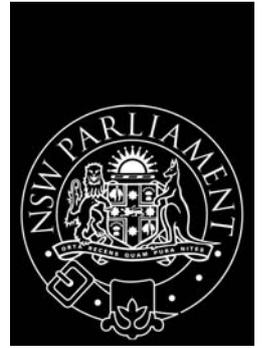


LEGISLATIVE ASSEMBLY



Standing Committee on Public Works

LOCAL GOVERNMENT PRIVATE PARTNERSHIPS FOR
ASSET DEVELOPMENT

Discussion Paper

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Functions of Standing Committee on Public Works

Terms of Reference Establishing Committee

Resolution passed 21 June 2007, 54th Parliament, Votes and Proceedings No.14, Item 13, Pages 169-170

That:

A Standing Committee on Public Works be appointed to inquire and report from time to time with the following terms of reference:

(1) As an on-going task, the committee is to examine and report on such existing and proposed capital works projects, or matters relating to capital works projects, in the public sector, including the environmental impacts of such works, and whether alternative management practices offer lower incremental costs, as are referred to it by a Minister, or by resolution of the Legislative Assembly.

(2) Such committee consist of seven members of the Legislative Assembly.

(3) Mr Baumann, Mr Borger, Ms Fardell, Mr Khoshaba, Mr McBride, Mrs Paluzzano and Mr Page be appointed to serve on such committee.

(4) The committee have leave to make visits of inspection within the State of New South Wales and other states and territories of Australia.

The Standing Committee on Public Works is a current standing committee of the Legislative Assembly.

The Standing Committee on Public Works examines and reports on existing and proposed capital works projects in the public sector, including the management and environmental impact of such works.

On 20 November 1997, the Parliament gave leave for the Standing Committee on Public Works and the Public Bodies Review Committee to conduct a joint inquiry into issues relating to and arising from the regulation of the procurement of goods and services, competitive tendering and contracting in the New South Wales public sector.

Terms of Reference for the Inquiry

The NSW Standing Committee on Public Works is to inquire into and report on issues concerning local government partnerships with the private sector in relation to the redevelopment of some council infrastructure assets.

The aim of the inquiry is to examine whether local councils may be able to improve returns on some of their infrastructure assets by redevelopment through partnerships with the private sector, the impediments to councils of this approach and the most appropriate partnership models for councils to follow.

The inquiry will examine:

1. The overall benefit to councils of entering into partnerships with the private sector to redevelop infrastructure assets;
2. Which type of council infrastructure assets are most suitable for such partnerships;
3. The impediments to councils of entering into such partnerships;
4. Models of managing risk to both councils and the community;
5. The effectiveness of the current Public Private Partnerships legislation and guidelines for councils; and
6. Any other related matters.

Questions for Consideration

1. **What are the existing impediments to councils engaging in PPPs?**
2. **Is there a negative image or perception of PPPs among local councils and within the community? If so, how could this be addressed?**
3. **Is the bundling of projects across council boundaries a viable option and would it assist councils to enter into PPPs and provide a greater incentive to developers?**
4. **Is it appropriate that councils remain the consent authority for any of their own PPPs? If not, which is the most appropriate body to undertake the task?**
5. **Should the state government provide technical assistance and financial incentives to assist councils to adopt a total asset management system within the next three years?**
6. **Should councils' Strategic Asset Plans make provision for PPPs?**
7. **Should there be a central NSW government agency assigned the responsibility of co-ordinating and managing all other state government agencies involved in local council PPPs?**
8. **Should there be a new agency to educate, train and provide access to external expert advice to local government in relation to PPPs?**
9. **If so, what should the key functions of this agency be and how should it be constituted and funded?**
10. **Would the availability of PPP standardised forms and contracts be of benefit to councils?**
11. **Is there a best practice model (or models) councils should adopt in relation to PPPs or should councils decide the most appropriate model in accordance with their own particular needs and the individual nature of each project? Should an agency of government provide information about available models to assist councils?**
12. **Do legislative restrictions on community land use, the Plans of Management of such land use, and the dealings a council can have in community land, present impediments to councils entering into PPPs?**
13. **Should one central NSW government agency assume responsibility for coordinating all government agencies and utilities involved in local government PPPs?**
14. **Do the guidelines and legislation, in their current form, present barriers for councils to enter PPPs?**
15. **Is it necessary to reform the legislation and guidelines with a greater focus on the facilitation of PPPs rather than of risk control?**

Chair's Foreword

Entering into partnerships with the private sector can be an expedient way for local councils to provide new infrastructure and better utilise assets which are currently underperforming. Many councils are not financially robust yet are still quite rich in assets such as vacant land, car parks and buildings which are currently not bringing in optimum returns for either councils or their communities.

Financial constraints on councils such as rate pegging also make Public Private Partnerships (PPPs) a very viable way to upgrade ageing infrastructure as well as provide new assets.

NSW local councils have different needs and circumstances than state government agencies in relation to PPPs and this has not yet been seriously examined and therefore probably not well understood at the state government level. For example, Council PPPs may be pursued in relation to underperforming assets because they can revitalise councils' town and city centres in addition to providing other public benefits and services.

Council PPPs span the breadth of infrastructure development from the very large to the relatively small. Councils' close relationships to their communities can also make it problematic to undertake a PPP when there is not a strong level of community trust in the project, particularly if the development is a controversial one.

The experience of Liverpool City Council regarding the Oasis Development has, understandably, made many councils wary about entering into such ventures, particularly large and complex developments.

While the September 2005 amendments to the *Local Government Act 1993* and the introduction of the associated guidelines have clarified requirements and provided greater certainty for councils in relation to PPPs, the NSW Department of Local Government has expressed surprise at the low amount of PPPs being submitted to the Project Review Committee for assessment.

The Public Works Committee is focussing this inquiry specifically on local government as it feels it would be valuable to explore the reasons for the low take up rate by local councils for PPPs and how some of the existing impediments can be overcome. The ultimate aim of the inquiry is to consider and facilitate methods by which both councils and developers can enter more confidently into PPP arrangements.

It is unlikely that individual local councils will ever undertake numerous PPPs and therefore cannot be expected to have the necessary in-house expertise to manage a large PPP project. Such projects are expensive, time consuming and call for a level of specialist expertise beyond the scope of most councils. However, seeking external advice is also very costly.

As discussed in the Paper, state and federal governments in many other jurisdictions are providing a greater level of assistance for their local governments in regard to PPPs.

Without similar assistance it is not surprising that so few councils are embarking on such projects in New South Wales.

This Paper seeks to solicit comment and ideas regarding how the system can better address the needs of all PPP stakeholders. The Committee has, to date, received written submissions and taken oral evidence from a range of parties including local government, state government, developers, law firms and consultants.

Many of the issues raised so far with the Committee have been incorporated into this Paper. The Committee seeks your comments on these and other areas of concern in order to better inform itself and ultimately make recommendations for improvement to state government.

A handwritten signature in black ink that reads "David Borger". The signature is written in a cursive style with a large initial 'D'.

David Borger MP
Chair

Should Councils Use PPPs?

- 1.1 Two recent major inquiries, *Rates and Taxes: A Fair Share for Responsible Local Government* (2003) and *Are Councils Sustainable?* (2006) have highlighted issues surrounding local government revenue streams and questioned their ability to fund new major infrastructure as well as upgrade their existing infrastructure.
- 1.2 *Are Councils Sustainable?*, a report commissioned by the NSW Local Government and Shires Association which was published in May 2006, highlighted issues surrounding the management and renewal of local government infrastructure in NSW. A backlog of over \$6 billion in infrastructure renewals was identified.
- 1.3 The report found that the traditional revenue sources available to local government such as rates, user charges, fees, fines, contributions and grants are not sufficient to properly maintain their current infrastructure portfolio.
- 1.4 With local council fiscal resources in NSW limited by rate capping, councils also heavily rely on Section 94 developer contributions for infrastructure upgrades.
- 1.5 In evidence given on 19 September 2007, Professor Maurice Daly told the Committee that he believed that PPPs were an essential way forward for local councils “...the number of inquiries that have been made in different states as to the sustainability of local government and the problems of infrastructure that beset local government, it seems to me inevitable there is only one way out and that is for local government to work effectively with the private sector, otherwise it is a year-by-year regression of where they sit in relation to infrastructure challenge”.
- 1.6 Public Private Partnerships (PPPs) present a viable and flexible mechanism to deliver infrastructure at the local government level. Such partnerships can be specifically tailored to different infrastructure types and geographical contexts.
- 1.7 Councils tend to own infrastructure in strategically important locations which can become the key drivers of a PPP project and lead to regeneration of centres. It maybe important for councils to retain these assets due to their strategic location but councils can lease the assets to private partners as an incentive to drive development.
- 1.8 Types of PPP applications in local government could include:
 - Property development including local government offices;
 - Car parks, land swaps and mixed development such as residential, commercial and community;
 - Waste collection and management;
 - Waste water treatment;
 - Child care and play group facilities, libraries and community education and community services;
 - Marina, sports facilities and other special purpose facilities;
 - Public buildings;

- Roads and road maintenance;
- Information technology;
- Public domain upgrades such as footpath widening and improved street furniture; and
- Social housing and aged care.

1.9 There are a number of forms of private investment in public infrastructure:

- Conventional procurement (including traditional design and construct, design construct and maintain, supply contracts)
- Privately financed projects (BOOT, BOT, BOO, DBFM, Concession(s) leasing)
- Outsourcing
- Privatisation; and
- Divestiture by licence.

1.10 Information obtained by the Committee through written submissions and oral evidence suggests that there are many benefits for councils entering into partnerships with the private sector.

1.11 A range of studies undertaken in both the UK and Australia have demonstrated there are substantial on-time, on-budget savings to be made through the use of PPPs.

1.12 PPPs can provide government agencies with access to a broader range of funding options; project delivery is often earlier; risks are transferred to the private sector which may be better able to manage the risks; whole of life costing factors in maintenance of assets; the partnership approach encourages competition and provides incentives for bidders to develop innovative designs and solutions; and infrastructure developed by the private sector can incorporate commercial activities, helping to defray the overall cost of services.

1.13 NSW Treasury considers that the procurement decision to enter into a PPP should be based upon a Value for Money (VFM) assessment. The concept of VFM derives strongly from the UK experience with PPPs. In the UK, value for money is defined as: ... *the optimum combination of whole of life cost and quality (or fitness for purpose) to meet the user's requirement.*

1.14 This will include: integration of service delivery and whole-of-life costing; innovation; potential for efficient risk transfer to the private sector; or more efficient asset use and management over the life of the asset.

1.15 Similarly, the Local Government Shires Association of NSW submitted that PPPs should be used only when they offered the best outcomes for the community. *"While PPPs are considered a legitimate option they are not considered to be necessarily a superior option to conventional borrowing and contracting*

arrangements. The primary consideration for determining which vehicle to use for a project should be the net public benefit". The Association further suggested that, "Given the issues of cost, complexity and scale, the benefits of a PPP need to be carefully weighed against more conventional financing and contracting options".

- 1.16 There are also arguments against the use of PPPs. These include: possible weakening of accountability for public expenditure; long term contracts can reduce budgetary flexibility; the higher borrowing costs paid by the private sector can effect value for money; it can be difficult for government agencies to adequately structure contracts for future unforeseen events and risks; PPP infrastructure contract costs can be more expensive than the traditional provision of infrastructure; and some aspects of risk are not transferable.
- 1.17 Infrastructure Partnerships Australia consider that the following conditions need to be met for PPPs to work efficiently at the local government level:
- The project will need to be of a sufficient financial size to attract private interest and participation;
 - Projects must be properly scoped before they are put out for tender, clearly articulating not only desired outcomes, but also whole-of-life operation;
 - Risks need to be placed with the party best equipped to manage the risk;
 - There needs to be appropriate methods of dealing with changes built into the contract;
 - Council needs to either have in-house or contract staff with the right skills in contract management;
 - All parties must understand what is sought. Bid costs should be reasonable for private parties to evince interest in the project. The information released to the market to price a project should be correct;
 - Community consultation is important in all local government infrastructure projects, but even more so for projects undertaken through PPPs. The government must establish what the community expects and how these expectations can best be satisfied in the project design. After construction, there is often an ongoing obligation for the operator to continue to consult with the community.
- 1.18 While the September 2005 amendments to the *Local Government Act 1993* and the introduction of the associated guidelines have clarified requirements and provided greater certainty for councils in relation to PPPs, this has not translated into more local government PPPs in NSW.

Impediments to the Use of PPPs by Councils

- 1.19 Submissions to the Committee outlined a number of possible reasons for the low number of PPPs within local government including:

- The negative image of PPPs as a result of projects such as the Cross City Tunnel and the Oasis Development;
 - The fact that most local government projects are not of a large enough size to interest developers;
 - Insufficient in-house expertise and experience within councils to deal with PPPs, especially strategic asset management;
 - The associated risks, complexity and costs;
 - Legal and regulatory obstacles;
 - A need for many councils to first improve asset management practices.
- 1.20 Most PPPs that state government has entered into incorporate an ongoing service component and revenue stream such as roads, prisons and hospitals. Often if a project does not involve these components and councils are merely selling off or swapping land, a traditional tender model would be most appropriate.
- 1.21 Some submissions argued that local government can borrow funds at a lower cost than the private sector and the public ends up paying more for infrastructure under a PPP. Others objected to the 'privatisation' and the loss of control of public assets under PPPs.

Questions For Comment:

What are the existing impediments to councils engaging in PPPs?

Is there a negative image or perception of PPPs among local councils and within the community? If so, how could this be addressed?

Scale of Projects

- 1.22 As mentioned above, the scale of local government projects are often too small to be of interest to the big private developers who have expertise in the larger PPPs. The issue of scale is one of the reasons that local government PPPs are more prevalent in the UK than in Australia as local government in the UK is responsible for functions that are usually the responsibility of state government in Australia. These include: health, education, public housing and some public transport services.
- 1.23 To make smaller projects attractive to the private sector, it was suggested that projects should be bundled together to help address private sector concerns about costs of tendering and the certainty of the project proceeding. Bundling also offers greater economy of scale. A developer that might not be interested in doing one or two projects might be interested in doing 10 or 20, including projects bundled together across council boundaries.

Question for Comment:

Is the bundling of projects across council boundaries a viable option and would it assist councils to enter into PPPs and provide a greater incentive to developers?

Intellectual Property

- 1.24 Many councils receive unsolicited proposals from the private sector concerning developments. Developers expressed concern about the level of risk associated with unsolicited proposals as there was no guarantee of confidentiality. From the private sector perspective, significant investment goes into putting together concept plans and engineering drawings with no security of tenure or surety of implementation.
- 1.25 The private sector clearly would like some mechanism to protect their intellectual property. This mechanism would allow an unsolicited proposal to be evaluated by council without giving a detailed description.
- 1.26 It is important that councils clearly identify all intellectual property and confidentiality aspects of proposals that they receive in order to ensure their protection.
- 1.27 In cases where significant intellectual property is at risk councils should seek the advice of a qualified external probity advisor.
- 1.28 Unsolicited proposals will still need to be market tested to ensure councils achieve value for money.

Consent/Applicant Role

- 1.29 Mr Cooper, partner-solicitor, Allens Arthur Robinson, also argued that the private sector feels both frustration and concern regarding the fact that the local council is generally both the applicant and the consent authority.
- 1.30 Suggested options to address this problem included transferring consent decisions to a neighbouring council or constituting a separate board.
- 1.31 Current planning reforms suggested by the NSW Department of Planning in its Discussion Paper "*Improving the NSW Planning System*" November 2007 include that a Planning Assessment Commission would deal with developments of state significance and Joint Regional Planning Panels will deal with developments of regional significance. This framework should encompass the larger council PPP developments.

Question for Comment:

Is it appropriate that councils remain the consent authority for any of their own PPPs? If not, which is the most appropriate body to undertake the task?

Asset Management

- 1.32 Section 8 of the *Local Government Act 1993* (NSW) specifies that councils are to have regard to the long term and cumulative effects of their decisions, and are to

bear in mind that the councils are the custodians and trustees of public assets and must effectively account for and manage the assets for which they are responsible.

- 1.33 The only specific obligation which requires councils to undertake specific asset management planning is included in the Department of Energy, Utilities and Sustainability *Best Practice Management of Water Supply and Sewerage Guidelines, 2004*. These guidelines direct councils to undertake this planning only in relation to water supply and sewerage assets.
- 1.34 It has been suggested that many councils do not plan well for the long-term management of their assets. This limitation, when combined with the emergence of unsatisfactory asset accounting and reporting practices, may inhibit decision makers and other users of reported information from making informed judgments about the condition of local government infrastructure.
- 1.35 The NSW Department of Local Government published a Position Paper in mid-2007 which recommended the following:
- Strategic long term asset management and financial plans be included as essential components of an integrated planning and reporting framework across NSW local government.
 - Legislative amendments requiring long-term strategic asset management planning be introduced into the *Local Government Act 1993*.
 - Councils adopt asset management planning systems and practices that are consistent with the *Local Government Financial Sustainability Frameworks*, and where applicable and practical, the International Infrastructure Management Manual.
 - A basic (core) approach to asset management planning be the agreed minimum level for all NSW councils.
 - An asset management improvement program be implemented to progressively raise asset management planning to a level appropriate for each council.
 - Legislative amendments requiring ten year financial planning be introduced into the *Local Government Act 1993*.
 - An industry wide capacity building program including a range of training, tools, templates and guidelines be introduced.
- 1.36 In its submission, the Property Council of Australia argued that local government should adopt alternative financing options as part of a wider reform program which should include:
- Structural reform to create larger councils in urban areas (amalgamations in some cases and reconstituting new councils in others);

- Drop rate capping for larger councils subject to a fiscal responsibility framework;
- Establish independent Planning Assessment Panels as the consent authority for all development applications not determined by staff;
- Compel councils to expend unspent section 94 moneys;
- Require all councils to produce a 10 year infrastructure strategy every 2 years in similar format to that of the State Infrastructure Strategy.

1.37 *The Independent Inquiry into the Financial Sustainability of Local Government in NSW* (Percy Allan report, 2006) identified deficiencies in the asset management practices across NSW local councils. The inquiry found that only one in five councils had asset management plans. This lack of asset management systems was attributed to the resource limitations of councils which are already burdened by mandatory management and prescribed reporting.

1.38 The report also recommended that the state government provide technical assistance and financial incentives to enable councils to adopt a total asset management system within 3 years. A lack of long term strategic and financial planning among councils was also identified and it was recommended that councils develop long term, 10 year strategic and financial plans.

1.39 Ideally Strategic Assets Plans for local government should link in PPPs. This would also assist councils to retain a “line of sight” between community needs and PPPs.

Questions for Comment:

Should the state government provide technical assistance and financial incentives to assist councils to adopt a total asset management system within the next three years?

Should councils’ Strategic Asset Plans make provision for PPPs?

Knowledge Management

1.40 Lack of resources, knowledge and expertise within the local government sector was identified as a crucial factor which inhibits the growth of PPPs at this level. There is clearly a strong need for guidance and support which is currently absent.

1.41 Further, concern was expressed about the “silos” within the local and state government sector that inhibit the sharing of information.

1.42 Therefore, while councils may be strongly focussed on the desired outcomes from a partnership with the private sector, they often lack the in-house development and legal expertise to assess at what level benchmarks for the project should be set.

1.43 This often leaves councils too dependent upon the developer in areas of key negotiation. Apart from the obvious conflicts of interest, developers are often not the long-term strategic partners in a project, as they may be looking to on-sell.

- 1.44 Alternatively, councils must spend significant amounts of money seeking external advice to get to the stage of even determining the viability of a project.
- 1.45 This was acknowledged by Leighton Constructions, which is currently undertaking the North-South By-pass Tunnel in partnership with Brisbane City Council: *At the outset council had done all the background work.....Brisbane City Council did a lot of work before it put this out to tender. It would have had to do that whether it was a build, own, operate, transfer [BOOT], a design and construct, or an alliance. People make much about the delivery methodology but when you have big projects like this you have to define your needs and you have to work out what you want to build. People differentiate in the delivery method. You have to do your homework, no matter how you deliver a project. Brisbane City Council did a lot of work. It understood that it probably was not going to get this project at nil cost to it, so it had a facility. At tender it said that it had up to \$500 million available. It had worked that out before we had even started talking to it.*
- 1.46 Similarly, the Committee recently met with Banyule City Council in Victoria which is undertaking a \$400m PPP redeveloping the Greensborough Town Centre. Banyule Council has managed the entire project internally with the assistance of a Principal Consultant and spent two years of administrative work, as well as \$2m on the proposal before they were provided with assistance from the Victorian government.
- 1.47 Clearly, this type of expenditure and dedication of resources is beyond the scope of many NSW councils. Further, councils in NSW are not being given the assistance from NSW Treasury that Victorian councils are receiving from the Victorian Department of Treasury and Finance.
- 1.48 The NSW Department of Local Government has also taken a “hands off” approach to local government PPP projects prior to their submission to the Department for evaluation. The Department sees its role as to merely check that a potential PPP project is in accordance with the guidelines and only has a small allocation of funds to engage expert consultants to assist with matters such as risk assessment, when required.
- 1.49 A key strategy to address all these issues would be the establishment of an expert external agency which allows councils access to outside expertise and training.
- 1.50 This model has been used in other major jurisdictions such as Queensland, the United Kingdom, the United States and Canada. These agencies operate at a variety of levels of government: national, state or provincial and local.
- 1.51 The NSW Public Accounts Committee report on the *Inquiry into Public Private Partnerships (2006)* explored the issue of a NSW state central PPP unit, separate from but related to, NSW Treasury. This unit would be tasked with assembling the skills required to negotiate and provide management advice for PPPs which could assist in the sharing of knowledge across agencies and disciplines.
- 1.52 In its submission to the inquiry, NSW Treasury argued that such a model was unnecessary as *“the required capacity existed either in NSW Treasury or within individual agencies”*. Treasury also indicated to the Committee that *it “serves as the central repository of information about PPPs in NSW, in terms of technical aspects,*

the Public Sector Comparator and structures and uses this information to develop a common approach between agencies around procurement”.

- 1.53 The Treasury response does not address the problems facing local government which does not receive direct assistance from Treasury regarding the formulation and implementation of PPP projects.
- 1.54 The Public Accounts Committee recognised this and also recommended that the NSW government consider adopting a support structure for PPPs managed by local government similar to the Public Private Partnerships Programme (4Ps) in the UK, which included peer support, systems support and sharing of expertise. However, the Committee did not look at the issue of local government PPPs in any depth and did not receive submissions or take oral evidence from either the LGSA or any local councils.
- 1.55 The Government response to the recommendation was to draw the Committee’s attention to the legislation and related guidelines. However, these do not address the intent of the recommendation which was to develop a platform of support for local government.

Other Jurisdictions

United Kingdom

- 1.56 The United Kingdom has two agencies to facilitate PPPs, one at central government level (Partnerships UK) and one at local government level (Public Private Partnership Programme [4Ps]). The 4Ps is local government’s own project delivery specialist, set up by the English and Welsh local authority associations in April 1996, with cross party support.
- 1.57 4Ps is financed by, and accountable to, local government. During 2006/07 it received Government funding of £4,447,000 from the Department of Communities and Local Government through the Public Private Partnerships Programme.
- 1.58 The 4Ps assists local government in four key areas: project support; skills development; gateway reviews; and best-practice know-how. Expertise is drawn from lawyers, accountants, project managers/mentors, network groups and brokers. The 4Ps is also governed by a Board which is appointed by the UK’s Local Government Association.

Queensland

- 1.59 On August 2005, LG Infrastructure Services was launched to offer a comprehensive range of support services to Queensland local governments in relation to infrastructure and service provision, by providing support at each stage of the project delivery lifecycle. The initiative was loosely modelled on the UK Public Private partnership Programme (4Ps).
- 1.60 LG Infrastructure Services is a State authority which is owned by the Local Government Association of Queensland and the Queensland Treasury Corporation in equal shares.

- 1.61 LG Infrastructure Services offers the following project support to Queensland local government:
- *Project evaluation:* including options analysis, risk analysis, financial modelling and business case development;
 - *Working with government:* including applying for subsidies and satisfying regulatory and statutory approval requirements;
 - *Project delivery:* helping local governments to select a best practice delivery model, and ensuring that fair, open and transparent processes are undertaken in implementing the chosen model;
 - *Capital raising:* including both private and public financing;
 - *Project monitoring and review:* for the full range of requirements for existing projects; and
 - *Project reconstruction and recovery:* for projects that encounter difficulties.
- 1.62 The model adds value to local government by:
- Generating economies of scale in infrastructure services provision;
 - Increasing bargaining power;
 - Reducing the cost of infrastructure provision;
 - Expanding the range of choices in the assessment and implementation of infrastructure projects; and
 - Acting as a central repository of knowledge on procurement issues.
- 1.63 LG Infrastructure Services provides its services to Queensland local government on a fee for service basis, according to commercial principles. However, all key decisions are left to the councils involved.

Victoria

- 1.64 Partnerships Victoria was introduced in Victoria in 2000. It provides a framework for a whole-of-government approach to the provision of public infrastructure and related ancillary services through PPPs. It focuses on whole-of-life costing, project risks, and optimal risk allocation between the public and private sectors. There is a public interest test and 'core' public services must be retained.
- 1.65 Partnerships Victoria projects account for about 10 per cent of annual public asset investment commitments. There have been 16 Partnerships Victoria projects worth approximately \$4.5 billion in capital investment.
- 1.66 Partnerships Victoria is currently examining the reasons behind the failure of local government to engage in PPPs and has found that it is generally due to the following: financing is too complex; there is a general skills gap; there is a lack of

high-level commercial skills; there is also a lack of high-level engineering skills (except in relation to roads); and the cost is seen as prohibitive.

- 1.67 After examining the Queensland model, the Victorian Department of Treasury and Finance has decided not to establish a separate agency to assist Victorian local councils with their PPPs. This is largely due to the fact that, unlike Queensland, local councils in Victoria do not have control over water. The Department therefore feels that there will not be sufficient local government PPPs in Victoria to merit a dedicated agency.
- 1.68 However, Department of Treasury and Finance have been extensively involved in various local government PPPs such as Banyule Council's Greensborough Project and intend to continue providing such assistance in the future. Local councils are offered access to designated external consultants who are engaged by state government at discounted rates. The decision has also been made to designate a central agency of state government to co-ordinate and manage all of the other state agencies such as Transport and utilities, which need to be involved to optimise council PPP developments.

Questions for Comment:

Should there be a central NSW government agency assigned the responsibility of co-ordinating and managing all other state government agencies involved in local council PPPs?

Should there be a new agency to educate, train and provide access to external expert advice to local government in relation to PPPs?

If so, what should the key functions of this agency be and how should it be constituted and funded?

Standardised Forms and Contracts

- 1.69 Councils generally prepare Development Agreements for large and complex PPPs. These are legal agreements between councils and developers which sets out agreed upon issues such as who does what, conditions precedent and any compulsory acquisition of policy.
- 1.70 Councils reported to the Committee that substantial legal and administrative costs were incurred through the drawing up of contracts, even for relatively small PPP projects.
- 1.71 It was also argued that standardised contracts would assist in keeping councils' expectations of a PPP project realistic.
- 1.72 In its report on Public Private Partnerships in June 2006, the Public Accounts Committee considered the issue of whether standardised forms and contracts would assist in reducing bid and project costs.

- 1.73 The UK Treasury has standardised all its PFI (PPP) contracts, arguing that it helps to ensure best practice, improve procurements across the public sector, and reduces the length and cost of PFI procurements.
- 1.74 The Public Accounts Committee also heard counter arguments that standardised contracts reduced flexibility.
- 1.75 However the Committee did ultimately recommend “That NSW Treasury expedite the use of standard forms and contracts for PPPs”.

Question for Comment:

Would the availability of PPP standardised forms and contracts be of benefit to councils?

Models for Dealing with PPPs

- 1.76 There is currently no “one size fits all” method for dealing with a local government PPP. When Parramatta City Council undertook its \$1.4 billion Civic Place Development, several sub-committees of Council were established to deal with separate issues such as probity and project management. External advisors were attached to these to offer impartial advice. A project manager was also engaged.
- 1.77 This model is clearly expensive and borne out of necessity due to the size and complexity of the project.
- 1.78 Smaller private partnership projects are often undertaken with only one or two external advisors reporting to Council as a whole.

Question for Comment:

Is there a best practice model (or models) councils should adopt in relation to PPPs or should councils decide the most appropriate model in accordance with their own particular needs and the individual nature of each project? Should an agency of government provide information about available models to assist councils?

Land Use Issues

- 1.79 The *Local Government Amendment (Public-Private Partnership) Act 2004* amended the *Local Government Act 1993* to give a regulatory framework for PPPs entered into with NSW local governments.
- 1.80 Apart from the legislation regarding PPPs, other legal and regulatory issues surround the PPP issue such as the considerable restrictions on the use of community land, found in Chapter 6 of the *Local Government Act 1993*. Part 4 of the *Local Government (General) Regulations 2005* also set out the categorisation, preparation and adoption of draft Plans of Management (PoM) for community land and other matters relating to their leases, licenses and other estates. The PoM may place impediments on the use of community land as it includes the condition of the land,

any buildings or structures on the land and the purposes for which the land, any buildings or improvements on the land will be permitted to be used.

- 1.81 Section 45 of the Local Government Act provides for any dealings a council can have in community land. A council has no power to sell, exchange or dispose of community land. A council may grant a lease or licence over community land where it is for the provision of public utilities and works associated with or ancillary to public utilities. Section 47D prohibits the exclusive occupation or exclusive use by any person of community land.
- 1.82 At a public hearing on 9 November 2007, the issue of the complexity of converting community land to operational land was discussed. Mr Allan Smith, a Councillor from Dubbo City Council and Executive Member of the Local Government and Shires Association spoke of an example that arose in Dubbo: *I had an example that was fairly large, it was not to build a PPP. It was a fairly large shopping centre that was surrounded by a green belt that was public land. It was non-operational community land. To get an extra driveway out of their car park across the community land was a major difficulty. After public exhibition, the public said no way were we to put a driveway across..... when we went through the public exhibition period to change the plan of management to go from a narrow strip across that land to have a driveway, the community made it very clear that they were not going to wear it. As such it all fell over. You would have those same issues trying to convert a lot of community land to operational, under the present legislation.*
- 1.83 The Parramatta Civic Place Redevelopment has recently highlighted another potential legal impediment with regard to the *Land Acquisition (Just Terms Compensation Act) 1991*. The Land and Environment Court determined that Parramatta City Council did not have the power to compulsorily acquire two parcels of land. This was based on the interpretation that the land would ultimately be transferred to a private party and was not acquired for the purpose of exercising council functions. The decision is subject to appeal.
- 1.84 In large PPP developments, there are often issues requiring state government or federal government approval decisions. It is therefore important that the local government not only has assistance but also cooperation at these levels.

Questions for Comment:

Do legislative restrictions on community land use, the Plans of Management of such land use, and the dealings a council can have in community land, present impediments to councils entering into PPPs?

Should one central NSW government agency assume responsibility for co-ordinating all government agencies and utilities involved in local government PPPs?

PPP Guidelines

- 1.85 The Local Government Shires Association of NSW suggested that there should be a review of the recommendations of the Oasis report, the Guidelines and associated legislation.
- 1.86 The Association argued that some councils have found the current guidelines and regulations too restrictive. The need to develop a project brief before calling for expressions of interest (EOI), for example, may stifle creative alternative proposals for the use of a particular site. It was suggested that a review of the operations of the Guidelines and the Local Government Project Review Committee would be timely in order to assess whether or not they are realistic for councils in all instances.
- 1.87 In its submission, Infrastructure Partnerships Australia (IPA) also considered that there was scope for further legislative or Project Review Committee reform in order to shift the sole focus from risk control to greater facilitation of PPPs for Councils.
- 1.88 Professor Maurice Daly similarly commented that when a project comes before the Project Review Committee, *“there is a bit of a feeling we have to make sure this is absolutely watertight and it cannot go wrong, and so on, whereas the secret is to work with a council to make it happen rather than to stop it happening. I have a feeling there is more of the stop it happening than to make it happen. I think it is a learning experience for the Department of Local Government as well as the councils themselves”*.
- 1.89 Professor Daly believed that the Guidelines served *“to keep you out of trouble rather than lead you to getting effective outcomes”*. He believed that in comparison to the Victorian and Queensland systems, the NSW system at the state level is weak.
- 1.90 Professor Daly further argued that the best method to influence local government regarding PPPs is by the example of a few successful outcomes rather than merely by a regulatory framework.
- 1.91 Gregory Incoll of Incoll Management considered that streamlining of the Guidelines may assist councils and provide greater certainty to the private sector. He considered that, as they were implemented following the Liverpool inquiry and report, they may have been *“a little heavy-handed as the Government wanted to ensure that it did not happen again”*. He thought the private sector has become *“a little jaundiced”* with councils and PPPs due to the number of steps councils are now required to follow which have the potential to add to time delays and uncertainty that the project will proceed. As a result he believes that the private sector is choosing to invest their capital elsewhere.
- 1.92 Mr Incoll further submitted that, *“The intent of the guidelines is good. The intent of the guidelines is essentially that when a council has a requirement it not only has a concept and a way of going forward but it actually has a business plan or a feasibility surrounding the concept. That was probably a step that was missing in previous years. Holistically, the second step is that before a council enters into an engagement with the private sector, all the documentation related to the process up to that point in time, or the commercial arrangements around that negotiation and how the project will go forward after a contract is engaged, is really the second component of those guidelines. That, again, is a sensible structure. It just becomes unwieldy with the*

amount of information that has to flow at that point in time, and the timeframe taken. So a private sector organisation will look at the timeframe and probably balk at it”.

- 1.93 A representative from South East Region Training and Enterprise Centre also supported the view that there is the area of PPPs is now over-legislated.
- 1.94 However, the Department of Local Government argued that neither the legislation nor guidelines impose onerous burdens on councils entering into PPPs. *“The processes and procedures set out in the guidelines are for any responsible, transparent and well managed council to undertake to ensure they meet their obligations to the communities. The guidelines do not add another layer of bureaucracy and the process does not cost the council anything. Timeframes are also built into their guarantee of service so there is quick turnaround time”.*
- 1.95 The Guidelines also were designed to emphasise the dual role of councils to ensure transparency with respect to being the consent authority but also the proponent of the PPP and be responsible for the long term maintenance of an asset.
- 1.96 The Department also said that it found that with smaller projects, councils have welcomed the guidelines as they have clarified what exactly is required and has not received any criticism regarding their operation.

Questions for Comment:

Do the guidelines and legislation, in their current form, present barriers for councils to enter PPPs?

Is it necessary to reform the legislation and guidelines with a greater focus on the facilitation of PPPs rather than of risk control?