# Some observations on governance

## Introduction

Previous articles pointed to problems of governance afflicting transport advice. This article takes a more general look at governance questions, as ever, drawing on transport examples. Its purpose is to provide some background for later articles on substantive transport topics.

## Strange days have found us

Previously you might have read about …… examples of the transport advisory arm of the public service falling short of what should be expected. These include, for roads: inaccurate and misleading language; deficient or absent analyses; promulgation of errors. The issues are not limited to roads.[[1]](#endnote-1)

Some journals and organisations defend the public service but such examples, on the public record, undermine these efforts. It is reasonable to ask: are there agendas other than public service?

Human nature being what it is, these concerns are not new.

The purpose of governance is to overcome such problems by harnessing the nature of individuals for the wider good. Persistent shortcomings in the behaviour of individuals or institutions point to governance failures such as: lack of incentives or enforcement; incompleteness, inconsistency or incoherence in rules.

How can there be such failures when there is widespread use of ‘governance’ and such extensive guidelines? Not only is there ‘external governance’, organisations take pride in internal governance and even projects have ‘governance’. The terminology is popular yet the term is rarely defined.

Some examples deserving better explanation by practitioners follow.

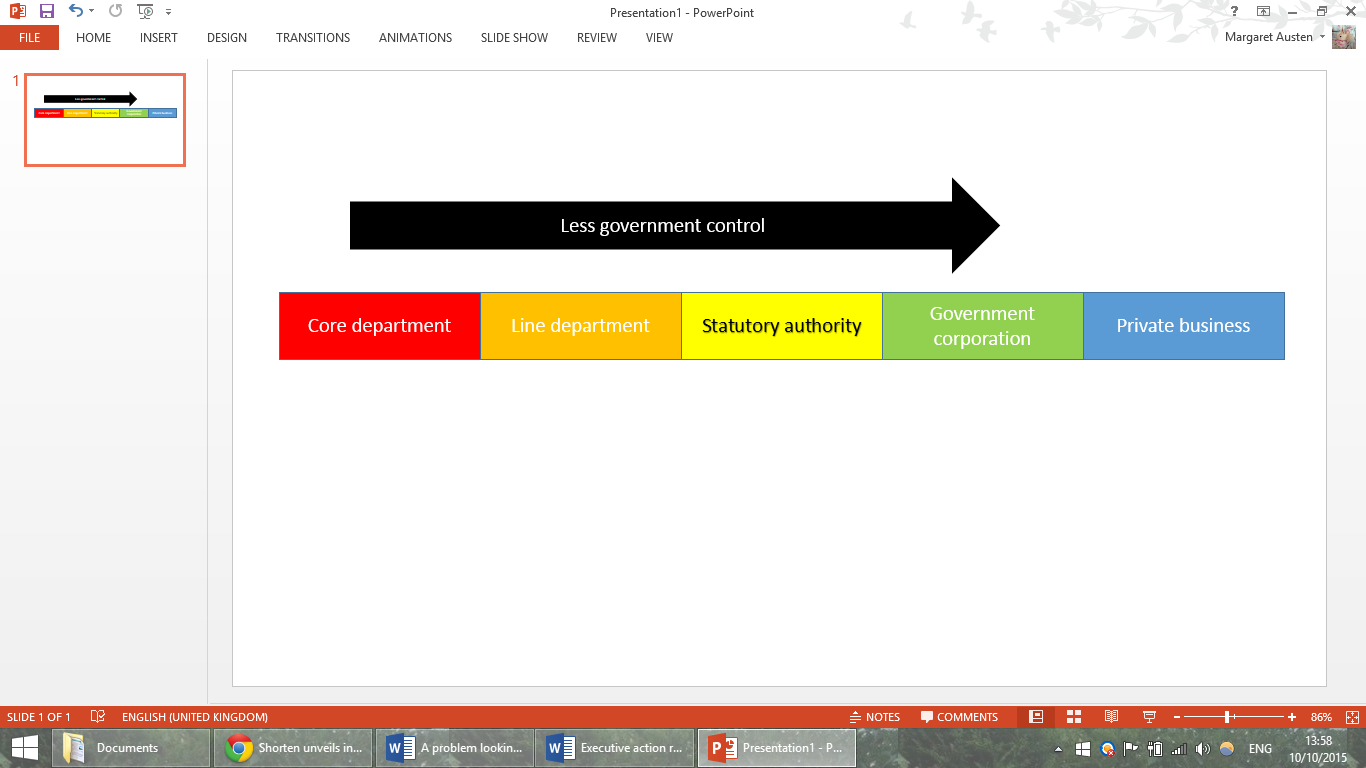
## *‘The mistakes are all there waiting to be made’;* Savielly Tartakower

### Example 1: Back to front

In Australia, public transport has long been a visible but necessary drain on the public purse.

From the 1960s to the mid 1990s growing car use and falling public transport patronage led to pressures on governments to cut, or control growth in, public transport spending. The government business/trading enterprise agenda starting in the mid 1980s offered some promise. The State of NSW was among the world leaders of this agenda, writing papers and guidelines subsequently adopted by governments in Australia and overseas.[[2]](#endnote-2)

The guidelines set a spectrum for public sector control of organisations. At one end, ‘core departments’ such as Treasuries (author of the guidelines) should be wholly within the government sector. At the other end trading or for-profit functions with private sector analogues should be private businesses. Statutory authorities and statutory corporations are in between; Figure 1.

**Figure 1: spectrum of public sector control**

Determination of a public sector organisation’s place on the spectrum ideally depends on potential profitability; a profitable organisation ought to be a corporation, an unprofitable one a statutory authority or a department.

This is echoed in the competition principles agreement which asks for consideration of separation of profitable from other functions. Where separation is too difficult due to common costs, or because of a need for coordination or leadership, a statutory authority is preferred.[[3]](#endnote-3)

The Thredbo series of conferences, organised by the Institute of Transport and Logistics and known by many transport advisers, adds a further overlay in relation to urban public transport; the strategic-tactical-operational paradigm. Strategic tasks need to remain in the public sector, operational matters can be contracted out, and tactical functions warrant case by case review.[[4]](#endnote-4)

In 2003 the NSW government decided to corporatize the least potentially profitable and most complex transport service, the urban railway. The railway had strategic tasks. A far more profitable and ‘operational’ transport service, eastern suburbs buses, remained as (part of) a statutory authority. Compared with the ideal the result seemed back to front.[[5]](#endnote-5)

Among the visible legacies is an odd fare structure which likely contributed to the more-than-decade delay in electronic ticketing. Arguably there remain issues with the structure of public transport in NSW, but that may be for another article.[[6]](#endnote-6)

### Example 2: Independence?

‘Independence’ is offered as a desirable quality for new public sector organisations. Two recent examples: the national rail safety regulator; Infrastructure Victoria.[[7]](#endnote-7)

But: independence from whom or what? The answer given in each example: executive government. Yet this can only ever be nominal as governments control the resources available to these organisations. Displeasing the government may result in a funding cut.[[8]](#endnote-8)

The origins of this version of ‘independence’ are unclear. With two important exceptions, discussed later, it is largely irrelevant. It draws attention away from the independence that is a foundation for good governance and that echoes common law: independence of public decision making from private beneficiaries. Elimination of conflict between public duty and private interest.[[9]](#endnote-9)

In the case of rail safety regulation: independence from the rail industry. In the case of infrastructure advisory organisations: independence from those who benefit from infrastructure decisions; major construction and financing firms for example. This is not to suggest that the regulator and Infrastructure Victoria are in fact anything less than appropriately independent from such parties; rather the observation is that the comments and arguments seem to ignore this point.[[10]](#endnote-10)

### Example 3: The impossible dream?

Rail gauge standardisation, or lack thereof, is the most notorious problem in Australian transport. While some view the history as a series of unfortunate events, more likely it included attempts to protect merchants in the different colonies. Consequences remain to this day.[[11]](#endnote-11)

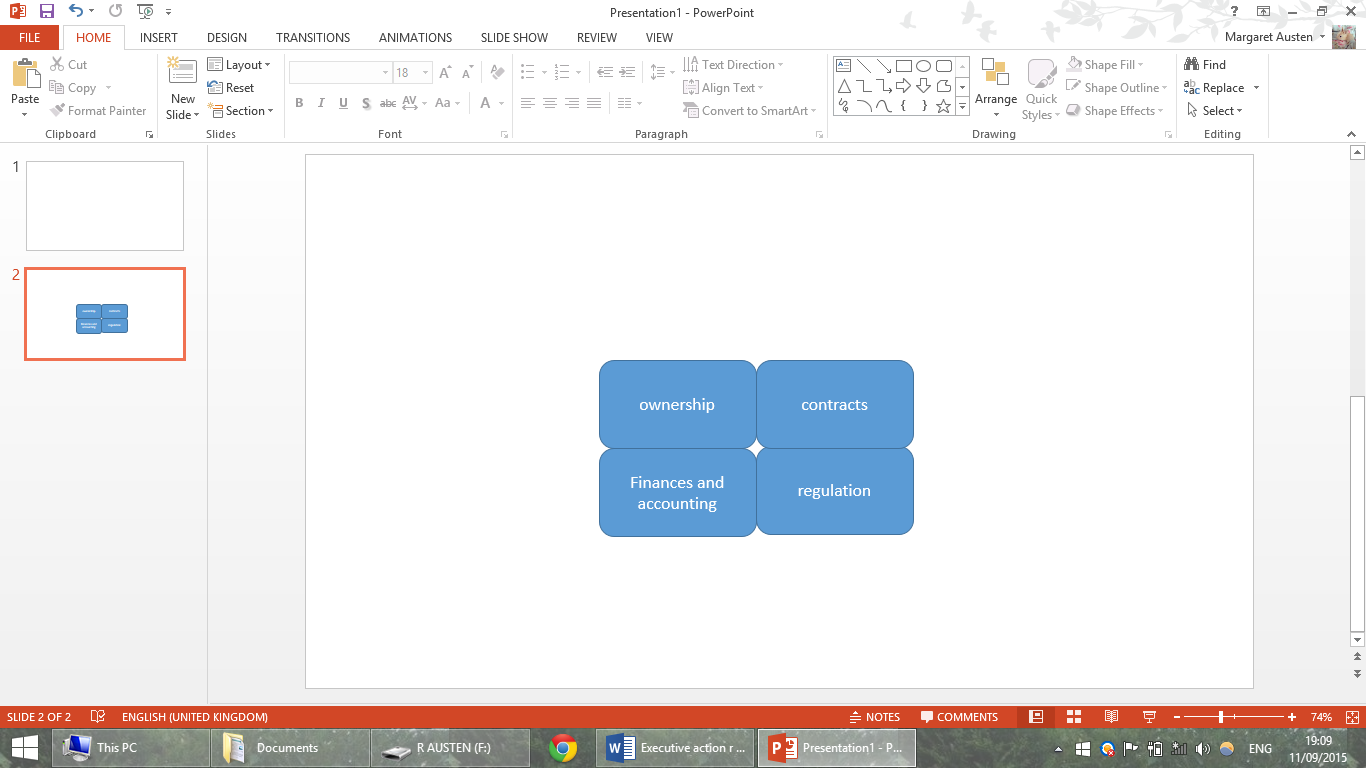
Why doesn’t the Commonwealth step in; the Constitution does allocate some responsibility for railways to it.

Standardisation projects included the transcontinental railway 1917; NSW to Brisbane 1930; Albury to Melbourne 1962; Kalgoorlie to Perth 1969; Melbourne to Adelaide 1996. While much remains to be done the scene has become quiet.[[12]](#endnote-12)

Instead of a national focus on investment for standardisation, ‘regulatory reform’ has attracted much official attention. Is this the path to standardisation?[[13]](#endnote-13)

If there is a belief that regulatory reform will solve much in railways, which is an ‘if’, then it is underpinned by misunderstandings about public sector governance. Governance is a system, and the relationship between government and enterprise depends on a range of instruments, not just regulation, as shown in Figure 2.

**Figure 2: governance instruments**[[14]](#endnote-14)



Regulatory reform is the main game in roads because in that sector regulation is pervasive. Regulation prevents a market for road provision or use and therefore is prescriptive. But those facts are not applicable for railways.[[15]](#endnote-15)

Regulatory ‘reform’ will be inadequate to achieve results such as rail standardisation unless arrangements for ownership, contracts and accounting are conducive to its effectiveness. Arrangements for railways are not so conducive. A market for use and provision of railways has long existed. Regulation is not pervasive in railways; de-regulatory reforms will not alter rail markets.[[16]](#endnote-16)

Moreover, the existing style of rail transport regulation reduces reform potency; regulation in Australia is ‘permission’ based, based on an independent assessment of operating etc. proposals put by industry. With very few exceptions, it does not mandate specific characteristics of operation. There are three basic differences between rail ‘permission’ and ‘road’ prescriptive regulation.

First, the visible financial cost of regulation and compliance is higher in a permission system because industry proposals need to be assessed. But this appearance is deceptive; the true cost is less, often greatly less, because any industry participant may choose systems or technologies most suitable to it; a choice unavailable in the prescriptive roads system. Filling out forms may be an inconvenience; but a straightjacket for operations would be a real cost.

Second, a change in permission is less costly than a change in prescription. If government participates in industry a change in prescription means cost shifting; if national regulations allow heavier trucks on local roads, councils bear the cost of decisions made elsewhere.[[17]](#endnote-17)

Third, a regulator in a permission system is unable to promote industry harmonisation; the system allows difference within industry. Firms naturally seek to create difference, ‘breaks of gauge’, as a form of product differentiation in any industry eg. VHS and Beta video tapes.

Despite beliefs, rail reform cannot improve, and may further embed, the gauge standardisation problem. Why the belief in rail regulatory reform? Three possibilities come to mind: a roads mindset; ignorance; avoidance. Others are in a better position to comment on motives; yet the national appetite for standardisation did wane as the impotence of rail regulation became more apparent.

Whatever the reason, standardisation by regulatory reform seems the impossible dream. [[18]](#endnote-18)

### Example 4: Right idea, wrong context?

Since the mid 1980s the idea of making public sector organisations like corporations has grown in popularity in Australia. This includes the government business enterprise agenda.[[19]](#endnote-19)

The idea is to separate ownership from direct control as is the case in publicly listed companies. Separation of: shareholders; directors (board); management. This is one exception where independence from executive government is important.[[20]](#endnote-20)

The agenda deals with organisations that: charge for goods or services; compete with other firms; receive money from other than its owning government. It is about organisations involved in business. To limit government financial liabilities such businesses hold money on their own account. Board members should not represent the government. Therefore the board, rather than government, appoints management. Let managers manage.

The logic: function determines form. A business or trading function leads to financial distance from government; it needs a board without government representatives that appoints management.

In contrast, the argument for the governance of the new Infrastructure Australia seemed to put this in reverse: the board should appoint a new chief executive, hence a need for financial distance from government. But Infrastructure Australia is fully reliant on Commonwealth funding. Are you as confused as the author yet?

These aspects of governance for Infrastructure Australia were set out in the Coalition’s 2013 election Platform. ‘Boards’ and ‘government-as-business’ might be as attractive to conservatives as their dislike of the big government. But to the author it seems odd that the platform included this detail, of no obvious electoral appeal, applying an accepted idea in an unusual context. Why venture beyond vote winning promises of new roads, a new organisation, more rigour etc.?[[21]](#endnote-21)

It may be that organisational form does match function in this case, but the explanation has not been publicly made, or at least understood by this author.

## The missed links

## *‘The main purpose of studying economics is to avoid being fooled by economists’;* Joan Robinson

Governance should have an internal logic or coherence. A failure or weakness will manifest in a number of problems as can be seen in the above examples. Governance problems cause instability in the organisation and industry and will impact on investment and employment.

In hindsight it seems inevitable that Sydney’s main railway would be ‘decorporatised’, and its ferries ‘privatised’. Gauge standardisation involves new tracks and financial cost; if there is an argument it is about money not regulation. If an organisation is to be financially independent from government it may need to trade i.e. sell products thereby becoming dependent on customers.

Concepts of industry structure, organisational form and independence are linked. Understanding this is necessary for proper governance.

What of the model for advisory organisations such as some claim the National Transport Commission to be? This claim is telling, unhappily. The most recent review of the Commission, interesting in itself, acknowledged its current governance as not optimal. Moreover the States and the Commonwealth fund the Commission; could it independently advise on proposals from any?[[22]](#endnote-22)

While there are guidelines for public sector governance, often long and often revised, understanding is more important than memory. Paul Keating’s pet shop galah showed its capacity to rote learn ‘microeconomic reform’ in the 1990s. Today its vocabulary would extend to: ‘regulatory reform’; ‘independence’; ‘governance’, with a wisdom unchanged from twenty years ago.

The above examples indicate caution is warranted in accepting, at face value, commentary about proposed governance arrangements. While the given examples may seem debatable, outdated, or even trite there will be other cases where governance assumes much greater importance; in particular those affecting many people or relations between tiers of government.

## Some ideas

Given the above it is useful to outline some public sector governance ideas. Suggestions follow.

**Aims**: to harness the nature of individuals for the wider good. To align power with responsibility.

**Definition**: the effective exercise of lawful control.

**Instruments**: ownership, contracts, regulation, disclosures and transparency.

**Operation**: specification of objectives, measurement of performance, rewards for success.

**Principles include:**

* Rules of natural justice including: independence of public decision making from beneficiaries (conflicts of public duties and private interest), right of affected parties to be heard;
* Instruments should be deployed in a coherent way;
* Line of sight for powers and responsibilities; responsibility allocated to a single party;
* Degree of corporatisation depends on how closely the function relates to a market;
* Strategic, tactical and operational matters allocated to different parties;
* Periodic refreshes of functions to arrest ‘entropy’;
* Agency; an official represents, speaks for, their organisation.

## Two exceptions

This article earlier mentioned there were two exceptional cases where a public sector function should be conducted independently from the government as well as (not instead of) beneficiaries. One is a government business enterprise.

The other is where a government decision or power is conditional on approval of another party. In such a case, the approving party’s decision should not be solely informed by the government.

How could a government be so constrained? In Australia by Parliament and the Constitution. This is part of the separation of powers. The powers of the executive, the Governor General advised by the Government of the day, differ to those of the legislature, the Parliament. Relevance?

One situation is draft legislation that seeks to confer discretionary power to a government (minister). Parliaments do not rely solely on what a government says about a bill. Another situation is Commonwealth specific purpose grants to the States. In many cases the Commonwealth makes such grants because it is not legally capable of directly funding the activity it wishes to see supported. School chaplains for example. So too roads?[[23]](#endnote-23)

The matter of a government decision or power being conditional on approval of another party is directly relevant to the Commonwealth’s involvement in many transport matters, including roads.

The Constitution does not confer on the Commonwealth a power to directly fund roads. The Commonwealth is able to make general road grants only because of Constitution s.96. This section allows any condition to be placed on grants to the States. For example: the grant is to be spent on a particular road. However, only Parliament, not the Government, may set such conditions.

S.96 allows the Commonwealth Parliament to intrude into State affairs via grants. If it does allow the Government to also so intrude, it is only with the approval of Parliament.[[24]](#endnote-24)

The main practical difference between Parliament and the Government is the Senate. The Senate was envisaged as a States’ house to review legislative proposals by the Government. Is controversy about Commonwealth intrusion into State affairs a matter of tension between the Government and States, rather than Parliament and States? Is it part of ongoing attempts by executive governments

to generally expand their influence? [[25]](#endnote-25)

In areas where the Commonwealth lacks direct Constitutional authority, where it needs to rely on grants to the States and in State relations more generally, Parliament can and in my view should take an (more) active role in its oversight of the Government. One of these areas is grants to the States for roads and other infrastructure.

How should Parliament inform itself, including about proposals to extend the Government’s reach and intrude into State affairs? Presumably it should not rely wholly on advice from the Government, its departments and officials.[[26]](#endnote-26)

Rather Parliament could rely on statutory authorities, advisory organisations established by the Constitution or legislation, whose duty is to the Parliament not the executive. Examples include the Grants Commission, the currently inactive Interstate Commission, the Productivity Commission and Infrastructure Australia.

To the extent organisations advise on draft legislation or Commonwealth-State matters they should be independent of the Government. In no way does it imply that independence from beneficiaries, for example States or industry, should be compromised.

In the author’s view, consideration of governance principles should lead to a shake-up in Commonwealth-State transport relations, especially for roads.

## An aside – intergovernmental forums

Aren’t there mechanisms in place to deal with these issues; such as intergovernmental forums?

Indeed there are a number of official forums dealing with Commonwealth-State matters, notably the Council of Australian Governments and Ministerial Councils. Councils comprise Ministers from each Australian jurisdiction, and usually are chaired by the Commonwealth Minister.

One Ministerial Council is the Standing Council on Transport etc., formerly the Australian Transport Council. It apparently is informed to some extent about Commonwealth infrastructure funding intentions. However its general agenda looks unambitious, it achieves less more slowly. Its sessions are closed to the public, communications can be terse, and follow through at times has been limited.[[27]](#endnote-27)

This under many different combinations of Coalition and Labor, Commonwealth and State Governments, Secretaries and Directors General, and under undoubted good intentions and diligent efforts of many capable people. Its shortcomings appear to be structural not personal i.e. they seem governance related.

A number of governance questions are evident: is the agenda set by officials who face a conflict; if the Commonwealth has the least responsibility for and most contentious involvement in the subject matter why does it occupy the chair; is there sufficient involvement by or ‘reporting back’ to the Commonwealth Parliament; why the limited transparency?[[28]](#endnote-28)

Other questions: why is almost every matter of consequence initiated by external parties? Why do States participate in the forum?

## So…..?

Some might think this article so far as being lopsided; there are many situations in which governance arrangements are first rate, participants work hard and effectively, and the public is much better off because of their efforts. However, since the aim is to improve this article looks at a few cases where some questions can be raised. Proponents of ‘road reform’ might care to bear these in mind.

The effects of less than best governance can be deep and pervasive: public transport issues; inability to address national problems; delays in delivering election promises. There are also hidden costs: pointless arguments; frustration and suspicion instead of agreement.

It is easy to ask about improvements. In the case of Infrastructure Australia, could the ‘governance’ objective of chief executive independent from Government have been achieved by an appointment made or ratified by the Senate? In the case of the transport Ministerial Council, why not a secretariat from a statutory authority like the Productivity Commission or the National Transport Commission - not a novel suggestion.[[29]](#endnote-29)

On the more important cases of Commonwealth –State relations, why doesn’t the Parliament, rather than the Government, convene regular meetings? Why isn’t advice for Council of Australian Governments meetings prepared and published by a statutory authority? Unlike some others, the author doesn’t mind people reinventing the wheel; he just wants the wheel to be round, not square.

## Finally….

Do governance arrangements which leave questions unresolved lead to a process fixation? At the expense of results?

Should there be better recognition of the ‘golden rule’; who has the gold sets the rule? And realisation that giving money out is different to getting money?

Giving out money does not compromise independence and need not affect the nature of the organisation. However, it is hard to argue that an organisation or person can (be seen to) be ‘independent’ from the source of its money. The receipt of money is central to organisational form; as it can create an obligation. Is this is the real point of reports and guidelines from Uhrig onwards?

And what about leaking? Is it possible that some take a keen interest when a change of government is in the air? This is not an original idea; why else would governments try so hard to prevent ‘leaks’?

Other articles put a concern about the vulnerability of an opposition to misinformation. Leaks are not always well informed; ‘utegate’ for example. Nor can it be assumed they are always well intentioned.

Punishment of leaks is tempting. Yet, there is a tension with ‘whistleblower’ ideas; ideas which may be especially important for jurisdictions without corruption watchdogs. Also leak controls are unable to avoid an opposition being misinformed by lobbyists or private proponents.

The best protection against misinformation is publication; it is difficult to leak information already in the public domain. Every private briefing contains risks. Perhaps more attention should be paid to disclosures and transparency and a little less to claiming ’independence from government’.

Transparency, and the publication of ideas not always accepted by executive government, is a good practical test of independence. In any event, actions of executive government, away from the public eye, should be carefully performed and more carefully appraised.

While the oracle put the task: know thyself, others added: ‘*it is only through the constraints of others that we come to know ourselves’*. Internal restraint and external transparency may be the most important role for governance. A lesson in misery being learned at high levels of government.[[30]](#endnote-30)

J Austen

October 2015

Notes

1. See the roads articles at thejadebeagle.com. Forthcoming articles will indicate issues in other modes.

   [↑](#endnote-ref-1)
2. See for example: <http://www.treasury.nsw.gov.au/__data/assets/pdf_file/0015/357/91_gtereform.pdf> and

   <http://www.treasury.nsw.gov.au/__data/assets/pdf_file/0009/4779/bp66.pdf> [↑](#endnote-ref-2)
3. For example competition principles agreement clauses 3 and 4; see: <https://www.coag.gov.au/node/52> [↑](#endnote-ref-3)
4. See for example: <https://sro.library.usyd.edu.au/bitstream/10765/65919/1/researchintransport.pdf> [↑](#endnote-ref-4)
5. The second reading speech for the corporatisation, and response from the opposition, did not recognise this issue. See: <http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LC20031202052> [↑](#endnote-ref-5)
6. The author’s submission to the Independent Pricing and Regulatory Tribunal’s review into fares (2015) alludes to the impact of separate entities on fares.

   From the late 1980s to the present, the NSW approach to fares is almost unique in the world. Prior to the introduction of the Opal card there were major differences in the types of tickets and fares available for trains and buses; notoriously bus tickets were unavailable at railway stations and vice versa. Bus tickets included ‘travel tens’ involving a discount for buying a book of 10 tickets; this was not available for rail which had periodical tickets such as weekly, monthly and annual. Bus tickets were based on sections, train tickets origin to destination involving over 300 rail stations. While an electronic card ticket was promised for the Sydney Olympics in 2000 it did not eventuate; a likely contributing factor would be a ‘requirement’ to preserve all the many thousands of fare types and combinations. That this is a likely factor can be seen in the Opal card which has greatly reduced the number of fare types and combinations. See: <file:///C:/Users/John/Downloads/online_submission_-_individual_-_j._austen_-_27_aug_2015_194956252.pdf> [↑](#endnote-ref-6)
7. Re rail safety see: http://www.onrsr.com.au/ and <http://hansardpublic.parliament.sa.gov.au/Pages/HansardResult.aspx#/docid/HANSARD-11-10397> where independence relates to Ministerial power.

   Re Infrastructure Victoria see: [http://hansard.parliament.vic.gov.au/search/?LDMS=Y&IW\_FIELD\_ADVANCE\_PHRASE=be+now+read+a+second+time&IW\_FIELD\_IN\_SpeechTitle=Infrastructure+Victoria+Bill+2015+&IW\_FIELD\_IN\_HOUSENAME=ASSEMBLY&IW\_FIELD\_IN\_ACTIVITYTYPE=Second+Reading&IW\_FIELD\_IN\_SittingYear=2015&IW\_DATABASE=\*](http://hansard.parliament.vic.gov.au/search/?LDMS=Y&IW_FIELD_ADVANCE_PHRASE=be+now+read+a+second+time&IW_FIELD_IN_SpeechTitle=Infrastructure+Victoria+Bill+2015+&IW_FIELD_IN_HOUSENAME=ASSEMBLY&IW_FIELD_IN_ACTIVITYTYPE=Second+Reading&IW_FIELD_IN_SittingYear=2015&IW_DATABASE=*) [↑](#endnote-ref-7)
8. Appropriation Bills in which public funding is determined need to come from the lower house. This house is controlled by the government of the day. [↑](#endnote-ref-8)
9. The echo is from the rules of natural justice: a right of affected parties to be heard; a person cannot judge their own rights. [↑](#endnote-ref-9)
10. In relation to a different organisation, Infrastructure Australia, the view that ‘independence’ relates just to independence from the Government was challenged only by Dr Edwards in an article on the changes proposed for Infrastructure Australia in 2014. In his view, independence from industry was a significant issue. See: Dr Geoff Edwards, *New body not in the public interest*, Public Administration Today, April 2014.

    In the current article the author is in part agreement with his thesis but cannot agree that the departmental public service is a superior institutional form for advising the Commonwealth on matters which fall outside the Government’s direct powers, but need to be dealt with by the Parliament via s.96 i.e. much infrastructure funding. [↑](#endnote-ref-10)
11. FFor a charitable view of reasons for gauge differences see: <http://www.australia.gov.au/about-australia/australian-story/railways-in-australia>. [↑](#endnote-ref-11)
12. The Commonwealth inquiries into railways included a royal commission into a uniform railway gauge almost a century ago (1920-21). [↑](#endnote-ref-12)
13. For example while interoperability featured prominently in the two Infrastructure Australia reports on a national land freight strategy, it was mentioned only twice in the relevant later document prepared by officials for the Ministerial Council. See: <http://infrastructureaustralia.gov.au/policy-publications/publications/index.aspx?collection=IA-publications&form=simple&query=land+freight&Submit=Search> and <http://transportinfrastructurecouncil.gov.au/publications/>

    A critical point of Infrastructure Australia reports is that its proposal is for a ‘national network’ that would only come into existence when gauge standardisation is achieved eg. most of Queensland should be, but is not yet, served by a national network. This is different to material at the Department of Infrastructure Transport and Regional Development website, purports that Queensland is already served by the national rail network. See: the roads articles at thejadebeagle.com and <http://investment.infrastructure.gov.au/whatis/network/images/QLD_National_Land_Transport_Network_Rail_Corridors_update_2014.pdf>

    Rail gauge standardisation is not mentioned in the 2015 national infrastructure audit. [↑](#endnote-ref-13)
14. Given the proposed definition of governance as the effective exercise of legal control, Figure 2 shows four types of governance instruments available to a government to control an organisation.

    Ownership allows the government to directly intervene, for example by appointing management or issuing directives. This can only be used for a public sector organisation, and in some cases the government’s power is circumscribed. For example usually the government appoints a board and the board appoints management for a government trading corporation. Corporatisation is discussed in the text and later notes.

    Contracts involve an exchange between parties. For governments they involve the purchase of goods or services. Contracts can include community service obligations.

    Regulation can compel organisations to behave in a particular way. For example rail safety regulation requires an organisation involved in railways to have a safety management system.

    Financing and accounting standards are relevant to the charter of an organisation. A for-profit organisation will seek a return on capital; for it a community service obligation contract will need to include a rate of return component, or in the case of a public sector organisation an ‘exemption’ from a return. Accounting standards can be critical for public sector organisations undertaking community service obligations; if a profit component is not included in payments the value of assets deployed will be less than historic or replacement cost, and consequently the depreciation schedule may not depict capital replacement needs for continuity of services.

    [↑](#endnote-ref-14)
15. For example: <https://infrastructure.gov.au/rail/legislation/ntc_ris.aspx> [↑](#endnote-ref-15)
16. The relevant regulatory impact statement, assumed (but did not demonstrate) a reduction in accidents and estimated a net present value benefit in 2009 of around $50m, or around $4m annually. In comparison the Australian Bureau of Statistics estimates industry income to have been around $13bn in that year. See: <https://infrastructure.gov.au/rail/legislation/ntc_ris.aspx> and <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1301.0~2012~Main%20Features~Transport,%20postal%20and%20warehousing%20industry~186> [↑](#endnote-ref-16)
17. The ability of heavy vehicles to use local roads is the ‘access’ issue unsuccessfully sought by a series of proposals including the heavy vehicle charging and investment initiative and the national heavy vehicle regulator. This is outlined in the htfu paper at thejadebeagle.com. The suspicion about ‘cost shifting’ is hardly dispelled by: the Commonwealth not offering to take responsibility for a (properly defined) national road network; several States (and the Commonwealth) not addressing access issues to their roads outlined by Infrastructure Australia eg. the ability of higher productivity vehicles to use the Hume Highway. [↑](#endnote-ref-17)
18. The final product of rail regulatory reform, a national regulator operating a permission based system, commenced in 2013. From that time, in at least the States subject to the regulator, it cannot be rationally suggested that regulation is impeding interoperability. A similar point was forcefully made in a 2012 external report commissioned by the Ministerial Council: see finding 13 and pages 40 to 43 of <http://transportinfrastructurecouncil.gov.au/publications/files/RISSB_review_report.pd>f. Since then there have been relatively few references in reports to standardisation and interoperability. [↑](#endnote-ref-18)
19. For corporatisation see: <http://www.treasury.nsw.gov.au/Commercial_Policy_Framework/Glossary_of_Terms>.

    The basic idea of a corporation is to separate ownership from direct control, this was seen as a cornerstone of modern capitalism; a mechanism necessary to marshal larger amounts of financial capital than available to individuals, families and partnerships etc.

    It is believed (by many economists) that a corporation is a superior form of organisation to operate in a market as it is driven by a profit motive. [↑](#endnote-ref-19)
20. See the references in note ii. In some cases, a portfolio minister may be able to provide directions to a government corporation. The circumstances and procedures are set out in legislation. Usually, such directions need to be tabled in parliament.

    There have been some curious points about some of these procedures. In a few cases directions needed to be ‘approved’ by a shareholder minister, which defeated the purpose of the exercise; incidentally demonstrating that intricate guidelines for public sector organisations, even when drafted by central agencies, can err.

    In other cases directions could be made on the grounds of ‘public interest’. Such directions only make sense if the government owned corporation was not acting in the public interest, calling into question the actions of its management, board and supervising (shareholder) ministers.

    These points indicate fundamental tensions in the corporatisation model, possibly arising from the fact that the original purpose of a corporation, to marshal capital for profit, can hardly be a valid rationale for the form of a public sector organisation.

    Among the other ‘purposes’ for public sector corporatisation is an attempt to place an organisation at ‘arms length’ from the executive government; usually expressed in financial terms or as removing ‘ shield of the crown’ or limiting liabilities. But the realism of this can be highly suspect; would a government allow a significant government owned corporation to become insolvent and then be liquidated?

    For this reason, some suspect corporatisation to relate more to reducing ‘political interference’ in the organisation. See for example the Productivity Commissions writings on the subject: <http://www.pc.gov.au/research/completed/government-trading-enterprises>.

    However, arguably the real effect (and possibly part intention) of corporatisation is to lessen the influence on the organisation of some ministers, portfolio ministers, by increasing the influence of other ministers, shareholder ministers eg. treasurers. It may be that shareholder-treasurers are less likely to exert political influence than portfolio ministers, but this idea has some interesting implications for responsible government via cabinet processes. [↑](#endnote-ref-20)
21. The Coalition’s election platform placed appointment of a chief executive at the top of its commitments regarding Infrastructure Australia, ahead of the tasks the organisation would perform:

    ‘*Under a Coalition government Infrastructure Australia will: • be led by a Chief Executive Officer, responsible to the Board who will be tasked with implementing the Board’s strategic objectives and direction; • develop a 15-year pipeline of major infrastructure projects……..’.*

    See: <http://lpaweb-static.s3.amazonaws.com/13-09-05%20Coalition%202013%20Election%20Policy%20%E2%80%93%20Better%20Infrastructure%20Planning%20%E2%80%93%20policy%20document.pdf>

    There is little on the public record regarding the reasons for the structure of Infrastructure Australia either at its origins in 2008 or in 2014.

    In 2008 the Senate initially sought amendments to the Bill including that the Minister consult the Council (board) over appointment of the infrastructure coordinator. The Bill passed without such amendment.

    In 2008, the desire to have Commonwealth and State officials on Infrastructure Australia’s Council implied that the Council should be ‘advisory’ rather than ‘governing’. The reason was the then Commonwealth guidelines which advised against the presence of officials on the governing boards needed for government corporate entities. For the Council to include officials, the organisation would need to be a non-corporate authority, like the Productivity Commission. The board of a non-corporate authority did not appoint chief executives; hence the infrastructure coordinator (the chief executive) would need to be appointed by another party, logically the Minister.

    It may be that the purpose of Coalition’s proposal for a board was to remove the Government’s power to appoint a chief executive, consistent with its comments in 2008. If so, simpler mechanisms were available; for example appointment on advice by the board, and/or subject to approval of Parliament.

    An alternative, which is merely a possibility because it has not been highlighted, is the little (publicly) known relationship between Infrastructure Australia and a tax (loss) concession. A tax concession, up to a certain total value cap, is available to proponents of projects recommended by Infrastructure Australia as ‘threshold’ or ‘ready to proceed’. The absence (?) of further decision may make Infrastructure Australia liable for its categorisation of projects, and it may have been thought that financial independence might mitigate Commonwealth liabilities for these decisions. The comments in note xx indicate this to be a more complex matter than many suspect.

    Returning to the offered explanation, the Coalition policy included a statement about abolishing the position of the national infrastructure coordinator; curious because redundant, being clearly implied by the statement about a board that appoints a chief executive.

    This is not the only curious comment about the infrastructure coordinator. The March 2014 national commission of audit p.138 recommended, without stating a reason, abolition of the position of national infrastructure coordinator. Abolition could not be considered a ‘saving’ as at that time it was expected a chief executive officer would be appointed instead of the coordinator; it is not a functional rationalisation and as the salary etc. of the chief executive was unknown, it also was unknown whether the replacement would constitute a financial saving. Was the commission of audit just copying the Coalition platform? See: <http://www.ncoa.gov.au/report/docs/phase_two_report.pdf>.

    The (Coalition) Minister’s reported criticism of a recent Labor proposal suggests there are some issues in understanding governance concepts in relation to Infrastructure Australia. It was reported:  “*Infrastructure Minister Warren Truss said Labor’s move to turn IA into a “banker” created a conflict of interest. “An independent assessor and funding body in one makes no sense and raises issues of propriety,” Mr Truss said.”* The comments are noteworthy for at least four reasons. First, the notion of independence referred to by Mr Truss relates to the recipient of funding, rather than the Government as previously claimed. Second, the corporate form of Infrastructure Australia introduced by Mr Truss in 2014 is more appropriate for the types of ‘funding’ activities envisaged than for the advisory body he thinks Infrastructure Australia currently is. Third, Infrastructure Australia’s current activities in the infrastructure tax concession could make it at least the equivalent of a funding body. Fourth, an assessor and funder in one body does make sense; indeed this is what Mr Truss’s own Department claims to do. There is no conflict of interest between assessing whether to dispense funds and then dispensing those funds. Of course certain disposition of funds might be evidence of pre-existing propriety issues. A later article might comment on some aspects of Labor’s proposal. See:

    <http://www.theaustralian.com.au/national-affairs/alp-infrastructure-funding-plan-could-favour-roads/story-fn59niix-1227562544926?sv=d7a50dd81cfd5e51ea4737d103aa0f75>. [↑](#endnote-ref-21)
22. Among the interesting aspects of the review of the National Transport Commission are it: was conducted 3 years after the previous review whereas the usual review interval is 6 years; was conducted by Commonwealth and State transport department officials rather than external parties; recommended greater control of the Commission by those officials and ignored a suggestion from experts that industry have increased input; recognised that greater control would be inconsistent with the governance model for an independent organisation; recommended against like arrangements for the rail industry safety and standards board. See: <https://infrastructure.gov.au/transport/australia/ntc/files/NTC_Review_Report_2.pdf>. [↑](#endnote-ref-22)
23. Twomey argues that the States are entitled to surplus public funds not allocated by the Commonwealth. This is the basis for States’ standing in legal challenges to Commonwealth spending, such as on school chaplains. In theory, if such spending is impugned, the States are entitled to the resultant surplus public funds. See: Anne Twomey, *Public Money Federal-State Financial Relations and the Constitutional Limits on Spending Public Money,* Report No 4, 2014, Constitutional Reform Unit Sydney Law School. [↑](#endnote-ref-23)
24. Zines took the view that s.96 allowed intrusion into State affairs. Williams v Commonwealth

    [2014] HCA 23 confirmed that s.96 conditions are to be set by Parliament, not Government. The question of how much of this function Parliament can delegate to the Government (Minister) has not been determined. It is possible that Parliament cannot simply hand over its responsibility to the Government via saying that it will enable ‘any condition the Minister might think fit’. See: Leslie Zines, *The High Court and the Constitution*, 5th Edition Federation Press, and Geoffrey Lindell, *The changed landscape of executive power of the Commonwealth after the William’s case*, Monash University Law Review (Vol 39 No. 2). [↑](#endnote-ref-24)
25. A more technical difference is between Parliament (legislature) and Government (executive). The legislature represents the people, the executive (Governor General and Ministers) represents the crown. The convention, post Whitlam, of the Governor General following the advice of the Prime Minister (and Ministers) effectively means the Government, supported by the lower house majority, represents the crown.

    [↑](#endnote-ref-25)
26. Most public service departments are part of executive Government. Departments and their officers represent and are agents of the Government. Officers have a duty to put the Government’s case to all, including Parliament. In this light, the ‘black is white’ nature of some comments by officials to Parliamentary Committees are understandable. [↑](#endnote-ref-26)
27. Some examples:

    Unambitious; while “*the Council's objective is to achieve a co-ordinated and integrated national transport and infrastructure system that is efficient, safe, sustainable, accessible and competitive”* it has not publicly recognised, or attempted to deal with, the large overall roads fiscal deficit, a deficit demonstrating a failure of coordination in national transport as described in other articles in this series. See: <http://transportinfrastructurecouncil.gov.au/about/>

    Achieves less more slowly; the heavy vehicle charging and investment initiative (formerly the Council of Australian Governments Road Reform Plan) was set up in 2007 to deal with heavy vehicle direct charging and related road expenditure, the latest Council Communique May 2015 stated ‘*The first outputs of the initial measures will be delivered to the Council in November 2015 and will include a national four year forward road expenditure plan and heavy vehicle road asset service standards publication covering Key Freight Routes’*. The communique claims it has taken 8 years to start to do the first part of the initial aspects of part of the ‘reform’ and only for some roads. Note that the ‘other half of the task’, direct charging, is not mentioned. The statement does not refer to any oversight of the road expenditure plan, and therefore (for reasons explained in the roads articles) its approach to the half task it might be starting, the spending on a few roads, is incomplete.

    <http://transportinfrastructurecouncil.gov.au/communique/files/Council_3rd_Communique_22_May_2015.pdf>Communications can be terse; the above communique also stated “*The Council also agreed a longer term road map which outlines the sequence of institutional and governance reform steps along the path to full market reform of heavy vehicle investment and charging arrangements.”* And the roadmap might say? Note: Search scope: [www.transportinfrastructurecouncil.gov.au](http://www.transportinfrastructurecouncil.gov.au)Results 0 - 0 of 0 for "roadmap"

    Its follow through is sometimes limited or even absent; see the experience with national transport policy at <http://infrastructureaustralia.gov.au/policy-publications/publications/files/NTC_Review.pdf>. The national transport policy exercise does not feature prominently (or at all) in recent Council communiques and a close reading of background material raises some interesting questions for example: why the policy it is not referred to in the officials’ land freight strategy document (although it is the basis of the strategy recommended by Infrastructure Australia and the relevant Victorian government submission). See: <http://transportinfrastructurecouncil.gov.au/publications/files/National_Land_Freight_Strategy_Compressed.pdf>, note xiii above and <http://infrastructureaustralia.gov.au/policy-publications/submissions/nlfs/files/VIC_Submission_to_NLFS_FINAL.pdf> [↑](#endnote-ref-27)
28. Is the agenda set by officials who face a conflict?; it is not easy to discern the agenda for any particular meeting or who might set it. The Council is assisted and advised by a senior officials committee: <http://transportinfrastructurecouncil.gov.au/officials_committee/>.

    While the committee members and meeting dates are known, the website does not indicate what might be discussed or decided, advised to the Council or indeed the exclusive function of the committee.

    One of the characteristics of officials is caution, famously put as: ‘my job is to keep the boss out of trouble’. Thus officials are unlikely to set an ambitious agenda, on the contrary they would not want their Minister to be ‘exposed’ to debate; the issue is not laziness and avoidance of work for the public service, but fear that their Minister might be embarrassed. If so any matter which could cause contention to any jurisdiction will likely be minimised, prior to consideration by Ministers. An attempt to create ‘sub groups’ would entrench the narrowing further. Officials face a conflict between addressing the Council’s objective and ensuring their boss is not troubled.

    If the Commonwealth has the least responsibility and most contentious involvement…?; Council and committee chair, and secretariat, is the Commonwealth Government. The Government has no Constitutional responsibility for most of the transport tasks in Australia, and much of subject matter of the Council’s agenda. Taking the latest communique as an example, the Commonwealth does not have responsibility for: investment in infrastructure it does not own; forward road expenditure plan; heavy vehicle regulation; rail regulation; remote and regional transport; cycling. Its involvement in these is by choice, and published State views (see note xxvi for example) indicate questions about Commonwealth intentions in some transport issues.

    Involvement of or reporting back to the Commonwealth Parliament; the Minister is representing the Government, as the Council is a subsidiary of the Council of Australian Governments (not parliaments); there is little evidence generally, and none at the Council’s website, of interest in its general proceedings by the Parliament.

    Limited transparency?; difficulties in discerning agenda (above), communications can be terse and opaque (note xvi), meetings not open to the public. [↑](#endnote-ref-28)
29. The suggestion, of a national transport advisory council, was made in the 2002 review of the national road transport commission by Affleck and Aplin. It was not acted on, with the Commonwealth’s Auslink program supposedly superseding it. A national transport secretariat operated between 2000 and 2003, however, it was effectively controlled by the senior officials and thus suffered the same governance problems indicated in notes xxv to xxvii above.

    [↑](#endnote-ref-29)
30. The full text is: *“Oh Lord, we give thee humble and hearty thanks for this, thy gift of discipline, knowing that it is only through the constraints of others that we come to know ourselves, and only through true misery can we find true contentment”.* <http://www.imdb.com/title/tt0686867/quotes> [↑](#endnote-ref-30)