

INFRASTRUCTURE WESTERN AUSTRALIA BILL 2019

Committee

Resumed from 6 June. The Deputy Chair of Committees (Hon Adele Farina) in the chair; Hon Sue Ellery (Leader of the House) in charge of the bill.

Clause 10: Annual work programme —

Progress was reported after the clause had been partly considered.

The DEPUTY CHAIR: I draw members' attention to supplementary notice paper 118, issue 4, issued today, 11 June.

Hon PETER COLLIER: For brevity, I will not go through everything we have already discussed. Clause 10(5) states —

Infrastructure WA may make its annual work programme publicly available.

Why is that discretionary? Why can we not compel Infrastructure WA to make its annual report publicly available?

Hon SUE ELLERY: No other jurisdiction requires the relevant infrastructure body to publish its program under its respective legislation. In South Australia, the minister must consult and prepare a statement of expectations, but there is no requirement to publish that. Infrastructure Australia prepares a statement of expectations and a statement of intent, but it is not required to under the legislation.

If we look at similar bodies that already exist in Western Australia—for example, the WA Planning Commission, the Environmental Protection Authority, respective state government departments and the Metropolitan Redevelopment Authority—none have a legally mandated requirement to publish a business plan. Many of them publish retrospective documents; for example, they will publish their annual reports, which provide what has happened for that reporting period. Government trading enterprises require various reports to be prepared and published, but these reports are backwards looking. Strategic development plans, which are the equivalent of Infrastructure WA work plans, are not generally made public. We think that keeping “may” leaves it optional to Infrastructure WA to make that decision. It does not prevent IWA from publishing it, but it leaves it up to it to make that judgement. We would expect, given it is not prevented from doing so, that it may well make a decision to publish it annually, but it is not a requirement.

We want to give Infrastructure WA, as an independent body, the flexibility to make its own decisions—that is, use its own discretion about whether to publish an annual work program. The word “may” in that particular provision gives it the discretion to do that. There are already a number of documents that Infrastructure WA and/or the government must make publicly available. We have already been through some of those. They include the draft strategy and the accepted strategy; the government's response to the strategy; the annual state infrastructure program; guidelines for assessment of major infrastructure proposals; the summary of assessment of a major infrastructure proposal; annual reports on the government's progress in implementing the accepted strategy recommendations; any direction from the Premier to IWA; the statement of grounds for suspending or removing a board member or the CEO from office; and, of course, it will be required to prepare an annual report.

An example of a GTE is the Water Corporation. Under its act, it is required to prepare an annual report in addition to quarterly reports. That quarterly report must detail performance against objectives. The reports are submitted to the minister and, after consultation with the board, are made publicly available, but all commercially sensitive information is deleted. As I said, when we compare this legislation with the legislation in other jurisdictions, no other jurisdiction compels the relevant infrastructure body to publicly release this particular information. We will provide IWA with the discretion to do so, so that there is no prohibition on it, but we think that is a judgement best made by it.

Hon PETER COLLIER: I have to be honest, I am not actually convinced. The other two jurisdictions are by the bye; that is fine. We are taking a step forward in where we are at in infrastructure development throughout the state. To have something as—for want of a better term—open and transparent as we possibly can is much better than the alternative. Given the fact that the minister mentioned that a raft of other areas in this bill compel openness and transparency, I cannot for the life of me work out why we are putting a line in the sand against the annual work program.

Before I make a couple of other comments, can the minister clarify whether there would be any negative operational implications if the annual work program were compelled to be made publicly available?

Hon SUE ELLERY: I cannot give the member an example of it, but there may well be from time to time a confidential matter that it is working on, either for commercial-in-confidence reasons or it is doing some particular piece of work for government that may be confidential, which means it might not want to publish information about that. I have no other advice other than the purpose of including “may”—allowing it to be discretionary rather than mandated—was to reflect our view that Infrastructure Western Australia ought be

independent enough to make its own judgements about these things. We are not preventing it from doing it. We are giving it the discretion so that it can make a judgement based on the nature of the work and its views about whether it needs to be confidential, and the model that is applied elsewhere in Australia and the fact that a range of other elements will be published. In that sense, we think we have the balance about right.

Hon PETER COLLIER: The minister has just confirmed for me that it effectively does not have any negative implications in terms of the operations of this bill, aside from those commercial-in-confidence aspects. That is the same in any situation like this. Of course, if it is commercial-in-confidence, it will be treated as commercial-in-confidence. But for all intents and purposes, nothing is going to impede the progress of this bill, the implementation of Infrastructure WA, by replacing “may” with “must”, as far as I can see. I have not heard anything to the contrary. With that in mind, I am going to proceed with my amendment for a number of reasons, not least being that there has been no compelling reason not to progress with it.

I will take the minister to her comments when I first raised this issue, when the house last sat. The minister said —

Maybe I will just ask the member to clarify what he is asking for. IWA must, in consultation with the Premier, prepare a program and submit it, and that program has to cover certain activities. IWA must inform the Premier and then it may make that publicly available. If the member’s question is similar to the question that was asked before about whether there is a fine or whatever, no, there is not, but it is anticipated that IWA, like all such organisations, will meet its obligations under the legislation. The Premier of the day will not be happy if it does not.

To me, that is not sufficient comfort. If the Premier is not happy, that is not sufficient comfort to me that we are providing that openness and transparency. On 18 May 2016, the now Premier was quoted as saying —

“The public interest must come first, transparency must come first, openness must come first.

In this instance there is an opportunity for that transparency, openness and public interest not to come first. If Infrastructure Western Australia decides, and we do not know why, that it is not going to release its annual work program and make it publicly available, or if the Premier decides that it is not going to happen, then it is not going to happen. The minister just said that it will not have, dare I say it, any negative implications in terms of the operation of this bill, and that it provides exactly what the Premier promised in opposition—openness, transparency and being in the public interest. I do not think this is an issue the government should oppose, if it is true to its word on openness and transparency. If the minister had stood up five or 10 minutes ago and said, “Yes, this will stymie the bill because it will stifle the operation of Infrastructure WA”, I would not move the amendment, but she has not been able to do that. The “Special Inquiry into Government Programs and Projects: Final Report” states —

The Special Inquirer believes reform is required in the following areas:

- introduce an Infrastructure WA entity to enhance planning and development;

Yes, it says that, but it also says —

- provide information about major projects in an accessible and transparent way to the public;

The government cannot provide Infrastructure WA but not provide openness and transparency, as the special inquirer said was needed. The special inquirer was unambiguous. I repeat: the special inquirer stated that the government should —

- provide information about major projects in an accessible and transparent way to the public;

The report of the special inquiry also states —

Areas requiring actions to change public sector culture and attitude are as follows:

- improve transparency on the progress with major projects by requiring continuous disclosure;

I will repeat that in case members missed that, because it is compelling —

- improve transparency on the progress with major projects by requiring continuous disclosure;

The annual work program is the very first step. The bill states —

Infrastructure WA may make its annual work programme publicly available.

That is not good enough. If we are to adhere to the recommendations of the special inquirer, which are thrown in our face quite consistently and are one of the reasons, but not the sole reason, for Infrastructure WA, we cannot nitpick and be selective with the special inquirer’s comments. He also said —

More discipline in the following areas will improve outcomes through:

...

- reporting on benefits realisation for major projects;
- setting and achieving financial targets;

They are all relevant to this. As I have said, the special inquirer stated that information about major projects should be provided in an accessible and transparent way to the public and that there should be improved transparency on the progress of major projects by requiring continuous disclosure. With that in mind, and given that this amendment is not going to have any negative impact on the operations of IWA and that the Premier himself stated that the public interest, transparency and openness must come first, I find it extraordinary that the government would oppose a very minor amendment to this bill, which would ensure everything that Labor has claimed it wants to achieve, both before and since the election, with this bill. It is extraordinary. As I said, I cannot for the life of me work out why the government would oppose this amendment. I think I have made my point. In the interests of openness and fairness and in the interests of ensuring that the Premier is true to his word, I move —

Page 9, line 19 — To delete “may” and substitute —

must

Hon SUE ELLERY: I indicate that the government will not support the amendment. I want to correct the record on a couple of things the member just said. It might just be shorthand, but he made reference to the Premier making a judgement on whether to publish the annual work program.

Hon Peter Collier interjected.

Hon SUE ELLERY: I am sorry, but that is what the member said. That is not what the Premier does; the board makes that judgement. The honourable member also made the point that there would be no diminution or damage to the operational capacity of IWA if this annual work program were to be released. That is a matter of judgement. The government’s view is that that program may well include work of a confidential nature that IWA has been asked to conduct, and that might not be appropriately published. It is important for the chamber to note that the assessments of each project will be made public; the guts of the work that is done by IWA will indeed be made public. The chamber will decide what the chamber will decide. The government does not believe that it is necessary to mandate that the work program be made public, given that all the other elements, including the critical bit, which is project by project, will indeed be made public.

Hon PETER COLLIER: To clarify one point, I acknowledge that some areas of the annual work program may be commercial-in-confidence. Of course, those parts will not be made public—I have stated that categorically—but for everything else, there is absolutely no reason that the information contained in the annual work program should not be made publicly available.

Hon SUE ELLERY: I draw the attention of the member to the fact that there is no discretion in the amendment he has moved. It does not say “except if matters are commercially sensitive or are of a confidential nature”. The amendment seeks to mandate it. The member has provided no exemptions or qualifications to that; he is just requiring that the annual work program be made public. If the chamber is to accept the member’s amendment, then confidential or otherwise, commercially sensitive or otherwise, the annual work program must be published.

Hon PETER COLLIER: Is that the same for every other aspect of accountability within the bill? I asked the specific question with regard to commercial-in-confidence and the minister stated that in contracts, the words “commercial-in-confidence” mean that they are commercial-in-confidence. The minister stated that in her second reading response. The government cannot have it for one aspect of the bill and not others. If it is commercial-in-confidence, it is the same as any statutory requirement; it is commercial-in-confidence within a government department. That does not need to be stated within the act.

Hon SUE ELLERY: I draw the member’s attention to clauses 22 and 66 of the bill; they need to be read together. The answer I gave in the second reading reply refers to what might be termed “secondary information”; that is, information provided to Infrastructure WA by another agency. An agency might say that in giving the information to IWA, it is —

... the subject of a duty of confidentiality or secrecy or is of a commercially sensitive nature.

That is under clause 22(3). Clause 66 talks about restrictions on the disclosure of sensitive information, with subclause (1) referring to sensitive information as being identified under section 22(3). Those are the confidentiality provisions, the commercially sensitive provisions, that apply to information that is provided by an agency to Infrastructure WA. The annual work program is IWA’s work program. The document is produced by IWA and does not necessarily include information that has been provided by another agency. That is why I make the point that the effect of the amendment that the member has moved, without any qualifications, does not give the kind of comfort I think he thinks it will give. He should rely on my answer to the point he raised in his contribution to the second reading debate, because there I was talking about the information provided to IWA, not the documents produced by IWA. There is a difference.

Hon PETER COLLIER: Will that be the same situation with the state infrastructure strategy?

Hon SUE ELLERY: The state infrastructure strategy must be released. I think it is mentioned in clause 9.

Hon Peter Collier: Yes, I can see it is clause 15(4).

Hon SUE ELLERY: Yes, clause 15(4).

Hon Peter Collier: Therefore, that provision is there.

Hon SUE ELLERY: No, that is a big-picture strategy that is different from a document that sets out the specifics of the work that is going to be conducted by IWA.

Hon MICHAEL MISCHIN: It might assist me to understand the import of both the amendment Hon Peter Collier is moving and what the minister is saying in opposition to it if she could assist me with a few aspects of clause 10. Just to go back a stage, clause 9(1) states —

Infrastructure WA may, with the approval of the Premier, —

So it has no discretion there —

make advice or a report prepared in the performance of a function under this Act publicly available.

The broad functions are set out in clause 8. Clause 9(2) says —

This section does not apply to a report or other thing that must or may be made publicly available under another provision of this Act.

Is the power to make IWA's annual work program publicly available under clause 10(5) captured or affected at all by the restrictions in clause 9, or is it a clearly independent and absolute discretion residing in Infrastructure WA?

Hon SUE ELLERY: It is the latter. It rests with Infrastructure WA. This is captured by clause 9(2), which the member read out. It says —

This section does not apply to a report or other thing that must or may be made publicly available under another provision of this Act.

Hon MICHAEL MISCHIN: Infrastructure WA's annual work program is regarded as a public thing for the purposes of clause 9(2). What exactly will an annual work program look like? Clause 10 says —

- (1) Infrastructure WA must, in consultation with the Premier, prepare an annual work programme.
- (2) Each programme must be submitted to the Premier before the beginning of the financial year to which it relates.
- (3) Each programme must cover the key activities that Infrastructure WA proposes to undertake in the year to which it relates.

If Infrastructure WA proposes to undertake something that is not covered in its work program, it has to tell the Premier. What is meant to be in this annual work program that is so confidential? Can the minister give us some idea of what Infrastructure WA is putting in its annual work program? Is it buying staplers or a photocopier for Infrastructure WA? Is it Infrastructure WA's agenda and priorities for the year? What would it look like?

Hon SUE ELLERY: I appreciate that the honourable member was out of the chamber on urgent parliamentary business when we were last debating this, but we went through this matter. The easiest explanation I can offer him is that it is effectively a business plan. As is captured in the very simple language of clause 10(3), it will set out the key activities going forward that Infrastructure WA will undertake in the course of the year.

Hon MICHAEL MISCHIN: Can the minister outline what those activities might be? Will it be: "We will be looking in the coming year to transport out to the regions" or "We are going to be looking at the number of schools we are building in the metropolitan area" or things of that nature, or does it descend into further detail than that?

Hon SUE ELLERY: As I said, the member was out of the chamber on urgent parliamentary business, but what was canvassed in our last debate is that Infrastructure WA may well set out those things. It is for the board to determine what they will be, but it may set out the things it is going to look at or state that it will continue work it was doing previously. It will depend entirely on the judgements made by the board. If you like, the framework will have been already set by the strategy, which will have been already published, but it will indeed set out the specifics, as determined by the board, that Infrastructure WA is going to cover.

Hon MICHAEL MISCHIN: Will the powers that Infrastructure WA exercises under clause 11 be governed to any degree by what it says it is planning to do in the coming year?

Hon SUE ELLERY: Clause 11 is quite separate. It does not relate specifically to the annual work program. The heading of clause 11 is "Powers" and it sets out the broad powers that Infrastructure WA has in order to carry out its functions. It is not of itself a clause directly related to the annual work program.

Extract from *Hansard*

[COUNCIL — Tuesday, 11 June 2019]

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Deputy Chair; Hon Peter Collier; Hon Sue Ellery; Hon Michael Mischin

Hon MICHAEL MISCHIN: I understand that. We will get onto the broadness of powers that will be invested in Infrastructure WA shortly. It sets out the work that Infrastructure WA is planning to do for the next financial year. Infrastructure WA is invested with all the powers it needs to perform its functions, and presumably those functions will be embraced in the annual work program as well. Infrastructure WA is empowered to do all sorts of things and yet it will be up to its own judgement whether it makes public what it plans doing in the coming year, even though it does not necessarily descend into the detail of how it is going to give effect to its work program. Will this work program, if provided to the Premier, be able to be called upon by Parliament to be tabled as a parliamentary document?

Hon SUE ELLERY: I appreciate that the honourable member was out of the chamber on urgent parliamentary business, but I provided a response that all the information, documents et cetera generated by IWA are covered by the Financial Management Act, and subject to procedures and privileges and freedom of information. It is not the Premier's annual work program to release, it is the board's, but, as I said in my response to the second reading debate, IWA is subject to the same parliamentary obligations as every other agency.

Committee interrupted, pursuant to standing orders.

[Continued on page 3833.]