⁴ Apart from telecommunications and aspects of aviation and shipping which are Commonwealth purposes.

4. The changed Infrastructure Australia

4.1 Corporation

In 2014, the new Coalition Government made good its election promise to make Infrastructure Australia even more 'independent' of the Government, while maintaining its functions of national infrastructure audits and assessments of proposals. It did so by effectively making it a corporation with a governing rather than advisory board.⁵

The explanation given lacked credibility.

The point of making a public sector organisation a corporation is to limit its financial reliance on government, government financial control and government liability for its operations. This is almost always limited to those organisations involved in trading - selling goods and services in markets.

The reason corporatisation is limited to trading organisations: were a government organisation to sell advisory services in markets, it would face an irreconcilable conflict of public duty of advising government with its private interest of gaining revenue from markets. Its private customers would (at least be seen to) expect the organisation's advice to government to favour them.

There also is a problem with a government advisory organisation being subject to a governing board. The reason: expertise of other than those solely employed by the organisation is correlated to (at least perceptions) of conflicts of public duty and private interest. The greater the industry expertise of board members not fully employed by the organisation the more likely it is they had, or have, private interests in that industry. Such a problem does not arise with an advisory board.

The new structure perverted governance principles. Public information suggests motivations were not limited to freedom from Government 'control'.

4.2 Change to context – Williams (No.2)

In mid-2014, the High Court in Williams (No.2) ruled Commonwealth purposes are neither determined by the Government nor in perpetual flux. Rather, lawful spending is broadly limited to purposes specified in Constitution s.51 and arising from Executive prerogatives suitable for the national government of a Federation.

Beyond those purposes, the Constitution limits Commonwealth spending to the provision of monies to States via s.96, possibly with conditions – e.g., to spend on certain projects - set by Parliament (not just the Government).

Assumptions that projects can receive monies from the Government or Commonwealth generally because they are nationally significant were thrown out by the Court. Also thrown out were a raft of other reasons including long-standing practice and convenience. It was an historic ruling, overturning many of the assumptions held by the Commonwealth – and officials – since at least the mid-1970s and probably since Federation.

If the principles of the ruling were followed, infrastructure proposals, assessments and decisions would specify the head of power, prerogative or s.96 State grant matter establishing the legality of proposed Commonwealth funding. Any s.96 matter would trigger advice to Parliament, rather than the Government, because s.96 has Parliament deciding conditions for State grants.

⁵ Corporate independence relates to financial matters, not public policy. Hence the doctrines apply to Government Business/Trading Enterprises, rather than advisory organisations.

4.3 *Invalidation of assumptions*

The 2014 decision meant all the main assumptions behind establishment of Infrastructure Australia had been invalidated:

- a. there were, and continued to be, very few shovel-ready projects for economic infrastructure, even fewer of which were presented to Infrastructure Australia;
- b. matters under State control, including aspects of urban affairs such as road traffic congestion and public transport, are not Commonwealth purposes and could only attract Commonwealth funding via s.96⁶;
- c. the relevant infrastructure deficit was not a construction shortfall, but a shortfall in democratic accountability;
- d. instead of vast new revenues from a resources boom, a Global Financial Crisis depleted the Budget position;
- e. the Constitution, rather than Governments, determines Commonwealth purposes.

Further, the cause of Departments' inability to provide infrastructure advice to the Government – policy flux due to political partisanship and ideology - had disappeared. Continued policy drift would raise questions about legality. Few if any of the claims of innate Government roles – such as in urban or regional areas, and most roads - were valid beyond that time.

4.4 *Response?*

The Court's decision should have upended the approach to Commonwealth infrastructure advising in relevant Departments and in Infrastructure Australia.

This should have occurred whether or not Governments continued to pursue political goals. Indeed, advice should have indicated the necessity for change and to publicly specify funding mechanisms if Government continued such pursuits.

Infrastructure audits for the Commonwealth should then have focussed on interstate and international infrastructure nodes and links, facilitation of exporting industries, interoperability for defence purposes etc. rather than shortcomings in essentially State responsibilities, such as inner urban road traffic congestion. Audits should have covered impediments to Commonwealth purposes resolvable by the Commonwealth without resort for funding – for example, restrictions on Newcastle port.

Any overview advice, such as arising from an audit, should have explained the implications of invalidation of assumptions made when Infrastructure Australia was formed - if only to disabuse Commonwealth politicians they had unlimited power to (promise to) do anything.

The explanation of 'why' in infrastructure assessments should have become much more focussed on Commonwealth purposes with all details of proposals and assessments presented to Parliament – i.e., published.

In the event, Infrastructure Australia appeared to continue its consideration of ever more projects outside Commonwealth purposes. The drift away from underlying purposes accelerated to include a broadening of coverage into aspects of social infrastructure. While that would have some insider support, it looked like empire building.

⁶ Aside from limited railway construction e.g. with State consent.

4.5 Assessments?

This was accompanied by an apparent relaxation of criteria for project recommendations – from a fourfold to a twofold classification.

On occasion since, the organisation has appeared to act more like a lobbyist than a gatekeeper. For example, its arguments there is an infrastructure construction deficit, for direct road charging and public transport franchising and for the implications of the pandemic were technically deficient and apparently aimed at securing more funds for infrastructure. ‘Reform’ was presented as a way for infrastructure industries to gain more funds. The continued enormous road fiscal deficit – road spending vastly outstripping road related revenues by \$8.9bn in 2019-20 – escaped attention.

There continues to be failure to apply the ‘as if road pricing’ test. This was identified in 2013 as necessary to facilitate transition to direct road charging. The result of the failure is advice promoting excessive and misdirected public funding of roads.

Some assessments are, frankly, suspect – Sydney Metro, WestConnex and Maldon-Dombarton among them. An integrity commission might take an interest in them.

Some assessment practices have become outmoded and are, perhaps, now deleterious. Problems include:

- absence of reference to Commonwealth purposes;
- limiting comments to presented proposals, while ignoring projects linked to proposals;
- reliance on proponents for all information and ignoring public domain information that refutes proponent claims or casts grave doubts on the merit of proposals;
- recitation of proponent claims even when implausible;
- non-release of proponent claims;
- more generally, the idea of working with proponents but not the public;
- behind-closed-doors assessments;
- publication of only summary assessments;
- not updating assessments after, or making any comment on, critical events that invalidate findings, for example redefinition of projects to exclude benefits identified in assessments, or major (multi-billion-dollar) cost estimate blowouts .

5. Conclusion

5.1 Infrastructure Australia

Infrastructure Australia should be abolished and necessary functions transferred to Departments and the Productivity Commission.

The circumstances justifying establishment of Infrastructure Australia in 2008 no longer exist.

Any public policy reason for it working with or encouraging proponents or industry to improve submissions for Commonwealth funding should have long ceased.

Its corporate form, adopted in 2013-14, is inappropriate for a public sector advisory body.

Infrastructure Australia’s published advice implicitly – and since 2014 wrongly - encourages use of ‘Jack Sparrow’s compass’ where the Government can spend however it likes.

With such views of a national adviser, politicians may feel increasingly emboldened to promise and deliver any infrastructure, disregarding – often wilfully - legality.

Among the risks: Governments, particularly the Commonwealth, will breach integrity principles and laws and fall foul of integrity commissions.

Twomey commented the Commonwealth Government is taking constitutional risk – engaging in suspect spending practices in the belief legal challenges are unlikely because few have incentives or resources to challenge. The likelihood of challenge will greatly increase if a proper Commonwealth integrity commission is established.⁷

5.2 Commonwealth purposes - Departments

Since mid-2014, Departments have been in a position to overcome the previous institutional handicap preventing their providing adequate infrastructure advice on Commonwealth purposes.

Whether Departments are presently competent or culturally adapted to such tasks should not be relevant to considering where functions should lie. Competence or cultural deficiencies should be addressed by Departmental leaders.

5.3 Other purposes – statutory authority

Advice on matters other than Commonwealth purposes needs to be provided to the Parliament independently of the Government. That can only be done by a statutory authority. The Government's views on those matters will be made known to Parliament in any event.

The statutory authority should provide advice based on public processes for each proposal: publication of the proposal; public hearings; draft report; consideration of submissions on the draft report; final report. There should be a single point personal accountability for such advice – a Commissioner in charge of the public process.

That is so much like Productivity Commission practices, if there is such a role the Commission should undertake it. There are further reasons for the Commission, rather than a statutory authority in a line portfolio, to perform this function:

- there is likely to (continue to) be antipathy between Departments and any statutory authority advising on related subject matters. That can only be properly resolved by the statutory authority being outside infrastructure line portfolios;
- the infrastructure issues in question are under several line portfolios;
- the central element of the function is Commonwealth-State relations. Submission of State proposals to Commonwealth agencies are invariably 'approved' by State central agencies. If there is to be a counter its indicated location should a Commonwealth central agency.

6. Further comments

The above challenges assumptions made in statements about this review.

6.1 Continuation of Infrastructure Australia?

A proper review should not presume continuation of a government organisation. It should not perceive its task is to identify functions for an organisation to undertake.

⁷ At: <https://www.cjcl.ca/wp-content/uploads/2021/05/10-Twomey.pdf>

Rather, functions useful to effectiveness and efficiency of the system of government should be first identified. Once identified, they can be allocated among present organisations or be used for new organisational powers and designs.

In the present case, aims of functions should be advice to the Commonwealth on (economic) infrastructure:

- to promote national economic and social development;
- consistent with the system of government including: Government powers and accountability to Parliament; Parliament's responsibilities; Federal distribution of powers; and, above all, democratic accountability.

6.2 State organisations?

There are State organisations with names mirroring Infrastructure Australia. However, their objects and functions differ among themselves and from Infrastructure Australia.

As such, indeed in principle, their existence is not reason for an attempt to create a Commonwealth counter-party organisation.

6.3 Infrastructure Australia board?

The primary issue regarding the Infrastructure Australia board is not its supposedly partisan appointees. Rather, it is its inappropriateness – as a governing board - for an organisation whose task is to advise government.

6.4 Drift and lack of direction

The continued drift in infrastructure advice and lack of appropriate direction is the result of ignoring (implications of High Court rulings about) purposes and processes of Federation.

In particular, drift and lack of direction will continue while-ever there remains the (since 2014 wrong) view 'national significance' is the criterion for Commonwealth Government interest. As the Government determines what is nationally significant, that criterion is circular and it is inevitable its use will result in drift, flux and policy instability.

Bases other than 'national significance' or size are needed for a proper Commonwealth and national approach to infrastructure. The Williams (No.2) case provides some guidance.

6.5 Guiding questions

The guiding questions drift. They assert several different versions of the purpose of Infrastructure Australia. Explicit assertions have purposes relating to the Government and the Commonwealth.

However, many questions implicitly assert there is or should be some desirable role, or result, of 'product' assisting others, including potential beneficiaries of government decisions on its advice. That suggests possible conceptions that location of functions of advising government about provision of public monies to other parties should be partly based on perceptions of organisations' popularity outside Parliament including among potential beneficiaries. The present type of review should not be (influenced by) a popularity contest.

The context and placement of terminology such as 'nationally significant', 'independent', 'infrastructure body', 'product', 'integrity', 'Cities' and 'business approach' may also indicate adherence to outdated views that significantly contribute to problems identified in this submission, including Federal integrity.