



Infrastructure Australia Bill 2008

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Economics Section

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Infrastructure Australia Bill 2008

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Commencement: The day after Royal Assent

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

To establish an entity, Infrastructure Australia, to advise all levels of government, investors, and infrastructure owners on matters relating to the provision of infrastructure.

Background and key issues

Definitions

Infrastructure can be broadly categorised as ‘economic’ or ‘social’. Economic—or ‘physical’—infrastructure refers to ports, airports, electricity generation etc. Social infrastructure refers to schools, hospitals, libraries, universities etc. One difference between the two categories is that, in general, the latter do not produce services for sale in markets but rather are not-for-profit service providers—although this is does not always hold true. Further, the distinction is not clear-cut. For example, government-owned urban passenger rail entities—usually considered to be economic infrastructure—are often required to undertake community service obligations for certain groups. The Bill stipulates that Infrastructure Australia will focus on transport, energy, communications, and water infrastructure.

Who is responsible for what?

Responsibility for infrastructure in Australia is spread across all three tiers of government and the private sector. Responsibility for the funding and physical provision of infrastructure lies overwhelmingly with the states—and not with the Commonwealth as is widely believed. Further, it is state government trading enterprises—not budget-funded state government agencies—that provide much of the electricity, water, urban transport, and ports. These government trading enterprises fund investment from retained profits and

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by borrowing, although some—such as urban public transport entities—are often subsidised from the budget. Much of the borrowing by government trading enterprises is conducted through state government central financing bodies such as the [NSW Treasury Corporation](#) rather than by each government trading enterprise raising funds on its own behalf.

The Commonwealth provides grants to the states and local government to fund infrastructure but the states and local government are responsible for its physical provision. Local government also funds and provides infrastructure. The private sector too is becoming increasingly involved in the financing, construction and operation of infrastructure, for example, in areas such as toll roads and electricity generation. Responsibility for regulation lies mainly with the Commonwealth and the states. In practice, the following pattern of responsibility has evolved across the three tiers of government.

Level of government	Economic infrastructure	Social infrastructure
Commonwealth	Aviation services (air navigation etc) Telecommunications Postal services National roads (shared) Local roads (shared) Railways (shared)	Tertiary education Public housing (shared) Health facilities (shared)
State	Roads (urban, rural, local) (shared) Railways (shared) Ports and sea navigation Aviation (some regional airports) Electricity supply Dams, water and sewerage systems Public transport (train, bus)	Educational institutions (primary, secondary and technical) (shared) Community health services (base hospitals, small district hospitals, and nursing homes) (shared) Public housing (shared) Sport, recreation and cultural facilities Libraries Public order and safety (courts, police stations, traffic signals etc)
Local	Roads (local) (shared) Sewerage treatment, water and drainage supply Aviation (local airports) Electricity supply Public transport (bus)	Libraries Community centres and nursing homes Recreation facilities, parks and open spaces

Source: Richard Webb, '[The Commonwealth Government's Role in Infrastructure Provision](#)', *Research Paper*, no. 8, Parliamentary Library, Canberra 2003-04.

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The Commonwealth's role in infrastructure provision

The Commonwealth's role in infrastructure provision takes two main [forms](#): funding and 'framework' policies. The Commonwealth funds infrastructure through the Budget in the form of [specific purpose payments](#) to the states (and local government) for capital purposes, and through its trading enterprises. The most important specific purpose payments by value are for roads, public housing and schools. When one hears calls for 'the government' (usually meaning the Commonwealth) to provide more funding for infrastructure, it is presumably specific purpose payments that advocates have in mind although this is rarely stated.

Following [privatisation](#), there are relatively few Commonwealth government trading enterprises. One of the main Commonwealth trading enterprises in terms of the value of investment it undertakes is the [Australian Rail Track Corporation](#).

The Commonwealth's role in funding is relatively small compared with state funding. For example, the Commonwealth provides grants to the states and local government to build and maintain roads. In 2003–04, the Commonwealth provided only 21 per cent of government funding of road-related expenditure while the states provided 40 per cent and local government 39 per cent.¹

The second way in which the Commonwealth affects infrastructure provision is through 'framework' policies. They are the regulations, legislation and other policies that set the parameters within which other governments and the private sector make investment decisions. Examples are the National Access Regime introduced under [Part IIIA](#) of the *Trade Practices Act 1974*, the activities of the National Transport Commission in devising a model rail safety bill whose provisions all the states will reproduce, and involvement in setting strategic directions for industries (for example, the establishment of a national regulator—the Australian Energy Regulator—for the electricity industry). Other examples of Commonwealth agencies that implement framework policies are the [Australian Competition and Consumer Commission](#) and the [National Competition Council](#). Framework policies affect the direction and strategies that other levels of government and the private sector take with respect to the provision of infrastructure even though no Commonwealth funding may be involved.

Level of investment

Concern is often expressed that the level of investment in infrastructure is too low. Arguments for additional investment are premised on some concept of 'inadequacy'.

1. Bureau of Transport and Regional Economics, [Australian Transport Statistics](#), June 2007, p. 14.

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Clearly, there will always be areas of ‘need’ for additional investment. But need has to be seen in the context of competition for limited investment resources.

In June 1996, the [National Commission of Audit](#) reviewed the adequacy of infrastructure. The Commission concluded that:

Overall measures of infrastructure are of limited value in determining the adequacy of Commonwealth infrastructure, or infrastructure in Australia generally, and are a poor guide to future investment. A proper assessment of the adequacy and condition of existing infrastructure can only be made on a case-by-case basis, with new investment determined using rate of return analysis of all the resource costs and benefits involved (including ‘externalities’)

There is no evidence of overall infrastructure inadequacy. There is no evidence that net pressures on Commonwealth finances will emerge because of Commonwealth infrastructure responsibilities

There is evidence of both shortages and excess capacity for particular types of infrastructure within Australia, reflecting demographic and technology pressures and poor past investment and management. Data on infrastructure performance and condition is limited, with maintenance expenditure data being a particular problem.²

In 2001, the Australian Infrastructure Report Card Alliance—a group of major infrastructure stakeholders—prepared a report on infrastructure adequacy.³ The report gave the following rankings (where A was ‘very good’, B ‘good’, C ‘adequate’, D ‘poor’, and E ‘inadequate’):

B: airports, ports and telecommunications

B-: electricity

C: gas, roads (national) and potable water

C-: roads (state) and wastewater

D: roads (local) and stormwater

D-: irrigation and rail.

It is noteworthy that the areas where the Commonwealth had whole or partial responsibility—airports, telecommunications and national roads—ranked relatively

2. National Commission of Audit. Report to the Commonwealth Government, June 1996, p. 177.

3. This report is not on the internet.

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highly. Areas of state government (and to a lesser extent local government) responsibility were most in need of remediation. As to the government/private sector responsibility split, the picture was mixed. State enterprises ranked relatively well for ports but poorly for rail. It was not possible to draw conclusions for areas of mixed ownership/responsibility (electricity) or which employed outsourcing to varying degrees (state road construction, potable water etc.)

Based on the Australian Infrastructure Report Card, the then Australian Council for Infrastructure Development (AusCID) estimated that \$24.8 billion was needed to bring infrastructure to the ‘A’ level.⁴ The breakdown of this amount was:

- electricity—distribution, transmission and generation: \$1.15 billion
- gas—transmission and distribution: \$2.6 billion
- water, sewerage and drainage: \$3 billion
- roads: \$10 billion, and
- rail—freight and urban passenger: \$8.06 billion.

AusCID did not say how it derived these estimates.

[Engineers Australia](#) have also issued infrastructure report cards at the state level.

The assessments of Australian Infrastructure Report Card Alliance and Engineers Australia are engineering-based. They therefore may not be a guide to the economic worth of additional investment nor the sectors where new investment should take place. For example, it does not follow that because a road is in need of repair, it must be repaired because the money might be better spent elsewhere.

In the second reading speech for the Bill, the Minister for Infrastructure, Transport, Regional Development and Local Government stated that the OECD ranks Australia twentieth out of 25 countries when it comes to investment in public infrastructure as a proportion of national income. The implication seems to be that Australia is ‘underperforming’ when it comes to investment levels. It could be argued that such comparisons are poor indicators of whether a country is ‘under-investing’ in infrastructure. First, different countries have different infrastructure needs and so can be expected to have different investment levels. Nor do such comparisons take account of the ‘quality’ of investment. Further, such comparisons can be misleading because investment undertaken in one country by a government business enterprise may be undertaken by a private enterprise in another country. The latter country would, by definition, have a smaller proportion of government investment in infrastructure. In Australia’s case, such international comparisons do not take account of:

4. This report is not on the internet.

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- the privatisation of government trading enterprises that previously provided infrastructure (for example, National Rail Corporation and Telstra), and
- the fact that the private sector now provides some of what was traditionally considered public infrastructure such as roads, electricity generation, airports, and rail. Toll roads are an example.

The Institute of Public Affairs estimated the fall in government capital formation that is attributable to privatisation:

... the public sector has sold \$115 billion of assets to the private sector since the late 1980s ... This means that about 40 per cent of the apparent decline in public infrastructure spending is a statistical illusion.⁵

This implies that, without privatisation, government capital formation would have been in the order of six per cent of GDP, which was the level late in the 1980s. Moreover:

The data [on government capital formation] are further biased downwards by the way in which public-private partnerships and capital spending by privatized business are treated. Over the last decade and more, a sizeable and increasing proportion of infrastructure spending, which in the 1980s would have been undertaken by the public sector, has been undertaken by the private sector.⁶

In short, after the data on government investment in infrastructure are adjusted take account of private investment in infrastructure that was previously provided by government, infrastructure spending would not show a declining trend and may well be increasing.⁷

Regulation

A major issue in infrastructure provision is the regulation of prices and rates of return that competition regulators impose on infrastructure owners/providers. A key issue is whether such regulation deters additional investment in infrastructure.

A characteristic of much infrastructure is its monopoly or quasi-monopoly status. As such, it is subject to regulation by competition authorities. The regulation of prices and rates of return by competition regulators is a source of controversy for both the Commonwealth and state governments. The Australian Competition and Consumer Commission (ACCC) is the Commonwealth body responsible for regulating prices and rates of return that

5. Mike Nahan, '[The Fiscal Fiends Are Back](#)', *Institute of Public Affairs Review*, December 2003, p.19.

6. *ibid.*

7. *ibid.*

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entities such as Telstra may charge. Areas subject to ACCC price regulation/surveillance include the charges that Airservices Australia levies for its services, aeronautical charges that the leased airports levy for aeronautical services, telecommunications (mainly Telstra), and container stevedoring.

The role that the ACCC and state regulatory authorities play has come under attack from several sources including the head of the Productivity Commission, Mr Gary Banks, and Professor Henry Ergas.⁸ The thrust of their arguments is that excessive price and rate of return regulation may provide short-term benefits to consumers but at the cost of curtailing long-term investment. In a letter to the *Australian Financial Review*, Mr Brad Page, the CEO of the Energy Supply Association of Australia, complained:

What it means is that the competition regulator effectively runs the capital programs for NSW transmission businesses over the next five years ...⁹

The ACCC has defended its role by pointing to the investment that has taken place despite regulation.¹⁰

Each state has established an independent competition regulator. In Queensland's case, for example, it is the [Queensland Competition Authority](#) (QCA). An example of the conflict between regulators and infrastructure providers was the dispute over the rate of return the QCA proposed to apply to expansion of the coal terminal at Port Dalrymple. Prime Infrastructure, which proposed the investment, initially said that the return was too low. The state regulators, too, have defended their actions.¹¹

It is difficult to know where the truth of these competing claims lies. The editorial in the *Australian Financial Review* on 15 March 2005 stated:

But the biggest impediment to infrastructure investment has been rates of return dictated by regulators whose main job is to prevent price gouging ... But raising rates of return won't come by haranguing the regulators. They're doing the job they've been asked to do. What's needed is a policy change by governments encouraging regulators to balance their emphasis on protecting consumers with recognition of the need to invest in new infrastructure.

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8. Henry Ergas, 'ACCC takes nation to point of no return', *Australian Financial Review*, 8 March 2005.
 9. Brad Page, letter to the *Australian Financial Review*, 21 March 2005.
 10. Graeme Samuel, 'regulator favours caution', *Australian Financial Review*, 14 March 2005.
 11. Paul Baxter, letter to the *Australian Financial Review*, 17 March 2005

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Infrastructure finance

As noted, the states are primarily responsible for the provision of economic and social infrastructure. The Allen Consulting Group, in a report titled *Funding Urban Public Infrastructure*, examined the alternative ways state (and local) governments can finance infrastructure. The alternatives were:

- taxes
- user charges
- producer levies
- government debt, and
- Special Purpose Vehicles (SPVs) such as public private partnerships (PPPs) and privately financed projects (PFPs).

The study modelled the gains (to New South Wales) of each alternative. The gains were measured in terms of the net present value of changes in gross state product (GSP), and in the average number of jobs created annually over the next 15 years from investment of \$200 million annually for five years. This allowed the alternatives to be ranked. They are, in order of most favoured to least favoured:

- government debt
- SPVs
- residential rates
- aggregate state taxes/user charges, and
- producer levies.

The ranking of aggregate state taxes and user charges depended on the relative importance placed upon output or jobs as an indicator of economic outcomes: user charges are more favourable for employment, while state taxes are more favourable for output.

In short:

This analysis suggests a strong preference for the use of approaches that match the cost to the community to the benefits from the use of infrastructure which are obtained over time—that is, government debt and SPV arrangements.¹²

The report makes a case for additional long-term government borrowing even if this means slowing the rate at which state governments reduce net debt:

12. Allen Consulting Group, *Funding Urban Public Infrastructure. Approaches Compared*. Report for the Property Council of Australia, August 2003, p. vi.

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The case for the greater use of government debt is strong. Public infrastructure typically involves long lived assets and it seems rational that they should be financed over time. The evidence provided in this study is that this funding approach provided the macro-economic path with the highest gains from infrastructure investment. Billions of dollars of economic growth and many thousand of NSW jobs hinge on this. A relatively modest detour in the path to debt elimination in NSW would enable many increasingly essential infrastructure investments to be made sooner. Building the economic base would make achievement of the longer run goal of debt elimination by 2020 easier and reduce the growing risk of a major infrastructure failure.¹³

This conclusion relates specifically to NSW. To test whether it is true of the other states would require additional modelling.

The quote above suggests there should be a shift in emphasis in fiscal policy, which entails greater emphasis on infrastructure investment and less on net debt reduction, and that this shift would facilitate debt reduction in the longer run. This raises the question: how well placed are the states to make such a policy switch and incur additional debt?

In aggregate, the states embarked on a process of reducing net debt (measured by general government net debt as a share of GSP). Thus, overall, the states are better placed to borrow than in the past. But the situation is not uniform with some better positioned than others.

Public private partnerships

As noted, the private sector has become increasingly involved in the provision of infrastructure following privatisations. [Public private partnerships](#) (PPPs) are another mechanism for the delivery of infrastructure. PPPs take numerous forms and have proved controversial for a range of reasons. A particular issue related to PPPs is whether to use public or private finance. The following summarises the issues.

The case for using private sector finance in PPPs has been put as follows:

The importance of the finance element of privately provided infrastructure lies in the incentive it can provide for the performance of the infrastructure, and the disciplines external financiers can provide on the delivery of projects to time and budget. It is difficult to replicate the strength of these incentives and disciplines within a conventional funding process where all the risks of delivery reside with the government.¹⁴

13. Allen Consulting Group, op. cit., p.xii.

14. J Pierce and I Little, 'Taxpayers need value from partnerships', *Australian Financial Review*, 8 April 2002.

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Critics have claimed that PPPs involving private sector finance should not be used because it is generally more expensive for the private sector to raise capital through private capital markets, than for governments to raise funds. However, critics of the argument that public sector finance is cheaper claim:

It's a myth that governments have access to 'cheaper' finance to undertake projects: a government's ability to borrow more cheaply is purely a function of its capacity to levy taxes to repay borrowings. But, when it comes to raising finance for a project, it's the risk of the individual project that determines the real cost of finance. The difference between the private and public sectors is that private-sector capital markets explicitly price in the risk of the project into the sources of finances. In the public sector, taxpayers implicitly subsidise the cost of a project by bearing the risk of cost overruns, time delays or performance failures, which are not priced into the government borrowing rate.¹⁵

It has been claimed that when risks are factored into the cost of government debt, the differential between the cost of government debt and private debt in the case of a project with a 'guaranteed' revenue stream from government is only 15 basis points.¹⁶ If so, it is difficult to use the 'higher cost of funds' argument especially if the benefits of risk transfer outweigh the additional cost of private finance.

The former Bureau of Transport and Communications Economics commented:

The transfer of financial risk from lenders to taxpayers provides no obvious benefit to society. The interest rate differential [between government and private sector borrowings] is therefore no indication that public ownership reduces the cost of capital to society.¹⁷

Commonwealth funding options

There are several options available to the Commonwealth to help fund government infrastructure projects. They include:

- expanding the scope of specific purpose payments to the states for capital purposes
 - the Hawke and Keating Governments, for example, funded public transport infrastructure
- lending to the states

15. *ibid.*

16. Michael B Gerrard, 'Public-Private Partnerships', *Finance and Development*, vol. 38, no. 3, September 2001. A basis point is one-hundredth of one per cent, that is 0.01 per cent.

17. Bureau of Transport and Communications Economics, *Benefits of Private Sector involvement in Road Provision: A Look at the Evidence*, Working Paper 33, June 1997, p. 10.

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- this was the case in the past. But the states have established their own treasury corporations to manage debt, and the Commonwealth has long ceased borrowing on the states behalf
- increasing its own investment through government trading enterprises such as the Australian Rail Track Corporation
- easing borrowing restrictions through the [Australian Loan Council](#)
 - in the past, the Loan Council limited state government borrowing. But with fiscal consolidation in the states, Loan Council arrangements emphasised transparency of public sector finances, through financial market scrutiny of proposed borrowing, to restrict borrowing to prudent levels, and
- facilitating changes that would ease impediments to private sector borrowing for infrastructure

Impediments to private sector provision of infrastructure

There are numerous impediments to private sector provision of infrastructure. It is not just price/rate of return regulation that concerns industry. For example, Mr Mitchell Hooke of the Minerals Council of Australia has written:

Our principal concern is the delays, uncertainty and mixed signals that result when jurisdictions overlap, competition policies contradict each other and bucks get passed. These hurdles can be overcome. There will be no shortage of sources of infrastructure financing.¹⁸

Other impediments include inconsistent state regulation, the cost and complication of providing documentation to government agencies when tendering for projects, and the [access provisions](#) of the *Trade Practices Act 1974*. Uncertainty over the form that a carbon emissions trading system will take may be discouraging investment in the electricity generation industry.

Priority areas for reform

On 28 February 2005, the Productivity Commission issued a report titled [Review of National Competition Policy Reforms](#). The report examined, among other things, further reform to the provision of infrastructure services. In identifying a reform agenda:

... the Commission has targeted areas that meet three tests: being inherently national in character; offering the prospect of significant gains; and likely to benefit from a nationally agreed reform framework under the stewardship of CoAG or another national leadership body.

18. Mitchell Hooke, letter to the *Australian Financial Review*, 15 March 2005.

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Against these benchmarks, within the infrastructure area, it is clear that further nationally coordinated reforms in the energy and water sectors should continue to be a high priority. However, the Commission considers that developing nationally coordinated reform frameworks and programs for the freight transport and passenger transport sectors would also provide a high return to the community.¹⁹

The key points the report made are:

There are significant opportunities to improve the efficiency of economic infrastructure through further competition-related reforms.

The energy and water sectors remain priorities for nationally coordinated reform. CoAG has already sponsored the development of new reform agendas for each of these sectors. These agendas should provide the basis for further performance improvements, though much detailed policy development, and leadership to overcome delays is still required. In addition:

- In the energy sector, there is a need to enhance the operation of the National Electricity Market. Addressing regulatory fragmentation and policy uncertainty in relation to greenhouse gas abatement is also critical to the sector's future performance.
- In the water sector, a key challenge is to better integrate the rural and urban water reform agendas and to achieve more effective management of environmental externalities.
- In both sectors, the next phase of reform has effectively been removed from current NCP arrangements. Progress would be facilitated by the re-instatement of effective independent review mechanisms.

Two dimensions of transport infrastructure would also benefit from the development of comprehensive reform agendas at the national level.

- There is a need to work towards achieving an efficient and sustainable national freight system that does not distort activity in favour of individual transport modes.
- A national review of passenger transport would provide a means to assess the impact of recent reforms and what is required to achieve more cost-effective, accessible and environmentally sustainable passenger transport services.

Although not a matter for collective action by CoAG, further reform in the communications sector is of national importance.

19. Productivity Commission, *Review of National Competition Policy Reforms*, Inquiry Report No. 33, 28 February 2005, p. 178.

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- Coordinated action to address anti-competitive aspects of broadcasting regulation identified in the National Competition Policy's legislation review program is a short term priority.
- Prior to any sale of Telstra, the Australian Government should conduct a comprehensive review of telecommunications regulation, including assessment of: the merits of further operational separation and an access regime for telecommunications content; and whether current regulations adequately address concerns about Telstra's entry into new markets.²⁰

Basis of policy commitment

On [11 May 2005](#), the Australian Labor Party announced that it would establish Infrastructure Australia if elected to government. On [2 August 2007](#), the then leader of the opposition, Mr Kevin Rudd, reiterated this pledge, and said that Infrastructure Australia would have three divisions:

- to deal with policy and regulatory issues, driving reform on legal, tax, planning and infrastructure finance matters
- to audit the adequacy of the nation's infrastructure, identify weaknesses and prioritise projects, and
- to evaluate the business cases of projects, project financing options including PPP (Private Public Partnerships) and manage the probity process.

Position of significant interest groups/press commentary

The response to the proposal to establish Infrastructure Australia has been mixed. [Infrastructure Australia Partnerships](#) (including AusCID)—the peak body representing private sector infrastructure providers—said that the creation of Infrastructure Australia is an important step forward in establishing key national infrastructure objectives and developing a national plan for priority projects. Some construction companies are reported as having welcomed the proposal to streamline the approval of PPPs, and the Australian Logistics Council is reported as supporting proposals to overhaul the rules that discourage PPPs.²¹ Mr Mitch King, chief executive of Lighthouse Infrastructure, is [reported](#) as saying that the government's plan is welcome but that the main problem is the overambitious timing: a year to create a list indicates it is not a real plan. [Engineers Australia](#) said that is 'highly supportive of the Federal Government's initiative to establish Infrastructure Australia to bring about cooperation and cohesion for infrastructure planning and delivery

20. Productivity Commission, op. cit., p. 177.

21. Sophie Morris and Annabel Hepworth, 'Builders back federal plan for faster PPP approval', *Australian Financial Review*, 12 February 2008, p. 4.

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on an Australia-wide basis'. The [Energy Supply Association of Australia](#) has questioned what Infrastructure Australia's role will be in the electricity and gas industries.²² The issue of potential conflicts of interest has been raised:

Albanese has deliberately set out to get people who are involved in infrastructure provision, or whose businesses need to use it, on his council. But you can see where the potential for apparent conflicts of interest arise in this exercise. This is particularly the case given that the government also wants Infrastructure Australia to tell it what the best form of financing for a particular form of project may be: public, private or some combination of both.²³

While the legislation is yet to pass through Parliament, Minister Albanese has announced the appointment of Sir Rod Eddington, formerly chief of British Airways, to head Infrastructure Australia.²⁴ The announcement was welcomed by a range of groups,²⁵ although concerns were expressed in other quarters.²⁶

Financial implications

\$20 million has been budgeted over four years to establish Infrastructure Australia and to fund its activities.²⁷

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22. Nigel Lawson, 'Query on project body's role', *Australian Financial Review*, 22 January 2008.
 23. Laura Tingle, 'Rudd's risky road on infrastructure', *Australian Financial Review*, 29 February 2008, p. 91.
 24. The Hon Anthony Albanese MP, Minister for Infrastructure, Transport, Regional Development and Local Government, *Media Release*, 26 February 2008, http://www.minister.infrastructure.gov.au/aa/releases/2008/february/aa014_2008.htm accessed on 3 March 2008.
 25. See Peter Veness and Simon Kirby, 'Sir Rod Eddington to drive infrastructure agenda', *AAP*, Tuesday 26 February 2008; Simon Kirby, 'Sir Rod ideal choice for top infrastructure role: industry', *AAP*, 26 February 2008. See also Mark Bowmer, Australian Road Forum, 'Infrastructure Australia needs to smooth out bumps in the road,' *Media Release*, 27 February 2008, <http://www.arf.org.au/news/show/33> accessed 28 February 2008, which welcomes the appointment but expresses ongoing concerns with the need to 'better coordinate the flow of projects into the marketplace.'
 26. Editorial, Daily Newsletter, crikey.com.au, 27 February 2008. The editorial expresses concern that Sir Eddington may be involved in an Australian Securities and Investments Commission investigation by regulators into the Allco Finance Group, of which Sir Rod is an independent director comment. They comment 'A wiser Prime Minister might well have waited until the Allco saga reached a conclusion.' <http://www.crikey.com.au/Crikey-Says/20080227-Crikey-Says.html> accessed 28 February 2008.
 27. Explanatory Memorandum, p. 1.

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Main provisions

Clause 3 contains definitions. They include ‘nationally significant infrastructure’ which is defined to include, transport, energy, communications, and water infrastructure in which investment or further investment will materially improve productivity.

Clause 4 establishes Infrastructure Australia, which will comprise a Chair and 11 other members (**Clause 7**).

Clause 5 contains Infrastructure Australia’s functions. They are divided between:

- the primary function [**subclause 5(1)**] which is to provide advice, and
- additional functions [**subclause 5(2)**].

Subclause 5(1) provides that Infrastructure Australia will provide advice to the Minister, Commonwealth, State, Territory and local governments, investors in infrastructure and owners of infrastructure on matters relating to infrastructure with respect to the matters set out in **paragraphs 5(1)(a) to (f)**. They are:

- infrastructure needs and priorities [**paragraph 5(1)(a)**]
- policy, pricing and regulatory issues [**paragraph 5(1)(b)**]
- impediments to the efficient utilisation of national infrastructure networks [**paragraph 5(1)(c)**]
- options and reforms, including regulatory reforms, to make the utilisation of national infrastructure networks more efficient [**paragraph 5(1)(d)**]
- the needs of infrastructure users [**paragraph 5(1)(e)**], and
- mechanisms for financing investment in infrastructure [**paragraph 5(1)(f)**].

Additional functions are set out in **subclause (5)(2)** and include the power:

- to conduct audits to determine the adequacy, capacity and condition of infrastructure, taking into account forecast growth [**paragraph 5(2)(a)**]
- to develop lists (to be known as Infrastructure Priority Lists) that prioritise infrastructure needs [**paragraph 5(2)(b)**]
- to provide advice on proposals to facilitate the harmonisation of policies, and laws relevant to infrastructure [**paragraph 5(2)(c)**]
- to evaluate proposals for investment in, or enhancements to, nationally significant infrastructure [**paragraph 5(2)(d)**]
- to provide advice on infrastructure policy issues arising from climate change [**paragraph 5(2)(g)**]

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- to review Commonwealth infrastructure funding programs to ensure they align with any Infrastructure Priority Lists [**paragraph 5(2)(h)**], and
- any functions that the Minister, by writing, directs Infrastructure Australia to perform [**paragraph 5(2)(j)**].

Clause 6 empowers the Minister to give directions to Infrastructure Australia. **Subclause 6(2)** provides that when making directions, the Minister may take account of decisions made by the Council of Australian Governments. **Subclause 6(3)** provides that the nature of the directions must be general, while **subclause 6(4)** provides that the Minister may not give directions about the content of any advice that Infrastructure Australia may give. **Subclause 6(6)** provides that directions are not legislative instruments. The effect will be to remove the directions from parliamentary scrutiny and disallowance functions normally attached to legislative instruments.

Division 2 deals with the constitution and membership of Infrastructure Australia. The Chair and the 11 other members are appointed under **clause 8**. Members are appointed by the Minister [**subclause 8(1)**] and the Minister must be satisfied that each member has knowledge of or experience in a field relevant to Infrastructure Australia's functions [**paragraph 8(2)(a)**]. It is proposed the Commonwealth nominate nine members [**paragraph 8(2)(b)**] of whom one must have knowledge of local government [**paragraph 8(2)(d)**] and three members are to be nominated by agreement of the States and Territories. There is a proposed statutory requirement [**paragraph 8(2)(c)**] that five members, including the Chair, are required to have acquired their knowledge through the private sector.

The appointments may not be for longer than three years (**clause 9**), must be on a part-time basis (other than the Chair who may, in the alternative, be full-time [**subclauses 8(3)** and **(8)(4)**], and remuneration is to be determined by the Remuneration Tribunal (**clause 11**). A full-time Chair must not engage in external paid employment without the Minister's approval (**clause 15**). To violate this clause is one of the grounds for the removal of the Chair, and provisions are generally made for the termination of members who are unfit or inappropriately absent (**clause 18**)

Clause 13 deals with the disclosure of interests to the Minister, and provides that a member must give written notice to the Minister of all interests that the member has and that conflict or could conflict with the proper performance of the member's functions.

Clause 14 deals with the disclosure of interests to Infrastructure Australia. **Subclause 14(1)** provides that a member who has an interest in a matter being considered or about to be considered by Infrastructure Australia must disclose the nature of the interest to a meeting of Infrastructure Australia. **Subclause 14(4)** provides that unless Infrastructure Australia otherwise determines, the member must not be present during any deliberation by Infrastructure Australia on the matter [**paragraph 14(4)(a)**], and must not take part in any decision of Infrastructure Australia with respect to the matter [**paragraph**

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14(4)(b). **Subclause 14(5)** provides that for the purposes of making a determination under **subclause 14(4)**, the member must not be present during any deliberation of Infrastructure Australia for the purpose of making the determination [**paragraph 14(5)(a)**], and must not take part in making the determination [**paragraph 14(5)(b)**].

Division 3 deals with meetings of Infrastructure Australia. **Clause 19** deals with the convening of meetings. Under **subclause 19(3)** the Chair:

- may convene a meeting [**paragraph 19(3)(a)**], and
- must convene at least four meetings each calendar year [**paragraph 19(3)(b)**], and
- must convene a meeting if requested, in writing, by three or more other members or the Minister [**paragraph 19(3)(c)**].

The quorum at a meeting is to be 8 members (**clause 21**) (or less if a member has been excluded by a potential conflict of interest and the operation of clause 14). With respect to voting it is to be determined by a majority of the votes of the members present and voting, with the person presiding having both a deliberative and casting vote, where necessary (**clause 22**).

Under **clause 25**, Infrastructure Australia can make decisions without meetings. There are conditions for the operation of these provisions regarding matters such as notice [**paragraph 25(1)(c)**] and records, and a member not entitled to vote at a meeting is still not entitled to vote regarding the particular proposals [**subclause 25(3)**].

Infrastructure Australia will present annual reports (**clause 26**), and it is in these reports that Infrastructure Australia will document any directions given by the Minister about any additional functions [**paragraph 5(2)(j)**] and about their performance [**subclause 6(1)**].

Clause 27 establishes the position of the Infrastructure Coordinator. The Infrastructure Coordinator's primary function is to assist Infrastructure Australia in the performance of its functions [**subclause 28(1)**], but also any functions that the Minister, by writing, directs the Infrastructure Coordinator to perform [**subclause 28(2)**].

Division 2 deals with the terms and conditions of appointment of the Infrastructure Coordinator. **Subclause 29(1)** empowers the Minister to appoint the Infrastructure Coordinator, by written instrument, on a full-time basis [**subclause 29(2)**]. The conditions of the appointment are comparable to the members of Infrastructure Australia, with remuneration to be determined by the Remuneration Tribunal (**clause 32**). **Clause 34** deals with the disclosure of interests by the Infrastructure Coordinator, and provides that the Infrastructure Coordinator must give written notice to the Minister of all interests the Infrastructure Coordinator has or acquires and that conflict or could conflict with the proper performance of the Infrastructure Coordinator's functions. **Clause 38** allows the Minister to terminate the appointment of the Infrastructure Coordinator for several reasons including misbehaviour or physical or mental incapacity [**subclause 38(1)**] or if the

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Infrastructure Coordinator fails, without reasonable excuse, to comply with section 34 (disclosure of interests) [**paragraph 38(2)(d)**]. The Infrastructure Coordinator cannot engage in external paid employment without obtaining the Minister's approval (**clause 35**).

Clause 39 permits the appointment of staff to assist the Infrastructure Coordinator under the *Public Service Act 1999*.

Concluding comments

Infrastructure Australia has the potential to deliver benefits particularly with respect to more harmonised regulation. For example, according to the Minister, Infrastructure Australia will develop nationally-consistent guidelines and principles for the assessment of PPPs and standardise documents for tendering processes.²⁸ The idea seems to be to develop one set of guidelines to replace those that each state and the Commonwealth have developed. More generally, given that a goal of the Rudd Government is to reduce business regulation, one would expect to see advice from Infrastructure Australia as to how regulation, as it affects infrastructure, might be reduced or rationalised. But what the relationship will be between Infrastructure Australia and regulatory bodies—such as the Australian Energy Regulator, the Australian Energy Market Commission, and state bodies such as Essential Services Commission of South Australia—is unclear. Nor is the relationship clear between Infrastructure Australia and other Commonwealth government agencies such as Treasury, which play a role in developing policy that affects infrastructure.²⁹ It seems that there is potential for duplication and overlap.

Other questions arise as to how Infrastructure Australia will perform its functions. For example, the purpose of the audit is to determine the adequacy of infrastructure taking account of forecast growth. This is ambitious to say the least. As the National Commission of Audit pointed out, a proper assessment of the adequacy and condition of existing infrastructure can only be made on a case-by-case basis. As it is, state government agencies, government trading enterprises and private sector companies are involved in identifying infrastructure needs and in assessing projects. Presumably, Infrastructure Australia will not conduct its own audit—its own resources seem to be small for that—but will have to draw on these bodies' assessments of adequacy and projected demand. A risk with such an approach would be that the states have an incentive to 'overstate' their investment needs.

28. Anthony Albanese, 'Infrastructure', House of Representatives, *Question Without Notice*, 13 February 2008, p.42.

29. See, for example, Department of the Treasury, '[Australia's infrastructure policy and the COAG National Reform Agenda](#)'.

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One of Infrastructure Australia's functions is to establish infrastructure priority lists to 'create a pipeline of projects'. Presumably, Infrastructure Australia will develop criteria with which to rank projects. This raises the question of what criteria Infrastructure Australia will employ. In particular, will the criteria include benefit-cost analysis—that is, analysis of the benefits and cost to society of undertaking investment projects—which is a widely-used device to rank projects? Further, will Infrastructure Australia insist that all projects be subjected to benefit-cost analysis? According to a press report, Infrastructure Australia will review the rates of return expected on big projects.³⁰ Even if Infrastructure Australia decides that a project has high priority, there is no guarantee that it will proceed. Whether a project proceeds may depend, for example, on the outcome of the deliberations of regulatory bodies as to rates of return and prices.

Undertaking projects on the basis of priority could result in some states and areas 'losing out' to others. States whose populations are growing rapidly and whose infrastructure needs are also growing rapidly presumably would be the prime beneficiaries. This could lead to tensions between the 'winners' and the 'losers'.

The standardisation of tender documents and contracts to promote best practice procurement and to expedite decision making would be beneficial. The lack of uniformity in documentation is an impediment to firms bidding for contracts. How far the process of standardisation can be taken is unclear given the diversity of projects.

30. David Crowe and Annabel Hepworth, 'Shake-up for \$60bn in big projects', *Australian Financial Review*, 11 February 2008.

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