

IMPROVING PUBLIC PRIVATE PARTNERSHIPS IN NSW

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I INTRODUCTION

In 2005, the Public Accounts Committee of the New South Wales ('NSW') Parliament commenced an inquiry into public private partnerships ('PPPs').¹ The Committee called for submissions, held public hearings and visited key interstate and international agencies. The focus of the Inquiry was to understand how well existing PPPs are managed, what could be done to improve them and how future PPPs could be better planned. Importantly, the Inquiry did not set out to examine whether or not PPPs should be used. This is because the role of the Public Accounts Committee is 'to inquire into and report on activities of Government that are reported in the Total State Sector Accounts and the accounts of the State's authorities'.² The Committee also 'scrutinises the actions of the Executive Branch of Government on behalf of the Legislative Assembly'³ and 'recommends improvements to the efficiency and effectiveness of government activities'.⁴ The Committee does not comment on policy matters.

During the Inquiry, the Committee examined the NSW Government's policy, practice and guidelines,⁵ and government models for evaluating and monitoring

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1 Public Accounts Committee, Parliament of New South Wales, *Inquiry into Public Private Partnerships* (2006).

2 Ibid v.

3 Ibid.

4 Ibid.

5 In NSW, the key documents underpinning PPP management and policy are *Working with Government: Policy for Privately Financed Projects* and *Working with Government: Guidelines for Privately Financed Projects*: see New South Wales Government, *Working with Government: Guidelines for Privately Financed Projects* (2001) New South Wales Treasury <<http://www.treasury.nsw.gov.au/wwg/pdf/wwgguidelines.pdf>> at 7 October 2006; New South Wales Government, *Working with Government Policy for Privately Financed Projects* (2001) New South Wales Treasury <<http://www.treasury.nsw.gov.au/wwg/pdf/wwgpolicy.pdf>> at 7 October 2006. The Guidelines were examined during the Inquiry for their adequacy. The Guidelines apply to all NSW government agencies, including departments, public trading enterprises and state-owned corporations. They are not, however, mandatory, and, during the Inquiry, the Committee heard of gaps in their interpretation by agencies. This concerned the Committee which observed that a degree of 'casualness' might be evident in the way that the guidelines are applied by agencies.

private sector investment in public infrastructure. The Committee also considered the Government's obligations to manage community and environmental interests.

Acknowledging that PPP arrangements are here to stay, the Committee was encouraged by the tantalising prospect that PPPs, as a process, will continue to evolve. As commentators Greve and Hodge have written:

PPPs could potentially alter the way both the public sector and the private sector are organised internally. If cooperation between the two sectors is extended, then the public sector will have to stop thinking about itself as a 'purchaser' and the private sector will not only be 'provider' but instead be a 'partner' and share organisational attributes, responsibilities and citizen expectations.⁶

In light of this, the Committee recommended a strengthening of the framework for consideration of PPPs by the Government. This included a defined PPP policy, principles and objectives; refined process guidelines to address any identified deficiencies; and clear governance and improved public disclosure arrangements.

This article focuses on the recommendations made by the Inquiry relating to the management of public interests by setting out some of the discussion and key findings from the Inquiry.

The Inquiry found that, while there was intense scrutiny in the period leading up to the decision to procure a project, there was insufficient attention given to monitoring and evaluation over the life of a PPP project. However, the Committee took heart from processes such as the Post Implementation Review of the first phase of the New Schools Project in NSW.⁷ It identified a range of processes for improving PPP management and thus, potentially, delivering better value for money. The Committee, therefore, recommended a more systematic approach to post-period evaluation for PPPs, allowing comparisons across projects and administrative jurisdictions, and assisting the practical application of 'lessons learned'. The Committee heard evidence that evaluation and monitoring costs of PPPs were not always included in overall project costs. It, therefore, recommended that the NSW Treasury ensure that the 'transaction costs' of evaluation and monitoring of a PPP are accounted for over the full life of a project.

II PUBLIC TRUST

The Committee heard that one of the principal public impacts of PPPs is the difficulty of creating and maintaining public trust. The Committee believed that there was ample evidence to indicate widespread public scepticism about the use of PPPs by governments. In an interview with a delegation of the Committee, Michael Gerrard, Deputy Chief Executive of Partnerships UK, said that '[p]ublic scepticism about PFIs ['Privately Financed Initiatives'] is almost insoluble'.⁸ The

6 Graeme Hodge and Carsten Greve, 'Public-Private Partnerships: A Policy for All Seasons?' in Graeme Hodge and Carsten Greve (eds), *The Challenge of Public-Private Partnerships: Learning from International Experience* (2005) 332, 345.

7 Public Accounts Committee, above n 1, 72.

8 Ibid 85.

Committee considered the many factors that may affect public trust regarding PPPs. It thought that these included:

- a desire for appropriate accountability and transparency regarding the PPP process;
- an ongoing need for independent assessment of purported benefits from and costs of PPPs, including equity considerations and costs to consumers; and
- policy discussion focussed on PPP project outcomes which are not delivered at the expense of accepted community amenities or freedoms.

III PROVISION OF SERVICES TO THE PUBLIC

In addition to improved public consultation measures, the Committee felt that the generation of trust about the public impact of PPPs would be enhanced if the NSW Government better articulated and defined the role of private investment in public infrastructure. Concerns by bodies such as the Council of Social Service of NSW ('NCOSS') were also considered in this regard. The former Director of NCOSS, Gary Moore, told the Committee:

[the] main concern with PPPs is the effect on disadvantaged people and communities, which we believe is not often considered in the PPP process. We believe that certain services are the core responsibility of government and not the private sector. In some instances there may well be a valid role for the private sector in partnering with government to increase or improve the infrastructure associated with the provision of these services. We think public infrastructure should be considered as both an economic asset and a social resource, for example, social housing as State communities, government skills and local resources.⁹

The Committee also heard evidence about the potential for the private sector to 'cherry-pick' the profitable parts of human service provision, and for potential cuts to services in circumstances where there is only a single provider. It was reminded about the hardship that fee-raising PPPs can cause for low income earners.

In response to these issues, the Committee recommended that the NSW Treasury consider the social impact of PPP tolls and fees and use a process similar to one followed by the Independent Pricing and Regulatory Tribunal to set tolls and fees in a monopoly situation.

IV PUBLIC KNOWLEDGE AND PPP DOCUMENTATION

An associated issue is whether there is a gap between public knowledge about and perceptions of PPPs. The Committee heard evidence from Professor Graeme Hodge of Monash University which indicated that the supporting documentation for a PPP is so complex that it is not well understood by decision makers, let

9 Report of Proceedings Before Public Accounts Committee Inquiry into Public Private Partnerships, (Gary Moore, Director, Council of Social Service of NSW, 18 November 2005) 10 <[http://www.parliament.nsw.gov.au/prod/PARLMENT/Committee.nsf/0/d2f72a1026f3b37dca2570d000821647/\\$FILE/corrected%20transcript%2018%20nov.pdf](http://www.parliament.nsw.gov.au/prod/PARLMENT/Committee.nsf/0/d2f72a1026f3b37dca2570d000821647/$FILE/corrected%20transcript%2018%20nov.pdf)> at 7 October 2006.

alone the general public.¹⁰ Professor Hodge went on to propose that contracts should be made available in their entirety, despite their complexity.¹¹ The Committee believed that such an action is at the heart of accountability, and strongly recommended the release of contracts, subject to certain conditions. There are constraints regarding the sensitive nature of components of contracts between the public and private sectors. The need for privacy is not only about the commercial interests of the private sector. In some instances the Government, too, may need to withhold public release of documents in order to preserve relationships during negotiations for other contracts. To ensure all contracts relating to PPPs are made available in their entirety to the public in due course, the Committee recommended that the Auditor-General should determine the timing of release of such documents. It also proposed that agencies should strive to meet the timeframe for the release of documents and explain any variations. The Committee also suggested that details of significant variations by either side to the contracts should be publicly available.

Many participants in the Inquiry expressed interest in increased disclosure of the Public Sector Comparator ('PSC'). The PSC is the calculation of what a project would cost if the public sector were to provide the infrastructure and services, rather than going to market. The Committee, therefore, recommended that the NSW Treasury review its policy on disclosure of the PSC, taking into account the public interest in knowing whether and how projects achieved greater value for money than would be possible under traditional forms of procurement.

However, given the complexity of some PPP contracts, the Committee also proposed that the NSW Treasury should develop material for public consumption about current accounting treatments. The Committee felt that where the public pays commercial fees or tolls to private sector partners through a PPP, there was scope for improving accountability. For example, the public sector partner could provide information in its reports about how the public can find information concerning the amount of revenue raised by private sector partners by way of user charges.

V EMPLOYMENT

The Committee received evidence about the potential for adverse impacts on public sector employment as a result of PPPs. It noted the changes introduced in the United Kingdom ('UK') in 1997 to protect the terms and conditions of public sector employees in that country, by transferring these terms and conditions to the private sector. The *Transfer of Undertakings (Protection of Employment) Regulations 2006* (UK) forbid the process of the transfer of workers from the public to the private sectors to be used as an opportunity to change their terms

10 Report of Proceedings Before Public Accounts Committee Inquiry into Public Private Partnerships, (Graeme Hodge, Professor, Director, Centre for Regulatory Studies, Faculty of Law, Monash University, 2 December 2005) 15
<[http://www.parliament.nsw.gov.au/prod/PARLMENT/Committee.nsf/0/fca7b7a9f9d70022ca2570df0080bf2d/\\$FILE/corrected%20transcript%202%20dec%2005.pdf](http://www.parliament.nsw.gov.au/prod/PARLMENT/Committee.nsf/0/fca7b7a9f9d70022ca2570df0080bf2d/$FILE/corrected%20transcript%202%20dec%2005.pdf)> at 7 October 2006.

11 Ibid 17.

and conditions. Following this trend, the Committee noted that Labour Services Agreements are now a part of some PPPs in NSW. It considered that these should be monitored over the life of a project to determine whether they might have broader implications.

The Committee also took evidence about the potential for PPPs to reduce concerns for ongoing investment by the State in skills acquisition and retention, particularly for the training of apprentices. It also heard about the importance of the role of local governments as employers within local economies, particularly in rural and regional areas. It was advised of the proposal for local government PPP guidelines to be amended to address industrial relations issues.

The Committee recommended that the amended PPP guidelines, *Working with Government: Guidelines for Privately Financed Projects*,¹² ensure local labour content and take into account the impact on apprentice and trade positions. This could be done by including defined ratios in PPP contracts.

VI PPPs AND THE ENVIRONMENT

The Committee further noted that the evaluation of PPP bids in NSW currently takes into consideration technical, operations, maintenance, legal, financial and commercial aspects, and social outcomes. However, this evaluation process does not explicitly take environmental factors into account.¹³

Again, international experience provides a learning opportunity. The Office of Government Commerce in the UK has issued a guidance note for agencies as to how they can include environmental considerations within their PPPs, with specific reference to a *Framework for Sustainable Development on the Government Estate*.¹⁴ The guidance note encourages agencies to take a long-term view and include the whole life cost of a project in their projects, as well as encouraging a focus on true value for money. It also indicates ethical standards when specifying outputs, selecting bidders and awarding contracts. The guidance note recognises the environment as a factor in PPPs by identifying green opportunities presented by projects with a 25 to 30 year time frame¹⁵ and including a series of high level questions to be asked about a project's green credentials during the stage of its initial consideration.

12 New South Wales Government, *Working with Government: Guidelines for Privately Financed Projects* (2001) New South Wales Treasury <<http://www.treasury.nsw.gov.au/www/pdf/wwwguidelines.pdf>> at 7 October 2006.

13 New South Wales Treasury, *Submission to Inquiry into Public Private Partnerships* (15 November 2005) 17 <[http://www.parliament.nsw.gov.au/prod/PARLMENT/Committee.nsf/0/a26261b71b338300ca2570cb001cee0c/\\$FILE/Sub.No.24.pdf](http://www.parliament.nsw.gov.au/prod/PARLMENT/Committee.nsf/0/a26261b71b338300ca2570cb001cee0c/$FILE/Sub.No.24.pdf)> at 7 October 2006.

14 See *Sustainable Operations on the Government Estate* (2006) Sustainable Development – The Government's Approach <<http://www.sustainable-development.gov.uk/government/estates/index.htm>> at 7 October 2006.

15 Office of Government Commerce et al, *Green Public Private Partnerships* (2002) 2–3 <http://www.hm-treasury.gov.uk/media/851/A5/PPP_GreenPublicPrivatePart.pdf#search=%22Green%20Public%20Private%20Partnerships%20Office%20of%20Government%20Commerce%22> at 7 October 2006.

The Committee also noted that environmental outcomes have been specific inclusions in ‘alliancing’ projects in NSW, such as those conducted by Sydney Water. While these types of projects are not strictly regarded as PPPs, they could, nevertheless, help to inform a recommended process by which NSW Treasury and partners in PPPs can address social and environmental considerations more fully. For example, social and environmental considerations could be addressed in the objectives established at the outset of PPP contracts, in project specifications and in the monitoring of outcomes.

VII CONCLUSION

This article summarises the findings of the Committee’s report, *Inquiry into Public Private Partnerships*,¹⁶ and the reasons for the Committee coming to its conclusions. The Report was tabled in June 2006 and, under administrative rules, the Government may take up to six months to respond to the Committee’s recommendations. One Minister has already responded, and indicated that amendments to the guidelines are already under way. The Committee hopes that as a result of the Report, more consistent application of PPP guidelines will occur. It also hopes for better and more transparent disclosure of PPP arrangements by agencies and robust focus on evaluating and monitoring PPP projects over their whole life. If this were accompanied with checks on whether key performance measures are met, these improvements would go a long way towards improving community confidence in PPPs.

16 Public Accounts Committee, Parliament of New South Wales, *Inquiry into Public Private Partnerships* (2006).