

As indicated to Professor Harper, at the public forum on 22nd October there are two sections of the Draft Report which are of interest to the Institute, namely regulatory restrictions and infrastructure markets. As regard regulatory restrictions, *Section 8.3 Planning and Zoning* is of particular relevance to the Institute.

Planning and Zoning

The complexity of statutory zoning regimes throughout Australia clearly act to hinder competition policy, notably due to their diverse application between States and Territories, and even between Local Government areas within States and Territories. The intention to create a “*Standard Instrument - Principal Local Environmental Plan*” (commonly termed the LEP template) for NSW (s.33A Environmental Planning and Assessment Act 1979) has been at best gradually accepted by local government in that State. Even where the LEP template has been adopted, it is pointed out that the Development Control Plans promulgated by individual local government authorities still provide sometime unrealistic and unnecessary variation and divergence between local government areas.

The intent of s.33A to gradually implement a state wide template for planning and zoning has been arguably hindered by the reluctance of local government authorities and hence planning and zoning remains a substantial disincentive to achieve greater competition. Further some States such as NSW do not have an appellate mechanism to obtain a review of decisions where a rezoning application has been refused by a local government authority. This absence of a very necessary appellate mechanism also remains a significant hindrance to necessary changes to zonings in particular. The statutory zoning system in Australia is based upon the outdated *Town and Country Planning Act 1932 (UK)*, whereas the UK remodelled its planning and zoning system with the *Town and Country Planning Act 1947 (UK)*. It can be seen that the Australian land use planning jurisdictions have adhered to an outdated regulatory scheme which has not been used in the UK since 1947.

As you are aware an attempt was made to update the planning and zoning regime of NSW with a raft of new legislative measures in 2013, but these have now been effectively defeated by the NSW Legislative Council. An updating of the NSW regime is still awaited, and continues to be a necessary ingredient in the improvements required to ensure that existing regulatory restrictions over land use are modernised. The Institute also provided a submission on 18th December 2013 to the Issues Paper on Public Infrastructure released by the Productivity Commission, and in that submission substantial arguments were advanced regarding the impact of planning and zoning on infrastructure provision (copy attached).

Water

Turning now to the second matter of concern to the Institute, infrastructure markets. It is noted in the Draft Report at Section 9.1 (pages 127 -128) that water is canvassed in terms of reform progress. The Report states that reform of water markets has not progressed as electricity has and suggests that this may be the result of the absence of a national framework. The Institute agrees with these comments and has consistently stated that the absence of inter-jurisdictional harmonisation of water legislation between the States is the major hindrance in achieving a truly competitive water market. Whereas real property and strata titling is harmonised between the six States permitting ready comparisons between property markets irrespective of state location, this is not the case for the water market.

Indeed, a right to water is so very different to a land property right, and hence the risk associated with providing debt or equity funds against a right to water is an endeavour which is regarded as a high risk by banks and financial institutions. The commutation of rights to water can be declared by the relevant State minister with the holder of the right to water receiving arguably dubious

compensation for this valuable and often scarce natural resource. Water in all the State jurisdictions is described as private personal property, no different to that attached to a motor vehicle or a piece of furniture. Whilst private personal property clearly can have substantial value, it nevertheless cannot support a secure charge such as a first mortgage over real property, which can be readily foreclosed in the case a breach between the mortgagee or and mortgagor. Interest rates charged for first mortgages over real property are substantially less than the interest rates charged when the asset is personal private property.

The Institute submitted a response to the Productivity Commission Discussion Draft on *Rural Water Use and the Environment : The Role of Market Mechanisms* on 17 July 2006 and this Submission (copy attached) sets out in greater detail the foregoing arguments pertaining to the absence of harmonisation and the dysfunctional nature of State water market.



AUSTRALIAN PROPERTY INSTITUTE INC.

**SUBMISSION TO THE
PRODUCTIVITY COMMISSION
ON
PUBLIC INFRASTRUCTURE**

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PREFACE

This submission to the Productivity Commission has been prepared by the Australian Property Institute, NSW Division (API) with the assistance of the Spatial Industries Business Association, NSW Regional Management Group (SIBA), as part of ongoing joint collaborative research efforts and dissemination of factual and dispassionate information about property rights and spatial information in Australia.

This close disciplinary collaboration between the property profession and spatial science professionals has been further strengthened through the preparation of this submission to the Department. In addition, API and SIBA record their appreciation for the invaluable and numerous discussions that occurred during the preparation of the submission with members of the Submission Committee. This submission however does not necessarily represent the views of any of the individual members of the Submission Committee.

INTRODUCTION

This submission constitutes a response by API to the document entitled *Public Infrastructure: Issues Paper (Issues Paper)* released by the Productivity Commission in November 2013 for public consultation and input by 23 December 2013.

The overall need for an inquiry into the financing of major public infrastructure is supported by API. In particular it is noted with approval that the inquiry is also to examine the scope for reducing the costs associated with the provision, funding and financing of major public infrastructure.¹

It is also noted with approval that the inquiry by the Commission

*...will provide the basis for the Commission to make recommendations to improve outcomes in infrastructure provision for the benefit of the community as a whole.*²

In analysing the content of the *Issues Paper*, API has formed the view that there are two distinct elements embedded within the various matters canvassed: firstly land costs of infrastructure projects, and secondly other costs associated with such projects. With this understanding, this submission has been prepared recognising both elements have a number of aspects that require careful consideration. These aspects are dealt with in the main body of this submission following the introductory comments below.

API notes attempts at reservation of land for infrastructure projects (notably roads) were arguably contained within the first significant planning legislation in Australia, being the *County of Cumberland Planning Scheme Ordinance (Ordinance)*³, passed by the NSW Parliament on 27 July 1951. Apart from planning and zoning of land introduced by the *Ordinance*, reservations for infrastructure such as “county roads” were also incorporated, including compensation provisions for those owners injuriously affected by zoning (and in particular infrastructure reservations):

... [l]egislation providing for planning must ensure that those injuriously affected by a scheme and those from whom land is compulsorily acquired will not be unjustly treated, but the legislation must also ensure so far as possible that the community will not be forced to pay unreasonably. In order to achieve these results, there must be carefully detailed clauses in the Act saying whether compensation is or is not payable in particular circumstances, and just how the assessment of compensation is to be determined.

*Town and country planning legislation almost invariably provides that owners of property which is injuriously affected and loses value when the scheme comes into effect will be entitled to payment of compensation by the responsible planning authority, usually the local governing authority, or council.*⁴

¹ Productivity Commission (2013) *Public Infrastructure: Issues Paper* (Melbourne) November, 1.

² Productivity Commission, 1.

³ The County of Cumberland Planning Scheme Ordinance was prepared pursuant to the *Local Government (Town and Country Planning) Amendment Act 1945* (NSW).

⁴ Brown A.J. & Sherrard H.M., (1969) *An Introduction to Town and Country Planning* 2nd ed. (Sydney: Angus & Robertson Ltd), 365-366.

Nevertheless, in 2013 the reservation of land for public infrastructure is increasingly viewed as a significant cost, notably where projects are to be constructed in metropolitan areas and even in peri-urban areas. As the nature of settlement patterns continues to change with demographic shift, API believes the provision of major public infrastructure to service the core of major Australian cities will also result in increasingly large costs being incurred for the acquisition of land. It is a truism that the cost of land acquisition rises as public infrastructure projects are located closer to the core of Australian metropolitan areas.

This is evidenced by recently announced projects such as the Sydney West Connex which will be constructed primarily in sub-stratum to ameliorate surface acquisition cost. Notwithstanding, it is reported at least 100 properties will be compulsorily acquired for the West Connex project, and this number of properties still represents a potential significant financial cost for the NSW Government and the project proponents.

SIBA has offered the following comments:

SIBA members have a strong history and experience in supporting the construction and maintenance of a wide range of infrastructure projects across Australia. Through this experience SIBA members have seen the evolution within the construction industry away from project based approaches to deploying whole of lifecycle systems to reduce construction time and costs.

Location is the foundation of modern infrastructure projects from planning through to operations and maintenance. An effective location-based framework for the entire infrastructure lifecycle allows all tiers of government and private organisations to achieve the following:

- *Use evidence-based techniques to forecast infrastructure demands and predict impact of projects on communities, the environment as well as macro and micro economic measures*
- *Allow for well-targeted data acquisition programs including accurately surveyed land parcels with ownership and valuations, register of intent on land and current planning instruments from local, regional, state and federal. Leading to much shorter and accurate land acquisitions cycles*
- *Underpin environmental impact assessment and significantly improve stakeholder engagement from government to citizen to businesses through rich interactive mapping platforms that enable crowd sourcing of information relevant to the project's success as well as a direct community feedback channel.*
- *Support the design process by sharing accrued data, increasing the accuracy, efficacy and speed of design by the private sector e.g. suitability analysis, geological assessment and 3D modeling*
- *Reduce construction cost through minimisation of errors, speed of access to information and ability to rapidly rerun analyses to better respond to on the ground construction challenges*
- *Provide a ready platform to collate as built data that provides a foundation for effective operation and maintenance systems that will protect private investments and support the handover to the public of healthy infrastructure during the transfer stage*

Providing a location platform for infrastructure has positively impacted construction costs and is rapidly becoming standard operating practice for many engineering construction firms that have first-hand realised the value of a location based approach and are applying it to many of the own internal business processes.

Finally, API would be pleased to discuss any of the matters raised in this submission or provide any additional information that may be requested. Arrangements can be made by contacting Ms. Gail Sanders OAM, API NSW Divisional Executive Officer on telephone number 02 9299 1811.

COMMENTS AND RECOMMENDATIONS

The following comments and recommendations have been framed to respond to the sequence of the pages and headings in the *Issues Paper*.

What is public infrastructure?

*Does the proposed definition of public infrastructure capture all forms of infrastructure that should be considered by this inquiry?*⁵

Response:

The definition of public infrastructure arguably is caught by the phrase *economic infrastructure*⁶, however the other two descriptions (nationally *significant infrastructure* and *major infrastructure projects*) appear to be only marginally different, especially in the area of major or significant projects.

It is noted however by API that the phrase *economic infrastructure* is regarded as distinct from social infrastructure and yet there is a clear melding between economic and social infrastructure. An example of this is in the provision of major projects, such as hospitals which in themselves represent a melding of economic and social infrastructure.

*What types of nationally significant economic infrastructure should be within the scope of this inquiry?*⁷

Response:

Please see above.

The importance of public infrastructure

Trends in infrastructure delivery

*What mechanisms are in place to identify and measure the infrastructure needs of the community?*⁸

Response:

API considers that strategic planning for infrastructure projects currently in place is the primary mechanism where the infrastructure needs of the community are identified and measured. However, given that most infrastructure projects involve the use of land, the

⁵ Productivity Commission, 4.

⁶ Productivity Commission, 3, Box 1.

⁷ Productivity Commission, 4.

⁸ Productivity Commission, 6.

strategic planning for such projects tends to be reflected in reservations of land in statutory regimes such as *Environmental Planning and Assessment Act 1979* (NSW). The proponent of such public infrastructure presumably identifies and measures the need at an early date, which results in the reservation of the land corridor.

*How effective are they and what other mechanisms could be used?*⁹

Response:

The reservation of land corridors referred to above can be inadequate in size, too large, inappropriate in plottage, or incorrectly located. This issue is also commented upon later in this submission under **Costs of infrastructure projects**.

*What are the circumstances that might lead to governments over- or under-investing in infrastructure?*¹⁰

Response:

Please see above.

*What is the appropriate distinction between the funding and financing of public infrastructure?*¹¹

Response:

API concurs with the distinction between funding and financing as proposed by the Commission.

*How is public infrastructure currently funded and financed in Australia, including by the Commonwealth, the states and the private sector?*¹²

Response:

API offers no comment.

*How has the composition of different forms of funding and financing of public infrastructure in Australia changed? In particular, how has the role of the private sector in the provision of public infrastructure changed?*¹³

Response:

API offers no comment.

*What information is available to show trends in public infrastructure investment, funding and financing in Australia, including different levels of involvement by the public and private sectors, and different types of infrastructure?*¹⁴

⁹ Productivity Commission, 6.

¹⁰ Productivity Commission, 6.

¹¹ Productivity Commission, 8.

¹² Productivity Commission, 8.

¹³ Productivity Commission, 8.

¹⁴ Productivity Commission, 8.

Response:

API offers no comment.

The provision of public infrastructure

What models can be used to provide public infrastructure?¹⁵

Response:

API offers no comment.

How do alternative models vary in their ability to address real or perceived limitations compared with more standard forms of public sector procurement?¹⁶

Response:

API offers no comment.

How adaptable are the different models between different types of infrastructure?¹⁷

Response:

API offers no comment.

How do different models influence the efficiency of provision, funding and financing of public infrastructure?¹⁸

Response:

API offers no comment.

What is the extent of the use of PPP models in Australia for different types of public infrastructure including in comparison to other countries and over time?¹⁹

Response:

The committee was advised that until the 1990s, typically a major healthcare project in Australia would be expected to be delivered in an 8 year timeframe – 4 years planning and 4 years delivery. Projects were delivered primarily by the public sector, with construction undertaken using traditional lump sum contracts. In response to the need for major investment in the 1990s and a political desire to be seen to be delivering projects within the electoral cycle, projects began to be delivered using increasing private sector involvement in the planning and management stages to compress the process to around 4 years by overlapping the design and constructions stages. Procurement methods including construction management and fast-track were used, with significant time benefits, however the cost risk was borne by government. As a response, a number of subsequent projects were delivered using procurement methods which sought to shift the cost risk onto the contractor, allowing the contractor to control the design process and drive innovation to reduce cost.

¹⁵ Productivity Commission, 9.

¹⁶ Productivity Commission, 9.

¹⁷ Productivity Commission, 9.

¹⁸ Productivity Commission, 9.

¹⁹ Productivity Commission, 10.

Design and Construct and Design Development and Construct were typical project delivery mechanisms from the mid 1990s onwards. These contracts used outline 'performance' documentation to define requirements to be delivered for a lump sum. However in a number of cases these failed to properly define quality resulting in facilities which were seen as not being 'fit for purpose', or at best being seen as basic, utilitarian facilities that met minimum standards. High quality design, whole of lifecycle costs and long term flexibility were not considerations, with the lowest capital cost and timely delivery the primary focus. Recurrent costs such as labour, energy and maintenance were disconnected from the capital process – the legacy being buildings which are inefficient and expensive to operate.

The drive to provide greater project cost certainty for the government was applied to the engagement of private sector design consultants, with a move to complete fee tendering based on an estimated or agreed project value, rather than a fee based on a percentage of final cost. As a result, design consultants took greater commercial risk for correctly defining the required work to deliver the services and manage their activities within that fee. The move to competitive tendering also had the impact of significantly lowering consultants fees, impacting on profitability of practices and in some cases leading to reduced quality of services, using less qualified staff etc. A further impact on design consultants has been the adoption by public sector authorities, which in some cases look to transfer commercial risks onto the consultants beyond that established in industry-standard contract forms.

The move to increased private sector involvement has included operational as well as capital approaches, with mixed results: at Port Macquarie in NSW, a new hospital was delivered in 1995 using a BOOT (Build Own Operate Transfer) contract which includes a 10 year service component to operate the public hospital, reverting to the State in 2005. The concept was that the private sector could plan and deliver health services more cost-effectively, with the physical infrastructure planned to support its operational requirements rather than prescriptive guidelines used in the planning of public facilities. A similar approach was implemented at Latrobe Hospital in Victoria.

A criticism of the BOOT approach at the time was that it failed to ensure that sufficient emphasis was placed on defining the service requirement that the private operator was required to deliver on behalf of the state, and that the transferred facility would be a viable long-term asset. As result, until recently there has been reluctance by governments to return to contracting with the private sector for operation of public healthcare facilities.

Since the mid-2000s, the committee was informed the significant wave of investment in healthcare infrastructure (in particular) significantly progressed the shift to private sector involvement, particularly for larger flagship projects of over \$1 billion project value. PPPs have been the preferred model for many of these including the New Children's Hospital in Melbourne, Royal Adelaide and Sunshine Coast Hospitals. It is noted Managed Contracts using Guaranteed or Maximum Construction Sum have been used on similar scaled projects such as Fiona Stanley Hospital in Perth and Gold Coast University Hospital. A history of unsatisfactory outcomes of infrastructure PPPs in NSW (particularly in the transport sector) has caused a reluctance to adopt PPPs. The committee was informed that over time, PPPs are now gaining greater acceptance as

the level of experience in PPPs across Australia has increased and the model has become more refined and better configured.

PPPs are typified by highly developed output specifications defining performance and quality requirements, usually incorporating a reference design, aggressive risk transference, contractual milestones and a protracted tender assessment and negotiation process, involving an Expression of Interest and Request for Tender, followed by a preferred tenderer. This results in significant bid costs for each stage, in particular the formal RFT which requires a full design for detailed costing and assessment by the project sponsor. While a fee is paid to each tenderer, these typically do not reflect the actual costs of preparing the bid and as a result these costs must be reflected in the business cost structures, also limiting the number of PPPs that can be tendered.

Similarly only tier one contractors can readily carry the finance for such projects. As a result, the available pool of potential PPP tenderers is limited, although the number of PPPs is likely to increase significantly in coming years, notably on projects as small as \$50 million.

A significant aspect of PPPs has been the incorporation of long-term facilities management components to maintain the asset and also provide non-clinical services such as catering, engineering, linen and waste management. Over the life of the contract this represents a significant part of the operational cost of the facility. Similarly the engineering and building maintenance costs are considered on a whole of life basis, rather than a pure capital cost, meaning that additional cost of energy efficient design, sophisticated building management and control systems and higher quality, durable materials can be supported through appropriate life cycle cost analysis, leading to higher quality facilities that are less costly to operate.

A major impact of the PPP process is the tying up of significant resources at the bid stages, preventing these being available to work on other projects. As these are usually high value, high profile projects, the two to four tenderers will assemble teams of the highly experienced and talented consultants, the result of this being that other projects will have to be serviced from a diminished pool of potential consultants. This represents a major risk to those projects, particularly with less experienced consultants combined with low fees, aggressive delivery programs and limited preliminary planning work being undertaken prior to the commencement of the project.

Typically a medium sized healthcare project of \$100-200 million is planned for delivery in 3-4 years. This compares with up to 4 years on projects planned before the 1990s, with the result that projects are frequently initiated and budgets set with only limited preliminary planning work having been undertaken. Therefore, there is a risk of changes during design and construction as project requirements become more clearly defined, with potential impacts on both cost and time. Lump sum contracts for both design consultants and contractors in some instances seek to transfer risk for design change, although neither party is necessarily positioned to manage this risk.

*What is the nature and scale of efficiency benefits from PPPs, including those arising from bundling the design, construction and operation phases?*²⁰

²⁰ Productivity Commission, 10.

Response:

The committee is aware that there has been greater acceptance of PPPs as the level of experience across Australia has increased and the model has become more refined and better configured. Similarly the experiences from the UK, where the shortcomings of some of the original PFI projects in the 1990s were addressed through more sophisticated and better designed procurements models such as Supply Chain Alliances which provided for a more efficient use of private sector resources in addition to better quality outcomes for the built facilities, has been brought into the design of these models.

The consensus opinion is that the number of PPPs is seen to be likely to increase significantly in coming years, potentially on projects as small as \$50 million. Contracting specific clinical services, such as imaging, pathology and pharmacy, to private operators co-located within public health facilities is well established. Future developments are likely to include elective surgical, cardiology, rehabilitation, cancer services and casualty, potentially within primary healthcare settings as well as acute facilities.

Two significant PPP healthcare projects, Midland in Perth and Northern Beaches in NSW are currently being developed to provide combined public and private health services to be delivered by private providers with a long term concession. These projects in some respects are a reinterpretation of the original BOOT model, but with significant emphasis on addressing the perceived shortfalls of that model both in the specification of service requirements and also the physical infrastructure to ensure that the asset that is returned to the state at the end of the concession is maximised in its future value. The model further builds on the whole of life considerations that are able to be embedded into PPPs by the operator developing the design of the facility to reflect their organisational model and workplace culture. In addition, the impacts of improved workplace design and high quality environments are able to be measured, both in terms of clinical outcomes and staff attraction and retention with significant cost benefits to the operator.

*What are the costs or weaknesses of PPP models?*²¹

Response:

Please see above.

*Should the risks associated with PPPs be shared appropriately between governments and the private partner?*²²

Response:

Please see above.

*What principles should guide the consideration of the most efficient model for delivery and operation of public infrastructure (by the public or private sectors)?*²³

²¹ Productivity Commission, 10.

²² Productivity Commission, 10.

²³ Productivity Commission, 10.

Response:

The committee was informed that there are significant lessons to be drawn from the experiences in social infrastructure delivery over the past two decades. In particular, UK experience suggests that the low-cost, low-risk approach of early PFI/PPP projects has matured into a more sophisticated approach that considers the capabilities of the private sector to best provide value, balances the availability of resources of the industry, better defines client requirements, values design to innovate and deliver high quality and sustainable facilities and more appropriately apportions commercial risks to those best placed to manage them.

It is recognised that the above comments are focused heavily on healthcare infrastructure, however it was accepted that broader current Australian experience appears to be building on that approach.

Are current systems for raising revenue for public infrastructure services providing appropriate signals for efficient use and for new investments? If not, what scope is there to improve these systems?²⁴

Response:

API offers no comment.

Are there any coordination issues between the different levels of government and the private sector in the provision of public infrastructure? If so, what implications does this have for funding and financing decisions?²⁵

Response:

API has noted above the protection of proposed public infrastructure corridors through statutory land use planning may not necessarily provide the optimum land corridor. The API is uncertain whether coordination between the different levels of government necessarily occurs when an infrastructure corridor is reserved (and/or maintained). Clearly the private sector can be affected by this possible lack of coordination.

To what extent do coordination issues present barriers to efficient investment in public infrastructure?²⁶

Response:

Please see above.

Does the scope for each level of government to impose user charges or taxes and other charges affect the provision of public infrastructure, and/or the funding and financing mechanisms used?²⁷

Response:

API offers no comment.

²⁴ Productivity Commission, 10.

²⁵ Productivity Commission, 10

²⁶ Productivity Commission, 10

²⁷ Productivity Commission, 10

What factors affect a government's capacity to effectively contract with the private sector for the delivery of public infrastructure, including the expertise required to enter into complex and lengthy contracts?²⁸

Response:

API offers no comment.

What are the roles of the different levels of government in the implementation of different funding and financing mechanisms for public infrastructure?²⁹

Response:

Apart from the comments above, the API offers no comment.

What are the strengths and weaknesses associated with the current arrangements by which different levels of government interact?³⁰

Response:

Please see above.

Do these arrangements create any perverse incentives or influence the choice of different funding and financing mechanisms?³¹

Response:

Please see above.

Decision-making and institutional arrangements

What are the strengths and weaknesses of the current institutional environment within which decisions about the provision of public infrastructure are made?³²

Response:

SIBA has provided the following comments:

Location-based information and more specifically geographic information systems that are used to capture, manage, analyse and disseminate location information have a rich tradition across the globe in evaluating the risk associated with infrastructure investment by providing an evidenced based framework that builds accurate demand models

This approach would include the use of a rich and powerful 'layering' technique of the available data sources on the map canvas. Then fusing these sources into an effective representation of the potential market and risk associated with the planned infrastructure whilst allowing for multiple "what-if" analysis. Data sources can include but not limited to:

- *Current demographic data*
- *Forecasted demographic data*
- *Current infrastructure with performance metrics*

²⁸ Productivity Commission, 10

²⁹ Productivity Commission, 11.

³⁰ Productivity Commission, 11.

³¹ Productivity Commission, 11.

³² Productivity Commission, 12.

- *Planned infrastructure*
- *Overall current infrastructure projects e.g. NSW State Government 2020 plan*
- *Property ownership and valuations*
- *Planning instruments from all tiers of government*

How does this differ for different types of public infrastructure?³³

Response:

Please see above.

How does this influence the extent to which efficient investments are prioritised?³⁴

Response:

Please see above.

What decision-making and policy frameworks do governments and the private sector use to determine whether to invest in public infrastructure, and in particular, to evaluate the risks associated with infrastructure investment?³⁵

Response:

Please see above.

Funding mechanisms

What alternative funding mechanisms for public infrastructure should be considered in this inquiry?³⁶

Response:

API offers no comment.

What are the strengths and weaknesses of each, trade-offs to consider, and what principles should guide their use?³⁷

Response:

API offers no comment.

What are the different types of revenue streams that can be created to attract private sector finance for public infrastructure projects, such as user charges, availability payments and any other mechanisms?³⁸

Response:

API offers no comment.

³³ Productivity Commission, 12.

³⁴ Productivity Commission, 12.

³⁵ Productivity Commission, 12.

³⁶ Productivity Commission, 12.

³⁷ Productivity Commission, 12.

³⁸ Productivity Commission, 12.

How widely are these currently used for different types of public infrastructure?³⁹

Response:

API offers no comment.

What costs and benefits should be taken into account when considering the suitability of user charging for public infrastructure?⁴⁰

Response:

API offers no comment.

What impediments exist to the wider application of user-pay funding arrangements for public infrastructure, and how does this differ for different infrastructure types? How could such impediments be addressed?⁴¹

Response:

API offers no comment.

What are the interrelationships between project-specific risks (such as construction or demand risk) and funding and financing decisions?⁴²

Response:

API offers no comment.

How are these inter-relationships different for greenfields development as opposed to projects that augment existing facilities or networks?⁴³

Response:

API offers no comment.

What is the scope for further privatisation or 'capital recycling' of existing government assets to fund new public infrastructure?⁴⁴

Response:

API offers no comment.

What principles and processes should guide these decisions, and what trade-offs need to be taken into account?⁴⁵

Response:

API offers no comment.

³⁹ Productivity Commission, 12.

⁴⁰ Productivity Commission, 13.

⁴¹ Productivity Commission, 13.

⁴² Productivity Commission, 13.

⁴³ Productivity Commission, 13.

⁴⁴ Productivity Commission, 13.

⁴⁵ Productivity Commission, 13.

*To what extent could widespread use of this approach create incentives for governments to over-invest in infrastructure irrespective of efficiency considerations?*⁴⁶

Response:

API offers no comment.

Financing mechanisms

*What are the different types of private financing models? What are the advantages and disadvantages of these models?*⁴⁷

Response:

API offers no comment.

*To what extent is unavailability or cost of private financing for public infrastructure projects an impediment to efficient investments taking place?*⁴⁸

Response:

API offers no comment.

*What are the relevant costs and benefits that should be taken into account in weighing up the choice between public and private sector financing mechanisms?*⁴⁹

Response:

API offers no comment.

*How effective are existing arrangements and tools used to compare different financing mechanisms for public infrastructure?*⁵⁰

Response:

API offers no comment.

*To what extent does the early commitment of financing reduce or eliminate the potential development of efficient funding mechanisms (charges and taxes), particularly user charging systems?*⁵¹

Response:

API offers no comment.

⁴⁶ Productivity Commission, 13.

⁴⁷ Productivity Commission, 14.

⁴⁸ Productivity Commission, 14.

⁴⁹ Productivity Commission, 14.

⁵⁰ Productivity Commission, 14.

⁵¹ Productivity Commission, 14.

To what extent do different types of project risks change across a project's lifecycle, how does this differ depending on the type of infrastructure, and what implications does this have for the funding and financing mechanisms used?⁵²

Response:

API offers no comment.

Under what circumstances are specific risks better left to government to manage or bear (for example, due to the nature of the infrastructure service or the government's greater ability to pool risks) or transferred to the private sector?⁵³

Response:

API offers no comment.

What has been the experience in Australia of risk allocation in public infrastructure projects for different infrastructure sectors?⁵⁴

Response:

API offers no comment.

What is the capacity and willingness of private sector investors to take on and manage different types of risks?⁵⁵

Response:

API offers no comment.

Do governments have the capacity to resist accepting risks allocated to private providers, such as bailing out a private partner at risk of bankruptcy?⁵⁶

Response:

API offers no comment.

What are some of the alternative risk allocation models that can be used for public infrastructure, both for publically and privately financed projects?⁵⁷

Response:

API offers no comment.

What principles should guide the allocation of different types of project risks in public infrastructure projects?⁵⁸

Response:

⁵² Productivity Commission, 15.

⁵³ Productivity Commission, 15.

⁵⁴ Productivity Commission, 15.

⁵⁵ Productivity Commission, 15.

⁵⁶ Productivity Commission, 15.

⁵⁷ Productivity Commission, 15.

⁵⁸ Productivity Commission, 15.

API offers no comment.

So called 'Alliance' contracts are said to be effective risk-sharing mechanisms. Does experience bear this out?⁵⁹

Response:

API offers no comment.

Is there any evidence of government policies or regulation impeding private sector participation in the provision and financing of infrastructure projects?⁶⁰

Response:

API offers no comment.

What are the components, and the total size, of transaction costs associated with the use of private financing models such as PPPs?⁶¹

Response:

API offers no comment.

What is the extent of competition in the market for private financing of public infrastructure projects, what factors influence this and does this differ by the type of infrastructure?⁶²

Response:

API offers no comment.

What are the impediments to greater private sector involvement and financing of public infrastructure by institutional investors, such as superannuation or pension funds (for example, taxation arrangements)?⁶³

Response:

API offers no comment.

What is the scope for superannuation funds to benefit from financing more public infrastructure, and the reasons why they are not already doing so?⁶⁴

Response:

API offers no comment.

What has been the effect of the National PPP framework and guidelines, endorsed by the COAG in 2008, in assisting the public and private sectors to improve delivery of public infrastructure assets?⁶⁵

⁵⁹ Productivity Commission, 15.

⁶⁰ Productivity Commission, 15.

⁶¹ Productivity Commission, 15.

⁶² Productivity Commission, 15.

⁶³ Productivity Commission, 15.

⁶⁴ Productivity Commission, 15.

Response:

API offers no comment.

*Is there scope for further reform to PPP processes, and if so what measures should be considered?*⁶⁶

Response:

API offers no comment.

*What is the likely effect of recent changes to the taxation treatment of business losses made by eligible infrastructure project entities?*⁶⁷

Response:

API offers no comment.

*What is the rationale for such concessional tax arrangements?*⁶⁸

Response:

API offers no comment.

Financial risks to the Commonwealth

*What are the main factors that determine financial risks to the Commonwealth from the use of alternative funding and financing mechanisms?*⁶⁹

Response:

API offers no comment.

*Do these risks to the Commonwealth differ from the financial risks faced by state and local governments and the private sector when they fund or finance infrastructure, and if so, how?*⁷⁰

Response:

API offers no comment.

How are public infrastructure projects accounted for in government budget statements under different funding and financing models, including those financed by the private sector?

Response:

API offers no comment.

*How does this differ between jurisdictions within Australia and internationally?*⁷¹

⁶⁵ Productivity Commission, 15.

⁶⁶ Productivity Commission, 17.

⁶⁷ Productivity Commission, 17.

⁶⁸ Productivity Commission, 17.

⁶⁹ Productivity Commission, 17.

⁷⁰ Productivity Commission, 17.

Response:

API offers no comment.

What is the potential for mechanisms such as availability payments to impose limits on the Australian Government's total payment obligations and exposure to contingent liabilities?⁷²

Response:

API offers no comment.

Are there alternative mechanisms for funding and financing that will minimise financial risks to the Commonwealth?⁷³

Response:

API offers no comment.

Would more transparent budget treatment provide more certainty around financial risks to the Commonwealth?⁷⁴

Response:

API offers no comment.

Do concessional taxation provisions for infrastructure projects present a financial risk to the Commonwealth?⁷⁵

Response:

API offers no comment.

Costs of infrastructure projects

Trends in costs in construction

How does the cost of land vary in the provision of different infrastructure projects?⁷⁶

Response:

As mentioned in the introduction, the location of an infrastructure project rather than the specific infrastructure type has a crucial influence upon the cost of land to be acquired. Where land is relatively cheap in rural and regional areas of States and Territories, the acquisition of freehold rights for the infrastructure project tends to be the primary method of securing the infrastructure corridor, except for aerial high tension transmission lines which are traditionally secured by way of an easement. However, in more closely settled areas, notably along the Australian coast, the cost of securing land corridors for the construction of public infrastructure rises significantly. As the infrastructure is located

⁷¹ Productivity Commission, 17.

⁷² Productivity Commission, 17.

⁷³ Productivity Commission, 17.

⁷⁴ Productivity Commission, 17.

⁷⁵ Productivity Commission, 17.

⁷⁶ Productivity Commission, 19.

closer and closer to major city centres so the balance shifts between the increasing cost of freehold surface acquisition of corridors and the option of subsurface acquisition (and construction).

Given Australia has arguably the most urbanised population per capita globally, the cost of land acquisition for urban and inner-urban infrastructure projects will increasingly need to be addressed.

How significant is this cost as a share of the total costs of infrastructure projects?⁷⁷

Response:

As stated above, as the infrastructure projects are located closer and closer to Australian city centres so the cost, as a share of the total cost of the project, must rise. API is unable to provide information as to the actual share of total cost attributable to land acquisition. However the increasing cost of land acquisition is evident through the propensity of inner urban and CBD projects to be located in the sub-stratum, rather than at ground level requiring freehold land acquisition.

What policies might be relevant to lowering the costs associated with land acquisition and access (including reducing delays)?⁷⁸

Response:

As stated in the introduction, since 1951 reservations of land corridors were facilitated in NSW by the *County of Cumberland Planning Scheme Ordinance*, and by similar planning legislation in the other five Australian States. Such reservations for infrastructure projects present a dichotomy in terms of adequacy for corridor protection. Beneficially, the reservation of such corridors many years prior to the use for infrastructure enables the constructing authority to be assured of: firstly guaranteed access to the required land, and secondly acquisition at a historically lower cost than that which would have ordinarily been paid when construction actually commenced. Detrimentially, the early reservation of such corridors may be found when required to be either inadequate in size, too large, inappropriate in plottage or incorrectly located.

Much land required for infrastructure projects, notably in rural and regional parts of Australia is held in private ownership, and the prospect of future acquisition to facilitate the construction of a specific project may blight the land owner's property rights for many years. There is the recent example of the decision by TransGrid in April 2013 not to proceed with the acquisition of the corridor for 132kV high tension transmission line between Stroud and Taree. Private land owners along the route of the proposed corridor were arguably subject to blight since publication of a Needs Document by TransGrid in 2002.⁷⁹

⁷⁷ Productivity Commission, 19.

⁷⁸ Productivity Commission, 19.

⁷⁹ RPS Australia East Pty Ltd (2013) *TransGrid Review of Public Consultation: Draft Report* (Sydney) October.

Surface acquisition of easements for such facilities requires the payment of compensation in all States, Territories and the Commonwealth⁸⁰. However, where such infrastructure corridors are acquired in sub-stratum, compensation is not payable, except for actual damage done in the construction of the infrastructure.⁸¹ Clearly, infrastructure corridors acquired primarily in sub-stratum lower the costs associated with land utilisation, however anecdotal evidence suggests land owners above the affected sub-stratum can in some circumstances experience loss of property value.

SIBA has also provided the following comments:

There is no doubt in the professional opinion of SIBA that an open data policy that specifically targets the release of land based government information will have a significant impact on the lowering the costs associated with land acquisitions and access. These include planning instruments comprising of local, regional and State environmental planning information and Federal instruments such as native title.

SIBA has been active across the country in supporting the various evolutions of open data policies in each State and in particular, we suggest the following key issues being emphasised in Open Data Policy:

- *For Open Data to be of real value to the community, it needs to be available through non-proprietary APIs (Application Programmable Interfaces) not electronic 'paper' formats like PDF's, or equivalent to 3 Star maturity rating as per the 5 Star Linked Open Data model. We propose the policy emphasises this as a minimum maturity target;*
- *SIBA applauds the State and Federal Government focus on data quality and data quality (metadata) statements. However, as users are the ones who can determine if data quality levels are fit for their purpose, we suggest that the policy stresses that publishing data (with a quality statement) should take priority over improving data quality;*
- *Prioritisation of high-value datasets for publication should be done in consultation with industry and the community, through established forums such as the Location Intelligence ThinkTank community in NSW.*

Are there lessons from the experiences of different Australian jurisdictions and overseas about how to best cater for the land use and acquisition requirements for major infrastructure projects?⁸²

Response:

API considers that a number of examples provided to the submission committee suggested a lack of strategic planning for infrastructure projects resulting in inadequate provision of land. An example was provided of the Homebush Olympic site, part of which was owned by the NSW Government, subsequently sold and then rezoned, and then repurchased by the NSW Government for the construction of the Olympic Games facilities at an increased cost of land acquisition.

⁸⁰ E.g. *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) sets out at *Division 1* the entitlement to compensation.

⁸¹ E.g. s.62(1) *Land Acquisition (Just Terms Compensation) Act 1991* (NSW)

⁸² Productivity Commission, 19.

SIBA has also offered the following comments:

The former Rail Infrastructure Corporation of NSW had a strong policy of collating a survey accurate location database of all land in and around its holdings. This database included land ownership, planning instruments, contracts and agreements for rights of way to support infrastructure maintenance. It also allowed the former corporation to track parcel history and lineage by maintaining the legal recording dates. Combined with their assets in use, retired and planned, the location based system allowed for rapid assessment of land costs to maintain their services and plan for service extensions or withdrawals. It was also a valuable communication tool to its stakeholders including the community on planned maintenance, construction and disruptions via online lightweight consumer oriented mapping tools.

This approach should be adopted more broadly allowing for effective overlay of planned construction, project land access issues and what contracts and acquisitions may be required to support design, construction and maintenance phases.

Critically this approach will support easing community anxiety as being expressed around projects such as WestConnex and Sydney Light Rail project by providing mapping as a common language between citizens, government, engineers and other stakeholders mitigating local political disruption and infrastructure delays which turns into added cost.

What factors have contributed to the recent productivity growth in the construction industry?⁸³

Response:

The committee was informed that in 1985-86 the Australian construction workforce represented 7 per cent of the overall workforce, whereas in 2012-13 this percentage had risen to 10 per cent. It was explained to the committee that the recent productivity growth in the construction industry was attributed primarily to the greater use of information technology, smart mechanisation and new construction technology.

Are there impediments that have dampened the potential productivity growth achievable? If so, what are they?⁸⁴

Response:

The committee was informed that the recent growth in productivity in the construction industry had been subdued somewhat due to increasing labour costs and design inadequacies attributable to a lack of specialist advice in specific fields.

How does Australia's productivity growth and levels compare with other countries?⁸⁵

Response:

API is not able to offer a comment.

⁸³ Productivity Commission, 20.

⁸⁴ Productivity Commission, 20.

⁸⁵ Productivity Commission, 21.

What factors have contributed to the labour cost pressures in the construction industry, and how do these vary by type of activity, location and occupation?⁸⁶

Response:

API offers no comment.

To what degree have demand pressures contributed to wage pressures? Are the effects of this localised, for example, to non-metropolitan locations where significant mining-related construction is taking place?⁸⁷

Response:

API offers no comment.

To what extent has this occurred and for what types of equipment? Is it a transient phenomenon?⁸⁸

Response:

The committee was informed the cost of equipment and other capital used in construction has generally fallen, however some specialised large equipment has risen due to generally high global demand. Similarly, infrastructure and construction are now generally larger, more specialised and not repetitive, unlike the general construction sector.

To what degree are the trends in physical capital costs for the construction sector as a whole representative of those for infrastructure construction? If not, what factors explain any differences?⁸⁹

Response:

Please see comments above.

How important are the prices of physical capital inputs for total construction costs?⁹⁰

Response:

Please see comments above.

What are the main sources of intermediate input cost pressures and what factors lie behind these pressures?⁹¹

Response:

The committee was informed the construction sector counts for 30 per cent of intermediate inputs, manufacturing/professional accounts for 25 per cent of intermediate

⁸⁶ Productivity Commission, 21.

⁸⁷ Productivity Commission, 21.

⁸⁸ Productivity Commission, 22.

⁸⁹ Productivity Commission, 22.

⁹⁰ Productivity Commission, 22.

⁹¹ Productivity Commission, 22.

inputs, while scientific/technical services accounts for only 16 per cent of intermediate inputs. The committee was also informed that the cost of such inputs has risen in recent years due to increased global demand, and that interest rates fluctuation can often affect the price of imported inputs.

To what extent has increased intermediate input costs placed pressure on total infrastructure construction costs?⁹²

Response:

Please see comments above.

To what extent have changes in the international market supply of intermediate inputs created cost pressures?⁹³

Response:

Please see comments above.

What are the major drivers of overall infrastructure construction costs in Australia?⁹⁴

Response:

API offers no comment.

What factors have kept aggregate infrastructure construction output price rises to similar levels observed for all goods and services in the economy, and how can this be reconciled with the micro-evidence on rising construction costs for major projects?⁹⁵

Response:

API offers no comment.

What is the role of the demand pressures on costs associated with the resources boom, and what are the anticipated impacts as commodity prices and mining investment activity abates?⁹⁶

Response:

API offers no comment.

The Commission seeks information on profitability along the supply chain and its importance for the total cost of projects.⁹⁷

Response:

⁹² Productivity Commission, 22.

⁹³ Productivity Commission, 22.

⁹⁴ Productivity Commission, 23.

⁹⁵ Productivity Commission, 23.

⁹⁶ Productivity Commission, 24.

⁹⁷ Productivity Commission, 24.

API offers no comment.

What is the typical distribution of costs across the various phases of infrastructure projects, and what are the key factors that affect these costs (such as planning and environmental approvals, delay, procurement problems, specification variations and industrial action)?⁹⁸

Response:

API offers no comment.

To what extent can government policy address any of these factors?⁹⁹

Response:

API offers no comment.

What significant changes, if any, have occurred in the cost structures of major infrastructure projects over the last ten years? Are these changes specific to Australia or part of broader international trends?¹⁰⁰

Response:

API offers no comment.

International comparisons

To what extent does reliable and methodologically sound data exist on construction cost differentials across countries, and what cost differentials and trends do these reveal?¹⁰¹

Response:

API offers no comment.

What does the available evidence show about Australia's ranking with regard to the cost of major construction projects?¹⁰²

Response:

API offers no comment.

Which countries are the best comparators for Australia in regard to major project construction costs?¹⁰³

Response:

API offers no comment.

⁹⁸ Productivity Commission, 24.

⁹⁹ Productivity Commission, 24.

¹⁰⁰ Productivity Commission, 24.

¹⁰¹ Productivity Commission, 25.

¹⁰² Productivity Commission, 25.

¹⁰³ Productivity Commission, 26.

Workforce issues

What are different unions' coverage across major public infrastructure projects? How does this vary across jurisdictions and project types?¹⁰⁴

Response:

API offers no comment.

What is 'best practice' in the bargaining process between employers and employees and are there 'win-win' options that have not been fully exploited? How can these opportunities be exploited?¹⁰⁵

Response:

API offers no comment.

What is the quality of training for negotiations (for both employers and employee representatives)?¹⁰⁶

Response:

API offers no comment.

To what extent have bargaining arrangements (or their breakdown) between employees (and their nominated representatives) and management:

- *Reduced innovation and flexibility*
- *Increased wages above levels of comparable employees in other sectors*
- *Resulted in inefficient input choices*
- *Led to project delay, and lower labour and capital utilisation*
- *Led to industrial disputes, 'work-to-rules', go-slows, bans (such as on overtime), and employer 'lock-outs'?¹⁰⁷*

Response:

API offers no comment.

What has been the associated impact on costs, and how do they compare with other factors creating cost pressures? Have such costs changed over time, and if so, why?¹⁰⁸

Response:

API offers no comment.

How do work practice and industrial relations affect the costs of different types of construction:

- *By the area of infrastructure (rail, roads, ports, airports etc)?*

¹⁰⁴ Productivity Commission, 26.

¹⁰⁵ Productivity Commission, 27.

¹⁰⁶ Productivity Commission, 28.

¹⁰⁷ Productivity Commission, 28.

¹⁰⁸ Productivity Commission, 28.

- *By the value of the project?*
- *By the project duration?*
- *Between different jurisdictions?*
- *Greenfield versus brownfield projects?*¹⁰⁹

Response:

API offers no comment.

*Why do these differences arise?*¹¹⁰

Response:

API offers no comment.

*What have been the primary causes of industrial unrest?*¹¹¹

Response:

API offers no comment.

*How quickly have matters been resolved, and by what mechanism (consensus between parties, actions suspended by the Fair Work Commission, intervention by the former Australian Building and Construction Commission, or in cases of unprotected actions, through civil litigation)?*¹¹²

Response:

API offers no comment.

*To what extent do employee-employer relations vary with the characteristics of construction contractors, such as their size, profitability, cash flow risks, and position in the subcontractor chain? How do any such variations directly or indirectly affect construction costs?*¹¹³

Response:

API offers no comment.

*More broadly, to what extent does the market structure of the construction industry – and in particular, the relatively small number of prime contractors – affect employer/employee bargaining arrangements, and with what effects on costs?*¹¹⁴

Response:

API offers no comment.

¹⁰⁹ Productivity Commission, 28.

¹¹⁰ Productivity Commission, 28.

¹¹¹ Productivity Commission, 28.

¹¹² Productivity Commission, 28.

¹¹³ Productivity Commission, 28.

¹¹⁴ Productivity Commission, 29.

*To what extent has there been unprotected industrial action (actions not covered by a Fair Work Commission protected action ballot) or the threat of such actions?*¹¹⁵

Response:

API offers no comment.

*Is there any evidence that the abolition of the Australian Building and Construction Commission affected workplace outcomes in the construction of major infrastructure?*¹¹⁶

Response:

API offers no comment.

*To what extent have there been union rivalries and demarcation issues, and what have been the impacts?*¹¹⁷

Response:

API offers no comment.

*To what extent are such flexibilities used by parties to an agreement, and with what impacts on costs?*¹¹⁸

Response:

API offers no comment.

*Are there material and consistent differences between the outcomes of greenfields agreements and other enterprise agreements?*¹¹⁹

Response:

API offers no comment.

*What evidence and examples of greenfields agreements should the Commission be aware of, particularly for public infrastructure projects?*¹²⁰

Response:

API offers no comment.

*Is the regulatory process and framework around greenfields agreements appropriate?*¹²¹

¹¹⁵ Productivity Commission, 29.

¹¹⁶ Productivity Commission, 29.

¹¹⁷ Productivity Commission, 29.

¹¹⁸ Productivity Commission, 29.

¹¹⁹ Productivity Commission, 29.

¹²⁰ Productivity Commission, 29.

¹²¹ Productivity Commission, 29.

Response:

API offers no comment.

What have the roles been of governments and employer organisations, and any effects on the outcomes in the relevant part of the construction industry?¹²²

Response:

API offers no comment.

What is the overall role played by the work practices, the industrial relations system and its institutions in increasing costs in the construction industry?¹²³

Response:

API offers no comment.

What specific features of that system are at fault, and how could they be corrected?¹²⁴

Response:

API offers no comment.

What other associated reforms or cultural changes may be required for effective employee/employer relationships?¹²⁵

Response:

API offers no comment.

How can such changes be best implemented?¹²⁶

Response:

API offers no comment.

Is there any scope to reduce labour shortages by using less skilled labour or by using technologies that substitute for labour?¹²⁷

Response:

API offers no comment.

To what extent have skill shortages contributed to the cost pressures for public infrastructure construction projects?¹²⁸

¹²² Productivity Commission, 29.

¹²³ Productivity Commission, 30.

¹²⁴ Productivity Commission, 30.

¹²⁵ Productivity Commission, 30.

¹²⁶ Productivity Commission, 30.

¹²⁷ Productivity Commission, 31.

Response:

API offers no comment.

*What evidence is there for current shortages among specific occupations?*¹²⁹

Response:

API offers no comment.

*Are skill shortages likely to be persistent?*¹³⁰

Response:

API offers no comment.

*How have 457 visas (and their underpinning arrangements) remedied skill shortages, and with what impacts on costs?*¹³¹

Response:

API offers no comment.

*What are the appropriate policies to address skill shortages?*¹³²

Response:

API offers no comment.

Market structure and behaviours

*Does whether the client is public or privately owned have implications for the cost of the project? If so, why, and what is the evidence for this? If not, do other client characteristics affect the cost of the project?*¹³³

Response:

API offers no comment.

*Are there differences in contracting arrangements across firms?*¹³⁴

Response:

API offers no comment.

*Is it possible to identify 'best practice' contracting arrangements?*¹³⁵

¹²⁸ Productivity Commission, 31.

¹²⁹ Productivity Commission, 31.

¹³⁰ Productivity Commission, 31.

¹³¹ Productivity Commission, 31.

¹³² Productivity Commission, 31.

¹³³ Productivity Commission, 32.

¹³⁴ Productivity Commission, 32.

¹³⁵ Productivity Commission, 32.

Response:

API offers no comment.

*Is the market for major infrastructure projects efficient? If not, what is the source of the inefficiency and how can it be remedied?*¹³⁶

Response:

API offers no comment.

*Does the current market structure lend itself to the efficient provision of infrastructure?*¹³⁷

Response:

API offers no comment.

*What is the combined market share of the major Australian construction groups?*¹³⁸

Response:

API offers no comment.

*How profitable have the major Australian construction groups been in recent years, with particular regard to the domestic market?*¹³⁹

Response:

API offers no comment.

*How does this compare with the profitability of smaller construction groups?*¹⁴⁰

Response:

API offers no comment.

*Do the divisions of the bigger market players effectively compete against each other?*¹⁴¹

Response:

API offers no comment.

*Does either the client or the supplier of the instruction possess market power? If so, what is the extent of the market power and how does it manifest itself?*¹⁴²

¹³⁶ Productivity Commission, 32.

¹³⁷ Productivity Commission, 32.

¹³⁸ Productivity Commission, 32.

¹³⁹ Productivity Commission, 32.

¹⁴⁰ Productivity Commission, 32.

¹⁴¹ Productivity Commission, 33.

¹⁴² Productivity Commission, 33.

Response:

API offers no comment.

How significant are any obstacles to gaining market share for smaller Australian firms or locally-based international firms?¹⁴³

Response:

API offers no comment.

Why have there not been more international firms entering the market? Do local firms, particularly the big two suppliers, have an advantage? If so, what is the nature of this advantage?¹⁴⁴

Response:

API offers no comment.

Does the Australian market have any appreciable barriers to entry? If so, does this barrier apply to both domestic and foreign firms?¹⁴⁵

Response:

API offers no comment.

To what extent does market structure or any conservative procurement cultures affect the optimal uptake of new cost-reducing technologies?

Response:

API offers no comment.

To what extent does 'project' risk affect the cost of a project?¹⁴⁶

Response:

API offers no comment.

What are the major 'project' risks? How are the risks managed, and who bears these risks?¹⁴⁷

Response:

API offers no comment.

Is there scope for improved management of project risk to alleviate cost pressures?¹⁴⁸

¹⁴³ Productivity Commission, 33.

¹⁴⁴ Productivity Commission, 33.

¹⁴⁵ Productivity Commission, 33.

¹⁴⁶ Productivity Commission, 33.

¹⁴⁷ Productivity Commission, 33.

¹⁴⁸ Productivity Commission, 34.

Response:

API offers no comment.

Does the current market structure impose 'market discipline' on the delivery of major projects?¹⁴⁹

Response:

API offers no comment.

Are there appropriate incentives for suppliers to deliver contracts on time and on schedule?¹⁵⁰

Response:

API offers no comment.

Is there scope for the greater use of incentives to curtail cost increases?¹⁵¹

Response:

API offers no comment.

How prevalent is sub-contracting in the provision of major infrastructure?¹⁵²

Response:

API offers no comment.

Is there any difference in how the major construction companies, consortia and other smaller constructors sub-contract?¹⁵³

Response:

API offers no comment.

Is there market power in sub-contracting markets? If so, which markets and which parties exhibit this power?¹⁵⁴

Response:

API offers no comment.

What is the impact of sub-contracting on the overall cost of a project?¹⁵⁵

Response:

¹⁴⁹ Productivity Commission, 34.

¹⁵⁰ Productivity Commission, 34.

¹⁵¹ Productivity Commission, 34.

¹⁵² Productivity Commission, 34.

¹⁵³ Productivity Commission, 34.

¹⁵⁴ Productivity Commission, 34.

¹⁵⁵ Productivity Commission, 34.

API offers no comment.

Procurement and project management

*To what extent have poor contracting arrangements resulted in cost overruns for major projects? How can this be avoided in the future?*¹⁵⁶

Response:

API offers no comment.

*How do Australian procurement practices compare to equivalent overseas arrangements and private sector processes?*¹⁵⁷

Response:

API offers no comment.

*To what extent does the current procurement design favour market incumbents and exclude potential market entrants?*¹⁵⁸

Response:

API offers no comment.

*To what extent do Commonwealth and state local procurement policies and practices result in higher project development costs? Are these costs justified by increased competition in the supply chain or other possible benefits?*¹⁵⁹

Response:

API offers no comment.

*Do the government teams responsible for procuring major projects have the correct skill mix? If not, what measures are most likely to ameliorate these deficiencies?*¹⁶⁰

Response:

API offers no comment.

Other cost pressures

*Are current regulatory requirements appropriate for businesses tendering for public infrastructure projects?*¹⁶¹

Response:

API offers no comment.

¹⁵⁶ Productivity Commission, 36.

¹⁵⁷ Productivity Commission, 36.

¹⁵⁸ Productivity Commission, 36.

¹⁵⁹ Productivity Commission, 36.

¹⁶⁰ Productivity Commission, 36.

¹⁶¹ Productivity Commission, 37.

*To what extent are major infrastructure projects coordinated in terms of location and timing? Should there be more such coordinating, and if so, how?*¹⁶²

Response:

API offers no comment.

*What other significant cost drivers for public infrastructure construction projects have not been mentioned in this issues paper? What would be the most appropriate role of policy in relation to these drivers?*¹⁶³

Response:

API offers no comment.

¹⁶² Productivity Commission, 37.

¹⁶³ Productivity Commission, 37.

APPENDIX 1

AUSTRALIAN PROPERTY INSTITUTE INC.

The Australian Property Institute, (formerly known as the Australian Institute of Valuers and Land Economists), has enjoyed a proud and long history. Originally formed in South Australia over 87 years ago in 1926, the Institute today represents the interests of nearly 8,000 property experts throughout Australia.

The API, the nation's peak professional property organisation and learned society, has been pivotal in providing factual, independent and dispassionate advice on a broad range of property issues addressed by the Commonwealth and State/Territory governments and their agencies since the Institute was formed.

In addition, the Institute's advice has increasingly been sought by international bodies such as the United Nations, the Food and Agriculture Organisation (FAO) and the World Bank, evidencing a level of expertise within the API and its membership, which is recognised regionally and globally.

As a professional organisation the primary role of the Australian Property Institute is to set and maintain the highest standards of professional practice, education, ethics and discipline for its members.

Institute members are engaged in all facets of the property industry including valuation, property development and management, property financing and trusts, property investment analysis, professional property consultancy, plant and machinery valuation, town planning consultancy, property law, research and education.

Membership of the Australian Property Institute has become synonymous with traits and qualities such as professional integrity and client service, industry experience, specialist expertise, together with tertiary level education and lifelong continuing professional development.

APPENDIX 2

SUBMISSION COMMITTEE

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Sydney Office Manager,
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National Board Member,
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AUSTRALIAN PROPERTY INSTITUTE INC., NSW DIVISION

&

**AUSTRALIAN SPATIAL INFORMATION BUSINESS
ASSOCIATION LIMITED**

JOINT SUBMISSION TO

PRODUCTIVITY COMMISSION

ON

DISCUSSION DRAFT

**RURAL WATER USE AND THE ENVIRONMENT: THE ROLE OF
MARKET MECHANISMS**

17 JULY 2006

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ABBREVIATIONS

| | |
|--------|---|
| APINSW | Australian Property Institute, NSW Division |
| ASIBA | Australian Spatial Information Business Association |
| ASX | Australian Stock Exchange |

TABLE OF STATUTES

Petroleum Act 1923 (Qld)
Petroleum and Gas (Production and Safety) Act 2004 (Qld)
Water Act 1912 (NSW)
Water Act 2000 (Qld)
Water Management Act 2000 (NSW)

PREFACE

This joint submission to the Productivity Commission has been prepared by the Australian Property Institute, NSW Division (APINSW), and the Australian Spatial Information Business Association (ASIBA) as part of an ongoing joint research collaboration between the NSW and Queensland Divisions of the Institute and the Association.

This collaborative effort commenced in 2001 in response to the unbundling of water from land throughout Australia by State Governments in response to National Competition Policy, which was first advanced by the Commonwealth Government in 1992. Since this collaboration commenced in 2001 the three bodies have overseen and funded the preparation of an Initial Scoping Report which was prepared in 2002 by Dr Garrick Small FAPI, Associate Head (Teaching and Learning), with the Faculty of Design Architecture and Construction, University of Technology Sydney.

As a result, throughout 2003 Land & Water Australia and the Department of Agriculture Fisheries and Forestry, conducted a research project entitled "An Effective System of Defining Water Property Titles" which was prepared by consultants ACIL Tasman in association with Freehills. The Initial Scoping Report prepared by Dr Small formed a resource for this research project, and the Steering Committee for the project was chaired by the then President of the NSW Division of the Institute, John Sheehan.

This close disciplinary collaboration between property valuation and spatial information has been further strengthened through the preparation of this joint submission to the Productivity Commission.



Michael Easton
Chairman
Australian Spatial Information Business Association



Tom Webster
President
NSW Division
Australian Property Institute

INTRODUCTION

This submission constitutes a response by APINSW and ASIBA to the *Discussion Draft Rural Water Use and the Environment: The Role of Market Mechanisms* released by the Productivity Commission in June 2006, which has been issued for further public consultation and input.

The overall need for an investigation into the role of market mechanisms for rural water use is supported, and in particular it is noted that the National Water Initiative (NWI) states at *clause 58* as follows:

- i) facilitate the operation of efficient water markets and the opportunities for trading, within and between States and Territories, where water systems are physically shared or hydrologic connections and water supply consideration will permit water trading;*
- ii) minimize transaction costs on water trades, including through good information flows in the market and compatible entitlement, registry, regulatory and other arrangements across jurisdictions;*
- iii) enable the appropriate mix of water products to develop based on access entitlements which can be traded either in whole or in part, and either temporarily or permanently, or through lease arrangements or other trading options that may evolve over time;*
- iv) recognise and protect the needs of the environment; and*
- v) provide appropriate protection of third-party interests.*

It is noted with approval the many and varied issues addressed in the *Discussion Draft*, and the Productivity Commission is to be commended for its attempt to address these issues from the NWI. It is further noted that in preparing the *Discussion Draft*, the Commission has in respect of its terms of reference, endeavoured to:

- assess and report on the feasibility of establishing workable market mechanisms:*
 - to provide practical incentives for investment in rural water-use efficiency and water related farm management strategies; and*
 - for dealing with rural water-management related environmental externalities;*
- take into account relevant practical experiences in other areas, such as with establishing tradeable salinity and pollution credits;*
- recognise that the purpose of the study is to support the parties in achieving the water markets and trading outcomes and actions under the NWI; and*

- *consult with signatories to the NWI (including through the inter-jurisdictional water trading group) and the National Water Commission.*

In analysing the content of the *Discussion Draft*, APINSW and ASIBA have formed the view that there are *inter alia* two distinct elements embedded within the various matters canvassed, namely the need for improvements in “entitlement and allocation regimes”, and a range “of impediments to water trade” (p.xviii). With this understanding, this submission has been prepared recognising that both elements have a number of aspects which require careful consideration. These aspects are dealt with in the main body of this Submission following the introductory comments below.

Importantly, it is noted that the Commission in the *Discussion Draft* at p.xxi in the “Overview” observes that:

[g]round and surface water management systems are poorly integrated and return flows inadequately managed.

(Extract from *Table 1 The way forward*)

This point is well received, as it was noted with considerable interest the observation in the *Discussion Draft* (at p.xxii) that:

Groundwater and surface water are closely connected in many areas...for example, estimated that on average, for the Murray-Darling Basin, each 100 megalitres of groundwater extracted would reduce surface water by 60 megalitres.

This connectivity and lack of integration appears to be poorly understood by Government and resource users, and it is with some concern that some State based water management regimes appear to misunderstand or even ignore the relationship between ground water and surface water. For example, amendments to the (then) existing petroleum and gas legislation in Queensland by the *Petroleum and Gas (Production and Safety) Act 2004 (Qld) (PGPSA)* provide that petroleum tenement holders should have ground water rights.

In particular, *s.185 (1)* provides that a petroleum tenure holder may “take or interfere” with underground water in the area of the tenure if required as a result of drilling or production. The tenure holder may also use water for “another authorised activity”. The term ‘underground water’ means either artesian or sub artesian water. It is accepted that water naturally occurs in petroleum and gas deposits, and that the *PGPSA* amendments to the legislation sought to clarify the non-specific right to take water, which miners apparently asserted under *s.35(1) Petroleum Act 1923 (Qld)*, namely:

The permittee shall have the right-

(a) to take and divert water from any natural spring, lake, pool, or watercourse situated on or flowing through any land (including any private land or improved land) covered by the permit and to use such water for any purpose necessary or incidental to the permittee's prospecting and mining operation;

The Act also states at s.86 (a) that:

...a holder of an authority to prospect, a permittee or a lessee may, with the prior permission in writing of the Minister and subject to such terms and conditions as the Minister deems fit, which terms and conditions shall be set out in such permission, search for, obtain, store and use underground water (including artesian and sub artesian water) within the limits of the land covered or demised by the authority, permit, or lease, for any of the purposes for which such authority, permit, or lease was granted and for any purpose incidental thereto;

Of concern, is s.185 (3)PGPSA which states that there shall be “no limit on the volume of water that may be taken under the underground water rights”. Whilst petroleum tenure holders are required to account for the water taken and to make good any water taken, it is noted that s.124 Petroleum Act 1923(Qld) requires that weekly reports are required to be submitted to the senior petroleum technologist giving details amongst other things of “high pressure formation water encountered” (s.s.(e)). It is further noted that there is “no limit” on the volume of water that can be taken by a petroleum tenure holder, however the Queensland Department of Natural Resources and Mines is able to request records from the petroleum tenure holder of such monitoring.

It is further noted that s.186 PGPSA allows a petroleum tenure holder to authorise an owner or occupier of land in the tenure area, or that adjoins land in the “area of the tenure” to use water obtained under s.185 for domestic or stock purposes.

In addition, Part 27 PGPSA amends the Water Act 2000 (Qld) which provides for a class of persons called “priority group” (cl. 985) who have been unable to gain a water licence under the Water Act 2000 (Qld) because of the granting of underground water rights to a petroleum tenement holder. The holder is permitted through the amendment of s.214 Water Act 2000 (Qld) to supply water to this “priority group” at a “stated volume or at a stated rate”. The charges for the supply to the “priority group” is an amount limited to the cost of the supply and the cost of treating the water to make it fit for the purpose for which it is supplied.

The predicted impact of underground water taken under the PGPSA require that the petroleum tenure holder should prepare a threshold drawdown which is then, if agreed to by the Department of Natural Resources and Mines, taken as the threshold which ought not to be exceeded to protect existing bores. If the threshold drawdown is exceeded, this merely triggers the need for an impact report by the petroleum tenure holder if a

“substantive reduction inflow occurs”.¹ This impact report may include a new threshold, and can propose the deepening of existing bores by other water users, or alternatively monetary compensation to be paid to other water users as an alternative.

Research by APINSW in late 2004 revealed that petroleum exploration production caused 20,000 megalitres of water to be drawn annually in Queensland, whilst for coal and methane production approximately 40,000 megalitres of water was drawn annually in that State. Whilst these figures are not excessive, nevertheless in irrigable areas it is our joint view that water drawn as a result of coal and methane mining clearly has the potential to effect rural water availability.

We have previously expressed concern over the apparent duplication of water rights in the *PGPSA* and the effective creation of a parallel regime of water rights. These rights which are alleged by the mining industry to reside in a non-specific manner in the *Petroleum Act 1923* (Qld), were clarified in the *PGPSA* and it is our view that such rights have the potential to disrupt the existing water regime under the *Water Act 2000* (Qld). Anecdotal evidence from rural valuers in the Queensland Division of API suggests that the lowering of artesian and sub artesian water levels in bores utilised by farmers has already occurred in specific instances, with understandable concern expressed by rural users.

We are unaware of whether a similar situation occurs in other State water management regimes, however anecdotal evidence strongly suggests that this lack of connectivity between ground water and surface water management is a wide spread occurrence. It is the strong view of both organisations that this duplication of rights to water is undesirable, creating unnecessary complexity and indeed has the potential to confound the aspirations of the NWI for a transparent market in water.

As regards the other more specific issues raised in the *Discussion Draft*, APINSW and ASIBA convened an *ad hoc* Submission Committee representative of not only the disciplines of valuation and spatial information, but notably and importantly also of property law and theory. We are happy to discuss any of the matters raised in this Submission or to provide any additional information requested. Arrangements can be made by contacting Ms Gail Sanders, APINSW Executive Officer on telephone number 02 9299 1811 or Mr David Hocking, ASIBA CEO on telephone 02 6282 5793.

The following comments adopt the order of contents as detailed in the *Discussion Draft*.

¹ Verbal advice received by APINSW from Department of Natural Resources and Mines, 7 October 2004.

COMMENTS AND RECOMMENDATIONS

The following comments and recommendations have been framed to respond to the sequence of the pages and headings in the *Discussion Draft*.

p. xvii *Overview: Key Points*

We are aware that the market for water is already reflecting the increasing value of this natural resource. With the unbundling of land and water, there currently exists three significant unresolved issues, namely:

- the mortgageability of water rights
- the need for title indefeasibility
- compensation for compulsory acquisition

It is our view that legislative change needs to occur in each State water management regime to give standing to finance providers similar to that for land. Since the introduction of the Torrens system for land titling in the 1860s in colonial South Australia, security for borrowing against land property has been by way of a registered mortgage which is engrossed on the second schedule of the Certificate of Title.

It is the view that a similar arrangement should be created for borrowing against water rights in each State regime. Concern was expressed however with the issuing of title documents by various States which purport to provide a Certificate of Title similar to a Certificate of Title under the Torrens system. It is our view that such title documents are misleading both borrowers and lenders through their similarity with Torrens system certificates.

The proposal for a modified Torrens based system which will introduce the notion of indefeasibility of title is strongly supported. It is noted that in the body of the *Discussion Draft* (p. 41) that the Commission refers to the earlier submission by ASIBA which argues for the adoption of such a system. Indefeasibility appears to be poorly understood by both Government and resource users and in the second half of this submission this aspect will be discussed more fully, given the importance that our two organisations place on the proposal.

It is also our view that centralized title registers should be created by each State rather than decentralized registers, which have apparently been proposed by some wholesale licence holders in NSW irrigation areas. Decentralisation of registers would result in even more complexity and greater difficulty in ascertaining sales data to ensure transparency in valuation. The existing CHESS system operated by ASX is considered to be worthy of investigation by the Commission as on screen trading of water rights continues to develop. Such an electronic transfer system would be of assistance in the trading of

temporary water transfers in particular, enabling speedier settlement of transactions which by their temporary nature have some degree of urgency.

Furthermore, it is noted that under the *Key Points* the Commission refers to a “number of impediments to water trade” which have the effect of reducing the efficiency of the market for water. We concur with this view. However, it is considered that one of the primary impediments to more efficient trading is the absence of a verifiable sales database. Trading in land property occurs in an almost completely transparent market, which is facilitated through the use of online databases such as *RP Data* and *Residex*, together with *National Sales and Leasing Monitor*, the latter published by CPM Research. These three databases are well respected, and importantly are provided as commercial undertakings by the private sector rather than by any State Government agency.

Given that most land property is purchased using a percentage of loan funds from a bank or financial institution, it is common for the potential mortgagee (funder) to cause a mortgage valuation to be undertaken by a registered property valuer. The three online databases referred to above provide valuers with an understanding of the history and the current dynamics of the land property market place, and hence enable the prospective funder to ascertain any risk associated with the land property offered as security. Importantly, these databases have three common features:

- electronic
- currency
- comprehensive

It is considered that the development of similar sales databases for water are a necessary precondition for the conduct of a transparent market for water. It is our view that developing national databases such as www.waterfind.com.au have the potential to form the genesis of a sales database, and should be provided with research and development funding for this purpose.

It is also noted that a significant impediment is the uncompleted business of unbundling water entitlements from land property, and it is the view of the two organisations that in reality this process has barely commenced. For example, since 2000 existing water licences under the *Water Act 1912* (NSW) have been converted to volumetric access licences under the *Water Management Act 2000* (NSW). In this process, resource users have been presented with licences which provide for a share of a particular catchment in volumetric terms, and yet anecdotal evidence by ASIBA strongly suggests that the total volume of various catchments is often problematic.

Given the increasing and somewhat relentless increase in the value of water per megalitre, it is concerning that there remains significant questions about the veracity of the volumetric data for overall catchments. It is conceded that the metering of individual resource users is now increasingly more sophisticated under the various State water

management regimes, however attention to the overall veracity of the catchment databases is urgently required.

In summary, it is our strong view that accurate measurement of surface and ground water resources should be an overarching priority of the NWI, and it is with considerable disappointment that the recently established National Water Commission appears to have either misunderstood or ignored the urgency of this important task. We prefer the retention of volumetric descriptions of water access entitlements, rather than descriptions based on a percentage of the total catchment volume. The market place always seeks clarity to offset risk, and whilst the overall catchment databases may be inadequate and probably inaccurate, a volumetric description of the private access entitlement still remains a market preference in the view of our two organisations.

Finally, the issue of compulsory acquisition of water access entitlements under legislation such as the *Water Management Act 2000* (NSW) appears to have been ignored as an important impediment to water trade efficiency. Compensation for water access entitlements appears to founder on the strict legal description of such rights which are now personalty (personal property), and no longer realty (real property) since the unbundling of land and water in the above legislation.

Entitlement to compensation for the cancellation of water access is widely regarded as problematic, and unsurprisingly the *Water Management Amendment (Water Property Rights Compensation) Bill 2006* (NSW) was tabled in the Legislative Assembly on 6 April, 2006, as a private members bill. It proposes the inclusion of access licences as a defined *interest* under *s.4 Land Acquisition (Just Terms Compensation) Act 1991* (NSW).

An earlier somewhat similar proposal amending the *Water Management Act 2000* (NSW) was suggested by APINSW in 2002, on the basis that:

...the current Act displays a continuing lack of clarity in relation to the existing, s. 79 Compulsory acquisition of access licences, and[the Institute] proposes that amendments should be made to this part of the Act.

It is the Institute's view that the Act is quite limited in how compensation is to be determined, and it is considered that the relevant sections namely s.79 and s.87 should be amended to refer to the provisions of the Land Acquisition (Just Terms Compensation) Act 1991 (NSW). This is a procedure which has been adopted in other legislation, and is regarded by the Institute as an overdue amendment to this Act, and would maintain conformity with other legislation.

It was also noted that the Land Acquisition (Just Terms Compensation) Act 1991 does not include access licences as a registered interest in the definitions in s.4. The Institute considers that inclusion of access licence as a registered interest,

could easily achieve this recognition, given that usefully access licence is already defined pursuant to s.4 in the Water Management Act 2000 (viz. s.56).²

The 2002 proposal by the Institute was never adopted by the NSW Government, and it is interesting that the *Water Management Amendment (Water Property Rights Compensation) Bill 2006* (NSW) picks up the flavour of the original proposed amendments. Since 2002, there has been a unwillingness to amend the limited compensation provisions of the *Water Management Act 2000* (NSW), and this currently suggests that the 2006 *Bill* will not be supported either.

However, access to water is not wholly confined to licences under the *Water Management Act 2000* (NSW), and s.52 states as regards existing riparian rights, described as “domestic and stock rights” that:

- (1) *An owner or occupier of a landholding is entitled, without the need for an access licence, water supply work approval or water use approval:*
- (a) *to take water from any river, estuary or lake to which the land has frontage or from any aquifer underlying the land, and*
 - (b) *to construct and use a water supply work for that purpose, and*
 - (c) *to use the water so taken for domestic consumption and stock watering, but not for any other purpose.*

Importantly, at s.52 (3) “domestic consumption” and “stock watering” are defined as:

Domestic consumption, in relation to land, means consumption for normal household purposes in domestic premises situated on the land.

Stock watering, in relation to land, means the watering of stock being raised on the land, but does not include the use of water in connection with intensive animal husbandry.

It can be reasonably argued that the s.52 riparian rights evidence a clear connection with land which is a compensable interest under the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW). In this Act, an interest in land means not only a legal or equitable estate, but also an interest which is "in connection with the land", and hence capture s.52 rights to water.

There are other sections of the *Water Management Act 2000* (NSW) which permit the Minister to revoke or cancel the access licence, and it is well recognised that as personal property the State of NSW could decide to acquire such licences without compensation. Whilst s.79 provides for the compulsory acquisition of access licences however, s.79(2) states that a holder is:

² Letter from John Sheehan, [then] President, APINSW to Ms Dominique Tubier, Senior Policy Advisor Legislation, Minister for Fair Trading and Land & Water Conservation, 28 November 2002.

...entitled to compensation for the market value of the licence as at the time it was compulsorily acquired.

This is not compensation as envisaged in the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) which takes into account not just the market value of an interest in land, but a whole raft of heads of compensation. Such matters arguably enable a package of compensation to be calculated which fully compensates the dispossessed owner for the loss arising from the compulsory acquisition.

Notwithstanding the provisions in s.79(2), the State of NSW has no constitutional obligation to pay compensation for the compulsory acquisition of realty or personalty, and it has in the past avoided or reduced its obligation for compensation through specific amending legislation. For example s.18 *City and Suburban Electric Railways Act, 1915 - 1967* (NSW) amended s.124 *Public Works Act 1912* (NSW) to limit the compensation to be paid for land acquired for the route of the Eastern Suburbs Railway to the value of land at 27 February 1967.

In another example, *Clause 36 Schedule 1 Water Management Amendment Act 2005* (NSW), amended the *Water Management Act 2000* (NSW) through the provision of a new section s.87AB which provides that compensation is not payable by or on behalf of the Crown in respect to "relevant conduct" in relation to a water management plan arising from the following:

- (a) any act or omission, whether unconscionable, misleading, deceptive or otherwise.
- (b) a representation of any kind, whether made verbally or in writing and whether negligent, false, misleading or otherwise.

Importantly, the President of the Law Society of NSW wrote to the Minister for Planning and the Attorney General in March 2006 regarding s.87AB stating as follows:

The effect of this amendment is to remove people's right to seek compensation for any loss they may suffer as a result of the creation of a management plan that reduces their valuable water allocation rights under circumstances where the loss arises from any act or omission in relation to the content of the plan, its effect or government policy in relation to it, even if such act or omission is inter alia unconscionable, deceptive, false or misleading. That is, a person is prevented from seeking compensation for a real loss suffered by them even if it results from deliberately false and misleading acts or omissions done in bad faith where are intended to cause the loss actually suffered.

This is an unconscionable abrogation to the rights of individuals who suffer loss at the hands of the state or its agencies to recover compensation in circumstances where it is clearly deserved.

We are of the view that the Law Society of NSW is well justified in the concerns that are expressed above. Clarification of the compensation due to resource users in every State water management regime urgently requires clarification, in order that the market place can be confident that funds invested in water access entitlements are protected from abrogation by the State except on payment of full compensation.

p.41 Water title arrangements

As previously mentioned in this submission, we note with approval the citing by the Commission of the recommendations for a modified Torrens title for water by ACIL Tasman in association with Freehills. It is recognised that there may be views both in favour or against the notion of a Torrens title system (vis p.42), however it is with concern that the *Discussion Draft* appears to be inconclusive about the appropriateness of systems for titling (p.43).

Anecdotal evidence strongly suggests that there is confusion regarding the possible adoption of a modified Torrens title system for water entitlements, foundering on the notion of indefeasibility. We believe that the indefeasibility should merely provide protection against fraud and other misdealings in water entitlements as is the case in land property. It is not intended in the recommendations by ACIL Tasman in association with Freehills that there should be indefeasibility of the volumetric terms of an entitlement, especially when affected by climatic vicissitude or by catchment wide regulatory adjustment.

Indeed any debate over whether or not to adopt a modified Torrens title system for water as discussed in the *Discussion Draft* (p.41-43) should in our view be prefaced with a more fulsome examination of the twin central issues of data accuracy, and how might the “currency” of water be described. There is a need for the fundamental concept of base-line measurement to be addressed prior to any debate on the system of titling. Realistically before allocation of water entitlements and hence trading in those entitlements to occur, the accurate determination of the base-line is fundamental, and yet this has not occurred to date in any State water management regime to a satisfactory level.

It is recognised that currently it is not feasible to measure water with the same accuracy as land, however there are three fundamental actions which can resolve current unreliability and inconsistency, namely:

- Water measurement standards are required that are factual, reliable, consistent and provide a level of adequacy for prospective mortgagees (funders) as a descriptor of the asset offered for security. This is known as a Standards Based Model (SBM);

- Establishment of the data that does exist together with assessments as to quality and contemporaneity, and determination of the appropriate points of truth;
- Testing of the existing data against the SBM to determine what additional data is necessary to meet the required standard.

From a spatial information standpoint, the unbundling of water from land has occurred opposite to that which ought to have occurred. Namely, the allocation and trading in water access entitlements should not have occurred until the adequacy of data was proven, the issue of inconsistent methodologies resolved, and an SBM in place.

Indeed, the debate reported in the *Discussion Draft* regarding the adequacy of one titling system over another, is not only premature in some respects but arguably a distraction at this important juncture. We consider that the notion of indefeasibility which underpins the current Torrens title land system is a mandatory precursor to the adoption of whatever titling system that might ultimately be adopted. However, it is certain in the view of the two organisations that there should be national consistency for both titling and description of the water asset, and in particular that a true property right in water should be adopted as a nationally consistent stereotype, albeit managed at the State level. Realistically nothing less should be acceptable to intending mortgagees (funders) who seek security for loans advanced against water access entitlements.

We are also concerned that in the *Discussion Draft* there appears to be an over emphasis on salinity (p.151-180) which has been well researched in other fora. The issue of salinity is only one part of one of the four bullet points noted in the “Terms of Reference” (p.iv) for the Commission in the preparation of the *Discussion Draft*, and arguably is somewhat of a distraction from the necessary research focus on the establishment of workable market mechanisms and the achieving of a realistic water market and resultant trading activity.

In any event salinity and other pollutants are evaluated as part of the due diligence exercised by mortgagees (funders) when deciding whether to advance funds to a prospective purchaser of water access entitlements. Whilst salinity may have some topicality in the general print and electronic media, it is clearly an issue which is of some concern but somewhat marginal to the broader issue of the creation of a transparent water market.

APPENDIX 1

AUSTRALIAN PROPERTY INSTITUTE INC.

The Australian Property Institute, (formerly known as the Australian Institute of Valuers and Land Economists), has enjoyed a proud and long history.

Originally formed over seventy years ago in 1926, the Institute today represents the interests of more than 7000 property experts throughout Australia. As the nation's peak professional property organisation, the API has been pivotal in providing factual, objective and dispassionate advice on a broad range of property issues addressed by the Commonwealth and State/Territory governments since the Institute was formed.

In addition, the Institute's advice has increasingly been sought by overseas bodies such as the United Nations and the World Bank, evidencing a level of expertise within the API and its membership which is recognised globally.

However, as a professional organisation the primary role of the Australian Property Institute is to set and maintain the highest standards of professional practice, education, ethics and discipline for its members.

Institute members are engaged in all facets of the property industry including valuation, property development and management, property financing and trusts, investment analysis, professional property consultancy, plant and machinery valuation, town planning consultancy, property law, and architecture. Membership of the Australian Property Institute has become synonymous with traits and qualities such as professional integrity and client service, industry experience, specialist expertise, together with tertiary level education and life long continuing professional development.

The Membership of the Australian Property Institute is bound by:

- A Code of Ethics and
- Rules of Conduct

APPENDIX 2

AUSTRALIAN SPATIAL INFORMATION BUSINESS ASSOCIATION

In September 2001, the then Minister for Industry, Science and Resources, Senator Nick Minchin, released the Spatial Industry Action Agenda Report, *Positioning for Growth*.

One of the first things the Action Agenda process created was the Australian Spatial Information Business Association (ASIBA), which now, a mere five years later, represents the business interests of some 400 companies throughout Australia.

Since then, ASIBA has been an important contributor to key government policy imperatives. In 2003 the then Deputy Prime Minister, John Anderson, commissioned ASIBA, together with the NSW Division of the Australian Property Institute (API), to develop a definition for a property right in water. In March 2004, ASIBA presented to the Deputy Prime Minister the final report titled *An Effective System of Defining Water Property Titles*, which was the foundation for the National Water Initiative. Recently, the OECD has referred to this work as “world leading”.

Throughout its short life, ASIBA has contributed to policy debate on water, salinity science, bushfires and security. Governments now consider spatial information and technology to be essential infrastructure and management tools. ASIBA has also been a leader in bridging the web services gap with its recently completed and much lauded Spatial Interoperability Demonstration Project (SIDP). This Project produced technical documentation to support spatial interoperability solutions for emergency management and the insurance and utilities sectors.

Much of ASIBA’s work in delivering the interoperability Project has already been acclaimed around the world. The international standards body for spatial information, the Open Geospatial Consortium (OGC), has asked permission to use one of our documents as an international White Paper on interoperability. The Project is a tribute to cooperation across the public and private sectors, the states, territories and commonwealth.

As the premier business representative body in the spatial information arena, ASIBA speaks for its member firms in a range of forums including Standards Australia and the AGCC, amongst others. ASIBA also contributes significant public comment through its awareness programs in the Australian popular press.

ASIBA’s work on key policy issues will have a significant and positive impact on the Australian community and economy for many years to come.

APPENDIX 3

SUBMISSION COMMITTEE

Professor Spike Boydell, FAPI
Chair of the Built Environment
Faculty of Design Architecture and Construction
University of Technology, Sydney

Jeff Brown, (representing ASIBA)
Engineering and Land Surveyor
Yass

Chris Egan, FAPI
Senior Vice President
NSW Division,
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David Hocking,
Chief Executive Officer
Australian Spatial Information Business Association
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John Sheehan, LFAPI (Chair of Submission Committee)
Chair Government Liaison,
Past President (2001-2003)
NSW Division
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David Shuter, FAPI
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