# Infrastructure policy ‘Pearl Harboured’

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## 1. Introduction

This article concerns the Commonwealth Government’s response to the 2022 review of Infrastructure Australia. It is a longer version of that at <https://johnmenadue.com/infrastructure-policy-pearl-harboured/>. A more complete version will soon be available.

As ever, comments and corrections are welcome.

## 2. A grim outlook?

Picture this:

* pork-barrelling encouraged while important projects languish;
* proponents assessing their own proposals;
* Premiers trashing the Commonwealth via national cabinet saying it should obey their experts;
* a Minister facing condemnation by the High Court and corruption commission.

All in the name of cleaning-up ‘Scott Morrison’s mess’.

Infrastructure policy after the independent review of Infrastructure Australia?

What could go wrong? What did go wrong?

## 3. The review

Soon after the Government was elected, the new Commonwealth Minister set-up an ‘independent review’ of Infrastructure Australia. The purpose: to find a job for it. The supposed problem: the former Government didn’t listen to it.[[1]](#footnote-1)

Implying: she didn’t intend to listen either. Evidence? Her announcing $123bn of infrastructure spending over the next decade, much derived from election promises. Another Minister who got into office and closed the door?[[2]](#footnote-2)

My submission to the review recommended abolition of the organisation. Departments should advise the Government on Commonwealth responsibilities. The Productivity Commission should advise Parliament on State etc. proposals.[[3]](#footnote-3)

The review didn’t like that. Even if it did agree the organisation’s current advisory functions should not be conducted by a corporation.[[4]](#footnote-4)

The review finished its assay in October 2022. Recommendations included:

* the organisation should be a commission;
* its ‘mandate’ should be to advise the Government;
* the Government should publicly respond to its recommendations etc;
* it should provide the Government with ‘statements’ for the Budget;
* ‘accredited’ proponents might assess their own proposals.

Reasons: despite being ignored by Governments, ‘the model’ remains popular among the infrastructure club evidenced by submissions and germination of similarly named organisations in the States. And the Government’s ambitions re productivity and climate change pose fresh infrastructure challenges.

Felicitously phrased via ‘operating context’, ‘ecosystem’, ‘product suite’ etc. And, de rigueur, yet another interpretation of national significance.

All accepted by the Government’s 7 December response. With a surprise befitting the anniversary of the Pearl Harbour attack: since the organisation is advising the Government, its advice might be kept secret – Cabinet confidentiality etc.

As the Minister said: thank you review![[5]](#footnote-5)

## 4. Comments

### 4.1 Overview

Undoing the Abbott-era stupidity of a government advisory corporation is undoubtedly right. If years overdue.[[6]](#footnote-6)

Beyond that the review initiated a mess which, among other things: wants a statutory authority treated like a Department; invites corruption of project assessments; would create turmoil in national cabinet.

Without touching the real problems: Governments, probably illegally, fund all shapes and sizes of infrastructure pork. And instead of disclosing important facts – costs, benefits, reasons - about use of your money, they lie to the public.[[7]](#footnote-7)

Contrary to views of the Minister and the infrastructure club, the real criticism of Infrastructure Australia isn’t that Governments don’t listen to it, or that the former Government did not give it adequate direction.

Rather, the criticism is it tries too hard to accommodate their deceits. It meekly accepts what proponents tell it, refuses to seek public comment on proposals it is assessing, and doesn’t disclose enough detail for anyone to reasonably trust its assessments and other proposals.[[8]](#footnote-8)

### 4.2 Oversights

The mess appears to be due to the review:

* interpreting terms of reference (above) in a most restrictive fashion;
* ignoring the key experience of the organisation: most proposals are rubbish;
* glossing over the key fact: increasingly Governments are supporting even worse proposals which lack any national relevance;
* ignoring the key change in the ‘operating context’ – the High Court decision in Williams (No.2) after which Infrastructure Australia’s purpose was inverted.

Such factors may have provided motivation for the organisation – and the review - to try to be accommodating, to seek support and to widen its purview e.g., into social infrastructure rather than take Governments and bureaucracies to task for their shortcomings.[[9]](#footnote-9)

### 4.3 Better approach

Even if the review insisted on continuation of the organisation, it should have recommended the Infrastructure Australia Act be overhauled via:

* a ‘mandate’ to advise *Parliament* about infrastructure the Commonwealth can support only through Constitution s.96 grants – State etc projects;
* that advice should promote Commonwealth (Constitutional) purposes;
* advice on project proposals must include detailed benefit: cost analyses and take account of comments from the public.

That would have scotched the Minister’s idea of keeping advice secret.

The Government would be practically forced to respond to advice. Or else it would be unable to seek support for State etc projects.

Parliament would start to play its proper role in Federal relations. Conditions imposed on infrastructure grants would more likely reflect real Commonwealth purposes than internal Departmental procedures - and signs advertising the Government’s spending.

Departments would be forced into playing their roles – advising the Government on its responsibilities and insisting on proper processes for dispensing public monies. For infrastructure, those processes include: rigorous checks on legality; benefit: cost analyses; publication of proposals and relevant assessments.

Issues surrounding artificial definitions of national significance would disappear.

All relevant proposals – of whatever scale – would be assessable. Putting whimsical pork barrelling in the sights of the anti-corruption commission.[[10]](#footnote-10)

Yet, political prerogatives to legally spend on things ‘the experts’ don’t consider worthwhile would, properly, be untouched.[[11]](#footnote-11)

In summary, ideas behind creation of Infrastructure Australia would be restored.

### 4.4 Why?

Reasons such an approach would be better than that recommended by the review can be seen from the intention behind the term ‘nationally significant infrastructure’ in the Infrastructure Australia Act. [[12]](#footnote-12)

The review assumed that term is and should be merely mechanical - to identify which projects should be assessed. Its suggestion to continue with a minimum spend of $250m etc. might seem reasonable, is consistent with previous practice and is supported by the infrastructure club.[[13]](#footnote-13)

However, it is completely wrong.

For one thing, it ignores the implication: projects seeking less than $250m need not be so assessed and would be fast-tracked to the front of any queue. Diverting Commonwealth politicians, and public monies, into widespread local pork-barrelling. As seen in recent election campaigns.[[14]](#footnote-14)

The review’s idea of salvaging such a wreck by proponents assessing their own major proposals is aberrant - not only for inviting corruption.

Typically, the proponents are Premiers. Unless the Commonwealth immediately funds State proposals – ‘follows the advice of the (State) experts’ – with self-assessments we can expect to be treated to the type of ‘cooperation’ seen inside – and outside - national cabinet during the pandemic.[[15]](#footnote-15)

Also, contrary to popular opinion, national significance is clearly defined in the legislation – ‘materially improve national productivity’. Even if inconvenient, it is not open to interpretation by Ministers, officials or the club.[[16]](#footnote-16)

Which indicates its real purpose: to guide the Minister.

### 4.5 Guiding the Minister?

To explain: the original, 2007, reason for Infrastructure Australia: Departmental failures.[[17]](#footnote-17)

Those failures resulted from the prevailing creed: Ministers set Commonwealth roles. The belief: if something is nationally significant, a Minister can spend public monies on it without further authorisation – even if it is a State responsibility.

The text of the legislation has national significance enabling certain functions of Infrastructure Australia. Notwithstanding that, the purpose of the term and its definition was, in so doing, to *enable* the Minister to spend on State infrastructure projects important to the national economy. Without such a term and definition, it was feared the Minister would be unable to provide funds to those projects.

That explains the peculiarity of the legislation having a statutory authority, an emanation of Parliament rather than Government, advising a Minister. The advice was to create a Ministerial power, and could not be challenged on the basis of Minister setting their own jurisdiction.[[18]](#footnote-18)

Spending on other State infrastructure – pork barrelling etc. – was thought to be Constitutionally suspect because it was unrelated to national objectives such as Australian economic development.

Hence, the legislative scheme wanted Government and public monies focused on projects significant to the national economy.

The scheme was a vital part of (then new) arrangements for co-operative Federalism – including Commonwealth spending on State responsibilities - introduced by the Rudd Labor Government in 2007-08.[[19]](#footnote-19)

It should have been revised in 2014 after the series of High Court challenges to Government spending culminating in Williams (No. 2). These are understood as rejecting some of the new Federalism arrangements as being co-operative Executive centralism. The challenges impugned certain practices for Government spending on infrastructure outside Commonwealth responsibilities – State etc. infrastructure.

That case said the Government cannot gain unilateral authority to spend on State etc. matters even if nationally significant or deemed as such by legislation.[[20]](#footnote-20)

Tellingly, the Court said Parliament cannot expand the Government’s authority to spend by deeming something nationally significant. Nor could States expand that authority by even explicit agreement about national significance, or to the spending in question. In saying that, the Court acknowledged contra arguments had been raised by the Commonwealth – including that it had long been assumed, including by States, that the Government could directly spend on nationally significant State matters, and very substantial spending had already occurred on such a basis.[[21]](#footnote-21)

### 4.6 Commonwealth spending and s.96

Post Williams (No.2), if spending on State etc. matters is desired, resort must be had to Constitution s.96 – grants to States with conditions, i.e., purposes, set by *Parliament.[[22]](#footnote-22)*

As Parliament is the decision maker for the funding of State etc. infrastructure, it needs advice. More than the Minister who is not the decision maker and, after all, has a Department to ask.

Hence the review’s idea that the organisation should advise the Government is as wrong as the Minister’s response that such advice should be secret.

Shown by Infrastructure Australia’s first chair and coordinator - Sir Rod Eddington and Michael Deegan – insisting on putting its reports to the Prime Minister, Premiers and the public. Again, highlighting the importance of Federalism to the organisation’s role. The chair and coordinator also insisted on independent benefit: cost analysis for every serious proposal.

By ignoring the Williams case, the review overlooked the nexus between Federalism and the organisation’s functions, and how that has been modified at law.

It did not examine the pivotal assumption behind Infrastructure Australia – (in 2007) the presumed legality of spending on nationally significant State infrastructure. Hence it failed to comprehend the original purpose of the scheme involving the organisation.

### 4.7 Purpose inverted

Consequently, the review was unable to understand Infrastructure Australia’s purpose has been inverted since 2014. Which caused a policy inversion underlying the Minister’s supposed problem.

That inversion is consistent with, and probably due to, the Commonwealth’s pig-headed sulkiness at a series of High Court rulings it did not like. The impression is that Governments have ignored the rulings as far as they could get away with such an attitude – hoping there would not be another Court challenge.[[23]](#footnote-23)

The inversion: investment in State infrastructure to boost the economy is at the back of the Minister’s queue, while tosh is promoted to the front by Federal election promises. With Infrastructure Australia struggling for attention amid the odious grandstanding – again more likely reason for it losing ‘focus’ than recent Board appointments.

Commonwealth political promises are now routinely made for pork of all sizes. Evidenced by this Government’s near replication of Prime Minister Abbott’s lets-help-our-party’s-Victorian-Premier’s-re-election-campaign example.[[24]](#footnote-24)

The Minister’s spending splurge confirms the bi-partisan – Abbott to Albanese - reaction to the Williams ruling that national significance does not allow Ministers to spend on State matters: *Ministers will commit spending to State - and local - matters whether nationally significant or not, including on better places to ‘relax’*.[[25]](#footnote-25)

### 4.8 Salvaging the battleship

Instead of abetting a Government response that would entrench this travesty under a further cloak of secrecy, the review should have told the Minister, and the public, some home truths.

To the problem of Governments not listening to the advice of statutory authorities, there are two blindingly obvious answers.

One is: make Governments listen. The Infrastructure Australia scheme initiated in 2007 had exactly that answer.

True - the review half-heartedly recommended something along those lines: the Government respond to Infrastructure Australia’s reports. Yet, the Government seized on other recommendations of the review – the organisation should provide a statement for consideration in Budget deliberations - to reject even that, under the guise of confidentiality!

The other: abolish the statutory authority.

Requiring the statutory authority to change its advice to align with what the Minister likes to hear is not a legitimate answer.

More politely: for Commonwealth spending, there is not any democratic, legal or logical relevance of State infrastructure being deemed nationally significant. Parliament should make every such decision, with a full public explanation.

Ministers might want to by-pass Parliament and fund things like nation-building refurbishment of ocean baths in a marginal seat. If so, we might look forward to them explaining the probity and legality of that at the corruption commission and High Court.[[26]](#footnote-26)

## 5. Conclusion

The review was superficial, inviting a day of infamy style attack on public policy.

The episode provides further evidence of carelessness about the legality and policy implications of Executive Government actions, including by ‘independent reviews’.[[27]](#footnote-27)

It also provides further evidence of the present Government displaying some of the less than desirable characteristics of its immediate predecessor.

Parliament should reject the Government’s response and ask for an overhaul of the Infrastructure Australia Act to restore its original – pre-2014 - intent: to focus Commonwealth infrastructure policy on promotion of national economic and social wellbeing.

Until this is done, the problems will continue – and worsen for the Government. Like at Pearl Harbour, the surprise hasn’t settled the issue.

J Austen

26 February 2023

1. See: <http://www.thejadebeagle.com/nifrastructure-australia-review-2022.html> [↑](#footnote-ref-1)
2. <https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansardr/26230/&sid=0000> [↑](#footnote-ref-2)
3. <http://www.thejadebeagle.com/nifrastructure-australia-review-2022.html>; and see note 1 (above). [↑](#footnote-ref-3)
4. <https://www.infrastructure.gov.au/department/media/publications/independent-review-infrastructure-australia> [↑](#footnote-ref-4)
5. <https://www.infrastructure.gov.au/department/media/publications/australian-government-response-independent-review-infrastructure-australia> [↑](#footnote-ref-5)
6. <http://www.thejadebeagle.com/governance.html> [↑](#footnote-ref-6)
7. <http://www.thejadebeagle.com/attempted-submission-to-committee-on-corruption-commission.html> [↑](#footnote-ref-7)
8. <http://www.thejadebeagle.com/infrastructure-principles---august-2018.html> [↑](#footnote-ref-8)
9. Compare <https://www.infrastructureaustralia.gov.au/publications/2021-australian-infrastructure-plan> with <https://www.infrastructureaustralia.gov.au/publications/report-council-australian-governments-december-2008> [↑](#footnote-ref-9)
10. See note 5 (above). [↑](#footnote-ref-10)
11. In this the author apparently differs from commentators such as the Grattan Institute which argue governments should follow the ‘expert’ advice. See e.g. <http://www.thejadebeagle.com/mousetrap-2.html>

    [↑](#footnote-ref-11)
12. Definition: ***"nationally significant infrastructure"***includes: (a)  transport infrastructure; and (b)  energy infrastructure; and (c)  communications infrastructure; and (d)  water infrastructure; in which investment or further investment will materially improve national productivity.<http://classic.austlii.edu.au/au/legis/cth/consol_act/iaa2008293/s3.html#board> [↑](#footnote-ref-12)
13. It also is consistent with the methodology recommended to Infrastructure Australia by ACIL Allen Consulting in 2014 <https://www.infrastructureaustralia.gov.au/sites/default/files/2019-07/Nationally-Significant-Infrastructure_0.pdf> [↑](#footnote-ref-13)
14. <https://www.thejadebeagle.com/election-2019.html> and see Tipfire series at the jadebeagle [↑](#footnote-ref-14)
15. <http://www.thejadebeagle.com/tip-fire-a.html>; <http://www.thejadebeagle.com/covid---july-2020.html> [↑](#footnote-ref-15)
16. See note 13 (above).

    [↑](#footnote-ref-16)
17. <http://www.thejadebeagle.com/nifrastructure-australia-review-2022.html>. [↑](#footnote-ref-17)
18. It was presumed national economic matters would be within the power of the Commonwealth Government – the proposition put by the Commonwealth in Pape <http://www.thejadebeagle.com/williams-case.html>. [↑](#footnote-ref-18)
19. See for example: <https://research-repository.griffith.edu.au/bitstream/handle/10072/367334/McQuestin_2014_02Thesis.pdf?sequence=1&isAllowed=y> [↑](#footnote-ref-19)
20. <https://johnmenadue.com/john-austen-the-high-court-the-williams-case-and-transport/> [↑](#footnote-ref-20)
21. Tellingly as the Infrastructure Australia Act was one of the few that had such a scheme. The raising of those arguments indicates the Commonwealth’s frame of mind prior to the cases - at the time of establishing Infrastructure Australia. [↑](#footnote-ref-21)
22. Prior to Williams (No. 2), but after Williams (No 1) several academics noted the likely necessity for the Commonwealth to rely on s.96 rather than legislation – especially the legislation Parliament hastily passed – for grants to other than Commonwealth purposes. <http://www.mulr.com.au/issues/37_1/37_1_5.pdf> [↑](#footnote-ref-22)
23. <https://www.cjccl.ca/wp-content/uploads/2021/05/10-Twomey.pdf> [↑](#footnote-ref-23)
24. <https://www.afr.com/companies/infrastructure/is-melbourne-s-suburban-rail-loop-nation-building-or-pork-barrelling-20221016-p5bq74> [↑](#footnote-ref-24)
25. <https://minister.infrastructure.gov.au/c-king/media-release/improving-infrastructure-central-coast> [↑](#footnote-ref-25)
26. <https://johnmenadue.com/restoring-integrity-to-commonwealth-infrastructure-spending/> [↑](#footnote-ref-26)
27. <http://www.thejadebeagle.com/tipfire-c2-mma-2.html> [↑](#footnote-ref-27)