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# THE PUBLIC-PRIVATE PARTNERSHIP LAW REVIEW

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EDITORS

BRUNO WERNECK AND MÁRIO SAADI

LAW BUSINESS RESEARCH

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For further information please email  
[Nick.Barette@lbresearch.com](mailto:Nick.Barette@lbresearch.com)

# THE PUBLIC-PRIVATE PARTNERSHIP LAW REVIEW

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Editors

BRUNO WERNECK AND MÁRIO SAADI

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## EDITORS' PREFACE

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We are very pleased to present this first edition of *The Public-Private Partnership Law Review*. Despite the existence of articles in various law reviews on topics involving public-private partnerships (PPPs) and private finance initiatives (in areas such as projects and construction, real estate, mergers, transfers of concessionaires' corporate control, special purpose vehicles and government procurement, to name but a few), there is a need for a deeper understanding of how different countries address specific matters on this topic. This book is an initial effort to fulfil this need.

In 2014, Brazil marked the 10th year since the publication of its Public-Private Partnership Law (Federal Law No. 11,079/2014). Our experience with this law is still very recent, especially in comparison with other countries where discussions on PPP models and the need to attract private investment into large projects dates back to the 1980s and '90s.

In view of that, we hope a comparative study covering practical aspects and different perspectives on public-private partnership issues will become an important tool for the strengthening of the model worldwide. We are certain this study will bring about a better dissemination of best practices implemented by private professionals and government authorities working on PPP projects around the globe.

Our contributors have been drawn from the most renowned firms working in the PPP field in their jurisdictions and we would like to thank all of them for their support in producing this first edition of *The Public-Private Partnership Law Review*.

We strongly believe that PPPs are an important tool for generating investments (and development) and creating efficiency not only in infrastructure, but also in the provision of public services, such as education and health, as well as prisons, monitoring urban areas and public lighting. PPPs are also an important means of combating corruption in the old and inefficient model of direct state procurement of projects.

We hope you enjoy this first edition of *The Public-Private Partnership Law Review* and we sincerely expect that this book will become, in the coming years, a comprehensive international guide to the anatomy of PPPs. We also look forward to hearing your thoughts on this edition and particularly your comments and suggestions for improving future editions of this work.

**Bruno Werneck and Mário Saadi**  
Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados  
São Paulo  
March 2015

## Chapter 2

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# AUSTRALIA

*David Donnelly, Nicholas Ng and Barton Donaldson<sup>1</sup>*

### I OVERVIEW

PPPs have been used in Australia for nearly 30 years, and began through state governments developing their own implementation and development models. Victoria was very much a front runner, establishing the Partnerships Victoria body and developing models based on the United Kingdom's 'private finance initiative' in the early 2000s. This resulted in the term 'public private partnership' (PPP) 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 Victorian model. A national approach was implemented in 2005, with the Australian federal government introducing the National PPP Policy and Guidelines, with the aim of harmonising all Australian governments' approaches to PPP implementation and development.

Australia does not have a specific legislative framework for PPPs, but rather the National PPP Policy and Guidelines set out the processes that authorities should follow in the investment, procurement, development and operations stages of PPPs, along with standard risk allocations and commercial principles to be adopted. State governments have their own jurisdictional requirements and departures that are read in conjunction with the National Guidelines.

The current federal government's recent policy regarding capital recycling bodes well for an increase in PPP activity, not only through the construction of new infrastructure, but also through sales or long-term leases of government assets, which could also involve PPP arrangements. The current economic and political climate in Australia suggests that government is more than willing to use the PPP delivery model. Recent examples include new hospitals, such as the Northern Beaches Hospital in NSW, tendered in 2014, and prisons, like the recently awarded Ravenhall Prison in Victoria.

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<sup>1</sup> David Donnelly and Nicholas Ng are partners and Barton Donaldson is a lawyer at Allens.

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

## **II THE YEAR IN REVIEW**

The PPP market in Australia continued to grow in Australia in 2014, with several new projects coming to market and others transitioning from development into their operations phase. The North West Rail Link PPP, Ravenhall Prison PPP and New Generation Rollingstock PPP reached financial close, and the Gold Coast Rapid Transit project achieved construction completion. New projects tendered in the market through expressions of interest or requests for proposal included the Sydney Light Rail project, the Toowoomba Second Range Crossing and the Northern Beaches Hospital PPP.

As part of the 2014 Federal Budget, the National Partnership Agreement on Asset Recycling between the Commonwealth government and each of the states was signed. This package sets out an asset-recycling regime which involves the Commonwealth contributing A\$5 billion of incentive payments comprising 15 per cent of the value of the asset proposed to be sold. These incentive payments are expected to be used to fund infrastructure within the states, and the first projects to utilise this scheme are likely to be announced in the near future.

## **III GENERAL FRAMEWORK**

### **i Types of public-private partnership**

There are several structures of PPP that have historically been used in Australia, including DCM (design–construct–maintain), DCMO (design–construct–maintain–operate), BOO (build–own–operate) and BOOT (build–own–operate–transfer) forms of project delivery, but in essence, PPP projects are frequently simply another version or versions of the BOOT scheme. The design–build–finance–operate (DBFO) model is commonly used for PPP projects in Australia, 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.

A common theme for recent PPPs has seen the inclusion of some form of government contribution. Contributions are generally structured as cash payments and may be made during the development phase, immediately following completion or on establishment of steady-state operations. Payments are usually subject to pre-agreed conditions being met.

### **ii The authorities**

Within each government, both federal and state, there is usually a centralised PPP authority associated with the treasury department (such as Projects Queensland). However, in most jurisdictions individual projects are usually procured by, or in conjunction with, the specific government department that is most appropriate to deliver the project. For example, Transport for NSW or the Roads and Maritime Service would administer a road or rail infrastructure project in the state of New South Wales.

This also means that certain Australian government departments have more experience in the PPP landscape than others, purely due to the nature of the functions they administer, for example, government departments that deal primarily with road and other transport infrastructure. The experience of government departments with PPPs can greatly influence both the bidding and delivery processes, due to knowledge of risk profile and market standards for similar projects.

While not an authority that awards PPPs, Infrastructure Australia is a seminal Australian statutory body that works with industry and government to develop all other aspects of the PPP process. Established under the Infrastructure Australia Act 2008 (Cth), which came into effect on 9 April 2008, Infrastructure Australia's primary function is to provide advice to the Commonwealth, state, territory and local governments on infrastructure matters, including advice regarding the harmonisation of policies and laws relating to the development of, and investment in, infrastructure. This includes publishing the National PPP Policy and Guidelines, as well as other publications regarding infrastructure investment and PPPs.

### **iii General requirements for PPP contracts**

There are few limitations in Australia when it comes to the use of the PPP delivery model by government (which, beyond the National PPP Policy and Guidelines, are also subject to change depending on the contracting government). At the present time, there are no projects or services that are deemed 'off limits' for consideration as a PPP project in Australia, especially considering the wide range of industries that have already used the model. That said, when assessing whether a PPP model is to be used, governments ordinarily perform a detailed business case assessment to ensure a PPP is likely to deliver better value for money to government than more traditional forms of government procurement.

The federal and state governments all have a value threshold for which they must consider PPP as a potential procurement method, but the value varies between governments, and is usually around A\$50 to A\$100 million. Projects under this value threshold can also be considered for PPPs if they represent significant value for money, but it is not mandatory to do so. Some jurisdictions also permit the bundling of projects to meet this value threshold.

Most Australian governments also require a public interest, public benefit or public policy test when considering a PPP delivery method. This usually involves conducting a business-case assessment, which includes considering the impact of the project on the public, especially on those stakeholders identified as being directly affected by the project. Reviews of this nature should undergo further development in the interim business case with a focus on issues that may arise through project development and delivery. The National Guidelines also recommend liaising with public interest groups and other relevant bodies and considering possible outcomes of a qualitative or quantitative nature that may impact upon the value-for-money analysis.

There are also no legal restrictions on foreign entities engaging in the PPP process with Australian governments, apart from building licensing obligations in some jurisdictions. This freedom has resulted in many foreign entities being involved in consortia that have bid for and won Australian PPP projects. These have included the

New Generation Rollingstock project in Queensland, and the Victorian Desalination Plant.

## **IV BIDDING AND AWARD PROCEDURE**

### **i Expressions of interest**

To ensure adherence to the value-for-money principles that underpin the National Guidelines, it is typical for a competitive tender process to be used to procure a PPP. This process is carried out in accordance with strict probity rules in relation to issues such as confidentiality and tenders submitted by related companies.

The procurement process usually comprises two phases: the publication of a broad invitation to submit expressions of interest, followed by a targeted request for proposals from a shortlist of selected tenderers. The exact process varies between Australian governments, but ordinarily includes a degree of interaction with government throughout the tender process.

### **ii Requests for proposals and unsolicited proposals**

Government parties may consider unsolicited proposals for PPP transactions. In fact, there has been a recent growth in the private sector putting forward unsolicited proposals in Australia due to the reduced bid costs of the unsolicited proposal process compared to a traditional tender process. For example, the NorthConnex project was an unsolicited proposal brought to the New South Wales state government.

Unsolicited proposals have become more popular in Australia in recent years due to the benefits of the process. While the traditional tender process offers value for money through competitive bidding of tenderers, unsolicited proposals offer value for money in a different context (generally through the private sector proponent offering a 'unique' element that would not otherwise be available). The overall process is usually less expensive than going to tender and often the uniqueness of the project is such that the proponent is the only entity that can actually implement the project, at least in the form brought to government. Each state's unsolicited proposal policy is designed to evaluate this uniqueness against other factors (including transparency) so that value for money can be demonstrated to the public.

### **iii Evaluation and grant**

It is usual practice for governments to publish a detailed set of evaluation criteria in the request for proposal documentation sent out to tenderers. These criteria would usually relate to the tenderer's technical solution, compliance with a proposed form of contract, and price (in particular, comparative value for money).

The scope is usually defined in terms of an output specification clearly setting out the outputs the government is seeking. It is designed to promote innovation and, accordingly, the government party is usually open to receiving deviations. The government may consider proposals which deviate from the scope or technical characteristics of the work included in the procurement documentation during the procurement process.

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

Upon considering all the proposals against the criteria and any deviations from documentation, the government will pick a preferred bidder and enter into negotiations. This process is ideally progressed as quickly as possible in order to achieve financial close and to minimise the number of issues that must be resolved in an environment of reduced competitive tension. It is usual for government to have reached agreement with a bidder on all or substantially all of the issues raised in the bidder's proposal before announcing the preferred bidder.

## **V THE CONTRACT**

### **i Payment**

Payment for private parties under PPP contracts in Australia usually depends on the type of asset that is being built as part of the project.

Economic infrastructure, such as toll roads, bridges and tunnels, has traditionally used a 'user-pays' system whereby the end-user of the asset (e.g., a motorist) pays tolls, fares or other similar charges for use of the asset directly to the private party. These charges are calculated such that the revenue covers all costs for the project, including construction, operating costs, and repayment of debt, as well as provide a return to investors. However, significant differences between modelled and actual traffic figures resulted in the failure of some early Australian greenfield road PPPs. In light of this history, investors and financiers are very hesitant to 'bank' any PPP on the basis of forecast patronage or usage, and recent economic infrastructure PPPs have utilised an 'availability payment' approach discussed below.

Social infrastructure, such as hospitals, schools and correctional facilities, typically operates on an availability-based system, and is reliant on payment directly from the government party. The payment regime will usually be dependent on the private party achieving certain criteria or key performance indicators while performing the services over the life of the PPP, with performance directly influencing the amount of service payments.

Some commentators suggest that the time may be right to return to the private sector having some degree of 'patronage' or 'market' risk for economic infrastructure (through, for example, the government underwriting minimum revenue levels) but this has not yet been seen in the Australian market.

### **ii State guarantees**

In the current market, Australian governments do not generally provide guarantees for PPP projects. The exception is New South Wales, which has specific legislative procedures for its treasury to issue sovereign guarantees.

Australian government credit ratings mean sovereign guarantees are not typically necessary when contracting with the Crown. However, difficulty arises where the contracting government entity is not a major department, but another entity, such as a government-owned corporation. This may potentially raise creditworthiness concerns for private investors who may consider that a government guarantee is necessary.

Both the private company and its financiers may wish to seek some certainty and avoid assuming the credit risk of the contracting entity, especially where it is likely

that the entity may be privatised during the life of the PPP (a possibility which has been heightened with the current trend of government asset and business divestments), or the industry in which the company operates is likely to be restructured and adversely impact projected revenue streams.

As with any payment from a government entity, it must be ensured that the government entity has both the power to grant the guarantee and the actual ability to appropriate funds for the purposes of the guarantee. This, of course, needs to come through the correct appropriation channels, but it is fundamental that this is considered as part of the guarantee issue.

Where a government entity decides to not provide a guarantee, there are additional means by which the private entity or its financiers can receive some form of government support. These mechanisms are rare in the Australian market.

### **iii Distribution of risk**

Risk analysis is usually undertaken in the preliminary stages of the bidding and award procedure by both parties under an Australian PPP. The National Guidelines (with jurisdiction-specific amendments) offer specific guidance on both the risks that will arise and optimal risk allocation in most PPPs. This is also an excellent indicator for private investors as to the position that will usually be offered by the government entity.

The following is a list of the main risks that are usually considered in PPP contracts and the standard allocation of these risks. Risk is ideally allocated in such a way that the party best able to manage a risk bears that risk, as they have the best opportunity to reduce the likelihood of occurrence and deal with the consequences. However, while there are market-standard positions, ultimately the risk allocation will depend on what is agreed by the parties and the risk assessment for the relevant project.

#### *Project delays*

The risk of delay is prominent in all aspects of an infrastructure project, even before the financial close of the project. Fulfilment of conditions precedent to financial close is normally a shared responsibility of the parties.

Similarly, risk of delays in construction are generally borne by the private party, except where explicitly agreed otherwise. The government party may be required to grant extensions of time and pay delay or prolongation costs under certain agreed circumstances, ordinarily including delays caused by government or certain delays beyond the private party's reasonable control.

Conversely, risk of delay for approvals is usually divided between the parties, with the government party obtaining most of the 'whole of project' environment and planning approvals, and the private party obtaining all other approvals.

#### *Risks outside the control of parties*

Specifically defined risks that arise outside of the private party's control ordinarily entitle the private party to relief from default or termination and also extensions of time for performance in some circumstances. The National Guidelines offer some guidance in this regard. These risks are ordinarily referred to as 'relief events'.



Where relief events materially impede performance for significant periods of time, the government ordinarily has the right to terminate the project contract.

Project contracts also usually define a narrow category of events beyond the private party's control (ordinarily matters within the control of the government party) the occurrence of which will entitle the private party to relief from performance, an extension of time for performance and compensation.

### *Political, legal and macroeconomic risks*

Primarily, political risk is borne by the government party in a PPP in Australia. The government will usually bear the monetary and performance impacts of a project-specific change in law; other changes in law are usually a shared risk.

Macroeconomic risk is usually dealt with through variation of the service charge (see subsection iv, *infra*), although 'rise and fall' type provisions are rare.

### *Insurance*

In an Australian PPP, the private party is ordinarily required to obtain project-specific insurances that cover both the private party and the government party. The insurances that are typically acquired for a PPP include:

- a* contract works insurance;
- b* industrial special risks insurance;
- c* property or material damage insurance;
- d* advanced consequential loss insurance;
- e* public or products liability insurance;
- f* professional indemnity insurance;
- g* workers' compensation insurance;
- h* motor vehicle insurance; and
- i* marine cargo or transit insurance.

The private party must typically demonstrate the currency of these insurances for the life of the project. The government may also effect and maintain insurances where the private party fails to do so and deduct premiums from amounts owing to the private party under the PPP agreement.

Insurance proceeds are usually required to be used to rectify insured damage to the project before a claim can be made upon the government.

### **iv Adjustment and revision**

It is usual for PPP contracts to have an inbuilt change or modification regime to deal with variations to the contract's technical scope or commercial terms throughout the concession period.

The change or variation mechanism usually contains a methodology for calculating the financial implications of the change, as well as the impact of the change upon the performance and other requirements under the contract. Changes are, once ordered by government, ordinarily self-executing and do not require the PPP contract to be formally amended.

Service charges can also be varied independently of a specific change to the services provided. There will often be a regime in place to vary the service charge in response to inflation, usually through a pre-agreed indexation regime. Projects may also employ a cost benchmarking regime throughout the term to ensure that the government entity is not paying in excess of market rates over time.

**v Ownership of underlying assets**

For most PPP projects in Australia, the government party will own the project assets from commencement of the operations phase at no cost. There will also usually be a handover period at the end of the term with specific conditions on the private party transferring the asset, such as ensuring the serviceable condition of the asset.

To the extent the private party owns any project assets, the government will ordinarily prohibit the project company from collateralising those assets except under approved project finance arrangements.

**vi Early termination**

Termination rights under PPPs are usually limited to those expressly stated in the terms of the PPP contract. The government party usually has greater rights for termination than the private entity. Beyond termination for breach of the PPP agreement, other common rights that give rise to termination are:

- a* where there is an extended event outside of the parties' control that materially disrupts the project (a *force majeure* event); or
- b* the private party becomes insolvent.

A generous cure regime (including separate financier rights) usually applies.

The government normally also has a right to terminate the PPP agreement for convenience without the need for default by the private sector party, but such a provision also requires the payment of compensation to the private contractor. This is effectively a compromise that allows the government to terminate for reasons beyond default or insolvency of the private contractor, such as change of policy, and also reduces sovereign risk for the private party entering into an agreement with a government entity.

It is extremely rare for the government to terminate a PPP for convenience, although at the time of writing there was some speculation that the Victorian government may terminate the East West Link project in this manner, due to the new Victorian government's clear policy against the project.

## **VI FINANCE**

Australian PPPs are typically financed through the combination of bank debt and equity provided by investors, although recent projects also typically include a monetary or other contribution by government during the development phase. There has been some speculation around the use of bond financing for both the development and operation stages of the PPP lifespan, but this has not yet featured prominently in Australia.

It is typical for debt financiers to also directly contract with the government to ensure the financiers have extensive cure rights to avoid termination of the project contract for default.

Some commentators have speculated that there is the possibility that governments may seek to take a greater role in procuring finance in the future, as opposed to tenderers arranging finance as part of their bid. Governments would conduct their own financier bid process and present a 'preferred financier' to the tenderers during the tender process. This has not yet been seen in an Australian PPP.

## VII RECENT DECISIONS

There have been few recent Australian decisions that directly deal with aspects of the PPP process or involve a PPP project.

The most significant case in recent times was *Murphy v. State of Victoria*.<sup>2</sup> This case related to the A\$15 billion proposed East West Link in Melbourne. The circumstances leading to the legal dispute involved the State of Victoria (the State) (with the assistance of the Linking Melbourne Authority (LMA)) announcing and promoting the business case for Stage One of the East West Link motorway.

Mr Tony Murphy brought an action against the State and the LMA alleging that the project proponents, through the published business case and media releases, had made representations in connection with the project that were misleading or deceptive in contravention of Section 18 of the Australian Consumer Law as applied in Victoria by the Australian Consumer Law and Fair Trading Act 2012 (Vic).

Mr Murphy also sought an interim injunction restraining the State and the LMA from entering into contracts with the East West Connect consortium relating to construction of the motorway. This application was unsuccessful and the construction contract was signed in September 2014.

While this litigation was largely concerned with civil procedure and the approach taken by the trial judge, the Victorian Court of Appeal also made comments regarding the misleading or deceptive conduct allegations.

Essentially, the Court indicated that a government could be found to be engaging in misleading and deceptive conduct during the tender process, as the government can be considered to be carrying on a business as soon as it starts to take steps to acquire the asset for the purposes of that operation. The Court emphasised that there is nothing in the activities of informing and engaging the community regarding the claimed benefits of a proposed infrastructure project which renders the exercise an essentially governmental activity. A government can also be carrying on a business at the same time as performing its regulatory functions

Overall, the Court did not present its statements as final determinations and emphasised that the outcome would depend on findings of facts to be determined at trial. Since the litigation has been halted due to abandonment of the motorway project, the statements are helpful to indicate that, in certain circumstances, a government or project

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2 (2014) 313 ALR 546.

proponent may be liable for misleading or deceptive conduct from the representations made in the course of promoting a PPP in the marketplace.

## **VIII OUTLOOK**

2015 is set to be another active year in the infrastructure space in Australia.

In terms of new projects, projects which are proposed to be funded through state and federal capital recycling projects (particularly those wishing to use the federal government's co-funding scheme) are likely to start to come to market, and rapidly progress through their respective procurement processes. Award and financial close of those projects is likely to follow once the relevant capital recycling projects reach financial close.

In relation to existing projects, a number of projects will move from their higher risk development phase into operations. This transition is a natural time for the investor mix within a project to change, due to the change in overall project risk profile, which may drive activity within the equity investor market.

Overall, indications are for a year of strong market activity, as well as a strong pipeline of projects over the coming years.

## Appendix 1

---

# ABOUT THE AUTHORS

### **DAVID DONNELLY**

*Allens*

David is one of Australia's leading infrastructure lawyers. He also has significant experience advising on resource development projects and project financing transactions.

David's practice includes: advising on the origination of new infrastructure (including PPPs and other competitive bid processes); ongoing advisory roles on the delivery and operational aspects of successfully closed PPPs and major infrastructure projects; and advising on secondary market investments and acquisitions.

David's infrastructure experience covers rail, roads, health, justice and prisons, mining and resources, telecoms water, education, defence, energy and entertainment.

### **NICHOLAS NG**

*Allens*

Nicholas specialises in the procurement, delivery and operation of major infrastructure projects. He acts for project owners, financiers, sponsors and contractors across a broad range of sectors and delivery models, with a particular emphasis on public private partnerships and other major outsourcing transactions. He has advised clients on many of the country's largest and most significant infrastructure projects.

### **BARTON DONALDSON**

*Allens*

Barton is a lawyer in the Allens projects practice group in Brisbane. He has worked on a broad range of projects, including the Northern Beaches Hospital PPP, the New Zealand Schools 2 PPP, the Gold Coast Rapid Transit light rail project and the A\$10 billion WestConnex Motorway.

**ALLENS**

Level 28, Deutsche Bank Place  
126 Phillip Street  
(Corner of Hunter & Phillip Streets)  
Sydney, NSW 2000  
Australia  
Tel: +61 2 9230 4000  
Fax: +61 2 9230 5333  
david.donnelly@allens.com.au  
nicholas.ng@allens.com.au  
barton.donaldson@allens.com.au  
www.allens.com.au