

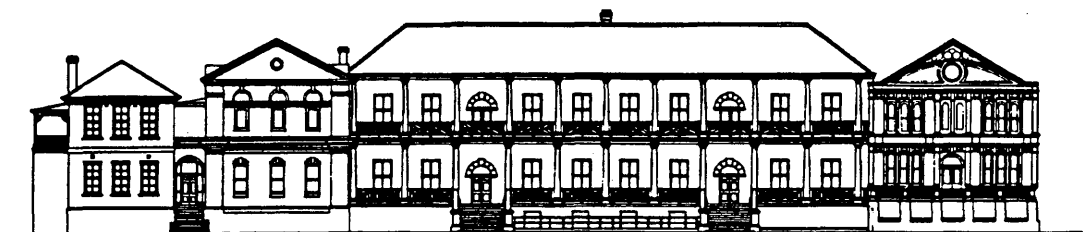


# **PUBLIC ACCOUNTS COMMITTEE ISSUES PAPER**

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## **Co-ordination of Government Inputs into Overseas Projects**

### **International Market Development Activities of NSW Marketing Boards**



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## MEMBERS OF THE PUBLIC ACCOUNTS COMMITTEE

### **Mr Ian Glachan, MP Chairman**

The Liberal Member for Albury since 1988, Ian Glachan has had a varied background. He served five years at sea as a marine engineer, was a farmer for ten years, and operated a newsagency in Albury for 18 years. Mr Glachan is also as past president of the Albury-Hume Rotary Club and a Paul Harris Fellow, an active member of the Anglican Church, and the Legislative Assembly member on the Board of Governors of Charles Sturt University. Other parliamentary responsibilities include Chairmanship of the Minister's Advisory Committee on Health, and vice-chairmanship of the Minister's Advisory Committee on Roads and Transport. Mr Glachan was elected Chairman of the Committee on 15 September, 1994.

### **Mr Peter Cochran, MP, Vice-Chairman**

Following a background in farming, the Army, the Commonwealth Police, ASIO, and the Cooma-Monaro Shire Council, Peter Cochran won the seat of Monaro for the National Party in 1988. His other parliamentary responsibilities include the chairmanship of the Minister's Advisory Committee on Land and Water Conservation, deputy chairmanship of the Committee for Police and Emergency Services, and membership of the committee for the Environment and the Select Committee on Public Sector Superannuation. He is also the Premier's representative on the Anzac House Trust and the Anzac Memorial Trust.

### **Mr Geoff Irwin, MBA, ProdEngCert, DipTech, DipEd, MP**

Geoff Irwin was elected to Parliament in March, 1984 as the Labor Member for Merrylands, and he has been the Member for Fairfield since March 1988. Before entering Parliament he worked in industry as a planning and supply manager and taught business studies at TAFE. He served as a member of the Select Committee upon Small Business and as Opposition Spokesperson on Business and Consumer Affairs.

### **Mr Terry Rumble, FCPA, MP**

Terry Rumble was elected Labor Member for Illawarra in March 1988. Before entering Parliament he qualified as an accountant and was employed in public practice and in the coal mining industry. He has served as a member of the Regulation Review Committee and is the Chairman of the Leader of the Opposition's Backbench Committee which involves Treasury, arts and ethnic affairs.

### **Mr Andrew Humpherson, MP**

Andrew Humpherson was appointed to the Public Accounts Committee on 14 September 1994 in place of Andrew Tink. The Liberal member for Davidson since May 1992 Andrew Humpherson was Deputy Shire President of Warringah Shire Council having served several terms on the Council. Mr Humpherson was an Area Manager for Shell. He has also worked as an Engineer for Repco and Shell. He holds a degree in Chemical Engineering from the

University of New South Wales. His other parliamentary responsibilities have included the Chairmanship of the Select Committee on Motor Vehicle Emissions and Legislation Committee upon the Endangered Species Bill. He has served as a Member of Select Committee into Water Board, State Owned Coal Mines, Bushfires and the Joint Committee on the Office of the Ombudsman.



**The Public Accounts Committee**

**From left: Terry Rumble, Andrew Humpherson, Ian Glachan (Chairman), Geoff Irwin  
Peter Cochran (Vice-Chairman)**

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## CHAIRMAN'S FOREWORD

In November 1994, the Committee received a request from the Premier, the Hon J. J. Fahey MP to inquire into two separate but related matters:

- the Co-ordination of Government Inputs into Overseas Projects;
- the International Market Development Activities of NSW Marketing Boards.

This Issues Paper represents the first step in meeting the Premier's request. Many of the issues it discusses were raised at a Roundtable Breakfast attended by senior representatives of both public and private sectors, which was held in December 1994. The Committee proposed to hold further Roundtable Breakfasts in 1995.

Comments are invited from all interested parties on the matters raised in the Issues Paper. However, there may be other questions which the Issues Paper does not cover, but which respondents consider important. They should not hesitate to deal with their concerns as comprehensively as they wish.

The Committee will be visiting all the relevant government bodies covered in this Issues Paper, and will be holding hearings in 1995. The report should appear in the first half of 1995.

Comments should be sent to:

The Director  
Public Accounts Committee  
Parliament House  
Macquarie Street  
SYDNEY 2000



Ian Glachan MP  
Chairman

21 December 1994

## **A. CO-ORDINATION OF OVERSEAS PROJECTS**

### **a. BRIEF BACKGROUND**

Most State Governments in Australia operate overseas projects. There appear to be several possible advantages to doing so:

- overseas projects can generate millions of dollars annually in revenue for the State (tens of millions for some States).
- much of this revenue is in the form of foreign exchange.
- short- and long-term jobs are created and/or maintained.
- overseas projects provide a boost to both private business and to government departments.
- they put the States' skill base to work and provide diversity of experience.
- they represent some return on the Australian aid dollar.

There may also be possible disadvantages, including the following:

- obtaining the projects may require sizeable investments of funds, time and skills.
- projects may fail to eventuate, after expenditure has been made seeking them.
- the private sector may feel that the public sector represents unfair competition.

Organising overseas projects involves:

- finding the projects, that is marketing services to as many recipient countries as possible and to funding sources;
- seeking funding from a diverse range of funding sources;
- putting together consortia (in many cases, public and private sector bodies working together);
- preparing co-ordinated bids;
- organising all details of implementation, including payment in foreign exchange.

So far, State Governments in Australia have evolved three separate models for running their overseas projects:



## **CO-ORDINATION OF OVERSEAS PROJECTS**

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### **(i) Through a Government Department**

This is the model used in Queensland, where the Premier's Department co-ordinates the overseas work of Queensland departments and agencies.

### **(ii) Each Agency Working Independently**

This is the model currently in use in NSW. Each agency

- markets its own services (in Australia and abroad),
- develops country and regional expertise,
- finds its own projects,
- identifies funding sources,
- organises its own bids (often in collaboration with the private sector), arranges payment of its experts (whether in foreign exchange or Australian dollars),

and in general carries out all the work involved in running an overseas project.

NSW has issued official Guidelines for the Export of the Skills and Expertise of NSW Public Sector Agencies in September 1993.

### **(iii) Through a 100% Government-Owned Corporation Run as a Business**

This is the model currently in use in Victoria and South Australia.

In Victoria, the Overseas Projects Corporation of Victoria (OPCV) is the sole body through which all Victorian agencies and departments — with the exception of energy-related bodies — must market and carry out their overseas activities. OPCV has existed since 1984 and has earned a profit every year since 1986. It has a staff of 32.

In South Australia, SAGRIC has been in existence since the mid-70s. Unlike in the case of OPCV, it is not mandatory for government bodies to market and carry out their overseas activities through SAGRIC. SAGRIC has consistently earned a surplus (which has fluctuated substantially since 1987). It has a staff of 40. It has two offices in Jakarta.

Both OPCV and SAGRIC issue contracts to (and derive revenue from) NSW Government bodies.

**b. ISSUES OF INTEREST TO THE PUBLIC ACCOUNTS COMMITTEE**

**1. JUSTIFICATION**

*Are there reasons justifying state government entities' involvement in overseas projects?*

**2. MAXIMISING FULL POTENTIAL FOR NSW**

*a. Has NSW maximised its potential returns from its involvement in overseas projects? What might some of the reasons for your response be?*

*b. Have NSW government bodies identified and tapped into the full range of possible funding sources, national and international, for their overseas projects?*

*c. What other possible sources of finance should be explored for overseas projects run by NSW government bodies? Is there a danger of over-reliance on AIDAB?*

While AIDAB appears to be the major source of the funding for overseas projects carried out by state bodies in the various States of Australia, there are many other international bodies which offer untied aid.

**3. THE NSW GUIDELINES (see Appendix)**

*Do*

- *the basic approach and*
- *the detailed directions*

*of the NSW Guidelines currently in place provide an appropriate framework for maximising the potential returns for NSW from its agencies' overseas activities?*

The NSW Guidelines, while outlining some of the potential benefits of overseas projects for NSW government bodies, place considerable stress on the possible risks. Among those it discusses are risk of project failure, risk of financial loss due to inadequate costings; liability for negligent advice or defective project; the risk that the State will be liable on any express or implied assurance; the credit risk on payments due; unfavourable currency fluctuations after tender; foreign jurisdiction risks such as restrictions on repatriation of funds or foreign taxes; internal cross-subsidy of export activities; the giving of priority to an export project at the expense of an agency's domestic obligations

## **CO-ORDINATION OF OVERSEAS PROJECTS**

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and the use of export projects to disguise the inefficient use of resources.

The Guidelines stress that overseas projects must come second to domestic activities, and that overseas activities are not to be engaged in unless there is a surplus of resources available for domestic use.

### **4. COSTS INCURRED**

- a. What are the total costs which have been incurred in NSW, Victoria, South Australia and Queensland in marketing and running overseas projects?*
- b. What have been the main components of the cost of securing overseas projects?*
- c. Has there been duplication of any of these costs?*

### **5. CO-ORDINATION**

- a. Should each individual agency market its own services, identify funding sources for possible overseas projects, attempt to become a source of country and regional information, and organise implementation, or should all these tasks be handled by one single body?*
- b. Should some of these tasks be handled by a single body?*
- c. If a single body should carry out some or all tasks, what form should that body take? Should it be a government-owned corporation run independently along commercial lines? Or should it form part of a government department, operating without commercial constraints? Or else should it be an off-the-shelf company which is a subsidiary of a department? What are the advantages and disadvantages of each of these structures? What would be the best form of accountability and ministerial responsibility for each?*
- d. Are there any other possible structures which might be appropriate?*
- e. What would be the optimum size and structure of the preferred body?*
- f. What should its ideal revenue/overheads ratio be?*
- g. Should any agencies be exempt from having to use such a body? If so, which ones, and why?*

## **CO-ORDINATION OF OVERSEAS PROJECTS**

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### **6. USE OF STAFF**

- a. Should agencies be encouraged to send their staff on overseas projects?*
- b. Should a career path be developed within agencies encouraging temporary work overseas?*

### **7. CO-OPERATION WITH THE PRIVATE SECTOR**

- a. Does the involvement of NSW government bodies in overseas projects constitute a threat to the private sector (in the form of unfair competition), a source of benefits (in the form of access to contracts), or both?*
- b. What is the best way of having the public and private sectors co-operate on overseas projects?*

### **8. TYPES OF PROJECTS FOR NSW**

- a. What types of projects should NSW get involved in? Should they be limited to service contracts, or should NSW government bodies attempt to become involved in construction and financing of infrastructure projects?*
- b. Should they act as procurement agents?*

### **9. DANGERS**

- a. What are the dangers of NSW government bodies getting involved in overseas projects? What are the best ways of combating these dangers?*
- b. What are the safeguards needed to protect NSW government bodies in their activities overseas?*

## **B. THE INTERNATIONAL MARKET DEVELOPMENT ACTIVITIES OF NSW MARKETING BOARDS**

### **a. BRIEF BACKGROUND**

The activities of the NSW marketing boards are currently regulated under the Marketing of Primary Products Act 1983 which replaced the original Act of 1927. The Act's overhaul was required to accommodate increasingly complex market forces. It introduced regulations for the Boards in regard to acting as merchants, dealing in futures contracts, creating and utilising reserves, transferring commodities between pools and the formation of companies. Whilst this Act defines the powers, structure and responsibilities of the marketing boards, it leaves each Board free from directions and control by the Minister with funding provided by the producers of the commodities.

The 1983 Act instituted eleven marketing boards which have either remained, been amalgamated or dissolved over the last decade. The current NSW Marketing Boards include the:

- **Tobacco Leaf Marketing Board** (established 1965);
- **Wine Grapes Marketing Board for the city of Griffith and Shires of Leeton, Carrathool and Murrumbidgee** (established 1993);
- **Rice Marketing Board for the state of NSW** (established 1928);
- **NSW Grains Board** (established in 1991 under its own Act as a result of amalgamating the Oats, Barley, Grain Sorghum and Oilseeds marketing boards)
- **Murray Valley Citrus Marketing Board** (established 1989 under its own Act).

Of these, the only two which currently engage in export activities are the Rice Marketing Board and the NSW Grains Board. The Tobacco Leaf Marketing Board will be wound up in early 1995; the Murray Valley Citrus Marketing Board does not currently engage in any export activities.

Many changes have taken place since the initial Act was introduced which have seen the need to reform the various marketing boards. Federal directions moving towards deregulation of industries thus opening up Australian markets to world competition have ensured the need for review.

A major review of the NSW marketing boards was undertaken in 1989 by the Minister for Agriculture and Rural Affairs. The assessment was organised in three stages:

Stage 1: financial position of all Boards to assess financial risk

Stage 2: specific studies on Barley, Oats, Grain Sorghum and Oilseeds which led to their individual dissolution and the establishment of the NSW Grains Board in July 1991. A review of the Rice Marketing Board was held which confirmed its continuation.

## ***NSW MARKETING BOARDS: EXPORT ACTIVITIES***

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**Stage 3:** all factors relating to market boards and committees including:-

- accountability,
- composition and structure of the Boards of Directors,
- commercial operating guidelines
- possibility of exemption from Trade Practices Act

The review led to the formation of consultative committees to look into the NSW Grains Board and the Rice Marketing Board. These committees act as a mechanism ensuring accountability of the Boards.

The NSW Grains Board Consultative Committee's role is to make recommendations on decisions made by the Board to acquire any of its commodities and to review this decision every four years. The Committee comprises the Director of Marketing and four members chosen by the Minister from six nominations made by the NSW Farmers' Association.

The Rice Marketing Board's Consultative Committee acts similarly. It also makes recommendations on the renewal of the annual agreement concerning the role of the Ricegrowers Co-operative as the Board's sole authorised buyer. Those on the Committee include the Director of Marketing, and the Rice Industry Coordination Committee which is already operating. The Rice Industry Coordination Committee members include three representatives from each of the Rice Marketing Board, Ricegrowers Association and the Ricegrowing Cooperative Ltd.

**b. ISSUES OF INTEREST TO THE PUBLIC ACCOUNTS COMMITTEE**

Some of the issues below are federal ones. However, this should not deter you from expressing a view.

**1. RELATED INDUSTRY COSTS**

- a. *What is the impact of related industries on the sale of commodities and how can the Boards combat any difficulties?***

Australia has significantly higher production costs than some of its competitors. These include power charges and rail and waterfront container freight charges, which are at least twice that of world best practice prices. (The Land, October 13, 1994). The (national) Royal Commission into these issues made a number of recommendations.

- b. *How has NSW responded to these recommendations?***
- c. *Are current related industry operations efficient, or do they still represent a barrier to the export of commodities by the commodity marketing boards?***

**2. MARKETING PRACTICES BY THE RICE MARKETING BOARD AND THE GRAINS BOARD**

- a. *How are target markets identified?***
- b. *How are targets set for individual countries and regions?***
- c. *What use, if any, is made of subsidies to potential buyers?***
- d. *What is the history of marketing campaigns in key target countries and regions?***
- e. *What has been their success rate?***
- f. *What is the role of Austrade in helping NSW commodity marketing boards achieve their targets?***
- g. *What barriers are there to efficient marketing of commodities?***
- h. *How have competitors' policies helped or hindered the Boards' exports?***
- i. *Who have been the major buyers in key target countries and regions?***

## **NSW MARKETING BOARDS: EXPORT ACTIVITIES**

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- j. Does the structure of the buying organisations hinder or help the marketing of NSW commodities by NSW government boards?***
- k. Should government boards be marketing produce abroad, or should this task be left up to the private sector?***
- l. Does the answer depend on the commodity, the market, or both?***
- m. Is there a case for single-desk export selling?***
- n. Are the Boards maximising the potential returns from their exporting activities?***

### **3. THE ASIA MARKET**

- a. In the context of the export operations of the Boards, what are the characteristics of the various segments of the Asia market?***
- b. What are the prospects for long-term growth in Asia for the exports of the Boards' commodities?***
- c. What are the main difficulties of exporting to Asia? Can they be overcome?***

### **4. FUNCTIONS AND POWERS OF THE BOARDS**

- a. Are the current functions and powers of the Boards appropriate?***
- b. Should the Boards be involved in research and development? If not, why not? If so, why and how?***

### **5. OPERATIONAL EFFICIENCY**

- a. What is the extent of the duplication of regulations and overlapping of services by State and Federal agencies - in what ways could they be improved?***
- b. What opinions are held on the success or otherwise of deregulation? Is there a need to return to partial regulations and in what areas?***

Some growers have voiced the need for a "new or revamped" statutory marketing board in the grains industry. Ideas for this new Board include:

- vesting powers over wheat, barley and sorghum markets;
- single desk trading powers for export sales;
- return to regulations to control cash prices and permit sales of feed grains.



## **NSW MARKETING BOARDS: EXPORT ACTIVITIES**

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These conditions are viewed as prerequisites to stabilising local markets, ensuring carryover stocks are available and thus preventing the current situation whereby imports have been called upon to bridge the gap brought about by the drought. (Land, November 17, 1994) Australia has had to import \$25 million worth of grain from US and Canada due to the drought (Australian, 11 October 1994).

- c. *Are the Boards' current policies and practices relating to reserves adequate?*
- d. *Are the Boards satisfying goals of economic efficiency and if not, what improvements could be made?*
- e. *Should value-adding processes be further investigated?*

Mr Park, Chief Executive of Krafts believes that commodities should be further processed on-shore and marketed as brands.

Grains Council president, Mr Don McGauchie says "We must move our industry as far down the marketing chain as possible". (Australian Farm Journal, June 1993, p8)

### **6. INFORMATION**

*In what ways can the NSW Government improve the information which exporters have about government programmes and which potential markets have about the Boards' exports?*

It was noted that there is a need to "improve the quality of industrial market intelligence" (Sydney Morning Herald, 16 April, 1994).

# **APPENDIX**

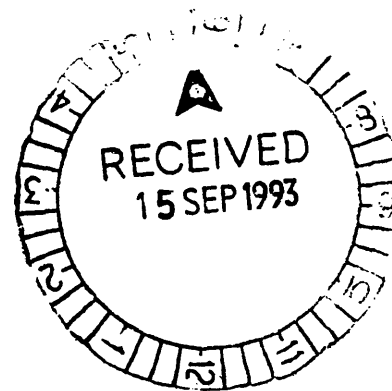
## **GUIDELINES FOR THE EXPORT OF THE SKILLS AND EXPERTISE OF NSW PUBLIC SECTOR AGENCIES**



Premier of New South Wales  
Australia

MEMORANDUM No. 93-31

(Memorandum to all Ministers)



## GUIDELINES FOR THE EXPORT OF THE SKILLS AND EXPERTISE OF NSW PUBLIC SECTOR AGENCIES

Attached is a copy of the *Guidelines for the Export of the Skills and Expertise of NSW Public Sector Agencies*, together with a policy statement on the export of public sector skills generally.

The purpose of the *Guidelines* is to help agencies identify the commercial and internal management risks associated with overseas projects, and to prescribe accountability measures designed to ensure that, for any given project, the risks will be contained within general parameters which are acceptable to the Government.

It would be appreciated if you would circulate the *Guidelines* to all agencies within your administration.

If agencies have any queries in relation to the application of the *Guidelines*, contacts at the relevant agencies are:

1. Office of Economic Development: Mr Ian Roberts, Executive Director Investment Group. Telephone (direct line) 228 5902; facsimile 228 4151;
2. Treasury: Mr George Maltabarow, Deputy Director Commercial Sector Division. Telephone (direct line) 228 4021; facsimile 228 5278; and
3. The Cabinet Office, Legal Branch: Mr David Harris, Legal Officer. Telephone (direct line) 228 5544; facsimile 228 5542.

John Fahey  
Premier and Minister for Economic Development

Issued: Legal Branch, The Cabinet Office  
Contact: David Harris (ext 5544)  
Date: 13 September, 1993

# GUIDELINES FOR THE EXPORT OF THE SKILLS AND EXPERTISE OF NSW PUBLIC SECTOR AGENCIES

## PREMIER'S POLICY STATEMENT

The NSW Government recognises the benefits which exporting public sector skills and expertise can bring to the State, particularly by assisting the private sector in overseas projects.

These benefits include:

1. NSW and Australian companies need access to public sector operational and training expertise in order to be able to bid for large-scale, integrated projects overseas;
2. the involvement of a public sector "partner" can considerably strengthen the competitiveness of NSW/Australian companies bidding for government contracts in those markets (and can, indeed, be a prerequisite for success);
3. successful bids for international project work can lead to valuable downstream procurement opportunities for NSW/Australian manufacturing and service firms, which in turn can create significant "spin off" benefits in terms of increased production, exports and employment;

The Government recognises that it must assist Australian corporations to position themselves favourably in overseas markets.

The Government also acknowledges that overseas work is one means of improving the Government's capacity to deliver efficient, cost effective and quality services to the people of NSW.

The benefits for the NSW public sector of exporting skills and expertise include:

1. commercial returns for the NSW public sector: export activities have the potential to provide agencies and the NSW Government with a commercial return on their existing investments in highly trained and experienced personnel, in infrastructure and capital facilities and in research and development;
2. organisational improvement:
  - (a) export activities can provide a means for agencies to measure their performance against national and international counterparts. Agencies can use this information in setting corporate goals and targets, and thereby establish a basis to achieve "best practice";

- (b) it is particularly desirable for agencies which have long held a monopolistic or semi-monopolistic position within NSW to be able to measure their performance through competition and to seek innovative ideas for change and improvement from outside their organisations;
- 3. staff development: at the level of individual motivation and performance, key public sector professionals can benefit substantially from being exposed to the challenges posed by the new operating environments and commercial disciplines associated with export activities. This is particularly important where skills and commitment might otherwise atrophy due to the uneven nature of domestic capital works programmes; and
- 4. benefits of internationalisation: while intangible, there are nevertheless very real and political benefits associated with strengthening commercial linkages between the NSW public sector and the countries in our region. These include a greater mutual awareness of the capabilities and opportunities we each have to offer, and an increased acceptance of Australia as part of the Asia/Pacific region.

There are, however, risks and disadvantages associated with the pursuit of overseas opportunities by NSW public sector agencies. They include:

- 1. commercial risks such as:
  - (a) risk of project failure;
  - (b) risk of financial loss due to inadequate costings;
  - (c) liability for negligent advice or defective product;
  - (d) the risk that the State will be liable on any express or implied assurance;
  - (e) the credit risk on payments due;
  - (f) unfavourable currency fluctuations after tender; and
  - (g) foreign jurisdiction risks such as restrictions on repatriation of funds or foreign taxes;
- 2. internal management risks such as:
  - (a) the internal cross-subsidy of export activities;
  - (b) the giving of priority to an export project at the expense of an agency's domestic obligations; and
  - (c) the use of export projects to disguise the inefficient use of resources; and
- 3. unfair competition with the NSW private sector if services are not priced appropriately.

The Government firmly believes that the primary function of public sector agencies is to provide services to the people of New South Wales. In view of this, and having full regard for the risks and disadvantages identified above, the Government supports and encourages the efforts of NSW public sector agencies to pursue international market opportunities for their skills and expertise provided that these activities:

- do not result in the agency giving priority to an export project at the expense of an agency's domestic obligations;
- have demonstrable links with the agency's core function(s);
- are generally undertaken on the basis of supplying knowledge and expertise rather than undertaking construction activities or providing equity;
- operate on a fully commercial basis, with separate financial reporting; and
- are subject to appropriate levels of review, risk analysis and risk coverage with a view to minimising liability for the Government.

## **GUIDELINES FOR THE EXPORT OF THE SKILLS AND EXPERTISE OF NSW PUBLIC SECTOR AGENCIES**

### **1. The purpose of these *Guidelines*.**

The policy guidelines are intended to:

- outline the process by which NSW public sector agencies may, by making available their skills and expertise, assist Australian corporations to pursue international market opportunities;
- identify some of the commercial and internal management risks involved in exporting skills and expertise;
- outline how agencies can keep these risks within parameters acceptable to the Government;
- advise agencies that the preferred way for them to export skills or expertise is to export their technical expertise and not to engage in marketing or project management roles outside their expertise. Licensing the use of intellectual property or contracting as a consultant to a project is preferable to taking the lead role in a project; and
- prohibit agencies from engaging in export projects which can be expected to cost the State money or undertake undue risk or result in the use of resources for export projects which should be used for domestic purposes.

### **2. Which skills and expertise is it appropriate for NSW public sector agencies to export?**

- Prospective projects for the export of skills and expertise must be approved in accordance with these *Guidelines*.
- An agency and the Minister responsible for that agency must be satisfied that a prospective export project will not result in the agency giving priority to the export project at the expense of its domestic obligations.

Where a prospective export project requires the approval of the Treasurer and/or Cabinet under these *Guidelines*, the Treasurer and/or Cabinet will need to be similarly satisfied that the agency will not be giving priority to the export project at the expense of its domestic obligations.

- Selling services and expertise embodied in off-the-shelf products (for example, existing computer software or technology) or other products which require minimal additional resources probably present the lowest risk of unacceptable priority being given to activities because selling those products will not require substantial resources.

- Other than in exceptional circumstances, an agency should only export its skills or expertise in areas within its core function(s). The risk that an agency which attempts to export skills and expertise in non-core functions will allocate disproportionate resources to those functions is too great.

An example of an exception may be where a department has already invested substantial resources in a non-core function which is proposed for export, such as writing computer software, and the sale or licensing of the fruit of that investment will not of itself require disproportionate resources.

- If an agency has sufficient resources to enable it to proceed with a prospective export project, it should consider whether those resources could be used to enhance its capacity to perform its core function(s). The agency must address this issue in its application for approval of the prospective project.

### 3. Which NSW public sector agencies can export their skills and expertise?

- In a policy document entitled *Classification and Control of State Organisations* published in June 1989, the NSW Government identified six basic types of Government organisations, ranging from heavily subsidised monopolistic bodies such as the Department of Conservation and Land Management, and central agencies such as Treasury (Category A), to self-sufficient competitive bodies such as the Public Trustee (Category F).
- These *Guidelines* apply to agencies which fall within Categories A to E of the above classification. While Category F agencies are free to export skills and expertise in the course of their core businesses, certain of these *Guidelines* apply to those agencies where expressly stated.
- An agency must be satisfied that it has the power to engage in export activities.

If the agency is a statutory corporation, the agency must be satisfied that its Act empowers it to export the relevant skills or expertise in the way proposed.

If the agency is a Department or an Administrative Office, it will not be regarded as a legal entity separate from the State. While the State's capacity to engage in activities is the same as that of a natural person, the authority of an officer or officers from a Department or Office to engage in activities on behalf of the State must be made clear.

Advice from the Solicitor General indicates that, for projects which are outside the well recognised or ordinary functions of government, the giving of authority to an officer or officers of a Department or Office is likely to require Cabinet or Executive Council approval.

Crown law advice should be obtained in this regard.



**4. Can a NSW public sector agency invest equity in a foreign project?**

- An agency may structure its involvement in an export project in a number of ways.

However, an agency (including a Category F agency) must not invest equity in a foreign project unless the Treasurer and Premier have approved the prospective investment in foreign assets or assets in Australia for a foreign project.

**5. How does a NSW public sector agency assess whether it should pursue a possible export opportunity?**

- The first step is for the agency to identify the skills or expertise which the prospective project will require.

The agency should only progress assessment of the project if it considers that its providing relevant skills or expertise will comply with these *Guidelines*.

- If the project will require skills or expertise in addition to those possessed by the agency, then the agency should consider making its skills or expertise available in a joint bid with a partner(s) which has the additional skills or expertise.

The agency should not try to develop the other skills or expertise itself.

- The agency should develop a preliminary work plan for its role in the prospective project. The agency can then consider whether it has available resources required to carry out the work plan. If it does, the agency should consider whether the resources are surplus to its requirements.
- The next step in an agency assessing an export opportunity will be the preparation of a budget for the project.

In preparing a budget for any project, the relevant agency must identify and incorporate the full direct and indirect costs of providing the relevant skills and expertise, including imputed Commonwealth and State taxes and charges where these do not otherwise apply (see NSW Treasury Publication, *Financial Management for Inner-Budget Sector Entities* and Department of Finance *Guidelines for Costing of Government Activities*, Australian Government Publishing Service, Canberra 1991).

- Costings for export projects must also include:
  - a profit margin consistent with *A Financial Distribution Policy for NSW Government Trading Enterprises*, NSW Government, August 1992; and
  - the full direct and indirect costs of replacing/redeploying staff, of changes to work programmes, and of dedicating marketing/management resources.

- The agency must assess the contractual terms of the prospective project so that it can correctly identify all costs and risks as well as rewards.
- The agency will then have to assess and, where possible, quantify, all commercial risks in the project.

It may be possible to quantify some risks by obtaining estimates of the premiums and fees which would be payable for all appropriate insurance and other risk minimisation (such as hedging any foreign currency exposure). Examples of the types of risks involved in international project work, and some mechanisms available to offset these, include:

<u>Risk</u>	<u>Offsetting mechanism</u>
Buyer insolvency	Export credit insurance
Delay in payment	Export credit insurance
Repudiation of contract	Export credit insurance
Exchange transfer delays	Export credit insurance
Professional error	Professional indemnity insurance
Public liability	Public liability insurance
Currency fluctuation	Forward exchange cover, currency hedging
Imposition of controls on repatriation of profits/capital	Overseas investment insurance
Expropriation	Overseas investment insurance
Property losses resulting from war/civil disturbance	Overseas investment insurance

- To enable it to assess all relevant risks, the agency may have to undertake some due diligence on the party offering the export opportunity (although this would not be required for projects financed by AIDAB or by multilateral funding institutions such as the World Bank, the Asian Development Bank and UN agencies) and on potential partners.
- The agency must then do a financial analysis of its participation in the project. This analysis must be made on the basis of financial criteria only, and must demonstrate a clear expected commercial return from the project.

An example of a way in which that risk could be eliminated is to forward sell the asset before providing the relevant skills or expertise and to receive for the sale cash or a promise to pay cash backed by a bank guarantee from a reputable bank.

- An agency should only consider proceeding with a project where a clear commercial return can be demonstrated or, in exceptional circumstances, where the project has demonstrable and significant non-financial benefits.
- As with any sound business, all care should be taken in applying good management and professional judgement in selecting and managing projects, staff, and in ensuring that exposure to commercial risks is minimised. A strategic business plan should provide a framework for this approach (see paragraph 11, "*How should a NSW public sector agency account for export projects?*").

**6. How does a public sector agency structure its involvement in export activities?**

- This will largely be a function of the type, scale and complexity of the prospective project.
- The structure must ensure that the agency does not offer to provide skills or expertise which the agency does not have. Licensing the use of intellectual property or making a consultant available to a project bidder will usually be preferable to taking the lead role in the project.

Limited liability

- One of the most important considerations in structuring a bid is to ensure that the State of NSW is not liable for breach by an agency of a contract to export skills or expertise, or for the negligent provision of the skills or expertise. Potential liability for the export project must be limited to the entity which proposes to engage in the project.

One way to achieve this may be for an agency to establish a (subsidiary) company to engage in the export project. The company could enter into joint venture or contractual arrangements with other private or public sector entities or companies, and could provide marketing advantages and greater operational flexibility for entering into such arrangements.

Written legal advice should be obtained regarding the risks to the State of an export project.

Company

- An agency which is a Department or statutory authority and which proposes to use a company for an export project must also comply with Premier's Memorandum No.91-2, *Guidelines for the Formation and Operation of Subsidiary Companies by Departments and Statutory Authorities*, in addition to these Guidelines.

- If an agency uses a company for a project:
  - the agency should ensure that the officers who will be responsible for the project are represented on the company's board of directors;
  - a properly constituted management structure based on similar private sector arrangements should be implemented;
  - the agency should ensure that the company's directors are adequately insured against the risks of being a director; and
  - the Minister responsible for the agency and officers of the agency who are not directors of the company should be aware that if the directors of the company are accustomed to act as directors in accordance with the directions or instructions of the Minister or officer, then the Minister or officer may be deemed to be a director of the company and may be liable as a director. Once a project has been approved, the directors of the company should not habitually act in accordance with the directions or instructions of any other person.

#### State assurance

- As stated above, the State of NSW must not become liable for breaches by an agency of their contracts to export skills or expertise, or for the negligent provision of those skills or expertise.
- The State will not guarantee performance of agencies' obligations, unless the agency has negotiated with The Treasury for the provision of an express guarantee and has paid an agreed fee. Agencies should be aware, in any case, of the limitations on the State's capacity to give guarantees.
- Agencies should include in their promotional material and the letter of engagement or other contractual document under which they are retained to export skills or expertise an express disclaimer of any State liability or implied guarantee or assurance.
- An agency which is an entity distinct from the State but which has a name or some other feature which implies or may imply a connection with the State should also include an appropriate disclaimer on its letterhead and other promotional material.

#### Consortium

- Where a public sector agency proposes to provide the relevant skills or expertise in conjunction with one or more other private (or public) sector agencies, the agency must fully negotiate and document exactly what each participant will contribute to the project, how risks and rewards will be shared, how consortium decisions will be made, and other matters relevant to the relationship of the participants with one another.

### Commercial risks

- The structure of the bid will also have to address all identified commercial risks and any relevant aspects of the law in the relevant foreign jurisdiction(s).

For example, it might provide for payment in instalments during the course of the project as a way of reducing the risk of non-payment or the credit risk of the party to whom the relevant skills or expertise will be provided. Payment in Australian dollars (or stronger currencies) will reduce the currency risk.

Where possible, it may be desirable to provide that the governing law of the contract under which the skills or expertise will be provided is the law of New South Wales.

- It may be necessary for an agency to obtain advice from private sector advisers experienced in structuring arrangements for the provision or export of skills or expertise. The costs of such advice must be included in the project budget.

#### **7. How should a NSW public sector agency select a private sector joint venture partner?**

- It is the responsibility of the agency involved to ensure that its process of selecting a private sector partner or of responding to an invitation to jointly bid with a private sector partner reflects best commercial practice. A competitive selection process will generally be required. In cases where there is a good reason for not engaging in a competitive selection process, the reason(s) should be recorded.
- If approached by a private sector company with a proposal for undertaking a joint export project, an agency should take care to establish, within the bounds of commercial confidentiality, that its own and the State's best interests would be served by a joint arrangement with that particular company.

It may be appropriate for the agency to provide its skills and expertise on a non-exclusive basis, which would enable it to participate in other consortia bidding for the same project.

#### **8. How does a NSW public sector agency prepare an offer or tender?**

- The details of how an agency prepares an offer or tender are a matter for the agency's judgement and will be influenced by a number of factors including:
  - the scale and complexity of the prospective export project;
  - the complexity of the skills or expertise which the agency proposes to provide;

- the credit worthiness and standing of the prospective client;
  - any relevant requirements of the foreign jurisdiction(s);
  - the desirability of a joint approach with private (or public) sector organisations;
  - the balancing of risks and rewards; and
  - competitive considerations, such as the desirability of the agency taking the lead role in a joint venture.
- A large part of most offers or tenders will deal with commercial matters such as identifying and addressing the prospective client's needs, describing the agency's capability and experience, setting out the price and terms of payment, specifying how and on what timetable the relevant skills or expertise will be provided, and specifying how contract variations will be made.
  - However, some disciplines must be observed in all offers or tenders.
  - An agency must not submit for the approval of its responsible Minister, the Treasurer and/or Cabinet (as required by these *Guidelines*) a proposal to accept the offer or respond to the invitation unless:
    - the stipulated terms are acceptable to the agency and comply with these *Guidelines*; or
    - in its acceptance or response the agency specifies amendments which it will require to the stipulated terms.
  - If an agency proposes to:-
    - respond to an offer or invitation to tender; or
    - offer to carry out a project,

and the agency has not obtained approval for its participation in the prospective project as required by these *Guidelines*, the agency's response or offer must clearly state that it is made subject to that approval being obtained.

**9. How does a NSW public sector agency protect its intellectual property used in, or the subject of, a NSW export project?**

- For the purposes of this paragraph, "intellectual property" includes confidential information, know-how, software programs, formulae, designs or any other material in respect of which an agency may have a valuable interest, copyright and/or any patent or trademark rights.

- If a prospective project will result in an agency giving another party or parties access to, or allowing it or them to use an item of the agency's intellectual property, the agency must ensure that its intellectual property is adequately protected.
- For example, if the agency has developed computer software for the purpose of performing a certain function and the agency enters into a joint venture agreement with a NSW private sector firm in the course of which the software will be used, the agency will have to:
  - assess the value of the software and decide whether it is too valuable to risk giving its joint venturer access to the software;
  - ensure that its joint venture agreement prohibits the use or copying of the software and gives the agency appropriate rights if that prohibition is contravened; and
  - ensure that the contract between the joint venture and the export client or customer contains similar protection.
- It is not possible to prescribe a form of protection which will be adequate for all purposes. An agency may need to obtain specialised legal advice in relation to any prospective project in which its intellectual property would be used.

The agency may also need to include in the documentation of a project a clause or clauses which will have the effect of protecting its intellectual property.

**10. How does a NSW public sector agency deal with staff/industrial relations issues with respect to a prospective export project?**

- The extent of any staffing and industrial relations issues will depend on the nature of the relevant project.
- In assessing a project, an agency should consider whether any staffing and industrial relations issues do arise. These may include:
  - general management issues such as:
    - any impact of the prospective project on the efficient use of resources by the agency for its core functions;
    - the impact of the prospective project on workloads of personnel performing core functions; and
    - the impact of personnel issues on project costing;

- personnel management issues such as:
  - any prospective change in the terms of employment of relevant staff (eg: salaries, travel allowances, leave arrangements);
  - placement of relevant staff at project completion;
  - fairness of any change to terms compared with other employees;
  - career planning implications and opportunities;
  - the need for travel and personal accident insurance;
  - the application of workers' compensation arrangements; and
  - emergency/health care arrangements.
- The agency must ensure that all officers are aware of the agency's position and their own obligations as to the ownership and protection of any existing intellectual property, or any developed as a result of the agency's or officer's involvement in an export project.
- If services will be provided in the course of a project by an entity (such as a subsidiary company) other than the agency which employs the staff, it may be necessary to put in place a consultancy or service agreement between:
  - (a) the entity which will provide the services; and
  - (b) the agency which employs the relevant staff.

In some cases it may be necessary for the staff to take leave from their usual employer so that they can be employed by the entity which will provide the relevant services.

These staffing and industrial relations issues must be dealt with in all project proposals.

- If it is proposed that the terms of employment, function or designation of any staff will be changed for the purposes of the project, the advice of the Minister for Industrial Relations must be obtained before the relevant proposal is submitted for approval, unless the agency itself or its Minister has the necessary delegation/accreditation to make such changes.
- The comprehensive guidelines on overseas allowances prepared by the Commonwealth Department of Foreign Affairs and Trade may also be a useful reference.



**11. How should a NSW public sector agency account for export projects?**

- Accounting for export projects must be transparent.

Each export project for which budgeted direct and indirect costs or revenues received or receivable by the agency exceed \$20,000 must be accounted for separately.

Projects under that threshold may be aggregated and accounted for on an aggregate basis.

- An agency which engages in an export project must comply with *Monitoring Policy for NSW Government Trading Enterprises*, NSW Government October 1992. In the unlikely event that an agency engages in export activities otherwise than through a company, the agency must comply with that *Policy* in respect of its export activities as though they were carried out by a company.

**12. Approval of projects which comply with these *Guidelines*.**

The approval process applicable to any particular agency will vary according to:

1. whether that agency is a statutory corporation or a Department; and
2. how that agency is classified under the NSW Government's 1989 classification policy, "*Which NSW public sector agencies can export their skills and expertise?*"

Irrespective, however, of the applicable approval process, the Office of Economic Development must be informed of each potential export project at the earliest possible stage in an agency's assessment of each such project.

(a) Category A-C agencies:

These agencies will be required to seek the approval of the responsible Minister and the Treasurer for all export projects.

If these agencies propose to embark on a project with budgeted direct and indirect costs or revenue received or receivable in excess of \$5 million, Cabinet approval for that project must also be obtained.

(b) Category D-E agencies:

These agencies may only embark on a project with the approval of:

- (i) the responsible Minister if the project has budgeted direct and indirect costs or revenue received or receivable up to \$1 million;

- (ii) the responsible Minister and the Treasurer if the project has budgeted direct and indirect costs or revenue received or receivable in excess of \$1 million but not in excess of \$5 million; or
- (iii) the responsible Minister, the Treasurer and Cabinet if the project has budgeted direct and indirect costs or revenue received or receivable in excess of \$5 million.

(c) Category F agencies:

Unless otherwise specified in these Guidelines, these agencies do not require approval by their Minister, the Treasurer or Cabinet. Rather, they should obtain approval in accordance with their own approval procedures.

(d) Preliminary matter for Departments:

It was stated above in paragraph 3, *Which NSW public sector agencies can export their skills and expertise?*, that if a particular project contemplated by a Department is outside the well recognised or ordinary functions of government, then the authority of the officer or officers engaging in the activity on behalf of the State must be established.

Advice from the Solicitor General indicates that, in order for an officer or officers to obtain the requisite authority to act on behalf of the State, the project must receive either Cabinet or Executive Council approval.

(e) Approval generally:

An application for approval of a prospective project must include a submission which demonstrates that the prospective project complies with each of these *Guidelines*.

The Minister responsible for an applicant agency must have approved an application to the Treasurer and/or to the Cabinet. When submitting a prospective project for approval by the Treasurer and/or Cabinet, the agency and the relevant Minister must indicate that they have first determined that the project:

- (i) complies with these *Guidelines*; and
- (ii) has a financial profile which justifies it proceeding.

**13. Approval of projects which do not comply with these *Guidelines*.**

- There may be exceptional cases where a prospective project does not comply with these *Guidelines* but has demonstrable and significant non-financial benefits.
- In those cases the responsible Minister will be required to seek the approval of the Treasurer and Cabinet for the prospective project. The responsible Minister will be required to inform the Treasurer and Cabinet of the ways in which the prospective project does not comply with these *Guidelines* and demonstrate the significant non-financial benefits of the project which, in the agency's and Minister's opinion, warrant the project's approval.

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