17th May 2019

Committee Secretariat

Finance and Expenditure Committee

Parliament Buildings

Wellington

Per email: fe@parliament.govt.nz

Guardians of New Zealand Superannuation Submission to the Finance and Expenditure Committee on the New Zealand Infrastructure Commission / Te Waihanga Bill

1. Introduction

1.1 Kia ora, thank you for the opportunity to submit on the New Zealand Infrastructure Commission / Te Waihanga Bill (the **Bill**).

1.2 The Guardians of New Zealand Superannuation (the **Guardians**) is a Crown entity that manages and invests the New Zealand Superannuation Fund (the **Fund**), on behalf of the Government, to help pay for the increased cost of universal superannuation entitlements in the future. As at 31 March 2019, the Fund totalled $41.6b; of this amount, approximately $6b is invested domestically.

1.3 The Guardians has specific expertise in infrastructure investment developed through a range of offshore and domestic investments over the last 15 years. Our submission also reflects our recent experience in our capacity as a prospective investor in large-scale New Zealand infrastructure projects (e.g. the Auckland Light Rail project).

1.4 We see large domestic infrastructure investment opportunities as having commercial potential and the scale to make a difference to the performance of the Fund. The Guardians received a Ministerial directive in 2009 to "actively seek and consider NZ investments", which specifically noted the promotion of domestic infrastructure investment.

1.5 This submission follows, and builds on, our prior submission to the Treasury in October 2018 on their consultation document "A New Independent Infrastructure Body".

1.6 We are willing to appear before the Committee to speak to our submission.

2. Need for Infrastructure Reform

2.1. New Zealand's infrastructure deficit, and the level of investment and development required to address it (estimated by Treasury at $129 billion over the next decade), is one of the most pressing economic challenges facing the country. If it remains

unaddressed, it will have a significant, negative and material impact on New Zealand's future economic potential, prosperity and well-being.

2.2. Compounding this, the need to adapt to climate change will place new pressures on infrastructure ranging from State Highways, to railways, ports, storm water and wastewater systems, flood and river control systems and buildings and structures around the New Zealand coast.

2.3. New Zealand competes in an increasingly competitive global market place for the capital, resources, capacity and expertise necessary to deliver infrastructure. McKinsey has estimated that the world's infrastructure deficit is US$21 trillion. If New Zealand is to be competitive, it requires a modern, best practice interface with the relevant international markets that clearly presents our requirements and opportunities for investment, in order to attract the necessary skills and resources.

3. Submission Summary

3.1. The Guardians supports the purpose and intent of the Bill and the establishment of the Commission.

3.2. In our submission, we focus on:

- One aspect of the Bill that could adversely impact our ability to invest in infrastructure projects, and
- Providing feedback on areas of the Bill where we believe amendments could be made to enhance the role, function and effectiveness of the Commission.

We have provided some illustrative drafting changes as to how our submissions could be reflected in the legislation.

3.3. Our comments are specifically related to:

- Information and Confidentiality (Section 4)
- Independence (Section 5)
- Commission Membership (Section 6)
- Commission Function and Focus (Section 7)
- Timeframes (Section 8)

3.4. Key points:

- The information provision requirements in the Bill appear to be directed towards core Crown agencies that hold infrastructure assets. As drafted, however, they also capture the Guardians and other Crown Financial Institutions (CFIs) and would impede our ability to access infrastructure investment opportunities. As a double-arms'-length Autonomous Crown Entity, with a mandate to maximise returns, the Fund should be treated the same as the private sector entities with which it competes and be excluded from these requirements.
- We are supportive of the independence provided by using the Crown Entity model and propose some amendments to further enhance the Commission's independence.

- The Bill should require Commission Members, with requisite expertise and experience in infrastructure development, be put forward by way of a "nominating committee" (as is the case in appointment of the Fund's board and is proposed for the Climate Change Commission). To optimise board size and diversity, we suggest there should be no fewer than five members (c.f. three as provided for in the Bill). This compares to the 12 members that Infrastructure Australia is required to have by legislation.
- The support functions of the Commission should be extended to include:
    - Promoting investment in New Zealand infrastructure,
    - Advising on regulatory reforms to enhance national infrastructure,
    - Identifying solutions to barrier-to-entry issues, and
    - Developing new funding and financing models.
- The legislation should provide more explicitly that the Commission be expected to have a role in the evaluation of nationally significant infrastructure proposals.
- Productivity gains should be added to the factors that the Commission is required to consider when carrying out its functions.
- Financing and funding mechanisms, one of the most significant constraints confronting infrastructure development, should be explicitly included in the establishment legislation as a key issue for the Commission to focus on.
- The feedback loops, timeframes and engagement processes proposed by the Bill could be streamlined to enhance the Commission's independence and effectiveness.

4. Information and Confidentiality

4.1. A Barrier to the Guardians (and other CFIs) Investing in Infrastructure

- Clauses 23-25 of the Bill provide the Commission with certain powers to require entities to provide information necessary for the Commission to perform its functions.
- We agree that the Commission should have powers to obtain information from central government in respect of infrastructure assets and demographic information to enable it to fulfil its role the most effective manner. We also suggest that these powers should extend to local government.
- As currently drafted, however, the information gathering powers apply to the Guardians, and other CFIs, who conduct commercial investment activities in highly competitive markets.
- The proposed information gathering powers are extremely broad, with only limited grounds to withhold information. For instance, the only grounds under the Official Information Act 1982 that apply are those in section 6 (a) and (b), relating to information that would prejudice the security and defence or international relations of New Zealand or that would be prejudicial to other government or international organisations.

- The Guardians invests on a commercial basis, and in doing so competes with the international private sector and financial market institutions who are not subject to such disclosure obligations.
- Much of the information we hold regarding infrastructure is highly commercially sensitive in nature for us and/or our co-investors, and obligations to disclose such information could put the Fund at a significant competitive and commercial disadvantage. For instance, co-investors, investees and other counterparties will be less willing to engage with us if there is a risk that sensitive information concerning infrastructure investment could be disclosed.
- Such disclosure obligation upon the Guardians and other CFIs could have a chilling effect on our ability to compete effectively in infrastructure investment opportunities.
- This unintended result could negatively affect the wellbeing of current and future taxpayers, which would be inconsistent with the objectives on which the establishment of the Commission is based.
- We also note that the information we hold is from an investment standpoint, which is not what the information gathering powers are designed to capture. Given this, applying the information gathering powers to the Guardians and other CFIs may have little benefit but significant downside.
- While clause 24 of the Bill imposes certain restrictions on how the Commission will publish or disclose information, this restriction does not alleviate the effect these provisions could have on our investment activity and competitiveness. For instance, the Commission is able to publish information in summary form.
- The Guardians should be treated in the same way as the private sector entities with which we compete, and excluded from those provisions. This exclusion may also be appropriate for other Crown Financial Institutions. This would be achieved by amending the Bill to include a new clause 23(5)(c)(i), in bold below:

  23 Power of the Commission to obtain information

  (5) A request may be made to 1 or more of the following entities:

  (c) a statutory entity named in Schedule 1 of the Crown Entities Act 2004: ***other than-***

  (i) Guardians of New Zealand Superannuation [and others]:
- By way of context, we note that Infrastructure Australia does not have information gathering powers such as those proposed by the Bill.

4.2. Extension of Requirement to Provide Information

- In relation to the information provision powers in the Bill, we believe these requirements should be extend to local government entities (regional, city, district and unitary authorities) and their subsidiaries or controlled organisations.
- The local government sector owns, operates or is responsible for a significant proportion of New Zealand's public infrastructure assets. For the Commission's

strategy, analysis or advice to be based on comprehensive and robust information, it is crucial that local government is captured by the information gathering provisions of the Bill.

5. Independence

5.1. Autonomous Crown Entity

- A key endowment for the Commission to operate successfully is that it must have a real and perceived level of independence from the Government of the day.
- We support the Bill's proposal to establish the Commission as an "Autonomous Crown Entity". We believe this strikes an appropriate balance, between operational independence and requirement for the Commission to have regard to government policies, to ensure its strategy is relevant and meaningful.

5.2. Ministerial Direction

- As noted above we appreciate that there is a delicate balance between the need for an independent Commission whilst also ensuring infrastructure plans are not prepared in complete isolation from the policies of the government of the day.
- Clauses 14 - 18 of the Bill provide that the Commission be required to provide the Minister with a draft of its 30-year strategy report. The Minister then has three months to provide comments on the report, which the Commission "must have regard to" in finalising its report. After the report is finalised, the Minister has a further six months to develop and present the Government's response to the strategy.
- While we think that the Bill strikes an appropriate balance, we note that there is a significant difference to the Infrastructure Australia Act 2008, which provides "the Minister must not give directions about the content of any audit, list, evaluation, plan or advice to be provided by Infrastructure Australia". The Bill could be amended to clarify that Ministerial advice should focused at a strategic level, rather than on specific infrastructure projects.

5.3. Consultation

- In relation to the development of the strategy report by the Commission, the Bill is silent in relation to consultation with stakeholders. While it is unlikely that the Commission would develop a strategy without undertaking comprehensive consultation, we believe this should be recognised in the Bill.
- Infrastructure Australia is required to consult with a wide range of stakeholders (paragraph 6B), and that consultation is explicitly mentioned in the New Zealand Productivity Commission Act 2010 (section 12).
- This could be achieve through a new clause 13A in the Bill:

  13A ***Commission must consult***

In developing a strategy report the Commission must, as it considers necessary, consult with-

(a) Any persons, bodies, organisations and agencies to ensure that a wide range of views is available to it; and

(b) Investors in, and owners of, infrastructure.

6. Commission Membership

6.1. Experience

- The process for appointing members of the Commission could be strengthened by including more specific criteria as to experience.
- The Crown Entity Act 2004 provides generic criteria for the appointment of (in this instance) Commission members.
- Under these provisions, the Minister may only appoint people who, in their view, have the appropriate knowledge, skills and experience to assist the statutory entity achieve its objectives and perform its functions.
- Given the specialised and technical nature of the infrastructure sector, and the issues associated with it, we are of the view that the bill would benefit from the inclusion of more specific criteria.
- The Infrastructure Australia Act 2008 requires members of that entity to have knowledge of, or experience in, a field relevant to the organisation's functions. Similarly, the legislation under which the NZ Super Fund was established requires the appointment of board members who, in the Minister's view, have "substantial experience, training, and expertise in the management of financial investments".
- The Bill should be amended to include more specific requirements for membership, similar to those described above. A proposed amendment to achieve this is provided at the end of this section.

6.2. Nominating Committee

- To further enhance the Commission's independence, the appointment process should include a nominating committee, such as used for appointments to the board of the Guardians and as proposed for the Climate Change Commission under the Climate Change Response (Zero Carbon) Amendment Bill.
- Under this approach, the Minister can only recommend appointments (to the Governor General) who have first been nominated by the "nominating committee". This committee would be established by the Minister, who is required to appoint appropriately qualified people to it.
- We also suggest that there is a requirement for consultation with representatives of other political parties in the Parliament before making recommendations. This helps build a cross-party consensus with respect to the Commission and its activities.

- We submit the Bill should also be amended to include a new clause 8A, which contains the following provisions (based on the equivalent clause in the Fund's establishment legislation) relating to a nominating committee:

> *8A* ***Nominating Committee***
>
> ***(1) The Minister must establish a committee to nominate candidates to the Minister for appointment as members of the board.***
>
> ***(2) The nominating committee must comprise not less than four persons with proven skills or relevant work experience that will enable them to identify candidates for appointment to the Commission who are suitably qualified.***
>
> ***(3) The expenses of the nominating committee must be met out of money appropriated by Parliament for the purpose.***
>
> ***(4) The Minister must notify the nominating committee of persons who the Minister considers to have an interest in appointments to the board, and the nominating committee must consult with those persons or representatives of those persons.***
>
> ***(5) Subsection (4) does not limit consultation or the calling for expressions of interest in appointments.***
>
> ***(6) After receiving nominations for appointment from the nominating committee, the Minister must consult with representatives of other political parties in Parliament before recommending that the Governor-General appoints a person to the board.***

6.3. Number of Members

- The Bill provides for as few as three (and no more than seven) Commission members.
- Given the breadth and complexity of the Commission's activities, and the significance of its work, we recommend a minimum of five members to ensure there is an appropriate breadth of diversity and expertise.
- Based on the analysis contained in this section, clause 8 of the Bill should be amended and have new provisions added to it, as bolded in the following:

> *8 Members of Commission*
>
> *(1) The Commission must have no fewer than* ***5****, and not more than 7 members*
>
> ***(3) The Minister must only recommend a person as member of the Commission who –***
>
> ***(a) in the Ministers opinion, has substantial experience and expertise in infrastructure development and investment; and***
>
> ***(b) has been nominated by the nominating committee.***

7. Commission Functions and Focus

7.1. Additional Support Functions

- Clause 10 of the Bill sets out the "support functions" of the Commission. We believe the functions contained in the Bill could be enhanced by specifically including:
    - Promoting investment in New Zealand infrastructure

      The financing of infrastructure projects represents a material constraint on infrastructure development and is an issue the Commission has the potential to help solve.
    - Advising on regulatory reforms to enhance national infrastructure

      The expertise the Commission will have in infrastructure development will be invaluable to ensure that regulation and regulatory models do not create unnecessary constraints to infrastructure development and investment.
    - Identifying solutions to barrier-to-entry issues

      As drafted, the Bill requires the Commission to identify matters that prevent or limit the delivery of infrastructure (i.e. barriers to entry). Ideally, the Commission's expertise should be applied more deeply in this area, with an accompanying requirement to help identify solutions.
    - Developing new funding and financing models

      The current lack of funding tools available to facilitate infrastructure investment is a significant constraint. Given that, addressing the issue of funding should be added to the support functions of the Commission contained in the Bill.

7.2. Addressing Barriers to Investment

- To provide an example of how the Commission could contribute to addressing New Zealand's infrastructure challenges, the Guardians submitted to the Taxation Working Group advocating that a nationally significant infrastructure taxation regime be established. Under such a regime, projects which qualified would receive concessions including:
    - a tax rate substantially less than the prevailing corporate tax rate
    - no additional tax impost upon profit distribution
    - full deductibility of third party, non-recourse.

      The Tax Working Group reacted favourably to our submission and recommended that the government consider the development of such a regime. Incentivised tax treatment such as this would significantly contribute to addressing financing constraints in terms of infrastructure investment and development. Working with the industry, and across government, to advance this sort of initiative is the sort of invaluable contribution we believe the Commission should play.

7.3. Funding and Financing

- The availability of funding and financing mechanisms, and the lack of options in terms of models, is one of the key constraints facing infrastructure development in New Zealand. Despite this, the issue is not addressed in the Bill.
- While meaningful work in underway by Treasury and the Productivity Commission in this area, we believe this could be supplemented/enhanced by focus and coordination with the Infrastructure Commission.
- The provision of advice in relation to the development of new and alternative financing and funding models could be included as a key issue for the Commission to focus on in a number of areas of the Bill, specifically:
    - function of the Commission
    - content of strategy report
    - capital intentions plan
    - the "shop front" related provisions and the Commission's work to remove barriers to entry
    - published pipeline information

7.4. Role in Procurement

- The Guardians supports the concept of the Commission acting as a "shop front" for New Zealand infrastructure development and a centre of expertise for significant infrastructure procurement. This will bring greater co-ordination to the sector, allow for a more clearly defined and effectively promoted pipeline of projects and provide for aligned and consistent analysis and decision-making.
- However, the Bill does not include a requirement for central or local government agencies to engage with the Commission. This reduces the likelihood of achieving a more aligned approach. We recognise that an attempt to introduce compulsion through legislation is potentially fraught, with a high likelihood of unintended consequences and counterproductive outcomes. The policy challenge is to strike the right balance.
- We suggest considering an explicit expectation as to the Commission's involvement in significant infrastructure projects, such as through including a provision comparable to Part 2 paragraph 5A(1) of the equivalent Australian legislation. This anticipates that Infrastructure Australia has a role in evaluating proposals for investment in, or enhancements to, nationally significant infrastructure. This could be achieved by inserting a new clause 10(da) as follows:

10 Additional Functions of the Commission

(da) contribute to the evaluation of current and proposed infrastructure projects of national significance

7.5. Productivity Gains

- Clause 11 of the Bill requires the Commission to provide advice that will improve the well-being of New Zealanders. Alongside that, the Commission is required to have regard to long-term trends related to changing demographics,

new technology and the mitigation of climate change. We support these factors being included in the focus of the Commission.

- We consider that productivity gains should be added to the factors required to be considered by the Commission. Low productivity and productivity growth are significant issues facing the New Zealand economy, and an efficient infrastructure sector and systems can help address it.
- Part 2 paragraph 5b of the Infrastructure Australia Act 2008 requires Infrastructure Australia to consider the potential for productivity gains during the development of its infrastructure plans.

7.6. Capital Intentions Plan

- The explanatory note to the Bill includes the publication of a "long-term capital intentions plan" as an expected activity of the Commission. The note explains such a plan as pulling together public and private sector investment intentions over a 10-year horizon. We support this initiative, as it would complement the 30-year strategy document and contribute significantly to the definition and promotion of a project pipeline. In addition, it would provide the Commission with a mechanism through which to identify and aggregate funding gaps and, thereby, highlight areas where there is a need and opportunity to develop alternative financing and/or funding models (an issue discussed further below).
- As drafted, however, this expectation of the Commission is not set out in the proposed legislation. We believe it should be and propose the following inserting a new clause 10(ba). In the amendment, we propose a three-year timeframe for preparing such plans so that it fits with the transport-planning framework and councils' Long-Term Plan (LTP) timeframes.

10 Additional Functions of the Commission

The Commission has the following additional functions:

Strategy and planning functions

(ba) to develop and publish, every three years, a long-term capital intentions plan which sets out local and central government and private sector infrastructure investment intentions over a 10-year period

8. Timeframes

8.1. Initial Strategy

- Clause 14(2) of the Bill provides that the draft of the first strategy report must be provided to the Minister no later than two years after the Act comes into force. In our view, this is too long. Allowing for the feedback and response processes, this means it will take three years before it becomes clear what the strategy, and the Government's response to it, mean for infrastructure development and the industry.

- The infrastructure issues facing New Zealand are (in many cases) acute and immediate, so we suggest the timeframe for preparing the Commission's initial strategy is reduced to one year from the date of enactment.

8.2. Election Period Impact

- Clause 19 of the Bill deals with the potential disruption caused by elections in terms of deadlines for the Government response (and Ministerial comment). We support the intent of these provisions. The approach proposed by the Bill, however, that the clock will be stopped on the process during the election period (defined as writ day through to two months after the commencement of the next session of Parliament) does not adequately address the potential issues.
- Where an election results in a change of government, a simple stopping of the clock would not necessarily provide an incoming government with sufficient time to develop a comprehensive and definitive response. Potentially, it could have less time than the outgoing government had already spent on its response. If the Government's response is seen by the industry to be rushed or not fully reflective of the Government's intentions or priorities, the credibility and weight given to it will be eroded, as will the effectiveness of the overall strategy. To avoid this, a new government formed after an election should have the option of restarting the timeframe for the response from the end of the election period (as defined in the Bill).
- This could be achieved through the inclusion of a new clause 19A:

  19A Deadline adjusted after election

  Following an election, the Minister may require the period under sections 15(2)(b) and 18 to be recalculated beginning on the day two months after the commencement of the next session of Parliament.