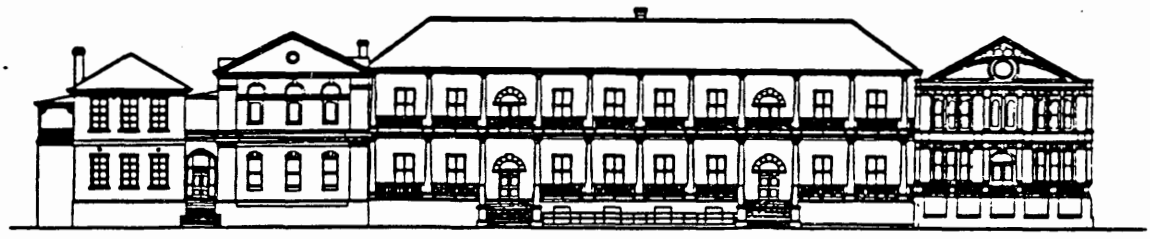
PUBLIC ACCOUNTS COMMITTEE

PARLIAMENT OF NEW SOUTH WALES

Infrastructure Management and Financing in New South Wales

Volume 1: From Concept to Contract— Management of Infrastructure Projects



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From left: Ray Chappell (Vice-Chairman to 24 May 1993), Terry Rumble, Andrew Tink (Chairman), Ian Glachan, Geoff Irwin

The Public Accounts Committee of the 50th Parliament

The Public Accounts Committee of the 50th Parliament comprises three Government and two Opposition members. A chairman and vice-chairman are elected by the Members.

Mr Andrew Tink, BA, LLB, MP, Chairman

Before becoming Liberal Member for Eastwood in March 1988, Andrew Tink practised as a barrister in equity, commercial and shipping law. He has since served on numerous parliamentary and government committees, holding the position of Chairman of the Joint Committee on the Office of the Ombudsman prior to his appointment to the Public Accounts Committee. He is also a Temporary Chairman of Committees in the Legislative Assembly and its representative on the Macquarie University Council.

Mr Ray Chappell, MP, Vice-Chairman

Ray Chappell was elected National Party Member for Northern Tablelands in May 1987. He has worked in university administration and in the building and retail industries, and he served four terms as an alderman on Armidale City Council. Ray Chappell is the Legislative Assembly representative on the Board of Governors of the University of New England, and is a Temporary Chairman of Committees in the Legislative Assembly. He served as Vice-Chairman of the Committee until his appointment as Minister for Small Business and Regional Development on 24 May 1993.

Mr Geoff Irwin, ProdEngCert, DipTech, DipEd, MP

Geoff Irwin was elected to Parliament in March 1984 as the Labor Member for Merrylands, and he has been the Member for Fairfield since March 1988. Before entering Parliament he worked in industry as a planning and supply manager and taught business studies at TAFE. He served as a member of the Select Committee upon Small Business and as Opposition Spokesperson on Business and Consumer Affairs.

Mr Terry Rumble, ASA, MP

Terry Rumble was elected Labor Member for Illawarra in March 1988. Before entering Parliament he qualified as an accountant and was employed in public practice and in the coal mining industry. He has served as a member of the Regulation Review Committee and is the Chairman of the Opposition's Backbench Committee which involves Treasury, arts and ethnic affairs.

Mr Ian Glachan, MP

The Liberal Member for Albury since 1988, Ian Glachan has had a varied background. He served five years at sea as a marine engineer, was a farmer for ten years, and operated a newsagency in Albury for 18 years. Mr Glachan is also a past president of the Albury-Hume Rotary Club, an active member of the Anglican Church, and the Legislative Assembly member on the Board of Governors of Charles Sturt University.

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CHAIRMAN'S FOREWORD

Recent experience with the Sydney Harbour Tunnel, the Monorail, Port Macquarie Hospital and some tollways illustrate the immense political heat infrastructure projects such as these can generate.

The planning financing and co-ordination of such projects is very complex and the Committee's inquiry into urban infrastructure financing is one of the most difficult the Public Accounts Committee has ever undertaken, resulting in a two-volume report.

Volume 2 will consider financing issues, the sharing of risks between the public and private sectors, and the role of the Loan Council which is currently reviewing its policies.

This volume attempts to chart the path of infrastructure projects from concept to execution, considers four case studies to illustrate problems and best practice, and studies special issues relating to the ICAC and to public disclosure of privately financed projects.

Comprehensive and integrated planning is at the heart of successful infrastructure development, and whilst such planning will always be difficult because of heated political debate over the respective merits of things like road, rail and urban consolidation, it must be attempted, constantly evolved and co-ordinated.

A starting point is the articulation of a clear plan by each department which can be integrated into wider planning proposals, and the Public Accounts Committee sees the RTA's Roads 2000 plan as a good model. This is not to say that it is not controversial but it does spell out to the public where the RTA wishes to go.

The Public Accounts Committee believes that all infrastructure building agencies should produce similar plans, and it would be an interesting exercise to overlay transparencies of maps of each agency's plans to attempt to move towards an integrated approach, or at least an informed and no doubt vigorous debate on the options.

Effective co-ordination of integrated planning is crucial and the Department of Planning has a very important role to play. But at the end of the day, only the Premier has the necessary political authority to bring conflicting departments into line.

State Development which might have had this role is seen by the Public Accounts Committee as a failure precisely because it did not have the direct authority of the Premier behind it.

The replacement of State Development by the new Office of Economic Development in the Premier's Department is seen by the Public Accounts Committee as a major step forward, and the Committee believes that the Office has a major role to play in effectively co-ordinating other departments the goal being an integrated infrastructure development plan which has a reasonable measure of public support.

Whilst the public financing of urban infrastructure has been constantly evolving in New South Wales for two centuries and has been the subject of numerous parliamentary reports, experience of investment by the private sector is much more limited, although early examples such as tolls on Pyrmont Bridge exist.

The Public Accounts Committee believes that, Australia-wide, there is broad bipartisan acceptance of the proposition that governments do not have the public funds available to fund all necessary infrastructure developments and that appropriate participation by the private sector is both necessary and welcome.

The argument of course is about what is appropriate both in terms of risk sharing and suitable projects, as evidenced by the divisions in the Public Accounts Committee itself over the private development of Port Macquarie Hospital.

Without again getting into that debate, the Public Accounts Committee agrees on a bipartisan basis that there are many important steps that can be taken to encourage private sector participation in the public interest. Some of these are as follows:

- The development of an integrated infrastructure development plan based on clear departmental plans which have been publicly discussed and enjoy a reasonable measure of public support.

- Much better co-ordination between departments now capable of being effected through the Premier's Office of Economic Development.

- Development of best practice across departments based on discussion of successful experience through seminars co-ordinated through the Premier's Department. Lest this be seen as a simplistic motherhood statement, the Public Accounts Committee organised a very successful private/public sector workshop on contract confidentiality and was amazed to be told that nothing like it had been done before.

- An interagency BOOT group be organised through the Office of Economic Development to swap experience and develop best practice.

- Development of coherent policies indicating the various forms of co-operation between the public and private sectors' acceptance to the government and the sorts of risks in broad terms the government would assume itself.

- Departments should prepare shortened public versions of their capital works plans indicating projects which may be suitable for private investment but also containing a suitable disclaimer.

Many private sector participants expressed great frustration and anger at expense incurred by them in bidding for projects later deferred or cancelled, which can make it more difficult for the State to attract private investment.

Deferral and cancellation can be caused by deficiencies in policy, planning, co-ordination and/or finance which often relates to the Loan Council, and the Public Accounts

Committee believes these issues should be settled before the private sector is invited to incur significant expense. In particular before seeking bids agencies should determine

- what acceptable funding arrangements are likely to be
- what the market's response is likely to be
- what they envisage will be the broad allocation of risks
- the costs and benefits of the project
- the project's technical feasibility.

Examples of best practice considered in this report are the Bennelong Car Park and the Junee Prison; and examples of problems are the Blue Mountains Tunnel and the SRA purchase of 350 coal wagons, both of which to a significant extent relate to the Loan Council.

The Public Accounts Committee is of course concerned to protect the public interest and suggests the following safeguards:

- all capital works projects over $5 million be presented to the Capital Works Committee of Cabinet for approval;

- EISs for privately financed projects should be financed and carried out by or on behalf of the government;

- except in special circumstances which the government should outline to the public, privately financed projects should be subject to competitive bidding;

- the retainer of independent white knights to oversight projects and certify as to legal and technical matters should be encouraged but not seen as a substitute for oversight by ICAC, the Courts or the Auditor-General;

- independent outside consultants be retained to assist in vetting the financial viability of proponents;

- the ICAC'S Corruption Prevention Unit develop broad principles for the contract tendering process and liaise more closely with public and private sector participants to provide more focussed and timely advice.

The Committee has carefully considered the question of private infrastructure contract disclosure. Having done so, it believes that such disclosures should be more specific than is presently the case under the Freedom of Information Act and that such disclosures should be available to the public as a matter of course.

At the same time the Committee recognises as it did when considering the Port Macquarie Hospital contract that some sensitive commercial information should remain confidential. In the broadest sense, this is in the public interest because disclosure of such information will discourage private sector participation in infrastructure projects.

Accordingly, the Committee has made the following recommendations:

- That the Premier's Department prepare guidelines, in generally applicable terms, on the elements of BOT-type contracts which should be included in the summaries prepared by agencies and made available to the Parliament and the public (No. 45).

- For all privately-financed projects above $5 million, the agency should, within 90 days after the contract is signed, prepare a summary of the main points of the contract, unless the contract has been disclosed in full in the meantime (No. 46).

- The Committee believes that the elements in the summaries should include:
  - the full identity of the successful proponents, including details of cross ownership of relevant companies
  - the duration of the contract, including details of future transfers of assets of significant value to government at no or nominal cost and details of the right to receive the asset and the date of the future transfer
  - the identification of any assets transferred to the contractor by the public sector
  - all maintenance provisions in the contract
  - the price payable by the public
  - the basis for changes in the price payable by the public
  - provisions for renegotiation
  - the results of cost-benefit analyses
  - the risk sharing in the construction and operational phases quantified in NPV terms (where possible) and specifying the major assumptions involved
  - significant guarantees or undertakings, including loans, entered into or agreed to be entered into, with an estimate of either the range, or the maximum amount, of any contingent liability
  - any other information required by statute to be disclosed to the Australian Securities Commission and made available to the public
  - to the extent not covered above, the remaining key elements of the contractual arrangements.

  The statements would not disclose:
  - the private sector's cost structure or profit margins
  - matters having an intellectual property characteristic
  - any other matters where disclosure would substantially commercially disadvantage the contracting firm with its competition (No. 47).

- That this summary be vetted for accuracy by the Auditor-General or his nominee, and that these services be paid for by the public sectoragency (No. 48).

Overall the Committee believes that private investment in infrastructure should be encouraged in the public interest in a way that is in the public interest. Inherent in this is the proposition that the key public sector players must have delegated authority to strike a deal with private sector participants free from second guessing and review along the way by parliamentary committees and the like.

That said, the public interest is safeguarded by the standing oversight and progressive development of guidelines by bodies like the ICAC and the Auditor-General, and public disclosure which in itself is a very important form of accountability.

This approach of allowing managerial flexibility subject to broad controls and oversight is consistent with the Committee's approach in its recent report on internal audit.

At the end of the day some projects, whether privately or publicly funded, will remain controversial, and Parliament itself will remain the best forum for informed debate on such projects.

The Loan Council, which is mentioned in passing in this report, is in fact central to key questions of risk sharing and financing and will be the subject of in-depth study in Volume 2.

The Committee is grateful to all those who have assisted with this inquiry, and especially to those who have given evidence in hearings, who have provided submissions, and who have responded to the Committee's requests for information at short notice.

I would particularly like to thank the Director of the Public Accounts Committee, Patricia Azarias, for the tremendous effort she has put into researching and writing this report. She has carried out this task with resourcefulness and distinction. I would also like to thank the Committee's consultant, Mike Smart, who has also made an important contribution to the overall inquiry.

Production of this report has again been a model team effort, involving long hours spent by members of the Committee's Secretariat. The project was carried out under the direction of Patricia Azarias; Wendy Terlecki and Caterina Sciara typed parts of this draft and finalised minutes of evidence; Ian Thackeray provided administrative support and prepared graphics; and Ian Clarke patiently edited and formatted the report while it was still taking shape.

I would like to thank all of the Committee Members for their contribution to this inquiry, which has been yet another Committee project that has received full bipartisan support.

Andrew Tink, MP
Chairman
14 July 1993

EXECUTIVE SUMMARY

Definition of infrastructure

The report begins by discussing the definition of infrastructure.

The OECD has made a useful distinction between economic infrastructure, which includes water and sewerage facilities, highways, energy distribution networks, telecommunications and other networked services, and social infrastructure, which includes schools, hospitals and leisure facilities. Both types of infrastructure incur relatively high initial capital costs, have relatively long lives, and should be managed and paid for on a long term basis. Most important, they exist to support other economic and social activities, not merely as an end in themselves.

Decline in infrastructure investment

As a proportion of domestic product, investment in infrastructure from public and private sources has been declining over the long term, both at the federal and at the State level. In NSW, it stood at around 5.8% of gross state product in 1987/88, but had declined to 5.2% by 1991/92.

There is a divergence of views as to whether this decline really matters. Some claim that it does, because there is a simple causal relationship between investment in infrastructure and the productivity of an economy. Others claim that the contribution of infrastructure to an economy's productivity is more complex. Empirical studies abroad and in Australia have emerged with different conclusions. The Committee has argued that a systematic and definitive study on the subject is now needed for NSW.

The Committee also believes further work should be done on statistics relating to privately-financed infrastructure in NSW. The Committee found it difficult to obtain a comprehensive set of such statistics, with dollar values, dates of signature of contracts, and length of negotiations, and considers it essential that such a list be compiled as soon as possible. It should be updated annually.

Government policy on infrastructure

The government also now needs to provide a comprehensive policy statement on privately-financed infrastructure, including policy on risk-sharing, on joint ventures and other forms of co-operation, on information the government would undertake to provide as background for any such co-operative projects, and the regulations on matters of finance, intellectual property and probity which the government would propose to govern these deals.

The path of the infrastructure project from concept to contract

The path an infrastructure project follows from the moment it appears as a concept in a plan to the point where the contract is signed is a complex one filled with possible pitfalls

and wrong turnings. This is particularly so in the case of privately-financed projects, in the provision of which there is comparatively short experience in NSW. The Committee has divided this path into three stages: planning; the period between the plan and the moment the agency goes out to competitive tender; and the interval between the call for bids and the signature of the contract.

The planning process for infrastructure projects needs to be based on a set of judgements planners make about major issues such as the form cities should be taking, particularly in connection with the issue of urban sprawl; the kind of housing people should be living in in the future; whether the need for a facility is artificially inflated by the low price changed for the service it provides; and the ways in which the costs and benefits of an infrastructure project can be assessed.

There are currently two sides to the debate on urban sprawl. One view, taken notably by the NSW Department of Planning, is that urban sprawl is unduly expensive partly because new infrastructure has to be built. The Department therefore favours consolidation. The other view, taken by, for example, the Industry Commission in a recent report, is that the costs of rectifying infrastructure bottlenecks in the inner cities can also be very considerable. In addition, urban consolidation can be socially divisive, and in any case can never be a serious substitute for fringe expansion.

One way of influencing the form of infrastructure in our cities is pricing. There are various possible objectives a government might have for its pricing policy: proper resource allocation, equity, maximising of financial returns to the government, and satisfaction of customers' wishes for a fair and reasonable price. Proper resource allocation means that prices should not be so low that over-consumption is encouraged, leading to the building of an unnecessary piece of infrastructure, nor so high that hardship to consumers and businesses results, leading to cuts in consumer expenditures, profits or employment. There could well be serious implications for equity, however, if prices are raised. At present, many authorities argue that their price, especially to the domestic consumer, is unduly low and that their operations are thereby compromised.

The costs and benefits of infrastructure projects have traditionally been studied in a number of ways: cost-benefit analysis, cost-effectiveness analysis, financial analysis, and value management. Each of these has its advantages and disadvantages. The Committee believes that the best combination is cost-benefit analysis supplemented by value management techniques. Environmental impact statements which are required to look at costs and benefits are also crucial in the development of projects from initial concept through to detailed plan.

Existing plans in NSW are numerous and of many kinds. There are strategic plans, which set out broad strategies without listing projects in detail; Capital Expenditure Strategic Plans, which have had to be produced by agencies since 1991 in two forms, the long official version and the shorter version for the public; forward capital works programs, priority plans and so on. One feature common to many of them is that they are not widely available to the public. The Committee has recommended that plans should be available specifically for public distribution.

Another feature is that, with a few exceptions, sectoral plans are not integrated with each other. This can lead to duplication and confusion, as shown in the case of transportation to and from the northern beaches of Sydney. The few integrated plans which do exist, namely the Metropolitan Strategy, the Integrated Transport Strategy and the State Road Network Plan, suggest that a fully integrated infrastructure development plan is possible, and this is a major recommendation of this report.

To co-ordinate the preparation and implementation of this integrated infrastructure development plan, a central agency is needed, one which is not sectorally based and which has the strongest political authority. This should be the new Office of Economic Development in the Premier's Office, in the view of the Committee.

The period between the plan and the call for bids is the stage when most problems occur. There is much greater experience in dealing with publicly-funded infrastructure projects than with those that are privately-funded, and it is with the latter that mistakes are often made.

The stages the publicly-funded project should go through are prepation of the broad technical and economic appraisal by the agency (the pre-feasibility stage); submission to the Capital Works Committee of Cabinet; finalisation by the Treasury of the capital works budget of the state, where the project should appear; preparation by the agency of the detailed environmental, technical and eocnomic feasibility studies; the development of the brief for the private sector which will be building the facility; and the call for expressions of interest.

The main problems which can beset the project during this phase include the difficulty of negotiating through the numerous, sometimes unco-ordinated committees and bodies which have to be consulted; the inadequacy of the brief given to the private sector; the delays in the environmental approval process; and the lack of clarity in the call for bids.

Privately-funded projects may be of three main types:

BOT (Build, Operate, Transfer), where the private sector builds the facility, relying on resources it can mobilise; operates it for a certain period and then transfers it for no payment to the government.

BOO (Build, Own, Operate), where the private sector funds the project, and owns and operates it for a long period.

BOOT (Build, Own, Operate and Transfer), where the private sector finances the construction, owns and operates the facility for a set period and transfers it to the governmentat no cost at the end.

Privately-financed projects may be identified by the government or by the private sector. The ideal procedures are different in each case. For projects identified by the government, the stages the project should go through are: preparation of broad technical and economic appraisals; approval by the Capital Works Committee; the obtaining of a preliminary view from the Treasury on Loan Council issues; preparation of the detailed

appraisal; preparation of briefs for the private sector, and the call for bids. It is only in exceptional circumstances that this last step may be omitted.

Projects proposed by the private sector should also normally go to competitive tender, in a way which does not compromise the intellectual property of the original proponent. This usually means going out to tender on a "broad needs" basis. Because of this, the process is longer in their case, because the Capital Works Committee should ideally approve not only the broad needs request but also the preferred proposal.

The period between acceptance of bids to the execution of the contract is easier for an agency to negotiate because it is carried out in-house. The review team has to be set up first. Criticism was voiced to the Committee from the private sector that the review teams were often inexperienced, particularly in BOT-related matters. This can partly be remedied by engaging independent consultants, and a most successful example of this is the Bennelong Car Park project.

Next, the preliminary proposals should be evaluated. This process may have one, two or three stages. There is debate about how much information a private company should be asked to provide at the first stage of a multi-stage process. The Committee considered that agencies should be alert to the costs they are asking companies to incur and should consider carefully whether detailed information is really necessary at the early stage. The selection of the short list, ideally not more than three, comes next, followed by the invitation to short-listed firms to submit firm proposals. The evaluation of those firm proposals is a difficult point, when the agency may have to balance the need for discussions with the proponents against the possibility of showing favouritism.

Cancellation and delays of infrastructure projects

During the inquiry the Committee heard from the private sector that there was great frustration and anger at the expense incurred by them in bidding for projects later deferred or cancelled, and that this would make it more difficult for the state to attract private investment. Deferral and cancellation can be caused by deficiencies in policy, planning, co-ordination and/or finance which often relates to the Loan Council, and the PAC believes these issues should be settled before the private sector is invited to make significant expenditures. In particular, before seeking bids, agencies should determine what acceptable funding arrangements are likely to be; what the markets' response is likely to be; what the public sector envisages will be the broad allocation of risks; the costs and benefits of the project in broad terms, and the project's technical feasibility.

The private sector also told the Committee that many agencies lacked experience in contract negotiation. The Committee considered several ways of remedying this problem, and finally concluded that bids should be sought for the conduct of a course in contract negotiation in privately-funded infrastructure projects, to be attended by senior public sector officials; and that this should be supplemented by the formation of an Interagency BOOT Group, which would share experience in handling contracts on privately-financed infrastructure projects.

Case studies

The Committee selected four cases studies as being representative of the NSW public sector's experience in privately-financed projects. Two of these were success stories, two had followed procedures where the Committee considered there was room for improvement. From the start, the Bennelong Car Park was a project where the government agency, the Department of Public Works, showed a clear sense of purpose. The respective risks were clearly identified and allocated at the beginning of the project; consultants were engaged to carry out an independent assessment of the financial offers and, separately, of the financial capability of the proponents; an independent review group consisting of three prominent businessmen were asked to report on whether the process was fair, proper and appropriately impartial; and the project opened seven months ahead of the contract completion date. The other valuable example was the Junee Correctional Centre, which was organised by the Department of Corrective Services. The useful features of this process were the timely preparation of the financial impact statement; the establishment of an effective interdepartmental committee to oversight the project; the appointment of independent technical consultants; building on best practice from interstate and overseas; excellent community liaison regarding the siting and development of the Centre; timely advice from the ICAC; the provision of tender documents which were not overly prescriptive; the enactment of appropriate legislation; the carrying out of independent checks of tenderers; examination by NSW Treasury of proposals for innovative financing; and preparation of independent reviews of the preferred tenderer.

The acquisition of the 350 Coal Wagons showed the need for improved liaison in the public sector between concerned agencies. Here the lines of communication among Treasury, Department of Transport and the State Rail Authority were unclear. The original proposal was for an operating lease, to take the project out of the state budget. The SRA assumed that the Department of Transport had discussed with Treasury the proposed financing arrangements for the project, but that did not in fact appear to be the case. It was only very late in the procedings, just before seeking tenders, that the SRA itself checked with Treasury that the proposed financing arrangements were appropriate. The Treasury said in evidence that this was the first they had heard of the project, and informed the SRA that the arrangements were not appropriate. However, two days after the date of the Treasury's negative advice, it appears that the SRA continued with the original procedure and sought tenders for the operating lease. However, following Treasury's advice that the financing arrangements contemplated by the SRA were inadvisable, it was decided by the Capital Works Committee that the project should be financed by the public sector. A result of this was that the original tenderers were considerably out of pocket, and that no tenderer was selected. In evidence, the SRA maintained that because the tender documents had stated that the SRA did not bind itself to accept any tender, there was no criticism to be made of the management of this project. The Committee disagreed, because in the end it was not a matter of all of the tenders being rejected except one, it was effectively a cancellation of the whole project, with no tenders being accepted at all.

The Blue Mountains Tunnel was another case where the position of the project with respect to Loan Council policies was not ascertained with complete clarity until very late. This was despite the fact that numerous discussions were held on the matter among the Water Board, Treasury, and the proponent between January 1991 and March 1993, when

the Loan Council advised the Treasury that the original financing arrangements were not possible. The project was originally intended to be financed by the private sector, which meant that it had to fall outside Loan Council guidelines. In other words, the private sector had to be taking the majority of the risk. However, two problems arose: no direct request was made to the Loan Council to make a definite determination early on in the procedings on the status of the original proposal, i.e. on whether the private sector was in fact taking enough risk; and second, Loan Council guidelines themselves changed during the negotiations on the project. After the Loan Council policy changed, a meeting was finally held between the state Treasury and the Loan Council on the status of the project, and the Loan Council then advised that the project would not fall outside its guidelines. The Water Board was then faced with a choice between cancelling the whole project at a very late stage and starting again with an "on Loan Council" funding arrangement, or continuing with the project under different terms. It chose not to cancel the project, because of the further delays and loss of credibility such a course would mean. It also reduced from $5m to $3m the premium which was originally to have been paid to the proponent.

Issues raised during the inquiry

During the inquiry, several issues arose which the Committee considered warranted further investigation. These included the role of the ICAC in the tendering process and the requirements of confidentiality.

Although the Committee heard criticism from both the public and private sectors about he role of the ICAC and its impact on infrastrucutre projects, there is no doubt in the Committee's mind that the ICAC has a crucial role to play, particularly in corruption prevention. The Committee believes that the balance should move more towards corruption prevention and a co-operative approach, addressing probity issues in a general and regular way before in specific cases they emerge as problems for the ICAC's investigative arm.

With respect to the confidentiality of BOO, BOOT and BOT infrastructure contracts, the Committee believes that there should be wider disclosure than that which occurs under the Freedom of Information Act, and, after consulting widely in the private and the public sector, notably through an unusual high-level seminar attended by senior representatives of both sectors, has made proposals to that end. The most important of these proposals is that contract summaries should be prepared for dissemination to the Parliament and the public, containing details of the full identity of the successful proponents, including details of cross-ownership of relevant companies; the duration of the contract; the identification of any assets transferred to the contractor; all maintenance provisions; the price payable by the public; the basis for changes in the price payable by the public; provisions for renegotiation; the results of cost-benefit analyses; risk-sharing in the construction and operation phases; significant guarantees or undertakings, including loans, entered into or to be entered into, by the public sector, with an estimate either the range, or the maximum amount, of any contingent liability; any protection in the contract against excessive profits; and any remaining key elements of the contractual arrangements. The summaries would not disclose the private sector's internal cost structure or profit margins; matters having an intellectual property characteristic or any other matters wher

disclosure would substantially commercially disadvantage the contracting firm with its competition.

In making this recommendation, the Committee believes that its specificity, and the narrower ambit of the exemptions, mean that there will be wider disclosure than that which occurs under the FOI Act. In addition, if these summaries are issued as a matter of routine, the expense, delay and inconvenience of making an FOI application will in many cases be unnecessary.

Overall, the Committee believes that private investment in infrastructure should be encouraged in the public interest in a way that is in the public interest. Inherent in this is the proposition that the key public sector players must have delegated authority to strike a deal with private sector participants free from second guessing and review along the way by Parliamentary committees and the like.

That said, the public interest is safeguarded by the standing oversight and progressive development of guidelines by bodies like the ICAC and Auditor-General, and public disclosure which in itself is a very important form of accountability.

At the end of the day some projects whether privately or publicly funded will remain controversial and Parliament itself willremain the best forum for informed debate on such projects.

Many of the procedural problems referred to in this report seem to relate back sooner or later to problems with the Loan Council, and fundamental questions relating to the allocation of risks in infrastructure projects involving the Loan Council. A more detailed study of Loan Council problems, including the crucial issue of allocation of risk in projects involving the private sector, and financing generally, will be dealt with in Volume 2 of this report.

LIST OF RECOMMENDATIONS

1. That the NSW Treasury carry out a study on the relationship in NSW between investment in infrastructure and the productivity of the economy. (page 12)

2. That the NSW Treasury compile a comprehensive list, with dollar values, dates of signature of contracts, and length of negotiations, of all privately-financed infrastructure projects which have been started since 1980, and that such a list be updated annually. (page 13)

3. That the NSW Treasury, in consultation with the Cabinet Office, develop a clear and coherent set of policies governing the private provision of infrastructure in NSW, including :

   - the various forms of co-operation between the public and private sectors that would be acceptable to the government;
   - the sorts of risks, in broad terms, which the government would consider it appropriate to assume itself;
   - the regulations the government would propose to govern any such deals;
   - the information the government would undertake to provide to the private sector preparatory to any such deals. (page 17)

4. That these policies be published in the form of a booklet and widely distributed to the public, to members of Parliament and to the private sector. (page 17)

5. That the NSW Treasury, together the Capital Works Unit, conduct regular seminars for relevant agencies in the preparation of cost-benefit analysis of major infrastructure projects. (page 34)

6. That standard procedures be developed jointly between the NSW Treasury and the Department of Public Works to facilitate the use of Value Management in conjunction with cost benefit analysis for estimating the worth of infrastructure projects. (page 34)

7. That the Government take action to ensure that agencies begin as soon as possible to prepare, for wide dissemination, the shorter, public versions of their Capital Investment Strategic Plans which are mandated by the government's own Asset Management Manual. (page 36)

8. That these plans include a list of projects which have potential for private sector involvement. (page 37)

9. That a prominent disclaimer be included in these plans to the effect that they do not represent firm commitments by the government to proceed with a project. (page 37)

10. That the government make it a statutory requirement that Capital Investment Strategic Plans be prepared by departments and authorities, the model for such requirements being the Electricity Commission Act Part 3 Division 6. (page 38)

11. That the government prepare a medium term Integrated Infrastructure Development Plan (IIDP), including projects for possible private sector involvement, at a level of detail close to that of Stage 2 for the Capital Investment Strategic Plan, as set out in the government's Asset Management Manual. (page 48)

12. That responsibility for co-ordinating the preparation of the Integrated Infrastructure Development Plan be assigned to the Office of Economic Development in the Premier's Department. (page 49)

13. That the Premier's Department strengthen the Office of Economic Development to enable it to co-ordinate the implementation of the Integrated Infrastructure Development Plan, and that a specialised unit be established within the OED to provide support for that function. (page 52)

14. That the Premier's Department enable the Chief Executive of the Office of Economic Development to report directly to the Premier. (page 52)

15. That in carrying out its co-ordinating role implementing the Integrated Infrastructure Development Plan, the Office of Economic Development liaise closely with the Treasury, and that the Office of Economic Development could be designated as the first "port of call" for any private sector firms wishing to make proposals to the government, with appropriate strengthening of the OED staff for that purpose. (page 52)

16. That on the model of the Western Australian document *Schedule of Capital Works Projects*, the Government issue a booklet in easily assimilable and portable form, intended for consumption by members of Parliament, the general public and the private sector, which lists the largest new infrastructure projects planned for the next 3 years.

    At the front of the booklet there should be a prominent disclaimer to the effect that contents represent plans only, and not firm commitments by the Government. (page 53)

17. That all infrastructure producing agencies prepare, on an annual basis, booklets on the model of *Roads 2000*, which contain an easily understandable overview of their medium term infrastructure plans. These booklets should be in addition to the plans recommended in the Committee's Recommendation 7 above. (page 53)

18. That before seeking bids from the private sector for privately-financed infrastructure projects, agencies first determine as definitely as possible
    - what the acceptable funding arrangements are likely to be
    - what the market's response is likely to be
    - what they envisage will be the broad allocation of risks in the project

- the costs and benefits of the project
- the project's technical feasibility. (page 72)

19. That when preparing their broad initial appraisals, agencies refer to the Commercial Principles document prepared by the Water Board in connection with the water treatment projects. (page 72)

20. That all privately financed projects identified by the government which are over $5 million be presented to the Capital Works Committee for approval. (page 73)

21. That the EIS for a privately-funded project be financed and carried out by or on behalf of the government. (page 77)

22. That agencies include in advertisements or letters requesting bids a short section outlining the number of stages the agency envisages will comprise the tender process. (page 79)

23. That unless there are special circumstances, privately financed projects identified by the government be subject to competitive bidding.

That in cases where competitive bidding has not been sought, a public statement be made by the government outlining the reasons for not doing so. (page 81)

24. Where a proposal is put up by the private sector, the Committee would prefer that the government go to the market to ensure it is getting the best deal possible rather than enter into an exclusive deal.

However, to provide some protection to the private proponent's intellectual property rights, the Committee proposes that the government goes to the market on a broad needs basis. (page 82)

25. That agencies reviewing tenders for large privately-financed infrastructure projects engage independent financial consultants to participate in the tender review team, and engage independent sources of legal and technical advice to ensure there is the necessary impartial oversight of the probity of the tender review process.

It is important to ensure when retaining such consultants and advisers that there is a full disclosure to ensure there is no conflict of interest. (page 88)

26. That to ensure impartiality, staff directly involved in researching a particular technology be excluded as a matter of routine from any tender review team evaluating private proposals relating to that technology. (page 89)

27. That agencies be alert to the costs they are asking firms to incur in the bidding process, and actively seek ways of reducing bidders' expenses. (page 92)

28. That agencies make it a practice to hire outside consultants to assist in assessing the financial viability of proponents. (page 93)

29. That agencies limit the number of final bidders on privately-financed projects to three, and the number of bidding stages to three.

    These numbers would be upper limits, and ideally the numbers would be smaller. (page 94)

30. That wherever possible, the choice of the review team be endorsed either by a more senior departmental committee, whether established for the purpose or not, or by an independent review. (page 96)

31. That agencies should not normally hand over to regional level the responsibility for negotiating privately-financed projects. (page 99)

32. That the private sector be invited to bid for the conduct of a course in contract negotiation for privately-funded infrastructure projects. This course should be attended by senior agency officers concerned with such negotiations. It should last for six to eight sessions of about two hours each, and should cover legal, financial and administrative matters. (page 105)

33. That the Premier's Department invite bids for the conduct of this course, and that funds should be allocated to it from the Premier's Department. (page 105)

34. That an Interagency BOOT Group (IBG) be formed, to meet every 3 months, with the purpose of sharing experience in handling contracts on privately-financed infrastructure projects. (page 105)

35. That this IBG be organised through the Office of Economic Development, which would draw up its agenda and chair its meetings. (page 105)

36. That liaison between the NSW Treasury, peak departments such as Transport and the public sector agencies co-ordinated by them such as the SRA, on financial and budgetary matters impacting on the private sector and the Loan Council, be better co-ordinated within a system of regular meetings. (page 118)

37. That Treasury undertake a pro-active explanatory programme of education of agencies, including seminars and meetings, to provide to them detailed information on Loan Council policies and principles. (page 118)

38. That the Office of Economic Development prepare for discussion by the Interagency BOOT Group (IBG) a paper on the cost implications for tenderers of cancellation of projects. (page 118)

39. That ICAC prepare a booklet setting out a consolidated list of broad principles for the contract tendering process. This booklet should draw on the principles enunciated in ICAC's publication *Pitfalls or Probity*, but should not represent rigid guidelines. (page 145)

40. That ICAC set up monthly liaison meetings with the relevant officials of the major contract-letting government bodies, with the aim of becoming familiar with each body's specific problems and requirements in the tendering process. (page 145)

41. That, based on the information collected at these meetings, the ICAC design client-specific training courses to be followed by the relevant officials. These would deal, among other things, with selective tendering, long-term tendering, and the way in which innovation can be encouraged without sacrificing fairness.

    That all senior officials of the client body attend these courses, as part of their SES requirements. (page 145)

42. That ICAC conduct a series of corruption prevention seminars for key private sector organisations. (page 145)

43. That before undertaking this liaison and training programme, ICAC organise a workshop, to be attended by major contract-letting organisations, to hear their concerns and to air its own. (page 145)

44. That ICAC re-evaluate its priorities when hiring staff for the Corruption Prevention Unit, and recruit more staff with close knowledge of the operations, rather than the policy, of one or more of the major contract-letting government organisations, and with experience in the private sector. (page 145)

45. That the Premier's Department prepare guidelines, in generally applicable terms, on the elements of BOT-type contracts which should be included in the summaries prepared by agencies and made available to the Parliament and the public. (page 165)

46. That for all privately-financed projects above $5 million, the agency prepare, within 90 days after the contract is signed, a summary of the main points of the contract, unless the contract has been disclosed in full in the meantime. (page 165)

47. The Committee believes that the elements in the summaries should include:
    - the full identity of the successful proponents, including details of cross ownership of relevant companies
    - the duration of the contract, including details of future transfers of assets of significant value to government at no or nominal cost and details of the right to receive the asset and the date of the future transfer
    - the identification of any assets transferred to the contractor by the public sector
    - all maintenance provisions in the contract
    - the price payable by the public
    - the basis for changes in the price payable by the public
    - provisions for renegotiation
    - the results of cost-benefit analyses
    - the risk sharing in the construction and operational phases quantified in NPV terms (where possible) and specifying the major assumptions involved

- significant guarantees or undertakings, including loans, entered into or agreed to be entered into, with an estimate of either the range, or the maximum amount, of any contingent liability
- to the extent not covered above, the remaining key elements of the contractual arrangements.

The statements would not disclose:

- the private sector's cost structure or profit margins
- matters having an intellectual property characteristic
- any other matters where disclosure would substantially commercially disadvantage the contracting firm with its competition. (page 165)

48. That this summary be vetted for accuracy by the Auditor-General or his nominee, and that these services be paid for by the public sector agency. (page 166)

49. That the Auditor-General present this report to Parliament. If he is not satisfied with the accuracy of the summary, or has experienced difficulty in obtaining information, he should refer the matter to the Public Accounts Committee. (page 166)

50. Whilst the use of independent white knights in the form of ministerial advisory groups and such like to review tenders and independent legal or financial consultants to review other aspects are very useful and are to be encouraged to ensure probity and best practice, they can never be a complete substitute for external oversight by the courts, the ICAC or the Auditor-General.

However, input into and further development of such best practice and oversight could be usefully made by the Auditor-General and the ICAC on a co-operative basis by providing advice to such independent white knights and financial consultants. (page 166)

PREFACE

This report deals with the management aspects of infrastructure provision in this state. It is the first of two volumes. The second volume deals with economic and financial issues. The Committee was originally to report to the Parliament by 30 June 1993 on the entire question of the financing and management of infrastructure. However, in May 1993 , the Committee was informed that Loan Council matters would form an important part of the discussions at the 5 July 1993 meeting of the states with the Commonwealth. Since the Loan Council was central to any consideration of the financing of infrastructure, the Committee resolved to issue a first volume only on the management aspects of infrastructure provision in the state, and to request leave to report early in the 1993-94 financial year on the financial and economic aspects of infrastructure provision. As it turned out, leave was also sought to table this volume fourteen days out of time. Whilst this delay is regretted, it resulted from the former Chairman Mr Longley's appointment to the Ministry in June 1992, followed by Mr Tink's appointment to the Committee by Parliament in September 1992, during which time Committee business fell three months behind.

Volume 1 therefore deals with the way the provision of infrastructure projects has been managed by State governments in NSW. Its aim is twofold: first, to chart the path an infrastructure project should follow through State channels from the moment it appears as a concept on the drawing board to the point where the contract for its execution is signed; and second, to point out the pitfalls that have beset a number of infrastructure projects along that route, make recommendations for improvements, and highlight successes. This volume does not seek to evaluate the merits or otherwise of private or public financing of infrastructure, or of the various methods of private financing. This will be left to Volume 2. Its purpose is rather to discuss the organisational, administrative and institutional aspects of infrastructure provision in this State. The report discusses these matters only as they relate to State expenditures, not those made by the Commonwealth or local government, because the purview of the Public Accounts Committee extends to State matters only.

Transcripts and submissions will be tabled after Volume 2 appears.

PART 1

INTRODUCTION: SETTING THE SCENE

This part of the report reviews various concepts of infrastructure which have been put forward, and proposes its own definition; it charts the decline in infrastructure spending in NSW, and discusses the question of whether this decline should be a matter for concern.

1.1 WHAT IS INFRASTRUCTURE?

The debate on infrastructure and its financing and management which began in the early 80s in Australia has thrown up a number of definitions of what it actually is.

The important Langmore Report on the adequacy of Australia's infrastructure[1] lists the "many diverse elements" making up infrastructure:

> there are hundred of thousands of kilometres of roads and tens of thousands of kilometres of railway track. Sea and air transport are served by hundreds of ports and airports. We are accommodated at home and work in vast numbers of buildings of varying size and complexity. We are educated and trained for work, leisure and social responsibility in thousands of public and private schools, colleges and universities. Most people are born in hospitals and are treated in them when injured or sick, and some of us are incarcerated in prisons when we transgress the laws of the land. We receive water and sewerage services through hundreds of thousands of kilometres of piping. Power is supplied through a huge and complex network of electricity generation and distribution facilities, as well as gas and oil wells, refineries, stores and pipelines.
>
> ...The term infrastructure, which groups these diverse goods and services, is to some extent an abstraction. The work embraces a host of different investments: some wholly in the public sector, some private but encouraged or facilitated by governments, other purely private. They all share several common elements:
>
> - the exist to support other economic or social activities, not as an end in themselves;
> - they incur relatively high initial capital costs;
> - they have relatively long lives; and therefore
> - they should be managed and paid for on a long term basis.

A later Commonwealth report[2] elaborates:

> infrastructure comprises the capital works required in urban areas for households to have access to major economic and social services. The OECD groups infrastructure into broad categories. In the first category is "economic" infrastructure, which comprises networked services such as water, sewerage and drainage (hydraulic) facilities, highways and other transport facilities, and energy distribution networks. The second category, "social" infrastructure comprises a broad range of facilities that provide community services such as education, health and leisure, and law and order.

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1 House of Representatives Standing Committee on Transport, Communications and Infrastructure, 1987: *Constructing and Restructuring Australia's Public Infrastructure*, November 1987, pp. 3-4.

2 Industry Commission, *Taxation and Financial Policy Impacts on Urban Settlement*, Vol. I, Report,, April 1993, pp. 95-96.

The OECD's exact definition[3] is:

> The infrastructure that is essential to the efficient working of a modern city is extensive. It includes provision for water and sewerage facilities, surface water drainage, highways, transport facilities, energy distribution networks, telecommunications facilities and other "networked" services. It also includes the provision of the types of social facilities which are regarded as essential to the maintenance of a tolerable standard of living for residents and workers: educational an health care facilities, leisure facilities and open space and the infrastructure associated with the maintenance of public health and welfare, law and order and public administration.

Probably the most useful definition of infrastructure is a comprehensive one, which distinguishes, as the OECD does, between economic and social infrastructure, but which also includes, as the Langmore report did, the characteristics which are common to both categories. The Committee therefore proposes, as a working definition:

Infrastructure comprises the physical assets required to satisfy the public's need for access to major economic and social facilities and services. It may be divided into two broad types:

- economic infrastructure, comprising
  - road
  - railways
  - ports
  - airports
  - dams and reservoirs
  - water headworks, water treatment and reticulation facilities
  - telecommunications and post facilities
  - power generation facilities

- social infrastructure, comprising:
  - schools and other education facilities
  - hospitals, clinics and other health facilities
  - housing
  - recreational facilities
  - law and order facilities.

The principal characteristics of infrastructure facilities are:

- they have high initial capital costs;
- they are time-consuming to build;
- they have long lives;
- they exist to support other economic and social activities, not merely as an end in themselves.

[3] Organisation for Economic Co-operation and Development, *Urban Infrastructure: Finance and Management*, Paris 1991, p. 19.

1.2 OVERVIEW OF EXISTING INFRASTRUCTURE FACILITIES IN NSW

Table 1 gives a snapshot of the main elements of New South Wales infrastructure in 1992.

TABLE 1

NEW SOUTH WALES' INFRASTRUCTURE IN 1992 - SELECTED STATISTICS

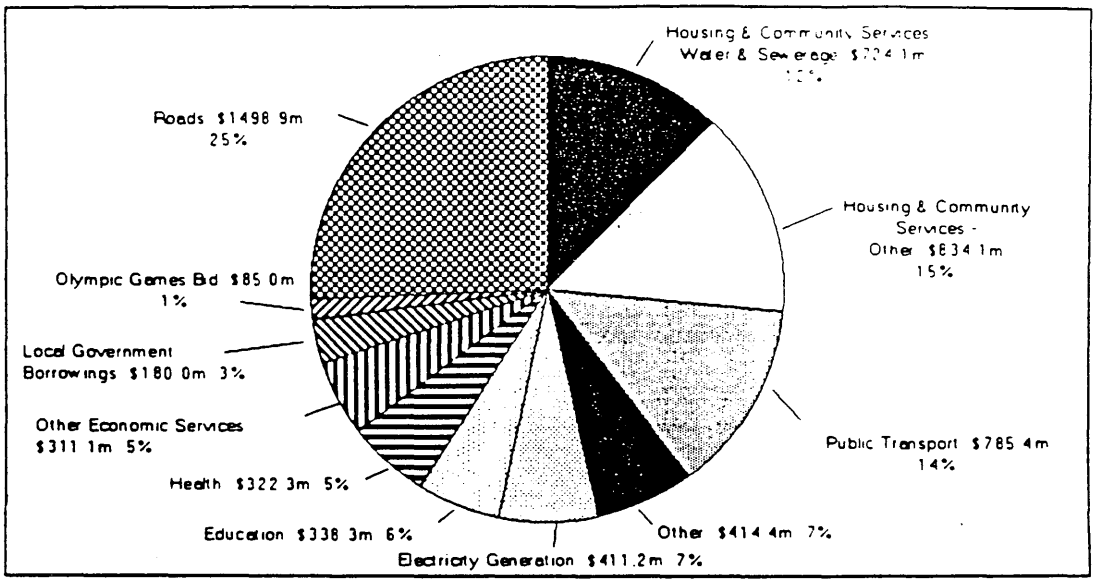
	Approximate
Kilometres of public road	200,000
Kilometres of government railway track	5,000
No. of aerodromes	80
No. of major dams	159
No. of telephone instruments in use	2,700,000
No. of primary and secondary schools	2,216
No. of occupied dwellings	2,000,000
No. of hospital beds	27,300

Source: NSW Roads and Traffic Authority, Department of Transport, Civil Aviation Authority, Dams Safety Committee Annual Report 1990-91, Australian Telecommunications Commission, Department of Education, Australian Bureau of Statistics, Department of Health, Annual Report 1991-92.

Figure 1 gives another snapshot: the division of the current year's infrastructure budget among sectors.

FIGURE 1

STATE CAPITAL PROGRAMME
TOTAL PROGRAMME 1992-93 (Estimate)

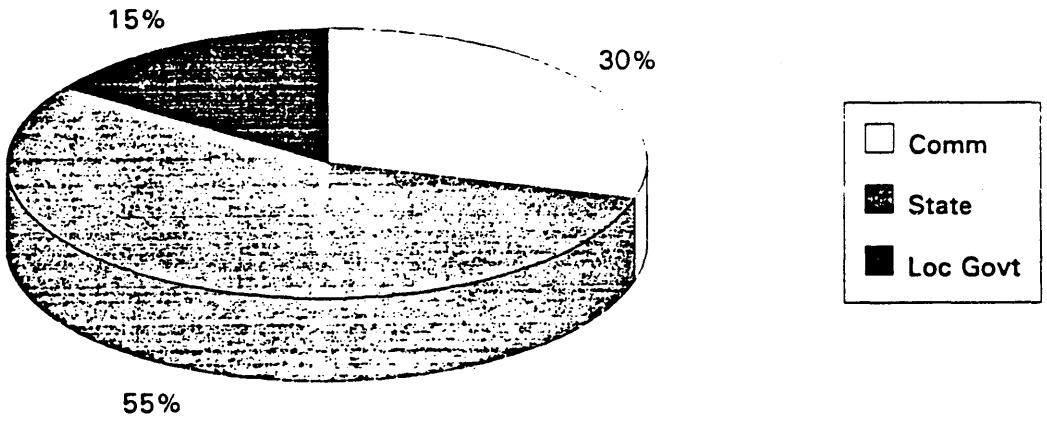


Source: State Capital Projects 1992-3, Budget Paper No. 4 p. 3.

Another snapshot is shown in figure 2 which sets out the proportion of gross fixed capital expenditure in New South Wales which is spent by the three levels of Government.

FIGURE 2

PUBLIC GROSS FIXED CAPITAL EXPENDITURE IN NSW: 1991-92



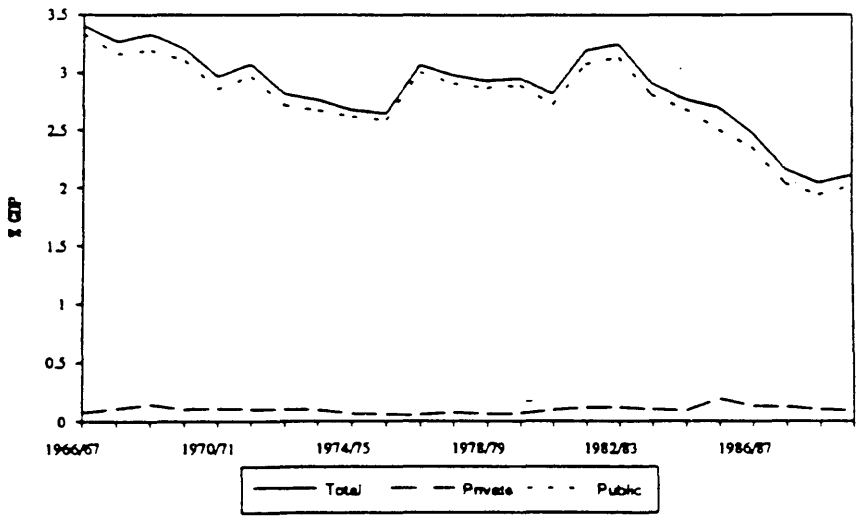
Source: ABS 5220.0 and ABS Communication to Committee

1.3 DECLINE IN INFRASTRUCTURE INVESTMENT

The above table and figures give only a snapshot view of the current status of infrastructure in NSW. The current status, however, is the result of a long-term declining trend in investment in infrastructure, not only in NSW but in Australia as a whole, as shown in figure 3.

FIGURE 3

TOTAL, PUBLIC AND PRIVATE INVESTMENT IN ECONOMIC INFRASTRUCTURE



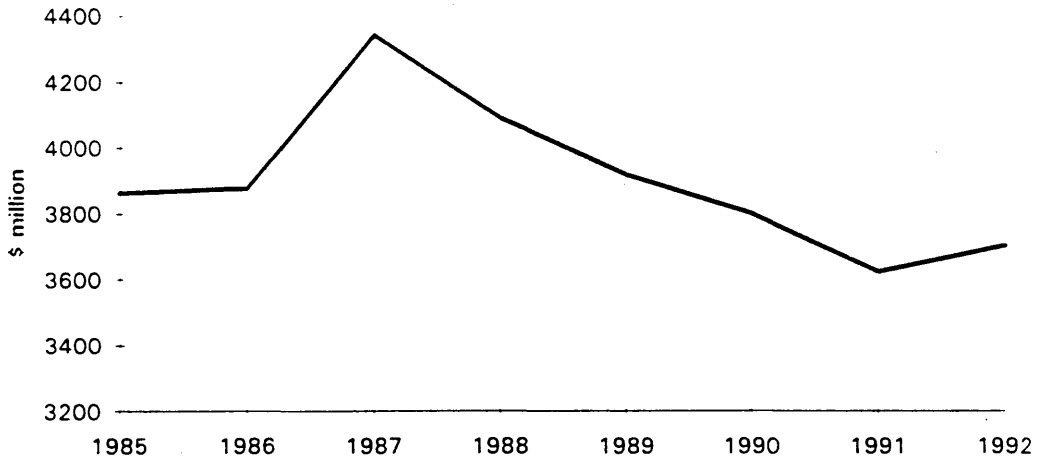
Source: ABS 5221.0 and 5211.0, as shown in A. Smith, Economic Infrastructure in Australia

In New South Wales the public gross fixed expenditure on non-dwelling building and construction has also declined in recent years, both in absolute terms and as a percentage of Gross State Product as figures 4 and 5 show.

FIGURE 4

PUBLIC GROSS FIXED CAPITAL EXPENDITURE

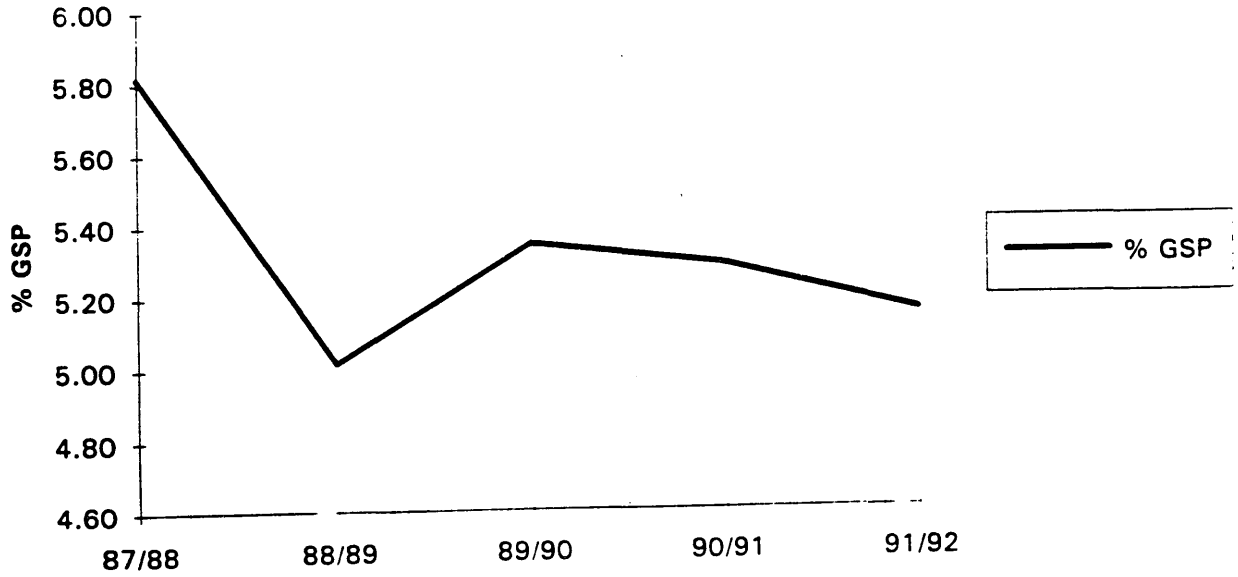
Non-dwelling building and construction (average 1989-90 prices)



Source: ABS Communication to Committee

FIGURE 5

PUBLIC GROSS FIXED CAPITAL EXPENDITURE AS % GROSS STATE PRODUCT



Source: ABS 5220.0

1.4 DOES THE DECLINE MATTER?

The charts above show a clear picture of declining public investment in infrastructure in NSW as a proportion of gross state product. The extent of private infrastructure investment in NSW has proved difficult to ascertain in practice, although there has been bipartisan support for such investment starting with Premier Unsworth and continuing with Premiers Greiner and Fahey. Although statistics are hard to obtain, the Committee views private sector infrastructure investment as being on the increase. At the end of this section, the Committee addresses the question of the difficulty in obtaining relevant statistics for NSW.

The Langmore Report discussed the view that even if investment in infrastructure were declining, that did not really matter. For one thing, it could be argued that Australia's biggest infrastructure needs have already been met, and that "investment can safely decline"[4]. The mass immigration programs of the 1950s and 1960s are over, a basic road network is largely complete, and there are no new projects of the size of the Snowy Mountains Scheme.

However, there are many arguments which could be made against this cheerful optimism. Our infrastructure could be too old; there could still be gaps in the network; demographic changes could have necessitated the construction of new facilities; technology has advanced, and so on.

There is strong anecdotal evidence that the infrastructure of New South Wales is ageing although there is a dearth of statistical support for that conclusion. Examples might include Sydney's sewerage and drainage system, a considerable proportion of railway facilities, some dams and water mains.

There are also still considerable gaps, notably in roads and airport capacity. Demographic changes have been dramatic in NSW, as well, and these have created new infrastructure requirements.

But perhaps the most powerful argument against the view that the decline in investment in infrastructure does not really matter is that, several years down the track, that decline will contribute towards a subsequent drop in the productivity of the economy as a whole.

This argument is intuitively appealing. At first, it seems practically self-evident that, since as we have seen infrastructure is needed for productive economic activity, a decline in investment in infrastructure will lead to a decline in economic productivity, and that therefore, the decline in NSW really does matter for the economy.

The general principles behind this argument have, however, been subjected to a considerable amount of empirical testing, both in Australia and overseas. One of the best known early studies on this question carried out in the United States, was unequivocal:

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[4] House of Representatives Standing Committee on Transport, Communications and Infrastructure, op. cit., p. 17.

the Federal Highway Administration in the United States in 1983 showed that a continuation of the declining trend in US highway investment in the 1970s would result in a decrease in GDP by 1995 of 3.5%, an increase in inflation of 8% and an increase in unemployment of 2.2%.[5]

Various American studies since then have supported that conclusion. Aschauer[6] and Munnell[7] argue that investment in infrastructure leads to a higher level of private sector productivity, and conversely, that a drop in infrastructure spending will lead to a drop in the productivity of an economy.

A number of expert studies have been carried out in Australia similarly claiming that infrastructure deficiencies are an important potential limitation on our future economic well-being. An early study was done by the National Institute for Economic and Industrial Research in 1987[8], which identified a severe capital stock constraint to Australia's productivity. Another, more recent study has confirmed the point[9]. This too found that "public capital investment ...[had] a significant and positive impact on private production and private total factor productivity".

However, other recent studies have tested the hypothesis and have suggested that the data may not support the intuitively appealing conclusion that a decline in investment in infrastructure will lead to a drop in the economy's productivity in the medium term.

The best known of these was carried out for the OECD in 1990 and 1991 by Ford and Poret[10], who also included data for Australia. Their graph for Australia is reproduced as figure 6.[11]

It shows that in the 1980s the productivity of the economy actually increased while investment in infrastructure decreased. It also shows that there is a long lag between an increase in investment in infrastructure and an increase in productivity.

A recent British study on the subject shared the scepticism about the effect on productivity of infrastructure, particularly transport, investment: "At the general level it

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5 Cited in Cox, J.B. *The Macroeconomics of Road Investment*, Business Council Bulletin, no. 96, April 1993.

6 Aschauer, D.A., 1989: Is Public Investment Productive?, *Journal of Monetary Economics 23*, pp. 177-200.

7 Is there a Shortfall in Public Capital Investment?, Munnell, A.H. ed. Proceedings of a Conference, Federal Reserve Bank of Boston, 1990.

8 Peter Brain and Ian Manning, Australia's Economic Predicament, in National Institute for Economic and Industrial Research Review No. 7 (June 1987), Melbourne 1987, pp. 5-60.

9 Otto, G. and Voss, G.M. 1992, Public Capital and Private Sector Productivity: Evidence for Australia 1966/7 to 1989/90, School of Economics, University of NSW, cited in Cox, J.B., op.cit.

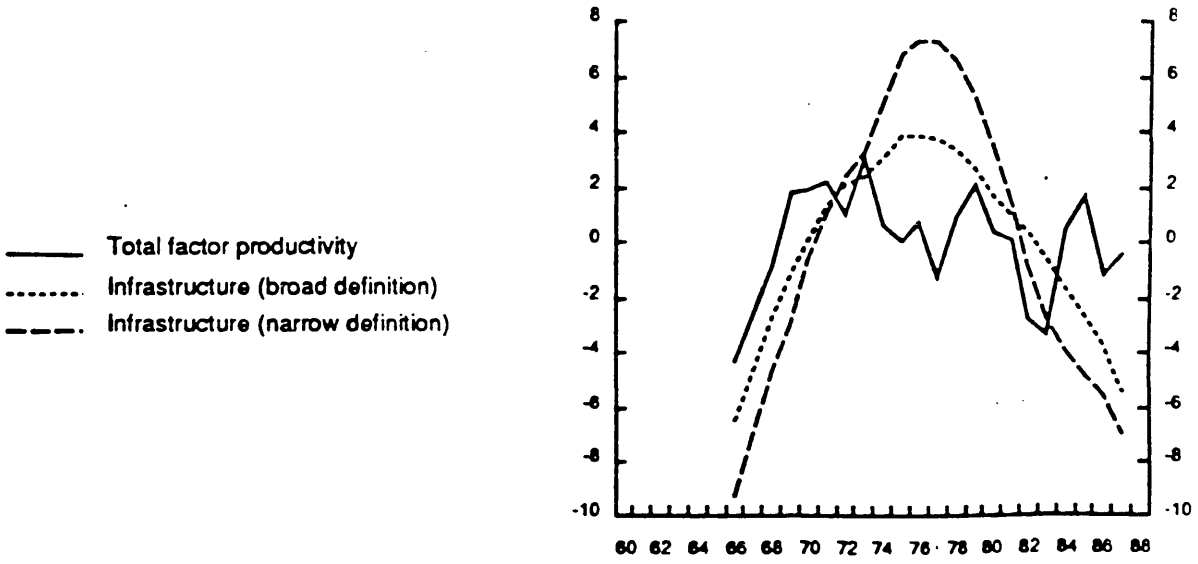
10 OECD Department of Economics and Statistics, Working Papers, no. 91, *Infrastructure and Private-Sector Productivity*, by Robert Ford and Pierre Poret, January 1991.

11 Ford and Poret, op. cit., p. 16.

remains unproven that transport investment raises the overall level of national economic activity. At the local level, it has not yet been widely researched..."[12]

FIGURE 6

RELATIONSHIP BETWEEN INFRASTRUCTURE SPENDING AND PRODUCTIVITY IN AUSTRALIA



Source: Ford and Poret, op. cit.

There may be other factors at work here. Ford and Poret suggest that the relationship between infrastructure and productivity may work the other way round: that instead of infrastructure investment raising productivity, gains in productivity (achieved through other, non-infrastructure means) will make governments more willing to invest in infrastructure.

The last word has not been at all said in this debate, either in Australia or overseas. It would seem to be a vital area for thorough research in Australia, where the call by infrastructure projects on the nation's investment capital has to be rigorously justified as the economy emerges from recession and other needs have to be satisfied.

There is no doubt that a well-thought-out research project needs to be carried out on the subject in Australia, similar to the OECD study. Such a study would provide the fundamental justification for the call by infrastructure projects on the nation's investment capital and borrowings. Such a study could be carried out at university or Treasury level. In NSW, there are a number of organisations equipped to handle this kind of research project, including the NSW Treasury itself.

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[12] Grieco, M. (1988), The Impact of Transport Investment upon the Inner City, Transport Studies Unit, University of Oxford, Oxford. Quotation from p. 15., cited in OECD, op cit. pp. 35.

RECOMMENDATION 1

That the NSW Treasury carry out a study on the relationship in NSW between investment in infrastructure and the productivity of the economy.

Lest it be thought at this point that the Committee has a negative view of investment in infrastructure, it will become plain later in this report that successive governments of different political persuasions, which are all represented on the Committee, have given and will continue to give a strong priority to infrastructure development and investment, although there may be disagreement about particular projects.

Moreover, there has been, is, and will continue to be strong bipartisan support for the involvement of the private sector in infrastructure development, although again there may be disagreement about such involvement in projects in particular sectors.

In October 1992 in a foreword to a presentation to industry publication, Premier John Fahey stated the Government's position as follows:

> The Government remains committed to a policy of encouraging greater participation by the private sector in the development of public facilities and the delivery of services.
>
> Under the Government's guidelines, agencies considering major capital works are expected as part of their strategic planning to examine in detail the eonomic and financial feasibility of such private sector involvement.

Again, on 1 October 1992, the Leader of the Opposition, Bob Carr, stated in a media release:

> Support for private sector involvement in infrastructure is absolutely consistent with Labor policy.

In an attachment to that media release, Mr Carr said:

> In the 1990s State governments alone will not be able to provide the new infrastructure required. This is especially so as existing infrastructure will place greater financial pressures due to the increasing maintenance and refurbishment cost. Accordingly the private sector will become increasingly involved in providing this infrastructure or the associated funding under appropriately determined guidelines.

This bipartisan approach to private participation in infrastructure development and financing is an Australia-wide phenomenon driven by the significant limitations on public borrowings. By way of example, a former Minister and Shadow Minister for Planning in Victoria, the Hon. Alan Hunt, wrote to the Committee on 29 June 1993 to the following effect:

> In an era of acute constraints on public borrowings governments will need to look increasingly to the private financing of infrastructure, including urban infrastructure. That course can stimulate economic activity, reduce public debt, and increase public revenues.

In a background information paper on *State Infrastructure Policy* published in November 1991, the Victorian Department of Planning and Housing stated the then Labor Government's view as follows:

> In May, 1991, the Victorian Government released a set of guidelines designed to facilitate private sector investment in Victorian infrastructure projects. The guidelines provide a framework within which the private sector is encouraged to approach the Government with ideas for infrastucture projects, and seek an environment within which the public sector can actively seek private participation in the funding of new capital works.

The Committee's views reflect this bipartisan approach.

* * *

The difficulty experienced by the Committee in obtaining precise and comprehensive data on the extent of private investment in infrastructure was surprising and inconvenient for this inquiry. No agency has yet assembled a completely comprehensive list, with dollar values, dates of signature of contracts, and length of negotiations, of all privately-financed projects in NSW which have been started since 1980. However, the former Department of State Development has assembled a list which it has indicated to the Committee is not exhaustive. This lack needs to be remedied as soon as possible to assist in informed government decision making and parliamentary oversight.

RECOMMENDATION 2

That the NSW Treasury compile a comprehensive list, with dollar values, dates of signature of contracts, and length of negotiations, of all privately-financed infrastructure projects which have been started since 1980, and that such a llist be updated annually.

1.5 GOVERNMENT POLICY TO DATE ON INFRASTRUCTURE

Successive NSW governments have not made very many policy statements on infrastructure as such. There have been various publications discussing how infrastructure proposals should be evaluated, how they should be planned for and how they should proceed, but little of a nature that examines the fundamental value of building more infrastructure.

Such a policy statement would, to be logical and soundly-based, probably have to await the results of the study recommended above.

However, the present government has issued a series of declarations respecting one particular form of infrastructure, that is, infrastructure which is privately provided. These are enshrined in successive editions (1988, 1990 and 1993) of the *Guidelines to Private Sector Participation in Infrastructure Provision* prepared by the Department of State Development. These guidelines contain the unambiguous statement:

> The Government is committeed to a policy of increasing private sector participation in infrastructure provision in order to further strengthen the State's economic base and to make New South Wales a leading economy in the Asia-Pacific region.[13]

These guidelines, however, provide no details on government policy on risk-sharing between government and private sector. They give no direction on the criteria the government might adopt when considering possible joint ventures between government and the private sector, of which there have in fact been a (very) few in NSW. They explore no possible forms of co-operation between government and the private sector. They give no guidance on information the government would undertake to provide as background for any such co-operative projects. They discuss no regulations or laws relating to government/private co-operation. In short, there is little stated policy at present on government/private sector co-operation in infrastructure provision in NSW.

This is in contrast to the French Government, which for decades has espoused, and stated, a policy of encouraging a variety of forms of co-operation and joint ventures between the private and the public sectors. Among the many forms of such co-operation are the Sociétés d'Economie Mixte (SEMs). SEMs are a mixture of private-public ownership. They arose as a result of the failure of most private tollway companies in the 1980s in France. The shareholders of SEMs are the central government, local department, Chambers of Agriculture or Chambers of Commerce, which themselves are partially financed by the private sector. They contract out construction work on infrastructure projects. Borrowings account for the bulk of the finance. The purpose is to foster commercial practice and discipline, but within a contractual and institutional environment which does not create perverse incentives.

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[13] Department of State Development, *Guidelines for Private Sector Participation in Infrastructure Provision*, July 1990 p. 2.

There are many forms of government-private co-operation which have been used elsewhere in the world: government-guaranteed borrowings; sliding guarantees offered by government; revenue guarantees; non-competition agreements; take-or-pay contracts; step-in provisions in contracts; inflation-indexed bonds; secondary long-term bond markets; infrastructure bonds; zero-coupon bonds, and so on. These will be explored in more detail in Volume 2 of this report. The point of relevance here is that there is at present considerable scope for state governments to work out and formally announce their policies on government-private sector co-operation in infrastructure provision, regardless of whether they would encourage any of these specific forms or not.

Loan Council provisions and NSW government policy on preserving the state's triple-AAA rating are clearly factors impinging on the development of any forms of state-private co-operation in NSW. However, there have, as pointed out earlier, already occurred in this state several forms of joint ventures, government guarantees of one sort or another, take-or-pay contracts and so on, in a sort of patchwork which appears to have developed on its own outside a coherent and thoroughly articulated set of state government criteria on the matter.

A detailed set of such criteria in NSW would be welcomed by the private sector in the interests of clarity.

The British Government did adopt a set of basic rules governing infrastructure provision by the private sector. These rules were known as the four Rirey Rules, which said the private sector project had to meet four tests or criteria:

- is it good value for money?
- can it work without government guarantees? (because the government had a policy of rejecting any such guarantees).
- does the proponent want exclusive dealings? (because the government had a policy of rejecting any such dealings).
- it will have to obey the additionality principle, according to which any funds provided by the private sector to infrastructure resulted in a corresponding reduction in the government budget.

These have now been partly rejected by the British government, but at least the government was able to articulate a clear set of policies which were understandable to the public, to Parliament and the private sector alike.

The Danish Government also has in place a stated policy encouraging co-operation between the government and the private sector in infrastructure provision.

The American Government in 1991 passed the Inter-modal Surface Transport Efficiency Act or ISTEA ("Iced Tea") Act for short, which provided specific measures encouraging the private provision of infrastructure in the United States, and the offering of tax concessions and other forms of state contribution.

The Committee believes that it would now be beneficial for the NSW government to develop and publish, as soon as practicable, a more detailed set of State government

policies on the private provision of infrastructure in NSW, specifically stating, among other matters:

- the forms of private-public sector co-operation that would be acceptable to the government;
- the sorts of risks, in broad terms, that the government would consider appropriate to assume itself;
- the regulations, if any, e.g. on matters of finance, intellectual property and probity, which the government would propose to govern these deals;
- the information which the government would undertake to provide for potential proponents to such deals.

This policy document would also explore the determinants, the advantages and the disadvantages of the private provision of infrastructure in NSW[14].

The appropriate body to prepare such a policy document would be the NSW Treasury, in close consultation with the Cabinet Office. The best time would be after the finalisation of Loan Council guidelines in the second half of 1993.

Infrastructure has been financed from the public purse since early colonial days. The Department of Public Works has existed in various forms since 1856. Governments have had over 150 years to work out policies and procedures relating to publicly-financed infrastructure, and these now exist in well-developed and sophisticated forms. The private provision of infrastructure is a much newer, and rarer, phenomenon (although there were several examples of it before Federation, including the Pyrmont Toll Bridge, the lines run by the Sydney Railway Company, and the installations of the Balmain Light and Power Company). It is now time for the government to refine and state clearly at a greater level of detail what its policies are on the private provision of infrastructure.

[14] See Alison Smith, Policy Research Unit, Commonwealth Treasury, *Economic Infrastructure in Australia*,paper presented to the 21st Conference of Economists, 1992, which contains a useful discussion of the determinants of public and private infrastructure in Australia.

RECOMMENDATION 3

That the NSW Treasury, in consultation with the Cabinet Office, develop a clear and coherent set of policies governing the private provision of infrastructure in NSW, including :

- the various forms of co-operation between the public and private sectors that would be acceptable to the government;
- the sorts of risks, in broad terms, which the government would consider it appropriate to assume itself;
- the regulations the government would propose to govern any such deals;
- the information the government would undertake to provide to the private sector preparatory to any such deals.

RECOMMENDATION 4

That these policies be published in the form of a booklet and widely distributed to the public, to members of Parliament and to the private sector.

PART 2

THE INFRASTRUCTURE PROJECT FROM CONCEPT TO CONTRACT: STAGES IN THE MANAGEMENT PROCESS

This part sets out the administrative steps an infrastructure project should take from the moment it appears as a concept, or a plan, on the drawing board to the point where the contract for its execution is actually signed. The part divides the process into three distinct stages: first, the planning phase; second, the phase between the plan and the point when the department calls for expressions of interest from the private sector; and third, the period between the call for expressions of interest and the actual signing of the contract. Issues arising during the inquiry which relate to each of these phases are discussed at the relevant point in the text. Part 2 as a whole represents in essence the Committee's recommendations on the nature and sequence of the administrative steps the infrastructure project should take between concept and contract.

2.1 STAGE I: PLANNING FOR INFRASTRUCTURE

2.1.1 JUDGING TRUE INFRASTRUCTURE NEEDS: MAJOR ISSUES

Introduction

Before any infrastructure plans can be drawn up, judgements have to made about what a country's, or a state's true infrastructure needs actually are. The questions infrastructure planners generally need to consider include:

- the form cities should be taking;
- the kind of housing people should be living in the future;
- whether the need for a facility is artificially inflated by the low price charged for the service it provides;
- the kind of environment which should be provided by urban growth.

There is an additional complication, in that what planners judge to be the state's true infrastructure needs may not necessarily be at all what the public wants. For example, planners, typically, are concerned with reducing urban sprawl; they devise measures for reducing it, and bring into play all kinds of tools like pricing and government regulations. The public, on the other hand, obstinately goes on moving into the outer fringe regardless, much to the planners' dismay. As well, there might well be eventualities unforeseen by the planners which force unexpected infrastructure solutions: for example, the unanticipated congestion on the other side of the Harbour Tunnel is forcing the government to consider the completion of the Eastern Distributor ahead of the original schedule.

What, in that case, are the state's true infrastructure needs - the ones the planners believe are necessary, or the ones the public forces them to consider?

There is another related issue—what is the difference between true needs and mere wants? In an effort to examine this question, the Department of Public Works has over the years undertaken a series of Value Management Studies to measure the difference between "needs" and "wants" in infrastructure, and has emerged with the conclusion that:

> on the basis of the Value Management Studies undertaken by Public Works over a wide range of urban infrastructure projects, the functional separation of "needs" from "wants" constitutes a substantial portion of the savings which have averaged around 14%[15].

[15] Preliminary submission by Department of Public Works, 1 June 1992, p. 4.

In an effort to judge true infrastructure needs, the Department of Public Works has emerged with the conclusion that they are 14% lower than the "wants" the public expresses. Value Management, the technique used by the Department of Public Works to reach this conclusion, identifies the purpose for which the infrastructure is being built and examines in detail genuine alternatives for meeting those objectives. The result ideally is that a cheaper but just as effective way of satisfying wants can be identified[16].

Another well-known way of focussing on true needs is by "integrated least-cost planning", a form of planning which seeks to find the cheapest way of satisfying wants. Often this cheapest way will not actually involve the construction of a new piece of infrastructure, but only the identification of a way of making existing systems more efficient.

As the Government Pricing Tribunal said in its first report, into water pricing:

> Integrated least-cost planning means that water suppliers examine supply-side and demand-side options to meet the customer's requirements for water, sewerage and drainage services. For example, a customer's demand for showers can be met by either adding to water supply capacity or making the existing delivery system more efficient[17].

Even when broad objectives, and the true need for a new infrastructure facility can be agreed on, for example, that because of demographic changes, there is an unarguable need for improved transportation between two points with extra population, there is still the problem of how to rank alternative ways of achieving that objective.

For example, should the infrastructure facility be heavy rail, light rail; a four-lane or a two-lane road; built from government funds or by the private sector; begun next year or in three years; directed through forest or residential areas? How should it be paid for, by users, local government, general taxation, or special, or hypothecated taxes? There are still many deficiencies in the techniques which help identify the best among several infrastructure alternatives. Numerous disputes still rage about what should and what should not be included in such analyses, and about the issues underlying the choice among alternatives.

This chapter seeks to discuss some of those issues.

* * *

The debate about the form of our cities is decades old. Passion and many academic articles are generated on both sides. The debate might be conveniently summarised in a series of questions:

1. Are we building the wrong type of infrastructure, particularly the kind which contributes to urban sprawl?

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[16] NSW Public Works Department, *Total Asset Management Manual, Value Management.*

[17] Government Pricing Tribunal of NSW, *Water: an Interim Report*, Vol. 1, p. 55.

2. Are we building a new facility only because the service it provides is too cheap and demand is therefore too high? If we priced the service properly, i.e. higher, demand would probably decline and the facility might not have to be built at all.

3. Are the social costs of this facility higher than the benefits?

4. Have we calculated the costs and the benefits appropriately?

To take each of these in turn:

Are we building infrastructure which supports urban sprawl instead of urban consolidation?

This first issue goes to the heart of the debate about the desirable form for Sydney.

The basic question, familiar to many for decades, is how harmful the urban sprawl is that has been undeniably growing in Sydney for decades.

In *Sydney Into Its Third Century, Metropolitan Strategy for the Sydney Region*, published in 1988, the Department of Planning set out two mutually exclusive options or "ways to go" for Sydney[18]:

- **the concentrated option**, which would encourage urban consolidation, the limiting of fully serviced land set aside for urban development and the increase of multi-unit dwellings in the city from the present 35% to 37%.

- **the dispersed option**, which would encourage low residential densities, more land released for development on the outer fringe of the Sydney Region, and a decrease in the number of multi-unit dwellings from 35% to only 25%.

The second option represents the current situation, warns the Department. It has several disadvantages, according to the Strategy:

- it encourages inequitable distribution of employment;
- it is more expensive for the government than urban consolidation;
- it encourages inefficient use of existing infrastructure and the building of unnecessary infrastructure facilities.

Unfortunately, the public did not in the event co-operate with the strategy. Not enough people wanted to live the consolidated urban life; too many still sought the quarter-acre block on the fringe. In 1992 the Department determined to update the original strategy, and in its request for submissions, admitted:

> We are using up the land we have available for housing faster than planned. We are not meeting the targets set in the 1988 strategy for the number of houses

[18] Department of Environment and Planning, *Sydney Into Its Third Century, Metropolitan Strategy for the Sydney Region*, Sydney 1988, p. 33.

> which should be built in new areas and in established areas. More than 70 per cent of new housing is in outer areas, compared to the target of 55%[19]

However, in its new version of the Strategy, put out as a discussion paper in June 1993[20], the Department still holds essentially to the old approach:

> To make a meaningful impact on Sydney's ongoing urban expansion, it will be necessary to intensify the use of both new and existing urban land. This means increasing the construction of multi-unit housing as a proportion of all new dwellings.
>
> This strategy aims to progressively increase the proportion of all new housing constructed annually in multi-unit form.[21]

The target, as set out in the Discussion Paper, is to increase housing in multi-unit form to 65% by 2011.

In evidence to the Committee, the Department repeated the anti-urban sprawl view:

> We would take into account all the costs including the ones that fall outside the transport portfolio—pollution, congestion, cost of adding in water and sewerage to the urban sprawl when it is cheaper in fact to do it in the centre of the city.[22]

Significantly, the New South Wales Council for Social Services agrees with the Department of Planning that urban sprawl is undesirable:

> ...planners have tended to pay too much attention to accommodating growth at the city fringe and anticipating the needs of new home buyers.[23]

The extra cost of providing infrastructure to the urban fringe has frequently been cited as a major reason why consolidation is desirable and urban expansion is not. The Water Board, in its evidence to the Committee, for example pointed this out[24]:

> **Water Board**: Urban consolidation would do the Water Board fine, because we have long sewers and long water mains. The Water Board's sewers are about 20,000 kilometres and the water mains are about the same. They are the same lengths of infrastructure as Tokyo has for 12 million people. I think the centre of Los Angeles has the same population, and I think they have about 6,000 kilometres of sewer and 6,000 kilometres of water mains.

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19 Department of Planning, *Updating the Metropolitan Strategy*, November 1992, p. 4.

20 Department of Planning, Managing Sydney's Future, a Discussion Paper on the Planning of the Greater Metropolitan Region, June 1993.

21 Department of Planning, Discussion Paper on the Planning of the Greater Metropolitan Region, May 1993.

22 Mr R. Garnham, Department of Planning, evidence before the Committee on 1 December 1991.

23 NSW Council of Social Service, *Urban Development and Social Justice*, Sydney, May 1991, p.4.

24 Mr R. Wilson, Evidence before the Committee 3 December 1991.

> So we have a very sprawled city. If we can get some urban consolidation and use the infrastructure better, we would be much better off. Even if we had to upgrade the existing infrastructure it would be cheaper than continuing this sprawl and getting treatment works to discharge to very sensitive waterways. We have been a great campaigner for urban consolidation for that reason as well . . .

Up till very recently, in fact, the argument against urban sprawl was a motherhood one. There was a general deploring of the extra infrastructure costs it would entail, the extra pollution, the extra use of roads rather than rail, the concentration on single-family owner-occupied dwellings instead of the needs of lower-income renters, and so on.

However, a few challenges have recently been mounted to the notion the urban sprawl is axiomatically a bad thing.

The extra infrastructure cost issue, for example, has recently come into question with the publication of the Industry Commission's report into the *Taxation and Financial Policy Impacts of Urban Settlement*. Citing a number of studies, the report concludes:

> Where bottlenecks in some services exist, the costs of rectifying them in inner areas can be high.[25]

Although still very much disputed, this is one significant document which questions the accepted notion that infrastructure is always necessarily more expensive at the fringe.

Several other challenges have been voiced to the desirability of urban consolidation. It is socially divisive, claim Murphy and Burneyl in a recent paper:

> Given the socially divisive nature of consolidation, in particular the likelihood that higher density housing in the established city will be priced so that only the rich can buy it... the social benefits may not be all that large.[26]

They go on to make a significant point against consolidation:

> in any case, consolidation is not likely to come anywhere near to being a serious substitute for fringe expansion.

In evidence to the Committee, the Associate Professor of Economics at the University of Sydney agreed with this view:

> **Dr Stillwell**: I am persuaded in general by the arguments for urban consolidation. I am also aware of the difficulties of achieving it. I know that the expected population growth cannot be accommodated through an urban consolidation programme alone. In fact, you would be lucky if a quarter of the population growth could be accommodated through urban consolidation.

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[25] op. cit. p. 134.

[26] P. Murphy and I. Burneyl, *Regional Issues Affecting the Financing of Urban Infrastructure in NSW*, paper presented to the conference on financing Urban Infrastructure, 1990, University of NSW.

> I saw some figures recently - I think they were put together by the Federal Government - looking at the likely balance between fringe development and accommodation of additional population in current metropolitan areas. In general it is suggested, on these figures which derived from the metropolitan strategy, that two thirds of Sydney's population will be fringe, and one third consolidation. I know the latest metropolitan strategy updates suggests that even that one third target is knocked on the head.[27]

The fundamental reason for this lies in the fact of the public's persistent preference for the quarter-acre block with clean air and a house of one's own. The Industry Commission observes ruefully:

> Sometimes the more costly developments are the ones that people value most highly[28].

The question for planners is to what extent they will try to compel the public, through other means, to abandon its preference for the urban fringe and live more in multi-unit dwellings in the city. In general terms, it must be admitted that the outlook on that score is not optimistic and much depends on the interaction between State and local government.

On 29 June 1993 the Minister for Planning, Robert Webster, announced that he would give all councils the opportunity to achieve the appropriate levels of dual occupancy through planning. Whilst current State policy overrides local council plans, Mr Webster indicated that he was now inviting councils to prepare their own plans for new areas and fine tune them to meet local needs, indicating that if councils met acceptable targets and incorporated a mix of housing styles and options, including dual occupancy and new subdivision proposals, then they would be exempted from the State policy.

On balance the Committee believes that some urban consolidation is desirable to avoid an excessively sprawled city structure. Moreover it believes that a co-operative approach between State and local government is the best way to deal with the potentially divisive nature of consolidation.

Are we pricing our Infrastructure properly?

If planners are serious about reducing urban sprawl, there is one major mechanism open to them: pricing. The then Managing Director of the Hunter Water Corporation, Mr Paul Broad, put this concept in a nutshell:

> **Mr Broad:** So people argue about sprawl and consolidation, we only have a market question. You could actually charge the right prices, the market will drive it.[29]

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[27] Dr F. Stilwell, in evidence before the Committee on 20 October 1992.

[28] Industry Commission op. cit. p. 135.

[29] Evidence to the Committee, 20 October 1992, p. 86.

Mr Broad was drawing on his experience of the introduction of user pays in the Hunter Valley in 1983. This policy led to a drop in the consumption of water, and the consequent deferral of the construction of the $40 million Tilligerry Dam, which had been due to be built in 1986.

The pricing of infrastructure is a complex and difficult question. Most infrastructure prices now come within the purview of the Government Pricing Tribunal, which began operations in 1992. Its first report was an interim one into water prices, which it issued nine months after beginning its inquiry into the subject. Among other things, it contains a very succinct and useful account of the various possible objectives of pricing policies[30], on which this part of the Committee's report has drawn.

When considering infrastructure prices, the first thing any government needs to work out clearly is: what are we trying to achieve through this pricing policy? The Government Pricing Tribunal sets out four main possible objectives:

- *proper resource allocation*

Simply put, this means that prices should not be so low that over-consumption is encouraged, leading to the building of an "unnecessary" piece of infrastructure, nor should they be so high as to cause hardship to consumers or businesses, leading to cuts in other consumer expenditures, profits or employment. Both of these outcomes would represent a misallocation of resources.

The Government Pricing Tribunal espouses the traditional view that prices ought to reflect the marginal costs of providing the service. In that way, the Tribunal considers they would be neither too low or too high. In many cases in NSW prices paid by the domestic consumer are nowhere near marginal costs. Mostly they are far below it. Thus an adherence to a marginal pricing policy will in many cases mean raising the price to domestic consumers.

There are of course problems with this approach. What is "over-consumption" really? How can we be sure that we do not cause hardship if we raise the price of the service? How do we know whether genuine needs are going unsatisfied because the price of the service has risen? In other words, how can we be sure that the consumption we have driven out by raising prices was really waste?

To help answer those questions, the government needs to examine how it wants to deal with another possible objective of pricing policy:

- *Equity*

The Tribunal in its interim report sets out a selective list of various possible meanings of the word "equity": equity across generations, across regions, across access to economic

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[30] Government Pricing Tribunal, op. cit. pp. 41-47. Government Pricing Tribunal *Water: An Interim Report* May 1993.

and social opportunities, and across use, the latter referring to the principle that users should pay according to the cost of the services provided to them[31].

Its discussion of these various meanings is directed towards proving the point it ultimately makes in its summary, that is that the objective of proper resource allocation should be the paramount one in the formulation of long-term infrastructure pricing policy.

For example, in reviewing the issue of affordability, it points out that cross-subsidies from businesses to consumers may in the end have to be paid for by consumers themselves in the form of higher business prices. The conclusion it draws is that pricing which does not reflect costs is undesirable because it will lead to an inefficient allocation of resources.

There may be an argument against this proposition, however, in that in many cases, it may not be those consumers currently receiving subsidies who would be paying higher business prices: many consumers (e.g. pensioners) would be better off having, say, their water bill subsidised by businesses, as happens at present, than they would be if they had to bear the higher domestic water prices resulting when cross subsidies are eliminated. Higher water prices would mostly be non-discretionary for pensioners, whereas they may in some cases be able to choose whether to buy goods and services from businesses at higher prices.

Thus, satisfactorily achieving the resource allocation objective by raising prices to reflect marginal costs would not necessarily achieve the equity objective for these particular consumers.

In common with many other commentators, the Pricing Tribunal would propose directly subsidising those consumers, in an effort to make the subsidy element transparent, but unfortunately, there are considerable practical difficulties with this "solution".

Another equity problem, with respect to water, is that the property-based charge for water is currently based on 1980 land values, which are, as the tribunal says, "largely irrelevant"[32].

The equity issues in infrastructure pricing are complex. They are questions to which there is no simple answer, but on which governments need to make policy decisions in the awareness of all sides of the argument. Up to very recently, governments have been reluctant for political or philosophical reasons to remove cross-subsidies favouring the domestic over the business consumer. However, now that responsibility for setting prices lies with the Government Pricing Tribunal, the problem, at least as far as water goes, will be avoided. The Tribunal makes its first annual price determination for water in August 1993. Another determination, for electricity, is due to appear in May 1994, together with an examination of State Transit Fares.

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[31] It discusses these issues further in its Research Paper no. 1: *Changes in the pricing of water and related services in the Water Board Region: distributional impacts and compensation policies.*

[32] Government Pricing Tribunal, op. cit., p. 46.

Another objective adduced by the Tribunal is relevant largely to the provider of the service:

- *financial objective*

The provider of the service needs an adequate cash flow to meet operating costs (although these may well be too high because of internal inefficiencies) and to fund future investments (although these may be unnecessary); it needs an acceptable return on its investment in the infrastructure; and it needs to generate enough revenue to pay dividends to its owner or quasi-owner (the government, in the case of authorities).

Many authorities complain that inappropriate prices compromise their efficiencies. Sydney Electricity, for example in a recent paper[33] argued that the price it was obliged to pay to Pacific Power was too high, and that it was increasing when decreases had been promised:

> ...there is concern with overall movements in the BST[34]...in particular, there is dissatisfaction with continued increases in the Supply Charge, which...was understood by all parties to gradually reduce over time[35].

This, said Sydney Electricity,

> makes it extremely difficult for distribution authorities to effectively plan and operate as commercial undertakings[36].

On the other hand, the Water Board has for many years complained that prices consumers paid to it were too low. In evidence to the Committee, its Manager of Pricing and Revenue made the point succinctly:

> **Mr Bawtree:** These improvements [new capital works, the Clean Waterways Programme] require quantum increases in prices and we require a historical correction of the cross subsidies, which are running at nearly $300 million per annum, which have been carried by small business[37].

In fact, the financial objectives of many authorities have been severely compromised by inappropriate pricing.

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[33] Sydney Electricity, *Position Paper: BST Reform*, April 1992.

[34] Bulk Supply Tariff. This makes up around 70% of final consumers' costs, and is a pricing arrangement between Pacific Power and the State's 25 distribution authorities for the bulk purchase of electricity. Historically, the BST has been set at levels which provide Pacific Power with sufficient revenues to balance its annual operating expenditures . More recently revenue levels have been increased to allow for recovery of depreciation costs on revalued assets, commercial rates of return and accelerated debt repayment. (Sydney Electricity, op. cit. p. 6).

[35] Sydney Electricity, op. cit., p. 2.

[36] Sydney Electricity, op. cit., p. 2.

[37] Evidence to the Committee, 3 December 1992, p. 272.

Whether this means that the government should make financial objectives their primary consideration when they consider infrastructure pricing is another matter entirely.

An argument might be made that is indeed what happens with privately-financed infrastructure. This is an issue which will be dealt with at greater length in Volume II. For the moment it will be enough to flag it as a question which governments need to bear in mind when they approve the level of the toll or charge on a privately-financed infrastructure facility.

The last major objective set out by the Tribunal is:

- *Customer objectives*

Customers, says the Tribunal, want a fair and reasonable price:

> Implicit in this is the minimisation, or control, of monopoly power. Indeed, the most effective means of meeting the consumers' objectives may be maximisation of competition.[38]

Another means, of course, may be regulation.

Different governments will place different emphases on each of these objectives. The Committee does not seek in this report to make policy recommendations with respect to prices of major utilities: the existence of the Pricing Tribunal, and the Committee's own statutory functions, would make any such recommendations otiose. It is sufficient merely to draw attention to the fact that pricing issues are highly relevant when plans for infrastructure are being drawn up.

Are the social costs of this facility higher than the benefits?

Have we calculated the costs and the benefits appropriately?

For several decades governments over the world have attempted to estimate the value to the community of proposed projects. A variety of techniques, each with their advantages and disadvantages, have been evolved for the purpose. These include cost-benefit analysis, cost-effectiveness analysis, financial analysis, incidence analysis, regional impact analysis and multiple objective programming.

Cost-benefit analysis is probably the best-known of these techniques. It is ambitious in that it attempts to quantify in money terms all the major costs and benefits of projects. These would include not just the simple, tangible, financial costs and benefits of the project itself e.g. the cost of acquiring the land, the cost of the materials and the labour neede to build it, the revenue stream it will generate and so on, but other costs and benefits that do not appear in a project's own financial balance sheet. These include the project's impact on the wider economy, e.g. its manifold effects on the organisations, businesses and individuals who use it, are its neighbours, or in some way are influenced

[38] Government Pricing Tribunal, op. cit. p. 44.

by it. The "external" effects of the project, that is, the ones outside its own balance sheet, are, logically, termed "externalities". Examples might include:

- the savings in users' travel time that the project might generate;
- the savings in an individual's cost of operating a vehicle that the project might enable;
- the savings in accident costs;
- the health savings;
- benefits and costs to downstream businesses;
- benefits related to enjoyment of the amenity provided by the project;
- pollution costs borne by its neighbours.

There is more experience world-wide in putting money values on some of these sorts of parameters than on others. Savings in travel time and vehicle operating costs have been studied extensively and there are widely-accepted formulas for calculating them based on average incomes. Others are notoriously difficult to estimate in dollar terms, although ingenious and expensive techniques are continually being evolved for doing so. For example, how would one go about estimating the value of a national park to the community? One could survey users (and, with more trouble, non-users), asking them how much they would be willing to pay to enjoy it (the willingness to pay, or WTP, principle), and use those numbers as a basis for calculating the value of the park to the community, but how is one to weight the value of the park to lower-income groups that might enjoy the park greatly but because of their low incomes find themselves unable to express a high willingness to pay? Conversely, how would one go about estimating the nuisance value of noise pollution coming from a road? Willingness to pay to avoid such pollution - which would typically provide the basis for "pricing" the pollution - also depends critically on individuals' income.

These problems are under continual discussion in the cost-benefit literature, and complex - and disputed - methods are increasingly available to synthesise and attribute "prices" to things which have no price in the real world.

Cost-benefit analysis is usually used where the project's major costs and benefits can in fact be "priced" in this way. It is typically used for big tangible infrastructure projects like bridges and roads rather than for social programmes like community services.

Cost-benefit analysis (CBA) then takes those goods which can be "priced", estimates the flow of the now "priced" costs and benefits over, usually, the next 15 or 20 years, discounts these future costs and benefits back to the present, after first adjusting for projected inflation, and comes up with a so-called "net present value" figure for both costs and benefits. These two figures are then set against each other, usually with the benefits first, in the form of a ratio. The higher the ratio, the more desirable the project, as a rough rule of thumb. A major rule for cost-benefit analysts is to signal to decision-makers as clearly as possible which factors cannot be valued at all.

Very often there is uncertainty, however, as to the level of critical factors in the analysis which can in fact be valued, for example, the discount rate, or the exchange rate, or the level of wages, or the cost of energy. In these cases, the cost-benefit analysis should be calculated for different values of these factors. For example, the calculation might be

done with a 4%, a 7%, and a 10% discount rate (the most common procedure), to see how sensitive the results are to these various changes in the value of the factors. This procedure needs to be done regularly for investment projects, and is called "sensitivity analysis".

Another, related, way of dealing with uncertainties is called "scenario planning". Scenarios, as the NSW Treasury says[39], consist of "descriptions of the future socio-economic environment which, while being logical and internally consistent, differ in crucial respects. The idea is to set up two, or possibly three, scenarios so as to draw the attention of senior management to the technical, economic, political or other uncertainties upon which the success of the investment project depends".

Often, senior management has not decided exactly how perceived infrastructure needs should be satisfied, and commissions a cost-benefit analysis of different alternatives. The final ratios for these alternatives are then compared, so as to rank them, with the project having the biggest ratio being ranked first.

Cost-benefit analysis is a tool to be used in conjuction with financial analysis. They have different goals. CBA is an economic analysis, which looks at the overall effects of the project on the local, the regional, and even the state economy. Financial analysis is an examination of the balance sheet of the project itself. It is essential to do a financial analysis for several reasons:

- economic evaluation does not consider directly the payment of interest costs
- economic evaluation shows capital costs as costs at the time they are incurred, whereas financial analysis shows them amortised over the life of the project for taxation and other purposes.

There have been a series of fundamental objections to cost-benefit analysis over the last twenty years[40], particularly when it deals with environmental issues:

- environmental phenomena have absolute, non-negotiable values in their own right. It is morally unacceptable to attempt to estimate non-use values for them;

- people have such widely different attitudes to environmental atributes like noise and visual beauty that it is nonsense to try to estimate values to them;

- there are different views about the nature of progress. Many people do not believe that a new piece of infrastructure, e.g. a new motorway, will in fact represent true "progress". CBA will appear irrelevant and provocative to such people;

- the equity argument referred to above;

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[39] New South Wales Treasury, *NSW Government Guidelines for Economic Appraisals*, Technical Paper, revised edition, January 1990, p. 77.

[40] The following section is based on Peter Abelson, *Valuing the Environment*, forthcoming book to be published by the Overseas Development Institute, London. The committee is grateful to Prof. Abelson (Macquarie University) for permission to quote from the book.

- the alternatives to the preferred project which CBA sets out are often "straw men", that is, not genuine or practical alternatives at all.

Proponents of these views usually espouse one of the alternatives to CBA: cost-effectiveness analysis, the environmental impact statement, or value management.

Cost-effectiveness analysis does not seek to place a monetary value on benefits, but merely to list them. As a result, it lacks one of the great strengths of CBA, which is its ability to rank different alternatives according to their benefit-cost ratio. When decision-makers choose one alternative after looking at a cost-effectiveness analysis, they are in fact implicitly placing their own valuation on the benefits which the analyst has simply listed without a valuation. Whether society should accept that valuation is a matter for debate.

However, there is still considerable value in conducting cost-effectiveness analyses for social programmes whose benefits are inherently difficult to cost. This is why they are popular in the regulatory impact statements now required by the NSW government for all new regulations.

Environmental impact statements also suffer from disadvantages: they "provide no formal guide to the relative costs and benefits of the forecast environmental impacts"[41], are not based on any explicitly stated and systematic theory of value, and mostly provide "no clear decision rule to decision makers"[42].

Value management is an additional tool, developed by the Department of Public Works, which identifies genuine and practical alternatives to the proposed project. It distinguishes unnecessary expenditures, challenges assumptions and generates alternative ideas. As developed by the Department of Public Works it is a practical, rather than theoretical, adjunct to cost benefit analysis, and can be used as a first step in the evaluation process, followed by cost-benefit analysis.

The single best available tool for judging the value of alternative infrastructure proposals is, still cost-benefit analysis (which can, in may cases, used in conjunction with value management), as long as those who prepare it state as clearly and comprehensively as possible their assumptions, the factors omitted from the analysis, and the factors which simply cannot be valued in monetary terms, either for practical or theoretical reasons.

The ability to carry out such analyses is scarce in the New South Wales public sector, and their quality is highly variable. The Capital Works Unit (CWU) examines agencies' CBAs and is often obliged to suggest improvements. However, it may be useful for Treasury and the CWU to carry out a regular training programme, including seminars, for relevant agencies, using as a basis the NSW Guidelines for Economic Appraisal.

The alternative, of using consultants, can yield mixed results. Some studies prepared by consultants can be controversial, and need to be recalculated. One well-known

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[41] Abelson, op. cit. p. 11.

[42] Abelson, op. cit. p. 12.

controversial case was the first analysis of the Sydney Harbour Tunnel carried out by consultants, which, among other problems, estimated travel time savings by using 275 weekdays as a basis, whereas there are fewer than 275 working days in the year. Others, on the other hand, can be very useful. There can still, the Committee believes, be no real substitute for an informed and capable level of skill in CBA preparation inside major infrastructure-producing agencies themselves.

RECOMMENDATION 5

That the NSW Treasury, together the Capital Works Unit, conduct regular seminars for relevant agencies in the preparation of cost-benefit analysis of major infrastructure projects.

RECOMMENDATION 6

That standard procedures be developed jointly between the NSW Treasury and the Department of Public Works to facilitate the use of Value Management in conjunction with cost benefit analysis for estimating the worth of infrastructure projects.

2.1.2 OVERVIEW OF EXISTING PLANS IN NSW

The Committee was frequently told during this inquiry that no infrastructure plans were available to the public in NSW, both in hearings:

> **Committee**: Mr Perry, you mentioned briefly the [recommendations of the Task Force for private sector participation]. Which of those which have not been acted on would you place most emphasis on as having the most serious deficiencies?
>
> **Mr Perry:** I think the publishing of strategic plans for each agency.....I know agencies have actually produced them but they have not seen the light of day.[43]

and in submissions:

> To date no such programmes [forward programmes for capital works] have been made available to the public.[44]

In actual fact, departments and agencies in New South Wales produce a plethora of plans relevant to infrastructure. The variety of these plans, many of which have been made available to the Committee, is truly remarkable. At one end of the spectrum, there are

[43] Evidence to the Committee, 22 May 1992, p. 8.

[44] Submission to the Committee from the Australian Federation of Construction Contractors, p.4.

the strategic plans which discuss the larger issues in a relatively academic manner and which include almost no details of actual capital works; at the other, there are the very detailed capital works plans, which include costings for every item from the largest road to the smallest rural classroom. In between, there are various attempts to bring together issues and works, and relate them in a meaningful manner.

The Strategic Capital Investment Plans

The Capital Works Plans cover only those projects which are funded from public funds. They are all supposed to be prepared according to guidelines laid down by the Premiers's Department.

The process began when the Minister for State Development issued a press statement on 22 May 1991 specifically stating that:

> guidelines which come into force from July, will regulate and speed-up (sic) the NSW Government private infrastructure strategy. From that date, all government agencies will be required to complete and publish a forward five year programme of capital works.

To help the required strategic planning process along, the Office of Public Management issued a Strategic Management Brief in November 1990, entitled "Guidelines for Capital Expenditure Strategic Plans", which set out the nature of the various Plans which must be produced, the dates they must be produced by, the approval procedures, and the arrangements for further assistance. It was intended to be used by capital works planners in the various departments as a guide for preparing their strategic plans.

The brief described a two-stage process according to which a *detailed* Capital Investment Strategic Plan would be produced for consideration by the Capital Works Committee of the Cabinet, after which a *less comprehensive* plan would be issued to the private sector and the public at large. The main difference between the detailed plan prepared for the Capital Works Committee and the shorter one issued for public consumption would be that the latter, unlike the former, was not to not include extended discussion of the medium term.

These requirements have been repeated in the very large Asset Management Manual issued in December 1992 by the Government.

Up to date, in fact, almost all agencies have certainly prepared the detailed Strategic Capital Investment Plans required for the Cabinet Capital Works subcommittee, but none, unless the RTA is excluded on the basis of *Roads for the 90s,* has prepared the shortened version that is supposed to go out to the public.

This the Committee considers to be a serious omission.

Agencies' reasons have been understandable. They fear to issue public versions of their strategic capital works plans on the grounds that the private sector may consider those plans binding for the next five years. They are apprehensive that the private sector, reading in a publicly-issued plan that a department proposes to build a particular

installation in Year 5, could take this as a firm commitment on the government's part and could go and spend large amounts on various studies. If the government in Year 5 then decides that conditions have changed, the demographics have not worked out as originally thought, finance is harder to come by than expected and so on, and withdraws from the project, there is apprehension that the private sector might sue the government for misrepresentation and/or accuse it of poor planning. This has been the fundamental reason why public plans have not been issued in the event, even though at the start there certainly was a clear commitment to do so.

Another reason may also have been that there is a perceived risk of enabling some developers to make windfall profits at or near the site of proposed installations.

The Committee appreciates the genuineness of these fears, but considers that the force of the argument for publicly issued plans is so compelling that ways need to be devised to reduce agencies' objections.

One way might be to give the agencies preparing such plans legal protection from being sued on the grounds that their plans were not implemented. This might be done in the cases of authorities by an amendment to their Acts. Indeed, on the model of the Electricity Commission Act it could well be worth considering introducing amendments to authorities' Acts requiring them to produce strategic infrastructure plans in just the same way as the Electricity Commission, now Pacific Power, is required to produce its Electricity Development and Fuel Sourcing Plan.

Another suggestion could be to include in the published plans prominent disclaimers to the effect that these are plans only and do not represent firm commitments by the government. The disclaimer would also point out that any investment made by a developer would have to be at his own risk. As will be seen shortly, other states in Australia already include such disclaimers in their published schedules of capital works.

The Committee considers it unacceptable that so far the public has been denied the simpler plans which the Asset Management Manual mandates. It urges that action be taken to ensure that these plans are prepared and published without delay.

RECOMMENDATION 7

That the Government take action to ensure that agencies begin as soon as possible to prepare, for wide dissemination, the shorter, public versions of their Capital Investment Strategic Plans which are mandated by the government's own Asset Management Manual.

RECOMMENDATION 8

That these plans include a list of projects which have potential for private sector involvement.

RECOMMENDATION 9

That a prominent disclaimer be included in these plans to the effect that they do not represent firm commitments by the government to proceed with a project.

The longer versions of Capital Investment Strategic Plans which have been produced so far have been of variable quality. Indeed some agencies have not produced any at all. Those made available to the Committee include:

RTA's Capital Investment Strategic Plan

This Plan is divided into two main parts, whose interconnection is not made very explicit. The first part consists of an exposition of the several parts of the RTA's broad investment strategy, and deals with matters like road safety, the environment, and economic development. The second part is a list of road projects which are due to be constructed up to FY 1997-98.

A very valuable, if short, third section lists projects which have "potential for private sector involvement". The Committee supports the thinking behind this concept, and considers that sections like this should form part of the plans of every infrastructure-producing agency.

Department of Health's Capital Expenditure Strategic Plan

This was first developed for 1991-1996 and was then updated in 1992. It sets out the Department's primary goals, to improve the health status, health care and value for money available to the population of NSW, and, at a progressively greater level of detail, describes the measures it proposes for reaching those goals.

Inevitably, it includes a (very short) section on the potential for private sector involvement. This is an issue which was dealt with in the Committee's reports numbers 62 (Public Accounts Special Committee Inquiry into the Port Macquarie Hospital Contract) and 72 (Funding of Health Infrastructure and Services in NSW).

At the end, it lists major works in progress, the new works which were authorised by the Capital Works Committee for construction beginning in 1992-93, and future priority works, all with aggregate costings.

Maritime Services Board's Capital Expenditure Strategic Plan

This document sets out two types of plans: A Broad Ten Year's Capital Expenditure Stragegic Plan, and a Five Year Plan which includes a short list of six projects having potential for private sector involvement.

Water Board

Surprisingly, the Water Board has not prepared a Capital Expenditure Strategic Plan as required by the Premier's Department.

RECOMMENDATION 10

That the Government make it a statutory requirement that Capital Investment Strategic Plans be prepared by departments and authorities, the model for such requirements being the Electricity Commission Act Part 3 Division 6.

* * *

As well as the ordinary capital investment strategic plans, agencies have produced, as pointed out earlier, a wide variety of other kinds of plan. Those made available to the Committee include those from:

Department of Planning

The Department of Planning does not primarily aim to produce plans which contain lists of projects. The plans it does produce are more in the nature of general strategies. The most important one of these has so far been:

- ***Sydney Into Its Third Century - Metropolitan Strategy for the Sydney Region.***

This was a 71-page document published in 1988. It discussed issues and aims to provide a general policy direction more than a list of capital works. Its general policy was to limit the urban sprawl as far as possible. In very broad terms, it set out a set of background data on population and housing, economic development and employment, transport, and the environment; it proposed policies for guiding development in various sectors like transport and manufacturing; it described the other kinds of plans (Regional and Local Development Plans) which represent an elaboration of the strategy, and, it most importantly set out the form of the general strategy.

As pointed out in Part 2.1 above, in the event the plan's targets were not met, mainly because of the public's rooted preference for the outer fringe. The Department of

Planning decided it was time for an update of the strategy, to take into account the changes in trends in housing, education and employment that have occurred since 1988.

It asked the public for comments on what the shape of the updated strategy should be. In its booklet *Updating the Metropolitan Strategy: Invitation to Comment*, 1992, it sets out demographic changes and a set of options for dealing with them.

It also set up two groups to work on the update:

- an inter-agency Task Force, with representatives from the Departments of Planning, Housing, Transport, State Development and Local Government and Co-operatives, the Water Board, The Environment Protection Authority, National Parks and Wildlife Service, Roads and Traffic Authority, Treasury and the Social Policy Directorate.

- An independent advisory committee appointed by the Minister to provide community input.

It then put together the public comments, the work of these two groups, and the fruit of its own efforts. The result was:

Discussion Paper on the Planning of the Greater Metropolitan Region

This was issued in May 1993, and represents a vision for the urban future. Its broad goals were equity, efficiency, and environmental quality, in the service of which it proposes various policies for housing, employment location, transport, environmental quality, economic development, services and implementation.

This update is one of a trio of recent strategies, to be discussed in greater detail at the end of this section.

Roads and Traffic Authority

- ***Roads 2000***

This is a glossy 16-page booklet published in 1987, which gives a short, clear account of policy, strategies and specific projects to meet the infrastructure needs of the Sydney metropolitan region by the year 2000. The Committee found this a very valuable document. It was widely published, easily understandable and succinct. Its maps were plain and intelligible, its listing of individual projects concrete and comprehensive, and its general presentation calculated to appeal to members of Parliament and the general public alike.

In Part 2.1.3, the Committee deals with the question of the desirability of all relevant agencies publishing similar booklets.

- ***Roads for the 90s***

This represented an expansion of Roads 2000 to cover the whole state. It is a series of ten glossy brochures, again with maps, photographs and specific projects, which describe the plans for various regions of the State: the Sydney Central Region, Western Sydney, Newcastle and the Hunter Valley, Central Coast, North Coast, Wollongong Region, Western NSW, Southwest Region, South Coast/Monaro, and Bathurst/Blue Mountains. Its distribution did not appear to be as wide as that of Roads 2000, but again, the Committee considered it to be a very valuable document.

- ***Road Transport Future Directions: Report on Options***

This was a different type of document entirely—very long (195 pages), and aimed first, at discussing a wide range of issues influencing road policies and second, at developing a strategic planning process. It is an ambitious product, sometimes almost philosophical in character, which does not set out primarily to list individual projects but rather to canvass and explore views. It is more a tool for planners rather than a plan in itself, although it does contain a few specific projects.

- ***The State Road Network Plan***

This is the most comprehensive and integrated of all the RTA's plans presented to the Committee. It represents an update of Roads for the 90s.

Department of Transport

Integrated Transport Strategy for Greater Sydney

This document represents a first in transport planning in New South Wales. It is the first time that transport needs have been integrated in land use and economic planning in a systematic rather than an ad hoc manner.

Its purpose is stated at the outset:

> For too long planners have failed to integrate transport considerations into urban development and there has been a lack of foresight in transport infrastructure and service planning. There is recognition in all sectors of governemnt and in the business and general communities that transport modes need to be planned and operated in a more comprehensive and coherent manner and that transport needs to be an integral part of land use and economic planning, rather than an after thought. In the absence of this integration, transport investment and service development will be ad hoc and fragmented and the efficiency benefits reaped from recent reforms will not be optimised[45].

The plan contains a complete discussion of the strategic context, covering environmental, social justice, urban planning and administrative matters. It discusses its approach and

[45] Department of Transport, *Integrated Transport Strategy for Greater Sydney: a New South Wales Government Vision* June 1993.

methodology, sets out a method of integrating land use and transport and, most importantly provides a list of projects (without, however, costing them) which would embody the strategy.

This plan might, together with the Metropolitan Strategy, be considered as a germ, or prototype, of the Integrated Infrastructure Development Plan proposed in this report.

Department of Health

The Department produces a number of infrastructure and capital works plans, of varying complexity and detail. These include:

Infrastructure Strategy Options

This is a theoretical document, produced in October 1992, which analyses the results of choosing different strategies for providing health infrastructure - the accelerated development option, and the base, or "current program" option. It finds that, although the accelerated option is costlier in the short term, it yields much greater long-term savings than the non-accelerated version, which would be intuitively obvious. It takes different projects and runs them through a model simulating each option.

The document only shows the results of choosing each option. It is not a plan in itself, although it would be expected to have provided basic inputs into the Department's other plans.

Forward Capital Works Program for 1993-1996

This is essentially an elaboration of the Capital Expenditure Strategic Plan, with one significant difference: like the Infrastructure Strategy Options report, it sets out two options, the accelerated and the non-accelerated versions, with their different implications for capital works, and, like the Options report, recommends the accelerated programme. It is not clear what status this programme has in the absence of a decision on which option is being taken.

Priority Future New Works

This short plan was produced in August 1992 and consists of a list of hospitals and community health centres for new construction or redevelopment, taken over a ten-year period.

Capital Works Plan 1992-93

This gives a brief justification for and details of the expenditure to be undertaken on capital works in the current financial year. The background is less detailed than that provided in the Forward Capital Works Program.

Department of Housing

Commonwealth State Housing Agreement - State Plan for New South Wales 1992 -93

The Commonwealth State Housing Agreement is the primary source of funding for public housing in NSW. The State Plan outlines, at a high degree of aggregation, how that allocation is to be spent, on various rental housing programs, aboriginal rental housing programs, local government and community housing programs and mortgage and rent assistance programs. It also provides a list, again at a high level of aggregation, showing where the funds are to be spent, by region.

Commonwealth State Housing Agreement - New South Wales Housing Assistance Plan 1993-94 to 1995-96.

This essentially takes the previous document one year further forward. Its scope and intentions are very similar, although the level of detail is somewhat less aggregated. It provides a set of objectives e.g. to ensure that appropriate housing assistance is available to households with special needs, and gives specific details on projects designed to meet those needs.

Water Board

The Water Board provided to the Committee an extract from its draft busines plan 1993/94. This is the closest the Board appears to have come to the preparation of a Capital Expenditure Strategic Plan. This does not appear to include a list of projects with private sector involvement.

Pacific Power

Electricity Development and Fuel Sourcing Plan

This is the only infrastructure plan in New South Wales which is required by statute. The Electricity Commission Act requires Pacific Power to prepare an Electricity Development and Fuel Sourcing Plan, covering the cost-effective generation and the supply of electricity in the State; the development and use of fuel sources; proposals for expansions of the generation and supply of electricity and for action to meet or reduce demand for electricity; interstate trading or development activities; proposed strategies for carrying out Pacific Power's functions in terms of a statement of strategies and a linking of projects to those strategies. However, the Plan does not include cost estimates for individual projects.

Perhaps because it is required by statute, this is easily the most impressive of all the plans reviewed by the Committee in terms of statement of strategy and integration of projects with strategies.

If it were to include cost estimates of individual projects, it would be close to an exemplary way of preparing an infrastructure development plan.

The success of this plan leads the Committee to suspect that statutory requirements to produce a plan would result in higher quality plans than the non-statutory requirements embodied in the Asset Management Plan. Such statutory requirements could be added as amendments to the Acts relating to the various infrastructure-producing statutory authorities, e.g. the Water Board Act, just as the Electricity Commission Act had the relevant amendment inserted in 1989. Ways of doing so for departments would need to be examined in detail. Imposing a statutory requirement is probably the most effective way of ensuring the adequacy of the infrastructure planning mechanism in New South Wales.

State Rail Authority

Capital Programmes

The SRA has prepared two separate capital programmes. The first is its non-Commercial Capital Programme for 1992-93 to 1996-97 covering CityRail and CountryLink. The second is its Freight Rail Capital Programme for the same years. Both contain an overview, programme initiative summaries and details of capital programmes. They are succinct, clear and consistent. However, neither includes a separate section setting out projects which have potential for private sector financing.

The CityRail Operations Plan 1991 to 2011

This operations plan also includes an identification of additional investment necessary in rolling stock, infrastructure and new lines. It is an ambitious plan which seeks to situate these individual projects within a strategic framework, clearly specifies its assumptions, provides excellent maps and graphics, and examines possible alternatives.

* * *

The strategic planning process has very recently undergone a metamorphosis in New South Wales, with the preparation of the three significant documents outlined earlier:

- the draft update of "Sydney into its Third Century", the Metropolitan Strategy for the Sydney Region;
- the Integrated Transport Strategy;
- the State Road Network Plan.

These three plans reveal a new conceptual direction in the planning of New South Wales infrastructure. A new appreciation of the need to integrate infrastructure plans appears to have borne fruit in these three documents, which have all appeared at approximately the same time, that is mid 1993. They embody a new understanding that it is very hard, either in theory or practice to consider land use, economic, transport, education and utility planning separately; that it is much more realistic, if difficult, to achieve an integrated vision and co-ordinate sectorial plans in one document.

Later in this report, the Committee will make a recommendation building on the planning work already carried out in these three documents.

2.1.3 THREE RECOMMENDATIONS

2.1.3.1 An Integrated Infrastructure Development Plan for the State

a. The nature of the proposed Integrated Infrastructure Development Plan

A true comprehensive and integrated Infrastructure Development Plan would represent a somewhat novel concept for this state. So far, what has been issued has largely either been the traditional kind of plan, which discusses general issues limited to a particular sector or geographical area and which, if it lists projects at all, gives them at a high level of generality, or else the equally traditional capital works plans, which do give detailed specifics but which have little strategic content or discussion of issues. The list of plans cited and discussed in the previous section gives ample proof that so far plans have had borders of a conceptual, sectoral or geographical kind. Even when taken together, the various plans do not amount to what the Committee considers it essential for the state to produce, that is, a genuine, comprehensive and integrated medium-term Infrastructure Development Plan for the state as a whole.

Such a plan would show, in concrete and specific terms:

- the total infrastructure needs of the state over the medium term;
- the distribution of these needs across individual departments and agencies;
- the methodology used to arrive at the assessment of those needs;
- identification of alternative ways of meeting those needs
- translation of those alternatives into possible projects, with summaries of any cost-benefit studies carried out;
- where possible, cost estimates (in the dollars of the publication year) for projects identified;
- the projected sources of funding for individual new facilities (which would include, by implication, the shortfall in government funding for infrastructure over that period and the consequent need for private financing);
- selected details of the mechanisms by which the needs set out in the plan will be translated into realities in the state's budget;
- the methodology used to co-ordinate the different agencies' interests.
- a breakdown of infrastructure needs, at a moderate level of detail, showing new facilities and maintenance of existing items.
- It would be the product of a Task Force, as detailed in the next part of this section.

The Integrated Infrastructure Development Plan would cover a five-year period (because infrastructure facilities typically have a long lead time), and be updated every year.

The Committee firmly believes that the plan should be easily understandable for the public and should be made widely available, along the lines of the distribution achieved for Roads 2000.

The advantages of such a plan would be numerous:

- it would integrate in the one document, readily available to the Parliament and the public, information and issues which can at present only be found covered in scattered sources that are often hard to find;
- it would force the government to devise budgetary and administrative mechanisms linking plans to on-the-ground infrastructure projects;
- it would make those mechanisms publicly known;
- it would help to compel agencies to justify individual projects in the context of the overall plan, instead of allowing projects to proceed which have little relevance to it;
- ongoing co-ordination between agencies would obviously be mandatory, with the result that duplication, gaps and unrealistic requirements would be reduced;
- it would include projects deemed possibly suitable for private financing. Excluding projects from plans on the grounds that they will not be funded by the state would result in a lack of comprehensiveness, and a loss of validity for the whole plan;
- it would provide a much more robust basis for informed discussion in the Cabinet;
- it would represent a mechanism for linking together the Capital Works Committee of Cabinet, the Urban Policy Committee of Cabinet, and the Expenditure Review Committee of Cabinet, which at present often discuss related issues in an unrelated manner;
- it would make the public consultation processes explicit for the most important projects;
- it would be public's one main source of general, multipurpose, information about the state's intentions for infrastructure, easily understandable, widely distributed and simple;
- it could help standardise the format of public sector infrastructure plans, which at present differs widely from agency to agency, causing confusion among the public and in the private sector.

The need for such a plan can be illustrated by a number of examples of confusion and poor co-ordination in infrastructure provision. For example, the Committee would cite one well-known recent case, that of transportation on Sydney's North Shore.

On 3 April 1993, an advertisement appeared in the Sydney Morning Herald. It was placed by the Roads and Traffic Authority, and sought "ideas to develop schemes to improve the road system in the lower North Shore and Eastern suburbs *and the extension of the Warringah Freeway from Manly to Naremburn"* (emphasis added).

The previous day, a spokesman for the RTA had been reported as saying that "the Warringah Freeway might be constructed along a land corridor which runs from existing end point at Naremburn....to connect with Condamine Street in Manly"[46].

The public might have been forgiven for believing that a Warringah Freeway was being planned in the North Shore. The private sector, too, would have been justified in beginning to spend money developing the "ideas" for the extension of the Warringah Freeway.

However, about a month and half later, on 19 May 1993, another advertisement appeared in the Sydney Morning Herald, this time placed by the Department of Transport. It did not mention the Warringah Freeway. Instead, it was headed "Warringah Mass Transit Link - Expressions of Interest". It said: "The purpose of this call for Expressions of Interest is to provide an opportunity for private sector groups or individuals to submit substantive initial proposals to finance, build and operate a mass transit link between the Warringah peninsula, the North Sydney Business district and the Sydney Central Business District".

It now appeared that a mass transit proposal was being contemplated, not a new freeway after all. The public, let alone the private sector, would have been forgiven for wondering what was happening.

In fact, while their contemplated routes were different, the two proposals were in effect competing ones. They were basically addressing the problem of how to move people living in the geographical area bounded by Manly, Palm Beach, the eastern seaboard beach areas and the west (Balgowlah North, Belrose, Forestville, Ingleside and Bayview Church Point). There is not likely to be enough population growth in those areas to justify two systems side by side. In effect, it should be one or the other.

The draft Integrated Transport Strategy for Greater Sydney, prepared by the Department of Transport, is clear: in its section on "Policies and Actions", it lists the Warringah Corridor as one of its "Preferred Public Transport Priority Routes", giving it an "Immediate" priority. These "preferred public transport priority routes" form part of section A of the Department's "Policies and Actions", which is headed by the words: "The Strategy identifies a clear need to restore balance in the transport system through increased investment in public transport in the short term".

[46] Sydney Morning Herald, 2 April 1993.

What should the public and the private sector believe? The Integrated Transport Strategy (which in any case has limited dissemination), the 3 April 1993 advertisement for road proposals, or the 19 May 1993 advertisement for mass transit proposals over essentially the same area?

The Committee suggests that if its proposed Integrated Infrastructure Development Plan had been in operation in April and May 1993, this confusion would have been ironed out at the planning stage and would never have surfaced in the inconvenient form it did. The planning stage is the stage at which governments should decide the basic form of the infrastructure they want. Is going to be it a new road, a new rail line, a new bus route, a new dam, an upgrading of existing pipes, a large new generating station or a series of smaller generating stations? The planning process is essentially about making those choices.

Although for the Committee conducting the present inquiry, this lack of a comprehensive State Infrastructure Development Plan represented a serious inconvenience, it is not surprising. There are powerful competing interests in infrastructure provision, strongly-held views on, for example, the virtues of rail over road, different political priorities which may change from year to year, and intense commitments to one or the other methodology of assessing infrastructure needs. It is not startling that it has proved difficult to reconcile all these views and paint a conclusive, neat picture showing the State's total infrastructure needs over the medium term.

However, that does not mean that the task should not be attempted. Indeed, there are at least three factors which lead to the Committee to expect that it is possible.

First and foremost is the fact that the Metropolitan Strategy for Sydney is under discussion and should be finalised within twelve months of the publication of this report. The Committee believes that if it has been possible for the various departments responsible for infrastructure planning and provision, that is, the Departments of Planning, Housing and Transport, the Water Board, the RTA, the SRA , the EPA and the Treasury, to combine in a Task Force and produce the prototype of a new Metropolitan Strategy cited above, and if, additionally, it is possible for most of them to produce their separate Capital Investment Strategic Plans, it should also be possible, with appropriate management, for a fully integrated Infrastructure Development Plan to be created, incorporating all the theoretical, financial and technical matters referred to above.

The second factor which gives the Committee grounds for hope that such a plan would be within the capabilities of the various agencies is that the government's new Asset Management Manual sets out the procedure for a two-stage publication of a comprehensive and detailed Capital Expenditure Strategic Plan. If the preparation of such a plan is envisaged as possible, then it should not be out of the question for it to be taken one step further to include the theoretical, financial and technical matters proposed by the Committee.

A third consideration is that the Department of Planning already has under discussion a new concept provisionally entitled the State Settlement Strategy, which it is envisaged would contain a number of the elements the Committee proposes.

The comprehensive integrated document proposed by the committee would not be overly prescriptive in nature. Clearly stated at the outset would be a disclaimer pointing out that it represented a vision for the medium term, which would inevitably undergo modification as the period progressed. Indeed, the plan, as pointed out above, would be updated every year. This would have two advantages: first, it would ensure flexibility for the departments, allowing them to change their choice of project or method of implementation if circumstances required; and second, it would help forestall the danger that a government changing the plan could be sued by a developer who had made expenditures in the expectation that the plan was immutable.

However, although not prescriptive, it would be reasonably detailed, although not as specific as the state's Capital Works Plan. In its level of detail, it would probably approximate to stage 2 of the Capital Expenditure Strategic Plan, as outlined by the new Asset Management Manual, which is the stage at which the plan as aimed at the general public and the private sector is prepared.

RECOMMENDATION 11

That the government prepare a medium term Integrated Infrastructure Development Plan (IIDP), including projects for possible private sector involvlement, at a level of detail close to that of Stage 2 for the Capital Investment Strategic Plan, as set out in the government's Asset Management Manual.

b. Responsibility for Preparing the Plan

At present, of course, there is no department which produces a plan integrating financial, economic, geographical and technical matters across the whole of the state. The closest any agency comes to it is the Department of Planning, in its new Discussion Paper on the Planning of the Greater Metropolitan Region, "Managing Sydney's Future". This plan is essentially a discussion of issues, but it also includes details of transport plans, particularly for road, and an account of how these mesh with the overall concept.

For our purposes here, the most relevant feature of this plan is that, as just pointed out, it was produced by an inter-agency Task Force, comprising the Departments of Planning, Housing, Transport, State Development and Local Government and Co-operatives, the Water Board, the Environment Protection Authority, National Parks and Wildlife Service, Roads and Traffic Authority, Treasury and the Social Policy Directorate, under the chairmanship of the Department of Planning.

As well, an independent advisory committee was appointed to provide community input into the preparation of the strategy. Its essential function was to advise the Task Force and the Government about land use and transport interactions.

The Committee believes that this structure could provide a model for the preparation of the Integrated Infrastructure Development Plan.

To provide co-ordinated inputs into the IIDP, a similar Task Force should be set up, with the addition of Pacific Power and the Department of School Education. The sectoral agencies would provide the details of their forward programmes *and* their capital works plans, preferably already integrated internally. They would also include summaries of any cost-benefit analyses already carried out. The Treasury would contribute details of how the plans should be translated into budgets, and would have a major input into the issue of which projects could be suitable for private financing. The Social Policy Directorate would put forward considerations of equity and social need.

With the 24 May 1993 restructuring of the Ministry, it seems to the Committee that this Task Force should be chaired by the new Office of Economic Development in the Premier's Department. Only the Premier and his Department have the ultimate political authority to require co-operation from the various departments in the preparation of such a plan. The Department of Planning would of course be central to the process, but the Task Force should be chaired by the Premier's Department.

There could also be an integrated programme of public consultation, comprising

- the setting up of a independent advisory committee similar to that of the Department of Planning,
- a programme of public consultation, through the issue of the IIDP as a discussion document and the holding of public meetings.

The Committee recognises the magnitude of the task, but so much has already been achieved that the one last lap does not appear impossible. The end result, a fully integrated, clear, widely available Infrastructure Development Plan, would represent a first for New South Wales and a great leap forward in co-ordination in government.

RECOMMENDATION 12

That responsibility for co-ordinating the preparation of the Integrated Infrastructure Development Plan be assigned to the Office of Economic Development in the Premier's Department.

c. Responsibility for ensuring implementation of the plan

Preparing the plan is one thing, but ensuring that it does not stay in a pigeonhole is another. Many plans in the history of the state have been admirable documents, but they have sometimes tended to serve as a basis for academic discussion while the actual business of financing and building the infrastructure is organised in the real world with only passing reference to the plan, if at all. Capital Works budgets have often borne little

relationship with the more theoretically-based plans; other considerations, like Loan Council restrictions or private sector proposals, may carry the day instead of the carefully thought-out strategies of the planners; and, at the end of the day, central agencies, notably the Treasury and the Commonwealth Loan Council have frequently been the final arbiters of what actually appeared on the ground and what was left out.

There is now a growing appreciation in New South Wales that this comparative isolation of the plan from the realities of implementation cannot go on. Attempts are currently under way in the Treasury, for example, to translate plans into budgets, a development which the Committee would unreservedly support.

However, this still leaves open the question of who would be responsible for ensuring that the plan was implemented. Various proposals have been put forward:

- strengthening of co-operation through the existing system of ministerial and officers' committees;
- creation of a unit responsible for the urban portions of the strategy;
- strengthening the Department of Planning.

In the Committee's view, none of the proposed alternatives would be satisfactory. The dilution and scattering of responsibility over the plethora of ministerial and officers' committees would be a recipe for, if not paralysis and inaction, at the least, confusion and delays; a unit responsible for the urban portions of the strategy would no doubt be useful, but cannot by definition take the larger, state-wide view; and a strengthening of the Department of Planning to give it the power to ensure implementation would radically change its charter without necessarily providing it with the required political "clout".

The Committee believes that since the 24 May 1993 redistribution of ministerial responsibilities, there now exists an unparalleled opportunity for a dominant, central agency to secure the co-operation of all departments and authorities and ensure the implementation of an overall plan. This is the Premier's Department, newly charged with Economic Development.

The responsibility of ensuring that an overall infrastructure development plan was implemented would clearly come well within the purview of any central and powerful Office of Economic Development. The Office would have the opportunity to act as the "champion" of the infrastructure plan's implementation. It would be in a unique position to bring together Treasury, the Department of Planning and the sectoral agencies in one Plan Implementation Task Force, whose purpose would be to co-ordinate the implementation of the infrastructure plan. It would possess an unmatched authority to allocate responsibilities, to ensure co-operation and to require concrete action. Consultation with various Cabinet Committees like the Urban Policy Committee and the Capital Works Committee would still be of major importance, but executive responsibility for ensuring, as far as possible, compliance with the infrastructure plan would rest with the Department itself.

The advantages of this approach would, the Committee believes, be numerous:

- the authority of the Premier would lie behind any decisions or requirements relating to infrastructure provision;
- the lines of command for the implementation of the infrastructure plan would be totally clear to all departments and authorities, and indeed to the public at large;
- it would help eliminate the confusion which the private sector repeatedly asserts it currently faces in dealing with a clutter of committees, bodies, agencies and units in the public sector;
- it would mean a state-wide, total approach to infrastructure provision rather than a narrowed focus on, say, just urban issues (although, of course, urban issues would be of central importance);
- if properly managed, consultation with departments would be comprehensive and thorough, reducing the chances for contradictions, gaps and overlapping;
- in a nutshell, it should mean action.

The challenge would be to find ways of including this function within the organisational structure of the Office of Economic Development. Ideally, its Chief Executive should have a direct reporting responsibility to the Premier, so as to maximise the authority of the Office as it deals with other agencies and departments, as well as with the private sector, and, in addition, to reduce clutter and confusion. At present, this is not the case, but the Committee believes that this arrangement should be established as soon as possible, and that the Office should be strengthened in terms of staff and skills to enable it to carry out this role.

The Chief Executive of this Office should act as the "champion" of the plan's implementation largely as an extension of the previous role of "Co-ordinator-General". The Chief Executive would chair, say, monthly meetings of Heads of Agencies, who would form the Plan Implementation Task Force, and who would seek and snuff out any potential discrepancies between agencies' implementation schedules.

Another related function of the Office of Economic Development could be to act as the first "port of call" for any private sector companies making proposals to the government.

Supporting the Director in these functions would be a small unit of perhaps three staff, who would compile the papers for the meetings and follow up on any resolutions.

The Committee considers that such an arrangement would be clean and transparent, that it would make best use of the existing expertise of the Office, and that it would lead to greater efficiency in the provision of infrastructure in New South Wales.

RECOMMENDATION 13

That the Premier's Department strengthen the Office of Economic Development to enable it to co-ordinate the implementation of the Integrated Infrastructure Development Plan, and a that specialised unit be established within the OED to provide support for that function.

RECOMMENDATION 14

That the Premier's Department enable the Chief Executive of the Office of Economic Development to report directly to the Premier.

RECOMMENDATION 15

That in carrying out its co-ordinating role implementing the Integrated Infrastructure Development Plan, the Office of Economic Development liaise closely with the Treasury, and that the Office of Economic Development could be designated as the first "port of call" for any private sector firms wishing to make proposals to the government, with appropriate strengthening of the OED staff for that purpose.

2.1.3.2 A published schedule of capital works projects

The Government of Western Australia has had no difficulty publishing a "Schedule of Capital Works Projects" for a three-year period. This schedule is printed in thousands of copies and is issued in conjunction with the government's Guidelines for Private Sector Participation in Public Infrastructure[47]. At the front of the Schedule is a prominent disclaimer: "This schedule does not represent a commitment by the Government or any of its agencies to proceed with a project".

The Committee sees no reason why New South Wales cannot do the same.

It might be argued that NSW already does something of the sort. For example, it publishes every year a Budget Paper listing the Government's Capital Works for the coming year, and also a list of capital works, in great detail.

However, neither of these is readily available to the public or even to the private sector. Both are somewhat arcane and perhaps a little unwieldy for general public consumption.

What is needed is a booklet, along the lines of the Western Australian document, in easily assimilable and portable form, intended for consumption by members of Parliament, the

[47] Government of Western Australia, Investing in Infrastructure: Guidelines for Private Sector Participation in Public Infrastructure and Schedule of Capital Works Projects 1992-5, March 1992.

general public and the private sector, which lists the largest new infrastructure projects planned in the State for the next three years.

If the Integrated Infrastructure Development Plan is prepared, it would provide the ideal base data from which the Schedule of Capital Works would be drawn.

At the front of the booklet, there should be a prominent disclaimer to the effect that the contents represent plans only, and not firm commitments by the government.

RECOMMENDATION 16

That on the model of the Western Australian document *Schedule of Capital Works Projects*, the Government issue a booklet in easily assimilable and portable form, intended for consumption by members of Parliament, the general public and the private sector, which lists the largest new infrastructure projects planned for the next 3 years.

At the front of the booklet there should be a prominent disclaimer to the effect that contents represent plans only, and not firm commitments by the Government.

2.1.3.3 Infrastructure plan booklets for each agency

The Committee, and many witnesses, were highly impressed with *Roads 2000*, the 16-page booklet originally published in 1987 by the RTA. It was short, easy to understand, and attractively presented. It had photographs and clear maps, and its vision was lucid and specific. It should be a model for other agencies, especially when communicating their ideas to the general public, which the Committee sees as a crucial part of the infrastructure planning process.

RECOMMENDATION 17

That all infrastructure producing agencies prepare, on an annual basis, booklets on the model of *Roads 2000*, which contain an easily understandable overview of their medium term infrastructure plans. These booklets should be in addition to the plans recommended in the Committee's Recommendation 7 above.

2.2 STAGE II: FROM PLAN TO REQUEST FOR TENDERS

FLOWCHART OF STEPS

A. THE PUBLICLY-FUNDED PROJECT	B. THE PRIVATELY-FUNDED PROJECT	
	(i) Identified by government	(ii) Proposed by private sector
Step 1. Pre-feasibility study	Step 1. Pre-feasibility study	Step 1. Obtaining Treasury's opinion on Loan Council issues
Step 2. Submission to Capital Works Committee of Cabinet	Step 2. Submission to Capital Works Committee of Cabinet	Step 2. Preparation of preliminary appraisal
Step 3. Treasury finalises Capital Works budget	Step 3. Obtaining Treasury's opinion on Loan Council issues	Step 3. Submission to Capital Works Committee of broad needs proposal
Step 4. Detailed economic and technical appraisals and feasibility studies, including EIS	Step 4. Detailed economic and technical appraisal, including EIS	Step 4. Call for precise proposals
Step 5. Development of brief for expressions of interest	Step 5. Development of brief	Step 5. Selection in principle
Step 6. Calling for bids	Step 6. Call for bids	Step 6. Detailed appraisal of preferred proposal
		Step 7. Submission to Capital Works Committee of preferred proposal
		Step 8. EIS preparation
		Step 9. Negotiation and signing

In this next stage, the project is no longer just part of a plan on a piece of paper. This stage represents the beginning of its transition from plan to reality.

This is probably the most hazardous time for the project. Many have foundered at this point. It is dangerous because it is the stage when many agencies, bodies, units, departments and organisations need to work together, when the failure of one can mean the failure of the whole enterprise, and when the potential for misunderstandings and crossed wires is at its highest. We have moved beyond the planning stage, when it is not too late to rectify a problem with the stroke of a pen, if necessary, to the realities of

implementation, when significant sums are being spent by private and public sector alike. Conflicts, gaps, overlappings, and miscalculations mean real money, real lives being affected and real political reputations jeopardised or made.

That is why it is important to get this phase right. Blueprints exist in great numbers for Phases 1 and 3 of the project's pre-operational life, but very little has been done to chart the project's progress through the critical period between when it is just part of a plan to the moment when a public announcement is made actually seeking tenders for its execution. Planning documents, as we have seen above[48], proliferate in government - indeed, as far as the private sector and indeed the public are concerned, the whole presentation of plans needs to be simplified considerably; guides to the tender evaluation process, as we shall see in the next section, are even more numerous, and can be tremendously detailed; but so far only the (former) Department of State Development,[49] for privately-funded projects, and the Capital Works Unit[50] , for publicly-funded projects, have ever attempted to provide a general "map", or a flow-chart, showing the path of the project from the plan phase to the call for expressions of interest.

This section of the Committee's report seeks to expand considerably on these flow-charts and sets out a sequence of events which the Committee believes incorporates best practice.

Whilst the Committee recognises the dangers of inflexibility and an approach which is too prescriptive, it has repeatedly found that attempts to jump one or more stages can sometimes mean that the project never gets signed at all. They can mean muddle and failures, duplication and confusion, and, in the worst case, cancellation of projects which have already been announced. In short, the short-cutting of the process often leads to damaging consequences.

Again, the fact that the Committee has set this succession of stages out in order does not mean that it does not appreciate the need for flexibility. Clearly in certain circumstances rigid and unimaginative adherence to a pre-set sequence can be inefficient and costly. However, there are some commonsense principles of logical succession which have sometimes been ignored in practice in NSW with detrimental effects.

The Committee's flow-chart details the process for two quite different categories of infrastructure projects:

- those which are publicly-funded;
- those which are privately-funded.

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[48] Part 2.1.2.

[49] *Guidelines for Private Sector Participation in Infrastructure Provision*, a statement by the NSW Government published in 1988 and 1990 in booklet form.

[50] New South Wales Government, Capital Works Investment: Total Asset management Manual, 1992, pp. 14-15.

The privately-funded projects, in their turn, are divided into two groups:

- those which are identified by the public sector;
- those which are proposed to the government by the private sector.

Each of these categories should ideally follow a reasonably distinct path through the bureaucratic and political round, so they are considered separately below.

2.2.1 THE PUBLICLY FUNDED PROJECT

Broad Overview of the Process

The path which the publicly-funded project should in principle follow during a single year has been set out in broad terms in the Government's Total Asset Management Manual. The process it outlines is long and contains much which is not directly relevant for our purposes here.

For our purposes, the process starts in November, when the Expenditure Review Committee of the Cabinet meets to review the government's general budget strategy, and the Treasurer issues forward estimates. In December, the Treasury writes to agencies seeking their capital works proposals. From December to February, the agencies work on their capital works plans and their economic appraisals of individual projects. In February they submit their capital works programs, supported by their Capital Investment Strategic Plans. In May, the Capital Works Committee of the Cabinet considers the overall capital works program and, usually, simply gives it its approval.

In June, the Treasurer issues initial budget and capital allocations, and in September, presents the State Budget, which always includes a volume on the State's capital works program for the coming year.

Throughout the year, agencies should also be preparing economic appraisals for projects as they arise.

Within that process, the individual publicly-funded infrastructure project should be reviewed, considered and examined many times, by the agency proposing it, by the Treasury, and by the various committees of Cabinet. A number of steps, within the broad process outlined by the Asset Management Manual, need to be taken to ensure that the project is efficiently realised. They are outlined below. In principle, the process is a great deal simpler for the publicly-funded project than for one which is privately financed, since briefs to the private sector need to cover only technical, rather than financial matters.

Publicly-funded project - Step 1:

Preparation of broad technical and economic appraisal: the pre-feasibility stage

For the publicly-funded project, the first post-plan activity should be the carrying out of a technical and economic appraisal by the agency in very broad and preliminary terms. It should examine very general questions:

- will this be a publicly-funded or a privately-funded project?
- what are its likely costs and benefits, in broad terms?
- is it technically feasible?

These questions appear to be very simple, even self-evident. However, there are many cases when the government has been unable to answer the first, in particular, and has provided unsatisfactory and partial answers to the second.

Ideally, the government should decide right at the start whether the project should be publicly- or privately-funded.

This has not always happened. The Committee was presented with many instances where the government had not made up its mind from the start how the project should be funded, where large sums had unnecessarily been spent by private and public sectors alike before a decision was finally reached, and where the result had been serious losses for many concerned. In other words, the government had gone on a "fishing expedition" to see what, if any, interest there was in the project from the private sector, without having first worked out and finalised whether the project should indeed be privately-financed.

One example, which will be dealt with at greater length in Part 3 of this report, is the operating lease for 350 coal wagons first announced, then cancelled, by the State Rail Authority. If the government had carried out a broad economic appraisal at this early stage, including an initial approach to Treasury, the risk of the private sector wasting large sums on preparing bids would have been considerably lessened. The broadest economic appraisal would have been sufficient here: there would have been no need to go into the details the Committee proposes be covered at a later stage in the process, the preparation of the full economic appraisal.

Publicly-funded project - Step 2:

Submission to Capital Works Committee of Cabinet

Before the project goes to the Capital Works Committee, the Ministerial Expenditure Review Committee will have set the broad budget strategy and major budget targets and approved the issue to ministers of forward estimates. In March departments submit details of their capital works programmes which Treasury and the Office of Public Management

review[51]. In this review, Treasury's Budget Division normally discusses capital works programmes bids with senior agency officers. In their capital works bids, agencies are required to indicate options for further cut back of recommended programme allocations. These cut back options are subject to close review by the Capital Works Committee in determining the final state programme[52].

The terms of reference of the Capital Works Committee are to determine, manage and co-ordinate the State's capital programme.[53] In June 1993 the members of the Capital Works Committee were the Premier, the Minister for Transport and Roads, the Deputy Premier, the Minister for Land and Water Conservation and the Treasurer.

There are several other Cabinet committees concerned with infrastructure. As we shall see, the very plethora of these committees has caused problems of co-ordination and brought about a dissipating of responsibility. They are:

- the Urban Policy Committee;
- the Expenditure Review Committee;
- the Economic Development Committee

These committees are supported by various officers' committees and units: the Capital Works Unit, which supports the Capital Works Committee, the Urban Development Committee (which itself has seven sub-committees with over 40 bodies and agencies represented), the Urban Development Finance Committee, the Private Infrastructure Committee, the Section 22 Committee on City West, the Rouse Hill Task Force, and a number of others.

In fact, there is a profusion of committees and units concerned with infrastructure, each with its own agenda, modus operandi and priorities. Some of them function well, while others make serious efforts but do not appear to be senior enough to make a significant impact.

There is one major problem with this over-generous endowment of infrastructure-related committees: that is that responsibility for infrastructure provision is split among too many of them. The Capital Works Committee considers capital works plans, the Urban Development Committee considers urban development, and even when capital works are in urban areas, in general the twain do not meet. There is currently no single Cabinet committee which considers all infrastructure plans and proposals across the whole of government, which ranks them in order of priority, and which sees that they are all co-ordinated with each other.

For example, the Capital Works Committee does not receive for approval the Urban Development Plan, but the Urban Development Committee does. There is thus no

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[51] Don Nicolls, *Managing State Finance: the NSW Experience*, 1991 p. 192.

[52] NSW Treasury, *Budget Procedures Manual*, B54.4/2.

[53] NSW Treasury, *Budget Procedures Manual*, *A33.0/1.*

mechanism by which the larger strategies like the Urban Development Plan can be translated into Capital Works Programs consistently across government:

As the Department of Planning said in its submission:

> the level of co-ordination being attained is limited by the absence of a mechanism for collectively considering capital works programs of individual agencies...there is currently no co-ordination of agencies' separate budget proposals. This has implications for the effectiveness and efficiency of funds allocated to urban development.[54]

Similarly, Treasury in its submission pointed out:

> From a financing viewpoint, the most serious failing of the land use planning process to date is that it has largely operated in isolation from the budgeting process. Although servicing needs are part of the considerations in deciding to proceed on a particular release area, they tend to have been considered in a somewhat a hoc manner. Infrastructure requirements for urban development consume a substantial part of the State capital budget. However, the Urban Development Plan is not formally submitted to the Capital Works Committee for approval.[55]

In evidence, the Treasury elaborated:

> We did commission a consultant [G. Glazebrook] to do some preliminary work whereby we could develop a process to link urban development with the capital works planning process. Some theoretical work was done on that, and since that time we have been upgrading our computer systems in Treasury in order to get an overview of a slice of the capital works programme which concentrated on urban development, so that it could be available to Government.
>
> The methodology has been examined by the Urban Development Finance Committee and has been endorsed in principle. Subsequently when we have been looking at major development we have been trying to apply the methodology that Glazebrook recommended. To date the overall procedures we link the urban development process to the capital works programme are still being developed. It will take a fair amount of resources to be able to do that. While we have gone part of the way, with our own computer system, there will be a lot more work required to bring together all the agencies and get the information flow into operation.[56]

The Treasury in its submission also said :

> The link between the Capital Works Program and the Urban Development Program is usually no more than the fact that agencies are represented on the Urban Development Committee, so that agencies are aware of the UDP and involved its formulation. Some agencies affected by urban development are aware

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[54] Submission from Department of Planning, 29 July 1992, p. 15.

[55] Submission from the Treasury, August 1992, p. 8

[56] Minutes of Evidence 1 December, 1992

of the UDP but are not represented on the Urban Development Committee (of Cabinet).

The Committee believes that many of these problems of co-ordination can be solved comparatively simply, although not necessarily easily. The main task is to prepare the Integrated Infrastructure Development Plan (IIDP) proposed in the previous section. This is because the IIDP, as envisaged by the Committee, would not only be a strategic, general document which discusses issues in an academic manner, but would also contain a concrete list of capital works projects manifesting agencies' responses to those issues.

Chairing the Task Force which oversights the Integrated Infrastructure Development Plan should be the new Office of Economic Development, which would benefit from all the authority of the Premier's Department. If the IIDP were in existence, it would then be considered by the Capital Works Committee.

In this way, there would be one major infrastructure development plan, and one senior Cabinet committee to approve it.

The benefits in co-ordination would be tremendous. Rather than the current gap between capital works and plans, between urban development and capital works, and between the budget and the different levels of plans, there would be a simple, unified structure which would be easily understandable, easily workable and, in principle, easily enforced across government. Rather than confusion and duplication, there would be clarity.

There is an excellent opportunity, after the May 1993 restructuring of the Ministry, to put this uncomplicated and businesslike system into operation. In the Premier's own Department, there is now an Office of Economic Development, which the Committee has proposed should be primarily responsible for the preparation of the Integrated Infrastructure Development Plan and its submission to the Cabinet. This office, working with the Capital Works Unit, could realistically be given the responsibility for ensuring that the Capital Works Committee was presented with an internally consistent set of infrastructure proposals.

To return to the present, the function of the Capital Works Committee is not to ensure that there are sufficient funds to pay for the publicly-funded programs that are submitted to it. Rather, it is to give approval in principle to the capital works programs sent to it by the various agencies.

The process whereby the project is actually included in the budget represents the next step for the publicly-funded infrastructure project.

Publicly-funded project - Step 3:

The Treasury finalises the Capital Works Budget

To prepare the Capital Works budget, Treasury, as we have seen, at present uses only the capital works plans which are submitted by each agency.

There are two problems here, as seen by the Treasury. The first is essentially that it uses only the capital works plans and not the larger strategies prepared by the agencies. The implications of this, and a proposed solution, have been discussed in the previous section.

The second problem is much thornier, because it is not so much organisational as conceptual in nature. This is that it is very difficult to rank projects across portfolios. As the Treasury pointed out in evidence:

> We invite the Committee's attention to the fact that essentially the economic appraisal process works, and the assessment of costs and benefits works within portfolios but does not apply across portfolios because of the way the process works.[57]

In other words, ranking projects across portfolios is not done at present in New South Wales. However, the Committee understands that work is currently under way on methods of doing so, a development which the Committee would support.

Publicly-funded project - Step 4:

Preparation of detailed environmental, technical and economic feasibility studies

This is the stage at which the agency should go into top gear with the infrastructure project. It should either carry out itself, if it has the resources, or commission consultants to carry out, detailed technical and economic feasibility studies. This is also the stage at which the Environmental Impact Statement will be prepared.

The technical feasibility studies will of course differ in each case. However, for economic appraisals, the Treasury has published a Guide which sets out the principles and practice of the preparation of cost-benefit analyses[58]. This guide is intended for use by government departments and authorities.

The Capital Works Unit of the Premiers Department currently considers the economic appraisals prepared by agencies, and occasionally sends them back for reworking.

This is the stage at which the Environmental Impact Statement should be prepared for publicly-funded projects. In that regard , the Department of Planning has advised that the statutory requirements for environmental impact statements are as follows:

> In accordance with Part V of the Environmental Planning and Assessment Act, 1979, an environmental impact statement (EIS) must meet the following requirements.
>
> Pursuant to clause 57 of the Environmentall Planning and Assessment Regulation, 1980, as amended:

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[57] Minutes of Evidence. 1 December 1992, p. 251.

[58] New South Wales Treasury, *NSW Government Guidelines for Economic Appraisals*, Technical Paper, revised edition, January 1990.

(1) An environmental impact statement referred to in section 112 (1) of the Act shall be prepared in written form and shall be signed by the person who has prepared it.

(2) The contents on an environemental impact statement referred to in subclause (1) shall include the following matters:-

(a) a full description of the proposed activity:

(b) statement of the objectives of the proposed activit;

(c) a full description of the existing environment likely to be affected by the proposed activity, if carried out;

(d) identification and analysis of the likely environmental interactions between the proposed activity and the environment;

(e) analysis of the likely environmental impacts or consequences of carrying out the proposed activity (including implications for use and conservation of energy);

(f) justification of the proposed activity in terms of environmental, economic and social considerations;

(g) measures to be taken in conjunction with the proposed activity to protect the environment and an assessment of the likely effectiveness of those measures;

(g1) details of energy requirements of the proposed development and measures to be taken to conserve energy;

(h) any feasible alternatives to the carrying out of the proposed activity and the reasons for choosing the latter;

(i) consequences of not carrying out the propsoed activity.

The EIS must also take into account any matters required by the Director of Planning pursuant to clause 58 of the Regulation, which may be included in the attached letter.

The EIS must bear a certificate as required by clause 59 of the Regulation.

The reason the EIS should be prepared at this point, and not before the Capital Works Committee has approved the project, is that it would be inadvisable to spend considerable time and money on assessing the environmental impact of a project according to the above critera while the project has still not been approved by the Committee.

The EIS process can be of variable length. One of the best-known examples is the EIS series associated with the North West Transport link. The first of these, for the eastern section of the corridor, began in 1989; this was the subject of a Commission of Inquiry; subsequently, in October 1990, two further EISs were commissioned for the eastern

section and the western section. In terms of the above requirements and related procedural matters the Department of Planning advised the RTA as follows:[59]

North West Transport Links - Western Section

Thank you for your letter of 21 October, 1990 indicating that you are consulting with the Director with regard to the preparation of an environmental impact statement (EIS) for the above proposal.

2. An EIS is required to be prepared where the proposal is an activity referred to in Section 112(1) of the Environmental Planing and Assessment Act, 1979. The EIS shall bear a certificate required by clause 59 of the Regulation (see Attachment No 1).

3. In addition, pursuant to clause 58 of the Regulation, the Director requires that the following matters be specifically addressed in each EIS:
   - detailed description of the proposal including earthworks, traffic management arrangements and associated facilities using appropriate diagrams, photo montages based on aerial photographs and drawings to scale.
   - clear definition of the North West Transport Region and description of its present and likely future transport, mobility and access needs, and outline of an overall North West Transport Strategy.
   - the role of the proposal as a component of an overall North West Transport Strategy. Details of the relationship of the proposal to the regional and local transport/road system.
   - a full assessment of alternatives to the proposal including relative social and economic costs, and impacts of the options considered, and reasons for rejection of alternatives.
   - assessment of the proposal with respect to the mobility of goods and people.
   - assessment of the proposal with respect to access needs of the North West Transport Region.
   - implications of the proposal for Parramatta and Sydney CBD and other commercial centres in the region.
   - impact of the proposal on the character of Sydney's North West Transport Region.
   - diagrammatic identification of proposed property acquisition, if any, and a description of the acquisition process.
   - likely impact of the proposal on urban bushland and native fauna habitat.
   - impact on air quality and noise levels.
   - implications of the proposal and alternatives for energy use and greenhouse gas and emissions; consideration of Government policy to reduce carbon dioxide emissions.
   - commitments to give written notice, at the commencement of the EIS exhibition period, to the apparent owners and occupiers of

[59] Letter to RTA's Director, Sydney Western Region from Department of Planning dated 10.1.91.

land adjoining or directly included in the proposal and, where practicable, its alternatives, of the exhibition of the EIS and the opportunity to make a submission.

4. When an adequate EIS has been prepared for the subject proposal, as determining authority, you should then proceed with the matter in accordance with Section 112 and 113 of the Act, and place the document on public exhibition. The procedures for public display that are to be followed by the proponent and/or determining authority are as in clauses 60 to 64 of the Environmental Planning and Assessment Regulation, 1980.

5. When the EIS is completed, six (6) copies should be forwarded to the Secretary, Attention: Manager, Assessment Branch pursuant to Section 112(2) of the Act, as well as details of the exhibition period and public display locations.

6. The determining authority should also note that section 113 of the Environmental Planning and Assessment Act, 1979, and clause 61 of the associated Regulation, require that the EIS be made available for inspection at the same time in the offices of the determining authority and the Department as well as any other agencies nominated by them. To ensure that simultaneous exhibition occurs, the Authority should forward the necessary documents to the Department prior to the commencement of the public display period. This will enable concurrent exhibition in the Department's head office and the relevant regional office where appropriate.

7. Should any submissions be made during the period of public exhibition, it is advised that such submissions should be forwarded to the Secretary in accordance with Section 113(3) of the Act.

8. If the determining authority has not received a reply within 21 days of sending submissions to the Secretary, it should proceed to determine the matter. The Department will only contact the determining authority after the receipt of submissions if an issue of major significance is involved.

9. If there is no objection to the proposed development as a result of the exhibition, the determining authority may determine the matter at any time after the last day upon which submissions are accepted.

10. It would be appreciated if a copy of the determination could be forwarded to the Department for our information.

11. Should you require any further information regarding this matter please do not hesitate to contact us again.

It was only in May 1993 that it was finally determined, by the RTA, that the project should go ahead, after 14,000 submissions had been received, 250,000 newsletters had been distributed, 31 advertisements placed in newspapers, 18 guided information walks of the routes had been conducted, 15 acquisition information nights, 3 meetings of the community consultative committee and numerous community/interest group meetings had

been held, and about $4 million spent[60]. The result is Sydney's first proposal for a fully integrated transport link incorporating exclusive bus ways on a toll road which may later be developed for light rail.

One of the issues raised in the present EIS process is whether the agency proposing the project should have the power to determine whether it should actually proceed. In that regard, the Committee notes that the Government has a bill presently before the Parliament, the object of which is to amend the Environmental Planning and Assessment Act to provide that where a government agency is both the proponent and the determining authority for any activity for which an EIS has been obtained under Part 5 of that Act, the Minister for Planning and not the agency will finally decide whether the activity may proceed and any conditions to which it may be subject following the examination of the statement and public responses to it.

Publicly-funded project - Step 5:

Development of Brief for Private Sector

At this penultimate step in Stage II, the agency prepares a brief to present to the private sector which will be constructing the facility. It is vital that this brief be as complete as possible. However, it should be remembered that we are still discussing only publicly-funded projects, so the brief will normally deal only with technical and commercial matters, and will exclude any financing considerations.

Most large infrastructure providers in the public sector have prepared guidelines on how to prepare a brief, or a set of specifications for publicly-funded projects.

The Central Contracts Group of the SRA, for example, has prepared a Procurement Procedures and Policies Manual which sets out in very considerable detail exactly the aspects which should be covered in the Specifications provided to prospective tenderers. It divides the specifications to be prepared into two categories: Technical and Commercial, and allocates the following responsibilities:

3.3.1 Technical Specification

Initiating Section

- will prepare a technical specification
- establish the evaluation criteria ...and the information to be sought from tenderers.

Central Contracts Group

Will review the technical specifications to ensure these are not overly restrictive, evaluation criteria are clearly defined and specifications accurately reflect what the end user wants.

[60] Submission to the Committee from the Roads and Traffic Authority, dated 23 June 1993.

3.3.2 Commercial Specification

Initiating Section
Information to be supplied to CCG:

- Amount for liquidated damages
- If materials are to be supplied by Principal, indicate value
- Defects liability period
- Nominated subcontractors
- Special requirements
- Proximity to SRA running lines
- Programme
- Site safety provision (if applicable)
- Quality assurance (if applicable)
- Options/alternatives (if applicable)
- Lump sum price schedules
- Schedule of rates
- Separable portions
- Tender period
- Validity period

CCG
will incorporate the following, as appropriate:

- Conditions of Tendering
- Form of Tender
- Tender Schedules
- General Conditions of Contract
- Special Conditions of Contract
- NSW Government Purchasing Policy
- Rise and Fall Provisions.

The reason for setting out these details here at such length is that this kind of scrupulous detail has not been characteristic of some of the briefs received by the private sector for privately-funded projects. This level of care can be thought of as a benchmark for agencies to follow for privately-funded infrastructure projects.

Indeed, the central agency for the construction of public works, the Department of Public Works (PWD) has set out as a basic principle a requirement for comprehensiveness in briefs. It has prepared a series of three Documentation Manuals for the implementation of various types of building project:

- Design and Construct Contracts
- Design, Novate and Construct Contracts
- Design Development and Construct Contracts,

in each of which it stresses the need for the brief to be complete:

- in the first and third manuals, it uses the identical words: "PWD should take positive action to ensure the Client's brief is as complete as practicable. It should

stress upon the Client how essential it is to prepare a comprehensive and complete brief"[61].

- in the second, it says: "The Client [in its brief] sets out objectives of the project, including time, cost, quality and scope and may have further requirements in terms of appearance an function....the more precise and detailed any brief is the more likely the Client's objectives will be met"[62].

Briefs for publicly-funded infrastructure projects have been developed over the years to a high degree of relevance, detail and accuracy. The same cannot always be said for privately-funded projects, as we shall see. Of course, with privately-funded projects there is the much more onerous requirement that financing provisions be spelt out in detail as far as possible, but that does not alter the principle that briefs must always contain considerable thought and adequate amount of well-thought-out and relevant particulars.

Publicly-funded project - Step 6:

Calling for Bids

This is the culmination of this stage in the path of the publicly-funded infrastructure project. All the other steps have essentially been leading up to this public declaration of intent, this point from which any turning back will be highly embarrassing and awkward, although not impossible.

With large infrastructure projects which are publicly-funded, it would normally be desirable to call publicly for expressions of interest. Indeed, the Central Contracts Group of the SRA says that "departure from open tendering must only be made in exceptional circumstances" [63]. Any request for the waiving of open tendering in the SRA must be approved by the Chief Executive, Chief Financial Officer or Group General Managers, and, where appropriate the Minister is advised.

Whether to go to open or closed tendering is a question of judgement, and there are varying opinions on the matter. The question is dealt with in greater detail in Part 4.1 of this report, which discusses the ICAC and the tendering process.

To sum up for our purposes here, however, the ICAC, for example, said in evidence that it preferred open tendering:

> **Ms Reed**: People say 'I know the market, why bother to tender? I can go to the right supplier or builder because I know who is out there'. Our experience is that

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[61] Department of Public Works, Guidelines and Documentation Manual for Design an Construct Contracts, 1992, Appendix A, p. G10; and Department of Public Works, Guidelines and Documentation Manual for Design Development and Construct Contracts, 1992, Appendix A, p. G7.

[62] Public Works Department, Manual for the Design, Novate and Construct System, Part 1.

[63] SRA, op. cit., p. 5.

> you do not know the market unless you ask the market. The only way to find out who is interested and capable is to ask[64].

The Water Board, on the other hand stressed the delays and extra costs involved in the process, especially when prospective tenderers were known and were known to be few in number :

> **Mr Wilson:** We are a business enterprise that tries to get the best value for its dollar and you do need to know your business and you do need to know that at times it is just too costly to tender, and that you need to find other methods to try to reduce the tender process..... There is a role for long term arrangements and negotiated tenders and for selective tendering[65].

In this they were supported by the former Director of the Cabinet Office, Mr G. Sturgess, who said in evidence to the Committee that a preoccupation with process (for example, an insistence on open tendering in all cases) could compromise efficiency of outcome. However, as we have seen, other agencies like the SRA would normally go to open tenders.

The ICAC said in evidence on the same day:

> **Ms Reed:** There is certainly a role there for one of the central Government agency to pull this material together, take a good look at what is there, and put out a simple guide for people in Government as to what to refer to in what circumstances... people out in the field are very confused [about tendering guidelines][66]

The Office of Public Management of the New South Wales Premier's Department did in fact produce in 1991 a booklet entitled *Competetive Tendering and Contracting Out: Guidelines*. Although it deals with the steps in the process, it does not cover ICAC-related issues. The Committee considers there is scope for a supplementary booklet discussing such issues and recommending ways of dealing with them. This should be prepared by the ICAC. In Part 4.1 of this report, the Committee discusses the issue of ICAC and makes a number of related recommendations.

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[64] Ms A. Reed, Director of Corruption Prevention, ICAC, in evidence to the Committee 30 November 1992, p. 266.

[65] Mr R. Wilson, Managing Director of the Water Board, in evidence to the Committee 3 December 1993 pp. 284, 286.

[66] Minutes of Evidence p. 265.

2.2.2 THE PRIVATELY FUNDED PROJECT

The process privately-funded infrastructure projects follow from their appearance in a plan to the point where expressions of interest are sought is more complex than that for publicly-funded infrastructure projects. More variables are called into play - the Loan Council needs to make a determination, the Private Infrastructure Committee constitutes yet another institutional player, briefs need to cover financial matters as well as technical and commercial ones, other problems like the protection of intellectual property are raised, and overall, much more work is needed to make the process work smoothly. Unfortunately, there is - inevitably - nowhere near the same depth of experience in getting privately-funded infrastructure projects to the point of realisation in NSW as there is for publicly-funded projects, so it is not surprising that errors are made and losses incurred. This section seeks to set out in some detail the steps that need to be followed to ensure success in this phase of the privately-funded project's development, and points out some of the errors made so far.

It divides privately-funded infrastructure projects into two categories: those the public sector has identified, and those the private sector has itself proposed to the government.

Within each of these categories, privately-funded projects can be of several types:

BOT: Build, operate, transfer

In this model, the private sector builds the facility, relying largely on resources it can mobilise (a mixture of equity and debt) together with, in some cases, government support to a greater or lesser degree; it operates it for a certain period (usually between 15 and 30 years) and then transfers it, for no payment, to the government. In this model, either the government, or another private sector company operates the facility.

An example of this model in NSW is the Junee Private Prison.

BOO: Build, own, operate

In this model, the private sector again funds the project, and owns and operates it for a long period.

Examples of this are the four water treatment plants proposed by the Water Board at Woronora, Illawarra, Macarthur and Prospect, and the Port Macquarie hospital which was the subject of a Public Accounts Special Committee report in June 1992.

BOOT: Build, own, operate and transfer

In this model, the private sector finances the construction, owns and operates the facility for a set period and transfers it to the government at no cost at the end.

Examples of this are the Harbour Tunnel, the M4 and M5 motorways, and the Bennelong Car Park.

The advantages and disadvantages of each of these models, an the reasons for adopting them, will be discussed in Volume 2 of this report. For our purposes here, it is sufficient to set them out as existing models which have gone through various administrative and organisational stages in NSW.

2.2.2.1 Projects identified by government

Step 1: ***The preparation of broad technical and economic appraisal: the pre-feasibility stage***

For the privately-funded infrastructure project identified by the government, this is probably the most critical stage of all, because it needs to set the basic parameters for the project:

- what objectives is the government seeking to reach with this project?
- what are its likely costs and benefits, in broad terms?
- what is the market's response likely to be to this project?
- what sort of financing arrangement is likely to be acceptable to government?
- what is the nature and the maximum level of support the government is prepared to provide if the project is not self-supporting?
- which, broadly, are the risks the government is proposing that the private sector take, and which the government?
- in brief, what does the government want here?

Again, these would appear to be obvious questions. And yet, in practice, it is exactly here that some of the most striking instances have occurred of confusion of purpose and lack of co-ordination at the bureaucratic and even political levels. This confusion has led to the wasting of very significant sums by both private and public sectors, the needless expenditure of passions and print, and cynicism and disillusionment in many of the quarters involved.

Indeed, this stage is frequently omitted altogether. In evidence, Mr M. Perry, of Infrastructure Development Corporation, stated:

> Let me give a composite view of how not to approach these sorts of projects. I will draw on a number of examples - unfortunate examples that are probably well known to you. The starting point is that an agency decides there is a need for a piece of infrastructure and does not do a pre-feasibility study to establish the likely cost or the financial involvement of the public sector. It puts an ad in the paper quickly to see if there is any interest out there. It is a very broad statement because there has not been any definition as to what is wanted by the agency...no thought has been given to the criteria of the project, no tight definition of the

> technical specifications....there has been no discussion with other agencies that may have a relevant involvement,..no advisers have been appointed, either technical, financial or legal...tremendous confusion starts to occur in the private sector.[67]

In earlier evidence, he cited an example:

> **Mr Perry:** there is one case at the moment of a project of some $400 million but there was no allocation of $20,000, $30,000, $40,000 initially to say whether that made sense. I suspect the private sector and public sector on that particular project have now spent many hundreds of thousands of dollars without the initial homework being done.
>
> **Mr Photios:** Which project is this?
>
> **Mr Perry:** That is the airport link[68]

And later on:

> **Mr Rumble:** You mentioned the airport link before. Is that the rail link of CRI?
>
> **Mr Perry:** Yes.
>
> **Mr Rumble:** There was no feasibility study conducted?
>
> **Mr Perry:** No.
>
> **Mr Rumble:** With the problems associated with that, do you blame the Roads and Traffic Authority or is it a mixture of both, Roads and Traffic Authority and State Rail Authority, and also the private people involved?
>
> **Mr Perry:** Rather than ascribe blame, I think the structure was never put in place at the start. There was an approach from the private sector, from CRI, to do a project and the submission was reasonably detailed. It took almost a year for any response from government—whatever agency—to them, and expressions of interest being called. The private sector was given a very short period of time to respond—from memory it was a couple of months—to go and spend a lot of money and come back with a submission. Then, almost a year elapsed before any response. That involves a lot of money but, also, circumstances change. I believe in the end a lot of people in the private sector would have been interested in that project but simply went away because they got so frustrated. The hope is that, from now on, the resources are there and there is a disciplined approach to the project.
>
> **Mr Rumble:** But there is a definite commitment, is there not, by CRI on that project?

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[67] Evidence to Committee, 22 Mary 1992.

[68] Evidence to Committee, 22 May 1992.

> **Mr Perry:** We have been advising the government agencies on that in recent times and my understanding is that a joint venture is being entered into by the various parties, including the Government, into a fairly detailed feasibility. The outcome of that will be about 12 months away.

This did in fact occur.

RECOMMENDATION 18

That before seeking bids from the private sector for privately-financed infrastructure projects, agencies first determine as definitely as possible

- what the acceptable funding arrangements are likely to be
- what the market's response is likely to be
- what they envisage will be the broad allocation of risks in the project
- the costs and benefits of the project
- the project's technical feasibility.

However, some agencies, notably the Water Board, did work out very clearly, even at this earliest stage, what the answers to those simple questions posed earlier should be. For the four large water treatment plants, for example, it prepared a set of "Commercial Principles", which, among other things, detailed in a reasonably scrupulous and well-thought-out way the risks it was envisaged would be allocated to each party to the contract. For example, design and construction risk, industrial relations risk, performance risk, operations risk, taxation risk, and natural disaster risk, would all be borne by the private water treatment company; the Board and the company together would bear market, supply of raw water, Loan Council, and technical obsolescence risks; and the Board alone would bear the risk of operating the upstream facilities like river systems, canals, pipelines, reservoirs, dams and catchments and of any changes in the law.

This should be a model for other agencies.

RECOMMENDATION 19

That when preparing their broad initial appraisals, agencies refer to the Commercial Principles document prepared by the Water Board in connection with the water treatment projects.

Privately funded project identified by the government - Step 2:

Approval by Capital Works Committee

Normally if the privately-funded project identified by the Government will cost more than $5 million, it should go to the Capital Works Committee of Cabinet at this stage. For projects identified by the government, the procedure is relatively straightforward: the sectoral agency goes with its broad appraisal to the Committee and seeks approval.

This of course is the ideal. It has not happened with several projects to date, for example the John Hunter Hospital Campus (NIB Day Hospital Centre), the Freight Haulage on Disused and Mothballed Branch Lines, and the Bulahdelah-Coolongolook deviation, all of which were privately-funded projects originally identified by the government.

The Committee believes that the practice of bypassing the Capital Works Committee is undesirable. It is still, at the moment, the only body capable of taking an overall view of infrastructure provision in the state. Large projects need the endorsement of the government as a whole, not just that of a single sectoral department or agency. Otherwise there is no guarantee that there will be no overlapping, contradictions, or gaps.

RECOMMENDATION 20

That all privately financed projects identified by the government which are over $5 million should be presented to the Capital Works Committee for approval.

Privately funded project identified by the government - Step 3:

Obtaining Preliminary view of Treasury on Loan Council questions

(This step should be carried out for both types of privately-funded projects, those which are identified by the public sector, and those which have proposed by the private sector).

The question of the Loan Council is dealt with in more detail in Volume 2 of this report. For our purposes here, however, a brief summary of the functions and powers of the Loan Council will suffice.

The Loan Council dates from 1927. The reason it was originally set up was to bring together under one umbrella all the various borrowings by the separate states, with the aim of reducing their intense competition for post-war reconstruction funds, and thereby making borrowing cheaper for all of them.

The main reason why the Loan Council exists in principle is to manage the public sector's call on domestic and foreign savings. Without such management, it is feared that the public sector's borrowings will rise to uncontrolled levels, its credit rating will drop, and

the price it will have to pay for its borrowings will increase. The result will be a public sector struggling to pay back high interest loans, unable to borrow to finance further capital expenditure at reasonable rates, and not delivering an adequate level of capital and recurrent spending for the benefit of its citizens.

One way the Loan Council has developed to combat this scenario is the setting of "Global Borrowing Limits" for each state, that is, a maximum figure which that state may borrow in any one financial year without jeopardising its credit rating.

This ceiling is a set dollar amount. If it is, say, $100 million, and if the state borrows $15 million for one particular infrastructure project, that means it has only $85 million left for any others it might want to construct, or indeed, for any other needs it might want to satisfy.

States therefore have an incentive to use non-government sources of borrowed funds to finance their infrastructure needs. A major non-government source of borrowed funds is the private sector. Most states therefore strive to use private sources of borrowed funds as much as possible, simply because those sources are not subject to the Loan Council's "Global Borrowing Limits".

Since 1927 the history of the Loan Council has been a cycle of regulations imposed by the Commonwealth, followed by attempts by the States to escape from those regulations. Loan Council policies have therefor repeatedly changed, with confusing results for State-based infrastructure-producing agencies.

In recent years, the Loan Council has evolved a set of complex criteria for determining whether borrowings for a project are subject to Global Limits and are therefore subject to its effective control, or whether they do not. Although the criteria themselves are complex, the principle on which they are based is simple: is the government bearing the majority of the risk in this project, or not?

If the government is bearing most, that is, more than 50%, of the risks, then the borrowings for the project "come in under Loan Council" . In that case, the borrowings for that project must be included in the global figure the government is allowed to borrow.

If, on the other hand, the private sector is bearing more than 50% of the risks, then the borrowings for the project are not subject to Loan Council limits.

There is thus a powerful incentive to construct projects so that the private sector carries a bare majority, say 51%, of the risks.

Assessing risks is more of an art than a science, and the list of risks a project can take is very long. What is important for our purposes here is that the step of obtaining a preliminary view from Treasury on Loan Council issues must be taken at this point in the progress of the privately-financed project. It cannot be omitted. Nor can it be done half-heartedly. In other words, a plain and definite determination in principle should be obtained at this stage of the project's development.

This did not happen in the case of the Blue Mountains Tunnel which is discussed in Part 4.1 of this report.

One point should be included here. When agencies go out to tender, they are now expressly forbidden to include the effect of any Loan Council provisions in their criteria for evaluation. In a circular dated 15 March 1993 the NSW Treasury said to relevant agencies:

> Since the announcement of the Government's policy on private sector infrastructure there has been an increasing trend for agencies to seek tenders with the condition that they will be outside the scope of Loan Council controls. While such a result may be a relevant factor in determining whether the project can proceed in the time frame envisaged by the agency concerned, the inclusion of Loan Council clauses at an early stage of project formulation can lead to a distortion of risk allocation.
>
> Henceforth, all tenders for private sector infrastructure projects should not include reference to Loan Council considerations.
>
> Your co-operation in the implementation of this direction would be appreciated.

Following the Loan Council meeting in Canberra on 5 July 1993, Federal Treasurer Dawkins announced that the classification task for Loan Council coverage of private sector involvement in public sector infrastructure projects is under consideration by Heads of Treasuries. In that regard the Treasurer stressed that the apropriate inclusion of such projects is important for the integrity and credibility of the Loan Council allocations.

Treasurer Dawkins said that Heads of Treasuries are to recommend a new set of guidelines for these projects for Loan Council endorsement out of session as soon as possible.

The Committee noted with interest Treasurer Dawkins' announcement that:

> Loan Council endorsed special "pipeline" arrangements to allow infrastructure projects with private sector involvement to be exempted from 1993-94 LCAs where:
>
> - they were unlikely to qualify for Loan Council exemption under the new guidelines now being developed; and
>
> - where considerable good faith, effort and expense had already been incurred by both the private and public sectors in structuring these projects to be outside the existing Loan Council guidelines.
>
> The intention is to restrict the number of nominated "pipeline" projects to the minimum in order to enhance the initial credibility of the new infrastructure arrangements when they are finalised.
>
> Accordingly, the exemption is limited to those major projects which are too far advanced to be easily unwound.

This treatment has been accorded to projects in Tasmania, New South Wales and Victoria.

Loan Council problems are at the heart of many procedural difficulties in the development of infrastructure projects outlined in this report,and the Committee will be devoting much of Voume 2 of its report on this inquiry to looking at Loan Council issues, including in particular the allocation of risk and related financial matters.

What the Committee finds significant about Mr Dawkins' statement of special "pipeline" arrangements is that it clearly acknowledges the major problems incurred by the private and public sectors in dealing with existing Loan Council guidelines.

Privately funded project identified by the government - Step 4:

Preparation of detailed appraisal

The detailed technical and economic appraisal should be prepared at this point. The government should have decided whether it wants to have an open or a selective bidding process, what its maximum contribution will be, what is the risk allocation it envisages for the project between government and private sector, what the detailed costs and benefits of the project are, and its environmental impact. In other words, it should wrap up in detail the matters it had begun to study in Step 1.

Several submissions to the Committee criticised agencies for carrying out "fishing expeditions", that is, for going out to the market and soliciting bids just to see what interest there might be out there from the private sector, without having first tied down all the details, e.g what sort of funding arrangement is likely to be acceptable to government, what is the form of infrastructure which the agency wants, what is feasible technically, what the market's response is likely to be, what the broad allocation of risks is that the government envisages, and so on. In other words, agencies have been criticised for not doing their homework first. The Committee is concerned about this accusation, and recommends that agencies take steps to ensure that as many of the above details are tied down before bids are formally sought from the private sector.

The preparation of the environmental impact statement should be done at this stage. In that regard, the detailed requirements for an EIS were considered under the heading of *Publicly-funded projects - Step 4.*

There is one point, however, that the Committee wishes to make in relation to EISs and privately funded projects. It is that such EISs and the oversight of procedural matters relating to them should be the responsibility of and funded by the relevant public sector agency. In that regard the Committee was concerned by the experience of the British Department of Transport with a project known as the Birmingham Northern Relief Road. The preferred private sector bidder—Trafalgar House—was selected and was on financial risk *before* the environmental questions relating to the proposal had been sorted out. The project has now been made the subject of a public inquiry, and Trafalgar House and its financiers have expressed profound dissatisfaction with this public inquiry risk.

The Committee's concerns are two-fold. Firstly, as a matter of principle and perception, the Committee believes that the EIS process and public participation in it should be the responsibility of the public sector in the interests of objectivity and fairness, although private consultants can be used to assist. Secondly, if the private sector participants get bogged down in a public inquiry process and are on financial risk, it will make it very difficult to obtain private funding for other infrastructure projects.

RECOMMENDATION 21

That the EIS for a privately-funded project be financed and carried out by or on behalf of the government.

Privately funded project identified by the government - Step 5:

Preparation of Briefs for Private Sector

At this stage, the agency should start preparing two kinds of brief:

- the broad brief which will go to all the firms expressing interest;
- the more detailed brief which will go only to the short-listed firms.

Both of these briefs should contain technical and financial information. It is essential that the agency does its homework thoroughly for these briefs. It needs to work out now what its criteria for selection will be; it needs to have a reasonably clear idea at this stage what the level of interest in the financial markets is likely to be in the project and what sort of information banks and other lenders are likely to require (for this it will very probably have to hire specialist financial advice); it needs to have thoroughly worked out a detailed risk analysis, and it needs to synthesise its detailed feasibility studies.

Only the broad brief need be finished at this stage. It has to be ready to give to all prospective tenderers who inquire in response to the forthcoming advertisement inviting expressions of interest. However, the detailed brief will need to be well advanced even now, although it must be finished only at a later stage, when the short list of firms is drawn up.

As pointed out earlier, the brief for the private sector should contain both technical and financial information. The technical specifications are usually the ones the agency is most familiar with. How detailed they should be for each type of brief is always a matter of judgement. Mr R. Morris, Director of the Sydney Region of the Roads and Traffic Authority, told a Conference on Privately-Funded Infrastructure[69] that:

[69] Construction Law Project Law (International) Conference on Privately-Funded Infrastructure: Case Studies of Two Successful Deals: F4 and F5 Tollroads, Sydney 28 July 1992.

> the technical description of the project needs to be sufficiently detailed to leave no doubt as the objectives of the project so that the innovations which will be embodied in responses are within an envelope of Government expectation.
>
> Similarly Technical Specifications should be of the Performance type and not prescriptive. It is often in the delivery of a conforming product that Consortia are able to bring real efficiencies, make savings and achieve the commercial viability of the project.

Thus for the RTA, it is important when preparing technical specifications to leave room for innovation by prospective proponents. The Water Board, however, appeared to take a more prescriptive approach when preparing the technical specifications for its four water treatment plants. Before requesting any bids, it commissioned three large documents from consultants:

- the Concept Design Report, a huge file 7cm thick with very detailed accounts of the elements the new plants should include;
- Studies of Pilot Plants proposed;
- Geotechnical Investigations.

The Concept Design Report, as we shall see in Part 4.1 of this report, was in the event so detailed and prescriptive as to threaten to choke off innovative, and efficient, ideas from proponents.

On the other hand, a brief to proponents for privately-funded projects can be of limited value if it does not contain adequate financial information, particularly an indication of the government's approach to risk sharing. The lack of detailed background may well compel firms to spend too much time and money collecting data and putting a bid together.

At both stages of the process of brief preparation, in fact, it is generally difficult to tread the fine line between, on the one hand, providing enough information so that proponents have a clear idea of what the government wants and do not waste resources finding out basic data, and, on the other, tying down prospective tenderers to processes and structures that may not be the most efficient ones available world-wide.

This is a judgement call in the end. Every project has its own characteristics, and the nature and level of technical detail that should be included in the specifications will be different in each case. The Committee would only point out that the major requirement is for the agency to be completely clear in its own mind what the basic objectives and broad parameters of the project are.

Privately funded project identified by the government - Step 6:

Call for Bids

When the advertisement is placed or the letter is sent soliciting bids, it should contain a small section outlining the number of stages which the agency envisages for the bidding process. Commonly, a two-stage process is undertaken, in which the agency first outlines broad criteria according to which a short list of proponents will be selected. These short-listed proponents would then, in a second stage, be invited to submit more detailed proposals. The various stages of the tendering process are outlined in the next section of this chapter in greater detail. What is important here is that prospective proponents should know right at the start how the tendering process is to be carried out.

RECOMMENDATION 22

That agencies include in advertisements or letters requesting bids a short section outlining the number of stages the agency envisages will comprise the tender process.

Sometimes agencies do not go out to public tender or even to a selective tender.

In a questionnaire to eleven agencies on their contract tendering processes[70], the Committee asked, among other things:

- In what circumstances do you enter into construction, maintenance, or operating contracts without competitive bidding? In your view, what considerations would justify the lack of competition for such contracts?

In these circumstances:

- To what extent was a one-to-one contract negotiation entered into because a tenderer proposed an innovative solution to constructing, maintaining, or operating the projects? Please provide a list of the situations in which this has occurred since 1950. In each such situation, precisely what was the nature of the innovation? (If such a list would be extremely long, would you please telephone the Public Accounts Committee office to discuss the matter).

- What consideration had you given to purchasing the innovative idea form the proposer, then making the idea the basis of competitive tendering? Have you ever

[70] Questionnaire sent on 28.9.92 to Prospect Electricity, Sydney Electricity, Pacific Power, Department of School Education, Department of Health, Roads and Traffic Authority, Water Board, Maritime Services Board, Department of Corrective Services, State Rail Authority of NSW, and the Hunter Water Corporation Ltd.

made such a purchase? If you have decided not to buy the "intellectual property" and tender, what factors influenced you to pursue exclusive dealing?

The answers were illuminating. Almost all agencies said that they never let any contracts without competitive bidding. However, three agencies said that they did so: the RTA, the SRA and the Hunter Water Corporation Ltd. For our purposes here, the RTA's response[71] was the most relevant since it was the only one which dealt with a privately-funded project. It said:

> ...the idea for a second Harbour crossing originated in the Authority...in the case of the Sydney Harbour Tunnel the public invitation for proposals did not result in a suitable proposal, principally because of the environmental difficulties involved in the suggested routes. It was some time later that the Transfield/Kumagai consortium, which had responded to the earlier invitation, came forward with the proposal which was ultimately successful. The principal attraction of that proposal was that no private land acquisition would be required....
>
> the only privately-funded infrastructure project where a one-to-one contract negotiation was entered into was the Sydney Harbour Tunnel. The nature of the innovation was the route location - it involved no private land. To a lesser extent the financing arrangements were also innovative. ...it was only the successful contract which persisted with the concept and modified it to an extent which overcame the DMR's objections.
>
> This [purchasing an idea and using as the basis of a call for bids] was considered but not pursued. The Authority has not made such a purchase. The factors which influenced the Authority to pursue exclusive dealing in the case of the Sydney Harbour Tunnel were fairness to the proponent and the Government's wish to advance the project.

In fact, this case was a hybrid. The idea of the crossing had originated with the government, but the new way of doing so was devised by Transfield/Kumagai. The government in this case decided not to take that new way out to competitive bidding, although it has decided to do so in several other cases where the private sector has proposed ideas itself, for example the small hydro-electric power plant project.

The Committee believes that it is only in special circumstances that an agency should not seek competitive bids, whether in an open or a selective tendering process. As we have seen, for publicly funded projects competitive tenders are routinely sought. The Committee believes that this should be the norm for privately funded projects identified by the government.

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[71] Letter to the Committee dated 20 January 1993.

RECOMMENDATION 23

That unless there are special circumstances, privately financed projects identified by the government be subject to competitive bidding.

That .in cases where competitive bidding has not been sought, a public statement be made by the government outlining the reasons for not doing so.

2.2.2.2 Projects proposed by the private sector

In general terms it would appear that there is no special treatment of proponents of privately funded projects. In that regard the *Guidelines for Private Sector Participation in Infrastructure Provision*, prepared by the Department of State Development in 1990, state:

> In the case where a private sector proponent has initiated a proposal, close consideration will be given to shortlisting this proponent. However, the initiator, while possibly shortlisted in a large number of cases, will not be automatically included.[72]

In December 1989, an Industry Task Force into private sector participation in the provision of infrastructure recommended:

> That where a private proponent introduces a project to the public sector, the Guidelines permit the Responsible Authority involved to enter into negotiations with that proponent on an exclusive basis, where the Authority believes it appropriate. This is seen as the only means of realistically protecting intellectual property rights.
>
> The establishment by Government of an Independent Panel to assist the Responsible Authority in determining the appropriateness of direct negotiations and exclusivity and to assist in determining the performance criteria upon which the negotiations would proceed.

The Committee gave very careful consideration to the proposals of the Task Force, and especially to their concerns about protecting intellectual property rights, which have to be weighed against the idea of taking a private sector proposal to the market to ensure that the government is getting the best deal possible.

After careful consideration the Committee decided it had a preference for going to the market to get the best deal. However, the Committee remains concerned about the implications of this for intellectual property rights. In that regard the Committee believes that some protection can be afforded to such intellectual property rights if the government

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[72] op. cit., p. 6.

goes to the market, not with the precise idea put forward by the proponent, but with a much broader concept which would among other things encompass the proponent's proposal.

An example of this procedure is the Department of Transport's handling of the new transport system for Sydney's northern beaches area. It had initially received a number of different proposals for such a transport system directly from various private sector companies. One company proposed a light rail system, another proposed a heavy rail link. Rather than deal exclusively with any of these, the Department had decided to go to the market with a "broad needs" proposal, asking companies to provide "a mass transport system from Sydney's northern beaches to the city".[73]

If the agency goes out to the market on a broad needs basis, it should first, after consulting with Treasury, prepare a document outlining what the broad need is, and the likely form of the financing; at this stage it would appear that an EIS is premature. The agency should then go to the Capital Works Committee with the broad needs proposal, in order to avoid conflict in general terms with any other competing proposal. An example of such conflict was cited by the Committee in Part 2.1 of this report. When the specific proposals come in, and a selection has been made of the precise form of the project and of the preferred proponent, the agency should ideally go to the Capital Works Committee again to seek approval for that particular shape of the project. Once that approval has been granted, the EIS can be prepared and negotiations can proceed.

RECOMMENDATION 24

Where a proposal is put up by the private sector, the Committee would prefer that the government go to the market to ensure it is getting the best deal possible rather than enter into an exclusive deal.

However, to provide some protection to the private proponent's intellectual property rights, the Committee proposes that the government goes to the market on a broad needs basis.

[73] Minister for Transport Media Release, 13 May 1993.

2.3 STAGE III: FROM ACCEPTANCE OF BIDS TO EXECUTION OF CONTRACTS

FROM ACCEPTANCE OF BIDS TO EXECUTION OF CONTRACTS	
Step 1	*Setting up the Review Team*
Step 2	*Evaluation of Preliminary Proposals*
Step 3	*Selection of shortlist*
Step 4	*Invitation to shortlisted firms to submit firm proposals*
Step 5	*Evaluation of firm proposals*
Step 6	*Selection of preferred tenderer*
Step 7	*Approval at political level*
Step 8	*Detailed negotiations and final documentation*
Step 9	*Execution of documents*

2.3.1 FROM ACCEPTANCE OF BIDS TO EXECUTION OF CONTRACTS

The call for expression of interest has been issued. The next stage in the project's development is the one where bids are judged and the contract is negotiated. This section of the report deals only with contract tendering procedures followed by agencies for privately-funded infrastructure projects. Unlike Part 2.2, it will not cover publicly-funded projects. The reason for this is that the Parliament's Standing Committee on State Development has, since 1989, been issuing a series of reports on public sector tendering and Contracting in NSW[74], concentrating largely on publicly-funded activities. These reports have already dealt very thoroughly, indeed exhaustively, with the question of tendering procedures between the call for expressions of interest and the signing of the contract, for publicly-funded projects, and they are commended to the reader.

Privately-funded projects have not been dealt with to anything like the same extent. This reflects the relatively short and scant experience gained in New South Wales in the private provision of infrastructure, compared with the wealth of preparation and training possessed by agencies in publicly-funded infrastructure. However, the *Guide to Procedures and Issues for Private Sector Infrastructure Provision*[75] does provide an outline of the steps a project must follow at this stage of its progression towards realisation. The Committee's Flow Chart above covering Stage III of the process represents an expansion of the one provided in the Guide to Procedures and Issues.

The tendering process, while filled with risks of its own, is usually less difficult to manage than the previous phase, which covered the period from the very early stage when the project is simply a plan on paper, to the moment when expressions of interest are invited for its execution. This is because the tendering process is normally now in the hands of a single agency. There are usually no external committees, bodies, departments or agencies to impose their own requirements and delay or derail the process. The main problems normally come from within the agency itself. Of course, that does not mean that delays do not occur, as we shall see. A few of these, notably of a political kind, can and do arise and hold matters up, even at this phase of the process, but usually the agency itself is the source of most postponements and suspensions.

During the inquiry, the Committee sought to shed light on how agencies had been managing this phase of the project's pre-contract existence. On 28 September 1992, it wrote to eleven major public sector providers of infrastructure enclosing a questionnaire on their contract tendering procedures. Those receiving the questionnaire were Prospect

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[74] Standing Committee on State Development, *Discussion Paper no. 1: Public Sector Tendering and Contracting in New South Wales, a Survey* (May 1989); *Report no. 1: Public Sector Tendering and Contracting in New South Wales* (August 1989); *Report no. 2: Public Sector Tendering and Contracting in New South Wales, Local Government Tendering and Contracting* (October 1989); *Discussion Paper no. 3,: Public Sector Tendering and Contracting in New South Wales, Capital Works Tendering and Contracting: Management Options* (June 1990); *Report no. 3, Public Sector Tendering and Contracting in New South Wales, Capital Works Tendering and Contracting: Volume A* (April 1991); and *Volume B* (December 1991).

[75] Office of Economic Development, *Private Sector Infrastructure Provision - Guide to Procedures and Issues*, June 1993.

Electricity, Sydney Electricity, Pacific Power, Department of School Education, Department of Health, Roads and Traffic Authority, Water Board, Maritime Services Board, Department of Corrective Services, State Rail Authority of NSW, and the Hunter Water Corporation Ltd.

The questions relating to the tendering process were:

- Under what circumstances do you call for competitive tenders for construction, maintenance or operating contracts?

In these circumstances:

- In how many stages do you cull bidders? Does the number of stages depend upon the size or complexity of the contract? What consideration have you given to enlarging the number of stages? What consideration have you given to decreasing the number? If you do employ a multiple-stage elimination process, what is the preferred number of bidders on the short list?

- What is the composition of your tender review teams? If there are any rules, policies or procedures regarding the composition of tender review teams, what are they? If there are none, who is responsible for appointing members of these teams?

- How often do the tender review teams meet? Please answer by referring to a specific "typical" example.

- How do you decide what level of detail is appropriate to each set of tender documents? Who prepares the documents? What is the nature an extent of technical input into ender document preparation?

- What role, if any, do consultants play in preparing tender documents? What role do consultants play in the tender review process? From what professional disciplines do you most require consulting assistance?

- How much time has elapsed in past tender exercises between the selection of a preferred tenderer and the signing of contracts? In the cases in which this elapsed time has been greatest, what were the reasons for the delay? Please give specific examples.

- How problematic is it from your point of view that unsuccessful tenderers may spend large sums of money in preparing tender responses? What, if anything, can be done to minimise the waster of time, effort, and money on the part of unsuccessful tenderers?

The contents of this section are partly based on the responses to this questionnaire. These responses brought vividly home to the Committee the relative dearth of experience in managing privately-funded infrastructure projects in New South Wales, as compared to those which are publicly-funded. There were few instances to cite, few cases to draw on for experience, and few successes to point to. However, as Appendix 2 shows, there still

have been a total of some 24 privately-financed infrastructure projects in NSW, both completed and under way, and these have provided a bedrock of relevant experience in the public sector.

When going through the steps which should normally be followed during this phase of the process, the same caveat should be made as for the previous phase: these steps represent the paradigmatic ideal. Rigid adherence to this sequence should not be considered compulsory. Indeed, there have been cases when an original timetable was adhered to, with entirely inappropriate results, even when a major factor had totally changed. For example, to retain the original design of an infrastructure facility, at considerable extra cost, even when its major user has in the meantime gone out of business, as has occurred in NSW, would represent a lack of imagination and flexibility.

Experience has shown that the process outlined below is the simplest one which is best suited to the majority of privately-funded infrastructure projects.

Before setting out the steps in that process, a few assumptions should be specified. We assume that:

- detailed feasibility studies have been carried out;
- the advertisement was clear that at this stage only preliminary proposals are being sought;
- the broad brief is ready and is adequately but not excessively informative;
- preparation of the detailed brief is well under way.
- the agency has worked out its criteria for evaluation of the proposals.

Step 1: Setting up the Review Team

Normally the review team is composed of a variety of personnel from within the agency, assisted by outside consultants. In putting together review teams, agencies commonly face two problems: first, obtaining sufficient expertise in technical, financial and legal matters, and second, securing adequate co-operation on the review team between their own engineering and commercial staff.

To take these two problems in turn:

In a paper given at the CPLI Conference on Privately Funded Infrastructure in July 1992, Mr R. Morris, Director of the Sydney Region of the Roads and Traffic Authority, said:

> The RTA established a Committee to assess the preliminary offers received [for the F4 and F5 motorways]. The committee members from the RTA were the Tollways Manger, Projects Assessment Engineer, Manager Engineering Services, Manager Contract Legal Services, and Corporate Treasurer. Financial advisers to the Committee were Capel Court Investment Bank.

> The RTA also engaged specialised legal services to the Committee.

The RTA provided further details in its reply to the Committee's questionnaire:

> The review teams for the M4 and the M5 projects comprised a senior representative from the Authority's Finance Directorate, a Senior Project Engineer and a Senior Legal Officer. These review teams were assisted with advice by private legal and financial consultants. Originally, the private consultants were included as formal members of the teams but this was discontinued as possible conflict of interest issues were perceived because of those consultants[']past associations with proponents. ...The responsibility for appointing members of the review team lies with the Chief Executive.

Similarly, the Department of Health combines internal with external expertise:

> Tender review teams comprise a broad range of skills, representation and industry experience, including representatives from Central Agencies (notably Treasury, Premier's Department and Public Works) Central of the Department, Area Health Services, Regions and technical experts. The policy regarding composition of such teams is that there be widespread representation of the affected parties consistent with the skills required to evaluate proposals. Appointments are normally made by the Director-General and the decision-making responsibilities require that appointments are senior managers.

The State Rail Authority, on the other hand, appears to have no outside consultants on its tender review teams:

> The commercial aspects of all tenders above the values listed in response to Question 4 are undertaken by the Authority's Central Contracts Group. Central Contracts Group is responsible for the establishment/preparation of the Authority's commercial conditions and terms for contracts....the technical evaluation of all tenders is undertaken by the relevant section within the Authority who initiated the projects. In small/minor projects the tehcnical evaluation may be undertaken by one individual, however in large/major or complex projects an evauation team/committee is established to undertake evaluation either jointly or separately. The membership is determined by the manager who initiated the project in conjunction with Central Contracts Group.

During the inquiry, the Committee was told by many representatives of the private sector that one reason for the delays and cancellations of privately-financed projects which are seen as endemic was that some review teams were not experienced or qualified enough for the job.

For example, in evidence to the Committee, a well-known lawyer involved in negotiations for various privately-financed infrastructure projects in NSW and interstate outlined in general terms:

> **Committee**: What is wrong in that situation [delays in getting projects off the ground], what is causing that?

> **Mr Burke**: . . . There is a combination of over-confidence and paranoia that traps the middle management public sector in some of these deals. Paranoia that they are going to be done in by the slick private sector. I might add there is no slick private sector because they have the same learning curve in trying to come together with risk models as the public sector.
>
> The only thing with the private sector, they can buy and they have to buy, advisers.[76]

It is true that there is a dearth of experience in the public sector in handling privately-funded projects, and that the development of procedures, as we have seen, is in its infancy. The review teams may easily comprise individuals with little experience of private markets or of contract negotiation.

However, in many cases, it is also clear that the public sector has, just like the private sector referred to by Mr Burke, retained outside consultants, particularly in financial markets, to give advice. The Committee believes this is essential. Given the comparative lack of experience in the public sector in this type of project, particualrly in the finance field, it is indispensable that for the medium term agencies retain skilled and independent outside advice to help avert mishaps and misjudgements.

The excellent example of the procedures followed for the Bennelong Car Park, which included the retention of relevant consultants at this stage, is a model for other agencies to follow. This example is set out in Part 3 of this report.

It goes without saying that these consultants need to be independent. Probity issues can arise if consultants hired by an agency have also prepared the tender documentation or form part of a bidding consortium.

RECOMMENDATION 25

That agencies reviewing tenders for large privately-financed infrastructure projects engage independent financial consultants to participate in the tender review team, and engage independent sources of legal and technical advice to ensure there is the necessary impartial oversight of the probity of the tender review process.

It is important to ensure when retaining such consultants and advisors that there is full disclosure to ensure there is no conflict of interest.

The ideal situation is one where the outside consultants have had no association whatever with either the tender documentation or any of the bidders, and are a formal part of the

[76] Evidence given to Committee, 20 October 1992, p. 70. Mr Burke made it clear later in his evidence that he was not referring to the RTA.

review team. This would combine the maximum independence with the maximum usefulness of advice. In practice, however, this ideal is hard to achieve in Australia, where technical expertise in a particular field is likely to be spread over a few companies, which may well have been involved in the project in one way or another before the bids are received. One solution which although expensive has been adopted in a few cases in New South Wales could be to go overseas.

There also needs to be independence and impartiality within the organisation. For example, staff researching a particular technology may not be the best people to have on a review team which is evaluating proposals relating to that technology, simply because they might have a vested interest in one particular method. This was recognised at senior management level in the Water Board, for instance, when, as ICAC stated in its investigation of the Board's handling of the sludge treatment proposals[77], the Managing Director, Mr R. Wilson

> gave an instruction that tender processes and research projects were to be kept separate....[he] had talked to officers of the need to have a "Chinese Wall" between research projects and the tender evaluation process.

It is essential that in those organisations which carry out research into a particular technology, review teams evaluating proposals relating to that technology not include any staff carrying out that research. The independence and impartiality of the review team must at all times be the over-riding consideration.

Apart from the problem of obtaining sufficient expertise, agencies sometimes face difficulties in securing co-operation between their own engineering and commercial staff. The case of the Water Board in the sludge tendering process is an illustration. The ICAC report on this project details the reluctance of the engineers of the Water Board to entertain a proposal for a joint venture in sludge treatment, compared to the strong support for the proposal from the commercial and finance areas[78]. The tensions between these two areas of staff are not unique to the Water Board and can be very counterproductive, contributing, as in the case of the sludge tendering process, to the cancellation of the entire proejct. Again, one way to minimise these would be to exclude from the review team any staff with direct involvement in the process under evaluation.

RECOMMENDATION 26

That to ensure impartiality, staff directly involved in researching a particular technology be excluded as a matter of routine from any tender review team evaluating private proposals relating to that technology.

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[77] Independent Commission against Corruption, *Report on Investigation into the Sydney Water Board and Sludge Tendering*, May 1992., p. 106.

[78] ICAC, op. cit. p. 11.

Step 2: Evaluation of Preliminary Proposals

This step can consist of a varying number of stages. In a one-stage process, an advertisement is placed, or a letter sent, requesting full, detailed and final responses from bidders. The agency selects the successful bidder from among the respondents, and negotiates and signs the contract.

In a two-stage process, the most common, the agency may request firms to provide, in the first instance, either a simple expression of interest and capability, together with a preliminary indication of the firm's approach to the project, or, instead, a reasonably detailed response to the tender documentation. From among those responding, the agency selects a short list, and asks the firms on it to provide their full, detailed and final responses. It then selects the successful bidder from among the firms sending in those detailed responses, and negotiates and signs the contract.

In a three-stage process, two short lists are drawn up, the first being longer than the second. Firms are asked to provide progressively more detailed responses as the process advances and the culls are made.

The agency should be clear from the outset on the number of stages that will comprise this step. If it has decided on a two- or a three-stage process, it should then decide on the level of detail it will ask from bidders during the first stage.

There are different views on this question. Some maintain that all that is needed in any first stage is an expression of interest and capability, together with an outline of the firm's approach to the project. Others claim that preliminary proposals should be as close as possible to a final offer. The Department of Health in its response to the Committee's questionnaire made the distinction between the two kinds of proposals clear:

> It is important that Expressions of Interest proposals be distinguished from tender proposals. Tender proposals require sepcification in detail of the required solution, whereas Expressions of Interest proposals would be expected to only provide an outline.

The Department of State Development, in its *Guide to Procedures and Issues for Private Sector Infrastructure Provision*, sets out a sample set of criteria which it considers should be adopted by agencies during the first phase:

- technical achievability and quality
- commercial achievability
- financial benefits to the government and benefits to the NSW economy and the community in general terms.
- State development benefits, including local industry participation and technology transfer.
- Corporate credibility of the proponent
  - management, construction and operations capabilities,
  - financial capacity

- marketing skills (if relevant).[79]

In contrast, the specific criteria adopted in the case of the F4 and F5 projects were much more detailed:

- Toll levels to be charged or other sources of income
- Term of the toll
- Financial return to the RTA
- Financial conditions
- Effect on Government's Global Borrowing Limits
- Method of financing
- Standard of road construction
- Sinking fund for maintenance.[80]

Other factors taken into consideration were:

- Proposals for the early opening of completed lengths taking into account safety and traffic management considerations.
- Whether preliminary offers conformed with the RTA's concept design plans and any modifications submitted as an alternative to the conforming offer.
- traffic projections
- Cost of design, operation and financing costs
- Composition of the consortium.[81]

The Chief Solicitor and General Manager, Legal Services of the RTA said in a recent conference paper[82], that preliminary proposals had to be of a "substance which was not too far removed from a firm offer". The RTA had only one cull for both the F4 and the F5.

There can be no final answer to the question of how detailed firms' initial responses ought to be. Some firms may prefer to put in a detailed bid, even at this early stage, believing that this is the best way to be taken seriously and progress to the next stage; others may resent having to spend considerable resources and time putting together a detailed bid that will never go any further. The Committee believes that agencies ought to be sensitive to the costs they are asking firms to incur, and that they should seek to find ways to reduce expenditures by bidders.

In a three-stage process, the Committee considers there can be little justification for asking firms to submit detailed proposals at the early stage.

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[79] Office of State Development, Private Sector Infrastructure Provision - Guide to Procedures and Issues, p. 7.

[80] B. Morris, paper delivered to CPLI Conference on Privately Funded Infrastructure, 28 July 1992, p. 5.

[81] K. B. Ford, paper delivered to CPLI Conference on Privately Funded Infrastructure, 28 July 1992.

[82] K.B. Ford, op. cit., p. 2.

RECOMMENDATION 27

That agencies be alert to the costs they are asking firms to incur in the bidding process, and actively seek ways of reducing bidders' expenses.

Non-conforming tenders

The treatment at this stage of non-conforming tenders has always been problematical. On the one hand, it is obviously out of the question to entertain a tender which has completely misunderstood the objectives of the project and proposed a solution unconnected with the aims of the government. On the other, it would be inflexible to rule out the possibility that a private company may have a proprietary process which is superior to any known by the agency, but which does not conform with the specifications they agency has put out.

The Water Board gave evidence on this matter:

> **Committee:** From your point of view, what special problems do non-conforming tenders pose? What obligation do you feel you are under to consider non-conforming tenders? Is there a specific procedure for consideration and evaluation of non-conforming tenders?
>
> **Mr Cameron:** Generally, non-conforming tenders are ruled out at the earlier evaluation. That is the principle on which we work.
>
> **Committee:** Does that apply if the non-conforming aspect of it is entirely new technology or just a different approach that nobody had thought of before?
>
> **Mr Cameron:** Normally if it is bringing some new technology they will put in an alternative as well, and the alternative can be considered, but the non-conforming one is ruled out.
>
> **Mr Wilson:** You get over that to some extent by not being as specific in those things where you know that the technology can come along[83].

There is of course another, quite separate and more minor reason why a tender may not conform with the agency's specifications, and that is, that it simply omits to give the full information the documents require:

> **Mr Cameron:** There is evidence to suggest that some of the non-conforming tenders have been knocked back because of the sloppiness of the tender process by the tenderers themselves...One firm....chose to fill in one of 25 schedules, without any detailed support in what the tender was about.[84]

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[83] Evidence to the Committee on 3 December 1992, p. 282.

[84] Evidence to the Committee, 3 December 1992, p.281.

A judgement regarding non-conforming tenders has to be made at this stage by the agency. If it is a question of a new technology the firm is proposing, usually the major factor the agency will take into account here is the corporate credibility of the proponent. A large multinational with decades of experience, which proposes a non-conforming solution, will probably be taken more seriously than a smaller, less experienced firm.

This is also the stage at which the agency needs to check on the financial viability of the proponent.

Sometimes a tendering firm is on the edge: in other words, it would end up in considerable difficulties if it does not win the contract, but if it does it will pull through. In all these areas the agency needs to obtain as much data on the firm as it can, and usually, if the firm is willing to provide that information, it is likely to be taken more seriously by the agency than if it is reluctant to supply it.

Consultants can sometimes be of use here. Again, the example of the Bennelong Car Park, where the Public Works Department did engage consultants to check on the financial viability of proponents, could be a model to follow. The Committee believes that a modest amount spent here could avoid serious problems down the track.

RECOMMENDATION 28

That agencies make it a practice to hire outside consultants to assist in assessing the financial viability of proponents.

Step 3: Selection of shortlist

The *Guide to Procedures and Issues* puts an upper limit of four on the short list, although other agencies have their own preferences. The RTA, for example, in a letter to the Committee[85], said:

> the preferred number of bidders on the short list is two. In this regard the Authority is acutely aware of the cost to the private sector in developing a bid.

The Department of Corrective Services, in a letter to the Committee[86], said:

> although an arbitrary choice, three bidders is a desirable number to consider. Three bidders provide a range of options while remaining relatively manageable. The private sector have also indicated that a shortlist of three is preferred.

[85] dated 20 January 1993.

[86] dated 9 November 1992.

The Department of Health, in its response to the Committee's questionnaire, said:

> The preferred number of bidders on a short list for a complex and significant project is three. This offers competition and is acceptable to the private sector, whereas a larger short list is a disincentive to incurring the expense of preparing and negotiating proposals.

Concerning the desirable upper limit for any one project, the RTA points out that the more expeditiously the process can be handled, the less expensive it will be for participating firms.

The Committee is extremely concerned about the cost of developing bids by shortlisted private sector organisations, and notes that although the *Guide to Procedures and Issues* puts an upper limit of four on the shortlist, two public sector agencies have an upper limit of three and one an upper limit of two. The Committee therefore believes that the upper limit in the *Guide to Procedures and Issues* should be reduced to three.

RECOMMENDATION 29

That agencies limit the number of final bidders on privately-financed projects to three, and the number of bidding stages to three.

These numbers would be upper limits, and ideally the numbers would be smaller.

Step 4: ***Invitation to short-listed firms to submit firm proposals***

This invitation needs to be accompanied by all the documentation the agency has prepared. Now is the time to give the prospective proponents the detailed brief discussed earlier.

It is the duty of the agency to provide to the private sector the results of any market surveys or estimates of the potential market for the project, the results of any technical analyses or studies the agency has prepared or commissioned, the EIS and any other financial, technical and commercial data it has which is relevant to the project. This was done, for example, with the tilt train project.

In some cases, the agency will be able to tell the proponent what the price will be for the service. An example of this which was brought to the Committee's attention was that of the small scale hydro-electric power stations, where the price for electricity was established at the outset by the government. In these instances, competition will be based on another factor than price, such as the level of royalties the proponent is prepared to pay the government.

The extent and level of the government support (or competition) for the project should, as far as possible, be clarified now.

Step 5: Evaluation of firm proposals

This is a complex step in the procedure. The evidence of the Water Board on the subject illustrates:

> **Water Board:** We had an open process where we had a lot of discussion with the tenderers. That was pre-qualification. Once we qualified we enter another period where we were exchanging information a great deal. When we asked them to submit a tender and give us a firm price for doing the project, then we had a difficult time when we had five tenderers, all going away with a lot of information to prepare a firm price, and we had a difficulty as to the extent to which we should talk to them during that time when we had problems across the boundaries. A lot of what they are doing is very secretive because it is their idea of what they wanted to produce. We had to be concerned that we did not cross the boundaries there.
>
> We also have to be concerned that it is a tender price, and they are doing their tender, and the feedback backwards and forwards can sometimes become quite difficult, so we did actually close down to a large degree. We had some discussions, but we had generally closed down discussions. I think you are right in the point you are making that there were some opportunitites during that time when feedback from us might have assisted them in the tendering process. But with five tenderers, how much more effort do you put into one than another? [87]

The ICAC's impact on this process is dealt with in Part 4.1 of this report.

A review team should be set up for the evaluation.

The Review Team will normally consist of officials from the Department, often supplemented by officials from other departments. The team will often have outside technical advice. For example, the Review, or Evaluation, Team for the Junee Prison project was a subcommittee of the Steering Committee for the whole project. The Steering Committee consisted of senior executives from the Premier's Department, the NSW Treasury, the Department of Public Works, and the Department of Corrective Services. In addition, Jardine Fleming Australia Securities Ltd, was appointed as an independent review to the Committee, while McLachlan Consultants were appointed as independent technical consultants. This latter position was filled following a formal tendering process.

In the case of the Junee Prison, the Evaluation Sub-Committee devised a rating methodology to score the fifteen items making up the evaluation criteria. Individual criteria were divided into three main groupings, i.e. Prison Buildings, Management, and the Proponents, and each items was given a relative weighting. In addition to the evaluation criteria, the sub-committee also gave consideration to the indication capital and

[87] Evidence given to the Committee, 3 December 1992, p. 279.

recurrent costs of each proposal. Further, as part of the assessment process, Macquarie Bank was commissioned to complete a review of the financial capability of the various consortia.

Similarly, in the case of the Bennelong Car Park project, the Evaluation Review Panel comprised representatives of Public Works' Commercial Development Branch, Government Architects Branch and Turner Consulting Services.

The Committee would endorse this use of consultants as providers of assistance to the public service review team.

The *Guide to Procedures and Issues for Private Sector Infrastructure Provision* stipulates that the review committee should:

> ensure that short-listed proponents be given the opportunity to provide a face-to-face presentation of their proposal. However, it may be necessary to undergo a consultative process with proponents to ensure all requirements are clarified and fully met. All proponents should be given the opportunity to equally participate in this process.[88]

While endorsing this procedure, the Committee would point out that there is a need to ensure fair treatment of all proponents. This is one aspect which the ICAC criticised in the Water Board's handling of the sludge treatment proposals, i.e. that favouritism was shown to one proponent.

On the other hand, there is no need to carry to unrealistic lengths any attempts to ensure fairness, as the Committee points out in part 4.1 of this report.

Step 6: Selection of preferred tenderer.

The choice of successful tenderer in the case of the Junee Prison was made by an evaluation subcommittee of a broader committee called the Junee Prison Steering Committee, and had to be endorsed by the broader committee. This sort of double checking is a desirable feature of the selection process, and should be adopted wherever possible.

RECOMMENDATION 30

That wherever possible, the choice of the review team be endorsed either by a more senior departmental committee, whether established for the purpose or not, or by an independent outside review.

[88] p. 10.

Step 7: Approval at political level

The NSW Government's 1990 *Guidelines for Private Sector Participation in Infrastructure Provision* describe this step as follows:

> A final recommendation on the successful proponent will be made to the responsible Minister in most cases. For projects with major significance to the State, final approval may lie with the Capital Works Committee of Cabinet, or Cabinet.

The Government's 1993 edition of the *Guidelines* describes the same step as follows:

> Following the evaluation process, a recommendation on the preferred proponent will be made to the responsible Minister or the Capital Works Committee of Cabinet or Cabinet depending on the scope and sensitivity of the project.

The Committee believes that the 1993 *Guidelines* are tighter, and welcomes this. However, the Committee notes that in the case of the Junee Prison project, which is detailed in Part 3.4, the final approval was referred firstly to the Minister, who in turn referred it to Cabinet.

The Committee considers this to be best practice and the preferred option for all major BOOT projects.

It would appear from the *Guidelines* that after this approval is given:

> The contract will be negotiated and the project can then commence.

In the Junee Prison example the process was said to be one where the Steering Committee recommended to the Minister that Cabinet endorse the preferred tenderer "subject to final contract negotiations".

The actual and the ideal sequence of events in connection with the final approval of the preferred tenderer and the final approval of contractual documentation will be the subject of further study by the Committee and will be reported on in Volume 2, since it bears directly on the allocation of risk and other financial matters.

At this stage the Committee believes it is important that for major BOOT projects there should be high level input at ministerial or Cabinet level into both the final selection of the preferred tenderer and the final form of the contracts following detailed negotiations which are set out in the next step.

Step 8: Detailed negotiations and final documentation.

Once the preferred tenderer is selected, the final documentation needs to be established. Quite often this process involves the determination by the chief executive of the relevant agency that the project can go ahead. This determination must be made under Part 5 of the Environmental Planning and Assessment Act. In the case of the water treatment plants, for example, the Water Board announced the preferred tenderer on 18 November

1992, and the Director-General of the Water Board made his determination under Part 5 on 11 June 1993. However, the contracts for the water treatment plants had not been signed at the time this report was issued, in July 1993.

In other cases the EIS determination by the chief executive has been made well before this point. A good example of this is the F2 Castlereagh Expressway EIS. In that regard, the Committee believes that the EIS should be finalised as early as possible, and preferably prior to the involvement of the private sector, unless the private sector is involved as part of its bid in putting forward proposals which must be subject to an EIS.

Another part of this step could be a consideration of any development applications. In the case of the water treatment plants, the relevant councils requested the Water Board to make development applications after the determination had been made under Part 5.

During this part of the process, the financing scheme will also be finalised. Discussions with the banks will be taking place, and tax rulings obtained.

There may also be an independent review of commercial issues and risk allocation. For example, the Water Board has engaged Macquarie Bank to carry out such an independent review for the water treatment plants.

The critical factor in this step is the expertise of the people on the government's side of the table. The Committee heard in evidence that one problem arose in that connection: that is, that some agencies had devolved responsibility to regional offices which had little or no expertise in negotiating BOT-type contracts:

> **Mr Burke:** Speaking frankly, as you know what happened in several departments a few years ago was that there was an aggressive decentralisation that occurred, including the RTA. Decentralisation in terms of management, which has its pluses and minuses. There was a danger in doing that, it coincided with the time of these larger projects, and more complex projects, coming in.[89]

Expertise on the government's side is absolutely essential. On the other side of the table are highly experienced lawyers, financiers and engineers. The process can be draining and complex. At the end of this section, the Committee makes a recommendation intended to improve the public sector's ability to conduct negotiations on BOT-type projects. At this point, however, the Committee would only signal that it considers that negotiations on BOT-type projects should not normally be handed over to regional level, simply because there is not likely to be the required expertise in place.

[89] Minutes of Evidence, 20 October 1992, p. 70.

RECOMMENDATION 31

That agencies should not normally hand over to regional level the responsibility for negotiating privately-financed projects.

The detailed consideration of financial matters and the allocation of risk between the public and private sectors, which are of fundamental importance throughout this process but no more so than at this point, will be the subject of detailed consideration in the next stage of the inquiry in Volume 2 of this report.

Step 9: Execution of documents.

As indicated earlier, the Committee believes that there is great merit in having high level political input into the final form of the contracts proposed to be signed by the public sector agency and the preferred tenderer for major BOOT projects.

Again as indicated earlier, this will be subject of further inquiry and report in Volume 2.

2.3.2 LEARNING FROM EXPERIENCE: A SUGGESTION FOR IMPROVEMENT

Over the course of this inquiry, the Committee was told repeatedly by the private sector, on and off the record, that the public sector had the wrong "mentality" for negotiating BOT-type deals with the private sector, that it was "paranoid" about being "done in by the slick private sector", that it viewed itself as entitled to make absurd requests, change its mind at a whim, switch the goalposts in the middle of the game, make the private sector wait months, even years, for concrete outcomes, at enormous expense, that in short, it was unfit to carry out negotiations on privately-financed infrastructure projects. One effect of these failings was said to be the cancellation or delay of announced projects.

Cancellation and delay of announced projects

One study has been carried out covering all of Australia on the outcomes of 49 major BOO projects[90]. It shows that only 11 of these proceeded as proposed; 24 tenders were cancelled; in 11 cases there were major changes to the tender, and in 3 the government made new attempts to overturn agreements. To quote from the paper:

> Let me now review projects over the past five years that government agencies have sought development and have not proceeded, or have experienced inordinate delays:
> - Collie Power Station

[90] M. Perry, *Project Evaluation - Critical Factors for Successful Infrastructure Projects*, paper given to the Victorian Transport Infrastructure Conference, Melbourne 31 May 1993, p. 15.

- Sydney Water Board sludge disposal
- Sydney Water Board Blue Mountains Tunnel
- NSW mini hydros
- NSW private hospitals on public campuses
- Port Macquarie hospital
- Southern and Western bypasses
- Tullamarine light rail
- Melbourne museum redevelopment
- Pay TV licences

In addition:

- Loy Yang "B"
- Sydney Harbour Tunnel and Darling Harbour Monorail

The paper estimates that these cancellations and delays have cost both government and tenderers about $200 million in wasted cost and time, and have created the impression in the private sector that government is not interested in private financing of infrastructure projects. To quote from the paper again: "This situation has led to a great deal of scepticism in the private sector that, despite *One Nation* and various infrastructure guidelines, this industry will be still born."

The Committee considers the Blue Mountains Tunnel project in part 3.3 of this report, and is only too well aware of the delays surrounding the issue of private hospitals,and Port Macquarie in particular.[91] Mention will also been made in this report of sludge tendering and the ICAC report on it (part 4.1). In addition, the Committee considers a matter which is not on Mr Perry's list, namely the purchase of 350 coal wagons by the SRA at part 3.2 of this report.

Cancellation or deferral of announced projects or major changes to tender often mean that something is wrong with agency's planning or its operational management. Very occasionally an external factor is blamed for the cancellation of a project, but on further examination, it usually transpires that that factor could have been envisaged or guarded against with better planning or management.

Among the victims of many such cancellations are private sector firms. These companies may have acted on government advertisements soliciting bids and spent money putting bids together only to have then be informed that the project would not go ahead in the form envisaged after all.

The private sector questioned the competence of middle managers who had to carry out detailed negotiations with private companies. The claim was made that these managers had done nothing of the sort before, had no feel for the market-place or the private sector's concerns, could not understand the complexities of deal-making and risk allocation, and in general, were not up to the job.

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[91] Public Accounts Special Committee, 1992: *Inquiry Into the Port Macquarie Hospital Contract, Phase One Report*, Report No. 62, June 1992.

Even allowing for the fact that many of the projects the private sector points to as illustrations of this incompetence and/or poor attitude were in fact delayed or cancelled as a result of the political process rather than of bureaucratic incompetence, there still appears, as we shall see in Part 3, to be sufficient evidence that there is a need for improvement in the public sector's ability to conduct negotiations with the private sector on privately-financed projects.

How is this to be achieved? The problem was raised by the Committee with Mr G. Sturgess, former Director-General of the Cabinet Office:

> **Chairman:** One thing we have noticed along the way in this inquiry is that some government departments and instrumentalities seem to be involved in arrangements with the private sector on the funding of public infrastructure better than others. There are some key people in a couple of departments that stand out as prepared to get involved in an active sense, to take a creative risk rather than a reckless risk, and to make things happen. At the same time there are also formal structures, interaction between various government departments, with a view to co-ordinating infrastructure projects. The people who make things happen and really stand out, are not necessarily on those committees. Is there some way in which they can be brought together to share ideas and to disseminate ideas? It struck us that in the RTA and in Corrective Services there has been, through a series of projects, an increase in knowledge in a very constructive sense. They both have experience that is relevant and useful. I am not sure how effectively it is being disseminated.
>
> **Mr Sturgess:** It is not being disseminated. I think there is a need to generalise that expertise within government, and institute some sort of process of studying those processes across government and generalising the lesson and trying to spread those lessons across government. [92]

And later,

> **Mr Irwin:** On another issue, I have gathered from your evidence this morning that you believe that many government agencies are nowhere near as experienced or competent as they should be in this whole area of contracting. In order to increase the level of competency within departments, do you see a need for a specialised unit within government to oversight or advise individual agencies, or would you see it as more a need to work to increase the competency within each individual agency?
>
> **Mr Sturgess:** I think it is better that agencies own the expertise themselves. There is probably some merit in a task force or in a group of people concentrating on this issue across the government for a concentrated period. My comment that I do not think the government is anywhere near good enough should be read in the context of my general feeling that I do not think government generally is anywhere near good enough in the things it needs to do well. It is coming from a standard of professionalism I have promulgated for the past four and a half years very actively in government.

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[92] Evidence to the Committee, 1 December 1992, p. 209.

We ought to be developing some academic courses which permit our people to be trained in this particular expertise so that they are learning some skills about risk allocation and contract letting and monitoring. There is a particular set of skills that I am not sure are taught other than within very specialised disciplines, say within an engineering degree where they might touch on it in part. There are some specialised skills here that have to be generalised and taught, and taught professionally, probably in academia as well as in government.

At least over the past couple of hundred years, we have tended to do all of this ourselves as governments. As we shift increasingly into contract, it is going to become an increasingly important issue.

Chairman: At Macquarie University for example they run a Master of Public Administration through the graduate School of Management. They also have short courses of a couple of months' duration in their MBA course that relate to things like specialist applications in marketing and all that sort of stuff. Would you see some possibility in the context of that campus or other places of developing not courses that lead to some sort of degree but shorter courses to concentrate intensively and directly on some of the issues we are talking about? You can walk some of the SES through there in seven to ten weeks.

Mr Sturgess: I agree. Having said that, I would say, and this again is not to be read as a criticism of universities but is rather more a focus on my belief in the level of professionalism that is required. My worry is that universities would not do it anywhere near rigorously enough. There has to be a lot of work. Unless I am missing a whole area of literature, and I do not think I am, I am not aware that anyone has sat down to grapple with this problem in quite this way. There will be some lessons we could pick up from elsewhere, but lawyers are not taught how to design contracts specifically for the purpose of assessing and allocating risk.[93]

The Committee believes there is a clear need to generalise across government the experience gained by a few agencies in contract negotiation, and would agree that an academic course is not necessarily the right way to go about this.

As shown in the evidence with Gary Sturgess, one idea which has been put forward is that all negotiations with the private sector on privately-financed infrastructure projects should be handled by a single unit in the Premier's Department. This idea was also explored with the Commonwealth Bank and others early in the inquiry:

Chairman: Do you think it would be appropriate for the State Government to set up a single contract administration unit staffed by experts which would handle all contracts across the board of departments and statutory authorities, or do you think each agency should handle its own contracts?

Mr Talbot: I was looking at a project yesterday which involved water resources and a power generation potential. It would involve every aspect of government at local, State and Federal level and, furthermore, within those three levels it would involve multiple departments. It is a $400 million project, and it would have

[93] Evidence to Committee, 1 December 1992, p. 214.

> enormous ramifications for water resources and power generations on the North Coast of New South Wales. Given that situation of three levels of Government and multiple departments within those three levels, we just do not know where to start. It is not simply a case of creating a department within the State Government; it is creating some department that can cross levels of Government as well as cross departments, and I do not know how you achieve that.
>
> **Mr Perry:** I think that creating another department, just for the sake of creating another department, will make it even worse. That department, if there is an agency, has to have extremely strong power to make decisions. I think the success that Victoria is now having is that Treasury has a fairly strong involvement in these sorts of projects, although it is left to particular agencies—Health or SECV, or whatever—because they have the technical expertise. It has to be a combination of the operating agency, with expertise to make it happen but with very strong pressure from a central agency and, at the end of the day from a politician or a group of politicians.[94].

In its submission to the Committee, the Department of Public Works argued that it should constitute that unit. However, because it agreed with Gary Sturgess that "very strong pressure from a central agency" was required, and because the Department of Public Works is not a central agency, the Committee was unable to agree with this argument, although members did consider it with sympathy.

At the CPLI Conference cited earlier, there was also a uniformly negative reaction from the private sector to the setting up of a single unit within government to handle all BOT-type contract negotiations.

A variant on the model might be a hybrid, where the Premier's Department would contain, for a short period of say, six months, a collection of senior staff drawn on secondment from both the private and the public sectors, consisting essentially of lawyers and financiers, and charged with the duty of assisting agencies conduct current negotiations and training them (and others) to conduct future ones. It would have no power of decision, although agencies would be bound to take its advice. These experts would, for example, know what kind of information banks and proponents would need; they would be knowledgeable in risk allocation; they would advise on the level of detail appropriate to the different kinds of briefs given to the private sector at different stages of the tendering process; they would devise, perhaps for the first time in Australia, and conduct, a training course for SES officers of the several departments handling privately-financed infrastructure projects.

These experts would sit in on current negotiations. They would not be able to participate directly, but would be available separately to assist the agency.

The Committee discussed this possibility at length but was persuaded against it because conflict of interest problems could too easily arise with any financiers and lawyers seconded from the private sector.

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[94] Evidence to the Committee 22 May 1992, p. 11.

Unwilling, however, to abandon the idea of improving the government's ability to conduct negotiations with the private sector on privately-funded infrastructure projects, the Committee went on to develop a two-pronged recommendation of its own, with the training function separated from the supply of operational advice on current projects. The Committee considered that this separation would go a long way towards meeting the "conflict-of interest" objections to the above proposal.

The first part of the Committee's recommendation relates to training. It is undeniable that senior agency officers need training in the art of conducting negotiations on privately-funded infrastructure projects. This training course should not necessarily be conducted by a university. Instead, the private sector should be invited to bid for the conduct of the course, which should last for six to eight sessions of two hours each, with legal, ICAC-related and financial components of both a theoretical and highly practical, relevant kind. The Premier's Department should invite and evaluate bids for this training programme, and funds should be allocated for the purpose from the Premier's Department budget. A variety of organisations would be expected to bid to conduct the course: law firms, finance houses with inhouse legal expertise, major consulting firms, and universities with, possibly, added expertise. The principal criterion for selection would be experience in conducting negotiations relating to infrastructure projects.

It might be observed that no private sector firm would ever want the government to know its methods and devices. This objection the Committee considers jejune. The private sector has endured for a considerable time the results of bureaucratic unfamiliarity with negotiations for privately-funded infrastructure projects, and in the end would have a great deal to gain from well-informed, alert and knowledgeable counterparts across the table.

The second part of the Committee's recommendation relates to assistance with actual projects. Because of conflict of interest problems, it would unfortunately, as pointed out above, be difficult to find impartial and independent financiers and lawyers to provide this assistance. Instead, it could be provided through an Interagency BOOT (or BOO, or BOT) Group, which would meet, say, every three months to share experience in contract negotiation. This IBG would be organised through the Office of Economic Development, which would draw up the agenda and chair the meetings. The purpose of the meetings would be to share past and present experience (within the limitations of confidentiality) in contract negotiations in privately-funded infrastructure projects.

RECOMMENDATION 32

That the private sector be invited to bid for the conduct of a course in contract negotiation for privately-funded infrastructure projects. This course should be attended by senior agency officers concerned with such negotiations. It should last for six to eight sessions of about two hours each, and should cover legal, financial and administrative matters.

RECOMMENDATION 33

That the Premier's Department invite bids for the conduct of this course, and that funds should be allocated to it from the Premier's Department.

RECOMMENDATION 34

That an Interagency BOOT Group (IBG) be formed, to meet every 3 months, with the purpose of sharing experience in handling contracts on privately-financed infrastructure projects.

RECOMMENDATION 35

That this IBG be organised through the Office of Economic Development, which would draw up its agenda and chair its meetings.

PART 3

CASE STUDIES

3.1 THE BENNELONG CAR PARK: A SUCCESS STORY

The Bennelong Car Park, which was an early privately-financed BOOT project handled by the Department of Public Works, is an example of how the whole process should be organised. The necessary homework was done by the agency, the tender documents and the tender process had inputs from a suitable mix of public and private interests, the procedure was completed expeditiously, and the net result was that the government obtained an important infrastructure facility at minimal up-front cost.

There have been several proposals to construct a carpark at the Opera House since the mid 1960s. The most notable proposal was that initiated by the NSW Government in 1970 called the Sydney Cove Carpark. This was to be constructed in approximately the same area as the current Bennelong Point Parking Station but by open cut methods which would have destroyed the mature trees. The project was the target of a union 'Green Ban' and the development did not commence.

In 1984, the NSW Government again carried out detailed investigations for a proposal to construct a carpark at the Opera House. A decision was made for the Government not to finance the construction, but to call for the project to be totally funded by the private sector and with the aim of a return to the Government. This decision was made after early consultations with the Treasury.

Before registrations of interest were called an external assessment established the project was commercially viable.

An enabling Act of Parliament was required to allow the Minister for Public Works to appropriate land, to approve the works and enter in to agreement to construct, and operate the parking station. The Bennelong Point (Parking Station) Act was enacted in 1985.

With the approval of the Premier, Registrations of Interest were advertised in July 1985.

The primary objectives which were followed in preparing the Invitation to Tender documents were:

(a) to create a document reflecting the government's desire to provide a development opportunity for commercial enterprise which would also yield a financial return to the government.

(b) to ensure that the documents contained appropriate information on the major issues affecting development of the project.

(c) to ensure that the draft legal documents which would form the basis of agreements during the development and lease periods were at an advanced stage requiring minimum change prior to execution; and

(d) to specify the requirements for information to be submitted with the tender to enable effective evaluation, selection and dealings prior to proceeding with the development.

The project was developed on the basis of minimal risk to Government. The developer was to not only accept the commercial viability of the project, but the design, construction and operational risks.

The Government risk was the developer's ability to complete the project or that there would have been a partial or total destruction of the parking station, for which repair or making good was impractical.

A security of $10 million, 25% of the value of the project, was required to ensure due performance by the developer, particularly the environment/heritage requirements.

The developer was required to provide a guarantor which unconditionally guaranteed the performance of the developer.

The tendering process proceeded to the stage of the nomination of a preferred tenderer.

In April 1986, the then Minister for Public Works indicated that the Sydney Harbour Tunnel was to connect to the east of the city rather than the west, impacting on the parking station location.

This led to a decision to defer the project.

A revised design was prepared by Public Works to enable a new EIS to be prepared. This EIS was prepared with input from specialist consultants and exhibited from 12 July 1988 until 12 August 1988.

An open invitation for registration of interest was called in early July 1988 (concurrent with the exhibition of the EIS). A total of 16 expressions of interest were received when registration closed on 4 August 1988.

The former Preferred Tenderer submitted a registration.

The expressions of interest were reviewed by a panel comprising representatives of the Public Works' Government Architects Branch, Engineering Design Branch, Construction Division, Commercial Property Unit and Accounts Branch. The Registrants selected to tender were those that demonstrated they had the expertise, experience and financial capability to carry out a major development of this nature.

The Invitation to Tender Documents were issued to the eight registrants on 15 August 1989, with tenders to close on 7 November 1989.

During the tender period, three of the eight registered tenderers (Hooker, Comreatly and Costain) advised that they would not be submitting a tender. In addition two of the remaining five tenderers advised that they would be combining and submitting a single bid as Concrete-Kumagai Joint Venture.

When Invitations to Tender closed on 7 November 1989 offers from the following two organisations were received:-

Concrete - Kumagai Joint Venture (Operator Wilson Parking)
Enacon Parking (Backed by Hastings Deering Corporation)

Review of the tenders were undertaken with the aim of selecting a Preferred Tenderer. This process is to determine a tenderer that had the necessary ability to finance, design, construct and operate the parking station and provide the most favourable financial return to Government.

The Evaluation Review Panel established, to review the tenders, comprised representatives of Public Works' Commercial Development Branch, Government Architects Branch and Turner Consulting Services.

To assist in the review process, the services of Public Works' Accounts Branch and Geotechnical Centre, were utilised.

Because of the importance of the financial proposals, an independent assessment of the financial offers was undertaken by consultants Sallmanns International. The Valuer General also undertook a similar assessment.

Likewise, an assessment of the financial capability of the two organisations to construct and complete the parking station was performed externally by Peat Marwick Hungerfords.

To provide advice on the Special Conditions submitted by both tenderers and the legal issues, the services of Mallesons Stephen Jaques Solicitors and Attorneys was sought.

A Ministerial Review Group (MRG) comprising three prominent businessmen was established in November 1989 to independently advise the Minister direct on the process which was used by Public Works in making a recommendation of a developer for the project. They were asked to report on whether the process was fair, proper and appropriately impartial.

The MRG contacted all the selected registrants who did not tender. They also interviewed both tenderers prior to the nomination of the preferred tenderer (who were unaware at the time of the successful nominee). The MRG Committee's report was forwarded to the Minister on 21 February 1990.

The Evaluation Review Panel chose Enacon Parking and submitted its recommendation to Public Works' Board of Advice and Reference (BAR) for concurrence.

Enacon Parking was nominated as the Preferred Tenderer on 5 March 1990.

Enacon Parking was selected as Preferred Tenderer as it offered a technically sound, feasible proposal, and demonstrated an ability to finance, design, construct and operate the parking station and provide the most favourable return to Government.

To be granted the status of Preferred Tenderer a non-refundable payment was required to be made by the tenderer. A period was nominated for the exclusive dealings with the Preferred Tenderer, at the conclusion of which the Minister for Public Works was at liberty to negotiate with another tenderer should he so wish.

The Development process then required the Preferred Tenderer to refine its plans and documentation to Development Application stage.

The actions required to be resolved during the Preferred Tenderer period and their defined outcomes were documented in a "Heads of Agreement". This document had to be accepted by the developer before being nominated at the Preferred Tenderer.

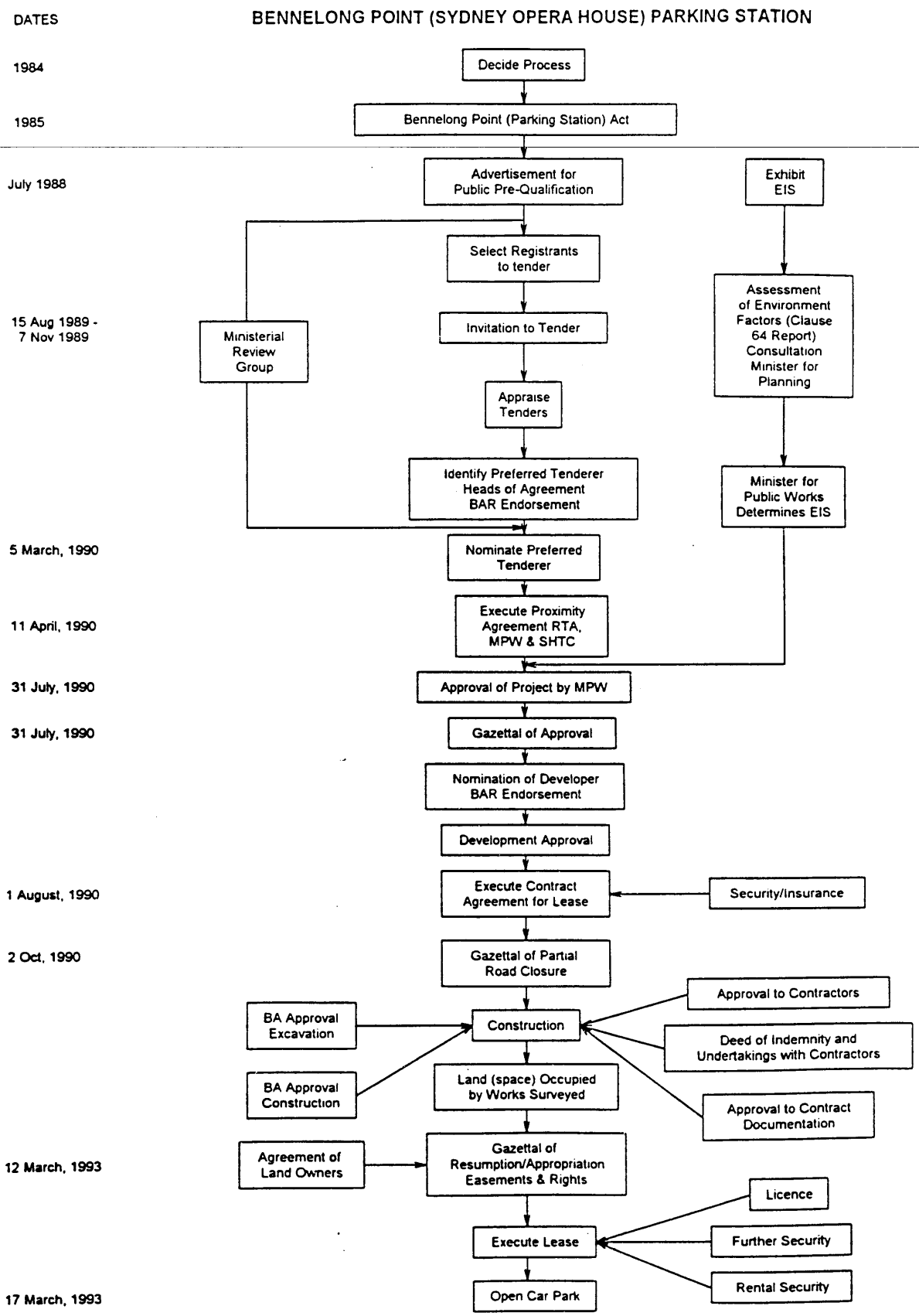
Not until the items in the "Heads of Agreement" were finalised could the Agreement to Lease be signed.

On 31 July 1990 the "Environmental Impact Assessment Report" - Clause 64 Report, was determined by the Minister for Public Works, giving approval to the project. The contract "Agreement for Lease" was executed on 1 August 1990, after submission to Public Works' BAR for concurrence to the exclusive dealings phase of the tendering process.

The parking station was opened on 17 March 1993 seven (7) months ahead of the contract completion date.

A flow chart of the key milestones in the process and the timing can be found at the end of this section.

In brief, the best practice emerging from the Bennelong Car Park story is that agencies reviewing tenders for large privately financed infrastructure projects engage independent financial consultants to participate in the tender review team, and hire independent sources of legal and technical advice to ensure there is the necessary impartial oversight of the probity of the tender review process.


DATES
BENNELONG POINT (SYDNEY OPERA HOUSE) PARKING STATION
1984
Decide Process
1985
Bennelong Point (Parking Station) Act
July 1988
Advertisement for Public Pre-Qualification
Exhibit EIS
Select Registrants to tender
15 Aug 1989 - 7 Nov 1989
Ministerial Review Group
Invitation to Tender
Assessment of Environment Factors (Clause 64 Report) Consultation Minister for Planning
Appraise Tenders
Identify Preferred Tenderer Heads of Agreement BAR Endorsement
Minister for Public Works Determines EIS
5 March, 1990
Nominate Preferred Tenderer
11 April, 1990
Execute Proximity Agreement RTA, MPW & SHTC
31 July, 1990
Approval of Project by MPW
31 July, 1990
Gazettal of Approval
Nomination of Developer BAR Endorsement
Development Approval
1 August, 1990
Execute Contract Agreement for Lease
Security/Insurance
2 Oct, 1990
Gazettal of Partial Road Closure
Approval to Contractors
BA Approval Excavation
Construction
Deed of Indemnity and Undertakings with Contractors
BA Approval Construction
Land (space) Occupied by Works Surveyed
Approval to Contract Documentation
12 March, 1993
Agreement of Land Owners
Gazettal of Resumption/Appropriation Easements & Rights
Licence
Execute Lease
Further Security
Rental Security
17 March, 1993
Open Car Park

3.2 350 COAL WAGONS

In early 1991, the State Rail Authority' Freight Rail section in the normal way prepared its bid for its capital works programme for the following financial year. This was sent to the Treasury through the Department of Transport, which acts as a "co-ordinator" and "clearing-house" for all transport-related capital works bids across various portfolios.

In evidence on 18 June 1993, the NSW Treasury was asked what the rationale was for this arrangement:

> **Committee:** Is there any hierarchical reason why SRA cannot discuss these types of things directly with the Treasury?
>
> **Treasury :** From our point of view, no, but I think the Department of Transport has a general view that they act as sort of the central agency for the transport area and they would prefer interaction with Treasury to occur through them. We have regular financial meetings with the SRA but generally for things of policy determination the Department of Transport sees itself as the major conduit.

The Treasury informed the SRA, again through the Department of Transport, that its bid was too high. In fact, its capital works had to be reduced from the $118 million requested to $100 million.

The SRA interpreted this to mean that if it still wanted to have all the items on its list, alternative sources of funding such as private finance had to be found for some of them. One item it identified as having the potential for private sector funding was the financing of 350 coal wagons and associated bogies, or wheels, a $54 million project.

The SRA decided that it would organise this purchase through an operating lease, largely but not solely in order to take the project outside the Loan Council global borrowing limits for NSW. In doing so, it apparently acted under what it later discovered to be a misapprehension that it was carrying out Treasury policy. It held preliminary discussions with prospective tenderers, but did not inform the Treasury of its intention to go out to the market for the operating lease.

> **Committee:** You didn't think about consulting Treasury before the advertisement in the paper [the letter soliciting bids]?
>
> **SRA:** I guess that goes back to our original point. In putting forward our capital programme we clearly spelt out that the coal wagons were to be financed separately. When our capital programme was approved we took that as being confirmation of the approach we put forward.

However, before sending out the letter inviting bids, the SRA did consult with the Department of Transport:

> **Committee:** So that you did consult with the Department of Transport before the ad went in the paper [the letter was sent]?

SRA: Oh yes, they were fully aware of what we were doing, yes.

On 14 February 1992, when it was close to actually sending out the letter seeking bids for this contract, the SRA did finally write to the Treasury requesting advice on this operating lease. Why it did so, if it assumed that it already had "confirmation of the approach we put forward", puzzled the Committee:

> **Committee:** Why does it appear that [the SRA] needed to seek advice in February 1992? ...If it was all assumed that everything was all right, what triggered writing to Treasury?
>
> **SRA**: We were concerned to make sure that it was properly structured.

This was actually the first the Treasury - or, to be more precise, the Economics and Revenue Division of the Treasury - had ever heard of this project. (Of course, the Budget Division of the Treasury knew about it from the SRA's capital programme). The Economic and Revenue Division was surprised and dismayed:

> **Treasury:** First of all, there was no consultation by SRA with Treasury at any point in time until that letter arrives and we had no pre-discussion. Second point is operating leases have already been regarded as marginal and indeed the policy has been changed.

It wrote back to the SRA on 2 March 1992 registering its strong disapproval of the proposed leasing arrangement and suggesting alternatives, including financing by the public sector after all.

However, the SRA appeared to have gone too far along the road to turn back, because on 4 March 1992, two days later than the Treasury's strongly-worded letter, it actually proceeded with the project as it had originally envisaged it on that date. On that date it sent a letter inviting six finance organisations to bid for the "Non-Public Sector funding of current manufacturing tender for the supply of 350 Coal Wagons and 730 Bogies". The invitation letter said in part:

> This tender is a selective tender for the funding of the above assets valued at about $54 m by way of a genuine operating lease.

There was thus no doubt whatsoever that the agency was seeking funding from non-public sources for these coal wagons.

The invitation was accompanied by detailed specifications which, to be satisfied, necessitated the input of skilled (and expensive) accounting and legal personnel on the tenderers' side.

For one tenderer, the cost of these inputs was reportedly around $200,000.

In the specifications was a small clause saying :

> The Principal does not bind itself to accept any tender

Following the Treasury's strong advice that the private financing by the SRA was inadvisable, the project then appeared before the Capital Works Committee of Cabinet for a decision on whether it should be financed by the public sector after all. On 31 March 1992, the Capital Works Committee met and approved "the acquisition of 350 new coal wagons as a first charge against SRA FreightRail borrowing allocations"[95].

The hapless companies which had spent large sums putting bids together, a total sum which probably exceeded $1 million, were then informed that the project was not going to be privately financed after all. Regrets were formally expressed.

In evidence, the SRA maintained that because of the small clause "The Principal does not bind itself to accept any tender", there was no criticism to be made of the management of this project.

* * *

This example illustrates many of the things that can go wrong with this type of project.

The Committee drew five conclusions:

- it would have been preferable if the SRA had not sought tenders two days after Treasury had informed it that the leasing arrangement was not advisable;
- the lines of communication among Treasury, Department of Transport and the SRA were tangled and unclear, with the result that misinformation, misunderstandings and faulty decisions were allowed to occur;
- there was little understanding in the SRA of the rationale for the policy on operating leases, and of the fact that the policy had changed;
- there is a lack of understanding in the SRA of the justification for private sector anger at being abruptly informed that the project would no longer proceed.
- there appeared to be little liaison between the Budget Division and the Economics and Revenue Division of the Treasury.

There is a clear need for better interagency communication on policy matters relating to Transport. The fact that the relevant officers of the Treasury heard about the project for the first time on 14 February 1992, from the SRA, indicates that the Department of Transport had failed in its liaison role between Treasury and the agencies it co-ordinates. The Committee understands and supports the need to co-ordinate transport infrastructure, but it would appear that in this case, the Department did not carry out its self-appointed task.

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[95] Letter to Minister for Transport from Director-General, Premier's Department, dated 15 April 1992.

Another need is for agencies to be better informed of Loan Council policies and guidelines. The following evidence details efforts made by the NSW Treasury:

> **Treasury Officer no. 1**: We had to write to each of them formally when we put together the submission to Loan Council; 1993/4 Loan Council allocation - we had to seek from them information and at the point of time it was made very clear what is the current situation, what is currently under the Loan Council limits, and they include all forms of financing, including private sector infrastructure and leases.
>
> **Treasury Officer no. 2**: They are definitely well aware.

Despite these sterling efforts, it is clear that agencies do not know what government or Loan Council policies are currently in force, what is being asked of them and what cannot be done. Partly this is because Loan Council policies themselves have been in a state of flux, with state agencies bearing the brunt of the indecision and changes in course. Partly this is because Treasury has not mounted a serious concerted effort, which would include seminars and meetings, to inform agencies of what the latest policies are. The Committee would consider such a programme indispensable in the current climate of transition and change.

The last need is for greater understanding on the part of the public sector of the private sector's tendering costs. The Committee cannot consider it acceptable that an agency refuses to acknowledge any fault when tenders are cancelled:

> **SRA:** Remember this, Mr Chairman, on the basis that out of the six we invited one to do the job anyway. In order to operate their business they have to make allowance for tendering and if they are competitive they may be successful. There is a certain element of risk from that aspect.
>
> **Committee:** I understand that but they are saying the risk was different, that the whole thing was a waste of time. It wasn't one in six it was none in six, after it turned out, after the fact.

Many agencies do in fact claim to be trying to reduce the costs to tenderers. However, cases like this one show there is still a considerable way to go before the NSW public sector as a whole understands that thorough preparation needs to be carried out before the private sector is asked to spend any time or money bidding for a project.

RECOMMENDATION 36

That liaison between the NSW Treasury, peak departments such as Transport and public sector agencies co-ordinated by them such as the SRA, on financial and budgetary matters impacting on the private sector and the Loan Council, be better co-ordinated within a system of regular meetings.

RECOMMENDATION 37

That Treasury undertake a pro-active explanatory programme of education of agencies, including seminars and meetings, to provide to them detailed information on Loan Council policies and principles.

RECOMMENDATION 38

That the Office of Economic Development prepare for discussion by the Interagency BOOT Group (IBG) a paper on the cost implications for tenderers of cancellation of projects.

3.3 BLUE MOUNTAINS SEWAGE TRANSFER SCHEME

In April 1990, the Water Board placed a newspaper advertisement requesting tenders for the Blue Mountains Sewage Transfer Project. The advertisement said, in part,

> This invitation seeks tenders from the private sector to design construct and finance a section of the Blue Mountains Sewage Transfer Scheme and if desired to operate the transfer scheme under commercial arrangement with the Water Board.

Construction companies which for one reason or another could not form a consortium with a bank, or a financing company, were therefore, by the terms of this advertisement, excluded from applying, even though their construction methods might possibly have been cheaper, more efficient, or of higher quality. The advertisement clearly sought a financing capability from bidders.

The advertisement directed potential bidders to obtain copies of the tender documents. These clearly repeated the terms of the advertisement, and added that one objective tenderers had to meet was "maximum return/minimum net cost to the Water Board"[96]. In evidence to the Committee, the Water Board stated:

> **Water Board:** We made it a condition precedent that [this was] not a Loan Council transaction. The rationale for that was that it was one of the government's examples. . . of private sector involvement in a genuine build, own and operate scheme, we wanted to ensure that the right degree of risk and control was carried by the successful tenderer. We thought the best way to put the discipline on that was to make it an outside Loan Council transaction. . .

and subsequently,

> **Water Board:** It was made a condition precedent that it was an off Loan Council transaction.
>
> **Committee:** What does that mean?
>
> **Water Board:** That means for the transaction to go ahead it had to be off Loan Council . . . that was put in the tender documentation that was issued to the tenderers and they tendered on the basis of that documentation.

In April 1990, of course, the Treasury had not yet formulated or issued its policy, stated in its circular of March 1993 (see page 75), that whether a project could be financed by the private sector or not was of secondary importance to its inherent value to the State.

Another interesting feature of the tender documentatation was its timetable. On p. 55, the documents state:

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[96] Tender Documents, p. 20.

> After close of tenders on 26 June 1990, tenders will be evaluated until End August 1990.

The documents had already stated, on p. 6:

> It is intended that the entire process by completed by September 1990.

In the event, the contract was signed in May 1993, about three years after the close of tenders in 1990.

One opinion given to the Committee about the process came from the private sector:

> **Mr Burke:**...another project,...the Blue Mountains Sewer Tunnel..... that was another disgrace. ...[97]

What happened?

The Treasury provided the Committee with a chronology of events from its point of view. This is reproduced at the end of this section. Its salient features are:

- in January 1991, the Water Board discusses two preliminary proposals with the Treasury from the Loan Council point of view.

- in September 1991, the financing arm of one proponent (the successful tenderer) seeks Treasury view on the Loan Council status of one proposal.

- in October 1991, Treasury indicates to that proponent that on a preliminary assessment the proposal would appear likely to fall outside the global borrowing limit. In other words, it looked at that point as though the proposal satisfied the Water Board's "condition precedent".

Again, in May 1992,

- the same proponent seeks Treasury's views on the Loan Council status of the Heads of Agreement.

- in June and July, the Treasury begins expressing reservations based on the degree of risk the proponent was assuming. Put simply, the Treasury did not believe the proposed arrangement allocated enough risk to the proponent to justify the project being classified as outside Loan Council, that is, as a genuine private sector project.

- in September, Treasury finally confirms that the proposal as currently formulated is not acceptable in Loan Council terms. It says that "if the cap on the volume-related payments was removed, Treasury would approve the project from a Loan Council perspective".

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[97] Evidence by Mr T. Burke to Committee, 20 October 1992, p. 70.

- later in September, the proponent revises its proposal incorporated uncapped volume-related payments, that is, going some way towards meeting Treasury conditions.

- in November, Treasury says this is still unsatisfactory, and advises financing the project from public sources instead of the private sources clearly specified in the advertisement and the tender documents.

- in December, the Victorian Loans Affair causes the Loan Council to begin revising its policy. The revised arrangements were to be finalised in 1993,but in the meantime, the thrust was supposed to be that all projects were to brought within Loan Council, with states' borrowing limits raised correspondingly.

- later in December, the Water Board is advised of this new Loan Council policy.

- later still in December, the proponent writes to the Premier expressing concern at all these delays.

- in January 1993, a meeting is held between the state Treasury and the Loan Council on the Loan Council status of the project.

- in March 1993, Loan Council sends a letter advising that the project would fall within Loan Council guidelines.

This last letter finalised the whole matter. The project was now considered to be within Loan Council, that is, it would now be publicly-financed. However, the problem was that tenders had not originally been called for an on-Loan Council project. The successful tenderer had been selected on the basis of an off-Loan Council advertisement. As we have seen, it was only very late in the proceedings that a final determination from the Loan Council was obtained that the project was on Loan Council. One option could now have been to cancel the whole process and start all over again on the basis that the project was on Loan Council. The Board saw two major disadvantages to this course of action: first, that the people of the Blue Mountains would have had to wait even longer for the area's sewage to be treated, and second, that the credibility of agencies with the private sector would be seriously compromised by cancellation at the eleventh hour. The Board therefore decided to go ahead and sign the contract on almost the same terms with the original winner of the competition, despite one important factor. This was that those original terms had included giving the tenderer a $5 million premium (over 35 years). This premium had been intended to reflect two main considerations: first, that the tenderer would, under the original arrangement, have been taking all construction, operation and maintenance risks, and second, that the Board would have benefited by being able to use the funds released by the BOO arrangement for other projects. When the BOO arrangement was rejected by the government, the Board's view was that only the first consideration retained any validity in the new circumstances, that is, that there was no longer any need for the premium to reflect the Board's benefit, but only the tenderer's construction, operation and maintenance risks. Accordingly, the Board negotiated with the tenderer and reduced the premium from $5 million over 35 years to $3 million over 35 years. In effect, the Board made a judgement that it was better to pay

this premium than to cancel the whole process and start all over again with an on-Loan Council project.

The chronology raises several questions.

There appeared to have been a delay between September 1990, when "the whole process was intended to be completed", and March 1991, when, according to the Treasury's chronology, the Water Board forwarded to the Treasury "very preliminary documentation concerning two proposals for a sewage tunnel in the Blue Mountains". This is curious in view of the claim in the tender documents that the successful tenderer would be named in September 1990.

In evidence, the Water Board said:

> The thing is that you can't get a clear ruling from the Loan Council that it's on or off Loan Council at that [early] stage. It's only when the documents are all but complete you can see exactly how it is constructed and all the agreed terms and conditions that you can formally go and get a Loan Council ruling. Until right at the end of the day after virtually years of negotiating you don't know for sure whether it's on or off Loan Council[98].

From Treasury's evidence, however, the most significant revision of the successful proponent's proposal was in September 1992, when he agreed to lift the cap on volume-related payments. It is unclear why the Loan Council was not approached in September 1992, when the proponent put forward this significant revision, or indeed, why the Loan Council was not approached before January 1993.

The Committee can understand the difficulties that occur when one jurisdiction (the State) depends heavily on another (the Commonwealth) for its policy. However, what the Committee cannot understand is why it took so long for the State to ascertain what that policy was. In one sense, this was particularly regrettable in this instance because the Commonwealth's policy had changed in the meantime, because of the Victorian Loans Affair. In another sense, of course, the end result was one that could last for the long term without having to be subsequently changed.

This failure to ascertain the Loan Council's view earlier on in the process is especially puzzling in view of Treasury's later evidence to the Committee:

> **Committee:** Do you consider it is possible...still fairly early in the process, to have at least Treasury here being in a position to give a determination on whether a project should proceed as a privately-funded [one] with some confidence at that early stage to avoid the kinds of delays that we see with the Blue Mountains Tunnel project?
>
> **Treasury:** We would very much like to have fairly clear, in principle guidelines that set out very clearly the policies and the principles that apply to the assessment of projects such that at the time you go to the market place you are confident how

[98] In evidence to the Committee, 18 June 1993, p. 50.

> it will be treated...we have always advocated this...it has been a bit of frustration that there's been a long process where this is still not clear. We are very strong advocates of having very clear policies put in place.

Any advocates of clarity might well have sought clarity a little earlier on in the Blue Mountains epic.

The Committee of course also understands the fundamental difficulty facing the Loan Council itself. There are basic difficulties in assessing risk and in deciding where on balance the risk lies in a project. These issues had not been resolved when the evidence was taken:

> **Treasury:** There is still uncertainty, there hasn't been resolution of the way the private sector infrastucture projects would be treated.[99].

However, on a case by case basis, the Loan Council has in the past given a determination quite early in the proceedings, for example with the Port Macquarie hospital instance. Why such a course was not followed with the Blue Mountains tunnel is not clear to the Committee.

From this case, the Committee would draw several conclusions:

- The Water Board should have discussed with the Treasury before going out to tender what the policy on Loan Council issues was. In this respect, this case is similar to that of the 350 wagons discussed in the previous section, where the SRA erroneously believed it was carrying out government policy by "taking the project off Loan Council".

- an approach should have been made directly to Loan Council considerably earlier in the proceedings;

- the state government was nevertheless impeded by the lack of clarity in Loan Council policies. As the Treasury said in evidence:

> **NSW Treasury:** The whole history of the Blue Mountains Tunnel is one....of changing approach and policies of Loan Council where the rules were changing following the Victorian Loans Affair and that created a great deal of uncertainty as to just what the policy was in this respect[100].

[99] Evidence to Committee, 18 June 1993, p. 86.

[100] Evidence to the Committee, 18 June 1993, p. 88.

Chronology of Events provided to Committee by NSW Treasury

3.1.91	Water Board forwards very preliminary documentation concerning two proposals for a sewage tunnel in the Blue Mountains. Discussions were held with Water Board and proponents (individually) outlining Loan Council issues.
13.9.91	Allco forwards details of a proposal to be put to the Board seeking Treasury view on Loan Council status. The proposal was an indicative one only, and not the one finally submitted.
9.10.91	Treasury responds to Allco letter indicating that on a preliminary assessment the proposal would appear likely to fall outside the global borrowing limit, but that in view of the innovative features and the fact that details were yet to be finalised, confirmation would be required based on the specifics of the final proposal.
7.4.92	Minister for Housing seeks Premier and Treasurer views on various ministerial guarantees and warranties.
16.4.92	Premier and Treasurer responds agreeing with the position put by the Minister for Housing.
19.5.92	Allco forwards copy of Heads of Agreement seeking views on Loan Council status of proposal.
2.6.92& 28.7.92	Meetings held with Allco (MR) to discuss sewage tunnel proposal. Some Treasury concerns with proposal were outlined.
29.7.92	Water Board forwards justification for proposal to Treasury.
30.7.92	Allco forwards letter to Treasury attempting to clarify some aspects of the proposal.
13.8.92	Meeting between Water Board and Treasury officers (ML and MR) to discuss proposal.
17.8.92	Treasury forwards letter to Water Board outlining areas of concern with proposal.
8.9.92	Allco submits revised proposal making modifications to volume related and sinking fund payments.
9.9.92	Water Board responds to Treasury concerns expressed in letter of 13.8.92.
14.9.92	Meeting held with Allco in which they outlined the revised arrangement. Treasury indicated that the proposal was an improvement but further consideration would be required.
17.9.92	Internal Treasury meeting held to discuss revised proposal. It was agreed that proposal was still marginal (mainly because of the lack of operating expenditure and therefore real operating risk) and that further consideration of the issues should be undertaken. The Board was requested to provide information as to the level of uncertainty associated with the resetting of the volume related charge

compared with its long term expected level. This information was provided on 18.9.92 but proved to be of little use.

21.9.92 Meeting with Michael Lambert where it was agreed that the current proposal was not acceptable from a Loan Council perspective given that the modifications made to the proposal as a result of the Treasury letter of 18 August were only marginal and did not address Treasury's fundamental concerns. It was agreed that Treasury should place before the Board the option of having the project count within global limits and therefore permitting it to proceed in its current form. It was also agreed that if the cap on the volume related payments were removed Treasury would approve the project from a Loan Council perspective on the basis that it should not provide a guide for future negotiations.

The Board was informed of Treasury's continuing concerns both in relation to the cap and the operation of the sinking fund.

22.9.92 Meeting with Allco in which a proposal to uncap the volume related payments was presented. Following further discussion with Michael Lambert both Allco and the Board were informed that this change did improve the position of the proposal under the Loan Council and, based on past precedents, there was the possibility that it would fall outside the global borrowing limits. The Board was also told of Treasury's concerns regarding this project being used as a precedent and that there will obviously be a need to renegotiate the level of payments between the Board and SASFIT if it were to proceed.

9.11.92 Allco forwards letter to Treasury seeking Loan Council sign off on revised proposal incorporating uncapped volume related payments.

18.11.92 Meeting between Minister Webster, Water Board and Treasury (ML and MR) to discuss proposal. Treasury put position that it considered the proposal to be still marginal and that its preferred position would be to count the arrangement as falling within global limits. The Water Board agreed to consider this option.

7.12.92 Special Loan Council meeting at which the reporting problems experienced by Victoria were discussed and in principle agreement reached on revised Loan Council arrangements. The revised arrangements are to be fully developed by officers and submitted to the 1993 Loan Council meeting.

15.12.92 Letter from Treasury to the Water Board reiterating concerns regarding the project and in particular expressing the view that the new Loan Council procedures made it more difficult to approve the project as an off-Loan Council arrangement.

Briefing note forwarded to the Premier and Treasurer and the Minister for Finance outlining Treasury's position on Loan Council approval of the project.

16.12.92 Letter forwarded by the Solicitors acting for the private sector joint ventures to the Minister for Finance expressing concern regarding the delay in finalising the project.

21.12.92 Letter from Water Board to Treasury stating that the project will be deemed off-Loan Council unless Treasury advises clearly to the contrary.

23.12.92	Letter from Minister for State Development to the Premier and Treasurer requesting that the project be classified as off-Loan Council.
24.12.92	Letter from the Joint Venturers to the Premier and Treasurer expressing concern regarding delays in finalising the project.
30.12.92	Briefing note forwarded to the Premier and Treasurer and the Minister for Finance seeking a formal ruling that the project as structured should be classified as on-Loan Council. A letter informing the Minister for Planning and Minister for Housing was attached.
21.1.93	Crown Solicitor provides advice on legal liability for compensation. Conclusion is that any compensation claim is unlikely to succeed.
14.1.93	Meeting with Minister for Planning and Minister for Housing to discuss the proposal. Treasury outlined its areas of concern. The Minister indicated that he felt it best to seek the view of Loan Council on the proposal before proceeding further.
18.1.93	Letter from joint venture to Premier and Treasurer requesting finalisation of guarantee and Loan Council matters.
23.1.93	Meeting in Canberra with Loan Council Secretariat regarding Loan Council status of project. The meeting was a consequence of the earlier meeting with the Minister for Planning (see 14.1.93).
16.2.93	Letter from Minister for Planning and Minister for Housing to Premier and Treasurer requesting certainty that tunnel project be deemed off Loan Council.
26.2.93	Letter from Water board to Treasury seeking advice on Loan Council status.
1.3.93	Letter from Loan Council Secretariat advising that the project would fall within Loan Council guidelines.
5.3.93	Letter from Secretary to Minister for Planning and Minister for Housing informing of Loan Council Secretariat's view and suggesting that project proceed on Loan Council.
5.3.93	Letter from Secretary to Water Board advising that project is on Loan Council.
12.3.93	Letter from Secretary to Water Board confirming that project is on Loan Council, and that Premier and Treasurer wishes the basic structure of the project to remain unchanged.

3.4 JUNEE CORRECTIONAL CENTRE

Another example of successful private participation in a BOT project is the Junee Correctional Centre, and the Committee believes that it is worth setting out the history of the project in some detail.

On 23 August 1988 Cabinet determined that a feasibility study should be undertaken on the possible construction of a maximum security prison in a country area of New South Wales.

Mr Yabsley, the then Minister for the Department of Corrective Services, wrote to all non-metropolitan Councils requesting expressions of interest. *Seventy* submissions were received from *sixty-two* Local Councils. A Financial Impact Statement was prepared by Treasury and an appraisal of Regional Economic Impact was prepared by State Development on the four short listed areas.

Following an exhaustive review, a recommendation was put to Cabinet by the Minister that a 250 bed maximum security correctional facility be built at Junee. On 4 May 1989 Cabinet endorsed Junee as the preferred site.

Subsequent to Cabinet's decision, a review of inmate population, profile and classification systems resulted in the Junee project expanding to 600 beds and a change of security classification from maximum to medium/minimum.

At the 18 June 1990 capital Works Committee of Cabinet, approval was given for the establishment of an interdepartmental committee to oversight the design, construction and possible private sector financing of the proposed new Correctional Centre at Junee. The committee comprised Senior Executives from:

Premier's Department;

New South Wales Treasury;

Public Works Department;

Department of Corrective Services.

In addition, Jardine Fleming Australia Securities Ltd, was appointed as an independent review person to the committee whilst McLachlan consultants appointed as an independent technical consultant. This latter position was filled following a formal tendering process.

By incorporating design and construction into the same contract, this promoted a greater degree of buildability into the design process.

This decision included an in-principle determination that the management of the Correctional Centre would also be contracted out whilst recognising that no legislative base for the private sector management of a gaol in New south Wales existed at that

stage. Information from Borallan (Australia's first privately managed gaol located in Queensland) indicated that the company managing the facility felt it could have achieved greater efficiencies had it been involved and responsible for the design and construct stages.

Whilst recognising the advantages of continuity in the contractual linkages of the design and construct stages, the Steering Committee was equally aware of the concomitant need to exercise discipline in its own arrangements, notably in respect of determining a clear brief concerning its requirements.

On 18 September 1990 expressions of interest were called from suitably qualified private sector organisations for the design, construction, financing and possible future management of the Junee Correctional Centre.

Eight Expressions of Interest were received by 22 October 1990. An Evaluation sub-Committee was formed by the Junee Gaol Steering committee to review the submissions and report to the Steering Committee.

In order to assess the expressions of interest, the Evaluation Sub-Committee devised a rating methodology to score the fifteen items making up the evaluation criteria. Individual criteria were divided into three main groupings, viz. the product "*Prison Buildings; the Management; and the Proponents*", whilst each item was given a relative weighting. In addition to the evaluation criteria, the sub-committee also gave consideration to the indicative capital and recurrent costs of each proposal. Further, as part of the assessment process the Macquarie Bank was commissioned to complete a review of the financial capability of the various consortia. The report of the Evaluation Sub-Committee reviewing the expressions of interest was submitted to the Junee Gaol Steering Committee in December 1990.

Following the Evaluation Sub-committee's review of the Expressions of Interest, the Steering committee endorsed the following sort listed consortia to tender for this project:

- Jennings/Group 4
- CCA
- McNamara/Pricor
- Thiess/Wackenhut

The proposed process for delivery was clarified in discussion and by letter with the Independent commission Against corruption to ensure consistency with government Standards concerning private sector involvement in the public sector. The entire process was summarised in a letter to ICAC, in june 1990. ICAC reviewed procedures and acknowledged satisfaction that all Government requirements had been met.

Amendments to legislation enabling the contracting out of gaol management and the transport of prisoners was introduced into Parliament in December 1990 and gazetted in February 1991.

In order to maximise the opportunity for innovations and creativity in the tenders, the Department's requirements were not overly prescriptive. To this end, individual briefing sessions were held for each of the four shortlisted consortia over December 1990 to January 1991 to explain the design, construct and operational management requirements.

Tenders were received on 27 February 1991 for two separate but complementary contracts:

Contract A	Design, Construction and Commissioning
Contract B	Management

From:

Australasian Correction Services (Thiess-Wackenhut-ADT)

Corrections Corporation Australia (CCA-John Holland)

Jennings - Group 4

Contract Prisons Australia (McNamara-Pricor)

A review of tenders was undertaken by the Evaluation Sub-Committee in accordance with the criteria for assessment detailed in the tender documents. A net present value analysis using discounted cash flow techniques was applied to the combined construction and management offers put forward by each tenderer. Over the full range of both discount rates and analysis periods, the tender by ACS was found to have a lower net present value (cost) to government by a significant margin.

As part of the total process independent checks on the financial capability of the four consortia were initiated. Given that the Macquarie Bank had been involved with a similar investigation during the review of Expressions of Interest, the Bank extended its earlier investigation and provided updated information.

Security clearances were initiated on the consortia and undertaken by the Special Investigation Unit, Department of corrective Services. Attention was paid to the integrity of the shortlisted companies involved in the tender process and the principals of those companies.

Three members of the Evaluation Sub-Committee undertook a relatively short but intensive overseas trip to examine first hand, gaol facilities managed by the tenderers.

During the tender evaluation process, senior staff from within the Department were requested to evaluate specific key areas. During this stage, a high degree of confidentiality was maintained. Particular attention was paid to the response provided by tenderers to the Minimum Standards for the Management of the Junee Correctional Centre. These Standards, whilst not being overly prescriptive set out baseline expectations of management designed to protect both inmates and staff and form an insurance for acceptable operational management levels.

A review of Tenders was presented by the Evaluation Sub-Committee to the Junee Gaol Steering Committee on 18 April 1991 recommending Australasian Correction Services as the preferred tenderer.

Treasury Corp. was engaged to examine the innovative financing advanced by two of the short listed tenderers. When the preferred tenderer was identified a further examination was undertaken in more detail. This examination was carried out throughout the evaluation process. Treasury Corp. recommended that the Steering Committee not accept the innovative financing scheme presented by the preferred tenderer as it represented no significant financial advantage to the Government. The fact of public ownership of the facility limited the extent of possible innovative financing.

Following the recommendation of a preferred tenderer to the Steering Committee two further steps were taken:

(i) An independent qualitative review was sought to review the tender from Australasian Correction Services. This was submitted on 10 May 1991.

(ii) A Value Review of the preferred tenderer was undertaken with ACS on 13 May 1991 to enable the Department to fully understand the proposals being offered and to clarify and resolve any outstanding issues.

The Steering Committee recommended to the Minister that Cabinet endorse the preferred tenderer subject to final contract considerations. This course of action was considered appropriate in the circumstances given the milestone nature of the decision viz. the State's first privately built and managed gaol.

Final contact negotiations were concluded on 29 July 1991. This process was designed to facilitate the maximum degree of cooperation between ACS and the Department and to ensure that the final contract were acceptable to all parties and were fair and equitable. It was important that the contract documents not only protected the Government's interest but were also workable.

The two contracts with the same company involved:

Public Works Department as principal to the Design and Construct Contract - Contract 'A'.

Department of Corrective Services as principal to the Management Contract - Contract 'B'.

Both the Crown Solicitors Office and the Department of corrective Services' own solicitors were utilised to frame and negotiate the contracts.

Government solicitors examined the structure of the company.

Copies of sub-contracts between consortia members were examined and a written guarantee was sought from principal consortia members stipulating that they would deliver what had been contracted with the consortium.

On 7 August 1991 the government and ACS entered into a Heads of Agreement that effectively linked the two main contracts together. The Heads of Agreement document was executed by the Minister for Public Works, the Minister for Justice, the Director-General of Corrective Services ACS.

ACS is committed in the contract to undertake quality assurance to Australian Standards. The Public Works Department has an ongoing audit role to ensure adherence to these ecified standards.

Prior to occupation, the Government has to be assured of set-up arrangements and the Public Works Department will confirm that buildings are satisfactory.

ACS is committed to producing key operational documents for examination at prescribed times prior to the opening of the Correctional Centre.

The Management Contract ('B') is for five years with a three year option. The contract is based on a fixed price with cost escalation only available in accordance with pre-arranged criteria.

Payments are made to ACS on a monthly (in arrears) basis and within twenty-one days of expected dates.

The Committee believes this is an excellent precedent for its handling of a number of key issues:

- a vision and clear sense of purpose surrounding the project
- timely preparation of the financial impact statement
- the establishment of a very effective interdepartmental committee to oversight the project
- the appointment of independent review and technical consultants
- building on best practice from interstate and overseas
- excellent community liaison regarding siting and development of the Centre
- timely advice from the ICAC
- tender requirements were not overly prescriptive
- independent checks on tenders were undertaken
- appropriate legislation was put in place
- Treasury Corp. was engaged to look at proposals for innovative financing
- independent reviews were done of the preferred tenderer
- Public Works did an ongoing audit to Australian standards

The best practice displayed by this example should be widely shared in the public sector, and the Committee hopes that through seminars and interdepartmental committees this best practice is extensively disseminated.

PART 4

ISSUES ARISING DURING THE INQUIRY

During the Inquiry a number of issues arose which the Committee considered warranted further investigation. These issues included the role of the ICAC in the tendering process, and the requirements of confidentiality. In pursuit of these further investigations the Committee held a series of meetings, seminars and hearings, and conducted further correspondence on each issue.

4.1 THE INDEPENDENT COMMISSION AGAINST CORRUPTION AND THE TENDERING PROCESS

In many ways, the model for the NSW Independent Commission against Corruption was the Independent Commission against Corruption in Hong Kong. While the statutory mandate of the Hong Kong Commission is different from that of the NSW Commission, the Committee considered that there were several principles and practices adopted in Hong Kong which were relevant to the New South Wales context. One such principle is that corruption prevention should not concentrate on process in such a way that it ignores outcomes.

In an address to the Fifth International Anti-Corruption Conference, the Hong Kong Commissioner made an observation which the Committee considers highly apposite to NSW:

> A sense of proportion must be maintained. Corruption prevention clearly is important, but must not be achieved at the expense of the client department failing to discharge its duties effectively[101].

In hearings, the general problem was put to Gary Sturgess, the former Director-General of the Cabinet Office in NSW, and the original architect of the ICAC:

> **Chairman:** It is said that the ICAC, in the context of looking at tendering and other things, is more concerned with process than with outcome. Can I get your comment on that?
>
> **Mr Sturgess:** You see that with a number of the ICAC inquiries . . . that is a focus on good government, and an interpretation of good government as meaning compliance with due process rather than a concern with producing effective outcomes.

In evidence, a number of particular instances was cited in which the ICAC's alleged concern with "process" over outcome, or, more likely, the fear of ICAC felt by various government bodies, resulted in greater expense and inefficiency for proponents, government bodies and the people of NSW.

For example, a government organisation judging tenders was given one proposal which offered an interesting new technology different from the one detailed in the organisation's tender documents. Communications with the proponent were complicated by the organisation's fear of the ICAC: it stipulated that it should always be the one to initiate telephone contact. If the proponent wanted to call, he first had to send a fax asking to be called by the agency. These complex procedures introduced some technical misunderstandings into the process, with the result that delays occurred.

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[101] *Empirical Knowledge on Strategies for Corruption Control*: A Reflection on the Hong Kong Experience, paper delivered to the Fifth International Anti-Corruption Conference, Amsterdam, February 1992.

The Committee is concerned about this emphasis on process at the expense of outcome. This is a clear instance of process crowding out commonsense. This sort of delay and uncertainty was not in the interests of the people of NSW, the government organisation concerned, or any of the other competing proponents.

Rightly or wrongly, some government bodies evaluating tenders appear to have a very strong perception that ICAC makes the process much less efficient and more costly. In other words, they believe that blame for delays like that above should be ascribed to ICAC rather than to their own fears. The Water Board cited an illustration:

> **Mr Wilson:** When we managed the submarine outfalls we had a very tough contract manager in place, and we had to manage that contract so that the contractor did not go broke, because their tender was very close to the margin and we managed that contract and we built incentives into it at various times, variations of the contract, and we constructed a major audit trail and documented everything and let our auditor see it and we let the Auditor-General see it, but I think if ICAC had been around then, I am not sure whether I would have taken the decisions I took. I would have said, "I will be before ICAC because it looks as if we have channelled some money to them". We actually came in under budget on the project because of the way we managed it, but if you look at bits in isolation, we paid contractors to stay in business at times to keep that projection going. Because I tended to be outcome-oriented I put my job on the line; I believed in getting the contract through. But I think I would have lost my job if ICAC had been there.

Whether this fear, that ICAC is more concerned with process than outcomes, is misplaced or not is another question. In evidence, the ICAC disputed the validity of that concern:

> **Ms Reed:** . . . he [Gary Sturgess] seems to have a sense that the Commission involves itself with process at the expense of outcome. That is to say, the process must be right, and hang the outcome. That certainly is not the way in which we operate . . . when we say we do not involve ourselves with the outcome, that means that we do not wish to be involved in making decisions which are operational decisions of government.

In actual fact, the ICAC has been very active in vetting contract tendering processes. Probably the best-known case is one involving the Water Board's own tenders for sludge treatment. Acting on a complaint from an unsuccessful tenderer, the ICAC made an investigation and found that the Water Board's Chief Economist had "acted improperly on many occasions in his dealings with [the successful tenderer]".[102] He had shown "clear favouritism, and consideration should be given to his dismissal or discipline".[103] The Water Board did in fact dismiss the Chief Economist.[104]

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[102] Report on the Independent Commission against Corruption on Investigation into the Sydney Water Board and Sludge Tendering, May 1992, p. 110.

[103] op. cit., p. iii

[104] He was reinstated on appeal.

Another case, which received attention in the press, was the tender for waste management at the Silverwater Prison complex, where the ICAC found that one company was unfairly favoured by the Department of Corrective Services.[105]

A third case investigated by ICAC involved the Department of Housing and its contract for the supply of carpets, where ICAC found that, although "no Department of Housing employee was on the take"[106], "the picture which emerges is one of woefully inefficient procedures for the letting and administration of a goods and services contract . . ."[107]

In view of the ICAC's determinations in cases such as these, it is at least understandable that government bodies like the Water Board are so wary of the ICAC that they allow process to overwhelm outcome, simply to forestall any possible ICAC criticism.

The Water Board considered that this concern with process over outcome could be seen in another area, that is, in ICAC's preference for putting virtually all projects out to tender instead of relying on known suppliers. The result of following this policy would necessarily be the putting out of frequent, short-term tenders over the development of long-term relationships with suppliers. The Water Board was critical about this policy and its effects:

> **Mr Wilson:** ICAC . . . would tend to say you must go for small contracts and give a lot of people a lot of opportunities. It is very costly for organisations to be always out to tender . . . in the main, it is becoming a very costly exercise in tendering, and we will need to avoid it by longer-term tenders.

The former Director-General of the Cabinet Office, Mr Gary Sturgess, agreed:

> **Mr Sturgess:** The view that you have to go for a general tender on all occasions, well, on most occasions, rather than a selective tender, and so on - I mean the sort of general principles that there has got to be some bias towards a general tender - that is a very expensive luxury. It costs a lot of money to go for a general tender all the time rather than isolating that section of the market that will have the expertise, and having enough so that there can be no suggestions of impropriety . . . unnecessary expense has been involved. People have felt because of the pressure of the ICAC that they had to go to those extra measures, and there was considerable expense involved.

Ms Ann Reed, Director of the Corruption Prevention Unit in ICAC, however, stated ICAC's position:

> **Ms Reid:** Why tender? It takes time, it costs money. You have to assess tenders, tenderers have to provide tenders and that costs them money, and that may lead to the sorts of things you have seen in Royal Commissions where you have people loading up theirs bids with payments to unsuccessful tenderers.

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[105] Report of the Independent Commission against Corruption on the Investigation into the Silverwater Filling Operation, February 1990, p. 10.

[106] Report on Investigation into Dealings between Homfray Carpets and the Department of Housing, ICAC, September 1990, p. 69.

[107] op. cit., p. 69.

> People say "I know the market, why both to tender? I can go to the right supplier or builder because I know who is there". Our experience is that you do not know the market unless you ask the market. They only way to find out who is interested and capable is to ask. There are fairly straightforward and simple processes to do that. To call for expressions of interest is a way to sort out the wheat from the chaff.

This is a genuine problem. The arguments *for* going out to public tender in most cases are: first, that there is nothing secret about the process and that there can be no disgruntled excluded tenderers; second, that it is a deterrent to the establishing of unfairly close relationships with one supplier; third, that in practical terms it obtains a better result by bringing out into the open previously unsuspected proponents and techniques, and fourth, that it usually results in a lower price.

The arguments *against* going out to public tender in most cases are first that it can be very expensive, both for the government and for the proponents and that this additional expense could well be reflected in the tender price; second, that it militates against the establishment of efficiently close relationships with suppliers, and third, that in most cases, the market is genuinely known to the government and previously unsuspected proponents and techniques simply do not exist.

The Water Board put it this way:

> **Mr Cameron:** We will always have trouble with people like ICAC because they are very nervous about long-term arrangements, selective tendering, negotiated tendering, and they feel more comfortable with the open tender. There is a role for long-term arrangements and negotiated tenders and for selective tendering.

Another instance where the ICAC 's concern with process is perceived to have hampered efficient operations is in the way the open tender requirement discourages innovation. Mr Wilson made the point that when a private company develops a proprietary new technology and proposes it to the Water Board, the Board can quite properly fund a small pilot plant in co-operation with that company, but cannot go any further to trial the new technology without going out to public tender. Of course, when the idea is out, the company which originally thought of it has lost its intellectual property. This threat discourages companies from proposing new technologies to the Board.

> **Mr Wilson:** There is not a clear direction from any government that you can take that next step up and trial something at that level. Then they say you have to go to competition. That restricts you. It has restricted us on many occasions. Having to go out to tender for all of that, and not release the confidential information . . . becomes a real issue. Unless we can get some clear direction - "Yes, we in the national interest or state interest believe that you should be able to go and work with a Memtec or CSIRO or IMA or any of those people and go to plant scale", we are not going to develop Australian technology.

The general principle, that process should not take priority over outcome, and that the workable solution is preferable to the blameless but ineffective course, was clearly highlighted by the Hong Kong Commissioner in his speech:

> In order to achieve the necessary good relationships at all levels in a client's organisation, which will enable the proposed changes to be accepted and implemented expeditiously and smoothly, it is necessary to be diplomatic and pragmatic. Primarily, it is necessary for any proposals made to clients to be viable and economical. Recommendations should take account of the difficulties which the client may experience; for instance, limitations on the number of staff, on training facilities and on resources of equipment and money. There is no point in proposing to a client a system which, although perfect in every way (including being perfectly free of corruption), cannot be afforded or achieved[108].

It must be remembered that the statutory mandate of the Hong Kong ICAC is different from its NSW counterpart. However the Committee believes that the NSWs ICAC's Corruption Prevention Unit could have greater regard to outcomes in the above sense without becoming involved in decisions which are operational decisions of government.

A second issue which arose during the Committee's inquiry related to the lack of relevant business experience of the ICAC Corruption Prevention Unit.

Many of the problems outlined above - the insistence on open tenders in most cases, the reluctance to sanction close relationships with suppliers, the over-readiness to discern favouritism in genuinely innocent cases - stem, in the view of some witnesses, from the lack of relevant business experience of the ICAC staff involved in corruption prevention, and the gulf between ICAC and its "clients", that is, the department and authorities involved in letting and administering contracts.

ICAC simply does not understand all the markets involved, the Water Board claimed:

> **Mr Wilson:** It is about understanding the business that you are in, and you need all of those sorts of people and all of those regulators, whether ICAC or Treasury or the Auditor-General, to do that . . . Public Works, RTA, Water Board, and power, and health, are big-dollar organisations. I submit that ICAC really does not understand those businesses. They're not the same business.

The Water Board also claimed that the staff of the ICAC was poor at liaising with their "clients", that is, bodies like the Water Board which needed their advice at critical times in tendering processes:

> **Mr Cameron:** The least helpful advice we got was from ICAC . . . We got better advice from the Commercial Service Group and advice from lawyers.

This is a pity, as originally as Mr Sturgess pointed out, "when we set up the ICAC it was envisaged that it would work together with teams from within the public sector".

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[108] Peter Allan, Commissioner, Independent Commission Against Corruption, Hong Kong, speech entitled *Empirical Knowledge on Strategies for Corruption Control: a Reflection on the Hong Kong Experience*, delivered to the Fifth International Anti-Corruption Conference, Amsterdam, February 1992, as quoted in the Committee on the ICAC, *Report on the Fifth International Anti-Corruption Conference 8 -12 march 1992 and the Hong Kong Study Tour 11 - 18 April 1992*, March/April 1992, p. 72.

According to Mr Sturgess, it was not surprising that ICAC was not client-oriented and did not understand ordinary business practice:

> **Mr Sturgess:** I do not think they are anywhere near good enough. The people they have recruited have essentially been reasonably low-level policy people from government departments who I just do not think have had the range of experience to grapple with the level of problems that senior management has to deal with. I do not think there is anywhere near enough expertise within the corruption prevention until down there.

The Chairman aimed to bring the facts to light in an exchange with Ms Ann Reed, Director of the ICAC's Corruption Prevention Unit:

> **Chairman:** Who are the people who work on these projects at ICAC and what are their qualifications?
>
> **Ms Reed**: The principal corruption prevention officers and senior corruption prevention officers.
>
> **Chairman:** Does any of them have a business background?
>
> **Ms Reed:** Some of them, including myself, have worked in both the public and the private sector, and I generally look for people with that kind of mix of qualifications.
>
> **Chairman:** At a sort of senior management level?
>
> **Ms Reed**: Not senior management. We are not paying people the worth of money that senior managers in the private sector would get.
>
> **Chairman:** Can you give us some examples of the sort of levels at which people worked in the private sector?
>
> **Ms Reed**: . . . Most of the people who have worked in the private sector have been in the small business area rather than at corporation level.
>
> **Chairman:** It is an area that you could perhaps get some recruitment from?
>
> **Ms Reed**: Most certainly, and certainly people apply. Unfortunately the people who apply from the private sector generally have such poor understanding of public sector management and ethics that it looks as though it is not smart proposition for us to take them on, because they are going to be somewhat of a liability.

It is clear that there exists some dissatisfaction with the business experience of the staff of the Corruption Prevention Unit. The Unit itself would probably be the first to claim that it needs relevant and solid expertise in large business organisations of both the private and public sector. However, at the salaries it can offer, it may be that it simply cannot attract the right staff.

> **Chairman**: What is the solution to that? Is it to recruit at higher levels? Is it to offer more money to keep people? Or is it to hire a different profile of person?

> **Mr Sturgess:** A mixture of those. Obviously if it is a unit which is perceived to be having an impact, then you will get better people.

A third issue was the relative emphasis placed on corruption prevention before the fact, as opposed to investigation after the fact. Until very recently, it could justifiably be claimed that the ICAC had been placing considerably more emphasis on investigation after misconduct had occurred than on preventing that misconduct in the first place. The Committee compared this propensity of ICAC's with the approach adopted by the Auditor-General.

Under s. 36(3) of the Public Finance and Audit Act, the Auditor-General is empowered to conduct investigations, hold hearings and require the productions of books, records and documents. In practice, however, the Auditor-General almost never uses this power, preferring to concentrate instead on preventing errors and breaches of good practice through the use of "engagement letters". Engagement letters inform auditees of the respective responsibilities and rights of the auditor and the auditee, the approach which the auditor will be taking, and the objectives of the audit. This approach is a positive one which concentrates on getting things right in the first place, rather than conducting public inquiries after things have gone wrong.

All of this is not to suggest that the ICAC should shift its primary focus from its very important investigative and hearing work to corruption prevention. Nevertheless the Committee believes that the ICAC can and should give a great deal more emphasis and devote far more of its resources to its statutory corruption prevention responsibilities.

The Committee is therefore pleased to see that recently the ICAC has been very recently increasing its emphasis on corruption prevention. In June 1993, it launched a new booklet entitled *Pitfalls or Probity:Case Studies in Purchasing and Tendering*. The Committee supports this trend and has made a number of recommendations to support it. These are listed together at the end of this section.

A further issue, which is related to the question of prevention, is the degree to which ICAC should be "pro-active", that is, the extent to which it should actively seek out agencies and propose a corruption prevention programme to them, as opposed to waiting until it is contacted. The Committee appreciates the limitations represented by the small size of the Corruption Prevention Unit, but believes that more could be done to bring corruption prevention principles directly to agencies. Again, the Committee has made concrete recommendations to this end.

Whether ICAC should carry that pro-active approach to the private sector is another question. While such approaches do not strictly form part of its functions as outlined in the Act, the Committee believes that they would be very useful. The private sector is often involved in ICAC investigations, either directly or peripherally, and the Committee believes that many key infrastructure players from the private sector would be willing to meet on a voluntary basis with the ICAC to discuss issues relating to infrastructure financing and contracting in the same way they were willing to meet as a group at Parliament House to discuss issues relating to contract confidentiality referred to in the next section. In that regard it may well be possible for ICAC to organise a series of corruption prevention seminars for key private sector organisations.

Possible Solutions

In the Committee's view, there are two principal solutions to most of the ICAC-related problems highlighted by this inquiry: improved liaison and better training. They are logically connected to one another.

A third possible solution was considered at length by the Committee and rejected. This would have involved the establishment of guidelines and rules governing ICAC-related matters in the tendering process and the relations between ICAC and its "client" departments. It is clear that as far as tendering is concerned, every department has its own rules, that there is a plethora of rules, and that there are no clear, across-government guidelines either for how to handle ICAC-related matters in the tender evaluation process, or how to liaise with ICAC. Indeed the point was forcibly made by the ICAC representative:

> **Ms Reed:** Many agencies have effectively their own rules. There is a proliferation of rules. People are not dealing with a fairly tight set of government rules where everybody knows the rules of the game.

In the face of this seeming confusion, it is certainly tempting to recommend that precisely what is missing be developed, that is, a set of firm regulations on how to deal with ICAC and how to handle ICAC-related matters in the tender evaluation process, to apply right across all arms of the government.

However, after considerable discussion, the Committee decided to adopt the approach outlined by the Chairman during evidence by the Water Board:

> **Chairman:** You can perhaps set down rigid rules for dealing with those situations, which inhibit in particular cases what commonsense might otherwise suggest be done, such as in the exchange of information. Another way perhaps is to put an emphasis on developing the individuals who are involved in the process so that you really are devolving to them the responsibility to behave properly as individuals, but leaving perhaps more to their discretion the precise nature of the exchanges that they have.

In the view of the Committee, improved liaison could be facilitated by one simple means. This would be the publication of a document setting out the broad principles of corruption prevention. The germ of this document is already to be found in the booklet published by ICAC in June 1993 entitled *Pitfalls or Probity: Case Studies in Purchasing and Tendering* referred to earlier. This booklet discusses a series of case studies, and at the end of each case study sets out a number of principles which that study illustrates. The first step to producing the broad principles document recommended by the Committee would be to list the various principles all together, and then to organise them along appropriate conceptual lines. These broad principles would of course not represent strict guidelines.

The second solution lies in training. In the Committee's view, the training programmes that ICAC would have to run would have to be heavily "client-specific". In other words, ICAC would have to get to know each client intimately, understand its specific problems and requirements, design the training programme especially for that organisation, and, in general, become much more "client-oriented". This is a labour-intensive and demanding

task, but the alternative, of coming up with the blanket prescriptions, is quite unsatisfactory and has led to all sorts of inefficiencies in practice. The example cited above would probably have been avoided if the ICAC had been meeting the relevant officials of the government frequently and regularly, and had, before the event, run training programmes for them.

In its 1992 annual report, the ICAC said:

> Many government agencies have requested advice from the Corruption Prevention Department about tendering, contracting out, privatisation, use of public resources, declarations of private interests, and a host of other issues. Occasionally it is necessary to decline the request because the process is already too far advanced. A careful distinction needs to be made between comment on the process and involvement in the outcome. The Commission is generally willing to do the former but never the latter.
>
> The opportunity to provide advice on a wide range of public sector processes is one of the most valuable ways of expanding the experience of corruption prevention staff and using the experience to benefit others.

Reconciling all these issues, the Committee believes that the ICAC and its clients can and should learn from each other in a mutually beneficial way. It seems to the Committee that without compromising itself by involvement in outcomes, the ICAC can do a great deal to promote the exchange of experience and development of principles through regular meetings with key public sector players in the major contract-letting agencies.

Outlined later in this report is an account of the workshop organised by the Committee to discuss contract confidentiality. Representatives from the private sector, including lawyers, financiers, contractors, engineers, heads of public authorities, and the Auditor-General met at Parliament House, where the Committee was surprised to learn that such a meeting had not been held before. It seems to the Committee that without jeopardising its position in relation to any specific project, the ICAC Corruption Prevention Unit could participate in discussions with such a group to consider tendering issues in general terms, which would be beneficial all round.

As the ICAC itself observed in its 1992 Annual Report,

> While the Commission has greatly expanded its knowledge in corruption prevention, we are still on a learning curve where new issues will continue to surface and new solutions must be explored[109].

Whilst the Committee heard much criticism from both the public and private sectors about the role of the ICAC and its impact on infrastructure projects, there is no doubt in the Committee's mind that the ICAC has a crucial role to play.

This can be no better illustrated than by reference to recent Italian experience where massive fraud and corruption scandals have plagued infrastructure projects at all levels.

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[109] p. 58.

Indeed it is no exaggeration to say that these scandals have rocked Italy's political, social and financial fabric to its very foundations.

Equally, however, the Committee is concerned that the actual, or more likely perceived concerns about the ICAC by public and private sector players may inhibit infrastructure development and financing in New South Wales.

At the end of the day, the question is one of balance, and the Committee believes that the balance should move more towards corruption prevention and a co-operative approach. This approach should address probity issues in a general and regular way before in specific cases they emerge as problems for the ICAC's investigative arm.

Clearly it would be naive to assume that seminars would put paid to the corrupt conduct, but equally clearly in the Committee's view, there is a lot of room for the ICAC to play a more co-operative and pro-active role in providing advice and promoting best practice while at the same time gaining a closer understanding of the pressures and needs of those involved in infrastructure projects.

RECOMMENDATION 39

That ICAC prepare a booklet setting out a consolidated list of broad principles for the contract tendering process. This booklet should draw on the principles enunciated in ICAC's publication *Pitfalls or Probity*, but should not represent rigid guidelines.

RECOMMENDATION 40

That ICAC set up monthly liaison meetings with the relevant officials of the major contract-letting government bodies, with the aim of becoming familiar with each body's specific problems and requirements in the tendering process.

RECOMMENDATION 41

That, based on the information collected at these meetings, the ICAC design client-specific training courses to be followed by the relevant officials. These would deal, among other things, with selective tendering, long-term tendering, and the way in which innovation can be encouraged without sacrificing fairness.

That all senior officials of the client body attend these courses, as part of their SES requirements.

RECOMMENDATION 42

That ICAC conduct a series of corruption prevention seminars for key private sector organisations.

RECOMMENDATION 43

That before undertaking this liaison and training programme, ICAC organise a workshop, to be attended by major contract-letting organisations, to hear their concerns and to air its own.

RECOMMENDATION 44

That ICAC re-evaluate its priorities when hiring staff for the Corruption Prevention Unit, and recruit more staff with close knowledge of the operations, rather than the policy, of one or more of the major contract-letting government organisations, and with experience in the private sector.

4.2 CONFIDENTIALITY OF INFRASTRUCTURE CONTRACTS

BACKGROUND

A recurring theme in this inquiry was the difficulty of achieving a balance between two sometimes contradictory requirements: on the one hand, the public's and the Parliament's right to know the details of an infrastructure contract between the government and the private sector, and on the other, the need to protect the private sector's commercial confidentiality.

By way of background, the Committee's initial interest in this issue was sparked towards the beginning of the inquiry by a number of early influences:

- the paper it was asked to prepare for the 1992 meeting of the Australsian Council of Public Accounts Committees, which was entitled: "Does the public's right to know outweigh the need for commercial confidentiality?"

The Committee extensively examined the issue in that paper from a number of points of view, and developed several compromise solutions.

- the appearance in 1992 of the *Report of the Royal Commission into Commercial Activities of Government and Other Matters in Western Australia.*

While this report emerged from the very different context of Western Australia, the Committee nevertheless perceived that it highlighted several relevant issues and proposed a number of interesting and innovative principles. Perhaps the most important of these principles was that existing legal provisions protecting commercially valuable information were acceptable *only provided that other accountability requirements were satisfied*, among which were full and free access by the Auditor-General to all commercially sensitive information, and a requirement on a minister to show to Parliament the full reasons why he proposes to deny it any information.[110]

As the inquiry progressed, further developments, still of an indirect kind, stimulated the Committee's interest in the question of confidentiality. An important influence was:

- the appearance of a contentious article in the Sydney Morning Herald of 9 January 1993 entitled "The Tollway Club".

This article made a number of unsupported allegations about the two main highway contracts signed over the past three years between the Government and the private sector. The Committee's initial view was that it might have been possible to pre-empt some of

[110] The Report of the Royal Commission into Commercial Activities of Government and Other Matters in Western Australia, 1992, Section 2.5.

these unsubstantiated allegations by a selective disclosure of certain elements of the infrastructure contracts it discussed.

However, the most significant single spur to the Committee's interest in the subject came later in the investigation, and directly, rather than indirectly, affected the Committee's conduct of the inquiry. This was:

- the difficulty the Committee initially experienced in obtaining details of some infrastructure contracts between the government and the private sector.

The difficulty of obtaining these contracts led the Committee to consider how to grapple with the whole problem of achieving a balance between commercial confidentiality, on the one hand, and the public's, and the Parliament's right to know, on the other.

The legislation provided some, but not comprehensive, guidance.

The broad need to protect commercial confidentiality is set out in the *Freedom of Information Act 1989*. Section 32(2) provides that

> an agency shall not give access to a document to which this section applies (otherwise than to the person concerned) unless the agency has taken such steps as are reasonably practicable to obtain the views of the person concerned as to whether or not the document is an exempt document by virtue of clause 7 of Schedule 1.

Clause 7 of Schedule 1, in its turn, provides that:

> 7. (1) A document is an exempt document:
>
> (a) if it contains matter the disclosure of which would disclose trade secrets of any agency or any other person; or
>
> (b) if it contains matter the disclosure of which:
>
> (i) would disclose information (other than trade secrets) that has a commercial value to any agency or any other person; and
>
> (ii) could reasonably be expected to destroy or diminish the commercial value of the information; or
>
> (c) if it contains matter the disclosure of which:
>
> (i) would disclose information (other than trade secrets or information referred to in paragraph (b)) concerning the business, professional, commercial or financial affairs of any agency or any other person; and
>
> (ii) could reasonably be expected to have an unreasonably adverse effect on those affairs or to prejudice the future supply of such information to the Government or to an agency.

> (2) A document is not an exempt document by virtue of this clause merely because it contains matter concerning the business, professional, commercial or financial affairs of the agency or other person by or on whose behalf an application for access to the document is being made.

It can be seen that the ambit of the Freedom of Information Act (FOI Act) is very broad, in that any item that "has a commercial value to any agency or any other person" may not be disclosed without prior consultation with that agency or person. It follows that it is the views of "that agency or person" which play a significant role in determining whether information of a commercial nature may be released.

The Act does not of course specify which items in infrastructure contracts should be released and which not. Another deficiency is that there exist no guidelines or directions from the government specifying which details the public may know, and which not.

From the outset, the Committee's initial view was that it was unacceptable that all infrastructure contracts between the government and the private sector should remain secret to the extent envisaged by the FOI Act. The Committee believes that there are certain items in the contracts which could be released without prejudicing commercial confidentiality, which the public and the Parliament would have a right to know, and which are not presently made public under the FOI Act. Moreover the Committee felt that, to the extent some items are already capable of being revealed under the FOI Act, it is unacceptable that the public be put to the expense, delay and inconvenience of applying for them under the FOI Act.

Thus the Committee's view from the start was essentially a middle-of-the-road one: it did not favour the view held by some that the contracts should be released in their entirety to public scrutiny, nor did it favour the level of secrecy imposed by the FOI legislation.

However, although the Committee's general position was established, it was clear that further investigation was needed on precisely what those items of infrastructure contracts which could be released actually were.

Since the FOI legislation did not provide detailed guidance, the Committee decided to pursue the question of which items could be disclosed and which not, one step further, to the private sector itself. The legislation provided support for this approach, since, as discussed above, it clearly implied that it was the private sector which ultimately determined what was commercially sensitive and what was not.

The Committee therefore met with representatives from the Australian Council for Infrastructure Development (ACID) to discuss, in part, the issue of contract confidentiality.

In view of the difficulties it had experienced in obtaining the F4 and the F5 contracts, the Committee was surprised at the relaxed attitude to confidentiality evident at that meeting. The consensus, submitted in writing to the Committee at a later date[111], was that "the

[111] Letter to PAC from ACID Chairman, Mr M. Perry, dated 7 April 1993.

private sector does not see transparency as one of the key issues", although there were certain matters which should nevertheless remain confidential.

To confirm that somewhat unexpected view, and to obtain the benefit of a full and free discussion among all interested parties, the Committee resolved to hold a Workshop on Confidentiality to which senior executives from both private and public sectors would be invited.

WORKSHOP ON CONTRACT CONFIDENTIALITY

The Workshop took place on 2 April 1993. Those present included the chief executives, or senior representatives in Australia, of the largest private sector providers of infrastructure; the managing directors of the largest public sector agencies responsible for infrastructure; the general managers of other interested organisations in the public and quasi-public sectors; and senior bankers and lawyers involved in infrastructure provision. It was made clear at the outset that only BOOT, BOT or BOO projects were to be discussed, not the huge range of the ordinary contracts which the public sector routinely signs with private companies for the provision of goods and services.

According to the participants, this was the first time in New South Wales that such a comprehensive, high-level group had ever been brought together. The Committee determined that to obtain the full benefit from this unique meeting, discussion should be as free and untrammelled as possible, and that observers should therefore be excluded.

The participants had been asked to provide short written papers for circulation before the meeting. These furnished an interesting cross-section of views.

At one end of the spectrum was the view of a senior lawyer attending, who stated in his firm's submission:

> Provided this tender process [public calls for tenders, following of timetable, press release on signing] is followed in an open manner, we do not see anything inherent in BOOT projects which justifies using a basis other than the FOI Act for determining what information should be disclosed to the public. In particular, we do not believe that the interests of public disclosure are more important where BOOT projects are concerned than in other circumstances.

Agreeing with this position, Pacific Power argued that:

> provided the proper controls are in place to allow open competitive entering on a fair basis, and the economic evaluation of the project shows it to be viable, this is all that should be required, having regard to the powers of the Auditor-General, PAC and ICAC to appropriately examine particular cases.

A contrary view was provided by the Auditor-General himself:

> On this basis [that risks can be passed to the government and cannot be conveniently summarised] a strong argument can be mounted that such contracts should not be privileged or otherwise be able to escape close scrutiny. By

> protecting such contracts from scrutiny, it can be argued that the Government that pledged the community's resources could avoid accountability for its current actions and for the possible future consequences of those actions.

Several of the submissions argued that too onerous disclosure requirements would discourage the private sector:

The Water Board stated:

> To reveal full details would make tenderers far more cautious in their bidding, and [there would be a] likelihood of bringing challenges from unsuccessful tenderers after the event.

Mr Mike Perry, Director of Infrastructure Development Corporation, provided an interesting slant on this point:

> As many, if not most, of these projects require specialist operators, (i.e. power stations, hospitals etc.) and many of these operators are from overseas it may be that such requirements could have an impact on the ability of such operators to be involved in these projects....if such transparency rules applied in Australia and they were to inhibit involvement of such operators this could be seen as a very retrograde step.

Valuable though these points were, they did not really help the Committee in forming a view as to which items could be disclosed and which not. More discussion on specifics was needed for there to be a genuinely useful, concrete outcome from the Workshop, rather than just the reiteration of a few possibly contradictory general principles.

The Treasury's submission had provided a few ideas on specifics:

> It is proposed that the following should apply:
>
> - contracts and agreements with the private sector should be confidential to government;
> - agencies should be obligated to prepare contract summaries and impact statements that disclose the following:
>   - the key elements of the contractual arrangements;
>   - the results of cost/benefit analysis
>   - the risk sharing in the construction and operation phases, quantified separately in net present value terms (where possible), and specifying the major assumption involved;
>   - significant guarantees or undertakings entered into with an estimate of either the range, or the maximum amount, of any contingent liability;

- the future transfer of assets of significant value to government at no or nominal cost, including details of the right to receive the asset and the date of the future transfer.

The statements would not disclose:

- cost structures for the private sector or profit margins;
- matters having an intellectual property characteristic; or
- any other matters where disclosure would commercially disadvantage the contracting firm with its competition.

The Public Finance and Audit Act requires the disclosure of contingent liabilities and commitments in the financial statements of agencies that are contained in annual reports. It does not require the extent of the other information outlined above.

One member of Parliament had provided the Committee with a submission outlining a few specifics he considered needed to be known in relation to the highway contracts:

[we need to know], for example:

- whether and how the toll operators can vary their price
- is there some form of price capping mechanism in line with the....policy not to increase charges above the CPI?
- has the government made any financial contribution or subsidy to ensure viability?
- what control does the government have in relation to poor or non-performance....?
- what criteria were used in determining the various cost/benefit relationships of each tender bid?
- when the roads are transferred back to government at the end of the contract, what are the contractual obligations in relation to the maintenance standards and condition of the road at that point in time?

The senior lawyer cited above also provided some specifics. He had no problem with the provision of the following information:

- the risks and liabilities the government has agreed to assume;
- the price to the public of essential services, and the mechanism for changing those prices;
- the assets created by the deal and the condition they will be in when the government gains control;
- the identity of the successful tenderers.

He did have a problem with the provision of more sensitive information, including, principally whether the deal struck was in the best possible interests of the people of the

State. He said that addressing this question was the major problem as it would involve undue disclosure of the bids of competing tenderers.

The submission of one large private sector road-building consortium was admirably succinct on the matter of specifics:

Topic	Disclose in broad terms	Disclose specific details
Allocation of risks	Yes	No
Price payable by public	Yes	Yes
Price escalation provisions	Yes	No
Quality of service	Yes	Yes
Assets to be created	Yes	Yes
Condition at handover	Yes	Yes
Liabilities created	Yes	No
Effects on third parties	Refer to EIS	-
Protection against excessive profits	Yes	No
Analysis of alternatives not adopted	Refer to EIS	-
Identify contracting parties	Yes	No

It was this last submission which appeared to be most interesting to the Committee. In the submissions, and during the workshop itself, representatives from outside the private sector were arguing strenuously against more disclosure than the Act allowed. Yet here was a very senior representative from the private sector arguing that disclosure of several key elements would not meet with objections from him.

During the workshop, another private sector representative agreed with this general approach, saying that Treasury's proposals were eminently reasonable. Yet another concurred, saying that contractors were generally willing to be open, and that disclosure was a secondary issue to them. However, a third very senior representative said that, while he agreed that Treasury's proposals about disclosure were acceptable, he questioned where the line would be drawn as to detail.

This theme recurred throughout the workshop. The private sector representatives generally exhibited a much greater readiness to see key elements of the contracts disclosed than did those from outside the private sector. It should be stressed here that in expressing their reluctance to see greater disclosure, the speakers from outside the private sector appeared merely to be attributing views to the private sector which the Committee was most interested to note the private sector did not appear to hold in actual fact.

However, one participant made what the Committee considered to be a very valuable point:

> The main danger with releasing contract details is how it may used. In volatile political environment it may be used against the proponents for no reason to do with the merits of the project....if every contract detail went through Parliament and was used for reasons other than an objective assessment of the deal itself, we would jeopardise our good international reputation.

In the next part of this section, the Committee makes specific proposals as to which elements of the contract should be disclosed, so as to help pre-empt this problem.

Three other aspects were also canvassed in the submissions and at the workshop: the timing of any disclosures, the need for government to issue guidelines on the matter of disclosure, and the need for an "angel" or a "committee of angels" to oversight the tender process and vouch as to its probity.

The timing of disclosure was critical, asserted several of the participants. The lawyer referred to above provided an entire section on timing in his submission. He said that:

> The appropriate timing for disclosure of otherwise confidential information could be:
>
> - when tenders close but before the contract has been awarded, some details would be released; and
>
> - within 90 days after the contract has been awarded, the remaining details (either in respect of all tenders or the successful tender only) specified in the invitation to tender would be made public.

The former representative of the Rouse Hill Consortium also differentiated among the items which may be released at different stages of the process. He pointed out that confidentiality during the tendering process is essential for various reasons:

- to ensure that the project, having been identified as being both desirable and necessary, proceeds;

- to ensure that there is minimal interference by minority self-interest groups;

- to protect commercially sensitive information and property.

However, he said that the problems arise at the execution stage, before the contract is actually signed. If details are released at that time, then "others will have the ability to ascertain proprietary confidentialities, and [the] competitive practices of the successful tenderer."

At the workshop itself, one of the private sector representatives made the same point:

THE COMMITTEE'S VIEWS

After considerable discussion, the Committee came to a view on virtually all the matters raised in the workshop, the submissions and other evidence and data at its disposal. The Committee's first preference is for full disclosure of contracts. However, it recognises that there are commercial in-confidence concerns about disclosing parts of some contracts. In considering these matters, the Committee felt that the following issues needed addressing:

- Which points of information about contracts should be disclosed to the public and the Parliament, and which should remain confidential?
- At what point should any disclosures be made?
- Who should make these disclosures?
- In what form should the disclosures be made?
- How is adherence to the Freedom of Information Act to be ensured?
- Should the government issue guidelines on disclosure of information relating to contract confidentiality?
- If so, should these be general guidelines applicable to all cases, or separate ones issued for individual projects?
- Should there be a "white knight" to observe the process independently?
- Should this "white knight" be an individual or a committee?
- Should he/she/they certify only that the tender process was conducted with probity, or, as well, that the deal struck was in the best possible interest of the people of the state?

To take these in order:

- **Which points of information about contracts should be disclosed to the public and the Parliament, and which should remain confidential?**

The Committee considers that the details the public has a right to know include the following:

- the full identity of the successul proponents, including details of cross-ownership of relevant companies;
- the duration of the contract, including details of the future transfer of assets of significant value to government at no or nominal cost, and details of the right to receive the asset and the date of the future transfer;

- the identification of any assets transferred to the contractor by the public sector;
- all maintenance provisions in the contract;
- the price payable by the public;
- the basis for changes in the price payable by the public;
- provisions for renegotiation;
- the results of cost-benefit analyses;
- the risk-sharing in the construction and operation phases, quantified separately in NPV terms (where possible), and specifying the major assumptions involved;
- significant guarantees or undertakings, including loans, entered into or agreed to be enteed into, with an estimate of either the range, or the maximum amount, of any contingent liability;
- any protection in the contract against excessive profits;
- any other information required by statute to be disclosed to the Australian Securities Commission and made available to the public;
- to the extent not covered above, the remaining key elements of the contractual arrangements.

The statements would not disclose:

- the private sector's internal cost structure or profit margins
- matters having an intellectual property characteristic;
- any other matters where disclosure would substantially commercially disadvantage the contracting firm with its competition.

In arriving at this list, the Committee had regard principally to two submissions, those from the road-building consortium and from the Treasury, both of which have been cited above. The Committee considered it significant that the private sector proponents were agreeable to the release of the details they cited, and was mindful of the general tenor of the contributions from the private sector participants, that they were relaxed about secrecy and did not give it top priority in their dealings with the government.

To examine each of these items:

- *The full identity of the successful proponents, including details of cross-ownership of relevant companies*

The private sector, for example the road-building consortium, had no problem with the public knowing who the successful proponents might be, and the Committee believes this is important information which the public has a right to know because it reveals who has an interest in major facilities used by the public.

- *the duration of the contract, including details of the future transfer of assets of significant value to government at no or nominal cost, and details of the right to receive the asset and the date of the future transfer;*

These details the Committee did not consider to be unduly controversial. There could be nothing in the disclosure of these details which would commercially disavantage a firm. Indeed, they should have been part of the original tender documents. This disclosure is recommended in the NSW Treasury's submission.

- *all maintenance provisions in the contract;*

It is clear that the public has a right to know, with these very long-term infrastructure contracts, the condition in which the facility must be returned to the state at the expiry of the contract. Information on this item would, again, not disadvantage a firm, and would have the benefit of allaying public suspicion that the contractor will allow the asset to run down in the last years of a lease.

- *the price payable by the public;*

- *the basis for changes in the price payable by the public;*

The price payable by the public should obviously included among these details. The basis for the changes in this price also need to be known. They might include inflation, and changes in the level of patronage of the service. They are included in the submission of the road-building consortium.

- *provisions for renegotiation*

This should not be a controversial item. Most contracts have these provisions, and there could be no proprietary information involved here.

- *the results of cost-benefit analyses;*

These suggestions were made by both the road-building consortium and the Treasury, and the Committee concurs with them. In some cases, notably the Harbour Tunnel, some cost-benefit analyses were not provided to the public and speculation and allegations were rife; in some cases, the analyses, carried out by private firms, were deficient; in others, there was no analysis of alternatives carried out at all. The Committee appreciates the risk of issuing faulty or incomplete analyses, which can, as one participant perceptively

pointed out, be misused for political ends. However, it considers that over-riding that risk is the claim of the public to know what the alternatives were.

- *the risk-sharing in the construction and operation phases, quantified separately in NPV terms (where possible), and specifying the major assumptions involved*

This is a central recommendation, which the Committee has taken from the Treasury's submission, and with which it agrees. However, more study needs to be done on how to disclose the allocation of risk without giving away proprietary information. Risk sharing disclosures are found in both the NSW Treasury's submission and that of the road-building consortium.

- *significant guarantees or undertakings, including loans, entered into or agreed to be enteed into, with an estimate of either the range, or the maximum amount, of any contingent liability;*

Very few participants would have disagreed with this provision. These represent the State's guarantees, made on behalf of future taxpayers. In any case, SAC4 provides that these must be disclosed, and it is included in the NSW Treasury's submission.

- *any protection in the contract against excessive profits.*

This was a proposal from the road-building consortium. The company did not consider that details of this protection should be published, that is dollar and cents amounts, and the Committee concurs.

- *any other information required by statute to be disclosed to the Australian Securities Commission and made available to the public.*

- *to the extent not covered above, the remaining key elements of the contractual arrangements.*

This draws from the NSW Treasury submission as a catch-all of other key elements not caught by the exceptions referred to below.

The exceptions broadly agreed by public and private sector workshop participants alike as being most significant are drawn from the NSW Treasury proposal with some variations as follows:

. the private sector's internal cost structure or profit margins;
. matters having an intellectual property characteristic;
. any other matters where disclosure would substantially commercially disadvantage the contracting firm with its competition.

The first two points are widely recognised as ones the disclosure of which could cause substantial commercial disadvantage. They are therefore recommended as being capable of exclusion on the public policy basis that to fail to provide them would discourage private participation in infrastructure development and therefore be a bad thing. Moreover these exemptions are generally recognised in the FOI legislation, and in general terms

were accepted on a bipartisan basis by the Public Accounts Special Committee in terms of the way in which it dealt *in camera* with some aspects of the Port Macquarie hospital contracts.

At the same time, the Committee is concerned to ensure that there is wider disclosure than that which occurs under the FOI Act in infrastructure contracts, and believes that its proposals achieve this in two ways:

. the specific nature of the key elements of the proposed contract summaries;
. the narrower ambit of the exemptions.

Moreover, the fact that the summaries would be made public without the expense, delay and inconvenience of making a FOI application is also seen as a plus—it being without prejudice, of course, to a FOI application in the usual way.

- **At what point should any disclosures be made?**

The Committee agrees that it is unwise, and probably illegal, to disclose any of the above matters during the tendering phase, before the contract is finally signed. Probity and suitability of choice can be ensured by other means than risking the release to competitors of proprietary information before the contract is finalised. The Committee proposes these other means later on in this section.

- **To whom should these disclosures be made?**

Various possibilities were canvassed by the Committee: the agency, the Minister, the Parliament, the "white knight or knights", the Public Accounts Committee, and the Auditor-General. In the end, after considerable discussion, the Committee considered that the most credible source for these disclosures should be the Auditor-General, or his nominee, as discussed below.

- **In what form should the disclosures be made?**

While BOT, BOOT and BOO contracts are usually very long and complex, the ideal is that they be released in their entirety. However, a summary in plain English, including the elements listed above and vetted by the Auditor-General, would no doubt be more easily understood by the public at large.

Indeed, the length and complexity of such contracts were experienced at first hand by the Committee during the Public Accounts Special Committee hearings into the Port Macquarie hospital, where a decision was made early on to concentrate on the Service Agreement to ensure that the Committee's task would be completed within a reasonable time frame.

- **Should the government issue guidelines?**

The Committee believes that general guidelines would fill a gap very evident at present. The Committee's own task would have been made far easier if there existed directions on which items of information could be released and which could not. It would have been much simpler to obtain the infrastructure contracts than it was.

The private sector would also welcome guidelines. Right from the beginning of the tender process, it would already know which items were likely to be released to the Parliament and the public, and when, and which would remain confidential. Speculation, suspicions and unfounded allegations would largely be pre-empted, resulting in greater predictability for the private sector and an easier life generally.

Government agencies would also benefit from the existence of guidelines. At present, they sometimes appear to be mounting exaggerated efforts to protect information which the private sector turns out to be quite happy to release. Notions of what to release and what to protect differ widely among agencies (the Committee, for instance, obtained without trouble an edited version of the Junee Prison Contract but had some difficulty obtaining the F4 and F5 contracts), and there does not seem to be any readily available objective document to turn to for direction.

The Premier's Department would be the most suitable source for the guidelines, with its experience of preparing comparable documents in connection with consultants and other engagements by agencies.

- **Should these guidelines be generally applicable, or separately prepared?**

The Committee believes that general guidelines would normally be sufficient, although Premier's Department should be prepared to assist in particular cases if requested.

The Committee considers that guidelines ought to be prepared by the Premier's Department and given to all proponents at the start of the tender process. Proponents would be told that these were the specific items of information which would be released about the contract, and that they would be released after the contract was signed. Proponents would also be told about the more general provisions of the FOI Act.

The preparation of the contract summaries would, however, be made against specific criteria capable of being independently verified by the Auditor-General or his nominee.

- **Should there be a "white knight or knights"?**
- **Should this be an individual or a committee?**
- **Should he/she/they certify as to the accuracy of the contract summary, that the tender process was conducted with probity, and/or that the deal struck was in the best possible interest of the people of the State?**
- **To whom should that person or person report?**
- **Who should pay that person or persons?**

After considerable discussion, the Committee adopted the following solution:

For all privately-financed projects above $5 million, the agency should, within 90 days after the contract is signed, prepare a summary of the main points of the contract referred to above, unless the contract has been disclosed in full in the meantime. Full disclosure of contracts is not unknown in New South Wales, as the cases of the Harbour Tunnel and the Monorail show.

The summary of main points should be vetted for accuracy by the Auditor-General or his nominee, who should also have full access to the primary contract documents, regardless of commercial sensitivity, for that purpose. The cost of this vetting should be paid for by the relevant public sector agency.

The Auditor-General should table a copy of the summary in Parliament. If he is not satisfied with the accuracy of the summary, or has experienced difficulty in obtaining information, he should refer the matter to the Public Accounts Committee. Plainly, the issue of disclosure, of commercial confidentiality and of the scope of the FOI Act and the proposed contract summaries have the potential to present particular difficulties, and the Committee would look to obtain practical and informed feedback from the Auditor-General to see if its proposals warranted further change.

These proposals are without prejudice to existing disclosure requirements in the FOI Act.

The Committee has some difficulty with the proposition that any of the authorities of State such as the ICAC or Auditor-General should be required to broadly certify that a tender process was conducted with probity or is in the best interests of the State. In that regard, whilst the Committee believes that it is important for these bodies to provide advice and liaison, as discussed earlier, they should not be put in a position of having to provide an opinion on probity which could later be called into question or referred to them for inquiry. In short, it is seen by the Committee as a major potential conflict of interest.

On the second matter, the Committee believes that whether a deal is in the best interests of the State raises policy and political issues which should not be dealt with by such authorities.

Broadly speaking, the Committee also believes that it is unwise for a parliamentary committee to be given such a task, as both the ICAC and the Auditor-General themselves are responsible to Parliament and both are oversighted by parliamentary committees. More specifically, questions of probity may raise technical or legal issues not best addressed by a parliamentary committee at first instance in every case. Moreover, the question of whether the deal is in the best interest of the State could, in such a forum, create endless arguments given the highly charged political nature of many projects—the Public Accounts Committee's experience with the Port Macquarie hospital contract being a case in point.

Put another way, probity and best interest questions will inevitably be debated in Parliament in any event, as illustrated by the Port Macquarie hospital example, and at the end of the day a parliamentary committee will not be able to agree on what the Parliament itself cannot. That said, the Public Accounts Committee will of course attend to any task the Parliament directs, and if the Parliament believes that the Committee can assist in vetting an infrastructure proposal or in considering a related policy issue, so be it, but it is not the Committee's preferred option.

As discussed above, the vetting of contracts before they are awarded creates other problems where second guessing by outsiders will make it difficult to close the deal at all.

In other words, closing the deal necessarily involves delegation which should not be second guessed.

The agency itself may well wish to appoint an independent overseer or a white knight of its own. In that regard the use of independent financial, legal and business expertise in the Bennelong Car Park example referred to earlier is a case in point. The Committee would encourage this course, on the understanding that such overseers should not be viewed as a substitute for due process, the oversight of which may involve the Courts, the ICAC and/or the Auditor-General. On the other hand, the white knight might well be able to turn to the ICAC during the process for advice on corruption prevention matters, and the voluntary disclosure of a report by such an overseer attesting to the probity of the deal might be a useful addition to the contract summary.

In a nutshell then, the Committee proposes that in addition to FOI requirements, a number of specified matters be disclosed in contract summaries within 90 days of the signing of the contracts, such summaries to be vetted by the Auditor-General who has unlimited access to the primary contract documents for that purpose. In the event of the Auditor-General striking a difficulty, he can refer the matter to the Public Accounts Committee.

In summary, the Committee resolved to adopt this proposal bearing in mind the following:

- Whilst complete disclosure is the ideal, workshop participants and the Public Accounts Committee through its Port Macquarie hospital experience recognise the need to protect commercially sensitive information, and that it is in the public interest to do so if it is accepted that private participation in infrastructure development is to be encouraged.

- Nevertheless, privately funded infrastructure projects of the BOT type are so significant to the State in terms of possible financial liability that, short of the ideal of full disclosure, it is in the public interest that there be specific provision made for disclosure of the main points in contract summaries in addition to disclosure required by FOI legislation.

- In this way the agency is held accountable for its handling of the contract and the result it has obtained by the fact that the relevant details of the contract, including cost-benefit analysis, are being published in summary and will form the basis of public scrutiny of the deal and of any debate in the political arena on the merits or otherwise of the deal;

- Thus there is a significant but not excessive amount of scrutiny of the process. In that regard, the Committee believes that the negotiation of such deals by public servants necessarily involves significant delegation and acceptance of responsibility, and that too many levels of scrutiny, especially second guessing shortlisted tenders by outside committees or agencies, wouuld clog up and severely hinder the deal making process, thus driving off private investment.

- The knowledge of the public servants involved that key details of the deals they negotiate will be made public for later scrutiny or debate is itself a powerful check and incentive to achieve the best result for the taxpayer.

- Whilst independent white knights should be engaged to vet deals for probity and on legal and technical issues and to make their reports public, this should not be seen as a substitute for independent oversight by the ICAC, the Courts or the Auditor-General.

- As the ICAC, the Courts or the Auditor-General may have probity questions referred to them at any time for consideration under their respective statutory powers, it would appear a serious potential conflict of interest to require them to be involved in vetting probity in any pro-active way.

- Statutory bodies such as the ICAC should not be required to get involved in considering whether a deal is in the best interests of the taxpayer, which really concern political or policy issues.

- As the Port Macquarie experience shows, these issues are not really ones for parliamentary committees either, precisely because of the deep divisions many such projects create in Parliament where such issues will be raised any way.

- Access by the Auditor-General to the primary contract documents to vet the contract summaries, the Committee believes is a significant step forward in accountability which will in a very real sense promote probity and the best possible deal for the public without compromising statutory officers or driving off private investment.

RECOMMENDATION 45

That the Premier's Department prepare guidelines, in generally applicable terms, on the elements of BOT-type contracts which should be included in the summaries prepared by agencies and made available to the Parliament and the public.

RECOMMENDATION 46

For all privately-financed projects above $5 million, the agency should, within 90 days after the contract is signed, prepare a summary of the main points of the contract, unless the contract has been disclosed in full in the meantime.

RECOMMENDATION 47

The Committee believes that the elements in the summaries should include:

- the full identity of the successful proponents, including details of cross ownership of relevant companies
- the duration of the contract, including details of future transfers of assets of significant value to government at no or nominal cost and details of the right to receive the asset and the date of the future transfer
- the identication of any assets transferred to the contractor by the public sector
- all maintenance provisions in the contract
- the price payable by the public
- the basis for changes in the price payable by the public
- provisions for renegotiation
- the results of cost-benefit analyses
- the risk sharing in the construction and operational phases quantified in NPV terms (where possible) and specifying the major assumptions involved
- significant guarantees or undertakings, including loans, entered into or agreed to be enteed into, with an estimate of either the range, or the maximum amount, of any contingent liability;
- to the extent not covered above, the remaining key elements of the contractual arrangements
- any other information required by statute to be disclosed to the Australian Securities Commission any made available to the public;
- to the extent not covered above, the remaining key elements of the contractural arrangements.

The statements would not disclose:

- the private sector's cost structure or profit margins
- matters having an intellectual property characteristic
- any other matters where disclosure would substantially commercially disadvantage the contracting firm with its competition

RECOMMENDATION 48

This summary be vetted for accuracy by the Auditor-General or his nominee and that these services be paid for by the public sector agency.

RECOMMENDATION 49

That the Auditor-General present this report to Parliament. If he is not satisfied with the accuracy of the summary, or has experienced difficulty in obtaining information, he should refer the matter to the Public Accounts Committee.

RECOMMENDATION 50

Whilst the use of independent white knights in the form of ministerial advisory groups and such like to review tenders and independant legal or financial consultants to review other aspects are very useful and are to be encouraged to ensure probity and best practice, they can never be a complete substitute for external oversight by the courts, the ICAC or the Auditor-General.

However, input into and further development of such best practice and oversight could be usefully made by the Auditor-General and the ICAC on a co-operative basis by providing advice to such independent white knights and financial consultants.

PART 5

CONCLUSIONS

Over the course of this inquiry many criticisms were directed at some government agencies by the private sector about inefficiencies, delays and cancellations which have occurred in privately financed infrastructure projects, calling into question in their minds the government's commitment to such projects.

The main aim of this volume has been to examine the management of infrastructure projects "from concept to contract" to identify key problem areas and examples of best practice, and to put forward proposals for action.

There is no doubt that one of the main problems as far as private investment in infratructure is concerned is the Loan Council, which was established in 1927 as a mechanism to control the public sector's call on domestic and foreign savings, for example for infrastructure projects. Its history since then has been a cycle of the Commonwealth attempting to curb borrowings, followed by attempts by States to cope with these curbs, sometimes leading to evasion, followed by clamping down by the Commonwealth again with new rules and regulations, followed by further attempts at evasion, and so on. The result has been that Loan Council policies have changed and changed again, with confusing results for government agencies attempting to finance infrastructure projects from private sources. An example of such a change came in December 1992, when, as a reaction to the Victorian Loans affair, the Loan Council changed its policy regarding operating leases and brought them under the guidelines. This led to confusion by agencies which had been only just become used to having operating leases outside the guidelines. The real problem, as the Committee saw in the cases of the Blue Mountains Tunnel and the 350 Coal Wagons, was that current Loan Council policy, as it applied to their particular deals, was not ascertained early enough by agencies or the NSW Treasury itself assuming that it could be reliably ascertained at all.

Other significant problems which have emerged in some agencies include a lack of experience in negotiating infrastructure deals with the private sector; a failure to observe proper procedures; poor liaison among departments; poor homework before going out to tender; little understanding of the needs and costs of the private sector; and a plethora of committees, bodies, units and organisations dealing with infrastructure, even at the central level.

In its report, the Committee has cited instances of each of these failings. However, there are also many cases where agencies have made praiseworthy efforts to create their own maps through the only partially charted territory of the privately-financed project.

Outstanding examples of best practice from the Committee's point of view include the Bennelong Car Park project and the Junnee Correctional Centre, and the Committee recommends that the very positive precedence created by these projects will be widely studied and emulated. Indeed the Committee believes that mechanisms should be put in place to formally share this best practice with other infrastructure-building agencies.

Implicit in many of the Committee's comments and recommendations is an acceptance that the private sector has a major role to play in the provision of infrastructure. In that regard, the Committee sees this as a world-wide phenomenon arising from governments' inability to finance all infrastructure projects from the public purse within an acceptable timeframe.

That said, much infrastructure will continue to be wholly publicly financed, and the Committee sees many of its key recommendations relating to planning and co-ordination applying equally to privately and publicly funded infrastructure projects.

The Committee has made two main categories of recommendations: the first relates to planning for infrastructure, and the second to co-ordination and implementation of infrastructure projects. The principal among several recommendations on planning is that the State now make efforts to prepare an Integrated Infrastructure Development Plan covering all major sectors. The State is nearly at that point now: there exist an integrated transport plan and a metropolitan strategy for the Sydney area. It would require an extra effort to create an infrastructure development plan for the State as a whole, but the benefits in co-ordination, elimination of waste and confusion, and logic would be very considerable.

The second category of recommendation relates to the co-ordination and implementation of infrastructure projects. The Committee believes that there now exists a good opportunity to achieve this end, following the restructuring of the New South Wales Government on 24 May 1993. In the Premier's Department there is now a new Office of Economic Development, which in the Committee's view should be allocated a major, central role in the provision of infrastructure projects in this State. The Committee sees several advantages to this approach:

- the authority of the Premier would lie behind any decision or requirements relating to infrastructure provisions;
- the lines of command for the implementation of the infrastructure plan would be totally clear to all departments and authorities, and indeed to the public at large;
- it would help to eliminate the confusion which the private sector repeatedly asserts it currently faces in dealing with a clutter of committees, bodies, agencies and units in the public sector;
- it would mean a state-wide, total approach to infrastructure provision, rather than a narrowed focus on, say, urban issues;
- if properly managed, consultation with departments would be comprehensive and thorough, reducing the chances for contradictions, gaps and overlapping;
- in a nutshell, it could mean action.

In the report, the Committee has set out in precise terms what it believes the role for this Office could usefully be.

In addition the Committee has dealt at length with concerns held in both the public and private sectors about the ICAC, which improved liaison and a more pro-active Corruption Prevention Unit will do a great deal to allay.

The Committee has also drawn on best practice from successful private infrastructure projects to make recommendations concerning the independent oversight of probity issues relating to the tender process and independent advice on technical and legal matters.

Last but by no means least, the Committee has attempted to tackle the important question of disclosure by seeking to find a better balance between commercial confidentiality and the public's right to know details about infrastructure contracts, involving an important role for the Auditor-General.

At the end of the day, however, much of the undertainty and confusion surrounding infrastructure projects can be sheeted home to the Loan Council which, following a meeting on 5 July 1993, looks set for some significant change. As indicated at the beginning of this volume, the financial and risk-sharing aspects of infrastructure contracts will be considered in more detail in Volume 2.

APPENDICES

APPENDIX 1: TERMS OF REFERENCE

INQUIRY INTO URBAN INFRASTRUCTURE FINANCING

(UNDER SECTION 57 PUBLIC FINANCE AND AUDIT ACT)

TERMS OF REFERENCE

To inquiry into and report by 30 June 1993 upon urban infrastructure financing in New South Wales, in particular:

1. To examine alternative methods of financing the provision of urban infrastructure and their potential application to New South Wales. In this regard the Committee is specifically requested to:

   . report on options to change pricing and charging policies to improve efficient utilisation of existing infrastructure.

   . report on and give particular consideration to the options for revision of pricing and charging policies to recover the capital and recurrent cost of new and replacement infrastructure including the following factors and their inter-relationships:

   (a) costs of providing physical infrastructure;
   (b) costs of providing social services infrastructure;
   (c) costs which fall on third parties (eg. increased pollution, congestion, and private transport costs);
   (d) extent to which capital costs are recoverable by recurrent charges.

2. To analyse the extent of public and private investment in infrastructure provision and return on that investment.

3. To review distribution of costs and benefits in both the short and long term, arising from provision of infrastructure for urban development including environmental and social impacts.

4. To review the effectiveness of co-ordinating departments or agencies in achieving overall economic efficiency.

5. To inquire into accounting processes and financial management practices of major infrastructure-providing departments and authorities on expenditure for urban infrastructure.

6. To review the impact of the financial and other requirements imposed by other levels of government on the New South Wales urban development budget.

7. To consider any other matters relating to the public and private financing of urban infrastructure.

APPENDIX 2: PROVISIONAL LIST OF CURRENT INFRASTRUCTURE PROJECTS IN NSW

ROAD TRANSPORT

- *F2 Castlereagh Freeway*

  Possible opportunity for private sector development of the tollroad between North Ryde and Seven Hills. A determination on this project is anticipated by end May 1993. Scope for private sector involvement in the development of the freeway is still under consideration.

- *North-Coast Corridor*

  Possible private sector involvement in the development of the North-Coast corridor from Hexham near Newcastle to the Queensland border (600km). The Government released a discussion paper in February 1993 outlining options to improve the Newcastle to Queensland link, including a tollway option. A decision on available options is anticipated by the year's end.

- *M5 South-Western Freeway*

  Private sector tollroad to connect Moorebank with Beverly Hills in the south-western region of the metropolitan area as part of the F5 Freeway - estimated cost $295m - facility opened August 1992.

- *M4 Western Freeway*

  Private sector tollroad to connect Mays Hills with Prospect in western Sydney as part of the M4 Freeway - estimated cost $230m - facility opened 15 May, 1992.

- *Bennelong Point Car Parking Station*

  Private Sector (Enacon Parking) provision of a 1100 place car park at a cost of $40 million, which recently opened.

RAIL TRANSPORT

- *Airport City Link*

  Examination of a dedicated airport rail link between Sydney CBD and the international airport at Mascot (Kingsford Smith Airport) - public/private sector joint development involving the merger of CRI and Transfield proposals ($800 million). Detailed feasibility studies are under current preparation for this project.

- *Homebush Bay - Sydney Olympics bid*

  The Property Services Group (PSG) is responsible for the overall renewal of

Homebush Bay involving a land area of approximately 760 hectares. The NSW Government has commenced a programme of renewal of Homebush Bay, establishing bicentennial Park and the State sports Centre within the site. The decision in February 1991 to proceed with the Sydney's bid for the year 2000 Olympics has instigated a new phase of renewal and development for this area.

The PSG has prepared a number of masterplan options for the renewal of Homebush Bay, much of which is in government ownership.

The masterplans make provision for the development of a light rail transportation system between Strathfield Station, the Homebush Bay site and Parramatta. The introduction of a light rail system is under investigation by the Homebush Bay Corporation and following some pre-feasibility analysis, Expressions of Interest are likely to be sought for private sector participation.

- *Pyrmont/Ultimo/White Bay*

The NSW Government has formulated its City West Urban Strategy to provide an integrated approach to the planning and development of 300 hectares of land adjacent to the CBD. The strategy provides for the establishment of a light rail transit system to serve the Leichhardt, Lilyfield, Pyrmont, Ultimo, Darling Harbour and CBD area. Registrations of Interest for the Pyrmont-Ultimo Light Rail were called in April 1993.

The City West area is close to the CBD, Sydney Harbour, Kingsford Smith Airport and other major transport routes. It offers many opportunities for the development of new living, working and recreational environments.

- *Abigroup - Metrolink Light Rail Proposal*

A private sector proponent, Abigroup Limited, has developed a concept for the establishment of a light rail system to link Sydney's north-east with its north-western suburbs.

The proposal would involve the construction of:

- stage 1, linking Dee Why to North Sydney, including a tunnel under Sydney Harbour ($850 million);

- stage 2, involves the construction of a line from North Sydney to Lane Cove village, via Wollstonecraft;

- subsequent stages would link Lane Cove to Epping; Carlingford to Parramatta; and Epping to Baulkham Hills.

The majority of the metrolink system (approximately 65%) would be built underground. Estimated total cost of this private sector proposal is $2.5 billion.

The Government is likely to call for Expressions of Interest by end May 1993 for

light rails solutions to transport deficiencies in the lower North Shore and Warringah Peninsula.

- ***Sydney to Canberra Tilt Train***

The Minister for Transport announced on 8 October 1992 a proposal to establish a privately run, high speed Tilt Train between Sydney and Canberra. The Tilt Train technology would reduce the journey to 2 hours and 45 minutes and would involve expenditure of some $82.5 million on track upgrading and purchasing new rolling stock.

Expressions of interest were called in October, 1992, for private sector involvement in the construction and operation of this rail infrastructure.

Responses are currently being evaluated by the Department of Transport, with a view to advancing the project to further stages of consideration by mid 1993.

- ***Freight Haulage on disused and Mothballed Branch Lines***

The Department of Transport called for Expressions of Interest in late 1992 from the private sector to operate, or assist in the operation of, rail freight services over disused and mothballed State Rail branch lines. The Expressions of Interest closed 29 January 1993.

The Expressions of Interest relate to the use of all, any or part of the following lines:

- Tarana-Oberon
- Moree-delungra-Inverell
- Molong-Yeoval
- Calcairn-Brocklesby-Corowa
- Narrandera-Jerilderie-Tocumwal

It is anticipated that further lines may be offered to the private sector in the future.

- ***Other Opportunities***

The State Rail Authority (SRA) is pursuing the provision of additional capacity for its systems. It has begun the planning process for major capital works and has identified the most urgent areas to be addressed.

Projects under evaluation include additional track capacity between Sydenham-Redfern and on the East Hills line, and Metrowest, which will provide a much needed underground link from Central through to existing underground platforms at Wynyard, linking with Darling Harbour. Potential links to Sydney's second airport at Badgerys's Creek are also under consideration.

Preliminary estimates on Metrowest are in the order of $350 million. The State Rail Authority is actively exploring opportunities for private sector participation in

projects such as this.

The Premier announced in March 1993 the redevelopment option for Circular Quay.

HEALTH SERVICES

- ***John Hunter Hospital Campus (NIB Day Hospital Centre Pty Ltd)***

  Development of a new Medical Centre/private hospital is underway.

- ***Lithgow Hospital***

  Redevelopment of existing facilities. Feasibility study being undertaken.

- ***Nepean Hospital Campus***

  Proposed development of a private hospital. Thiess/Markalinga selected as preferred developer/operator. Negotiations proceeding - draft Heads of Agreement prepared.

- ***Royal Prince Alfred Hospital Campus***

  Proposed development of private hospital. Macquarie Health Corp - approval in principle for 200 beds; awaiting council DA and licence application.

- ***Bowral Private Hospital***

  Development of a $20 million, 90 bed private hospital on the campus Bowral District Hospital in the Southern Highlands - preferred tenderer selected (Alpha Healthcare) and negotiations on draft agreements are currently proceeding.

- ***Port Macquarie Hospital***

  Australia's first Hospital privatisation is occurring subsequent to the NSW government reaching agreement with a private consortium to manage the Port Macquarie Hospital - Fletcher Constructions and Health Care of Australia will build, own and operate this $40m, 162 bed hospital development.

- ***Future Opportunities***

  The Department of Health has carried out planning for a range of health services/facilities. The private sector could potentially become involved in the provision of these facilities. These opportunities include:

  - Hawkesbury new Hospital
  - Liverpool Hospital redevelopment
  - Prince of Wales/Prince Henry Hospital redevelopment

PORT DEVELOPMENT

- *Second Bulk Liquids Berth*

  A public/private sector joint venture is currently developing a second bulk liquids berth at botany Bay, Sydney's major port, including the construction of new terminal and the refurbishment of existing facilities, with an approximate cost of $20m. The Environment Impact Statement is anticipated for public release by mid 1993.

  The Maritime Services Board (MSB) could, in future, be expected to sell down its share in this facility.

- *Other Opportunities*

  A major corporate objective of the MSB is to increase the extent of private sector involvement in the development and ownership of port facilities and in the provision of port services.

  The MSB requires the establishment of bulk cement facilities to facilitate the relocation of the MSB and its functions to the City West region. The MSB has not yet determined timeframes for the development of these bulk cement facilities. The MSB would welcome creative private sector proposals for the provision of these facilities.

  During 1990, control of the Port Kembla Coal Loader passed from MSB too Port Kembla Coal Terminal Limited, an industry consortium of NSW coal mine operators, by way of a 20 year lease agreement. Expansion of this facility is currently being considered. It sees further opportunity for private sector involvement in the expansion of coal handling and loading facilities in both Newcastle and Wollongong.

  The MSB also regards the development of a second overseas passenger terminal as a potential investment opportunity for the private sector.

CORRECTIVE SERVICES

- ***Junee Prison***

  Design, construct and management project for a new 600 cell prison - selected tenderers thiess Contractors/Wakenhut Corrections Corporation has completed the first Australian gaol which has been designed, built and run by the private sector at a cost of $57m.

- ***John Morony Correctional Centre***

  Design and construct project (250 cell) at South Windsor developed by the private sector at a cost of $51m.

HOUSING SERVICES

- *North-West Sector*

  A private/public sector consortium including Department of Housing, Australian Housing and Land and Norbrick will provide infrastructure (water and sewerage, drainage and arterial roads) in the Rouse Hill development area within the North-West sector of the metropolitan area for the production of 24,000 lots. Contracts worth $285 million have been signed for the construction of water, sewage and stormwater services in Precinct 1, the first of 11 in stage 1 of the project. Stage 1 lots are expected to go on sale from mid-to-late 1993.

- *South Penrith*

  A joint development agreement between the private and public sectors to develop approximately 540ha of Department of Housing land near Penrith in western Sydney to product 5700 lots with expected investment of $400m.

WATER SERVICES

- The Water Board seeks private sector involvement in the design, construction, financing and operating phases as a whole or as individual components of infrastructure projects ranging from water, sewerage and storm water infrastructure.

- Over the past five years, the proportion of Water Board Capital Works projects, both major and minor, contracted to the private sector has increased from 25% to 50%. However, some 70% of the Boards major projects involve private sector participation.

- The progressive introduction of Build/Own/Operate schemes over the next few years is expected to see the level of private sector involvement increase to higher levels.

- *Water Treatment Plants*

  The Water Board, which services the Greater Metropolitan Area of Sydney (3.7 million people over an area of 13,000 square kilometres) has invited tenders from five pre-qualified consortia for the provision of water treatment plants and associated infrastructure at Woronora, Illawarra, macarthur and Prospect. The cost of these four plants will be approximately $600 million. These four systems represent 95% of the Water Board's total supply.

  The following consortia have been selected as preferred tenderers for the three packages of work under BOOT contracts for the drinking water quality programme; these are:

  - Wyuna Water (Compagnie Generale des Eaux, AIDC, Kinhill - Illawarra/Woronora

- NSW Water Services (Lyonnaise des Eaux-Dumez, Lend Lease, P&O Australia) - Prospect

- NW Transfield (North West Water - UK, Transfield - Macarthur

Tenders received, when compared to the Board's base case, show a savings in costs of $650 million over the 25 year life of these projects. Final negotiations are expected to be completed by mid 1993, depending on the outcome of the environmental impact statements.

WATER RESOURCES AND ENERGY

- *Mini Hydro-electric schemes*

  Two private sector groups were awarded the rights in early 1989 to negotiate with the Department of Water Resources (DWR), Elcom (now Pacific Power) and the Office of Energy to establish small hydropower plants at six DWR dams.

  The Hydro Power group has opened the Wyangala power station (near cowra), which will produce approximately 20 megawatts of power.

  The HydroCo consortium is negotiating the provision of mini hydro schemes on the remaining five dams.