# Looking for a problem: the Commonwealth and urban transport?

## Introduction

***Australia is perhaps the only OECD country without a national policy covering urban issues…..if one emerges, then it may be viewed with a large measure of scepticism, unless it is finalised with a minimum of delay and is seen to deliver outcomes acceptable to both urban dwellers and those who are professionally involved in the development and management of our cities.[[1]](#endnote-1)***

Today, for at least transport, that remains the case. The Coalition and Labor have different views on the role of the Commonwealth in urban transport. The new Prime Minister’s attitudes to urban transport reputedly differ from his predecessor. Who is right?

This article explores some issues and offers suggestions for a Commonwealth role within the existing federal structure. While some may have hopes of a new debate about an expansive Commonwealth approach to funding, this article sounds a caution, suggesting that any such funding should be subject to conditions about Commonwealth purpose rather than ‘improvements’ in processes which should already be in place.

## Some views

### 2.1 From the Coalition

Notwithstanding the appointment of a Minister for Cities, the Coalition has long been sceptical about Commonwealth involvement in cities in general and public transport in particular. This is possibly reinforced by its practice of appointing a rural parliamentarian as Minister for Transport.[[2]](#endnote-2)

The Coalition’s 2013 election campaign promised funding for some major urban road projects sight unseen but not for public transport projects recommended by Infrastructure Australia. In response to challenges to this position the Coalition suggested that all governments should focus on ‘their core responsibilities in infrastructure investment’ and that Commonwealth funding for roads would free up State government resources which then could be spent on public transport.[[3]](#endnote-3)

Whatever the merits of that approach the explanation is wrong. The Commonwealth does not have any responsibility for road funding because it is not responsible for roads. In asking the States to identify and jointly fund roads the Commonwealth discouraged public transport.

### 2.2 From Federal Labor etc.

Since the 1970s Labor has wanted a greater Commonwealth role in cities. The recent Labor Government initiated a cities agenda, some of which remains in place; a few large grants and statements and reports that cities are important. Labor has hardly cemented a Commonwealth role beyond handing out funds to State infrastructure projects.[[4]](#endnote-4)

Among the difficulties with a cities agenda are: the Commonwealth does not have explicit powers over urban areas; States do not welcome Commonwealth ‘intrusion’; when Labor loses office the Coalition attempts to undo much of its cities work.

### 2.3 From Parliamentary Committees

In recent years Parliamentary Committees considered questions regarding urban transport. Recommendations often split along party lines. The Committees invited submissions, several of which argued that Australia is the only OECD country where the national government does not have a role funding and supporting public transport. The reports recited the importance of cities: where most Australians live; a source of economic growth.[[5]](#endnote-5)

The reports asked for: integrated transport and land planning; equal treatment of public transport and road projects; more Commonwealth and State ‘investment’. [[6]](#endnote-6)

The Committee reports were more detailed and articulate than party platforms, but embodied underlying biases towards roads and towards a Commonwealth ‘funding role’.[[7]](#endnote-7)

### 2.4 From the Ministerial Council

In 2008, the Ministerial Council on Transport and Infrastructure adopted national transport policy framework principles. Officials were to further develop the ideas. Little was subsequently seen.[[8]](#endnote-8)

While the Council stated that it would agree a comprehensive set of urban transport indicators the public report of a result is at the US highways department website. The Council has not dealt with the issue of a Commonwealth role in urban transport.[[9]](#endnote-9)

### 2.5 From Infrastructure Australia

Infrastructure Australia published a national urban transport strategy in 2014. It proposed high level policies for urban transport including linking: public transport and roads; freight and travel. While the report did not propose a Commonwealth role it hinted that the Commonwealth should consider activities beyond project funding.[[10]](#endnote-10)

It is not evident that the new Infrastructure Australia is following the guidance offered in the report. Its 2015 audit report did not address the question of a Commonwealth role and arguably underplayed existing Commonwealth interests and responsibilities such as in defence.[[11]](#endnote-11)

### 2.6 From industry and lobby groups

Peak industry associations or lobby groups publish their views on urban transport.

Some reports, such as ‘Moving People’, are extremely well researched and argued and enjoy widespread industry and practitioner support; they would be considered landmarks of public policy if published by Government as a white paper.[[12]](#endnote-12)

Most reports and arguments relating to the role of the Commonwealth usually refer to the influence on transport demand of Commonwealth policy eg: migration; tax; industry; macroeconomy. The more sophisticated reports refer to scale, geographical spread of common issues and financial constraints of the States. These references generally segue into a Commonwealth ‘funding role’ the extent of which is not defined. Some argue for independent assessment of project proposals prior to Commonwealth spending; they assume Commonwealth involvement in the funding of projects.

### 2.7 From the National Commission of Audit

In 2013 the new Coalition Government established a National Commission of Audit to examine Commonwealth spending. Among matters considered in its May 2014 reports were Commonwealth roles and spending on transport infrastructure.

The reports argued the Commonwealth has a role: in interstate freight; where economic or social benefits are wider than one State; in the coordination of nationally significant infrastructure and transport regulation. They argued that Commonwealth infrastructure spending should be wound back with States pursuing their own priorities via user charging and access to income tax.

Among the principles set out by the Audit is: the Commonwealth should be guided by the Constitution. There are questions about whether this principle was fully applied in assessing the Commonwealth’s role in infrastructure especially in light of recent High Court decisions.[[13]](#endnote-13)

## Comments

***‘Why? Because its there’***[[14]](#endnote-14)

While the above show some divergence in views most have some desire for Commonwealth involvement in urban transport; generally ad hoc funding for major infrastructure. The exception is the National Commission of Audit.

There are severe problems with the majority view. Involvement via ad hoc funding: diverts attention away from system performance; ebbs and flows according to the situation of the federal budget; does not demonstrably address Commonwealth objectives or responsibilities.

The Conservative position essentially denies a possibility of Commonwealth responsibility and therefore action. Labor etc. appear to assume the Commonwealth can provide funding without responsibility. They share mistaken grounds that the Commonwealth: does not and should not have responsibilities related to urban transport; is a piggy bank for major projects. The ‘debate’ is largely about gifts rather than policy.

As the Commonwealth is the highest tier of government its policies should be more durable and stable than those of other tiers. However, to date its involvement in urban transport has waxed and waned more than the States. In the author’s view this is because its policy: is not grounded in doctrine and thus is at the mercy of political tides; does not have a practical goal.[[15]](#endnote-15)

The scant criticism of the Commonwealth’s approach possibly results from gift giving; who would bite a hand that may feed?

Many advisers, including in departments, seem ill-placed to consider urban transport issues. There is little risk in advising that the Commonwealth donate funds to major projects, particularly roads: if money is available the donor is popular like Santa; if it is not available ‘Dr No’ in the Treasury or Finance Department can always be blamed.[[16]](#endnote-16)

Yet advisers should know, especially after the reminder by the National Commission of Audit, that specific purpose payments can lessen accountability for matters outside Commonwealth purposes. While this concern does not abnegate all such funding, there are serious questions about payments which do not advance Commonwealth *purposes*. The issue is not funding; it is purpose.

The ad nauseam practice of producing ‘evidence bases’ of issues, a search for ‘big problems’ to try justifying ad hoc Commonwealth project funding, was always unsatisfactory. It does not steer towards purpose.

Recent High Court clarification of Commonwealth purposes and consequent power should have led to reconsideration of a role for the Commonwealth in urban transport. Unfortunately there is no public evidence this has occurred. Most seem to assume the Commonwealth should fund some transport something in cities, as like an Everest of transport, ‘because it is there’.

## A different approach?

***The Commonwealth should be guided by the Constitution….[[17]](#endnote-17)***

A different approach to the question of the Commonwealth’s role in urban transport would draw on two ideas: a rationale for involvement which draws on the Constitution and therefore sets an apolitical purpose; a practical goal to assess the success of such involvement. A suggestion follows.

### 4.1 Rationale for Commonwealth involvement

The usual argument for Commonwealth involvement relates to a big problem or widespread opportunity that substantial resources could address; evidenced by data such as produced by the recent national infrastructure audit, or claims for a new football stadium. Better formulations ask for demonstration that benefits from resolving the problem exceed costs; an economic rationale.

However, it is now clear this is insufficient as a rationale in Australia’s federal structure. Commonwealth involvement in any activity, including funding, must relate to powers which arise from the Constitution. The Commonwealth does not have powers over every topic; the High Court has decisively rejected the assumption that the Commonwealth can directly fund anything it likes. For funding the Commonwealth needs a legal purpose not just ‘big’, ‘popular’ or ‘topical’.[[18]](#endnote-18)

Constitution s.96 does enable Parliament to provide payments to the States for any matter, including those beyond Commonwealth purposes. This ability cannot form the rationale for Commonwealth involvement in transport because of inherent circularity.[[19]](#endnote-19)

Commonwealth urban transport activities should reference its urban transport responsibilities. These responsibilities should align with, be guided by, explicit and implied Constitutional powers. This would provide an apolitical basis for its urban transport activities; funding could then be a consequence of policy and focus on the (primary or sole) domain of the Commonwealth instead of merely helping to meet State responsibilities. Difference in political opinion would be expressed via different priorities within this domain.

The search needs to be for Commonwealth responsibility and power outside of s.96. The National Commission of Audit alluded to such an approach. Three potential sources are: Constitution s.51; stewardship of assets; implied Commonwealth (executive) powers.[[20]](#endnote-20)

#### Constitution s.51

Constitution s.51 establishes ‘heads of power’ for the Commonwealth Parliament. S.51 does not mention urban transport, or roads. However it does cover railway acquisition / construction with State consent, or control of railways for defence purposes.

Beyond railways, reference might be had to s.51 powers over interstate and international trade and commerce, and matters physically necessary for these. Significant interstate and international nodes such as seaports and rail terminals and facilitative transport networks occur in urban areas.

The nodes and networks were broadly identified by Infrastructure Australia some years ago, yet there is little evidence of progress towards some cogent Commonwealth policy on these. The minimal mention of defence considerations in the officials’ land freight strategy and the national infrastructure audit are not promising signs.

Intrastate transport, which is the majority task in urban areas, is not within s.51. An economic connection of urban transport with interstate transport is probably insufficient to bring it within s.51 power. Consequently the practical impact of s.51 on potential responsibilities for urban transport is small relative to the overall scale of task, but may be significant in certain locations.[[21]](#endnote-21)

#### Stewardship of assets

The responsibility for an asset lies with its owner. It is possible for the Commonwealth to gain responsibility by acquiring urban transport assets; in most cases this requires State agreement.[[22]](#endnote-22)

Previous articles suggested the Commonwealth should (be prepared to) take responsibility for roads it provides funds to. This would put beliefs of project and funding proponents to a real test.

There are precedents. At one time the Commonwealth assumed responsibility for a national highway network; initiating a long term program of improvements and taking both credit for success and blame for slow progress. The Australian Rail Track Corporation controls some rail lines in most of Australia’s major cities. The Commonwealth also owned international airports; while these are now leased, in the eyes of the public the Commonwealth is the steward of those assets.

#### Implied executive powers

Since the mid 1970s constitutional cases suggest sources of Commonwealth power to be wider than explicitly set out in eg. s.51. Among implicit powers are those arising from its position as a national government; nationhood powers.[[23]](#endnote-23)

Nationhood powers include those over matters uniquely suited to a national government and not undertaken by States. The size or pervasiveness of an issue is not the determining factor; the Commonwealth is not an upscaled State. Nor is an issue one of nationhood simply by agreement of State and Commonwealth governments.

Two urban transport matters uniquely suited to a national government and not undertaken by the States are: strengthening accountability of each level of Government; national cohesion.[[24]](#endnote-24)

Accountability requires an understanding of how responsibilities are discharged. Urban transport has high accountability risks because many services are natural monopolies in need of subsidies.[[25]](#endnote-25)

State governments can at times contribute to accountability issues by lessening the ability of the electorate to assess urban transport performance. Practices in question include: incomplete reporting; attempts to frame responsibilities as limited to ‘projects’ or ‘on time running’.[[26]](#endnote-26)

States face substantial conflicts of interest in their reporting of urban transport which is exacerbated by Commonwealth project funding; the case for ‘investment’ in urban transport is poor current performance which may reflect badly on a State government. The response to date has not been falsification of data but reporting of irrelevancies. A national cooperative approach to State urban transport reporting has been mooted several times yet nothing has appeared. [[27]](#endnote-27)

National cohesion is a unique purpose of a national government, pursued by reducing subnational barriers that discriminate among citizens. In Australia expressions of this intent include efforts at nationally consistent regulation and mutual recognition. The obvious national purpose of facilitating skill mobility makes mutual recognition an enduring area of reform. The Commonwealth may not be exercising all of its powers in this area, but it does encourage relevant State activity.[[28]](#endnote-28)

The transport analogue to mutual recognition is interoperability: tolls; tickets; infrastructure; control systems; vehicles. Interoperability should be among the most important transport goals for a national Government. Relevant dimensions are: across modes; across States; within States.

There have been examples of Commonwealth interest in interoperability: from federation rail gauge standardisation; in the 1970s the national highway network. While interoperability issues remain, especially in urban areas, Governments and advisers now treat the matter as a second order issue.[[29]](#endnote-29)

### 4.2 Practical goals

The Commonwealth needs practical goals for any involvement in urban transport. A practical goal is one that can be seen by the community and allows progress to be easily observed. Practical goals for the Commonwealth need to relate to its responsibilities.

Many consider economic development or ‘national productivity’ to be important goals, however they are: neither necessary nor sufficient as a source of Commonwealth responsibility; not easy to see. Economic development or productivity may be an ambition but it is not itself a satisfactory goal for the purpose of establishing Commonwealth transport policy; it can justify diametrically opposed policies, and unless supplemented by more specific aims would cause instability in any Commonwealth approach to urban transport.[[30]](#endnote-30)

Practical goals need to be demonstrable and relate directly to Commonwealth roles via indicators. But more is needed than just indicators. For the Commonwealth to play a useful role it will need to understand indicators and this requires an understanding of urban transport; there is little evidence of such adequate understanding by some States, let alone the Commonwealth.[[31]](#endnote-31)

## Commonwealth roles?

### 5.1 Overview

The above suggests four potential roles for the Commonwealth in urban transport; shown in Table 1.

**Table 1: Example of potential Commonwealth roles in urban transport**

|  |  |  |
| --- | --- | --- |
| **Role** | **Source** | **Goal indicator** |
| Asset stewardship | Constitution: Commonwealth acquisition of property | Condition and utilisation of assets under control |
| Facilitation of interstate and international trade | Constitution s.51 | Cost of interstate and international trade |
| Improve accountability for urban transport | Implied powers? | Publication of urban transport performance indicators |
| National cohesion: interoperability | Implied powers | Extent of interoperability in transport |

The table offers a perspective different from the pursuit of economic or environmental aims. It has implications as to how the Commonwealth should engage in urban transport; the roles would be best pursued by Parliament and statutory authorities rather than Government and departments. Candidates include the Productivity Commission or Infrastructure Australia; both have some relevant experience. The functions should not be taken on by departments or Ministerial Councils.

To illustrate the table, the highlighted items are briefly discussed below.

### 5.2 Improve accountability

Publication of performance is the most important accountability mechanism in urban transport.[[32]](#endnote-32)

The Commonwealth could improve accountability by regularly informing, reporting to, the community about the performance of urban transport.

The ‘fear factor’ rules out reporting by the Government on urban transport; its agencies would be suspected of running ‘political agendas’ against the States. Suspicions would be less if reporting was done by an authority independent of governments yet accountable to Parliament.

Reporting could comprise publishing several times each year indicators of urban transport performance as well as indicators of the performance of important contributors such as railways.

Indicators must be understood and experienced by the public. ‘High level’ subjective reporting, such as of the ‘quality of city planning’, is the antithesis of what is needed in this respect. For similar reasons, current standards of reporting would need to be considerably improved to be credible.

The Commonwealth should already be collecting and analysing much of this information; in theory the relevant indicators are needed to assess project proposals and the effectiveness of Commonwealth project funding. The main ‘expansion’ of its activities would be to publish information on a nationally consistent basis. Given the public monies and monopoly rights provided to urban transport, there can be no real arguments against this.

To reiterate: the activity enables existing accountabilities to be better exercised. The activity is not and does not lead to the States or any other party reporting, in the sense of being accountable, to the Commonwealth. There is no increase in Commonwealth ‘control’.

### 5.3 National cohesion: interoperability

The Commonwealth should pursue interoperability in urban transport.

Examples include: tolling and ticketing within cities and across States; consistency in road design and access on a properly identified national road network; separation of commuter from freight railways; compatibility in train control systems.

While some point to the local nature of systems as a reason to not pursue interoperability such excuses are not convincing; differences in ticketing, performance, reporting and bus systems are not explained by different rail gauges; the Commonwealth should be discouraging ‘breaks of gauge’ because of their effect on national cohesion as well as economic cost.

This is an area where much can be done. For a start there can be: greater consistency in Commonwealth policies affecting roads and public transport; more freight separation; greater surety about interoperability of train control systems now being introduced; better designation of national roads; more specificity about road standards; correction of access disconnects among the national rail and road networks; discussions about the transport servicing needs of Commonwealth controlled facilities including international airports and military bases.[[33]](#endnote-33)

### 5.4 Commonwealth funding?

Table 1 does not show funding to be a role. At most project funding might be one of several tools used by the Commonwealth to pursue its substantive responsibilities. However, for completeness, some comments on funding follow.

The present case by case approach to funding is not consistent with the suggested roles. It may be efficient but will not be effective in delivering economic or environmental goals because: it is ad hoc; the Commonwealth would be led by State proposals. It would not strengthen accountability or increase national cohesion.

In this regard the approach of the 2015 national infrastructure audit, while an improvement over relying on the States to generate ideas, is inadequate. The audit considered locality based ‘economic contribution’ without opportunity cost, overlooked some Commonwealth purposes, and did not distinguish between State and Commonwealth responsibilities. Further steps in that process should address these matters especially in the light of relevant High Court decisions.[[34]](#endnote-34)

For funding to effectively support Commonwealth responsibilities it should focus on the matters in Table 1 and incidental issues. An example of an incidental issue is a project to improve the functions of a large Commonwealth facility such as an international airport.

Funding should also be subject to conditions that: deal with risks to accountability; increase interoperability. For example: funding to a project in any State should be conditional on adequate co-operation of the State re reporting. However, funding should not be tied to the achievement (or otherwise) of targets or ‘benchmarks’; State government accountability for performance should be to the electorate not to the Commonwealth.

Many ideas so far put forward as conditions for funding are well intentioned; some, like the need for a public ‘business case’ assessed by Infrastructure Australia, are well informed. However more is needed for a sensible, durable Commonwealth role. Suggested additional requirements for proposals from States or private proponents follow.

One: the Commonwealth should only provide funding to projects it is prepared to take into stewardship. The Commonwealth need not own all such assets, rather it should be prepared to own the ones it pays for. It is the approach investors would take in relation to any asset.

Two: the Commonwealth should provide funding to only those projects that demonstrably increase interoperability. This may require Commonwealth specification of some basic infrastructure output standards such as those that accommodate road or rail vehicle weights, dimensions and speeds.

Three: all urban transport projects should be assessed ‘as if’ there was road pricing. This will overcome suspicion of Commonwealth bias: towards roads; towards cities without toll roads.

Four: projects whose principal intention or benefit relates to personal travel should only be considered for funding after Commonwealth investigation and public reporting of impacts on freight flows on a (properly specified) national network, including the sea and air ports. Reasons include: the logical ordering of strategic planning starts with freight; suspicions about whether there is any case for government funding of urban motorways.

Five: the need for a project should be demonstrated against operational models of the relevant transport system. This is a separate exercise to demand modelling. It would seek to eliminate from consideration projects whose viability depends on volumes that exceed capacity. Also it would seek to modify projects whose results could partially be replicated by changes to traffic control inputs.[[35]](#endnote-35)

Six: the Commonwealth should provide funding to only those projects that have bi-partisan support within the relevant State. The purpose is to avoid Commonwealth funding for projects that are ‘politicised’. Support could be evidenced by resolutions of houses of State parliaments.

### 5.5 Other

Advice to the Commonwealth on the funding of some State urban transport infrastructure proposals should carry with it a responsibility to comment on other topical State proposals including, maybe especially, those for which Commonwealth funding is not sought. The above demonstrates that national significance, economic merit and deliverability may be necessary but are insufficient topics for such comment.

The Commonwealth currently plays a direct role in urban transport via its explicit (partial) funding of community transport and its subsidisation of car use including through the fringe benefits tax. Both are further examples of an incoherent or biased Commonwealth role. While these are beyond the scope of this article, there are good arguments for change.

Of course any discussion about Government funding is equally a discussion about user funding.

## Conclusions and next steps

The debate about the Commonwealth and urban transport has unduly focussed on funding-as-gift, and largely ignored legitimate and durable purposes of a national government. In urban transport Commonwealth advice and actions should be guided by the Constitution. Economic considerations, even national ones, are not an adequate compass for the Commonwealth in this field.

Unless Commonwealth funding in transport has such a proper Constitutional basis it will create wishful thinking and many calls to spend on matters well outside its remit. The spending reflex has created a significant problem in Australia’s federation. This is seldom mentioned; the public should expect much better from advisers, politicians and commentators.

Guidance from the current Constitution would reveal important roles for the Commonwealth that may have been overlooked; reporting and promotion of interoperability. Activation of these roles would result in better urban transport and a more engaged community. These roles should be satisfied by Parliament assisted by a statutory authority; not by the Government aided by a department.

A key consideration is that public disclosure is a, if not the, most powerful incentive for better urban transport. If the Commonwealth is to have any involvement in the field there is a compelling case for it to put all relevant matters before the public, not merely provide funding to the project du jour. To improve the performance of and community experience with urban transport it could usefully draw public attention to a range of matters such as: actual system performance; the existence and content of independent (of State government) expert views on transport planning or project issues; interoperability.[[36]](#endnote-36)

Were project funding to continue there is merit in new conditions on Commonwealth support: to put ‘effectiveness’ as well as ‘efficiency’ into the spotlight; to demonstrate the Commonwealth’s resolve for practical improvements rather than collect applause for handouts.

None of this trammels on States’ rights.

While this article deals with urban transport, most of these points could be made about transport more generally. As is the case for roads, a htfu in attitude is needed. Otherwise the search for transport problems for the Commonwealth to think about solving, such as through a national infrastructure audit process, can create larger more intractable problems in transport and beyond.

An alternative to bring Australia into line with claims of overseas practice is Constitutional change i.e. referendum, to create a different responsibility and role, a new *purpose*, for the Commonwealth. Few, if any, have been prepared to raise this. In the author’s view such a proposal cannot be justified until present arrangements have been properly utilised.

If there is an interest in progressing these matters next steps might be:

1. Public discussion about Commonwealth purposes in urban transport;
2. Parliamentary consideration;
3. Revisions to: the mandate of the Productivity Commission and or Infrastructure Australia; Commonwealth legislation regarding infrastructure spending.

J Austen

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1. Australian Parliamentary Library Current Issues Brief no. 14 2002-03, *Commonwealth City Commuting: the Federal Role in Urban Transport Planning*, [Matthew James](mailto:matthew.james@aph.gov.au) Science, Technology, Environment and Resources Group, 10 February 2003 at: <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/cib0203/03Cib14>. [↑](#endnote-ref-1)
2. Over the last few decades Ministers for transport etc. in federal Coalition Governments have been members of the National (formerly Country) party and represented non-urban electorates. The current Minister, the Hon. Warren Truss MP, represents the rural seat of Wide Bay Queensland, the main centres of which are Maryborough and Gympie each with around 20,000 residents in 2011. [↑](#endnote-ref-2)
3. For ‘core responsibilities’ see: <https://infrastructure.gov.au/department/ips/government_responses/response_public_transport.aspx>

   The reason given for road ‘investment’ being a responsibility of the Commonwealth was a ‘tradition’ of road spending. This line of argument was unanimously dismissed in Williams (2) see note xvii (below).

   For the Minister’s views on how road spending frees the States to spend on public transport see, for example: <http://www.afr.com/news/politics/tourist-lobby-criticises-coalition-on-public-transport-20140319-ixcst> [↑](#endnote-ref-3)
4. This article does not intend to review attempts at a Commonwealth urban policy, however to understand arguments about the Commonwealth’s role it is useful to consider aspects of the cities agenda of the Rudd / Gillard Labor Governments.

   In 2009 the Council of Australian Governments agreed to review and revise capital city strategic planning systems: the Council’s ‘reform council’ would conduct a review of such systems against certain criteria; Commonwealth infrastructure funding was to be linked to meeting these criteria. See: https://www.coag.gov.au/node/90#4. Capital City Strategic Planning Systems.

   In the event, the criteria and the reform council’s assessment focussed on processes rather than results. This was possibly due to sensitivities about the ‘performance’ of certain cities and State governments, and the merit of proposals for Commonwealth funds that were put to Infrastructure Australia. There is little in the public domain to suggest the Government held to its comment about infrastructure funding.

   In 2011 the Government released a ‘national urban policy’. Its aim was to support the Council of Australian Government’s national objective (goals?) for cities which related to: competitiveness; productivity; sustainability; liveability. It asserted a Commonwealth role:

   ‘*in planning for, and delivering, an urban Australia that is more productive, sustainable and liveable*.’

   The rationale for a role, while not explicitly stated, appeared to relate to either: the importance of cities to the national economy and the fact that most Australians live in cities; or previous and current Commonwealth activity in areas such as:

   *‘direct investment in housing and social and economic infrastructure and economic policy settings; property ownership; labour market regulation, immigration and taxation policies; and regulatory functions’*.

   See: <https://infrastructure.gov.au/infrastructure/pab/files/Our_Cities_National_Urban_Policy_Paper_2011.pdf>.

   In the author’s opinion the policy was relatively strong on the importance of cities, less strong on responsibilities of and actions to be undertaken by the Commonwealth; the goals, objectives, principles, role and almost of the rationale could equally be applied to non-urban matters. One potentially significant idea was Commonwealth spending to be informed by the national ports and land freight strategies of Infrastructure Australia; which might be supportable by the trade and commerce power of Constitution s.51. However, again there is little public evidence that this was applied and in any case officials later substantially changed the land freight strategy as discussed in the htfu article available at thejadebeagle website.

   The national urban policy was in Commonwealth ‘strategy’ format, but its reasoning for a Commonwealth role appears less than cogent in the light of the Pape and Williams cases (note xvii below).

   In 2011 the matter of cities was referred from the Council of Australian Governments to the Ministerial Council on Transport and Infrastructure. The governance article commented on the latter Council; its observations are supported by a word search of ‘cities’, or a search for the claimed cities ‘work plan’ on the Council’s website. A work plan was mentioned in communiques of May and November 2012 but it is difficult to ascertain substantive contents apart from some concern about communication of ‘non airport’ uses of airports, possibly related to airport carparks or complaints by nearby suburban shopkeepers. Any activity since then is unreported. See: <http://transportinfrastructurecouncil.gov.au/communique/>

   The Commonwealth did, however, commence a report series, ‘State of Australian cities’, and there is a national cities conference each year see: <https://infrastructure.gov.au/infrastructure/pab/soac/>. Infrastructure Australia also highlighted the importance of, and some infrastructure challenges in, major cities in its theme ‘transforming our cities’. In 2011-12 it argued for consideration of separating major freight from transit systems in the cities, a suggestion that was not taken up.

   Overall, the author finds it difficult to avoid the impression that federal Labor in Government instinctively grasped towards some greater involvement in cities, but did not place this within a principled position relating to the federation. As such it needed to avoid giving offence to the States a result of which was not following through its comments on infrastructure funding.

   Labor’s new policy, released in early October 2015, argues for additional sources of infrastructure funds, for example from a ‘financing facility’ and from the private sector. It argues that the Commonwealth should play a brokering role working with State governments, with some suggestion that this might allow better identification of infrastructure projects. It claims that the intended Government activity is somewhat analogous to a company investing in its capital stock. See: <http://www.alp.org.au/infrastructureplan>

   Without commenting on the policy or its reasons, it is noticeable that again no rationale other than (implicitly) size is presented for Commonwealth involvement; the Commonwealth being bigger than any State, national productivity being a big issue etc.

   At this point it is also worth noting views that the Commonwealth look at small investments since they sometimes had proportionately larger payoffs, see for example: Productivity Commission, *Public Infrastructure Report Vol 1*, May 2014 at p271. This implicitly rejects the idea that the Commonwealth’s role should be limited to a role in big things. Overall the impression is that any argument, big or small, will be put forward to justify funding.

   The above should not be taken as a partisan criticism of Labor. The other side of politics to date has attempted little city specific policy and introduced land transport programs with arguably less Constitutional or economic and social justification than many of Labor’s. The recent idea of ‘roads as the Commonwealth’s knitting’ was a particularly contentious essay; with the current Coalition leader reportedly jettisoning this early in his Prime Ministership. [↑](#endnote-ref-4)
5. The Senate Rural and Regional Affairs and Transport References Committee, *Investment of Commonwealth and State funds in public passenger transport infrastructure and services*, August 2009.

   The Senate Rural and Regional Affairs and Transport References Committee, *Role of public transport in delivering productivity outcomes,* December 2014. [↑](#endnote-ref-5)
6. The Senate Rural and Regional Affairs and Transport References Committee report on Investment of Commonwealth and State funds in public passenger transport infrastructure and services (2009) considered potential Commonwealth roles:

   *‘5.18 Almost all submissions argued that the Australian Government should take a greater role in promoting public transport for the sake of sustainable cities. The most common reasons put forward were related to climate change, peak oil and urban congestion, serious issues of national importance that require a nationally led response…..*

   *5.23 As to how the Australian Government should be involved, the main themes in submissions were: need for national leadership and coordination; need for a national research body; and Australian government funding of public transport and active transport.’*

   The report cited the National Transport Commission’s submission:

   *'potential opportunities for a more coordinated national approach to public and passenger transport could include…'*

   *• national objectives and strategies for people movement, linked to regional strategies to underpin the next generation of investment in passenger transport;*

   *• best practice transport governance structures - for regulators, government agencies and service providers across all modes - to ensure urban transport works more effectively together as an integrated system;*

   *• minimum standards for transport access;*

   *• a common technology platform for integrating 'smart card' technology on any transport mode in any city*…’

   This report was made prior to the Williams cases (2012, 2014), and possibly reflected an assumption that the Commonwealth executive can spend on or be involved in any matter. This author argues that the Pape and Williams cases invalidate most of the given reasons as a basis for a Commonwealth role (note xvii below).

   ‘Coordinating’ or ‘leading’ the States is not a defined task for the Commonwealth; the question is what activity is envisaged by coordination or leadership. Relevant implied powers rest on matters within the unique remit of, the character and status, of a national government; transport research is unlikely to be such a matter as it already is being undertaken by the States, Professor Currie giving the example of Austroads which was established by road authorities i.e. by the States.

   The idea that a greater role is justified by many submissions misses a key point; if indeed most Australians want the Commonwealth to have a greater role than allowed under the present Constitution then the suggestion should be for a referendum to change the Constitution to allow this greater role.

   The report also commented:

   *‘5.26 The National Transport Commission in early 2008 provided wide-ranging advice to the Australian Transport Council (ATC - Australian and state/territory transport ministers) on a 'national transport policy framework'. On 28 February 2008 transport ministers agreed that 'there is a need for a national approach to transport policy'. …... The ATC has agreed to implement a future work agenda arising from the NTC's proposal through a structure of subcommittees of the Standing Committee on Transport*.’

   Previous articles at thejadebeagle website demonstrated this came to little and was later ignored. As a general proposition, the ineffectiveness of a Ministerial Council or (in) action of officials do not give rise to Commonwealth powers or roles.

   The report concluded:

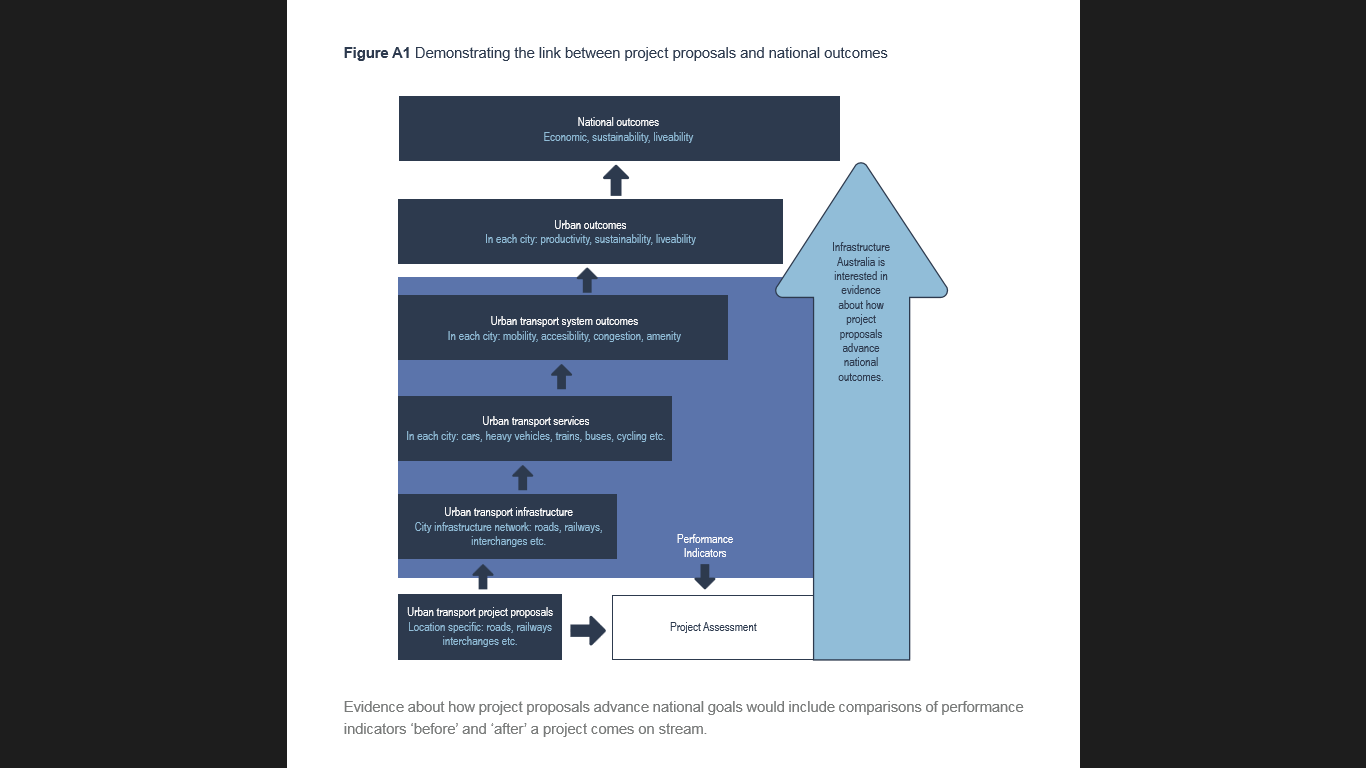
   *‘5.43 …… public transport has traditionally been the responsibility of the states and a key element of service delivery regarding which the voting public quite rightly hold their state governments to account. Moreover, public transport involves complex urban planning, land use and development decisions that are best carried out by the states since they are the closest constitutional level of government to the community. The Committee does not propose to recommend that this should change.*

   This conclusion relies on tradition; compare with note iii (above). It also calls on the subsidiarity (proximity of service delivery) argument. Neither of these is strictly relevant to a Commonwealth role. The ensuing recommendation (below) is, in the author’s view telling in it not making a statement of Commonwealth responsibility and its implication that the Commonwealth’s role is to support ‘good’ States:

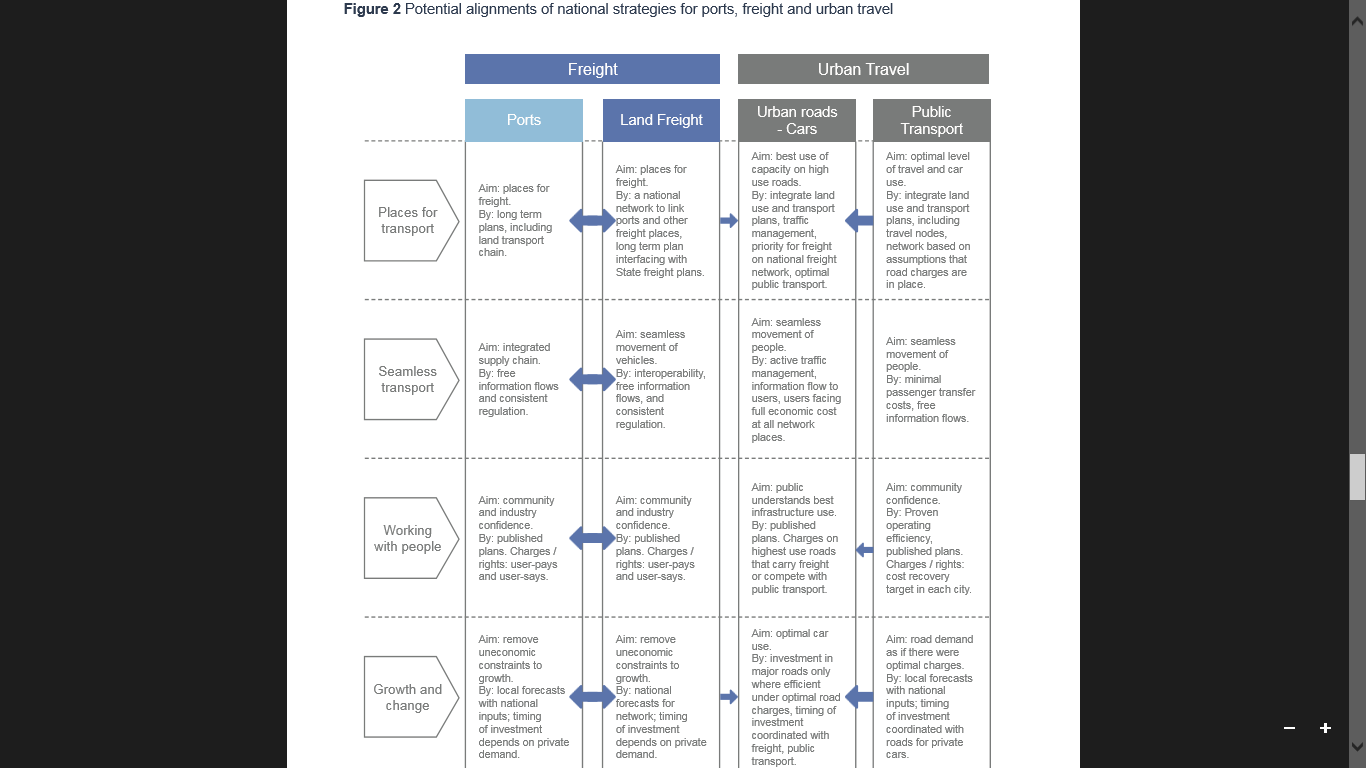
   *‘Recommendation 4*

   *5.44 Commonwealth funding for public transport should only occur in the context of overall funding for infrastructure projects that meet a strict merit base criteria. These include an objective assessment of the broader community and economic benefits and the degree to which the sponsoring state government has adopted an integrated, inter-modal, best-practice approach to transport planning and management. The Commonwealth can only make such decisions the context of broader judgements regarding all competing infrastructure projects that have national significance.’* [↑](#endnote-ref-6)
7. The bias towards ‘roles’ of funding is seen in note vi (above). States have undertaken, promised and proposed far more spending on roads than on public transport. A view that the Commonwealth should respond to State proposals implies a bias towards road spending by the Commonwealth. [↑](#endnote-ref-7)
8. See note vi (above) in relation to para 5.26. [↑](#endnote-ref-8)
9. See: Office of National Infrastructure Coordinator *Submission to the review of the national transport commission* (2012) at notes 20 and 22: <http://infrastructureaustralia.gov.au/policy-publications/publications/files/NTC_Review.pdf>

   For the results of the work on indicators, see: <http://international.fhwa.dot.gov/pubs/pl11024/pl11024.pdf> Yes, United States transport department highway site. There are serious problems with the proposed indicators in that report. Later articles in this series will suggest a preferable approach. [↑](#endnote-ref-9)
10. Infrastructure Australia’s urban transport strategy document included a diagram showing links between project proposals and national outcomes; suggesting in effect that were the Commonwealth to contribute funds to projects it would need to be satisfied of certain matters, including performance indicators of at least transport infrastructure, transport services and transport systems (Figure A1 below), and optimality conditions (Figure 2 below). See: <http://infrastructureaustralia.gov.au/policy-publications/publications/Infrastructure-Australias-Urban-Transport-Strategy-December-2013.aspx>.

    The document included a table showing how various transport tasks might be aligned. Among other things the table indicated that ‘investment’ in major roads should only occur if efficient under optimal charges and coordinated with freight and public transport investment. Like urban travel, freight is not mentioned in the Constitution; it is not a head of power and therefore of itself is not a Commonwealth ‘role’.

     [↑](#endnote-ref-10)
11. Infrastructure Australia’s national infrastructure audit did not adopt all the matters in note x (above) figures A1 or 2; for example it did not appear to assess road congestion under conditions of optimal pricing. See: author’s submission to the audit at thejadebeagle website. [↑](#endnote-ref-11)
12. Moving people is available at: <http://www.busnsw.com.au/Portals/15/Members%20Area/Publications/Moving%20People%20Solutions%20for%20a%20Liveable%20Australia.pdf>.

    The report was a collaboration of the Australasian Railways Association, the Bus Industry Confederation and the International Association of Public Transport. It was published in 2010 with an update in 2012.

    The report considered the role of the Commonwealth in urban transport, and specifically in public transport, not least to redress its current bias towards roads.

    The reasons given for Commonwealth involvement were scope and scale:

    *‘(e.g. the road toll, greenhouse gas emissions, social exclusion, economic competitiveness related to infrastructure provision and energy security). Because of the scale and geographical spread of these issues, national policy and program responses are required for effective solutions. This must, involve the Federal Government showing leadership and working in partnership with others. Some issues require a specific Federal policy and program response. The sheer scale of the financial requirement means that state‑based budgets will not be sufficient to equip Australia’s cities with adequate transport services.’*

    These issues are not unique to Australia; elsewhere national governments are involved in addressing them because they are relevant to national goals:

    *‘Around the world, there is remarkable similarity of the key transport issues that are the focus of national governments……These issues are of national concern because they impinge severely on what are the universal national goals of: economic competitiveness; environmental sustainability and; social inclusion.’*

    The report argued that the Commonwealth should focus on matters beyond (claimed) State capability:

    *‘capital assistance to projects that lead transformational change and improve national interest outcomes identified in this report.’*

    While attractive, neither State financial capability nor transformational change should be sufficient reason for Commonwealth involvement in projects. For example the north-west rail link in Sydney, which is transformational in several respects, is being organised by the State. Moreover, as discussed later in this article and notes, there may be circumstances where the Commonwealth should take a different view of a transformational project than that proposed by the State.

    However the report also stated:

    *‘Operational/delivery responsibilities mainly lie with subsidiary levels of government. The Federal Government should not involve itself in operation of land transport systems that are currently State/Territory or local government responsibilities but should influence the development direction of those systems in ways that contribute to better outcomes when assessed against the national interest issues raised in this report*.’

    The latter two quotes suggest the Commonwealth should ‘support’ the States. In the htfu article the author suggested a different approach to more closely align responsibility with power; if Commonwealth support is necessary for a road, the road should be transferred to the Commonwealth.

    Like the National Commission of Audit (note xiii below), the moving people report proposed at least some funding should be on a formula‑based approach because:

    *‘to do otherwise would unfairly penalise a jurisdiction that has put in additional past effort at its own expense and currently has a smaller backlog than others, simply because of greater effort. In such an environment a project‑based funding approach can effectively reward laggards for their past lack of effort.’*

    The issue of an unfair penalty arises only because it is assumed that the State owns the project i.e. only because Commonwealth grants are seen as a gift. The issue would not arise if assets were transferred to the Commonwealth.

    Overall the report, like the National Commission of Audit, presented arguments that Australia should have federal arrangements that enable the Commonwealth to have some ‘desired’ role. It took a very different view from the Audit as to what the desired role might be. However, its arguments do not go to the question of what the Commonwealth’s role should be under existing Constitutional arrangements, nor how the Constitution should be altered to allow the desired role. [↑](#endnote-ref-12)
13. The National Commission of Audit report is at <http://www.ncoa.gov.au/>

    The National Commission of Audit explicitly considered the role of the Commonwealth in infrastructure, including urban transport. It argued that certain principles of good government should be adopted, including: living within means; the Commonwealth’s activities should be guided by the Constitution.

    The report was authored by individuals with private and public sector experience, its secretariat drawn from Commonwealth central agency departments.

    The report was delivered in March 2014 while argument was being made in the High Court to reopen recent decisions restricting the extent of Commonwealth (executive) spending powers; some of its assumptions seem invalidated by the Court’s decision. These and other matters are discussed below; this author questions the report’s analysis of the Commonwealth’s role in infrastructure.

    The National Commission of Audit argued that the Commonwealth has a role in coordination of nationally significant infrastructure:

    *‘While the States are best placed to make decisions and deliver infrastructure projects most needed by local communities, there is a role for the Commonwealth to play in the coordination of nationally significant infrastructure.*

    *Under the Infrastructure Australia Act 2008 nationally significant infrastructure includes energy, transport, communications and water infrastructure in which investment or further investment will materially improve national productivity.’*

    As indicated in note vi (above), there is an issue about what ‘coordination’ might involve. Also, the Constitution does not provide the Commonwealth with power over ‘nationally significant infrastructure’; how national significance is defined will determine whether there is, and the nature of, a potential Commonwealth role. Determination by Commonwealth legislation would be circular and therefore cannot be a basis for responsibility or role.

    Another claim in the report is that the Commonwealth has a role in matters with impact beyond one State:

    *‘For most infrastructure, the users and beneficiaries reside within a particular State, and the State Government is in the best position to assess the merits of a particular project in providing services to the local community.*

    *In other cases, Commonwealth Government intervention may be necessary to ensure that infrastructure which provides broader economic or social benefits, but may not be commercial, is delivered.’*

    The Constitution does not provide the Commonwealth with power to ‘intervene’ simply because of broad economic benefits or because the costs or benefits of a project extend beyond a State border. As indicated in note xxiii (below) the test for ‘incidental to interstatedness’ relates to a physical rather than economic connection, and as indicated in note xvii (below) implied powers do not arise simply because an issue affects more than one State.

    A further suggestion by the National Commission of Audit is that the Commonwealth has responsibility for a national transport network:

    *‘The Commonwealth has the legislative responsibility for determining what constitutes the National Land Transport Network.’*

    The report’s formulation on this appears wrong. In fact Commonwealth legislation (on its face) provides the Minister with responsibility for designating a network. Whether legislation is valid for that purpose depends on what the Commonwealth asserts it might do in relation to this network, and the places included on it. Previous articles by the author, such as htfu, have pointed to serious practical flaws with the current definition of a national network.

    The National Commission of Audit appeared to accept that the Commonwealth will ‘invest’ in infrastructure in any case and acknowledged that support can take a number of forms including loans, grants and equity (ownership). It recommended process style constraints such as cost benefit analysis, assessment of commerciality, ensuring transparency. None of these process matters are directly relevant to the role of the Commonwealth.

    Two more types of role were noted:

    *‘The Commonwealth also imposes a fuel excise predominantly as a general revenue measure….*

    *The Commonwealth performs a significant role in economic and safety regulation related to infrastructure. These public interest roles involve responsibility for statutory regulatory frameworks, and providing national leadership and harmonisation, where appropriate across jurisdictions.’*

    Fuel excises are clearly a role for the Commonwealth. An implication is that ‘road reform’, in which (State) direct charges would replace excises, will require Commonwealth–State cooperation. However, the ability to collect excises from road use etc. does not create an ability to spend on roads.

    The Commonwealth has no direct power for the economic or safety regulation of all transport infrastructure. Rather its power for such regulation needs to come from another source, this current article argues that harmonisation to some extent may be a source of an implied power, a matter not fully considered in the National Commission of Audit report.

    The National Commission of Audit argued that in the longer run the Commonwealth should reduce its role in funding infrastructure because State revenues and user charges would be adequate:

    *‘With access to an improved source of revenue — for example through the personal income tax system — the States will be in a better position to fund their own priorities, including in relation to infrastructure. In this situation the need for separate tied funding from the Commonwealth for infrastructure will diminish.*

    *Recognising reforming the Federation will take time, the Commission recommends consolidating existing infrastructure funding arrangements between the Commonwealth and the States in the interim under a single ‘parent agreement’.*

    *Funding could be provided in a single pool and allocated to the States on a formulaic basis including appropriate funds for maintenance and disaster mitigation…. The Commonwealth would not be involved in the selection of projects.’*

    Agreement with the State(s) is necessary for Commonwealth specific purpose grants such as for infrastructure. However, the use of a formula basis suggests the National Commission of Audit viewed the Commonwealth’s interest and role as limited to supporting the States; in the author’s opinion State support is better done through general purpose grants or tax arrangements. Later comments in this article suggest the formulation to be a too narrow view of the Commonwealth’s role; missing some essential features of the Commonwealth as a national government in a federation. [↑](#endnote-ref-13)
14. Reputedly from George Mallory in an interview article *Climbing Mount Everest is work for super*men New *York Times* (18 March 1923): *"Why did you want to climb Mount Everest?" "Because it's there."* He had already made two attempts to climb the mountain; his later attempt in 1924 was his last as he died on the mountain. Many years later his body was found close to the summit; there is debate about whether he reached the top. Others can draw analogies with arguments about the Commonwealth’s role in ‘big things’. [↑](#endnote-ref-14)
15. Recent examples of the Commonwealth waxing and waning in its approach to urban transport include the Coalition Government’s reversal of its predecessor’s offers of funding for urban rail projects and subsequent reported reconsideration of this position under the new Prime Minister. [↑](#endnote-ref-15)
16. Some suggest the Commonwealth bureaucracy’s home, Canberra, puts its advisers at a disadvantage regarding urban transport as they do not experience road congestion and train crowding, first hand. The low cost of parking and subsidisation of cars for public service senior executives also have been pointed to.

    However, the author believes a more serious problem is (lack of) access to expertise.

    Most urban transport specialists practice in the bigger cities, not Canberra. The bulk of their time, contacts, income and prospects are tied to State government related matters; particularly in matters critical to infrastructure projects such as road design and railway operation. It would not be surprising if specialists considered work for the Commonwealth as transient and a sideline to the main business.

    More cynically, for mega projects the States can engage most of the experts in a particular field, rendering access to expertise and knowledge, and assessment of the pros and cons of projects, difficult for ‘outsiders’ such as the Commonwealth and, in some cases, parts of State bureaucracies. Unless relevant advice is open to public scrutiny such a practice creates risks to the projects and the systems in which they operate.

    Of interest in this regard is the private work on a Sydney rail / transport plan, led by Mr Ron Christie AO, published via the Sydney Morning Herald in 2010; work that cast substantial doubts on the then government’s transport and rail ‘plans’, including plans for ‘metros’. The origins of this work, privately funded, were concerns by experts and members of the public about State government proposals. The apparent lack of criticism of Christie’s effort suggests its analysis and recommendations to be generally sound, and therefore the then State government approach and project proposals to be deficient, deficiencies much greater than revealed by cost benefit analysis. See: <http://www.atrf11.unisa.edu.au/Assets/Papers/ATRF11_0068_final.pdf> and

    <http://www.catalyst.com.au/Public_files/F1_Public_Transport_Inquiry_Final_Report_Themes_and_Recommendations_26May2010.pdf> and <http://www.smh.com.au/federal-politics/political-opinion/its-sensible-to-build-on-cityrails-good-bones-20100212-nxms.html>

    One question for the Commonwealth, were it to be ‘involved’ in urban transport, is: what should it do in relation to State plans and project proposals that are challenged in public by thorough expert reports such as Christie’s? Previous articles hinted that a similar issue arose in relation to the East West Link in Melbourne, and the Commonwealth’s response was to continue to offer support to this contentious project. The question could be relevant to rail projects as well; some project concepts currently underway in Sydney may be similar to those said to be challenged by Christie’s report. [↑](#endnote-ref-16)
17. National Commission of Audit principle 2 (see note xiii above). [↑](#endnote-ref-17)
18. Three relevant cases are Pape, Williams (1) and Williams (2).

    Pape v Commissioner of Taxation (2009) 23 CLR 1, concerned the ability of the Commonwealth to provide a fiscal stimulus via payments to taxpayers by the tax department with legislative backing. The validity of the spending was challenged. Members of the court differed on certain aspects. A majority held that while the legislation was outside the competence of the Commonwealth, the Commonwealth executive did have powers of spending in this particular case due to: the matter being peculiarly adapted to the government of the nation that could not otherwise be carried out for the public benefit; (or) it being peculiarly within the capacity and resources of the Commonwealth. The majority held that an Appropriation Act is not sufficient authority for Commonwealth spending. The Commonwealth cannot spend on whatever it wants; there needs to be reference to a substantive head or power or implied power.

    Williams v Commonwealth [2012] HCA 23, (Williams (1)) concerned the ability of the Commonwealth to fund chaplains in State schools. Mr Williams challenged the spending on the basis that it infringed Constitutional provisions regarding religion; this basis was rejected. However, the Court confirmed its decision in Pape and held the spending invalid on other grounds. A majority held: the executive does not have power to spend money merely because it is a subject on which the Commonwealth might legislate, actual rather than potential legislation is needed; the Commonwealth’s capacity as a legal person does not give it the same capacity to contract and spend as a natural person; the Commonwealth does have an implied capacity to undertake enterprises peculiarly adapted to the government of a nation, but this did not extend to funding school chaplains. The majority upheld the view in Pape that an Appropriation Act is not sufficient authority for Commonwealth spending.

    Williams v Commonwealth [2013] HCA 23 (Williams (2)) was essentially a re-run of Williams (1) but with spending on school chaplains backed by a funding agreement and the Commonwealth Financial Management and Accountability Act; ‘remedial legislation’. The Commonwealth sought to reopen the decision in Williams (1). The Court again found the spending invalid and unanimously confirmed the majority approach in Williams (1). Spending must be based on legislation in addition to an Appropriations Act, and the purposes of spending in this case was not within a Commonwealth legislative head of power i.e. because of the absence of a head of power this aspect of the remedial legislation was invalid. The only other authority for spending may be an implied executive power of the Commonwealth being: executive power to enter contracts (more limited than that of a natural person); preservation of the Constitution; nationhood. Some quotes from the judgement follow.

    It was argued that Commonwealth and State governments had agreed to the funding of chaplains:

    *‘Consultation between the Commonwealth and States coupled with silent, even expressed, acquiescence by the States does not supply otherwise absent constitutional power to the Commonwealth. The Constitution contains several provisions by which the States and the Commonwealth may join in achieving common ends. It is enough to mention only s 51(xxxvii) (about referral of powers) and s 96 (about grants on condition). Neither of those provisions was engaged in relation to the matters the subject of this case. The consultations to which reference was made in argument do not support the Commonwealth parties' submissions’*

    It was argued that as other governments have broad implied powers to spend so should the Commonwealth:

    *‘the Constitution effects a distribution of powers and functions between the Commonwealth and the States. The polity which, as the Commonwealth parties rightly submitted, must "possess all the powers that it needs in order to function as a polity" is the central polity of a federation in which independent governments exist in the one area and exercise powers in different fields of action carefully defined by law. It is not a polity organised and operating under a unitary system or under a flexible constitution where the Parliament is supreme. The assumption underpinning the Commonwealth parties' submissions about executive power is not right and should be rejected’*

    Crennan J added other observations, regarding the relevance of government policy:

    *‘it is not necessary for this Court to express any views about the wisdom of governments providing services to school communities and students which support the wellbeing of students, including pastoral care, or about whether the provision of such services is a worthy object for the expenditure of public moneys. The Court's task is limited to determining whether the National School Chaplaincy and Student Welfare Program is sufficiently connected to s 51(xxiiiA)’*

    On the referendum that enabled the Commonwealth to provide social security payments she said:

    *‘Sir William Beveridge's Report Social Insurance and Allied Services39, mentioned by Dixon J in the BMA Case, considered the harmonisation of various social security systems to tackle threats to society described as want, ignorance, disease, squalor and idleness. Two requirements for effective social security advanced in the Report were universality and comprehensiveness. There was a spate of social security legislation in Australia in 1944 and 1945, which included the Pharmaceutical Benefits Act 1944 (Cth). The inclusion of s 51(xxiiiA) in the Constitution, following a referendum, was a response to this Court's decision concerning that Act’*

    The Pharmaceutical Benefits case (Attorney-General (Vic) (Ex Rel Dale) v Commonwealth (1945) 71 CLR 237) concerned in part the validity of legislation for spending to allow ‘free’ medicines. The High Court held that the Constitution at that time did not support such spending, but members of the Court relied on different grounds. One implication is that harmonisation of social security to tackle want, ignorance, disease etc. may not be a power implied by nationhood. Constitution s.51 (xxiiiA) now enables spending on this and other social security matters. The nationhood power is noted in xxiii (below).

    A further point of relevance of Crennan J’s observation is that Constitutional change may be necessary to support the ‘role’ some seem to think the Commonwealth should play in urban transport. [↑](#endnote-ref-18)
19. In the two Williams cases (note xviii above) the High Court pointed to and rejected arguments based on circularity. These arguments were that Appropriation Acts justify Commonwealth spending on any matter. The High Court held that such Acts are necessary for expenditure but are not adequate as a source of power to spend. [↑](#endnote-ref-19)
20. This goes to the relative position of Commonwealth and States; the federation and its ‘reform’. See: National Commission of Audit Vol 1 chapters 3 and 6 (note xiii above). The National Commission of Audit posited two additional principles for ‘reform of the federation’; subsidiarity and sovereignty. At p.69:

    *‘In determining ‘who should do what’ the Commission considers that two key principles should apply - subsidiarity and sovereignty.*

    *Under the principle of subsidiarity, policy and service delivery should, as far as practicable, be devolved to the level of government closest to the people receiving the services. This recognises that sub-national governments are likely to have greater knowledge about the needs of citizens affected by their policies. It allows programmes to be tailored to meet community needs.*

    *Governments should also operate at their natural levels. Policy oversight for national issues should go to the Commonwealth with responsibility for regional and local issues predominantly going to State and Territory governments.*

    *Under the principle of sovereignty, as far as practicable, each level of government should be sovereign in its own sphere.*

    *When reviewing roles and responsibilities, government activities should be allocated to one level of government where possible. This will provide greater clarity and accountability.’*

    TheNational Commission of Audit then recommended:

    *‘Recommendation 7: Reforming the Federation – clarifying roles and responsibilities*

    *There is significant overlap between the activities of the Commonwealth and the States. The Commission recommends that a comprehensive review of the roles and responsibilities between the Commonwealth and State governments be undertaken, informed by:*

    *a. the principle of ‘subsidiarity’ so that policy and service delivery is as far as is practicable delivered by the level of government closest to the people receiving those services;*

    *b. ensuring that each level of government is sovereign in its own sphere; and c. ensuring minimal duplication between the Commonwealth and the States and, where overlap cannot be avoided, ensuring appropriate cooperation occurs at all times.’*

    With respect, the author finds this ambiguous and not overly helpful in resolving what if any role the Commonwealth should play in urban transport. While the principles of subsidiarity and sovereignty are often recited, in this case they have an uncertain relationship with the idea of being guided by the Constitution: is it an argument for Constitutional change to embed the principles and if so how?; alternatively is it an argument for the Commonwealth to devolve some activities to agency States and / or for the States to refer some powers to the Commonwealth within the existing Constitutional framework? There is a significant difference between these alternatives, demonstrated by the wording in recommendation 7a which refers to the ‘delivery’ of policy and services i.e. States as agents in some respects, whereas the wording in the text refers to devolution i.e. States as principals in all respects. Further, the idea of ‘policy oversight for national issues’ does not appear in the recommendation and it is unclear what such oversight might involve. This current article proposes a role for the Commonwealth which is less intrusive than ‘policy oversight’.

    Previous articles at thejadebeagle website noted that ‘infrastructure’ and ‘transport’ did not feature in reform of the federation discussions under the former Prime Minister. [↑](#endnote-ref-20)
21. InVictoria v The Commonwealth and Hayden  (1975) 134 CLR 338 (Australia Assistance Plan case 1975) the High Court held that matters physically connected with interstate trade and commerce could fall within Commonwealth powers. It also held that an economic connection of itself would be insufficient to bring a matter within the trade and commerce power. [↑](#endnote-ref-21)
22. The Constitution provides for the Commonwealth to (make laws to) acquire ownership of property for any purpose which its Parliament has the power to make laws, provided it pays just compensation; s.51xxxi. The acquisition needs to be for a purpose within a legislative head of power; such as for railway construction s.51xxxiv. Roads are not mentioned in the Constitution, hence another head of power or alternative method of acquisition is needed. One possibility might be roads related to trade and commerce with other countries or among the States, however this may not cover certain roads, for example suburban local roads. Another possibility might be referral of State power over a particular road (class) to the Commonwealth, for a discussion of referral of power see: <http://www.austlii.edu.au/au/journals/FedJSchol/2003/3.html> [↑](#endnote-ref-22)
23. The modern formulations of an implied ‘nationhood power’ arose in the Australia Assistance Plan case (note xxi) per Mason J. Dr Spry put it:

    *‘his Honour took a more expansive view of the 'responsibilities' than that of Barwick CJ and Gibbs J, concluding that they may be found in:*

    * *the distribution of powers, especially legislative powers, in the Constitution; and*
    * *the 'character and status of the Commonwealth as a national government'.*

    *Further, Mason J continued, in defining the scope of the executive power, the following factors must be considered:*

    * *the impact of the incidental power [section 51(xxxix)] on section 61;*
    * *the Commonwealth's implied powers stemming from its existence and nature as a polity.*

    *His Honour stated that these two factors combined mean that the Commonwealth has 'a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation'. The Commonwealth Scientific and Industrial Research Organisation (CSIRO) is an example of the exercise of this capacity. On this reasoning, other activities will be able to be supported in a like fashion under the executive power*.

    *Mason J warned, however, that the executive power to engage in such national activities, arising as it does from a Constitutional implication and the operation of the incidental power, is limited in scope. It would not accord with the division of legislative responsibilities in the Constitution between the Commonwealth and the States to give this aspect of the executive power a wide operation. The Commonwealth, for example, could not establish programs not justified by a head of legislative power merely because such programs 'can be conveniently formulated and administered by the national government'. Thus, although acknowledging the existence of an implied nationhood power, both Barwick CJ and Mason J denied that it extended to support the Australian Assistance Plan.’*

    See*:* Dr Max Spry, *The* *Executive Power of the Commonwealth: its scope and limits,* Parliamentary Library Research Paper 28 1995-96 at <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP9596/96rp28#AAP>   
    Subsequent cases have further considered the nationhood power; it was held to apply in relation to protection of rights for the Bicentennial celebrations but not to the support of school chaplains in State schools.

    Professor Twomey has been critical of the reasoning for and application of this power, arguing that it is ill defined with potential to upset the federal balance:

    *‘Its scope extends beyond self-protection and the prerogatives and appears somehow conceptually related to the types of powers that a national government should be able to exercise, regardless of the actual powers distributed to that government by the Constitution.’*

    See: Anne Twomey, *Pushing the Boundaries of Executive Power — Pape, the prerogative and nationhood powers*, Melbourne University Law Review Vol 34, 2010.

    While nationhood was raised by Mason J regarding executive power, by implication it may attach to legislative action. Twomey later argued that Williams (1) placed limits on the scope of this implied power: the activity must be peculiarly adapted to the government of a nation and be a truly ‘national’ endeavour; the activity must be one that cannot otherwise be carried on for the benefit of the nation by the States or others; the Commonwealth’s executive power cannot be expanded outside its heads of power simply because it is ‘convenient’ to do so. Also it does not render s.96 of the Constitution otiose; there are large areas of activity which are outside the executive power of the Commonwealth which can only be entered by way of a s.96 grant; the power must involve no real competition with the States.

    She notes that in the Tasmanian Dams case Deane J stated that even in an area under State legislative and executive control Commonwealth activities may not be competing, for example payments to progress national endeavours might not impinge on the States. In the Pape case, French CJ referred to this view and argued:

    *‘it is difficult to see how the payment of moneys to taxpayers, as a short-term measure to meet an urgent national economic problem, is in any way an interference with the constitutional distribution of powers.’*

    Other restrictions for nationhood as a source of executive power are it cannot: impose taxation; create a new offence or impose coercive measures; dispense with the operation of any law; alter rights and liabilities under States laws; curtail the capacity of the States to function as governments.

    See: Professor Anne Twomey, *What now after Williams?*, presentation to IPAA Victoria, October 2012 at <http://www.vic.ipaa.org.au/news/january-2013/what-now-after-williams>. [↑](#endnote-ref-23)
24. Strengthening accountability of each level of government; every element of government is relevant to the Commonwealth because of the nature of Australia’s Constitution; accountability relies on the informed satisfaction of the relevant electorate. Note xxiii (above) indicated one source of Commonwealth executive power is to uphold the Constitution. Also only a national government is in a position to undertake some such activities, so these might fall within the nationhood power.

    National cohesion; the function of a national government in a federation is to increase cohesion among different States. This can be done by ‘harmonisation’ which in Australia this is constrained by the Constitution ‘reserving’ many activities including regulations and processes to the States; referral of State powers to the Commonwealth being necessary for example in the case of uniform corporations laws.

    In transport national cohesion requires physical interoperability of infrastructure, not merely (or even) uniform regulations and processes; even were there to be uniform national regulations and processes it would not be (practically) possible to run a train from north Brisbane to Sydney because of the break of gauge. To the author, interoperability trumps the idea of ‘competitive federalism’ in many transport systems and applications. Note xxi (above) implied that the Commonwealth has greater power in relation to physical than non-physical (economic, regulatory) connectedness. [↑](#endnote-ref-24)
25. Accountability issues arise in urban transport for two reasons: some urban transport services are in effect essential services with scale and natural monopoly characteristics; it is a subsidised industry.

    Urban passenger railways are essential service industries due to: large numbers of passengers; significant shares in particular markets eg. CBD commuting; absence of alternative or bypass services; fixed routes; infrastructure scheduling (being the basis for timetables). The last of these results in: scheduling of other public transport services etc. to conform to the railway schedule; an influence over average and variance of speeds on some roads. Suspension of rail services due to eg. labour strikes or power outages cause significant disruption to city activities. Most urban railways are economically indivisible; they exhibit strong economies of scale and scope. Attempts to divide urban passenger railways in Australia have so far failed; geographic separation in Melbourne and ‘vertical’ (track from trains) separation in Sydney both were reversed in the late 1990s and early 2000s.

    Most urban passenger railways are subsidised, meaning that the public needs to rely on a ‘contract’ between the government and the railway. In the event of major breach by the railway operator, government faces a difficult choice: impose financial ‘penalty’ which may exacerbate the underlying cause of the breach; do nothing or provide further resources which may provide perverse incentives. The other approach, a takeover of management, raises the question: by whom?

    For these reasons, publication of performance, not merely financial rewards, is considered to be among the most powerful incentives for satisfactory performance by urban railways. This is especially the case for government operated railways. See: Theresa Mejia and Bronwyn Lind, *Best Practice in Procurement of Commuter Rail Services,* 32nd Australasian Transport Research Forum at <http://atrf.info/papers/2009/2009_Mejia_Lind.pdf>. [↑](#endnote-ref-25)
26. For example in NSW, the new ‘State plan’ has a reduced focus; for transport it is projects delivered on time. See: <http://www.smh.com.au/nsw/mike-baird-tears-up-barry-ofarrells-state-plan-to-sharpen-focus-on-performance-20150913-gjlcyd.html> and <http://www.smh.com.au/nsw/premier-mike-bairds-fix-for-sydneys-transport-woes-scrap-the-measurements-20150916-gjnxpa.html>.

    Delivery of projects may be significant, but not as significant as the effect of the projects once delivered. Far more important than either to the public will be performance of the transport system. At the website <https://www.nsw.gov.au/making-it-happen> the transport priority is ‘90% of peak travel on key road routes is on time.’ The idea of assessing transport system performance via road performance might be laudable, but the concept of ‘on time’ peak travel on roads is novel and difficult for the author to comprehend.

    NSW provides an interesting case study in reporting. From 2004 to mid-2010 the performance of urban transport was monitored and reported by a statutory authority, the Independent Transport Safety and Reliability Regulator rather than by a government department. It was restricted to regularly report only on matters within ‘contracts’ or ‘agreements’ between government and transport service providers, the then Ministry of Transport not having detailed agreements at least for railways. The contracts and agreements are outlined at Rhonda Daniels, Cameron Gordon, Corinne Mulley and Nick Stevens, *Optimal contracting and incentives for public transport in Sydney: what has been learned from the Sydney Metro experience*? Australasian Transport Research Forum 2011 Proceedings 28 - 30 September 2011, Adelaide <http://www.atrf11.unisa.edu.au/Assets/Papers/ATRF11_0117_final.pdf>.

    Nonetheless, at the time the Regulator detected and pointed to several serious service performance issues for example: punctuality for a bus was determined at the time it left the depot; the claim that there were very few full on route buses; aspects of on-time running for rail were widely misunderstood; the rail timetable mismatched services to passengers, more services ran earlier than the time of maximum passenger usage which improved ‘on time running’; the trade-off between punctuality and service level was not precisely known, the approach was to take an educated guess that probably resulted in some unduly slow and infrequent services.

    The Regulator’s reporting in itself was incomplete; a comprehensive approach to public interest reporting would follow the demand function as explained to the Independent Pricing and Regulatory Tribunal. See: Independent Transport Safety and Reliability Regulator, *Submission to Independent Pricing and Regulatory Tribunal hearings for determination of CityRail fares for 2006*; Independent Transport Safety and Reliability Regulator, *Submission to Independent Pricing and Regulatory Tribunal hearings for determination of CityRail fares for 2007.*

    In 2010 this analysis and reporting function was deleted from the Regulator and its reports were no longer available on its website. Current reporting and commentary is far short of that by the Regulator. See for example: <http://www.sydneytrains.info/about/our_performance/>. [↑](#endnote-ref-26)
27. Perhaps the best example of irrelevant reporting is urban passenger rail on-time running (and see note xxvi above for buses). On-time running is one of several valuable statistics for rail track capacity analysis, but use beyond this is highly questionable. For example, as on-time running can be easily improved by running fewer trains or running trains to a slower schedule, it is neither an accurate nor reliable indicator of impact on passengers and resource utilisation.

    Better indicators for relevant aspects of services would be passenger transit times and delays. Nonetheless, some commentators offer detailed descriptions of on time running, at disaggregations such as for the morning of a particular day on a particular line. This is nonsensical because of randomness. Governments have proposed projects and operational changes to improve on-time running when on-time running was remarkably high. The significant danger is that policy and comment can be made on the basis of false expertise. Again, using NSW as an example, in the mid 2000s high levels of passenger dissatisfaction led some to believe that CityRail was falsifying its reports which showed high levels of on-time running. The Transport Safety and Reliability Regulator investigated, comparing CityRail’s manual reporting system with electronic records of train positions and found…accurate matches between the systems i.e. that on-time running was being accurately reported. The explanation of passenger dissatisfaction but good on time running may have lain in on-time running being measured at Central between 6am and 9am which was not entirely congruent with the time the bulk of passengers passed through that station. See: Independent Transport Safety & Reliability Regulator (ITSRR) Service Reliability Division, *Review of on-time running of CityRail services*, June 2004. [↑](#endnote-ref-27)
28. See for example: <https://www.coag.gov.au/node/39> and

    <http://www.licencerecognition.gov.au/Mutual%20recognition/Pages/default.aspx> [↑](#endnote-ref-28)
29. Interoperability is a concept applying to common componentry, common munitions and the ability of systems to ‘talk’ to each other. In transport it relates to ‘seamless’ services, the ability of a person or vehicle to move across a network uninterrupted by physical constraints such as different loading limits, kinematic envelopes etc. (see note x, figure 2 for ‘seamless transport’). The issue of interoperability as a balance against monopoly power was addressed in the governance article at thejadebeagle website.

    Examples of interoperability issues in urban areas include: in Sydney the north west rail link; in Melbourne the absence of a standard gauge line to the south east of the city and to Hastings which may be the site of a future major port development; in Brisbane the terminal for transfer between narrow and standard gauge being in the south of Brisbane (Acacia Ridge with identification of future terminal locations further south at Bromelton, Ebenezer) which increases the amount of truck traffic through Brisbane and its suburbs; in Perth the short spur of standard gauge to Fremantle but not to other ports such as Bunbury; generally, compatibility between ‘automatic’ train control systems (European ETCS, USA’s ATMS). There are also questions about current adequacy of certain ports, rail lines and highways for national purposes. Few of these issues were analysed in the officials’ version of the national land freight strategy or the recent Infrastructure Australia audit. For reasons explained in the governance article, these matters are unlikely to be publicly identified, let alone addressed by State governments. [↑](#endnote-ref-29)
30. A recent example of the goal of economic development can be argued to justify diametrically opposed policies is the former conservative Prime Minister’s insistence that Commonwealth subsidisation of road use, at the expense of public transport, would promote economic development. His replacement, the current Prime Minister and the Opposition clearly disagree. [↑](#endnote-ref-30)
31. Notes xvi (Christie) xxvi and xxvii (governance, on time running) illustrate deficiencies in at least the then public display of understanding of rail issues by the NSW government. [↑](#endnote-ref-31)
32. See: and note xxiii (above). An outline of an approach to national reporting of urban transport for infrastructure purposes, developed by LEK Consulting, is in the appendix of Infrastructure Australia’s urban transport strategy report. [↑](#endnote-ref-32)
33. Present questions about Commonwealth policies affecting transport indicate the absence of a solid or stable base for policy. These include: fringe benefit tax concessions for business use of cars but concern about road traffic congestion partly caused by such cars; a (wrong) view that freight is part of the Commonwealth’s remit but no encouragement or examination of separation of freight flows from personal travel; the peculiar designation of the national road network identified in previous articles; complaints about ‘lack of access’ for trucks but no commitment in all road expenditure programs to address this; access disconnects between parts of the national rail and road networks, terminals and ports; apparent lack of public discussions about the transport servicing needs of Commonwealth controlled facilities including international airports and military bases. [↑](#endnote-ref-33)
34. The national infrastructure audit was shortly followed by commentator and public calls for more Commonwealth spending. In this respect the interpretation of the audit has been unhelpful; the Commonwealth is not allowed to spend on any matter it wants, even if a matter is mentioned in the audit, and the commentary is likely to add to a sense of frustration. This is one reason for the audit, and Infrastructure Australia, to engage in a debate about the Commonwealth’s role. The issue is discussed in the author’s submission to the audit. [↑](#endnote-ref-34)
35. An understanding of operations is a precondition for proper identification of the location, timing and purpose of ‘investment’. Operational models therefore are essential to the investment decision in major infrastructure. For urban passenger railways, ‘capacity’ investment needs to be driven by the operational model and maximum train loads; however, these models are seldom visible if they are used at all.

    There have been other issues with demand or patronage models, going beyond the well-known criticism of failure to take into account land use change potential which creates a significant bias towards roads against railways. These issues include the use of ‘multipliers’ where the patronage on one mode is a multiple of that on another mode.

    [↑](#endnote-ref-35)
36. See the Christie example at note xvi (above). [↑](#endnote-ref-36)