

Can Good Legislation Be Overregulation For Public Private Partnerships?

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ABSTRACT

Recent reviews of those sections of local government Acts in NSW and Victoria that regulate public-private partnerships and entrepreneurial activities, respectively, have been carried out largely in response to the failure of some projects that have cost their local communities dearly. While such reviews could be said to be overdue considering the State's ongoing encouragement of entrepreneurial activity that include the private sector, any legislation that adds to regulatory requirements is a double edged sword.

The aim of the legislation is to regulate to some degree local government's engagement with the private sector to ensure they remain fully accountable and exercise good governance on behalf of their constituency and this is underpinned by the need to minimise risk. On the other hand, any legislation that requires added stages of reporting, accountability or possible intervention by the state could be perceived as increasing the risk to a major project thus undermining its good intent.

This paper starts with a review of the political environment that encouraged councils to exercise a more entrepreneurial outlook but to do so from a business-like approach with the aim of utilising the private sector wherever possible to supply and/or finance a majority of services, utilities and infrastructure. Taking Victoria as the exemplar in attracting private sector involvement it then briefly covers the changes to Section 193 of the Act that governs key aspects of these activities. The remainder of the paper then discusses the risk implications of the legislation.

Of prime concern is the fear that any increased regulation will bring about unacceptable delays in the conceptualisation, design and negotiation stages of a project for both the public and private parties engaged in the enterprise. The degree of internal and community reporting and accountability in the interests of good governance required of local governments is already quite onerous and time hungry and to give context these aspects are outlined in the paper. When reflecting on past experience, several councils reported unreasonably lengthy delays when they then needed approval from the state under section 193, and there is nothing in the updated legislation that would have any impact on this. The basis of these delays appears to have been that the state itself was ill-prepared to respond in a timely and efficient manner. As a result it would seem more than one council has actively sought to set up their projects in such a way as to by-pass the need for state government approval, not to avoid scrutiny so much as to avoid further delays and added costs, both direct and opportunity. This and other risk factors are covered drawing extensively on a case study of a major inner city development to exemplify the argument. The paper closes with an update on what the state is already doing to meet its obligations under the Act and where it is still developing its response.

INTRODUCTION

Good legislation controlling the activities of governments at all levels engaging in partnerships, joint ventures or similar entities with the private sector is essential.¹ In fact, public accountability, principles of governance and common sense would demand that legislation be put in place to regulate and guide such activities where large sums of public money are at risk, and it is this element of risk that is the real underlying driver for enacting such legislation.

The difficulty faced by legislators is that weak legislation fails to regulate adequately, while excessively prescriptive legislation over-regulates and, unfortunately, even good legislation can be seen as over-regulation in some circumstances. This puts the legislators in a no-win situation when designing legislation in relation to public-private partnerships (PPPs). Any legislation that requires added stages of reporting, accountability or intervention could be perceived as increasing the risk to a major project,² while the intended purpose of it is to help reduce risk to the public purse through those very same procedures and to ensure there is appropriate risk allocation. The need for accountability of government is nowhere more strongly expressed or more closely scrutinised by the voting public than at the level of local government, and it is legislation aimed at PPPs (broadly interpreted) and local government that is the focus of this paper.

In essence this is a call for legislation to reflect and ensure good governance as opposed to old style bureaucratic government. The distinction made by Stoker (1998) challenges the legal/constitutional tradition that finds itself on difficult ground in public-private partnerships, contracted service provision and other 'messy' arrangements for the supply and provision of public goods. Governance instead asks both governments and private bodies, be they in partnership or not, to look to what should be and strive to achieve that end. While this approach introduces a new set of complexities to legislators – how do we define and regulate for what should be - the starting point discussed below is to ensure the right systems and procedures are in place at the beginning of a project that would allow for flexible and reflexive project management while ensuring appropriate and accountable outcomes have a higher likelihood of eventuating.

THE POLICY ENVIRONMENT

PPPs and similar entities are largely an outgrowth of neo-liberal economic policies and, with this, the introduction of 'new public management'. They are part of the overall package that favours small government, the sale of public assets and private investment in public goods. Since the gradual introduction of these policies at federal and state levels in the late 1980s and into the 1990s, PPPs are no longer seen as an anomaly or in any way an unusual feature of the government spending landscape.

In Victoria the major drive into neo-liberalism came with the election of the Kennett Liberal/National government in 1992. By 1994 its agenda had stretched to the amalgamation of all local governments in the state, reducing them from 210 to 78 in the interests of cost-cutting through economies of scale; elected councillors were temporarily replaced with commissioners appointed by the government. Legislation required councils to outsource a minimum of 50 per cent of their

¹ For the sake of simplicity, the term 'public-private partnerships' (PPPs) is used but should be interpreted in the broadest possible terms, with apologies to Christopher Sheil (2003). The Victorian Local Government Act 1987 section 193 subsection 1(f) covers any 'partnership or any arrangement for sharing of profits, union of interest, co-operation, joint venture, reciprocal concession or otherwise, with any person or corporation carrying on or engaged in, or about to carry on or engage in, any business or transaction capable of being conducted so as to directly or indirectly benefit the Council'.

² Throughout this paper, the term 'major project' will be used to denote any project whose total cost would bring it within the requirements of legislative regulation.

activities via a process of compulsory competitive tendering (CCT) and they were expected to privatise public assets. Elected councils were restored in 1996, but those which did not comply were threatened with a repeat dose of sacking, suspension of democratic local elections, and possible further amalgamations (Gettler 1996). Henceforth a significant role of councils was to be the encouragement and facilitation of business and investment. Rather than continue with government owned enterprises, the private sector was engaged to take over the supply and delivery of public services (Woodward 1999: 150). This policy agenda extended to collaborations with the private sector for funding, constructing and operating public infrastructure through joint ventures, partnerships and similar contractual arrangements (Williamson 2002: 15; McQuaid 2000: 9). In order to achieve these changes, local government was to become more businesslike, adopting corporate management practices (Marshall 1998). While the Kennett government was replaced in 1999 by the Bracks Labor government, the policy agenda has changed very little with respect to PPPs, although more generally the Labor government has retreated from some of the coalition government's other demands on local government such as CCT which was replaced with 'best value'.

The policy agenda described reveals both sides of politics are committed to being active players in the market. The Kennett government in particular, although the Bracks government has tended to follow suit, looked primarily to pro-business oriented bodies such as the Business Council of Australia and the Industry Commission (Hayward and Aspin 2001) for advice and direction regarding the financing, construction and ownership of public utilities and infrastructure, while ignoring community and welfarist groups. A typical approach used to silence any such groups who expressed contrary opinions was to withdraw any government funding they may have received (Woodward 1999: 153).

In 2002 it was estimated that PPPs contributed around 15 per cent of total infrastructure investment in Australia, and Victoria accounted for the largest proportion of this (Australian Council for Infrastructure Development 2002). Needless to say, private investment at the local government level will represent only a small part of that figure, but no statistics are available to show the local government fraction. In part, this lower activity reflects the limited number of projects conducted by local governments that are of sufficient size in dollar terms to warrant a partnership approach.

LEGISLATIVE CHANGES

Partnership projects with local governments are a relatively new development. Traditionally councils were conservative, had legislative limitations on their entrepreneurial activities and were risk averse. With the rise in neo-liberal ideology and accompanying changes to the Local Government Acts in a number of states in the early 1990s, they have been encouraged to become more autonomous and entrepreneurial, and to venture into areas that engage with the private sector in ways they would not have done previously. The accompanying terminology was to 'roll back' government, which was to be achieved mainly through privatisation of facilities and services, reduced borrowings by utilising private financing, and making efficiency gains by taking a more businesslike approach to governance using measures such as CCT (Cannadi and Dollery 2005).

Lacking the experience and negotiating skills required for large-scale commercial ventures, some early attempts failed, and these cost the ratepayers dearly (Local Government Division 2000). A more recent and highly publicised failure was the Liverpool (New South Wales) council's Oasis project that resulted in an approximate \$20 million loss, with the council being sacked and an inquiry held (Daly 2004). In response to such failures, those sections of the *Local Government Acts* in New South Wales and Victoria that regulate entrepreneurial activities and PPPs were reviewed. The remainder of this paper will concentrate on the Victorian experience and response to the legislation.

The review of Section 193 'Entrepreneurial Activities' of the *Local Government Act 1989* (Vic.) began in 2000 with a discussion paper titled *Risky Business*. The foreword noted that the government was committed to pursuing new initiatives and reviewing current operations so as to 'enhance and facilitate local government activities' (Local Government Division 2000: 1). The result of this review and subsequent report (Local Government Division 2001) was the *Local Government (Democratic Reform) Act 2003* which was incorporated into the *Local Government Act 1989* in the following year.

The main changes to Section 193 were the inclusion of Subsection 5, Parts A-G. These required councils considering any project that involved another party to conduct a risk assessment and assess the total investment. Depending on the total value of risk exposure and investment, councils then had to conduct a full independent risk assessment report, refer the project to the minister and/or refer the project to Treasury.

Prior to these changes, and indeed the changes in themselves do not alter this, the experience of some councils was of long delays waiting for projects to be signed off by the minister. It appears the departmental officials were not the cause of these delays as they had worked efficiently and cooperatively with the councils in getting material prepared. One particular council representative (who preferred to remain anonymous) spoke of a year's delay waiting for the final sign-off, after the Department of Local Government Victoria (LGV) officials had given it the all clear. There may well have been valid reasons for the delay, such as requiring further information or impact statements from other departments, but if so, neither the LGV officials nor the councils involved were made aware of this. The role of Treasury also seemed to be unclear in relation to the legislation, largely resulting from a lack of guidelines and appropriate procedures for assessing and signing off a project. Only now does it appear these issues are being addressed.

THE RISK FACTORS

The risk factors introduced to a PPP when local government is involved are already many and complex before the additional complexity of state intervention via Section 193 is taken into consideration. These are exemplified in a case study conducted by the author who examined the Inkerman/Oasis project, a large inner city residential development by the City of Port Phillip in Melbourne. The case study analysis broadly categorised those risks encountered during the conceptualisation stage of the project and are outlined below.³ The Inkerman/Oasis project itself did not fall clearly into a 'partnership' category and as such was not 'captured' by the Section 193 legislation but it nonetheless remains an excellent example of a major project involving a public and a private body with all the relevant risk factors.

Conceptualisation stage risk factors

Local-state issues: The sacking of elected councils and the subsequent amalgamations demonstrated local government's lack of constitutional autonomy and remains a potential risk factor to PPPs at this level. Any contract signed between a private party and a suddenly non-existent council would have to be renegotiated, surely at the council's expense, and delays would only add to that cost. Apart from this more general scenario, in 1994-96 the new City of Port Phillip's state-appointed CEO was not in favour of direct council involvement in affordable housing, so any projects that were not already bound by contractual agreements were at risk. The Inkerman/Oasis project survived but the amalgamation process delayed the conceptualisation stage for some time.

³ For a full discussion of these issues, see Aspin (2004).

While joint state/local government funding was not a risk factor in the Inkerman/Oasis project, it has been in others. Considerable time and money expended in the early part of conceptualisation may be lost if a project relies on state funding support.

Intra-council conflict: Divisions within council also generated a risk for the case study project and some other affordable housing projects within the municipality. These divisions concerned differing opinions over council's role as a direct provider of social housing. Such divisions may undergo changes with each election cycle as the make-up of council changes. This risk is significantly reduced if there is a clear strategic policy within council, if there is at least one elected representative who champions the project in the chamber, and if much of the control of such projects is in the hands of council officers and out of the political arena.

Organisational changes: For the Inkerman/Oasis project to progress through the conceptual stage, it needed to be – and was – championed from the beginning by several people, but one in particular was a council officer who was responsible for most of the project management. At any time in the process, this person could have been lost from the department or council. With limited people resources, few projects would survive the conceptualisation stage without a champion to drive it through all the difficulties and complexities inevitably encountered.

Market changes: For the case study 'market' refers to the real estate market. Land and inner city apartment prices changed considerably over the six years of conceptualisation, design and tendering stages. Following the boom that started in the mid-1990s, a softening in the demand for inner city apartments in the early 2000s created difficulties in pre-sales for the project.

In general, where there is a long gestation period, initial enthusiasm over planning and favourable costings that give a project momentum may be at risk from an unfavourable turn in the market. While this holds true for any project, the limited capacity, skill and experience of local government may unnecessarily extend the conceptualisation stage and/or reduce their capacity to absorb the impact of large market swings, thereby increasing the risk factor. Inexperienced councils may also fail to conduct good market research and to repeat the process regularly.

Community consultations: This is a risk particularly relevant to municipal councils who are much more answerable to the local community than are other levels of government or private developers. Should a project meet stiff opposition at this late stage in the conceptualisation process, not only is its future at risk with the loss of time and money, but there is the potential for resident backlash at the next elections.

After considerable time and expense to the point of advanced concept drawings, costings, risk analysis and draft contractual arrangements, the Inkerman/Oasis proposal was put to the community through a public meeting and advertising. Fortunately, there were few objectors.

Contract negotiations: This is a critical stage in any PPP and, if the negotiating parties are not fully prepared and informed, the resultant contract will be an ongoing source of dispute throughout the life of the project. Perhaps here more than at any other point in the process, the council needs to engage good expert consultants. Even so, council officers need the training and skills to work through the process with the consultant in respect to allocation of risk and ways of dealing with unexpected eventualities. These details need to be written into the contract in clear and unambiguous terms.

Consultants: Linking a number of the risk categories listed above is council's need to buy in a great deal of expertise. Bringing in consultants requires the skill and expertise to project manage, understand and work with that expertise. Council must get the right consultants, establish clear and

correct briefs for them, and interpret the findings and advice given. Unfortunately the number and cost of consultants required to do the job properly can be a concern for smaller councils. Noting the large number of consultants needed to fully assess risk in a major PPP, a former risk manager in Sydney said that such studies tend not to take a holistic approach that would cover all assets and liabilities, but tend to focus on engineering risks (Tomlinson and Tilley 2001). Assessing risk from a whole-of-life perspective is both complex and difficult, and local governments are unlikely to be able to afford such comprehensive analysis, but it is worth questioning whether one or two specialists would be able to adequately assess even a moderately large project.

As well as the ability to deal with all the above mentioned risk factors, once the project is underway a council would need to deal with a private partner and ongoing contractual issues over the life of the project. The business sector with which a council is looking to enter a partnership is playing on its own turf, so to speak. This is their field of expertise and they are far more aware of risks and opportunities. They are also more likely to be familiar with contract negotiation than the council representatives, so there is always the possibility of council accepting more risk than it should.

Risk mitigation is of course essential to both parties in a PPP. The section of *Partnerships Victoria*'s guidelines particularly pertinent to risk, 'Risk Allocation and Contractual Issues', states that the private sector has many options open to it to pass on or insure against risk, but also notes that, while government has access to most of the same options, 'many of the risks retained by government are not insurable' (Department of Treasury and Finance 2000: 35). In order to counter this, the main actions offered are based on obtaining the best advice possible (which may mean contracting additional highly priced consultants), doing the homework before progressing too far, keeping to best practice, and developing contingency plans. Without passing on risk, and not being able to insure against it, the government is open to bearing costs and putting public money in jeopardy.

Bringing all of the above together, we can see that selecting the right people from within council to work on a project is critical. In order to achieve all the desired outcomes and work through the risk factors listed, they need wide-ranging skills, time to do the job, sufficient authority to overcome obstacles, and the respect of council. In regards to council's need to meet its obligations of accountability and governance, those representatives working on a project cannot afford to be 'lone guns' making decisions without the permission and ratification of council.

Section 193 issues of risk

Section 193 of the Act brings with it four additional elements that fit squarely in the above category of 'local-state issues', each carrying a number of possible risks. The four elements and their risks are: those risks associated with avoidance of the legislation; the risk that significant alterations or intervention by the state could occur; those brought about by delays while the additional levels of government fulfil their roles of accountability; and the risk of whether the cost of compliance will be at least offset by its hoped for advantages, that is, compliance will effectively reduce the risk to council through appropriate risk allocation and minimisation beyond what would otherwise be achieved.

Looking at each of these additional elements separately, though they are clearly interrelated, the first concern has been, and remains, that councils might choose to avoid such legislation if they are concerned about excessive delays or undue interference from the state. This can be done through the wording and structure of contractual arrangements with a private partner. The question is: is this adequate reason for avoiding legislation that is aimed at assisting them to reduce their risk?

There is no proof that Councils routinely work to avoid this legislation and as such there are no documented examples of that happening, however, the simple fact that a reasonable number of

significant project are undertaken without being submitted to section 193 scrutiny suggests this is the case. As stated earlier the Inkerman Oasis project was structured in a way that it was not captured by section 193, and while this was not done specifically to avoid the legislation but rather to reduce risks associated with finance and construction, it is used here to exemplify how this can be done and why a council might try to avoid it.

At the outset of the Inkerman Oasis project political ideologies and preferred outcomes differed both within council and between the majority of elected councillors and the state, which gave rise to concerns that there might be undue interference from the state. The project involved the redevelopment of a surplus council depot site in the heart of the city. The majority position amongst the elected representatives was for council to maintain some control over the development in order to achieve a demonstration project and a level of social housing that would be owned by council.

At this time the Kennett government, particularly the Minister for Planning and Local Government, Rob Maclellan, was strongly of the view that all councils should sell off their assets to the private sector, 'especially buildings, land and electricity supply departments' (Williamson 2002: 15). Christine Haag, a councillor and mayor of Port Phillip between 1996 and 1999, recalled there was concern within council that if the state government were to become involved there was a good chance they would be told to sell the site or drop the social housing element (personal interview, 9 June 2005). This would have been supported by a number of developers who failed to submit expressions of interest or tenders because they did not want to be tied to council's masterplan, or more specifically, did not want to have social housing as part of the site. Council had already invested a considerable amount of money and time into the conceptualisation and masterplanning of the site in order to achieve this outcome and this was at risk. It should be noted that the state intervention is not limited to section 193 agreements and could have acted at any time. The point here is that section 193 invites review by the state and as such opens a more direct process of intervention. One would hope that intervention would rarely if ever happen and even then only be exercised for a significant and beneficial reason but political ideologies and agendas can and do clash as was the case here so this risk can not be overlooked. Provided a council is acting responsibly intervention is unlikely.

The conflict within Port Phillip council was with the minority councillors (and some staff) who supported the state's position in that they did not believe council should continue its involvement in the direct provision of social housing. As part of its project cost minimisation Council transferred the title to the land to Ecumenical Housing Incorporated which was able to achieve tax advantages not available to council. Coincidentally, this process also reduced the risks associated with possible interference by either the state or future councillors (they were nearing an election cycle at this time) as the council no longer held the title. Council was still able to maintain control of the project by placing an encumbrance on the title in the form of a Section 173 agreement under the *Planning and Environment Act 1987*. The agreement incorporated a final masterplan that had been agreed to by both the council and the developer and gave council ongoing control over any variations from it, regardless of who held the title.

Other risks related to avoidance are those resulting from delays, both direct and indirect. These encompass lost time which incurs an opportunity cost, problems associated with planning and programming of work schedules that add to costs, market changes that reduce profitability or demand, added interest payments and holding costs, and changes in cost risk, that is, changes that increase costs of raw materials and/or labour and so would impact on project costings, all of which impact on the business plan.

There are already considerable delays at the local government level such as the need for working and steering committees to report back to the full chamber, the displaying of public notices, the

organising of community consultations and collecting feedback, or the hiatus that occurs when elections are held. Such delays were discussed by the architect Peter Williams, who has worked on a number of projects with local governments including the Inkerman/Oasis project. During an interview on 17 May 2005, he acknowledged that councils need to be accountable, but agreed it was more complicated than strictly private sector developments where he would be working with only a few people who were often decision makers. The main issue for him was trying to allocate resources across a number of projects, and a stop-start environment made this difficult. It is not an unreasonable extrapolation of Peter's thoughts to see that once another level of government becomes involved these delays are only going to be exacerbated for the private sector.

One example has already been given of a council project that was delayed by twelve months while they waited for the minister to sign off a contract. One can only imagine the costs and changes in risk factors such as the market resulting from a delay of twelve months, not to mention changes that would then need to be made to the business plan. An example given by a representative of another council (who also asked to remain anonymous) was that of a private partner who threatened to walk away from a planned project after several months of waiting for the final ratification from the minister. In order to retain the developer, some renegotiation had to occur, and council was not negotiating from a position of strength. Stories such as this circulate within the construction and development industry, generating a wariness and concern about entering into partnerships where this legislation might be involved.

Demand risk is one that is most often borne by the public sector and one that is difficult to predict (Cannadi and Dollery 2005). It can be highly market sensitive and impacted on by excessive delays. Contracts signed on the basis of predicted service demand or tenancy usage underwritten by guaranteed income to the private party have been the basis of more than one contract failure, as exemplified by the Footscray Quay West project (Local Government Division 2000: Appendix 2).

The last risk factor identified was the cost/benefit outcome, that is, will compliance with this legislation reduce risk sufficiently given the above examples of its potential to add both risk and costs. Risk cannot be removed completely while the public sector maintains any form of vested interest in a project even where it is fully at arms length from the project. In the case of Port Phillip, even though the land title was transferred, there was a consideration to be returned to council in the form of a number of completed apartments plus design deliverables. The contractual arrangements returned the title to council should the developer fail to complete the project for any reason, but even so, the cost of re-tendering in both time and money could well mean an overall loss to council. There would be a further indirect loss in terms of housing that would remain unbuilt but had in essence been paid for. Total risk avoidance is not possible even at the state level, a typical example of this inability to ignore public sector responsibility and the risk that goes with it is given by the public transport system. The private sector is responsible for running the system in Victoria but, because of the public good, the system, and therefore the private operator, cannot be allowed to fail; hence the state has continually paid additional funds to the operators to keep them solvent (Dubecki 2003; Davidson 2005). Appendix 2 of *Risky Business* (Local Government Division 2000) gives several examples of projects which were approved and supported by the state but failed nonetheless, Footscray Quay West being one of them. All councils with whom this research was discussed agreed that complying with this legislation required more work and increased the time to move a project through conceptualisation to contract. How much this process reduced their risk exposure and the overall risk to a successful contractual outcome could not be easily assessed.

THE ROLE OF THE STATE

The challenge for the state then seems to be to devise a user-friendly and timely response to councils who are considering a major project. Such a response would encourage councils to keep an

open mind to some form of PPP as a development option. Equally there needs to be confidence in the system devised that it will be effective in addressing all aspects of risk and therefore worth the added cost and time commitment. Any sense that implementation of the recently revised legislation will mean over-regulation needs to be dispelled for all relevant stakeholders.

Recent conversations with representatives of both LGV and the Department of Treasury and Finance have been encouraging in regard to these matters. LGV have assured me that their aim has always been to have councils approach them at the very outset of any major project so that they can become an integral part of the planning and assessment process. From their perspective, the process starts with council conducting a risk assessment and project valuation as per the Act. Council would then liaise with LGV to determine whether they need to submit an application to the minister under Section 193. LGV would help them prepare what needs to go to the minister such as cost/benefits analysis, any sensitivities that need to be taken into consideration, and a suitable business plan. LGV's biggest obstacle seems to be that councils do not approach them until well into the process when problems may have already occurred.

In the case of Treasury and Finance, they have become far more aware of the critical nature of their role in this regulatory process and the need to have in place both sound and timely processes and procedures. To this end, they have recently commenced to develop an approach that would meet the necessary requirements but their representative was unwilling to go into details until the minister has announced the initiatives. He pointed out that the guiding principles behind this action were largely in response to the National PPP Forum and directions outlined by the Parliamentary Secretary to the (federal) Minister for Finance Administration in a speech to the Pacific Economic Cooperation Council (Stone 2004). He was able to advise, however, that money has been allocated to the Municipal Association of Victoria to work with regional councils in order to understand their particular needs and to propose options for Treasury.

It appears Treasury see two main directions that could be taken in response to the current legislation and they need to look at all possible consequences and outcomes before deciding which to follow. One would be to adopt the hands-off regulatory approach of New South Wales whereby the state reviews a project's compliance with the legislation based on submitted documents; the other direction is the United Kingdom model of the Four Ps (Public Private Partnership Programme) whereby the government become directly involved as the procurement expert for major local government PFI and PPP procurements. In this capacity the 4ps project support team works with local authorities throughout the project lifecycle, from strategic idea generation through procurement and in to operation and monitoring (www.4ps.gov.uk).

Translating the Four Ps model to Victoria, Treasury would appoint or nominate persons to an 'expert' team that would operate in a similar fashion to the 'Public Private Partnerships Programme' in the above description. The expert team's role would be to ensure submitted projects and accompanying documentation met Treasury's requirements.

In discussions held with a number of council representatives at an April 2005 conference titled 'Building and Financing Local Government Infrastructure', a common theme seemed to be a preference to have clear guidelines stating exactly what Treasury would need in order to approve a project. Any council considering a major project could download these documents and consider the requirements before starting, then, as council progressed!! Suggest considered a project through its conceptualisation stage, it would be aware of the requirements and ensure appropriate documentation was maintained. Behind this documentation would sit a 'flying squad' of state officers or their representatives dedicated to local government projects. Their early inclusion in the project team, albeit only briefly, would ensure council has fully understood the requirements and has the right project teams, consultants and reporting mechanisms in place.

Further evidence of Treasury's activity in this area is given by their current involvement in a project with Banyule City Council in Melbourne's north, and the Minister for Planning, Rob Hulls, has also taken a keen personal interest. A Treasury officer said their purpose was to see a complex project such as this 'from the inside' which would give them a much better understanding of the process and how they could contribute in a meaningful way. In a telephone conversation in September 2005, Simon McMillan, Banyule's Director of City Development, informed me that the council was investigating a major redevelopment in its town centre. He expressed enthusiasm at the state's involvement and described how council and their partner met regularly with Treasury, and LGV as a normal part of their project steering committee program in the conceptualisation process. He felt this contributed greatly in guiding the project through the early difficulties and created a very open and consultative environment between all key stakeholders.

A final aspect of the legislation that could be addressed by the state relates to a somewhat lateral interpretation of the issue of avoidance. As stated, councils rarely set out to deliberately avoid the legislation but many major projects are not captured by it. It could be that Subsection 1 of Section 193 is inadequately defined so that alternative project structures, such as that adopted by the City of Port Phillip in the case of the Inkerman Oasis project, are not covered, potentially increasing the risk to ratepayer funds (although Port Phillip covered its risk very well). An option here would be to revisit the legislation to more comprehensively define the types of relationships it covers. One may well ask, given the dollars involved in a major project, why the private sector needs to be involved before this or similar legislation takes effect? This of course would not be welcomed by local government unless it can be demonstrated that over-regulation will not occur and the state is willing to work with councils to help make projects happen, as is being demonstrated in Banyule.

SUMMATION

The current legislation covering PPPs has the potential to reduce and/or create risk in major projects. For genuine reasons of accountability and governance, good legislation needs to be in place to regulate and direct activity of this nature at the local government level. In part this is because neither staff nor elected representatives in councils can be expected to have all the requisite skills and experience to tackle the complex nature of major project management and contract negotiation. It is also because good governance almost demands the state play some role in ensuring councils are getting the right advice and exercising best practice. Unfortunately we have seen that not even states do PPP's well.

At this time there are limited guidelines to the regulatory requirement for councils engaging in major projects, and history has left a number of examples of failed projects, whether approved by the state or not, and long delays in obtaining approval. Recent reviews of the legislation, particularly in Victoria, have tightened that legislation, but the concern is whether tighter legislation will lead to over-regulation and so increase risk factors to unacceptable levels.

While LGV believe they already offer a suitable response, their concern is that too many councils delay involving them, which makes the ongoing process more complex than it would otherwise need to be. On the other hand, Treasury and Finance have lacked a clear understanding of their role in the process and are only now actively engaged in choosing the right path to follow prior to establishing appropriate approaches to responding to councils.

Given the recent activity around this legislation, it seems timely to review the history, and in that light some clear options present themselves for possible inclusion in the regulatory process. Councils need ready access to guidelines written exclusively for dealing with the regulations required, and it appears some steps in this direction are already being taken. Councils need to be

assured all applications will be dealt with as a priority, not only to encourage them to engage in the process but to limit the risk factors that result from unnecessary or unseemly delays. Both direct and indirect costs of compliance need to be kept in mind when designing the regulatory regime. To assist councils to comply with the legislation, a useful approach would be to have a 'flying squad' of skilled officers who would interact directly with councils from the outset to ensure there is full understanding of requirements including all committees, consultants and reporting procedures that are needed. Lastly, there may be value in revisiting the legislation so that it captures more major projects in order to protect ratepayer funds and ensure full accountability and good governance practices are being followed.

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