

Contact Christopher Kelly  
Direct 02 8223 4143  
Email christopher.kelly@maddocks.com.au  
Our Ref CZK: KGR

Lawyers  
Level 28, Angel Place  
123 Pitt Street  
Sydney New South Wales 2000 Australia  
Telephone 61 2 8223 4100  
Facsimile 61 2 9221 0872  
Email info@maddocks.com.au  
www.maddocks.com.au  
DX 10284 Sydney Stock Exchange

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Committee Manager  
Public Accounts Committee  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

Dear Sir/Madam

**Public Accounts Committee Inquiry into Public-Private Partnerships  
Submission by Maddocks Lawyers**

This submission is made by Maddocks in response to a call for submissions by the NSW Public Accounts Committee in relation to its Inquiry into Public-Private Partnerships. Maddocks is a national law firm with offices in Sydney and Melbourne. A brief introduction to Maddocks and our PPP experience is set out at Appendix A.

Maddocks has over 15 lawyers in its Construction and Major Projects Group. This group, and the lawyers within it (in particular the partners), have extensive experience of public-private partnerships. A summary of this experience is set out at Appendix B.

**1. Summary**

While Maddocks acknowledges there are a number of areas which require improvement for an effective PPP framework to flourish in NSW, we have focussed on three principal matters. We briefly summarise our submissions below.

- 1.1 The development and application of co-ordinated policy and standardised contractual terms;
- 1.2 The rigorous adherence to good procurement practice to drive down deal costs and ensure that benefits are not only theoretically available but secured; and
- 1.3 The provision (or procurement) of meaningful policy support and guidance for PPPs at local government level.

More detail is provided in the following sections.

Interstate office  
Melbourne

Affiliated offices  
Adelaide, Beijing, Brisbane, Colombo,  
Dubai, Hong Kong, Jakarta, Kuala Lumpur,  
Manila, Mumbai, New Delhi, Perth,  
Singapore, Tianjin

## 2. Co-ordination and Standardisation

- 2.1 The application of PPP policies across Australia lacks consistency and co-ordination.
- 2.2 There are significant cost and time impacts associated with the navigation by the private sector through multiple, and at times unpredictable, policy processes.
- 2.3 The public sector must be equipped with the requisite number of people with project financing expertise in order to know how to create a bankable framework for PPP policy implementation.
- 2.4 If we compare the NSW PPP market to the more advanced UK market, there are lessons to be learnt.
- 2.5 Similar to the UK, NSW needs a properly empowered government taskforce or agency to develop policy and provide assistance to procuring authorities. For UK examples, refer to Partnerships UK (<http://www.partnershipsuk.org.uk>) which was given a brief to *"provide the public sector with the key commercial skills to forge increased and better partnerships with the private sector on equal terms"* and its predecessor the Treasury Task Force. Also refer to the independent Office of Government Commerce which has the stated aim to modernise government procurement (<http://www.ogc.gov.uk>)
- 2.6 Australia requires standardised contract terms. We recognise such terms may need to be developed on an industry or departmental specific basis. The UK has achieved this at both Treasury level and at departmental level. See, in particular, the HM Treasury website: [http://www.hm-treasury.gov.uk/documents/public\\_private\\_partnerships/ppp\\_index.cfm](http://www.hm-treasury.gov.uk/documents/public_private_partnerships/ppp_index.cfm); and the Department of Health website: [http://www.dh.gov.uk/Procurement And Proposals/PublicPrivatePartnership/fs/en](http://www.dh.gov.uk/ProcurementAndProposals/PublicPrivatePartnership/fs/en).
- 2.7 NSW needs to critically examine its PFP deals on a regular basis. This mandates the creation of an independent auditor similar to the UK (ie, the National Audit Office, <http://www.nao.org.uk/>).

- 2.8 NSW should engage in "co-operative federalism"<sup>1</sup> to achieve the above.

### 3. Process

- 3.1 The bid process needs to be predictable, cost-efficient and not unduly protracted.
- 3.2 Recent methods to elicit competitive tension between bidders in Australia (eg, two to the wire or best and final offer) has resulted in escalating bid costs.
- 3.3 The increasing uncertainty of the tender phase has also added to bid costs. For instance, the added cost of standing down a bid team after failing to be nominated as a preferred bidder, but subsequently having to re-group to continue in the bid process.
- 3.4 Time frames for private sector response to State issued requests are often quite compressed in comparison to the time afforded to the State to prepare or review submissions.
- 3.5 The specific requirements of a Request for Tender document often also add further cost and delay to the project time line, without any perceived value, for example:
  - 3.5.1 the requirement to include in a bid non-compliance tables which document every departure from the State's issued documents; and
  - 3.5.2 the requirement to comply with strict probity controls. This provides minimal opportunity for bidders to understand better the State's technical or other requirements by way of discussion.
- 3.6 A corollary of the currently problematic bid process is a reduction in the number of players willing to engage in the PPP market<sup>2</sup>.

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<sup>1</sup> The Hon John Brumby, MP, Treasurer and Minister for State and Regional Development in Victoria

<sup>2</sup> David Larocca, Ernst & Young "Financing Infrastructure and Public/Private Partnerships", presented to the Economic Society of Australia, 3<sup>rd</sup> Conference of Economists, 2004 Business Symposium, September 2004

#### 4. Local Government

- 4.1 On 1 September 2005 the *Local Government Act 1993* was amended to set out a process for NSW councils to comply with when entering into, or considering entering into, PPPs. The legislative amendments were the product of a report released by the Emeritus Professor Maurice Daly BA PhD MIMC, entitled "*Lessons from the Liverpool City Council Experience: Recommendations for Public-Private Partnerships in Local Government*" Volume 2, June 2004. PPPs are a relatively new procurement model at local government level.
- 4.2 Local government, typically, lacks the resourcing and expertise demanded of a PPP project. Accordingly, there is a strong need for policy guidance and support which is currently absent.
- 4.3 The UK has achieved standardisation of its policy and contractual materials at local government level via the 4ps (refer to <http://www.4ps.co.uk/>). The 4ps provides procurement support for local authorities. It facilitates the sharing of knowledge between procuring authorities by developing Procurement Packs which contains almost everything the unsuspecting local authority needs to deliver a deal, including a Project Agreement, payment mechanism and specification. It also contains comprehensive guidance on the early stages of procuring a PFI deal, such as developing a business case and constructing the public sector comparator. There are now a number of these available as follows:
- Schools;
  - Housing;
  - Leisure and Culture;
  - Street Lighting;
  - Waste Management.

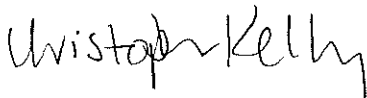
NSW councils require similar assistance. It is not enough to simply give the Department of Local Government additional PPP responsibilities without also giving it the considerable additional resource required.

**5. Conclusion**

The market perception of PPPs in NSW is that the government has lacked the political will to energetically implement and support the NSW Guidelines. Accordingly, the flow of PPP deals in NSW has been relatively thin. The extraordinarily complex nature of this form of procurement means that government must take responsibility for creating an environment in which these deals are competing equally with other methods of procurement. Everyone knows (or should now by now) how to go about procuring a building. Very few people however have the skills to deliver these deals in any meaningful numbers. The key to doing this is to focus on co-ordinating policy, standardising terms and rigorous adherence to good procurement practice.

We would be happy to provide the Public Accounts Committee with a more formal and in depth presentation of our submissions if required. Please contact Christopher Kelly on (02) 8223-4143 or Karin Ragel on (02) 8223 4181 if you require any further information.

Yours faithfully

A handwritten signature in black ink that reads "Christopher Kelly". The signature is written in a cursive, slightly slanted style.

Christopher Kelly  
Partner

## **Annexure A - Maddocks – An Overview**

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Maddocks is a leading Australian law firm with offices in Melbourne and Sydney. Established in 1885, the firm provides premium legal services in a broad range of practice areas to business and government, across Australia and Internationally. We comprise 42 partners, 160 lawyers and over 310 personnel nationally.

We attach the highest importance to accessibility and clarity. That's one of the reasons why we have succeeded in establishing strong, ongoing client relationships - the kind of relationships where clients identify us with their achievements.

We attract legal and strategic minds of the highest calibre, providing broad, ever-evolving opportunities for them to continually build on their skills and knowledge, at whatever stage in their career.

### **What we stand for**

We take pride in our culture, our commitment to excellence and in making a difference. Our business is based on our core values of:

- respect for the individual and of diversity
- integrity
- stewardship
- commitment to doing things better through excellence, change and innovation
- collaboration and working together to promote the interests of the firm.

### **Legal Expertise**

Maddocks provides a wide range of legal services to both public and private sector clients. Our experience in a variety of industry sectors ensures that we are well-placed to provide astute, commercial advice in the following areas:

- |                                      |  |
|--------------------------------------|--|
| - Banking & Finance                  | - Planning & Environment                                       |
| - Commercial Disputes                | - Property   |
| - Construction & Infrastructure      | - Public Law   |
| - Corporate & Commercial             | - Superannuation   |
| - Immigration                        | - Tax & Revenue  |
| - Intellectual Property & Technology | - Tax Disputes   |
| - Insolvency and Reconstruction      | - Workplace Services (Employment and Industrial Relations Law) |
| - Major Projects                     |  |

### **Our Clients**

Clients include some of Australia's major contractors, engineering firms, consultants, developers, government departments and agencies and local government. In particular, the firm has considerable expertise in working with local government. In Victoria, we act for 69 of the 79 councils, and in New South Wales, we act for 21 councils. We expect to be judged on our clients' success.

## **Annexure B - Maddocks Experience**

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**Brighton & Hove District Council** – principal lawyer for B&HDC on a £20m bundled schools (4 schools) Private Finance Initiative scheme.

**Walthamstow Schools, Lleyton Schools** - acting for the procuring authority: advising on commercial aspects of PFI schools transactions, including direct agreements and construction.

**Lane Cove Tunnel PPP Project** – advising the Lane Cove Tunnel Company undertaking a DBFO contract for the NSW Government, including advising on the design, construction, project delivery and operation of the project.

**Victorian Correctional Facilities Partnerships Victoria Project** – acted for the successful consortium led by Bilfinger+Berger BOT for the Partnerships Victoria prisons project undertaken by Department of Justice/Correctional Services Victoria.

**Frankston Private Hospital** – advising the owners on project delivery, consultancy agreements and construction contracts for a \$30 million private hospital project.

**UK Hospitals** – represented financiers on a series of UK Hospital PFI projects including some of the first major hospitals undertaken under the PFI initiative. Key projects included Bishop Auckland, South Tees and Neath Hospitals. The projects were developed using different financing arrangements including a US public bond issue.

**Berwick Community Hospital Partnerships Victoria Project** – advising the engineers and architects Partnerships Victoria issues and risk allocation under the project contract and advised on project documentation and contracts.

**Edinburgh Schools** – advice and assistance as required.

**Cardinia Shire Council – Civic Centre DBFM project** – acting in an innovative partnership with private sector consortium to redevelop the centre of Pakenham township by delivering a 5 star ESD rated civic offices for Council and a state government health authority (involving a ground lease to the developer, a long term leaseback and ultimate unencumbered freehold title to Council) as well as granting future development rights in respect of adjoining land to the developer.

**Coventry City Council** – principal lawyer for CCC on construction and project financing of a £160m project financed football stadium.

**Department of Treasury & Finance (Victorian Government Property Group)** – acted in respect of the acquisition of property for a new police station in Bendigo. This involved negotiating documentation for the acquisition of various parcels of land to create a master site for the redevelopment of a police station.

**Melbourne Central Shopping Centre Redevelopment Lend Lease** – recently advised General Property Trust and Lend Lease in relation to the redevelopment of the Melbourne Central Shopping Centre including acquisition of land from the State, long term leases from

the State, leasing of retail, advising on construction and project risk issues and advising on GMP Design & Construct Contract with Bovis Lend Lease.

**Monash University** – acting for the University in the redevelopment of the Caulfield campus which involved the preparation of requests for proposals and tender documentation in regard to the development of a retail plaza and commercial building.

**Frankston City Council** – acted for Council in the redevelopment of the Central Activities District which involved an expression of interest process and concurrent negotiation processes in respect of Council's sale for the redevelopment of a shopping centre.

**Sydney Airport Passenger Terminal Redevelopment** – acted for Ansett on the redevelopment of its \$180 million Sydney Airport passenger terminal.

**Melbourne Airport Passenger Terminal Redevelopment** – acted for Ansett on the upgrade and development of its Melbourne Airport passenger terminal.

**Melbourne Central (Underground) Station Redevelopment** – acting for General Property Trust (GPT) as the owner of the Melbourne Central Shopping Centre in the leasing and acquisition of rail land from VicTravel and the Director of Public Transport and negotiating a construction control agreement with the Director of Public Transport for the redevelopment of Melbourne Central Station.

**Regional Fast Rail Project** – acting for Freight Australia, the rail infrastructure lessee in relation to this \$500 million project to upgrade the main rail lines to Ballarat, Bendigo and Geelong in Victoria. This included advice on project documentation, access agreements and rail safety accreditation and safety processes for contractor access and occupation and consumer activities.

**Flinders Street Station Redevelopment** – acted for joint venture bidder, Alstom as contractor for the redevelopment of Melbourne's Flinders Street Station, in particular, advising on the application of contract and specifications and disputes between the contractor and the director of Public Transport.

**London Underground Ltd** – representing this government authority in relation to the London Underground part privatisation (Public Private Partnership), including advising on the approach to the procurement of station redevelopment on the underground system.

**Walsall Metropolitan Borough Council** – principal lawyer for WMBC on a £20m Private Finance Initiative integrated transport project (project to reconfigure roads and bus routes to enhance public transport provision).

**Walsall Metropolitan Borough Council** – principal lawyer for WMBC on a pathfinder £20m Private Finance Initiative street lighting scheme (this project won Best Transport Project at the 2003 Private Finance Initiative Awards).

**Luton Borough Council** – principal lawyer for LBC on a range of construction issues on a £100m project financed airport.



**Hampshire Waste Services** – contracts for 3 x £40m energy from waste plants for Hampshire County Council.

**Onyx Aurora Limited** – tender for Isle of Man energy from waste plant, Collaboration Agreement and Construction Option Contract with design and build contractor (£40m).

**Macquarie Bank** – we are on Macquarie Bank's preferred legal advisor panel in relation to Major Projects (Property Finance) and have acted for Macquarie on a number of syndicated property development investment schemes.

**Holden Headquarters at Fishermans Bend** – acted for James Fielding Group, as developer of the new Holden Headquarters involving development agreements and construction agreements for this \$200 million industrial and commercial development.

**Spencer Street Station Redevelopment Partnerships Victoria Project** – advising the Independent Certifier on the project agreement and subcontracts and its role and obligations under the relevant contracts for this Partnerships Victoria PPP project

**Craigieburn Bypass over the Melbourne to Sydney Rail Line** – acting for Freight Australia in the development of a construction control agreement between Freight Australia, Vicroads and the highway contractor for the construction of the bypass over the main Melbourne to Sydney rail line.

**Queensland Rail** – advising in relation to a number of disputes with contractors in relation to train and systems infrastructure.

**Dutch High Speed Rail** – advising a contractor in relation to a bid for the design, construction and operation for the system assets for the Netherlands High Speed Rail Project.

**Taiwan High Speed Rail Project** – advising the consortium in respect of the design and construction of the project.

**Melbourne CityLink BOOT Project Melbourne City Link Authority** – acting for the contractor TOJV in relation to contractual obligations and all environmental issues arising under the concession deed for \$1 billion BOOT project.

**Republic of Ireland** – advised the Irish government on the Irish program for major road upgrades using a PPP model.

**National Legal Aid** – currently advising this body (comprising all legal aid commissions in Australia and New Zealand), in relation to a project to deliver one computer system for all commissions (the Atlas project). This has included contract drafting (a GITC v4 contract) and advice on the RFT, project structure and procurement issues.

**Newood Resources Project, Tasmania** – acted for the sponsors of a privately funded forestry infrastructure project.

**Commonwealth Department of Defence** – advised in relation to the revision of the Department's suite of standard construction delivery contracts.

**Capital Finance Australia (CFA)** – acted for CFA on a number of building construction and development projects (including project finance for a 250 residential apartment complex in the Docklands).

**Landcom** – advised on Crown development rights, including documenting a public/private partnership development application model for public development.

**Swinburne University** – advising on campus projects in Malaysia, Vietnam and Cairns, including review of funding documentation.

**Moorabbin Airports Corporation** – advising on the development of a shopping centre and industrial and business park on Commonwealth land.

**Metropolitan Mobile Radio Partnerships Victoria project** – acting for Victoria Police, the Metropolitan Ambulance Service and the Metropolitan Fire and Emergency Services Board on this Partnerships Victoria Project. Advising on Partnerships Victoria and drafting and negotiating the service level agreement for the Project. We also advised on corporate governance issues and potential legal issues arising under the MMR Service Agreement between the State and the provider of the MMR services.

**Emergency Alerting System Partnerships Victoria Project** – acting for the CFA and advising on Partnerships Victoria and project contract. Drafted and negotiated the service level agreements for the project. We also advised the CFA in relation to corporate governance issues arising under the EAS Service Agreement between the State and the provider of the EAS services as they impacted on the CFA.

**Box Hill Hospital Car Park Partnerships Victoria Project** – advising a bidder for this Eastern Health Project on the application of the Partnerships Victoria Policy and risk allocation issues

**Cardinia Shire Council Road DBM Project** – advising the Council and preparing documentation on PPP method of procurement for the design, construction, financing and maintenance contracts for 50km of roads.

**Melbourne University Carpark BOOT Scheme** – preparation of build, own, operate and transfer (BOOT) scheme documentation whereby the Melbourne City Council leased the land to Equiset (builders of the project) to design, develop and operate a carpark in association with the private university and return the carpark at the end of the lease.

**Victorian Government/Pacific Hydro** – advised the Victorian Department of Treasury and Finance and the State Electricity Commission of Victoria in 2004 in relation to Pacific Hydro's proposed \$200 million 200 MW wind farm in Portland, Victoria, including advising on the power purchase agreements, forward commodity contracts and renewable energy certificate agreements that will underwrite the financing of the project.

**Eastern Energy – hydro electricity BOOT Project** – advising on risk allocation and project and lease documentation under a build, own, operate and transfer arrangement for a hydro-electricity facility.

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