

The Senate

Rural and Regional Affairs
and Transport
Legislation Committee

Infrastructure Australia Amendment Bill 2013
[Provisions]

March 2014

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List of recommendations

Recommendation 1

2.42 The committee recommends the bill be passed in its current form.

Chapter 1

Introduction

Referral of inquiry

1.1 On 5 December 2013 the Senate referred provisions of the Infrastructure Australia Amendment Bill 2013 (bill) to the Senate Rural and Regional Affairs and Transport Legislation Committee (committee) for inquiry and report by 17 March 2014.

Purpose of bill

1.2 The bill contains two schedules. Part 1 of Schedule 1 amends the *Infrastructure Australia Act 2008* to re-establish Infrastructure Australia (IA) as a separate entity under the *Commonwealth Authorities and Companies Act 1997* (CAC Act). Part 2 of Schedule 1 makes consequential amendments to the *Income Tax Assessment Act 1997* in order that determinations about designated infrastructure projects are made by a responsible person rather than, as currently, the Infrastructure Coordinator.

1.3 As part of the reforms detailed in Part 1 of Schedule 1 of the bill, IA would be governed by the Board of Infrastructure Australia (board) comprising a chair and eleven other members appointed by the Minister for Infrastructure and Regional Development (minister). Other key elements of the bill include changes in reporting arrangements with the board reporting to the minister and establishment of a Chief Executive Officer (CEO) position to manage IA and report directly to the board.¹

1.4 Notwithstanding these changes, IA would remain an advisory body only. The decision-making on funding allocation would remain with government. The proposed functions of IA are set out in proposed section 5 and include evaluating infrastructure proposals, developing Infrastructure Plans and providing advice on infrastructure matters. Proposed section 5D details the specific functions of IA which would be performed when directed by the minister.

1.5 A new Part 2A provides for the establishment and functions of the board. Item 11 would insert a new section 6E under Part 2A detailing the board's functions. The bill prescribes the following responsibilities to the board:

- (a) to decide the objectives, strategies and policies to be followed by Infrastructure Australia; and
- (b) to ensure the proper, efficient and effective performance of the Infrastructure Australia's functions; and
- (c) any other functions conferred on the board by this act.

1.6 Under provisions of the bill, all Commonwealth-funded projects worth more than \$100 million would undergo a cost-benefit analysis by IA.

1 *Explanatory Memorandum*, Infrastructure Australia Amendment Bill 2013, p. 2.

Background

1.7 IA was established as a statutory body under the *Infrastructure Australia Act 2008* (Act) and came into effect on 9 April 2008. Its purpose is to serve as an independent advisor to government, investors and infrastructure owners on issues including Australia's current and future infrastructure needs, mechanisms for financing infrastructure investments, and policy, pricing and regulation and their impacts on investment.² One of its key functions is to produce the Infrastructure Priority List which provides the projects that IA considers to be central to strengthening the economy, dealing with sustainable population growth, export bottlenecks, urban congestion and climate change.

1.8 Prior to the federal election on 7 September 2013, the Coalition made public its 'Policy to Deliver the Infrastructure for the 21st Century'. The reforms proposed the re-establishment of IA led by a CEO reporting to a board; development of infrastructure plans based on national, state and local priorities spanning 15 years to be revised every five years; and reviews of all Commonwealth infrastructure expenditure exceeding \$100 million on the basis of financial viability and cost effectiveness.³ The policy stated that the intention of the proposed reforms was to strengthen IA 'to create a more transparent, accountable and effective advisor on infrastructure projects and policies'.⁴ The proposed reforms to IA are reflected in proposed sections 4, 5 and 6 of the bill.

Conduct of inquiry

1.9 The committee advertised the inquiry on its webpage and in *The Australian*, calling for submissions to be lodged by 20 January 2014. The committee also wrote directly to a range of organisations and individuals likely to have an interest in the matters covered by the bill, drawing their attention to the inquiry and inviting them to make written submissions.

1.10 The committee received 20 submissions which are listed at Appendix 1. The submissions were published on the committee's webpage. The committee held a hearing in Canberra on 28 February 2014. Appendix 2 lists the names and organisations of those who appeared. Details of the inquiry, the bill and associated documents including the Hansard transcript of evidence may accessed through the committee's webpage at

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Rural_and_Regional_Affairs_and_Transport/Infrastructure_Australia_Amendment_Bill_2013

2 Infrastructure Australia, About Infrastructure Australia, <http://www.infrastructureaustralia.gov.au/about/> (accessed 9 December 2013).

3 Liberal Party of Australia, *Policy to Deliver the Infrastructure for the 21st Century*, p. 2, <http://www.liberal.org.au/our-policies> (accessed 24 January 2014).

4 Liberal Party of Australia, *Policy to Deliver the Infrastructure for the 21st Century*.

Acknowledgement

1.11 The committee thanks those organisations and individuals who made submissions and provided evidence at the public hearing.

Note on references

1.12 References to the Committee Hansard are to the proof Hansard. Page numbers may vary between the proof and the official Hansard.

Chapter 2

Issues

2.1 The majority of submitters to the inquiry acknowledged the importance of Infrastructure Australia (IA) and supported the bill's aim to make it more effective and to strengthen its role in improving infrastructure planning and prioritisation on a national basis.¹ Many submitters also supported the governance changes proposed in the bill.² However, there were specific concerns raised in relation to IA's proposed functions and the minister's powers. Additional concerns were raised by IA itself regarding the lack of consultation during the drafting of the legislation, re-establishment of IA under the CAC Act, and the tax concession arrangements for infrastructure projects.³ This chapter will address the primary concerns of submitters, namely IA's proposed functions and the minister's powers which some submitters argued would diminish IA's independence and transparency.

Governance structure

2.2 Item 8 of Schedule 1 of the bill would repeal sections 4 and 5 of the Act and insert proposed sections 4 and 5. Proposed section 4 establishes IA as a body corporate (statutory body) under the *Commonwealth Authorities and Companies Act 1997* (CAC Act). CAC Act bodies are independent governing entities which are both legally and financially separate from the Commonwealth.⁴ The CAC Act regulates certain aspects of the financial affairs of Commonwealth authorities and in particular, details rules regarding reporting and accountability.

2.3 Under the current arrangements, ministerial direction powers exist between the minister and the advisory council which are separate to the ministerial direction powers between the minister and the Infrastructure Coordinator. In effect, therefore, the current Act provides for a statutory position (Infrastructure Coordinator) and a separate statutory body (advisory council), each with separate reporting lines to the minister.⁵

1 Moving People 2030 Taskforce, *Submission 2*, p. 3; Infrastructure Australia, *Submission 13*, p. 5; Consult Australia, *Submission 12*, p. 2; Australian Sustainable Built Environment Council, *Submission 9*, p. 2; Tourism & Transport Forum, *Submission 6*, p. 3; Australian Conservation Foundation, *Submission 8*, p. 5; Urban Development Institute of Australia, *Submission 10*, p. 3; Infrastructure Partnerships Australia, *Submission 19*, p. 1.

2 Lend Lease, *Submission 1*; Australian Conservation Foundation, *Submission 8*, p. 2; Australian Sustainable Built Environment Council, *Submission 9*, p. 1; Consult Australia, *Submission 12*, p. 2; Infrastructure Partnerships Australia, *Submission 19*, p. 2.

3 Infrastructure Australia, *Submission 13*, pp 4–15.

4 Department of Infrastructure and Regional Development, *Submission 7*, p. 2.

5 Ms Lyn O'Connell, Department of Infrastructure and Regional Development, *Committee Hansard*, 28 February 2014, p. 30.

2.4 As part of re-establishing IA as a CAC Act body, the bill would abolish the position of Infrastructure Coordinator who is appointed by the minister and establish a position of CEO appointed by a board.⁶ The bill would also abolish the twelve-member advisory council and establish a twelve-member board under proposed section 6D.⁷ The proposed structure of the board comprises:

- nine members, including the chair, to be determined by the Commonwealth. Of the nine, at least five would have experience in the private sector, and one in local government; and
- three members nominated by the states and territories.⁸

2.5 The bill would impose directors' duties upon the board members, making them formally accountable for their decisions.⁹ The board would appoint a CEO who would be responsible to report to the board rather than the minister, and the CEO would undertake the day-to-day administration of IA which is currently the responsibility of the Department of Infrastructure and Regional Development (department).¹⁰ The department noted that, unlike current arrangements whereby the advisory council has no formal responsibilities for IA's objectives or performance, under the bill, the board and the CEO would have clearly articulated roles and responsibilities.¹¹

2.6 The bill would also simplify current reporting practices whereby both IA and the Infrastructure Coordinator report separately to the minister. According to the department, this can be duplicative and time consuming, potentially inhibiting the independence of the advice while not maximising the advisory capacity of IA.¹² The department noted that such changes would help preserve IA's independence, while improving reporting arrangements and the delivery of IA's functions.¹³ The department's Deputy Secretary, Ms Lyn O'Connell explained that the bill seeks to rationalise some of the current reporting lines and create greater transparency and accountability with the CEO reporting to the board.¹⁴ She argued that, compared to

6 Ms Lyn O'Connell, Department of Infrastructure and Regional Development, *Committee Hansard*, 28 February 2014, p. 30.

7 Department of Infrastructure and Regional Development, *Submission 7*, p. 3.

8 Department of Infrastructure and Regional Development, *Submission 7*, p. 3.

9 The Department of Infrastructure and Regional Development clarified that the bill does not preclude members of IA's advisory council from being considered for appointment to the board. Department of Infrastructure and Regional Development, *Submission 7*, p. 3.

10 Department of Infrastructure and Regional Development, *Submission 7*, p. 3.

11 Ms Lyn O'Connell, Department of Infrastructure and Regional Development, *Committee Hansard*, 28 February 2014, p. 31.

12 Department of Infrastructure and Regional Development, *Submission 7*, p. 2.

13 Department of Infrastructure and Regional Development, *Submission 7*, p. 3.

14 Ms Lyn O'Connell, Department of Infrastructure and Regional Development, *Committee Hansard*, 28 February 2014, p. 30.

current arrangements where there is a discrepancy between the reporting arrangements of the coordinator and the council, the bill would provide a direct, clear reporting line between the minister, the board through the chair and then to the CEO.¹⁵

2.7 Infrastructure Partnerships Australia (IPA) also supported the proposed governance changes. It argued that in comparison to current arrangements whereby the Infrastructure Coordinator is appointed and directed by the minister, the establishment of a board and CEO would introduce a normal reporting relationship between the board and agency's public service staff.¹⁶ Similarly, the Australian Automobile Association (AAA) held the view that the appointment of a CEO who reports to the board would provide for greater independence while improving reporting arrangements and the delivery of IA's functions.¹⁷

2.8 The proposal to re-establish IA as a body corporate under the CAC Act was recognised in evidence as an important step towards strengthening IA's critical role in providing independent, expert and transparent advice to government.¹⁸ The Moving People 2030 Taskforce stated that the 'reform process being undertaken by the Commonwealth Government holds significant potential to make IA an even more effective and valuable body'.¹⁹

2.9 IPA argued that the proposed structure serves to provide additional accountabilities and transparency because the execution of the prioritisation and policy functions of the agency would be better insulated from the priorities of executive government. According to IPA, the changes would create an appropriate governance relationship between the board and staff while reducing opportunities for inconsistent priorities between government and IA's work program and prioritisation of projects.²⁰ According to Mr Brendan Lyon, CEO of IPA, the current governance arrangements have contributed to the aggravation of state and territory governments regarding the process of prioritisation and lack of transparency.²¹ Beyond these proposed changes, IPA argued that the balance of the bill's provisions largely serve to give effect to the government's stated policy objectives including that of the refreshed audit and reforms to the agency's Infrastructure Priority List.²²

15 Ms Lyn O'Connell, Department of Infrastructure and Regional Development, *Committee Hansard*, 28 February 2014, p. 31.

16 Infrastructure Partnerships Australia, *Submission 19*, p. 1; Mr Brendan Lyon, Infrastructure Partnerships Australia, *Committee Hansard*, 28 February 2014, p. 26.

17 Australian Automobile Association, *Submission 20*, p. 2.

18 Australian Sustainable Built Environment Council, *Submission 9*, p. 1; Consult Australia, *Submission 12*, p. 2.

19 Moving People 2030 Taskforce, *Submission 2*, p. 5.

20 Infrastructure Partnerships Australia, *Submission 19*, p. 1.

21 Mr Brendan Lyon, Infrastructure Partnerships Australia, *Committee Hansard*, 28 February 2014, pp 26–27.

22 Infrastructure Partnerships Australia, *Submission 19*, p. 1.

Infrastructure Australia functions

2.10 Proposed section 5 sets out the general functions of IA. The provision retains IA's existing functions, including conducting audits of nationally significant infrastructure (currently defined as proposals in transport, energy, water and communications); development of the Infrastructure Priority Lists; identifying impediments to investment; promoting investment in infrastructure; undertaking or commissioning research and other functions as conferred on IA by the Act.

2.11 While there are no significant changes to IA's current functions under the bill, the department noted that the bill does define more clearly those functions to ensure that IA would deliver high quality, evidence-based advice.²³ Furthermore, the bill provides a broad remit to consider policy in the areas of nationally significant infrastructure which is distinct from the current Act while setting out specific reporting obligations.²⁴

Evaluating infrastructure proposals

2.12 Proposed section 5A provides for IA to evaluate proposals for investment in nationally significant infrastructure and other infrastructure determined by the minister. The proposed section would allow the minister to make two types of determinations, both of which are legislative instruments and subject therefore to disallowance. First, the bill provides that the minister may determine other infrastructure which is to be evaluated by IA and second, under proposed subsection 5A(2), the minister may determine a class of proposals which IA may not evaluate.

2.13 A number of submitters raised concerns about the determination provision in proposed subsection 5A(2) which would give the minister the power to limit the class of project proposals that IA will evaluate.²⁵ Consult Australia argued that what constitutes a 'class of proposals', on what basis this decision would be made, and whether and how such a decision would be published is not clear.²⁶ Mr Michael Apps, representative of the Moving People 2030 Taskforce and Executive Director of the Bus Industry Confederation, noted that while the classes of infrastructure that will be excluded from evaluation are not stated, it was 'clear' that urban transport will be one of the excluded classes.²⁷ The Tourism and Transport Forum (TTF) was concerned that the provision may allow the minister to prevent IA from assessing proposals

23 Department of Infrastructure and Regional Development, *Submission 7*, p. 3.

24 Ms Lyn O'Connell, Department of Infrastructure and Regional Development, *Committee Hansard*, 28 February 2014, pp 33 & 36.

25 Moving People 2030 Taskforce, *Submission 2*, p. 3; Infrastructure Australia, *Submission 13*, p. 5; Consult Australia, *Submission 12*, p. 2; Australian Sustainable Built Environment Council, *Submission 9*, p. 2; Tourism & Transport Forum, *Submission 6*, p. 3; and Urban Development Institute of Australia, *Submission 10*, p. 3; Business Council of Australia, *Submission 15*, p. 2; Committee for Melbourne, *Submission 17*, p. [2].

26 Consult Australia, *Submission 12*, p. 2.

27 Mr Michael Apps, Moving People 2030 Taskforce, *Committee Hansard*, 28 February 2014, p. 8.

relating to public transport.²⁸ Other submitters argued that the exercise of power in such a manner would undermine the ability of IA to fulfil many of its general functions as set out in the bill.²⁹

2.14 During the hearing, a number of witnesses highlighted the consequences of the exclusion of urban and specifically public transport from IA's consideration and the need for a holistic approach to addressing Australia's transport challenges. Mr Bryan Nye, representative of the Moving People 2030 Taskforce and CEO of the Australasian Railway Association argued that while the government has made a commitment to improve productivity, its own research has indicated that by 2020, congestion in capital cities will constrain the Australian economy by \$20 billion.³⁰ Noting that 84 per cent of the Australian community live in cities, the National Infrastructure Coordinator, Mr Deegan emphasised the importance of urban transport issues as well as the need for an independent body that assesses all projects given the pressure on both rural and urban Australia.³¹ He continued:

Unless we take a network approach to the operations of transport in our cities—dealing with roads, public transport and all of the other elements in a holistic fashion—the productivity benefits that might be derived will be lost.³²

2.15 Mr Liam Foley, Policy Officer of the Urban Development Institute of Australia (UDIA) also argued that rather than limiting the classes of infrastructure, the focus of IA should rest with evaluating all relevant infrastructure classes to ensure improvement in the nation's productivity as well as the maximum return for the community and economy from the government's infrastructure investment.³³

2.16 In response to such concerns, the department stated that it did not agree with concerns that the bill would limit the type of project to be evaluated by the IA and particularly IA's ability to assess public transport projects. The AAA also noted that it is neither the intent nor the practical impact of the bill to exclude proposals for investment in public transport.³⁴ Furthermore, the department noted that the Act currently provides for IA to evaluate proposals for investment in nationally significant infrastructure only by ministerial request. In contrast, the bill would enable this

28 Tourism and Transport Forum, *Submission 6*, p. 5.

29 Australian Sustainable Built Environment Council, *Submission 9*, p. 2; Consult Australia, *Submission 12*, p. 2; Australian Conservation Foundation, *Submission 8*, p. 3.

30 Mr Bryan Nye, Moving People 2030 Taskforce, *Committee Hansard*, 28 February 2014, p. 6.

31 Mr Michael Deegan, Infrastructure Australia, *Committee Hansard*, 28 February 2014, pp 16 & 18.

32 Mr Michael Deegan, Infrastructure Australia, *Committee Hansard*, 28 February 2014, p. 19.

33 Mr Liam Foley, Urban Development Institute of Australia, *Committee Hansard*, 28 February 2014, p. 6.

34 Department of Infrastructure and Regional Development, *Submission 7*, p. 5; Australian Automobile Association, *Submission 20*, p. 3.

function to be performed without a ministerial request, except in relation to proposals in a class determined by the minister under proposed paragraphs 5A(1)(a) and (2).³⁵

2.17 The department explained that under the bill, the minister would be provided with the power to exclude a class of proposals from IA's function to facilitate the government's policy that IA assess all projects across economic and social infrastructure (excluding Defence projects) that seek Commonwealth funding of over \$100 million.³⁶ Where projects do not meet the definition of 'nationally significant infrastructure' including projects involving social infrastructure, they could be brought within the evaluation function by a determination of the minister under proposed paragraph 5A(1)(b). Projects not seeking Commonwealth funding of over \$100 million could be excluded by a determination under proposed subsection 5A(2).³⁷

2.18 In relation to proposed paragraph 5A(1)(b) and proposed subsection 5A(2), Ms O'Connell further clarified that 'health and education proposals are [within scope] if looking at evaluations, but out [of scope] if looking at policy'. She noted that the legislative drafters' advice was that the best way to implement that intention was to provide ministerial power of direction but to make sure that the ministerial power of direction was a legislative instrument so that it is a disallowable instrument and transparent.³⁸

Development of infrastructure plans

2.19 Proposed section 5B sets out the requirements that IA would be required to meet when developing infrastructure plans. New subsection 5B(2) requires IA to develop infrastructure plans that cover a period of 15 years from the time that the plan is prepared. Such plans must be prepared every five years or at other such intervals as determined by the minister.

2.20 Submitters welcomed the inclusion of 15-year infrastructure plans specifying priorities for all spheres of government and subject to review every five years.³⁹ The Australian Conservation Foundation (ACF) noted that a 15-year planning horizon will allow for more rigor and certainty regarding recommendations while supporting lower infrastructure construction and maintenance costs.⁴⁰ Similarly, the TTF highlighted that the development of 15-year plans will help to ensure that there is an overarching framework, particularly for federal investment in infrastructure.⁴¹ The National

35 Department of Infrastructure and Regional Development, *Submission 7*, p. 5.

36 Department of Infrastructure and Regional Development, *Submission 7*, p. 5.

37 Department of Infrastructure and Regional Development, *Submission 7*, p. 5.

38 Ms Lyn O'Connell, Department of Infrastructure and Regional Development, *Committee Hansard*, 28 February 2014, p. 33.

39 Infrastructure Australia, *Submission 13*, p. 5; Consult Australia, *Submission 12*, p. 2; Australian Sustainable Built Environment Council, *Submission 9*, p. 2; and Tourism & Transport Forum, *Submission 6*, p. 3; Business Council of Australia, *Submission 15*, p. 3.

40 Australian Conservation Foundation, *Submission 8*, p. 3.

41 Tourism & Transport Forum, *Submission 6*, p. 3.

Infrastructure Coordinator, Mr Deegan noted that the strength of the legislation rested with the provision for long-term 15-year plans which would provide for 'long-term national infrastructure planning and moving away from the politicisation of the current process'.⁴²

2.21 Submitters also broadly supported proposed subsection 5B(1) which details the specific requirements that IA must comply with when developing infrastructure plans. Of this provision, Consult Australia stated that:

It is often through a suite of projects, or a regionally-based approach that the greatest benefits will be realised from an investment. This expansion in the functions of IA should help support business confidence and plan for the delivery of infrastructure with greater certainty.⁴³

Providing advice on infrastructure matters

2.22 Proposed section 5C sets out the infrastructure matters on which IA would provide advice. The department noted that IA's current primary functions as set out in the Act are retained in the bill.⁴⁴ Under the proposed section 5C, IA will advise the minister, Commonwealth, state, territory and local governments, infrastructure investors and owners on matters including:

- (a) Australia's current and future needs and priorities relating to nationally significant infrastructure;
- (b) policy, pricing and regulatory issues that may impact on the utilisation of infrastructure;
- (c) impediments to the efficient utilisation of national infrastructure networks;
- (d) options and reforms, including regulatory reforms, to make the utilisation of national infrastructure networks more efficient;
- (e) the needs of users of infrastructure; and
- (f) mechanisms for financing investment in infrastructure.

2.23 The department advised the committee that proposed section 5C would provide IA with a wide-ranging remit across infrastructure.⁴⁵ IPA also commented that oversight of social infrastructure investments would mark a material change in the

42 Mr Michael Deegan, Infrastructure Australia, *Committee Hansard*, 28 February 2014, p. 12.

43 Consult Australia, *Submission 15*, p. 2.

44 Department of Infrastructure and Regional Development, *Submission 7*, p. 3.

45 Department of Infrastructure and Regional Development, *Submission 7*, p. 5.

mandate of IA which 'increases the relevance of IA, because it gives the agency a role in advising on every Commonwealth economic and social infrastructure project'.⁴⁶

2.24 The bill proposes to remove functions provided under paragraph 5(2)(g) of the Act 'to provide advice on infrastructure policy issues arising from climate change'. It also proposes to remove the function of reviewing Commonwealth infrastructure funding programs to ensure that they align with Infrastructure Priority Lists as provided for in paragraph 5(2)(h) of the Act.⁴⁷ The proposed removal of these provisions raised concerns with some submitters.

2.25 The UDIA advocated that IA should provide advice on climate change, as it 'is a legal and policy reality' and is likely to have a 'significant impact' on both Australia's existing infrastructure assets and future infrastructure needs.⁴⁸ The National Infrastructure Coordinator, Mr Deegan stated that there were a number of specific instances relating to bridge heights, port development and opportunities in Australia's cities to deal with climate change threats where appropriate early expenditure to deal with possible climate change impacts will save money. He emphasised that the up-front consideration of climate change impacts is an important component in assessing projects and one of the factors that should be considered in prioritisation of projects and the associated costs.⁴⁹

2.26 However, the department confirmed that the bill includes all of the current 'additional functions' of IA except those contained in paragraphs 5(2)(g) and 5(2)(h) of the Act. In relation to these two provisions, the department highlighted that under section 5(4) of the Act, these two functions can only be undertaken by IA on request of the minister.⁵⁰ The department emphasised that the bill would provide the necessary flexibility for these functions to be undertaken by IA through two new provisions, namely proposed subsection 5C(b) and proposed paragraph 5D(1)(c).

2.27 Proposed subsection 5C(b) would direct IA to provide advice on policy, pricing and regulatory issues that may impact on the utilisation of infrastructure and which could include any issues arising from climate change.⁵¹ Furthermore, according to the department, the bill would provide IA with the necessary flexibility to address matters pertaining to climate change and Commonwealth infrastructure funding with the inclusion of proposed paragraph 5D(1)(c) which provides for IA to undertake any functions that the minister directs it to perform.⁵² The department emphasised that this

46 Infrastructure Partnerships Australia, *Submission 19*, p. 5; Infrastructure Partnerships Australia, 'Infrastructure Australia reform thoughtful, thorough, supported by industry', *Media Release*, 20 November 2013, <http://www.infrastructure.org.au/Content/IAreformtwelcomed.aspx> (accessed 20 January 2014).

47 *Infrastructure Australia Act 2008*, para. 5(2)(g) and 5(2)(h).

48 Urban Development Institute of Australia, *Submission 10*, p. 2.

49 Mr Michael Deegan, Infrastructure Australia, *Committee Hansard*, 28 February 2014, p. 16.

50 Department of Infrastructure and Regional Development, *Submission 7*, p. 3.

51 Department of Infrastructure and Regional Development, *Submission 7*, p. 3.

52 Department of Infrastructure and Regional Development, *Submission 7*, pp 3–4.

proposed provision is similar to that contained in paragraph 5(2)(j) of the Act concerning additional functions which states that IA has any functions that the minister, by writing, directs IA to perform. Moreover, the bill's section 5C would enable IA to provide advice on Australia's future needs and priorities relating to nationally significant infrastructure, policy issues impacting on the utilisation of infrastructure, impediments to the efficient utilisation of national infrastructure networks and options and reforms to improve the efficiency of utilisation of such networks.⁵³

2.28 Mr Brendan Lyon, CEO of IPA argued that the removal of climate change from the legislation would not have any material impact on whether there is up-front consideration of climate change. Mr Lyon, whose views were supported by the department, argued that:⁵⁴

The place to do that is through the project inception tools that are used. An area where Infrastructure Australia certainly should have done deeper work over the last couple of years is around how you engender proper consideration of sustainable development objectives into the front end inception of infrastructure.⁵⁵

Functions only performed when directed by the minister

2.29 Section 5D details the functions that IA would only be able to perform when directed to do so by the minister in writing. Under subsection 5D(1), these functions include:

- (a) to review and provide advice on proposals to facilitate the harmonisation of policies, and laws, relating to development of, and investment in, infrastructure;
- (b) to publish the following material:
 - (i) evaluations conducted under section 5A;
 - (ii) evidence relied on in preparing, and reasons for any opinion or conclusion contained in, the audits, lists, evaluations, plans and advice mentioned in paragraphs 5(a) to (e);
- (c) any other functions that the Minister directs Infrastructure Australia to perform.

2.30 Concerns were raised in evidence that the section 5D would give the minister excessive direction powers and limit IA's independence as an advisory body to

53 Department of Infrastructure and Regional Development, *Submission 7*, p. 5.

54 Ms Lyn O'Connell, Department of Infrastructure and Regional Development, *Committee Hansard*, 28 February 2014, p. 34.

55 Mr Brendan Lyon, Infrastructure Partnerships Australia, *Committee Hansard*, 28 February 2014, p. 21.

government.⁵⁶ Under proposed paragraph 5D(1)(b), for example, IA evaluations would be published only with the minister's consent.

2.31 Mr Nye, representative of the Moving People 2030 Taskforce, informed the committee that proposed section 5D would prevent IA from publishing project evaluations, material used in those evaluations, plans, audits or advice other than at the direction of the minister.⁵⁷ The UDIA argued that by preventing IA from publishing evaluations conducted under section 5A, paragraph 5D(1)(b) would reduce the independence of IA as well as the transparency and scrutiny with which it performs its functions.⁵⁸ Similarly, the National Infrastructure Coordinator argued that by providing that IA is not permitted to publish evaluations and other documentation without the written direction of the minister, proposed paragraph 5D(1)(b) would undermine the credibility of IA and its value to the nation.⁵⁹ It was highlighted that while a determination under proposed paragraph 5D(1)(a) would be a legislative instrument to come before Parliament, directions given under proposed paragraph 5D(1)(b) are not legislative instruments and could not therefore be reviewed by Parliament.⁶⁰ The Business Council of Australia argued that the publication of such evaluations wherever possible is critical to public confidence in the decisions made by government and that a substantial component of public disclosure is the publication of such reports.⁶¹

2.32 However, the department clarified that the intention behind proposed paragraph 5D(1)(b) was to provide a requirement for IA to publish evaluations and other documentation while also ensuring that it would be able to safeguard commercial information. Whereas there is no current provision for IA to publish material under the Act, the bill proposes to provide greater transparency by providing such a provision while also balancing the need to publish with that of safeguarding commercial information. Ms O'Connell noted that such a balance would meet the need of the state governments which were particularly concerned about the appropriate treatment of commercially sensitive material when they put forward information to IA.⁶²

2.33 Furthermore, contrary to the concerns raised by some submitters, the department also highlighted that section 5D would reduce the list of functions that IA can only perform at the request of the minister. At the same time, it expands the

56 Australian Sustainable Built Environment Council, *Submission 8*, p. 3.

57 Mr Bryan Nye, Moving People 2030 Taskforce, *Committee Hansard*, 28 February 2014, p. 2.

58 Urban Development Institute of Australia, *Submission 10*, p. [3].

59 Infrastructure Australia, *Submission 13*, p. 10.

60 Infrastructure Australia, *Submission 13*, p. 13.

61 Business Council of Australia, *Submission 15*, p. 3.

62 Ms Lyn O'Connell, Department of Infrastructure and Regional Development, *Committee Hansard*, 28 February 2014, p. 34.

function of evaluating 'nationally significant infrastructure' without a ministerial request except in relation to proposals in a class determined by the minister.⁶³

Ministerial power to direct IA about the performance of its functions

2.34 Section 6 of the Act empowers the minister to give written directions to IA about the performance of its functions. The bill's item 9 of Schedule 1 would substitute subsections 6(3) and 6(4) of the Act and set out the general nature of the directions that may be given (proposed subsection 6(3)), while proposed subsection 6(4) makes it clear that the minister could not give directions about the content of any audit, list, evaluation, plan or advice to be provided by IA. The proposed provisions expand upon the existing subsections which limit the directions that the minister can make to those that are of a general nature only.

2.35 Mr Foley from the UDIA raised concern that proposed subsection 6(3) would require IA to perform its functions in accordance with requirements specified in the direction. The UDIA argued that the proposed subsection 6(3) would allow the minister to provide direction on a project's scope, what matters will be considered by the project, and the manner in which the project will be conducted.⁶⁴ Similarly, the National Infrastructure Coordinator raised concerns with subsections 6(3) and 6(4) of the bill on the grounds that the width of the ministerial directions may curtail and inhibit the opportunity for the community to have a public debate on matters of national importance.⁶⁵

2.36 However, the department emphasised to the committee that proposed subsection 6(4) would clearly limit the powers available under proposed section 6(3).⁶⁶ The department advised that under proposed paragraph 6(3)(c), the bill would retain the minister's power under the Act to direct IA to perform a function in accordance with any requirement that are specified in the direction, including requirements relating to:

- (i) the scope of any audit, list, evaluation, plan or advice to be provided by Infrastructure Australia; and
- (ii) any matters that Infrastructure Australia must or must not consider in performing the function; and
- (iii) the manner in which Infrastructure Australia is to perform the function.⁶⁷

2.37 Proposed section 6(4) states that 'the Minister must not give directions about the content of any audit, list evaluation, plan or advice to be provided by Infrastructure

63 Department of Infrastructure and Regional Development, *Submission 7*, p. 4.

64 Urban Development Institute of Australia, *Submission 10*, p. [4].

65 Mr Michael Deegan, Infrastructure Australia, *Committee Hansard*, 28 February 2014, p. 14.

66 Ms Lyn O'Connell, Department of Infrastructure and Regional Development, *Committee Hansard*, 28 February 2014, p. 35.

67 Department of Infrastructure and Regional Development, *Submission 7*, p. 5.

Australia'. The department noted that this provision ensures that IA would at all times maintain an unfettered capacity in relation to its advice on investment, planning, priorities, projects and other matters to government.⁶⁸ Similarly, the AAA noted that this section would ensure the independence of IA in relation to its advice on investment, planning and priorities.⁶⁹

Consequential changes for tax concessions

2.38 The Selection of Bills Committee noted some concern that the bill changes arrangements for tax concessions in respect of infrastructure projects.⁷⁰

2.39 However, the department noted in its submission that the proposed consequential changes provided for in the bill are not intended to have any impact on the assessment of tax concessions for infrastructure projects currently provided for under the *Income Tax Assessment Act 1997*.⁷¹

Committee view

2.40 The committee considered the concerns of submitters and witnesses regarding the governance structure reforms, the functions of IA as well as the minister's powers as proposed by the bill. The committee notes that, contrary to the views of many submitters, the bill would widen the infrastructure remit of IA while imposing for the first time, reporting and publishing obligations.

2.41 The committee is satisfied that, rather than diminishing IA's ability to provide expert and independence advice to government, the bill would codify the extent of ministerial powers and reduces the list of functions that IA can perform only upon ministerial request. The committee is also satisfied that the bill would strengthen IA's role as an independent and transparent advisory body through the clarification of functions and a governance structure that is legally and financially separate from the Commonwealth.

Recommendation 1

2.42 The committee recommends the bill be passed in its current form.

Senator the Hon Bill Heffernan

Chair

68 Department of Infrastructure and Regional Development, *Submission 7*, p. 5.

69 Australian Automobile Association, *Submission 20*, p. 3.

70 Selection of Bills Committee, *Report No. 10 of 2013*, 4 December 2013, Appendix 2, http://www.aph.gov.au/~media/Senate/committee/selectionbills_ctte/reports/2013/rep1013.aspx (accessed 20 January 2014).

71 Department of Infrastructure and Regional Development, *Submission 7*, p. 6.

Inquiry into Infrastructure Australia Amendment Bill 2013

Dissenting Report – Senator Sterle

Infrastructure Australia

1.1 Infrastructure Australia was established by the Rudd Labor Government in 2008, following passage of the Infrastructure Australia Act that year.

1.2 Infrastructure Australia commenced operations, with a Council headed by Sir Rod Eddington, and he remains in that role. The Infrastructure Co-ordinator, created by Part 3 of the Act, was, and remains, Mr Michael Deegan.

Achievements

1.3 In a short period, Infrastructure Australia has overhauled and driven lasting improvements to the way Australia plans, assesses, finances, builds and uses the infrastructure it needs to compete in the 21st century. To date its achievements include:

- (a) completed the first ever infrastructure audit;
- (b) put in place a National Priority List to guide investment into nationally-significant projects which offer the highest economic and social returns – and the former government committed funding to all 15 projects identified as ‘ready-to-proceed’;
- (c) developed national Public Private Partnership (PPP) guidelines to make it easier and cheaper for private investors to partner with governments to build new infrastructure;
- (d) finalised long term blueprints for a truly national, integrated and multimodal transport system capable of moving goods around as well as into and out of Australia quickly, reliably and efficiently: the National Port Strategy, the National Freight Strategy and more recently the Urban Transport Strategy; and
- (e) conducted pilot work on improving governance and developing rigour around evidence-based road funding.

1.4 It is a credit to the Infrastructure Australia Council, the Infrastructure Coordinator, and the staff of Infrastructure Australia that almost every one of the submissions to the inquiry see IA as being a positive reform, and that there is a strong mood for retaining and enhancing IA’s role as critical adviser to government on infrastructure policy and priorities.

Consultation and change

1.5 The new Government announced its infrastructure policy two days before the election in September 2013.

1.6 The evidence of the inquiry is that the Department drew up drafting instructions based on the new Government's election policy and in discussions with the Minister's office.

1.7 There was no formal consultation on the detail of the Bill prior to its introduction with any stakeholders outside the Government, including interested parties such as Infrastructure Partnerships Australia, the Business Council of Australia, the Urban Development Institute or the Tourism & Transport Forum. Given the tenor of these organisations' submissions, the Government would have been better advised to have sought detailed input via an exposure draft process at the very least.

1.8 Indeed, the Government did not formally consult on the detail of the Bill with Infrastructure Australia or the Infrastructure Co-ordinator. According to the latter, over twenty drafts of the Bill existed, but he saw none, despite having an evidently large background and body of knowledge that the Government could have drawn upon. Mr Deegan's comprehensive submission and oral testimony would have been valuable input into legislative drafting.

1.9 Many other organisations were also not consulted on this Bill, and such was evident from the written submissions.

Detail of the Bill

1.10 The Bill seeks to change the governance of Infrastructure Australia via changing its corporate character and lines of reporting, fleshing out its functions and eliminating others.

1.11 Of greater concern however, is the enhancing of the Minister's explicit powers to direct Infrastructure Australia's operations, by allowing the Minister to add projects that are not "nationally significant", excluding whole classes of projects from evaluation, and by defining the Minister's powers from general to very specific and detailed. This is corrosive of the independence of an organisation whose primary role is to provide expert advice to Government.

1.12 Transparency is reduced via the explicit prevention of publication of evaluations or evidence relied upon without explicit Ministerial permission. This runs counter to the election commitment to greater transparency.

1.13 Of additional concern is the proposal to permit the separation of Infrastructure Australia, from the process of approving tax offsets for designated infrastructure projects.

1.14 The above are serious defects in the Bill, and most will have the effect of reducing confidence in the independence and transparency of the organisation.

Conclusion

1.15 The preferred course is for the Bill to be withdrawn and for proper and broad inquiry on reform to Infrastructure Australia to be undertaken.

1.16 The Bill as it currently stands is not supported.

Senator Glenn Sterle
Deputy Chair

Dissenting Report

Australian Greens

1.1 The Australian Greens have a number of significant issues with the Infrastructure Australia Amendment Bill which were addressed during the inquiry but not reflected in the recommendation to pass the bill in its current form.

1.2 This bill weakens the independent arms-length decision-making in IA, increases the power of the Minister to interfere in IA's evaluation processes, has the capacity to exclude classes of projects from IA's consideration including public transport, removes climate change considerations, and foreshadows a return to reduced merit in assessments, deal-making, forsaken productivity and favouring roads over public transport.

1.3 The issue of going backwards on climate and public transport is of particular concern. The Prime Minister wants to be seen as "an infrastructure Prime Minister" – this bill spells out what kind of agenda he is setting us up for.

Particular issues with the bill

1.4 A number of submissions to the inquiry expressed significant concern with the particular elements of the bill that relate to expanding the discretionary powers of the Minister in relation to Infrastructure Australia fulfilling its roles and obligations.

1.5 The Australian Sustainable Built Environment Council said that the changes this Bill introduces to the functions of Infrastructure under which the Minister may give directions to IA where of "greatest concern". In particular, their submission raises concerns with Section 5A(2) which empowers the Minister to exclude any 'class of proposals' from IA's remit for evaluation.

1.6 The Urban Development Institute Australia shares the concerns expressed by the Australian Sustainable Built Environment Council, and in specific, the functional obligation of Infrastructure Australia to "review and provide advice on proposals to facilitate the harmonisation of policies, and laws, relating to development of, and investment in, infrastructure" being shifted to the discretion of the Minister.

1.7 Similar concerns along these lines were raised in submissions from the Committee for Melbourne, the Business Council of Australia and Consult Australia.

1.8 It's also concerning to note that Infrastructure Australia was not consulted while the Bill was being drafted. In its submission Infrastructure Australia notes that the "proposed new provisions appear diametrically opposed" to Infrastructure Australia's "objectives and principles".

1.9 The Bill removes references to climate change in defining the functions of Infrastructure Australia, something noted by a number of submissions.

1.10 The submission by the Australian Conservation Foundation recommends include green infrastructure as a valid infrastructure sector, something supported by The Greens.

1.11 The submission and evidence heard by the Moving People 2030 Taskforce was compelling. In particular their concerns with Section 5D (1)(b) which removes the requirement for Infrastructure Australia to publish project evaluations or material used in those evaluations or plans, audits and advice, other than at the direction of the Minister. The Taskforce stated ‘this will completely undermine the credibility of Infrastructure Australia and its value to the nation. It runs counter to the principles of consultation and transparency which any attempt to obtain consensus on a national infrastructure plan must accept’.

1.12 In short, the Australian Greens believe

- Climate change must remain as a strategic priority;
- Productivity gains shouldn’t take precedence above all else (e.g. Schedule 1, Part 1, Section 5B). Sustainability principles and green infrastructure should be a feature, and mass public transport should be included as a priority;
- IA should also be free from Ministerial direction on the scope of audits, lists, evaluations, plans or advice, including the infrastructure to be considered;
- There should be more opportunity for consultation with individuals, community organisations and their representatives; and
- Transparency and independence should be enhanced not curtailed (e.g. Schedule 1, Part 1, Section 5D) - IA should publish draft and final evaluations and reports immediately and without the need for approval by a Minister. Commercial-in-confidence material should be published where it is necessary to assess the public benefit of a proposal or evaluation.

1.13 For these reasons and the damning evidence against this Bill heard in the Inquiry and articulated in numerous submissions, the Greens believe the government must be out of its mind to pursue the amendments contained.

Senator Scott Ludlam
Australian Greens Senator for Western Australia

Appendix 1

Submissions received

Submission Number	Submitter
1	Lend Lease
2	Moving People 2030 Taskforce
3	Northern Territory Department of Infrastructure
4	Australian Road Transport Suppliers Association Inc
5	Ettamogah Rail Hub
6	Tourism & Transport Forum
7	Department of Infrastructure and Regional Development
8	Australian Conservation Foundation
9	Australian Sustainable Built Environment Council
10	Urban Development Institute of Australia
11	Australian Logistics Council
12	Consult Australia
13	Infrastructure Australia
14	Associate Professor Philip Laird
15	Business Council of Australia
16	Mr Matt Mushalik
17	Committee for Melbourne
18	Mr Geoff Edwards
19	Infrastructure Partnerships Australia
20	Australian Automobile Association

Additional information received

Tabled documents

28 February 2014, Canberra, ACT

- Tabled document by Ms Lyn O'Connell, Deputy Secretary, Department of Infrastructure and Regional Development. Opening Statement.

Appendix 2

Public hearings and witnesses

28 February 2014, Canberra, ACT

- APPS, Mr Michael Shane, Executive Director,
Moving People 2030 Taskforce and Bus Industry Confederation of Australia
- FOLEY, Mr Liam James, Policy Officer,
Urban Development Institute of Australia
- LINDSAY, Mr Richard, Chief Executive Officer,
Urban Development Institute of Australia
- NYE OAM, Mr Bryan, Chief Executive Officer,
Australasian Railway Association
- DEEGAN, Mr Michael, National Infrastructure Coordinator,
Infrastructure Australia
- LYON, Mr Brendan, Chief Executive Officer,
Infrastructure Partnerships Australia
- HALL, Ms Jessica, Acting General Manager, Infrastructure Policy,
Infrastructure Investment Division, Department of Infrastructure and Regional
Development
- O'CONNELL, Ms Lyn, Deputy Secretary,
Department of Infrastructure and Regional Development

