



NSW Legislative Assembly Hansard

Local Government Amendment (Public-Private Partnerships) Bill

Extract from NSW Legislative Assembly Hansard and Papers Friday 19 November 2004.

Second Reading

Mr DAVID CAMPBELL (Keira—Minister for Regional Development, Minister for the Illawarra, and Minister for Small Business) [3.45 p.m.]: I move:

That this bill be now read a second time.

The bill will amend the Local Government Act 1993 and provide a regulatory framework within which local government can benefit from public-private partnerships. The Local Government Act 1993 is the core Act for the regulation of local council and county council functions. Public-private partnerships [PPPs] are emerging as a potentially attractive and flexible means for local government to create infrastructure and deliver services. For the purposes of this bill, a PPP is defined as any contracted relationship between a council and the private sector in which a council has an equity interest, shareholding or ongoing obligation or liability. Normal transactions such as sale of community land classified as operational and councils acting as trustees for donations or bequests and tendering will not be affected by these new provisions.

A number of councils already have experience in negotiating public private partnerships. Unfortunately, not all those experiences have been positive. As members will be aware, Liverpool City Council, between 1996 and 2003, entered into various commercial arrangements with the private sector to develop infrastructure on land owned by the council. The Liverpool City Council public inquiry found that the cost to council of the failed redevelopment proposals—ultimately to be borne by ratepayers—is at least \$22 million. The commissioner of the public inquiry, Professor Maurice Daly, found that councils lacked the in-house expertise required to successfully negotiate PPP arrangements. This in turn may impact significantly on the ability of councils throughout the State to make decisions about entering into such arrangements for the benefit of their communities.

Professor Daly also made a series of recommendations about managing local government participation in PPPs. This bill gives effect to those recommendations. Providing a regulatory framework with conditions before councils sign binding contracts has the advantage of allowing flexibility for the financing and provision of council infrastructure and services. At the same time, councils will be required to ensure that the public interest is protected and that any contracts entered into have had risk properly factored into them. The bill proposes an external review process for projects that are worth more than \$50 million, or 25 per cent of council revenue that has not been designated for another purpose. This review committee's function is to ensure that a council has undertaken appropriate probity and due diligence checks before signing binding contracts.

The process will also consider the financial viability of the project, the council's capacity to enter into such a deal and the views of appropriate and independent experts. For all PPP projects, regardless of size, councils will be required to undertake a risk assessment and forward that assessment to the Department of Local Government for review. Those projects determined to be high risk will be called in for assessment by the project review committee in the same way as a project that meets the size and significance threshold. Under this framework, councils are not being asked to do any more than is prudent and in their own best interests. Ratepayers and residents cannot afford another Oasis project. All councils considering PPPs will now be obliged to test the market by seeking expressions of interest for proposals involving them in equity relationships or commercial arrangements with private companies involving council assets or ongoing obligations. In this way, their communities can be assured that they are getting the best value for money outcome.

Certain minimum process and management elements for PPPs will also be required of councils. To assist councils, guidelines will be published by the Director-General of the Department of Local Government under proposed new section 400C of the Local Government Act. The Minister has met with representatives of the Local Government and Shires Associations and asked them for their input on these important guidelines. It is anticipated that these will be available early in 2005. The guidelines will, as recommended by Professor Daly, provide for appropriate governance and administrative arrangements for PPPs that include reporting to councils and local communities. Public access to information about the PPP project that is not confidential will be on the same basis as the public has access to other council information. In this way, the public accountability of councils involved in PPPs will not be unduly diluted.

The project review committee will have a core membership drawn from the Department of Local Government, Infrastructure, Planning and Natural Resources, and from Treasury, the Cabinet Office and the Premier's Department. Depending on the nature of the project proposal and the particular assessment stage, relevant expertise drawn from other agencies or from independent experts from the private sector will be co-opted to the committee. A positive assessment from the committee will be required at three stages for any proposal to advance: initial risk analysis and costing, project plan and contract development.

A council that signs a contract without satisfying the committee that the section 400C guidelines have been fully complied with will be in breach of the Local Government Act 1993. The remedial measures already available under section 672—that is, action in the Land and Environment Court—and section 435—that is, surcharging—as well as the investigative and public inquiry powers provided by sections 430 and 740 will apply. This message will be reinforced in the guidelines referred to above. PPP projects may take the form of a number of different legal entities. Indeed, as this particular market matures

and grows, it is likely that arrangements not even thought of now will become commonplace.

Section 358 of the Act currently provides only for ministerial approval where a council seeks to form or participate in the formation of a corporation or acquire a controlling interest in a corporation. This bill seeks to extend this current requirement to other entities and relationships that councils may enter into with a purely commercial rationale. In seeking such an approval, either from the Project Review Committee or from the Minister, as determined by the nature of the project proposal, it is appropriate that councils, as guardians of public trust and funds, should demonstrate that there is a clear public benefit to be gained from the proposed arrangement.

Another matter that goes to issues of transparency and public accountability is the potential use of financial entities or project vehicles to circumvent tendering requirements under the Local Government Act, either wilfully or by mistake. These circumstances arise in only a small number of cases, but their effect on public confidence can be significant. It is important that local government retains the confidence and trust of their communities in this regard. To this end, this bill gives effect to Professor Daly's recommendation that the tendering provisions in section 55 of the Act be strengthened. This means that the community can be assured that councils obtain the best value for money by engaging in market processes and that similar transparency and accountability provisions apply to council-commercial entities as apply to councils.

That means two things: first, in selecting project partners for PPPs, councils undertake an expressions of interest process; and, second, once the assessment and contract process of a PPP is completed and approved, councils and their PPP partners must adhere to the matters specified in the contract. That is, approved projects must not be varied or amended without approval from the Project Review Committee and the Minister. That means that those works or activities that will be conducted by the public-private entity or the council would not need to re-tender for the works or activities to the new project vehicle. However, works or activities outside of the PPP project contract are still required to be put out for tender. Clearly, councils should not use project vehicles created for a specific outcome as a convenient mechanism for other non-related projects or needs.

The bill will ensure that this situation does not occur by making it clear that in such situations the tendering provisions of section 55 of the Act apply where councils are involved in some form of partnership with the private sector. In that way, council obligations in regard to transparency and accountability will continue to apply and the integrity of PPP project vehicles will be upheld. The bill proposes that this framework apply from 28 June 2004. On that day Parliament was advised that the Government intended to accept the recommendations of the Liverpool City Council public inquiry and would legislate to give effect to those recommendations with regard to the management of public-private partnerships. Councils were informed by means of a Department of Local Government circular to councils on 21 July 2004.

Were the proposed regulatory framework not to apply retrospectively, it is possible that a number of councils, under perceived pressure from potential commercial partners, may fast-track projects to specifically avoid their requirements. Such a headlong rush would not serve the public interest, as it is likely that corners would be cut and attention to detail minimised rather than maximised. It is preferable that councils take a considered approach to the negotiation of PPPs. The condition that most favours that approach is the certainty that projects in development will need to meet the standards required under the revised framework. Anything else invites precipitous actions, hasty judgments and, potentially, poor or less than optimal outcomes for communities. The bill provides for a framework that is no more onerous for councils than they should themselves undertake from the perspectives of prudence, transparency and best practice management of public resources. I commend the bill to the House.