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# PPP POLICIES THROUGHOUT AUSTRALIA

## A COMPARATIVE ANALYSIS OF PUBLIC PRIVATE PARTNERSHIPS

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# 1. INTRODUCTION

This paper provides a comparative analysis of policies and procedures governing public private partnerships ('PPPs') throughout the various Australian jurisdictions, including the six States, two Territories, the Commonwealth and the Department of Defence.<sup>2</sup> It also provides a useful reference guide to PPP practitioners and participants in different jurisdictions.

All Australian jurisdictions have policy documents governing the identification, establishment and operation of PPPs. These documents draw heavily on the groundbreaking and detailed set of manuals first released by the State Government of Victoria in June 2001. Despite various technical and terminology differences, there is a tendency towards homogeneity. Such a homogeneous approach has benefits to both the public and private sectors by way of increased certainty and lower transaction costs.

Victoria continues to lead the way with respect to the development of PPPs. As a result of an initiative of the Victorian Government reaching out to other States and Territories, the inaugural National PPP Forum was held in May 2003. This National Forum is designed to deliver better coordination, information sharing and support among Australian governments in relation to PPP projects. In addition, following extensive industry consultation, the Victorian Department of Treasury and Finance is currently drafting whole of Government standardised commercial principles and contractual provisions. These measures aim to increase intrastate homogeneity with respect to PPP contracts and thus ideally minimise bidding costs for both private and public sectors. It is anticipated that other jurisdictions will follow Victoria's lead, developing their own standardised contractual principles and provisions; NSW Treasury is currently working closely with the Victorian Government in this respect. The National PPP Forum and collaboration between the States will continue the trend towards intra-jurisdictional homogeneity in PPP policies.

The applicability of PPP policies is discussed in section 2, while section 3 discusses the development process, including the required tests and government approvals. Risk allocation principles and preferences are contained in section 4, with the conclusion in section 5. For convenience, a glossary of terms is provided in Appendix A. Appendix B contains a

resource guide to applicable policies and documentation for hardcopy access, Appendix C provides the same resource with active internet links. Appendix D provides a comparative analysis of risk allocation preferences.

## 2. APPLICATION

### 2.1 THE PARTIES

While it is clear that the various guidelines relate to 'public bodies', most do not specify which government bodies count as public, usually referring to catch-all categories such as 'all agencies'<sup>3</sup> or 'departments and agencies'.<sup>4</sup>

In most cases, whether the body constitutes a public body will be clear, for example, bodies managing public schools and hospitals would be such 'public bodies', while local governments are not. The situation regarding Government Business Enterprises and State-owned Companies is less clear. Of those policies which do make reference to applicability, NSW specifically includes these bodies,<sup>5</sup> while TAS and QLD generally exclude them from an obligation to comply with the guidelines,<sup>6</sup> (except in QLD, where the body makes a request for State Government funding and the project value exceeds a \$30 million net present value ('NPV') threshold<sup>7</sup>).

### 2.2 PROJECT TYPE

All PPP policies are concerned with private sector involvement in the provision of public infrastructure and services. None of the policies deal with privatisation (ie the selling of publicly owned assets) or the outsourcing of existing services.

#### (a) Public Infrastructure

While the various policies usually refer to the provision of new infrastructure, replacement or renovation of ageing infrastructure may also be included,<sup>8</sup> provided it is not simply a one-off maintenance contract such as painting or the refurbishment of a roof.<sup>9</sup>

Nevertheless, each policy appears to envisage slightly different types of public infrastructure and services within their framework.

**(b) Public services**

Given the movement toward PPPs in part is designed to allow private sector access to bring the provision of public services associated with that infrastructure into their framework, all policies are therefore open to the private delivery of traditional public services.

Although the policies are designed to be flexible in their application, it is clear that those of the Commonwealth, NSW and ACT have a narrower ambit, applying merely to services which are associated with the infrastructure provided. The Commonwealth policy, for example, specifically excludes from the definition of 'private financing' all contracts for services where:<sup>10</sup>

- (i) the government has not traditionally owned the relevant asset;
- (ii) the term of the contract is less than five years; and
- (iii) the service is commonly provided by the private sector.

NSW expressly distinguishes the scope of a Private Financing policy from that of a PPP policy.<sup>11</sup> The title of the main ACT guidelines denotes their restriction to the 'private provision of public infrastructure projects'.

The other policies, by contrast, seem to leave room in their framework for the private supply of services independent of any infrastructure provision. The WA, SA and TAS policies go so far as to specifically include such 'independent arrangements' for services,<sup>12</sup> or 'operating contracts over publicly owned assets'.<sup>13</sup> The VIC and QLD policies are designed to be flexible in this regard and, while focussed on the provision of services ancillary to the supply of 'hard' infrastructure, are nonetheless capable of bringing some especially long-term and high value partnerships for the provision of public services within their PPP structures. In relation to private financing, the Department of Defence policy on private involvement also seems to permit the supply of services unaccompanied by infrastructure provision.<sup>14</sup>

While the option of bringing contracts for the independent provision of services within the PPP structure is available in WA, SA, TAS, VIC, QLD and the Department of Defence, it seems this will only

occur rarely. All such policies indicate that projects which do not involve any capital investment (e.g. in equipment), or are short-term or low-cost, are more appropriately dealt with by the governmental policies applicable to outsourcing.<sup>15</sup> As a result, even in these jurisdictions, it appears that using the relevant PPP policy for operation and management agreements, for example, should only be considered for large, ongoing projects involving some kind of up-front private funding.

**(c) Non-core services**

In most jurisdictions, private provision of services is limited to non-core public services.

Core services are defined (variously but similarly) as those which involve direct delivery of community services to the public or the exercise of statutory power,<sup>16</sup> or those over which the government wants to retain direct control.<sup>17</sup> What constitutes a core service is a question for government.<sup>18</sup> Examples given include police services, public system teaching, medical services in public hospitals and the judiciary.<sup>19</sup>

Non-core services may include engineering, facilities management, security and maintenance.<sup>20</sup> Many non-core services may be closely tied to core services, such as accommodation services to house the core service delivery<sup>21</sup>, (e.g. Victoria's County Court accommodation services, where it is substantially only the judicial and custodial functions that remain under public control.)

NSW,<sup>22</sup> VIC, QLD,<sup>23</sup> WA,<sup>24</sup> the ACT<sup>25</sup> and the NT<sup>26</sup> draw this distinction between core and non-core services and expressly preclude private involvement in the provision of core services, while the Department of Defence policy specifically excludes the role of delivering lethal or combative force from the scope of its PPP policy.<sup>27</sup>

There is no mention of this distinction in the differently-structured Commonwealth, SA and TAS policies. While the provision of such services is still unlikely to be opened up to the public sector on the basis of any applicable public interest testing and policy (see below section 3.2), they leave the option open. The TAS policy even suggests that private delivery may extend to the provision of health care for a contractually agreed level of services.<sup>28</sup>





#### (d) Measurable service outputs

The NSW,<sup>29</sup> VIC,<sup>30</sup> SA<sup>31</sup> and ACT<sup>32</sup> policies require that it be possible to define the required service outputs in clear and measurable terms such that payments can be structured around them. Payment mechanisms need to be structured around outputs.

### 2.3 THRESHOLDS - VALUE AND TIME

#### (a) Value for money test

PPPs involve considerable administrative costs and will therefore only be used for projects large enough and long enough to justify incurring such costs. While most jurisdictions address this issue in the value for money assessment of a project, some set out dollar amounts below which using the PPP structure would not be appropriate. For example:

- In QLD, the framework does not apply without special Cabinet committee exemption if the capital value of a project is \$30 million or less or its NPV does not exceed \$50 million.
- In VIC, NSW, NT, ACT and the Department of Defence there is an explicit presumption that the project will generally not satisfy the value for money test unless it has a total contract value (in NPV terms) of more than \$10 million (VIC) or \$20 million (NSW, ACT, NT and Defence<sup>33</sup>), or can be bundled together with other similar projects to overcome that threshold.
- At the Commonwealth level the \$20 million and \$50 million thresholds are only relevant in determining the level of approval required. They have no bearing on whether the project will be governed by the policy.

#### (b) Long term

In a similar way, all jurisdictions will consider whether a project is long-term enough to justify use of the relevant PPP framework. Some give an indication as to the length likely to be considered sufficient:<sup>34</sup>

- Not less than 5 years: The Commonwealth Private Financing Policy may consider

projects of less than five years in duration too short for the private financing program.<sup>35</sup>

- More than 15 years: Department of Defence.<sup>36</sup>
- 25 years or more: NSW,<sup>37</sup> ACT,<sup>38</sup> and SA.<sup>39</sup>
- Up to 30 years or more: VIC.<sup>40</sup>

## 3. DEVELOPMENT PROCESS

Although each jurisdiction has a slightly different process relating to the development of PPPs, they all share many common features, often completing the same main tasks in the same order.

The following sub-sections discuss the common order of tasks completed and the stages at which a project may be substantially amended or cancelled concentrating on the public interest test, the public sector comparator and any required government approvals.

### 3.1 COMMON ORDER OF TASKS COMPLETED

Irrespective of which project development stage a task is placed into and the name of those stages, all jurisdictions go about establishing a PPP by progressing through each of the following core tasks (the name in the heading is used in all jurisdictions not specifically mentioned immediately below each heading):

#### (a) Step One: Initial Appraisal and Project Development

(i) This entire process is known as the 'project definition' stage in NSW, TAS and Department of Defence.

(ii) In QLD this initial step is called a 'feasibility study' and has three-stages:

(A) service identification;

(B) preliminary assessment; and

(C) business case development.

**(b) Step Two: Call for Expressions of Interest (Eols)**

Called an 'Invitation To Register interest' (ITR) in the Department of Defence.

**(c) Step Three: Evaluate Eol responses and develop shortlist****(d) Step Four: Call for Detailed Proposals (CDP)**

(i) Includes a main document called, and this stage therefore often referred to as, a 'Project Brief' in VIC, WA, ACT, QLD and NT. It is usually released to shortlisted bidders together with a contract. Queensland calls this material the 'Binding Bid Documentation' which includes a collection of factual information ('data room material') while the NT includes a format for the structuring of bidder responses.

(ii) This is also known as:

(A) a Request for Detailed Proposals (RDP) in TAS; and

(B) a Request For Tenders (RFT) in the Department of Defence.

The SA process differs from the others at this point.<sup>41</sup> It requires only a brief response to the call for Eol, an initial estimate of the cost of private sector delivery and information merely sufficient for the agency to assess the ability of the private sector to deliver the required outputs. The government then decides whether to:

- abandon the idea of private sector involvement in the project;
- issue an 'invitation to negotiate' (ITN) to respondents. This is likely where there is a limited number of respondents capable of meeting output requirements; or
- proceed to an open tender. This is likely where there is a large field and it is difficult to exclude some proponents on the basis of the Eol, which was requested not to be detailed.

In SA, the Eol and ITN do not commit the government to the project, nor do they require cabinet

approval to proceed.<sup>42</sup> By contrast, the Project Brief in VIC is a commitment from government,<sup>43</sup> while in QLD the invitation to submit a Binding Bid signals a governmental commitment subject to achievement of a best value for money outcome.<sup>44</sup>

**(e) Step Five: Evaluation of detailed proposals (bids)**

While all Australian jurisdictions seek to establish and maintain high standards of probity in their tendering activities, such a requirement is not part of their PPP policy documents and therefore be subject to subsequent review.<sup>45</sup> No jurisdiction has signed up to the WTO Agreement on Government Procurement.<sup>46</sup>

**(f) Step Six: Negotiations with preferred bidder(s)**

(i) There is no specific mention of a negotiation phase in QLD, though a similar activity is likely to be conducted in the name of finalising the project agreements with the preferred proponent.<sup>47</sup>

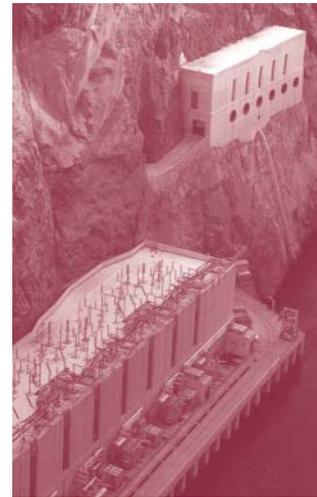
(ii) Interestingly, none of the Australian jurisdictions mentions a best and final offer (BAFO), or any similar, process in their policy materials.

**(g) Step Seven: Contractual agreement and financial close**

While most policies do not describe this element of the process in any detail, three jurisdictions distinguish between contractual agreement and financial close:

(i) The VIC and NT policy documents envisage a situation in which financial close follows contractual close. This is usually the case because financiers often require specific government approvals before they sign the contract and these will only be forthcoming after the executed contractual documents have been sighted.<sup>48</sup> In both jurisdictions, the policy position requires the applicable service charge to be settled at financial close.

(ii) The Department of Defence distinguishes between contractual and financial close, but





does not specifically envisage financial close occurring after contractual close.<sup>49</sup>

- (iii) Queensland's PPP framework mentions both aspects under the same subject heading only distinguishing to the extent that it requires no public announcement to be made as to the outcome of the process until financial close has occurred.<sup>50</sup>

Further detail on each of these stages is contained in the relevant policy materials (see references in Appendix B).

### 3.2 PUBLIC INTEREST TEST

PPP projects are subject to some level of public interest test. Sources of the public interest test which are applicable to PPPs are to be found both within the PPP policy documents themselves and in separate government legislation and policies.

#### (a) References to the public interest within the PPP policy documents

- (i) The NSW, VIC, QLD and NT PPP policy documents set out similar tests aimed at protecting public rights to infrastructure and services. Essentially, the various criteria require that measures are in place to address concerns related to<sup>51</sup>:

- (A) government openness and accountability;
- (B) consultation with affected groups;
- (C) guaranteed public (including disadvantaged group) access to the infrastructure;
- (D) consumer rights;
- (E) privacy; and
- (F) community health and safety.

- (ii) The WA policy implicitly requires accountability and consultation but does not address these public interest issues in the same way as the other detailed policies.<sup>52</sup> However, WA's *Project Evaluation Guidelines* apply to PPP projects,<sup>53</sup> and its general principles,<sup>54</sup> prioritisation criteria<sup>55</sup> and, in particular, social impact analysis addresses all of the same concerns. In addition, WA's non-

exhaustive list of social impact categories brings into consideration additional issues including environment, heritage, native title and quality of life.<sup>56</sup>

- (iii) In the less detailed policies of SA, TAS, the ACT, the Commonwealth and the Department of Defence a public interest test is not set out. However, the need for governmental transparency and accountability in public-private partnerships is nonetheless widely acknowledged.<sup>57</sup> Consequently, although the public interest factors will play some part in the evaluation process, their technical role is very limited.

- (iv) The Federal policies of the Commonwealth and the Department of Defence are vague on the matter providing that '[p]ublic interest considerations may also impact on the assessment of the value of certain private financing proposals'<sup>58</sup> and that '[w]hen considering choice of projects for PF, allowance should be made for political level judgments to be made taking account of a balance of public perceptions and interests related to the particular project and the current circumstances'.<sup>59</sup>

#### (b) A public interest test from documents external to PPP policies

- (i) The *Commonwealth Procurement Guidelines* apply to all Commonwealth agencies involved in private financing (including the Department of Defence), particularly in relation to the assessment of value for money. Division 3 of that document contains various legislative requirements and policy objectives that should be considered. These seek to reconcile PPP's with a range of legislation and varying public policy goals of the relevant government and department.

- (ii) The Commonwealth's Procurement Guidelines require agencies to consider applying various government objectives to their outsourced service providers on a case-by-case basis. These include:

- (A) policies and codes of practice relating to industries such as IT, Construction, Telecommunications and Legal Services;

- (B) anti-discrimination and affirmative action programmes in relation to disabled and indigenous Australians; and
  - (C) legislative and policy requirements in the areas of industrial relations, government advertising and the environment.
- (iii) In addition these guidelines require all government procurements with a value exceeding \$20 million to involve a minimum proportion (10% or 20% depending on contract type) of small to medium enterprise (SME) participation.<sup>60</sup>
- (iv) The impact of these requirements is potentially very large. For example, with respect to Industrial Relations, the Procurement Guidelines require that not just the *Workplace Relations Act 1996*, but all relevant Government policies on workplace relations, be fully recognised and complied with by those who seek to do business with the Commonwealth.
- (v) In a similar way, the WA policy seeks to ensure that PPPs observe industrial relations standards, are sensitive to the environment and, where possible, assist under-represented individuals.<sup>61</sup> In addition, they evince a preference for projects which help and develop regional communities and do not involve the transfer of employees from the public to the private sector. Bidders in WA should bear all of these factors in mind.
- (vi) The other detailed PPP policies (NSW, VIC, QLD and NT) concentrate, not only on the protection of public rights described (see section (a) above), but also make reference to prescriptive goals such as those set out in the Commonwealth's Procurement Guidelines. This is done via the effectiveness criterion of the seven/eight part public interest test, which assesses whether, and to what extent, the proposed project's outputs

are consistent with the government's relevant minimum service standards, legislative requirements and policy objectives.<sup>62</sup> The TAS guidelines have a similar effect by requiring infrastructure projects to feature consistency with Government principles and the agency's strategic planning.<sup>63</sup> While this part of the test is neither detailed nor emphasised in any of these jurisdictions, it is sufficient to legitimise the government's rejection of a bid on the basis of its policy goals.

**(c) When the public interest test (if applicable) is undertaken**

- (i) The public interest test is usually undertaken at a very early stage of project development. Generally, the process involving the public interest test is very similar. Most jurisdictions undertake a preliminary public interest analysis and then complete a more thorough assessment in a prescribed form. In QLD, for example, there is a preliminary public interest assessment before the first Cabinet Committee approval and a completion of the assessment as part of the business case development.<sup>64</sup> In NSW all projects undergo a broad public interest assessment before they are offered as PFPs.<sup>65</sup> Importantly, in all jurisdictions which have a public interest test, bidders can rest assured that the project has already satisfied this hurdle before it has been offered up to them at the EoI stage (step two).
- (ii) Even jurisdictions which do not have a formal public interest testing process complete similar studies by this stage. For example, the ACT agencies are required to assess stakeholder, environmental and planning impacts as part of the project's business case development.<sup>66</sup>

The table below summarises the public interest test approaches in each jurisdiction.



	Preliminary PI Assessment	Full Public Interest Evaluation
NSW	Single test conducted early on in the project development stage (step one).	
VIC	Early stages of the option appraisal process. <sup>67</sup>	As part of business case development—submitted for approval to invite EoIs. <sup>68</sup>
QLD	Part of preliminary assessment stage before first Cabinet Committee approval.	Part of business case development.
NT	Consideration of public interest undertaken from the outset of a project, that is, at the options appraisal stage. <sup>69</sup>	Full test applied and reported at the business case stage, <sup>70</sup> documented for consideration in the project approval process and measures highlighted in the Project Brief and contract. <sup>71</sup>
WA	Social impact analysis undertaken as part of procurement planning after the development of a business case but before the bidding process.	



### 3.3 PUBLIC SECTOR COMPARATOR (PSC)

All jurisdictions concentrate on achieving value for money and they do this through the use of a comparative device which assesses the potential viability of the option of private sector provision, and then of each individual bid, against the cost of undertaking the project in the public sector.<sup>72</sup> Again, the most detailed policy on this point is from *Partnerships Victoria* which released a separate booklet on its 'Public Sector Comparator' (PSC). While not all jurisdictions use the same terminology or formula,<sup>73</sup> many explicitly rely on the Victorian approach and all involve a substantively similar, nearly identical process.

For example, Tasmania's 'Financial Benchmark' and the Defence Department's 'Project Cost Benchmark' also require the adding together of all costs and risks associated with the project,<sup>74</sup> as do the less detailed and differently structured PSC policies of the Commonwealth, NSW, QLD and SA. While these policies do not distinguish between transferred and retained risk, consideration of these risks is inherent in any financially sound evaluation process. The same can be said for competitive neutrality, since all policies indicate that adjustments are to be made for the government's inherent advantages or disadvantages derived from not being in the private sector — except the Department of Defence material which appears to pick up on the substance of the adjustment for competitive neutrality by referring to 'cost comparisons... considering net tax effects'.<sup>75</sup>

#### (a) For all projects?

The policies also agree that the public sector comparator (or equivalent) should almost always be used. The NSW policy requires it to be used for all projects,<sup>76</sup> while the SA guidelines provide that it is not necessary where the project is financially free-standing (ie where the private sector relies on consumer funding rather than government outlays).<sup>77</sup> The other jurisdictions do not comment on this issue but may follow the VIC lead, which requires the construction and use of a PSC except in the rare situations where the Department of Treasury and Finance may agree a PSC is not required. In that case, an appropriate benchmark, undoubtedly a cheaper and easier one, still needs to be constructed to demonstrate value for money.<sup>78</sup>

#### (b) Will it be released?

(i) One way in which the policies diverge in relation to the PSC is in the matter of its release to the public and, more significantly, to bidders. The Commonwealth and SA policies have no general rule on release and, in those jurisdictions which do, approaches range from complete confidentiality to a general policy of release.

(ii) In WA, for example, the PSC is to remain confidential until after the contract is executed,<sup>79</sup> while VIC, TAS and the ACT have a general rule against disclosure of the total PSC value.<sup>80</sup> However, even in those jurisdictions which favour confidentiality, the Raw PSC and Competitive Neutrality values (not the relevant risk assessments) may be disclosed in rare circumstances<sup>81</sup> — usually where there is a large enough number of bidders for disclosure not to inhibit a competitive bidding process. This element of strategic policy is the sole criterion in NSW<sup>82</sup> and lies beneath all of the jurisdictions' guidelines. The QLD, NT and Defence authorities have their general rule in favour of disclosure, but subject to this condition.<sup>83</sup>

(iii) Practically-speaking, agencies should only release details of the PSC (not including its risk value assessments) where there is a strong competitive bidding environment which all bidders should be made aware of. If the details of a PSC (or equivalent) are released by the government, then it is an indication that there are several bidders involved.

(iv) Jurisdictions including NSW, VIC, the ACT and the NT, state that the PSC disclosure policy for the particular project must be decided in the project development stage; ie before the bidding process begins.<sup>84</sup> The latter three require that this policy on PSC disclosure be published in the project brief.<sup>85</sup>

#### (c) At what stage in the project development does the agency develop, use and amend the PSC?

(i) In almost all jurisdictions a form of the PSC will be used three times:

- (A) in the preliminary assessment of any potential project and whether it is likely to achieve value for money as a PPP (this will usually take the form of a preliminary PSC in which broad estimates of each of the components will suffice);<sup>86</sup>
- (B) before bid evaluation, usually as part of the business case (ie before scoping the market); and
- (C) as part of the evaluation processes in order to determine whether the private sector bids provide value for money.<sup>87</sup>
- (ii) Previously stated, different jurisdictions use slightly different processes in the development of a PPP. In addition, even within the one jurisdiction, when certain parts of a PSC are developed can depend on the particular project. Regardless of this, in order to obtain more certainty in the bidding process, agencies across all jurisdictions will ensure that the PSC (or equivalent) is developed well before bidding begins and usually before any call for Eols; ie it will be part of step one in the formulation shown above.<sup>88</sup>
- (iii) In VIC and the ACT, the PSC must be signed-off on by government before the bidding process begins. In VIC the portfolio Minister and Cabinet (or a Cabinet Committee) must sign off on the PSC,<sup>89</sup> while in the ACT the sign-off responsibility is with the steering committee (formed after Cabinet's approval of the business case and including nominees of both the Chief Minister's Department and the Department of Treasury, which signs-off on the PSC itself and then obtains formal approval of this from Cabinet (or the appropriate committee)).<sup>90</sup>
- (iv) Most policy documents provide scant advice on if, when and how the PSC can be amended. The Commonwealth, NSW and WA policies do not discuss this at all, although WA does refer to the VIC materials for additional detail and the NSW guidelines comment on the incorporation of new material into the PSC as it comes to light (see below).<sup>91</sup>
- (v) The issue of whether the PSC can be amended is only relevant to the period after it has been developed and the private sector has become involved in the PPP process. In most jurisdictions, agencies are free to make alterations to the PSC (or equivalent) up until the release of the project brief; ie before the call for detailed proposals, step four above.<sup>92</sup> The precise time at which the SA policy imposes its general rule is less clear since it speaks in terms of 'engagement with the private sector' and thus could also refer to calling for Eols.<sup>93</sup>
- (vi) In TAS, there is no provision for the benchmark to be revised after release of the project brief,<sup>94</sup> but in VIC, SA, QLD, the ACT and the NT the benchmark may be revised in certain circumstances. Each of these jurisdictions expresses the change in the state of affairs necessary to justify PSC amendment in slightly different terms. In SA, there must be fundamental changes in the nature of the project, such as a change in risk apportionment amongst the parties.<sup>95</sup> While in VIC, QLD, the ACT and the NT, if the scope of the project changes or it becomes apparent that a specific component has been mispriced or omitted, the PSC may be amended to rectify the error.<sup>96</sup> The Department of Defence leaves room for amendments to its PSC, envisaging that this would occur:<sup>97</sup>
- (A) once PF bids have been received in response to an RFT in order to reflect the risk transfer accepted by each private bidder; and/or
- (B) in negotiation with the bidders, in an iterative way to match changes as they develop during the negotiations.
- (vii) Four of these jurisdictions which allow their agencies to change the PSC during the bidding process in certain circumstances, require Cabinet approval for such amendments:
- (A) In VIC, the agency must obtain written approval from Cabinet or the relevant committee for all 'significant variations' to the PSC compared with what was





released in the project brief.<sup>98</sup> The VIC policy is the only one which explicitly allows the probity auditor alone to be consulted for minor refinements, but for major increases (eg in cost predictions), the approval of Cabinet must be sought.<sup>99</sup>

(B) The Territory policies are similar to the Partnerships Victoria material in this regard, but make no reference to the probity auditor and, in place of 'significant variations' speak of 'major' (ACT) and 'material' (NT) departures from the approved PSC.<sup>100</sup>

(C) In QLD, it will be necessary to consult with the Infrastructure Partnerships Taskforce of the Department of State Development (IPT) and the QLD Treasury to determine whether it is necessary to resubmit the business case to Cabinet Budget Review Committee (CBRC) and Cabinet, if and only if the change to the PSC has an impact on the potential funding requirements of the project.

(viii) An additional issue arises when a private bidder suggests a method of delivery which is clearly more efficient than that used by the government in constructing its PSC. In VIC, the ACT and the NT adjusting the PSC to reflect this method is considered poor policy as it would reduce bidder confidence in the process and discourage private innovation — one of the core aims of PPPs.<sup>101</sup> No other jurisdiction discusses this specific issue within its PPP policy documents, although NSW does suggest that, subject to maintaining probity, the PSC should be flexible enough to allow the incorporation of new material as it comes to light.<sup>102</sup>

### 3.4 EXTERNAL APPROVALS IN PPP DEVELOPMENT

Most policies require approval from Cabinet or a cabinet committee at multiple stages in the development of a PPP project.

Agencies in all States and Territories are required to get at least one approval from Cabinet before they call for EoI (ie during step one).

(a) In the following jurisdictions, approval is required at the very early stage of preliminary assessment/option appraisal:

(i) QLD: Approval to proceed from Cabinet Budget Review Committee (CBRC).

(ii) SA: The Cabinet or, alternatively, the Minister responsible jointly with the Treasurer, has the discretion to decide if the project is a potential PPP.

(iii) ACT: The Cabinet must give its approval before the agency proceeds to develop the business case.

(b) Many jurisdictions require Cabinet approval after the agency has completed, and on the basis of, the business case:

(i) In VIC, QLD, WA, SA, the ACT and the NT this takes the form of a funding approval by Cabinet itself, usually as part of the budget process.

(ii) QLD requires a joint Agency/Department of State Development (DSD)/Treasury submission to be presented to Cabinet.

(iii) The NT policy asks the agency to refer the business case and any of its recommendations to Cabinet via the Infrastructure Development Subcommittee.

(c) In TAS the agency must seek Budget Committee/Cabinet approval on the basis of the business case to continue to the call for EoIs (called 'market testing' in TAS).

WA agencies also need to submit their procurement plan (a part of step one developed after completion of the business case in WA) to Treasury and, on the basis of Treasury's recommendation, obtain approval from the Cabinet Expenditure Review Committee (ERC).

Most State and Territory policies also require some kind of governmental approval before they issue their call for EoIs:

(a) In VIC the responsible Minister would normally consult with the Treasurer and then present to Cabinet a paper seeking this approval and discussing.<sup>103</sup>

- (i) any material changes since the business case;
  - (ii) the proposed structure of the project and nature of the roles of government and the private party;
  - (iii) information on market interest and potential for achieving value for money; and
  - (iv) the project timetable.
- (b) In NSW this is the first approval process and is conducted by the Budget Committee of Cabinet (BCC), presumably on the basis of all materials produced in the project development stage.
- (c) The WA policy requires Cabinet approval before EoI can be called from the market.
- (d) In the ACT, the agency need not obtain approval from Cabinet at this stage, but instead from the Government Procurement Board.
- (e) The NT policy requires Cabinet or a delegated committee approval of the EoI document before it is released to the market.

After EoI's have been received and evaluated (step three), most States (excluding SA) and Territories require a form of government approval before proceeding to a call for detailed proposals (CDP or equivalent — step four).

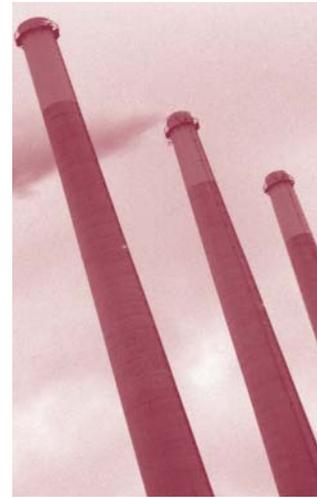
- (a) In VIC, WA, ACT and the NT this requires cabinet approval of the project brief and its release — except that in the NT a delegated Cabinet Committee may perform this function.
- (b) In QLD the relevant body for approval at this stage is the Cabinet Budget Review Committee (CBRC), while in TAS only the responsible Minister need endorse the process.
- (c) NSW differs slightly in only requiring approval (from the Budget Committee of Cabinet) in the case of very large projects which have received a number of divergent proposals.

Some States require Cabinet approval between the evaluation of detailed proposals (step five) and detailed negotiations with the preferred bidder(s) (step six). These include:

- (a) WA, SA and the ACT; and
- (b) NSW, where the Budget Committee of Cabinet undertakes this task; but
- (c) in the NT, only the relevant portfolio Minister must endorse the preferred proponent at this stage; and
- (d) in VIC it is only necessary that the responsible Minister report to the Treasurer during finalisation.

Following negotiation (step six) and leading up to contract execution (step seven), all States and Territories excluding SA require some kind of approval.

- (a) Some jurisdictions only require approval if significant variations (from the business case) have arisen in negotiations:
  - (i) in VIC, these must be brought to the attention of the Minister with a recommendation that she or he seek Cabinet endorsement of the variations;<sup>104</sup>
  - (ii) in the ACT, they must be brought to the attention of Cabinet, with a recommendation that Cabinet endorse the variations;<sup>105</sup>
  - (iii) in NSW, via the Budget Committee of Cabinet; and
  - (iv) in WA, by the Cabinet itself.
- (b) In other jurisdictions, the government department needs approval before executing the contract, irrespective of whether the project has been substantially varied:
  - (i) in QLD, a joint Agency/Department of State Development (DSD)/Treasury submission must be presented to Cabinet through the Cabinet Budget Review Committee (CBRC). It should include an analysis of how value for money is expected to be achieved by entering into the partnership and, if Cabinet is not satisfied, it may abandon the project at this point.
  - (ii) In the NT, the relevant portfolio Minister and the Treasurer must approve finalisation and execution of the documents.<sup>106</sup>





(iii) In NSW, the Treasurer's approval is always required under the PAFA Act before a government contract is executed.

The exceptions to the above guidelines are the private financing policy of the **Commonwealth** and its agencies (including the Department of Defence which makes no mention of any department-specific approval process). Together with the *Principles for the use of Private Financing*, the *Commonwealth Procurement Guidelines* provide a separate regime which requires a different level of approval depending on the type and value of the project.<sup>107</sup>

(a) a proposal must be referred to the Minister for Finance and Administration if:

(i) it has an asset replacement value in excess of \$20 million; or

(ii) it has the potential to significantly limit or impact on:<sup>108</sup>

(A) an agency's future activity; or

(B) the Government's fiscal position.

(b) the Government (presumably Cabinet) must be consulted for proposals exceeding \$50 million; and

(c) public works costing in excess of \$6 million must be referred to the Parliamentary Standing Committee on Public Works, and this committee must be notified of any proposals for public works with an estimated value of between \$2 million and \$6 million. Whether these provisions apply to any PPP undertaken by the Commonwealth or one of its departments depends on the precise nature of the particular agreement. Activities such as construction, maintenance (repair) and refurbishment will qualify as 'public works' under the *Public Works Committee Act 1969* (Cth) to the extent that the

government pays the private party to carry out these works for the Commonwealth. The issue is less clear if the government agency merely requires private provision of certain outputs and does not separately specify a requirement to, for example, maintain or refurbish. There is argument, however, that the legislation still applies, since any Commonwealth payments made for such services are likely to be seen as 'in relation to' the construction, maintenance and refurbishment work undertaken.<sup>109</sup>

The States and Territories all have slightly different governmental approval processes in place. They vary from an onerous WA policy imposing a total of six different cabinet approvals, to the TAS policy for which only one 'in principle' cabinet approval and a maximum of three ministerial approvals suffice.

As noted above, many jurisdictions require approval of the PPP project in the context of the relevant government's budget allocations. Whether a project receives budget funding or not will depend on the particular project and its associated political claims.

Budget papers usually indicate previous and likely future budgets for infrastructure-related spending. Some make specific reference to infrastructure or capital works projects in a separate section, while others deal with the funding of PPP type projects within the section devoted to the relevant government department. All jurisdictions list a number of, if not all, major projects and the levels of government funding.

Such data may well be considered by Cabinet (or a cabinet committee) as part of any budget approval process for a PPP project. Accordingly, it may be useful to refer to the relevant papers in the project specific jurisdiction.

The most relevant budget papers in each of the jurisdictions are:

Jurisdiction	Internet-linked (most) Relevant 2004-05 Budget Paper	Further Information (URL)
Victoria	Information Paper No. 1: Public Sector Asset Investment Program 2004-05	<a href="http://www.budget.vic.gov.au/">http://www.budget.vic.gov.au/</a>
NSW	Budget Summary	<a href="http://www.treasury.nsw.gov.au/bp04-05/bpapers.htm">http://www.treasury.nsw.gov.au/bp04-05/bpapers.htm</a>
Queensland	Budget Paper 3: Capital Statement	<a href="http://www.budget.qld.gov.au/budget-papers/bp3.htm">http://www.budget.qld.gov.au/budget-papers/bp3.htm</a>
WA	Budget Paper No 3: Economic and Fiscal Overview	<a href="http://www.dtf.wa.gov.au/cms/uploadedFiles/200405BP3f.pdf">http://www.dtf.wa.gov.au/cms/uploadedFiles/200405BP3f.pdf</a>
SA	State Budget 2004-05: Budget Statement	<a href="http://www.statebudget.sa.gov.au/budget200405/pdf/bstatement/bstatement200405.pdf">http://www.statebudget.sa.gov.au/budget200405/pdf/bstatement/bstatement200405.pdf</a>
Tasmania	Budget at a Glance	<a href="http://www.treasury.tas.gov.au/domino/dtf/dtf.nsf/6455c8b3fbd1de624a256819001bcb26/679984fe0ac7913cca256e92000a9f42?OpenDocument">http://www.treasury.tas.gov.au/domino/dtf/dtf.nsf/6455c8b3fbd1de624a256819001bcb26/679984fe0ac7913cca256e92000a9f42?OpenDocument</a>
ACT	Budget at a Glance	<a href="http://www.treasury.act.gov.au/budget/budget_2004/">http://www.treasury.act.gov.au/budget/budget_2004/</a>
NT	Budget Paper No. 4: The Infrastructure Program	<a href="http://www.budget.nt.gov.au/">http://www.budget.nt.gov.au/</a>
Commonwealth	Budget Paper 2, Part 3: Capital Measures	<a href="http://www.aph.gov.au/budget/2004-05/index.htm">http://www.aph.gov.au/budget/2004-05/index.htm</a>
Defence	Portfolio Budget Statement: Department of Defence — Overview (see also as per Commonwealth)	<a href="http://www.defence.gov.au/budget/04-05/pbs/index.htm">http://www.defence.gov.au/budget/04-05/pbs/index.htm</a>

## 4. RISK ALLOCATION

### 4.1 GENERAL PRINCIPLES

One of the primary goals of private sector participation in the provision of infrastructure or services is the transfer of risk. Accordingly all policies envisage a process whereby some risks are retained by the relevant government and others are transferred to the private party. However, as policy documents such as those of VIC, NSW and SA explicitly point out, the concept is to allocate risk as efficiently as possible, not to transfer as much risk as possible.<sup>110</sup> Consequently, all jurisdictions are committed to the optimal risk allocation principle which lies at the core of the value for money concept so central to PPPs.

This principle requires that risk be allocated to the party best able to manage it at least cost.<sup>111</sup> For example, the private sector is generally seen to be a good manager of commercial risk, while the public sector is considered to be better at managing regulatory risk.<sup>112</sup> Most documents suggest that where a risk is outside the control of both parties, it should be shared between the public and private sectors.<sup>113</sup> This is likely to be the case where, for example, capacity upgrades which are dependent on future usage patterns cannot be predicted at the time of the contract.<sup>114</sup> Another example of a risk that may be shared is force majeure, for which the standard position is that the government bears the risk of not being provided with services, but only paying for the services to the extent they are provided, leaving the private party to bear the financial consequences of force majeure occurring. This is consistent with the general approach to the extent the private party is able to insure the risk.<sup>115</sup>

### 4.2 PREFERRED RISK ALLOCATION

While the way in which risks are to be assigned in any given project remains ultimately for consideration and negotiation according to the specific requirements of each project, in the interests of standardisation and lowering transaction costs, some policies suggest that the risk allocation preferences are likely to be adhered to.<sup>116</sup>

Some jurisdictions classify the different risk categories and clearly express the government's preferred way of allocating each type of risk. *Partnerships Victoria* released a separate 'Risk Allocation Manual', which is very similar to the ACT in

its risk allocation guide, and is used as a model in QLD and, to a lesser extent, in Appendix 3 of the NSW Guidelines and Appendix B of the NT Appendices (which is almost identical to the NSW formulation). WA gives a list of 'possible allocations' of a small number of broadly-expressed risks and cites the VIC guide for extra detail.<sup>117</sup>

Some jurisdictions do not follow the above approach of classifying risk categories and expressing the government's preferred allocation. However, these jurisdictions do provide an indication as to a few of their likely risk allocation preferences. The relevant SA and Defence materials provide examples of how to set out a hypothetical risk matrix, which is neither detailed nor comprehensive.<sup>118</sup> In TAS there is no published policy on the allocation of risk, merely a discussion of general principles and a commitment to deciding the precise risk allocation on a case by case basis.

A table of main risk categories and the way the different jurisdictions have allocated them in their respective policy document, is provided in Appendix C. In reading the table it is important to note:

- (a) jurisdictions outside of NSW, VIC, QLD, ACT and NT, do not publish a detailed document indicating the government's risk allocation preferences;
- (b) the terminology used in classifying the different types of risk differs slightly even within the approaches of the above five jurisdictions which are fairly consistent.

As a general rule however, it could be surmised that the NT risk matrix is modelled on that of NSW, the ACT's on that of VIC, and QLD, while largely using terminology from the other jurisdictions' documents, at times offers a separate approach to risk categorisation and allocation.



## 5. CONCLUSIONS

The various PPP policies throughout Australia are sufficiently similar for a practitioner in one of the jurisdictions to be able to apply her or his skills to a project in another. This in part derives from the common basis of many of the policy documents in the work of *Partnerships Victoria* and from many jurisdictions' support for a national PPP approach.

Nonetheless, there are certain key differences which must be observed, particularly regarding

application of the policies, whether projects are assessed against the public interest, the timing of cabinet approvals and the detail of government preferences for risk allocation. This paper provides a comparative analysis of some of the key differences in terminology and approach, as well as a practical guide to documentation in each jurisdiction. It is hoped that recent steps towards homogeneity throughout Australia, including a standardised approach to contracts, will continue. Such homogeneity will bring significant cost savings to all PPP participants and stakeholders.

### Endnotes

- 1 The authors would like to acknowledge the initial research and drafting contribution of Julian Wyatt to this article.
- 2 [The Department of Defence's policies have been included because, unlike other Commonwealth departments, the Department of Defence has created its own set of documents relating to PPP in Defence work.]
- 3 SA 1; TAS GP 5; QLD Framework 3.
- 4 Cth PFPs 4; VIC OV 4.
- 5 NSW Guidelines iv.
- 6 TAS GP 5.
- 7 QLD Framework 2.
- 8 NSW Guidelines 4.
- 9 See example: TAS GP 1.
- 10 Cth PFPs 7.
- 11 NSW Guidelines iv.
- 12 WA PPP 6.
- 13 SA 3.
- 14 Def Intro.
- 15 See for example: SA 4.
- 16 QLD Framework 2.
- 17 ACT Circular 4.
- 18 See for example: VIC OV 7.
- 19 VIC PG 4; WA PPP 9; NSW GP 5.
- 20 WA PPP 9.
- 21 NT PF 13; NSW Guidelines 11.
- 22 NSW Guidelines 4.
- 23 QLD Framework 2.
- 24 WA PPP 6.
- 25 ACT Circular 4.
- 26 NT PF 13.
- 27 Def Framework.
- 28 TAS GP 5.
- 29 NSW Guidelines 7.
- 30 VIC PG 18.
- 31 SA 11.
- 32 ACT Circular 3.
- 33 Def PFM 15.
- 34 None of these minimum time stipulations are expressed as a rule. They are simply the relevant policy committee's preference for the length of time that a PPP is likely to achieve value for money.
- 35 Cth PFPs 4.
- 36 Def PFM 16.
- 37 NSW Guidelines 7.
- 38 ACT Circular 3.
- 39 SA 14.
- 40 VIC PG 4; VIC OV 8.
- 41 SA 18.
- 42 SA 18, 20.
- 43 VIC PG 33.
- 44 QLD Framework 22.
- 45 In Victoria, for example, the Department of Treasury and Finance has released best practice advice on probity which applies to large transactions including those which come within the *Partnerships Victoria* framework.
- 46 WTO Agreement on Government Procurement (15 April 1994).
- 47 QLD Framework 24.
- 48 VIC PG 48.
- 49 Def PFM 9.
- 50 QLD Framework 25.
- 51 See: NSW Guidelines (Appendix 2) 57; VIC PG 76, (Appendix D) 131; QLD Framework 10, 30; NT GM 9.
- 52 WA PPP 6, 8, 10.
- 53 WA PEG 5: apply to all new (ie post January 2002) project proposals that have material financing implications.
- 54 See examples on consultation WA PEG 43.
- 55 See examples on equity and access WA PEG 162; and on internal agency agenda WA PEG 171.
- 56 WA PEG (Chapter 7) 110-118.
- 57 SA 22; Cth PFPs 16-19 (agencies not able to transfer their accountability); TAS GP 13.
- 58 Cth PFPs 12.
- 59 Def PFM 26.
- 60 A SME is an Australian or New Zealand body corporate with an average annual revenue over the last four financial years of less than A\$500 million.
- 61 WA PPP 9.
- 62 See for example: VIC PG (Appendix 2) 131; and, more obviously, NSW Guidelines 57.
- 63 TAS GP iv.
- 64 QLD Framework 10, 17. For further details see Section 3 on the process of project development.
- 65 NSW Guidelines 57.
- 66 ACT Circular 9.
- 67 VIC PG 76.
- 68 VIC PG 23, 78.
- 69 NT GM 37, 41, 112.
- 70 NT GM 37, 41, 111.
- 71 NT GM 41.
- 72 NSW Guidelines (Section 7) 45-48; VIC PSC *passim*; QLD Framework 17-18; WA PPP (Part 4) 26-28; SA (Attachment D) 31-35; TAS GP (Appendix D) 35-37; ACT PSC *passim* (copies VIC PSC almost verbatim); NT GM (Chapter 4) 19-23 (copy of VIC PSC); Cth PFPs *passim* (no detail, called PSC and seems similar); Def PFM (Part 4) 17-23 (called the PCB).
- 73 The VIC policy provides four components which must be valued in creating the Public Sector Comparator and adopts the following formula: 'Raw PSC + 'Competitive Neutrality' + 'Transferable Risk' + 'Retained Risk'.
- 74 TAS GP 35-36: Financial is one of three benchmarks (others are performance and risk).
- 75 Def PFM 17-23.
- 76 NSW Guidelines 45.
- 77 SA 15.
- 78 VIC PSC 12.
- 79 WA PPP 27.
- 80 VIC PSC 69; TAS GP 35; ACT PSC 69.
- 81 VIC PSC 69.
- 82 NSW Policy 3.
- 83 QLD Framework 17; NT GM 23; Def PFM 22.
- 84 NSW Guidelines 19.
- 85 VIC PSC 71; ACT PSC 68; NT GM 23.
- 86 See example: VIC PSC 12.
- 87 In some jurisdictions, such as the Department of Defence, the PSC (PCB in this case) is only used in instances 2 and 3 (Def PFM 18).
- 88 See for example: VIC PSC 69, 71; QLD BCD 21; SA 8; TAS GP 11.
- 89 VIC PSC 70.
- 90 ACT PSC 70.
- 91 WA PPP 28; NSW Guidelines 46.
- 92 See for example: VIC PSC 71; NT GM 23.
- 93 SA 8.
- 94 TAS GP 37.
- 95 SA 8.
- 96 VIC PSC 71; QLD BCD 21; ACT PSC 69; NT GM 23.
- 97 Def PFM 22-23.
- 98 VIC PSC 71.
- 99 VIC PSC 72.
- 100 ACT PSC 69; NT GM 23.
- 101 VIC PSC 69; ACT PSC 68; NT GM 23.
- 102 NSW Guidelines 46.
- 103 VIC PG 32.
- 104 VIC PG 47.
- 105 ACT Circular 15.
- 106 NT GM 59.
- 107 Cth PFPs 15, 19.
- 108 Cth PFPs 15.
- 109 See: *Public Works Committee Act 1969* (Cth), especially section 5.
- 110 NSW Guidelines 33; SA 24.
- 111 See for example: VIC OV 18.
- 112 WA PPP 6.
- 113 NSW Guidelines 34.
- 114 See: ACT RA 18.
- 115 See for example: VIC RA 109; see also Appendix A below.
- 116 See for example: NSW Guidelines 33.
- 117 WA PPP 25.
- 118 (Appendix 4) 63-64; Def PFM (Risk Annex B) 32.