Independent review of the APS

Department of the Prime Minister and Cabinet

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**Submission to review of Australian Public Service – Part 1**

Dear reviewers:

This is the first part of a submission to your review of the Australian Public Service in which the Chair asked for challenges to your thinking. While based on national transport policy you might consider whether it has more general application.

It identifies several inter-related matters which do not appear in the draft report. Links between the matters were not clearly identified in the six papers commissioned from the Australian And New Zealand School of Government.

The matters are:

1. loss of connection between the public service and foundations of Australia’s democracy;
2. governance issues;
3. disengagement with the community and lack of pride in work.

The draft report and commissioned papers concern themselves with a future Australian Public Service. This is reason for considering the ‘stewardship’ function currently assigned to Secretaries. The three points (above) imply deficiencies in execution of this function. This suggests the detail of the Public Service Act shelters underlying problems - as do some other attempts to legislate proper, ethical behaviour.

This part of the submission deals with the first two points: democratic foundations and governance.

Regarding democratic foundations, claims the Australian Public Service serves the public are concerning. They open the door to public service beliefs Parliament can or should be bypassed.

Officials may feel they know better than Parliamentarians. Such feelings may occasionally be justified. However, Australia’s system of government has officials serving Parliament. Their obligations to Parliament are either direct in the case of appointees and employees of Statutory Authorities or indirect in the case of Departmental heads and employees.

Similarly worrying is a view the Public Service is an institution in its own right. It is not. It exists only because of, and for its members only to serve, Parliament. This would be the case without the Public Service Act. That the Act may give rise to notions of institutional independence from Parliament is sufficient reason for Parliament to revisit it.

Consideration of a future Service should begin with Australia’s federal democracy. While Parliament and Executive Government differ, the former’s power to control the latter needs recognition.

In the last few decades Commonwealth Executive activity has changed in scope and direction. Recent recognition that some extensions have been unlawful implies some change was misdirected. Necessary redirection of activity requires re-definition of some public service roles.

Re-definition must involve more precise roles. It needs to recognise differences between matters for Executive Government and matters reserved to Parliament. The latter includes significant aspects of Commonwealth-State relations.

Regarding governance, despite extensive writings, Australian Public Service appreciation and application of underlying principles appears to be limited. Sophistry is evident.

For example, the current practice of senior officials sitting on ‘boards’ of what some consider lobby groups is not proscribed by ‘guidelines’. This might be compared with a comment from the commissioned paper on an Integrity Framework:

*‘The APS must also recognise that one of its greatest integrity threats is policy and regulatory capture. Public perception of ‘elites’, powerful interests or the familiar few, having privileged influence over public policy and administration will strongly erode public trust in the APS, its credibility and legitimacy.’*

As another example, arguments (for legislation) to further centralise control with Secretaries or central Departments do not sit well with democratic and governance precepts. For one thing they reduce power of Parliamentarians. For another, they reflect misconceptions about a ‘stewardship’ role. That role should be considered critical for every public servant not just agency heads. The idea that stewardship and matters such as integrity need to be legislated should be disturbing.

The Public Service Act itself shows issues that arise from sophistry. Its references to serving the Government, Parliament and the public are practically and legally irrelevant to nearly every public servant. S.13(5) of the Act means public servants serve agency heads who in turn serve the Parliament.

To be effective, any governance system requires honesty and respect by those entrusted with power. This first part of my submission suggests this should be considered by the review. The second part of my submission will provide evidence these are increasingly variable characteristics of the Australian Public Service. That situation must change.

Some short notes on these matters and other matters are attached. I would be pleased to provide further information and answer questions.

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Thursday, 16 May 2019

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Contents

[1. Introduction 4](#_Toc7446744)

[2. Democratic foundations 4](#_Toc7446745)

[2.1 Framework 4](#_Toc7446746)

[2.2 Relevance of framework to the public service 4](#_Toc7446747)

[2.3 Commonwealth and Executive powers 6](#_Toc7446748)

[2.4 Implications for public service 7](#_Toc7446749)

[2.5 Implications for review 8](#_Toc7446750)

[3. Governance 9](#_Toc7446751)

[3.1 Defined 9](#_Toc7446752)

[3.2 The corporate model 10](#_Toc7446753)

[3.3 Confusion about independence 10](#_Toc7446754)

[3.4 Some specific deficiencies 11](#_Toc7446755)

[4. Conclusion 12](#_Toc7446756)

[4.1 Gaps 12](#_Toc7446757)

[4.2 Themes 13](#_Toc7446758)

## 1. Introduction

Where once there was considerable debate in Departments about the ‘role of the Commonwealth’ and therefore of its public service, this has given way to assuming that role is whatever suits a Minister, Department or central Department staff on a given day.

Similarly, there once was research, debate and principled application of public sector governance norms. However, this has been supplanted by verbose tomes which have engendered odd practices, hidden agendas and concentration of power.

The results reduce confidence in public institutions and public servants.

## Democratic foundations

### 2.1 Framework

Australia is a federation which comprises two tiers of government established by a Constitution.[[1]](#footnote-1)

Both tiers embody responsible government. In this the Government, represented by Ministers, accounts to Parliament and Parliament accounts to the people via elections.

Each tier has separation of powers. There are distinct functions of: a legislature comprising lower and upper houses of Parliament; Executive being the Government of the day having the confidence of the majority of lower house Parliamentarians; Judiciary appointed by the Executive to tenures.

The higher tier of government, the Commonwealth, has powers defined by the Constitution. The Constitution also defines the separation of Commonwealth powers.

Its legislative power is vested in Parliament comprising the House of Representatives and the Senate. In the former house Parliamentarians are elected for individual seats and represent local areas. Senators are elected by proportional representation for each State. The Senate is considered the States House; Senators represent States.

Executive functions are set in the Constitution. While precise delineation is evolving, the better view is: substantial parts of it require activation (legislation), and all of it is controllable, by Parliament.[[2]](#endnote-1)

A part of the Commonwealth judiciary, the High Court, is the final court of appeal for all Australian jurisdictions and adjudicator of Constitutional disputes, including the extent of Commonwealth and Executive power.

### 2.2 Relevance of framework to the public service

#### Departments as part of Executive Government

Public service Departments are created by Administrative Arrangements Orders.[[3]](#footnote-2) The orders allocate functions to Ministerial portfolios.

Such Departments are part of the Executive. They have dual functions: to advise Ministers; to represent the Government. The latter includes execution of legislation. This may involve exercise of powers delegated to the Minister, such as for spending or collecting public monies.

Other forms of representation include: promulgation of policy; information about public sector services; appearances in proceedings such as Parliamentary Committees, international forums.

Such Departments are not responsible to the public. They are responsible to the relevant Minister. The Departments do not serve the public except through the Minister and then Parliament.[[4]](#endnote-2)

#### Organisations outside Executive Government

There is another class of government organisation which employs members of the Australian Public Service. These are Statutory Authorities, created by legislation.[[5]](#endnote-3)

As a creation of the Parliament, these organisations serve that institution and not the Executive.

Authorities do not have a primary responsibility of advising a Minister. Nor do they represent the Government. They are sometimes inaccurately referred to as ‘independent agencies’.[[6]](#endnote-4)

For convenience the relevant legislation often nominates a Minister for the purpose of informing the Parliament on accountability matters etc.

For current purposes there are three sub-classes of Authorities: those which provide advice; those which provide public services; those which trade.[[7]](#endnote-5)

#### Public Service

There is a Public Service Act which is amended from time to time. As expected, it deals with public service recruitment, employment, etc.[[8]](#endnote-6)

However, it does more. It creates an Australian Public Service comprising appointed heads of Departments and Authorities and their employees. Some processes for appointments are specified. It sets some expectations for public servants including ‘values’ and a code of conduct. It establishes overview mechanisms including a Public Service Commissioner and a Secretaries Board.

While some may see the Act as creating an institution, such a view is wrong. The Act is insufficient to create an ‘institution’ as the Public Service is effective only to the extent there are Departments and Authorities established by different, higher order, processes. In contrast, Departments and Authorities could be created in the absence of the Act.

To the extent the Act conflicts with the principles outlined above its application will be problematic.

The draft report, and several commissioned papers, appear to assume the value of the Australian Public Service is associated with the Act and it making it an institution.[[9]](#endnote-7)

For example, ‘stewardship’ (of the Public Service) assigned by the Act to Secretaries, is raised as important because it leads to future public service capability. Underlying this are three unfortunate assumptions: an institution is necessary for such stewardship; Secretaries would not take on stewardship unless there was such an Act; other public servants cannot or will not effect stewardship.

To my mind this is somewhat akin to attempts to legislate ethics. This behaviour sought by the Act should occur without the Act. If this behaviour would not occur without the Act the Australian Public Service has people who are not fit to be its members, let alone its leaders.

#### Differences between organisations

It may have been thought the two types of government organisations, and therefore public service responsibilities, are for practical purposes indistinguishable. However, a series of High Court cases culminating in 2014 suggests this is not the case for the Commonwealth.[[10]](#endnote-8)

The reasons lie in the powers and therefore roles of the Commonwealth and its Executive.

### 2.3 Commonwealth and Executive powers

#### Position clarified in 2014-2016

The scheme of the Constitution has the Commonwealth distributing its surplus of public monies, revenue less spending, to the States.[[11]](#endnote-9)

The matter of Commonwealth spending is a significant national issue not least due to the vertical fiscal imbalance.[[12]](#endnote-10)

In three cases, the High Court emphatically rejected a proposition that the Commonwealth Government could spend public monies on any matter. The scope of the Commonwealth Executive is limited. The scope of the Departmental public service must be similarly limited.

The Court held the Commonwealth can only spend on: matters for which there is legislation; certain other limited ‘implied’ matters; payments to the States. [[13]](#endnote-11)

The first of these, legislation, is only available for matters within Commonwealth legislative competence. These matters are set out in the Constitution.

The second, ‘implied’ powers, are limited to matters necessary for the Executive to protect the Constitution or undertake unique and necessary attributes of nationhood. Implied powers for the Government are less for the Commonwealth than the States, and Britain, due to it being a Federal Government under a written Constitution.

The third means the Commonwealth can make payments to the States. In fact, payments beyond the Commonwealth’s legislative and implied powers can only be made to the States.

#### Payments to the States – conditions

Payments to the States may include conditions such that the recipient State must spend monies on defined purposes – specific purpose or conditional payments.[[14]](#endnote-12)

The range of conditions is virtually unlimited, extending beyond purposes of the Commonwealth or other matters in the Constitution. Through these conditions the Commonwealth has extended its influence into matters not allocated to it in the Constitution, such as roads.[[15]](#endnote-13)

Conditional payments are voluntary; a State can avoid this influence of the Commonwealth by not accepting the payment.

Conditions of such payments are to be set by Parliament. The structure of the Constitution indicates the underlying ideas behind this. As Commonwealth spending, including conditional grants, affects its surplus it is a matter of interest to all States and thus the States’ House.

The scheme of Parliament, instead of the Government, setting conditions on grants similarly deals with a latent issue. Parliamentary endorsement necessarily involves the opinion of the States’ House.

#### Relations with the States

The Commonwealth can encroach on a State, but only with approval of Parliament and of the State concerned. Mechanisms are: referendum; referral of powers; conditional grants.

The three High Court cases repudiated attempts by the Government to encroach on or bypass the States by other mechanisms even were there consultation and express acquiescence of the States.[[16]](#endnote-14)

Hence there are functional as well as procedural differences between the Government and Parliament in Commonwealth-State relations. This must have implications for Departments and Authorities.

One paper commissioned for the review – the jurisdictions paper - considered some issues regarding Commonwealth-State relations. It took a seemingly pragmatic view that responsibilities of the two tiers are entangled, and that mechanisms such as the Council of Australian Governments are useful to improve community outcomes.[[17]](#endnote-15)

It treated interaction and overlap between the tiers alike and suggested reliance on a Senior Officers Meeting; a meeting of Prime Ministers and Premiers Departments which supports the Council and *‘acts as a clearing house for important cross-jurisdictional issues’*.

I do not agree with that. Interaction of policies of the tiers is unavoidable, overlap is not. Some overlap may occur from time to time. However, to countenance overlap is to invite governance problems starting with diffusion of accountability and tensions between tiers. There is no reason to believe these are less for Senior Officers than others. In fact, given such Officers’ wider purview and higher political exposure, there are reasons to believe there are bigger problems.

Overlap occurs when Governments wish to stray beyond their responsibilities. The Commonwealth is the tier most likely to do so due to the vertical fiscal imbalance. Conditions on payments can include Commonwealth overlaps. A recent example was an election promise for the Commonwealth to improve certain roads simply because the State had not.

The Constitutionally thematic approach is for the Commonwealth Parliament, not just the Government, to deal with overlap areas.

### 2.4 Implications for public service

#### Basic implications

There are two basic implications for the Australian Public Service.

First, as the principled position is for Parliament to deal with Commonwealth overlap matters, public service advice and (possible) representation on these matters should be via Authorities rather than Departments.

The jurisdictions paper posited a similar idea; that intergovernmental forums such as the Council of Australian Governments be serviced by an organisation independent of Commonwealth Departments. However, to have it overseen by ‘Senior Officers’ would be a mistake.[[18]](#endnote-16)

Second, whether or not the principled position is adopted, the Public Service should make all Parliamentarians aware of the adverse consequences of overlaps. To my mind it is not good enough for an ‘institution’ under ‘stewardship’ to simply sit back and await uninformed orders on the matter.

In transport these consequences start with the Commonwealth ignoring its responsibilities. They extend to game playing in intergovernmental forums, to avoid considering significant national issues. They end up with States claiming they cannot meet their responsibilities without Commonwealth financial gifts for particular infrastructure projects.[[19]](#endnote-17)

#### Departmental restructuring

The principles and consequences point to a desirability to restructure Departments that currently deal with matters within direct Commonwealth powers as well as conditional grants. The Department of Infrastructure Regional Development and Cities is one such Department. The Departments very name indicates interest about matters which are State, not Commonwealth, responsibilities.

The restructure should separate from that Department the function of advising on State grants. Such advice needs to be available to Parliament because Parliament is to set conditions on State grants.

It is conceivable, possibly likely, that adequate advice to Parliament needs to cover matters beyond those considered important by Government. The Department, which represents Government, cannot give such advice. Hence the advice should come from an Authority such as a Grants Commission.[[20]](#endnote-18)

#### Implications for Australian Public Service

If this is not done, public servants relevantly engaged in that Department face a conflict of interest. Do they represent the Government’s views on what conditions should be included in State grants, or do they (potentially) critique the Government’s views in the interest of properly informing Parliament?

In this conflict, the Department is vulnerable to losing direction. It cannot orient itself merely by referring to conditions on grants since any conditions are permitted. It will face and cause real problems if it interprets conditions on grants as being purposes of the Commonwealth.

The vulnerability may become expressed in ‘creative writing’ by public servants; exculpating Ministerial grandstanding by pretending grants have some deeper purpose than vote harvesting. While not necessarily a problem for Departmental public servants in their role as representing the Government, it carries two risks.

First, exculpation can extend from representing the Government to advising the Government. It can lead to Departmental public servants encouraging Ministerial grandstanding, which will benefit their private interest via the Department administering larger programs and more public monies etc.

Second, it may cross the thin line between representing the Government and knowingly misrepresenting what the Government is doing; falsely advising the public of motivations etc.

### 2.5 Implications for review

#### Commonwealth purposes

The review should recognise limits to Commonwealth purposes. These are matters set by the Constitution for legislative competence and implied Executive powers.

Grants to the States can be a purpose, however, conditions attaching to a grant neither need reflect a Commonwealth purpose nor can they create a purpose. The ways in which an additional Commonwealth purpose can be created are limited to referral of powers by States to the Commonwealth or Constitutional change via referendum.

#### Pre 2014 interpretations

Prior to 2014 this was not clear. It was assumed within the Australian Public Service that its Government could provide funds to anybody for any purpose, for example to school chaplains for their services.

Commonwealth purposes were assumed to be undefinable and varied with the Government of the day. Examples of this include local road and government funding by Conservative Governments and funding of projects in cities by Labor Governments.

At times a policy overlay proposed Commonwealth purposes to include: matters of national significance; matters addressed in other jurisdictions; major infrastructure or projects costing over a certain amount; support for State Government projects.

Other suggestions for Commonwealth Executive powers; matters agreed by Governments or Ministerial Councils such as the Council of Australian Governments; matters which would be (most) conveniently handled by the Commonwealth and its Departments.

#### Position post 2014

All these suggestions for Commonwealth purposes and funding powers were *specifically* rejected by the High Court by 2014.[[21]](#endnote-19)

Further, in 2016, one justice of the court drew explicit attention to the primacy of Parliament over the Executive in relation to some non-funding issues; powers of detention.[[22]](#endnote-20)

The review should specifically refer to this, and discuss its implications.

It should also note that after five years none of the Court’s reasoning – Constitutional guidance - has found its way into statements about transport or infrastructure by the Commonwealth Government, Opposition, Ministerial Councils or supposed expert advisers such as Infrastructure Australia.

It could be inferred from this failure that none understand, wish to follow or promulgate Australian rule-of-law precepts.

That may perhaps be understandable for those seeking election. However, that does not make it excusable. It is not understandable or excusable for members of the Australian Public Service.

This failure indicates underlying problems in the Australian Public Service. The second part of this submission will present some manifestations of this. These are not limited to the Departmental public service but extend to Authorities.

## 3. Governance

### 3.1 Defined

For the purposes of this submission, governance means the effective exercise of legal control.[[23]](#endnote-21)

There are voluminous writings about public sector external governance. These boil down to propose application of a few principles the most important of which is: avoidance of appearance conflicts of public duty with private interest.[[24]](#footnote-3)

The basic rule is a person should not be (seen to be) a judge of their own cause. This entails concepts of honesty, justice and transparency.

However, a degree of sophistry has been introduced which distorts the principles and has been used for uncertain ends.

The Public Service Act itself shows evidence of sophistry. Section 3a has the public service serving the Government, Parliament and the public. As discussed above this is incorrect for Statutory Authorities as they serve Parliament. The section also is countermanded by s.13(5) which requires employees to obey directions from agency heads.[[25]](#endnote-22)

 Before considering some specifics, it is useful to review the corporate model on which a substantial part of the guidelines is based.[[26]](#endnote-23)

### 3.2 The corporate model

Writings propose some government organisations should mimic private sector corporations, by separating management of the organisation from ownership. This is achieved by different powers of shareholders, directors and managers. The corporation is a new legal person, original reasons for which included ability to marshal more resources potentially from many individual shareholders.

Corporation management is accountable to directors, the board. The board is accountable to the owners. The essence of the corporation is control via finance. Performance is assessed by reference to financial reports. To provide owners with confidence, corporations are required to produce relevant statements and have them audited. Greater managerial independence is balanced by limited liabilities of owners and a requirement for higher transparency to the outside world.

It is assumed organisations and individuals respond primarily to financial incentives. Among other things this implies the organisation only undertakes activities it expects to be profitable.

The direct analogy in the public sector is the government trading enterprise. Those enterprises do not make public decisions. They can be asked to undertake unprofitable activities; however, this should be recognised in the accounts to enable ‘proper’ assessment of management. A corollary is that such requests need to be public.[[27]](#endnote-24)

Government trading enterprises are typically public sector corporations or companies established by legislation and owned by Parliament. Usually Ministers are nominal owners. To be formally ‘independent’ a board of directors is required. The board appoints management, usually a chief executive. Extensive guidelines have been drafted by central Departments. A primary interest is to reduce financial exposure of government by creation of an independent organisation.[[28]](#endnote-25)

There is a tension involved in public sector ownership of such enterprises with issues extensively considered by, for example, the Productivity Commission.[[29]](#endnote-26)

### 3.3 Confusion about independence

In the transport and infrastructure field there are claims about the independence of public sector organisations and advice. However, most show a mistaken understanding of the purpose of independence which is to reduce potential conflicts of private interest and public duty rather than to marshal capital from many individual shareholders.[[30]](#endnote-27)

The relevant question is: independent from whom? The answer should be: those who stand to make a private benefit from the public duties of the organisation.

The assumption of financial motivation implies organisations which receive most of their income from a party cannot be independent of that party.

Nor should they be. They need to be independent of those who stand to benefit from their public duties. To conform with transparency principles ‘independent’ government organisations should disclose more than other government bodies.

The guidelines have that public servants should not be on the boards of Government organisations, particularly those within their portfolio. The given reason is public servants may be compromised in advising Government on organisational performance.

This implies performance of such organisations are not assessable by financial indicators. It also implies a ‘new principle’; avoidance of conflict of several public duties, as distinct from avoidance of conflict of public duty and private interest.

The above indicates confusion. This hides large gaps. For example, nothing is said of public servants being on the boards of private organisations.

### 3.4 Some specific deficiencies

The tenor of the draft report, and commissioned papers, concerns what needs to be done to make the Australian Public Service trusted.

The commissioned paper on the integrity framework points to deficiencies, including of understandings, of an appropriate governance framework.[[31]](#endnote-28)

Some further examples are worth considering by the review.

#### Membership of private boards

For some time, senior Commonwealth and State public servants have been members of ‘advisory’ etc. boards of industry associations / ‘think tanks’ some regard as lobby groups. Infrastructure Partnerships Australia is one example.[[32]](#endnote-29)

In my view this is bad practice being incompatible with the duties of Departmental officers to represent and advise Government.[[33]](#endnote-30)

If membership of ‘industry peak’ boards is not a breach of guidelines the guidelines are grossly inadequate and beside the point. The matter has not been publicly addressed by ‘oversight’ such as by the Secretaries Board.

#### Infrastructure Australia as a corporation

Changes to the governance of Infrastructure Australia in 2014, purportedly to make it independent of the Government, also raise concerns.

The changes in effect make it a corporation which is inappropriate for a government advisory body. That it receives all its income from the Commonwealth, does not compete with private firms, does not trade and cannot create substantial financial liabilities demonstrate its form to be a nonsense.[[34]](#endnote-31)

Its core function, to provide the Commonwealth with advice on infrastructure, means it needs to be independent from those who stand to gain from Commonwealth public decisions. Relevant parties include the States, Commonwealth spending Departments and private firms with infrastructure advisory, financing or construction (potential) interests.

This broad extent of possible interests and contentious and contested nature of its decisions suggests board decision making is inappropriate, at least when board members are not full-time employees of the Australian Public Service.

Infrastructure Australia should be a commission and operate like the Productivity Commission rather than its current convoluted structure.[[35]](#endnote-32)

The process leading to the changes raises unsettling issues. The inappropriateness of the corporate scheme could be interpreted as a subterfuge for removing Parliamentary influence over appointment of the chief executive, among other things diluting the influence of the Public Service Act. In this regard explicit references by the (incoming) Government to removal of the chief executive are peculiar and the public record does not show the Australian Public Service in a good light.[[36]](#endnote-33)

#### Joint jurisdictional organisations

The commissioned paper on jurisdictions made some observations about Commonwealth-State relations among officials and suggestions for improvements. Among the bases for these suggestions was the observation that national issues do not always require Commonwealth control, leadership or even involvement.[[37]](#endnote-34)

Examples in the transport and infrastructure portfolio illustrate these and other points. Most especially the Australian Public Service, as distinct from Commonwealth Ministers, resists organisations and agendas it does not control.

Nonetheless the Service also resists identifying or pursuing national issues that could require the Commonwealth to consider new policy issues or responses. There have been long standing requests and attempts by States, industry and the community to establish a national transport advisor, to consider national transport policies and to provide public exposure to deliberations. All have been vehemently resisted by the Australian Public Service.[[38]](#endnote-35)

At present there are two organisations that may provide advice on a narrow range of national transport matters; Infrastructure Australia and the National Transport Commission.

The defective governance for Infrastructure Australia is noted above.

The National Transport Commission suffered continuous bureaucratic interference and unnecessary ‘reviews’ until Government officials, including from Commonwealth, joined its ‘board’. The review leading up to this, conducted by the Department, recognised such arrangements did not accord with relevant guidelines but nonetheless recommended such a ‘reform’.[[39]](#endnote-36)

Subsequently, public services, include the Australian Public Service, have put to Ministers and the public associated ‘reforms’ some of which are not what they purport. These include establishment of a ‘regulator’ which is unable to regulate and a proposal for an economic regulator which also would not regulate. Proposals for road charges are misleading on a number of grounds including that the word ‘location’ is used to mean ‘type of road’. The national transport network is a misnomer as it is not a network in any relevant sense, and the national freight network has little relevance to freight.[[40]](#endnote-37)

Undoubtedly such disingenuity has contributed to a distinct lack of trust, even cynicism, about national transport policy and the role of public servants in it.

## 4. Conclusion

### 4.1 Gaps

The above demonstrates gaps in the draft report.

The review should consider implications of recent Constitutional clarifications for the Australian Public Service. This should include the respective roles of Departments and Statutory Authorities and relations with the States.

It should also consider whether development of the Australian Public Service culture under the assumption of unlimited Commonwealth Executive influence is appropriate.

The presumed necessity and merit of a ‘black letter law’ approach in the Australian Public Service also needs examination. The danger of such an approach is illustrated by the perverse governance arrangements stemming from inadequate and confused guidelines.

### 4.2 Themes

Substantial elements of the draft report presume benefits accrue from centralisation of power. It asserts outcomes would improve with greater central Department input and increased powers of Secretaries.

This may reflect contributions to the review. However, there are strong reasons to be cautious. Centralisation tends to runs counter to democratic principles. Also, the above suggests failures in existing centralised power have contributed to deficiencies in the Public Service.

The review did not enter the debate about whether ethics can be legislated. Perhaps wisely.

However, there is little debate that effective exercise of controls – governance – presumes honesty and respect by those with responsibilities of power in and stewardship over the legal framework.

The above discussion, and examples in the second part of this submission, challenge whether this presumption has been met by the Australian Public Service in transport and infrastructure.

Unless this changes trust in the Public Service will continue to diminish.

1. In this note government comprises organs of the state – Legislature (Parliament), Executive (Government) and Judiciary (courts). Government (capitalised) is the Executive. [↑](#footnote-ref-1)
2. Peter Gerangelos, *Section 61 of the Commonwealth Constitution and an "Historical Constitutional Approach": An Excursus on Justice Gageler's Reasoning in the M68 Case,* The University of Sydney Law School, Legal Studies Research Paper Series, No. 17/79, April 2018 [↑](#endnote-ref-1)
3. In this note Departments are those organisations created by the Executive, Authorities are created by the Parliament. [↑](#footnote-ref-2)
4. Chief Justice Robert French AC, *If they could see us now — what would the founders say?* John Curtin Prime Ministerial Library 2013 Anniversary Lecture. [↑](#endnote-ref-2)
5. A list of Commonwealth organisations is at: <https://www.finance.gov.au/sites/default/files/types-of-bodies.pdf?v=1> [↑](#endnote-ref-3)
6. While they are ‘independent’ of the Government, in the sense of not being under its direct control, the term is a misnomer. As discussed later in this note, the correct context of ‘independent’ means from independence from potential beneficiaries rather than the owner or originator of the organisation. [↑](#endnote-ref-4)
7. Examples: those which provide advice – the Productivity Commission; those which provide public services – the Australian Broadcasting Commission; those which trade – the Australian Rail Track Corporation.

Those which trade conform with the Competition Principles Agreement (1993) in respect of removal of the shield of the Crown, competitive neutrality and application of the Australian Competition and Consumers Act (xx) [↑](#endnote-ref-5)
8. Public Service Act (1999). [↑](#endnote-ref-6)
9. For example, APS Review, *Priorities for change*, 19 March 2019, p.19. [↑](#endnote-ref-7)
10. Pape v Federal Commissioner of Taxation (2009) 238 CLR 1;

Williams v Commonwealth (No 1) (2012) 248 CLR 156;

Williams v Commonwealth (No 2) (2014) 252 CLR 416. [↑](#endnote-ref-8)
11. Anne Twomey, *Public Money Federal-State Financial Relations and the Constitutional Limits on Spending*, Constitutional Reform Unit, Sydney Law School, Report No 4, 2014

 [↑](#endnote-ref-9)
12. The vertical fiscal imbalance arises because the Commonwealth raises more revenue than it spends on its own account, while the States raise less. This ‘necessitates’ financial transfers from the Commonwealth to the States. The two primary transfer mechanisms are: untied grants, payments without conditions; tied grants, conditional or specific purpose payments. Constitutional origins are explored in note ii (above). [↑](#endnote-ref-10)
13. Concluded in Williams (No 2) – see note ix (above). [↑](#endnote-ref-11)
14. Constitution s.96…. ‘*the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit’.* [↑](#endnote-ref-12)
15. Shirpa Chordia, *Section 96 of the Constitution: Developments in Methodology and Interpretation,* [2015] University of Tasmania Law Review 54. [↑](#endnote-ref-13)
16. Williams (No 2) see note viii (above), per French CJ, Hayne, Kiefel, Bell and Keane JJ:.

‘*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)*.’ [↑](#endnote-ref-14)
17. Ben Rimmer, Cheryl Saunders, Michael Crommelin, *Working better with other jurisdictions*, An ANZSOG research paper for the Australian Public Service Review Panel, March 2019. [↑](#endnote-ref-15)
18. The proposed Federal Relations Secretariat; at page 29 (note xv above).

It would be a mistake for this to be overseen by Senior Officers, since the Commonwealth officer must represent the Government, rather than act ‘nationally’. This is more than just a theoretical observation; the same approach has been attempted on several occasions in the transport portfolio – for example the National Transport Secretariat - and each time has failed. In my view failure has been due to Commonwealth interference, for example restricting the matters that could be considered by the Secretariat. See notes xvii and xxxiv (below). [↑](#endnote-ref-16)
19. An example of this process, national rail policy, is described <https://www.thejadebeagle.com/austral-obscura-2.html> [↑](#endnote-ref-17)
20. Grants commission: <https://www.cgc.gov.au/> [↑](#endnote-ref-18)
21. Williams (No 2) see note viii (above). [↑](#endnote-ref-19)
22. See note i (above). [↑](#endnote-ref-20)
23. This draws on articles in <https://www.thejadebeagle.com/federal-state-relations.html>. [↑](#endnote-ref-21)
24. In this note, the term ‘public duty’ entails decisions made with a government power e.g. not an arms- length contract. Examples include regulatory decisions, advice and information from a government agency. [↑](#footnote-ref-3)
25. See note vi (above). [↑](#endnote-ref-22)
26. Governance guidelines at <https://www.finance.gov.au/resource-management/governance/overview/> [↑](#endnote-ref-23)
27. Limits to the scope of the organisations are set out in the Competition Principles Agreement (1995). [↑](#endnote-ref-24)
28. See note xxiii (above). [↑](#endnote-ref-25)
29. Outlined in the Productivity Commission series Financial Performance of Government Trading Enterprises eg. <https://www.pc.gov.au/research/completed/gte0607> [↑](#endnote-ref-26)
30. ##  For example: Infrastructure Australia is an independent statutory body with a mandate to prioritise and progress nationally significant infrastructure. <https://infrastructureaustralia.gov.au/>

 [↑](#endnote-ref-27)
31. Nikolas Kirby, Simone Webbe, *Being a trusted and respected partner: the APS integrity framework*, An ANZSOG research paper for the Australian Public Service Review Panel, March 2019. [↑](#endnote-ref-28)
32. See: <https://infrastructure.org.au/our-board/>.

The matter is presumably known by the Australian Public Service; it has been raised on Mr John Menadue AO Pearls and Irritations site – a site widely read among senior public servants. It also was identified on the jadebeagle site which also is read by Commonwealth and State officials involved in infrastructure and transport. See for example: <https://johnmenadue.com/john-austen-revolving-doors-at-the-infrastructure-club/> [↑](#endnote-ref-29)
33. The practice is not limited to Commonwealth officials; senior State officials are on similar boards.

It is true employees of public sector organisations are on boards of industry peak organisations such as the Australasian Railways Association. However, those public sector organisations are not Departments; they neither represent nor advise government. It is also true senior public servants are on advisory boards of other organisations. However, those organisations, such as universities, are not primarily engaged in the promotion of private interests. Moreover, there is much more information about the nature of those organisations in terms of finances, control and membership. [↑](#endnote-ref-30)
34. For example see Senator Johnston’s comments on the second reading of the 2013 Infrastructure Australia Amendment Bill: <https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/83688ae6-f170-4f32-a8f6-d8a971c587c8/0153/hansard_frag.pdf;fileType=application%2Fpdf> (and note xxiii below). [↑](#endnote-ref-31)
35. As a corporate, Infrastructure Australia has issued highly contentious advice without adequate explanation. One example is the very brief recommendation for Sydney Metro which ignored the determining features of the project (tunnel size and Sydney city alignment) and was made without a stated cost - <https://johnmenadue.com/john-austen-infrastructure-advice-worse-than-expected/>. Another is the similarly brief recommendation for WestConnex; while the project’s scope fundamentally changed after Infrastructure Australia’s report, its assessment has not been publicly revised <https://johnmenadue.com/john-austen-doubts-about-infrastructure-go-beyond-sydney-metro/>. Other contentious advice includes an inadequately researched piece on public transport franchising - <https://johnmenadue.com/john-austen-does-infrastructure-australia-understand-its-ideas-for-public-transport-franchising/>and a strange recommendation to not proceed with the Maldon -Dombarton rail project <https://www.thejadebeagle.com/the-dog-that-didnt-bark.html>. [↑](#endnote-ref-32)
36. See, for example: <https://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> [↑](#endnote-ref-33)
37. See note xv (above). [↑](#endnote-ref-34)
38. Examples are provided in Austral Obscura at the jadebeagle.com, especially at notes xx, xxii and xxiii. [↑](#endnote-ref-35)
39. See note xxxv (above). [↑](#endnote-ref-36)
40. Examples:

Regulator unable to regulate: note xi of Australia Obscura <https://www.thejadebeagle.com/austral-obscura-2.html>

Proposal for regulator: <https://www.thejadebeagle.com/a-job-for-hollywood-harold.html>

Location instead of road class: note xi of Austral Obscura

National network: note xii Austral Obscura

Freight: <https://johnmenadue.com/john-austen-australian-freight-policy-after-the-chainsaw-part-3/> [↑](#endnote-ref-37)