

### NSW LOCAL GOVERNMENTS' NEW PPP FRAMEWORK

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### THE NEW LEGISLATION

The Local Government Amendment (Public-Private Partnerships) Act 2004 (NSW) (the Act) amends the Local Government Act 1993 (NSW) and provides a regulatory framework for public private partnerships (PPPs) entered into with New South Wales local governments. The Act will impact significantly the manner in which PPPs with local governments are negotiated and undertaken. The Act has not yet come into force. It was assented to on 21 December 2004 and will commence on proclamation.

### OASIS PROJECT

The Act is largely a response to the findings of the Liverpool City Council Public Inquiry, headed by Professor Maurice Daly.<sup>1</sup> The inquiry investigated failed commercial arrangements entered into by Liverpool City Council with the Canterbury Bulldogs Rugby League Club between 1996 and 2003 for the redevelopment of lands at Woodward Park, commonly known as the 'Oasis Project'. The inquiry found that the failed project had cost NSW ratepayers more than \$20 million.

The final report of the inquiry indicates that a critical element in the failure of the Oasis Project, at the time the largest undertaking ever attempted by a council in conjunction with the private sector in NSW, was the absence of guidelines and regulations setting out procedures for councils to follow.<sup>2</sup> The Act is aimed at avoiding similar failures in the future by providing a framework within which local governments can successfully negotiate and implement PPP arrangements in NSW.

A PPP, for the purposes of the Act, is any entity formed under an arrangement between a

council and a private person for the purposes of providing public infrastructure or facilities (in respect of which the council retains a beneficial interest under the arrangement) or delivering services in accordance with the arrangement. Transactions such as the sale of operational community land, councils acting as trustees for donations or bequests and tendering are not affected by the Act.

### KEY FEATURES

There are three key features of the Act:

- the establishment of guidelines setting out processes and procedures for local governments to follow in negotiating and carrying out PPPs;
- the establishment of a project review committee to review significant and high-risk projects; and
- the extension of the compulsory tendering requirements of the Local Government Act 1993 to PPP contracts.

### PPP GUIDELINES

The first key feature of the Act is the establishment of guidelines setting out specified procedures for councils to follow in relation to the formation of and carrying out of PPP projects. These guidelines will be published by the Director-General of the Department of Local Government following consultation with local government representatives. A council that signs a contract without complying with the guidelines will be in breach of the Local Government Act 1993. The guidelines will not apply to PPPs that a council resolved to enter into before 28 June 2004 but will apply to PPPs entered into after that date.

The guidelines are expected to be similar to the existing NSW Privately Funded Project

Guidelines, and will establish procedures to be followed for the various stages of a PPP project, including:

- the initial stage of establishing a need for the project in question;
- a preliminary assessment of the council's capacity to undertake the project;
- the establishment of a probity plan, a community relations plan, a preliminary risk assessment and a form of comparator similar to the Public Sector Comparator used in various State PPP guidelines;
- assessment to determine whether the project should proceed;
- approaching and evaluating potential private sector partners through an expressions of interest process;
- taking of detailed submissions from short-listed private sector proponents;
- selection of the preferred proponent;
- contract development;
- council approval;
- contract signing; and
- contract management and review of the project at key milestones<sup>3</sup>

The guidelines are expected to be publicly available in February 2005.

#### ESTABLISHMENT OF A PROJECT REVIEW COMMITTEE

The Act establishes a project review committee (the Committee), which will include the Director-General of the Department of Local Government (the Director-General), the Secretary of the Treasury, the Director-General of the Premier's Department, the Director-General of the Cabinet Office

and the Director-General of the Department of Infrastructure, Planning and Natural Resources (or officers nominated by those persons). The Committee will conduct an external review process for 'significant projects', defined as:

- projects worth more than \$50 million; or
- projects in which a council's financial contribution is 25 per cent or more of council revenue that is available for spending on facilities or services of the kind to which the project relates.

The Committee's function is to verify that the relevant council has complied with the requirements of the PPP guidelines in relation to the proposed project. This will include ensuring that appropriate probity and due diligence checks have been made by the relevant council and verifying the financial viability of the project and the council's capacity to enter into the proposed commercial arrangements.

For all PPP projects, regardless of size, councils will be required to submit an assessment of the project according to the guidelines, which will be reviewed by the Department of Local Government. Projects deemed to be high-risk will be subject to the Committee's external review. The Minister for Local Government (the Minister) also has a discretionary power to refer any project to the Committee for review. If an existing project has been, or is proposed to be, significantly varied, the Director-General can require the council to provide an assessment of the varied project. If the Director-General is of the opinion that the project has or will become a significant or high risk project, the Director-General may refer the project to the Committee for review.

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A local government seeking the Minister's approval ... will be required to demonstrate that the proposal is in the public interest.

Once a project has been referred to the Committee, the relevant council must not proceed with the project as a PPP unless and until the Committee is satisfied that the guidelines have been complied with. The Committee's decision as to compliance with the guidelines is final and cannot be reviewed by any court or tribunal.

#### EXTENSION OF TENDERING PROVISIONS TO PPPs

The third key feature of the Act is the strengthening of the tendering provisions contained in section 55 of the Local Government Act 1993. This is aimed at preventing the use of financial entities or project vehicles to circumvent tendering requirements under the Local Government Act 1993. When seeking private sector partners for PPPs, councils must invite tenders from interested persons. The tendering provisions will also apply to contracts entered into by entities formed by councils, as well as contracts entered into by councils themselves. This is intended to ensure that proposed PPP arrangements are properly market-tested.

#### OTHER PROVISIONS

The Local Government Act 1993 currently requires ministerial approval to be obtained where a council seeks to participate in the formation of a corporation or acquire a controlling interest in a corporation. The Act also requires obtaining the approval of the Minister or of the Committee (as relevant) for other commercial relationships that the council may wish to enter. This recognises the variety of forms that a PPP with local government may take and the need to extend ministerial supervision across the range of potential commercial arrangements.

The Act also introduces a public interest test for obtaining the Minister's consent. A local government seeking the Minister's approval to the formation of a corporation or other entity, or acquisition of a controlling interest in a corporation or other entity, will be required to demonstrate that the proposal is in the public interest.

The Act stipulates that compensation is not payable by the state for matters arising from the enactment of the Act or to any private person as a consequence of the council being prevented by the Act from forming or carrying out a PPP. However, this does not apply to a PPP that the council decided to enter into between 28 June 2004 and the Act's commencement.

Many of the new amendments contained in the Act will apply retrospectively from 28 June 2004 to ensure that local councils are not subjected to pressure from potential PPP partners to fast-track projects in order to avoid the requirements of the new legislation.

## REFERENCES

1. Professor Maurice Daly, Liverpool City Council Public Inquiry: Primary Findings and Interim Report, March 2004; Professor Maurice Daly, Liverpool City Council Public Inquiry: Lessons from the Liverpool City Council Experience - Recommendations for Public Private Partnerships in Local Government, Vol 2, June 2004 and Professor Maurice Daly, Liverpool City Council Public Inquiry: Final Report - Findings and Recommendations, Vol 3, July 2004.

2. Professor Maurice Daly, Liverpool City Council Public Inquiry: Lessons from the Liverpool City Council Experience - Recommendations for Public Private Partnerships in Local Government, Vol 2, June 2004 and Professor Maurice Daly, Liverpool City Council Public Inquiry: Final Report - Findings and Recommendations, Vol 3, 25.

3. Professor Maurice Daly, Liverpool City Council Public Inquiry: Lessons from the Liverpool City Council Experience - Recommendations for Public Private Partnerships in Local Government, Vol 2, June 2004, 29-33.

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