# Cause and consequence

The previous article identified roads as a ‘tar baby’ of public policy with a system that leads to perverse results. This note explores some causes and consequences of that system.[[1]](#endnote-1)

To recap, the roads sector has: a financial deficit of $25billion in the last five years; a $multibillion maintenance backlog; possibly damaged competitors through cross subsidisation; overestimated demand for its urban services; become the subject of a spending race between political parties.

## Of cause

The proximate cause of these issues is a system where spending impulses are not constrained by earned revenue. Funding is a gift. This results from dissociations of: government road revenue and road spending; benefits and burdens.[[2]](#endnote-2)

The former dissociation is said to be an outcome of the Australian Constitution. Only the Commonwealth can levy the excises considered most effective as a means of collecting road revenue.[[3]](#endnote-3)

In recent years the Commonwealth collected somewhat more from roads than it spent. States and local governments spent much more on roads than they collected. While this has been presented as a type of vertical fiscal imbalance it also is a total fiscal imbalance; an overall deficit as the Commonwealth’s surplus is less than States’ etc. deficits.[[4]](#endnote-4)

Given that collections from roads should at least equal road spending, the overall deficit is a failure of coordination among governments. The issue is primarily for the Commonwealth which, through its optional gift giving, causes the need for coordination. It is the only tier able to provide a solution; to initiate coordination.[[5]](#endnote-5)

The latter dissociation is shown by an increasing propensity to reinforce road gift giving. Recent examples include: calls for Commonwealth contributions; ‘availability payments’; sale of public assets to ‘liberate’ funds.

Beneficiaries include some road users, motorist organisations and those who provide roads: road agencies; construction firms; supporting organisations. The latter groups can be vociferous about the ‘need’ to build more roads.[[6]](#endnote-6)

The view put is that roads are public goods and should be treated like hospitals or schools. Some consider road spending to be good for all; those benefitting need not contribute unless for exceptional service. Such spending is a matter of electoral contest; of promises by government and opposition for good works financed by ‘savings’ from elsewhere.[[7]](#endnote-7)

Yet disclosure to the electorate about road projects and associated public spending is less than full. Governments can appear to wish to keep details to themselves, at times relying on claims that matters are commercially sensitive. This echoes an emerging question in wider public policy: how much is the electorate entitled to know about what government is doing?[[8]](#endnote-8)

## And consequence

Beyond the economic questions of fiscal responsibility and cross subsidy, the roads issues present several types of problems: political; power; proximity.[[9]](#endnote-9)

### Political

An opposition has political incentives to differentiate itself from the government. Yet it is likely to know less about road project proposals than the government. It does not have the information and analytical resources of public service departments.[[10]](#endnote-10)

An opposition may feel a need to put forward road projects not proposed by government but may be more vulnerable to being misled into supporting those that lack objective merit. If elected, it may face the choice of reneging on promises or implementing poor projects.

The government may feel a need to react to opposition road promises, for example by offering even more. Such an offer may be at odds with bureau views, creating risk of a rift between the government and its public servants. Any such rift could undermine governments’ advisory advantages.

The challenge is to enable better analysis available to all; difficult in an environment where information about projects and proposals is not freely available.

An associated problem is inadequate analysis and scrutiny; why look a gift horse in the mouth? Recent examples include withholding of information lest it undermine the presented case for road spending.[[11]](#endnote-11)

Some analyses of some general road issues, not projects, by even respected institutions are outdated, wrong or not answered to answer obvious questions. Errors can be promulgated rather than corrected.[[12]](#endnote-12)

### Power

Power in Australia is defined around the Constitution. Misunderstandings of this power could diminish appropriate political accountability.

Questionable propositions can cause misunderstandings and problems for roads. One example is the idea that, for Commonwealth purposes, responsibility for some roads lies with local governments. In reality, for that purpose local governments are an emanation of States. Adequacy of roads, and road funding, ultimately is a matter for the States.[[13]](#endnote-13)

It can be argued that States’ divestiture of some roads to local governments and their claiming a ‘need’ for Commonwealth funds for major road projects has muddied accountability.[[14]](#endnote-14)

There are more severe, and acute, problems for the Commonwealth. Some arise from limitations over its power generally and Executive or Government power within it.

Contrary to claims that roads are part of the Commonwealth’s knitting, it has no specific responsibility or power for roads. Curiously the Commonwealth’s responsibility for a national rail network is not often mentioned as part of its knitting.[[15]](#endnote-15)

One consequence of the Commonwealth not having power is legal restrictions on the Government’s ability to spend public funds. The restrictions include a need for legislation and State agreement, even for ‘popular’ road funding programs.[[16]](#endnote-16)

Legislation is not guaranteed by a Government; Senate approval also is necessary. Even were legislation passed, there is no guarantee that a State government will accept an offer of Commonwealth funding. The East West Link proposal is a recent example.

The effects of restrictions on Commonwealth power over roads extend beyond funding. The Constitution, framed along the lines of legal governance, provides power to support responsibility. An absence of Commonwealth responsibility implies a lack of power.[[17]](#endnote-17)

There may be questions of democratic accountability, which tier is responsible for what, unless the Parliament, not merely Government, asserts an easily understood defined responsibility; a durable and stable Commonwealth policy.[[18]](#endnote-18)

Commonwealth conditions on road funding are limited and administrative in nature. While there are requirements such as to account for money and to erect signs identifying the Commonwealth as a donor to projects, these do not extend to matters claimed to be of concern to productivity: engineering specifications; truck access; ‘regulatory reform’.[[19]](#endnote-19)

Attempts to improve existing processes of Commonwealth road funding, for example through multi-year agreements, requirements for co-contributions, and support for specific projects, while worthwhile do not address these issues.[[20]](#endnote-20)

### Proximity

A further challenge for the Commonwealth is its distance from the coal face.

The Commonwealth was not always so distant. Whitlam’s Governments attempted to create a policy by offering to take responsibility for a national highway network.[[21]](#endnote-21)

Aspects of a Commonwealth responsibility were echoed by the Howard Governments’ Auslink. That program, in response to pressure from the States, entailed significant steps towards Commonwealth responsibility for a national rail network. Yet it sought ‘joint’ funding of some road projects thereby dividing ‘responsibility’ for roads.[[22]](#endnote-22)

Among the consequences is Commonwealth reliance on States for information about roads; including the projects proposed by States for Commonwealth funding. There is no such problem for the national rail network.[[23]](#endnote-23)

In this context, the claims of ‘fraud’ about the East West Link are troubling. True or not, they may lead to question about incentives to be fully open with the Commonwealth.[[24]](#endnote-24)

General governance concepts, or federalism ideas such as subsidiarity, have not clearly been consistently applied in relation to roads. This may have contributed to matters such as maintenance deficits and failure to progress ‘road reform’.[[25]](#endnote-25)

## To conclude

The proximate causes of the roads financial problem are dissociation of revenue from spending and belief that road funding should be a gift. The dissociation has put roads into the electoral battleground.

This reflects, and results in, issues about governance; in the way governments and roads interact.

Issues appear greatest at the Commonwealth level. The sharing of functions between the tiers of government creates challenges.

The consequence is dissatisfaction and cynicism about roads and transport.

**June 2015**

## Notes and sources

1. **‘tar baby’**

Available at jadebeagle.com [↑](#endnote-ref-1)
2. **Funding as a gift**

As described in *Infrastructure Finance Working Group Report*, April 2012 at <https://www.infrastructure.gov.au/infrastructure/iff/files/IFWG_Report.pdf> [↑](#endnote-ref-2)
3. **Commonwealth road revenue and spending powers**

For revenue: there is a vertical fiscal imbalance in many federations, including Australia.

The Australian Constitution s.90 gives the Commonwealth exclusive power to levy excises. This was clarified by the High Court in *Ha and Lim v State of New South Wales and ors* *1997*, which held State tobacco franchising fees to be invalid. By analogy, then State fuel franchising fees also would be invalid. See: *History of fuel taxation in Australia*, Fuel Taxation Inquiry, September 2001: http://fueltaxinquiry.treasury.gov.au/content/backgnd/002.asp.

For spending: the Constitution does not mention roads. Hence roads is a field in which the States retain pre-federation colonial responsibilities and powers. In contrast, the Constitution does mention railways at s.51(xxxii).

There is no principle or obligation of the Commonwealth to spend or provide roads. Road spending is optional. The Commonwealth generally seeks to support its spending on roads by s.96 grants to the States. Recent decisions of the High Court have called into question previous Commonwealth practices in relation to this section, including direct grants to local governments. This is discussed further in note xviii. [↑](#endnote-ref-3)
4. **Roads vertical fiscal imbalance**

Figure 1 demonstrates the outcome of the roads vertical fiscal imbalance: the Commonwealth generally collects more revenue than it spends, a surplus; the States spend more than they collect, deficits.

**Figure 1**

Sources: Bureau of Infrastructure Transport and Regional Economics, *Australian Infrastructure Statistics Yearbooks 2013, 2014*.

Since 2007 the Commonwealth’s net road revenue, e.g. fuel excise less its own spending, would have been unable to cover the States road financial deficits.

In the last three years of this data, Commonwealth gross road revenue would have been unable to cover the States road financial deficits. Even if the Commonwealth road funding programs were cancelled there would still have been an Australian road financial deficit. [↑](#endnote-ref-4)
5. **Lack of coordination an issue for the Commonwealth**

The ‘tar baby’ note explained that there should not be an aggregate Australian roads financial deficit. Any such a deficit would reflect a failure of public policy.

Failures in policy can arise from poor coordination. Inadequate cross government coordination is a risk in a Federation, such as Australia. Professor Twomey argues that the design of the Australian Constitution included mechanisms for adequate fiscal and financial coordination. She also argues that the Commonwealth has avoided the use of these. See: Anne Twomey, *Public Money Federal-State Financial Relations and the Constitutional Limits on Spending Public Money*, Report No 4, 2014, Constitutional Reform Unit Sydney Law School.

As such, the onus for establishment and effectiveness of other coordinating mechanisms should fall on the Commonwealth.

Commonwealth-State forums have been used in Australia to seek coordination of policies; the peak group currently is the Council of Australian Governments.

There has also been a long standing Commonwealth-State forum for transport and roads; currently the Standing Council on Transport and Infrastructure. It is chaired by the Commonwealth Minister, which also provides the Secretariat and sets its agenda. See: Transport and Infrastructure Council at http://www.transportinfrastructurecouncil.gov.au/.

The Standing Council has not sought to coordinate road spending. Rather the Commonwealth strikes ‘bi-lateral’ agreements with each State. These agreements cover a minority of roads, and focussing on capital upgrades. The agreements are published, which is a positive step See: http://investment.infrastructure.gov.au/.

In the absence of formal coordination, the Standing Council has limited authority over revenue. It does make determinations of heavy vehicle charges which are assumed to comprise around 20 percent of road revenues. See: http://www.comlaw.gov.au/Details/F2013L00990/Explanatory%20Statement/Text However, it has not sought to coordinate other revenue sources.

The Standing Council has not publicly identified that there is a roads fiscal deficit.

In a later paper, I will raise an issue about Australian Government representation at some such forums, suggesting there should be much greater Parliamentary oversight as, for example, in the making of international treaties. [↑](#endnote-ref-5)
6. **Vociferous about the need to build roads**

Examples include <http://www.afr.com/business/infrastructure/transurban-in-55b-plan-to-revive-part-of-east-west-project-20150430-1mwmoi>

<http://www.afr.com/business/infrastructure/andrews-government-looks-to-road-project-in-the-west-20150422-1mqfzd>

A contra (?) example is the reported comments of the Chief Executive of the Committee for Sydney on road building and the Westconnex road project. See: <http://www.smh.com.au/nsw/committee-for-sydneys-tim-williams-slams-road-building-plans-for-city-20150429-1mv3vq.html>

The Chief Executive later clarified that the comments related to his views as an individual rather than the views of the Committee for Sydney. It was reported that this clarification followed phone calls from the (office of) the NSW Minister for Roads to the Chief Executive and the Committee. See http://www.smh.com.au/nsw/roads-minister-duncan-gay-admits-to-angry-phone-calls-over-westconnex-criticism-20150515-gh24li.html [↑](#endnote-ref-6)
7. **Public goods**

Health and education services provide benefits to users and to the wider community. Benefits gained by one individual generally does not disadvantage or reduce availability to others; hence they are considered largely public goods.

Neither health nor education is allocated to the Commonwealth by the Constitution. A discussion of the Commonwealth’s position in these sectors is available at Reform of the Federation White Paper, Issues papers <https://federation.dpmc.gov.au/issues-papers>. No similar analysis is available for transport or roads.

In both health and education the primary and ‘default’ providers of services are State authorities. The services are supported by Commonwealth grants to the States. A base level of service is provided at no financial cost to users. The Commonwealth also provides support payments to individuals.

Private firms operate in these sectors. While some are ‘not for profit’ all charge fees to users for different and (arguably) better services. The Commonwealth provides subsidies to these firms and services such as to private schools and tax concessions for private health insurance.

In comparison, roads provide benefits to users but road use may disadvantage the wider community, especially in cities. Hence roads are considered more joint or club goods than public goods.

There is limited private involvement in road provision, mainly toll roads. Relevant private firms are for-profit entities. Road users are charged for the use of these roads, but some such roads are also subsidised or protected from competition by governments. Government policies for toll roads have included that they are allowable only when there remains a ‘free’ alternative route. See, for example: http://www.audit.nsw.gov.au/ArticleDocuments/138/152\_Cross\_City\_Tunnel.pdf.aspx?Embed=Y [↑](#endnote-ref-7)
8. **Lack of public information**

Details of arrangements for transport public private partnerships are not routinely made public in Australia.

The most recent high profile example is the East West link. Prior to the September 2014 Victorian election the then government refused requests to release certain documentation about its business case and the arrangements it had agreed with the project builders and financiers.

Documents subsequently released by the new government caused concern, including about the merits of the project and a ‘side agreement’ which ostensibly guaranteed payments if the project was cancelled. See, for example: http://www.abc.net.au/news/2015-02-05/east-west-link-victorian-opposition-releases-secret-side-letter/6072904

Details about some major road projects, including arrangements between governments and the private sector, remain unpublished and the subject of speculation. An early example is the M2 motorway in Sydney which reputedly had an agreement for the government to compensate the road owners were competing public transport alternatives to be offered. See: <http://www.ptua.org.au/myths/citylink/>

Information does not have to be formally published, or launched, to be made public. Parliaments provide a mechanism for making information public including through debates and, for the Commonwealth, Committees such as Senate Estimates, the proceedings of which are recorded and transcribed. Departmental officials can assist in representing governments in these committees, and there are guidelines that constrain their appearance and evidence. See for example: http://www.aph.gov.au/Parliamentary\_Business/Senate\_Estimates/Guidelines\_for\_official\_witness

In 2008, the Council of Australian Governments published a framework and guidelines for public private partnerships. In the 7 volume document, the discussion of disclosure issues was along the lines of:

‘T*ransparency and openness are important requirements of all government procurement. The use of PPPs should not diminish the availability of information on the use of government resources to Parliaments, taxpayers and other stakeholders. There should be an emphasis on transparency and disclosure of the processes and outcomes, acknowledging the need to protect commercial confidentiality where appropriate.*’….. [↑](#endnote-ref-8)
9. **Issues regarding fiscal responsibility and cross subsidy**

The ‘Tar baby’ note identified issues regarding a deficit and potential for cross subsidy.

A cross subsidy would be a particular concern were it to adversely impact on competition to road transport e.g. Railways. At present such a case would meet one leg of the test for misuse of market power / predatory pricing under the Competition and Consumers Act. However, evidence of intention or purpose would be needed to prove a breach of the Act in this regard; see <https://www.accc.gov.au/business/anti-competitive-behaviour/predatory-pricing>.

The recent review of competition policy recommended the Act be amended to apply merely an ‘effects’ test for misuse of market power, under which no proof of intention would be necessary. If accepted, this may have implications for roads. See: http://www.australiancompetitionlaw.org/reports/2014harper.html [↑](#endnote-ref-9)
10. **Departmental resources**

While not every official may work in an advisory capacity many departments and agencies engage non-staff consultants and contractors in advisory roles. There also are relevant advisors in other portfolios such as Prime Minister/Premiers departments and Treasuries. In addition, most Ministers engage advisors in their own offices.

Most departments are part of executive government. Officials etc. have a duty to their Minister rather than to other parliamentarians individually or collectively. They are restricted in providing advice and opinions to parliamentary bodies such as parliamentary or upper house committees. See: Department of the Prime Minister and Cabinet, *GOVERNMENT GUIDELINES FOR OFFICIAL WITNESSES BEFORE PARLIAMENTARY COMMITTEES AND RELATED MATTERS*, February 2015 at https://www.google.com.au/webhp?sourceid=chrome-instant&ion=1&espv=2&es\_th=1&ie=UTF-8#q=guidelines+appearing+before+parliamentary+committees.

Sources of information for both government and opposition include statutory authorities, parliamentary inquiries and academe. The opposition and media at times might acquire information from ‘leaks’ by departments. [↑](#endnote-ref-10)
11. **Information**

One document regarding the East West Link’s business case reportedly argued that it should not be provided to Infrastructure Australia as:

"*The risk associated with this ()action is that lower end range of BCRs presented in this business case may be used as a justification for not supporting the project*"

 <http://www.sbs.com.au/news/article/2014/12/15/east-west-link-business-case-revealed> [↑](#endnote-ref-11)
12. **Errors**

The ‘tar baby’ note demonstrated promulgation of an error by the Department of Infrastructure; that the national access regime does not apply to roads. This was accepted at face value by the Productivity Commission, in the face of evidence proving the contrary.

There are other questions regarding actual or proposed roads policy. For example, the Council of Australian Governments Road Reform Plan (later the heavy vehicle charging and investment initiative) claimed that mass-distance-location was feasible did not apparently examine the technical feasibility of such charging. Significantly, its assessment was based on mass–distance and road type not location, i.e. it purported that road type was in fact ‘actual location’. See: https://www.coag.gov.au/sites/default/files/COAG%20Road%20Reform%20Plan%20Feasibility%20Study%20Report.pdf [↑](#endnote-ref-12)
13. **Lies ultimately with the States**

It has been argued that the Australian Constitution is vital not only for establishing the Commonwealth but also the States. The States owe their existence to the Constitution rather than to the Commonwealth, and are thus an independent tier of government.

Local governments owe their authority to States i.e. they are subsidiaries of States. Therefore they are not an independent tier of government. [↑](#endnote-ref-13)
14. **Divestiture**

Accountability being dependent on allocation of responsibilities and on public understanding of that allocation.

Divestiture of roads can occur following ‘upgrades’. For example, once sections of the new Pacific Highway have been completed some pre-existing assets have been divested to local governments.

Issues for local governments include certainty about the condition, contingent liabilities, and ability to finance maintenance of assets they are about to inherit. See for example, comments regarding the current highway bridges near Macksville NSW: <http://www.bellingencourier.com.au/story/3015055/a-bridge-too-far/> [↑](#endnote-ref-14)
15. **Commonwealth knitting**

The Commonwealth does not own roads; the Government’s ‘roads of the 21st century’ are not owned or controlled by the Government.

However, through its fully owned Australian Rail Track Corporation the Commonwealth owns, has leasehold over, and has rail access rights over mainline standard gauge railways on the mainland, excluding Sydney. In Sydney it owns the Southern Sydney Freight Line, and has access rights over track used by both passenger (commuter) and freight trains.

. [↑](#endnote-ref-15)
16. **Restrictions on Commonwealth power**

Three recent High Court cases changed assumptions about Commonwealth spending powers; Pape v. Commissioner of Taxation (2009), Williams v. Commonwealth (2012), Williams (2) v. Commonwealth (2014).

Together they mean that for the Commonwealth Government to spend on any matter it must have legislation on that matter, and therefore must have a ‘head of power’ for that legislation. Commonwealth ‘heads of power’ are set out in s.51 of the Constitution.

An Appropriation Act, to allow the Government to spend public funds, may be necessary but will not be sufficient as legislation on a matter, as appropriations to the executive are not a head of power.

The power for the Commonwealth Government (executive) to spend is more limited than those jurisdictions without such a constitution, such as the UK. There the government may have implied powers of executive authority over many matters, not merely those allocated to that tier of government in a document. Implied Commonwealth Government powers also are likely to be more limited than those of Australian State governments.

In addition to s.51, the Commonwealth may make grants to the States subject to any conditions Parliament sees fit (s.96). This provides an alternative channel for the Commonwealth to support road projects; a condition of a grant to a State may be that the monies are spent on roads.

A result is that it has been suggested that direct grants to local governments, or to road projects under some former Commonwealth Government programs, are beyond the Commonwealth’s powers. Road grants need to be made through the States, possibly with conditions such as: the State is to provide a certain amount of funds to a road or local government.

Twomey comments that the Commonwealth Governments response to Williams 2 may set the stage for a further successful challenge to Commonwealth executive power. See: Anne Twomey, *Déjà vu – The Commonwealth‘s response to the Williams Case*, Constitutional Critique July 2014 at http://blogs.usyd.edu.au/cru/2014/07/deja\_vu\_the\_commonwealths\_resp\_1.html.

Recent reports are of a new challenge to Commonwealth spending, the case relating to immigration detention. The reports have the challenge being along the lines of the Williams cases, claiming that requisite Commonwealth legislation has not been passed. See http://www.abc.net.au/news/2015-05-14/asylum-seekers-launch-high-court-challenge/6471376.

While the Commonwealth’s response to Williams 2 may be well informed, it is not clear that the issues are widely understood. A critical point is the potential for confusion in the role of departments; whether they are advising the Commonwealth or whether they are representing the Government (executive) of the Commonwealth.

The most recent exposition of this confusion is in commentary about the Intergenerational Report; whether the Government or Treasury is ‘responsible’ for, among other things, ‘Dr Karl’ being misled. Treasury is an agency of the Government a point seemingly not fully understood. See <http://www.canberratimes.com.au/national/public-service/intergenerational-report-weakens-the-entire-public-services-integrity-20150501-1muta0.html>

A later paper will contend that the tasks of officials to advise and represent can create confusion in external and intergovernmental forums.

 [↑](#endnote-ref-16)
17. **Legal governance**

Governance is the effective exercise of lawful control. Much of the modern governance thought appears to stem from common law. For example, in the exercise of administrative discretion: there is a right of affected parties to be heard; justice must be seen to be done; a person cannot be a judge of his own cause; a duty can only be owed where there is power to affect the result.

From these come ideas such as: fair hearing; transparency; avoidance of conflicts of public duty and private interest; disclosure of potential conflicts among private interests. [↑](#endnote-ref-17)
18. **Democratic accountability**

The principle of subsidiarity and voter understanding of the allocation of responsibility is said to be important in a democratic federation such as Australia. See: Parliamentary Research Paper no. 17 2007–08*, Specific purpose payments and the Australian federal system*, [Scott Bennett](http://www.aph.gov.au/binaries/library/pubs/rp/2007-08/scott.bennett%40aph.gov.au), [Richard Webb](http://www.aph.gov.au/binaries/library/pubs/rp/2007-08/richard.webb%40aph.gov.au) at <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP0708/08rp17>.

As accountability depends on voter understanding of responsibility, not just the legal allocation of responsibility itself, the creation of confusion about responsibility in the minds of voters’ works against accountability. Accountability is best served by easy to understand divisions of power.

Only the Parliament has authority to impose conditions on s.96 grants. Where those grants are necessary for Commonwealth purposes, e.g. a matter outside the s.51 heads of power, it is for the Parliament and the States to agree respective responsibilities. [↑](#endnote-ref-18)
19. **Conditions on funding**

Commonwealth Government funding is enabled by the *National Land Transport Act* (2014).

Conditions on Commonwealth road funding for the States are expressed in the Act and in a National Partnership Agreement on Land Transport Infrastructure Projects and subsidiary documents.

The Agreement, dated October 2014, is not intended to be legally binding.

Commonwealth ‘responsibilities’ under the Agreement centre on providing funds to projects selected by the Government, and maintenance funding for a national network. This formulation, does not provide guidance as to what the Government must do.

One key condition is that Commonwealth funds be spent on the projects selected by the Commonwealth Government. This is in contrast to the proposition, sometimes put, that money is for a State and should be able to be redeployed within a State if the priorities of that State change.

Notes of administration dated November 2014 pay attention to administrative matters and emphasise the desirability of public recognition of Commonwealth funding. Guidance is not given as to why or how particular projects from an eligible class are selected for funding, nor to how much funds will be made available.

The notes say that the Department will recommend which projects should be funded and by how much. Given that the Department represents the Government, this formulation seems circular.

The notes indicate that some funding will be made available for maintenance on a national network, using a formula basis, but described as a project. The notes also require the Commonwealth Government to be given an opportunity to participate in ‘governance’.

There also is an Australian Government signage guidelines document.

None of these documents raise as conditions: vehicle access; interoperability; participation in regulatory reform. Consequently Commonwealth involvement in these and related matters such as the work and recommendations of the National Transport Commission and National Heavy Vehicle Regulator is vexed. A later article in this series will identify some issues arising from this.

See: http://investment.infrastructure.gov.au/funding/projects/index.aspx [↑](#endnote-ref-19)
20. **Improvements in processes**

Improvements in processes in recent years have included multi-year funding, conditions of contributions from other parties including the states, competitive costs, reporting on works undertaken, and requirements for forward schedules of works and projects from the states.

Some improvements have been in response to reviews by the Commonwealth Auditor General, for example on the roads to recovery project. See: Australian National Audit Office, *Performance Audit Roads to Recovery Department of Transport and Regional Services,* Audit Report No.31 2005–06 at http://www.anao.gov.au/~/media/Uploads/Documents/2005%2006\_audit\_report\_31.pdf. [↑](#endnote-ref-20)
21. **Whitlam’s national highway**

*‘By specifying the purpose of financial grants to the states, the government financed a national highway system’* <http://primeministers.naa.gov.au/primeministers/whitlam/in-office.aspx>

*‘In 1974, the National Roads Act came into force thus defining the shape and nature of Commonwealth road funding for the next 20 years. This Act created the National Highway scheme and fundamentally shifted the way road infrastructure was funded in Australia. Under s4 of this Act, the minister responsible for roads was authorised to declare road links between two state capitals, a capital and Darwin, Brisbane and Cairns and Hobart and Burnie a National Highway. This was promptly done, linking all the adjacent State capitals, Darwin, Cairns and Canberra by road under the National Roads Act.*

*A National Highway was a fully federally-funded road. The entire route was maintained and upgraded as required without succumbing to state prejudices and petty disputes. The Commonwealth Government would allocate a set amount of money to a state government for spending on a particular project on a National Highway route. Additionally money was allocated for the express purpose of maintaining a National Highway route. The Act authorised not only the expenditure of funds on existing National Highway roads, but on new roads that would immediately or would on completion of further sections of road become a part of the National Highway route…..*

*Commonwealth road funding was mainly governed by convention and by government policy. The Act provided for the Commonwealth to fund National Highways, but it did not stipulate that they must be fully funded. Similarly the Act provided for the Commonwealth to fund Major Commercial Roads and Export Roads, but it did not stipulate that the cost of construction on maintenance on these roads should be shared with the states. The fact that both took place was merely as a result of the policy of the Whitlam government on introduction and continued as a convention for the entirety of the existence of the Act.’*

David Isaacs, *Onward to Auslink*, <http://www.ozroads.com.au/NationalSystem/auslink.htm>

Curiously, one of Australia’s most important and heavily used highways, the Pacific Highway, was not included in the national network. It was later placed in a new category; roads of national importance. [↑](#endnote-ref-21)
22. **Auslink**

Arguably the origins of Auslink were in responses to criticisms by the States, particularly NSW and Western Australia, that the Ministerial Council was not well informed and that there was a Commonwealth bias towards roads. It was argued that a national land transport policy needed to be developed with assistance independent from the Commonwealth Department e.g. from a land transport commission, similar to an expanded version of the Interstate Commission. The review of the National Road Transport Commission recommended a similar body. The history will be summarised in a later article.

Auslink was a funding program rather than the transport policy. Development of the green paper was led by Commonwealth officials on a multilateral basis, however, substantive agreements were made bilaterally – with each individual State – with common terms.

In response to the criticisms about road bias, Auslink included some funding for interstate railways through the Australian Rail Track Corporation.

On announcing the program, the Minister argued that it would include the greatest ever Commonwealth contribution to local government roads. Design of the roads to recovery component of the program indicated an intention that Commonwealth funds would be in addition to those normally allocated, however, the Auditor General found that this did not occur:

*the R2R Funding Conditions and the R2R Administrative Guidelines aimed at ensuring that LGAs were not cost shifting by substituting Australian Government funding for their own in constructing, upgrading and maintaining local roads. However, more than 60 per cent of the individual LGAs examined by ANAO had not maintained their expenditure at the required level (that is, at or above the average for the period 1998–99 to 2000–01) in at least one year between 2000–01 and 2003–04. Some had not maintained their own expenditure in any year*.

Australian National Audit Office, *Performance Audit Roads to Recovery Department of Transport and Regional Services,* Audit Report No.31 2005–06.

Auslink also involved an administrative ‘tidy up’. Instead of several Acts (purportedly) authorising Commonwealth Government spending on virtually any road, there would only be one Act allowing the same.

 [↑](#endnote-ref-22)
23. **No such problem for the national rail network**

As the national rail network is under the control of the Commonwealth’s Australian Rail Track Corporation, the Commonwealth is in a position to be advised about rail network matters directly from the coalface rather than through the States or their rail authorities. [↑](#endnote-ref-23)
24. **Incentives to be open with the Commonwealth**

The ‘tar baby’ note provided sources for the claim of ‘fraud’ and public malfeasance in relation to the East West Link. The 2015-16 Budget papers include a media release indicating the Commonwealth Government continued to support the East West Link see: http://www.minister.infrastructure.gov.au/wt/releases/2015/May/budget-infra\_02-2015.aspx

There are laws establishing criminal offences for misleading the Commonwealth (Criminal Code Act Divisions 134 to 137). I have not explored whether such sanctions may potentially apply to road project proponents.

The public funds involved in individual road projects are likely to be much larger than those received by other recipients of benefits, for example social security claimants. To provide an indication of scale, the Commonwealth Government offered over $3 billion in funding for the East West Link. Social security fraud cost an estimated $380m in 2008 (http://www.aic.gov.au/publications/current%20series/tandi/421-440/tandi421.html).

. [↑](#endnote-ref-24)
25. **Road reform**

‘Road reform’ in Australia is thought to involve direct charging of vehicles. To date there has been no public progress towards this outside of toll roads. One attempt, the Heavy Vehicle Charging Initiative was recently wound up.

There are two issues with the attempts to date.

First, they seek to treat all roads equally all at once. Unlike in other networked infrastructure industries such as rail, energy and telecommunications, there is no differentiation between national and local networks.

An alternative approach recommended by Juturna and Infrastructure Australia of seeking reform on the major routes has not been assessed or pursued.

Similarly, while truck ‘access’, the ability to use larger trucks on various roads, has long been considered an issue of ‘regulatory reform’ the approach pursued has been to seek for disputes about truck access to be resolved via an economic regulatory process covering every road. This is the type approach of the national (all industries) access regime where an economic regulator determines all questions, although that regime applies only to nationally significant infrastructure.

The national access regime approach has been criticised, with suggestions including: the choice of facilities to which the regime should be determined by government; for those nominated the economic regulatory process would be available. This would potentially avoid regulatory determination (and challenge) on issues such as whether the north west iron ore railways should be included or excluded.

Application of such a concept to roads has not been considered by governments. Consequently, the initial ambitions for the national heavy vehicle regulator to regulate access to every road have not been met; in fact it does not determine access to any road.

Second, proponents of direct charging implicitly assume that current charges will be replaced. A focus therefore has been on potential for Commonwealth State agreements since the former Government would need to forego the revenue it collects through excises. If the Commonwealth has no road revenue, what is to happen to its spending program?

More importantly, the present existence of an aggregate roads deficit implies a likelihood that spending would need to decrease and/or charge revenue would need to increase, substantially.

‘Reform’ of all roads would then be associated with higher charges and payments by road users, contrary to comments by parties such as the Productivity Commission. This may prove particularly problematic for users of those roads which have been allowed to deteriorate while highways have been greatly improved. [↑](#endnote-ref-25)