The Public-Private Partnership Law Review

Second Edition

Editors
Bruno Werneck and Mário Saadi

Law Business Research

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EDITOR'S PREFACE

We are very pleased to present the second edition of *The Public-Private Partnership Law Review.* Notwithstanding 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 a few), we identified the need for a deeper understanding of the specifics of this topic in different countries. The first edition of the book was an initial effort to fulfil this need.

Brazil marked the 10th year of the publication of its first Public-Private Partnership Law (Federal Law No. 11,079/2004) in 2014. Our experience with this law is still developing, 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 1990s.

This is the case for countries such as the United Kingdom, the United States and Canada. PPPs have been used in the United States across a wide range of sectors in various forms for more than 30 years. From 1986–2012, approximately 700 PPP projects reached financial closure. The UK is widely known as one of the pioneers of PPP model; Margaret Thatcher's governments in the 1980s embarked on an extensive privatisation programme of publicly owned utilities, including telecoms, gas, electricity, water and waste, airports and railways. The Private Finance Initiative was launched in the UK in 1992 aiming to boost design–build–finance–operate projects. Canada has developed a sustained and robust market for the development of public infrastructure using the PPP model. Since the 1990s PPP procurement has significantly expanded to the extent that PPP projects are now procured in the federal, provincial and municipal levels of government across that country.

On the other hand, in developing countries with similarities with Brazil, PPP laws are more recent. Argentina was the first country in Latin America to enact a PPP Law (Decree No. 1299/2000, ratified by Law No. 25,414/2000). The PPP Law was designed to promote private investment in public infrastructure projects that could not be afforded exclusively by the state, especially in the areas of health, education,

justice, transportation, construction of airport facilities, highways and investments in local safety. In Mozambique, Law No. 15/2011 and Decree No. 16/2012 stipulated the Public-Private Partnerships (PPP) Law and other related PPP regulations, which establishes procedures for contracting, implementing and monitoring PPP projects. In Paraguay, a regulation establishing the PPP regime has recently been enacted (Law No. 5102) to promote public infrastructure and the expansion and improvement of goods and services provided by the state; this law has been in force since late 2013.

In view of the foregoing, 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 this 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.

With respect to Brazil, the experience evidenced abroad may lead to the strengthening of this model in the country. In this preface, we call your attention to one specific feature of the PPP law in Brazil – state guarantees. This feature permits payment obligations undertaken by the public party in PPP agreements be guaranteed by, among other mechanisms authorised by law: (1) a pledge of revenues; (2) creation or use of special funds; (3) purchase of guarantee from insurance companies that are not under public control; (4) guarantees granted by international organisations or financial institutions not controlled by any government authority; or (5) guarantees by guarantor funds or a state-owned company created especially for that purpose.

The state guarantee pursuant to PPP agreements is, without question, an important innovation in administrative agreements in Brazil; it assures payment obligations by the public partner and serves as a guarantee in the event of lawsuits and claims against the government. This tool is one of the main factors distinguishing the legal regimen of PPP agreements from ordinary administrative agreements or concessions, and is viewed as crucial for the success of PPPs, especially from the private investors' standpoint.

Nevertheless, the difficulty in implementing state guarantees on PPP projects has been one of the main issues in the execution of new PPP projects in the country. This point is made worse due to the history of government default in administrative contracts.

In other jurisdictions, however, state guarantees are not a rule. On the contrary, unlike PPP projects in developing countries, government solvency has not historically been a serious consideration. That is the case in countries such as Australia, Canada, France, Ireland, Japan, the United Kingdom and the United States.

We expect that the consolidation of PPPs and the strengthening of the government in Brazil may lead to a similar model, enabling private investments in areas where the country lacks them most.

In the first edition, our contributors were drawn from the most renowned firms working in the PPP field in their jurisdictions, including Argentina (M&M Bomchil), Australia (Allens), Belgium (Liedekerke), Canada (Fasken Martineau), China (Jun He Law Offices), France (White & Case), Ireland (Maples and Calder), Japan (Mori Hamada & Matsumoto), Mozambique (TPLA), Paraguay (Parquet & Asociados), Philippines (SyCip Salazar Hernandez & Gatmaitan), Turkey (Paksoy), the United Kingdom (Herbert Smith Freehills) and the United States (Kilpatrick Townsend &

Stockton LLP). We would like to thank all of them and our new contributors for their support in producing *The Public-Private Partnership Law Review* and in helping in the collective construction of a broad study on the main aspects of PPP projects.

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

We hope you enjoy this second edition of *The Public-Private Partnership Law Review* and we sincerely hope that this book will consolidate 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 2016

Chapter 2

AUSTRALIA

David Donnelly, Nicholas Ng and Timothy Leschke[1]

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. The term 'public private partnership' (PPP) was formally adopted to cover those types of public and private arrangements, and policies developed in other Australian states were 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 (such as the A$10.25 billion long-term lease of part of the New South Wales government's 'poles and wires' business, and the long-term lease of the Port of Darwin).

1 David Donnelly and Nicholas Ng are partners, and Timothy Leschke is an associate, at Allens.

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, awarded in 2015, and schools, like the recently awarded Victoria New Schools PPP and Western Australia Schools PPP.

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 Australian PPP market continued to grow in 2015, with several new projects coming to market and others transitioning from development into their operations phase. The Sydney Light Rail PPP, NorthConnex PPP, Northern Beaches Hospital PPP, Toowoomba Second Range Crossing, Victorian New Schools PPP, WA Schools PPP and the ACT Courts PPP reached financial close. New projects tendered in the market through expressions of interest or requests for proposal included Stage 2 of the Gold Coast Light Rail PPP, the High Capacity Metro Trains Project and the ACT Capital Metro light rail 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. In 2015, the New South Wales government secured A$2 billion of funding from the Asset Recycling Fund to fund its transport and infrastructure initiatives, after the ACT government had already secured A$60 million to support an investment into the ACT Capital Metro light rail PPP.

There has also been an increase in unsolicited or 'market-led' proposals received by all levels of government in Australia, which bodes well for continued private sector investment in delivering infrastructure, including through PPPs.

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 Building 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, owing 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 or 'market-led' 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, and a number of states updated their policies in 2015 to provide transparency and certainty for the private sector in putting forward unsolicited proposals. 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. However, the Victorian government's decision to terminate the proposed East West Link project in early 2015 provides an example of an Australian government terminating for convenience in unusual circumstances.

The A$5.3 billion contract for the first stage of the East West Link was signed on 29 September 2014, two months prior to an election. It was publicly known prior to signing that the then-opposition government strongly opposed the project and would not proceed with the project if elected. They were elected, and followed through in deciding to terminate. The government and the consortium negotiated a commercial settlement. According to a report published by the Victorian Auditor-General's Office in December 2015, the settlement involved the state paying A$424 million to the consortium to cover costs it had incurred to date (including A$81 million in respect of establishing the loan facility for the project), and the state acquiring the consortium and project assets, including the interest rate swap facilities (which was estimated to cost A$218 million to close out as at 30 June 2015). The settlement also provided the state with discretionary access to future debt funding through a A$3.1 billion uncommitted note issuance mandate with some members of the consortium's banking group (independent of the loan facility established for the East West Link project). Notwithstanding East West Link, terminating a PPP for convenience remains highly unusual in the Australian market.

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*.[2] 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.

2 (2014) 313 ALR 546.

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 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

2016 promises to be another active year in the infrastructure space in Australia.

In terms of new projects, projects that 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 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. Similarly, it is likely that government at all levels will continue to receive numerous unsolicited proposals in 2016, some of which will progress through to investment evaluations and an exclusive mandate for the proponent to deliver the project.

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.

TIMOTHY LESCHKE

Allens

Timothy has advised government and private sector clients throughout the life cycle of major infrastructure and transport projects – from advising on procurement issues, to drafting and negotiating various contract models (including PPPs), and through to delivery, contract administration, claims management and dispute resolution. He has worked on a broad range of major infrastructure projects across Australia, including the

New Generation Rollingstock PPP, the Gold Coast Rapid Transit light rail PPP, the ACT Capital Metro light rail PPP, the Legacy Way tunnel, the Forrestfield-Airport Link, the WestConnex Motorway and the A$10.25 billion long-term lease of TransGrid.

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