

Local Government Amendment (Public-Private Partnerships) Bill 2004

New South Wales

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Local Government Act 1993* (**the Principal Act**) as follows:

- (a) to institute new requirements in relation to the participation by councils in public-private partnerships, including the requirement for councils to comply with specified procedures and processes (as set out in guidelines issued by the Director-General of the Department of Local Government) in relation to public-private partnerships,
- (b) to establish a Local Government Project Review Committee for the purposes of ensuring that the requirements set out in the guidelines are complied with by councils in relation to projects carried out under public-private partnerships,
- (c) to require a council to invite tenders before it enters into a contract to form a public-private partnership,
- (d) to provide that contracts involving entities that are formed by councils will be subject to the same tendering requirements that apply to contracts entered into by councils,
- (e) to provide that a council must not form an entity except with the Minister's consent (as is the case at present for corporations that are formed by councils),
- (f) to make other miscellaneous or consequential amendments.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision that gives effect to the amendments to the *Local Government Act 1993* set out in Schedule 1.

Schedule 1 Amendments

Schedule 1 [1] amends section 55 of the Principal Act to provide that a council will be required to invite tenders if it is proposing to enter into a contract to form a public-private partnership.

Schedule 1 [2] extends the operation of section 55 of the Principal Act (which requires a council to invite tenders before entering into certain kinds of contracts) so that it will also apply to contracts involving any entity formed by a council. An **entity** is defined as any partnership, trust, corporation, joint venture, syndicate or other body (whether or not incorporated). If the entity is a public-private partnership, the requirements for tendering will only apply to contracts that are not part of the project carried out under the partnership (as assessed or reviewed in accordance with proposed Part 6 of Chapter 12).

Schedule 1 [3] amends section 358 of the Principal Act (which currently prevents a council from forming, or from participating in the formation of, a corporation except with the Minister's consent) to provide that the requirement for the Minister's consent will also apply to the formation of any other type of entity. **Schedule 1 [4]** introduces a public interest test for obtaining the Minister's consent under section 358 in relation to both corporations and other entities. **Schedule 1 [7]** is a consequential amendment.

Schedule 1 [5] inserts proposed Part 6 into Chapter 12 of the Principal Act (proposed sections 400B–400N) to impose restrictions on councils forming, and carrying out

projects under, public-private partnerships. The proposed Part contains the following provisions:

Proposed section 400B defines a **public-private partnership** as an entity formed by a council and a private person for the purposes of providing public infrastructure or facilities or delivering services. Proposed section 400C enables the Director-General to issue guidelines requiring specified procedures and processes (eg due diligence and risk assessment) to be followed by councils in relation to public-private partnerships. Proposed section 400D ensures that the PPP guidelines are to be made available to councils.

Proposed section 400E prevents a council from forming a public-private partnership, or from carrying out a project under a partnership, except in accordance with the proposed Part. Proposed section 400F requires a council to provide the Director-General with an assessment, prepared in accordance with the PPP guidelines, of the project to be carried out under a public-private partnership. If the project is a significant project (eg a project with an estimated total cost of more than \$50 million) or if it has a high risk, the project is to be referred to the Project Review Committee. Otherwise, the council may proceed to form the partnership (subject to obtaining the Minister's consent under section 358) and to carry out the project in accordance with the PPP guidelines. Proposed section 400G enables the Minister to intervene at any stage of the process and require a project under a public-private partnership to be reviewed by the Project Review Committee. Proposed section 400H enables the Director-General to require a council to provide an assessment of a varied project and, if of the opinion that the project has become a significant project or a high risk project, to have the project referred to the Project Review Committee.

Proposed section 400I provides that if a project is required or directed to be referred to the Project Review Committee under the proposed Part, the relevant council must not form a public-private partnership to carry out the project, or continue to carry out the project, unless the Committee has been provided with an assessment of the project and is satisfied that the requirements of the PPP guidelines have been complied with in relation to the project. If the Committee is satisfied that the PPP guidelines have been complied with, the council may proceed to form the partnership or to continue to carry out the project. The Committee's decision as to whether the PPP guidelines have been complied with is final and cannot be reviewed.

Proposed section 400J establishes the Local Government Project Review Committee. It is to be chaired by the Director-General, who may appoint persons with special expertise as members (including from the private sector). Proposed section 400K exempts the State from any liability for compensation in connection with the proposed changes to the Principal Act (including any liability arising out of any conduct or statement in relation to public-private partnerships). A council will also not be liable to pay compensation to a private person if the council is prevented from forming a public-private partnership, or carrying out a project, because of the operation of the proposed Part (unless the partnership concerned is one that the council decided to form between 28 June 2004 and the commencement of the proposed Part). Proposed section 400L requires decisions by councils in relation to the formation of a public-private partnership to be made by resolution only. Proposed section 400M prevents councils and private persons from avoiding the operation of the proposed Part through the terms of any arrangement. Proposed section 400N provides that the proposed Part does not apply to public-private partnerships that councils decided to form before 28 June 2004, but it will apply to partnerships that councils decided to form after that date.

Schedule 1 [6] requires councils to include in their annual reports a statement of all public-private partnerships to which they were a party during the year concerned.

Schedule 1 [8] inserts provisions relating to the members and procedure of the Project Review Committee, including the requirement for members to disclose any

pecuniary interest that they may have in a matter that is before the Committee.

Schedule 1 [9] enables the regulations to make provision for or with respect to public-private partnerships.

Schedule 1 [10] enables regulations of a savings or transitional nature to be made as a consequence of the enactment of the proposed Act.

Schedule 1 [11] inserts relevant definitions in the Dictionary to the Principal Act.