

# Australia

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## General PPP framework

### 1 How has the concept of public-private partnership (PPP) developed in your jurisdiction? What types of transactions are permitted and commonly used in your jurisdiction?

Use of PPPs in Australia started through state governments developing their own implementation and development models for PPPs. Victoria in particular took a very proactive approach around 2000, establishing the Partnerships Victoria body and developing mechanisms based on the United Kingdom's 'private finance initiative'. This resulted in the term 'public-private partnership' being formally adopted to cover those types of public and private arrangements, and other policies in other Australian states were in turn heavily based on the Victoria model. In 2005, the National PPP Policy and Guidelines were implemented by the Australian federal government to harmonise all Australian governments' approaches to PPP implementation and development.

Within the National Guidelines, a PPP is defined as 'a long-term contract between the public and private sectors where Government pays the private sector to deliver infrastructure and related services on behalf, or in support, of Government's broader service responsibilities.'

In Australia, the design-build-finance-operate model is commonly used for PPP projects, particularly where the project has a 25 to 30-year term and as a result is required to take a whole-of-life approach to service delivery.

### 2 What categories of public infrastructure are subject to public-private partnership transactions in your jurisdictions?

Virtually all categories of public infrastructure have been or are prospectively subject to PPP transactions in Australia. Transport and social infrastructure feature most prominently on the types of projects delivered through a PPP in all Australian states and territories, but there have also been energy, water and telecommunications projects.

### 3 Is there a legislative framework for PPPs in your jurisdiction, or are PPPs undertaken pursuant to general government powers as one-off transactions?

While not a legislative framework as such, the National PPP Policy and Guidelines present a unified national framework for the procurement of PPPs in Australia. The National Guidelines set out the processes that should be followed in the investment, procurement and delivery stages of PPPs, as well as considering the appropriate risk allocation and commercial principles. Some individual state governments also have their own jurisdictional requirements and departures that are read in conjunction with the National Guidelines.

### 4 Is there a centralised PPP authority or may each agency carry out its own programme?

The National Guidelines are published by Infrastructure Australia, a national statutory body tasked with developing strategy for delivering infrastructure and modernising assets both nationally and at a state level. However, within each government there is usually a centralised PPP authority associated with the Treasury department. That being said, individual projects are carried out by the specific government departments that are most appropriate for the project, for example the Department for

Main Roads and Transport would administer a road infrastructure project in Queensland.

### 5 Are PPPs procured only at the national level or may state, municipal or other subdivision government bodies enter into PPPs?

PPPs are procured at every level of government in Australia. However, they are typically done at state level. The National Guidelines only apply to the federal, state and territory governments and not local councils.

### 6 How is the private party in a PPP remunerated in your jurisdiction?

Remuneration of the private party varies from project to project and will depend to some extent on the nature of the infrastructure. Most PPPs are done on an availability basis. Historically, for economic infrastructure, the private party was often paid on the basis of revenue collected from use of the facility. However, toll roads in Australia have been procured as availability PPPs, for example the Peninsula Link project in Victoria.

### 7 May revenue risk or usage risk be shared between the private party and the government? How is risk shared?

Although there are no restrictions on the sharing of revenue or usage risk, this is not typical in an Australian PPP project.

### 8 In situations where the private party is compensated in whole or in part through availability or other periodic payments from the government, are the payment obligations of the government subject to the relevant legislative body approving budgetary funding in the future?

Not expressly, though the ability of government to pay will always depend on appropriation bills being passed by parliament each year.

### 9 Is there any cap on the rate of return that may be earned by the private party in the PPP transaction?

There is no statutory cap on the rate of return in an Australian PPP; however the procurement of all PPP projects is subject to the National Guidelines, which mandate the importance of value for money of PPPs. Project agreements for economic infrastructure may include revenue-sharing regimes that are triggered when a threshold is reached, thus preventing the project company earning returns that may be perceived as 'excessive'.

### 10 Is the transfer of direct or indirect ownership interests in the project company or other participants restricted?

Project agreements in Australia generally restrict change of ownership of project companies to some extent. The precise nature of the restriction will vary between jurisdictions. However, in most cases change of ownership will be subject to the government's prior consent. The project agreement may stipulate circumstances where it will be deemed reasonable to withhold consent, for example before the second anniversary of construction completion or if the government has concerns about the other business interests of the proposed entity.

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**Procurement process**
**11 What procedures normally apply to a PPP procurement? What evaluation criteria are used to award a PPP transaction?**

PPPs in Australia are typically procured through a competitive tender process, which is carried out in accordance with strict probity rules in relation to issues such as confidentiality and tenders submitted by related companies. However, unsolicited proposals are becoming more common (see question 13). The procurement process usually comprises two phases: the publication of a broad invitation to submit expressions of interest, followed by a targeted request for tenders from a shortlist of selected tenderers. Following the initial evaluation of tenders, the procuring authority will usually select the top two tenderers to take part in an interactive tender process.

Tenders are evaluated against criteria published in the request for tenders relating to their technical solution, compliance with a proposed form of contract, and price (in particular, comparative value for money).

**12 May the government consider proposals to deviate from the scope or technical characteristics of the work included in the procurement documentation during the procurement process, without altering such terms with respect to other proponents? How are such deviations assessed?**

Yes. The scope is usually defined in terms of an output specification clearly setting out the outputs the government is seeking. These define the outputs for the construction and services for the project, and outline the minimum design, functional, technical and equipment requirements for the project. It is designed to promote innovation and, accordingly, the government party is usually open to receiving deviations.

Deviations are generally assessed on the value for money provided by the proposed solutions, in terms of both the quantitative and qualitative aspects.

**13 May government parties consider unsolicited proposals for PPP transactions? How are these evaluated?**

Yes. In fact, there has been a recent growth in popularity of unsolicited proposals in Australia due to the reduced bid costs of the unsolicited proposal process compared with a traditional tender process.

The National Guidelines state that each state jurisdiction will have its own policies and procedures for dealing with unsolicited proposals. The guidelines for PPPs in New South Wales and Victoria have specific processes, including requirements for the initial proposal to contain essential information to conduct an initial evaluation, conducting an evaluation of that proposal, developing that proposal with the proponent and then making a decision as to whether to finalise an agreement with the proponent or take the proposal to tender. The evaluations of the proposals are based on the uniqueness of the proposal, its benefits and its consistency with government policy, among other things.

**14 Does the government party provide a stipend for unsuccessful short-listed proponents or otherwise bear a portion of their costs?**

Generally, governments in Australia do not reimburse bid costs. Any payment to unsuccessful proponents is on a discretionary basis, for example on a recent New South Wales PPP project the unsuccessful shortlisted proponent was reimbursed a limited proportion of its bid costs.

**15 May the government ask its counsel to provide a legal opinion on the enforceability of the PPP agreement? May it provide representations as to the enforceability of the PPP agreement?**

Yes, it would be the customary practice for counsel to provide a legal sign-off on the PPP agreement. Government does not typically provide any representation or warranty to the sponsors, who rely on their own counsel.

**16 Are there restrictions on participation in PPP projects by foreign entities? May foreign entities exercise control over the project company?**

There are no legal restrictions on foreign entities bidding for and participating in PPP projects in Australia. As a result, there have been many foreign entities involved in consortia bidding for Australian PPP projects, such as the Gold Coast Rapid Transit project and the Victorian Desalination PPP.

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**Design and construction in greenfield PPP projects**
**17 Does local law mandate that any particular form of contract govern design and construction activities? Does it mandate the choice of governing law?**

Neither federal nor state law mandates any particular form of contract for design and construction activities, although the National PPP Guidelines provide standard terms and some procuring governments and agencies have their own standard forms. Parties to contracts in Australia are free to choose the governing law of their agreement. However, although not mandated, it would be unusual for the governing law to be other than that of the jurisdiction of the procuring government or agency.

**18 Does local law impose liability for design defects and, if so, on what terms?**

There is no specific liability for design defects in Australia, as the liability will be governed by the relevant contract. The limit of that liability will depend on whether the contract is a simple agreement or a deed, and also on governing law. In all states, the limitation period for simple agreements is six years from the date on which the cause of action accrued. In the case of deeds, the limitation period is 12 years in New South Wales, Queensland, Tasmania and the Australian Capital Territory. In Victoria and South Australia it is 15 years, and in Western Australia it is 20 years. However, in the case of an action for damages for loss or damage arising out of defective building work, these periods are limited by the Building Act 1993 (Vic) in Victoria and the Environment Planning and Assessment Act 1979 (NSW) in New South Wales, which provide that an action cannot be brought more than 10 years after the issue of the final certificate of inspection.

**19 Does local law require the inclusion of specific warranties? Are there implied warranties in cases where the relevant contract is silent? Does local law mandate or regulate the duration of warranties?**

Construction contracts in Australia are typically drafted to include all relevant warranties as express terms, reducing the need to rely on implied terms under the common law. However, in the event that the contract is silent, there will be an implied warranty of due care and skill on the contractor. The duration of warranties will be limited by the relevant limitation act, as set out above. However, it is possible to extend the warranty period by contracting out of these limitation periods, which may be relevant in particular for design life warranties under PPP contracts.

**20 Are liquidated damages for delay in construction enforceable? Are certain penalty clauses unenforceable?**

Liquidated damages provisions for delay in construction are standard in Australian contracts and are generally considered to be enforceable, provided they are calculated as a genuine pre-estimate of the loss arising from the delay. Otherwise, the common law rule against penalties will apply and the clause may be unenforceable.

**21 What restrictions are imposed by local law on the contractor's ability to limit or disclaim liability for indirect or consequential damages?**

The law in Australia does not restrict a contractor's ability to limit or exclude its liability for indirect or consequential loss. However, the law on the meaning of the term 'indirect' or 'consequential' loss is unsettled, following a number of judicial decisions (starting with *Environmental Systems Pty Ltd v Peerless Holdings Pty Ltd* [2008] VSCA 26) that have explicitly rejected the rule of remoteness of loss as laid down in the English decision of *Hadley v Baxendale* (1854) 9 Ex 341. As a result, it is advisable in Australia to avoid these compendious terms when excluding liability for loss and damage under the contract, and instead list each head of loss separately.

**22 May a contractor suspend performance for non-payment?**

Yes. Each state and territory in Australia has enacted security of payment (SOP) legislation that allows contractors to suspend performance in the event of non-payment (subject to the expiry of notice periods). It is not possible to contract out of SOP legislation.

### 23 Does local law restrict 'pay if paid' or 'paid when paid' clauses?

Yes. 'Pay when paid' (and equivalent) clauses are unenforceable under the relevant SOP legislation. The term is broadly drafted, for example under the Building and Construction Industry Security of Payment Act 1999 (NSW), a 'pay when paid provision of a construction contract' means a provision of the contract:

- that makes the liability of one party (the first party) to pay money owed to another party (the second party) contingent on payment to the first party by a further party (the third party) of the whole or any part of that money;
- that makes the due date for payment of money owed by the first party to the second party dependent on the date on which payment of the whole or any part of that money is made to the first party by the third party; or
- that otherwise makes the liability to pay money owed, or the due date for payment of money owed, contingent or dependent on the operation of another contract.

### 24 Are 'equivalent project relief' clauses enforceable under local law?

Equivalent project relief clauses may be enforceable under local law, subject to compliance with the relevant SOP legislation.

### 25 May the government party decide unilaterally to expand the scope of work under the PPP agreement?

Yes. The National Guidelines recommend the inclusion of modification regimes allowing the government party unilaterally to expand the scope of work, or to omit work from the scope, at its discretion. The government party will bear the cost of the modification, usually after taking into account any cost savings from it.

### 26 Does local law entitle either party to have a PPP agreement 'rebalanced' or set aside if it becomes unduly burdensome owing to unforeseen events? Can this be agreed to by the parties?

No. In Australia, the default position (which will apply if the parties have not included any relevant express terms in their contract) is the doctrine of frustration, which will apply to set aside a contract if some radical intervening event makes it physically or legally impossible or pointless to perform the contract. However, it is typical (and recommended by the National Guidelines) to include a force majeure regime in a PPP agreement, which will be triggered by the occurrence of an extreme event. This regime applies to suspend the obligations of the parties to the extent that they cannot be performed, whilst requiring the parties to cooperate to mitigate and overcome the effects of the intervening event. If the event continues for a prolonged period, this will give rise to a right to terminate.

### 27 Are statutory lien laws applicable to construction work performed in connection with a PPP agreement?

Yes, in some Australian states and territories (New South Wales, Victoria, South Australia, Tasmania and Australian Capital Territory). The SOP legislation in these states and territories provides that the contractor will be entitled to a statutory lien in respect of the unpaid amount over any unfixed plant and materials for use in connection with the construction work.

### 28 Are there any other material provisions related to design and construction work that PPP agreements must address?

The National Guidelines contain detailed provisions in relation to:

- environmental issues (including approvals) and site conditions;
- native title claims and discovery of artefacts;
- planning and other approvals;
- site access;
- tenure;
- compensation events;
- reinstatement and repair;
- insurance; and
- step-in by the government party.

## Operation and maintenance

### 29 Are private parties' obligations during the operating period required to be defined in detail or may the PPP agreement set forth performance criteria?

Both are possible, although typically output specifications will be used. The National Guidelines provide that the service specifications will generally be output based, but in some cases it will be necessary to nominate performance and project inputs, particularly in areas where there is an absolute necessity for a certain specification to be met (eg, infection control in hospitals or door locks for prison cells).

### 30 Are liquidated damages payable, or are deductions from availability payments possible, for the private party's failure to operate and maintain the facility as agreed?

Both are possible, although liquidated damages during the operations period are unusual. Typically, performance is measured against specified key performance indicators (KPIs) (this is the regime recommended by the National Guidelines). Deductions (referred to as abatements) are calculated by reference to those KPIs and deducted from the payment due. In some jurisdictions the government party will rely on the abatement regime as its exclusive remedy for performance failure (with some exceptions), thus limiting its rights to make a claim for damages or under an indemnity.

### 31 Are there any legal or customary requirements that facilities be refurbished before they are handed back to the government party at the end of the term?

Yes. Normal practice follows the recommendations of the National Guidelines, which set out the principle that the private party must (at its own cost) ensure that the project assets meet the government party's return conditions at contract expiry. It is common for the private party to be required to provide a bond prior to handover, or for the government party to make a retention from availability payments in the final years prior to handover. In both cases, release will be subject to certification that the facilities meet the return conditions.

## Risk allocation

### 32 How is the risk of delays in commercial or financial closing customarily allocated between the parties?

The private party will usually be required to maintain its tender price for a specified period in order to allow everything required for commercial close to be put in place. The government party may bear the risk that commercial close is not achieved within that period, as this may allow the private party to increase its price. Once commercial close is reached, each party will be responsible for fulfilling the conditions precedent to financial close allocated to it. This allocation is agreed between the parties. Most conditions precedent will be the responsibility of the private party, but there may be certain approvals that the government party must obtain. The target date for satisfaction of the conditions precedent will be determined on a project-specific basis, but is usually 20 business days from commercial close.

### 33 How is the risk of delay in obtaining the necessary permits customarily allocated between the parties?

The government party will be responsible for:

- obtaining the key environmental approvals required for the site (such as any that may be required under the Environment Protection and Biodiversity Conservation Act 1999 (Cth));
- undertaking the state environmental impact assessment and obtaining any related environmental approvals; and
- obtaining planning permission (if required).

This allocation corresponds with the government party's obligation to provide access to the site for the project works. The private party will be responsible for obtaining all other approvals, as well as complying with all conditions of any approvals obtained by the government party (to the extent possible). This allocation is agreed between the parties.

**34 How are force majeure and geotechnical, environmental and weather risks customarily allocated between the parties? Is force majeure treated as a general concept relating to acts outside the parties' control or is it defined with reference to specific enumerated events?**

Force majeure events trigger a regime that relieves both parties from performance of their obligations (in whole or in part) (see also question 26). In some states, force majeure events are defined as relief events that last for longer than a specified period. In other states, force majeure events are defined as a limited category of events of exceptional severity that are outside the control of either party and prevent the private party from performing all or a material part of its non-financial obligations under the project agreement.

To the extent that geotechnical, environmental and weather risks are not force majeure events, the allocation will vary from project to project. Typically these are borne by the private sector. The allocation of these risks is agreed between the parties.

**35 How is risk for acts of third parties customarily allocated between parties to a PPP agreement?**

The allocation of these risks varies from project to project. However, the National Guidelines list these categories of risk as those that in many cases give rise to relief events (for example, acts or omissions of government parties and contractors, or failure of other authorities (including utilities providers) to give access to the site). The allocation of these risks is agreed between the parties.

**36 How are political, legal and macroeconomic risks customarily allocated between the parties? What protection is afforded to the private party against discriminatory change of law or regulation?**

In PPPs in Australia, political risks are borne by the government party.

Legal risks are typically borne by the private party, with the exception of risks of discriminatory changes in the law of the relevant jurisdiction. However, changes to the law in relation to income tax and goods and services tax are not classified as discriminatory changes.

Mechanisms to deal with different macroeconomic changes will typically be included in the PPP agreement. Availability payments to the private party will be indexed under the payment mechanism and, in the case of economic infrastructure projects, a periodic right to vary the user charge may be included (subject to any statutory limits). In a social infrastructure project, the government party will usually have a right to benchmark the provision of services periodically.

**37 What events entitle the private party to extensions of time to perform its obligations?**

In Australia, the project agreement will often not include an obligation to complete construction by a specific date. The private party will instead be under a 'best endeavours' obligation to complete construction by the target date. The National Guidelines do not consider extensions of time for economic infrastructure, in particular, and note that in respect of social infrastructure extensions of time will be at the discretion of the government party. Whether or not such a relief event during the construction period results in an extension of the contract term (and therefore the operating term) will depend on the project specifics and whether there is any special need for the project to terminate at a particular time.

**38 What events entitle the private party to additional compensation?**

Compensation events may arise during the construction or operation period, and will be agreed on a project-by-project basis. In respect of economic infrastructure projects, the National Guidelines set out the following typical compensation events:

- modification or revocation of the planning approval;
- challenge to the planning approval that requires suspension by the private party of performance;
- native title application that requires suspension of performance;
- direction of the government party in relation to artefacts; and
- service of notice requiring action or suspension of performance under environmental protection legislation.

In respect of social infrastructure projects, the National Guidelines set out the following additional events, which may also be included:

- act of prevention by the government party or its employees or contractors;
- industrial action (relief may be limited to the extent it directly affects the project site); and
- unexploded ordnance.

In addition, in both types of project the private party will usually be entitled to compensation in the event of step-in by the government party and modifications initiated by the government party.

**39 How is compensation calculated and paid?**

In the event of a compensation event, the private party will be entitled to its reasonable incremental costs and expenses incurred as a direct result of the compensation event, as reasonably assessed by the government. While there will be some variation between jurisdictions, the private party will generally be entitled to the following categories of costs and expenses:

- the sum of the following incremental amounts properly and reasonably incurred by it:
  - design and construction trade costs;
  - debt financing costs for the period of the delay;
  - external third-party advisory costs; and
  - administrative and overhead costs of the private party;
- less:
  - any insurance proceeds or damages or other compensation or amounts received by the private party as a direct result of the compensation event;
  - any costs avoided (including tax, financing or other benefits associated with deferred expenditure) accruing to the private party as a result of the occurrence of a compensation event; and
  - any additional revenue (over and above that specified in the base case financial model) that will be earned as a direct result of the compensation event.

**40 Are there any legal or customary requirements for project agreements to specify a programme of insurance? Which party mandatorily or customarily bears the risk of insurance becoming unavailable on commercially reasonable terms?**

Project agreements in Australia typically specify the insurances required in relation to the project and allocate responsibility for their procurement. As well as statutory insurances (motor vehicle and workers' compensation insurance), the private party will be responsible for effecting the project insurances. Examples of insurances required during both the construction and operating periods include property or material damage insurance (construction all risks or contractors all risks), public or product liability insurance, and professional indemnity insurance. The project agreement will specify the periods for which the private party must maintain the insurances, and will require periodic reviews of insurances in the operating periods.

**Default and termination**

**41 What remedies are available to the government party for breach by the private party?**

Remedies available to the government party for breach by the private party include (depending on the nature of the breach and circumstances):

- rights to recover damages (including for delay);
- step-in rights (including to take over performance of core contracts) and associated rights to ensure this;
- rights to require the private party to repair or reinstate damage to the works and third-party works;
- suspension rights;
- indemnification rights;
- rights to require the remedy of any persistent or frequent breaches;
- rights to require cure or prevention of defaults or breaches within an applicable cure period;
- rights to have recourse against security provided; and
- termination rights.

### Update and trends

In Australia there is an acknowledged 'infrastructure deficit' and a recognised need to facilitate private investment in infrastructure as a way of addressing the deficit. A particular area of concern is the effect of high bid costs, arising in part from the requirement for fully funded bids, which may constrain competition in the market.

In recent years, governments have attempted to address these concerns with a number of changes to the traditional model of procuring PPPs. In some cases, government funding contributions have been made, seeking to reduce borrowing costs. These have been seen in two forms: upfront capital funding or buy-back of debt after construction completion. There have also been some examples of governments using iterative processes in procurement, such as by involving contractors in the preliminary design of works. Unsolicited proposals have also grown in popularity, in part due to the greatly reduced cost of procurement.

The federal government has implemented a number of measures in the sector since the general election in September 2013. The National Partnership Agreement on Asset Recycling between the Commonwealth and each of the states and territories was signed on 2 May 2014, setting out the asset recycling regime for the next five years. The Commonwealth has contributed A\$5 billion to establish a pool of

funds to give the states and territories incentive payments of 15 per cent of the value of the government-owned asset they are proposing to sell, provided the state or territory government uses the money to reinvest in new infrastructure projects. The expectation is that this will support the pipeline of infrastructure projects coming to market in Australia over the next five years.

The Productivity Commission has also recently completed a public inquiry into ways to reduce infrastructure costs and address barriers to private sector financing for major infrastructure projects. The report acknowledges the benefits that can be offered by PPPs but advises caution in their use in circumstances where the long-term costs of the project cannot be covered by user charges.

The report considers the concerns around high bid costs for PPP projects, in particular the requirement to provide fully financed bids, and proposes that governments trial bidding processes in which the requirement for bids to be fully financed at the time of tendering is relaxed. It also considers that a hybrid model based on the existing bidding framework and elements of the inverted bid model (with the lowest expected internal rate of return on unlevered equity as the key selection criteria) would be worth trialling.

#### 42 On what grounds may the PPP agreement be terminated?

Termination rights are often limited to rights expressly set out in the PPP agreement. These include termination by the government party for:

- extended force majeure events that the parties cannot agree to mitigate;
- the private party's failure to:
  - achieve particular performance criteria;
  - achieve completion by a 'sunset date';
  - commence activities within a specified period of financial close;
  - insure in accordance with the requirements of the agreement;
  - remedy defaults or breaches within an applicable cure period;
  - prevent defaults or breaches subject to a prevention plan; or
  - submit a cure or prevention plan or consult in good faith regarding the same, if such failure is not remedied following notice;
- the private party's:
  - further persistent or frequent breaches following the provision of prescribed notices;
  - whole or substantial abandonment of the project;
  - breach of assignment provisions; or
  - breach of restriction with share capital;
- insolvency of the private party, core contractors or core guarantors; or
- the government party's convenience, with notice.

The private party generally only has limited termination rights, such as for an extended force majeure event or government party default.

#### 43 Is there a possibility of termination for convenience?

Yes, the government usually expressly has this right.

#### 44 If the PPP agreement is terminated, is compensation available?

Yes, although such compensation depends on the manner of termination. If termination is for the private party's default, the termination payment is calculated by reference to any amounts due and payable to the private party as at the termination date that remain unpaid, plus the highest sum offered by a tenderer taking over the works, minus various amounts such as the costs of the government party tendering for the work, set-off amounts, amounts owed to the government party, gains that have accrued or will accrue to the private party as a result of termination and the securitisation refund payment.

If termination is for the convenience of the government party, the termination payment includes amounts in respect of the senior debt, the internal rate of return of equity equal to the base case equity return, the subcontractor breakage costs, amounts due and payable to the private party as at the termination date that remain unpaid, and redundancy amounts, minus amounts such as amounts owing to the government party, gains that have accrued or will accrue to the private party as a result of termination, amounts the private party is entitled to retain under an insurance policy, and the securitisation refund payments.

If termination is due to a force majeure event, it will include amounts in respect of the senior debt, amounts due and payable to the private party as at the termination date that remain unpaid, and amounts due and payable to the major subcontractors in respect of works prior to the termination date, minus amounts such as those specified in relation to termination for convenience.

If the private party abandons the project, typically no compensation or termination payment is payable.

### Financing

#### 45 Does the government provide debt financing or guarantees for PPP projects? On what terms? Which agencies are responsible?

Australian governments generally do not provide debt financing on PPP projects. On recent projects, however, they have made significant capital contributions in order to alleviate private sector finance constraints and take advantage of lower public sector borrowing costs.

Australian governments generally do not provide guarantees for PPP projects, except for the state of New South Wales, which has specific legislative procedures for its treasury to issue sovereign guarantees.

#### 46 Are lenders afforded privity of contract with the government party through direct agreements or similar mechanisms? What rights will lenders typically have under these agreements?

Lenders typically enter into direct agreements with government, affording them privity of contract. These agreements usually contain an acknowledgement of the financiers' rights under the finance documents, provisions that facilitate the exercise of those rights, and provisions that give financiers the opportunity to step in and cure a default by the project company before termination by the state.

#### 47 Is there a mechanism under which lenders may exercise step-in rights or take over the PPP project? Are lenders able to obtain a security interest in the PPP agreement itself?

Lenders will typically enter into a tripartite agreement with the government and the project company, which may give lenders the right to step-in or take over the project if an event of default subsists for a period of time. Lenders can obtain a security interest in the PPP agreement, and there will usually be provisions in the PPP agreement or tripartite agreement facilitating permitted security interests.

#### 48 Are lenders expressly afforded cure rights beyond those available to the project company or are they permitted to cure only during the same period and under the same conditions as the project company?

The lenders will generally have cure rights in addition to any rights granted to the project company. However, on some projects equity and debt simply divide an existing cure period between them. The exception to this may be

completion of the project by a specific 'sunset date', in which case the time to complete may be shared by the lenders and the project company.

**49 If the private party refinances the PPP project at a lower cost of funds, is there any requirement that the gains from such refinancing be shared with the government? Are there any restrictions on refinancing?**

Government consent is required for refinancing, and the government will usually enjoy a 50 per cent share of a refinancing gain.

**Governing law and dispute resolution**

**50 What key project agreements must be governed by local law?**

All project documents are governed by local law.

**51 Under local law, what immunities does the government party enjoy in PPP transactions? Which of these immunities can be waived by the government?**

The government party enjoys immunities in respect of its statutory functions or power (including the power to legislate and to determine policy in a way that may negatively impact or disadvantage the project). However, government will often accept some aspect of this risk by agreeing to accept the risk of certain changes of law.

**52 Is arbitration available to settle disputes under the project agreement between the government and the private party? If not, what regime applies?**

Yes, arbitration is available, but usually there is a tiered dispute resolution process involving executives from the parties that must be complied with before other forms of alternative dispute resolution, such as mediation and arbitration. In particular, the parties' ability to litigate may be limited.

**53 Is there a requirement to enter into mediation or other preliminary dispute resolution procedures as a condition to seeking arbitration or other binding resolution?**

Yes. See question 52.

**54 Is there a special mechanism to deal with technical disputes?**

Yes, there is often an expert determination process to deal with technical disputes. Additionally, it is not uncommon to have an independent expert appointed to deal with technical matters such as asset inspections and the hand-back of assets.

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