

29 May 2017

Stephanie Galbraith
Principal Council Officer, Upper House Committees
Parliament of New South Wales
Macquarie Street,
Sydney NSW,
2000 Australia

Dear Stephanie,

Please find below my answers to the questions posed at the recent Toll Road Inquiry.

1) The Hon. JOHN GRAHAM (p4): “Looking at transparency in New South Wales, how do we measure up on those specifics? ... how does New South Wales measure up compared to other jurisdictions you have seen?”

A search through various NSW websites indicates a wealth of information visible on NSW PPP projects, including toll roads. Project contracts are available along with project summaries similar to those made available in Victoria. I personally have always found such project summaries useful, and I was a key advocate for their initial development in Victoria¹. In concept, project summaries should bring together an accessible summary of the contract itself as well as the details of how government decisions were made. The NSW project summary information, however, does not appear to often include details of the public sector comparator, crucial to understanding the PPP deal.

Overall, then, I would say that NSW information released rates fairly well on in terms of transparency but the clarity in terms of the commercial ‘deal’ done on behalf of taxpayers could be much improved. Indeed, this is needed if the citizens are to be assured of the value for money of long term infrastructure project decisions.

2) The CHAIR (p5): “The notion or concept of commercial-in-confidence is one that we have come up against time and time again in the submissions we have received ... where do we go to look for a definition that is as precise as we can possibly get of what that means?”

My immediate response to the Inquiry in April on the question of defining ‘commercial-in-confidence’ was that it was a creature of private contract law and could cover any matters which both contract parties agreed were to be kept confidential within the contract. This is broadly correct. It would be more accurate, though, to say that ‘commercial-in-confidence’ is a ‘loose description for information of a commercial nature’ but ‘is neither a technical term nor one with a recognised legal meaning’.² A typical legal dictionary such as the LexisNexis Concise

¹ Partnerships Victoria Requirements (2016, 18), Government of Victoria, Treasury and Finance, Melbourne

² Public Accounts and Estimates Committee (2000, 15) Inquiry into Commercial-in-Confidence Material and The Public Interest, March 2000, Melbourne

Australian Legal Dictionary, for instance, defines ‘commercial-in-confidence’ as ‘a *label* or contractual stipulation *flagging an intention* to maintain the confidentiality of commercial information’ (with my italics added); LexisNexis Butterworths (2015, 107). In other words, it is a desired state of affairs by the two contract parties rather than being a guaranteed state. The ‘commercial-in-confidence’ label does not guarantee protection from disclosure under freedom of information. Nor does it guarantee confidentiality through enforceable confidentiality orders; LexisNexis Butterworths (2015, 107)³.

Definitional issues aside, the precise information typically deemed to be ‘commercial-in-confidence’ have used the label more widely than has been acceptable to the voting public. Past claims of ‘commercial-on-confidence’ have ranged from an entire contract (as in the case for Melbourne’s Grand Prix contract) to today’s practice which limits such secrecy to sensitive commercial information. Ultimately, different opinions exist on what ought legitimately be kept confidential and what ought not.

3) The Hon. Dr PETER PHELPS: On page 4 you say.... ‘commercial deals done on behalf of voters have been too secretive ... To what degree are NSW toll roads insufficiently transparent?’

See above answer to question 1. I also make the comment that transparency appears to me to have improved markedly over the past decade in NSW, in common with many jurisdictions.

4) Supplementary Question. “References to academic books, articles, papers, reports or research *that explain ... methods ... to examine ... the relative merits ... of involving the private sector ... in road infrastructure projects including toll road concession agreements?”

This is a huge question worthy of a PhD on its own! To my mind, some of the most useful materials for evaluating the relative merit of private sector involvement in concessions include the following:

General Texts:

- a) Dewulf, G., Blanken, A., and Bult-Spiering, M. (2012). Strategic Issues in Public–Private Partnerships, 2nd edn. Chichester: Wiley Blackwell.
- b) P. de Vries and E. B. Yehoue (eds.) (2013), The Routledge Companion to Public–Private Partnerships. Oxford: Routledge.
- c) G. Hodge, A. Boardman, and C. Greve, (eds.) (2010), International Handbook on Public–Private Partnerships. Cheltenham: Edward Elgar.
- d) Productivity Commission (2014) Public Infrastructure, Productivity Commission Inquiry Report No 71, 27 May, Melbourne.
- e) Flyvbjerg, B. (Ed.) (2014) MegaProject Planning and Management: Essential Readings, Volumes 1 and 2, Edward Elgar. (These volumes contain 70 seminal readings drawn from decades of relevant literature.)

Many of these references are general. This is in part because there are as many concession arrangements possible as there are different contracts to write.

³ More strictly, PAEC (2000, xxi) notes that ‘the expression ‘commercial in confidence’ is commonly used as a loose description for information of a commercial nature that would be protected by the common law action for breach of confidence... [T]he courts apply a number of public interest qualifications in defining the extent of the duty to treat information as confidential and the ability of persons to sue for breaches of that duty’

Articles focussing on Evaluation

- f) Blanc-Brude, F., Goldsmith, H., and Valila, T. (2006). Ex Ante Construction Costs in the European Road Sector: A Comparison of Public–Private Partnerships and Traditional Public Procurement. Economic and Financial Report 2006/01, European Investment Bank.
- g) Boardman, A. and Vining, A. (2010). “Assessing the economic worth of public–private partnerships,” in G. Hodge, A. Boardman, and C. Greve, (eds.), International Handbook on Public–Private Partnerships. Cheltenham: Edward Elgar.
- h) Hodge, G. A. (2010). “Reviewing public–private partnerships: Some thoughts on evaluation.” in G. A. Hodge, C. Greve, and A. Boardman (eds.), International Handbook in Public–Private /Partnerships. Cheltenham: Edward Elgar.
- i) Boers, I., Hoek, F., van Montford, C., and Wieles, J. (2013). “Public–private partnerships: International audit findings,” in P. de Vries and E. B. Yehoue (eds.), The Routledge Companion to Public–Private Partnerships. Oxford: Routledge.

I trust that these additional comments assist in your Inquiry.

Best,

Graeme Hodge
Dr Graeme Hodge
Professor of Law
Faculty of Law
Monash University 3800
VICTORIA, AUSTRALIA