

**SENATE RURAL & REGIONAL AFFAIRS & TRANSPORT
LEGISLATION COMMITTEE**

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Inquiry into the Infrastructure Australia Amendment Bill 2013

Canberra, Friday, 28 February 2014

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**Senate Rural and Regional Affairs and Transport Legislation Committee
- Inquiry into the Infrastructure Australia Bill 2013.**

Opening Statement – Lyn O’Connell

In my opening statement I will provide the Committee with the context for the legislative amendments including commenting on the differences between the current Act and the Amendment Bill focussing on independence, transparency, performance of function, Ministerial directions powers, reporting obligations and consultation undertaken.

Infrastructure Australia was created under the *Infrastructure Australia Act 2008 (the Act)* which came into effect on 9 April 2008, establishing Infrastructure Australia as a statutory advisory council with a Chair, eleven other members; and the statutory position of Infrastructure Coordinator. Under this legislation, the Infrastructure Coordinator is a statutory appointee, appointed by the Minister for Infrastructure and Regional Development, with quite separate powers to that of the Council. The current legislation also specifies separate Ministerial direction powers between the Minister and the Council, and between the Minister and the Infrastructure Coordinator.

The staff of Infrastructure Australia, excluding the Infrastructure Coordinator, are employed by the Department of Infrastructure and Regional Development under the *Australian Public Service Act 1999* and are made available to the Infrastructure Coordinator by the Secretary of the Department.

In effect, the current legislation establishes a statutory position in the Infrastructure Coordinator, a separate statutory body, being Infrastructure Australia, and both with separate reporting lines to the Minister.

Infrastructure Australia (ie the Council) has the primary function of providing advice to the Minister, Commonwealth, State, Territory and local governments, investors in infrastructure and owners of infrastructure on matters relating to infrastructure, including in relation to:

- Australia’s current and future infrastructure needs relating to nationally significant infrastructure;
- Existing policy, pricing and regulation impacting on, or impeding, the efficient utilisation of infrastructure their impacts on investment;
- Reforms that improve the utilisation of national infrastructure networks; and
- Mechanisms for financing investment in infrastructure.

The primary function of the Infrastructure Coordinator is to assist Infrastructure Australia in the performance of Infrastructure Australia’s functions (Section 28(1), the Act), whilst the position reports to and takes direction from the Minister.

Government Election Commitments

The Government set out its intention to reform Infrastructure Australia when in opposition firstly in May 2012, stating its intention to task Infrastructure Australia to develop a 15 year rolling infrastructure plan, to publish its analyses and extend Infrastructure Australia’s evaluation function to infrastructure projects seeking federal funding of more than \$100 million.

This was reinforced in July 2013 also announcing their intention to reform Infrastructure Australia to enhance its capability as an independent, transparent and expert advisory body which would require an overhaul of Infrastructure Australia's structure with Infrastructure Australia led by a Chief Executive Officer, responsible to the Infrastructure Australia Board with the new CEO position being responsible for delivering the strategic objectives of Infrastructure Australia and its policy reform program.

Prior to the election the reforms to Infrastructure Australia were set out in the Coalition's policy paper published on 5 September 2013.

Infrastructure Australia Amendment Bill 2013 (the Bill)

The Process and consultation

Turning to the Amendment Bill before you, this Bill, the Infrastructure Australia Bill 2013 (the Bill) seeks to implement the Government's announced policies and election commitments. The process and consultation included.

The Deputy Prime Minister met with Sir Rod Eddington on 31 October 2013 to discuss how the government was to implement its election commitments to reform Infrastructure Australia through legislation.

The Hon Jamie Briggs MP, Assistant Minister for Infrastructure and Regional Development, met with Mr Deegan on 2 October 2013 to similarly discuss, amongst other matters, the implementation of the reform to Infrastructure Australia.

Similarly, the Secretary of the Department, Mr Mike Mrdak, has had discussions with Mr Deegan on a number of occasions to discuss the reforms to IA, both prior to and post the tabling of the legislation.

On 4 November 2013, policy authority to implement the Government's reforms to Infrastructure Australia was obtained.

On the same day, the Deputy Prime Minister wrote to the Chair of Infrastructure Australia, Sir Rod Eddington, and to the Infrastructure Coordinator, requesting Infrastructure Australia commence work on the infrastructure audit and advising on the progress of the legislative process that would give effect to the Government's reform to Infrastructure Australia.

On 6 November 2013, Departmental officials met with the Office of Parliamentary Counsel to brief the legislative drafters on the Government's policy objectives. Subsequent to that meeting, drafting commenced on the Bill.

On 18 November 2013, the Bill and Explanatory Memorandum were provided to the Infrastructure Coordinator and the second reading speech was provided after tabling.

On 20 November 2013, the Bill was tabled in Parliament.

On 10 December 2013, the Bill was passed by the House of Representatives and introduced into the Senate on 11 December 2013.

In addition, there were two Council meetings between September and December 2013, Assistant Minister Briggs attended the Council meeting on 22 November and raised the changes to the legislation directly with the Council.

Neither the Council nor the Coordinator raised concerns with the policy, direction of the legislation or actual amendments with the Department or Ministers until the Coordinator's submission to this Senate Inquiry.

The Difference between the current legislation and the Government's reforms.

I will now outline the key elements of the Amendment Bill that deliver the Government's commitment to create a more independent, transparent and expert advisory body.

(Independence - governance structure)

First, the change in governance structure entrenches Infrastructure Australia's independence in legislation. The change establishes Infrastructure Australia under the *Commonwealth Authorities and Companies Act 1997* (CAC Act), which will provide for an independent governing entity that is both legally and financially separate from the Commonwealth.

This governance structure will provide for a Board, comprising 11 members and a Chair, with legislative responsibility for the organisation's overarching strategy, objectives and policies, and ultimately its performance and reporting obligations.

As is current practice, Board members will be determined by Cabinet and will report to the Minister for Infrastructure and Regional Development.

The Bill abolishes the role of the Infrastructure Coordinator and gives authority to the Board to appoint a CEO. The CEO will be responsible for delivering Infrastructure Australia's functions, including managing its resources and appointing staff as appropriate.

This structural change to the governance foundation enables Infrastructure Australia to operate as a truly independent authority, at arm's length to Government.

The Board and CEO will have clearly articulated roles and responsibilities, unlike the current arrangement where the Council has no formal responsibility for the organisation's objectives or performance.

Furthermore, under the Amendment Bill, there will be one clear reporting line between the Minister and the Board, through the Chair, and then to the CEO. This is unlike the current Act which provides for two lines of reporting to Government; (1) through the Council; and (2) directly between the Infrastructure Coordinator and the Minister.

In the current Act, Part 2, Division 1, Section 6 establishes the ministerial directions in relation to Infrastructure Australia (ie the Council); and Part 3, Division 1, Sections 27 and 28 establish the position of the Infrastructure Coordinator and the Infrastructure Coordinator's functions; where the Coordinator will perform any function as directed by the Minister in writing; and in directing the Infrastructure Coordinator, the Minister **may** have regard to the views of the Council.

Improved transparency

The Amendment Bill also increases the transparency of Infrastructure Australia's operations by clearly articulating its functions, the linkage between functions, identifying who it must consult with, requiring it to publish its evaluations and justifications where possible, and importantly, improving the disclosure around ministerial directions.

Functions

In relation to functions to be performed, the current Act sets out different functions for the Council to that of the Coordinator and differing authority to perform those functions. For example, there are functions that the Council has a mandate to perform and some that are to be performed on request by the Minister. These requests need not be in writing and need not be reported.

The current Act also provides for a number of functions to only be undertaken on request by the Minister. These are section 5(2)(c), (d), (g) and (h) - to review and provide advice on proposals to facilitate the harmonisation of policies, and laws, relating to development of, and investment in, infrastructure; to evaluate proposals for investment in, or enhancements to, nationally significant infrastructure; to provide advice on infrastructure policy issues arising from climate change; and to review Commonwealth infrastructure funding programs to ensure they align with any Infrastructure Priority Lists.

There is no requirement in the legislation that these requests are to be made in writing, or that they be reported.

The Amendment Bill provides greater flexibility around the policy issues Infrastructure Australia can advise on because it does not specify or single out specific matters.

The Bill also enables Infrastructure Australia a greater independence by conferring a responsibility to perform audits, develop priority lists, evaluate proposals and provide policy advice, in accordance with Section 5.

In particular, the Amendment Bill specifies under section 5B that Infrastructure Australia undertake a 15 year infrastructure plan to be developed which importantly is underpinned by an independent audit and developed in consultation with all tiers of Australian governments. The plan is to prioritise projects, include a delivery timeframe, identify productivity gains as well as any complementary projects required to unlock full productivity potential.

This will provide the long-term infrastructure planning process required to give the business community the increased certainty requested for future planning and investment.

Powers to Direct

On Ministerial powers to direct IA there have been some comments with the regard to the differences between the current Act's subsections 6(3) and 6(4) and the new subsections 6(3) and (4) in the Amendment Bill.

The current Act states:

Section 6 The Minister may give directions to Infrastructure Australia:...

- (3) Directions given by the Minister under subsection (1) must be of a general nature only.
- (4) The Minister must not give directions about the content of any advice that may be given by Infrastructure Australia.

Under the Bill, Section 6(3) specifies mechanical aspects of Infrastructure Australia's functions. It provides the Government with an opportunity to ensure Infrastructure Australia undertakes its work in a timely manner (see Paragraphs (6(3)(a) and (b)) and consider other policy initiatives (6(3)(c)) for example, the Northern Australia white paper, congestion in urban centres, drought requirements and its impact on delivery of infrastructure.

Section 6(4) of the Bill clearly limits the Minister's powers under Section 6(3) as it states:

"However, the Minister must not give directions about the content of any audit, list, evaluation, plan or advice to be provided by Infrastructure Australia."

When read together, subsections 6(3) and 6(4) do not allow the Minister to give direction on the content of IA's work. Subsection 6(4) is more robust than the current provision because it applies to more of Infrastructure Australia's functions and extends the prohibition to various other documents that Infrastructure Australia may produce.

I should also note that the current provisions on the limitations of the direction powers of the Minister only apply to directions to the Council. They **do not** apply to the directions to the Infrastructure Coordinator. Subsections 28(2) to 28(4) of the Act state:

- (2) The Infrastructure Coordinator also has any functions that the Minister, by writing, directs the Infrastructure Coordinator to perform.
- (3) The Minister may have regard to any views of Infrastructure Australia in making directions under subsection (2).
- (4) A direction made under subsection (2) is not a legislative instrument.

There is no limit on the scope of these directions, nor is the Infrastructure Coordinator obliged under the Act to report any directions.

Class of Proposals

On classes of proposals that Infrastructure Australia can evaluate, there has been concern raised that the Minister may prevent IA from evaluating certain classes of proposals, specifically urban rail.

Under Section 5(2)(d) of the current legislation, Infrastructure Australia is only able to evaluate proposals for investment in, or enhancements to, nationally significant infrastructure. Nationally significant infrastructure is defined in the Act to only be transport, energy, water and communications. Infrastructure Australia is to undertake this role when requested by the Minister, rather than as it sees fit.

Section 5A(2) of the Amendment Bill states that Infrastructure Australia must not evaluate proposals in a class of proposal determined by the Minister. This Section has been drafted to give effect to the Government's commitment that proposals seeking Commonwealth funding valued at \$100 million and over will be evaluated by Infrastructure Australia, including hospitals and educational institutions, but not Defence projects. This was set out in the second reading speech for the Amendment Bill.

The legislation experts within the Office of Parliamentary Counsel provided advice on how best the policy might be achieved in legislation and developed the construct in 5A(2). Its intent is to provide a mechanism to include projects \$100 million and over for proposal evaluation, to include hospitals and education institutions in the proposal evaluation function only and not in the policy advice function and to exclude Defence altogether from both proposal evaluation and policy advice functions.

Importantly the direction around the class of proposals is a legislative instrument and must therefore be tabled in Parliament and is subject to disallowance. This provides full disclosure, unlike the current legislation which is limited to reporting written directions only.

Publishing

On publishing and reporting. There is no provision in the current Act for Infrastructure Australia to publish its evaluations or findings. This means it is entirely at the discretion of the Council or Infrastructure Coordinator.

Reporting of Ministerial Directions

The current legislation only requires **written** ministerial directions given to the Council to be reported. These directions are to be reported in the Annual Report.

There is no provision in the current Act for the written ministerial directions to the Infrastructure Coordinator, under Section 28(2), to be reported at all, nor for requests to be reported.

The Amendment Bill provides greater transparency around the reporting of ministerial directions. Under the Bill, any written directions and other functions that the Minister directs Infrastructure Australia to perform **must** be reported in the Annual Report. I refer to Paragraph 39C(a) of the Bill.

It also ceases the differing reporting obligations that currently exist between the Council and the Coordinator and removes the differences in functions to be performed only upon request.

Conclusion

In conclusion, the Amendment Bill delivers on the Government's commitment to strengthen the independence and transparency of Infrastructure Australia as stated in their election commitments.

From the submissions to this Senate Committee, it is clear that the amendments have the support of industry and the business community.

I am happy to take any questions from the Committee.