

# The Treasury

## New Zealand Infrastructure Commission/Te Waihanga Bill 2019: Approval for Introduction - Te Waihang Bill 2019 Information Release

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### Information Withheld

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Office of the Minister for Infrastructure

Chair, Cabinet Legislation Committee

## **New Zealand Infrastructure Commission/Te Waihanga Bill 2019: Approval for Introduction**

### **Proposal**

- 1 This paper seeks approval for the introduction of the New Zealand Infrastructure Commission/Te Waihanga Bill 2019 (the Bill).

### **Policy**

- 2 On 7 August 2018, the Cabinet Government Administration and Expenditure Review Committee agreed that we need a step-change in how we plan and deliver infrastructure and as a result agreed in principle to establish a new independent infrastructure body by 1 October 2019 [GOV-18-MIN-0054 refers]. This in-principle decision was informed by a paper outlining the poor incentive structures which result in ad-hoc and short-term investment decisions that are often focused on the asset solution rather than the outcome sought.
- 3 In October 2018, consultation with the public, infrastructure asset owners and interested stakeholders was undertaken on the proposed functions and form of the new independent infrastructure body. Nearly 130 submissions were received, none of which opposed the establishment of an infrastructure body.

### ***Cabinet agreed to establish the New Zealand Infrastructure Commission, Te Waihanga***

- 4 On 13 February 2019, the Cabinet Economic Development Committee subsequently agreed to establish the new independent infrastructure body, and agreed the infrastructure body's functions and form [DEV-19-MIN-0021 refers]. Ministers later decided that the infrastructure body would be named the New Zealand Infrastructure Commission, Te Waihanga (the Commission).
- 5 The Committee agreed that:
  - 5.1 The Commission will be established as an autonomous Crown entity.
  - 5.2 The Commission will be governed by a board of directors comprising between five and seven members.
  - 5.3 Subject to amendment through the legislative drafting process, the purpose of the Commission should be to promote infrastructure that improves the well-being of all New Zealanders, by:
    - 5.3.1 developing a broad consensus on long-term strategy

- 5.3.2 enabling coordination of infrastructure planning, and
  - 5.3.3 providing advice and best practice support to infrastructure initiatives
  - 5.4 The Commission has the following five strategy and planning functions and the following three procurement and delivery functions:
    - 5.4.1 Strategy and planning functions include to:
      - 5.4.1.1 assess the condition of New Zealand's current infrastructure
      - 5.4.1.2 develop a long-term infrastructure strategy
      - 5.4.1.3 identify New Zealand's priority infrastructure needs and its ability to deliver on community expectations
      - 5.4.1.4 identify barriers to good infrastructure outcomes, and
      - 5.4.1.5 publish a long-term capital intentions plan.
    - 5.4.2 Procurement and delivery support functions include to:
      - 5.4.2.1 act as a 'shop-front' for the market and publish a pipeline of infrastructure projects
      - 5.4.2.2 produce best practice guidance on infrastructure procurement and delivery, and
      - 5.4.2.3 support project procurement and delivery.
  - 5.5 The Commission's key function is developing and publishing a 30-year infrastructure strategy through the following process:
    - 5.5.1 the Commission develops a strategy at least every 5 years, covering a period of 30 years
    - 5.5.2 the Commission is the owner of the strategy
    - 5.5.3 the draft strategy is provided to the Minister, who comments on the draft
    - 5.5.4 the Commission takes the Minister's comments into account and publishes the Commission's final strategy
    - 5.5.5 the final version is tabled in Parliament, and
    - 5.5.6 Government responds to the strategy through processes specified in legislation and decides which recommendations to adopt into the Government's infrastructure strategy.
  - 5.6 Both the Minister for Infrastructure and the Commission may commission work to identify barriers to good infrastructure outcomes.
- 6 The Bill gives effect to these decisions, with the following minor points of difference arising through the legislative drafting process.

*Statutory minimum number of Board members is three*

- 7 The Bill provides for the Commission to have between three and seven Board members. This allows for the target of five to seven to be achieved, while reducing the risk that the Board drops below the statutory minimum (for example, due to a Board member suddenly resigning due to ill health), which requires urgent action to appoint new Board members.

*The Commission has a main function rather than a purpose statement*

- 8 The Bill provides for the Commission to have a main function, as opposed to a purpose statement or objective. The Commission will operate under the Crown Entities Act 2004, which would give the Commission power to act for the purpose of performing its “functions”. The Bill establishes that main function of the Commission is to co-ordinate, develop and promote an approach to infrastructure that encourages infrastructure and services that improve the well-being of New Zealanders.
- 9 As anticipated in Cabinet’s decision on the purpose statement, the exact wording of the main function has changed from that previously agreed, but retains the main elements.

*The Bill does not define infrastructure*

- 10 The Commission should be enabled to work laterally and innovatively, particularly in carrying out its strategy and planning functions. Infrastructure is likely to evolve over time, including from new technologies that change what infrastructure looks like. Not specifically defining infrastructure in the legislation provides flexibility for the Commission over time, and prevents the Commission becoming overly concerned with interpreting legislative language when considering its work programme.
- 11 Also, there is very low risk of the Commission misunderstanding what infrastructure is and focussing on the wrong assets. The description of infrastructure used in Government documents is also included in the Explanatory Note to the Bill to assist with a general understanding of the term.
- 12 The approach taken in the Bill mirrors the approach taken in the legislation of all of the Australian state infrastructure bodies, whose establishing legislation does not define infrastructure.

*Drafting of the specific functions of the Commission*

- 13 Cabinet agreed that the Commission would carry out eight functions, split into two broad groups. The Bill contains the two broad groups of strategy and planning functions, and support functions, but provides for the eight specific functions agreed to by Cabinet through six broad functions in the Bill (in addition to the main function). The Bill provides the Commission with functions to:

*Strategy and planning functions*

- 13.1 develop broad public agreement on the approach under the main function, and on the long-term infrastructure strategy
- 13.2 provide advice in relation to infrastructure, including (without limitation) advice in relation to—

- 13.2.1 the ability of existing infrastructure to meet community expectations;
  - 13.2.2 current and future infrastructure needs;
  - 13.2.3 the priorities for infrastructure; and
  - 13.2.4 matters that prevent, limit, or promote the efficient and effective delivery of infrastructure and services y:
- 13.3 provide a long-term infrastructure strategy, and any reports directed by the responsible Minister.

*Support functions*

- 13.4 promote a strategic and co-ordinated approach to the delivery of current and proposed infrastructure projects:
  - 13.5 provide and co-ordinate information about current and proposed infrastructure projects:
  - 13.6 provide support services to current and proposed infrastructure projects.
- 14 While different in number, these provisions in the Bill provide for the Commission to carry out the functions agreed by Cabinet.

***Cabinet authorised Ministers to make subsequent policy decisions***

- 15 The Committee also authorised me, alongside the Minister of Finance, Minister of State Services, Minister of Transport and Housing and Urban Development and Minister for Climate Change to make subsequent policy decisions on related policy details consistent with policy proposals discussed in the paper prior to the introduction of legislation, and report back to Cabinet on the decisions taken [DEV-19-SUB-0021 refers].
- 16 The authorised Ministers made the following decisions:
- 16.1 The name of the infrastructure body will be the New Zealand Infrastructure Commission, Te Waihanga.
  - 16.2 The responsible Minister will be required to respond to the Commission's draft long-term infrastructure strategy within three months. This deadline is extended if a general election occurs during that period.
  - 16.3 The Commission will be required to publish the final long-term strategy within three months of receiving the responsible Minister's comments.
  - 16.4 The Government will be required to respond to the long-term strategy within six months of receiving the final strategy. This deadline is also extended if a general election occurs during that period.
  - 16.5 The mandate for agencies to engage with the Commission when beginning an infrastructure project will be delivered through a combination of amendments to the Government Rules of Sourcing and Cabinet Office Circular CO (15) 5: *Investment Management and Asset Performance in the State Services*.

- 16.6 The Commission's establishing legislation will provide that the Commission must make an offer of employment to identified Treasury staff carrying out functions that will transfer to the Commission and whose positions at the Treasury will cease to exist because of the establishment of the Commission. The offer of employment must be on no less favourable terms, and for similar roles (including location in Wellington).
  - 16.7 The Commission's establishing legislation will provide that contracts entered into by the Treasury for the establishment of the Commission are transferred to the Commission once it is established.
  - 16.8 The Commission's establishing legislation will include a provision requiring State sector agencies to provide information to enable the Commission to carry out its functions, which is discussed further below.
- 17 The Bill gives effect to these decisions.

*The information gathering power may attract particular attention*

- 18 The decision by Ministers to include information gathering provisions in the Bill acknowledges that the success of the Commission will rely heavily on its ability to gather information and that, as a Crown entity, the Commission will not have the same ability to gather information from government departments as Ministers do, and will not have Ministers' statutory power to request information from statutory entities.
- 19 The Bill provides for the Commission to request information that is necessary or desirable for it to perform its functions, but it cannot request personal information, information held by the Government Statistician and collected under the Statistics Act 1975, or information that a revenue officer must keep confidential under the Tax Administration Act 1994. It could only make formal requests from public service departments (except the New Zealand Security Intelligence Service and Government Communications Security Bureau), departmental agencies, statutory entities and the New Zealand Defence Force (which is a non-public service department).
- 20 Agencies will be required to supply the requested information, unless there are good reasons for agencies to refuse to supply the information, such as to protect legal professional privilege or for national security reasons.
- 21 Some of the information provided to the Commission may be commercially confidential or sensitive. To address this, the Bill provides that the Commission must not publish or disclose any information obtained under the information gathering power unless one of the following applies:
  - 21.1 the information is already publically available, or available to the public under an enactment (such as the Official Information Act),
  - 21.2 the information is in statistical or summary form,
  - 21.3 the publication or disclosure is with the consent of the person to whom the information relates or to whom the information is confidential, or
  - 21.4 the publication or disclosure is required by law.

- 22 The Commission will be subject to the Official Information Act 1982 . The Commission may transfer requests under that Act to other agencies, where the request is more closely connected to the functions of another agency. The Commission can also withhold under that Act information that is subject to an obligation of confidence, or where disclosure would be likely to prejudice the supply of similar information in the future (and subject to any overriding public interest considerations in favour of release). In responding to official information requests, I would expect the Commission to consult with those agencies that have provided information to it and/or the people who are the subject of the information.
- 23 I note that the information gathering provisions have been added as a subsequent policy decision and may attract particular attention as the Bill progresses. Other expert advisory bodies such as the Law Commission and Productivity Commission do not have such a power. However, they do not have the same essential need for data to be regularly sourced from across the State sector.

### ***Requirement to have regard to long-term trends including climate change***

- 24 A further provision has also been included in the Bill, requiring that when advising on current and future infrastructure needs, or the priorities for infrastructure, the Commission:
- 24.1 must provide advice with the objective of achieving infrastructure, and services that result from the infrastructure, that improve the well-being of New Zealanders, and
  - 24.2 must have regard to long-term trends that impact on, or are impacted by, infrastructure, including (but not limited to)—
    - 24.2.1 changes to demographics,
    - 24.2.2 the emergence and availability of new technology, and
    - 24.2.3 matters relating to the mitigation of effects of climate change (including through reducing emissions of greenhouse gases) and adapting to the effects of climate change, and
  - 24.3 may have regard to any other matters the Commission considers relevant.

### **Regulatory impact analysis**

- 25 The Regulatory Quality Team at the Treasury has determined that the regulatory decisions sought in this paper are exempt from the requirement to provide a Regulatory Impact Assessment as they have no or minor impacts on businesses, individuals or not for profit entities.

### **Compliance**

- 26 The Bill is consistent with:
- 26.1 the principles of the Treaty of Waitangi;
  - 26.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993;

- 26.3 the disclosure statement requirement (a disclosure statement has been prepared and is attached to this paper);
- 26.4 the principles and guidelines set out in the Privacy Act 1993;
- 26.5 relevant international standards and obligations;
- 26.6 the Legislation Design and Advisory Committee's Legislation Guidelines (2018 edition).

## Consultation

- 27 The following departments and agencies were consulted on the policy proposals for the Bill prior to the 7 August 2018 Cabinet Government Administration and Expenditure Review Committee meeting: Ministry of Business, Innovation and Employment, Ministry of Defence, Defence Force, Ministry of Education, Ministry of Health, Department of Corrections, Ministry of Transport, New Zealand Transport Agency, Department of Internal Affairs, Ministry for the Environment, and the State Services Commission. The Department of Prime Minister and Cabinet was informed.
- 28 In October 2018, the Treasury consulted with the public, infrastructure asset owners, and interested stakeholders on the proposed functions of the independent infrastructure body. Nearly 130 submissions were received and there were no submissions opposing the establishment of an infrastructure body. Broadly, submissions noted the current failures in how we plan and deliver infrastructure, and viewed the establishment of an infrastructure body as the opportunity to bring about the step change necessary for New Zealand.
- 29 The Treasury and the National Infrastructure Advisory Board held consultation sessions in Auckland, Wellington, Christchurch and Sydney to supplement the feedback received through submissions. These sessions were well attended by local government, financiers, construction firms, professional services firms and other interested parties. The Treasury also held a number of one-on-one meetings with capital-intensive government agencies, councils and strategic partners. A session dedicated to the initiative followed each of the Prime Minister's addresses in October 2018 to the Hugo Group of senior business executives in Wellington and Auckland. The Treasury has also briefed the Chair of the Prime Minister's Business Advisory Council.
- 30 Respondents acknowledged that, in order to be successful, the infrastructure body must have a degree of independence from Ministers to ensure its advice is viewed as credible and impartial, but it must also collaborate with Ministers in order to be influential. In order to achieve this, the body needs to be transparent in its advice and recommendations to the Government.
- 31 Furthermore, the majority of respondents suggested that ensuring the body has the right governance structure as well as the resources and mana to attract the right people will be critical to its ongoing success.
- 32 An Expert Review Panel, comprised of senior infrastructure individuals, supported the Treasury throughout the consultation process<sup>1</sup>.

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<sup>1</sup>The members of the Expert Review Panel are: Simon Allen, Chair, Crown Infrastructure Partners; Jim Betts, Chief Executive, Infrastructure New South Wales; Jenny Chetwynd, Strategy, Policy and Planning General Manager, NZ



- 33 The following departments and agencies were consulted on the policy proposals for the Bill prior to the 13 February 2019 Cabinet Economic Development Committee meeting: Ministry of Business, Innovation and Employment, Defence Force, Ministry of Education, Ministry of Health, Department of Corrections, Ministry of Transport, New Zealand Transport Agency, Ministry of Housing and Urban Development, Statistics New Zealand, Department of Internal Affairs, Ministry for the Environment, and the State Services Commission. The Department of Prime Minister and Cabinet was informed.
- 34 The following departments and agencies were consulted on this paper: Ministry of Business, Innovation and Employment, Defence Force, Ministry of Education, Ministry of Health, Department of Corrections, Ministry of Transport, New Zealand Transport Agency, Ministry of Housing and Urban Development, Statistics New Zealand, Department of Internal Affairs, Ministry for the Environment, Tertiary Education Commission, Housing New Zealand Corporation and the State Services Commission. The Department of Prime Minister and Cabinet was informed.
- 35 Labour, New Zealand First and the Green Party were consulted on the policy proposals for the Bill. The National Party has been briefed.

### **Binding on the Crown**

- 36 The Bill would bind the Crown. This has not been previously agreed.

### **Creating a new agency**

- 37 The legislation will create a new agency, the New Zealand Infrastructure Commission/Te Waihanga.
- 38 The Commission will be an autonomous Crown entity under the Crown Entities Act 2004.
- 39 The Bill will add the Commission to be listed in the Ombudsmen Act 1975, and so it will also be covered by the Official Information Act 1982. The Treasury has consulted with the Office of the Ombudsmen, which agrees with this standard approach.

### **Allocation of decision making powers**

- 40 The Bill does not involve the allocation of decision making powers between the executive, the courts, and tribunals.

### **Associated regulations**

- 41 Regulations are not needed to bring the Bill into operation.

### **Other instruments**

- 42 The Bill does not include any provision empowering the making of legislative instruments.
- 43 The Bill would allow the Minister to give a formal direction to the Commission to publish a report on any matter relating to infrastructure. This direction would be a direction for

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Transport Agency; Fiona Mules, National Infrastructure Advisory Board; John Rae, Chair, National Infrastructure Advisory Board; and Sarah Sinclair, Partner, Minter Ellison Rudd Watts and Board Member Infrastructure New Zealand.

the purposes of section 115 of the Crown Entities Act 2004, and the provisions of sections 114 to 115 of that Act would apply to the direction. This includes a requirement that directions be published in the *Gazette* and presented in the House.

- 44 Section 115A of that Act would not apply. That provision sets out that directions should be reviewed to consider whether they should remain in place. That provision is not necessary for the Bill's proposed directions that the Commission publish a report, which will become redundant once the report is published.

### **Definition of Minister/department**

- 45 The Bill defines the 'responsible Minister' in the usual way, as a Minister who, under the authority of any warrant or with the authority of the Prime Minister, is the person for the time being responsible for the administration of the Act. The Treasury has consulted with the Cabinet Office, which agrees with this standard approach.

### **Commencement of legislation**

- 46 The Bill will come into force on the day after the date of Royal assent.

### **Parliamentary stages**

- 47 The Bill should be introduced on Monday 8 April 2019, to allow for a first reading on Thursday 11 April, before the Easter recess. However, I am advised that completing the first reading on 11 April is unlikely, given two other Bills are scheduled to have their third reading on that day. The next available sitting day will be Tuesday 30 April 2019.
- 48 The Bill should be enacted, if possible, by 1 October 2019. I proposed that the Bill have category two priority on the 2019 Legislation Programme.
- 49 Achieving enactment by 1 October 2019 will require the select committee be given a four month deadline to consider the Bill (it could report back sooner), and that once the select committee reports back, the second reading, committee of the whole House stage and third reading occur swiftly. Any change to that plan is likely to cause a material delay.
- 50 I intend to refer the Bill to the Finance and Expenditure Committee for consideration, with a four month deadline to report the Bill back to the House.

### **Proactive release**

- 51 The Minister for Infrastructure intends to proactively release this paper within 30 business days of final decisions being taken by Cabinet. Redactions might be made if the Bill that as introduced differs from the descriptions in this paper, to protect Crown legal privilege over draft legislation.

### **Recommendations**

The Minister for Infrastructure recommends that the Committee:

- 1 note that the New Zealand Infrastructure Commission/Te Waihanga Bill holds a category 2 priority on the 2019 Legislation Programme, to be passed in 2019.
- 2 note that the Bill establishes the New Zealand Infrastructure Commission, Te Waihanga, as an autonomous Crown entity with the main function of co-ordinating, developing and

promoting an approach to infrastructure that encourages infrastructure, and services that result from the infrastructure, that improve the well-being of New Zealanders.

- 3 approve the further policy decision of authorised Ministers, that:
  - 3.1 the responsible Minister will be required to respond to the Commission's draft long-term infrastructure strategy within three months (with an extension if a general election occurs during that period);
  - 3.2 the Commission will be required to publish the final long-term strategy within three months of receiving the responsible Minister's comments;
  - 3.3 the Government will be required to respond to the long-term strategy within six months of receiving the final strategy (with an extension if a general election occurs during that period);
  - 3.4 the Commission's establishing legislation will provide that the Commission must make an offer of employment to identified Treasury staff carrying out functions that will transfer to the Commission and whose positions at the Treasury will cease to exist because of the establishment of the Commission, on no less favourable terms, and for similar roles (including location in Wellington);
  - 3.5 the Commission's establishing legislation will provide that contracts entered into by the Treasury for the establishment of the Commission are transferred to the Commission once it is established; and
  - 3.6 the Commission's establishing legislation will include a provision requiring State sector agencies to provide information to enable the Commission to carry out its functions.
- 4 agree that the Bill include a provision that when providing advice on infrastructure needs and priorities, the Commission must have regard to long-term trends including climate change, as well as having regard to any other matters the Commission considers relevant.
- 5 agree that the Bill bind the Crown.
- 6 approve the New Zealand Infrastructure Commission/Te Waihanga Bill for introduction, subject to the final approval of the government caucus and sufficient support in the House of Representatives.
- 7 agree that the Bill be introduced on Monday 8 April 2019.

- 8 agree that the Government propose that:
- 8.1 the Bill be referred to the Finance and Expenditure Committee for consideration;
  - 8.2 the Finance and Expenditure Committee be given a four month deadline to report back the Bill; and
  - 8.3 the Bill be enacted by 1 October 2019, which will rely on the second reading, committee of the whole House stage and third reading occurring swiftly.

Authorised for lodgement

Hon Shane Jones

Minister for Infrastructure